IN THE COMPETITION APPEAL TRIBUNAL

Case No. : 1429/4/12/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Monday 25 April – Thursday 28 April 2022

Before:
The Honourable Mr Justice Marcus Smith
Professor John Cubbin
Simon Holmes
(Sitting as a Tribunal in England and Wales)

BETWEEN:

Meta Platforms, Inc.

Applicant

v

Competition and Markets Authority

Respondent

A P P E A R AN C E S

Mr Daniel Jowell QC, Mr Gerard Rothschild and Mr Richard Howell (On behalf of Meta)
Mr Josh Holmes QC, Mr Tristan Jones and Ms Emma Mockford (On behalf of the CMA)

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Wednesday, 27th April 2022

(Hearing began in private session)

(IN PUBLIC SESSION)

Submissions on grounds 4 and 4A by RESPONDENT

MR JUSTICE MARCUS SMITH: Mr Jones, you have very helpfully indicated that we are now in public session. So I just confirm that on the record and that is okay by you.

MR JONES: Understood. Yes.

MR JUSTICE MARCUS SMITH: Thank you very much, Mr Jones. Very much obliged.

MR JONES: Just a couple of points of housekeeping to take stock of where we have got to on the timing. There is clearly a lot to get through on grounds 4 and 4A. I expect I will do the same as Mr Jowell, in that I will eat into some of the time otherwise allocated for tomorrow, which means we are very unlikely to get through these grounds until late tomorrow morning I would have thought.

I am going to take the grounds in the order that they are in the pleadings, in other words, start with 4 (a), (b) and then 4A.

Like Mr Jowell, I will do an open session covering all of those and then a closed session which will look at the details on all of those.

Turning then to ground 4 (a), in which the principal question is the obligations of fairness during the CMA's consultation process. The basic principles have been examined in several cases and they are not I think controversial. There

is a statutory obligation to consult. That requires, as a matter of fairness, that the consultee be shown the gist of the CMA's reasoning. What the gist is is acutely context-dependent, reflecting the well-known principle that fairness is acutely context-dependent.

There is, on the other hand, a statutory prohibition on the disclosure of specified information, but these things are resolved, because, if the gist must be shown as a matter of fairness, then the statutory prohibition does not bite.

It is also common ground that information which needs to be shared as a matter of fairness either needs to be shared or cannot be relied upon. That's well-established.

Now, picking up on the point about the statutory prohibition, it is important to keep in mind that the prohibition is actually a criminal prohibition. That's section 245 of the Enterprise Act. That puts the CMA in a very different position to most other bodies when consulting. The CMA has to take confidentiality extremely seriously, because if it discloses more than it thinks is required as a matter of fairness, then it is in the territory of the prohibition biting.

That's an important difference not only between the criterion of the CMA and other public bodies, but, sir, as you will be aware, it is one of the difference between the CMA and this Tribunal, because you are not subject to the part 9 requirements. You are masters of your own procedure, in a way that the CMA is not.

As you observed earlier, there are various cases emphasising the distinction between the process before the CMA and the process before this Tribunal.

Sir, of course in the couple of recent judgments which were adverted to, you have been at the forefront of emphasising that. But just by way of illustration of the sea change in approach, you have heard some references to the Ryanair

case. Of course, the point in that case was Ryanair wanted to know the names of the airlines whom it was being said might combine with Aer Lingus. The reason it wanted to know the names was because it was saying: "We know this industry. We know the airline industry. If only we knew who had made these representations, we might have things to say about them".

As you know, Ryanair was refused access to the names. But not only was Ryanair refused access. Ryanair's external advisers were refused access and, when it came to this Tribunal, even counsel and solicitors at the Tribunal stage were refused access. I was Lord Pannick's junior in that case. He wasn't allowed to look at the names.

So there has been something of a sea change, and part of that has been to recognise, firstly, that this Tribunal has more leeway than the CMA but, secondly, in my submission, there are different considerations in this Tribunal. There are considerations of open justice and, of course, one needs to look at the way the issues have developed and the way the case is put, because that also colours the significance to be attached to particular pieces of information.

So for all these types of reasons, the cases rightly recognise that whilst fairness is ultimately a question for you, for this Tribunal, as you put it, sir, in the BMI case, it is the CMA which stands in the front line on these decisions, and for that reason the CMA's judgments are entitled to great weight.

It is making difficult decisions in a context where Parliament has emphasised very strongly the importance of confidentiality.

I mentioned BMI. The reference I had in mind was paragraph 39, sub-paragraph (6).

As I will come on to show you when we look at the examples, what we are principally concerned with in this case is the extent to which Facebook should have seen evidence relevant to the case or, if you prefer, descriptions of the evidence

relevant to the case.

In that connection, Mr Jowell showed you two extracts in BMI. I just want to pick those up, please. It is volume 3, tab 59, paragraph 38.

So, sir, we are in your judgment. You gave references to two cases, and Mr Jowell pointed you to these. The extracts in question here essentially say "an accused man needs to see the evidence". That's the point being made.

Just to be clear about this, we don't have these two cases in the bundle. They can, of course be procured if that would be helpful. I don't think this will be controversial. To be absolutely clear what these cases were about, the first one concerned a police officer who was dismissed by a disciplinary body for failing to disclose evidence in a criminal case, and he wasn't given the evidence against him. That was the first one.

The second one was a childminder, who was suspended from the Register of Childminders for essentially physical abuse of a child, again without having an opportunity to see the evidence against her.

One can see in these cases of course they needed the evidence. It was about them. The evidence was about them. They would have had something to say about it, and it was critically important to the allegations against them.

That's quite distant from the present case. We are in administrative proceedings, not a disciplinary process against an individual, and the evidence that we're actually talking about is not evidence about Meta. It is about other people.

The Tribunal has already observed in this context that there can't be an obligation to disclose all inculpatory or exculpatory evidence. That is Group Eurotunnel, just for your note, paragraph 221.

Now, sir, to be clear, I am not trying to draw a sharp line at which evidence should never be disclosed. That is not what I am saying. As you have seen, and I will

take you to it in more detail, they were, in fact, given a very, very large amount of evidence. So that's not my point. But I am cautioning you against the more ambitious reaches of Mr Jowell's argument.

The question, to be clear, is not whether all relevant material was disclosed. It is not even whether all of the evidence which might have supported Mr Jowell's case and enabled him to make a submission based on the evidence was disclosed. It is whether a sufficient gist was disclosed to enable Facebook fairly to comment on it.

Now, sir, where I do find common ground with Mr Jowell, and this might perhaps make your task here somewhat easier, on the law is his adoption of the approach in the Law Society case. Could I just look back at that? It is in volume 4 at tab 75? What I am agreeing with is paragraph 73, which is on page 2567.

What the Divisional Court says here is essentially there are four factors to place in the balance:

"In judging whether non-disclosure of particular information made a consultation process so unfair as to be unlawful, relevant considerations include."

Then there are four. I will just run through them briefly:

"1. The nature and potential impact of the proposal put out for consultation."

I agree that the proposal here is serious. I agree with Mr Jowell. We are talking about property rights, A1 P1 rights. So far I agree.

"Secondly, the importance of the information to the justification for the proposal and the decision ultimately taken."

Of course, I will need to go through this in detail on the examples. My submission will be that, when seen in context, the withheld information was not important. In fact, it was minor.

"Thirdly, whether there was a good reason for not disclosing the information."

Of course, the reason was confidentiality. I will come back to this with some examples in due course, but could I just flag that Mr McIntosh's first witness statement explains in some detail the painstaking process of evaluation that was gone through by him in considering the representations which had been made, and in relation specifically to the Snap information, because that has obviously taken on a particular significance.

Can I refer you in particular to his first statement, paragraphs 55 to 61, and then again 73 to 76?

MR JUSTICE MARCUS SMITH: Do you want us to read that now?

PROFESSOR CUBBIN: What is the reference?

MR JONES: I don't have it to hand. I will give it to you. I will make sure in future there are references to make that easier.

MR JUSTICE MARCUS SMITH: Mr Jones, you can take it as read that we will be looking pretty carefully at all the witness evidence again, in light of the submissions.

MR JONES: Yes, I am grateful.

The fourth consideration -- before I go on, first of all, I do have an answer. Tab 13, which is in volume 1, page 424.

PROFESSOR CUBBIN: Thank you.

MR JONES: The fourth consideration here is whether consultees were prejudiced by the non-disclosure. Again, I will have to come back to this and address you in some detail when I come to the examples.

Could I make one general point on prejudice while we are here? This judgment that's being described by the Divisional Court of looking at these four factors needs to be made by the CMA in real time, as it were, when it is conducting

its investigation under the statutory time limits.

Now, Mr Jowell and his team have done a sterling job over the last couple of days of identifying what they say is the prejudice, particularly in relation to Snap. I think there was less on the others, but particularly in relation to Snap.

If you go back to the pleadings and to the skeleton argument, I don't think you will find any of that. To be clear, those documents were produced several weeks after they had had all of the confidential information.

There is a danger, which I caution you against, in coming at this fresh and being led by Mr Jowell's very refined view of matters, and thinking, to put it bluntly, all of this should have been obvious. I will need to take you back to the decision maker's actual approach, and remind you that the CMA is, as I put it, on the front line of the investigation. It doesn't have a big team focused on spending several weeks refining the best viewpoints on questions such as this.

Everything I have said so far applies when information is withheld from Meta and its external advisers.

I just wanted to address the point you picked up with Mr Jowell about confidentiality rings, because one feature of ground 4 (a), which is not clear from the notice of appeal, so one needs to keep this carefully in mind, is the very large majority of Meta's complaints, certainly of those in the notice of appeal -- they have shifted focus a little bit before you, but I will come on to that, but certainly in the notice of appeal, the very large majority of the things which they say were withheld were actually provided to Meta's external advisers and they were only withheld, as it were, from Meta itself.

Now, there is a point of principle and point of practice that I want to run through. Sir, your question was, as I understand it, driving at the question of principle. When is it appropriate for the CMA in its own internal processes to disclose

into a confidentiality ring versus disclosing to the individual entity themselves? My answer to that is when that is what fairness requires. That's the simple answer. So if fairness can be satisfied by disclosing into a confidentiality ring, then that is what can be done. If fairness requires disclosure here to Meta, then I accept that's what fairness requires, and that is what can be done. So that's the point of principle.

Just on the practicalities of this, could I emphasise that the reason why disclosure to external advisers may suffice is that they are able to speak to their client and take instructions, and then apply those instructions to the confidential material which they have seen. Meta may well have discussed with its solicitors, for example: "What do you think Google's plans for Tenor might be? What would be realistic? What could it achieve?" One could have very detailed discussions around those sorts of questions: "How might it react to the merger". None of that involves revealing confidential information. That's the process of taking instructions. It will give the external advisers the basis on which they can then look at confidential information and make submissions to the regulator upon it.

Of course, if they get to the point where they say: "Actually we can't make submissions on this point. We really have to take instructions. We can't understand it. We don't know what our clients have to say about it, but we can see that they might have something very helpful to say," then that is a particular fairness point which they can raise with the CMA, which may or may not agree with it, but which will certainly consider it.

MR JUSTICE MARCUS SMITH: Mr Jones, I entirely take your point that the protection accorded to confidential information is itself a matter for the CMA's judgment, and that judgment needs to be informed by considerations of

fairness. I understand that and you are clearly right. There is a difference between some information which can appropriately be protected fairly by simple disclosure into an external adviser only ring, for the reasons you have just been articulating. What I was I think getting at also with Mr Jowell, and I just want to put it on your radar, is the extent to which the question of confidentiality also needs to be weighed. To what extent is the CMA informed? Clearly it needs to be informed to some extent, but how great is the CMA's reliance on the third party's own characterisation of material as confidential, and how far does it apply a check which is independent of the third party's assessment?

That's obviously a very difficult judgment call in its own right, and one could see an argument for saying: "Well, actually if a third party says this is confidential, we are not going to look behind that", but one can see arguments going the other way. It would help I think to understand how far that is a factor which again needs to be weighed in the balance.

MR JONES: Sir, it certainly is a factor. However, as a starting point, the part 9 protection covers specified information. So at a minimum, if the information satisfies the description of specified information, then you are already in territory where you can't disclose it unless it's required fairly to give the gist of the information.

So at that base level, one does not get into more refined questions about precisely how confidential the information is. That said, there is often a process of back and forth with third parties to try to understand really how confidential the information is that they're talking about.

I have given you the references to Mr McIntosh's evidence, where he describes some of this in some detail. There is also guidance, which is the old

Competition Commission guidance which has been carried forward. Again, it is discussed in his statement. For your note, that is tab 103 of the authorities bundles. That explains the process, in broad terms, in some detail about how the CMA will go about looking at confidentiality claims.

Mr Jowell has mentioned that there was correspondence, and we will put together or his team, I suppose, is currently putting together a list of what that is. But you will see, when you look at it, that it was a mixture of -- I am talking now about the dialogue with Meta, of course, rather than with the third parties -- but it was a mixture of broad brush requests: "Please lift all of the confidentiality redactions". And then some quite targeted things, for example, about Snap.

When you look then at the CMA's response, you will see that the broad brush requests were pushed back, but some of the more targeted ones led the CMA to change its view, and Snap is the obvious example. That's why we have the extra couple of tabs of Snap material that I will need to go back to. But what was going on behind the scenes, of course, was the CMA liaising with Snap and going back and forth with Snap on its own confidentiality claims.

You will get more colour again in Mr McIntosh's statement on all of that process. So I hope that is helpful.

That ends my open submissions on ground 4 (a) and I was going to turn next to ground 4 (b), which is in broad terms to address the law on the content of the decision and the reasons the decision must contain.

Could I go back, please, to the legislative provisions? This is authorities 1, tab 5. I want page 55, which is section 38. You are very familiar with this now, but I am going to make some quick points on it, if I may:

"38.2. The report shall contain the decisions, its reasons for the decisions and such information as the CMA considers appropriate for facilitating a proper

understanding."

Pausing there, what that tells us is that there is a distinction between reasons, that's (b), and information appropriate to understanding reasons. That is a distinction which is recognised in the common law case law.

Could I jump to authorities tab 55, please, which is volume 3, para 20 (8), which is page 1597? This is where we see the extract from the Porter case. It is concerning reasons. So, linking it back to the statute, there was the reasons versus information, but this is about reasons.

You will see what is said in that decision:

"The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the principal important controversial issues disclosing how any issue of law or fact was resolved."

Two lines further down:

"The reasoning must not give rise to a substantial doubt as to whether the decision maker erred in law, for example, by misunderstanding some relevant policy or some other important matter, or by failing to reach a rational decision on relevant grounds. But such adverse inference would not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration."

Sir, you will know there is an expression one often has in these public law cases but also I think on court's reasoning, which is the obligation is an obligation to give reasons, not "reasons for reasons".

So the core duty of giving reasons is there explained, and it is concerned with explaining the reasoning on the principal issues of controversy in the case.

Now, part of the reason I start with that is just to emphasise the distinction between

those two limbs in the Act, but also the distinction of the approach that the Tribunal should adopt to them, because on a reasons challenge, where it is said you haven't given sufficient reasons, that is to be judged by this Tribunal asking the straightforward question: Have sufficient reasons been given, applying the test which we just looked at? It is not a rationality test. But if one were to then say: "Well, the core reasons might be there, but there's insufficient information", that type of argument clearly is something which would have to be pursued on a rationality basis.

That's clear from the Act, because it's clear from the section in the Act that we just looked at that they have to provide such information as the CMA considers appropriate for facilitating a proper understanding.

Mr Jowell has not put his case on that basis. He is focusing in on the narrow reasons points. So we are in that ring of concentric circles, if you like.

Now, the decision here is obviously a very lengthy decision and, to be clear, the CMA would say that most of what you see in this decision is information, not, as it were, core reasons.

You will all be aware that the CMA, in common with other big regulators, has a culture of producing very lengthy reports. They could in a lot of cases be a lot punchier. They do it for good reason, which is to be as full and transparent as possible, but doing something for that good reason doesn't mean that that is what they think is required as the minimum under the statute. It isn't. The decision goes well beyond, in my submission, that which is required by the reasons which needed to be given under the statute.

Now, sir, that argument, which is my argument, the report contains ample reasons, of course, leads naturally to the question which version of the report are you talking about? My answer to that is simple. It is the public version. That is the

one which the CMA considers discharges its section 38 obligations. It is accessible to everyone, and the CMA has been able to give its reasons without compromising confidentiality.

That takes us to two of Mr Jowell's points of principle. His first point of principle is the CMA cannot redact anything from its final report. He says that there's no power to do that. The answer to that is simple. The CMA has not redacted anything that was required to be published. It has published a report to the public containing full reasons as required by statute, as well as the additional information which it considered appropriate to publish to the public. So there has not been any redaction from the report required by statute to be published.

Mr Jowell made an analogy with Ryanair. He said at the provisional finding stage, if confidential information should be shared as a matter of fairness, then you either need to share it or you can't rely on it. That was his point. He said the same must apply at the final report stage.

My answer to that, we are simply not in that territory, because the CMA has not had to rely on confidential information to provide its public reasons or to provide such information as it considers appropriate for facilitating proper understanding of those. So it didn't need to decide what would happen if it had to rely on confidential information to publish its reasons.

Perhaps Mr Jowell is right. Perhaps if we had got there, the CMA would have had to publish confidential information. Perhaps that's right, but we are not there, because that was not what the CMA thought it was doing.

Now, one might observe there are, of course, redactions to the confidential version of the report. So the published version has things cut out of it. The same was true, of course, in Ryanair.

To be clear, my point is they are not redactions to the information which was required by statute to be published. When the CMA decided what additional information it was including in the report, it was entitled to take account of confidentiality considerations, and some has been withheld on that basis, but that's a totally appropriate course when taking a discretionary decision about which additional information to publish, because one then has alongside the public report these other confidential versions, which provide more information to those able to see it.

Really, although Mr Jowell says you can't make redactions from the report, really, as a matter of law, in my submission, what his case has to be is you can't publish fuller versions of the report. You can't publish the section 38 report and then some other versions with confidential information in it. The answer to that is there's no restriction on the CMA publishing fuller versions containing confidential information to provide further detail to interested parties. Indeed, it's a sensible thing for the CMA to do. It is what it routinely does and it is what it did here.

MR JUSTICE MARCUS SMITH: Yes. I can see that there's a very interesting question about what a report and a decision should contain, and that's something I think we will need to think about, but to be clear, your position as regards this report and the decisions contained within it is that there is a substantial amount of overkill in the report.

MR JONES: Yes.

MR JUSTICE MARCUS SMITH: The problem, of course, that this approach engenders is that one has an argument exactly of the sort that we are having now, that one has got to be able to separate that which is overkill from that which is not, and, of course, that's the problem of an over-inclusive approach,

but that's the approach you are saying is here, and we mustn't take from a redaction in the public report any inference that the mere fact that it was in the confidential version means that it is a section 38 essential piece of prose.

MR JONES: Quite right.

That leads us on to Mr Jowell's second point of principle, which is he says: "The CMA cannot rely in these proceedings on the confidential version of the report." This is his Ermakov point. He says: "If you say the published version is the section 38 decision, then that's it. Essentially, you are stuck with that and you can't go to the confidential material."

One needs to be cautious of this argument and just take it in stages. There's a weak version of it, if I can put it that way, and a strong version of the argument. I am just going to distinguish between those two.

The weak version of the argument is to say the published decision must contain your section 38 reasons, and if the published version doesn't contain your section 38 reasons, then you can't rescue the situation by coming up with fresh reasons in a challenge and pointing to the confidential material.

Now, that weak version -- I agree with that. As I hope I have explained, that's not what the CMA is trying to do in these proceedings. We stand by the published version and we bring that squarely within section 38. So the weak version of the Ermakov argument I entirely agree with.

But there is then a stronger version, which is particularly apparent in the skeleton argument and crept in in view of Mr Jowell's submissions. But the stronger version seems to be to say that we can't rely in these proceedings not only to defend the section 38 argument, but really to defend anything, we can't rely on confidential material that wasn't in the published decision, on the basis that these are new reasons, they weren't in the published decision, you can't rely

on it.

That is simply incorrect. we are relying on the confidential information in large part to respond to points which are made by Meta. But, putting that to one side, it is important to be absolutely clear what the Ermakov case establishes.

Could we turn to that, please? It is in authorities 1 at tab 28. Now, Ermakov is a case which is, just to summarise, about retrospective reasoning. It's a case which in broad terms establishes that courts should be wary of retrospective -- I underline that -- reasoning, in other words, reasoning which is dreamt up after the fact.

Let me just show you that. The decision in question was about whether an individual had become intentionally homeless, which obviously if you are intentionally homeless, that has implications for your entitlement to housing.

You will see on the first page just at G:

"The applicant applied for a judicial review of the decision. For the purposes of the proceedings, L", who was the homelessness officer "swore an affidavit explaining the true reasons for his decision were not those expressed in the decision letter, but rather that he was satisfied that notwithstanding the matters disclosed in the applicant's statement, it would have been reasonable for him and his family to continue to occupy the accommodation he rented in Greece."

So they came up with wholly new reasons and they put in an affidavit during the proceedings to say: "Actually, my real reasons weren't the ones in the letter. It was something different".

Now, that was not allowed. You will see why it was not allowed. If you go forward, please, to page 657, that paragraph which starts just above G:

"The weight of authority favours the applicant."

1. That is irrelevant for our purposes.

"2. The court can and in appropriate cases should admit evidence to elucidate or exceptionally add to the reasons, but should be very cautious about doing so."

Just note that what he is talking about is admitting evidence to correct or add to reasons. But then if you look at the reason for this, it is on 3, over the page:

"There are, I consider, good policy reasons why this should be so. The cases emphasise that the purpose of reasons is to inform parties why they've won or lost and to enable them to assess whether they have any ground for challenging an adverse decision."

Just pausing there, that essentially is the core reasoning point. I accept we have to provide those core reasons.

Then it goes on to say:

"Wholesale amendment or reverse of the said reasons is inimical for this purpose. Moreover, not only does it encourage a sloppy approach by the decision maker but it gives rise to potential practical difficulties. In the present case it was not, but in many cases it might be suggested that the alleged true reasons were, in fact, second thoughts, designed to remedy an otherwise fatal error exposed by the judicial review proceedings. That would lead to applications to cross-examine and possibly for further discovery, both of which are, while permissible in judicial review proceedings, generally regarded as inappropriate."

Then you will see down at 5:

"Nothing I have said is intended to call into question the propriety of the kind of exchanges, sometimes even to further exposition of the authorities' reasons or even to an agreement to reconsider the application which frequently follow the initial notification of rejection. These are in no way to be discouraged,

occurring, as they do, before but not after the commencement of proceedings."

I should draw to your attention:

"I wish to emphasise all I have said is with reference to the provisions of section 64 of the 1985 Act."

In fact, this is a well known case on retrospective reasons now, in administrative law generally. But, as you see, it is all about giving after the fact reasons during litigation. That is where you have to be cautious, because, on the other hand, in judicial review proceedings, it is absolutely bog standard to disclose in the course of judicial review documents expressing reasons which weren't published at the time. So a submission which went to the minister, e-mails which explain the thinking, et cetera, et cetera. Mr Jowell has not provided any case which suggests that contemporaneous reasoning, in a general sense, can't be relied upon. It would be a very odd approach.

So the weak version I agree W the stronger version of the Ermakov argument is incorrect.

So sum up, sir, where this takes us on this particular topic, regarding the contents of the decision is, in my submission, the CMA was entitled to withhold information on grounds of confidentiality, provided that its published decision, the section 38 decision, satisfied the section 38 obligations.

I will have to address you on the details of that again in the closed session, but my headline submission is that the report, in fact, went well beyond what was required by statute.

I turn next to ground 4A. We need to go back I am sorry to say to the statute, which, sir, you are all getting very familiar with. Tab 5, please, in authorities volume 1. Back in section 35, which is on page 51.

MR JUSTICE MARCUS SMITH: Yes.

MR JONES: Sir, I am addressing you now on the question of delegation, which is really the question about the finalisation process for the report. Before we look back again at the report writing obligations in section 38, I want to start with section 35, because this is the decision-making section.

You have seen that section 35 (1) requires the CMA, which we know needs to be read as "the group", so requires the group to decide certain questions, and then section 35 (3) requires the group to decide certain additional questions.

I underline "decide", because these are decision-making functions, classic decision-making functions. The law on the delegation of decision-making powers is extensive. As Mr Jowell has explained, where an Act of Parliament gives a decision-making power to an individual or to a committee of individuals, the normal implication, which I accept applies here, is that those individuals take the decision.

In this case that conclusion is further strengthened, as Mr Jowell again explained, by the statutory history. The maintenance of the separation between phase one and phase two was carried over from the old CC/OFT days.

Could I give you one further reference to that. Could we look at it, please, sir? It is volume 11, tab 160. Mr Jowell took you to this. This was the Government's response to the consultation. This was in the run-up to changing the system and having the CMA Board and the Panel.

I just wanted to emphasise at paragraph 11.19, page 8468, where the Government explains why it is introducing the Panel system. You will see just under the bold text:

"The decision-making structure will need to ensure that executives do not perform any part of the decision-making body for those decisions that are to be taken

by such groups. similarly, the members of such groups may not have any say in decisions of the type currently made by the OFT in phase 1."

So what was important was to maintain the separation of -- and again I underline the decision-making function. That was why the Act was framed in the way it was and why there is a distinction between phase 1 and phase 2, because decisions have to be taken by the group and those cannot be delegated.

As I have said, what this ground is concerned with, in fact, is not the making of the statutory decisions under section 35. Those obviously were made by the group. It is concerned with the finalisation of the report.

For that we need to go back to section 38, which is on page 55. Sir, I see the time. I was wondering whether this might make more sense, given we had a short break, for me to carry on for 15 minutes and take 45 minutes later in the hour. I am in your hands.

MR JUSTICE MARCUS SMITH: Ordinarily that would be great. I happen to have a call to make at 1 o'clock. If you don't mind, we will start early and finish now, otherwise I will inconvenience someone, but should we start at 1.40?

MR JONES: Yes. I am grateful.

MR JUSTICE MARCUS SMITH: We can probably run until 4.30 or a little after that. We probably could add ten or so minutes.

MR JONES: Sir, I think that would be extremely helpful.

MR JUSTICE MARCUS SMITH: In that case we will run until 4.40 today. I am just checking I am not misspeaking. Very good. Until 1.40 then. We will resume then.

MR JONES: I am grateful.

MR JUSTICE MARCUS SMITH: Thank you very much.

(1.02 pm)

(Lunch break)

(1.40 pm)

MR JUSTICE MARCUS SMITH: Yes, Mr Jones.

MR JONES: Sir, we broke at a point where I had been labouring somewhat the point that statutory decisions can't be delegated. I was moving on to look at section 38 and what it says about drafting a report and how that might be different.

We may by now all have memorised section 38. I need it in front of me and it is just to remind you, tab 5, page 55.

To make one point clear from the outset, I entirely accept that where it says "The report shall contain the decisions of the group and its reasons for its decision and the additional information", that means the group's reasons, and it means information that the group thinks is appropriate to include in the report. So there isn't any dispute about that.

The question which you are confronted with is a procedural question in this sense: does the statute require a particular procedure to be followed in order to produce this report? Can the group say, as it did in this case: "We are happy that the report contains our decisions and our reasons because, in summary, we had an awful lot of discussions and we saw a very nearly final version, and we trusted the Chair to oversee the final steps", or does it impose a strict requirement that they must all see and sign off on the final report? That's the question.

To answer that question you need to look beyond subsection (2), because one needs to look, of course, at what the statutory duties are. 2 says what the report shall contain, but the obligations on the group are these. It is in sub-section (1):

"The group shall prepare or publish a report."

And subsection (3):

"The group shall carry out such investigations as it considers appropriate."

That last one, "investigations", we are not directly concerned with it, but it is really important, because this section, of course, has to be construed as a whole in divining what Parliament's intention was.

That brings us to the question to what extent can the case law of the delegation of decisions be applied to this section? One potential interpretation of this section would be to say: Well, building on the case law of the delegation of decisions, it follows that Parliament intended that everything which is described here has to be done personally by the group. So the group has to prepare the report. The group has to publish the report. The group also, by that logic, has to carry out such investigations.

One could take an extreme version of saying those functions might be large and wide-ranging, but they are all given to the group and the group can't delegate anything and that's, as it were, the end of the enquiry.

The obvious difficulty with that is that it would be completely and obviously unworkable. We are talking here, when we refer to the group, about a small number of part-time expert Panel members, and not the large team of full-time employees such as required to carry out these activities in the statutory timetable.

It is obvious and inevitable that the group is going to be, for example, making use of CMA staff. It is going to have a case team. Indeed, the Competition Commission used to have a very large staff of 100 or 200 people who were involved in investigations as required.

So when the functions were combined, as I have emphasised, into the CMA, whilst

the decision-making was kept separate, clearly these activities of support were going to be provided and, in fact, are provided to the group by the CMA staff.

Could I just give you a reference -- I don't ask you so turn it up -- but just a reference to the CMA's own published guidance, which makes clear that a CMA case team will assist the group? It is in the authorities bundle, volume 6, tab 105, page 4005, paragraph 10.08.

So that extreme version, which is that the group has to do everything, cannot be right, I think, in fairness to Mr Jowell, he does not go that far. He has acknowledged that, at the very least, the case team can advise and assist. I assume, although he will correct me if I am wrong, he would say that the case team can be taking day-to-day decisions in the course of the investigation. But that's one extreme.

The other extreme, which would be the opposite, would be to say this. One might say, given we are not here concerned with decision-making powers, we can effectively ignore that case law on delegation, and the result would be that the group can do whatever it likes. It could come in at the end and essentially read and approve a report which has been drafted by the case team without its involvement.

I should make clear I do not go anywhere near that far. The reason I don't go that far is that that would not do justice to Parliament's clear intent to entrust these particular functions to this particular group of people.

MR JUSTICE MARCUS SMITH: How are you assisted, Mr Jones, by the fact that CMA was inserted in place of CC. I mean, as we have had described, there's a merger of two bodies but a preservation of the distinction between the two, which is what we have seen in the various documents that Mr Jowell has

taken us to. But before that merger section 38 read:

"The CC shall prepare and publish a report".

Not a particular group within the CC, but the CC.

MR JONES: Yes.

MR JUSTICE MARCUS SMITH: Now that would mean, would it not, that the arguments about delegation would be much more broad in that case, in that you would not be saying "look at a particular entity within the CC. Just look at the CC".

MR JONES: Yes.

MR JUSTICE MARCUS SMITH: So I suppose my question is, given that we have a reference in section 38 (1) to not "the group" but to the CMA, obviously one has got to read section 38 in light of the other constitutional restrictions on separation, which are essential, and obviously if the Panel or the Board rather than the group did all the work under section 38, you would have a real problem, but we are not there. We are in a situation where there has been instead a delegation by the group within what was once the CC.

MR JONES: Yes.

MR JUSTICE MARCUS SMITH: So my question is ought you to be making the concession that the reading of section 38 (1) ought to be "the group shall prepare and publish a report rather than the CMA", because you have a little more wiggle room on that reading I think than otherwise. Beware of gifts offered by the bench. It may be I am completely wrong about that. But it did seem to me that there is something in the use of the word "CMA" which may affect the way in which one regards the ability to delegate or serve administerial functions.

MR JONES: Yes. My immediate reaction to that is there are two points which

I would place some emphasis on. One is the history, and the fact that this used to go to the Competition Commission does have some relevance, because, as I have said, when it went to the Commission, they obviously could have used their own staff. That's why they had a big staff.

Sir, as you pointed out, the principles which Mr Jowell has relied on concerning statutes which refer to individuals, named individuals, would not have applied there to impose a restriction on the CC.

Now, it may have had its own power to delegate, but we're talking in those statutory powers to delegate about key decisions really. That's where one gets to needing a statutory power of delegation. Sir, I do take that point.

Your second point, sir, if one turns back to 34 (c), remember that the reason that are reading "group" into those sections is because of 34 (c), which actually doesn't simply say "read it as though it says group". It says:

"Where a reference is made, the functions of the CMA are to be carried out on behalf of the CMA by the group so constituted."

So it is right to say that we are not quite in the territory of a function in the actual statutory language being imposed on a group. The only point which I would draw from that is that it is clear again from 34 (c) that they always remain the functions of the CMA, but they are being exercised by the group:

"Carried out on behalf of the CMA by the group."

That does in my submission provide another clue as to how the group is intended to operate, and in particular by making use of the CMA's executive facilities. I hope that answers your question.

MR JUSTICE MARCUS SMITH: Thank you, it does. I am sure Mr Jowell will have much to say about it, but that is the reason I raised it, because it struck me as something that is helpful to have submissions on.

MR JOWELL: I can make a very short point on it now so my learned friend can -- simply this. The Competition Commission's functions were themselves to be carried out by groups consisting of three persons, with a Chairman. Similar insistence that those functions be carried out by a specific group existed under the old regime as well. That's the difficulty for that line of argument.

MR JUSTICE MARCUS SMITH: We will have to look at this quite carefully, but I think no point is bad enough to be left unsaid, so I have said it.

MR JONES: Could I turn back to 38. I posited two extremes. I suggested that although I am sketching them out really for the sake of argument, those two extremes, it can't be said that I am setting them up for the purpose of argument, because, as I have said, it seems to me that both Mr Jowell and myself get to the point of saying neither of those is right and there must be a middle ground. The crucial question is what is that middle ground.

My answer to that question is this. The group must have sufficient oversight of and sufficient involvement in the process of investigating and the process of preparing and publishing the report that one can stand back at the end of the process and say with confidence this was the group's investigation. This is the group's report. It may have delegated certain individual tasks to members of a case team or to individual group members, but looked at in the round, you can have confidence, as I say, that this was the group's report and the group's investigation.

Now, that way of formulating the point, in my submission, leaves appropriate flexibility for the group to work closely and collaboratively with the case team and between itself, allocating particular tasks and particular work streams to particular individuals.

That's vital, because this exercise that we are talking about is an intensive and

collaborative process, and because of that the group must be able to manage its process in a practical and a flexible, proportionate way.

I want to emphasise that my approach does not involve setting a low bar for the group. I am going to show up in a moment just how heavily the group was involved here. It was very, very heavily involved.

On the contrary, my suggestion is that the bar is actually very high. So while it may be attractive to draw sharp lines, as Mr Jowell wants to do, about what the group must or must not do, and his particular point is they must sign off on the final report, that would not actually tell you anything about how involved the group had been in practice. It would be a box to tick at the end and of course one would have confidence in this group of individuals that they would take it seriously, but it wouldn't actually by itself tell you anything. They would still, in my submission, need to be heavily involved in the process.

So for that reason I am deliberately setting a high bar. CMA's approach is a high bar, but this is the crucial point. It is an approach which avoids drawing sharp lines and instead leaves practical matters to the group's good sense, which could, as in this case, include enabling the Chair to make any last minute changes.

Now, to be clear, none of this prevents Mr Jowell looking at some of the changes made at the end of the process and saying: "Look, this particular text can't actually have reflected the group's reasons". He can make that argument and I will come to the examples. Of course, if he is right that the text does not reflect their reasons, for example, then you would be justified in finding there was a failure in the process, because, contrary to what I have just submitted to you, you would then have decided that there was a report which does not contain the group's reasons.

So we do need to look at the examples, but, as I said, that would be because he would have shown you that it does not contain the group's reasons. It wouldn't be because of some bright line rule about delegating the final furlong of the approval process.

Mr Jowell took you to two authorities on delegation. The first one I don't need to go to because I think I can just make the point. It was the Hillingdon case at tab 20 of the authorities. The only point I want to make is, going back to my earlier theme, the case concerned a statutory duty to make a decision to issue a statutory notice. So that was a decision case.

So too was the second case, but I need to show you that just to make good the submission. This is in authorities 5, tab 88.

MR JUSTICE MARCUS SMITH: Yes.

MR JONES: If we can turn, please, to page 3127, tab 88, sir, I think you have seen paragraph 2 -- I think Mr Jowell went here -- which is, describing the contours of litigation:

"There is a single question of law to be determined, namely whether the relevant legislation permits the discharge of the Charity Commission's statutory powers, duties and functions by its staff."

Of course, when it is expressed that broadly, it is not clear that what's being looked at is decisions, because it is talking about powers duties and functions. But if you look at the next paragraph, you will see:

"In brief compass the backdrop to these appeals is formed by certain decisions purportedly made by the Charity Commission."

That was the focus. You will see there's a description of the impugned decisions at page 3134, paragraph 13. You will see, therefore, what this concerned was various statutory decisions. The Commissioner had not been involved in any

of us of this. It was all done by the staff. The Commissioner was essentially saying: "For practical reasons, I can't make any of these decisions, my staff need to make them all", and that's what's rejected.

The final reference, paragraph 44, which is on page 3150, the topic being discussed here is there is an implied power to delegate, but you will see if you pick it up halfway down reference to the threshold of inevitability. That's talking about the implied delegation:

"The threshold of inevitability is to be distinguished between that of administrative convenience and desirability. It denotes a more exacting standard, which in principle will not be easily satisfied. Furthermore, we can identify nothing in the statute or in the wider canvas to confound the analysis that the scheme of the 2008 Act is that the role of the Commission is to make all of the decisions required in the exercise and discharge of its statutory powers, duties and functions, while that of its staff is one of research, information gathering, briefing, advice and recommendation."

Just to emphasise again that there wasn't in that case any question about some unlawful delegation of research, advice, et cetera, et cetera. It was, as I have said, all about decision-making.

MR SIMON HOLMES: You have referred in passing to the Hillingdon case, to which Mr Jowell took us earlier. Can I ask if one parks for a moment what can be, to use a neutral term, what can be left to the CMA staff or Chairman, what stops the CMA or the group, rather, signing off at the end of the process in the way that seems to have been done in the Hillingdon process, where action in that case had to be taken urgently, but the court recognised it had been properly authorised and confirmed at the end of the process? So what stops the group taking a final look and saying "Yes, I'm happy with that"?

MR JONES: I think understand the question, sir. In other words, could they have looked at it and said "we are happy with that". If that's the question, they could have done that.

MR SIMON HOLMES: My understanding is as a matter of fact, correct me if I am wrong, that was not done. My question is what stops the group doing that as a last minute check to say "Yes, this is my document"?

MR JONES: There is no great impediment. The short answer is it was not the process which they adopted and they had at the end of this long exercise. I will take you in a moment to the process which they did adopt. They were getting to the end of exercise and they were essentially done and were happy to leave things to the Chair in the final stages, and they therefore didn't think it was necessary for them all to look at it.

I don't think any member of the Panel would say after the number of hours they have put in, that had they had to spend a little bit more time reading it, they couldn't have done it. They didn't do it. The question is whether, as a matter of law, they were obliged to. That's where my answer is no, they weren't. It could be left to them.

That does feed into a related point, which is one can see a temptation in these sorts of cases to say: "Well, why not just run the decisions past everybody, the final version, and then avoid all of this pain which we are now in, having to spend a couple days before you?"

Sir, going forward, those behind me I am sure will take that away and think on it. That is a different question, though, to what as a matter of law was actually required. In this particular process, courts don't often look at what happens behind the screens when decisions are made, which in a way is a good thing, because it means that the decision makers aren't making decisions, cautious

decisions, just to insulate themselves from challenge. They are actually doing what they think is practical and sensible on the ground.

So one does need to be careful not to confuse those two things. What would be sensible to avoid us having to argue this out versus what were they actually entitled to do. I also reiterate the point I made earlier, which is in a sense paradoxically -- I am not suggesting any panel would ever do this -- but had the decision just been run past a panel at its final stage, and people had just signed off on it, without actually reading the changes that had been made, Mr Jowell I don't think would have an argument or anything he could say about that, because he has to pin his colours to the "they must sign it off" argument. There is a strict line about signing it off.

In my submission, that highlights a danger with the tick box approach. If, on these rare occasions, when the Tribunal is going to look at what the CMA did, if you just look at box ticking, that's really not enough. What you need to do is look at the nuts and bolts of what they were doing. I am going to show you that in a minute. As I say, they were very, very heavily involved. I hope that answers the question.

I will indeed go straight to the nuts and bolts, picking it up in Mr McIntosh's second statement, please, which is at tab 14 of bundle 1. If we could go, please, to page 450, you will see at paragraph 19 the heading "Preparation of the decision". The last sentence there describes:

"The contents of these documents", they are talking about earlier stage documents, "are reviewed and discussed extensively with the group and developed or modified to reflect the group's comments and conclusions."

So from the very early stages there is an intensive process of review.

The next paragraphs really describe that process in a bit more detail. Could I pick it

up at paragraph 26, where there's a discussion of the actual process of the drafting of the report:

"Whilst the core drafting of the decision was done by the case team, the group members directed and closely oversaw the drafting process and commented extensively on the draft text produced by the case team, particularly in respect of PS and the decision, while group members would typically refrain from suggesting stylistic changes which had no bearing on the substance, other than to enhance clarity, I and the other group members saw it as our responsibility to ensure that the published documents accurately reflected the group's views and the reasoning supporting those views."

In 28 you will see the first meeting was on 1st April. Between that date and the publication the group convened 27 formal group meetings, each one typically lasting three to four hours. So that is about a meeting per week over that period. You have seen that between meetings -- this is mentioned at the end of paragraph 29 -- the group were commenting on documents and so on.

What it doesn't mention, but you see in some of the evidence which has been disclosed, is members of the group were also attending site visits and hearings in addition to what is described here.

Over the page, paragraph 30, the process of drafting the final decision, because they already had a provisional decision, but that started on 7th October.

A couple of paragraphs down, 32, this is the start of the in principle approval meetings, which you are aware of from our previous hearing. So it was 16th November 2021, the group formally confirmed in principle approval for the first time. There were then various other meetings in principle approving other parts of the decision. That process is described in some detail.

Then, in terms of the final steps, could I pick it up at paragraph 40. You will see

Mr McIntosh has referred back to the delegation in paragraph 38. What he says at 40 is:

"At this stage of the investigation, the group had already reached ..."

I will pause there to invite the Tribunal to read -- it is probably more efficient -- paragraphs 40 to 43 to yourselves, please?

MR JUSTICE MARCUS SMITH: Yes, of course. (Pause.)

MR JONES: Mr Chairman, members of the Tribunal, you will know in response to this ground every member of the group has also put in their own witness statement in their own words. That's what's in the rest of this bundle, the further tabs of this bundle. They all essentially say the same thing. I am not going to take you through those, but they are obviously important and they show you why the group felt able to proceed in the way that it did.

Now, there are two further points of detail which I should sweep up concerning the process before I come in the confidential section to the particular amendments which are complained about.

Firstly, Mr Jowell has made several references to changes being made by the case team, perhaps without even being signed off by Mr McIntosh. I just want to be absolutely clear about that, because he has made a couple of references to it. I want to be absolutely clear about where we are on this.

It is, in short, a bit of a red herring. Mr McIntosh in this statement in paragraphs 67 and 73 refers to a couple of minor drafting changes, which were just for consistency, which because they were just for consistency, he left to the discretion of the case team.

Now he is explaining that is just for completeness in this witness statement. None of the examples, not the five which were given in response to your ruling and also not the 30-odd which have been relied on in Mr Jowell's table, none of

those were examples of this. All of those were approved by Mr McIntosh. So all of the ones you have been asked to look at were ones which were approved by Mr McIntosh.

MR JOWELL: Forgive me for interrupting. This is new evidence which we have not been provided with.

MR JUSTICE MARCUS SMITH: I rather inferred that because I asked you earlier who had made a particular change.

MR JOWELL: I don't make any point about that except that -- I mean, it is not -- what's said here is:

"I also suggested a few minor drafting changes which I left to the case team to determine the appropriateness of."

It doesn't say that they are of the nature that my learned friend has said necessarily, and so if this to be relied on as evidence, then it should be in a further witness statement, in our submission. Forgive me for interrupting.

MR JONES: I understand. Sir, can I respond? With respect, that confuses two slightly different points, which is whether they were signed off by Mr McIntosh, which is the point I just addressed, and who "made the change". I don't have any objection to putting in a short statement to confirm what I have just said, but could I on this point just be clear about what happened and what the process has been?

At the hearing before you, you will recall there was a discussion about how onerous it might be for the CMA to have to respond to a large number of questions regarding the final changes. the compromise which the Tribunal suggested and which the parties agreed with was that Meta would be able to identify five examples and the CMA then, in response to those five examples, would give a description of why the change was made, who made the change and

whether it was approved by Mr McIntosh.

There was actually in a correspondence a bit of pushback on this point about who made the change, because we at the CMA couldn't see what the relevance of it. We said they were all made by the case team, because the whole decision was drafted by the case team. There was pushback. "You've got to tell us who made it." Above a certain level of seniority we told them who it was but otherwise it was just the case team.

We answered those five. They were all signed off by Mr McIntosh and they were all made by the case team.

At the same time there was a letter which Meta had sent which said "In addition to these five can you answer the other 30-odd". We said "no". The Tribunal did not order that. As you will see, as I will come to later on to show you the examples which Mr Jowell has picked up on, it is actually quite an intensive process, working out why changes were made and why things were moved from one part of the decision to another and so on and so forth. We had so many other strands of work on that we refused to do that.

Meta, in its amended notice of appeal, essentially just threw in all of these other examples, refused to answer them in correspondence, but they said: "Never mind. We will put them all in the notice of appeal". That's basically what their table is that they have given. So even though we were resistant to engaging in that, they have managed to get them on the table.

Because of that we were obviously somewhat snookered, which was obviously their detention. we had to do something in the defence because there was this big table.

So we explained what I have just explained to you in the defence, that this seemed like a disproportionate possess and we have been resistant to do it.

Nonetheless, the group, when one reads the group's witness statement, many of the group members have given evidence on those additional changes, because they wanted to explain. So it was not set out in a sort of neat tabulated form, but we did what we could to respond to it.

Then, of course, in the run-up to today I have been doing what I can to get further information, because I was not sure which ones Mr Jowell was going to pick up on.

On the "who made the changes", he had an interest in which individual made the changes. I still can't answer that and I am not going to try to answer that. It was all case team. We said that before, because the case team did the drafting.

On the separate question, though, was any of this signed off by Mr McIntosh, I have taken instructions and they all were.

Mr Jowell, if that was the focus of his point, is probably right about that. That is something which I was told in the last few days and we can easily put in a witness statement just saying "all of this was approved by me".

MR JUSTICE MARCUS SMITH: I think Mr Jowell's point is a good one, and I think just so that we have certainty on the record, a statement that is directed to the material that Mr Jowell has put in in the tables -- from what you say it is going to be very short, because the point has already been considered.

MR JONES: Yes.

MR JUSTICE MARCUS SMITH: I think it would be helpful to do that. In a sense, when one digs into it, the point is actually quite an obvious one, because I am looking at paragraph 27 of McIntosh 2, and there he says what you have just said in submission, that the drafting was done by the case team.

Now, I imagine if you were required to say which member of the case team drafted

paragraph 306 of the report, you would not be able to do that. What you'd say is what you have just said about the later amendments. They were signed off in this case by the group who looked at the report, which is what is said in paragraph 26 as well.

MR JONES: Yes.

MR JUSTICE MARCUS SMITH: All you are saying is that that was the process that was carried through by these tail end amendments, except there was this delegation to Mr McIntosh, as evidenced in the document that Mr Jowell showed us this morning.

So I think confirmation of that position is helpful, but I don't think it makes a huge difference in terms of the argument that we have heard from Mr Jowell or indeed your response.

MR SIMON HOLMES: Could I just clarify one point? The points to which Mr Jowell took you, you are saying those were signed off by Mr McIntosh or by the group?

MR JONES: Mr Jowell's table, that is a table I think entirely of Mr McIntosh's sign-offs.

MR JUSTICE MARCUS SMITH: If that's wrong, it was the group --

MR JONES: There are so many tables going round. It is definitely a table signed off by Mr McIntosh.

MR JUSTICE MARCUS SMITH: I am sure that's right. The implication would be Mr Jowell's team had missed a trick if that was not right, and I am quite sure they will not have done that.

MR JONES: There is a second similar point, which is this. The complaints which Meta made in this process are principally complaints about changes to the text at the last minute, but in oral submissions yesterday Mr Jowell also made

a point about the judgments which had been made regarding the confidential treatment of information in the decision and what would be redacted from the published report. I think the suggestion was some of those judgments were made by the case team only.

I will be corrected if I am wrong. I don't think that's a pleaded point. So it is not a point we have addressed head on. I will be corrected if I am wrong.

MR JOWELL: It is very much a pleaded point, yes.

MR JONES: Very well. My understanding is that the basis in evidence then for that is a comment which is also made in Mr McIntosh's first statement at paragraph 126, where he said you will see in the middle of that paragraph:

"The case team has carried out a review of these versions over a number of weeks, which requires a painstaking analysis."

As far as we can tell, that seems to be the basis for saying that this is just done by the case team without the group looking at it. So this is a point you can make just by looking at the versions which are signed off by the group. They all have the confidentiality markings in them and then the final sign-offs, to the extent they went to Mr McIntosh, those final ones, also all had the confidentiality markings in it. So there is not I don't think a separate point about the case team doing any of that without Mr McIntosh's involvement.

MR JUSTICE MARCUS SMITH: So I think what you are saying is that we should be regarding the regime which applied to drafting changes as applying equally to changes to the confidentiality markings.

MR JONES: Yes, sir.

So, sir, in conclusion on this topic in this open session, my submission is that, looking at all of this evidence in the round, together with the examples of the changes that I will come to in the closed session, you can be confident that

the group discharged its statutory obligations. These were the group's decisions. It is the group's report containing its reasons and the information which it thought was appropriate to include.

Sir, I've very short point on remedy. The only reason I am going to make it is to ensure that we are on exactly the same territory in terms of where we draw stumps, as you put it yesterday, sir.

It might be helpful just to look at my skeleton argument, please. It is in bundle 10, tab 168. If we could go, please, to page 5475. I don't think there is any dispute over this, but it is just for clarity. You will see there the heading "A note on remedy", and there are a few paragraphs addressing a particular point which Mr Jowell had raised in his pleadings, in his skeleton, which is a point which really ties particularly to grounds 4 and 4A. It is an argument about whether, if there's been a procedural failing, there is a decision at all. I am not sure if that's the words Mr Jowell uses, but in essence I think that's the point, whether there is a decision or what he calls a purported decision, if there is a decision, whether it is null and void. That bleeds into questions about whether you could remit a null and void decision and so on and so forth.

My understanding is all of this has been held over to a later date. I am only showing it to you because it is, I accept, somewhat peculiar when one looks at it that these grounds have been singled out for comments on remedy in the skeleton and nothing else has. The reason for that is that this unusual point had been raised on these grounds, so we addressed it on the skeleton. It was really preparing for the hearing it occurred to us that it is a bit odd to be addressing on remedy for a couple of grounds and not the others.

So those ones are off the table until any later date that may be necessary.

Sir, unless I can assist on any questions in this open session, now might be a good

moment to break and return in closed.

MR JUSTICE MARCUS SMITH: Thank you, Mr Jones. Just to pick up on the drawing stumps point that you have just mentioned, it is obviously a slightly messy line that we have agreed to draw, and to be clear we will draw it. Quite where it is drawn exactly is likely to depend upon how we address the various matters that are before us at this hearing in the draft judgment. My sense about this particular point, whether it's a decision or not, is that we probably are going to get drawn into deciding it, because it's very closely linked to the construction of the various provisions that we have been taken to and that we are going to have to decide in order to understand the delegation and the other points that arise here.

Obviously we will be circulating a draft of our reserve judgment before it is published. If we go too far in any point addressing remediation, then we would want both parties to come back and tell us, because we absolutely do not want to decide points on which either side has not received full argument. So if we overstep the mark, then you will tell us and we will retract matters as appropriate, but I do think that it's probably appropriate to put on the record a sort of warning note that this isn't an absolutely bright line that any of us have completely understood. There are so many permutations that frankly I think one can't do it. We know what we are not doing and what we are doing in rough terms, but I can anticipate that there may be an issue going forward, but the touchstone I think will be not whether we've drawn the line absolutely right in our judgment, but whether either side feels that they have not had a fair shake of the dice on a point that will be important to them.

So that's just to clarify how I see it, because I wouldn't want there to be an issue on circulation of the draft where someone says "look, you promised not to do this

and you have". If we do that, then it will be unintentional and because of the messy nature of the line that we are quite rightly I think trying to draw.

MR JONES: Sir, that is very helpful. Just a couple of quick comments, if I may. One is this is one area where there may be a grey line. Those comments I think were particularly apt here. The other obvious area is ground 5, which we will be coming on to tomorrow and we might need to address you on a couple of points related to that. Mr Jowell and I have also had a couple of conversations about where the line might be drawn.

Could I, at the risk of stating the absolute obvious, just say that for my own part when thinking thought that issue, I found it quite helpful to say that what is being decided in these proceedings is whether there is a legal error in the decision, and anything which goes to that question is encompassed and anything which goes beyond that is left over. I did warn you, sir, I was going to make a very obvious point but I have found it helpful as a way of thinking through some of the more tricky areas.

MR JUSTICE MARCUS SMITH: I think that is helpful as a broad guide. My thinking has been ground 6 we almost certainly won't touch. There may be other areas, like ground 5, which also affect the self-imposed limitation that we have got. But I think we all know where we are at. It's just the penumbral issues here are more broad than in other cases, and what I absolutely want is just to ensure that that uncertainty is registered so that neither side is feeling prejudiced if we overstep the mark in the draft, because we will positively be inviting pushback on that. I mean, it would be -- I don't know the usual drafting suggestions that one gets in a draft judgment, but we would want those points to be made and we would deal with them in the final draft, and if we needed to hear further submissions, then we would do that, but we'll cross that bridge

when we come to it.

MR JONES: Sir, that's very helpful. I am sorry to have to end before the break on this particular note, but I feel I should say I will discuss with Mr Jowell, but I think he and I might have a different view, sir, to your view on ground 6. That may be a point we will address you on tomorrow, but just to warn you of that. I think we have rather taken a different view on that. Before saying anything more to you, I will speak to Mr Jowell and then we can have a discussion.

MR JUSTICE MARCUS SMITH: That's fine. At the end of the day, we are going to be deciding these issues. In the end it is a question of what is possible to decide fairly now, and if I can provide my own guidance in response to your bright line, we want to decide as much as we can, provided we can do so fairly, which means having heard full submissions from both sides.

Now, if that helps on the ground 6 point I don't know.

MR JONES: I am grateful.

MR JOWELL: I can give my reaction now, if that would assist.

MR JUSTICE MARCUS SMITH: Yes, indeed.

MR JOWELL: Ground 6 can certainly be dealt with, in our submission, on this occasion, but it would be, of course, in a sense on a hypothetical basis. So it would be on the basis that we are wrong about everything else on grounds 1 to 5. So we are very much in the Tribunal's hands. You can hear argument on it or we could stand it over to a further occasion, on the basis that if we're right about everything, or sufficiently, then it doesn't arise. If we are wrong about everything, then it does arise, but it can be heard on that subsequent occasion. So it is very much a case management decision really for the Tribunal, but we think it can be heard, albeit on that basis, but ...

MR JUSTICE MARCUS SMITH: That's very helpful. We will have a further look at

ground 6, but my instinctive reaction, putting it as a case management point, is that we probably have enough on our plate without dealing with ground 6, but again the messiness of the line we are drawing makes things more difficult. I wouldn't want you not to say something which is referable to ground 6, but which might be helpful on antecedent points as well. So I think we are going to have to rely on your judgment as to what needs to be said, but you can take it that we are not going to invite submissions on specifics as regards remediation. We will to the extent we think we have heard full argument try to set out some guidance to inform the remediation hearing going forward. So if there are points of general principle that we can articulate, then, provided we have done so after proper argument, we will do that, but we will know when we are writing whether we heard submissions on a point or not, and, as I say, the safety valve will be, if we go too far, that the parties will tell us and we will retract, because we can quite easily do that, because we are all trained in withdrawing a point and deciding it afresh on new evidence.

So it's slightly unsatisfactorily vague, but I hope both of you are sufficiently happy that we all know roughly where we're going, and that the end point can be managed appropriately when we get there.

MR JONES: Yes, I am grateful.

MR JUSTICE MARCUS SMITH: So we now go into private session.

MR JONES: Private session, yes.

MR JUSTICE MARCUS SMITH: Very good. I am sorry again to those who are not within the ring, but I am going to have to ask you to leave, and if we could switch off the live stream, that would be very helpful.

MR JONES: Sir, it has also been suggested to me it might be a convenient moment for a shorthand writers' break.

MR JUSTICE MARCUS SMITH: In that case we can combine the two. We will rise until 2.45 and we can resume then. Thank you very much, Mr Jones.

(Short break)

(Hearing concluded in private session)