Neutral citation [2009] CAT 36

**IN THE COMPETITION APPEAL TRIBUNAL**

Case Number: 1106/5/7/08

Victoria House
Bloomsbury Place
London WC1A 2EB

21 December 2009

Before:

LORD CARLILE OF BERRIEW Q.C.
(Chairman)
GRAHAM MATHER
RICHARD PROSSER OBE

Sitting as a Tribunal in England and Wales

BETWEEN:

**ENRON COAL SERVICES LIMITED (IN LIQUIDATION)**

Claimant

**-v-**

**ENGLISH WELSH & SCOTTISH RAILWAY LIMITED**

Defendant

REPRESENTATION:

Mr. Paul Lasok Q.C., Mr. Daniel Beard and Mr. Rob Williams (instructed by Orrick, Herrington & Sutcliffe (Europe) LLP) appeared on behalf of the Claimant.

Mr. Mark Brealey Q.C. and Miss Maya Lester (instructed by Freshfields Bruckhaus Deringer LLP) appeared on behalf of the Defendant.

Hearing dates: 16, 17, 18, 21 and 22 September 2009

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**JUDGMENT**

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## I. INTRODUCTION

1. This case concerns the delivery to Edison Mission Energy Limited ("EME") of coal for electricity generation in Great Britain from 2001 to 2004. The rail network provides one of the main ways that imported and indigenous coal is transported from mines or ports to coal-fired power stations.

2. In June 2000 EME issued an invitation to tender ("ITT") for the rail haulage of coal to two of its power stations, at Fiddler's Ferry and Ferrybridge C respectively, for a four year period commencing on 1 January 2001. EME rejected the Claimant's bid for the tender and awarded the contract to the Defendant. The claim asserts that the Defendant's unlawful behaviour caused the Claimant to lose not only that tender but also a substantial chance of securing a contract to supply coal to one of EME's power stations during the same period. To use the expression employed by both parties, the Claimant is claiming for loss of a chance.

3. The Claimant, Enron Coal Services Limited (in liquidation) ("ECSL") was in the business of coal supply and freight trading. It traded principally imported coal and in particular offered customers the "end-to-end" or "E2E" model of service, from mine to generating plant. The Defendant, English Welsh and Scottish Railway Limited ("EWS") was an operator of bulk rail freight services[1]. EWS was the only company providing such services in Great Britain until January 2001.

4. This case 'follows on' from a decision by the Office of Rail Regulation ("ORR"), the regulator for the rail industry in Great Britain, published on 17 November 2006 ("the Decision"). The ORR found that EWS was in breach of Article 82 EC[2] and, with effect from 1 March 2000, the Chapter II prohibition contained in section 18 of the Competition Act 1998 ("the Act"). The ORR imposed a penalty of £4.1 million on EWS for the various infringements it committed. The Decision was not appealed by

[1] EWS has since been acquired by Deutsche Bahn AG and changed its name to DB Schenker (UK) Limited.
[2] Although Article 82 EC has now been replaced by Article 102 of the Treaty on the Functioning of the European Union, we refer throughout, for simplicity, to Article 82.

EWS and is thus final[3]. The fine has been paid, and is not the concern of this Tribunal. In the Decision the ORR found, inter alia, that EWS engaged in unlawful price discrimination against ECSL from May to October 2000. In particular, the ORR decided that EWS' discriminatory treatment placed ECSL at a competitive disadvantage in its contractual negotiations with EME relating to coal haulage supply to Fiddler's Ferry and Ferrybridge C power stations.

5. On 7 November 2008 ECSL[4] issued a claim form against EWS (subsequently amended on 8 January and 16 June 2009) seeking damages for the loss which it claims to have suffered as a result of some of the infringements found by the ORR. The trial before us concerned only the claim entitled "the loss of EME contract"; the other claims have either been struck out or withdrawn. The claim is brought under section 47A of the Act.

6. ECSL's case essentially is that it has been deprived of a real or substantial chance of winning a contract for the supply of coal to one of EME's power stations from 2001 to 2004 as a result of the infringement found by the ORR. ECSL estimates the value of that contract – and thus the amount of damages claimed – to be £19.1 million. EWS admits (as it must) the infringement found by the ORR, but denies ECSL's monetary claim. Its fundamental point is that ECSL has failed to prove that it was more likely than not that the abuse caused it to lose the chance of winning such an E2E contract. This issue of causation is at the centre of this litigation.

7. In this Judgment the Tribunal seeks to explain the main thrust of the arguments of the parties. We omit matters which seem to us to be irrelevant or of lesser importance. Abbreviations are contained in Annex 1 at the end of the Judgment, and will assist if kept alongside.

8. At the outset we give our unanimous decision that ECSL's claim against EWS for the loss of an opportunity to supply coal to EME's Ferrybridge C power station fails and is dismissed.

[3] The Decision was appealed by E.ON UK plc (Case No 1076/2/5/07), but the appeal was withdrawn with permission on 7 January 2008.

[4] ECSL sues on its own behalf and as assignee of a related company, Enron Capital and Trade Resources Limited. No issue arises in relation to ECSL's entitlement to sue.

9. We are aware that is the first follow-on claim for damages to reach trial in this Tribunal and that it has been unsuccessful. We caution against any attempts to prejudge its importance or implications for the outcome of monetary claims in the future. It is axiomatic that each case must be assessed on its own facts.

10. The burden of proving that the defendant's unlawful conduct caused the claimed loss rests on the claimant. On this occasion ECSL has simply failed to prove that the breach of statutory duty by EWS caused any claimed loss.

## II. FACTUAL BACKGROUND

11. Before dealing with the substance of ECSL's claim, it is necessary briefly to describe the factual background. What follows in this section is necessarily an abbreviated account of the uncontested evidence before the Tribunal, and of an extremely detailed ORR Decision of 409 pages plus appendices. In this section we set out the general facts of the case. We shall return to the specific and contested factual issues later.

*The supply and delivery of coal to power stations*

12. The privatisation of the electricity industry in England and Wales began in 1990 and was combined with a process of market liberalisation and regulation. This led to entry into the electricity generation market, mainly through the acquisition of coal-fired power stations. As a result the ownership of power stations changed hands (several times in some cases) from 1996 to 2004. (See Annex D to the Decision.) Some of the new entrants took on, either in part or in whole, existing coal supply and haulage arrangements from the previous owners of the power stations as part of the sale process. (These 'divestment contracts' are described in paragraphs 58 to 61 and Annex E to the Decision.) This was the case in respect of the power stations acquired by EME in 1999 and which are relevant to these proceedings.

13. We are concerned here with the delivery of coal to two power stations. They are:

    (a) Ferrybridge C, which is located on the south bank of the River Aire (south-east of the City of Leeds); and

(b) Fiddler's Ferry, which is situated on the north bank of the River Mersey (south-east of the City of Liverpool).

14. From 1991 to July 1999 both were owned by Powergen UK plc ("Powergen") (now E.ON UK plc). In June 1999 Edison First Power Limited, a subsidiary of EME, purchased from Powergen 199 year leases of both power stations. In December 2001 Edison First Power Limited sold the stations to AEP Energy Services UK Generation Limited ("AEP"). Finally, for the purposes of this Judgment, in July 2004 AEP sold the stations to Scottish and Southern Energy plc.

15. Fiddler's Ferry and Ferrybridge C require large and frequent deliveries of coal. At the material time, coal burned by power stations was indigenous or imported. Imported coal typically arrived via Liverpool Bulk Terminal ("LBT"), Immingham and Hunterston. Coal was transported from the mine or port to the power station, most commonly by rail. Haulage by rail requires a haulier to have train crews, locomotives, coal wagons and the relevant licences and track access contracts.

16. Coal from different mines has different chemical characteristics, which affect the way in which it can be transported, stored and burned. Different types of coal produce different emissions when they are burned. A regulatory regime controls the volumes of different types of emissions that coal-fired power stations are permitted to produce. (See paragraphs 78 to 83 of the Decision for further detail on types of coal).

17. Power generators in Great Britain arrange their coal supplies either on what is known as a do-it-yourself ("DIY") basis, or on an E2E basis.

18. In DIY, as the name implies, the power generator purchases coal from its chosen coal supplier, and then separately makes its own arrangements for transport (e.g. rail, road, or canal) from the coal mine, or in the case of imported coal, a port, to the power station. In the case of rail transport, a power station using DIY contracts directly with a rail haulier for haulage to the stockpile of the power station.

19. E2E services concern the end-to-end supply of coal and haulage services by a third party intermediary as a single service. They comprise the mining or purchase from the

mine of coal, shipping (if imported coal) and haulage to the stockpile of the power station. For rail transport, the E2E supplier contracts with the rail haulier for haulage.

*The 1999 Contract between ECSL and EME*

20. When EME purchased Fiddler's Ferry and Ferrybridge C in 1999, it entered into an E2E contract with the previous owner, Powergen, for the supply of indigenous coal from July 1999 to March 2003. This supply agreement remained in place throughout the period of EME's ownership of the power stations and is an important part of the background to the way in which EME decided to meet its coal requirements.

21. In July 1999 EME entered into a further E2E arrangement with ECSL for the supply of coal to Fiddler's Ferry and Ferrybridge C. ECSL and EME entered into a formal contract dated 13 August 1999 entitled "Master Coal Purchase and Sale Agreement for Fiddler's Ferry and Ferrybridge" ("the 1999 Contract"). The 1999 Contract was a framework agreement which allowed the parties to specify and agree at a later stage the prices and volumes of coal in written confirmations. Confirmations were subsequently executed by the parties on 3 September 1999 and 16 December 1999 (the "September Confirmations" and "December Confirmations" respectively).

22. Unfortunately, from November 1999 onwards commercial relations between EME and ECSL deteriorated. This deterioration derived from a combination of several factors, one of which was the over-supply of coal. EME had contracted to purchase more coal than it needed to burn or could even stockpile at its power stations. This resulted in both ECSL (and Powergen) attempting to supply more coal than could be accommodated. Operational difficulties resulted at the power stations. These difficulties are exemplified by problems with the haulage of coal to Fiddler's Ferry which, in some instances, led to train cancellations and to EWS being unable to provide the volume of haulage wagon capacity that ECSL (or Powergen) wished to deliver. The precise cause of these difficulties and their ramifications was a matter of dispute.

23. In the course of early 2000 discussions took place between ECSL and EME about possible amendments to the 1999 Contract. Having committed itself to buying too much coal, EME wanted to alter its coal supply and haulage arrangements. The implications of these renegotiations are a contentious matter, to which we return below.

24. The parties ultimately entered into a formal amendment of the 1999 Contract in July 2000, backdated to June 2000. In conjunction with that amendment, the parties executed in July 2000 a confirmation covering the delivery of coal to LBT. By two side letters, the term of each of the September Confirmations was extended and the December Confirmations were cancelled. The effect of these various amendments from 12 June 2000 is set out in paragraph 25 below.

25. It was agreed that:

(a) ECSL would continue to supply the outstanding undelivered quantities of coal under the September Confirmation for consumption by the power stations at Fiddler's Ferry and Ferrybridge C.

(b) The imported coal supplied by ECSL was to be supplied for use only at Fiddler's Ferry rather than Ferrybridge C.

(c) The total volumes of imported coal ECSL would supply to EME would be, essentially, the same as under the 1999 Contract with ECSL.

(d) The volumes would be delivered for 17 months longer than under the 1999 Contract in order to ensure that ECSL did not lose out from ceasing to supply volumes previously intended for Ferrybridge C.

(e) EME assumed direct responsibility for hauling the coal from LBT to Fiddler's Ferry. The new delivery point was LBT rather than the power station. Thus, coal was no longer supplied on an E2E basis.

(f) The prices were to be renegotiated for each year of the amended contract.

(g) EME would be able to purchase imported coal from suppliers other than ECSL and (as the case may be) could sell that coal on to other generators.

*Rail haulage contract between ECSL and EWS*

26. EWS owned or had access to most of the wagons used for coal haulage by rail. ECSL used EWS to haul the coal under the EWS standard conditions of carriage at rates which were agreed in August 1999 and later embodied in a seven month formal contract on 1 December 1999. That contract remained in place until 1 July 2000.

27. From January to May 2000 ECSL and EWS discussed a possible performance-based contract which, if implemented, would have superseded the existing contractual arrangements for the haulage of coal to the two EME power stations. As part of those negotiations in May 2000 EWS quoted rates for a wide variety of routes from the ports of Hunterston, Hull and Immingham to Fiddler's Ferry and to the Aire Valley (where Ferrybridge C is located) ("the May 2000 rates").

28. As explained further below, the May 2000 rates were found by the ORR to be higher than those previously offered to ECSL under the seven month contract and the rates which EWS subsequently offered to EME in October 2000. (A table comparing the various rates EWS offered to ECSL and EME is set out at Annex 2 to this Judgment.) On 30 June 2000 ECSL entered into a contract with Freightliner Heavy Haul Ltd ("FHH") which, from January 2001, began to operate coal haulage services in competition with EWS.

*The EME Tender*

29. In June 2000 EME was developing a fresh purchasing strategy for coal to be delivered to the Fiddler's Ferry and Ferrybridge C power stations over the period 2001-2004. As part of the development of that strategy, EME issued invitations to tender for a four year contract for the haulage of coal by rail to Fiddler's Ferry and Ferrybridge C, commencing on 1 January 2001 ("the EME Tender"). It is to be noted that the tender invitation document did not expressly envisage E2E arrangements.

30. An ITT was sent to EWS in June 2000 and to ECSL in August 2000, amongst other rail hauliers.

31. Both EWS and ECSL submitted tenders. The ECSL tender offered a minimum discount if and to the extent that the trains carried coal supplied by ECSL. Whether ECSL's bid for the tender was based on rates quoted by EWS in May 2000 or rates offered by FHH in June 2000 is a matter of controversy.

32. The contract was awarded to EWS in or around October 2000. The tendered contract was signed on 25 July 2001, but backdated to commence on 1 January 2001.

## III. ISSUES FOR THE TRIBUNAL

33. The jurisdiction of the Tribunal under section 47A of the Act is limited to determining actions for damages based on a finding of infringement made by a competition authority (more commonly known as "follow-on actions"). The role of the Tribunal in proceedings under section 47A has been described by the Court of Appeal as follows:

> "… the role of the Tribunal is limited to the determination of loss which results from a finding of infringement by a regulator. The Tribunal is not therefore concerned with the correctness of that finding but only with whether it has been made."
>
> (*English Welsh & Scottish Railway Ltd v Enron Coal Services Ltd* [2009] EWCA Civ 647 per Patten LJ at paragraph 28).

34. Therefore the issues falling for decision are:

    (a) What infringement was found by the ORR?

    (b) What (if any) is the loss or damage caused by that infringement?

    (c) If the claimed loss or damage was caused by that infringement, what (if any) is the quantum of that loss or damage?

## IV. MAIN FINDINGS OF THE ORR

35. The claim advanced by ECSL is based on the findings made by the ORR. It is necessary therefore to describe in some detail the reasoning set out in the Decision. In considering the ORR's findings, the Tribunal has remained mindful of a remark of

Carnwath LJ in *English Welsh & Scottish Railway Ltd v Enron Coal Services Ltd* [2009] EWCA Civ 647. He emphasised at paragraph 64:

> "the need for a determination by the regulator of an infringement as a foundation for liability under section 47A. It is not enough to be able to point to findings in the decision from which an infringement might arguably be inferred."

36. In response to complaints first made by ECSL and subsequently by FHH, the ORR concluded that EWS had abused its dominant position in a number of ways. The ORR summarised its conclusions as follows:

> "13. In this Decision, ORR concentrates on three particular allegations of abusive behaviour brought to its attention by the above complaints and extending over various time periods.
>
> (a) Exclusionary contracts with industrial users of coal (1996-2005).
>
> (b) Discrimination against ECSL (May 2000 to October 2000).
>
> (c) Predatory behaviour directed towards FHH (July 2002 to December 2003).
>
> 14. ORR has concluded that the facts underlying the complaint of a refusal to deal and that of discrimination are the same and that the essence of the abusive conduct in question is discrimination on the part of EWS in relation to prices offered to ECSL. Taken together the conduct amounts to a sustained and deliberate campaign by EWS to protect its own dominant position from competition and to disadvantage ECSL (perceived by EWS to act as a competitor to it) and FHH (a new entrant providing haulage of coal by rail). ORR does not, therefore, find an infringement that can be characterised as a refusal to deal with ECSL."

37. The ORR outlined its assessment of EWS' discrimination against ECSL and how it formed part of EWS' wider exclusionary strategy in paragraphs B2 to B3:

> "B2 EWS has engaged in abusive discrimination between its customers. In particular, EWS set an existing customer, ECSL, selectively higher prices than it charged other customers directly for the same flows without objective justification.
>
> B3 This behaviour was a further manifestation of EWS's wider strategy to exclude or limit competitive opportunities for potential new entrants to the market for coal haulage by rail in Great Britain. EWS was concerned that ECSL could facilitate such entry into this market by developing an intermediary role, including through the negotiation of E2E contracts with new owners of power stations. EWS sought to constrain this competitive threat by ensuring that it, and not ECSL, secured direct contracts with the power stations."

38. The ORR referred to the potential for an intermediary such as ECSL to facilitate entry into the relevant market and to evidence showing the development of a strategy by

EWS to treat ECSL in such a way as to forestall "open access throughout". This helps to explain EWS' motivation in its dealings with ECSL. The ORR found that:

> "B18 The threat posed by ECSL establishing customer relationships and using these relationships to sponsor or facilitate entry was recognised by EWS at the time. ECSL became active as a supplier to UK power stations during 1999 at a time when EWS was the sole haulier of coal by rail. As shown in more detail below, EWS's response was to try to secure direct contracts with the generators.
>
> B19 Therefore, in considering the evidence surrounding EWS's conduct towards ECSL, it is important to appreciate the role that ECSL could have played as a facilitator of entry into the market for the supply of coal haulage by rail in Great Britain."

39. The ORR began its assessment of whether EWS engaged in unlawful price discrimination in paragraph B21 of the Decision, which states:

> "B21 The objection concerns three particular aspects of the negotiations between EWS and ECSL:
>
> (a) around May 2000, when EWS offered ECSL rates significantly higher than rates that EWS had previously offered ECSL;
>
> (b) the period between May 2000 and November 2000 when EWS offered significantly lower rates to other customers; and
>
> (c) during the same time period, when active contractual negotiations between the two parties ceased and ECSL was not offered price reductions similar to those offered to other customers of EWS."

40. The ORR described its approach to the allegations of price discrimination in paragraphs B22 and B24:

> "B22 ORR's analysis is focused on rates for coal haulage applying to certain flows to Fiddler's Ferry and Ferrybridge power stations (operated by EME) and certain flows to Eggborough power station (operated by BE). ORR presents analysis of EWS's prices on these flows to different customers and at different points in time. ORR also considers how the discriminatory prices placed ECSL at a competitive disadvantage.
>
> …
>
> B24 The assessment demonstrates that, between May 2000 and November 2000, EWS applied dissimilar conditions to equivalent transactions, with its customers for coal haulage by rail, and placed ECSL at a competitive disadvantage."

41. The Decision contains evidence of EWS' intent to limit ECSL's ability to negotiate terms with the new owners of power stations such as EME and to forestall ECSL from sponsoring the entry of a new rail freight operator, such as FHH (see paragraphs B25 to

B44). The evidence shows how EWS saw indirect relationships between ECSL and the power generators as capable of undermining its own ability to preserve the price it charged generators for coal haulage in future direct negotiations. Of particular importance for present purposes is an internal EWS email at the time of the restructured 1999 Contract:

> "B42 In June 2000, EME and EWS reached an agreement to negotiate towards a direct contract for coal haulage by rail (on a DIY basis), which would replace the previous indirect E2E arrangements that EME had in place with ECSL. An internal EWS e-mail noted:
>
> "We did the deal with Edison Mission yesterday morning for LBT-Fiddlers @ £[ … ]/tonne as agreed. This rate until 16th September pending a contract.
>
> **Enron are now off our hands so far as Edison are concerned. The Enron flows we have left are to British Energy's station at Eggborough; from Immingham, Redcar and Hull**. Also to Enron's own power station at Wilton – 250,000 tonnes/year. I think we are stuck Enron [sic] on the Eggborough traffic until next April when British Energy will, hopefully take over their own coal procurement. **But we have got them out of Fiddlers Ferry and Ferrybridge – a big step forward**." (Emphasis added.)
>
> B43 This e-mail is evidence of both EWS's intent and, indeed, its success in stopping ECSL from carrying out indirect supplies to EME, one of the new generating companies."
>
> (emphasis in original)

42. The ORR found that this (and the documents cited at paragraphs B141-B174 of the Decision) was evidence of EWS' exclusionary intent, i.e. intent to stop ECSL's indirect coal supplies to power generators in general and to EME's power stations in particular. In paragraph 76 of its skeleton argument ECSL claimed that the infringement found by the ORR had a further factual component, namely that the discrimination formed part of a wider anti-competitive strategy to foreclose competition in the relevant market. We did not understand EWS to resist or seek to challenge that finding of intent.

43. The ORR expressly addressed the question of price discrimination in relation to the EME Tender in section IIB of the Decision and made specific findings about it in paragraphs B45 to B65. Paragraphs B45 to B48 describe the "contractual background" which we have already set out in section II above. The ORR pointed out that it sought to understand EWS' internal price setting practices and cost modelling, and the underlying thinking of those taking decisions on rates for coal haulage: paragraph B49.

44. In paragraphs B51 and B52 the ORR observed that the initial rates agreed with ECSL in 1999 were significantly higher than existing rates to other generators at that time and this led to an angry response from ECSL when they discovered it. The ORR then examined the May 2000 rates offered by EWS to ECSL in connection with the negotiations for the performance-based contract which were considerably higher than both the 1999 rates and the rates subsequently offered by EWS in October and November 2000 to EME. This information is presented in Table 15 of the Decision. According to paragraph B54 of the Decision the figures in Table 15:

> "… demonstrate two aspects of discriminatory pricing:
>
> (a) EWS set ECSL higher prices in May 2000 (compared to those in December 1999) once ECSL started to seek quotes for the haulage of coal generally (i.e. in order to provide haulage prices as an intermediary, including supply on an E2E basis, and not just in respect of a pre-existing E2E contract with a specific generator) and when EWS had become more concerned about the threat posed by ECSL as a facilitator of new entry to the market for coal haulage by rail.
>
> (b) EWS in May 2000 set ECSL higher prices (in the region of 5% to 36% higher) than it subsequently set EME for direct supply in respect of the same flows."

45. The Decision compared the May 2000 rates quoted to ECSL with those previously offered and agreed in December 1999 with ECSL and those subsequently offered to EME in October 2000. The ORR's conclusion on this issue is set out in paragraphs B57 to B58, as follows:

> "B57 On the basis of all this evidence, EWS is found to have offered selective price reductions to EME, with prices considerably lower than those offered to ECSL in May 2000. EWS has not provided an objective justification for the price differences.
>
> B58 Taken together with the evidence of the price increases to ECSL compared to the rates ECSL had previously been granted, and the evidence above of EWS's intent to impede ECSL's ability [to] contract directly with the generators for rail haulage, including by way of E2E supply, this evidence supports the finding that EWS discriminated against ECSL between May 2000 and November 2000 in respect of prices for coal haulage on the flows to Fiddler's Ferry and Ferrybridge."

46. The ORR considered the question of competitive disadvantage. Its reasoning and conclusion on this question is set out in paragraphs B62 and B65 in the following terms:

> "B62 In bidding as part of these negotiations, EWS's discriminatory treatment of ECSL placed ECSL at a competitive disadvantage in two main ways:

> (a) First, having failed to agree the performance related contract it had sought from EWS, ECSL was in the position of having neither its own coal haulage operations nor a suitable contract with EWS (the only operator of coal haulage by rail at the time). This would have impeded ECSL's ability to offer competitive rates for coal haulage to EME. In bidding to supply EME, ECSL would have had to bear the business risks of subsequently needing to re-open negotiations with EWS and/or trying to assist the new entry of an untested rail haulage operator that had never previously carried coal (the substantial barriers to entry to the market for coal haulage by rail are discussed in part I – Market definition and Assessment of dominance).
>
> (b) Second, ECSL's ability to offer relatively attractive rates for coal haulage to EME was impeded by the fact that, between August 2000 and October 2000, EWS (i) offered EME rates for coal haulage that were lower than the rates it had offered to ECSL in May 2000 but (ii) did not make available to ECSL the reduced rates it was offering to EME.
>
> …
>
> B65 It is not possible to conclude that ECSL was displaced from supplying EME as a result only of the discriminatory terms from EWS. Nonetheless, for the reasons set out above, ECSL was clearly placed at a competitive disadvantage when competing against EWS, compared to the scenario that would have prevailed had EWS been willing to treat ECSL in a non-discriminatory manner (i.e. had it offered ECSL similar rate reductions to those it had offered to EME)."

47. The ORR summarised its findings again in paragraphs B100 and B198 of Part IIB of the Decision:

> "B100 On the basis of all the evidence set out above, and the points made in response to EWS's arguments below, it is found that between May 2000 and November 2000, EWS pursued discriminatory pricing practices against ECSL. This discriminatory pricing placed ECSL at a competitive disadvantage when negotiating intermediary contracts (including E2E deals) with generating companies. EWS's intention was to reduce the threat that ECSL posed to its position in the market for coal haulage by rail in Great Britain. EWS has advanced no credible objective justification for the higher prices charged to ECSL. EWS's conduct distorted the competitive process and is inconsistent with the obligations of a dominant company. EWS's behaviour towards ECSL is therefore found to be abusive.
>
> B198 For all of the above reasons, it is found that between May 2000 and November 2000, EWS pursued, without objective justification, selective and discriminatory pricing practices that placed ECSL at a competitive disadvantage in its contractual negotiations with two power generators, EME and BE. By impeding the competitive position of ECSL as a customer and a competitor, EWS's actions were capable of distorting the structure of competition in the relevant market."

48. For these and other reasons, the ORR decided that EWS had infringed the prohibition on abuse of a dominant position contained in section 18 of the Act and Article 82 EC.

## V. THE LEGAL FRAMEWORK

*Article 82 EC and the Chapter II prohibition*

49. This case concerns the private law consequences of a breach of Article 82 EC and the Chapter II prohibition. Article 82 provides, in so far as material:

> "Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between member states.
>
> Such abuse may, in particular, consist in:
>
> …
>
> (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage ..."

50. As a matter of domestic law, the Act came into force on 1 March 2000. Section 18(1) contains the Chapter II prohibition which is to the same effect as Article 82 save for excluded cases; and the requirement in the latter provision that there be an effect on trade between Member States is replaced with a requirement that there be an effect on trade within the United Kingdom. For convenience, references to Article 82 in this judgment should be taken to include the Chapter II prohibition.

*Section 47A*

51. So far as material, section 47A of the Act[5] (inserted by section 18 of the Enterprise Act 2002 with effect from 20 June 2003) provides as follows:

> "**47A Monetary claims before Tribunal**
>
> (1) This section applies to—
>
> (a) any claim for damages, or
>
> (b) any other claim for a sum of money,
>
> which a person who has suffered loss or damage as a result of the infringement of a relevant prohibition may make in civil proceedings brought in any part of the United Kingdom.
>
> (2) In this section "relevant prohibition" means any of the following—
>
> …

[5] References to the OFT in section 47A include any of the sectoral regulators, such as the ORR, who enjoy concurrent powers of enforcement in respect of Article 82: see section 54 of the Act and sections 67(3) and 67(3A) of the Railways Act 1993.

(b) the Chapter II prohibition;

…

(d) the prohibition in Article 82 of the Treaty;

…

(4) A claim to which this section applies may (subject to the provisions of this Act and Tribunal rules) be made in proceedings brought before the Tribunal.

(5) But no claim may be made in such proceedings—

(a) until a decision mentioned in subsection (6) has established that the relevant prohibition in question has been infringed; and

(b) otherwise than with the permission of the Tribunal, during any period specified in subsection (7) or (8) which relates to that decision.

(6) The decisions which may be relied on for the purposes of proceedings under this section are—

(a) a decision of the OFT that the Chapter I prohibition or the Chapter II prohibition has been infringed;

(b) a decision of the OFT that the prohibition in Article 81(1) or Article 82 of the Treaty has been infringed;

…

(9) In determining a claim to which this section applies the Tribunal is bound by any decision mentioned in subsection (6) which establishes that the prohibition in question has been infringed.

(10) The right to make a claim to which this section applies in proceedings before the Tribunal does not affect the right to bring any other proceedings in respect of the claim."

52. The parties agreed that section 47A(9) of the Act is of particular importance for the present claim. Section 47A(9) provides that in determining the present claim the Tribunal is bound by the Decision in so far as it establishes that the relevant prohibitions have been infringed. The parties agreed that the Tribunal is therefore bound by the findings of fact that constitute the elements of the demonstrated infringement. What essentially separated them was whether other findings of fact contained in a decision finding an infringement of EU or UK competition law were binding on the Tribunal.

*Section 58 and findings of fact*

53. ECSL's case is that the Tribunal is bound by all findings of fact made by the ORR in the course of its investigation, as recorded in the Decision, and not just those supporting its finding of infringement. ECSL relied upon section 58 of Act, which provides:

> "**Findings of fact by OFT**
>
> (1) Unless the court directs otherwise, an OFT's finding which is relevant to an issue arising in Part I proceedings is binding on the parties if--
>
> (a) the time for bringing an appeal in respect of the finding has expired and the relevant party has not brought such an appeal under section 46 or 47; or
>
> (b) the decision of the Tribunal on such an appeal has confirmed the finding.
>
> (2) In this section--
>
> "an OFT's finding" means a finding of fact made by the OFT in the course of conducting an investigation;
>
> "Part 1 proceedings" means proceedings brought otherwise than by the OFT-
>
> (a) in respect of an alleged infringement of the Chapter I prohibition or of the Chapter II prohibition; or
>
> (b) in respect of an alleged infringement of the prohibitions in Article 81(1) or Article 82;
>
> "relevant party" means--
>
> (a) in relation to the Chapter I prohibition, a party to the agreement which is alleged to have infringed the prohibition; and
>
> (b) in relation to the Chapter II prohibition, the undertaking whose conduct is alleged to have infringed the prohibition.
>
> (3) Rules of court may make provision in respect of assistance to be given by the OFT to the court in Part I proceedings."

54. ECSL submitted that section 58 applies to monetary claims before the Tribunal. First, they referred to the definition of "the court" for the purposes of section 58. Section 59(1) of the Act contains the following definition:

> "… "the court", except in sections 58, 58A and 60 and the expression "European Court", means --
>
> (a) in England and Wales, the High Court;
>
> (b) in Scotland, the Court of Session; and
>
> (c) in Northern Ireland, the High Court …"

55. ECSL contended that the term "the court" is not limited to the High Court of England and Wales for the purposes of section 58, but must be read as including the Tribunal. This interpretation is said to be consistent with the ordinary meaning of "court", the Interpretation Act 1978 and the use of that term in various other statutes. Any other interpretation, they submitted, would mean that the High Court would be more strictly bound than the Tribunal by certain findings of fact made by a domestic competition authority. ECSL submitted that such a result would be perverse.

56. ECSL's second submission in this context was that "Part I proceedings" for this purpose should include section 47A of the Act. ECSL submitted that the word "alleged" simply refers to the contentions of infringement made in a decision finding an infringement of EU or UK competition law. Were it otherwise, a claimant would have the benefit of the binding findings of fact when it alleges an infringement (unless the court directs otherwise), but not when it relies on a prior decision to that effect. Put simply, section 58 would only apply in standalone actions before the High Court. Such a result, ECSL argued, would be absurd and should be avoided.

57. The third step in ECSL's argument was that section 58A does and should apply to the Tribunal. Section 58A provides:

> "**Findings of infringements**
>
> (1) This section applies to proceedings before the court in which damages or any other sum of money is claimed in respect of an infringement of--
>
> (a) the Chapter I prohibition;
>
> (b) the Chapter II prohibition;
>
> (c) the prohibition in Article 81(1) of the Treaty;
>
> (d) the prohibition in Article 82 of the Treaty.
>
> (2) In such proceedings, the court is bound by a decision mentioned in subsection (3) once any period specified in subsection (4) which relates to the decision has elapsed.
>
> (3) The decisions are--
>
> (a) a decision of the OFT that the Chapter I prohibition or the Chapter II prohibition has been infringed;
>
> (b) a decision of the OFT that the prohibition in Article 81(1) or Article 82 of the Treaty has been infringed;

> (c) a decision of the Tribunal (on an appeal from a decision of the OFT) that the Chapter I prohibition or the Chapter II prohibition has been infringed, or that the prohibition in Article 81(1) or Article 82 of the Treaty has been infringed.
>
> (4) The periods mentioned in subsection (2) are--
>
> (a) in the case of a decision of the OFT, the period during which an appeal may be made to the Tribunal under section 46 or 47;
>
> (b) in the case of a decision of the Tribunal mentioned in subsection (3)(c), the period during which a further appeal may be made under section 49;
>
> (c) in the case of any decision which is the subject of a further appeal, the period during which an appeal may be made to the Supreme Court from a decision on the further appeal;
>
> and, where any appeal mentioned in paragraph (a), (b) or (c) is made, the period specified in that paragraph includes the period before the appeal is determined."

58. ECSL submitted that section 58A adopts the same definition of "the court" as section 58 and should therefore include the Tribunal: see section 59(1), cited above. ECSL acknowledged that its suggested interpretation would create a degree of duplication between section 58A and section 47A(9), but noted that section 58A indicates when a finding of infringement becomes binding, whereas section 47A(9) states what sorts of decisions are binding. This proposed statutory construction, it argued, had the merit of clarity.

59. Despite the formidable quality of the arguments presented by Mr. Lasok Q.C., who appeared on behalf of ECSL, in our judgment the Claimant's case on this point faces insurmountable obstacles. We accept the force of ECSL's argument on the meaning of "the court" for the purposes of sections 58 and 58A. In principle, there is no reason why the broader definition could not include the Tribunal, the county court[6] or indeed any domestic judicial body. In practice, however, the wording of section 47A provides a compelling reason why section 58 does not apply to the Tribunal.

60. The Claimant's first difficulty, as it seems to us, is the wording of section 58 which, on any view, only applies to findings which are relevant to "Part I proceedings". Part I proceedings are expressly defined by subsection 58(2) as proceedings brought

[6] See, however, paragraph 2.3 of the Practice Direction – Competition Law – Claims Relating to the application of Articles 81 and 82 of the EC Treaty and Chapters I and II of Part I of the Competition Act 1998.

otherwise than by the OFT in respect of an alleged infringement of EC or UK competition law. The Tribunal has jurisdiction to hear monetary claims only where the competition authority has already made a decision of the kind described in section 47A(6): see section 47A(5)(b). The Tribunal is thus not currently seized of damages actions in respect of alleged infringements. This is clear on the face of the Act. Any lingering uncertainty about the scope of the Tribunal's jurisdiction was dispelled by the judgment of Patten LJ in *English Welsh & Scottish Railway Ltd v Enron Coal Services Ltd*, cited above, at paragraph 31:

> "The use of the word "decision" makes it clear that s.47A is differentiating between findings of fact as to the conduct of the defendant made as part of the overall decision and a determination by the regulator that particular conduct amounts to an infringement of the Chapter II prohibition."

61. The distinction identified by Patten LJ tells strongly against the suggestion that all findings of fact must be treated in exactly the same way as a finding of infringement. Whereas section 47A(9) provides that the Tribunal is bound by a definitive finding of infringement, there is no reference to findings of fact or to section 58. ECSL's concerns about the resulting differences between the High Court and the Tribunal do not justify a departure from what we regard as the very clear wording of the Act.

62. Secondly, the Claimant's case crucially depends upon reading "alleged infringement" in section 58 as referring to the contentions of infringement made in the relevant infringement decision. In our judgment there is no room for such a reading. The existence of a definitive finding of infringement is a pre-condition to the making of a claim under section 47A(1). The whole point of section 47A is to avoid the need for the parties and the Tribunal to decide whether there has been an infringement. We do not accept that the decision establishing the infringement (and the Tribunal's jurisdiction) is merely an allegation: unless and until it is set aside on appeal, an infringement decision is final and binds the Tribunal: see section 47A(9).

63. Third, the interpretation advocated by ECSL would appear to create an unnecessary duplication between section 47A(9) and section 58A (which, as already noted, applies the same definition of "court" as section 58). We are not persuaded that section 47A(9) merely refers to the types of infringement decision that are binding, while section 58A addresses when those decisions are binding. It is clear that subsections 47A(6)-(8) –

and not section 58A – provide for the timing of a section 47A claim and when a decision establishing an infringement will be binding on the Tribunal.

64. Fourth, the fact that section 58 does not apply to section 47A proceedings does not mean that the Tribunal should disregard the ORR's findings of fact. On the contrary, we have considered all of the ORR's findings carefully and given due weight to all of its findings. We have naturally given particular attention to any points on which either party differed from the Decision. As it was, there were very few instances where the evidence adduced before us contradicted the findings made by the ORR[7]. Further still, we do not consider that our overall conclusions depend on the application of section 58 to these proceedings since, as explained further below, the Decision does not assist on the question of causation.

65. In any event, even if section 58 did apply to the present claim, we would have reached the same findings of fact as are contained in this Judgment and would have reached the same conclusion on the issue of causation.

66. The arguments before us raised other issues, including ECSL's application for permission to appeal to the Supreme Court from the Court of Appeal's judgment of 1 July 2009 in relation to aspects of this case; the relevance of the doctrine of estoppel; the Advocate General's Opinion in Case C-128/92 *HJ Banks & Co Ltd v British Coal Corp* [1994] ECR 1209 and the judgment of the High Court in *Betws Anthracite Limited v DSK Anthrazit Ibbenburen GmbH* [2003] EWHC 2403 (Comm). Such issues are no doubt interesting but they do not appear to us to inhibit or affect this judgment.

## VI. THE EVIDENCE

67. The evidence came in three broad categories – documentary, other factual, and expert.

*Documentary evidence*

68. The Tribunal's Order of 14 January 2009 (as amended) provided for standard disclosure, including the disclosure of the relevant parts of the confidential version of

[7] The salient ones are paragraph 55 (on lowest delivered price) and paragraph 390 (nature of ECSL's bid as E2E).

the ORR Decision. This was followed by a further Order for third party disclosure on 2 April 2009; this required the ORR to make available certain documents submitted by EME and/or AEP to the ORR during its investigation.

69. Many of the communications between and within the parties took place by email and have been disclosed, but it would be a mistake to suppose that these are comprehensive since it is clear that communications also took place by telephone and in person. We were taken to the principal documents such as the 1999 Contract and its confirmations and amendments, the ITT, the bids submitted by various parties including ECSL and EWS. Contemporary documents show how those bids were evaluated, although it should be pointed out that there was no contemporary document specifically explaining when and why the ECSL bid was rejected[8]. We have regarded contemporary documents as being of particular value.

*Witnesses of fact*

70. Both parties lodged statements from witnesses of fact:

(a) Ian Maxwell Crosland was the Fuels Director with EME at the material time. He was responsible for negotiating and managing its coal supply and haulage contracts. He gave evidence describing the background to the EME Tender, in particular the restructuring of the 1999 Contract. He explained the way in which EME assessed the bids received in response to the EME Tender and the reasons why EME rejected ECSL's bid. In our judgment, Mr. Crosland gave his evidence candidly and in a straightforward manner. We were impressed by his overall consistency on key points. Mr. Crosland's answers were convincing on the reasons why EME held a competitive tender for coal haulage to its power stations, and the considerations which influenced the way in which the competing bids were assessed, including ECSL's. On this issue Mr. Crosland's evidence was corroborated by other evidence, even if his recollection unsurprisingly was affected on at least one point (in relation to the December Confirmations) by the passage of time.

[8] We deal with an internal EME document of 12 October 2000 in paragraphs 196 and 197 below.

(b) Stuart Staley was employed by ECSL from September 1995 to December 2001. From 1998 he worked as a member of ECSL's Coal Trading Group. He led the work of that group to develop ECSL's business model for coal procurement and supply to power generators in the UK and was responsible for its implementation. Mr. Staley reported to Mr. George McClellan, a Managing Director, who was not called as a witness but whose name appears on a number of the documents. As Mr. Staley accepted, he delegated much of the day-to-work on transactions to employees, including Mr. Kearney, but himself decided the key commercial terms in rail and port contracts. Mr. Staley was an important witness for two reasons - first, because of his knowledge of ECSL's business model and its dealings with EME during the relevant period; and, secondly, because he was the only former ECSL employee seeking to provide acceptable evidence relating to the chance ECSL claims to have lost.

(c) Thomas Kearney was a senior commercial employee at ECSL from December 1996 to November 2001. He was responsible for negotiating, implementing and managing their international port and rail contracts, including those in the UK. In giving evidence, Mr. Kearney taken alone came across to us as a witness motivated as much by agenda as accuracy. Nevertheless we found that we were able to rely on his evidence to the Tribunal where it was sufficiently corroborated by other elements.

(d) David White is the Head of Commercial Policy at DB Schenker (UK) Limited. He gave a detailed statement about his involvement in the 1999 Contract, EME Tender and relations between EWS and respectively ECSL and EME at the relevant time. When Mr. White was cross-examined, it became apparent that on various matters he had only a vague recollection of events, as he acknowledged. We derived little assistance from the evidence of Mr. White on the matters in dispute, but are grateful for the helpful way in which he set out the background to the supply and haulage of coal to power stations. He had no direct knowledge of the negotiations between ECSL and EME and thus would have had no part to play in the hypothetical scenario which we must consider.

(e) Neville Kahn is a partner at Deloitte LLP and was appointed joint administrator of ECSL in November 2001 (at which time he was employed by PricewaterhouseCoopers LLP ("PwC")). We considered him a helpful witness, and have generally found his evidence reliable.

71. None of the witnesses of fact claimed to have a perfect recollection of the matters about which they gave evidence. This is not surprising given the lapse of time. We have therefore sought to test the veracity of witness evidence by reference to facts proved independently of their testimony, in particular by reference to the documents in the case. All the witnesses themselves relied heavily upon the contemporaneous written exchanges and file notes in order to recall, or to some extent reconstruct, their account of what happened.

*Absent witnesses*

72. Neither party formally invited the Tribunal to draw any adverse inference from the absence of potential witnesses: e.g. George McClellan; Stephen Pirozzi and Riaz Rizvi (former employees of ECSL) or Willie Heller (CEO of EME's European business at the relevant time). It is not appropriate for us to speculate on what these individuals would have said.

*Expert evidence*

73. The Tribunal heard evidence from three experts in competition economics and accountancy. The Claimant's two experts met with the Defendant's expert prior to the hearing and agreed two joint statements which recorded the extent of their agreement and their disagreement on various matters. While we make only limited reference to the expert evidence in this judgment, we have taken it all into account and have found it of assistance.

(a) Professor Janusz Ordover is Professor of Economics at New York University. He is also a Senior Consultant at Compass Lexecon, an economic consulting firm specialising in the application of economic analysis to competition law matters. ECSL called Professor Ordover to give evidence on whether EWS's discriminatory behaviour caused ECSL to suffer anti-competitive injury in the form of a four year contract with EME

to supply coal to Ferrybridge C on an E2E basis. EWS objected to the admissibility of his evidence, a matter which we discuss below. Professor Ordover fulfilled his responsibilities as an expert properly, but we concluded that limited weight can be placed on his evidence in so far as he insisted that the correct focus was on the decisions that would have been made by a rational economic decision-maker rather than the actual third party in this case, EME (see further paragraphs 192 and 193 below).

(b) Mr. John Fisher, a partner at PwC, is a forensic accountant specialising in the financial aspects of commercial claims and disputes. ECSL called Mr. Fisher to give evidence on the quantification of its damages claim. We do not doubt that Mr. Fisher was properly qualified to give evidence about those matters upon which he expressed an opinion, or that he was straightforward in seeking to assist the Tribunal with his evidence. However, we have some reservations in relation to his opinion on several matters relating to the assessment of damages – a matter which, in the event, we do not have to determine.

(c) Mr. Zoltan Biro is a Director of Frontier Economics Limited, a consultancy specialising in economic analysis. EWS called Mr. Biro to give evidence in response to Professor Ordover's opinion on causation and Mr. Fisher's assessment of the damages associated with ECSL's alleged loss of chance. We conclude that Mr. Biro was capable of giving evidence about those matters upon which he expressed an opinion, and we found his evidence persuasive.

*Admissibility of Professor Ordover's evidence*

74. Mr. Brealey Q.C., who appeared on behalf of EWS, challenged the admissibility of the expert evidence of Professor Ordover. Mr. Brealey referred us to CPR Part 35.1 and the judgment of Aikens J (as he then was) in *JP Morgan Chase Bank v. Springwell Navigation Corporation* [2006] EWHC 2755 (Comm) at [19] for the general proposition that expert evidence is to be restricted to that which is reasonably required to resolve the proceedings. Mr. Brealey submitted that Professor Ordover's evidence was not so required, for three reasons: (1) Professor Ordover's approach is wrong in

law, in suggesting that the subjective view of a third party (Max Crosland) should be disregarded in considering the "but for world"; (2) his report is based on his own findings of fact, which is contrary to paragraph 21 of *JP Morgan Chase Bank*; and (3) Professor Ordover does not bring specialist knowledge to the table, and an economist is no more or no less expert to decide a loss of a chance case than the Tribunal or anybody else.

75. It was argued by Mr. Lasok, on behalf of ECSL, that Professor Ordover's report should be admissible and could be of material assistance to the Tribunal which has to decide, as a matter of law and fact, on the cause(s) of ECSL failing to win a contract for the supply of coal to Ferrybridge C following the EME Tender. It is then for the Tribunal to decide on the weight to be given to Professor Ordover's evidence in the context of the general body of evidence before it.

76. The Tribunal ruled that the evidence of Professor Ordover was admissible. These are the reasons for that decision.

77. The Tribunal notes, first, that the purpose of expert evidence is to enable the Tribunal to reach a fully informed decision. The Tribunal's powers to control evidence generally derives from rule 22 of the Tribunal Rules; and to control the evidence of experts, in particular, from rule 19(2)(l). It is for the party seeking to call expert evidence to satisfy the Tribunal that expert evidence is properly admissible and relevant to the issues which the Tribunal has to decide and would be helpful to the Tribunal in reaching a conclusion on those issues. The Tribunal naturally will have regard to the relevant provisions of the CPR, but will ultimately be guided by the circumstances of overall fairness, rather than technical rules of evidence.

78. Second, it is not for experts to attempt to make findings of fact. Expert evidence may be excluded if the expert examines the acts and omissions of a party and expresses an opinion as to what he, the expert, would himself have done in similar factual circumstances: see Aikens J in *JP Morgan Chase Bank* at [22]. However that is not the position in this case. Professor Ordover has not sought to ask himself what he would have done in the context of the EME Tender. Furthermore, Professor Ordover's report

may summarise the facts as seen through the eyes of a party, but, obviously, it cannot constitute proof of the facts there summarised.

79. Third, the Tribunal is satisfied that Professor Ordover has a sufficient relevant economic expertise to render his opinion potentially of value in resolving the issues in dispute. Professor Ordover has used his expertise to express a view on how he considers a commercial entity in the position of EME might have behaved absent the abuse by EWS of its dominant position (i.e. in the but for world). Whether his underlying factual assumptions are correct – a point raised by Mr. Biro in his expert report – is a matter for the Tribunal to decide. That matter may in turn affect the weight that the Tribunal ultimately decides to give to Professor Ordover's evidence.

80. Fourth, we do not accept the submission of Mr. Brealey that Professor Ordover's evidence should be inadmissible because it might prove to be wrong in law. In so far as it is shown that the approach followed by Professor Ordover differs from the one required by the law (as regards, in particular, the weight to be given to subjective factors in modelling the but for world, if genuinely this is a question of law), this is an issue which the Tribunal must take into account when deciding what (if any) weight to give to his evidence, and how far to take it into account.

## VI. CAUSATION

81. This is a claim based on loss of a chance that a third party (here, EME) would act in a particular way (by awarding the EME Tender) so as to produce an opportunity for the claimant (the chance to secure a four year E2E contract to supply coal to Ferrybridge C power station). The judgment of Stuart-Smith LJ in *Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 W.L.R. 1602 contains important observations as to the approach which a court or the Tribunal should adopt in evaluating a loss of chance claim.

*The approach from Allied Maples in evaluating the loss of a chance*

82. In *Allied Maples* two issues material to the present case arose. They arose from the discussion as to whether the claimants, had they received the correct advice from their solicitors, would have sought to renegotiate a contract with their sellers: and, if so,

whether they would have succeeded in that renegotiation. The first question depended only on the claimants themselves: would they have sought to renegotiate? The second question, however, depended on the actions of a third party, in that case the sellers. ECSL and EWS agreed that there is a clear distinction between those two questions. Giving the leading judgment Stuart-Smith LJ summarised the law as follows (at pages 1609-1610):

> "Not only were questions of breach of duty closely related to questions of causation; but the question of causation was also closely related to the question of quantification of damages. These latter questions depend upon what (a) the Plaintiffs, and (b) Gillow, would have done in a hypothetical situation, namely if the Defendants had given the advice that they should have done to the Plaintiffs. And in the light of Mr Jackson QC's submissions, it has been necessary for this Court to analyse, as a matter of law, where the question of causation ends and quantification begins.
>
> …
>
> In these circumstances, where the plaintiffs' loss depends upon the actions of an independent third party, it is necessary to consider as a matter of law what it is necessary to establish as a matter of causation, and where causation ends and quantification of damage begins.
>
> (1) What has to be proved to establish a causal link between the negligence of the Defendants and the loss sustained by the Plaintiffs depends in the first instance on whether the negligence consists on some positive act or misfeasance, or an omission or non feasance. In the former case, the question of causation is one of historical fact. The Court has to determine on the balance of probability whether the defendant's act, for example the careless driving, caused the plaintiff's loss consisting of his broken leg. Once established on balance of probability, that fact is taken as true and the plaintiff recovers his damage in full. There is no discount because the judge considers that the balance is only just tipped in favour of the plaintiff; and the plaintiff gets nothing if he fails to establish that it is more likely than not that the accident resulted in the injury.
>
> Questions of quantification of the plaintiff's loss, however, may depend upon future uncertain events. For example, whether and to what extent he will suffer osteoarthritis, whether he will continue to earn at the same rate until retirement, whether, but for the accident, he might have been promoted. It is trite law that these questions are not decided on a balance of probability, but rather on the court's assessment, often expressed in percentage terms, of the risk eventuating or the prospect of promotion, which it should be noted depends in part at least on the hypothetical acts of a third party, namely the plaintiff's employer.
>
> (2) If the defendant's negligence consists of an omission, for example to provide proper equipment, given [sic give] proper instructions or advice, causation depends, not upon a question of historical fact, but on the answer to the hypothetical question, what would the plaintiff have done if the equipment had been provided or the instruction or advice given? This can only be a matter of inference to be determined from all the circumstances. The plaintiff's own evidence that he would have acted to obtain the benefit or avoid the risk, while important, may not be believed by the judge, especially if there is compelling

> evidence that he would not. In the ordinary way, where the action required of the plaintiff is clearly for his benefit, the court has little difficulty in concluding that he would have taken it. But in many cases the risk is not obvious and the precaution may be tedious or uncomfortable, for example the need to use ear-defenders in noisy surroundings or breathing apparatus in dusty ones. It is unfortunately not unknown for workmen persistently not to wear them even if they are available and known to be so. A striking example of this is McWilliams v Sir William Arrol & Co Ltd [1962] 1 WLR 295; the employers failed in breach of their statutory duty to provide a safety belt for the deceased steel erector. But his widow failed in her claim under the Factories Act 1937, because there was compelling evidence that, even if it had been provided, he would not have worn it.
>
> Although the question is a hypothetical one, it is well established that the plaintiff must prove on balance of probability that he would have taken action to obtain the benefit or avoid the risk. But again, if he does establish that, there is no discount because the balance is only just tipped in his favour. In the present case the plaintiffs had to prove that if they had been given the right advice, they would have sought to negotiate with Gillow to obtain protection ...
>
> (3) In many cases the plaintiff's loss depends on the hypothetical action of a third party, either in addition to action by the plaintiff, as in this case, or independently of it. In such a case, does the plaintiff have to prove on balance of probability, as Mr Jackson submits, that the third party would have acted so as to confer the benefit or avoid the risk to the plaintiff, or can the plaintiff succeed provided he shows that he had a substantial chance rather than a speculative one, the evaluation of the substantial chance being a question of quantification of damages?
>
> Although there is not a great deal of authority, and none in the Court of Appeal, relating to solicitors failing to give advice which is directly in point, I have no doubt that Mr Jackson's submission is wrong and the second alternative is correct."

83. Hobhouse LJ agreed (at page 1618). Although Millett LJ dissented on the factual conclusion, he nevertheless agreed with Stuart-Smith LJ's analysis of the distinction that arises between the two questions, in the following passage (at page 1623):

> "That left the second head of loss: the chance that, if properly advised, the plaintiffs might have succeeded in persuading the defendants to agree to reinstate warranty 29 or to provide some other total or partial protection against the risk of first tenant liability. This depended on (i) whether the plaintiffs would have sought to reopen the negotiations to obtain such protection and (ii) whether and if so how far they would have been successful. The first of these again depended on what the plaintiffs themselves would have done in a hypothetical situation and accordingly had to be established on a balance of probabilities. The judge thought that it had been so established, and I agree with Stuart-Smith LJ that there was evidence to support his conclusion."

84. Although, as noted above, in the present case there was agreement between Mr. Brealey and Mr. Lasok that two questions fall to be determined, they disagreed in particular on

the formulation of the first question. Mr. Lasok submitted that ECSL had to show that it would have sought to negotiate with EME for coal business. Mr. Brealey disputed this, submitting that ECSL must prove both (i) what, in the but for world, ECSL would have agreed with EWS and (ii) what, in the but for world, ECSL would have offered EME.

85. In our judgment the difference between Mr. Brealey and Mr. Lasok's arguments is more apparent than real. One can mislead oneself by taking from decided cases dicta in one factual context and applying them mechanistically to another. In *Allied Maples* the matrix was a transaction-based claim for professional negligence, where heads of terms had already been agreed. That is a far cry from an 'opening salvo' made by ECSL in a competitive tender held by EME. With this caution in mind, we apply the principles derived from *Allied Maples* to this case as follows:

(a) The claimant has to show on the balance of probabilities what it would have done, but for the infringement. If it fails at that point to cross the relevant factual threshold, that is the end of the matter: *Allied Maples* [1995] 1 W.L.R. 1602, at 1610G per Stuart-Smith LJ. In the present case, ECSL must demonstrate that, in the but for world, (a) it would have submitted a bid to EME on the basis of terms agreed with EWS and (b) it would have sought to negotiate with EME for a four year E2E contract to supply coal to Ferrybridge C.

(b) Where (as here) loss depends on what a third party would have done, but for the abuse, then the claimant must satisfy the Tribunal on the balance of probabilities that there is a real or substantial (i.e. not negligible) chance that the third party would have acted in the way which the claimant asserts: *Allied Maples* [1995] 1 W.L.R. 1602, at 1614C per Stuart-Smith LJ – i.e. here, ECSL must show that, absent EWS' abuse, there was a real or substantial chance that negotiations between EME and ECSL would have led to the award of a four year E2E contract to supply coal to Ferrybridge C.

(c) If the claimant establishes that it has lost a chance, the Tribunal must then put a figure on what it has lost. That, as Simon Brown LJ said in *Mount v*

*Barker Austin* [1998] PNLR 493, depends on a realistic assessment of the prospects of a successful outcome.

86. It is important to avoid over-compartmentalising the foregoing questions. In *Allied Maples* two essential questions were identified. The '(a) question' concerns the actions of the claimant. The '(b) question' concerns the actions of a third party, here EME. Of particular importance to the present case is that there is an area of commercial negotiation that was unresolved. By its very nature, negotiation involves two or more parties and reconciling their respective bargaining positions. As a consequence of this, certain factors relevant to the (b) question, i.e. the attitude and behaviour of the third party EME, may also be relevant to answering the (a) question, i.e. what the claimant would have done.

*The but for world*

87. Before considering the application of the (a) and (b) questions in this case, we must in particular explain what is meant by the concept of the but for world.

88. The "but for" test is a recognised and simple analytical tool in the law of tort when considering questions of causation. The test asks whether the loss alleged by the claimant would have occurred but for the unlawful conduct of the defendant. The parties' experts agreed that but for analysis was the appropriate analytical tool for assessing this damages claim. However, they differed as to whether specific behaviour that took place in the real world should be removed or "purged" from what would have happened in the "but for world".

89. As regards the Defendant's behaviour in the but for world, ECSL submitted that the appropriate test is set out in the case of *Normans Bay Ltd (formerly Illingworth Morris Ltd) v Coudert Bros* [2004] EWCA Civ 215, Waller LJ said at paragraph 46:

> "…It is Coudert who want to reduce the value of the chance, by asserting they failed to do something which would have lowered the chance. Is there a principle which allows a defendant from relying on a wrong which he has committed in order to reduce the damages that would otherwise flow from a tort or breach of contract? It seems to me that there should be such a principle, and that is what Lord Brown Wilkinson was recognising. It is quite difficult to say why it should be so, other than that it flows from public policy where it is a principle that a person should not be entitled to rely on their own wrong in order to secure a benefit."

90. ECSL argued, and EWS appeared to accept, that this is authority for the proposition that the but for world should be purged not only of EWS' abuse and its consequences, but also any other unlawful conduct on EWS' part. The Tribunal agrees that this is the correct approach. This does not require, however, that the Tribunal is required to identify further abuse on the part of EWS where the ORR has not done so. Rather, it can simply assume, for the purposes of the but for world, that EWS would not have engaged in any other illegal behaviour, including any other violation of competition law.

**THE (A) QUESTION** (see paragraph 85 above)

91. We turn now to the (a) question, i.e. whether we can conclude that it was more likely than not that ECSL would have sought to negotiate with EME for a four year E2E contract to supply coal to Ferrybridge C.

92. Paragraph 19 of ECSL's closing submissions summarises its case on the (a) question as follows. Absent the abuse: (1) ECSL would have been able to secure a rail haulage contract with EWS that was indistinguishable in competitive terms from that which EWS gave to EME; (2) it would still have sought to use the June to October 2000 rail haulage tender as an opportunity to negotiate the best possible E2E deal for coal supply to Ferrybridge, in particular by offering EME incentives to take coal from ECSL in addition to rail haulage (as it did in fact do in the actual world); (3) it would have been able to advance, and would have advanced, a bid which was at least as competitive as that advanced by EWS for rail haulage if not more so (which it could not do in the actual world).

93. ECSL argued that the ORR's own findings are sufficient to answer the (a) question affirmatively, and submits too that further extrinsic evidence has been provided to support this submission. Although we have considered the Decision carefully, we do not consider that the Decision was definitive on each of the three issues highlighted by ECSL above, and accordingly have reached a view on the totality of evidence before the Tribunal.

94. We have structured our analysis of the (a) question in two sections:

(i) The nature of the commercial arrangement that would have been agreed between ECSL and EWS in the but for world; and

(ii) The nature and manner of ECSL's bid to EME in the but for world.

*(i) The nature of the commercial arrangement that would have been agreed between ECSL and EWS in the but for world*

95. ECSL submits that there appears to be no dispute that, absent the abuse, ECSL would have had a performance-based contract with EWS on the basis of non-discriminatory rates. The Tribunal has considered separately the rates and performance terms that ECSL submits it would have been offered by EWS in the but for world, as these are the key aspects of the (hypothetical) commercial arrangement to have been highlighted by the parties in their submissions.

*Rates offered by EWS to ECSL*

96. In the real world there is no evidence that ECSL requested a rate from EWS in connection with the specific ITT issued by EME, which was sent to ECSL on 23 August 2000. Rather, the Tribunal was taken to evidence of what was discussed in negotiations between ECSL and EWS between January and May 2000, when the companies were discussing a possible contract to supersede the existing contractual arrangements for the haulage of coal to EME's power stations. In May 2000, EWS quoted rates to ECSL in respect of several routes. These rates are set out in the table at Annex 2 to this Judgment. We have not seen evidence of any further negotiation between the parties in relation to these rates, nor evidence that any lower rates were offered by EWS to ECSL independently.

97. In the but for world the Tribunal must assume that there would have been no discrimination between the rates offered by EWS to ECSL and the rates subsequently offered to EME in respect of the same services. This approach appears to be accepted by both parties.

98. In constructing the but for world the rates offered by EWS to EME in October 2000 (see Annex 2) are a helpful benchmark in estimating the rates that EWS would in turn

have offered to ECSL, not least because the October 2000 rates had been the subject of negotiation with one of its customers, EME. It might be assumed that the rates represent sustainable pricing that EWS would have been prepared to offer to other customers for similar services.

*Performance terms offered by EWS to ECSL*

99. In the real world EWS and ECSL did not agree to the adoption of particular performance terms, for example, provision for penalties to be paid in the event of delayed or cancelled trains. EWS argues that ECSL and EWS came close to agreeing such terms, but that ECSL dropped its request during the negotiations that took place between January and May 2000, and ultimately broke off negotiations. An email prepared by Matthew Arnold of ECSL (sent to George McClellan, Stuart Staley, Tom Kearney and Stephen Pirozzi on 16 March 2000), appears to show that an agreement in principle was arrived at during a meeting between ECSL and EWS for a contract incorporating certain guaranteed performance terms, including a "Base Train Plan" and specific performance incentives and penalties. We were also taken to EWS' response of 12 May 2000 to a term sheet prepared by ECSL, and this response provides, inter alia, for penalties to be paid by EWS in respect of cancelled trains, lost trains and lost tonnage.

100. EWS and ECSL disagreed on the question of whether the ORR made a specific finding that the failure to provide performance terms was part of the identified abuse. ECSL argued that the ORR did make such a finding, and referred in particular to paragraphs 14, B31, B62 and B118 of the Decision. EWS contended that the ORR made no such finding, but that the ORR rather had simply noted that EWS and ECSL had not entered into the performance-based contract they had been negotiating. Having reviewed the ORR decision carefully, in particular the paragraphs relied upon by ECSL, we are not persuaded that the ORR made a clear and definitive finding that EWS' failure to agree to a performance-based contract amounted to an abuse, nor that ECSL's interpretation of certain sections of the Decision withstands close scrutiny.

101. As noted above, the proposition in *Normans Bay* requires that the Tribunal should assume no illegality on the part of EWS in the but for world, and that EWS would not discriminate between customers as regards prices or any other contractual terms.

However, whereas in relation to pricing there is clear agreement that the discriminatory rates offered by EWS in May 2000 should be purged in constructing the but for world, the ORR has not, in our view, identified an abuse in relation to performance terms within the relevant time period (namely between May and November 2000) which can similarly be purged. However, we are required to determine a different question, namely whether, on the balance of probabilities, EWS and ECSL would have agreed on a performance-based contract in the but for world. We are persuaded that they would have done so.

102. We reach that conclusion for three reasons. First, it is a consequence of our conclusion (see paragraphs 113 to 119 below) that the arrangement between ECSL and FHH does not break the chain of causation, i.e. that it is more likely than not that ECSL would have chosen to contract with EWS for haulage services in responding to the ITT.

103. Second, ECSL and EWS were agreed in principle, in the real world, on the conclusion of performance-based terms and would have been expected to reach formal agreement on such terms in respect of the haulage services to be resold to EME by ECSL.

104. Third, ECSL would have needed to offer performance-based terms to EME in order to stand a chance of entering into negotiations with EME, given in particular that the ITT requested (at paragraphs 3 and 4) details of how each bidder proposed to "deliver an excellent service" and details of each bidder's "acceptable percentages for reliability".

105. Again, it is not necessary to identify with any specificity the nature of the performance-based terms that EWS would have offered to ECSL in the but for world. It is sufficient to note that EWS would not have discriminated between EME and ECSL in respect of such terms.

*(ii) The nature and manner of ECSL's bid to EME in the but for world.*

106. This brings us on to the second part of the (a) question, namely whether it is more likely than not that ECSL would have sought to negotiate with EME for a four year E2E contract to supply coal to Ferrybridge C. This requires the Tribunal to consider the nature and manner of ECSL's bid to EME in the but for world, and in particular how

this might have differed from what was actually offered in the real world, absent any unlawful behaviour on the part of EWS.

*ECSL's bid in the real world*

107. In the real world Stephen Pirozzi of ECSL submitted a bid to EME on 15 September 2000. By way of brief summary, the bid was sent under cover of a letter from Stephen Pirozzi entitled "Coal Carriage Agreement" and refers to EME's "tender for coal haulage". The letter also refers to the possibility of EME gaining additional efficiencies, in particular by "combining… haulage, freight and port throughput services" and proposes a meeting to discuss how ECSL could optimise EME's operations "by fully taking advantage of the ECSL Portfolio".

108. The substance of the ECSL bid is set out in a term sheet of four pages, describing the service to be provided as the provision of rail haulage services to the Ferrybridge C power station on three routes (from Redcar Ore Terminal, Humber International Terminal and Hull Bulk Terminal) from 1 January 2001 to 31 December 2004 with a committed contract tonnage of 0.6 million tonnes in each of 2001 and 2002, increasing to 1.75 million tonnes in each of 2003 and 2004. The term sheet includes a proposed penalty of £1.50 per tonne in respect of any shortfall between the committed tonnage and the actual tonnage hauled in any calendar year.

109. The prices proposed by ECSL for each of the three routes are set out in the table in Annex 2, but the term sheet also included a "price incentive" expressed in the following terms:

> "All trains carrying Enron coal will be subject to a minimum discount of UK£0.25 per ton for rail haulage."

110. The term sheet contains certain "operational parameters", namely obligations to be accepted by EME. These include requirements to provide ECSL with estimates of tonnages to be hauled, to complete loading and discharge within certain time windows and to pay a penalty if the "Total Site Time" is exceeded.

111. The circumstances surrounding the submission of ECSL's bid are considered in more detail below. However, it is sufficient to note for now that ECSL's bid did not contain,

on the face of it, any specific reference to coal supply beyond the coal incentive mentioned above (for example, setting out proposed prices, volumes, or types of coal), nor any specific performance-based terms other than a general commitment to provide services to a level of skill and care consistent with the industry standard.

*ECSL's bid in the but for world*

112. The construction of ECSL's bid in the but for world involves the consideration of several variables, in particular:

- Whether ECSL would have chosen to contract with EWS or FHH in respect of the haulage services provided to EME;

- Whether ECSL would have passed on the benefit of the key features of the underlying haulage contract in its bid to EME (or indeed (i) withheld certain benefits of that contract; or (ii) improved thereon);

- How ECSL would have communicated its bid to EME.

*Whether ECSL would have chosen to contract with EWS or FHH*

113. There is no document that indicates exactly on what basis ECSL prepared its unsuccessful bid for the EME Tender in the real world. At no stage did ECSL approach EWS for rates that could be used in the EME Tender. The evidence of Mr. Kearney was that the rates in ECSL's bid were based on the rates in the FHH rail haulage agreement (which had been concluded by FHH and ECSL in June 2000, prior to the issuing of the EME tender) because that was the only available source. Given the similarities between the two documents, it is probable that the FHH Contract was used as a practical template for preparing the ECSL bid in the real world.

114. Turning to the but for world, EWS submitted that, even if EWS had not offered ECSL discriminatory prices in May 2000, ECSL would in any event have decided to pursue negotiations with FHH, a factor which would potentially break the chain of causation between EWS' abuse and ECSL's claimed loss. ECSL countered that it had only contracted with FHH because of EWS' abusive conduct and that, absent the abuse, ECSL would not have needed to contract with FHH; and that it had not made any

positive decision not to contract with EWS, rather it had contracted with FHH in an attempt to gain leverage over EWS in further negotiations.

115. In considering the choice that ECSL would have made in the but for world, it is helpful to consider both what the ORR concluded in relation to FHH and also EME's own view of FHH, given that FHH itself submitted a bid in response to EME's tender:

116. The ORR made several observations in respect of FHH in the Decision, in particular that it took a considerable period for FHH to build up capacity, particularly in relation to coal wagons; that its ability to compete was contingent on its non-contractually committed capacity; and that it had experienced difficulty in recruiting drivers.

117. EME's view of FHH is best summarised by Max Crosland, who explained in some detail his reasons for choosing EWS over FHH. These included the fact that FHH would have had to commission new rolling stock in order to service EME's needs; that FHH was seeking minimum tonnage requirements (in order to finance the new rolling stock); that FHH had no proven track record and FHH's rates were higher than EWS for almost all routes. Mr. Crosland's overall conclusion was that EWS presented "by far the lowest risk option".

118. We have concluded that it is more likely than not that ECSL would have chosen to contract with EWS in the but for world. Most importantly, EWS would have offered ECSL non-discriminatory rates and (for the reasons outlined above) performance-based terms. Assuming that EWS had offered ECSL the same rates that it ultimately offered to EME in October 2000, these would have undercut the headline rates offered by FHH to EWS by as much as £0.35 on certain routes. Faced with rates from EWS that trumped those of FHH, and assuming ECSL's bid to EME was a serious one, EWS would have been a rational choice for ECSL. Further, the risks acknowledged by Max Crosland of EME in relation to FHH would also have likely informed ECSL's choice of trading partner, not least because – as a reseller of haulage services – ECSL would ultimately be held accountable for any failings of its chosen haulier.

119. It cannot be excluded that ECSL would have sought to sponsor entry by FHH in competition with EWS (for example, with a view to leveraging better rates from EWS),

but since EWS would have offered ECSL non-discriminatory terms in the but for world, it is in the Tribunal's view more likely that ECSL would still have chosen to contract with a tried and tested operator.

*Whether ECSL would have passed on the benefit of the key features of the underlying haulage contract in its bid to EME*

120. ECSL argued that it would not have sought to hold back any material part of the benefit of the terms which it could obtain from a rail haulier. EWS argued that the fact that ECSL did not pass on all the benefits of its deal with FHH in its actual bid to EME is evidence that ECSL might indeed have held back certain benefits of the terms agreed upon with its haulier in the but for world.

121. In the real world ECSL did not pass on every benefit of its underlying haulage contract with FHH in its bid to EME. Mr. Kearney confirmed that the rates in the FHH Contract formed the basis of ECSL's bid to EME. The rates offered by FHH to ECSL pursuant to that contract dated 30 June 2000, and the rates in turn offered by ECSL to EME in response to the EME Tender are set out in Table 1 below:

**Table 1**

| **Route** | **FHH to ECSL, June 2000**[9] | **FHH to ECSL, June 2000**[10] | **ECSL to EME, September 2000** |
|---|---|---|---|
| *Hull to Ferrybridge C* | 2.85 | 2.75 | 2.75 |
| *Redcar to Ferrybridge C* | 3.30 | 3.20 | 3.20 |
| *Immingham to Ferrybridge C* | 2.75 | 2.65 | 2.70 |

*Source: FHH Contract dated 30 June 2000 and ECSL's bid in response to the EME Tender dated 15 September 2000.*

[9] These figures are the charges applicable where aggregate tonnage was less than 1.5 million tonnes in the twelve months from the date upon which FHH commences haulage of freight by rail (or any subsequent years) as contained in Schedule 2 to the FHH Contract.

[10] These figures are the contractual charges but include a rebate of £0.10 per tonne handled by FHH in excess of 1 million tonnes in any year, as contained in Schedule 2 to the FHH Contract.

122. The figures in column 3 of the table allow for the possibility that ECSL could have benefited from a clause in the rail haulage agreement with FHH which provided for a further discount of £0.10 per tonne on each route in respect of each tonne hauled by FHH in excess of 1 million tonnes in any year. Assuming that ECSL would have benefited from that discount (having satisfied the 1 million tonne requirement on the basis of contracts with other electricity generators), the table shows that ECSL passed on the benefit of its rates with FHH on two out of the three routes, but would have retained a £0.05 per tonne benefit in respect of the Immingham to Ferrybridge C route.

123. As regards performance terms, a comparison of the FHH rail haulage agreement with ECSL's bid to EME shows that ECSL did not pass on the full benefit of the performance terms that it had agreed with FHH. In particular, ECSL did not pass on any general commitment to EME in respect of guaranteed performance, notwithstanding that ECSL had secured a guarantee from FHH to deliver 95% of its required tonnage of coal in each quarter. Further, whereas ECSL benefited from a "total site time" (the total loading and unloading time for each route) of 3 hours under the rail haulage agreement, it offered a more restricted time frame to EME in its bid, amounting to 2 hours and 30 minutes. ECSL's term sheet also provided for a higher level of penalty (at £0.10 per tonne) in certain circumstances where the total site time was exceeded (the rail haulage agreement provided for a penalty of £0.05 per tonne).

124. Mr. Lasok's submissions appeared to acknowledge that ECSL might indeed have held back certain benefits from its bid, in the expectation of being required to revise the bid in the course of negotiations:

> "The idea that there was no anticipation on the part of ECSL to take a loss on rail haulage disappears completely once one accepts that an opening bid is nothing other than an opening bid and that in the normal course of events attempts will be made to negotiate it downwards."
>
> (Transcript, 22 September, p. 44)

125. A consequence of the Tribunal's conclusion above that, in the but for world, ECSL would have chosen to contract with EWS in respect of coal haulage services provided to EME is that ECSL would have been entitled to expect that there would be no discrimination by EWS as regards the rates offered to each of ECSL and EME. By contrast, in the real world, at the time of submitting its bid, ECSL had no knowledge of

the rates actually offered by EWS to EME, but was instead only aware of the rates that EWS had offered to ECSL in May 2000 (and that the rates it had secured with FHH were lower).

126. In the but for world, the Tribunal can assume that ECSL knew that EWS was likely to bid for the EME tender, and had knowledge too of the rates that EWS would offer to EME. The Tribunal can therefore conclude that – if ECSL's bid was indeed a serious one – it is more likely than not that it would, at the very least, have passed on the benefit of the rates it had secured from EWS, if not gone further to undercut those rates.

*Would ECSL have improved on the terms it had secured from its haulage provider?*

127. A further line of argument advanced by ECSL concerned its willingness to make a loss on haulage in order to incentivise EME to negotiate and enter into a coal supply contract. This happened in the real world and, it was said, there was no reason why it would not have happened in the but for world. In the real world, ECSL's bid contained a discount of £0.25 per tonne in the event that the coal hauled was supplied by ECSL. Mr. Staley's evidence was that ECSL was willing to cross-subsidise the haulage element of the service from profits made on the supply of coal.

128. The experts for both parties – Professor Ordover and Mr. Biro – were agreed that, as a matter of economic logic, if ECSL was willing to incur a loss on its rail haulage tender in the real world, then ECSL must have anticipated making significant profits on any possible associated coal sales as a result of winning the EME Tender. The experts disagreed, however, as to whether they would in fact have incurred such a loss in the real world.

129. Having considered the expert evidence, we agree with Mr. Biro that, in so far as the ECSL bid for the EME Tender was actually based on the rail haulage services provided by FHH, nothing can be inferred about the willingness or otherwise of ECSL to incur losses on rail haulage or, as a corollary, ECSL's expectation of earning profits from any coal supply contract with EME.

130. A separate, but related, point is that if ECSL had anticipated making substantial profits on any contract to supply coal to Ferrybridge C, Mr. Biro rightly suggested that ECSL

may reasonably have been expected to offer to EME as much of a discount on haulage as commercially feasible to secure the opportunity to negotiate with EME for a lucrative coal contract. ECSL's actual bid indicates or infers that it did not anticipate profitable coal sales following the EME Tender. This is supported by Mr. Kearney's oral evidence that the discount on hauling ECSL's coal was only added "at the last minute". There is no reason to believe that the but for world would look any different from the real world on this point.

*How ECSL would have communicated its bid to EME*

131. In light of the analysis summarised above, the Tribunal has concluded that it is more likely than not that ECSL would have chosen EWS as its haulier in connection with the EME tender and would have been able to advance, and would have advanced, a bid which was at least as competitive as that advanced by EWS for rail haulage.

132. We now turn to the crux of the (a) question in the present case, namely the manner in which ECSL would have communicated its bid to EME in the but for world; and whether the Tribunal can be satisfied that it is more likely than not that ECSL would have sought to negotiate with EME for a four year E2E contract to supply coal to Ferrybridge C. For the Tribunal to be so satisfied, it would expect to see some evidence that the contract was viewed internally within ECSL as an important opportunity worthy of pursuit (or that it would have been so viewed in the but for world) and that their bid was communicated (or would have been communicated in the but for world) in a manner that clearly signalled the intensity of their interest.

*ECSL's intentions: the attitude within ECSL towards a four year E2E contract*

133. The Tribunal has been shown very little evidence highlighting the attractiveness of a contract, whether for rail haulage or coal supply with EME. The key contemporaneous documents that appear to highlight ECSL's approach, in the real world, to the EME tender and its attitude towards the submission of a bid are only four in number, as follows:

    (a) An internal ECSL email sent by Riaz Rizvi to other members of the ECSL coal team on 23 August 2000, in which he reports on a telephone conversation with Max Crosland, which took place immediately prior to

ECSL being sent the ITT. In the penultimate paragraph of this email, Mr. Rizvi reports on what he had said to Max Crosland on the telephone "*I'll be getting the details today but I already reiterated our desire to rebuild a great long-term relationship with them, and the fact that we would be happy to quote both rail and an into the stockpile price including port / freight / coal …*".

(b) Two emails from George McClellan dated 27 August 2000 in response to the email from Riaz Rizvi above. In the first of these he wrote: "*You are a glutton for punishment!*" In the second, sent five minutes later, he stated: "*Don't you just love points 5 and 6!*" which would appear to be a sarcastic reference to paragraphs 5 and 6 of the ITT.

(c) The bid (and the covering letter) ultimately submitted by ECSL to EME on 15 September 2000 (on which see paragraphs 146 to 149 below).

134. Mr. Kearney's evidence supports the view that the submission of ECSL's bid in response to the ITT was not a matter of high strategic priority to ECSL. In cross-examination by Mr. Lasok, he stated:

> "…The rail tender launched by Mission in August/September 2000 - we did not consider that – we mentioned it in our competition case that we did not consider that a loss of business. We did not consider it a viable option or even the possibility of winning that tender and we certainly did not consider it a way that we could get back into supplying coal to Edison Mission. When I say in my witness statement it was a joke - even George McClellan (Stuart Staley's boss) ridiculed our attempt to participate in the rail tender as being 'gluttons for punishment'. I have not found - and I don't recall - any evidence within Enron that stated this was a strategic move; this was a way for us to get back into the business. In fact, the early drafts of that tender included nothing about the provision of coal or a discount for coal."
>
> (Transcript, 18 September, p. 43)

135. Mr. Kearney questioned whether ECSL's bid had ever seriously been intended to lead to the conclusion of another E2E contract and commented on the fact that the bid had been submitted by a junior member of their coal team:

> "… I always found this letter to be a bit of an anomaly because Steve Pirozzi was a very junior member of the Enron team. He worked for me. I always found this one strange because if this was such a serious response from Enron, I would've thought [Mr. Staley] or George McClellan would've handled this. If this was

> really a coal tender -- because [Mr. Staley] handled all the coal tenders with Riaz [Rizvi]. He was really driving the coal tender and the coal response and especially the [EME] relationship. I always found this to be a little odd - that a junior member of the Enron coal team was allowed to submit this tender - because [Mr. Staley] really had the relationship with all the generators, and [Mr. Staley] had other relationships with [EME]…"
>
> (Transcript, 18 September, p. 58)

136. Mr. Staley's description of the circumstances surrounding the submission of ECSL's bid does not inform the Tribunal at all strongly as to the attitude within ECSL towards the ITT at the relevant time, as he described the submission of the bid in neutral terms. Mr. Staley did say in paragraph 32 of his first witness statement dated 29 May 2009, however:

> "The rail haulage component in and of itself was not something that would have yielded meaningful profit to us."

137. Mr. Staley went slightly further in paragraph 29 of his second witness statement dated 4 September 2009, in response to Mr. Kearney's suggestion that ECSL's response to the EME Tender was not a serious one:

> "I disagree with Mr Kearney's assertion that Enron's response to EME's tender for rail services was not a serious one (Kearney, Paragraph 6). We would not have responded to the tender if we were not interested in the business. As I stated in my first witness statement, the real value in a rail haulage contract with EME would have been to combine it with the supply of coal, and we structured our response to the tender in such a way as to give EME an incentive to commit to an E2E arrangement. Therefore, that was our primary objective in tendering to EME; the only other benefit would have been to offset partially the tonnage commitments that we had made to Freightliner (Staley 1, Paragraph 32)."

138. The Tribunal's overall view of the evidence is that there was not a high degree of enthusiasm within ECSL towards the submission of the bid. This would be consistent with the fact that only junior members of their coal team (Riaz Rizvi and Stephen Pirozzi) were involved in the communications with EME in connection with the tender, and (as noted below) the lack of any evidence to suggest that the submission of ECSL's bid was actively followed up by any further correspondence or meetings, with a view to entering into negotiations.

139. A lack of enthusiasm towards the bid that was submitted to EME in September 2000 would be consistent with the evidence of a deteriorating relationship between EME and ECSL in connection with the initial E2E contract that was concluded between them.

The Tribunal will consider that evidence (in the sub-section entitled "The legacy of the 1999 Contract") in its analysis of the (b) question. The deterioration of their contractual relationship would have also informed ECSL's own view of EME as a trading partner, and the extent of ECSL's enthusiasm for entering into a further contract with EME.

140. The Tribunal is not persuaded that ECSL's attitude towards the EME tender would have been materially different in the but for world. We accept the comment by Mr. Biro in his expert report dated 10 July 2009:

> "…there appear to have been various causes and consequences of the relationship breakdown between EME and ECSL, with only tangential references to EWS. The main flavour is of a breakdown in the relationship between EME and ECSL."

141. We have taken this comment into account when considering whether it is more likely than not that ECSL would have sought to negotiate with EME for a contract to supply coal to Ferrybridge.

*Did ECSL clearly signal its intention to negotiate for a four year E2E coal supply agreement to EME?*

142. ECSL submitted that it was plainly seeking to win an E2E contract i.e. a contract for the supply of delivered coal to Ferrybridge C. In this regard ECSL relied on Stuart Staley's evidence, who described the supply of coal to Ferrybridge C as ECSL's "primary objective" in bidding to EME. This, it is said, is further supported by the observation set out in paragraph 390 of the Decision:

> "EME issued an ITT on 26 June 2000 for its long term coal haulage requirements to its power stations, following expiry of the previous E2E deal with ECSL. The contract was for haulage to EME's two power stations at Fiddler's Ferry and Ferrybridge for a four-year period with a commencement date of 1 January 2001. *ECSL (on an E2E basis)*, FHH and EWS all bid for the contract."
>
> (emphasis added)

143. In support of the proposition that ECSL had signalled its intention to bid on an E2E basis, Mr. Staley gave evidence that (in the real world) the bid offered a £0.25 per tonne discount on haulage in the event that the coal hauled was ECSL coal, amounting to a cross-subsidisation of rail haulage from coal profits in order to incentivise EME to source coal from ECSL. Cross-examined by Mr. Brealey, however, Mr. Staley did concede that the price incentive was only inserted at a late stage.

144. Mr. Staley also appeared to suggest, contrary to his written statement, that ECSL would have accepted a coal haulage agreement (as opposed to an E2E contract that is the subject of the present claim), or at least that ECSL might not have adequately communicated to Mr. Crosland that ECSL was interested in an E2E contract:

> "MR. BREALEY: The point is made, but -- Mr. Lasok, in his questions to you when you arrived, went through certain types of E2E contracts that could, or could not, be offered. What I suggest to you is that you never communicated any type of deal to Mr. Crosland which would put him on notice that you wanted a four year E2E coal supply agreement, did you?
>
> MR. STALEY: No."
>
> (Transcript, 18 September, pp. 36-37).

145. This would appear to be consistent with Mr. Crosland's response to a question put to him in cross-examination:

> "MR. LASOK: …Did you know that ECSL or ECSL was using the tender for the coal haulage contract in order to angle for a coal supply contract?
>
> MR. CROSLAND: I wasn't aware of that."
>
> (Transcript, 17 September, p. 36; although we note that Mr. Crosland would not have been surprised if ECSL had been angling for a coal supply contract: p. 37).

146. Notwithstanding the language used by the ORR, the Tribunal's view of the bid, and the circumstances in which it was communicated, is that it was far from clear that ECSL did, in the real world, signal its intention to enter into a four year E2E coal supply contract. We have not heard any submission from ECSL that the manner in which the bid was communicated (as distinct from the rates and terms contained in that bid) would have been materially different in the but for world. We return to this issue in more detail in connection with the (b) question below.

147. We turn then to ECSL's alternative hypothesis, that ECSL and EME might have concluded a rail haulage agreement in the first instance and, on the back of such an agreement, proceeded to negotiate a four year E2E coal supply agreement. We have evaluated the prospects of such an arrangement in connection with the (b) question below, but it is relevant to consider – for the purposes of the (a) question – whether the Tribunal can be satisfied that it is more likely than not that ECSL would have sought to negotiate with EME at all (so as to have stood a chance, at the very least of securing a rail haulage contract).

148. Notwithstanding the apparent breakdown in the relationship between EME and ECSL, the wording of the parties' written communications at the material time suggests, at face value, that the door was not entirely closed to discussions and possible negotiations in connection with EME Tender. For example, it is clear from an internal ECSL email circulated by Riaz Rizvi shortly after speaking with Max Crosland at EME about the ITT on 23 August 2000 that a face-to-face meeting was initially envisaged. The email ends with the words: "Mission would like to meet with us 1st week of [September]." Furthermore, the wording of the letter sent by Stephen Pirozzi to Max Crosland on 15 September 2000 states that "we would like to meet with you to discuss how we can optimise your operations by fully taking advantage of the Enron Portfolio" and the footnote to ECSL's term sheet states that: "…this proposal is for discussion purposes only to facilitate the negotiation, preparation and execution of a definitive agreement."

149. However the Tribunal has not seen any evidence to suggest that ECSL did pursue, or would have pursued, negotiations. The submission of ECSL's bid and Mr. Pirozzi's letter of 15 September 2000 does not appear to have been actively followed up by telephone calls, emails or face-to-face meetings to further discuss the bid or to pave the way for negotiations. The Tribunal was not shown any evidence that the proposed meeting in the first week of September 2000 (mentioned in Riaz Rizvi's email mentioned above) actually took place. Indeed a meeting took place between Stuart Staley of ECSL and Max Crosland of EME on 25 September 2000 and the email sent the next day from Mr. Staley to Mr. Crosland made no mention at all of ECSL's bid, EME's provisional views or further discussions.

150. The Tribunal was shown no evidence of any reaction by ECSL to the lack of any such discussions with EME, or indeed to the ultimate loss of the EME Tender, that would suggest disappointment on the part of ECSL's employees, nor was any contemporary document adduced before the Tribunal showing the importance to ECSL – financially, strategically or otherwise – of concluding a contract for coal supply to Ferrybridge C.

151. The evidence shows that EME did negotiate with other bidders who responded to their tender. For example face-to-face meetings (attended either by Max Crosland of EME or an external consultant, Roger Pettit) took place with each of Direct Rail Services, GB Railways Group, FHH and EWS. That no meeting took place to discuss ECSL's bid,

notwithstanding contact between senior employees of EME and ECSL during the relevant period, strongly suggests to the Tribunal that ECSL did not consider the EME Tender an important or pressing commercial proposal. The only support for the bid appears to have been at a relatively junior level, and there is evidence that those responsible for submitting the bid were advocates of the value in concluding "rail-only" contracts with customers.

152. The Tribunal notes that, at the time of its submission, the rates submitted in ECSL's bid were competitive and (as can be seen from the table in Annex 2) were actually lower than the rates that had been put forward by EWS at that time. The fact that no negotiations took place between EME and ECSL in the real world, notwithstanding a competitive price, would appear to contradict ECSL's claim that negotiations would have followed from their submission of a bid that was at least as competitive as EWS's bid, and suggests that other factors would have been relevant to the ultimate outcome.

*Conclusions on the (a) question*

153. The Tribunal considers that it is more likely than not that, in the but for world, ECSL would have chosen to contract with EWS in connection with its bid to EME, and that it would have succeeded in securing non-discriminatory rates and performance terms from EWS.

154. However, for the reasons that are explained in more detail below in connection with the (b) question, the Tribunal considers that the deterioration of the relationship between ECSL and EME in the aftermath of the 1999 Contract would have persisted in the but for world. The Tribunal is not persuaded, nor has it been suggested by ECSL, that the manner in which it would have communicated its bid to EME would have been materially different in the but for world, nor that it would have approached the EME Tender with a greater degree of enthusiasm. The manner of its communication with EME in the real world was not consistent with the behaviour of a company in vigorous pursuit of an attractive business opportunity. We cannot therefore conclude that it was more likely than not that it would have sought to negotiate with EME for a four year E2E contract for coal supply to Ferrybridge C, and indeed cannot conclude that it was more likely than not that ECSL would have sought to negotiate with EME at all.

**THE (B) QUESTION** (see paragraph 85 above)

*Introduction*

155. We have to determine whether ECSL has shown to the requisite standard that, if there had been no abuse, this would probably have affected how ECSL and EME conducted negotiations so as substantially to improve the prospects of obtaining an E2E coal contract to supply Ferrybridge C. Since that question depends on what a third party would have done in a hypothetical situation, a claimant is not expected to establish such behaviour on a balance of probabilities. The Tribunal must be satisfied that there was a real or substantial chance and, if it is shown, evaluate that chance.

156. ECSL placed particular emphasis on an evidential presumption in its favour in answering the (b) question, i.e. it may be presumed that the unlawful actions of EWS caused ECSL to lose something of value. We were referred to *Mount v Barker Austin* (cited above), in which Simon Brown LJ set out the applicable principles. It is clear that the claimant bears the legal burden of showing that it had a real or substantial prospect of success. If, as here, the Defendant claims that any such chance was merely negligible, it is for them to demonstrate it by adducing evidence.

157. ECSL submitted that the ORR clearly found ECSL to have been at a competitive disadvantage because it lost a chance to seek E2E business with EME. It was said that the evidence showed too that EME was always willing to consider a beneficial E2E arrangement with ECSL. EWS' essential stance was that ECSL's case was a misconceived and unsustainable attempt to blame the loss of an unidentified hypothetical E2E coal supply agreement with EME on the abuse found by the ORR.

158. In our judgment there are three important considerations relevant to the (b) question:

(a) The findings of the ORR in the Decision;

(b) Whether there was an opportunity for an E2E arrangement associated with the tender for haulage; and

(c) The reasons why EME rejected ECSL's bid in the real world and whether those reasons would have differed in the but for world.

*The ORR's findings*

159. ECSL's primary case is that it has satisfied the legal burden placed upon it by reason of the ORR's findings of competitive disadvantage; and that EWS has not discharged the evidential burden to adduce some evidence to contradict the claim. ECSL drew the Tribunal's attention to paragraphs 55, B5, B62, B64, B65, B100, B178-179, B183, B187 and 312 in the Decision which, they argued, clearly show that it had a substantial chance of winning an E2E contract to supply coal to Ferrybridge C. It was submitted that it is hard to see how a party can suffer such a disadvantage if its chances of success were zero. If ECSL was materially hindered in efforts to secure an E2E coal supply contract to Ferrybridge, then necessarily it followed that a real chance to win that business had been lost. In these circumstances, ECSL contends that there is no need to consider further evidence. EWS disputed this contention and argued that ECSL was wrongly eliding two separate issues: the existence of a competitive disadvantage and causation of loss.

160. There are five main points we should make about the findings in the Decision. First, the ORR expressly found that as a result of EWS' discriminatory behaviour, ECSL certainly suffered a competitive disadvantage in bidding to EME (see paragraph B62 of the Decision). Such a finding is required in order for the conditions for applying sub-paragraph (c) of the second paragraph of Article 82 to be met.

161. Second, the ORR acknowledged that it was "not possible to conclude that [ECSL] was displaced from supplying EME as a result only of the discriminatory terms from EWS." An in-depth analysis by the regulator of the actual consequences of the competitive disadvantage is not required by law.

162. Third, a finding of discrimination that results in a competitive disadvantage is not the same as a finding that loss was caused thereby to a trading partner of an undertaking in a dominant position. The finding of competitive disadvantage (which EWS accepts, as it must) means that EWS hindered the competitive position of ECSL in relation to the EME Tender. This is certainly relevant to, but not determinative of, the question of causation. It is relevant because it means that ECSL was impeded in its ability to offer EME competitive rates for coal haulage and supply. It is not determinative because the

Decision does not establish that ECSL was well-placed to win a coal supply contract with EME absent the abuse.

163. Fourth, the difference between competitive disadvantage and causation is demonstrated by the analogy made by EWS in its skeleton argument (paragraph 52):

> "In fact, the ORR expressly stated that it could not say that ECSL was displaced from supplying Edison as a result only of the discriminatory terms from EWS. This is an important distinction. By analogy, if a horse running in a race at Ascot is given an unfair handicap because the handicapper wrongly gives the horse too much weight, it may have suffered a competitive disadvantage in the race, but the owner will not have lost a substantial chance of winning the race if the horse becomes lame immediately before the race (and therefore would never have had a substantial chance of winning it). The wrongful handicap (even though it imposed a competitive disadvantage) is not in fact or in law a cause of any loss".

164. Fifth, the ORR's findings in relation to the British Energy Limited ("BE") tender process also illustrates the same point. There the ORR found that EWS had discriminated against ECSL in respect of flows to Eggborough power station operated by BE between May and November 2002. ECSL was found to be at a competitive disadvantage in its contractual negotiations with BE even though it ultimately won the tender. ECSL's competitive disadvantage (due to the selectively higher prices imposed on it) and the reasons why it won the tender (due mainly to BE's "subjective preferences for coal procurement" including E2E services and imported coal) were separate matters.

165. ECSL also relied on various passages in the Decision which set out contemporary evidence that showed, in the ORR's view, that the discriminatory rates offered to ECSL formed part of a wider anti-competitive strategy to foreclose competition in the relevant market. There is no doubt that such exclusionary intent existed, but it does not necessarily follow that EWS was responsible for ECSL losing the chance asserted in these proceedings.

166. On several occasions counsel for ECSL asked: if EWS knew that ECSL had little or no chance of winning the EME Tender (and thus obtaining an E2E coal supply agreement) why did it discriminate against ECSL? There are a number of answers to this rhetorical question, as follows:

(a) We find that ECSL has failed to establish that it would have secured an E2E coal supply agreement with EME in the but for world.

(b) The ORR explained that EWS' discrimination against ECSL formed part of its general strategy to exclude actual or potential competitors. The existence of exclusionary intent does not, however, of itself demonstrate that EWS' discriminatory pricing produced a concrete adverse effect on the market.

(c) The fact that the hoped-for result was achieved (i.e. ECSL did not win the EME Tender) does not mean that EWS knew that it was certain or even likely to happen. EWS was not directly privy to the communications or relationship between EME and ECSL at the material time. Thus EWS may have discriminated against ECSL to 'nip in the bud' the competitive threat it perceived at the time.

(d) This is a case where the effects of the abuse depended on the behaviour and preferences of a third party. ECSL may still have lost the EME Tender had EWS not discriminated against it; whether that is the case is a question which the Tribunal must decide.

167. It follows from the above that we must consider the whole of the evidence that the parties have adduced to assess ECSL's loss of chance.

*Was there an opportunity to negotiate an E2E arrangement with EME in either the real or but for world?*

168. In this context we have examined the history of the 1999 Contract, its legacy and its restructuring, together with other points specifically raised.

*EME needed coal*

169. In broad terms, ECSL argued that there was an opportunity to sell imported coal to EME at Ferrybridge for the simple reason that EME would need such coal at the time of the tender process and in the foreseeable future. ECSL added that the facts bear witness to this opportunity since substantial quantities of imported coal were hauled to Ferrybridge C from 2001 to 2004: for example, 1.1 million tonnes of imported coal

were hauled in 2001. As EME did not have any arrangements in place to cover the supply of imported coal at the material time, it follows that had an E2E arrangement provided EME with objectively better value, such a deal with have been in EME's best interests.

170. That EME needed coal (of different types) at Ferrybridge C during the period at issue is plain. However, it does not inexorably follow that EME would have negotiated or entered into an E2E arrangement of the type that ECSL is now claiming. One of the crucial issues between the parties is how EME decided to procure coal that it needed, e.g. whether to enter into E2E or DIY supply arrangements and, in each case, whether to enter into spot, short-term or long-term arrangements. It is clear from Mr. Crosland's evidence, which we accept on this point, that EME had wished simply to supplement its coal supplies from Powergen on an ad hoc basis. He gave various reasons for this, including the need for flexibility in response to changes in the profitability of electricity generation and thus burn coal; the price and type of coal required and the need to comply with sulphur emissions limits. Mr. Crosland stressed that, having already contracted with Powergen for significant volumes of coal over a long period of time, EME did not wish to enter into any further long-term contracts for the supply of significant volumes of coal. When cross-examined on this issue Mr. Crosland accepted that this could leave a generator exposed to price or exchange rate fluctuations, but added that, in his opinion, a customer could equally use contractual terms and/or hedging to guard against such risks.

171. In our judgment Mr. Crosland gave cogent justification for a flexible approach to coal purchase at the times in question. His stated preference for flexible spot or short-term supply contracts was a commercial decision, which we accept he made on the merits.

*The legacy of the 1999 Contract*

172. It was a matter of some dispute between the parties whether the 1999 Contract was only intended to be a stop-gap measure (pending EME recruiting its own coal procurement team) or instead embodied the economic advantages of E2E services. In our judgment, the 1999 Contract met EME's requirements at the time it was entered into, but a number of contemporary documents indicate that it was intended to be an interim arrangement. Internal EWS emails dating back as early as June 1999 and as late as

May 2000 show that EME had apparently intimated to EWS that the 1999 Contract would be temporary; for example:

> "Of the newcomers, AES seem to have a clear preference for managing these activities in-house. *Edison Mission seem to have decided to do likewise*. British Energy and NRG will each have only one power station. In the short term the new owners might find the use of an intermediary useful whilst they sort out longer term strategy, but the long term prospects seem limited for ECSL."
>
> (Internal EWS email from Nigel Jones dated 4 February 2000, emphasis added.)

173. This and other documents before the Tribunal support Mr. Crosland's evidence to the same effect and indicate that EME was far from wedded to the idea of E2E services.

174. In November 1999 EME recruited a coal procurement team, consisting of Mr. Crosland as the 'Fuels Director' and two other individuals specialising in transport logistics. Mr. Crosland sought to make much of the EME in-house team as effectively displacing the need for an intermediary. When asked about this in cross-examination, however, Mr. Crosland candidly accepted that the existence of an in-house team did not necessarily mean that a generator would opt for a DIY rather than an E2E model (Day 2, p. 50). We are not therefore persuaded that the mere existence of such a team rules out the possibility of negotiating an E2E arrangement, although it could certainly be a factor in how a generator decides to procure coal.

175. ECSL sought to support its argument that EME would still be potentially interested in E2E arrangements in September 2000 by pointing out that the 1999 Contract had been implemented by two confirmations, the second of which took place on 16 December 1999 and extended the provision of E2E services until 31 May 2001. In cross-examination about the details of that confirmation, Mr. Crosland was unable to give the Tribunal a reason as to why he thought it had been signed. ECSL suggested that he was unable to remember what happened either because his memory was unreliable, due to his reluctance to recollect, or that he was genuinely not involved in that negotiation. Whatever the explanation, we do not accept ECSL's contention that we should extrapolate from Mr. Crosland's inability to recollect this specific point to question the credibility of his other evidence, provided it is corroborated by other witnesses or documentary evidence. We found him to be an honest witness who did not pretend to remember things when he clearly had no recollection.

176. As for the specific reason for entering into the December Confirmations it is, on the evidence adduced, a matter of pure speculation. It may simply have been that it suited the interests of both parties at that time. A party's commercial outlook may change over time. There is evidence before the Tribunal that the operational difficulties under the extended 1999 Contract continued in to 2000 and ultimately led to it being mutually restructured.

177. It was common ground, as Mr. Crosland accepted in cross-examination, that EME had overestimated its coal requirements during 1999. At the time of purchasing Fiddler's Ferry and Ferrybridge C in 1999, electricity prices were high, and EME had anticipated that both power stations would be generating electricity for long periods of the day, most of the year round. However, electricity prices fell towards the end of 1999, with the consequence that the profitability of electricity generation fell and EME required far less coal than it had contracted to buy from Powergen and ECSL. This resulted in an unhappy mismatch between the demand and supply of coal and caused the vexed and recurring problem of over-supply to Fiddler's Ferry and Ferrybridge C. In turn the problem of over-supply threw into sharp relief the need for EME to have contractual flexibility, that is to say, the ability for it to cancel or defer coal supplies when it was not generating electricity and to recommence or expedite supplies when electricity prices increased to a profitable level. Only a nimble response to changing market conditions would enable EME to capitalise on the volatility of the market for electricity generation. This was an issue which Mr. Crosland repeatedly emphasised as explaining why he felt that E2E contracts were not in the best interests of EME.

178. The excess coal supply situation meant that ECSL and Powergen were both trying to deliver more coal than the Fiddler's Ferry and Ferrybridge C stations could handle. There was considerable evidence of this situation. The situation pleased no one and frustrated everyone. It was also readily apparent from the evidence that everyone was blaming everyone else for the operational difficulties that occurred under the 1999 Contract.

179. Part of the reason for these difficulties in 1999 was that EME was only required to pay for the coal that was actually delivered to it (which gave it an incentive to resist

deliveries of coal surplus to requirements). The physical capacity of Fiddler's Ferry also contributed to the problems, as did the shortage of rail haulage capacity.

180. There was a clear recognition by both sides by May 2000 that the 1999 Contract in its then existing form was 'unworkable'. ECSL even began to prepare and keep an 'Edison Mission Incident Report' to record any attempt by EME to restrict or obstruct coal deliveries in anticipation of the matter becoming contentious. As Mr. Staley pointed out, the exchange between ECSL and EME was "an interaction characteristic of two American firms: "I'll race you to the courthouse"." In other words, the dispute was serious, difficult and potentially litigious.

181. A point relied on by ECSL was that the historical relations between ECSL and EME were not relevant to the outcome of the EME Tender in the real world or the but for world. ECSL submitted that a rational economic operator would look for best value and not allow an incident in its previous commercial dealings to cloud its judgment. We regard that approach as erroneous and unrealistic. It is plain that the experience of the 1999 Contract reinforced, or at least informed, Mr. Crosland's view of the need for flexible contractual arrangements for coal supplies (to avoid over-supply) and the importance of communicating directly with transport providers (to avoid delivery problems). The nature and evolution of relations between parties can be an important consideration in deciding whether to enter into, maintain or alter a commercial relationship. We do not accept that, as ECSL contended, Mr. Crosland exaggerated the 'fall out' from the restructuring of the 1999 Contract and can see that, as he put it, it left "a bitter taste in the mouth".

182. ECSL attached importance to the fact that relations improved after the restructured 1999 Contract and that EME was prepared to do business with ECSL. Mr. Crosland's evidence was that EME was willing to consider ECSL *qua* supplier of coal. In this connection there was evidence before us that ECSL, amongst others, was invited by EME to tender for the supply of coal at or around the time of the EME tender. The important point, however, is that the tendered contracts were for the supply of coal on a spot or short-term basis. This falls far short of establishing that EME was prepared to negotiate with ECSL for the provision of E2E services for the duration of the tendered haulage contract, i.e. from 2001 to 2004. Rather, it supported Mr. Crosland's evidence

that EME was only interested in supplementing its coal supplies to Ferrybridge C from time to time (bearing in mind that Powergen already supplied indigenous coal to that power station at the material time).

183. In his second witness statement Mr. Staley acknowledged that he let some time elapse to "clear the air" following what he described as the difficult renegotiation of the 1999 Contract. Six months passed and in March 2001 he suggested that ECSL should contact EME to discuss its E2E business. This casts doubt on whether ECSL actually considered that EME would be interested in negotiating an E2E coal supply agreement in September 2000.

184. The parties did not agree about the circumstances in which ECSL was invited to bid for the EME Tender. Even if we were to hold that Mr. Crosland invited ECSL to tender, we do not accept that, by simply inviting ECSL to bid, EME was necessarily expecting (still less interested in) an offer of an E2E supply agreement. There is no evidence as to how or if Mr. Crosland (or anyone at EME) responded to Mr. Rizvi's indication to quote for both rail haulage and a price for E2E services. The only response which we were referred to came from Mr. McClellan of ECSL. He sent an e-mail to Mr. Rizvi on 27 August 2000 and stated: "you are gluttons for punishment". The e-mail thus appears to refer to Mr. Rizvi's apparent willingness to accept a difficult task, namely ECSL participating in the EME Tender. The language of the e-mail is consistent with the continuing adverse effects of the breakdown in the relationship between ECSL and EME.

*The ITT*

185. ECSL argued that the opportunity to sell coal (in addition to haulage) to EME was envisaged by the ITT itself. They drew the Tribunal's attention to the wording of the ITT and in particular the cover letter to the EME tender, which stated:

> "We [i.e. EME] are developing our draft purchasing strategy for coal to be delivered to Ferrybridge and Fiddler's Ferry Power Stations for the calendar years 2001-2004. Factors affecting the choice of coal type and origin obviously include the cost of inland transportation from port or mine, and the quality / reliability of the service provided. We intend to procure effective and efficient transport arrangements for our fuels and invite you to submit proposals to us in this respect, with details of …".

186. In our judgment it is clear from the evidence taken as a whole that EME was reviewing and reorganising the way in which it sourced coal. While it is correct to note that EME was developing its "purchasing strategy for coal for 2001-2004", this did not mean that the ITT embodied the entirety of that strategy. Rather, the restructuring of the 1999 Contract should be understood as part of this strategy. This, in turn, led EME to issue the ITT in order to "procure effective and efficient transport arrangements for [its] fuels." Neither the cover letter nor the ITT itself refers to the possibility of coal supplies forming part of the tender process. ECSL relied on the fact that the ITT itself invited "imaginative solutions" so as to secure "efficiency and value for money" but, read as a whole, the ITT is referring to imaginative transport-related solutions. The terms of the ITT are not decisive in determining whether an opportunity for a coal contract existed, but they do shed some light on how EME approached the tender process in the real world and how it would have acted in the but for world.

187. We have not overlooked that the cover letter to ECSL's bid of 15 September 2000 referred to the possible combination of haulage, freight and port services. The cover letter expressed ECSL's apparent interest in meeting EME to discuss how it could optimise EME's operations "by fully taking advantage of the ECSL portfolio". Yet those hints of ECSL angling for something more than a coal haulage agreement were neither contained in the attached term sheet (save for a possible price incentive) nor followed up in the real world. Moreover, as already noted, there appears to be no evidence that EME expressed any interest in the possibility of negotiating or contracting for the supply of coal as well as its haulage to Ferrybridge C from 2001 to 2004. If EME showed no measurable interest in long-term E2E services in the real world, why is it reasonable to suppose that it might have done in the but for world?

188. ECSL argued that a decision as to whether to accept an E2E proposal would ultimately have been made not by Mr. Crosland but by his superiors at EME. In our judgment, the evidence is clear that Mr. Crosland was intimately involved in overseeing the EME Tender; that he assessed the competing bids and was the key point of contact with both EWS and ECSL. Mr. Crosland's evidence was that, ultimately, he made a recommendation to the EME senior management on the decision to award the EME Tender. No evidence was adduced as to the involvement or views of Mr. Crosland's superiors at the material time. In his second witness statement Mr. Staley refers to Mr.

Willie Heller of EME being described by a colleague as an "Enronophile". In cross-examination Mr. Crosland considered that this was "something of an exaggeration". A separate point is that this evidence is hearsay and the Tribunal has had regard to the weight to be given in our judgment to such second hand hearsay. Furthermore, the statement was made in March 2001, some six months after the EME Tender. We are satisfied that there is no contemporaneous evidence to suggest that Mr. Crosland's decision on the EME Tender would have been second-guessed or overruled by his superiors.

189. Several other points were raised by ECSL in relation to EWS' case on what EME would have done in the absence of the discriminatory abuse. For example, ECSL referred to the tender process held by BE and how it was persuaded through a tender process to enter into a flexible E2E arrangement in its best interests. They claimed that this was a strong comparator to the possible outcome of the EME Tender. However, they also recognised that every customer is different; and we are far from convinced that what suited BE would or should have suited EME. The ORR expressly found that BE was willing to consider options for E2E or DIY supply of coal as part of its invitation to tender: see paragraphs B71 and B91 of the Decision.

190. ECSL also referred to the views of Mr. Pettit, an external consultant to EME, who sent an e-mail to Mr. Crosland on 2 September 2000. We have taken his views into account in reaching our conclusions.

*EME's reasons for rejecting the ECSL bid in the real world*

191. ECSL's case is that, had it not been denied the opportunity to negotiate with EME in the context of the rail haulage tender it would have had a real or substantial chance of persuading EME that an E2E deal would in fact have offered better value on delivered coal that it could have achieved for itself.

192. ECSL placed heavy reliance on the opinion of Professor Ordover (as recorded in paragraphs 13, 70 and 80 of his expert report dated 19 June 2009) that it is necessary to consider how EME, as a rational economic decision-maker, would have acted in the but for world. Professor Ordover suggested that Mr. Crosland's evidence was not sufficiently removed from what actually happened and thus was irrelevant. If his

analysis amounts to no more than constructing the but for world by purging the actions tainted by the abuse in the real world, then such analysis can hardly be disputed. If his expert evidence amounts to more than this, to the effect that the Tribunal should discount the (untainted) factors that informed Mr. Crosland's decisions and more broadly EME's procurement preferences, then it seems to us that it is neither logical nor supported by the authorities. In *Allied Maples* Stuart Smith LJ said at page 1614:

> "Mr Jackson, however, submits that the Plaintiffs do not even establish that they had a substantial chance of successful negotiation with Gillow. First, he submits that they cannot prove anything beyond a speculative chance in the absence of evidence of Gillow's and Theodore Goddard's reaction. I wholly reject this submission. *The prospect of success depends on all the circumstances of the case and the third parties' attitude must be a matter of inference. In many cases direct evidence from the third party will not be available,* as in the cases of the deceased husbands in Hall v. Meyrick and Davies v. Taylor."
>
> (emphasis added)

193. The question of what the third party would actually have done in the but for world is a matter of evidence. This may be direct, or inferential. We have not heard evidence from all of the responsible persons working for EME at the material time. As stated above, we hold that Mr. Crosland was intimately involved in restructuring the 1999 Contract and, more importantly, the EME Tender itself. The weight which the Tribunal attaches to his evidence naturally depends on whether and the extent to which its veracity is corroborated by evidence from context, by contemporary documents, and in some important respects by other witnesses.

194. We saw force in Mr. Biro's observation that the non-price factors mentioned by Mr. Crosland were rational and economic in nature, and relevant to the analysis of the but for world.

195. The reasons why ECSL's bid for the EME Tender was rejected are set out in Mr. Crosland's first witness statement dated 29 May 2009, as follows:

> "44. … It was not a difficult decision to reject Enron's bid, in view of the difficulties I have already summarised in this statement which did not make me well disposed to continuing our contractual relationship with them for haulage. …
>
> 45. Given our negative experiences of dealing with Enron in the past (in particular given the breakdown in our relationship during the renegotiation process, and given that we felt that they did not understand the meaning of

"customer focus"), we really would not have wanted to contract with Enron at all, unless there had been no viable alternatives in the tender process.

46. Against that background, in order to have had any chance at all of winning the tender, Enron would have had to have been offering us at the very least a great deal of flexibility, and no requirement to take minimum volumes. Its bid did not offer us either of those things. The two principal reasons why I rejected ECSL's bid were that:

a. Enron's bid was not sufficiently flexible. I have already explained why Edison required flexibility, to be able to order and receive the quantities of coal it wanted when it wanted, and that its pre-existing arrangements had been insufficiently flexible in this respect, since they required us to accept specified volumes of coal every month. Enron's bid required minimum volumes; Edison had to agree to transport at least the contract volumes, or pay a penalty of £1.50 per tonne. This was precisely the kind of inflexibility we had been trying to get away from.

b. Enron had no rolling stock of its own but was an intermediary, and as I have already explained, from the time Edison hired its own coal team, it wished to dispense with intermediaries and enter into direct haulage contracts with a haulier. I have already summarised why an intermediary was both unnecessary and sometimes positively unhelpful and inefficient. We did not wish to continue to deal with someone who had to have a "back to back" contract with a haulier. All of the other bidders were rail operators, so all of them were in that respect more attractive than Enron.

47. Even if Enron had offered us flexibility and no minimum volume commitments, its bid was unattractive in other ways too, in that:

a. Enron had only bid for some volumes on some routes (i.e. it had only bid to haul coal to Ferrybridge, not Fiddler's Ferry, and not for all volumes we anticipated we would be hauling to that station, as set out in the tender letter IMC40). Since Enron had tendered for volumes that fell short of the volumes specified, we considered that we might have had to have negotiated an additional premium with Enron in order for Enron to have agreed to haul those additional volumes. Although we would not have ruled out having to contract with more than one haulier (i.e. splitting the tender award), dealing with multiple hauliers would have been more complex, and so we preferred to deal with one haulier who could offer all routes.

b. Enron's rates were not sufficiently compelling to have made up for the other negative aspects of its bid. Given all the reasons why we did not wish to contract with Enron, even had Enron's offer offered us the route/volume coverage and the flexibility we required (including no minimum volume commitment), it would still have had to have offered rates that were so low that they would have been operating at a loss for us even to have considered their offer seriously. It is difficult to put a price on it, but they would have had to have offered prices at least 50p cheaper per tonne than the rates EWS quoted for me even to have come to the negotiating table."

196. It is important to compare Mr. Crosland's witness evidence with the principal document recording how he assessed the rival bids at the time. On 12 October 2000 Mr. Crosland

sent an email to several colleagues at EME setting out the key points in connection with the evaluation of the competing bids. In its closing submissions ECSL described this document as the "best evidence of how Mr. Crosland in fact approached the decision between tenders at the time". Mr. Crosland wrote:

> "Key points:
>
> - EWS to be exclusive rail haulier for routes detailed in table below.
> - No requirement for minimum tonnage guarantees to be given by EFPL (other bidders looking for 85% to be take or pay)
> - Significant savings on existing haulage rates (over £0.60M/yr at LBT alone):

| **Route** | **£/t New EWS** | **£/t Freightliner Bid** | **£/t Enron Bid** | **£/t Current EWS Spot** |
|---|---|---|---|---|
| **ScotIand>FF/FB 0-250kt** | 6.20 | 6.45 | - | 6.75 |
| **Scotland>FF/FB 250-500kt** | 6.30 | 6.45 | - | 6.75 |
| **ScotIand>FF/FB 500-750kt** | 6.50 | 6.45 | - | 6.75 |
| **Immingham HIT>FB** | 2.55 | 2.70 | 2.70 | 2.80 |
| **Hull>FB** | 2.50 | 2.75 | 2.75 | 2.88 |
| **Redcar>FB** | 3.00 | 3.14 | 3.20 | 3.40 |
| **LBT>FF** | 1.85 | 1.95 | - | 2.19 |

> - Terms: Monthly within 28 days of invoice. Invoiced at 80% of estimated agreed average monthly value. Quarterly +- reconciliation with actuals.
> - Penalties: ON cancelling party for train cancellation, on EFPL for failure to load or unload within agreed time or failure to ensure reasonably full wagon loads, on EWS for unpunctuality.
> - Indexation: Currently agreed as RPI but jointly looking for more representative formula.
> - Only EWS are prepared to accept no volume commitment from us and give us ability to 'chop and change' almost at will (also EWS currently only people with equipment to do the job).
> - Enables us to secure our position on rail slots ex HIT and Hull (very limited availability)
> - Without prejudice/subject to agreement of final contract terms' acceptance triggers new rates immediately. ***Will do this today to capture next week's LBT and Hull movements at new rates***.
> - EWS preparing a draft discussion for discussion."

197. ECSL sought to characterise the criteria used by Mr. Crosland at the time of the EME Tender as being purely financial. We disagree. In our view the email of 12 October 2000 corroborated the points made by Mr. Crosland in paragraphs 46 and 47 of his first

witness statement. They both refer to the flexibility of the winning EWS bid and, in particular, that only EWS was prepared to accept no minimum volume commitments. The same day Mr. Crosland wrote to Mr. David Griffiths of EWS in order formally to accept EWS' bid and again referred to "no minimum tonnage guarantees". The flexibility of the contractual terms proposed by EWS would, to use Mr. Crosland's words at the time, enable EME to "chop and change" its coal supply requirements. Finally, Mr. Crosland's evidence and the email of 12 October 2000 both refer to the importance of having the rolling stock or "equipment to do the job". This shows that the criteria were therefore not solely financial in nature.

198. Price is self-evidently a very important factor in business generally, and in the procurement of coal. On this issue ECSL referred us to paragraph 55 of the Decision which reads:

> "Generating companies source coal according to the lowest delivered price, taking account both of the cost of the coal and the cost of transportation, and the costs associated with the qualities of the coal."

199. We accept the validity of the ORR's finding in relation to the way in which generating companies source coal in general, but the evidence before the Tribunal indicates that so far as EME was concerned, procurement of coal was influenced by not only the lowest delivered price but also by other considerations, notably the quality and reliability of the proposed service; the preference for direct contact with suppliers or hauliers; the need for flexibility to adjust the volume of supplies under a contract and the difficulties encountered in dealing with ECSL in the past.

200. ECSL also referred us to a file note (annexed to Mr. White's witness statement) of a meeting that took place on 10 August 2000 between EWS and EME (at which Mr. Crosland was present). The objective of the meeting was said to have been to progress the discussions between EWS and EME in relation to the former's response to the EME Tender. In considering the criteria that were relevant to the award of the EME Tender, Mr. Crosland was reported as having said:

> "… It comes down to three things,
> Price
> Relationship
> Confidence in the quality of service"
>
> It was clear that [Mr. Crosland's] emphasis was on price …"

201. We accept that this evidence shows that price (i.e. the haulage rates) was important, but it also confirms that price was not the sole criterion. It would therefore be an over-simplification to treat commercial success in purely monetary terms. Non-price factors – such as quality of service and the commercial relationship – also played a meaningful role in EME's decisions.

202. In cross-examination both Mr. Staley and Professor Ordover accepted that factors other than price could play a role in the award of the EME Tender. Thus, in answer to the suggestion that coal supply on an E2E basis would obviously be preferable to supply on a DIY basis, Professor Ordover said:

> "THE CHAIRMAN: Professor, in the "but for" world, are you saying that the choice between an E2E contract and an in-house DIY operation is a no brainer in favour of E2E? I do not think you are, are you?
>
> PROFESSOR ORDOVER: No, heaven forbid, I would never say such a thing, because that would mean over-reaching beyond what an economist can really testify to, in part because of some of the points that Mr. Crosland made. What I am simply saying is that an E2E procurement method has certain advantages stemming from scale and scope economies.
>
> THE CHAIRMAN: I understand.
>
> PROFESSOR ORDOVER: Those advantages stemming from scale and scope economies have to be weighed against whatever considerations that I believe are rational and economic that we can describe in dollars and cents or pounds and pennies in gauging what model will be adopted. The adoption, in my view, would be driven by the terms that an E2E supplier can obtain from the third parties that it needs to construct its business model."
>
> (Transcript, 21 September, p. 27)

203. It is thus clear from the evidence that E2E services may have produced economic advantages for power generators, but it is equally clear that they could entail drawbacks as well. Whether the advantages or drawbacks prevailed was likely to depend on their relative importance and magnitude as well as the preferences of the power generator in question. Mr. Crosland described in evidence that the EME Tender comprised a "three-horse race" between ECSL, EWS and FHH by 12 October 2000, but ECSL "was some considerable distance behind the others in desirability." In our judgment ECSL was behind in terms of the three non-price issues identified by Mr. Crosland. First, the bid was not sufficiently flexible as it contained minimum volume requirements. Secondly,

ECSL was an intermediary, not a haulier. Third, EME had no desire to award a haulage contract to ECSL after its bad experiences dealing with ECSL under the 1999 Contract.

*Whether ECSL's bid for the EME Tender would have been rejected by EME in the but for world*

204. To re-emphasise the essential issue, in the real world, in which EWS' abuse occurred, ECSL was at a competitive disadvantage in submitting its bid. This was, of course, the finding made by the ORR. In the 'but for world', by contrast, ECSL would not have been at such a disadvantage since it would have had the benefit of EWS offering non-discriminatory rates and would have used those to bid for the EME Tender. Be that as it may, it does not necessarily follow that ECSL lost the chance to secure a coal supply contract with EME as a result of EWS' abuse of a dominant position.

205. Even if EWS and ECSL had been evenly matched on price (i.e. haulage rates) in the but for world, we do not accept Professor Ordover's conclusion that more efficient E2E suppliers would necessarily win business from power generators. Apart from the point that Professor Ordover wrongly focused on the hypothetical rational economic decision-maker rather than EME, it seems to us that a number of material considerations would have led EME to reject ECSL's bid in any event. The following considerations do not include those which specifically concern the alleged coal supply agreement associated with the EME Tender (as to which, see paragraphs 211 to 220 below), but would have been relevant to EME's behaviour generally in the but for world.

*(i) Difficult previous relationship between ECSL and EME*

206. The breakdown of the relationship between ECSL and EME under the 1999 Contract and the consequent acrimony remained in the but for world. The deterioration in the relationship preceded EWS' discriminatory pricing in May 2000 and would still have influenced EME's decision to award the EME Tender in the but for world. Despite Mr. Staley's evidence that relations between ECSL and EME improved in 2001, the events pertaining to the EME Tender from June to October 2000 were firmly in the memory. Mr. Crosland stated strongly that there was a "general presumption" that EME would have preferred not to deal with ECSL owing to their past relationship and that having

"been bitten once and we were careful not to be bitten twice." We accept this as a significant statement.

*(ii) ECSL offered EME inflexible contractual terms*

207. ECSL's bid would still have contained commitments for specified amounts of coal to be hauled in the but for world. As Mr. Biro noted, this is an issue of risk allocation between EME and ECSL in a world where future coal demands are uncertain. Professor Ordover did not explain whether or why ECSL's acceptance of the performance-based terms offered by EWS would have changed its decision to include this minimum volume requirement in its bid. Thus ECSL's opening bid would have lacked precisely the degree of contractual flexibility said to be sought by EME in order to cope with fluctuations in the market price for generating electricity. In our judgment it is far from established that any negotiations would have produced a deal. There was no sign that this happened in the real world and no compelling basis for finding that it would have happened in the but for world.

*(iii) Difficulties in dealing with a third party intermediary*

208. ECSL's bid would still have required it to act as an intermediary between EME and a rail freight operator (which, in the but for world, was more likely than not to be EWS). Mr. Crosland's evidence was that EME's experience of dealing with an intermediary had been frustrating since it had impeded direct communications with suppliers and transport providers. This experience would have been the same in the but for world. Mr. Crosland's evidence is consistent with several internal EWS documents indicating that EME intended to deal directly with EWS from 2001 and the evidence of EME's previous inability to resolve operational difficulties under the 1999 Contract. In cross-examination by counsel for ECSL on this issue, Mr. Crosland said:

> "MR. CROSLAND: … I suppose it is the comfort of knowing that you are getting the information from the horse's mouth
>
> MR. LASOK: Did you find that they would be more flexible than an intermediary and, if so, why?
>
> MR. CROSLAND: Our experience was that they could be more flexible. As to why, I would imagine that was because of Enron's mark-to-market contracting philosophy whereby when they entered a contract with us, everything else was backed off again down the line with third party contracts which reduced their – rather, I assumed it would reduce their flexibility …"

(Transcript, 17 September, p. 45)

209. Even accepting Mr. Staley's evidence that ECSL's business model did not rely on mark-to-market accounting[11] (as Mr. Crosland had suggested), Mr. Staley recognised that Mr. Crosland "valued other components – direct control on some of the things that he has cited in his witness statement were more important to him than price or flexibility". Mr. Staley's reference to flexibility in this context would appear to relate to ECSL's ability to manage the supply chain efficiently, as opposed to the flexibility sought by EME (as to the contractual terms offered regarding the volumes of coal required).

210. Mr. Crosland said in evidence that he would still have rejected ECSL's bid even if ECSL had offered lower rates than EWS. Tellingly, ECSL's bid was rejected in September 2000 at a time when ECSL's rates were lower than EWS' in the real world. Even if ECSL had sought to negotiate and refine its bid in an attempt to persuade EME to award the tender (something it did not do in the real world), there is no way of telling what the outcome of such negotiations would have been. On the evidence it appears that ECSL would have had a difficult task to persuade EME that the non-price issues (paragraphs 206 to 209 above) had been resolved or become moot in the but for world. We agree with Mr. Biro that Professor Ordover did not explain how and why EME, as the relevant third party, would have been persuaded that its non-price concerns, such as its previous relationship with ECSL, were immaterial.

*Whether ECSL would have secured a contract with EME to supply coal to Ferrybridge C in the but for world*

211. Even if ECSL had a real or substantial chance of winning the EME Tender, the evidence strongly suggests that it would have had a negligible chance of negotiating (let alone securing) a supply contract to Ferrybridge C. Mr. Crosland's witness statement discussed this issue as follows:

> "55. Furthermore, it does not follow at all that if Enron had been awarded the haulage tender, it would have also won a contract (or contracts) to supply additional coal to Edison beyond that which it was also supplying for use at Fiddler's Ferry. Where a coal haulage contract is placed plays no role in coal

[11] Mark-to-marketing, also known as fair value, is an accounting practice of valuing an asset at its current market price as opposed to its book price

supply decision-making. It certainly played no role in our coal purchasing decisions for coal required by Edison's power stations for the following reasons:

a. Enron's haulage tender included a "Price Incentive" which provided a discount of £0.25 per tonne on haulage where the coal hauled was Enron coal. This "discount" had no influence or relevance when we were considering where to place the tender because we did not know what, if any, stocks of coal would be required for Ferrybridge in addition to those already contracted to be supplied by Powergen. For the same reason and the additional reasons set out below, it also had no impact on our coal purchasing decisions either.

b. The amount of coal, if any, needed to supplement the Powergen supplies depended on a number of different factors, including how profitable it was for Edison to generate electricity at the time and therefore how long we wanted to operate the power station for and where we were in relation to our emissions limits.

c. In the event that additional stocks were required for Ferrybridge, whether imported or indigenous, would depend, in part, on market prices and the characteristics of the coal that were available on the market at the relevant time. If low sulphur imported coal was expensive when we were looking for it, we would probably, ceilings permitting, have supplemented our supplies with indigenous coal. If low sulphur imported coal was cheap, we might have used that.

d. Having already contracted with Powergen for significant volumes of coal over a long period of time, Edison did not wish to enter into any further long-term contracts for the supply of significant volumes of coal. To have done so would have starved us of the flexibility that was critical to our financial viability.

e. In order to supplement Ferrybridge's core coal supply needs, we would certainly not have entered into a four year coal supply agreement with any coal supplier (unless that coal supplier was offering low sulphur, low ash, low dust coal for a price that was significantly below market prices for the duration of the contract). In all my years in the coal industry, I have never known such an offer to be made, for obvious reasons and it was not something that Enron was offering at the time.

f. To the extent that supplies additional to Powergen were required, Edison had wished simply to supplement its coal supplies on an ad hoc basis (which is what we did – see IMC56-58) which suited us better because it offered us much greater flexibility. In the period after June 2000, we had coal supply arrangements in place with a number of different suppliers, including The Scottish Coal Company Limited, Glencore International AG, Interocean Coal Sales LBC and TXU Energy Trading Limited. None of these, save for the arrangement with Glencore, was a long term arrangement, and the Glencore arrangement was entered into only because they had unique access to a particular supply of very low sulphur Russian coal that Edison could have used anywhere.

g. We would have been particularly reluctant to enter into a four year coal supply contract with Enron because they were already supplying us with significant volumes to Fiddler's Ferry and we would have run the risk of becoming too dependent on one supplier)."

212. We have carefully considered this evidence, and we are satisfied that ECSL has not adduced sufficient evidence to establish that there was a real or substantial chance for it to secure a contract to supply coal to Ferrybridge C in or around September 2000. Indeed, we are satisfied that EWS has adduced sufficient evidence to establish that any such chance was negligible.

*(i) There was no coal contract associated with the EME Tender*

213. First, the evidence of both Mr. Crosland and Mr. Kearney was that there was never any suggestion by EME that winning the coal haulage tender would improve ECSL's prospects of selling more coal to EME. More fundamentally, there is no suggestion in any of the documents that a coal supply contract was associated with the EME Tender. The reason for this is simple: EME did not wish to enter into any such contract. In that regard, ECSL's own bid on 15 September 2000 is instructive. The rates ECSL quoted in the real world were for coal haulage only. We do not consider the reference in paragraph 390 of the Decision to the effect that ECSL bid on an E2E basis alters that fact. The wording of ECSL's draft term sheet (i.e. the bid itself) as well as the evidence of both Mr. Staley and Mr. Kearney (both of whom were involved in preparing the bid) clearly show that the bid was for haulage. This is consistent with the reality that, contrary to ECSL's submissions, there was no second stage during which a coal supply contract could be negotiated.

*(ii) Ferrybridge C was already being supplied with coal by Powergen*

214. A significant feature of Mr. Crosland's evidence on this issue was the fact that the anticipated coal requirements of Ferrybridge C were substantially satisfied by EME's contractual requirements with Powergen. EME obtained additional coal supplies thereafter on a flexible, ad hoc basis. Professor Ordover's expert report did not address this point, but in cross-examination he accepted that there was nothing irrational about organising EME's supply arrangements in this way. As events turned out this approach was prescient in so far as the volumes of imported coal actually delivered to Ferrybridge C fell far short of the volumes envisaged by the ITT, thereby avoiding repetition of the difficulties that arose under the 1999 Contract.

215. During cross-examination, Mr. Crosland remarked "you can never say never" to the prospect of making an E2E coal supply contract with ECSL. That falls far short, however, of establishing that EME was interested in, still less tendering for, such a contract.

216. ECSL placed reliance on Mr. Crosland's acceptance in cross-examination that EME could have supplemented its coal supplies for Ferrybridge C by way of an E2E framework agreement just as well as by making separate coal supply and haulage arrangements. They submitted that any such E2E agreement could be quite flexible. This point has potential implications for the assessment of damages. The more flexible the hypothetical E2E agreement becomes, the more speculative the outcome of negotiations between ECSL and EME, and the less likely ECSL would have secured an agreement with EME to supply the volumes of coal used to quantify its alleged loss.

217. However, an important point in this context is that EME was reluctant to enter into a long term coal supply agreement, not least because it already had two such contracts: one with Powergen supplying Ferrybridge C and one with ECSL supplying Fiddler's Ferry. Unlike the situation in the *Allied Maples* case there were no detailed negotiations in this case and there is nothing in the evidence to show that ECSL and EME would have negotiated what would have been EME's third E2E coal supply agreement. Any such negotiations would have run against the grain of restructuring the 1999 Contract that had been agreed only a few months before. None of this means that ECSL was precluded from supplying coal to Ferrybridge C from 2001 to 2004; rather it reflected the fact that EME had decided to tender for those ad hoc supplies on a spot or short-term basis. (ECSL was invited to tender for these supplies and did so, albeit unsuccessfully.)

*(iii) EME was not aware that ECSL was angling for a coal contract*

218. An important further point emerged from Mr. Crosland's cross-examination. He stated that he was not aware that ECSL was using the EME Tender in order to angle for a coal supply contract to Ferrybridge C (although he would not have been surprised if they had done since ECSL was a coal supplier). His lack of awareness is hardly surprising when considered in the light of Mr. Staley's evidence in cross-examination that such a contract was never communicated to EME. It was, perhaps, for this reason that Mr.

Staley candidly acknowledged that he was not in a position to estimate the level of chance of ECSL negotiating an E2E contract being as much as 90 per cent or as little as 10 per cent.

219. Removing the abuse of a dominant position would have enabled ECSL to offer haulage rates which were at least as competitive as EWS' rates in the but for world. Removing the abuse does not somehow transform ECSL's behaviour in other respects. If ECSL did not inform EME that it was seeking to negotiate an E2E arrangement to supply coal to Ferrybridge C in the real world, we find it very difficult to assume that this would have happened absent the abuse by EWS of its dominant position. As we noted in respect of the (a) question, Mr. Kearney's evidence was that not all of the ECSL employees regarded its bid for the EME Tender as having a serious chance of winning in the real world, still less did they actively consider ways in which to angle for the supply of coal via that tender. No contemporary document was adduced before the Tribunal showing how important – financially, strategically or otherwise – was the possibility of negotiations for an additional contract to supply coal to Ferrybridge C to ECSL (or for that matter to EME).

*(iv) EME's legitimate non-price concerns would have affected any coal contract*

220. The non-price issues we have mentioned in connection with the EME Tender are also relevant to the prospect of a coal supply agreement. These issues are wholly unrelated to the abuse by EWS of its dominant position and thus relevant in the but for world. These issues are material to and significantly reduce the chance of winning a contract to supply coal to Ferrybridge C, even by means of negotiation. Even if ECSL had initiated negotiations with EME as regards coal supply in the absence of EWS' abuse of a dominant position, the 'fall out' from the 1999 Contract would still have been material to EME's decision-making. It is notable that it took a further six months after the EME Tender for Mr. Staley to rekindle commercial relations with EME.

*Conclusion on question (b)*

221. Taking all this evidence together we conclude that ECSL had no real or substantial prospect of supplying coal to EME on an E2E basis. This was a speculative prospect:

there is ample evidence about the unwillingness of EME to enter into a long-term coal supply contract.

## VII. OVERALL CONCLUSION

222. The Claimant has lost on causation and questions of quantum will only arise if we are subsequently held to be wrong in this conclusion. In view of the limited amount of time and evidence that was devoted to quantum at the trial, it is desirable to refrain at this stage from making any hypothetical findings on that issue. We therefore unanimously conclude that ECSL's claim against EWS for the loss of an opportunity to supply coal to EME's Ferrybridge C power station fails and is dismissed.

Lord Carlile of Berriew Q.C. Graham Mather Richard Prosser

Charles Dhanowa
Registrar Date: 21 December 2009

**ANNEX 1**

**ABBREVIATIONS**

(Paragraph 7 of the Judgment)

| | |
|---|---|
| 1999 Contract | Master Coal Purchase and Sale Agreement for Fiddler's Ferry and Ferrybridge C dated 13 August 1999 |
| AEP | AEP Energy Services UK Generation Limited |
| BE | British Energy Limited |
| But for world | The world that would have existed but for the abuse of a dominant position found by the ORR in the Decision |
| CIF | International Commercial Term (INCOTERM) standing for "Cost, Insurance and Freight". Use of this term indicates that the cargo insurance and delivery of goods to the named port of destination is at the seller's expense, although the buyer retains responsibility for import customs clearance and other costs and risks |
| December Confirmations | Confirmations dated 16 December 1999 to the 1999 Contract |
| Decision | Decision of the Office of Rail Regulation *English Welsh and Scottish Railway Limited* published on 17 November 2006 |
| DIY | A "do-it-yourself" arrangement for the supply and haulage of coal to a power station |
| ECSL | Enron Coal Services Limited (in liquidation) |
| EME | Edison Emission Energy Limited |
| EME Tender | Invitation to tender issued by EME for a four-year contract for the haulage of coal by rail to Fiddler's Ferry and Ferrybridge, commencing on 1 January 2001 |
| E2E | "End-to-end" services comprising the purchase of the coal at the loading port, shipping, rail haulage and delivery of the coal to the stockpile of the UK power station |
| EWS | English Welsh and Scottish Railway Limited |

| | |
|---|---|
| Ferrybridge C | Ferrybridge C power station, located on the south bank of the River Aire (near Leeds) |
| Fiddler's Ferry | Fiddler's Ferry power station, located on the north bank of the River Mersey (near Liverpool) |
| FHH | Freightliner Heavy Haul Limited |
| FHH Contract | Rail Haulage Agreement between Freightliner Limited and Enron Coal Services Limited dated 30 June 2000 |
| FOB | INCOTERM standing for "Free On Board". Use of this term indicates the delivery of goods on board the vessel at the named port of origin at the seller's expense. The buyer is responsible for the main carriage/freight, cargo insurance and other costs and risks |
| ITT | Invitation to tender |
| LBT | Liverpool Bulk Terminal |
| May 2000 rates | The prices quoted by EWS to ECSL to haul coal for a wide variety of routes from the ports of Hunterston, Hull and Immingham to Fiddler's Ferry and to the Aire Valley (where Ferrybridge C is located) |
| Mr. Biro | Mr. Zoltan Biro, a founding member and Director of Frontier Economics Limited, a consultancy specialising in economic analysis. Expert witness on behalf of EWS |
| Mr. Crosland | Mr. Ian Maxwell Crosland, who was the Fuels Director of EME at the relevant time. Witness of fact on behalf of EWS |
| Mr. Fisher | Mr. John Fisher, partner at PricewaterhouseCoopers LLP, a forensic accountant specialising in the financial aspects of commercial claims and disputes. Expert witness on behalf of ECSL |
| Mr. Kahn | Mr. Neville Kahn, partner at Deloitte LLP and (at the relevant time) joint administrator of ECSL in November 2001 (at which time he was employed by PricewaterhouseCoopers LLP). Witness of fact on behalf of ECSL |
| Mr. Kearney | Mr. Thomas Kearney, a senior commercial employee at ECSL from December 1996 to November 2001. Witness of fact on behalf of EWS |

| | |
|---|---|
| Mr. Staley | Mr. Stuart Staley, head of Enron's Coal Trading Group from 1998 to 2001. Witness of fact on behalf of ECSL |
| Mr. White | Mr. David White, head of Commercial Policy at EWS. Witness of fact on behalf of EWS |
| October 2000 rates | The final prices agreed between EWS and EME in connection with the award of the services in the EME Tender |
| ORR | Office of Rail Regulation |
| Powergen | Powergen UK plc (now E.ON UK plc), the former owner of Ferrybridge C and Fiddler's Ferry |
| Professor Ordover | Professor Janusz Ordover, Professor of Economics at New York University and Senior Consultant at Compass Lexecon. Expert witness on behalf of ECSL |
| September Confirmations | Confirmations dated 3 September 1999 to the 1999 Contract |

**ANNEX 2**

**COMPARISON OF RATES**

(Paragraphs 28, 96, 98, 109, 152 of the Judgment)

| **Route** | **EWS to ECSL, May 2000** | **FHH to ECSL, June 2000** | **EWS to EME, August 2000** | **ECSL to EME, September 2000** | **EWS to EME, October 2000** |
|---|---|---|---|---|---|
| *Hull to Ferrybridge C* | 3.40 | 2.85* | - | 2.75 | 2.50 |
| *Redcar to Ferrybridge C* | 3.60 | 3.30* | 3.40 | 3.20 | 3.00 |
| *Hunterston to Ferrybridge C* | 6.90 | - | 6.25 | - | 6.20 – 6.50 |
| *Immingham to Ferrybridge C* | 3.40 | 2.75* | 2.80 | 2.70 | 2.55 |
| *LBT to Fiddler's Ferry* | - | - | - | - | 1.85 |

* The terms of the Rail Haulage Agreement concluded between FHH and ECSL provided for a further discount of £0.10 per tonne on each route in respect of each tonne hauled by FHH in excess of 1 million tonnes in any year.