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IN THE COMPETITION

Case Nos. 1257/7/7/16

APPEAL TRIBUNAL

Victoria House,
Bloomsbury Place,
London WC1A 2EB

14 December 2016

Before:

THE HONOURABLE MR JUSTICE ROTH
(The President)
DERMOT GLYNN
JOANNE STUART OBE

(Sitting as a Tribunal in England and Wales)

BETWEEN:

DOROTHY GIBSON

Applicant / Proposed Class Representative

- and -

PRIDE MOBILITY PRODUCTS LIMITED

Respondent / Proposed Defendant

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(a trading name of Opus 2 International Limited)
Official Court Reporters and Audio Transcribers
5 Chancery Lane, London EC4A 1BL
Tel: 020 7831 5627 Fax: 020 7831 7737
info@beverleynunnery.com*

CPO APPLICATION HEARING

APPEARANCES

Mr. de la Mare, Mr. Jones and Mr. Cashman (instructed by Leigh Day) appeared on behalf of the Applicant / Proposed Class Representative.

Mr. Bates, Mr. Armitage and Mr. Williams (instructed by Band Hatton Button LLP) appeared on behalf of the Respondent / Proposed Defendant.

1 THE PRESIDENT: Yes, Mr. Bates.

2 MR. BATES: Just to update you in relation to timings, I have had a think about this overnight
3 and if I am able to cover some of the points which I wanted to cover with Mr. Noble, which
4 I do not think would take me more than about 45 minutes, I think my submissions probably
5 would be done in an hour and a half or something like that so we should be able to finish
6 comfortably today.

7 THE PRESIDENT: That sounds sensible, thank you. MR. ROBIN NOBLE (continued) Cross-
8 examination by MR. BATES

9 MR. BATES: Mr. Noble after your evidence yesterday, I think have begun to grasp precisely
10 what you were saying about why you predict market-wide effects, even if there are only the
11 eight infringements. So I want to make sure, before we go any further, that I have
12 understood it correctly.

13 You have told us that you focused on the effects of the policy because there would not have
14 been any infringements in the absence of the policy; is that right?

15 A. Yes, that is correct. I explained yesterday that there was a policy, the policy is what leads to
16 the eight infringements, and therefore if there were not -- to look at the counterfactual in my
17 analysis I have considered a world in which there is not a policy and there are not eight
18 infringements either.

19 Q. Yes. You said that in the counterfactual, your retailer who is not approached because there
20 is no policy but in the factual you, that is the retailer, are approached and you will
21 presumably have some expectation that even if you do not agree to it that some other people
22 might agree to it and your expectations about what the pricing dynamics might be in the
23 market may be changed because of that. So that is the possible effects not of the
24 infringements but of the policy on retailer behaviour; is that right?

25 A. Yes, that is a mechanism by which the information that -- has flowed in a way that it would
26 not have other side have flowed and therefore pricing dynamics can be affected more
27 broadly and we can see in the evidence the rogue reports and in various other statements
28 that this information flowed very widely.

29 Q. In your first report, which is at tab 17 of the core bundle, at paragraph 5.2, this is your
30 section on the estimate of damages.

31 A. Mm-hm.

32 Q. You say there:

33 "The counterfactual used in this section assumes that Pride's strategy to interact with
34 retailers would have been different absent the infringement, thus Pride's behaviour,

1 that of eight retailers and the behaviour of Pride's other retailers would all have been
2 different in the counterfactual when compared with the factual; how different is the
3 key empirical question."

4 So since you say that how other retailers behaved in the factual situation is the key or a key
5 empirical question, would you agree that, without the empirical evidence needed for
6 answering that question, it is hard to see how you could prove large consumer losses?

7 A. If I did not have any information on that then I think when you are trying to prove the loss
8 then I think you are going to have a difficulty, yes.

9 Q. So you need empirical evidence about the behaviour of Pride's other retailers; you would
10 accept that?

11 A. Yes. When you come -- as I said, when you come to demonstrate the damages that have
12 ultimately been suffered because I am -- a lot of what I am suggesting are ... the damages
13 relate to sales via other retailers, so you do need information from other retailers, that is
14 correct.

15 Q. It is particularly in relation to how the behaviour of those other retailers would all have been
16 different, to use the words that you are using in paragraph 5.2; yes?

17 A. Well, maybe if we judge just break that down a smidgen because what ultimately matters is
18 what people pay and so you can either try and directly observe, is this retailer behaving
19 differently, or you can try and observe, the outcome that is achieved in terms of the price
20 achieved at that retailer, is that different than it otherwise would have been.

21 Q. What matters is not simply how much they pay but why they pay how much they pay, is it
22 not?

23 A. It does matter why they pay what they pay, yes. That is ultimately what the empirical
24 techniques are seeking to try and to demonstrate.

25 Q. So if the only empirical evidence you have is price comparison data that shows that prices
26 for the affected models now are lower than they were in 2010 to 2012, that simply is not
27 going to be sufficient to show that the price difference is attributable to the policy; you
28 would agree with that?

29 A. No, I do not think I do agree with that. Because I think that the question I had understood
30 you to be asking earlier was that, when it comes to actually awarding damages, do you need
31 to show what has gone on at these retailers, and I agreed, I said, yes I believe that to be
32 correct.

33 I think at this stage the question that I am being asked is, do I think it is likely that there is a
34 prima facie case that there is likely to be harm at retailers beyond the eight, and I do not

1 have data on actually prices beyond the eight, but I do have data from the rogue reports and
2 from the collections that we have done that speak to a much broader group of retailers that
3 were in the rogue reports -- I forget how many exactly, I think it was 30 or 40 that I
4 mentioned yesterday -- and we have collected data from the rogue reports at the relevant
5 time during the infringements and also more recently.

6 Q. Let us say then that I agree with your data that shows that prices in this year are 13 per cent
7 lower than they were for the affected models -- for other models that were on sale in 2010.
8 How are we going to conclude from that what the loss to consumers was that is attributable
9 to the infringements or, as you would say, to the policy?

10 A. Well, I think what we are going to -- what I do, is I do an arithmetic during and after
11 analysis which is a method advocated in the European Commission's working paper on
12 quantifying damages. It is in fact the first method they mention in that study. I do not
13 know if we have on a copy of that because it is actually worth just referring to that
14 document because that talks about the kinds of things you need to think about when you are
15 doing that and that is what I have done here. So -- do we have a copy that we could maybe
16 refer to?

17 THE PRESIDENT: I think we do, do we not?

18 MR. DE LA MARE: It is in A3. What we have, sir, is the excerpt from the guide dealing with
19 other infringements but I believe the passage Mr. Noble is referring to is in the passage
20 actually dealing with conventional horizontal infringement --

21 THE PRESIDENT: Yes.

22 MR. DE LA MARE: -- and I am not sure that passage is there but it is in the bundle --

23 THE PRESIDENT: It is quite a long --

24 MR. DE LA MARE: It is in the Butterworth's guide, I believe.

25 THE PRESIDENT: Right. What we have is at tab 76; is that right?

26 MR. DE LA MARE: That is only an extract from the guide, which is what I believe Mr. Noble is
27 referring to, showing the paucity of guidance about vertical --

28 THE PRESIDENT: Yes. We have the contents and then we have the paragraphs 171 onwards.

29 MR. DE LA MARE: That is right.

30 A. Yes. I am talking about -- it is around paragraph 30 or 40 that I am referring to.

31 THE PRESIDENT: Yes, choice of techniques, that sort of thing?

32 A. Yes. Do you have that?

33 MR. DE LA MARE: Butterworth's guide has it, Mr. Jones has reminded me, at page 2105, sir.

1 I believe the passage Mr. Noble might be talking about is around 26 to 27, which is page
2 3109.

3 A. I was actually thinking of paragraph 43.

4 THE PRESIDENT: Once Mr. Noble has it, he will be able to find what he wants as he is quite
5 familiar with it.

6 A. Yes. I helped write the study that was the inspiration for this, so that is why I am so
7 familiar with it.

8 THE PRESIDENT: Yes, I know that.

9 Where is it you would like us to go? Just take your time finding it.

10 A. So if you look at paragraph 38 here, it talks about how:

11 "... one frequently used method consists of comparing the actual situation during the
12 period when the infringement produced effects and the same situation in the same
13 market before the infringement produced effects or after they ceased."

14 MR. GLYNN: Which page is it?

15 A. Sorry, this is on page 2110.

16 MR. GLYNN: Yes I have it.

17 A. Then if one goes to paragraph 43 it says:

18 "Where data are available, the choice between a comparison before and after, during
19 and after, or before, during and after can be determined by a range of factors. It is
20 highly unlikely to find any reference period when market circumstances exactly
21 represent what would have happened in the infringement period had the infringement
22 not occurred. It is only possible to identify a sufficiently similar time period that
23 allows likely non-infringement scenario to be reasonably approximated."

24 The reason I highlight that particular passage is because this section is all about during and
25 after and it starts off by talking about the arithmetic during and after, which is what I have
26 done in my analysis, and it then goes to it talk about more advanced techniques such as
27 regression analysis, and what it describes here is that necessarily these during and after
28 comparisons are imperfect, but, however, they are perhaps as good as one is ever going to
29 get when one is trying to do this kind of analysis.

30 MR. BATES: Mr. Noble, I did not suggest to you yet, at least, that any of those methods are
31 imperfect. The question I am asking you is: what is the exercise that you propose to do in
32 order to show that there is this overcharge that is attributable to the infringement? We have
33 seen what is in this document and we know that you had a hand in writing it and you must
34 have done some thinking yourself about how you are going to demonstrate the overcharge.

1 I am simply asking if you can explain to the tribunal how you propose to do that by a
2 comparison of 2016 prices with 2010/2011 prices.

3 A. Again, I do not know which question we are asking here. Are we asking what one has to
4 show prior to getting disclosure from third party retailers or are we talking about a situation
5 in which one has gone and got that?

6 Q. In the situation where one has got whatever material you think we are likely to be able to
7 get.

8 A. I think we are likely to be able to get material from retailers and, as Mr. de la Mare referred
9 to earlier, I have been involved in some very large scale exercises involving disclosure. The
10 one he referred to was one involving the Local Government Association. There were
11 several hundred participants in that case and those ranged from large national players with
12 really very good databases to very small individual mum-and-dad shops of the kind that we
13 see here where they had only hard copies. So in order to -- in that case the analysis was
14 about passing on and we went in and reviewed those invoices and created a data set.
15 I can envisage that that is entirely feasible in a case like this. If necessary one sends
16 individuals to the stores to go and take the administrative burden away from the storeholder
17 and collates that data and then one can analyse the data. Because I would think it is quite
18 likely that a number of retailers will hold data of the type held by MT Mobility which
19 shows under the circumstances what actual transaction prices were during the relevant
20 periods and after the period of time periods.

21 THE PRESIDENT: Yes I think, Mr. Noble -- and Mr. Bates will correct me if I am wrong -- the
22 point being explored is not how does one get the data, but assuming you get pricing data
23 from a sufficient number of non-infringing retailers in 2016 or even, which is clearly better,
24 in 2012. This is not a cartel across the market; it is a very different kind of infringement.
25 It is not even RPM there is no restriction on the price that even the infringing retailers can
26 charge; it is an advertising restriction. How do you -- in this sort of case, can you deduce in
27 a reliable way from just a change in price that it is due to the infringement? Is that the point
28 being put?

29 MR. BATES: Exactly, sir, yes.

30 THE PRESIDENT: That is what I have understood.

31 A. Yes, and I recognise it is not a cartel, but in a sense the parallel is apt with a the cartel.
32 Because in a cartel situation there are a myriad of factors that could also be causing the
33 prices to move. What I would anticipate is that, as one collates more data one effectively

1 works one's way through the Commission's guide and one starts to use the more advanced
2 techniques.

3 So, for example, if one is concerned that costs may have moved, one can control for that. If
4 one is concerned about entry having occurred, one can control for that by looking at market
5 shares of different players. Actually, as an aside, I would say I have re-reviewed Mr.
6 Allen's statement on that and I actually -- I did not quite read him as saying there is fresh
7 entry from KimCo. I think what I had understood him to be saying was there is rebranding
8 of KimCo's product. KimCo was a player in the market; it was just white-labelling product
9 to other players.

10 So one can go through and factor in these kinds of controls and essentially strip them out
11 because what one is trying to find is that -- to take my example, my analysis, my empirical
12 analysis of the MT Mobility data is finding a 16 per cent movement in price. What you
13 would do with regression analysis or with other statistical techniques, is you would explore
14 a variety of other explanations that might explain why did prices go down?

15 Pure retail price inflation would suggest they go up, so costs may have moved, one can
16 explore that, I have explored that in my analysis. I have not done it empirically but I have
17 done it at the conceptual level and it is not clear to me that costs have moved significantly in
18 this period.

19 So one goes through a long list of these kinds of factors and either controls for them
20 empirically or makes an educated judgment about whether or not it is likely to explain the
21 price effect that you are finding.

22 MR. BATES: So you are now identifying other information, are you, that would be needed, such
23 as information about how much retailers' costs would have moved; is that right?

24 A. I think the primary cost that I am interested in is going to be the marginal costs and we have
25 a very good measure of that, we have the data from Pride itself, we have got the wholesale
26 data set and, as the excellent RBB paper on passing on reminds us, it is primarily the
27 marginal costs of a business that are going to be key in terms of affecting the price
28 determination process.

29 Q. The markets which the retailers are in, would you accept that there are going to be lots of
30 local markets because if, for example, you are a retail store in Nuneaton selling mobility
31 scooters, you are not going to be competing very much with one in Scotland?

32 A. Absolutely, but of course one only needs to worry about whether that changes. So
33 Nuneaton and Scotland will remain the same distance apart and I would expect that
34 Nuneaton and Scotland have a similar population distribution during that period, if one is

1 concerned however perhaps there are new retailers opening in Nuneaton, then again one can
2 seek to gather data on that.

3 We see, for example, in the Pride data set it lists all the different players that it interacts
4 with. We can identify their identifies and look at their addresses and do on. So if one is
5 concerned about a Nuneaton effect, one can, I think, relatively tractably examine that.

6 Q. So you would be gathering data about competition and how it had changed in the 5-year
7 period in all these local markets; is that right?

8 A. I think that is something you would need to consider. It is not obvious to me as I sit here
9 now that that is something that is going to materially affect what is going on.

10 If the market remains of a similar volume over the years and the broad distribution of
11 retailers stayed approximately the same over those periods, then it is quite likely not a lot
12 has changed over that period and, as I think the guide reminds us, that is going to be a good
13 comparison of what the world would have looked like during the factual period absent the
14 infringement.

15 Q. One way of trying to isolate the cause of any price difference is to use a control group of
16 retailers; would you agree?

17 A. Yes. I think -- are you referring perhaps to a cross-sectional technique? Is that --

18 Q. I am not an economist, Mr. Noble, but it seems to me in my simplistic way that if you have
19 got one group of retailers who you are saying were affected by the infringement and then
20 you have another group who were not affected by the infringement, then if you had data on
21 how both of those groups' prices moved and you had enough data then you might able to
22 decide how much of price difference in the market was attributable to the infringement
23 because you have got a control group that was not affected by the infringement.

24 The question I was going to ask you was: given that you hypothesised a cross-market
25 effect, does not that preclude the existence of a control group of retailers that could be used
26 for the kind of analysis I have described?

27 A. Yes. So the reason I said I thought you were referring to go a cross-sectional technique was
28 because I think what you were referring to -- the technique that I have described is a time
29 series technique. So I look at the retailers during the infringement and then I compare them
30 to retailers after the infringement.

31 What I think you are describing is a situation in which one looks at a set of retailers,
32 perhaps the eight, during the infringement and then compares them to another set of
33 mobility scooter retailers also during the infringement.

1 I think that makes sense if you are -- the hypothesis you are trying to test is: do I think that
2 there is only a direct effect. If however the hypothesis is, I think there is a direct effect and
3 a more indirect broader umbrella effect on these retailers, you could try and deploy that
4 technique but I am not sure in a sense what hypothesis it is falsifying so I am not sure what
5 it is showing you.

6 Q. I want to explore with you also the evidence base for this market-wide effect of the policy
7 on retailers' behaviour. Do you accept that the policy itself is described in the decision as
8 an internal policy? I can show you the place if you would like.

9 A. Yes. I believe it is.

10 Q. Yes, for the tribunal's note on the transcript it is decision paragraph 2.112, which is bundle
11 B1, tab 3, page 57. Can I ask you anyway to take up, Mr. Noble, bundle B1?

12 A. Which is that? It is not the core.

13 Q. No, of the non-core bundles. If you go to the decision at tab 3, we are looking at page 12.
14 You will see there the way that the OFT sets out at paragraph 1.12 what the evidence in its
15 possession demonstrates.

16 THE PRESIDENT: Where are you?

17 MR. BATES: This is the summary of the infringement at paragraph 1.12 of the decision, sir.

18 THE PRESIDENT: Before that you referred to 2.112 on page 57 --

19 MR. BATES: Yes.

20 THE PRESIDENT: -- which indeed, as you said, says that this was an internal policy but it is a
21 policy that was being communicated to the eight retailers.

22 MR. BATES: Indeed sir, yes.

23 THE PRESIDENT: So it is internal for the eight retailers who were being told about it.

24 MR. BATES: The important thing -- it is good that we have turned to it.

25 On paragraph 2.112, can I ask you this, Mr. Noble: where it says it was being
26 communicated to retailers, the fact that "retailers" there is capitalised is denoting
27 specifically the eight; is it not?

28 A. Yes, yes, that is the way I understand the nomenclature of the OFT's decision.

29 Q. Then looking at paragraph 1.12 -- it is on page 12 of the decision -- you can see there at (a)
30 it says:

31 "While it may have been introduced earlier, Pride started to communicate the
32 existence of the prohibition to Retailers by 28 January 2010."

33 Then (b):

34 "The Retailers agreed to abide by or acquiesce in the request."

1 Then (e):

2 "Those Retailers which are identified as Internet rogues were contacted by members
3 of the external sales team and/or their areas sales manager and requested or instructed
4 to essentially observe the prohibition."

5 So what we discern from that, do we not, is the way that this policy was put into effect was
6 by individual contacts with particular retailers?

7 A. Yes, that is my understanding and I believe the evidence shows that it was Amy Burton
8 who contacts retailers and creates the rogue lists and so on.

9 Q. Yes. There is no finding in the decision that Pride issued the policy to all retailers, such as
10 by a bulletin or something like that, sent out to all dealers; do you agree?

11 A. I do not think there is. No, I do not think there is any evidence of that.

12 Q. In order for a retailer's behaviour to be affected by an expectation that other retailers might
13 agree to the policy, the retailer would need to know about the prohibition; do you agree?

14 A. Yes, it would.

15 Q. Have you seen any evidence as to how many retailers were approached by Pride and asked
16 to abide by or were at least informed of the existence of the prohibition?

17 A. I understand the rogue lists to indicate a list of retailers -- as I mentioned, the 30 or 40
18 retailers -- that are being contacted by Amy Burton and asked to alter their behaviour.

19 Q. We will make a note of that and maybe Pride's counsel can refer us to the relevant place --
20 sorry, Ms. Gibson's counsel can refer us to the relevant place in his submissions.

21 MR. DE LA MARE: It is rather important if this witness is actually -- if he is going to be
22 examined by reference to provisions in the decision, it is rather important he is examined
23 accurately.

24 Actually the decision is quite clear at 3.225(3), page 130 that:

25 "Small R retailers were themselves monitoring below-RRP online pricing prohibitions
26 and in some cases these small R retailers contacted Pride to let them know about their
27 competitors advertising below and request that Pride enforce the below against the
28 competitor."

29 So, with respect to my learned friend, his questioning has been unfair and based on a false
30 premise.

31 THE PRESIDENT: It says that -- it is a little unclear because the summary at 1.12 refers to only
32 the eight infringements being contacted by members of the Pride team. The passage at
33 3.225 says that the rogue reports cover other retailers as well. As you say, (iii) says:

34 "Retailers generally were monitoring the prohibition."

1 MR. DE LA MARE: It goes further than that, with respect, sir. It says that:

2 "Retailers were monitoring the prohibition and that would suggest they were aware of
3 it and were requesting it be enforced against those who were not adhering to it."

4 THE PRESIDENT: Yes but there is no evidence that it was enforced in a way that is an
5 infringement.

6 MR. BATES: My point is, sir, simply, that it does not say how many. I completely accept that
7 there were retailers other than the eight who knew about the policy. After all the reason for
8 the policy was because some retailers complaining about other retailers and it would be
9 pretty surprising if Pride did not then say to the complaining retailers, this is what we have
10 done about it.

11 The question that I was putting to Mr. Noble is simply: we do not have empirical evidence
12 as to how many retailers either knew about the policy and I think he agreed with that.

13 THE PRESIDENT: Mm-hm.

14 A. Well --

15 MR. BATES: Do you want it change your answer, Mr. Noble?

16 A. No, I do not want to change my answer; I am just reiterating the answer I gave, which is
17 that the rogue reports do give you an indication of who would have known about it because
18 they are a list of the information and the interactions that Amy Burton is engaged in.
19 So I am not sure that they give you -- because I think what you are seeking is an authentic
20 list of, these people knew this at this time. I am not sure there is any evidence that goes
21 directly to that. But I think there is something quite close, which is the rogue reports.

22 Q. Let us say that you and I agree that those retailers who are listed in the rogue reports are
23 likely to have been contacted, but the point here is that we cannot assume that all Pride
24 dealers knew about the prohibition, can we?

25 A. No, I think that is a fair assumption.

26 Q. Suppose Pride does contact a particular retailer and says, we have a policy to try to stop
27 price advertising of these models, please stop, but the retailer who is contacted knows and
28 can see on the Internet that many of its competitors are still advertising specific prices
29 online for the relevant models, so the prohibition is not being followed.

30 A. Mm-hm.

31 Q. Would that not be something that would be likely to have an effect on whether and how that
32 retailer would then change its pricing or other behaviour in response to knowing about the
33 policy?

1 A. Yes, it is certainly going to be a factor. The general price monitoring is something that I
2 think these businesses do seem to engage in, yes.

3 Q. So the number of retailers that were complying with the prohibition is something that could
4 have an important impact on whether and how other retailers might change the behaviour?
5 It is something that would be important to know.

6 A. Yes, it is certainly a factor that can influence the analysis.

7 Q. Even if it was right to focus on Pride's policies, even if you were right to focus on Pride's
8 policy rather than agreements between Pride and retailers and consider the effects of the
9 policy on the market, it would still be important to establish the extent to which retailers
10 actually change their online price advertising in order to comply with the policy; yes?

11 A. Yes, but you have to think very carefully about what you can ever really show by look at
12 Internet pricing because in my framework -- because I think Mr. Parker and I agree that
13 there is an interaction. Retailers care about what other retailers are doing. If they did not
14 care you would not have this issue because people would not be complaining to Pride about
15 Internet advertising. So there he is an interrelationship between retailers and so it is very
16 hard to directly observe the alternative decision that a retailer would have made because in a
17 sense it is constantly re-evaluating its position with the information that it has got.
18 So our retailer in Nuneaton is sat there and he is thinking, what am I going to do about
19 pricing, and he is caring about what is on the Internet, he is caring about the fact he has
20 received a phone call from Amy Burton, and he is caring about the prices that he sees or
21 hears about when people speak to him in his shop.
22 The issue is that he may be able to directly observe whether or not say, for example,
23 Discount Mobility Direct is seemingly adhering to the particular policy, but what he will not
24 know but will be factoring into his analysis is the extent to which another retailer has altered
25 its pricing behaviour but is not complying with the RRP prohibition. So, for example,
26 another retailer may not be complying and may putting actual prices on their website, but
27 those actual prices may be higher actual prices than they otherwise would have been
28 because of this interrelationship.
29 I think Mr. Parker's analysis also allows for that umbrella, that feedback effect between
30 different retailers because people are making different choices in the factual. People are
31 potentially shopping at different retailers and retailers are interacting in a different way.

32 Q. You have seen Mr. Parker's analysis of compliance with the policy using the Way-Back
33 Machine, so you would agree, would you not, that even the eight relevant retailers were

1 sometimes advertising prices for relevant models online during the relevant periods in
2 breach of their agreements with Pride?

3 A. Yes.

4 Q. You would also agree, would you not, that given the persistence of the rogue prices shown
5 in the rogue reports, that the factual position may well have been that people searching the
6 Internet during the relevant supra period for terms like "mobility scooter" or even particular
7 models maybe models with the name of a relevant retailer would have seen multiple Pride
8 and other scooters being advertised at prices representing considerable discounts to the
9 RRP?

10 A. Yes. It is possible they would have seen that.

11 Q. So that empirical evidence as to what consumers are likely to have seen, that would be
12 relevant, would it not, to assessing the likely extent of any consumer harm arising from the
13 policy?

14 A. I think things like that are useful to take into account when you are evaluating whether or
15 not you think there is a harm and the extent to which you think -- how large that harm is.

16 Q. But in your supplementary report you have not taken any account of that empirical
17 evidence when estimating the overcharge which you attribute to the policy, have you?

18 A. No and the reason for that -- I think I explained that ... Maybe I can take you to the
19 paragraph --

20 THE PRESIDENT: Tab 19?

21 MR. BATES: Core bundle 19.

22 A. Yes, I explain this at paragraph 2.36, which is effectively a restatement of what I gave in
23 one of my answers a few moments ago. I say:

24 "For this reason I have not sought to estimate or infer information on the proportion of
25 consumers who saw compliant advertising at the eight identified retailers because it is
26 not directly informative about the scale of effects in my framework."

27 Then I explain that:

28 "I consider the appropriate way to robustly study the size of the impact is to assess the
29 transaction prices directly."

30 Q. So turning then to that analysis then, the analysis that you have done --

31 A. The pricing analysis in the supplementary report?

32 Q. Yes, in the supplementary report.

1 You have sought, as I understand it, to extrapolate a consumer loss, an estimated consumer
2 loss figure, from the data provided by MT Mobility. Can we just briefly look at that data?
3 It is at bundle 3, non-core bundle 3, tab 18. This is exhibit JD1 to Ms. Dunn's statement.

4 MS. STUART: Which tab was that?

5 MR. BATES: Tab 18.

6 After the cover sheet, you have December 2009 which has Plymouth in the left-hand corner;
7 I am not sure of the significance of that.

8 A. Mm-hm. I think that refers to the fact they have a Plymouth store.

9 Q. But the data curiously underneath it has other locations as well, but if we turn to February
10 2010, which is the first one that does not have Plymouth on it --

11 A. Mm-hm.

12 Q. -- you can see here there is only six sales of Pride scooters being made by MT Mobility in
13 the entire month.

14 A. Yes, that seems to be the case.

15 Q. So when you said in answer to the questions asked by the tribunal yesterday that some of
16 these eight retailers may have been so significant in the overall market that they could have
17 a price-anchoring effect, do you accept that that would not be true for MT Mobility given
18 the volume of its sales?

19 A. Well, for MT Mobility itself, I am not sure I can say it just based on this.

20 Q. You have looked have you on not at the total volume of all of their sales because that has
21 been part of your analysis. You have looked at all of these figures?

22 A. Yes.

23 Q. I am asking you, looking at the overall number of sales that it made of Pride's scooters
24 during the whole of the supra period, if you like, it is not sufficiently significant, is it, that
25 MT Mobility could have a price-anchoring effect across the country?

26 A. Er --

27 THE PRESIDENT: We are not quite clear about the question, Mr. Bates.

28 Are you saying: if the only infringement was by MT Mobility, and nobody else, would that
29 have had a price-anchoring effect, given its sales? Is that the question?

30 MR. BATES: No, I was picking up on, from the transcript of yesterday, it is what Mr. Noble said
31 at -- we can have a look at it actually.

32 THE PRESIDENT: I do not know if we have to; I just want to understand the question.

33 MR. BATES: Yes, okay. It is picking up on what Mr. Noble said yesterday where he said:

1 "The impact of a small number of agreements can be magnified because if those eight
2 retailers that were well known -- they are acting as anchors for those people that do
3 shop around, so that is an impact on consumer behaviour rather than retailer behaviour
4 arising not from other infringements but from specifically the eight infringements."

5 I am asking whether MT Mobility is one of these retailers that was sufficiently well known
6 that it could have this price-anchoring effect.

7 THE PRESIDENT: Yes, but the effect is the cumulative effect of the eight together, as I
8 understand it; it is not saying one alone.

9 MR. BATES: Yes, but according to what Mr. Noble said yesterday, it only arises if those eight
10 retailers were well known. So it is something about the size and scale of those particular
11 eight out of the 300.

12 A. Yes, and that is why I wanted to clarify about MT because the eight collectively are
13 something like 15 or 17 per cent of Pride's wholesale volume. So collectively they are not
14 that small and also the -- February 2010 is a relatively thin month. If you look at page 20,
15 you see July 2011 -- I have not counted them but there are many more transactions here.

16 MR. BATES: Looking at the page we are looking at page 3, February 2010 then, just so that we
17 can understand, the tribunal can see what the raw data is.

18 A. Mm-hm.

19 Q. You have "Plymouth retail", "Northampton retail". So that is two sales made in retail stores
20 each in different parts of the country.

21 A. Yes that is my understanding from reading the Jemma Dunn witness statement, I think she
22 describes they have the two retail stores, one in Northampton and one in Plymouth.

23 Q. You have four remote sales, so you have got Internet and phone sales, I think, here, have
24 you not? You have four telephone sales but we are not sure to what extent they were
25 prompted by the Internet.

26 A. Yes and I think Jemma Dunn explains that in her witness statement. She explains that the
27 typically an internet transaction for them involves someone clicking on the website and then
28 there being a subsequent phone conversation. So my understanding of what it means when
29 it says "telephone/Google" is they have arrived at the website via Google and they have
30 clicked on "Please can I have an Elite Traveller 4", but there is then a subsequent telephone
31 conversation. I think she explains that this is to make sure that the elite Traveller 4 is the
32 right model and that the Elite Traveller 3 or the Elite Traveller Plus or some other model
33 might not be more suitable.

1 Q. I think she actually says there was not a significance to the word that appeared after
2 "telephone", but I am not sure it matters for present purposes.

3 A. Right.

4 Q. Looking at the prices that were charged, you see that there were two Elite Traveller Pluses
5 that were at the same price.

6 A. Yes.

7 Q. We do not know what date those sales were made during the month, whether it was the
8 same person or -- we do not know anything about that.

9 There are two --

10 A. Although on the left-hand side it tells you the brand, so I think they are going through
11 different brandings of the firm so ...

12 Q. Right, yes, different website branding?

13 A. More than one --

14 Q. So that would suggest they are to different people?

15 A. More than one identify as it were.

16 THE PRESIDENT: Yes.

17 MR. BATES: So they are both for 679 and then you have two Elite Traveller 4s, which are at
18 very different prices: one is 579 and one is 800.

19 A. Mm-hm.

20 Q. The difference here is that the 579 one is by phone and the other one is in a retail store.

21 A. Mm-hm.

22 Q. So this suggests there are very different prices depending on the channel that you buy
23 through.

24 A. It is consistent with telephone or Internet sales being cheaper on average than store sales.
25 That particular transaction is.

26 Q. That is what one would normally expect, would one not, that generally sales made through
27 the Internet, typically on average, be cheaper than where you are going to the store because
28 you do not have the same overheads?

29 A. Well, yes, but they do have the same overheads because this is the same retailer.

30 Q. But in relation to those particular kinds of sales.

31 Looking at the last entry there, which is the Colt XL8 with upgraded batteries, am I right to
32 understand that this is one of the ones that you would have left out from your analysis
33 because it is effectively for a package price?

1 A. Yes, that is correct. So what we did in the analysis is we wanted to compare apples and
2 apples so we looked at only the transactions that did not have extras -- so batteries, walking
3 sticks, et cetera -- and we removed those.
4 So we compare Elite Traveller 4s with Elite Traveller 4s and Colt XL8s with Colt LX8s
5 rather than the Colt LX8 with an upgraded battery with one that does not have an upgraded
6 battery.

7 Q. I am going to ask Mr. Williams to just hand you a couple of charts and I will tell you what
8 they are.

9 A. Mm-hm.

10 Q. Obviously they will be distributed to everybody. (Handed)

11 A. Where does that go?

12 Q. There is no need to put it anywhere for now.
13 What this is a graphical illustration of the points that I have already made in paragraph 74 of
14 my skeleton argument.

15 A. Mm-hm.

16 Q. The axis to the left is the prices and then along the bottom are the dates when the sales were
17 made.
18 So looking at the first chart, which is the Colt Deluxe -- I should also say that the colours of
19 the dots are significant. The blue dots are retail store sales, green dots are telephone sales,
20 and the grey ones are sales made at a show.

21 A. Mm-hm.

22 Q. I think we can agree, can we not --

23 THE PRESIDENT: These were sales by?

24 MR. BATES: By MT Mobility, so it is just taking the figures from the these tables and leaving
25 out ones where the customer got a package price with a battery or case or something else.

26 THE PRESIDENT: Yes.

27 MR. BATES: I think we can agree, can we not, that there is a large amount of variation in the
28 prices that different consumers can be paying for the same model?

29 A. Yes. There are instances where some people paid a lot and some people paid less. There
30 are other instances where people seem to pay the same. So at the bottom right of the chart
31 you seem to have several dots that are at the same price.

32 Q. Yes. They are all for telephone sales; yes?

33 A. Well the bottom right ones are not; they seem to be retail and show sales.

1 Q. Yes, at the very far bottom right corner, that is right, but that relates to July 2014, so that is
2 more than two years after the end of the infringements.

3 A. Yes, that is correct.

4 Q. So looking first at the infringement period -- it does not even go back much beyond July
5 2010, so we do not even have data going back to the --

6 THE PRESIDENT: This is MT Mobility?

7 MR. BATES: This is taken from the Jemma Dunn --

8 THE PRESIDENT: What are you using as the infringement period?

9 MR. BATES: Oh, the relevant supra period which is I think the one that Mr. Noble has used.

10 THE PRESIDENT: Yes. They were not, of course, an infringer at all in the early part, so the
11 infringement period for MT Mobility is quite short.

12 MR. GLYNN: I think it was March to June 2012, was it?

13 A. 2011.

14 MR. GLYNN: 2011.

15 MR. BATES: So we would have even fewer observations, clearly, if we were to take that period.
16 So looking at the supra period first of all, you can see that the retail store observation is
17 much more expensive than the telephone observation; would you agree?

18 A. Which one, the top left one with the circle round it?

19 Q. Yes, because the left-hand side is during the relevant supra period, which is what you have
20 used for the purpose of your analysis; yes?

21 A. Yes, that is correct.

22 Q. Looking after the infringement period -- that is the right-hand side -- you can see again
23 different retail channels and you can see that most of the observations occur three years
24 after the infringement period.

25 A. Yes, and that is partly because Jemma Dunn explains in her witness statement there is a gap
26 in her data. So I think January 2013 to July, possibly, 2013, she unfortunately was not able
27 to supply that data, so in a sense I am not surprised that there is slight gap in the middle of
28 your chart because there is no data.

29 Q. Yes, well, we have data for 10 months, do we not, after the infringement period?

30 A. Yes, we have 10 months and then there is a gap and then there is another 11, 12 months
31 after that.

32 Q. Then we have some more recent data. Would you not agree that the more recent data is
33 going to be less useful than the data in the 10 months following the infringement because

1 there is more chance of all these other factors that you mentioned earlier -- like cost
2 changes, et cetera -- being responsible for the difference in price?

3 A. Yes conceptually what you are trying to do with an arithmetic during and after analysis is
4 you are trying to do it over the narrowest possible window and obviously the wider you
5 make it, the more likely it is that other extraneous factors are going to be having an impact.

6 Q. If you just take out one observation, so if we ignored the retail store observation in the top
7 left-hand side corner, for example, would you not say that would have a significant effect
8 on the undercharge or overcharge figure?

9 A. Yes, it is a low N sample you have here; you could say that of any of the individual
10 observations.

11 THE PRESIDENT: Mr. Bates, we are not quite sure where this is going. It clearly would not be
12 satisfactory to base a claim on one -- on data from one of the eight making significantly
13 smaller sales than the number of the others and say you can extrapolate that and invite the
14 tribunal to make any kind of award of damages. It just would not be robust.

15 What is envisaged, if we let this go ahead and come back is that -- and we know data is
16 available from a number of other retailers, I do not know how many of them are infringers,
17 some 20 or 21 others -- there would be a bigger data set. Mr. Noble said he would be much
18 happier doing it with 2012 data rather than 2016, hence the use of his second report, and he
19 did in his first report separate online sales from retail sales as being having to be treated
20 differently. He did not do it in the second report because there was so little data there, but
21 that is the approach he favours.

22 It may be that, when further information is obtained, if that happens, you are still able to
23 show that it is not very robust and one cannot really draw sound conclusions from it. But
24 your questioning at the moment seems to be based on the fact that you could not draw
25 sound conclusions from this alone. I do not think it is suggested that you could.

26 So that is why I am not quite clear where we are going. It seems a different point from the
27 point you were exploring earlier, which is how can you, with an infringement like this,
28 prove cause and effect just from even sound robust data on pricing because of all the other
29 factors going on? That is a separate point, is it not?

30 MR. BATES: Yes, it is a completely different point. The reason I am asking the questions I am
31 is because, as I understand it, one of the questions that we have to look at in the course of
32 this hearing is whether or not Mrs. Gibson has a strong case or a weak case, et cetera. So we
33 are looking at least whether there is a credible case.

34 THE PRESIDENT: Yes.

1 MR. BATES: In my submission -- and it is perhaps not the time for submissions, but in my
2 submission it is not enough to simply speculate that there may be some effects on
3 consumers; one has to make it concrete at least to some extent.

4 THE PRESIDENT: Yes.

5 MR. BATES: As I understand it, what has been done here by Mr. Noble is to rely on the Jemma
6 Dunn data, albeit it is a small sample, et cetera, and we understand that, in order to show
7 they have a credible case and to show that there are these losses that have been suffered by
8 consumers and extrapolate from this data nationally.

9 If the Jemma Dunn analysis in Noble 2 is being withdrawn, then I agree I do not need to
10 cross examine on it.

11 THE PRESIDENT: I think it would be subsumed, included in a broader analysis. It will still be
12 simply a during and after analysis. It is not suggested that anything better than that, as it
13 were, will be produced. It will just be during and after analysis with many more price
14 points.

15 MR. BATES: Indeed, and so perhaps one gets some insight as to how useful or unuseful that data
16 exercise might be by looking at how useful or unuseful this particular data set could be.

17 THE PRESIDENT: Yes, but removing one outlier when -- you will have many more data points.

18 MR. BATES: That point, sir, was -- where I was going to go with that was in relation to channel
19 mix.

20 THE PRESIDENT: Yes.

21 MR. BATES: Here what you have -- maybe I should put my questions to Mr. Noble.

22 THE PRESIDENT: You go ahead, but you have understood the point I am making.

23 MR. BATES: I have understood the concern.

24 THE PRESIDENT: It may well be, as I say, that if one had more data it is such that you could
25 say, it is still not very robust, but the fact that this alone is not robust seems to me quite
26 clear.

27 MR. BATES: I think we are all agreed that this is not robust data.

28 THE PRESIDENT: I think Mr. Noble would accept this is just an example, as sort of sample and
29 he would need more.

30 MR. BATES: But you can see, can you not, Mr. Noble, from looking at this data that channel
31 mix does appear to be important? You can look at the next chart as well, if that assists.

32 A. Yes. If what you do here is you -- if you want to try and estimate the ... if the hypothesis is,
33 I think there is a retail premium, then you can take the difference between the average of the
34 telephone sales, for example, and the retail sales and work out what that is.

1 As I think the chairman just explained, I think these sorts of things do matter. I think it is
2 more challenging to take them into account with the small -- with the number of data that
3 we have in this particular data set. I think one can try and do that. We did not in the
4 answers that I presented in my supplementary report but it is a factor that one does need to
5 consider.

6 Q. But in the analysis that you have done in your supplementary report --

7 A. Mm-hm.

8 Q. -- you have not done anything to control for channel mix, have you?

9 A. No, there is not a channel mix adjustment in there.

10 THE PRESIDENT: The classes you proposed, and which the applicants have adopted in their
11 application, in your first report --

12 A. Mm-hm.

13 THE PRESIDENT: -- separated out the subclasses online versus offline and it was put forward
14 on the basis that one should not treat consumers who bought online necessarily in the same
15 way and effectively in the same state -- or the price difference might be different whether
16 they bought online or in physical store. That is at page 17 of your first report.

17 A. Yes, and I think it is something that one does want to consider empirically.

18 THE PRESIDENT: I think the point is that you did not do that when you came to do your results
19 in the second report, you just did affected models and umbrella models.

20 A. Yes.

21 THE PRESIDENT: Can you just explain that? Would you adhere to the view that it should be
22 separate classes for online and physical stores, subclasses?

23 A. I think it is something that makes intellectual sense to have a distinction. Whether there is
24 an empirically a distinction and therefore whether one would actually want to award a
25 different amount to those groups I think is ultimately something one can determine once one
26 has got the data.

27 The reasoning behind why we have merged the data in Jemma Dunn analysis is in part is
28 because, as I think you can see from some of the charts, that for some of the models there
29 are not very many observations at all and we were seeking to try and provide as much
30 insight as we could.

31 THE PRESIDENT: Yes.

32 MR. BATES: It does not provide insight, does it, Mr. Noble? It provides distortion. Because I
33 was putting to you, by asking what would happen if you blocked out that high price in

1 December 2010, which is a retail store price, it changes completely the insight, if you can
2 call that, as to whether there is an overcharge or not.

3 A. It would but equally you could block out one on the right-hand side.

4 Q. Which one could you block out on the right-hand side?

5 A. Which would you block out on the left? This is an informal arithmetic outlier exclusion that
6 you are applying. If anything, it is not the outlier because the true outlier would be the June
7 or July 2014. There are empirical techniques to evaluate whether or not something is
8 sufficiently far away from the average transaction price that it should be treated as an
9 outlier. I am pretty certain that one would fail if you were to apply such a technique to this
10 whole data set because it is not the top one and outliers have to be, almost by necessity, the
11 top one and the top one would be at 1,600.

12 Q. All right. Let us say we do not use the word "outlier" then. The point is that the July 2014
13 sales that you are referring to, they too are retail store sales, are they not?

14 A. Sorry which month, July?

15 Q. The figures that you just referred us to, you said July 2014, if any of them are outliers, it is
16 the high one in July 2014.

17 A. Mm-hm.

18 Q. But those ones are retail store sales as well.

19 A. Mm-hm.

20 Q. What I am putting to you is: if you control for the channel mix, so you are actually doing
21 like with like Internet sales with Internet sales or at least telephone sales that might have
22 been prompted by looking on the Internet, it radically changes the insight that we gain as to
23 whether there is an overcharge or not.

24 A. I do not know whether it does though because what you are saying is to do two subanalyses,
25 compare because we have only got one, that retail price number of £1,500 or so with the
26 average of the retail prices on the right-hand side -- and there are six of them -- and my sort
27 of eyeball averaging would suggest it is somewhere around £1,300.

28 So that has gone down and it is the same if you do the same for the telephone sales and
29 ignore the show sales, because it is a different channel on this card, and you would say
30 something like the telephone average in the during period is something like, I do not know,
31 1,050 and it is more like 1,000 in the after period.

32 So I think it is not obvious to me that doing these subcuts would materially change the
33 answer.

- 1 Q. Have you looked at what were the proportion of MT Mobility's sales during the
2 infringement period that were online sales rather than retail store versus the same division
3 after the infringement period?
- 4 A. I do remember looking at it but I do not recall exactly what it said and I have not presented
5 it in my report.
- 6 Q. No. If it were the case that the proportion of MT Mobility sales after the infringement
7 period was significantly higher, would you agree then that it would not be all that surprising
8 if the average price obtained by MT Mobility for scooters after the infringement was lower
9 because it is just a product of the channel mix?
- 10 A. Yes and no. It depends what you think drives channel mix. In my analysis there is an
11 endogeneity in the sense that the choice of medium of transaction is potentially influenced
12 by the infringement. So if you are someone who wishes to transact over the Internet but
13 finds it difficult to find anyone that will tell you an actual price, then in a sense you cannot
14 transact over the Internet and you have to transact over the phone or in the shop. It is in the
15 after period, when there is more Internet advertising that you, you know -- it is possible that
16 you would then go to buy on the Internet when you otherwise would have gone in the store.
17 In a sense I can see the point, but if you think channel mix is an entirely externally driven
18 factor because more people have computers or more people are Internet savvy, then I can
19 see the logic of that. But if you do not, if you think it is related to the infringement itself, it
20 is not obvious that that does cause the issue that you are describing.
- 21 Q. Would you agree that, over the last five years, use of the Internet by consumers to make
22 purchases and to research prices is likely to have increased?
- 23 A. Well, I do not know whether in the last five years. Certainly in merger discussions that I
24 have had with the OFT I remember from four or five years ago they described themselves as
25 viewing many markets as already being in the post-Internet era, in that people that have
26 physical stores have already kind of factored in fully the impact that the Internet is having
27 on their businesses and they have made choices to have this physical store portfolio.
- 28 Q. So where you see in both your first report and also in your supplementary report that there
29 has been this decline in prices for the affected models over this five year period, that could
30 be due to increasing use of the Internet and the effect that has on competitive pressures
31 generally?
- 32 A. It could in the sense that, if again, if you think that ever more transactions are going on over
33 the Internet then, yes, I think it could be a factor.

1 Q. How do you propose to control for that in the analysis that you are going to do using retail
2 sales data?

3 A. I think if you can measure it, you can control for it; that is the general mantra. I think you
4 are describing the fact that you anticipate having evidence that Internet usage has gone up
5 and if one can measure Internet usage then one can control for it in an analysis such as this.
6 Another way of addressing it is in a sense the way we just talked about which is that you
7 split by channel. When you have got information on channel sale you do a version of the
8 analysis that controls for that, but as I said the risk with that is there is an interrelationship
9 with the infringement and therefore you might not be presenting the full picture.

10 THE PRESIDENT: If it was done, as in your second report, where you are comparing prices in a
11 period of basically 2011 and 2010 and you are going up to 2012 to 2014, I suppose that is
12 getting close to the five-year period. It is some time ago but I do not know if that makes
13 much difference from the 2016 figures you used in your first report.

14 A. In a sense, in an empirical model, one way of thinking about it is the centre of each data
15 point. So in the supra period, in a sense, the centre is around -- it is halfway through the
16 infringement.

17 THE PRESIDENT: February 2011?

18 A. February 2011. Then the centre of the after period is I think something like June or July
19 2013 and that is about 18 months apart. That is because the period right at the end of the
20 supra period is then obviously immediately adjacent to the beginning of the post period.

21 THE PRESIDENT: Yes.

22 MR. BATES: Mr. Noble, if there is an increase in consumers doing price research on the Internet
23 over the last five years and that has an impact on competitive pressure generally, that is
24 going to impact, is it not, on the prices paid by consumers in all channels? So you cannot
25 solve that problem by adjusting for channel mix.

26 A. I think what you are saying is that there is an exogenous driver of more people searching on
27 the Internet and more people searching on the Internet means that more people are placing
28 competitive pressure on retailers. Those retailers react and they adjust their prices down for
29 everybody. That mechanism is right at the heart of what I am doing here. I agree that if
30 there is that kind of exogenous driver of Internet savviness, as it were, going up then I think
31 it is something you may need to take into account. I think one wants to go and look at how
32 much of an impact that is having and try and measure it.

33 MR. BATES: It is the fundamental assumption, is it not, behind your own analysis in Noble 1
34 where you are looking at the Internet prices in 2010 and comparing them with the Internet

1 prices -- or prices at least being advertised on the Internet recently and saying, anything that
2 could change competitive pressures is just going to have this market effect on prices across
3 the whole market.

4 A. Yes. I think we are back to the beginning almost in that, yes, that is what the uncontrolled
5 arithmetic during and after does and then what you do is you consider alternative
6 explanations for what you find.

7 What I find in both these analyses is that there is a significantly sized reduction in price. If I
8 would have found the exact opposite, that would be very inconsistent with my case. My
9 case is that I expect to find such a fall, I go and look, I find such a fall I then go and
10 consider, well, what alternative reasons might there be for such a fall, and, as I think we
11 have discussed here and also in my reports, I have tried to exclude as many of those as
12 possible.

13 I think there are further ones one needs to look into in more detail and I think as one gets
14 more data one can use more sophisticated techniques to do that.

15 Q. The data from MT Mobility, it confirms, does it not, that even within the same channel -- so
16 let us say telephone, for example -- that you can still get large variations in what consumers
17 actually pay for the same scooter; do you agree?

18 A. Yes, there are instances where some people pay a lot and other people pay much less.

19 Q. So that confirms what Mr. Parker says, that you have highly focused price discrimination,
20 individual negotiations, each customer paying a different price because of that. It is
21 confirmatory of what he says, is it not?

22 A. It is consistent with what he says. I think, as I explained in my letter, there are also a
23 number of instances where you find the exact same price being charged. I think you took us
24 to one of those in the MT Mobility data set and I have highlighted some more. 679 seems to
25 be the going rate for the Elite Traveller Plus in a number of months and for quite a large
26 number of transactions. So I think it is not one or the other; this is a market in which there
27 are various dynamics ongoing.

28 Q. One of the things that makes a difference -- is likely to make a big difference to the prices
29 that customers achieve is the information that they have on other prices that are available to
30 them in the market; would you agree?

31 A. That is a factor, yes.

32 Q. Customers with good information, who have done online research and come across rogue
33 prices, for example, are likely to end up paying lower prices wherever they end up buying
34 from?

- 1 A. Yes, if you do lots of research I think it does seem likely you are more likely to get a good
2 deal.
- 3 Q. If one of the things that makes a big difference to the prices that a consumer pays is that sort
4 of research, so their buying journey, if you like, how are you going to be able to adjust for
5 that through the use of subclasses?
- 6 A. The logic being that there are a group of people who did little research and another group of
7 people who did a lot of research?
- 8 Q. I am saying that -- let us say that you are looking at people who bought a particular model
9 of scooter by phone. So that is a subclass, if you like. Within that, you are going to have
10 some consumers who did research and negotiated their way to a price based perhaps even
11 on seeing rogue prices, and there is other people who did Internet search where they did not
12 come across rogue prices and they just saw "Call for best price", but you are not going to
13 be able to capture any of that variation if you are using subclasses, are you?
- 14 A. I think the issue there is about the extent to which that sort of information premium changes
15 in the factual and the counterfactual, so in the post period, in the after period, you see
16 people who pay high prices and you see people who pay low prices and the same, you see
17 that in the during period.
- 18 The issue -- the question I think you are getting at is: is the differential, is the information
19 premium different? My analysis is proceeding on the assumption that it is not clear that the
20 information premium is different. So if you go into a shop uninformed, you would have
21 paid a high price during and you would have also paid a high price after.
- 22 The issue is, the high price you would have paid would not have been as high as it would
23 otherwise have been because of the effects that posted prices -- the fact that informed
24 consumers protect uninformed consumers would have; they affect the behaviour of retailers.
- 25 Q. Looking at these charts and how it would work in practice then --
- 26 A. Mm-hm.
- 27 Q. -- let us see ... If we look at the Colt 9. So you have two sales -- I am not sure exactly
28 which month it is -- just after the left-hand dotted line. They are both in green.
- 29 A. Where are we.
- 30 Q. Just here on the second chart, the Colt 9 (indicating).
- 31 A. Yes.
- 32 Q. You have got one consumer has paid £700 or thereabouts.
- 33 A. Mm-hm.
- 34 Q. The other one has paid, I do not know, £820 or something likes that.

1 A. Mm-hm.

2 Q. So are you proposing that it would be appropriate to have a subclass which included both of
3 those consumers so they get the same compensation?

4 THE PRESIDENT: I think the point being made, as I understand it, is this: this was a very poorly
5 functional market, that was the whole theme of the OFT report, for all sorts of reasons. So
6 you get this wide variety in prices paid even by the same channel, and this is just a graphic
7 demonstration of it and you have some examples in the report and so on.

8 In those circumstances, if one is trying to get a figure for an overcharge, even if it is within
9 classes by channel, it is going -- that figure is going to be ... maybe it is an average or an
10 estimate, which may be far more than some people are paying and far less than others to a
11 degree that averages in a competitive market would not be.

12 A. Mm-hm.

13 THE PRESIDENT: I think that is the point. So one would actually get something that is quite
14 far, for most consumers, from the actual reality of what they pay.

15 A. But --

16 THE PRESIDENT: Is that the point being made?

17 MR. BATES: Yes, I think that is another way of putting it.

18 THE PRESIDENT: So you can see what we are getting at. That is not likely to change by having
19 a lot more data because you are also going to get a variety of prices.

20 A. Yes and I think the issue is: do you see price dispersion during and after? If it were the case
21 there was no price dispersion after and lots during then I think this would be a significant
22 concern because what you are saying is, information is everything. If that person knew
23 what was going on, they would have paid a completely different price than the other one
24 who did not and in the after period you get -- it is a sort of law of one price and everyone
25 pays exactly the same.

26 That is not what we see though. What we see is that information matters both during and
27 after and so in the after period you do see people paying a lot and you also see them paying
28 a little. But the essence of my analysis is that the whole distribution shifts down and so it is
29 not clear that the information premium is different.

30 So you pay 30 per cent extra because you did not do any research or, if you had had paid 30
31 per cent extra in the factual or counterfactual, well you would have paid more. My point is
32 -- I am not trying tell you exactly what the information premium is; what I am saying is that
33 that person also paid that person also paid an extra 16 per cent because of the infringement.
34 That is what I am saying.

1 THE PRESIDENT: Yes I understand. Would that be a sensible point? I do not know how much
2 more you have, Mr. Bates, but at some point we have to take a break.

3 MR. BATES: I do not have any more, save that I was going to give Mr. Noble an opportunity to
4 say how the additional data would in fact help them to identify better subclasses. I thought
5 it would be fair to give him a chance to explain that.

6 THE PRESIDENT: Yes.

7 Would you like to comment on that with the benefit of the additional data --

8 A. Yes.

9 THE PRESIDENT: -- which will be, as we are all assuming, no more than pricing data from
10 another maybe 20 retailers?

11 A. Yes. I think what you can do with that information is you can explore in more detail things
12 like sales channels, whether that matters. You can address the issue that we discussed
13 yesterday with regard to identifying what is at the moment subsumed within one of my
14 subclasses, the eight retailers when they are infringing, so you have a subclass
15 addressing those.

16 So for example -- and looking at the data that I think is going to be available -- I reviewed
17 some of the documents last night. Discount Mobility Direct, for example, has a very large
18 number of transactions both during and after. It does not seem to sell a very wide range of
19 models either, so it is something like 300 Elite LX models are sold during the relevant
20 period and then several hundred after the relevant period -- and when I say "relevant period"
21 I mean "relevant period for that retailer specifically".

22 So I think this data is going to be able to help us home in on those issues that we have
23 discussed today and the issues being discussed yesterday.

24 MR. BATES: Do you have any hypotheses then as to what these more refined subclasses might
25 be?

26 A. I think, sitting here now, the discussion yesterday took us to the fact that one needs six
27 subclasses rather than four and that at the moment I have affected models -- I have
28 distinguished between affected and unaffected models, but I have not distinguished between
29 affected and unaffected retailers in the sense of infringing retailers.

30 MR. BATES: Sorry, how would this additional data then help you get to a place where you can
31 justify those six subclasses rather than the four?

32 A. Because then I am going to have data that addresses the various boxes.

33 Q. Which will then be the six boxes, is that what you are saying?

1 A. Yes, as I sit here today, I think that is the way to go, but I think one has to take that under
2 advisement and I think I was not actually clear where we landed yesterday with regard to
3 the binding nature of the subclasses versus the class. It seems there was a little bit of lack of
4 clarity about that.

5 I think if we do proceed with what will be essentially another expert report, I think it would
6 be useful to be as clear as possible about precisely what one is showing about what a
7 subclass is, et cetera.

8 Q. Indeed.

9 THE PRESIDENT: Yes. It goes back to your first report, 2.28, where you say you have
10 identified two key dimensions for consumers where they bought online or in a physical
11 outlet and whether they bought the model directly subject to the online price advertising
12 restriction.

13 Well, the point is that the model that was directly subject to the restriction is a model bought
14 from an infringing retailer over the period of the infringement. So when you say:

15 "Oxera's preliminary view is these four claimant categories might have been
16 differentially affected by the infringement."

17 I think you accepted that the pricing by retailers who had agreed to abide by the
18 infringement were therefore infringing over the relevant period for that retailer, they might
19 be pricing differently from others who were just responding to less competitive pressure and
20 so it would be beneficial to treat those who had agreed to abide by the infringement or by
21 the policy and therefore were infringing differently from those who were perhaps
22 responding to reduced competitive pressure from the infringements.

23 That is the distinction being made and whether it end up with four subclasses or eight, I do
24 not know; it might depend what the data shows. But it is looking at the those who are
25 directly affected and those for whom it is an umbrella effect.

26 MR. BATES: Sir, this is my last question, just so I can understand what you are saying: so if you
27 have one consumer who does research online --

28 A. Mm-hm.

29 Q. -- sees rogue prices and then buys online at a price that is equivalent to the rogue prices, and
30 then you have another customer who looks online and sees only the compliant advertising
31 and negotiates their way to a price that ends up higher than the rogue price, then both of
32 those consumers will be in your same subclass; is that right?

33 A. Can you just repeat that just to make sure I have correctly understood it?

34 Q. You have got one consumer, they go online --

1 A. Yes.

2 Q. -- they do their research online, they come across lots of rogue prices, they put "Colt "9 in
3 Google or whatever, and up pops five people who are selling it at £500 or whatever. That
4 consumer then phones up their preferred seller and says, I have seen this is on for £500, and
5 they negotiate and they pay £500.

6 A. Mm-hm.

7 Q. Then you got the next consumer and they look on the Internet, but they do not come across
8 rogue prices; what they are coming across is "Call for best price".

9 A. Yes.

10 Q. They then phone up the same retailer, they do not have that negotiating information, and so
11 they end up paying £800.

12 A. Yes.

13 Q. I am just trying to understand whether you put those two people in the same subclass or not.

14 A. I think on the framework we are talking about now, yes, they would and it goes back to the
15 point we just discussed which is that is about the information premium, that is about the fact
16 that someone has come in with good information, and that is why they get 500. Someone
17 else has come in with not so good information and that is why they get 800.
18 My analysis is not seeking to say that there would not be such an information premium; it is
19 looking at the data and saying, well, it seems as though you have similar information
20 premiums existing after infringement. It is that the whole distribution of those prices gets
21 moved up or down. So in the counterfactual in essence what the analysis is saying is that
22 the £500 person would have paid £450 and the £800 person would have paid £750.

23 MR. BATES: That was very helpful for understanding of that, thank you.

24 I do not have any further questions, sir.

25 THE PRESIDENT: We should take a break. Yes. We will take our break now -- we have got on
26 quite a long time -- for the transcribers. But if you could stay in the witness box, we may
27 have some questions for you.

28 A. Okay.

29 THE PRESIDENT: We will see where we get to. We will come back at quarter to 12.

30 (11.40 am) (A short break)

31 (11.55 am)

32 Further questions from THE TRIBUNAL

33 THE PRESIDENT: Mr. Noble, there is one thing we wanted to ask you.

34 A. Mm-hm.

1 THE PRESIDENT: We are concerned, as you know, with trying to see if any damage and, if so,
2 damage that one can reasonably estimate flowed from the infringements. The infringements
3 were these agreements with the eight retailers over specific periods.

4 A. Mm-hm.

5 THE PRESIDENT: There are different periods for the different retailers, as you know, and it is
6 not the case that all eight retailers infringed for a period of two years. Indeed at no time, I
7 think, in that two-year period where there eight retailers infringing; they overlap the period.

8 A. Yes.

9 THE PRESIDENT: There is also the policy that Pride operated, which did last for that two years,
10 and which led to the infringements, but we need to distinguish damages that come from the
11 infringements as opposed to any pricing effects that might come from the policy below.

12 What we would like to just ask you is how, in getting all this additional data and the
13 techniques you described, would you be able to distinguish between the effect of prices on
14 the infringements, in particular, as regards the umbrella retailers or the others from the
15 effect of the policy? Is that possible?

16 A. What one is trying to do when you are looking at that data is trying to effectively compare
17 different states of the world. I think the question you are getting at is: can one separate out
18 the infringement bit from the policy part? I think the empirical data can help you do that. It
19 can do that by -- if you look at, for example, the price that someone is paying at an
20 infringing retailer during the infringing period for that retailer and then you look at that
21 price they are paying at the infringing retailer but just after their infringement ends but
22 while other infringements are ongoing and therefore while the policy is ongoing and
23 therefore that difference -- you can observe an effect one would hypothesise that the price
24 goes down by somewhat and then the price goes down by an element further at the end of
25 the whole infringement from the time that the policy dissipates. The fact that they do not
26 overlap is actually very helpful because it allows you then to do that kind of analysis.
27 If all the infringements had all occurred at the same time period then in a sense there would
28 not be any distinction between the two. But because we have one thing that occurs for the
29 whole period and you have other things that occur for the shorter distinct periods and it
30 allows you to empirically distinguish between the two.

31 THE PRESIDENT: Yes, thank you. (Pause). The other thing was we have seen the witness
32 statement from Mrs. Gibson's solicitors saying there are 20 retailers who have replied. You
33 mentioned that you looked last night at one of them. Do you know -- if not someone else
34 can tell us -- but how many of those 20 are, well in fact 21, one who has volunteered data

1 and 20 who said that they would provide it if their costs or whatever are paid. How many
2 of them are infringements?

3 A. As I sit here, I do not know the answer to that question.

4 THE PRESIDENT: Do you know, Mr. de la Mare?

5 MR. DE LA MARE: I think Mr. Haan is sticking up a single digit. I suspect that is a provisional
6 but likely to be reasonably accurate estimate. it is one, just one.

7 THE PRESIDENT: Yes, do we know which one it is? He has not exhibited the letters.

8 MR. DE LA MARE: Better Mobility.

9 THE PRESIDENT: Sorry?

10 MR. DE LA MARE: It is Better Mobility. Theirs is the last in section C, the decision starts at
11 1.10.

12 THE PRESIDENT: They made no sales at all in the infringing period, or at least they purchased
13 nothing from Pride in the infringing period.

14 MR. DE LA MARE: That is right.

15 THE PRESIDENT: Yes.

16 MR. DE LA MARE: Which raises the question, do we not need a Rule 63 application directed at
17 the capital R retailers or a reasonable selection of them? To which I think the answer is
18 likely to be obviously, yes.

19 THE PRESIDENT: Yes, some have gone out of business.

20 MR. DE LA MARE: Two out of eight.

21 THE PRESIDENT: Yes. Do we know which two have gone out of business?

22 MR. DE LA MARE: I do not recall off the top of my head.

23 THE PRESIDENT: Somebody knows.

24 MR. DE LA MARE: It is in Mr. Haan's statement, yes, that is right. Turn up his first statement,
25 it is around, yes, the explanation is from 57 onwards as to what additional data we have
26 tried to see.

27 THE PRESIDENT: Sorry, which witness statement?

28 MR. DE LA MARE: Mr. Haan's first witness statement in the core bundle. The strategy
29 employed was to write to the companies that had gone into insolvency for the obvious
30 reasons that they were likely to un-have(?) reasons for am prop(?) for being resistant to
31 providing the information.

32 THE PRESIDENT: You wrote to four dissolved companies, Robert Gregg Limited, so they have
33 gone.

34 MR. DE LA MARE: They have gone.

1 THE PRESIDENT: Discount Mobility, I think that is the only one out of the eight, is it not?
2 Additional four companies: Easy Care, Easy Care Mobility Freedom and One Stop. I think
3 that is the only one out of the infringers, is it not? The names are so similar.
4 MR. DE LA MARE: Give our passing on a nightmare but for the use of common words. We can
5 check, sir.
6 THE PRESIDENT: It looks as though the large ones, CareCo, which seems to be a big dealer.
7 MR. DE LA MARE: Yes.
8 THE PRESIDENT: One that is called Milton Keynes I think, just looking and volume of
9 purchases.
10 MR. DE LA MARE: Yes.
11 THE PRESIDENT: Which are set out at the end helpfully in an annex of Mr. Parker's report are
12 still going.
13 MR. DE LA MARE: Yes. That would, we agree, be a sensible place to make a~--
14 THE PRESIDENT: Mr. Thomas of Pride wrote to them all. Robert -- Mobility For You may
15 have ceased trading, he says.
16 MR. DE LA MARE: Yes, this is where I got the point that there were two, I knew there were
17 two.
18 THE PRESIDENT: Yes. It is clear that a number of them are still there, still trading so there are
19 -- there is a potential source of more data points we, are not dependent on Better Mobility
20 which is unlikely to produce much. Yes.
21 MR. DE LA MARE: Yes.
22 THE PRESIDENT: Yes, thank you. Thank you very much Mr. Noble. I do not think Mr. de la
23 Mare. On this point, namely there may be other arguments that Mr. Bates is going to
24 address to us but we do not feel that, subject to submissions but on the evidence that it is
25 implausible that additional data may enable a case that crosses the threshold to go forward
26 when more thought is given to it. If you wanted to ask questions in re-examination --
27 MR. DE LA MARE: Given that very helpful indication I do not really see the point, sir.
28 THE PRESIDENT: I would not have thought so. There are clearly still significant difficulties on
29 causation so those things will have to be encountered in due course.
30 MR. DE LA MARE: I hope we have been reasonably candid about the difficulties in relation to
31 data from the outset. Mr. Noble's initial report was very much drafted on the basis that this
32 was the only forms of evidence he had available to him.
33 THE PRESIDENT: We will come to that.
34 MR. DE LA MARE: We will come though that. I am grateful, sir.

1 THE PRESIDENT: It was a conceptual approach that I think was fundamentally mistaken, but
2 there we are. Thank you very much, Mr. Noble, so you are released.

3 A. Thank you. (The witness withdrew)

4 THE PRESIDENT: But Mr. Bates, you have of course other submissions I think that we are keen
5 to hear.

6 MR. BATES: I was not sure if Mr. de la Mare had any further submissions.

7 THE PRESIDENT: I think he said in light of that he was not going to ask any questions to Mr.
8 Noble in re-examination.

9 MR. BATES: He has also concluded his opening submissions then?

10 THE PRESIDENT: Of course. I am sorry, you are quite right because of the course we have
11 taken.

12 MR. DE LA MARE: I think the most efficient way to proceed is to hear what Mr. Bates has to
13 say and then I will reply to that. I do not want to take any nice points about who has the last
14 word. If he feels disadvantaged having heard me say something in reply he has not had an
15 opportunity to address then of course he should be allowed to re-enter the fray.

16 THE PRESIDENT: You have set out what you say about Mrs. Gibson, you have set out what you
17 say about funding.

18 MR. DE LA MARE: As I understand it, sir, and I have discussed this with my learned friend --

19 THE PRESIDENT: Yes.

20 MR. DE LA MARE: -- there are no, if you like, representative-based objections that are
21 vigorously advanced to you that do not link to complaints about the way that the case on the
22 evidence and its analytic basis has been presented so I do not understand Mr. Bates, despite
23 the points having being pretty vigorously taken first in correspondence and then in the
24 responses, to be saying, viewed alone, Mrs. Gibson is not an appropriate claims
25 representative or matters of that kind. The complaints are about, or linked to, the
26 substantive merits of the case and its forensic investigation. I will be corrected if I am
27 wrong.

28 THE PRESIDENT: Is that right, Mr. Bates, because we obviously read what you had put in.

29 MR. BATES: Save that the just and reasonable test does link in with the merits et cetera, so I
30 think all of these tests tend to run together.

31 THE PRESIDENT: Yes.

32 MR. BATES: There is nothing specific regarding Mrs. Gibson, no.

33 THE PRESIDENT: That is not pursued.

1 MR. BATES: It is not something that I intend to address you on orally but we do stand by our
2 points.

3 THE PRESIDENT: It is not abandoned but it rests on your written submission. I have one
4 question Mr. de la Mare, can you help us.

5 MR. DE LA MARE: Of course.

6 THE PRESIDENT: It was not clear to me at least on the funding side.

7 MR. DE LA MARE: Yes.

8 THE PRESIDENT: You see how the lawyers fees are dealt with. Who is paying the premium for
9 the ATE insurance?

10 MR. DE LA MARE: The premium is fully deferred.

11 THE PRESIDENT: It is a fully deferred premium.

12 MR. DE LA MARE: Indeed, so it is only payable in the event of success.

13 THE PRESIDENT: Who is paying the fees of Oxera?

14 MR. DE LA MARE: That is being paid by Leigh Day.

15 MS. STUART: By who, sorry?

16 THE PRESIDENT: The solicitors, so it is within general disbursement.

17 MR. DE LA MARE: Indeed, yes.

18 THE PRESIDENT: Thanks very much, that is all I wanted to clarify. So the role of Burford is
19 purely to facilitate the setting up of the insurance, it is not that they are paying a premium.

20 MR. DE LA MARE: No, Leigh Day are covering the costs of disbursements and given that the
21 lawyers are all acting on a straight CFA basis, there are no other costs.

22 THE PRESIDENT: Yes, I see.

23 MR. DE LA MARE: Effectively, Burford's policy provides cover against the adverse costs risk
24 of the litigation.

25 THE PRESIDENT: Yes, thank you.

26 Yes, Mr. Bates. Further submissions by MR. BATES

27 MR. BATES: Members of the tribunal, English law generally does not allow anyone other than
28 the attorney general or another state agency to bring private law proceedings on behalf of
29 other people, especially other people who they do not know who have not authorised such
30 proceedings.

31 The consultation paper that preceded the 2015 Act recognised the need for strong
32 safeguards to ensure that opt-out actions in particular could not be brought unless certain
33 criteria were satisfied and subject to a preliminary merits examination.

1 Amongst the things that the tribunal must consider when deciding whether to certify a
2 collective action is the relationship between likely costs and likely benefits, and that is Rule
3 79(2)(b) which is of course something that goes to the proportionality of allowing the
4 proceedings to go on.

5 It would not be desirable to subject companies having to defend themselves in costly
6 litigation brought on behalf of large numbers of unnamed consumers, based on mere
7 speculations and hypotheses that there might have been significant aggregate consumer
8 losses simply because there had been an infringement and the OFT or the CMA had not
9 made a definitive finding one way or another as to whether an object infringement had had
10 particular effects or what those effects might be.

11 In order for the tribunal to properly consider proportionality and merits it is necessary for
12 the proposed representative to explain in some detail with quite a lot of forethought what
13 her case is, exactly what it is she intends to prove and how it is that she intends to prove it.
14 That is basic.

15 In recent months there has been a lot of debate in the media about whether it makes sense to
16 embark on a major undertaking without having a plan. No such debate arises in relation to
17 Section 47B. Rule 793G and H require that an applicant for a CPO provide a concise
18 statement of the relevant facts and contentions of law on which she intends to rely -- so that
19 is the requirement to start off by stating what the case is -- and then the CAT guide at
20 paragraph 6.30 states:

21 "The tribunal will expect the proposed representative to have prepared a plan for the
22 collective proceedings".

23 THE PRESIDENT: Just pause a moment.

24 MR. BATES: Yes we can look it up if that would be helpful.

25 THE PRESIDENT: Sorry, you were in the guide.

26 MR. BATES: At paragraph 6.30 and it is a very long paragraph. The bit I was reading from is
27 under the subheading, "Any plan for the collective proceedings Rule 783C". It says there:

28 "The tribunal will expect the proposed class representative --"

29 THE PRESIDENT: Can we find it in the Butterworth's book or have we got another copy?

30 MR. DE LA MARE: It is page 3515.

31 THE PRESIDENT: 3515, thank you.

32 MR. BATES: It says:

33 "The tribunal will expect the proposed class representative to have prepared a plan for
34 the collective proceedings which addresses matters set out in the relevant sub-rule.

1 Such a plan should be sufficiently detailed and comprehensive to correspond to the
2 nature of the particular case."

3 Then there is a list of matters that may appropriately be set out in the plan and that list
4 includes things like: the degree of disclosure likely to be required in the proceedings; how
5 necessary witnesses will be identified and what steps will be taken to obtain their evidence;
6 if it is proposed that the collective proceedings should result in an aggregate award of
7 damages, how that award would be distributed as between members of the class; and then
8 also a proposed timetable for the litigation.

9 THE PRESIDENT: Yes.

10 MR. BATES: They are all things that necessarily envisage as a prerequisite that the applicant will
11 be clear as to precisely what facts she intends to rely on and how she might prove those
12 facts. As the CPO application says, this is Mrs. Gibson saying it as paragraph 35:

13 "In broad terms of plan is intended to encompass the various matters which would
14 ordinarily be considered at the outset of any large piece of litigation albeit that it is not
15 normal practice to reduce all such matters into one written document. In the present
16 case the litigation plan is contained in Mr. Haan's witness statement at paragraph 28
17 and onwards."

18 In relation to a proposed opt-out claim the nature of the preliminary merits examination is
19 apparent from another paragraph of the CAT guide and that is paragraph 6.7.

20 THE PRESIDENT: 6.7.

21 MR. BATES: Yes. If I can ask the tribunal to perhaps read it quickly to yourselves. (Pause)
22 What it is saying is that where an opt-out CPO is applied for and granted the panel that
23 granted the CPO will not be able to hear the trial.

24 THE PRESIDENT: No, no, no, it will not be able to hear -- it is an application for a collective
25 settlement, it is dealing, I think this is a different point. It is approval of a collective
26 settlement after proceedings have started. So, for example, suppose you go away now and
27 in two months' time there is a proposed settlement --

28 MR. BATES: Yes, you are quite right, I had misread that part.

29 In Pride's CPOA response, we have set out how courts of other common law jurisdictions
30 approach applications for collective proceedings orders. Some relevant cases are in the
31 bundle, so they are available if the tribunal wishes to read some of them to get a flavour of
32 how things work in those jurisdictions.

33 I do not propose to get into a thicket of going through all the Commonwealth case law you
34 will be pleased to hear and clearly there are material differences between the legislations of

1 the different jurisdictions. But I simply make the following observations about those cases
2 as follows.

3 First of all, one can see from all of the common law authorities that they apply fairly
4 intensive scrutiny to proposed actions at the certification stage, especially, where relevant,
5 opt-out actions. So that is the first point.

6 Secondly, that it is true that the US federal rules include a predominance requirement in
7 relation to commonality and that has not been imported to the UK, but that does not detract
8 from the potential to gain useful insights by looking at how the US courts have approached
9 other issues, including the assessment of merits.

10 Third, that my learned friend's skeleton suggests that Canada may be a more helpful
11 example than the United States. We suggest that it may not be because the Canadians do
12 not have a preliminary merits test whereas in contrast, of course, the UK policy choice,
13 taken after considering the examples of all these other jurisdictions, is to consider the
14 strength of the claim and we pointed to in our skeleton at paragraph 37 the BIS consultation
15 response document which shows that there was a choice to include a preliminary merits test.
16 So Canada is not a helpful comparator with us in that particular respect and indeed, anyway,
17 if you look at the Canadian authorities, there is pretty strict analysis given to whether or not
18 the commonality requirement is satisfied and, of course, as we saw from the discussion
19 yesterday about commonality and suitability, all of these things and the definition of the
20 class do tend to run into each other.

21 THE PRESIDENT: The Canadian courts -- I think it is slightly different with Quebec, but with
22 other provinces it is provincial law and not federal law -- and they do, as interpreted,
23 require the court to be satisfied that not just it is a suitable case for common issues but that
24 it has a plausible basis in fact to proceed. So they do and they throw out some applications
25 for that reason.

26 MR. BATES: Indeed, yes, but they look at it in terms of whether there is some evidence on each
27 of the things that would need to be proved, which is perhaps slightly different -- requiring
28 there to be some evidence on each point is perhaps a lower threshold than looking at
29 whether the case is strong or weak.

30 It may be that when one actually reads what the courts have done, as you have indicated, sir,
31 sometimes it is difficult to discern great difference in the substance.

32 THE PRESIDENT: I can only say, "Is there any particular case you want to take me to?" but
33 when we did look at the Canadian cases, they do apply -- it is a low threshold, but they
34 certainly do look at seeing, not that it is on the balance of probabilities likely to succeed --

1 and I do not think the UK legislation does that either -- but they do look and see that it is not
2 a weak case in which that is a factor.

3 MR. BATES: Indeed, sir. Given that indication I do not think I need to show you the authorities
4 themselves.

5 As stated in our skeleton, Pride continue to rely on all our objections to the CPO which
6 were set out in our response. I do not propose to go through them all orally, but I will
7 simply focus on those points that might benefit from some oral elucidation.

8 But our case in a nutshell is that the material that has been filed by Mrs. Gibson as part of
9 her application is insufficient to meet any of the statutory thresholds -- commonality,
10 suitability, just and reasonable -- and we also say that the claim is weak because it is based
11 on little more than speculation that consumers could have suffered losses on a particular
12 hypothesis but it is also weak for another reason, which is that the factual evidence that
13 would be needed to establish a loss of anything like the kind of level that is being suggested
14 by Mr. Noble's reports is simply not available.

15 As I have already indicated, I am not going to consider each of the statutory thresholds in
16 turn because, for example, if claims do not raise common issues they will not be suitable for
17 collective proceedings and it is also hard to see there could be an aggregate damages award
18 and a proper distribution, et cetera, so there is no point in separating out the tests in that
19 way.

20 Also, if a claim is well thought out then that will help to show that it would be fair and
21 reasonable to permit the proposed representative to bring the action, but of course the
22 converse is also true: if you have a class representative saying, I am familiar with litigation,
23 I can control the litigation, make appropriate judgments about that, et cetera, to some extent
24 the proof of the pudding is in the eating by looking at what is being done within the
25 application.

26 THE PRESIDENT: I do not think, to be fair, any class representative at the moment here could
27 say, I am familiar with collective actions litigation, and what is required for that is they tell
28 them -- it is only what their lawyers tell them at the moment.

29 MR. BATES: Indeed, but in terms of whether or not they meet the just and reasonable
30 requirement, I think one -- I suggest one can get some insight by looking at what has
31 actually been done in terms of the clarity with which the claim has been put or not put.

32 THE PRESIDENT: Yes.

33 MR. BATES: What I propose to do in the rest of my submissions is to address the following
34 topics in order: first, the consequence for this case of the principle that you can only get

1 damages for losses caused by infringements rather than policies; second topic, what facts
2 have already been established by the OFT decision; third, what are the other facts that Mrs.
3 Gibson would need to prove in order to provide the basis for obtaining anything
4 approaching the level of damages indicated by Mr. Noble and how could she go about
5 proving those things, what would be involved and what might be the cost.

6 Fourth topic, how does the need for Mrs. Gibson to prove those things fit with what is
7 envisaged by her litigation plan.

8 Fifth, based on what we now know, is her case likely to be strong or, as we say, entirely
9 speculative and very weak?

10 Sixth, does Mr. Noble's economic approach in Noble 1 and Noble 2 stand up to scrutiny in
11 terms of serving as a reasonable basis for making even a preliminary assessment of potential
12 consumer losses? Even ignoring any issue about subclasses, just looking at the whole class.

13 THE PRESIDENT: Yes.

14 MR. BATES: Then, seventh, if there were consumer losses how could you go about distributing
15 the funds?

16 So the first topic: you can only get damages for losses flowing from infringements. We
17 have already seen that the analysis in Noble -- and that is what is being relied on principally
18 to show any consumer loss -- has been based on the policy and not the infringements. His
19 explanation for this is that the communication by Pride to retailers -- and he accepted under
20 cross-examination today that we do not know how many retailers -- so the communication
21 to them of the facts of the policy will itself have somehow affected how retailers generally
22 behaved when setting their prices or some other aspect of their conduct.

23 This will somehow have dampened competition with the effect of raising prices on all
24 models of Pride's scooters regardless of where they were bought from. So that, as I
25 understand it, is what is now being alleged as to the main bit of damage.

26 I note that at the end of the evidence being given by Mr. Noble there are other possibilities
27 about losses flowing from specifically the infringements, for example. But in my
28 submission, when you look at Mr. Parker's analysis, and indeed even what is said in Noble 2
29 -- and I will come back to this later when we are looking at merits -- that is not really what
30 these proceedings are about because the quantum of any losses that could be attributed to
31 the infringements themselves affecting -- as Mr. Glynn, I think, mentioned on Day 1 -- less
32 than 1,000 potential consumers just does not get you anywhere like to the level of damages
33 where these proceedings could be regarded as proportionate. That is even assuming that all

1 of them suffered loss whereas, in fact, as Mr. Parker says, it is likely to be, if any
2 consumers, a much smaller number than the 1,000.

3 The relevant case that is being put against us is all about the effects of the policy. But as
4 Mr. de la Mare accepted yesterday, damages are available only for losses caused by
5 infringements and a chapter 1 infringement requires a meeting of minds and that is clear
6 from the decision itself -- it is trite law anyway but just for your note it is at paragraphs 3.5
7 to 3.26 of the decision where all the law is summarised.

8 Mr. de la Mare confirmed that Mrs. Gibson does not intend to seek to prove any additional
9 infringements beyond the eight that are found in the decision.

10 The way of Mrs. Gibson attempting to very inventively get around this problem is by
11 constructing a counterfactual analysis that assumes that there was no policy, so you are
12 comparing the world with the policy with the world without the policy. So that is how
13 somehow this circle is being squared.

14 We would say, of course, it does not actually get her very far towards establishing liability
15 because it simply begs the question as to how she is going to show what were the market
16 effects of the policy which, of course, is going to require rather more than simply showing a
17 movement in prices over five years, but that is a subsequent question that I will come onto
18 later.

19 The prior problem is it completely misapprehends the nature and purpose of counterfactual
20 analysis in a competition damages case. You cannot get damages based simply on
21 counterfactuals or a selection of counterfactuals. Counterfactual analysis is a tool that is
22 used simply for identifying and estimating the effects of infringements, which is what the
23 laws imposing tort liability are for. So to select a counterfactual scenario that seeks model
24 the effects of the policy rather than focusing directly on the eight infringements is
25 fundamentally wrong.

26 This is a very basic point and it is a short one, but I do not want to be passed over just
27 because I have not had to take time over it. Obviously it is fundamental to whether a CPO
28 should be granted in this case for a number of reasons.

29 First of all, it is fundamental to the losses that are alleged in the CPO application. It is
30 clearly also fundamental to the estimate of the aggregate value of the claims. The only
31 evidence before the tribunal to suggest there could be claims worth substantial sums is the
32 Noble reports which are expressly based on a counterfactual focused on the policy.

33 So if that was not the right approach, then it follows the Noble reports really have no value
34 for present purposes with the consequence that there is no evidence at all before the tribunal

1 to show that the infringements gave rise to any significant consumer losses, let alone
2 millions of pounds of consumer losses, which is the assertion in the CPOA itself.
3 Indeed the assertion in the CPOA is by reference to some people having paid RRP anyway,
4 which of course we know now that they did not, so that seems now to have been no longer
5 pursued.

6 We say that all of this itself surely suffices to make it wholly inappropriate for a CPO to be
7 granted in this case given that the burden is on Mrs. Gibson to satisfy the Rule 79
8 requirements. But in fact we also have Mr. Parker's evidence, which does apply the right
9 counterfactual, and confirms it is very unlikely that significant consumer losses, if any
10 losses, were produced. So that is what I say about policy versus infringement.

11 In case the tribunal is not with me on the counterfactual and infringement, the issue I have
12 just set out, I will go on to make my other arguments.

13 THE PRESIDENT: I think we are with you to a significant extent in that, as we said yesterday I
14 think, we do not think that the methodology and conceptual approach of Mr. Noble's report
15 can stand up and justify a CPO because as you have said we agree it proceeds on the basis
16 that it is all retailers for the full supra period who are directly affected. That is why we said,
17 yes, it is either on that basis, as you would urge, we dismiss it or there is an adjournment
18 such that the applicant can go away and think again, reformulate their approach by focusing,
19 as you have emphasized, on the infringements and looking and asking the question whether
20 there was an effect on other retailers through a change in the competitive pressure from the
21 eight over the period that they were infringed, which is theoretically possible.

22 Whether there was we have no idea. Whether it was significant and what it might amount
23 to we have no idea. How robust the data might be in supporting it, we also have no idea.

24 But all that -- and you would say, I think with force -- that should have been done at the
25 outset.

26 We understand that point because it is a fairly obvious point and it will require some
27 disclosure whereas the applicants approached this case on the basis, as they say, that no
28 disclosure is really going to be required.

29 So we take those points of criticism and so we are, to that extent, with you on the first point
30 that you made, but what we have indicated is, subject of course to the other points which
31 you are about to elaborate, we think it may be appropriate for the applicants to be given a
32 chance to cure that in this case, for circumstances I summarised yesterday. I know you
33 urged us not to take that course and you said it would be unfair Pride and so on, but we have

1 already, as it were, indicated that we see that point and that the starting point of classes fails
2 to look at what actually the infringements were how long they lasted.

3 MR. BATES: In light of that indication, sir, I will do my best with the rest of my submissions,
4 but the reason why it causes difficulty is this: one is trying to look at what facts have been
5 conclusively established by the decision and then what other facts would need to be proved
6 in order to show that loss has been given rise to in a particular way.

7 At the moment, the position of Mrs. Gibson -- and as articulated by Mr. Noble -- is that
8 there was this general cross-market effect and it is that that produces this figure of £4
9 million or £5 million that makes it proportionate to carry on spending time, money and
10 effort on these proceedings.

11 If the position is that we should all go away and wait until there is some additional data and
12 then look at that data and then essentially come up with a new case that is totally different
13 from what has been advanced by Mrs. Gibson so far, because that is what it would be. That,
14 I suggest, is going much further than what I had understood the tribunal to be suggesting
15 yesterday.

16 What I had understood the suggestion to be yesterday is that there was a difficulty
17 specifically about subclassing and the question was, whether by going and getting some
18 additional price data, one might be able to do more accurate subclassing.

19 What is now being put to me is that it is not even about subclassing; it is that if we go and
20 have a look at the data maybe we could design a completely different theory of how there
21 could be effects on consumers that is relating actually to the infringements rather than to
22 consumers knowing about the policy, which is a totally different case.

23 THE PRESIDENT: It is the case, although it certainly did not emerge from the application, that
24 Mr. de la Mare said yesterday, before Mr. Noble started his evidence, that that is the case
25 the applicant wants to put. He explained it just before lunch yesterday, namely that it is a
26 reduction in the competitive impact because the infringing retailers did not advertise lower
27 prices. So that is the case they wanted to advance.

28 Therefore one would have to look at -- which amounts to an umbrella effect on all the other
29 retailers, just like in a cartel where you have the cartel prices being higher and you may
30 have non-cartelists' prices also higher because of the umbrella effect. So it is the same point
31 and that is how they wish to put their case.

32 The work to put that case in terms of what sort of figure it ends up with on once you look at
33 the effect on the umbrella retailers, we just do not know because Mr. Noble has not done
34 that work. It may be, when it is done, that there is a marked difference between the directly

1 affected price and the umbrella price such that the value of the claim for everybody other
2 than the 1,000 consumers who actually bought from the infringing retailers over the
3 infringement period goes down significantly. That is possible and it is possible that
4 therefore the case then does not make sense in terms of expense and outcome.

5 But at the moment we just do not know and that is why it is not just revising the subclasses;
6 it is going back to the point of can you calculate common damages on a common basis for
7 people in these classes, which is one of the things you have to show to get a CPO in the first
8 place, plus some idea, just in very broad terms, of what the sort of damages might be.

9 Those are all matters that go to some of your submissions. It may be that even so you may
10 be able to say, now, well, all you will get is different prices and regression techniques, the
11 various techniques that Mr. Noble has now explained one would need to apply in order to
12 look at causation, just are not going to be adequate in this case.

13 That is an important question which is not addressed in his report at the moment as to the
14 sort of technique to be applied but he explained them in his evidence.

15 I am not trying to cause difficulties for you, Mr. Bates, but what I am saying is that some of
16 these points -- some of them -- will be points you would be able to advance if and when any
17 reconsidered case is put forward and one would then have to assess them.

18 The difficulty of doing it now is you are doing it on the basis of an approach which we
19 accept, for the reasons you have given, has a fundamental problem. It is not going to be
20 done nonetheless -- even with better information, it is certainly not going to be done in the
21 way in which Mr. Parker thinks it should be done. It is clear that that is not being proposed,
22 that one would be looking at individual negotiations by consumers and, in his argument,
23 that you need to have information about how individual consumers make their choices.

24 That is not proposed. If that is a good objection then it will stand and one can address it
25 now.

26 MR. BATES: Yes.

27 I do not think Mr. Parker was proposing that such an exercise should be done or that it was
28 possible; his evidence was about the theoretical framework for establishing loss. I fully
29 accept that we do not have here today the data and we always would have accepted that
30 there are limitations to the data available to Mrs. Gibson.

31 However, the minimum that should be expected of Mrs. Gibson at this stage is to tell us
32 what is the theoretical framework, as a matter of economics, that leads one to suppose that
33 there could be substantial effects on consumers that would make these proceedings

1 worthwhile and proportionate. If they cannot get over that threshold, these proceedings
2 should be put out of their misery now and no more money should be wasted on them.
3 What I am saying the difficulty that I am in is that I know what our theoretical framework is
4 or Mr. Parker's theoretical framework is and I can certainly address you on that, but none of
5 us know what Mrs. Gibson's theoretical framework is because in all of the evidence that was
6 given by Mr. Noble, I could not divine from it any theoretical framework suggesting
7 consumer loss that did not relate to the policy rather than the infringements.

8 THE PRESIDENT: I think we could.

9 MR. GLYNN: Yes.

10 THE PRESIDENT: There we are not with you, Mr. Bates. The theoretical framework explained
11 by Mr. Noble in his evidence, but not in his report, is that there are eight retailers who,
12 together, are a not insignificant part --

13 MR. BATES: It is the anchoring point.

14 THE PRESIDENT: -- of the market. They are about 15 per cent, they are important retailers.
15 Even though the number of sales they may have made may be limited, they were advertising
16 on the Internet.

17 In the period of the infringement the prices they advertised or, to put it another way, they
18 did not advertise the sort of lower prices that they might have advertised absent the
19 infringement. Either they advertised higher prices or they advertised no prices and said
20 "Call for better prices".

21 Therefore the competitive pressure that they would have exerted on other retailers in the
22 absence of the infringement in the counterfactual was not there and because in aggregate
23 they are not insignificant and because retailers look at each other's prices online, this
24 therefore had an effect on other retailers and therefore on people buying from other
25 retailers.

26 Even though there is a variety in price that individual consumers pay, the effect was a
27 uniform effect, so people still paid a variety of prices and always would have, but the
28 percentage by which the amount they paid was higher.

29 It would be the same, broadly the same, whether you were paying £1,000 or £750 for your
30 scooter. That as we understood it --

31 MR. GLYNN: That is exactly right.

32 THE PRESIDENT: -- is the theory which conceptually, theoretically we can see is plausible.

33 MR. BATES: Yes and indeed Mr. Parker says it is plausible in his evidence --

1 THE PRESIDENT: He does. Well, I think he says that you cannot then use it to calculate loss
2 because of the individualised negotiation and you would have to take that into account
3 which, of course, you have not got the data to do so you cannot. Mr. Noble is saying you do
4 not need to look at individualised negotiation.

5 MR. BATES: I think he goes rather further than that, does he not? He says, as a matter of
6 theoretical framework, it is possible that there could be such an effect; however, when you
7 actually look at the evidence in terms of the scale of these retailers, et cetera, being eight out
8 of 300 -- and that is only the ones selling it regularly -- that on that basis it does not make
9 sense to suppose that there are indirect effects because unless you can establish significant
10 direct effects you do not have umbrella effects because umbrella effects are by definition
11 parasitic and consequential on the direct effects. So that is his analysis.

12 MR. GLYNN: I think the way in which the discussion has gone on past that is that there could be
13 an indirect effect not to do with the policy but there could be an indirect effect from the
14 information. So even if there were a small number of directly affected sales, it could be that
15 the different information in the market affected the wider group, so the ripple effect is
16 through economics, if I can put it that way, rather than through policy.

17 MR. BATES: Yes. There are so many points there I do not know which to address first.
18 I do, of course, stand by the submissions I made at the end of the day yesterday. I do
19 suggest it is really come to something where, in the context of a CPO application that is
20 supposed to be a strong safeguard, one is dealing with a theoretical framework that was one
21 answer to a question that was asked to -- I have to say, in my submission, it is wholly
22 inappropriate to go down this road.
23 However, if we are going to go down it, I also make the further point which is that even if
24 Mr. Parker is wrong to rule out the possibility of these further ripple effects, et cetera, which
25 he has not hypothesised -- and I will have to take guidance from him over the lunch
26 adjournment as to how to deal with that point further -- one still has the question of how you
27 are then going to show what those effects were. That is again something that is very
28 difficult to see.

29 MR. GLYNN: Exactly so, exactly so, exactly right.

30 THE PRESIDENT: We are sympathetic to your difficulty but you were making submissions on a
31 case that was not available to you when you came to prepare for this hearing. We fully
32 understand that point. That is the difficulty.

33 But equally it may well go to the question of whether it is fair to adjourn and give the
34 applicant another chance or whether that would be unfair because obviously we have got to

1 have regard to the interests of Pride as well the interests of the class Mrs. Gibson seems to
2 represent.

3 MR. BATES: That has been very helpful guidance, yes.

4 THE PRESIDENT: It seems to me that the really important question, if we do adjourn it and if
5 we are persuaded to adjourn it, then I think it is really not fair to expect you to answer a
6 case that has only, as you say, been elaborated in answer to questions from the witness.
7 You have not had a chance to discuss it with your expert and your expert has not put in a
8 report on it and so on.

9 MR. BATES: Possibly less -- I am not sure if it is less unfair to me then giving them another bite
10 of the cherry.

11 THE PRESIDENT: It is not unfair to you as an advocate.

12 MR. BATES: Merely to my clients.

13 THE PRESIDENT: Merely to your clients and that is quite a different thing.

14 So you are welcome to meet the case as now rethought, if you feel comfortable doing it.

15 MR. BATES: Yes.

16 THE PRESIDENT: But if you say it would be quite unfair to expect you to do so --

17 MR. BATES: I do not say that; I would rather do my best to meet it as best as we can.

18 What I was going to say before we had this discussion was that in the remainder of my
19 submissions I will assume that Mr. Noble was right to be seeking to model the effect of the
20 policy. So I will now not say that and substitute it to say that he is right to bring forward
21 this new hypothesis about the anchoring effect, et cetera.

22 THE PRESIDENT: Yes.

23 MR. BATES: We will substitute that instead.

24 So the second topic I was going to address is what facts have been conclusively addressed
25 by the decision such that Mrs. Gibson will not need to prove them.

26 We know that pursuant to section 58Aa of the 1998 act an infringement decision is binding
27 on the tribunal. What is meant by an infringement decision? Well pursuant to section 59(1),
28 an infringement decision has the meaning given in 47A(6) and that meaning is, so far as is
29 relevant to these proceedings, a decision of the OFT that the chapter 1 prohibition has been
30 infringed.

31 We certainly accept that the findings of infringement, that is Pride was party to the eight
32 agreements with the eight retailers, each for its own relevant period, are binding.

33 THE PRESIDENT: Yes.

1 MR. BATES: Section 58 provides that other findings of fact in an OFT decision are binding on
2 the parties to the proceedings, though not on the tribunal under part 1 of the act, but subject
3 to the proviso that such binding effect applies unless the tribunal directs otherwise. The
4 reasons for that proviso are identified in the *Enron II* case which is authorities bundle 1, tab
5 18. It is from paragraphs 50 to 583.

6 THE PRESIDENT: Before you go there --

7 MR. BATES: Yes, sir.

8 THE PRESIDENT: -- are you building up to saying that we should direct otherwise in this case?

9 MR. BATES: Well, that is certainly my alternative submission. My first submission was going
10 to be the requirements -- first of all the explanation given by Lord Justice Lloyd as to the
11 difference between section 58 and 58A and why there is a difference.

12 THE PRESIDENT: Yes.

13 MR. BATES: Then I was going to go on to what he says at paragraphs 54 to 56 about the need
14 for --

15 THE PRESIDENT: We had better look at it then.

16 MR. BATES: It may be convenient if the tribunal reads paragraphs 50 to 56 over the lunch
17 adjournment and I can consult with Mr. Parker.

18 THE PRESIDENT: Yes, very sensible. 50 to 56 of *Enron* at tab 18, which will explain these
19 sections. Yes.

20 MR. BATES: I do not know, sir --

21 THE PRESIDENT: Are there any particular passages in the decision that you are going to say
22 therefore do not have, as it were, the full force?

23 MR. BATES: I am thinking particularly of 3.225 which seems to be of particular importance in
24 my learned friend's case.

25 THE PRESIDENT: Yes I see. I understand. Well, we can look at that as well and we will bring
26 that very helpful indication to mind.

27 Shall we rise now and come back at 2 o'clock, to give you a little longer? We will look at
28 both *Enron* and -- I can see where you are going.

29 We will come back at 2 o'clock.

30 (12.55 pm) (The luncheon adjournment)

31 (2.00 pm)

32 THE PRESIDENT: Yes.

33 Mr. Bates, we have read the passage in the *Enron* case that you were asking us to.

34 MR. BATES: I am very grateful.

1 So the points that I draw from it -- well, the main point is that Lord Justice Lloyd
2 emphasized the need for any OFT findings of fact that a claimant wishes to rely on under
3 section 58 to be clear and unequivocal.

4 Mrs. Gibson relies on the CAT guide for submitting that there is almost a presumption that
5 she satisfies the preliminary merits standard because she is relying on the binding effect of
6 the OFT decision. It is a submission that my learned friend made which of course does take
7 one back to precisely what it is that the OFT's decision is actually finding and also
8 specifically what in it is being relied on.

9 Rule 75(3)(g) of the Tribunal Rules expressly requires an application for a CPO to identify
10 any relevant findings in an infringement decision. We say -- and this is simply a
11 preliminary point -- that anyone thinking sensibly about bringing proceedings of this kind
12 should surely have a clear idea about what is the extent to which they are relying on facts
13 that are conclusively established by the decision under section 58A and to what extent they
14 are relying on findings -- other findings of fact under section 58.

15 Judging by the tribunal's questions to Mr. de la Mare on the first day and how they were
16 dealt with, perhaps I was not alone in thinking that Mrs. Gibson might be seeking to rely on
17 the decision as some how establishing that the number of infringements was greater than
18 eight.

19 I got that from paragraph 54 of the CPO application, which says that:

20 "The case against the retailers was thus a case based on an sample --"

21 THE PRESIDENT: Just a minute, paragraph 54?

22 MR. BATES: Yes, paragraph 54 of the CPOA.

23 THE PRESIDENT: Which is tab 1 of our core bundle?

24 MR. BATES: Yes. It is at the top of page 19, starting at the bottom of page:

25 "The case against the retailers was thus a case based on a sample showing Pride's
26 consistent policy/strategy."

27 So it was not clear to me from that whether they were accepting there were only the eight
28 infringements or whether they are saying that there were other infringements and seeking
29 perhaps to prove some of those infringements. But Mr. de la Mare disclaimed any case of
30 that kind.

31 Instead, Mr. de la Mare referred to the infringements having "network effects" and placed
32 particular reliance on paragraphs 3.225 of the decision. So since that paragraph has some
33 particular importance in their case, I think we had better have a look at it.

1 It is 130 of the decision, so that is bundle 1, tab 3, page 130. I know that the tribunal's
2 already been shown this. What it is saying is that:

3 "The OFT considers that Pride's strategy in relation to implementing the below RRP --
4 "

5 THE PRESIDENT: Just one moment.

6 MR. BATES: Sorry sir, yes.

7 THE PRESIDENT: Yes.

8 MR. BATES: So there at 3.225 it says that:

9 "The OFT considers that Pride's strategy in relation to implementing the prohibition
10 was intended to apply to the whole dealer network and was widespread, going well
11 beyond the retailers named in this decision."

12 Then at (i) it says:

13 "The overall strategy could only have worked if the majority of retailers adhered to
14 it."

15 My learned friend placed particular emphasis on the word "widespread", so I need to tell
16 you what we say about that.

17 We say that on a plain reading of what the OFT is saying there, it was the strategy which
18 was widespread, it was intended by Pride to apply nationwide. Pride accepts that, it has
19 always accepted that, and it is actually just common sense.

20 THE PRESIDENT: Indeed.

21 MR. BATES: Because otherwise the thing would have been unsuccessful and consumers would
22 have still been able to easily find advertised prices online which would create competitive
23 pressure on the compliant retailers to stop complying in order to stop haemorrhaging
24 Internet-driven sales.

25 THE PRESIDENT: Yes.

26 MR. BATES: It is also common sense that the fact that Pride had a policy or strategy of putting a
27 nationwide stop to the online advertising of specific prices for the relevant models was
28 relevant to whether the individual eight agreements were capable of having appreciable
29 effects on competition, which is what the OFT was analysing in this section of the decision.
30 But you cannot properly or fairly read paragraph 3.225 as making findings that there were
31 in fact network effects. It is simply setting out there what Pride's intention was, what the
32 strategy was.

33 I was also going to make a submission that nor can you read that paragraph as a finding that
34 Pride communicated the prohibition to all retailers, but given I was going make that

1 submission in relation to Mr. Noble's analysis of how the umbrella effect could arise, I
2 perhaps no longer need to make that submission.

3 We say that the trying to rely on the word "widespread" in this paragraph as making a
4 finding about anything other than Pride's internal intentions is clearly irreconcilable with
5 what *Enron II* says about the need for findings to be clear and unequivocal.

6 But in the alternative, if I am wrong on that, this would surely be an instance where the
7 tribunal would direct that Mrs. Gibson proved the facts rather than simply relying on the
8 finding. That just brings us back to the question of how Mrs. Gibson would be able to do
9 that.

10 That brings me conveniently to the third topic I was going to address which is: what facts
11 not already established by the decision would Mrs. Gibson need to prove in order to provide
12 the basis for the damages assessment?

13 Here I think is where I need to essentially abandon what I planned to say and address you
14 directly on the new theory that we are focusing on. You already have my submission as to
15 why the language that was used earlier by the tribunal, about whether or not it is completely
16 implausible that consumers suffered some loss from the infringement is not the right test,
17 but I say even if that is the right way to look at it, it is completely implausible when one
18 actually looks at the facts --

19 THE PRESIDENT: I do not think I quite said completely.

20 MR. BATES: Well implausible then. That is an even better for me thing that I will try and
21 address then.

22 I will start, if I may, just by explaining in my own words what I think the theory is because I
23 think that is important for the transcript and to make sure I have understood it correctly.

24 I think what is being said is that you have got eight retailers who were party to
25 infringements. To the extent that they complied with the prohibition they would have been
26 putting less price data onto their websites in relation to the relevant models because they
27 had been putting "call for best price" rather than specific prices.

28 THE PRESIDENT: Or higher prices.

29 MR. BATES: Or higher, yes.

30 It has some -- well, I am not sure if they would be putting higher prices, would they?

31 THE PRESIDENT: Well --

32 MR. BATES: They could put the RRP or they could put "call for best price"; I do not think there
33 is anything in between.

34 THE PRESIDENT: No, I think that is right.

1 MR. BATES: That changes, by definition, the total amount of information that is available on the
2 Internet and that therefore if these eight were particularly important, anchoring, benchmark,
3 whatever you want to call them, reference points anyway for either consumers or retailers
4 researching competitors, I suppose, who were looking on the Internet to get indications
5 about prices, that could have produced the ripple effect because it could have had some
6 impact on either I suppose the information that consumers had when they were negotiating
7 prices or alternatively had some effect on other retailers who, having researched
8 competitors' prices, were then putting their own prices. I think that is as I understood it.
9 At a theoretical level, we agree that just leaving aside the fact that it is only eight retailers,
10 we can see that a ripple effect like that could arise in principle from a reduction of price
11 information being put on the Internet by particular retailers. But we say in terms of whether
12 it did so in this case (a) It is entirely speculative and (b) it is very unlikely.
13 Before I go further with that submission, I think I should show you what Mr. Parker says in
14 his research. So that is tab 19 of the core bundle.
15 We are going to section 6. So just picking it up at paragraph 7 of -- perhaps I could ask the
16 tribunal to read 6.2.15 to 6.2.19 first of all. It is behind tab 18.

17 THE PRESIDENT: 6.2.15 to 6.2.19?

18 MR. BATES: Yes, sir.

19 MS. STUART: That is page 55; yes?

20 MR. BATES: It is, ma'am, thank you. (Pause)

21 So what Mr. Parker has done here is carried out research using the Way-Back Machine of
22 actually seeing what was on the relevant retailers websites during the infringement period.
23 One can see that, even during that period, you can find on the relevant retailers websites
24 instances where they are not complying with the prohibition themselves.

25 You have already seen in Mr. Allen's witness statement, his explanation for this regarding
26 the competitive pressure that was coming from all the rogue retailers who were continuing
27 to advertise specific prices.

28 I think it is also useful just to focus on exhibit 5, which is an example of one of the relevant
29 retailer's websites, just to get a sense of how those websites were laid out and what was
30 actually on the web pages.

31 So the first point to note is that you see a number of different scooters of the same type from
32 different brands all being displayed within the same web pages and you have prices for all
33 of the scooters that are at very large discounts against the RRP.

1 In this case that includes for the Pride Colt Plus and the Pride Colt Twin, which, I think I
2 am right in saying, were amongst the seven relevant models.

3 THE PRESIDENT: Yes.

4 MR. BATES: So that is an example of what consumers would have seen.

5 If I can now take you onto paragraph 6.2.20 to 6.2.23 and ask you to read those, that is just
6 going on in the same bit of Mr. Parker's report. It is where he is talking about the rogue
7 reports. (Pause)

8 THE PRESIDENT: Yes.

9 MR. BATES: So it is a statement of the obvious, really, that the rogue reports were a list of
10 breaches rather than a list of compliance with the prohibition. The reports themselves -- I
11 am not going to take you through them all, but so you know where they are, they are exhibit
12 NA6, at non-core bundle 2, tab 8.

13 One can see there that there are pages and pages and pages of all sorts of different retailers
14 who are breaching the prohibition. As Mr. Allen explains in his witness statement, this is
15 not the result of some sort of comprehensive monitoring process of looking at every single
16 retailer; it is to do with the fact that other retailers are complaining about low prices being
17 advertised online, please can you, Pride, do something about it, and that is then feeding into
18 the efforts made by Pride's area representatives, et cetera, to try to stop that conduct from
19 going on.

20 Then you combine all of this, of course, with what Mr. Allen says about the policy, the
21 strategy being a failure and the fact that the relevant supra period ends in February 2012
22 which is before the OFT's unannounced visit.

23 So what we get from all much that is that such contemporaneous evidence that there is
24 about the extent to which the policy was being adhered to, both by the relevant retailers and
25 other retailers, shows that there were lots of people -- including sometimes the relevant
26 retailers -- who were displaying prices online for the relevant models and, in addition to
27 that, even when the relevant retailers were complying, you could see on their websites at all
28 times that there were all these other Pride models and non-Pride models all being sold at
29 great discounts against the RRP.

30 Indeed, just for your note, at paragraph 3.66 of the decision, there is just an example for the
31 DNB retailer where the OFT is noting that their compliance was inconsistent and you get
32 similar in relation to other retailers as well.

1 So that is the contemporaneous evidence of what was going on at the time in terms of
2 Internet displaying of specifying prices. Coming on now to thinking about how scooters
3 were actually being sold.

4 We know that there were multiple retailers. Mr. Parker says at paragraph 1.2.1A of his
5 report that there were 600 to 700, of which is 250 to 300 regularly sold Pride scooters.
6 There are lots of small retailers.

7 Given that we are talking about an infringement period of 2010 to 2012, I think we can
8 perhaps take judicial notice of the fact that lots of these retailers are going to have websites.
9 Buying a scooter is a significant purchase. Paragraph 2.11 of the decision notes that the
10 prices were anything between £349 through to nearly £6,000, so the inference --

11 THE PRESIDENT: Sorry, paragraph?

12 MR. BATES: It is 2.11 of the decision.

13 THE PRESIDENT: 2.11, thank you.

14 MR. BATES: It is actually making the specific point there that I make, which is that the OFT's
15 research shows the price of mobility scooters can range from £349 to £5,995:

16 "Given the significant expense that mobility scooters can represent, empowering
17 consumers with the right information and tools to obtain good value can help ensure
18 they are able to [et cetera]."

19 So that is talking about how you can afford a remedy for consumers, in a sense, by online
20 advertising so that they can do research on prices.

21 We also know from the variation in the prices that consumers paid even to the same retailers
22 for the same model, so such as the MT Mobility data, that there is considerable scope for
23 negotiations to take place, whether that is bargaining over the price itself or bargaining over
24 what extras -- batteries, cases, et cetera -- are going to be thrown in as part of the overall
25 package.

26 Knowing what we know, I think this is the time now where we can kind of stand back and
27 ask ourselves -- or we could put ourselves in the position of a consumer going to buy a
28 scooter.

29 It is a significant outlay of money. Many consumers are likely to do some research,
30 whether it is by going to various stores or whether it is by looking online, et cetera. We are
31 talking about 2010 to 2012, so lots of consumers, even quite old people, are going to be
32 using the Internet. I do not think we should draw an inference that people over a certain
33 age do not use the Internet much.

1 THE PRESIDENT: Mr. Bates, we do not need to draw these various inferences one way or the
2 other because we have the benefit of the market study by the OFT which looked at precisely
3 these things. One of the things it found is that a high proportion of consumers do not shop
4 around.

5 MR. BATES: Indeed.

6 THE PRESIDENT: It also found that -- it is true it only looked at the elderly and not at the
7 people under 45 who might be disabled and in need of a scooter, but I think somewhere
8 someone says -- maybe your client -- about 75 per cent of the sales are to the elderly, so
9 certainly a significant number. So that is not a distorted picture of the OFT was looking at.
10 They also found that quite a high proportion of people -- over half of respondents who made
11 a purchase for themselves and 22 per cent of the respondents who made the purchase from
12 somebody else -- did not have access to the Internet.

13 So actually -- although clearly there are some consumers, a not insignificant number of
14 them, who shop around, but quite a lot, perhaps surprisingly given when it was and given
15 that it was, as you say, a significant purchase, who did not.

16 MR. BATES: Indeed, sir, and that is a very important point because to the extent that Internet
17 price comparison was not going on, obviously the potential for changes in online
18 information to have market-wide effects is obviously much more limited because you can
19 only have the effects on those consumers who are doing that sort of research.

20 THE PRESIDENT: Mr. Noble addressed that and he said two things: one, retailers, when they
21 are advertising prices, they do not know which consumer it might be -- whether it is
22 someone who has done research or not -- and it will affect the price they offer.

23 MR. BATES: That is entirely true but one thing is parasitic on the other, is it not, because if I am
24 a retailer trying decide how much weight to give to what information is online when
25 deciding what my own prices should be, if the position is that online research is very
26 important to consumers in the sense that lots of consumers are doing lots of online research,
27 obviously that is going to increase the competitive pressure that is arising on me from what
28 is going on on the Internet. So I think there is a relationship between the two.

29 Perhaps the best way actually for me to develop this point is to show you Parker paragraph
30 6.2.25 and ask you to read from there through to 35.

31 THE PRESIDENT: 6.2.25?

32 MR. BATES: Yes.

33 THE PRESIDENT: "Evidence from contemporaneous research." (Pause)

1 How much can you infer, from research results in 2016, what might have been available in
2 2011?

3 MR. BATES: I am not sure that that is a particularly fair criticism of what is being said here.
4 What Mr. Parker saying is simply: how does Google work in terms of what happens if you
5 do particular searches?

6 THE PRESIDENT: We know how Google works. I thought he was saying in 6.2.26:

7 "I gained an indicative sense of the type of results that would be available ..."

8 Leading to his conclusions in 6.2.33:

9 "... a wide range of prices and variety of products and retailers active in the market ...
10 consumers would appear to be able to observe several discount offers."

11 Well, they would in 2016; I just wonder how much that tells us of what they would have
12 seen in April 2011.

13 MR. BATES: Yes, well, I think there is a couple of points to be made about this. One is that of
14 course the rogue reports were compiled through precisely this method so we do know what
15 would have come up through doing Google searches because that is what is in the rogue
16 researches.

17 Further, at 6.2.25, Mr. Parker is very fairly and rightly --

18 THE PRESIDENT: Sorry, are the rogue reports based on generic searches like this or are they
19 also based on retailers who look at another retailer's website and say, retailer X is on its
20 website advertising the scooter at this price?

21 MR. BATES: Yes, but that is exactly the same thing, is it not?

22 THE PRESIDENT: It is not the same thing because a consumer may not be doing that. I thought
23 he was making the point here about the range of prices you would see on a generic search. I
24 just do not know --

25 MR. BATES: Okay. All right. Let us take a step back and maybe I can explain it this way, sir.

26 THE PRESIDENT: I have not looked at them in great detail but --

27 MR. BATES: Let me try and explain it this way --

28 MR. DE LA MARE: It is paragraph 91 of Mr. Allen's statement; that answers your question on
29 that: it is a blend of the two.

30 MR. BATES: Yes, exactly, it is a blend of the two.

31 Let me try and deal with the point this way: put yourself in the position of a retailer who is
32 not one of the eight.

33 THE PRESIDENT: Yes.

1 MR. BATES: Your concern is to look at what prices people who might want to buy from you are
2 otherwise going to see; that is why you are doing competitor research.

3 You know that there two types of customer, broadly speaking: there are customers who do
4 not do any research, maybe they are not particularly price sensitive, they walk into the shop
5 and they are prepared to pay what the price is because it is not worth the investment of time
6 for them to do the research; and then you have got another group of consumers who do do
7 research, they shop around. The way of shopping around is going to vary between different
8 consumers: some do it by going to a number of shops, some look at adverts in the press,
9 some -- especially people who bought scooters before -- might get direct mail from scooter
10 distributors. There are various sources, but some of those consumers will search online.
11 If you are that retailer, what you are going to be concerned about is, for those consumers
12 that are looking online, what price data are they going to see? There is no point in
13 worrying about what is on the Internet if your own customers are not going to search; it
14 does not matter.

15 So the concern that is going to be coming from the retailers is: look, if you do a search for
16 scooters of this kind on Google -- in fact, as Mr. Parker's analysis shows, even if you did the
17 search, albeit he accepts this is five years later and I suppose it is possible the way Google
18 works might have changed, but even if you did the search with the name of the particular
19 retailer itself that you were thinking of buying from, what you get up is a whole load of
20 prices from other retailers that are cheaper, so that is why you are annoyed about it.

21 So you then get on the phone to Pride and say, this is unacceptable, I cannot make a proper
22 margin, what you are going to do about this. Otherwise why complain about it? There is no
23 problem.

24 THE PRESIDENT: Yes.

25 MR. BATES: At paragraph 6.2.25, Mr. Parker is absolutely professionally and rightly
26 acknowledging -- as he says, unfortunately, it is not possible to use the Way-Back Machine
27 to replicate what consumer using a Google search for mobility scooters during the supra
28 period would have observed because the Way-Back Machine only allows you to find
29 particular web pages and not replicate Google searches.

30 He then sets out, given what we know now, only five years later, as to how Google actually
31 works in coming up with all these particular prices, and given that we have seen in a
32 previous section of his report that we have got the rogue report showing what people were
33 advertising online, then all of that leads to the conclusion that if you were a consumer who

1 wanted to do online research and did some online research during the relevant supra period,
2 what would you have seen?

3 The overwhelming likelihood is that you would have seen something very much like what is
4 on Google now, which is all these rogue prices. That is exactly what is demonstrated by the
5 rogue reports and that is precisely why the rogues were a problem. Otherwise, there would
6 not be a problem.

7 THE PRESIDENT: Yes.

8 MR. BATES: All that analysis of how the market works feeds in to Mr. Parker's conclusions,
9 which he sets out, he summarises them in section 1 of his report; I will come to those
10 momentarily. Before I do so, let me say this: I recognise that Mr. Parker's conclusions are
11 directed to meeting the case that was at that time being put by Mr. Noble. What Mr. Parker
12 was saying is that if you look at direct effects on people who would have seen the
13 advertising that said "Call for best price", how many of those people are there, could you
14 have significant effects, and if the effects were insignificant, it is not realistic to assume
15 significant indirect effects; that is his analysis.

16 I accept that is not directly on point for the theory now, but actually it is still relevant for
17 this reason which is that, again, coming back to putting yourself in the situation of the
18 retailer, all these things are parasitic because if you are a retailer trying to decide how to
19 respond to pricing information that is out there, what you are really trying to process is how
20 is that going to have effects on the pricing information sets that people who are making
21 purchasing decisions actually see?

22 That is precisely the way that Mr. Parker's looking at things in his analysis. Because if you
23 have got lots of consumers whose information sets are going to include the rogue prices,
24 then that is going to create the competitive pressure for other retailers to keep their prices
25 down because they know that there is all this research going on and that consumers have
26 that data in the information sets.

27 If, on the other hand, consumers do not have the information in -- the rogue prices in the
28 information set, then you can see that there is a likelihood, if you like, of them paying more
29 although then there is the question about whether the reason they do not have those prices in
30 the information set is down to these eight infringements or it is down to something else like
31 they did not bother to search online.

32 If I can take you to page 5 of Mr. Parker's report, it is where his summary starts. He is
33 explaining in all of this section -- I imagine the tribunal's probably had an opportunity to
34 read at least the summary of Mr. Parker's report.

1 THE PRESIDENT: Yes.

2 MR. BATES: It all feeds -- he is analysing there how direct effects would depend on your
3 information set and then at paragraph 1.7.4B, which is on page 18, he is saying there:

4 "The analysis of historic web pages shows that those customers who did search online
5 and saw policy compliant online advertising would in my view have been
6 overwhelmingly likely to have seen a large number of advertised prices on other Pride
7 models and other scooters, often in the form of large discounts to the RRP.

8 "C. There appear to be many comparable scooters that customers would have
9 switched to that provided them with a good alternative."

10 In D there is the evidence of Ms. Dunn and her supporting data for her company there were
11 no relevant sales of relevant models at the RRP in the relevant period. Then he concludes:

12 "As a result, it would seem implausible that any more than an extremely small number
13 of customers would have been affected."

14 What is the basis for his saying that? He is saying in order for somebody to be directly
15 affected, this would be something to do with their own purchasing story, in particular where
16 they looked in their information set at the time of purchasing.

17 We know that the total number of people who purchased from these relevant retailers
18 relevant models in the supra period was -- or rather the irrelevant periods was relatively
19 low, under 1,000, but in addition we know that the majority of those sales were not online
20 sales. So they were not either made on a website or by telephone following looking at a
21 website, so we are looking at a very small potential pool of people on whom they could
22 have been these direct effects.

23 The basis for his conclusion is his reasonable summation based on the research that he has
24 done of what consumers who bothered to do Internet research would actually have seen. In
25 my submission, all of that research analysis is still very relevant to addressing the theory
26 that we are now concerned with.

27 With all that in mind, I now come to consider what are the facts.

28 THE PRESIDENT: The 280, yes. It is the online ones, yes.

29 MR. BATES: Yes. So they are the ones who could have seen -- well, insofar as the retailer was
30 complying, they are the ones would have seen compliant advertising. But of course we do
31 not know what was showing on the retailers' website at the time when they looked since the
32 retailers were not always complying.

33 THE PRESIDENT: Sorry, 260, is it not?

34 MR. BATES: I think that is right sir, yes.

1 I now come on to consider what things would need to be proved in order to show loss under
2 this new theory. There are two aspects of the theory in terms of what would need to be
3 proved: one is the information reduction; and then the other part is the effect on sales prices
4 flowing from that information reduction.

5 So looking first at the information reduction, we would need to know what information
6 about prices for the relevant models was on the Internet during the relevant supra period and
7 what was the difference in the quantity of that information.

8 THE PRESIDENT: Just a minute.

9 MR. BATES: Sorry, sir.

10 THE PRESIDENT: On the Internet during the supra period?

11 MR. BATES: Also, what difference was made in terms of the amount of that information and its
12 accessibility as a result of the eight infringements.

13 I mean, those things are easy to say but obviously behind them lies a whole package of
14 other factual enquiries because, for example, you have to consider when the eight were
15 complying and when they were not and obviously it is not an either/or because you could be
16 complying in relation to some models and not other models at any particular time.

17 You have also got to know what price information was being displayed by all these rogues
18 that are in the rogues list at the relevant times and then hypothesise about how, if a
19 consumer did a Google search for example in 2011, what price information would have
20 shown up to them, and what is the difference between the information in the factual and the
21 counterfactual and its accessibility? You can see the complexity of that factual enquiry.

22 THE PRESIDENT: Yes.

23 MR. BATES: Let us say that you could get over that and show all those facts. You have then
24 have to ask: we have now identified the information reduction, but how can we then show
25 that that reduction actually affected the sales prices? You then come back to these twin
26 possibilities for how the information reduction could have affected sales price: one is by
27 affecting consumers and the other is by affecting retailers.

28 If you are thinking how it could have affected consumer, it brings you straight to this
29 question about how many consumers would have actually done research online and what
30 would they have seen and that is the question about individual purchasing journeys. We
31 cannot get around that problem by looking simply at channel mix because it is possible that
32 somebody could go to shops, et cetera, and also look online and then buy from either a shop
33 or by telephone. It does not tell you what online or other research they would have done.

1 THE PRESIDENT: But the retailer will not know necessarily what research the consumer has
2 done so they will determine their price by reference to -- or their negotiated price by
3 reference to ... on a common basis. If they think some of their consumers are researching
4 online that may affect their advertised price and perhaps also their negotiated price. So you
5 do not need to go to the level of looking at the individual consumers, do you, and just know
6 that retailer will know some are doing comparative research and some are not.

7 MR. BATES: You are running ahead of me slightly, if I may say so. I said there were two ways
8 that the information reduction could have affected sales prices. The first one was by
9 affecting consumers' behaviour, which is what I was dealing with, and I will come onto by
10 affecting retailers' behaviour, which is what I think you had in mind, sir.

11 THE PRESIDENT: Yes.

12 MR. BATES: But in terms of affects consumers, I say that you would need to know the
13 purchasing journey followed by the consumers and in order for there to be -- for the
14 information reduction to actually have any effect on the consumer as a result of the
15 consumer's behaviour being affected, either the consumer would need to see no price
16 because of the infringement, because they were just seeing "call for best price" or -- and this
17 is what you were getting at, sir -- they might see a higher price than they otherwise would
18 have seen but that could only be so because of some effect on the behaviour of retailers.

19 THE PRESIDENT: Yes.

20 MR. BATES: So if we look then at what you would need to show in order to establish an effect
21 on the behaviour of retailers, the theory here is that because these other retailers would see
22 fewer other retailers advertising for specific prices for those seven specific models, that that
23 would somehow lead to the retailers doing this online research and setting their own prices
24 less keenly.

25 First of all, that is really quite a speculative assertion. It is very hard it see how you would
26 actually find the evidence to demonstrate it. But also it brings us back to what I was saying
27 earlier about the example of what a retailer would actually do as part of consumer research -
28 - sorry, as part of competitor research in setting their own prices. They are going to be
29 doing Google searches in order to mimic what consumers who were doing online research
30 would see and then taking account of that in then deciding where to set their own prices.

31 If you are one of these retailers and you do the Google search and you come up with all
32 these rogue retailers who are advertising the rogue prices, is it really being said that because
33 there were not eight additional retailers who were also advertising these prices, that made a
34 difference to where you, as the retailer, would set your price.

1 I suppose at a theoretical level there is some very minor difference that it might make, but I
2 suggest it must be very minor for this reason, which is that if you are a retailer, your
3 concern is going to be what is the lowest price that a consumer doing that sort of search is
4 going to see.

5 So it does not matter whether -- if, for example, you are the retailer and you have a scooter
6 on sale in your shop for £800 and you know that -- so you are a retailer who has a scooter
7 on sale in your shop for £800 and you know that if the customer, while they are in your
8 shop, they go on Google using their phone, let us say, and do a search and they find it is on
9 sale on the Internet for £500, that has the same affect on you whether it is five retailers or
10 ten retailers.

11 THE PRESIDENT: Yes.

12 MR. BATES: So for all those reasons, we say that these supposed umbrella effects, looking at the
13 factual evidence there is, are implausible and, even to the extent that they were plausible,
14 they are likely to be very small and, in any event, they are impossible to actually prove
15 because of all these facts that you would need to find out, which we do not already know,
16 save for what is in the Way-Back Machine analysis, which, in my submission, tells very
17 heavily against there being a significant effect on retail prices across the market.

18 That, I think, has covered the topic of what Mrs. Gibson would need to prove.

19 My fourth topic was going to be how the need to prove these things has been taken into
20 account in her litigation plan and cost budgets. Well, since this was not her theory, it has
21 not been taken into account at all. But in relation to what was envisaged in the cost budget,
22 et cetera, what was envisaged was a five-day trial, which I think was to include both any
23 necessary factual evidence and also economic evidence and ... The tribunal can form its
24 own view as to how all these different issues might be addressed.

25 You have already had my submission they cannot be addressed, but it seems to me that if
26 the tribunal were against me and thought they could be addressed somehow that the sensible
27 way to do it would be to work out what the factual enquiries were and deal with them first
28 at one trial. Because it is only once you have established the facts it is sensible to go and do
29 economic analysis applying those facts because otherwise you are going to be in a situation,
30 like today, where you have different economists producing reports on completely different
31 factual assumptions.

32 My fifth topic was based on what we know --

33 THE PRESIDENT: You can have all the factual evidence before a trial --

34 MR. BATES: Yes.

1 THE PRESIDENT: It is only if it is contested --

2 MR. BATES: Yes.

3 THE PRESIDENT: But the facts of the kind that you have indicated, information, would all be
4 available. It would be very different from today; we just do not know what the information
5 is. The idea of having a split trial with a judgment on fact and then another judgment -- and
6 then all trials with economists, you have some facts to be in doubt, but normally you know
7 what the basic facts are; it is their relevance and interpretation that is the issue. It is perhaps
8 a small point --

9 MR. BATES: It is difficult to take it further -- it was a very important point in the context of the
10 original theory because of the things that needed to be proved as part of that. I think the
11 difficulty now is that since I say that all these things -- the evidence is not available in the
12 sense that the question does not arise as to how you would demonstrate them. But, I think,
13 insofar there were factual disputes, certainly insofar anything in Mr. Allen's witness
14 statement and what he says about the extent to which retailers did or did not comply,
15 relevant retailers did or did not actually comply with the prohibition, there may well be
16 factual disputes there that would need to be determined although how you would find the
17 evidence to determine them, apart from what is on the Way-Back Machine, I do not know.
18 The fifth topic was going to be: given what we now know, does Mrs. Gibson have a strong
19 case? I think you know what my answer is on that.

20 My sixth topic was going to be: does Mr. Noble's economic approach in Noble 1 and Noble
21 2 stand up to scrutiny as serving as a reasonable basis for making a preliminary assessment
22 of the alleged consumer losses? I do not think I need to address you on that.

23 The seventh topic is distribution of damages to class members. It is here that this idea of
24 subclasses, et cetera, comes in.

25 We entirely accept that in the context of any tort claim where you are awarding damages,
26 one should not chase after an unrealistic or disproportionate degree of precision. We
27 completely agree therefore that the classic broad axe approach is entirely appropriate. But a
28 broad axe is very different from a sort of crazed axeman swinging out all over the place
29 because you do not have the parameters, proper parameters for the exercise.

30 So all the points that I have already made about the difficulties of getting evidence, et
31 cetera, are all also relevant here. But thinking about how you could identify subclasses to
32 capture these sorts of losses is really -- it is really very difficult. If, for example, you take as
33 subclass that it is people who bought from a retailer that was not a relevant retailer and they

1 bought, say, in a retail store, that is it is really not going to tell you anything about that
2 consumer's search journey.

3 If the consumer was somebody who would not have done any online research anyway and
4 they would have just bought from the first online store they came to or the first retail store
5 they went into, then, actually, it is really quite difficult to see how you would be able to
6 quantify the loss that that consumer had suffered. You can make broad assertions, which is
7 what is being done on Mrs. Gibson's side, about general competitive pressures --
8 (Pause)

9 THE PRESIDENT: Sorry.

10 MR. BATES: You can make very broad suppositions about some cross-market effect in terms of
11 keenness of retailers to reduce their prices, et cetera, but it is still not addressing the fact that
12 you have consumers paying very different prices for products all on the same occasions.
13 You do not know why they are paying the prices that they are paying and whether that is
14 because they have done lots of research on the Internet or they have not done lots of
15 research on the Internet.

16 THE PRESIDENT: That is assuming the retailer prices differently to two people coming into the
17 shop for the same product because the retailer is able to find out by, I do not know, cross-
18 examination, of the customer, have you done research on the Internet.

19 MR. BATES: Exactly.

20 THE PRESIDENT: Most retailers, one may be able to assume, if you were looking at this
21 sensibly, do not do that and if the question is the effect on the retailer's price and if you are
22 right that one cannot work that out or it would have been -- then there is no loss. But if it
23 does have an effect on the retailer's price that they charge in store and it raises it by X per
24 cent, then if you have a benchmark price you could work out the loss and you do not have to
25 ask whether this consumer A who bought on Monday did online searches and consumer B
26 who buys on Tuesday did not.

27 MR. BATES: What you are putting to me, sir, may work in a different kind of market, one where
28 consumers are actually paying the ticket prices --

29 THE PRESIDENT: No, no -- we know consumers pay different prices. But if the overall effect
30 on a retailer is that its prices that it is prepared to sell at is X per cent higher --

31 MR. BATES: A lot of consumers are paying prices that are higher anyway than what is the
32 lowest price that the retailer is prepared to sell at.

1 THE PRESIDENT: Because if this was Mr. Noble -- you put this point to Mr. Noble. But if
2 everyone is paying £150 more than they otherwise would have, what they actually pay does
3 not matter.

4 MR. BATES: But it does for this reason: if we go back to the charts that you I handed up to Mr.
5 Noble showing in the same month you have got a difference of several hundred pounds
6 between what different consumers are paying, you then have to ask yourself: given that both
7 of those consumers bought over the phone, let us say, what is the reason why one is paying
8 several hundred pounds more than the other? The reason is likely to be something to do
9 with that consumer's information set, as Mr. Parker sets out, because if the consumer has
10 done online research and sees that the lowest price that the product is available for is £500,
11 they can negotiate down to £500 using that information and it may be that the retailer is
12 prepared to sell at £500, that is the lowest price they are prepared to go. So when those two
13 things match up, you get this sort of John Lewis "Never knowingly undersold" effect.
14 But for lots of consumers, even though the lowest price the retailer would be prepared to go
15 down to is £500, in fact the consumer is ending up paying £800 because the consumer has
16 not got the £500 price within their information sets.

17 So this is something that is completely different from the notion of retailers doing online
18 research and seeing what prices are advertised on other people's websites and that
19 conditioning the advertised prices. Here you have a market where what people are paying is
20 often very different from the advertised prices.

21 If you were to take a consumer who would have paid £800 anyway and say, well, because
22 of this infringement we actually think that you paid £150 more and gave them a cheque for
23 £150, that would grossly overstate the loss they suffered -- in fact the loss they suffered is
24 nil.

25 This problem cannot be resolved by having subclasses because however many subclasses
26 you have is not going to be enough to capture these differences in consumer information
27 sets.

28 To sum up and look at what we say in relation to the tests that have to be considered. First
29 of all, commonality and suitability. We say that, yes, of course there are some common
30 issues that would be relevant to all the claims. However, the claims are weak, at least in
31 aggregate, for the reasons that I have described. The litigation plan was obviously based on
32 completely wrong assumptions anyway and the assertion that is now being made about
33 consumer losses is really just based on speculation alone. It is simply theoretical and no
34 work has actually been done to try and show that there has actually been an effect on

1 consumers, other than what Mr. Noble has done which, to put it politely, has been put to
2 one side.

3 We say that Mr. Noble's analysis was seriously unsound and that, in any event, even on this
4 new theory the proceedings could not fairly result in a damages fund to be drawn on either
5 in the way proposed by Mr. Noble or indeed in any other way that would fairly compensate
6 consumers because of these vast differences between the prices that individual consumers
7 paid and the lack of evidence about consumer journeys and, in my submission, that is a
8 strong factor that is relevant to commonality because it shows that there is important issues
9 to do with the losses suffered by individual consumers that would not be common and it is
10 also relevant to the suitability of these proceedings to be dealt with by way of an aggregate
11 award and it is also relevant to opt in versus opt out because at least if you had an opt-in
12 claim you might have some consumers who could give evidence about their own journeys,
13 so you would have a pool of evidence to draw on in relation to that. But given that we have
14 yet to identify any consumers who are interested in claiming the compensation, that pool
15 just not available.

16 THE PRESIDENT: Yes.

17 MR. BATES: In relation to just and reasonable, as I said at the outset of my submissions, we do
18 not intend any criticism of Mrs. Gibson personally and she is obviously quite right to be
19 concerned about this market not working properly for all the reasons that were identified by
20 the OFT.

21 However, the extent to which these proceedings have been properly thought through is
22 relevant to whether or not Mrs. Gibson plus her legal representatives and her economists, by
23 whom she is assisted, are appropriate persons to permit to bring this proposed collective
24 proceedings.

25 Much of a point is made against me of the fact that Pride -- that Mrs. Gibson is assisted by
26 counsel in experienced in competition law and that Mr. Noble has this long CV of cases he
27 has been involved in, et cetera.

28 THE PRESIDENT: Mr. Bates, if you are right on the points you have been addressing us on, on
29 commonality and suitability, then the question of a particular class representative does not
30 arise.

31 MR. BATES: Indeed.

32 THE PRESIDENT: Is that right? If you are wrong (inaudible: coughing), then I am not sure how
33 independently there is an alternative point about the class representative.

1 MR. BATES: I think that is right. But the point that I was going to make is that given the
2 resources that are available to Mrs. Gibson, it would not be right to now cut her any slack,
3 as it were, in terms of being expected to have put forward a proper litigation plan rather than
4 being sent away to essentially go back to square one and re-conceive these proceedings
5 entirely.

6 There is then the question of the after-the-event insurance and the protection of Pride's
7 ability to recover its costs. It is very difficult to see whether the 1.8 million that has been
8 provided for would be sufficient --

9 THE PRESIDENT: 1.08.

10 MR. BATES: Yes, the 1.08 million that has been provided for would be sufficient because
11 obviously if these proceedings carried on any further there would be duplication of costs
12 due to having to have another hearing to look at the new economic evidence, et cetera.
13 There is also all the costs that have not been budgeted for of analysing this data just in order
14 to pass the CPO standard.

15 It is said that Pride's position can be protected by an award of costs in relation to costs
16 incurred up until this point. But obviously that would deplete the 1.08 and also it is not
17 money that could be paid now. It could only possibly come at the end of the proceedings
18 but in any event it is going to complete the 1.08.

19 The thing is we cannot make any assessment now of what the costs of the proceedings
20 would be likely to be on any fair or sensible basis because of all this uncertainty about the
21 evidence that would be required to prove all of these things that would need to be proved,
22 the cost of obtaining that evidence --

23 THE PRESIDENT: If we cannot make an assessment now, I am not sure what we can do with
24 that point now.

25 MR. BATES: It is a reason to not grant a CPO because the problem with granting a CPO is you
26 are then -- the problem of adjourning rather and not granting a CPO now but potentially
27 granting one at a later date is that you run up additional costs with no certainty that, once we
28 come up against the 1.08, the insurers are going to be willing to extend the coverage.

29 THE PRESIDENT: That point would have to be looked at if we did adjourn and we come back,
30 but I do not think we cannot anticipate what would happen.

31 MR. BATES: We had said to Mrs. Gibson's lawyers in correspondence, please go away and find
32 out the amount that the insurers would be prepared to go up to, but I do not think we have
33 been given any indication of that.

1 THE PRESIDENT: But I do not see how we can address that is what I am saying. We just do not
2 know.

3 If we did adjourn, you say that the costs budget would have to be revised and we then know
4 where we are. Clearly if it were revised and if the insurance cover was not available, you
5 would have a strong argument. But that is all rather speculative.

6 MR. BATES: The final point I want to make in relation to just and reasonable is about whether it
7 is relevant that there are not some consumers who claim to have suffered a loss who are
8 expressing interest in gaining compensation under these proceedings.

9 For that I would just like to show you one of the foreign authorities, which is the *Singer*
10 case. It is authorities bundle 3, tab 63. It is page 60.

11 THE PRESIDENT: Yes.

12 MR. BATES: This paragraph is also relevant to what we said in our CPO response about the fact
13 that Leigh Day had taken the initiative to recruit the representative rather than Mrs. Gibson
14 contacting law firms because she was keen to pursue this issue. So if I could ask the
15 tribunal to read paragraph 221 --

16 THE PRESIDENT: 221?

17 MR. BATES: Yes, please. It is at the top of page 60. (Pause)

18 THE PRESIDENT: Yes, there were particular issues, I think about, Mr. Singer. I think I have
19 read this case before, yes.

20 MR. BATES: Indeed. So we are not saying that was the only difficulty with him, but we just rely
21 on this paragraph as a sensible statement of general principle. We do not make any
22 criticism of the fact that Leigh Day have gone out and recruited Mrs. Gibson; our point
23 more is that the extent to which there are people who are keen to obtain compensation for
24 this and have been actively pursuing these matters is something that would be relevant to
25 assessing whether it is just and reasonable to allow Mrs. Gibson to pursue these matters now
26 against the background of all the issues and difficulties with the case that we have been
27 discussing.

28 THE PRESIDENT: Yes, I understand.

29 MR. BATES: Finally, I just want to deal very broadly with this issue -- although I know I
30 addressed you on it at the end of yesterday --

31 THE PRESIDENT: I am a bit concerned about time, Mr. Bates. You said you would not be very
32 long and Mr. de la Mare must have a right to reply.

33 How much more have you got?

34 MR. BATES: About two minutes.

1 THE PRESIDENT: Okay. Two minutes. Can we put away Mr. Singer?

2 MR. BATES: You can put away Mr. Singer, yes.

3 I will not repeat all of the points I made yesterday save to say that the policy behind this
4 requirement for class certification was clearly to ensure that these matters were matters
5 concerned with the litigation, the length of the litigation, the costs of the litigation,
6 proportionality, what needs to be proved, et cetera. All the things which any sensible person
7 contemplating a claim on their own behalf would think through carefully before
8 commencing the litigation, that all of that would be thought through properly up front.
9 This is the first occasion, as we know, on which the tribunal has been considering whether
10 to grant an opt-out CPO. In my submission it would be very unfortunate for the tribunal to
11 undermine that policy and really, in my submission, give a bad name to this entire new
12 regime by starting with what, in my submission, is really an embarrassment of a case, at
13 least as it is at the moment, that would generate -- that has already generated very
14 substantial costs and is at real risk of generating even more costs with the prospect of
15 pursuing a damages award which, on any sensible analysis of the facts, as we know them to
16 be, on the basis of the currently available information, is likely to be very small.

17 THE PRESIDENT: Yes, thank you.

18 MR. BATES: I am not sure if I went slightly over the two minutes; I am grateful, sir.

19 THE PRESIDENT: We will take a break for 5 minutes.

20 MR. DE LA MARE: Can I enquire to what, sir, you are going to be able to sit? I have had
21 approximately 25 minutes, by my counting, to address the issues of substance in the case so
22 far and I am a little bit concerned about the quite conspicuous inequity in the amount of
23 time allocated between the parties.

24 THE PRESIDENT: We will come back and let you know. (Pause). We can sit until 5 o'clock.

25 MR. DE LA MARE: I am grateful.

26 THE PRESIDENT: I think that should give you sufficient time.

27 MR. DE LA MARE: I hope I will not need that long.

28 THE PRESIDENT: We will indicate the matters on which we do not need you to respond.

29 MR. DE LA MARE: I am grateful.

30 THE PRESIDENT: That is the advantage of speaking in reply.

31 (3.14 pm) (A short break)

32 (3.25 pm)

33 THE PRESIDENT: Mr. de la Mare, we do not need you to refresh us on what was virtually the
34 last point, I think, point 8 about Mrs. Gibson and the *Singer* case.

1 MR. DE LA MARE: Right.

2 THE PRESIDENT: But we do want to hear from you on most of the rest and, in particular, is
3 there really any realistic possibility that just getting better, different during and after prices -
4 -

5 MR. DE LA MARE: Yes.

6 THE PRESIDENT: -- one could plausibly infer any kind of umbrella effect, given that what we
7 know about this market on the facts of this case, and then on the distribution point.

8 MR. DE LA MARE: Yes.

9 Submissions in reply by MR. DE LA MARE

10 MR. DE LA MARE: Can I start by handing out a chronology. (Handed). It has been given to the
11 other side and it is on a very short point. It is the question of what has been said over time
12 about the issue of data, just to address a point you raised with me, sir, yesterday about what
13 the discussion there had been about this at the CMC and we had not already got more data.

14 THE PRESIDENT: Yes.

15 MR. DE LA MARE: It seeks to explain in a fairly self-evident fashion what we were saying
16 about our intentions to seek further data. As I have said a number of times, we have always
17 been candid about the fact that we want and need more price data.

18 It was set out clearly in -- first of all, there was an exchange at the letter before action, at the
19 response stage, which revealed that Pride had little, if any, data of that kind.

20 Then Mr. Haan's first statement in support of the application set out -- referred to the fact
21 that Mr. Noble's report had set out the data he wanted and said that this would be subject, he
22 anticipated, to liaison and collaborative attempts to get it.

23 Then, at the case management conference, the topic of contacting the retailers was
24 discussed. But as we read the transcript -- and as Mr. Jones reminds me -- the thrust of that
25 exchange was not that that data was needed now for processing in the context of the CPO
26 obligation, but more to range to see what data was out there so that one could scope for the
27 purposes of the further work required should a CPO be granted.

28 That was the terms of the debate and it was not suggested that the data was needed now.

29 We then, in consequence of that, wrote those letters which have revealed the various
30 responses and revealed there is various data out there.

31 THE PRESIDENT: Is this not about identifying consumers?

32 MR. DE LA MARE: It is about identifying retailers with data.

33 THE PRESIDENT: I thought it was about identifying -- we were not asked to make any third
34 party disclosure --

1 MR. DE LA MARE: You were not.

2 THE PRESIDENT: The parties were asked if they wanted it, nobody wanted it, and then it was
3 about getting records.

4 MR. DE LA MARE: Attempting to get records from the retailers.

5 THE PRESIDENT: About the individual identities of their customers, was it not? That is what it
6 was looking at.

7 MR. DE LA MARE: Yes.

8 As we put on the chronology, you might even get pricing information, but as far as the
9 hearing in December is concerned, what we are interested in is what sort of information
10 you have about the six individual identities -- about individual identifies of customers.
11 I think that is a legacy from the transcript.

12 THE PRESIDENT: But the --

13 MR. DE LA MARE: It is a modest point I am trying to make, sir, and I am simply trying to say
14 retail data has always been on our radar, we have always been candid about it and, insofar it
15 has been discussed to date, it has not been suggested that this is something that we have to
16 have now. That is as far as I take the point.

17 The second point I just want to explain or engage with --

18 THE PRESIDENT: Yes.

19 MR. DE LA MARE: -- is the agglomeration of capital R retailers and small R retailers in Mr.
20 Noble's report. Mr. Noble's answer in relation to that was that effectively that was to treat
21 all as umbrella claims or to treat the capital R retailers' customers in the same way as the
22 small R retailers' customers. Effectively that is an assumption against the claimants and he
23 makes exactly the same point in his first report because if one tests it this way, using his
24 rogue method, you are assuming for the prices of the capital R retailers, notwithstanding the
25 fact that in the relevant period they are adhering to the policy and not price advertising on
26 the Internet, but nevertheless the customer is succeeding in obtaining the rogue price,
27 whereas for a capital R retailer during the infringing period, for that retailer that assumption
28 could obviously be pushed higher in the sense that the customer in question, going to deal
29 with that retailer, notwithstanding the fact that they have no Internet offer disclosing price,
30 may well arrive in a situation where they negotiate a price higher than they would do if the
31 retailer had already disclosed their best price on the Internet or their best Internet price.
32 That is important to remember because the context of this is -- this is a scheme in a market
33 working by reference to price establishment. The OFT's report is very clear on this. What
34 is going on is that consumers are having generated for them unrealistic or even false

1 expectations of value based upon heavy discounting. That form of price establishment,
2 particularly for credulous or vulnerable consumers, can leave them, without information,
3 into paying more than they should.

4 So by definition when you are dealing with the capital R retailers, it is reasonable to expect
5 that their losses might be greater than the rogue model would disclose.

6 That is where we agreed, when you pointed the point out, that the issues should be
7 disaggregated. What I have never conceded -- and we had an exchange on it yesterday and
8 I have been through it very carefully -- and what is really in many ways the fundamental
9 point of principle is we have never conceded that the relevant counterfactual, the relevant
10 "but for" is one in which the policy continues to run or continues to operate with all the
11 effects it generates. Indeed, when Mr. Noble was first asked on that topic, he said, you have
12 to exclude the policy.

13 With respect, that is the fundamental issue of substance between us affecting the likely
14 quantum. Because if you do not exclude the policy and you treat the policy as part of the
15 infringement identified by the OFT or as part of the facts that would necessarily change
16 when the infringing party choose how to modulate its conduct in the light of the fact that the
17 infringement has changed --

18 THE PRESIDENT: It has to be the second, does it not? It is not part of the infringement.

19 MR. DE LA MARE: It is part of the critical facts with which the infringement is identified. I
20 listened with interest to what my learned friend said to try and get out of the hoop --

21 THE PRESIDENT: It is part of the infringement as regards the offer or approach to the eight
22 infringers, but it is not part of the infringement as regards the attempts to persuade
23 everybody else.

24 MR. DE LA MARE: It is not part of --

25 THE PRESIDENT: It is not a circular where you can say, this circular would not have been
26 issued with an individual request.

27 MR. DE LA MARE: It is not in and off itself an agreement, but it is absolutely factually,
28 logically, intellectually linked to the agreements that are found. Indeed the agreements that
29 were found would not exist without the policy. The genesis of the policy, about which the
30 defendant is candid, is very much requests from retailers that such action be taken by Pride
31 in order to support them and their margins.

32 In those circumstances when you ask yourself what would have happened when these eight
33 infringements came to an end, the only possible counterfactual is one in which the policy
34 does not operate. That is why, time and time again, with respect -- and I thought I was clear

1 and evidently I was not -- I said our case on the counterfactual was one in which you had to
2 assume that the policy no longer operated.

3 I said it is for that reason that I do not have to get into niceties of proving whether or not the
4 operation of the policy led to further agreements and how many further agreements there
5 were or whether or not knowledge of the policy was useful information for small R retailers
6 to take pricing decisions -- if you like, on a game-theory basis, knowing what others are
7 likely to be doing so as to maximise profits and reduce the Internet offer as low as possible,
8 or whether or not those who continued to not have an Internet price were simply choosing to
9 do so out of lassitude, business as usual and they do not want to run a website.

10 They do not have to look at the difference between those because in the counterfactual the
11 situation has to be that the agreement comes to an end, the agreements come to an end, and
12 you ask, what would not just the eight retailers do, but what would Pride do?

13 Much of this debate about counterfactual has been predicated on simply an investigation on
14 the eight retailers. There are nine infringers identified in the decision, the first of which is
15 Pride. Its behaviour in the counterfactual has to be enquired into as well.

16 You cannot simply, as Mr. Bates would have you, investigate what the eight retailers would
17 have done differently, how did they change up their mixing channels, how do they decide to
18 respond to the new market in question, and ignore entirely what response Pride would take.
19 That is simply wrong in law. You have to ask what both parties to the various sets of
20 agreements would do as and when the infringement is identified and as and when they
21 change conduct.

22 That any other sense is unintelligible is demonstrated by the process of justification that
23 Pride goes through with the OFT. The whole process of justification for saying there is no
24 infringement, it does not have substantive effect, it is not appreciable, is in very substantial -
25 - predicated -- substantial -- entirely predicated upon it being a network policy, it being
26 designed to deliver benefits, not to the eight retailers, but to the network as a whole. It is
27 incapable of justification if it is to the eight retailers, so it has to be they are turning up to
28 the OFT and saying, these agreements are justified because we are doing it for the retailers
29 as a whole in order to support their margins, but it did not work and then their alternative
30 case, both to the OFT, then in the letter before action and in Mr. Allen's statement, is: what
31 we would have done in the counterfactual is to introduce some other network-wide policy.
32 The minute you make that factual concession, as they have to -- and the network policy is
33 either "do nothing", which is what in fact they have done, or selected distribution

1 agreements, which they have postulated, but cannot show in fact is the reasonable
2 counterfactual because they have not done it.

3 That is a fact that you have entire freedom to find in the counterfactual as part of your
4 enquiries into damages. You are in no way tied by anything in the decision or anything in
5 the fact that we are not seeking to allege other infringements from deciding that the relevant
6 counterfactual is one in which the policy does not exist.

7 In my submission, any other approach would make this regime entirely unworkable --
8 entirely unworkable -- at least for follow-on claims brought in relation to vertical
9 infringements.

10 Let us just consider for a moment the practical reality of what the OFT did. They identified
11 a type of agreement that they knew that a retailer was applying on a network basis. They
12 choose the -- the wholesaler was applying on a network basis.

13 THE PRESIDENT: The wholesaler, not the retailer.

14 MR. DE LA MARE: I am so sorry.

15 They choose the low hanging evidential fruit. In other words, those eight rogues that they
16 could show had fluctuated in and out of compliance with the policy and those would be the
17 cases that for the OFT would necessarily be the very easiest to prove because there would
18 be communication with the retailer in question, compliance and then relisting as a rogue
19 from the period when they ceased to comply with the policy.

20 So rather than investigate all 600 Pride suppliers they choose to demonstrate --

21 THE PRESIDENT: They did investigate many more. They say there is not the evidence to
22 support agreement. There clearly were making --

23 MR. DE LA MARE: No, the point is they do as a regulator no more than they sensibly have to
24 demonstrate --

25 THE PRESIDENT: I do not think they say that at all. Surely they say that they considered it,
26 they do not exclude the possibility, but they look at the evidence and on the strength of the
27 evidence these are the eight where the evidence shows there was compliance.

28 MR. DE LA MARE: Absolutely, and at 1.11 they are saying no mention should be drawn either
29 way as to whether or not there are more agreements or not. But the practical reality, from
30 an investigation perspective, is that what the OFT is doing is looking for its best case and
31 proving its best case --

32 THE PRESIDENT: We do not know. But that is what they have proved.

33 MR. DE LA MARE: Well --

1 THE PRESIDENT: Then they say it is possible -- they accept it is quite possible there might have
2 been more agreements.

3 MR. DE LA MARE: Yes, yes, absolutely.
4 The practical reality for a follow-on claim -- the first practical reality is for a consumer
5 claim of this kind -- follow-on is the only game in town, that is the only possibility available
6 because of the nature of the transitional provisions.

7 THE PRESIDENT: Well, I do not think we want to get into that -- particularly now.

8 MR. DE LA MARE: It is very important, sir, that we do because that fact is what brings with it
9 the *Enron* line of case law. The whole *Enron* line of case law is delivered by the follow-on
10 provisions that were contained in the old section 47A.

11 THE PRESIDENT: That is saying, if you want to do more, to the extent you you want to raise
12 something outside the decision, it is not follow-on, and at that time --

13 MR. DE LA MARE: No, it is not permissible.

14 THE PRESIDENT: It was not permissible --

15 MR. DE LA MARE: It is still not permissible.

16 THE PRESIDENT: I am not sure about that.

17 MR. DE LA MARE: It is is still not permissible and if it is not permissible, then what is the vice
18 --

19 THE PRESIDENT: You say it is not permissible; why is it not permissible?

20 MR. DE LA MARE: It is not permissible because of the transitional provisions in Rule 31(3)
21 unless -- and we can go back to Rule 31(3) of the old rules -- this is why it is described as
22 the *Enron* point --

23 THE PRESIDENT: No, it was the point at that stage -- at the time of *Enron* this tribunal had no
24 jurisdiction to stand-alone cases.

25 MR. DE LA MARE: That is right.

26 THE PRESIDENT: It is relevant now because it also considered what is within section 58 and
27 therefore, if you want to rely on the finding of fact -- that is the only point that was raised
28 here -- that what is a finding of fact in the decision. It is nothing to do with the question of
29 whether collective proceedings can be brought on a stand-alone claim. That is not the
30 *Enron* case at all.

31 MR. DE LA MARE: With respect, this is a very important point because we had understood
32 through the deployment of the *Enron* point against us that the point was been taken that the
33 only infringements you are permitted --

1 THE PRESIDENT: No, what is being said -- it is section 58 -- the only findings of fact that is
2 binding on the tribunal ... You have chosen to bring a follow-on case, you have not
3 brought us down here -- you have not added an allegation of further infringement. That is
4 no part of your case; you said so at the outset (overspeaking). Mr. de la Mare; is that right?

5 MR. DE LA MARE: It is no part of our case --

6 THE PRESIDENT: It is no part of your case that there are other infringements. You are seeking
7 to rely on findings of fact in the decision in support of your follow-on claim --

8 MR. DE LA MARE: That is right.

9 THE PRESIDENT: Would you just listen for a moment?

10 MR. DE LA MARE: I am so sorry.

11 THE PRESIDENT: The reason why Mr. Bates, as I understood it, referred to section 58 was
12 simply as authority to establish what are the findings of fact in the decision which are
13 binding on us in this follow-on case. It was not to deal with the question of whether or not
14 you might be able to bring a stand-alone case because you are not bringing a stand-alone
15 case, so that issue just does not arise.

16 That is why it was cited. Is that right Mr. Bates? Yes. If you want to raise a quite separate
17 point which has not been raised before saying we would have liked to bring a stand-alone
18 case but we felt we could not, that is a wholly separate point which has not been mentioned
19 before.

20 MR. DE LA MARE: Can I ask you to look at the Rule 31(3)?

21 THE PRESIDENT: Yes.

22 MS. STUART: What page is this on?

23 MR. DE LA MARE: I am so sorry; it is on page 3411. Rule 31, "Making a claim for damages".
24 The position, as I understand it, is this: under the old Section 47A -- the old Section 47A --
25 it was a requirement to have an infringement. That was in the old Section 47A(5). What an
26 infringement was then explained by reference to the types of decisions that may contain
27 findings as to infringements in the old Section 47A(6).

28 The new Section 47A has come into force -- transitional provision has been made for the
29 continuation of the old Section 47A for the purposes of the operation of this rule which sets
30 the limitation for a transitional case such as this. The limitation rule is that it is either
31 brought at the end of the period specified in 47A(7) or (8) in relation to the decision on the
32 basis of which the claim --

33 THE PRESIDENT: One has to start with Rule 119 of the rules.

34 MR. DE LA MARE: Yes.

1 THE PRESIDENT: That is what -- which says that Rule 31(3), the time -- I am sorry, that is at
2 page --

3 MR. DE LA MARE: Page 3473, sir.

4 THE PRESIDENT: Thank you.

5 MR. DE LA MARE: The time limit in Rule 31(1) to (3) continues to apply in respect of the
6 claim.

7 THE PRESIDENT: I can try and short-circuit this -- this is a complex point. It seems to me that
8 if the OFT thought there was not evidence strong enough that they could get with all their
9 search powers to show other infringement, then it would be a tall order for a claimant to
10 seek to do so.

11 MR. DE LA MARE: No.

12 THE PRESIDENT: They could try, but it would obviously be -- one would be undertaking a
13 much more onerous case.

14 MR. DE LA MARE: They would be undertaking a much more onerous case because that case is
15 likely to or was at a risk of encountering resistance against the criminal standard that would
16 be applied in that context.

17 It is a quite different matter --

18 THE PRESIDENT: For the OFT to have said --

19 MR. DE LA MARE: To be satisfied to the high threshold of proof it would require, it is quite a
20 different thing in this context for us to say that what happened is that there were in practice
21 other arrangements and we do not need to say who they were, they operated on the network
22 in relation to a number of retailers.

23 THE PRESIDENT: I am not sure it is the criminal standard of proof of applying now in fact, but
24 in any event --

25 MR. DE LA MARE: It is the higher, heightened --

26 THE PRESIDENT: You could say they have a higher standard of proof --

27 MR. DE LA MARE: Yes.

28 THE PRESIDENT: -- but they say that the evidence they felt was not there and, on any view, it is
29 much easier to bring a follow-on case because infringement you do not have to establish as
30 it has been established for you. You would get into a whole different area of evidence and
31 argument if you were trying to allege further infringement.

32 So that is one reason why for a consumer, as you started saying, a stand-alone case is not
33 very attractive.

1 MR. DE LA MARE: I never said a stand-alone case was not very attractive, still less this type of
2 hybrid claim where the additional facts that you may need to prove to show an
3 infringement, if you set out to prove an infringement, are highly proximate to the facts
4 found in the decision. The problem is that under the old regime, *Enron* combined with the
5 old rules prevented you, it would be argued, from doing anything of that kind.

6 THE PRESIDENT: I do not quite see why not --

7 MR. DE LA MARE: The point I am making, sir, is that the limitation period in 31(2)(a) does not
8 permit you to bring a claim other than one in relation to the decision on the basis of which
9 the claim is made and it keeps alive 47A(7) and (8) on that basis and the only sensible way
10 you can construe that rule is bringing with it sections 47A(5) and (6) otherwise it does not --

11 THE PRESIDENT: Then you have to deal with Rule 119, subrule 4. That only continues to
12 apply to the extent necessary for the purposes of paragraph 2, Rule 119.

13 MR. DE LA MARE: Indeed it is necessary because how otherwise can we show, first of all, that
14 the claim which is to be aggregated is a claim to which Section 47A of the act applies and
15 that the claim arose before the act of 1 October 2015?

16 THE PRESIDENT: Well, as I say, I do not want you to spend a lot of time on this --

17 MR. DE LA MARE: It is really important with respect, sir, because the whole genesis of this
18 whole *Enron* point about how you are trying to fetter what can be acquired in the
19 counterfactual flows from this and this is why my learned friend's skeleton argument is all
20 about *Enron* and *Enron II*.

21 THE PRESIDENT: I do not think it was about this at all but you say, because of your
22 understanding of the transitional provisions, a follow-on claim -- a stand-alone element was
23 precluded?

24 MR. DE LA MARE: Indeed, indeed. That means therefore that if you are seeking to bring a
25 follow-on claim in the transitional period in relation to a vertical infringement, you are
26 effectively, if that analysis is right, at the mercy of the OFT as to how many of the decisions
27 that may exist it chooses to investigate and prove.

28 THE PRESIDENT: Yes.

29 MR. DE LA MARE: Whatever decision it takes as to administrative convenience, how far it
30 wishes to push the issue, that will set the parameters of the ensuing claim unless we are
31 right in relation to the counterfactual and the fact that what is relevant is that the policy can
32 no longer continue.

33 If we are right in relation to that -- and we say we must be because it is a predicate of the
34 decision that it was the policy that generated the agreements that had to be justified and it

1 was therefore the policy in the real world situation which would change -- what does not fall
2 away is, if you like, that bit of the overcharge that is established not to have anything to do
3 with market entry, et cetera, et cetera, et cetera, but is attributable, in your language, to the
4 policy rather than the incremental effect of each of the eight agreements.

5 So let us say Mr. Noble's analysis, when he has all of the data, shows a 15 per cent
6 overcharge in general terms. Let us say --

7 THE PRESIDENT: By general terms you mean what?

8 MR. DE LA MARE: By reference to the combined effect of the policy and the eight
9 infringements.

10 THE PRESIDENT: So you were saying you would aggregate the retailers with a capital R from
11 the retailers with a small R and say, on average, 15 per cent?

12 MR. DE LA MARE: At the counterfactual, let us assume that policy and the infringements come
13 to an end.

14 THE PRESIDENT: Not come to an end; never occurred.

15 MR. DE LA MARE: Never occurred. You are then looking at a market in which they do not
16 exist and produce effects.

17 THE PRESIDENT: You say you average across and it is 15 per cent?

18 MR. DE LA MARE: Let us assume that. The difference between this approach is whether it is
19 that 15 per cent that is recoverable or, for the sake of argument, let us just keep it nice and
20 simple, let us suppose it is 0.5 per cent attributable to each of eight and they each produce
21 an incremental effect. I am just taking numbers for the sake of argument to illustrate. So
22 you will have 4 per cent in the 15 per cent that is attributable to the eight incremental
23 agreements.

24 As I understood what you were saying, sir, in terms of what you were inviting Mr. Noble to
25 investigate is that 4 per cent. It is the incremental effect. What you are keeping constant
26 therefore in your counterfactual is the continued operation and effects of the policy and
27 therefore any further agreements it may have produced and any further strategic pricing that
28 it may have produced. So retailers who were aware of the policy and proceed to use that
29 information to fix their prices.

30 The essential difference between us is that our case is that we are entitled to recover that as
31 well and that in an infringement characterised by the agreements that are intended to work
32 and do work and can only work by reference to network effects, to attempt to disentangle in
33 that situation is legally wrong and potentially economically problematic or meaningless.

1 It is meaningless because once you do not have the eight infringements, once you are not
2 permitted to have them, then you will not have the policy.

3 THE PRESIDENT: Well, if you did not have the eight agreements throughout the supra period --
4 suppose at the last, I have not looked at the overlap in detail. Suppose in the last three
5 months you only had one agreement.

6 MR. DE LA MARE: Yes.

7 THE PRESIDENT: You say you only have the policy because there is that one agreement, that is
8 the only reason you have the policy? You say once you no longer have eight agreements,
9 you no longer have the policy; why not? You have the policy as long as you hope you can
10 get people to comply with it.

11 MR. DE LA MARE: But then you have the counterfactual predicated either on the existence of
12 or the attempt to create further unlawful agreements. You cannot have a counterfactual
13 predicated on the operation of a policy with a view to generating further coordinated
14 behaviour. It is a counterfactual premised on continued illegality and that is the --

15 THE PRESIDENT: The policy is not illegal.

16 MR. DE LA MARE: The policy is not illegal, but if it is producing effects it, is either producing
17 effects through the generation of further agreements or strategic pricing by reference to it.

18 THE PRESIDENT: If it is strategic pricing by reference to it, it is not illegal.

19 MR. DE LA MARE: It is when what people are being told is that it is being implemented. If the
20 policy changes -- we have got this policy and we are not implementing it.

21 THE PRESIDENT: On what basis? If you are non-dom and you try and persuade your retailers
22 to --

23 MR. DE LA MARE: It is not that the policy has to be -- it is simply that the policy will not exist
24 as a matter of fact in the counterfactual.

25 It is a bit like the debate in *Albion*, which we can turn up in the bundle, about how you
26 postulate the counterfactual. Admittedly, that is an abuse of dominance case -- and I know
27 everything my learned friend and you are going to say against me, but actually that is not
28 the nature of the debate in *Albion* at tab 23 of the bundle.

29 The debate is really about how close to the wind do you think somebody is going to sail?
30 How close to the wind are you going to push it? If a particular strategy is not lawful or risks
31 being unlawful, what strategy will replace it? Because it is the strategy of *Pride* that is
32 going to shape and determine what network of agreements and concerted practices and how
33 its retail network operates in the counterfactual.

34 THE PRESIDENT: Sorry, *Albion* you want to us look at.

1 MR. DE LA MARE: It is at tab 23.

2 THE PRESIDENT: In authorities bundle?

3 MS. STUART: Authorities bundle 1.

4 MR. DE LA MARE: Yes. 17 and following. This question of counterfactual --

5 THE PRESIDENT: Wait a minute.

6 MS. STUART: We only have three pages of it.

7 MR. DE LA MARE: It is the bit dealing with the -- it is the bit dealing with the -- it is a very long

8 judgment and it is the bit dealing with the counterfactuals.

9 THE PRESIDENT: Paragraph 67, is it?

10 MR. DE LA MARE: Yes. Tellingly, in my submission, what happens here is they look to the

11 general common law for a counterfactual and they look to a negligence case to establish

12 how you look for the counterfactual in a case of tort. It is straight "but for" analysis. It is

13 not --

14 THE PRESIDENT: 67, is it, the test to apply --

15 MR. DE LA MARE: The relevant test is applied at 70 and 71.

16 THE PRESIDENT: What should we read?

17 MR. DE LA MARE: If you could read 70 and 71.

18 THE PRESIDENT: Okay, let us just read it. (Pause)

19 Yes, in which Welsh Water, which I cannot pronounce in Welsh, charged an unlawful

20 access price --

21 MR. DE LA MARE: Yes.

22 THE PRESIDENT: So the counterfactual is -- the charging of that price in itself was unlawful.

23 MR. DE LA MARE: Yes.

24 THE PRESIDENT: So the counterfactual is what would have been the lawful price it would have

25 charged.

26 MR. DE LA MARE: Yes and here they operated a policy pursuant to which they created

27 agreements, what would the counterfactual have been? It would have been no policy and no

28 agreement. Mr. Allen says as much and that is why I showed you the bit in the remedy

29 section where they are effectively told, this seems to be implementing the agreement, that is

30 why the remedy is concerned about the policy and its potential to generate further

31 infringements.

32 THE PRESIDENT: Does it say withdraw the policy? Or does it say end all agreements?

33 MR. DE LA MARE: The policy does not make any sense without any agreements.

34 THE PRESIDENT: Yes it does. You can urge your suppliers not to price in a certain way --

1 MR. DE LA MARE: Well, let us take that argument as a question of fact. Could they design --

2 THE PRESIDENT: RPM is a policy, is it not.

3 MR. DE LA MARE: Could they design a policy that sought to sail as close to the wind as they
4 could without concluding unlawful agreements? It is a kind of Colgate argument, in
5 American terms, where you simply say, unilaterally, this is what I am doing, I am not
6 intending to engender any agreements by reference to it, but if you breach what I say is
7 going to happen I am going to cut you off.

8 That might be a factual counterfactual as to how they would behave. One answer as to how
9 they might have behaved once the infringements are detected and brought to an end is to
10 say, what we would have done is sailed as close to the wind as we could and simply
11 continue to operate the policy but with no mutual reciprocal reporting, no putting to people
12 what was going to be happening, whatever is going on, none of the stuff identified in
13 3225(iii) we just simply told people, if you do this, what will happen? We will terminate
14 you? We will put you on a different price maybe?

15 But we know they did not do that. So why on earth would you adopt that as counterfactual
16 when it is not the reality? We know what their conduct shifts to and what their conduct
17 shifts to must be every bit as relevant as to what the retailers' conduct shifts to which is what
18 we are all agreed you should investigate, but it is a two-way street.

19 THE PRESIDENT: Yes, well, we have got your point on that.

20 MR. DE LA MARE: That with respect generates a vast amount of the heat and noise between us
21 because that has all been our case, it remains our case. If you consider it is wrong in law
22 then I invite you to rule that it is wrong in law because~--

23 THE PRESIDENT: If we consider it is wrong in law, Mr. de la Mare, you do not have to invite
24 me.

25 MR. DE LA MARE: Then you shall rule that it is wrong in law. That will define the parameters
26 of what comes afterwards.

27 THE PRESIDENT: Assume it is right. We know that only eight agreed to it. It is out there as a
28 policy, eight agreed to it.

29 MR. DE LA MARE: Yes.

30 THE PRESIDENT: So the question then is what effect may it have had on the pricing of
31 everybody else who did not agree to it? We know people did not abide by it.

32 MR. DE LA MARE: Absolutely, so there is a separate point about what the strength of the case
33 absent the policy is. Totally accept that. The case that is being made is notwithstanding the
34 policy there is lots of rogues, and lots of people who have been adherent to the agreements

1 who nevertheless come out of the agreement or cheat even whilst they are within the
2 agreements. So there is lots of noise about price.

3 In that context we say you have some very valuable information. First of all you have the
4 basic insight that this type of advertising RPM is likely to be capable of moving prices.

5 That is why particularly the OFT concludes when operated through a network or intended to
6 be operated through a network it is likely to have appreciable effects. I have to make a
7 finding on that to find that the agreement infringes.

8 THE PRESIDENT: Capable of -- it is an object infringement, it has to be, to be an infringement,
9 something that would be capable as having an appreciable effect.

10 MR. DE LA MARE: Yes. The second thing we know --

11 THE PRESIDENT: But they do not say it is likely.

12 MR. DE LA MARE: The second thing we know is that this is a market with very unusual
13 features, it is not a competitive market. We know that it is a market also constituted on the
14 demand side by a number of uninformed or vulnerable or ineffective negotiating
15 counterparties.

16 THE PRESIDENT: Yes.

17 MR. DE LA MARE: We know, because the OFT has told us in terms, that non-supply of
18 information, the failure to provide pricing information, is one of the problems it has
19 identified as to why that market is not producing competitive prices.

20 The OFT, in the market investigation report I showed you, it says identifies the price
21 dynamics that flow from consumers -- some consumers, not all -- some consumers being
22 given a better offer of information and how that produces a virtual (inaudible). You
23 certainly indicated you understand in principle, putting aside the factual issue, how that
24 argument works whether it is between the eight retailers and the rest of the network or the
25 network as a whole.

26 You have that piece of information. You also know from the overall surveys the OFT have
27 provided that approximately 50 per cent of the Internet offerings such as they are, not all
28 retailers have an Internet offering do not include prices. That is obviously not specific to
29 Pride, that is the sector as a whole and you know that that is also true of 50 per cent of the
30 print advertising and the OFT has identified that all of these practices are supporting price
31 establishment with a view to extracting maximum margin from those vulnerable consumers.
32 That is why it is set up in the way that it is and that is why, incrementally increased
33 information about the real price or closer to the real price of the value of the product is so
34 particularly valuable because if you are engaged in a price establishment mechanism where

1 you are trying to create, at least so far as you can, false expectations of value by routine and
2 massive discounts from recommended retail prices, the less information that is available to
3 your customers about what the merchants will really accept for those products is obviously
4 extremely inconsistent, it is unhelpful for the operation of such a scheme.

5 THE PRESIDENT: Yes.

6 MR. DE LA MARE: We know that it is operating in such a way which makes it entirely
7 plausible in my submission that agreements of this kind are going to produce effects and
8 effects larger than you would expect to be produced by agreements being operated in an
9 already wholly competitive market on markets with consumers operating efficiently and
10 effectively with prices being effectively disclosed and thereby effectively reduced through
11 price competition between the retailers and different sectors of the retailers.
12 I should have pointed out, in the section on appreciability, you said to me "capable of
13 having an infringement" but the language of the introductory passage at 3220 actually goes
14 considerably further than that.

15 THE PRESIDENT: This is in the decision?

16 MR. DE LA MARE: Yes, it is page 127 of the decision.

17 THE PRESIDENT: Yes.

18 MR. DE LA MARE: They say:

19 "In any event and in the alternative following the CJU --"

20 THE PRESIDENT: 322?

21 MR. DE LA MARE: 3220, page 127.

22 THE PRESIDENT: Sorry, 3220. (Pause).

23 MR. DE LA MARE: :

24 "The OFT finds that the agreement and/or competitor practices appreciably prevented
25 restricted or -- "

26 Not capable of, but did so. On the basis that their impact on competition was not
27 insignificant and the reasons that follow at 321 through to 325 are the reasons to reach that
28 conclusion of fact. That is a binding conclusion of fact and then you asked me whether or
29 not it was a requirement of the OFT's directions.

30 THE PRESIDENT: Are they making -- I am not clear -- are they making an alternative finding
31 here that this was restriction by effect? Or are they here dealing with appreciability because
32 even if it has an anti-competitive object it is not an infringement if the effect could not be
33 appreciable.

1 MR. DE LA MARE: It is not enough if the effect could not be appreciable but they have gone
2 further than that and found that it is appreciable. The OFT finds, not that the agreements
3 are capable, but the agreements and/or concerted practice is in fact appreciably prevented.
4 THE PRESIDENT: Although their conclusion at 3.257 is purely object.
5 MR. DE LA MARE: At 3?
6 THE PRESIDENT: 3.257.
7 MR. DE LA MARE: Yes.
8 THE PRESIDENT: We do not say object or alternatively effect.
9 MR. DE LA MARE: Yes but with respect they do not recite all of the facts and conclusions.
10 THE PRESIDENT: You are saying that is their conclusion, that it had an effect.
11 MR. DE LA MARE: That is the finding that they have made at 3220 and they have explained it
12 in the ensuing paragraphs. As to paragraph 4.3 which is worth having a look at again.
13 THE PRESIDENT: Sorry, 4.3?
14 MR. DE LA MARE: 4.3.
15 THE PRESIDENT: Of directions.
16 MR. DE LA MARE: Yes. What is revealing, we know that by this stage that the agreement, such
17 as it is, has fallen over. So it has come to an end, there are no findings of any infringement
18 after February 2012. Nevertheless, what the OFT is requiring is requiring effectively any
19 other retailers to be told -- in respect of whom it is operated to below RRP pricing
20 prohibition -- to be told that it no longer operates such a prohibition. So effectively it is
21 being required to publicise the fact that this is no longer our policy.
22 THE PRESIDENT: Except, does this not relate to what they said at the beginning, we found it for
23 the eight retailers, we do not know whether there might be others. It is not saying, inform all
24 your retailers generally, it is just saying, the retailers with whom we have found you to have
25 had an agreement and any others with whom which we do not know you may have an
26 agreement. It is not saying, inform all your retailers, is it?
27 MR. DE LA MARE: Yes. It is anyone with whom it is operating.
28 THE PRESIDENT: Is not that tying it with what they said earlier on, where they say, as
29 summarised in 1.11, which you pointed us to.
30 MR. DE LA MARE: Yes.
31 THE PRESIDENT: It may be that there are others. We have not established it but there might be
32 others you have got agreements with as well.
33 MR. DE LA MARE: The point I am relying on this for is not to prove X, Y and Z further
34 requirements. I am proving, or seeking to prove that in the counterfactual the continuation

1 of the policy is simply not plausible and such policy as may continue could only be, with
2 respect, it could only be a policy applied entirely unilaterally on a kind of Colgate basis and
3 yet we know they have not done that. Why, in the counterfactual, in circumstances where
4 you know that they have to strip out all of the other infringing agreements that may exist --
5 there may be none there may be lots -- why do you assume that nevertheless having done
6 that they then go on to continue to operate an arrangement that will have no teeth and will
7 have no enforcement and does not accord to the facts on the ground.

8 THE PRESIDENT: Suppose you are right, in the counterfactual, you assume no infringements
9 and no policy.

10 MR. DE LA MARE: Yes.

11 THE PRESIDENT: What you then have to show is the cause of the price effect.

12 MR. DE LA MARE: The combined effect of those matters because they are indissociable from
13 the perspective of Pride.

14 THE PRESIDENT: The effect, you would say, the follow on claim is the effect of the policy
15 even when there were very few infringements.

16 MR. DE LA MARE: Indeed because you have to test it in this way. Let us say by February 2012
17 there is but one agreement.

18 THE PRESIDENT: Yes.

19 MR. DE LA MARE: But the termination of that agreement would bring to an end the termination
20 of the policy and with the termination of the policy it would bring to an end all the other
21 undisclosed---

22 THE PRESIDENT: It need not necessarily bring to an end the termination of the policy because
23 they might continue the policy hoping somebody else might --

24 MR. DE LA MARE: It comes down to what they in fact did. That is the issue that you have got
25 to investigate in the counterfactual. You have got to decide what they in fact would have
26 done. Just as for instance, it is open to argue, if we had had to terminate this in 2012 what
27 we would have done in 2012 or 2010 when we first started doing it, is what we would have
28 done in 2010, we would have introduced a selective distribution system. You will then
29 investigate the plausibility of that in fact as a counterfactual. That is the issue.

30 My case is, that is not a plausible factual counterfactual because it is not what they did, it
31 makes no sense, it is inconsistent with what in general terms the OFT has decided, it would
32 be an extremely risky course, the OFT having decided that an agreement like this, or
33 agreements generated by a policy like this, are incapable of justification. It would be
34 extremely dangerous to operate a policy like that. They would never do it and that is why

1 they have not. Any damage that subsists under the penumbra of the unlawful infringement
2 is recoverable on the "but for" basis.

3 What we fully accept we have to do is disaggregate all other effects that are not attributable
4 to the infringing agreements and the policy, so your market entry points, the changes
5 affected by the changes in the code, which I think from my checks on the Way-Back
6 Machine they do not want to give evidence. I think the earliest code change I could detect
7 was in April 2013 I could not find the code itself, there was one introduced in 2009. All of
8 that will have to be gone through. All of that will have to be controlled by an appropriate
9 before and after analysis.

10 With respect, if we are right on this basic point, and it was the premise on which Mr. Noble
11 said he was investigating and it is actually a question of law as to whether or not it is the
12 correct premise on which to investigate, it is also the economically sensible basis to
13 investigate because treating these infringements which are designed to work as a network as
14 somehow meaningfully severable from the whole does not make much economic sense.
15 The very vice in these types of agreement is their concerted operation across a network.
16 That is why I said yesterday that the counterfactual has to be legally and factually real,
17 realistic. Time and again, I make the point that a counterfactual (inaudible) policy
18 continues to operate is just not realistic, it is just the not the real word.

19 THE PRESIDENT: Do you say someone has such a policy and they get 200 of the dealers in
20 their network to sign up to it and actually agree the follow on claim is the same as if they
21 get only one to sign up and agree?

22 MR. DE LA MARE: No, I say --

23 THE PRESIDENT: What is the difference?

24 MR. DE LA MARE: I say that in relation to the one that is found I am entitled to bring the claim
25 and insofar as the investigation of the counterfactual where there is no policy discloses the
26 existence of loss that is only explicable by reference to the policy itself and not explicable
27 by reference to anything else, that is recoverable because it is necessarily linked to the
28 policy.

29 THE PRESIDENT: It would be the same as the 250, or if they all agreed, because if you say it is
30 linked to the policy it is the same loss. Your counterfactual is the same. No agreements
31 because there is also no policy.

32 MR. DE LA MARE: To go back to my cartel example it is exactly the same as knowing that A,
33 B and C are in the cartel, so A, B and C are retailers in the vertical agreement. We can see
34 this bit of the vertical arrangement. We do not know whether or not going across this way,

1 C and D are in, but what I am entitled to do is to investigate by reference to the facts, the
2 before and after situation in relation to A, B and C and if it discloses the fact that not only
3 the prices I have been charged by A, B and C have gone up, but also the prices charged by
4 D and E have gone up, it is a proper inference in those circumstances to say that the reason
5 for that is the release of competitive pressure. You do not need to enquire whether D and E
6 were released from that competitive pressure because they are in the cartel or simply smart
7 people who had spotted what was going on and priced accordingly, it does not matter.

8 THE PRESIDENT: We understand that, that was the point we put to Mr. Noble, that is classic
9 umbrella pricing and it is quite legitimate of you to say, as you explained it before Mr.
10 Noble gave evidence, that you would say these eight retailers exerted competitive pressure,
11 they were accounting for 15 per cent or so of Pride sales and they are therefore not
12 insignificant and they exerted competitive pressure on the others, the other, all the other
13 retailers, 242 or 292 and it was as a result of the decline of that competitive pressure that the
14 prices of the others went up and that is the point we put to Mr. Noble. That is different
15 from saying that we look and see -- forget whether eight agreed or one agreed or 100 agreed
16 -- we look and see what was the response of everyone to the policy.

17 MR. DE LA MARE: With respect that is not what happens in a regression analysis, that is not
18 what you do. You are looking at the effect of the changes across all of those for whom you
19 are making the claim. So part of the data that would go in would be the prices of D and E.
20 Whether D and E's prices are depleted because they are in the cartel or because they are
21 shadow pricing does not matter in the analysis of the data, you do not seek to investigate
22 that. You look to see whether or not the event which is the cartel identified by reference to
23 the periods of infringement, has produced loss in the data as whole. You do not seek to say
24 I must decide first and foremost whether or not this competitive lifting of pressure is as a
25 result of A to C and if and only if it is then do I go on to award loss against D and E. You
26 look at the data as a whole.

27 That is because you cannot meaningfully disaggregate what is happening in the market at
28 the time. What you do know is that there is at least this infringement, this agreement going
29 on, and you enquire as it on the effects of it.

30 THE PRESIDENT: Yes.

31 MR. DE LA MARE: Frankly, that is the end it.

32 MR. GLYNN: What you can meaningfully disaggregate is the effect on the infringing retailers,
33 the eight, this under 1000 sales, from the rest of the market and you have not sought to do
34 that.

1 MR. DE LA MARE: Even that is difficult with respect because in this context what is happening
2 is that the parties with which you deal will change or may change in consequence of the
3 infringement. Take this example, let us say there are 600 odd sales made with the retailers.
4 Those are only the sales made in consequence of the retailers adhering to the policy. In
5 other words, having made themselves less price competitive than they should have been.
6 But the counterfactual is how many sales would they have concluded and at what price in
7 the counterfactual? It may be that they will have altered their offering, produced Internet
8 pricing and, in conclusion of that, in consequence of that, concluded more sales. Indeed,
9 Jemma Dunn's witness statement says in terms, operating restriction was not great news
10 because we did not make any sales and that is exactly what I would expect.
11 You cannot start from the premise that the only sales affected by the capital R retailers'
12 conduct are their own sales, that just does not make sense.

13 THE PRESIDENT: We are not suggesting those are the only sales affected; we are saying the
14 price effect may be different.

15 MR. DE LA MARE: Yes, I understand that point, that is the investigating the incremental effect -
16 -

17 THE PRESIDENT: That is a different thing from your policy point. Would you like to, I am
18 conscious of the time, address the point that here, in this that Mr. Bates' developed at some
19 length, that in this market because of the range of rogue, the degree of rogue pricing, the
20 fact that therefore anyone looking at Internet, whether particular other retailers that would
21 see that a great number of people are not simply advertising the RRP. It is not going, it is
22 implausible that -- I do not think whether it matters if we talk about the restriction or the
23 policy -- that their pricing would have changed.

24 MR. DE LA MARE: With respect his implausibility case was very much focused in on the
25 alternative case because that is where he choose, he said, now we fundamentally changed
26 our case, which is what I have been gabbling about. We have not changed our case and his
27 points about implausibility were then directed at that capital R retailer-specific compared to
28 policy loss.

29 THE PRESIDENT: Well, I do not --

30 MR. DE LA MARE: Let me address it generally, in any event. There is one answer to it, one
31 simple answer which is, effectively, that is an empirical question. It is a question as to what
32 ripple effects will be produced by the agreements and the policy.

33 THE PRESIDENT: Yes.

1 MR. DE LA MARE: Seeking to investigate it or to divert its investigation into what individual
2 consumers would have done, what suite of information would have been available to
3 consumer A, to consumer B, to consumer C, to consumer D, is a misdirection for the
4 reasons given in paragraph 2.35 of Mr. Noble's second report.

5 THE PRESIDENT: Yes. I think he was saying -- that was one thing he said, but the other thing
6 he said, which is divorced from the question of what individual consumers might have done
7 is that, if one is talking about competitive pressure on retailers, any retailer looking at the
8 Internet and looking for other people's prices, their competitors' prices, would have seen a
9 significant number of people, as evidenced by the rogue report and even a bit of the OFT
10 decision for the infringement, was not actually keeping to adhering to the policy at all.

11 MR. DE LA MARE: But that posits a situation in which every offer on the Internet that you can
12 find in relation to every consumer operates in the same way to effect how they negotiate --

13 THE PRESIDENT: No, it is about the effect on retailers I am talking about, not consumers.

14 MR. DE LA MARE: Indeed so, but the point I am trying to make is this. The nature and quality
15 and extent of the Internet pricing is what is going to interest retailers because the evidence is
16 quite plain, that what retailers do in response to a consumer seeking to deploy an Internet
17 price is to persuade them, well, there are all kinds of problems in relation to that. Are you
18 going to get your manufacturer's guarantee adhered to? Are they going to provide you with
19 a replacement vehicle promptly if this one breaks? Is it not better to have a face that you
20 know and trust, et cetera.

21 So the nature and quality of the offering must be capable of producing effects that goes back
22 to the point I was making at the very opening about the characteristics of these consumers,
23 back on day one. They are not driven solely by reference to price. The OFT report is very
24 clear about that. Substantial concerns are: dealing with the traditional bricks and mortars
25 retailer; proximity; convenience; ease; the need to buy in a short time, some of them are
26 pressure buyers, they need to buy things and are not motivated to negotiate on price.

27 THE PRESIDENT: Yes.

28 MR. DE LA MARE: Once you appreciate that that is the position it is easy to see that the
29 competitive pressure exerted by let us say a number of rogues who are predominantly
30 Internet-only businesses, or Internet-only businesses with a retail arm concentrated in one
31 area of the country and another is going to be considerably different to a wider competitive
32 offering across the network as a whole because once the policy goes, everyone is going to
33 be advertising or thinking about advertising their prices. Why? Because the Internet prices

1 act predominantly -- and again you have seen the evidence of this -- as a teaser to engage
2 people in a telephone conversation to negotiate about price.

3 The evidence is pretty clear that during the relevant period the Internet price was operating
4 to generate telephone calls or to persuade people to come in to the particular shop in
5 question. As a stand-alone sales channel the sales were modest. Okay, the stand-alone
6 sales channels should be analysed separately, not least because anyone who is dealing with
7 a capital R retailer in a stand-alone Internet sale and therefore is concluding at the RRP is
8 going to be suffering much greater loss than anyone else and that is precisely why we
9 accept that it is necessary to attempt to disaggregate them from the data.

10 But it is the characteristics of the market, the lack of price competition and the particular
11 characteristics of those purchasing that explain why it is at the very least plausible -- we say
12 more than that -- that the substantial absence of pricing informing will lead to a dampening
13 of competitive pressure to reduce prices.

14 The wider and better the offer is, the more prevalent posted prices are, the more the posted
15 prices are going to be reduced, the more that retailers are going to be focusing on whether or
16 not they should be adjusting their costs, changing their manner of sale, in order to achieve
17 margin in other ways -- and it goes to the point you made, sir, in that respect: what it is
18 reasonable to expect will change is both posted prices and indeed the prevalence of posted
19 prices and what a retailer's bottom line figure is in any negotiation because, as price
20 competition intensifies, you are going to reevaluate that in order to see whether or not you
21 can attack that to increase margins in other ways. That is why this is a virtual circle. That
22 is why the uninformed consumer is protected by the informed consumer and that is why it
23 will operate effectively to lower posted prices across the board and operate to lower the
24 break price, if you like, for the retailer below the posted price.

25 The extent to which that has happened --

26 THE PRESIDENT: Just a moment.

27 MR. DE LA MARE: I am so sorry.

28 THE PRESIDENT: Yes, the uninformed consumer will benefit from the break price which you
29 say --

30 MR. DE LA MARE: The posted price first, so they will enter the negotiation at a different posted
31 price and therefore with a different perception of value because if you are seeing lots more
32 posted prices all at a consistently lower price, the price establishment technique by which
33 excessive margins are being gouged is less effective.

1 If I try a sell a bag of sugar at £300 or let us say £2 and everywhere there are posted prices
2 showing that the price of a bag of sugar is £1, the effect of me trying to persuade a
3 consumer that they are getting a discount, 50 per cent off £1, is likely to be a lot less in
4 those circumstances.

5 THE PRESIDENT: I thought the uninformed consumer was the one --

6 MR. DE LA MARE: The uninformed consumer.

7 THE PRESIDENT: -- does not know what the posted prices are; is it?

8 MR. DE LA MARE: But once you start seeing posted prices in the shop that are moving by
9 reference to things and on the Internet, then that will move the prices across the board.

10 THE PRESIDENT: Yes, sorry I thought that was the informed consumer --

11 MR. DE LA MARE: The informed consumer is still confronted with price establishment. They
12 still do not have anything like the insight you would have into what the competitive price is
13 for a bag of sugar. They are still not experts in mobility vehicles and the price
14 establishment is still going to be having some effect.

15 THE PRESIDENT: I think what was troubling us was when you said the characteristics of the
16 market would explain why it is plausible that a substantial absence of pricing information
17 will affect retailers. I can see that. But we have got to find it plausible that the retailers
18 who agreed to the -- the retailers who abided by the policy, which at the moment is only
19 shown to be 8, they constitute a substantial absence of pricing information.

20 MR. DE LA MARE: That goes back to the fact that is it only the competitive pressure that is
21 engendered by the removal of the eight retailers or the additional absence of competitive
22 pressure identified by the policy?

23 THE PRESIDENT: But you were talking about the absence of pricing information; that must be
24 retailers who adhere to the policy.

25 MR. DE LA MARE: Yes, but it will encompass retailers who adhere -- the capital R retailers
26 who adhere to the policy, small R retailers, how many of them we do not know --

27 THE PRESIDENT: How are we possibly going to find out?

28 MR. DE LA MARE: Because it is going to be manifested in the empirical data which will, if it
29 discloses difference in prices which are not attributable to any other plausible factor, can
30 only be attributable to the difference in competitive pressure between the price advertising
31 that there was in fact in 2010 to 2012 and the price information that would have been
32 available from all sources.

33 So to give you an example, once one or eight capital R retailers start advertising on price, if
34 somebody who has not previously had an Internet site or has had completely unilaterally an

1 Internet site on which they have not been advertising price decides in response themselves
2 to start advertising price, it is all of those new prices that will be relevant to the increased
3 information of the consumer.

4 Equally, if there is somebody who was party to an infringement who has not been disclosed
5 and has had a letter saying it is all over, their prices will go in as well.

6 It is therefore the operation of the agreements in the context of the policy that makes such
7 effects plausible. What you then get to is a situation in which the pricing information is a
8 proxy for the information and the decisions taken by consumers, whatever their level of
9 information, upon that pricing information.

10 So in the factual, the prices expressed -- particularly in aggregate -- are a proxy for how
11 effectively all of the consumers negotiated with the pricing information available at that
12 time.

13 MS. STUART: Can I just ask one question, sorry, just to clarify that.

14 In that you had said that we were talking about rogue retailers not adhering to the policy. Is
15 what you are saying is that the retailers who are not providing that pricing information -- so
16 when you talk about a substantial lack of pricing information are you saying that the rogue
17 retailers who were providing pricing policy was significantly less than those who were not
18 providing the pricing policy? I am just trying to understand where you are putting the rogue
19 retailers against this substantial lack of pricing information.

20 MR. DE LA MARE: Of the rogues we know, according to Mr. Allen, there are 50 to 60 rogues,
21 there are not any such a large number of rogues in the pricing reports. The pricing reports
22 trot along with different numbers, but it is those prices that have been used by Mr. Noble as
23 his starting proxy for what the price would have been in the factual.

24 So he is assuming that the effect of the rogue prices, therefore the extant price information
25 that there is, is to set effectively the prices which we can then investigate against the posted
26 prices thereafter and, from that, infer what the difference in competitive pressure is. That is
27 the whole basis of the rogue methodology at 520 of his report.

28 So we are assuming against ourselves in terms of the potential impact that, notwithstanding
29 the fact that there are uninformed consumers, everyone is getting the rogue price. That is
30 why we agreed that it would make sense to disaggregate those who had dealt with the
31 capital R retailer because if there is a category of case where somebody is likely not to have
32 paid that price and to have paid appreciably more, it is those who went ahead and dealt with
33 the capital R retailers in the period in question, notwithstanding the fact that there is no
34 disclosed price. That is obviously particularly true if they went ahead and concluded an

1 Internet price -- an Internet sale because in an Internet sale all you are getting is the price. If
2 it is a telephone sale generated by an Internet lead then that is much more closely analogous
3 to a shop sale.

4 We say the empirical data will effectively act as a proxy for that difference in price
5 competition produced by the differing range and quality and nature of prices on offer
6 between the two if it is sufficiently controlled for all other factors that may explain a
7 reduction in prices.

8 If you are satisfied that nothing else is reduced in prices, it is not market entry, it is not the
9 OFT recommendations coming into force, or what have you, if you are satisfied of that, then
10 the only plausible explanation for the difference in prices is the change in competitive
11 pressure engendered by increased advertising as a result of the removal of the infringements
12 and the policy.

13 Of course, we say once you get into that, whatever that change is, it will generate ripple
14 effects. How large those ripple effects will be a function of how big a change there is in
15 competitive pressure. If the combined effects of the infringements and the policy is to
16 produce a small change in competitive pressure, the ripple effects will be small. If the
17 combined effect of the infringements and the policy is to give rise to a large change in
18 competitive pressure, lots more prices going up, lots more alternatives to the 30 or 40
19 regulars and the 60 maximum rogues, then it is reasonable to expect, with the features of the
20 market that we know, that that will generate larger benefits.

21 It is exactly that analysis, with respect, that underpins the diagrams in the OFT market --

22 THE PRESIDENT: Can I ask a fairly basic question?

23 MR. DE LA MARE: Always suspicious!

24 THE PRESIDENT: What you say exactly, as distinct from the agreements, the policy is looking
25 at the decision?

26 MR. DE LA MARE: What do I say that the policy is as distinct from the agreements?

27 THE PRESIDENT: Yes. We can understand where there is an agreement that they have agreed
28 to perform, both sides have agreed something, but what do you say is the general policy?

29 MR. DE LA MARE: The general policy is that there will be these agreements and that is known
30 and communicated and steps are being taken to enforce it.

31 THE PRESIDENT: The policy is that there will be agreements?

32 MR. DE LA MARE: No.

33 THE PRESIDENT: Can you just point us in the decision?

34 MR. DE LA MARE: It is defined in the decision at page 18.

1 THE PRESIDENT: Page 18? That is the prohibition.

2 MR. DE LA MARE: The prohibition is the policy -- it is a policy of prohibiting and agreeing
3 therefore to prohibit online advertising of prices below RRP and the agreements it produces
4 -- if applied in relation to these models and the agreements it produces are with those
5 retailers who have agreed to abide by it.

6 THE PRESIDENT: You see, they have defined the --

7 MR. DE LA MARE: The language --

8 THE PRESIDENT: We are looking at paragraph 1.10 in the decision --

9 MR. DE LA MARE: Yes.

10 THE PRESIDENT: -- where they distinguish and then define the online pricing prohibition and
11 then they say in 1.11:
12 "Whilst Pride's policies concerning the online advertising of prices below the RRP in
13 respect of certain mobility scooters applied to the dealer network generally, the OFT
14 finding based on the evidence in its possession is that the retailers were party to
15 agreements or concerted practices in respect of the below RRP online price
16 advertising prohibition."
17 So it is the policy that retailers should not advertise online prices below RRP in respect of
18 these certain scooters; is that the policy?

19 MR. DE LA MARE: That is the policy and you can see its genesis at 57 at 2.111 to 2.112 which
20 includes the word "internal", which Mr. Bates placed such reliance on, and the point I made
21 is that its existence is communicated and known more widely.

22 THE PRESIDENT: Yes. Yes. That, I think, is clear.

23 MR. DE LA MARE: We know, for instance, it came to be enforced or threatened to be enforced
24 through measures such as threats of T-listing(?), being put on unfavourable price terms, or
25 even discontinuance of the supply. What we do not know is whether there were T-list
26 prices implemented or whether or not those threats of discontinuation of supply were
27 themselves exaggerated(?).

28 The language of prohibition is important because it reveals that Pride is effectively telling
29 its retailers --presumably not the ones that had asked for it to happen -- do not do this.

30 MS. STUART: Can I just go back to one point you made around the competitive pressure.

31 MR. DE LA MARE: Yes.

32 MS. STUART: You said you are satisfied that the competitive pressure basically has been
33 generated from the infringements. Does that go back to what Mr. Noble was talking about

1 this morning, about controlling other factors? Is that what you are talking about? How do
2 we become satisfied that the competitive pressure is just from the infringements?

3 MR. DE LA MARE: Also the policy.

4 MS. STUART: Sorry? Also the policy? Okay.

5 MR. DE LA MARE: How do you become satisfied? What he is explaining is that his proposed
6 approach is to adopt a before and after analysis, so looking at prices during the period and
7 prices after. There will obviously be nice questions as to how wide -- what temporal span
8 should be covered by the after analysis because the longer it is, the greater the risk is that it
9 might become tainted with other factors such as a change in market circumstances in 2014
10 or 2015 or developments affecting commerce more generally.

11 So there will be a nice series of issues connected with selection of the after period to
12 effectively ensure it is a clean after period which is a proper comparator to the before period
13 and insofar as other factors are detectable and at work, Mr. Noble proposes to employ
14 techniques such as market share analysis for market entry as something to control for those
15 factors.

16 MS. STUART: Okay.

17 MR. DE LA MARE: That is the approach and it is, as he pointed out, an approach entirely in
18 line with the Commission guidance and guideline and it may be that that is the best and only
19 approach that one can do because of the limitations of data, which is why I emphasized at
20 the outset there are difficulties in estimating damages in cases like this: the very novelty --
21 the very differences of the issues in the market produced by vertical infringements
22 compared to horizontal infringements deliver those difficulties and one of the issues in
23 principle that this tribunal will have to grapple with if this case goes further is how far it is
24 willing to go in terms of rough and ready assessment in order to decide, this is a practical
25 and fair and reasonable assessment of damage for something everyone agrees is likely to
26 cause damage if appreciable in effect.

27 You will have to decide whether you are satisfied it is appreciable in effect and then decide
28 how best to assess it. That is a very difficult question. I do not shirk from that because it is
29 not something any court that we can detect has grappled with beforehand.

30 THE PRESIDENT: Well, helped by the fact that most of the damages cases are settled either
31 before they start or before judgments because you do get problems even if cartel cases
32 (overspeaking) --

33 MR. DE LA MARE: Of course you do. There are all kinds of problems in cartel cases but at
34 least in cartel cases you tend to have much better data certainly on value of commerce such

1 that identifying an overcharge is perhaps less contentious than the issues that arise in
2 relation to pass on, where again, in relation to pass on where again in relation to pass on, the
3 court is involved in making decisions that are substantially policy led.

4 THE PRESIDENT: Yes.

5 MR. DE LA MARE: So that is our answer to the question and that is why we think Mr. Bates'
6 third topic, the other facts that need to be proved, is misleading and it is misleading by
7 reasons given by Mr. Noble at 2.35. We propose to prove that change of competitive
8 pressure empirically. I have addressed why this is in no way speculative and I have
9 addressed also in consequence why there has been no fundamental change in Mr. Noble's
10 approach. All that we have conceded that it is appropriate to do is to disaggregate, so far as
11 we can, the sales in relation to the big R retailers. That is not the same as conceding that we
12 cannot recover that part, if you like, that you find attributable to the policy and all that goes
13 with it.

14 That then leads to the last topic, which is distribution. Distribution is going to be a function
15 of class definition. You have not settled upon -- and nor should you settle upon -- any final
16 conclusions as to which the appropriate classes are. No doubt both Mr. Noble and Mr.
17 Parker are going to cut the data assembled in the way that we propose as many ways as
18 possible to see whether or not there are meaningful and discernible trends in it. For
19 instance, whether or not Internet-only sales, telephone sales or retail shop sales produce
20 different results, whether big R retailers and small R retailers produce different results and
21 whether the umbrella effect as between the seven models and the other models is
22 demonstrated by the data even allowing for those differences --

23 THE PRESIDENT: I think his point was that because of the peculiarities of this market,
24 producing an aggregate award is difficult -- or, he would say, impossible -- because even
25 within smaller classes, the loss suffered by the individual consumer purchaser of the same
26 model, let alone different models, will be so varied it will not be a uniform measure of loss
27 because of the way they go about their purchases. Even within the same subclass, it is so
28 different.

29 Therefore you see -- even with the limited sample from the T-Mobility -- people buying the
30 same model in a shop and paying hugely different prices. That, I think, was his point. So it
31 is not about how you define the classes; it is clear the class is going to be several hundred
32 people --

33 MR. DE LA MARE: With any particular class there is a spread. How do you address the
34 problem of the spread?

1 THE PRESIDENT: He is saying in this case, unlike most cases -- for most goods, the prices in
2 stores tend to be pretty standard, they might be cheaper on the Internet, but there is not this
3 wide fluctuation of sales within the same shop.

4 MR. DE LA MARE: There are a number of consumer markets in which consumer products are
5 price negotiable. Cars (overspeaking) tends to be feature of higher value, irregular
6 purchases -- white goods as well are often negotiable if you try hard enough from personal
7 experience.

8 THE PRESIDENT: You buy your dishwashers obviously better than I do, but cars clearly is a
9 good example, yes.

10 MR. DE LA MARE: The point is that Mr. Noble's first answer to this -- the first relevant
11 question is: is the spread expressed before and after in any event? If it is, is there any
12 reason to expect effectively an uninformed consumer to have suffered a different relative
13 loss?

14 Let us say that the putative mug punter pays £1,000 when everyone else is paying £500 and
15 in the counterfactual you also see a spread between the mug punter at £900 but everyone
16 else paying £400. That is perfectly good basis on which to infer that effectively the price
17 competition would have delivered the same sort of benefits for everyone. Why? Why?
18 Because the dynamic effect Mr. Noble has explained has moved posted prices, has moved
19 underlying price expectations and has therefore moved two of the essential predicates in the
20 negotiation.

21 So you cannot assume simply because there is a spread that there will not be a similar or
22 broadly comparable spread visible in the class afterwards. So if dispersion is broadly
23 consistent, then distribution is not any kind of problem at all.

24 But the second answer is one of policy. It is very unattractive to rely upon such dispersion
25 and such therefore putative impossibility of deciding exactly what someone would have
26 paid when the consequence of that is to deprive all of compensation.

27 I go back to the point I made again at opening: if there is a third unusual feature of this case
28 of variability in price -- and I identified that right at the outset as one of the things I was
29 going to have to grapple with. If there is such a feature, then one of the policy choices you
30 are going to have to wrestle with -- and I suggest you can only wrestle with it when you
31 know what the actual facts are -- is whether or not it is a greater justice to the claimants to
32 give them an average amount that may, as between themselves, result in some being over
33 and under-compensated but leads to no net aggregate over-compensation relative to the
34 defendant.

1 Where is the justice in that? No consumer, I would suggest, would plausibly say, well,
2 because you might underpay me something, I would rather receive nothing. Yet that is the
3 logic of the objection.

4 THE PRESIDENT: I think the objection was that some consumers who have lost nothing will get
5 compensation and as this is not, as in a claim against cartelists --

6 MR. DE LA MARE: I do not think Mr. Bates was able to go that far, but nevertheless.

7 THE PRESIDENT: I think he was saying that. He was saying that some people for whom the
8 price paid really would not change.

9 MR. DE LA MARE: It is hard to see, with respect, how that is going to happen because for the
10 absolute muggest of mug punters they are going to go by reference to the recommended
11 retail price on the Internet and that is not going to happen outside the infringement and, if it
12 does, it is easily controlled.

13 THE PRESIDENT: They do not go on the Internet at all --

14 MR. DE LA MARE: Yes.

15 THE PRESIDENT: -- and indeed we now know quite a lot of people do not.

16 MR. DE LA MARE: If they are not on the Internet at all, then you are straightaway into the
17 impact that the informed consumer has on posted prices.

18 So if you are not buying on the Internet and buying at recommended retail price and
19 continuing to do so and doing no price searching, then you are going into the shop and the
20 entry point for your price negotiation is the sign that says "Was £3,000, now £1,200". If
21 that posted price has moved in consequence of the market, the market changes, then the
22 uninformed consumer benefits.

23 So the only scenario in which the uninformed consumer might conceivably not benefit is in
24 a situation where they are paying recommended retail price on the Internet. Jemma Dunn's
25 evidence is that no one does. She say that in terms in paragraph 7 in her witness statement.
26 That is the only situation in which it can arise. But if the data shows otherwise, if when we
27 have data from others we see that some were particularly successful in persuading some
28 people to part with RRP both before and after, that might present a problem and require a
29 metric to identify the exclusion of those from compensation. I suggest that is deeply
30 implausible that is going to be shown on the data.

31 Indeed, that thesis is entirely inconsistent with my learned friends' case because my learned
32 friends' case --

33 THE PRESIDENT: We will not know what has happened to the posted prices from the -- we will
34 only know what has happened to achieve the prices.

1 MR. DE LA MARE: That is right.

2 THE PRESIDENT: Yes.

3 MR. DE LA MARE: What I am saying is that if there is a phenomenon of RRP being achieved
4 during a period where --

5 THE PRESIDENT: It is not going to be RRP because that is pretty rare but --

6 MR. DE LA MARE: If it is not RRP --

7 THE PRESIDENT: It never was in terms of actual service.

8 MR. DE LA MARE: If it is not RRP, sir, then how does it happen? Because what is happening is
9 that you are getting into a telephone conversation in which you are talking about
10 discounting and if you are in a telephone conversation in which you are talking about
11 discounting and the relevant party has posted prices and price expectations, their bottom
12 line price has moved, then that is liable to produce an impact on where you stop in the
13 negotiation. That is the point and that is why the uninformed consumer benefits from the
14 informed consumer.

15 So, yes, there may be some spread. No, we do not accept that it is in any way demonstrated
16 that the spread is necessarily different; there is no reason to expect that it will be. If there is,
17 it is not likely to be so substantial as to preclude the relative rough justice as between the
18 claimants, of some being under-compensated and some being over-compensated.

19 Any other approach, I would suggest, will lead to a situation in which follow-on claims for
20 consumers but also follow-on claims in which what you are doing is chasing indirect losses
21 after a degree of upstream pass-on or indirect-indirect purchases, they will become
22 impossible.

23 If you are not willing to do some basis of aggregation and some rough justice as between
24 the classes members in order to ensure that they get some compensation --

25 THE PRESIDENT: Impossible where prices are individually negotiated.

26 MR. DE LA MARE: Not just where prices are individually negotiated; when there are features of
27 an individual that will expose them in a different way to loss.

28 THE PRESIDENT: Well, that can only be if they pay a different price.

29 MR. DE LA MARE: No, I do not want to talk about another case, but that is obviously -- when
30 you are dealing with indirect purchases or indirect-indirects -- the extent to which you, as an
31 end consumer, may have had various overcharges passed on may depend on who you deal
32 with. It may depend on which shops you go to and do commerce at in relation to which that
33 will effect the degree to which there has been pass-on to you.

1 The minute you start saying there has to be absolute identification of what the attributes of
2 the customer is, you are basically saying to that kind of indirect-indirect purchaser claim: if
3 that ends up at a consumer then you will not be able to make a claim.

4 Let us imagine a widget, a widget that is included in a wide range of consumer goods -- let
5 us say, I do not know --

6 THE PRESIDENT: You might have to take an average of pass-ones is what you are saying.

7 MR. DE LA MARE: Yes. You might have to take an average of pass-on in circumstances where,
8 because of the different features of the different retailers or the different types of products
9 that you have bought that incorporate the widget -- let us say a rechargeable battery -- the
10 degree to which you are passed on the cost in relation to that will vary depending on
11 whether or not you have been buying a torch incorporating batteries or a jackhammer or
12 batteries over the Internet and from which retailer you have been purchasing those from.
13 So you have to aggregate in those circumstances in order to make the class claim system
14 work.

15 THE PRESIDENT: Sometimes and sometimes you pay the impossible.

16 MR. DE LA MARE: My final point is it is only when you see with the data the extent of the
17 spread and the difficulties it has produced that you can draw such a judgment. To knock out
18 a consumer claim on the basis of those types of the claim at this stage is, in my submission,
19 precipitate.

20 So we say, for those reasons, there is no fundamental objection to this claim, there is no
21 basic change in the policy or approach that we have adopted -- and Mr. Noble's concession
22 to go and look at small R and big R retailers was not intended to and is not such a
23 concession -- and we say that in those circumstances it still remains appropriate to follow
24 the course that you, sir, suggested which is to gather in the data and to have consideration of
25 the Rule 63 orders to get in better data because of the more general concerns expressed
26 about problems or potential issues with the before and after analysis so --

27 THE PRESIDENT: I think we should say during and after.

28 MR. DE LA MARE: During and after, I am so sorry, you are quite right.

29 The during and after analysis. We accept that better data there will better explain the extent
30 to which the infringements plus the policy are shown to be causative or potentially causative
31 of substantial loss.

32 We agree that exercise is sensible and that that exercise should be gone through. But if you
33 are against me on the infringements plus the policy, then I invite you to rule against me on
34 that and to do so now.

1 THE PRESIDENT: We are not going to rule at 5.05 pm on anything. There is a lot for us to
2 consider but we will produce, either way, a reasoned judgment.

3 MR. DE LA MARE: Of course.

4 THE PRESIDENT: On any view, that will deal with this question of the counterfactual, but it
5 will also consider then what is the best course for the case to take and whether --

6 MR. DE LA MARE: Of course.

7 THE PRESIDENT: You will be invited to make further submissions then because we are not
8 going to take a decision now given all that we have heard.

9 Mr. Bates, did you want to? Further submissions by MR. BATES

10 MR. BATES: Sir, it has been a funny old day and perhaps the suggestion of my learned friend
11 that I go first in saying my bits perhaps did not turn out to be the most appropriate way of
12 dealing with things.

13 It was suggested in his submissions that it was my choice not to deal with Mr. Noble's
14 analysis and the effects flowing from the policy. I think I am right in saying that I was
15 following the instructions given to me by the tribunal, so I would not want it to be held
16 against me in any way that I have not dealt with the case that it is clear he is still pursuing
17 on the basis of Mr. Noble's analysis.

18 I think the tribunal is right that the substance of some of the points that I made would
19 anyway carry over. I do not want to make us stay late so I deal with all of those points. I
20 would only make a couple of very brief observations, if I may.

21 First of all, in relation to the suggestion that one can judge the effects of the policy by
22 looking at the change in prices and then, as my learned friend put it, disaggregate all other
23 effects, in my submission it should be held very much against granting a CPO or indeed any
24 adjournment. The fact that there is no explanation whatsoever in either of Mr. Noble's
25 reports that can satisfy this tribunal that it is at all realistic that one would be able to do that
26 sort of disaggregation exercise and control for a whole load of factors.

27 It is completely different from a cartel situation because where you have a cartel situation --
28 especially where the cartel seems to have been successful for a period of time -- by
29 definition much of the market, if not all of the market, is going to be covered by the cartel
30 whereas here it is clearly an incredibly different factual scenario. Of course, if the tribunal
31 were to decide that the policy based approach was not the appropriate one it would be even
32 more impossible.

33 So I do suggest that the tribunal before saying that more time should be invested in this case
34 would have to think very carefully whether it is realistic that this sort of disaggregation

1 exercise could attribute a particular price increase to the infringements, particularly in light
2 of the likely increase in use of the Internet for price research and as a selling channel over
3 the last five years.

4 The other short point I would make is in relation to my learned friend's comments that
5 Jemma Dunn's witness statement shows that she did not make any sales as a result of
6 adhering to the policy. What she actually says is slightly more limited than that: it is at
7 paragraph 14 of her witness statement where she says:

8 "... this 'call for best price' policy ... I doubt that this helped sales, rather the opposite.

9 We did not sell much volume of the models that Pride's ban related to."

10 I make that point as a matter of factual accuracy. But the basic conclusion that one draws
11 from it is still the same that, if it is the case that the result of using "call for best price"
12 rather than a specific price meant that consumers, instead of going to Jemma Dunn's three
13 websites, decided to go elsewhere, then that suggests that consumers were seeing on the
14 Internet other retailers who were citing specific prices.

15 While I hear what my learned friend says about how there could still be some sort of effect
16 on prices somehow in various different ways, in my submission what Jemma Dunn says
17 about that -- and what she says is backed up by the data, of course -- suggests that Pride is
18 right: that if there is any such effect, it is likely to be very small indeed.

19 Finally, I would simply urge the tribunal in deciding this matter to look closely at the
20 criteria that are set out in Rule 79. It is not simply dealing with the strength of case; it is
21 dealing with a whole range of factors in relation to suitability. While none of us have
22 covered all those factors in oral submissions, it is of course appropriate for the tribunal to
23 look at all of those in deciding what to do.

24 THE PRESIDENT: Yes. Absolutely.

25 MR. DE LA MARE: Mr. Bates suggested I inadvertently misled you. I referred to paragraph 5
26 which states in terms:

27 "I would make the initial point that, as far as I recall, the companies have never sold
28 any Pride models at Pride's recommended retail price."

29 I believe that is what I said.

30 MR. BATES: I do not understand how that referred to anything I said but there we are ...

31 THE PRESIDENT: I do not think that was the point that I understood Mr. Bates to be referring
32 to. It was not about sales of retail of RPM, was it? No, that is not the way I understood it.

33 MR. BATES: It has been a long day for all of us.

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THE PRESIDENT: Yes. I think it is no surprise to say it is not the easiest case, not only because it is the first case where we will grapple with the requirements for a collective action, but because of the nature of the infringement and the nature of this market so we have quite a bit to think about and we will let you know as soon as we reach a decision. We cannot promise that will be before Christmas.