IN THE COMPETITION APPEAL TRIBUNAL

Case Nos. 1216/4/8/13
1217/4/8/13

Victoria House,
Bloomsbury Place,
London WC1A 2EB

10th September 2013

Before:

MARCUS SMITH QC
(Chairman)
HERIOT CURRIE QC
DERMOT GLYNN

Sitting as a Tribunal in England and Wales

BETWEEN:

GROUPE EUROTUNNEL S.A.

Applicant

-v-

COMPETITION COMMISSION

Respondent

- and -

THE SOCIÉTÉ COOPÉRATIVE DE PRODUCTION SEA FRANCE S.A.
DFDS A/S

Interveners

THE SOCIÉTÉ COOPÉRATIVE DE PRODUCTION SEA FRANCE S.A.

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H E A R I N G
D A Y O N E

APPEARANCES

Mr. Nicholas Green QC and Mr. Alistair Lindsay (instructed by Pinsent Masons LLP) appeared for the Applicant, Groupe Eurotunnel S.A. ("GET")

Mr. Daniel Beard QC and Mr. Rob Williams (instructed by Reynolds Porter Chamberlain LLP) appeared for the Applicant, The Société Coopérative de Production Sea France S.A. ("SCOP")

Mr. Paul Harris QC, Mr. Ben Rayment and Mr. T. Sebastian (Instructed by the Treasury Solicitor) appeared for the Respondent.

Mr. Meredith Pickford (instructed by Hogan Lovells International LLP) appeared for the Intervener, DFDS A/S.

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THE CHAIRMAN: Good morning.

MR. BEARD: Good morning, sir. I appear in this matter for SCOP with Mr. Williams. Eurotunnel, who have a second appeal, are represented by Mr. Green and Mr. Lindsay. The Competition Commission are represented by Mr. Harris, Mr. Raymond and Mr. Sebastian. DFDS, the intervener, is represented by Mr. Pickford today.

Before I turn to deal with one or two housekeeping matters, there are two issues arising in relation to admissibility.

THE CHAIRMAN: Yes, we noticed that. There is the evidence of Mr. Genin and the evidence of Mr. Ole Færge.

MR. BEARD: Yes, that is right. In relation to Mr. Genin, that is evidence that we have put forward essentially in support of paras.69 and 70 of our skeleton argument. I understand the Competition Commission are continuing to oppose the admissibility of that evidence. I am very happy to deal with that now if that would be of use. In addition, there is material from DFDS upon which I know that Mr. Green wishes to comment.

THE CHAIRMAN: Mr. Beard, it may help if we give you an initial indication. We have discussed beforehand and we have read both the evidence of Mr. Genin and that of Mr. Færge, and our provisional - of course with the objections - is that both statements should be admitted for the purpose of this hearing. So rather than invite you to submit why your evidence should be admitted, I will hear the objection to, first the evidence of Mr. Genin, and secondly to the evidence of Mr. Færge.

MR. BEARD: I shall step aside and leave it to Mr. Harris and indeed Mr. Green.

MR. HARRIS: Good morning, sir. We have two grounds of objection. The first is that it is pointless. The point that is made by SCOP is one of fair procedure. They say that should have been able to comment on the opinions of others at the time that those opinions were submitted. But to make that point, that they would have wished to say something, does not require them to tell you exactly what it is that they would have said. The detail or the substance is neither here nor there, even if the ground is one of fair procedure. We can take it as read that they would have wanted to say something. They have not exactly been taciturn on other matters. But we do not need the actual text of the additional opinion.

The second point is related. It is that it came in at such a late stage and in a manner that prejudices the Commission. The fact is that these two opinions upon Mr. Genin now wishes to comment in substance were received by my learned friend's clients on 6th August. So well over a month ago. Yet they did not apply to add Mr. Genin to the confidentiality ring until the end of August, I think it was 29th. There was then an objection by us, the same

legitimate (I submit) objection that I am now making. That took a few days and then it was finally resolved several days later. But that leaves us with too little time in the midst, in the thick, of preparing for all the other myriad substantive points that we do have to deal with, with a new substantive opinion.

So the problem is this. If there is some reason to see the substance of the opinion then we are prejudiced because we have not had the ability to respond to it in substance, and yet if the response to that is you do not need to deal with the substance, that proves my first point which is that we do not need the substance in the first place. So for a combination of those two reasons we invite you to declare it as inadmissible. It is just pointless and too late.

THE CHAIRMAN: Thank you, Mr. Harris. Mr. Beard.

MR. BEARD: On the pointless, obviously the ground that we are dealing with is ground 5 and it is to do with fair procedure. The reason it is submitted is to show that there are things that it is material that we could have said amongst those other things that are being said by Mr. Genin. We wanted to show the tribunal that there was a real issue here. We think the evidence assists in that regard, and it is therefore not pointless.

As to the late stage, it is perhaps just worth recalling (and Mr. Williams reminds me) that we actually applied for Mr. Genin to be added to the confidentiality ring back at the CMC and it was the CC that objected to that. We did not receive the advice until 6th August when Mr. Genin was on holiday. It was not produced with the earlier materials from either the CC or DFDS.

In those circumstances we made an application, when people were back from holiday, that Mr. Genin should be admitted to the ring. I am sorry, Mr. Williams corrects me. We applied for disclosure at the CMC, not the addition to the ring of Mr. Genin. But nonetheless, once we got the disclosure in August we then considered the material, we realised that it was material that plainly needed a French lawyer to comment on. Our French lawyer who dealt with these matters previously was not available until the end of August. We then made the application when people were back. We got on with it as quickly as we could. We only had Mr. Genin admitted to the ring last Friday. To turn the material round as fast as he did is quite impressive in all the circumstances.

It plainly is not prejudicial. It is plainly sensible that the tribunal has access to this material. Of course, the other matter is that Mr. Genin also comments on the further order of the French court that was only available last Monday.

THE CHAIRMAN: Thank you, Mr. Beard. Thank you very much. For reasons that we will give in our ruling, we are minded to admit the evidence of Mr. Genin.

MR. BEARD: I am most grateful.

THE CHAIRMAN: It might perhaps be better to deal with Mr. Færge now, to understand the objection to that.

MR. BEARD: Yes.

MR. GREEN: Our position in relation to Mr. Færge is as follows: that we would invite the tribunal to admit it *de bene esse* and rule upon its relevance and admissibility at a later stage. I say that for a number of reasons. The basis upon which they seek to adduce it is an allegation that we have alleged against them, dishonesty, and that is simply unsustainable. However, when we look at the detail of what is said, it is actually very helpful to us. We believe it is inadmissible, but in so far as it goes in it is actually quite supportive of the propositions that I will advance to you later today. It may, therefore, not be a great use of time now to go through the whole of Ground 2 and how it fits into it and why it is relevant when I am going to deal with that later. On that basis, it seems to us sensible that the matter is adjourned.

The difficulty with a ruling now that it is admissible is that, were it to be admissible, we would have to consider whether there were any procedural implications of it. For example, we may wish to apply for proper disclosure of various facts and matters which arise out of Mr. Færge's statement, but we are not in a position to do that now. We have not been able to take instructions.

There are issues which arise from the client because the relevant material is all completely redacted, and there are issues which therefore arise as to the procedural fairness of the matter being dealt with in this way at this stage. You may conclude at the end of two days that it is either irrelevant or is supportive, in so far as substance is concerned, of the applicant's case. It is supportive because it actually identifies how carefully DFDS construe the CC's request so as to avoid, and it did avoid, giving disclosure of relevant evidence. In para.10 we have entirely new evidence, new reasons which are not in the CC's decision, for which we have no disclosure at all.

I can make those points, this being a judicial review, that new evidence, new facts, new grounds, were not put to the CC, it is too late now, and that is a judicial review argument. If, however, you were going to consider the merits of them, it would give rise to an entirely different problem, that we have not had disclosure, we have not been able to assess the credibility of the arguments, we have not be able to seek our expert's view on them, and so on and so forth, which is why I would suggest that it is admitted *de bene esse*, and that its

relevance and admissibility is ruled on later when you have heard all the relevant submissions about it.

THE CHAIRMAN: Thank you, Mr. Green. Mr. Pickford, do you have anything to say?

MR. PICKFORD: Thank you, sir, members of the Tribunal, Mr. Green's or GET's original objections to the evidence were apparently that it was asking the Tribunal to reach a decision on the merits as to whether, on the balance of probabilities, we were likely to exit from the Dover-Calais route. We did not understand that. That objection now seems to have been entirely abandoned by Mr. Green, and instead he seems to want to have his cake and eat it, in that he says in so far as it is going to be helpful he will have it, but in so far as it is not, it is inadmissible because there are all sorts of procedural problems with it.

Our position is very simple. In GET's skeleton, to an extent not raised in its notice of appeal, there were attacks on the honesty of DFDS that were made. It was said that we engaged in a brush-off and deliberately avoided providing documents, despite an explicit request from the CC to do so, which it says it is inconceivable that did not exist. That is para.118 of his skeleton.

It also says that there was a risk, and we must presume a material one, that we tailored or embroidered our board papers so as to mislead the CC.

It also says that we have admitted now to having told lies, official lies, about our conduct on the short-sea. Those are all very serious allegations and we are quite entitled to defend ourselves against them. Indeed, that is one of the main reasons why I am here representing DFDS, to make sure our interests are protected in these kinds of regards. Mr. Færge's evidence explains that each one of those accusations is baseless, and we say it is quite proper, if those allegations are to be made, that we should be able to defend against them, and it is really that simple.

Of course, Mr. Green could try to withdraw all those allegations in which case the matter will go away. They are there, they are made. We could also have a debate about whether they are properly made and whether there is sufficient evidence for them. Rather than get drawn into that kind of satellite litigation, we thought the easiest thing to do, pragmatically, is simply to put on the record that they are wrong.

THE CHAIRMAN: You say it should be admitted unconditionally, not *de bene esse*?

MR. PICKFORD: Correct.

THE CHAIRMAN: Thank you, Mr. Pickford.

Thank you all. Again, we will admit this evidence, not *de bene esse*, we will admit it unconditionally. I want to make clear, as regards both these statements, that the fact that we

have admitted them means nothing as to the weight that we are attaching to them. They are simply in for what purposes they may serve over the next two days. Thank you very much. Mr. Beard, you can continue.

MR. BEARD: I am most grateful. Some quick housekeeping. The Tribunal should have a pleadings bundle, four core bundles and the joys of six authorities bundles, 3A to F. It looks like it is all in order.

The Tribunal will have seen the various pleadings. You will have seen our notice of application and skeleton argument. I am not going to repeat that or have some lengthy introduction, I am just gong to go straight into Ground 1.

Ground 1, as the Tribunal knows, is concerned with a narrow issue of statutory interpretation, where under s.127(4)(d) of the Enterprise Act two persons may be regarded as acting together to secure control of any enterprise or assets in circumstances where, and this is common ground, one of the persons, SCOP, neither sought to acquire, nor did acquire control of the assets in question.

Essentially, this is focused on parts of the report at around 4.22 onwards. The confidential report is to be found in bundle 2D at tab 50. I am actually going to be working off a separated copy and so I will make paragraph rather than page references. Could the Tribunal just turn up para.4.26, which is p.30 of the internal numbering, At 4.26 there is consideration under the heading of "Staff" of the position of what are referred to as the ex-SeaFrance employees of the SCOP and the extent to which they are relevant to the jurisdiction assessment, and the CC considers that they are if either:

> "(a) GET and the SCOP 'acted together' during the bidding period to secure control of the liquidation assets."

That is the vessels.

> "If this is the case then are 'associated persons' within the meaning of section 127 of the Act, with the specific legal consequences that they (and any bodies corporate which they or any of them control) 'shall be treated as one person … for the purpose of deciding under section 26 whether any two enterprises have been brought under common ownership or common control."

This would mean the CC says that the ex-SeaFrance assets controlled by Eurotunnel and the SCOP must be considered together for the purposes of applying the enterprise test. Then (b), which is the alternative:

> "The SCOP's economic dependence on GET is such as to confer on GET a 'material influence' over SCOP."

That is obviously related to ground 3. Ground 1 is concerned with 4.26(a) and then, over the page, the findings are made in relation to 4.30 through to 4.40 on what is referred to as the 'associated persons issue' and what we are saying is that the CC simply applied the wrong approach to the legal test, that is ground 1.

With that in mind it is worth just turning up the Act itself, which is in authorities bundle 3A, tab 1. Some of these provisions will no doubt be cryingly familiar to members of the Tribunal, but I am just going to go through one or two of the key components of the Act as it applies in relation to the particular completed mergers.

So if we start at s.22: "Duty to make references in relation to completed mergers". This obviously applies to the Office of Fair Trading.

> "(1) The OFT shall, subject to subsections (2) and (3), make a reference to the Commission if the OFT believes that it is or may be the case that –
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> (a) a relevant merger situation has been created; and
>
> (b) the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services."

Subsections (2) and (3) I do not think are material for these purposes. Obviously what we are concerned about here is the notion of a relevant merger situation. We are assisted at least to some degree in the understanding of the concept "relevant merger situation" by s.23 just over the page.

> "23 Relevant merger situations.
>
> (1) For the purposes of this Part, a relevant merger situation has been created if –
>
> (a) two or more enterprises have ceased to be distinct enterprises at a time or in circumstances falling within section 24."

So s.23(1)(a) brings in the concept of ceasing to be distinct enterprises, you need two or more of them and the requirements of s.24 (1)(b) is referred to often as the 'turnover threshold', so:

> "(b) the value of the turnover in the United Kingdom of the enterprise being taken over must exceed £70 million."

23(2) is an alternative test for relevant merger situation. 2(a) is the same as 1(a):

> "two or more enterprises have ceased to be distinct enterprises at a time or in circumstances falling within section 24"

But then, (b):

"as a result, one or both of the conditions mentioned in subsections (3) and (4) below prevails or prevails to a greater extent."

This is what is referred to as the "share of supply" threshold, and (3) and (4) are talking about the increment of the share of supply of the merged entity being greater than 25 per cent. I will not go through the remainder of s.23.

If we move on to s.24, the requirements of which are baked into 23(1)(a) and 23(2)(a). 24 is just over the page. "Time-limits and prior notice":

"(1) For the purposes of section 23 two or more enterprises have ceased to be distinct enterprises at a time or in circumstances falling within this section if –

(a) The two or more enterprises ceased to be distinct enterprises before the day on which the reference relating to them is to be made and did so not more than four months before that day."

As the definition of a time limit goes it is not the easiest piece of drafting that has troubled the Statute books but what, in essence, it means is that you cannot make a reference if you are the OFT if the relevant merger situation occurred, in other words, two or more enterprises ceased to be distinct more than four months ago, so it builds in a relatively strict time limit in relation to these matters. 24(1)(b) modifies that slightly so that you cannot go ahead and carry out a secret merger and therefore circumvent merger control because the OFT could never have known about it. The four month time limit runs only when you have notified the OFT or the merger has been made public, so the OFT need people scanning the pages of the FT and so on to make sure they are alive to these things, but it is still a strict four month time limit and although s.25 talks about extension of time limits, actually the four months cannot be extended save with the agreement of the parties or effectively where there are undertakings being sought, or there are special circumstances relating to an inter-relation with the EU. So a relevant merger situation therefore is two or more enterprises have ceased to be distinct, the relevant threshold either of turnover or share of supply has been met and it has occurred with the relevant time limit.

If we move on to s.35, which is on p.3.23. I am not going to try and cover all of the relevant provisions governing the CC, but just to carry across what the issue was that was considered by the OFT in deciding whether or not to refer then feeds into the questions to be decided in relation to completed mergers by the commission when a reference has been made under s.22. There you see in 35(1)(a): "Whether a relevant merger situation has been created", so that is the matter that the Commission then has to decide, and that is the matter on which it has relied on the concept of associated persons which is dealt with in s.127, but

I will come back to that in a moment. What I would just like to take the Tribunal to for the moment is at p.3.162, s.129. This is just interpretive provisions. You will have seen these because these have been referred to widely in the Act. The provisions that are particularly germane are in s.129(1) towards the bottom of the page: "enterprise means the activities, or part of the activities, of a business." So it is activities constitute an enterprise. Just for reference: "business" is actually defined further up the page as:

> "includes a professional practice and includes any other undertaking which is carried on for gain or rewards or which is an undertaking in the course of which goods or services are supplied otherwise than free of charge."

So those are two of the key definitions but the one that is obviously going to be of particular importance when we come on, especially in relation to ground 4 is 'enterprise'.

If I may, I want to go back to s.26, p.3.7. We have seen that the jurisdictional tests, i.e. the identification of a relevant merger situation depends upon two or more enterprises ceasing to be distinct, and s.26 spells out what ceasing to be distinct of those enterprises, those activities, means. Section 26:

> "(1) For the purposes of this Part any two enterprises cease to be distinct enterprises if they are brought under common ownership or common control (whether or not the business to which either of them formerly belonged continues to be carried on under the same or different ownership or control)."

So common ownership or common control. "Common ownership" is owning 100 per cent of another enterprise, owning it. "Common control" is the more interesting issue for the purposes of this case.

> "(2) Enterprises shall, in particular, be treated as being under common control if they are –
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> (a) enterprises of interconnected bodies corporate;
>
> (b) enterprises carried on by two or more bodies corporate of which one and the same person or group of persons has control; or
>
> (c) an enterprise carried on by a body corporate and an enterprise carried on by a person or group of persons having control of that body corporate."

26(3) may be important.

> "A person or group of persons able, directly or indirectly, to control or materially to influence the policy of a body corporate, or the policy of any person in carrying on an enterprise but without having a controlling interest in that body corporate or

in that enterprise, may, for the purpose of subsections (1) and (2) be treated as having control of it."

Again, it is not necessarily the most polluted drafting but what this section does is it says that two enterprises cease to be distinct if they come under common ownership, common control, meaning not only *de jure* control, but also *de facto* control and, in particular, if two enterprises come under common control because the controller of one enterprise can materially influence the policy of the other enterprise, then that also constitutes control sufficient for the merger. But it is important, what is being said here is being able materially to influence the policy of the other enterprise amounts to control. And the key concept throughout this assessment of whether or not enterprises cease to be distinct enterprises is control. It is total control through ownership, or it is a lesser degree of control, but nonetheless a significant degree of control or *de facto* control. It is common control of enterprises by a person or group of persons that is critical.

And that is what is important when one considers the jurisdictional test that we are looking at in relation in particular to ground one. Control is the mischief of the Act. It is where parties control two enterprises that concerns arise about how they will exercise that control. If one person controls another enterprise, we can understand that the focus of the legislation is to scrutinise what he or she will do with it. The controller of the two enterprises can ensure that competition is softened between them, and of course that concept of control is not a concern that is unique to the UK structure. Of course under EU law the level of control that triggers jurisdiction for a concentration with a Community dimension is higher than material influence. It is decisive influence which is often equated with common control in UK law. But the same key concept is there. It is the control of undertakings and enterprises that is the focus of merger control.

Now, just as the Act is interested in the controller, it is just not concerned with those who assist that person or those persons in obtaining control. That is not of interest because the concern is not with what aiders or abetters of a controller will do, but what the controller him or herself does, or the group of persons controlling. The purpose of merger control is to ensure that persons obtaining control of a further enterprise are not able to substantially lessen competition by their actions. Now, as I say, it is of course possible that people get together to control a company, an enterprise. If they do, then the concern about their obtaining control of further enterprises arises, as it does, just in the same way as when a single person obtains control of two enterprises. It is enough that a person has sole control of enterprise A and joint control with another person of enterprise B. That will be bringing

A and B under common control, and of course it is of importance. So parties who jointly acquire control of an enterprise will necessarily in those circumstances not be acting independently of one another, and so there is plainly a case for treating them as associated, ie people whose use of the various assets may be co-ordinated so as to soften competition. That is why we have a provision in the Act that deems those multiple persons having control as being one person, and that is all that section 127 is doing. So, if we just turn up section 127, it is at p.3.160. What section 127 is doing is, it is identifying particular cases where if two people are together bringing an enterprise under common control, they are to be treated as a single person. That is to say the activities controlled by each of them should be examined together.

If we just go to section 127(1) for a moment:

> "Associated persons, and any bodies corporate which they or any of them control, shall be treated as one person —
>
> (a) for the purpose of deciding under section 26 whether any two enterprises have been brought under common ownership or common control".

Here, we are looking at whether an enterprise is brought under common control by associated persons and brought under common control with the other enterprises they already control. There is a bringing that is required, and they are to be treated as one person for the purposes of assessing that bringing under control the acquisition of the new enterprise. So when we come to the crucial provision that is being relied upon by the Competition Commission, which is section 127 (4) (d):

> "For the purposes of this section —
>
> two or more persons acting together to secure or exercise control of a body of persons corporate or unincorporated or to secure control of any enterprise or assets,
>
> Shall be regarded as associated with one another".

We know that what we are considering is two otherwise independent people being treated together for the purposes of the bringing of a new enterprise under common control with other enterprises. And all we say is that if two people are to be treated as together bringing an enterprise under common control, they must each be engaged in that control, and we are saying, simply, that is what section 127(4)(d) says. It is only where two independent persons are each involved in the control that they should be treated as associated persons. That is the key concept that we are dealing with in the Act. That is the mischief of this provision.

The Commission says, “No, no, no. That’s not right. It doesn’t matter if one of two persons is not involved in controlling the new entity, the new enterprise, at all, you know, all the control is with only one person”. They say, “Nonetheless for the purpose of considering whether there is common control, the business of the person with no control at all over the new enterprise are to be treated as all under the common control by reason of this deeming provision”. And the key basis on which they say that is they say it is clear because this sentence does not say “together” twice. So they say our interpretation will be right, they say, if section 127(4)(d) said, “for the purposes of this section — two or more persons acting together to secure or exercise control together of a body of persons corporate or unincorporated or to secure control of any enterprise or assets”.

So, they like the idea of repetition. And then they say, “If you had ‘together’ twice, then we’d be right, but because it does not have ‘together’ twice there, then we are wrong”. They ignore the fact that control is the key concept in the Act. They ignore the fact that the remedies that the Competition Commission can put in place will focus on the controller. They ignore the fact that the mischief of the Act focusing on control is because it is the controller that will be able to soften competition, and they say it is all to do with the absence of the second “together”.

Actually, to be fair to the Competition Commission, if they are going to be coherent in that linguistic attack they actually need three togethers in this sentence, because it needs to say, “For the purposes of this section — two or more persons acting together to secure or exercise control together of a body of persons corporate or unincorporated or to secure control together of any enterprise or assets”, because otherwise their togethers would not be governing the right part of the final clause. In other words, they are saying, “If you repeat “together” three times, then a bit like in The Wizard of Oz, it has a magical transformatory impact on the interpretation of the clause. If I say “together” three times here, then it would be the case that each of the persons acting together would be required to have some sort of control of the new enterprise; but because it does not, because it is actually just more streamlined; because it makes sense in its own terms, we say, that is not correct.

Now, it is just worth bearing in mind what the purpose of this sort of provision is. You do not need the Commission’s approach here because, really, what this provision is dealing with is a situation where two people agree that each will buy a chunk of a new enterprise, but that the chunk they buy of the new enterprise itself will not cross the relevant merger threshold. It will not give each of them alone enough control over all the enterprise so as to give them a lone material influence. So if you have two people in each bought 15 per cent

of an enterprise probably, not least before this case, would not have constituted material influence over the enterprise. But if two people each agree to buy 15 per cent and coordinate their behaviour, then you get a cumulative 30 per cent and then you probably would be looking at material influence, because the benchmark for material influence has traditionally been a 25 per cent shareholding in an enterprise.

That situation would be caught by s.127(4)(b) on our interpretation. It is the key concept; it would be the key problem; and it would be dealt with on that interpretation. But it would not be dealing with a situation where one person buys 30 per cent of an enterprise and another person helps them in that regard, assists them in obtaining that, because you would have the 30 per cent single controller, that person alone would have material influence, and the CC could act to deal with it. They can act to deal with the controller.

Of course, in testing our statutory analysis what we have been looking at is whether or not the Commission's approach would be over-inclusive. We say it plainly would because if you capture anyone that is assisting someone obtaining control, because they are acting together to secure control even though the person assisting does not actually obtain any control at all, then in those circumstances you will end up with a situation where all sorts of people can potentially fall within the scope of merger control in circumstances where it makes no sense because the assisting person cannot operate to soften competition.

This case is concerned with the SCOP assisting Eurotunnel by the provision of human capital. The point we have made is that assistance can be by way of the commitment of human capital, but equally it can be by the commitment of financial capital. Nothing the Commission has said, either in its defence or in its skeleton, deals with the problem that funders of acquisitions who will act together with the acquirer, they will make all sorts of commitments to the acquirer and require commitments of the acquirer to them, so a bank who is funding an acquisition will impose all sorts of requirements on the acquirer and put in place all sorts of covenants, will be assisting, will be acting together with the person that obtains control and, on the Commission's definition would be an associated person.

THE CHAIRMAN: Let me try to understand this, Mr. Beard. Let us suppose instead of human capital or financial capital there was an agreement between the SCOP and GET for one to buy two vessels and the other to buy the third and they were acting together in that. On that situation you would say plainly these provisions would catch that situation?

MR. BEARD: Sir, if one person buys two vessels --

THE CHAIRMAN: Let us say SCOP decide to buy two and GET decide to buy a third, they were acting together?

MR. BEARD: I think that might become more difficult because there you have just got a separation of the assets that are being acquired, and then it would depend on what it is intended to be done with the assets, how it is to be arranged in those circumstances. I do not think one can read across very easily from the present situation to that situation.

THE CHAIRMAN: That, in a sense, is my difficulty here because it does seem to me that the CC's position is rather predicated on the fact that the ex-SeaFrance employees were either an enterprise or part of an enterprise, and that is what SCOP was, as it were, bringing to the party.

MR. BEARD: The parts of the SeaFrance business that ceased to operate at some point were obviously part of the SeaFrance enterprise. We say in relation to ground 4 that enterprise had ceased to be active; there were no activities obtained, but we will come on to that. But in relation to that situation the fact that the SCOP says: we can make a commitment of human capital just as, presumably, a recruitment agency could make a commitment of human capital in relation to an acquisition by Eurotunnel of the relevant assets, does not suddenly make the SCOP a person that is actually obtaining control in relation to any of the assets that are the subject of the finding, because of course the subject of the finding is the assets that were obtained under the transaction, i.e. the vessels and some IP, but the focus is really the vessels.

THE CHAIRMAN: No, the focus is three-fold. The focus is vessels, goodwill and names, and the workforce. I understand what you are saying about the workforce, that they were effectively acquired on the free market, but let us suppose that the workforce had been TUPE'd over (whatever the French equivalent of TUPE is) from SeaFrance to the SCOP, would that cause your situation to fall within s.126?

MR. BEARD: That becomes more complicated because what you would then have to identify is on what basis the SCOP workforce would be TUPE'd over, as you put it, because it would only be if there was a continuation of the business by the SCOP that the SCOP would then be taking over the labour force in those circumstances. The question would surely be whether the labour force was TUPE'd over to Eurotunnel on its obtaining control of the vessels. If that were the case then you would probably have a continuity in relation to the relevant transfer of an enterprise. But then you are dealing with a different situation. You are talking about Eurotunnel directly obtaining the control over the vessels and the labour force by the mechanism of TUPE subsisting in those circumstances. Again, it is not the same sort of situation because what you have here is the SCOP having a labour force, just as a recruitment agency could have a pool of human capital, and saying: look if you,

Eurotunnel, obtain the vessels we will make sure that there are staff available to run those vessels; we are assisting you. You may also need to turn to some banks for a pile of cash in order to actually acquire the vessels. So we are assisting you; they are assisting you; we are all assisting you but we are not obtaining control over those vessels that are the subject of the transaction.

THE CHAIRMAN: In a sense, (I do not want to take you out of order) it does seem to me that the answer to your s.126 point may very well lie in what is the true meaning in this case of "the enterprise"? In other words, what is it that GET and/or SCOP were acquiring, and can it or can it not be regarded as an enterprise? Once you have answered that question it may well be that the s.126 problem resolves itself. Every time I put one of these points to you, Mr. Beard, what you say is: ah yes, but in fact this is not part of the enterprise at all; what it is is it is assisting.

MR. BEARD: It is assisting in obtaining control of the assets obtained under the transaction, which is of course what the conclusion in this section of the report is saying. What is being said in relation to 4.26, if one looks at 4.26(a): "GET and the SCOP acted together during the bidding period to secure control of the liquidation assets." Securing control of the liquidation assets is securing control of the vessels, as you refer to, the goodwill and so on, but primarily the vessels. So the question we are asking ourselves is: are they associated persons for the purposes of securing control of the liquidation assets? What we say is that that is absolutely the right question to ask yourself, but they reached the wrong answer. It can be read charitably as them asking whether or not the SCOP is securing control of those liquidation assets and acting together with GET to do so, and we say no, plainly they are not; they are assisting GET in obtaining the liquidation assets.

THE CHAIRMAN: Yes, but the liquidation assets again begs the question. If you look at para.4.68 of the Decision, it seems to me that here, right or wrong, the CC's reasoning is spelt out, in that the assets that it is looking at are not simply the vessels. At 4.68(b) the CC is obviously the former SeaFrance employees.

MR. BEARD: No, I do not think one can reach that conclusion. Quite apart from the points made in the summary, if one looks, for instance, at 4.38, which is in the section with which we are dealing in relation to Ground 1, the Commission is saying:

> "We therefore consider that the SCOP activity assisted in preparing GET's bid, that GET and the Court both considered that the SCOP relationship was an important factor in making GET's bid the most attractive …"

That is the bid for the liquidation assets -

"… and that the two continued to act to secure GET's control over the liquidation assets and the MFL enterprise."

It is the Eurotunnel's control that is being talked about here.

"As a result, we have concluded that GET and the SCOP acted together in order to secure control by GET over the liquidation assets …"

So the fact that a more general formulation is used in 4.68 does not assist, because in this passage where the analysis is being carried out it is plainly Eurotunnel's control over those liquidation assets - i.e. the vessels and the goodwill. It is nothing else and that is the test that has to be applied in relation to associated persons. Was the SCOP acting together with Eurotunnel to obtain control of those assets, the liquidation assets, the vessels? We say the meaning of 127.(4)(d) it is clear, it is only if SCOP is obtaining some control over those assets that it should be treated as associated persons for those purposes, and it plainly was not. So the Commission misdirected itself in relation to those issues. There is no suggestion that the SCOP has control over the liquidation assets.

THE CHAIRMAN: When you say "liquidation assets" you mean the vessels only - is that right?

MR. BEARD: It is vessels with goodwill and the other IP. It is not the staff, because those are not part of what is considered as part of the liquidation assets as is referred to continuously throughout this report. You can see this in relation to para.4.12, p.27, where it says:

"In the present case, a key part of the context for this analysis is the fact that GET did not acquire a trading business, as SeaFrance had ceased operations some seven and a half months before the date of completion."

Footnote 61:

"SeaFrance ceased operating on 16 November 2011, and the sale of the liquidation assets to GET was completed on 2 July 2012."

It really could not be clearer that the liquidation assets we are talking about here are the vessels and the goodwill and other components alone and not the staff.

THE CHAIRMAN: What about 4.15?

MR. BEARD: Yes:

"In what follows, we consider the SeaFrance assets acquired by GET, in particular vessels, staff, brand and customer records …"

That is what the CC is then going to go on and consider as whether or not they have been obtained by Eurotunnel. That is what the analysis from 4.22 onwards is doing, and that is what we are saying, that does not constitute a situation where SCOP is obtaining any control

over vessels, brand customer records, because that is the key issue here. 4.15 does not cut across that.

It is worth bearing in mind that the definition of "transaction" is found in the summary on para.5 on p.4:

> "The acquisition of the three Vessels and other assets was completed on 2 July 2012 (the transaction) …"

That is plainly not referring to the staff there.

You can also see that in 4.28, which is within the section with which we are dealing with here.

> "In neither case are we precluded from taking account of SCOP's ex-SeaFrance staff on the grounds that they were not transferred from the liquidator …"

So they were not liquidation assets -

> "… whether directly or under TUPE regulations, but recruited in the market by SCOP."

This is where the Competition Commission's reasoning very, very blurred.

> "There is no requirement in the Act that all the assets making up the enterprise are obtained through the same route or at the same time, only that two enterprises cease to be distinct within the relevant time frame."

The first part of that sentence is correct. The second part of that sentence is entirely unclear, and actually distracts from the statutory process that has to be undertaken. Just to reinforce the point it is just worth bearing in mind that when it comes to the assessment of the statutory time limit, which is 4.78 to 4.79, a point I was going to come on to, it says:

> "Section 24 of the Act stipulates that a reference must be made to the CC within four months of the enterprise ceasing to be distinct.
>
> The transaction was completed on 2 July 2012. On the same date, GET and SCOP signed a Memorandum of Understanding. The reference was made to the CC on 29 October 2012."

The transaction completed on 2nd July 2012, i.e. the sale of the liquidation assets was plainly the vessels with the goodwill and customer lists. There was nothing else there. The question then is, was SCOP an associated person in relation to the obtaining of control of those assets? We say there is in fact no dispute that SCOP did not get any form of control of those assets. That is what s.127(4)(d) requires, because that is what the key concept of control is concerned with. In those circumstances, SCOP is simply not an associated person

for the purposes of 127(4)(d). Let us for the sake of argument assume we are wrong about "associated person", but SCOP is an associated person.

Moving on to Ground 2, SCOP and Eurotunnel are associated persons. Then we assess the question, for the purposes of deciding whether enterprises are brought under common control, SCOP and Eurotunnel are a single person. What is it that has been brought under common control? We say it plainly is those transaction assets, the vessels plus the goodwill and customer lists. There is no finding that those transaction assets alone amount to an enterprise. The finding that an enterprise was acquired depends on the labour also having been acquired. You can see that from para.4.15 of the Report, to which we have already gone in passing, but we can go back to if it is of assistance.

The Commission says that SCOP's Ground 2 is somehow a minute chronological dissection of the detailed mechanics of the transaction. It is not, it is simply looking at what the Commission considered, and the Commission considered the transaction, the acquisition of the vessels and the other limited assets from the liquidation trustee. The Commission found that those enterprises ceased to be distinct - i.e. Eurotunnel and any enterprises that were controlled by Eurotunnel and/or the SCOP at that time, ceased to be distinct with those transaction assets on 2nd July 2012. The reference was then made at the end of October, i.e. three days before the four month deadline for a reference to be made, after the date of the transaction.

The single point here is that when you ask yourself what was brought under the control of the deemed single person, the SCOP Eurotunnel single person, which we hypothesise for the purposes of Ground 2, what was brought under common control as at 2nd July 2012 were the vessels, goodwill and customer lists. What already existed with the deemed single person was Eurotunnel's range of assets and activities, including the tunnel itself, and SCOP's labour. The associated persons already had control of the tunnel and the Eurotunnel staff, and the labour that the SCOP had gathered together.

So what happened was, on 2nd July 2012, assuming there is a single associated person, that single associated person acquired vessels, customer lists and goodwill, and it was brought under common control with tunnel, Eurotunnel staff, SCOP labour. In other words, it was brought under common control with the assets and activities of both Eurotunnel and SCOP, but it was not an enterprise that was brought under common control. What was brought was less than an enterprise. It was the vessels, goodwill and customer lists, which the Competition Commission has not found constituted an enterprise, and indeed does not constitute an enterprise.

If we are dealing with it in mathematical terms, essentially what the CC has done wrong here is that it has put the SCOP labour on the wrong side of the equation when it is deciding whether or not two enterprises cease to be distinct. Instead of considering a situation where Eurotunnel acquired labour and vessels and goodwill and customer lists, which may have constituted an enterprise if it had actually been active at the time, it looked at a situation where the single deemed person acquired vessels, goodwill and customer lists, and then said, "Because it connects up with activities you already control, in particular, the labour of the SCOP, that means that an enterprise was brought under common control", but it was not, the bringing on 2nd July was of a group of assets that was less than an enterprise. In other words the labour was already with the associated person and only the vessels were brought in. That is plainly what is being assessed in the report, and it is plainly wrong. The bringing in was not of an enterprise, and it is not a matter about chronology, it is about the nature of the transaction which is said to give rise to the relevant merger situation, what was being obtained by whom in the light of the deeming effect of s.127(4)(d).

The Commissions' response to this is not clear. The Commission tries to say that the SCOP acted together with Eurotunnel to bring about a situation in which there was common control over the labour force, but that is not actually what the Commission found. The Commission made no finding that Eurotunnel and the SCOP acted together to acquire the labour force of SCOP, not at all. Indeed, SCOP and Eurotunnel did not act together to obtain control of the labour force because, of course, the labour force was acquired by the SCOP back in October 2011, wholly separately from the transaction that scrutinised, and in relation to which the reference is made, and certainly outside any relevant time frame, whatever that might mean in the Commissions' language. The Commission finding that the SCOP and Eurotunnel were associated persons was based on steps allegedly taken together to acquire the liquidation assets, not the labour. That is precisely the point that is being made at report para.4.38 to which I have already referred the Tribunal.

Interestingly, in the defence the Commission says it did identify the route by which the labour force was acquired, which was SCOP's understanding with Eurotunnel, but we really do not understand that point. It appears to rest on para. 4.35 of the report – just look at the start of 4.35:

> "We have examined a range of evidence relating to the interactions between Eurotunnel and the SCOP leading up to, during and after the transaction took place. In our view, on balance there is a significant body of evidence which taken together indicates that the SCOP acted together with Eurotunnel in preparing

Eurotunnel's bid and its involvement was instrumental in securing the Sea France assets for Eurotunnel."

Then there is a list of examples. But nothing there is concerned with the acquisition of the labour force. The acquisition of the labour force had already occurred for the SCOP, which, for the purposes of ground 2, is being treated as part of this single entity. In other words, the single entity already had the labour force.

Paragraph 4.35 is just concerned with the factual basis for the Commission's finding that Eurotunnel and the SCOP are associated persons and relates to the acquisition of the liquidation assets, the preparation of the bid for the liquidation assets. It does not contain any findings that the transaction extended to the acquisition of the labour force. There was not any acquisition of the labour force at all there. So the Commission has not answered ground 2, and essentially it has made that basic error of what I have referred to as a sort of 'jurisdictional arithmetic'. It has counted the labour on the wrong side of the equation.

THE CHAIRMAN: That may or may not be right, but just looking at s.4 of the Decision, which starts at 4.3 with what is an enterprise and what are the relevant assets and do they constitute an enterprise. We start with the legal test at 4.4. We have GET's views and SCOP's views, and they are set out. Then we have context of the analysis, and then it goes through various classes of asset, and we start with vessels. We then go on to 'Staff', so staff is treated as sequentially – just looking at the headings – as something that is acquired as part of the merger. We then do get relevant 'SCOP's employees: material influence'. Then we get 'Other Assets Acquired' 4.48, so it seems to be suggesting, just looking at the headings and the thinking behind the headings, that we have vessels, staff, other assets, then we have, the next heading: "Assets not acquired by GET", and we get there the freight traffic, passengers, supplier contracts and then we get conclusions and we have the paragraph that I have already taken you to 4.68, which seems to be suggesting that the CC is focusing in terms of what was acquired as comprising not merely the vessels but also the employees, brand goodwill, and customer lists. That is, for better or worse, how the decision is structured but it does seem to suggest that whoever wrote this was regarding the staff as part of the assets that were acquired in the course of this merger.

MR. BEARD: The Competition Commission clearly thinks that it is critical that the staff are part of what it acquired in order for there to be an enterprise, that is absolutely true, and that is what it is trying to say in 4.68. But our point is simply that when you actually look at the section on staff it does not found a finding that the staff were acquired because what you have is a situation where there are two alternatives put forward. Either the staff are

somehow in because of the SCOP and Eurotunnel being associated persons, or they are in because of the material influence test. I will come on to material influence in a moment. At the moment we are dealing with the Competition Commission's assertion that the staff are acquired as part of the transaction, they are brought in because SCOP and Eurotunnel are associated persons. Ground 1 says that is wrong, we have dealt with that. Ground 2 says that even if they are associated persons the Commission has made a fundamental mistake because the associated persons deeming provision means all of the assets and activities that those two parties had form part of the background to the analysis of the question: what is brought in? What is brought into those associated persons is only the vessels' goodwill and customer lists. So if 4.68 is saying actually, because SCOP and Eurotunnel are associated persons, the labour was acquired then that is wrong as a matter of law, and that is why the focus has been on the analysis of the associated persons section because essentially the Commission has misconstrued what associated person rules do. Instead of thinking about associated persons themselves going out and acquiring various things including asking itself the question "Did the associated person go and acquire staff?", it fails to recognise that the associated person already had the staff, therefore it did not acquire it, therefore it did not form part of the transaction and there was not an enterprise acquired therefore there was not a relevant merger situation and jurisdiction of the Competition Commission does not apply. That is the account of why 4.68 if it is saying, "Actually, there was an acquisition" is just wrong because the analysis of the associated persons section in relation to staff is wrong and as I will come on to, so it is the material influence analysis.

I should just add, I suppose, that if the SCOP loses on ground one but then succeeds on ground two, that is sufficient for SCOP's appeal to succeed. I will come on to the mutual exclusivity of associated persons and material influence in a moment after ground three. I will deal with it, but we say that is important. So, let us deal, then, with ground three. Here, the SCOP's challenge is perhaps even more straightforward than ground two. As we have seen when we look at the definition of "control" when we are looking at whether enterprises cease to be distinct enterprises, the definition in section 26(3) emphasises material influence over the policy of a body corporate, or the policy of any person in carrying on an enterprise. But in the relevant section of the report, which is the section that follows on from the section on associated persons, so, it is para.4.41 through to 4.47 dealing with material influence, there is not even a glimmer of reference to the term "policy". Not in a footnote. Nowhere.

As I say, the term "material influence" is used as a shorthand. It must always be the ability materially to influence the policy of the body corporate and it is just worth pulling out the CC's own guidelines on policy and the definition of "policy" and "material influence", which are found in the authorities bundle 3F at tab.83. If the tribunal could turn on to 3.4094 there is a heading "Control". These are the substantive merger assessment guidelines. They are joint CC and OFT set of guidelines. So, under the heading "Control" you will see a little further down "Material influence". Sorry, under 3.25 there is the difference between "material influence", "*de facto*", and "legal control", which is spelled out as I did in relation to section 26 previously. At 3.28 under "Material influence":

> "The ability to exercise 'material influence' is the lowest level of control that may give rise to a relevant merger situation. In assessing material influence in the context of the Act, the Authorities will conduct a case-by-case analysis, focusing on the overall relationship between the acquirer and the target and on the acquirer's ability materially to influence policy relevant to the behaviour of the target entity in the marketplace. The policy of the target includes its strategic direction and its ability to define and achieve its commercial objectives".

So, strategic direction and commercial objectives are key parts of the policy of any relevant enterprise.

> "The acquirer's ability to influence the target's policy can arise through the exercise of votes at shareholders' meetings, together with any additional supporting factors that might suggest that the acquiring party exercises an influence disproportionate to its shareholding".

So, there we are talking about a situation where there is a shareholding which does not give you *de facto* or *de jure* control, but together with additional supporting factors means that the exercise of votes at shareholders' meetings will enable you materially to influence policy. It then says material influence may also arise as the result of ability to influence the board at the target and/or through other arrangements, and the footnote there, you will see, is to *BSkyB/ITV* and the CC's decision in relation to that matter.

So the principal approach will be in relation to shareholding with other supporting factors. It may also arise through influencing the board and/or through other arrangements. And then at 3.2.10:

> "In considering whether material influence may be present by virtue of a shareholding in a particular case, the Authorities will consider not only the ownership of the

shareholding but also whether, as a matter of practice, the acquiring party is able to exert influence".

And then it lists a range of factors material to the way in which it may be able to exert influence through its shareholding. At 3.2.11:

"In addition to the ability materially to influence policy through the voting of shares [so, in addition to] the Authorities' determination may also turn on whether the acquirer is able materially to influence the policy of the target entity through board representation. Indeed, it is possible that board representation alone could, in certain circumstances, confer material influence"

So, board representation alone is an exception to the general approach which is, you will need a shareholding possibly with other factors, in order to have material influence.

"The Authorities may also consider whether any other factors, such as agreements with the company, enable the acquirer materially to influence policy. These might include the provision of consultancy services to the target or might, in certain circumstances, include agreements between firms that one will cease production and source all its requirements from the other. Financial arrangements may in certain circumstances confer material influence where the conditions are such that one party becomes so dependent on the other that the latter gains material influence over the company's commercial policy".

Then it goes on to *de facto* control, which is over a 50 per cent shareholding.

Now, as we understand it, what the Competition Commission is doing is relying on that final paragraph which is the second order exception to the basic approach which says, "You need to have some sort of shareholding normally in order to have material influence. Indeed, footnote 27 that refers to the *Sky/ITV* report, is instructive. I will not ask you to turn up the report although it is in the bundles at authorities bundle 3F, tab.77. But, at paragraph 3.32 of that report there is a section which, and I will just read it out:

"The OFT *Substantive Merger Guidance* notes that a shareholding giving voting rights of greater than 25 per cent is likely to be seen as presumptively conferring material influence".

(Over 25 per cent).

"Additionally, the OFT may examine any case where there is shareholding of 15 per cent or more, to ascertain whether the holder might be able to materially influence company policy. The guidance also notes that, occasionally, it may be appropriate to examine shareholdings of less than 15 per cent to determine whether material

influence exists. In practice there have only been a few cases where the MMC or the CC have been asked to examine holdings of less than 20 per cent".

Now, of course, with *SKY/ITV*, Sky held 17·9 per cent of ITV, and the argument was that that did not give rise to material influence. It was a finding that was rejected, so it is clear that you can have shareholdings less than 20 per cent, and you can have material influence. But it is also clear that these are the exceptions to the general presumption, and it is going to need the fullest and most compelling story of policy control where you have shareholdings of less than 20 per cent; and certainly where you have no shareholding at all it is going to require an exceptional story with precise clarity as to how it is that the policy of the entity in question, over which policy there is said to be material influence, has been spelled out in order for that to be a tenable position. Yet here we do not even have a mention of the word "policy" at all.

This is really the first and the fundamental criticism of the Commission's findings. No mention of policy. You cannot, when you are dealing with the second order exception to the basic presumption that you will only have material influence between 25 per cent and 50 per cent of a shareholding (over that, you will be into *de facto* control probably, albeit you can have situations even over 50 per cent it is certainly material influence). In those circumstances you are going to need the most precise account of why it is that the strategic direction and commercial objectives of the entity in question have been properly considered, and those key aspects of the policy have been shown to be subject to material influence on the part of the party who is said to be able to exercise it. We just do not have that. Indeed, we cannot have that here because the Commission has not asked itself the right question in this section. You cannot properly carry out such an exceptional analysis of policy without referring to policy.

So when we actually turn to the sections of the report that deal with this, all we find is essentially a conclusion that SCOP is economically highly dependent on its relationship with Eurotunnel. But economic dependency on another party does not mean that you have material influence for the purposes of merger control over another party.

It is just worth turning to the report at para.4.41 onwards to canvass the points that the Commission specifically relies upon in support of this economic high dependence which it says, without considering how economic high dependence impacts on policy, spells out the situation. 4.41 says:

"The important relationship between GET and the SCOP also raises the question of whether GET has 'material influence' over the SCOP, and therefore over its employees.

"4.42 The SCOP argues that GET cannot exercise material influence over the SCOP, because GET has no equity interest in, nor ability to participate in strategic decisions of the SCOP and because its undertakings to the French Competition Authority (FCA) limit GET's ability to negotiate contracts for the MFL service."

So plainly SCOP was specifically focused on what constitutes policy.

"4.43 However, as envisaged throughout the bidding process by GET, the SCOP and the Courts, when GET acquired the liquidation assets, at the same time GET (via MFL) also entered into contractual arrangements with the SCOP under which the Vessels are chartered to the SCOP under a bareboat charter, and the SCOP operates the ferry service under a service contract, using staff employed by it."

So what is being focused upon here are the contractual arrangements: bareboat charter plus staffing. There are all sorts of companies that have arrangements whereby bareboat charters are entered into and staffing arrangements are put in place. They may be relatively small companies so that all of their resources are committed to the particular bareboat charters. They might well be said to be economically dependent. Mergers in the shipping world would proliferate at a remarkable rate if that sort of relationship gave rise to material influence between the person chartering the vessel and the person who was staffing it. We say it plainly does not give material influence. What is worth bearing in mind is that the key point in terms of the SCOP strategic direction and policy was that it decided to enter into these sorts of arrangements with Eurotunnel. That was the policy it decided to pursue. It had previously pursued an entirely different policy, trying to obtain the vessels itself. That had failed and it had changed its policy. But it was SCOP that changed its policy, not Eurotunnel changing SCOP's policy. So it was the pursuit of SCOP's commercial objectives that led it to enter into these chartering arrangements.

It is of course right that because SCOP is focused on this MFL business you can say SCOP is a commercial entity; it is economically dependent on those arrangements. But that does not mean that it has ceded somehow to Eurotunnel its ability to set its own strategic direction, any more than any sort of exclusive contract arrangement limits your freedom to deal.

There is a wonderful bit right at the beginning of **Bellamy & Child** talking about restrictions under Article 101 which says something along the lines of: to some extent

whenever you enter into a contract you restrict your freedom to act in relation to the goods or services under contract during the duration of the contract but that is not a restriction on competition. I only use that as an analogy. Entering into exclusive arrangements with someone, deciding you are going to commit yourself to one key commercial partner is common, but it does not mean that there is a merger; it does not mean that there is material influence, one party over the other, because of those contractual arrangements. That is all that is at stake here.

Then when we move on to 4.44:

> "Under these arrangements [the ones we have already talked about] the SCOP is economically highly dependent on its relationship with GET".

Yes, but so what? In relation to (a) I am conscious that that is a confidential statement, and we are in open at the moment, but I will just say this (which I do not think betrays anything). It is concerned with Eurotunnel's concerns. It is not any suggestion that Eurotunnel can control SCOP at all. I can provide more details on (a) in closed, but it seems unnecessary to go into closed session to deal with this.

4.44(b):

> "GET told us in early January 2013 [so a long period after the acquisition] that in order to ensure the continued survival of the SCOP, MFL was providing working capital in the form of paying in advance ..."

Again, that does not tell you anything. The fact that you have got a start up business and actually it wants payment up front and early in order to deal with early cash flow problems again is just common business practice. That is not something that suggests that because you are agreeing to pay early in order to make sure that someone can keep working you have somehow immediately entered into a merger situation by obtaining material influence here.

The reason I keep referring to a merger situation is because, of course, material influence is the threshold for there being a merger here. What is essentially being said is that Eurotunnel has sufficient control over SCOP for them to be a merged entity. That is the relevant threshold test we are talking about here.

Then we come to (c):

> "The SCOP has no viable source of income other than GET. The contract between the SCOP and GET requires the SCOP to undertake its short-sea crossings …"

and then there is a bit that is confidential relating to duration.

This does not advance the Competition Commission at all. Quite apart from there being disagreements about the interpretation of the contract, even taking the Commission's interpretation of the contract at face value, all that we are talking about here is a situation of one party committing its resources to another.

We have given the example in our notice of application of a common situation where a farmer or a food producer makes a complete commitment to one of the big supermarkets. It is true that that farmer or that meals producer will be dependent on the supermarket. It will have entered into probably quite a long term exclusive arrangement. The supermarket will take all of the produce of the farmer, all of the products of a factory. The supermarket will probably turn round to the factory from time to time and say, "Tastes are changing, we do not want any more of your Chicken Kormas, we want more of your Green Thai Chicken Curries, you are going to have to change what you are producing for us". So there can be a real degree of influence over the factory but there is no way that that is material influence over the policy of the factory and the factory owner for the purposes of this crossing a threshold that would amount to a merger, no more is it that if you take all of an orchard's apples that suddenly you have merged with the orchard by reason of those contractual arrangements.

So these points made by the Commission simply fail to grapple with the key issue of what it is that is the policy of SCOP and how it is influenced. It is hugely over-inclusive as a way of setting the test.

The Competition Commission keeps saying, "Oh, this is all fact specific, we have made an assessment of the facts, and you are challenging the facts". We are not saying that at all. We are saying something very different. Wrong question, wrong analysis, irrelevant considerations and plainly applying the threshold in the wrong place because it is far, far too inclusive, in circumstances where it was incumbent upon the Commission, absent a shareholding, absent board representation, to give the fullest and most complete reasoning, given that this is a massive departure from all previous case law, including the previous lowest threshold case that was tested in the courts, the *Sky ITV* case.

If we just go on to 44.4.(d):

> "Further, it is clear that the SCOP is not in a position to establish its own service. The document 'Groupe Eurotunnel NewLink Project - Proposed Structure' rejected this option because the SCOP would not have been able to raise the necessary finance,"

The SCOP had tried and it had failed. Whether or not it might at some point in the future do other things, that will be a matter for the SCOP to decide.

The final point is:

> "Jean-Michel Giguet was recruited by GET, and is both the CEO of the SCOP and a manager of MFL [My Ferry Link]."

He did assist Eurotunnel with its bid. He did so on behalf of the SCOP. That tells you nothing about Eurotunnel controlling the SCOP. The fact that a SCOP person helped Eurotunnel when the SCOP had made a decision to assist Eurotunnel does not suggest Eurotunnel controls the SCOP. It furthermore does not add anything to say that he is an MFL manager. The SCOP is, of course, responsible for the operation of MFL, and it is in that capacity, as a member of the SCOP that he is an MFL manager.

The manner in which the SCOP's policy is formed is fully explained in the witness statement of M. Doutrebente, which is at tab 2 in the pleadings bundle, attached to the notice of application. I would just briefly, if I may, refer you to that. His statement starts at 1.127, and the relevant section begins at p1.132, "Organisation and Management of the SCOP". I will just highlight a couple of paragraphs.

> "36 The Directoire acts in the name of the company to manage the company in pursuit of its objects. In practice, this means control of all day to day activities of the SCOP fall under the responsibility of the Directoire."

Then there is a reference in 37 to M. Doutrebente having been made aware of the CC's guidance.

> "Bearing in mind that definition, the SCOP's policy is formulated by the Directoire in consultation (where necessary) with the Supervisory Council. By way of example, the decision to enter into the commercial arrangements with GET (and also any future decisions as to possible amendments or extensions to those arrangements) has been taken by the Directoire."

So this is just spelling out what one would plainly expect. Just going down to 41, he has previously explained the nature of the shareholder and how the SCOP came to be. I will not take you to these sections. At 41 he says:

> "The entire share capital of the SCOP is owned by its employees with no third parties owning (nor having the ability to acquire) any equity interest in the SCOP. GET does not have an equity in the SCOP ... nor is it a subscriber. The only link between the SCOP and GET is the commercial arrangements entered into in 2012."

So the Commission misdirected itself in law as to the proper test on material influence under 26.3 and has departed from its proper guidance. It has failed to have regard to relevant considerations in the absence of any shareholding or other formal mechanism through which Eurotunnel could exercise control over the policy of the SCOP and to make any enquiries or obtain evidence to support a finding of material influence over policy. In the circumstances, the Commission's finding that Eurotunnel exercised material influence over the SCOP cannot stand.

Just before I move on to Ground 4, I said I would pick up the point relating to the position that we have set out that you cannot both have material influence over someone and also be an associated person with them.

The first point to make is that this was an issue we raised in the notice of application. The reason we did it first was because that is actually the way the Commission approaches this issue in this report. If I may, I will just take you to one or two passages in the report, starting at 4.26. I am not pretending this is comprehensive. I have already shown you 4.26 in the report:

> "The CC considers that the ex-SeaFrance employees of the SCOP are relevant to its jurisdiction assessment if either …"

I recognise that between (a), which is associated persons, and (b) which is material influence, there is not an "or". With respect, we say you do not need one in order for that passage to be clear.

4.28:

> "In neither case are we precluded from taking account of the SCOP's ex-SeaFrance staff on the grounds that they were not transferred from the liquidator, whether directly or under TUPE regulations, but recruited in the market by the SCOP."

"In neither case". Let us move on to 4.46:

> "As a result of the transaction …"

The obtaining the assets under the liquidation sale -

> "… the SCOP workforce, along with the liquidation assets …"

so a separate issue -

> "… have been brought under 'common control' with GET's existing business. This alternative reasoning …"

"alternative reasoning", what are we talking about here, the material influence section. Material influence gives rise to common control. It is in the alternative to the section on associated persons. Then 4.47:

> "Overall, we consider that the ex-SeaFrance staff emailed by the SCOP fall to be included within the CC's assessment of whether two 'enterprises' have ceased to be distinct, either because GET and the SCOP acted to secure control of the liquidation assets …"

that is the associated persons point -

> "… and are therefore associated person, or because GET has material influence over the SCOP."

So that was the position taken in the report. It was not disputed in the defence. There now seems to be some contrary suggestion in the skeleton argument from the Competition Commission that you can be both an associated person and have material influence over your associated person.

That is plainly wrong. The CC is not entitled to shift its position from its report in any event, but, as I say, it is plainly wrong because if, for the purposes of s.26 and jurisdiction, you are deemed to be one person, you cannot also, for the purpose of jurisdiction and whether or not enterprises cease to be distinct, also be two people, it is a sort of ontological impossibility. We are not in the realm of quantum physics where things can be entirely different things at the same time. The Commission cannot have proceeded on the basis that Eurotunnel and SCOP are deemed in law to be one person, but then also find that Eurotunnel has a degree of control over the SCOP such as to merit treating them as under common control by Eurotunnel. Those two analyses are obviously mutually exclusive. Given that the application of s.127(4)(d) is mandatory, it plainly precludes a finding of material influence if s.127(4)(d) is to apply. At the very least you can only have one or other, you cannot say that two persons who are treated for the purposes of s.26 to be single can then be treated as two persons for the purposes of the material influence analysis, and the contradictory assumptions that would be acquired under these two limbs just mean that that is not sustainable.

The Competition Commission has dug out an authority in its skeleton, *Swedish Match*, I will wait to see what Mr. Harris says about that, but what is striking about *Swedish Match* – no pun intended – is that you have a situation where the alternative is laid out throughout the report; there is no suggestion that they can be simultaneous, both associated persons and a case of material influence. That is obviously significant because we say if we lose on

ground 2, but succeed on ground 3 in these circumstances we are going to be successful in any event.

Ground 4. Ground 4 of the SCOP's challenge is based on a distinct legal issue, whether the Commission erred in finding that Eurotunnel acquired the activities of a business, or part of a business. In the defence some fuss was made by the Commission of the fact that we had not been referring to parts of business rather than businesses just does not matter. The key issue is 'activities'. The simple point is in circumstances where the SeaFrance business had ceased all business activities some seven and a half months before the transaction took place, there were not activities to be acquired, there could, therefore, not be an enterprise that ceased to be distinct with whatever it was that Eurotunnel had, and/or Eurotunnel and SCOP had.

THE CHAIRMAN: Apart from the statutory wording, Mr. Beard, is there any case law to assist us on the meaning of enterprise or activities of the business?

MR. BEARD: The best we have come up with is actually the material in relation to TUPE, because obviously in relation to TUPE what you are looking at is asking yourself whether or not there a continuity of activities in relation to these matters. It is obviously right that we are not in a position to identify some beautifully binding case, if there were I do not imagine we would be having this discussion now. We say that it is plain and obvious that after a period of seven and a half months in circumstances where all of the staff have been made redundant, that in those circumstances you do not have activities being acquired.

As I say, the starting point for this argument is that under the scheme of the Act, in particular s.129(b), the transaction must be concerned with the acquisition of the activities of a business, and here I think there is no issue, but the case put by the Competition Commission is the activities of SeaFrance, or the ex-SeaFrance business, and that is s.129, as I say, "the merger is the acquisition of an existing set of business activities by another active business", in other words two enterprises ceasing to be distinct, and then the share of supply or turnover test will be applied. It is fundamental that what is acquired is a set of business activities, not simply a set of assets which can be used to commence business operations.

I think it is probably common ground that the period of time during which a business does not trade is highly material in considering whether the transaction involves the transferred activities of a business, and the length of period of inactivity that we have here really does determine, it does not merely militate but it determines that you could not sensibly find here that there were activities transferred under the relevant test.

If I may, I will just again go to Guidance CC2, which is in bundle 3F at tab 83, the substantive merger guidance. The relevant page I wanted to take the Tribunal to is p.3.4093, it is just under the section "Enterprises ceasing to be distinct". The key point really is set out in 3.2.2:

> "The term 'enterprise' is defined in section 129 as the activities, or part of the activities, of a business. The enterprise in question need not therefore be a separate legal entity. The definition states that the activities in question should be carried out for 'gain or reward'."

- there was not much of that going on during the seven and a half months.

> "However, there is no requirement that the transferred activities should be profitable, or generate a dividend for shareholders …"

- I do not think that is at issue -

> "… and the definition may include transferred activities conducted on a not-for-profit basis".

- again, not at issue. 3.2.3:

> "In making a judgment as to whether or not the activities of a business, or part of a business, constitute an enterprise under the Act, the Authorities will have regard to the substance of the arrangement under consideration, rather than merely its legal form."

That is a slightly different point because that is saying where you have got activities you are looking at what subset of activities could constitute an enterprise. 3.2.4:

> "An enterprise may comprise any number of components, most commonly including the assets and records needed to carry on the business, together with the benefit of existing contracts and/or goodwill. In some cases, the transfer of physical assets alone may be sufficient to constitute an enterprise, for example where the facilities or site transferred enable a particular business activity to be continued. Intangible assets such as intellectual property rights are unlikely, on their own, to constitute an enterprise unless it is possible to identify turnover directly related to the transferred intangible assets … The business acquired may no longer be trading but this does not in itself prevent the business from being an enterprise for the purposes of this Act."

We accept that, for the purposes of this Act it may not, in itself, preclude there being activities transferred such as to constitute an enterprise that is brought under common control with others. We have *AAH Holdings v Medicopharma* to show that that is a

possibility. We do not dispute that case, but it is plainly an exception, and normally where a business is no longer trading you will not have activities and you will not have a merger because you will not have the transfer of an enterprise into common control.

Let us just go to *Medicopharma*, it is in authorities bundle 3E, tab 75. It is a lengthy decision but, if I may, I will try and foreshorten the consideration by turning on to p.3.3452 to the section under the subheading: "The merger situation". It is probably easier if I give the internal numbers, it is 123 on the internal numbering. The heading is about halfway down. Just for your notes, at para.2.42 (I will not take you to it) there is a wonderfully terse statement which says:

> "On Sunday 3rd November 1991, there was a complex sequence of arrangements involving Medicopharma NV and its subsidiaries and AAH and its subsidiaries".

And that is what falls for consideration in relation to the issue of merger situation. In essence, what happened was that Medicopharma ceased trading on 3rd November under a complex set of arrangements whereby AAH then obtained all the assets of Medicopharma, or rather the former business that was Medicopharma, and then wanted to fire the business up again on the following day. There were certain hitches, so it actually re-emerged three days later rather than actually on the following day, so, rather than just being a Sunday to Monday transaction it was a Sunday to Wednesday transaction. And what was being argued by AAH, the acquirer, was that there was not any merger situation here because Medicopharma had stopped operating.

I will just take you to 6.58 because this was a case under the Fair Trading Act, not under the Enterprise Act, and the relevant provision s.65(1) of the Fair Trading Act and it provides that:

> "Any two enterprises shall be regarded as ceasing to be distinct enterprises if either *(a)* they are brought under common ownership or control (whether or not the business to which either of them formerly belonged continues to be carried on under the same or different ownership or control)".

So that mirrors perfectly the relevant provisions of the Enterprise Act. I just will note, however, *(b)*:

> "Either of the enterprises ceases to be carried on at all and does so in consequence of any arrangements or transaction entered into to prevent competition between the enterprises".

What is interesting is the Fair Trading Act had a specific provision that dealt with situations where a business had ceased to operate. Now, that was not carried across into the

Enterprise Act. What was carried across into the Enterprise Act was only section 65(1)(a). But it does identify that ceasing to be carried on was a particular issue.

And then it goes on:

> "An enterprise is defined by section 63(2) of the Act as meaning the activities or part of the activities of a business".

The reason I am pointing that out is for the purposes of section 65(1)(a) and section 63(2) we are dealing with the same definitions. It is just interesting that the Fair Trading Act also had a provision where an enterprise has ceased to be carried on which no longer exists.

And then what see in paragraphs 6.59 through to 6.62 in particular is a description of the somewhat complex arrangements that had been put in place, that all were triggered on 3rd November. Just picking up at 6.62:

> "Medicopharma NV also submitted that no merger situation had been created, pointing out that its United Kingdom operation had ceased to trade prior to the acquisition and that AAH had acquired only stock, certain assets and three depots. We have considered carefully these arguments ….".

If one turns over the page one sees at 6.74 moreover (I am just skipping through this. It is something to be read at leisure):

> "Moreover the evidence from the various parties confirmed that the clear understanding was that AAH would sign the agreement to purchase the various assets as soon as the redundancy letters were sent and would not do so unless this had happened. AAH accepted that it itself suggested that Medicopharma NV should close its United Kingdom operation".

So, AAH was putting in place arrangements saying, "Please shut your operation so we can sack your staff and we can also thereby sidestep merger control, notwithstanding the intention to open on the following business day".

As I say, 6.87 points out that, actually, they did not quite manage to open on the following business day, it took a little longer than that. And then if one goes on through to 6.102 on p.131:

> "In our view, however, although AAH did not in terms acquire the depots as going concerns, in reality it obtained much of the benefit of so acquiring them and it clearly acquired more than bare assets, as described in greater detail above. It obtained three depots complete with stock and fixtures and fittings, which for reasons given in … 6.82 and 6.83 would have carried with them a certain degree of goodwill".

And then it goes on and in the end concludes that, notwithstanding that there had been a termination, there was a situation here that meant there were transfers of activities. There are two points to make. I am sorry, there is just one point that Mr. Williams rightly points out. I think I have already trailed it, but if one looks at 6.98:

> "AAH told us that it was very conscious of the possibility of investigation by the competition authorities and tried to structure the arrangements so that they would not constitute a merger situation qualifying for investigation. Had it not been for these constraints, it would have wished to have acquired Medicopharma UK as a going concern".

So, what we have here is a situation where a specific set of arrangements were put in place to shut down and re-start a business within a period of days. It was done with the intention of circumventing competition control, merger control, and yet still here there is real concern on the part of the Competition Commission (the MMC as it then was) carefully to go through whether or not there really were activities being transferred. It is striking, the detailed analysis that is carried out here as the nature of activities that are being considered in relation to a three-day — I use Mr. Harris's word "hiatus" — as compared to a seven and a half month period where you had total redundancy, a complete cessation of any sailings, of vessels being mothballed. It is called "hot lay-by". If it took two months to start your car, you would not feel that it was ready to roll immediately. The vessels were not available. They had not been sailing. The staff were redundant. They had taken the initiative to join and set up the SCOP. But the Sea France entity had ceased to operate. There was (picking up one of the terms that is used in the guidance) "a lack of continuity of business". There was no continuity of activities between Sea France that stopped operating in fact in November 2011, and the "My Ferry Link" business that started up in the summer of 2012. Continuity, as we have referred to in our submissions, was a key consideration in the *Stagecoach* case. Continuity is also reflected, as we have also said, in the TUPE provisions which have been referred to in particular in the *Cineworld v HMV Zavvi* cases as key indicators as to whether or not there had been transfers of activities, because the TUPE provisions operate to protect the interests of employees when businesses active businesses are transferred to different owners. But they do not apply where businesses are defunct and by definition there is no activity for the employees to engage in and they are made redundant.

Now, the SCOP acknowledges that activities need not be transferred wholesale. But both *Cineworld* and *Zavvi* are cases in which the labour force was in fact transferred across by

reference to the application of TUPE regulations, which of course apply across the whole of the EU and there is no parallel with the present case. We have included in the authorities bundle (and I will just give you the reference) at bundle 3A, tab.2, an extract under the relevant TUPE regulations:

> "The regulations apply under English law to the transfer of an undertaking or business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity".

And the TUPE analysis under French law is actually helpfully set out in exhibits to Monsieur Doutrebent's witness statement which are now found in bundle 2(c) at tab.37. Unless you wish me to, I will not take you to it. The point on TUPE is a clear and obvious one: it is the closest statutory comparison to the language and purpose of the provisions relating to the transfer of enterprise. Although the language is not precisely the same it is material, it has been used as a benchmark in other cases by the Competition Commission, quite properly. Here, plainly TUPE did not apply.

Quite remarkably, the duration of the period between the cessation of trading by SeaFrance and the acquisition of vessels by Eurotunnel received almost no consideration in the report, and it is in marked contrast to the *AAH Holdings/Medicopharma* decision. Either at a general level, or in relation to the particular assets, the Commission just broadly makes two points. First, the Eurotunnel acquired vessels which were of suitable design and were of sufficient number to operate a passenger and freight transport business on the short-sea. Yes, that is true. It tells you nothing about activities. Secondly, the vessels were in a condition from which they were able to be brought into operation within two months after their acquisition. Yes, again that is true but actually that plainly indicates there were no activities in relation to those vessels, I suppose apart from the maintenance of them, but that is not an issue because that is not what was at issue in terms of the transfer enterprise here. As regards the staff, the report contains no discussion of the significant lag between the formation of the SCOP and the signing up of its many subscribers in late 2011 and the much later acquisition of the vessels by Eurotunnel and the establishment of the MFL business. The Commission say they refer to a relevant timeframe, but that really is not explained, and it is not explained how the relevant timeframe applies in relation to consideration of activities. All the skeleton appears to say about this is that the transaction rekindled the business from the embers of the SeaFrance operation, and that there was a hiatus.

Quite apart from the fact that those are not terms actually used in the conclusions of the Commission (one is a quote from other documents and one is new), they just do not help. Rekindled means started again. There was no doubt that the ferry crossing business was started up again in the form of MFL, but that does not mean that there were any activities, embers, of the SeaFrance business still glowing during the seven and a half months. It stopped sailings in November 2011; the court confirmed this by order in January 2012; the ships were mothballed; the staff out of work. There were no embers; their glow had long ago ended by the time of the transaction; there were no activities.

As for hiatus, this is just a euphemism; it is a somewhat desperate euphemism. This is Mr. Harris playing the role of the pet shop keeper in Monty Python. The business of SeaFrance had ceased to be; it was no more. It was not a mere hiatus; it was not there to be rekindled. It had no more glowing embers than the Norwegian Blue. It was over. There were no activities; there was no possibility of those activities being transferred. The Commission has singularly failed to grapple with this issue in its report, or in its defence, or in its skeleton argument. The seven and a half months before the acquisition involved no activities of a business. This is very far from the continuity envisaged by the Commission's guidance and present in its previous decisions where, in particular, TUPE considerations were referred to. It is highly revealing that in its defence the Commission has sought to defend ground 4 on the basis of a range of points that were not supported by findings made in the report, matters we have dealt with in our skeleton argument.

I think I am a couple of minutes over my hour and three quarters, but unless I can assist the tribunal further, those are our submissions on the first four grounds.

THE CHAIRMAN: Thank you, Mr. Beard. Just by way of recap, if we look at s.26(1) Enterprise Act we are looking at, as you said earlier, two enterprises, and, you might say, two sides of an equation. Your case is that on one side of the equation - and now assume that we are against you on grounds 1, 2 and 3 so we are aggregating GET and SCOP - we have the Eurotunnel employees, we have the SCOP employees, we have any other assets that GET might have. On the other side of the equation we have the three vessels plus the goodwill and the website and the names and that is it, you would say?

MR. BEARD: We say that in relation to the earlier grounds. We say that under ground 4, when you are asking yourself did two enterprises cease to be distinct, assume we are wrong on everything in relation to grounds 1, 2 and 3, there still were not activities transferred. That just was not what happened.

THE CHAIRMAN: Yes quite. One has to say, with regard to the vessels, do they constitute an activity given that they have no crew, no berthing slots, they are mothballed? All these things we have to take into account?

MR. BEARD: Yes.

THE CHAIRMAN: We have to decide whether that is or is not an activity?

MR. BEARD: Yes. Whatever permutation of the assets, we say you cannot possibly say, after seven and a half months, whichever bits of these assets you pick and choose from, that they are actually active. There is no activity at issue. Any more than if you went and bought three new ships; you are not buying activities.

THE CHAIRMAN: Would you say, or do you think this is going too far, that activity is synonymous with "going concern", which is a phrase I saw used in the MMC report that you referred us to a moment ago?

MR. BEARD: I prefer not to take it too far. Generally, that will be the case, that must be the ordinary understanding of activities. We are conscious of *AAH Holdings/Medicopharma* where it might be said that Medicopharma was not, for a scintilla of time, a going concern, I suppose.

THE CHAIRMAN: That would be really a question of shams. You would not want to have a --

MR. BEARD: I suppose so. I think the answer is it is difficult to see how you can have activities acquired from a not going concern. It feels like it is almost an analytical proposition and therefore I am very tempted to agree. But I am also concerned that someone could take issue with whether at one particular moment arrangements had been put in place, it was not actually a going concern for a day or two, and at that point I am not going to cavil at those sorts of exceptions, particularly if they are essentially a sham. But broadly speaking the answer is yes.

THE CHAIRMAN: Thank you very much, Mr. Beard.

MR. BEARD: I am most grateful. I do not know whether this is an opportune moment for a short break for the shorthand writer.

THE CHAIRMAN: That is normal. We will rise for five minutes.

Adjourned for a short time

THE CHAIRMAN: Yes, Mr. Green.

MR. GREEN: As the Tribunal knows, I have four Grounds. They are of varying lengths. Ground 1 raises a really important issue about the Commission's procedures and whether they are fair in the light of recent case law, in particular jurisprudence of the Supreme Court. Grounds 2 and 3 concern classic judicial review points focusing upon failures by the

Commission to collect evidence, put themselves in a position to form a proper judgment, and to adopt a logical reasoned approach. In one sense, these are no more than classic *Tameside* grounds, but they have been applied with greater specificity to the Tribunal in *UniChem* and at the European Court level by *Tetra Laval*. Grounds 2 and 3 both, to some degree, incorporate the Ground 1 objection about failure to provide adequate disclosure. Ground 4 contains two different objectives to the remedy. They are short and neat points, and we do not consider that the Commission has advanced in its pleadings a cogent answer to them.

I am going to concentrate in my three and a half hours on submissions. You have detailed submissions in writing from us. Throughout I am going to refer to a number of cases and what I will do to save time is simply give you references for the transcript but I will be taking you to some materials.

Before turning to Ground 1 I have got two introductory comments to make which apply across all of our four grounds. The first concerns what we have identified in an annex B to our skeleton as the chain of causation in this case. I wonder if I can ask you, please, to turn that up. In annex B we have stripped out of the Commission's decision what is, in effect, a logic tree or a line of logic, and we have identified 18 chains in the link before you get to the conclusion in 19, but link 7, itself, has four sub-links - in other words, we have identified approximately 22 discrete links in the chain of reasoning. If any one of these links breaks the Commission's entire theory of harm collapses. Each link is conditional upon the others. Indeed, many of the links are described in broad terms and they will have a series of sub-links or sub-chains of causation within them.

The importance of this is as follows: that it has implications for the evidential standard of proof and the burden of proof, and it has implications for the procedure which needs to adopted in a merger case. This is because a decision prohibiting a merger will frequently involve the decision maker hypothesising future behaviour and concluding that the future behaviour is or will be harmful, and that is what has occurred in the present case. The Commission's theory of harm in this case is based on an unusually lengthy causal chain, and that is why we have identified the chain itself in annex B. If you apply the microscope to each of those links you would find many other critical links within each link. For example, link 10 is headed "GET will increase prices on the tunnel, freight and passengers", but for the theory of harm to survive GET must raise prices by a particular magnitude, because otherwise none of the other links will come into being. In other words, there has to be a diversion of a particular quantity of business caused by the level of increase in the

prices, but the decision to raise prices itself may be subject to dozens of evidential, economic, commercial considerations which might vary from month to month. So even if Eurotunnel raised prices by X as opposed to Y, the rate of diversion might not be as great as the Commission concludes, and even if the diversion rate was high not much freight might transfer to MFL.

This simply shows that each successive link in the chain is conditional upon prior links, and the same point can be made in relation to each of the 20 plus links identified.

The conclusion one draws from this in very general terms is that, by its very nature, the analysis is speculative and fragile. This does not, of course, mean that a competition authority is denied the jurisdiction to take the prophylactic decisions, but the factor does have legal consequences as to the integrity of the procedures to be adopted and the evidence which has to be collected.

The first court to address this particular issue about the standard of proof in merger cases of a prospective nature was the Court of Justice's decision in *Tetra Laval* which was then applied by this Tribunal subsequently in *UniChem*. What I was proposing to do was give you a summary of the propositions that we rely upon from it. I am happy if you would prefer to go to the judgment, but I was going to simply identify each of the propositions with the paragraph number so that they can be verified and checked later. In that case the European Court was concerned with a prospective merger analysis involving, as the court put it, an assessment of chains of causes and effects - para.43.

The court said that the prediction of the Commission involved events which were more or less likely to occur - para.42.

They said in a case where a theory turns on leveraging over a lengthy period of time, the future events are, as they put it, "dimly discernible" - para.44.

What this meant for a judicial review in a prospective merger was as follows: first, that the court would conduct "a close examination of the circumstances which are relevant of effects" - para.40. The court will review the Commission's interpretation of information of an economic character - para.39. The court will establish whether the evidence relied upon is factually accurate, is reliable and is consistent - also 39. The court will also establish whether "the evidence contains all of the information which must be taken into account".

The court concluded that that in a prospective merger case, this implied that the evidence required to justify a negative decision had to be of a very high quality. Again, I will give you a summary of paras.39 to 42. The court used the following expression, "the Commission's analysis be precise - 41. It must be "supported by convincing evidence" -

41. The Commission must establish convincingly the merits". 42: A prospective analysis must be carried out with "great care" if it does not entail the examination of past events. For these reasons the quality of the evidence is particularly important. "39 The court will establish whether the evidence is capable of substantiating the conclusions drawn from it" and such a detailed review was – 39 – all the more necessary in the case of a prospective analysis.

The Tribunal has applied the *Tetra Laval* approach in *Unichem* and we have set out various quotes in our note on relevant cases, in the annex to our skeleton. It is also consistent with the Court of Appeal in *IBA Health* and the standard review in merger cases which makes plain that it can vary according to the nature of the case.

As to procedural implications Lord Sumption in *Bank Mellat (No.2)* tab 61, para. 32 made an important observation. He said that the adoption of open and fair evidential procedures improved decision making. One of the reasons the majority in Bank Mellat was so critical of closed decision making was that it denied the target of the procedure the chance to make relevant representations on the merits. But he also made an important observation that the need for procedural fairness was not just because of the duty to adhere to the principle of natural justice, it was over and above this because of: "the principle of good administration." He said that decisions would have been of a higher quality had a proper procedure been applied. For your note, that is bundle 3D, tab 61, para. 32. The point is a good practical one, the fuller the affected person has to the underlying evidence the fuller and more precise will be its submissions.

For the Commission having the fuller submissions enables it to see the other side, or the contrary viewpoint, it enables errors to be corrected, it enables procedural avenues to be identified for it to pursue. In a case which turns, by its very nature, on a very lengthy chain of causation it par excellence is the type of case where an open transparent procedure is essential. It is, to use Lord Sumption's phrase, "good administration".

In the present case the following facts are relevant to the evidential standard which should be demanded of the Commission and procedures, which it should adopt. The first is the point I have made that the theory of harm is highly theoretical, it involves a very lengthy chain of cause and effect over a lengthy period of time which are, to use the Court of Justice's language: "dimly discernible".

Secondly, the Commission's case on certain pivotal issues, such as DFDS's exit, turns upon the Commission's assessment of two things, one the strategy of operators, in particular DFDS, and secondly, the credibility of DFDS's submissions (see CC Decision para. 8.68).

Thirdly, the Commission itself relied heavily on evidence from DFDS and, to a lesser extent, P&O. Both companies had, and have, a conflict of interest in that both would benefit from an adverse decision against GET and MFL. The market would reduce from three to two operators and both would have an opportunity to acquire assets under forced sale conditions. For your note, when there was doubt about this in the Commission's mind, P&O emphasised that it was interested in buying the forced sale assets from MFL (ref: bundle 2B, tab 32).

By their nature the assessments made by the Commission needed input from the one person most affected or "targeted" (to use Lord Sumption's phrase) by the procedure (*Bank Mellat (2)* para.32). Ensuring that the target had full access to information was essential for good administration, it would lead to a higher quality decision. That is all I wish to say about the implications of the fact this is a prospective analysis involving a very lengthy chain of causation.

The second introductory point concerns the relevance of European Union law. The order which the Commission seeks to impose does two things. First, it prohibits GET from providing services from the United Kingdom to France and vice-versa. Secondly, it prohibits a company from establishing in the United Kingdom, viz. from Dover, that prohibition emanates from national law, i.e. an order of the Competition Commission. National law prohibitions, therefore, engage the prohibition in European law on restrictions on the right to provide services, which is Article 56 of the TFEU and the restriction in the Treaty on prohibitions or restrictions on establishment in Article 49. We brought copies along of the Treaty provisions and we will have them inserted into the files or made available in due course.

We have also brought along a text book, because I am going to summarise certain submissions, not take you to case law, I will give you paragraph reference numbers from **Wyatt and Dashwood** in a moment.

Prima facie, unless the Commission justify these orders, these restrictions, they are prohibited under European law. We accept, of course, that it is open to the Commission in principle to advance justifications for the restrictions but the burden of proof is upon them, and if they do not do so then they would be unlawful under European law as well as English law.

The Competition Commission has stated in its pleadings that the Treaty prohibitions do not apply because the order is not discriminatory. There are two complete answers to this: first, the two prohibitions do not apply only to discriminatory measures, and that has been the

case for literally decades, but in any event the order is discriminatory in that it singles out a single company out of all of the competitors and imposes restrictions upon both establishment and provision of service only in relation to that one company and to nobody else.

We have cited authorities in our skeleton, which are in the bundle; I am simply going to give you references to Wyatt and Dashwood which make those propositions good. They are at pp.534, 535, 540, 547 and 552 amongst many others, but they should not be controversial propositions.

THE CHAIRMAN: Just for our note, could you give us the reference to your skeleton as well, the paragraph?

MR. GREEN: Yes. Mr. Lindsay will do that and I will give you the reference in one moment.

The implications for this may take you no further than domestic law would. However, since the activity that we are concerned with, namely, the prohibitions on provision of services and establishment fall within the scope of European law. It means that principles of European law apply – not just the prohibition in relation to services and establishment, but the fundamental principles apply. Again, I do not think that is a controversial proposition, it has been established in case law since the early 1990s – I will get a copy of **De Smith** on that, which sets out all the case law and summarises it. The simple proposition is no more than this, that if and insofar as domestic law and European law part company, and we say they do not materially, but if they do, then you are also to take account of European law general principles, about rights of defence, and fairness.

That takes me to ground 1, the reference in our skeleton to this point is at para. 150.

Ground 1 is our important procedural ground, and I am going to divide my submissions in to five sections. The first section is an identification of the issue. The second section is a law, which will include a commentary on points taken by the Commission. The third section involves an analysis of the facts, in particular the following,

1 that the failure of the Commission to provide exculpatory evidence;
2 the failure to provide summaries of evidence
3 the failure to use or sanction a confidentiality ring
4 the non-disclosure of inculpatory documents; and
5 the non disclosure of data and data sets.

The fourth section of the submissions will concern materiality, if you conclude that there is in principle a prima facie breach what implications flow from that, and then finally conclusions. So, section 1 which is an identification of the issue. In a nutshell, the issue is

whether the procedure adopted by the Commission in this case is contrary to the principles of natural justice. The Commission's position has been set out in its defence and in its skeleton, and when you add them together you come to the following propositions which describe the Commission's position in this case.

First, the Commission says it is under no duty to disclose to companies being investigated exculpatory evidence. Indeed, they say there is not even a duty to look for exculpatory evidence, that is to say evidence which assists or furthers the defendant's case. So, for example, if it found in its possession a document which was of extremely great potential value to my client, it was under no duty to hand it over.

THE CHAIRMAN: Mr. Green, when you refer to "exculpatory evidence", you simply mean evidence that helps your client.

MR. GREEN: Yes.

THE CHAIRMAN: Right, yes.

MR. GREEN: What I will do is, I am going to provide a summary. I will take each of these as a discrete topic because there is quite a lot of case law on each of these particular types of evidence. That is the Commission's position. It need not even look for exculpatory evidence — evidence which is beneficial to my client and contrary to its own case.

Secondly, when evidence is given orally to the Commission in hearings, there is no duty on the Commission to provide a transcript to a company to the affected person, and this arises even if the evidence given orally is not confidential, which is a fairly remarkable proposition in itself.

If the oral evidence is confidential, then it redacts it in its entirety and does not provide a summary.

Further, if the hearing is between the complainants and the Commission staff — and there were many such hearings — then not only is that meeting kept secret, it is not publicised on the website as a hearing and no transcript of the evidence or any summary is ever made available. I will come to that later. We discovered that the Commission held, so far as we know, but possibly more, only held three meetings with DFDS: one with the panel, two with the staff. Transcripts were taken of all three. In relation to the panel itself what may have been a 60 or 70 or 80 or 90 or 100 page transcript bore down to 42 paragraphs. We were provided with a summary of non-confidential material and then the confidential material was completely redacted.

In relation to the staff, we only discovered that there were two meetings with DFDS from Professor Smith's witness statement.

Thirdly, the Commission says they have no duty to use confidentiality rings and it is clear from the present case the Commission took the decision not to use a ring for reasons which appear to be wholly unrelated to the facts of this case. They appear to be generic reasons. It was not a decision on the evidence of the case.

Fourthly, when critical parts of the Commission's reasoning turns upon statistical analysis and where the defending company submits data and analysis, the Commission has no duty to provide its own dataset to the defending company, nor the assumptions upon which its own dataset is based, even in circumstances where it vigorously disagrees with the defending company, who remain in ignorance of the statistical and data analysis of the Commission as proceedings go on.

The net effect of the Commission's position is that the procedure it adopts offers substantially less protection than any equivalent company would get from the European Union, which operates in similarly tight time-constrained circumstances, and there is an important point about the comparison between Europe and London which is that in Europe the European Commission is subject to a statutory prohibition on the disclosure of confidential information, whereas the new Competition Commission is not, yet the European Commission in Brussels has overcome this and provided a greater level of protection even in relation to confidential information.

THE CHAIRMAN: Mr. Green, you have articulated very forcefully a series of no-duties on the part of the Competition Commission, but is it not really more accurate to say that the CC's position is that it is under — take confidentiality rings — under no duty always to implement a confidentiality ring in each and every case. As I understand, the Competition Commission case is that they have a duty to act fairly —

MR. GREEN: Yes, that is their —

THE CHAIRMAN: And to carry out a fair process.

MR. GREEN: Indeed.

THE CHAIRMAN: And that may or may not involve the imposition of a confidentiality ring.

MR. GREEN: Yes.

THE CHAIRMAN: Is it your case that the Competition Commission should always put in a place a confidentiality ring, and that other forms of protection of confidential information are simply unacceptable and unfair?

MR. GREEN: We put our case in two broad ways, and I am going to develop the law in a moment, amongst other things confidentiality rings. But we say that first the net effect of the common law is that in circumstances where you have an adjudicatory process subject to

natural justice principles, which includes the Competition Commission as case law has established, that the position now in law is that closed procedures are absolutely prohibited without derogation or exception being permitted, only statute can permitted closed procedures, a closed procedure being one where evidence is withheld from the party being investigated, which is relevant to the adjudicatory process. Alternatively, if you conclude that the law is not as bright line strict as that, that the recent case law demonstrates that there is a very powerful and fundamental objection to closed procedures, and that guidance given by case law would in almost every case require some form of confidentiality ring. It then becomes slightly more case-specific, so one can never — as it was said in the Court of Appeal in *Al Rawi* — you can never say never, something which the Supreme Court did not agree with, but I put it in two ways, and we do not say actually at the end of the day you will come to any different conclusion whether you apply a very strict approach an absolutist approach, or whether you apply a more flexible approach which depends on the facts of the case.

THE CHAIRMAN: I do not want to take you out of order, and I am sure you will come to this, but I think we would be assisted on how your contentions as to the common law position integrate with the statutory provisions of the Enterprise Act.

MR. GREEN: Yes, certainly. Yes.

THE CHAIRMAN: Because one could say that there is a statutory framework which gives the Competition Commission a series of options as to how to deal with confidential material.

MR. GREEN: Certainly. I can give you the answer to that in a nutshell, because the specific question of statutory authority was addressed in some detail in the Supreme Court authorities, in particular in *Bank Mellat (No.1)* which was a regulatory decision to prevent a bank from trading was subject to a judicial review, and the Supreme Court, in particular in Lord Neuberger's judgment, said that (applying *Al Rawi*) that the common law is absolutest. Statute can derogate from common law. Statute permits a closed procedure in two circumstances:

* First when by its express language it requires the use of a closed procedure, for example the counter-terrorist legislation is very specific as to what the closed procedure will be who can have evidence, who cannot, but that is not the case with the Enterprise Act; and

* Secondly whether the requirement to use a closed procedure arises by necessary implication, but the court rejected the suggestion that if there is simply a power and it is reasonable to use the power, that that permits the use of a closed procedure. I will come back, give you the references and so on to that later. But, we have a fairly detailed analysis

of when a statute can and cannot justify a closed procedure and it is, in our submission, quite clear that at its very highest the Enterprise Act fits into the third category. It confers a power on the Commission to disclose confidential information in pursuit of its duties, but it does not require it to operate a closed procedure, either expressly or by necessary implication. At the highest it could be said to be reasonable that in some circumstances it might, but whether it is good law or bad, the Supreme Court has established that that is not enough. I will come back to that later.

The Commission adopts these very strict and extreme, we say, propositions notwithstanding that it is the prosecutor, the judge and the executioner in its own case. It runs the case against the company, it decides it, and then it decides upon the remedy. It is also the Commission's case that it is entitled to adopt what is, we submit, a sub-optimal or a sub-lawful procedure even though a great deal of the evidence that it relies upon and treats as adverse and inculpatory (in other words, harmful to the defending company's case), emanates from third parties with a vested interest in an adverse outcome.

Ultimately, therefore, the issues for you may be said to be three in number. (1) What is the correct test in law? (2) Has the Commission's procedure fallen below the standards set out in the law? (3) What consequences flow from a finding that the Commission has violated the required standard?

What I would propose to do now, and I can probably do this before lunch in about ten minutes or so, is provide you with a summary of the essential legal propositions. I am going to ask you to turn up one or two paragraphs in judgments because I think they repay careful consideration. After that, I am going to turn to the specific factual issues arising from the facts.

A summary of law, which is the second section of my submissions. The first proposition is this, which is that the guiding principle is natural justice, and it is a common law principle of a most fundamental nature. I think it is worth having the Supreme Court's observations on this principle to hand. Could I ask you to look at bundle 3B, first of all, the Supreme Court in *Al Rawi and others v. Security Services and others* at tab 55, the judgment of the majority given by Lord Dyson, in particular paras. 12 and 13. The context to paras. 12 and 13 is an observation in paras. 10 and 11 about the features of a common law trial, and it is undoubtedly true because the court here was dealing with court procedure. We are dealing here with judicial determinations, but as I will show you, the law extends the same principles to the Competition Commission and I will show you the case law on that shortly.

The first observation made at para. 11 is about the court's distaste of hearings which are *in*

camera, in private. But they are not as bad as what they describe closed procedures because at least the defendant, or the party affected, is there, albeit that the public is excluded.

THE CHAIRMAN: Do they define was a closed material procedure is in the judgment?

MR. GREEN: You can deduce what it is. It is a procedure whereby the person affected is denied access to the submissions and the evidence, both documentary and oral, which is relevant to the case. So a closed procedure may be partial or total. You may have something which is minimally closed but predominantly open. It simply defines the circumstances. It is any derogation from something which is open, if you like. Of course, it is therefore a question of degree.

THE CHAIRMAN: Paragraph 2, I see, has been --

MR. GREEN: The issue for the Supreme Court, if you look at Lord Dyson's judgment in para. 1 does define a closed procedure. A preliminary issue was ordered before the Supreme Court even though the case has settled, because of the public importance of the point. The preliminary issue was defined in the following terms:

> "Could it be lawful and proper for a court to order that a 'closed material procedure' (defined below) be adopted in a civil claim for damages? Definition of 'closed material procedure'. A closed 'closed material procedure' means a procedure in which (a) a party is permitted (i) to comply with his obligations for disclosure of documents, and (ii) rely on pleadings and/or written evidence and/or oral evidence without disclosing such material to other parties if and to the extent that disclosure to them would be contrary to the public interest (such withheld material being known as 'closed material'), and (b) disclosure of such closed material is made to special advocates and, where appropriate, the court; and (c) the court must ensure that such closed material is not disclosed to any other parties or to any other person, save where it is satisfied that such disclosure would not be contrary to the public interest. For the purposes of this definition, disclosure is contrary to the public interest if it is made contrary to the interests of national security, the international relations of the United Kingdom, the detection and prevention of crime, or in any other circumstances where disclosure is likely to harm the public interest."

That was the definition put to the Supreme Court and as formulated by Silber J at first instance. But the court's observations range more widely. Paragraph 12 of the judgment for the majority says as follows: "Secondly, trials are conducted on the basis of the principle of natural justice. There are a number of strands to this." So the important point is that

when you analyse what the duties of the parties are in a trial you start with the principles of natural justice. Natural justice is broader than just trials. Here they are applying the principle to trials.

> "There are a number of strands to this. A party has a right to know the case against him and the evidence on which it is based. He is entitled to have the opportunity to respond to any such evidence and to any submissions made by the other side. The other side may not advance contentions or adduce evidence of which he is kept in ignorance. [They cite the Privy Council in *Kanda*] ...
>
> > 'If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him; and then he must be given a fair opportunity to correct or contradict them.'
>
> "(13) Another aspect of the principle of natural justice is that the parties should be given an opportunity to call their own witnesses and to cross-examine the opposing witnesses. As was said by the High Court of Australia in *Lee* ... 'Confrontation and the opportunity for cross-examination is of central significance to the common law adversarial system of trial'."

I pause there because it is not disputed by us that natural justice may apply in a different way to inquisitorial procedure. It is not suggested that there has to be a right of cross-examination. What it does mean as a bare minimum is that the oral evidence that is relied upon by the Commission must be put to the affected person, the adversely affected person, for their submission, commentary, representation, clarification or correction. That is not a right to cross-examination, but it is respecting the fundamental right that you see the evidence against you so you can make your representations about it.

You will see from the paragraphs I have just cited that what is described as essential feature of natural justice is the right to be informed of the case. The case involves submissions, evidence and the end result is the other side may not advance contentions of which he is kept in ignorance.

If you flick in the bundle to tab 60 you will see the Supreme Court in *Bank Mellat Number 1*, an interestingly analogous case to the present. It was a regulatory decision followed by a judicial review. At paras. 3 and 4 Lord Neuberger (again for the majority) says about closed and open systems:

"(3) Even more fundamental to any justice system in a modern, democratic society is the principle of natural justice, whose most important aspect is that every party has a right to know the full case against him, and the right to test and challenge that case fully."

Again, I emphasise that the starting point for the analysis is the existence of a right to natural justice and they then apply it to the facts before them.

"A closed hearing is therefore even more offensive to fundamental principle than a private hearing. At least a private hearing cannot be said, of itself, to give rise to inequality or even unfairness as between the parties. But that cannot be said of an arrangement where the court can look at evidence or hear arguments on behalf of one party without the other party ('the excluded party') knowing, or being able to test, the contents of that evidence and those arguments …"

again, evidence and arguments -

"… ('the closed material') or even being able to see all the reasons why the court reached its conclusions.

(4) In *Al Rawi v. Security Services*, Lord Dyson made it clear that, although 'the open justice principles may be abrogated if justice cannot otherwise be achieved', the common law would in no circumstances permit a closed material procedure. As he went on to say … having explained that, in this connection, there was no difference between civil and criminal proceedings:

'[T]he right to be confronted by one's accusers is such a fundamental element of the common law right to a fair trial that the court cannot abrogate it in the exercise of its inherent power. Only Parliament can do that.'"

THE CHAIRMAN: He is talking about courts here.

MR. GREEN: He is talking about context. The entire context of both cases is courts. The starting point of the analysis if the principle of justice, and I will come to, does the principle of natural justice apply to the Competition Commission in due course. I accept, of course, that the Competition Commission is inquisitorial, not adversarial, and you would need to modify the application of the principle to take account of that.

THE CHAIRMAN: Indeed, I suspect that is where the rub lies. I do not think there will be any dispute that the principles of natural justice in the Competition Commission, it is a question of what the implications of that rather broad statement are.

MR. GREEN: In their skeleton argument the Commission says that the principle of natural justice, as laid down here, applies only to what is described as "common law adversarial trials". That is wrong in any event, because this was a judicial review which did not have cross-examination in it. The starting point is how natural justice applies, and that is why the fundamental principles are what really matter. You will see that the principles are not dependent on whether it is a court. It is much more dependent on whether there is an adjudicatory process.

That is why I put my case in two ways, which is an interesting one for the Tribunal. Is this an absolute rule? Do you start with natural justice and say "This is what it means", or do you say, "When it comes to the Competition Commission we have to flex it a bit", and even though the Supreme Court says it is absolute in relation to courts it is not absolute when it comes to the Commission, and that is a key issue. If that is your conclusion, we say it does not matter because the tenor or the tone of the Supreme Court's analysis of natural justice is that it is so fundamental that even if a closed procedure can be allowed in some circumstances, there is then a co-relative duty on the adjudicatory body to take absolutely maximal steps to minimise the prejudice.

Again, foreshadowing, because we are coming up to the luncheon break, what I am going to say, the Supreme Court held that where a closed procedure was allowed then the bottom line and Lord Neuberger gives guidance on this, is that the adversely affected party is protected in two ways: first, the lawyers are given full and unlimited access to the documents, but the client is not. The client is simply given summaries, non-confidential summaries, and the logic is that the summaries are sufficient to enable the client to instruct the lawyers. That was Lord Neuberger's compromise in a closed procedure circumstance. So my learned friend has got to go beyond that. He has got to convince you, first of all, that the principle is not absolute; secondly, that even if it is not absolute, Lord Neuberger's guidance can be flexed massively downwards so that there is no duty to give exculpatory evidence and no duty to give rings, no duty to give summaries of evidence, oral evidence against. It is a very, very long way below even Lord Neuberger's alternative ----

THE CHAIRMAN: Starting with your absolute standard, your starting position as it applies to courts, do you go as far as to say as it applies to each and every type of administrative decision maker?

MR. GREEN: No.

THE CHAIRMAN: It is purely an administrative decision maker?

MR. GREEN: That is really an important question. Let me divide off something which it may not apply to. If you have simply got what one might loosely describe as internal administrative decisions, a local authority decision on health or education, something like that, taken by a civil servant, then there is a duty of fairness, but it may not be the natural justice principle, which applies in the present case to the Competition Commission, so said the House of Lords 30 plus years ago.

If you think about the Competition Commission, it has draconian powers. It is an independent statutory body designed to take a decision in the public interest and adjudicate in an inquisitorial way between conflicting and competing parties. It says in its documentation that it accepts that it has a duty to act fairly and transparently. It, therefore, is, in a highly analogous way, *quasi* judicial, albeit that plainly it is administrative. It is statutorily independent with enormous powers. That is why the House of Lords in *Hoffmann La Roche* held that natural justice applied to it.

You will have to decide whether the absolute rule applying to a court would apply to an equivalent body. If you decide it does not, we suggest that you will come to a conclusion that it is near as to it, that a high standard is required, even if it is not absolute. It may vary according to circumstances. It is very interesting - that is a terrible submission for an advocate to make to a court, but it is an interesting an important issue, but I will persuade you by reference to the evidence that, howsoever you decide that, you will confidently conclude that they fell below the requisite standard.

I do not know if that is an appropriate moment to break. I am happy to go on if it is convenient for you.

THE CHAIRMAN: No, Mr. Green, we will resume at two o'clock. Thank you very much.

(Adjourned for a short time)

THE CHAIRMAN: Yes, Mr. Green?

MR. GREEN: Before lunch I was providing you with a summary of the broad legal principles which apply and I am going to come on to the facts and the evidence and apply them more specifically in due course, but I would like to complete the exercise first of all.

I have explained that the guiding principle, the starting point, the *locus* if you like, is the principle of natural justice and I have explained that an essential – as it is put – feature of natural justice is the right to be informed of the case against you, that this involves the broad case or contentions, the submissions, the evidence, documentary and oral, and that the fundamental principle is, as Lord Dyson put it, in *Al Rawi* paras. 12 and 13, the other side may not advance contentions of which he is kept in ignorance. One of the reasons why the

full evidence must be put is because, as Lord Kerr put it (para. 93) evidence that has been insulated from challenge may positively mislead and that is equally applicable to any adjudicatory body.

The next point is that the duty to disclose is a feature of an adversarial trial but, as Lord Kerr put it (para. 89):

> "It is not merely a feature of the adversarial system of trials. It is an elementary and essential pre-requisite of fairness."

- again emphasising the point that one starts with the general and moves through to the particular.

The duty to disclose evidence applies to inculpatory and exculpatory evidence. You simply note at this point *Al Rawi* para. 42, because when I deal with the exculpatory evidence I will come back to that paragraph. It applies to the "full" evidence, that is *Bank Mellat (No.1)* para. 3 and generally *Al Rawi* paras. 23 to 50, per Lord Dyson para. 12: "The other side may not advance contentions or adduce evidence of which he is kept in ignorance."

The next point is that the common law is absolute, there are no exceptions. It is a duty upon those subject to the rules of natural justice that cannot be derogated from. It cannot be waived, and it cannot be consented to, see in particular Lord Dyson, paras. 46 to 48 and, in particular, para.47 where, if you like, the underlying divide between the common law and Statute is laid down. Paragraph 47 starts with the following words:

> "Closed material procedures and the use of special advocates continue to be controversial. In my view it is not for the courts to extend such a controversial procedure beyond the boundaries which Parliament has chosen to draw for its use thus far."

If one stands back from that proposition it tells you really where the boundary lies, that common law rejects closed procedures, but Parliament may condone them. If one says, as the Commission no doubt will, that it does not matter, although the Supreme Court has held there are no exceptions, it is for Parliament, that is inconsistent, because they will be saying it is an absolute principle, as defined by the Supreme Court, it is for Parliament, but we create another sub-exception for *quasi*-Judicial bodies, or administrative bodies operating an adjudicatory process. You then have an absolute common law which applies to the courts because the philosophy is it is for Parliament to condone a closed procedure, and the objection is the closed procedure, but nonetheless the Competition Commission can apply one regardless. That is a very, very stark and strong submission to make, and it is inconsistent with the Supreme Court. Although, as I have emphasised, I accept that the

cases that we are dealing with concern courts, the question is: what is the underlying principle.

Let me turn to the position of the Competition Commission. The House of Lords confirmed 38 years ago in *Hoffmann La Roche* tab 8, p.368 per Lord Diplock, that the Monopolies and Mergers Commission was subject to the principles of natural justice, if you like to turn it up it may be worth it just to see the paragraph which has been cited and relied upon subsequently. This is a statement of the application of natural justice some 38 years ago and, of course, you will appreciate the law on natural justice has moved on. But if you go to page 368 of the Judgment, just below "C" it says:

> "The commission makes its own investigation into facts. It does not adjudicate upon a lis between contending parties. The adversary procedure followed in a court of law is not appropriate to its investigations. It has a wide discretion as to how they should be conducted. Nevertheless, I would accept that it is the duty of the commissioners to observe the rules of natural justice in the course of their investigation – which means no more than that they must act fairly by giving to the person whose activities are being investigated a reasonable opportunity to put forward facts and arguments in justification of his conduct of these activities before they reach a conclusion which may affect him adversely."

This is a statement of some 38 years vintage, and the actual content of what is required in a competition law case has evolved enormously both at the European level and domestic level since then. But there can be no doubt that (a) the principle of natural justice applies. (b) it applies that notwithstanding that the process is inquisitorial not adversarial, and (c) it applies notwithstanding that there is no lis in the traditional litigated sense of a legal right which is being disputed between the parties.

THE CHAIRMAN: But it certainly is not an absent standard, per Lord Diplock. What it means is it is a context sensitive standard which depends upon the ----

MR. GREEN: From that brief statement one might deduce that which is why I say that one has to look at how the principle has evolved, and it is why I started by saying you either say the starting point is natural justice and you have now a highly controversial Judgment of the Supreme Court and what is meant by 'natural justice', or you say it is contextual but this provides very, very strong guidance as to how the principle is to be applied. Either way on one score it leaves no discretion for the decision maker in an adjudicatory process unless Parliament allows it. On the other score it allows a margin of appreciation that is going to be very limited.

THE CHAIRMAN: Do you not have a chain in your argument to complete, which is to apply what the Supreme Court has said to administrative Tribunals, because I take what you say about natural justice in the context of courts, and it may be that it extends to *quasi*-judicial procedures, but you need to make good if your proposition is that *Bank Mellat* applies with full force to administrative bodies, you need to make good that it is not simply a flexible standard as Lord Diplock is suggesting here in *Hoffmann La Roche*.

MR. GREEN: I do not think he said it is necessarily a flexible standard. What he is saying is they must observe the rules of natural justice. They must act fairly.

THE CHAIRMAN: Which means no more than they must act fairly by giving the person whose activities are being investigated reasonable opportunity to ----

MR. GREEN: Yes, well in the last 38 years we have had a lot of law of what is mean by 'acting fairly' in a competition case, this is not quite in the depths of the realms of history but it is not far off in competition law terms. The question is now if natural justice has been defined as controversially as it has by the Supreme Court, there is no doubt it is controversial, if that is what they mean by 'natural justice' this means you must apply natural justice as understood by the supreme court to the Competition Commission. That is the bridge. It depends whether you take the view that the Supreme Court is construing the principle of natural justice or a subset of it as applied to courts. It would be, in my submission, inconsistent to take the latter view because the principle that you have to draw a divide between what Parliament allows and what the common law allows really is a principle of universal application. It would be very odd to simply say that applies to courts but not to another body with equally draconian powers of an adjudicatory nature. That is the nub of the issue. It is an important point of law.

THE CHAIRMAN: It does seem to me that it may be that *Bank Mellat* applies in this situation. Suppose on this appeal this Tribunal had operated a closed procedure, I can see there that there would be a strong force in suggesting that the Supreme Court said that that could not work, because that is precisely analogous to the *Bank Mellat* case where you have an administrative decision which is then appealed. But it does not follow from that necessarily that what the Supreme Court defined as natural justice as applicable to courts applies to the Competition Commission.

MR. GREEN: I understand the point and, in a sense, it simply comes to this – and obviously you will need to look in great depth at these two Judgments, *Bank Mellat* and *Al Rawi*, and you will have to decide whether they are either laying down a bright line, which just simply flows ineluctably from natural justice, or whether it is limited to courts. If it is limited to

courts you then have to say: "What does it tell me about the principle of natural justice as it applies to the Competition Commission?" to which the answer will be that it actually provides very clear guidance that the circumstances in which closed procedures can be tolerated will be few and far between, and that the Commission will have to go a very long way to provide a higher degree of protection than is provided for at present, even if it is not an absolute. So, that is the crux of the issue, and I accept that.

Let me explain why, in broad terms summarise because I have made the points already, why the Competition Commission is a body which par excellence should be subject to a very vigorous application of the natural justice rule, and I have made the point so I will be very brief:

1 It is an independent body created by statute to adjudicate and take decisions. We are not concerned with purely internal administrative decisions.

2 The decision can be draconian. It interferes with property rights. In *Bank Mellat*, the Supreme Court described the regulatory decision against the bank as draconian because it prohibited the company from engaging in banking services in the United Kingdom. The Commission's decision is equally draconian, it prohibits a company from trading from the United Kingdom in a particular business.

3 The fact that it is inquisitorial as opposed to adversarial is a distinction without a difference. That was made plain by the House of Lords in *Hoffman-La Roche*. It has also been made plain in *Al Rawi* which says, in Lord Kerr's judgment and in Lord Dyson's judgment, which make it clear that it is not just confined to cases where there is cross-examination.

4 The CC adjudicates between people with stronger conflicting interests and in substance there is an adversarial element to its procedure, albeit that it is inquisitorial.

Now, those features of the CC's procedure indicate that even if you do not apply a bright line to it, it is nonetheless a very strong duty as would naturally apply.

Can I deal now with the question of the Enterprise Act and how a statutory exception would apply. What I am going to do is to do it by analogy with the way in which the Supreme Court in *Al Rawi* address the question of when statute, I beg your pardon, in *Bank Mellat*, when statute permitted or rather required a closed procedure.

In both *Al Rawi* and in *Bank Mellat*, the Supreme Court stated that:

"The common law prohibition can only be ousted by either an express or an implied statutory requirement",

and the first question for you is whether the Enterprise Act fits that description. We have addressed this in our skeleton at 37, and in our notice of appeal at 24-34, to which the answer is a very clear one: does the Enterprise Act require, which is the key word, the use of a closed procedure — to which the answer is "clearly not". And it is no, it is silent as to the procedure to be adopted. Insofar as it addresses confidential information, it is clear the Commission has a power to disclose confidential information notwithstanding its confidential nature. So it does not require in the same way that the legislation in the *Bank Mellat* case did. It is thus the opposite of a statute which requires the use of a closed procedure.

Now, in this regard I think it is useful to compare and contrast the piece of legislation which was in issue in *Bank Mellat*. We have brought copies of the legislation. We provided a potted summary of it in our annexe to the skeleton, and it is set out in those two Supreme Court judgments. But it is quite helpful just to see the legislation in issue because it gives you an idea of what the Supreme Court thought was, if you like, condoning or sanctioning legislation. This comes from the Counter Terrorism Act 2008 and the position we have summarised in Annexe E to our skeleton which summarises the statutory provisions, and I can take it quite briefly, if you turn to p.37 of the skeleton, you will see that under section 66 of the counter-terrorist legislation it sets out a series of provisions which apply to financial restrictions, proceedings and appeals. It requires rules of court to have regard to the need to secure that directions made under schedule 7 are properly reviewed, and that information is not disclosed when contrary to the public interest.

THE CHAIRMAN: Sorry, where are we?

MR. GREEN: It is p.37 of the skeleton, the Annexe.

THE CHAIRMAN: Of your skeleton.

MR. GREEN: Annexe E. Section 66 concerns specific rules of court for restriction proceedings.

It says:

> "The rules of court may make provision for factors such as mode of proof, and about evidence, about legal representation".

It states:

> "The rules may enable the proceedings to take place without full particulars of the direction being given to a party. The court to conduct proceedings in the absence of any person including a party can deal with the functions of a special advocate and deal with the power to give an excluded party a summary of evidence".

Then section 67 concerns rules about disclosure in cases covered by section 66(1). Under section 67(2):

> "The rules of court must ensure the Treasury gives disclosure on normal principles, that they disclose material which they rely upon which adversely affects their case, that is exculpatory evidence, supports the case of another party".

Section 67(3) states:

> "The rules of court must ensure the Treasury can apply not to disclose material but they can do so under a closed material procedure with a special advocate present, and the court can accede to the application in those defined circumstances".

So, what one actually has is a statutory procedure in detailed form which is then supplemented by the CPR and there is in fact a special code in the CPR for closed procedures.

I do not think I need to go into it in any more detail because the point is an obvious one. For there to be a requirement that a court operate a closed procedure, it needs to be addressed in detail. Lord Dyson, para.48 *Al Rawi*:

> "Where Parliament allows closed procedures, it will do so after full consultation, consideration of the sensitivities and use carefully defined situations".

And Lord Neuberger, *Bank Mellat (No.1)* para.36:

> "Any submission that a statute sanctions a closed procedure must be closely and critically scrutinised".

So the Enterprise Act does not require it. The second question is, would it do so by necessary implication? Again, the answer clearly has to be "no". The reason that the Supreme Court concluded that it was necessarily to be inferred that they were required to use a closed procedure in *Bank Mellat* was that the case had proceeded from administrative decision to High Court; in the High Court there had been a closed procedure; to the Court of Appeal where there had been a closed procedure; and to the Supreme Court. Now, the Supreme Court is constituted under the Constitutional Reform Act of 2005 and does not address the question of closed procedures. The question was, in the light of the counter-terrorist legislation, and the fact that the High Court and Court of Appeal could use a closed procedure, was it necessarily to be inferred that they were required to do so to conduct an appeal? And they were split on it. Again, it was controversial, but the majority concluded that they were required to adopt a closed procedure by necessary implication from the statutory framework. But they were quite clear to exclude circumstances where it was simply reasonable to do so. And we have given all the references in our note to where the

distinction is drawn between a necessary required implication and a reasonably required implication.

Let me put it in the alternative. Let us assume that the Enterprise Act sanctioned a closed procedure. In those circumstances the Supreme Court was quite clear that there was a duty on a court, and here *a fortiori* on an administrative body, the Commission, to take the maximum steps it possibly could to mitigate the adverse position for the defending company. The bare minimum which the Supreme Court was prepared to sanction was a confidentiality ring plus summaries.

We can pick this up in *Bank Mellat Number 1* tab 60 in the judgment of Lord Neuberger from para.67 onwards. Again, I entirely accept that, because it is the context of the facts of the case, we are dealing with a court. But he is now dealing with the situation where a closed procedure is permitted, so the principles would be directly analogous to the more flexible circumstance which might arise if you found it was not a bright line rule. I want to pick up just a couple of principles and guidance that he gives. I am going to start a paras. 72 and 73, which is fifth and sixth principles.

> "(72) Fifthly, if the court decides that a closed material procedure appears to be necessary, the parties should try and agree a way of avoiding, or minimising the extent of, a closed hearing. This would also involve the legal representatives to the parties to any such appeal advising their clients accordingly, and, if a closed hearing is needed, doing their best to agree a gist of any relevant closed document (including any closed judgment below).
>
> "(73) Sixthly, if there is a closed hearing, the lawyers representing the party who is relying on the closed material, as well as that party itself, should ensure that, well in advance of the hearing of the appeal, (i) the excluded party is given as much information as possible about any closed documents (including any closed judgment) relied on, and (ii) the special advocates are given as full information as possible as to the nature of the passages relied on in such closed documents and the arguments which will be advanced in relation thereto.
>
> "(74) Finally, appellate courts should be robust about acceding to applications to go into closed session or even to look at closed material" and then they go on to make various points.

So the minimum procedure or safeguard where closed material procedures are allowed is a confidentiality ring with the lawyers and gist to the client. That is where it is allowed, in other words where it is an exception to the common law prohibition.

I want to turn now to potentially the facts of the case. Can I, before I do that, just again to make sure the references are on the transcript, there are two other points I should just have noted. In *Al Rawi* the Supreme Court held is the process proves impossible to operate and the withholding party refuses to disclose them, then the evidence cannot be relied upon. So you put up or shut up. That is *Al Rawi* 34-41 you cannot keep the other side in ignorance. Finally, it is no defence to say that it is acceptable to operate a closed procedure because there is an appeal or a judicial review where it will all be sorted out. Lord Sumption (*Bank Mellat Number 2* para.37 tab 61. We cite also the European Court in *Solvay* which I will come to; tab 70 para.51.

So to the evidence. First of all, exculpatory evidence. We have set out in Annex A (which I do not ask you to turn to now) all of the myriad occasions upon which those acting for GET during the administrative procedure asked the Commission for documentary and other evidence. They asked for exculpatory evidence. In our submission, disclosure means disclosure of all of the evidence. There are two broad categories of relevant evidence: inculpatory and exculpatory. Inculpatory is that which is adverse to the defending company and exculpatory is in favour of the defending company. Exculpatory evidence is critical. By its nature it is not usually referred to in the disputed decision for the obvious reason that it is exculpatory and the disputed decision is generally inculpatory evidence leading to an adverse result. It is not uncommon that you do not get much of a hint of the exculpatory evidence from the disputed decision. The CC's position (skeleton 122) is that it does not in law have to disclose exculpatory evidence; it is under no duty to do so. So even if it has it in its possession it will not hand it over.

The law as it is developing is as follows. First of all, a general expression of profound concern by Lord Dyson in *Al Rawi* at para.42 of his judgment, which is bundle 3.2414 (580 internal numbering). You can take from this a statement of general profound concern about the implications of not disclosing exculpatory evidence. He says:

> "Secondly, it is obviously true that party A who is in possession of the closed material will know whether there is material on which it may wish to rely and will therefore be in a position to decide whether to ask the court to order a closed procedure in relation to that material. But it is difficult to see how opposing party B will know whether his case will be assisted by, or even depend to a significant extent on, the closed material held by A without knowing what the material is and what it contains. If a special advocate is appointed, he might be able to assess the importance of some of the documents, but the scope for doing so without being

able to take instructions from B is bound to be limited. It follows that, if the power to order a closed material procedure turns on such considerations, it is likely to operate in favour of A and to the disadvantage of B. [And then this] In my view, this is an approach which is inherently unfair. It is certainly not necessary in the interests of justice."

That is equally applicable in the court involving landlord and tenant, or in the Chancery Division in an IP case as it is in the Competition Commission. How can you defend yourself if you are not told what the evidence is that might be of assistance to you? It is, as he put it, inherently unfair.

THE CHAIRMAN: Mr. Green, to what extent do you say it is relevant, or he makes it irrelevant, that there are third parties, as it were, before the Competition Commission? It is quite a hard word to define because of course, as you rightly accepted, there is no list before the CC. What one has is a range of parties who may or may not have relevant information which the Competition Commission can compel them to produce. They are quite possibly not interested at all in the merger; they simply have relevant information to give.

MR. GREEN: Highly relevant. Highly relevant, not least because it highlights the need for exculpatory evidence. It is precisely the same in Europe where it is always the case in a merger case, in exactly the way it is in front of the Commission, that you may get third party complainants who may be more or less interested in the procedure. In Europe precisely the opposite regime applies. The European Commission accepts that it must provide exculpatory information and that in a clash between confidentiality the duty to disclose the exculpatory information prevails.

That is a directly analogous practical situation when you get the same triangulated relationships between decision maker and parties who are affected in different ways. It is very different really in a court you may get four or five parties, some of whom are more or less interested in the litigation but they are interested; they have a sufficient interest to be there. The fact that evidence may be adverse to one party is irrelevant. If you think about it in ordinary litigation terms, it is axiomatic that when you give disclosure, you give disclosure in a civil case of the evidence which is adverse to you. It is equally axiomatic in a criminal case, you always give adverse information.

THE CHAIRMAN: That is my point. The point is that in litigation you have got clearly defined parties. You have got the claimant who chooses to bring the claim against a named defendant. It may be there are other defendants and third parties, but they are all bound up in the litigation. One has different rules which apply to obligations to disclose material

where you have a third party to the litigation, which are much less extensive than the disclosure obligations on parties. What I am asking is, in your contentions regarding the CC's obligations to make available exculpatory information, whether the Commission ought to have regard to the fact that it has obtained this information using, let us say, compulsory powers from a person who did not approach it really would rather not have been approached by it in the course of the investigation.

MR. GREEN: The reason exculpatory evidence is even more important, because nobody wants to be before the regulator, it is public interest litigation where the defending company certainly does not want to be there, and its commercial operations, its property rights, may be decimated by the adverse result, the adverse decision. Nobody wants to be there. This is why the European analogy is very important. It is absolutely accepted in Europe that there is a compelling duty on the decision maker to provide the exculpatory information, and if it is not provided it is treated as almost, *per se*, a violation of rights of defence and a breach of the principle of fairness.

You just have to think about it. Let us assume the Commission, and it seems to us from just reading documents that we have seen that there is a good deal of exculpatory evidence on the Commission's file. In Europe we would get a list, everything on the Commission file, and then you can inspect it. If it is confidential there is now a complicated procedure which you go through to thrash it out and for summaries to be provided of equivalent evidential value. If push comes to shove at the end of the day, the Commission provides the confidential information.

In the CC they do not have to look for it, they do not have to provide it, they do not give you a list of it, you do not know whether it exists or not. If the European principle is even roughly equivalent, that it is part of the rights of defence, that it is part of the rule of fairness, and it applies in Europe, why would it not apply here? There is no difference in terms of practicalities or importance of the procedure or the rules which are being applied.

We cited in para.31 of our skeleton the Court of Appeal in *Dunraven* where Lord Justice Sedley, with whom Lord Justice Morritt agreed, and I can really take this from pp.8 and 9 of our skeleton, made it clear that the duty of disclosure covered exculpatory and inculpatory evidence, and he was referring to, as an example, the fact that the decision maker - it was an educational case - had inconsistent evidence on its file. It was a ground which led to the decision being quashed that they failed to disclose what he describes as:

> "… at least two different and arguably inconsistent forms, fairness will ordinarily require enough disclosure to reveal the inconsistency."

That is a common law application of the same principle. In my submission, the European analogy is far more potent because it is about mergers, and it apes the procedure of the Competition Commission.

What I would like to do now is take you through the European analogy.

MR. CURRIE: Mr. Green, before you do that, I wonder if you could help me. You moved from looking at *Al Rawi* and talking about closed procedures to *Dunraven*. What I am not clear about is why you say that the *Al Rawi* case, for example, which deals with closed procedures, or *Bank Mellat*, why these principles are applying to the case in point. In that connection, how widely do you define a "closed procedure"? In *Al Rawi*, as we saw earlier this morning, there is a very clear definition in paras.1, 2, 3 and 4, as to what the court and what the parties were talking about when they used the expression "closed procedure" or "closed material". At certain points in your submissions, it seemed to me that you were suggesting that a closed procedure existed where anything at all was held back. Is that your position?

MR. GREEN: A closed procedure is the opposite of an open procedure. An open procedure is that where the defending company, the adversely affected party, has access to all the information. I absolutely accept that there are degrees of closed procedure which may have an impact upon the outcome. A closed procedure is one where relevant information is withheld from one of the parties. With *Dunraven* it was simply two inconsistent documents. I will show you a case called *Eisai v. NICE* where it was failure to disclose an executable form of a model, just one piece of information.

MR. CURRIE: So on your analysis the expression "closed procedure" would apply if the Competition Commission decided, in balancing whether to redact or not to redact an item of confidential information, to redact. That would convert the proceedings into a closed procedure?

MR. GREEN: You are right to identify the question of what is meant by a "closed procedure". We are in a relatively novel area of law, but let me give an example from the European equivalent. Where in Brussels confidential information is decided by the Commission to be very important and should be protected, the duty is to provide an equivalent document which was of equivalent evidential value. So something may be exactly the same and the confidentiality is preserved, but it is accepted that it is not relevant, that bit which is confidential, so there is no prejudice. If there is prejudice then disclosure trumps confidentiality.

There may, therefore, be circumstances in which it is quite plain that disclosing something is an utter irrelevance, and the fact that the defending party does not get it does not mean to say it is a closed procedure. You may have all sorts of utterly irrelevant material on the file. Something which falls within the realms of relevance, whether it is exculpatory or inculpatory, if that is withheld there is an element of 'closedness' about the procedure.

MR. CURRIE: If we come back to the domestic situation, you have told us that the result of *Al Rawi* and *Bank Mellat* is that the common law prevails unless the statute requires disclosure. Are you saying that in a situation where the Competition Commission has to balance, on the one hand, confidentiality claimed by a third party providing information, and on the other hand natural justice to the party under investigation, in this case GET, the Competition Commission has to look at the Enterprise Act and see if the Enterprise Act requires it to keep the information confidential before it can do that? Is that how far you are taking the argument?

MR. GREEN: No, I put my case two ways. You either take the principle of natural justice to the logical conclusion laid down by the Supreme Court or you say, "We accept there is modicum of flexibility" and the Supreme Court guides you as to how you should apply natural justice principles to the Competition Commission. If it is the latter then there may be a degree of flexibility in terms of balancing. In our submission, if push comes to shove and rights of defence clash with confidentiality, the law says, and indeed this Tribunal has confirmed, rights of defence prevail. This Tribunal said so in the *Umbro* case against the Office of Fair Trading.

When two irreconcilable principles clash head to head rights of defence prevail.

MR. CURRIE: Thank you.

MR. GREEN: Can I take you to the position in Europe, the *Solvay* judgment. There are two *Solvay* judgments, I am going to take you to the most recent. This is tab 70, which is in 3E. Then I am going to take you to the earlier case of a couple of decades ago upon which this principle was first established, and I will do that by summary only. The relevant paragraphs here, first of all, for your note are 48 to 52, 60, 61, 66 and 67. You will see that the principle laid down in this case has been applied in merger cases by the Commission. If you start at para. 48:

> "Observance of the rights of defence in a proceeding before the Commission, the aim of which is to impose a fine on an undertaking for infringement of the competition laws requires that the undertaking under investigation must have been afforded the opportunity to make known its views on the truth and relevance of the

facts alleged and the documents used by the Commission to support its claim that there has been an infringement. Those rights are referred to in Article 41(2)(a) of the Charter of Fundamental Rights of the European Union …"

Can I pause there? That Charter applies to civil proceedings, criminal proceedings, regulatory proceedings of all types and it applies, and we will hand up in due course an except from **De Smith**, it applies in any case where a Member State is required to justify a restriction on services or establishment – a principle which has been laid down by the court for over 20 years.

"49. As the General Court rightly pointed out in para. 224 of the Judgment under appeal the right of access to the file means that the Commission must provide the undertaking concerned with the opportunity to examine all the documents in the investigation that might be relevant for its defence. These documents comprise both inclupatory and exculpatory evidence with the exception of business secrets of the other undertaking, internal documents of the Commission and other confidential information."

Again, pausing there, the exception of business secrets arises because under the Treaty itself there is a direct express prohibition on disclosing business secrets. That is important in this case because the Commission and the court have overcome that, recognising that, in fact, you cannot refuse to provide confidential exculpatory and inculpatory evidence, notwithstanding the Treaty prohibition and is therefore a very strong case for us.

"50. Infringement of the right of access to the Commission file during the procedure prior to the adoption of a decision can, in principle, cause the decision to be annulled if the right of defence of the undertaking concerned had been infringed. In such a case the infringement is not remedied by the mere fact that access was made possible during the judicial proceedings as the examination undertaken by the General Court is limited to review of the pleas in law put forward. It has neither the object nor the effect of replacing a full investigation of the case in the context of an administrative procedure. Moreover, belated disclosure of documents in the file does not return the undertaking, which has brought the action against the Commission decision to the situation in which it would have been if it had been able to rely on the documents in presenting its written and oral observations. Where access to the file …"

- could you please note the conditional use of the word "where" -

"… and particularly to exculpatory documents is granted at the stage of the judicial proceedings, the undertaking concerned has to show not that if it had had access to the non-disclosed documents the Commission decision would have been different in context, but only that the documents could have been useful for its defence."

So the conditional word "where" indicates that the burden of proof arises on, in the present context, my client, only if the Competition Commission has disclosed all the exculpatory documents, which it has not done. So if you are applying the European context, there are no circumstances where the court could even apply a materiality test in a case such as this. It is a pre-condition of the court reviewing materiality that there has been full disclosure by the Commission, and that, of course, does not arise here. 60 to 61 – "The consequences of that loss for the rights of the defence …" - this is where the Commission had mislaid some documents, just a few files out of a vast number:

"The consequences of that loss for the rights of the defence are all the more grave, given that according to the Commission the missing sub-files probably contained the replies to the requests for information under Regulation 17. It cannot therefore be excluded that Solvay could have found in the sub-files evidence in substantiation of the arguments that it had put forward in the administrative proceedings."

So the standard, the threshold for Solvay is extremely low. It cannot be excluded that the files may contain evidence which substantiate its arguments, a very low threshold. 61:

"It should be pointed out that the matter at issue in the present case is not that of a few missing documents, the contents of which could have been reconstructed from other sources, but of whole sub-files which have been lost and which, if the supposition of the Commission, referred to in para. 60 above were correct, could have contained essential documents relating to the procedure before the Commission which might have been relevant to defence."

The standard is therefore, here, whether it might have been relevant to Solvay's defence.

Then paras. 66 and 67:

"66. As was recalled in *Solvay v Commission* and *ICI v Commission*, the General Court found, with regard to Decision 91/297 which is linked to the contested decision and which was the subject of the same statement of objections, that the administrative proceeding was vitiated by an infringement of the rights of the defence, since the Commission had not given the undertaking concerned sufficient

> access to the documents and, in particular, to those likely to be useful to its defence."

So the words "in particular" are important, because that is a particular infringement of the rights of the defence if they are not provided.

> "Accordingly, the General Court annulled those decisions, stating, in particular, that access to the file in competition cases is one of the procedural safeguards intended to protect the rights of the defence and that it was necessary to draw up a sufficiently detailed list of the documents in the file to enable the undertaking concerned to assess whether it was appropriate to request access to particular documents which might be useful for its defence.

Paragraph 67:

> "Despite those circumstances and notwithstanding the case-law of the Court confirming the importance of access to the file …"

- again, I rely on the next words:

> "… and, more specifically, to exculpatory documents, the Commission adopted a decision which was the same as the decision which had been annulled owing to the lack of proper authentification, without opening a new proceeding in which it would have heard Solvay after granting it access to the file."

There cannot be a clearer statement of the importance generally of exculpatory information to rights of defence based upon the fundamental charter, Article 41 which, in particular, is concerned with good administration. And, of course, it is important that this is in the context of a regime where disclosure of confidential material is absolutely prohibited. Yet, as I will show you, the Commission get round that.

Given time, what I am going to do in relation to *Solvay (No.1)* is give you the references and a summary of what it held. It was a case cited by this court on this occasion. *Solvay (No.1)* is in tab 63, it is the old *Solvay* case and the relevant points of principle are as follows: first, the Commission must divulge exculpatory documents. It is not for the Commission what is and what is not exculpatory – paras. 82 and 101. Then, important, documents may be subject to alternative explanations. The decision maker might not appreciate how or why a document is exculpatory – 82. Can you please highlight that because I am going to come back to the point when I deal with the Commission's treatment of oral evidence? A very important point, as any litigator knows, we all interpret documents differently, and if the decision maker interprets it, as it were, on your behalf, they may miss the point that you think is critical. Thirdly, it is not acceptable for the

Commission to possess information and evidence which the affected person does not have – 83. 84 – the good faith or bad faith of the decision maker is irrelevant, the test is objective. 85 – the confidentiality of a document is not a reason not to disclose, granting file access and identifying confidential material will enable the affected company to find a solution. 92 – 95, a failure to provide exculpatory material cannot be cured by judicial review. 98 – 103, a failure will arise the moment it is established that an exculpatory document might – hence the word "may", which I emphasise in para. 100 – exist.

In relation to confidential evidence, law and practice has evolved since then. Let me turn now to the current European Procedure. I can start by just giving you a reference to point 1. Point 1 is that access to file is recognised in legislation as being required for rights of defence in a merger case, and this is for your note Regulation 802 of 2004 at tab.4, Article 17. There is a statutory recognition that access to file is required for rights of defence. This is not criminal law, this is not fining law, this is purely and simply regulatory law.

Secondly, there is the European's Commission's guidance and notice on access to file, and I would ask you to turn this up, please. This is tab.88, bundle 2D.

THE CHAIRMAN: Do you mean 3F? Tab 88, is it?

MR. GREEN: Yes, tab.88.

THE CHAIRMAN: This is 3F.

MR. GREEN: Yes. Thank you. I want to just pick it up at — and if anyone wants me to read anything else, I am very happy, but given the time I am going to be quite economical. Bundle p.3.4341 and it is under the heading "Criteria for the acceptance of requests for confidential treatment", and I want to highlight paragraphs 24-25, and could you please read this in the light of the fact that under Article 339 of the Treaty, the TFEU, there is a prohibition on disclosure. It is one of the differentiating factors. But, given that the Commission can do it, so can the Competition Commission.

So, paragraph 24:

> "In proceedings under Article 81 and 82 of the Treaty, the qualification of a piece of information as confidential is not a bar to its disclosure. If such information is necessary to prove an alleged infringement inculpatory document or could be necessary to exonerate a party, exculpatory document. In this case the need to safeguard the rights of defence of the parties through the provision of the widest possible access to the Commission file may outweigh the concern to protect confidential information of other parties. It is for the Commission to assess whether

those circumstances apply to any specific situation calls for an assessment of all relevant elements".

And then it identifies a number of them. Then, below that:

"Similar considerations apply to proceedings under the merger regulation when the disclosure of information is considered necessary by the Commission for the purpose of the procedure.

25 Where the Commission intends to disclose information, the person or undertaking in question shall be granted the possibility to provide a non-confidential version of the document where that information is contained with the same evidential value as the original document".

So, confidentiality is not a bar to disclosure. Access to file is relevant to rights of defence. This covers inculpatory and exculpatory documents. It is the same whether you are dealing with mergers or ordinary competition law, but the Commission will, in the case of a confidential document, seek to provide a way of protecting confidentiality by disclosing, if you like, a gist, a summary, quote/unquote, with the same evidential value as the original documents.

MR. CURRIE: Mr. Green, just picking up on our earlier discussions, on the face of it this provision contains expressions like "necessary", "may outweigh", which imply an exercise of judgment. If this were a domestic provision, would it be consistent with the way you would invite us to read *Al Rawi* and *Bank Mellat*?

MR. GREEN: I doubt it would, to be frank.

MR. CURRIE: Right.

MR. GREEN: The Commission, they have not addressed this issue from precisely the same optic. One of the interesting things which the Supreme Court grappled with is whether the law it was applying was stricter than the Convention, the Human Rights Convention, and they concluded that it was, but they concluded that did not bar them from providing greater protection than was available in Europe.

MR. CURRIE: Thank you.

MR. GREEN: Can I ask you, just, really, for note. *Umbro v Office of Fair Trading*, tab.37, the Tribunal has held that confidentiality plays second fiddle to rights of defence.

What I would like to do now is to give you — and I accept you will see that is a fairly brief statement. It does not carry with it the depth of analysis that we have been engaging in in this case. But, can I give you just two examples of exculpatory evidence that we have identified in the decision. If you could just take the decision I would like to just ask you to

compare 8.88 and 8.90. And 8.88 is almost totally redacted, so I am not going to read it, but you will see it starts with the words "DFDS told us that …", which implies.

THE CHAIRMAN: One moment, Mr. Green, we do not have it yet.

MR. GREEN: It is p.83 of the Decision, para.8.88.

THE CHAIRMAN: We are with you now.

MR. GREEN: Yes. And I will try and be careful here. So, we start with "DFDS told us that", there is no source relied upon, no document referred to, but you will see the DFDS is in the context of the subject matter of that paragraph painting a picture of gloom.

THE CHAIRMAN: And the provisional decision was in the same form, was it?

MR. GREEN: Yes. Anything which is redacted here was redacted in the provisional findings.

THE CHAIRMAN: Yes.

MR. GREEN: But, you will then see that in 8.90 which I can read, it says:

> "We received mixed evidence on the level of profitability of this route. The financial data provided by DFDS suggests that the returns it provides are below the company's target and insufficient in the long run. These numbers are, however, not consistent with those included in DFDS's bid for Sea France, which show an EBIT margin of 10 per cent. The projections included in this document show that the profitability of the route is expected to climb significantly in Year 4 to an EBIT Margin of 5-6 per cent. The company anticipated that increased fuel prices and the sulphur regulations would negatively impact profitability. DFDS told us that at the time of making the bid it was overly-optimistic on the future development of the Dover/Dunkirk route. However, DFDS gave us no indication that it was considering exiting the Dover/Dunkirk route over the short to medium".

Now, this was in relation to Dover/Dunkirk not Dover/Calais, but on the one hand you had evidence from, it turns out, 2011-2012 as against evidence that they put into the Commission in 2013, and the Commission found in relation to exit of this route that there was inconsistency. We did not see the evidence in 8.88. We do not know what it is based upon. Even now we have only seen this for the purpose of this hearing. It is an illustration of a line of inquiry that we might have followed because here there is evidence of the details and particulars of serious inconsistency between documents of an earlier vintage which is very relevant to our ground two, and documents submitted to the Commission during the course of the administrative proceedings. And there was an inconsistency, and this was specifically in relation to exit from a route. I accept it is Dover/Dunkirk, not Dover/Calais, but you have got mixed evidence. If you compare that with another confidential piece of

information which you will find in the decision at the end in annexe H para.7 which is on the second page of annexe H, you will see that the Commission redacted — and frankly we have no idea why this was seriously to be treated as confidential, but they redacted information which would —

THE CHAIRMAN: Appendix H, is this?

MR. GREEN: It is appendix H, yes, para.7 p.2 of H. It is numbered "H2".

THE CHAIRMAN: Yes.

MR. GREEN: You will see there is there redacted the observations of an operator about the amount of time that might be — I do not think what I am going to say is confidential — the issue there was about a break-even point and the amount of time taken to break even.

THE CHAIRMAN: We can read it.

MR. GREEN: You can read it.

THE CHAIRMAN: We will tread carefully.

MR. GREEN: But the relevance of it is really, should be obvious. And it is significant in the context of our ground two. But, let us take a hypothetical operator who enters the market around the end of 2011 beginning of 2012. They will internally have at least some sort of assessment of the break-even point. Let us say for the sake of argument it is five years. I am just picking a figure out of the air. Let us assume that that was something that DFDS, again, this is entirely hypothetical, pure speculation, that DFDS itself predicted, break even in five years. When you see evidence which is telling you how long the break-even point is, it is very relevant in measuring the credibility of evidence given in 2013 about the point at which they would leave the market. If you assume, for the sake of argument, that a company says, "Unless I make profits this year, within six months I'm off", but a year earlier they had said, "I can hang on for five years". You would seriously doubt the submission made to you that they are off. This is a piece of information about break even points generated by somebody who may or may not be objective (we do not know who it was) which would have been very relevant had we known about it in using that to develop an argument to the Commission about the credibility of evidence submitted the DFDS in the course of the administrative investigation. Those are purely and simply two stray illustrations.

Let me pull together my submissions on exculpatory evidence. We first of all have a point of principle to address. Did the CC err in finding as a point of principle that it should never give exculpatory information and does not have to look for it? If they are wrong in that, even if you conclude that they have to address their mind to the issue, then they have plainly

erred. They failed to provide access to the file at all. We know from other competition proceedings, whether in front of Europe or the Office of Fair Trading, that that is commonplace; there is no practical obstacle to doing it.

There is a duty under European law, and we say it must follow from the very strong observations of Lord Dyson in para.42 that there is a strong duty under English law, domestic law, to grant exculpatory information. We submit it stands to reason that if you hold exculpatory information you must hand it over. If you do not look for it, if you do not have a process for looking for it, then you will almost inevitably infringe the rights of defence.

We submit also that because the European Court got it dead right in *Solvay*, unless they can actually show you what was on their file now, you are not in a position to say that it was not material. If it was material and there is a materiality test. Case law suggests it is a very low test. That is all I wish to say about exculpatory information.

I want to now turn to the question of summaries and gist.

THE CHAIRMAN: It might be helpful if I raise one point with you now, Mr. Green.

MR. GREEN: Yes.

THE CHAIRMAN: Perhaps I should have raised it earlier. The starting point for the Commission's consideration of whether or not to disclose material is s.244 Enterprise Act?

MR. GREEN: Yes.

THE CHAIRMAN: That lists a series of factors which the authority must take into account for disclosing material.

MR. GREEN: Yes.

THE CHAIRMAN: Essentially, it should not disclose material which is confidential and is not in the public interest. There is no mention in s.244 of the natural justice provisions which you are talking about, but that is because this seems to be focusing on the considerations that the authority ought to have when choosing not to disclose rather than when choosing to disclose. So the default appears to be disclosure unless there are considerations apart. So there is nothing in this provision that you would say is in any way inconsistent with the Supreme Court authorities that you have been citing today?

MR. GREEN: Yes.

THE CHAIRMAN: Moving on, then, to the guidance of the Commission itself which we find at tab 85 bundle 3F, looking at para. 9.14 on p.17 internal numbering, what we have at 9.14 is the options that the Commission has by way of protecting information. 9.15 then sets out the preferred courses that the Commission has. These were cited in the CC's skeleton and

pleadings. But is it your case, then, that these provisions need to be recast, fundamentally rewritten, in the light of the Supreme Court cases you have been citing to us?

MR. GREEN: That depends. If I am right that it is absolutist, then the answer is yes. If you take the view that it is contextual (if I can use that broad term) then one simply says that whenever they exercise powers they must have in mind natural justice and fairness considerations and that will guide them. All we have here is a series of considerations that they may take into account. It does not tell you what weight you give to any particular consideration, or what general principles you apply. That was very clearly set out. Indeed, it is axiomatic that in the exercise of any statutory power the decision maker must act fairly. This is hardly controversial as a proposition.

So if I am right on proposition one that it is absolute, I accept it creates a problem. It is no greater problem when the government is facing *Al Rawi* in relation to terrorist cases. They have had to introduce legislation through Parliament in order to create a power for closed procedures. They gave intense, anxious and highly controversial scrutiny to the question whether they should completely throw up into the air their special advocates scheme, their disclosure rules, and they have come to the conclusion that the way to deal with it is through legislation. But the fact that it is difficult or controversial is neither here nor there.

THE CHAIRMAN: No, I take that. But let us take your primary case, then, that it is an absolute provision.

MR. GREEN: I put them both equally. My case does not turn on them.

THE CHAIRMAN: All right, let us call it number one and then we will go on to number two. Can we start with number one, the absolute rule. In order to be compliant with the absolute rule is it your case that actually one has got to strike out everything except provision (g) disclosure subject to restrictions, i.e. confidentiality rings, and everything else is non-compliant with *Bank Mellat*, or do you say that there are other provisions in 9.14 that could comply with *Bank Mellat*?

MR. GREEN: It may well be that residual decision under which they can say that something is so wholly irrelevant that it is not part of the case; it does not fall within the penumbra of relevance.

THE CHAIRMAN: Let us assume it is relevant, and let us look at, say, subparagraph (e) anonymising the information. Is that a situation which the CC could, looking at the evidence, decide that in fact fairness would be satisfied by deleting the name of the party and substituting an initial?

MR. GREEN: Yes, if the identity of the party was relevant. Let us assume that the identity of the party was highly relevant to the defence. Denying that person relevant information which they could have used in their defence by saying: we know a great deal about that complainant or that witness and in assessing the credibility of their evidence you must take account of X, Y or Z, then it would be unfair to deny the defending company subject to a draconian remedy that information. One would have thought it is inherently unfair ,to use Lord Dyson's expression, it is inherently unfair. You are going to take the decision without me knowing a crucial piece of information which I might have been able to use to get myself off the hook. That is inherently unfair.

THE CHAIRMAN: In determining how important the identity in the hypothetical example, the identity provided in the information or the main document is, is that something which the CC needs to consider as a matter of discretion itself in order to satisfy the requirement or fairness, or -

MR. GREEN: The European Court in *Solvay* stated and made the obvious point, reflected in observations in *Al Rawi* and *Bank Mellat*, is that it is not for the decision maker to decide what is relevant because they may not understand the significance of a letter or a document to the defence. That is another axiomatic proposition for litigators. We form a view about it: the document or the letter, and we may form a different view from the other side. We see in a letter, or a document, or a business plan something which we immediately recognise as exculpatory and which the decision maker simply did not have the faintest idea about. So that is why the European Court said it is for the defendant to see a list of the documents. This is why the procedure in Europe is you get access to the file, and with the Office of Fair Trading here. You get the list, you can inspect the documents. If there is a confidentiality issue you can have a tussle with the regulator about it. If they can provide something of equivalent evidential value, then by definition there is no prejudice to the rights of the defence. If push comes to shove and there is a clash between prejudice and confidentiality, then prejudice trumps. Indeed, the Court of Appeal said that in *Eisai v NICE*.

I do not for a moment shrink from the fact that if we are right, then this may need to be reviewed. But that is not really a relevant consideration.

THE CHAIRMAN: No, I accept that. What I am trying to gauge is how far it is an inevitable consequence of your first position that these provisions need to be rewritten.

MR. GREEN: They will need to be revised.

THE CHAIRMAN: It seems to me that you are saying that a number of these provisions are non-compliant with what you say the common law provision is regarding natural justice.

MR. GREEN: But there is nothing surprising about that. This is the Chairman's guidance; it can be easily revised. This is not a statute; this is simply the Chairman's guidance and from time to time these things have to be updated in just the same way that the Home Office had to grapple with the unwelcome implications of the majority judgments in the Supreme Court.

THE CHAIRMAN: And again, sticking to your primary position, you say there is no room for any discretion in the Competition Commission to decide, in the light of the information which it alone sees, which is the best way between these options (a) to (h) of treating that information?

MR. GREEN: Rather than giving a snap view of that, I need to go through these with more care and work through the implications of them because it is not something I addressed my mind to in detail. It may be that it is something that one would want to come back to. You will see that the Commission fully recognises that, for example, use of data rings is perfectly justifiable; use of confidentiality rings is perfectly justifiable. Disclosure to one or more parties without publication, there may be nothing wrong with that. Lord Sumption said in *Bank Mellat Number 2* that the target company is entitled to more rights than other parties. So it is not necessarily symmetrical as between all affected parties.

It may be that anonymising the information is perfectly proper in relation to someone who is not the target of the procedure. I would not want to express a definitive view on this. It may be that you would simply have to apply it according to the way in which the natural justice rules/the fairness rules apply to the power in question. They may be different as between a complainant and a target, a defending company.

THE CHAIRMAN: That, in a way, is what is troubling me because I anticipate what Mr. Harris may say is that these are all perfectly sensible ways of dealing with the problem of confidential information and that it is for the CC to hold the ring and to determine what is the most appropriate way of dealing with the matter, and that it is for you to show not that the confidentiality rings are the only course but to show that in this particular case the course adopted by the CC of not adopting a confidentiality ring was one that was so unreasonable that a properly informed authority should not have taken it.

MR. GREEN: If he was not going to be saying it, he will be now. But there is one flaw in that analysis.

THE CHAIRMAN: That is why I am putting it to you.

MR. GREEN: It is not a rationality test. Whether or not fundamental rights have been infringed is a question of law for the tribunal; it is not a rationality test. The law makes that clear.

Indeed, that was one of the things that split the majority from the minority in *Bank Mellat*. The minority said there was a wide margin of discretion to be attributed to the decision maker; the majority said this is a fundamental procedural right and it really does not matter how strong the case is otherwise; it is for the court to decide whether there is a violation. This is not a *Wednesbury* point; it is not a rationality point.

If you conclude this is not what I call a bright line, then obviously we are into the territory of discretion and they have to apply the rules flexibly but bearing in mind the very strong guidance given in case law and in European case law. Then these factors would perhaps all stand but it would be a question for applying them properly according to principle in each and every case.

THE CHAIRMAN: Of course, in this case the CC is saying: we have these options and we selected, of these options, a certain course which did not include a confidentiality ring. How, on judicial review, do we test whether that was the right course or not? Do we look at your annex and simply look at the excisions and say you should have seen them?

MR. GREEN: With respect, this again is why *Solvay* is important. What have the CC come to the Tribunal to do? They have come to defend their position by assertion. They have not put in front of you the documents which they have withheld, and said, "Listen, it is completely irrelevant, you can be absolutely confident this would not have changed the case one jot, there is nothing relevant which GET could have made submissions about, absolutely nothing". That is why European Court in *Solvay* said, "If the Commission come to court and put that in front of you then we will assess it". It follows, *a fortiori*, that if they do not do that, if they are not prepared to put in front of you the material, they cannot turn round and say, "We operate a closed procedure, we submit and assert that it is all fine and dandy, but you are not in a position to review it and come to a decision because you cannot see the material". It is up to them to come and put their cards face down on the table.

As Advocate General Kokott observed, and we have recorded in our skeleton argument, we cannot be asked to prove the impossible. We do not know what is on their file which we have not seen. We can therefore make some sort of submissions about it. We cannot even, in the terms of the confidentiality ring, speak to our client or our advisers to make submissions to you. Our hands are tied behind our back, and that is why you simply have to say, even if there is a materiality test, "Is there likely to be something? Is it beyond question that there is something which GET could have used, because that is the test in English judicial review, in Europe and in the Supreme Court, it is a low threshold. Otherwise, any advocate is completely up the "swanee", you have got no way of proving

your case, because they operate a closed procedure and they are not prepared to try and persuade that it is all irrelevant.

MR. CURRIE: Mr. Green, can I just ask you this: am I right in understanding that if we take what you call your absolute rule, if that is the law, is it your position that as soon as the Competition Commission looked at its own guidelines on this, it was committing an error of law?

MR. GREEN: No. I think, in answer to the Chairman's earlier question, I said it may very well depend upon who it is, whether it is the target or whether it is the third party, whether we are talking about the use of a data room, it may be perfectly justified disclosure subject to restrictions, it may be perfectly proper, there may be irrelevant material, there may be a wide range of considerations which apply, even in relation to the absolute rule, just looking at this here. We are not suggesting that at all, which is why really to give a black and white answer about this list is far too crude an approach, it really is a much more nuanced position. A number of these would, in some circumstances, appear to be consistent with the common law.

MR. CURRIE: I may have misunderstood what you said to me earlier, but I had understood that your absolute rule meant that a closed procedure came into being as soon as something was held back.

MR. GREEN: I also accepted that you have to modify the procedure for an inquisitorial body - say, for example, cross-examination. No one is suggesting that you have to have cross-examination, but the bottom line of a closed procedure is that the defending company is not bereft of information that everybody else has and which is adverse to him. The way in which you give that information to the defending company may be myriad. There may be many different ways of doing it. In an inquisitorial procedure it does not have to be tested through cross-examination, the equivalent is that information is disclosed, perhaps into a ring, and then a right of representation is given on that. There are different ways of achieving natural justice, even under an absolutist rule. You cannot just say an adversarial court is the same as an inquisitorial tribunal.

THE CHAIRMAN: Thank you, Mr. Green. I am sorry, that rather took up time.

MR. GREEN: Not at all. I absolutely understand, this is challenging, and it is not intended to be anything else. It is a serious point and we are all trying to work out the dividing line between various principles following some highly, highly controversial Supreme Court judgments.

Can I just give you a reference to the question, this is not a reasonableness test. It is the Court of Appeal in *Guinness*, bundle 3A, tab 15, pp.183 and 184.

Summaries: the present case, what was the position on the facts in the present case? The position evidentially was as follows: the Commission did not provide summaries of the evidence it withheld of an inculpatory nature - see our schedule at annex G. As you will have seen, its case is not that it has to give what it calls "detail". It does not have to go through the evidence item by item and justify it, it simply has to say, "You broadly understood". It did not provide summaries of the evidence of an inculpatory nature that it withheld.

Secondly, no exculpatory evidence was provided as a matter of principle, and it obviously follows that no summaries were provided of exculpatory evidence.

Thirdly, where the Commission did provide summaries, this was of evidence which was not confidential - for example, the transcripts of oral hearings with the Panel. So in relation to material which was not confidential, they provided summaries, but in relation to the confidential material coming out of oral hearings with the Panel no summaries were provided, and I will return to this in a moment.

The next point is that over and above the oral hearings with the Panel the Commission took oral evidence in other hearings between the staff and DFDS. We learn this from Professor Smith's statement at para.48, that with DFDS there were two meetings in January and March of this year. It is correct to say the meetings were secret, we did not know about them, and unlike in relation to meetings with the Panel no information about them was put on the website. Transcripts were taken, transcripts were not provided to GET, summaries were not provided to GET, but they were treated as evidence, which is also apparent from Professor Smith's statement. Two examples we have given, and I will give you the references and go to them in a moment, are bundle 2D, tabs 70 and 71.

There are therefore two components of the Commission's case that I wish to concentrate on, one, there is the explanation given by Professor Smith in para.43 of his statement as to why he did not consider it relevant to give additional evidence to GET in relation to the exit of DFDS; and secondly, there is the question of summaries of oral evidence.

Can I start with Professor Smith's witness statement at para.43, which you will find in bundle 1. I believe it is behind the defence in tab 4. Just so you can see the context, it is in a section of the statement which starts on p.8 under the heading "The CC's treatment of GET's request for disclosure". He then says at para.43:

> "With regard to evidence about whether and when DFDS would exit the Dover-Calais route, DFDS reiterated its concerns about the potential disclosure of the timing of its possible exit in response to the CC's put-back of the remedies working paper. I consider that it is clear from GET's comments at its second remedies hearing on 10 May 2013 and after receipt of the CC's remedies working paper dated 29 April 2013 that GET had understood the CC's reasoning with regard to whether DFDS would exit the Dover to Calais route."

He then cites from the hearing and he says as follows:

> "In that hearing, Mr. Lougher [the senior partner at Pinsent Masons for GET] told the Group that '… *we note in the remedies working paper that actually your thinking has since moved on from there and that it's now considered ore, not less, likely that DFDS will exit and that is more likely to happen sooner rather than later*'."

So if you look at that paragraph he says he considers that it was clear from GET's and Mr. Lougher's observation, that they understood, and I quote the CC's reasoning with regard to whether DFDS would exit the Dover/Calais route, and he therefore quotes what he treats as an acceptance and proof that there was proper understanding. I wonder if I could ask you to turn to the quotation itself which conveniently can be found attached to our skeleton, annex A, which is a Summary of GET's objections to the CC's procedure during the course of the administrative procedure, and if you could go to p.13, which is towards the end of Annex A, you will find the quote that Professor Smith is referring to, and it is an extract from a hearing held on 10th May. If you turn over the page to p.14 you will see that the following is found – it is not confidential so I am going to read it:

> "So at the hearing we had last, for example – I think it was fed to us, the view that actually we were focussing too much on DFDS's exit. Well, we note in the remedies working paper that actually your thinking has since moved on from there and that it's now considered more, not less, likely that DFDS will exit and that it is more likely to happen sooner rather than later."

That is the part that Professor Smith relies upon. He does not cite the next bit in which Mr. Lougher goes on to say:

> "However, we are unable to respond to that, or to actually understand the comment, because the relevant section from the remedies working paper is fully redacted, and we think that element of redaction is actually hindering our ability to understand and to be able to respond to the arguments that are being put to us."

I do not understand how Professor Smith can say it is clear to him on that basis that we, in fact, understood what their case was on DFDS's exit, both as to whether and as to timing. In fact, precisely the opposite is actually being said. If one actually assumes that Professor Smith's rationale here is an accurate reflection of his thinking it reveals a pretty obvious error. Mr. Lougher was merely noting what was in the provisional remedies working paper and he explicitly explains that we did not understand. If you look at the very first line of that statement, he says:

> "So, at the hearing we had last – I think it was fed to us, the view that actually we were focussing too much on DFDS exit."

The reason that those words are important was because at an earlier hearing the Commission had said: "This case does not necessarily depend upon whether DFDS will exit. The internalisation effect might arise even if they stay in the market", and if you want we can provide the references and transcripts for that, but it is not necessary.

So, Mr. Lougher was saying: "Unless I am rather confused, you seem to have changed your analysis". Now it was not about DFDS exit and now it is. Now, it is not only about them but you are now saying "we have noted", you think it is sooner rather than later. We cannot see why you have said this because you have redacted the entirety of the section and provision of the remedies' document, we do not understand yet Professor Smith thinks it is sufficiently important to include in his witness statement that it was clear to him that we did understand. I am not certain there is very much more to say about that but it does, in our submission, reflect a serious error.

I am not quite certain what time you want to take a break, any time that is convenient for you is convenient for me.

THE CHAIRMAN: We will go on for another quarter of an hour and rise at quarter to four.

MR. GREEN: The CC in their skeleton say that this is not to be construed as Professor Smith treating this as a waiver on our part. If that is the case then fine, I accept that, there is no suggestion that we waived or consented to anything, but can I just give you some references to the Supreme Court in *Al Rawi* about consent. Lord Neuberger in the Court of Appeal, they left open the question of whether you could consent to a violation of natural justice, reference tab 55, para. 71, p.555. Lord Mance in the Supreme Court considered that it might be possible to consent to a violation of natural justice, p.599, para. 120. The majority rejected the notion that you could consent to a violation of natural justice. Lord Dyson, 46 to 48, they were very strongly of the view that you should not create any exceptions because it creates a slippery slope, it is the thin end of the wedge – if you create one exception you

have to create another, and they thought the principle was too important to permit of any exceptions, even if it was reasonable so to do.

Let me turn to summaries of oral evidence. There are two categories, there are hearings with the Panel and there are hearings with the staff. As to hearings with the Panel, the Commission did what we think is extremely odd – I can demonstrate this by asking you to go to an example. The DFDS summary of the oral hearing, bundle 2A, at tab 8. This is the summary of the hearing held with DFDS on 4th January. There are some 46 paragraphs. It is five pages. If it is anything similar to our own hearings this is probably the summary of a transcript which may be anything from 60 to 100 pages long – we, of course, do not know that, it is our educated guess. There are 15 redactions of which seven include whole paragraphs. So for the non-confidential material, which you can see here, which was put on the website, we have a staff member's abbreviated summary. But for the confidential material there is simply a complete redaction, which we would respectfully suggest is topsy turvey. If it is not confidential you provide the transcript without summarising it so that we can form our own view of relevance and whether it is exculpatory and so on. If it is confidential you redact the transcript, that is, practically, an easy thing to do – we do it all the time in litigation, and in regulatory proceedings. It violates the principle of natural justice - there is no reason to summarise it. There is no public interest in summarising something which is not confidential. The evidence has been substantially degraded, it might be inaccurate, it might be incomplete. The civil servant who had responsibility for the summary might have failed to grasp the point. He might not have picked up that there was something exculpatory in it.

A summary is not evidence, it is not the evidence, it is a pale shadow of the evidence, and that is why in the Supreme Court it was treated as trite, that you have an ability to see the evidence and cross-examine on it. In an inquisitorial process you see the non-confidential evidence and you make representations about it.

Meetings with staff – first, you can pick up Professor Smith at para. 48 who refers to the fact that there were two separate hearings with the staff, with DFDS. We have snippets of the transcripts and just to pick them up they are at bundle 2D 70 and 71.

THE CHAIRMAN: Yes, we have that.

MR. GREEN: Now, we have difficulty of course in identifying precisely what this is. It is described in Professor Smith as "Enquiry start, probes DFDS on its strategic plans for Dover/Calais, two separate staff hearings upon 4th January and 4th March".

And then you will see that the people who attended were largely the specialist financial advisers, the economists and lawyers, though Mr. Alasdair Smith attended as well, and then we can see who from DFDS attended.

Now, we have got two pages of this. The first page starts at 62 and 63. We have no idea what happened in the first 60-odd pages, or what happened thereafter. We assume that the Commission had meetings with other complainants, for example P & O, we really do not know; possibly with other customers, we do not know. But it was treated as evidence and it was treated as relevant. It is quite difficult to read, but you will see that if you are able to take one's glasses off and put it very very close to one's nose, you will then see that a lot of pretty prejudicial stuff was being thrown around at us.

THE CHAIRMAN: Can you give us a line number? Do not read it out, obviously, Mr. Green. Where are you looking at?

MR. GREEN: Well, I was looking, if you want to read something, the first blue page from line 14 to the bottom.

THE CHAIRMAN: Page 11. Which page are you on in the internal numbering?

MR. GREEN: It says 62 at the bottom.

THE CHAIRMAN: Right, and which line?

MR. GREEN: If you just start halfway down.

THE CHAIRMAN: Right, line 10.

MR. GREEN: About, yes, really from then on, you will see that it is just simply oral submissions of a prejudicial nature, not apparently supported by documents, but there is an intriguing bit at the bottom of p.63 which does refer to something which implicitly suggests they "ain't got no evidence" for it. I do not think that can remotely be said to be confidential, the last line and a tiny bit on p.63, but I am not going to read it anyway. A more startling example of the same is found in the next tab where we have just got one page, p.11. We have got a Mr. Dixon, Miss Beverley, Mr. Kahn, Mr. Muysert, Mr. Wood (Miss Kahn, I beg her pardon) Mr. Baker for the staff. You have got some DFDS people on a telephone link and you have got Hogan Lovells also on a telephone link, a transcript is taken, and if you look at, turn over, at the top of the page if you read this, there are, we submit, some fairly astonishing, when you think about it, it is fairly startling. I do not see how this can possibly be confidential, but nonetheless the tenor of this is as follows — that a prejudicial statement is made by the operator, the competitor, the CC then says, "We'll take you at your word, for we haven't got any evidence. Can you provide some evidence to back it up?". Not, "Can

you provide the evidence set which is relevant to the issue? You have made an oral assertion, can you please provide us with something to back it up?"

Now, this was at a point in time in which, in the open part of the evidence in the decision, DFDS had been saying that they had had "a very encouraging month, January".

THE CHAIRMAN: Yes.

MR. GREEN: I will come to that and give you the reference shortly, so they had had a stonking good month, and yet here they are making oral submissions which are adverse, and the Commission saying, "We'll take you at your word for it, but can you give us some evidence to back it up?" Now, there could be another 60 or 70 pages of this. This is not referred to on the website, we have not seen it, and yet it is treated as evidence. There could be inculpatory material which is being relied upon that we have no knowledge of, there could be exculpatory material or material which put this into context. We have not the faintest idea.

Conclusion on summaries. You have seen from the schedule to our skeleton which actually identifies the best part of 140 categories in the decision, the witness statement and the redacted hearings where evidence has been withdrawn from us. We have done an analysis, though not with the help of our client or economists, as to broad relevance of this material, and it is very obvious, and I will give you some examples in a moment, that we would have said a great deal about this information. It is the crown jewels, it is the nuggets amongst the dust. You get a great deal of description around it, but you are not told what the nuggets are. The sheer volume of withheld material is enormous, and on not a single occasion were we given a summary of it, with one or two very minor exceptions which I will show you simply to demonstrate how, even when they gave us summaries they were not adequate. If you go to the schedule itself, which is right at the end of our skeleton, it is annexe H. I am not going to read it. Anything which is yellow in this is confidential. The example I would like to give you is item 77 on p.92 out of 136 references to tables, sections, paragraphs. The 136 reflects hundreds and hundreds of excised and redacted pieces of information. This is one of the very, very few cases where it may be said that an attempt to give a gist was undertaken where they had given ranges. You will see the yellow marked figure, and you will see the range which was given. And the very broad ranges, 20 per cent, that is in the brochure. And when you have got a range as big as that, it is very, very difficult to know precisely what response you make to it unless you give an analysis which is, let us say, 2 per cent gradations. But this is the exception which proved the rule. There is virtually no other occasions when gist was given. And you will see, because we put a column in which

says "was a gist given", and the Commission's case is quite different. They say, "You don't need any of this. It's merely detail, just detail, you've understood in broad terms. You could intelligently respond, even though it was not given".

So they did not provide summaries of withheld inculpatory evidence, and this is all inculpatory because it is a part of the reasoning going to the adverse result, we did not get summaries of anything exculpatory. In relation to non-confidential oral evidence, we have got a summary. In relation to confidential oral evidence we have got nothing.

MR. GLYNN: Could I go back a second to the example you gave where they gave the ranges?

MR. GREEN: Yes.

MR. GLYNN: Would it not have been possible for you to make your own estimate of what the most reliable numbers were, and if they helped your case to have put them forward?

MR. GREEN: We did. We put forward an IPR and a Guppi analysis. It was rejected, as I will show you when I deal with the question of datasets. The datasets that were included, and you can see just examples here that in the tables, of which there were very many, almost completely redacted, so we put forward our case. They collect in evidence. They come to a different review which rejects our analysis. We do not see the revised dataset, we do not know what its assumptions are. And no doubt clever economists can try and reverse engineer, can speculate. But that is not good enough. You do not know whether you are hitting the target or not. You could have a go, and of course people will have a go, but this is the evidence which was rejected. It is not our case, because we had had a go at this point. Is the CC saying, "In all of these tables, these are our conclusions. We reject your analysis. Here is our conclusion, but we are not going to show you what the data is".

MR. GLYNN: Is it your view that the conclusion, the exact number that the Commission reached, was an important part —

MR. GREEN: I am not able to make a submission about that. I have not been able to speak to the economists. They may very well say that if we had been given a narrow range, we could have done something useful with it, but a range of 20 per cent is simply too large to be practical.

MR. GLYNN: Even if it has shown a material increase in prices? Was there any point in that range?

MR. GREEN: And of course in terms of the internalisation effect, it is all a question of degree how much will prices go up, how much trade will divert, how much of that trade will divert to MFL as opposed to somebody else — all of which depends upon how they all behave and how their prices will go. So, there are a huge number of imponderables about the analysis,

and unless we see their thinking and their assumptions as reflected in their data, then we are whistling in the dark.

MR. GLYNN: One final question, if I might?

MR. GREEN: Yes, of course.

MR. GLYNN: In the work that you did yourselves on these numbers, were there any results which showed anything other than an increase in prices result from that?

MR. GREEN: I am afraid I am not sufficiently familiar at the moment with the economic analysis. And my point is really a much more basic one. This was one example which I am able to isolate and show you where we were given a range. You will see from the whole of this document that we were not given any summary for all of these things, and this is just one aspect of it. This was just inculpatory evidence. We did not get anything for exculpatory and we did not get transcripts of oral evidence. It is cumulative.

Is this an appropriate moment?

THE CHAIRMAN: This would be a good moment, Mr. Green.

MR. HARRIS: Can I put one marker down. Certainly on this side of the room we are proceeding on the basis that everything from GET and SCOP will be wrapped up by five o'clock today. That is what the timetable says.

THE CHAIRMAN: Mr. Lusty has been keeping a close check on the clock.

MR. HARRIS: I am just saying that we do not seem to have got very far through Mr. Green's grounds.

THE CHAIRMAN: Rest assured we have got half an eye on the clock.

MR. HARRIS: I am grateful.

MR. GREEN: I will try and accelerate. I am trying to answer questions at the same time.

THE CHAIRMAN: Indeed, I am quite conscious there have been a number of interruptions.

MR. GREEN: I will try and accelerate, it may be that I will have to give you more references and notes.

THE CHAIRMAN: I am grateful. Four o'clock.

(Short break)

THE CHAIRMAN: Mr. Green, just to keep you posted, Mr. Lusty's speaking clock tells me that you have got 55 minutes left.

MR. GREEN: I thought it was one hour and four minutes.

THE CHAIRMAN: I see. Well, we will stick with Mr. Lusty, but I am prepared to give you more latitude and run until, at the latest, 5.15, if that helps.

I am conscious we have been interrupting a great deal, but one point that I hope you will address us on is the point that you are actually out of time for this matter. You were coming to that?

MR. GREEN: Yes. On the theme of facts, because, frankly, it does not matter what the law is, it all turns on the facts, confidentiality rings, and this is the position in relation to confidentiality rings, and this is how you conceptually analyse the problem, by a series of propositions: first, it is unlawful for a decision maker to decide what an affected person may see by way of the evidence. They are not the gatekeeper.

Two, where there exists a compelling reason to withhold evidence, then the decision maker must do the absolute maximum they can to minimise the prejudice.

Three, this is achieved through a ring, plus a right for the client to see summaries, so that they can give instructions.

Four, GET in fact asked for less than this, which was the *Bank Mellat* solution. We asked for a ring of lawyers and economists only, excluding clients altogether. So, in one sense, that was sub-natural justice. The Competition Commission refused even this. They do not say on the facts that it would have been impracticable, or that there would in relation to my instructing solicitors, or Mr. Lindsay, or the economists have been a risk of inadvertent breach. The end result was that the Competition Commission proceeded to decide the case without the documents being disclosed to the lawyers or the experts.

The CC advance a number of points, which I will deal with briefly. First of all, the risk of inadequate breach, their skeleton, 47: this is a misguided point and if it did, in fact, direct Professor Smith's mind then it is a clear and manifest error. The risk of inadvertence is precisely the same before the Competition Commission as it is in front of this Tribunal.

The sanctions indeed are stronger under the Enterprise Act than they are in this Tribunal. It is a criminal offence to fail to comply with a confidentiality requirement, and of course a ring will give contractual effect to those who are subject to it and wish to protect it. That may be a secondary sanction which would create a deterrent not to infringe.

In front of this Tribunal, there is no criminal sanction. There is no contempt jurisdiction. There is no reason why the risk of inadvertence is different here as it in front of the Competition Commission.

There is not any evidence that Pinsent Masons or Mr. Lindsay or Compass Lexicon or RBB would be careless or would not abide their professional duties. It is not so alleged.

Point two: we asked only once. In fact, you look at the number of times we asked for information and were refused it. If we only asked once, that is enough. Their duty is to

protect rights of defence. How many times do you have to ask before your rights are, in fact, respected?

Point three: if they use a ring with us, they would have to use it with companies who cannot afford lawyers. Again, if that really did figure in Professor Smith's thinking then it demonstrates a further manifest error. You cannot justify a violation of my client's rights of defence because of the practical problems of a theoretical, remote and improbable nature which relate to another person. You look at the facts in front of you, and can I just remind you that Lord Sumption in *Bank Mellat (No.2)* made clear that the rights of the targeted party are paramount and the rights of other may be less.

You will recollect that Lord Dyson said that the principle of natural justice is non-derogable.

Point four: it is all very complicated. It is not. Confidentiality rings are commonplace. We have all used them for decades. They work. One is reminded of the Treasury's argument in *Bank Mellat (No.2)*, tab 61, para.31, that it was impracticable to provide summaries or evidence. The Supreme Court rejected this upon the basis that if it could be done in front of a court it can be done at the earlier stage.

Finally, the withheld material was merely detail and therefore did not need to be put into a ring. See our skeleton, para.67, the devil is always in the detail. Here the volume of detail withheld from us was overwhelming, it was very substantial. If this governed the CC's approach to disclosure, it yet again reflected an elementary misunderstanding of how rights of defence work.

So much for confidentiality rings. A few points about individual documents. In a sense, it falls into the same category of analysis as confidentiality rings, but just by way of example, some of the things that GET never saw: we never saw analysts' reports, we never saw investors' reports or communications between DFDS and its investors, we did not see forecasts, we did not see projections, we did not see their capacity analysis, we did not see their analysis of charter availability, we did not see their case on the efficacy of bundling of different services together or profitability or pricing or strategy documents. DFDS and the Commission had all of these and they were used to reach conclusions adverse to my client.

We have included, and we put it in annex simply because there is a lot of confidential information in it, in annex G to our skeleton a snapshot of one category of information and how the Commission addressed it. I wonder if I could ask you to go to annex G. Rather than take you to the Decision I am going to do it by way of this summary. Rather than ask you to read it now or make detailed comments upon it, I am going to give you some

conclusions about it, because I know that you will have a chance to read it later. This concerned the number of documents that the CC relied upon to come to the conclusion about DFDS exit. You will see that, in fact, it turns out to be an extremely small number of documents. The Decision cites two documents, and you will see this in para.5 of the skeleton, that we have been able to identify. It refers to what we believe to be a public report issued in February 2013, it was their 2012 report, and then there is an email from November 2012. That appears to be the sum total of the documents relied upon by the CC for its conclusion that DFDS would exit the market.

We did not see any of these documents. We did not see, until we saw the Decision, that DFDS was, in fact, submitting to the CC that they would exit in the short term because the losses would, in effect, be so disastrous.

Just so that you get a feel for the importance of these documents, if you look at 8.64 in the note, and this is in the public part of the Decision, that their sales in 2013, January, were very encouraging. What we notice from the Decision is that almost immediately, and this is almost immediately after the date of the hearing with DFDS in which the Commission said, "Can you please find us some confirmatory evidence", in January they say it is all very encouraging and within days or weeks they are suddenly going from joy to gloom and doom, from very encouraging to it is catastrophic. On the basis of documents which were generated, as you will see from this analysis, right in the latter stages of the CC inquiry, we made the point that there is a risk that they were embroidered. Let me at this stage make it quite clear, no part of our submissions involves a suggestion that DFDS acted dishonestly. We have said that the CC should have been on high alert when looking at the evidence to corroborate it.

Here is a highly, highly sensitive difficult part of the Decision. A very small number of documents are referred to. They are pivotal to the Commission's Decision. If the Commission is wrong on this, the entire case collapses. These are precisely the sort of documents that the lawyers should have been able to comment upon because they may have been able, with possibly the assistance of experts, to provide a gloss. The number of documents here which are pivotal is tiny. They could easily have been provided.

The same sort of points arise in relation to data sets, and I am going to take this briefly. I do not ask you to look back to the schedule, but you will see from the schedule, that in Part 1 of the schedule there are 90 categories of document referred to. Of these a high number, in fact 28 out of the 90, concern data charts. These data charts cover key issues, they cover market share, prices for different services over time, capacity, load factors, market share

and price data in the counterfactual, the IPR analysis, the Guppi Analysis, breakdown of different traffic types and so on; they cover every aspect of the analysis. In each and every table the key data is redacted, so we could therefore not check the underlying data to see if it was accurate. We could not get the data sets and manipulate it to introduce different assumptions, which is very commonly done now in front of the European Commission, or in front of the Office of Fair Trading. We did not have the opportunity to verify it, and we were not able to challenge the underlying inferences, or to contest them. 28 out of the 90 items concerned data charts, and of the other 72 a high percentage analyse the inferences of data points. But, in all cases, the data point is redacted. That is between 20 and 25 of the other 72. 30 of the excised material is about the dynamics of the market.

I want to give you one Court of Appeal Judgment on data sets and, given time, I am going to summarise it. It is *Eisai v NICE* [2008] EWCA Civ 438, tab 46, bundle 3C. It concerned an economic cost data model – you see that from para. 2. The facts are set out at paras. 12 to 16. NICE, in relation to a pharmaceutical product, disclosed the non-executable form of this cost data. The company concerned wanted to get a manipulatable set of data so it could check the data, verify it and change the assumptions. This was refused upon the basis that it had been provided to NICE on a confidential basis.

The Court of Appeal upheld the applicant's contention that the entire decision was flawed upon the basis that providing only a non-executable set of the data it was a breach of rights of defence. I will summarise the points which arise of relevance from the court's rationale. Having the executable model and being able to manipulate it would have enabled the applicant to check reliability of the sensitivity analysis (para. 44). Whether the model has weaknesses is something that consultees, and I quote from Lord Justice Richards: "may properly have something to say."

(45) Work by consultees might: "bring to light hitherto unrecognised weaknesses in the model. The possibility cannot be excluded."

Paragraph 49: It is not enough to know the substance of the case or the assumptions. It is not enough just to be able to make an intelligent response. Paragraphs 50, coupled to 16 and 59, the Court of Appeal rejected NICE's argument that it was confidential and I will just read you what the Court of Appeal said about confidentiality as against rights of defence: Paragraph 59:

> "Accordingly, the argument concerning confidentiality is not one to which I would attach any weight, It should not in my view have a material effect on the court's decision as to whether procedural fairness requires the fully executable version to

be disclosed to consultees. I should add, though I do not think it arises, that even if disclosure were *prima facie* a breach of confidence, Mr. Giffin conceded that NICE would have a public interest defence available to it if disclosure were necessary in order to meet the req3uirements of procedural fairness."

So procedural fairness trumps confidentiality, the decision maker has a defence of public interest.

Paragraph 67 - the fact that a finding of unfairness might have wider practical ramifications is immaterial. In terms of timing it was alleged in that case that the application was out of time because the challenge should have been made at the time of the refusal to provide the data. This was roundly and robustly rejected by the Court of Appeal. Paragraph 69:

"That brings me to the question of relief. It is at this point that I must consider Mr. Giffin's submission that Eisai should be refused relief … on grounds of its delay in applying for judicial review. The argument is that the refusal to supply the fully executable version was the subject of a clear decision by NICE which was capable of being challenged at the time; yet Eisai waited some 18 months, until the end of the appraisal process before mounting its challenge. There was a failure to apply within the time limit laid down in CPR …"

- I am omitting some parts.

"… there was therefore 'undue delay'... Had a prompt challenge been made the court would have entertained it at that time, rather than allowing the appraisal process to continue for over a year in circumstances of doubt as to its lawfulness."

Paragraph 70:

"I do not accept that the court would have viewed an early challenge in that way. It is more likely that such a challenge would have been considered premature and inappropriate. At the time when NICE refused to release the fully executable version, it was uncertain what the outcome of the appraisal process would be. The Final Appraisal Determination might have proved to be acceptable to Eisai, in which case the issue concerning release of the fully executable version would have been academic. Further, and very importantly, Eisai had a right of appeal to the Appeal Panel against that determination, and the grounds on which such an appeal lay included procedural unfairness. That might well have been viewed as providing an appropriate alternative remedy, rendering a judicial review challenge inappropriate at that stage.

Paragraph 71:

"Even if there had been undue delay in applying for judicial review, it would only be a factor to be taken into account in the exercise of the court's discretion as to the grant of relief; and in the light of the matters set out below it would in my view be of no materiality."

So, effectively, if you went at the time of the decision it was premature and inappropriate for the essential reason that the process might have turned out to be in favour of Eisai.

THE CHAIRMAN: I see that, but this was a JR, and here we are talking about a case where the rules about appealing decisions are rather clearly set out in the Tribunal's Rules which require decisions to be appealed within a month in merger cases unless exceptional circumstances apply.

MR. GREEN: Which is what we did. We had a decision on our merger and we appealed it within a month.

THE CHAIRMAN: No, but I think ----

MR. GREEN: … decision on the merger to deny us a ----

THE CHAIRMAN: -- what Mr. Harris will say, and I am sure he will correct me if I am wrong is that the decision that you should have appealed was actually made when you asked for and did not get your confidentiality ring.

MR. GREEN: It is exactly the same in the NICE case. The underlying rationale is that NICE might have won and because they might have won it would have been a waste of the court's time, it would have been "therefore premature and inappropriate" said Lord Justice Richards. If it had gone at that point, regardless of the fact that there may have been an alternative route to an appeal panel, it was considered to have been premature and inappropriate to challenge a procedural decision which might have been academic, and that was the gist of the Court of Appeal's reasoning. It does not really alter in this case. The point was squarely addressed in *Sports Direct*. At tab 52, para. 55:

"In our judgment a decision will normally be covered by section 120(1) if it is something that could form a ground of challenge in the appeal from the ultimate decision if it were not addressed and, if necessary, remedied on an interlocutory basis. No one argued that Sports Direct could not rely on the plea of non-disclosure as a ground of review when challenging the CC's decision in a final report."

So if that was the Tribunal's view, we were entitled to follow the Tribunal's guidance. It is consistent with other cases ----

THE CHAIRMAN: Well, there are a couple of other cases. There is the decision of this Tribunal in *BT v Ofcom* [2011] CAT 5 paras. 183 et seq and those paragraphs cite an earlier decision of this Tribunal in *Orange* [2007] CAT 36. You are certainly right in cases where jurisdiction is in issue there is a degree of flexibility but I am not so sure whether it is as clear cut in cases where there is a decision to decline a request for confidentiality. I quite take your point about convenience. It is most inconvenient to have, as it were, interlocutory appeals during the course of the merger, but I just want to make sure I have all your points regarding limitation because I am quite sure Mr. Harris will be making these points, saying that we have very clear time limits which can only be extended in "exceptional circumstances", those being rather tightly defined.

MR. GREEN: On our part we cannot imagine that it would be acceptable practice for anybody to spend their time judicially reviewing CC decisions as the CC was going through its process on a six month tight timetable, which is only extendable by Statute once, and we cannot imagine that that would be good practice or good law, and I know, so you say, that the timetable, the decision supports directives, we submit in a perfectly rational reasonable and correct proposition. You wait for the final decision. Otherwise you are going to engage in what may be entirely hypothetical academic judicial reviews which would entirely stop the process of the very tightly constrained timetable. But you cannot stop the timetable, it is statutorially benchmarked either side.

Can I leave it this way, that we have set out opposition in our skeleton. We will hear what Mr. —

THE CHAIRMAN: And leave to reply, yes.

MR. GREEN: Yes.

THE CHAIRMAN: That, I am sure, is helpful, but can I invite you to look at [2011] CAT 5 ...

MR. GREEN: We certainly will. Very briefly on materiality, and then I am going to move on to other points, point one, materiality, it does not arise because they have not put in front of you the material upon which you can make an assessment (see *Solvay)*. In any event, let me give you some short examples of clearly redacted material which is on any view highly germane upon which we would have made relevant representations, using the language of the court we would have had something to say about it. We could have made strong representations, it cannot have been excluded that it would be relevant. So, if you could take the decision, please, and this is just simply a series of points arising which are redacted in the decision and which are of significance in a variety of different ways. Forgive me if they appear to be a bit random, but they concern issues which would generally focus upon DFDS's willingness and ability to remain in the market.

THE CHAIRMAN: Mr. Green, if it helps, you could quite easily hand up a list and move on, but I leave it in your hands in terms of timing.

MR. GREEN: We can perhaps produce that overnight. Would that be simpler? It would just be a paragraph with an observation.

THE CHAIRMAN: That will be fine.

MR. GREEN: Yes. We will do it that way.

MR. HARRIS: So, the only problem we have is how am I going to respond to that?

MR. GREEN: We will put it in writing and get it to my friend as soon as we can this evening.

Ground two, the issue. The issue can be summarised in the following way: that a central conclusion of the Commission was that DFDS would exit in the short term if MFL remained in the market. The evidence relied upon is set out in that annexe. It is a very small number of documents, four in total. The critical two appear to be February or March 2013. As we have explained in that annexe, they followed hot on the tails of hearings at which they had been asked to produce confirmatory evidence and the documents themselves refer to the fact that the Commission's outcome was critical. There was therefore an obvious risk that they were self-serving. They may not have been, we accept that. What we say the Commission should have done was to compare and contrast those documents with the documents from 2012, documents which may have put the 2013 documents into an entirely different light. The point is made by reference to the chronology which is attached to the notice of appeal which we have recycled into annexe C to the skeleton, if you just take that, I can make the point by reference to events which occurred in 2012. So, the four documents that the Commission relied upon was DFDS's annual report which we understand was issued in January-February 2013, some board minutes of 27th February 2013, an unidentified DFDS internal report which we believe to be February, and an email of 19th November, that is the total.

What we say will have happened — and I will come to DFDS's rather interesting evidence produced for the purpose of this morning's application in a moment — in 2012, right at the beginning of 2012, Lloyd's List reported that GET intended to make an offer for the Sea France Ferries. Now, you will recollect that from the witness statement provided this morning, that DFDS were asked for documents about the decision to enter, which was November 2011, and that is what they were very, very careful to define as the documents they searched for, the decision to enter, which we understand was in 2011. So, let us assume for the sake of argument that they entered in 2011. Right at the beginning of January, Lloyd's List reports that GET is going after the assets, almost certainly someone

within DFDS is going to say "What impact does this have upon our assessment of viability? If they get the assets and they are competing with us, what will that mean about our profitability, the volumes and so on?"

One month after that, item 2, they announce their intention to begin operations in conjunction with a joint venture partner. They will have had discussions with the joint venture partner about the viability of the joint venture if MFL are in the market. On 17th February DFDS commenced operations with a vessel chartered from LDA, again, they will have had a discussion with LDA and no doubt internally about whether it was worth investing in the charter of the *"Norman Spirit"*, given the market circumstances at the time. These were positive steps they were taking, knowing that my client was intent on making an offer and might be a competitor.

On 1st March, Lloyd's List reported that the CEO of GET had stated that GET had a strong interest in acquiring the assets and they gave a price range, €125-€150 million. DFDS would inevitably have analysed that. It is highly relevant to its own valuation of the assets, and that of its joint venture partner. In March, DFDS and LDA declined to meet the liquidators. Why? What forensic considerations apply to that? But on 27th March they announced that they were entering into an agreement to form a new company which combined the ferry routes of DFDS and LDA. There were plainly a lot of discussions with their joint venture partner over these months. It is inconceivable that that did not factor into the equation MFL being a potential competitor on the market, which will have had some impact upon break-even. You saw the confidential information in annexe H p.2, about the amount of time an ordinary operator might take to break even. If you take that number of years which you can work out, 2012 to the figure they give, add it to DFDS's assessment, you get to a period of time which is way beyond 2013. So, they were making an assessment of how long it would take to break even, knowing they were subject to a competitor.

Item 7, in fact that should say "May 2012", they purchased another vessel, *"The Barfleur"*, re-naming it *"Deal Seaways"*. Again there is some analysis. Eight, the deadline set by the Paris Commercial Court for the submission of bids to acquire the Sea France assets, 4th May, GET notified its proposed acquisition to the FCA. On 10th May the Paris Court reported that formal bids had been received from GET, NCC (the joint venture) and Stena. DFDS knew that MFL was a serious competitor. It must have factored that in some way into its assessment. Revised bids were then submitted on 25th May, but they were out of time. Why did they submit a revised bid? Presumably because they were competing with MFL, one speculates. The 11th June, the Paris Court declared GET to be the transferee,

maybe shattering news. They would have assessed it. They would have considered its impact upon break-even point upon revenues, upon profitability. Completion of the sale, 2nd July. MFL begins operations. Then you will see another charter. DFDS/LDA chartered *"The Molière"*, so further investment knowing they have got a competitor. And then you have seen from the decision that in January 2012 everything was "very" encouraging. And yet after the hearing with the CC, everything went downhill. Forecasts were gloomy, they were going to exit imminently, and the CC believed that. Surely the CC should have been on the alert and should have simply said, "We need to get the 2012 documents". Why did they not do that? Well, let me show you.

Professor Smith in para.48 says that the CC asked DFDS, as he puts it, "on numerous occasions" to provide documentary evidence regarding plans for entry. Can I ask you to go to bundle 2D at tab.66. So, Professor Smith, according to his statement, plainly considered this to be a relevant issue. This is an email of the Competition Commission of 8th January referred to by Professor Smith. If you look at question 3 it says - I think it is confidential but you will see that they were asked to provide a certain category of information. So they plainly knew that this whole issue of entry was a relevant issue. It is not really the right question. They should have been asking, not just about the decision to enter but actual entry and their evolving view of profitability and break-even over time. But DFDS did not provide a document in response to question 3. They provided a document submitted to the French Court on 20th October 2011 which you can see at tab 67. So they did not provide anything which would be germane to the points I have just made about 2012.

On 5th April 2013, so some three to four months after they did not get a response, the Competition Commission asked for DFDS's submissions to the FCA. We do not know what they said to the FCA, the French Competition Authority. But what we do not have asked for, or obtained, are all those documents which will inevitably have been generated in 2012 under which my client is convinced it is possible that they said, for example, we are going to make losses in 2012, 2013, 2014, 2015, we will break even in 2016. These are entirely hypothetical figures; they are not confidential; it is an example. Therefore, when the CC said: we are told that they are going to make losses in 2013 and they want to exit they took them at their word instead of saying; no, your 2012 analysis demonstrates that you will not make profits until 2016, then you will break even. The mere fact that they were going to make losses in 2013 might have been utterly irrelevant if they had seen the broader suite of documents. I do not know the truth about it because the documents were not collected, but they should have been because, as we have analysed in our annex, the

documents which were collected were very small in number. They were at least potentially self-serving. They needed to be put into context. You have that important document which was kept away from us, or the evidence kept away from us, in annex H2 which says that operators will plan to break even over an extended period of years. There was therefore a category of documents which they did not collect.

What does Mr. Færge say about this? This morning you have seen the statement. It is at B1 tabs 8 and 9. It is at tab 9. It is Mr. Færge's statement, much of which contains new evidence, but the point I want to make is really quite a specific one. You will see in the confidential part para. 7(e). If you will just read that you will see what category of documents were being considered there. I do not think it is confidential because it is in the non-confidential part. It is documents related to entry to the route. You will see how they interpreted this in para. 9. They have been very clear.

THE CHAIRMAN: Do you want us to read that?

MR. GREEN: Yes, and could you please read 8 as well. (Pause)

THE CHAIRMAN: Yes.

MR. GREEN: So they did not locate any of the documents other than the 2011 document and they define relevant documents to mean - if you see the words "decision to enter" - so we have seen from the chronology they came on in 2012 but the decision was taken in November 2011. If it is a decision about entry it is therefore everything preceding the entry. They took the decision before GET had expressed its intention of competing. So it tells you nothing about how those views or documents might have changed once it was known that my client was a potential entrant in the market. That was critical because if they still thought they would be profitable and would not leave the market, knowing that my client was an entrant then that really does put some context on CC's 2013 analysis and their conclusion.

All I can say about the rest of para. 10 is that it is new evidence and I do not propose to deal with it.

The position with regard to the French Competition Authority, it is almost but not entirely a red herring. GET's complaint is that the Commission failed to obtain an important and relevant category of evidence that the CC needed to assess the credibility (para 8.68 of the Decision); it is a credibility issue we are looking at, of later, potentially self-serving, documents.

The French Competition Authority is relevant because they considered, as you know, that DFDS's assertion that it would exit the market lacked credibility. They rejected it. They

came to that decision in November 2012, and there is no evidence of any change in circumstances of a material nature, because just two months later in January 2013 DFDS said they had had very encouraging results. So the French Competition Authority thought it was relevant; Professor Smith says it is relevant, yet they just simply did not get documents from 2012 which they should have obtained to put the issue into context.

There was other evidence in the file that DFDS's evidence was inconsistent. Again, I will not take you to it. The Commission were concerned by the fact that DFDS was issuing public statements to the market that it would not depart, and we see that from the Commission's decision. Therefore they record there were inconsistencies in DFDS's evidence.

You have also seen the inconsistency between 8.88 and 8.90 about Dover-Dunkirk, in which the Commission recorded inconsistency between what we believe to be the 2011 document that I have just identified and the 2013 evidence. So you have clear evidence that the Commission itself thought there was inconsistency in DFDS's approach.

Finally on this, one has to put in context para. 8.95 of the Decision. It is not confidential so I can read it: "Both companies anticipated losses on the Dover-Calais route in the next 12 months. We note that GET anticipated that it would continue to fund losses until the end of -

THE CHAIRMAN: That is confidential.

MR. GREEN: Yes. "... would continue to fund losses until the end of X. We have seen no evidence to suggest that DFDS would be prepared to sustain losses for as long a period of time."

If that evidence existed it would have been in 2012 when they were analysing the impact of MFL's entry to the market and they came to the conclusion that hypothetically everything was fine and dandy; they would make money; they would break even by such-and-such a point; and they would not be departing sooner rather than later. The reason they did not see any evidence was because they did not obtain it.

So far as the law is concerned on this point, we have set out a summary of all the cases of the tribunal that we rely upon in relation to failure to address relevant categories of evidence. They are in annex D. What you have to ask yourself by way of bottom line is really one or more of the following three questions. Have the facts been properly found? Have all the material considerations been taken into account? Have material facts been omitted? They are three ways of asking the same questions, but they come from the case law. This is classic *Tameside*, which is an equally acceptable way of formulating the test.

Have they taken reasonable steps to acquaint themselves with relevant information to answer the question? Answer, we submit, no.

Ground 3 ----

THE CHAIRMAN: You have 15 minutes left according to Mr. Lusty, who is authoritative on this. After that you will be on the Tribunal's mercy. There will be some discretion, but ----

MR. GREEN: I probably can finish in 15 minutes, because we would describe these points as "small but perfectly formed"

THE CHAIRMAN: If they are in short and perfect form that would be perfect.

MR. GREEN: The issue in relation to Ground 3 is found in para. 8.161 of the Decision, and I would ask you, please, if you would turn to it. There are very few paragraphs you need to analyse in order to get a handle on Ground 3. If you look at 8.161 it says as follows:

> "We considered whether DFDS/LD, once having exited the Dover-Calais route, might re-enter if pricing and/or demand conditions became more favourable. Our view is that re-entry would be unlikely because it would be difficult in these circumstances for DFDS/LD to establish credibility with freight customers that it was committed to the route."

Then footnote 222:

> "Based on the views of freight customers we have received."

We were not given any disclosure of these freight customers, we had no idea what this was, but if you would turn, please, to para.6.27, and if you keep open 8.161 to compare, the CC's logic was follows: DFDS is not a new entrant in the market, it is, in their view, going to remain on Dover-Dunkirk. If it leaves Dover-Calais as an existing operator on the market within the same product market, could it actually expand back to Dover-Calais at some future point in time? We are not looking at new entry, we are looking at an incumbent operator, and indeed you will actually see that Mr. Færge in his statement this morning said something about the difficulty of transferring between routes which confirms what we are saying here. He explains how easy it is.

Then 6.27:

> "We received only 189 responses to a questionnaire that we sent to 3,119 freight customers. Because of this low response rate and our corresponding concern about the potentially unrepresentative nature of the sample, the survey results cannot be considered to provide a reliable guide to the likely behaviour of the broader customer base, but give an indication of certain freight

customers' views on their ability to switch away from the short sea to other routes."

Then they go on to set out some evidence. The bit that I rely upon is that a group of 189 respondees does not provide a reliable guide to the likely behaviour of the broader customer base. It is a question about the probative value of numbers. 189 out of 3,000 plus is not reliable. We now learn that the CC's conclusion in 8.161 about the same issue is based on two freight customers. So two out of 3,119, 2 out of 189, if 189 is not reliable this is 90 times less reliable.

So the first point is simply, how can you possibly meet your burden of proof when this is right at the end of the chain of causation and the court requires you to have convincing evidence on a balance of probabilities when you have probably 20 speculative steps which lead up to this point in time. It is right at the end of the line. How can you possibly say that there is sufficient evidence to preclude re-entry when you have got two out of 3,000?

It is worse than that. We have actually got the customer survey. For your note it is at bundle 2A, tab 7, and it asks a lengthy series of questions. Many of these questions focused upon identifying the factors which mad freight customers switch operators. A question at D5 (for the transcript pp.2.548 to 2.555) asked questions which focused upon matters such as reliability of service, long term relationship and loyalty. The freight forwarders were asked to rank these amongst more generic criteria such as price, crossing time, peak time availability.

They got answers which do not demonstrate that there was a tremendous reliance upon loyalty or long term relationships. Those were not the most important factors, but that does not matter because the 189 that did respond were treated as unreliable in the sense that you could not use their evidence as a guide to likely behaviour of the broader customer base. It is a statement about probative value and statistical significance. It must follow as a matter of logic that if you have got evidence and you ignore and you then take two freight forwarders, and you have a meeting with them and they give you some evidence, that that in some way is to be treated as probative.

The CC in their defence effectively have two strands to their case. It is defence, 169 to 174, two components. First of all, 169(c) a whole series of other factual matters they say the Decision must be read in conjunction with. Let me summarise them for you because it is pretty startling stuff. Everything in the report is the first thing you must read 161 in conjunction with. You must look at over-capacity, P&O's incumbency's position, P&O's incentive not to reduce capacity, the history of the market, the perception of the equity

market and availability of vessels. It is just a list of things they say they took into account, or you can take into account which they say justifies their Decision. We have no idea what these are or whether they were reduced or whether they were addressed by the CC. They are generalised assertions of no relevance at all.

The other point they rely upon is appendix H. Appendix H is worth just skimming very briefly, because it starts - this is H1 of the Decision - here the Commission set out evidence about likelihood of entry, and they distinguish between two things: new entrants and those who were incumbent and wish to expand. The first part of the appendix concerns new entrants which DFDS is not, and it is in that section about new entrants that we get a reference to the two witnesses that are said to be relevant and referred to in the footnote.

If you look at the section on expansion, which is DFDS, you will see that a number of really quite important points are made. Let me summarise them for you. Paragraph 31, it is recognised that DFDS is an incumbent who expands, not a new entrant. 32, 33, 34, operators explained how it was possible to increase capacity. 34, operator explained this was "relatively easy". At 34 another one says it is "very easy". 35, the CC records gets evidence with approval that re-routing the vessels was possible which makes expansion costs "very low". 35, the CC accepted further that it was easier for existing operators to expand than for new entrants to enter.

I rely also upon Mr. Færge's evidence in para.10 which is to the same effect.

As to the unknown witnesses, we do not know who they were. We do not know if they were recommended or suggested by DFDS or P&O. We do not know why they were selected. They may have been selected because, as the CC sometimes says, they said, "Can you put up some people who might talk to this?" You put up your mates. Who knows? They may be entirely neutral. We do not know.

Finally, on this point, inter-relationship between Ground 3 and Ground 1. It is an obvious point. None of the evidence was ever put to us, period, full stop.

Ground 5, brief points, remedies, two short points. The first topic is the divestiture of two vessels as opposed to one. The issue in law is a straightforward one. The CC must apply the test of proportionality. Proportionality says you must use the least intrusive remedy possible, *Tesco*, tab 48, paras.135 to 139.

On proportionality generally, Lord Sumption, *Bank Mellat (No.2)* tab 61, para. 20, who agrees with Lord Reed, paras. 68 to 76 and Lord Reed, paras. 69 to 72, who cites the *FEDESA* test of European law. English law and European law are happily at one. They must apply the least intrusive remedy. We submitted the sale of one vessel would be

sufficient, references: notice of application 187 to 203, skeleton, 152 to 157, notice of application 75 to 82. The remedy imposed by the Commission requires GET to divest two vessels, *"The Berlioz"* and *"The Rodin"* as part of the remedy – notice of application 75. We objected upon the basis that in accordance with the Commission's own logic and findings, the maximum remedy that was proportionate was the divestiture of a single vessel only. GET's point was very simple, that "they are using a sledge hammer to crack a nut when a nutcracker would do" to quote Lord Diplock. The CC rejected this, and I quote: "as a matter of principle", and their logic is set out in para. 10.62. It comprises the following components.

THE CHAIRMAN: 10.62 of the Decision?

MR. GREEN: Of the Decision, yes, which I can summarise as follows. This is the point of principle – first, the Act requires the Commission to be as comprehensive as possible. Secondly, the starting point is to reverse the completed merger. Thirdly, because the Commission must adopt a comprehensive remedy: "We are not required to make fine judgments as to when the SLC has been reduced to merely an 'acceptable' lessoning of competition". Fourthly, remedies must be certain to a high degree, complete reversal is this – which brings me to the nub of this: what were the Commission's key findings on whether it was necessary to divest two vessels. The CC made clear findings about the minimum efficient scale required of an operator and you will see this in a relatively small number of paragraphs 8.27 to 8.35 and 8.24(a). The Commission explains in 8.24 that the analysis of minimum efficient scale is necessary in order to form a view on the three ways in which an SLC could arise as was set out in 8.19. There was, therefore a direct nexus between their finding on minimum efficient scale and the SLC. It follows from the logic of the Decision that an operator below minimum efficient scale could not create an SLC. The Commission's key finding is shortly recorded in 8.32. If you could turn to that it is really a short conclusion, and the key word is in the second line ----

THE CHAIRMAN: We will read it, Mr. Green, it is highlighted again.

MR. GREEN: 8.32.

THE CHAIRMAN: I thought you said 8.33.

MR. GREEN: Yes, 8.33.

> "(8.32) It is on the Dover/Calais route, which is particularly short, this requires at least two ships. We have been told consistently that freight customers value service reliability and an additional ship is needed to cover periods of maintenance or unexpected breakdowns, so access to three ships is required. We therefore

> consider that the minimum efficient scale of operation requires two fully operational ships and access to one additional ship for back-up."

Nowhere have they found that two ships would be viable or could give rise to an SLC, and the evidence was entirely consistent, and they summarised the evidence in 8.30 from P&O and a freight customer. MFL's evidence in 8.29 and so on. It is clear that they did not receive any confused evidence, anything which went both ways. It was clear, consistent, pointed in one direction. It necessarily follows that divestiture of one vessel is unequivocally sufficient. This is not a case where there is doubt about whether one or two would be sufficient. The evidence was consistent and it was one and one only.

The Commission made a neat, clear cut finding about which there was no doubt. It was a clear line in the sand, there is no uncertainty about it. It is a line with no penumbra or margin of uncertainty. Just to give you a benchmark example, if we were talking about the WAC and the argument was: is it 4.5, 4.6 or 4.7, there may be considerable uncertainty about where you finally come down on. It is perfectly proper because the evidence may be going in all sorts of different directions and requires a fine judgment for you to say it is 4.6 and it could have been 4.5 or 4.7. This is not this sort of a case. The step change between selling one vessel and selling two is enormous; it is the difference between obliteration and the ability to operate a suboptimal but non-harmful service. Proportionality on the facts of this case and on the logic required the sale of one vessel not two.

Very, very finally, and this is an even shorter point: remedy issues no.2 – references: notice of application 204 to 211, skeleton, 158 to 168. It is an important point. The remedy prohibits GET from operating from Dover, and this therefore prevents GET from operating any service to any foreign port even if it is unrelated to the SLC or the Competition Commission's findings.

The Competition Commission's Remedies Working Paper, bundle 2B tab 3, para. 92 and I will ask you, really as almost my final point, just to go to this, and then I am pretty much finished. If you look at the last sentence of para. 92:

> "We consider that if GET did not operate ferry services on the Dover-Calais or Dover-Dunkirk routes the SLC would not arise because Eurotunnel would have no incentive to raise prices due to the internalisation effect."

We said, indeed the debate we had with the Competition Commission was that any remedy was route by route, and for reasons which came as a complete surprise to us when we saw the Decision, because it is not in their remedies working paper, we got hit absolutely on operating from a port. So, for instance, we cannot operate Dover/Boulogne. The simple

point is this, it is perfectly proper, if they make a valid finding to do it route by route, but they cannot go beyond that. On their own logic there is no need to go to Dover/Boulogne. We may or may not wish to do that. You cannot prohibit something because somebody has not put forward a business plan of something they may or may not want to do. That is it, that is the point; it is short and we submit perfectly formed.

There are a couple of things to hand up – shall I do that right at the end, it is really just housekeeping?

THE CHAIRMAN: Yes, that is probably appropriate.

MR. GLYNN: Could I just ask one question? One of the points which the Competition Commission make at the beginning of their skeleton is that the Competition Commission concluded that there would be substantial adverse effects imposed on consumers notably in terms of higher prices if the merger were permitted, and they say that again that conclusion is not directly challenged, whereas a lot of what you have been saying challenges things which are relevant to the conclusion. Could you summarise for me the major points that you have found out from the information you have been able to go over, what the key points are, if any, that would contest that finding?

MR. GREEN: Well, it is not an exercise that we have engaged in because this is not a merits appeal. So we …

MR. GLYNN: I understand that.

MR. GREEN: … through the evidence, with judicial review, with respect, we would not do that. We would simply — it is not our task to come to you and say, "We are going to put forward a whole load of new evidence which demonstrates the outcome would have been different". It is not our burden, it is not our task, and it is not something we have addressed our minds to.

MR. GLYNN: I suppose really what I was trying to understand a little more was the materiality of the different points that you have made, because there is a sense in which materiality would take you to this kind of point.

MR. GREEN: Clearly, the last points go to remedy only. If we are right on DFDS entry, then according to the CC's own logic, that is the end of the case because it is part of their chain of causation which they must pass through on their own logic to get to the case. They are not entitled to turn round to you and say, "Please form your own view on whether there is a likelihood of DFDS's exit from a common sense point of view as they do". That is not an appropriate or permissible judicial review approach. The judicial review looks at their logic: their logic is that the only reason why DFDS would not enter is because freight

customers would have a reputational problem. Two, that is the only reason. But for that there is no SLC. So that is a complete answer.

Our submissions on the 2012 and 2013 documents is a complete answer. If we are right then because they have abandoned any suggestion that MFL's remaining in the market would still lead to an internalisation effect because that is pivotal to exit. That is also a complete answer. It is only grounds two and three that really go to the substance of the analysis. Ground one is procedural. Grounds four and five are purely remedy based. I do not know if that answers your —

MR. GLYNN: Thank you.

THE CHAIRMAN: Thank you very much, Mr. Green. Mr. Beard, you were going to rise.

MR. BEARD: It is just a question of timing now.

THE CHAIRMAN: Well it is, we are three-quarters of an hour behind. That is mainly due to breaks and other matters, I think. Were you minded and were it helpful to have ten minutes now, we would entertain that. Otherwise we will make up the time tomorrow by sitting half an hour only for lunch and running to five-fifteen or five-thirty to ensure everyone has got the time they need.

MR. BEARD: I am entirely content to start, if that would be of assistance, for ten minutes.

THE CHAIRMAN: I think it might be helpful, give us a flavour.

MR. BEARD: Yes, there is no difficulty.

THE CHAIRMAN: Grateful, Mr. Beard.

MR. BEARD: That being the case I am going to start radically on ground five after having finished with the fourth of our grounds. Now, ground five of the SCOP's application is that the Commission's conduct of the remedies phase of its investigation was procedurally unfair, in particular because the SCOP was not given opportunity to comment on the Commission's remedies working paper and the legal opinions submitted by DFDS and Eurotunnel. Now, of course, Mr. Green has referred this afternoon, and this morning has set out an account of the case law in relation to the proper requirements of procedural fairness following on from *Al Rawi* and *Bank Mellat* that set a particularly strict threshold, and were that to be the case it is really unnecessary for me to delve into any of the issues in any detail at all. There would clearly have been a breach of fair procedure. But on the basis of pre *Al Rawi* and *Bank Mellat* case law, I am going to proceed in the alternative in relation to ground five, if I may.

What I will do, just very briefly, is pick up a couple of pre *Al Rawi*, *Bank Mellat* authorities if I may. First of all, if we could go to bundle 3B tab 32, *Begum*. I am not going to pretend

that this is a topic that falls four square within the sort of ambit of activity that concerns the Commission, or indeed this Tribunal. This was a matter that pertained to questions of a local authority providing suitable accommodation for Mrs. Begum, her daughter and others under relevant provisions of the Housing Act. The details of that perhaps are not particularly important, save that in carrying out the assessment as to whether or not Mrs. Begum should be provided with housing, the local authority put forward material from a Mr. Cruickshank considering various documents including general practitioner notes.

If one turns on to p.3.1382, para.34, I will pick it up at the third sentence:

> "The question before me is not whether the Defendant [the local authority] made adequate inquiries of third persons [for the purposes of assessing whether or not Mrs. Begum was intentionally homeless] for this purpose. Indeed, it would be difficult to assert that the Defendant failed to make any such inquiry that any reasonable authority would have made. The point is rather whether, when inquiries of third persons yield significant information inconsistent with that provided by the applicant, which will substantially affect the decision of the local authority, the local authority must put that information to the applicant and give him an opportunity to comment on it. In my judgment, a local authority is under such a duty".

And then it talks about the principles of fairness and good administration. And, finally, I will just pick up the last sentence in that paragraph:

> "It is therefore important that the local authority should have had before it the applicant's responses to significant information obtained by the local authority which is inconsistent with that provided by the applicant, so that those responses are similarly available to the County Court in the event of an appeal".

And then it goes on and says the information provided by the claimants' General Practitioner to the local authority clearly affected the position of the local authority and she should have been afforded opportunity to comment.

And I will just give you a reference to another authority. It is in 3C at tab.34, para.35 of a case called RAMDA which was a High Court decision, Divisional Court decision just at para.25 there is a consideration by Lord Justice Sedley, as the fairness of process he recognises there are two principles that come into potential conflict in an administrative process, the clash between constant dialogue with a particular applicant or concerned party, and the need for legal finality. The other is that he must not rely on potentially influential material, he being the decision maker, which is withheld from the individual affected. This is a simple corollary of Lord Lawburn's axiom that the duty to listen fairly to both sides lies

upon everyone who decides anything. *Board of Education v Rice* which is the bundles, and of Lord Denning's dictum that if the right to be heard is to be worth anything, it must carry a right in the accused man to know the case against him.

Now, interestingly, citing the accused man analysis in *Kanda* but in the context plainly of administrative decision making that was in relation to extradition decisions by the Home Secretary. So, that is just a couple of quick authorities.

Now, what we are concerned with in terms of the fair procedure here are documents containing critical reasoning related to the Commission's assessment of the effectiveness of the prohibition remedy which it adopted specifically concerning the effect of the remedy on SCOP. Indeed, when we come on to look at the working paper, that paper specifically responded to arguments advanced by SCOP. But the SCOP was given no proper opportunity to address those matters as part of the Commission's investigation, and it is worth recalling that the SCOP, though formerly a third party to the merger, was plainly very gravely affected by any adverse conclusions reached by the Commission and any remedies imposed. Indeed, the SCOP is more significantly affected by such findings and remedies than Eurotunnel itself. At this stage in its development the SCOP will be devastated by prohibition remedies. Eurotunnel will continue in business.

Now, the catastrophic consequences of the adverse findings for the SCOP were clear to all and should have constituted a very weighty consideration militating in favour of the SCOP being provided with any and all relevant material. It is difficult to understand in circumstances where the Commission's findings had the obvious consequence of bringing to the end the entirety of the SCOP's existing business that it was not at the forefront of the Commission's mind to provide the SCOP with the very fullest opportunity to comment on all relevant matters, and the Commission, we say, singularly failed to weigh that significant factor adequately in the balance. So, with that in mind I am going to deal very swiftly in two minutes with a couple of documents. If you could turn to pleadings bundle tab.2 at p.1.134.

THE CHAIRMAN: Are you looking at the core documents bundle?

MR. BEARD: Yes, sorry, I have got it labelled as -- it is bundle 1. It is pleadings bundle 1 or core documents bundle 2. Pleading bundle 1. It is actually the statement of Monsieur Doutrebente which is behind tab 2. I just want to pick it up at para.45. I am just going to give you a couple of references. This is the account of how SCOP saw the remedies process. It is important to have this perspective.

> "The Commission published its original Remedies Notice on 19 February 2013. [For your note that is in core bundle 2B tab 17] The SCOP attended a hearing at the CC on 28 February 2013 and submitted its response to the CC's remedies notice on 5 March 2013 [2B tab 27]. (46) In its original Remedies Notice, the CC did not consider a remedy which would require a cessation of MFL's operations on the Short Sea or the Dover-Calais route. Such a remedy was first proposed by the CC in its Supplementary Remedies Notice, published on 2 April 2013, although only briefly."

Let us turn that up briefly, if we may. Leave Monsieur Doutrebente's statement open and go to 2B tab 28. Here we have the Supplementary Remedies Notice. Obviously there was a link to the initial remedies notice. This supplementary remedies notice picks up issues that were raised in the remedies notice, but expands on them. So issues in Part A starting on p. 3 after the background and introduction, Part A Divestiture remedies - those that have been tried previously are dealt with at some length. There is Part B Divestiture after expiry of the inalienability clause, Part C Cessation of operations on certain routes which runs to three short paragraphs, then we have got Part D Short-term price controls, Part E the SCOP remedy proposal, and then various other matters arising. Part C is the only indication that a cessation of operations on certain routes was being considered.

Needless to say, the SCOP responded to that. It can be found in tab 31. As you will see, there is extensive submission in relation to Part A and Part B, and the in relation to Part C you have got mirroring the terse statement by the Commission.

> "(5) Part C: Cessation of operations on certain routes. 5.1 The SCOP would be highly concerned were the CC to consider further the remedies set out at Part C of the Supplementary Notice (i.e. obligations on GET to cease operating ferry services (through its arrangements with SCOP) on either the short sea or on the Dover-Calais route). The SCOP does not consider that either of these remedy proposals would be practicable or effective in addressing any SLC."

So it picked it up, highlighted the significance; it expressed very significant concern about it and then from the CC came silence. However, that was not that the CC was not busy in the background, as we see at tab 33. There was a walloping great remedies working paper being produced. I will come on to that tomorrow, but there are two points to make clear. That Remedies Working Paper (a) dealt with issues the SCOP was raising; (b) dealt with issues that were plainly of the highest concern to the SCOP; (c) dealt with that in detail; and (d) was not shown to us. We got it when GET lodged its appeal. There was no justification

for failing to provide that to us. It was a plain and simple breach of fair procedure. Given the time I will perhaps pick that up further tomorrow morning.

THE CHAIRMAN: I am grateful, Mr. Beard. In terms of timing we will resume at 10 o'clock tomorrow but we will shorten our luncheon adjournment and if necessary extend times to about this time tomorrow in order to ensure everyone has time.

MR. HARRIS: Sir, I would seek to persuade you otherwise. Surely Mr. Beard must be nearly finished on this ground and we start with clear decks tomorrow. I am the one who is prejudiced by having a short luncheon adjournment. If the applicants' combined submissions today were to run over their allotted time it should have been them who are shortened. It would be better to start with clear decks tomorrow, in my respectful submission. There cannot be much more left. Mr. Beard has just successfully adumbrated what the short additional points are. We have seen them in writing twice now: in the Notice of Appeal and in the skeleton. Perhaps if he has another ten minutes he will finish. With respect, sir, half an hour takes him even beyond the amount of time that was set out in the original letter.

THE CHAIRMAN: Mr. Harris, it only does because it is 45 minutes. By my computation Mr. Beard has had about ten. Mr. Harris, we will do everything we can to accommodate any difficulty you have tomorrow, but I really do not think that sitting for a further half an hour is going to work. There is always diminishing returns set in, and I know from my own experience of previous cases the shorthand writers will have my scalp if we sit much longer without informing them in advance.

MR. HARRIS: So be it, sir, except that the same rule must apply to me, the law of diminishing returns. If there is less time for recovery and rejuvenation at lunchtime I stand here and make my submissions, and yet it is not my fault that this has all run over so late. The two choices are either we do a little bit now and finish, instead of a half an hour which cannot possibly be necessary given the amount of written work we have already had, or we have an impact upon the CC tomorrow which is unfair to us given that it is not our responsibility. Obviously those are my points. If you are not with me, so be it. But I respectfully contend that the better course is to continue now and perhaps for ten or 15 minutes and we will all be done.

THE CHAIRMAN: Mr. Harris, we will sit at 10 tomorrow. We will see how things pan out tomorrow, but you can rest assured that we will do out utmost to ensure that you do not suffer from the law of diminishing returns yourself.

MR. HARRIS: I am grateful, thank you.

THE CHAIRMAN: 10 o'clock tomorrow morning.

(adjourned until 10 o'clock on Wednesday 11 September 2013)