IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1024/4/1/03

Royal Courts of Justice

Friday, 28th November 2003

B e f o r e:

SIR CHRISTOPHER BELLAMY
(The President)
MR PETER CLAYTON
MR ADAM SCOTT, TD

BETWEEN:

IBA HEALTH LTD — Applicant

&

THE OFFICE OF FAIR TRADING — Respondent

&

(1) iSOFT GROUP LTD
(2) TOREX PLC — Interveners

Mr Nicholas Green QC and Mr Aidan Robertson (instructed by Macfarlanes) appeared on behalf of the Applicant

Mr Jonathan Crow and Mr Daniel Beard (instructed by Treasury Solicitors) appeared on behalf of the Respondent

Mr David Anderson QC and Miss Kelyn Bacon (instructed by Ashurst Morris Crisp) appeared on behalf of iSoft

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T R A N S C R I P T O F P R O C E E D I N G S

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(At 10.30 a.m.)

THE PRESIDENT: The Tribunal is grateful to the parties for their cooperation in enabling this case to be brought on so quickly. We have done our best to read everything, but please forgive us if we need reminding as to where particular points are to be found. Yes, Mr Green.

MR GREEN: President, Mr Clayton, Mr Scott, good morning. I appear today for IBA with Mr Robertson. For the Office of Fair Trading, Mr Jonathan Crow and Mr Daniel Beard appear, and for iSoft, the Interveners, Mr David Anderson and Miss Kelyn Bacon. Torex, the other Intervener, is not represented by counsel today.

I would propose to divide my submissions this morning into two quite discrete sections. I wish first to address general considerations which we would submit should guide your approach to judicial review in cases of this sort. I do not propose to go in any detail into the case law. We have set our position out in writing but I will make some general observations about the case law. Given time constraints, I want to concentrate on analysis of the decision today, so the preponderant part of my submissions is really going to concentrate on the merits rather than the procedure.

The second part of my submission will focus upon the particular reasons why we submit the OFT decision is thoroughly and fatally flawed by a series of material errors.

Can I start by addressing what I loosely call the procedural issues, considerations affecting the scope of the Tribunal's task in this the first case in relation to the merger under the Enterprise Act. There are four points I wish to address: the first is the scope of the Respondent's discretion under the Act, in particular under section 33; the second issue concerns the nature of the Tribunal as a specialist adjudicator overseeing the Respondent's decision; the third issue concerns the proper analysis of the decision, whether as an issue of law or fact or jurisdiction; and the fourth issue concerns

parallels with EC law.

If I may, I would like to start, therefore, by considering the scope of the OFT's discretion. You will have seen from the Respondent's and the Interveners' submissions that they do and will urge upon you to adopt an approach whereby the OFT's discretion is largely untrammelled. They will remind you that the OFT engages in complex economic analysis; they will remind you that you are engaged only in a judicial review and, in particular, you will be reminded of old cases of judicial review about the Competition Commission under the Fair Trading Act. You will be reminded that the OFT is entitled to express a view based upon its belief under section 33, to use the statutory language, and it will be suggested that the OFT has a broad discretion which you should only exceptionally, if ever, interfere with.

As to this, there will be a certain element of common ground between us. Plainly, this is a judicial review, it is not a merits appeal such as exists under the Competition Act. It is also true to say that the OFT does have a margin of assessment, a margin of appreciation, and it is plainly true to say that in arriving at any decision the OFT will engage in an economic assessment. All of these things are true. They do not, however, indicate that the role of the Tribunal is nugatory, or that the Tribunal should not scrutinise very closely the logic and the evidential underpinning of this decision.

The thrust of a great deal of the Respondent's and the Interveners' analysis is that you should apply a legal test which involves so much self-denial that no decision will ever be overturned.

By way of introduction I would like to set out what we say the correct legal context to this judicial review is. What I do not propose to do in any detail is address different types of decision to that with which you are concerned today, and of course there are many types of decision which could theoretically come to the Tribunal in relation to a merger, and certainly nothing that we submit

this morning can be taken to suggest that the principles you may apply in this case will automatically apply to other types of decision.

There are a whole range of decisions which might come in front of the Tribunal over the ensuing years. We have here a decision not to refer, but there is of course a decision to refer to the Competition Commission and I will dwell for a moment on that in a moment because that is the counterfactual to this case, it is what we say should have happened. But you could also have in front of you a decision of the OFT that a merger results in SLC, but under section 33(2)(a) the market is just simply not one of significance. Or you could have a decision that a merger results in SLC but it is within section 33(2)(c), in other words consumer benefits outweigh the SLC and any consequential adverse effects.

Our submissions today will focus only on one type of decision which is a decision not to refer. This is a threshold decision. We do not submit that the principles you apply to this type of decision necessarily translate to other types of decision.

None of the submissions we will make today undermine the conclusion that the OFT does have a margin of appreciation. It would follow, and we would submit that this is correct, that if you disagree with the conclusion reached by the OFT but you can find no error of law or fact or which would otherwise sound in judicial review, then this application necessarily fails.

In such a case, the OFT would be within its margin of appreciation and the decision would be unreviewable.

But we also submit that in every case of a judicial review, whether in relation to mergers, housing, local authority funding or whatever, the nature and the scope of the judicial review depends critically upon its context. That is why the specific nature of this decision is an important factor in deciding what role you should play in reviewing it.

As to this, a decision by the Office of Fair Trading

to refer, which we say is the relevant counterfactual, is not a definitive or determinative decision. It is neither a decision that the merger is good or bad. It is simply a decision that the merger warrants further investigation and that prima facie there is SLC. In coming to such a conclusion, the Office of Fair Trading acknowledges that there are limits to its investigative role and that there are issues which are relevant to the assessment which the Competition Commission needs to look into.

In all probability -- and I say this tentatively because this is not the case before you -- if such a decision were challenged, that is a decision to refer, an Applicant would face an uphill struggle. This is because the impugned decision implies no assessment of a definitive nature of the merits of the merger.

By way of contrast, the decision that a merger does not create SLC is a merits decision with immediate and permanent legal consequences; they are that the merger can proceed forthwith, they are that the Competition Commission lacks jurisdiction to hear the case. The consequences include that the OFT cannot seek undertakings. It is a definitive and determinative decision on the merits and it is clearly different in its essential nature to a decision to refer.

We submit that that difference is reflected in the nature of the judicial review and the obvious difference, we would suggest, is in relation to the intensity of the review. The intensity of review will be greater in a non-reference case than in a reference case. There are perhaps exceptions to that. It may be the case that it is provable as a simple question of fact that the mechanical qualification for making a reference does not exist, turnover for example. There could be very simple errors and it may be demonstrable, in which case that may be different, but save for that sort of exceptional case, we submit that there is a big difference between a decision not to refer and a decision to refer.

The decision we think can be categorised in this way:

the case before the Tribunal today is a choice between white and grey - it is not a choice between white and black. It is helpful to put it in those terms because it highlights the fact that it is not a choice between good and bad, which is for the Competition Commission ultimately to decide, it is a choice between unequivocally good and possibly bad.

The OFT itself recognises and acknowledges this distinction in its own guidelines and I would ask you to look at paragraph 3.2 which is tab three of the authorities. This is tab three of the authorities, paragraph 3.2 of the OFT's substantive assessment guidance. It is on page 14 of the document itself.

THE PRESIDENT: That is in our red file.

MR GREEN: In the red file, yes. It is the Applicant's authorities.

THE PRESIDENT: Fourteen, did you say?

MR GREEN: It is page 14 of the internal numbering. In this the OFT say as follows: "The test for reference will be met if the OFT has a reasonably held belief that on the basis of evidence available to there is at least a significant prospect that a merger may be expected to lessen competition substantially. The OFT considers that this threshold is the same as that against which FTA reference advices were prepared. It differs from that used by the CC in its merger inquiries reflecting the fact that the OFT is a first phase screen while the CC is determinative. Hence the test for making a merger reference is lower than the CC's test for deciding that a merger may be expected to substantially lessen competition."

So the OFT recognises that under the Act, its role is as a first phase screen. It also recognises that its test for whether there is SLC is lower than that of the CC's; in other words, it is more likely to find a substantial lessening of competition than is the Competition Commission in relative terms.

We submit the OFT's view on this is correct in

determining the balance between itself and the Competition Commission. There is in this sense therefore a bias in favour of a finding of SLC when compared with the Competition Commission's propensity to make such a finding. In other words, we would submit that the OFT's assessment is based upon more of a precautionary analysis than is that of the CC. We would submit that is correct and proper and does reflect the balance which the statutory language draws between the OFT's powers and those of the Competition Commission.

We would suggest that is reflected in section 33 of the Act. I wonder if I could ask you to look at that, please.

THE PRESIDENT: Yes.

MR GREEN: Section 33 creates a relatively low statutory threshold before the duty to refer arises. The OFT is under a statutory duty to refer, it is not a discretion, if (a) it believes that (b) it is or may be the case that (c) the merger may result in substantial lessening of competition.

Two points can be made about that. First as to the word "belief". A belief we would suggest is not a definitive decision, the OFT does not have to conclude or find that there is SLC, the threshold is lower. It simply has to belief on the basis of a reasonable belief that there is SLC. We say that lowers the threshold.

Secondly, there is the double use of the "may".

THE PRESIDENT: Yes.

MR GREEN: "It may be the case that a merger may result in SLC", not "will".

THE PRESIDENT: "May be expected to result."

MR GREEN: "May be expected to result." In particular, "It may be the case that the situation may be expected to result." Again, that emphasises that we are not dealing with a high threshold but a precautionary threshold.

So the first contextual point therefore that we make is that the decision that we challenge is one which is a choice between white and grey not black and white which is

a decision which should have been taken upon a precautionary basis. We also point out that of all the decisions which the OFT could take, this decision has the hardest edges to it.

THE PRESIDENT: Mr Green, what is the legal position under section 33(1) if the OFT accepts that there is room for two views, but the OFT's own view is that the merger may not be expected to result in a substantial lessening of competition? Does that bring you within the "may"?

MR GREEN: I think one has to draw a distinction between the context to the decision.

THE PRESIDENT: The first "may" I mean.

MR GREEN: Yes. What section 33(1) is seeking to make clear is the threshold which has to be overcome in order to make a reference is a low one. Plainly that gives you some guidance as to where its margin of discretion arises below that threshold, but section 33(1) is directed to making clear that for the OFT's duty to refer to be triggered, it does not have to have any definitive views of its own. It is a lowering of the threshold, not a raising of the threshold.

If it reasonably believes that there might be a situation which might result in an SLC, then it is bound to refer. If it does not get to -----

THE PRESIDENT: You read "may" as meaning "might"?

MR GREEN: Yes. It may be the case, it might be the case.

THE PRESIDENT: Yes.

MR GREEN: That is consistent with the relationship which one would expect to see between the OFT and the CC. It is quite clear that the OFT is not the primary fact-finder. It is, as it acknowledges itself, a first phase screen. The thrust and policy behind the Act is to ensure that mergers which are marginal, or in respect of which there may be two views, are referred.

So the decision before you is a choice of -----

THE PRESIDENT: Are you submitting that the OFT's duty is to ascertain whether it is reasonably arguably the case that the situation may be expected to result in a substantial

lessening of competition, in which case that is enough to trigger a reference without the OFT having to go on and form a view as to whether in fact it is the case?

MR GREEN: Yes, indeed. Yes, we say that is consistent with both the language -----

THE PRESIDENT: What do you say they actually did in this case? If you take the decision, you read the decision, what is the legal test that was applied in this case so far as we can -----

MR GREEN: One has to say that it simply is not set out. If you stand back from the decision, our reading of it is as follows: prima facie -- and I emphasise prima facie -- this merger gave rise to SLC because the market shares were very high, circa 50 per cent, and there are very high barriers to entry.

THE PRESIDENT: Yes.

MR GREEN: I emphasise this is a prima facie conclusion, but if it were the OFT's view that that did not give rise to SLC, we would say that is an error of law. It was a wrong inference to draw from facts which they have found. We understand the decision to be that that prima facie does give rise to SLC, but what negates the SLC is the countervailing buying power.

So we say the starting point is a finding implicit in the decision, though nowhere expressed, that there was SLC and had it not been for their analysis of the countervailing buying power arising from the NP FIT, from the National Programme, that they would have made a reference.

THE PRESIDENT: Yes.

MR GREEN: Our submission is that having made a prima facie finding of SLC that they should have referred there and then, but we also say, because this is the reality of the decision, that the analysis of buyer power is utterly defective, riddled with judicially reviewable errors.

THE PRESIDENT: Yes.

MR GREEN: Can I come back to a point I do wish to make about the difference between black and white and white and grey?

I think it is an important point and it helps understand why we say this case may be different to other merger cases which come in front of the Tribunal in due course. An error on the part of the OFT in a case such as the present, we would suggest, is inherently more likely to be material and to switch the analysis from white to grey. That is for the simple reason that the distance you travel from white to grey is far less than the distance you travel from white to black. Those are the two relevant counterfactuals, is this unequivocally good as a merger?

THE PRESIDENT: I see, yes.

MR GREEN: Or is it possibly bad? If it is possibly bad, they must refer because they are not taking a decision that it is unequivocally bad.

THE PRESIDENT: It is probably a bit stronger than "possibly", is it not? "The prospect" is the phrase that is used in the guideline.

MR GREEN: The statute says it may be the case.

THE PRESIDENT: "May".

MR GREEN: That it may be expected to result.

THE PRESIDENT: One can think of various ways of expressing "may". We might have to think what the level is at some point. Is it arguably the case? Is it real risk? Is it serious doubt? Is it significant possibility? What is it? Maybe it does not help to try to express it and just look at the statute.

MR GREEN: You see, one may find that the answer in a particular case, and I am speaking hypothetically, is that the OFT come to a result that a merger is borderline, there is a factual matter which may be determinative but they simply either do not have the time or the wherewithal to investigate it to the bottom line.

THE PRESIDENT: Yes.

MR GREEN: And therefore they say it really is for the CC because they are the inquisitorial body.

THE PRESIDENT: Yes.

MR GREEN: It may have been that had they had another six months they would have simply said there is nothing wrong

with this merger at all, but the reason they have referred is simply a limit to their procedural ability.

THE PRESIDENT: Yes.

MR GREEN: Trying to put it into semantic language may, in the fullness of time, appear to be not a helpful exercise because every case will turn on its own facts.

THE PRESIDENT: Yes.

MR GREEN: We would also suggest that the distance between white and grey is shortened by reference to the statutory structure which creates a precautionary approach to fact-finding. That is the first general consideration which I wish to bring to your attention about the scope of judicial review.

The second is a shorter point and it concerns your role as a specialist body. The Administrative Court possessed the jurisdiction up until now, but Parliament has expressly recognised that the quality of the review process will improve by entrusting reviews to a specialist body which combines competition law expertise, accountancy, economic and business experience. The Court of Appeal in the Napp case which we have referred to in the skeleton, and I do not propose to take you to it -----

THE PRESIDENT: No, we have the reference.

MR GREEN: You have got the reference but a point which was made by Buxton LJ in that judgment was that the Tribunal was required, "to make judgments in an area where judges have no expertise", and I am quoting just two lines. That is an important point, that your expertise is something which the High Court generally does not have.

Whilst plainly you have limits because you are engaging in a judicial review, it is our submission that Parliament has given you this role because Parliament expects you to do things which judges ordinarily cannot do. That does mean examine a case with a finer and more sophisticated eye. What may be perfectly innocuous to a High Court Judge in relation to factual assessment or appraisal may be an error in this Tribunal.

The third general point I wish to make is that on a

true construction of the Act, the decision of the OFT in this case was both a legal conclusion and a jurisdictional one. It is a legal conclusion because the Office of Fair Trading's powers and obligations are triggered by the decision it arrives at on the facts, either not to refer, to refer, to seek undertakings and so on, and it is jurisdictional because it governs the jurisdiction of the Competition Commission to look at the merger at all.

Errors in the OFT's assessment in this case are properly to be described in substantial part as errors of law and jurisdiction. Again, that might not always be the case in relation to every decision that comes in front of you in relation to a merger. For example, if the decision were that the merger had SLC but the OFT had negotiated adequate undertakings, then the decision in front of you might be focusing upon the OFT's assessment of the adequacy of an undertaking to address potential adverse effects.

THE PRESIDENT: What is the significance of the jurisdiction point, according to you?

MR GREEN: It colours the grounds of review. An issue, it might not turn out to be an issue, but one of the issues on the skeletons is whether one categorises errors which we have identified as errors of fact or law or jurisdiction. There is, in ordinary judicial review terms, a considerable body of case law addressing the extent to which errors of fact sound in judicial review. The more that errors of fact can properly be analysed as errors of law or jurisdiction, the more reviewable they become and the context helps one decide whether something is fact, pure fact, fact in law, fact in jurisdiction and so on.

Now, the fourth general consideration and the last before I turn to the substantive merits concerns parallels with European Community law. We do not suggest that you are bound by European law, but we do suggest that it is perfectly proper for you to take European law considerations in mind and we would actually go one step further and suggest that in the light of the modernisation

regulation after May of next year, it would be inconsistent with the spirit and intent of the regime which is sought to be brought into effect if you were completely to ignore European law.

So we would submit that it is relevant, admissible as guidance but it plainly does not bind you. Now, so far as EC law is concerned, again we have set out our position in our skeleton and I will not go over it again, but the approach of the CFI in the Tetra Lavalle case we say is apposite and helpful. What the Tribunal is going to be concerned with in this case is the sort of judicial review that the High Court has very rarely had to be engaged in. Mergers, of necessity, involve speculation as to the operation of a future market and that is not a scenario that, in traditional judicial review terms, the Administrative Court regularly has to grapple with.

The analysis of the court of first instance in Tetra Lavalle in a merger case requires, in that case the European Commission, if it is speculating as to future events which then determine whether it is a aye or a nay to a merger, it requires a high degree of cogency in the thinking.

The CFI's ruling is largely one of common sense. If one is saying that as a result of the merger the combined entity will behave in a particular way in the future, then one has got to say that you cannot just assert that or speculate that it might be the case; you have to set out the relevant facts which would lead to that conclusion and you have got to justify them.

We say that that is a pertinent in the present case because it was, on the analysis of this decision, the OFT's prognosis as to how the market will operate, which has led to the decision not to refer. One starts with the proposition that this merger creates approximately 50 per cent market share for the merged entity in a market with high barriers to entry and little scope for potential competition, those are the decided facts in the decision.

One then says we predict that the National Programme,

and this is a prediction, in the future will negate the market power of the merged entity. So the essence of this decision turns upon a prediction as to the operation of the NP in the future. That is similar to Tetra Lavalle where the Commission said the merged entity may abuse a dominant position in the future and therefore, because of that prediction, we are going to prohibit the merger. The Court said, if you are going to engage in that predictive analysis, which is perfectly fair enough, you have to do it, there has to be cogent evidential underpinning for each of the steps in the analysis.

We have also cited in the skeleton the CFI's ruling in Langonese Shola, the ice cream case. We have set out the relevant paragraphs where the Court itself appears to draw a distinction between judicial review of different types of Commission decision. It draws a distinction between judicial review when you are dealing with a hard-edged decision, such as is there a restriction of competition at all? In such a case the CFI has indicated that the review appears to be more intense than in a case when you are looking at judicial review of an exemption.

We would simply suggest that these are relevant parallels, that Tetra Lavalle is apposite because it is dealing with the approach of a court to a decision which is predictive in nature. Of course it is clearly correct to say that in that case the Commission had prohibited a merger and, in this case, it has been cleared. But what we say is relevant is the overall approach of the Court which is to require from the decision-maker, as it were, a logic tree. You have got to set out the factual steps and the investigative steps which get you from A through to Z.

THE PRESIDENT: Mr Green, what I have written down is the following: that prediction must be sufficiently factually based and reasoned for it to be one on which the OFT could reasonably have based a decision not to refer.

MR GREEN: If one equates "reasonably" with "may".

THE PRESIDENT: All right, square brackets around "reasonably". Yes, on you go.

MR GREEN: Yes. I would like to turn from those considerations to what we say are the material errors in the decision. By way of introduction to what is really the second part of my submission and really the main part of my submissions is to remind you that we are in a judicial review engaged in an analysis of a decision.

You will recollect that Macfarlanes sent a letter to the OFT on 17th November, perhaps it is suffice just to give you the reference, Volume 1, tab four, page 44 in which Macfarlanes asked a series of questions of the OFT in relation to the decision so that they could advise the client in relation to a possible appeal. The answer which came back from the OFT was not to answer any of the questions, though most of them were framed on the basis that the issues were public domain matters, but the OFT was quite emphatic that the decision says it all and is sufficiently detailed. I would ask you to look at the OFT response on page 46, tab four, Volume 1.

THE PRESIDENT: Volume 1, tab four.

MR GREEN: It is annexed to the application itself.

THE PRESIDENT: Yes.

MR GREEN: The letter from Macfarlanes is in the preceding pages and perhaps you would just glance at it to see that it is a covering letter plus two pages of questions. The answer is in unequivocal terms, in the second paragraph it says, "In respect of your request for information we do not propose to address individually the 22 questions you have raised with us. The reasons for the OFT's decision to clear iSoft's proposed acquisition of Torex have been set out in detail in the decision published on 14th November 2003 and we do not consider it necessary to elaborate on them."

THE PRESIDENT: Yes.

MR GREEN: Now, we have taken that at face value, we prepared the application upon that basis, without having the benefit of answers to those questions. Plainly this Tribunal does not have the answer to those questions. We do not know whether the OFT has long answers, short

answers or no answers to those questions. We do not have their internal assessment notes nor their analyses; the Tribunal does not have them, the Applicant does not have them, we cannot make submissions to you about them, nor perhaps in the course of such an expedited procedure would we be able to do otherwise.

At the end of the day, the OFT is content to stand by the decision and have it subjected to enquiry and that is the way we have proceeded. It is important because you will have seen the flurry of witness statements produced by iSoft and Torex yesterday and, indeed, by the OFT. A great deal of this is blatantly tendentious and self-serving.

You plainly cannot decide some of the issues which arise on the face of the witness statements. For example, it is certainly our case that Torex's witness statement is an attempt to mitigate what is going to be a claim for damages. It is getting its retaliation in first, but that is not a matter for this Tribunal.

There are also allegations that the IBA product is inadequate; maybe it is, but that is not for you, though it may be worth noting that at six a.m. this morning, IBA signed a contract with fifty hospitals in Australia for a clinical suite of software which covers more or less the same technology that is in issue in this case. That announcement will be made on the Australian Stock Exchange very shortly but it was signed at six a.m. this morning which is Friday evening, Australian time.

That, again, is not something which you can decide. What you will see from the witness statements is a range of issues which you can rely upon to get a feel for the complexity of the issues in the case. Without having to decide on the merits or demerits of any particular point, the witness statements do highlight the complexity of some of the issues and you may use that as a benchmark to measure the decision.

THE PRESIDENT: Yes.

MR GREEN: The errors that we say flow out of this decision

can be grouped under five headings. If I could summarise them first and then deal with them one by one, the first heading is errors in relation to the relevance of legacy contracts; the second is errors in relation to buyer power; the third is errors concerning the analysis of what we describe as non-NP opportunities and competition, that is opportunities and competition outside the scope of the National Programme; the fourth is errors in relation to the position of Torex; and the fifth is errors in relation to the position of IBA.

The first of these is with regard to legacy.

THE PRESIDENT: Mr Green, just before we leave section 33(1), we are moving away from section 33(1), subsection (1)(b) refers to substantial lessening of competition within any market or markets.

MR GREEN: Yes.

THE PRESIDENT: In the United Kingdom.

MR GREEN: Yes.

THE PRESIDENT: At some stage we would like to explore with you and other parties to what extent the definition of "the market or markets" there is an essential element of the appraisal under the decision to refer or otherwise given that that is specifically the statutory framework within which this decision is supposed to be taken.

MR GREEN: Yes. We would suggest that there are two relevances to those words. First of all, the OFT has a duty to consider the relevant product market or markets in which the merged entity will operate, and it also has an obligation to consider the impact of the merger in markets plural whether or not the merged entity is presently in that market.

THE PRESIDENT: Yes. Mr Scott has a question.

MR GREEN: Yes.

MR SCOTT: It seems that there may be two levels of speculation in relation to belief and expectation. The first level of belief or expectation has to do with what the market has viewed from a demand-side perspective, and the second has to do with the market as viewed from a

supplier-side.

In reaching the belief of expectations, one might have expected the Office of Fair Trading to address both of those, and to recognise in relation to the double "may" that they were doing both of those in a relatively speculative way because the National Programme sets out some details of Government's expectations against which the Office of Fair Trading was going to have to make judgments about what was going to happen, both in terms of realistic demand and in terms of realistic supply.

MR GREEN: Yes.

MR SCOTT: You may come back to that later on.

MR GREEN: Yes. At this stage what I would like to say is this: I entirely agree that the analysis must consider both demand-side and supply-side. Traditionally that involves considering not two but three issues. Demand-side is traditionally part of the focus of delineating your product market, but supply-side always has two considerations to it: first, product market but, second, potential competition.

MR SCOTT: Yes.

MR GREEN: I think and I would have to check paragraph 13 of the Commission's notice on relevant markets identifies these three different considerations but says that even if supply-side constraints are not such as to define the product market, it is always relevant to look at supply side to consider who might come into the market and exercise a constraint in that way.

So we would suggest there are three relevances to demand-side and supply-side. We would submit also that it is correct to say that the OFT must address their mind to those three issues with a view to whether it is speculating, but speculating on we would say a Tetra Lavalle type basis, as to the impact of the merger in all of those three respects.

MR SCOTT: Just staying with the demand-side, the demand-side is in itself tiered and the National Programme tends to focus at the upper levels of that tiering and not at the

lower levels at which subcontracting is likely to occur, in which a secondary market may be of significance.

MR GREEN: Absolutely, yes. There is a lot of confusion in the decision as to who is the actual buyer. Our understanding of the way the National Programme will operate is that the NHS Trusts ultimately will do the buying, they will be provided with a catalogue of product by the LSP and it will be for them to make their buying decisions.

Some of the literature we have seen suggests that there will be some form of novation of contracts down the line from LSPs to buyers. We do not know what is in those contracts, what obligations NHS Trusts will acquire, what responsibilities they will have to buy, when they will be required to buy, whether they will be required to buy. That is uncertain because obviously no one knows what is in the contracts, they are not even signed in many instances.

The decision seems to be confused as to where the buying decision is going to take place, but that does highlight the fact you have got to look at the different levels of the market to identify where the pressures on the merged entity will be. So I would agree with your suggestion, yes.

THE PRESIDENT: Speaking for myself, Mr Green, I am not entirely clear as to how this is going to operate and in particular the role of what is described as "the preferred subcontractor". Are the Trusts to be obliged to obtain services from the preferred subcontractor, or have they got some room for manoeuvre and, if so, what? Exactly how does it work? It is something I am a bit hazy on and no doubt other parties will help me as we go along.

MR GREEN: There is nothing in the specification which indicates the answer to that. You may have seen in some of the Press that there is uncertainty about the extent to which the NHS Trust will be required to pay for implementation. There is uncertainty as to whether they will be required to pay anything and, if so, for what, and it is, so far as we can gather, uncertain as to whether

they will be able to buy from suppliers other than the LSP selected supplier.

We would suggest that these are matters which, simply by raising them, indicate that in a programme which is so inchoate at the moment, it is really in its infancy, it required a great deal of further investigation. I will come to that in due course.

THE PRESIDENT: If we just stick with the market point that we have just been on, reliance seems to be placed on what has been numbered as paragraph 13 in the decision, where there is a reference to something called "the appropriate frame of reference" in this case.

MR GREEN: Yes.

THE PRESIDENT: It appears to be "the supply of software systems to the relevant hospital users" which is actually the sentence under the heading "Geographic Market" but leave that aside for the moment.

MR GREEN: Yes.

THE PRESIDENT: "The supply of software systems to the relevant hospital users" appears to be a rather wide market.

MR GREEN: Yes.

THE PRESIDENT: So the decision itself, just earlier on, what is numbered paragraph 11 suggests that actually the markets are discrete markets for particular products and services performing for particular applications. It is not actually said, but my admittedly imperfect understanding is that you need a different application for a maternity unit than you would do for an outpatients department or you would do for a path. lab.

MR GREEN: Yes.

THE PRESIDENT: We have therefore seen that there are a series of discrete sectors which, for all I know, also perhaps spill over into GPs, relationships between GPs and the hospitals.

MR GREEN: Yes.

THE PRESIDENT: Where in your submission do we find the market or markets in the decision which section 33(1)(b) is directing our attention?

MR GREEN: We have identified ten different formulations of the product market in the decision. We have listed them in paragraph 42 of our application with the relevant paragraph numbers.

THE PRESIDENT: Yes.

MR GREEN: Let me just list them.

THE PRESIDENT: That is all right. I have got the note, paragraph 42.

MR GREEN: Paragraph 42, page nine of the Notice of Application.

THE PRESIDENT: Yes.

MR GREEN: Those are the ten formulations in the decision, some of them are pretty much identical but we have identified five, six, seven possible differences between them.

THE PRESIDENT: Yes. I am sorry, you were going to go back to your five heads.

MR GREEN: Yes and I was going to start with legacy.

THE PRESIDENT: Yes.

MR GREEN: At the outset, let me take the point very shortly that the OFT's decision rests upon an assumption that legacy contracts are irrelevant.

THE PRESIDENT: Yes.

MR GREEN: That is plank number one, pillar number one, the largest pillar in their decision. If that is wrong, we would submit that the entire decision is permeated through with a very serious error. The reality of the situation, which is transparent from the OBS, is that legacy is critical, indeed one of the requirements that bidders have to certify to is that they will ensure the protection of existing investments. Indeed, one of the sections in the OBS is entitled "Legacy" and sets out in considerable detail what each bidder must specify to the Authority with a view to identifying and protecting legacy systems.

In other words, it is the opposite of the OFT's conclusion. The OFT, if legacy is relevant, would appear to accept that legacy is installed base is the most powerful indicator of market power in the future. I will

very shortly take you to all the relevant decisions which address this point so you can see the full extent of what the OFT say about legacy.

MR SCOTT: Sorry to interrupt you, Mr Green, just for a moment, but we are considering a programme which is at the moment scheduled to last, as I understand it, into the next decade.

MR GREEN: Yes.

MR SCOTT: Against the background of legacy systems with an expected life span of approximately fifteen years from introduction, so we are looking at a long period of time.

MR GREEN: We are. Let me address the question of time frame. What appears to be required by the OBS is that every bidder will, as it were, paint a picture of the relevant geographical area that they are bidding for which maps the state of legacy contracts. So you will get a zig-zagging line, looking like a heart monitor on "ER" where there will be a high level of NP compliance and a low level and you will get a widely varying picture depending upon how each NHS Trust's legacy solutions compare to the specification.

Within ten years, by 2010 rather, it is expected that there will be a flattening of that situation and you will have an evolution over time from the present state of jagged disparity to one of a much flatter range of solutions. So the time frame over which -----

THE PRESIDENT: When you say "flatter range of solutions", you mean more solutions that are compatible with each other?

MR GREEN: Inter-operable with each other.

THE PRESIDENT: Inter-operable with each other.

MR GREEN: That appears to be what the specification requires. It talks about bridging the gap.

THE PRESIDENT: Again I must confess, and perhaps it is not my fault not having grasped it yet, but one in my case is a bit hazy as to whether one is talking, to put it in very crude terms, of a sort of ripping out of existing systems and replacing of the existing systems by something new, or whether one is talking about the progressive adaptation of

existing systems to a level when those existing systems are all more inter-operable. If one is talking about the latter, exactly how does it work and what sort of competitive forces are likely to be relevant in that sort of exercise?

MR GREEN: If I can take that in turn. 'Rip and replace' appears to have been rejected and certainly the headline "Rip and Replace Rejected" was in the computer Press in May when leaked versions of the OBS got out and people latched on to provisions in the OBS which say a fundamental principle is protecting existing investment. The headlines in the Press were "Rip and Replace not to be the case."

THE PRESIDENT: Right.

MR GREEN: As to the speed at which one is going to adapt, again looking at the public announcements and Mr Richard Granger's speeches and the OBS itself, I do not think the Authority has any specific expectation as to the speed of migration because it recognises, as common sense would suggest it must, that the speed of migration will vary. One has got no doubt that some NHS Trusts will adapt progressively whilst others may not.

I do not think the Authority intends to be prescriptive; it wishes to move the systems at a fairly cracking pace in terms of migration, but there is no rules which say you must adapt in certain stages or by certain times because the situation on the ground is too widely disparate for there to be rules and regulations which govern that. The expectation is that by 2010 there will be coalescence so it will be different rates across the country. But underlying this will be the principle which is set out in the OBS that you are protecting existing investment; you are not ripping and replacing, you are not spending money unnecessarily. It is a good housekeeping principle.

Again, one might say even by putting it in those terms that the OFT's conclusion, which is manifestly wrong on the face of the decision, should have been that this is

a matter which required very considerable investigation. Plainly with a merger which has 50 per cent of the market and surrounded by high entry barriers, the impact of that merger in the market place over the next few years until 2010 is a crucially important issue.

Will this merger be able to win all of the renewal and adaptation contracts? How much money is going to be devoted to that process? What impact will that have on non-NP spend, in other words on competition outside of the NP budget? These are matters which one sees from the decision barely touch the radar.

MR SCOTT: If you excuse us just a second.

(Mr Scott conferred with the President)

THE PRESIDENT: Yes. Mr Scott is just drawing our attention to the OBS on page 17 of that document under the heading "Roles and Responsibilities" where a number of things are said that are needed to take into account.

MR GREEN: Is this Part 1 or Part 2? Page 17 of?

THE PRESIDENT: Page 17 of 607. This is what is annexed to your -- this is what I think you sent to us. It is in Part 2, "LSP Services". On page 17 under the heading "Roles and Responsibilities" one of the matters mentioned is the interfaces used and interfaces written and rewritten. There is a list of bullet points and that one is about three up from the bottom. Are you there, Mr Green?

MR GREEN: Yes, I am. If I can, I would like to give you a list of the references to legacy because one gets a slightly -----

THE PRESIDENT: No doubt there are others.

MR GREEN: I think there are a number which actually help explain how legacy is relevant. Perhaps it is appropriate to go straight to that list.

THE PRESIDENT: Just hang on if we may, because these are review proceedings, to the legal points. You are, I think, submitting that the belief referred to in section 33(1), at least in a situation where no reference is made, has to be a belief based on a sufficient investigation of the underlying facts.

MR GREEN: Yes.
THE PRESIDENT: So as to -- I am not drafting anything, I do not want any heart attacks in the courtroom, but so as in some sense to be satisfied that...on a sufficiently secure factual basis that the situation may not be expected etc?
MR GREEN: That is right.
THE PRESIDENT: Yes. It does not involve us deciding whether the facts are right or wrong, it just involves verifying that there has been a factual investigation sufficient to arrive at the conclusion that that decision-maker arrived at.
MR GREEN: That is quite correct, though there are situations where, if one can see manifest errors of fact, they also sound in judicial review.
THE PRESIDENT: Yes.
MR GREEN: One looks at the cases both at the European and domestic level, real howlers of fact are reviewable, but if it is pure howler, then maybe the standard is relatively high. The courts prefer to say there is likely to be a factual error because they have not investigated it properly.
THE PRESIDENT: Are you saying this is a pure howler case or are you saying this is a lack of sufficient investigation case or both?
MR GREEN: Both and probably three or four other formulations.
THE PRESIDENT: Okay. Let us see.
MR GREEN: If I could leave it to your creativity, I would -----
THE PRESIDENT: If you want us to define howlers, you have got to direct us as to where we might go.
MR GREEN: Absolutely.
THE PRESIDENT: I do not think we are too keen on finding howlers.
MR GREEN: No. What you will see from the decision is an assumption that legacy is irrelevant. The decision does not refer to the OBS anywhere. There is no description of it, no analysis of it. One would have thought that if this is the only defining document in existence concerning the

NP, it would have been an important part of the decision. If in the OBS it is plain that legacy is relevant yet the decision says it is not, then we would suggest that falls into the howler category, but it would also be relevant because they will have failed to investigate the OBS or draw any proper inferences which the OBS indicates are to be drawn.

Can I start by just showing you what is in the decision so that we have the target in mind, as it were? There are four paragraphs of the decision which are relevant directly or indirectly to the legacy point.

THE PRESIDENT: Yes.

MR GREEN: The first is paragraph 14 which says, "The main suppliers of secondary health care software currently installed in UK hospitals are iSoft, Torex/IBA, McKesson and Siemens. The parties' share of installed legacy systems is significant with the parties supplying 44 per cent of EPRs and 56 per cent of LIMS", then they put it more broadly "to the UK public sector" and that does not appear to be limited to the NP sector.

"They are key suppliers in each country in the UK, particularly in the supply of LIMS where, in Scotland and Wales their legacy systems will account for 100 per cent of the installed base. The pace of innovation in health care, IT systems and changes to the procurement process suggest, however" -- and the word "however" is important -- "that the installed base is not the best guide as to whether parties will have market power in the future."

So here legacy is said to be irrelevant because of the pace of innovation and the changes to the procurement process.

In paragraph 15, which is the next relevant paragraph, the OFT says, "Since most public sector contracts are awarded following a competitive tender, a better measure of the potential market power may be the parties' success in winning competitive bids in the past few years." Quite frankly we do not see how installed base is any different to legacy and that appears to be a

contradictory statement.

Then the OFT go on and say -----

THE PRESIDENT: It is a contradiction, the first sentence of 15 is in contradiction with the last sentence of 14.

MR GREEN: That is right. In 14 legacy is irrelevant because of the pace of innovation and changes in the procurement; in 15 they say a better measure, in other words forget legacy, but a better measure is installed base. Well, we would view installed base essentially as the same thing as legacy.

The OFT then goes on and says, "While the existence of an installed base may give incumbent bidders reputational or informational advantages in bidding for new contracts, if the system required a substantially different from existing systems, these advantages are then unlikely to be significant."

They then go and make the point, unrelated to legacy, about the presence of other bidders.

So installed base, they say, even though it seems to be better than legacy, may not give rise to significant indications of future market power if the system required is different. So the system they are referring to is the National Programme system and one has to look to see whether the NP then treats legacy as important or not. Is it different and does it relegate legacy to an irrelevant role?

Paragraph 29 makes effectively the same point. "In terms of their legacy contracts to the UK public sector, iSoft and Torex are clearly the two leading suppliers of IT software to the health care sector in the UK. In a bidding market, competition is core the market rather than in the market so that the competitive advantage acquired from the legacy base is unlikely to be strong, especially where a new procurement strategy is being introduced."

So legacy is irrelevant where a new procurement strategy, in other words the NP specification process, is being introduced.

Then finally at paragraph 32, "iSoft and Torex have

been the two leading suppliers of IT software to the health care sector in the UK. While a strong legacy base may give the parties a large presence, it is unlikely in itself to confer significant market power in view of the changes being brought about by the NP FIT. Such a fundamental change has altered the future competitive landscape with the effect that competitive constraints must be viewed under a new scenario."

The question is, is that correct? Does the NP FIT so fundamentally change the future competitive landscape that legacy is irrelevant?

Within these paragraphs, there are four principal assumptions which the decision rests upon and they are as follows: the first assumption is that legacy and installed base is an indicator of future market power where the legacy system will remain relevant in the future. Of course where the legacy system will remain relevant in the future is where the OFT would disagree from that first proposition, but it is implicit in their analysis that legacy and installed base is an indicator of future market power where legacy remains relevant under the new bidding process.

The second assumption is that legacy and installed base do confer informational and reputational benefits. Now, what do these mean? Informational advantages, we would understand, to be a reference to the obvious advantage that Torex and iSoft would have in relation to future contracts if these future contracts are built upon legacy systems. Torex and iSoft are the progenitors, they have a large installed base, they know the technology, they have a massive advantage in terms of the existing system and its upgrading and its evolution. That is how we would understand informational advantages which the OFT prima facie accept exist.

Reputational advantages really come down to track record. I think the OFT here is saying that Torex and iSoft, with 50 per cent of the market and in some cases 100 per cent, have a proven track record which no one else

comes close to matching or can replicate. This track record confers a commercial advantage. I think the OFT here is, in a formulaic way, describing what used to be described as the FUD factor, Fear Uncertainty Doubt. There used to be an expression that you never got sacked for buying IBM. You overcame the FUD factor. That is another way I think of describing reputational advantages.

So the second assumption, therefore, is simply that legacy and installed base confer informational and reputational benefits.

The third assumption in the decision is that legacy and installed base is not however relevant or significant in this case because the systems which are being introduced are, and I am quoting from paragraph 15, "substantially different from existing systems".

The fourth assumption, if in fact it is different from the third, comes from paragraph 32, legacy and installed base are not relevant or significant because the new procurement system being put in place is 'fundamentally different', creates a fundamentally different market scenario.

That is the target for our challenge. If I could take you now to the OBS to see what is clear from the face of the OBS. In Part 1, page five of 95, right at the beginning of the document, third page in under the heading "The Current Systems Environment - some of the services described in this part of the OBS..."

THE PRESIDENT: Yes, halfway down the page.

MR GREEN: Yes. "Some of the services described in this part of the OBS do not exist, others may exist in very localised areas and some services, such as patient demographics registers, exist in nearly all systems at both the local and national levels. Therefore it is important to illustrate the starting point and to be clear about some of the opportunities that exist.

"It is clear that radical changes to the systems environment must be made in order to meet the business direction and drivers as described. Bidders should explain

how their offering will meet the following goals: rationalise the systems portfolio. It is expected that by 2010" -- there is a reference to the time frame -- "there will have been a rationalisation of national and local person demographic systems. Provide a tighter process and data integration. It is essential that much tighter integration exists in the proposed solutions than is apparent in the systems of today, and it must be clear how the level of integration increases year on year as products and product sets developed. It is recognised that the scope and type of solution required are not currently available within single systems, therefore the solutions that are ready for delivery at the time of award of contract will be very different to those that will be being deployed in 2010.

"It is essential that the Authority does not get locked into fixed solutions that constrain its ability to deliver new models of care and achieve the goals outlined in the various strategic documents described in the previous section."

Then D is solutions available at award of contract.

THE PRESIDENT: Do you want us to read it to ourselves?

MR GREEN: If you would read the box, please.

THE PRESIDENT: Read box D?

MR GREEN: Box D, please.

(Pause)

THE PRESIDENT: So it describes, among other things, the elements of the existing infrastructure they propose to use?

MR GREEN: That is right. What existing services exist and their track records and what they are going to use.

THE PRESIDENT: Yes.

MR GREEN: And how they will use, if appropriate, existing solutions on an interim basis and how existing products, whether they are new or legacy, will be modified.

THE PRESIDENT: Yes.

MR GREEN: That is a broad starting point. It does not refer to the word "legacy" but we get plenty of references later

on. If you turn the page -----

MR SCOTT: Sorry, Mr Green, while we are in the box, there is a reference to intellectual property rights and presumably there are substantial intellectual property rights in the existing legacy systems.

MR GREEN: Absolutely, yes.

MR SCOTT: Many of which are presumably held by companies who are the subject of the -----

MR GREEN: And indeed there will be long-term contracts. You cannot simply just expect the NHS Trust to engage in breach a contract, rip out old systems, get rid of old suppliers. That is going to be one of the factors which will govern the speed of transition, how quickly can you replace existing contracts.

THE PRESIDENT: How does the intellectual property rights aspect work? Presumably the software is covered by some kind of right maybe.

MR GREEN: It will effectively be a copyright clause or generic software right, database right.

THE PRESIDENT: Can one, as it were, use and adapt that software without the consent of the copyright holder?

MR GREEN: Almost certainly not because almost every adaption will involve copying or will involve some use of a data base right. If you are going to achieve inter-operability, you are almost certainly going to have to intrude upon either the copyright or the data base right and there is going to be a lot of debate and probably litigation about the scope of those rights and the extent to which exceptions to them exist, but inevitably that will be a drag on the rate of transition. Without knowing what is in the contents of the bid and what information the Authority has upon the state of play as it presently stands, it is impossible to know the extent to which that will create a drag, but common sense suggests it will be substantial.

THE PRESIDENT: Yes. It may depend a bit on the terms of the existing contracts I imagine.

MR GREEN: Yes. Many of these contracts are fairly long term

though. They are typically between five and fifteen years which I think would be a reasonable range.

THE PRESIDENT: Yes.

MR GREEN: Page 86 of Part 1 which is under a heading on the previous page "Piloting".

THE PRESIDENT: I am sorry, page?

MR GREEN: Page 86.

THE PRESIDENT: I do not think we have got page 86. We have got some extracts that were referred to in your skeleton argument.

MR GREEN: You have the whole volume.

THE PRESIDENT: We have got to look at the whole volume, do we? Yes.

MR GREEN: We assumed that you will all have read it by now!

THE PRESIDENT: Not quite to the end yet. Page 86.

MR GREEN: Page 86, yes, please. Under a heading which is on page 85 "Piloting" which is the piloting of new solutions, new software applications, one finds that one of the matters the bidders have to address in their bid under 840.3.1, which is a sub-heading "Inter-operability and Performance".

THE PRESIDENT: Sorry, you said page 86.

MR GREEN: Page 86, second box down, "Inter-operability and Performance".

THE PRESIDENT: My page 86 starts with something called "Review" at 105.15. I am in the wrong bit.

MR GREEN: Yes, it is quite close to the beginning.

THE PRESIDENT: Here we are. Yes, right. "Inter-operability and Performance", yes.

MR GREEN: That is right. It is the first box down. "The ICRS NASP and LSP shall ensure that data extraction and transfer", and they are just dealing with that particular software issue, "is piloted for both existing local legacy systems and new local applications."

You will see later on more explicit references to preservation of legacy systems but piloting has to be on top of legacy systems.

Then if you go to Part 2 under the heading, "LSP

Services" on page five.

THE PRESIDENT: Yes.

MR GREEN: "Under the full scope of ICRS national and local elements", if you look at the bottom bullet point, "ICRS implementation services" if you would, I would be grateful if you could read from "full scope" down to the end of that page, but the relevant bit is in the last paragraph which says, "As the spine solutions are relatively passive in nature, much of the implementation work will consist of interfacing local systems to these applications and providing end users with the tools on their desk top to access them. It is expected that only new systems and robust legacy systems will be linked to the spine."

By "robust" one presupposes that the Authority means which is viable, which works and is viable.

But there is a reference to new systems and robust legacy systems. One of the matters which the bidders had to specify to the Authority was the extent to which they could provide the full scope of the ICRS, including linkages to the legacy systems.

If you turn over on to page six, under the heading "Local ICRS Solutions - this is the heart of the ICRS concept and is where the deep, rich, clinical functionality and clinical data resides to support the end-to-end process of care delivery across a broad range of settings. These solutions will be functionally rich and will either be provided through new solution procured from LSPs, through the integration of the legacy systems or through a combination of new and integrated solutions whichever of these 'through' routes are demonstrated to be the most robust in both functional and technical aspects."

So the OBS says the heart of the ICRS concept will be either new systems or legacy systems or a combination of legacy and new. That is going to be the starting point and that will govern how it develops.

THE PRESIDENT: Just pausing there, Mr Green. The OFT, as I understand it, places reliance on the fact that Torex's bids so far have not been apparently accepted.

MR GREEN: Yes.

THE PRESIDENT: What I am not clear about is whether those bids relate to what you are drawing to our attention now, or whether what you are talking about at this stage is something that comes further down the line later in time?

MR GREEN: ICRS solutions, if one stands back and thinks what they are going to be, and it is not as if you have got a single piece of software called ICRS, it covers a number of different softwares, and again it is going to be very difficult to say with precision precisely what comes under the heading of ICRS. There are a huge number of different components and they will vary according to what is out there in the market already.

The OFT plainly have not done this but in measuring the impact of the merger, one would have to go into very considerable detail as to the nature of the market as it presently stands and the merged entity's ability to meet those solutions.

What we do know is that the OFT's finding of fact is that they have approximately 50 per cent of the market for EPRs and LIMS, 46 per cent and 54 per cent I think are the figures given. So the OFT assumes that they are in the same market and they do compete.

THE PRESIDENT: Just let me see if I can understand the underlying facts of this case. On the opposite page, the top of page four under the heading "Provisionally the LSP services", it starts, "This section of Part 2 of the OBS provides...(read to the words)... follow."

So is one right in assuming that this part of the document is telling the LSPs what it is that they are going to be responsible for project-managing down the line?

MR GREEN: Yes.

THE PRESIDENT: We have not yet got to the stage of anybody being invited to bid for specific solutions to interface local systems, although we have apparently got to the stage when prospective LSPs have been invited to indicate preferred subcontractors, in relation to which Torex, for

whatever reason, has not been successful.

MR GREEN: Yes. LSPs are partnered subcontractors/suppliers and they have to identify who their preferred suppliers are.

THE PRESIDENT: Yes. Thank you.

MR SCOTT: In thinking about the vertical structure of the market place, presumably even a preferred supplier is likely to turn to the company that lies behind the legacy system when considering how that may be integrated in the new situation.

MR GREEN: Yes, one would have assumed so. I mean, one of the difficulties one faces is that we have the OBS, we have Press information, we have speeches from Mr Granger and others from the Authority. Save for that, we do not have much information and indeed one sees that even the Chief Executives of the NHS Trusts are in doubt as to the full scope of the NP.

One gets to the nuts and bolts of legacy towards the end of Part 2 under the heading "Legacy Management".

THE PRESIDENT: Page?

MR GREEN: Page 603.

THE PRESIDENT: "Legacy Management", yes.

MR GREEN: To put that into context, one goes back to page 590. If you keep those two pages, 590 about six or seven pages back which says "Requirement" and then you have got a box 950.4.4, "Bidders shall ensure that future developments aim to protect previous investment in infrastructure and equipment."

It was actually this box here which led to a considerable amount of Press speculation, "There is no rip and replace." We have got the references to the literature which refers to this paragraph and it is in our documentation. We will provide you with that in due course. That is an underlying principle which is that existing previous investment in infrastructure and equipment is to be preserved and the required response is each bidder shall describe how it would ensure that this is achieved. That is the context to section 980 of the

specification, "Legacy Management".

What that says is as follows: "LSPs will, in some cases, be expected to provide a continuation of IT services from existing legacy systems within the health community. Legacy system service levels will be agreed between LSPs and the Authority. Where legacy systems are replaced by new system implementations, LSPs will be expected to prepare and agree detailed migration plans with the Authority.

"In continuation of legacy systems, LSPs and the Authority shall agree and document the specific system and module details that will be subject to the legacy management services. Legacy systems for which the LSP assumes responsibility must be provided at the level of service and functionality not less than that provided prior to the commencement of legacy services. LSP and the Authority shall define the service levels to apply to the legacy management services. These shall include system availability times and system response times.

"Bidders shall agree to performance targets against the service levels and will provide regular monitoring reports of actual performance against targets."

Now, that suggests that the migration speed will be variable depending upon the nature and sophistication of the legacy system. It will be a matter for agreement, the agreement will no doubt focus upon the cost of migration, the nature and length of existing contracts and IP rights and so on. The time period is intended to be approximately ten years, by 2010 rather, less than ten years. I think it is almost impossible to say whether migration in any given case will be twelve months, 36 months, five years or whatever.

THE PRESIDENT: What was the date of the OBS, Mr Green?

MR GREEN: It was August 2003. Versions were in the market place earlier in that.

THE PRESIDENT: August 2003?

MR GREEN: August, yes.

THE PRESIDENT: Do we know when in August?

MR GREEN: There was an earlier version which was circulated. There is one article in which Mr Granger went to a conference and asked the audience how many of them had seen the OBS. I think it was in May and I think about half of the audience put their hands up.
THE PRESIDENT: The passage to which you draw attention on page 590, was that in the earlier version?
MR GREEN: Yes, it was. It must have been because it is referred to in the Press in May.
THE PRESIDENT: Yes, I see.
MR GREEN: The first version was May/June.
THE PRESIDENT: Is there any specific change between the first version and this final version which is relevant to this case?
MR GREEN: This wording seems to be precisely the same wording in the Press article of May, but we will check and see if there is any difference.
THE PRESIDENT: Thank you.
MR SCOTT: Confusingly, Part 2 appears to be labelled "Final 1" and Part 1 is labelled "Final 2".
THE PRESIDENT: Yes, and one bit is labelled "Final 1A".
MR GREEN: This is some Whitehall code that I am not familiar with.
THE PRESIDENT: How are you doing for time, Mr Green?
MR GREEN: I think I have probably got another hour.
THE PRESIDENT: Yes. Do you think you can -- we need to give everybody a decent shout.
MR GREEN: Yes.
THE PRESIDENT: We can perhaps truncate the short adjournment at some point. The original timetable I think envisages a break at 12.15, and the suggested timetable was circulated by the Respondent, the indicative timetable.
MR GREEN: It was not one -----
THE PRESIDENT: I know it was not one that was agreed.
MR GREEN: We would suggest we go through until one o'clock and if it is convenient to truncate lunch, then that is fine.
THE PRESIDENT: Mr Crow, if the Applicant has the morning and

the Respondent and the Interveners between them have the afternoon, is justice likely to be done?

MR CROW: On the basis that my learned friend, by spreading himself in opening, is depriving himself of a closing, yes.

THE PRESIDENT: Yes, I see. We will see how we get on. I think if you could shave it a bit, Mr Green, that would be helpful.

MR GREEN: Yes. I have just had confirmation from the behind that the paragraphs I have just shown you did not change from the earlier to the second version. We have looked at the list of changes.

THE PRESIDENT: Yes.

MR GREEN: If I could briefly give you the other references to this point and I will speed up in relation to that. In Part 3, page three, this document applies to both the NASP and the LSP and our references to legacy is on page 176.

THE PRESIDENT: Yes.

MR GREEN: One of the assumptions in the OBS on page 176, and perhaps you could read this section 440 at a later stage, but if I just identify the relevant part, under the heading "Assumptions - the assumption is that existing infrastructure services will be used wherever possible in order to minimise duplication and enable earlier implementation of the ICRS."

THE PRESIDENT: Yes.

MR GREEN: The relevant part of that is that page and halfway down the second page. That is consistent with the basic principle that there will be no OBS. If I can perhaps give you references, Volume 3, tab 13, which is Torex's interim results of 30th June, and this is really just an outsider's view on the OBS if you like, an informed outsider.

Torex refers on page 127, that is Volume 3, tab 13, the interim results of 30th June of this year, "Existing compliance systems will have a continuing role for some years to come", so that was Torex's view at the time in June of this year.

There is an article of 19th June which is Volume 2, tab 18 entitled "Granger Rip and Replace Fears Unfounded, where Richard Granger, the Director General of NHS IT told an expert audience 'We are going to hold on to what is there already. We are not going to bulldoze. If you use a system at the moment and it serves you well, I can see no rational basis for replacing that system'" which is quite consistent with the OBS itself.

THE PRESIDENT: Yes.

MR GREEN: That brings me back to principal criticisms we make of the decision in this respect. The OFT's decision is silent as to the OBS but this is the critical document; in so far as there are answers to be had, they exist in this document. The critical assumption in the decision is that legacy is irrelevant and that the procurement system also renders legacy irrelevant.

The OBS shows that legacy is very relevant and that the bidding process itself is structured to preserve and exploit legacy to the maximum possible extent. This is the very opposite of the OFT's key assumption. We say that this is a failure to investigate, it is a failure to show proper reasoning for evidence supporting the conclusion in the decision, and it is a howler.

A further point is to ask what inferences one should draw from the fact that legacy has the relevance which the OBS says it has. We submit that it is implicit in the OFT's decision that but for the OFT's assumption that installed base and legacy was irrelevant, the OFT would have concluded that the merger gave rise to SLC in the future. So but for their assumption about legacy, it is clear from paragraphs 14 and 15 that they would have concluded there was SLC and therefore would have referred. We would submit this conclusion was an unavoidable conclusion and, as a result, the error is a material one going to the heart of the decision.

Indeed, if the OFT had properly read the OBS and analysed it in the terms that we have analysed it, if it was at that juncture going to say that it nullified the

market power of the parties flowing from their installed base, it could not have come to that conclusion without a very detailed investigation of the extent of the NP and legacy systems, their longevity, how long they would last in the market place, their use as a framework for add-on or integrated modules, the extent of IP rights, the drag effect of existing supplier contracts and so on.

We would submit that the OFT would have come to the conclusion that that was a matter for the CC.

THE PRESIDENT: If we go to paragraph 30 of the decision, "The NP FIT has created five LSP regions and the five regions will pre-select their preferred contractors. Torex's product has not been selected". That appears all to be common ground.

Then it goes on, "Absent the merger, this means that Torex is likely to face significantly reduced opportunities to sell its products or those of IBA in England."

What exactly is the attack that you make on that sentence which is a fairly significant sentence in this decision?

MR GREEN: There are a number of other paragraphs in this decision and indeed in the witness statement evidence now which suggests that when contracts come up for renewal they will go to the incumbents. What the OFT has not examined is the extent -- and I will come to that later because that is an important point in its own right.

Whether or not there are significantly reduced or expanded opportunities once the NP FIT has rolled into action is a completely uncertain equation. What would appear to be important is that legacy is relevant and the OFT say, particularly in paragraph 14 and 15, that legacy is an indication of future market power.

If one asks what is the essence of the objection to this, this is a merger which creates a substantial market power protected by high entry barriers. If they merge and have a very high percentage or are very successful in bidding, as iSoft is likely to be, we say that will give

them an immense advantage, both in this segment in relation to replacement and upgrading of existing and legacy contracts because they are the incumbents. Because of the informational and reputational benefits, this will give them an immense advantage in the non-NP sector, which is very substantial, over one billion a year in the NHS, and then you have got outside of the NHS which this specification also addresses, hospices, NHS Direct, prisons and so on, it will give them an immense advantage there. The spill-over effects of the merger are such that we would submit as to foreclose.

Now, they ought to be competing. If they were separate, they would have separate competitions for renewals, they would be incumbents but they would compete, they would be separately competing for non-NP spend within the NHS, they would be separately competing for IT spend in the social services outside the NHS. All of these three are impacted upon by the OBS.

This is a classic horizontal merger; you are reducing the pool of suppliers from a low starting point by one in a market where there are high barriers to entry.

MR SCOTT: Two matters arise from that. You have referred to the social side and, as I understand the NP FIT, the idea is that it should mesh with the social care system.

MR GREEN: Yes.

MR SCOTT: You have taken us to the paragraph in which there is reference to Note 3 which reminds us of the vertical structure of the health industry with its primary, secondary and tertiary levels. You may wish to refer to paragraph 27 of the decision in which the OFT deals with the concerns coming from hospitals about legacy systems being abandoned and regarding that as a contractual point rather than a competition point.

MR GREEN: Yes, indeed. When you are looking at the potential adverse effects of a merger, one looks to see whether or not the increased market power hypothetically, because we are dealing with a merger which of course has not yet arisen, but hypothetically will be able to act in a

non-competitive way, in an abnormal way. That may mean it has sufficient market power, it can force hospitals to spend more than they would, replace quicker than they would otherwise wish to replace, pay more, or they may simply offer a reduced choice. One prohibits a horizontal merger because one protects the structure of the market.

In this case, we actually have hospitals who are saying, we can predict what they be the problems which this merged entity would give rise to. I cannot of course say in three years' time the merger did in fact raise prices or reduce product quality because that is a hypothesis, but one does not prohibit a horizontal merger for that reason. One prohibits a horizontal merger because the structure of the market is damaged and there are a smaller number of players, the competitive process does not work as effectively, there is therefore a material risk that price, quality and choice is eliminated.

Can I move to the question of buyer power to make sure I make progress?

THE PRESIDENT: Yes.

MR GREEN: The relevant paragraphs of the decision are 21 and 22. These make it clear that so far as the OFT is concerned they have come to an unequivocal conclusion that the NP creates buyer power. They say in effect as much in 21 and 22. In 21, "The LSPs exercise buyer power so long as there are enough PPR and LIMS competing suppliers."

In paragraphs 21 through to 23 and in 23, "Elsewhere in the UK contracts are awarded nationally and thus this raises the prospect that awarding bodies are likely to possess an exercising buying power."

Now, the first point and the first error is as to the linkage between buyer power and legacy contracts. If the OFT is wrong on legacy, it must also be wrong on buyer power and this is evident from paragraph 15 of the decision which I have taken you to. "Installed base does prime facie confer advantages", says the OFT, and this is just looking at the logic of the OFT's decision and the only reason that it does not do so is because legacy is

irrelevant in the bidding system. If legacy is relevant, then the OFT must acknowledge that installed base and legacy is relevant and does confer market power. It is simply the reverse of the logic in paragraphs 14 and 15.

If they are saying that it does confer market power, then you have implicit in that assumption that there is no sufficient countervailing buyer power.

So that is the first point and if we are right on our first point about legacy, that undermines their analysis of buyer power.

The second point is to consider the position even if the OFT are correct. Even were legacy to be irrelevant, the decision on buying power is still based on unproven and illogical assertions about the extent of horizontal competition in bids for contracts.

The relevant paragraphs on this particular point are 12, 14, 19 and 22. If I can just summarise them shortly to save time, in paragraph 14, the OFT recognises the obvious point that there are only four main players and the merger will leave three. In paragraph 14 it also recognises that the merged group will have a very high market share. In paragraph 19 the OFT recognises that there are high barriers to entry and these are compounded by lack of supply and demand-side switchability (see paragraphs 10 and 11).

In paragraph 12, the OFT recognises that "A key requirement to being able to implement a new system is a local presence", and so one says in the light of these admitted facts it is necessary to consider what the OFT then says it relies upon to counter or negate its prior conclusion that there are high entry barriers.

If you would look at the last sentence of paragraph 22, one finds this: "However this is not an unnatural consequence of competition for the market and it seems likely that as contracts come up for renewal this may provide entry opportunities for other providers of sufficient scale." So the OFT's view is that there will be entry because of renewals.

THE PRESIDENT: It says it "may provide opportunities", it is somewhat more tentative.

MR GREEN: It is more tentative, yes, and the reason it has to be tentative is because it simply does not stack up. If one goes to paragraph 17(b) of the witness statement of Mr Gaddes which we received yesterday, Mr Gaddes says precisely the opposite. This is the OFT's bundle.

THE PRESIDENT: Yes.

MR GREEN: Page ten of the witness statement, paragraph 17(b), Mr Gaddes says, and this is his explanation for why the OFT did not consider the extent of the NP market further than they actually did, "Equally, any non-NP FIT expenditure by hospitals and/or Trust on, for example, extending or upgrading an existing EPR or PAS system which might otherwise be obsolete is unlikely to be contestable since the hospital and/or NHS Trust are highly likely to use existing providers rather than seek competing bids."

That logic, if it applies to renewals, means that when renewals come up, or modification contracts, you are not going to suck in new entry. One really does wonder why any potential new entrant would come into the UK market and establish a presence which the OFT says is a pre-condition in paragraph 12, a presence in this country simply on the off chance that it might win a small renewal contract which, in any event, the OFT now seem to believe will go to the incumbent.

THE PRESIDENT: I think the thrust of 22, the last sentence is that some suppliers are likely to exit the market, so they are not going to be around when the contract comes up for renewal, and that that may provide entry opportunities for other providers.

MR GREEN: They do point out that people have exited the market and it seems to be inconsistent in our view to say the mere existence of the NP has already deterred -----

THE PRESIDENT: If they have exited the market, then the market is contestable.

MR GREEN: It is hard to see why that should be the case. If people are leaving the market, it is because they cannot

get in. Why on earth would the mere existence of the renewal suddenly induce them back if they did not win in the first place? Mr Gaddes statement says that renewals, upgrades modifications will go to the incumbent.

THE PRESIDENT: Yes.

MR GREEN: We do not have to go very far in this to suggest we move from white to grey. All we have to do is to establish to your satisfaction that this is a real issue that the OFT has not properly investigated.

THE PRESIDENT: Yes.

MR GREEN: The next piece of evidence in relation to buyer power is paragraph 23. Here the OFT say the contracts are awarded on a national scale outside the NP and buyers therefore have buyer power.

THE PRESIDENT: Again, it "raises the prospect that awarding bodies are likely to possess."

MR GREEN: It is the prospect of a likelihood which, with respect, is not evidence. It is simply someone assuming there is a prospect of a likelihood. I mean, it is not evidence. It is not evidence that there was an analysis. There is no suggestion there was an analysis of any nature of this issue, but it is inconsistent with paragraph 21 where the OFT decision records that there are 177 NHS Trusts. We know and everybody knows that they buy locally. Precisely what contracts we are talking about which are said to be purchased nationally, whether we are talking about contracts within the NP or contracts within the NHS or contracts within the other social services, we really do not know, but such evidence as does exist suggests that at the moment contracts are acquired locally and that is one of the founding principles of the NP which is to try to move away from more localised purchasing to a more coherent national basis.

As paragraph 23 stands, we would suggest it is just not right. It is inconsistent with paragraph 21 and at the very least it shows inadequate investigation.

Then the third piece of evidence relied upon by the OFT is in paragraphs 16 and 18 which concern the United

States entry of Cerner and IDX. It is not entirely clear what the OFT's point is here, but giving them the benefit of the doubt the OFT appear in some way to imply that if they can do it, so can others.

IDX and Cerner, and there is quite a bit of evidence now in the papers about them, if I can summarise it as follows, it is this: they have been in the UK for a considerable period of time, they are substantial companies, they are successful and effective outside of the United Kingdom, but in the United Kingdom to date they have achieved limited success.

THE PRESIDENT: And they are not among the top four identified in the decision.

MR GREEN: They are not amongst the top four and indeed they barely register on the market share figures that we have in our evidence. If you like, I will get the reference.

Let us assume for the sake of argument that they win some contracts and they therefore grow in size. If they grow in size, the question which then has to be asked is whether they can exert countervailing competitive constraint to the merged entity. That is not a question which the OFT has asked or examined. No evidence exists as to Cerner in the decision or to IDX, their capabilities, their potential.

Whether they increase their market share or not is simply not the point. Let us say they get 10 per cent of the market or 15 per cent, the question which then has to be asked is whether that could constrain a merged entity.

Again I will give you the reference without taking you to it, Mr Walhouse has given evidence on this, Volume 2, page seven, paragraph 3.9 to 3.11. We take on the chin that both of those companies could win contracts, could grow but the real question is can they constrain the merged entity, which is not something which the OFT has investigated, at least if the evidence of this decision is to be believed.

I would respectfully remind you that the OFT have told us in no uncertain terms that they rest on this

decision and do not wish to elaborate upon it.

MR SCOTT: Mr Green, just briefly on paragraph 18, this states that, "The two US companies offer an integrated system...(read to the words)...chose its preferred subcontractor may be less inclined to invite tenders" and so on. This looks as though the fact they have an integrated system places them at a significant disadvantage in relation to legacy systems.

MR GREEN: Yes. Neither of them, so far as we understand that, has had an installed base. You will have seen, and again I do not really have time but there are many references in the OBS to bidders having to be able to establish their track record, having to show implementations which are relevant to the operation of the NP. If you are a very, very small player in the UK market at present, then you have less of a track record.

Can I just give you the reference to the market shares? I will not take you to it but it is Volume 3, tab one, page 14 of the bundle, paragraph 3.4 of the complaint.

I am being told by Mr Cohen that your point about integrated systems is absolutely right, it does place those suppliers at a disadvantage. Again, this is not really something which the Tribunal can rule upon. All you can say is it is an issue which required investigation.

THE PRESIDENT: Mr Green, can I just see whether I am following that? I am probably being very slow. If we take paragraph 16 of the decision which refers to Cerner and IDX being selected as preferred subcontractors etc, the second sentence goes on, "The effect of this selection process which is already taking place will be to displace other suppliers of EPR systems which currently hold a share of the install base from the future NP FIT."

Then, I think, as we saw a moment ago, that point really links to paragraph 30 where, in the second sentence, it says, "Torex products have not been selected for the preferred subcontractors. Absent the merger, this means that Torex is likely to face significantly reduced

opportunities to sell its products" etc etc.

What I think you are saying is that the failure to be selected at this stage as a preferred subcontractor to an LSP does not carry the weight that this decision suggests it should carry because, as it were, at a lower level there are still numerous opportunities and competitive situations in what you say is the increased strength of the merger concerned will still play, particularly in relation to the whole business of adapting legacy systems. Is that the point?

MR GREEN: Certainly, that is a point.

THE PRESIDENT: Or part of it?

MR GREEN: Yes, that is right.

THE PRESIDENT: I see.

MR GREEN: But we do not accept the proposition in the middle of paragraph 16, "The effect of the selection process will be to displace other suppliers of EPR systems who currently hold a share of the install base from the future NP FIT."

Torex does have a significant legacy position and it is difficult, if not impossible, to see how it can be displaced if you do not have a 'rip and replace' policy. It would have to be -----

THE PRESIDENT: Yes, I see.

MR GREEN: Yes, and of course the position outside of the NP remains contestable.

THE PRESIDENT: The position outside the programme, yes.

MR GREEN: Let me draw together some conclusions on buyer power and then deal with the other three points relatively briefly.

THE PRESIDENT: Yes.

MR GREEN: First, the OFT's conclusion is based on a false assumption that legacy contracts are irrelevant. On the OFT's own logic (paragraphs 14 and 15) legacy is relevant. Well, if it is relevant, then there can be no buyer power on their thinking.

THE PRESIDENT: Yes.

MR GREEN: Two, their analysis of buyer power is based upon an

assumption that contracts outside the NP are awarded nationally. This is incorrect. It is inconsistent with paragraph 21 which refers to the 177 Trusts buying software locally.

Three, it is based on an assumption that there will be new entry through renewals, yet on the basis of the decision entry is not only unlikely but suppliers are leaving the market.

THE PRESIDENT: Yes.

MR GREEN: Four, the OFT decision is based on no hard evidence but on the contrary, on broad-brush speculation, for example, there is a prospect of likely entry.

THE PRESIDENT: Yes.

MR GREEN: And fifthly, the OFT analysis has to be counterbalanced against the agreed facts. The merger will create very large market shares. There are high barriers to entry and expansion. The analysis, we would submit, is confused, often internally inconsistent but it, at heart, reveals shortcomings in the scope of the investigation. It leaves matters which really should have been addressed by the Competition Commission.

If I can move now straight away to issue three which is to make brief submissions about the scope of non-NP opportunities.

THE PRESIDENT: Yes.

MR GREEN: The first point is that the OFT, in its decision in paragraph 20, identifies the size of the non-NP IT spend. When you add it up, it is 1.025 billion per year; 850 million for England per annum, 25 million -----

THE PRESIDENT: Yes, we have got that.

MR GREEN: You have got that. That is ten million plus over ten years -----

THE PRESIDENT: Ten billion?

MR GREEN: Ten billion, yes, ten billion plus. In paragraph 16 of the decision, the OFT says, in terms which are remarkable for the admission that they contained, "Within England it is uncertain whether NHS Trusts will have the funds or autonomy to be able to purchase IT software and

systems independently of the NP FIT. Any such purchases are likely to be of limited value, may have been to be funded directly by the NHS Trust so that there is unlikely to be sufficient incentive to behave autonomously outside of the NP FIT", an admission that they have no idea as to how purchases outside the NP sector will operate. They simply say it is uncertain, they do not know whether the NHS Trusts will purchase autonomously or how much they will have to spend or anything along those lines.

But the non-NP market is in fact huge, ten billion over ten years and it also includes non-health services. If I can give you the reference, it is page 12 of 607 of the OBS which is where it is made clear that the NP applies to non-health social services, hospices, prisons, NHS Direct and so on.

Technology in these areas is to be increasingly integrated. Now, the OBS does not quantify the size of that market, but it could very easily be 200 million or 300 million a year, one just simply does not know, and it was not investigated by the OFT.

THE PRESIDENT: That is not part of the relevant market as defined in the decision.

MR GREEN: It is not part of the relevant market but it should have been something which the OFT investigated as a market or markets in which the merger could affect competition. The spill-over effects, the reputational and informational advantages the incumbent has will spill over into the non-NP sector of the NHS and beyond. Indeed that appears to be the OFT's conclusion because they think it is unlikely that people outside the NP will behave autonomously. But who knows? They are uncertain.

Now, a number of quite valid points are made in the skeletons against us on this. It is said, for example, that quite a lot of this one billion per year will already be committed. Well, plainly some of it will be.

THE PRESIDENT: Yes, it is ongoing, incurring expenditure.

MR GREEN: Absolutely, but ten billion over ten years is a very large sum of money, or seven billion to 2010 is a

very large sum of money. A substantial portion will go on new contracts for this sort of solution plainly. No analysis in the OFT analysis of that though, I have to speculate.

Secondly, it is said that a distinction is to be drawn between the primary and secondary care sector and that we have not broken that down. With respect, that is a bad point. The OFT plainly defines the market as secondary, in other words it applies to hospitals, but the merger will create effects in the primary market because the NP covers the primary market.

I would like to just show you one illustrative paragraph of the OBS which is page ten of 607 and it concerns Joan and her ulcers. Poor Joan as a chronic illness and leg ulcers.

THE PRESIDENT: Where are we?

MR GREEN: This is Scenario 2, page ten, Part 2.

THE PRESIDENT: On holiday in Spain.

MR GREEN: That is right. Perhaps you could read this at leisure, but the point is here you have got, as it were, a descriptive flowchart of how the NP will operate. It defines, on the right-hand side, the sort of technology support that is going to be applicable at each stage.

THE PRESIDENT: Yes.

MR GREEN: In the sixth bullet point down where poor Joan moves on to the GP and dermatology, "the GP is able to use the ICRS health records to see the results of Joan's consultation with the GP and diabetes. She takes some digital photographs of Joan's legs to send up to the dermatologist at the acute hospital for a second opinion on best treatment. She also takes swabs so that she can send pathology the results using near patient testing at the same time. The dermatologist responds within two days confirming best treating and the software will be that directed to teleconsulting."

Now, this simply illustrates the seamless web between primary and secondary care that the NP is intended to create.

THE PRESIDENT: Yes.
MR GREEN: So that when you have a merged company that has very substantial market power in the secondary sector, it is almost bound to have spill-over effects in the primary sector.
THE PRESIDENT: Yes.
MR GREEN: A third criticism which is made of our analysis is that it is suggested, again quite wrongly, and I will give you the reference, paragraph 39 of iSoft's Statement of Intervention, that the impact of the NP on NHS purchasing will be great.

Can I just simply give you the reference to the counter evidence? There is a letter from Sir Nigel Chris, the Chief Executive of the NHS, who wrote just a few weeks ago to NHS Chief Executives at local level, making it clear that the new NP arrangements do not apply outside the NP. This is Volume 2, tab four, page three.

That deals with two things but in paragraph one and the seventh paragraph of that article, that Press Release, or that Computer article, there is a reference to the fact that it is not intended to cover non-NP purchases.
THE PRESIDENT: Yes.
MR GREEN: There are some grey areas but, in principle, it is not intended. I highlight these points because it is clear that the OFT decision does not address them or identify them as matters of relevance.

The non-NP market we say is substantial almost on any analysis, notwithstanding whatever uncertainties might exist. The OFT do not even know, because they say they are uncertain, whether NP buyers outside the NP will have freedom to make acquisitions (see what they say in paragraph 16). If this reflects the limits of the OFT's knowledge it is scarcely surprising the OFT did not go further and, by their own admission, examine the extent of non-NP purchases. I will not -----
THE PRESIDENT: Bearing in mind the section we are dealing with refers to the United Kingdom and the fact that we sit as a United Kingdom Tribunal, what is the situation as regards

the decision in relation to Scotland, Wales and Northern Ireland?

MR GREEN: We know that in relation to some applications they have 100 per cent in Scotland and Wales. We are not told what market share they have in Ireland. The NP does not apply to hospitals outside of England, but the merged entity has market power in those other regions of the United Kingdom. The decision is silent as to the impact of the merger on those areas.

MR SCOTT: In paragraph 28, we gather that there was an unwillingness to have some of the text put in the public domain, but we do see in the last sentence of paragraph 28 the fact that the Northern Irish Authority were uneasy.

MR GREEN: Yes, or they felt the merger could potentially lead to loss of competition for contracts.

THE PRESIDENT: Part of the answer is in the last sentence of 31, "There is a reasonable prospect international competitors with a UK base will bid for contracts in the region with the likely effect to increase competition of contracts in Northern Ireland, Scotland and Wales."

MR GREEN: Of which there is not a shred of evidence. Frankly, it seems to us highly illogical. Why would you go into the £25 million Northern Ireland market or Welsh market if you are not the main player in England? Frankly, if you are a United States operator one thinks frankly that is just pie in the sky.

THE PRESIDENT: Does that deal with the non-NP?

MR GREEN: Can I briefly make an observation about Mr Gaddes' witness statement, paragraph 17? I shall not take you to it. In this, he seeks to say precisely the opposite to that which is stated in paragraph 16 of the decision. He sets out here a series of reasons why they did not go beyond the analysis of the NP sector.

Frankly, each of the reasons is not a good one, but there is a more general criticism which we make, which is that according to Mr Gaddes, the Chairman of the OFT guided and advised on the drafting of this decision. We have been told that the decision stands and we are not to

see anything else and they will not answer our questions on it. It really should not be open to the OFT to contradict what it says in the decision with a witness statement from a case handler when it comes to a judicial review.

THE PRESIDENT: We are into Amacott and that line of cases.

MR GREEN: We are indeed. I will deal with any points that come out of this perhaps in reply, I do not think it is worth taking up time on it now.

The last two points which I will try to deal with briefly concern the position of Torex and the position of IBA. They are relevant because in any merger analysis you are looking at the counterfactual between the market with the merged entity and that without it, so the position of the merging companies is important. In this case it is doubly important because Torex drags in its wake IBA.

Now, the gist of the point we make here is that the OFT appears to have been astonishingly naive as to the conduct of Torex in relation to bidding. Some of the documents which have been disclosed to us, attached to witness statements overnight, really demonstrate precisely why this was a matter requiring very close scrutiny because the OFT decision appears to operate upon an assumption which is somewhat resiled from in the witness statement that Torex is a duffer and that the loss of Torex to the market does not matter. It is neutral. They failed anyway and so the merger does not take away someone who is relevant.

Torex, in its witness statement, rather jibs at this description -- the witness statement of the OFT rather, resiles from it but it does demonstrate why the OFT should have investigated very closely Torex's position.

MR SCOTT: But there is no failed company argument.

MR GREEN: There is no failed company argument, absolutely. I will give you a series of references because, again, time does not permit me to go further. The points we make are as follows: Torex is plainly a viable and effective competitor at all levels and in relation to all

technologies. The OFT decision proceeds upon the assumption that they are competitors in the same market and that is stated in the decision.

Torex's Annual Reports, and if I could just give you a series of references and they can be read later of course, Volume 2, page five, signed off on 3rd March of this year, Torex makes the point that it has leading clinical software, software called Premier Synergy. If you look at their website and Premier Synergy, it is a leading EPR software. They make points about how they are going to compete vigorously in the National Programme, page eight, page nine.

At page ten they are going to increase their R & D into software and that their EPRs, page 11, are produced and used elsewhere in the European Community.

This is tab 16 of Volume 2, the next reference, When Torex entered into the agreement with IBA, Mr Chris Moore of Torex made an announcement that so far as Torex and IBA were concerned, together they were in effect a fantastic partnership that would do very well under the new NHS regime. Torex's position elsewhere in the market has already been discussed - they are powerful, they have a large installed legacy basis.

Torex's position in bidding is important. Can I give you a chronology, please, and the references? On 31st March of this year, IBA and Torex entered a long-term Distribution Agreement with the distribution of IBA's full range of software health care solutions. The agreement is Volume 3, tab two. It was a seven-year agreement and that comes from page eight. The territory was the United Kingdom, the Republic of Ireland, the Netherlands, Germany and Switzerland. It was an exclusive contract.

THE PRESIDENT: Where is this point going, Mr Green?

MR GREEN: Sir, it goes to this: it goes to the OFT's uncritical assumption that Torex's failure to win contracts to date renders them non-viable. What we say in a nutshell, when you look at the chronology, is that the moment Torex entered into negotiations to merge with

iSoft, which was in mid-May, Mr Whiston's witness statement paragraph 11, at the same time, literally days before, they had purchased shares in IBA, that was on 9th May.

THE PRESIDENT: So what?

MR GREEN: Yes, Mr Moore became a Director of IBA at the same time. On 22nd July, the merger was announced. The announcement, just to give you the reference, is Volume 3, tab seven, this is the iSoft announcement of 22nd July 2003 and this makes it clear that as of that date a great deal of the merger was effectively in full and final form.

Prior to that, we know that Torex pulled out of the bidding process. We have had exhibited now a letter to the Authority whereby they pulled out of the bidding process for reasons which, on the face of the letter to the Authority, are completely obscure.

The next reference is Mr Sprigg's witness statement, paragraph 29, Torex Bundle, tab two and he says that they took the decision to pull out mid-May which was the precise time that they first started negotiating the merger. What appears to have happened is that when they agreed the merger, they decided that it was no good bidding in competition with iSoft so they pulled out of the bidding process, and the letters we have seen. They did not announce to the Authority that they were pulling out for another six weeks. According to Mr Sprigg in his witness statement, this was because they did not wish to lose credibility. Quite what that means is not explained.

We have a statement from Mr Sprigg, not Mr Chris Moore. Mr Sprigg said he did not know about the merger but Mr Chris Moore plainly did.

There is a very strong suggestion from the chronology that the reason Torex did not have the success that it would otherwise have had was because it was plain that it was going to merge. The Authority knew it was going to merge. There was no way the Authority was going to award contracts to iSoft and Torex. Torex only bid to be an LSP and it withdrew its application.

THE PRESIDENT: And it sought to be a preferred subcontractor under -----

MR GREEN: Well, it is unclear from the evidence as to the extent to which it also wished to get into arrangements with other LSPs and for what.

Now, the OFT's point is simply this: they must have competed in a purely competitive market with no extraneous factors bearing upon their decision-making. They did not do very well, they are therefore non-viable. The merger is therefore neutral of competition which we say, if the OFT had dug further, it may have had to question that conclusion. We submit there is a great deal more to the bidding process and the relationship between iSoft and Torex than meets the eye. When one considers that they decided to pull out of the LSP bid at precisely the same time they entered into merger discussions, one begins to get a sense of what might have happened.

Our point is simply this: that was a matter the OFT should have investigated. It is an important matter because they have rested part of their conclusion upon an assumption that Torex is non-viable. We have said they are viable for many other reasons and this reason is not critical. It is, we simply say, an evidence of a lack of critical facility, critical faculty as applied to the facts of this case.

There is another important aspect to this, and it is the final point I wish to make, which concerns the specific position of IBA. IBA's position is linked to that of Torex. The OFT acknowledges that the merger will remove one player from the market, namely Torex. The OFT failed to consider how the merger will exclude IBA from the market. One sees this as simply a recitation of IBA's submission, (decision paragraphs 26 and 30) but no analysis at all.

THE PRESIDENT: IBA has got about three per cent, I think.

MR GREEN: Three per cent of the market. It wants to enter the market and it was going to enter through Torex through the Distribution Agreement. The OFT did not even ask for a

copy of the Distribution Agreement. So the merger has the effect of taking Torex out of the market and IBA out of the market. IBA is one of those OFT so-called international new entrants. Well, at least IBA is actually bigger than Cerner at the present time.

THE PRESIDENT: Bigger than Cerner you say?

MR GREEN: Bigger than Cerner in terms of market share, and IDX.

THE PRESIDENT: In terms of market share in the UK?

MR GREEN: Yes.

THE PRESIDENT: How big is IBA relative to Torex and iSoft?

MR GREEN: A market capital of about 30 million, 40 million. It is obviously smaller.

THE PRESIDENT: Yes.

MR GREEN: What is said now in the evidence, though it is not in the decision, is that the IBA product is a bad product. Again, you cannot possibly express a judgment upon that. What you have seen is quite a lot of evidence from Torex trying to justify why it did not win any contracts.

The real point I think is simply this: if Torex had won some contracts, it was under a contractual obligation in the Distribution Agreement to promote IBA product.

It is an inevitable conclusion that, for Torex, it would have been a disaster to win contracts because it would have been in immediate breach of contract to IBA. It could not have been any way otherwise. If it won any contracts for the supply of product, after the merger it was never in a million years going to supply IBA product; it was supplying iSoft product.

The OFT should have realised this by looking at the Distribution Agreement and pondering for one moment on the position of Torex. Torex could not possibly afford to win contracts because that would give it an obligation to supply IBA. It was merging with iSoft and it had already committed to supplying iSoft product, not IBA. It was on the horns of a very sharp dilemma.

Who knows? Our prognosis, our analysis might be entirely wrong but the OFT should have twigged to that one

and investigated and they did not even ask for a copy of the Distribution Agreement.

Final conclusions. On admitted facts, prima facie the merged entity results in SLC. You reduce from four to three the number of main suppliers in a market protected by high entry barriers, protected by a low level of supply substitutability and little potential competition.

Prima facie installed base confers advantages of a reputational and informational nature which will translate into future market power, says the OFT. So on the basis of the OFT's guidelines and the Competition Commission's guidelines, this is prima facie substantially lessening of competition. The Competition Commission says 25 per cent would probably be at threshold. If the OFT says otherwise, then we would submit that on the basis of those admitted facts that is an error of law.

The only answer to that is the negativing of their market power by the National Programme. Does the National Programme negative market power? Answer no. The NP is in its earliest stage of infancy, it is barely born. Phases two and three are even barely conceived of, even in loose outline. The system is intended to evolve over time. The OFT has conducted no investigation of the NP of any note. It does not even refer to the OBS in the decision.

The OFT does not know, paragraph 16, to what extent it confers autonomy outside the NP area. The OFT has no grasp of the extent of legacy contracts, it has not examined them. It has no comprehension of how post initial contracting will work out, whether or not renewals will give rise to entry opportunities or not in the witness statement, it now says not. There is no real understanding of how NP and non-NP funding operate and interrelate. The decision seems to suggest that the OFT is uncertain as to this.

There is no acknowledgment in the decision that the NP integrates with other non-NHS social services. There is no description of how the NHS NP Trusts will purchase, whether it will be the LSPs that buy or whether the

hospitals and, if so, will they be obliged to purchase, and when and what happens if they run out of money, what happens to existing supplier contracts, existing IP rights.

There is no analysis of the companies in the market. We see reference to McKesson and Siemens but they are simply referred to en passant. No analysis of Cerner or IDX. We have a few assertions about them but nothing more, no breakdown of their market shares. We have no evidence from the NHS Trusts, no evidence recorded from the NP itself; we have mere assertion that the NP will exert buyer power but it is not explained how or why.

No analysis of the relationship between primary and secondary care and community care, even though that is integral to the NP. No analysis of renewals or upgrades or the timescales or their likely values.

We would submit that if you apply a test even approaching that of the CFI in Tetra Lavalle you will be bound to find that this decision fails. We have a merger which prima facie has 50 per cent of the market and high barriers to entry. The OFT's answer is the NP.

To negate SLC through buyer power necessarily requires that the countervailing force be very well established, very well defined, fully effective and with a track record. It seems to us quite impossible for the OFT to predict that the NP, in its present inchoate form could possibly create such buyer power as to negate such very substantial SLC. This is not a marginal case on SLC with 50 per cent and high barriers to entry.

For those reasons, we say the decision is defective.

THE PRESIDENT: Thank you, Mr Green. Mr Crow?

MR CROW: Could I just put one thought in your minds before the break?

THE PRESIDENT: Yes.

MR CROW: About two and a half hours ago my learned friend paid lip service to the notion that this was judicial review.

THE PRESIDENT: Yes.

MR CROW: He has then spent the last two and a half hours taking you through items of judgment and the way you can tell that this is not an attempt at judicial review but an attempt for an appeal on the matter is just to bear in mind two things. One is the Issues document that went out. It is two pages long.

THE PRESIDENT: Yes.

MR CROW: It identifies every one of the issues which my learned friend is now trying to have a second bite at. For your convenience, it is exhibited to Mr Gaddes statement and it is page 151 of that bundle.

THE PRESIDENT: Yes.

MR CROW: The OFT was aware of every single one of the issues that has been canvassed in front of you. The short point is that IBA simply did not get the result they wanted.

The second reason why it is entirely apparent this is an attempt to appeal on the merits is that one just has to look at IBA's evidence. Who do they get in? They get in an expert, Mr Walhouse. Now, I will leave it to somebody else to discuss whether he is an expert or not, but he is put forward as an expert.

THE PRESIDENT: Yes.

MR CROW: And the reason he is put forward as an expert, self-evidently, is to try to persuade you to take a different view from the expert view of the OFT and that is not the function of judicial review.

THE PRESIDENT: Yes.

MR CROW: My Lord, I do not want to get any more ahead of steam. That may be a convenient moment.

THE PRESIDENT: A well-fired shot, Mr Crow.

MR CROW: I am obliged

THE PRESIDENT: Shall we say two o'clock.

(Luncheon adjournment)

MR GREEN: Just before Mr Crow continues, we have placed on your desk the article from Computing that I referred to this morning. This is the one which refers to that paragraph and the spec which was leaked and then the spec was published later.

THE PRESIDENT: Thank you. Yes, Mr Crow.
MR CROW: My Lord, while we are dealing with a few incidental points, a second statement by Mr Cohen was provided to us at about 10.29. I cannot pretend I have divested it at all and my clients have not had time to come up with any detailed instructions. If it is, once we have had a look at it, something that we would wish to respond to, could we have permission to put something in writing afterwards?
THE PRESIDENT: Certainly.
MR ANDERSON: Sir, could I ask for the same provision?
THE PRESIDENT: Certainly.
MR CROW: In order to try and help move along in a coherent way, I was proposing to try and follow our skeleton argument.
THE PRESIDENT: Yes.
MR CROW: If I could pick that up at page four, dealing with the legal test for review, I do not want to labour the point, but given the early days of this particular jurisdiction, maybe it would be convenient to look at it briefly because obviously it will set the tone for what follows.
THE PRESIDENT: Yes.
MR CROW: You will already have seen that we emphasise that there are three points to be made about your jurisdiction under section 120. There is an obligation to apply the principles of judicial review. It is an obligation to apply the same principles, not principles adapted by analogy or anything, and they are the principles of domestic law. On the latter point, there is simply one incidental point of confirmation which we have included in an authorities bundle which I believe may not have got to you yet, but you may be relieved to see it is one of the thinner bundles that is going up in the course of the hearing (same handed). If they are numbered, it is at tab five. There is a short piece on judicial review under The Enterprise Act.
THE PRESIDENT: Yes.
MR CROW: At page 66 of the article top left-hand corner,

"Grounds of Review".

THE PRESIDENT: Yes.

MR CROW: "The Appeal Tribunal shall apply the same principles as will be applied by a court on an application for judicial review. Accordingly, the relevance in the case law of England and Wales and Scotland are automatically incorporated into the body principles that the Tribunal must apply."

I take that simply as an incidental swipe at the suggestion that we should be taking on board Tetra Lavalle as part of the case law. Our submission on Tetra Lavalle we actually make a little bit later in the skeleton, but it ties up to the same point. It is essentially this, really two points on Tetra Lavalle and the first is that it is not the English jurisdiction for judicial review.

THE PRESIDENT: Yes.

MR CROW: Secondly, what it was in fact dealing with was something very significantly different from the kind of judgment that was being made in this case because the prediction that was made in that case was as to future misconduct effectively.

THE PRESIDENT: Yes.

MR CROW: Whereas the prediction that is being made in this case is simply what is the market going to look like, and what is market the going to look like is pre-eminently the kind of expert assessment that the OFT is there to make.

THE PRESIDENT: Yes. Can you help me on one aspect of section 120? It is entirely right that subsection 4 requires us to apply the same principles as would be applied by a court on an application for judicial review, but we all know that in most cases, certainly in cases that are anything like this one, the Court, on an application for judicial review, is typically a non-specialist Court reviewing the decision of a regulated specialist.

MR CROW: Yes.

THE PRESIDENT: So how do we apply the same principles as would be applied by a Court, bearing in mind that this Tribunal is supposed to have a certain degree of expertise in this

particular subject matter?

MR CROW: I am very grateful, my Lord. It is absolutely a point that needs to be addressed. The answer, in our submission, is simply this: yes, you are a specialist Tribunal; no this is not a specialist jurisdiction.

THE PRESIDENT: Yes.

MR CROW: All that has actually happened under section 120 is that whereas we might have been standing up in this very court in front of gentlemen wearing wigs applying the judicial review jurisdiction. We are in front of you; it is simply a change of venue, not even physically, but a change of forum. It is not a change of jurisdiction.

Now, something not dissimilar I think happens in the Patents Court. One gets a Patents Judge who has a degree in engineering or chemistry so he can simply understand the subject matter of what is being argued in front of him. That does not mean he is applying anything other than English law.

THE PRESIDENT: Yes.

MR CROW: He is a specialist so he understands the subject matter, not so that he applies different principles from any other Judge.

THE PRESIDENT: If we just take the problem one stage further in the analysis, the Administrative Court very often finds itself with varying degrees of enthusiasm, giving what he calls due deference to the decision-maker.

MR CROW: Yes.

THE PRESIDENT: What should the Tribunal's approach be to that specific question?

MR CROW: Exactly the same as the courts. We have, again, in the bundle I have just handed up two very short passages I wanted to draw to your attention because my learned friend relied on the decision in Napp.

THE PRESIDENT: Yes.

MR CROW: Where the Court of Appeal was deferring to the Appeal Tribunal.

THE PRESIDENT: Yes.

MR CROW: But if one goes through Napp, I do not want to read

out paragraphs of it.

THE PRESIDENT: No.

MR CROW: But if you look at the substance of what the Appeal Tribunal was dealing with there, it was itself making specialist judgemental assessments and the Court of Appeal was saying well, we are not going to substitute our own judgment for the specialist.

THE PRESIDENT: Yes.

MR CROW: In fact, in the context you are dealing with, exactly the same principles apply; you are the Court for these purposes.

THE PRESIDENT: Yes.

MR CROW: The specialist Tribunal is the OFT. The approach is clearly set out in two very recent decisions, one is a decision of Lightman J in Selcom which is in the third tab of our authorities bundle. This was a judicial review by one of the telecoms company of the Director General of Telecommunications.

THE PRESIDENT: Yes.

MR CROW: At page 12 of 18, his Lordship set out the relevant principles. It is appropriate briefly to state the relevant principles: "Where the Act has conferred the decision-making function on the Director, it is for him and him alone to consider the economic arguments, weigh the compelling considerations and arrive at a judgment. The applicants have no right of appeal. In these judicial review proceedings, so long as he directs himself correctly in law, his decision can only be challenged on Wednesbury grounds. The Court must be astute to avoid the danger of substituting its views for the decision-maker and of contradicting, as in this case, a conscientious decision-maker acting in good faith with knowledge of all the facts", and he refers to a number of earlier decisions.

My Lords, I would commend the whole of paragraph 26 to you.

THE PRESIDENT: Yes.

MR CROW: It was followed more recently in a decision of Moses

J.
THE PRESIDENT: This is mobile phones, is it not?
MR CROW: No, actually it was not, in fact.
THE PRESIDENT: The Rail Regulator.
MR CROW: Yes, it was the Rail Regulator at the next divider.
THE PRESIDENT: Yes.
MR CROW: The passage I need from that is paragraph 27.
THE PRESIDENT: Yes.
MR CROW: Paragraphs 27 to 34. Again, I will not bore you by reading it all out, but could I commend paragraphs 27 through to 34 but just read 34 to you now. This is on page eight of 26, "In considering the various challenges advanced to the Regulator's directions, I must accordingly bear in mind that he was reaching his conclusions in a field in which he was both expert and experienced. He was advised by experts, he gave ample opportunity to the claimant to challenge his provisional conclusion. That opportunity was far greater than that which was afforded by the statute. Further, he was concerned with predictions for the future, incapable of any exact measurement. All these factors demonstrate that what Simon Brown LJ described as the constraining role of the courts is indeed modest."
THE PRESIDENT: Yes.
MR CROW: That, we would urge on you, is exactly right, it is extremely recent and it fits very neatly on what we have got here because, as I mentioned just before the short break, the Issues Letter shows that every opportunity was given to these Complainants to say their piece. They took that opportunity.
THE PRESIDENT: They got the Issues Letter, did they?
MR CROW: They did.
MR GREEN: No, we did not get the Issues Letter.
MR CROW: I do apologise. It goes to the parties. I will rephrase it. The Issues Letter demonstrates that the decision-maker was live to the issues.
THE PRESIDENT: Yes.
MR CROW: The opportunity was given to these Claimants to say

their piece. Now, if and in so far as, for instance, huge play was made this morning of the OBS. It is said it was a howler for us not to pick up various points in it. That being so, it is, frankly, pretty staggering that IBA did not mention the OBS to us in the course of making its various submissions.

The first time it has been relied on is in the course of these proceedings. If it really was such a blindingly obvious thing for the OFT to consider, why on earth didn't IBA bring the point up earlier? One of the points or one of the threads that is going to run through my submissions is the way in which points are being picked up and dropped in the course of IBA's complaint. They are casting around for pebbles they are going to skip.

We saw an enormous amount, for instance, in their evidence about whether or not the National Programme is actually going to go ahead at all. We see nothing of that in their skeleton argument, we heard nothing about it in oral submissions this morning. Points are coming and going and being thought of late or being dropped. In our submission, that is entirely characteristic not only of an attempt to appeal on the merits but a slightly desperate one because they are simply casting around for different points to try and snipe. Now, obviously sniper fire can be fatal but one would have thought that a sniper who says that he has got a deadly bullet would know what his target is at an early stage.

THE PRESIDENT: Yes.

MR CROW: What we say on the expert Tribunal is that yes you have the advantage of expertise but you are not exercising an expert jurisdiction, and the correct approaches have to be derived from Selcom and the Rail Regulator decisions.

Just going back to our skeleton to track it through, paragraph nine picks up the applicable principles for judicial review. I do not think there is any real significant difference about this. Paragraph 9.1, yes we acknowledge if we got the law wrong but we say they are actually on analysis. None of the points taken against us

are legal points at all. They are simply matters of evaluation of the evidence.

Secondly, it is said that the Court can overturn a decision on the basis of the material procedural error. Again, that really cannot fairly been said because IBA has had every opportunity to say what it wanted to say before the decision was taken. It cannot be said that they were shut out from saying their piece and that there has been any form of procedural unfairness, and indeed it is not said.

Over the page to 9.3, it may assist just to expand slightly on the question of errors of fact. It ties in, to some extent, with what I have already said about the Selcom and the Rail Regulator decisions because where an expert has made a factual decision which is essentially an evaluative decision, what is the market going to look like, is such and such a market share going to produce an SLC? Where an expert has made that kind of decision, the Court -- and for these purposes I mean you -- should show due deference.

I did not understand my learned friend actually to be urging upon you, from his use of the word -- and it is in some sense helpful -- "howler". He was not urging upon you that any error of fact by the OFT triggers a jurisdiction in the Court to overturn the decision. That must be right because if you can simply point to any old error of fact, then there would be an appellate jurisdiction.

THE PRESIDENT: It must at least be material and arguably manifest.

MR CROW: Exactly. In fact, I would wish to expand what we say in paragraph 9.3 by aligning ourselves with what iSoft's skeleton argument says which is essentially that, yes, if there has been such an error of fact in the sense that there is no evidence to support the factual conclusion, or the error of fact is so fundamental that the decision is effectively irrational to base the decision on that error, then the Court can review.

THE PRESIDENT: Yes.

MR CROW: Again, I do not want to spend too much time going through authorities, but my learned friend, on behalf of IBA, has put in some passages in his skeleton argument quoting from Lord Slynn's judgment in the Criminal Injuries Compensation Board case.

THE PRESIDENT: Yes.

MR CROW: He says the other members of the House agreed with Lord Slynn. Well, they did agree with Lord Slynn as to the result of the appeal.

THE PRESIDENT: But not on the reasoning, you say?

MR CROW: No, the passage quoted is obiter. What he says is, "I, Lord Slynn, think it is time to recognise that material error of fact is a ground for review, but I decide the case on the basis of procedural unfairness." So in terms of what Lord Slynn said was obiter. What the other members of the House actually said, if one looks at the last two pages of the CICB judgment, I think it is 347 to 348, all the other members of the House say, "I agree that the appeal should be dismissed for the reasons Lord Slynn gives", so they were all agreeing with the ratio, not with the obiter remarks about material error of fact.

My Lord, just for your note, we have also included a recent Court of Appeal judgment called Adan v Newham London Borough Council in our authorities bundle which is, I think, a relatively recent review of the authorities. At paragraph 41 -----

THE PRESIDENT: It is tab two, I think.

MR CROW: I am so sorry, tab two, yes it is. Paragraph 41 on page 13, having reviewed the authorities they simply say this: "This is not the occasion, because we do not have to decide the point, to take further the discussion initiated by Lord Slynn in Ex Parte A case Alkenbury.

"In very many cases, although it could be said that an administrative body has made a material mistake of fact, the decision is vulnerable on other more conventional grounds, for procedural impropriety or because a factor has been taken into account which should not have been taken into account, or because there was no

evidence on which the decision could have been safely based.

"What is quite clear is that the Court with supervisory jurisdiction does not, without law, have the power to substitute its own view of the primary facts the view reasonably adopted by the body to whom the fact-finding power been entrusted" and we say a fortiori, where the fact-finding body is itself an expert.

So that last sentence needs to be read in sort of bold print and underlined in light of Selcom and the Rail Regulator decision.

MR SCOTT: I would like to take you back for a moment to the judgment of Moses J, quoting in paragraph 31 from Lord Templeman and pointing out that everything does depend on fact, he then goes on to say, "Judicial review should not be allowed to run riot" and I understand you to be suggesting the Applicant is running riot.

MR CROW: He would.

MR SCOTT: However, what he goes on to say is "A skilled advocate producing doubted confusion where none exists". Now, it seems to me, having regard to section 33, that in so far as we have the double "mays" we are in a situation where we are not introducing doubt where none should exist; we are in a doubtful situation within which the Respondent needed to make a decision.

MR CROW: Right. I am extremely grateful for that because in fact in a sense it picks up one of the images my learned friend tried to conjure of grey and white. Our answer to that, my Lord, is this: the decision that the OFT takes is a judgmental decision which involves making assumptions, estimates and assessments as to what may happen in the future. That is a decision which is taken in an area of uncertainty. Nobody has actually criticised the test that is set out in the OFT's guidance that there has to be a reasonably held belief that there is a, I cannot remember the exact phrase, a substantial -----

THE PRESIDENT: A significant prospect.

MR CROW: Yes, a significant prospect. With respect, that must

be right because it would be absurd to say that there has to be a reference if there is a fanciful or insignificant prospect.

So the decision that the OFT takes is a judgmental decision in an area of doubt. Once that decision has been taken, it can only be reviewed on judicial review principles at which point the question for you is black and white because the decision for you is not an appeal, was that a good decision by the OFT; it is was it a lawful decision? Did they actually get the law wrong or did they get the facts so wrong that it is a decision that no reasonable Regulator could have taken.

Again, I would emphasise the language and we set it out in our skeleton. It is so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question could have arrived at it. That is the test and that is black and white. It is not a question of thinking, maybe if I had been in that position I may have taken a slightly different view on the availability of subcontracting under LSPs or something. That just is not the exercise.

It is a question of looking at what the OFT has done and seeing whether or not they have in fact gone through a fact-finding exercise? Answer, yes. Have they identified the right issues? Yes. Have they come to a view on them? Yes.

THE PRESIDENT: I think we ought to start the discussion, and a logical place for starting this discussion is to ask myself what is the legal test that the OFT must apply under section 33(1), which is not a topic at the moment addressed in a number of the skeletons. In looking at that test, one also I think has to look at the context of the Act as a whole.

MR CROW: Yes.

THE PRESIDENT: And ask oneself, as I think we indicated in the letter we sent out last night, which I hope you have got, wherever it was supposed to be going, to the balance between what the OFT is doing and the role of the

Competition Commission.

MR CROW: Yes.

THE PRESIDENT: From this Tribunal's point of view, if we are to get something right, we ought to get that right. I think that is a matter for us under the statute interpretation.

MR CROW: I am very grateful. I would very much like to deal with that. The reason why we did not in our skeleton was because it is no part of the challenge to this decision that we got the test wrong. The Application Notice and the skeleton argument on behalf of the Applicant simply recites the section 33 language, recites the test that we have stated in the OFT's guidance which you were taken to this morning at paragraph 3.2, and moved on. There is no suggestion that we have got it wrong.

We would submit that it is the right test and -----

THE PRESIDENT: Let me see if I can, probably inadequately, express it. We have got in the section what has already been referred to as the double "may".

MR CROW: Yes.

THE PRESIDENT: In fact we start with a statutory obligation to do something.

MR CROW: Yes.

THE PRESIDENT: Then we have a belief and then we have "it may be the case" and then a bit later on we have "it may be expected".

MR CROW: Yes.

THE PRESIDENT: So what is the weight we are to give to that "may"? In other words, does the OFT say to itself, well, there are competition problems here. It does not seem to us that those competition problems will result in a substantial lessening of competition, we can see there is an argument the other way.

MR CROW: Yes.

THE PRESIDENT: And therefore this ought to be referred.

MR CROW: Yes.

THE PRESIDENT: Or, to try to put it perhaps a little bit more concretely, do they simply have to see whether there is

something that, on a reasonable view, merits further investigation, or do they have to actually reach a view that says, we do not think it is going to result in a substantial lessening of competition and even though somebody has taken another view, that is our view and over and out?

Do you see what I mean?

MR CROW: Absolutely.

THE PRESIDENT: I have not put it very well but -----

MR CROW: No, no, absolutely clear. The answer that I would offer to you is really to be found within the gloss that is put in paragraph 3.2 of the guidance.

THE PRESIDENT: Yes.

MR CROW: There will be a significant prospect that the merger may be expected to lessen competition, even if the OFT does not think it is going to happen but it recognises that there is a credible view that that is the result. If it considers that that expectation is incredible, then it does not fall under the obligation, so it does not -----

THE PRESIDENT: So an alternative credible view with which they do not necessarily agree but still a credible view would be sufficient?

MR CROW: Yes. What we would urge on you is that the double use of the word "may" does not increase the improbability that may be present before the obligation.

THE PRESIDENT: Yes.

MR SCOTT: So it does not lower the threshold in the way we were discussing?

MR CROW: No, exactly. We would say that for two reasons: one reason is linguistic and the other is, in a sense, purposive. The linguistic reason is simply this, simply because of the way the draftsman has actually structured section 33(1), the OFT falls under this obligation if it believes that it is, and there has to be "may be", partly because of (a) because it cannot be required only to refer to the Competition Commission where it is satisfied that the arrangements are in progress which, if carried into effect, will result in the creation of a relevant merger

situation because otherwise it would have to conduct a full in-depth investigation itself before it even made a reference.

THE PRESIDENT: Yes.

MR CROW: So there must be that element of uncertainty that is built in in relation to (a).

It does not, however, add to the degree of uncertainty that may be present, or the threshold of uncertainty for the purpose of (b). That is partly just a grammatical interpretation, "The OFT believes that it is or may be the case that the creation of that situation may be expected to resulted in a substantial lessening...."

Simply structuring the grammar as they have, if the draftsman had put in (b) "the creation of that situation is expected to result" it would leave the question, well is expected by who? By the OFT? By somebody else? Expected on reasonable grounds or what? So by simply using "may be expected to" it does not mean "may be expected to" or "might just conceivably possibly produce", it is simply "may be expected to". The emphasis there is on "expected". That is just the linguistic approach.

The purposive interpretation is that if, in fact, the use of "may be" twice reduces the threshold to such a point where there is actually a force of obligation to refer in a situation where there might conceivably be an SLC but it is a fanciful, improbable or negligible possibility, the regime would not be working terribly well because the OFT would not be a filter.

THE PRESIDENT: "Might conceivably", in your submission, would be too weak.

MR CROW: Yes.

THE PRESIDENT: But "an alternative but credible view" would be strong enough?

MR CROW: Yes.

THE PRESIDENT: Yes.

MR CROW: It is always difficult adding glosses to glosses. The gloss that the OFT has gone into print with is the one that we stand by. "There is at least a significant

prospect". What constitutes a significant prospect is a matter of evaluation in each case. You put to me the question of an alternative credible view.

THE PRESIDENT: Yes.

MR CROW: That is well capable of amounting to a significant prospect.

MR SCOTT: While we are dealing with glosses, we have the gloss of the explanatory note which you addressed in footnote one in your skeleton.

MR CROW: Yes.

MR SCOTT: As I understand it, what you are suggesting is that we should not give our mind proportionality on the grounds that that is a European principle rather than a domestic principle?

MR CROW: Yes.

MR SCOTT: Nonetheless, you would expect us to take some regard to the meaning of the word "substantial" in the section and "significant" in the gloss provided by the guidance?

MR CROW: Yes. Certainly, yes. I would expect the OFT to do so and if you came to the view that that was wholly absent to the point where the OFT had not applied its own jurisdiction properly, then you would review, yes.

THE PRESIDENT: Would it be fair to look at it this way, and we are quite genuinely looking for your help, Mr Crow, and everybody's help and it is very important that we debate these issues. The process that the OFT undertakes is described in its guidance as "a first screen".

MR CROW: Yes.

THE PRESIDENT: So it is looking at the matter on the basis of a first screen, I do not quite know what one means by a "first screen", a prima facie examination or something of that kind, I would have thought.

MR CROW: Yes.

THE PRESIDENT: We have the Competition Commission there to make more in-depth investigations partly because they have got more time, partly because they have got more resources and partly because that is what they are actually there

for.
MR CROW: Yes.
THE PRESIDENT: In a case like the present, to put it more concrete in the present case, in the case like the present when there is at least some quite substantial prima facie evidence as to a possible, or indeed probable, substantial lessening of competition, how far should the OFT, in its first screen mode, go in to the question of whether that prima facie case can, in fact, be rebutted by other facts, or how far should that really be left to the Competition Commission, and does it depend on how easily and robustly ascertainable those other facts might be by the OFT in the context of its first screen investigation?
MR CROW: Taking that in stages, simply the label "first screen" in our submission would be that both of those words are useful and have value. It is a screening process in the sense that it is positively intended that certain things do not go through it.
THE PRESIDENT: Yes.
MR CROW: So clearly something is going to be capable of being filtered out. It is the first screen in the sense, as you say, that there is then the Competition Commission at the second level.
The second point I would simply urge on you is this: given that there is the OFT and there is the Competition Commission, the fact that there is also a third forum for these matters being debated is something of a luxury.
THE PRESIDENT: Yes.
MR CROW: And it should not encourage your enthusiasm to be unduly interventus.
THE PRESIDENT: No.
MR CROW: The third point is that it is extremely difficult, and certainly on my feet I would say impossible, to give a useful answer in the abstract to your question about what the OFT ought to be doing.
THE PRESIDENT: Yes.
MR CROW: In a sense, I do not feel I have to answer that, with respect, for this reason: the question that arises in

front of the Tribunal is not is there a general blueprint to which this particular investigation by the OFT complied? The question for you is, given the threshold test which the OFT had to satisfy itself, has it taken a decision which falls so short of that that it is an unlawful one?

So I do not think my client would thank me if I tried -----

THE PRESIDENT: No, there may be limits to the extent to which one can elaborate in the circumstances. Yes.

MR CROW: The only other incidental points, and I think they appear in the evidence but I will simply make them but the approach we have adopted which is not criticised in this case is consistent, as I understand it, with the approach that was taken under the Fair Trading Act and it also appears to be consistent with the approach outlined in the explanatory notes which my learned friend would urge you to look at, which does not purport to give any sort of extra value to the double "maybe".

THE PRESIDENT: I think the Fair Trading Act point is perhaps a little distant from the new regime because it is public interest, Secretary of State -----

MR CROW: It was a 'make ways' point.

THE PRESIDENT: Yes.

MR CROW: The only other thing I would simply add while we are just rounding up these points is that in the decision itself, you may well recall, although my learned friend forensically said that he was wholly unclear what test we applied. The first point is there is absolutely no reason to believe that anything other than the guidance test was applied. In paragraph 33 of the decision the actual statutory test it is explicitly set out, so there really seriously cannot be any doubt that the OFT did apply the right test.

THE PRESIDENT: Yes.

MR CROW: Just going back to the skeleton, then, and taking it forward, I think I have covered everything I wanted to say in relation to paragraph nine. Paragraph ten is just

there by way of emphasis. Paragraph 11, Selcom and the Rail Regulator cases I have already dealt with.

THE PRESIDENT: Can I just jog back?

MR CROW: Yes.

THE PRESIDENT: Sorry.

MR CROW: No, no, please.

THE PRESIDENT: If you just go back to 5.4 in the skeleton, the last sentence, "While the OFT fully recognises that there may be room for differences of opinion as to whether there would be a substantial lessening of competition, it is submitted that not one could reasonably be reached". How does that phrase "the OFT fully recognises that there may be room for differences of opinion as to where there would be a substantial lessening of competition" relate to our discussion a moment ago about the "alternative credible view"?

MR CROW: The answer is that the conclusion in paragraph 33 of the decision is that the OFT do not regard those alternative views as being sufficiently credible to push it over into the obligation to refer.

THE PRESIDENT: According to this, there is room for differences of opinion.

MR CROW: Yes, but that does not mean that they are credible ones or ones that have to be taken into account.

THE PRESIDENT: I see.

MR CROW: Simply because somebody happens to hold on opinion, if it is ill-informed and it is an opinion driven entirely by self-interest, then it is not a credible one.

THE PRESIDENT: I see.

MR CROW: Or it does not have to be regarded as a credible one by the OFT.

MR SCOTT: I believe that what the Applicant is suggesting to us is that a well-informed alternative opinion was possible.

MR CROW: Yes.

MR SCOTT: And it may be that reference to the OBS is part of explaining how an opinion might have been formed.

MR CROW: Yes. As I say, if in fact it is being said that the

OFT reached a view so in defiance of logic by disregarding the OBS and that it is in fact such a document of biblical revelation that it should have been taken into account at the earliest stage, it is literally incomprehensible how it could not have been put in front of the OFT by the IBA before the decision was taken, and it is exactly the territory.

THE PRESIDENT: I just wonder, Mr Crow, on that point whether IBA really knew what the Director's reasoning was going to be until the decision came out and may not have twigged, as it were, that it was really being decided on the position of legacy contracts.

MR CROW: I have to admit I am not sufficiently familiar with the exchange that went on to answer that on my feet.

THE PRESIDENT: I understand that.

MR CROW: Could we reserve the right to draw your attention to anything that could be significant?

THE PRESIDENT: Yes.

MR CROW: The other point in relation to the judicial review jurisdiction is this: the lawfulness of the decision can only be judged by reference to the material that was available at the time. If, having been given an opportunity, a party does not put material in front of the decision-maker, it cannot then turn around after the event and say, "Oh you have disregarded this important consideration so your decision is unlawful." The legality of the decision has got to be judged by reference to the material that was in front of the decision-maker at the time.

THE PRESIDENT: With the possible exception of the case where an Applicant who discovers later that the decision-maker had failed to take into account something that he should have done.

MR CROW: In an extreme case, that is possible yes, but what we are talking about here is refined points of evidence, one or two lines plucked out of a 900-page document.

THE PRESIDENT: Can we take it that the OFT did have the OBS?

MR CROW: No.

THE PRESIDENT: We cannot take that?
MR CROW: No.
THE PRESIDENT: Thank you.
MR SCOTT: Sorry, just staying on this for a moment. Part of our difficulty is that the decision does not tell us how much of the National Programme was available to the OFT.
MR CROW: Yes.
MR SCOTT: We have got the OBS document, we have got the original national strategy document, but of course we are not in a position to know what the OFT had at the time.
MR CROW: No. Beyond what the decision itself says and as explained by Mr Gaddes, who I think was dealing principally with the complaint which was then being run, that the National Programme was not actually going to be going ahead. You may remember that the allegation was actually being put initially in the application form that Phase 1 was not even going to complete. One then saw the evidence that came in that actually said well, the National Programme is not going to go beyond Phase 1, and then one looked at the underlying material and all it showed was that various people had raised concerns about the scale and the timetable.
THE PRESIDENT: Yes.
MR CROW: So what Mr Gaddes was dealing with at paragraph 18 of his statement was exactly that and he simply explains in outline that the OFT was provided with information, contacted the team itself, considered and weighed the evidence and came to the view.

Now, picking up the point that was put to my learned friend earlier in his submission, that is all that a Court should ask to see on judicial review proceedings because it shows that a point has been taken on board, an investigation has been conducted and a view has been taken. If you ask to go further, then you are conducting an appeal, not a review. You can be satisfied on the basis of the material here that these points were taken on board and they were considered.

THE PRESIDENT: Sorry, which points? The points in Mr Gaddes's

witness statement?

MR CROW: That particular point was the one I was dealing with there, yes but more generally the issues in the Issues Letter are the ones that the OFT have addressed its mind to. That particular point Mr Gaddes was dealing with was the question if the National Programme was actually going to go ahead because that was the particular point that was being brought into question at that stage.

THE PRESIDENT: Yes.

MR CROW: The rest of the introductory section to our skeleton deals -- yes, I ought to pick up paragraph 12 briefly and that is the suggestion that a decision not to refer should be subjected to a more intensive review than a decision to refer.

THE PRESIDENT: Yes.

MR CROW: We submit essentially the three points there, and I do urge them on you. The first is that it is simply wrong as a matter of principle to apply a sort of sliding scale of judicial review principles according to the outcome of the particular decision. That is just wrong in principle. There is no support for it in authority and it is not done.

The second point in a sense is a bit more of a debated point which is simply that even if it was right to have a sliding scale, because a decision to refer is actually a more intrusive regulatory measure than a decision not to refer, one would, if anything, have expected a decision to refer to be subject to more intensive review because, in a sense, it disturbs the status quo in the sense that it is an intervention rather than an abstinence.

Then 12.3 stands for itself. Paragraph 13, Tetra Lavalle I have already dealt with, then 14 and 15 I am not going to go through.

Paragraph 16 is just fact and I will not deal with that.

Just in order to move through what I need to deal with, it may be convenient just to turn and deal in order

with the what I think actually boiled down to four points that were advanced during the course of submissions this morning as being the merits of the case.

THE PRESIDENT: Yes.

MR CROW: The first point was the legacy base. Simply by way of comment, if you go back to the Application Notice, you will see the legacy base comes up as the fourth point and it seems to have dropped three along the way. That is further illustration of the fact that this is simply a scattered-up approach to try and get something that sticks, picking up and dropping points as my learned friend goes.

THE PRESIDENT: Yes.

MR CROW: Now, the thrust of the point on the legacy base was very, very crudely and simply this: my learned friend said many times that the decision says that the legacy base is irrelevant whereas the OBS shows that it is relevant. With respect, neither of those is true; both involve a serious distortion and both involve using the word "relevant" in completely different senses.

First of all, the decision does not say the legacy base is irrelevant. What it says in paragraphs 14 and 15 principally is that whereas a legacy base might, in other circumstances, be a good indicator of future market strength, in the circumstances of this case, it is not such a good indicator of future market strength.

It is a matter of serious objection, although it may sound fanciful, but the way that the decision is quoted in the application and in my learned friend's skeleton is extremely selective and it is seriously misleading because it simply misses out the actual sense of the paragraphs that are being selectively quoted.

What is being said in paragraphs 14 and 15 only makes sense if you read the whole of it. When you do read the whole of it -- I am not going to do that for you now and read it out -- it is perfectly obvious that the decision is not that the legacy base is irrelevant, which is how my learned friend kept putting it this morning, it is that

the significance of the legacy base is very seriously less because of the circumstances in which we now find ourselves with a National Programme going ahead.

THE PRESIDENT: The conclusion is at 32, "A strong legacy base is unlikely in itself to confer significant market power."

MR CROW: Yes, absolutely. Exactly, "unlikely in itself". It is not being said at all that it is an irrelevant factor. It is simply being said that the value in itself, in determining the issue, is very significantly less because of the circumstances of this case. With respect, that is an assessment which cannot be posited.

MR SCOTT: But it is an assessment which appears to have been made on the basis of evidence that we do not know about in the sense that we understand it was not on the basis of the OBS, so therefore it was on some other basis.

MR CROW: Yes.

MR SCOTT: And we understand that there was contact between the Office and the relevant government department.

MR CROW: Absolutely, but if you are asking me now to come to court and produce the evidence upon which the decision is based, you are turning this into an appeal.

MR SCOTT: Yes.

MR CROW: We do urge on you that the questions you need to ask yourselves are: was this issue identified? Was there some evidential basis? Yes. Was a decision taken on it? Yes. That is the process that needs to be gone through.

MR SCOTT: Just pausing there for a moment. I suppose the question comes up whether the word that qualifies "evidential basis" is "some" or "adequate".

MR CROW: Yes.

MR SCOTT: You said "some".

MR CROW: Yes.

MR SCOTT: The Applicant may urge upon us the word "adequate".

MR CROW: If what he is saying is that you have to be satisfied that we reached a decision on the basis of adequate evidence, he is seeking to appeal our judgment because he is impugning the sufficiency of the basis of our decision. That is not judicial review, that is an

appeal on the merits.

THE PRESIDENT: I am not sure that it is because you are not saying whether the Director's decision was right or wrong; you are simply asking yourself is this basis a basis upon which a reasonable Director could have reached this decision?

MR CROW: The question is where a decision -----

THE PRESIDENT: I mean, if there is certainly no evidence, then that would be a fairly clear case.

MR CROW: Absolutely.

THE PRESIDENT: If there had been a lot of evidence, that would be another case, but we are somewhere in the middle.

MR CROW: My Lord, if there is something more than no evidence, then if you do start examining the quality of the evidence, the probative weight that should have been attached to it, you are then substituting your own decision, or if you are testing whether or not it was a good decision, the OFT -----

THE PRESIDENT: This may take us back and I am not trying to reopen that debate at the moment, but it may take us back to the role of this Tribunal and this jurisdiction and how far we should go just to test not the correctness of the decision but the sufficiency of the decision.

MR CROW: Yes. If you do that, you will face a challenge on every single decision -- I am not holding this inter orem, but it is a fact that somebody is going to be aggrieved by any decision the OFT takes because the decision has to go one way or another and somebody is going to be unhappy with it. If anybody can complain to you and not face effectively a strike out by saying he should not have reached that decision because the evidence was not good enough on this issue and the evidence was not good enough on that issue, you will be facing an appeal on the merits every time. The question will be, was it a good decision? Not, was it a lawful decision that the OFT had the jurisdiction to make, and not one so in defiance of logic as to render us unlawful.

THE PRESIDENT: Come at it from another angle and perhaps we

should not lose complete sight of it, I think it is section 107 provides that the OFT has to give reasons for its decision.

MR CROW: Yes.

THE PRESIDENT: It is surely classically the role of a judicial review court to look at the reason and to see whether the reasoning supports the conclusion.

MR CROW: Absolutely.

THE PRESIDENT: It may or may not be, and depending on the circumstances, an interesting question as to how far the reasoning needs to set out the factual substratum upon which the reasons are based.

MR CROW: I will not apologise for not having any authority on that because it is not a complaint, this is not a complaint that they did not know what our decision was. The answer in principle is this: for the purposes of judicial review, the obligation to give reasons, whether it is a statutory one or a common law one, the obligation to give reasons is there so that the person affected by the decision, first of all knows what the result is and, secondly, knows why the decision-maker reached that conclusion sufficient for him to be able to challenge within JR parameters what that decision was.

What it is not is an obligation to justify the decision by reference to the evidential material upon which it was taken, because that is not giving reasons. That is explaining the evidential basis for reaching the conclusion you have.

That is a very different process and none of the judicial review authorities of which I am aware, which deal with the question of the adequacy of reasons, goes anywhere further than saying that the decision maker simply has to explain the result he gets to and the logical steps he has taken in order to get to there, sufficient so that if there are grounds for challenge, the challenge can be brought.

THE PRESIDENT: Yes.

MR CROW: But it would, on behalf of my learned friend, be a

completely sort of boot straps argument to say, "I am entitled to challenge on the grounds of insufficient evidence, therefore the decision must contain sufficient evidence to justify itself." That is not the position. There is not a challenge on evidential grounds and, therefore, we would submit, or at least consistently with that, the decision itself does not have to contain evidential material.

It is an interesting point, my Lord, because it is one of the misconceptions that runs through my learned friend's skeleton argument. He consistently refers to the decision making remarks like, "This is mere assertion" or something as if we were having to try and persuade them that we were right. The decision itself is simply an explanation of the assessment that the OFT has reached. It is not meant to be persuasive in the sense of seeking to change somebody else's mind if they are not of the same opinion. It simply discloses what the decision actually was and what the reasons for reaching it were.

It contains evaluative judgments. I mean, if you wish to describe them pejoratively, yes you can call them assertions, but the point is that the decision itself is an evaluative judgment and it needs to express nothing more than that.

THE PRESIDENT: Yes.

MR SCOTT: In an ex ante situation it is necessarily of that character because there were facts available, but the facts related to the existing situation and they had to draw a judgment about how that situation would develop in the light of the evidence that they gathered.

MR CROW: Absolutely.

THE PRESIDENT: Yes.

MR CROW: Just to wrap up, I do not want to intrude because I promised I would try and sit down by about quarter past, on the legacy basis, there were two points urged on you. One was that the decision was that the legacy basis is irrelevant. On analysis that is wrong and the other, it says, is that the line was given to the decision because

the OBS shows that the legacy base is relevant.

Well, what the OBS shows is nothing more than this: that the National Programme does not involve ripping out everything that is already there. In that sense, yes, there is going to be a continuing, over time diminishing, legacy base. That does not help to answer the question of what relevance that has to the contestable market, because if all that is happening in relation to the legacy base is renewal contracts which are not put out to tender, that is not part of the contestable market.

THE PRESIDENT: This is Mr Gaddes evidence?

MR CROW: Yes, it is. My Lord, for those reasons we say that the words "relevant/irrelevant" were being used (a) wrongly and (b) inconsistently in relation to the decision and the OBS.

THE PRESIDENT: Yes.

MR CROW: So far as buyer power is concerned, the case appeared to be advanced on the basis that paragraph 22 of the decision was inconsistent with paragraph 17 of Mr Gaddes's statement. That, we submit, is simply not the case.

If you have open paragraph 22, what it is dealing with is renewals of LSP contracts under the National Programme. If you have open paragraph 17(b) of Mr Gaddes -----

THE PRESIDENT: It is not the legacy contracts, it is legacy renewals of future LSP contracts.

MR CROW: Yes, exactly. Paragraph 17(b) of Mr Gaddes is dealing with non-National Programme expenditure by hospitals and NHS Trusts. He is dealing with entirely different factual circumstances.

THE PRESIDENT: Renewals of LSP contracts that have not even been placed must be a very long run way in the future.

MR CROW: Sorry, my Lord, I missed that.

THE PRESIDENT: To be talking in paragraph 22 of renewal of an LSP contract -----

MR CROW: Yes.

THE PRESIDENT: ----- must be looking at least ten years down

the line, if not longer.

MR CROW: Yes. Off the top of my head, I am not sure. The paragraph starts with saying LSP contracts will be in place until 2010, so seven years.

THE PRESIDENT: You are saying this is talking about the situation after 2010?

MR CROW: Yes.

THE PRESIDENT: So the argument here is that there may be new entry opportunities after 2010 when the contracts then come up for renewal; that is the point that is being made?

MR CROW: Yes. My Lord, what is the thrust of the actual complaint here? If one examines the way it is put in the Applicant's skeleton, all it actually boils down to is this: it is being said that the OFT overestimated the effect of buyer power under, as it will be, the National Programme.

That, with respect, is exactly the kind of expert evaluation that the OFT itself is entrusted with and which, under Selcom and the Rail Regulator's jurisdiction you should not, with respect, interfere with it.

THE PRESIDENT: Yes.

MR CROW: The third point that my learned friend ran with was the non-National Programme expenditure. I hope the evidence is fairly clear on that and I can deal with it in some sort of summary bullet points. The first is essentially the same point as I have made in answer to all of them, which is that the competitive significance of the non-National Programme market is a matter for assessment for the future. There is not a right and a wrong answer.

The second point is that my learned friend has tried sniping at it saying, "Oh well, you did not take into account what is going to happen in Scotland, Wales or Northern Ireland." That is, with respect, a criticism that cannot fairly be left because the market that has been identified is the UK and the assessment of whether or not there is going to be SLC is an assessment for the UK.

You cannot, having made that decision, it not actually being the subject matter of a complaint, you

cannot then start fragmenting the question and say, yes, you made your evaluation for the whole of the UK and you took your view as to the effect on competition for the UK, but there is actually a sub-market in Wales and you did not take a separate view about that.

That is just not -----

THE PRESIDENT: Could you not, in order to satisfy the statutory test of looking at the market or markets, satisfy yourself that the geographical market is indeed the UK and that there are not separate markets in Wales, Scotland and Northern Ireland, for example, because the National Programme does not apply there.

MR CROW: My Lord, the question was addressed and the decision was taken and the market that was identified was the UK. That was taken on board and that is what emerges clearly from paragraphs eight to 13.

MR SCOTT: But if one goes to paragraph 14, we read that there are key suppliers in each country of the UK.

MR CROW: Yes.

MR SCOTT: And that in Scotland and Wales the Interveners will account for 100 per cent of the installed base.

MR CROW: Yes.

MR SCOTT: So there is an acknowledgment of looking at parts of the United Kingdom.

MR CROW: That is simply descriptive of where Torex and Isoft are. That is not in any sense acknowledging that the decision that the appropriate geographic market is the UK is the wrong assessment. Indeed, I do not understand it is being said that we have hit upon the wrong geographic market.

THE PRESIDENT: What is being said is that you have not properly taken into account the sector that lies outside the Programme, and it so happens that the sectors that lie outside the Programme are -- you include geographically distinct parts of the United Kingdom.

Are we to take it that because the Director has taken the United Kingdom as the relevant market -- sorry, the OFT, have said to itself well, we do not need to bother

about the fact that they are 100 per cent in Scotland and Wales because we think the relevant market is the United Kingdom?

MR CROW: My Lord, two answers. One, yes, the market is the United Kingdom but, secondly, no the OFT did not ignore the separate factors that operate outside England. We can see that from paragraphs 23 and 31.

In paragraph 21, talking about buyer power, it says, "Under the National Programme, five LSPs...(read to the words)... in England." Then paragraph 23, "Elsewhere in the UK contracts are largely awarded on a national basis...."

THE PRESIDENT: Yes.

MR CROW: "...which raises the prospect that awarding bodies are likely to possess and exercise buyer power. Again this requires alternative suppliers of EPRs and LIMS."

So what is being said in paragraph 23 is that yes the market shares are different outside England but buyer power is higher. Then one goes on in paragraph 31 -----

THE PRESIDENT: Yes, we have seen that.

MR CROW: You have already seen that.

MR SCOTT: Just to be clear about this, we are in a situation where, in geographical terms, we are talking about the whole market.

MR CROW: Yes.

MR SCOTT: But in terms of the structure of those matters covered by the National Programme, we are dealing solely with those matters that are for hospital users, that is paragraph 30.

MR CROW: Yes.

MR SCOTT: And not those matters which are, for example in note three, primary care or, as I understand the Programme extends to social care.

MR CROW: Yes.

MR SCOTT: So the market is geographically across the United Kingdom and in terms of the section of that, there is simply hospital users.

MR CROW: Yes. Just to draw the threads together on the impact

outside the National Programme, the first is the point I have made that it is a point that is taken into consideration. The second is that the attack that is being made is misconceived because of the definition of the market. The third point is simply that were it necessary and appropriate actually to consider a sort of appeal on the merits, so to speak, of the decision, you are already aware that the way that the non-National Programme budget, as it has been described, is misleading because to say that it is an £850 million budget, as if all of that is being spent on patient health care in the secondary market, is simply wrong.

The 850 million covers primary health care as well, it covers things other than patient care systems so it is going to include some payroll and that kind of thing, it is going to include an enormous amount of expenditure that is already committed. So, simply, the evidential basis upon which the attack is being launched is far, far, far too optimistic.

There is of course the incidental point -- I am not quite sure where I should be making this -- of my learned friend trying saying well, yes you have got to take into account the primary health care market, the knock-on effect of the merger on the primary health care market because there is going to be a knock-on effect. That, with respect, completely overlooks the fact that Isoft does not have a primary health care market product. There is no overlap in the primary health care market and so it was not subject matter of the investigation at all. So that, with respect, is just an air shot.

The final point in relation to purchases outside the National Programme -- and this is a point that my learned friend will no doubt make, although it is reflected in paragraph 16 of the decision -- is simply that whatever is being bought outside the Programme has, if it is new purchases, it has got to be congruent with the National Programme, so there clearly is a significant knock-on effect of the National Programme on the market outside it.

The fourth and final territory in which my learned friend sought to make some headway was the competitive position of Torex. With respect to him at this point, were it not being advanced with such enthusiasm, one might question the credibility of the argument because if one steps back and looks at the arguments being advanced, it is being said that the OFT took an irrational decision because it did not attribute enough rate to the puffs that Torex is putting in its interim reports about how successful it is or because it did not give enough weight to a Press announcement that the Chief Executive made when he had a link up with IBA.

Well, of course Torex is going to say something optimistic in its interim reports and of course Directors make optimistic announcements when they think they have got a contract that they can PR. But with the greatest respect, it is inconceivable that a Court could come to the conclusion that the OFT was acting irrationally in not giving sufficient weight to Torex's market presence by reference to these sort of incidental, as I say, PR puffs that are put into the Press.

THE PRESIDENT: What I think is being said, at least so far as I have understood it, and I may have misunderstood it, is that a great deal of weight is placed in the decision on the fact that Torex had not been selected as a preferred subcontractor by any of the LSPs.

MR CROW: Yes. Okay, yes.

THE PRESIDENT: What is said is that (a) there may be alternative explanations for that, other than Torex's non-competitiveness.

MR CROW: Yes.

THE PRESIDENT: But (b) it overlooks the fact that because you are not preferred subcontractor does not mean to say that you are out of the market.

MR CROW: Right.

THE PRESIDENT: There is still a huge amount to play for in relation to a -----

MR CROW: I am extremely grateful. Could I deal with those two

points, then? The first, we did not look at the reasons why Torex was out of the market. The fact is a decision has to be taken in the factual circumstances in which the OFT finds itself. Torex had not been selected.

Now, the OFT, in order to look at the likely impact on competition of the merger does not have to come to a view as to whether that is because Torex has got duff products or because it has chosen to pull out of software submissions completely and concentrate simply on support, or because some nefarious agreement was entered into between Torex and iSoft where Torex can simply pull its application to become -----

THE PRESIDENT: There may not necessarily even be an agreement, it may have just been for whatever reason.

MR CROW: It may not have been that. The fact is that when the decision came to be taken, Torex had not been chosen, either as a Local Services Provider or as a preferred contractor to any of the shortlisted Local Services Providers. That is a fact. Why it happened is irrelevant.

It does mean, in the OFT's assessment, that Torex is not going to be, by reference to its legacy base, a significant market player once the National Programme is up and running.

MR CLAYTON: But in the short term there will be a vast amount of business that they will have on maintenance and renewal of that legacy base.

MR CROW: Absolutely, but not in a contestable market.

MR CLAYTON: A huge percentage of that business of that installed legacy system base.

MR CROW: It means that the merged creature has a large -- yes, and we fully recognise that and we say as much in the decision. The merged company will have a significant market share, but that does not answer the question which the OFT has to answer, which is what is the competitive impact of the merger and, in that context, the fact that Torex has not been selected is the significant factor and it is significant -- and this spills over into the second point that you put to me -- because if you are not a

chosen subcontractor to any of the shortlisted LSPs, those LSPs are not going to be selling or offering your products to the National Health Service Trusts.

THE PRESIDENT: Sorry, Mr Crow, for interrupting, that is where I slightly find concerns about my understanding of the case. Does not being a preferred subcontractor mean that you are, in fact, excluded or does it simply mean that there is, for the time, a preferred subcontractor who may be changed or added to or adapted and, in either case, or in any case, is the preferred subcontractor himself going to be looking for subcontractors to help him in particular circumstances, particularly where we know this is not a 'rip and replace' system, it is a process of gradual adaptation?

MR CROW: Yes.

THE PRESIDENT: It is rather hard to imagine existing incumbents, of whom there are now only three, playing no role at all.

MR CROW: No, indeed. I do not want to either put glosses or give evidence while I am on my feet.

THE PRESIDENT: No.

MR CROW: It may be that if it is a point that troubles you and I cannot give you a full enough answer now, if we could reserve our opportunity to -----

THE PRESIDENT: Let me put it this way: if one is asking oneself in a very loose sense, does this situation "stack up", which I think is a phrase one has seen in one or two judgments.

MR CROW: Yes.

THE PRESIDENT: Here we have the company that has the largest market share, Torex, in at least one of the sectors that is being dealt with here, that is said in the decision to be valued at 337 million.

MR CROW: Yes.

THE PRESIDENT: Whose Chairman is becoming the Chairman of iSoft and it is said in the same breath that this company is in fact dead in the water so far as its principal business is concerned because it has not been selected as

a preferred subcontractor. One is just trying to square those things.

MR CROW: Dead in the water in the sense of evaluating its competitive strength.

THE PRESIDENT: Not in the relation to -----

MR CROW: Not dead in the water in the sense that it is not going to have any turnover. Surely it is going to have turnover, but it is going to have a lot of turnover in maintaining, perhaps upgrading and servicing the legacy base that is there, which is the non-contestable market argument.

Because this is the bidding market in which essentially three software players have succeeded, they are the ones who are going to be supplying the software solutions through the LSPs to the National Health Service Trusts.

Now, I think more by way of rhetoric than anything, my learned friend said oh well the Local Service Providers cannot force NHS Trusts to buy software. Well, they cannot force them to but the NHS Trust is not going to get national funding if they do not buy it under the National Programme. So they are married, of necessity, to the software providers who are the contractors under the Programme.

MR SCOTT: So we have a situation which you are distinguishing for us in a way that is perhaps more eloquent than the decision does, between the contestable market and that part of the market which is not contestable, whilst at the same time explaining to us that under the National Programme the contestability of that market will have been foreclosed by the bidding for the market.

MR CROW: Yes.

MR SCOTT: So that we do not have a limited portfolio within which buyer power is then exercised by whomsoever does the procurement.

MR CROW: Yes. I will take the compliment in my stride, but having heard what you have only had, in a sense, condensed in a day's hearing, if knowing what you now know you go

back and read the decision, you will find that that is what is there and it is unfair to try and -- although we said yes in correspondence we are not going to add to what is said in the decision, it is artificial and unfair to read the decision in itself in a sort of factual vacuum as if it came out of nowhere. It came out of a dialogue and it has to be read in context. It is not designed to be some sort of self-sufficient gospel and to be read with no reference to anything else.

It emerged from dialogue that had been going on, it meant what it meant to the parties, it does not contain a list of definitions in software for the secondary health care. It is not in fact defined but that is because it is written to an audience that knows what it means.

Yes, I have expanded rather more forcefully certain points that emerge from it, exactly that point about the non-contestable market, in our submission, does impact.

I am conscious of the time.

THE PRESIDENT: We have been interrupting you.

MR CROW: No, it is one of the pleasures of oral advocacy. The skeleton, I think, covers the ground. I think I have covered the points I wanted to cover, unless there are any specific points and we have asked if we could come back on a couple of incidentals in writing hereafter.

THE PRESIDENT: Yes. Forgive me, Mr Anderson. I am just grappling with a point. Forgive me for thinking aloud but I think it is fairer to think aloud than to think to oneself, as it were. There is part at the end of Mr Gaddes's statement where he is dealing with the question of whether Torex would not exert effective competitive constraints on iSoft.

One understands the point that he is making there, but let's be clear on two things. The OFT's position seems to be that Torex's ability to win has been impaired as a result of product not being approved as fit for purpose and not meeting... (read to the words)...NP", that is the first point he makes.

There is perhaps, however, a second question which is

whether, if any of that is the right question, it may be Mr Gaddes is answering a question which is not the right question, but is the right question not the question whether the presence of the merged company, iSoft/Torex, will be so strong in the new world that relative to the two other competitors, whose names you will remind me of in a moment, McKessons and Siemens, it will have such a powerful position that the remaining possibilities for competition will be substantially lessened which I suppose in the decision, part of the OFT's view is to place reliance on the bids for Cerner and IDX.

MR GREEN: Yes because -----

THE PRESIDENT: Yes. Maybe I have answered my own question.

MR CROW: I think probably better than I would have done.

THE PRESIDENT: Yes. Thank you, Mr Crow. Yes, Mr Anderson.

MR ANDERSON: Sir, you started by asking Mr Crow two questions about judicial approach. First you said does our specialist nature affect the job we have to do.

THE PRESIDENT: Yes.

MR ANDERSON: Secondly, you said what degree of deference is due to the Office of Fair Trading. Sir, we would answer both those questions by adopting what Mr Crow had to say about them.

THE PRESIDENT: Yes.

MR ANDERSON: In relation to judicial review of competition law decisions we would refer also to the cases and the article at paragraph 16 of our skeleton argument.

THE PRESIDENT: Yes.

MR ANDERSON: But we would add that there are particular reasons for deference where an application is brought and heard to a timetable such as this one.

THE PRESIDENT: Yes.

MR ANDERSON: May I make it clear that this is in no sense a complaint; indeed on the contrary, I am sure that all parties here represented are extremely grateful to the Tribunal for the efforts it has made to convene and to hear this case.

But it is, in our submission, necessary to remember

that the Office of Fair Trading took forty days -- well, it had forty days, it took a little more than that.

THE PRESIDENT: Yes.

MR ANDERSON: None of us have had anything like that amount of time. We placed before the Court yesterday two full bundles of written submissions that were made by my client and by Torex to the Office of Fair Trading.

THE PRESIDENT: Yes.

MR ANDERSON: Many of the points raised by Mr Green, in fact I think all the points raised by Mr Green -- or nearly all -- contained in the Issues Letter were the subject of very detailed comment in those observations.

THE PRESIDENT: Yes.

MR ANDERSON: And yet nobody so far has taken the Tribunal to any of them and I was not proposing to do so either. IBA likewise have put in their submissions spread over two bundles and that was only the tip of the iceberg. Mr Gaddes says, at paragraph seven, the OFT sought and obtained views from an unusually large number, over thirty third parties, including a number of hospitals, NHS Trusts and competitors.

THE PRESIDENT: Yes.

MR ANDERSON: And those included, as he went on to explain at paragraphs 18 to 20, and this perhaps helps to answer the second question of the Tribunal, those who were responsible for the National Programme within the Department of Health.

Sir, you asked whether IBA knew the reasons that the OFT had in mind. Well, Mr Green and Mr Robertson were both in the Interbrew case. Had there been a suspicion of such an argument, no doubt it would have been ventilated in the application, but it was not.

There is a second reason why, in our submission, a sceptical view should be taken or a second reason for caution, given the time scale.

THE PRESIDENT: Yes.

MR ANDERSON: And that is to the extent that matters are advanced which were not advanced before the Office of Fair

Trading, the OBS being one example. I do not propose to say very much about the OBS because it is, as its name suggests, a technical specification, that is what the document was. IBA knew all about it but did not see fit to put it before the Office of Fair Trading, and we would say that was a very understandable decision. It really has nothing to do with the competition issues.

So in circumstances where matters were not put before the Office of Fair Trading, even an appeal will not likely be allowed, let alone a judicial view.

THE PRESIDENT: Would it not have been up to the Office to find out a bit more about how this Programme actually worked and what the specifications were, who was responsible for buying what and all the rest of it?

MR ANDERSON: That implies that some knowledge of how much they did find out. What one does know is that there were extensive submissions from both sides of the argument about exactly what the National Programme was going to involve. Whether it was likely to start on time, how much expenditure it was going to take up, whether budget estimates for its expenditure were going to be maintained, what proportion of the market would be covered by it, these were all arguments that were the subject of extremely detailed comment by the parties.

We also know from Mr Gaddes that the Office dealt directly with those responsible for the Programme so it was not as though they were simply reading Press Releases and relying on what they read in the business Press.

In terms of the burden of all this, of course one is not saying that the Office should not conduct its own investigation, it has to do that. But in terms of what Mr Green has to do before the Tribunal, he has the burden of proof. He has to show, on the basis of whatever evidence there is, that the Tribunal proceeded on the basis of evidence so inadequate that no reasonable person could have reached that decision. So it is another factor that comes in when one is dealing with court proceedings to a time scale, the questions of burden of proof do become

important.

In our submission, sir, we should take an equally sceptical view of submissions which do not find a place in the application and which come along later on. Buyer power we would place in that category.

We would also refer to the whole business of markets outside the secondary health care sector, the non-hospital market. We heard a lot this morning about prisons and mental hospitals and all sorts of things, primary health care. That is irrelevant. It is luckily very easy to show why because of the first section of paragraph eight of the decision, "The parties overlap in the supply of IT software systems for use in hospitals". That is where the overlap was, that is where the competitive concern was and, sir, that is where all the parties concentrated, not just the Office of Fair Trading but the parties to the merger and IBA as well.

Sir, in relation to factual errors, I do not want to go on about this but the factual errors, the alleged factual errors, were listed perfectly plainly in paragraphs 52 to 57 of the application. We all did our best to respond to those as best we could. We took the view that there is no judicial review for factual error, but just in case there was, we put in evidence relating to those alleged factual errors. Yet today we find a whole series of further so-called howlers.

Of course it is very easy to kick up a bit of dust in this sort of procedure, but it is in those circumstances that perhaps one has to be stricter than one otherwise would in terms of keeping to what is in the application.

Still on judicial approach, and I think I can take the remainder of this briefly, on the question of error of law and whether it constitutes a ground for judicial review, we associate ourselves entirely with what Mr Crow said and of course it is set out in our skeleton argument. He could have added that in the Ex Parte A case, Lord Hobhouse also agreed with Lord Slynn's reasons for deciding the case, but he very specifically made a point

of not agreeing with his comments on error or fact. Indeed in Alkenbury, when Lord Slynn again made his suggestion that perhaps this ought to be a ground for judicial review, he did not suggest that anyone had agreed with him last time and, again, nobody did.

One can see the attraction in a case such as Ex Parte A, one can see what tempted Lord Slynn to introduce such a doctrine into English law. The facts of the case are perhaps different from those one often hears in this Tribunal, but a very distressing case about a claim before the Criminal Injuries Compensation Board. Somebody had medical damage and the Criminal Injuries Compensation Board decided not to pay her any compensation because they had a report of the expert's report and so the expert's report said the damage to her back passage was caused by having piles, that is what they were told. In fact the expert report said it was consistent with buggery.

That is the sort of case where one can see an error of fact so blatant, so determinative of the decision whilst some of the articles call it cardinal error of fact, but one can see why judges might be tempted to introduce it into our law even if others are made of sterner stuff.

That is, we say, thousands of miles away from this case. That really was a howler and my friend has suggested really nothing that even comes close.

Indeed, what they are forced to say appears very well from the first paragraph of their skeleton where it is said the principal issue in this application is whether the OFT was correct to conclude in the decision that the anticipated merger would be expected to result in a substantial lessening of competition.

The standard for judicial review cannot be anywhere close to that. This Tribunal could no more say it was incorrect than it could say the OFT was correct. It is of course very tempting when one does have the expertise in the subject matter to take an interest and say, "I would not have done it that way, I might have done it

differently", but that is very far from being the legal test for a judicial review.

Indeed Mr Green, I think, came some way to accepting that this morning when he accepted in terms that if there was no error of fact and no error of law, then his application, as he put it, was doomed to fail. Well, there can be no error of fact because the law does not allow it. That brings him down to error of law.

In that connection, I would like to seek to address the Tribunal's questions in relation to section 33.

THE PRESIDENT: Yes.

MR ANDERSON: Though before I do so, may I just very briefly refer to a couple of other points on the law? The first was the relevance of European law. Of course the system is fundamentally different from the EC system, both as a matter of substance and a matter of procedure, there are different tests, the dominance or the significant lessening of competition and the procedure too. In the EC one has the single body, the Commission, and here we have the OFT with referral to the Competition Commission. So in those circumstances it is very difficult to see how the point even gets off the ground.

THE PRESIDENT: Yes.

MR ANDERSON: So far as differential standard of review is concerned, I think I can simply rely upon what we said in our skeleton at paragraph 18 and gratefully adopt what the Office of Fair Trading said at paragraph 12, there is some overlap there but we each had a distinctive point.

THE PRESIDENT: Yes.

MR SCOTT: Mr Anderson, just before you move on, we have raised the subject of section 107 and reasons.

MR ANDERSON: Yes.

MR SCOTT: I take it that you would see those in terms of an error of law?

MR ANDERSON: One of the complaints that is noticeable because it is not made is the complaint that this decision is not adequately reasoned. The failure to give reasons can, in certain circumstances, be a ground for judicial review and

no such ground is alleged here. Reasons are given, Mr Gaddes has explained why the reasons were given at the level of detail that they were, and in the absence of a complaint on that score, just as in the absence of a complaint that my friend was taken by surprise as in the Interbrew case, our submission is we do not need to deal with that.

But certainly in relation to section 33, if I could just -----

THE PRESIDENT: Sorry, Mr Anderson, just before we leave judicial review, just in case anybody wants to come back on it, between the stark dichotomy between fact on the one hand and law on the other, which you invite us to respect, there is a very well established middle ground in judicial review which consists of failing to take into account relevant consideration or wrongly taking into account irrelevant consideration.

MR ANDERSON: Yes.

THE PRESIDENT: That is sometimes a ground that involves a sort of mixture of facts and argument and appraisal as to what a reasonable decision-maker should have done confronted with the situation which he was in.

MR ANDERSON: Yes. A classic example in the public law context would be the local authority that refuses to allow its playing field to be used by a visiting rugby team because it does not approve of the politics of the country from which the team comes, as the Tribunal will well know.

THE PRESIDENT: Yes.

MR ANDERSON: That is a classic example of an irrelevant consideration.

THE PRESIDENT: What I am, I suppose, wondering about in this case partly is whether there is any relevance for that provisional approach and, secondly, to what extent is it implicit in the section to which you are about to come that the OFT's belief must be based on an investigation and how far it is within the realm of review not to decide the facts, but the question of whether the investigation was a sufficient investigation in the circumstances of the

case.

MR ANDERSON: Can I come onto "reasonable" and perhaps I can try and answer that? I think certainly we would accept that means reasonable in a public law sense and we have no difficulty with that. Perhaps I could come to that in due order.

THE PRESIDENT: Yes.

MR ANDERSON: So far as relevant considerations are concerned, it is an elusive ground of review and there are certainly cases in which the error of fact, if one likes, is so blatant that courts have been tempted to divert it into the framework of failure to take into account a relevant consideration and to determine it that way.

But that is not really what this case is about and, to be fair to Mr Green, it is not how the case is put. It has never been suggested that there is a relevant consideration that we have failed to take into it. It has been said that the facts were wrong, that the appreciation of the facts was wrong, and of course we would accept that if it was Wednesbury unreasonable, then it can also be the subject of judicial review, but it has not been put in this way.

THE PRESIDENT: No.

MR ANDERSON: Indeed if one looks at the list of issues, as Mr Crow says, one does see all these issues right up front. If one delves -- I am not inclined to delve now -- but if one looks at these submissions and if you are looking for a good read we particularly recommend our submission of 6th October which is the answer to the list of Issues Letter, one does see really exhaustive coverage of these issues with the exception of the ones that have come out of left field because they had nothing to do with the competitive analysis such as the supply of IT systems to prisons and so on.

THE PRESIDENT: Yes.

MR ANDERSON: Going on to section 33 and just perhaps glancing briefly at an authority in my friend's bundle, it is tab five. I am not sure of the number of it but mine is red,

and I think it may be bundle four.

THE PRESIDENT: Yes.

MR ANDERSON: Looking at tab five of that bundle, decision of the House of Lords last year in Westminster City Council v NAS, and in the speech of Lord Steyn, one sees, starting at paragraph four, the system of explanatory notes is mentioned. Paragraph five, more general comments are made. The second sentence, "The starting point is that language in all these texts conveys meanings according to the circumstances in which it was used. It follows the context must always be identified and considered before the process of construction or during it. It is therefore wrong to say that the Court may only resort to evidence of a contextual scene when an ambiguity has arisen."

Then a little lower down, Lord Hoffmann is cited on what he said about contracts and he said the same applies to construction.

THE PRESIDENT: Yes.

MR ANDERSON: Then over the page, opposite B, "Again, no need to establish an ambiguity before taking into account the objective circumstances to which the language relates", and a reference to explanatory notes which is said to be sometimes more informative and valuable than the reports of the Law Commission agreeing on White Papers and the like, though of course the White Paper is one of those pre-Parliamentary aids which in principle is already treated as admissible. So those are the remarks of Lord Steyn on that subject.

If one looks at this section in context, it must be against the situation well known to this Tribunal but referred to specifically in the evidence of Mr Gaddes at paragraph six where he gives the figure that only three of 70 merger notifications under the Act have resulted in references and one in the acceptance of undertakings. Of course we do not say that figure the determinative of the construction of the Act. Perhaps the OFT is getting the construction of the Act entirely wrong, but that general balance of numbers which is similar no doubt to that under

the old regime does give some idea of how the respective functions of the Office of Fair Trading and the Competition Commission have traditionally been viewed.

THE PRESIDENT: As I understand it, those numbers in themselves reflect the fact that many, many mergers, although satisfying at least the assets test under the statute, do not in fact raise any competition problems.

MR ANDERSON: Yes, that may be so and of course Mr Gaddes -----

THE PRESIDENT: I think the situation we are dealing with here is the perhaps not typical situation where there is a prima facie problem which, after all, in this case the OFT is found issuing the Issues Letter, but the OFT decided to resolve it at the level of the OFT, or there were grounds upon which it could be resolved in the context of an OFT decision without meriting further investigation.

MR ANDERSON: Yes. But despite that, of course -----

THE PRESIDENT: It is a slightly unusual situation.

MR ANDERSON: The OFT is still given its forty days and a significant investigation is plainly envisaged. I have just handed up a few pages of the White Paper.

THE PRESIDENT: The White Paper that led to the -----

MR ANDERSON: That led to The Enterprise Act, July 2001.

THE PRESIDENT: Yes.

MR ANDERSON: Just by way of flavour, one sees at page 24 in the box there, about four bullet points from the bottom, "The new regime will retain a two-stage approach to merger investigations. The OFT will carry out the first stage of investigations which will be sufficient to decide most cases." There is no indication there that any sort of seismic change was envisaged.

If one turns to the statute itself, a useful way into the problem, in my submission, and particularly the problem of the two "mays" is to look at section 33 together with section 36; section 33 of course governing the OFT's decision and section 36 the decision of the Competition Commission. That may also have some bearing on the Tribunal's question about the balance between the

two.

THE PRESIDENT: Yes.

MR ANDERSON: If one starts with section 36, one sees how the question is put for the Competition Commission. "On a reference under section 33 it shall decide the following question: whether arrangements are in progress or in contemplation which are carried into effect will result in the creation of the merger situation and, if so, whether the creation of that situation may be expected to result in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services."

In other words, whether, on the balance of probabilities, perhaps it will result in a sufficient lessening -----

THE PRESIDENT: I think it is classically regarded as answering the question whether it is more probable than not that the situation would or will.

MR ANDERSON: Yes. You will be very familiar with Beresford and so on, an authority which I do not think is before the Tribunal but I think the point is clear.

THE PRESIDENT: Yes.

MR ANDERSON: Of course one -----

THE PRESIDENT: I had forgotten what the authority was.

MR ANDERSON: The words "may be expected" are still used because certainty as to the future is never possible.

THE PRESIDENT: Yes.

MR ANDERSON: But in practice it simply means "will" on the balance of probabilities.

Turning from there to 33, the question for the Office of Fair Trading is self-evidently different. What makes it different on the face of the statute is the insertion of two phrases, the first is "believes that it is the case that" and the second is the phrase "or may be the case". Those are the two qualifiers, if you like.

THE PRESIDENT: Yes.

MR ANDERSON: First of all looking at them in the round, what is the purpose of those phrases, plainly one purpose is

they are designed to ensure that the Office of Fair Trading can make a reference, even when it has not formed a view that there will be a substantial lessening of competition. I mean, plainly it can make a reference without itself having formed a view on the balance of probabilities that there will be a substantial lessening of competition, but also they are designed to ensure that the Office of Fair Trading does make a reference in particular circumstances.

So what do the phrases mean? We would entirely accept that they mark the distinction between the preliminary role of the Office of Fair Trading and the secondary role or referral role of the Competition Commission. But they do, in our submission, serve slightly different purposes.

"Believes that" in our submission goes to the finality with which the Office of Fair Trading must have reached its conclusion. It has no bearing on what the content of that conclusion must be. It is really there because the OFT is, in the phrase of the guidance, a "first phase screen". It may refer once it has a belief without having to proceed to the stage where it has reached a firm conclusion as to the likelihood of an SLC.

In response to the Tribunal's question, of course that belief must be a reasonable belief in the public law sense. There may be circumstances in which that means that it is a belief based on a sufficient investigation, but it is relevant to that in considering whether it is a public law unreasonable belief and whether the investigation has been plainly and obviously insufficient to look at what the Complainant has put before it and what part the Complainant has taken in that investigation.

It is really in that context that we say it is relevant when one looks at things like the OBS that they were not put before the Office of Fair Trading at an earlier stage.

The word "may", on the other hand, goes to the content of the conclusion. The determination made in section 36 can be made by the Competition Commission only

if it concludes that there will, on the balance of probabilities, be an SLC, but on section 33 the determination can be made if the OFT concludes that there may be an SLC.

We, like Mr Crow, would accept the language of the guidance that "may" in this context means there is a significant prospect of there being SLC.

We are not quite so fond of Mr Crow's other formulation about the "alternative credible view".

THE PRESIDENT: We will come to that in a moment.

MR ANDERSON: Yes, we prefer to first stick to 3.2. The submission made against us this morning, if I got it down right, is that the reference must be made if the OFT believes that there might be a situation which might result in a significant lessening of competition.

THE PRESIDENT: Yes, we slipped into "might" at some.

MR ANDERSON: The double "may" became a double "might".

THE PRESIDENT: Yes.

MR ANDERSON: In our submission, that really is wholly unrealistic and one can do that not only by reference to the well known context of the operation of a competition authority, but one can actually do it textually as well by reference the section 33.

THE PRESIDENT: Yes.

MR ANDERSON: Because of course this qualifier "is or may be the case" does not just apply to 33(1)(b), it applies to 33(1)(a) as well, "Arrangements are in progress or in contemplation which are carried into effect will result in the creation of a relevant merger situation."

THE PRESIDENT: Yes.

MR ANDERSON: It would be ludicrous if that condition could be satisfied if the OFT believed that it was possible that someone somewhere was talking to somebody else. You could not entirely exclude the possibility that such conversations were happening and that they might be deciding to merge. It is plain that "may" in that context must have a different and much more substantial meaning.

MR GREEN: Perhaps I can clarify, I was not intending to

suggest this morning that "might" would mean 0.1 per cent which clearly it could do. I understood "might" essentially to be the same as "may", but we are not suggesting -----

THE PRESIDENT: We are dealing with a statute that says "may".

MR ANDERSON: Good. Well, "may" is a flexible word and that is the extent, in our submission, of the flexibility.

The same applies in our submission as regards (b). It would be absurd if the Office of Fair Trading were obliged to refer every time, looking into the future as well as it could, it considered there to be a theoretical possibility, however small, it could be a substantial lessening of competition. To us, it means "may realistically" or there is a genuine prospect that it may.

I would like to refer briefly also to the explanatory notes.

MR SCOTT: Sorry, just sticking with 33 and with 36.

MR ANDERSON: Yes.

MR SCOTT: When we get to 36, the Commission is deciding in (b) "if so, whether the creation of that situation may be expected", so what you are saying is that they are doing that on the basis of that meaning "will" on the balance of probabilities.

MR ANDERSON: Yes.

MR SCOTT: I think part of the question that we were discussing earlier on was in relation to that test, is there any distinction between the level of probability the Commission needs to apply and the level of probability that the Respondent should apply?

MR ANDERSON: Yes. The reason I was using section 36 in a sense was to diffuse the second "may".

MR SCOTT: Yes, I understand.

MR ANDERSON: And that the second "may" meant "might." Clearly it cannot do because it would be ludicrous if the Competition Commission had to -----

MR SCOTT: But given a purposive construction as distinct from the fact that the words are the same, having regard to the different purpose in 33 and 36.

MR ANDERSON: That is why the first "may" comes in. What we do to diffuse the first "may" is to say well don't just look at (b), look at (a) as well. It must mean the same in both contexts. As to the question of whether somebody might be talking to somebody else, of course one can never exclude the possibility, so that is really how we put it together. That is, in our submission, consistent with the explanatory note.

THE PRESIDENT: Mr Anderson, does it help at all to compare the word "decide" which is used in 36(1) of what the Commission has to do, they must decide it, with the word "believes" in 33(1)? In some respects this is related to the "alternative credible view" point. If the OFT has a case where there is prima facie evidence of a substantial lessening of competition, is it for the OFT to decide that in fact that prima facie evidence can be rebutted by other consideration, or is it for the OFT to say, well there the prima facie evidence here. Whether that evidence can be rebutted is really a matter for investigation by the Competition Commission and not a matter for us.

This, in other words, comes back to the whole balance of the system and so forth.

MR ANDERSON: What I would say about that is, the reason for "believes", I think I put it earlier in terms that it went to the finality with which the OFT must reach its conclusion.

THE PRESIDENT: Yes.

MR ANDERSON: And the reason it is there is for the absolutely plain dead obvious case where it has obviously got to go to the Competition Commission. The OFT may not be required to make a finding quite as elaborate as might be envisaged in a more difficult case.

THE PRESIDENT: No.

MR ANDERSON: And "believes" gives it the liberty to make that reference without going so far as to making a sort of finding or determination that one might expect in other circumstances, or indeed one might expect the Competition Commission to make, but it does not go to the content of

the conclusion. There, one is in the territory of the two "mays" and "believes" simply goes to how final the assessment must be.

THE PRESIDENT: One has to be -- I don't know, I will say it anyway because it is good to have these things out in the open, but had the case gone the other way, put it like that, that there had been a reference, one could perhaps quite imagine somebody saying if that were challenged, well, there is a prima facie case here, you may be right or you may be wrong on your arguments about the National Programme but that is for the Competition Commission to sort out. One could imagine conceptually somebody arguing that.

But here the OFT has gone some way into it in a way that might, in an earlier world, have been expected to be part of the remit of the Competition Commission in a rather complicated long-term operation like the effect on the National Programme.

MR ANDERSON: "Complicated" and "long term" might of course have been adjectives one could have applied to the investigation as well, that being the nature of these things. Of course one of the functions of the Act -----

THE PRESIDENT: I am only thinking aloud. I am not taking any view on it. It is just to demonstrate the point.

MR ANDERSON: Yes. You have seen the timetable and how the tenders are coming up and so on. One can see the damage that would be caused -----

THE PRESIDENT: I mean, there is limit to what they can be expected to do in the time they set themselves.

MR ANDERSON: Yes. In our submission it is very impressive what they have done in terms of the evidence they have taken and the people they have seen and the fact they have produced a conclusion. I do not think anyone is complaining they have not had a proper hearing, or even that the conclusion is not properly reasoned. So, really, it is an attack on assessment and no doubt whichever body came to the same assessment would have been attacked on the same grounds.

In terms of prima facie evidence, I do not suggest you were thinking particularly in terms of this case, but this is not at all a case, in our submission, where there was a prima facie case based on installed market share and the burden then shifted in some way to demonstrate that things were otherwise. One simply has to look at the market as it is, the market for the future where it is a vast and revolutionary programme getting off the ground.

THE PRESIDENT: Yes.

MR ANDERSON: The PAPs already having been short-listed by the LSPs and Torex simply not figuring on the shortlist. I can come to the suggestions as to the Machiavellian reasons why they do not feature on the shortlist, but in our submission there is no credibility in that at all.

THE PRESIDENT: Yes.

MR ANDERSON: The game has changed, it has moved on. The three companies on that shortlist are the two Americans, Cerner and IDX, and the British company iSoft.

MR SCOTT: You say they properly addressed themselves to the contestable market?

MR ANDERSON: Yes. These are huge companies of course, the American companies. The suggestion that the barriers to entry are so high that the Americans will not make much of an impact is really quite incredible. Between them, they are the only PAPs in the whole of London. How one can say they are not a credible or serious competitor in those circumstances, one does not know because there are two shortlisted PAPs for London and one is Cerner and one is IDX. That is the sort of league in which one is fighting.

Our information is that the market capitalisation of IBA is about £12 million. It may be the 40 million was Australian dollars, I do not know, or maybe we got it wrong, but that is what my instructions are. One is really in a totally different league.

I do not want to spend too long on the legal text, but I just -----

THE PRESIDENT: No, that was helpful.

MR ANDERSON: I hope it was. We are happy with the guidance at

3.2. If I could simply refer you quickly to the explanatory notes and they are in Bundle 4, tab one.

THE PRESIDENT: I think it is our Volume 10.

MR SCOTT: Tab four in our 10.

THE PRESIDENT: Right. Where do you need to take us?

MR ANDERSON: Tribunal Volume 10 at tab one, I am so sorry. It is four passages, paragraph 95 is the first one. This is the note to section 22 note and of course section 22 is the equivalent to section 33 in relation to completed mergers, but the note is incorporated by reference. It is stated at 95, "Subsection 1 provides that the OFT must make a reference to the CC if it believes that there is or may be a relevant merger situation that has or may be expected to result in a substantial lessening of competition."

So the first "may" is omitted in the explanatory note and that is despite the fact that the wording of the section is exactly the same as the wording of section 33. For what it is worth, not a lot of weight placed on the first "may" there.

If one goes on to 128, it is said that section 33 broadly mirrors the reference duty in section 22 so it is incorporated by reference. There is also a point on 33(1)(a) which goes to my submission on the first "may": "The OFT is given discretion not to refer unless it believes the proposals are sufficiently far advanced or likely to proceed."

On my friend's interpretation, I think it is possible that they might be sufficiently far advanced or likely to proceed.

Then moving on -----

MR SCOTT: That is also covered in 33(2)(b).

MR ANDERSON: Yes, that is right. Moving on to 131, that is on section 35 which are the questions the Commission has to decide in relation to completed mergers and it is the companion to 22 and the opposite number of 36. Again, 35 is raised in the same way, 35(1)(b) is like 36(1)(b) but it is expressed as "The CC has to decide whether the

merger has resulted or will result in a substantial lessening of competition."

THE PRESIDENT: It is not an entirely accurate precis.

MR ANDERSON: No, it is not. One does not derive a great deal from that, save that one knows Lord Steyn thinks the explanatory notes are relevant, indeed more relevant he says in some ways of pre-legislative material, and one certainly is not conscious here of any obvious desire to say that this filter is a merely formal or just there to screen hopeless cases or anything like that - quite the contrary.

Finally at 137, the reference to section 36. Again this is a point of the second "may". It does not even aver to the second "may", it simply describes it as useful for future tests so that goes to my point that the second "may" really means "will", of course on the balance of probabilities.

Going on to legacy base, we dealt with that in general terms at 54 to 55 of our skeleton argument and I shall not burden the Tribunal once again with the submission that the world is moving on, which is why the installed base is not or at least it was reasonably thought not to be the appropriate measure. I should say, if there is any doubt about that, I would refer you to the Issues Letter which has a lot of questions about legacy base.

May I simply deal with two offshoots of the argument on installed base or legacy, one of which was the point on upgrading and adaptation which did not feature very much before the letter of the Tribunal last night which did feature a certain amount today and which I would propose to address as well and, secondly, with the non-National Programme aspects of that question.

IBA did not, so far as we were aware, and they have not referred anything to the Tribunal, raise concerns in relation to the effects of incumbency in the market in upgrades in its submissions to the OFT, or indeed in its written submissions before this Court. We infer from that

that that may have been because it was inclined to share the OFT's recognition that in this respect incumbency had no significant competitive effects.

There are, really, in our submission, two reasons why it did not have those competitive effects. The first is given by Mr Gaddes at paragraph 17(b) where he says that where ordinary upgrades are concerned, control over upgrades is undoubtedly an incumbency advantage but it is not one which is susceptible of competition. I do not think I need to take you to that, the reference is 17(b). What he says is that in practice only the incumbent will get the contract to upgrade and that segment of the market is therefore not contestable.

Now, that may be for intellectual property reasons. I think one of you raised that with Mr Green this morning and certainly unless you go in for reverse engineering of not a very sophisticated client it is very difficult to upgrade somebody else's product. It may be that that was the reason why the OFT came to the conclusion that it did.

I should show you also the evidence of Mr Whiston where more ambitious adaptations are concerned. I think that really is Volume 7 but I will be corrected if I am wrong. It is tab three of Volume 7. There are two references, the first is at 25 and the second is at 33.

If I summarise 25, "The National Programme will determine the manner in which legacy systems are upgraded and in place from the moment the LCPs" -- I think that should be "LSPs" -- "assume responsibility for the implementation of the National Programme pursuant to the contract awards."

There is more on that at 26. Then at 33 it is developed in more detail. I do not think I need take you to that. It is not denied that not everything is going to be removed and replaced straight away and of course in some circumstances that will be the case, some systems are going to require enhancement.

But you are going to need to operate still within the framework of the National Programme and as is stated here,

"These commissions will be restricted to systems that are part of another LSP solution set", in other words those that have been accredited as part of the National Programme procurement process. "So that he understands that even where existing systems outside of the chosen LSPs' approved portfolio are to be retained and enhanced. Any such enhancement to be implemented using National Programme accredited solutions."

Of course you will know that Torex has no National Programme accredited solution, accredited neither by NASP which is Part 1 of those technical specifications, nor by the LSPs who are dealt with in Part 2.

One has got to focus, in our submission, on what -- well, one has not got to in this case, but one would have to if one were stepping into the shoes of the Office of Fair Trading, focus on what the LSPs and their PAPs are trying to do, which is not simply to prolong the life of old product but determine them, if they retain them at all, into services which interact seamlessly or interface seamlessly with other national and local services.

The whole grand idea of the National Programme is to provide a system in which everybody can interface with everybody else and it simply is not realistic to suggest that these major adaptations are not going to be made without recognition of the programme. Indeed, in the OBS document itself, the emphasis is all on new and innovative solutions.

Going on to the non-National Programme market, we have dealt with that in paragraphs 38 to 41 and 54 to 55 of our skeleton argument. There are references there to such evidence as we have put in that is relevant to that and we refer also to the statement of Mr Gaddes at paragraphs 16 to 20. It might just be worth turning that up. It is in the Office of Fair Trading's bundle which I think the Tribunal has. I do not have it on my list.

THE PRESIDENT: That is all right, we have got it.

MR ANDERSON: It is tab two, begins at page ten, paragraph 16. The Applicant produced information as to the non-National

Programme market, as it did on the other issues. He then gives the reasons why further analysis was not included in the decision and he states that the information was received and reviewed. Then he gives a number of reasons, much of the non-National Programme expenditure is already allocated. The point I just referred the Tribunal to about unlikely to be contestable I was talking about extending or upgrading.

The second point which I just made by reference to my client's evidence in relation to new systems needing to comply with expectations. Little incentive in any event to invest in systems outside the National Programme, funding is limited.

Then there is the point that one cannot simply look statically at Cerner and IDX. Even if one accepts -- I would really like not to have to accept it -- that they are sitting there in the box seat in terms of being PAPs all ready to start providing LSPs with products and services, one cannot just assume that it will end there. The presence on the market that they obtain is obviously going to enable them to provide strongly competitive pressure outside the Programme as well, or at least arguably be thought to do so.

Then a similar point is made at 'F', once the products are fit for purposive and so on. In relation to, points were made about countries other than England and of course it is stated in the decision that they spoke to National Health Service Trusts in those countries and all of them were perfectly content, except the Northern Irish expressed some reservations which were dealt with and taken into account by the Office of Fair Trading.

THE PRESIDENT: Mr Anderson, bearing in mind what is in paragraph 17 of Mr Gaddes's evidence is not in the decision, can we take that into account under judicial review principles or not?

MR ANDERSON: Mr Gaddes is being helpful but it is not for Mr Gaddes to prove anything. It is for Mr Green to prove. In fact, he puts it himself in this application.

THE PRESIDENT: It is not a question of proof.
MR ANDERSON: The only reasonable conclusion that was possible to come to was that there was going to be a significant lessening of competition in the non-National Programme market. Well, it does not, in a sense matter whether this is true or not. Of course if it is true, in our submission, it coincides with our evidence as well, but the point is one can find another way of looking at it and it is another way which results in the opposite conclusion. In those circumstances, it is Mr Green who has not made out his burden of proof.
THE PRESIDENT: Yes.
MR ANDERSON: There is one more point on that which is a very striking point and it is made by Mr Whiston at paragraph 34 in bundle seven. I think we were just there.
THE PRESIDENT: Yes, it is bundle seven, tab three.
MR ANDERSON: The next point, "The ownership of legacy systems do not confer a material competitive advantage even prior to the National Programme in respect of the use of anything...(read to the words)...any event. In this regard..."
THE PRESIDENT: Sorry, where are you?
MR ANDERSON: I am so sorry, paragraph 34. "In this regard, it is regard it is a case of historically some 80 per cent of all new EPR IT systems for hospitals have been awarded to providers other than the incumbent. Torex's particular failure in recent years to implement its systems in the market evidences this lack of advantage conferred by incumbent systems."

Mr Green says well, it is perfectly obvious if there had not been a National Programme there would have had to be a reference. Well, maybe he is right, maybe there would have had to be a reference, but it is not something that we would necessarily accept because one sees this very striking figure here, for churn, if you like. Systems, when they are replaced, on the whole, people do not go to the person who provided it the first time round.

So those are, I think, the main points on outside the

Programme. I am getting close to trespassing on the Tribunal's indulgence so let me move on to the question of buyer power. My friend's first point was that if he was right on legacy, then there is no buyer power. We say that he is not right on legacy, that is the short answer to that.

Secondly, he said the OFT's case assumed a national award of contracts which is not the case for contracts outside the National Programme which he says are still governed by individual Trusts. That submission confuses the issue of buyer power under the National Programme which is what paragraph 21 of the decision is all about with the issue of competition outside the National Programme market.

In any event, even with individual Trusts, very few contracts each year are awarded, they are often very big one and they generate vigorous competition. The reference for that is in Bundle 8, tab 1(a) at Annex 13. This is, again, a recycling of the point made to the OFT.

Thirdly, he said, and this is where he brings in the Americans, the findings on buyer power assume credible competing suppliers and new entry which is not the case. We describe that submission as absurd -- I think it is the only time we use that word -- that the idea that these huge companies sitting in pole position for these massive contracts are not credible competing suppliers really does not stack up.

If I can give you a reference on that, the position of Cerner and IDX. It is in the witness statement of Mr Whiston, 35 to 38. They are both PAPs, their software has been accredited, it met the National Programme specification and standards. Neither of them could have been put forward as a PAP or as a selection PAP without having a product that the National Programme was satisfied has been successfully adapted for the UK market. So the idea that these American systems do not work in England, there is no basis for that.

As for smaller suppliers, perhaps I could simply

refer you to our skeleton at paragraph 53.

Finally, he said the conclusions on buyer power must be counterbalanced by the agreed facts, as he called them, of large market shares and a significant increase in concentration. Well, we are back to legacy again; those market shares relate to the legacy market and I have made my submissions on that.

So the buyer power point did not figure in the application, it is based on a mixture of irrelevant considerations and scenarios which would be helpful to IBA's case if they existed, but they do not exist and, in any event, have not been proved to exist. It is wishful thinking.

Going on to the position of Torex -----

MR SCOTT: Sorry, forgive me. You referred us I thought to paragraph 43 of your skeleton, that is relating to competition between iSoft and Torex or was it paragraph 53?

MR ANDERSON: My skeleton?

MR SCOTT: Your page 19, paragraph 53.

MR ANDERSON: Page 19, paragraph 53, yes. I think it is probably both of them, is it not? There is certainly a reference at 43 to the OFT not disputing that iSoft and Torex have been competitors in the past.

MR SCOTT: That is right.

MR ANDERSON: Did I give this reference just now?

MR SCOTT: You did, yes.

MR ANDERSON: I am so sorry. That takes us neatly on to Torex. My friend said this morning, well they were a competitor across the board. That is exactly what the OFT put to us in the list of issues at paragraph two and again at paragraph three. Again, there was a lot of submission on that and the OFT's conclusion was that the competition was as defined in the first sentence of paragraph eight of the decision.

The main point comes back once again to the question of installed capacity/legacy/historic market share. The main point, and the point that appeared to be missed

altogether in the application is that historic market share is not the relevant basis in the bidding market and was rightly not so treated by the Office of Fair Trading although, of course, it was taken into account.

Torex was not selected by any of the short-listed LSPs though it has been selected as a service provider. Its EPR products were unfit for purpose to the extent that it was not invited by LSPs to submit them for detailed testing. That is at footnote 63 to our skeleton, paragraph 44 of the skeleton.

So Torex is no longer a viable competitor as regards the National Programme market while opportunities for competition outside that market are limited, as I have already submitted to the Tribunal.

The point as to whether it is theoretically possible for Torex to supply an LSP, which is something I think the Tribunal asked about, is dealt with my Mr Sprigg who gives evidence for Torex at paragraph 24. He says, "While it is theoretically possible that LSPs will accredit other products in the future for subsequent phases of the roll out, this will have no bearing on the potential for competition between iSoft and Torex. The fact is that Torex does not and will not have an EPR system that is capable of accreditation by LSPs."

THE PRESIDENT: Yes. How are you doing, Mr Anderson?

MR ANDERSON: I have nearly finished. I have got two thought points. I would not have thought they would take more than five minutes. Might I have the Tribunal's indulgence?

THE PRESIDENT: Yes, of course.

MR ANDERSON: A point was made, it appeared in the application, it did not come into the skeleton but it came back again this morning on the circumstances of the merger which is thought were very suspicious. Mr Green would like, I think, to suggest that the only reason Torex withdrew from the tender was because of the merger, but the evidence is that it was the other way around. It was the early confirmation that Torex was not going to be selected as a PAP, followed by its subsequent failure to

sustain a credible LSP bid in its own right which served as the catalyst for the merger discussions which commenced in earnest in July 2003. It is all dealt with in our skeleton at 44 and 56 to 57 and the OFT, no doubt, was told all about it.

Which leads on, I think finally, to the position of IBA and that is dealt with in our skeleton at 46 to 49 and I do not think I need to dwell on this. The Tribunal made the point this morning that of course it is a company with only a three per cent market share, that the Gaddes paragraph 14.

The central point here is that the position of IBA was not undermined by the merger; rather, it was undermined by the course that the NHS had set upon, in other words to select only credible international application suppliers with strong investment capacity and the final resources to underwrite the software development risk and that is the basis of the National Programme. If IBA have a complaint, it is about that, it is not about the merger. It does not matter in a sense what is the UK vehicle for IBA, whether it is Torex or somebody else. That is the obstacle that it faces.

Of course the Distribution Agreement did not address the issue of credibility or the issue of product investment capacity because the arrangements still relied on a small company in the fulfilment of this horrendously complicated agenda.

I will not say anything about Mr Sprigg and what he says about problems with IBA systems, but I would refer you to Sprigg 35, do not look at it now, but that makes the point that as the Office of Fair Trading was told at the time, Torex is quite prepared to go non-exclusive. It offered that undertaking, it was not taken up on it, so the problem that IBA identifies really for all those reasons is not right.

As I said, a lot of dust, in our submission, has been very expertly kicked up but there is no suggestion anyone was taken by surprise or that anything has been

inadequately reasoned or that there is a genuine howler or even, in reality, that this decision was perverse and we would ask the Tribunal to uphold it.

THE PRESIDENT: Thank you very much, Mr Anderson.

MR GREEN: I probably have no more than five to ten minutes if I may?

THE PRESIDENT: If we can finish by 4.30.

MR GREEN: A piece of cake! When this decision was taken, we now know that the OFT did not possess the OBS. They did not see it apparently until this week, they were oblivious to it. They complained that we did not give it to them even though they spoke to Mr Granger, who obviously knew about it; to Torex, who obviously knew about it; to iSoft, who obviously knew about it and they had the cheek, when they wrote back to us on 19th November refusing to elaborate, to point us to the Department of Health's own website where we could get public domain information. This was the seminal document, the document which defined the scope of the National Programme and it is, frankly, incredible that the OFT did not have it the moment it came out or in draft from the NP Authority itself.

THE PRESIDENT: It is not in the public domain. This document is not in the public domain.

MR GREEN: We got it off the website.

THE PRESIDENT: It is in the public domain?

MR GREEN: Yes. It took me about two minutes to find it. Once I saw that article from May I went hunting for it and that is how I found it.

THE PRESIDENT: Right. Yes.

MR GREEN: The OFT say in paragraph 16 of the decision that they are uncertain as to a number of critical matters; the autonomy of the NHS outside of the NP, the size, the scope of all these matters. They should not have been uncertain. They should have asked, they should have found out, they should have looked at the OBS for guidance but they did not.

Let me move to the next point which a section 33 point. I understand, having listened to Mr Anderson, what

the "might" point is. Certainly we are not suggesting, and it would not make administrative law sense if the OFT had to refer every merger which might hypothetically, theoretically give rise to SLC.

It does seem to us, however, that the difference between section 33 and 36 is important. One needs to compare them both. The "may" "may" plus the "belief" have to be contrasted with the "decide" in section 36. If section 36 is decided on a balance of probabilities, the combination of "belief" and "may" "may" would mean that a reference should be made even if there is not a 50.1 per cent probability. It is almost impossible to put it in numerical terms, but a significant possibility would probably be fair, provided it was understood that 46 per cent or 40 per cent was sufficient to justify a reference.

There may be cases where the OFT, on balance, finds the case marginal but does not have the time or the evidence to decide and that may be a proper case for a reference. One must not lose sight of the purpose which is to provide a hierarchy of decision-making between the OFT and the Competition Commission.

The third point, it was suggested that we have not, in our Notice of Appeal, alleged failure to investigate or failure to take account of relevant considerations. On a very quick canter through, if I could give you the paragraph numbers, they are paragraphs 42, 46, 57, 58, 79, 96, 97, 101 and 103 all complain about failures to investigate or failures to address certain matters in the decision.

Point four, deference and judicial review. The Selcom decision, I think I only need give you the reference, paragraph 27, the Judge makes it clear that errors of fact are judicially reviewable. He says, "If the decision is, as a matter of fact, logically unsound" then that would qualify as a material error. Whether you describe it as manifest or material or perverse really does not matter. "Logically unsound" was the formulation given by the Judge in Selcom, paragraph 27.

Mr Anderson's time constraints point, point five. Everybody has had limited occasion to prepare this case. Our case was limited to an attack on the four corners of the decision because we were denied answers by the OFT to questions. We have not had nor asked for disclosure and we have not launched and attack upon the administrative procedure. We could, perhaps, have said we should have seen the Issues Letter. We have launched our attack upon the decision which the OFT, in its letter to us of just a week or so back, said, so far as they were concerned, was the 'be all and end all' of the challenge.

Floodgates. Well, it had to come up. This is not a marginal case. If bad cases do come before you, and I cannot resist this, having an Australian client, you will do a John Wilkinson on them and drop-kick their cases into oblivion and that would be the end of the floodgates. It will not take many bad cases to come before the Tribunal.

The opposite of floodgates dates is, of course, drought which is precisely where my learned friends would like this Tribunal to be so far as merger cases.

Standard of review, "manifest" against "material". We would respectfully suggest that "material" is the correct way to look at things. "Manifest" is difficult to quantify. "Material" simply means that you identify an error which really means something, which could have resulted in the decision going the other way. If that means "material" is the same as "manifest", then so be it, but we would suggest that "material" is the proper test.

In a case such as this where we would say there is, as a matter of law, a prima facie SLC, it has to be a very strong case countermanding that before there should not be a reference.

Next point, duty to give reasons. Can I simply refer you to paragraph 268 of the explanatory notes which highlight the importance of the third justification for a duty to give reasons, namely education of third parties, the other two explaining the reasons to the disappointed party and giving the Tribunal the ability to facilitate a

proper judicial review.

Two very final points, Mr Anderson's barriers to entry, IDX and Cerner. The market share figures at the moment suggest Cerner has 0.8 per cent of the market and IDX 0.4. If they grow, as we accept they will, so what? The question is, will the merger be disciplined by McKesson or Siemens or IDX and Cerner? This is a merger which will give rise to something approaching dominance. That is not a question which the OFT have identified or answered.

Very finally, legacy, upgrades and renewals. We now appear to have at least four different and potentially contradictory analyses from my learned friends. We have paragraph 16 of the decision whereby so far as the non-NP budget is concerned, it will follow the NP because non-NP purchases will not have autonomy. We then have my learned friend's quote this afternoon saying that renewals, well that is renewals after 2010 which means there is really no contestability for the next seven years. We have Mr Gaddes, in paragraph 17(b), who seems to suggest that it is all non-contestable anyway and now we have Mr Whiston at paragraph 34 who believes everything is super contestable.

Frankly, the OFT say they are uncertain about these things. The reality is it is a matter which they have not properly addressed.

Those are my submissions. Thank you very much.

THE PRESIDENT: Thank you very much, Mr Green. Bang on time. Mr Crow, the Tribunal sent a letter to the parties yesterday I think with two or three questions, one of which was whether The Department of Health had expressed to the Office any views on the merger and, if so, where one found them as they do not appear to be in the decision.

Is there an answer to the question or do you simply note there is no answer to the question?

MR CROW: I apologise. I was not conscious the question had been asked in those terms. I thought the question we had answered in paragraph 18 -----

THE PRESIDENT: I may not have the letter to hand.
MR CROW: I thought the question was whether the OFT had been in touch with the Department in relation to the viability of the National Programme.
THE PRESIDENT: The question was whether the Department -- I will just find the letter. Do I take it that the views of the Authority or the Department were limited to the viability of the Programme and not to the competitive consequences of the merger?
MR CROW: I am sorry. I do not know if they are limited to because I had not appreciated, when I saw that wording, that it was looking -- I thought that was directed towards the complaint which was non-viability. I will have to take instructions, I am sorry.
THE PRESIDENT: I see, yes. Our present intention is to aim to give judgment on Wednesday unless there is an urgent demand for earlier judgment. In the normal course of the events, that will be Wednesday morning at 10.30.
MR ANDERSON: I am booked in the Court of Appeal that day, it should not of course detain the Tribunal or prevent it from giving judgment.
THE PRESIDENT: We are always pleased to see you, Mr Anderson, if you are available, if you are not we will bear it as best we can. Again, we would like to thank everybody very much for the efforts that we made in this case within a very short timetable. Thank you all very much indeed.

(Adjourned at 4.35 p.m.)
