

Case No: 1262/5/7/16 (T)
IN THE COMPETITION APPEAL TRIBUNAL

Competition Appeal Tribunal
Victoria House
Bloomsbury Place
London
WC1A 2EB

Before:

MR JUSTICE MARCUS SMITH
MR PETER FREEMAN CBE, QC (Hon) and MR BRIAN LANDERS

Between:

AGENTS' MUTUAL LIMITED
Claimant

and

GASCOIGNE HALMAN LIMITED (T/A GASCOIGNE HALMAN)
Defendant

MR ALAN MACLEAN QC and MR JOSH HOLMES appeared on behalf of
the Claimant

MR PAUL HARRIS QC and MR PHILIP WOOLFE appeared on behalf of
the Defendant

<p>1 Friday, 3 February 2017 2 (10.30 am) 3 Opening submissions by MR HARRIS 4 MR HARRIS: Good morning, sir, members of the Tribunal. 5 THE CHAIRMAN: Mr Harris, good morning. 6 MR HARRIS: I appear with Mr Woolfe on behalf of Gascoigne 7 Halman Limited and Mr Maclean, Queen's Counsel, appears 8 with Mr Holmes on behalf of Agents' Mutual. This will 9 be the last time I am able to introduce Mr Holmes as 10 a junior counsel. It gives me great pleasure to say in 11 a matter of days he will be elevated to the more senior 12 status. 13 THE CHAIRMAN: Many congratulations, Mr Holmes. 14 MR HARRIS: Sir, I don't have any preliminary or 15 housekeeping matters. I was proposing to spend my time 16 this morning developing some of the bigger themes in our 17 skeleton argument, showing you some of the documents. 18 I plainly don't intend nor have the time to traverse all 19 of the various issues, but I apprehend that with the 20 pre-reading that you have been able to do and in 21 particular our skeleton argument, you know the tramlines 22 for our case, so nothing that I say to you in 23 development of a theme is new or different. 24 Before I sit down I just need to give you an update 25 as regards two matters. The first is the duration of</p> <p style="text-align: center;">Page 2</p>	<p>1 with the witnesses -- that chunks of what is said to be 2 confidential, the same information is not confidential 3 in other documents, and yet, despite what Mr Maclean 4 said at the PTR, no progress has been made and he hasn't 5 removed any of those redactions. 6 So I will obviously do my best but, as the current 7 markings are, I fear that there will be instances, 8 despite the upheaval that it causes, where people will 9 have to be told to leave. I will do my best, but with 10 the massive amount of marking that there is, there is 11 not much I can do to ensure a totally open hearing. 12 THE CHAIRMAN: Mr Harris, I recall the debate at the PTR 13 very well and I anticipate what will happen is when we 14 start seeing confidential documents, it may be at that 15 point -- 16 MR HARRIS: Indeed, it may happen in about ten minutes' 17 time. 18 THE CHAIRMAN: We'll road test the ad hoc regime that 19 I anticipated in ten minutes time then. 20 MR HARRIS: I am very grateful. 21 So, members of the Tribunal, with no further ado, 22 I want to show you at the outset two documents that put 23 some flesh on the bones of the submissions made in the 24 skeleton argument about the fundamental protectionist 25 ethos of this claimant company, Agents' Mutual, and how</p> <p style="text-align: center;">Page 4</p>
<p>1 the contracts, these listing agreements. I will do this 2 right at the end and show you one or two things that 3 have come in very recently, and then a development 4 overnight that we have been told about some different 5 circumstances that are said to prevail in part of the 6 relevant market, namely in Northern Ireland. So I will 7 give you the update about that as well. We have been 8 disclosed more information and more documents just last 9 night. 10 THE CHAIRMAN: Thank you, Mr Harris, that is very helpful. 11 For our part we had one housekeeping matter which 12 I will raise now. It is simply to do with confidential 13 and non-confidential documents. As you would appreciate 14 we have the full set of confidential materials behind 15 us. Obviously what is put to witnesses may vary 16 depending on who their witness is and what the documents 17 are. I just want to make it clear from the outset that 18 we regard as the parties' responsibility, to ensure the 19 confidentiality is preserved in those documents that you 20 wish to preserve confidentiality over. 21 MR HARRIS: I am grateful, sir. I won't take up time now 22 because there are more important matters, but suffice to 23 say that we still contest large swathes of the alleged 24 confidentiality on the part of the claimant company and 25 it will become clear -- indeed this morning, let alone</p> <p style="text-align: center;">Page 3</p>	<p>1 it set out to create a structure which is partly in its 2 listing agreements with their many and varied 3 restrictions that were intended to insulate it from what 4 it saw as competitive threats. So, far from being, as 5 Mr Maclean would have it, and no doubt will attempt to 6 develop this afternoon and throughout the trial, 7 a pro-competitive market entry story, this is nothing 8 like that; this is a defensive, protectionist, 9 anti-competitive story. 10 The first document I would like to show you in that 11 regard is a variant of one that you may or may not have 12 had the chance to get to in our pre-reading list. In 13 the pre-reading list we identified an early so-called 14 project Z document and I am going to show you the next 15 iteration of that document. 16 If you would turn up, please, H1 and go, please, to 17 page 213. As you go through the bundle, you may just 18 like to note that an earlier iteration of the same 19 document which was on the pre-reading list begins 20 at 173, and if you had a chance to look at that in 21 pre-reading, you would note that the page that I am 22 about to go to in the version that you looked at was 23 at 179. It has a table of supposed threats to the world 24 of traditional estate agency in this country. I am just 25 saying that in case you did get a chance to see that in</p> <p style="text-align: center;">Page 5</p>

<p>1 the pre-reading. 2 Now, some three weeks later -- 213 -- at the end 3 of November, another iteration of this project Z 4 document came into existence. The date of this one is 5 28 November, whereas the one in pre-reading you looked 6 at was I think early November, 9 November. The 7 corresponding page is, as I say, 213. This is not 8 a confidential document and not marked as such. 9 You will see, gentlemen, if I could draw your 10 attention, please, to the top of the page, under the 11 heading "Item 5, need for action": 12 "The findings of the portal market review make clear 13 the rapid consolidation of power of the two portal 14 groups ..." 15 So this is the discussion draft of what turns into 16 the business plan, which was also on the pre-reading 17 list: 18 "... and the increasing dependency of agents on them 19 as a source of business." 20 Just pausing there, Agents' Mutual consistently 21 characterises that competitive development in the market 22 as a threat. It says: 23 "A range of threats arise from this situation, some 24 current and some potential." 25 Then there's the table. Now, I don't want to go</p> <p style="text-align: center;">Page 6</p>	<p>1 a threat. They just want to sell, we will see in due 2 course, just houses and nothing else. What the 3 consumers want on these markets, they also want to buy 4 other goods and services, for example surveying, other 5 local market information services, where's the school 6 et cetera. 7 MR FREEMAN: Mr Harris, you missed one out. 8 MR HARRIS: Yes, I mean, I am happy to read them all, I'm 9 just going to focus on -- 10 MR FREEMAN: But you jumped over it. Is that good or bad? 11 MR HARRIS: I'm happy for all of them to be read. I am just 12 focusing, given the limited amount of time, on some of 13 them rather than others of them. 14 "New pricing formulae linked portal fees with agent 15 commission." 16 What they are worried about there is that instead of 17 being charged a blanket listing fee, say, per month, 18 that there might be, "Well, I am going to charge you on 19 my portal a cut of your commission for selling the 20 house", so if the estate agent is charging 2 per cent 21 the portal might say, "Well, I'll have 10 per cent of 22 that", or 0.1 per cent of the property value. That may 23 be in isolation or in combination. 24 And then there is another threat which to most of us 25 would just simply represent another source of</p> <p style="text-align: center;">Page 8</p>
<p>1 through all of them because time doesn't permit. I am 2 just going to pick out a few. If you go down to the 3 sixth one: 4 "Weakening of agents' central role in property 5 transactions via increased information to consumers." 6 So what they regard this world of insular and we say 7 protectionist traditional estate agents as a threat to 8 them, is in fact none other than a benefit and 9 a competitive benefit to one side of the market. It is 10 increased information to consumers but they characterise 11 it as a weakening of their central role in property 12 transactions. 13 The next one is somewhat similar: 14 "The importance of portal brands over agents' brands 15 in consumers' minds." 16 Well, that is a classic example of inter-brand 17 competition. One set of brands is increasing in 18 prominence, the other is fading, and how do agent 19 Agents' Mutual and its members regard that? They regard 20 that as a threat. 21 The last three: 22 "Ever increasing promotion of non-property goods and 23 services to the portal's consumer audiences." 24 That, of course, is a benefit to the consumer 25 audiences, but how does Agents' Mutual regard it? As</p> <p style="text-align: center;">Page 7</p>	<p>1 competition in the market: 2 "Inclusion of direct private listings alongside 3 agent listings." 4 So what's worried about there? This is what we 5 referred to in our skeleton as FSBO, "for sale by 6 owner". Plainly that is a direct method of competing 7 with traditional estate agents. Instead of using them 8 they are cut out of the market altogether, and of course 9 they see that as a threat. In due course we'll see that 10 they describe that as an existential threat. 11 So what's happening here right at the very outset is 12 a protectionist mindset: how is our traditional full 13 service agency market with its commissions, et cetera, 14 going to be affected by all of these new sources of 15 competition, some of which come through the portals? 16 If you look beneath the table you will see that they 17 are worried about the main two portal groups taking more 18 money out of the total estate agency commission pot. In 19 other words, they are concerned -- and we shall see this 20 increasingly throughout this trial -- to protect their 21 own bottom lines. They don't want profits taken out of 22 the traditional agency industry and into the hands of 23 shareholders of innovative and new types of competitive 24 vehicles such as the portals, or for that matter 25 non-traditional estate agents. They want to retain this</p> <p style="text-align: center;">Page 9</p>

<p>1 for themselves. Classic protectionism. 2 It goes on and gives some numbers there which are 3 not terribly germane. Then at the end of that paragraph 4 it says: 5 "The last two threats [so that is the new pricing 6 formulae and direct private listings] to agents listed 7 above provide possible ways to them [the portal groups] 8 to achieve this [extract more money from the market 9 which the agents want to keep for themselves] on top of 10 simple increases in listing fees." 11 If you look down in the bullet points you will see 12 that they are further expanded: 13 "Adding a percentage referral commission on top." 14 That's the one I just adverted to, and then there is 15 an example of how you might go about doing a direct 16 listing, an FSBO, and they even draw attention to 17 another tried and tested type of, if you like, platform, 18 namely Auto Trader, where if you want to sell your car 19 you do it at a flat fee directly. There is no 20 middleman. In other words, they are terrified of the 21 notion of the portal becoming akin to a direct platform 22 such as Auto Trader and they want to protect themselves 23 against it. 24 The next document I want to show you builds upon 25 these themes. So what you saw in pre-reading was the</p> <p style="text-align: center;">Page 10</p>	<p>1 now in your hands, sir, but to my mind not a single 2 aspect of the next two pages is confidential because in 3 substance it is the same as that which I have already 4 read out, and I propose to go through it. 5 THE CHAIRMAN: Mr Maclean, if you maintain the 6 confidentiality we'll obviously clear the courtroom, but 7 there is the opportunity for ad hoc review if you can 8 deal with it. 9 MR MACLEAN: I am relaxed about the point. 10 THE CHAIRMAN: You are relaxed about the point. 11 MR HARRIS: There we go. Doubtless the first of hundreds, 12 but in any event, the existential threat to agents. It 13 is important that all of these developments below are 14 said to be the threats against which they wish, as 15 a grouping of traditional, full-service, high 16 street-style agents to protect themselves. 17 The first one, trusted local brands. If you could 18 just cast your eye over that, in the second line it 19 says: 20 "It is now evident that the portal brands are more 21 important than the agent brands." 22 Well, exactly. That is a form of competition. They 23 don't like it. They want to set up a structure that 24 protects themselves and defends themselves against that 25 form of competition.</p> <p style="text-align: center;">Page 12</p>
<p>1 earliest iteration of project Z. This is a slightly 2 later iteration. All of these protectionist themes 3 coming right through to the fore. 4 If we could put away bundle 1 and turn to bundle 2, 5 in that bundle you will find beginning at page 644, also 6 identified on the pre-reading, the business plan 7 of March 2013. 8 So what happened with project Z was it went through 9 the 9 November iteration, the 28 November that we looked 10 at. Then there is another one at 21 December, then 11 there are various things going on of a similar ilk in 12 2012, including some slides that were given to the 13 Savills founder member firm that was on the pre-reading 14 list. 15 Then by the time we reach early 2013 we have this 16 document at 644, the first business plan. 17 THE CHAIRMAN: And this is confidential, I see. 18 MR HARRIS: This is marked as confidential. But if we could 19 just turn to page 652, you will see, in my submission, 20 that there is no basis upon which to continue to redact 21 as confidential the material on this page, which is 22 effectively the same in substance as that which I have 23 just read out in open court in a non-confidential 24 document. Certainly the heading, well, that's not 25 confidential, the existential threat to agents, and I am</p> <p style="text-align: center;">Page 11</p>	<p>1 The next one down: 2 "Property seekers first port of call when embarking 3 on their search." 4 This is very illustrative. Property seekers no 5 longer trawl local estate agents offices to register 6 with them and collect sales and lettings, they now start 7 with one of the portal websites. Well, exactly. A form 8 of new competition of direct benefit to at least the 9 house-hunter side of the market, one of the two sides of 10 the market. Do they like this? No, they hate it, 11 because it starts to weaken their position in the 12 market. 13 The next one: 14 "Detailed knowledge of local area. While agents 15 still have this detailed knowledge, much of the 16 information can be gained from the portal websites." 17 And then they give various examples. Well, exactly. 18 Another form of competition about sources of local 19 knowledge. Do they like this? No. It is regarded by 20 them as an existential threat that they simply must 21 protect themselves against. 22 The next one: 23 "Information regarding currently available property 24 stocks. Although an agent might have had detailed 25 knowledge of all properties available in their local</p> <p style="text-align: center;">Page 13</p>

<p>1 area, they generally focused on their own instructions, 2 but searching on a portal brings the relevant stock from 3 all the local agents." 4 Again, a new form of competition, demonstrably 5 better, seemingly even on their own view, than that 6 which they provide, because it provides a more 7 aggregated amount of information to somebody searching. 8 It is a form of competition to their traditional model. 9 They hate it. They regard it as an existential threat. 10 "Knowledge of local pricing trends. Agents have 11 this knowledge. The portals can provide it in a 12 data-driven structured fashion and also add statistical 13 information." 14 You get the theme. Another form of competition. 15 They have to protect themselves against it. 16 The next one: 17 "Trusted source of individual property sales/letting 18 valuations." 19 This one is even more amazing: 20 "Both the portal groups provide Land Registry sold 21 price data ..." 22 I think that means they buy it from the 23 Land Registry: 24 "... and they offer sophisticated valuation models." 25 It goes on to say that most agents now rely on that</p> <p style="text-align: center;">Page 14</p>	<p>1 them in the sales of these other services. So when we 2 get to 11/6235 I will show you that, but I don't want to 3 disrupt the flow. 4 Then it says -- and I paraphrase the next paragraph 5 down on 653 -- that effectively they are worried 6 about -- and this is the sixth line down -- direct 7 listing of property on their sites by individual owners, 8 and direct listings by owners, that is the FSBO, for 9 sale by owner. And these are all the things that they 10 are setting themselves up in this business plan, 11 preceded by all the project Z documents, to protect 12 themselves against by the structure of their mutual 13 members organisation. 14 So that puts a little bit more flesh on the bones of 15 the themes that were developed in the skeleton argument. 16 We'll obviously be seeing quite a lot more of these 17 things during the course of next week in particular. 18 I am going to move on now to a different theme, 19 which is the horizontal nature of these arrangements. 20 You would be forgiven for thinking, if you just read 21 my learned friend's skeleton, that this case wasn't 22 really about horizontal agreements at all, it was just 23 about vertical agreements. But that is very far from 24 the case. There is a series of, we say, obviously 25 anti-competitive horizontal arrangements in this case,</p> <p style="text-align: center;">Page 16</p>
<p>1 themselves. In other words, that was obviously better 2 than the agents in this full-service traditional agency 3 world that they wish to protect were providing 4 themselves. 5 So they are being competed against. How do they 6 regard this? They don't say next to any of these, "We 7 need to up our game, we need to make our services 8 better, we need to cut our prices, we need to be more 9 efficient. We can go in to compete on the merits 10 against these." They regard these as existential 11 threats and they have to set up a structure to defend 12 against it. 13 The next one over the page is linked to relevant 14 services. This means, as I said a moment ago, things 15 like survey, solicitor, removal, financial -- all the 16 things that could be associated with a property 17 transaction. And what they say is in the past agents 18 served as the point of reference for these sorts of 19 services, but now the portals provide it. Well, 20 exactly. Another form of competition. 21 What we will see -- I just invite you to note this 22 one and perhaps jot down next to it the reference, 23 bundle 11, page 6235. That's a document I will be 24 taking you to later, but it shows that the naked object 25 of Agents' Mutual was to prevent competition against</p> <p style="text-align: center;">Page 15</p>	<p>1 as well as the anti-competitive vertical arrangements. 2 So, for instance, not addressed at all by my learned 3 friends in their skeleton is what we contend is the 4 illegal collective decision by groups of estate agents 5 facilitated and encouraged and connived in and 6 participated in by Agents' Mutual the company, 7 collectively to join Agents' Mutual in the first place. 8 Simply ignored in my learned friend's skeleton, but let 9 me perhaps explain why they have never, ever understood 10 that that is illegal. 11 If I could just draw your attention in this regard 12 to a document in H16. It is the only time we are going 13 to need 16. You will see that this is an email. It 14 starts at 8718 and it is an email from Mr Springett to 15 the two most senior other employees as we understand it 16 in Agents' Mutual, Ms Whiteley and Mr Milsom, on 17 4 May 2016. So that is well over a year after launch 18 and many, many years after these documents talking about 19 wanting to protect themselves against these threats. 20 It is not marked as confidential. There are various 21 privileged bits that are redacted, but I would like to 22 just draw your attention, please, to the next page, 23 8719. 24 What has happened is this email is sent by 25 Mr Springett after the company had received another</p> <p style="text-align: center;">Page 17</p>

<p>1 letter from the Competition and Markets Authority 2 saying, amongst other things, "We think there might be 3 something going on but we're not pursuing it". We don't 4 need to turn up that letter. 5 The point is that on 2 May 2016, Mr Springett writes 6 to John, that is John Milsom: 7 "Thank you. I agree that having some more 8 demonstrable compliance is desirable." 9 So they have received the letter and it provokes 10 a response, "Let's have some more demonstrable 11 compliance". 12 But over the page at 8721, so this is in May 2016, 13 years after these collective agreements that we've 14 alleged have been in place, and he says four lines up 15 from the bottom -- do you have the paragraph, "The 16 question which needs clarifying"? 17 THE CHAIRMAN: Yes. 18 MR HARRIS: So even at this stage he is saying the question 19 which needs clarifying is whether a collective decision 20 to join AM would be illegal, even if each agent involved 21 made an individual decision regarding their one other 22 portal. 23 So a clear distinction between collective decisions 24 to join, which we do impugn but which are completely 25 ignored, and another set of collective arrangements</p> <p style="text-align: center;">Page 18</p>	<p>1 that business plan was put into existence, and it is 2 from the second most senior member of Agents' Mutual 3 behind Mr Springett. She writes, Ms Whiteley, to 4 Mr Springett: 5 "Hi Ian, I just want to check the legal issues 6 surrounding the North East meeting. The meeting is 7 officially a marketing forum for the Agents' Mutual 8 members in the North East. As part of that agenda, they 9 will be negotiating with Zoopla and Rightmove for 10 a collective rate to list with them. That obviously 11 could link to a collective decision for them to choose 12 to list on one particular portal and then hence 13 a collective decision not to list on any other portal." 14 You might have thought that Ms Whiteley would say, 15 "But that's obviously illegal, we couldn't possibly have 16 anything to do with that", being the second most senior 17 employee. But no, what does she say? "Does that create 18 any legal issues? And is there an issue with Julie 19 being present when those discussions happened?" 20 Little wonder that they should have fallen into that 21 error when here they are, many, many months into 22 recruiting agents, and the second most senior person 23 doesn't even know whether it would be illegal or not. 24 MR FREEMAN: Mr Harris, does negotiating a collective 25 a rate -- is that the wrong side of the line as well in</p> <p style="text-align: center;">Page 20</p>
<p>1 which we also impugn, that are to some extent dealt 2 with, namely as to the actual which other portal. 3 So little surprise that we say, amongst other 4 things, that this sort of collective decision-making 5 about whether or not even to join should have been going 6 on, in circumstances where the three most senior members 7 of the company don't even know and haven't addressed 8 their minds to as late as May 2016 the question of 9 whether or not that's even legal. 10 That's the first. 11 Now, the second, as just adverted to, horizontal 12 type of illegal arrangement is a collective decision 13 about which portal. Now, we know more about that from 14 both skeleton arguments, but can I just take you to 15 another revealing document on the question of collective 16 decisions about which portal to join. That is to be 17 found in bundle 5 at 2754. 18 Sir, it is possible that you might remember this 19 document. It was one of the ones that featured at the 20 PTR and it will, I have no doubt, feature later in the 21 trial since both sides deal with it in their witness 22 evidence. But for present purposes, I just wish to draw 23 your attention to the end, so the end email in a chain 24 that begins on 2753, and the end email is on 2754 and it 25 is on 2 June 2014, so that is well over a year after</p> <p style="text-align: center;">Page 19</p>	<p>1 your view? 2 MR HARRIS: I don't impugn that in this case. It might, it 3 might not, depending upon the case. But I don't impugn 4 that because, as you know, I focus on the collective 5 decision to join and the collective decision to choose 6 a particular portal and, thirdly, the one I am about to 7 address is that in the vast majority of the cases, the 8 choice of the portal was Rightmove and ditching -- 9 MR FREEMAN: I understand that, but the question of what 10 agents are able to do legally collectively I think is an 11 issue which underlies the case you are putting to us. 12 MR HARRIS: Yes, that's right, and for today's purposes and 13 throughout this trial, I don't take issue with, I don't 14 need to address you, I don't say it is relevant one way 15 or the other, a collective trying to negotiate a rate. 16 What I will say, however -- and in my submission 17 I don't need to address that because I have different 18 categories that are clearly illegal, but in my 19 submission it is a pertinent remark, Mr Freeman, for 20 this reason, which is that the genesis behind these 21 collective groups was in some cases collective groupings 22 about negotiating rates, and then it is clear -- we will 23 see this during the course of next week -- that the 24 people involved, including with the participation and 25 involvement of AM through its senior officers and</p> <p style="text-align: center;">Page 21</p>

<p>1 founder members and board members, was that even if it 2 is legal to negotiate a collective rate, it then very 3 easily slid into the illegal actions of choosing to 4 join, as opposed to unilaterally deciding to join, and 5 choosing a particular portal as a group as opposed to 6 doing it unilaterally. 7 So one can well understand how this illegal 8 behaviour has come about, even if it started -- which, 9 as I say, is a matter I don't need to deal with -- with 10 something that might have been legal, namely collective 11 negotiation. We will see that this happens in area 12 after area throughout the country. There is North East, 13 that particular example. There is north Devon, there is 14 north London, there's west Wales, Bristol, Cambridge, 15 Maidstone -- you name it. There are umpteen examples in 16 the documents about where this is going on. 17 So then horizontal agreements, and you will have 18 seen from the skeleton -- I don't propose to develop it 19 at any length in oral opening -- and you will have seen 20 in the witness evidence in particular that it was very 21 important for actual and prospective members to have the 22 security of knowing what their fellow either actual or 23 prospective members were going to do and were doing, and 24 that's because, as you know, a key parameter of 25 competition amongst estate agents in their local markets</p> <p style="text-align: center;">Page 22</p>	<p>1 facilitated and encouraged in knowing whether people are 2 going to join at all, that is the illegal collective 3 decision to join, and they also want to know, having 4 taken the decision about collectively whether or not to 5 join, for the same reason, what the other people are 6 going to be choosing by way of their one other portal, 7 because the last thing they want -- this is talking in 8 the first instance about the individual members -- is 9 for them to join but to choose Zoopla, and then to find 10 out that half, 60, 70 per cent of the others have joined 11 but they have chosen Rightmove. So there was a strong 12 impetus and motivation towards finding that out. 13 On top of that, it was both highly in the interests, 14 and then structurally and factually encouraged by 15 Agents' Mutual, in a manner of ways that will be 16 explored next week, that these people would know who the 17 others had chosen. That's because Agents' Mutual didn't 18 regard it as in its interest for there to be 19 a fragmentation of choice over the other portal. In 20 each local area, Agents' Mutual -- this will all come 21 out next week -- wanted there to be one other portal 22 chosen in that area, even if in another area it happened 23 to be a different portal. It would complicate their 24 route to their chosen objectives, which we will see 25 later on this morning, of killing off Zoopla if people</p> <p style="text-align: center;">Page 24</p>
<p>1 is the number and identity of the portals upon which 2 they list. So it is critical for them to know what 3 other people are going to do, and there is a very heavy 4 impetus and motivation towards finding out what they 5 were going to do in advance. We'll see masses of 6 documents next week where that is exactly what happens. 7 You will see that that is facilitated and encouraged 8 inter alia by the practice on the part of the company to 9 engage in signing people up through letters of intent. 10 You have a certain hurdle number of agents, in the first 11 instance 1,000 and then later on it was, whatever, 12 5,000, and then there was another hurdle point of 7,500, 13 and they go by way of letter of intent. 14 So structurally, as a matter of the very 15 organisation of this company, they are bringing about 16 a situation in which people won't join unless and until 17 they know that there is horizontal reciprocity. That is 18 the purpose. Why is it the purpose? For the reason 19 that I have just given: that it is going to be a lot 20 harder for Agents' Mutual ever to get anywhere unless 21 they can bring on people in groupings, in collectives, 22 particularly in local areas, who all know what the 23 others are going to do. And that extends to both levels 24 that I identified a moment ago. 25 They want to know and they need to know and they are</p> <p style="text-align: center;">Page 23</p>	<p>1 in a local area were to choose different portals. And 2 so that's why and how Agents' Mutual becomes involved in 3 these illegal horizontal agreements. 4 Just before leaving horizontal and spending a few 5 minutes turning to the vertical analysis, I don't know 6 if you have to hand my skeleton argument. The easiest 7 place to find this reference -- somebody gave me a new 8 bundle this morning with skeletons in, but I have them 9 separately. I think -- was it G? 10 MR FREEMAN: Bundle I. 11 MR HARRIS: If that is convenient for you. In my skeleton 12 argument, you will find it in paragraph 89.1, and this 13 is where in the skeleton we address this issue about how 14 there are lots of horizontal sets of arrangements here, 15 not just vertical, and then there is a footnote. I am 16 happy to take you to the case if you like, I just 17 thought it was easier in this bundle. It is volume K2, 18 tab 20. It is a citation at footnote 75 from 19 Mastercard. It just simply says that obviously 20 Article 101(1) catches all forms of cooperation and 21 collusion between undertakings, including by means of 22 a collective structure or a common body such as an 23 association which it calculated to produce. 24 Obviously in my learned friend's own skeleton they 25 quite rightly say, well, this is a mutual company. This</p> <p style="text-align: center;">Page 25</p>

<p>1 is obviously a collective structure or a common body, 2 and it catches all such forms of coordination within 3 Article 101. It then goes on to say: 4 "The prohibitions of that article catch different 5 forms of coordination, and, critically, prevent 6 undertakings from being able to evade the rules of 7 competition on account simply of the form in which they 8 coordinate that conduct." 9 Can you just note, gentlemen, that the reference 10 there should be to paragraph 62 to 63, not 52 to 53. 11 I apologise for that. 12 THE CHAIRMAN: Mr Harris, you aren't bringing a claim here, 13 you are running what one might call a competition 14 defence, and so the competition issues arise as 15 a response to an allegation of breach of contract, and 16 you say that in that contract there are certain 17 provisions which infringe competition law and are void, 18 and that is in essence how your defence operates in 19 terms of breach of contract. 20 At some point I think it would assist us if you 21 could explain how the boycott, if I can call it that, 22 these horizontal arrangements which you are critiquing 23 at the moment which don't appear from the contract, 24 interact with your contractual defence. 25 Are you asking us, for instance, to read into the</p> <p style="text-align: center;">Page 26</p>	<p>1 terms are effectively interchangeable for these 2 purposes -- where you have that sort of set of contracts 3 across the board, where they all know that everybody 4 else is going to be employing the OOP through a letter 5 of intent-type process, that that can be analysed in 6 substance, which is why I showed you footnote 75, as 7 a horizontal agreement. 8 So the OOP is right at the heart of it. And I am 9 about to show you just now why it is that my learned 10 friend's suggestion in their skeleton that, "Oh, well, 11 really this is nothing but verticals, and we'd actually 12 be off the hook, save for a technicality, we'd actually 13 fall within the block of the exemption." If only it 14 weren't for what they effectively try to characterise as 15 a technicality -- it is fundamentally wrong. 16 If I could turn to that now. I am going to begin 17 just with a brief reference to a case, Allianz Hungaria, 18 which you will find in tab 19 of the authorities, which 19 is in bundle K2. 20 As I open this, you will recall that effectively the 21 major theme of the skeleton is, "Oh, verticals, no real 22 problem, why are you so upset?" And that's even more 23 obviously expressed in Mr Bishop's report. Effectively 24 his founding premise, amongst others, one of his handful 25 of founding premises, is there is nothing wrong with</p> <p style="text-align: center;">Page 28</p>
<p>1 contract an agreement that, for example, only one portal 2 will be chosen as the other portal, or how does it work? 3 I am not asking you to answer that now, but at some 4 point I would be grateful for your assistance. 5 MR HARRIS: I am happy to develop that further at a later 6 stage, but at its highest level, the contracts are the 7 fruits of these illegal concerted practices and 8 decisions of associations of undertaking. You can't 9 have a lawful contract that sets out the fruits of an 10 illegal concerted practice/decision of an association of 11 undertakings. 12 THE CHAIRMAN: So the contract is, as it were, the 13 instrument of a prior and anterior illegal agreement. 14 MR HARRIS: In part. This will become clearer when you see 15 the evidence because you will see how these things 16 really all merge into one. But we say in addition that, 17 properly understood, the OOP rule and the way it is 18 structured to be implemented through inter alia letters 19 of intent, as I was explaining a moment ago, is part of 20 the horizontal arrangements. And what I am about to 21 develop just now, in fact, is the fact that where there 22 are mutual agreements between members of what my learned 23 friends call a mutual company, which I am happy to 24 adopt, or otherwise described as an association of 25 undertakings -- it doesn't really matter, all these</p> <p style="text-align: center;">Page 27</p>	<p>1 vertical agreements generally speaking and you therefore 2 have an uphill task, but that is just wrong. 3 If you turn to paragraph 19 of Allianz Hungaria in 4 the Court of Justice, I am only going to take you to 5 that paragraph which is cited in our skeleton arguments, 6 which is 43 on page 1033. It speaks for itself. It is 7 a completely false premise from which to start. 8 So there are lots of horizontal agreements here. 9 They implicate the very rules in question. In any 10 event, even if there weren't, it is a non-point to say, 11 "Oh, well, there's nothing wrong with verticals", for 12 the reasons I have just given you. But it is very 13 telling how my learned friends seek to draw some 14 reliance and some support from the verticals block 15 exemption, which you will recall from their skeleton 16 argument. 17 If we could just identify that part of their 18 skeleton, which you will find -- I thought I had sticky 19 on it, but it is paragraph 45 of their skeleton, and in 20 particular (b). 21 So they mention the block exemption and they set out 22 various aspects of it, and then they say at (c) 23 something that is particularly remarkable, "If AM were 24 not a mutual company". Well, just pausing there, AM is 25 a mutual company and, as I shall show you in the</p> <p style="text-align: center;">Page 29</p>

<p>1 guidelines to this block exemption in a moment, that is</p> <p>2 absolutely critical. So they try and, with a wave of</p> <p>3 the hand, "If it were not something that, well, it is</p> <p>4 that something", and then they go on to say the VABR</p> <p>5 would clearly apply to it. That is just wrong.</p> <p>6 In the next sentence they say it could arguably take</p> <p>7 it outside the block exemption. With great respect, we</p> <p>8 know perfectly well that if there was any sliver of an</p> <p>9 argument about the vertical block exemption destroying</p> <p>10 my defence, that would have been argued. There</p> <p>11 obviously isn't because it hasn't been argued. Instead,</p> <p>12 they try to place some reliance on it.</p> <p>13 Can I just show you why this is hopeless. If you</p> <p>14 could turn up the block exemption, it is to be found in</p> <p>15 K4, tab 41, I believe. My learned friends rightly draw</p> <p>16 attention to what for them is the impossibly problematic</p> <p>17 article, namely article 2.2, which you will find on</p> <p>18 internal page 2481 of the bundle, and what 2.2 says, if</p> <p>19 you look at it, is:</p> <p>20 "The exemption provided for in paragraph 1 [that is</p> <p>21 the vertical exemption] shall apply to vertical</p> <p>22 agreements entered into between an association of</p> <p>23 undertakings and its members [that is our situation] or</p> <p>24 between such an association and its suppliers only if</p> <p>25 all its members are retailers of goods and if no</p> <p style="text-align: center;">Page 30</p>	<p>1 Paragraph 30:</p> <p>2 "An association of undertakings may involve both</p> <p>3 horizontal and vertical agreements."</p> <p>4 Exactly. That is why they don't fall within the</p> <p>5 block exemption except in two tightly defined</p> <p>6 circumstances, neither of which have the remotest</p> <p>7 application to our case:</p> <p>8 "The horizontal agreements have to be assessed</p> <p>9 according to the principles set out in the guidelines</p> <p>10 and the applicability of Article 101. If this</p> <p>11 assessment leads to a conclusion that cooperation</p> <p>12 between undertakings in the area of purchasing ..."</p> <p>13 Well, that's what these people are doing:</p> <p>14 "... or selling is acceptable, a further assessment</p> <p>15 will be necessary to examine the vertical agreement."</p> <p>16 So you recognise that a mutual company by its very</p> <p>17 nature has inherent within it horizontal agreements as</p> <p>18 well as, depending on the circumstances, it can enter</p> <p>19 into vertical agreements.</p> <p>20 It goes on to give some examples.</p> <p>21 MR FREEMAN: Just to interrupt you for a moment. It does</p> <p>22 say that further assessment will follow the principles</p> <p>23 of the block exemption, doesn't it?</p> <p>24 MR HARRIS: Yes, as regards the vertical part of it,</p> <p>25 absolutely. Yes. But as you will appreciate, I am</p> <p style="text-align: center;">Page 32</p>
<p>1 individual member of the association has a certain</p> <p>2 turnover."</p> <p>3 So the only time that the vertical gateway ever</p> <p>4 escapes where you are in the context of an association</p> <p>5 of undertakings, ie a mutual company, is (a) if it is</p> <p>6 about retailers' goods -- that is not us, so they are</p> <p>7 dead in the water on that one -- and then when the</p> <p>8 individual members don't have agreed annual turnovers</p> <p>9 exceeding -- well, there are plenty of members of this</p> <p>10 company which have annual turnovers vastly exceeding</p> <p>11 that figure.</p> <p>12 So it was never going to apply to them and it is no</p> <p>13 accident, gentlemen, that the verticals block exemption</p> <p>14 does not apply to a mutual company. If we could keep</p> <p>15 the same bundle and turn over, this time into tab 43,</p> <p>16 you will see the vertical guidelines of the commission</p> <p>17 that talk about this very point. It is in tab 43 at</p> <p>18 internal page 2498.</p> <p>19 Could I ask you, gentlemen, just to read to</p> <p>20 yourselves paragraph 29 and then I'll pick it up at 30.</p> <p>21 (Pause).</p> <p>22 So effectively 29 sort of repeats in slightly more</p> <p>23 verbose form the text of the article, and then picking</p> <p>24 up -- and, of course, as you will appreciate, these are</p> <p>25 the guidelines as to why these things are in place.</p> <p style="text-align: center;">Page 31</p>	<p>1 making a different point here, that this is a case not</p> <p>2 just about verticals, and it is no accident that you</p> <p>3 don't get out of jail when you're a mutual company by</p> <p>4 reference to the block exemption because they typically</p> <p>5 also involve a series of horizontal agreements, just</p> <p>6 like our case. And as I said, sir, to you before, the</p> <p>7 OOP rule is a horizontal arrangement between the</p> <p>8 members. Because everybody, as a member of the mutual</p> <p>9 company, undertakes to the company, and as a matter of</p> <p>10 substance with each other, that it is not going to be</p> <p>11 choosing anything else other than one portal. As we</p> <p>12 shall see next week, in fact it went further than that</p> <p>13 and they named names, et cetera, et cetera.</p> <p>14 But it is interesting here just to finish off in</p> <p>15 paragraph 30 that it goes on to say:</p> <p>16 "For instance, horizontal agreements concluded</p> <p>17 between the members of the association, such as the</p> <p>18 decision to require members to purchase from the</p> <p>19 association, have to be assessed first as a horizontal</p> <p>20 agreement."</p> <p>21 That is our case. This is the members of an</p> <p>22 association being required to purchase from the</p> <p>23 association plus one other competing portal, and it says</p> <p>24 in terms that that has to be assessed first as</p> <p>25 a horizontal agreement.</p> <p style="text-align: center;">Page 33</p>

<p>1 So I think, sir, that that also answers partly the 2 question you addressed to me. There is a requirement 3 within all of these series of networks of contracts that 4 applies to all of the members of the mutual 5 organisation. 6 So the suggestion that were it not a mutual company 7 VABR would apply is demonstrably wrong, and more 8 importantly still, it is very clear that the VABR 9 doesn't apply in most cases to mutual companies in any 10 event because they are horizontal and the very example 11 given in the guidelines is the one that applies to our 12 case. 13 It is also important, though I am not going to turn 14 this up, that you should recall in this context that 15 here we have a network of agreements across the UK as 16 a whole. Now, that is in our skeleton at 59, I am not 17 going to develop that orally, but you will appreciate, 18 I am sure, members of the Tribunal, the importance of 19 the fact that there is a network, and you may well be 20 very familiar with the Delimitis case about networks of 21 brewery tying contracts. These things can't be viewed 22 as a single agreement; they have to be viewed in their 23 proper context as a network of agreements. 24 So that's what I have to say about, if you like, the 25 global overview on -- there are verticals here, they can</p> <p style="text-align: center;">Page 34</p>	<p>1 Mr Bishop's other major point -- "Oh, well, this is 2 market entry, you know, it must be good" -- simply 3 doesn't work. It is too glib, it is too high level. It 4 mistakes the fact that this is not a normal market. 5 Where do we find the best exposition of what this 6 market in fact is? It is the orthodox economic analysis 7 of what was then the OFT, followed by the 8 Bundeskartellamt, in firstly the OFT decision. I think 9 you will find that in the authorities, but I am going to 10 pick it up at F1, which is my marked up copy, which is 11 an exhibit to Mr Parker's witness statement. My bundle 12 is at F1 and it begins on internal page 309. 13 I hope you have had the opportunity to read it. 14 This is a very important document for the purposes of 15 this case and I hope you will forgive me if I take it 16 fairly quickly, given the limited time, as it has been 17 on the pre-reading list for obvious reasons. 18 But what's most important from this -- I will take 19 you to some of the paragraphs individually in 20 a minute -- is that of course the OFT came to the 21 conclusion, after a considerable market examination and 22 analysis, including of data and of interviewing lots of 23 people, which stands in extremely stark contrast to 24 those project Z documents that we saw before, that in 25 this market, dominated as it is by Rightmove, it would</p> <p style="text-align: center;">Page 36</p>
<p>1 be impugned, they should be impugned, but also the 2 importance of these horizontal agreements, some of which 3 are just completely ignored by my learned friends. 4 That then takes me on to the next stage, which is 5 that you have heard a lot in the skeleton arguments and 6 in the expert reports from my learned friend's side that 7 this is a case about market entry, as if market entry 8 was some panacea for all the evils: "I am a new entrant, 9 there can't be an anti-competition problem here." 10 What's more, they say, and no doubt seek to develop 11 this afternoon, "Not only am I a market entrant", as 12 though that is somehow automatically good, "but there 13 are some terrible barriers to entry in this market and 14 so you should effectively forgive me all what 15 I characterise as anti-competitive evils because I have 16 to do that in order to get in." That is effectively the 17 story. 18 But, of course, market entry by itself is only even 19 prima facie pro-competitive if you are talking about 20 a normal market and where there aren't anti-competitive 21 tools used in order to leverage your way in. 22 But at this next stage of my oral opening I just 23 want to remind you, gentlemen, that this is of course 24 not a normal market. Nobody contends that this is 25 a normal market. So the other thesis, which is</p> <p style="text-align: center;">Page 35</p>	<p>1 be pro-competitive for what were then the second and 2 third portals to get together in order to create 3 a better substitute or a closer constraint to Rightmove. 4 So that is the orthodox economic analysis of 5 a market of this type, which is not a bog standard 6 normal market, and what effectively, gentlemen, my 7 learned friends have to persuade you during the course 8 of this case is that the OFT got it wrong, because the 9 effect of their rule -- not just the effect but the 10 object and intention as well -- was to bring about 11 a situation in which far from two people getting 12 together to create a closer substitute and a better 13 competitive constraint to the far runaway dominant 14 provider, was to create a situation in which they were 15 fragmented and split up. In other words, in essence to 16 go back to the pre-merger, less competitive situation. 17 I'm not saying the names of the companies were the same, 18 obviously they weren't, but in essence that's the 19 effect. 20 What's important about this document is that the OFT 21 is saying after this full examination, well, creating 22 a closer competitive constraint by making Zoopla bigger 23 with more properties through the merger, such that they 24 are more of a credible threat for substitution, that's 25 what constrains Rightmove. As you know from Mr Parker's</p> <p style="text-align: center;">Page 37</p>

<p>1 report, that has now been to some extent taken away by 2 operation of the OOP rule. 3 MR FREEMAN: I am sure you are right it is an important 4 document. Am I right that it is a phase 1 merger 5 clearance by the OFT? 6 MR HARRIS: That's right, yes. 7 MR FREEMAN: A decision not to refer it to what was then the 8 Competition Commission. 9 MR HARRIS: That's correct, and I don't put it any higher 10 than that. But what you will see when we go through it 11 in a moment is that it was after extensive examination. 12 MR FREEMAN: But like all pre-merger clearances, it is 13 essentially an estimate of the reasonable likelihood of 14 substantial lessening of competition. 15 MR HARRIS: Absolutely, yes. 16 MR FREEMAN: So when I used to do these things it was our 17 best informed guess. So it is conceivable that it could 18 be wrong. It isn't completely to be ruled out. 19 MR HARRIS: I accept that entirely. 20 MR FREEMAN: Because events tend to prove whether your 21 merger prediction is right or not. 22 MR HARRIS: I accept that entirely, yes, but what I say, 23 amongst other things, is very telling is it is the same 24 analysis by the Bundeskartellamt, the same analysis by 25 our independent expert, and it is the same analysis by</p> <p style="text-align: center;">Page 38</p>	<p>1 commonly switch spending between them." 2 That is a feature of the case that will recur later 3 on. 4 Then at 19 they make the rather obvious point that 5 the estate agents want maximum -- 6 MR MACLEAN: I am sorry, that's the parties' argument. The 7 OFT is saying what the parties were arguing. It is not 8 the conclusion by the OFT. 9 MR HARRIS: Thank you. So they are recording the parties' 10 argument that the estate agents want maximum exposure to 11 potential buyers or renters in order to increase the 12 demand for the property on their books and they'll be 13 prepared to pay more for a portal which attracts more 14 viewers, and then there is reference in paragraph 26 to 15 the parties submitting that there will be network 16 effects, and I am picking this up now halfway down 26: 17 "The parties further argue that network effects will 18 create a tipping point for property portals, whereby 19 once Rightmove has captured a certain proportion of 20 supply it will be impossible for other agents to catch 21 up and an increasing share of customers will solely use 22 Rightmove." 23 That is because they were saying, "If we don't 24 merge, it might get even worse, the competitive 25 situation". The OFT doesn't accept that. They say,</p> <p style="text-align: center;">Page 40</p>
<p>1 a whole series of independent market analysts, some of 2 which I will show you very briefly later this morning. 3 MR FREEMAN: Yes, the Bundeskartellamt case is interesting, 4 but again it is very cryptic as Bundeskartellamt 5 clearances tend to be. So -- 6 MR HARRIS: I accept that point as well, but what is 7 telling -- and we'll come to this in a minute with the 8 Bundeskartellamt -- is the underlying substantive 9 analysis is identical, namely once you get a second 10 portal by merging what had hitherto been the second and 11 third into a closer undertaking compared to the runaway 12 incumbent dominant player, that will lead to more 13 competition. 14 MR FREEMAN: Authorities in different countries do sometimes 15 come to the same conclusions. Not always. 16 MR HARRIS: That's right. So I am, with your permission, 17 not going to obviously go through this OFT decision at 18 great length this morning because you have had an 19 opportunity to read it. I am just going to pick out 20 certain parts from it. You may just want to note in 21 passing at paragraph 14 that the OFT remarks following 22 its investigation: 23 "Therefore, an agent with a finite advertising 24 budget would have to decide how best to allocate the 25 budget across the different online sources and more</p> <p style="text-align: center;">Page 39</p>	<p>1 "I can still see pro-competitive benefits from you 2 merging even if otherwise the situation wouldn't be 3 worse", but what's telling, the reason I draw this to 4 your attention for now, is that this is the very view 5 that Agents' Mutual takes. Their view of the market is 6 that you can and will create tipping points that shove 7 people out of the market. We shall see that in some 8 documents later this morning. You may have had an 9 opportunity to see some of them in pre-reading. That is 10 their view of how this market works, and it was on the 11 basis of that view that they took action with their, we 12 say, anti-competitive set of arrangements. 13 Over the page you will note that in table 1, 14 Rightmove was very obviously dominant back at that 15 stage. The figures don't matter. What matters is that 16 this was a situation where Rightmove was obviously 17 dominant and it is entirely common ground between you 18 today that Rightmove is dominant. 19 THE CHAIRMAN: Common ground on the question of facts on 20 which the experts take no view beyond the common ground. 21 MR HARRIS: Common ground both as a matter of legal 22 characterisation, and then all the data I don't think is 23 very largely disputed. I mean, there is data about site 24 visits, page views and what have you. They will 25 obviously show dominance. But it is common ground,</p> <p style="text-align: center;">Page 41</p>

<p>1 expressly common ground in this trial that Rightmove is 2 a dominant undertaking on this market. That was 3 formally accepted by my learned friend I think at 4 the July hearing before Mr Justice Roth last year. We 5 can find you the reference if you need it. 6 What they go on to say in this document is -- it is 7 important to see what they say under the heading 8 "Closeness of competition between the parties" at page 9 319: 10 "Where products are differentiated, for example by 11 branding or quality, unilateral effects [that is of the 12 merger] are more likely where the parties' products 13 compete more closely ..." 14 I am paraphrasing, a merger results in a greater 15 loss of competition where the merging parties are closer 16 competitors. 17 That, of course, is Mr Parker's very thesis in his 18 independent review of this market, which is that Zoopla 19 had reached their position where it was a greater 20 constraint because the parties' products were competing 21 more closely because they had a more similar number of 22 estate agents and the OOP rule had both the object and 23 effect of taking that away from them. 24 I just note in passing that, Mr Freeman, there is an 25 example in 37 of how the OFT, even at this phase 1</p> <p style="text-align: center;">Page 42</p>	<p>1 So that is the situation which still pertains today: 2 "The OFT is generally sceptical that an income 3 effect [ie having a limited budget] would provide 4 a significant constraint on the parties. A number of 5 third parties supported that proposition." 6 I just pause there because of course this supposed 7 limitation income effect about which the OFT is so 8 sceptical, that is a key part of Agents' Mutual. They 9 say inter alia that the OOP rule is needed because 10 agents either can't or won't spend on more than two 11 portals. 12 Now, as you know, there is masses of evidence that 13 says that that is just wrong as a matter of fact. Lots 14 of people busy competing on more than three portals, let 15 alone just two. So it is just wrong on the facts. But 16 it is interesting here to note that the OFT is sceptical 17 that it would constrain the parties from listing on 18 other venues and portals. It says: 19 "Even in the absence of such an effect, Rightmove is 20 likely to provide a strong constraint on the parties 21 because estate agents can achieve significant exposure 22 through listing with Rightmove and it is generally only 23 Rightmove which vendors request an agent to list on. 24 The parties need to provide a very competitive offering 25 in order to convince estate agents to list on them given</p> <p style="text-align: center;">Page 44</p>
<p>1 stage, took third-party views. Multiple references in 2 here to how the data was examined. So if you look at 3 paragraph 38, that was the OFT, even at this phase 1 4 stage, examining relevant price data, and at table 2 of 5 39 they were examining data about the combination -- 6 well, you can see for yourself. 7 Then it talks over the page about third parties -- 8 this is at 41 -- almost unanimously perceive Rightmove 9 as being essential. In other words, all the 10 characteristics of the market that we still face. 11 At 42 it refers to the OFT's examination of internal 12 documents. So they went that far, sir. 13 And then at 43: 14 "Some respondents indicated they would have to 15 increase their overall spend on portals following price 16 increases from Rightmove rather than reduce their spend 17 on the parties or other portals. Although this suggests 18 that agents' portal budgets are not entirely fixed at 19 a given point in time, the OFT does accept that there 20 may be a ceiling on the amount they are willing to spend 21 ... but the OFT also considers that the evidence points 22 clearly to the perception among estate agent that 23 Rightmove is extremely important to their business, such 24 that estate agents currently have little choice but to 25 list on the portal."</p> <p style="text-align: center;">Page 43</p>	<p>1 that they are getting a comprehensive service from 2 Rightmove." 3 That is my point. You need to have a very 4 competitive offering if you are going to compete with 5 Rightmove. Zoopla had that prior to the market being 6 deliberately disrupted -- that is their term, not 7 mine -- by the institution of the OOP rule and the 8 taking away of the agent from the other portal and, in 9 particular, Zoopla. 10 Then it goes on to say, and I expect you are very 11 familiar with this bit so I am not going to dwell upon 12 it, under the heading "Increased rivalry to Rightmove", 13 and this is the part of the analysis where they set out 14 that the merger will lead to a closer competitive 15 constraint and therefore a closer substitute and 16 a pro-competitive constraint upon Rightmove. 17 I just want to -- before I -- 18 MR FREEMAN: Can I interrupt you there again. That's what 19 you say this decision says, but can you point me to the 20 OFT's analysis of competition in the future between 21 Rightmove and the merged entity? Because if you look at 22 paragraph 61, what the basis of the decision appears to 23 be -- and it may be this is perfectly right, I don't 24 know -- the bigger the merged entity is and the nearer 25 to Rightmove it is in terms of size, without going into</p> <p style="text-align: center;">Page 45</p>

<p>1 too much detail about what size gives you by way of 2 advantage, then the more of a constraint it will be. 3 But it did seem to me just when I first came across this 4 case, which was long before this litigation arose, that 5 the essence of the decision was that the competition 6 between the merging parties had been not as close as you 7 might think at first sight. 8 MR HARRIS: Exactly, sir. 9 MR FREEMAN: Therefore, not much competition was lost by the 10 merger and, in any case, Rightmove would constrain them, 11 which is not a surprising conclusion, and there would 12 also be a benefit in terms of presumed, and on what 13 I said before, it is an informed guess, of some 14 constraint on Rightmove from the merger. So that is an 15 added benefit. 16 It didn't see seem to me that the very great weight 17 that has been put on the need for a merger in order to 18 prove competition against Rightmove is actually borne 19 out by the decision because it is a clearance, it is not 20 a positive decision. It is a non intervention, an 21 approval of a proposal. 22 MR HARRIS: All of that -- 23 MR FREEMAN: Am I completely off theme on that? 24 MR HARRIS: No, not at all. 25 MR FREEMAN: It would be nice to be on the same page legally</p> <p style="text-align: center;">Page 46</p>	<p>1 MR FREEMAN: I am trying to work out the weight to be 2 attached to it. 3 MR HARRIS: Well, as I said, it is part of a consistent 4 piece. You have Mr Parker's independent view. You have 5 the OFT, which shares the same substantive analysis, 6 albeit in the form of this document which you have 7 described. You have the BKA, which shares that 8 independent analysis. And then you have a whole series 9 of market analysts who probably know more than any of us 10 in this room about these companies, working over there 11 in the city, we'll see later on, Morgan Stanley and UBS, 12 amongst others, and they also share this view, and what 13 I am saying to you is that that is a great weight, 14 a preponderance of the evidence, which shows you that 15 the orthodox economic analysis is on our side of the 16 case and, therefore, it is little surprise that when you 17 effectively bring about a situation that has, in 18 essence, the effect of reversing this sort of merger, 19 therefore you should come to the conclusion that it is 20 anti-competitive. 21 So that's how I put it, sir, and I don't rely upon 22 this in isolation, I don't try and make more of it than 23 it is worth; it is part of this panoply of evidence 24 which all points in the same direction. 25 It is also important that it totally holds below the</p> <p style="text-align: center;">Page 48</p>
<p>1 at least. 2 MR HARRIS: I don't take issue with any of that. It is true 3 that part of the analysis is there wasn't as much 4 competition between numbers 2 and 3 in that market as 5 you might have thought, but why it is important is 6 because they didn't have -- they were addressing, if you 7 like, different market segments or structures and they 8 didn't have overlapping customer bases and properties. 9 MR FREEMAN: Yes, so you can't just assume that because one 10 is a property portal that it provides a competitive 11 constraint on the other. 12 MR HARRIS: That's right, but of course in the world 13 pre-OOP, Rightmove and Zoopla did have a very large 14 coincidence of the number of agents and the number of 15 properties, and the object and indeed effect of OOP was 16 to take away that coincidence. 17 MR FREEMAN: But I don't think the OFT examined that in 18 great detail. 19 MR HARRIS: No, I don't pretend for a moment, Mr Freeman, 20 that this goes further than it goes. Phase 1, clearance 21 decision -- but it wouldn't be fair -- I am not 22 suggesting you are doing this -- to put it on one side 23 as being unanalysed or unevidenced or without 24 third-party views or without crunching some data. All 25 of those things have been done.</p> <p style="text-align: center;">Page 47</p>	<p>1 waterline the suggestion that's repeatedly made by my 2 learned friends that actually theirs is the standard 3 analysis, because market entry by itself, if you like, 4 simpliciter, might lead to pro-competitive benefits in 5 a bog standard normal market as a matter of orthodox 6 economic analysis. No problem. We completely agree. 7 But this isn't that market for all of these reasons. 8 Paragraph 61, sir, Mr Freeman, is a good summary 9 there under the conclusion on unilateral effects. It is 10 likely to have pro-competitive effects, that is what the 11 OFT considered, strongly supported by third parties, no 12 doubt in the market, that by creating a portal that can 13 rival Rightmove in size the merger (inaudible) a strong 14 constraint, et cetera, et cetera. 15 So I am going to leave that one there but can I just 16 show you, since it is over the next page -- it is 17 slightly out of order but it is more convenient this 18 way -- one of the very market analysts that I was 19 talking about is a company called Enders, nothing to do 20 with us, they are just city analysts. Here they are, 21 nearly a year after the launch of the OOP rule in the 22 market, which was 26 January 2015, and here they are 23 reporting in December 2015, and it is a property 24 marketing outlook, and you will see that on page 333 -- 25 so a year into the OOP rule and the final bullet point,</p> <p style="text-align: center;">Page 49</p>

<p>1 the round bullet point, where it says "however": 2 "However, these brands are not generating large 3 revenue streams from digital as the portals and 4 Rightmove in particular have tightened their grip on the 5 market." 6 And they go on to say at the bottom, picking up in 7 the final line: 8 "With the new entrant on the market failing to 9 impact the status quo ..." 10 And over the page the third bullet point down: 11 "New entrant OTM has not introduced a new pricing 12 strategy and has not introduced a range of new consumer 13 services. As a result, it has had a short-term and 14 limited disruptive impact upon ZPG." 15 What we will see later is that the intention was to 16 have a massively disruptive impact on ZPG, but because 17 they have mucked things up according to these 18 independent analysts not introducing a new pricing 19 strategy and introducing a range of new consumer 20 services. They haven't actually achieved their 21 intention, but their intention was to be massively 22 disruptive and to knock out Zoopla -- we shall see that 23 later on -- but the other relevant thing about this 24 report is it is an independent person saying, a year 25 after OOP, just as Agents' Mutual knew would happen and</p> <p style="text-align: center;">Page 50</p>	<p>1 course why he has exhibited it, but I just invite you to 2 note the date: 30 October 2014. So by this stage 3 Agents' Mutual has been out and about in the market for 4 approximately 18 months publicising its business plan, 5 that was March 2013, sending out information memoranda, 6 trying to persuade people to sign up and, indeed, 7 signing up many people. So the notion of Agents' Mutual 8 is out there, completely. But it is still pre-launch. 9 Launch was several months after this. And this 10 independent analyst, nothing to do with us, says in the 11 first bold by the top hole punch: 12 "Our proprietary authorised survey suggests agents 13 are highly unlikely to leave Rightmove." 14 So they know all about the OOP rule and they have 15 analysed it, all of these named people in the top 16 right-hand side who spend their days analysing companies 17 and what they say is before launch their prediction and 18 their survey suggest that agents are highly unlikely to 19 leave Rightmove. 20 What we shall see during the course of this trial is 21 Agents' Mutual took exactly the same view. They knew 22 perfectly well that people were generally speaking, and 23 indeed it has turned out to be the tune of 90 per cent, 24 that agents weren't going to leave Rightmove, they were 25 going to leave Zoopla and they deliberately targeted</p> <p style="text-align: center;">Page 52</p>
<p>1 intended to happen, that Rightmove in particular have 2 tightened their grip on the market. That's of course 3 exactly what Mr Parker says in his independent analysis 4 by reference to the empirical data. 5 I apprehend that it may not be worthwhile in opening 6 to go to the Bundeskartellamt decision. That is in 7 bundle F4. It was on the pre-reading list. It is 8 short. What I get out of it is it is part of this 9 panoply of consistent evidence about creating a greater 10 competitive constraint where you have somebody who is 11 closer in substitution and, as you know, Zoopla is 12 obviously less of a substitute because thousands of its 13 agents have been taken away by the OOP rule, as was 14 always the intention. 15 I could just show you, however, before finishing off 16 on this section, and perhaps -- I don't know if the 17 shorthand writers are going to want -- perhaps I can 18 show you one more analyst and then, if it is convenient, 19 we have a short break. After that I am going to turn to 20 the case of BIDS, Beef Industry Development Society. 21 So I will just finish off then with another 22 reference -- this time it is in bundle F4 -- to an 23 independent analyst. It is at page 1750. I only take 24 you to one line here. There is much in this document 25 that is supportive of Mr Parker's analysis, which is of</p> <p style="text-align: center;">Page 51</p>	<p>1 Zoopla knowing that that would be the case and the 2 effect of the OOP rule. 3 Then just moving on then -- if you wanted the 4 reference to the BK decision it is in the same bundle at 5 1958 but I am just going to move on to again another 6 completely independent analyst. You will find this on 7 page 2045. This time it is UBS. So so far we have had 8 Morgan Stanley and Enders and now we are on UBS. This 9 is at 2045. You will see that the date of this document 10 is 12 July 2016. So we are now in the world some 11 15/16 months after launch, and what do they say? If you 12 look at the first heading under the mid key call 13 Rightmove it says in bold: 14 "Rightmove's market leading position maintained..." 15 Then the second sentence beneath that: 16 "Overall we see the launch of OTM as having actually 17 strengthened the position of Rightmove by making it 18 a stronger number 1 in the segment with Rightmove now 19 having circa 65 per cent more properties listed for 20 resale than Zoopla. No wonder they reiterate their buy 21 rating. 22 So, gentlemen, that is entirely consistent with what 23 Mr Parker says and indeed, as I said, we shall see later 24 on in this trial entirely consistent with what 25 Agents' Mutual wished to achieve right from the very</p> <p style="text-align: center;">Page 53</p>

<p>1 beginning.</p> <p>2 That may be a convenient moment, gentlemen. I am</p> <p>3 going to turn after a short break to the case of BIDS</p> <p>4 which you will find in bundle K2.</p> <p>5 THE CHAIRMAN: Thank you, Mr Harris. We'll rise for five</p> <p>6 minutes.</p> <p>7 (11.45 am)</p> <p>8 (A short break)</p> <p>9 (12.00 pm)</p> <p>10 MR HARRIS: Can I ask you, please, to take up bundle K2 and</p> <p>11 look to the Beef Industry Development Society case,</p> <p>12 BIDS. It is at tab 16. As gently as I can, given that</p> <p>13 I know you're overrun with bundles, may I suggest that</p> <p>14 this case might repay careful reading if you did have</p> <p>15 a spare moment over the weekend. I am going to give</p> <p>16 a potted summary, but I would invite you to read it all,</p> <p>17 including the AG's opinion.</p> <p>18 What this case was about was a very important</p> <p>19 industry in the Republic of Ireland, beef slaughter and</p> <p>20 processing, and it has massive structural overcapacity</p> <p>21 and it was said by the government to be a big economic</p> <p>22 problem. They had the laudable and legitimate and,</p> <p>23 indeed, some people think highly commendable aim of</p> <p>24 trying to rationalise that industry and reduce the</p> <p>25 significant overcapacity with the economic problems that</p> <p style="text-align: center;">Page 54</p>	<p>1 the Attorney-General's opinion --</p> <p>2 THE CHAIRMAN: Advocate General.</p> <p>3 MR HARRIS: I beg your pardon. I have now made that mistake</p> <p>4 several times. I am very sorry. Advocate General's</p> <p>5 opinion, yes. In Advocate General paragraph 8, you can</p> <p>6 see the reference to overcapacity, the issues about</p> <p>7 capacity utilisation. And as I said, the object of BIDS</p> <p>8 and, indeed, of the Irish government and the economic</p> <p>9 consultants was to allow for the rationalisation of that</p> <p>10 overcapacity, but the court, if you pick it up in the</p> <p>11 judgment towards the end of this tab, at paragraph 21 --</p> <p>12 well, perhaps at 19, BIDS was submitting, as I say,</p> <p>13 supported by the government, who had come up with the</p> <p>14 scheme, that the BIDS arrangements are not</p> <p>15 anti-competitive on purpose and do not entail injurious</p> <p>16 consequences. The purpose is not adversely to affect</p> <p>17 competition or the welfare but to rationalise the beef</p> <p>18 industry in order to make it more competitive by</p> <p>19 reducing but not eliminating production overcapacity.</p> <p>20 So the mutual company is putting forward on the face</p> <p>21 of it what looks like a sensible and laudable and,</p> <p>22 indeed, on one view of the world, pro-competitive object</p> <p>23 for its arrangements. And what the court says is at 20:</p> <p>24 "That argument cannot be accepted. In fact, to</p> <p>25 determine whether an agreement comes within the</p> <p style="text-align: center;">Page 56</p>
<p>1 it caused in a coherent and ordered manner, as opposed</p> <p>2 to just having people go bust through the overcapacity</p> <p>3 and the lack of margin.</p> <p>4 So the government sponsored an economic survey and</p> <p>5 that recommended the formation of a mutual company.</p> <p>6 That sounds familiar. The mutual company in this case</p> <p>7 was called BIDS, Beef Industry Development Society. And</p> <p>8 you can see if you pick it up in the headnote at H3</p> <p>9 that, in light of that high overcapacity, the processors</p> <p>10 formed this so-called BIDS. If you go down, they</p> <p>11 entered into standard forms of contract, and if you were</p> <p>12 to look several pages further over to the</p> <p>13 Attorney-General's opinion at AG12, which is on internal</p> <p>14 page 915, you can see that some of the processors which</p> <p>15 are members of BIDS -- so it is a members mutual</p> <p>16 company -- enter into agreements with BIDS in which they</p> <p>17 undertake to leave the processing industry.</p> <p>18 So we are in the same sort of framework as</p> <p>19 Agents' Mutual. A members company with standard</p> <p>20 pro forma contracts entered into by the members with the</p> <p>21 company, and the first thing I get from this case is</p> <p>22 that that's all analysed because of that set up as</p> <p>23 a members company as a set of horizontal arrangements.</p> <p>24 So point number 1.</p> <p>25 But then point number 2, is that if you look into</p> <p style="text-align: center;">Page 55</p>	<p>1 prohibition, close regard must be paid to the wording</p> <p>2 and to the objectives which it is intended to attain.</p> <p>3 In that regard, even supposing it is to be established</p> <p>4 that the parties to an agreement acted without any</p> <p>5 subjective intention of restricting competition, but</p> <p>6 with the object of remedying the effects of a crisis in</p> <p>7 their sector, such considerations are irrelevant for the</p> <p>8 purposes of applying that provision. Indeed, an</p> <p>9 agreement may be regarded as having a restrictive object</p> <p>10 even if it does not have the restriction of competition</p> <p>11 as its sole aim but also pursues other legitimate</p> <p>12 objectives."</p> <p>13 This is important because you are going to be told</p> <p>14 a great deal, I apprehend, by Mr Maclean about how it is</p> <p>15 pro-competitive market entry and what they wanted to do</p> <p>16 was to attack the so-called duopoly -- as you know, that</p> <p>17 is a misnomer -- and in those circumstances how could</p> <p>18 you come to any conclusion but that this is</p> <p>19 pro-competitive?</p> <p>20 This case says, in terms, when examining an</p> <p>21 agreement in the context of a mutual members</p> <p>22 organisation, that it does not matter even if you had</p> <p>23 some other legitimate objective.</p> <p>24 So I don't accept for a minute, and I am going to</p> <p>25 show you some documents later in this opening why</p> <p style="text-align: center;">Page 57</p>

<p>1 I don't accept that they had a pro-competitive market 2 entry objective. That is just wrong on the facts. But 3 even were it right, you can nevertheless still have as 4 a matter of object a set of arrangements that has the 5 intention of restricting competition and that's even 6 where what you are trying to do is remedy what you 7 perceive to be a crisis in your sector. 8 Now, perhaps another way of describing crisis in 9 your sector might be to describe it as existential 10 threats to your sector. Well, that's of course what 11 Agents' Mutual thought. They thought they had a crisis 12 in their sector. They thought they could put together 13 a mutual members organisation with a whole series of 14 restrictions by object in my submission and that that 15 could pass competition law scrutiny, but this case says 16 it doesn't. 17 MR FREEMAN: There are some other cases on restriction which 18 I am sure you are going to mention to us. 19 MR HARRIS: Quite a lot are in the skeleton. Cartes 20 Bancaires, for example, Allianz Hungaria is another one. 21 Mastercard is a very good example where there is a very 22 big analysis of by object. 23 MR FREEMAN: This passage you have drawn our attention to is 24 not the last word on the subject, is it? 25 MR HARRIS: No, certainly not and that is why the skeleton</p> <p style="text-align: center;">Page 58</p>	<p>1 Agents' Mutual and its founder members and its directors 2 and what have you, thought they had a crisis in their 3 sector and they chose to address it with different 4 anti-competitive means, principally the OOP but not 5 limited of course to the OOP rule. One of the threats 6 was the non traditional agency market. They addressed 7 that including by the Bricks and Mortar full service 8 agent restriction. 9 MR FREEMAN: Are you now into the restriction by object part 10 of your argument? 11 MR HARRIS: Yes, BIDS is a case all about it. BIDS is an 12 object case. It is all about how you go on about 13 analysing object. 14 MR FREEMAN: But in order to do that you will have to look 15 at the specifics of what Agents' Mutual did and then it 16 related the jurisprudence. 17 MR HARRIS: The specifics in their market context, yes, 18 absolutely. Then there is a series of additional -- as 19 I say, I commend you to read this because I obviously 20 don't have time to go through every point in this 21 judgment in this oral opening but I commend you to read 22 both the Advocate General and the court and there are 23 certain other passages that I am just simply going to 24 highlight now in paragraph 31 of the judgment. It is 25 apparent from the documents before the court and from</p> <p style="text-align: center;">Page 60</p>
<p>1 doesn't mention just this case. 2 But this is particularly important because it is the 3 case that says, the points at paragraph 21, that just 4 because you might have some other legitimate -- on one 5 view you abandon analysis of all parts of the agreement, 6 especially will within a mutual in the context in which 7 they occurred so when that is submitted to you you will 8 know that that is not right. 9 MR FREEMAN: It is essentially a case concerning an 10 agreement to reduce capacity. 11 MR HARRIS: That is right, yes. 12 MR FREEMAN: And you are saying that it doesn't matter, it 13 is the principle that matters. 14 MR HARRIS: Yes, I am not drawing an analogy with the 15 disruption of the market anti-competitive disruption in 16 that case being -- 17 MR FREEMAN: I think you did because you said it was like an 18 existential threat but I mean but you are not making 19 that point. 20 MR HARRIS: No, I think there is a difference here. They 21 said that they had a crisis in their sector. They then 22 chose to remedy it by a rationalised structure which was 23 found to be anti-competitive by object so the latter 24 part I don't say was rationalisation of overcapacity but 25 what I do say is yes, these people, the members of</p> <p style="text-align: center;">Page 59</p>	<p>1 the information provided that the object of the BIDS 2 arrangement is to change appreciably the structure of 3 the market. 4 They then did it through this rationalise concept. 5 But it is nakedly the intention and object of the OOP 6 rule in particular, not just the OOP rule the other 7 restrictions as well to change appreciably the structure 8 of the market. 9 So what they say is their avowed intention is to 10 disrupt the market and their avowed intention is to 11 knock out Zoopla and replace Zoopla. In other words, 12 they want to go from a situation where in substantive 13 terms two major firms, namely Rightmove and Zoopla to 14 a situation in which there are two major players. But 15 this time it is going to be Rightmove and OTM. That is 16 the structure. I am going to show you some documents 17 that say this. They have to kill off Zoopla and replace 18 Zoopla with them and indeed it didn't even end there. 19 The object and intention of these arrangements was 20 to go even further and to substantially undermine the 21 very dominant incumbent Rightmove. Ultimately the 22 objective -- 23 MR FREEMAN: How would they do that? 24 MR HARRIS: Ultimately their objective was to create 25 a tipping point first against Zoopla and then that would</p> <p style="text-align: center;">Page 61</p>

<p>1 wither away and die and then all the remaining members 2 of Zoopla would go to them and they would reach 3 a tipping point on their own ... 4 (12.15 pm) 5 (short pause because of technical problem) 6 (12.25 pm) 7 MR HARRIS: May I be granted the indulgence of just a few 8 minutes over the usual stopping time in light of the -- 9 THE CHAIRMAN: Yes, of course. 10 MR HARRIS: I am very grateful. 11 As I say, it pays a careful read, BIDS, but the last 12 point I wish to take you to in opening is in the 13 judgment at 38, unsurprisingly one of the things that 14 the Court of Justice described as capable of being 15 a restriction by object is a set of arrangements that 16 are designed to dissuade any entry of competitors. That 17 is the phrase in the final line. 18 Now, plainly, and as Mr Freeman has already 19 identified, the details I am not saying are on all 20 fours. The rationalisation mechanism in this case was 21 about not using the plan that you have taken over in 22 certain ways. But the important point of principle is 23 the court identifies as a restriction by object that 24 part of the arrangements were: 25 "... those restrictions are obviously intended to</p> <p style="text-align: center;">Page 62</p>	<p>1 conception of how things operate. And do you see at 2 item number 3, halfway down the page, "In terms of the 3 portal not working", and then the second sentence: 4 "The Agents' Mutual strategy will also make it more 5 difficult if not impossible for new portals to enter the 6 market." 7 There we go. That was one of their objects. And 8 why, gentlemen? Obviously because they regarded portals 9 as an existential threat in all the many senses that we 10 saw earlier today. And they are setting up an 11 arrangement in which the restrictions which they employ, 12 including as we have just seen in that very document, 13 the OOP rule, are designed to insulate and protect 14 themselves from many things but including new entry by 15 other portals. So there is a yet another respect in 16 which this is an anti-competitive venture by object. 17 So I am going to leave BIDS there but, as I say, it 18 is important all round. 19 I am going to move on now to just showing you 20 a couple of documents to make out why it was that 21 a moment ago I submitted that we just do not accept that 22 there is a legitimate purpose even buried within the 23 overall aims and purposes of Agents' Mutual. 24 What we can see from the documents I am about to 25 show you is that the avowed intention and purpose, the</p> <p style="text-align: center;">Page 64</p>
<p>1 dissuade any new entry of competitors throughout the 2 island of Ireland." 3 And in this regard, can I just show you one 4 document. One of the avowed intentions of 5 Agents' Mutual was to set up additional barriers to 6 entry to new competitors. In this regard, can I take 7 you to volume 2, please, and if you could turn to 8 page 1154. Do you have that almost at the back of 9 volume 2? 10 MR FREEMAN: Yes. 11 MR HARRIS: What this document is, you will see at the top 12 of that page, is an email from the second most senior 13 employee to the most senior employee, Ms Whiteley to 14 Mr Springett, on 21 June 2013. So this is during the 15 inception phase and note this is post the business 16 plans. This is when they are setting out what 17 Agents' Mutual is about and how it is to operate, what 18 its aims and objectives are, and Ms Whiteley says, "Here 19 you go, some thoughts on question 4." What had happened 20 was Mr Masters from KFH, who they were trying to get on 21 board, had raised various questions about the proposed 22 project, and the answers on question 4 are to be found 23 near the back of the bundle on page 1160. Do you see at 24 the top of that page it says, "KFH point 4", and these 25 are Ms Whiteley's suggested responses because it is her</p> <p style="text-align: center;">Page 63</p>	<p>1 strategy and the set up, including the OOP rule, was 2 intended to kill off Zoopla, tip it out of the market, 3 replace one operator with a completely different 4 operator and then, indeed, go on to undermine Rightmove. 5 Gentlemen, I had thought that I was going to do this 6 in bundle 11 but can I just ask whether you did have 7 a chance to read in the pre-reading the document at 8 volume 5. It begins on page 2401. This is the core 9 business plan of January 2014. Because if you haven't 10 had a chance to read this one at bundle 5 beginning at 11 page 2401 -- and if you turn in there to the fifth 12 internal page I have it marked as 2406. Does it have 13 the heading "scenario"? 14 THE CHAIRMAN: Yes. 15 MR HARRIS: If this is familiar, then I am very pleased, but 16 if you haven't had a chance to get here -- in fact I am 17 going to deal with it on this document. There are other 18 examples of where the same features emerge in later 19 documents. But if you haven't seen this, this is very 20 important. 21 So this is pre-launch. So this is setting out 22 the aims, objectives and strategies in a business 23 plan -- indeed, a core business plan -- dated 24 January 2014. So that is a whole year prior to launch. 25 What is it that Agents' Mutual were setting out to</p> <p style="text-align: center;">Page 65</p>

<p>1 achieve?</p> <p>2 If you start, in fact, at 2405, you will see that it</p> <p>3 is marked as confidential. I don't know whether anyone</p> <p>4 is going to stand by that. We can't see that it is</p> <p>5 confidential.</p> <p>6 THE CHAIRMAN: We can look at it, Mr Harris. (Pause).</p> <p>7 This was a series of projections over time?</p> <p>8 MR HARRIS: This is setting out their intentions, exactly,</p> <p>9 their strategy and intentions, their aims and</p> <p>10 objectives. As I say, pre-launch. And what we can see</p> <p>11 on page 2405 is a projected impact. I don't even need</p> <p>12 to read out the specific numbers if they are the ones</p> <p>13 that are thought to be difficult.</p> <p>14 THE CHAIRMAN: No, we can see those.</p> <p>15 MR HARRIS: You can see all the losses to Zoopla, and do you</p> <p>16 see the line on 2405 that the projection -- the aim and</p> <p>17 intention here brought about principally by the OOP rule</p> <p>18 is that RM suffers no losses. Do you see that, sir, on</p> <p>19 the scenario slide, left-hand side, bottom entry, "RM</p> <p>20 suffers no losses"?</p> <p>21 THE CHAIRMAN: It is just slightly odd that the figures are</p> <p>22 exactly the same in 2405 as they are in 2404, which sets</p> <p>23 out the current market position.</p> <p>24 MR HARRIS: I am not sure that that matters. I'll have</p> <p>25 a look into that, if I may, at the short adjournment.</p> <p style="text-align: center;">Page 66</p>	<p>1 Now, who is the tipping point against? The tipping</p> <p>2 point is against Zoopla demonstrably. First of all look</p> <p>3 at the pie chart and then, secondly, look at the text.</p> <p>4 The aim and intention was to set out in order to cause</p> <p>5 Zoopla to lose 5,000 offices and all of that income --</p> <p>6 oh, but look again. At that stage Rightmove loses no</p> <p>7 offices at all. And what's that described as? That's</p> <p>8 described as the tipping point. Can I invite you to</p> <p>9 note, gentlemen, please, when it is said to occur.</p> <p>10 So this is a business plan forecasting and setting</p> <p>11 out the aims and intentions in January 2014, and by this</p> <p>12 stage they already have the OOP rule, that is set out in</p> <p>13 their business plan, and they are saying to themselves:</p> <p>14 this is our aim and intention, to cause a tipping point</p> <p>15 by none other than January 2015, where Rightmove loses</p> <p>16 no offices, and certainly by January 2016 Zoopla has</p> <p>17 lost a further 2,000 offices and it is suggesting that</p> <p>18 there may be 500 offices lost at that stage by</p> <p>19 Rightmove. But it is quite clear what the intention</p> <p>20 here is; it is to cause a tipping point against Zoopla</p> <p>21 and to replace Zoopla as the number 2 in the market, as</p> <p>22 you can see from their part of the pie growing in the</p> <p>23 bottom of the diagram.</p> <p>24 Now, I have not finished with this document yet, but</p> <p>25 in order to make good that specific point can I, whilst</p> <p style="text-align: center;">Page 68</p>
<p>1 But the critical thing is that the strategy that is</p> <p>2 being set out and the aims and the projections in this</p> <p>3 scenario are to project that Zoopla loses thousands of</p> <p>4 offices and that Rightmove loses none.</p> <p>5 THE CHAIRMAN: I see the writing in the left-hand margin.</p> <p>6 It is simply the pie chart. The only difference</p> <p>7 actually between the one on the left of 2404 and the one</p> <p>8 on the right of 2405 is that the gap that one sees on</p> <p>9 the left-hand diagram has been filled by Agents' Mutual.</p> <p>10 Maybe I'm misunderstanding.</p> <p>11 MR HARRIS: They are difficult to see. Actually, one says</p> <p>12 in the left-hand -- on 2404, that number is not the same</p> <p>13 as the one on 2405.</p> <p>14 THE CHAIRMAN: I see.</p> <p>15 MR HARRIS: They are 2,000 less, and that explains --</p> <p>16 THE CHAIRMAN: Is that right?</p> <p>17 MR HARRIS: Yes.</p> <p>18 THE CHAIRMAN: I see.</p> <p>19 MR FREEMAN: The shaded area is smaller.</p> <p>20 THE CHAIRMAN: I see.</p> <p>21 MR HARRIS: So we then move on, and here where we get to</p> <p>22 something that is definitely not confidential but</p> <p>23 remains marked as such, the tipping point. So the</p> <p>24 scenario is intended -- and this is the forecast and</p> <p>25 objective -- to lead to none other than a tipping point.</p> <p style="text-align: center;">Page 67</p>	<p>1 keeping bundle 5 open, show you two or three other</p> <p>2 documents.</p> <p>3 H9, please, at page 4974. This is an email from</p> <p>4 Mr Springett in February 2015, so just after launch. It</p> <p>5 is a matter of days after launch and he's emailing</p> <p>6 a founder and a board member, a man called Mr Abrahamson</p> <p>7 from a firm called Glentree, and for the moment all</p> <p>8 I want to show you is the second sentence of the second</p> <p>9 paragraph:</p> <p>10 "Dear Trevor, of course [such-and-such] ..."</p> <p>11 And then for present purposes it is the next</p> <p>12 sentence:</p> <p>13 "I want to make sure we deliver the endgame for our</p> <p>14 members as soon as possible and replacing Zoopla as</p> <p>15 number 2 has been the board strategy since</p> <p>16 last February."</p> <p>17 That's what they say is their strategy and</p> <p>18 intention, and when is last February? Last February is</p> <p>19 of course 2014, which is a very similar date to this</p> <p>20 document.</p> <p>21 Can I show you another document in H9, this time at</p> <p>22 5089, on the same theme, and then there will be one more</p> <p>23 in this bundle as well. 5090, towards the back of</p> <p>24 volume 9. On 5089 we can see the genesis of the</p> <p>25 document. It is an email in February 2015 from</p> <p style="text-align: center;">Page 69</p>

<p>1 Mr Springett to a founder and board member, Mr Jarman at 2 Savills. And I am going to pick it up over at 5090, the 3 final paragraph of that email. Do you have the one "It 4 will take time"? And then it goes on to read after the 5 dash: 6 "The point of the 'one other portal' is that agents 7 remain on their strongest portal, in most cases 8 Rightmove. While this happens, the fact that we have 9 taken so many agents away from ZPG makes it clear they 10 are a distant second to the market leader, and by 11 holding tight and continuing to grow at their expense 12 [that is Zoopla's expense] we can quickly reach the 13 number 2 position and have the level of income we need 14 to sustain and increase our marketing spends." 15 And then lastly whilst we are in this bundle, if you 16 could turn over to 5102, please, this is an extract from 17 a document that is a board report in 18 early February 2015, and it is marked as confidential, 19 5107, and I don't mind, can you just read that to 20 yourselves. It makes exactly the same points. 21 THE CHAIRMAN: So 5102? 22 MR HARRIS: 5107, I beg your pardon. It is slide number 5. 23 (Pause). 24 So it is important to note both the timeframe, this 25 is an objective to be obtained by the end of 2015, so</p> <p style="text-align: center;">Page 70</p>	<p>1 That is the whole point of the OOP rule, it is to take 2 listings away from the others. That is how they are 3 going to generate their size. And you can see how the 4 strategy leads to the tipping points. You have seen the 5 numbers for the tipping point on the other documents 6 I showed you, either just at launch or, on the 7 projection of that triangle, shortly after launch. 8 What we know from other documents is that they 9 regarded having even 3,000 to 5,000 offices as 10 a formidable force for entry and giving rise to the 11 ability -- well, they are totally established in the 12 market at that point, so that is even before tipping -- 13 even before tipping -- let alone after tipping. 14 Then, again, just to finish off the story, you can 15 see the next diagram on 2409. So in the post-launch 16 period -- so there's six months of working in 2013. The 17 12 months pre-launch, that is the second arrow at the 18 bottom, that is effectively calendar year 2014, if you 19 want to mark that down. The 12 months post-launch, that 20 is effectively calendar year 2016. And their own aim 21 and intention, based upon the numbers of entrants of the 22 number of members that they had then generated, was to 23 become a credible alternative to the number 1 portal, 24 ie to have tipped Zoopla out of the market, to have 25 replaced it and even to have got to the point of being a</p> <p style="text-align: center;">Page 72</p>
<p>1 that is only after one year of trading, not five years, 2 which is when the OOP rule applies, subject to the 3 points I am going to update you with at the end of these 4 oral openings, it is not even limited to five years, but 5 this is after one year. And what is it? It is about, 6 as the heading says, replacing Zoopla. It is not about 7 entering with a wonderful new third market participant 8 and competing on the merits; it is about killing off one 9 of the people who is already there. 10 So we can put away volume 9 and go back to where we 11 were in volume 5, and we move over the page, please, to 12 2407. Again, you can see what the scenario is that is 13 being aimed at. It is that they want to be ready to be 14 number 1. And when are they going to do that? On this 15 strategy and aim and intention, this forecast, it is to 16 be after only two years of trading, ie January 2017. 17 Zoopla loses another many offices, and by this stage 18 having of course -- this is post-tipping Zoopla out of 19 the market, this is the next slide after the tipping has 20 taken place. Zoopla are withering away and, lo and 21 behold, Agents' Mutual is becoming ready to be number 1. 22 And the theme goes on. 23 If you turn over the page at 2408 and at 2409, you 24 can see in more pictorial form becoming the number 2 and 25 taking listings away. That, of course, is the OOP rule.</p> <p style="text-align: center;">Page 71</p>	<p>1 credible -- on no view of the world -- 2 MR FREEMAN: Are we looking at 2409? 3 MR HARRIS: Yes. 4 MR FREEMAN: Some of the measures listed -- there is 5 a question I asked you before we broke, which is how 6 Agents' Mutual, assuming that it succeeded in displacing 7 Zoopla, would then take on Rightmove, but then we had to 8 break. But the two things they mention here look quite 9 competitive and quite good for consumers and don't 10 mention any rule. 11 MR HARRIS: That is really a question for them, sir, as to 12 whether or not, notwithstanding having tipped out the 13 other number 2, they nevertheless intended to continue 14 on with their restrictive measures. 15 MR FREEMAN: But you criticised them earlier for not 16 competing on the merits, but that's what this would 17 mean. 18 MR HARRIS: It can't be, sir, because their rule lasts for 19 five years. 20 THE CHAIRMAN: Yes, but it is one other portal, so let us 21 assume they've tipped out Zoopla, then it is ascribed to 22 Agents' Mutual, you can still choose Rightmove. So the 23 One Other Portal Rule can't be the way in which one 24 achieves dominance over Rightmove. 25 MR HARRIS: No, I mean, this is more a matter for them than</p> <p style="text-align: center;">Page 73</p>

<p>1 for me, but I apprehend that their thinking was, from 2 the documents I have seen, that having taken so many 3 agents away from Zoopla that the markets tip them out 4 all altogether, and then they have such a -- this is 5 effectively the theme of the documents we will see next 6 week. They are so attractive that then other people 7 will say there is no longer any need to be on Rightmove, 8 and the irony of it, because they have so many agents 9 and so many properties, having taken everybody from 10 Zoopla and indeed some people from Rightmove -- 11 MR FREEMAN: Why isn't that happening to Zoopla at the 12 moment? 13 MR HARRIS: That is dealt with to some extent in the expert 14 evidence and the witness evidence. The aim and 15 intention was to do exactly that, but they haven't got 16 a business model that's sufficiently attractive for it 17 actually to have worked. That is the answer to your 18 question. 19 MR FREEMAN: Zoopla hasn't got a business model. My 20 question is: if it's possible when you displaced 21 Zoopla -- and we are dealing in hypotheticals here -- to 22 then take on and replace Rightmove by simply having 23 a lot of properties and competing on the merits, why 24 isn't Zoopla able to do that now? Because it has the 25 properties and it is competing presumably on the merits.</p> <p style="text-align: center;">Page 74</p>	<p>1 on the merits, that is not a restriction by object. 2 MR HARRIS: Well, put like that, that's fine, sir, but look 3 at the time periods. The restriction of the rule 4 remains in place for long after these aims and 5 objectives have been obtained. 6 MR FREEMAN: Yes, in which case you would expect some 7 mention of it in the slide covering that phase of the 8 business plan. 9 MR HARRIS: Well, what you would expect, sir, is that 10 somebody would have designed and put together their aims 11 and objectives reflecting their actual aims and 12 objectives and saying, for instance, we don't accept 13 that it is necessary, but on this hypothesis, I only 14 need the OOP rule until I have reached the tipping point 15 against Zoopla or until I have reach critical mass or 16 until anything, but that doesn't appear, sir, in any 17 document, and that is one of the reasons we impugn it. 18 One of the many things that are wrong with the OOP rule 19 is its blanket application for five years, and as I will 20 show you in a moment indeed longer than five years, and 21 doesn't even reflect what they thought that they needed, 22 and yet there it is. 23 MR FREEMAN: You must go on and make your case and we'll 24 listen. 25 MR HARRIS: Yes. And the next slide then, just finishing</p> <p style="text-align: center;">Page 76</p>
<p>1 MR HARRIS: Well, again, these are really questions -- this 2 is their plan and this is what they set out to achieve. 3 MR FREEMAN: But you are putting a gloss on it and asking us 4 to take that as part of your case, and we are listening 5 very attentively. 6 MR HARRIS: I don't think that is really very fair. The 7 point that I am making is that part of my case is to 8 demonstrate what their aims and objectives were by 9 reference to their documents viewed pre-launch. 10 MR FREEMAN: So it doesn't matter from your point of view 11 whether the aims and objectives are realistic; you are 12 just saying those are their aims and objectives? 13 MR HARRIS: Well, on an object case it is of less importance 14 to me whether they ended up succeeding, whether they 15 were biting off more than they could chew, anything like 16 that. What I am setting out to demonstrate to you -- 17 and as I say, more of this will come out next week -- is 18 that they had the objective of killing off and tipping 19 out Zoopla and then, on their view of the world, they 20 would also lead on to challenging Rightmove and possibly 21 leading to them ultimately not being there either. 22 MR FREEMAN: Maybe we are dancing on the head of a pin. All 23 I am suggesting to you is if at a particular point they 24 were the number 2, they were to be the number 2, and 25 they competed against the number 1 simply by competing</p> <p style="text-align: center;">Page 75</p>	<p>1 off at 2410, the summary of numbers. You can see the 2 original business plan assumed that they would launch 3 with 1,000 and go on at 500 per annum after that. But 4 in fact they got vastly more than that. This is a year 5 before launch. They are already talking about having 6 2,000, and that's gold members. It is said to be 7 confidential, the number on launch day -- I won't say it 8 out loud -- is very, very significantly higher than even 9 that. And then it says it goes on to say: 10 "As a result of the progress so far a new business 11 plan has been created." 12 That is this document. As a result, it goes on, the 13 increased level of membership to date and increased 14 level of speed of recruitment and revised (inaudible) 15 and increased level of costs to allow for more rapid 16 growth. So what happens is when they get more than they 17 are forecasting in terms of numbers, all that they want 18 to then do is tip Zoopla out of the market quicker and 19 challenge Rightmove quicker. What they don't say at any 20 stage is, "Ah, right, we've now succeeded in entering. 21 Even on our own view of the world we only need these 22 restrictive tools in order to enter, but now we've 23 obviously entered -- indeed, we have done more than 24 entered, we have entered with flying force -- let's get 25 rid of the restrictions."</p> <p style="text-align: center;">Page 77</p>

<p>1 They don't do it. They don't do it at all. They 2 never even think of doing it, and therefore the 3 restrictions remain in place, even on their own view of 4 the world about them being necessary, which as you know 5 I don't accept. But even if they were necessary, they 6 stay in place for vastly longer than on any view of the 7 world could conceivably be necessary, post-tipping 8 Zoopla out of the market and indeed going to undermine 9 Rightmove. 10 I am not going to do it now but later on -- well, 11 you can see this is all translated in the numbers on 12 page 2411 and 2412. 13 Can I just give you a reference now to the same 14 thing featuring in some slides that were presented to my 15 own side, so the now corporate owner of Gascoigne 16 Halman. Slides were presented when it was suggested 17 that they should join Agents' Mutual in a collective 18 with LSL and Countrywide, and the slides are at 11/6226. 19 You don't need to turn them up now, but what you 20 will see in those slides from a meeting at Leighton 21 Buzzard was that the presentation that was made by 22 Mr Springett to Mr Livesey, both of whom you will be 23 seeing next week, was in substance the same as the 24 presentation in that core business plan of January 2014, 25 all about replacing Zoopla, tipping Zoopla out of the</p> <p style="text-align: center;">Page 78</p>	<p>1 qualifying as an ancillary restraint and we don't accept 2 that any one of them is made out. So taking 63.1: 3 "An overall operational activity that is at least 4 neutral or positive ..." 5 No, in fact, it was designed to kill off Zoopla and 6 replace that number 2 with a different number 2 so as to 7 line the pockets of its members with the profits that 8 would otherwise leave to Zoopla shareholders. 9 63.2 and 63.3 together, they are rather similar. 10 You have to have a restriction which is inherent in the 11 operation of the activity, could not be carried out 12 without that restriction. But just like, sir, in the 13 case of MIFs in the credit card set up, there are plenty 14 of operations that don't use MIFs, they can't begin to 15 be said to be ancillary restrictions in the sense of 16 inherent and necessary for the functioning of the 17 operation, and yet we know that is the case for portals 18 as well. The OOP rule, that kind of restriction is 19 simply obviously not necessary because there are plenty 20 of other people out there who operate portals perfectly 21 happily without having this restriction. So you don't 22 get off the ground there. 23 Then fourthly, it has to be proportionate, and of 24 course we have just seen one of the many reasons why the 25 five-year duration couldn't possibly be proportionate.</p> <p style="text-align: center;">Page 80</p>
<p>1 market and growing at the expense of Zoopla. 2 And you may not have quite perceived that some of 3 these documents -- we saw the one at 5090 about growing 4 at the expense and reaching the number 2 position. And 5 there is a similar -- sorry, I think I just have the 6 wrong reference here. I don't need that one. There is 7 a reference in bundle 11 at 5925 to there ultimately not 8 being any Rightmove. Ultimately no Rightmove. So that 9 was part of the aims and objectives. 10 Gentlemen, I am just going to identify two other 11 parts of the case principally by reference to the 12 skeleton, and then I am going to deal with the new 13 information on the five-year period and the position 14 regarding Northern Ireland. 15 So as you know, one key part of the battleground in 16 this case is whether or not these restrictions amount to 17 ancillary restrictions within the meaning of the case 18 law. In that regard, can I just in a couple of minutes 19 take you to some of the key points in our skeleton. It 20 is our skeleton at paragraph 63. 21 The first line of defence, if you like, to these 22 attacks, is "Oh, no, they are all ancillary restraints", 23 but as you know, sir, very well, and indeed we have 24 cited Sainsbury's in our footnote 50, this is an 25 extremely high test. We set out the elements of</p> <p style="text-align: center;">Page 79</p>	<p>1 It is only an ancillary restriction to get you into the 2 market, to get you as a successful entrant. It is not 3 about creating profits over years and years and years, 4 let alone rising to be number 2, and even less about 5 becoming number 1. Ancillary restrictions aren't 6 allowed to protect you in that regard. But we know that 7 that is exactly what Agents' Mutual was setting out to 8 achieve with their restrictions. A five-year period 9 where they didn't just enter, they massively entered and 10 they even knocked out number 2, and they were hoping to 11 go on and substantially undermine number 1. All well 12 within the five-year period. Couldn't begin to be 13 proportionate. 14 Next in my skeleton, pre-penultimate theme before 15 I go on to the, if you like, updates, are the less 16 restrictive alternatives. You will find them in our 17 skeleton at 118 and I would just like, for your note, to 18 add in two more now that we have had a chance to read 19 more of the disclosure. So you have a whole long list 20 here of how you could have entered this market with less 21 restrictive measures than were in fact employed. 22 Do you see at the top of my page 65 I have 23 a reference to generating additional revenues from 24 additional products. That was another anti-competitive 25 arrangement amongst the members endorsed and adopted by</p> <p style="text-align: center;">Page 81</p>

<p>1 Agents' Mutual itself that they wouldn't -- even whilst 2 upon Agents' Mutual's own website, OTM, they wouldn't 3 compete with each other as regards additional products, 4 because God forbid, gentlemen, that these estate agents 5 under this mutual company should compete with each 6 other. We certainly don't want that. But in the same 7 way that it would have been less restrictive to allow 8 additional revenues from additional products, it would 9 have been less restrictive to have allowed -- so this is 10 the addition non traditional agents, including online 11 agents and builders, to list on the website, on the new 12 website. But as you know they didn't do that because 13 that is excluded by the Bricks and Mortar restriction. 14 Then as a second addition, if you could add perhaps 15 somewhere on that page or at the end, we are now 16 beginning just now to learn of a less restrictive 17 alternative that was employed within the same market, 18 namely Northern Ireland. So yesterday evening we 19 received a letter saying that in fact there is a version 20 of the one other portal regime in part of this UK-wide 21 relevant property portal market, but lo and behold it is 22 only 12 months, not five years, let alone more than five 23 years, and lo and behold it allows, so we are learning, 24 agents to not take every single property on their own 25 itinerary or inventory and place it all upon</p> <p style="text-align: center;">Page 82</p>	<p>1 and the ability of our parent company which has estate 2 agencies, to compete with other estate agents. As the 3 CMA said in one of its letters that we'll see next week, 4 a key parameter of competition between estate agents is 5 the number and identity of the property portals upon 6 which they list or would like to list. It is obvious 7 anyway. Absolutely obvious. 8 What does the OOP rule do? Well, it demonstrably 9 and by object, let alone by effect, reduces that key 10 parameter of competition. That is the whole point. 11 They don't go off and list on multiple portals. Amongst 12 other things that would cost too much and we want 13 to reduce cost. They don't go off and do that because, 14 as I say, it will cost you more, but Gascoigne Halman 15 objects to that, it says that is anti-competitive. This 16 is the anti-competitive object within the estate agent's 17 market. It wants to be able to compete against its 18 local agents by, if it chooses, listing on three 19 portals, or four portals, or five, or however many, and 20 likewise, so does Connells. And we have seen oodles of 21 evidence from other market participants that they see it 22 in the same way. They don't want to be restricted in 23 this key parameter of competition between themselves. 24 Indeed, one of the profound ironies of this case is 25 that in the notes of the four-party meeting -- we don't</p> <p style="text-align: center;">Page 84</p>
<p>1 a particular one other portal, it allows them to split 2 property by property. Plainly less restrictive than 3 having to put all of your properties only on one other 4 competing portal. 5 So let us say if you had three houses, you could 6 choose OTM for house 1 and the Northern Ireland 7 equivalent of Rightmove for that house, and then for 8 house number 2 you could choose OTM and the Northern 9 Ireland equivalent of Zoopla for that house -- this is 10 all within the same estate agent -- and then on house 11 number 3 you can choose OTM and then you can choose 12 either one of the -- they have different names in 13 Northern Ireland, but it is essentially the equivalent. 14 That is less restrictive than is applied in the rest 15 of the market and yet that would be the entry tool 16 employed in Northern Ireland. We only just learnt this. 17 We got a new document about it last night for the first 18 time ever. 19 So please can you add this. I will be coming back 20 to that once we have learnt more about it. 21 Just before I turn to the updates, why is this 22 attack on all of these agreements so relevant to 23 Gascoigne Halman and its now new parent company, 24 Connells? It is for this reason: these agreements 25 fundamentally restrict our ability as an estate agent,</p> <p style="text-align: center;">Page 83</p>	<p>1 need to turn them up, later on we can have a dispute as 2 to whether they are really confidential, and this bit is 3 certainly not confidential. It came from David Livesey, 4 Mr Livesey -- was that he wanted to have three vibrant 5 and competing portals. That's his own objective. And 6 one of the ironies of this case is that OTM and its OOP 7 rule in particular is preventing that. 8 THE CHAIRMAN: So your client would think the OFT had got it 9 wrong in allowing a merger between number 2 and number 3 10 in the market. 11 MR HARRIS: No, not at all. What we say is, and this is 12 Mr Parker's other counter-factual that is completely 13 ignored by Mr Bishop, is if you had entered without all 14 these restrictions and it had been genuine 15 pro-competitive entry by a new venture that had good 16 ideas, entrepreneurial and innovative products and 17 features, a new pricing model or whatever, that would 18 have been unalloyed pro-competition. Three competing 19 portals. Mr Livesey wants that. He expressly said 20 that. So do these other agents. But first of all the 21 OOP rule is designed to bring about the exact opposite. 22 It is to kick out Zoopla and replace it with OTM. And 23 it is inapt to achieve the true pro-competitive entry, 24 because why is it that Mr Livesey, and for that matter 25 LSL and Countrywide and Hunters and a whole series of</p> <p style="text-align: center;">Page 85</p>

<p>1 other agents aren't prepared to sign up? It is because 2 they see it as being anti-competitive. It reduces and 3 prevents them from engaging in these forms of 4 competition between themselves, which, by the way, 5 although it doesn't matter for my purposes, would be to 6 the benefit of their own customers. 7 MR FREEMAN: Mr Harris, what would happen if Agents' Mutual 8 sought to acquire Zoopla? What would you advise the 9 Competition and Markets Authority at its phase 1 10 assessment? 11 MR HARRIS: Can I take that one under advisement and I will 12 come back to you? 13 MR FREEMAN: Please. It is not just an exam question. 14 MR HARRIS: I am very grateful. We noted that one down. 15 The last thing that I want to do is give you some 16 updates about the five-year rule. I have given you the 17 update we received last night about Northern Ireland and 18 we will obviously be pursuing that further. Who knows 19 what other new documents there are out there on that 20 front. But you should have, and I was handed this 21 morning, a bundle describing itself as "X", which is 22 a supplementary bundle. 23 THE CHAIRMAN: An X file, excellent. 24 MR HARRIS: One of those cases. 25 MR FREEMAN: Does it have an X factor, that is what we need</p> <p style="text-align: center;">Page 86</p>	<p>1 page at tab 28, do you see the line that says "The 2 following schemes remain available"? Do you see one of 3 them is "gold 5 standard", et cetera. 4 THE CHAIRMAN: Which page are you on? 5 MR HARRIS: The first page of tab 28. 6 THE CHAIRMAN: I have 179. Where are you reading? 7 MR HARRIS: The very final sentence of that page. 8 THE CHAIRMAN: "By way of clarification"? 9 MR HARRIS: Yes, that's right. So as at today, a few days 10 ago and indeed today, schemes remain open for new 11 members. No surprise. 12 If you could just keep your finger in that page and 13 go forward in the bundle to tab 25, and you will see 14 that by reference to a previous answer to a request for 15 further information, the start dates of various of these 16 schemes were identified. 17 If you look down the table, do you see item 5, 18 gold 5, and do you see the date opened? So five years 19 from that is of course a lot later than 26 January 2020, 20 obviously. 21 Then if you go over the page, you can see that the 22 item 8 or five years from that takes you beyond 23 January 2020. The same at item 10, the same at item 15 24 and then at item 17. And you can see how many contracts 25 are said to have been contracted as at the date that the</p> <p style="text-align: center;">Page 88</p>
<p>1 to know. 2 MR HARRIS: Not with me at the helm, I am afraid, no. 3 I have behind my tab 28 a letter from my learned 4 friends instructing solicitors dated 26 January. The 5 letter says at the top it contains confidential 6 information, but there is only one passage over the page 7 that is actually blanked out. 8 So as you may recall, sir, because there were some 9 interlocutory exchanges about this, we wanted to find 10 out more information about who was listing for how long 11 and how long the five years really lasted. And just 12 before I introduce this letter, I will of course just 13 remind you, members of the Tribunal, that there is no 14 five-year limitation at all for the restriction on 15 promoting other portals rule. So that is not limited in 16 time. It is in perpetuity. And there is no time limit 17 restriction at all for the Bricks and Mortar 18 full-service agent restriction. That is again in 19 perpetuity. That reflects the defensive and 20 protectionist aims and objectives that I took you to in 21 those early documents. So when we talk about five 22 years, we are only talking about the OOP rule. What 23 this document shows is that the OOP rule isn't limited 24 to five years. 25 If you could just pick it up at the bottom of the</p> <p style="text-align: center;">Page 87</p>	<p>1 scheme closed for each of those entries. 2 So all of which potentially led to application of 3 the OOP rule for greater than the five years from the 4 date of launch. So that's why, sir, we wanted to find 5 out more because we say that five years by itself is too 6 much and, indeed, your own case limits your restriction 7 to 26 January 2020. That is your own case. And yet 8 here you are busy signing up people to the same 9 restriction that goes beyond even the outer extremity of 10 your own case. On no view could that be said to be 11 lawful. 12 Then we get this document at tab 28, it refers to 13 carrying on signing up on all these types of contract. 14 Over the page, we then sought to query at (iii) 15 a reference in an information memorandum that claimed 16 that listings only carried on until January 2020 and we 17 are told, oops, that's an error, so we can correct that. 18 And indeed, they go on at (iv) to say that, indeed, in 19 order to draw a line on the matter, it is confirmed that 20 there are a small number of members whose contracts 21 would expire after January 2020, the end of their 22 five-year term falls after that date, and then there is 23 said to be some confidential details, which I don't need 24 to read out. 25 But the last sentence repays careful scrutiny:</p> <p style="text-align: center;">Page 89</p>

<p>1 "Subject to any early release in light of market 2 conditions the OOP rule operates for the duration of the 3 agreement." 4 That is a really extraordinary statement: 5 "Subject to any early release in light of market 6 conditions ..." 7 Can I just show you the OOP clause as my last task 8 before the short adjournment. You will find the one 9 that we signed at bundle number 4, page 2208. This is 10 cited in our skeleton and you may have seen it. It was 11 on the pre-reading list. 2208 is the start of our 12 listing agreement, the one for my client. We signed it 13 over the page. And the OOP rule appears at item 6 at 14 2209. So what it reads is: 15 "We confirm our understanding that the company will, 16 through its directors, seek to implement the requirement 17 during the listing period that we list our UK 18 residential sales and letting properties on the 19 portal~..." 20 Just pausing there. There is a difference we have 21 now just learnt between this case and Northern Ireland. 22 So they don't in Northern Ireland apparently have to 23 list all of the residential sales and letting agents 24 from the one office on the same portal, but be that as 25 it may, it goes on to read:</p> <p style="text-align: center;">Page 90</p>	<p>1 his own projections. He has never gone back to release 2 or reduce the restriction that was said to be necessary 3 when he first came up with the proposal, and secondly, 4 there's no way of doing it anyway. There is no way out 5 on this clause. It doesn't say, "Subject to early 6 release in light of market conditions", it doesn't say, 7 "Once we have hit this KPI and the other KPI it will 8 automatically fall away". Incapable of being done. And 9 critically, what is now said, to my astonishment, is 10 somehow, "Oh, well, Agents' Mutual, we could just 11 release it". No, this is a bilateral contract. You 12 would have to have every agent who signed this would 13 have to agree, and that's not what -- if they wanted to 14 release it. It can't be unilaterally waived by Agents' 15 Mutual. 16 MR FREEMAN: You mean it is a multi-lateral contract. 17 MR HARRIS: Yes, the wrong word, yes, multi-lateral. And 18 that proves my point. Mr Springett's own case is that 19 he might not need it for this long if he outperforms his 20 projections. He absolutely outperforms his projections 21 if he doesn't release it, and even if he had wanted to 22 release it or reduce the restriction, he can't. Plainly 23 illegal. 24 As I say, we can see from this letter that they are 25 carrying on signing up agents to this restriction well</p> <p style="text-align: center;">Page 92</p>
<p>1 "... our website, together with a maximum of one 2 other competing portal in accordance with the terms of 3 this letter, the exclusively requirement." 4 Then: 5 "We hereby undertake that we will comply and procure 6 that each member of our group complies with 7 exclusivity." 8 That is what is termed the group procurement clause. 9 Gentlemen, nowhere in this clause or, indeed, 10 anywhere else does it say, quote from the letter that 11 I just showed you, "Subject to any early release in 12 light of market conditions". It just doesn't appear. 13 There is no such get out, back door or caveat. It 14 applies blanket for every single day of the listing 15 period, including for those things that are blanked out 16 in the letter well beyond January 2020, including at 17 least in one case by my reckoning for some 18 months 18 beyond that. Every day it applies. There is no way 19 out, and that's one of the critical flaws with this 20 clause. Mr Springett says in his own evidence, 21 Springett 5, paragraph 11.8, that he would review the 22 duration of his restriction if he outperformed his 23 projections. That's Springett 5 at 11.8. 24 But -- and these are my final two points -- first of 25 all, he never did, even though he massively outperformed</p> <p style="text-align: center;">Page 91</p>	<p>1 beyond January 2020 when, on their own view of the 2 world, it was never necessary beyond January 2020. 3 So, sir, subject to -- I think there is one point 4 that I will clarify as soon as the short adjournment is 5 over and I think that might be, Mr Freeman, your point 6 to me, and unless you have any questions, that is the 7 oral opening. 8 THE CHAIRMAN: One point, Mr Harris, rather fortuitously 9 arising out of the provision you have just been showing 10 us, do I take it that it is common ground between the 11 parties that this is the provision that we, the 12 Tribunal, will have to construe in order to determine 13 the competition arguments? And I have in mind really 14 the procure point and the ambit of the obligation that 15 that entails. 16 MR HARRIS: Yes, the group procurement rule, so-called, is 17 a combination of the final sentence of item 6 and the 18 wording in appendix 4, and yes, you will have to 19 construe it. And then you will have to think about, 20 having decided what it means, what's the competition 21 effect. 22 THE CHAIRMAN: Exactly so. It is an anterior point to 23 effect. 24 MR HARRIS: Yes. 25 THE CHAIRMAN: I just wanted to nail a trivial but --</p> <p style="text-align: center;">Page 93</p>

<p>1 MR HARRIS: Absolutely. There is a dispute -- well, lots of 2 disputes, but Mr Maclean and Mr Holmes have come up in 3 their annex with some version of what the word procure 4 means and they say it effectively means a warranty or -- 5 THE CHAIRMAN: To see that it is done, I read that. 6 MR HARRIS: That is just wrong. 7 THE CHAIRMAN: I am sure we will have an argument. What 8 I wanted to be clear is whether the argument was one 9 which the Tribunal would resolve or whether it is one 10 that would be resolved in the Chancery Division. My 11 view -- 12 MR HARRIS: No, that is very much for today and if you look 13 at the list of competition issues that was referred to 14 the Tribunal -- 15 THE CHAIRMAN: Sir Kenneth Parker specifically referred to 16 this provision, absolutely. 17 MR MACLEAN: He did, and no one is keener for it to be sent 18 to this Tribunal than Mr Harris, but we are entirely 19 content for the Tribunal to deal with it. 20 MR HARRIS: Subject to the one query that was put to me that 21 I said I would think about, those are -- 22 MR FREEMAN: I don't want a textbook on it, Mr Harris. 23 MR HARRIS: No. Thank you. 24 THE CHAIRMAN: Thank you. We'll rise until 2 o'clock. 25 MR MACLEAN: I am sorry, sir, could I just enquire just for</p> <p style="text-align: center;">Page 94</p>	<p>1 but even if he is, I would have thought, even rising at 2 3 o'clock on Monday, that we should get through my 3 cross-examination in those two days, but could I invite 4 the Tribunal to revisit that question on Monday at 2.59 5 with a view, perhaps, to sitting a little earlier on 6 Tuesday if that was necessary. 7 THE CHAIRMAN: Mr Maclean, I think you can take it that if 8 we are imposing on the parties with a shorter day on 9 Monday then you'll have our indulgence for a longer day 10 on Tuesday. 11 MR MACLEAN: I am very grateful, sir. 12 THE CHAIRMAN: 2 o'clock. 13 (1.17 pm) 14 (Luncheon Adjournment) 15 (2.00 pm) 16 MR HARRIS: May I just address briefly Mr Freeman's 17 question. The question, as we understood it, was: what 18 would the CMA's analysis be if Agents' Mutual bought 19 Zoopla? 20 MR FREEMAN: Now. 21 MR HARRIS: Yes. And we say that it depends principally 22 upon which assumptions you apply about the restrictions 23 within the Agents' Mutual set of contracts. So if 24 Agents' Mutual were to buy Zoopla and they don't keep in 25 force any of the restrictions, the OOP rule, the Bricks</p> <p style="text-align: center;">Page 96</p>
<p>1 my own benefit and to make arrangements with chambers, 2 as to what the Tribunal's intended time of rising is 3 throughout the trial, if I can be so impertinent as to 4 ask? They have asked me. 5 THE CHAIRMAN: Not at all. The intention, unless we have 6 timetabling issues that require us to sit longer, would 7 be 10.30 start to finish not later than 4.30, so between 8 4.20 and 4.30. 9 MR MACLEAN: Very good. 10 THE CHAIRMAN: Except -- and this gives me an opportunity to 11 raise one point -- the Tribunal will have to rise at 12 3 o'clock on Monday, but that's a one-off. I am afraid 13 it is a very short day on Monday. 14 Now, we could start early but I understand that 15 there is a tube strike. 16 MR MACLEAN: There is a tube strike. It has really strange 17 hours, so we are trying to work out when they are on 18 strike. 19 THE CHAIRMAN: It is mainly on Sunday but the run-off will 20 be into Monday morning, so it may be that we should 21 start at the normal time on Monday. 22 MR MACLEAN: Can I say this, sir, about Monday and Tuesday, 23 because obviously it is my cross-examination of the 24 other side's witnesses, and I am assuming for these 25 purposes that Mr James is coming and I am told he is,</p> <p style="text-align: center;">Page 95</p>	<p>1 and Mortar rule, the restriction on promoting other 2 portals rule, then that is effectively the same as the 3 TDPG merger with Zoopla and it is a pro-competitive 4 analysis, because what you are doing in those 5 circumstances is you are moving from -- numbers 2 and 3 6 get in together and are effectively making a bigger and 7 better closer substitute number 2 to the runaway 8 dominant provider. So no problem. But that is assuming 9 that once they have taken them over, they get rid of all 10 these restrictive rules. 11 On the other hand, if Agents' Mutual takes over 12 Zoopla and maintains in place all of its restrictive 13 rules, then I don't know quite where the analysis would 14 come out, but it is a much more difficult competition 15 law analysis, because although it would have been 16 numbers, on this hypothesis, 2 and 3 getting together to 17 create a bigger number 2 to the dominant runaway person, 18 nevertheless, the number 2 would have maintained in 19 place in the market as number 2 a whole series of 20 restrictions. So the OOP rule on this hypothesis would 21 still in be place and, as we saw by reference to that 22 KFH point 4 document, that is, if nothing else, 23 a barrier to entry to new portals. There would also be 24 in place the Bricks and Mortar restriction, so that 25 excludes all of these online non traditional estate</p> <p style="text-align: center;">Page 97</p>

<p>1 agents from the market, and on this hypothesis this is 2 a portal which has become a big number 2 player and yet 3 they are all excluded. Restricted promotion of other 4 portals. 5 So in those circumstances, the Competition Authority 6 would have to grapple with the fact that, yes, numbers 2 7 and 3 have come together to make a bigger number 2 to 8 counter the runaway number 1, but it is countered by the 9 fact that they have all these anti-competitive 10 restrictions. Also in those circumstances the OOP rule 11 would continue to have anti-competitive effects as 12 between estate agents because, as we know, number and 13 identity of choice of portals is a key parameter of 14 competition as between estate agents, but on this 15 hypothesis the OOP rule is still in place and it is 16 restricting that parameter of competition. 17 And then the only other one to address is what you 18 also dealt with in interchanges before the short 19 adjournment to some extent, which was, well, what about 20 if Agents' Mutual is taking over Zoopla at a stage where 21 the market has tipped against Zoopla and, if you like, 22 Zoopla is withering away and -- 23 MR FREEMAN: Well, a merger is an extreme form of tipping, 24 I would suggest. 25 MR HARRIS: Possibly. One analytical answer to the question</p> <p style="text-align: center;">Page 98</p>	<p>1 the red line at the top. Either in figure 5 or figure 2 6, they are slightly different metrics. If you look at 3 the axis, you can see the time that we are talking 4 about. Zoopla is obviously a lot closer, but OTM hasn't 5 got anywhere near it, and that is after -- this is about 6 16, 18 months of trading and the position hasn't 7 improved since. If anything there has been a tailing 8 off, a falling away of the OTM proposition. 9 So the point there, sir, Mr Freeman, is that if we 10 are in this world of Zoopla withering and dying away, 11 then buying up the last remaining value incremental 12 arguably makes OTM a little bit better than it would 13 otherwise be, but it hasn't begun to replace the Zoopla 14 constraint that otherwise had existed on Rightmove 15 because it is not attractive. It is simply not 16 attractive to the house-hunter side of the market. 17 So the overall outcome will have been a loss of 18 competition. 19 MR FREEMAN: But your basic answer is it depends on whether 20 the restrictions are maintained. 21 MR HARRIS: At the most basic level, yes. 22 I think that answers the question. I am very 23 grateful, thank you. 24 Opening submissions by MR MACLEAN 25 MR MACLEAN: As the Tribunal knows, a feature of the</p> <p style="text-align: center;">Page 100</p>
<p>1 is if Zoopla is on its way out, it is a failing firm, 2 and taking over a failing firm so it doesn't exit the 3 market altogether is traditionally pro-competitive. 4 That is the failing firm defence. 5 MR FREEMAN: Not anti-competitive. 6 MR HARRIS: I accept that, not anti-competitive. But the 7 important things in those circumstances -- so this is 8 a hypothesis of Zoopla -- the market having tipped, 9 Zoopla is in effect on its way out, then Agents' Mutual 10 takes it over. Arguably in those circumstances it would 11 be better to have the number 2 player, OTM, increase 12 a little bit by taking over what's left of Zoopla so 13 that it is a bigger and more effective constraint 14 against Rightmove, but the problem with this one is that 15 we know from the expert evidence that Agents' Mutual's 16 proposition doesn't replace the Zoopla proposition. It 17 is just not attractive to one side of the market. 18 Can I just finish off, because I am conscious that 19 this is Mr Maclean's part of the hearing, by showing you 20 at bundle F/1 Mr Parker's report to make good that last 21 proposition. It is bundle F, tab 1. And if you turn in 22 that to figures 5 and 6, which are on bundle pages 34 23 and 35, what you can see -- I hope you have colour 24 copies -- is runaway most attractive proposition from 25 the house-hunter side of the market, Rightmove. That's</p> <p style="text-align: center;">Page 99</p>	<p>1 property portal market is that it has very high barriers 2 to successful entry. The main barrier to entry, as you 3 will have gathered from your reading, stems from the 4 presence of network effects. A property portal needs to 5 have a substantial amount of viewers in order to 6 persuade agents to sign up to the portal, but the portal 7 will only attract a large number of viewers if it lists 8 a large number of properties. 9 Secondly, in order to attract large number of 10 viewers, a new entrant property portal has to market 11 itself in order to increase brand awareness with 12 consumers, and find some way of attracting agents to 13 list with it in order to ensure that it has the 14 sufficient inventory of properties. 15 Agents' Mutual or OnTheMarket, and we can use those 16 terms interchangeably, and no doubt I will do so, was 17 essentially a speculative venture in which the founders, 18 who between them had 240 branches within a total market 19 of 18,000 branches, declared an intention of setting up 20 a portal to compete in the property portal market and 21 then invited other estate agents to join with them in 22 that venture. The viability of the project rested 23 entirely upon the agents' responses to presentations and 24 support from those agents for the Agents' Mutual 25 proposition.</p> <p style="text-align: center;">Page 101</p>

<p>1 Now, as you will know, and you will have gathered by 2 now, Mr Springett, who is the main witness for my 3 client, from whom we will be hearing next week, was at 4 the heart of the setting up and successful launch of 5 a previous portal venture called Primelocation. 6 Primelocation was launched in 2001 as a free-to-list 7 service initially, so it didn't charge estate agents for 8 marketing their properties by its portal. But in or 9 around September 2001 a decision was taken that 10 Primelocation would move to a pay-to-list model. At 11 that time there were a number -- I am going to show you 12 a very helpful graphic in a minute to illustrate this -- 13 of other property portal websites as well as 14 Primelocation, including Find A Property, Fish for 15 Homes, Asserta Home, Property Finder and Rightmove. The 16 only one that is with us today is Rightmove. 17 When Primelocation decided to move on the 18 pay-to-list system, Rightmove also began charging agents 19 to list with it. The founding members of Rightmove had 20 about 2,000 agency branches, so when they moved to the 21 pay-to-list model, it had an immediate revenue stream 22 from those members and other members which enabled it to 23 recruit more agents rapidly and market the portal 24 throughout the UK, and it quickly became the 25 market-leading portal.</p> <p style="text-align: center;">Page 102</p>	<p>1 Countrywide, Connells and LSL Property Holdings Plc. At 2 the four-way meeting which Mr Harris will be 3 entertaining us with at some stage during the trial, 4 those are the four participants, along with Mr 5 Springett: Countrywide, Connells and LSL. 6 In 2012, as you know, Zoopla merged with TDPG, which 7 was by that stage the owner of Primelocation and Find a 8 Property, having obtained the clearance from the OFT, 9 and the merged entity became known as the Zoopla 10 Property Group, or ZPG. 11 Before we go any further, I just want to show you 12 the graphic that I mentioned in bundle C, tab 7, 13 page 122. It is in our submission helpful. It is 14 entirely factual, it is a totally, as it were, neutral 15 document, purely factual, and I don't believe it to be 16 remotely controversial, but you never know in this case. 17 It is just a useful graphic to see what happened to 18 these various players. 19 C, tab 7, page 122. It is the last page on that 20 tab. You see at the top of the page OnTheMarket, which 21 appears in early 2015. There are ten other players 22 identified there. What's very striking is you see 23 Rightmove launches in 2000 and it is the green line, it 24 is still there, it is still live in the market. All of 25 the others, with the exception of Property Live, which</p> <p style="text-align: center;">Page 104</p>
<p>1 As you will know, those who had developed 2 Primelocation, including Mr Springett, sold to the 3 Daily Mail Group in 2006, and until it was acquired by 4 the Daily Mail Group in 2006, Primelocation operated on 5 the basis that all property listings on its portal were 6 entirely exclusive to that portal. The rationale behind 7 that obviously was to create a strong brand for prime 8 properties and to drive market presence. 9 Primelocation's exclusivity requirement was released 10 following the sale to the Daily Mail Group. 11 Rightmove, for its part, was also launched on an 12 exclusivity basis. It was formed in 2000 by a number of 13 the largest corporate estate agents at the time, 14 Countrywide, Connells, Halifax, and Royal & Sun 15 Alliance. Those four agencies, as Mr Springett explains 16 in his evidence, effectively became Rightmove anchor 17 tenants and listed their properties exclusively on 18 Rightmove at that time. 19 Zoopla at some stage comes along and in 2010 -- 20 I think it began in 2008 -- Zoopla entered into 21 a strategic partnership, as it called it, with what are 22 now, following the exit of Halifax and Royal & Sun 23 Alliance from the market, the three largest corporate 24 estate and lettings agencies in the UK, what we call in 25 this case the corporates. The corporates are</p> <p style="text-align: center;">Page 103</p>	<p>1 I am going to say something about in the course of this 2 opening submission -- if we leave Property Live to one 3 side for the moment, I will deal with it shortly, what's 4 very striking is that all the others -- other all the 5 others, without exception -- are now part of the Zoopla 6 empire. And you can see when they fold into each other. 7 Primelocation and Find a Property get together in 2008. 8 They are joined by Globrix in 2010. Then you see Zoopla 9 and Primelocation, the 2012 merger, and in a previous 10 time all these other small players had all folded into 11 Zoopla. 12 So when OnTheMarket launched in 2015 there were 13 these two players, and Property Live, as I will indicate 14 by reference to some of the documents in a minute, the 15 last rites were read to it in 2013, and by the time 16 OnTheMarket was on the market, Property Live was dead. 17 So it is just a helpful illustration of how many 18 players there have been, how many have fallen by the 19 wayside and how Zoopla, through a process of essentially 20 acquisition as opposed to the start-up model of 21 Rightmove or the start-up model of Primelocation, 22 Zoopla, through a series of acquisitions, has ended up 23 in the position it was when OnTheMarket started off. 24 What I now want to do is to just show you a little 25 bit of the story, essentially -- but not, I fear,</p> <p style="text-align: center;">Page 105</p>

<p>1 entirely exclusively -- chronologically, just to make 2 some points as I go along. 3 Could I invite the Tribunal to take H1, please. 4 Would you turn, please, to page 474. 5 MR LANDERS: Before we do that, can I just ask one question 6 about the table you have shown us. 7 MR MACLEAN: Yes. 8 MR LANDERS: In one of the annexes in the papers there is 9 a list of portals that are in the market at the moment. 10 It is a lot more extensive than just these three, isn't 11 it? 12 MR MACLEAN: Yes. I am going to show you at the end of my 13 submission, by reference to I think Mr Parker's report, 14 the market as it stands now. What you will see is that 15 you have got Rightmove and Zoopla and OnTheMarket, and 16 then a series of almost unidentifiable tiddlers as well. 17 You are quite right. 18 So if we take bundle H1, please, and turn to 19 page 474, the background against which my client entered 20 the portal market was one of significant dissatisfaction 21 on the part of agents with both Rightmove and Zoopla. 22 I could show you many examples but I take this one 23 because it is nicely illustrative of the point. You 24 will see at 474 there is an email from somebody called 25 Charles Hess to some other agents in the context of</p> <p style="text-align: center;">Page 106</p>	<p>1 Mr Halman. This is, as it were, the "Dear John" letter. 2 Mr Halman to Lesley Dunn of Zoopla -- or it is referring 3 to the "Dear John" letter -- do you see in the middle of 4 the page: 5 "I only advised AM [that is my client] on Monday of 6 our intention and I have no beef with them so I wish to 7 depart on as good terms as possible. You were one of 8 the first companies to sign up with gold membership ..." 9 Then the next paragraph: 10 "It is worth recording that we felt the launch of AM 11 gave us, as an independent company, the ability to 12 protect ourselves against the growth of the duopoly of 13 Rightmove and Zoopla. We have nothing against Zoopla 14 and in fact I enjoined Jon Notley's company on a number 15 of social occasions. Our change of status to become a 16 subsidiary company of the Connells group made this 17 change inevitable. I think many independents 18 desperately want AM to survive but in their hearts are 19 recognising this is becoming a much bigger task than 20 initially anticipated." 21 Now, what Mr Springett says -- we can put H14 away 22 but if you keep a hold on to H1, please, if you wouldn't 23 mind. If you could keep H1 open but also take H2, 24 please, what Mr Springett found as he was touring round 25 the country extensively, as he did at this time, if you</p> <p style="text-align: center;">Page 108</p>
<p>1 a Rightmove price increase. If you then turn up the 2 email chain, if you go to page 472, Mr Graham's email: 3 "We are about to embark on the dark art of trying to 4 understand ..." 5 And then you can read on what he says about 6 Rightmove. You see then what he says in the next 7 paragraph about Zoopla: 8 "So the long and short of having a possible credible 9 alternative to Rightmove [this is post-merger] is now 10 two portals out to screw us." 11 Now, ironically, that view -- perhaps not quite with 12 the colourful epithet -- was shared by Mr Halman of 13 Gascoigne Halman. If you go to page 485 in the same 14 bundle, you see Mr Halman's email at the bottom of the 15 page: 16 "Zoopla having another go at us on the basis of 17 a particular amount per month. Meanwhile, Rightmove are 18 looking for a particular uplift on subscription on my 19 renewal at the end of March." 20 And then the reply at the top of the page: 21 "There was always talk about a credible competitor 22 to Rightmove to stop their monopoly but not to create 23 two of them." 24 If you just look at the end of the story at 25 bundle H14 at page 7889, you will find an email from</p> <p style="text-align: center;">Page 107</p>	<p>1 turn to page 1013, in an email to Mr Hayward of the 2 11 June 2013, Mr Springett makes various points, but 3 I just want to draw your attention to the paragraph 4 beginning "Our opponents are trying" and, in particular, 5 the last sentence: 6 "The reaction when speaking to agents is incredibly 7 supportive. I had underestimated the strength of 8 feeling against the behaviour of the big forces and 9 there is a real will to make this happen." 10 In the same vain, just before I come to the genesis 11 of the OOP rule, is the Morgan Stanley report which 12 Mr Harris took you to this morning, which is in file F4 13 at page 1769. This was one of the documents in my 14 learned friend's reading list and he highlighted the 15 first paragraph at page 1750. But if you turn, please, 16 a bit further on in the document to some pages Mr Harris 17 didn't show you, if you go to 1769 first of all, can 18 I just ask you to cast your eye over exhibits 44 and 45. 19 This is in the appendix to the Morgan Stanley report, 20 real estate agents survey, exhibit 44: 21 "Although over 60 per cent say they are not at all 22 satisfied with the value for money." 23 Then you see -- it is quite hard to read, but do you 24 see it is divided into Rightmove, Zoopla and 25 Primelocation. Are you able to decipher that? So the</p> <p style="text-align: center;">Page 109</p>

<p>1 black line is Rightmove, the middle line is Zoopla and 2 the bottom one is Primelocation. So you see the level 3 of not being satisfied on value for money, Rightmove it 4 is somewhere between 60 and 70 per cent. Zoopla and 5 Primelocation it's 40 and 50 per cent respectively. And 6 then at 45: 7 "Agents show preference for Rightmove's offering but 8 Zoopla's prices." 9 In other words, Rightmove's seen as too expensive. 10 And if you turn over to exhibits 51 and 53 -- 50 11 really first of all. 12 "53 per cent of respondents have already signed up 13 to Agents' Mutual." 14 51: 15 "33 per cent of those who had joined intended to 16 drop Zoopla and 9 per cent Rightmove." 17 So that is a split of not quite 4 to 1, and then 52: 18 "From the 47 per cent that had not yet signed up 19 13 per cent are still very likely to do so, 40 per cent 20 quite likely, and of those 55 per cent would drop Zoopla 21 and 14 per cent Rightmove upon joining Agents' Mutual." 22 So the background to the Agents' Mutual and coming 23 about of its proposition which contained within it the 24 OOP rule was one of considerable agent dissatisfaction 25 with the status quo, particularly in light of the merger</p> <p style="text-align: center;">Page 110</p>	<p>1 equipment point of view or due to an insufficient number 2 of agents willing to make the necessary sacrifices then, 3 either concurrently or as an alternative strategy for 4 there to be an agent group negotiation on tariffs with 5 the existing major portals." 6 Just pausing there. Mr Harris, of course, quite 7 rightly, has no complaint about agents having collective 8 negotiations, collective purchasing negotiations or 9 arrangements with portals. 10 MR FREEMAN: I thought he said he might but wasn't taking 11 the point. 12 MR MACLEAN: He is not taking the point. Not taking the 13 point is the same as not taking the point. 14 Now, just in passing, before we get to project Z, 15 would you note at page 81 that no less a body than 16 Google has dipped its toe into these particular waters 17 and found it not to its liking. So you see there 18 reference in the press in January 2011 to Google having 19 abandoned its brief foray into property searches. It 20 was a victory for, amongst others, Rightmove. 21 Then at page 85 is a briefing document about 22 project Z. Project Z, you may have picked this up, is 23 named after a well known restaurant in Belgravia called 24 Zafferano hence project Z, which Mr Holmes tells me is 25 or at least was an excellent restaurant. That is why it</p> <p style="text-align: center;">Page 112</p>
<p>1 between Primelocation and Zoopla. 2 So the spark for the discussions which led to my 3 client coming into existence was Mr Abrahamson's 4 invitation and hosting of a dinner in late 2010. The 5 attendees were 17 senior estate agents from 15 firms and 6 there were then a number of meetings that took place. 7 Can I just show you very quickly, just so you have 8 the chronology in mind, in bundle H1, if you would turn, 9 please, to page 76. This is, I think, probably the 10 earliest indication of the conception of what became 11 Agents' Mutual. So you see there's 8 December: 12 "The first meeting of the steering group takes place 13 today at Knight Frank's offices at 55 Baker Street." 14 Then at page 77 there's reference to a draft 15 briefing document, which is being sent to Mr Springett, 16 and then if you turn over the page, that document, 17 page 78, paragraph 1, do you see the reference there to 18 exclusivity issues in the last sentence? And at 19 paragraph 2(b), do you see reference to the efficacy of 20 working with and supporting the existing Property Live 21 site? 22 Also note the reference in paragraph 5 to potential 23 alternative strategies: 24 "Should an agent owned/controlled portal be deemed 25 as inefficacious or unworkable from a financial</p> <p style="text-align: center;">Page 111</p>	<p>1 is called project Z. You see that at page 295 in the 2 presentation to Savills. 3 So here we are with the first project Z briefing 4 document, and if you look at the first paragraph you 5 will see it refers to: 6 "The existing major aggregate of sites have achieved 7 a very strong competitive position in relation to their 8 customers, their agents and they are beginning to impose 9 unreasonable price increases and contract terms. It is 10 also believed that these aggregates may in future 11 attempt to compete with agents by seeking direct 12 listings from the house selling public and extending the 13 services they provide." 14 Mr Harris has referred to and one might say well 15 what's wrong with that? In principle, nothing. But 16 equally there's nothing wrong with the agents, by 17 Agents' Mutual, setting up a portal to compete in the 18 portal market with Rightmove and Zoopla, which of course 19 is precisely what they have done. That is why we are 20 here. 21 Both these developments are regarded as an increase 22 in threat to estate agency business at both individual 23 and industry levels. An agent-controlled aggregate 24 would counteract the current dominance of the existing 25 major aggregates operating as a utility for agents,</p> <p style="text-align: center;">Page 113</p>

<p>1 reducing costs and providing a comprehensive and 2 simplified service without the distraction of 3 non-property advertising and associated difficult 4 marketing which is prevalent on the existing sites." 5 Which of course was to the economic benefit of the 6 portal owners, Rightmove and Zoopla, rather than the 7 agents, the customers of the portals. 8 So then at page 91 there was a meeting on 9 9 March 2011 and you see the agenda. The only point to 10 note in the agenda, do you see at paragraph 7, "Appetite 11 for risk/financial commitment". A, B and C is go 12 exclusive (inaudible). 13 There were then a series of meetings with what 14 became the founder members of Agents' Mutual. Just for 15 your note, page 93 there was a meeting with one of them, 16 95 is a meeting with Strutt&Parker, and on page 102 17 there is a meeting with Mr Hodgeson at Douglas&Gordon. 18 Can I then ask you to go to page 133, an email from 19 Mr Springett to Mr Flint of Knight Frank, 17 June 2011, 20 and you see from the second paragraph: 21 "The decision has been taken to form a steering 22 committee." 23 Then there are some early slides attached to this. 24 If you go, please, to page 140, a lot of these slides 25 are interesting and repay consideration, but obviously</p> <p style="text-align: center;">Page 114</p>	<p>1 merge: 2 "... and the three large corporate estate agents, 3 Connells, Countrywide and LSL. 4 The next sentence deals with the merger, and then: 5 "A duopoly has been created which may allow the two 6 portal groups to drive profits without sufficient regard 7 to the needs of agents, their customers, vendors and 8 landlords, the agents' clients, and property-seeking 9 consumers." 10 And then at page 177 there was a review of the 11 market in which we got Rightmove, and then we have 12 Primelocation, FindaProperty.com and Zoopla. The 13 second, third and fourth of those all end up in the 14 Zoopla net. So in effect we have Rightmove and what 15 becomes what we now refer to as Zoopla. 16 You see from the top of the page: 17 "An early conclusion was that only four portals were 18 significant in terms of audience and lead generation and 19 therefore of relevance to agents." 20 And there is then some other discussion about the 21 increased turnover and so on. 22 Then I want to go to page 181, where we see an early 23 version of what became the OOP rule. You get that in 24 the paragraph beginning "To allow it to achieve", but it 25 is not the rule that we end up with, so I am not going</p> <p style="text-align: center;">Page 116</p>
<p>1 I just want to touch on some of them in opening. 2 140, bottom left-hand corner, I hope you can read: 3 "Create a new 100 per cent agent-owned portal." 4 And then do you see just below that: 5 "A superior site using latest technologies and smart 6 SEO. Preferred state status, ideally exclusive at least 7 minimising use of other sites." 8 So we haven't got to OOP yet. 9 And then there is a discussion draft of project Z at 10 page 173. This, I think, is the one which my learned 11 friends put in their reading list dated 9 November 2011. 12 If you go to page 174, penultimate paragraph, beginning, 13 "The aim of the venture", do you see in the penultimate 14 sentence: 15 "The vehicle company will contract individually with 16 member agents who will have set obligations to support 17 the preferred portal." 18 We haven't yet identified what those are. 19 Then at 175, paragraph 2, you see in the third line: 20 "These concerns arise due to the growing dominance 21 of Rightmove nationally, the strength of DPG [that is 22 Zoopla] brands in and around London and the creation of 23 a strategic partnership between the venture capital bank 24 and Zoopla ..." 25 Sorry, that is Zoopla and DPG are of course going to</p> <p style="text-align: center;">Page 115</p>	<p>1 to spend very long on it. We also see an embryonic 2 version of what became the Bricks and Mortar rule at 3 page 185. 4 What was critical, and one of the distinctions 5 between obviously this plan and the Property Live 6 portal, which was on its last legs, we get at page 182, 7 third paragraph: 8 "The main business principle is that it was going to 9 be run as a commercially successful business in which 10 the agents via the vehicle company have a stake in 11 perpetuity. In other words, the preferred portal should 12 be for profit but not for sale." 13 Then at page 207 there is a further discussion draft 14 which Mr Harris took you to, I think, this morning, 15 28 November, and it has again an early version but not 16 the final version of the OOP rule at page 215. Then 17 there is the presentation, the Savills's one at 18 page 271, 7 February 2012, and we can see at page 280 -- 19 Mr Harris gets excited about the word "threats", but we 20 see the threats to the independent agents identified at 21 page 280, the first of which is ever increasing prices, 22 both for listing fees and for brand building exposure, 23 pressure to be on all sites and creation of more and 24 more paid-for services to agents using agents' data. 25 Then the discussion at the bottom.</p> <p style="text-align: center;">Page 117</p>

<p>1 Then the possible responses to the threat are 2 identified at 285. One of them, page 285 -- the first 3 one is collective negotiation. Acquire control of an 4 existing portal, partnership in an existing portal, 5 create our own portal with a non-portal partner or 6 create our own new portal with 100 per cent agent 7 control. That is of course what happened. 8 Then at 288 we see the genesis of the OOP rule. It 9 is still couched in terms of preferred site status 10 exclusive except for one other site. 11 And then in January 2013, page 403, we have the 12 draft of the business plan. I just want to spend 13 a moment or two on this. So this is produced internally 14 on 8 January 2013. We haven't yet got a name for the 15 business, it is New Co's business plan, and then if you 16 go to 404, second paragraph: 17 "During 2012, the OFT investigated the portals 18 market as it was required to determine whether 19 a proposed merger between DPG and Zoopla should be 20 referred to the Competition Commission. It found that 21 the only way to create a viable competitor to the 22 dominant and super-profitable Rightmove was to allow the 23 merger to proceed. It reasoned that the creation of 24 such a competitor would provide agents with an 25 alternative to Rightmove, thereby providing a limit on</p> <p style="text-align: center;">Page 118</p>	<p>1 Bricks and Mortar point that I will say something about 2 later. 3 Then there is an introduction and background that 4 I am not going to dwell on at 406, and at 410 there is 5 an analysis under the heading "The OFT may be proved 6 wrong". Do you see in the middle of that paragraph -- 7 I am not going to read it all out, but the paragraph 8 I have in mind is one beginning "As indicated above". 9 In the middle of that paragraph there is a sentence 10 beginning: 11 "However, the OFT did note that if agents found that 12 they had no commercial option other than to list with 13 both Rightmove and Zoopla then the merger would not 14 significantly enhance rivalry." 15 That is in quotation marks. Can I give you the 16 reference to that: that is paragraph 56 of the OFT 17 decision that Mr Harris showed you this morning, which 18 is in the bundle at F1/309, 309 I think being the first 19 page of the document, but that is a direct quote from 20 paragraph 56. 21 Then there is a reference at page 411 to the 22 existential threat to agents, trusted local brands and 23 no longer trawling local agents' offices and so on that 24 Mr Harris referred to. Of course, that is aiming -- 25 what's going to happen is that the Agents' Mutual</p> <p style="text-align: center;">Page 120</p>
<p>1 the price increases it could impose. However, it noted 2 that if agents felt obliged to list on both Rightmove 3 and the newly formed Zoopla Group site, then no increase 4 in rivalry would be created. Early indications since 5 the merger are that, far from providing a constraint on 6 Rightmove, Zoopla is simply adding to the overall cost 7 of listing for agents by requiring them to list on all 8 its sites or none and dramatically increasing prices. 9 There appears to be every chance that what has been 10 created in the portals market is more akin to a duopoly 11 than a rivalry which would benefit agents and 12 consumers." 13 We'll see shortly that Mr Chesterman, the head 14 honcho at Zoopla, thought exactly the same. We'll come 15 to that later. 16 Then at the bottom of the page: 17 "In order to achieve a viable market entry, members 18 will be required to list on the new portal and on 19 a maximum of one other portal only. This requirement 20 will be implemented after launch. They will also be 21 required to help promote the new portal in various 22 ways." 23 Then just in passing at 405, the last sentence, you 24 see the reference to inviting all other bona fide estate 25 and lettings agents to participate with -- that is the</p> <p style="text-align: center;">Page 119</p>	<p>1 proposition is aimed at Bricks and Mortar, so-called 2 Bricks and Mortar agents, who provide that locally based 3 service. That's its raison d'etre. 4 At page 413, medium-term objectives, and one of the 5 points to note here, just in the penultimate paragraph, 6 last sentence: 7 "It is envisaged that the start-up phase will 8 comprise of a one-year pre-launch development period 9 followed by a five-year post-launch growth period." 10 Then at 414 there is another reference to OOP, so we 11 have now been developed: 12 "After launch and for the remainder of the five-year 13 post-launch period, agents will be required to list with 14 a new portal and a maximum of one other portal only. 15 At 416 that's explained. It is explained in the 16 paragraph beginning "Given the powerfully established 17 competition", that ideally, as with Primelocation when 18 it started, as with Rightmove when it started, one would 19 have had an exclusively arrangement. But that paragraph 20 explains why that's not possible, the market essentially 21 having moved on, and so: 22 "The requirement will be that members list on a new 23 portal website and on one other portal website only. 24 This requirement will be implemented after the new 25 portal launches. Whilst not as impactful as full</p> <p style="text-align: center;">Page 121</p>

<p>1 exclusivity of listings, it will create some disruption 2 of the market as agents switch from other portals to the 3 new portal." 4 And so on. 5 Now, at about this same time, if you go back to 6 page 362 in the same bundle, Property Live was on its 7 last legs. You remember Property Live was the last one 8 on the chart that I showed you earlier. We get this in 9 a number of places in the bundle, but at page 362 the 10 demise of Property Live didn't go down very well in 11 Surrey in particular and there was some correspondence 12 about it, but you see that 362, pre-penultimate 13 paragraph: 14 "Members are clearly very interested in this topic 15 because Rightmove and DPG have formed themselves into 16 a virtual duopoly and are starting to ramp up their 17 charges." 18 You see that at this stage what is being suggested 19 in the middle of the next paragraph is that 20 Property Live must be run on a much more commercial 21 basis, and Mr Wyatt wants Property Live to succeed. But 22 if you go on to 437, that didn't happen, and a meeting 23 on 15 January 2013 was opened with Mr Hayward telling us 24 about the proposed closure of Property Live, and the 25 reasons were that it was costing too much to run and the</p> <p style="text-align: center;">Page 122</p>	<p>1 marketing. 2 I will come back to look at this agreement again on 3 a number of occasions, but it is also important, at 4 least -- in my case it is not important, but I think it 5 probably is important to my learned friend's case -- to 6 have in mind the membership rules, and you have them in 7 the same bundle, H4/2102. 8 I don't think there is any dispute about this but 9 just to show you how it works. 2102. Those are the 10 rules. Membership rule number 2, 2.1: 11 "Members shall be admitted in accordance with 12 article 3, provided that ..." 13 2.1.3: 14 "A member must be an estate or letting agent." 15 What does that mean? Answer: page 2110, defines 16 estate or letting agent as a bona fide office-based 17 estate or letting agent offering the full range of 18 agency services, including valuations and so on. 19 So a combination of the definition in schedule 1 and 20 2.1.3, that is what has become known as the Bricks and 21 Mortar rule. 22 Those are the sum total of the contractual 23 provisions that actually lies at the very heart of this 24 case, despite having broadened somewhat since. 25 I think we can put bundle H1 away and pick up bundle</p> <p style="text-align: center;">Page 124</p>
<p>1 lead levels were poor. 2 As set out on the next page, 438, the greatest flaw 3 was that it was free, see the top of the page. That was 4 a members'-only portal for NAEA members, National 5 Association of Estate Agents members. And the last 6 rites for Property Live were eventually read in 7 October 2013, see bundle H4, 1816 and 1886, which I am 8 not going to dwell on. 9 Now, the contract that Gascoigne Halman entered 10 into, the listing agreement, is at bundle H4/2208. If 11 we just look for a moment at the first paragraph of the 12 letter, there are three different things going on. 228: 13 "This letter sets out the terms in which we agree, 14 subject to the satisfaction of certain conditions of 15 this letter ..." 16 One could enter a notional (i) here: 17 "(i) to become a member of Agents' Mutual, whose 18 registered address is at [blah blah blah]. (ii) to 19 subscribe or procure the subscription for certain loan 20 notes. (iii) to list certain of our properties on the 21 company's associated portal, the name of which will be 22 confirmed by the company within the listing notice, the 23 portal." 24 And then the terms are set out and paragraph 6, of 25 course, is the OOP provision and paragraph 7 deals with</p> <p style="text-align: center;">Page 123</p>	<p>1 H2. We know that by March 2013 there was the -- 2 I showed you the draft business plan and Mr Harris 3 showed you the final version of that business plan, 4 which is at the start of bundle H2 in one of his 5 pre-reading documents, dated 11 March. It is in various 6 places but one version starts at page 644. 7 And then, as well as that, the bundles are replete 8 with examples of something called the information 9 memorandum. They differ slightly over time but in 10 structure and substance they are pretty much the same. 11 Can I just give you the reference to the one which 12 arguably matters most in this case because it was the 13 one given to Gascoigne Halman, and that is the one at 14 H2/709, the version as at 29 April 2013. If you would 15 turn then, please, to 712, middle paragraph: 16 "The portal has the medium-term aim of setting 17 listing fees at the minimum level consistent with 18 developing and then maintaining itself as one of the 19 leading portals of the UK." 20 Mr Harris, likes to talk about the ambition to tip 21 people out of the market and so on as if somehow when 22 one goes from being number 3 in the market to being 23 number 2, number 2 somehow disappears in a puff of 24 commercial smoke. Of course, that's not what happens. 25 Number 3 becomes number 2 and number 2 becomes number 1,</p> <p style="text-align: center;">Page 125</p>

<p>1 normally the other guys remain to fight their corner, 2 certainly not in the Beef-type situation. Anyway, 3 the aim was to identify and maintain itself as one of 4 the leading portals in the UK. 5 Then if you go to the next page: 6 "The purpose of the company, the structure has been 7 frozen, [first paragraph, second line] to underpin the 8 purpose of the company which is to create a fully 9 national residential property portal which is driven not 10 by maximising shareholder returns which is of course the 11 duty of the directors of Rightmove and Zoopla but by 12 providing the best possible service to agents, their 13 customers and the property seeking public at the lowest 14 possible cost consistent with achieving and maintaining 15 a leading position in the portals market." 16 Now, that, translated into Mr Harris's language, is 17 something which was an aim to recapture from the main 18 incumbent portals the associated profits so as to line 19 the pockets of Agents' Mutual members, says Mr Harris, 20 in paragraph 6.2 of his skeleton argument. That is one 21 way of putting it. But so what, one might think. 22 In the next paragraph last sentence: 23 "The intention is that the business should not be 24 run to generate surpluses for distribution but rather 25 should aim to minimise the listing fees paid by its</p> <p style="text-align: center;">Page 126</p>	<p>1 now be viable for agents given their current reliance on 2 the membership of existing portals, both for gaining 3 instructions and for lead generation." 4 Then the OOP rule is set out and at the end of the 5 paragraph: 6 "The effect of this requirement will be that the 7 company's new portal will have a unique collection of 8 properties, ie consumers will not be able to find all of 9 them on any other portal. It will also produce some 10 movement of agents and properties from the existing 11 portals to the company's portal, offering an opportunity 12 to encourage consumers to trial and use it. Of further 13 benefit is that the monthly spend by agents on portal 14 advertising will not rise and in many cases will fall." 15 Then it goes on to describe the fees at 715 and the 16 loan notes paying a very generous interest of 17 15 per cent and then the marketing budget, and then at 18 717: 19 "The intention is to build a sustainable business." 20 Then: 21 "In only a few years, the company is targeting 22 operations of a similar scale to those of the current 23 market leader, Rightmove, which has cost base of over 24 30 million per annum, employs 325 staff and serves over 25 12,000 agent customers, several thousand developers and</p> <p style="text-align: center;">Page 128</p>
<p>1 member agents." 2 And then there is reference to the founders at the 3 bottom of the page. 4 The strategy is then set out over the page and right 5 at the beginning: 6 "The directors recognise the scale, strength and 7 backing of the two main portal groups already in the 8 market. To achieve the company's stated objectives, 9 they have considered and rejected pursuing a high-risk, 10 high-cost strategy of simply launching a new portal and 11 trying to attract agents." 12 Then they explain why in the next paragraph, and 13 then four lines down in the second paragraph: 14 "It is essential that the launch of the new portal 15 disrupts the market and gives consumers a good reason to 16 come to it. The ideal way to achieve this would be to 17 require agents listing with it to do so exclusively so 18 that consumers could not find those properties on any 19 other portal. Of course, Rightmove and Primelocation 20 entered the market using this method and Primelocation 21 maintained it for more than five years. However, the 22 directors ..." 23 And of course guided by Mr Springett, who was the 24 gentleman responsible for setting up Primelocation: 25 "... did not consider that such a requirement would</p> <p style="text-align: center;">Page 127</p>	<p>1 millions of consumer visitors." 2 And then there is a reference to the medium-term 3 target following the initial six-year build phase, and 4 then there is reference to Mr Springett. 5 Now, along the way, as the story develops, there are 6 numerous examples, various examples, of Mr Springett 7 explaining the basis for the OOP rule. I could show you 8 many examples but I want to just give you references to 9 three of them, if I may. The first one is in this same 10 bundle, H2, page 867. See the last paragraph, four 11 lines. There is a pithy explanation of the rationale 12 for OOP. 13 A slightly more fulsome explanation, if you take the 14 next bundle, H3, and turn to page 1436. This is a very 15 useful summary, really, of the rationale and what was 16 going on. It is useful because it is in Mr Springett's 17 own words, well before there was any litigation, well 18 before there has been any dispute. 19 Let me just explain to you what's going on. If you 20 look at page 1433, first of all, at the bottom of the 21 page, you should see an email from somebody called 22 Rosalind Renshaw, "Hi Ian", do you see that? 1433 at 23 the bottom. 24 THE CHAIRMAN: Yes. 25 MR MACLEAN: "Would you like to do a 60-second interview on</p> <p style="text-align: center;">Page 129</p>

<p>1 Estate Agent Today?"</p> <p>2 And yes, he was delighted. Will await the</p> <p>3 questions:</p> <p>4 "Excellent, thanks. How about these attached?"</p> <p>5 So these are Estate Agent Today's questions, and the</p> <p>6 questions for Ian are then over the page at 1435 and, in</p> <p>7 particular, although 5, 6 and 7 are all important, would</p> <p>8 you look -- well, 5, 6 and 7 are all important, but 7 in</p> <p>9 particular, if you would cast your eye over 7, at 1436.</p> <p>10 I am happy to read it on to the transcript but it may be</p> <p>11 quicker just to --</p> <p>12 THE CHAIRMAN: We'll read it. (Pause).</p> <p>13 MR MACLEAN: Once you have digested that --</p> <p>14 THE CHAIRMAN: Yes.</p> <p>15 MR MACLEAN: -- could I ask you to take bundle H8, please.</p> <p>16 Don't put away 2 because I have not finished with 2.</p> <p>17 I am going to dip into 8 at 4156.</p> <p>18 The reason I take this one is this is a bit later in</p> <p>19 the story. 4156. This is a short-term loan facility</p> <p>20 proposal on 3 November 2014. So this is only two months</p> <p>21 before launch and there is a series of slides in this</p> <p>22 presentation. The relevant one for my present purposes</p> <p>23 is page 4170, the paragraph beginning, "An essential</p> <p>24 early", and the second sentence, "An essential element".</p> <p>25 I note in particular the last sentence of that</p> <p style="text-align: center;">Page 130</p>	<p>1 MR MACLEAN: Yes, that's right, yes.</p> <p>2 MR FREEMAN: Thank you.</p> <p>3 MR MACLEAN: There is evidence that Mr Springett's view that</p> <p>4 exclusivity was not an option was shared by agents.</p> <p>5 I just want to give one example in H5.</p> <p>6 THE CHAIRMAN: Can we put away H8?</p> <p>7 MR MACLEAN: Yes, indeed. H5, page 2568. And that is an</p> <p>8 email from one of the estate agents here on</p> <p>9 28 March 2014, where Mr Dewar to Mr Springett, headed</p> <p>10 "Launch strategy January 2015", ends his email by</p> <p>11 saying:</p> <p>12 "Personally, I cannot wait to loose off one of the</p> <p>13 big boys. I would love to do two but commercially that</p> <p>14 is not an option right now."</p> <p>15 In other words, confirmation that complete</p> <p>16 exclusivity would not have worked. The OOP rule was the</p> <p>17 best and, indeed, only realistic hope for getting</p> <p>18 a differentiated consumer proposition for OTM in the</p> <p>19 property portal market.</p> <p>20 How did Mr Springett go about bringing this</p> <p>21 proposition to fruition? If you still have bundle H2,</p> <p>22 what he did was he set out to identify the most</p> <p>23 substantial independent firms in each region. He knew</p> <p>24 that the corporates were already well entrenched with</p> <p>25 Rightmove and with Zoopla and they had all done a deal</p> <p style="text-align: center;">Page 132</p>
<p>1 paragraph, that middle paragraph beginning "If</p> <p>2 competitive" and ending "existing duopoly".</p> <p>3 Now, the Tribunal will hear evidence from</p> <p>4 Mr Springett as to why the OOP rule was indispensable to</p> <p>5 OTM's successful entry into the market. It is our case</p> <p>6 that it was, but whether that has any legal relevance to</p> <p>7 the questions before the Tribunal for the disposal of</p> <p>8 the case remains to be seen because of course that</p> <p>9 question of indispensability only crystallises as</p> <p>10 a matter of any legal importance if my learned friend</p> <p>11 has on the face of it made out his case as to either</p> <p>12 object or effect.</p> <p>13 But what is beyond doubt is that there is --</p> <p>14 MR FREEMAN: So you mean by that, sorry, that we are into</p> <p>15 exemption territory?</p> <p>16 MR MACLEAN: Well, we might be into exemption territory but</p> <p>17 only into ancillary restraint territory and we are only</p> <p>18 into questions of exemption if there is on the face of</p> <p>19 it some problem, some harm to competition either by</p> <p>20 object or effect.</p> <p>21 MR FREEMAN: So either at the stage of seeing whether the</p> <p>22 prohibition applies or at the stage of seeing whether</p> <p>23 there should be an exemption individually obtained --</p> <p>24 MR MACLEAN: Yes.</p> <p>25 MR FREEMAN: -- under the system we have now.</p> <p style="text-align: center;">Page 131</p>	<p>1 with Zoopla and they were all shareholders with very</p> <p>2 considerable shareholdings in Zoopla.</p> <p>3 So what he did was he targeted the most substantial</p> <p>4 independent firms in each region. An example of this is</p> <p>5 to be found at page 905 of bundle H2. My learned</p> <p>6 friend's clients' evidence takes issue with this, as if</p> <p>7 Mr Springett was going about this in some sort of</p> <p>8 wrongheaded way, but as I am sure the Tribunal will</p> <p>9 discover next week, Mr Springett knew exactly how to go</p> <p>10 about building this strategy and bringing it to market,</p> <p>11 and what he was doing was identifying the most</p> <p>12 substantial independent firms in each region. This</p> <p>13 email explains it, see in particular the second</p> <p>14 substantive paragraph beginning, "Second", where he</p> <p>15 explains the logic. He says it is laborious work but he</p> <p>16 seemed to be having some success. And then he says:</p> <p>17 "If you are willing to assemble the right firms in</p> <p>18 East Anglia that would be a great help. Must include</p> <p>19 the more mainstream multi-office firms, obviously those</p> <p>20 not owned by Countrywide, Connells and LSL."</p> <p>21 And so on.</p> <p>22 So the point is that the three big corporates had</p> <p>23 close and long-term relationships with Rightmove and</p> <p>24 were major shareholders in Zoopla, having signed the</p> <p>25 strategic partnership, as they called it, with three</p> <p style="text-align: center;">Page 133</p>

<p>1 corporates in 2010, and Agents' Mutual didn't consider 2 that the interests of those businesses, the big 3 corporates, could be aligned with those of the 4 independent agents who were suffering most under the 5 Rightmove and Zoopla duopoly at this early stage in 6 Agents' Mutual's development. 7 Another example which is pertinent particularly to 8 the facts of this case is at 991 of the same bundle, 9 where guess who is identified as one of the key 10 independent players in the North West. At page 991 you 11 see in the box there there is identification of all 12 sorts of people, but about eight lines from the bottom 13 do you see the reference, "The initial discussions with 14 northwest firms"? 15 "Gascoigne Halman are interested and also members of 16 IEAG, and I believe there to be an appetite among other 17 good independents. One or two have already given 18 letters of intent." 19 And IEAG is an association of medium and large 20 regional independent estate agents totalling over 100 21 offices all together, and you see that Mr Springett was 22 setting up a series of regional meetings with these key 23 characters around the country. 24 Then we come to the same bundle, page 1080. This is 25 one of the documents that I think we invited the</p> <p style="text-align: center;">Page 134</p>	<p>1 Rightmove, is now part of Zoopla. Not all the brands 2 still exist, of course, but all the entities were 3 swallowed up by the acquisitive Zoopla. I don't use 4 that term pejoratively because that is the way they have 5 built their business. There is nothing wrong with that. 6 Then at 1091 we see the consolidation which had at 7 that time taken place between Primelocation, Find a 8 Property and Globrix. We still have Property Live out 9 on its own and we still have Zoopla out of a price on 10 its own, but we know there was further consolidation to 11 come. We see that over the page. There is reference to 12 the merger, the merger being approved in 2012. And then 13 at 1094 to 1096 is the strategy. So there is the 14 strategy. Medium-term commitment to list with the new 15 portal, five years. Members to list with a maximum of 16 one other portal of their choosing. 17 1095: 18 "Neither Rightmove or Zoopla will have all the 19 agents and properties that we will have ... creates 20 a unique set of listings for a new portal ... a reason 21 for consumers to use us." 22 So taking listings from both Rightmove and from 23 Zoopla. 24 And then over the page: 25 "Agents will move from Rightmove or Zoopla to us.</p> <p style="text-align: center;">Page 136</p>
<p>1 Tribunal to read if time permitted before the hearing. 2 Again, the bundles are -- you find these quite often, 3 they come along, not like tubes but like buses in the 4 bundles. And this is the one that was given to 5 Gascoigne Halman, that is why we chose this one. That 6 is why we identified this as the one for you to read if 7 you had time. But they are all in the same familiar 8 format, and so 1082, second bullet: 9 "Serious competitor to the existing major portal 10 groups tool." 11 It is not a question of murdering one of them and 12 then taking on the other, it is competing with all of 13 them. 14 And then 1085 makes a positive virtue, last bullet 15 point, of being open to all bona fide agents, including 16 national agents' champion. And then 1086 identifies the 17 sheer size of Rightmove, and 1087 shows how Rightmove 18 has grown, with that rather sinister cylinder leaping 19 out at of the page. 20 At 1090, here are the other players. I am not 21 suggesting -- there might be some tiddlers, but here are 22 the other people that matter. What's striking about 23 this, if we go back to Mr Springett's -- the chart 24 I showed you at the beginning, every one of those 25 entities on that page, every single one apart from</p> <p style="text-align: center;">Page 135</p>	<p>1 They can publicise the switch and promote the new 2 portal." 3 And then there is some reference to pricing and 4 funding and then at 1108, bottom of the page: 5 "We will make sure there is a critical mass of 6 support in each region before proceeding. This will 7 take time and effort but it is vital. We will not 8 proceed until we are confident we can achieve fully 9 national coverage." 10 Then there is a recap and then the last slide, 1115, 11 "What next?" Answer: 12 "Consider our information memorandum with your 13 colleagues. Each firm must make its own independent 14 decision." 15 And that is repeated ad nauseum in these 16 presentations. Then referring to the information, 17 letter of intent, then the listing agreement and off we 18 go. 19 The presentation was very well received by Gascoigne 20 Halman, if we look at page 1139. The letter of 21 intent -- so the presentation that we have just looked 22 at was given, I think, the day before. It is dated 23 20 June. The next day is a Gascoigne Halman letter of 24 intent at 1139, signed at page 1140. 25 We can close H2. In fact -- well, it doesn't</p> <p style="text-align: center;">Page 137</p>

<p>1 matter, but actually the listing agreement also is in 2 the bundle there at 1145, but we have already seen it 3 elsewhere. 4 You can put H2 away and take H3. Would you turn, 5 please, to page 1229. We are not going to be hearing 6 from Mr Halman, of course, because his business has been 7 bought out by Connells, but I think we can see what he 8 would say if he was here. Mr Halman, on 1 July 2013, 9 third paragraph, you see what he says about 10 Agents' Mutual, worthwhile proposition: 11 "It is probably one of the last opportunities for 12 the industry to come together with a proposition which 13 may rival Zoopla and Rightmove. The alternative is that 14 the duopoly will take an ever increasing slice of 15 income." 16 So it is not difficult to see why my learned friends 17 aren't bringing Mr Halman along to talk to. His view is 18 entirely aligned with Mr Springett's. 19 Can we then take bundle H4, and would you turn, 20 please, to 2329 which, in accordance with the iron law 21 of litigation, is nearly at the back. 10 February 2014. 22 This is a board meeting of my client, attended by the 23 directors -- Mr Springett, of course, is not a director, 24 but he attends the board meeting as you see from 2328. 25 I want to just draw your attention to the business</p> <p style="text-align: center;">Page 138</p>	<p>1 THE CHAIRMAN: But no one has had to leave the courtroom, 2 Mr Harris. 3 MR MACLEAN: I am very grateful. 4 So the strategy is to join this market that has got 5 two very big players. Almost at the moment of joining, 6 in fact I think at the moment of joining, Agents' Mutual 7 is going to be the number 3 player, and the strategy is 8 to become the number 2 player as quickly as possible and 9 then set their sights on number 1. What, one asks 10 rhetorically, is wrong with that? 11 If Mr Springett had been an independent consultant 12 and had gone along to Mr Chesterman and said, "Well, 13 Mr Chesterman, I suggest your strategy should be to 14 stick at being number 2 in the market", Mr Chesterman 15 would have said, "Why shouldn't our strategy be to try 16 to go to number 1?" "Oh, well, we hadn't thought of 17 that." Of course the strategy is to get into business 18 as number 3 and become the number 2 player as quickly as 19 possible, and once that's been achieved, if it is 20 achieved, set one's sights higher. There is no mystery 21 about it. There is no surprise about it. It is called 22 capitalism. It is called competition, even. But now it 23 is suggested that it is somehow suspicious or there is 24 something vaguely distasteful, even unlawful, about 25 having that strategy.</p> <p style="text-align: center;">Page 140</p>
<p>1 plan section. The first bullet point, the reference to 2 a more ambitious business plan having been created, and 3 then the third bullet point: 4 "The company strategy is to get Agents' Mutual to be 5 the number 2 player as quickly as possible within the 6 first two to three years and then we will work to become 7 equal to Rightmove." 8 MR HARRIS: I am sorry to interrupt, can we take it 9 therefore that none of this board minute is 10 confidential? It has just been read out in open court. 11 MR MACLEAN: I haven't read anything out that is 12 confidential. 13 MR HARRIS: It is confusing, sir. 14 MR MACLEAN: It is not at all confusing. It is perfectly 15 simple. I haven't read anything out that is 16 confidential. 17 MR HARRIS: You can see for yourself it is marked 18 confidential. This is an increasing problem throughout 19 this trial. I would like to refer to many other board 20 minutes. They are all marked the same way. Mr Maclean 21 has just told the Tribunal it is not confidential. 22 THE CHAIRMAN: He has read out a part which is not 23 confidential. To the extent that it was labelled 24 confidential, that has now been waived. 25 MR HARRIS: Exactly.</p> <p style="text-align: center;">Page 139</p>	<p>1 Mr Harris draws attention to the core business plan. 2 I just want to show you that in bundle H5 at page 2400. 3 We can see he showed you these pie charts, the 4 scenarios, at 2404, 2405, 2406 and 2407. 5 Two preliminary points to make about the scenarios. 6 The first point is that if you go to page 2410, a page 7 which Mr Harris did take you to but he didn't take you 8 to the very bottom of it, summary of numbers, you see 9 the very last sentence there beginning "Please note". 10 At the risk of incurring Mr Harris's wrath, what it says 11 is: 12 "Please note that various scenarios have been 13 considered and a slower growth business plan is included 14 in appendix 1." 15 The other point to make about the scenarios, if you 16 just keep a finger in the business plan and turn, 17 please, to page 2452 of the same bundle, you see the 18 email at the bottom of the page from Mr Springett to 19 Mr Jarman and others, essentially the founder, the board 20 members: 21 "I undertook to circulate the business plan document 22 I ran through at the last board meeting. I have left in 23 the scenario slides." 24 Then there is a reply from Mr Jarman, and then at 25 the top of the page Mr Springett explains:</p> <p style="text-align: center;">Page 141</p>

<p>1 "The slides I sent contained some material which is 2 additional to the business plan. It is simply 3 a scenario and is headed so based on what agents have 4 said to me unsolicited during my travels. Our plan, the 5 information memorandum and contract documents make clear 6 there must be individual agent choice of other portal." 7 Then if we go back to the business plan, Mr Harris 8 presented pages 2404 through to 2407 as if they were 9 predictions of the future which, as it were, had already 10 happened, because he said, "Oh, well, there is no 11 suggestion here that they are going to get rid of any of 12 the restrictions". Of course there isn't. These are 13 simply stylised scenarios showing getting to the 14 so-called tipping point, and in the stylised scenario 15 the shortest conceivable theoretically possible route to 16 becoming number 2 player in terms of number of offices 17 is under the entirely stylised basis of no agent 18 anywhere, no agent office -- not just no agent, no agent 19 office anywhere dropping Rightmove until 5,000 or more 20 have left Zoopla, which is obviously a stylised 21 scenario, but it helps to set out in a stylised way the 22 proposition of aiming to become the number 2 player in 23 the market. 24 And there is nothing wrong with being the number 3 25 and wanting to become the number 1, and a necessary</p> <p style="text-align: center;">Page 142</p>	<p>1 Mr Chesterman himself was planning. 2 So the core business plan and the scenarios can't 3 possibly be read or understood in the way that Mr Harris 4 was rather excitedly suggesting this morning, and to the 5 extent that there's criticism of having a strategy of 6 displacing the number 2 as the number 2 -- not knocking 7 him out of the market and not letting him in again but 8 simply displacing him as the number 2 player -- there's 9 nothing wrong with that. 10 Now, we will have to explore in the evidence how 11 Zoopla behaved, what it did when it knew that 12 Agents' Mutual was coming into the market, the impending 13 launch of my client, and we'll explore that in this 14 evidence. But can I just by way of taster invite you to 15 take bundle H2 at page 668. This is March 2013 and it 16 starts at 669, which is an email from Mr Notley of 17 Zoopla to somebody called Mr Ozwell, who is at an estate 18 agent called Hunters Group, but he is a big wheel in the 19 IEAG. And what Mr Notley is doing is making a group 20 purchasing offer on behalf of Zoopla to this leading 21 group of estate agents. 22 In the context of doing so, and under the yellow 23 box, he makes the point, the line under the yellow box: 24 "Given that the property-seeking audience has 25 largely moved online, and over 50 per cent of our</p> <p style="text-align: center;">Page 144</p>
<p>1 part, if you are number 3, of becoming number 1, as Andy 2 Murray has found, is to pass number 2 on the way. And 3 there is nothing wrong with any of that. Nothing wrong 4 with having a strategy of becoming number 2. 5 If you take bundle H2, just for a moment -- I am 6 sorry to jump around like this, but you can't tell the 7 story entirely chronologically -- can I just show you 8 a somewhat ironic document in the light of much of 9 Mr Harris's skeleton argument, quite a bit of what he 10 said this morning. It starts at page 688 and it is 11 a document headed "Introducing Zoopla Property Group 12 Limited", Alex Chesterman, who is the founder and CEO -- 13 he is not a witness either but we will be hearing from 14 Mr Notley, who is one of his main lieutenants, if I put 15 it like that. 16 This is a presentation given by Mr Chesterman. We 17 may have to look at some of it with some of the 18 witnesses, but can I just invite you to look at 19 page 697, please, and in particular the fourth bullet 20 point, to see where Mr Chesterman was trading his guns. 21 MR FREEMAN: The OFT would be pleased, presumably. 22 MR MACLEAN: We're going to see what Mr Chesterman had in 23 mind, sir, as to what he was going to do shortly, 24 because the OFT's predictions about how things might pan 25 out were confounded by the fact, as we'll see, from what</p> <p style="text-align: center;">Page 143</p>	<p>1 audience does not visit Rightmove, strategically what we 2 are proposing should be very easy to agree to." 3 And he wanted to extend the term and the negotiation 4 that then takes place. 5 What we'll see is that, as one would expect, the 6 impending arrival of OnTheMarket did have 7 pro-competitive effects even before we got to the market 8 in the way that Zoopla behaved. 9 Now, the next document I just want to spend a little 10 bit of time on, but it is in bundle H5 -- I will take it 11 as quickly as I can. Mr Harris is inviting you to read 12 a document from Morgan Stanley and he, quite wrongly, as 13 it happens, as we'll submit in due course, sought to get 14 some comfort for his case from Morgan Stanley material. 15 But he doesn't get any help. Indeed, it is all the 16 other way. 17 If you turn in H5 to 2354, you see a Morgan Stanley 18 report of 4 October 2013 headed "Rightmove Plc". This 19 is one of one of the documents that we invited the 20 Tribunal to read, but I appreciate there are thousands 21 and thousands of pages in these bundles and I entirely 22 understand if you haven't got to grips with it all yet. 23 The first point to make is at 2354, in the box in 24 the right-hand corner at the bottom, is that this is 25 entirely disinterested, this report.</p> <p style="text-align: center;">Page 145</p>

<p>1 "Morgan Stanley does and seeks to do business with 2 companies ...(Reading to the words)... only a single 3 factor in making their investment decision." 4 Then if you go to 2356, more importantly, under the 5 heading "Rightmove", in the right-hand side, second 6 bullet point: 7 "Rightmove is the leading online property portal in 8 a two-player market that is likely to be supportive to 9 returns." 10 And then you see the market shares at 2358, in 11 particular exhibit 3. You see the numbers there, 12 68 per cent Rightmove, 31 per cent Zoopla, others 2, the 13 collection of tiddlers. 14 Then would you just please note paragraph 9: 15 "The merger of Zoopla, Find a Property and 16 Primelocation in 2012 to form Zoopla Property Group has 17 created a duopoly in the online portal market in the UK 18 and reduced the risk of regulatory intervention for 19 Rightmove. Commentary from DMGT suggests that Zoopla 20 achieves a circa 50 per cent EBITDA margin. This high 21 profitability and its stated desire to raise prices 22 gives us confidence that there will not be aggressive 23 competition on price and industry profitability will be 24 supported. Our market model conservatively assumes a 25 normalisation in Rightmove's share of digital marketing</p> <p style="text-align: center;">Page 146</p>	<p>1 Then at 2367 there is a heading and a debate. 2 I don't have time to go through all of this, but the key 3 debate 1, "Competition, will Zoopla dent Rightmove's 4 profitability?" starts at 2367. This is all important, 5 these next few pages are quite important. It is not 6 a terribly long section. It runs up to 2374. But note 7 at the bottom of the left-hand column on 2367: 8 "In early 2012, DMGT and Zoopla completed the merger 9 of Zoopla.co.uk, Primelocation.com and 10 Findaproperty.co.uk to form ZPG. Globrix.com was 11 subsequently acquired by the merged group. The result 12 has been to create a duopoly with the combined market 13 access market share across Rightmove and ZPG more than 14 95 per cent of online property advertising in the UK in 15 2012". 16 And so on. 17 Then it asks over the page at 2368 -- refers to the 18 three big players in the left-hand column in the middle, 19 Countrywide, LSL and Connells, who are shareholders. 20 Long-term strategic partnership. And then question 1 in 21 the middle of the right-hand column: 22 "Zoopla, substitute or quantum? If Zoopla can be 23 shown to be a genuine substitute for Rightmove on both 24 sides of the portal, there is a risk that a switching 25 market may develop among estate and letting agents,</p> <p style="text-align: center;">Page 148</p>
<p>1 spend of up to 60 per cent by 2020." 2 Then at 2361 we see the reference to summary 3 forecasts by reference to ARPA. We will be hearing 4 about ARPA in due course, but I just at the moment note 5 that Morgan Stanley's presentation is by reference to 6 ARPA, or average revenue per advertiser, see the bottom 7 table at 2361. While you are there, note the difference 8 between agency ARPA on the one hand and new home ARPA on 9 the other. That is another point which we may have to 10 explore with the experts. 11 Then at 2363, rather interestingly, there is 12 exhibit 17: 13 "The proportion of agents very likely or quite 14 likely to switch is 44 per cent." 15 So that sounds rather encouraging. 16 Exhibit 18, "Where to?" Answer: essentially, nobody 17 knows. Not sure yet. 94 per cent. 18 "In our view, this discrepancy between the desire to 19 switch and the lack of conviction as to the switching 20 destination reflects the fact that agents have few 21 credible alternatives to the leading online property 22 portals." 23 And then 2365 refers to the history of the 24 exclusivity. I have already dealt with that 25 essentially.</p> <p style="text-align: center;">Page 147</p>	<p>1 given that Zoopla's ARPA is still circa 50 per cent 2 below Rightmove's. We detect few features that truly 3 differentiate Rightmove's and Zoopla's proposition to 4 home-hunters. Neither has much in the way of unique 5 inventory. But the evidence suggests Rightmove still 6 leads Zoopla by four times in terms of home-hunter usage 7 and five to six times in terms of lead generation. This 8 provides Rightmove with a strong basis for further price 9 increases and reinforces its position as the must-have 10 portal for agents." 11 Then they deal with the proposition to home-hunters, 12 all of market coverage. I haven't got time to go 13 through all of the analysis, but over the page -- yes, 14 2368, and then 2370: 15 "Zoopla's proposition to agents and developers 16 versus Rightmove. Zoopla is an increasingly relevant 17 complementary product to Rightmove but not a genuine 18 substitute, in our view, nor is it likely to constrain 19 Rightmove's ability to achieve price increases." 20 Indeed, if you we go on to 2372, at the left-hand 21 column, penultimate paragraph: 22 "Possession of a unique audience is potentially of 23 great interest to its members but in our view is not a 24 sufficient reason in itself to reduce the value of 25 Rightmove or equally elevate Zoopla to the status of</p> <p style="text-align: center;">Page 149</p>

<p>1 a potential substitute. 2 And then at 2373 there is reference, under the 3 heading "Pricing", right-hand corner: 4 "ZPG's broad intention to raise prices seem to be 5 confirmed by their CEO [Mr Chesterman], who indicated at 6 the investor day that he expected ZPG ARPA to close the 7 gap with Rightmove by rising to meet it rather than 8 Rightmove ARPA falling to meet Zoopla's." 9 So those people referred to in paragraph, I think it 10 is, 56 of the OFT decision were spot on, if this is 11 right. It is entirely inconsistent with any suggestion 12 that ZPG constrained the pricing power of Rightmove 13 before OnTheMarket's launch into the market. And we get 14 that from the whole of this, but we get it from the 2373 15 in particular. 16 And just to put the jam on top, at page 2385, 17 Morgan Stanley's prediction. These analysts that 18 Mr Harris was placing such reliance on -- he was right 19 to place reliance on the analysis, he is wrong to think 20 it helps his case, of course, but he is right to place 21 reliance on them. The prediction from Morgan Stanley 22 you see from 2385, the third-last bullet point: 23 "Rightmove and Zoopla are able to drive effective 24 price increases on portals of circa 13 per cent per 25 annum in 2012 to 20 absorbing to find print spend as</p> <p style="text-align: center;">Page 150</p>	<p>1 investor confidence in the Zoopla revenue growth and 2 margin catch-up story." 3 That is Mr Chesterman's story from the investor day. 4 The story he has been telling as reported in the 5 Morgan Stanley report. 6 And then at 2904B, the other email, it is the same 7 story using again reference to ARPA catch up, and there 8 is then a reference, do you see at 2904B, to download 9 full document, 48 pages at the bottom. We have done 10 that and you have that document for your sins in 11 supplementary bundle X at tab 3. It is dated 12 6 June 2014. I haven't got time to deal with it but 13 could I commend to you pages, in particular, 136, and 14 then on a slightly different point, 4. 15 Then the other document that I want to draw your 16 attention to is again from analysts that Mr Harris was 17 highlighting as being knowledgeable about these things. 18 That is not quite what he said but that is what he 19 meant. Bundle H8, page 4414, an analysis from Enders on 20 20 November 2014. You see that date at 4414. And just 21 some bite-sized tasters from this. 4416. Top of the 22 page: 23 "Rightmove and Zoopla's duopoly continued unabated 24 in 2013 ..." 25 So that is after the merger:</p> <p style="text-align: center;">Page 152</p>
<p>1 well as attracting the bulk of incremental marketing 2 spend." 3 MR FREEMAN: Good news for investors. 4 MR MACLEAN: Great news if you bought some shares in 5 Rightmove and Zoopla, not so much fun if you are 6 Mr Halman at the coalface of estate agency in England. 7 There are other independent market analyses to the 8 same effect. Time, I think, is going to defeat me from 9 doing the same job with these as I just have. Can 10 I just give you the reference to both of them. The 11 first one is actually in the same bundle. It is 2768, 12 so it is convenient just to glance at it. There is an 13 email here at 2768, and if you could just, when you get 14 to 2768, put a finger there and also go on in the same 15 bundle to 2904B. You really know you are in an 16 overdeveloped piece of litigation when there is page 17 number 2904B on the first day of the hearing, but there 18 you are. This is market commentary from BNP Paribas. 19 What is going on is that Zoopla has announced its IPO 20 pricing range and there are two short emails here 21 discussing the level of ZPG's IPO stock pricing. And we 22 can take it from the first one at 2768, the price range 23 at 200, 250 implying a valuation range midpoint, and in 24 the last sentence: 25 "The implied EV EBITDA premium to Rightmove reflects</p> <p style="text-align: center;">Page 151</p>	<p>1 "... and will continue for the foreseeable future." 2 And then 4429. Right-hand side, first bullet point: 3 "Online property's favourable duopolistic structure 4 has meant that Rightmove and Zoopla have been able to 5 raise subscription fees to mitigate the revenue losses 6 associated with the print to digital transition." 7 4435, fifth bullet point: 8 "There is also significant scope for Zoopla to 9 narrow the gap through the familiar channels of 10 subscription fee rises and development of additional 11 products." 12 And then the last bullet point: 13 "The past year has seen Zoopla raise subscription 14 prices following the trend set by Rightmove ... also 15 managed impressive growth in their member base which 16 grew 8.1 per cent in the year to March ...(Reading to 17 the words)... their growth should continue." 18 The result: misery for Gascoigne Halman. 19 And then 4436: 20 "Strong network effects which in property portals 21 and estate agents ensure that property classified 22 advertising is a winner-take-all market, especially in 23 Australia and the UK." 24 Now, those are some indications of why paragraph 56 25 of the OFT's decision is rather more on the ball than</p> <p style="text-align: center;">Page 153</p>

<p>1 the bits that Mr Harris prefers.</p> <p>2 Moving ahead to the current state of the UK property</p> <p>3 portals market, to pick up the point Mr Landers made</p> <p>4 earlier. The current state of the UK portals market is</p> <p>5 that there are only three portals of any scale. The</p> <p>6 others are minuscule. You get some sense of this from</p> <p>7 the annex to the amended defence Mr Harris has put in</p> <p>8 which is in bundle A at page 62. I am certainly not</p> <p>9 suggesting that there aren't any tiddlers, there are</p> <p>10 a whole bunch of tiddlers. But you get the flavour of</p> <p>11 it there.</p> <p>12 Page 62, Rightmove, Zoopla, Primelocation, which of</p> <p>13 course is still used as a brand but it is owned by</p> <p>14 Zoopla. Spare Room is not really a property portal, for</p> <p>15 reasons I have forgotten but I am sure I'll remember</p> <p>16 them when Mr Holmes reminds me what they are. Rightmove</p> <p>17 Zoopla, Primelocation and then OnTheMarket. And nobody</p> <p>18 else is above 1.5 per cent.</p> <p>19 Now, the metric that's used here is share of visits</p> <p>20 on a given day, a chosen day, 17 May 2016. And you can</p> <p>21 see from the top of the page that Rightmove and Zoopla</p> <p>22 and Primelocation account for, what's that,</p> <p>23 82.7 per cent of all visits on that day, and OnTheMarket</p> <p>24 was 3 per cent. There is a long tail of portals, each</p> <p>25 with a minuscule share of visits.</p> <p style="text-align: center;">Page 154</p>	<p>1 on a revenue basis as a result."</p> <p>2 We respectfully agree.</p> <p>3 If you then go to page 37. You see the Revenue</p> <p>4 shares of the three main portals. Rightmove, 61; ZPG</p> <p>5 34; OnTheMarket, about 5. And you see the general</p> <p>6 conclusion of Mr Parker at the next paragraph, 4.4.13,</p> <p>7 a clear picture across all these metrics, Rightmove</p> <p>8 consistently had the largest share, Zoopla,</p> <p>9 Primelocation, second, and different proportions. OTM</p> <p>10 much smaller than Rightmove, according to these metrics.</p> <p>11 Pellucidly clear that there is no market power for</p> <p>12 my client and never has been.</p> <p>13 With my profound apologies to the shorthand writer,</p> <p>14 is that an appropriate moment to have a short break?</p> <p>15 THE CHAIRMAN: Yes, thank you, Mr Maclean, we'll rise for</p> <p>16 five minutes.</p> <p>17 (3.35 pm)</p> <p>18 (A short break)</p> <p>19 (3.45 pm)</p> <p>20 MR MACLEAN: I want to turn to just a little bit of law,</p> <p>21 just lightly. Does the Tribunal have in mind what we</p> <p>22 call the Gascoigne Halman concession letter, which you</p> <p>23 will find in bundle X at tab 26. Slightly belated but</p> <p>24 nonetheless welcome letter from Quinn Emanuel, and what</p> <p>25 it does is to indicate that they no longer pursue the</p> <p style="text-align: center;">Page 156</p>
<p>1 Spare-Room is a flat share site and it is not really</p> <p>2 comparable to the others at all. But we need not dwell</p> <p>3 on that. Some are limited to specific geographic areas,</p> <p>4 for example Aberdeen Solicitors Property Centre,</p> <p>5 Edinburgh Solicitors Property Centre and City Lets</p> <p>6 Scotland all have geographical limits.</p> <p>7 Now, so there are only three of any appreciable</p> <p>8 size. The incumbents, Rightmove and Zoopla, and the new</p> <p>9 entrant, OnTheMarket.</p> <p>10 Mr Parker, Mr Harris's clients' expert, gives some</p> <p>11 information on the current market of these portals in</p> <p>12 his first report, and Mr Harris actually went to just</p> <p>13 about the same territory. Bundle F1, page 33.</p> <p>14 Bundle F, tab 1. If I can just deal with this point.</p> <p>15 Page 33, paragraph 4.4.1. So Mr Parker identifies three</p> <p>16 different types of metric for measuring market share.</p> <p>17 House-hunter/vendor side metrics, agent side metrics and</p> <p>18 direct metrics such as revenue. And then he says at the</p> <p>19 next paragraph:</p> <p>20 "All of these are potentially informative. In my</p> <p>21 view, the revenue metric is the most directly</p> <p>22 informative measure as it reflects the ability of</p> <p>23 portals to the charge for their services. This metric</p> <p>24 is also considered most informative by the competition</p> <p>25 authorities, who typically aim to measure market shares</p> <p style="text-align: center;">Page 155</p>	<p>1 allegation that the OOP rule --</p> <p>2 THE CHAIRMAN: Sorry, did you say tab 26?</p> <p>3 MR MACLEAN: If I said 26, I meant 27. Page 177. They</p> <p>4 abandoned the OOP rule case on effect, but maintain it</p> <p>5 as to object. So paragraph 36.1, which alleges the OOP</p> <p>6 rule breaches chapter 1 insofar as it has the effect of</p> <p>7 preventing, restricting and/or distorting competition in</p> <p>8 the market provision of services by estate agents, but</p> <p>9 they maintain their object case in relation to the</p> <p>10 estate agent market, and then they also no longer pursue</p> <p>11 the allegations in relation to the Bricks and Mortar</p> <p>12 allegation, to the extent that they were alleging that</p> <p>13 there was an effect of restricting competition there,</p> <p>14 but again they continue to allege that the -- that that</p> <p>15 term is a restriction of competition by object.</p> <p>16 Now, as to object, just very briefly, Mr Harris did</p> <p>17 a little bit of law on this, but in his skeleton</p> <p>18 argument at paragraph 47 he refers to Cartes Bancaires,</p> <p>19 and he refers to that case at 47, 48, 49, 51 and 52 of</p> <p>20 his skeleton argument. I just want to spend two minutes</p> <p>21 on that. It is in K2, tab 21, and the analysis starts</p> <p>22 at paragraph 48. In particular --</p> <p>23 THE CHAIRMAN: Just bear with us a moment.</p> <p>24 MR MACLEAN: So the analysis starts just above 48,</p> <p>25 "Examination of whether there is a restriction of</p> <p style="text-align: center;">Page 157</p>

<p>1 competition by object within the meaning of 2 article 88(1)". Then the debate takes place at 3 paragraph 51. It is established -- so 49, first of all: 4 "In that regard it is apparent from the ...(Reading 5 to the words)... to the detriment in particular of 6 consumers." 7 And if one takes, against that background, and sees 8 also paragraph 58 of the court's judgment, my learned 9 friend's skeleton at paragraph 88, he says: 10 "As already explained in paragraph 81 above 11 Agents' Mutual's members see OnTheMarket as existing 12 inter alia to reduce competition between estate agents 13 in order to reduce their output in costs to the benefit 14 of agents. In particular, the OOP rule has the inherent 15 purposes of restricting one important parameter of 16 competition between agents, namely their freedom to 17 choose how many and which portals on which to list the 18 properties of their customers." 19 But what's a little curious against the background 20 of abandoning the effect case in the estate agent's 21 market is that if we are in object territory, if we are 22 in Cartes Bancaires object territory, if there is no 23 need to examine effects, it is a bit odd that the 24 effects case has been abandoned because the relevant 25 deleterious effect should surely be abundantly clear by</p> <p style="text-align: center;">Page 158</p>	<p>1 Agents' Mutual's objective was to become the strongest 2 portal, which of necessity involved taking over the 3 number 2 spot held by Zoopla. It is very difficult to 4 see how my learned friend's object case satisfies the 5 Cartes Bancaires test. No doubt at the end of the case 6 Mr Harris will explain why it does, but in our 7 submission it simply doesn't and can't and the object 8 case is frankly hopeless. 9 Related to that is the position of the CMA. Could 10 I ask you to take bundle H10 and turn to page 5393. 11 I don't know whether you have had the opportunity to see 12 this before. In fact, there are three relevant 13 communications from the CMA. This is the earliest and 14 most substantive. Can I just give you the references 15 for the other two as I don't propose to take time over 16 them. The other two are at H15/8525 and H16/9141. But 17 the earliest, and I say the most substantive, is this 18 one, H10/5393. 19 The first point to note about this letter is that it 20 doesn't raise any object concern at all. 21 THE CHAIRMAN: What is the page reference? 22 MR MACLEAN: H10/5393. You should then be looking at the 23 first page of the letter from the CMA dated 24 27 March 2015. There is no object concern raised there 25 and this letter couldn't have been couched in the terms</p> <p style="text-align: center;">Page 160</p>
<p>1 now, two years after OTM's launch, after my client's 2 launch. But they don't advance any such case. 3 Then at paragraph 91 of my learned friend's 4 skeleton: 5 "The OOP rule has the object and has the effect of 6 restricting competition in the property portal 7 market~..." 8 Well, this paragraph, 91: 9 "As explained in section F1 above, there is ample 10 evidence that the subjective intent behind the OOP rule 11 and its objective purpose, having regard to its terms 12 and the legal and economic context, was to restrict 13 competition in the UK property portal market by denying 14 listings to Zoopla and thus diminishing it as 15 a competitive force and achieving a tipping point at 16 which Zoopla would shrink rapidly and OTM would grow at 17 its expense. The OOP rule therefore plainly has the 18 object of restricting competition in the UK property 19 portal market." 20 That is a spectacular non sequitur, and that 21 paragraph, in our submission, with its focus on the 22 supposed subjective intent of Agents' Mutual, might 23 charitably be described as legally threadbare. 24 There is nothing illegal about the number 3 player 25 wanting to be number 2 and then number 1.</p> <p style="text-align: center;">Page 159</p>	<p>1 that it is, with the analysis of market power that we'll 2 come to in a moment, if there had been any such concern. 3 So the CMA is plainly not concerned about the object 4 point, which is now all that my learned friend has left 5 so far as the estate agent market is concerned in the 6 context of OOP. The CMA's concerns, such as they are, 7 are hypothetical and prospective, so far as they concern 8 my client. You get that in particular from page 5395, 9 but also from the first paragraph, actually, at 5393. 10 Sorry, I'm taking it too quickly. 5393, the first 11 paragraph, the last sentence: 12 "We would also like to highlight some potential 13 concerns around the current rules of Agents' Mutual 14 should OnTheMarket establish a position of market power 15 in the future." 16 We just saw before that short break that we are 17 country miles away from market power. 18 Then over the page at 5395, under the heading "Other 19 concerns with the rules", could you just cast your eyes, 20 please, over those next two paragraphs: 21 "We have received information, we don't know from 22 where. We could no doubt make educated guesses but it 23 doesn't matter." 24 If you could read those paragraphs, please. 25 (Pause).</p> <p style="text-align: center;">Page 161</p>

<p>1 Obviously the reference to the plus one rule, that 2 is CMA language for OOP.</p> <p>3 The CMA's position set out in this letter is 4 entirely in line, first, with orthodox economic theory 5 applicable to what are, as my learned friend's annex to 6 their skeleton argument recognises, which is in many 7 ways an unsatisfactory document that we don't accept to 8 be a neutral summary of the experts, but even given all 9 its faults, identifies at paragraph 4, I think it is, 10 that we are dealing here, both experts agree, with 11 vertical agreements, and the CMA's position is entirely 12 in line with orthodox theory applicable to vertical 13 agreements. Second, it is entirely in line with the 14 position of Mr Bishop in his evidence.</p> <p>15 Mr Parker, for his part, and we'll obviously have to 16 ask him some questions about this, takes a heterodox, 17 not to say, with respect, heretical line which we will 18 have to explore with him in due course.</p> <p>19 So the object case that my learned friend is left 20 with on the estate agent market is frankly hopeless.</p> <p>21 I then want to say something about Bricks and 22 Mortar, which is the other point that the CMA deals with 23 in that letter. The CMA has expressed a substantive 24 view about Bricks and Mortar. Can I ask you to take 25 H5/2903. It is a circular email, a "Dear Agent"</p> <p style="text-align: center;">Page 162</p>	<p>1 and the relevant extract is at 3379, the paragraph 2 beginning "The directors believe". There is 3 a three-line paragraph which explains the rationale 4 behind the so-called Bricks and Mortar rule, and there 5 are other places where Mr Springett articulates the 6 reason for this provision. I will give you a couple of 7 references. One I am not going to go to is H7/4010, 8 where eMoov complained about the rule, and 9 Mr Springett's response to their querying of the rule, 10 they do that at 4011 to 4012. Mr Springett's draft 11 response is at 4016, and he says in the sixth and 12 seventh paragraphs:</p> <p>13 "In making this offer, AM is simply a members 14 organisation addressing specific albeit a very large 15 segment of the residential property marketing universe. 16 It is no different in principle from, say, Rightmove 17 having a policy that it does not accept private vendor 18 or landlord listings."</p> <p>19 It goes on to say that:</p> <p>20 "Agents' Mutual recognises there is a difference 21 between online agent services on the one hand, and those 22 of the locally visible, office-based, full-service 23 agents who are its members. This is surely consistent 24 with the marketing message of internet-only agents such 25 as your own. The different level of reliance on the</p> <p style="text-align: center;">Page 164</p>
<p>1 email -- so it is from Agents' Mutual to lots of people 2 including Mr Springett:</p> <p>3 "Dear Agent, Agents' Mutual is committed to 4 strengthening the competitive collective position of 5 full-service, office-based estate and letting agents. 6 That is why we won't be accepting membership from 7 online-only agents who depend almost entirely on the 8 Rightmove/Zoopla duopoly to deliver their part-service, 9 low budget services."</p> <p>10 And then there is reference to eMoov, and then this: 11 "Online agents currently operate at the fringes of 12 the broader market. The fact remains that over 13 90 per cent of vendors and landlords rely on the 14 professionalism and local knowledge of traditional firms 15 to achieve the highest price and therefore to provide 16 the best overall value."</p> <p>17 And as an explanation of the rationale, which is a 18 perfectly lawful rationale, it may or may not be 19 a sensible business decision to have taken, it might or 20 might not have proven to be attractive to agents, though 21 in fact it did. There is an explanation for it in the 22 information memorandum.</p> <p>23 Can I just give you the best reference for that. It 24 is H6/3376. That should, I think, be the start of the 25 relevant document, which is the information memorandum,</p> <p style="text-align: center;">Page 163</p>	<p>1 major property portals between the two models is clear." 2 There is another reference which I do want to show 3 you very briefly, H8/4272. In an email exchange 4 in November 2014, Mr Springett to some of the leading 5 players behind OnTheMarket, Agents' Mutual, he refers 6 there:</p> <p>7 "Please find attached a vendor landlord leaflet." 8 If you go over the page, at 4274 there is the 9 leaflet, and if you go over the page again, still in the 10 leaflet.</p> <p>11 The point is that 4275, in the middle of the page, 12 the middle column, under the heading "Locally based 13 expert agents", there is the commercial rationale for 14 the Bricks and Mortar rule. It was seen as a selling 15 point for OnTheMarket. It is a selling point because: 16 "The members are locally based. They will manage 17 the process of selling or letting a property from 18 beginning through to completion ...(Reading the 19 words)... offering a full service to help them 20 understand everything your property has to offer. Your 21 property will not be mixed up with others being marketed 22 by budget internet-only agencies or private sellers or 23 landlords."</p> <p>24 So that is simply the commercial decision, that's 25 where OnTheMarket was targeting itself, seeking to</p> <p style="text-align: center;">Page 165</p>

<p>1 attract agents to join it to make it a viable 2 proposition, and there is nothing unlawful about that. 3 Can I say a word quickly about cost per lead and the 4 OFT. My learned friend's skeleton argument at 5 paragraph 106.1, the last sentence refers to the OFT 6 using cost per lead as a key metric, to use Mr Harris' 7 words, in considering the competitive effects of the 8 Zoopla merger. He refers to the OFT decision in 9 paragraph 59. He gives you the reference F1/327. 10 In fact, paragraph 59 is merely observing what the 11 parties' business plan said. The parties, of course, 12 were Zoopla and Primelocation, advised, as it happens, 13 by Mr Parker whose analysis -- here's one we made 14 earlier -- we see now presented in his evidence in this 15 case. 16 The reference to cost per lead was a passing 17 observation within the 15-paragraph section headed 18 "Increased rivalry to Rightmove", and the only paragraph 19 of the whole decision where the phrase "cost per lead" 20 appears is that paragraph 59. Mr Harris -- he didn't do 21 this this morning, to be fair to him, but it seemed to 22 us in his skeleton he was trying to elevate the concept 23 of cost per lead as if it had the imprimatur of the OFT, 24 and if that is what he is saying, he is wrong, because 25 it doesn't.</p> <p style="text-align: center;">Page 166</p>	<p>1 "The restriction on promoting other portals is on 2 its face an anti-competitive provision, in that it 3 restricts existing or new entrant portals from having 4 access ..." 5 Down to "in perpetuity". 6 With respect, we find the first sentence of 7 paragraph 127 of Mr Harris's skeleton hard to 8 understand, its reference to on its face an 9 anti-competitive provision. It seems to be an object 10 point, but if it is an object point, it can't possibly 11 satisfy the legal tests, the Cartes Bancaires and all 12 the other cases, and the rest of that paragraph, 127, is 13 attacking a straw man. We don't suggest that this 14 provision is indispensable; we never have. So that's 15 a complete non-point. 16 The other point I want to say something about is 17 severability, see paragraph 76 of my learned friend's 18 skeleton argument. Now, we don't take issue with 19 paragraph 76 of my friend's argument, written argument, 20 as a statement of the legal principles. Everybody knows 21 this, even me, paragraph 76, as a statement of 22 principle. But when one looks at where the point is 23 then developed, if you look at paragraph 16.5 -- so we 24 have to go back now to paragraph 16 of my learned 25 friend's skeleton, to see what they say about</p> <p style="text-align: center;">Page 168</p>
<p>1 THE CHAIRMAN: Is there an agreed definition of what exactly 2 a lead is? 3 MR MACLEAN: I know the Tribunal has been struggling 4 manfully to see if there is agreement. I don't know 5 whether you have had the opportunity yet to see the 6 document that has come in from the expert? 7 THE CHAIRMAN: No, we see that something has come in. 8 MR MACLEAN: Something has come in, that is exactly right. 9 I don't know -- I did see that document when it came in 10 yesterday. I am afraid I haven't got my head round the 11 detail of it but -- 12 MR FREEMAN: Have they agreed that point? 13 MR MACLEAN: They haven't agreed much. I am told there is 14 no real agreement. 15 THE CHAIRMAN: Perhaps we'll resume on that when we see the 16 materials. 17 MR MACLEAN: I think so. And I have mentioned paragraph 56 18 of the OFT report already, which is, as we see it, 19 closer to the mark. 20 Can I say a word about the other restriction which 21 Mr Harris relies on, though I think rather more faintly 22 than some of the others. This is a restriction on 23 promoting other portals. 24 What he says in paragraph 127 of his skeleton 25 argument, right at the end:</p> <p style="text-align: center;">Page 167</p>	<p>1 severability because they say at every turn that 2 severability doesn't work. 16.5 is dealing with 3 severability of OOP. 16.6 a different point, that's 4 procure, we can leave that to one side for the moment. 5 16.7 is dealing with severability on Bricks and Mortar, 6 and 16.8 is dealing with severability and restricting 7 promoting other portals. 8 Can I take them in reverse order. I can take 16.7 9 and 16.8 together because, with respect to my learned 10 friends, there is nothing of any substance at all in 11 16.7 or 16.8. There is no explanation of why our 12 argument that if there is anything in these points 13 nonetheless they are severable is wrong. There is just 14 an assertion that it is wrong. But there is no 15 explanation and Mr Harris hasn't ventured one today. 16 So we are proceeding for present purposes on the 17 basis -- and this will be our closing submission I am 18 sure -- that my learned friend has no sustainable answer 19 for our submission on severability of Bricks and Mortar 20 or the restriction on promoting other portals. 21 He does venture an answer to our case of 22 severability of OOP. He does that in 16.5. What he 23 says is this: 24 "The OOP rule is not severable from the remainder of 25 the listing agreements. Indeed, AM's case is that the</p> <p style="text-align: center;">Page 169</p>

<p>1 OOP rule is an absolutely critical and essential element 2 of all such agreements."</p> <p>3 But the trouble with that submission, we 4 respectfully suggest, is that it is met by the point 5 that we make at the very end of our own skeleton 6 argument at paragraphs 142 and 143, where we say, 142: 7 "If, contrary to the above, the OOP rule is void and 8 unenforceable, whether in itself or as part of some 9 wider agreement, it is severable from the wider 10 contract. Applying the factors set out in the legal 11 test, A, B and C [this is the point], the contract is 12 not substantially modified because the question of 13 severability would arise only if the rule had been found 14 not to be indispensable to the operation of the contract 15 and of Agents' Mutual."</p> <p>16 So my learned friend's attempt in 16.5 to answer our 17 case on severability, in our submission, just doesn't 18 work.</p> <p>19 There are three points left that I want to touch on. 20 I will do them as quickly as I can. The first is the 21 collective boycott suggestion, about which I fear we are 22 going to hear more than enough next week in the course 23 of the evidence, but it is important to bear in mind as 24 we set out in our skeleton argument what the case is on 25 collective boycott. It is set out in my learned</p> <p style="text-align: center;">Page 170</p>	<p>1 bottom of the page, "Also I do have one concern" says 2 Mr Hughes. The bit I want is the short paragraph at the 3 top of the page, "I know what you say."</p> <p>4 In bundle H7 if you would turn, please, to page 3812 5 there is another email to Mr Springett this time from 6 a Mr Newell and he says at the bottom of the page: 7 "He explained West Wales are dropping Rightmove and 8 sticking with ZPG as a group of agents and want all of 9 Wales to do the same as they have offered West Wales..."</p> <p>10 It sits rather oddly with the suggestion there is 11 a collective boycott of Zoopla that it was so successful 12 that all of Wales decided to stick with Zoopla and drop 13 Rightmove.</p> <p>14 But Mr Springett's response is at the top of the 15 page. We see it is his email and at 3812, and this 16 really encapsulates Mr Springett's and my client's 17 position.</p> <p>18 "Thanks for this. Our advice is to stay with the 19 portal that will most protect your business in the 20 period while we are getting established."</p> <p>21 And there are other examples. There are other 22 examples including in the email which Mr Springett sent 23 to Mr Rook, it is in the same bundle. I will just spend 24 a moment on this if I may. We dealt with this in the 25 skeleton argument. My learned friends, I fear, get</p> <p style="text-align: center;">Page 172</p>
<p>1 friend's amended defence bundle A, tab 3, page 48 and 2 the allegation is that there was an anti-competitive 3 agreement or concerted practice collectively to boycott 4 Zoopla and Primelocation. And my learned friends plead 5 that out over paragraphs 38, 39 and 40. And then they 6 move on to something else. And we have dealt with this 7 in our skeleton argument. We have dealt with those 8 paragraphs extensively and in detail and I am not going 9 to repeat what we've said there.</p> <p>10 What we say is, and again this was flagged in the 11 skeleton, is that there is no evidence of any substance 12 at all of my client's participation in agent discussions 13 as to which portal to drop, still less of any collective 14 boycott of Zoopla. Of course Mr Springett in many 15 instances had his own view as to what course would be 16 prudent from the point of view of a particular OTM 17 member but he was scrupulous in making clear this was 18 a decision not for him or for Agents' Mutual but for 19 each agent.</p> <p>20 Can I just give you two or three references which 21 encapsulate Mr Springett's position. The first one is 22 in H3 at page 1446. In answer to an email from 23 a Mr Hughes, 1447, which was an email at the bottom of 24 the page, you see the reference to "Also I do have one 25 concern". Does the Tribunal see that? H3/1447, at the</p> <p style="text-align: center;">Page 171</p>	<p>1 quite excited about the email at page 3981. 398 is an 2 email from Mr Springett to Ms Whiteley saying: 3 "Much better if they leave Z. Should I have a go?"</p> <p>4 What happens is that Mr Springett has a word the 5 following day, a chat, a telephone call with Mr Rook and 6 his email to Mr Rook following that call is at page 3994 7 where he summarises what they talked of earlier. We 8 will no doubt see this email again. The point I want 9 for present purposes is the middle of the page: 10 "The easiest situation to sustain is where OTM 11 agents choose to retain the portal they each consider 12 the strongest for their business."</p> <p>13 The final example on this point in bundle H8 at 14 page 4270. At 4271 in the middle of the page there is 15 an email from Mr Norwood to Kaylene Oliveira: 16 "Kaylene, hello, I hope you are well. I am writing 17 to the agents representing the board of Agents' Mutual 18 asking (a) if they have yet decided which of the two 19 major existing portals they are dropping to comply with 20 the no other portals rule (b), if all of the AM board 21 agents are combining to maximise the effect of this rule 22 by agreeing to adopt the same portal."</p> <p>23 To which the answer is Mr Springett at 4270 at the 24 top of the page: 25 "The answer to (a) is up to individual firms and in</p> <p style="text-align: center;">Page 173</p>

<p>1 answer to (b) of course is that the directors do not 2 discuss and would never discuss the portal choices their 3 own firms will make." 4 And you will find another reference in the same 5 bundle just for your note, I am not going to turn it up 6 at 4464 it is all to the same effect. 7 Just a word about the four way meeting. Mr Harris 8 didn't say much about that but you have seen in the 9 pleadings the four way meeting. Can I just tell you 10 where you will find the note of the four way meeting, 11 and it is common ground that this note, Mr Springett's 12 note, reflects a discussion that took place. And it is 13 bundle H14 at page 7734. When I talk about the four way 14 meeting the Tribunal by now knows what I have in mind is 15 the meeting that took place involving someone from 16 Countrywide, somebody from Connells somebody from LSL 17 and Mr Springett. 18 THE CHAIRMAN: Are we still dealing with collective 19 boycotts? 20 MR MACLEAN: I think it is the same story and Mr Harris' 21 view of the world. 22 THE CHAIRMAN: You haven't moved on. 23 MR MACLEAN: So the note of the meeting is 7734 and 7735. 24 The piece of paper which Mr Springett in his evidence 25 says he presented at the meeting is 7736. And his own,</p> <p style="text-align: center;">Page 174</p>	<p>1 Two final points if I may -- 2 MR FREEMAN: Just before you do, can I see that I understand 3 your position on collective boycott. You would say, and 4 correct me if I am wrong, Agents' Mutual did not 5 organise or take part in any joint action, right? 6 MR MACLEAN: Yes. 7 MR FREEMAN: There may have been joint action. You don't 8 know, you can't stop individual agents getting together 9 and doing things which may or may not have been the 10 right side of the law. You take no position on that. 11 MR MACLEAN: Yes. 12 MR FREEMAN: On the assumption that Agents' Mutual was not 13 involved in it, then the fact that estate agents may 14 between themselves have decided collectively or in 15 little groups of collectivities that they would move 16 from Zoopla to Agents' Mutual, that doesn't vitiate the 17 arguments you make about the effect of the OOP rule. 18 MR MACLEAN: Precisely. 19 MR FREEMAN: That is your position. 20 MR MACLEAN: Precisely and I made the submission earlier 21 Mr Harris accepts that he isn't taking any issue with 22 the agents having collective purchase negotiations. 23 Now, when one just holds that thought, in the 24 circumstances where you have an OOP rule and you are 25 thinking about joining OnTheMarket and there are only</p> <p style="text-align: center;">Page 176</p>
<p>1 as it were, agenda, for the meeting is 7737. I am not 2 going to now through all of this but the point I wanted 3 to make was that in my learned friend's skeleton 4 argument at paragraph 44. My learned friend says "It is 5 common ground that Mr Springett suggested", and then you 6 see those words which are confidential. If you just 7 turn to paragraph 44: 8 "It is common ground, if you just read that 9 sentence, please ending with the words "as one other 10 portal." That is emphatically not common ground and if 11 you look at the note of the four way meeting 12 Mr Springett does not make the suggestion of 13 compensation when they all choose to drop Zoopla. And 14 that is, with respect, a rather important error in my 15 learned friend's skeleton, paragraph 44 is seriously 16 misplaced. 17 He did not put forward a proposal in the manner 18 alleged. He would have been happy to put 1, 2, or 3 of 19 them as members of Agents' Mutual with the OOP rule in 20 force. 21 The discussion of the OOP rule was overtaken by 22 Connells causing Gascoigne Halman to list on Zoopla as 23 well as Rightmove and OnTheMarket shortly afterwards, 24 the following month, thereby triggering this litigation 25 and that is where that disappeared to.</p> <p style="text-align: center;">Page 175</p>	<p>1 these other two shows in town apart from the other 2 little tiddlers then in effect what you are doing is, if 3 there is a collective decision going on, that is 4 a collective decision to purchase membership, become 5 a member of OnTheMarket. Structurally it is exactly the 6 same. 7 MR FREEMAN: That I think you would agree is there could be 8 risks involved in estate agents -- 9 MR MACLEAN: Yes. 10 MR FREEMAN: -- discussing collectively their future actions 11 and I think the OFT's open letter rather makes that 12 clear, doesn't it? 13 MR MACLEAN: It does, and when the CMA sent further 14 communications my clients who had always been scrupulous 15 on this point followed up and made it even clearer than 16 it had been hitherto in the information memorandum as to 17 what the position should be, but I showed you the slide 18 earlier of next steps where it is made perfectly clear 19 in every presentation that Mr Springett was giving that 20 it is a decision that has to be taken on an individual 21 basis by the individual members. 22 MR FREEMAN: And you don't think the fact that numerous 23 agents must have been well very aware from presentations 24 that Mr Springett would like them to move to his portal, 25 that doesn't taint his non-involvement, is that right?</p> <p style="text-align: center;">Page 177</p>

<p>1 MR MACLEAN: No, it doesn't. 2 MR FREEMAN: They can't implicate him just by the awareness 3 of what his wishes are, which he has made very clear. 4 MR MACLEAN: Well, his position is, as I have just shown 5 you, that you, the individual member joining 6 Agents' Mutual, must first of all take your own course; 7 secondly, my advice would be to take the course which is 8 in the best interests of your individual circumstances 9 now. 10 In some cases, no doubt, that might have meant that 11 it was, as it were, obvious or may have been 12 sufficiently clear to somebody communicating with 13 Mr Springett that they both knew that Rightmove would be 14 the person to leave, in some cases Zoopla, and there 15 were groups of estate agents around the country some of 16 whom decided to ditch Rightmove, and there were some 17 other groups which decided to leave Zoopla. Whether 18 those arrangements that they entered into were on the 19 right side or not of some legal line is not a matter for 20 this tribunal or will need to be resolved by this 21 tribunal, and it is not a matter on which I take any 22 particular position. 23 MR FREEMAN: It could affect the theoretical argument about 24 the effects of the practice. I am speculating because 25 we haven't got to that yet.</p> <p style="text-align: center;">Page 178</p>	<p>1 a very, very important point. Whether the concerted 2 practice argument sticks or not it is a very important 3 point. 4 MR MACLEAN: Yes, well, we have, I hope, made our position 5 clear. We will see where it goes on the evidence and, 6 once we have heard the evidence, we'll obviously make 7 submissions about it. 8 I have two final points which I hope I can make 9 shortly. 10 The first is to identify what is, with respect, 11 another error in my learned friend's skeleton argument 12 in paragraph 93. I hope I can do this very quickly, not 13 least because you, sir, Mr Chairman, were party to the 14 relevant decision. 15 If you look at paragraph 93, Mr Harris is dealing 16 here with the relevant counter-factual point, and what 17 he says is: 18 "Mr Parker reaches this expert conclusion 19 irrespective of whether the OOP rule was necessary to 20 OTM's entry. Put another way, Mr Parker considers the 21 OOP rule has caused appreciable harm to competition both 22 relevant to ...(Reading the words)... in that regard it 23 should be noted that the assessment of effect must be 24 made by reference to a counter-factual that is based 25 inter alia on realistic situations that might arise in</p> <p style="text-align: center;">Page 180</p>
<p>1 MR MACLEAN: One might in a different case, in a differently 2 structured case, where different points were pleaded 3 than are pleaded here. What we are dealing with here is 4 whether Mr Harris has got some competition defence to 5 claim against him for breach of contract as the chairman 6 pointed out this morning. 7 MR FREEMAN: You are saying you can't be part of a concerted 8 practice without intending to be part of a concerted 9 practice. 10 MR MACLEAN: Well, my clients weren't part of any such 11 concerted practice on the facts. 12 MR FREEMAN: Yes, okay. It is one of the most difficult 13 areas of the law to actually work out whether 14 a concerted practice exists or not. I am sure you know 15 that. 16 MR MACLEAN: I have shown you the documents where there is 17 no mystery about Mr Springett's modus operandi in terms 18 of building support for this new venture, which was to 19 make presentations to groups of people, intelligently 20 chosen people, namely the leading independent estate 21 agents in every particular area, no doubt because it is 22 obvious that if one particular player in a particular 23 area decides that this is a jolly good thing then other 24 dominos may follow. That is just common sense. 25 MR FREEMAN: As the chairman said at the beginning, it is</p> <p style="text-align: center;">Page 179</p>	<p>1 the absence of that restriction. The counter-factual is 2 not limited to the situation that would arise in the 3 absence of that counter-factual." 4 Footnote, "Mastercard paras 108 to 111". 5 That is simply wrong. I haven't got the time, 6 I think, to develop it, but paragraphs 107 to 111 of 7 Mastercard are all in the context of the ancillary 8 restraint discussion, and not at all in the context of 9 the counter-factual for the effect question, which is 10 dealt with in a separate part of the judgment beginning 11 at 154, but see paragraphs 161 and 162 and 163 and 164 12 of Mastercard. 13 The point was picked up in Sainsbury's, a decision 14 to which you, sir, were party, with Mr Justice Barling. 15 Can I just show you that very quickly. I am skipping 16 over Mastercard because you deal with the relevant 17 points in Sainsbury's. K3/35 at page 73. This is a 18 decision from last July. Page 73, paragraphs 103 and 19 following. Then 105. It is 105(3): 20 "The allegedly harmful effect is then assessed by 21 reference to what the position would have been in the 22 absence of ...(Reading the words)... is indeed 23 restrictive of competition." 24 Then, sir, you dealt with the O2 case. And then 25 at 109 -- sorry, 109 he set out the question, then he</p> <p style="text-align: center;">Page 181</p>

<p>1 dealt with O2, and then at 112 the Tribunal breaks it 2 down into stages, as it puts it, and then you see the 3 discussion of Mastercard at 113, 114, and then at 116 4 you say: 5 "Pausing there, it is easy to see why this should be 6 the case. The question of whether it is impossible to 7 carry on a primary operation or activity without 8 a particular term is very different from the question of 9 whether that term is restrictive of competition, which 10 invokes an enquiry as to the nature of competition in 11 the relevant market absent the restriction in question." 12 And a discussion of ancillary restraints in this 13 judgment takes place later at paragraphs 274 to 277. 14 So the point is that in paragraph 93 my learned 15 friends have misread or misapplied paragraphs 108 to 111 16 of Mastercard out of context, and the position which is 17 taken in Sainsbury's is underlined by the most recent 18 decision in Mastercard, which I think will be added to 19 the authorities bundle. 20 The second and final point is the "shall procure" 21 point. We dealt with this in an annex to our skeleton 22 argument because it doesn't seem to us to be a point 23 which really has any real traction in competition law 24 terms at all. 25 My learned friend told the court earlier that</p> <p style="text-align: center;">Page 182</p>	<p>1 THE CHAIRMAN: Yes. 2 MR HARRIS: In no particular order, Mr Maclean takes issue 3 and says theres a misleading paragraph in my skeleton. 4 It had some blue writing on it. I have now lost that 5 page. 44. 6 Can I invite you to just turn up bundle C, tab 4. 7 This is the fifth witness statement of his chief 8 witness, Mr Springett. The bundle numbering is page 68 9 to paragraph 16.7. You can see that Mr Springett says 10 he didn't make any specific financial proposal but he 11 explained that if the three corporates joined 12 Agents' Mutual -- 13 THE CHAIRMAN: Should we read it to ourselves, because this 14 is marked -- 15 MR HARRIS: No, because Mr Maclean read out the substance of 16 my blue in open court earlier on, so this is yet another 17 point which is not confidential in fact. 18 "... thereby strengthening our position as a third 19 major player in the market, the upside that they might 20 currently expect from their holdings in ZPG over the 21 ensuing years. I explained that it might be possible 22 that membership of AM would lead to financial benefits 23 which might go some way to compensate them for that 24 reduction." 25 So that is the foundation of that paragraph. We</p> <p style="text-align: center;">Page 184</p>
<p>1 Mr Holmes and I were wrong to suggest what was meant by 2 a "shall procure" or "shall ensure" clause. Of course, 3 one preliminary difficulty with that assertion, which 4 wasn't backed up by any argument, is that it wasn't my 5 assertion or Mr Holmes's assertion, it is 6 Lord Hoffmann's exposition in Lloyd's v Lloyd's at 7 paragraph 21, and that really is the beginning, the 8 middle and the end of it, because once one understands 9 a "shall procure" or "shall ensure" clause is not a 10 requirement to do anything at all, it is just an 11 agreement to bear the economic and legal consequences if 12 a particular state of affairs does or doesn't arise, 13 depending on how the clause has been drawn up. 14 Once one grasps that rather fundamental but very 15 simple point, then all of my learned friend's objections 16 to how this might have monstrous effects all falls away. 17 It is a complete, from his point of view, non-point, and 18 that wouldn't detain the Tribunal very long. 19 Can I check with Mr Holmes how many points I have 20 forgotten ... 21 Unless I can assist you any further, those are my 22 opening submissions. 23 THE CHAIRMAN: Thank you very much, Mr Maclean. 24 Housekeeping 25 MR HARRIS: A couple of housekeeping matters, if I may.</p> <p style="text-align: center;">Page 183</p>	<p>1 will find out what the witnesses say about that orally. 2 The second housekeeping point -- there are only 3 three -- is Mr Maclean took you to my defence in 4 bundle A, tab 3, amended defence, suggesting that the 5 case was all and exclusively about a collective boycott 6 of Zoopla. He did so because he only read the heading 7 that appears on internal page 48 at tab 3. As a result 8 of that misreading or misunderstanding, of course, in 9 the oral submissions that he has just made, as well as 10 in his written submissions, he completely overlooks the 11 other ways in which the horizontal collective boycott 12 allegations and concerted practice cases are put. So 13 you need to pick it up first of all at paragraph 26 on 14 page 42, which is the first place that introduces to 15 what is particularised later on. If you look at 26 on 16 42, "As particularised further below", the second 17 sentence, so the particulars are the ones that begin on 18 page 48: 19 "As particularised further below, the OOP rule is 20 void and unenforceable because it amounts to further or 21 alternatively forms part of ..." 22 And then all the variants are put in expressly in 23 issue: 24 "... an agreement, or a concerted practice ..." 25 And then we name the people:</p> <p style="text-align: center;">Page 185</p>

<p>1 "... and/or a decision by an association of 2 undertakings, that has the object or the effect ..." 3 It is very clear. It is all of those different 4 three types and it is as particularised further below. 5 Then when you get to the particulars, which is page 48, 6 so just above 38. I accept that the short form title 7 only refers to one example, collectively to boycott 8 Zoopla, but what is important is the substance, of 9 course, not of the short form title but of the 10 paragraph. 11 If you look at 38 you can see that we say it is 12 a breach, formed part of a wider concerted practice, we 13 name the people, and this is against the background of 14 above it being an agreement, a concerted practice or a 15 decision of association of undertakings, and then over 16 the page we give various dates, and: 17 "... subsequently between the claimant and its 18 members, or some of them, by which those undertakings 19 substituted practical cooperation as to the property 20 portals which the estate agent's undertakings in 21 question would use to market their relevant sales and 22 lettings." 23 So the decision about whether to join or not is 24 included in that, and I will make good that point 25 further in a minute by reference to some of the other</p> <p style="text-align: center;">Page 186</p>	<p>1 and likewise at (h)(i), again, it refers in terms about 2 decisions to join the claimants. 3 And so the passing reference by Mr Maclean only to 4 the title, and then the resounding by its silence lack 5 of reference to any of these other forms of concerted 6 practice, misplaced. That is the second housekeeping 7 point. 8 The third one is a little more mundane. You 9 probably have this somewhere in one of the hundreds of 10 files, but just for the ease of reference I will hand it 11 in. It is about the timetabling for Monday. If 12 Mr Maclean wishes to see a copy -- he and I have already 13 discussed this. 14 But just so that the Tribunal is on the same page as 15 the parties, Day 1 of course is today, that is now 16 finished. Day 2, I am calling my witnesses to give the 17 oral evidence part of the case, not the documentary part 18 but the oral evidence, and it is going to be Miss Glynis 19 Frew, you will find her witness statement in bundle D; 20 Mr David Livesey, who as you know is the chief executive 21 of Connells, and then we will also have available on 22 Monday, in case we get there, Mr Notley, who is the COO 23 of Zoopla. 24 In that regard, I have just been handed a note 25 saying that the tube strike has been cancelled,</p> <p style="text-align: center;">Page 188</p>
<p>1 particulars: 2 "... and would use to then market ...(Reading the 3 words)... and vendors for the risk of competition in 4 relation to the choice of property portals." 5 So that includes an agreement, it includes 6 a concerted practice and it includes a decision of an 7 association undertaking to cover both joining in a group 8 and as to which choice of property portal you adopt, and 9 then just to further confirm the fact that it expressly 10 includes that which is completely ignored by my learned 11 friends, the joining of OTM, can you see over the page 12 at (f) -- so we are now into the text of paragraph 40, 13 which has lots of subparagraphs: 14 "The claimant's practice of recruiting members by 15 holding group meetings ..." 16 We are going to learn a lot more about that next 17 week: 18 "... by reason of the facts and matters set out in 19 subparagraphs (j) to (l) below, the defendant infers 20 that such meetings are likely to have been used 21 ...(Reading the words)... as to whether they intended to 22 join OTM and/or which other property portal they would 23 use." 24 At (g)(ii) -- I'm not going to read that out -- that 25 also refers in terms to decisions to join the claimant,</p> <p style="text-align: center;">Page 187</p>	<p>1 presumably for Sunday/Monday. I am not sure that makes 2 any difference. We were going to just start at 10.30 3 anyway. 4 THE CHAIRMAN: Perhaps we could ask Mr Maclean what his 5 preference is there? We suggested 10.30 because of the 6 tube strike. We will be more than happy to start at, 7 say, 9.30 if that were to assist. 8 MR MACLEAN: I am not sure it would assist. 9 THE CHAIRMAN: Shall we review the matter -- 10 MR MACLEAN: I would prefer to -- 11 THE CHAIRMAN: -- just before 3 o'clock. 12 MR MACLEAN: Yes. 13 THE CHAIRMAN: In that case we will say 10.30 on Monday, but 14 thank you, Mr Harris. 15 MR HARRIS: I am very grateful. And you might just want to 16 keep this inside your notebook or something as a road 17 map. 18 So the next day it will be Mr Notley if he's not 19 finished or been started, Mr Forrest and Mr James, and 20 then the remaining days of next week are Mr Maclean 21 calling his three witnesses, and principally 22 Mr Springett being cross-examined. I think the order is 23 as shown here, Mr Wyatt, Mr Symons and then 24 Mr Springett. 25 MR MACLEAN: It is for logistical reasons that they are</p> <p style="text-align: center;">Page 189</p>

1 called in that order. People can't be here --

2 MR HARRIS: I can't resist just closing the hearing with

3 a reference back to my learned friend's remarks

4 concerning Mr Andy Murray. Of course, it is a wholly

5 inapt metaphor. Mr Andy Murray practised like mad and

6 succeeded in going from number 2 to number 1 on the

7 basis of the merits of his abilities. What he didn't do

8 was take a knife and cut Novak Djokovic's hamstring so

9 that he could achieve the number 1 status.

10 THE CHAIRMAN: Then he got knocked out by number 16, didn't

11 he?

12 MR HARRIS: Perhaps he merged number 16 with number 8, who

13 knows, but in any event, that of course is all the

14 difference. If this were an Andy Murray situation we

15 wouldn't be here, but it is not.

16 So with no further ado, that's --

17 THE CHAIRMAN: Thank you. Then we'll resume at 10.30.

18 Obviously we are anxious that we don't have to

19 vacate the courtroom of people not admitted to the

20 confidentiality agreement when there is

21 cross-examination going on. Equally I don't feel

22 inclined to require one side to clear with the other

23 side what documents they are going to put to witnesses.

24 We'll see how we go, but I would invite both parties

25 when they are cross-examining to see if it can be done

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1 by reference to looking at a document without getting

2 either the witness or the questioner to read out the

3 highlighted parts or see how we go on that basis.

4 If we reach a point where either the questioner or,

5 more importantly, the witness simply cannot proceed

6 without referencing stuff that had been highlighted then

7 clearly we will vacate, but I hope we can proceed on the

8 basis that the discussion and the cross-examination can

9 be open rather than in closed session.

10 Unless there is anything else, until 10.30 on --

11 MR MACLEAN: The first two were rather curious housekeeping

12 points, but there we are.

13 THE CHAIRMAN: I thought they were more points in reply, but

14 I didn't think it was a point worth making.

15 MR MACLEAN: I will survive.

16 THE CHAIRMAN: Until 10.30 on Monday.

17 (4.45 pm)

18 (The court adjourned until Monday, 6 February at 10.30 am)

19

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