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Case No.: 1328/4/10/19

IN THE COMPETITION
APPEAL TRIBUNAL

Victoria House,
Bloomsbury Place,
London WC1A 2EB

23 July 2019

Before:

The Honourable Mr Justice Roth, Tim Frazer, Paul Lomas

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Lebedev Holdings Limited and Another
v
Secretary of State for Digital, Culture, Media and Sport

*Transcribed by Opus 2 International Ltd.
(Incorporating Beverley F. Nunnery & Co.)
Official Court Reporters and Audio Transcribers
5 New Street Square, London EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
civil@opus2.digital*

Hearing– Day 1

Tuesday, 23 July 2019

(10.30 am)

THE PRESIDENT: Yes, Miss Ford.

Submissions by MISS FORD

MISS FORD: Sir, I appear for the applicants, Lebedev Holdings Limited and Independent Digital News and Media Limited.

Mr. Scannell and Ms. Mackenzie appear for the respondent, the Secretary of State for Digital, Culture, Media and Sport. We are grateful to the Tribunal for accommodating us at such short notice.

This is my application for the review of the public interest intervention notice given by the Secretary of State under section 42(2) of the Enterprise Act 2002.

There are two grounds of challenge.

THE PRESIDENT: Just before you go ahead on the grounds of challenge, we do need first to determine the forum in which this application is heard. I think you're proposal is we should be sitting in England and Wales, and as I understand it, there is no objection to that on behalf of the Secretary of State.

MR SCANNELL: No, there is not.

THE PRESIDENT: So we shall order that the forum for this application is England and Wales.

MISS FORD: I am grateful.

1 THE PRESIDENT: May I also raise the point about
2 confidentiality. There are some documents that have
3 been marked "Confidential", some of them are the actual
4 transaction documents which perhaps we will not need to
5 look at, but there is also a letter and in our index it
6 is put as confidential which is the report to the
7 Secretary of State from the CMA, I think there is
8 a question for you, Mr. Scannell, but looking at it,
9 there seemed to be only just a couple of items in it, it
10 is in your bundle at B5, that are highlighted as
11 confidential. Is it the case that apart from those
12 passages and a price that is indeed blanked out, the
13 rest of the report, which has been referred to in
14 places, is not confidential?

15 MR SCANNELL: Yes, Mr. President, and just to put some
16 detail on that, so that makes it clearer about precisely
17 the paragraphs to which we are referring.

18 THE PRESIDENT: Yes.

19 MR SCANNELL: A redaction is proposed at paragraph 18 that
20 is uncontroversial. There is a figure in that
21 paragraph.

22 THE PRESIDENT: Before you get there, I have something
23 highlighted in my copy.

24 MR SCANNELL: In paragraph 16.

25 THE PRESIDENT: In paragraph 16.

1 MR SCANNELL: Yes, can I return to that?

2 THE PRESIDENT: Yes, so 18, that is redacted, yes.

3 MR SCANNELL: And that is uncontroversial. Likewise the
4 redaction at paragraph 19 and there is a footnote, 9, on
5 the same page, sir, and there are two figures there,
6 which are redacted, again, uncontroversial and agreed by
7 the Secretary of State.

8 That then leaves two paragraphs to address you on.
9 The first is paragraph 16 to which the president has
10 referred and the other is paragraph 30 on page 8.

11 THE PRESIDENT: Yes.

12 MR SCANNELL: Now, first, there is a qualitative difference
13 between the way that these redactions have been
14 presented by the applicant, so the ones I have just
15 referred you to were proposed by Bristows, legal
16 representatives for the applicants. The redactions at
17 paragraph 16 and 30 were suggested to the
18 Secretary of State by Bristows, not on their own behalf
19 but on behalf of the legal representatives of the
20 ultimate acquirers --

21 THE PRESIDENT: Yes.

22 MR SCANNELL: -- whose identity we are still unclear about.

23 So there is a difference there, and as I understand
24 it, the way those were suggested were -- these are not
25 coming from us, Bristows, they are coming from the legal

1 representatives of the acquirers, and we will let you
2 know in due course whether they insist on them.

3 THE PRESIDENT: Yes.

4 MR SCANNELL: My understanding is that they would prefer for
5 these redactions to hold, but for the avoidance of doubt
6 the Secretary of State does not agree that there is
7 anything commercially confidential in either
8 paragraph 16 or in paragraph 30.

9 THE PRESIDENT: Therefore, subject to the first group of
10 redactions which are not, I think, necessarily relevant
11 for us, namely 18, 19 and the footnote, the rest of the
12 report is not confidential.

13 MR SCANNELL: No, sir.

14 THE PRESIDENT: Yes, thank you; so Miss Ford, you need not
15 come to it now, but if you can, when it is convenient,
16 is it maintained for your client that what is said in 16
17 and 30 highlighted in our copies is confidential? It
18 seems to be points that are evident from a lot of the
19 other documents that are not confidential but --

20 MISS FORD: On behalf of my clients we are not seeking to
21 maintain confidentiality on that.

22 THE PRESIDENT: Yes. Thank you, and I do not think there is
23 anything confidential in either skeleton as far as I can
24 see.

25 MISS FORD: Just to draw your attention to, there are two

1 documents in B3 and B4 which are letters from
2 Mr. Lebedev which do contain sensitive information about
3 the business, and we do say that elements of those are
4 confidential.

5 THE PRESIDENT: Yes. I mean, they are, I think, probably --
6 we will deal with them if necessary but they did not
7 seem matters we need to refer to for the substance of
8 the issues we have to decide.

9 MISS FORD: Certainly for our part, we would agree.

10 THE PRESIDENT: Thank you. I stopped you. If you would
11 like to proceed, we will in the usual way take a break
12 at a convenient time.

13 MISS FORD: There are two grounds of challenge. We say
14 either the Public Interest Intervention Notice was
15 itself out of time under section 24 or we say that any
16 reference under the Public Interest Intervention Notice
17 would have been out of time and so the timetable that
18 was set out in that notice was itself essentially
19 unlawful.

20 THE PRESIDENT: Yes.

21 MISS FORD: My submissions are going to be in three parts.
22 First, I am going to go through the background of the
23 matter; secondly, I am going to work through the
24 applicable statutory provisions; and then thirdly, I am
25 going to make my submissions on grounds 1 and 2.

1 THE PRESIDENT: Yes.

2 MISS FORD: So starting with the factual background. The
3 Intervention Notice is concerned with two relevant
4 transactions. The first in time is the acquisition of
5 a 30% stake in Independent Digital News and Media
6 Limited on 7 June 2017. If you look at the applicants'
7 bundle behind tab 4 you should see a diagram showing the
8 shareholdings before the transaction and after the
9 transaction.

10 THE PRESIDENT: Sorry, applicants' bundle at tab?

11 MISS FORD: It is tab 4 and it is actually the second page
12 in, but numbered 1.

13 THE PRESIDENT: Yes, which although it is a confidential
14 exhibit, that is not confidential.

15 MISS FORD: This element of it is not confidential, that is
16 right.

17 You see at the top of the page a diagram which shows
18 the position before the acquisition and in the middle is
19 a box that shows IDNM. IDNM is a digital consumer media
20 business, it delivers news and entertainment content
21 through its websites, independent.co.uk and indy100.com,
22 and its digital mobile application, The Independent
23 Digital Edition. You can see that IDNM owns 100% of
24 Independent Digital News and Media Inc. You then see
25 above that the shareholding structure of IDNM, and you

1 can see that 67.66% of it is owned by Evgeny Lebedev
2 before the transaction and there are three other
3 shareholders.

4 THE PRESIDENT: Yes.

5 MISS FORD: The second diagram shows the position after the
6 transaction, so you can see that there is now an
7 additional shareholder, an entity called Scalable Inc.
8 It is the second box in at the top. Scalable Inc has
9 a 30% stake in IDNM.

10 THE PRESIDENT: Yes.

11 MISS FORD: We have also produced another diagram to hand up
12 which shows the shareholding in Scalable Inc and also
13 International Media Company. (Handed)

14 THE PRESIDENT: Yes.

15 MISS FORD: You can see the first diagram on this page is
16 Scalable shareholdings. Scalable Inc is
17 a Cayman Islands company. It has two issued shares.
18 One share is owned by Sultan Mohamed Abuljadayel, who is
19 a Saudi investor, and the other is owned by Wondrous
20 Investment Holdings LP.

21 Wondrous Investment Holdings is a limited
22 partnership in the Cayman Islands and it has two
23 partners, one partner is a management company which is
24 ultimately owned by National Commercial Bank which is
25 a publicly owned company listed in Saudi Arabia, and the

1 other is an investment fund for clients of the bank.

2 THE PRESIDENT: Is Sultan Abuljadayel linked to the bank?

3 MISS FORD: It has certainly been reported as such, sir. We

4 will come to see how the transactions have been reported

5 and it is said he has links with the bank.

6 THE PRESIDENT: We have seen the newspaper reports but apart

7 from that is there any basis that on which it is said he

8 has any links to the bank? The newspaper reports were

9 a bit vague on that.

10 MISS FORD: I think we are not really in a position either

11 way to assist on that, I am afraid.

12 THE PRESIDENT: Thank you.

13 MISS FORD: So this transaction was first reported in the

14 Middle East Eye on 28 July 2017 and that is in our

15 bundles, the applicants' bundle tab 6, page 1. You

16 should have there a printout from the Middle East Eye

17 with the headline: "Exclusive: Saudi investor ploughs

18 millions into liberal icon of UK media. Sultan Mohamed

19 Abuljadayel gained significant control of Independent

20 alongside Russian media mogul, Evgeny Lebedev."

21 Also the following day reported in the Guardian --

22 THE PRESIDENT: Just looking at the article, what that says,

23 it is slightly over-printed the first sentence, but on

24 the top of page 2:

25 "Sultan Mohamed Abuljadayel listed as a Saudi

1 Arabian national acquired up to 50%."

2 That is not actually correct, well it is up to 50
3 but --

4 MISS FORD: It is in fact 30%.

5 THE PRESIDENT: Is it 30%, because it is 50% of Scalable and
6 if he is not linked to the bank, Scalable has got 30%,
7 he has half of Scalable?

8 MISS FORD: Yes.

9 THE PRESIDENT: So it is not actually correct, is it?

10 MISS FORD: That must be right, yes. There was then also
11 a Guardian article, just for completeness which starts
12 at page 5, and they actually put it as a stake of
13 between 25% and 50%. But that is the first reporting of
14 that transaction.

15 Then moving on to deal with the second transaction
16 in issue --

17 THE PRESIDENT: Just pausing there a minute. ESI Media is
18 not actually a company, is it?

19 MISS FORD: I am sorry, where are you?

20 THE PRESIDENT: The last paragraph on -- the first page of
21 the Guardian article. "Either way Evgeny Lebedev, the
22 owner of independent parent company ESI Media ..."

23 MISS FORD: It is not a company, no.

24 THE PRESIDENT: It is, from what you have shown us in fact
25 in your table, it is IDNM, is it not?

1 MISS FORD: IDNM is the relevant company, yes.

2 THE PRESIDENT: ESI Media is a trading name is it or what
3 is it?

4 MISS FORD: It is, I am told, yes.

5 MR LOMAS: Sorry, is it correct that through ESI though the
6 Standard and The Independent businesses are essentially
7 run as one?

8 MISS FORD: I am told that they share certain services but
9 not journalists, not the journalistic aspects of it.

10 THE PRESIDENT: But the same head office I think.

11 MISS FORD: Yes. Moving on to the second transaction in
12 issue, it is the 30% stake in Lebedev Holdings Limited
13 which was acquired progressively over the period from
14 7 December 2018 to 20 February 2019. LHL is a holding
15 company. It is the majority holder in the Evening
16 Standard Limited which publishes the Evening Standard
17 printed newspaper and the Evening Standard news website,
18 and again we have a table which shows this acquisition.
19 It is behind tab 5 in our bundle, page 1.

20 THE PRESIDENT: Again, to be clear, that is not
21 confidential, though the rest --

22 MISS FORD: No, the table is not. Looking at the position
23 before the transaction you see Lebedev Holdings Limited
24 is the second box down. It is, prior to the
25 transaction, 100% owned by Evgeny Lebedev, and then the

1 position after the transaction is that you then have
2 three shareholdings of Lebedev Holdings Limited,
3 Mr. Lebedev has 60% and IMC has acquired a 30% stake.

4 THE PRESIDENT: (Pause) Yes.

5 MISS FORD: So looking back at the new table that I handed
6 up we have also got the structure here of IMC and you
7 will see it is essentially the same shareholders and the
8 same structure as Scalable.

9 THE PRESIDENT: Yes.

10 MISS FORD: So this transaction was first reported in the
11 Financial Times on 30 January 2019. That is tab 6 in
12 our bundle, page 9. You see there:

13 "Mystery investor bought 20% of the Evening Standard
14 parent. Cayman company's 14 million investment in
15 Lebedev Holdings stirs transparency questions."

16 There was also a Guardian article on 30 January, and
17 that starts at page 12. You see:

18 "Mystery offshore investor takes 20% stake in the
19 Evening Standard. London newspaper refuses to reveal
20 identity of new financial backer."

21 We have evidence --

22 THE PRESIDENT: Does that Guardian article link the
23 purchaser, the mystery purchaser in the Evening Standard
24 to the purchase of The Independent?

25 MISS FORD: I believe it did. You see seven paragraphs down

1 you have:

2 "In 2017, Lebedev sold one third of The Independent
3 to a Cayman Islands company controlled by an obscure
4 Saudi-based individual called Sultan Mohamed
5 Abuljadayel.

6 "According to the FT, the recent anonymous
7 investment in Lebedev Holdings was made by a Caymans
8 Islands company founded by the same agent used during
9 the Saudi investment of The Independent."

10 THE PRESIDENT: Yes, founded -- the company was founded by
11 the same agent. That in itself does not -- that may be
12 just an agent sets up Cayman Island companies.

13 Other than they are both Saudi, it does not seem to
14 be a link, does it?

15 MISS FORD: Look back at the FT article.

16 THE PRESIDENT: That says --

17 MISS FORD: So the FT article starting at page 9. If you
18 then turn over the page to page 10 you see:

19 "In 2017 a 30% stake in Independent's judicial
20 operations were sold to a relatively unknown investor,
21 Sultan Mohamed Abuljadayel ..."

22 THE PRESIDENT: That actually says that Sultan Abuljadayel
23 worked for NCB capital, but that is not your
24 instructions.

25 MISS FORD: We do not have information either way, which is

1 why I answered your question, sir, that that is what has
2 been reported.

3 THE PRESIDENT: But they do not say that refers to Scalable.

4 MISS FORD: That refers to Scalable.

5 THE PRESIDENT: But it does not link Mr. Abuljadayel to the
6 new acquisition, does it?

7 MISS FORD: It does in the sense that this is an article
8 about the new acquisition and it is mentioning the
9 previous acquisition by -- that is the extent of it. It
10 is drawing a link between the two.

11 THE PRESIDENT: Then it says:

12 "Despite several requests [your clients] refuse to
13 reveal the identity."

14 MISS FORD: Yes.

15 THE PRESIDENT: Yes.

16 MISS FORD: We have evidence as to what was in the mind of
17 the DCMS media team at the relevant time, so at the time
18 of the 30 January articles, and that is in Mr O'Neill's
19 statement. So the respondent's bundle, tab B, page 3.
20 At paragraph 8 he refers to the Financial Times article
21 and then at paragraph 9 he says:

22 "At the time I and other DCMS media team colleagues
23 had an open mind about the matters raised by the
24 article. The fact that the article was apparently
25 written by journalists, without confirmation from any of

1 the enterprises apparently involved, meant that an open
2 mind had to be kept, but we believed that the matters
3 referred to in the article could potentially give rise
4 to public interest considerations under the
5 Enterprise Act 2002 meriting further investigation."

6 So it has come to the attention of DCMS and they
7 recognise that it might potentially require further
8 investigation under the Enterprise Act.

9 You then see at paragraph 10 Mr. O'Neill refers to
10 an email chain between himself and Faye Fullalove, the
11 principal case officer at the Competition and Markets
12 Authority, and he exhibits that in B.2 in the bundle,
13 B2. If you turn to page 4 in that exhibit there are
14 a chain of emails exchanged between DCMS and the CMA.
15 At page 4 you see right at the bottom of the page an
16 email dated 11 February 2019 from Ms. Fullalove, and if
17 you turn over the page to page 5 she says:

18 "Just to let you know that the transaction was
19 picked up as part of our mergers intelligence
20 monitoring. It is due to be discussed on Wednesday,
21 where the mergers intelligence team will decide whether
22 we wish to get in contact with them or not. I have told
23 the team that DCMS may have an interest in the
24 transaction."

25 So by this time the transaction has also come across

1 the radar of the CMA.

2 If we then turn back to Mr O'Neill's statement in
3 tab B, paragraph 11, he says:

4 "I explained to Faye Fullalove that we would need to
5 liaise with the Secretary of State and decide how LHL
6 might best be approached. The Secretary of State was
7 duly briefed on this issue. Having considered this, the
8 Secretary of State agreed with our recommendation to him
9 that the matters raised to him did warrant further
10 investigation."

11 So at this stage the Secretary of State is aware of
12 the transaction and he has agreed with the
13 recommendation that was made to him that it warrants
14 further investigation.

15 MR LOMAS: Just so I can be clear, you are not submitting
16 that the material facts being public test is being met
17 at this stage.

18 MISS FORD: No, I am not, no. I am saying that the
19 25 February is the test. But I do place reliance on the
20 fact that internally it is very clear that everybody
21 involved, the Secretary of State, the DCMS media team
22 and the CMA were on notice of the merger.

23 MR LOMAS: Yes.

24 MISS FORD: There were then questions asked in Parliament
25 about the transaction. You can see, if you look at B1

1 in the respondent's bundle, there was a question asked
2 by Lord Myners to ask Her Majesty's government whether
3 they were advised of the change in ownership of
4 Lebedev Holdings and the grant of an option to acquire
5 the Evening Standard and a board seat at that newspaper.

6 Then the answer is to refer to the response to
7 another question. If you note the number, 218767, you
8 can see that that is actually the question on the
9 following page. This is then a question from Tom Watson
10 saying:

11 "To ask the Secretary of State for Digital, Culture,
12 Media and Sport what information his department holds on
13 the identity of the new part owner of the
14 Evening Standard's parent company Lebedev Holdings?"

15 That is answered on 13 February 2019 saying:

16 "Neither I nor my department has had contact from
17 Lebedev Holdings Limited or its representatives about
18 the transaction. While the Secretary of State has
19 powers under the Enterprise Act 2002 to intervene in
20 certain media mergers raising public interest concerns,
21 there is no requirement under the Enterprise Act 2002
22 for parties to advise us of the transaction. My
23 officials will contact Lebedev Holdings Limited about
24 the transaction and to obtain further information to
25 determine whether there has been a change of control

1 which would give rise to a merger falling within the
2 jurisdiction of the 2002 Act. However, writing to the
3 party does not necessarily indicate that any transaction
4 raises any public interest concerns. These decisions
5 are always made in quasi-judicial capacity by the
6 Secretary of State."

7 So questions have been raised in Parliament and the
8 Secretary of State expresses the intention to write to
9 LHL, which he duly did. We can see that at the
10 applicants' bundle, tab 7, page 1. A letter that was
11 dated 12 February 2019, headed "Acquisition of
12 a minority shareholding in Lebedev Holdings Limited".

13 If you turn over the page to page 2, you see:

14 "The Secretary of State's attention has been drawn
15 to a transaction in December 2018 involving the sale of
16 a significant equity stake in Lebedev Holdings Limited.
17 In order for the Secretary of State to consider this
18 matter in more detail we would welcome further
19 information about the transaction including ..."

20 Then a list of information requests.

21 THE PRESIDENT: It asks for details of the entity acquiring
22 the shares, the beneficial owner of the entity, and
23 at 4, details of any interests held or control over
24 other UK ... by the individuals identified.

25 MISS FORD: Yes.

1 THE PRESIDENT: Yes.

2 MISS FORD: The response to that letter, on page 2 you can
3 see the deadline was set for Tuesday, 19 February, and
4 the response was sent, it is the next page, page 3,
5 19 February 2019. This is the letter which, although
6 dated 19 February 2019, was then shared with the CMA on
7 1 March 2019.

8 THE PRESIDENT: Yes.

9 MISS FORD: This is the letter which is said to have started
10 time running, so it is said to contain sufficient
11 information to start time running for the purposes of
12 the Act.

13 THE PRESIDENT: Yes.

14 MISS FORD: So as a matter of practicality the
15 Secretary of State had that information from the 19th.

16 THE PRESIDENT: Yes.

17 MISS FORD: There was then a further article in the
18 Financial Times.

19 THE PRESIDENT: Just looking at that, this identifies IMC,
20 it identifies the two shares, one with Mr. Abuljadayel,
21 and Mr. Sultan Abuljadayel.

22 Is it like the Spanish, that both names are part of
23 the surname?

24 MISS FORD: I am afraid I do not know and those behind me do
25 not know either.

1 THE PRESIDENT: Your client will know. Yes. The other with
2 Wondrous, and it gives the details and then it gives at
3 paragraph 4 the fact that the same two ultimate owners
4 took the 30% share in IDNM which publishes
5 The Independent.

6 MISS FORD: Yes. We then get the Financial Times article of
7 25 February. That is at tab 6, page 17.

8 THE PRESIDENT: This is the one you strongly rely on.

9 MISS FORD: This is the one. It is headed:

10 "Hidden buyer of Evening Standard stake revealed as
11 Saudi investor. Sultan Mohamed Abuljadayel has links to
12 Riyadh-owned bank and also backs The Independent."

13 Can I just ask the Tribunal to read the first page.

14 (Pause)

15 THE PRESIDENT: Yes.

16 MISS FORD: On the other side of the diagram that I handed
17 up showing the --

18 THE PRESIDENT: Before we go back to that, so this refers
19 to -- says that Mr. Abuljadayel bought a stake of 30% in
20 the parent of the Evening Standard.

21 MISS FORD: Yes.

22 THE PRESIDENT: But that is not correct, is it? Because, as
23 before, he has one share equally with Wondrous in IMC.

24 MISS FORD: Yes, he has done it through a Cayman Islands
25 entity.

1 THE PRESIDENT: If he was the owner of IMC it would be
2 correct but he is not. He is half owner.

3 MISS FORD: Yes.

4 THE PRESIDENT: So that statement is not correct, is it?

5 MISS FORD: On that basis, yes, I certainly see that, yes.

6 THE PRESIDENT: Yes. It is not part of your case, that is
7 why I have been asking it, that he controls Wondrous.
8 It is no part of your case that Mr. Sultan Abuljadayel
9 controls Wondrous.

10 MISS FORD: No.

11 MR FRAZER: Just before we leave this document, is there any
12 relevance on the fact that on page 18 there was
13 a decline to comment and a no response to a request for
14 comment by Mr. Lebedev and Sultan Abuljadayel?

15 MISS FORD: In my submission I would say, no relevance in
16 the sense that what we are asking is, did material facts
17 come into the public domain. So the enquiry is: what
18 material facts --

19 MR FRAZER: Is there any doubt that those were facts in the
20 absence of any confirmation?

21 MISS FORD: I see that point is taken against me. It is
22 common ground between us that the Secretary of State
23 cannot be expected to take a decision based on material
24 that comes into the public domain in a newspaper. So
25 I fully accept that the Secretary of State has to go and

1 verify and potentially find more information, having
2 been put on notice by the information that comes into
3 the public domain. But my submission would be that the
4 correct construction of section 24 is that the
5 requirement of material facts, rather than all material
6 facts, means that that obligation to go and investigate
7 your jurisdiction is triggered when material facts come
8 into the public domain. It is not required, the section
9 does not envisage that everything necessary to take
10 a decision is present in that information.

11 MEMBER 2: Understood, thank you.

12 MISS FORD: On the back of the diagram we handed up we have
13 done a rough illustration of what we say is the
14 information which is in the public domain as
15 a consequence of this article. It does of course
16 contain the 30% figure which is subject to the point,
17 sir, that you made, about the actual structure by which
18 that was acquired.

19 You can see, starting at the bottom, we know that
20 the relevant acquisition concerned
21 Lebedev Holdings Limited. That is evident from this
22 article. We know that it was acquired by
23 a Cayman Islands company. You can see the first line of
24 the article, "The mystery buyer used a Cayman Islands
25 company to mask his identity."

1 You know that one of the acquirers is
2 Sultan Abuljadayel, and you know about the involvement
3 in the transaction of National Commercial Bank because
4 that is referred to in the fourth paragraph of the
5 article:

6 "Mr. Abuljadayel is associated with NCB Capital, the
7 investment banking arm of Saudi Arabia's National
8 Commercial Bank."

9 THE PRESIDENT: Yes.

10 MISS FORD: That information --

11 THE PRESIDENT: It is not clear that NCB Capital has any
12 interest in the acquisition other than through something
13 other than the fact that Mr. Abuljadayel is associated
14 with it, but --

15 MISS FORD: That is the way it is put, yes.

16 THE PRESIDENT: On the other hand, the article also shows
17 that Mr. Abuljadayel took an interest in The Independent
18 two years previously.

19 MISS FORD: It does, yes.

20 In terms of what is not shown in this article it is
21 essentially the boxes that have not been highlighted in
22 yellow on this diagram. So although we know that the
23 immediate acquiring vehicle was a Cayman Islands entity,
24 we do not know the name, and we do not know the identity
25 of Wondrous Investment Holdings or its shareholders.

1 THE PRESIDENT: Or that Mr. Abuljadayel does not in fact --
2 is not the sole owner of the Cayman Islands company.

3 MISS FORD: No, you know -- you are essentially told that
4 there is an association between him and National
5 Commercial Bank.

6 MR FRAZER: As you rightly said, because we do not know
7 about Wondrous, we do not really know about NCB, other
8 than Sultan Abuljadayel is "associated" with it.

9 MISS FORD: Yes, that is what you know, yes.

10 MR FRAZER: Right.

11 THE PRESIDENT: Yes.

12 MISS FORD: There is also a Guardian article on the same
13 date, for completeness. I do not think it adds anything
14 in terms of information but it is at page 20. You see
15 there:

16 "Evening Standard investor unveiled as Saudi
17 businessman. Mohamed Abuljadayel's 25 million stake is
18 yet another Middle Eastern interest in UK media."

19 It is essentially saying "according to the FT", so
20 I think it is derived from information --

21 THE PRESIDENT: It is really derived from the FT.

22 MISS FORD: -- from the FT. In terms of the timeline, there
23 was then further correspondence between the
24 Secretary of State and LHL asking for more information
25 and being provided with more information. You then get

1 a "minded to" letter which is at tab 7 of the bundle,
2 page 31. Dated 13 June 2019:

3 "Lebedev Holdings Limited and Independent Digital
4 News and Media Limited transactions. Notice of
5 a potential intervention notice."

6 You see in the second paragraph down:

7 "The Secretary of State is currently minded to issue
8 an intervention notice."

9 It sets out the basis on which that is proposed.

10 If you turn over to page 33, you see the heading
11 "Timing" and you see:

12 "The Secretary of State notes that under section 24
13 of the Enterprise Act as applied by section 42 there is
14 a four month time period for him to decide whether to
15 refer this matter to the CMA under section 45 of the
16 Enterprise Act. This time period runs from when the CMA
17 became aware of the transaction and includes not only
18 any decision to issue an intervention notice, but also
19 the time to obtain reports from the CMA and from Ofcom
20 under sections 44 and 44(a) of the Act."

21 So at least at the time of the "minded to" letter,
22 the Secretary of State is expressing a relatively
23 conventional interpretation of the timing provisions of
24 the statute. He takes the view that he has four months
25 both to issue an intervention notice and to make a ref.

1 THE PRESIDENT: Which is your case.

2 MISS FORD: That is our case. You see in the following
3 paragraph:

4 "In the light of that he expresses the hope that an
5 extension can be agreed once the Public Interest
6 Intervention Notice is issued."

7 On 25 June 2019 there was then a meeting between
8 DCMS and representatives of LHL, and there is evidence
9 about that in Mr O'Neill's statement, paragraph 21,
10 respondent's bundle tab B, page 7. If you look right at
11 the top of the page, the tail end of paragraph 20, you
12 see a reference to a meeting which took place on 25 June
13 and then he says:

14 "As emerges from the follow-up email sent by
15 Clare Kissin of the DCMS team later the same day, DCMS
16 explained towards the end of the meeting that its view
17 at the time was that the four-month period for issuing
18 the intervention notice expired on 1 July, and that the
19 plan was for the Secretary of State to be advised on
20 26 June, following which he would make his decision.
21 DCMS indicated, however, that there was a small doubt
22 about time limits and asked LHL to consider consenting
23 to an extension to clarify the situation."

24 There was an email sent to that effect and it is at
25 the applicants' bundle, tab 7, page 44. This is the

1 email from Ms. Kissin.

2 THE PRESIDENT: Is that the same day?

3 MISS FORD: It is the same day, yes. You see:

4 "We discussed the issue of timing at the meeting
5 with DCMS officials, myself, Mr. Lebedev, Mr. Byam Shaw
6 earlier today."

7 It sets out the Secretary of State's understanding
8 of timing and then it goes on to say:

9 "Nonetheless, we recognise that there is some
10 ambiguity about time limits in the legislation and so
11 our view is that it would be helpful to fix a clear time
12 period for the conclusion of the phase 1 process in the
13 event that the Secretary of State does decide to issue
14 an intervention notice."

15 So what is proposed is that you would then agree
16 a 40 working day extension to the time.

17 THE PRESIDENT: Yes.

18 MISS FORD: The reply is then on the following page, 46. If
19 you look at the second full paragraph down you can see
20 that the reply is essentially:

21 "In fact our understanding is clear that the
22 relevant time period has already expired."

23 The basis for that is set out. You then get the
24 reply to that which starts at page 49 which says:

25 "We have noted your views on the interpretation of

1 the time period but are content with our analysis that
2 the time period in fact expires at the end of 1 July."

3 Then the final paragraph on this page says:

4 "In the event that you nonetheless remain unwilling
5 to agree an extension of time in principle, any
6 intervention notice issued by the Secretary of State
7 will set out the deadline for the production of reports
8 by the CMA and Ofcom, and he will take his decision on
9 whether to refer the matter under section 45 in due
10 course after that point. As explained in the meeting
11 yesterday, this may mean the whole phase 1 process
12 concludes some time after the 40 working days timetable
13 otherwise proposed."

14 What appears to be being said, if you decline to
15 agree an extension the process may well take longer.

16 In the event, there was no agreement on an extension
17 and the Public Interest Intervention Notice was given on
18 27 June. That is at tab 3. You can see there the
19 Secretary of State says he has:

20 "... reasonable grounds for suspecting that as
21 a result of the transactions it is or may be the case,
22 that (a) a relevant merger situation has been created
23 ..."

24 Then part way down you see reference to public
25 interest considerations and section 58(2A) of the Act,

1 namely the need for accurate presentation of news and
2 free expression of opinion in newspapers.

3 "Now, therefore, the Secretary of State in exercise
4 of his powers under section 42(2) of the Act hereby
5 gives this intervention notice."

6 Then you see the Secretary of State setting out
7 a timetable for the CMA and Ofcom to provide their
8 reports, and the deadline set for that, the sections 44
9 and 44(a) is the end of 23 August 2019.

10 One day later, one day after the Public Interest
11 Intervention Notice was issued, the CMA produced its
12 report, which is admirably rapid. That is at
13 respondent's bundle B5. The CMA expresses a view about
14 timing. If you look at paragraph 37 you see part-way
15 down the paragraph:

16 "CMA considers that material facts, in particular
17 the identity of the acquiring parties, Wondrous and IMC,
18 related to the transaction was brought to the CMA's
19 attention by officials of the Department for Digital,
20 Culture, Media and Sport on 1 March 2019 ..."

21 That is the 19 February letter.

22 ".. and were not made public before this date.
23 Therefore the CMA considers that the four-month period
24 under section 24 of the Act ends on 1 July 2019."

25 You then get the CMA's conclusion which is carefully

1 focused on the things that the CMA has to comment on and
2 not on any other questions. The CMA says:

3 "A relevant merger situation has been created as at
4 the date of the Public Interest Intervention Notice [so
5 27 June] and as the date of the report."

6 So it has managed to get its report out in time,
7 according to the CMA.

8 It is not required to express a view on any later
9 date, so it is not required to express a view about
10 whether or not actually any reference which then comes
11 out of it would be in time on the basis of the views it
12 has expressed.

13 That is are the factual background. I am turning to
14 deal with the applicable statutory provisions.

15 THE PRESIDENT: I suppose the other thing is, I do not know
16 if you took us to-- when the 1 March, when the letter
17 from your clients was forwarded to the CMA.

18 MISS FORD: It was on 1 March. I do not know whether we --

19 THE PRESIDENT: I think there is an email, is there not --

20 MISS FORD: There may be.

21 THE PRESIDENT: -- where that was sent on? It is in --

22 MR SCANNELL: That is our bundle B2, page 1.

23 THE PRESIDENT: B2, which is quite important I think, on
24 page 1 from Ian O'Neill:

25 "Faye, thanks for the chat earlier."

1 Then skipping a paragraph:

2 "Here is the LHL letter ..."

3 That is when the letter, as I understand it, of
4 19 February was sent to the CMA which the respondent
5 says triggers the period.

6 MISS FORD: Yes. Turning to the provisions of the
7 Enterprise Act. They are in authorities bundle tab 4,
8 starting with section 23 which is on page 4 of this tab,
9 internal page 4. You see that section 23 is the
10 provision which sets out the circumstances where
11 a relevant merger situation has been created. It says:

12 "For the purposes of this part a relevant merger
13 situation has been created if (a) two or more
14 enterprises have ceased to be distinct enterprises at
15 the time or in circumstances falling within section 24,
16 and ..."

17 Then it sets out turnover required.

18 So the definition of a relevant merger situation
19 incorporates a timing concept, at a time or in
20 circumstances falling within section 24.

21 If you then look at subsection 9 of section 23, you
22 have a provision which tells you at what time you have
23 to consider whether a relevant merger situation has been
24 created. This is subsection 9 and it says:

25 "For the purposes of this chapter the question

1 whether a relevant merger situation has been created
2 should be determined as at (a) in the case of
3 a reference which is treated as having been made under
4 section 22, such time as the CMA may determine, and (b)
5 in any other case immediately before the time when the
6 reference has been brought is to be made."

7 THE PRESIDENT: Section 22 is completed mergers, is it not?

8 MISS FORD: Certainly not relevant to this -- looking back,
9 section 22 is in the first page, "due to make references
10 in reference to completed mergers."

11 This is one of the sections that is subsequently
12 amended for the purposes of the public interest
13 provisions and we will come to see them.

14 THE PRESIDENT: Yes.

15 MISS FORD: Turning on to section 24, which contains the
16 time limit provisions you see it says:

17 "For the purposes of section 23, two or more
18 enterprises have ceased to be distinct enterprises at a
19 time or in circumstances falling within this section if
20 ..."

21 There are two possibilities. One is in paragraph
22 (a) it is less than four months from the time of
23 completion of the transaction, and the other possibility
24 in 24.1(b) is that there has not been notice of material
25 facts, it says "expressed negatively".

1 "Notice of material facts about the arrangements or
2 transactions under or in consequence of which the
3 enterprises have ceased to be distinct has not been
4 given in accordance with subsection (2)."

5 So either it has been completed within four months
6 or there has not been notice of material facts. What is
7 meant by "notice of material facts" is then given in
8 subsection (2). Subsection (2)(a) is dealing with
9 a situation where notice is given to the CMA before or
10 it is made public before completion of the transaction.

11 The provision that we are concerned with in this
12 case, subsection (2)(b) has itself two possibilities.

13 "Notice of material facts is given if it is given to
14 the CMA or the facts are made public more than four
15 months before the day on which the reference is to be
16 made."

17 You see that then in subsection 3 you have
18 a definition of "made public":

19 "Made public means so publicised as to be generally
20 known or readily ascertainable."

21 THE PRESIDENT: But no definition of material facts.

22 MISS FORD: No definition of material facts, no.

23 Section 25 on the following page contains provision
24 for extension of those time limits. Just to deal
25 quickly with the possibility, subsection (1) is the

1 possibility of agreeing an extension. Subsection (2),
2 occurs if the CMA gives notice that there has been
3 a failure to comply with a section 109 notice.
4 Subsection (4) applies if the CMA is seeking
5 undertakings, and Subsection (6) applies if the European
6 Commission is considering a request made by the UK under
7 the EC merger regulation.

8 Those are the circumstances in which you could get
9 an extension.

10 If you then turn on to section 42 which is page 59
11 on the internal numbering. This is the power of the
12 Secretary of State to issue the Public Interest
13 Intervention Notice and it says:

14 "Subsection (2) applies where (a) the
15 Secretary of State has reasonable grounds for suspecting
16 that it is or may be the case that a relevant merger
17 situation has been created."

18 The reference to a relevant merger situation
19 incorporates the definition of a relevant merger
20 situation in section 23, which itself then cross-refers
21 to the timing in section 24. So this incorporates
22 a timing requirement.

23 THE PRESIDENT: The notion of ceasing to be distinct in
24 section 26.

25 MISS FORD: Yes.

1 THE PRESIDENT: Presumably, which is part of --

2 MISS FORD: Yes, although the substance of that is not for

3 the purpose of this appeal.

4 THE PRESIDENT: It might be because it is the common

5 control, is it not, of the two?

6 MISS FORD: I am sorry?

7 THE PRESIDENT: Perhaps we will leave that and see how the

8 respondent puts their case, but it may be relevant that

9 it is not just the acquisition of the Evening Standard.

10 It is the fact that the same parties acquired the

11 Evening Standard, had an interest in The Independent,

12 which is how you get the merger situation, as

13 I understand it.

14 MISS FORD: It is and that is the respondent's case. We

15 have not taken issue for the purposes of this challenge,

16 obviously we reserve our position in relation to any

17 future decisions on that point.

18 THE PRESIDENT: Yes, but that arises, I think, through

19 section 26.

20 MISS FORD: It does.

21 THE PRESIDENT: But you are on section 42 and you say it

22 incorporates the timing.

23 MISS FORD: It incorporates the timing. You then see

24 section 5:

25 "For the purposes ..."

1 THE PRESIDENT: It incorporates the timing because?

2 MISS FORD: Because what the Secretary of State has to have
3 reasonable grounds for suspecting that it is or may be
4 the case that, is that a relevant merger situation has
5 been created. The concept of a relevant merger
6 situation having been created is defined in section 23,
7 and section 23 itself refers to the timing or
8 circumstances in section 24. We can go back --

9 THE PRESIDENT: Are we concerned at all with 42(1)(d) or
10 not?

11 MISS FORD: For the purposes of this appeal, no. This is
12 a finding to the effect that no reference is prevented
13 from being made in the PIIN. So that is something that
14 the Secretary of State has to be satisfied in order to
15 issue a Public Interest Intervention Notice and he has
16 to make a statement to that effect.

17 THE PRESIDENT: I only ask because the reference is
18 prevented from being made by reason of being out of
19 time, is it not, under section 22(3) or is that only for
20 completed merger? This is a completed merger. No
21 reference is prevented from being made under section 22
22 by --

23 MISS FORD: This concerns the CMA. So section 22 is the
24 CMA's duty to make references in relation to completed
25 mergers.

1 THE PRESIDENT: This is --

2 MISS FORD: It says:

3 "No reference shall be made under this section if
4 the period within which the CMA is required by section
5 34(za) to decide whether the duty to make the different
6 supplies has expired without such a decision having been
7 made."

8 THE PRESIDENT: I find that a bit hard to understand because
9 this is dealing with a public interest case, is it not,
10 section 42?

11 "No reference is prevented from being made under
12 section 22 by virtue of section 22(3)(za)."

13 MISS FORD: Those behind me say it is dealing with
14 a situation where you have had a notification, so if you
15 notify your merger and then the CMA does not deal with
16 it within the statutory time limit then it is out of
17 time.

18 THE PRESIDENT: I see. So were we are not concerned with
19 that.

20 MISS FORD: Certainly the point has not been taken. I think
21 I am right in saying that the Public Interest
22 Intervention Notice does say because of this
23 requirement --

24 THE PRESIDENT: It does but you say it is out of time, so --

25 MISS FORD: But not for this reason.

1 THE PRESIDENT: Yes. Yes, thank you.

2 MISS FORD: I am coming on to look at subsection 5 which is
3 the provision which tells you that the timing provisions
4 in Chapter I also apply for the purposes of the public
5 interest provisions, and you see:

6 "For the purposes of deciding whether a relevant
7 merger situation has been created sections 23 to 30,
8 read together with section 34, shall apply for the
9 purposes of this chapter as they do for the purposes of
10 Chapter I, but subject to subsection 6."

11 In subsection 6 you then have a series of
12 modifications which are made to subsections 23 to 30 to
13 make sure that they apply for the purposes of public
14 interest situations.

15 Just to go through the modifications.
16 Subsection 6(a) is a modification to section 23(9) which
17 I showed you which is the provision which tells you at
18 what point in time you have to ask has a relevant merger
19 situation been created?

20 If you turn back to section 23(9). It is at page 6.
21 Instead of the subparagraph (a) which is there, you
22 substitute these three subparagraphs (a), (aa), and
23 (ab). (a) says:

24 "In relation to the giving of an intervention notice
25 the time at which the notice is given."

1 So that is relevant. That tells you if you are
2 making your intervention notice that is the point at
3 which you have to satisfy yourself that the requirement
4 of a relevant merger situation has been complied with,
5 including the time limit.

6 Subsection (aa) concerns the making of a report by
7 the CMA under section 44. So the CMA has to be
8 satisfied at the time of its report and it said that it
9 was. We have seen that.

10 Then we are not concerned here with subsection (ab),
11 that does not arise in this case.

12 THE PRESIDENT: What is that about?

13 MISS FORD: It relates to when the CMA essentially amends
14 a reference, I believe. Section 49(1), variation of
15 references under section 45.

16 THE PRESIDENT: 49(1).

17 MISS FORD: 49(1) at page 85.

18 THE PRESIDENT: Yes.

19 MISS FORD: What is not changed by this subparagraph 6(a) is
20 subparagraph 9(b) in section 23.

21 THE PRESIDENT: Yes, and you rely on that.

22 MISS FORD: We rely on that. It is telling you in any other
23 case the relevant time is immediately before the time
24 when the reference has been or is to be made.

25 THE PRESIDENT: Yes.

1 MISS FORD: The next set of amendments are to section 25
2 which concerns extensions of time. That applies to
3 subparagraph 6(b), (c), (d), (e), (f) and (g). They are
4 all making changes to section 25.

5 THE PRESIDENT: We are not concerned.

6 MISS FORD: We are not directly concerned with any of those.
7 You then get subsection 6(h) on which we rely, which
8 tells you that the powers to extend time limits under
9 section 25, as amended by all those previous provisions,
10 are not exercisable by the CMA or the Secretary of State
11 before the giving of an intervention notice, but the
12 existing time limits in relation to possible references
13 are applicable for the purposes of giving that notice.

14 So in order for all the amended possibilities for
15 extending time to apply you have to first give your
16 Public Interest Intervention Notice.

17 6(i) tells you that existing time limits continue to
18 apply. So if there had been an extension then you still
19 get the benefit of it.

20 Then 6(k) tells you, in the case of giving of
21 intervention notices, the references in sections 23 to
22 30 refer to the making of a reference or a reference
23 were so far as necessary references to the giving of an
24 intervention notice, or an intervention notice.

25 So changes are made to references, which are

1 references, to refer to Public Interest Intervention
2 Notices, but importantly, only insofar as is necessary.

3 THE PRESIDENT: Extremely unhelpful choice of word, is it
4 not?

5 MISS FORD: It is indeed. Those are --

6 THE PRESIDENT: Looking back at this subsection you rely on
7 in 23(9) on page, is it 6, 23.9(b) the word "reference"
8 there, if I have understood it correctly, you say that
9 is not affected by section 42(6)(k). It is not
10 necessary; is that right?

11 MISS FORD: That is right, because --

12 THE PRESIDENT: To substitute for "reference", intervention
13 notice.

14 MISS FORD: Because we have a provision in relation to an
15 intervention notice at subsection 6(a), and then the
16 inserted (a) which tells you the time of the
17 intervention notice.

18 THE PRESIDENT: Yes. Just a moment. (Pause) Yes.

19 MISS FORD: Turning on to section --

20 THE PRESIDENT: Where the public interest consideration is
21 still being finalised.

22 MISS FORD: Yes, that as I understand it is the possibility
23 that the Secretary of State might want to intervene for
24 reasons which are not presently specified as public
25 interest, and there is a mechanism in the Act for him to

1 then add in more, and it appears that he can take action
2 in the meantime provided that he has set in train the
3 process for adding in a new public interest.

4 THE PRESIDENT: Yes.

5 MISS FORD: Again, that is not engaged in this case.

6 MISS FORD: Turning on to section 44, this is the --

7 THE PRESIDENT: Perhaps we should look at 43, "Intervention
8 notice shall state ..." what has to be put in it.

9 MISS FORD: Yes. Although I do not think we necessarily
10 take any point that the intervention notice is lacking
11 in content.

12 THE PRESIDENT: But it might have a bearing might it not, on
13 what are material facts, because you have to put certain
14 information in the intervention notice in deciding what
15 facts are material. You have to be able to issue an
16 intervention notice.

17 MISS FORD: We can certainly have a look at it. It says:

18 "An intervention notice shall state the relevant
19 merger situation concerned, the public interest
20 consideration or considerations which are or may be
21 relevant to a consideration of the relevant merger
22 situation concerned, and where any public interest
23 consideration concerned is not finalised the proposed
24 timetable for finalising."

25 THE PRESIDENT: Yes.

1 MISS FORD: We then see 44, this is the provision requiring
2 an investigation and report by the CMA. It applies
3 where the Secretary of State has given an intervention
4 notice in relation to a relevant merger situation and
5 says:

6 "The CMA shall within such period as the
7 Secretary of State may require give a report to the
8 Secretary of State in relation to the case."

9 The Secretary of State has stipulated the time
10 within which he requires a response and he has said
11 23 August, and we obviously rely on that point.

12 There is an equivalent provision in relation to
13 Ofcom, which is 44A:

14 "Additional investigation and report by Ofcom Media
15 Mergers."

16 Then similar provision there, subparagraph 2:

17 "Ofcom shall, within such period as the
18 Secretary of State may require give a report to the
19 Secretary of State on the effect of the consideration or
20 considerations concerned on the case."

21 THE PRESIDENT: Although the CMA have produced their report,
22 as you told us, Ofcom had not.

23 MISS FORD: Ofcom had not.

24 We then turn on to section 45, this is the power of
25 the Secretary of State to refer the matter to the CMA.

1 What you see there is that:

2 "Subsections (2) to (5) apply where the
3 Secretary of State has (a) given an intervention notice,
4 in relation to the relevant merger situation; (b) has
5 received a report of the CMA ..." under section 44, and
6 then the report of Ofcom which is required by virtue of
7 section 44(a) in relation to the matter.

8 "The Secretary of State may make a reference to the
9 chair of the CMA if he believes that it is or may be the
10 case that (a) a relevant merger has been created ..."

11 In the same way that the reference to a relevant
12 merger situation has been created in section 42 referred
13 back to the definition of a relevant merger situation in
14 section 23, and the time limits in section 24, this same
15 wording in this section, in my submission, does the same
16 thing. So it goes back to section 23 and it
17 incorporates the time limits in section 24.

18 THE PRESIDENT: (Pause) Hence you say the 22(9)(b) time
19 limit.

20 MISS FORD: 23.

21 THE PRESIDENT: Sorry, 23(9)(b), yes.

22 MISS FORD: It incorporates the definition of a relevant
23 merger situation at 23, which specifically says it has
24 to be at a time or in circumstances falling within
25 subsection 24, and then you go to subsection 24 which

1 contains the time limits.

2 THE PRESIDENT: Yes.

3 MISS FORD: Then finally, turning on to section 58, you can
4 see the relevant public interest considerations and the
5 ones that we are concerned with subsection (2) (a):

6 "The need for (a) accurate presentation of news and
7 (b) free expression of opinion."

8 THE PRESIDENT: In section 44A, the Ofcom report, 44A(1)(b):

9 "The intervention notice mentions any media public
10 interest consideration."

11 Is that any -- is media public interest
12 consideration defined? Has it just assumed it covers
13 (2A), (2B), (2C)?

14 MISS FORD: I think we will have to check that. I have not
15 personally identified the definition, but ...

16 THE PRESIDENT: Actually the word "media" only appears in
17 (2C) but there has been a requirement for Ofcom in this
18 case under 44A. It may be Mr. Scannell can help us in
19 due course.

20 MR SCANNELL: Sir, it may assist, section 44(8).

21 THE PRESIDENT: 44(8). Thank you. Yes, that is it,
22 thank you very much.

23 MISS FORD: Turning to deal with some of the guidance on
24 authorities on how the scheme works.

25 MR FRAZER: Just before we leave the Act itself, do you have

1 any submissions on the relevance or the meaning of
2 section 46, subsection 3?

3 I ask because it mentions a period following the
4 intervention notice etc.

5 THE PRESIDENT: You can come back to that if you like.

6 MR FRAZER: Absolutely.

7 MISS FORD: I am grateful, yes.

8 THE PRESIDENT: But it does appear to envisage a reference
9 after a period of 24 weeks, beginning with the
10 intervention notice which is clearly more than four
11 months.

12 MISS FORD: I think, and I am speaking on my feet here, that
13 there is a period of time where a public interest must
14 be finalised, where you have a public interest which is
15 not finalised. So you are seeing but which has not been
16 finalised before the end of that period. So you are
17 dealing specifically here with a public interest which
18 has not yet been finalised.

19 THE PRESIDENT: I know, but the period of the provisions you
20 referred us to on, I think, relying on the four months
21 do not seem to depend on that.

22 MISS FORD: No, because it is a specific situation
23 concerning where you have a public interest which has
24 not yet been finalised.

25 THE PRESIDENT: The source -- the provisions you rely on for

1 MISS FORD: Tab 20. You should have the explanatory notes
2 relating to section 24, which is time limits and prior
3 notice.

4 THE PRESIDENT: Yes.

5 MISS FORD: It says:

6 "This section provides that the time period in which
7 completed mergers may be treated as a relevant merger
8 situation and therefore are referable."

9 Obviously this is the language when the Act was
10 originally brought in. You see:

11 "A reference to the CC must be made within four
12 months of the completion of a merger or if later
13 material facts about the merger being made public or
14 given to the OFT. For this purpose the section defines
15 the term 'made public' as having the meaning of
16 generally known or readily ascertainable. The intention
17 is that the OFT would reasonably be expected to have
18 known or found out about the merger if it has not been
19 notified about it."

20 The short point I make about that is that this is
21 expressing a relatively low threshold. It is saying
22 that the intention of the time limits, the time limit
23 related to making public, is that the OFT, now the CMA,
24 could reasonably have been expected to have known or
25 found out about the merger if it has not been notified

1 about it.

2 Turning on to the CMA's 2014 guidance as to the
3 circumstances in which facts are made public. This is
4 authorities bundle tab 17.

5 THE PRESIDENT: This is statutory guidance, is it not?

6 MISS FORD: It is, if we look at the first page, I do not
7 see any statement as to it being made in relation to any
8 particular --

9 THE PRESIDENT: Do we have in the bundle section 106?

10 MISS FORD: No, we do not.

11 THE PRESIDENT: I assume. That is mandatory guidance that
12 they have to publish. It is not the section 106
13 guidance.

14 MISS FORD: I think that maybe what we have done is only put
15 an excerpt in from the guidance so what you do not see
16 is the statement at the beginning is the basis on which
17 I have done it. I anticipate we can check.

18 THE PRESIDENT: There will be section 106 claims. I wonder
19 whether they cross-refer here.

20 MISS FORD: Sir, you are quite right. I imagine we have
21 just confirmed the same thing.

22 THE PRESIDENT: Yes, it is the section 106 guidance.

23 MISS FORD: The paragraph that both parties have referred to
24 is paragraph 4.44 on page 15 talking about the test
25 under the Act for when material facts are made public.

1 I ask the Tribunal just to read 4.44 and the two bullet
2 points. (Pause)

3 THE PRESIDENT: Yes.

4 MISS FORD: The particular point that we draw from this is
5 CMA's guidance, that it says it:

6 "... will consider that an acquiring party would
7 normally be said to have made public material facts
8 where those facts have been publicised in the national
9 or relevant trade press in the UK."

10 THE PRESIDENT: That is in the second bullet.

11 MISS FORD: That is in the second bullet.

12 THE PRESIDENT: You accept that as correct?

13 MISS FORD: We rely on it, yes.

14 THE PRESIDENT: You rely on it. Do you accept the first
15 bullet is correct?

16 MISS FORD: We, I think in broad terms, yes. We note the
17 reference to the identity of the parties and the effect
18 of our case is essentially that you would not
19 necessarily stipulate that that is essential
20 information. You would say: has there been sufficient
21 information in the public domain such that the
22 decision-maker appreciates that their jurisdiction is
23 potentially engaged?

24 THE PRESIDENT: That is a different question. The question
25 is, what are material facts? What is said here is not

1 much but it says:

2 "Information on the identity of the parties, number
3 one, and number two, whether the transaction is
4 anticipated including conditions precedent [not here
5 relevant], or has completed."

6 MISS FORD: I accept the first sentence. It is relevant to
7 the determination of your jurisdiction. The CMA says,
8 then "in practice this means".

9 My point is that you would not necessarily in
10 determining whether your jurisdiction is potentially
11 engaged and you need to pursue the matter, you would not
12 say categorically: you must have the following
13 information. The CMA is quite rightly saying in
14 practice this is the sort of thing that would trigger
15 our enquiry. My point is: you would not necessarily say
16 well there is a particular piece of information about
17 the identity of the acquiring parties which was not
18 available and therefore time does not begin to run.

19 I would not accept that that is the case.

20 THE PRESIDENT: So what do you say about identity? To what
21 extent is the identity of parties material?

22 MISS FORD: If we work it through, the facts have to be
23 material to the jurisdiction that is being exercised.

24 I am going to come on to this in terms of my
25 submissions.

1 THE PRESIDENT: Yes.

2 MISS FORD: But the wording of the section does not say "all
3 material facts".

4 THE PRESIDENT: No.

5 MISS FORD: It says "material facts", so it must mean that
6 the section is not requiring the decision-maker to have
7 accumulated all facts necessary to make his decision,
8 and it is also okay common ground that the
9 decision-maker will have to verify facts which come to
10 him via public sources. Once you accept that the
11 decision-maker, that time can begin to run under the
12 section, both when the decision-maker does not have all
13 material facts and when he has to go and verify the
14 facts that he has, then in my submission there is no
15 reason to say that these particular facts are essential
16 and you must have got them before time begins to run.

17 What you must have got is sufficient to appreciate
18 that your jurisdiction may be engaged, and that you do
19 need to verify the facts that have drawn your attention
20 to this merger, and you do need to establish the
21 position in order to take a decision.

22 THE PRESIDENT: So you are not accepting, is that not the
23 answer, the first bullet? You are saying it is
24 simply -- it is an evaluative question of whether you
25 have enough material facts to say the jurisdiction is

1 engaged.

2 MISS FORD: To appreciate that your jurisdiction is engaged.

3 I understand the words "in practice" to be the CMA not
4 being prescriptive in that respect.

5 MR FRAZER: (Pause) I guess the reference to the identity
6 of the parties in that case is because you have -- the
7 CMA has to have some comfort as to the enterprises
8 ceasing to have been distinct, correct?

9 MISS FORD: Certainly that is the question that the
10 jurisdiction goes to, and of course it needs to know
11 some sort of identity in order to pursue its enquiries.
12 If it does not know the identity of the parties it
13 cannot then make further enquiries. That is a very
14 basic point. What the CMA is not focusing on here is
15 a situation such as ours which is slightly more complex
16 where you have information about some of the relevant
17 involved parties, but some information has yet to come
18 into the public domain.

19 In my submission, when you look at the true
20 construction of section 24 it does not say "all material
21 facts" and that is for a reason, because what is
22 required is sufficient information to trigger the
23 decision-maker appreciating that their jurisdiction may
24 be engaged and that they need to --

25 THE PRESIDENT: It does not say all material facts either

1 because it is not referring to the turnover test or the
2 share of supply test. So I do not think there is any
3 suggestion here that it is all material facts. It is
4 saying in effect: we need this.

5 MISS FORD: It is. It is saying "in practice", and I think
6 that might well be the case if you have a basic
7 transaction, you need to know who you are going to
8 address your enquiries to. You need to know who the
9 transaction relates to. I do say that that threshold is
10 overcome in the circumstances of this particular case.

11 THE PRESIDENT: Why do you need to know the acquiring
12 parties at all to know whom to address the enquiries to?
13 The enquiries here were addressed to the acquired party,
14 not to the acquiring party. So you never need to know
15 the acquiring party. You could write to -- you just
16 need to know someone is buying an interest and you write
17 to, as they did here, to LHL saying, who is it?

18 MISS FORD: Sir, that is entirely consistent with my
19 submission. I say we are not in that situation because
20 of course there was information in the public domain
21 about the acquiring parties as well, and that is how the
22 Secretary of State appreciated it might potentially
23 engage public interest considerations, but the section
24 is saying "material facts". The facts must be material
25 to the jurisdiction it is going to be exercised. It

1 need not be all material facts, that is common ground,
2 and once you accept that it need not be all it must be
3 sufficient material facts to appreciate that your
4 jurisdiction may be engaged.

5 MR LOMAS: Do you think the scope of the material facts may
6 be different whether you are looking at the CMA's
7 ability to consider whether there is a relevant merger
8 situation, or the Secretary of State's ability to
9 consider whether there is a public interest that might
10 be engaged?

11 MISS FORD: They must be different in the sense that the
12 Secretary of State has additional considerations to take
13 into account. He must also satisfy himself to the
14 requisite standard in relation to the public interest
15 considerations as well, but I do say, and it is common
16 ground as I understand it, that you cannot expect all
17 material on which the decision will be based to have
18 come to the Secretary of State through public sources,
19 and that in my submission is not the intention of
20 section 24.

21 THE PRESIDENT: Yes, the question is where do you draw the
22 line?

23 MISS FORD: Quite. We have two illustrations of the CMA
24 dealing with the question of whether facts come into the
25 public domain by virtue of newspapers. The first one is

1 authorities bundle tab 8.

2 THE PRESIDENT: Yes.

3 MISS FORD: This is a completed acquisition by Tesco

4 Stores Limited of Brian Ford's Discount Store Limited,

5 and the short point is at paragraph 5:

6 "The four month time limit under section 24 of the

7 Act ..."

8 THE PRESIDENT: I am sorry, paragraph 5.

9 MISS FORD: I am sorry, paragraph 5, page 2:

10 "... four month time limit under section 24 of the

11 Act started on 22 June 2008 the day in which the

12 acquisition was made public through the article

13 published in the Daily Telegraph."

14 It is an example of the CMA accepting time running

15 from the publication of an article.

16 Just by way of contrast by that --

17 THE PRESIDENT: It clearly can run from the publication of

18 an article. That is not in dispute. It is a question

19 of if the article has enough facts, it clearly could.

20 MISS FORD: Yes.

21 THE PRESIDENT: There is no dispute about that. What do we

22 get out of this?

23 MISS FORD: It may be that if it is self-evident that it can

24 run from an article then we can leave it at that.

25 THE PRESIDENT: I think the Act pretty much says so. It

1 does say that deadline for reference, I think, for
2 a decision on a reference.

3 MISS FORD: Yes. There is an extension by virtue of
4 section 25(2).

5 MR LOMAS: It may be an unfair factual question but do we
6 know in relation to the Tesco case whether Tesco
7 confirmed or gave any quotes to the Daily Telegraph
8 article?

9 MISS FORD: I am afraid I do not know.

10 MR LOMAS: We do not know.

11 MISS FORD: I would make the submission, though, that it
12 should not make any difference, in the sense that it is
13 no part of my case that there should be information in
14 the public domain sufficient to take a decision. It is
15 fully accepted that the Secretary of State has to go and
16 verify the information. Once that is clear, in my
17 submission, provided you have sufficient information to
18 recognise that your jurisdiction may be engaged and you
19 do need to go and investigate further, that suffices.

20 There is relevant guidance as to whether the four
21 month time limit applies to a reference as it does to a
22 public interest notice. Starting at tab 16 in the
23 bundle, this is DTI guidance dated May 2004. If you
24 look at paragraph 3.19.

25 THE PRESIDENT: Again, this is statutory guidance as well

1 I think, is it not?

2 MISS FORD: This one we do have the introduction --

3 THE PRESIDENT: On page 5. This is 58. What is this?

4 Which Act?

5 MISS FORD: It would appear to be under 58(2A) to (2C).

6 THE PRESIDENT: Yes, I think -- no, that is the public
7 interest considerations. The advice. The relevant
8 provision is section 106, I think. It is 106(a):

9 "The Secretary of State may prepare and publish
10 general advice and information about consideration
11 specified in section 58 ..." back at (2) (a) and (2) (c).

12 I think that must be this document, Mr. Fraser is
13 helpfully referring to. Yes. To paragraph 1.6. So
14 this is statutory guidance pursuant to section 106(a),
15 yes.

16 MISS FORD: Paragraph 3.19 on page 14 and the relevant
17 section starts just after the brackets pretty much
18 opposite the hole punch. It says:

19 "As is the case with all UK relevant merger
20 situations, the merger may be referred to the CC after
21 the completion of the transaction. In the event of an
22 adverse public interest finding in such a case the
23 transaction may have to be unwound if no other remedies
24 are appropriate. The power to refer a completed media
25 merger to the CC on competition or public interest

1 grounds under the standard special or European
2 intervention schemes is subject to the standard longstop
3 on reference for four months."

4 THE PRESIDENT: Yes.

5 MISS FORD: Then footnote 23 then refers to section 24.

6 THE PRESIDENT: Yes.

7 MISS FORD: Then similarly, you have at authorities
8 bundle 18 more recent guidance.

9 THE PRESIDENT: This is not statutory guidance.

10 MISS FORD: This is not, I do not believe.

11 THE PRESIDENT: It actually says so on page 2.

12 MISS FORD: This relates to potential changes.

13 THE PRESIDENT: Yes. Page 2, (vii).

14 MISS FORD: Yes. The relevant paragraph in this guidance is
15 5.4:

16 "In the event that a merger has already taken place,
17 the CMA under section 24 can decide up to four months
18 after it completed whether to refer the case to
19 a phase 2 investigation on competition grounds. The
20 Secretary of State has the same four month period in
21 which to decide, having issued a Public Interest
22 Intervention Notice, whether to refer a completed merger
23 for a phase 2 investigation of whether it is likely to
24 operate against the public interest.

25 "Where the CMA is investigating a merger, however,

1 the Secretary of State must intervene before the CMA
2 reaches the decision on whether to make a reference on
3 phase 2 on competition grounds."

4 THE PRESIDENT: Well, that is not this case, is it?

5 MISS FORD: It is not. So the final point to draw attention
6 to is --

7 MR LOMAS: Before you move on, it may be relevant to your
8 ground two:

9 "The Secretary of State has the same four month
10 period in which to decide, having issued a Public
11 Interest Intervention Notice, whether to refer
12 a completed merger."

13 MISS FORD: Yes.

14 MR LOMAS: Are you saying there is not a temporal connection
15 there, so the same four month period does not flow from
16 the fact of having issued a Public Interest Intervention
17 Notice, it is just a condition that applies independent
18 of when the period starts.

19 MISS FORD: No. I say when you read it with what it is
20 saying about the CMA and it is saying the same four
21 month period, you can see that it is from time of
22 completion to making a reference on phase 2
23 investigation. It does not run from the Public Interest
24 Intervention Notice.

25 THE PRESIDENT: The CMA's report, that is the section 44

1 report, is that right?

2 MISS FORD: This is not referring to the CMA's report. This
3 is referring to the CMA making a reference, because that
4 occurs, that would be the usual situation unless the
5 Secretary of State takes over by issuing a Public
6 Interest Intervention Notice, and you can see in the
7 last line:

8 "Where the CMA is investigating the merger the
9 Secretary of State must intervene before the CMA reaches
10 a decision on whether to make a reference."

11 THE PRESIDENT: Yes, but in the specific guidance on
12 newspapers which you showed us, the media mergers
13 rather, is it treated that the CMA's report has the
14 equivalent of a phase 1 report or ...

15 MISS FORD: (Pause) Tab 16, page 14 that we looked at.

16 THE PRESIDENT: It may be that it is in the respondent's
17 case there is reference to it being the, I thought the
18 equivalent of phase 1. Well, it is in paragraph 5.5, is
19 it not:

20 "Following an intervention notice the CMA is obliged
21 to prepare a report for the Secretary of State by date
22 specified by the Secretary of State."

23 MISS FORD: Yes.

24 THE PRESIDENT: That is treated as phase 1, is it not?

25 MISS FORD: It is, yes.

1 THE PRESIDENT: Then what does one make of 5.8?

2 MISS FORD: It is subject to the longstop, in my submission.

3 There is no statutory deadline in the sense that you do

4 not find a statutory decision you must make your

5 decision within a certain period of time, but it is all

6 subject to the statutory longstop.

7 THE PRESIDENT: Then there is a statutory deadline. Whether

8 you call it a longstop or a deadline it is a matter of

9 words, is it not?

10 MISS FORD: Certainly on any view you see a reference to

11 a deadline in 5.4, "The Secretary of State has the same

12 four month period in which to decide."

13 THE PRESIDENT: Yes, I do. That is why I do not

14 understand it.

15 MISS FORD: In my submission what it is saying is there is

16 no specific time period within which, having received

17 the report, further action must be taken, but that is

18 subject to the overall four month backstop. What is

19 described as a backstop provision, longstop in fact, I

20 should say. That is the wording that was used in the

21 previous --

22 THE PRESIDENT: Avoid the word "backstop".

23 MEMBER 3: The problem is the second sentence of 5.4 is

24 ambiguous, is it not? I understand that you contend for

25 a particular interpretation which is essentially: where

1 the Secretary of State has issued a public interest
2 notice the same four month period applies in which to
3 decide a reference (irrespective of when the Public
4 Interest Intervention Notice was issued).

5 That would be your interpretation --

6 MISS FORD: It would.

7 MR LOMAS: -- but as drafted it is ambiguous.

8 MISS FORD: I see why you say that. I do say why you can
9 read it in the context of the first period and that
10 makes clear it is talking about a period from the date
11 of the merger up to the reference of a case to a phase 2
12 investigation, and that is the four month period. So
13 when it says the same four month period it must mean up
14 to the point of reference.

15 MR LOMAS: I understand that.

16 THE PRESIDENT: You can have four months -- on your case,
17 four months for the intervention notice, is that right?
18 Four months in which to issue an intervention notice.

19 MISS FORD: Four months in which to go --

20 THE PRESIDENT: To issue an intervention notice.

21 MISS FORD: Yes.

22 THE PRESIDENT: Following the intervention notice, a report
23 from CMA and Ofcom.

24 MISS FORD: Yes.

25 THE PRESIDENT: Then the Secretary of State decides whether

1 to make a reference to the CMA and all that is within,
2 on your case, the same four months as the issue of the
3 intervention notice that triggers the later stages.

4 MISS FORD: It is. I can show you an example if that
5 assists. It is the Trinity Mirror case, authorities
6 bundle 15.

7 It is I interpose what the Secretary of State said
8 in his "minded to" letter as well. This is a report
9 from the CMA to the Secretary of State in the context of
10 a merger, so it is a section 44 report. You can see the
11 facts at paragraphs 1 and 2. You have a merger which
12 took place on 28 February and then on 1 May the
13 Secretary of State in exercise of his powers under
14 section 42 of the Act issued a Public Interest
15 Intervention Notice in respect of the merger.

16 Then:

17 "In accordance with sections 44 and 44A, the CMA and
18 Ofcom are respectfully required to investigate and
19 report to the Secretary of State by midnight on
20 31 May 2018."

21 So you are still within the four month period there.

22 If you then turn to paragraph 26 you see the CMA
23 saying:

24 "Given that the acquisition of the core business was
25 target assets, ie the business of Northern Shell,

1 completed on 28 February 2018, the four month deadline
2 for a phase 2 reference decision under section 24 of the
3 Act is 27 June 2018. Accordingly, the CMA believes that
4 it is or may be the case that a relevant merger
5 situation has been created for the purposes of
6 sections 44 and 44A of the Act."

7 You have there a very clear statement from the CMA
8 that what it is looking at is a four month period for
9 the making of a reference.

10 THE PRESIDENT: (Pause) The reference was made. Presumably
11 there is a --

12 MISS FORD: (Pause) Those behind me have just checked and
13 they say a decision was published on 20 June but it was
14 a decision not to refer in due course.

15 THE PRESIDENT: Sorry?

16 MISS FORD: I am told that a decision was taken not to refer
17 but it was taken within that period. It was taken on
18 20 June.

19 THE PRESIDENT: This is the section 44 report we are looking
20 at here.

21 MISS FORD: Yes.

22 THE PRESIDENT: Yes.

23 MISS FORD: (Pause) I have covered the statutory scheme and
24 the guidance. I am turning to make my submissions on
25 the grounds.

1 As you are aware, our first ground of review is that
2 the notice was out of time, and I have shown you the
3 information that was in the public domain as
4 a consequence of the 25 February articles. You can see
5 from the diagram that I handed up that all that was
6 missing was the specific identity of the Cayman Islands
7 physical vehicle that was used to make the acquisition
8 and the details about Wondrous Investment Holdings LP.

9 THE PRESIDENT: Yes.

10 MR LOMAS: Can we just test that? Is it your case that the
11 ownership interest of NCB was disclosed on 25 February?

12 MISS FORD: The involvement.

13 MR LOMAS: Involvement but not ownership.

14 MISS FORD: We can go back to exactly what was said, but
15 I think from recollection what was said was there was an
16 association between --

17 MR LOMAS: Correct, connection between the Sultan and the
18 bank but not an allegation of an ownership interest by
19 the bank.

20 MISS FORD: The detail of the structure was not disclosed at
21 this time, that is correct.

22 MR LOMAS: Or in respect of the detail that there was an
23 ownership interest vested in NCB.

24 MISS FORD: Yes, that is right.

25 MR LOMAS: Thank you.

1 MISS FORD: This ground of appeal essentially boils down to
2 what is meant by the words "material facts". There is
3 a lot of emphasis in the respondent's skeleton on
4 whether the Secretary of State took a reasonable view as
5 to that question and that, in my submission, is not the
6 correct test because it is a question of law as to the
7 construction of the section. Very briefly I rely on the
8 Groupe Eurotunnel case in the Supreme Court for that
9 proposition. It is authorities bundle 21. If you look
10 at paragraph 2 you can see in September 2014 the CMA,
11 after an investigation, prohibited an entity called GET
12 from operating any ferry service from Dover using its
13 passenger ships. Its jurisdiction to do this depended
14 on whether GET's acquisition of Sea France assets
15 created a relevant merger situation for the purpose of
16 the Enterprise Act 2002. That question in turn depends
17 on whether GET and SCOP acquired -- what they acquired
18 was an enterprise or merely the assets of a defunct
19 enterprise.

20 The passage I rely on is what Lord Sumption says at
21 paragraph 31 of the case. I ask the Tribunal just to
22 read that. (Pause)

23 He says the test in issue in that case, what are the
24 relevant activities whose absorption by another
25 enterprise found the jurisdiction of the authority, the

1 test is a question of law. He says it depends on the
2 construction of the Enterprise Act and in looking at
3 that question of law you do not accord any particular
4 deference to decision, and I say the same applies in
5 this case. The question of what are material facts is
6 a question of law, it is a question of construction of
7 the Enterprise Act, and in the same way you don't
8 attribute any particular deference to the decision of
9 the decision-maker on that point.

10 The Tribunal has heard my submission as to what is
11 the correct construction of material facts. Material
12 facts must refer to the jurisdiction decision-maker is
13 to exercise, so the jurisdiction to issue a Public
14 Interest Intervention Notice and/or to make a reference.

15 In my submission there must be sufficient material
16 facts in the public domain about the transaction in
17 question for the decision-maker to appreciate that his
18 jurisdiction might be engaged and that further
19 investigation would be warranted.

20 THE PRESIDENT: Just a moment. (Pause)

21 MISS FORD: I should say sufficient information in the
22 public domain because I did not want to incorporate the
23 wording of the statute into my definition.

24 THE PRESIDENT: Sufficient information to appreciate that
25 his jurisdiction might be engaged and to justify --

1 MISS FORD: And that further investigation might be
2 warranted.

3 THE PRESIDENT: That is a very low threshold, is it not?

4 MISS FORD: I am going to give you three reasons why, in my
5 submission, it is the right one.

6 THE PRESIDENT: Further investigation might be warranted.

7 If there was a newspaper article saying it is
8 rumoured that Saudi interests have purchased a share in
9 the Evening Standard, full stop, no details of who, no
10 confirmation, a rumour, you could say, well that
11 suggests the jurisdiction might be engaged and further
12 investigation might be warranted. You say that would
13 trigger the four month statutory period?

14 MISS FORD: I think there does have to be a certain degree
15 of weight. I do not disagree with the point made on
16 behalf of the respondents that the individual nuggets of
17 information in isolation have to achieve
18 a certain degree of gravity before reasonably the
19 decision-maker can be expected to act.

20 THE PRESIDENT: The reality here is that the newspapers ask
21 your client for comment or confirmation and the answer
22 is: we are not saying anything.

23 MISS FORD: Yes, and my submission is that makes no
24 difference whatsoever because it is --

25 THE PRESIDENT: It might give, going back to your previous

1 answer, sufficient gravity. I mean if they had said:
2 yes, that's true, that would give it what was a rumour
3 a bit more substance. It is no longer a rumour.

4 MISS FORD: In my submission the test must be an objective
5 one. We are not dealing with a situation where it was
6 purely a rumour. We are dealing with a situation where
7 information had come into the public domain about the
8 involvement of Sultan Abuljadayel about the involvement
9 of National Commercial Bank, about the fact that they
10 had used a Cayman Islands company to purchase a 30%
11 holding in LHL. This is not simply a rumour. There
12 were concrete details of a transaction.

13 I am going to come on to make the submission that,
14 of course, the proof of the pudding in this case is that
15 every relevant decision-maker had fully appreciated that
16 this might engage their jurisdiction.

17 THE PRESIDENT: I appreciate they had, but it is going back
18 to your test. Clearly if that is the right test it is
19 satisfied. No doubt about that. The question is, is it
20 the right test? It is sufficient information to
21 appreciate his jurisdiction might be engaged.

22 MISS FORD: Sir, can I give you the three reasons why I say
23 that is the right way?

24 THE PRESIDENT: Yes.

25 MISS FORD: The first is the wording of the Act says

1 "material facts" not "all material facts". You have to
2 ask, what is the draftsman trying to convey by that?

3 In my submission what is being said is that you do
4 not need all the information that would be necessary for
5 you to take a decision based on your jurisdiction. That
6 must be what the omission of the word "all" means. It
7 is saying material facts relevant to jurisdiction but
8 not necessarily all of them.

9 THE PRESIDENT: Equally it is not saying "any material
10 facts".

11 MISS FORD: It is not saying "any".

12 THE PRESIDENT: So somewhere between any and all.

13 MISS FORD: Indeed. My submission is once you appreciate
14 you do not have all the material information necessary
15 to take a decision then the particular facts that were
16 not evident in this case are not sufficiently material.
17 They are not sufficient to say, well, there was no basis
18 on which to suspect that your jurisdiction might be
19 engaged here.

20 Secondly, this construction is supported by the
21 purpose of section 24(2)(b). This is a provision which
22 is specifically making provision for time to run not
23 when facts are formally notified to the decision-maker,
24 but when facts come into the public domain. As you,
25 sir, pointed out, it is self-evident that one way in

1 which that might happen is by means of national
2 newspapers. If that is what this section is
3 contemplating, it is self-evident that the sort of
4 information that comes into the public domain in this
5 way is not necessarily going to be in a formal state, it
6 is not necessarily going to be complete. It is not
7 necessarily going to be exhaustive. It is going to
8 require to be verified. That is the sort of information
9 this section is contemplating will start time to run.
10 That is the nature of the information it is looking at.

11 It is common ground that the Secretary of State will
12 have to go and verify the information he gets by this
13 route, and again, once you accept that the
14 Secretary of State cannot take a decision based on
15 a newspaper, once you accept that there is necessarily
16 going to be a process of investigation and verification,
17 in my submission that means that what you need is
18 material facts in order to trigger that exercise. There
19 is no reason to expect that information in the public
20 domain is going to contain all that information. This
21 is the scenario that that section is dealing with.

22 The Secretary of State draws a very different
23 conclusion. This is paragraphs 66 to 67 of the
24 skeleton. He says because information in the public
25 domain might not be reliable and because I have to go

1 away and verify it, that means it is not a material fact
2 at all until it has been confirmed.

3 In my submission that cannot be right because it
4 undermines the utility of section 24(2)(b). That means
5 there are going to be very few circumstances where time
6 will be triggered by facts coming into the public domain
7 in this way.

8 This section is positively contemplating time
9 starting to run in these circumstances, and it is
10 necessary to take into account the sort of information
11 that will come into the public domain in this way.

12 Thirdly, I do place emphasis on the explanatory
13 notes to section 24 which I took you to, authorities
14 bundle B, tab 20. That tells us the intention is that
15 the OFT, so now the CMA, "would reasonably be expected
16 to have known or found out about the merger if it has
17 not been notified about it."

18 Sir, you put to me the threshold I am suggesting is
19 a very low threshold. In my submission that is entirely
20 consistent with the guidance that is given here. If
21 there has not been formal notification there has to be
22 some other means by which the decision-maker can be
23 expected, reasonably expected to have known or found out
24 about the merger.

25 As I have said --

1 THE PRESIDENT: Do they have compulsory power to find out?
2 The letter that was sent to you which your clients
3 replied on 19 February asking for information, was that
4 a mandatory request for information?

5 MISS FORD: I do not think it was a section 109 notice but
6 they do have the power to send section 109 notices, and
7 we have seen in section 25 there is a provision which
8 the CMA can notify if it considers there is a failure to
9 comply with the section 109 notice, and then time stops.

10 So the statutory scheme does contemplate that if you
11 had a party that was not prepared to comply with
12 a mandatory request for information, then they cannot
13 then rely on the time limit and the CMA must notify them
14 that they consider the time limit is not running while
15 there is a relevant failure to comply, but of course
16 that is not the circumstance of this case.

17 THE PRESIDENT: The Secretary of State can issue such
18 a notice, can he?

19 MISS FORD: I do not believe he can. I think it is the CMA
20 under section 109. I am told that the email chain that
21 was exhibited to Mr. O'Neill's report there was an
22 exchange about whether the CMA should do that. B2.

23 THE PRESIDENT: Page 7.

24 MISS FORD: Page 7. Yes, you see an exchange of that
25 whether to adopt a formal approach or whether to

1 contact, write to them.

2 Then I think further on in the chain you see -- yes,
3 so previous page, page 6 you see:

4 "We have prepared a draft letter to send to
5 Lebedev Holdings ..."

6 THE PRESIDENT: Sorry, this is page 6 of tab 7?

7 MISS FORD: Sorry, tab B2.

8 THE PRESIDENT: Sorry. B2.

9 MISS FORD: Starting at page 7 you see the issue is whether
10 this warrants such a formal approach, referring to the
11 use of our mergers and intelligence function. We can
12 deal with it simply by contacting, writing to
13 Lebedev Holdings Limited.

14 If you look at then page 4 you can see the DCMS
15 saying:

16 "The Secretary of State has agreed to write direct
17 rather than pass to you ..."

18 MR LOMAS: Is the key in 109(b) that the powers of those at
19 the CMA to operate, that one of the circumstances in
20 which they can do so is to assist the Secretary of State
21 in carrying out the functions.

22 MISS FORD: I have to say I do not have it in front of me
23 because it is not in the bundle but that sounds to me as
24 though it ought to be right.

25 THE PRESIDENT: (Pause) That should cover, I think. That

1 is production of documents, yes.

2 MISS FORD: In my submission the proof of the pudding in
3 this case is that all relevant decision-makers were well
4 aware that their jurisdiction might be engaged even
5 before 25 February, and I have shown the Tribunal the
6 evidence on that. The Secretary of State's evidence was
7 that the DCMS media team believed that the matters
8 referred to in the Financial Times article could
9 potentially give rise to public interest considerations,
10 meriting further investigation. You had the CMA picking
11 it up as part of their mergers intelligence monitoring
12 and you have the Secretary of State agreeing with the
13 recommendation made to him that the matters raised did
14 warrant further investigation.

15 THE PRESIDENT: Yes.

16 MISS FORD: So in my submission sufficient material facts
17 came into public domain on 25 February if not earlier,
18 such that time began to run at that time and therefore
19 the Public Interest Intervention Notice was out of time.

20 Moving on to deal with my second ground of review,
21 which is that even if the notice itself was out of time,
22 then on the Secretary of State's case time began to run
23 on 1 March and any reference made under the intervention
24 notice must itself now be out of time.

25 I have shown you that section 45 of the Act requires

1 a Secretary of State to have a belief that it is or may
2 be the case that a relevant merger situation has been
3 created, and the wording in section 45 in the same way
4 as section 42 cross-refers to the definition in
5 section 23 of a relevant merger situation, and it
6 incorporates the timing provisions in section 24. The
7 same form of wording is used.

8 I have shown you the DTI and BEIS guidance which
9 agrees with that construction. I fully accept that the
10 guidance of course is not binding but I do say that the
11 Secretary of State's proposed construction, which he has
12 alighted upon after his notice, his "minded to" letter,
13 is something of an outlier.

14 As I understand the point, what the
15 Secretary of State says is that once the wording of
16 section 24 has been amended for public interest cases to
17 tell you the timing for a Public Interest Intervention
18 Notice it then never reverts back to refer to a timing
19 for a reference. Therefore, there is in effect no
20 statutory deadline for making a reference at all.

21 In my submission that is wrong for three reasons.
22 The first is section 23(9)(b) of the Act which I showed
23 you. This is the provision which tells you when you
24 have to take a view about whether a relevant merger
25 situation has been created, on page 6 of the bundle. We

1 know that section 23(9)(a) is amended for public
2 interest purposes to make various provisions which
3 relate to the public interest scheme, but no amendment
4 is made to 9(b) which continues then to provide that in
5 any other case you have to take a view immediately
6 before the time when the reference has been or is to be
7 made.

8 THE PRESIDENT: Yes.

9 MISS FORD: So in my submission that is an express provision
10 dealing with the time of the assessment for making
11 a reference in public interest cases.

12 Secondly, section 42(6)(h) of the Act which is the
13 provision which deals with the powers to extend time
14 limits under section 45, and what it tells you is that
15 the powers to extend time are only exercisable after the
16 giving of Public Interest Intervention Notice. If the
17 Secretary of State were right that there is no time
18 limit for giving Public Interest Intervention Notice --
19 sorry, for making a reference after the giving of
20 a Public Interest Intervention Notice, then this
21 provision will be otiose.

22 THE PRESIDENT: I find it an extremely convoluted
23 subsection.

24 MISS FORD: It is. I would not disagree with that.

25 THE PRESIDENT: Yes. Why people draft statutes in this way

1 is beyond me.

2 Did you say it means that you can extend time after
3 the giving of the notice?

4 MISS FORD: Yes.

5 THE PRESIDENT: That is what it says.

6 MISS FORD: It is actually expressed negatively, in that it
7 is saying the powers to extend time limits under
8 section 25, as applied by subsection 5 above, were not
9 exercisable by the CMA or the Secretary of State before
10 the giving of an intervention notice.

11 THE PRESIDENT: But --

12 MISS FORD: But the existing time limits by virtue of
13 section 24 as so applied in relation to the possible
14 references under section 22 and 23 were applicable for
15 the purpose of giving that notice.

16 THE PRESIDENT: For the purpose of the giving of that --
17 that notice is --

18 MISS FORD: The intervention notice.

19 THE PRESIDENT: The existing time limits were applicable for
20 the purpose of giving of that notice.

21 MISS FORD: So, if for example you already had an extension
22 under section 25 because, for example, there had been
23 a failure to comply with section 25, those time limits
24 apply for the purpose of giving the notice. At the
25 point when the notice is given you then have the amended

1 time limit provisions which apply because the
2 Secretary of State has now given a notice and taken over
3 as a relevant decision-maker.

4 THE PRESIDENT: Does the power to extend under section 25
5 then apply? That is what I do not understand.

6 MISS FORD: It does by virtue of --

7 THE PRESIDENT: I am being rather slow. I am struggling
8 with what this means.

9 MISS FORD: You can see, for example, all the subparagraphs
10 (b) to (g) are making amendments to section 25 in order
11 to permit them to apply in the circumstances of public
12 interest. So you are changing references from the CMA
13 to the Secretary of State.

14 MR FRAZER: Does that not include 25(2) which is your
15 section 109 notices? Because paragraph (h) of 42 talks
16 about the powers to extend time limits under section 25
17 generally, which includes 25(2) which means stop the
18 clock if you do not comply with the 109 notice.

19 MISS FORD: You can see that there is no amendment to
20 subsection 25(2). If you look at 6(b), 42(6)(b) the
21 references are amended in 1, 3, 6 and 8.

22 MR FRAZER: It is 1 to 3, 6 and 8.

23 MISS FORD: You are quite right, yes. Presumably then the
24 Secretary of State does acquire --

25 MR FRAZER: But section 109 notices will be -- under your

1 correspondence you alert us to the CMA asks the
2 Secretary of State if its merger intelligence should be
3 engaged. Are you suggesting that a section 109 notice
4 in that case would have been issued by the CMA?

5 MISS FORD: Certainly there were notices issued by the CMA.
6 No suggestion has been made that there has been any
7 relevant failure to comply with them, and of course if
8 there were there would have to be notice given by the
9 CMA in order to trigger an extension of time.

10 MR FRAZER: I see. Your argument in relation to
11 section 24(2)(b), which was the triggering threshold, if
12 I can just summarise it like that, that does not give
13 the whip hand, as it were, to the parties because,
14 I think you suggested, because of the possibility of
15 section 109 notices.

16 MISS FORD: Yes. If they were perceived to be a relevant
17 delay in providing information.

18 MR FRAZER: But a section 109 notice cannot be given by the
19 Secretary of State under the provisions of
20 section 42(h), and section 42(5) and section 42(6)(h).
21 It can only be given by the CMA, is that right?

22 MISS FORD: That is true, but I would reiterate that nobody
23 suggested there has been any relevant failure to comply
24 with (inaudible).

25 MR FRAZER: I am just trying to work through your scheme.

1 MISS FORD: The point about subparagraph (h) is that it is
2 making clear that the amended powers for extending time
3 only apply after the giving of an intervention notice.
4 So the short point is if no time limits apply after the
5 giving of the intervention notice this provision will be
6 otiose.

7 MR FRAZER: I see.

8 THE PRESIDENT: Yes. Is that your second point?

9 MISS FORD: That is my second point. My third point is
10 section 42(6)(k) and we have canvassed this already.
11 This is the provision which changes references to
12 references to references to intervention notices, but it
13 only applies insofar as necessary.

14 THE PRESIDENT: Yes.

15 MISS FORD: So it does not, in my submission, have the
16 effect that once you have changed the time limits to
17 refer to the Public Interest Intervention Notice they
18 cannot revert, and therefore there is only a time limit
19 which applies for the purposes of the Public Interest
20 Intervention Notice. In my submission, the reason why
21 it says "insofar as necessary" is precisely because the
22 time limits do apply both to the giving of an
23 intervention notice and to the making of a reference.
24 That is why it necessarily has to say they only change
25 the wording insofar as is necessary and not absolutely.

1 So those are my submissions on the second ground of
2 appeal. We say even if the intervention notice was in
3 time any reference made under it is necessarily out of
4 time.

5 I propose to revert to you in my reply on the point
6 raised in relation to finalising public interest
7 matters.

8 THE PRESIDENT: I do not know, it might be helpful for
9 Mr. Scannell if, rather than doing it in reply, could
10 you do it at 2 o'clock?

11 MISS FORD: I hope so.

12 THE PRESIDENT: Because it is something we would want to
13 hear I think him on as well it seems to us of potential
14 significance.

15 Is there anything -- subject to that point.

16 MISS FORD: Those are my submissions.

17 THE PRESIDENT: Does that conclude -- we drew, I think, your
18 attention to the *BSkyB ITV* case.

19 MISS FORD: Sir, you did, yes.

20 THE PRESIDENT: Because that was a case where on your case
21 the reference was out of time because it was well over
22 four months.

23 MISS FORD: I have to say we had not appreciated that was
24 the point that you were referring to it for --

25 THE PRESIDENT: The second paragraph sets out the time

1 limits that applies. I think it is the -- perhaps it is
2 a bit further in. I cannot quite remember, but
3 background.

4 MISS FORD: Yes. Of course, what we do not know --

5 THE PRESIDENT: You get the intervention notice there, yes.

6 MISS FORD: What we do not know is the extent to which time
7 was stopped by virtue of, for example, section 109
8 notices, and I understand that the point was made for
9 Sky that they did not know, because of course they were
10 liaising with different parties and different parties
11 received 109 notices, they did not know the extent to
12 which there had been any relevant failure to comply with
13 the 109 notice. They were not in a position to make
14 a submission either way, so the way they put it was,
15 well the Commission must be satisfied that time limit is
16 complied with.

17 THE PRESIDENT: I am not talking -- this was not the time
18 limit of the intervention notice. That was within --
19 I think within four months. It is the reference.

20 MISS FORD: Yes. The extension of time applies to
21 references as well --

22 THE PRESIDENT: You can extend but you have to formally
23 extend it, do not you?

24 MISS FORD: You do.

25 THE PRESIDENT: I do not think there is any suggestion that

1 THE PRESIDENT: Yes, Miss Ford.

2 MISS FORD: Sir, I agreed to come back on two points. The
3 first was the mysterious section 46, subsection 3. In
4 relation to that can we start by looking at
5 section 42(6) which is the section we have been looking
6 at that makes all the amendments for public interest
7 purposes.

8 THE PRESIDENT: Yes.

9 MISS FORD: Subsection (6)(e).

10 THE PRESIDENT: Just one moment. (Pause)

11 MISS FORD: (6)(e) is introducing a new subsection (5A) into
12 section 25. Section 25 is the section which deals with
13 extensions to time and the new section (5A) says:

14 "The Secretary of State may by notice to the persons
15 carrying on the enterprises which have or may have
16 ceased to be distinct enterprises extend the four month
17 period mentioned in section 24(1)(a) or (2)(b), if by
18 virtue of section 46(5) or paragraph (3)(6) of
19 schedule 7, he decides to delay a decision as to whether
20 to make a reference under section 45."

21 So there is an additional power by notice to extend
22 the period.

23 If we then look at section 46(5), this is one of the
24 sections cross-referred to in that bit I just read --
25 page 73. You see:

1 "The Secretary of State may if he believes that
2 there is a realistic prospect of the public interest
3 consideration mentioned in subsection 4 being finalised
4 within the period of 24 weeks beginning with the giving
5 of the intervention notice concerned, delay deciding
6 whether to make the reference concerned until the public
7 interest consideration is finalised or, if earlier, the
8 period expired."

9 So what we see, this is the origin of the 24 weeks
10 period and this is the power of the Secretary of State,
11 if he is trying to rely on a public interest
12 consideration which has yet to be finalised, he can
13 delay making the reference in order to give time for it
14 to be finalised.

15 If you then refer back to the relevant 46(3) it
16 says:

17 "Where the decision to make a reference under
18 section 45 is made at any time on or after the end of
19 the period of 24 weeks beginning with the beginning of
20 the intervention notice concerned, the
21 Secretary of State shall, in deciding whether to make
22 such a reference, disregard any public interest
23 consideration which is mentioned in the intervention
24 notice but which has not been finalised before the end
25 of that period."

1 Pausing there, it is entirely possible that you
2 might have a reference being made on or after the end of
3 the period of 24 weeks in circumstances where the
4 Secretary of State has the power under section 25 as
5 amended to extend the period to enable a public interest
6 consideration to be finalised. We have seen that is
7 a power which is slotted into section 25.

8 What he has to do is if, when he is then considering
9 making a reference, actually the public interest
10 consideration has not been finalised, he has to
11 disregard it.

12 We have --

13 THE PRESIDENT: Just a second. (Pause)

14 So at 46(3) it is saying if there is a public
15 interest consideration that is not one set out currently
16 in section 58 but which he thinks ought to be made and
17 is seeking to introduce by making an order that has to
18 be laid before Parliament, if it has not been finalised
19 by the end of 24 weeks beginning with the intervention
20 notice he must disregard it.

21 MISS FORD: Yes.

22 THE PRESIDENT: But he can still make the reference under
23 section 45.

24 MISS FORD: Because --

25 THE PRESIDENT: If he must disregard that ground he has to

1 do it on another ground.

2 MISS FORD: We have to assume, in this circumstance, that
3 there has been an extension of time, for example, in
4 relation to a potential finalised -- the hope that
5 a further public interest might be finalised. I have
6 shown you the provision under which that could be, and
7 the provision is an extension of time for a period of
8 24 weeks.

9 THE PRESIDENT: Under section -- he then delays it under
10 section 46 -- still a little hard. I can see how that
11 works with section 46(5) but section 46(3) is not
12 cross-referred to in subsection (5A). So --

13 MISS FORD: No.

14 THE PRESIDENT: -- he decides to delay because he believes
15 there is a realistic prospect and then it does not
16 materialise, the prospect, is that it?

17 MISS FORD: The power to delay is subsection 5. That is why
18 it is the subsection referred to in subparagraph (5A),
19 and this is all within the scheme of the section 24 time
20 limits applying because what is being done in
21 subsection (5A) is to introduce a further means of
22 extending that time period.

23 THE PRESIDENT: (Pause) The delay under section (5A) of the
24 new section (5A) set out in section 42(6)(e), that's
25 unlimited, with delay, is it?

1 MISS FORD: No, because it is cross-referring to the power
2 under section 46(5), and under section 46(5) the power
3 tells him it is 24 weeks period.

4 THE PRESIDENT: If he believes -- he may delay it until it
5 is finalised.

6 MISS FORD: Or, if earlier, the period expires.

7 THE PRESIDENT: That suggests he cannot delay it for more
8 than 24 weeks; is that right?

9 MISS FORD: It does, for the purposes of ensuring that the
10 public interest consideration is finalised. That is
11 where subsection (3) comes in because it says if within
12 the end of the period of 24 weeks despite your best
13 endeavours it has not been finalised, you have to go
14 ahead and take your reference decision on that basis.

15 THE PRESIDENT: After 24 weeks.

16 MISS FORD: After 24 weeks because you have -- the
17 presumption has to be you have exercised your power to
18 extend time under (5A) and so you are still within the
19 24 timing regime. Section 24 sets out the limit,
20 section 25 tells you how you can extend them, and this
21 is a specific provision which tells you you can extend
22 them in these particular circumstances.

23 THE PRESIDENT: If it has not been finalised within 24 weeks
24 you can then still take your decision but you have to
25 disregard that -- he can still refer but you have to

1 disregard the public interest consideration which was
2 the reason for which you were planning to delay or did
3 delay.

4 MISS FORD: You have to take your decision whether to refer
5 or not and query whether in those circumstances, if you
6 were relying on a public interest consideration which
7 had not been finalised and ultimately it was not --

8 THE PRESIDENT: You disregard.

9 MISS FORD: You must disregard that and therefore you may
10 not be a position to make a reference, because you may
11 not be a position where you are satisfied that the
12 relevant public interest criterion is satisfied.

13 THE PRESIDENT: I accept you may have to specify a deal
14 I suppose, but it is clearly envisaging, subsection (3),
15 you can still make a reference in deciding to disregard
16 any such, which is mentioned, in deciding -- it does not
17 say you cannot make a reference.

18 MISS FORD: It does not. It is saying you have to make
19 a decision whether to make a reference.

20 THE PRESIDENT: I think you can, can you not, specify to
21 public interest?

22 MISS FORD: You can. So it may be that you can rely on one
23 which was already specified and you can still rely on
24 it.

25 THE PRESIDENT: You can still rely on it and then you are

1 more than 24 weeks because you have given an extension
2 under the 25(5A) in the expectation that it would be
3 finalised.

4 MISS FORD: Yes.

5 THE PRESIDENT: Yes, I see.

6 MISS FORD: None of that, in my submission, in any way
7 subverts the section 24 timing scheme. It is all -- the
8 mechanism has been incorporated into --

9 THE PRESIDENT: It is dealing with this particular
10 circumstance where there is a further public interest
11 consideration.

12 MISS FORD: It is doing so by introducing a power to extend
13 into section 25.

14 THE PRESIDENT: Yes.

15 MISS FORD: Just for completeness, we looked up the
16 explanatory notes for the section.

17 THE PRESIDENT: Why cannot people draft these things in
18 ordinary English.

19 MISS FORD: It would have been helpful if they could. May
20 I hand up the explanatory note just for completeness.

21 (Handed)

22 The part dealing with this particular section, the
23 part dealing with this particular debate we have been
24 having starts "In addition" and it says:

25 "In addition this section prevents the

1 Secretary of State from clearing a merger where the OFT
2 identified competition concerns. If the public interest
3 consideration that she wishes to base that decision on
4 had not been approved by Parliament, the
5 Secretary of State may delay taking the decision on
6 reference for up to 24 weeks from the date of the
7 intervention notice so that she might be able to take a
8 newly approved consideration into account."

9 THE PRESIDENT: Then the second sentence is helpful:

10 "No reference is permitted if the deadline for
11 reference is passed."

12 MISS FORD: Yes, so I think that applies to the earlier part
13 of the section.

14 THE PRESIDENT: Yes, I see. Its other deadline.

15 MISS FORD: (Pause) You see there a making of reference is
16 prevented by 74(1). That is a reference to the effect
17 of undertakings in relation to 73, so it is referring to
18 if the CMA has accepted an undertaking then it cannot
19 then make a reference in respect of --

20 THE PRESIDENT: Why does it say if a merger involves

21 a newspaper transfer in the explanatory note? (Pause)

22 I do not see anything in section 46 that is
23 specifically dealing with newspaper transfers, is there?

24 MISS FORD: Those behind me are going to check whether it
25 might be explained by the fact that these references

1 have since been repealed. We are going to check whether
2 that is the explanation or not.

3 THE PRESIDENT: I do not follow that for the moment.

4 MISS FORD: I apologise that in answering one mystery I have
5 just discovered another.

6 THE PRESIDENT: It is not your fault. It is the way this
7 whole thing has been put together. Yes, but I do follow
8 your helpful explanation of section 46(3).

9 MISS FORD: In that case the only other point that I was
10 asked about was the BSkyB case and there we have two
11 documents to hand up to you. (Handed)

12 The first is Sky's initial submission to the
13 Competition Commission and the second is the Competition
14 Commission's report.

15 The document that has the sky headnote on it is
16 Sky's submission to the Competition Commission and if
17 you turn over to page 2.4 you see Sky's submission
18 there:

19 "Notwithstanding Sky's view that a relevant merger
20 situation has not arisen in this case, as part of its
21 analysis the Commission must verify that the reference
22 was made within the time frame set out in the
23 Enterprise Act, ie within four months of the
24 transaction."

25 So Sky is clearly of the view that you have the four

1 month deadline for making a reference, and Sky then
2 says:

3 "The statutory clock was stopped several times
4 including to allow ITV time to submit information to the
5 OFT. Sky is not aware of the details of these stoppages
6 as opposed to those that related to Sky's provision of
7 information and cannot therefore comment on whether this
8 criterion was satisfied."

9 That is what Sky said to the Competition Commission
10 and then you can see how the Competition Commission then
11 dealt it with on the other documents. It has the
12 heading "Jurisdiction". Paragraph 3.29 refers to
13 section 23 of the Act. If you look at note 54 to that
14 paragraph you see:

15 "BSkyB suggested that we should verify that the
16 reference was made within the time limits set out in
17 section 23(1)(a) of the Act. The OFT provided us with
18 the relevant details and we are satisfied that the
19 reference was made to us within a specified time frame."

20 So the Competition Commission appears to have looked
21 at it and satisfied itself that in the light of all the
22 statutory stoppages actually the deadline was met.

23 THE PRESIDENT: Yes, thank you very much. I think we will
24 put the explanatory note in tab 20 where you have the
25 other explanatory note. Thank you very much.

1 Yes, Mr. Scannell.

2 Submissions by MR. SCANNELL

3 MR SCANNELL: Mr. President, members of the Tribunal,
4 good afternoon.

5 I propose first to take you to the PIIN at issue in
6 the proceedings.

7 Second, I will say a few words about the structure,
8 scope and context of the merger that has prompted the
9 Secretary of State to intervene on public interest
10 grounds.

11 Finally, I will address each of the grounds of
12 challenge advanced by my learned friend.

13 As to the PIIN, by way of background to that, the
14 Secretary of State has -- the Tribunal has seen is
15 empowered by section 42(2) to give such a PIIN where he
16 considers that it is or may be the case that public
17 interest considerations are relevant to the
18 consideration of a merger, and a non-exhaustive list, as
19 we have seen, of those public interest considerations is
20 set out in section 58 of the Act.

21 They include national security considerations as you
22 will have seen in section 58(1), and a number of public
23 interest media public interest considerations, as they
24 are referred to in section 44(a). They include the need
25 to ensure a sufficient plurality of views and under

1 section 58(2A) which are the relevant ones in this case
2 accurate presentation of views and freedom of expression
3 of opinion.

4 Section 43 of the Act, as the president noted
5 earlier, sets out that the PIIN must contain certain
6 details, in particular they must contain details of the
7 relevant merger situation concerned and the public
8 interest considerations that are or may be relevant.

9 With those elements in mind, could I ask you,
10 please, to turn up the PIIN at issue in this case. That
11 is behind tab 3 of the application bundle.

12 At the foot of the page the Tribunal will see that
13 the PIIN was issued on 27 June and at the top of the
14 page under the title the PIIN identifies the relevant
15 merger situation concerned. So it is acquisition by
16 International Media Company of a share in
17 Lebedev Holdings, and by Scalable of a share in
18 Independent Digital News and Media.

19 So it is not only the acquisition by IMC of the
20 Lebedev Holdings stake, it is also the acquisition by
21 Scalable of a share in Independent News and Media. That
22 is also clear from the preambular recital where
23 reference is made to both of those acquisitions and in
24 paragraph (a) (i) which explains the basis on which the
25 view has been taken that the relevant merger comprises

1 both of those acquisitions, which is that the merger
2 comprises a series of transactions between the same
3 parties within the meaning of section 29 of the Act.

4 Then at the bottom of the notice the relevant public
5 interest considerations are set out and these are the
6 public interest considerations in section 58(2A) of the
7 Act.

8 Finally, the Tribunal will see in the final
9 paragraph the deadline that was imposed by the
10 Secretary of State for the production of the reports by
11 the CMA and Ofcom, end of 23 August 2019.

12 It is important for the Tribunal to have clear in
13 its mind the structure and scope of the relevant merger
14 situation and how it actually works, how it links to
15 the Act. We have seen already that there are two
16 relevant acquisitions which resulted from a series of
17 transactions, and the transactions are the transactions
18 that resulted in the acquisition of the 30% stake in
19 Independent on 7 June 2017 and the acquisition of the
20 30% stake in Lebedev Holdings by a series of
21 transactions between December and February of this year.

22 The ostensible acquirers, and I emphasise the word
23 ostensible, under the merger transaction are Scalable
24 which acquired The Independent shares and International
25 Media Company which acquired the Lebedev Holding shares.

1 Scalable and International Media Company are
2 Cayman Islands brass plaque companies. Neither of them
3 conducts any business at all. We know that from
4 a letter that was sent by Mr. Malhotra, representing
5 both Independent and Lebedev, to DCMS in April of this
6 year, so after the 1 March.

7 Those brass plaque companies were seemingly
8 incorporated for the express purpose of concealing the
9 true identities of the ultimate acquirers.

10 The ultimate acquirers of the shares in Independent
11 were the shareholders of Scalable. They are
12 Mr. Abuljadayel and the Wondrous Investment Holdings
13 partnership. The ultimate acquirers of the shares in
14 Lebedev Holdings were the shareholdings of IMC,
15 International Media Company. Again, they are
16 Mr. Abuljadayel and the Wondrous partnership.

17 Under section 27(5) of the Act, successive
18 transactions occurring within two years can be treated
19 as having occurred simultaneously on the date of on
20 which the most recent transaction occurred, and on that
21 basis the acquisitions of The Independent and Lebedev
22 Holding -- shareholdings have been treated as having
23 occurred on 20 February 2019.

24 Under section 27(8) of the Enterprise Act,
25 transactions ostensibly between different entities can

1 be treated as transactions between the same interests
2 where the same persons are substantially concerned in
3 the transactions, and on that basis the two transactions
4 were treated as being between the same parties or
5 interests, so on the acquirer side Mr. Abuljadayel and
6 the Wondrous partnership. They were the ultimate
7 acquirers in both cases. They are treated as associated
8 persons within the meaning of section 127 of the Act.

9 On the target company's side the seller in both
10 cases was Evgeny Lebedev. He was the majority
11 shareholder in Independent Digital News and Media and
12 Lebedev Holdings, before and after the transactions.
13 Those two companies were under common control before the
14 merger. They operate under the ESI Media banner and
15 they share corporate elements.

16 On the basis that the transactions were between the
17 same parties, the turnover of Independent and
18 Lebedev Holdings was combined for the purpose of
19 ascertaining whether the 70% value of turnover
20 thresholds was satisfied, and it was. 70 million,
21 excuse me.

22 As for the enterprises that ceased to be distinct
23 within the meaning of section 26(1) of the Act, they
24 were Wondrous, Independent Digital News and Media, and
25 Lebedev Holdings.

1 So I emphasise that fundamentally what is at issue
2 in this case is a merger between Wondrous on the one
3 hand, and Independent Digital News and Media and
4 Lebedev Holdings on the other. That is the structure
5 and the scope of the merger at issue.

6 The context in which --

7 THE PRESIDENT: Just one second. You say the enterprises
8 which cease to be distinct are Wondrous --

9 MR SCANNELL: Independent Digital News and Media and
10 Lebedev Holdings.

11 THE PRESIDENT: Because Mr. Sultan is not an enterprise.

12 MR SCANNELL: Correct. I will get to that point in greater
13 detail in the course of my submissions.

14 The context in which this merger has occurred is
15 also relevant. Not only because it shows that it is
16 wrong to suggest that it was enough to know that
17 Mr. Abuljadayel was somehow involved in these
18 transactions, but also because the context shows the
19 difficulties that are faced, or can be faced, by the
20 Secretary of State when he has to decide whether he has
21 reasonable grounds to suspect that a relevant merger
22 situation has or may have been created and that public
23 interest considerations may be relevant to
24 a consideration of that particular merger.

25 THE PRESIDENT: Can I stop you, because the PIIN I thought

1 treats the merger situation on the basis, not
2 specifically at Wondrous, but on the basis that control
3 over both Lebedev Holdings and Independent Digital News
4 and Media are obtained by the same group of persons,
5 that that is the basis on which it is treating this as
6 a merger situation.

7 MR SCANNELL: Yes, it is treating --

8 THE PRESIDENT: Which includes Mr. Sultan. They have come
9 under the same ownership, those two groups. It is not
10 about Wondrous ceasing to be distinct at all.

11 MR SCANNELL: It is acknowledging -- obviously the PIIN is
12 at a very high level. It is recognising what the
13 merger, relevant merger situation is and it is
14 identifying what the relevant public interest
15 considerations are. That is all that the PIIN actually
16 has to perform. It does not have to go into the detail
17 but I am --

18 THE PRESIDENT: It does have to say that there is a relevant
19 merger situation.

20 MR SCANNELL: It does.

21 THE PRESIDENT: Yes.

22 MR SCANNELL: It identifies the relevant merger situation.

23 THE PRESIDENT: It does that on the basis of common control
24 over Lebedev Holdings and Independent Digital News and
25 Media.

1 MR SCANNELL: Yes.

2 THE PRESIDENT: Those two previously separate enterprises
3 are now, as a result of these transactions, under common
4 control.

5 MR SCANNELL: Yes, but it begs the question of who has
6 acquired the control of the share in Independent Digital
7 News and Media and Lebedev Holdings so the --

8 THE PRESIDENT: It is the same parties.

9 MR SCANNELL: It is the same parties, yes.

10 THE PRESIDENT: I am just asking why you are focussing --
11 that is why I am asking, why is it specifically Wondrous
12 and not Mr. Sultan Abuljadayel?

13 MR SCANNELL: So far as the identification at a high level
14 in the PIIN of what the relevant merger situation is, it
15 is the acquisition by Scalable of the IDNM shareholding
16 and the acquisition of Independent -- of IMC of the
17 Lebedev Holdings shareholding. They are the two sets of
18 transactions which are being regarded as the relevant
19 merger situation.

20 THE PRESIDENT: No, that would not be enough. It is the
21 link between the two of them, that they are under the
22 same -- as set out. The same parties or interests
23 control both.

24 MR SCANNELL: Yes, exactly, yes.

25 THE PRESIDENT: That is the relevant merger situation.

1 MR SCANNELL: It is -- the PIIN at a high level is
2 acknowledging that for both sides it is the same entity.

3 THE PRESIDENT: I do not quite understand why you keep
4 saying the high level. It has to define, as you said,
5 the relevant merger situation and it does. It is not
6 specifically about Wondrous as opposed to
7 Mr. Abuljadayel. It is the two of them.

8 MR SCANNELL: Yes, and so there is more to be unpacked here
9 in ascertaining precisely how IMC and Scalable get
10 treated together as the same party taking over the
11 Lebedev vehicles of LHL and Independent Digital News and
12 Media.

13 THE PRESIDENT: Yes.

14 MR SCANNELL: I was talking about the context in which all
15 of this has come to pass, and I am suggesting that it is
16 relevant to determining the issues before the Tribunal,
17 not least because it shows the difficulties that can be
18 faced in practice by the Secretary of State.

19 The relevant transactions have been described in the
20 British press as having the air of secrecy about them.
21 The Tribunal will have seen that from The Economist
22 article exhibited to Mr. O'Neill's witness statement at
23 tab B6 of the defence bundle.

24 If anything, we say that that description in the
25 press is an understatement, not least because the press

1 apparently proceeds on the mistaken basis that the
2 relevant merger comprises only the acquisition of 30%
3 shareholding in Lebedev Holdings which is only half the
4 story.

5 In any event, the merger at issue in this case has
6 not admitted of a speedy assessment by the
7 Secretary of State. That is really the point I want to
8 make here.

9 First, the transactions and arrangements comprising
10 these acquisitions are unconventional, complex and
11 clandestine. Cayman Islands companies have been used as
12 the vehicles of the acquisitions and behind the
13 Caymanian companies lie yet more Caymanian entities.
14 The Tribunal can see this graphically illustrated from
15 the flowchart of the Caymanian companies behind
16 Mr. Malhotra's 24 April letter which is in the
17 application bundle at tab 7, page 24. I would ask you,
18 please, to turn that up.

19 This is the information that has been given to the
20 Secretary of State by Lebedev Holdings and IDNM, and the
21 Tribunal will immediately see that it is very different
22 to the flowchart that was handed up to the Tribunal
23 earlier today. One sees at the bottom of the page
24 International Media Company. That is the company that
25 was incorporated two days before the merger took place.

1 The shareholders in that company are Abuljadayel and
2 Wondrous Investment Holdings, and above that is another
3 Caymanian entity, Wondrous GP Limited, and a fund, the
4 Multi Opportunities Fund which is apparently a fund of
5 investors in a bank, the Al Ahli Bank in Saudi Arabia.

6 What we do not have from that --

7 THE PRESIDENT: Clients of the bank.

8 MR SCANNELL: Yes, clients of the bank, that is right. What
9 we do not have is the box above these boxes showing that
10 behind Wondrous GP Limited is National Commercial Bank.
11 That intelligence is entirely new and was revealed this
12 morning by the applicants when they handed up their
13 flowchart.

14 As we will see in a moment, what was revealed in the
15 press was that there was some association between
16 Mr. Abuljadayel and the National Commercial Bank, but no
17 indication at all that the National Commercial Bank was
18 somehow associated with these transactions, that it had
19 participated in some way.

20 Then over the page is a similar flowchart for
21 Scalable. The striking point here is that the structure
22 is identical to the structure that was used --

23 MR LOMAS: Is that surprise quite justified? I think it is
24 in the notice of application, is it not, that National
25 Commerical Bank is the owner of Wondrous Investment

1 Holdings?

2 MISS FORD: It is in fact mentioned in the 19 February
3 letter as well which is the one the Secretary of State
4 says sets time running.

5 MR SCANNELL: Yes, what we have been told in the 19 February
6 letter is that there are two partners in Wondrous
7 Investment Holdings, one of them is a management company
8 that is ultimately owned by National Commercial Bank and
9 yes, to be fair, one can see that National Commercial
10 Bank is --

11 MR LOMAS: I just do not think today was the first time that
12 came out.

13 MR SCANNELL: Second, at no point has Mr. Lebedev or
14 Lebedev Holdings Limited or Independent Digital News and
15 Media or Mr. Malhotra, notified the transactions to the
16 CMA or to the Secretary of State.

17 I do not say that they are legally required to
18 notify proactively, they are not, but the fact that they
19 have chosen not to provide information when expressly
20 asked by journalists, for example, contextualises the
21 submission made this morning that the material facts
22 were abundantly clear from the press articles that they
23 rely on.

24 The Tribunal already has the point that in the
25 Financial Times article of 25 February on which the

1 applicants rely, Mr. Lebedev and the Evening Standard
2 are each reported to have declined to comment. In the
3 Guardian article of the same date, which is also relied
4 on, an unnamed spokesman for the Evening Standard is
5 quoted as saying that Lebedev Holdings never comments
6 publicly on individual shareholders.

7 Third, even if it is accepted that it is not
8 necessary to know the identities of the beneficial
9 owners of Wondrous in order to determine whether
10 a relevant merger situation has been created, their
11 identities are crucial to a proper understanding of the
12 public interest considerations in play.

13 But a definitive account of who these persons or
14 states are have not been provided to the
15 Secretary of State. The position is not entirely clear
16 even today.

17 THE PRESIDENT: What is not clear?

18 MR SCANNELL: Who the beneficial owners are at the upstream
19 level above National Commercial Bank. Who ultimately
20 gets to benefit.

21 THE PRESIDENT: The shareholders in the bank, but -- and the
22 bank is as I understand it, a public company in
23 Saudi Arabia, is it not?

24 MR SCANNELL: Our understanding is that the bank is, for all
25 intents and purposes, owned and controlled by the

1 Saudi Arabian kingdom, the kingdom of Saudi Arabia, yes.

2 THE PRESIDENT: Is it not a listed -- I am looking for the
3 letter.

4 MR SCANNELL: It is a publicly owned company listed in
5 Saudi Arabia.

6 THE PRESIDENT: A publicly owned company. Yes, publicly
7 owned and listed.

8 MR SCANNELL: We also do not know Mr. Abduljayadel's precise
9 links to that bank. We know that he is associated
10 with it.

11 THE PRESIDENT: Yes.

12 MR SCANNELL: He may work for it. He may have some deeper
13 connection. We do not know that.

14 As for Mr. Lebedev himself, his resistance to any
15 enquiry into the circumstances of the merger is clear.
16 He opposes the very notion of the Secretary of State
17 enquiring into the public interest aspects of these
18 transactions.

19 THE PRESIDENT: He has responded to -- they have responded
20 to your enquiries. Of course he does not want
21 a reference and he has brought this challenge, but he
22 has not refused to answer questions. There was some
23 delay at one point, I suppose because of having to get
24 information from Saudi Arabia, but you have never had to
25 use compulsory powers to get information.

1 MR SCANNELL: No, we have not deployed compulsory powers
2 to --

3 THE PRESIDENT: To say he has resisted any enquiry, he
4 has --

5 MR SCANNELL: I take that point from the letter which
6 Mr. Lebedev wrote to the Secretary of State setting out
7 his position in which he makes --

8 THE PRESIDENT: He strongly opposes any reference. He
9 thinks there are no good grounds for a reference and
10 so on, but in terms of supplying information he has not
11 resisted that, has he?

12 MR SCANNELL: He has failed to answer the final questions
13 that were asked in mid-May relating to the beneficial
14 ownership structure behind the Wondrous entity. The
15 letter at tab 7, page 27 of the application bundle has
16 not been answered.

17 MR LOMAS: If you can just tell me, to what point in the
18 judicial review does the behaviour of the parties in not
19 answering letters of correspondence in May go? Is that
20 not after the events that we really need to consider?

21 MR SCANNELL: At the moment I am simply seeking to set the
22 context of the merger that took place and explaining
23 that so far as the Secretary of State is concerned it
24 can be difficult, in particular facts, to ascertain what
25 exactly is going on and that is what occurred in this

1 case. I will unpack that a little bit more in a moment,
2 but at the moment I am simply making the point that it
3 has not been straightforward in this case, largely
4 because of the use of Caymanian shell companies to
5 ascertain who exactly is behind the acquisition of a 30%
6 stake in IDNM and Lebedev Holdings, and it was not
7 enough, we say, to know that Mr. Abuljadayel was somehow
8 involved.

9 THE PRESIDENT: But you accept that once you have the letter
10 of 19 February, and I take your point about the press
11 report, but the letter of 19 February, you accept was
12 enough.

13 MR SCANNELL: Yes, we do.

14 THE PRESIDENT: So what Mr. Lomas is saying, well what
15 happened in May is really a bit irrelevant.

16 MR SCANNELL: No, I am simply letting the Tribunal know when
17 we learned particular facts about the structure of the
18 relevant merger situation.

19 THE PRESIDENT: Yes.

20 MR SCANNELL: Turning to ground 1, so far as the legislative
21 framework relevant to the ground is concerned, the
22 Secretary of State does not disagree with the outline
23 structure presented to the Tribunal by my learned
24 friend, save for certain points of emphasis that we say
25 must be borne in mind when considering the exercise of

1 powers under section 42.

2 As to the points of emphasis, first, the question to
3 be assessed under section 42(2) which is the provision
4 empowering the Secretary of State to give an
5 intervention notice, is whether the conditions of
6 section 42(1) are met. As to these conditions, the
7 applicants do not dispute that the conditions set out in
8 section 42(1)(b), (c), and (d) of the Act are met.

9 That leaves section 42(1)(a).

10 THE PRESIDENT: Just a second, 42 --

11 MR SCANNELL: This is at page --

12 THE PRESIDENT: These are the no objection -- the -- right.

13 MR SCANNELL: Yes. So they are not in issue.

14 THE PRESIDENT: Yes.

15 MR SCANNELL: The question that arises under

16 section 42(1)(a) is whether the Secretary of State has
17 reasonable grounds for suspecting that it is or may be
18 the case that a relevant merger situation has been
19 created.

20 We do say that that language affords the
21 Secretary of State a margin of appreciation within the
22 bounds of reasonableness. Under section 23(1) of
23 the Act the question of whether a relevant merger
24 situation has been created has three overlapping
25 elements. First, there is a substantive element: two or

1 more enterprises have ceased to be distinct; second,
2 there is a temporal element, they cease to be distinct
3 at a time or in circumstances falling within section 24;
4 and there is a value element, that the value of the
5 turnover in the UK of the enterprise taken over exceeds
6 certain thresholds or that the share of supply test is
7 met.

8 The applicants do not contest the substantive
9 element or the value elements of that assessment and
10 that leaves only the temporal element.

11 So the residual question is whether the
12 Secretary of State had reasonable grounds to suspect
13 when he gave the PIIN that it was or might be the case
14 that the enterprises had ceased to be distinct at a time
15 or in circumstances falling within section 24.

16 There are multiple alternative tests under
17 section 24 which applies depends on the facts of the
18 case and in the present case the relevant section 24
19 test is the test in section 24(1)(b), whether notice of
20 material facts about the arrangements or transactions
21 comprising the merger had been given in accordance with
22 subsection (2).

23 In order for the temporal element to be satisfied
24 the answer to that question must be no. So, as my
25 learned friend explained, it is expressed in the

1 negative.

2 Section 24(2)(b) then says notice of material facts
3 is given if it is given more than four months before the
4 PIIN is given. Either by notifying the material facts
5 to the CMA or by making them public. I am using the
6 language of the PIIN being given because that is what
7 section 42(6)(k) says you must do when sections 23 to 30
8 of part 3 Chapter I of the Act are applied in the
9 context of public interest cases.

10 So if the material facts are notified less than four
11 months before the PIIN, the section 24(2)(b) test is
12 answered no and that means that the section 24(1)(b)
13 test is satisfied. It is very complicated and it is
14 difficult to understand but that is the way it works.

15 The point of emphasis that I wish to make is that in
16 the context of the Secretary of State's decision whether
17 to give a PIIN, the section 24(2)(b) question becomes
18 whether the Secretary of State had reasonable grounds to
19 suspect that it was or might be the case, that notice of
20 material facts had been given to the CMA or had been
21 made public within four months of the PIIN.

22 The reason I emphasise that point is because insofar
23 as my learned friend contends that the publication of
24 information in the press before the 1 March amounted to
25 sufficient notice, the Secretary of State's assessment

1 was that that information did not provide sufficient
2 grounds for him to suspect that a relevant merger
3 situation had been created. We say that is an
4 assessment the Tribunal should be slow to interfere
5 with.

6 THE PRESIDENT: Where is that assessment? You say you made
7 that assessment.

8 MR SCANNELL: It is not in evidence, sir. But an assessment
9 was there to be made by the Secretary of State under
10 section 42(1). He had to be satisfied that there were
11 reasonable grounds to suspect that it is or was the case
12 that -- or may have been the case that a relevant merger
13 situation had been created. We accept that that brings
14 into play section 23 and that section 23 brings into
15 play section 24. The point I am making is that the
16 reasonable grounds to suspect threshold gets imported
17 into those levels, section 23 and section 24.

18 THE PRESIDENT: Yes, but I mean if you say he made an
19 assessment that is a positive statement. There is no
20 evidence of it at all.

21 MR SCANNELL: There is the witness statement of Mr. O'Neill.

22 THE PRESIDENT: Yes.

23 MR SCANNELL: At paragraph 14 he says that on 27 February
24 they became aware of the --

25 THE PRESIDENT: Just a minute. (Pause)

1 MR FRAZER: Paragraph 14?

2 MR SCANNELL: Paragraph 14.

3 THE PRESIDENT: He says:

4 "On 27 February ..."

5 I am not quite sure why it takes two days to be
6 aware of an article in the Financial Times but still.

7 "... which gave some details, but not all relevant
8 given in the letter to us."

9 It is a slightly odd situation because by the time
10 they read the article in the Financial Times, by the
11 time it was published they had had the letter of
12 19 February which gave them these details.

13 MR SCANNELL: The view was taken that time ran from the time
14 that they notified the CMA on the basis that the
15 information that had been made available in the press
16 was not sufficient to give rise to reasonable grounds to
17 suspect that a relevant merger situation had been
18 created.

19 THE PRESIDENT: The information in the letter was.

20 MR SCANNELL: Yes, correct, and --

21 THE PRESIDENT: The difference that you rely on is what he
22 says here, that crucial was the identity of the buyer --

23 MR SCANNELL: Yes.

24 THE PRESIDENT: -- and the shareholders in the buyer.

25 MR SCANNELL: Yes. Therefore, the existence of links

1 between the LHL acquisition and the IDNM acquisition.

2 Because that is the key to unlocking --

3 THE PRESIDENT: Why did they need to know that it was IMC?

4 If they knew that the buyers were -- that the interests

5 in the buyer and the buyer was controlled by

6 Mr. Abuljadayel and Wondrous and those are the same

7 people who had control over the buyer of the share in

8 Independent Digital News and Media.

9 MR SCANNELL: But he did not know, sir, from the newspaper

10 reports that Wondrous was involved at all.

11 THE PRESIDENT: No, I understand the Wondrous point. I see

12 that, but I do not understand why they needed to know

13 that it was IMC that was the vehicle.

14 MR SCANNELL: Because finding out that IMC was the relevant

15 Caymanian company was the gateway to finding out who the

16 enterprises were behind IMC. IMC was obviously a shell

17 company and that was reported in the press that it was

18 incorporated for the purpose of the transaction. It

19 begs the question, well what are the enterprises behind

20 it? Not Mr. Abuljadayel, but what is the enterprise

21 behind it, and the enterprise is Wondrous.

22 THE PRESIDENT: Why does it depend on them being an

23 enterprise under the Act? I thought if the controlling

24 persons are the same they do not need to be enterprises

25 do they? If you look under the provision, I cannot

1 remember which it is, that shows --

2 MR SCANNELL: It is section 26 of the Act which says that
3 the enterprises cease to be distinct, and the
4 Secretary of State wanted to work out, well, okay, I can
5 see that enterprises are being acquired. I can see that
6 Independent Digital News and Media and Lebedev Holdings
7 are being acquired. But what enterprise is doing that?

8 THE PRESIDENT: But it does not matter, does it? The
9 enterprises, the two distinct enterprises namely
10 Lebedev Holdings or indeed -- or indeed, and the one
11 that controls --

12 MR SCANNELL: Independent Digital News and Media.

13 THE PRESIDENT: News Media are under section 26(3), is it
14 not -- are under the same control which control is then
15 given an extended definition to mean material influence
16 so 30% will count as control, but technically -- they do
17 not have to be enterprises that have control. It is any
18 person, group of persons. The two enterprises are
19 Lebedev Holdings and Independent Digital News and Media.

20 MR SCANNELL: No, the enterprises that are ceasing to be
21 distinct are, on the one hand, Lebedev Holdings and
22 Independent Digital News and Media, which are together
23 rationalised as a single enterprise under the control of
24 Evgeny Lebedev, and on the other side of the equation
25 Wondrous.

1 THE PRESIDENT: Wondrous is ceasing to --

2 MR SCANNELL: Yes. Before the transaction, and this is
3 explained in the CMA's report also.

4 THE PRESIDENT: But that is not what is stated in the PIIN.

5 MR SCANNELL: No, it is not --

6 THE PRESIDENT: Two or more enterprises have ceased to be
7 distinct. It is not my understanding of the merger at
8 all, as control. The PIIN seems to follow quite
9 precisely section 26 of the Act. Two or more
10 enterprises have ceased to be distinct as control over
11 both Lebedev Holdings and Independent Digital News and
12 Media have been obtained in stages by the same parties
13 or interests or group of persons. That is to say,
14 Wondrous plus Mr. Abuljadayel having in 2017 gained
15 control over the owners of The Independent have then in
16 2019 gained control over Lebedev Holdings Limited,
17 controllers of the Evening Standard. Is that not the
18 transaction? That was my understanding.

19 MR SCANNELL: The PIIN can certainly be clearer in this
20 regard but it is --

21 THE PRESIDENT: But that would be a merger situation.

22 MR SCANNELL: That would be a merger situation in itself,
23 but the structure of the merger is explained by the CMA
24 in the CMA's report. The way it is rationalised is that
25 the Wondrous enterprise is controlled before the

1 transaction. If you imagine the situation before they
2 buy anything, it is controlled by Wondrous and its
3 partners, so there is an enterprise -- an enterprise is
4 simply the business activities that are conducted and
5 the Wondrous business, whatever that is, is controlled
6 by Wondrous and its parties before the merger goes
7 through. After the transaction that business is
8 controlled along with Independent Digital News and Media
9 and Lebedev Holdings by Wondrous and its partners.

10 For that reason the business is brought under common
11 control within the meaning of section 26(1). That is
12 the way the CMA rationalises it.

13 MR LOMAS: I think if it helps, the CMA defines Wondrous and
14 the Sultan or Mr. Sultan as "the acquirers", and then
15 defines the acquirers and the target companies, which
16 are IDNM and LHL as "the parties", and then finds that
17 there may be a case the parties enterprises have ceased
18 to be distinct, which I think supports what you have
19 just been saying.

20 MR SCANNELL: Yes.

21 MR LOMAS: That is certainly the CMA's analysis as in their
22 report.

23 MR SCANNELL: Yes.

24 MR LOMAS: Whether that is right or not is another question
25 but that is their analysis.

1 MR SCANNELL: Yes, that is the analysis.

2 With mergers, as the Tribunal is well aware, it is
3 often quite difficult on the acquirers' side to
4 understand how exactly the acquirer ceases to be
5 distinct, how the acquirer can be an enterprise that
6 ceases to be distinct. In a situation such as the
7 merger of this case that is possible where common
8 control is acquired in a company because the business
9 that used to be in the acquirer is a business which
10 together with the businesses that are acquired come
11 under common control, and that is the way the CMA
12 rationalises merger transactions.

13 MR FRAZER: Just to come back to a question the president
14 asked, you do not need to know that that common control
15 is in the hands of an enterprise, do you, only the hands
16 of a person or a group of persons.

17 MR SCANNELL: It is possible for a person or group of
18 persons to be acquirer, yes.

19 MR FRAZER: So when you talked about the Secretary of State
20 needing to know who was above the enterprise, which
21 enterprises, sorry, were above the ones which had been
22 disclosed, it was not necessarily looking for
23 enterprises.

24 MR SCANNELL: No, at an earlier stage I was explaining that
25 in order to ascertain the public interest

1 considerations, in particular it is necessary to know,
2 to know more of the picture, but so far as whether there
3 is a relevant merger situation is concerned, it is
4 necessary to know what are the entities that are taking
5 over the Lebedev vehicles, and the view that was taken
6 was it is not enough just to know that Mr. Abuljadayel
7 was somehow involved. We need to know who else is
8 behind Scalable and IMC because that way we get to
9 ascertain, for example, that Wondrous has an enterprise
10 and that enterprise is joined together with the Lebedev
11 enterprises and are coming under common control.

12 Mr. Abuljadayel is not coming under common control.

13 MR FRAZER: He is not an enterprise.

14 MR SCANNELL: Yes.

15 The applicants' first ground, if I can turn to that,
16 is that notice of material facts concerning the LHL
17 acquisition was given on 25 February 2019 at the latest.

18 Where we actually come out with the words "at the
19 latest" is not entirely clear because the applicants do
20 not explain whether the earlier press publications were
21 enough and if so why they would have been enough. Be
22 that as it may, the Secretary of State's position for
23 the purposes of these proceedings is that the
24 information that was made public on or before
25 25 February was materially incomplete because it did not

1 identify the acquirers and was uncorroborated.

2 To repeat, the Secretary of State accepts that the
3 19 February letter provided material facts and that
4 letter was notified to the CMA as we have seen on
5 1 March.

6 MR LOMAS: May I interrupt for a second. One of the things
7 that has troubled me, on your analysis of the timescale
8 can you help us with why it was appropriate for the
9 Secretary of State to wait from 17 February to 1 March
10 and what controls -- could he have waited until 1 May or
11 1 June? We could not see anything in the statute which
12 controlled the time gap between the response of the
13 information and the trigger event which you say is the
14 case, which he is reporting to the CMA.

15 MR SCANNELL: Yes, there is, as I understand it, nothing in
16 the legislation to control the period of time between
17 the receipt of private information and the communication
18 of that information to the CMA. All we have to go on is
19 section 24 of the Act which does not speak of
20 communication to the Secretary of State. It speaks of
21 notice to the CMA and so what matters is when the CMA
22 gets the material not the Secretary of State.

23 MR LOMAS: So the logical consequence of your position would
24 be if there had been no further press comment after
25 17 February --

1 MR SCANNELL: The 19 February press release.

2 MR LOMAS: So no article on 25 February etc, technically the
3 Secretary of State could have sat on that information
4 until, say, June or July, then notified the CMA, and
5 then the four month time period would start running.

6 MR SCANNELL: Yes, that is correct.

7 MR LOMAS: I am not saying he would have done but
8 technically the statute --

9 MR SCANNELL: Yes, and almost certainly he would not have
10 done. It is -- the normal set of circumstances of
11 course is a situation where the entities notify the CMA
12 themselves. It is wholly unusual to have a situation
13 such as the one that has arisen in this case where no
14 notice is made to the CMA at all in circumstances where
15 it is obvious that the Secretary of State wants to find
16 out what exactly is going on. Of course that is one way
17 that merging entities can bring a certain amount of
18 business certainty to the case by notifying to the CMA
19 themselves.

20 THE PRESIDENT: It just seems a bit odd that when the
21 Secretary of State's officials were in regular contact
22 with the CMA, as we saw from the email, the
23 Secretary of State gets a letter, or rather his media
24 team gets a letter on 19 February, it is not passed on
25 for over ten days.

1 MR SCANNELL: Yes, this is addressed in the witness
2 statement of Mr. O'Neill. I am just finding the
3 reference for you.

4 THE PRESIDENT: Yes, I think Ms. Mackenzie is directing your
5 attention to something.

6 MR SCANNELL: It is addressed at paragraph 13 of
7 Mr. O'Neill's witness statement.

8 THE PRESIDENT: It is not really addressed. He says:
9 "We considered whether we were able to share the
10 letter with the CMA."
11 It does not say why we did not immediately, and then
12 did on 1 March. He says in 13:
13 "We considered in detail internally whether we were
14 able to share the letter."
15 Then in paragraph 15 he says:
16 "After internal consideration as mentioned above,
17 I contacted the CMA on 1 March."
18 MR SCANNELL: Yes. As I understand the position, DCMS was
19 waiting for internal legal advice on the question of
20 whether any GDPR issues arose with the sharing of the
21 letter. I am afraid I cannot assist beyond making that
22 point.

23 THE PRESIDENT: I think the statute is clear that it has to
24 be the CMA not the Secretary of State.

25 MR SCANNELL: It is.

1 THE PRESIDENT: But oddly, given that it is the
2 Secretary of State who has to issue the PIIN not the
3 CMA, but that is for some reason the way the statute is
4 drafted.

5 MR SCANNELL: Yes. There are many drafting infelicities in
6 the Act.

7 THE PRESIDENT: Yes.

8 MR SCANNELL: Before I get to why we say that the
9 applicants' first ground fails on its own terms, I want
10 to first explore and in limine point. We have seen that
11 the relevant merger situation in this case involves two
12 sets of transactions. There is the acquisition of IDNM
13 in 2017 and there is the acquisition of Lebedev Holdings
14 in December to February of this year. It was not simply
15 the acquisition of the Lebedev shares. That is
16 important to appreciate.

17 THE PRESIDENT: Yes.

18 MR SCANNELL: With that in mind, can I ask the Tribunal to
19 turn up the applicants' case on ground 1. This is at
20 section 47 of their skeleton but it is perhaps more
21 apposite to take it from the application itself. This
22 is paragraph 44 of the application at tab 1 of the
23 application bundle.

24 Here we see on page 13 how the first ground of
25 review is actually put by the applicants. They say in

1 paragraph 44 that the Financial Times and Guardian
2 articles provided the material facts because they
3 resealed facts concerning the acquisition of a 30%
4 holding in Lebedev Holdings.

5 Then over the page they say that what was in the
6 Guardian and Financial Times articles provided in
7 particular the details that you see in paragraph 44.

8 So information was given on the vehicle used to make
9 the purchase, a Cayman Islands company. We know that
10 there is not just one vehicle at issue in this case,
11 there are at least two. There is IMC and there is
12 Scalable. It is not one purchase. It is two.

13 The subject of the transaction, a 30% share
14 shareholding in Lebedev Holdings, that is part of the
15 story, certainly but it is not the full story. The full
16 story is the acquisition of 30% in both Lebedev Holdings
17 and --

18 THE PRESIDENT: You have to know about the 2017 --

19 MR SCANNELL: You have to know about it, because ultimately
20 what we are talking about here and what is of concern to
21 Her Majesty's government, is the possibility that there
22 are -- that a foreign state could be acquiring
23 a substantial shareholding in Lebedev Holdings and
24 Independent.

25 THE PRESIDENT: Yes.

1 MR SCANNELL: Simultaneously.

2 THE PRESIDENT: We have that point and that is why the
3 earlier articles are of little help.

4 MR SCANNELL: Yes.

5 THE PRESIDENT: It is what you get in the Financial Times
6 which is the key article on page 17. You make the
7 point: no reference to Wondrous, no indication about
8 Wondrous.

9 MR SCANNELL: Yes.

10 THE PRESIDENT: But it does say about Mr. Abuljadayel, who
11 it treats as being the purchaser, that two years ago he
12 bought a similar-sized stake in The Independent.

13 MR SCANNELL: Yes.

14 THE PRESIDENT: So it does -- that does article does link
15 the two, does it not?

16 MR SCANNELL: Yes, but with the best will in the world we do
17 not know how Mr. Abuljadayel is involved in the
18 transactions. We know that he -- the impression that is
19 given in the articles is that Mr. Abuljadayel, an
20 individual, has bought a shareholding in two companies.
21 That is not a relevant merger situation. What might be
22 a relevant merger situation is where one business
23 acquires a substantial stake in another business, or
24 where on the acquirer's side you have two ostensibly
25 separate businesses which are treated as a single entity

1 acquiring a single entity on the other side where you
2 get to treat, for example, Lebedev Holdings and
3 Independent Digital News and Media together because they
4 are the ultimate target companies and treated as --

5 THE PRESIDENT: If it was true that Mr. Abuljadayel, not an
6 enterprise but a person, had bought 30% of
7 The Independent and then two years later buys 30% of the
8 Evening Standard, you would have a relevant merger
9 situation, would you not?

10 MR SCANNELL: The way that the CMA rationalises this, and
11 the Secretary of State also, is that they are looking to
12 ascertain the business that takes over the Lebedev
13 business.

14 THE PRESIDENT: I know that the CMA approached it that way.
15 I am positing to you that on the basis of that which
16 seems to be the foundation of the PIIN, as I read it, it
17 is that the same persons who acquired a material
18 influence over The Independent have now acquired
19 material influence over the Evening Standard.

20 MR SCANNELL: Yes.

21 THE PRESIDENT: The only difference is that instead of
22 being, as the Financial Times would suggest, just
23 Mr. Abuljadayel on his own, it is a combination of him
24 acting together with this entity Wondrous.

25 MR SCANNELL: Yes, on the target company side one has

1 Lebedev Holdings Limited and Independent Digital News
2 and Media. They are under common control before anybody
3 purchases anything.

4 THE PRESIDENT: Yes.

5 MR SCANNELL: So they can hardly come under common control
6 or cease to be distinct, I should say, they can hardly
7 cease to be distinct later.

8 THE PRESIDENT: I think they can, can they not? Is that not
9 what section 26 says? Is that not right?

10 MR SCANNELL: It speaks of two or more enterprises ceasing
11 to be distinct. So it is any two enterprises cease to
12 be distinct for the purposes of section 26. If
13 Lebedev Holdings Limited and Independent Digital News
14 and Media are together under common control before
15 Mr. Abuljadayel or Wondrous came along, then you do not
16 have a situation where two enterprises are ceasing to be
17 distinct. You do need to know what is going on with
18 Wondrous.

19 The CMA report does make it clear, but it is clear
20 anyway, that Lebedev Holdings and Independent Digital
21 News and Media were under common control before any of
22 the transactions took place. That is paragraph 7 of
23 their report.

24 MR LOMAS: Just so that I can clarify that. Suppose that
25 Mr. Abuljadayel had bought 100% of both companies.

1 Understanding that they are prior to the acquisition,
2 run as one, and you would say were not operating as
3 distinct enterprises, but suppose he had come along and
4 bought 100%, which is the entire Lebedev Holdings in
5 both hold companies, would you say that was outside the
6 merger provisions of the Enterprise Act?

7 MR SCANNELL: If he did it in a personal capacity yes,
8 I would.

9 MR LOMAS: Okay. Is that right?

10 THE PRESIDENT: It seems an astonishing --

11 MR LOMAS: I do not think it is. I am thinking of
12 section 26 -- no, section 26(4). It is where you
13 increase the level of control that you already have.
14 But if he did not have controlling interest but had the
15 ability materially to control and acquires, as you were
16 hypothesising, an outright control of it, I think that
17 would be a merger under 26(4).

18 MR SCANNELL: If he was a sole trader and/or if he had some
19 sort of business and that business took over 100% of the
20 shareholding, then I can well imagine that that would be
21 a relevant merger situation, but what I was asked to
22 agree was whether if he did so in a personal capacity,
23 if he bought 100% of the shares, would that be
24 a relevant merger situation? I am not entirely sure
25 that that would be a relevant merger situation.

1 THE PRESIDENT: I am looking at section 26(1):

2 "For the purpose of this part any two enterprises
3 cease to be distinct if they are brought under common
4 ownership or common control whether or not the business
5 to which either of them formally belonged continues to
6 be carried on under the same or different ownership or
7 control."

8 If you read that with subsection (3):

9 "A person or group of persons being able directly or
10 indirectly to materially to influence the policy of the
11 body corporate but without having a controlling interest
12 in that body may for the purpose of subsection (1) be
13 treated as having control of ..."

14 So surely if Mr. Abuljadayel had acquired 30% of the
15 company owning The Independent and the company owning
16 the Evening Standard, there would be, even though they
17 were -- remained under common control of Mr. Lebedev,
18 there would still be a change by Mr. Abuljadayel
19 acquiring the ability materially to influence them and
20 that would create a situation within section 26, it
21 seems to me.

22 It is not the situation we have, but it would be
23 a very strange gap in the ability of the
24 Secretary of State to control newspaper mergers if he
25 could not act when the same person acquired a material

1 influence over several newspapers just because they were
2 commonly owned by someone else, if he was concerned
3 about the person who acquires material influence.

4 MR SCANNELL: I do take the point, it is not the situation
5 that has arisen here but --

6 THE PRESIDENT: But it is important for your argument,
7 because you say that, as I understand it, that if it
8 were not for Wondrous there would not be grounds to make
9 a reference at all.

10 MR SCANNELL: We do say that Wondrous is the enterprise, not
11 Mr. Abuljadayel, and we do say that as a result of these
12 transactions Lebedev Holdings and Independent Digital
13 News and Media have come under the common control of one
14 group, and Lebedev Holdings and Independent Digital News
15 and Media for these purposes are considered to be one
16 enterprise.

17 MR LOMAS: Can I broaden the debate out for a second. We
18 are very much focused here on merger of enterprises, but
19 the Secretary of State is interested in the public
20 interest criteria.

21 MR SCANNELL: Yes.

22 MR LOMAS: For that purpose is not the relevant question not
23 the name or identity of an SPV in the Cayman Islands
24 that just holds shares, but of the controlling influence
25 behind that?

1 MR SCANNELL: Yes.

2 MR LOMAS: Therefore the issue is not really the identity of
3 Wondrous or its address or anything of that nature. It
4 is what is the nature of the Saudi Arabian interest in
5 the two news media that we are talking about.

6 MR SCANNELL: Yes.

7 MR LOMAS: What happens in that little black box in the
8 Cayman Islands doesn't matter very much, does it? It is
9 who in Saudi Arabia ultimately might be in a position to
10 influence the editorial process in The Independent or
11 the Standard?

12 MR SCANNELL: Yes, I do take that point. There are two
13 considerations of course that the Secretary of State has
14 to take into account when issuing a Public Interest
15 Intervention Notice. The first are the public interest
16 considerations, but in order to form what those public
17 interest considerations are separately but relatedly
18 a view has to be taken as to whether or not there is
19 a relevant merger situation.

20 MR LOMAS: I understand.

21 MR SCANNELL: Whether there is a relevant merger situation
22 does not actually involve an assessment of public
23 interest considerations. So the Secretary of State has
24 to try to ride two horses at the same time. If the
25 developing understanding of the Secretary of State is

1 that there is a relevant merger situation but it is
2 becoming increasingly apparent to the Secretary of State
3 that there are no public interest considerations, he
4 will not give a PIIN and all of this will fall away.

5 Conversely, he may feel that there are lots of
6 public interest considerations but he just cannot work
7 out how there is a relevant merger situation. Likewise,
8 he loses the power to issue the PIIN. He has to try to
9 develop both simultaneously. The difficulty that was
10 faced in this case is that all of those had to be
11 appreciated by the Secretary of State.

12 But we accept that so far as the assessment of
13 whether there was a relevant merger situation is
14 concerned, the question fundamentally that he had to ask
15 at that stage was: in accordance with the
16 Enterprise Act, are there reasonable grounds to suspect
17 that a relevant merger situation has been created? Once
18 he got to the point of satisfying himself that yes, he
19 felt that there were reasonable grounds to suspect that
20 an RMS had been created or may have been created, he
21 took the matter further by transmitting the letter to
22 the CMA.

23 So there is a disconnect between what the
24 Secretary of State has to juggle overall with the
25 specific question of satisfaction of the section 24

1 conditions, and the section 24 conditions are silent on
2 the public interest considerations.

3 Focusing for a moment on what was not reported in
4 the press, if I may.

5 THE PRESIDENT: Yes.

6 MR SCANNELL: First, these reports contained no confirmation
7 from any of the entities in question that what was
8 reported was in fact true. So in the Financial Times
9 report as the Tribunal has already picked up,
10 Mr. Lebedev declined to comment, Mr. Abuljadayel did not
11 respond to requests for comment. In the Guardian report
12 what was reported was that a spokesperson for the
13 Evening Standard said: we never comment publicly on
14 individual shareholders.

15 It was not reported that the buyer of
16 Lebedev Holdings was International Media, nor that
17 international -- that the entities that lay behind
18 International Media Company were not just the
19 individual, Abuljadayel, but also the enterprise of
20 Wondrous Investment Holdings; nor was it reported that
21 the ultimate acquirers on the Scalable side were not
22 just Mr. Abuljadayel but also the Wondrous partnership.

23 We say that it is important that the
24 Secretary of State did not know and could not have known
25 that on the acquirer's side of the transaction was

1 Wondrous. That became clear only when the
2 Secretary of State received the 19 February letter.

3 My learned friend says that it is enough to have
4 scraps of information that appear in the press, so as
5 long as a thread is shown the thread can be followed by
6 the Secretary of State until he gets into a position of
7 understanding the transaction.

8 We do not accept that proposition for three reasons.
9 First, and with respect, we say that it lies rather
10 uncomfortably in the mouths of the applicants to suggest
11 that what journalists were able to piece together about
12 these transactions was enough to discern what was going
13 on in circumstances where shell companies have been used
14 to conceal the identities of the ultimate acquirers, and
15 where there was no official confirmation from
16 Mr. Lebedev or any of his companies that what was
17 reported was true.

18 Secondly, the Act does not say that the revelation
19 by third parties of snippets of information is enough.
20 What the Act requires is the notification of material
21 facts. Not any material fact, as the president has
22 said, but material facts.

23 My learned friend says that once it is accepted that
24 the Secretary of State needs to verify what appears in
25 the newspapers, it must be accepted that what appears in

1 the newspapers need not be exhaustive. It need not be
2 an exhaustive account of all of the aspects of the
3 transaction.

4 With respect, if the Secretary of State had verified
5 what was in the press all that would have been verified
6 is that Mr. Abuljadayel was involved in the transaction.
7 Fine, we still do not know that Wondrous is involved in
8 the transaction.

9 The fact that Wondrous is involved is new
10 information that is not in the press.

11 We do accept that it is not necessary for every
12 piece of material information, it is not necessary for
13 every piece to appear in the press. We do not say, for
14 example, that all of the turnover figures need to be
15 published in the press or that the sharer supply test is
16 met, but every case has to turn on its own facts and we
17 say that the facts of this case involving these shell
18 companies and a refusal to confirm or deny that what is
19 in the press is actually an accurate account shows that
20 the information that was published, and I use the word
21 "information" advisedly, they are not facts, it is just
22 information, did not amount to the publication of
23 material facts.

24 You will have seen from the CMA's report under
25 section 44 that it agrees with that publication. It

1 agrees that there was not enough information in the
2 press to conclude that material facts had been made
3 public.

4 We say that it would have been the easiest thing in
5 the world for the companies or Mr. Lebedev himself, or
6 Mr. Abuljadayel, when approached by journalists to
7 confirm what the position was and to confirm who the
8 acquirers of the Lebedev businesses were, but they
9 refused.

10 We say that is manifestly unsustainable.

11 Third, we say that it is all very well to suggest
12 that information leading to a chain of enquiry is enough
13 but even then the thread or the chain of enquiry has to
14 have some logical starting point. The only logical
15 starting point is to know who the ultimate acquirers of
16 the target companies are. We do say that knowing that
17 Mr. Abuljadayel was somehow involved was not enough.
18 He, as we now know, was merely the owner of a single
19 share in IMC and Scalable. The other shareholder was
20 Wondrous and there is nothing in the press about
21 Wondrous.

22 We do emphasise the fact that Abuljadayel is just an
23 individual. He is not an enterprise. Nor are IMC and
24 Scalable. They conduct no business of their own. We
25 know that from Mr. Malhotra's 24 April letter at page 18

1 of tab 7 of the application bundle.

2 The press reports not only did not identify that
3 Wondrous was involved, they actually pointed away from
4 anybody but Mr. Abuljadayel being involved. We can see
5 this from the Financial Times report.

6 THE PRESIDENT: I think Miss Ford accepted very properly
7 that it was not accurate because it said that Mr. A had
8 30%.

9 MR SCANNELL: Yes.

10 The relevant clues in the reports that were
11 published on 25 February suggesting that only
12 Mr. Abuljadayel was involved was that it was repeatedly
13 said that little was known about him. It was unclear
14 why Mr. Abuljadayel had used a Cayman company to make
15 the investment. The purchase of the stake in
16 Lebedev Holdings is the latest push by a Saudi investor
17 into the Western media. In the Guardian article the
18 statement is repeated that very little is known about
19 Mr. Abuljadayel. It is also stated that Mr. Abuljadayel
20 had said that he had made the IDNM acquisition in
21 a personal capacity. It is also stated that
22 Abduljayadel's latest investment in Lebedev Holdings,
23 the Evening Standard's parent company was made through
24 a CI company which obscured a Saudi's role and instead
25 led to feverish speculation about the identity of the

1 investor. Saudi's is S-A-U-D-I apostrophe S, so the
2 location of that apostrophe is telling, we say.

3 So the clear impression was that the investor was
4 Mr. Abuljadayel acting in a personal capacity through
5 a CI company, a Cayman Islands company to make that
6 clear. That is not the true picture, as we know. The
7 enterprise that is invested in the Lebedev vehicles is
8 Wondrous, and the beneficiaries of the investments are
9 likely to be persons or entities that lie behind those
10 partnerships.

11 MR LOMAS: Sorry, just to come back to that, on page 17, the
12 Financial Times article of 25 February, how do you deal
13 with the paragraph after "little is known":

14 "Mr. Abuljadayel is associated with NCB Capital, the
15 investing banking arm of Saudi Arabia's National
16 Commercial Bank. The lender is majority-owned by the
17 Saudi government through its public investment fund."

18 That is at least hinting at the fact that he is not
19 buying it in his personal capacity, putting people on
20 notice of that.

21 MR SCANNELL: It is clearly not enough, in my submission.

22 Let us say for the sake of argument that Mr. Abuljadayel
23 is a loyal employee of NCB Capital. That is his job.
24 He has money in the bank. He makes investments with the
25 money in his bank account.

1 This paragraph is not inaccurate, if they are the
2 underlying facts of the case. We simply do not know
3 whether NCB Capital is somehow involved in the
4 transaction in its own right, whether it is the
5 investing entity and that fundamentally, we say, is the
6 problem.

7 The early articles actually said he was an employee.
8 We do not know whether that is true but they said that
9 he was.

10 Finally, members of the Tribunal, before I leave
11 ground 1, I also wish to make it clear on behalf of the
12 Secretary of State, and although it should come as no
13 surprise to the Tribunal, that the information published
14 in the press in this case was in point of fact not what
15 caused the Secretary of State to conclude that there
16 were reasonable grounds to suspect that a relevant
17 merger situation had been created.

18 Mr. O'Neill explains in his witness statement that
19 the combination of the newspaper articles and a question
20 which my learned friend referred to this morning to
21 Lord Keen of Elie by Lord Myners in Parliament on
22 31 January caused the department to consider that public
23 interest considerations may be in play, but the
24 department at that stage had an open mind about the
25 matters reported in the press. The department wrote to

1 Mr. Malhotra, the Tribunal has seen that, on
2 12 February, 2019 with a view to determining whether
3 there was a reasonable basis for intervening under
4 section 42 of the Act, and it was the response to that
5 letter that contained what the department considered to
6 be material facts concerning the merger.

7 So for all of those reasons -- before I leave
8 ground 1, if I may, Mr. President, members of the
9 Tribunal, I will make one brief point on the
10 *Seafrance* case in the Supreme Court. I have made
11 the submission that the Secretary of State must have
12 a margin of appreciation given the clear statutory
13 language of section 42(1) of the Enterprise Act. It is
14 said against me that, oh no, it is a pure question of
15 statutory construction. It is a question of law. There
16 is no margin of appreciation whatever. *Seafrance*
17 was pointed to as authority for that proposition.

18 What was at issue in the *Seafrance* case was
19 simply the interpretation of activities and of course
20 that is statutory language which has to be interpreted.
21 Just as importantly, what had happened in the
22 *Seafrance* case is that the CMA had taken a decision
23 to prohibit the operation of a ferry service from Dover.
24 So the CMA was at a very advanced stage, at the stage of
25 actually taking prohibitive or prohibitory actions, the

1 CMA actually had to conclude once and for all: is there
2 a relevant merger situation? Not does it believe or are
3 there reasonable grounds for belief? At that stage they
4 actually have to put their money where their mouth is
5 and say there is a relevant merger situation. There, of
6 course, there is not a margin of appreciation. But we
7 say it is abundantly clear just from the statutory
8 language in section 42 of the Act that the
9 Secretary of State does have a margin of appreciation.
10 He must do, particularly on a judicial review of the
11 question of whether he had reasonable grounds to suspect
12 that it was or might be the case that an RMS had been
13 created.

14 For all of those reasons we say that you should
15 dismiss ground 1, the PIIN was issued within four months
16 of the transmission to the CMA of 19 February letter.

17 As to the second ground --

18 THE PRESIDENT: Before you move to the second ground that
19 would be a sensible moment to take --

20 MR SCANNELL: Indeed.

21 THE PRESIDENT: We will come back at 3.55.

22 MR SCANNELL: I am grateful.

23 (3.47 pm)

24 (A short break)

25 (4.00 pm)

1 THE PRESIDENT: Yes.

2 MR SCANNELL: That was the easy argument. As to the second
3 ground, the contention here is that not only must the
4 Secretary of State give the PIIN within the four month
5 time limit we looked at in section 24, he must also
6 ensure or procure that within the same time limit the
7 CMA gives its report under section 44, Ofcom gives its
8 report under section 44A, and the Secretary of State
9 makes his reference under section 45 of the Act.

10 At the outset of my submissions on this ground
11 I accept that Chapter II of part 3 of the Enterprise Act
12 is not the clearest suite of provisions in the statute
13 book. As I understand --

14 THE PRESIDENT: I think there will be universal agreement
15 with that submission, Mr. Scannell.

16 MR SCANNELL: As I understand it, this chapter of the
17 Enterprise Act as enacted was in fact the very first
18 draft of the legislation. There was insufficient
19 parliamentary time for parliamentary counsel to review
20 the legislation with the result that it is in places
21 difficult to construe. In particular, at the points
22 where Chapter II is stitched in to part 3, borrowing
23 provisions from Chapter I, rather than containing its
24 own self-contained scheme, multiple interpretations
25 become tenable and one is at points forced to construe

1 on the least bad construction.

2 I also accept that different government departments
3 have taken divergent views as to the construction of
4 elements of Chapter II, in particular, in respect of
5 time limits.

6 As to the guidance to which my learned friend drew
7 attention this morning, I would for your notes draw your
8 attention to paragraph 1.7 of the DTI guidance in
9 tab 16. Perhaps we could turn it up.

10 This was a paragraph to which the Tribunal was not
11 taken by my learned friend.

12 THE PRESIDENT: Yes.

13 MR SCANNELL: The point that is being made is that this is
14 not a substitute for an interpretation of the provision.
15 It is a short point.

16 THE PRESIDENT: That is true of all guidance.

17 MR SCANNELL: Indeed it is, yes.

18 THE PRESIDENT: Yes.

19 MR SCANNELL: Even within the guidance that has been issued
20 by government departments we saw that the BEIS guidance
21 is not entirely free of interpretative difficulty
22 itself.

23 That said, the Secretary of State's clear position
24 on ground 2 is that first there is a four month time
25 limit for the giving of a PIIN under section 24 of

1 the Act. Indeed, the fact that this is the case
2 provides the first indication that ground 2 might be
3 wrong because it would be strange indeed if there were
4 a four month time limit to give a Public Interest
5 Intervention Notice which in practice could never be
6 availed of because of the further steps that have to be
7 taken within the same four month period.

8 Second, that so long as the time limit for giving
9 a PIIN has been complied with there is no time limit for
10 the making of a section 45 reference to the CMA.

11 Section 45 itself contains no time limit, of course,
12 nor is there any specific time limit for section 45 set
13 out elsewhere in the Act. So ground 2 is based on
14 a reading of a series of legislative provisions rather
15 than any clear legislative statement.

16 THE PRESIDENT: I fully appreciate your first point, it
17 would be strange if there is a time limit which in
18 practice you can never avail yourself of, but equally,
19 the second point is also strange, that in an Act which
20 quite laboriously sets out time limits for virtually
21 everything, provisions for extension for limited periods
22 on certain grounds etc, there is just no time limit for
23 the making of a reference on something as important to
24 business people as this, so that once a PIIN has been
25 issued in time and presumably the CMA and, if relevant,

1 Ofcom report within the time specified in the PIIN, the
2 Secretary of State can take as long as he or she likes.

3 MR SCANNELL: Yes.

4 THE PRESIDENT: That is a striking situation.

5 MR SCANNELL: The Secretary of State -- there are a number
6 of points. I will develop the points that we wish to
7 make on ground 2.

8 THE PRESIDENT: I do not want to take you out of your order
9 because it is an important point but it is a remarkable
10 consequence.

11 MR SCANNELL: I do fully understand and take on board the
12 intervention, Mr. President. I would just at this point
13 pause to say that it is not altogether as unusual as it
14 might be in other contexts given the public interest
15 considerations in play, amongst them national security
16 considerations.

17 In that context, of course, business certainty may
18 very well have to take, in my submission, a back seat
19 and there is nothing in itself unusual in that.

20 Section 103 of the Act does impose a duty on the
21 Secretary of State to act with expedition so it is
22 tolerably clear that the Secretary of State cannot drag
23 his heels with a view to the prevention or removal of
24 uncertainty. I am told that section 103 may not be in
25 the bundle.

1 THE PRESIDENT: No, we have --

2 MR SCANNELL: At least one member of the Tribunal has the
3 famous purple book.

4 THE PRESIDENT: But it says section 103(2):

5 "In deciding whether to make a reference under
6 section 45 or 62 Secretary of State shall have regard
7 with a view to the prevention or removal of uncertainty
8 to the need for making a decision as soon as reasonably
9 practicable."

10 MR SCANNELL: That is what I had in mind, Mr. President,
11 yes.

12 So the Secretary of State is certainly not permitted
13 consistent with his statutory duties to drag his heels.
14 It is not a complete answer either, but --

15 THE PRESIDENT: Yes.

16 MR SCANNELL: The final point out of sequence that I would
17 make in direct answer to the question is that a measure
18 of uncertainty can of course be removed by the merging
19 entities themselves, either by notifying the CMA or by
20 entering into a dialogue at least with the CMA which can
21 then take it forward within their merger unit; a well
22 worn path to this building.

23 MR FRAZER: I do not want to take you out of your order but
24 just you mentioned that section 45 has no reference to
25 the time limits etc, and no other part of the Act does

1 as well. I just want to make sure we are going to be
2 dealing with section 23(9)(b) when making a point about
3 that, thank you.

4 MR SCANNELL: Yes.

5 First, I want to state clearly my understanding of
6 ground 2 as it is put so that we are all on the same
7 page.

8 The applicants take section 45(2)(a) and (3)(a) as
9 the starting point. They are the provisions which state
10 that when the Secretary of State is making reference
11 under section 45 he must believe that a relevant merger
12 situation has been created.

13 The reference to a relevant merger situation brings
14 section 23 of the Act into play and that in turn brings
15 section 24 of the Act into play.

16 The applicants then say that section 42(6)(k) of
17 the Act does not replace the reference in section 24 to
18 the day on which the reference is to be made with the
19 words "the day on which the PIIN is given".

20 THE PRESIDENT: Sorry, the reference in section --

21 MR SCANNELL: 42(6)(k).

22 THE PRESIDENT: Yes, so far as necessary then.

23 MR SCANNELL: Yes. So we know that when the

24 Secretary of State is giving a PIIN, the way the

25 Secretary of State calculates the four month deadline

1 for doing that is by reference to section 24 as modified
2 by section 42(6)(k). But as I understand my learned
3 friend's argument, when it comes to the section 45
4 reference, that modification is not made. Instead they
5 say that the word "reference" in section 24 is to be
6 taken to mean the section 45 reference. They say that
7 section 23(9)(b) supports that reading because the
8 assessment of whether relevant merger situation has been
9 created is to be determined when the reference has been
10 or is to be met. That is the argument, as I understand
11 it.

12 We say that that argument does not work. First, we
13 look at section 23(9)(b). We say that that provision
14 does not mean that the word "reference" in section 24
15 means the section 45 reference.

16 THE PRESIDENT: Sorry, you look at section 23(9)(b):

17 "In any other case when the ..."

18 You say that does not mean --

19 MR SCANNELL: That does not mean that the word "reference"
20 in section 24 means the section 45 reference. It does
21 not modify the language of section 24 at all. All it is
22 doing is telling you when particular determinations have
23 to be made.

24 It is important to note that the modification --

25 THE PRESIDENT: Sorry, you will have to go a little slowly

1 because it is quite -- if necessary we will sit on
2 because it is quite dense stuff.

3 MR SCANNELL: It is dense.

4 THE PRESIDENT: We need to understand fully the submission
5 you are making.

6 MR SCANNELL: Yes. Can I -- I appreciate that I am cutting
7 across you slightly but can I just state one more
8 sentence which should, I think, make it clearer what
9 I am saying.

10 THE PRESIDENT: Yes.

11 MR SCANNELL: Sections 23 to 30 of the Act apply to part 3
12 Chapter II, public interest cases.

13 THE PRESIDENT: Yes.

14 MR SCANNELL: That is section 42(5).

15 THE PRESIDENT: Yes.

16 MR SCANNELL: But when they apply to those public interest
17 cases they apply as modified.

18 THE PRESIDENT: Yes.

19 MR SCANNELL: Section 23(9) (b) is not amongst the provisions
20 that are modified. So that means that section 23(9) (b)
21 must be given its ordinary meaning unless there is
22 something to suggest otherwise.

23 THE PRESIDENT: Yes.

24 MR SCANNELL: We say that what section 23(9) (b) does is it
25 tells you when a determination is to be made, it does

1 not tell you what the test to be applied to relevant
2 merger situation is.

3 THE PRESIDENT: It tells you when --

4 MR SCANNELL: When a determination is to be made but not
5 what the test is for determining what a relevant merger
6 situation actually is, or whether a relevant merger
7 situation has been created, I should say.

8 The fact that section 23(9) does not amend the
9 meaning of section 24 is also clear, we say, from
10 section 42(6) which includes both section 42(6)(k),
11 which does modify the language of section 24 to replace
12 the word reference with the words "the giving of the
13 PIIN", so section 42(6) contains that provision which
14 does modify section 24 and it also modifies -- it also
15 contains section 42(6)(a) which amends section 23(9) and
16 clarifies that whether a relevant merger situation has
17 been created --

18 MR FRAZER: It amends section 23(9)(a) rather than 23(9) as
19 a whole.

20 MR SCANNELL: Yes, making it clear that in relation to the
21 giving of a PIIN the question of whether an RMS has been
22 created is to be determined at the time that the PIIN is
23 given. So it has a provision which tells you when to
24 conduct an assessment and it has a separate provision
25 which amends the language of section 24. That is

1 section 42(6).

2 But if the applicants' reading of section 23(9) were
3 right then you would not need section 42(6)(k) to modify
4 the language of section 24, arguably, because it would
5 be enough to know that you assess whether there is
6 a relevant merger situation at the time of giving your
7 PIIN.

8 MR FRAZER: So you are saying that paragraph K of 42(6)
9 modifies section 24 to replace references to a reference
10 to the CMA instead with a reference to the giving of an
11 intervention notice or an intervention notice itself.

12 MR SCANNELL: Not the words "the CMA", if I may.

13 MR FRAZER: No, sorry, I meant --

14 MR SCANNELL: The making of the reference.

15 MR FRAZER: The making of a reference.

16 MR SCANNELL: So it does that and then we know when the
17 Secretary of State has to make his assessment from
18 section 42(6)(a) which amends section 23(9)(a) to
19 provide that that assessment is to be made at the time
20 when the notice is given, at the time that the PIIN is
21 given.

22 It is difficult, but the point I am making is that
23 section 23(9) tells you when assessments are to be made,
24 at a time when a reference is made or at a time when
25 a PIIN is given. Section 24 tells you how you decide

1 whether there is a relevant merger situation.

2 Section 24 carries its ordinary meaning unless it is
3 modified. Section 42(6)(k) is the provision which
4 modifies it.

5 MR FRAZER: Even if section 24 is modified, what about the
6 word "reference" in 23(9)(a) which remains as the
7 word -- 23(9)(b) which remains unamended? It is still
8 talking about a time when the reference --

9 MR SCANNELL: We say that in fact it is tolerably clear what
10 that word "reference" refers to, and that is a CMA
11 reference under section 22 of the Act. Section 23(9)(b)
12 is contained in part 3, Chapter I of the Act. Part 3,
13 Chapter I of the Act relates to CMA references under
14 section 22.

15 MR FRAZER: But specifically not amended for the purposes
16 of --

17 MR SCANNELL: Chapter II.

18 MEMBER 2: Correct.

19 MR SCANNELL: Public interest cases.

20 THE PRESIDENT: Why in that case is in the care taken in
21 section 42 to go through sections 23 to 30 to see what
22 changes need to be made, and obviously someone looking
23 at section 23(9) have they not removed subsection (b)?
24 Because how does section 23 -- does section 23(9)(b)
25 then have any application to a Chapter II merger?

1 MR SCANNELL: Yes, well, simply because it has no
2 application to a Chapter II merger that does not mean
3 there is going to be a provision in section 42(6)
4 saying: do not apply that provision because it couldn't
5 possibly be relevant to a Chapter II merger. There are
6 no provisions in section 42(6) which say obviously there
7 are provisions in sections 23 to 30 which could not
8 apply in a Chapter II case.

9 THE PRESIDENT: Except they delete 23(9)(a) and substitute
10 something completely different, so why do they not just
11 delete section 23(9), or say for section 23(9) there was
12 substituted A, B, C? But they only modify 23(9)(a). It
13 is just a rather curious approach whether it was
14 reviewed by parliamentary counsel or not. It says
15 subsection (5) shall have effect.

16 MR SCANNELL: There can be a section 22 reference under
17 Chapter II of the Act where the initial reference made
18 by the Secretary of State is discontinued. The CMA can
19 then make a section 22 reference so you still need
20 provisions in public interest cases to deal with the
21 possibility that CMA might make a reference under
22 section 22.

23 We say that looking at section 24, for example, and
24 imagining that there is no Chapter II at all, the word
25 "reference" in section 24 means a section 22 reference.

1 The only provision of the Act that says that this word
2 "reference" is to carry a different meaning in public
3 interest cases is section 42(6)(k), and that says that
4 it is to be read as referring to the giving of a PIIN.

5 We say that if you replace the word "reference" in
6 section 24 to mean a reference under section 45, the
7 consequences that flow are rather absurd.

8 THE PRESIDENT: Sorry, if you replace the word -- we have,
9 we need section 24 for section 45 references, do not we,
10 because --

11 MR SCANNELL: Yes, we do.

12 THE PRESIDENT: -- that is the whole basis about ceasing to
13 distinct.

14 MR SCANNELL: Yes.

15 THE PRESIDENT: So section 24 will cover section 45
16 references.

17 MR SCANNELL: Yes.

18 THE PRESIDENT: Sorry, I misunderstood you.

19 MR SCANNELL: Yes. So just to be clear, under section 45
20 the Secretary of State does have to believe that there
21 is a relevant merger situation, and because he has to
22 hold that belief section 23 is relevant, section 24 is
23 relevant.

24 THE PRESIDENT: Yes.

25 MR SCANNELL: But then the question is, what does section 24

1 mean when he is making his reference? We say that he
2 has to believe that when he issued his PIIN less than
3 four months had passed from the making notice of -- the
4 making of material facts public or notification of the
5 material facts to the CMA. We do not say that four
6 months have passed from notice to the CMA or making
7 public and the section 45 reference.

8 So we say that the word "reference" in section 24
9 does not change from meaning a section 22 reference to
10 meaning a section 45 reference.

11 MR FRAZER: But the outcome you have just described is
12 available much more plainly from the words in section
13 42(6)(a) which deal specifically with the time limits,
14 what the Secretary of State has to satisfy himself of in
15 relation to the time limits for an intervention notice.
16 So in relation to the giving of an intervention notice,
17 under new paragraph (a), the time when the notice is
18 given. So we know the Secretary of State in considering
19 giving a notice must bear that in mind.

20 MR SCANNELL: Yes, he does have to at that point when he is
21 giving the notice, that is the provision you have just
22 read out --

23 MR FRAZER: Yes.

24 MR SCANNELL: -- form a view as to whether there are
25 reasonable grounds to suspect that it is or may be the

1 case that an RMS has been created. He goes into
2 section 23, he is bounced from there to section 24, and
3 within section 24 he uses 42(6)(k) to read section 24 as
4 giving rise to the question: have four months passed
5 from the giving of notice to the CMA or the making
6 public of material facts and the giving of my PIIN?

7 MR FRAZER: That is for the purpose of deciding that first
8 question.

9 MR SCANNELL: Yes.

10 MR FRAZER: But in deciding the question of whether
11 a reference can be made, that would be a different
12 question, I am assuming.

13 MR SCANNELL: The submission I am making is that it is the
14 same question but a different threshold of belief,
15 because under section 42 when he is deciding whether to
16 issue a PIIN the question is: does he have reasonable
17 grounds to suspect that it is or may be the case that an
18 RMS has been created? Whereas under section 45 it is
19 just a question of belief at that stage but he is asking
20 himself the same question. He is not replacing the word
21 "reference" in section 24 with a new word.

22 THE PRESIDENT: Section 23(9)(b) has no effect, you say, in
23 the case of a public interest reference; is that right?

24 MR SCANNELL: Yes, that is right.

25 THE PRESIDENT: My problem is the wording of section 42(6)

1 and (5). (5) says section 23 to 30 shall apply for the
2 purpose of this chapter. So in their entirety, subject
3 to subsection (6), and subsection (6) says they shall
4 have effect as if, and then there is the change to
5 section 23(9) (a). So those provisions seem to say that
6 section 23(9) (b) shall have effect for the purpose of
7 Chapter II.

8 MR SCANNELL: There is not a provision in section
9 42(6) (k) -- a section 42(6) saying ignore, for example,
10 section 23(9) (b) because that is not going to arise when
11 you are in section --

12 THE PRESIDENT: Quite the opposite. There is a provision
13 saying it shall have effect.

14 MR SCANNELL: Yes, but there are other provisions in
15 sections 23 to 30 which logically couldn't arise in
16 a Chapter II case and they are not set aside.

17 THE PRESIDENT: No, I see that.

18 MR FRAZER: The logic of this not applying in the public
19 interest case is because it is not feasible or for
20 reasons of statutory construction? In other words, are
21 you looking at what has to be done within the four month
22 time limit and also the fact that a four month time
23 limit is given for the PIIN and if it could never be
24 availed of that would be a nonsense; is that your
25 submission?

1 MR SCANNELL: It is not a submission which is based on the
2 common -- what should be imposed on the meaning of the
3 statutory words by the demands of common sense, for
4 example. It is just saying that section 23(9)(b) does
5 not arise at all because the CMA is not making
6 a reference under section 22.

7 THE PRESIDENT: If one starts from the --

8 MR SCANNELL: Which you could do.

9 THE PRESIDENT: If one were to start from the premise that
10 one would expect the statute to have a time limit for
11 this reference as it does for everything else, then
12 there is section 23(9)(b) which gives you one or the
13 alternative reading of it.

14 MR SCANNELL: I do not accept that section 23(9) does impose
15 a time limit. Section 23(9) is in the Act to tell you
16 when you make an assessment.

17 THE PRESIDENT: Yes.

18 MR SCANNELL: You ask a question as at a certain time. What
19 is that question? That is what we are debating.

20 MR FRAZER: But it does imply a time limit, does it not,
21 because if you find that the merger situation arose
22 prior to that, to the time period as at the time you ask
23 it, then you cannot proceed.

24 MR SCANNELL: If you decided that when you issued your PIIN,
25 for example, there was not a relevant merger situation

1 then you would run out of runway, you could not proceed
2 with the section 45 reference.

3 MR FRAZER: Or in its original form, for example, if the
4 merger situation occurred more than four months before
5 the reference was made to the CMA, the CMA could not
6 continue.

7 MR SCANNELL: Yes, that's --

8 MR FRAZER: So it implies a time limit even though it is not
9 expressed as one.

10 THE PRESIDENT: In an ordinary Chapter I case that is how
11 you get your time limit through this route.

12 MR SCANNELL: No, in a normal Chapter I case the way that
13 the CMA is subject to a time limit is through
14 section 24.

15 MR FRAZER: Section 24 is for the purposes of section 23,
16 definition of a merger situation.

17 MR SCANNELL: Correct.

18 THE PRESIDENT: Yes.

19 MR SCANNELL: So if you look at section 22, the CMA can make
20 a reference to its chair under section 22 so long as it
21 believes that there is a relevant merger situation. It
22 applies section 24 and it asks itself the question
23 whether four months have passed, and that is where the
24 time limit comes in, between the making public of the
25 information and the time when it makes its reference to

1 itself, and it asks itself that question at the time of
2 making the reference. That is section 23(9).

3 THE PRESIDENT: You need to know that to apply the time
4 limit because you have to know at what point you ask the
5 question.

6 MR SCANNELL: If that is the extent of the point, then
7 I agree, yes.

8 MR FRAZER: It says the end date for that time limit
9 otherwise -- that is the date on which the time expires.
10 You go backwards from the time at which you ask the
11 question and ask yourself whether the merger situation
12 occurred more than four months before that date.

13 MR SCANNELL: Yes.

14 MR FRAZER: That is not expressed in 23(9)(b) itself or
15 23(9) as only for the purposes of section 22, if you
16 look at it as modified by --

17 MR SCANNELL: It does not need to.

18 MR FRAZER: It does not need to for Chapter I, but when you
19 look at it through the prism of 42, where the section 22
20 references have been removed and replaced, that still
21 remains.

22 THE PRESIDENT: It could apply, it is just what I still
23 find -- is why you say it is impossible that it applies.

24 MR SCANNELL: I do not say it is impossible to apply.

25 THE PRESIDENT: If it is not impossible there may be certain

1 provisions which in Chapter I clearly do not apply to
2 Chapter II because they obviously have no relevance, and
3 therefore you can say, as you did, it was not necessary
4 for section 42 to say: ignore them. But where you have
5 a provision that could apply, and could apply in a way
6 that seems on one view sensible, you would expect
7 section 42(6) to say: do not apply it if that is what is
8 meant.

9 MR SCANNELL: It is a point I have made but we do not say
10 that section 23(9) is impossible to apply in
11 a Chapter II case because there can be a reference under
12 section 22 of the Act, in a Chapter II case, and when
13 there is a section 22 reference in a Chapter II case,
14 section 23(9)(b) applies.

15 The short point I am making is that the word
16 "reference" in section 23(9)(b) refers to a section 22
17 reference. It does not refer to a section 45 reference.
18 There is no statutory provision in section 42(6) which
19 modifies the word "reference" there to mean a section 45
20 reference.

21 THE PRESIDENT: Does it -- the question is, does it need
22 modification?

23 MR SCANNELL: Does it need modification because it is both
24 the same word, "reference"? One is a section 22
25 reference and one is a section 45 reference.

1 Let us test that proposition. If it is permissible
2 to change the ordinary meaning of section 24 because of
3 section 23(9), for the purposes of section 45, then why
4 stop there would be the question. When the CMA gives
5 its section 44 report it also has to decide whether
6 there is a relevant merger situation. That brings the
7 CMA to 23 and from there to section 24.

8 Section 23(9)(aa) which is another modification
9 provision in section 42(6) says that it has to determine
10 that at the time the CMA makes its report.

11 According to the applicants when the CMA comes to
12 apply section 24 in its section 44 report, this would
13 mean that the word "reference" in section 24 would have
14 to change yet again. So it is not asking itself, have
15 four months passed from the notification to the CMA to
16 the section 22 reference, because that is relevant, it
17 is not asking itself about a section 45 reference. It
18 is asking itself, have four months passed from the
19 notification to the CMA to the making of our report?

20 So that is the answer to the question of whether
21 something is changing -- if they are right, not only do
22 you have to change "reference" from section 22
23 "reference" to section 45 "reference", you are also
24 going to have to change "reference" in section 24 from
25 section 22 "reference" to CMA report when the CMA comes

1 to decide when there is a relevant merger situation.

2 THE PRESIDENT: For the purposes of a Chapter II case,
3 section 23(9) now reads (a) as set out in 42(6), (aa) as
4 set out in 42(6), (ab) as set out in 42(6) and (b) as
5 unchanged from section 23(9).

6 MR SCANNELL: Yes.

7 THE PRESIDENT: I think that is common ground.

8 MR SCANNELL: Yes.

9 THE PRESIDENT: In (ab) it says in the a case of a reference
10 which is treated as being made under section -- that is
11 a section 45 reference, as I understand it, it must be,
12 is it not? It is treated by 49(1) is what?

13 MR SCANNELL: It is where they modified or recast the
14 reference.

15 THE PRESIDENT: Yes, so it is where it has been modified but
16 it is a reference, a modified reference under
17 section 45. So it is a Chapter II reference but where
18 modified.

19 MR SCANNELL: Yes.

20 THE PRESIDENT: But in (b) that immediately follows it, you
21 say "reference" does not mean a "reference" under 45,
22 its means a "reference" under 22.

23 MR SCANNELL: Yes.

24 THE PRESIDENT: So we have the word "reference" in the same
25 subsection having a different meaning.

1 MR SCANNELL: Yes. There is no statutory provision in this
2 Act which says that in a Chapter II case the word
3 "reference" as it existed in the statute before these
4 amendments were enacted, is to change its meaning.
5 Chapter I of part 3 of the Act refers to "references" as
6 meaning a section 22 "reference". Now, it could have --
7 section 42(6) could have modified the language to say
8 you must change the word "reference" to mean
9 a section 45 "reference" when you are applying sections
10 23 to 30 to a Chapter II case but it does not contain
11 that provision.

12 As I have sought to point out, if you go down that
13 rabbit hole of changing the word "reference" to mean
14 a section 45 "reference", I am afraid you are going to
15 have to do it again in an even more violent way when you
16 come to apply section 44, when the CMA does, because the
17 CMA itself has to decide whether there is a relevant
18 merger situation at the point that it makes its report
19 under section 44, and it must do so, it must make that
20 determination according to section 42(6) at the time
21 that it makes its report, and that means, according to
22 the applicants, that you have to change section 24 to
23 replace the word "reference" with some sort of reference
24 to the CMA giving its report.

25 MR FRAZER: Your submission I think is that section 42(5)

1 does not automatically bring in these changes in order
2 to render Chapter I suitable for Chapter II purposes.
3 That is your submission.

4 MR SCANNELL: Correct. Can we test the applicants' argument
5 another way to see if this works. Let us imagine that
6 they are right and when the Secretary of State comes to
7 make a section 45 reference, the word "reference" in
8 section 24 means a section 45 reference. Everything has
9 to happen within four months from making public to the
10 section 45 reference.

11 Now say that the Secretary of State gives a PIIN and
12 requires reports to be given to him by the CMA under
13 section 44 and Ofcom under section 44A, all within four
14 months or within the balance of four months that he has
15 not used up getting to the point of giving his PIIN.

16 THE PRESIDENT: He can specify any period he likes
17 effectively.

18 MR SCANNELL: That is my submission, yes.

19 THE PRESIDENT: No, I mean, he does not have to say the
20 balance, he could say a shorter period.

21 MR SCANNELL: Yes.

22 THE PRESIDENT: Indeed, in this case, as we saw, the CMA was
23 able to do it by the following day.

24 MR SCANNELL: Correct, but not Ofcom.

25 THE PRESIDENT: Yes.

1 MR SCANNELL: So the CMA report, let us just focus in on
2 that now, the CMA report has to contain a decision under
3 section 44(4) as to whether there is a relevant merger
4 situation.

5 "The report shall in particular include decisions as
6 to whether the CMA believes that it is or may be the
7 case that an RMS case has been created."

8 That is why, in the section 44 report that you have
9 before you, sirs, there is such a decision by the CMA.

10 Let us say that the CMA concludes that there is,
11 there is relevant merger situation. This is all of
12 course on all fours with the facts of this case.

13 THE PRESIDENT: Yes.

14 MR SCANNELL: If more time passes such that more than four
15 months have passed from the making public of the
16 information or the giving of notice to the CMA, then on
17 the applicant's case the Secretary of State is up a gum
18 tree, because the Secretary of State when he comes to
19 make his section 45 reference and decide whether there
20 is an RMS, will have to conclude that there is no RMS
21 because the section 24 test fails. We say that that
22 cannot be right because section 45 of the Act is subject
23 to section 46 of the Act. So you need to turn up
24 section 45(7) of the Act to see that point. This
25 section is subject to section 46.

1 THE PRESIDENT: Yes.

2 MR SCANNELL: Section 46(2) says that the
3 Secretary of State, in deciding whether to make
4 a reference under section 45, shall accept the decisions
5 of the CMA included in its report by virtue of
6 section 44(4). That includes the CMA's decision that
7 there is a relevant merger situation.

8 If the applicants were right, the Secretary of State
9 would breach section 46(2) of the Act by concluding that
10 he could not make a section 45 reference on the basis
11 that there is no relevant merger situation.

12 MR FRAZER: But only if it was out of time.

13 MR SCANNELL: Yes. The applicants say that he is, on the
14 facts of our case.

15 THE PRESIDENT: Because the time has expired between the CMA
16 report and the --

17 MR SCANNELL: Yes.

18 MR FRAZER: But there would not be an inconsistency between
19 46(2) and 23(9)(b) if the whole process occurred within
20 that four month period.

21 MR SCANNELL: There would be no inconsistency between
22 section 46(2) and section 23 if it is accepted that the
23 section 24 question does not actually change. They are
24 all asking the same question: have more than four months
25 passed between notification to the CMA or making public

1 and the giving of the PIIN? Then you can see that the
2 Secretary of State, as in this case, can receive the
3 CMA's section 44 report and say, well, yes, you have
4 said that there is a relevant merger situation. Under
5 section 42(6) section 46(2), I accept that and I can
6 make a reference under section 45. On the applicant's
7 case, however, the Secretary of State cannot do that.
8 The Secretary of State has to say, sorry, CMA, but there
9 is not a relevant merger situation because the
10 section 24 test fails and therefore, cannot comply with
11 his obligation to respect the decision that was taken by
12 the CMA.

13 So the point we make is that it is possible to read
14 Chapter II in a way that makes sense by giving effect to
15 section 42(6)(k) which modifies the language of
16 section 24, and what it means is that when the
17 Secretary of State comes to decide whether he believes
18 that there is a relevant merger situation at the
19 section 45 stage he is asking himself the same question,
20 albeit to a different threshold of satisfaction, as he
21 asked when he gave his PIIN.

22 That is, we say, not only consistent with the
23 language of the provisions we have seen so far but it is
24 also obviously sensible. In the case of a completed
25 merger such as the merger that we are dealing with in

1 this case, if the Secretary of State is satisfied at the
2 section 42 stage that there is a relevant merger
3 situation arising from these completed transactions to
4 the section 42 standard, and then the CMA comes along
5 and says, yes, there is a relevant merger situation at
6 the stage that it gives its report, it is faintly absurd
7 to suggest that there is no relevant merger situation by
8 reason only that a few more days or weeks have passed.
9 It is after all the same set of transactions and they
10 are complete, they were complete when the PIIN was
11 given.

12 Moreover, we say that there is no obvious policy
13 reason why the Secretary of State should be denied the
14 opportunity of examining the public interest elements of
15 a merger by reason only of the passage of time.
16 I repeat that the public interest considerations are
17 weighty public interest considerations.

18 In particular, my submission is that it is not
19 intolerable to conclude that the desirability of
20 business certainty must take a back seat to those public
21 interest considerations.

22 There is at least business certainty insofar as that
23 there is a four month time limit for the giving of the
24 PIIN so the enterprises know where they stand once they
25 get a Public Interest Intervention Notice. They know

1 that there is going to be an enquiry and yes, they have
2 to live in the knowledge that that is ongoing, but in
3 the circumstances that is perfectly appropriate, and of
4 course my learned friend, Ms. Mackenzie, reminds me that
5 there is also the section 103 duty to act with all --
6 I want to get the language right.

7 THE PRESIDENT: As soon as reasonably practical.

8 MR SCANNELL: As soon as reasonably practical, I am
9 grateful, in the interests of certainty.

10 I do want to be fair to the Tribunal and I do not
11 want to overstate the simplicity of this question. It
12 is an unenviable task that you face.

13 THE PRESIDENT: Simplicity is not a word that springs to
14 mind.

15 MR SCANNELL: No, so I do not say that this is a slam dunk
16 winner. In particular, section 42(6)(h) of the Act is
17 incongruous on my case. It does seem to be surplus to
18 requirements to suggest that the Secretary of State can
19 extend time only after the PIIN is given. I would,
20 however, say in relation to section 25(5)(a), which is
21 that provision that allows an extension of time to
22 happen at all, that that provision too is fraught with
23 some difficulty. It deals with situations where the
24 Secretary of State is either finalising the public
25 interest considerations because the Secretary of State

1 has relied on public interest considerations that were
2 not expressly enumerated in the Act and therefore needs
3 to adopt a statutory instrument to regularise the
4 position, or a situation where the Secretary of State is
5 accepting undertakings in lieu of a section 45 reference
6 under schedule 7, paragraph 3 of the Act.

7 Within schedule 7, paragraph 3 of the Act, one runs
8 into the same difficulty that I have identified under
9 section 46(2). It requires the Secretary of State to
10 accept the decision that the CMA has already taken under
11 section 44 as to whether there is a relevant merger
12 situation. So if the CMA has said there is a relevant
13 merger situation then the Secretary of State is bound by
14 the CMA's determination and is free to make a section 45
15 reference or accept undertakings in law.

16 THE PRESIDENT: In section 25(5)(a) as put in by 42(6) --

17 MR SCANNELL: Yes, it was.

18 THE PRESIDENT: -- where it says extend the four month
19 period.

20 MR SCANNELL: Yes. Of course that could be a reference to
21 the four month period that the Secretary of State has to
22 give a PIIN, but the point --

23 THE PRESIDENT: If he decides to delay -- extend the four
24 month period for the PIIN, if he decides to delay
25 a decision as to whether to make a reference under

1 section 45.

2 MR SCANNELL: Yes. But the point I am making, which is
3 a point I am making in fairness to the applicants, is
4 that section 42(6)(h) sits uncomfortably with the
5 structure --

6 THE PRESIDENT: Yes.

7 MR SCANNELL: -- because it speaks of using section 25(5A)
8 after the PIIN, and I am submitting to you that there is
9 no time limit for making the reference after the
10 Secretary of State has given the PIIN.

11 THE PRESIDENT: Yes, and I think section 25(5A) by virtue of
12 section 46(5) he decides to delay a decision whether to
13 make a reference -- when he is deciding to delay the
14 decision whether to make reference under section 46(5),
15 delay deciding whether to make reference ...

16 MR SCANNELL: Those provisions are not entirely clear either
17 because delay is not the same thing as extending time.
18 They are dealing with a particular situation that arises
19 where the public interest considerations are not
20 finalised. The reference to delaying things may be
21 simply there to get over the fact that the
22 Secretary of State is otherwise under a duty to act as
23 soon as reasonably practicable under section 103.

24 We do say in conclusion on these points that the net
25 position, given the incongruity that I have identified

1 in section 42(6)(h), is that if the Secretary of State's
2 reading of the provisions is accepted, then there is one
3 provision of Chapter II that sits uneasily in the
4 structure because it is surplus to requirements, there
5 is no need to extend a time limit if you are not under
6 a time limit.

7 But if the applicants' interpretation of section 45
8 is preferred, the result will be first that the
9 Secretary of State will breach section 46(2) of the Act
10 by concluding that there is no relevant merger situation
11 in circumstances where the CMA has already said that
12 there is. Second, that the wording of section 24 of
13 the Act will be amended otherwise than by Parliament or
14 ministerial order since the word "reference" in that
15 section will be given multiple meanings under Chapter I,
16 section 42, section 44 and section 45 -- different
17 meanings each time.

18 Finally, that a sensible legislative scheme whereby
19 the Secretary of State is empowered without limit of
20 time to enquire into the public interest considerations
21 of mergers is replaced by what I would submit would be
22 a wholly artificial one which requires us to believe
23 there is no relevant merger situation when it is plain
24 as could be that there is.

25 That would hamper the proper investigation of the

1 public interests at play. So for all of those reasons,
2 sir, I submit that ground 2 should be dismissed.

3 THE PRESIDENT: Can I just ask you, is it then implicit in
4 your submissions that the statutory guidance that has
5 been given which would be taken by the predecessor
6 department but still remaining in the statutory
7 guidance, and in particular paragraph 3.19 which I am
8 sure you are familiar with at tab 16, is incorrect?

9 MR SCANNELL: Yes, I suggest that it is.

10 THE PRESIDENT: Similarly, the -- although somewhat less
11 clear as Mr. Lomas pointed out in discussion with
12 Miss Ford, that paragraph 5.4 of the CMA's statute --
13 no, sorry, that is the wrong one.

14 MR SCANNELL: Tab 18.

15 THE PRESIDENT: No, tab 18 is non-statutory guidance but
16 that is also incorrect.

17 MR SCANNELL: It is less clearly incorrect because there are
18 other provisions of that guidance which muddies the
19 waters, in particular paragraph 5.8 suggesting that
20 there is no statutory deadline for the
21 Secretary of State to respond to the CMA's section 44
22 report.

23 THE PRESIDENT: Yes. Equally, manifestly that the officials
24 of the department, they were in some confusion.

25 MR SCANNELL: On the facts of the case.

1 THE PRESIDENT: On the facts of this case in the letter of
2 13 June on page 33 of exhibit 5 to Mr. Smith's witness
3 statement, but that is less significant.

4 MR SCANNELL: Yes, that is my submission. There is an
5 acceptance within multiple government departments that
6 this is extremely difficult legislation to construe.
7 They await judgment in this case with great interest and
8 will amend their guidance in accordance with the
9 findings that this tribunal makes. This is, I repeat,
10 a question of pure statutory construction.

11 THE PRESIDENT: Yes.

12 MR SCANNELL: The fact that BEIS and the DTI at earlier
13 junctures have expressed their view should not be
14 determinative of these weighty issues.

15 THE PRESIDENT: They are clearly not determinative.

16 Thank you very much, Mr. Scannell.

17 We can sit until 5.45 because we obviously should
18 finish today and you must given a full chance to reply.

19 Reply submissions by MISS FORD

20 MISS FORD: I will try to be shorter than that.

21 THE PRESIDENT: We have poured over these provisions but
22 they are not easy.

23 MISS FORD: Indeed. Starting with ground 1, the question
24 for the Tribunal is the objective construction of the
25 term in the statute "material facts". So in my

1 submission there were a number of matters traversed in
2 Mr. Scannell's submissions which are not relevant to the
3 question of objective construction of the statute. They
4 include, for example, the submission that this is a very
5 difficult case and that the Secretary of State was in
6 a difficult position and the facts of the case are
7 particularly complicated. That is not a matter which is
8 relevant to take into account in the objective
9 construction of the statute.

10 Also the point was made on a number of occasions
11 that no notification of the merger had been made.

12 THE PRESIDENT: No, that is not relevant.

13 MISS FORD: That is not a relevant matter. The point was
14 also made that although the Secretary of State accepts
15 that material facts have now been given at the very
16 least in the letter of 19 February, it was said there
17 are lots more things that we do not know. That again,
18 in my submission, is not relevant to the question of
19 construction of material facts, and the answer to that
20 point is the Secretary of State could and should have
21 used their section 109 powers and indeed we saw the
22 exchange with the CMA where there was a consideration of
23 whether the CMA in fact should use those powers. So
24 that is the answer to that point.

25 The submission was made that the language of the

1 statute affords the Secretary of State a margin of
2 appreciation. I have referred the Tribunal to the
3 *Seafrance* case, paragraph 31 on that point.

4 Mr. Scannell sought to distinguish *Seafrance* on two
5 bases. He said first of all it was concerned with
6 activities which was the statutory language. My
7 submission this is concerned with material facts which
8 was the statutory language. He then pointed to the fact
9 that the relevant statutory provisions in the case
10 includes the words "reasonable grounds to suspect" may
11 be the case that these sorts of wording.

12 In my submission the presence of that wording does
13 not change the exercise for this Tribunal which is
14 a pure question of construction of a test that the
15 Secretary of State has to apply, and the reasonable
16 grounds-type wording does not impact on the question of
17 what is the test for the purposes of the
18 Secretary of State's jurisdiction. He is in no better
19 position, in my submission, to construe his own
20 jurisdiction as a matter of law. I do say that is the
21 effect of paragraph 31 of *Seafrance*.

22 The submission was made that the
23 Secretary of State's assessment was that the
24 Financial Times article did not provide sufficient
25 grounds for him to suspect a relevant merger situation

1 had been created, and reliance was placed on the
2 evidence in paragraph 14 of Mr. O'Neill's statement.

3 In my submission that is not the correct question
4 because that assumes that the Secretary of State has to
5 be in a position to make his decision under the Act on
6 the basis of the information that was in the newspaper
7 article. That in my submission is not correct. The
8 relevance of the information in the newspaper article is
9 that it provides material facts within the meaning of
10 section 24(2) (b) and it starts the time run, but the
11 Secretary of State still has to conduct appropriate
12 enquiries to put himself in a position to take
13 a decision. So it is not, in my submission, any answer
14 to say: there was not enough information in this article
15 for me to make my decision.

16 The Tribunal rightly put to me that the question is:
17 where do you draw the line when you are trying to decide
18 what is material facts, where is the line to be drawn?
19 In my submission there has to be a principled reason for
20 drawing the line to include some information and to
21 exclude other information. In my submission, the
22 Secretary of State's case has not advanced a principled
23 reason why the information that they point to that was
24 not present in the relevant articles, essentially the
25 identity of the acquiring parties, why that information

1 should fall on one side of the line and not the other.
2 There is no principled basis given for saying that that
3 information, the absence of that information means that
4 material facts have not been made public.

5 In my submission the principled place to draw the
6 line comes from the wording of the statute itself, the
7 fact that it does not say "all material facts", and is
8 informed by the purpose of section 24(2)(b) which is to
9 permit time to be triggered by information coming into
10 the public domain, and is informed by the wording of the
11 explanatory notes which tells us that what you are
12 asking is: could the decision-maker reasonably be
13 expected to have discovered, found out about this merger
14 when it was not notified?

15 That, in my submission, does give you a principled
16 basis to draw the line. Is there enough here for the
17 decision-maker to appreciate that their jurisdiction
18 might be engaged?

19 Much emphasis was placed on the fact that there was
20 no confirmation by my clients of what was reported in
21 the newspapers. In my submission, even if my clients
22 had confirmed the information, the Secretary of State
23 would not have been in a position to take a decision
24 based on a newspaper article, self-evidently. So the
25 absence of confirmation does not, in my submission, make

1 any relevant distinction. The Secretary of State still
2 has to go and investigate the position and inform
3 himself, put himself in a position where he can take
4 a decision.

5 It was also said, if the Secretary of State had
6 verified what was in the relevant news articles, he
7 still would not have discovered anything about Wondrous
8 because Wondrous was not mentioned in the news articles.

9 In my submission again that is imposing an
10 artificial scenario because the Secretary of State is
11 not going to simply verify the information in the
12 newspapers and refrain from asking for any further
13 information, and we know that he did not. What the
14 Secretary of State is going to do is to be prompted to
15 ask for the information he needs in order to take
16 a decision. That, in my submission, is the intention of
17 section 24(2) (b).

18 Those were the reply submissions I have on grounds 1
19 unless I can assist the Tribunal further on that.

20 Turning to ground 2, the first submission that was
21 made was, it is very odd that you have a four month time
22 limit for giving a public intervention notice that you
23 might never avail yourself of. You have a four month
24 time limit for making a reference and you might never
25 avail yourself of it.

1 In my submission the answer to that is you can avail
2 yourself of it. You simply have to issue your PIIN in
3 good time in order to accommodate making a reference in
4 due course once you have the information you need. It
5 is not an impossibility. You are not never going to be
6 able to avail yourself of it. We have seen there are
7 previous cases where that process has been managed
8 perfectly fine. We have seen that *BSkyB* was within
9 a four month period taking into account statutory clock
10 stoppages and we have seen *Trinity Mirror* where the
11 entire process was completed within a four month period.

12 So in my submission it is not correct to suggest
13 that this somehow means that you are never going to be
14 able to avail yourself of the opportunity.

15 THE PRESIDENT: That was not quite the point, I think.

16 I think the point was if you are going to take the full
17 four months, then you will not be able to make
18 a reference, so it is a rather odd -- to give the same
19 deadline when in fact you are going to have to do it in
20 less than four months.

21 MISS FORD: I think it rather -- the way you put it then
22 informs the answer in the sense that the answer is you
23 have to do everything within the four months. You have
24 to take -- you have to give your Public Interest
25 Intervention Notice earlier.

1 THE PRESIDENT: Yes.

2 MISS FORD: The Tribunal made the point that it would be
3 strange if there was no time limit whatsoever and we
4 would respectfully endorse that point.

5 Reference was made to section 103(2) and the duty to
6 act with expedition with a view to preventing or
7 removing uncertainty.

8 In my submission there is no inconsistency between
9 that provision and the existence of a four month time
10 limit. If anything what it is telling you is even
11 within that four month time limit the Secretary of State
12 is supposed to be acting with expedition.

13 We know that section 24 is described colloquially as
14 a longstop. That makes a lot of sense when you have an
15 independent statutory obligation to be getting on with
16 it in the meantime.

17 THE PRESIDENT: Yes.

18 MR LOMAS: Do you have any comment to make about the 103(2)
19 is limited to expedition under section 45 and 62 and not
20 generally? So 103 is set up differently from the
21 general scheme of the merger control provision to give
22 an obligation in only those identified circumstances.

23 MISS FORD: Yes, but it is referring to the ultimate
24 decision to make a reference, so it is the end point of
25 the process, is it not?

1 MR LOMAS: Yes.

2 MISS FORD: It seems to me that that is consistent with the
3 construction which envisages that all the interim stages
4 must be completed within the relevant period and that --
5 it is statutory shorthand for saying your ultimate final
6 decision needs to be taken with due expedition because
7 if your final decision is, then the steps which go
8 towards it must presumably be as well.

9 MR LOMAS: I suppose you would say 103(1) extends the same
10 obligation to the CMA when there is clearly a four month
11 time limit for its activities.

12 MISS FORD: That is true. It refers to references in the
13 same way when of course there would be interim stages
14 for the CMA as well.

15 MR LOMAS: Yes.

16 MISS FORD: The submission was made that section 23(9) (b)
17 does not modify the language of section 24. To be
18 clear, it is not any part of our case that it does
19 modify the language of section 24. We say that it makes
20 clear when you have to ask yourself the requisite test
21 is met and for the purposes of a reference you have to
22 ask yourself at the time of making the reference.

23 I think the point is then made that because a
24 reference in section 24 is capable of referring to
25 a Chapter I reference, it is not in any way modified in

1 order to refer to a Chapter II reference. In my
2 submission it does not need to be modified. A reference
3 to a reference generally is capable, perfectly capable
4 of referring to both a Chapter I reference and
5 a Chapter II reference.

6 I make the same point, to be clear, in section
7 23(9)(b) where you find the reference to a reference.
8 The statutory scheme clearly uses the word "reference"
9 to mean a reference whether brought under Chapter I or
10 Chapter II.

11 A submission was made that if my client's proposed
12 construction were correct you would not need section
13 42(6)(k), I believe, and I confess I do not quite follow
14 why that might be. Section 42(6)(k) is the provision
15 that tells you that you should read "reference" as
16 Public Interest Intervention Notice insofar as is
17 necessary. So it does have a function because when you
18 are looking at what is the deadline for issuing your
19 Public Interest Intervention Notice it needs to read
20 Public Interest Intervention Notice rather than
21 "reference". So that is the function of that provision
22 and I do not quite follow the argument that it becomes
23 otiose in some way.

24 MR LOMAS: Was the point not being made that subsection (h)
25 was otiose?

1 MISS FORD: I understood my learned friend to accept that
2 subsection (h) did not fit comfortably with his
3 proposed --

4 THE PRESIDENT: It was the other way round I think, yes.

5 MISS FORD: The submission was made that the word
6 "reference" in section 23(9) (b) has to understood as
7 referring solely to a CMA reference and not capable of
8 encompassing a public interest reference. The Tribunal
9 has my submission on the word reference generally, but
10 there is a further point which is section 46 -- sorry,
11 section 42(6) (a) inserts into section 23(9) three
12 subparagraphs, and then one sees at the end the word
13 "and". In my submission that is quite significant
14 because what it tells you is that the draftsman in
15 contemplating what is going to apply for the purposes of
16 a public interest intervention is saying "and"
17 section 23(9) (b). It is a specific indication that this
18 does have relevance for the purposes of public interest
19 cases.

20 The submission was made that if a section 42 Public
21 Interest Intervention Notice is discontinued and the CMA
22 then makes a reference, then that reference is made
23 under Chapter II and that might be what is intended by
24 section 23(9) (b). In our submission a reference in
25 those circumstances is not made under Chapter II, it is

1 made under Chapter I, and the reason we say that is if
2 the Tribunal looks at section 22(3)(d) -- section 22,
3 this is governing the CMA's duty to make references.
4 (3), the headline says, "No reference shall be made
5 under this section if ..." and then (d):

6 "A notice under section 42(2) is in force in
7 relation to the matter or to the matters to which such
8 notice relates has been finally determined in Chapter II
9 otherwise than in circumstances in which a notice is
10 then given to the CMA for section 56(1)."

11 What we see is that the decision-maker changes from
12 the CMA to the Secretary of State when a Public Interest
13 Intervention Notice is issued and in certain
14 circumstances it can revert back again.

15 If we look at the definition of when a Public
16 Interest Intervention Notice is in force, that is in
17 section 43(3):

18 "An intervention notice shall come into force when
19 it is given and shall cease to be in force when the
20 matter to which it relates is finally determined under
21 this Chapter."

22 In my submission what you see is a mechanism whereby
23 the CMA's duty to make a reference is suspended while
24 matters are considered under the public interest regime,
25 but if in certain circumstances you do not end up with

1 a reference under the public interest regime then you
2 may then have a possibility for the CMA to then make
3 a reference under section 22, but it does so under
4 Chapter I.

5 THE PRESIDENT: Does it explain where final determination
6 for the purposes of section 43(3) is? That is
7 subsection 4.

8 MISS FORD: 43(4), those behind me are saying.

9 THE PRESIDENT: So he decides not to make the reference
10 under this section is 43(4)(c). At that point it is no
11 longer in force. Once it is no longer in force you say
12 section 22 then revives.

13 MISS FORD: Yes. The intention is under section 22 to have
14 a temporary stop essentially. Responsibility passes to
15 the Secretary of State for the period of validity or
16 period in force of the intervention notice.

17 THE PRESIDENT: So section 23(9) then applies under the
18 ordinary Chapter I mechanism --

19 MISS FORD: It does, yes.

20 THE PRESIDENT: -- without the section 42(6) modification.

21 MISS FORD: Yes.

22 THE PRESIDENT: So that your point is that there is no need
23 to give that meaning to section 23(9)(b) for the purpose
24 of section 42 because it will not be playing that role
25 under section 42.

1 MISS FORD: Yes, and that is a point which is cumulative
2 with the presence of the word "and" in the --

3 THE PRESIDENT: "And" just preserves it there which it was
4 accepted -- it was not suggested it was removed.

5 MISS FORD: It does play a slightly larger role because it
6 shows that the draftsman of the public interest
7 element intended that it stay there and it must
8 therefore perform a function in the public interest
9 context, in our submission.

10 THE PRESIDENT: Yes.

11 MISS FORD: The submission was made that when the CMA comes
12 to perform its functions you then have a further change
13 in meaning of the words in section 24 and that that
14 might in some way be problematic.

15 In my submission the CMA appears to have been under
16 no confusion in relation to its own role and the way in
17 which section 24 operates for its purposes. We can see
18 that from the respondent's bundle B5, page 9 which is
19 the CMA's report. Paragraph 38 where the CMA states:

20 "The CMA therefore believes that it is or may be the
21 case that a relevant merger situation has been created
22 as of the date of the Public Interest Intervention
23 Notice."

24 THE PRESIDENT: Sorry, you are at paragraph?

25 MISS FORD: Paragraph 38 on page 9.

1 "It is clear the circumstances in which it is
2 obliged to express a view as to whether or not the
3 relevant merger situation has been created as of the
4 date of the Public Interest Intervention Notice as at
5 the date of its report."

6 THE PRESIDENT: Yes.

7 MISS FORD: A submission was also made that there is
8 a tension with section 46(2) of the Act which is the
9 provision which requires the Secretary of State in
10 deciding whether to make a reference under section 45 to
11 accept the decisions of the CMA included in its report.

12 In my submission no tension arises because the CMA's
13 decision is that the four month period under section 24
14 of the Act ends on 1 July 2019. So it has expressed
15 a view that there is a relevant merger situation as at
16 the date of the Public Interest Intervention Notice.
17 Obviously the Tribunal is aware we take issue with that,
18 but that is its view as of 27 June, and then it says
19 also as at the date of the report, 28 June, and it says
20 the relevant period ends on 1 July 2019.

21 So if the Secretary of State were to reach a view
22 consistent with the CMA's report, the view must be,
23 "I cannot make a reference because I'm out of time."

24 (Pause)

25 Sir, a final point, it was suggested that the

1 insertion in section 42(6)(e), so this is the insertion
2 of 5A which refers to the extension of time where you
3 have a pending public interest. It was suggested that
4 that could be a reference to a four month period for the
5 purposes of a Public Interest Intervention Notice. In
6 my submission that cannot be right because we see
7 subsection (h) below which tells you that there can be
8 no extension under section 25 at all until the
9 intervention notice is given.

10 THE PRESIDENT: Yes.

11 MISS FORD: Unless I can assist the Tribunal further those
12 are my submissions in reply.

13 THE PRESIDENT: Thank you both very much. As you will
14 doubtless appreciate there is quite a lot to think about
15 in trying to construe these provisions which neither
16 side have suggested are particularly clear, and you will
17 be notified as soon as we have produced our judgment.

18 (5.31 pm)

19 (The hearing concluded)

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