IN THE COMPETITION APPEAL TRIBUNAL

Case Nos. 1222/6/8/13
1223/6/8/13

Victoria House,
Bloomsbury Place,
London WC1A 2EB

15th November 2013

Before:
ANDREW LENON QC
(Chairman)
DR. CLIVE ELPHICK
JONATHAN MAY

Sitting as a Tribunal in England and Wales

BETWEEN:

LAFARGE TARMAC HOLDINGS LIMITED Applicant

- and -

COMPETITION COMMISSION Respondent

HANSON QUARRY PRODUCTS EUROPE LIMITED Applicant

- and -

COMPETITION COMMISSION Respondent

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CASE MANAGEMENT CONFERENCE

APPEARANCES

Mr. Daniel Jowell QC and Mr. Gerard Rothschild (instructed by Kirkland & Ellis International LLP and Slaughter and May) appeared for Lafarge Tarmac Holdings Limited.

Mr. Richard Gordon QC and Mr. Tony Singla (instructed by Pinsent Masons LLP) appeared for Hanson Quarry Products Europe Limited.

Mr. Daniel Beard QC and Mr. Rob Williams (instructed by the Treasury Solicitor) appeared for the Competition Commission.

THE CHAIRMAN: Good afternoon.

MR. JOWELL: May it please the Tribunal, I am Daniel Jowell and I appear for Lafarge Tarmac leading Mr. Rothschild. Mr. Gordon QC appears for Hanson leading Mr. Singla, and Mr. Beard QC leads Mr. Williams for the Competition Commission.

With the Tribunal's permission, it seems to me there are essentially two ways we could proceed today. We could either go through the agenda items one by one, or we could deal first with the key issue which seems to divide the parties, which is, in substance, whether the substantive application is to come on this side of Christmas or not, in other words, before the Commission reaches its final decision. I am very much in the Tribunal's hands as to how to proceed.

THE CHAIRMAN: Yes, we have given this a bit of thought and it would be helpful if you could deal with the issues of expedition and stay, in other words, whether the application should be stayed pending the publication of the final report first.

MR. JOWELL: As the Tribunal will appreciate, Lafarge Tarmac has brought an application a little over three weeks ago on 22nd October for judicial review of decisions taken in the course of the market investigation by the Competition Commission. Those decisions took place between 7th and 11th October. The Tribunal will also appreciate that our application is based on the Competition Commission's decisions in early October that were, in brief summary, first, not to disclose important categories of relevant documents to Lafarge Tarmac and, secondly, to issue a press release in which it said in summary that it would be creating a new cement producer to remedy the problems that it had found caused by the existing producers not competing sufficiently.

We say the continued refusal to provide the documents, or to provide them on fair terms was a breach of the Competition Commission's duty to consult and a violation of the principles of natural justice that underlie that duty.

We say that the Competition Commission's decisions also showed that the investigation had passed a formative stage, i.e. the stage at which consultation, if it is to be proper, must take place. Also, we say that the terms of the press release created an appearance of bias or pre-determination and that the proceedings were thereafter vitiated, and accordingly so was the investigation as a whole.

The debate, as the Tribunal has identified, is whether to hear this application before or after the final decision.

What we say, in summary, is this. First, in principle it is in the interests of good administration that this matter should be resolved before the final decision. In particular, if

we wait until after a final decision is reached there are likely to be real commercial costs to Lafarge Tarmac and more unnecessary time and expenditure on these legal proceedings.

Secondly, we say, against that background, it would only be appropriate to defer or adjourn this matter if the Tribunal were satisfied that there were really obstacles of great difficulty for the Competition Commission dealing with this application and finalising its report in parallel. We submit that if this is actually looked at objectively any inconvenience to the Competition Commission is bound to be extremely minor.

Before I develop those submissions with the Tribunal's permission I would just like to refer to two propositions of law which I believe are – or certainly should be – uncontroversial.

The first proposition is that where you have on a judicial review an application of the present type, in principle, the person so affected can bring an application for review either in relation to the preliminary decision that is made in the midst of the investigation in this case, or, in relation to the final decision that affects the applicant's substantive legal rights, that is in relation to the final report. We say this is clear from multiple authorities, but can be demonstrated quite simply by just the two cases that we have provided the Tribunal with copies of, namely, the *Burkett* case and the *Sports Direct* case.

I do not intend, unless the Tribunal wishes to, to actually turn those authorities up, but in very brief summary in *Burkett* the House of Lords held that where a provisional outline planning permission could have been challenged but was not in that case challenged in time, it was nonetheless possible, once the final planning permission was granted, for the applicant to amend and challenge that grant.

One sees the same point emerging in the *Sports Direct* case, where it was common ground between the parties and one of the parties was the Competition Commission in that case, that a failure to give disclosure could form a basis for the challenge of the Commission's decision in its final report and the court also held that it could also give rise to a challenge on a preliminary basis made in the course of the investigation.

So an applicant in our position has an option whether to challenge the preliminary decision, and even if he is out of time to challenge that, to then challenge the final decision. I note that my learned friend, Mr. Beard, does not quite concede that point in his skeleton argument, but neither does he gainsay it. I think we should take it as common ground.

MR. BEARD: You should not.

MR. JOWELL: We should not, very well. My learned friend has not referred to any contrary authority, or any contrary proposition of law but, in any event, that is what we submit is the position in law and it is very clear.

THE CHAIRMAN: But if you are right that is not a reason for expedition, is it? That is a reason why you could wait until the final report had been published.

MR. JOWELL: We could but, and I will come to this in a moment, I think when you view the situation in the round you will see that it is an important part of the background and it means that actually it should come on now, it is more convenient for it to come on now.

The second point that I think is common ground is that the Competition Appeal Tribunal has indicated in the recent *BMI* case that it is desirable in principle that applications of this type should be brought on earlier rather than later. Again I do not invite you to turn it up, but it is paras. 29 and 79 of the *BMI* case.

Against that background, and for the reasons that I will come to, we say that the presumption of this Tribunal should be that where an application of this nature has been brought against a procedural preliminary decision, in principle, as a matter of good administration, it is desirable it is resolved in advance of the final decision. In large part, this is because once a formal final decision is reached, particularly one of the type contemplated in the present investigation there are bound to be adverse consequences to the parties affected. And it is also for case management reasons of efficiency and procedural economy and, in particular, once the final decision comes out it is likely to give rise to other grounds of challenge which mean that the challenge cannot be disposed of with the same efficiency and economy, and that is an important point that I will come to. It may be quite specific to this Tribunal, but I will come to that in due course, if I may.

THE CHAIRMAN: I have to say that the possibility of there being other grounds of challenge would again seem to be a reason possibly for deferring rather than expediting your application.

MR. JOWELL: If the grounds of challenge on procedural grounds are a knock-out, which they potentially are, then to have them wrapped up and heard with the many, many substantive grounds is going to lead to increased costs and delay – substantial increased costs and delay, and that is the contrary argument.

In the present case we say that the same considerations apply because, first, in terms of the damage to the applicant there is no doubt that there will be reputational effects, and also concrete commercial harm consequential on a final decision. This is, after all, a decision that the CC is intending to make and is one which will involve a substantial interference with Lafarge Tarmac's property rights.

The Competition Commission says, in its skeleton argument, that there is no such harm because the Competition Commission would put on hold implementation of its report

pending an appeal. But that is not an entirely accurate representation of the position. First, it is important to appreciate the commercial context here. Lafarge Tarmac is an entity that has only recently been created at the beginning of this year as a process of a merger approved by the Competition Commission. Lafarge Tarmac has also publicly announced some time ago that it intends an IPO of its business within the next year or two. The CC is well aware of all this, it is recorded in its merger decision.

Once there is a formal decision of the Competition Commission that this business has to be broken up again, all of this, both the merger process and the IPO is thrown up into the air, and inevitably will have to be put on hold with all the attendant commercial disruption that this is going to cause. Once a final decision is reached, the Competition Commission's general practice is to immediately appoint a monitoring trustee, and that point is not, we understand, generally retracted, pending an appeal.

This is a large business in the process of completing a merger and planning an IPO, and the harmful commercial effect on this business of having a decision of this nature, of this seriousness, hanging over its head potentially for many months further, simply cannot be underestimated.

THE CHAIRMAN: Is there any evidence about this, Mr. Jowell?

MR. JOWELL: The fact of the IPO and the merger is a matter of public record, and I can take you to the provisions in the merger report if you would like to see them, which refer to the intention to IPO. I am happy to hand those up. Perhaps I should do that. (Same handed) You will see in para. 6 and again in para. 25 of the extracts – this is from the Competition Commission's own report, where reference is made to the intention to IPO. There were also equally references in the "Financial Times", we can hand up an article from 2011; let us do that as well. (Same handed)

MR. BEARD: I do not mean to intrude into the flow of new evidence that is coming in, but is it being suggested by Mr. Jowell that the one to two years for the IPO is by reference to para. 6(c) of this appendix E?

MR. JOWELL: No, it is in the article that I am just coming to. This is from the "Financial Times", an article of February 2011.

MR. BEARD: Could we have some copies, please?

MR. JOWELL: Yes, sorry. (Same handed) The third paragraph up from the bottom reports: The Anglo Finance Director stating that the plan is "to pursue an initial public offering of the joint venture within one to two years of the deal completing. I do not think that this should come as any surprise to the Competition Commission. This is well known.

THE CHAIRMAN: Thank you.

MR. JOWELL: We submit that the harmful commercial effect on a business of this nature of having a decision like this out against it is just self-evident. One cannot also understate the inhibitory effect of having the watchful scrutiny of a monitoring trustee. If, as we say it is, the Commission's process has been fundamentally flawed and unfair, it is obvious that to permit the resolution of this application to be drawn out unnecessarily is undesirable and contrary to good administration – justice delayed is justice denied.

The second point is this, that justice delayed is also likely in this case to be more expensive justice, because for the reasons that I have already explained if this application is adjourned to be heard only after the final report as the Commission proposes, we will be entitled to amend our application as was done in *Burkett*, to apply to review not the preliminary decisions but the final decision in the report or, if we do not amend we just simply issue a fresh application in relation to the final decision making the same points. We will inevitably do so if that turns out to be the position.

Once that final decision is out it would simply make no sense at all for our application to be heard in relation to the preliminary decisions alone. The question's really relating only to the preliminary decisions, such as the time bar point that my learned friend adverts to will be superseded by the final decision. So, too, will some of the issues as to whether a formative stage is reached because, of course, once you have the final decision there is no question but that formative stage has been reached.

Mr. Beard says: "Fine, all well and good", that you can just hear all these points in relation to the final decision. But here is the rub: we envisage that if this investigation proceeds to a final decision, Lafarge Tarmac would almost certainly wish to challenge that final decision on a number of further substantive grounds. Of course, we cannot know for sure in advance of seeing the final decision what those will be. But if the provisional decisions are anything to go by then we are likely to be submitting to this Tribunal that the final decision is flawed on a number of fundamental substantive grounds which we would plan to challenge on the basis of disproportionality or irrationality or other procedural bases.

Those grounds are inevitably going to be complex. They are likely to involve economic analysis, possibly expert evidence from economists, possibly expert evidence from accountants. So once the final decision is out we bring a fresh application for judicial review of that decision based not just on the non-disclosures and these nice discrete procedural points but on many other substantive grounds. A fully fledged judicial review of all of those points is going to be very costly, not just to my client but also to the

Competition Commission, and it is inevitably going to lead to considerable delay and expenditure, and expenditure of time on the part of this Tribunal.

I say it is unnecessary because if we are right that this is just a decision that is clearly vitiated on fairly straight forward procedural grounds, all of that is going to be wasted.

THE CHAIRMAN: I suppose you could bring that as a preliminary issue in the context of the proposed report challenges.

MR. JOWELL: You raise a very good point, Mr. Chairman. The difficulty one has here is it is really Rule 11(3) of the CAT's Rules.– I do not know if you have a copy of the CAT's Rules to hand, but it may just be worth turning that up. I should start with 11.1 which says that the Appellant may amend the notice of appeal only with the permission of the Tribunal. 11.3 stipulates that:

> "The Tribunal shall not grant permission to amend in order to add a new ground for contesting the decision unless:
>
> (a) such ground is based on matters of law or fact which have come to light since the appeal was made, or
>
> (b) it was not practical to include such ground in the notice of appeal; or
>
> (c) the circumstances are exceptional."

So, faced with that, it would be a very risky thing, without some comfort from the Tribunal or the CC, to simply plead the procedural grounds against the final decision and then wait because we could not be sure that we would come within the exceptional circumstances there of being able to raise those later grounds later on should the procedural ground not succeed.

Of course, raising these grounds, that is not anything like raising points by way of notice of appeal to the Court of Appeal or pleading the point in the High Court. What is required in order to raise these points here is a substantive exercise with reference to evidence and authority and annexing documents and so on. These are not mere bare bones that we have to plead out, this is a substantive exercise we would have to carry out. The Competition Commission in due course would have to develop its points in response in equivalent detail.

So even if one could later on refashion a preliminary issue, there is going to be a lot of work in working up these points and a lot of delay.

I do not completely exclude the possibility that it might be possible, if the Commission is prepared to agree to this, or if the Tribunal can give clear directions, that one could have some case management method to circumvent that. For example, you could have a situation where it is agreed that we do not have to plead substantive issues, and we have a

preliminary issue and then perhaps we can plead the substantive issues some weeks after a Judgment if it should prove necessary, but that is not an easy process. The Competition Commission has not proposed such an order – at least not yet.

So, absent such an order, we say that there are likely to be clear costs, both commercial costs and legal costs to both sides if this matter is not resolved before the final decision. We say that the starting point must be that it is desirable therefore that this is resolved in advance.

To be fair, in initial correspondence to the Tribunal the Competition Commission's instinctive reaction was to agree with that. They said, and I do not ask you to turn it up, but I am sure you will recall their first letter. They said: "We wish to see the position resolved quickly, particularly having in mind the statutory timetable for the investigation". But, since then, the Commission has slowly turned 180 degrees in its correspondence, and it now says that it would be positively prejudiced by hearing the application in advance of the final report.

Despite our requests, it has not filed the defence before this CMC and it says, in essence, "We are just far too busy finalising the final decision". There is even a hint in that correspondence that we are bringing this application just to distract them while they are in that process.

We reject these submissions and actually find them quite hard to understand when you look at the objective facts.

First, taking the second point that somehow this is all just a distraction, a tactical ploy. Our application was brought on 22nd October, and it was preceded by a letter of 4th October. At the time of our application this investigation still had three months left to run. In the *BMI* case the time from application to Judgment was 16 days. We had no reason to suppose that it would be substantially different in this case, and if a similar timetable had applied on this application it would have been entirely resolved by now already and the CC would have over two months to finalise its report without disruption. So the suggestion that this was somehow all about causing disruption is actually verging on the paranoid.

Secondly, the issues on our application are hardly ones of great complexity. The facts, so far as we are aware, are not in dispute, it is just a matter of public record what the CC did and did not disclose to Lafarge Tarmac. There can be no serious dispute but that the documents, we say, should have been disclosed and have not been disclosed. There are only three categories of non-disclosed documents that the Tribunal will have to consider on this application because the *Eurotunnel* category documents, we accept, fall away.

Then there are the facts relevant to the issue of formative stage and pre-determination which are short and, again, uncontroversial.

It is suggested again in the Competition Commission's skeleton argument that the CC will wish to put in a witness statement to explain their conduct. We find it difficult to see why a witness statement is actually necessary or what it would add. At the most, it seems to us, it would be an attempt by the Competition Commission to put a gloss on the facts. But the relevant facts actually speak for themselves, and they are just a matter of public record. But if the CC do wish to put in a statement seeking to justify themselves then by this time next week they will have had a full month in which to do so. Aided with the resource of Treasury Solicitors and counsel, the notion that a full month after our application they cannot put in a short witness statement dealing with the non-disclosure of these three categories of documents to us just beggars belief.

As to the law, the law relating to the duty to consult and provide disclosure in the identical statutory context has only just been very helpfully reviewed and set out in the recent *BMI* Judgment. Likewise, the law on apparent bias, or apparent pre-determination is well settled. It is the test of whether, at the relevant time, a fair minded observer would have concluded that there was a real possibility that the CC has made up its mind. It is not relevant to look into individual, actual states of mind, or later events.

Indeed, Mr. Beard submits in his own skeleton argument at para. 53 he says: "the legal principles relied on in both applications are well established". We entirely agree.

So all that will be necessary is for this Tribunal to hear the parties' legal submissions on the points we have raised and apply the established law to relatively short and undisputed facts.

Given this, we do struggle to understand why the Competition Commission considers that hearing this matter in the next few weeks would be a material distraction to finalising its report.

The submissions would be matters that would be dealt with by Treasury solicitors and by counsel. The Competition Commission Panel and its staff would be free to get on with finalising their report. So when one looks at the matter objectively we say the burden on the CC of dealing with the two matters coterminously is actually very minor, and we see no point in the Competition Commission seeking to put matters off which inevitably are going to have to be resolved. It is better that they are dealt with expeditiously and before further time and resources are wasted.

Unless I can assist the Tribunal further.

THE CHAIRMAN: No, that is very helpful, thank you.

MR. GORDON: Sir, as so often the most important material before the CAT will be my learned friend, Mr. Beard's skeleton argument which no doubt has been drafted with his usual felicity. What we have done is to identify seven arguments that he advances and attempt to deconstruct them, at least by reference to Hanson's case.

First, at para. 29 of his skeleton argument my learned friend says that the Competition Commission would be subject to "overwhelming practical difficulties" by an urgent timetable. That is put slightly differently in the letter of 12th November, but it is the same thing. It says that the Competition Commission would be subject to enormous strain. I will come back to each of these arguments in a moment.

The second argument is at para. 30 that such strain would be even more significant if it were imposed in parallel with similar directions in the Lafarge Tarmac application – that is the thrust of what is being said at para. 30, so two applications impose more strain than one.

The third point, para. 25, put slightly differently in my learned friend's skeleton, but this is the way it is put in the letter, the Competition Commission must have a proper time to respond to such a serious and far reaching application.

The fourth argument, para. 32 of Mr. Beard's skeleton argument. The application is not time sensitive. It has no impact on the way in which the investigation may be conducted going forward.

The fifth argument, para. 32: Hanson may only have brought the application to avoid limitation issues.

The sixth argument, para. 31: An urgent hearing would not result in any saving or cost to Hanson and, I take this from the letter actually, any burden on the Competition Commission by not having an urgent hearing would be relatively modest.

Finally, para. 45 of the skeleton argument, only deferring hearing the application until after the final report will enable the Tribunal properly to decide the points of law on Hanson's application.

Unless I have missed anything, those are the arguments and each of them, at least in the case of Hanson's application is flawed. May I indicate why?

First, in the context of argument one, inadequate resources, whatever the position may be where you have jagged edges like *Eurotunnel* or you have lots of different classes of documents, which may or may not be the position in the Lafarge Tarmac application, what you definitely do not have is any of that in Hanson's application.

The case could not be simpler. The case law on consultation says - it is in our notice of application, Mr. Beard will definitely accept this – that a consultation is unlawful in judicial

review terms if proposals are put forward beyond a formative stage. That is the proposition and it is uncontroversial.

What Mr. Beard says in his skeleton at para.11 is that the provisional decision is not a final decision, and that is, of course, a truism. But a provisional decision is the route through which the Competition Commission finalises a consultation, issues its decision based on a consultation and then allows responses to what is in effect a 'minded to refuse' letter.

So the consultation process in terms of legality, in terms of I think it is s.169 of the Act, has to take place, we say, to be legally valid before you reach a provisional decision.

In Hanson's case the provisional decision was reached on 23rd May. The provisional decision on remedies, which came out on 8th October and was then linked to an addendum. The addendum dealing with the guts of what Hanson complains about was not consulted upon, or let me put it another way the consultation started post the provisional decision.

Mr. Beard may accept, I hope he does, what we submit is an obvious proposition of law, which is that that is well beyond a formative stage. But, knowing Mr. Beard, he will not accept that proposition and so we might have half a day in the CAT arguing about it. But the point is that there is absolutely no evidence beyond the simple facts that I have outlined, which that point of law raises.

So what we say is with the greatest respect to the Competition Commission and to the range of lawyers arrayed behind us, one does not need a vast amount of resources, one lawyer, one good advocate, one day in court at the most, probably half a day, will deal with this case. If it is listed in isolation, as we submit it can easily be and, as I understand it, my learned friend wants, there is absolutely no resource implication that matters in terms of dealing with our application.

We say in our skeleton, para. 13, there is a case called *Morrison v AWG*, actually on such a foundational point resources do not matter anyway, and if the court looks at paras. 5 and 6 – I am not going to take you to it, but it is tab 6 in the authorities bundle – where you have a foundational issue such as this, we submit that resources would not matter, but I am not going to press that particular point because, in a sense, that point does not matter. When one looks at the nature of Hanson's application resources vanish in our submission and they cease to be a material issue.

May I turn to point two which is related ----

THE CHAIRMAN: I understood that case as saying resources do not matter if the issue is whether a Judge should recuse himself.

MR. GORDON: I thought, sir, you were going to say that. May I deal ----

THE CHAIRMAN: This application is simply about expedition. We are dealing with case management issues, are we not, in which case disruption and costs are relevant factors?

MR. GORDON: No, no, I do not accept that. I had anticipated in my note the point that you made earlier, which is it is true that the *AWG* case is dealing with a judicial decision. What I was going to say in answer to that is simply that the administrative judicial dichotomy disappeared from judicial review with *Ridge v Baldwin* in 1964. So the fact that apparent bias should not be there in a court does not mean that it is not highly relevant if it is there in an administrative process. The point here is that when one looks at what the whole rationale of "formative stage" means, it means, does it not, that the decision maker has an open mind. In other words, that the decision maker is not evincing a species of bias. So that would be my answer to that particular point.

My answer to the directions point, case management, is this – and it is an important point, and it is slightly, I think, glossed over, not deliberately, by Mr. Jowell – it is not just a question of having a choice as to whether we can come to the Competition Appeal Tribunal, as in the context of *Burkett* it was, because what was happening in *Burkett* was a judicial review with two different possible time starting points – or maybe three or four. But, in this particular case we have a statutory right under s.179 to come to the Tribunal in relation to unfair consultation. If the statutory right merges, to use Mr. Jowell's words, into the final decision, what has happened is the erosion of a fundamental statutory entitlement. So to clothe that act with the apparatus of case management is to disguise the very real injustice that will happen if my learned friend were to succeed in his application or, at least, in resisting our application. But I will come back to that too, because that is very important when it comes to the argument against us that says: "The investigation is now going to proceed and there will not be any change to it" and that is the problem, not the solution.

In relation to the second argument that my learned friend puts forward: two applications impose more strain than one, of course, that is obviously correct.

We do not make any submissions about the nature of the Lafarge Tarmac case, but what we do say is this, that if it is correct – we do not say it is correct, but if it were to be correct – that Lafarge Tarmac in different ways poses more complicated issues as, for example, possibly flagged up by Mr. Beard at respectively paras. 18 and 49 of his skeleton, those are not issues that arise on the Hanson application. If there were – we do not say there are, but if there were – special reasons for not hearing the Lafarge Tarmac application because there were complex issues, that would not be a reason for not hearing the Hanson application. In

other words - again, I am not suggesting we should have - one could have different directions on each application.

Point three raised by Mr. Beard: "no proper time to respond", that point merges with the first one. It is not really anything other than a duplication. If this is a simple case, the Tribunal is well versed in granting directions that dispense, for example, with defences and simply require a skeleton argument, this is such a case. There is absolutely no reason why we cannot have a very simple timetable with a skeleton argument in substitution for pleadings and a very quick hearing.

Point four, namely, applications are not time sensitive and have no impact on the way the investigation will be conducted going forward, is possibly the worst point that Mr. Beard makes, because if we are right in the legal submissions we make every day that passes means that an unlawful investigation is continuing. The rationale of compelling consultation to take place at or before a formative stage is to prevent an investigation continuing with a closed mind. That is what we see that very much from *Sports Direct*. That is why Mr. Beard was unsuccessful in that case in resisting an appeal to quash an interlocutory decision arising out of unfair consultation. He made much the same submissions that I anticipate he is going to make this afternoon. Can I show the Tribunal that case? It is tab 4 of the authorities bundle - I hope the Tribunal has that small bundle. One needs only to go to a cluster of paragraphs to see what this case was about and what the points were and are. Paragraph 1, this was an appeal brought under s.120, which is a direct analogue of s.179, for judicial review, as this is, "of a decision made course of its investigation", so that was exactly the same model.

Then if we go to para. 27 we see what we submit is the truism, that "the common law rules of natural justice underpin the statutory framework".

> "It was not in dispute that the CC is subject to general principles of procedural fairness and that it must act fairly in conducting its inquiries."

If one then moves to para. 44, we can see that:

> "The submissions of the CC and OFT (but not JJB) raised the threshold question whether the Application is premature given the redactions appear in working papers and not in any provisional or final decision."

Then if one goes to paras. 51 to 53 Mr. Beard refers to the countervailing proposition - I will miss the next two lines:

"that it is unnecessary for a party to 'jump the gun' and challenge a decision immediately because the error may be corrected during the investigation or may simply never arise."

So that was the submission and the Tribunal said:

"These propositions do not, however, resolve the issue now before the Tribunal which is whether in respect of a challenge to a decision by the CC to refuse to disclose certain information from working papers, Sports Direct acted prematurely or whether it should have waited …"

The Tribunal agreed with Mr. Beard that there were no bright lines but the legislation must be the starting point. Then at 55 to 56 it comes down to what is the meaning of "the decision" and, without taking the Tribunal to the next two paragraphs, essentially it is saying that an interlocutory decision made before a final decision is a decision covered by s.120 as it is common ground it is covered by s.179.

So we submit that the fact that an illegality may not be capable of being remedied if the investigation continues cannot sensibly mean - it is a complete *non sequitur* - that the investigation should therefore be allowed to continue or should not be subject to urgent remedial judicial intervention. The impact that my learned friend seeks to deny is the impact of vast public resources being consumed in an entirely fruitless exercise if we are right.

If we are right what is going to happen is that the Competition Commission from day to day is going to spend these vast resources on a completely unlawful investigation at vast public expense, because the greater the resources the greater the public is going to have to pay for it.

THE CHAIRMAN: It is not completely unlawful it is just the bit of it that you challenge?

MR. GORDON: The guts of it, but the bit of it I challenge, yes, absolutely. But, of course, if Mr. Jowell's application succeeds one extends, as I understand it, to the whole investigation. You, sir, are quite right to say in our case it is not the whole of the investigation.

What I do say is that to permit the Competition Commission day after day after day to consume vast amounts of resources is quite contrary to the purpose of giving Hanson, amongst others, a statutory entitlement to appeal.

As to point five, my learned friend says we may have brought this case because of limitation concerns. In a sense Mr. Jowell has dealt with that by his references to *Burkett* and also to *BMI* and *Sports Direct*.

We are not out of time, there is a choice, but the reason we have brought this application is not because we are concerned defensively about being out of time, it is that just like an impartial Tribunal - just like, perhaps, the foundation right of access to a court - fair consultation is the beginning of the fair process of allowing Hanson to say what it wants to say and if it is denied that right we say we should be allowed to challenge the decision at the earliest possible moment.

As to point six - no saving or cost to Hanson from an early hearing - this takes me back again to one of the points that Mr. Jowell made, which was that it is really obvious that if you have regulatory scrutiny at this level and this kind drifting on and on and on, it is injurious and inimical to the commercial reality that a successful business needs to keep staff, to keep contracts, etc. I do not need to spell that out; I do not need evidence of that, that is the most self-evident point around.

As to point seven, this is a rare occasion on which I fail to understand the point, but the point being made here appears to be that if we wait for a final decision the Competition Commission will therefore enable the Tribunal to be in a better position to decide the law. The reason I do not understand it is because it simply does not matter what the final report says. What matters is, for the purpose of fair consultation the focus is not on some later report, it is on what happened or did not happen on or before 8th October. One might go further back and say, by reference to the provisional decision that was made back in May, what happened on 8th October is that we were denied fair consultation by the publication of this vast addendum, which comes after the Competition Commission has proceeded beyond a formative stage.

So we cannot see, with great respect, how it is possible for this Tribunal to be in a better position to decide the law if we wait for the Competition Commission to produce its final report.

Can I finish by saying this, and this is very much a fall-back position on our part: the Tribunal will appreciate that there are a number of different ways of dealing with this matter, and there is a spectrum of different directions, but it is possible to treat Hanson and Lafarge Tarmac's applications differently. It is possible to accede to them, of course it is possible to deny them. But there is a further dimension which we do not rule out in quite the way that my learned friend, Mr. Jowell, appears to have done, which is following the logic that we are entitled to bring an appeal at the earliest possible time, this Tribunal must obviously decide - and this is part of a case management decision - what the earliest possible time is. We greatly hope that in Hanson's case you will say that the earliest

possible time accords with the directions that we have sought. But if, contrary to our primary submissions, it were not possible for various reasons - no doubt perhaps the Tribunal's own resources - to ensure a hearing, let us say, on 2nd December or 9th December, if a hearing was arranged in January or February, or whenever, that is something which is different in kind to merging everything in the final report - a challenge to the final report. As Mr. Jowell has said one has a time limit to challenge the final report two month time limit, but by that time you have to put every single ground of challenge into the appeal. If we are right on this foundational point there is only one challenge we need to make.

What will happen if this is just allowed to drift is that we will be pushed into a possibly wholly unnecessary appeal with all the vast legal costs that that appeal will necessarily demand. So whenever the direction is made by this Tribunal as to the date of a hearing, the date for further pleadings and so forth, our primary point is that urgency is extremely important.

All other considerations aside, this Tribunal should avoid a situation that allows illegality to be compounded day after day, but at the very least we should be enabled to have the earliest possible hearing consistent with case management considerations.

Sir, those are our brief submissions.

MR. BEARD: I am grateful. I am concerned not to repeat what we have already set out in our skeleton argument. Just for your note, we have explained in paras. 4 to 13 some of the background, the fact of the length of the investigation, how long it has been going on, the amount of work that has been going on - we can only barely touch on that in those paragraphs. We have also set out why an expedited hearing would be a massive burden and unfair to the Competition Commission dealing as it would be with responding to applications being made effectively for a hearing on the proposed timetable on week 98 of the investigation, just as we are coming to the conclusions of the investigation and intense work is being undertaken.

In relation to Lafarge Tarmac we have also set out why it is plain that it could have brought its challenges many moons ago and, indeed, it should have done in relation to the decisions reached earlier in the year. But those time points are substantive points to be dealt with on the challenge, they are not matters that need to be resolved in relation to this CMC question. Rightly, Mr. Jowell now does not emphasise those points, and in his submissions he started with two new stories.

The first is the degree of commercial impact on Lafarge Tarmac that will be faced if the hearing of this application by Lafarge Tarmac and, in parentheses, I also say Hanson, is not

dealt with until after the final report. He says that this is a new entity that has been the subject of a merger, the Competition Commission is well aware of that, as he rightly said, it was subject to scrutiny by the Competition Commission.

He also said that the uncertainties and concerns could impact on Lafarge Tarmac because there is an IPO one to two years away in relation to it. This is an entirely new story, not present in any of the correspondence application or skeleton at all.

He passed up an extract from the Competition Commission's merger decision report in Anglo/American Lafarge, but quite fairly said that that did not refer to an IPO within one to two years.

He then passed up an article from the Financial Times and said the plan was to offer an initial public offering within one to two years of the deal completing.

Of course, that article was published in 2011, substantially before the merger report was undertaken. It is quite wrong to be turning up with new evidence of this sort today. It is quite wrong to do so in circumstances where we have not had proper opportunity to consider it and deal with it, but, on its face, it amounts to nothing. Even if it is right that there will be an IPO in a year, two years, we are not talking about this hearing of these matters being pushed back one to two years, we are talking about hearings being listed early in the New Year.

As for monitoring trustees, and the terrible spectre that they apparently cast over a business, although those are matters that are discussed in relation to the provisional remedies decision, no decision has been reached on whether or not there is going to be a monitoring trustee at all. Of course, that would not be put in place until you reach the final decision in any event.

Then there is a further spectre, unrelated to the commercial issues, albeit one suggesting a degree of uncertainty, of further grounds for challenge against this final report that the Commission should not be allowed to reach before the hearing. It goes without saying that they are speculative but it also goes without saying that how those grounds are to be managed, if they are brought, is a matter for case management and if it is appropriate for these procedural issues to be dealt with as preliminary issues more quickly in the New Year, and that is perceived to be the most efficient way of dealing with things, so be it.

I wonder whether, in fact, when we get to the New Year Lafarge Tarmac and Hanson will be maintaining that position, but I do not need to speculate about that now.

What I can say is that the point that Mr. Jowell raised in relation to Rule 11(3) of the CAT Rules is just wrong. If he is going to, on behalf of Lafarge Tarmac, bring new challenges,

in fact, those challenges will be to a new decision. Therefore, it is not a question of amending the grounds of challenge to the decisions which he says he is challenging now, it is a new appeal, whether or not a single document is produced, matters not. You are not dealing with a Rule 11(3) situation because you are dealing with a new challenge to a new decision.

I think it is just worth emphasising that we do maintain that there are time points in relation to Lafarge Tarmac. We say that they are misreading *Burkett*, that *Burkett* does not suggest that you can bring the challenges at any time you fancy between some preliminary decision and a final decision at all. We say that is quite wrong but, as I say, that is a matter for another day.

As to the suggestion that in the New Year, if they are going to bring further grounds it will be a big burden for them, again, the timing of those grounds, how they are to be dealt with, can be dealt with by way of case management, but I do put down this marker on behalf of the Competition Commission: Mr. Jowell is referring to economic evidence and accountancy evidence, this is a judicial review. This Tribunal in particular in the *BAA* case has given clear steers about when fresh evidence can be adduced in relation to judicial reviews.

One of the times it is relevant is when a decision maker is facing a procedural fairness challenge, and that is precisely why the CC would need to pull together evidence, dealing with the challenges in relation to (a) whether or not it had gone beyond a formative stage in its decision making which, contrary to what Mr. Jowell says and what Mr. Gordon echoes, is not something that falls from the documents. There are a lot of documents, it is not going to be a matter of simply pointing at exchanges of correspondence, submissions and working papers, and provisional findings. It is a matter of what the state of mind of the Group was in relation to these matters at the relevant point upon which we are challenged. So we do have to have people that are closely involved in the investigation dealing with this matter now if an expedited timetable is put in place.

The same is true of the consultation issues, because consultation issues depend upon what the nature of the material is that has been provided in the context of the analysis of the issues that are being considered, and the way in which they are being considered. The significance of that, and what has gone beforehand and why, in terms of the process is again a matter of evidence. These matters will be the subject of evidence by those that are closely involved in the process. Indeed, Mr. Jowell's suggestion that you can simply hand this sort of case over to the Treasury Solicitor and counsel whilst, of course, we are deeply

flattered is just unrealistic. It is like saying you can deal with litigation without talking to your client; you cannot, it is unreal and it is wrong, and these challenges are fundamental to the way that this investigation has gone on.

I will come back to the case law in a moment, but these are not just: "You should have given us more disclosure; you should have run a data room differently" challenges, these are "stop everything". This investigation is at an end.

It may be in the … alternative it can be restarted, and in the further alternative it says there is some sort of queue in relation to some elements of this claim, but fundamentally both Hanson and Lafarge are saying: "This is the end."

In those circumstances it is not surprising that the CC considers that there will be a very substantial burden on it in dealing with these matters. Just for reference there has once previously been a challenge to the Competition Commission in relation to allegations of apparent bias, it was concerned with the Airports' Inquiry. It led to a three day hearing before the Tribunal just on that issue.

Preparation for and dealing with that issue, along with all the others which are fundamental to this inquiry, is a huge burden. The idea that we can be lodging a defence in three working days' time, is simply unreal, and it is also grossly unfair to the Competition Commission. We would need to be dealing, on the face of it, with two cases, although Mr. Gordon at times seemed to be departing from the union of appellants' line, and suggesting that Hanson could be dealt with separately. On the face of it that is not Mr. Jowell's position and in the circumstances we have to deal with what is put before us.

Now, when we first saw Lafarge Tarmac's application we did say: "We are open-minded as to ways that we can deal with things quickly. We suggested there might be some preliminary issues that could be carved out." Lafarge Tarmac said: "No, we are not dealing with it that way, we want a full hearing". Time has elapsed since then, a full hearing would now be a major burden.

As for Mr. Gordon's suggestion that it is important that we are conscious of public resources we are, indeed, very conscious of public resources. But this inquiry will have to, at least in relation to Hanson's application, continue whether or not Hanson was successful. In relation to Lafarge Tarmac it appears there would be at least elements of the inquiry that would have to continue, but overall the idea that vast swathes of it should be interrupted now, dealing with these applications, is not a sensible use of public resources if, as we say, these applications are ill-founded and wrong, and you should not proceed, Tribunal, on some implicit basis that they are sound; they are not. The Competition Commission had not

gone beyond reaching a formative view when it consulted further in relation to the matters it has done, we have received very substantial representations from a number of parties, including Lafarge Tarmac and Hanson, indeed, some of those representations were handed in but an hour ago.

In those circumstances you should not proceed on that basis, you should not proceed on the basis that the disclosure issues have been dealt with improperly or wrongly, they have not. We set out in our skeleton argument why, dealing with the third iteration of Lafarge Tarmac's case, that in practice, even if the argument was that there could be some sort of cure for the allegations of unfairness, which is not Lafarge Tarmac's main case, in fact, given the time that we are at now we could not effectively deal with those matters.

Just to pick up some of the case law, I have already touched on *Burkett*, I do not think I need to say more than to lay down a marker that we do not interpret *Burkett* in the way that the other parties do, but that is a discussion for another day as to whether there are time points, in particular against Lafarge Tarmac. I was going to say that there is not a time point against Hanson, certainly as they put their case in their application, but in the course of submissions Mr. Gordon, at one point, started referring to challenges to the provisional findings and if that were to be the case things might be different.

Leave aside *Burkett* and go back to *Sports Direct*. It is important to remember what *Sports Direct* was about. Apart from the fact that the Sports Direct challenge came in two days after the relevant decision in question and the relevant decision in question was to hand out a working paper on the part of the CC which had vast swathes of redaction through it, and SDI came back and said they wanted substantial chunks of that unredacted. So it was a disclosure issue alone. It was not saying: "You must stop this whole merger investigation". It was done within two days of the decision and it was half-way through the merger decision making process.

It clearly could be cured, for taking into account in the final decision and, as I say, not a challenge to the whole investigation, very different from here.

More fundamentally, it was about prematurity as to whether or not the case had been brought too early, not too late.

In relation to *BMI*, just for your notes, it was 10 days after the relevant decision that challenge was made. The challenge was made by BMI and others in relation to the operation of the data room. That challenge was brought six months before the end of the market investigation. It clearly was a matter that could be cured and, more fundamentally, it was again not a challenge to the whole investigation.

The other case that has been referred to is the *AWG v Morrison* case. I simply pick up the point that, Mr. Chairman, you adverted to in your question to Mr. Gordon, this is nothing to do with arcane distinctions that used to apply between administrative and judicial bodies and the *BAA* case readily recognises administrative decision making by the CC can be the subject of apparent bias challenges. That is not at issue. But the decision in *AWG v Morrison* was concerned with whether or not resource issues somehow attenuated the effect of apparent bias. The Court of Appeal said that no, of course they do not.

We are not trying to trammel on that sort of reasoning at all. We are here dealing with case management issues, that are entirely different from that. We are asking ourselves whether or not it is appropriate to apply a vastly accelerated timetable in circumstances where it will put the absolute maximal pressure upon the CC and those involved in the investigation and this most critical point in the decision making process, where these late submissions are now being considered, and the entirety of the process is under review. Or, whether we wait until after Christmas and hear those matters then, and we leave to this Tribunal how it may wish to case manage these matters after Christmas and the provision of the final report.

That final report will effectively have been concluded by the middle of December. There is a process then of fact checking and publication that goes on, but actually we are dealing with a decision that is about to be concluded. It would be quite wrong, disproportionate and unfair in those circumstances to impose those burdens on the Competition Commission. Contrary to Mr. Gordon's suggestions, these are not pure questions of law, these are obviously questions of fact. The prejudice that has been suggested in relation to Lafarge Tarmac is illusory, and the suggestion that this will all be terribly straightforward is one that is easy for counsel to make now, but it only takes a scintilla of thought to recognise that the nature of these applications is not going to be susceptible to quick, simple disposal in the way that is being suggested.

THE CHAIRMAN: What do you say to Mr. Gordon's point, if he is right, that carrying on with the investigation is going to be compounding the illegality on a daily basis?

MR. BEARD: In a way all challenges to any regulatory decision that are brought in the course of an investigation, when there is any timetable lag, are allowing that investigation to continue. Notionally, if the challenge is successful, it will transpire with hindsight that those steps were unlawful. At the moment they are not unlawful. The fact that appeals have been brought does not mean that we have done anything wrong. It is perfectly appropriate, indeed, given the statutory scheme that says we are to report within two years, that the presumption is that we are doing the right thing and that we should be entitled to continue to

do it. Quite properly, people can challenge us but that does not mean that each day that continues a new sin is being committed because that is the wrong presumption to be made. The real point is highly marginal in the present circumstances given that if these calumnious sins have been committed they are going to stop being committed fairly shortly as the report process draws to a halt. So if some sort of moral slide rule is being applied to the CC, it is not going to have moved very far between week 98 and week 99 or 100. If the moral failings exist this Tribunal will be able to correct them very quickly in the New Year.

THE CHAIRMAN: Thank you. Mr. Jowell?

MR. JOWELL: Just six brief points. The intention to IPO was clearly known to the Competition Commission because it is set out in the extract from their report that I have shown you. The precise date of that IPO emerges only from the "Financial Times'" report, but it is clear that the intention to IPO was known to the Competition Commission.

Mr. Beard referred to the fact that no decision has been made in relation to a monitoring trustee, but I did not hear him say that they would not be seeking to appoint one pending the resolution of this matter, and I think it may be assumed that unless such an undertaking is given the point is not a good one; one can assume that a monitoring trustee will be appointed with all the attendant inhibition that that will lead to.

Mr. Beard I think misunderstood my point regarding the need to bring all your points at once in relation to Rule 11(3). We think it is right that, in fact, one could bring an application in relation to the final decision by way of amendment to this application if we so choose. That is what happened in *Burkett* in a judicial review context. There is no reason really why it should be any different here, but that matters not. Even if we brought it by way of - in fact, especially if we brought it by way of a fresh application against the final decision on the face of it unless there are some case management directions in advance to the contrary, we will have to put in all our points from the outset. And that means inevitably that any appeal on the final decision is going to be delayed because it will take us many weeks to digest the final decision and resolve what are the points to appeal against, and put all of that together.

THE CHAIRMAN: Can I just be clear about the 11(3) point, why could you not immediately after the publication of the final report - even before you have put together your other grounds of challenge, if any - why could you not ask for that to be determined as a matter of urgency then?

MR. JOWELL: Because first of all one has to put in the application, so what does one do? One puts in the grounds of appeal just in relation to the procedural point.

THE CHAIRMAN: Yes, the existing application.

MR. JOWELL: Then one is in a situation where one may need later on, if that fails, to add in further grounds. And, if you look at 11(3) that says that this Tribunal "shall not" permit amendments to raise additional grounds unless one of those three circumstances are met.

THE CHAIRMAN: I think Mr. Beard's point was it would be a fresh appeal in relation to the final decision.

MR. JOWELL: It may well be a fresh appeal, but let us suppose it is a fresh appeal. We put in a fresh appeal in relation to the final decision. We then have to raise all of our grounds at that point.

THE CHAIRMAN: That pre-supposes you could not dispose of this application in time for you to then bring a further appeal within the two months if it failed.

MR. JOWELL: That is correct. There are two possibilities, either Mr. Beard could say: "We are not going to take any limitation points in relation to your preliminary appeal", and we accept that if it is vitiated that effectively there is a read across from this application to the final decision, so accept then that the final decision is vitiated as well, that is a possibility, but he has not made that concession. On the contrary, he says in correspondence they wish to retain their 'without prejudice to the limitation' point. So either that or we would have really no choice but to bring the two applications in parallel, or seek to amend as was preferred. The difficulty we have is that unless it is accepted by this Tribunal and by the Competition Commission, or at least by this Tribunal that exceptional circumstances would exist for us to be able to bring further grounds later after the procedural issues are resolved on this application, then we have to bring everything all at once, and that is a very great exercise.

MR. BEARD: I am sorry, this was not a matter that I canvassed in submissions, but I want to make sure that Mr. Jowell has the opportunity to deal with it. There have been other cases where, for various reasons, appellants have effectively put in protective appeals so they did not need to make any application for any exceptional circumstances extension, and they said: "These are our grounds, but we will amend if we have to proceed with this" and in certain circumstances they did not have to proceed because other hearings meant that the need for that appeal fell away. So there are ways and means of dealing with these sorts of things. I do not want Mr. Jowell to proceed on the basis that that we are trying to be too draconian about these things.

MR. JOWELL: No, I am grateful for that indication, but unless there is something very concrete along those lines agreed either by the Tribunal or ideally also by the Competition

Commission, that exceptional circumstances exist here such that we could just bring a standalone further application in relation to the final decision on these procedural points alone, and we could then have permission later on - we will have, if you like, prospective permission to amend on the basis of exceptional circumstances - then this issue remains. Obviously, we cannot take a risk that our other points are somehow disallowed because there is not jurisdiction to allow further grounds of appeal, despite that very helpful indication.

In relation to the *Burkett* point, Mr. Beard somewhat mischaracterised what we say *Burkett* stands for, that we said that it stands for the proposition that you can just bring your application any time between the provisional and final decision. We did not suggest that. What we suggested was that it means that you can bring it in relation to the final decision even if you are out of time in relation to a preliminary decision.

I do not get the impression that my learned friend is somebody who is reticent about taking legal points when he can, and yet he has not actually come up with any citation or authority to suggest that that is not correct, that we could not bring it in relation to the final decision.

In relation to the judicial review, my learned friend lays down a marker. He says we talk about adducing evidence and this is a judicial review, he says, and you could not necessarily get away with it. This is a judicial review of a very special sort, because it is a judicial review involving prospective interference, very serious interference with property rights, which means that Article 1 of Protocol 1 of the European Convention on Human Rights is involved. That means that this Tribunal will give it considerably closer scrutiny and, indeed, will be obliged to give us a fair hearing, which does involve a greater consideration of everything.

Finally, we do not really follow what is all the evidence that the Competition Commission says that it wants to put in. We do not see a great difference on the facts of our case and that of the *BMI* case. Essentially, it is just about the non-disclosure of documents, which is all a matter of public record.

My learned friend refers to the fact that our pre-determination issue would require reams of evidence. Again, we do not see that and, in fact, in an earlier lifetime my learned friend was proposing that we should take as a preliminary issue the point of "formative stage" and, if anything that is a broader issue than pre-determination, so it is difficult to see why suddenly this has become an unmanageable exercise when it was not previously and proposed as a preliminary issue.

We think that there is something 'ostrich-like' about the Competition Commission's attitude here. They are trying to put their head in the sands of their decision and simply focus on finalising that when there are these enormous procedural issues out there which have to be, or should be resolved as soon as possible.

MR. GORDON: Sir, as far as we could detect, Mr. Beard made three points and one defensive response. The first point was a general assertion that formative stage required evidence. It is interesting because I did give particulars of our case in very short outline, and not one argument was advanced as to what evidence was needed to me.

One only has to look at the Competition Commission's own statements, which are set out in our notice of application. Paragraphs 29 to 32, and I will just read one of them. This is all post the provisional findings decision, so we are at para. 32, p.10. Pinsent Masons, solicitors for Hanson, fairly understandably in our submission:

> "I just make one point. I feel we are at the wrong stage. I think you know this morning has been useful but it is really more like a main hearing to find out about GGBS, sort of pre-provisional finding stage."

"Well", says the Competition Commission: "from an administrative point of view we have no alternative but to discuss remedies today in view of the limited amount of time." Now, no proposition of law is clearer than sacrificing fairness for the interest of time is an unlawful act. We say that not one shred of argument has been devoted to why that is not a very simple, non-evidential issue, beyond what must be accepted fact. That is point one.

Point two was that when my learned friend was making submissions about formative stage, he slid into, without any differentiation in logic, an argument about consequences, i.e. very far reaching consequences. It is perhaps the most obvious point for me to make, and I am sorry I did not make it earlier, but there is no link between the simplicity legally of a case, or the complexity legally of a case and its consequences. So you can have a very complicated case, no doubt about one or two rivet screws. You can have a very simple case which can have very, very wide-ranging effects, indeed, in judicial review it happens rather a lot - very simple one sheet of paper arguments can have colossal effects. So the argument that these cases have wide-ranging effects has nothing to do with a case management time based decision.

That leads me into Mr. Beard's third point, which is when he got to the cases he tried to distinguish *BMI* and *Sports Direct* by saying in those cases you had a breach which was capable of being remedied, to which the answer is: that does not meet my point, which is not whether the breach can be remedied, it is whether an irremediable breach should be

remedied at the earliest opportunity. That links up slightly with Mr. Jowell's point about the European Convention on Human Rights. Indeed, I was not going to mention it but since Mr. Jowell has brought up human rights one always is very decorous about raising them in cases nowadays, the CAT is, of course a public authority under s.6 of the Human Rights Act, so it is not just case management, there is a human right dimension.

THE CHAIRMAN: We cannot be expected to pre-judge whether there has been an irremediable error at this stage, can we?

MR. GORDON: That leads me to my fourth point, which was the defensive response to your question, sir.

What Mr. Beard has done is to create from nowhere a presumption of legality. Of course, it is true that in a strictly formalistic sense, and one can think of many cases *Rossminster* being amongst them, in a purely formalistic sense, until a decision has been set aside or quashed it is a lawful decision in the sense it has not been quashed, but that does not mean that in the context of case management, human rights protection, the real world, one presumes on a set of facts which, in my submission, is fairly self-evident in Hanson's case, that far from their not having been illegality one must assume that there has been legality. This is a case where consultation has happened after a decision, the legal issue there, of course, is - and it is a very simple legal issue - in this very simple set of circumstances is there unlawful consultation or not. It does not require evidence, and so we say that one must not be mesmerised by a presumption of legality in the strictly syntactical formal sense, one has to look at it in real terms when one is looking at case management decisions.

We respectfully submit that my learned friend did not answer that question. What he, in fact, kept saying was: in the end it would be retrospectively validated because an illegality would be recognised. But the real consequences that the illegality will have happened and that if we are in this world of resource allocation, if an early hearing on the apparent nature of a case, can avoid that waste of resources that is what should happen in our submission. That is why Hanson's case may - may - be different, but certainly is why it should be heard at the earliest possible opportunity.

Those are my submissions.

THE CHAIRMAN: Thank you very much. We are going to rise now to consider our decision.

(Short break)

(For Ruling see separate transcript)

MR. BEARD: I am grateful to the Tribunal. May I just briefly take instructions as to whether or not there are any other matters which the Commission would ask the Tribunal to rule on? I

anticipate not, but just for a moment, if I may. (After a pause): No, there are no other matters the Competition Commission would ask that are dealt with now, they can be dealt with in due course, and dealt with relatively quickly.

As for costs matters, given that this is case management it appears sensible that these are costs in the case.

MR. JOWELL: We have no further submissions.

MR. GORDON: Nor do we.

THE CHAIRMAN: Thank you.