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IN THE COMPETITION

Case No. 1110/6/8/09

APPEAL TRIBUNAL

Victoria House
Bloomsbury Place
London WC1A.2EB

Thursday, 22nd October 2009

Before:

THE HON. SIR GERALD BARLING
(President)

LORD CARLILE OF BERRIEW QC
SHEILA HEWITT

Sitting as a Tribunal in England and Wales

BETWEEN:

BAA LIMITED

Applicant

and

THE COMPETITION COMMISSION

Respondent

Supported by

RYANAIR LIMITED

Intervener

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**HEARING
DAY FOUR**

APPEARANCES

Mr. Nicholas Green QC and Mr. Mark Hoskins QC (instructed by Herbert Smith LLP and Freshfield Bruckhaus Deringer) appeared on behalf of the Applicant.

Mr. John Swift QC, Mr. Paul Harris, Mr. Ben Rayment and Mr. Ewan West (instructed by the Treasury Solicitor) appeared on behalf of the Respondent.

Mr. Daniel Jowell and Miss Sarah Love (instructed by Nabarro LLP) appeared on behalf of the Intervener, Ryanair Limited.

1 THE PRESIDENT: Good morning.

2 MR. GREEN: Good morning. Can I start just by handing in a number of documents? First of
3 all, the references from the Competition Commission guidelines. I am not going to say
4 anything about any of these documents. Secondly, again by way of record, documents from
5 the Competition Commission published in the last twenty-four hours in relation to the sale
6 yesterday and undertakings being extracted from the new purchaser. They are there for the
7 record only. I have handed up also a note on the confidential matters arising out of Mr.
8 Jowell's submissions yesterday which you have just got. Those are the points we were
9 making, somewhat opaquely, about Mr. Jowell's submissions. I do not propose to make any
10 further submissions about those this morning.

11 These documents are purely for record. (Same handed) They are documents produced by
12 the Competition Commission in relation to purchaser undertakings. They are purely and
13 simply for record only. There are two separate documents.

14 THE PRESIDENT: They look similar, but they are different.

15 MR. GREEN: They are different. Purely for information they do not add or subtract, but you are
16 now informed as to the public documents disseminated by either party - the press release
17 and the Competition Commission's information.

18 THE PRESIDENT: Thank you very much.

19 MR. GREEN: I am anticipating that I will be less than an hour this morning. I will be dealing
20 with five matters raised by the Competition Commission. They are as follows: first, the
21 Competition Commission's case that BAA was 'not concerned about the conflict and
22 'delayed and waived' by passivity; secondly, the Competition Commission's case on
23 constructive knowledge; thirdly the Competition Commission's attack on the evidence and
24 issues of credibility; fourthly, the Competition Commission's downplaying of the 2002
25 notice; and, fifthly and finally, the Competition Commission's case on what I will loosely
26 call severance, which is that it really does not matter.

27 Issue 1 - the Competition Commission's case that BAA was not concerned. The facts really
28 speak for themselves. I am going to remind you pretty briefly of the chronology and make
29 some observations about it as I go through. I do not propose, save with limited exceptions,
30 to take you to any documents because you are now familiar with them. Point 1 - the
31 Commission informed BAA that Professor Moizer had a problem in January of this year.
32 No information was given at that stage as to the nature of the problem.

33 THE PRESIDENT: Do you have the actual date?

1 MR. GREEN: I have just said that you know the facts. I ought to know the date myself, but I am
2 just checking the precise date – 22nd January. It is chronology, 110.

3 The second point is that BAA expected to receive a letter as a follow-up, nothing arrived, so
4 it did its own internet search and it discovered the 2002 notice on 26th January. Mr. Jowell
5 was puzzled by Mr. Herga saying that he was puzzled in his witness statement at para.13.
6 In fact, what Mr. Herga said between 13 and 15 was that he was “obviously concerned”.
7 For your note that is paras.13 to 15, bundle 5, tab 82.

8 Point three, on 6th February BAA wrote a letter asking a series of questions – that is defence
9 bundle, tab 4, p.7. The Competition Commission have submitted that the contents of this
10 letter indicated that BAA was only concerned with the mechanics for the sale of Gatwick,
11 and that, apart from that, BAA thought the position of Professor Moizer was “not a big
12 deal” – reference, transcript day 2, p.42, line 7.

13 THE PRESIDENT: Sorry, what was not a big deal, you said this shows BAA only concerned
14 with Gatwick and that?

15 MR. GREEN: Apart from that BAA thought the position of Professor Moizer was “not a big
16 deal” – transcript reference, p.42, line 7, to p.44, line 30. As to this, as you will have seen,
17 the letter was not intended to, and did not set out BAA’s concerns. It was a request for
18 information. It set out a list of questions to be answered and, as you will have seen, at no
19 point did the Competition Commission answer those questions.

20 The extent to which BAA was still in the dark is demonstrated, for example, by the first
21 bullet point, we did not even know whether Professor Moizer still acted as an adviser to the
22 Fund. The Competition Commission refused to give a copy of Professor Moizer’s retainer
23 and indeed persistently refused even in pre-action correspondence.

24 On its own terms, the letter was not confined to Gatwick, as indeed the Tribunal pointed out
25 during the course of argument. The letter expressly refers to BAA’s understanding that
26 MAG was a potential bidder for Stansted and/or a Scottish airport. I will come back to it
27 later, but you know that the Competition Commission’s letter of 25th February in response
28 to this omitted to explain that to BAA, even though the Competition Commission knew that
29 at the time.

30 BAA cannot remotely be criticised for seeking information before putting forward what
31 would necessarily be a serious allegation at a very sensitive stage of the inquiry, as Mr.
32 Herga has explained in his statement. Indeed, I think the fair minded observer would be
33 quite certain that it would have been inappropriate for BAA to make an allegation until the
34 Competition Commission had been given an opportunity to answer the questions. I will not

1 take you to it, but Lord Hope in *Helow*, authorities bundle 2, tab 24, para.2, said of the fair
2 minded observer as follows:

3 “The observer who is fair minded is the sort of person who always reserves
4 judgment on every point until she has seen and fully understood both sides of the
5 argument.”

6 Point four concerns the Competition Commission’s meeting of 11th February, 2009. This
7 contains an acknowledgement that the Competition Commission did not, at that point in
8 time, know about the fund’s true intentions or Professor Moizer’s position in the fund. You
9 will recollect that it was decided that Simon Jones would speak to BAA.

10 Point five. The next day, 12th February, was the informal meeting between BAA and the
11 Competition Commission. The Competition Commission did not at this point have all the
12 facts at its fingertips. Mr. Jones wrongly described Professor Moizer’s role. He described
13 him in terms of a high level adviser on macro-economics. But you have already picked up
14 that just a few days’ later he was expressly told by the fund, and recorded amongst other
15 things that Professor Moizer was one of the wise men; they would normally comment on
16 matters such as the investment in Gatwick as a matter of course; that the fund would not
17 make an investment that was not approved by each of the three wise men; that Professor
18 Moizer was very influential in forming the consensus at meetings; that he was effectively at
19 officer level; he was a main player; he was significant because of his longevity and a
20 relationship of trust and respect had developed and matured. So, at the meeting on 12th
21 February a mis-description of his role was given. At that same meeting the Competition
22 Commission wrongly limited the fund’s involvement to Gatwick. They also failed to
23 explain that the quarantine was highly circumscribed and limited only to the details of the
24 Gatwick bid. But, as we now know, Professor Moizer was able to, and did, sit in relation to
25 all other matters and, in particular, including those relating to Gatwick on the basis that
26 Gatwick might not be solved by the time the report was published, and therefore the report
27 might have to deal with Gatwick, as indeed was the case. At that meeting they did not
28 mention Professor Moizer involvement with Fleet of Foot. I think one can reasonably infer
29 from the evidence that Mr. Jones did not know about it because it is not at all clear that
30 Professor Moizer ever disclosed that to the Competition Commission.

31 Point six. Over the course of the next six days, leading up to 18th February the Competition
32 Commission elicited information from the fund and they discovered in broad terms three
33 things: first of all, that Professor Moizer was very close indeed to the fund; secondly, that
34 the fund was interested in non-Gatwick assets; thirdly and importantly, that the fund’s

1 investment decisions were affected by its very close relationship with MAG - they were not
2 arm's length investment decisions.

3 Having obtained this information the Competition Commission did not either call or write
4 to BAA in order to correct the mis-information communicated on 12th February.

5 Point seven. Over the course of 23rd and 24th February the Competition Commission
6 decided to stand Professor Moizer down. They must have taken this decision in the light of
7 the information given to them by the fund. Mr. Clarke decided that Professor Moizer
8 should be stood down with effect from 3rd March because he was such a valuable player and
9 they wanted him to advise on the submission they were making to the Department of
10 Transport in relation to regulatory reform. It appears that in fact he did not advise as
11 requested or invited, but that does not alter the fact that he was viewed as so important that
12 he should stay on nonetheless notwithstanding the recognition of a conflict.

13 Point eight. The next day, 25th February was the reply to the BAA's request for information
14 of 6th February. Again, you have seen it. We have reserved a great deal of criticism for this
15 letter. It does not answer the questions which were posed. It does not inform BAA of the
16 fund's interest in non-Gatwick assets. It does not inform BAA that twenty-four hours
17 earlier the Competition Commission had taken the decision to stand Professor Moizer
18 down. Misleadingly, it suggests he has been quarantined from everything, and the clear
19 inference is that he is still sitting. We know he was not quarantined from everything. There
20 was no clear explanation of what he was, and was not, quarantined from.

21 Point 9. The next day, 26th February, the Competition Commission informed Professor
22 Moizer he is to stand down. They do not tell BAA. They do not communicate this decision
23 to the rest of the world or to any other interested party.

24 Point ten. On 3rd March 2009 Professor Moizer formally stands down. Again, the
25 Competition Commission does not tell BAA, nor anybody else.

26 Point eleven. 19th March. Report published. Almost total silence as to the position. See the
27 asterisk and the footnote.

28 Point twelve. 20th March, 2009 - the next day - Mr. Hawkins phones Simon Jones. The note
29 of the tele-conference is Bundle 4, Tab 76. He is asked whether Professor Moizer had been
30 identified as having any form of conflict in either an historical sense or a future sense. The
31 response is that the Competition Commission is satisfied that no conflict in either sense.
32 Then they say they stand him down simply because there is a connection between Professor
33 Moizer and the fund. Thoroughly misleading. It does not identify any of the matters which
34 the Competition Commission knew about - not least the fund's interest in non-Gatwick

1 assets. It is apparent, and I think you will deduce from the evidence, that by this time the
2 Competition Commission had concluded there was a conflict, and it was for that reason they
3 stood him down.

4 Two documents which I do not think you have seen – could you take bundle 4, tab 77, the
5 document of 31st March 2009, a letter from Herbert Smith to the Competition Commission.
6 It is not a confidential document, but I am not proposing to read it. Its gist is self-evident.
7 It asks a series of questions seeking to elicit the nature of the conflict of interest or the
8 position adopted by the Competition Commission and its reasons. So a detailed request for
9 information. Attached to the letter was BAA’s request for information of 6th February, plus
10 information which had now been obtained from the Competition Commission’s website
11 about Professor Moizer.

12 In the light of a detailed request for information, the Competition Commission’s response is
13 at tab 78, and it is dated 8th April. It is short, dismissive, uncooperative and generally
14 unhelpful. They make a number of points. First of all, in the third paragraph, the
15 Competition Commission says they were:

16 “... satisfied that no actual impropriety or conflict of interest had arisen. Among
17 the matters we took into account in reaching this conclusion were representations
18 made to us by BAA. In particular, on 6 February 2009 Robert Herga of BAA had
19 identified a specific point arising from Professor Moizer’s relationship with the
20 Greater Manchester Pension Fund. However, Mr. Herga accepted our assurance
21 that his concern was unfounded and indicated that BAA had no further concern.”

22 You have seen the evidence. That is flatly rejected. Mr. Herga addresses that in his
23 statement.

24 “We subsequently wrote to BAA on 25th February 2009 to confirm that we had
25 investigated BAA’s concern both with Professor Moizer and with the Pension
26 Fund and were satisfied that it was without foundation.”

27 That also is a concealment of the true position of its knowledge vis-à-vis the Fund, in
28 particular in the light of the discussions on 18th February. At no point have they recognised
29 the closeness of Professor Moizer’s relationship with the Fund or that the Fund itself quite
30 firmly refused to rule out the possibility of bids for non-Gatwick assets.

31 In the next paragraph they state that they were concerned only about appearances and
32 reputation and for that reason they stood Professor Moizer down. That is not, we would
33 invite you to conclude, an accurate description of their thought process at the time.

1 In the next paragraph they refer to the telephone conversation with Mr. Hawkins, which you
2 have just seen, and they say:

3 “This was explained to Mr. Hawkins on 20 March 2009 without any expression of
4 dissatisfaction by him.”

5 I think that barely deserves comment.

6 Then what I think is perhaps the most important failing, which is reflected by this letter:

7 “In the light of our discussions with Mr. Herga on 6 February 2009, and of our
8 conversation with Mr. Hawkins of 20 March 2009, we do not see any reason why
9 we should now answer the numerous questions set out in your letter of 31 March
10 2009. Many of those questions are in any event either difficult to relate to the
11 concerns BAA has expressed about Professor Moizer or very intrusive.”

12 So a point blank refusal to answer questions, and, in fact, a conclusion that we were being
13 intrusive – in other words, impertinent – in even asking the questions.

14 THE PRESIDENT: That date of 6th February, do they mean the 12th?

15 MR. GREEN: I think that is probably right. That would make sense, since they are talking about
16 discussions rather than the letter itself.

17 In the next paragraph they say:

18 “The Greater Manchester Pension Fund has been disclosed by the Competition
19 Commission on numerous occasions, including of course at the start of the BAA
20 market inquiry.”

21 Then they say the following:

22 “However, in case it is of reassurance to BAA, we have investigated whether any
23 change was made on 13 February 2009 or 25 March 2009 to the disclosure notices
24 for the Manchester and BAA quinquennial inquiries of 2002, or for the present
25 BAA market inquiry, relating to Professor Moizer.”

26 The reason they are saying this is because they have been asked whether the website had, in
27 fact, been updated, as had been suggested it would be earlier in February.

28 “Having investigated our records and our archives we do not believe that any such
29 change was made. The changes identified by your search of our website are likely
30 to be changes made to the relevant navigation menu to reflect updates to our
31 website. When those updates are made each modified page will be uploaded to the
32 server and it is likely that it is this process that is reflected in the results of your
33 search.”

1 Translated into less technical language, the website was never updated to take account of
2 information the Competition Commission itself discovered during January, February or
3 March.

4 It is in that context that the Competition Commission says that BAA acted unreasonably,
5 passively, and without any real concern for what was going on. The reality is that BAA
6 acted reasonably and did not jump to conclusions. It requested information. The
7 Competition Commission, in a variety of different ways, declined to answer or answered
8 inaccurately, or in a manner which led to a misleading impression being given.

9 There is, therefore, absolutely nothing in the Competition Commission's suggestion that
10 BAA was not concerned, delayed or waived through passivity.

11 The second issue concerns the Competition Commission's case on constructive knowledge.
12 In the course of its submissions the Competition Commission took three different positions
13 which I will isolate and dissect. The first, for your note, transcript, day two, pages 64 and
14 65, in response to a question from Lord Carlile on whether affected persons should not be
15 entitled to take the Competition Commission's disclosure notices at face value, the
16 Competition Commission's response was that:

17 "It may be taken into account by the company but experience suggests that it is far
18 from complete."

19 What I am going to do is just identify the three points and then come back to them. I will
20 give you the quote again:

21 "It may be taken into account by the company but experience suggests that it is far
22 from complete."

23 The second point that they make, coming out of the transcript, day two, pages 65 and 66 in
24 response to the President's questions on the relevance of information on the internet, came
25 the Competition Commission's response that, BAA has actual knowledge or constructive
26 knowledge, and they seem to waver between the two, because it could find out information
27 on the net, and this is what a diligent person exercising due diligence would have done.

28 Thirdly, and there is no need for me to give you a transcript reference, corporate knowledge.
29 If someone at some point in time within BAA knew of the 2002 notice then the company, as
30 a whole, is impressed with that knowledge for all time.

31 Those are three points of principle that arise out of the various submissions on constructive
32 knowledge, and I am going to deal with each one. The starting point is simply to remind
33 you what the case law says. I am not going to go into the cases. I will give you references
34 and they can be looked at at leisure, but it is, we submit, incontrovertible that the concept of

1 waiver requires that the person who is said to have waived, and this is a quotation, “has
2 acted freely and in full knowledge of the facts”. That is *Pinochet*, per Lord Browne-
3 Wilkinson at 137; and *Smith v. Kvaerner*, para.26.

4 It is, secondly, incontrovertible that any waiver must be “clear and unequivocal”, and also
5 that it must be made with full knowledge of all the facts relevant to the decision whether to
6 waive or not, *Locabail*, para.15. Waiver must be actual. It cannot be constructive. There is
7 no case on constructive knowledge. One other point of law - though in our submission it
8 does not arise on the facts - on constructive knowledge it is submitted that knowledge can
9 arise (a) in the absence of disclosure; (b) if the affected person knows of all the relevant
10 facts and then does nothing. The important point is that it is submitted that waiver can arise
11 (a) in the absence of disclosure. On this, you were shown *Locabail* at para. 40 (Authorities
12 1, Tab 9) as a support for the proposition. However, you will, I am sure in due course, wish
13 to read para.26 and onwards of *Locabail*. Paragraph 26 says as follows - and I am quoting
14 from the judgment -

15 “If [and that is the important word] appropriate disclosure having been made by
16 the judge, a party raises no objection to the judge hearing or continuing to hear a
17 case, the party cannot thereafter complain of the matter disclosed as giving rise to
18 a real danger of bias”.

19 It makes it clear from that quotation that waiver can only arise where a party is put to his
20 election after appropriate disclosure has been made and then there being no objection taken.
21 it is not authority for the proposition that waiver by silence might arise. Paragraph 26 also
22 says,

23 “If, of course the judge does make further inquiry and learn additional facts not
24 known to him, then he must make disclosure of those facts also”.

25 Paragraph 26 therefore makes it a condition that waiver should have been -- that the
26 condition of waiver -- that there should have been preceding appropriate disclosure because
27 of the word ‘if’. Now, we have not identified a single case in the United Kingdom, in the
28 Strasbourg jurisprudence, or elsewhere where waiver has been said to arise when the
29 decision-maker fails to give adequate notice, and where it is nonetheless found that the
30 affected person knew of the facts. So the suggestion goes considerably beyond existing
31 case law. The case law that you are looking at is case law which follows *Re. Medicaments*
32 in the United Kingdom because that is the point in time at which UK law was brought into
33 consistency with Strasbourg case law. It is a small point. It does not arise on the facts, but I
34 simply wanted to note it.

1 THE PRESIDENT: Mr. Jowell showed us some older cases ---
2 MR. GREEN: A couple of George VI cases and one from either Outer Mongolia or Deepest Peru
3 - I think it was forty years old.
4 THE PRESIDENT: I think one was actually in Victoria, Australia.
5 MR. GREEN: There we are. It was Australia. Whether that counts -- Well exactly.
6 THE PRESIDENT: Are you going to say anything about those?
7 MR. GREEN: They do not deserve comment. The law that you are concerned with is post
8 *Medicaments* case law in compliance with Article 6 of the Convention. The first time that
9 English law was brought into compliance was in *Medicaments*. That was endorsed by the
10 House of Lords and that deals with the concept of bias and the circumstances with which it
11 can be waived. *Locabail* is a case which is consistent with Convention case law and it says,
12 in unequivocal terms "If there is appropriate waiver --"
13 THE PRESIDENT: What about cases where you know the facts but you keep it in reserve?
14 MR. GREEN: If you are told the facts -----
15 THE PRESIDENT: There is no disclosure -- No, you are not told. You just know them, or you
16 may have looked them up. There is no disclosure.
17 MR. GREEN: No. I understand. It is an interesting point and it has plainly got merits going both
18 ways. Put it another way -- There is lack of merit on the part of the party concerned
19 because they are saving a point, as it were. That is not good for the administration of justice.
20 But, there is also a failure on the part of the decision-maker to make proper disclosure. That
21 also is bad for the administration of justice. One goes back to the statement of the House of
22 Lords in *Dimes* in 1852 - that the purpose of this rule is a salutary one, to ensure that even if
23 it could not in a million years be suggested that the decision would be any different, or that
24 the decision-maker was affected by bias -- If there is a failure it is salutary because it tells
25 other inferior courts and tribunals that they must comply with the law in the future. So,
26 there are two competing interests there - one a broader interest in ensuring that the decision-
27 makers stay up to the mark; then, secondly, the individual (if you want to put it in such
28 terms) misconduct in sitting on a point. All I can say is that there is no case which
29 addresses that squarely. *Locabail* seems to suggest there is a pre-condition of disclosure
30 before the 'sitting on your hands' argument can come into force.
31 THE PRESIDENT: I am not sure, you see. I know you dismiss them, but I think one of those old
32 cases is not dissimilar from that.
33 MR. GREEN: I heard what Mr. Jowell said - that if one is going to take literally one-line
34 comments without analysis, without background jurisprudence as indicating anything -- I

1 mean, one can read them. They are as Mr. Jowell suggested they are. But, they really do
2 not take one anywhere. Cases which are one hundred years old or, in Australia, forty years
3 old, which do not take account of the Article 6 considerations do not cite -- *Dimes* does not
4 take account of the policy considerations in the judgments from *Re. Medicaments* onwards.
5 They do not take account of the Strasbourg case law. They really are not cases to which any
6 sensible weight can be attached. I see what they say.

7 THE PRESIDENT: There was **Chitty** as well, was there not?

8 LORD CARLILE: But even if you are right on the law, if the situation was that the complainant
9 knew all the material facts, given that we are in judicial review territory, that would go to
10 remedy, would it not -- or, it could go to remedy? The court might refuse a remedy because
11 all the relevant knowledge was in the hands of the complainant.

12 MR. GREEN: It is possible. At that point a discretion arises. But, the same policy clash arises
13 between the importance of salutary decision-maker behaviour as against passive and
14 unacceptable conduct on the part of the litigant. There would be a balance to be struck at
15 that stage.

16 I mention that point not because it arises on the facts but because it seemed to us that the
17 submission, as made, simply over-stretches itself in the light of the modern jurisprudence.
18 Those are the points of principle. I am now going to take each of the Competition
19 Commission's three considerations. The first point is the submission made that experience
20 suggests that it is far from complete. That is referring to the Competition Commission's
21 disclosure notices. That is the Competition Commission's three positions on constructive
22 knowledge, the first point taken. I have dealt very briefly with the legal position where we
23 say that actual knowledge is required, coming back to the Competition Commission's
24 position addressed to you on Day 2, pp.64 and 65.

25 Let us start with this: everybody knows that you cannot rely on a Competition Commission
26 disclosure notice because it is incomplete. I must say this: this took everybody on this side
27 of the court by surprise. It is a pretty startling proposition. I ask this question rhetorically:
28 is the Competition Commission now submitting that its disclosure notices generally should
29 be treated as incomplete and that the assurances given by the Competition Commission in
30 disclosure letters are not to be trusted? I have to say that on our side we did expect that
31 submission to be withdrawn, but it has not been. It is our view that you should treat that
32 submission as one made in the heat of battle. We simply cannot believe that the
33 Competition Commission, with mature reflection, would wish to say in a court of law that
34 carefully thought-out public disclosure notices are to be treated as unreliable because they

1 are habitually incomplete. Consider the implications of that. City solicitors and industry
2 would instruct inquiry agents into panel members. Their professional and personal lives
3 would be investigated - personal lives because those are also relevant to the position of
4 conflict. Solicitors will bombard the Competition Commission with requests for
5 information. What about the staff of the Competition Commission? They are highly
6 influential in the formulation of the decision. There are large numbers of them. Their
7 personal lives, their professional affiliations will be investigated. Is this what the
8 Competition Commission really wants? Then there arises the implications for other
9 statements of the Competition Commission - for example, statements in provisional
10 documents that the Competition Commission has not yet formed a view. Are those to be
11 treated, as Mr. Jowell would have it, as boilerplate statements that nobody could take at face
12 value. Should the City and industry take such statements at face value and trust the
13 Competition Commission or not? What about other regulatory bodies? Is it conceivable
14 that the FSA would make a statement in a similar vein - that its notices are not to be relied
15 upon?

16 For these reasons, and notwithstanding the Competition Commission's position, we invite
17 you to treat that as not a position that the Competition Commission would, on mature
18 reflection, wish to advance before you. Instructing me today are Freshfields and Herbert
19 Smith, and I have asked both of them as to whether their current practice is to conduct
20 personal enquiries about members of the Competition Commission or its panel, and at the
21 moment they trust the Competition Commission, and I think that is indicative of the
22 position in the City and industry generally. It would, frankly, be a very, very serious
23 backward step if that were not to remain the case. There cannot possibly be anything in the
24 suggestion that the world at large should treat Competition Commission disclosure notices
25 as inaccurate or incomplete and everybody knows it.

26 What about "searching the net, it is all on the net"? That is an equally ridiculous statement.
27 The net is not 100 per cent accurate, nor is it 100 per complete. We did discover, after
28 considerable investigation, the Fund's November 21st minutes. We did not know that "fleet
29 of foot" was first mooted by the Fund in June, because that was not on the net. We have
30 been given a version of disclosure leading to constructive knowledge based upon the
31 concept of "click-click" knowledge. In fact, looking at the document that you were shown,
32 a document submitted by BAA to the Competition Commission which in a footnote referred
33 to a document which, if you clicked a number of times, could have taken you to a reference
34 to MAG. It took four clicks to get to it. So we have a doctrine of "click-click, click-click"

1 constructive knowledge. Again, it is frankly absurd, and the implications of the
2 Competition Commission saying that the net must now be searched is pretty much the same
3 as the Competition Commission saying that its own statements are not to be treated as
4 reliable.

5 Thirdly, we have corporate knowledge. "Corporate knowledge" is a concept which is
6 inconsistent with the case law which requires actual knowledge by those affected, and the
7 persons who were affected, those who were conducting BAA's inquiry, it is a very bad
8 point. The BAA witnesses in this case have set out their state of knowledge very candidly.
9 It is a reasonable assumption to make that somebody within BAA will have picked up the
10 2002 Moizer notice, but you will recollect that BAA did not get a letter. It was simply put
11 on the CC website. It was sent to the members of the Manchester inquiry, which did not
12 include BAA, and it was not a matter of concern to BAA because it did not concern its
13 inquiry, it concerned the MAG inquiry. That is not to say that it would not have been
14 picked up, we do not know. Assume that a company had knowledge ten years before or 15
15 years before, why would it be relevant to conflict ten or 15 years later? The person who
16 received it might have left, the company might have moved its headquarters, its computer
17 systems might have transmogrified to new systems, its archive might be almost
18 inaccessible, and so on and so forth.

19 The conclusion to this is the concept of constructive knowledge is not known to law, and
20 the way in which it is put by the Competition Commission is an unacceptable one.

21 Issue three concerns the Competition Commission's attack on the evidence and credibility.
22 Because knowledge was predictably going to be an issue in this case, BAA decided, quite
23 deliberately, to put forward Mr. Herga and Mr. Hawkins as witnesses; and further,
24 Mr. Hawkins was asked to address points arising in the Competition Commission's defence.
25 These are clear and candid statements as to what was and what was not known. In
26 particular, in his second statement, Mr. Hawkins, in order to ensure that the position could
27 be accurately advanced to the Tribunal, contacted and interviewed other members of his
28 team, and he sets out the individuals who he spoke to in para.2 of his statement. You
29 therefore have the knowledge of those affected before you.

30 I want to now tell you what BAA did know and what they did not know. First of all, the
31 BAA team did not know of the June 2002 notice until January 2009.

32 THE PRESIDENT: Can you take this fairly steadily, Mr. Green, unless you have got a note with
33 it on.

34 MR. GREEN: I am sorry, I do not.

1 THE PRESIDENT: Did not know of the 2002 notice until?
2 MR. GREEN: Until January 2009.
3 THE PRESIDENT: Any references are obviously helpful.
4 MR. GREEN: The easiest thing is to give you the chronology reference.
5 THE PRESIDENT: This is all in the chronology, is it?
6 MR. GREEN: It is all in the chronology, yes. I note that, notwithstanding Ryanair's submissions,
7 no one from Ryanair has come forward and said that they were aware of the 2002 notice.
8 Indeed, we have had no statements from Ryanair explaining what their state of knowledge
9 is. Silence is golden in their case. There is no challenge to the fact that the notice in 2002
10 went to the MAG inquiry participants but not BAA. There is no challenge to the fact that it
11 went on the CC website. There is no suggestion it was necessarily an issue for BAA. That
12 is unchallenged evidence and I will explain later why it is entirely credible.
13 The second fact that BAA was not aware of is as follows: BAA did not know of the links
14 between MAG and the Fund. The 02 notice spoke of the Fund being open to local authority
15 employees. It did not say that MAG employees had access.
16 THE PRESIDENT: It spoke of the Fund being open to?
17 MR. GREEN: The employees of the local authorities and local authority bodies.
18 THE PRESIDENT: It did not mention MAG employees?
19 MR. GREEN: It did not mention specifically MAG. At all events, this information was not
20 known to BAA. That is a simple statement of BAA's knowledge.
21 Thirdly, it did not know of the internal management arrangements within the Fund or
22 Professor Moizer's level of involvement within the Fund. That is clearly set out. Indeed, it
23 is clear the Competition Commission did not either, even though they had Professor Moizer
24 in their building, hence what must have been the surprising nature of the conversation on
25 18th February when the discussion occurred with members of the Fund and they were given
26 information about Professor Moizer's closeness of connection, we would not invest without
27 his say so, he is very, very important, etc, etc.
28 Fourthly, BAA did not know that the owners of MAG were the owners of the Fund. We
29 have got Mr. Jowell's rather colourful "phone a friend" test. Actually, it is quite a useful
30 test. What would somebody have thought about the meaning of the words "Greater
31 Manchester Pension Fund". Those terms are about as informative as "Norwich Union",
32 "Scottish Widows", "Bradford & Bingley". It tells you there is some connection with
33 Manchester and it has got something to do with a pension fund. You could not necessarily
34 draw the connection that only widows were members of Scottish Widows from looking at

1 the title. You would not necessarily draw the connection that Manchester airport in
2 common ownership automatically had access to the fund. It does not follow from the title.
3 It is a silly point.

4 At all events, they did not know. That is the hard fact. They did not know that the owners of
5 MAG were the owners of the fund. When I say 'owners' I am using that term in a non-
6 technical sense. They were the owners of the fund in the sense that they exercised a
7 statutory control which is not quite equivalent to trusteeship, but it is a useful analogy and
8 they had a fiduciary duty which was operated in parallel with their statutory duties.

9 Fifthly, BAA never knew of Professor Moizer's involvement with Fleet of Foot from June
10 2008 onwards. Apparently, neither did the Competition Commission. There is no
11 evidence that they were ever told by Professor Moizer of his involvement in that.

12 BAA never knew that Professor Moizer knew whether actually, or by inference, on 2nd
13 December that the fund was interested in a bid and that he recognised he then had a position
14 of conflict. We never knew that and it appears that the Competition Commission never
15 knew that until this litigation. At the very least it is not something the Competition
16 Commission has explained to you that they were aware of.

17 The seventh matter. BAA never knew that the fund was interested in non-Gatwick assets.
18 BAA knew from the press that MAG was interested in non-Gatwick assets, but at the time
19 had no reason to connect that interest with the fund.

20 The eighth matter. BAA never knew that the fund's investment decisions were influenced
21 by the closeness of its connection with MAG - a fact the fund confirmed to the Commission
22 in its tele-conference on 18th February. In other words, there was never an arm's length
23 relationship between the fund and MAG.

24 Those were facts BAA did not know.

25 BAA did know - and these have been set out in the skeleton and in the witness statements -
26 two essential facts: that Professor Moizer advised the fund; they knew that the local
27 authorities owned MAG.

28 THE PRESIDENT: Which local authorities?

29 MR. GREEN: I am not certain if they had specific knowledge. They know that it was in public
30 ownership owned by authorities in the North. Whether it is the ten local authorities -- I
31 probably should not be specific as to whether east or west. But, they knew there were
32 authorities.

1 MR. JOWELL: I hesitate to interrupt, but I just draw Mr. Green's attention to the footnote to the
2 document that the Competition Commission handed up, which lists each of the local
3 authorities - the precise local authorities - that owned Greater Manchester airport.

4 MR. GREEN: It does not tell you anything about what BAA was addressing its mind to at the
5 time. It does not really matter whether they knew there were seven, eight, nine, or ten, or
6 who they were. Assume, for the sake of argument, that they knew the exact identity. It
7 does not really matter two hoots. The short point is this: you may know who Peter is; you
8 may know who Jane is; but you do not know they are connected until you know they have
9 the same father, who is John. Unless that link is spelled out, you do not know they are
10 brother and sister. You have got two bodies. You may know a bit about each of them.
11 Unless you know the connection between the two, you do not smell anything. You are not
12 on notice that there is a connection. It is that connection which creates the conflict.

13 THE PRESIDENT: The connection being the fact that the same local authorities who owned, for
14 want of a better word -- had control of -- were responsible for the fund were also the owners
15 of Manchester airport.

16 MR. GREEN: There are lots of ways in which you can put it. His clients, who he was advising in
17 the fund owned MAG. One of them - Manchester City Council - owned 55 percent of it.
18 When he was sitting in the fund, he was advising those self-same owners. That is the way
19 he himself analysed it in 2002. It is the same way he explained it to Mr. Jones. It is the way
20 Mr. Jones analysed it. Also the fact that he was advising on the contributions which MAG
21 made to the fund and on the use of those pension contributions. I will come back to the
22 connections and draw them out one by one in their simplest form in a little while.
23 Dealing at this stage with questions of credibility, and what they did and did not know, let
24 us just stand back from it. The Competition Commission are trying to raise an argument
25 that in some way we have constructive knowledge or even actual knowledge. I am simply
26 saying to you that you have before you very explicit evidence as to what was known and
27 what was not known. You can measure it yourself. When you add one and three-quarters
28 and one and a half together, they do not make four. Pretty easy maths.
29 Now, the Competition Commission must have asked themselves whether they wished to
30 cross-examine Mr. Herga or Mr. Hawkins since this evidence goes to waiver - not bias.
31 They did not. It was for them to decide whether they wished to challenge the evidence.
32 Those individuals have given 100 percent honest evidence and it is highly credible. Let me
33 give you some factors just demonstrating why it is highly credible.

1 First of all, Mr. Herga explained in his statement that he was not closely involved with the
2 2002 inquiry. I should clarify for the record that he is no longer a consultant to BAA. He
3 was once he left for a period of time.

4 THE PRESIDENT: Which inquiry?

5 MR. GREEN: The 2002 inquiry. This is in relation to whether it could be said he ought to have
6 known about the 2002 facts. Secondly, the notice was not sent by way of letter to BAA.

7 THE PRESIDENT: Do you have any references to these? If we happen to have them noted -- If
8 you have not, do not worry.

9 MR. GREEN: If you want, we can take the transcript afterwards and make sure that we just put
10 cross-references to documents into the transcript. It is sometimes quite a useful thing to do
11 if that would help.

12 LORD CARLILE: It probably would.

13 MR. GREEN: Yes. We will do that as an exercise afterwards. (After a pause): The second
14 point: the notice was not sent to BAA.

15 The third point: there is no reason that that particular notice would have created waves at
16 the time since it concerned the MAG inquiry - not the BAA inquiry.

17 Fourthly - and really rather importantly - this Competition Commission did not itself
18 remember the existence of what they must have had in their possession - a Moizer folder.

19 We know that there was one because it is referred to on the face of the disclosure letter - the
20 blind copy to the Moizer folder. Nor did they refer to the Moizer folder or the Moizer issue
21 in their 2007 notice. It is a bit rum for them to complain about us not remembering it if they
22 themselves did not.

23 The fifth point. The 2007 letter gave what BAA believed were the normal guarantees about
24 independence and impartiality. You will have to form a view about that - whether that is
25 something which they were entitled to rely upon. But, they did. You have that from the
26 witness statement evidence. There was no reason for them to be on notice.

27 The next point is that during the period 2007 to 2009 Competition Commission never
28 disclosed any further information.

29 The seventh point is that Professor Moizer did not himself re-raise the issue with the
30 Competition Commission - at least we have not been told that he did. We raised the issue
31 of 2002 with the Competition Commission in 2009. You may conclude that when you
32 analyse all the evidence in the course of preparing the judgment that it is very unsatisfactory
33 that we have not had a proper explanation of why the Competition Commission failed to
34 recall the 2002 notice in 2007. We really do not know what happened. We do not know

1 whether it was cock-up or conspiracy. Unlikely to be conspiracy. More likely to be cock-
2 up. But, you have not had any form of adequate explanation of what happened at that point
3 in time. It is not suggested that Professor Moizer himself re-referred those queries to the
4 Competition Commission. We know -- I say 'we know' -- The evidence does not suggest
5 that after the Fleet of Foot meetings in June or in November, or after the 2nd December tele-
6 conference where his advice was sought, he then went back to the Competition Commission
7 and said, oops! I have got a conflict, even though he apparently concluded he had a conflict
8 on 2nd December. We know from his statement that he went on holiday.

9 So, no disclosure from the Competition Commission up until 2009. In January 2009 the
10 Competition Commission learned of the connection and thereafter failed to act, and failed at
11 any point in time to put the information it subsequently learnt into the public domain or
12 communicated accurately to BAA. You have seen that it was in a state of denial after the
13 report was published - hence the letter from the Competition Commission to Herbert Smith
14 in Bundle 4. It even refused to answer the questions which were posed on the basis that
15 they were intrusive and irrelevant.

16 It is, in conclusion, in relation to the evidence a profoundly unfair suggestion to make that
17 the evidence of Messrs. Herga and Hawkins lack credibility.

18 MR. JOWELL: Is that the end of your submissions on knowledge, because I would, if I may,
19 make a request of the Tribunal, which is to ask Mr. Green to please clarify whether,
20 knowing of the existence of an entity called the Greater Manchester Pension Fund, none of
21 the members of the BAA team or its legal advisors -- none of them understood that the
22 Greater Manchester Pension Fund was a pension fund related to the local authorities in
23 Greater Manchester, and if they did not realise that -- if that is said to be the effect of Mr.
24 Herga and Mr. Hawkins' evidence, what they thought the GMPF was?

25 MR. GREEN: I do not respond -- I am not going to respond to that. If he wanted to cross-
26 examine, he could have applied to do so. It is nonsense.

27 MR. JOWELL: I had not understood that that was the effect of Mr. Herga and Mr. Hawkins'
28 evidence. If that is said to be the effect of their evidence, then I think that that evidence
29 should actually have been put in, not just by Mr. Herga and Mr. Hawkins, but also by their
30 legal advisors and by the other members of the team. I would apply to cross-examine them
31 in those circumstances.

32 MR. GREEN: (a) It is utter nonsense. (b) It is far too late. (c) This is a silly point. If he wanted
33 to cross-examine -- It is really up to Mr. Swift to say whether he wants to cross-examine on

1 waiver - not Ryanair. But, it is a hopeless application. I am not minded to spend any time
2 on it unless you wish me to -- any more time.

3 THE PRESIDENT: The only thing I think would be useful is to have the references to the parts
4 of the evidence that you say relate to those factor that you mention.

5 MR. GREEN: Absolutely. You have got Mr. Jowell's submission. If there are gaps in the
6 evidence you can take those on board. You have a framework for analysis.
7 Issue four. The 2002 notice. What is the relevance of the 2002 notice? It is relevant as to
8 the context to 2007. In order to analyse it the Tribunal needs to examine two points. I
9 would invite you to address the relevance of 2002 in this way: first of all, ask yourself what
10 is the nature of the underlying connection between Professor Moizer and MAG and how did
11 the Competition Commission perceive it at the time? Those are two different questions.
12 They are not automatically overlapping. They may be.

13 THE PRESIDENT: What is the connection between Moizer and MAG or ----?

14 MR. GREEN: Professor Moizer and MAG. What is the nature of the underlying connection
15 between Professor Moizer and MAG and how did the Competition Commission perceive it
16 at the time? You will appreciate the relevance of the fact that there were two questions.
17 The fair-minded observer will both examine the underlying facts, but also, and quite
18 independently, ask himself, "How did the Competition Commission perceive the position to
19 be?" The fair-minded observer will assume the Competition Commission knows its own
20 business, and if it takes steps which it concludes are necessary to avoid the conflict of
21 interest, that there is no reason to gainsay that conclusion. So, there are two quite separate
22 points. That is the first thing.

23 The second thing is simply to ask how, if at all, does this relate to the 2007 inquiry? So,
24 you then take, as it were, the pre-existing facts and you apply them to the new facts arising
25 in 2007.

26 I can make my submissions quite briefly about each of those two questions. I think then the
27 relevance of them will become more apparent. Let us start with 2002. We are analysing it
28 in and of itself and without considering the 2007 facts. The points to note are as follows:
29 first, Professor Moizer himself acknowledged in 2002 that his connection with MAG was
30 problematic. He analysed the relationship as we do, i.e. his clients owned MAG. We will
31 give you the references in due course, so that you have them to hand.

32 Secondly, the Competition Commission unequivocally accepted this analysis – see in this
33 regard Mr. Jones witness statement where he says, amongst other things, that as a result of it
34 the Competition Commission would not have permitted Professor Moizer to sit on the

1 MAG Inquiry, the logic of that being that his connections with MAG meant that he should
2 never be in a position – and this is my analysis, it is not in the statement – to affect MAG
3 actually or potentially. That was the logic underpinning their decision, he should not be in a
4 position whereby he could actually or potentially affect MAG. You have seen their
5 disclosure letter which was drafted in unequivocal terms, not precautionary terms, that he
6 did have a conflict of interest and it was necessary to remove the conflicts by taking
7 quarantining steps. That was the Competition Commission’s perception at the time and the
8 fair minded observer would have no reason to go behind that conclusion. One might say
9 that is the start, the middle and the end of the entire case.

10 Point three, though, as to the relationship of his clients as shareholders, this was not an
11 arm’s length investor relationship. The clients of Professor Moizer owned 100 per cent of
12 the company and MCC owned 55 per cent. The reference is in our skeleton. They wielded
13 considerable power under the articles of association, there was a proactive relationship
14 between the company and the shareholders, and we know that, as a fact, Professor Moizer’s
15 clients had a very close nexus with MAG because we were told that as a result of the tele-
16 conference in 2009, when it was explained that the Fund’s investment decisions were not
17 arm’s length, they were affected by the closeness of that connection.

18 THE PRESIDENT: The tele-conference between Mr. Jones and ----

19 MR. GREEN: That is right, yes. It is not relevant to the facts of 2002 because it concerned the
20 way in which the closeness impacted on a bid, but the closeness itself is an important
21 consideration.

22 Fourthly, there is the pensions’ position. MAG contributes at present *circa* £300 million in
23 contributions to the Fund and Professor Moizer advises the employer and employee
24 representatives on the Fund. So he is advising at this point in an even more direct way
25 MAG itself, albeit through representatives on the employment side. His decisions can
26 influence whether MAG has to make pension contributions, whether there is a deficit to
27 make up.

28 Fifthly, Professor Moizer is, himself, a distant consultant, he is a “wise man”. He is part of,
29 to use the Fund’s own terminology, the “backbone”. He is very influential, he almost has –
30 and you will conclude when you look at the statements there is perhaps a degree of
31 inconsistency – a power of veto.

32 Accordingly, and ignoring all the connections arising because the Fund might participate in
33 a bid for BAA – which of course was not foreseeable in 2002, it was not even on the
34 horizon, however far one looked out for it – the pre-existing links were powerful, created a

1 conflict, and was recognised as such by the Competition Commission. That is the first way
2 of looking at it.

3 The second question we invite you to ask is how the facts of 2007 influenced that pre-
4 existing state of affairs. The reason why that has to be the relevant question, because the
5 point in time at which you are making your assessment is the point in time at which he was
6 appointed, namely April 2007. That is the point at which the decision was taken in which a
7 conflict might first arise.

8 As of 2007 the issue now is simply to see how the fact of the inquiry affected the pre-
9 existing facts, and as to this I think there are four broad points to make. First, there is the
10 OFT report which contemplates divestiture as a possibility, and any sensible, fair minded
11 observer reading that report would note that MAG is identified as a rival to a BAA, and for
12 your reference it is bundle 3, tab 12, p.14, the OFT report 912, tab 3.1. So as of the date of
13 the report MAG was a possible rival who might, and I only put it at “might”, be interested
14 in a bid for BAA assets.

15 The second broad point to take account of is that, as such, MAG was likely to be adopting a
16 position adverse to BAA from the start of the inquiry, not the case in the quinquennial
17 review.

18 Point three, MAG and BAA were now parties in the same case, the same *lis*, not the case of
19 quinquennial reviews.

20 Point four, so far as the Fund itself was concerned, whereas in 2002 there was no prospect
21 of the Fund itself being involved in the MAG quinquennial review, now there was at least a
22 possibility. Again, it is only a possibility that the Fund might be called upon to assist MAG
23 in the bid. They have got the same “dad”. We know, because Mr. Taylor of the Fund
24 explained it on 18th February, that the Fund’s investment decisions are affected by the
25 closeness of its relationship with MAG. The Competition Commission was told this and
26 one can therefore assume – it is reasonable to assume – that the same applied in April 2007.
27 So how does one therefore analyse the 2002 situation? In 2007 Professor Moizer’s position
28 was one of conflict. It was a more severe conflict than existed in 2002 because of those
29 exacerbating factors I have just identified. The 2007 notice did not come close to
30 addressing these relevant facts, and you simply hold the 02 notice up against the 07 notice
31 and compare and contrast, and that, frankly, is the end of it.

32 My final point, which will probably take me five minutes, is issue five, severance. Our first
33 point is that severance is not possible. Once a conflict arises the consequence is inevitable,

1 and we have set out authorities from the House of Lords to that effect in our skeleton
2 argument from para.19 onwards.

3 THE PRESIDENT: By “severance” are you talking about severing the group or severance of the
4 personnel decision makers?

5 MR. GREEN: Yes. The point I have just dealt with, and indeed the point I made last night,
6 addresses the temporal question of severance. Mr. Swift accepts that if you find a conflict
7 as of 07 that is the end of the matter, there is nothing to sever, the report collapses. His case
8 is limited to ----

9 THE PRESIDENT: Subject to his point on waiver.

10 MR. GREEN: Subject to waiver, yes. His point is that if you only identify a conflict in the very,
11 very limited sense, as he advanced, based on specific knowledge of a specific bid limited to
12 Gatwick, then you can push the facts backwards and backwards and backwards until late
13 2009, and then he says no retrospective severance, the whole thing stands, you cannot
14 retrospectively attack the report. So he has tried to push all the relevant facts as far up to
15 the end date as he possibly can. He is forced to do this because that is the earliest that the
16 Competition Commission acknowledged there ever to be a conflict on the facts – only in
17 relation to Gatwick, only an actual bid, only arising very, very late in the day which they
18 say they addressed adequately. That is the corner that he has backed into. I am not going to
19 go into the cases again, you will have the chance to look at them and form your own view
20 about them.

21 We have the counterpoint to what we say is the strict position, which is *Re Medicaments*,
22 which suggests that there may be a factual element to it. Again, I am not going to repeat
23 our submissions which you have in mind. The standard in *Re Medicaments* is extremely
24 low, in the sense the hurdle is very low. They simply asked, “Did Dr. Rowlett discuss the
25 issues with her colleagues?” Answer, “Yes”. “Did the issue arise late?” In other words,
26 was there an extensive period of discussion. Answer, “Yes”. Then the Court of Appeal
27 said, “It is inevitable that the other two are thereby tainted”. All of this accepts that the
28 other two, and indeed the person tainted, may have acted in good faith because good faith is
29 a complete irrelevance here because this is an objective test.

30 Let us just look at the underlying reality to Professor Moizer’s role, and none of this is
31 seriously contested or indeed at all. Professor Moizer was an important player in the
32 Competition Commission’s inquiry. Mr. Clarke in his witness statement confirms that and
33 we will give you the reference. He was the key financial wizard and he was particularly
34 brought in because of his experience of airports in the course of the 2002 quinquennial

1 review. You have no statements before you from other members of the panel saying, in
2 terms, that his views were unimportant or uninfluential, because they could not possibly say
3 that. A reflection of his importance lies in Mr. Clarke's insistence that he should be kept on
4 after the decisions of 24th February until 3rd March. We know that he participated even after
5 he was so-called "quarantined", and we have set out the details of that in the annex to our
6 skeleton. We have set out the dates upon which he participated so far as we can judge them,
7 and we know that even after the very limited quarantine he participated extensively in
8 Competition Commission deliberations. That is schedule B to our original skeleton, which
9 is entitled "Professor Moizer's involvement in the market investigation". We know, for
10 example, that he attended a hearing with BAA on 20th January in which he cross-questioned
11 BAA on matters in which he was critical about BAA – that is 20th January again. We will
12 provide references to the transcript and we will do the cross-references in that to the
13 chronology and skeleton.

14 He played a full and influential role throughout and nobody has suggested he did not.

15 As to the suggestion, and I am really reverse engineering the points I made last night, that if
16 you find bias in relation to the Fund's bid then there is no retrospectivity then your starting
17 date is still, on the basis of that logic, still going to be April 2007, because that was the date
18 upon which it was foreseeable that the Fund might, and I emphasise the word "might", be
19 interested in bidding as part of a consortium, or in some way participating. As of that date it
20 was quite foreseeable that they "might" participate. So if one is adopting even the very
21 limited definition of a conflict, which is wholly related to MAG, itself, but is limited to the
22 Fund and nothing else, and then limited to the Fund not as a pensions body but as a
23 potential investor, even if you take that extremely limited perspective, that was still on the
24 cards as a possibility in April. If it was not April, then it was certainly October 2007 when
25 MAG told the Competition Commission specifically that it was interested in bids for all
26 BAA assets. If it was not October 2007 then it must be June 2008 when "fleet of foot" was
27 first mooted because the fund was then looking at a much more aggressive approach in the
28 market place for investments. If it was not June 2008 when the fund started looking
29 towards the recession-market, it was the summer - in particular, August - when MAG went
30 into the press to say that it had shareholder consent for a bid. All of these make the fund
31 itself an ever more probable participant. If it was not August, then it was 21st November
32 when Professor Moizer advised on the use of Fleet of Foot. If it was then, then it was
33 December 2nd when Professor Moizer knew, constructively or otherwise, that the fund was
34 interested in bidding. So, 09 is far, far too late a starting point, even on the very myopic

1 analysis of the Competition Commission. Quarantine was never enough, even on their own
2 analysis. They limited it to the actual bid as opposed to a bid the fund might be involved in
3 after the report came out. Professor Moizer was entitled to sit on the Commission on
4 matters relating to Gatwick, but not related to the specific particularities of the sale.
5 So, all in all, it boils down to the fact that for a very large number of different reasons. The
6 entire inquiry was permeated through with an intolerable conflict from the start. It
7 exacerbated in nature from Day One until the end. There was never an attempt to make
8 proper disclosure . The consequence, we say, is an inevitable one in law. It is in fact a
9 question of law, a question of bias, because the House of Lords say that this is not a
10 question of fact; it is a question of law.

11 Those are our submissions in reply to the Competition Commission's submissions.

12 THE PRESIDENT: Thank you. Mr. Green, as I understand it, you do not question that it would
13 have been perfectly possible for your clients or their advisors to ascertain the common
14 ownership, if you like, of the fund and MAG.

15 MR. GREEN: Yes. From the internet.

16 THE PRESIDENT: Yes, or from other sources.

17 MR. GREEN: We did after the event. It took quite a lot of work, and it was not easy. But, you
18 know, if we put an inquiry agent on it -- or given Herbert Smith the task, or Freshfields the
19 task, they would have found out. Yes. Not all of the information -- For example, not all of
20 the minutes of the fund are on the internet.

21 THE PRESIDENT: No. You mentioned the giving of Fleet of Foot.

22 MR. GREEN: Yes. But, we do not know what -- It does not tell us about the exact nature of
23 Professor Moizer's involvement. But, yes, certainly, core facts could be unearthed on the
24 net. We found them. We had to dig around and find them out in order to prepare this case.

25 MR. SWIFT: Sir, before you rise, if I may, I did not seek to intervene in the course of Mr.
26 Green's reply, but to the extent that the reply was not just a reply but, to an extent, a re-
27 formulation of the case presented on Day One, there are just two matters that would like to
28 make some observations on.

29 The first is in relation to Mr. Green's first issue, which was the lack of concern and the
30 delay. The Tribunal will have noted - and the transcript will reveal - the number of
31 occasions in which Mr. Green has effectively accused the Commission of making
32 misleading statements. These are serious allegations made against the Commission. This
33 re-formulation appeared to me to go much further than Mr. Green had put it - in particular,

1 the suggestion that the Commission did not correct the mis-information communicated on
2 12th. That is a reference to the meeting between Mr. Jones and Mr. Herga.
3 There are, to some extent, different recollections as between those two witnesses, as does
4 tend to happen on occasions such as this, even within five minutes of the end of a very short
5 meeting. What I would ask the Tribunal is for us to consider again, carefully, what has been
6 said this morning by reference to the transcript and to put in, if we may, a supplementary
7 note from the Commission correcting what we would say is a serious mis-statement by Mr.
8 Green about what Mr. Jones is alleged to have said to Mr. Herga on 12th. Mr. Green,
9 replying to an intervention by my friend, said that, "No application was made to cross-
10 examine any witnesses in this case". That is right. There was an agreement reached at the
11 CMC that we thought as in ordinary judicial review proceedings we would proceed on the
12 basis of written statements. Lord Justice Scott Baker - I think it is in the *Al-Sweady* case -
13 expressed his concern that there may be injustice caused in cases where there is no
14 possibility for cross-examination. But, as Mr. Green said, it is far too late. But, in those
15 circumstances there has been a quite specific allegation (a) that Mr. Jones personally mis-
16 informed Mr. Herga; and (b) the Commission failed to correct that. We are in a position to
17 put our side of the case in writing, which of course my learned friends will be able to
18 comment on. I would not like this Day Five to end with our accepting anything of what has
19 been said by Mr. Green in relation to that serious allegation ----

20 THE PRESIDENT: I think, to be fair, I seem to recall that he made that comment in opening -
21 that, as it were, the Commission gleaned information from Mr. Taylor (or whoever they had
22 their conversation with at the fund after the discussions between Mr. Herga and Mr. Jones).
23 I seem to recall that from his opening. He certainly returned to it again today.
24 Speaking for myself, without having consulted my colleagues, what I am keen to avoid is
25 that we have a whole round of written submissions following on.

26 MR. SWIFT: Very short. Simply an opportunity to look at what is in the transcript and, in our
27 submission, if what is stated in the transcript cannot be derived from the evidence, or if
28 there was a clear doubt as to that, that those doubts should at least be before this Tribunal
29 when you consider your final decision.

30 MR. GREEN: I have certainly got no objection to that, and it is quite right and proper that you
31 should look at both statements. *Re. Medicaments* makes it clear that so far as bias is
32 concerned you do not have to resolve issues of fact. So, it is quite right that you look at
33 both statements. If my learned friend wishes to draw certain points to your attention, I have
34 got no objection whatsoever.

1 MR. SWIFT: I am grateful.

2 THE PRESIDENT: For my part, I do not want to encourage there to be another round. That
3 sounds very limited. It would come in pretty soon, would it?

4 MR. SWIFT: It will come in very soon. It is an allegation that a professional person owing a
5 duty to his ... has misled a party to the inquiry. It is a very serious allegation.
6 The second point - and Mr. Green put it in the third person about the Competition
7 Commission's own submission in relation to the question from Lord Carlile, and that his
8 professional clients were dismayed as to what I had said -- May I just say that when the
9 Tribunal comes to consider that, could they please look at the transcript at Day Two,
10 starting at p.64, line 16 when I was first raising this issue. It then goes on to p.68, line 15
11 where I cited the evidence given by Mr. Christopher Clarke (Defence, Tab 5, para. 18) as to
12 what is the purpose of a disclosure notice. I would ask the Tribunal to consider whether Mr.
13 Green's summary of what I said is fair, taking account of the context in which the
14 submissions were put. There was certainly no suggestion on my part that in any way
15 disclosure was, or was not, intended to be an unreliable set of information.
16 Those are my comments.

17 THE PRESIDENT: Thank you very much, Mr. Swift.

18 MR. GREEN: I am perfectly prepared to take my friend's position on that. On our side we would
19 be perfectly content for the Competition Commission to clarify that it does not say that its
20 statements are intended to be unreliable. That is how we have always understood it. Just to
21 be precise - and my friend has got it. The words that we alighted upon - perhaps unfairly -
22 are 'but experience suggests that this is far from complete'. If my friend is saying that he is
23 happy for his client to confirm - and, indeed, I am sure it would be the City's preferred
24 position - that disclosure notices were intended to be complete and reliable, then we would
25 be very pleased.

26 MR. SWIFT: Disclosure notices are intended to be reliable. It is a matter for the judgment of the
27 person putting the notice out as to the fullness or extent of the information, but is certainly
28 not intended to be unreliable; nor did I even use the expression 'unreliable' in what I said to
29 this Tribunal yesterday.

30 THE PRESIDENT: Mr. Swift, we very gratefully took the suggestion that in relation to his
31 submissions just now Mr. Green is going to put some references next to some of the
32 assertions to evidence and documents which will obviously be helpful to u in the absence of
33 a note. We obviously would not preclude anyone else from doing the same if they thought
34 that that would assist us.

1 MR. SWIFT: I am grateful.

2 THE PRESIDENT: I can just say thank you very much to all parties for the great assistance they
3 have given us. You obviously will not be surprised to know that we have got a lot of
4 thinking to do. We will obviously reserve our decision.

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