IN THE COMPETITION APPEAL TRIBUNAL

Case Nos. 1095/4/8/08
1096/4/8/08

Victoria House,
Bloomsbury Place,
London WC1A 2EB

15th October 2008

Before:
THE HON. MR JUSTICE GERALD BARLING
(President)

PETER CLAYTON
PROFESSOR PETER GRINYER

Sitting as a Tribunal in England and Wales

BETWEEN:

BRITISH SKY BROADCASTING GROUP PLC

Applicant

- v -

(1) **THE COMPETITION COMMISSION**
(2) **THE SECRETARY OF STATE FOR BUSINESS, ENTERPRISE AND REGULATORY REFORM**

Respondents

AND

VIRGIN MEDIA, Inc

Applicant

- v-

(1) **THE COMPETITION COMMISSION**
(2) **THE SECRETARY OF STATE FOR BUSINESS, ENTERPRISE AND REGULATORY REFORM**

Respondents

ALSO APPEARING:

ITV PLC

_____

HEARING

APPEARANCES

Mr. James Flynn QC (instructed by Allen & Overy) appeared for British Sky Broadcasting Group Plc.

Mr. Richard Gordon and Miss Marie Demetriou (instructed by Ashurst LLP) appeared for Virgin Media, Inc.

Mr. John Swift QC and Mr. Rob Williams (instructed by the Treasury Solicitor) appeared for The Competition Commission.

Miss Elisa Holmes (instructed by the Treasury Solicitor) appeared for the Secretary of State for Business, Enterprise and Regulatory Reform.

Mr. Simon Priddis and Mr. Martin McElwee (Solicitors, of Freshfields Bruckhaus Deringer) appeared for ITV plc.

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THE PRESIDENT: Good morning ladies and gentlemen, thank you very much for coming. We have two main issues to deal with and the first I think we ought to tackle is the question of relief. Then, when everyone has had their say on that, we will turn to the confidentiality matters, which I hope will not detain us very long and we can perhaps organise the mechanisms for that, whether we have to be *in camera* – I imagine we will at some point in due course – we can have a break perhaps after we have dealt with relief.

Thank you for your respective written submissions. I ought to say that we have *de bene* read the ITV submission. ITV are not a party, notwithstanding a bit of prodding from us at the outset they have chosen to remain not a party. It has to be said it has not made our job any easier that they have not been parties, but as they are intimately involved at any rate in the results of the case we thought it right, as I have said, *de bene* to read what they say. It did not seem to add very much to what some of the other parties were saying, but there it is.

Who would like to crack off? Mr. Gordon.

MR. GORDON: Sir, just dealing first with representation and then with order of presentation. As the Tribunal knows, I appear for Virgin with my learned friend, Miss Demetriou. The Competition Commission is now represented by Mr. John Swift, who appeared last time, together with Mr. Rob Williams. The Secretary of State I think is now represented solely by Miss Elisa Holmes, Sky now solely by Mr. James Flynn.

Sir, in terms of presentation I have actually given you the order in terms of the representation, that we will be speaking. We have agreed that Virgin should go first and deal with everything relevant to relief and, if appropriate, costs.

THE PRESIDENT: On costs, I think we have only had representations from you so far.

MR. GORDON: Yes.

THE PRESIDENT: I suppose there is no harm, but is the feeling that people just want to make some oral submissions and leave it at that?

MR. GORDON: I have not got the feeling actually … (Laughter).

THE PRESIDENT: I did not think so.

MR. GORDON: Maybe they are agreed, I do not know.

THE PRESIDENT: We may want to shelve the costs matter, I do not know.

MR. GORDON: What I was going to say about costs is that it is in our written submissions and you have those, so I was not going to take it any further in oral address. The order, as I have indicated, will be the one that I have set out in the representation and then it was proposed that we should reply at the end to anything raised in answer to our points.

Sir, as you have anticipated, the central issue is that of relief, and as far as relief is concerned there appear to be two questions and those two questions are those raised by the Tribunal in its judgment at para.332 which, on my copy at least, is p.98. The two questions are (which I will deal with in turn) from Virgin's perspective at least, the first was the effect (if any) of the judgment on the existing remedy imposed in order to deal with SLC; and secondly, and separately, whether the plurality issue should be remitted to the Competition Commission and/or the Secretary of State.

If I may take each of those questions in turn. First, the SLC remedy, we say, for reasons which I will come to in a moment, that the Tribunal's judgment has no impact whatever on the existing remedy imposed in order to deal with SLC and the resultant adverse effects on the public interest. There is a very simple reason for that and that is because of the relief that has already been granted, because what we are dealing with is further relief – not any relief but further relief – because, if the Tribunal will go to para. 334(2)(i) of the Judgment at p.99 what has already happened is that the Tribunal has quashed the report and the decision only to the extent that they concern media plurality. That is the effect of the relief granted thus far.

So what follows from the order already made is that the Tribunal has left intact the respective determinations of the Secretary of State and the Competition Commission on three things. First, on the SLC question, secondly, on the resultant adverse effect on the public interest; and thirdly, on the appropriate remedy to address that adverse effect. So what we submit is that those determinations, standing as they do – they are lawful determinations they have not been quashed – cannot therefore be remitted. They remain in force as lawful determinations and the Tribunal's power to remit lies only in respect of that part of a decision that has been quashed.

THE PRESIDENT: Well hang on, Mr. Gordon. One of the points that we left open was further relief and so one of the questions we want to know is whether we ought to quash the remedies, because Virgin, in its notice of application asked for the remedies bit to be quashed as well and we deliberately did not quash it because we wanted to hear people on it – we could still quash it.

MR. GORDON: Sir, all I am doing is looking at what has been quashed ----

THE PRESIDENT: No, I agree it has not been quashed, we have left it open.

MR. GORDON: But as we understand the judgment, and it may be that we have misunderstood what the Tribunal had intended, so I certainly do not want to ----

THE PRESIDENT: You might have done, because what we said in 332 was intended to indicate that we had not decided what should happen to the existing remedy. You may well be right that nothing should happen to the existing remedy but that is one of the issues we wanted to hear from you on.

MR. GORDON: I certainly do not want to rely upon formal points. The point that we make really, substantively – but also it is a formal point – is that the thrust of the Tribunal's reasoning, and therefore the quashing order that it has already made is to the effect – and the clear effect in our submission – of invalidating one part of the Commission's reasoning and the contingent reasoning of the Secretary of State and leaving intact the other. Now, I do not for the moment want to confine my argument to formality in the sense you have quashed X but not Y, but the reason, in my respectful submission, that the Tribunal has not quashed Y – that is to say the three aspects of SLC that I have identified, is because the Tribunal was holding them to be lawful determinations; they were not unlawful, they were not invalidated by any defect of reasoning or law. So what we submit, having regard to the way in which remitting goes – or normally goes – is that when one looks at the Tribunal's power to remit, and can I just show you, Sir, that in the handbook at p.224, and it is s.120(5)

> "The Competition Appeal Tribunal may –
>
> (a) dismiss the application or quash the whole or part of the decision to which it relates .."

Now, why would the Tribunal only quash part of a decision? We find the answer to that in:

> "(b) where it quashes the whole or part of that decision, refer the matter back to the original decision maker with a direction to reconsider and make a new decision in accordance with the ruling of the Competition Appeal Tribunal."

So the purpose of remitting under the statutory provision at least is that the Tribunal remits that which requires to be reconsidered as a matter of law. That being the case it is our submission that, as a result of the Tribunal's reasoning, the only matter which requires to be reconsidered as a matter of law, subject obviously to the separate arguments on whether you should remit that part, is the question of media plurality. There is nothing to reconsider in the context of SLC. What the opposing argument appears to come to and I should say – I will give the Tribunal the references for this – as we understand it both the Secretary of State (para.19 of Secretary of State's submissions) and the Competition Commission (see para.3 of the Competition Commission's submissions) agree with our analysis. The only opposition to the submission we make on the existing remedy comes from Sky, which

appears to argue, though respectfully we would submit it has not pushed that argument very strongly in its written submissions (see para.19 of Sky's submissions). The only argument against us comes from Sky which is that the entire decision on remedies must be remitted, and the reason why Sky submits that to be the resulting position is because of an asserted incompleteness to the remedies question. But there is no incompleteness in any sensible use of that term, in our submission, because Sky's challenge to the remedy has, as a matter not of form but of substantive reasoning, been rejected by the Tribunal and the remedy therefore stands as a matter of substance as well as a matter of form in our submission. If there is to be any change in remedy as a result of remitting it can only result in an additional remedy to address the adverse effects on the public interest resulting from the media plurality issue.

So we respectfully agree, for those reasons, with the words that the Competition Commission uses at para.3 of its submissions, and the Commission says – I will just remind the Tribunal – that any remittal of the plurality issue "cannot act as some form of stay over his powers to give effect to the existing remedy." That is the way we put that argument and I simply remind, without reciting it again, what we say at para.8 of our written submissions in relation to the time that has already elapsed in this case. That is not an analytical reason for asking the Tribunal not to remit. It simply follows in our submission as a result of the Tribunal's judgment.

May I turn now to the plurality issue? Again, a similar question as to whether there should be a remission of that issue for reconsideration by the Commission and the Secretary of State. Here, I hope that I can rely not only on substance but also on form, in other words on what the Tribunal has already done, because here, as a result of the relief already granted, the determinations contained in the report and the decision on plurality, have been quashed – that is clear. Unlike SLC there is absolutely no determination standing on plurality, because that must be the result of a quashing order , the respective recommendations and decisions have gone. Yet it is, or should be, in our submission, uncontroversial that the legislation requires a determination to be made; there has to be one. This is where Mr. Flynn's word "incomplete" actually finds its true focus. The legislation, I am not going to take the Tribunal to it unless, Sir, you wish me to, but we have flagged it up in para . 17 of our written submissions and I will give the Handbook references as well, the legislative provisions that require a determination to be made in the context of plurality lie in the Enterprise Act s.47(2)(b) and s.47(7)(b), that is at p.174 of the Handbook.

THE PRESIDENT: I think it might be useful just to glance at it, if we may.

MR. GORDON: Certainly, Sir. First of all at p.174, and 47(2)(b): "If the Commission decides that such a situation …" and I emphasise these words for later argument, "… has been created, it shall, on a reference under s.45(2), decide the following additional questions." Well question (a) has been decided and substantively has been decided lawfully. Question (b):

> " (b) Whether, taking account only of any [SLC] and the admissible public interest consideration or considerations concerned, the creation of that situation operates or may be expected to operate against the public interest."

Then 47(7):

> "The Commission shall, if it has decided on a reference under s.45 that the creation of a relevant merger situation operates or may be expected to operate against the public interest, decide the following additional questions."

Then (b):

> "(b) Whether the Commission should recommend the taking of other action by the Secretary of State of action by persons other than itself and the Secretary of State for the purpose of remedying, mitigating or preventing any of the effects adverse to the public interest which have resulted from, or may be expected to result from the creation of the relevant merger situation."

Then if one goes to s.54 (2) at p.179, this is where the Secretary of State enters the picture:

> "The Secretary of State shall decide whether to make an adverse public interest finding in relation to the relevant merger situation and whether to make no finding at all in the matter."

Then if we go to the next page, 55(1) to (3) "Enforcement action by the Secretary of State."

> "(1) Subsection (2) applies where the Secretary of State has decided under subsection (2) of section 54 within the period required … to make an adverse public interest finding in relation to a relevant merger situation and has published his decision within the period so required.
>
> (2) The Secretary of State may take such action under paragraph 9 or 11 of Schedule 7 as he considers to be reasonable and practicable to remedy, mitigate or prevent any of the effects adverse to the public interest which have resulted from, or may be expected to result from the creation of the relevant merger situation concerned."

And then the link with the Commission in (3):

> "In making a decision under subsection (2) the Secretary of State shall, in particular, have regard to the report of the Commission under section 50."

So we submit that there has to be a decision on the adverse effects flowing from media plurality, and in our submission it follows from the Tribunal's judgment that the appropriate course is to remit the plurality question, again going back to s.120(5)(b), and that is at p.224 again if the Tribunal needs to look at it. On this question we note that, unusually perhaps, we are in agreement with Sky.

THE PRESIDENT: We noted that too!

MR. GORDON: Can I now deal with the opposing arguments? The single argument against us, as we understand it, advanced by the Secretary of State and the Commission, is that remittal would be otiose, and it would be otiose on the ground – it comes to one proposition – that the existing remedy would suffice to address any adverse effects on media plurality that may be identified.

The first point, and perhaps the easiest point to articulate, is that neither the Commission or the Secretary of State have gone as far as to submit that remittal would inevitably be otiose.

THE PRESIDENT: It is pretty close to it in the skeleton argument.

MR. GORDON: Pretty close, and I am going to deal with the construction argument separately and the practical arguments separately still, but the first point to make is, as a matter of what is asserted, and what has been perhaps most materially asserted in the decision of the Secretary of State, it is not submitted that remittal would inevitably be otiose. Can I explain why I make that submission? First, we turn to para.20 of the Secretary of State's decision, and that is cited in the judgment at para.331, at pp.98-99 of the copy I have at least.

Paragraph 20 of the Secretary of State's decision, which is perhaps what really matters for the purposes of considering remittal, says that the existing remedy: "… is likely also to be an appropriate remedy to address any adverse effects on media plurality." Sir, can I stop there just to highlight the word "likely"?

Similarly, when one looks at the Commission's written submissions (see para.4) those submissions state – we would say "merely state" – that the Commission: "… does not at present see …" and I emphasise the words "at present",

> "… how an adverse finding on plurality could lead to the imposition of a more onerous remedy than divestment by Sky to below 7.5%."

Sir, what we say about those two formulations is that each of the parties, that is to say the Secretary of State and the Competition Commission, are careful and have chosen their

words carefully so as not to shut the door completely on the possibility that there could be a different remedy. We say that those formulations and, in particular, the actual contemporary document (para.20 of the decision of the Secretary of State) are as a starting point crucial to the question of whether it is otiose to remit.

THE PRESIDENT: Could you also look at para. 13 of the Commission's skeleton?

MR. GORDON: Yes, I will.

THE PRESIDENT: It is phrased slightly differently, but I am not sure the effect is any different:

> "The matter should not be remitted to the Commission and/or the Secretary of State, at substantial cost to the public purse, if the only realistic outcome would be a further recommendation of a remedy which is already to be given effect in any event."

"…only realistic outcome"?

MR. GORDON: Yes, I would submit that whether one uses the words "likely" or "at present", or "only realistic outcome", one is in the territory of all those cases which were helpfully addressed by Mr. Justice Megarry in *John v Rees* and you, Sir, will know what I am talking about.

THE PRESIDENT: Yes.

MR. GORDON: Unanswerable cases that somehow were answered, etc. There is a space, and if there is a space – if there is a space – the critical point of analysis that we would make is this: it is crucial to the question of whether remitting back is otiose, and it is crucial for this reason. The CAT may not, to any extent, substitute its own decision for that of the primary decision maker and we, in our outline submissions at para.11, have compared the powers of this Tribunal under the Competition Act, para. 3 of Schedule 8, much more intrusive powers than would exist in this context. So that is why, as a starting point, and I emphasise it is a starting point, we say that it is a hopeless submission to say that it is otiose to remit when one looks and unravels at what is meant by the word "otiose" in the context of administrative law.

THE PRESIDENT: We should also, for the sake of completeness, should we not look at the Secretary of State's latest ----

MR. GORDON: Yes, Sir.

THE PRESIDENT: -- and in particular para. 16.

MR. GORDON: Ah, but I was going to come to that.

THE PRESIDENT: Were you? Sorry.

MR. GORDON: I was going to approach this on three limbs. The first limb is to say the argument never gets off the ground because it is not otiose if you have regard to the wording of the decision and actually the formulations put. The second argument, however, is to address what they are actually saying as to why they think it is very likely, and so on. The third argument is to submit to the Tribunal that if they were right what wider consequences would it have? That is the practical argument.

If I may turn to the way in which the argument is put in a substantive form against us, it is put in slightly different ways, or at least it has been at different times, but it consists of one underlying proposition, and that proposition is that the existing remedy removes Sky's control over ITV, and so the argument proceeds, it is said, that once the remedy is implemented there will be no adverse effect on media plurality, and if that is correct it is said that there is therefore no basis for imposing a more onerous remedy; that is the argument.

Now, the Competition Commission's argument (see para. 7 of its submissions) is that both the competition issues and the media plurality issue only come within the scope of the merger regime – I am summarising so I hope it is not an unfair summary – only come within the scope of the merger regime because of the creation of a relevant merger situation. So if the existing remedy has removed the relevant merger situation it must, as a matter of logic (see para. 9 of the Commission's submissions) remove any adverse effect on the public interest resulting from media plurality concerns. That is how we see the argument of the Commission.

That submission, now supported by the Secretary of State, but originally formulated slightly differently. Sir, you will recall the decision focused more on s.58A(5) and I will come to that separately. That submission, i.e. the Competition Commission's submission, is, we say, a surprising one. The first point we would make is that it is simply wrong as a matter of statutory interpretation and the reason it is wrong has to be, I suppose, traced back to the three or four sections that link "relevant merger situation" to the Act.

The concept of a relevant merger situation is defined in the Enterprise Act in s.23, and we see that section in the Handbook at p.152. The only point at the moment that perhaps I should make is that it links in two sections, either expressly or by necessary implication, it links in s.24 and s.26. What one is looking for in terms of "what is a relevant merger situation?" as s.23 makes clear is the creation of a relevant merger situation at a particular point and in particular circumstances. That point and circumstances take us to s.24 and s.26 deals with enterprises ceasing to be distinct enterprises.

So the creation of a relevant merger situation is linked, as I say, through the statute to a particular set of circumstances and a particular time, it is the creation of something.

When we come to remedies, which is what we are concerned with in these proceedings, we look at s.47(7) and s.55(2), which I have already taken the Tribunal to, but it is quite obvious in our submission that the remedies are looking to the action to be taken to address the adverse effects. What adverse effects? The adverse effects flowing from the creation of a relevant merger situation. I have already made the point that the creation of a relevant merger situation is temporal and circumstantial event and what the Commission and the Secretary of State are looking at is what consequences flow from that event? That is to say, the creation of the relevant merger situation.

So the fact that the relevant merger situation may now itself no longer exist says nothing about the adverse consequences flowing from its creation, and the word "creation" was the important word. That is our first point on statutory construction.

The second point is really a wider ramification point. We can put this point very practically. As far as we can tell the Competition Commission's and the Secretary of State's discretion in respectively recommending and determining an appropriate remedy, whether in respect of adverse consequences flowing from SLC or media plurality has never been supposed to be fettered in the way this argument compels or mandates. It has never, for example, been limited to requiring an acquirer to divest its shareholding to a level below which applying s.26, a merger situation, would not arise. Indeed, s.47(9) (p.174 of the Handbook) I think the Tribunal will remember it, that section deals admittedly with SLC but it must be part and parcel of the same analysis, provides that the Commission must have regard to the need to achieve as comprehensive – and I emphasise the word "comprehensive" – a solution as is reasonable and practical. So "comprehensive" is an important word which shows the breadth of the remedial discretionary area of judgment.

The focus under s.47(9) is on addressing the substantial lessening of competition and adverse effects and not on ensuring that the criteria necessary for a merger situation to be created are no longer satisfied.

It may be that this Tribunal will recall two things: first, that if the arguments now being advanced were right as a matter of statutory construction, all the points Virgin made on remedy about proportionality and everything else, would not have mattered, we could have been dealt a single blow of the sword with this argument, yet the argument that proceeded in front of this Tribunal was on what was necessary in the circumstances. It will also be important for the Tribunal to recall as a matter of practicality, what is in para. 6.66 of the

Competition Commission Report. I can read it, it is in I think the first bundle at tab 1. This, of course, is not a construction argument, but it is a practical argument. Does the Tribunal have it?

THE PRESIDENT: Yes.

MR. GORDON: I will read it, if I may – I can make the point very simply. We conclude that two remedy options …" and I underline the word, mentally, the word "options", "… would be effective in addressing the SLC and consequent adverse effects on the public interest expected following the acquisition by BSkyB of a 17.9% shareholding in ITV.

(a) divestiture of the whole of BSkyB's shareholding; and (b) …" what I will summarise as "part divestment".

In the event, as the Tribunal knows, the Commission decided on partial divestment on the basis that this would be more proportionate, that is why we had the proportionality argument, but it certainly took the view in its report that it had the power in principle to order full divestment – see the phrase: "Remedy options", an "option" is necessarily that which one selects of two possible choices. Once you get into the question of proportionality you are into questions of margin of appreciation, discretionary area of judgment, we are back to the same point about what is otiose and what is not.

What I am told, and it may strike a chord with the Tribunal, is that in many if not most divestment or prohibition cases, the divesting company is not normally permitted to retain any or more than an immaterial shareholding, and I am given an example in the Commission's Report on the completed acquisition of Emap plc of ABI Building Data Limited – it may be that the Tribunal has knowledge of that or not. We do not have the documentation here. There the Commission found that the merger would give rise to a substantial lessening of competition and that the only appropriate remedy to address the adverse effects would be for Emap to divest the entirety of the ABI business. We say that there are several other cases where the Competition Commission or the MMC before that, have adopted a similar approach, and Virgin, in its response to remedies (see the notice of application para.3.5) refer to some of these cases in its response on the Commission's possible remedies.

We do make this point because it is a wider ramifications point, it would be in our submission extraordinary if the result of this argument were that the Commission accepted that its discretion as regards remedy to require divestment was limited in the way that the logic of its arguments suggest it is, because it would have a much wider effect on future

cases, of course it is not decisive as a matter of construction but it is highly relevant to what may or may not be otiose, and how the Tribunal should approach that question.

We make a wider point which is this, that the existing remedy was fashioned only to address the identified SLC. We say that it cannot be assumed that it will be equally effective to address any concerns arising as a consequence of the relevant public interest consideration. The remedy recommended by the Competition Commission was dealing with special resolutions. The very specific objective was clearly linked to the fact that a special resolution was identified as the means by which BSkyB would be able to influence the behaviour of ITV. Again, I do not want to go back and back and back to the judgment, but if I can by reference at least refer to para. 262 of the Tribunal's judgment, p.75 in my copy, what we respectfully did succeed in persuading the Tribunal was of the fragile nature of media plurality, and it is such that once lost it may be extremely difficult if not impossible to restore. That being the case the approach to remedies adopted to address adverse effects arising from that consideration may be very different from those considered appropriate to address SLC adverse effects.

The way in which strategic influence may become relevant was articulated by Virgin in its notice of application in this case, can I give the Tribunal a further reference? It is paras.3.73 to 3.74 of Virgin's submission to the Competition Commission of 15th June 2007, which was attached to its notice of application. As far as that is concerned, that was dealing with Newscorp's acquisition of 7.5% shareholding in John Fairfax Newspapers in Australia, and the point being made there was that the acquisition was a strategic one; it was a minority holding, it fell below the 15 per cent stake permitted by Australian cross-ownership provisions, but it was enough to influence the commercial decisions being made by Fairfax management.

THE PRESIDENT: Was that reference of 3.73 to 74, was that in your notice of application?

MR. GORDON: It was. So that is the Competition Commission's argument, that is our response to it and, as I say, that is largely mirrored now by the Secretary of State. I only need to add to our analysis the separate argument – but it is not really separate – which was advanced in the decision (para.20) relying on s.58A (5) of the Enterprise Act. All I think that we would say is this: the Competition Commission considers, as we do but perhaps for different reasons, that s.58A (5) is irrelevant to this question. One sees the Competition Commission's dismissal of its relevance at para.11 of the Commission's outline submissions. But the reason – and the very short and simple reason – why it is irrelevant in our submission is that s.58A (5) is simply a deeming provision which conditions assessment

of the sufficiency of media plurality in the first place, but rather like the Competition Commission's argument on other aspects of the matter a deeming provision is only a deeming provision, it says nothing about appropriate remedy. It is merely how you get to the assessment, it has nothing to do with remedy at all.

If any of these arguments succeed, that is to say, what is otiose in the administrative law sense? What is the right construction? What are the wider ramifications? In our submission it cannot be said as a result of para.20, which was the question I think the Tribunal posed in remedies, cannot be said that it would be otiose to remit, and we say that if it is not otiose to remit then the matter must be remitted because there is currently no determination at all that stands in law as a result of the quashing that has taken place.

Sir, those are our submissions.

THE PRESIDENT: Mr. Gordon, if you remove all realistic possibility of influence being exercised over ITV, which is the finding in the report which we have upheld as being at least unimpugned in a judicial review sense, what realistic scope does that leave? I appreciate your fragility point, but what realistic scope does that leave for an additional remedy to cope with any plurality insufficiency?

MR. GORDON: It is the fragility point. It is the fragility point which the Tribunal accepts in its judgment at para.262, and that is, in our submission, absolutely crucial because no one knows now how the Commission is going to deal with media plurality, what it is going to say if the matter is remitted. I think the Tribunal makes that point itself, I was just trying to find it in our written submissions where we pick that up from the Tribunal decision. I think it may be around para.27:

> "… the fragile nature of media plurality is such that once lost it may be very difficult or indeed impossible to restore. That being the case, the approach to remedies adopted to address any adverse effects … may be very different from those considered appropriate to address the SLC."

That is why we do submit that one cannot, at this stage, say it is otiose to remit back. I make no submissions about what the remedy would be at the end of the day, and it may be that it would stay the same, but what I do submit is that it is certainly not otiose to remit.

THE PRESIDENT: I think you were going to comment briefly on some paragraphs in the Secretary of State's skeleton where they seem to put in slightly more trenchant terms, and that may lead to alternative submissions about fettering and so on, but I think 16 really through to 18 and 20.

MR. GORDON: I found it hard to extract from these paragraphs anything more than a mirroring of what the Competition Commission's argument was, namely, that if you take away the RMS you take away the situation that caused the problem, but I may be simplifying it. We have of course put the fettering point, my learned friend reminds me it is in our submissions, the *Venables* case. It is not clear to me how it is put any differently in these three paragraphs. What is said at 18 is, given the Tribunal's affirmation that a reduction of Sky's shareholding to a level below 7.5 per cent is appropriate to remedy the SLC, that seems to be the premise on which it is then said that:

> "… the imposition of the remedy will result in the position where there is no effect whatever on the sufficiency of plurality of persons with control flowing from Sky's remaining shareholding."

We say, as I hope I have indicated, what one is looking at in terms of remedy is the effects by reference to the media plurality concerned, the adverse effects flowing from the creation of the merger situation. If the Secretary of State is correct what it means, in very blunt terms, is that the final remedy for SLC will always be sufficient for plurality, there is a match between them and that seems to follow from para.18. If that is right, and I may have oversimplified Miss Holmes's argument, but if that is right not only does it immediately trigger fettering feelings, intuitions, but it has an artificiality about it which seems not to place enough weight on what we say is the critical element of the fragility of plurality.

THE PRESIDENT: Another thing to comment briefly on, no one is suggesting we do not have a discretion under s.120?

MR. GORDON: I was not going to suggest that.

THE PRESIDENT: No, and no one else has so far. To what extent, in your submission, should we take account of what the ultimate decision makers say is likely to be the result and to what extent should we take account of the implications for uncertainty and costs to the public purse, uncertainty for ITV and its shareholders and so on, that arguably result from a remission?

MR. GORDON: In my respectful submission each of those three possible criteria that you, Sir, have identified would be materially irrelevant, legally irrelevant, to the exercise of a discretion.

THE PRESIDENT: Irrelevant?

MR. GORDON: Irrelevant, and I say that really picking up first of all the point on which we are all agreed that the Tribunal is an administrative law body dealing with judicial review principles, and one will recall I think the talk by Lord Bingham in public law on "Discretion

in Judicial Review", how rarely and how circumscribed it should be in terms of its exercise. I struggle to find any accepted basis for the exercise of discretion to refuse relief on these three criteria. Before we get to the factors which might be said to exercise it they contain two different routes. One of them is what the decision maker says about the likelihood of the final decision. In our submission that is not discretion to refuse relief, that is straightforward application of *John v Rees* principles, in other words, you do not get into discretion, you cannot exercise discretion to refuse relief because the decision maker says that the result will not be any different, because there are all sorts of cases where, once the matter is reconsidered, the result is different. To say the result will not be any different is a fettering of discretion, and if I can pick up a case called *R v North & East Devon Health Authority ex parte Pow* about 10 years ago where the local authority said "We do not bother to consult because it will not make any difference to our decision", and that was struck down as unlawful. We say that second factor is not relevant.

The cost to the public purse is again as a matter of discretion not relevant because the only heading under which something which is nobody's fault but is the consequence of bringing a case has been occasionally turned down, is "administrative inconvenience". What that means, of course, is administrative inconvenience in the sense of actually being impossible really to implement the remedy. One can think of all sorts of social security examples where you might get into that situation but that is not this, this would be a very great extension of that principle.

I am just trying to remember the third – it is categorisation by the decision maker, public purse – uncertainty. Again, if one goes through – and I am going through deliberately because Lord Bingham said they should be closed not open categories – I cannot think of any judicial review decision in the last 20 years where the kind of uncertainty that we are talking about here would ever have been held to be a ground for refusing relief that had been established, after all, if the premise is that the result might be different, then it might be different and I cannot at the moment think of uncertainty being a ground for refusing relief in anything other than a delay case. There, of course, uncertainty can be prejudice to third parties in the statutory sense, that is if you have not brought your case quickly enough, but that is not a ground for discretion for refusing relief once you have your case up and running.

We say that we do not get into arguments about whether it is uncertain, whether it is going to cost a lot, whether it is going to get into administrative resource expenditure. The discretion to refuse relief could, we do accept, be exercised under s.120 if the matter was

otiose, because then you really do get into an accepted head of discretion, but we say that you do not get into that and it would be hard, even if we were not in any of the territory we are in about why the ramifications and so on, to say that something is otiose to remit when the legislation itself says there must be a determination on X and Y, and currently there is no determination at all. I do not say it is impossible to reach that conclusion but it is a fairly forbidding first hurdle.

But the key point in our submission is that it is not otiose, that is the point of substance that we have been trying to deal with. The very logic of the Tribunal's decision on media plurality indicates why it is not otiose. One is looking at what are the adverse consequences flowing from the creation of a relevant merger situation? That creation has a ripple effect, and it has a ripple effect in what kind of influence can be exercised and we say that may be highly relevant to remedy. At the end of the day the decision maker may reject these points but they cannot be dismissed as otiose.

THE PRESIDENT: So what you envisage is if it were to be remitted there would then be a separate remedy because you say the existing remedy is sacrosanct?

MR. GORDON: Yes.

THE PRESIDENT: So there then would be a separate remedy, possibly, if additional effects were found that needed a remedy.

MR. GORDON: Yes.

THE PRESIDENT: So there would be two remedies effectively. Just another point, while you are on your feet, Mr. Gordon, have you any thoughts about the logistics? Obviously, when there is initially a reference and there are statutory time limits and so on and so forth, first of all for the Commission to report and then for the Secretary of State to take a decision?

MR. GORDON: Yes.

THE PRESIDENT: On the second time around is it something that the Tribunal should lay down, or should it just let them make some sense of it?

MR. GORDON: If there is any possibility of the Tribunal laying down particular time limits we would strongly enforce such an approach. Where we had a little stumbling block in our thinking was finding the Tribunal's power to lay down directions. But, on the other hand, it is possible, of course, to appeal directions under the Tribunal Rules, and one assumes that there is the possibility of the Tribunal making such a direction, and certainly if there is we would endorse that.

THE PRESIDENT: Thank you. Mr. Swift?

MR. SWIFT: May it please the Tribunal, what I am proposing to do is to follow Mr. Gordon's order – it seems logical - taking question 1 first and then question 2. A number of the points Mr. Gordon has made this morning I believe I am going to cover in my opening, but to the extent the Tribunal considers I am not meeting those points then please ask me the questions as I may have some extra observations as I go along. Starting at the end, as it were, I was not proposing to get into the three criteria relevant to the exercise of discretion, but if those matter are going to be pursued by the Tribunal I would be grateful to put comments in in writing, but we will see.

May I deal first with question 1 in which Virgin, the Commission and the Secretary of State are at one if not for precisely the same reasons. The starting point is that the whole of Sky's application in respect of SLC has been dismissed by the Tribunal. The legal effect of that, in my submission, is to enable the Secretary of State to exercise the powers that he said in his decision that he would exercise. It removes any legal doubt as to the Secretary of State's ability to carry out the appropriate action to implement the remedy that was recommended by the Commission and which was accepted in full by the Secretary of State.

To the extent that the Tribunal considers that it may have some power to stay, and in my submission it is difficult to see from the legislation where that power would arise from, but to the extent there is a discretion in my submission the following considerations really point overwhelmingly in favour of an early divestment.

The first is that this is a completed merger where the adverse effects on SLC and on the public interest are substantial and have existed now for 23 months. The fact that undertakings were given by Sky in respect of the use of that shareholding does not take away what I may call the toxic effect of that shareholding on the development of competition in this important market. It is also very much in the interests of consumers that the shareholding moves from 17.9 to less than 7.5 as soon as is practicable. The quashing of the Commission's findings on plurality therefore has no relevance to the findings on SLC or as to the course of action that this Tribunal should take in respect of question 1.

I have to say, speaking on behalf of a public authority, and therefore being extremely careful in what I say, that when I read Sky's submission in respect of questions 1 or 2 with its endorsement of the Virgin arguments in respect of remittal I was expecting to see the word "however", Sky having been opposed to Virgin throughout this case on almost every issue, but I could not find it. I realised that Sky is adopting question 2 because it has to win on question 2 to have any chance of supporting its argument on question 1. In other words, the Secretary of State's remedy should not be given effect to now. Of course, if the Tribunal

does remit on whatever grounds the Tribunal thinks is appropriate, but it must be on the assumption that there is some realistic prospect of a remedy more onerous than the less than 7.5 per cent, then Sky stands at risk of that more onerous recommendation which it might appeal. So the 23 months might go to 33 months, and in my strong submission now is the time to make the break and to commence the process. There are no alternative public interest arguments that can be made that go anywhere near the overwhelming public interest considerations that demand, if the Secretary of State supports this, steps taken to implement the divestment.

THE PRESIDENT: I have to say, Mr. Swift, the Tribunal was never contemplating that it would stay the remedy, or would wish to stay it. I think what our question 1 really was directed to was whether it could stand. Whether its legal basis was undermined by what we had found on plurality. We would not be in the market for staying it if it was otherwise ----

MR. SWIFT: Well, in my submission, the Tribunal should be well satisfied that it stands. The Tribunal has answered ----

THE PRESIDENT: Well that is what we are obviously interested in hearing about.

MR. SWIFT: It has approved the manner in which the Commission has answered all those questions in respect of SLC which it was required to do by the Secretary of State when the reference was made, and that is sufficient under s.47.

THE PRESIDENT: It is sufficient the CAT has approved all the ----

MR. SWIFT: It has approved all the arguments from the relevant merger situation to the SLC, to the remedies and on each of those aspects of the Commission's decision the Tribunal has been satisfied that the Commission has acted fully in accordance with its obligations under s.47, that being the case that is done.

THE PRESIDENT: So you are agreeing with Mr. Gordon there is not a problem in sort of salami slicing the remedy; there can be a distinct remedy for the SLC?

MR. SWIFT: Yes.

THE PRESIDENT: And another distinct remedy if necessary for the ----

MR. SWIFT: If necessary, yes. We say in respect of these "public interest" references the Commission's duty is to make the recommendations to the Secretary of State as distinct from the standard merger references in which the Commission is itself the decision making body, but subject to that the arguments stand.

May I turn to question 2, Sir? On question 2, when we put in our written submissions we were putting them in blind and we simply did not know how the other parties would respond. It was perfectly possible that Virgin and its advisers, having considered the

Tribunal's judgment, considered that whatever commercial imperatives had driven them to bring the application, they were satisfied that it would be otiose, it would not be reasonable to make the reference, so our submissions were, indeed, very, very short. But as, Sir, you pointed out in your early observations to Mr. Gordon, the Commission really summarised its position at para.13, where we introduced the concept of a realistic outcome, realistic prospect, that the matter should not be remitted to the Commission "… if the only realistic outcome would be the further recommendation of a remedy which is already to be given effect in any event. To do so would serve no practical purpose."

Also, at 10, which is perhaps the most succinct – I do not know whether you have our short submission before you, Sir?

THE PRESIDENT: Yes, I do.

MR. SWIFT: At 10, perhaps in the most succinct way we put it:

> "It is noted that the specified public interest consideration is the need for a sufficient plurality of persons with *control* of media enterprises. By reason of the remedy Sky has no realistic prospect of control of any sort recognised under the merger regime, i.e. material influence, control or ownership, because there is no realistic prospect of even the lowest level of control."

First, may I give the assurance to the Tribunal and to all the parties, and indeed any other persons who may be giving evidence, that if the Tribunal considers that there is to be a remittal, however the process is then determined for handling the remittal, then the Commission, of course, will be acting entirely in accordance with the principles of due process, will listen to all arguments and will come to its appropriate decision and recommendations. So the fact that we have responded in writing, and I am responding today in direct response to questions from the Tribunal, should not in any way be considered as in some way ----

THE PRESIDENT: Fettering?

MR. SWIFT: "Fettering" was the word I was looking for, yes, "fettering" – we will come on to fettering a little bit later – but I wanted to make sure that there was no risk to fair process in the event there is going to be a remittal.

I have always been an admirer of Mr. Gordon's taxonomy, and I think I agree with him that the Virgin submission can be broken down into three main types of argument. The first – I am largely in agreement with Mr. Gordon – and that is that in the ordinary type of case, and Mr. Gordon has taken the Tribunal through s.43, s.47, the normal type of case, a quashing of an essential part of the reasoning would lead to a remittal. The Tribunal says to the

Commission: "You have got it wrong, now make your determination in accordance with the law", and so we would go back. Indeed, when the Tribunal wrote its judgment you said (at para.265) the Commission might be expected to engage in a detailed, wide-ranging, qualitative assessment on the basis of which the Commission would judge whether the external plurality of the remaining controllers is sufficient which, in a nutshell, put the key issue on media plurality. Then you said it was not possible to say with any confidence what the Commissions' conclusions on these questions would have been had it directed itself properly. (For the record that is at para.267).

There is, in my submission, no duty to remit, otherwise we would not find the expression "may" in the relevant section of s.120, but were the plurality issue to be, as it were, self-standing, all other things being equal, let me put it that way, it may be that the Tribunal would have exercised that discretion. The problem is that Virgin's first line of argument, as supported by Sky, does not take it very far in dealing with the Tribunal's second question because there is a serious issue as to the effect of an undisturbed finding that the Sky shareholding will be, as a matter of law, brought down to 7.5 per cent, and that is a new matter; that is the reason why the Tribunal raise question 2.

So a general analysis of the provisions of the Enterprise Act can take one so far, but it does not actually deal with the real kernel of the problem, or the issue, that is before the Tribunal.

The second type of argument relates to issues of discretion, issues of statutory interpretation. Miss Holmes will deal with this probably in more detail, but Mr. Gordon refers to a well known passage by Lord Browne-Wilkinson in which he uses this expression about "you cannot do a *nunc pro tunc*, you cannot fetter your discretion – we are allowed a bit of Latin ----

THE PRESIDENT: You can say as much Latin as you like!

MR. SWIFT: I was going to say "gravamen", but anyway *nunc pro tunc*, and I do not think anybody suggested that in some way the Secretary of State is binding himself, he said "likely". But what he said in my submission is a statement of the self-evident. He said that once effect has been given to the remedy there will be no change in the number of persons with control of media enterprises arising out of Sky's shareholding. Virgin say: "That is wrong, that is the wrong consideration." They are saying that no change, even if it is the restoration of the *status quo ante*, is not a relevant consideration or does not go far enough.

But in my submission the Secretary of State made a rather convincing statement, what he is saying is almost a statement of the self-evident. How can it be seriously said that with 7.49 per cent the News Corporation or Sky has control of ITV? It cannot be; it cannot be, nor do

I hear any argument from Mr. Gordon to say "It might be." On any proper statutory analysis 7.49 per cent enables ITV to carry on its media enterprises under its own ownership completely unfettered. Sir, you mentioned the brief observation put in by ITV, one might have thought that if anybody was concerned about the risk to their ability to make a contribution to the public interest on media issues it might have been ITV, but they are not worried about the 7.49 per cent .

The third type of argument is one that reveals the Commission's concerns about what I call the "unless" issue, and that is really the way we have tried to approach this issue before the Tribunal, the "unless". Unless there appears to be some real and substantial argument that 7.49 does not, and cannot be expected to remedy an adverse public interest effect on plurality, but it clearly does on SLC, then the exercise in a remittal does indeed seem otiose. The Tribunal will recall you used a very colourful phrase, you said that the divestment to 7.49 "neutralises material influence" – "neutralises material influence" – and in my submission following the "unless" argument, unless the Tribunal has very strong grounds for predicting or thinking that when you neutralise for one the neutralised shareholding has some potency in respect of plurality, then it would seem difficult to see why this extra long process has got to be gone through.

In my submission Virgin's argument on relief suffers from exactly the same problem as that identified by the Tribunal at para.318 of your judgment, and that is the divestment to zero and divestment to 7.49 "would be equally effective" – equally effective in doing what? I ask rhetorically. In removing any realistic prospect that Sky would have or be able to exercise any level of control over ITV. When considering media plurality and the risk of an insufficient number of enterprises is that not the key issue?

How does Virgin evade the consequences of the equal effect finding by the Tribunal? There appear to be two strands in the argument. First, that the finding was made by reference to an ability to block a special resolution, and that was all to do with an examination of the shareholding and the relative powers that different shareholders had. The second appears to be the fragility argument, that more onerous remedies may in principle be called for when freedom of speech and other matters relating to the independence of the media are at issue. In my submission it cannot be fragility, because fragility is really dealt with in the deeming provisions (58) where, as the Tribunal found the Commission would have to proceed on the plurality issues on the basis of a fiction that News Corporation and Sky controlled ITV media enterprises. The shareholding might not be relevant, for this purpose ITV could cease to exist , all its media enterprises would be under the control of News Corporation and Sky.

Virgin accepts, at para. 22 of its submission, that deeming provisions are not relevant to the remedy stage. In my submission when you get to the remedy stage reality steps back in, and when you have reality you can look at the level of shareholding as divested down to 7.49 and you then, just as in the case of SLC – I say "you", we, the Commission – then have to comply with the obligations in s.47(9) to determine a remedy which is comprehensive, the phrase: "comprehensive, reasonable and practical", which we know incorporates the notion of proportionality where two remedies are equally effective.

As to the suggestion that the Commission's remedy was made by the ability to block special resolutions, in my submission that is far from the complete picture. The Commission's recommended remedy for the SLC will remove Sky's ability materially to influence ITV, i.e. to control it. If that is the effect of the remedy, irrespective of the context in which that remedy was devised it is hard to see what room there is left for a different remedy for plurality.

Pausing there, Mr. Gordon was referring to the distinction between the creation of a merger situation on the one hand and the adverse effects that f low on the other. The Tribunal will recall that we went through these steps at the hearing in June and, yes, of course, something else has to be determined before a relevant merger situation can give rise to adverse effects, and that is why the Tribunal went into the assessment of probabilities and what was likely to happen. But, of course, the material influence, the 17.9, is the key, it is the mechanism by which Sky is able to exercise rights, powers, in such a way as to affect the outcome. This is why there is such a close connection between the merger situation and the adverse effects. If you "neutralise" (using the Tribunal's expression) that shareholding then you neutralise power, whether it is the material influence level, or control, that is what has happened.

What is left? All we appear to be left with is something called "we cannot assume that the Commission would adopt the same remedy". That is the expression that Virgin uses in its written submission – "We cannot assume that". But this Tribunal has shown in its assessment of the Commission's decision, when examining prognoses, that one cannot assume that is not in a sense sufficient. In my submission the Tribunal needs something more substantial, as we said in para.13, something which establishes, is seriously arguable that the public interest risks of the adverse effects that are deemed to be created by control will still be there as priority issues on a shareholding of 7.49 per cent, and we have not seen anything in the written submissions that addresses those arguments, nor have I heard anything this morning that addresses that point. It remains speculation, not a realistic

prospect. The only realistic prospect is that ITV would remain an independent owner of media enterprises, fully able to make its contribution to those public interest objectives.

In conclusion, my submission is that the Tribunal should look at the reality of the picture. The reality is that with immediate effect – hopefully with immediate effect – the Sky shareholding will be reduced to 7.49%. We do not think that it is seriously suggested that at that level ITV is not in sole control of its media enterprises, which is the essence of the plurality issue. Virgin's arguments that on remittal the Commission and Secretary of State may come to a more onerous decision are at best speculative and fail to give proper weight to what, in my submission, is the key issue, there is no realistic prospect of Sky exercising control on ITV whatever the circumstances, whatever the motive.

That was how I was proposing to end, but can I add a footnote, which is a rather dull footnote? I saw the reference to the Emap merger in 2005. As the Tribunal knows, the Competition Commission issues many, many reports on mergers, both before and after the Enterprise Act 2002. I would not accept for one minute the categorisation, and I think it is fair to appoint it as categorisation, that in some way the ordinary remedy for a finding of adverse effect is a divestment of an entire business, or a divestment of a shareholding down to zero. It is absolutely clear what is guiding the Commission are two things. First, above all, it is the statutory obligation in the Enterprise Act to provide a comprehensive solution insofar as is reasonable and practicable; and secondly, the Commission's formulation of the guidelines which are themselves required to be made under the statute, which it takes account of; there is no such presumption and, indeed, I looked at the *Emap* case, and there was quite a considerable debate on whether behavioural remedies would be suitable, or whether there could be divestment; there is nothing in the point. Those are my submissions, I hope I have made them clearly, but if there are any questions then please put them.

THE PRESIDENT: Thank you very much. Miss Holmes?

MISS HOLMES: Thank you, Sir. I, too, will deal with the first question rather more briefly than the second, and deal with it first, that is the effect of the Tribunal's decision (if any) on the existing remedy. It seems to me that there are two components to this question. The first is a substantive question and the second is more procedural. As to the substantive question I think it is right to say that every party is in agreement, i.e. there is no effect arising from the Tribunal's decision on the substantive remedy to address the SLC alone, and I do not take there to be any dispute about that.

But the second aspect is more of a procedural or technical aspect if you like. It is in relation to this aspect of the question that Sky attempt to make a rather technical point that the effect

of the Tribunal's decision is that the Commission and the Secretary of State have, if you like, only made partial decisions in some respect.

In our submission the Tribunal's decision for the reasons already alluded to or, in fact, already stated quite clearly by Mr. Swift, dismissed all the grounds of appeal in relation to the SLC and the appropriate remedy, and it is quite clear, we say, that those decisions therefore remain unaffected. But it is perhaps useful nevertheless, to have a look at the statutory provisions which set out what the Secretary of State was obliged to do and we say we can see from that that there is still a full, not incomplete, as Mr. Flynn would ask the Tribunal to find, but a full set of decisions which can now be implemented.

The starting point is s.54(2) of the Enterprise Act, and I do not propose to spend too much time, because the Tribunal has already been taken to these. (P.179 of the Handbook).

> "(2) The Secretary of State shall decide whether to make an adverse public interest finding in relation to the relevant merger situation and whether to make no finding at all in the matter."

Now, the Secretary of State has made those decisions and that, if you like, survives the extent of the quashing that the Tribunal has imposed.

The next step is the question of remedies, and we can just turn over the page and go to s.55(2) of the Act. We can see:

> "(2) The Secretary of State may take such action under paragraph 9 or 11 of Schedule 7 as he considers to be reasonable and practicable to remedy, mitigate or prevent any of the effects adverse to the public interest which have resulted from or may be expected to result from the creation of the relevant merger situation concerned."

Now, again the Secretary of State has done that, and that decision survives the Tribunal's decision. Mr. Swift has already referred to the relevant provisions and the Tribunal has already been taken to them insofar as they relate to the Commission and exactly the same can be said of those provisions, and I will not take the Tribunal to them, but they are in s.47(2) and (7).

The first point arising from that is that there is simply no impact on the remedy insofar as it relates to SLC arising from the Tribunal's decision. Secondly, what Sky say is that the Secretary of State's decision under s.55(2) is somehow incomplete, but we can see that there still remains intact a complete decision which should be enforced, and which can be enforced. Indeed, on Sky's own argument, which it sets out at para.16 of its written submissions for this hearing, the matter it wants remitted is the question in relation to the

specified public interest consideration, set out in s.47(2)(b), that is it wants quite a distinct matter remitted, and a remittal of that matter does not impact upon the complete set of decisions which I have taken the Tribunal to which remain in place.

THE PRESIDENT: Sorry, which paragraph was that again?

MISS HOLMES: That was para.16 of Sky's written submissions.

THE PRESIDENT: Thank you very much, yes.

MISS HOLMES: On that point, in conclusion, there is a decision in place by the Commission under s.47(2) and 47(7) and we say, with respect to the Tribunal rightly so, and by the Secretary of State under s.54(2) and s.55(2). These decisions, and in particular the Secretary of State's decisions are enforceable and survive the Tribunal's ruling.

I turn now to the second question. The Secretary of State's written submissions deal with why we say any remittal of the effect of the merger on the sufficiency and plurality of persons with control over media enterprises would be entirely futile. I would perhaps start by responding partially to Mr. Gordon's emphasis on the Secretary of State's decision. Of course, when the Secretary of State made his decision, the Secretary of State was not making a decision as to this question hence the use of the word "may", and we put it no further than that. The question for the Tribunal now is whether the Secretary of State was right when he said "may" – these are the questions which we have addressed in our written submissions, and which we will expand upon now. It is simply misleading, with respect, to emphasise the use of that word "may" at that stage, of course the Secretary of State would have been wrong to make a final determination on that at the point of the initial decision.

Beginning with Sky in relation to the second question, Sky have not specifically addressed the futility points, if I can put them that way, made by either the Secretary of State or the Commission, rather it seems to assert and this is at paras. 5 and 6 of its written submissions, since the Tribunal found that it is not possible to say with any confidence what conclusions the Commission might have reached if it had carried out the assessment as the Tribunal found it should have, it follows that it is equally impossible to say what conclusion the Commission would have reached as to remedies, had it taken the appropriate starting point. That, we say, is simply a *non-sequitur* and it simply does not follow from that that one cannot, on the specific facts of this case, determine what remedial action might follow a different determination on the plurality question.

Mr. Gordon, in his written submissions, and indeed, in his oral submissions today, makes some attempt to address the futility argument, but in so doing, and this is perhaps the most important point in our respectful submission, loses sight of the precise nature of the plurality

public interest concern, which any remedy arising from a finding of an adverse public interest in this context must necessarily address.

Before I go any further, it is perhaps just reminding ourselves what that public interest concern is, and if one turns to p.181 of the Handbook, this is s.58(2C)(a) the relevant public interest which, even if it was found to lead to adverse consequences, which must be remedied, is the need in relation to every different audience in the United Kingdom or in a particular area or locality of the United Kingdom, for there to be a sufficient plurality of persons with control of the media enterprises serving that audience. I quite clearly deliberately emphasise the words "with control". It is not, with respect, right for Mr. Gordon to say that the Secretary of State's submissions in this respect rely at all on the deeming provisions with which the Tribunal has been concerned in its judgment. What the Secretary of State relies on is the plain meaning, the plain words of the relevant public interest consideration which inevitably any remedy responding to an adverse public interest finding must address, and that is the effect of this merger on the sufficiency of persons with control.

It follows from that, in our submission, that even if the Commission did find an adverse public interest arising from Sky's acquisition originally of 17.9 per cent shareholding in ITV, taking into account the plurality consideration, such an adverse public interest finding – and there are two ways of looking at this, there is one way of imagining we are in the position of the Commission at the relevant time, or imagining we are approaching it afresh now that we know that Sky is going to have their shareholding divested – it matters not particularly which we look at it. The Commission have emphasised on the second approach, but the point is that such an adverse public interest finding whether, if there was one at the time, just could not withstand a reduction in Sky's shareholding to a level at which there is no realistic prospect that that shareholding brought about any change in control. So in other words, whether or not the Commission did it as a whole back when they were making their original determination or whether they go back and do it now, once any realistic prospect of control is taken away we say it is virtually impossible to imagine what further remedy there could be to address any insufficient (or perceived insufficient) plurality arising from the original shareholding in plurality of persons with control, and that is because now there is no change in the number of persons with control.

THE PRESIDENT: Yes, so I can see you say you do not rely on the deeming provision for that.

MISS HOLMES: Yes.

THE PRESIDENT: The deeming provision takes you into a specific situation when you are assessing sufficiency.

MISS HOLMES: That is right.

THE PRESIDENT: Here you say that you have, as it were, restored the *status quo* in terms of plurality.

MISS HOLMES: Yes, indeed, and one way of looking at it, as the Commission have emphasised, is that there would no longer in any event be jurisdiction, if you like, for the Commission to be looking at it, it is as though a merger did not happen.

To put it another way and, as I said, there are many ways of putting this, a remedy which takes a shareholding below a level at which the purchaser has any control must necessarily be sufficient to deal with an impact of the merger on the sufficiency of plurality of persons with control. Further, given that the Commission is bound to impose the most proportionate remedy we say it simply could not justify a remedy going further beyond that, and indeed all parties agree that there would be no reduction in that remedy arising from this aspect of the Tribunal's decision.

So we get to the question of whether there is any point in remitting this matter in this way. So given that we know the remedy for the SLC is divestment to a level below 7.5 per cent and that that remedy is imposed because Sky cannot exercise any control over Virgin at that level, we know that divestment to at least that level would occur and a remittal would be entirely futile for all the reasons that I have just said.

THE PRESIDENT: Mr. Gordon said that the remedy is aimed at the effects rather than at the merger, it is aimed at the effects of the merger – the adverse effects – and he referred to the "ripple effects". Does your point deal with the possibility of there being some effects rippling through, effects on this plurality consideration, or in relation to this plurality consideration which may be different from effects on competition?

MISS HOLMES: With respect, in the abstract we certainly find it difficult to imagine what those might be, given that the effects have to be effects in relation to the sufficiency of plurality of persons with control. So they are the effects we are concerned about, because that is the public interest consideration that we are remedying. It is not for Mr. Gordon to say there might be any number of other perhaps undesirable or consequential effects, and I say that without prejudice to our position that there probably is not, and we certainly have not heard any specific examples but in our submission the Tribunal must bear in mind the kind of effects that the Commission and the Secretary of State must be concerned with and those effects are limited to the effects on the sufficiency of plurality of persons with control. It is

difficult, with respect, Sir, to take that matter any further without any concrete examples of what Mr. Gordon says might be effects, ripple-on effects, on the sufficiency of plurality of persons with control. We cannot think of any and indeed, we say in the absence of any concrete examples that there simply is not a point which needs addressing

Of course, the situation might well have been different if the remedy to address the SLC was something less than reducing Sky's shareholding to a level below which they had no control. It is hard to imagine when that might occur, but nevertheless that might be if, for some reason, there was another remedy. But the point is the remedy imposed was explicitly imposed to bring Sky's shareholding to below a level at which there was any reasonable chance, or any likely chance that they would have any control whatsoever, any material influence which, as we are aware, is the lowest level of control.

I have made the point and, with respect I think the Tribunal has my point, that this does not rely upon the application of the deeming provisions at all.

Again a point I have made, but to make it another way, Virgin itself emphasised at para. 23 of its written submissions, and Mr. Gordon spent some time emphasising this point but obviously to encourage the Tribunal to a rather different conclusion.

The question of remedy insofar as the Secretary of State is concerned is governed by s.55(2) of the Enterprise Act, which clearly provides that the Secretary of State has a wide discretion to take such action as he considers to be reasonable and practical to remedy, mitigate or prevent any of the effects adverse to the public interest, which resulted from or maybe expected to result from the creation of a relevant merger situation, and again we emphasise this to emphasise that what is being remedied (if there is to be a remedy) is any effect resulting from the merger situation, that is from any change in control which we say the Commission, and the Tribunal's decision, and the Secretary of State's decision have now taken away.

Virgin are simply, with respect, wrong to say, as they do at para.26 of their written submissions, that it cannot be assumed that the existing remedy, which was addressed solely at the identified SLC, will be equally effective to address any concern arising as a consequence of the application of the relevant public interest consideration.

Sir, I do not take Virgin or, indeed, Sky in their written submissions to say that the Tribunal does not have a discretion in the event that it agrees that the Commission and/or the Secretary of State would necessarily come to the same conclusion as to remedies, not to impose, or not to award any relief. I understand that to be common ground. In case there is any doubt about that I do have, and I have not handed up yet and perhaps I can at a more

convenient moment when we break, an extract from both **Fordham's** book on Judicial Review and **Smith** which make that unequivocally clear, at least in the case of judicial review courts and, as we all know the same principles apply in these cases.

THE PRESIDENT: Sorry, what was the proposition briefly stated?

MISS HOLMES: The proposition is that the court may exercise discretion not to provide a remedy if to make an order would serve no practical purpose. It is important, of course, to bear in mind the distinction that doing so is not equivalent to holding that the decision is not unlawful, and of course that sounds trite, but there are many examples. It is important to keep that in mind, so it is not equivalent, if you like, of saying to the Commission: "The Secretary of State, oh, it is okay". The point is that it would simply be redundant if you like to remit it.

We say at this point it is of course that if the Tribunal is satisfied that remitting the matter to the Commission and/or the Secretary of State would be otiose that another relevant matter to throw into the mix is the delay that would occur. Perhaps I need to expand on that. The delay would be significant. We take on board the Tribunal's questions as to timetable and, of course, that has been a matter that has bothered us because of course there is not statutory provisions which provide for any such timetable. In those circumstances, in our submission, if the Tribunal were minded to remit it, it probably would be appropriate for the Tribunal to make appropriate directions, but of course that is without prejudice to our very strong primary submissions. It is also relevant to take into account the cost to the public purse, and also as ITV have submitted in their letter in the final paragraph or thereabouts, the effect on ITV and this has now been going on for some time.

THE PRESIDENT: You agree with Mr. Gordon that those factors are irrelevant if it is not otiose?

MISS HOLMES: Yes, we do. In the event that there is a prospect that the remedy could be different, or there is a material prospect I suppose we would say that the remedy could be different, yes, we do agree that it would not be right for this Tribunal in those circumstances not to remit the matter.

THE PRESIDENT: So their relevance would only be on that basis? If we thought no useful purpose would be served by remitting it would boost us in our ----

MISS HOLMES: Perhaps if you thought there was a remote possibility, Sir, or something of the kind, and it was a borderline question it would be relevant to throw it into the mix. You would need to think there was a realistic possibility, to put it that way and, to use common jargon in other areas, a realistic possibility that with a different remedy, there could be a different ultimate result. If you thought there was perhaps a remote possibility then we

would say it would then be relevant to take into account matters such as the length of time and cost and effect on ITV and shareholders.

Sir, unless I can be of any further assistance, those are our submissions.

THE PRESIDENT: Thank you very much. Mr. Flynn?

MR. FLYNN: Sir, Members of the Tribunal. We agree with Virgin only to a limited extent. Mr. Swift's "however" if not expressly in our submissions is there loud and clear, because we take a very different view from anyone else in this room it would appear, or at least on this bench I should say, as to the meaning of the statutory provisions. We take the view that the question that you have asked of each of my learned friends that have had rather rhetorical answers, the question you ask is whether the findings of the Tribunal have an impact on the remedies decision, we say that it does as a matter of law and construction of the statute, and I will need I am afraid to take you back – but I hope to do it briefly – over the statutory provisions, in order to make that good.

Taking our written submissions as a whole, the point that we make in short is that the statutory provisions require the Commission in a reference of this kind to consider SLC, the public interest consideration and, taking those two together, whether there is an adverse effect on the public interest and, if so, to make recommendations as to remedy, and you cannot – to use a phrase that has been used a couple of times this morning – 'salami slice' that issue at the remedies stage.

Sir, can I take the Tribunal to the provisions of the Act?

THE PRESIDENT: Yes.

MR. FLYNN: This is a reference under s.45(2) and in respect of such references – I do not need to read that out – we look to s.47, what does the Commission do? If the reference is made under s.45(2) its first job is to decide whether a relevant merger situation has been created, that is s.47(1) and, if it does so decide, then you go to subsection (2). In that subsection the Commission shall decide the following questions. The first is an SLC question, whether the merger situation has resulted, or may be expected to result in SLC, and then: (b) whether, taking account only of the SLC, the subject of para.(a), and the admissible public interest consideration or considerations – here "media plurality" seems to be the accepted shorthand – "the creation of that situation operates or may be expected to operate against the public interest."

You go from there to subsection (7): If it is decided in a s.45 reference that the creation of the relevant merger situation operates or may be expected to operate against the public

interest then it must decide what remedial action should be taken under subparagraphs (a), (b) and (c), which I do not need to read out at this stage.

It is required to prepare a report on a reference under s.45 and to send it to the Secretary of State, and under s.50(2) "The report shall, in particular, contain –

> "(a) the decisions of the Commission on the questions which it is required to answer by virtue of section 47
>
> (b) the reasons for its decisions; and
>
> (c) such information as the Commission considers appropriate …"

And I emphasise those words "required to answer".

Then, I think one goes to s.54, which is the decision of the Secretary of State when he receives a report under s.50, as it says in subparagraph (1). He is required to decide whether to make an adverse public interest finding or not in the words of para.(2) and he makes an adverse public interest finding in relation to a relevant merger situation if, and (a) is relevant here:

> "in connection with a reference to the Commission under subsection (2) of section 45, that it is the case as mentioned in paragraphs (a) to (d) …"

which I did not read out at the beginning, but you know that those relate to relevant merger situation and so forth. So he has to make that decision, and if he does make an adverse public interest finding as defined by that section we go to s.55. You will see what para.(1) makes, if he makes that sort of decision under para.(2) he "… may take such action under paras. 9 or 11 of Schedule 7 as he considers reasonable and practicable to remedy …" etc. "… the effects adverse to the public interest which have resulted from … the creation of the relevant merger situation."

So we say that the statutory scheme is very clear, that the Commission and the Secretary of State are required to come to final conclusions on the remedy having examined both the SLC and the media plurality issue. The remedy that the Commission is to recommend has to be made in the light of that overall examination. Plainly, the result of the Tribunal's ruling is that the Commission has not done so and at para.267 of the judgment, which I think has been read to you earlier today, the Tribunal finds that the misdirection by the Commission in relation to the media plurality construction issues is obviously material to its conclusions and that it is impossible to conclude with any confidence what conclusions it would have reached if it had properly directed itself as to the meaning of those provisions. So we fail to understand how it can be said to you today that it is obvious from the report that whatever they might have decided if they had looked at media plurality in the correct

way that they would have reached the same conclusion in respect of remedies. That is why we say as a result of the Tribunal's ruling the report that the Secretary of State has received is vitiated and "incomplete" – a word we used – it does not meet the standards that are set out in s.50 at para.2, and it follows that his decision likewise is flawed. The Secretary of State, just like the Commission, is required to take a decision on remedies having considered the full effects on the public interest arising from both SLC considerations and, in this case, media plurality considerations. We say that this matter cannot be pre-judged for the essentially pragmatic reasons that the respondents give. The two channels, the SLC channel and the media plurality (in this case) consideration flow into a single remedies assessment.

THE PRESIDENT: Mr. Flynn, do you suggest there would be any problem with having a different remedy for a different effect. Could you have a behavioural remedy to deal with one effect, an adverse effect that has been found, and a divestment remedy for another effect? Could you salami slice to that extent?

MR. FLYNN: The Commission has a range of possible remedies at its disposal to recommend, and the Secretary of State has a range of possible action that he can take under the statute, but the decision as to which and how many elements from the armoury should be deployed has to be made on the basis of a proper assessment. Essentially you might be saying: "Why not let the SLC remedy go ahead now because the media plurality remedy might be something different?" Well, it might but that is a matter to be addressed, in terms of the statute, in the round.

THE PRESIDENT: With all due respect it could only make things worse for Sky could it not? If we remitted and they found sufficiency was fine even on what we would say was a correct approach, then the matter would fall. If they found that there was insufficiency on that approach and there were adverse effects resulting from it, it cannot make life any better for your clients, can it? They could decide, well even though there are adverse effects there is nothing they needed to do about it, but if they did need to do something about it, it would not be a smaller divestiture than was already the case with the existing remedy?

MR. FLYNN: No, that is true, Sir, and of course we recognise – just to make that point – we have had a couple of rhetorical points levelled at us. We recognise that the Tribunal has dismissed any challenge in relation to the SLC finding and to the remedy imposed in respect of the SLC finding so the way Miss Holmes put it in starting we entirely agree with that, that has happened. The Tribunal has also rejected Virgin's challenges in relation to the remedy for the SLC finding. So to that extent if there was to be a remittal on the media plurality

issue which was salami sliced then of course I recognise on that hypothesis it could only get worse for Sky.

THE PRESIDENT: But even if it was not salami sliced, they would still have to deal, since we found there was nothing wrong with their decision on ----

MR. FLYNN: That stands, yes.

THE PRESIDENT: And the remedy for it would still be the proportionate remedy.

MR. FLYNN: Yes.

THE PRESIDENT: And nothing else, they found, was effective.

MR. FLYNN: But I make the additional point from the point of view of fairness to Sky, that if there is the possibility – Mr. Gordon gave some classification of possibility – if there is the possibility that on remittal an additional element of remedy would be imposed it would be right, as Sky has the right to expect under the statutory provisions (as I submit they should be read) that that remedy be imposed and, more particularly, implemented in one go. Let us say that Virgin are right, since that is what they will be contending if there is a remittal – as they have throughout – that there is an adverse effect on media plurality for which the only conceivable remedy is full divestment or something down to something truly insignificant. Now for Sky to have to do that ----

THE PRESIDENT: Two bites.

MR. FLYNN: -- in two goes with all the risk that that involves I submit is unfair and not at all an appropriate way of handling this. If there is to be remittal, we have our legal submissions and we say the necessary consequence of your finding is that the remedies decision is also undermined and should be remitted, you cannot legally divide it. If you are against us on that we would still say that the appropriate course, if it is to be remitted, is for the Commission to complete its work, the remedies issue on that side to be reassessed and then an implementation period. We are not saying or seeking any form of stay here, that is a matter initially for discussion with the authorities, but that is a point I make very strongly, that it would be wrong and unfair on Sky for it to be divided up in those two stages.

THE PRESIDENT: We are still on question 1 which is the legal effect of the ruling. But supposing for a moment you were right that it should have been done in that way as a global remedy, or at least at the same time, we still have a discretion do we not as to what we quash or set aside?

MR. FLYNN: Yes, you have a discretion as to what you then do, that is my legal point that you have it. Having set aside the decision on the media plurality because the statutory

procedures have not been followed, the necessary consequence is that the remedies findings fall with it.

THE PRESIDENT: So we do not have a discretion once it comes to that bit? We have to set those aside?

MR. FLYNN: On that bit, in my submission it follows that that is the effect of the judgment, you have already set aside the decisions as they apply the media plurality provisions. The area of your discretion is what do you do next? We say the only possible answer must be that it be remitted for reconsideration.

You say it can only get worse for us, of course everything that Virgin say in relation to media plurality we, and possibly others, would be fiercely resisting but our submission is that the Tribunal cannot effectively pre-judge those issues and say that it does not matter because the existing remedy which was decided only in the light of an SLC finding will necessarily be adequate for any conclusion the Competition Commission might reach in relation to media plurality as properly understood in the light of the Tribunal's judgment and therefore focusing more on external plurality than internal plurality.

I think I have covered, at least in brief, the legal submissions that we wish to make; they are summarised in the written submissions although I think the force of them possibly had not been appreciated fully and Mr. Gordon certainly should not mistake concision for force or strength of feeling. We are not putting this weakly, we make it as a fundamental submission of law.

THE PRESIDENT: Yes, just so there is no mistake about it, it is your submission that even if it is otiose to remit because the same decision is for all intents and purposes on remedy inevitable?

MR. FLYNN: I think I have put it this way, correctly or otherwise, that for you to determine that it is otiose, or accept submissions that it is otiose, is in fact deciding the question that is for the Commission and the Secretary of State and that is again what we said in our written submissions. It may be otiose in the sense that each of the decision makers here represented says that they have not made their mind up, they just cannot imagine a different circumstance.

THE PRESIDENT: Let us suppose there had been full divestiture ordered as the remedy – we are in the same position in all other respects – we still could not decide that no worse a remedy was likely – was realistic – and we would then still have to remit?

MR. FLYNN: We are in sort of Wittgenstein territory here in speculation I think. But is it not conceivable in certain circumstances not only divestment but other behavioural

undertakings about how a company sought to relate in commercial dealings with another media company might also be thought to be appropriate. I am speculating wildly, but again I do not think that is an issue that one should pre-judge, that is an issue that should be left to the statutory decision makers.

THE PRESIDENT: It does not leave much discretion to us in s.120, does it? That follows on, you say, mainly from the legal point?

MR. FLYNN: Yes, precisely. (After a pause) And Mr. Wotton observes to me that if you have a discretion it is at that point that the points that I have made in relation to fairness to Sky should be taken into account in exercising it.

THE PRESIDENT: Yes.

MR. FLYNN: Sir, unless I can assist further, those are the points I needed to cover.

THE PRESIDENT: I just want to make sure I have it absolutely clear – I think I have. That covers question 2 as well? That covers remission as well?

MR. FLYNN: Sir, yes, we essentially see it as a single question.

THE PRESIDENT: Yes, a single question. The remedy has to fall because of the finding, the existing remedy must therefore suffer the same fate and the result of that is that there has to be a remittal so that the whole matter can be dealt with properly?

MR. FLYNN: Yes, but as we made clear in our submissions what is to be remitted, what needs to be reconsidered is solely the 'media plurality channel' as I have called it, and the SLC bit will survive, but then the Commission and in turn the Secretary of State will need to form a view on the remedy issue in the light of a consideration in the proper statutory framework.

THE PRESIDENT: Yes, thank you very much. Mr. Gordon?

MR. GORDON: Sir, I am not quite sure what I have the right to reply on, but at the moment – unless I am stopped – I would like to reply on both questions; certainly, I would start with question 2.

THE PRESIDENT: Yes.

MR. GORDON: My learned friend, Mr. Swift, appeared to contend that para.318 of the judgment at p.94 contained the solution to question 2.

THE PRESIDENT: Neutralising the material influence.

MR. GORDON: Exactly. We say that the clear answer to that point is that the prospect of influence may not harm SLC, adverse consequences flowing from SLC, but may harm media plurality. In other words, there is a conflating again of the situation which gives rise to the creation of a relevant merger situation and the question of remedy. Really that was his point. He also moved to s.58A(5), which I am going to move to as well very briefly, to

address Miss Holmes's point, but that apart his analysis came down, in my submission, to a footnote on the *Emap* case which I am not going to respond to given all the other cases we have cited on remedy are before the Tribunal. Then a reality question, as I understood it, about "What is the point?" The point I would make about that is that this Tribunal is not hearing substantive argument on remedy at this stage, it is simply dealing with the effect of the judgment on whether or not it is otiose to remit. So the key argument of Mr. Swift focuses upon the neutralisation of the situation giving rise to the remedial jurisdiction and the Tribunal has our answer to that. There is a confusion between the adverse effects flowing from SLC on the one hand, and the adverse effects flowing from media plurality on the other.

The point made by Miss Holmes, which echoes but does not quite replicate the point made by my learned friend, Mr. Swift, focuses upon one word in s.58(2), which is the word "control". But the fallacy of focusing upon that word is that it assumes that the concept of control for the purpose of identification of a public interest consideration as fragile as media plurality and the remedy for addressing public interest considerations are one and the same as the word "control" as it occurs in s.26 and as it occurs in the jurisdiction created by the creation of a relevant merger situation. But the answer to the point is that the word "control" is of course not defined in s.58 itself, either in s.58 or in s.58A(5). As far as s.58A(5) is concerned, that is a deeming provision but it is not an exhaustive statement, indeed, I think the Tribunal – in our submission correctly – used the words "particular situation". It does not define the circumstances in which a person may be in control for the purpose of what is the relevant public interest consideration that we have to meet. Putting the matter as concretely as I can, if we go back to this *Fairfax* case, which was not about commercial or investment decisions, but was actually about editorial control, what we are looking at here, in my submission, is the possibility of strategic influence being exerted with a degree of influence that can affect editorial control. So to rely upon a deeming provision in a particular situation, or an undefined word in a section (that word being "control") is, in our respectful submission, to miss the whole point of the public interest consideration in question. Once one focuses upon that fallacy, or I should say in fairness to Miss Holmes, the two fallacies – the fallacy of para.318 of the judgment and the fallacy of control – it becomes, in our submission, clear that the issue before the decision maker on remittal is not an abstract question but is a real question. As to the strength of the question or the strength of its resolution, that is not a matter for this Tribunal to address today at all, in my submission.

With great respect that is what we say are the answers to the two addresses put forward by Mr. Swift and Miss Holmes.

THE PRESIDENT: I wonder if that is an answer to Miss Holmes's point though because what she says is you look at the number of controllers and the sufficiency of the number of persons in control.

MR. GORDON: Yes.

THE PRESIDENT: And if the remedy that has been granted restores the *status quo* so the sufficiency is precisely the same as it was before, or the number of controllers – sorry – the number of controllers is precisely the same as it was before the merger, how can there then be any adverse effects which have not been adequately neutralised?

MR. GORDON: That comes straight back to the point I made earlier, which is that the identification of the public interest consideration, the adverse effects flowing in terms of remedy comes from the creation of a relevant merger situation.

THE PRESIDENT: What ripple effects could there be? That is the point that is being made, what could there be? What could those ripple effects be? They have to be in some way related to the public consideration interest in (2C)(a) do they not?

MR. GORDON: I do not know what page it is on ----

THE PRESIDENT: It is p.181.

MR. GORDON: I am very grateful. The public interest consideration in 58(2C)(a) – which is what I think, Sir, you are looking at?

THE PRESIDENT: Yes.

MR. GORDON: -- does not have the effect that the word "control" has the limited effect of meaning a person with, as it were, the stake necessary for control under other parts of the Act. In particular, if one goes to 58A(5) it should not, in our submission, be assumed in the context of a deeming provision that a lesser degree of control than that specified in 58A(5) does not engage adverse effects on media plurality. In other words, 58A(5) is not dealing with anything more than the specific situation that it there contemplates.

THE PRESIDENT: I think that is right, I think Miss Holmes says it does not matter about 58A(5).

MR. GORDON: She does say that, but the point we make is that the word "control" in 58(2C)(a) is not a term of art restricted to majority holdings – I put that rather loosely. In other words, when you are looking at media plurality and the remedy for it what you are looking to address is a very fluid but important question in terms of freedom of expression, which is, is there a sufficient plurality of persons with control serving that audience. If you have a

person with a 7.4 per cent stake – I am transposing the facts of *Fairfax* at the moment – who has got that stake for the purpose of influencing editorial decisions, then in our submission you would fall square within 58(2C).

THE PRESIDENT: But you have to give some meaning to "control", do you not? This is probably an indication that I did not understand your argument first time around. You have to give some meaning to "control". There is the range of so-called controllers that we see in s.26.

MR. GORDON: Yes.

THE PRESIDENT: And the lowest form of control there being material influence?

MR. GORDON: Yes.

THE PRESIDENT: So if you remove, for the sake of argument, material influence, what other form of control could s.58(2C)(a) be dealing with?

MR. GORDON: The amount of control necessary to exert influence, adverse public interest effects on editorial control of a newspaper, for example.

THE PRESIDENT: It has to be "control" has it not? If you have not even got material influence, how can you actually have any form of control within the scope of anything that this legislation is contemplating?

MR. GORDON: That is, in our respectful submission, the question, because it is obvious as a matter of – to use the word that has been used today – "reality" there can be a sufficiently high stake to affect freedom of expression; that must be right as a matter of ordinary reality. The question is, is that concept imported or recognised in 58(2C)(a). Now, in our submission it plainly is not, the word "control" in that subsection is not defined and if you go to 58A(5) in our submission it is clear that the deeming provision is not saying that there cannot be a lesser degree of control and so in our submission, having regard to what plurality is directed towards, that is precisely the kind of question that the decision maker has to consider. It simply is not right to attempt to import a definition to control for the specific purpose of identifying a public interest consideration and the adverse effects flowing from it and the remedy for it, and that is the fallacy in the argument.

If the Tribunal thinks that "control" does have a specific meaning when it is not defined in that context then obviously our argument on that particular point would not succeed, but we submit that, as a matter of law, it must be correct – it is not defined, and deliberately not defined.

One must bear in mind, of course, that one is looking here at something which underlies plurality, which is the fundamental freedom of freedom of expression, so we do submit that

the control has to be looked at in that context, and certainly you cannot exclude that degree of control from the ambit of the subsection.

Sir, I do not know whether you want me to – I can – address question 1 or not?

THE PRESIDENT: Well if you are minded to.

MR. GORDON: I only wanted to say in relation to question 1, my learned friend, Mr. Flynn, in our submission, confuses two different things. The first is the need for exercise of the functions in the legislation itself to reach a decision which is then capable, or perhaps not capable we would say, of being appealed successfully. In terms of the review process, or appeal process, a separate and quite different question arises, namely is the recommendation and the decision indivisible, or is it divisible. We submit that it must be (and is) possible for the Tribunal to hold – as indeed it has done in this case – that part of the decision is lawful, and part of the decision is unlawful. It is in our submission clear although Mr. Flynn, I think, ducked this question when it was first asked and then came to an answer consistent with his analysis, that there must be a discretion not to quash part of a decision. Or, putting it another way, we would say that there cannot be a discretion to quash part of a decision which has been ruled to be lawful, that would be the mirror image, but the impermissible mirror image of discretion to refuse relief. Of course, one has discretion to refuse relief, what one does not have is discretion to grant relief to which a claimant or an appellant is not entitled, yet that is the effect of Mr. Flynn's argument. The position is in relation to the remedial functions or powers of the Tribunal that the Tribunal plainly has a general power at least to quash part of a decision, because that is what s.120 says. I appreciate that s.120 cannot itself, as it were, affect the construction of the statutory provisions in question in relation to the power, but that is only because it does not purport to do that. What s.120 purports to do is to direct itself towards the Tribunal's powers once the decision has been exercised using those powers, and it would be a somewhat strange use of the s.120(5) power to enable it to quash a decision (or part of a decision) which is lawful and to remit back the whole decision for reconsideration when it is inevitable – if it is inevitable, and I appreciate Mr. Flynn has made submissions on that – that the decision has been reached lawfully and does not fall to be reconsidered. So we say that s.120 is the key if one asks the right question which is: is a decision divisible having been made, but containing within it part lawfulness and part unlawfulness? This is, in our submission, just such a case. Sir, those are our submissions.

THE PRESIDENT: Thank you very much indeed.

MR. SWIFT: I raise this, Sir, really just to follow up the points that Mr. Gordon is making. The Tribunal did ask for written submissions in the first place, and so far as I can see the only submission that Mr. Flynn and Sky made in respect of this issue of construction was at para.19 which is as short as short can be. In my submission when the Tribunal goes back and considers s.47(7) and s.47(9) there is ample – ample – justification for the argument put by Miss Holmes and myself, that that part – the divisible part – in respect of SLC has been properly found and therefore triggers an ability on the part of the Secretary of State to act accordingly, with particular reference to s.47(7)to decide:

> "(a) whether action should be taken by the Secretary of State under section 55 for the purpose of remedying, mitigating or preventing any of the effects adverse to the public interest which have resulted from ... the creation of a merger situation."

Well, plainly SLC is one of such effects, and s.47(9): "In deciding the questions mentioned in subsections (7) ..." the question of remedies,

> "... the Commission shall, in particular, have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to –
>
> (a) the adverse effects to the public interest, or
>
> (b) (as the case may be) the substantial lessening of competition and any adverse effects resulting from it."

Absolutely clear, in my submission, as a matter of construction, and that is not just a literal construction; in terms of purposive construction I would say that Parliament could not have seriously intended that Sky should be, as it were, entitled to sit on this shareholding of 17.9 per cent pending the outcome of issues relating to plurality.

THE PRESIDENT: I think you could make the same point about "any of the effects" in s.55(2).

MR. SWIFT: Yes, I do, Sir.

THE PRESIDENT: All right, I am not barring anyone out if they want to make any brief comments since we have taken a particular order. Right, we have not got on as well as I had hoped, I think we are going to have to deal with confidentiality after the break – I hope that does not put people in any difficulty. I am very much hoping also that we can deal with it quite quickly. I do not think there is any point trying to deal with it in five or ten minutes.

MR. GORDON: Sir, confidentiality, as far as we are aware, does not concern us, so may we absent ourselves this afternoon.

THE PRESIDENT: You have nothing to say, and you are happy, whatever? Yes, of course.

MR. SWIFT: Sir, we have one comment to make. (Laughter) It is nothing to do with ITV, it is one paragraph, part of a paragraph raised by Sky, and it may be that we could resolve that, if possible.

THE PRESIDENT: Miss Holmes is going to say something similar.

MISS HOLMES: Sir, we have no observations to make in respect of confidentiality.

THE PRESIDENT: At all?

MISS HOLMES: At all.

THE PRESIDENT: In that case you can definitely be released. I do not know whether to release Mr. Swift and Mr. Williams. We have got five minutes, I suppose, so why do we not try and deal with that whatever you want to say about this particular paragraph? Does this mean that we have to go into camera?

MR. SWIFT: Yes.

THE PRESIDENT: I am sorry, those who are not in the confidentiality ring, that includes at the moment, I am afraid, ITV, does it not? You have a lot of points you want to take, I think we are going to have to deal with that after lunch.

MR. PRIDDIS: (no microphone) I think we are going to have to deal with it as we go. My submissions are essentially as set out in the letter. I do not propose to expound on them.

THE PRESIDENT: I do no think this is going to take more than half an hour at the most, after lunch. Shall we break, can you manage that? We will deal with a short point now, which I am afraid you are not in the confidentiality ring, so we will have to ask ITV to disappear and we will start again at 2 o'clock.

(The hearing then went into closed session)