Case No: 1262/5/7/16 (T)

IN THE COMPETITION APPEAL TRIBUNAL

Competition Appeal Tribunal
Victoria House
Bloomsbury Place
London
WC1A 2EB

Before:

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

Between:

AGENTS' MUTUAL LIMITED
Claimant

and

GASCOIGNE HALMAN LIMITED (T/A GASCOIGNE HALMAN)
Defendant

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

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

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Monday, 20 February 2017
(10.30 am)
Housekeeping
MR HARRIS: Good morning, members of the Tribunal. Mr Maclean and I, subject to the views of the Tribunal, are agreed there ought to be a short window at the very end of the day for a reply from me. I am obviously in the Tribunal's hands as regards how long that should last.

I am further in the Tribunal's hands as to how they want me to deal with the oral closing. Plainly I have some topics that I would like to address, by no means all, that would be impossible. But I am equally keen that the Tribunal should address me, if you like, and ask me about concerns or issues or lack of clarity as they see it in my case.

So I am happy we begin with that, or that I start and there be an interchange as and as when appropriate.
THE CHAIRMAN: I think the latter is probably the best course, Mr Harris. If you start, we'll interrupt as and when we see the occasion as merited.
MR HARRIS: Yes.
MR MACLEAN: Sorry, just as you came in, Mr Harris and I were discussing, we hadn't quite got to proposals as to how we might cut up the day. But it seems to me that

Mr Harris is right, he is entitled to a short reply at the end. One obvious possibility is if Mr Harris had from now, until 12.45, two and a quarter hours or just about, and I had the same. That would then take us until 4 o'clock and Mr Harris would then have 15 minutes to reply and may be done by 4.15, but obviously it's a matter for the Tribunal.
THE CHAIRMAN: If that makes sense as a broad template, Mr Harris --
MR HARRIS: Yes, thank you.
THE CHAIRMAN: -- let's proceed on that basis.
MR HARRIS: I am grateful.
Closing submissions by MR HARRIS
MR HARRIS: The first point I would like to address is the negative impact that the central restriction in this case has had upon my client, Gascoigne Halman, the central restriction obviously being the OOP rule.

What we say is indisputable now in the light of the evidence is that the portals are a key parameter of competition for estate agents. So it goes without saying therefore that the One Other Portal rule restricts the ability on the part of my client to compete using that parameter, to put it at its most simple, otherwise GHL would have been able to compete using three, four, five or frankly however many portals

it liked, but now it is restricted to in what we contend is to be viewed as output to a maximum of two, one of which of course is OTM.

As you know that we say causes damage in a number of respects, including to my client. The prices have gone up in those circumstances, relative to the counter-factual. As you know, that is the force of our expert evidence. We may have an interchange about that in due course. But we say of course that there has also been damage to consumers, so beyond GHL, and that's because prices have gone up to estate agents, no matter which selection of portals you have regard to, and if and insofar as the prices have been then passed on to downstream consumers of estate agents, that's adverse to them. In any event, it is adverse to estate agents, including my client.

And of course there is another obvious downstream effect, which is that by being restricted in this parameter of competition, the client's properties can't be as exposed as they would otherwise be in any counter-factual situation and therefore there is less competition for those clients' properties. They are not being exposed, it is what Miss Frew referred to as the auction principle.

So what we say on this, what is now clearly

established portals being a key parameter of competition between estate agents -- incidentally, of course exactly the words used by the CMA in its 27 March 2015 letter -- there has been a restriction of competition as regards that parameter in the estate agency market. And that has been a direct adverse effect not just to my client, but to other clients in other estate agents in similar positions with the corollary of further adverse effects further downstream.
THE CHAIRMAN: That begs the question -- you may say it doesn't matter but I'll raise it -- why did your client sign up to the restriction in the first place?
MR HARRIS: Oh, well, that is very easy to answer, sir. That is because the evidence has been quite clear, including from the estate agents adduced by my learned friend's side, that they regard it as a means to restrict competition between them, therefore reduce their costs, and that's the answer. There is an anti-competitive motive. It wasn't just on the part of my client, but it was on the part of Mr Symons, Mr Wyatt and all the others. What they knew full well was that costs were rising and they didn't like that. The last they wanted was for costs to rise, so how do you reduce cost as a collective? What you do is you collectively restrict your output, therefore you reduce what you're

1 spending on it, but the corollary of that are these
2 anti-competitive effects.
3 As it happens, we know it also had a series of
4 anti-competitive objects, by which I mean for present
5 purposes both subjective anti-competitive intentions,
6 plus objects properly so called as a matter of
7 competition law, ie looking at the set of arrangements
8 in the round. Of course, it is no answer to an
9 anti-competitive effects case that the people who put it
10 in place wanted the anti-competitive effects. That is
11 absurd. So that's the answer.
12 We want to reduce the output collectively with
13 others, and of course it goes further. Now my learned
14 friend in his skeleton closing points to the extract
15 from the BAGS case and says, "Ah, yes, but increasing
16 your profit or acting for profit, there is nothing wrong
17 with that". And I completely agree. Per se there is
18 nothing wrong with acting for profit. One wouldn't
19 expect Agents' Mutual to be doing anything less, but
20 what is completely wrong because of its anti-competitive
21 object and its anti-competitive effect is to
22 deliberately disrupt and change the structure of the
23 market so as to reduce output by a means of restricting
24 competition between yourself, and by that method to
25 increase your bottom line.

1 So that's what's pernicious. It is not going for
2 profit per se, it is excluding other people from the
3 market and then taking the economic rents that they
4 would otherwise be able to obtain and instead bringing
5 them back to your bottom line. So the people being
6 excluded are here twofold; there are other members of
7 the estate agency market, in particular non-traditional
8 estate agents -- we call them online agents, but you
9 know what I mean. So otherwise they would be taking
10 some money from the market, but we know from all the
11 foundational documents and the business plans that is
12 the last thing Agents' Mutual wanted, so they are
13 excluded. The other one of course is the other portal,
14 in particular, as to 90 per cent Zoopla.
15 So they are also being excluded. They would have
16 been making money, and we saw if you recall -- I think
17 it's bundle 1, page 185 and various other iterations of
18 it -- there was an analysis of how much money was being
19 generated by both Rightmove and Zoopla and the estate
20 agents as a collective, through this mutual company,
21 wanted to bring that back to them. They don't want this
22 money going out to the shareholders of Zoopla and
23 Rightmove.
24 Then just so that we don't lose sight of it, of
25 course what was also established in the evidence was

1 that it wasn't -- expressly was not so that the money
2 that could be brought back into the club of traditional
3 agents was then going to be distributed downstream to
4 end consumers. That is simply not established by the
5 evidence. What is established by the evidence, and
6 I was careful to put all these documents to
7 Mr Springett, was multiple references to the benefits
8 accruing to the agent members, not to their downstream
9 customers, and to increases of the bottom line. So you
10 may recall, I believe it was the Savills example, where
11 it was underlined -- I can find you the reference where
12 they said -- where they were trying to induce -- it
13 wasn't Savills, it was KFH -- to join and what was put
14 forward to that prospective member was a particular
15 figure which may or may not be confidential going to
16 your bottom line.
17 There were three or four references. I am happy to
18 hand up a sheet afterwards if you like, but there were
19 three or four references, and none of that is
20 countermanded.
21 This has a number of ramifications. For instance --
22 I was going to later come back to the exemption case,
23 but one of the reasons that the exemption case that is
24 run by my learned friend's team is hopeless is because
25 if we get to that stage, then the burden is upon them

1 and they have to establish actual pro-competitive
2 benefits and they have to establish that those
3 pro-competitive benefits outweigh the adverse effects,
4 and they have to establish that a "fair share" of those
5 have gone to consumers.
6 But they haven't actually established any
7 pro-competitive benefits, let alone in a quantified or
8 analysed sense. And in that regard as you know, their
9 case is not supported by their own expert and the only
10 bare inference to be drawn from that --
11 MR FREEMAN: Mr Harris, can I just take you back to
12 something you said earlier. I want to be clear what you
13 mean by "output" in this context.
14 MR HARRIS: Yes. Output in the sense that an estate agent
15 produces advertising output on the part of the client
16 property that it's trying to sell. If your output is
17 only on two portals, it's less output than if it's put
18 on three or four or five portals. You are not
19 producing, you are not putting out as much advertising.
20 MR FREEMAN: You are saying that your client voluntarily
21 restricted its output by joining Agents' Mutual's
22 scheme, is that right?
23 MR HARRIS: That is right. But there are two parts to that
24 answer. That's unequivocally now found on the evidence,
25 and secondly, it doesn't --

1 MR FREEMAN: I am just trying to get the theory clear.
2 MR HARRIS: Yes. Secondly, it matters absolutely not one
3 jot whether it was voluntary or not. 99.9 per cent of
4 Article 101 cases are likely to be or are in fact cases
5 where there has been voluntary entry into the illegal
6 agreement. It doesn't matter if it's illegal by object
7 or effect, it's still illegal.
8 MR FREEMAN: I do appreciate that. But what you are saying
9 is that your clients, Gascoigne Halman, suffered harm by
10 restricting their output through being members of this
11 agreement.
12 MR HARRIS: That is right, as have the other members.
13 MR FREEMAN: But the harm consisted, as I understand you to
14 say, in increasing their profits.
15 MR HARRIS: The harm consisted in their inability any longer
16 freely to compete by reference to this key parameter of
17 competition.
18 MR FREEMAN: I think I follow you with that. But the
19 consequence of restricting their output as in the
20 argument you put is that their profitability would
21 increase because they would be spending less on listing
22 fees.
23 MR HARRIS: That was their intention.
24 MR FREEMAN: That was their intention but not the result.
25 MR HARRIS: No, not the result.

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1 MR FREEMAN: I see.
2 MR HARRIS: That's right. And that of course is important
3 in many respects through this case, which is it is
4 nothing to the point in an object case if it turns out
5 that the object hasn't been achieved. It is completely
6 irrelevant.
7 THE CHAIRMAN: Just to be clear, so output is measured by
8 reference to the number of properties you put on
9 portals. What is the metric?
10 MR HARRIS: It is the amount of advertising of those
11 properties. So an estate agent is there, and this was
12 common ground between my witnesses and those of my
13 learned friends, principally to advertise the properties
14 of the vendors. So what does it put out? It puts out
15 advertising services; various different sites, local
16 newspapers, handouts, magazines, portals. We now know
17 of course that portals are by far the most important and
18 it's growing, and indeed the purpose of the rule was to
19 prevent more putting out, more output, and that type of
20 advertising.
21 MR FREEMAN: I am sure that's not quite right. Just
22 pursuing the advertising analogy, what the agent is
23 doing is providing copy, content and it is purchasing
24 advertising services from the portal.
25 MR HARRIS: To the vendor.

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1 MR FREEMAN: You will probably tell me they are doing both
2 but that's --
3 MR HARRIS: To the vendor. The estate agent is providing
4 the advertising of that vendor's house.
5 MR FREEMAN: All I am saying is that the portal is providing
6 the advertising service to the agent, who is providing
7 the content and the copy for that service to the
8 consumer, who in this case is the purchaser, house
9 hunter.
10 THE CHAIRMAN: And paying for it.
11 MR HARRIS: That's right, but of course this is a mutual
12 company.
13 MR FREEMAN: I am just trying to stick with the interplay
14 between the agent and the portal, which is where your
15 restriction of output argument comes in.
16 MR HARRIS: That's right, but the restricted advertising
17 here arises in the context of the agents collectively
18 coming together to provide a further venue for
19 advertising. But then the rule that lies at the heart
20 of that mutual company is what causes the restriction in
21 the portal's market.
22 MR FREEMAN: But on your analysis, they have agreed not to
23 purchase advertising services from the third portal.
24 MR HARRIS: That's true, and as a group of what ought to be
25 horizontal competing entities in respect of this very

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1 parameter of competition. So yes, sir, that's right.
2 MR FREEMAN: Thank you. Let's go on.
3 MR HARRIS: Thank you.
4 And of course -- well, I can just end on that point
5 for this first topic, which of course what it really
6 means is you can't divorce the operation of the portals
7 market from the operation of competition in the estate
8 agency market, because the portals are providing one key
9 parameter of competition in the market for competition
10 as between estate agents.
11 So the two, if you like, go hand in glove and even
12 more so in this case because this particular portal we
13 are talking about is created as a mutual or a collective
14 of some 6300-odd estate agents out of a market of about
15 18,000, so a significant proportion of it.
16 I am going to come back later, if I may, to a couple
17 of remarks about Gottrup Klim and exclusive purchasing
18 and exclusive supply. I could deal with that now if you
19 prefer.
20 THE CHAIRMAN: No, that's fine, we don't want to take you
21 out of your order. But when you say something like key
22 parameters of competition in the market, what they are
23 doing, the portals, is they are providing an important
24 service.
25 MR HARRIS: Yes.

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1 THE CHAIRMAN: Which estate agents use to further the
2 service that they provide to their clients. There is no
3 more mystery than that to parameters of competition.
4 MR HARRIS: No, no. Of course, where I get that phrase from
5 is this 27 March 2015 letter from the CMA. I can turn
6 up the reference if you like.
7 THE CHAIRMAN: No, we remember very well.
8 MR HARRIS: That's right. So none of that is particularly
9 controversial, but that only makes my case easier, in my
10 respectful submission. It is commonly acknowledged by
11 all the witnesses, by the CMA, by both experts that this
12 is an, I think they used the word "important parameter"
13 in the letter.
14 MR MACLEAN: Can be.
15 MR HARRIS: Can be an important parameter.
16 MR FREEMAN: I think on the first day, you and I had an
17 exchange where you agreed it just means the way in which
18 they compete.
19 MR HARRIS: Yes, absolutely, and I am very happy with that.
20 MR FREEMAN: Why use a short word when a long word will do.
21 MR HARRIS: That's right. But of course that neatly
22 encapsulates my case. It is a way in which they
23 compete, they have all chosen together collectively to
24 restrict that way in which they compete.
25 Can I just turn up the membership agreement, because

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1 a couple of times during this hearing -- it is in
2 bundle 4/2208 -- a number of times this has arisen and
3 it is relevant to some of the points that were raised
4 during the trial and in closings.
5 So this is Gascoigne Halman's at 2208 membership
6 agreement. I don't know if you would like to mark it up
7 in the manner that I have done, but I am starting in the
8 first paragraph and it sets out three things that this
9 agreement does. So it sets out:
10 "The terms upon which we agree, subject to the
11 satisfaction of certain conditions in this letter ..."
12 And then the first one is:
13 "... to become a member of Agents' Mutual Limited."
14 That is one thing this agreement does and then it
15 gives an address. The second one is after the next
16 comma:
17 "... to subscribe or (procure the subscription for
18 certain loan notes."
19 So that is aim and objective number 2. Then the
20 first one is after the "and":
21 "... to list certain of our properties on the
22 company's associated portal."
23 So just taking the first one, "Membership", you can
24 see that -- in this case Gascoigne Halman, but as we
25 know, these are materially identical for all of the

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1 members. They are agreeing to become a member, then
2 there is a heading on the next page, second hole punch:
3 "Membership of the company and subscription for loan
4 notes."
5 So this is a separate and freestanding aspect of the
6 agreement, and you can see one just needs to read for
7 oneself:
8 "We hereby apply for membership. We hereby give
9 notice of our application. We hereby agree [at the
10 bottom of 10] to comply and be bound by the articles and
11 the membership rules ..."
12 And then over the page at 13:
13 "In consideration of our entering into this, we
14 undertake to list all of our UK residential properties
15 on the portal in accordance with the exclusivity
16 requirement ..."
17 That is of course the OOP rule. That is how it is
18 described in this letter:
19 "... we become a member. We get to enter our name
20 into the register and we get the loan notes."
21 So this is important because I am going to obviously
22 look in a minute at the OOP rule at 6 and indeed the
23 restriction on promoting other portals, which is
24 a combination of basically 7. I am going to come back
25 to them.

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1 But what is important about this is that we know
2 that "member" is as defined in the membership rules,
3 which Gascoigne Halman and all other members have agreed
4 to comply with by virtue of entering into this written
5 contract. And "member", if you want to keep one finger
6 in the agreement and then turn to the membership rules,
7 you will find that the membership rules begin on
8 page 2102. It is worth keeping a finger in the
9 membership agreement. If you look over the page at 2103
10 at the top, you can see entry 2.1.3, that says agents:
11 "A member must be an estate or letting agent."
12 Then the definition of estate or letting agent is to
13 be found at 2.1.1.0, and that is the one that says
14 effectively you have to be a traditional agent.
15 So it is quite straightforward how this works. You
16 have agreed to become a member, and member is defined as
17 it happens in another document, but that definition
18 applies to the terms of this agreement, not least of all
19 because in section 10 of the agreement you have agreed
20 to be bound by the membership rules. And what's
21 important about this, members of the Tribunal, is that
22 the term of membership is simply not limited in time at
23 all by this membership agreement. So nowhere will you
24 find in this membership agreement a limitation in the
25 duration of membership. It is not structured that way

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1 at all.
2 In a minute, we shall see there is an express
3 limitation on the duration of the OOP rule by reference
4 to the listing period, but that simply doesn't apply to
5 the membership, therefore to the obligation to be
6 a traditional full service agent.
7 We respectfully contend, as you know, that is
8 completely fatal to Agents' Mutual on the bricks and
9 mortar traditional estate agent restriction because it
10 was Mr Springett's own evidence that he thought it would
11 go -- I will take you to this exact passage so there can
12 be no danger of mis-paraphrasing or anything -- that it
13 was put in place for a five-year period and that's what
14 he thought it was there for. But it is not limited, not
15 limited to that.
16 If you want the reference, I am happy to turn it up,
17 it is Day 6 of the transcript at page 211. But the key
18 passage, you don't need to turn it up, is Mr Springett
19 saying at line 15:
20 "It was five years afterwards and I think everyone's
21 mind who was involved was thinking, 'Well, that is
22 a realistic contractual framework to help this business
23 enter the market and prosper, ie five years'."
24 And I said to him -- and you may recall this was the
25 fourth time I put this specific point to him:

1 "What you thought, Mr Springett, was that you were
2 only going to have a bricks and mortar restriction in
3 place for five years post-launch for anybody. That is
4 right, isn't it?"
5 And Mr Springett's answer at line 24:
6 "I think that's akin to what I've just said."
7 In other words, the bricks and mortar restriction is
8 built into the contract by reference to the term member.
9 It is not limited in time at all, and yet even
10 Agents' Mutual thought it would only be required for
11 five years. It therefore goes on any view of the world
12 further than is necessary and that is fatal to it.
13 MR FREEMAN: Mr Harris, how do you cease to be a member?
14 MR HARRIS: That is set out in the membership rules on
15 page 2103 at paragraph 2.4.
16 MR FREEMAN: What does 2.4.1 mean?
17 MR HARRIS: It means what it says. And incidentally,
18 although not relevant terribly to this part of the case,
19 in the other part of the case that's currently stayed
20 and may or may not ever be reached, we have pleaded that
21 Gascoigne Halman's membership has terminated as a result
22 of 2.4.1 and it has been denied.
23 MR FREEMAN: Right. You said there was no time limit on
24 membership.
25 MR HARRIS: No time limit on membership within the four

1 corners of this document, and certainly not by reference
2 to any listing period.
3 MR FREEMAN: But it is possible to cease to be a member?
4 MR HARRIS: Yes, in those manners, correct. But it is
5 interesting you should pick 2.4.1, because we have
6 pleaded there was a letter in which we confirmed to the
7 company that we no longer wished to use the services of
8 the company in accordance with the agency listing
9 conditions and it has been denied, and indeed it's even
10 been denied there are any agent listing conditions.
11 MR FREEMAN: Articles 3.5 and 3.6 of the articles, what are
12 they?
13 MR HARRIS: Of the membership rules?
14 MR FREEMAN: Paragraphs 3.5 and 3.6 of the articles?
15 MR HARRIS: Sir, they're a different document.
16 MR FREEMAN: That is another way of ceasing to be a member,
17 is it?
18 MR HARRIS: Yes, although 3.5 is not ceasing, it is not
19 becoming.
20 MR FREEMAN: Right. That is a bit odd, isn't it? It says:
21 "A membership shall cease in accordance with article
22 3.5."
23 MR HARRIS: Are you reading from the articles on page 2085?
24 MR FREEMAN: I am just asking what paragraph 2.4.4 of the
25 membership rules mean. Is it a way in which a member

1 can cease to be a member? Perhaps you are not the right
2 person to ask. I am not asking you to interpret
3 Agents' Mutual's rules, but --
4 MR HARRIS: With respect, sir, I don't see how 3.5 can be
5 a cessation of an existing membership when it is talking
6 about not accepting you as a member in the first place.
7 But in any event, yes, there are other methods in 3.6
8 but they have no relevance to this case.
9 MR FREEMAN: I thought there was an implication in your
10 earlier point that membership was perpetual?
11 MR HARRIS: It is. The relevant point, sir, perhaps if
12 I can phrase it this way, is that it is not limited by
13 reference to the duration of five years, which is how it
14 was understood and indeed put forward by Mr Springett.
15 That's the key point.
16 So I don't say there is no way for the agreement to
17 terminate, there are other various ways. They don't
18 arise here and the critical thing is that they don't
19 bear upon the listing period. Another way of putting it
20 is that membership is indefinite subject to those other
21 ways out that don't arise here.
22 And of course, the way to have regard to this is to
23 contrast, if we go back in our membership agreement --
24 THE CHAIRMAN: Can we pause there for one moment. The route
25 by which we get to your unlimited in time extent is that

1 membership doesn't have a natural expiry and a member
2 must be an estate or a letting agent under 2.1.3.
3 MR HARRIS: That is right, yes.
4 THE CHAIRMAN: And estate or a letting agent is then
5 a defined term in schedule 1.
6 MR HARRIS: Correct.
7 THE CHAIRMAN: And then in schedule 2, we have "Reserved
8 matters" which define the extent to which the provisions
9 of the membership rules can be altered.
10 MR HARRIS: That is right. And there are various mechanics
11 there --
12 THE CHAIRMAN: Various gradations of stringency according to
13 which one can alter things.
14 MR HARRIS: Yes.
15 THE CHAIRMAN: I wonder if you could help us on this: were
16 Agents' Mutual minded to re-define or define more
17 broadly the meaning of estate or letting agent, what
18 would they have to satisfy in terms of the hoops in
19 schedule 2 in order to achieve that change?
20 MR HARRIS: I am going to answer that, if I may, in two
21 parts.
22 The first part is that if we are in the territory of
23 them having to change the agreement by whatever the
24 mechanics are, then in my respectful submission, I have
25 won, because I am attacking the agreement as it is.

1 I am not attacking the agreement that might be varied or
2 altered or changed in some way in due course. And that
3 of course is a complete answer.
4 The other answer is one would have to follow the
5 mechanics as set out in schedule 2, and they just read
6 as they do. But what's important is that the other
7 contracting party is involved in any alteration or
8 variation to its own agreement. And more widely, if
9 there are to be changes if you like on a more pro forma
10 basis, such as in part 2, paragraph 1, then there has to
11 be a broad groundswell of support, including in that
12 case 75 per cent of the members at a general meeting.
13 So there are a number of answers to the question.
14 First of all, if it's to be changed, well, that's all
15 well and good. If it hasn't changed, then I am not
16 attacking a changed agreement, and it means that I have
17 succeeded in my submission as regards the agreement as
18 it is.
19 The second point is, and this is important to my
20 learned friend's supposed waiver argument that he raises
21 in paragraph 90 of his closings, is that my client is
22 a contractual counterparty to the agreement as it is and
23 the agreement as it is can't be unilaterally waived on
24 the part of Agents' Mutual. That is a matter of
25 elementary law. I am going to come back to that in

1 a minute, because that has all manner of totally fatal
2 difficulties for my learned friend.
3 The third point is that even if there were to be
4 a new and different agreement, again it is by no means
5 a unilateral change on the part of Agents' Mutual and
6 its board, let alone Mr Springett. It has to go through
7 this rather demanding set of hurdles about things like
8 75 per cent of the meeting in a general vote of the
9 meeting, or part 4, certain things can be dealt with by
10 the board requiring 75 per cent approval.
11 THE CHAIRMAN: Is it your position that if one is amending
12 the membership rules, the amendment will inevitably fall
13 under one of parts 1, 2, 3 or 4 of schedule 2?
14 MR HARRIS: If you were to amend the rules, yes. But of
15 course, none of this can deal with the point that in
16 order to succeed, my learned friend has to change my
17 contract to which I'm a party and we don't consent. We
18 haven't been asked and we don't consent. You can't
19 unilaterally waive an obligation in yours to my benefit
20 as well as to that of Agents' Mutual's. That is just
21 trite law.
22 And this One Other Portal rule was sold to me and my
23 client as a benefit and accepted as such, and so it
24 moves in both directions.
25 THE CHAIRMAN: Sorry, Mr Harris. I am dealing with an

1 incredibly narrow point, and it may be that the OOP rule
2 is different.
3 I am simply postulating to you a situation where
4 there is an attempt to stretch the definition of estate
5 or letting agent in 2.1.3 to, let us say, hypothetically
6 include online estate agents.
7 MR HARRIS: Yes.
8 THE CHAIRMAN: So entirely hypothetically, I just want to
9 understand how it works. We have a proposal that the
10 definition of estate agent in schedule 1 is expanded to,
11 let us say, delete a full range of agency services or
12 something to make it clear that it is extending to
13 non-bricks and mortar estate agents.
14 What I am trying to get a sense of is how that
15 change would be effected, and we see in clause 7 that we
16 have a provision regarding amendments to membership
17 rules, which refers to schedule 2, and schedule 2 sets
18 out reserved matters.
19 Now reading the various parts very quickly, it is
20 not altogether clear to me under which part, if any, the
21 amendment that I am hypothesising would fall. And the
22 question -- and do feel free to come back to it later or
23 indeed in writing, because I don't want to take up too
24 much of your time on what may well be a minor point --
25 what I am wondering is whether the change I am

1 postulating has to fall within parts 1 to 4 of
2 schedule 2, or whether there is a limited discretion for
3 those parts or those points that fall outside the
4 matters enumerated in parts 1 to 4 whereby change can be
5 made.
6 MR HARRIS: I am happy to take it under further advisement
7 and if needs be respond further. Of course these are
8 not my rules, which I think is Mr Freeman's point. But
9 our understanding is that they likely fall within part
10 2, subparagraph 1 that it would have to be an amendment
11 to the membership rules, and then go through the process
12 that's there and set out, which of course is requiring
13 consent of more than 75 per cent of the members.
14 THE CHAIRMAN: Presumably you would accept that if that
15 process were gone through, assuming it is the one that
16 applies, that would affect your client as much as anyone
17 else.
18 MR HARRIS: Yes, but the key point there is -- well, there
19 are a number of key points. It hasn't happened, so I am
20 not attacking something that hasn't happened.
21 THE CHAIRMAN: No, I am just trying to understand how it
22 works in theory.
23 MR HARRIS: That's right, but that is absolutely fundamental
24 to this particular case. Then secondly, it says itself
25 that would be an amendment; by definition, that is a new

1 contractual provision. So again that reinforces my
2 point that I am not attacking that, I am attacking
3 what's there at the moment.
4 THE CHAIRMAN: No, I see that. But if this process were
5 gone through, you accept, I think, but tell me if I'm
6 wrong, that the contract between your client and
7 Agents' Mutual would change to the extent that I'm
8 hypothesising.
9 MR HARRIS: I certainly don't accept that on my feet,
10 because there are interesting questions about -- again,
11 that is a two way obligation, bricks and mortar. You
12 will recall, and I think it is now completely
13 inescapable, that this entire venture was always sold to
14 member agents as including the ability on behalf of the
15 collective member agents to exclude head to head
16 competition from the likes of Easyproperty and eMoov and
17 Purplebricks, and that was seen to be very much
18 a benefit. So this is not just a benefit, if you like
19 for the company, it is a benefit for all of its members
20 including me, my client.
21 So I certainly don't concede now that even if there
22 were to be an amendment, it could be of retrospective
23 effect or it could necessarily bind me in circumstances
24 where I have an existing contract with a benefit going
25 in my direction as well as in the other direction. So

1 no, I certainly wouldn't accept that on my feet.
2 THE CHAIRMAN: No, I quite understand why you take that
3 position.
4 MR HARRIS: Yes.
5 THE CHAIRMAN: I think it would assist us if we had
6 a statement from your team, Mr Harris, as to how the
7 contract and the membership rules interact. Because
8 I confess, I can see some force in the point that you or
9 your client have signed up to a certain movable feast
10 whereby the parameters of what you get change, but
11 change in accordance with the provisions we see here set
12 out in schedule 2.
13 MR HARRIS: Well, the reason, sir, that that is simply not
14 right is because as Mr Springett quite rightly accepted
15 in cross-examination, there is no provision either as
16 regards OOP or as regards restriction on promoting other
17 portals that says or comes close to saying: this only
18 stays in place until and then anything. It might be
19 until we reach the CMA's market definition standard of
20 market power. It doesn't say that. Until we reach some
21 other key performance indicator --
22 THE CHAIRMAN: I appreciate it doesn't say that, but you
23 will also appreciate that we are going to attach
24 appropriate weight, which is actually not very much, to
25 what Mr Springett says regarding the operation of the

1 contract. That is fundamentally a legal question for
2 us.
3 MR HARRIS: The reason I put it like that is because
4 Mr Springett was only recognising the obvious point,
5 that my client hasn't agreed to any of that. Hasn't
6 agreed to changing the key nature of certain things that
7 were sold to it as benefits to it in entering into this
8 particular document.
9 THE CHAIRMAN: No, I see that. But you have been making the
10 point with some force that as regards the bricks and
11 mortar rule, its origin is in the membership rules.
12 What I am pointing out to you is that the membership
13 rules are not immutable. They contain a provision for
14 their variation.
15 MR HARRIS: Yes.
16 THE CHAIRMAN: What I am asking you to respond to but not
17 now, particularly given your indications a moment ago,
18 is that if one went through the process for part 2 of 75
19 per cent board and 75 per cent members approving the
20 change could you delete the bricks and mortar
21 restriction? And if that happened, would that bind your
22 client?
23 MR HARRIS: Sir, we will come back to you on that specific
24 point. But even if -- which I don't accept certainly
25 for the moment -- that were right, it doesn't and can't

1 apply to the OOP rule to be found in clause 6 or the
2 restriction on promoting other portals to be found in
3 clause 7, because that is not a term defined in the
4 membership rules and subject to the change in the
5 membership rules in a manner that you are putting to me
6 now.
7 So it doesn't work for clause 7, full stop, which
8 incidentally Mr Springett also said he thought would
9 apply for five years. That was in his written evidence
10 as well as in cross-examination, and that one you can
11 see. Number 7 says:
12 "We agree that from the listing date we will
13 promote~..."
14 And there is no time limitation to that. And if you
15 look where listing date and listing period come into
16 play, they are to be found in clauses number 1 and
17 number 4. So in sharp contrast to the OOP rule where
18 under the heading "Portal listing" you agree to list for
19 the listing period, and the listing period begins on the
20 listing date as defined in clause 4, and then in -- the
21 five years is obviously to be found in clause 1.
22 So whereas clause 6 in the first part obliges the
23 company and indeed gives the benefit to my client of
24 a listing just during a listing period which is
25 five years from the listing date -- and that's all very

1 clearly set out -- in sharp contrast to that, there is
2 no limitation in time to the restriction on promoting
3 other portals to be found at clause 7. And as we have
4 just explored, in my submission no listing limitation,
5 and certainly not to five years for the bricks and
6 mortar.
7 THE CHAIRMAN: Right. So just to summarise your position:
8 you draw a clear distinction between the rights and
9 obligations that are set out in the letter as opposed to
10 those set out in the membership rules. But even as
11 regards the membership rules, your position now, and you
12 will come back later, is that your client's rights and
13 obligations can't actually be affected by the schedule 2
14 variation process.
15 MR HARRIS: That's right, and without any doubt as regards
16 the OOP rule and/or restricting other portal, and I'll
17 come back to you on the definition of member.
18 THE CHAIRMAN: Okay. I think when you do, I am looking at
19 paragraph 10, which of course does import the articles
20 of association and membership rules into the letter,
21 page 2209.
22 MR HARRIS: Yes.
23 THE CHAIRMAN: But again, your position would be that that
24 can't affect the rights and obligations stated in the
25 anterior provisions of the letter in paragraph 6 and 7.

1 MR HARRIS: Well, that's my position right now as regards
2 all three, and I will -- yes.
3 THE CHAIRMAN: Sure, okay.
4 MR HARRIS: It is important to note how this is put by my
5 learned friend -- none of this is put by my learned
6 friend. What my learned friend says is, "Oh, it can be
7 waived". But with great respect, this is a complete
8 nonstarter, the supposed waiver, because of course you
9 can't waive, as I said a moment ago, an obligation that
10 runs in both directions. And all of these obligations
11 run in both directions and my client doesn't waive them.
12 You can't unilaterally waive something which goes in
13 both directions.
14 Another interesting way of looking at this is we
15 know perfectly well that Agents' Mutual knows it has to
16 be a formal variation or amendment when you are seeking
17 to tinker with the restrictions that are found in the
18 membership and listing agreements. And that's because
19 the proof there is in the pudding. In Northern Ireland
20 at tab X28, we know that when they wanted to reduce the
21 restriction of the OOP rule as applies in Northern
22 Ireland, they created and they had to create a formal
23 contractual variation. We have the copy in tab X28.
24 And that again proves my point, this is not a unilateral
25 waiver of forbearance or anything like that. It

1 certainly can't come one way only from Agents' Mutual.
2 To the contrary, there has to be a new agreement,
3 a variation. Again, that means I win because I am not
4 attacking the new or different agreement, I am attacking
5 this agreement.
6 MR FREEMAN: Can I go back to the idea of harm to your
7 client which is what you were talking about earlier,
8 just so I understand what you are saying?
9 Your client signed this agreement and became
10 a member of Agents' Mutual and is committed to listing
11 its properties for five years from a particular date.
12 So that is an obligation that is limited in time. It
13 subscribed to the other rules, including the OOP rule
14 and the promotion rule, and so on, and you are saying
15 those are not limited in time. Is that right?
16 MR HARRIS: That is right.
17 MR FREEMAN: And by being a member, it adopted the
18 restrictive definition of membership, which is also not
19 limited in time. Is that what you are saying?
20 MR HARRIS: Yes, sir, so far.
21 MR FREEMAN: After five years when the listing obligation
22 expires, what is your client's contractual position in
23 your submission?
24 MR HARRIS: As regards membership, they continue to be a
25 member until --

1 MR FREEMAN: Can they cease to be a member?
2 MR HARRIS: They could if they fall within one of those
3 cessation of membership provisions. But that again is
4 not a unilateral termination --
5 MR FREEMAN: You are saying the contract continues and they
6 can't get out of it?
7 MR HARRIS: Yes, yes. There are three things going on in
8 the contract as we saw in the first paragraph. There
9 are the loan notes about which there has not been
10 a great deal of focus, but they carry on life. We loan
11 money. One day we want it back and in the meantime we
12 want our interest on it. It is totally separate and
13 freestanding. It doesn't come to an end just because
14 the listing period for listing of properties has come to
15 an end.
16 Likewise, our membership doesn't come to an end
17 within the four corners of the agreement just by the
18 effluxion of time. Something else has to happen.
19 MR FREEMAN: So Agents' Mutual can never lose members on
20 this --
21 MR HARRIS: Not simply by the effluxion of time, correct.
22 You have to understand, sir, with respect, that's what's
23 going on here, the five years -- what they thought was
24 it wouldn't even be the end of the listing period for
25 properties. What it says in the agreement is it's the

1 end of the set of tariffs set out in the box at the end
2 of the contract with certain numbers in it for that
3 five-year period. It's not contemplated that this is
4 just a five-year agreement. It is just that the
5 five-year listing by reference to that set of tariffs --
6 which we could turn up if you like, there are a few
7 pages further on, which is, whatever, £300 for this type
8 of office --
9 MR FREEMAN: So the agreement goes on but the terms change.
10 MR HARRIS: As regards the listing obligation and
11 the prices, yes, that's right.
12 MR FREEMAN: What you are saying is that your client could
13 only escape the contractual obligations in the agreement
14 by consent. Is that right?
15 MR HARRIS: No. What I am saying is that the agreement can
16 terminate in the manner set out for example in
17 membership rule 2.2, but that is said not to have
18 happened here.
19 MR FREEMAN: I don't want to raise other disputes. I just
20 want to know whether you are saying this agreement goes
21 on and binds your client --
22 MR HARRIS: Yes, as a plain member and as loans -- that's
23 exactly. And that is very much how it has been set out.
24 MR FREEMAN: You are also saying that your client signed
25 this agreement and it signed it voluntarily, but that

1 doesn't matter because 99.9 per cent of agreements are
2 voluntarily entered into.
3 MR HARRIS: It doesn't matter for that reason, absolutely.
4 It makes absolutely no difference to any effects case
5 whether the people who have entered into an agreement
6 that causes anti-competitive effects have done so
7 voluntarily.
8 MR FREEMAN: But you are saying that your client did enter
9 this agreement and that it is an a restrictive
10 agreement.
11 MR HARRIS: Absolutely, yes. I'm attacking it for that
12 reason. I am saying it is void for that reason.
13 MR FREEMAN: Thank you.
14 MR LANDERS: Sorry, can I just ask something? What happens
15 at the end of the five-year contract? Can't they just
16 say, "Well we are not going to sign another one"?
17 MR HARRIS: No, no, that's as regards listing, absolutely.
18 As regards listing and absent a new agreement on some
19 new terms including new tariffs, then there is no
20 obligation on my client to list and there is no benefit
21 to Agents' Mutual of my listing. But that doesn't --
22 MR LANDERS: But they would then be able to list on both
23 Zoopla and Rightmove if they didn't sign another
24 contract.
25 MR HARRIS: That's very unlikely because if you look at the

1 termination provisions, failure to adhere to the agent
2 listing conditions, which we have contended one of which
3 is the OOP rule, means that you are in breach in
4 a manner that can lead to a termination under agent
5 membership rule 2.
6 MR LANDERS: Just in terms of the five-year contract itself,
7 at the end of that five-year contract, can't an estate
8 agent just say, "I don't want to sign another contract,
9 I'm going to go away" --
10 MR HARRIS: Yes, they can do that. But that doesn't mean
11 that the contract has come to an end as a member, nor
12 the obligations as regards, for example, loan notes. It
13 could have been set up that way, no problem at all.
14 Indeed, Mr Springett seems to have thought that might
15 have been what was going on, but that is not what the
16 document says.
17 As I say, the reason -- you can see the reason why,
18 because what was plainly going through the mind of those
19 who were contracting was that for five years, there
20 would be tariffs set out in the tariff table of
21 a certain amount. But after five years of listing at
22 those tariff amounts, life may well have moved on, so
23 there would be a need to agree some new tariff amounts.
24 Fair enough.
25 Mr Landers, in response to your point, if at that

1 point there could not have been agreement on new tariff
2 points, then there is no agreement further to list. But
3 it doesn't mean that you have stopped being a member or
4 that your loan note obligations and rights have stopped.
5 It could have been like that, but it isn't.
6 Then just to finish off on the waiver, so the first
7 point, as you know I have now made twice, is that it is
8 trite law that you can't unilaterally waive an
9 obligation in both directions, and that is all of these
10 obligations in your own both directions. So that is the
11 end of it.
12 But in any event, it is incoherent for this reason:
13 you can't waive a void obligation. That is the end of
14 it. You simply can't do it. If it is void, there is
15 nothing there to waive in any event.
16 A third fatal flaw is that a unilateral waiver, that
17 being put forward by my learned friends team, doesn't
18 dispose of the term, it doesn't get rid of the term in
19 any event. It just means I am not going to apply it to
20 you and/or on this occasion. But the term is still
21 there and I am attacking the term. So that's another
22 fatal flaw.
23 Then last of all, as if I needed any more, it's with
24 respect, an absurdity in any event. Because it would
25 mean if it were right, which of course it isn't for

1 these reasons, then in any anti-competitive agreement,
2 the offender would just say, "Ah, well, of course, now
3 that it's been found out that my term is
4 anti-competitive either by object and/or effect, I will
5 just unilaterally waive it, end of story, and then no
6 agreement would ever be illegal".
7 THE CHAIRMAN: Is there a difference between a restriction
8 by object and a restriction by effect? One can see, for
9 instance, that when one has an object restriction,
10 looking at the time the contract is agreed, you see that
11 the nature of the restriction is so pernicious that it
12 just has to be anti-competitive, end of story --
13 MR HARRIS: Yes.
14 THE CHAIRMAN: -- it is void by object, and that is a test
15 that is very easy to apply at the time of the conclusion
16 of the contract. Of course, when one is talking about
17 effects, when the contract is concluded, there will only
18 be anticipatory effects, future effects.
19 Perhaps you could assist us on how the voidness of
20 a contract interacts with this effects doctrine and the
21 effects are only felt almost by definition later on down
22 the line.
23 MR HARRIS: Yes, there is a difference, and it is the one
24 you identify. But where it doesn't help my learned
25 friend's team is because he doesn't have a carve-out in

1 his agreement. He doesn't have a carve-out that says:
2 I agree with you, Gascoigne Halman, that we will do the
3 following; a listing with the OOP rule up until such
4 time as it becomes of anti-competitive effect, which can
5 be measured in whatever manner they thought was
6 defensible: market power definition under the CMA
7 guidelines, a certain number of agents, a certain
8 revenue turnover or anything like that.
9 And if they had had that, that might have been a way
10 out for them on the effects part -- not on the object
11 part for the reason you gave, but on the effects part.
12 They could have done this, but they didn't. That is
13 a matter for them. I don't know whether they got the
14 advice or they didn't take it or whatever, but they
15 didn't do it. And now it's too late.
16 What one sees in quite a lot of contracts these days
17 is that people anticipate, and in particular on
18 duration. But again, they've chosen not to do this. In
19 particular on duration, what you do is say: A and B, we
20 agree that the duration of what somebody might in due
21 course attack as anti-competitive is say five years.
22 But we now hereby agree that if it is determined in due
23 course in this venue or that venue that five years is
24 anti-competitive and of excessive duration, we hereby
25 agree to replace it with four years. And if that's

1 found to be anti-competitive by whomsoever, we hereby
2 agree that it is to be a fallback of three years,
3 et cetera.
4 In other words, there are pre-agreements. That is
5 increasingly common, but this party has chosen not to do
6 it and they don't have that get out now. What is more
7 difficult -- just to finish it off -- is if you just
8 say, as used to be some years ago: if five years is too
9 long, or ten years or whatever, this restriction is too
10 long, we agree to replace it with whatever's legal. But
11 that doesn't work for a different reason, which is
12 thatit is void for uncertainty and you haven't had an
13 ad idem meeting on whatever it might turn out to be
14 legal.
15 So this is why this falls flat on its face. And as
16 I say, Mr Landers, a bit like your point, you could have
17 agreed just five years across the board. But they
18 didn't. They could have agreed these carve outs but
19 they didn't. They could have agreed these fall backs
20 but they didn't; now they have to live with the
21 consequences. And it is simply no answer for
22 Mr Springett or Agents' Mutual to say: oh, well, we
23 think we might relax it later on because that falls foul
24 of all of the unilateral side of things, and the proof
25 of the pudding being the Northern Ireland variation.

1 THE CHAIRMAN: If I can just formulate the test on effects.
2 Let's park object. Let's assume there is no object
3 infringement and we are only looking at effects.
4 If you have an agreement which is irreducible, it is
5 a five-year agreement and that can't be changed. If
6 during the course of that five-year period you get to
7 a stage where it can be said that the effects are
8 anti-competitive -- be that year 2 or year 3 or
9 whatever -- because the five-year term is incapable of
10 variation, one can say even before the end of the
11 agreement, it is void by virtue of anti-competitive
12 effect, because you know on the evidence that at some
13 point the effects hit an anti-competitive mark which
14 can't be assuaged or ameliorated by the agreement being
15 changed.
16 MR HARRIS: I wouldn't put it quite like that, sir. I would
17 put it that -- or perhaps more accurately that is not
18 this case. So I would be unwilling to address that
19 particular point. The reason that's not this case is
20 because on our evidence to be assessed by the Tribunal,
21 there already is anti-competitive effect. So I don't
22 have to worry about whether it won't actually emerge as
23 anti-competitive effect until next year or the year
24 after or some later point within the five years. And
25 secondly and critically, what we know from the evidence

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1 that was adduced and the inescapable documents is that
2 this company set out to achieve that effect well within
3 the five years. It says, and this is what we
4 deliberately cite in our written closing, the aim is to
5 get there within two to three years, the aim is get
6 there as quickly as possible. And when you analyse any
7 of the business cases put forward, which I didn't have
8 time to go through a great detail in cross-examination,
9 but you will recall that even on the entry with 1,000
10 branches followed by 500 a year, that led to break even
11 after just a little over a year of trading, and
12 cumulative break even after just a little over two years
13 of trading. Then when you go through all the flexed
14 variants in the different parts of the documents, they
15 all show exactly the same thing. They all show an
16 ability to have achieved way more than sustainable
17 market entry well before five years.
18 MR FREEMAN: Isn't that mixing up subjective intention with
19 assessment of effects?
20 MR HARRIS: Well, the effects case -- I take that point,
21 sir, in this sense. The effects case as fact is set out
22 principally by us in the expert evidence. So that is
23 fact, not subjective intent. But what one has --
24 MR FREEMAN: It is expert opinion in effect.
25 MR HARRIS: I'll rephrase it. That is expert opinion

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1 combined with facts, I take that point. That is why of
2 course our case on effects is put forward in that way,
3 because it is effectively a matter of what are the facts
4 expertly analysed? So I take that point.
5 But what I am saying is you have to have regard to
6 what's going on in this context by reference to what the
7 company both subjectively and objectively sought to set
8 out to achieve and we know what that is because that's
9 inescapable on the documents. It was to put it another
10 way, take for instance the Leighton Buzzard slides, 28
11 September, to Mr Livesey.
12 Those slides show not just the denigration of Zoopla
13 by name, but also tipping point one well within the
14 five-year period as against who? As against Zoopla, and
15 a significant growth so as to achieve an effect against
16 Rightmove as well, and that is all within -- do you
17 remember the little circle, five-year strategy -- it's
18 all well within the five years.
19 MR LANDERS: Your expert argued that one other portal clause
20 had an effect now. But are you saying there is an
21 effect now, an immediate effect, of the restriction on
22 Purplebricks and so on using OnTheMarket?
23 MR HARRIS: Definitely, yes. What we don't adduce is
24 evidence of effect by way of data and quantification or
25 through the experts, but that's because one doesn't need

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1 to adduce such evidence of effects where there's an
2 object restriction. We say it is completely unarguable.
3 We know why bricks and mortar was introduced, because
4 they regarded that as a competitive threat. And who's
5 doing this? This is a grouping of 6,300 agents out of
6 18,000 agents and what are they doing? They are
7 collectively getting together both jointly to sell to
8 somebody and jointly to buy from somebody. That is over
9 a third of the agents in the market. And what are they
10 doing in this joint purchasing and selling arrangement?
11 They are excluding a competitor. So that's an object
12 restriction.
13 MR LANDERS: Yes, I understand the object restriction
14 argument. But are you saying that the effect on the
15 online agents has already been felt of that restriction?
16 MR HARRIS: I don't do that, Mr Landers, by reference to a
17 factual or expert-driven analysis of data. So no, not
18 as a matter of fact or data. But that's because, it
19 being an object restriction, I don't have to do that.
20 That's why. I mean, it speaks for itself. These things
21 are --
22 MR FREEMAN: I don't want to spar with you, but I mean the
23 same argument applies to the OOP rule. You say that is
24 a restriction by argument but you have gone into effects
25 on that.

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1 MR HARRIS: That is our choice, sir.
2 MR FREEMAN: Yes. It's your choice on Purple Bricks as
3 well, isn't it?
4 MR HARRIS: Yes, it is our choice.
5 MR FREEMAN: You have taken the choice and that's what you
6 are putting to us.
7 MR HARRIS: Absolutely, yes. We say we are not obliged to
8 put forward an effects case on anything which is also an
9 object restrictions. All the restrictions we identify
10 are object restriction. We are entitled to put forward
11 if and where we wish a case on effects by reference to
12 data and facts. And because the case in our respectful
13 submission is so clear on the effect in the portals
14 market, that is where we chose to adduce our evidence,
15 expert and data-driven and fact-led evidence on effects.
16 One of the reasons this was done, although there are
17 plainly reasons I can't talk about for taking certain
18 choices and not others, is because it was important in
19 our respectful submission for this Tribunal to
20 appreciate -- this is how we contend it should be
21 seen -- that both the aim and the effect of this
22 particular restriction was to damage a particular person
23 in the market for far longer. Even if you were to
24 accept there was a necessity for this, which as you know
25 we don't, but even if you were accept it was to damage

1 a named person in the market for far, far longer on any
2 view of the world than was needed in order to achieve
3 sustainable entry, that is just is completely
4 inescapable in our submission on the evidence. Every
5 document says that.
6 So that's the answer. We wouldn't have had to do it
7 on any of them. We have chosen to do it on that one
8 because we thought it was important for the Tribunal to
9 appreciate quite how and why this was targeted at Zoopla
10 and what effect it has had on Zoopla. So that ties in
11 all of those documents we have cited in the submissions
12 about, for example, the point -- I am paraphrasing, but
13 you know the document -- of the OOP rule is for members
14 to obtain the stronger of the two duopoly portals.
15 Do you remember that document? That was the whole
16 point. And lo and behold, it has had that effect. And
17 having established those objects and that particular
18 effect, we say game over. We don't need to go any
19 further.
20 So if I may move on then. I would like to address
21 what we contend are some fundamental difficulties or
22 indeed absurdities at the heart of my learned friend's
23 case. So what they say is that the merged Zoopla TDPG
24 exerted no competitive constraint on Rightmove
25 whatsoever. In other words -- as you know, this was

1 their case when they came into court -- pre-OTM's entry,
2 Zoopla in its merged state and Rightmove were just not
3 competing. So they say no problem if there is
4 a restrictive rule because they are not competing
5 anyway. But of course that is downright bizarre,
6 because one only has to ask oneself the question: who
7 are the customers of the Zoopla merged group and the
8 Rightmove group? They are the same people. They are
9 estate agents.
10 So Zoopla has to get who? Well, those estate agents
11 over there. And who does Rightmove have to get? It has
12 to get those estate agents over there. That is
13 obviously a situation in which there is going to be on
14 the face of it a dynamic for competing for those people.
15 And it is made worse, in fact, for my learned friend's
16 team because they are the ones who have been at pains to
17 point out that there is, viewed at any particular moment
18 in time, a finite marketing budget.
19 Of course, over the course of time it is growing,
20 and it is growing relative to other types of media. But
21 what the merged Zoopla and Rightmove are doing? They
22 are competing for the same people and at any given point
23 in time a fixed or finite budget for that particular
24 group of people.
25 On the face of it, that would be a situation in

1 which fairly obviously there is competition between
2 Zoopla on the one hand and Rightmove on the other.
3 THE CHAIRMAN: It is quite an odd form of competition, isn't
4 it, Mr Harris, in the sense that the competition
5 operates at the level of wanting to get the estate agent
6 simply to sign up with Rightmove, or as the case may be
7 Zoopla, but they don't have to choose. They can sign up
8 with both. So the competition is very much: we want you
9 to sign up with us. It would be nice if you left our
10 rival, but you don't have to.
11 MR HARRIS: No, you do have to leave one of the rivals.
12 THE CHAIRMAN: Only under the OOP rule.
13 MR HARRIS: Yes, but I thought you were putting to me
14 a situation --
15 THE CHAIRMAN: No. You said that there is competition
16 self-evidently between Zoopla and Rightmove.
17 MR HARRIS: Yes.
18 THE CHAIRMAN: Because they have to get agents and my point
19 is simply --
20 MR HARRIS: Sorry, I thought you were putting to me
21 a member.
22 THE CHAIRMAN: -- it's a slightly odd competition in that,
23 for instance, if I am competing with plumbers to get my
24 washing machine repaired, at the end of the day I have
25 to pick one plumber.

1 MR HARRIS: Yes.
2 THE CHAIRMAN: But subject to the budgetary constraints you
3 mentioned a moment ago, the estate agents actually are
4 not compelled to choose absent a rule such as the OOP
5 rule.
6 MR HARRIS: Well, that's interesting, sir, because of course
7 when they walked into court, that was the case being
8 presented. There is no competition whatsoever pre-OTM's
9 entry as between Zoopla on the one hand and Rightmove on
10 the other.
11 But of course Mr Bishop fairly quickly during the
12 hot tub session said: actually, no, there is competition
13 as regards at least the unique audience. So that case
14 has changed, it's now gone. And we agree, we say there
15 is more competition than that but it is now accepted by
16 the other side that there is at least competition
17 including in the pre-OTM entry chronology for the unique
18 audience. And that's not a surprise.
19 THE CHAIRMAN: I think, Mr Harris, you need to tread quite
20 carefully in terms of labelling what's been accepted or
21 not accepted. We will read what Mr Bishop and Mr Parker
22 said during the hot tub with great care, but we'll do so
23 in the context, in particular Mr Bishop's case of the
24 reports he submitted. Because of course the hot tub
25 was, as it were, an overlay on his two written reports,

1 which -- and I quite understand why you might want to
2 take that course -- you didn't cross-examine him on.
3 MR HARRIS: Yes. Sir, we have gone to the trouble of
4 setting out in the written closings, and I accept
5 obviously -- I wouldn't want you to do anything else
6 than take that and read it in the context of all the
7 other evidence. But we say it is very clear, at least
8 as regards unique audience -- and I don't have to use
9 the word "accept". That is what he said.
10 THE CHAIRMAN: No. It is a question of what the expert is
11 saying, that's right.
12 MR HARRIS: Yes. Then what we say is there is another way
13 in which this can be tested, if you like, another
14 bizarre feature, this way of putting this case -- or at
15 least the case before that evidence was given by
16 Mr Bishop -- which is that if it were right that the OOP
17 rule is that which suddenly transforms a market in which
18 there is no competition into a market in which there is
19 now said to be the competition, well, if that were
20 right -- obviously we don't accept any of that -- but if
21 it were right, then obviously the OOP rule should remain
22 in place for ever more.
23 It is the OOP rule which on this hypothesis, which
24 is wrong, but nevertheless on this hypothesis is
25 creating the competition in a market where there was no

1 competition before. Obviously, therefore, the OOP rule
2 on this view of the world is the pro-competitive
3 fantastic new whizz bang feature. Well, keep it in
4 place, it should stay there the whole time.
5 But of course it doesn't. Even on Agents' Mutual's
6 own case, it doesn't stay there for all time. It is the
7 very feature which Mr Bishop said introduces
8 competition, and yet it doesn't last for all time. Even
9 on their case, it lasts for a maximum of five years,
10 subject to the fact that actually the five years is not
11 a hard and fast five years, as you know from the written
12 closings. It goes on and on and on and carries on going
13 on.
14 But leaving that to one side, it would mean that it
15 should stay in place for all time and it doesn't. And
16 that again exposes another absurdity at the heart of the
17 case, which is -- this is the tension between on the one
18 hand Mr Bishop and on the other hand Mr Springett:
19 Mr Bishop saying, well, this is the pro-competitive
20 feature, it introduces all of this wonderful new
21 competition. But why on earth, I ask rhetorically,
22 would a new entrant introduce a rule that creates more
23 competition in the market that it is trying to enter
24 than was there before? It is completely absurd.
25 Totally and utterly counterintuitive. You don't get

1 that.
2 Ancillary restraint cases, which is what this is
3 said to be, are what it says on the tin. They are
4 restraints. The archetypal example of course is the
5 non-compete clause. I'm the new venture, I want
6 a non-compete clause to get me up and off the ground to
7 achieve sustainable entry. By definition, non-compete
8 is anti-competitive. It might be capable of being
9 rescued by virtue of the doctrine of ancillary
10 restraints, but in and of itself it is not creating more
11 competition.
12 MR FREEMAN: Competition law is full of paradoxes.
13 MR HARRIS: Maybe, but this one is irreconcilable for my
14 learned friend's team, which is of course why I raise
15 it. There is no answer.
16 There is another thing to which there is no answer
17 on this point, which is that on their own
18 characterisation of the world, there is a whole tale of
19 other "competing" portals. Tens of them. We gave you
20 a hand up identifying them all. If there is or was no
21 competition between portals, then how on earth can there
22 be all these competing portals that they have identified
23 and labelled? It simply makes no sense at all.
24 And of course, turn this round the other way. What
25 it demonstrates is -- and no criticism per se of this --

1 but it is not a pro-competitive rule making the market
2 more competitive. It is deliberately a rule that is
3 intended to restrict and protect Agents' Mutual until
4 a certain period of time. I have made my criticisms of
5 the period of time, you know what they are. But that's
6 what's going on here. It is not just some at large,
7 "This is a wonderful pro-competitive feature and
8 therefore we should keep it for ever", that is not what
9 is going on at all.
10 Of course what we can't overlook is the fact that
11 this is all in the context of the OOP rule, we say now
12 made out in the cross-examination and on the documents,
13 of being deliberately to overtake and knock out -- that
14 "knock out, knock Zoopla over" is from one of my learned
15 friend's own side's documents. So it is all in the
16 context of it being specifically targeted at the weaker
17 of the two duopoly portals until we can overtake it and
18 watch it wither away well within the five-year period.
19 Those points are impossible in my respectful submission
20 to overcome.
21 I am in your hands, gentlemen, if we are going to
22 have a short break. I was going to move on. I am not
23 going to be able to cover all of my points, so I am
24 going to maybe take a few minutes and find the next few
25 that I can sensibly deal with.

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1 THE CHAIRMAN: Fair enough, Mr Harris. We'll rise for five
2 minutes and I am entirely happy with the cherry-picking
3 approach. You can take it as read that we have read and
4 will re-read your written submissions, and you go to the
5 points you feel --
6 MR HARRIS: What I may do -- I was going to go to one or two
7 of the cases, but I may just give you some references
8 and that may save some time.
9 THE CHAIRMAN: By all means. We will rise for five minutes.
10 (11.43 am)
11 (A short break)
12 (11.48 am)
13 MR HARRIS: Sir, picking it up, members of the Tribunal,
14 with one more oddity and then in my submission another
15 fatality of my learned friend's case.
16 So the last oddity where we were talking about
17 bizarreness and absurdity at the heart of my learned
18 friend's case is that what we can see from the strategy
19 and aims in the business plans and the various
20 associated slides is that it was not only
21 Agents' Mutual's intention to overtake Zoopla and then
22 watch it wither away so that there would be a market
23 with only two large portal groups on their view
24 competing, but that on top of that at some point in time
25 no later than five years but, so we are told,

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1 potentially before five years they would then remove the
2 OOP rule, therefore, bringing about the very situation
3 in which they say there is no competition between
4 portals. Because their method, so we are told, of
5 obtaining competition between the portals is the OOP
6 rule. Again, a fundamental difficulty for my learned
7 friend's side.
8 The short fatality, I am going to move on in
9 a minute, to which I just wish to draw your attention,
10 obviously set out in our closing submissions, is
11 Northern Ireland. As you know, it is made out now on
12 the evidence that there are a whole series of less
13 restrictive alternative means of entering this market.
14 We say that therefore completely undermines the
15 necessity case and, if we were ever to get there, the
16 exemption case, but with respect, Agents' Mutual simply
17 have no answer to many of them but on their own case no
18 answer to the Northern Ireland less restrictive rule.
19 Mr Springett obviously started smiling at that
20 point. We have got that document, those two documents
21 in the trial file, one of which said, that will be handy
22 in court. They know perfectly well that is a less
23 restrictive tool for achieving entry to the part of this
24 market that they themselves have employed and therefore
25 that completely and utterly undermines any case on

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1 necessity or for that matter indispensability, and there
2 is no answer.
3 I am going to move on just to pick up something that
4 was mentioned by you, sir, Mr Chairman, this morning
5 about, is it an odd form of competition to have where
6 a purchaser on a merchant market purchases things from
7 multiple suppliers and is not having to choose between
8 the two but they are nevertheless regarded as competing.
9 But of course that answer is met by the example that
10 Mr Parker gave more than once in his evidence about
11 supermarkets. So you can have supermarkets carrying
12 multiple lines, Nestle, Kellogg's or whatever, and those
13 products are provided to the multiple supermarkets but
14 there is no question of them having to choose between
15 supermarkets. They are complements so there's Asda and
16 Sainsbury's and Tesco's and all of the rest of them but
17 nobody would say that because they are selling their
18 products by a different means or portals, if you like,
19 supermarkets, that they are not competing as between
20 themselves, Nestle and Kellogg's. Obviously the
21 supermarkets are also competing but the more relevant
22 point is just because they are selling via complementary
23 means to market doesn't mean that they are not
24 competing. They obviously do.
25 I am going to move on, if I may, to make a few

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1 particular points about Zoopla because my learned friend
2 seeks to pick up on them. One can understand why, if
3 you like, presentationally but they are weak points and
4 they don't go anywhere.
5 First of all, and for the record it is totally
6 misleading and without foundation that the litigation is
7 being funded and controlled by Zoopla. My learned
8 friend's phraseology at his paragraph 14 is that Zoopla
9 is or at any rate Zoopla at least in conjunction with
10 others are calling the shots. That is totally and
11 utterly unfounded. It should either be withdrawn or in
12 any event, it should be dismissed. It certainly wasn't
13 put to any of the witnesses and nor is it made out by
14 any of the documents.
15 A second point is, a number of potshots are taken at
16 Zoopla in my learned friend's closings and again one can
17 understand presentationally. A good jury point or not
18 even that good, but Zoopla in their arrangements at any
19 point in time are not on trial here. They are nothing
20 to the point.
21 Another point is it is never a defence to any kind
22 of anti-competitive arrangement to say or to point at
23 something else and say, "Oh, well that's also
24 anti-competitive". So what? It doesn't make any
25 difference either way. They are not on trial, we don't

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1 have evidence about them. And even if some other person
2 were to be doing something that is anti-competitive,
3 that doesn't mean this isn't anti-competitive,
4 especially when they are not on trial. It is like me if
5 I got inevitably caught speeding and I say to the police
6 officer, "You were speeding as well, you were speeding
7 faster than me". So what? It is no defence.
8 And of course, it is important in this context to
9 just recall that like in the beef industry development
10 case, the Irish case about the beef market that I took
11 the Tribunal to in opening, this is a set of horizontal
12 arrangements through a mutual company, just like BIDS
13 was a mutual company, a limited company, and it was
14 viewed as a horizontal set of arrangements. This is
15 a situation in which the agreements are all aimed at
16 having Zoopla fall out of the market. That goes back to
17 where we were just before the short break about the
18 various pie charts and the denigration of Zoopla and the
19 tipping points. And it is telling in our respectful
20 submission that what my learned friend completely omits
21 in his written closings is any reference to or focus
22 upon all of that we submit overwhelming weight of
23 documents that show this was a targeted measure aimed at
24 who? Aimed at Zoopla.
25 That's why there are all of these documents which

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1 say at the expense of Zoopla. "We want you to ditch
2 Zoopla". That was the Trevor Abrahmsohn email from
3 Mr Springett. They were all aimed at Zoopla. That is
4 why in the case -- for instance, just take of my own
5 client's grouping, the IEAG we referred to in the
6 appendix, Mr Ozwell reports back from having had
7 a meeting, "Yesterday with Mr Springett, their plan
8 is" -- do you remember this document? Their plan is --
9 I paraphrase but you know the document -- to see Zoopla
10 disappear first. And that of course, as you know, was
11 exactly the plan that was relayed to Mr Livesey at the
12 Leighton Buzzard meeting. We now know, because
13 Mr Springett freely volunteered it, those exact slides
14 and that exact message were also put forward to Alison
15 Platt of Countrywide and Ian Crabb at LSL. It is all
16 part of a piece.
17 There was another email -- we could perhaps turn it
18 up if we need to -- in which another group of agents,
19 I think it might have been the west Wales agents, had
20 also formed the impression from meeting with
21 Mr Springett that the strategy of Agents' Mutual was
22 targeted at Zoopla. So there were all of these
23 documents.
24 So that is why we say, as you know from our
25 closings, one can't be falsely attracted by the notion

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1 that this is a simple market entry case, a nice easy
2 plain vanilla, "We're a new person into the markets,
3 that's got to be good". It is wrong on the documents --
4 that is the point I am now making -- and it is wrong in
5 any event in the same way it was wrong for Mr Bishop to
6 rely upon that as one of his foundational premises.
7 Because it does work in a bog standard market where
8 you are entering with a new model and trying to compete
9 on the merits. But it doesn't work in a non-bog
10 standard market, and in particular where you are
11 entering with a deeply, we say, restrictive core tool
12 and other tools to surround it, and that core tool is
13 aimed specifically at a particular market participant.
14 That is not the sort of situation in which the Tribunal
15 can safely sit back and say, "No problem, market entry,
16 all the evils are solved".
17 THE CHAIRMAN: To what extent, Mr Harris, ought we to be
18 careful in deciding the anti-competitive effect of the
19 various provisions that you are laying out before us,
20 the fact that we are seeing inevitably a partial
21 picture? Obviously we only get the material which on
22 disclosure the parties can produce, and to that extent
23 our data is limited -- and it is not a criticism, it is
24 simply a fact. Ought we to be particularly cautious in
25 approaching decisions on anti-competitive object and

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1 effect, particularly effect, given the fact that we
2 don't have the sort of breadth of evidence that let us
3 say the market regulator might have?
4 MR HARRIS: In my submission, no. And that is for this
5 reason: Mr Parker, as you know, was careful in his
6 reports and in his oral evidence to explain very clearly
7 that the data analysis part of the piece for which there
8 are just a limited number of data points, was (a)
9 consistent with and (b) formed part of a whole piece.
10 So just by way of reminder, there is the theoretical
11 analysis. That then chimes with that of the OFT and the
12 Bundeskartellamt and then that then chimes with both the
13 third party analysts which it is worth re-reading again
14 at section 9.2 of his first report because there are
15 pages and pages of stuff about Rightmove getting
16 stronger, Zoopla being weakened. These are people who
17 do this for a living. That is how they earn their
18 money. They are if you like particular market analysts
19 and then there are also wider industry analysts such as
20 Enders. They are not, if you like, stockbroker type or
21 equity analysts.
22 And it is only at the end of that that we get to the
23 data analysis, but the data analysis is consistent with
24 all of that for what it's worth. And Mr Parker was very
25 clear we don't overplay that but nevertheless it points

1 in the right direction and is consistent.
2 It is worth bearing in mind of course that even when
3 Mr Bishop altered the figures on his reanalysed
4 figures -- now I appreciate he says, oh well you can't
5 rely on them for other reasons but insofar as you take
6 a different view and you think you can rely on them it
7 is very telling that instead of a 17.4 combined overall
8 increase in price compared to the counter-factual, which
9 was Mr Parker's analysis, it becomes 10.4 or it is 17.3
10 to 10.4. In any event, 17 to 10.
11 Again, that is why one of the reasons Mr Parker was
12 able to say, yes, there are points that you can make, as
13 if this was some sort of scientific study of the highest
14 calibre and it was a perfect economic analysis that it
15 doesn't meet the 95 per cent statistical threshold but
16 that is neither here nor there because that is not the
17 standard you are applying. What is important is that
18 even on the reworked figures they come out as a positive
19 increase in price.
20 Would it be better if there were more data points?
21 Yes. But again that doesn't assist my learned friend's
22 team because, for instance, when it is said oh well,
23 your analysis is undermined because there might be some
24 other variations going on here that you can't control
25 for, well, Mr Parker first of all said "No, I can't

1 control for them but it doesn't mean to say you
2 completely jettison that which I can do particularly
3 when it is on a cost per lead measure which has also
4 factored in a quality consideration."
5 But what's telling about that and where it actually
6 counts against my learned friend's team is that they
7 have an expert. They are a participant in the market.
8 They have a large team. They have a big budget. If it
9 were the case that there was some other variable that
10 undermined the analysis, well where is that data? Why
11 hasn't Mr Bishop or my learned friend's team come
12 forward and said, "The one thing that will really undo
13 your analysis is for me to show in the relevant time
14 period Rightmove's quality of leads has increased
15 materially." Now if it had come that would have been
16 a problem but it hasn't come. Where is the data on
17 that?
18 So what you have to, we say, infer from that is that
19 is all that the other side has been able to do including
20 with its experts is to say, well there might be
21 a problem, there might be a problem about this variable
22 or that variable. But they haven't been able to show
23 it.
24 Another point where it comes back to assist me and
25 hurt my learned friend is as regards exemption, if we

1 ever get there. Before I finish I am going to explain
2 why the exemption case is, well we don't really get
3 there or it is hopeless. But if we were ever to get
4 there, and it goes back to a point I was making earlier,
5 it is incumbent upon my learned friend's team to advance
6 a proven case of pro-competitive benefits. So he has to
7 show that, to take one of their pleaded examples, there
8 has been a price benefit to end consumers. That is the
9 burden upon them. That is what they have pleaded. They
10 have no evidence at all.
11 So when you asked me, about is there enough evidence
12 and/or what are the implications of the fact that there
13 aren't, one of the implications is that their case on
14 pro-competitive benefit is completely hopeless. They
15 haven't each tried to advance a case of pro-competitive
16 benefits established by data or facts, let alone expert
17 evidence.
18 As I said earlier on, that means that taking the
19 four hurdles, the last one of which is fair share to
20 consumers, well, there isn't any share shown, let alone
21 that it is then fairly split up between the various
22 categories of consumer in this case. And to the extent,
23 sir, that you are driving at the point that there might
24 have been more evidence potentially available from other
25 people, well, that's true, but that is the same in any

1 case, the same in any trial. There is no reason why if
2 more data hadn't been wanted or required from some other
3 source that Agents' Mutual couldn't have sourced it.
4 MR LANDERS: If I may use your phrase, one of the potshots
5 that Mr Maclean launched at Zoopla in the closing
6 submissions was that they could have provided
7 information to your expert on listing fees and chose not
8 to do so. Do you want to answer that point?
9 MR HARRIS: Well, it may or may not be right. I simply
10 don't know what the factual answer to that is. But the
11 way in which our effects case is advanced is that that
12 is not necessary because what we have done in a manner
13 that we say is fully defended by Mr Parker is advance
14 the most coherent relevant metric, cost per lead, and
15 shown the difference between the actual and the
16 counter-factual. And it is nothing to the point for the
17 purposes of that analysis that there might have been
18 possibly some sporadic information from Zoopla only
19 about negotiations that may or may not have been going
20 on involving Zoopla only. That wouldn't have been a pan
21 market approach in any event.
22 Then doubtless we would have been criticised if that
23 had happened about saying well if it is pan market and
24 where's the data for Rightmove.
25 THE CHAIRMAN: That is a good example of data which would be

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1 interesting but which we don't have. We know we don't
2 have it and we simply have to live with that. That's
3 your point.
4 MR HARRIS: That is my submission. What I would say,
5 however, is that this is a case in which the Tribunal is
6 respectfully invited to take note on a completely
7 different subject, the wider collusive practices case of
8 the fact that there are limitations in data, limitations
9 in disclosure and evidence.
10 Now this is just fact. This is not a criticism of
11 anybody. It is not a criticism of us or my learned
12 friend, the Tribunal or anybody. It's just there is
13 a limit, there is a limit to what was ordered to be
14 disclosed. This is an expedited trial, it has got to
15 where it's got. But what we do say is that it is very
16 telling that in one area where we were able to augment
17 substantially and meaningfully the evidence about
18 collusive practice by a series of flukes, we were able
19 to do that in the North East that we can now see an
20 extremely telling picture in the North East.
21 And what we know -- indeed, one of my learned
22 friend's own submissions in oral opening was effectively
23 the MO, the modus operandi, was the same around the
24 country.
25 I am not trying to suggest that that means by itself

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1 that is something I can rely upon for wider collusive
2 practice of a particular type in a particular area, but
3 what do I mean to say is what we have described in the
4 closing submissions as the structural and mutual
5 horizontal nature of this arrangement and the letter of
6 intent process and the group marketing meetings and the
7 deliberate attempt to create critical mass and those
8 sorts of features -- I am not talking about specifics
9 here, I am talking about generics -- that was an MO that
10 was common around the country.
11 So whilst you have significantly more evidence for
12 the North East area because we were able to provide lots
13 of it, given that it is a common MO, and indeed for
14 reasons that are now advanced by my learned friend's
15 team, they actually say, well, it all made sense to have
16 for example a joint marketing meeting. We would invite
17 you to infer that if and when you get to an area where
18 there is not quite as much disclosure because of the way
19 the disclosure order has panned out and the nature of
20 the litigation, that was the same sort of process that
21 was going on in the other areas when we took our train
22 journey around the country.
23 MR FREEMAN: You are not suggesting that is the same sort of
24 evidence as economic data assessing market effects?
25 MR HARRIS: No.

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1 MR FREEMAN: You are making a very general point.
2 MR HARRIS: Yes. I was just trying to build on another but
3 completely different point about what the Tribunal
4 should do when there is doubtless more evidence out
5 there but it hasn't been adduced before this Tribunal.
6 Just for completeness on the Zoopla point,
7 Mr Landers. As I said before, we would have been
8 criticised if we only got it from Zoopla because the
9 whole point is you would need a pan market view, and
10 then this case would have started in another three
11 months and cost another £3 million, and what have you.
12 We are where we are.
13 What I want to do now is move on and make some brief
14 submissions about collectivity and critical mass because
15 this is quite telling. What is now sought to be said by
16 the other side in response to the different horizontal
17 allegations of anti-competitive object and effect is,
18 inter alia, there is some kind of justification for the
19 collectivity; namely that a critical mass was needed.
20 But it is important just to pause here for a minute.
21 This has been, on the pleadings, a horizontal case
22 from the beginning and there is no pleaded case of
23 critical mass by way of justification for collectivity
24 at all. Just absent. Just like it was absent in
25 response to my written skeleton argument and just like

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1 it was completely absent in response to my oral opening.
2 So right at the death, we have some kind of attempt to
3 suggest, oh, well there's some sort of justification for
4 collectivity in the form of critical mass.
5 But leaving aside the absence hitherto forth which
6 is one matter, the reason it fails is very
7 straightforward. First of all, there is absolutely no
8 evidence that came out of the documents or the
9 cross-examination that that was how it was analysed in
10 fact at the time. What we see from the documents is
11 a strategy and attempt to grow well beyond critical
12 mass, well beyond the critical mass that is needed "to
13 achieve a sustainable entry" -- that is from the very
14 first business plan on bundle 1, page 181. That was
15 with 1,000 offices and then 500 per year leading to
16 trading at a profit at a little over a year, and
17 a cumulative break even a little bit after two years.
18 That is potentially a sustainable entry, but that is
19 not where the minimum indispensable restriction was set.
20 Nowhere does it say, "Fine, that's the critical mass
21 that is needed to get me into the market". First of
22 all, it doesn't say that, and secondly, we know from the
23 facts that that is just not what happened. It was 4,600
24 offices, so it was well over four times what might
25 potentially have been said to be the critical mass that

1 was actually achieved. And what happened was at that
2 point, instead of revisiting the nature of the
3 restrictions, whether they were needed at all or whether
4 they were needed for that scope or duration, all of that
5 was ignored. What was said was, "I am just going to
6 spend all of this new money on marketing". And indeed
7 as we pointed out in our closing submissions in a bit
8 that's highlighted in blue, there was a particular
9 objective there by reference to Zoopla and Rightmove's
10 marketing spend. Well, fine, we're glad that's been
11 acknowledged. It is not legal. It is not a legitimate
12 or objective justification.
13 Then the contrast with BAGS here is really quite
14 startling, because in BAGS -- first of all, as you know,
15 the context is utterly different because that was a case
16 in which there was ineluctably no competition in the
17 market. It was a monopoly and a monopsony. And
18 critically -- and please do not ever lose sight of this,
19 gentlemen -- it was a market in which as a matter of
20 fact it was found there wasn't going to be any
21 competition. There was no potential entry, so it was
22 a monopoly and a monopsony and no potential competition.
23 So it is difficult to see how an entry tool in those
24 circumstances can create an anti-competitive effect when
25 there is nothing to effect. So that's one thing.

1 But on this point, what's critical is that in sharp
2 contrast to Agents' Mutual, what happened in BAGS was
3 the new entrant, a company called AMRAC, went to very
4 great trouble in analysing pre-entry what was the
5 minimum indispensable requirement for collectively, how
6 many race courses were needed to be within the AMRAC
7 club, and not one more could be taken, because that
8 would go beyond what was the minimum indispensable entry
9 technique, and what was the minimum indispensable level
10 of exclusivity, and not one jot more could be obtained
11 because that wouldn't fit the legal -- and there was
12 a budget for that and there were experts and
13 consultants, data was obtained, sensitivity analyses and
14 what have you.
15 Has any of that happened here? Absolutely not.
16 Mr Springett admitted it. What we had was Mr Springett
17 with a £5,000 budget at the beginning with no help, and
18 then we saw out of thin air three-year restriction, and
19 indeed as you know Rightmove was in fact specifically
20 named there in that one, but there is no analysis for
21 the three years and no analysis for the five-year; no
22 data, no sensitivity analysis, no consultant. And most
23 importantly of all, no attempt to ask oneself the right
24 question at that stage, which is: what is the minimum
25 indispensable to get me with an implemented functioning

1 portal within the market? It just wasn't asked. When
2 it was overachieved, as I say, instead of dialling back
3 on the restrictions, all that happens is more is spent
4 on marketing. Well, those were the choices but they
5 were not legal choices.
6 Then another interesting point to note at this stage
7 is that in trying to get together more members in
8 groups, in these collectives around the various regions
9 of the country, incidentally deliberately using board
10 members, of whom of course Clive Rook is a central
11 member -- putting that to one side -- in trying to get
12 these reasonable groupings and critical masses
13 "everywhere", names of other people in the very region,
14 who weren't even members at the time, were disseminated
15 by none other than Agents' Mutual.
16 So that plainly involves a facilitation in our
17 respectful submission and an encouragement of the
18 collusion which we say then took place at these local
19 levels. There is absolutely no need on any view of the
20 world for you to give names if what you are trying to do
21 is give reassurance that there are other people
22 involved. But Mr Springett did give names. We have two
23 cast iron examples, even in the disclosure we have
24 received. One was in the North East region and one was
25 in the Cambridge region. That latter one is relevant as

1 you know from our closings including annex A, because
2 Mr Springett knew exactly why it was wanted. It was so
3 we could have "discreet discussions about which other
4 portal to choose". That was why it was sought, that is
5 why it was sent back.
6 In that regard, I am not going to turn any parts of
7 these up unless invited to do so, but there are
8 particular passages we have mentioned in our closing
9 submissions I would respectfully invite the Tribunal to
10 just refresh its collective memory, about the width of
11 the case law on concerted practices. I am now talking
12 very briefly about that wider case of collusion in
13 various regions.
14 To take that now infamous case in the Tribunal JJB,
15 the replica kit case. Of course why it has achieved
16 notoriety in many ways is because of the rather comic
17 meeting, the helicopter meeting at which the chief
18 executives of these competing retailers of replica kit
19 shirts arrived at one of their houses. One of them flew
20 in by helicopter and they had one meeting. On one view
21 of the world, or at least for some of them, one meeting
22 at which there was then a dissemination between
23 competitors, horizontally of what should have been
24 private information about pricing.
25 And what of course the Tribunal found in that case,

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1 consistent with all the European case law, of course, is
2 that one meeting alone can implicate somebody in illegal
3 collusion. It is because -- and to use the words of
4 Anic which we also cite because:
5 "It makes one aware of the actual conduct planned or
6 put into effect by other undertakings in pursuit of the
7 same objectives."
8 And that takes away the unilateral nature of what
9 you are supposed to be doing. It even goes so far --
10 and here I am quoting from Anic at paragraph 87:
11 "You are bound if you could reasonably have foreseen
12 what the reaction would have been of the other people
13 and you are prepared to take that risk."
14 What we know here from many of the documents we have
15 cited, including our annex is that Mr Springett and
16 other people within Agents' Mutual expressly, including
17 board directors, not limited to Mr Rook, is that they
18 did know there was going to be this --
19 THE CHAIRMAN: Pausing there. Leaving Mr Springett on one
20 side and looking at other board directors, to what
21 extent do we need to have regard to the fact that these
22 gentlemen had several hats?
23 MR HARRIS: Yes. You need not worry in this case for this
24 reason: we know from the documents that we have gone to
25 the very great trouble of setting out in the written

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1 submissions -- as well I have taken care to
2 cross-examine them all on -- was that the board members
3 were deliberately put forward by Agents' Mutual as the
4 ones to disseminate the relevant messages. And in
5 clause 6 of the agreement, they are the ones
6 specifically tasked with implementation of the OOP rule.
7 So to give you an example, post his appointment as
8 a board member, which was on 1st or 10 March 2014, and
9 going forward several months to 2 June where Julie
10 Emmerson and Ms Whiteley were enquiring about the
11 legality of things that were going on in the North East
12 agent's marketing meeting -- up there in the North East.
13 Do you recall that one of the things Mr Springett
14 said was, "Don't create any more messages documents,
15 refer them to Clive." Why is that? Because Clive Rook
16 was the personification for these purposes of
17 Agents' Mutual in that part of the world. Then when
18 there was a query from Nigel Jones in the West Wales
19 group -- I forget the date -- to Mr Springett, one of
20 the things he said was, "You will need a direct line to
21 the board, I'll get a board member to ring you", and
22 then it turned out to be Mr Hodgson, who was Douglas &
23 Gordon -- it doesn't really matter, he was a board
24 member. So what we know is the way in which these
25 horizontal messages were being carried out was directly

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1 via board members and not limited to just Mr Springett.
2 I will just add as a postscript to that. Of course
3 what we also know, but we don't have full disclosure on
4 that -- that is just facts -- other people within the
5 organisation who haven't been called, who I haven't been
6 able to cross-examine, they weren't aware of even the
7 most basic parts of competition law well into the piece.
8 And yet they were the people who were going ahead and
9 carrying on with the actual implementation of the
10 organisation's objectives on the ground, and yet they
11 didn't have a basic understanding of elementary concepts
12 of competition law.
13 One of the reasons I raised JJB here of course, and
14 the relevant passages are cited in our skeleton
15 closings, but in particular it is paragraphs 876 and
16 1042 to 1046 -- this is how far the case law goes and it
17 simply hasn't been appreciated, with respect, by
18 Agents' Mutual -- is if you find yourself implicated
19 even in a single meeting, what do you have to do in
20 order to get off the hook? You need to publicly
21 distance yourself. You might even have to go to the
22 authorities and report it.
23 What have Agents' Mutual done? It hasn't done that.
24 It hasn't done that as regards these wider collusive
25 practices. What it seeks to rely upon, limited only to

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1 Mr Springett -- it doesn't bear upon Ms Whiteley,
2 Miss Emmerson, Ms Beaufoy, Ms Kerr, Mr Hodgson, Mr Rook
3 or any of these other people, it simply doesn't bear on
4 them at all. But what Mr Springett has done on isolated
5 occasions is make semi-attempts to cover some of the
6 ground that shouldn't be being dealt with collusively by
7 agents.
8 That is not good enough because you would have to do
9 it completely and on every occasion in order to get
10 yourself off the hook and/or report what's going on to
11 the regulatory authority. And that's not happened.
12 If you can be caught by one meeting alone without
13 publicly distancing yourself or reporting, then it means
14 you are not off the hook if you make sporadic and
15 isolated individual attempts to cover half the message.
16 THE CHAIRMAN: What do you say about the distinction that
17 Mr Springett drew between Agents' Mutual making a group
18 presentation of what it was intending to do on the one
19 side and on the other side what he said was an
20 individual decision of individual estate agents to
21 decide whether or not to sign up? I think he said -- or
22 if he didn't say, it was Mr Maclean -- if there was
23 a collusive agreement between estate agents where they
24 were discussing collective action for or against
25 Agents' Mutual and on Zoopla, that was nothing to do

1 with his client.
2 MR HARRIS: He says that, but that is undermined by the
3 factual evidence. To take your first point, I have no
4 difficulty with a mere joint marketing presentation. No
5 problem. But we know from the document that it didn't
6 end there. Let me give you one example. The North
7 London group, the REAP Fabric group with
8 Mr Abrahmsohn -- I am just paraphrasing, but the gist of
9 it was, "We are thinking of joining Zoopla, have you got
10 anything to say about that?" And what he comes back
11 with and says is, "Act as a group, and what's more, you
12 [I think that's Glentree, Mr Abrahmsohn] you are a swing
13 vote within it. What we don't want to be is the
14 number 2".
15 Then there is another email, and the further email
16 back is "yes". He says in part of the email, "Be
17 careful in certain respects". But what does he also say
18 in the email? He says, "I hope you will forgive me from
19 signalling that from an OTM/AM point of view, I would
20 like you all to ditch them, all to ditch Zoopla".
21 So there is clear encouragement. It is no good to
22 say on the one hand, "I have given a bit of a warning to
23 one person", and then in the same document and seen in
24 other documents where there is no warning at all to say,
25 "Nevertheless, I think you should act as a group and

1 I think this is how you should act". And that is
2 repeated all over the place. So it was giving specific
3 advice to the group in West Wales about, for example,
4 the terms upon which they could list with Zoopla in flat
5 contradiction to his written evidence.
6 Specific advice in the North East context without
7 any warnings at all to, for example, Caroline Pattinson
8 about, "Can you please align?" And then specific advice
9 reported in an email from a conversation with Clive Rook
10 about, "Well, actually, we don't think you should come
11 off both because that might lead to the dam breaking and
12 people coming back more quickly".
13 So in other words, time after time after time, we
14 are not limited to a simple joint marketing presentation
15 and then everybody disappears. I have two more points
16 about that.
17 The first is that even if it were, we know it was
18 effectively a facade or a sham now we have got better
19 disclosure for the North East, because Julie Emmerson
20 was told that she couldn't be there at that point, which
21 was the media negotiation, and who uses that word?
22 Well, none other than a board director, he knew full
23 well what was going on. It doesn't matter anyway,
24 because she left the room and got two emails which
25 report in two separate meetings, including that one

1 where the email is on 2 June, she just finds out
2 afterwards what happened in any event.
3 I don't mean this in the legal sense, but that is
4 a sham, and that is just a joke. It doesn't make any
5 difference if you pop out behind the door and then a few
6 days later somebody says, "Oh, this is what happened
7 when you went for a cup of coffee".
8 Most important of all, could I please invite the
9 Tribunal not to pick it up but to just note down that in
10 the Electrotechnical Fittings cartel case, which we have
11 now added into the additional authorities bundle -- I am
12 not sure which tab it is, but Mr Woolfe will tell me --
13 is that one of the means in which the horizontal
14 association, tab 3 of that authorities bundle, and the
15 relevant paragraphs really if I could invite the
16 Tribunal to read them extend from 359 through 379.
17 But a number of points come out of them and one of
18 them is that where a trade association facilitates and
19 encourages the horizontal collusion by providing the
20 forum, the meetings that act as the forum by which this
21 horizontal collusion goes on, then that implicates the
22 trade association.
23 It is completely admitted by Agents' Mutual that
24 they were doing that and that they were attempting to do
25 that all over the place. So for those reasons in this

1 particular case you can't regard in isolation even the
2 mere convening of joint meetings because it can't be
3 divorced from what else is --
4 THE CHAIRMAN: What you called a moment ago group marketing
5 meetings?
6 MR HARRIS: Yes, that's right. If there were nothing bar
7 that and there were no other things going on in the
8 background then that by itself I wouldn't or couldn't
9 impugn. But that is not this case for all of these
10 reasons.
11 So take, for example, take Bristol as another port
12 of call. When Mr Springett was invited there he knew
13 from the email that was setting it up that that group
14 wanted to take joint decisions about which portal to
15 choose. So it wasn't and of course we also know, and
16 this is so important in this case, is this was directly
17 in the interests of Agents' Mutual. They wanted to have
18 Zoopla targeted. They wanted to not be second anywhere.
19 They didn't want the split vote or the diluted vote and
20 who was getting the message about what they wanted?
21 Mr Springett denies it. He says, oh well even there for
22 example I left the room and they went upstairs for some
23 more drinks and what have you.
24 But the important thing we know from the evidence,
25 the incontrovertible evidence of what message was

1 actually being received, take for example that John
2 Ozwell email where he says: Mr Springett came to see me
3 yesterday, their plan is to see Zoopla disappear.
4 Perhaps if Mr Woolfe could just turn that one up so
5 I can make sure that I get that accurate.
6 And that was the same all round the country. That
7 was the same in west Wales. It was the same in
8 Maidstone and in Bristol et cetera et cetera.
9 And then there are a couple of other -- it is H2/979
10 and the relevant bits, so this is in one of the entries
11 on page 24 of my annex A, the bit that I have been
12 trying to paraphrase a couple of times now, Mr Ozwell
13 met with Mr Springett and before any dispute about any
14 of this arose from a contemporaneous email, his
15 impression was:
16 "Their plan [that is OTM's plan] is based upon most
17 agents initially dropping Zoopla to go with them and
18 then eventually dropping Rightmove as the new portal
19 becomes the major portal."
20 As I said before, Mr Livesey gave evidence that he
21 formed exactly the same -- he obtained exactly the same
22 understanding, and little wonder when you see the
23 slides. Little wonder he got that understanding.
24 The other reason that Electrotechnicals is important
25 is because at 365 to 367 it is another case where it

1 talks about when you are informed of anti-competitive
2 conversations, so in that case it was between various
3 members of one of the associations and then the
4 association finding out, one of the reasons that the
5 association was impugned, as well as the members, was
6 because it didn't publicly distance itself from those
7 discussions and it had set up the forum in which those
8 discussions were taking place.
9 So there were a number of important aspects of that.
10 THE CHAIRMAN: What are we to make of the group negotiations
11 by agents with Zoopla? Again, do you say that's
12 perfectly legitimate or ...
13 MR HARRIS: Again, I think this was a point which might have
14 arisen in the opening. I don't take a stance one way or
15 the other on that. There might be certain circumstances
16 in which a group negotiation could occur without any
17 difficulty. And there are other circumstances in which
18 it might not. But that is not in my focus and I don't
19 have to take a stance on that. That is not intended to
20 be a cop out. What it is intended to be is that one has
21 to be very careful in this case to focus upon those
22 collective discussions that went too far and that
23 involved Agents' Mutual in any relevant sense of
24 providing a forum for a meeting, knowing of or
25 facilitating, failing publicly to distance itself and/or

1 knowing what's going on and being prepared to take the
2 risk that it will carry on even though you know of it
3 and are facilitating of it.
4 What I would say however, and your question partly
5 bears upon what I was going to finish on as regards
6 Gottrup Klim, which is a case always cited where there
7 is an anti-competitive method of supposedly entering
8 a new market, is that one has to understand where
9 a joint purchasing decision can stray into the illegal
10 territory.
11 So just to remind ourselves of course. Gottrup Klim
12 was a case in which the people were getting together in
13 the agricultural cooperative precisely so as to obtain
14 countervailing buyer power. That was the whole raison
15 d'etre of doing that. Why were they doing that? It is
16 because they were being effectively squashed by the big
17 agricultural suppliers. Massive companies, massive
18 multinational companies and they were not getting a good
19 deal. And they thought, what do I need to do? What is
20 my purpose? What I am really trying to do here? Trying
21 to countervail is what they're doing. Because there
22 were very strong sellers. If that's your very core
23 objective, little wonder that you should be allowed to
24 take some measures to facilitate that core objective of
25 creating the countervailing power on the other side of

1 the market.
2 But what's key in that case is to recognise that, as
3 I think we set out in our written submissions, is that
4 in that case, notwithstanding that some part of the
5 collectivity was permitted, what wasn't permitted were
6 two things. What had to be allowed for it to be lawful
7 was that persons other than the members of the
8 cooperative could purchase from it. That was one of the
9 conditions upon which it was said to be allowed to have
10 some of the restrictions. But of course in our case
11 that is simply not true because non-members can't buy
12 from this mutual cooperative, this portal. Non-members
13 are emphatically excluded. They are competitors and
14 they are deliberately excluded. So the onlines, the
15 non-bricks and mortar are excluded. So this goes
16 significantly further on one of the points that was
17 taken in the Court of Justice in that case.
18 The prohibition on membership of competing
19 organisations, back in Gottrup Klim, what had to be
20 allowed was that members had to be free to make
21 purchases from other cooperatives. So even though they
22 were joined together in a membership structure to allow
23 countervailing power, nonetheless they had to be allowed
24 to buy from other people, and indeed, as many such other
25 people as they saw fit.

1 But of course that is not the case here because the
2 exclusivity obligation in this case excludes the members
3 from buying from other sources save only for one.
4 That's not the case. These are important because that
5 was a case in which there were certain ancillary
6 restraints for less time than was proposed by the
7 cooperative, so that is another important point,
8 duration is always relevant here, it was only allowed to
9 allow the very raison d'etre and pro-competitive raison
10 d'etre to be achieved and not a jot more, not a jot more
11 was allowed, not for a day more than was allowed and
12 specifically you had to allow other people to purchase
13 who weren't members. Well, that is included in the case
14 of Agents' Mutual. And you had to allow the members to
15 purchase from as many other places as they liked and
16 that is excluded from Agents' Mutual.
17 So that is not a good case for my learned friends,
18 and then of course -- I don't have time to turn it up --
19 but in the Cooperative Stremsel case that we cite in our
20 closing --
21 MR FREEMAN: That is the Rennet decision.
22 MR HARRIS: Yes, sometimes called the Rennet case, yes.
23 MR FREEMAN: Easier to pronounce I think.
24 MR HARRIS: That's right. What is telling there is what was
25 an ancillary restriction for circumstances in which you

1 were supplying to and buying from the same organisation
2 as opposed to some other big multinational selling
3 organisation, where it is the same do you need any
4 exclusivity at all? No, no exclusivity was allowed.
5 And that is very important in the case because in -- it
6 is probably my final point in many ways. Insofar as we
7 are going back to the new case on, oh well there's some
8 kind of critical mass justification, the other thing
9 that it simply doesn't deal with is exclusivity.
10 Critical mass is a possible justification if analysed
11 and if supported by the data and if really used at the
12 time, none of which apply here, but if all of those are
13 dealt with then it is a justification for collectivity,
14 not for exclusivity. Critical mass means getting people
15 together. It might mean getting them together for
16 a certain period of time so that they provide an
17 adequate income stream. But it has nothing whatsoever
18 to do with exclusivity and in the Rennet case no
19 exclusivity case was permitted at all.
20 I do accept that to some degree and by no means the
21 whole case but to some degree it was talking about the
22 anti-competitive effects that can take place in the
23 purchasing and/or in the supply market where the people
24 doing this exclusive collective purchasing form
25 a meaningful part of the market. I do accept that was

1 some part of the analysis but of course these people do
2 form a meaningful part of the market. There are 6,300
3 agents, occasionally there has been a bit of a variation
4 around there, out of about 18,000 agents. That is
5 exactly the sorts of reasons why these exclusivity parts
6 are not permitted. They have, for example, foreclosure
7 effects. They have foreclosure effects within the
8 market of in this case other would be purchasers, right.
9 For example, the non-traditional estate agents. They
10 are foreclosed. They are excluded. That is what the
11 bricks and mortar restriction does. And it also has an
12 exclusion area -- perhaps that is a better word than
13 foreclosure, meaning more or less the same thing --
14 exclusion effects on other portals, because lo and
15 behold, mostly Zoopla in this case, is now effectively
16 precluded from getting its hands upon those people who
17 have gone with the 6,300 who are members of
18 Agents' Mutual.
19 And that's what's going on in this case law.
20 Gottrup Klim says even where you have got a particular
21 method of creating a pro-competitive countervailing
22 force nevertheless you have to allow purchasers from
23 elsewhere and non-members to use it. That is not this
24 case. And that's where there was somebody else that was
25 being countervailed against. Whereas in Rennet where it

1 is the same people you are not allowed any exclusivity.
2 MR FREEMAN: They are not two-sided portal markets cases,
3 are they?
4 MR HARRIS: No, I accept that, but Gottrup Klim is put
5 forward by my learned friends in particular as the
6 answer. Look at Gottrup Klim, we are effectively
7 analogous with that. They succeed, we succeed and it
8 just doesn't work.
9 May I just take one moment.
10 THE CHAIRMAN: Of course.
11 MR HARRIS: Sir, so unless I can assist further those are
12 the closing oral submissions subject to a reply.
13 THE CHAIRMAN: Thank you, Mr Harris. I think we may have
14 one or two questions. Mr Freeman.
15 MR FREEMAN: Just going back to the joint marketing
16 presentation and your argument that the meetings went
17 too far, and I appreciate that on your submission the
18 OOP rule is itself restrictive and therefore has
19 a tainting effect, but at what point are you suggesting
20 to us that the meetings go too far? If Agents' Mutual,
21 rightly or wrongly, has the OOP rule as one of its
22 features, then a presentation to agents who might be
23 interested in joining Agents' Mutual has to address the
24 OOP rule because that's your submission and nobody has
25 argued, a key feature of joining Agents' Mutual, you

1 subscribe to the OOP rule, and that means you are
2 allowed to list on one other portal only if you join
3 Agents' Mutual.
4 Now, presumably a joint marketing presentation that
5 says, well you have got to choose which you list on but
6 it can only be one other, that's not going too far. Is
7 that what you are saying? Just to finish, and you go
8 too far when you start naming names. Is that what you
9 are inviting us to conclude?
10 MR HARRIS: So, sir, it is not limited to the naming names.
11 It is if it were a joint marketing meeting that simply
12 said: this is the Agents' Mutual proposition and here
13 I am marketing to ten of you because that's cheaper than
14 doing it ten separate meetings --
15 MR FREEMAN: I'm a sceptical agent and I put up my hand and
16 I say, "Hang on, but what's this clause which says one
17 other portal only?"
18 MR HARRIS: If you simply explain what the Agents' Mutual's
19 proposition is including that there is this thing called
20 the One Other Portal rule and the other restrictions,
21 then no problem. But what has to be scrupulously to be
22 adhered to is that there is nothing beyond just the
23 marketing and the exposition and in particular, that you
24 would have take all full measures including where
25 necessary, public distancing or reporting or all manner

1 of written explanations on every occasion, that there
2 couldn't then be a group decision by people what to do.
3 So that's where the line is crossed in this
4 circumstance.
5 Now, this is for all the reasons we have set out in
6 our written closing because this is inherently a mutual
7 horizontal arrangement between competitors and where
8 Agents' Mutual goes wrong right at the beginning --
9 MR FREEMAN: Potential competitors.
10 MR HARRIS: Well in many, many cases actually competitors.
11 I haven't got time to do --
12 MR FREEMAN: It is a regional market. It is a series of
13 regional markets.
14 MR HARRIS: Take, for example, the North East AMG. We know
15 that they are all competitors. But anyway be that as it
16 may. That is where it goes too far. Of course we know
17 Agents' Mutual falls foul of that going too far because,
18 as Mr Springett fairly explained, it was their own modus
19 operandi to make sure this was done in groups.
20 MR FREEMAN: The question is how much is it implicit in
21 explaining how the OOP rule operates that there will
22 have to be a choice? You are saying it is the
23 facilitating of a collective decision on any choice that
24 is the issue.
25 MR HARRIS: It is two things, sir. It is the facilitating

1 and encouraging because it was in their interests -- and
2 this is all admitted. It is in their interests to get
3 there to be group decisions because what they didn't
4 want was a splitting or a dilution of the vote. They
5 didn't want it fracturing. These are their terms. They
6 wanted a critical mass of agents everywhere, and that is
7 a more or less direct quote from one of the documents.
8 MR FREEMAN: That is to join Agents' Mutual.
9 MR HARRIS: Yes, but that is a dividing line that shouldn't
10 have been crossed in this case because it is
11 a horizontal arrangement between competing estate
12 agents. So it is not limited to an illegal decision
13 collectively to boycott one or the other whether named
14 or not. It is also in this case a collective decision
15 to join which was deliberately facilitated, avowedly
16 facilitated. That is what they were doing by
17 Agents' Mutual. And that is a distinction and
18 a dividing line between a mere collective marketing
19 presentation which by itself simpliciter may be of no
20 particular difficulty even if it said there is an OOP
21 and it means X on the one hand, versus going too far on
22 the other.
23 And then there are embellishments upon it. So
24 adding lists of names even when they are not members
25 et cetera et cetera. And, as I say, further embellished

1 by the fact that it is not limited. It would be
2 a mistake I respectfully submit to think that this was
3 limited to Agents' Mutual, whether via its directors or
4 its senior or less senior employees, not knowing the
5 other things that were going on in the background. They
6 did know. The documents show that they knew that there
7 were going to be these collective decisions about
8 joining and which other portal. And in many cases --
9 take, for example, the one in the north Devon region
10 where they say: "We have reached a consensus."
11 This was stuff that was known to Agents' Mutual and
12 so as an absolute bare minimum they carried on
13 facilitating these group arrangements taking the risk.
14 MR FREEMAN: I am eating into your time. So the collective
15 decision doesn't have to be about the OOP rule in your
16 submission.
17 MR HARRIS: Not limited to. It includes but is not limited
18 to.
19 MR FREEMAN: So if Agents' Mutual hadn't had an OOP rule,
20 the collective decision to join facilitated by
21 Agents' Mutual's representatives at group meetings would
22 have been illegal in your submission.
23 MR HARRIS: It certainly could have been illegal. It might
24 have been capable of being saved in theory by
25 a collectivity critical mass argument, but you know what

1 I have to say about that.
2 MR FREEMAN: Yes, okay, thank you.
3 MR HARRIS: And not made out in this case.
4 THE CHAIRMAN: Thank you.
5 MR LANDERS: Just so that I have understood the exclusivity
6 rule and the Danish case. If the Agents' Mutual members
7 had decided at some point a portal is not going to fly
8 and instead we will go to Zoopla and Rightmove and say,
9 give us a good price if we agree that we will only
10 appear on one of those portals ie exclusivity, that
11 would have been anti-competitive as well.
12 MR HARRIS: Absolutely could have been, yes. One would have
13 to analyse that in context but, yes, it certainly could
14 have been. Why? Because it would have been a big chunk
15 of the market effectively adopting a foreclosing or
16 exclusionary rule as against other portals.
17 Perhaps my very final word is we are also not to
18 forget that this was avowedly a situation, this OOP
19 rule, not just to attack the people who were in the
20 market but to create a barrier to entry to people who
21 would be in the market. That was Helen Whiteley's point
22 four to the KFH enquiry: our strategy is to create
23 further barriers to entry. And that of course further
24 distinguishes the case from BAGS because there was no
25 possibility of other entry in that case.

1 THE CHAIRMAN: Mr Harris, thank you very much.
2 Mr Maclean, we will run a little bit past one
3 o'clock.
4 MR MACLEAN: Yes, of course. The Tribunal will no doubt
5 tell me when its desire to eat outruns its desire to
6 listen to me.
7 MR FREEMAN: A very difficult choice.
8 Closing submissions by MR MACLEAN
9 MR MACLEAN: As we say in our closing submission at
10 paragraph 34, Gascoigne Halman has abandoned the
11 allegation that the OOP rule has the effect of
12 restricting competition in local estate agency markets
13 and the Tribunal won't have forgotten what we call the
14 concession letter which also abandons the effect case on
15 one of the other restrictions as well, namely the bricks
16 and mortar restriction, and you have that in bundle X,
17 tab 27.
18 So they have abandoned their effects case in
19 relation to OOP and bricks and mortar but Gascoigne
20 Halman continues to allege that the OOP has the object
21 of restricting competition between agents in such
22 markets. I am dealing here now first with the estate
23 agents market and I will deal with the portal market
24 shortly. That is on the basis that the OOP rule,
25 according to my learned friend's skeleton argument at

1 paragraph 88, and I quote, "Restricts one important
2 parameter of competition between agents, namely their
3 freedom to choose how many and which portals to list the
4 properties of their customers", and they make their
5 point in a number of places in their skeleton.
6 So they contend that the OOP rule is an object
7 infringement because agents are effectively agreeing
8 with one another to limit their own output on the
9 downstream market for estate agency services and/or to
10 restrict themselves as regards the key parameter of
11 competition in that market. See my learned friend's
12 written closing argument at paragraph 5.1.
13 Now, we know that the agreement between my client
14 and Gascoigne Halman is a vertical one, albeit
15 a vertical one in, as Mr Freeman put it, a horizontal
16 context. It is not a direct agreement between agents.
17 But even if it were, even if one was to regard the
18 agreement as horizontal, it doesn't amount to an object
19 restriction. As I indicated in opening, and Mr Harris
20 hasn't, I think said anything to the contrary in the
21 course of the trial, whether an agreement restricts by
22 object depends on whether it reveals a sufficient deal
23 of harm to competition to remove the need to examine the
24 effects. That is Cartes Bancaires. I took you to it in
25 opening. It is in bundle K2, tab 21. I am not going to

1 go to it now. The relevant paragraphs are certainly
2 between 49 and 53.
3 In paragraph 53 the court explains that in order to
4 determine whether one is in object territory you have to
5 have regard to the economic context of the agreement.
6 So what's the economic context of this agreement?
7 First, there were prior to my client's entry and still
8 are two very large portals, Rightmove and Zoopla. We
9 know, it is common ground, that most agents felt
10 compelled to list on both of them. See the
11 cross-examination of Mr Parker who agreed by reference
12 to one, I think, of the Zoopla documents which showed
13 that 88 per cent of agents listed on Rightmove and 89
14 per cent listed on Zoopla and he confirmed that when one
15 does the math, as the Americans would say, the minimum
16 of 77 per cent of agents therefore listed on both the
17 two main portals, Day 8, page 108, line 16 and
18 following.
19 Third, the other portals beside the incumbents and
20 OnTheMarket were and are insignificant, to pick up
21 a point Mr Landers raised right at the beginning on
22 Day 1. That was already the case by the time of the OFT
23 merger decision. We have been to the OFT decision on
24 a number of occasions. I think we haven't been to this
25 bit, and could I just invite the Tribunal to dig out one

1 last time the OFT's decision which is in bundle F1 and
2 you will remember that it starts at page 309. I just
3 want to show the Tribunal -- it starts at 309. If you
4 turn to 318 and could I just invite the Tribunal to
5 note, I am not going to read it out, but could I just
6 invite you to note paragraphs 31 through to 34 inclusive
7 dealing with what's called a "tale of smaller property
8 portals", at 31 through to 34 where the conclusion is
9 that the smaller portals are unlikely to represent
10 a meaningful constraint on the parties, ie Zoopla and
11 Primelocation at this stage or Rightmove. And so they
12 forget about that. They sideline them and go on to deal
13 with the parties and Rightmove, and quite rightly.
14 So that's the third point. The fourth point is that
15 the other portals had a much lower level of site visits,
16 they were less valuable and they didn't constrain the
17 larger portals. That remains the position today. See
18 the appendix to the amended defence which is in bundle A
19 at tab 2, a helpful table in Mr Harris's pleading.
20 The evidence that the Tribunal has heard from the
21 estate agents which you have heard during the trial also
22 tends to confirm that Rightmove and Zoopla were the only
23 real shows in town and that portal listing -- this is
24 the point -- that portal listing was not, contrary to
25 Mr Harris' submission, and prior to my client's entry an

1 important parameter of competition at all. As
2 Miss Frew, my learned friend's witness put it, she said
3 at Day 2:
4 "When you've only got two portals then, you know, it
5 was interesting and positive, potentially positive to
6 have a third portal."
7 In her mind there were only two portals of
8 importance. The same point was made in an exchange
9 between Mr Harris and Mr Symons on Day 4, see page 14,
10 line 9. Again I am not going to read all of this out
11 but Mr Symons made the point in his answers that there
12 were really only two portals. He went on to say:
13 "I mean to completely clarify, they were utterly
14 insignificant to us."
15 Ie the other ones, the ones that didn't matter.
16 Page 45:
17 "The truth is there were only two. The rest were
18 little insignificance."
19 "It was designed to take from both of them. We
20 found we can live with two portals quite easily and
21 without losing any market share at all," said Mr Wyatt
22 on the same day at page 80, and there are other
23 references to be found at page 79 as well.
24 So when one has regard to the evidence of the estate
25 agents and the economic context in which the OOP rule

1 was introduced, it is not correct in our submission that
2 the OOP rule has limited output or has restricted agents
3 in an important parameter of competition at all, what
4 Mr Harris this morning called a key parameter of
5 competition.
6 Before my client entered with the OOP rule, agents
7 effectively had a choice of listing with one or both of
8 the major portals. The other portals were insignificant
9 and didn't affect competition or offer any realistic
10 opportunity for agents to differentiate their offering.
11 In this context if you take paragraph 100.1 of my
12 learned friend's written closing argument it is rather
13 interesting to note what he says here -- 100 is a very,
14 very long paragraph with all sorts of subpoints and
15 subplots but if you take 100.1 at internal page 59 at
16 the bottom of the page do you see the (ii), so the
17 sentence begins in the middle of the paragraph:
18 "Thus the OOP rule substantially simplifies the
19 tasks for AM and for its member agents in coordinating
20 as to the choice of other portal once OTM has joined
21 rather than each member having to decide separately and
22 independently of other agents in respect of each and
23 every other portal in the market whether they would drop
24 it or not they would have the comfort of knowing: 1..."
25 And then 2:

1 "The choice, given market conditions, is effectively
2 a binary one of choosing Rightmove and boycotting Zoopla
3 or choosing Zoopla and boycotting Rightmove."
4 That recognises rightly, we say, just how restricted
5 a parameter of competition the choice of portal is and,
6 as Gascoigne Halman recognise in that same paragraph,
7 100.1, the market conditions which one has to have
8 regard to for the object argument mean that agents felt
9 compelled to maintain a listing with either one or both
10 of the incumbent portals. The smaller ones were of no
11 competitive significance and didn't permit an agent to
12 differentiate itself in any meaningful way."
13 My client's launch has not reduced the opportunities
14 for agents to differentiate themselves or in any way
15 limit their output. On the contrary, it has increased
16 the opportunities for differentiation. It has enabled
17 agents to offer a wider array of choices to their
18 customers. Agents' Mutual members listed on one of the
19 incumbent portals before, who did so before can still do
20 so in combination with OnTheMarket. Members listing on
21 both of the incumbent portals before have chosen to
22 substitute OnTheMarket for one of the incumbent portals,
23 thereby differentiating themselves in a way which
24 wasn't open to them previously. The incumbent portals
25 were free to compete for the business of these agents at

1 the moment when they made their choice and they can
2 still compete to be the one other portal of
3 Agents' Mutual members and of course Agents' Mutual
4 members are -- of course the smaller portals are still
5 there but they are still as utterly insignificant as
6 they always were.
7 We submit that the situation does bear some analogy,
8 contrary to Mr Harris's submission, with the BAGS case.
9 Can I just show you Lord Justice Lloyd in BAGS in K4.
10 Now, there was a BAGS case in K4 but that was the first
11 instance decision. That was the wrong case. I hope you
12 now have in bundle K4 tab 48. You should have the Court
13 of Appeal's decision in the BAGS case which was the one
14 we really want. We have quoted some parts of this in
15 our written closing. I don't want to show you the bits
16 we have quoted in the closing. I want to show you
17 a different bit which is paragraph 92 of
18 Lord Justice Lloyd who gives the main judgment with whom
19 Lord Justices Moore-Bick and Mummery agree. Paragraph
20 92 at page 2722 of the authorities bundle:
21 "At a more basic level. ...(Reading to the
22 words)... but did not and could not exist at the time."
23 Now, in the present case it is true that there was
24 some degree of competition, and Mr Bishop never
25 suggested otherwise, between the incumbent portals for

1 the business of agents but Mr Bishop's point, which my
2 learned friend with respect hasn't grasped, is that
3 there was no competition, there was no meaningful
4 restraint by Zoopla, prior to my client's entry of
5 OnTheMarket, on the pricing power of Rightmove. The
6 question is whether portal choice represented an
7 important parameter of competition which the OOP rule
8 has constrained and the answer to that question is no,
9 on the contrary, as I have already submitted, the only
10 competitively significant choice was prior to my
11 client's entry whether to list on either or both of the
12 incumbent portals and the large majority of agents, as
13 we have seen on the evidence, felt compelled, for
14 whatever reason, whether it was the wildebeest, herd
15 data or some other reason felt compelled to list on
16 both.
17 The choice of listing on either of the portals
18 remains open and the fact that those agents who are
19 members of my client have exercised a competitive choice
20 to list with Agents' Mutual and one of the incumbents is
21 a situation which illustrates the injection of
22 competition into the market which my client's entry has
23 brought about.
24 I was just going to turn to the CMA's letter just
25 very briefly. If I can just do that that would be

1 convenient.
2 THE CHAIRMAN: Please do.
3 MR MACLEAN: Mr Harris relies in his closing submission
4 footnote 3 to paragraph 5.1 on the CMA's letter to my
5 client of 27 March 2015. That is in bundle H10 at
6 page 5395. What that says is, and I quote:
7 "The number and identity of portals can be an
8 important parameter of competition for estate agents."
9 That statement is true, and no doubt carefully
10 worded, see the word "can" and the CMA of course was --
11 well, can, can be an important parameter and we know
12 that the CMA's predecessor, the OFT, at the time of the
13 merger was similarly of the view that there could be
14 some additional restraint on Rightmove after the merger
15 of Zoopla and Primelocation.
16 But the point about the CMA letter of March 2015 and
17 indeed the other CMA letter and the email that followed
18 it in 2016 is that the CMA did not have any present
19 concerns about what it calls the plus one rule, the OOP
20 rule, it didn't have any concern about the bricks and
21 mortar restriction either. Those concerns would only
22 arise if and in the event that my client acquired market
23 power. Mr Parker, on his analysis my client's going to
24 be of tiny significance each in 2020 and no one
25 seriously suggests that Agents' Mutual has ever had

1 market power, in 2015 had market power or even today is
2 anywhere close to obtaining market power.
3 MR FREEMAN: Mr Maclean, you don't take Mr Harris's point
4 that having 6,000 agents as members gives market power
5 of some kind?
6 MR MACLEAN: No, it doesn't. I am going to deal with the
7 34 per cent figure that's been floated around and I am
8 going to explain why that figure is to all intents and
9 purposes meaningless. It certainly doesn't get
10 Gascoigne Halman anywhere. I was going to spend just
11 five minutes on that in the course of my submission.
12 So I was going to turn then to the supposed object
13 infringement vis à vis the portal market, but would it
14 be convenient to do that after the short adjournment?
15 THE CHAIRMAN: Yes, thank you very much, Mr Maclean. We'll
16 resume at 1.55.
17 (1.10 pm)
18 (Luncheon Adjournment)
19 (1.55 pm)
20 MR MACLEAN: Sir, I wanted to turn to say just a few words
21 about the object case in relation to the portal market.
22 If you have our written closing to hand, we deal with
23 this between paragraphs 43 and 49. I am not going to
24 obviously go through all of that. I know the Tribunal
25 has read it. But as we point out at paragraph 46, the

1 case law confirms that even a full exclusivity
2 requirement is not a restriction by object, and we give
3 some references there, but in particular the Advocate
4 General's opinion in the Neste case, which we cite in
5 paragraph 46, and the reference for that is bundle K1,
6 tab 9 at pages 586 to 587.
7 Then we go on in that same paragraph to point out
8 that Mr Parker in purporting to find an adverse effect
9 on the portal market acknowledged that his result was
10 unusual given that provisions such as the OOP rule are
11 typically of concern only being enacted by the dominant
12 firms, in which case they are controlled under the
13 Chapter 2 prohibition, and we give the reference to
14 Mr Parker's first report. I am not going to read this
15 out, but the Tribunal will have seen what we say in our
16 paragraph 48.
17 To turn then to what Mr Harris says in his closing
18 submissions, in paragraphs 35 to 38 of their written
19 closing, my learned friends make the somewhat surprising
20 submission that my clients have, as they put it, all but
21 abandoned the justification for the OOP rule that it
22 provides a differentiated stock of properties, so that
23 OnTheMarket didn't simply replicate the same stock
24 available on both of the incumbents.
25 My learned friends rely for that claim on

1 Mr Springett's evidence. With respect, that is quite
2 wrong, because when one looks at Mr Springett's
3 evidence, it's clear in our submission that he
4 absolutely stood by -- and my clients stand by -- the
5 justification of the OOP rule which was consistently
6 stated in the contemporaneous document.
7 The relevant passages are in Day 7 of the
8 transcript, and I am just going to ask you to turn those
9 up in just a moment, and we cite them in our closing
10 submission at paragraph 49.
11 But where the point goes is if contrary to
12 Mr Harris' submission -- he is very keen to distance
13 this case from the BAGS case -- this case is like the
14 BAGS case because my client generally and the OOP rule
15 specifically were introduced with the object of
16 increasing competition by enabling the entry of an
17 additional undertaking into the market. That's BAGS
18 paragraph 81, Lord Justice Lloyd, with whom
19 Lord Justice Moore-Bick and Lord Justice Mummery agreed,
20 which we cite in our closing submissions at
21 paragraph 33.
22 Can I then just show you briefly the relevant bits
23 of the transcript which I was referring to. If you have
24 the daily transcript, they are all in Day 7. I think
25 there are three extracts I want to show you. The first

1 one, using the four pages to a page version, is page 66
2 of the transcript, where right at the bottom of the page
3 Mr Harris asks:
4 "Can you show me the document?"
5 Do you see that?
6 Can I just draw the Tribunal's attention to
7 Mr Springett's answer beginning, "That's a judgment",
8 and the next answer beginning "Well, because our view".
9 Then if you go over two or three pages to page 79 of the
10 transcript, line 17, you see Mr Harris' question:
11 "So you could have gone round?"
12 And can I draw your attention to Mr Springett's
13 answer beginning, "No, because it still doesn't
14 address".
15 And then finally on this point, page 91, Mr Harris's
16 question at line 17 -- that seems to be where he asked
17 all his best questions -- line 17:
18 "My suggestion to you under the OOP rule in
19 fact~..."
20 Can I just highlight Mr Springett's answer, "Well,
21 I don't think" over the page, ending, "Either Rightmove
22 or Zoopla". Then Mr Harris asks him another question,
23 and in his next answer beginning, "Well, and I take that
24 view", he says:
25 "What we've said is, I think it is referred to here

1 and there as a unique collection of properties ..."
2 And then at the end:
3 "I have explained to you what the objective was, to
4 move the market away from the situation where any new
5 entrant would only ever have a subset of what one or
6 other of the big portals had."
7 So there has been no resiling from that at all and
8 we are slightly puzzled to see the suggestion otherwise
9 in my learned friend's closing.
10 Can I say just a couple of words about collective
11 purchasing and indeed joint production/ My learned
12 friend's written closing contained some material on
13 collective purchasing which might charitably be
14 described as rather novel. What we have in mind are the
15 passages beginning at paragraph 25 referring to the
16 horizontal guidelines. If you have my learned friend's
17 written closings at paragraph 30.4, it is said:
18 "With respect to the purchasing market, ie here the
19 property portal market, it is necessary to focus on the
20 extent to which switching by the suppliers constrains
21 the purchasers, ie the extent to which property portals
22 are able to switch away from supplying the parties to
23 the agreement in question."
24 Then there is a citation you see in the parenthesis
25 a couple of paragraphs further on, paragraph 198 of the

1 horizontal guidelines. Then it is said in the last
2 sentence, picking up a point Mr Freeman touched on
3 before the short adjournment, the last sentence:
4 "In that regard, it should be noted that AM's
5 members account for over one-third of the estate agents
6 demanding property portal services since as accepted by
7 Mr Springett, AM has member branches totalling over
8 one-third the total number of agency branches."
9 What we say about that, and I think I dealt with
10 this in cross-examination of Mr Parker, the over
11 one-third figure is a wholly misleading metric which the
12 Tribunal would be wise to ignore. The best measure is
13 sales by value, ie revenue, and as to that Mr Parker's
14 first report, bundle F, tab 1, page 33 at
15 paragraph 4.4.2. You will remember that Mr Parker
16 identified three different metrics by which one, as he
17 puts it, can measure the size of the market. The first
18 one was number of visits, the second was number of
19 agents and number of properties listed, and then the
20 third one was direct property portal metrics such as
21 revenue. At 4.4.2, he says this:
22 "In my view, the revenue metric is the most directly
23 informative measure as it reflects the ability of
24 portals to charge for their services. This metric is
25 also considered most informative by the competition

1 authorities who particularly aim to measure market
2 shares on a revenue basis as a result."
3 Dead right.
4 Now Agents' Mutual's share of purchases by revenue
5 is well below, very far below, 30 per cent. The agents
6 buy from Agents' Mutual, which has the lowest ARPA --
7 average revenue per advertiser -- of the three portals,
8 and usually almost always from one other portal, most
9 from Rightmove and some from Zoopla. You can see the
10 comparative ARPA figures, if you haven't put Mr Parker's
11 first report away again.
12 In bundle F1, tab 1, page 79, you can see the
13 comparative ARPA figures on Mr Parker's own analysis,
14 which chops them up into six monthly periods. Mr Bishop
15 doesn't think that is the correct approach, indeed, it
16 introduces errors, he explains. But we need not worry
17 about that for the moment. I just want to remind the
18 Tribunal of the overall pattern of ARPA, and you can see
19 that Rightmove is some way ahead of Zoopla, which is
20 some way although less far ahead of OnTheMarket.
21 In any event, the collective purchasing that
22 Mr Harris is discussing in his closing submission is the
23 collective purchasing by Agents' Mutual's members of
24 Agents' Mutual's listing services, because collective
25 purchasing from other portals is not impugned.

1 So the relevant question for the purposes of this
2 litigation is whether other suppliers are foreclosed
3 because too great a portion of the purchasing market is
4 subject to the OOP rule.
5 The answer to that question is very obvious. The
6 relevant market share measure is a proportion of the
7 market which is being supplied by Agents' Mutual over
8 the listing period, the period for which the OOP
9 restriction applies. Agents' Mutual does not require
10 agents to purchase the entirety of their portal
11 provision from it, but only a proportion of their
12 services; 50 per cent by volume and less than that by
13 value, given Agents' Mutual's lower ARPA as I have just
14 shown you.
15 On that basis, Agents' Mutual's arrangements cannot
16 possibly cause any competition law difficulties because
17 the amount of the purchasing side of the portal market
18 that is tied up, to use a neutral term -- foreclosed if
19 you like, but tied up would be a neutral term -- by
20 Agents' Mutual's entry is tiny. And the one-third,
21 32 per cent or 34 per cent, or whatever it is, figure is
22 of no value because it is not a measure of market share.
23 And Mr Parker, although I asked him twice what this was
24 actually doing, well, he did indicate -- I'm not sure we
25 got a very coherent answer to that question -- but he

1 didn't suggest and can't suggest, and in light of his
2 first report -- I have shown you the references -- that
3 it is a metric of market share. And plainly it isn't.
4 So there just aren't any competition law difficulties at
5 all raised by my client's entry into the market.
6 My learned friends then go on to suggest, they
7 appear to be suggesting, that an agreement to purchase
8 largely or exclusively from a collective will in all
9 cases infringe article 101 by object; and more generally
10 that an agreement by members of a purchasing collective
11 to buy from such a collective will infringe article 101
12 unless it can be justified as strictly necessary to
13 ensure that the cooperative can function properly.
14 We get that from paragraph 33 of my learned friend's
15 written closing. In those paragraphs, 33, 33.1, 33.2
16 and 33.3, they refer to a couple of cases. First of
17 all, they refer to Gottrup Klim -- I am going to come to
18 that in just a second -- and they also refer to the
19 Rennet case you see in paragraph in 33.3.
20 Neither of those propositions, the ones of the two
21 I have just referred to, is correct. I want to make
22 three observations if I may.
23 First, the Rennet case, which you have in my learned
24 friend's additional bundle of authorities Mr Harris took
25 you to at tab 1. That represents now rather old case

1 law from the Court of Justice, under which collective
2 purchasing arrangements were treated as restrictions by
3 object. But that case law has been superseded by the
4 more contextual and economic approach which is taken in
5 Gottrup Klim. I just want to show you one extract from
6 Bellamy and Child which makes this good.
7 If you take bundle K4 and if you turn, please, to
8 page -- it should be, I hope, tab 53. We should
9 obviously have photocopied the front page of this, but
10 would the Tribunal take it from me this is the current
11 edition of Bellamy and Child. You see the heading
12 "Joint purchasing agreements". It is a fairly shortish
13 passage which runs from here through to page 375.
14 I dare say all of it is some interest, but the most
15 important passages, the ones I would invite the Tribunal
16 to look at now, are 6.068 at the foot of 372 and 6.069.
17 I wonder whether the Tribunal would just read them to
18 yourselves, if you would. You will see the footnote 304
19 is the Rennet case. That is the older case law, and
20 then 6.069 comes on to discuss Gottrup Klim, which in
21 our submission is the more modern and current approach.
22 If the Tribunal would care to read those two
23 paragraphs, I would be very grateful. (Pause).
24 THE CHAIRMAN: Yes, we have read that.
25 MR MACLEAN: You will see the next paragraph goes on to say:

1 "A notional joint purchasing agreement will have as
2 its object the restriction of competition where it is in
3 fact a disguised cartel ..."
4 And some cases are cited, but that is obviously not
5 this case.
6 So then Gottrup Klim itself, which is as you see
7 heavily footnoted in paragraph 6.069 of Bellamy and
8 Child, the case itself is at tab 50 of bundle K4.
9 Gottrup Klim is not authority for the proposition that
10 a collective purchasing agreement will infringe
11 Article 101 unless it can be justified as strictly
12 necessary to the functions of the cooperative.
13 What was going on in that case, if we turn to
14 paragraph 28, was that the court was considering whether
15 a provision in the statutes of a cooperative purchasing
16 association was caught as they put it in paragraph 28,
17 by the prohibition in what is now Article 101. At
18 paragraph 32 of the judgment, the court made clear that
19 collective purchasing associations may be a good thing
20 for competition, and the court recognised that.
21 "A provision preventing members from joining other
22 associations may have adverse effects on competition and
23 that to escape the prohibition. Regardless of such
24 effects, the restrictions under the rules would need to
25 be limited to what was necessary to the proper

1 functioning of the cooperative."
2 You get that from paragraph 35. In other words, the
3 court was making clear that the provision at issue in
4 that case could infringe article 101 by reason of its
5 adverse effects on competition. Whether it did in fact
6 have such an effect would be a question for the national
7 court referring the matter to the European Court. And
8 if it did, the association's rules would need to be
9 justified.
10 But the issue of justification only arises where
11 a restrictive effect has first been shown. And one of
12 the problems with one of the themes of Mr Harris'
13 submissions was that he spent quite a lot of time
14 attacking my client's positive case on ancillary
15 restraint and exemption, which of course we only get to
16 if Mr Harris succeeds in his positive case of showing
17 there is either some restriction by object or
18 a restriction by effect in one of the ways which hasn't
19 been abandoned under the concession.
20 In other words, basically, whether he can show there
21 is an effect argument on the portal market of the OOP
22 rule. That is really what his effects case now comes to
23 in light of those concessions. The third point, as
24 Bellamy and Child note:
25 "The horizontal guidelines adopt the most contextual

1 approach in Gottrup Klim and only treat collective
2 purchasing agreements as infringements by object in very
3 limited circumstances."
4 So in this case, even if the OOP rule was to be
5 treated as a horizontal agreement between agents --
6 which on the face of it, it is not, because it is
7 a classic vertical restraint--. But even if that were
8 to be treated as a horizontal agreement, there is simply
9 no support for my learned friend's wholly misplaced
10 submission that it is to be regarded as an infringement
11 of Article 101 and less capable of objective
12 justification.
13 In paragraph 29 of my learned friend's closing, he
14 makes some points on joint production by reference to
15 the Commission's guidelines. Those observations in his
16 paragraph 29, in our respectful submission, don't take
17 matters any further and I don't propose to say anything
18 about them.
19 Can I then turn to the case on effect, and I am
20 talking now about the effect of the case in relation to
21 the OOP rule in the portal market, because the effects
22 case on the estate agents market has been dropped.
23 MR FREEMAN: Just before you get there, just going back to
24 our Danish friend, Gottrup Klim. That is a preliminary
25 ruling on a reference from a Danish court, and I just

1 wonder how much weight do we attach to the factual
2 matrix of that case in trying to construe the rather
3 Delphic pronouncements of the reference judgment?
4 MR MACLEAN: I am not sure one needs -- the reason I take
5 you to Gottrup Klim is really to make the good point
6 that Bellamy and Child make about the fact that Rennet
7 is now rather old hat. And the reason I take you to
8 Gottrup Klim is to show you the approach, the contextual
9 and economic based approach that is now to be taken.
10 I am not sure you get much assistance from the
11 detailed --
12 MR FREEMAN: It is responding to questions, so the questions
13 drew attention to particular restrictions, which is why
14 you get the restrictions mentioned in the reference
15 judgment.
16 MR MACLEAN: Yes.
17 MR FREEMAN: So what I am asking is: do you have to go
18 behind that and parse what was going on in the Danish
19 litigation in order to understand what the court was
20 getting at, or can we just take the statements as
21 literal tablets from Mount Sinai, as it were?
22 MR MACLEAN: You can take the court's answer to the
23 questions referred to the court as being all one needs
24 in order to grasp what the court was saying about the
25 relevant legal principles.

1 MR FREEMAN: Till the next question is asked and then --
2 yes.
3 MR MACLEAN: Well, one builds up the picture in stages.
4 MR FREEMAN: Okay.
5 MR MACLEAN: So far as the effects case is concerned, as we
6 have pointed out in paragraph 50 of our closing
7 submission -- indeed, I think I touched on this in
8 opening -- the correct analytical approach as to
9 analysing the effects is set out amongst other places in
10 this Tribunal's decision in the Sainsbury's case, to
11 which the Chairman was a party -- see paragraph 105.
12 The reference for that is in bundle K3, tab 35,
13 pages 2019 to 2020.
14 What one does, we all know, is to identify the
15 relevant market, identify theory of harm, and then you
16 imagine what the market would have been like absent the
17 alleged infringing provision. And as we also point out
18 at paragraphs 52 and 53 of our written closing, I just
19 want to show you this briefly. If you take our written
20 document and turn to paragraph 52, we refer to the O2
21 case where the court examined how competition would
22 operate in the absence of the agreement:
23 "As the court observed in the O2 case, the
24 examination of how competition would operate in the
25 absence of the agreement is particularly important in

1 markets where effective competition may be problematic,
2 owing for example to the presence of a dominant
3 operator, the concentrated nature of the market
4 structure or the existence of significant barriers to
5 entry."
6 Then we refer to BAGS. Can I just invite you to
7 take up the BAGS case, the Court of Appeal version,
8 bundle K4, tab 48. Just to show you paragraph 97, which
9 is the passage we refer to there, still in the judgment
10 of Lord Justice Lloyd, just above paragraph 95, you see
11 the heading, "Arrangements with the effect of
12 restricting competition". Lord Justice Lloyd says:
13 "I therefore turn to anti-competitive effect."
14 And at 96 he refers to the O2 v Commission case.
15 And at 97, he says this:
16 "The markets presently under consideration are not
17 in general analogous to the emerging TT mobile
18 telecommunications market. But they do share the
19 features of a dominant operator and high cost of entry
20 as a significant barrier to a new operator. ...(Reading
21 to the words)... Equally the references in paragraph 68
22 and 71 to considering the agreement in light of the
23 competition situation as it would be in the absence of
24 the agreement in dispute are highly pertinent to the
25 present case."

1 We respectfully suggest those observations find an
2 echo in this case too. As we go on to say then in
3 paragraph 53, the burden is on my learned friend,
4 Gascoigne Halman, to show that although the (inaudible)
5 gives rise to an adverse effect on competition in any
6 relevant market. We have given the reference to the
7 regulation, but I am not going to waste time turning
8 that up.
9 Now, as we explain from paragraph 56 and following
10 in our written closing, Mr Parker's analysis just does
11 not show that OnTheMarket's entry has caused any
12 appreciable harm to competition. Mr Parker's
13 theoretical account in support of his unusual conclusion
14 rests on an important and incorrect assumption; namely
15 that ZPG provided any material constraint on Rightmove's
16 pricing power prior to OnTheMarket's launch. The
17 evidence, we respectfully suggest, does not support that
18 assumption, and we have dealt with that fairly
19 extensively in our written document from paragraphs 58
20 to 68 in particular.
21 As we point out at paragraph 65 -- we have set out
22 extensively extracts from Morgan Stanley, from Enders,
23 from Exane BNP Paribas, from the estate agents
24 themselves who gave evidence. And at paragraph 65, we
25 make the point that Rightmove's ARPA has progressed

1 upwards for several years at the same rate with no
2 change either following the ZPG merger with
3 Primelocation in 2012, or following OTM's entry,
4 although ZPG's ARPA has also increased every year since
5 the merger, albeit at slower rate since OnTheMarket's
6 launch.
7 Then at paragraph 69 and following, we deal with the
8 OFT's decision in relation to the Zoopla merger. The
9 Tribunal I know already has the point well in mind that
10 our submission is that that decision by the OFT does not
11 provide any strong support for the suggestion that ZPG
12 constrained Rightmove's pricing power before OTM's
13 launch. As we point out at paragraph 71, in his opening
14 submissions my learned friend Mr Harris accepted that
15 that was so, contrary to the contentions advanced by
16 Mr Parker in his evidence.
17 At paragraph 72 of our written document, we have
18 attempted to summarise the reasoning of the OFT, and
19 again, I am not going to spend time reading that out.
20 But what I do want to spend just a little bit of time on
21 is Mr Parker's empirical analysis. Because as we tried
22 to explain from paragraphs 76 and following, the
23 empirical analysis relied upon by Mr Parker to validate
24 this does not demonstrate any increase in Rightmove's
25 pricing power.

1 Can I just draw your attention to footnote 22,
2 because it is actually rather important. This is
3 paragraph 35 of our written closing. What we say there
4 is that during his oral evidence to the Tribunal, by
5 which we have in mind not just his cross-examination but
6 also the hot tub experience, Mr Parker very visibly
7 sought to downplay the significance of the empirical
8 analysis, describing it as, "By no means the only item
9 of evidence I think I bring to bear", coming right at
10 the end of the other evidence, and so on.
11 But the important point is not the extent to which
12 Mr Parker was running away from, though he was, the
13 important point is at the end of that footnote. The
14 empirical analysis is the only means by which Mr Parker
15 purports to substantiate his allegation that agents have
16 experienced higher prices by reason of Agents' Mutual's
17 entry. His theoretical predictions can't do that, nor
18 does the OFT decision, nor do the third party
19 statements.
20 So it is only the empirical analysis and nothing
21 else which seeks to address the question of Rightmove's
22 pricing power and whether Rightmove's pricing power has
23 been enhanced. It is no good Mr Parker saying, "This is
24 only one part of the case, I can point to Morgan Stanley
25 or I can point to Enders or I can point to the OFT", the

1 case stands or falls. The case that OnTheMarket's entry
2 has enhanced Rightmove's pricing power stands or falls
3 with Mr Parker's empirical analysis. And if it stands
4 and falls on that, then of course it falls, because the
5 analysis faces at least four hurdles, none of which it
6 is able to clear.
7 It falls at the first; and if it didn't fall at the
8 first, it would fall at the second, and so on. There
9 are four key flaws, each of which is -- to use my
10 learned friend's term -- "fatal" to Gascoigne Halman's
11 reliance on Mr Parker's imperial analysis. We set those
12 out clearly and extensively in our closing submission
13 between paragraphs 77 and 81. I just want to emphasise
14 what each of them is without developing them in the way
15 we have in the written document.
16 The first of the four is this: cost per lead on
17 which the whole thing rests is totally unsuitable as
18 a quality adjusted measure of price. It's not the
19 subject of any negotiation between estate agents and
20 property portals. It is instead derived from the
21 actually negotiated price, which is fixed or fixed for
22 a 12 month period, usually a listing fee, negotiated
23 annually and based on a price per branch per month, and
24 the numbers of leads subsequently achieved during that
25 year.

1 In other words, as Mr Bishop explained, it is an
2 ex post measure used by Mr Parker in an attempt, to use
3 the chairman's terminology, to slice out of the bare
4 price a particular driver of that price without taking
5 account of the other features of the service provided by
6 property portals to the estate agent's way when
7 assessing the value of a particular portal.
8 That is the first problem; the cost per lead is just
9 unsuitable as a tool for the task to which Mr Parker
10 sets down to deal with.
11 The second problem is that cost per lead, even if
12 one does adopt that as the metric, will inevitably vary
13 for a variety of reasons which have nothing to do with
14 the pricing power of any particular portal. We give
15 three examples of this at our paragraph 78. One of
16 those is that the design of a particular portal may
17 affect the volume of leads produced.
18 You will remember the evidence about one too many
19 leads which have the potential to produce a large volume
20 of leads, usually of fairly low quality -- see for
21 example, Day 3, pages 155 to 159, but also
22 Mr Springett's seventh statement and various other
23 places, and indeed the Exane BNP Paribas report of
24 8 January 2015, bundle X2, tab 41, page 351.
25 You will recall during his evidence, Mr Notley

1 explained for the first time that Rightmove, not Zoopla,
2 had removed a particular type of lead in 2016. And that
3 is inconvenient for Mr Parker because those changes are
4 likely to impact on the overall volume of leads
5 produced, and the increase in cost per lead relied on by
6 Mr Parker as supposedly showing Rightmove's greater
7 pricing power since my client's entry is driven not by
8 any change in the rate of increase of Rightmove's ARPA,
9 but rather by its number of leads stalling in 2016.
10 But as I think I made the point at the end of
11 Mr Parker's cross-examination, the Tribunal has no way
12 of knowing based on Mr Parker's methodology whether the
13 phenomenon he detects was caused by a change in the
14 design of Rightmove's portal. To accept Mr Parker's
15 analysis, the Tribunal would need to be satisfied that
16 no other important drivers beside pricing power could
17 account for the changes in cost per lead that Mr Parker
18 claims to have identified. That is the second problem.
19 That is also fatal.
20 The third problem is that Mr Parker in attributing
21 the alleged increase in cost per lead to Rightmove's
22 pricing power as opposed to some other explanation has
23 a problem, because both ZPG's and Rightmove's cost per
24 lead have on his analysis risen. But on his theory,
25 only Rightmove has any pricing power in the market that

1 could have increased. So he has to give some other
2 explanation for ZPG's increase, which he conveniently
3 attributes to a timeline.
4 As we point out in our written closing at
5 paragraph 79B -- we are not at all persuaded that is
6 remotely plausible -- but even if it were accepted,
7 Mr Parker has no basis on which to conclude that the
8 increase in Rightmove's cost per lead is not to be
9 explained on the same basis rather than by reference to
10 any alleged increase in Rightmove's pricing power.
11 I suggested to Mr Parker that he was in effect
12 guessing, a proposition which of course he rejected.
13 But whatever Mr Parker may have been doing, the Tribunal
14 is not in the business of guessing, and I know this
15 Tribunal won't be doing so. So that's the third
16 problem.
17 The fourth problem is the one that Mr Landers, if
18 I may say so, put his finger on, which is that the
19 empirical analysis of cost per lead which Mr Parker
20 presents is based on only six data points, from which as
21 Mr Landers put it in the question to Mr Parker, I think
22 it was, it is very difficult to draw any conclusions.
23 What we do know is that it doesn't meet the conventional
24 standards of significance usually employed by economists
25 and embodied in the Commission's best practice

1 guidelines, with which Mr Parker was in fact very
2 familiar, but which he hadn't referred to or dealt with
3 in either of his reports.
4 So in short, Mr Parker's empirical analysis simply
5 does not demonstrate the required causal link between
6 OTM's entry with the OOP rule and the alleged increase
7 in Rightmove's prices -- I use that word advisedly -- to
8 make good Gascoigne Halman's allegation of adverse
9 effects on the portal market. And that is the end of my
10 learned friend's case on effects in relation to the OOP
11 rule, and it is actually the end of this case.
12 But I'm going to deal anyway with what my learned
13 friend says about the supposed collective boycott. We
14 dealt with this in our opening, we have made the points
15 in our opening and indeed in our written closing. We
16 have made the points about the case as pleaded against
17 us. And the case that's pleaded against us is a case of
18 collective boycott of Zoopla.
19 In his opening submissions and in their closing
20 submissions, Mr Harris now tries to ride several other
21 horses besides the collective boycott of Zoopla because
22 that case hasn't come up to proof.
23 Before I go into the detail of this, I should
24 perhaps note that despite the vast number of documents
25 in the bundle in fact, and despite the enormous efforts,

1 almost without boundary, that Zoopla seems have gone to
2 in order to gather information which they hope might be
3 of some assistance to Gascoigne Halman in these
4 proceedings -- I have in mind people in Northern Ireland
5 sitting with tape recorders in their handbags --
6 Gascoigne Halman have in fact relied --
7 MR HARRIS: Sir, that is an entirely unfair remark. What on
8 earth has that got to do with Zoopla? That is
9 completely unwarranted and should be withdrawn.
10 MR MACLEAN: Well, the Tribunal will make of it what it
11 will. But what we have seen, in particular in the
12 letter from Quinn Emanuel, is what could only fairly be
13 described as sustained efforts, leaving no stone
14 unturned, in order to gather material which Zoopla for
15 its part -- I am not suggesting Gascoigne Halman or
16 Connells were directly or otherwise involved -- appears
17 to have enthusiastically engaged in.
18 Because we know that Zoopla is really calling the
19 shots and is the real enemy. It is Zoopla that is
20 concerned with OnTheMarket's entry and for very good
21 reasons. But the point I was about to try and make was
22 that Gascoigne Halman have in fact relied on about 100
23 documents in this case in the end, these H1 to H18, the
24 10,000 pages. In fact, they have relied in the end on
25 about 100 documents in their oral opening, in the

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1 cross-examination or in the skeleton argument. They
2 rely heavily -- I will come to in a minute -- on emails
3 from Mr Rook, but they haven't called evidence from
4 anybody at Rook Matthews Sayer, they haven't called
5 Mr Rook to give evidence. They rely -- they are
6 Gascoigne Halman. They haven't called Mr Halman to give
7 any evidence in the context of the allegations about the
8 IEAG. In fact, despite Connells' ownership of two key
9 member firms in regions where they now allege collective
10 boycotts involving Agents' Mutual, they have put forward
11 no witness evidence whatsoever from those member firms
12 of a boycott.
13 The only witness from any of the -- the only estate
14 agent witness at all from any of those firms was
15 Mr Forrest. Mr Forrest quite rightly didn't make any
16 allegations of that sort at all, and he suggested -- and
17 it is obvious from the contemporaneous documents -- that
18 Gascoigne Halman made its choice of portal as
19 a commercial decision upon its own individually, in
20 accordance with the "What's next?" slide in the
21 presentations that Mr Springett made. And this slide is
22 in the Gascoigne Halman presentation, and you will
23 remember it is in the other presentations as well; for
24 example at bundle H2/852:
25 "What's next? ...(Reading to the words)... each

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1 firm must make its own independent decision."
2 And that is precisely what Gascoigne Halman did, and
3 we can see that from Mr Halman's own emails.
4 So what do we make of Mr Harris's new case? The
5 first attempt to provide any specifics as to this new
6 case on collective boycott is in the written closing
7 submission in paragraph 100 and the accompanying
8 annex A, the 28-page I think annex which it says sets
9 out the totality of the evidence.
10 Before we come to the emails and the evidence, can
11 I just start with a little bit of law? This law is in
12 our written opening. It is not in our written closing,
13 and I didn't refer to it in my oral opening. I'm sure
14 the Tribunal has this well in mind, but I just want to
15 remind you of three little bits of law.
16 The first is the Chester City Council case and then
17 the Napp case, both of which refer to in Re H. So the
18 point is, as the Tribunal will recall, Gascoigne Halman
19 must provide strong and compelling evidence that
20 Gascoigne Halman was party to the relevant alleged
21 infringing conduct.
22 First of all, Chester City Council is in bundle K3,
23 tab 31, paragraph 10. Mr Justice Rimer, as he then was,
24 in a case which I see my learned friend appeared for the
25 defendants led by Mr Sharp, Queen's Counsel.

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1 The relevant paragraph, paragraph 10,
2 Mr Justice Rimer -- and I don't know if the Tribunal's
3 copy has been helpfully sidelined as mine has, but
4 that's the bit:
5 "In applying that standard, it is however settled
6 that it is necessary to factor into the assessment the
7 seriousness of the particular allegation being
8 considered, the short point being that the more serious
9 the allegation, the less probable it is well founded,
10 and therefore the stronger must be the evidence to make
11 it good."
12 Then there is a reference to the well-known passage
13 of Re H, Lord Nicholls of Birkenhead. Re H is in the
14 same bundle at tab 25. I'm not going to go to it, but
15 what I want to go to is tab 26. This is the decision of
16 this Tribunal. Originally we had the wrong version of
17 this case in this tab, but when you come to tab 26, are
18 you looking at a decision of 15 January 2002 and where
19 counsel, Messrs Green and Roth as they then
20 respectfully --
21 THE CHAIRMAN: Yes, we have that.
22 MR MACLEAN: That is the right one then, sir, and the
23 relevant passage is at paragraph 107, this Tribunal's
24 judgment. If the Tribunal would just please read to
25 itself and note paragraphs 107, 108 and 109, which makes

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1 the Re H point in the Competition Appeal Tribunal
2 context. (Pause).
3 THE CHAIRMAN: Yes, we have read that.
4 MR MACLEAN: I am very grateful. So that is the evidential
5 threshold, the type of allegation of collective boycott
6 in our submission has to meet.
7 So what do my learned friends say about this? If
8 you take their written closing at paragraph 100 at
9 page 59. In paragraph 100.1, they say that the OOP rule
10 itself is a form of horizontal cooperation or
11 coordination between agents. That of course is
12 a repetition of their case on object but it doesn't take
13 the collective boycott allegation any further. The OOP
14 rule is not required to effect a collective boycott and
15 it doesn't make a boycott any easier to implement,
16 whereas agents can instantly verify whether other agents
17 are abiding by an agreement to boycott the given portal
18 by looking at the portal online.
19 Then at 100.2 to 100.7, allegations are made that
20 agents coordinated in deciding to join OnTheMarket. But
21 joining OnTheMarket doesn't involve the collective
22 boycott of anyone at all. And in our submission,
23 Agents' Mutual was perfectly entitled to use the letter
24 of intent process to market its services to groups of
25 agents at the same time. The evidence the Tribunal has

1 heard clearly shows that the property portals need
2 a critical mass of properties which requires the
3 involvement of multiple agents. That was true of
4 Rightmove in the early noughties, it was true of
5 Primelocation, and it was key to the growth of Zoopla.
6 And the involvement of multiple agents in setting up or
7 joining OnTheMarket is not a restriction of competition
8 by object or by effect.
9 So it is not until you get to paragraph 100.8 that
10 my learned friends turn to an allegation that
11 Agents' Mutual was involved in collusion between agents
12 as to their choice of other portal. That is to say, an
13 allegation of collective boycott in various parts of the
14 country.
15 What they say is that they are relying on annex A
16 and what they call the totality of the evidence set out
17 in annex A. You see that in the fourth line of
18 subparagraph 100.8. In fact, annex A has some notable
19 omissions as I'll note shortly in the context of
20 Mr Springett's contact with Mr Rook. But when one turns
21 to annex A, we submit there is no strong or compelling
22 evidence that Agents' Mutual was involved in
23 a collective boycott of any other portal in any part of
24 the country.
25 One could spend a long time going through each of

1 these geographical areas, but I just want to as quickly
2 as I can deal with at least what seemed to be the most
3 important of the allegations made. Over the first few
4 pages of this annex, the first nearly 11 pages is the
5 North East. Now what is suggested in general terms is
6 that my client was involved in an agreement or concerted
7 practice among agents in the North East. But it is
8 still not clear what the agents are actually said to be
9 concerting to do, whether to drop Rightmove or Zoopla.
10 And the emails which are set out are actually
11 a collection of some irrelevant material, some emails
12 that have been spun by Gascoigne Halman into a case
13 against Agents' Mutual, but do not in fact show any
14 involvement by Agents' Mutual in a boycott of anybody.
15 The first email is from Mr Henning of Jan Forster
16 Estates into which Mr Springett is copied, but the
17 emails proposed dropping Rightmove. So clearly that's
18 not going to support any case of a Zoopla boycott. But
19 in any event, the emails are hopeless in our submission
20 as evidence of any participation by Agents' Mutual.
21 Mr Springett's response is at page 1307, set out on
22 page 2 of the annex. He says he does need to speak to
23 Mr Henning:
24 "Regarding any attempt to reach a collective
25 agreement on which portals to drop/remain on."

1 And he warns Mr Henning that there are "competition
2 law issues which you could be exposed to". He explains
3 that:
4 "The bottom line is that each individual firm must
5 make its own independent decision."
6 Now what, one asks, is wrong with that?
7 Then Gascoigne Halman rely on emails beginning nine
8 months later between March and June 2014, see page 3 of
9 the annex. But those are emails about collective
10 negotiations between agents with Zoopla or with
11 Rightmove. In fact, Rightmove refuses to participate in
12 collective negotiations, but Zoopla agrees to do so. My
13 learned friend has made it perfectly clear in his
14 opening, and indeed in his closing argument today, that
15 he does not impugn such collective negotiations with
16 agents by a portal. That's because no doubt Zoopla,
17 part funder of this litigation, was a party to and
18 indeed the driving force behind precisely those
19 negotiations.
20 And as Mr Harris accepts and we also accept,
21 collective purchasing of that nature may well be
22 perfectly lawful for the reasons set out in
23 paragraphs 12 to 18 of our written closing.
24 So then over the page, page 4. On 4 April,
25 Mr Springett provided a list of agents in the North East

1 to Mr Rook and to Mr Henning. He did so for two
2 reasons. First, so they could help with a further
3 recruitment OnTheMarket. Nothing wrong with that. And
4 second, in connection with the portal negotiations --
5 that's to say the collective negotiations by agents with
6 portals -- which Gascoigne Halman makes clear it does
7 not impugn. The email is not compelling evidence or
8 otherwise which could implicate Mr Springett, and hence
9 Agents' Mutual, in any kind of boycott of anybody.
10 Then we have an internal exchange within
11 Agents' Mutual on 2 June 2014, H5/2751. Ms Whiteley
12 emails Mr Springett and her concern is that there have
13 been negotiations with Zoopla and Rightmove for
14 a collective rate at a meeting which Miss Emmerson, the
15 local rep for my client, will be attending. So the
16 conduct of which Agents' Mutual is aware is not
17 a collective boycott discussion but a collective
18 negotiation with other portals which Gascoigne Halman
19 doesn't impugn. Her concern is that the collective
20 negotiation discussion could link to a collective
21 decision on which portals to drop. Mr Springett's
22 response makes perfectly clear that Agents' Mutual must
23 not be involved in discussions of other portals. See
24 the middle of the page, where he says:
25 "Joint negotiation with other portals ..."

1 If we just turn that up, H5/2751. I know we have it
2 set out in the annex, but if we just look at it in the
3 original. In the middle of the page, Ms Whiteley has
4 emailed Mr Springett, and he then replies in the middle
5 of the page:
6 "Yes. Julie needs to ask whoever is leading the
7 market to put matters like further agent
8 recruitment...(Reading to the words)... and then move on
9 to agent only matters. [Joint negotiation] with other
10 portals and choice of other portals are completely off
11 limits for us."
12 Then at the top of the page, he emphasises it again.
13 She should refer people to Clive Rook, she should not be
14 party in any sense to this and should avoid receiving/
15 sending any messages/ documents about it. If questioned
16 about the stand, she should refer people to Clive Rook.
17 I am coming to Clive Rook shortly. What the email
18 shows is Mr Springett, and therefore Agents' Mutual,
19 being very careful to avoid getting involved in any
20 potential boycott of another portal. To go back then to
21 my learned friend's annex in page 5, the annex changes
22 tack and includes an email of 6 June 2014, which is
23 concerned with member recruitment to Agents' Mutual.
24 Nothing to do with any collective boycott at all and an
25 entirely unproblematic practice for the reasons we have

1 set out in our written closing.
2 So this annex is a jumble of different points. Some
3 of it is about collective consideration of whether to
4 join Agents' Mutual, some of it is about collective
5 negotiations with another portal -- Zoopla, in fact.
6 Some of it shows that some agents at least in some
7 places are at least considering having some collective
8 putting of the heads together about the question of the
9 other portal. But my clients are very careful never to
10 be involved in that and to make sure that they are not
11 involved in it.
12 Then we come to 21 June. I just want to spend
13 a little bit of time with this. There is an email
14 correspondence between Mr Rook of RMS -- no doubt
15 Mr Harris would like me to point out at this stage he
16 was also a director of Agents' Mutual. I am going to
17 come to that point in a minute, which of course doesn't
18 take him anywhere -- and Miss Emmerson.
19 This solitary email is perhaps the high watermark of
20 Mr Harris's case. He relies on the fact that
21 Miss Emmerson records that she left the room and they
22 got into the second portal debate feedback suggesting an
23 overwhelming desire to drop Rightmove and Zoopla. But
24 it doesn't get Mr Harris anywhere. I have two
25 observations.

1 First, Miss Emmerson did not attend the discussion
2 relating to the collective negotiations with the other
3 portals. My learned friend does not and cannot suggest
4 otherwise. Second, the feedback she heard after the
5 meeting was that agents favoured dropping both of the
6 incumbent portals. That is not the pleaded collective
7 boycott of Zoopla, and in any event it didn't come to
8 pass. And there is no suggestion that Agents' Mutual
9 supported such a course then, previously or since. On
10 the contrary, the contemporaneous emails show that
11 Mr Springett did not want agents to drop both portals
12 for the reasons he explained in the emails and he
13 explained in his cross-examination. But the key point
14 is that whatever was discussed by the agents,
15 Miss Emmerson wasn't there.
16 Then we go to 2 August, and now we have veered back
17 again to allegations about collective negotiations with
18 Zoopla. Mr Springett offers some thoughts on the
19 prospective group deal. The notes do not say the group
20 should adopt one portal or the other, and of course such
21 collective negotiations are not impugned by Gascoigne
22 Halman.
23 Then at page 6, the next email of 2 August is also
24 about the collective negotiations with Zoopla. No one
25 from Agents' Mutual is copied in to that email, it is

1 not suggested that they were. And that doesn't provide
2 any evidential weight either for Gascoigne Halman's
3 defence. It is true it is an email to Mr Rook, and as
4 we know he was a director of Agents' Mutual. I'm going
5 to deal with that point in just a moment --
6 Then at page 7 there are emails showing agents in
7 the North East discussing which portals to drop and
8 whether to boycott Zoopla. But no Agents' Mutual
9 executive or even employee is copied in to those emails
10 and there is no evidence they saw them or had any
11 involvement in the relevant events.
12 So what do Gascoigne Halman rely on? They put quite
13 a lot of store in the fact that Mr Rook was a director
14 of Agents' Mutual at the time, at least from March
15 I think of 2014. This is a thoroughly bad point for
16 various reasons. The first and most obvious reason, and
17 the Chairman touched on it this morning, is the hats
18 point. Mr Rook was clearly not acting in his capacity
19 as an Agents' Mutual non-executive director, but rather
20 in his capacity as an estate agent on behalf of Rook
21 Matthews Sayer in discussions with other estate agents,
22 and in those discussions those other estate agents had
23 as a group with Zoopla. It would be nonsensical to
24 suggest that Agents' Mutual was one of the legal persons
25 negotiating with Zoopla. Clearly it wasn't.

1 So the fact that he is a director of Agents' Mutual
2 or maybe a director of Unilever, Kraft or Tesco or
3 anybody else is neither here nor there. It was Rook
4 Matthews Sayer that was negotiating with Zoopla, who was
5 participating in the collective negotiation. And if
6 there were any collective boycotts, which it is far from
7 clear there was, it would be Rook Matthews Sayer that
8 would be involved in that.
9 But the second point is a matter of English company
10 law. Mr Rook could not in any event act for or bind
11 Agents' Mutual in any of these discussions. Can I just
12 make that good by reference first of all to two
13 documents. The first one is the articles of
14 Agents' Mutual, the articles of association, bundle
15 H4/2080. These are the articles, and if you turn,
16 please, the two articles that matter are articles 12 and
17 13 at 2091. 2091 says it is the powers of directors --
18 plural:
19 "Subject to the divisions of the provisions of the
20 2006 Act [that is the Companies Act obviously] and these
21 articles and to any directions given by special
22 resolution and subject to any matters especially
23 reserved to the members, the business of the company
24 shall be managed by the directors who may exercise all
25 the powers of the company ..."

1 And then 13, "Delegation of directors powers":
2 "The directors may delegate any of their powers to.
3 (1) Any committee consisting of one or more
4 directors and such other persons if any not being
5 directors co-opted on to such committee as the directors
6 think fit provided that ..."
7 (2) The chief executive for the time being of the
8 company."
9 So actual authority can be conferred on a committee
10 of one or more directors or on the chief executive,
11 Mr Springett.
12 Then can I ask you to turn, please, to bundle K4,
13 the authorities bundle, at page 2887. It should be
14 tab 54, I hope. This is an extract from Bowstead and
15 Reynolds on Agency. If you would turn over the page to
16 8033, you see the heading "Common law" -- this is
17 page 398 of Bowstead. Does the Tribunal see the
18 sentence in the fifth line, "Under the rule in Royal
19 British Bank". If you would just read from, "Under the
20 rule in Royal British Bank", down to, "More specific
21 holding out", which is the end of the pre-penultimate
22 sentence. If you just read that, please.
23 Then once you have got to, "More specific holding
24 out", there is then a discussion about the Companies Act
25 and the various reforms which took place leading up to

1 section 40 of the Companies Act 2006, referred to on
2 8036 on the facing page. Do you see the reference in
3 8036 to section 40 which provides:
4 "... the power of the directors to bind the company
5 and authorise others to do so shall be deemed in the
6 case of a person dealing with a company in good faith to
7 be free of any limitation under the company's
8 constitution."
9 Then the last sentence:
10 "It remains doubtful whether directors who
11 themselves do not purport to be acting as the board but
12 only as delegates are within the purview of section 40."
13 Just before that, it has made the point:
14 "Upon its face, section 40 seems to direct the
15 limitations on the power of the board as a whole when
16 constituted as a quorum. The section refers to the
17 directors, not to individual directors, who ordinarily
18 have little status except at a properly constituted
19 board meeting."
20 Then over the page at 8038 of page 401 of Chitty:
21 "In respect of other agents, including individual
22 director, the agreement will be enforceable by the
23 application of normal rules of agency ...(Reading to
24 the words)... has power to authorise others to bind the
25 company."

1 Clearly we have seen in the article there is power
2 to delegate functions:
3 "... but he can only assume he has actually
4 exercised this power by virtue of the common law rules
5 ...(Reading to the words)... as by granting powers of
6 attorney without restriction."
7 And then last sentence:
8 "But pursuant to the general doctrine, there is no
9 protection even in such a case for a third
10 party...(Reading to the words)... by the facts of the
11 transaction."
12 So in our case, the first answer to Mr Rook as
13 a director point -- and the same applies to
14 Mr Abrahmsohn and indeed to Mr Hodgson -- is that
15 obviously they were acting not on behalf of
16 Agents' Mutual in these groups, but on behalf of the
17 estate agents which were their businesses. But in any
18 event, they didn't have any power to bind
19 Agents' Mutual.
20 They had no actual authority to do so and it was not
21 suggested that they had any actual authority. Nor is it
22 suggested there was any holding out by the company -- of
23 course, one can't hold oneself out in order to have
24 apparent authority. There has to be holding out by the
25 company to say, "X has authority to act on behalf of the

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1 company". That then confers authority.
2 THE CHAIRMAN: Of course we are not here talking about
3 whether these gentlemen bound Agents' Mutual to
4 anything. We are talking about whether any knowledge
5 they had which Mr Harris relies upon is attributed back
6 to Agents' Mutual.
7 MR MACLEAN: Yes.
8 THE CHAIRMAN: Are you saying that the question of
9 attribution is coloured or framed by the actual
10 authority they had pursuant to these rules?
11 MR MACLEAN: Yes, exactly. And we know from Meridian Global
12 where Lord Hoffmann tells us about the rules of
13 attribution of the company.
14 THE CHAIRMAN: The function, yes.
15 MR MACLEAN: Exactly, one looks at the function -- it is not
16 a question of ticking boxes and asking whether
17 somebody's a managing director or the chairman or a
18 director, and one can attribute -- I was in a case
19 called Bilta Nazir in the Supreme Court 18 months ago
20 which traversed exactly this territory. One is
21 concerned -- depending on the particular circumstances,
22 one can identify a particular person who might not be on
23 the board at all, whose knowledge is in the particular
24 circumstances to be attributed to a particular legal
25 person.

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1 Whether they are a director or not, there is no
2 magic in somebody being a director, executive director
3 or non-executive director. There is no magic in any of
4 that. All I am doing here is just pointing out that the
5 fact Mr Rook was a director of Agents' Mutual is, as
6 Lord Justice Laws would say, true but uninteresting.
7 THE CHAIRMAN: Good, I think we are going to the same point,
8 because I was going to say that isn't the test we need
9 to apply the Meridian/Bilta line, rather than the formal
10 powers that accord powers on to a director.
11 MR MACLEAN: Absolutely. All I am doing is -- Mr Harris
12 chants the mantra, he's a director, he's a director. It
13 doesn't matter, it doesn't tell one anything. I'll move
14 on from that.
15 MR FREEMAN: Isn't the fact that Mr Springett as managing
16 director has authority, if he then says to somebody,
17 "Talk to Clive Rook because he's acting for me", does
18 that not carry any weight?
19 MR MACLEAN: It depends what's meant by, "Talk to Clive Rook
20 because he's acting for me". I am not sure the evidence
21 goes that far. The evidence goes as far as to suggest
22 that what Miss Emmerson was to say was that if anybody
23 had a question they were to talk to Mr Rook. That is
24 because Mr Rook, wearing his RMS hat, was the moving
25 spirit or one of the moving spirits behind that group.

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1 So, far from that being something that was conferring
2 some sort of Agents' Mutual authority on Mr Rook, it was
3 precisely the reverse. It was all to do with distancing
4 Agents' Mutual from whatever might be going on on that
5 side of the curtain, because Mr Rook was one of the
6 moving spirits behind the group.
7 So in fact, the company law point goes slightly
8 further. It would have to be the company that would
9 have to confer authority. It's a nice question as to
10 whether Mr Springett could in fact do that, but it
11 doesn't matter.
12 We have also cited a case called Musique Diffusion
13 which makes the same point about authority and so on
14 from the competition law aspect. This is bundle K4 --
15 I think it is not necessary to go to it -- page 2905 at
16 paragraph 97.
17 So then to come back to the annex briefly again, the
18 annex to my learned friend's written submission. If you
19 turn to page 7 of that document, there are some emails
20 internal to my client exchanged between Ms Whiteley and
21 Mr Springett on 5 October 2014, H7/3977. Ms Whiteley
22 says that agents in the North East are thinking of
23 leaving both Rightmove and Zoopla. Nothing to suggest
24 that Agents' Mutual is involved in that. Mr Springett
25 indicates that far from agreeing with her colluding in

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1 the practice, he thinks it is a bad idea. He then asks
2 whether he should "have a go". And as subsequent emails
3 show, what he means is, "Give Clive a call to explain
4 why dropping both portals would be a bad idea". That is
5 not an agreement to boycott, it is the antithesis of an
6 agreement to boycott.
7 And as the Tribunal will recall, there is an email
8 setting out what was discussed on the call between
9 Mr Springett and Mr Rook, which the former sent to the
10 latter. It is a rather startling omission from this
11 table that that email isn't referred to at all in this
12 annex. Just airbrushed out of the relevant history. It
13 is in bundle H7/3994.
14 We dealt with this in our opening submission.
15 Mr Springett to Mr Rook, copied to various people
16 including Ms Whiteley and Mr Henning. What Mr Springett
17 does is to explain:
18 "One other portal situation is much easier to
19 sustain than a total exclusivity and that the easiest
20 situation to sustain is where OTM agents choose to
21 retain the portal that each considers the strongest for
22 their business."
23 He then says:
24 "My advice would on balance still be that you should
25 each choose the lowest risk option for your business and

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1 take the benefits we deliver progressively."
2 You see that at the second hole punch towards the
3 bottom of the page. In other words, each agent should
4 choose the other portal which is best for them. That's
5 about as far removed from strong and compelling evidence
6 of agreement or concerted practice to boycott any
7 particular portal as it is possible to imagine.
8 That is one of the two or three emails which
9 Mr Harris puts at the centre of his case. Another one
10 he gets very excited about is the exchange with
11 Ms Pattinson at H7/3987, which he refers to at page 8 of
12 his annex. Since we are in the bundle anyway, perhaps
13 if we just look at that at page 3990. Mr Springett is
14 getting in touch with Caroline to explore membership
15 options. That's important when we come to the email
16 about alignement which my learned friends with respect
17 misread. He is getting in touch to explore membership
18 options.
19 Then at 3989, Ms Pattinson has been very clear in
20 our position she wasn't prepared to commit to a product
21 she hadn't seen and which she thinks relies on most of
22 her competitors doing something they currently lack the
23 courage to do, ie drop Rightmove. Mr Springett then
24 replies that he appreciated her position of course:
25 "I am simply thinking if all the main agents in the

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1 North East were aligned it would be easier for them to
2 make courageous decisions about individual and indeed
3 potentially all other portals."
4 As we have set out in our written closing, those
5 documents, those words rather, do not bear the weight
6 Gascoigne Halman seeks to place on them. The reference
7 to agents aligning is to them joining Agents' Mutual.
8 The reference to "courageous decisions about individual
9 portals" isn't expressed as a collective matter at all.
10 On the contrary, Mr Springett recognises that selection
11 of the other portal is a matter for the individual
12 choice of agents.
13 So this email exchange, like all the others, simply
14 doesn't support the existence of any agreement or
15 collective practice involving Agents' Mutual boycotting
16 any particular portal.
17 Then the final document emailed in the North East
18 table on page 8 is an internal Rook Matthews Sayer's
19 email of 24 November 2014, indicating that members have
20 committed verbally to Zoopla. But again, there is
21 nothing to link that to Agents' Mutual. So the
22 allegation of some involvement and some collective
23 boycott in the North East in which my clients
24 participated or facilitated, in our submission fails
25 There are various other places identified in the

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1 annex; Wales, Devon, Maidstone, Cambridge, North London,
2 Bristol, Norfolk and East Anglia, and then slightly more
3 diffusely, the IEAG group. But in relation to none of
4 them does Mr Harris make good the suggestion of
5 a collective boycott.
6 Let's just take Wales very briefly. The emails
7 about Wales are all about agents' collective
8 negotiations to join Zoopla, which Mr Harris doesn't
9 impugn. They show at most that Agents' Mutual was aware
10 of those discussions, and Mr Springett offered some high
11 level thoughts about the negotiations. But since the
12 negotiations aren't impugned, Mr Springett's peripheral
13 contact with it doesn't take matters any further
14 forward.
15 As far as Devon is concerned, my learned friends
16 rely on three emails -- see page 15 of this annex. The
17 first is an incredibly anodyne reference to a regional
18 marketing meeting. The second then is an exchange of
19 30 October between a Mr Harrison of Webbers and
20 Mr Springett. At page 3041, Mr Harrison reports the
21 North Devon group:
22 "Talked of dropping both portals immediately."
23 He explains if his firm did that, they would stay on
24 one of the portals elsewhere, like Rightmove in Somerset
25 and Cornwall.

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1 Mr Springett's reply at is 3040, and he starts by
2 saying:
3 "From an AM agent member viewpoint, we must avoid
4 anything that would evidence collusion between agents or
5 that AM is leading any kind of collective boycott."
6 My learned friend seemed to see something sinister,
7 because they have underlined it, in the word "evidence".
8 But on a fair reading, it's clear that Mr Springett is
9 simply warning Mr Harrison not to participate in
10 collective boycott.
11 But what synonym would Mr Springett have chosen that
12 Gascoigne Halman wouldn't seek to impugn as sinister?
13 How else is he supposed to express himself? Then having
14 given a warning against collective conduct, Mr Springett
15 also goes on to note in the second point of his email
16 that if particular agents did come off both the
17 incumbent portals, that would help AM in the sense that
18 they could say that some properties would be unique to
19 Agents' Mutual. But he was concerned -- and he made
20 this point repeatedly in his emails and in his
21 cross-examination -- that there could then be
22 a disorderly flow of agents back to the incumbents,
23 which would not be welcome.
24 So looked at on a fair reading without seeing too
25 many reds under the bed, in our submission, this is

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1 a balanced assessment and shows that Mr Springett was
2 not attempting to influence agents one way or the other
3 in the choice of portals. He is simply expressing that
4 view.
5 The third email is the Devon exchanges about
6 collective decision making, which Agents' Mutual isn't
7 copied in on, and there is nothing to suggest it was
8 involved in.
9 As far as Maidstone is concerned, my learned friends
10 rely on a single email which is, in most respects,
11 hopeless as any evidence of a collective boycott. The
12 relevant email is H8/4125 to 4126 from Mr Harwood at
13 Knight Frank. He gets an email from a Maidstone-based
14 estate agent, suggesting that agents in Maidstone are
15 planning to meet to decide which portal to retain. He
16 forwarded that to Mr Flint -- who you will remember was,
17 I think, a director certainly of Agents' Mutual --
18 explaining that he did not attend the meeting. We don't
19 know what warnings Mr Flint may have been sent, but his
20 email to Mr Springett shows he was entirely sensitive to
21 the competition law concerns saying:
22 "I will explain that as founding board members, we
23 have made a conscious decision backed by legal advice
24 not to give any recommendations on which portal to
25 select."

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1 So again, that email doesn't show that
2 Agents' Mutual was involved in a collective boycott of
3 either of the incumbent portals in Maidstone, Kent or
4 indeed anywhere else.
5 Cambridge, well, again the same is true. Cambridge
6 and Environ is another area identified by my learned
7 friends. They rely on a single email from one agent
8 asking for a list of Agents' Mutual members. But as
9 Mr Springett pointed out in his cross-examination --
10 reference is Day 6, page 18, lines 13 to 17 -- as
11 a member of Agents' Mutual, the agent was entitled to
12 know the identity of the other members and could find
13 them by consulting the list of members. So Mr Springett
14 supplied the list as required and as requested. And
15 that wasn't illegal, it wasn't indicative of any
16 illegality on the part of Mr Springett or
17 Agents' Mutual.
18 As with all these other areas, there is nothing to
19 indicate that Agents' Mutual was involved in any
20 collective discussion or encouraged any particular
21 approach to the one other portal question.
22 The North London area, again we can take that very
23 quickly. That's a story about collective negotiation
24 between the REAP group of agents and Zoopla.
25 Mr Springett offered some general advice to

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1 Mr Abrahmsohn, but he stressed that:
2 "These decisions are for members to take and not
3 me."
4 And in the event, the agents decided to go with
5 Zoopla and not with Rightmove.
6 Bristol, again, single email. This is page 22 now
7 of my learned friend's annex. A single email which
8 wasn't sent to Mr Springett, it was forwarded to him,
9 referring to a critical mass of support and rather
10 vaguely to the possibility of dropping other portals.
11 Mr Springett was asked about that in his
12 cross-examination, and he said he did his presentation
13 to the audience, some of whom were estate agents. There
14 were no questions and answers. That is the one where
15 they are all keen to get off to their cocktail party.
16 It may say something about the quality of either the
17 cocktails or the presentation, or both. I don't know.
18 It is a bit like the decision as to when the Tribunal
19 should rise for lunch.
20 So that doesn't get Mr Harris home either and nor
21 does a trip to Norfolk. That is not going to help him,
22 because the penultimate area is a single email from
23 Mr Springett to the board, page 23 of the annex, saying
24 that particular agents agreed to form a regional group
25 in East Anglia. Well, big deal.

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1 Then so far as IEAG is concerned, the emails in
2 relation to them show that the agents discussed choice
3 of portal with one another, but there is nothing to link
4 that to Agents' Mutual, and again that doesn't get my
5 learned friend anywhere either.
6 Of course, standing back and asking: well, does this
7 come up to the relevant evidential burden? The
8 allegations which have now, as the clock prepares to
9 strike 12 on this part of this litigation, been
10 specifically identified, albeit not pleaded, do not in
11 our submission provide any robust basis for the very
12 serious allegations which Gascoigne Halman has sought to
13 advance.
14 And despite extensive disclosure, and there is some
15 rather curious criticism in my learned friend's closing
16 submissions of the disclosure that has been given by my
17 clients -- which I know caused some surprise if not
18 offence on our side of the court -- despite the very
19 extensive disclosure, despite Zoopla's zealous pursuit
20 of material which might damage Agents' Mutual, of which
21 the extraordinary business in Northern Ireland is to be
22 inferred but one example, Gascoigne Halman's allegations
23 simply haven't been made good. There is no collective
24 boycott allegation against my client that Mr Harris can
25 make stick.

1 I could stop there, sir, but I am not going to.
2 I have one more point I want to deal with. I am
3 conscious we have been going for I think an hour and
4 20 minutes. It won't take me terribly long to deal with
5 this point, I think I will be finished in another
6 20 minutes. But it may be sensible to take a short
7 break.
8 THE CHAIRMAN: We'll rise for five minutes.
9 (3.15 pm)
10 (A short break)
11 (3.20 pm)
12 MR MACLEAN: Sir, the trouble with taking a short break when
13 you have just told the court you have one point is that
14 you are then told you have two points.
15 MR FREEMAN: I have written down, "I could stop there".
16 MR MACLEAN: That holds the truth. If you would take,
17 please, Mr Harris' annex at page 20, I just want to make
18 a small point which probably doesn't matter. But
19 page 20, under the heading "North London", do you see
20 there are four emails referred to there? The first two
21 date from 2012 and the second two date from 2015. S,o,
22 they are quite different temporarily, but also the first
23 two are nothing to do with the REAP group at all.
24 Nothing to do with Mr Abrahmsohn's group.
25 The first two are concerned with Chesterton's and

1 some negotiations that were taking place in 2012. We
2 did touch on this in the evidence, but if you could,
3 please, take bundle H1 and look at pages 390 and 391.
4 This is an entirely separate set of discussions, but
5 I just want to remind the Tribunal -- you have seen this
6 document before, but at the bottom of 390, do you see
7 Mr Bartlett's email to various people, some of whom we
8 recognise; Mr Flint, Mr Jarman, and so on. Do you see:
9 "Andrew, I think the consensus between us all is for
10 you to return and seek a maximum increase of X with
11 DPG."
12 Then this:
13 "I accept what you say that they may then ask us to
14 pull off the portal if nothing can be agreed."
15 So this isn't about any agent boycotting or pulling
16 off anybody. What is being contemplated here is that if
17 they can't come to a meeting of minds with DPG on price,
18 DPG might tell them to take a running jump, not the
19 other way round. So not only is it nothing to do with
20 Mr Abrahmsohn's group, not only is it three years
21 before, but it is not about agents pulling off. It is
22 about being given the push rather than pulling off.
23 That is just to tidy up what my learned friend said
24 about North London. It is only the 2015 stuff that's
25 North London.

1 Anyway, that wasn't my last point, you will be
2 pleased to know. The final point I want to say
3 something about is the "shall procure" point which
4 I touched on in opening, but Mr Harris has said
5 absolutely nothing about on his feet, but they do touch
6 on it over eight or nine pages in their written closing.
7 So if you would have to hand Mr Harris's written
8 closing, he starts to deal with this point at page 84 at
9 paragraph 126. He starts quite rightly with
10 Arnold v Britton, which as we all know is the latest
11 word on the question of contractual construction -- and
12 you will be familiar with Arnold v Britton, I am not
13 going to waste your time taking you to Lord Neuberger
14 there.
15 What Mr Harris seems to be saying, if you look to
16 his paragraph 136, is that the definition of "group" in
17 appendix 4 does not include for clause 6's purposes,
18 parent companies not members of the group at the date of
19 the contract to which one says, well, why not? And the
20 point is in fact the bootstraps argument because it is
21 assuming that "shall procure" means is actually able
22 under its own steam to bring about. And Mr Harris then
23 goes on to refer at paragraphs 138 and 139 to an extract
24 from the information memoranda at his paragraph 138:
25 "Where a firm operates multiple agency brands, we

1 will accept one or more of those brands for membership
2 without requiring all brands of that firm to join. But
3 each individual brand must adhere to the company's terms
4 of membership as if it were a standalone firm and pay
5 listing fees on that basis to qualify under this
6 policy ..."
7 That provision about brands has nothing to do with
8 the "shall procure" obligation in relation to corporate
9 groups procuring first legal person X, procuring
10 a second legal person Y, or a third legal person Z to do
11 something.
12 Paragraph 139 isn't right either. It is suggested
13 that:
14 "Gascoigne Halman is precisely such an independently
15 managed brand. Thus if at the time GHL had joined OTM
16 it had already been a part of the Connells group, it
17 could simply have opted to join OTM without any effect
18 at all on other Connells' brands."
19 Well, that is wrong, and the passage from the
20 information memoranda about a single firm with different
21 brands doesn't support that proposition.
22 At footnote 125, there is reference there to the
23 arrangements made between Agents' Mutual and Spicer
24 Haart. But the special arrangements incorporated into
25 the Spicer Haart letter of intent allowed Spicer Haart

1 to select a different one other portal for each of its
2 differently branded operating subsidiaries. But the
3 point is that the Spicer Haart group was itself the
4 contracting party joining Agents' Mutual, and the
5 agreement covered all of its subsidiary brands and
6 businesses from the outset. Those special arrangements
7 were then actually specifically incorporated as
8 a variant to the standard contract in the contract
9 between Agents' Mutual and Spicer Haart.
10 So the point at my learned friend's paragraph 139
11 is, with respect, wrong and isn't supported by the
12 provision quoted in the information memoranda at 138.
13 And there is nothing in any of those points to provide
14 any reason to depart from the ordinary meaning of the
15 words in the contract, which is where Lord Neuberger
16 would have us start and often stop in the process of
17 contractual construction.
18 So in the context of the contract here, in our
19 submission, "shall procure" is to be read as being
20 a promise to cause or bring about, or one might say to
21 see to it or to ensure.
22 In opening, I took you to Lord Hoffmann in the
23 Lloyds TSB case, which is in K3, tab 27. I just want to
24 take you to one other passage in that case, K3/27,
25 Lloyds TSB and Lloyds Bank in the House of Lords.

1 I took you to paragraph 21 in opening, which is
2 Lord Hoffmann dealing with the words "ensure that". You
3 saw this in opening at paragraph 21, page 1478:
4 "A duty to ensure that something does or does not
5 happen is a standard form of words used to impose
6 a contingent liability which will arise if a specified
7 act or omission occurs. Even if the act of omission is
8 under a third party such as a company representative,
9 liability is not vicarious. The company is not liable
10 for the representative act or omission, simply the
11 contingency giving rise to the company's own liability.
12 Nobody should be misled by the word "ensure" into
13 thinking that the effect is to impose upon a company
14 a duty to do something. No doubt the company will be
15 well advised to take whatever steps it can to prevent
16 the contingency from happening, but the question of
17 whether it took such steps or not is legally irrelevant
18 to its liability. It is liable simply upon proof that
19 the contingency has occurred."
20 The other passage is in the speech of Lord Hobhouse,
21 paragraph 45, a little bit further on. Lord Hobhouse
22 talks about the aggregation clause which was the subject
23 of the discussion in that case. Then do you see at
24 page 57 of the report between A and B, there is
25 a sentence beginning, "What they seek to rely upon --"

1 THE CHAIRMAN: Yes.
2 MR MACLEAN: "-- is the liability of the insurance by reason
3 of the obligation to insure. This does not provide them
4 with an answer ...(Reading to the words)... The
5 insurer's argument in the cross-appeal does not survive
6 scrutiny and the Court of Appeal were wrong to reject
7 it."
8 In their written closing, my learned friends rely on
9 two cases which don't cause me, or more importantly
10 Lord Hoffmann, any difficulty at all. In my learned
11 friend's bundle of additional authorities, the second
12 is a case called R v Beck, which is tab 6 of my learned
13 friend's little bundle. It refers to the other case he
14 relies on, which is Attorney General's Reference (No 1
15 of 1975), which is in tab 5. If you take tab 6, the
16 Beck case, and if you turn to page 5 -- page 213 of the
17 bundle in the bottom right-hand corner -- do you see
18 a reference to Mr Hytner about a third of the way down
19 page 213:
20 "Mr Hytner further relied upon ..."
21 THE CHAIRMAN: Yes.
22 MR MACLEAN: Then there is a reference to Attorney-General's
23 Reference (No 1) where Lord Widgery said at page 779,
24 to procure means to produce by endeavour.
25 My learned friend wants to rely on the words "by

1 endeavour", but of course Lord Hoffmann in Lloyds v
2 Lloyds isn't saying that one should shouldn't take such
3 steps as you can. What he is saying is it doesn't
4 matter whether you take the step, you are well advised
5 to take the steps, but the question of whether you took
6 the steps is legally irrelevant to the liability.
7 Lord Widgery is quoted in Attorney-General's
8 reference, and then there is a reference to a case
9 called Broadfoot where Mr Justice Cusack said what you
10 see there set out at the bottom. Then what he said at
11 page 755, his first complaint was that:
12 "The learned judge told the jury that the word
13 'procure' was really equivalent to the word 'recruit'.
14 Let it be said at an early stage the word procure in the
15 1956 Act is not a term of art. It is a word of common
16 usage and a word which a jury is well able to
17 understand. Each case of which is alleged there has
18 been a procurement or attempt at procurement must be
19 related to the facts of that particular case. It is
20 essential for the jury to make up their minds when they
21 have heard the evidence and decide what to accept,
22 whether what they do accept does amount to procuring.
23 Counsel has quoted to the court several decisions
24 dealing with the interpretation of the word procure in
25 cases involving quite different facts ...(Reading to

1 the words)... what is to be decided."
2 Then the Court of Appeal in this case,
3 Lord Justice Watkins is giving the judgment of the Court
4 of Appeal. He then says this:
5 "We agree with the general tenor of those
6 observations. It is a word in common usage which in our
7 view ...(Reading to the words)... is to cause or to
8 bring about."
9 We respectfully agree with that, and Lord Hoffmann
10 dealing with the word "venture", which in our submission
11 is a synonym for "procure", says much the same.
12 So in the criminal law of course, the question may
13 often be whether the state of affairs has in fact come
14 about. If you take my learned friend's closing argument
15 at paragraph 128, having referred to these two cases, my
16 learned friends say this -- having cited those cases and
17 Beck being "procure" means "to cause" or "bring
18 about" -- I'm entirely comfortable with "to cause" or
19 "bring about". That is fine, we don't take issue with
20 that.
21 It follows that, says Mr Harris --
22 THE CHAIRMAN: Where does he say that?
23 MR MACLEAN: Paragraph 128 of Mr Harris's submission. Do
24 you see the reference to the two cases?
25 THE CHAIRMAN: Yes, I do.

1 MR MACLEAN: Attorney-General's Reference and then Beck.
2 THE CHAIRMAN: Yes, I have it.
3 MR MACLEAN: Then he says "it follows that". So what is it
4 that follows:
5 "It follows that a state of affairs cannot have been
6 procured unless it happens ..."
7 Ie it has in fact been caused or brought about. And
8 then 2:
9 "An obligation to procure is an obligation to take
10 steps actually to bring about the desired state of
11 affairs."
12 With respect, paragraph 128.1 misses the point
13 altogether. The contractual promise that Gascoigne
14 Halman has entered into is to bring about the relevant
15 state of affairs, and the question is: what's the legal
16 consequence of the state of affairs that they've
17 promised to bring about not being brought about? As to
18 the second point, 128.2, if one takes 128.2 of
19 Mr Harris' submission:
20 "An obligation to procure is an obligation to take
21 steps actually to bring about the desired state of
22 affairs."
23 What he's getting at is it can only work in his
24 analysis if somebody is required to do something that
25 they actually have the power to do. But if you just

1 hold that thought and then move on to paragraph 142 of
2 this same document, what Mr Harris does here is to
3 speculate as to how the clause might work in his
4 analysis, conveniently not touching the situation if
5 Connells purchases Gascoigne Halman. What he says is:
6 "Viewed objectively, the purpose of the clause
7 appears to be as a form of anti-avoidance measure to
8 cover the situation where a estate agent operating under
9 a single brand wishes to join OTM but its branches are
10 operating, where there are multiple companies under the
11 same brand. For example, different offices in different
12 locations might be incorporated in different companies,
13 or lettings or sales operations might be divided between
14 companies, but also marketed under the same brand."
15 But he appears to be contemplating that the clause
16 there, would operate to bring both those legal persons
17 within the ambit of the agreement. But how could that
18 be done? He appears to be contemplating that it could
19 be done, and he is entirely right that it could be done.
20 How is that consistent with the suggestion at 128.2 that
21 all we are concerned about is an obligation to do
22 something which is within the power of the legal person
23 who is promising to bring about the state of affairs?
24 How can company A in Mr Harris's paragraph 142
25 actually bring about compliance by the company B?

1 Mr Harris doesn't explain that, and that's because of
2 course he can't do so consistent with his own case on
3 the meaning of the clause. Consistent with that and
4 following on from that, if we take Mr Harris'
5 paragraph 134, he says:
6 "As explained further below, the plausibility of the
7 group procurement rule as advanced by Agents' Mutual;
8 namely as it applies to the case where a new parent
9 company acquires a subsidiary which had listed with OTM,
10 notwithstanding that the parent company and subsidiary
11 run separately-managed brands, should be judged in the
12 proper meaning of the term 'procure', in that it would
13 actually require the subsidiary to bring about the state
14 of affairs where the parent company and the sister
15 companies actually comply with the OOP rule."
16 That is in fact a point which is dead against
17 Mr Harris. A contract is not to be interpreted as
18 requiring a party to achieve the impossible. That is
19 not the construction you would normally give to the
20 words of a contract. The court would normally strive to
21 read the words of the contract, the words that the
22 parties have chosen, in order to give them some
23 meaningful sense.
24 But if "procure" means only a state of affairs where
25 company A is actually able under its own steam, as it

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1 were, to bring about the adherence by the other company,
2 company B, if that's what's meant, then the relevant
3 provision in the contract would be emasculated, because
4 it wouldn't be able to be applied to any case of
5 a sister company or indeed of a parent company. It just
6 wouldn't work.
7 So what Mr Harris loses sight of, with respect, in
8 paragraph 134 is that it is precisely because of the
9 terms in which "group" is defined that leads us to the
10 conclusion, inexorably in our submission, that 'procure'
11 means 'see to' or 'bring about", or as
12 Lord Justice Watkins said "cause to bring about". And
13 if the relevant circumstances are not brought about, if
14 it isn't seen to, then Gascoigne Halman bears the legal
15 and economic consequences.
16 So the long and the short of it is that Gascoigne
17 Halman promised to bring about that each member of the
18 group complies with the exclusivity requirement, or to
19 see to that the state of affairs was brought about. But
20 that state of affairs has not been brought about and the
21 legal question then is what are the legal consequences
22 of that.
23 My learned friend says there are none, because
24 Connells is not to be read as being part of the "Group"
25 for relevant purposes. But why not? Plainly, it is

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1 part of the group, and there is no reason in our
2 submission to depart from the ordinary meaning of the
3 words used in the contract, and none of the attempted
4 get-outs suggested in these paragraphs by Mr Harris get
5 him home. Neither the factual matrix, nor commercial
6 common sense, nor anything else requires any other
7 approach.
8 It is true, as Mr Harris points out in his closing
9 submission, that my client has not enforced the "shall
10 procure" obligation in situations where perhaps it could
11 have done. For example, where member firms have been
12 acquired by other agent firms and have continued to
13 comply with their contracts -- see the John Francis
14 situation, which was acquired by Countrywide, or where
15 member firms have been acquired by other agent firms and
16 have ceased or sought to cease to comply with the
17 contract. And there was one example covered in
18 Mr Springett's cross-examination.
19 But that's neither here nor there for present
20 purposes where we are concerned with what this contract
21 means. In my submission, the contract means what
22 I submitted in opening: it means that it is in effect
23 a "see to it" obligation, an obligation to ensure, to
24 procure, to bring about or to cause a state of affairs,
25 in respect of which if Gascoigne Halman cannot under its

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1 own steam bring that about, it no doubt would want to
2 take such steps as it can as Mr Norton(?) points out.
3 But if the relevant state of affairs is not brought
4 about, then the legal and economic consequences are
5 visited on Gascoigne Halman.
6 Finally on this point, paragraph 147 of Mr Harris'
7 document, under the heading "Commercial common sense"
8 makes the point at 147.2 that it was never part of the
9 deal between Agents' Mutual and GHL that Connells and
10 its subsidiaries would list on OTM. That was not
11 something which AM was asking for which GHL could
12 meaningfully be said to have promised or was even able
13 to promise. It makes no commercial sense to read that
14 provision "Agents' Mutual's urges" as meaning that
15 Gascoigne Halman's promise to pay substantial damages to
16 underwrite their supposed obligations of lots of other
17 companies. But that is, with respect, not the correct
18 legal analysis. It's not the supposed obligations of
19 lots of other companies, it is Gascoigne Halman's
20 obligation to see to it or to procure or to bring about
21 that members of its group will comply with this
22 obligation.
23 When Connells came along to buy Gascoigne Halman, it
24 should have spotted this clause as it did, as Mr Livesey
25 confirmed that it did, and it should have known that the

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1 clause was there, and it should have been able to take
2 such advise as it wanted as to what the implications
3 would be of proceeding with the purchase on that basis.
4 What they appear to have done is proceeded on the basis
5 either -- well, we know that they proceeded on the basis
6 that they believed Mr Springett wouldn't stand and
7 fight -- you remember the email exchange that I took
8 Mr Livesey to.
9 They wanted to get Gascoigne Halman on to Zoopla.
10 That was the first thing, they wanted him on to Zoopla,
11 and they didn't think that Mr Springett would stand and
12 fight. It may be they thought they would just be able
13 to steam roller through their purchase of Gascoigne
14 Halman and Mr Springett would roll over and wave his
15 legs in the air. Well, he hasn't, and here we are. But
16 it won't do to suggest, as Mr Harris does, that somehow
17 the definition of "group" is to be construed as carving
18 out a parent company which acquires a member of
19 OnTheMarket after that entity, that agent, has become
20 a member of OnTheMarket in the way that Gascoigne Halman
21 did.
22 In other words, Mr Harris does not in my submission
23 get any comfort on the "shall procure" point from any of
24 the points he makes. And indeed, as I have submitted,
25 if you think about his paragraph 142, you think about

1 how is the clause going to operate in this situation,
2 which is the situation in which he says it does operate,
3 how can the first company under its own steam bring
4 about the compliance by the second company?
5 The answer is that it can't. Once you appreciate
6 that, you realise that Mr Harris' supposed or suggested
7 construction of the clause must in my submission be
8 wrong. And it is wrong for all the reasons that we have
9 set out in opening and the reasons I have just given.
10 Sir, there are various other points that I am not
11 going to deal with. We have dealt in writing with the
12 other restrictions with the bricks and mortar point,
13 which is now only pursued as to object but not as to
14 effect, something that Mr Harris I think at times lost
15 sight of this morning. But that is the position -- see
16 the concession letter -- and I am not going to say
17 anything more about the promotions rule either, we have
18 dealt with that in writing. And I am not going to say
19 anything about severability, which is a fairly short and
20 simple point, which again we have dealt with in writing.
21 Unless Mr Holmes tells me otherwise, there is just
22 one other point I want to finish on, which is that when
23 looking at the chronology of the emails -- indeed the
24 chronology generally -- it is very important in this
25 case to bear in mind where they sit as a matter of the

1 chronology.
2 Take, for example, the reliance which Mr Harris
3 places on the document which refers as inconceivable
4 that agents would drop Rightmove. I know the Tribunal
5 will have this point, but as Mr Springett pointed out in
6 his cross-examination, it is very important always to
7 remember where documents fall in the chronology. That
8 particular document was written at a time before
9 Primelocation and Zoopla had merged. So when one is
10 looking at the documents in this case, one has to ask
11 oneself, is this pre-merger or post-merger? If it is
12 post-merger, is it pre-launch of OTM or post-launch?
13 And if it is pre-launch, is it way pre-launch or is it
14 impending launch? I am thinking for example of the
15 table in which Mr Parker shows the amount of churn in
16 May and June, and then we see the churn ramping-up. Why
17 is the churn ramping-up? That is because my client is
18 about to enter the markets and pending arrival is
19 beginning to have an effect.
20 I am sure the Tribunal will have that rather basic
21 and simple point, but it is one that can easily be lost
22 sight of, and as I pointed out half an hour ago, it is
23 in fact lost sight of in Mr Harris' annex. And it is
24 really important that when one bears in mind with each
25 document whether it is pre or post-merger or pre or

1 post-launch, it normally slots into place.
2 Can I find out how long the list is of all the
3 things I haven't already dealt with? (Pause).
4 Unless I can assist you further, those are my
5 submissions.
6 THE CHAIRMAN: Thank you very much, Mr Maclean. We have no
7 questions.
8 Reply submissions by MR HARRIS
9 MR HARRIS: May I deal in the orthodox manner with some
10 points in reply to my learned friend's oral closing,
11 taking them in the order as they arose and as briefly as
12 I can. BAGS at paragraph 92. Exactly, we rely four
13 square on BAGS, paragraph 92. That is the paragraph
14 which said there was no competition in the market
15 beforehand, why is that?- That's because there was
16 a monopoly, which was also a monopsony, and it was found
17 as a matter of fact there would not be any new entry.
18 Obviously, no competition. That could not be
19 further from this case, not least of all, because the
20 very next point out of my learned friend's mouth, which
21 I noted down in this rolling transcript device at 100:1,
22 it's true there was some degree of competition between
23 incumbent portals for the business of agents. There we
24 go. So, his own concession is that this is not a bad
25 situation where there simply was not and could not be

1 any competition.
2 So I expressly rely upon those words, and
3 I expressly rely on BAGS at 92. And then Mr Maclean's
4 next part of his submission: well, there is some degree
5 of competition between incumbent portals for the
6 business of agents, but it is not about pricing. So
7 what? There are lots of manners and ways and means in
8 which even if that were true -- of course you know we
9 don't accept that -- but even if it were true, it
10 wouldn't make any difference because one can compete on
11 all manner of other fronts besides pricing, such as the
12 obvious ones; equality, reliability, in this case
13 attractiveness to house-hunters, et cetera.
14 So with respect, that very foundation stone of my
15 learned friend's case, essential to his case on effects,
16 on his own admission doesn't exist. So there we have
17 that.
18 The next point was the OFT. He said Mr Harris
19 places reliance upon the OFT letter and it uses the
20 words "important" and, back to our favourite, "parameter
21 of competition". That is true, I don't need to turn
22 that up again. But what you will note from the very
23 same letter is that first of all, it does not stand for
24 the fact that the OFT "does not have any concerns". It
25 says, "This is a prioritisation decision, we haven't

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1 really looked into it and we don't have any current
2 reason to believe and we are not going to do so".
3 It doesn't stand for anything in particular. But
4 one thing it does say, which my learned friend was at
5 pains not to point out, and I quote:
6 "We would be concerned if it were to be proven that
7 Agents' Mutual was encouraging its members to enter into
8 potentially anti-competitive agreements."
9 Exactly, quite rightly so, and we have now seen the
10 evidence to that effect.
11 The next point my learned friend makes was one of
12 the favourites on that part of the courtroom: well,
13 Mr Parker said at one point in his first report quite
14 properly and candidly, as you would expect from an
15 independent, that prima facie the upward movement of
16 Zoopla prices post-entry of OTM was unusual. Quite
17 candid and upfront about that, and is that to be
18 explained?
19 Yes, it is to be explained perfectly coherently in
20 the theory because cost per lead plainly goes up as
21 a measure when the number of your leads goes down. Why
22 has the number of leads gone down? Because the OOP rule
23 is targeted at Zoopla and it has had the effect of
24 damaging Zoopla to the tune of -- it used to be there
25 were approximately 16,500 each -- if you remember figure

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1 12 -- agent branches per Rightmove and per Zoopla, and
2 then there's a slide down, by some 4,000-odd offices to
3 12,300, I think, for Zoopla very, very quickly at time
4 of entry of OTM into the market.
5 So no problem on the theory. One explains exactly
6 the theory: if the number of leads plummets, the costs
7 per lead goes up. But then what has been completely and
8 utterly ignored by Agents' Mutual is what has happened
9 since the date of that report but pre-trial as to which
10 Mr Parker gave unchallenged evidence in the answers to
11 cross-examination. That he has now had regard to the
12 new data points which do show just as predicted,
13 Zoopla's prices coming down to reflect the fact after
14 the time lag that there has been a reduction in its
15 proposition to people whom it seeks to charge for that
16 proposition. In other words, it is totally explained by
17 the theory and now it's being borne out just as
18 predicted by the theory, by the practice, and that's
19 unchallenged.
20 The next point my learned friend made was about the
21 6,300 agents versus the 18,000. You don't have to be an
22 economist or a rocket scientist to figure out that 6,300
23 is a large proportion of 18,000. Why is it relevant?
24 It is relevant because that number of purchasers has
25 been effectively taken out of the market as contestable

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1 for the other portal, in particular Zoopla, the one that
2 has been damaged. That is why it is relevant to the
3 competition law assessment because they are no longer
4 seriously contestable because they have now only two
5 portals they can have, one of them by definition has to
6 be OTM, because they are members of OTM. Then what is
7 the other one? We all know what the other one is
8 because it is the must have. It was already dominant,
9 now it's even more must have. So those ones can't
10 seriously be contested any more, therein lies the
11 competitive harm.
12 The next point is that Mr Maclean said, and I quote:
13 "I accept there is no strong support from the OFT
14 report."
15 That is not right. What I accepted was the OFT
16 report -- and this was in response to Mr Freeman's
17 questioning in my oral opening -- goes as far as it
18 goes. But I was at pains to point out, and I stand by
19 the submission that if you look at it, it demonstrates
20 a significant amount of investigation by reference to
21 underlying data, underlying facts and third parties, and
22 it is itself at pains to point out to how much
23 "examination" has been undertaken by the regulator.
24 So it doesn't go any further than it goes, but it is
25 an important, and I would go so far as to say, a strong

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1 part of the piece, to use Mr Parker's phrase. And there
2 has never been a coherent explanation for why that
3 theory must be wrong on my learned friend's case. It
4 must be wrong.
5 We also know that although it is a phase 1 decision
6 and in that sense it only goes so far, nevertheless it
7 is a phase 1 decision that has the effect of saying, "We
8 don't have any concerns about this whatsoever" -- that
9 is obviously not the exact test, but the point being
10 that if you have any concerns about substantial
11 lessening of competition, then it goes to a phase 2
12 examination.
13 MR FREEMAN: Mr Harris, that is not how the system works
14 I think. From my own experience, I think you're placing
15 too much weight on a phase 1 clearance.
16 MR HARRIS: In that case --
17 MR FREEMAN: I would stick with your earlier formulation
18 which I was content with. It goes as far as it goes.
19 MR HARRIS: I am happy with that, because it is part of the
20 piece. But it is fair to say that if there had been
21 concerns of a material nature, then it would have been
22 pushed on to phase 2 -- so I will rephrase it in that
23 manner -- and it wasn't.
24 So yes, it only goes as far as it goes, but it does
25 go that far. So if I have overstepped the mark and

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1 overstated it, so be it.
2 MR FREEMAN: Oversimplified it.
3 MR HARRIS: Yes, I am happy with that.
4 Then my learned friend said as his next point,
5 having said: oh, well, Mr Harris has accepted there's
6 not strong support from the OFT, which is wrong, he
7 said:
8 "It is therefore only the empirical analysis and
9 nothing else."
10 But plainly that's wrong. At the risk of repeating,
11 we know what their relation is. It is all part of the
12 piece, it is the theory. And it's the OFT, the BKA, the
13 third party analysis and it is the industry analysts,
14 who are different from the equity analysts. And then it
15 is the empirical analysis. So it is just -- it is
16 incomprehensible, with respect, to say that: oh, my case
17 is nothing but the data analysis. That's just wrong.
18 Let us just remind ourselves how incredibly simple
19 the theory part of it is. The theory part is you have
20 Rightmove is now bigger and meaner than it was before,
21 relative to Zoopla. Utterly incontestable at that
22 point. And Zoopla being less close relative to
23 Rightmove, on the facts, utterly incontestable, is less
24 able to present a close competitive constraint, compared
25 to when it was bigger and more comparable. It is very

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1 simple. Little wonder in those circumstances when the
2 bigger, meaner gorilla has become even bigger and meaner
3 that it is able to flex its market muscle even more than
4 it did before. It is very, very straightforward.
5 Little wonder, therefore, that Rightmove should be the
6 one to have been remarked upon by participants in this
7 market as circling like vultures, if you can have a
8 gorilla circling like a vulture.
9 The next point, sir, with respect, Mr Maclean ought
10 to know better, and he was given express warning about
11 this. When I made my oral submissions, he repeated that
12 Zoopla is calling the shots. That is totally wrong. It
13 should be withdrawn, and even though it hasn't been
14 withdrawn, it should be ignored by the Tribunal. That
15 is not true, there is no evidence for it. It wasn't put
16 to any witnesses, there are no documents. Just wrong.
17 The next point probably won't detain the Tribunal in
18 the sense that it's a bit of a jury point. No, it is
19 a new case it is said to have developed. Of course, no
20 objection is taken to that, but it is just worth reading
21 to you this passage from paragraph 26 of the amended
22 defence, which of course has been in place for many,
23 many months. It says:
24 "The exclusivity requirement/-OOP rule is void and
25 unenforceable because it amounts to further or

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1 alternatively forms part of an agreement between
2 undertakings and/or a concerted practice between
3 undertakings."
4 And who are those undertakings? It reads:
5 "In each case, the members of the Claimant,
6 alternatively, the members of the claimant or any of
7 them and the Claimant."
8 And then it goes on to particularise. It is simply
9 wrong on the facts that these horizontal allegations
10 have suddenly emerged out of nowhere. It may be that
11 Mr Maclean and his team would like them to be
12 characterised as new because they haven't really dealt
13 with them. But that is a completely different point.
14 Just for your further note, if you wanted to turn
15 them up, the express allegations about horizontal
16 illegality or a collusive nature about joining AM in
17 terms, they are to be found at paragraphs 40F, G and H,
18 where on each occasion it says that the joining decision
19 of AM by a collective is to be impugned as illegal. So
20 they have been in there right since the beginning.
21 Then the next point is my learned friend refers to
22 an old case of mine, Chester City Council, which is on
23 the point about how persuasive does one's evidence have
24 to be. I don't demur from any of that. But persuasive
25 evidence is brought up by my learned friend as if to

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1 say: oh, well, crikey, why on earth would these agents
2 be engaging in this horizontal collusive behaviour?
3 That sounds like the naughty sort of thing you ought to
4 have in evidence. But it is obvious why they were
5 engaging in the collusive horizontal behaviour; because
6 unless you collude in groups so as to make sure that
7 groups of people don't go on to a third or a fourth or
8 a fifth portal, unless you do that, you are subject to
9 a competitive disadvantage. Because the people with
10 whom you are competing, you have limited yourself to
11 two, but they are on three, four or five. So they do
12 better than you, obvious why they would collude. It is
13 obvious from the paperwork that is exactly why they were
14 colluding.
15 This is not like the lion in the park example
16 from -- I can't remember if that was in Re H: you'd have
17 to have very convincing proof if somebody told you there
18 was a lion walking through Regent's Park because it is
19 so incredibly unusual and out of the ordinary. It is
20 obvious why these people were colluding horizontally.
21 The next point my learned friend said was the OOP
22 rule doesn't make it easier to coordinate, but we dealt
23 with that in our written closings. It does, it was
24 a focal point, and of course one thing we haven't heard
25 anything about is it has allied the OOP rule with the

1 letter of intent process. This was structurally and
2 reciprocally neutral, including not just through the OOP
3 rule, but the letter of intent process.
4 The next point my learned friend spent some time
5 dealing in his own inimitable fashion, was with the
6 documents set out in our annex A. I'm not going to do
7 it now, gentlemen, for obvious reasons, but I would
8 invite you to actually have regard to the submissions we
9 make beneath each part of the table which weren't dealt
10 with. And that's rather telling, in our respectful
11 submission.
12 The next point was about Mr Rook, so this arose in
13 the context of annex A. A pot shot was taken about,
14 well, why is Mr Rook not here? Of course, nothing but
15 a jury point. I could equally say, well, Ms Whiteley's
16 not here or Miss Emmerson or Miss Beaufoy. But there is
17 in fact a very good reason. He doesn't work for us,
18 he's never worked for us. He doesn't even work for Rook
19 Matthews Sayer. He has retired, end of story. The
20 point works from both ways; if they'd wanted to call
21 him, they could have called him. But they haven't done
22 that. What a surprise that they haven't done that.
23 Mr Rook of course was a board member of
24 Agents' Mutual. Importantly he was appointed to the
25 board -- and that's what this chronology shows in the

1 tabular part of annex A -- he was appointed to the board
2 at the very time that the board and Mr Springett knew he
3 was engaging in these horizontal collusive decision
4 making meetings. They already knew that and then they
5 appointed him to the board.
6 I would just like to show you a couple of documents
7 because there was a couple of unbelievable straw men put
8 forward in my learned friend's closing by reference to
9 Bowstead and the articles of association. It is all
10 completely irrelevant. I don't have to make out that
11 this was a particular director who had actual or
12 ostensible authority, or frankly any other authority to
13 enter into some kind of binding legal arrangement on
14 behalf of the company. Utterly, utterly irrelevant.
15 What I have to do -- and I think, Mr Landers, this may
16 have been your question if I remember correctly,
17 a combination of you, sir, and the chair: isn't really
18 what is needed is does he know?
19 Obviously he knew and he was a board director. He
20 was actually participating. That's what counts. Not
21 anything to do with actual or ostensible authority or
22 binding under the articles or entering into contracts or
23 anything like that. The Court of Justice will be
24 astonished if a case about collusive horizontal
25 behaviour in the Anic sense or the JJB sense or in the

1 Electrotechnical Fittings sense, which as I took some
2 trouble to remind the Tribunal in opening is so
3 incredibly wide, was told: ah, yes, but you can't
4 actually be in on this horizontal illegal behaviour
5 unless you are a board member with actual authority to
6 enter into a binding contract. It is all irrelevant.
7 The only time that the seniority or otherwise of the
8 person who enters into a cartel or other horizontal
9 arrangement features in the European case law is at the
10 question of finding stage: is it an aggravating factor,
11 is it more serious to have say the MD or the CEO or just
12 some fairly small underling? That's when it enters
13 into, it is not on the substantive measure. It is on
14 the punitive measure.
15 And of course most cartels, most horizontal
16 behaviour, doesn't take place right at the board level.
17 It is usually, in my experience certainly, it's nearly
18 always the middle managers who get their companies into
19 trouble, whether or not they have authority.
20 Now I would just like to show you another --
21 THE CHAIRMAN: Do you say there is no rule of attribution at
22 all; if they are an employee within an undertaking that
23 their knowledge is attributable to that undertaking?
24 MR HARRIS: There may be on certain factual circumstances,
25 but I am about to show you a document why in this case

1 you need not be detained or worried by it. Because what
2 we know in this case is that the board members were
3 being deliberately held out in order to facilitate and
4 encourage the very sorts of collusive decision making
5 that then took place. So there may be a nice question,
6 and indeed it sounds like Mr Maclean and you, sir, and
7 I have all been involved in cases about quite how do you
8 attribute knowledge from an employee in various
9 circumstances. But can I just show you the reason --
10 THE CHAIRMAN: No, please do. But in this case, we are not
11 so concerned about the level of employee. But as
12 I think I have put it to you: hats, in the sense of if
13 a person is engaged on slightly different but related
14 ventures for different people, is the knowledge that he
15 has acquired in the context of one venture attributable
16 to the organisation he is working for in another?
17 It may be the document you are taking us to is going
18 to assist on that, but it is that question which I think
19 we are concerned with, rather than the question of
20 seniority within a single organisation.
21 MR HARRIS: I accept that, sir. So why don't we turn, if
22 I may, to two documents. The first one I have noted
23 down is bundle 5/2577. This one is in the context of
24 the west Wales group, and if you turn to the bottom
25 paragraph on page 2577 -- if you pick up the one above

1 that, there is clear knowledge as you can see about
2 collective decision making, about individual choices of
3 what they call here the "other portal or media owner".
4 And then this is the very email that talks about:
5 "Doing our best to create such a critical mass
6 everywhere."
7 And I made different submissions about this. But
8 what is telling on this point is the final paragraph:
9 "I thought you might welcome a conversation with one
10 of our directors about this."
11 So what is being put forward by Mr Springett on
12 behalf of the company is a board member to talk to these
13 actual or prospective agents about these decisions,
14 whether there should be decisions about other portals.
15 Then it goes on to give further reassurance about the
16 board's commitment to the stated strategy. So the board
17 directors are being put forward as the people to talk
18 about these matters to their actual or prospective
19 members. It goes on to say:
20 "In any event for you and your colleagues to have
21 a direct line to the board."
22 So on these topics, the board is expressly being put
23 forward as the person to give the position of, "The
24 board's commitment to the state and strategy".
25 Then if you stay in this bundle and move over

1 several pages to 2751, we can see this very theme is
2 then picked up with Mr Rook. If you pick it up -- in my
3 copy, the relevant page number is 2753, I think it
4 carries on in time to 2751. But the bit I want is
5 2 June, second hole punch down on 2753. This is
6 Mr Springett to Ms Whiteley on 2 June at 10.39.
7 There is the point about reorganising the agenda and
8 asking Ms Emmerson to leave:
9 "She should not be in a party in any sense to this
10 and she should avoid receiving/sending messages/
11 documents about it."
12 Just pausing there. What is it that is going to be
13 discussed in this marketing meeting in which it is said
14 the representative should not personally be present at?
15 It is about media negotiation of other portals, and as
16 we know from what I just showed you in the document
17 several pages earlier, and we know from clause 6 of the
18 listing agreements, it was the directors who had the
19 responsibility for the implementation of the other
20 portal rule, and Mr Hodgson was being put forward to the
21 west Wales group as the direct line to the board on
22 these points. Then it says:
23 "If questioned about this stance [ie this subject
24 matter], she should refer people to Clive Rook."
25 Why? Because that's --

1 MR FREEMAN: The stance is about not receiving messages.
2 MR HARRIS: Well, in my respectful submission, sir --
3 MR FREEMAN: That would be her stance; avoiding sending and
4 receiving messages, documents about it. And she is
5 asked about this stance, which is presumably --
6 MR HARRIS: I am happy with that.
7 MR FREEMAN: -- a blank non-cooperative stance, she refers
8 them to Mr Rook. That's what it says.
9 MR HARRIS: I am happy with that because --
10 MR FREEMAN: It is not what you put to us but it is fine if
11 you are happy.
12 MR HARRIS: I am happy with that because the stance about
13 not creating the messages documents is on the topic of
14 media negotiation or other portal which we know is
15 a matter that the company is putting forward its
16 directors to agents to talk about.
17 That is a matter where, as a minimum, sir, Mr Rook
18 was wearing two hats and certainly at least one of them
19 was the Agents' Mutual hat and that is why it is being
20 said, speak to Mr Rook, he's a board director.
21 The last point then, it is irrelevant whether he
22 could be binding them in any legal sense or had any
23 particular authority.
24 Just a few more points to finish. Mr Maclean
25 attacked the alignment email with Miss Pattinson, the

1 reference to which I have temporarily mislaid, but if
2 one were to turn into bundle 8 you can see what happened
3 after. This is the one where he said -- actually this
4 is a slightly different point. He said: it is startling
5 that Mr Harris hasn't referred in the table to
6 a particular email, and then there is an email at bundle
7 7/4001.
8 Mr Maclean's forensic point, jury point in closing,
9 was, "Oh, Mr Harris hasn't referred to 3994" although of
10 course I did do very fully in cross-examination and
11 I made the points there that if that particular email
12 shows that Mr Springett and indeed Ms Whiteley know of
13 and then get involved in and try to influence the
14 decision making that's being made by a group of agents
15 about how to make portal choices, and that's just
16 inescapable, that's what it shows.
17 But then of course in cross-examination I was
18 careful also to turn over several more pages to 4001
19 which is sent to Mr Springett and copied to
20 Miss Whiteley and of course to Mr Rook being the board
21 member for that region. What that says inter alia and
22 picking it up in the second sentence:
23 "However, I think by continuing to drive our current
24 strategy as a region, we can all gain whether we
25 individually subsequently choose to come off or stay

1 with Rightmove or Zoopla."
2 And it carries on in the final sentence of that
3 paragraph to say:
4 "Following obtaining feedback that the coastal and
5 South Shields agents may drop both Rightmove and
6 Zoopla."
7 This is not met by a "Oh my gosh, what are you
8 doing, this is completely illegal." This is just one of
9 the many examples of where there is a half point made
10 about the competition or warning on some issues and then
11 it all just carries on. That is not good enough. If it
12 was good enough to be caught by one helicopter meeting
13 in JJB without distancing oneself and/or going to the
14 regulators, then all I would need, although I have more
15 than that, is one meeting where that didn't happen in
16 this case.
17 Nearly at the end. Just a couple of final points.
18 Mr Maclean spent 20 minutes or 25 minutes or so dealing
19 with the group procure obligation at the end. Our
20 submissions are set out largely in writing or fully in
21 writing and I invite you to reconsider those.
22 And I just finish with these two points which is
23 Mr Maclean said, as I noted it down, Gascoigne Halman is
24 not a separate brand. Just wrong. Gascoigne Halman is
25 a completely separate brand and what's more, it is

1 autonomously managed. If I could just invite for your
2 note that Mr Forrest's evidence at his paragraph 10,
3 I think his first witness statement, on this point was
4 not challenged and then this is the relevant passage
5 from the transcript on Day 3, page 195, starting at
6 line 11. The question was:
7 "And since October 2015 [this is a question in
8 cross-examination to Mr Forrest from Mr Maclean] you
9 have had to toe the Connells party line?
10 "Answer: That is not exactly their management
11 style, no. We still operate quite autonomously. There
12 are very few things that we are told we have to do. The
13 ones that we are told we have to do relate to health and
14 safety procedures rather than how we run our business."
15 So it is a separate brand and it was before and it
16 continues to be run in an autonomous manner, and those
17 are exactly the circumstances that apply in that carve
18 out in the information memoranda.
19 Then the final point or the penultimate point is it
20 is quite telling in all of that lengthy series of oral
21 responses on the group procurement rule that there has
22 been no answer at all, whether in writing or orally, at
23 any stage to that impossible question for my learned
24 friend's side which is: if these other companies are all
25 bound by these obligations, the sister companies, the

1 parent company, where are the concomitant rights? What
2 are they paying for? That's one question. What are
3 their rights as a member? When did they vote? What
4 loans were they entitled to? What happens in
5 a winding-up? It is just not dealt with at all. These
6 things were not contemplated as applying to a situation
7 that has arisen on the facts of this case and there is
8 no answer to that.
9 So where does that take us in summary then,
10 gentlemen? The final, Members of the Tribunal. What we
11 have ultimately at the end of the day in this case is we
12 have not a pro-competitive market entry. What we have
13 is demonstrably on the documents an attempt to shroud
14 a regressive and protectionist venture by restrictive
15 rules for an excessive period with the express intention
16 and then effect of damaging a particular other named
17 market participant so as to leverage a new market
18 participant well within the five-year period into
19 a position of significant power as a matter of object.
20 Those are not arrangements that should be allowed to
21 stand under the Competition Act in my respectful
22 submission. The fact that they haven't then had the
23 profound effect that they were always intended to have
24 is neither here nor there but what we do see on the
25 evidence is that because they were specifically targeted

1 at damaging one other participant and they at least did
2 that because of the very nature of the rule, that that
3 participant has been damaged at least insofar as it
4 self-evidently can no longer be such a close competitive
5 constraint to the run-away market leader. Little
6 surprise in those circumstances that Rightmove is no
7 longer as constrained. And why is this bad not just for
8 my client, not just for other estate agents but because
9 the effect of those arrangements has been to lead to
10 higher prices than either counter-factual one, of
11 course, which is effectively ignored, certainly by my
12 learned friend's expert, is that insofar as those prices
13 are then passed on that it is also damaging to
14 consumers.
15 So for those reasons and all the other reasons that
16 I have advanced we would commend you to set aside these
17 restrictive provisions for the reasons I have given.
18 Unless I can be of further assistance those are our
19 submissions.
20 THE CHAIRMAN: I think briefly just on your penultimate
21 point, on the procure obligation. I understand exactly
22 what your submissions are, but I think it is just
23 important that I put across to you what I understood
24 Mr Maclean's submissions to be which was that there were
25 no obligations on parent companies. The obligation was

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1 on Gascoigne Halman to procure. As a result there would
2 be no rights or obligations in parent companies at all.
3 Obviously as part of the performance of its procure
4 obligation it may be that Gascoigne Halman might have
5 procured Connells to sign up to Agents' Mutual or not.
6 That would be a matter for it. I think Mr Maclean's
7 point is that if Gascoigne Halman failed to do they are
8 liable in damages. So the obligation is entirely its.
9 I am sure Mr Maclean will tell me if I have that wrong
10 but that, as I understood it, was the argument and, in
11 a sense, you weren't answering Mr Maclean's submissions,
12 simply repeating your own primary submission.
13 I understand that. But if you want to make any further
14 point about Mr Maclean's contention --
15 MR HARRIS: Yes, I do.
16 THE CHAIRMAN: -- other than it is wrong, then please do.
17 MR HARRIS: Well, there are two levels of response to it.
18 He's wrong for the reasons we advanced in our written
19 closings about the meaning of the word procure.
20 THE CHAIRMAN: You don't need to take us any further than
21 that.
22 MR HARRIS: No. The second point is that it can also be
23 seen through the lens of damages. He says, "Oh well it
24 doesn't mean that. It just means a right to damage."
25 So one asks oneself or I pose the question rhetorically:

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1 what damage? What damage? How does one calculate the
2 damage that is said to be owed to his client from my
3 client's failure to do the procuring? The answer is you
4 can only do that by reference to the terms upon which
5 these other people who on this hypothesis are not doing
6 what we should be making them do, that they are not
7 doing it. And the obvious one is price to think about.
8 Price and duration.
9 Let's take a sister company or whatever, Smiths.
10 For how long is Smiths supposed to be listing and at
11 what price? Because that would give rise to the
12 quantification of the damage that is said on my learned
13 friend's argument to be what he is entitled to. There
14 is no duration and there is no price. We know there are
15 multiple different types of contract here. LOIX, LOXNM,
16 five-year agreements, silver agreements, lesser
17 agreements, different prices, all the rest of it. The
18 reason that none of this makes sense is because if GHL
19 hasn't procured Smiths to go off and do what it is said
20 to be doing, what is it said that Smiths is said to be
21 doing and for how long and what price?
22 It doesn't make any sense, so that is the second
23 level of response.
24 THE CHAIRMAN: Thank you, Mr Harris.
25 MR HARRIS: Thank you.

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1 THE CHAIRMAN: Thank you all very much. It won't surprise
2 you that we will be reserving our judgment. We'll hand
3 something down as soon as we can.
4 One point which I should make which I don't normally
5 in these hearings is that obviously this is a part of
6 a wider whole and although I can't say because it
7 depends on what our judgment is what issues may lie
8 further down the line, I would envisage fairly shortly
9 after handing down judgment a case management conference
10 to deal with those issues. I just want to put your
11 respective legal teams on notice that that will happen
12 fairly quickly, and since I know you are both very busy
13 people, without reference to counsel because I am
14 thinking in more days than weeks after judgment is
15 handed down.
16 MR HARRIS: Yes, thank you.
17 THE CHAIRMAN: So simply --
18 MR HARRIS: Whilst we are on the subject of housekeeping, we
19 have a very short written submission to make about the
20 effect of the membership rule and the change of the
21 definition. May we have until the end of the week to
22 put that in?
23 THE CHAIRMAN: Yes, by all means and, Mr Maclean, if you
24 want to reply, then I am not encouraging it but should
25 you want to you can.

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1 MR MACLEAN: Very good. We'll obviously see what Mr Harris
2 puts in. My client -- obviously, I know the Tribunal
3 has this point but this is obviously an expedited case
4 and I am sure the Tribunal, you are all busy people as
5 well, but obviously my client's concern, this is
6 obviously a point which is causing much debate in the
7 trade press and so on and the best way of dealing with
8 some of the speculation, which some of its ill-founded,
9 the best way of dealing with it is to have the
10 definitive answer sooner rather than later. I am sure
11 the Tribunal understands my client's position.
12 THE CHAIRMAN: We quite understand and we do have it fully
13 in mind.
14 MR MACLEAN: I am sure you do.
15 MR FREEMAN: We will ensure that it happens.
16 MR MACLEAN: I can only take such steps as I can to procure
17 it which I have just done.
18 THE CHAIRMAN: Although you have no power to do so.
19 MR HARRIS: What a wonderful note to end on, sir.
20 THE CHAIRMAN: Thank you all very much.
21 (4.30 pm)
22 (The case concluded)
23

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