IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1107/4/10/08

Victoria House
Bloomsbury Place
London WC1A.2EB

9th December 2008

Before:

THE HONOURABLE MR JUSTICE BARLING
(President)

MICHAEL BLAIR QC
PETER GRINYER

Sitting as a Tribunal in England and Wales

BETWEEN:

MERGER ACTION GROUP Applicant

and

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

Supported by

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

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HEARING DAY TWO

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: Good morning.

MR. LASOK: May it please you, Sir; may I just update the Tribunal on what we understand the position to be regarding the Court of Session. Our information is that the Court of Session would be able to deal with a potential appeal on Friday of this week. If the Tribunal delivered its judgment on Wednesday, as we understand it, it might be possible, by informing the Court of Session on Wednesday itself, for the Court of Session to clear its business on Thursday if it were able to do so. What appears to be the situation is that Friday is a distinct possibility in the Court of Session. Anything earlier would require the Court of Session to take action that might affect other cases and might therefore cause it some difficulty.

THE PRESIDENT: Thank you.

MR. LASOK: Just before we started off, I think we were all handed a copy of the Tribunal's decision in *IBA Health*.

THE PRESIDENT: Thanks to the diligence of our Registrar, he remembered that we had, in the *IBA* case, touched on the test of a person aggrieved, and it seemed therefore appropriate that we should at least share that with the parties.

MR. LASOK: I am much obliged. It looks as though the relevant paragraphs are 55 and 56 in the judgment. At para.55 there appears a tentative and not definitive statement of what the Tribunal at that stage thought the position was. I say "tentative and not definitive" because at the end of the first line the way the Tribunal expresses itself is by using the phrase "it seems unlikely that". Ultimately, that boils down to a view expressed by the Tribunal that "officious persons should", and I insert the word "not" "be able to use spoiling tactics to disrupt prospective mergers on far fetched or spurious grounds". In our respectful submission, that is an adequate description of the present case.

It is right to note that there are three parts to that description, "officious persons", "spoiling tactics" and "far fetched or spurious grounds". In our submission, however, one needs to bear in mind that although that may be part of the statutory purpose in limiting the class of persons able to bring proceedings, the way that Parliament expresses itself is by reference to the notion of being "aggrieved", and what Parliament did not do was to insert in s.120 a parallel to the permission process that is followed in judicial review proceedings, which is a process that does enable the Administrative Court to screen out applications both on the ground of lack of standing and on the ground that the claim is brought on far fetched or spurious grounds.

The next paragraph, in our submission, moves on to a slightly different point, but in that paragraph the Tribunal does not express itself as to what "aggrieved" means. We would respectfully submit that although this is an indication that the Tribunal, in our view correctly, took the view that Parliament's intention was that s.120 would not be an *acteo popularis* – in other words, that it did intend a limitation upon the class of persons who were able to bring proceedings under that provision. The Tribunal did not go very much further than that, and it still leaves open the question as to what is meant by "aggrieved". We would submit that these passages do not cut across the submissions that I made yesterday as to what "aggrieved" means. If anything, they do tend to support the case that "aggrieved" does not refer to an officious person, there must be something else.

Although the term "officious" is very often used with a certain pejorative meaning associated with it, it is better to look at its actual meaning, which is simply that of a person who is interested and wishes to bring a matter before a court, but otherwise does not have any personal interest in the proceedings.

We would submit that "aggrieved" has this connotation of something specific, some effect on the person who is bringing the proceedings that sets them apart from others and transforms them from being merely an officious person into somebody who has got a specific and concrete interest affected by the contested decision.

THE PRESIDENT: Mr. Forrester, you will obviously have a chance to look at that because we have sprung that on you a bit.

MR. LASOK: Yesterday, towards the close of the afternoon, the President asked me to deal with the question of how difficult it is for a Minister to make a different decision in the light of a previous categorical statement. In the present case, and I interpolate this remark almost in parenthesis, we are not dealing with collective Cabinet responsibility. There is no suggestion that that ever arose. This was a matter that fell within the jurisdiction of a particular Minister. It was not something that was dealt with by the Cabinet or a Committee, and nobody has ever suggested that it was. So we are not in the field of collective Cabinet responsibility.

When one therefore turns to consider the particular issue that the President raised, in our submission, it is important to take a step backwards and ask rhetorically whether the premise is founded. The premise appears to be that where you have a categorical statement, what I have described as an "alleged fettering event", although that may be inappropriate language, there is almost, as it were, a presumption that that event is going to have a fettering effect, that presumption needing to be rebutted by evidence taking the form, as Mr.

Forrester put it, of a public disavowal of the fettering event in order, as it were, to clear the decks and demonstrate that the decision maker is not overborne by the fettering event. No authority has been cited in support of the proposition that that is actually how you look at situations of this sort. We would put it another way and we would say that where you have an alleged fettering event that does not give rise to any kind of presumption that needs to be rebutted, that that event has, or will have any such effect.

THE PRESIDENT: I think you said yesterday that really fettering is a question of fact?

MR. LASOK: It is a question of fact and you have to look at what the decision maker did and, to some extent, it is a question of working backwards from what he did rather than working forwards from the alleged fettering event.

THE PRESIDENT: I think what is put by Mr. Forrester is that if someone, say, in the position of the Prime Minister or the Chancellor of the Exchequer makes a categorical statement that as a matter of fact that constrains the person who comes to take the decision, not by any presumption of law but simply he says the facts speak for themselves.

MR. LASOK: That is a presumption of fact.

THE PRESIDENT: Well it is evidence. I think he was saying it is self-evident that if the Prime Minister says: "We have decided X" that is going to have some effect on a Minister.

MR. LASOK: Yes, but when I was using the word "presumption" I was not referring to a presumption of law, I meant an evidential presumption – let us call it an "inference", a "necessary inference".

THE PRESIDENT: Yes.

MR. LASOK: So the case against me is that where the Prime Minister makes a categorical statement that gives rise to a necessary inference that the Minister who was responsible for making the decision became merely an instrument of the Prime Minister, a puppet, and did not address his own mind to the exercise of the discretion when he came to make his decision. I still go back to my point that no authority has been cited for the supposition that in that kind of situation an evidential presumption, or a necessary inference of fact of that nature, arises in those circumstances.

THE PRESIDENT: Well surely it is not something you need authority for; I think the way it is put is that this is just obvious. I do not want to put words into Mr. Forrester's mouth, but ----

MR. LASOK: Can I put it another way, there is already an illustration of this type of situation of where the decision maker expresses a view, initiates a process and is then judicially reviewed on the ground that the initial expression of a view was a fettering of its discretion

and there it was held that it was not. The case I am referring to is, I think, a case in the Lloyds' list of authorities, which is the *City of Aberdeen Council* case. As it is in their bundle I am not too sure where the Tribunal has got it.

MISS DAVIES: If it assists we should have a bundle of Interveners' authorities, and it should be at tab 16 of that. It is a joint bundle prepared by Lloyds and HBOS.

THE PRESIDENT: This is about the electoral wards.

MR. LASOK: Yes, if you look at the third paragraph on the first page you will see what the factual background was. It was that the local authority had received an intimation from the Commission, which there was the local government Boundary Commission, of an intention to propose a reduction in the number of electoral wards from 50 to 43. You will see that there was then consultation because the Commission's letter invited representations. Representations by the Authority were made, but then you see that on 17th June 1996, after various correspondence and meetings the Commission concluded that the number of Councillors should be reduced to 43. But if you go to the last sentence of that paragraph you see that at that stage the Commission was obliged to issue draft proposals and take into account any representations made thereon after a period fixed for that purpose, and it was at that point that the Authority petitioned the Court of Session for judicial review of the Commission's decision.

So there you had what was on the face of it a much stronger case than the present because what had actually happened was that the decision maker had initially concluded that it was right to make the relevant decision which in that case was a reduction in the number of wards down to 43. It consulted, it then persisted in its view, indeed, it actually concluded that the number should be reduced, but it then had to go through a second state of consultation and it was at that point that the judicial review application was made.

The relevant passage for present purposes is on the penultimate page. The pagination in my copy is at the top right hand, so it is p.14 or 623. It is the paragraph starting: "The issue for me is whether …" running down to the end of that paragraph just before the first hole punch of the next page, and I would propose not to read that out loud.

THE PRESIDENT: (After a pause) Particularly the end of that paragraph: "But there was nothing objectionable in my view …."

MR. LASOK: So the long and short of it is that even if the decision maker himself or itself has expressed a view, indeed a concluded view, but has to go through a further process before making the decision you cannot infer from that that the decision maker has fettered his or her discretion. In our submission that is much stronger than the present case because in that

situation it was actually the decision maker himself or itself that had expressed the view on two previous occasions, but it still did not give rise to an inference that there had been a fettering of discretion. There was still a process that had to be gone through and the only reliable assumption that one can make is that in the absence of evidence to the contrary the decision maker will faithfully go through the process that it is required to go through before it reaches its decision.

So in the present case even if you did have a categorical earlier statement the only inference that one could draw from that was that it would still leave matters for the actual decision-maker to decide by going through the correct process. There is no need publicly to disavow the previous statement. So, for example, the local authority boundary commission -- There is no suggestion that it was obliged constantly to say, "Well, we've actually taken the view previously that electoral wards should be reduced to forty-three. We now disavow that view and carry on with the representations". That was, in fact, a case in which quite the reverse happened because they thought initially they should reduce to forty-three; they then concluded that they should reduce to forty-three; they then went through the next stage and still it was a situation in which there was no fettering.

To some extent, in our submission, that is sufficient to dispose of the suggestion. However, lying deep in the background, in the thickets, as it were, is the question whether or not there actually was a categorical statement of this sort. In relation to that, the problem is that the evidence advanced by Mr. Forrester is particularly exiguous. What he did yesterday was to play to us an extract from the radio interview with the Chancellor of the Exchequer and he stopped it before the Chancellor had actually finished the particular bit in which the Chancellor was responding. You will remember that I drew the Tribunal's attention to what the rest of the bit was. Now, the problem is that that piece of evidence is nothing other than an unscripted interview in which the Chancellor of the Exchequer is responding manifestly off-the-cuff, because you heard his tone, the hesitation at the beginning -- He is not reading a prepared speech. That is clear. So, this is an off-the-cuff expression, and when you look at what he actually says in our submission it actually suggests that what he is talking about are the steps which were being taken to amend the Enterprise Act in order to insert the new specified public interest consideration.

On any view that radio interview was actually ambiguous as to what the Chancellor of the Exchequer was talking about. In the circumstances you could not have expected him to have embarked upon an exegetical analysis of these arcane provisions of the Enterprise Act in order to enlighten the listeners to the radio programme.

THE PRESIDENT: Mr. Lasok, supposing the policy of the government and the Chancellor was, if at all possible, to make this merger go through, facilitate it, does that matter?

MR. LASOK: It does not matter at all. I will deal with that in two stages, however. The President has used the verb 'facilitate' ----

THE PRESIDENT: Only because I think that was one of the phrases that was ----

MR. LASOK: -- bandied around. Facilitate what? There is an interesting exhibit to Mr. Forrester's Notice of Appeal - I think it is no. 11 - that we could have a look at. This is a print-off from the official site of the Prime Minister's office. It relates to a morning press briefing on 30th September, 2008 . This is an extract headed 'Economy. It says this,

> "The Prime Minister's Spokesman (PMS) began by briefing journalists on this morning's Cabinet, which was dominated by the economy. The Cabinet was briefed in detail by the Chancellor on the current situation, and the Prime Minister and the Chancellor reminded Cabinet of the international origins and dimensions to what was happening at the moment. They explained the actions that the authorities had taken since Cabinet last met - facilitating the takeover by Lloyds of HBOS ----"

Then there is reference to other actions. So, here we see the Prime Minister and the Chancellor simply briefing the Cabinet as to what other people had been doing. You might say, "Ah-ha! Facilitating the takeover by Lloyds of HBOS". If we turn to the next page, at the end of the first full paragraph (this is the paragraph beginning,

> "Asked if there was a view on the Irish government guaranteeing deposits --"

If you go to the end of that paragraph we have got the Spokesman saying,

> "-- we would continue to take whatever action was necessary to maintain the stability of the financial system".

Then I am going to read the next paragraph in its entirety.

> "Asked if the Prime Minister imagined that given what had happened in the last week, the terms of the Lloyds takeover of HBOS were likely to change given that they may no longer want to pay as much as it would have done, the PMS replied that this was a matter for the relevant institutions involved. Our role in this was to make a commitment to introduce legislation in order to facilitate the takeover and we stood by that commitment".

That, of course, was a statement made by the Prime Minister's spokesman. In our submission, it has got greater strength than indirect commentary made by journalists, with all due respect to journalists. But, it puts, in ours submission, a completely different

complexion upon the statements that were being made at that time because it indicates that at least in the view of No. 10 in the form of the Prime Minister's spokesman, the commitment was a commitment to introduce the legislative means that might be used to facilitate the takeover. That, of course, is consistent with what was happening in September. At that stage the means of clearing the merger if it was thought appropriate to do so were being introduced into the Enterprise Act. But, facilitating a takeover by introducing the statutory means to enable it to be cleared is not equivalent to a categorical statement that it is going to be cleared. There is therefore no basis for the assertion that the Prime Minister, or indeed anyone else, had actually made the categorical statement to the effect that has been suggested to me in the course of argument, a statement intended to and having the effect of, overriding the independent judgment of the responsible Minister. Furthermore, one can look at the matter in a slightly different way by saying, "Are we dealing with clear and unequivocal evidence in the statements and reported statements that there was this categorical statement?" Of course, there are not. Does one then look for corroborative evidence that would tend to suggest that we have to construe these ambiguities in such a way as to mean a categorical statement to the effect that the decision had been made or that the merger should be cleared, or that some kind of injunction was being issued, or had been issued, to the responsible Minister to clear the merger come what may.

What corroborative evidence is there? There is none because all the evidence works the other way. You have Mr. Saunders's witness statement unchallenged by the claimants, who sets out the process. He reports on what happened. That unchallenged evidence that the process was followed, that representations were made to the Secretary of State. A specific example of that can be found in a letter from the Chancellor of the Exchequer which is dated 30th October. This is a redacted letter and part of it is confidential. I am not going to read out any confidential bits. It is exhibit 22 to Mr. Saunders' witness statement. It starts on p.284. You will recall from Mr. Saunders' evidence that this letter was received by the Secretary of State on, I think, the morning of 30th October, so he had read it by the time when he came to make his decision on the afternoon of that day. This is a letter which starts off in a non-confidential paragraph saying, "You are considering a report from the Office of Fair Trading", and that paragraph ends, "I wanted to write to you to emphasise the key points contained in the Tripartite Authorities' evidence". This was a letter from the Chancellor of the Exchequer. It is also a letter that refers to various matters, including recapitalisation.

One asks rhetorically, what on earth was the point of the Chancellor writing to the Secretary of State on 30th October 2008 if the Secretary of State's mind had been closed by a previous statement, categorical or otherwise, emanating from one or other, or both, of the Prime Minister and the Chancellor of the Exchequer? In our submission, it seems that really the claimants are on the horns of a dilemma because they either accept that the evidence before the Tribunal is true and credible, and they have so far accepted that Mr. Saunders' evidence is true and credible, in which case their fettering of discretion argument must be groundless, or they are forced into the position of running the argument, a rather extravagant argument, that what has actually happened is that a large number of Civil Servants and Ministers of the Crown have engaged in a conspiracy to lie and deceive, because either they accept this evidence is true and credible or such things as the Chancellor's letter of 30th October were written with an intent to deceive. That is the choice that my learned friend is confronted with.

Previously, yesterday, he candidly accepted the evidence of Mr. Saunders, so he is clearly not running the conspiracy argument. If he accepting the evidence of Mr. Saunders, I do not understand why he persisted in this fettering of discretion argument, because once he had decided that Mr. Saunders' evidence was reliable that was an end to it, and he must have known that at least on Friday morning.

Had these proceedings been commenced in accordance with the guidance given by the Tribunal – that is to say with a letter before claim – these things would have been brought into the open, he would have been referred to the passages in Hansard on 16th October; and in our respectful submission he would not, and should not, have made these assertions.

There it is. One is left, in our submission, with a situation in which, however you look at it, this fettering of discretion argument is simply, with all due respect to my learned friend, completely hopeless.

I pass on now to my next point, unless there is some further query or enquiry that the Tribunal has.

THE PRESIDENT: No, not as far as I know.

MR. LASOK: The Tribunal will recall that my learned friend made basically four points about the contested decision. The first one was the tinkering with the competition analysis. I dealt with yesterday. In our submission, there is clear manifest, unequivocal acceptance by the Secretary of State of the competition analysis. What my learned friend has raised is what he regards as the criticism that could be advanced over the summary process that was

undertaken when the OFT's report was reduced to a manageable proportion in the context of the decision.

The next point he made was that the FSA analysis had been wrongly relied upon in connection with the competition part of the exercise, and I already pointed out yesterday that that is incorrect because if one looks at the decision one sees that the FSA analysis appears only in connection with the public interest part of the analysis, and there is no suggestion anywhere in the contested decision that it was relied upon in order to weaken or denature or denigrate, as my learned friend I think has put it, the OFT's competition analysis, which had in fact been accepted by the Secretary of State.

That brings me to a point that I have not dealt with as yet, and that is the allegation that the FSA made an error in relation to the state aid issue. Yesterday I had pointed out that in the contested decision the Secretary of State had, in fact, referred expressly both to the FSA analysis and to the OFT analysis, but he had not expressed any view as to which of them was correct. What one can say, therefore, is that the Secretary of State took both into account. The attack that has been launched on the contested decision is that the FSA analysis on the State Aid issue was actually wrong as a matter of law. In support of that assertion the claimants have relied upon a recent communication emanating from the Commission of the European Communities on the question of the grant of State Aid to financial institutions in the present conjuncture, and that is to be found at tab 24 of the claimant's bundle.

There are only certain parts of this rather lengthy, close written document that are of relevance in the present context. It starts off with a general introduction into the question of the grant and approval of State Aid to financial institutions. If you go on to the second page you see there is a section headed: "General Principles", and what I would suggest is that you read para. 14.

THE PRESIDENT: Shall we do that now? (After a pause) Yes.

MR. LASOK: In that paragraph the Commission distinguishes between financial institutions that are suffering problems in the present situation as a result of endogenous factors and those institutions suffering problems as a result of exogenous factors, and it says it takes a beneficial view of the grant of State Aid to undertakings that are basically sound but are suffering problems because of exogenous factors. However, financial institutions that are suffering problems that may be aggravated by the present situation as a result of endogenous factors have to be dealt with within the normal framework of rescue aid – that

is the part on p.10 round about the middle of the part of that paragraph that appears on that page. They say:

> "By contrast, other financial institutions, likely to be particularly affected by losses stemming for instance from inefficiencies, poor asset-liability management or risky strategies, would fit with [in] the normal framework of rescue aid, and in particular need a far-reaching restructuring, as well as compensatory measures to limit distortions of competition."

Now, in the next section of the communication the Commission is turning to consider a particular form of State support, which is the provision of guarantees, and in para. 27, which I would ask the Tribunal to read we see what are effectively constraints that the Commission would expect to see imposed were a financial institution to benefit from a guarantee. (After a pause): If you go to para. 30 it is just the first couple of sentences, I will read them:

> "Where the guarantee scheme has to be called upon for the benefit of individual financial institutions it is indispensable that this emergency rescue measure aimed to keep the insolvent institution afloat, which gives rise to an additional distortion of competition over and above that resulting from the general introduction of the scheme, is followed up as soon as the situation of the financial markets so permits by adequate steps leading to a restructuring or liquidation of the beneficiary."

Then paragraph 33, again I am not going to read it but if you look at it, para.33 repeats the distinction between support that is given to fundamentally sound institutions that are adversely affected by the current crisis – the exogenous factors – and financial institutions that are suffering from endogenous problems.

The next section deals with an alternative which is recapitalisation, and para. 34 says:

> "A second systemic measure in response to the ongoing financial crisis would be the establishment of a recapitalisation scheme which would be used to support financial institutions that are fundamentally sound."

Then in para. 35 they start off by saying that in principle the considerations relating to general guarantee schemes would apply to recapitalisation schemes so I do not need to repeat that.

But if you look at the last indent of para. 35 you see again ----

THE PRESIDENT: Is that the one over the page?

MR. LASOK: Yes, over the page. The last indent again draws the distinction between fundamentally sound institution suffering from exogenous problems and institutions that have endogenous problems.

The upshot is that the State Aid position is far from being as the claimants describe it. The implication from their submissions is that in reality the State Aid issue is no problem at all, but it is not because what one actually sees is the Commission being very, very concerned about the grant of State Aid to financial institutions suffering from endogenous problems. It is concerned about the grant of State Aid to financial institutions suffering from exogenous problems, but those difficulties, those concerns are much less. But you also see in all this a concern expressed by the Commission that where support is given it may have to be associated with rescue and restructuring arrangements, and possibly by effectively a requirement that the institution be liquidated.

THE PRESIDENT: Just looking at para. 27 again, that seems to be generalised, does it? It does not seem to draw that distinction. The restrictions that are going to be imposed on beneficiaries in relation to guarantees seem to be unrelated to that distinction between exogenous and endogenous problems.

MR. LASOK: Generally speaking, the approach of the Commission is to look at aids that may be granted on a generalised basis to the general class of financial institutions and aids that can be granted to individual institutions. In both cases the Commission is concerned to ensure that any State aid that is granted does not distort competition more than is absolutely necessary. In that sense it is right to say that twenty-seven is a general observation. So, there is an across-the-board concern by the Commission that the grant of State support - in fact, whatever form it takes - should not distort competition more than is absolutely necessary in the circumstances. But, elsewhere, the Commission draws this distinction that I have pointed out to the Tribunal between what it describes as 'fundamentally sound institutions adversely affected by exogenous factors' and those financial institutions that also have endogenous problems. The general theme in this communication is that the Commission has a positive view with regard to the grant of State support to fundamentally sound financial institutions

THE PRESIDENT: We are just trying to relate it to the bit that Mr. Forrester criticised in the FSA. You are probably coming to that. I am just trying to remember what paragraph it was. Was it para. 85?

MR. LASOK: I think it is para. 22 in the Decision. I think if you are looking at the contested decision it is p.292.

THE PRESIDENT: Yes. "The FSA concludes that full or partial --"

MR. LASOK: The observation that Mr. Forrester has made is twofold. Firstly, he says that there is nothing in the State aid rules that preclude government-owned entities from competing aggressively. But, he also says that this was overtaken by events because the Commission communication that we have just looked at effectively supplanted earlier guidance given by the Commission concerning the grant of State aid. What you will have seen from the Commission communication is that what the Commission actually says is that if you are dealing with institutions suffering from endogenous problems actually you apply the preceding rules. That was one of the early paragraphs I referred to. So, technically, the change in the Commission's position concerned the grant of State aid to institutions that were suffering exogenous problems.

Under the preceding rules- and I do not think there is any dispute about that - if State aid were granted it had to be accompanied by a rescue or restructuring package, it might of course potentially simply mean the running down of the undertaking in question and its eventual liquidation. So, the FSA comment is not radically distinct from the position as it would have existed under the preceding rules. You could not have had a State supported financial institution competing aggressively with private sector banks because if it was suffering from endogenous factors that required the grant of State aid, albeit that those factors might have been exacerbated by the endogenous conditions of the market at the time, there would have to have been some alteration in the business model of the institution in question because the difficulties were arising not simply for exogenous reasons - they were arising for endogenous reasons. That is one of the themes in the Commission's State aid communication that we have been looking at.

THE PRESIDENT: But even one with exogenous problems - if you are going to benefit from a guarantee - is going to be subject, according to the Commission in para. 27, to a number of behavioural constraints and restrictions on its financial conduct.

MR. LASOK: Quite so. So, there is no foundation at all for the belief espoused by Mr. Forrester that State aid could have been granted and could have permitted HBOS to have carried on with, let us say, aggressive competition with private sector banks. Now, we do not actually know what conditions might have been imposed because that is, say, a hypothetical situation. What we do know is that support has been proffered to the combined Lloyds/HBOS on the basis that the merger goes through. There have been clear statements that if the merger does not go through then the conditions under which support is provided will have to be reconsidered.

Bearing in mind we are considering a hypothetical - that is to say, what conditions might be imposed on the grant of a State aid to a stand-alone HBOS - it is, in our submission, not unreasonable for the decision-maker to take the view that one has to treat this with a certain amount of caution. There is no indication that the decision-maker did anything else.

THE PRESIDENT: We do not know what he made of what was recited by the FSA as to State aid, do we? It is just recited.

MR. LASOK: He recited it, and he recited the Oft's view. In our submission, the inference that one can draw is that he approached this aspect with caution. He did not say, "I take the view that the FSA was right, and therefore my decision is such-and-such". He did not say that. That is what renders this excursion into the debate between the FSA and the Oft a somewhat futile exercise because not merely can we not identify an error of law by the FSA, but we cannot even identify any taking up of position -- any adoption by the decision-maker of an erroneous view.

MR. BLAIR: Mr. Lasok, I think I must be one behind you. I am stuck on the timing here. The application says at para. 112 that this guidance that we are looking at was published on 13th October three days before the FSA report. But, what I am looking at in the application at Tab 24 is dated 25th October - and therefore long after it had all happened.

MR. LASOK: I am told that that relates to the date of publication in the Official Journal.

MR. BLAIR: That is correct.

MR. LASOK: There is somewhere, I think, a press statement made by the Commission that probably announced this, but I cannot at the moment find out where it is.

MR. BLAIR: So I assume it was all available on the 13th, so that it is all relevant to ----

MR. LASOK: Yes, typically these things will be produced by the Commission in the form of a self-standing document, and it will then be formally published in the Official Journal. I am told that it is in the authorities bundle, I think it the joint Lloyds/HBOS bundle, at tab 17.

MISS DAVIES: I am sorry to interject, but just to assist, it is not in our authorities bundle, it is the annexes to the application at tab 13.

MR. LASOK: Yes, that is correct, that is what I was looking for. If you are looking at tab 13, under the heading it starts off, "The European Commission has published guidance". This was the release that accompanied by the publication of the guidance that was later published officially in the Official Journal.

MR. BLAIR: I am much obliged, thank you.

MR. LASOK: Unless any member of the Tribunal has got any question for me on this point, I am going to make a brief observation on the last point made by Mr. Forrester, which is the

suggestion that the contested decision is unlawful because it failed to consider alternative solutions. This is actually the recapitalisation argument. It is the suggestion that by the time the contested decision was made, recapitalisation was the nostrum, the solution to the problem and that there was no need to regard the merger as a solution. The difficulty with that, of course, is that it all depends upon how you assess the situation. That is a matter of judgment. It is a matter of judgment that had to be exercised by the Secretary of State. We know that the importance of recapitalisation and its impact on the decision that he had to make was before him. Mr. Saunders says so, it was in the documentation that we have seen, it was in the 30th October letter, it was in the representations that had been made. It had been put to him, the Secretary of State, on 16th October when he made his speech in the House of Lords, the occasion on which you may remember he said that he retained an open mind.

It is simply unsustainable to assert that the possibility of alternative solutions – here the recapitalisation solution – was not considered by the Secretary of State. It was. His task was judgmental, he had to make an evaluation. There is no suggestion that what he did was unreasonable in the technical sense, all that is said is that the claimants and the various commentators and journalists upon which they rely would take a different view. As I have said, reasonable people can disagree about things without being unreasonable.

It is also relevant to bear in mind that so far as we know none of the commentators, none of the journalists, whose opinions are relied upon by the claimants actually formed their views on the basis of the same material that was in front of the Secretary of State. For all we know, had they seen what the Secretary of State saw, they would have formed exactly the same view as the Secretary of State.

Finally, at the risk of the repetition, but I need to make this point, Mr. Saunders' evidence does refer to the briefing notes that were provided to the Secretary of State before he made his decision, which again referred to the recapitalisation issue. So there is no doubt at all that he had it in his mind that he had to exercise his judgment.

Unless the Tribunal has got any questions for me those are our submissions.

THE PRESIDENT: Thank you very much, Mr. Lasok. Mr. Green.

MR. GREEN: I am not going to repeat many of the points that Mr. Lasok makes. I am going to deal with two particular issues, which seem to us to be the two central issues which arise in this case and which remain in this case, and they are as follows: first, whether the Secretary of State took account of an irrelevant consideration when he recorded the views of the FSA that there was no competition law concerned. Then the other issue I am going to address

substantively is an objective analysis of the relationship between the Chancellor's statement and the decision itself.

My learned friend Mr. Forrester has abandoned a large number of issues which I do not propose to deal with. He has not made anything of the notice of intervention of notice of intervention of 18th September, he has not made anything of proportionality, he said in relation to the issue of Lloyds offering undertakings, that it is not independently a ground which vitiates the decision. In relation to the weight to be given to the option of recapitalisation over merger he accepted, in response to a question from Mr. Blair, that that was essentially tied up with his argument on fettering.

So I am going to deal with the two issues which arise, so it seems to us, by way of substance, and the first point which one can deal with relatively briefly, but it will enable me to address the structure of the decision, concerns the views of the FSA. Yesterday in his submissions Mr. Forrester put it this way, and the reference to the transcript is p.13, lines 26 to 30, that 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 short riposte to that is on the face of the decision it is quite expressly stated that the Secretary of State took account of the OFT's conclusion on competition, and it is implicit, but nonetheless quite clear, that he either rejected the FSA's conclusion or he simply did not consider it relevant. That is, we submit, really crystal clear from paras.27 and 28 of the decision itself.

I would like to start with those two paragraphs and then briefly summarise the main propositions which one finds in the decision by reference to the paragraph numbers. Paragraphs 27 and 28 of the decision are those paragraphs where the Secretary of State is taking his actual decision in the light of the considerations which he has already set out. He starts in para.27 by saying:

> "It is clear from the OFT Report that the proposed merger is capable giving rise to competition concerns."

If one pauses there, one is inexorably driven to the conclusion that had he taken any account of the FSA's concerns he could not have said that because the FSA said there was no competition concern. His starting point is, "It is clear from the OFT report that the merger is capable of giving rise to competition concerns". He does not say, "and I qualify that by the assessment of the FSA". The place where he identifies the competition concern is in the first line of para.27 and it emanates from the OFT.

He then says, "However", so he is creating a counterpoint:

> "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."

So his counterpoint is purely and simply financial stability and he refers only to the Tripartite Authorities' views.

The same point is made in para.28. He says:

> "In accordance with s.45(6) of the Act, the judgment the Secretary of State has to make is whether the anti-competitive outcome that may arise from this merger should be considered justified by the public interest as it relates to ensuring the stability of the UK financial system."

Again, it is implicit that he accepts that there is an anti-competitive outcome, and he is balancing it against stability. He then in a crucial sentence says that on balance he has concluded that ensuring the stability of the UK financial system justifies the anti-competitive outcome which the OFT has identified and that the public interest is best served by clearing the merger.

So it is, in our submission, crystal clear that on the one hand he took account only of the OFT's analysis of competition and, on the other hand, he took account of all submissions he received in relation to financial stability and he refers to others at para. 26, but in particular the Tripartite Authority's views. Had he taken account of the FSA's views on competition he would have said so, and it therefore leaves only two alternative analyses, either he rejected the FSA or, and I think more properly, he considered it to be irrelevant. It does not matter which of the two apply, he either rejected it because he was bound to apply the OFT's conclusion, or he rejected it because that was the conclusion he came to, but since the Statute makes clear he is bound by the OFT's report and, indeed, he says he is bound by the OFT's report, we would submit the proper analysis is he concluded that he FSA's recitation of the competition concern was simply irrelevant to the exercise he was engaged in. We submit the short answer lies in an analysis of those two paragraphs.

What I would like to do now is just back track and provide you with a structure to the logic process in the decision. What I will do is tell you what the propositions are that we say arise out of this decision and then give you the paragraph numbers as I go through.

First, in relation to competition, the first point is that the Secretary of State accepted the conclusions of the OFT and he says this at para.14, and he recites at para. 13:

"The OFT report includes the OFT's decisions that", and he then cites four things. He says that the Secretary of State is required under the Act to accept these decisions. So paras. 13 and 14 set out that the Secretary of State accepts the conclusions of the OFT.

The second point is that the OFT found that there might be an SLC in three markets (para.16). The third point is that the reasoning of the OFT involved the analysis of a counterfactual in which the State intervened to prevent failure, and the State Aid rules would not prevent HBOS being a competitor and exerting competitive pressure, and he says that in para.18. Again, insofar as the FSA came to a different conclusion he plainly is bound to accept the reasoning of the OFT, he recites it in para. 18, and he says in paras. 27 and 28 that it is the OFT's competition analysis that he accepts (as he is bound to) and that must *a fortiori* include the OFT's State Aid analysis. He is not required to second guess it, he simply accepts the conclusion. We submit that the analysis in para.18 is an accurate précis of the OFT's decision, and my learned friend, Mr. Forrester, yesterday, sought to make a great deal of nuances of differences between para.18 and the OFT's decision, para.85 and 86. He referred you to para.85 of the OFT decision, but para.86 is in terms which is extremely similar to the précis in para.18 of the decision. Paragraph 86 contains in its second sentence the conclusion:

> "Under both counterfactuals, HBOS is assumed to be exerting competitive pressure in the market place …"

That is a conclusionary statement. Paragraph 18 of the decision simply says, and we submit it is a sufficiently accurate précis that HBOS would continue to exert some competitive pressure in the market. It does not mean whether "some" means "significant", it plainly means more than *de minimis* otherwise it would have been excluded, and if it is more than *de minimis* it means "significant."

There is no material difference between the précis provided in para.18, and para.86, indeed, para.85 of the OFT's decision. Anybody who wanted to see what the OFT had said, given that the Secretary of State stated expressly that he accepted that conclusion, only had to look at the report if they wanted to get a more elaborate version of what was actually stated there. It really is a hopeless argument to try and draw nit-picking distinctions based upon individual words contained within the decision, which is a brief document, it does not purport to be an extensive or exhaustive summary of any of the documents that it cross refers to.

The next point on this is that the OFT's conclusion is a stage 1 *IBA* analysis, and one finds this set out in the decision, in the last part of para. 15. There is no challenge to this analysis.

My learned friend says that insufficient weight was given to the concern, but this conclusion is not challenged, and the conclusion that the Secretary of State arrived at after, as we have seen from Mr. Saunders' statement, a discussion on the phone with Mr. Fingleton, the Chief Executive of the OFT, was that the OFT's conclusion, and I am citing from the last four lines:

> "… it is by no means a foregone conclusion that, following their more detailed investigation and based on the balance of probabilities' standard the CC would reach the finding that the merger in fact resulted in a substantial lessening of competition."

That is a correct statement of law because it follows *IBA Health* in the Court of Appeal, it was a conclusion which the Secretary of State recorded in his decision not least because it is correct in law but following a discussion with the OFT it is not challenged, and it plainly is relevant to the weight which the Secretary of State was entitled to place on the OFT's competition assessment.

THE PRESIDENT: It was an express finding by the OFT that it was not a foregone conclusion in respect of at least two of the markets?

MR. GREEN: Yes.

THE PRESIDENT: The third market I think was even ----

MR. GREEN: Was even less certain, yes. I think the word was "caution" he used in relation not the third market, because of the higher degree of unpredictability and lack of foreseeability as to consequences.

We have seen from para. 27 of this decision that the Secretary of State accepted that the OFT concluded the proposed merger is capable of giving rise to competition concerns. The FSA's conclusion, in para.22 is simply recorded *en passant*, it is part of the FSA's conclusionary remarks, it might with the benefit of a great deal of hindsight have been better to have redacted that bit for the purpose of the decision but then I do not think the Secretary of State reasonably could have expected at that point that someone would have taken such a point.

THE PRESIDENT: Which bit are you referring to?

MR. GREEN: Two sentences in the FSA's submission which is recorded in para.22. The third full paragraph down under the heading "The FSA concludes that …" there is the last sentence: "Under this scenario …"

THE PRESIDENT: Yes.

MR. GREEN: Then there is the sentence at the very bottom of that page: "We consider these benefits to be considerable relative to the competition aspects of the merger." That is their view, it is in part of a conclusionary statement which has been cited fully here, but it is plain that it was not accepted, otherwise it would have been recorded as such in paras. 27 and 28. That is the competition side of this decision. The public interest side demonstrates that the Secretary of State took account of a range of relevant considerations, none of which are challenged in this case, and the reasoning was as follows: At first the Secretary of State considered the importance of HBOS to the United Kingdom financial stability, and it is recorded in the decision that HBOS was a major player in household and corporate sectors, that the continued vulnerability of HBOS via a merger was important to the government's recapitalisation and guarantee programme.

It is also recorded, in particular in paras. 20 and 21, that the Secretary of State received evidence on such matters as the importance of HBOS to financial stability, the circumstances leading to the crisis at HBOS, the likely impact of a failure of HBOS, alternative ways of addressing the problems at HBOS, and the impact that the proposed merger might have in terms of securing financial stability.

Based upon my learned friend's submissions, we do not need to address you on the nature and the extent of the risks which arose because it is no longer suggested that there is in fact a *Wednesbury* challenge to the assessment. Had he been maintaining in detail a realistic challenge to the manner in which the exercise of judgment was performed then we would need to take you to a large number of the underlying and confidential documents, but his case is now put by way of example, or the consequence of fetter and that was in response to Mr. Blair's question yesterday evening in which my friend clarified the position. That certainly means that we do not have to take you to quite so many documents.

It is possible to see, even without going to the documents, what evidence was put in front of the Secretary of State: that the FSA analysis, setting aside any issue of competition, addressed such matters as the limited ability of HBOS to reduce its wholesale funding and to lengthen the maturity profile of its liabilities; the FSA addressed the relatively high loan-to-deposit ratio compared to UK rivals; they addressed the relatively high funding gap, relative to UK rivals; and the high concentration of its loans book with was exposed to the United Kingdom mortgage market and its consequential increase in vulnerability to bad debt in that sector. Those are all matters which are summarised and referred to in the decision. It also refers to the high degree to which HBOS was exposed in the UK corporate loan sector and, in particular, its exposure to commercial property.

Now, the Secretary of State also received advice on the contagion effects on the remainder of the UK economy if there had been a failure of HBOS. Again, that is summarised in para. 20. The Bank of England makes similar points in para. 21. The Treasury made similar points. The Secretary of State also received advice on the alternatives - in other words, the binary choice between merger and recapitalisation. It is referred to in paras. 20 and 23. I will pause to make this point: the Applicant's submissions seem to believe that there was a simple choice between merger or recapitalisation whereas all the advisors to the Secretary of State – and it is a conclusion that the Secretary of State accepted – pointed out that in fact the relationship between capitalisation and merger was complimentary. The merger had to go ahead because that would have created further stability in the market which would, in and of itself, have rendered more easy and more practicable the capitalisation and guarantee funding programme which the government was contemplating. One was a precursor to the other. The point is made very thoroughly in Mr. Saunders' statement where he talks about capitalisation and merger being complimentary, not alternatives. That is a correct description of the decision.

Sir, we submit that on the face of the decision, the process followed by the Secretary of State shows unequivocally that he did not take account of irrelevant considerations. Now, if the Tribunal finds, contrary to our submission, that on the face of the record he did, then you have two alternative sources of information at the very least which will provide guidance, or if you are uncertain, or you conclude that the decision is ambiguous. The two most directly proximate sources of information are, first, the advice which the Secretary of State received from his civil servants and, secondly. Mr. Saunders' witness statement. Both of those address directly the information the Secretary of State bore in mind at the time of the decision. They would assist you if you thought there was any inconsistency.

I would like to just briefly take you to the advisor's note which is in Tab 19. Now, some of this is confidential. I do not think I really need to make submissions about it, but I would like to point out certain paragraphs because they are all consistent with the decision itself. There are a small number of paragraphs which have been marked as confidential, but the whole document at the moment is categorised as confidential. I do not think that I need take the risk of reading anything aloud. There is no great magic in the document. You can read it for yourselves. But, I would like to just pick up a number of paragraphs. First of all, para. 8 and the bullet points contained therein which summarise the Oft's assessment. You will notice that nowhere in that do they summarise the FSA's assessment on competition because it is irrelevant.

At para. 9 there is a summary of the public interest representations. You will see the Bank of England's position in para. 10. There is something which is certainly marked as specifically confidential in that paragraph. Paragraph 11 deals with alternative courses of action. You will see that the Secretary of State plainly addressed his mind to the recapitalisation -- or, in effect, the nationalisation (partial or full) option. You will see that the risk and likelihood of corporate failure is addressed in that paragraph as well. Paragraph 12 deals with the Treasury's submissions, and the assessment by the Treasury of the importance for financial stability of the merger. Then there is the advisors' assessment from para. 13 onwards. You will see that the Oft's assessment is accepted. Could you please read to yourselves para. 15. (Pause for reading): In particular, the last sentence which makes it clear that the advice which was being given was up-to-date. You will see the reference in the last two lines to 'recent government intervention'. So, it takes into account all government policy and action up to the date of that advice.

Then, finally, an important paragraph - para. 17. The Secretary of State is reminded of the statement he made to the House of Lords - in particular, the statement where he said,

"I will ensure that I receive all available advice and views before I make any decisions. This will include advice from Treasury, Bank of England and FSA which make up the Tri-Partite Authorities".

You will see it is recorded that nobody wished to update their submissions. So, in the light of current developments, they were content with that which they had already submitted. But, the Secretary of State was advised of his duty to act impartially; he was reminded of the statement he had made in the House of Lords.

So, that is one piece of evidence which you might find of assistance as directly relevant context to the decision. The other is Mr. Saunders' statement, none of which is challenged, and all of which is consistent with the submissions I have made about the statement and is consistent with this. Those are the two documents most directly proximate to the decision. They describe the decision after the event of course in the case of Mr. Saunders. But, the advisors' document is the document which immediately preceded the decision and brought everything which had brought everything which had been put to the Secretary of State to a head. It brought it to the apex.

Now, insofar as the Applicant's retain, as any part of their challenge, a submission about the exercise of discretion, we would invite you to take account of the following short points. First, the decision to be adopted was a straightforward choice. It was refer or not refer. Point 2 - the evidence against reference was overwhelming. Point 3 - the nature of the

decision which the Secretary of State was bound to take was one which in law would in principle confer upon him the broadest discretion permitted under administrative law. We have set out in our skeleton at paras 64 and 65 -and I will simply give you the references at this stage - a reference to *ex parte Hammersmith & Fulham* and a reference to *Fordham*, which summarises the range of discretions which arise according to the circumstance of the case. This is a point which this Tribunal has made in relation to mergers and in other cases, particularly, I remember, in *Unichem* a similar point was made - the degree of discretion which a decision-maker has depends upon the circumstances. It is a point emphasised by the Court of Appeal in *IBA*. In the present case, the factors which indicate that this is at the broadest range of discretion end of the spectrum are as follows: that the decision involved an assessment of what was best for the economy as a whole. Secondly, it involved balancing the public interest in financial stability against a phase one and somewhat cautiously worded SLC finding by the OFT. That exercise is one involving judgment on the part of the decision maker, which is virtually impossible of precise calibration. It is classically an exercise in judgment. The context to the actual decision is also relevant given that the court does not second-guess the decision maker's judgment. There was, of course, a need for urgent action, given the depth of the financial crisis. There is the fact that the decision was taken in the midst of a crisis of international proportions where what happened was largely, or at least partially, outside of the control of the Secretary of State because he could not control what happened in the United States, or Iceland for that matter. The decision was one which involved the weighing up of inherently uncertain and unpredictable factors.

There are many different types of judicial review which can come in front of this Tribunal from a very narrow factually driven merger to an extraordinary one like the present. This sits at the broadest discretion end of the spectrum. It is almost hard to imagine in a classic judicial review an exercise of discretion which is broader and probably less prone to judicial intervention than this one. That is not to say that in other cases a more intensive review is not appropriate, but on the facts of this case this is at that end of the scale where the courts will exercise great care before intervening.

That is all I wish to say about the decision and the exercise of discretion exercised in the decision. The other point that I wish to refer in relation to the substance is this. It is the question whether the Secretary of State was in fact suborned by, as it is alleged, the Chancellor and the Prime Minister. One can examine this objectively. Mr. Lasok has dealt in some detail with the facts, and I will not go over those again. I will limit myself

essentially to making submissions. This is an extraordinary submission. It assumes that the decision is, in effect, a sham. The Secretary of State sets out very carefully in his decision the factors that he took account of. He does not say that he accepted and considered himself bound by the position allegedly adopted by the Chancellor of the Exchequer in a press interview with Robert Peston. So the applicant's case, therefore, has to be that the Secretary of State is guilty of a sham. Indeed, since Lord Mandelson said to the House of Lords that he kept an open mind, the applicant's case must be that he misled Parliament, quite deliberately so.

The response to this allegation is as follows. First, s.45 of the Enterprise Act imposes a duty on the Secretary of State to conduct the balancing exercise. It does not say that the Chancellor of the Exchequer or the Prime Minister had any role in this exercise. So the statutory duty is imposed upon the Secretary of State. Secondly, the decision itself describes, we say comprehensively, the process of decision making which was undertaken. We submit that, correctly, the Secretary of State does not cite the views of the Chancellor of the Exchequer in a press interview for the simple reason that they are irrelevant and indeed it would have been a distraction if he had referred to them in order to, as it were, blow them away. There was no reason to cite them, and it would have been inappropriate to have introduced that sort of extraneous rebuttal in a document of this nature. It would have been to mix politics with a formal statutory balancing exercise.

In the transcript for yesterday's hearing on p.12, when, Mr. President, you asked Mr. Forrester about this and whether or not he could or should have done anything about it, Sir, you said:

> "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 was to make a wrong application of the tests which were applicable to him."

Mr. Forrester's submission seems to be really, the first point, that he made a wrong application of the tests, but he said he made the right statements. What more could he have done? The situation, as Mr. Lasok rightly points out, is not to be equated with a collective decision of the Cabinet. In such a situation, the views of politician A may be relevant when a decision is taken by A, B, C and D. But this is not such a case. This is a decision taken by a single Minister of the Crown under statute.

If, for the sake of argument, the Secretary of State had wished to place some distance between his decision and the comments of another politician, then he could do this by making a public statement. If one analyses what in principle he might have said, he might have said three things. He might have said, first, that he has not yet taken a decision. He would then say, secondly, that he will not, in fact, take a decision until he has received the proper advice. Thirdly, he would reiterate that he maintained and kept an open mind. This is exactly what the Secretary of State did so in Parliament in his maiden speech, and you saw it yesterday, tab 14, exhibit to Mr. Saunders' witness statement. What better statement to make than that? There is no better forum than in Parliament itself, to Parliamentarians and to the world at large. The statement was not necessary, but given the allegation of a sham it was salutary.

The applicants have not put before the Tribunal a single piece of evidence that supports this paranoid delusion. They cite snippets from various journalists. Journalists do not produce evidence, they produce stories to sell papers. You have the evidence. You have the decision, you have the statement in Parliament, you have the advisors' advice, you have the documents, you have the Treasury's submissions, you have the Chancellor's submissions to the Secretary of State. There is nothing which can suggest that the Secretary of State was affected by what might, on analysis, have been an over-enthusiastic statement by the Chancellor. We accept Mr. Lasok's analysis of the document as evidencing a predisposition but certainly not a predetermination. There is nothing wrong with a Minister having a strong view. It is perfectly proper. Ministers are required to have strong views. That is how they formulate policy. That does not mean to say either he was predetermined or that the Secretary of State had predetermined the matter.

The only other point on this that I would like to address arises out of the manner in which my learned friend accepted Mr. Blair's statement on p.35, lines 1 to 7 of yesterday's transcript. Mr. Blair said as follows:

> "I had assumed 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 agrees, he endorses that, he says, "Yes, indeed". So that is his view on the relevance of the change of circumstances.

What change of circumstances is referred to? We do not know. The only change of circumstance which Mr. Forrester referred to, which is p.34, lines 27 to 34, is the fact that the European Commission issued its state aid guidelines on 13th October. There does not seem to be anything else which is said to give rise to a change of circumstance. What we do know, and indeed the documents I have shown you from the Secretary of State's advice and the Bank of England, and there is a Bank of England letter that I want to show you, demonstrate quite clearly that all circumstances from the date of 18th September onwards were taken into account. You have seen the Secretary of State's advice. Can I briefly show you one other document which is a letter from the Bank of England. It is a confidential document. It is at p.191B of the respondent's bundle. It was inserted over the week-end. So you should have had it put it into your bundles. It is a document dated 21st October 2008, and I would simply ask you to read it to yourselves. Again, for those sitting behind there is nothing particularly magical in it, but it is marked as a "confidential" document. You will simply see the broad point made that the evolution of events as they occurred did not alter the conclusions of those advising the OFT and, indeed, the Secretary of State.

THE PRESIDENT: We are just trying to work out whether p.192 is the attached analysis.

MR. GREEN: I think that is the analysis which is attached to this letter. You will see that the author of this letter, if you look at his title, you could not get a better person to express a view, top left the name and his title "Executive Director, Financial Stability". Then you see the analysis, and again this is a confidential document and there is quite a lot of confidential material in it which is genuinely confidential but we would invite you to read this, in particular in terms of the seriousness of the merger, paras. 12, 13, and 14, and you will see the heading there.

THE PRESIDENT: Yes.

MR. GREEN: It has not been necessary for us to go into these documents to persuade you that the exercise of judgment was correct.

THE PRESIDENT: I do not think that that is the point that is really put as such.

MR. GREEN: No, quite. We are certainly not treating it as having been put, we are treating this point as an aspect of simple fettering which is the way in which it was described to us yesterday.

The only other point I wish to address is that of locus. Again, Mr. Lasok has covered a lot of the ground so I am going to be relatively brief. Our submission is that the applicants simply do not have locus. The test is whether they are persons aggrieved under s.120 of the Act, and to be a person aggrieved they must satisfy two conditions at the very least. They

must have (a) a grievance, and (b) that grievance must arise because of prejudicial effects flowing out of the impugned decision and that comes from the judgment in the *Attorney General of the Gambia* which we have cited at para.25 of our skeleton argument. It is important that there has to be, and it is implicit in that judgment that there has to be some proper nexus between the applicant and the impugned decision whereby the applicant's position is materially prejudiced, and that is how they become aggrieved.

We do submit, and again we have made this point in our skeleton so I will not develop it at any length, the choice of language, "person aggrieved" is deliberate. They have not chosen the lesser language of "judicial review", "person interested", "person affected", and that was a deliberate choice.

As matters stand, there is no evidence before the Tribunal showing how the applicants are prejudicially affected. The applicants' claim is a generic one, it is that they are "concerned". In their skeleton argument, paras. 2 and 3, they identify a number of extremely nebulous ways in which they claim to be prejudiced. They deal first in para. 2 of their skeleton with the fact that they were an unincorporated association – you do not need to address that point. They say they:

> "… have significant businesses and personal interests which rely upon the availability of banking services in Scotland. Well, no doubt so do many millions of others. Each of them is concerned about the reduction of choice in the banking sector due to the merger of HBOS and Lloyds TSB. Each of them shares the concerns expressed by the OFT in its decision from 24 October 2008. The Applicant should be granted standing on this basis."

It is important that the capacity in which they claim to be prejudiced and aggrieved is as people concerned about the market as a whole, they do not in any way claim to be concerned *qua* shareholder or account holder, that is not their case, they have not advanced the case on that basis, and we know nothing about the personal circumstances of the individuals concerned.

They then say:

"A further factor indicating the applicant should be granted standing is the fact that n o other applicant has raised this issue before this Tribunal."

Well that is the officious bystander *par excellence*. "No one has brought this whinge up so we better had." That is the officious bystander writ large. In a matter of importance, such as this one, concerning the future of competition and banking services in the UK as well as the future of HBOS the decision of the Secretary of State not to refer the merger to the

Competition Commission should be open to public scrutiny as envisaged by the Act, and that is just the officious bystander expressing his or her views.

The applicants have not identified anything which differentiates them from the literally millions of other businesses in the UK who might have an identical concern and the Tribunal will have to consider whether applicants with that status should have locus and whether that would open the floodgates to challenges in all merger cases simply because someone says: "I am in a business and am affected by a market in which the merging parties operate and therefore I would like to challenge it on bystander grounds."

THE PRESIDENT: Is it relevant to our determination that in this context no one else has come forward and there has been voiced, you have seen the correspondence and the first Minister and others, is it relevant that there is nobody else in this particular context, given presumably the competitors themselves are all in receipt, or may be in receipt of capitalisation, assistance, and all the rest of it, that therefore absent anyone else this concern should be voiced.

MR. GREEN: With respect, that is entirely circular. The officious bystander is going to be the first, if he turns out to be the second he gets kicked out, if he is the first he is allowed in would be the logical extension of that argument. The officious bystander is a characteristic which that applicant has. He simply is not sufficiently closely connected to the decision and he is thereby the officious bystander. Even if he is the officious bystander who is the first in, and no one else has done it, it does not mean to say that he is aggrieved in the manner which the Act describes has to be in existence. Why is he aggrieved? The concept of a grievance requires that his interests are materially prejudiced, and that must be a question of law as to the extent to which someone who is as far removed from the decision could ever simply because they are in the market for receiving banking services be said to be aggrieved and prejudiced.

THE PRESIDENT: Well the fact there are millions of customers – and there are millions of customers of these banks obviously – competition concerns may actually affect customers, may they not?

MR. GREEN: Well we submit that the use of the word "aggrieved" in the Act is precisely there to avoid everyone and their encore having a right of application before the Tribunal. They could have used the words "interested", or "affected", but they used ----

THE PRESIDENT: If you are afraid you are going to have to pay more ultimately or get a worse service, is that not an interest that could be ----

MR. GREEN: It is not a sufficiently close interest, because if you look at our skeleton, para.25. the citation from Lord Denning in *Attorney General of the Gambia*:

> "The words 'person aggrieved' are of wide import should not be subjected to a restrictive interpretation. They do not include, of course, a mere busybody who is interfering with things which do not concern him: but they do include a person who has a genuine grievance because an order has been made which prejudicially affects his interests."

That brings me to an evidence point that we have no knowledge of how or why any of these applicants are prejudiced in a manner which is described there. This is not an arid technical point. The Applicant's approach is lax in the extreme. It really should not be tolerated. These Applicants are perfectly well-funded. No-one should be under any illusion that they are not properly funded or they are not represented by fairly substantial financial or corporate concerns behind them. They are. They are advised by a large US law firm. It is unprecedented that an Applicant in a judicial review of this scale and of this importance should come to this court first of all without a witness statement on locus; even before that without even identifying who the Applicants are; proffering tardily a one-page biography which is not verified (there is no statement of truth attached to them); and then, even more tardily, proffering hand-written scraps of paper with ticks and crosses as to who has got a shareholding or who has got an account. This is not evidence. There is no reason why we, as interveners, or the government, as respondents, should accept that. We cannot test it. It is not attested to. It is not verified. The Tribunal has not been told why these persons are prejudiced in any of their interests to a material degree.

THE PRESIDENT: I think Mr. Forrester has expressly not relied upon the fact that one of them is a shareholder. He has put it deliberately, it seems to me, in a very wide, broad way. Therefore, in a sense, that leaves it open to you to make the comments you have made about the exiguous nature of the detail. That is absolutely correct.

MR. GREEN: I made that point because I do not want it to be accepted for one moment that we accept that they have rights qua shareholders or accountholders. If it is put at the highly nebulous level - and I am quoting from the transcript of yesterday -

> "A person who uses the service of a bank in the UK can be concerned about the effect of competition in the market after the effect of the market on competition in the market".

So, anybody who is concerned about the effect on competition in the market has a right to bring their grievance to this Tribunal and they are to be treated as having a sufficiently

materially prejudiced position to give them locus. Now, we submit that that would be wrong in principle. There may be individuals who are so closely connected to the facts of the case that they would be materially and individually affected. But, it cannot, we submit, in law, extend to the morass of individuals in the population - millions, tens of millions of people who, on that definition, would be concerned. We submit that is a matter of law, and that is really just a description of the officious bystander, the inter-meddler. They are concerned in the broadest possible way whether they have an account with £50 in it or £1 million; whether they have got a small mortgage, a large mortgage. They can simply come to the Tribunal and seek to de-rail a merger without limitation.

THE PRESIDENT: Supposing there is a company with six customers only and two huge suppliers were going to merge. Would those six customers - who might well perceive that their interests would be effected ----

MR. GREEN: Our submission is that it would be a question of fact in each case.

THE PRESIDENT: But is it the number of customers that matter? That is what I was trying to get at.

MR. GREEN: I think the inference to be drawn from Lord Denning's statement in *Attorney-General of the Gambia* is that there has to be some sort of reasonable nexus between the decision and the applicant, such that the applicant's interests are materially prejudiced. It is a real grievance based upon the decision. The further you get away from the decision the wider the number of people, the more remote becomes that interest. There may well be circumstances that one can hypothesise whereby individual companies may well be sufficiently closely connected to the merger to have a grievance. Competitors would have a grievance. It has been established they have locus in other cases. Direct customers who are really prejudicially affected may have a grievance. But, we have no evidence as to the extent of the grievance or its materiality .We have been told that some of these individuals - and they are all named individuals - they are not their companies. They are shareholders in companies who, in some instances, have relations with one or more of these banks. We do not know the extent of that relationship. We simply have no evidence to measure what we say is an essential part of determining the test. It is a matter for the Tribunal, but it is a matter really of some significance that there is no guidance on this other than IBA, which we have all seen (para. 55 and onwards). But, there is very little guidance and there has to be a line drawn somewhere, and it has to be a line which cannot be passed.

We submit that in this case there is no evidence before the Tribunal which establishes locus - even if *ex hypothesi* one could envisage circumstances in which it might arise. So, we do

submit that they have not established locus, and that is essentially a matter of law, backed by a failure to produce any evidence which could establish that locus.

MR. BLAIR: You have chosen in your skeleton, Mr. Green, to give these proceedings a different title from everybody else. You say there are six applicants now, collectively called 'The Merger Action Group'. Is there any submission you wish to make to us about 'what is a person' for this purpose?

MR. GREEN: Yes. I blame Mr. Robertson for that one. (Laughter).

MR. BLAIR: That is not much of a submission! (Laughter)

MR. GREEN: I accept that an unincorporated association is no more than the sum total of the individuals. So, if one uses the acronym MAG you are really using it as a shorthand for those individuals who are properly to be described as the Applicants. It would probably be better if we had listed them because those are the Applicants. I am afraid that is just a shorthand.

MR. BLAIR: Thank you.

MR. GREEN: Unless I can assist further, those are my submissions.

THE PRESIDENT: Thank you very much.

MISS DAVIES: Sir, we respectfully adopt my learned friends, Mr. Lasok's and Mr. Green's in full. For those reasons we submit that this Tribunal should have no hesitation in dismissing the application. I obviously do not propose to repeat the points that have been made by my learned friends, but there are a few additional matters that I would wish to draw to the Tribunal's attention in support of those submissions.

In that respect, I was proposing to address two main matters: firstly, the correct legal approach to the allegation that the discretion of the Secretary of State was in some way fettered by the public pronouncements of other Ministers; secondly, the separate suggestion that this fetter certainly - and I quote from Mr. Forrester's oral submissions yesterday - "had an effect on my client, Lloyds, in that it led it not to provide undertakings to the Oft in the course of the Oft's investigation". Finally, I wish just to make a few concluding remarks about the other points that remain live on Mr. Forrester's application. However, I was not proposing to add anything to the submissions on standing, on which I adopt those made by the Secretary of State and HBOS.

So, first, dealing with the correct legal approach to fettering -- As the Tribunal has heard, this is obviously the first basis of the challenge raised, although the case as advanced in the Notice of Application was principally put in terms of a fetter imposed by the Secretary of State on himself by reason of his public announcements on 18th September. That is, of

course, a case from which Mr. Forrester gracefully withdrew yesterday, and it is no longer pursued. Rather, reliance is now solely placed on the statements made by other Ministers of which it is either said, first at its highest, that they were meant to bind and they did bind the Secretary of State (p.12, lines 10 - 11 of the transcript), or, somewhat more measuredly, that they were statements of which the Secretary of State must have been aware, although I interject that there is no evidence of that. But, it is said that he must have been aware of them and they must therefore have affected him (p.12,line 4).

What I wanted to do was to make a few submissions as to the applicable legal principles, additional to those made by Mr. Lasok, and in support of Mr. Lasok's submissions. I do not understand from Mr. Forrester's submissions that there is any dispute about this because these are all cases to which I referred in my skeleton and on which he has made no submission in the course of his submissions yesterday.

THE PRESIDENT: If I may say so, thank you very much for your detailed note on the law.

MISS DAVIES: What I hoped to do was to illustrate a few points because, in short, we, like Mr. Lasok, say that the relevant case law quite clearly establishes that the simple fact that there is some prior policy or statement to which the decision-maker has had regard, even if that were to be factually established -- that does not constitute an unlawful fetter. For it to be a fetter, the event must actually be shown to have constrained the decision in the sense of having actually precluded the genuine exercise of the statutory discretion in question.

Now, as I say, we refer to these principles in our skeleton. It is at paras. 44 to 52. The conclusion that we draw from the case law is at para. 52. The key question in each case is whether the decision-maker has himself, or herself, exercised his discretion on the basis of the facts before him at the relevant time.

Just to look in a bit more detail at some of the authorities we referred to to illustrate these points. I wanted first to refer to *Lavender v. Minister of Housing*, which is the case relied on by the Applicants in their Notice of Application at para. 74. That can be found at Tab 2 of the interveners' authorities bundle. This is a judgment of Mr. Justice Willis. It concerned a decision of the Minister of Housing and Local Government relating to a planning application to use agriculture land for gravel working. The decision itself is quoted at p.1236G between E and G. In particular, it is the second paragraph of the decision to which I wanted to draw attention:

> "It is the Minister's present policy that land in the reservations should not be released for mineral working …"

THE PRESIDENT: Sorry?

MISS DAVIES: It is surprise.1236 at G. The whole decision is quoted, but it is the second paragraph in particular:

> "'It is the Minister's present policy that land in the reservations should not be released for mineral working unless the Minister of Agriculture is not opposed to working. In the present case the agricultural objection has not been waived and the Minister has, therefore, decided not to grant planning permission for the working of the appeal site.'"

So, on its face, the decision referred to the position of another Minister in the Government, the Minister of Agriculture, and said for that reason the planning permission was not to be permitted.

THE PRESIDENT: So a policy of allowing another to dictate how he should take his decision?

MISS DAVIES: Exactly. At 1238B Mr. Justice Willis recorded the fact that:

> "It is, of course, common ground between Mr. Frank and Mr. Slynn [as he then was] that the Minister is entitled to have a policy and to decide an appeal in the context of that policy."

That was common ground against which the assessment was then made. Mr. Justice Willis then went through various authorities, including, as we can see at the foot of p.1239, a case called *Myton Ltd*. in which Mr. Justice Widgery, over the page at 1240, had felt:

> "'… bound to observe that the very speed with which they disposed of the application at least raises some suspicion that they dealt with the matter as being already prejudged by the fact that land was within the sketch plan green belt.'"

Another planning case. There speed, just pausing to interject, led to a conclusion of prejudging. That is not a complaint that either has been made in this case or indeed could be made.

Indeed, if one looks at the material that is before the Tribunal in relation to this decision, what one can see is, notwithstanding the obvious urgency of this matter, the Secretary of State took great care in relation to the decision that was being taken. He received the report from the OFT on 24th October, some six days before his decision, the deadlines for representations on public interest had been extended to the day before, 23rd October, at the request of BERR, for the express purpose of ensuring that the Secretary of State had the most up to date information available to him. We can see that from the briefing note of 28th October, para.17, to which Mr. Green just referred.

So the Secretary of State was presented with two detailed briefing papers, both of which described in detail the exercise that he was required to undertake, and the second of which

also summarised the content of the OFT report and the various representations that had been made. He then had a further discussion with Mr. Fingleton of the OFT and with his advisors before he took the decision. We see that from Mr. Saunders' statement at paras.31 and 34. So all of that process is wholly inconsistent in this case with any suggestion that the decision was prejudged or taken by dictation from another Minister.

Returning to *Lavender*, and picking it up at p.1240, Mr. Justice Willis noted after the quotation from *Myton*:

> "It is, of course, clear that if the Minister had prejudged any genuine consideration of the matter before him, or has failed to give genuine consideration … he has failed to carry out his statutory duties properly.
>
> In the present case, Mr. Frank does not shrink from submitting that the decision letter shows that no genuine consideration was given to the question whether planning permission could, in the circumstances, be granted. I have carefully considered the authorities cited by counsel, but I have not found any clear guide …"

He referred to *Wednesbury* and made the point by reference to *Wednesbury* that:

> "… in relation to ministerial decisions coloured or dictated by policy, the courts will interfere only within a strictly circumscribed field …"

but the decision maker must keep that actual decision in his own hands. Then he returns to the words used by the Minister:

> "It seems to me that he has said in language which admits of no doubt that his decision to refuse permission was solely in pursuance of a policy not to permit minerals in the Waters agricultural reserve to be worked …"

Mr. Slynn, he then records, had submitted that some words had to be implied into that to say that, effectively, he had gone through the right exercise. Mr. Justice Willis accepted:

> "If that were the right construction perhaps Mr. Slynn would be justified in saying that there was no error in law. But in my judgment the language used is not open to any such implication. There is no indication that this might be an exceptional case such as would or could induce the Minister to change his policy. It is common ground that the Minister must be open to persuasion …"

He then referred to the fact that the Minister of Agriculture's attitude was well known before the inquiry and was maintained during the inquiry.

The critical passage is then referring to what happened afterwards, because he says at H:

. "… I do not think that the Minister after the inquiry can be said in any real sense to have given genuine consideration to whether on planning (including agricultural) grounds this lad could be worked. It seems to me that by adopting and applying his stated policy he has in effect inhibited himself from exercising a proper discretion (…) in any case where the Minister of Agriculture has made and maintained an objection …"

Then just above B:

"It was the decision of the Minister of Agriculture not to waive his objection which was decisive to this case … it seems to me quite wrong for a policy to be applied which in reality eliminates all the material considerations save only the consideration, when that is the case, that the Minister of Agriculture objects. That means, as I think, that the Minister has by his stated policy delegated to the Minister of Agriculture the effective decision …"

So it is quite clear, he was saying, that in this case the Minister of Agriculture's decision was the decisive factor and there was in reality no genuine exercise of discretion.

An example of a case to the other effect, where there is an application of a prior policy but no fetter, is provided by the *Adams v. Licensing Division* case to which I refer in para.48 of my skeleton, which was a decision of the Court of Session (Outer House). That is at tab 9 of this bundle. Just to summarise the facts, it was a licensing case involving a public in Hamilton, which had for some time been allowed to have extended opening hours at the week-end as a result of successful occasional applications to extend its hours. The licensing authority then changed its policy limiting the number of occasional extensions that could be obtained by a public house and generally seeking to reduce the opening hours so that pubs did not remain open past 11.45 pm. That policy may not have survived the more recent changes in this country, but it was applied in 2001 to the pub in Hamilton when it came to apply for a regular extension which was refused. Picking it up just to explain the refusal at the headnote in para.1, Lord Wheatley, giving this judgment, first of all, explained:

"The reasons given by the board for its decision appeared to be entirely clear – an informed reader would not be left in any doubt. The respondents had come to their decision on the principal basis that no need for the regular extensions sought had been established."

The headnote then noted some things about the fetter, but rather than taking that from the headnote, if we go forward to para.20, which is the relevant part of the decision, Lord Wheatley noted:

> "Nor can it be suggested that the board acted in such a way as to **fetter** its own **discretion**. I think it is difficult to maintain that argument in any circumstances where the board has given sufficient reasons for their decisions in the context of the application of their policy. The board are fully entitled to consider their policy while treating each case on its own merits. The fettering of a discretion can only properly be described as having occurred when the board have allowed their policy to exclude any other legitimate and relevant considerations in coming to their decision in any particular case, or not considered any particular case on its merits. What the board has done here was to consider the relevant issues on the basis of the material placed before it and then exercise a reasoned judgment on that material in apply their policy."

One can see from the second sentence of that quote that he is reaching that conclusion on the basis of the decision itself, which is that the board has given sufficient reasons for their decisions in that decision.

In my skeleton, Sir, we have also referred to Lord Justice Oliver's comments, in the *Fares Fair* case, which is at para.47 of our skeleton. The *Fares Fair* case, Sir, as the Tribunal may recall was a case involving a local council where in an election a commitment had been made in relation to fares for public transport and that commitment was then carried through into a decision after the election when they were in a position to give effect to it, on the basis that they were bound effectively by their manifesto commitments so they had to do it. Lord Justice Oliver, as we quote at para.7 made it clear:

> "Of course it does not follow that a decision which happens to accord with a pre-announced policy is simply on that account vitiated. But the fact of a pre-announcement, the concept of a commitment come what may, however firmly or even blindly believed in, cannot properly be made a substitute for a fair and rational exercise of a statutory discretion."

So the critical question is whether there has been a substitution of the decision making to an application of a prior commitment of policy. The same approach is, in our respectful submission, obviously to be adopted to pressure from an outside body or decision maker, such as another government Minister. An example of that is, we submit, provided by the *Malloch v Aberdeen Corporation* case, to which we refer at para. 50.2. I do not need to take the Tribunal to it as it was a lengthy judgment, because there are numerous issues. The relevant paragraphs are quoted in para. 50.2. It is a decision of the Court of Session Inner

House comprising Lord Migdale and not Lord Keith, in fact Lord Cameron, there is a mistake at the foot of the page. Lord Migdale stated, as we can see:

> "Mr. Malloch referred to pressure put on the committee from the outside to employ only registered teachers. There is no proof that this was done but even if there was canvassing of members by an outside body or person I do not think that would vitiate a decision on policy."

He refers to the fact that a decision must have been reached by a majority, and it may be that the minority took a different view. Lord Cameron a similar view, it had been urged upon him that:

> "… the decision on policy was, in fact, the result of pressure from the Secretary of State, but even if that were so, every decision in a matter of choice or discretion is one which is determined by considerations, arguments, or even pressures. The weight to be accorded to these elements determining a choice of action or policy to be followed, assuming neither bad faith, corruption, misdirection nor the taking account of irrelevant or illegitimate matters, is for the authority clothed with the power of choice."

You cannot simply presume from the existence of prior pressure that there has been an unlawful decision taken.

MR. BLAIR: Miss Davies, can I just mention, my recollection is that that case of *Malloch v Aberdeen Corporation* went on to the House of Lords, indeed, it is the only example of a litigant in person winning in the House of Lords. I imagine from the way your skeleton is framed that the win in the Lords was on a different point from the one that we are now discussing?

MISS DAVIES: That is my understanding and these paragraphs were produced for the assistance of the Scottish counsel who were also representing Lloyds.

We say, turning to apply those principles to the facts of this case, it is not simply enough in our respectful submission to say that the Minister was aware of public statements that had been made by either the Prime Minister or the Chancellor. On that view of events the most that those amount to could be pressure in the *Malloch* sense. It is actually necessary for the applicants to go one stage further and say that regardless of the decision on its face, the reality is that the Secretary of State either bound himself, or was bound to give effect to those previous statements. That theory, we submit, is wholly at odds with the evidence before the Tribunal. In particular, there is obviously no evidence on the face of the decision that the prior statements were in any way decisive or even, indeed, influential.

I note in that respect in passing that during the course of his submissions yesterday, Mr. Forrester sought to criticise paragraph 53 of our skeleton argument in which we make the submission that it is clear that the Secretary of State exercised his own discretion taking into account all relevant factors. He sought to criticise that on the ground that I was, in that paragraph, incorrectly relying on the evidence of Mr. Saunders. In fact, Sir, if you read the paragraph, what we say is that it was clear from the face of the decision itself and the evidence of Mr. Saunders, and I do of course accept that it is the decision which is the most important, although I would make this point: if the Tribunal is being asked, as it is, by the applicants to go behind the face of the decision and say that it does not reflect the reality of the events that were going on, the only way the Tribunal can assess that submission is to look at the evidence as to the underlying circumstances – Mr. Saunders' evidence. Mr. Green has already made the point this morning that the suggestion that the decision does not reflect the reality of what is going on is wholly inconsistent with Mr. Saunders' evidence, the various materials that were put before the Secretary of State, the letter from the Chancellor and so on.

Faced with those difficulties, Mr. Forrester was in the event pushed, during the course of yesterday into saying that because the Secretary of State had not stated on the face of the decision that he had taken no account of those previous statements, there remained a cloud "created by the unlawful fetter". That submission obviously pre-supposes in its favour that there was, indeed, an unlawful fetter to create the cloud. It also turns the test of what an applicant alleging a fetter must establish on its head and I make that point by reference to the authorities that we have just looked at. Those authorities and the other authorities to which we refer in these paragraphs of our skeleton are expressed in clear language of preclusion in reality eliminating genuine consideration, Mr. Justice Willis' comment "admitting of no doubt" on the face of the decision, and it is simply not enough, in our submission, to say that because there was this prior statement that creates a doubt.

In any event we also agree with the point made by Mr. Lasok and Mr. Green that it is a nonsensical suggestion given the very, very clear statement made by Lord Mandelson to Parliament on 16th October, when he said in terms he had an open mind and no decision had been taken. Similarly, a more junior Minister in the relevant department made a similar comment to the House of Commons on the same day. Mr. Lasok did not take you to that but it is in the relevant citation from Hansard.

I then wanted to say a few words about the suggestion that the conduct of the Prime Minister and Chancellor certainly, as I said, had an effect, as it is submitted on Lloyds in

respect of the undertakings because, and I again quote, Lloyds knew that it would be immunised from the scope of the competition rules.

I should start by making clear that in light of the submissions yesterday it is not clear where this point goes because Mr. Forrester fairly accepted that it did not constitute an independent ground of challenging the decision, rather he suggested it was being relied upon as a manifestation of the fetter. We say no such thing, and that is the point I wanted to develop orally.

But even if you were to accept it, it is simply impossible to see how it assists Mr. Forrester in this case. The legal relevance of a fetter (if any) can only be as to the conduct of a decision maker, not another party such as Lloyds, and effectively I think Mr. Forrester was accepting that, but he nonetheless pursued this point so I must deal with it.

THE PRESIDENT: It was my understanding, Miss Davies, that he was gracefully accepting that it was not something which could add to the unlawfulness of the decision.

MISS DAVIES: But he nonetheless pursued it and it is factually incorrect, we say, so I should just say a few words, and I will keep it brief, as to why we say it is factually incorrect.

First, and briefly, it is based on the premise that Lloyds knew prior to 30th October that the merger would be cleared without a reference to the Competition Commission. However, as I have just referred to, Lord Mandelson had said in terms to Parliament on 16th October that he had an open mind and a similar statement had been made by a more junior Minister to the House of Commons. It would obviously have been foolhardy in the extreme for Lloyds simply to assume that there would be no reference in such circumstances.

Secondly, Lloyds' conduct is, in fact, wholly inconsistent with the assumption or the assertion. Not only did Lloyds engage with the Oft in relation to its competition assessment, making two separate submissions on the competition issues that are referred to in the Oft's report and attending a full issues hearing, and for which my instructions are there were no less than twenty individuals present, it also made detailed submissions to the Oft as to why any undertakings would be inappropriate in this case as well as on the public interest consideration. The suggestion that was made yesterday and also made in the Notice of Application that in so doing Lloyds was simply going through the motions of an Oft filing is as offensive to those sitting behind me who worked hard on those submissions as it is wrong. Lloyds' efforts in this respect did not stop with the Oft. The Chief Executive of Lloyds, Mr. Daniels, also separately wrote directly to the Secretary of State on 24th October. The letter is at DS1, pp.260 - 261. It is not a letter we have looked at in any detail. I would just like to refer to it briefly. It can be found in the exhibits to Mr. Saunders' statement at

Tab 18. This is the Group Chief Executive of Lloyds. He refers to Lord Mandelson referring to the fact that 'during the course of today Lord Mandelson received the Oft's final report on the competition impacts'. Mr. Daniels, in the first two paragraphs, specifically addressed the question of why, in his view, the transaction would deliver for Lloyds and HBOS customers, and shareholders and the like, and restore confidence and stability in the banking sector more generally. Specifically on the question of undertakings, at the foot of the page, if the Tribunal sees a sentence in the last paragraph starting, "Similarly --" Mr. Daniels pointed to the

> "--onerous requirements, in lieu of a referral, would inevitably mean that we would need to review whether the acquisition remains appropriate for Lloyds TSB. In both cases, the uncertainty over the future of HBOS [the first case is a referral; the second is undertakings] would be both intensified and prolonged not least as the Government support for HBOS of 12th/13th October was conditional on the merger going ahead. That uncertainty would provoke further volatility ----"

Then, in the next paragraph,

> "We do not believe that a referral to the Competition Commission is necessary. Nor do we consider that it is in the public interest to seek undertakings from Lloyds TSB in lieu of a referral".

The fact that Lloyds felt the need to, and did, make such representations is, in my submission, wholly inconsistent with a suggestion that it knew it did not need to offer undertakings. Indeed, in fact, the same view - and I need not take the Tribunal to it, but simply refer to it - seems to have been taken by the Chancellor himself because in his letter of 30th November, to which Mr. Lasok referred, the Chancellor, as well as making the points to which Mr. Lasok drew attention, specifically referred to the fact that when the amendments to the Enterprise Act had been taken through Parliament, the issue had been raised whether any conditions would be imposed upon the merged entity, and the Chancellor in that letter also made representations as to why it would be inappropriate for the Secretary of State to do so. The reason for that, in short, was that there were very real practical problems with undertakings in this case. They were nothing to do - and contrary to the submission being made by Mr. Forrester yesterday - with the difficulties that might, or might not, have been experienced by the Oft in dealing with remedies, but they are actually to do with the problems associated with the impact of undertakings on the rationale for, and effects of, the merger itself.

In fact, if one looks at para. 377 of the Oft report - and, again, I do not need to take the Tribunal to it, but that is recognised by the Oft when quoting the submissions from the parties - the Oft recorded that the parties were saying that 'undertakings would not be appropriate in this case given the fact that remedies might prove a distraction to normalising banking markets as soon as possible'. Those latter words are not quoted in para. 84 of the Notice of Application which gives a misleading impression as a result. But, it was that practical problem that was a key.

There is also an additional problem - and it is a very real one - that it is not at all clear what undertakings (if, indeed, any) could ever have been offered by Lloyds in this case, and certainly not at a Phase 1 inquiry. As the Oft pointed out in para. 380 of its report, the development of an appropriate package of undertakings would certainly have been challenging. That is its language. In that context the Oft referred to the Lloyds/Abbey decision in which even at the end of the Competition Commission Phase 2 investigation, the Competition Commission had not found it possible to identify any remedies short of blocking the merger that would suffice. We have added that passage to the interveners' authorities bundle should the Tribunal wish to look at it, but I was not going to take up time today.

Indeed, in fact, on the Applicant's case it remains quite unclear what they are saying would have happened had circumstances been different. On the one hand, para. 87 of the Notice of Application merely suggests that without the statements of the government Ministers Lloyds would have been willing at least to engage with the Oft and discuss remedies; on the other, it was put much higher yesterday and is put higher elsewhere in the Notice of Application, it is suggested that there was a disproportionate market outcome which must presume that there were some undertakings that could have been extracted from Lloyds in different circumstances. However, it is very noticeable, we submit, that the Applicants have failed either in their Notice of Application, or, indeed, orally yesterday to identify what those undertakings could have been.

So, we say that not only are these allegations legally irrelevant, but they are also based on a mis-reading of the facts.

That brings me very briefly to two short points by way of conclusion. First of all, in support of the point that my learned friend, Mr. Lasok made in relation to State aid and the FSA's views on State aid -- We have, in para. 67 of our skeleton, also referred to the Commission's decision on the UK recapitalisation scheme which was also taken on 13th October, the same date as the Commission guideline was published. I was not going to take

up time by going to that now, but we have added it to our authorities bundle at Tab 17. In para. 53, in particular, of that decision the Commission refers to behavioural conditions that have been imposed as part of the recapitalisation scheme in order to prevent aggressive commercial -- that in the Commission's view will have the effect of preventing aggressive commercial strategies. So, even in the situation of the endogenous problem this is very much still a concern of the Commission.

THE PRESIDENT: This goes to how inaccurate, if at all, the FSA position was.

MISS DAVIES: Exactly. We support the points that have been made by Mr. Lasok and the points we made in our skeleton that it was not inaccurate. It certainly was not inaccurate for the grounds that are alleged by my learned friend, Mr. Forrester as in his Notice of Application he asserts that the changed field post the Commission guidance on 13th October was that the concern was as to the amount of the capital injection and the timing of it. There were no behavioural restrictions. That is the suggestion that has been made. We say that that is simply wrong - you just have to look at the full guidance.

Finally, and extremely briefly, on the point that crept in towards the end of Mr. Forrester's submissions about the alternatives available to HBOS -- Although he seems to have abandoned the allegation in the Notice of Application of irrationality on the ground of not preferring the alternatives, it still seems to be suggested that there is not enough weight given to those.

All I wish to say in relation to that is that we do urge in relation to those submissions that the Tribunal look at the unredacted versions of the submissions that were made to the Secretary of State. The decision, for obvious reasons, quotes from the redacted versions appended to the public Oft report, but those within the confidentiality ring obviously have the benefit of the full submissions - in particular, the submissions the Bank of England and Her Majesty's Treasury. We have given the references to those in para. 34 of our skeleton. They demonstrate, we submit, quite clearly, that the possibility of HBOS proceeding on a stand-alone basis was very much considered, but the considered view of the Tripartite Authorities was that the merger brought with it benefits that would put the merged entity on a stronger footing from a financial stability point of view than such a stand-alone HBOS. That was the point that was indeed emphasised by the Chancellor in his letter of 30th October.

These are all no doubt difficult issues and they also arose against the context of the most extraordinary of times. But, the assessment of those matters was, we submit, clearly a matter for the Secretary of State. On the basis of the material before him, it is quite clear

also, in our submission, that his assessment of those relevant issues cannot properly be challenged. For those reasons we would also invite the Tribunal to dismiss this application.

THE PRESIDENT: Thank you very much. Mr. Forrester, would you like a short break, or are you happy to go straight into your reply?

MR. FORRESTER: I would like a short break if I could.

THE PRESIDENT: Do you know roughly how long you think you will be?

MR. FORRESTER: Not more than half an hour.

THE PRESIDENT: We will take a short break. We would rather give you a short break now and then try and finish before we take lunch.

(Short break)

THE PRESIDENT: Mr. Forrester?

MR. FORRESTER: Thank you, Sir, and my apologies for the delay in pulling together our thoughts. It has been a busy morning. I want to begin with a note of apology. Some of our preparations for the Tribunal have been a bit rough about the edges. The train delivering the application got stuck in the Channel tunnel but it finally was delivered on time. We have handed over a handwritten lists, and there have not been quite enough bundles on various occasions, and I am sorry about that in the sense that I would not want in any way to appear to show any lack of respect for the Tribunal.

We have a small legal team, I am instructed by a sole practitioner, Mr. Semple, and the consequence of that is that from time to time over the past days our presentations have been a trifle rough at the edges, and I regret that.

THE PRESIDENT: Well yours has been exemplary, Mr. Forrester. We thank you for the apology but as far as we are concerned it was not necessary.

MR. FORRESTER: Then that fortifies me in my next remark, which is an absence of an apology, in that I do not at all apologise for taking instructions from six sober citizens who are troubled, worried, aggrieved, at their anticipation that the OFT's predictions about the significant lessening of competition due to this merger, that those concerns are well founded and will materialise.

Mr. Green suggested, if I caught him correctly, that there was some well funded person in the background, and that this was some kind of improperly put together group. I did not quite catch what my learned friend exactly was saying, but it was to the effect that who you are seeing here before the Tribunal, and they are with me in the Tribunal that those are somehow different from the backers, the supporters. My learned friend had no evidence to

say that at all, other than irritation perhaps about the bringing of an inconvenient appeal to this Tribunal. The remark is wrong, and the remark ought not to have been made, I suggest. The individuals have been telling me during the short break about how personally concerned they are regarding this merger. In towns in Scotland where there used to be the Bank of Scotland and another one, now there is no choice. There are (or there will be) two branches of the same bank and soon only one branch. So it is not fanciful, it is not hysterical, it is not any of the over colourful adjectives that have been advanced against the Merger Action Group for its members and the 600 supporters who have logged on to its website with donations and support, it is not at all fanciful for them to be concerned about the impact of this merger upon t heir personal lives and those of their businesses and thence the lives of their employees. They have debts, they have loans, they have mortgages, they are constantly using banking services, and they are therefore not at all busybodies who are looking over the fence at something that does not concern them. To the contrary, they are regular users of banking services, and they will suffer when competition in the banking sector in Scotland diminishes as it surely will if this merger goes through without proper examination by competition experts.

Now, that takes me to the question of standing and I was very grateful drew to our attention this morning the Tribunal's decision in the *IBA* case. Of course, my learned friend, Mr. Lasok, jumped upon para.55 where we read that:

> "It seems unlikely Parliament intended that officious persons should be able to use spoiling tactics to disrupt prospective mergers on far fetched or spurious grounds. The Tribunal is alert to that danger but it does not arise in the present case, *IBA* has advanced a serious case."

The next paragraph seems to me equally and indeed more pertinent, that is para. 56.

> "As we see it, in giving the wide category of any person aggrieved, standing to apply for a review, Parliament is not implying that any special precedence should be accorded to the interests of the particular person who happens to be aggrieved in a particular case over and above the interests of other parties concerned."

Omitting a sentence:

> "As we see it, a person aggrieved who presents a serious case is simply the catalyst which triggers a review by the Tribunal in the wider public interest, not of the merits but of the legality of what has taken place."

And that is precisely the situation of the members of the Merger Action Group and those who support them. They are bringing to the attention of the Tribunal the legality of the

decision of the Secretary of State at the end of October not to refer the matter to the Competition Commission.

I have been given various personal statements by the individuals who are instructing me, and who were particularly disturbed by what we heard from my learned friend, Mr. Green, this morning. I think it is not necessary for me to read those to the Tribunal, let me merely say as vigorously as I can that the individuals are individuals vitally concerned with the availability of choice in the banking sector in Scotland. They are concerned on their own accounts, on accounts of their own businesses, with concerns for their own debts , their own bank transfers, and the welfare of their own employees. They are not acting for anyone else. They are not paid by anyone else. Any suggestion to the contrary is mistaken.

Now, I am happy at this point to address any questions the Tribunal might have on the subject of standing.

THE PRESIDENT: Thank you, Mr. Forrester. We are all right at the moment.

MR. FORRESTER: Let me pass to, shall we say, the merits of our case. First, the fetter. Her Majesty's government, at the highest level, in September 2008 declared, decided, announced, a policy. That policy was going to be that the competition rules would be changed or the competition rule would be waived in order to facilitate a particular merger, and also, perhaps, to address future such concerns about financial stability.

Now, it was put by each of my learned friends yesterday and this morning that really we had no evidence to the effect that such a government policy existed. It was, from I think, Mr. Green, snippets – off-the-cuff comments (I think that was Mr. Lasok) – suggestions that this is just journalistic chatter and that one cannot find anything more by way of substance.

Now, in addition to the quotations that we relied upon in our Notice of Application I have three more ----

THE PRESIDENT: It would be very helpful if you would just give us the touchpoint(?)ones. Obviously we know about the Chancellor. We have that. You have placed a great deal of emphasis on that one. The Prime Minister is the other one.

MR. FORRESTER: I have three additional references that I would like to put to the Tribunal which are still there on websites.

THE PRESIDENT: Show us of course those. But, I would like to know the best one you have got - apart from the Chancellor. I have the Chancellor very much in mind. If there is another high watermark one ----

MR. FORRESTER: It is about four sentences. I do not think it will take very long. They are, on this occasion, properly printed out in the bundles. I trust the Tribunal has been given white bundles.

THE PRESIDENT: These are bundles that no-one has looked at up to now.

MR. FORRESTER: They are hot off the printer. The front one ----

THE PRESIDENT: I anticipate there might be rumblings about new material being introduced at this stage.

MISS DAVIES: They are so hot off the printer that they were just handed to us two minutes ago. We have never seen them before.

THE PRESIDENT: We will have a look at them. You show us the four sentences.

MR. FORRESTER: I invite you to turn to the third page. This is from the Treasury website - Newsroom and Speeches. This is October 6th 2008 - a statement by the Chancellor on financial markets. This was before, of course, the Oft decision was made. Here, at para. 22,

> "In September we amended the competition regime to allow the interests of financial stability to be considered in the merger between Lloyds TSB and HBOS. We took this exceptional measure because financial stability had to come before normal competition concerns".

This was 6th October. This, of course, is before the Oft report.

THE PRESIDENT: I cannot remember when the order was laid before Parliament.

MR. FORRESTER: Just about the same time. It is the Chancellor effectively saying that competition should trump the public interest -- The opposite. Sorry.

THE PRESIDENT: I suppose he is saying two things there. Paragraphs 22 and 23 are slightly different, are they not?

MR. FORRESTER: Yes.

THE PRESIDENT: One is saying that, "We have altered the competition regime to enable something to be considered. This is being done because financial stability has to come before ----"

MR. FORRESTER: Then we have the Prime Minister talking. That is in the next tab. I ask the Tribunal to go to p.13 of that one. This is an interview with the Prime Minister. The interviewer begins at the top of p.13 (bottom of the page in small print - out of 29). The interviewer says with admirable vigour,

> "Did you fix the HBOS deal?"

The Prime Minister replies,

"I think the issues that arose in the HBOS and Lloyds TSB deal was whether the government was prepared to look at the competition laws and look as to whether the issue of financial stability was important enough to say that a deal, such as was being proposed, was the right thing to do. I think we have taken the right decision".

Then, less relevantly,

"We have also insisted on an assurance from the new company about their mortgage lending in the market place so that they will not reduce it. They say they will expand it and it will remain a very high share of the lending in the market place and I think that was the right thing to do as well. So obviously in a deal with involves the legislative process, the government has to be involved, and yes, I and Alistair Darling did talk to the parties that were involved because it was the right thing to do."

"Did you fix the deal?"

"I'm not claiming, this was a deal that took place between two companies, it involves no government money."

"With a little help from the government."

"But we had to deal with the issues of competition and we had to deal with some of the other issues that flow from that, like the maintenance of the mortgage market".

So, these are not, I suggest, snippets. They are not off-the-cuff remarks. They may be unscripted, but ----

THE PRESIDENT: We have not seen them before. So, let me try and see what you get out of these though. It has not been in doubt, has it, that the government was in favour of the merger? It was a policy of the government as it evolved.

MR. FORRESTER: Yes, indeed, Sir, I am responding to the suggestion ----

THE PRESIDENT: That there is no evidence?

MR. FORRESTER: That there is no evidence. The last one which I would just briefly refer you to is the Chancellor of the Exchequer, and there on p.9 out of 89, the third picture on the page is that of the Chancellor with his well known hairstyle and there we have him looking out and beside it:

"My Honourable Friend will recall that the decision to merge was taken by the boards of HBOS and Lloyds TSB; it is their commercial judgment that was important. It is the judgment of ourselves, the Financial Services Authority and the

Bank of England that it was also in the interests of greater financial stability that the merger should go through. Indeed, that is why we amended the provisions on the competition law. As I said at the time, that was one example of where financial stability trumped competition concerns, and that remains our view."

So the second tab was from the Prime Minister. This one is from 14th October.

THE PRESIDENT: This one is 14th October, and the Prime Minister's was – do we have a date for that?

MR. FORRESTER: Yes, it will be there.

THE PRESIDENT: Yes, 19th September, does that sound right?

MR. FORRESTER: Yes.

THE PRESIDENT: Mr. Forrester, allied to the "Today" programme interview, can we treat these as the ones that you rely upon?

MR. FORRESTER: Yes.

THE PRESIDENT: Is there anything that you pointed us to yesterday that betters your submissions?

MR. FORRESTER: I have nothing more to offer to you by way of evidence of the Government policy. Your question fortifies me in my belief that there is an elephant in the corner of the room and that is the Government policy that was known to everyone, and it cannot be denied, it cannot be disparaged as being mere snippets of information. It is Government policy plainly and positively adopted at the highest level, "This merger will go through and the Competition Rules will be changed to ensure that it goes through, or the Competition Rules will be waived" – various verbs.

We do not object to the principle of new criteria being concluded in the arsenal of techniques at the disposal of the Secretary of State, but we say that, first of all, this was a unique situation. It was the first time that this new power was contemplated, and the adoption of the new power was closely linked, very closely linked, to the encouragement of the merger of HBOS and Lloyds.

The premise was that this transaction has got to go ahead. There will not be a reference, as the Chancellor said, and the Competition Rules will not get in the way. If those statements had been made by the Secretary of State in the middle of September or at the end of October, plainly there would be an improper fettering of the discretion by the Secretary of State. That is to say, it is unacceptable to short-circuit the analysis prescribed by the legislation by saying, "The rules will not be applied, this merger is too important". That is unacceptable.

THE PRESIDENT: You would still have, even in those circumstances, even if he was one of these interviewees, to look at what he actually did, would you not?

MR. FORRESTER: Oh, yes. Indeed, my over-arching problem would be very strong and maybe so strong that it would be difficult for the Secretary of State to disprove the suspicion that he had acted because he was fettered. I offered yesterday the example of the Minister or the political figure who announces that a certain policy will be adopted by the State. I offered no social security benefits for immigrants from Latvia. The officer who says that this Latvian candidate for social security benefits will not receive them may be deciding as a consequence of what he believes to be the instructions as a consequence of the fetter, of he may be deciding on the basis of the merits of the matter before him.

Unfortunately, the Government, in the person of the Chancellor, having been careless, I daresay, in expressing what the Government was doing and the measures, and the intentions behind those measures that the Government was introducing, those statements created a difficulty and a risk of illegality by purporting to adopt a measure which would ensure that the deal went through even if that involved stretching the Competition Rules (my verb), even if, above all, it would not involve a reference to the Competition Commission.

THE PRESIDENT: It did not really involve stretching them, did it, that is a bit tendentious. What they did was precisely what the statute envisaged. They added a public interest consideration which the Minister thought ought to be there in the light of current circumstances. That is exactly what the statute envisages. There is no stretching of it, is there, in terms of what they actually did with the legislation?

MR. FORRESTER: I withdraw the verb, but it remains the case that the Chancellor and the Prime Minister separately and in separate ways acted in a manner which conveyed that the Competition Rules would not constitute an obstacle to the consummation of this important merger. This declaration of Government policy was very strong, it cannot be denied, and the question then for you is whether the decision of the Secretary of State is a manifestation of that policy. I say that the first indication that it is a manifestation that it is a consequence of the fetter is indeed that the Secretary of State found the way he did. The Secretary of State is in a difficulty. Once Government policy has been proclaimed, asserted, declared, if the Secretary of State finds in that direction then there are two possibilities: he did it on the merits or he did it ----

THE PRESIDENT: As a result of the fetter?

MR. FORRESTER: Yes.

THE PRESIDENT: So he is between the devil and the deep blue sea, which is why I asked you, is there that could be done to cure it, and your answer was, "Well, there might be but it would involve him saying certain things".

MR. FORRESTER: I think my first answer yesterday was rather wimpish and I think that he could have cured it and he could have said in plain terms, "I am going to decide without reference to what the Government policy has been", that is to say the fetter, the declarations of the Chancellor, other officials, other Government Ministers, "I am going to reach my decision rejecting any hint of pressure from my Cabinet colleagues that this merger should go through and that the Competition Rules should be departed from in order to ensure that this goes through".

What he said to the House of Lords was a good positive statement of the things that he would have regard to. We know from the submission of Mr. Saunders that he was given appropriate inputs. However, when it comes to the decision we see the imperfections which we mentioned yesterday.

THE PRESIDENT: What he said to the House of Lords was a bit more than just saying what considerations he would take account of. He actually said in terms that he would approach the matter with an open mind.

MR. FORRESTER: He did say that he would approach the matter with an open mind.

THE PRESIDENT: Which wholly inconsistent with him approaching it in a fetter.

MR. FORRESTER: Yes.

THE PRESIDENT: So are the Secretary of State and the Interveners right in saying that the effect of your argument has to be that what he said was just untrue.

MR. FORRESTER: We advance no claim, no moral reproach to the Secretary of State. Various unpleasant words were attributed to the accusations that we might perhaps by inference be making against him, we make no such moral criticism, none whatever. As I said yesterday we make no personal reproach at all to the Secretary of State, we are concentrating our fire on the decision. Now, the individual speaking in the House of Lords stated that he had an open mind and that is good, but we persist in seeing in the decision itself rather than what is said about the decision, manifestations of a readiness to see the merger waived through by not making a reference to the Competition Commission; we see a readiness to have the merger waived through, and the elements which we note very, very briefly, because we have talked about them a lot and they are also in our written submissions, there is a mention of the stage 1 counterfactual, but little mention of the stage 2 counterfactual.

Now, we are not asking that the Secretary of State has to summarise 180 pages of the OFT report. We do say, however, that it is incumbent on him fairly to reflect what the OFT reported and recommended as the basis for saying there are competition concerns, and we contend that the decision as a whole does not adequately do that.

We say that there is an error in the language taken in from what the FSA had to say. We note that there is no consideration of alternative mechanisms involving recapitalisation.

Overall, if you look at the decision, it is very short – seven pages or so – and we say it gives a lopsided account of the competition problems.

Mr. Lasok said that it was a précis. It is headed "Summary of reasons for a decision", it is not a précis, it is not a bibliography of things that the Minister has looked at. It is the Minister's account of why he found the way he did. Now, whereas the sanction for someone at school doing an imperfect précis is failing an exam the sanction for a Minister in doing an imperfect decision is judicial review.

Once we have an imperfectly drawn decision which gives too little weight to the OFT and slightly down plays the OFT concerns, looks at the FSA and other authorities and their predictions about the competitive future, then we have a risk of error, and we assert that the decision insufficiently analysed did not fairly analyse the issues which the Secretary of State had to analyse.

THE PRESIDENT: What label do you put this under? "Insufficiently analysed the issues which the Secretary of State had to analyse", is this a fettering point, or is it a failure to take account of relevant considerations?

MR. FORRESTER: I think it is two things. He takes account of irrelevant factors in doing the competition assessment by looking at the FSA. You will remember my two scales. T his one is the OFT assessment, and you cannot touch that. This one is public interest and everyone can talk to him about public interest and then he has to decide. He cannot take items from here and put them there.

So when he takes an item from here and puts it there, he is having regard to irrelevant considerations.

THE PRESIDENT: Regardless of whether there is a fetter; this is a separate ----

MR. FORRESTER: Yes.

THE PRESIDENT: I think the way it was put yesterday you had your overarching point and then you had your narrower point?

MR. FORRESTER: Yes.

THE PRESIDENT: Both of which were elements of the fetter, and you made the point you just made now I thought in regard really to the narrower aspect of the fettering, because they were manifestations of the operation of the fetter?

MR. FORRESTER: Yes.

THE PRESIDENT: But you are making this as a separate point as well?

MR. FORRESTER: We make two complementary assertions, that the Government by its policy enunciated in various places, established what government policy would be, and that the government transgressed upon that which was proper for governments to do with regard to pending matters. Instead of saying the Secretary of State may need help, so we will give him a new criterion, but what Ministers did was to go further and say the competition laws are not going to get in the way of this deal.

THE PRESIDENT: That is the fettering act, if you like?

MR. FORRESTER: Yes.

THE PRESIDENT: When it comes to the fettered person who is taking the decision, if you like the flaws that you identified in the decision in relation to the use of the FSA material, the incomplete summary of the OFT material and the State Aid point, are you saying that those are connected with the fetter, or are they really just matters that show he did not properly fulfil his statutory function?

MR. FORRESTER: They can be seen as separate, or they can be seen together, in other words.

THE PRESIDENT: They could be evidence of fettering and as well they are evidence of him not going through the statutory process properly?

MR. FORRESTER: Just so, because of the Government's over enthusiasm for seeing the deal consummated the Secretary of State had a particular difficulty when, as you put it, Sir, he was damned if he did, and I think it was a different metaphor that you used – "between the devil and the deep blue sea" I think was yours. Even if he felt on the merits that there should not be a reference to the Competition Commission to the extent that he was acting in accordance with government policy it was difficult for him to shake off the taint, the criticism, the suspicion that we have advanced, that his discretion had been improperly fettered by the State, by previous acts of Her Majesty's Government.

One may indeed see, and we do see, in the decision, an enthusiasm to a particular readiness to squeeze the available input into a conclusion which says: "This matter shall not go to the Competition Commission", and we say that a totally unfettered Minister could have come to a different conclusion and this Minister came to a wrong conclusion when he looked by reference to the criticisms, the particular points that we make.

THE PRESIDENT: But you are not asking us to debate how he should have done the balance had he done it properly?

MR. FORRESTER: No.

THE PRESIDENT: You are not suggesting that we can adjudicate on what the result of a correct balancing effect is?

MR. FORRESTER: Of course not, I am sorry if I spoke to suggest otherwise.

THE PRESIDENT: No, no, I just want to be sure how you are putting it.

MR. FORRESTER: We challenge; our challenge is based entirely on the legality of the Minister's decision. The merits of the decision are for him and it is our contention that the decision should be annulled and the matter sent back to the Secretary of State for further consideration with such recommendation as the Tribunal may wish to impose, or to communicate.

That is all that I have to say, but I am happy to answer any questions.

THE PRESIDENT: We have no questions, Mr. Forrester. Thank you very much for your succinct reply.

MR. LASOK: I think I am entitled to respond only on the new material and not on my learned friend's arguments. If you take the slim bundle that we have been provided with and go to the first extract which is four pages into the first tab, and which dates to, I think, 6th October this year. The relevant passages are paras. 22 and 23. Paragraph 22 says,

> "In September we amended the competition regime to allow the interests of financial stability to be considered in the merger between Lloyds TSB and HBOS".

I understand that to be uncontroversial. It seems to me to be an observation of fact. It must have been known to the Secretary of State. I simply do not understand how, rationally, that can be regarded as an utterance that is indicative of a so-called fettering act. Then we have the next paragraph, para. 23. "We took this exceptional measure because financial stability had to come before normal competition concerns".

Again, that is not actually disputed by the claimants. The claimants have nowhere suggested that the decision to amend the Enterprise Act by inserting maintenance of financial stability in the UK financial system as a public interest consideration that would, in context, be a public interest consideration capable in the right case, or a proper case, of overriding justifying an anti-competitive outcome because that is what the statute says. It has not been asserted -- or, no challenge has been put to that decision to amend the Act. What the Chancellor is referring to is that decision. The view was taken that the Act should

be amended. The amendment would have created a situation in which financial stability could justify an anti-competitive outcome in a proper case. So, I simply do not understand how anybody can seriously turn up in front of this Tribunal and assert that these passages provide any support whatsoever for the allegation that the Secretary of States decision-making functions had been the subject of an attempt at fettering them.

If we move to the next tab, the passage here is, I think, on p.13 in the miniscule pagination at the bottom of the page. Page 13 of 28. The first passage after the question, "Did you fix the HBOS deal?" which I think is a leading question - technically -- The passage says,

> "I think the issues that arose in the HBOS and Lloyds TSB deal was whether the government was prepared to look at the competition laws and look as to whether the issue of financial stability was important enough for us to say that a deal such as was being proposed was the right thing to do. I think we have taken the right decision".

So, the sentence, "I think we have taken the right decision" refers to a decision that has been taken. But, what was the decision that had already been taken? We know what that decision was. That was the decision to insert into the Enterprise Act the new specified public interest consideration. What we see here in the passage which I have just read are the two 'whethers': whether the government was prepared to look at the competition laws and whether the issue of financial stability was important enough for us to say that a deal such as was being proposed was the right thing to do. In fact, there is no suggestion here that a decision had been made on the Lloyds/HBOS merger.

THE PRESIDENT: It seems to be talking about two things. The one you are just referring to is a future decision because it is looking to see whether the issue of financial stability was important enough to say that the deal was the right thing to do. When he says, "I think we have taken the right decision" - that is a decision that enables the other decision to be looked at.

MR. LASOK: That is the ordinary and natural interpretation that you place on this. The past decision that were made were decisions of a preparatory nature that would enable a decision to be made at some time in the future. But, what he is referring to here clearly is something that is much more general than that. He does not even refer to the HBOS and Lloyds TSB deal when he specifies or identifies what the 'whethers' refer to. The first whether refers to looking at the competition laws, and the second 'whether' concerns a deal such as was being proposed. This is not indicative of an attempt to fetter a later decision to be made by the Secretary of State.

Towards the end of that passage we have, three lines from the end of it, in the same paragraph,

> "So, obviously, in a deal with involves the legislative process the government has to be involved".

That is obviously a reference to what had already been done, which was the initiation, at that stage at any rate, of the process for amending the Enterprise Act. One can certainly say that there was a 'government' decision to amend the Enterprise Act which was acted upon by the Secretary of State by laying the relevant order before Parliament. That order was then subsequently made by Parliament. We have seen the extract from the debate in the House of Lords. But, that part of the exercise is completely different from the issue that we are concerned with in the present case. No challenge has been made to that part of it.

If we come to the last extract in the third tab, at p.9 of 89 -- We have the photograph of Mr. Darling. I will refrain - unlike my learned friend - from making any comment about the feature, save to say that I envy him ----

THE PRESIDENT: So do we all! (Laughter)

MR. LASOK: He is described here, I believe correctly, as 'the Chancellor of the Exchequer, (H.M. Treasury). He says in the second sentence, after referring to the commercial judgment of the boards of HBOS and Lloyds:

> "It was the judgment of ourselves, the Financial Services Authority and the Bank of England that it was also in the interests of greater financial stability that the merger should go through".

Of course, that, on the face of it, is a reference to the Tripartite Authorities. It is not a revelation to know that the Tripartite Authorities were in favour of the merger between HBOS and Lloyds because they were going to – I think this is dated 14th October – be making submissions to the OFT and to the Secretary of State precisely in order to encourage and exhort the Secretary of State to make a decision favourable to the merger. In our respectful submission, it is simply bizarre to launch the argument that when the Tripartite Authorities who have the function of making representations designed to encourage the Secretary of State to make a decision in a particular way, when they actually do that that is somehow a fettering of the discretion of the decision maker. It is actually the very function carried out by the Tripartite Authorities and it is the function of the decision maker to take account of the representations made to him. It is impossible to classify exhortatory remarks, encouragements, submissions, representations to a decision maker as attempts to fetter. That is simply ludicrous. A fetter, an attempt to fetter, is an overriding of the decision

making process. You do not override the decision making process by making it public, as the Chancellor of the Exchequer did in this extract, that the judgment of the Tripartite Authorities which was later to be expanded upon in submissions to the OFT and to the Secretary of State was in favour of the merger going through in the interests of greater financial stability.

THE PRESIDENT: Yes.

MR. BLAIR: When you speak of "ourselves" at line 2, that is the Treasury, when you speak of "we" in line 4, that is a different use, that is the Government, is it?

MR. LASOK: No, it is Parliament, because it was Parliament that amended the provisions on the competition law.

THE PRESIDENT: Affirmative resolution.

MR. LASOK: Yes, so when he says "we" he cannot possibly mean the same person or body as "ourselves". "The judgment of ourselves" in context refers, in our submission, to HM Treasury because that is the third element of the Tripartite Authorities that he is referring to here. When he refers "we", you can see him looking around the Members of the House, encompassing them in his glance. That is the "we" he is referring to, because it was Parliament that amended the provisions on the competition laws. It was not a HM Treasury and it was not the Chancellor of the Exchequer and the Prime Minister.

MR. BLAIR: The Lords debate on 16th October – I forget when the Commons debate was, it may have been before that.

MR. LASOK: I think that technically the amendment actually took place, so he is anticipating when he says, "We amended". Chronologically it does not quite work. This is not a pre-prepared statement, it is thrown out in the heat of the moment.

THE PRESIDENT: It seems to me for my part that "we" cannot mean the Treasury, *qua* Treasury, the Financial Services Authority and the Bank of England. Whether "we" means Parliament or "we, the Government" are proposing things, I am not sure.

MR. LASOK: In our submission, the real crucial bit is that when you look at "the judgment of ourselves, the Financial Services Authority and the Bank of England", on the face of it that is a reference to the Tripartite Authorities. Why else would the other two appear? More broadly the point that I have just made is that encouragements, exhortatory remarks, are just the kind of thing that a decision maker receives when he, she or it considers representations. You cannot convert "encouragements" into fettering acts.

THE PRESIDENT: I do not think Mr. Forrester suggests that the Treasury, for example, was not entitled to make representations.

MR. LASOK: No, he does not, but his difficulty is that he is now mounting the case that the mere fact that people utter things, encouraging noises, is sufficient to fetter the discretion of the decision maker because the decision maker then is forced into the situation of making statements to disavow them in order to demonstrate that the suspicion of being fettered which has now arisen must be dispelled.

That, in our submission, is worse than the devil and the deep blue sea because at least there you have a choice. If a fettering event occurs as a result of the making of encouraging noises from somebody there is no way, particularly when you are told, as Mr. Forrester puts it, that to say that you have an open mind is not good enough, that you can get out of the situation. That sheds a very, very curious light on the function of providing for representations to be made to a decision maker before he or she makes the decision, because under Mr. Forrester's view of the law these are now all converted into attempts to fetter discretion, hence any decision that is made after consultation must be illegal.

THE PRESIDENT: Thank you. Mr. Lasok has said it all, has he not, on these?

MISS DAVIES: Absolutely.

THE PRESIDENT: Mr. Forrester, if there is anything you are burning to say that will take not very long then of course we will hear you.

MR. FORRESTER: I am content.

THE PRESIDENT: It just remains to say thank you all and the legal teams very much indeed for the help you have given us and the short notice that you have worked to.

MR. LASOK: Can I just mention one thing again, this follows on from the point that I made this morning about the Court of Session?

THE PRESIDENT: Yes.

MR. LASOK: I think that all parties would be available to come back to the Tribunal as soon as possible when the Tribunal gives notice that it would be appropriate for us to do so. It may be that a little more than a ten minute warning would be required, because I believe that there are some benighted souls whose Chambers are slightly further away, indeed south of Fleet Street or the Strand. So it may be that ten minutes warning might not be enough, but – obviously I cannot speak for my learned friends – certainly we would be prepared to come to the Tribunal at the shortest reasonable notice.

THE PRESIDENT: That is very helpful. All I can say is that we cannot give any guarantees. We have got a lot to think about. We will do our best, and we understand the reasons why you need to know as soon as possible. Thank you.

1