IN THE COMPETITION Case No. : 1285/10/12/18
APPEAL TRIBUNAL

Victoria House,

Bloomsbury Place,

London WC1A 2EB

25 October 2018

Before:

Heriot Currie QC, Sir Iain McMillan CBE, Paul Lomas

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Electro Rent Corporation v Competition and Markets Authority

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HEARING – Day 2

A P P E A R AN C E S

Daniel Beard QC & Alistair Lindsay (of Monckton Chambers) appeared on behalf of the Appellant

Marie Demetriou QC & David Bailey (both of Brick Court Chambers) appeared on behalf of the Respondent

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Thursday, 25 October 2018

(10.00 am)

THE CHAIRMAN: Good morning, Mr. Beard.

Before we start, there is one matter that the Tribunal would like to be addressed on in closing submissions and we thought it would be helpful to counsel to give you some advance notice of that. Mr. Lomas is going to articulate that question.

MR. LOMAS: Thank you, Chairman.

I think both of you touched on it in opening but I think it would help us in closing if you could be very clear about the legal test in relation to reasonable excuse.

If we assume, and I think it is common ground, that the Monitoring Trustee could not give consent on behalf of the CMA, and that the Monitoring Trustee could not give binding legal determinations of the scope of the order, and there was a breach of the order, the question that seems to be posed is: on what does reasonable excuse fasten?

There are at least three possibilities. That although that is common ground now, it was not clear at the time; or that there was a conversation with the Monitoring Trustee which shed doubt on that, and that is the basis of reasonable excuse; or that there were good

commercial reasons for doing what was done in relation to the lease and that was reasonable excuse. Which of the three is that or is it a combination of them, and if so, in what combination?

I think it would be helpful to have your views on how that legal test is to be applied.

MR. BEARD: I am grateful.

THE CHAIRMAN: Thank you.

MR. NASOUL GOPAL (continued)

Cross-examination by MR. BEARD(continued)

MR. BEARD: Mr. Gopal, good morning.

A. Good morning.

Q. I am going to pick up where I left off yesterday, just talking about break clauses, if I may. Could we take up your statement, tab 10 in bundle A. We were in paragraph 28.

A. Yes.

Q. I just want to pick up the final sentence of 28(d):

"I understood Mr. Brown to be saying in the conversation that there would be a commercial ability to reverse the break clause after it was served."

We talked about commercial deals to reverse break clauses. There you are talking about renegotiating, are you not?

A. Yes.

Q. Yes, thank you.

There was another way in which Mr. Brown explained to you that it might be possible to reverse the service of notice of the break clause, and he spelled that out in his email which is found at bundle B1/224 in tab 7.

A. Yes.

Q. You have read this? You are familiar with this.

A. Yes, I have seen the email.

Q. This is the other method, the other mechanism which is, in essence, there are some requirements for the notice of the break clause to be valid.

A. Yes.

Q. If you do not comply with them, then the landlord may say, "You cannot break the contract". That is what he is saying there, is he not?

A. This is what the email said, yes, sir.

Q. Yes, so there are two mechanisms for reversibility that Mr. Brown set out to you. He did not set out any third way, did he? I do not want to sound too Blairite.

A. I just want to go back to the conversation that we had on the phone call. I think the only two things which Mr. Brown mentioned to me was: it was easy to withdraw the notice, and (2) if the new purchaser comes in and wants to, you know, renegotiate, that should be quite straightforward. I do not understand anything about the

onus on the landlord, but we only took it from the tenant's point of view. That is what I understood during the call, yes.

Q. But here, when we are talking about the email at page 224:

"The break clause is effective in April 2019 provided we comply with the conditions of termination."

What he is saying there:

"If we do not comply with any of the termination provisions, then the break clause is not effective. So if we choose not to vacate the premises, we merely have to not comply or serve a notice stating we will not comply with the Break Notice for the lease to continue. This is all standard stuff."

A. Yes.

Q. He is saying this is the way these things will generally work --

A. Yes.

Q. -- because the landlords will want their tenants to stay, is he not?

A. I understood from this email, which is a reflection of what we discussed earlier in the call, that it was reversible. I did not look at it from the landlord's point of view but I knew that it was a reflection of the call we had earlier in the day.

Q. But you are saying that you understood, are you, from the call --
A. Yes.
Q. -- that even if the landlord objected to reversibility you could still reverse the break clause, is that right?
A. I cannot recall Mr. Brown mentioning anything about a landlord rejecting the -- you know, not accepting the notice.
Q. But I am asking you, did you think that you could reverse a break clause without the consent of the landlord?
A. No, I mean I am sure that if you want to reverse a Break Notice you would have to discuss it with the landlord. But from my -- from the call I had, what Mr. Brown told me was quite straightforward and it should be quite easy to do.
Q. So you would have to discuss it with the landlord and the landlord would have to consent, but Mr. Brown had said he thought that would be probably quite easy to do.
A. That would be quite easy to do.
Q. Yes. Just to be clear, he sent you the lease.
A. Yes.
Q. The terms of the lease. But you did not read the lease?
A. No, I did not read the lease. I only saw the cover email.

Q. Have you read the lease subsequently?
A. Yes, I have. Yes.
Q. You understand the terms of the lease on the break clause are clear in that regard?
A. It is clear, yes.
Q. So you accept there were two mechanisms, a commercial negotiation or this sort of reversibility --
A. Yes.
Q. -- that we are referring to here, where the landlord would need to consent.

If we go on in your notes, if we may, very briefly, going back to bundle C1 tab 6.

A. Page?
Q. Page 27. I will be coming back to this note in a moment but just to close out this issue. The two mechanisms that we are talking about, that I have just been referring to, they are described by you as having been referred to at bullet points 2 and 4, is that right? If you just want to familiarise yourself.
A. On page?
Q. Page 27. I am so sorry, Mr. Gopal.
A. Sorry, in the top one?
Q. No, under the heading "Communication", second bullet:

"Mr. Brown informed me ..."

That is one of the mechanisms that we have referred

to. Then bullet point 4.

A. Yes. One minute, please, sir. (Pause)

Yes.

Q. Just on bullet point 4:

"I asked Mr. Brown whether the notice was reversible, anticipating that a new owner may keep the property."

A. Yes.

Q. This was a discussion undertaken in the context of Mr. Brown talking about a purchaser coming in, as you have referred to them, because of the remedies process. That is right, is it not?

A. Yes, but I have to tell Mr. Chairman about the context of my understanding at the time on 15 March. I did not know that on 13 March there was already a remedies working paper issued by the CMA, which Mr. Brown did not tell me about, where I believe the remedies paper had already focused that the remedy proposal would be the Electro Rent UK. Also, having checked the CMA website on the day, even though I was in China, I knew that the decision of the CMA was due at the end of March, which means that the divestment would probably have completed by September. So I knew that there was, you know, plenty of time for a new purchaser, if they come in around September or October, you know, to stay in

Sunbury or to leave Sunbury if they want to.

Q. I have seen that from your witness statement, Mr. Gopal.

A. Yes.

Q. But you well knew at the time of this March conversation that divestment of Electro Rent UK was a possibility under the remedies scheme, did you not?

A. On 15 March I knew that it was one of the three potential remedies. I did not know about the remedies paper --

Q. But you knew it was one of the potential remedies.

A. Yes.

Q. You did not need any further remedy statement to know that, did you?

A. No, I did not need any further remedies paper, but I remember clearly that Mr. Brown did tell me, "It is possible that we may not have to sell Electro Rent UK. Even if we keep Electro Rent UK we will not need it because it is not fit for purpose."

Q. Understood, and the paper you are referring to is a possible remedies paper --

A. In February, yes.

Q. Then there was a further remedies paper in March, and that was saying that Electro Rent UK being sold was, of the remedies that had been put forward previously, the most likely to occur; is that right?

A. But on 15 March I did not have access to this remedies paper.
Q. It does not make any difference for your position, does it? Because you knew that Electro Rent UK was a potential remedy, and you are the Monitoring Trustee that is conscious of all potential remedies.
A. Yes, I knew on the day there was still three potential remedies, yes.
Q. Thank you. Whilst we are in this bundle --
A. Bundle C1.
Q. Yes, in C1, just in these notes.
A. Yes. Do you mean the email?
Q. Let us just turn on, if we may, to page 35. This is an email from David Hansen at the Competition Commission -- Competition and Markets Authority, I am sorry, where the concern is being expressed by the CMA that they understand Electro Rent has recently initiated a process to break its lease on the Sunbury facilities, and the CMA is expressing concern about these matters and raising with you a series of questions. That is correct, is it not?
A. That is correct, yes.
Q. Then your response to this, if we turn back, actually begins at page 29. That is right, is it not?
A. It does, yes.

Q. What we see is that you have spoken to various people, including Mr. Brown, in your initial bullets. Then you go on to deal with the questions or points that have been raised by the CMA in this email. That is right, is it not?
A. That is correct, yes.
Q. So if we just turn on, pick it up at the top of page 31. The top of page 31, I think this is all common ground but this is the text of Mr. Brown's communication to you, apologising that he made a mistake in relation to the 12-month notice period.
A. Yes, either by text or email, that was Mr. Brown, yes.
Q. Thank you. Then at the bottom of 31 you have got a text here of what Mr. Brown had said about the three remedy options. That is right, is it not?
A. The four, yes.
Q. I am so sorry. Well, yes, the fourth is actually no SLC, in which case no remedy is required, but I am not going to dwell on the semantics of that.
Yes, so that sets out those matters, including remedies option 3, the disposal of Electro Rent UK.
A. Yes.
Q. Then if we turn on to page 33, you are dealing here with your view on whether these actions, so the actions we are talking about here is the service of the notice with

the break clause, would represent a breach of the interim order, and you say here:

"We do not consider that Electro Rent/Microlease may have/has deliberately breached the interim order."

That is correct, is it not? So you are saying you do not believe there is a breach here.

A. Which paragraph are you ...

Q. I am sorry, it is its first paragraph under the bold type on page 33.

A. Yes, that was our view on 16 April, yes.

Q. Of April?

A. Yes.

Q. Then I am not going to take you through all of this given the time, but the final sentence in the three paragraphs:

"On the contrary, we understand that in its view the decision to terminate the lease was taken to protect the viability of Electro Rent UK."

A. Sorry, which page again?

Q. The same page, just three paragraphs down. It is in the paragraph, "We understand".

A. Yes.

Q. In fact what Mr. Brown had said to you was not that it was needed to protect the viability, but it would ensure flexibility that would be attractive to purchasers.

That is what he had said, was it not?

A. I am not sure what was the exact words but it was around -- yes, it was around that to be able to give, you know, the purchaser the option, and also to also give an option to Electro Rent, you know, that if they do not have to sell Electro Rent UK that they will get out of it, yes.

Q. I am grateful.

Then in your fourth paragraph you start, you had visited the site at Sunbury and you noticed that no stock was despatched and no calibration; so there was no warehousing activity and no laboratory activity there, that is right, is it not?

A. From my recollection there is a warehouse facility but it was not being used to --

Q. Yes, there is no dispute about that there was space for warehousing.

A. There was -- all the arrangements were there.

Q. The next paragraph:

"Currently the Sunbury site serves only as an administrative office and is therefore under-utilised."

Again, I do not think there is any dispute about that. That is correct, is it not?

A. That is from what we have seen, yes.

THE CHAIRMAN: Mr. Beard, I just wanted to ask Mr. Gopal

a question.

MR. BEARD: Please.

THE CHAIRMAN: I would like to understand the context in which you set out your views on paragraph 33, Mr. Gopal.

A. Page 33?

THE CHAIRMAN: Sorry, page 33. Just under the bold type you say:

"We do not consider that Electro Rent/Microlease may have/has deliberately breached the interim order."

Is that the question you thought you were being asked, whether in relation to Electro Rent it had deliberately breached the interim order?

A. I need to look at the question again here.

MR. BEARD: The question is just above it, if it assists.

THE CHAIRMAN: Yes.

A. I think the question was whether it represented breach. But from the information we had on that date, that the conclusion I came to was that it was not a deliberate breach.

THE CHAIRMAN: Thank you.

MR. BEARD: It may just assist the court if we just diverge for a minute. Keep that file open because I am going to come back to it but can we just go to A18.

I am sorry, I can do it in the same bundle. My apologies to the court, I have just realised I have

a double reference. If we stay in C1 it is easier.

A. That is all right.

Q. If you turn on to page 37, this is the Monitoring Trustee report from you for the month ending 31 March 2018. That is correct, is it not?

A. Yes.

Q. If we go on to page 40 --

A. Yes.

Q. -- you will see "Introduction":

"As required by paragraph 16 in the directions we have set out below a statement confirming that Electro Rent has complied with the interim order."

This is for the period through to 31 March.

"The rest of this report also supports this statement."

So this is a compliance report for the relevant period, is it not, Mr. Gopal?

A. It is a -- I mean we do not call it compliance report, first, it is a Monitoring Trustee report on our work of monitoring the parties' compliance with the interim order.

Q. I am perfectly content to take your alternative title.

A. Yes.

Q. So this covers the relevant period which we have just been discussing where these conversations occurred

in March 15 and the service of the notice had been discussed.

What is interesting here, of course, is at 2.3.4:

"We believe that Electro Rent and Microlease continue to comply with the interim order and have not sought to deliberately breach the interim order."

So the language being applied there, in terms of there being no breach, there being compliance, is the same language that Mr. Gopal has used in his notes, and that is obviously consistent with the answer he gave some moments ago in relation to my question on that first line, that there was not a breach.

If we could go back then to page 33.

THE CHAIRMAN: Could I just ask one further question before we go on.

Why did you use the word "deliberately" in both of these passages, Mr. Gopal?

A. I think the word "deliberate" is also included in the interim in our directions. If you may refer me to where our directions is, I can point you out.

MR. BEARD: Certainly. The directions are in bundle A at tab 14, Mr. Gopal.

A. Just give me two minutes, please. (Pause)

MR. BEARD: For the Tribunal's information, I will have some further questions on further documents where notions of

breach are talked about, which I am coming on to, but I will leave Mr. Gopal to see whether he has a particular reference that he wants.

A. Yes, 16(a), the third point underneath, "whether anything else causes him or her to be concerned about a possible future breach of the order, whether deliberate or inadvertent".

Q. But, Mr. Gopal in your compliance report on 31 March you were not suggesting that there was any breach at all, were you?

A. No. Based on my assessment on 15 March 2018 I did not.

Q. No, and as you have already fairly answered in relation to page 33, you did not think there was any breach when you answered the CMA's 13 April email, did you?

A. On 16 April, no, but I think we did reissue our opinion on the 17th.

Q. We will come to the 17th.

A. Yes.

Q. You are going to have the opportunity to deal with the 17th, of course.

Let us just stay with page 33. The bottom of the page:

"Our preliminary assessment is the ability of the Electro Rent Corporation business to compete independently ..."

Sorry, I am back in C1. I am sorry, sir, I am just trying to move things along, I am just conscious of time.

THE CHAIRMAN: Where are we now?

MR. BEARD: Back on page 33 of C1.

"Our preliminary assessment is that the ability of the Electro Rent Corporation business to compete independently in any of the markets affected by the transaction may not be impacted by the termination of the lease. We agree with Electro Rent that whatever the outcome, the premises may not to be appropriate for the long-term, therefore terminating the lease may assist in Electro Rent's ability to compete in the future."

So you think this is a positive as part of the conduct of the business, do you not?

A. Yes, but as I mentioned that was based on my -- what I knew on 15 March, that there was still 12 months to the break date.

THE CHAIRMAN: Sorry, I did not catch the end of your answer there.

A. That was on the basis that I knew that there was another 12 months until the break date of April -- of March 2019.

MR. BEARD: Yes. Let us go on to that, then:

"The counterfactual may have been that the Sunbury

site would present a burden for Electro Rent UK moving forward, therey making it less attractive to buyers and/or impacting on their business model."

As part of their ordinary business there was a concern that actually this under-utilised office space was a burden, is what you are saying here.

A. Yes.

Q. "However, we need to do some future analysis to complete a counterfactual assessment, for example around the likely rental costs in different scenarios."

Have you seen the evidence of Mr. Peterman in these proceedings?

A. No.

Q. But the sort of analysis you are talking about is, presumably, rents for appropriate sized premises, availability of such premises in the surrounding area.

A. In the surrounding area.

Q. Yes, thank you. Just for the Tribunal's note, that is of course what Mr. Peterman is doing in his evidence.

Then you have got, over the page:

"Overall, we understand that the decision to terminate the lease [was] to protect the viability of Electro Rent UK."

So here you are talking about viability, just not in terms of it collapsing as a firm but making it work better, is that right?

A. I am not sure that I meant it working better, but the word "viability" is to maintain the operations of the business going forward, yes.

Q. Thank you.

"Nevertheless, in our view it was inappropriate for Electro Rent/Microlease to terminate the lease 13 months in advance rather than waiting until the outcome of the merger inquiry was known and to take this decision without seeking a steer from Electro Rent UK."

So this is the point that you were just coming to, where you say, "I do not have a problem with ..." -- I am going to summarise, "I do not have a problem with them issuing the notice, but they did not need to do it this early". That is the concern you have got here, is it not?

A. Yes.

Q. But from a remedies point of view, precisely when the notice was served does not alter whether serving a notice is a breach, does it?

A. Sorry, can you repeat the question again?

Q. When the notice is served does not alter whether serving a notice is a breach, does it?

A. I think it is -- it is difficult for me to answer, I think. If I may ask you again to repeat the question.

Q. When a notice is served or the notice is served --

A. Yes.
Q. -- does not alter whether serving a notice is in breach does it?
Let us assume that Mr. Brown had been right, that actually it was a 12-month notice period. If that was the necessary period, you considered this was fine, did you not?
A. Yes.
Q. Yes. Thank you.
Then you say you would have expected him to have contacted Electro Rent UK, but that was not something that you ever asked Mr. Brown, was it?
A. No. I think I need to put into context when I received the call what was my thought process. I mean, I know Mr. Brown is the global CEO of Electro Rent Corporation and he is not involved in the day-to-day running of Electro Rent UK. But I know that as the chairman or the global CEO he has got the responsibility for the statutory and legal obligations of Electro Rent, and the fact that he contacted me was not a surprise that, you know, he called me.
Q. You knew he was responsible also for property matters on a global basis?
A. I mean, not necessarily, but given that this was something which sounded like a legal matter, and I am

assuming that he was involved, yes.

Q. So he is responsible for property matters, it was not a surprise to you that he was contacting you about them.

A. No.

Q. So there was actually no basis for you expecting him to contact Electro Rent UK and he gave you no reason to think he was doing so.

A. No, he did not give me any reason to think that, but I assume he would have discussed it internally because I know Mr. Brown is not a property expert or property law -- or even a lawyer, so I would have expected that he would have consulted internally.

Q. He would have consulted internally. Thank you.

Following these responses you gave in the 16 April email, if you go back to page 28 we see an email from the CMA saying:

"Please could you give an account of any ... discussion ..."

Starting at the bottom of the page, sir.

A. Yes.

Q. "Please could you give an account of any previous discussion."

Then 29:

"Please could you clarify whether you consider the parties have breached any part of the interim order,

regardless of whether this was deliberate or not."

So the CMA was essentially raising the same sort of question the Tribunal has already raised.

Then your response to that is the email starting on the preceding page, 27, 17 April, which I have taken you to some of already.

A. Yes.

Q. So the first bullet point you identify -- this is all under the heading of "Communication":

"Mr. Brown called me on 15 March."

Then the second bullet point we have discussed, which is the commercial negotiation.

The third bullet point:

"Mr. Brown confirmed the termination is not linked to the CMA investigation but in fact was intended to ensure all remedy actions remain open until the outcome of the merger", and he explained 12-month notice period.

We have covered the issue of whether or not it is the only option available but it was not, he did not say that, and you accepted that yesterday, I think.

A. He did not use the words "only option" but he did mention that we need to serve the notice now because it is a 12 months -- the break date is 12 months. Yes.

Q. We covered that yesterday, yes. Then 4:

"I asked Mr. Brown whether the notice was

reversible, anticipating that a new owner may want the property", and "I followed up by email to seek evidence" on that notice, "see attached".

The email you attached was the one that I showed you. I am not going to test you on the references but it is the one of 15 March that we went to earlier from Mr. Brown.

For the Tribunal's note, it is the one in B1, tab 7 at 244. I do not think there will be any dispute about that.

You attached the lease as well, when you sent it to the CMA.

A. Yes.

Q. Then you say:

"Mr. Brown gave me the impression Electro Rent had considered the issue thoroughly."

We have just covered the issue about the impression whether or not it would liaise with Electro Rent UK. You say "and its legal advisers", but Mr Brown did not say that he was going to liaise with the legal advisers, did he?

A. I have been the Monitoring Trustee from mid-November until end of July, and every issue which Electro Rent has raised with us there has always been involvement of the legal advisers. So that was the only occasion when

Mr. Brown has not followed up with the legal adviser, so on that occasion I had assumed he would have liaised.

Q. We have Mr. Brown's evidence on the involvement of his legal advisers, and I do not think it is accepted that this is the only occasion at all.

A. Sorry?

Q. "Based on this evidence, the impression that Electro Rent and the CMA if needed would be informed ..."

That is the first time you have referred to the CMA.

There is no basis for your fuller memory now, on 17 April, that the CMA were going to get involved.

A. Sorry, are you referring to the bullet point?

Q. The sixth bullet point.

A. Yes.

Q. It is not mentioned in any of your earlier emails or notes, is it?

A. About me contacting --

Q. The possibility of the CMA being involved.

A. Earlier email from -- on this --

Q. In this chain of email or any time going back to 15 March.

A. No.

Q. No, and when you say "if needed" here, what you really mean is if there was any doubt about compliance, do you

not?

A. Whether compliance or non-compliance, I would have expected that Electro Rent would have contacted the CMA, yes.

Q. To work out whether or not, if it had a doubt whether there was compliance or non-compliance it would have contacted the CMA.

A. Or contacted the CMA to inform them that they have spoken to me.

Q. Contacted the CMA, that is what you were saying here, to say that they had spoken to you?

A. Yes, I mean, as I mentioned earlier, there has never been a case where Electro Rent has contacted me and not followed up with counsel or the CMA.

Q. I do not think that is accepted, Mr. Gopal.

A. If you can show me another time where Electro Rent has contacted me and not liaised with the lawyers I will be very happy to respond to that.

Q. That is a matter that was subject to cross-examination by Ms. Demetriou of Mr. Brown yesterday.

A. Yes.

Q. The seventh point -- sorry:

"This did not raise a concern with me at the time. Based on the information available to me now, it is clear I was misinformed by Mr. Brown during our

communication regarding the lease for the Sunbury facility. I do not believe this was deliberately done and my impression is that Mr. Brown was acting with the intention to preserve viability. As you will see in his email of 14 April 2018 (to be sent separately) he advised that this was a mistake of his."

So this was about the timing of the service of the notice, was it not?

A. Yes.

Q. Then let us move on to your assessment. I will deal with this as swiftly as I can.

On 4(c), so this is clause 4(c) of the interim Electro Rent order, if you turn over the page, the top of page 28, underlined, your conclusion is that knowing all that you knew then, Electro Rent did not breach clause 4(c) of the order.

A. Yes, that was on the basis that I knew there was another 12 months for the break date, yes.

Q. I am sorry, that was on the basis that you knew that 12 months? You knew at that time that the Break Notice was six months. I have just taken you to bullet point 7 --

A. Yes.

Q. -- which you have just confirmed is concerned with your knowing that Mr. Brown had made the mistake. So that is

not correct, is it, Mr. Gopal? Your conclusion there is on the basis that actually Mr. Brown had misinformed you and you are still saying he did not breach 4(c).

A. Not breaching 4(c) was -- it is set in relation to them to be able to compete independently, so I knew that they -- that both businesses will still have, you know, their side of operations.

Q. The point is that at this stage you knew about the error that Mr. Brown had made, you knew about the two mechanisms for reversibility, and you are still here saying no breach of 4(c), are you not?

A. Yes.

Q. Thank you. Let us go on to 5(c).

A. This is -- I apologise, this is a typo, it should say 5(e).

Q. 5(e)?

A. Yes.

Q. I am grateful. So although you refer to 5(c) throughout this, it should be read as 5(e)?

A. (e).

Q. Very good.

We can actually understand that, in fairness, from the summary in the first bullet of the clause, of this section, can we not? Because that is in fact a summary of 5(e), or aspects of 5(e), not of 5(c).

A. Yes.

Q. Then you say:

"As set out in our 16 April letter, Electro Rent is of the view that the Sunbury facility is no longer fit for purpose."

That is the language that you use here, but you are talking about it being effectively under-utilised and unduly costly.

A. Under-utilised, yes.

Q. Thank you.

Your third bullet point is:

"In our view this decision to terminate the lease cannot be qualified as being undertaken in the ordinary course of business."

Because you are aware under 5(e) one of key questions is ordinary course of business.

A. Yes.

Q. What you are saying here is it:

"... cannot be qualified as being undertaken in the ordinary course of business by the mere fact that notice was served 13 months in advance rather than the required six months. Electro Rent, deliberately or not, deviated from the standard notice period, which implies the decision was not taken in the ordinary course of business."

So your reasoning here is there is a breach of 5(e) because they used the wrong notice period. That is what you are saying there.

A. Together with that, you know, it was not reversible.

Q. Let us see:

"Also, Electro Rent made the decision to terminate the lease for the facility to protect the viability of Electro Rent, given the under-utilisation of the site. It therefore appears to have made a strategic decision with the perceived aim of protecting its interests and/or those of a future owner. By its nature this appears not to have been a decision that would have been taken in the ordinary course of business. Electro Rent should have known that such a decision would require prior written consent or at least a steer from the CMA."

So you know about the reversibility issues. You do not refer to those here, do you, Mr. Gopal? You give two reasons why you are concerned about breach. One is that it was not in the ordinary course of business to terminate the lease or issue the notice to break the lease because the period was wrong.

A. Yes.

Q. That is the third bullet. Then the fourth bullet is it was taken having regard to the interests of Electro Rent and potentially a future owner. Those are the two

reasons that you give here, are they not?

A. Yes.

Q. Not reversibility.

A. No.

Q. Thank you. So that is the conclusion on which you say it appears that Electro Rent may have breached clause 5(e) of the interim order, as it served notice for a facility, which was not undertaken in the ordinary course of business.

That is the conclusion that you are drawing here. That is what is said in 5, is it not?

A. That is a conclusion I came to on 16 or 17 -- 16 April, yes. Or 17th, yes.

Q. Yes. Thank you.

In your witness statement you say,

but if I had known about issues to do with reversibility I would have said something different here.

This is in paragraph 67 of your witness statement.

A. Sorry, which ...?

Q. I am sorry, paragraph 67 of your witness statement.

A. Which tab again, please?

Q. I am sorry. It is tab 10 in bundle A.

A. Paragraph?

Q. Paragraph 67.

A. Yes.
Q. You say in 67,
if I had known about the reversibility issues, as you put them, I would have said something different.
But that is not true, is it, Mr. Gopal? Because you knew about the reversibility issues when you responded to the CMA, who were specifically asking you about breach, and in relation to 4(c) you said no breach and in relation to 5(e) you did not refer to any reversibility issues at all, did you?
A. I mean, on the date of 16 April I did not know that a new lease would need to be -- would be renegotiated at a higher cost.
Q. You knew about commercial negotiation, you knew about the second mechanism. You decided that there was no breach of 4(c) and you did not refer to or consider those issues in relation to 5(e), did you?
A. I did not spell it out in that email, no.
Q. Mr. Gopal, when you say you did not spell it out, you had a situation where on a Friday night, 13 April, the CMA had expressed concerns about these matters. You had then provided an extensive email on 16 email. The CMA have immediately come back and said "Have you got any concerns about breach?" and you did not have concerns about breach related to reversibility. That is spelled

out in your response. That is the true position. It is not a matter of whether or not there were other issues. This was specifically being focused on and you did not think it mattered.

The truth is that this witness statement at paragraph 67, Mr. Gopal, is not an accurate position. It is you, with the benefit of hindsight, in the course of this litigation, coming up with a different justification for what you had done here, is it not?

A. One minute, please. I mean, what I was trying to say in my witness statement here is if I had known that the new lease would incur increased costs, it would have raised concerns for me. I mean, on 16 April, even having spoken to the landlord, I do not know, on the 13th or 14th, he did not mention to me about this will need to be renegotiated at the increased cost.

Q. Mr. Gopal, the second mechanism that -- the first mechanism that you refer to at bullet 2, in relation to your conversation with Mr. Brown on 15 March, was commercial negotiation.

Are you saying to the Tribunal that a commercial negotiation would always have resulted in a lower lease price?

A. I mean, I am not sure about a lower lease price but I think, given that I was told that there is plenty of

alternative sites available, it was a buyer's market. So I am sure, I think our understanding is the landlord would be very keen to, you know, keep the tenant in, and may provide an incentive for them to stay.

Q. But no guarantee.

A. There is no guarantee.

Q. No guarantee. Thank you.

We have dealt with, I think, the alternative position you put on the remedies working paper at paragraph 73.

Can I just go back to one issue. We explored at the outset that you have been involved in a large number of mergers, and in your experience, to use an ugly word, one of the reasons that parties merge is to create synergies.

A. Yes.

Q. The synergies are in the form of cost savings, that is what we are referring to.

A. Yes.

Are you referring to any particular document?

Q. No, it is all right, I will take you to the documents, these are just general propositions.

One of the major costs of almost any business is their labour costs, is it not?

A. Yes.

Q. So when companies merge, one of the major synergies that can could be looked for is savings on labour.
A. Yes.
Q. You knew that in a merger, in any merger effectively, there is a risk, indeed a possibility or even a likelihood, that employees would lose their jobs.
A. Yes.
Q. Yes. Indeed, there are measures put in place under the interim order for key staff retention packages.
A. Yes.
Q. Yes, and that is what was done here, was it not? There were key staff retention packages put in place, were there not?
A. I need to go back to the chronology. I think when we were appointed in November 2017 we had already identified a number of key staff and we had suggested that the retention scheme be put in place, which Electro Rent did not put, but I think then one of the key staff left at the end of January and the CMA was quite concerned about that and asked us to go back to Electro Rent to put in the schemes to retain those three remaining staff.
Q. Yes. After January, key staff retention packages were all put in place.
A. Were put in place, yes.

Q. Thank you. So you knew that employees of course risked being destabilised by a merger, but that measures had been put in place in order to protect key staff.
A. Yes.
Q. You have already, on a multitude of occasions in these notes, referred to what you call maintaining the viability of the business, and that Mr. Brown was concerned to maintain the viability of the business.
A. Yes.
Q. So you would expect that as part of that he would want to protect the key staff, in line with the provision of the staff retention packages. That is correct, is it not?
A. Mm-hmm.
Q. Sorry, you nodded to me; just for the transcript's benefit could you just say "yes"?
A. Yes.
Q. Thank you. So at the time of the service of notice you were not particularly concerned about these issues of staff retention, because you knew about the key staff retention packages and you knew that it was Mr. Brown's specific concern to ensure that this business continued, including by retaining staff. That is correct, is it not?
A. At the date of 15 March I knew that there were already

retention schemes in place, yes.

Q. So one of the sensible and humane things to do if you are running a merging company is not to create any risk of undue alarm or stress with employees, given that they have got a merger hanging over them. That is a sensible management decision, is it not?

A. Yes.

Q. Yes, and that is exactly what Mr. Brown was doing when he decided not to tell those three employees about the service of the notice. He has given evidence on that.

A. I was not expecting Mr. Brown to inform the three employees, because two of the employees, one is a lady who was not doing much there and one was a credit controller, but I expected Mr. Brown to have contacted the office manager because he is the one who was running the site; and having spoken to him also on 13 or 14 April he said that he was the one who was involved in the negotiation of the lease, so he was surprised that he was not informed.

Q. He was surprised.

A. Yes.

Q. I understand. But he was one of the people that was subject to a key staff retention package, was he not?

A. Yes.

Q. So Mr. Brown was there making sure that he just did not

create undue alarm, because he did not consider that actually there was any risk to the staff by service of the notice, not increased risk. There is of course the risk of the merger but there was not increased risk, because the whole purpose of what he was doing was to maintain the viability and the saleability of the business. That is correct, is it not?

A. I mean, that is your view. My view was if he is taking a decision for Electro Rent UK, the people who is running the site should be aware about it. Whether it will cause them any destabilising effects or any concern, I thought they would have known.

MR. BEARD: Whether or not there were any risks of destabilising effect.

I do not have any further questions for you, Mr. Gopal. Thank you very much.

A. Thank you.

THE CHAIRMAN: Any re-examination?

Sorry, before you start, Mr. Lomas would like to ask one question.

Questions by THE TRIBUNAL

MR. LOMAS: Just one question picking up on that.

If the news of the termination of the lease had leaked in some way to the staff in the business, was it your view that there was a risk of that destabilising

them? Had they known, might they have been destabilised?

A. It depends. I mean if they thought serving the notice period was that, you know, the business was going to be closing down, they may have looked for other jobs.

MR. LOMAS: Or moved locations.

A. Or moved locations.

MR. LOMAS: So if the news of the termination leaked, there was at least a possibility of destabilising the staff.

A. Yes. Not all the staff, but I would think the key staff, yes.

MR. LOMAS: How would you evaluate the possibility that destabilising the staff might in some way impede the process of sale of the business?

A. Usually, if the staff would have -- the key staff would have any concern, they would speak to us, and we would, you know, seek their views of what they are planning to do during the divestment process.

MR. LOMAS: Okay.

THE CHAIRMAN: Ms. Demetriou, do you have any re-examination?

Re-examination by MS. DEMETRIOU

MS. DEMETRIOU: Mr. Gopal, just one question on destabilisation.

Can you turn to Mr. Brown's statement at tab 8 of

bundle 1, and it is paragraph 47, because I think it is important to see what he says.

A. Yes.

Q. He says there that he wanted to keep the service of the Break Notice confidential as regards the three Electro Rent UK staff in case it destabilised them.

Now, if he had told you on the call that that was his position, that there was a risk -- that he thought there was a risk of destabilising the staff, would that have caused you to do anything differently?

A. I mean, the only thing I am sure I would have done is I would have gone back to Mr. Sullivan and asked for his view about the serving of the notice. I mean I had assumed that, you know, he was in the loop of this. So I did not ask Mr. Brown whether Mr. Sullivan was informed.

Q. Also, I just wanted to take you back briefly to the letter, the email of 17 April. That is in bundle C1, tab 6, page 27. Do you have that in front of you?

A. Yes.

Q. You see in the first part, Mr. Beard took you through all the bullet points under "Communication", yes?

A. Yes.

Q. He took you to the second bullet point, which was the possibility of negotiating a new lease with the

landlord, renegotiation. The fourth bullet point deals with you asked Mr Brown whether the notice was reversible. Then if you go down "Our assessment" under clause 4(c), the fourth bullet point says:

"Our understanding from Investec ..."

That is the landlord, is it not?

A. Yes.

Q. "... is that this notice cannot be reversed."

A. Yes.

Q. Did your discussion -- so what did you understand? So from your discussion with Investec, what was your view then about what Mr. Brown had told you about reversibility? Did your view change after speaking to Investec?

A. Yes, I mean from my conversation with -- I think his name was Mark Kelly, he told me categorically this cannot be reversed, and so I knew that the new lease would have to be renegotiated. I did not know about the terms of it but I knew there was going to be a new lease.

Q. When he told you that it categorically cannot be reversed --

A. Yes.

Q. -- is that what you had understood from Mr. Brown or is it different to what you had understood from Mr. Brown?

A. Sorry?
Q. In the conversation. I am referring back to the conversation on the 15th. When you heard from Investec this cannot be reversed, categorically --
A. Yes.
Q. -- is that different to what Mr. Brown had told you on the phone?
A. Yes, I mean that is the opposite of what Mr. Brown told me on 15 March.
Q. When you see here, under the next bullet point:

"In our view Electro Rent should have sought prior written consent or at least a steer from the CMA."

Why did you reach that view?
A. Because I know that the onus of the compliance with the interim order is not on us but on the parties, so I assumed that -- I thought Electro Rent would have sought written consent from the CMA or either informed its lawyers that he has spoken to me.
Q. Then finally, Mr. Gopal, you have had lots of questions about what you knew and understood on 15 March, what you knew and understood in April, and obviously now you have been in court and you have heard and seen more evidence in this appeal.

My question is now, knowing everything that you now know, including the information in this appeal, from

Mr. Brown, do you think that if you had been asked the question, if you had known that on 15 March, would you have acted in the same way?

A. I do not think so. I definitely would have a lot of things I would have raised, (inaudible) before me, having known all this information. I think, to be honest, I see all those events from 1 March until 16 or 19 March is focusing just on 15 March, on my conversation with Mr. Brown, there has been a lot of things which I was not aware of. I mean, given that we are the Monitoring Trustee, we are supposed to be shared -- to be given all information to help us to do our job, to ensure compliance with the interim order.

I was not aware about the meeting between Electro Rent and the CMA about the potential purchasers. I was not aware about the response on 7 March from Electro Rent. I was not aware about the issue of the remedies paper on 13 March. I was not aware that there has been a telephone conversation between Mr. Colley and Mr. Brown and the spreadsheet. I was not aware that the lease was signed on the 16th. We know that it was going to be served because -- sorry, the notice was going to be served because we were informed about that on the 15th. I was not aware that Mr. Hafferty was not the director of the business on the 16th, because

I found out later on that he was only appointed as director on 19 March, which is the Monday.

So I think there is a series of events in that period where we were totally in the dark, and the only thing which the Monitoring Trustee was informed of was the ten minutes' conversation that we had on the 15th, followed by that follow-up email which Mr. Brown sent me after the call. So I think a lot of things, if I had known on the 15th, for example if Mr. Brown had told me "I have spoken to my property adviser", I would have said, "Who is the property adviser?" because we have never come across Mr. Colley before. If he told me this is someone who is a consultant to Microlease, that would already have raised a red flag for me, because we know that anybody from Microlease should not be getting involved in the operations of Electro Rent, except for Mr. Brown, who we know is the global CEO of Electro Rent, so I did not dispute his involvement in that. But if I knew that someone else was involved in looking at the negotiation of a lease from Microlease, this would have raised a concern for me.

I think all of this information was not shared with me on the day and I have made also a limited judgment on what I knew, what I was informed of. I mean there is a lot of information which, with hindsight, have come

into light after the appeal came on 5 July, but on 15 March we were totally in the dark. I do not know the reason why we were not provided with the information but I can only make an assessment or judgment on what we were given on the day, which is the phone call.

MS. DEMETRIOU: Thank you.

Further questions by THE TRIBUNAL

THE CHAIRMAN: Before you go, Mr. Gopal, there is one question that I would like to ask you. If it gives rise to the need for further re-examination that would be permitted.

Do you have your witness statement handy?

A. Yes.

THE CHAIRMAN: Could you look at paragraph 28(c).

A. Paragraph 28?

THE CHAIRMAN: Paragraph 28(c).

A. Is that 10, yes?

THE CHAIRMAN: It is on page 8, I think. It is on page 8, paragraph 28(c). Do you have that?

A. Yes.

THE CHAIRMAN: You say there:

"Mr. Brown said that the break clause of the lease on the Sunbury premises had to be exercised 12 months in advance of spring 2019. I had the impression from Mr. Brown that this was something that needed to be done

urgently on that day."

That was your impression during that telephone call with Mr. Brown on 15 March, is that right?

A. Yes, that was the impression because Mr. Brown had told me, you know, "We need to serve this notice", he said "now", but it could be now as in March, whether it was on the day or the next day, but he said in 12 months' time we can be stuck with that.

THE CHAIRMAN: Yes, what I am particularly interested in is when you believed the notice had to be served. Am I right in understanding that you understood, during the telephone call on 15 March, that the Break Notice needed to be served that day?

A. Yes.

THE CHAIRMAN: Yes. If that is the case, in one of the subsequent emails you say that you thought -- and I am paraphrasing from memory; if we need to look at it we can -- you thought that Mr. Brown and Electro Rent would consult the CMA before proceeding to serve the Break Notice.

A. Whether -- I cannot be sure whether they would have consulted the CMA or the lawyers before proceeding, but I would have thought they would have informed the lawyers or the CMA that, you know, "We have served the notice" or whatever, after speaking with the trustee.

But I knew -- I suspected there was going to be some follow-up, yes.

THE CHAIRMAN: So your position is that you would have expected Electro Rent to consult with their lawyers and/or the CMA, but not necessarily before the Break Notice was served.

A. I mean, I am not sure how they would have proceeded, but I expected there would have been some follow-up, yes.

THE CHAIRMAN: Ms. Demetriou, is there anything arising out of that? No.

Thank you very much, Mr. Gopal, you are free to go.

(The witness withdrew)

(11.07 am)

MR. BEARD: Sir and members of the Tribunal, I am conscious it is not quite 11.30, but I am going to move into closing and I am just wondering whether now might be the moment to take a ten-minute break and then we can roll through, otherwise I am going to start and break off.

THE CHAIRMAN: I think the people that matter in relation to the question are the transcribers. (Pause)

We will rise now.

(Short break)

(11.20 am)

THE CHAIRMAN: Mr. Beard.

Closing submissions by MR. BEARD

MR. BEARD: Mr. Chairman, members of the Tribunal, in these closings I will first deal with ground 1, and I am going to deal with that in four parts.

First of all I am going to look at legal issues, including the standard of review and pick up the question that Mr. Lomas raised.

Secondly, I will go back and look at why the decision is wrong on its face and unsustainable.

Thirdly, insofar as we then need to, we will then also explain why the CMA case which now runs on obviousness is wrong.

Fourthly, I will deal with the CMA's further new allegations on how Electro Rent dealt with the Monitoring Trustee and why those further allegations are wrong.

Those are the four heads I will try and deal with matters under.

Starting with the legal issues. Just at opening, Mr. Chairman, you asked about issues concerning the standard of review. Given the time in opening, neither me nor Ms. Demetriou went to the actual appellate provision. It is perhaps just worth turning that up. It is in authorities bundle 1, tab 1, at page 109.

This is section 114, "Appeals in relation to

penalties" under the Enterprise Act:

"This section applies if a person on whom a penalty is imposed under section 110 is aggrieved by the imposition or nature of the penalty, the amount or amounts of the penalty, or the date by which it is to be paid."

Then there are specific provisions on how that process is to be fulfilled. If a copy of the notice under section 112, which is notifying of a proposed penalty, was served on the person on whom the penalty is imposed, the application to the Tribunal shall -- I am sorry, 112. I may be wrong in referring to that as provisional. Sorry:

"... the copy of the notice under section 112 was served on the person on whom the penalty was imposed, the application to the Tribunal shall, subject to subsection 4, be made within the period of 28 days."

So this is part of the process. The application relates to a decision of the CMA.

The key passage is then in sub-5:

"On application under this section the Competition Appeal Tribunal may quash the penalty, substitute a penalty of a different nature or of such lesser amount or amounts as the Tribunal considers appropriate, or in a case falling within 1(c) [that is the dates case] substitute for the date or dates imposed

by the CMA an alternative date or dates ..."

Then what it says simply is:

"... if it considers it appropriate to do so."

I think it probably is common ground that the use of the word "appropriate" in this context is something of an unusual one, because of course elsewhere in the Enterprise Act, when you are challenging substantive merger or market investigation decisions under section 120 or section 179, what you have is a very clear statement that any challenge, any appeal is to be brought on judicial review principles, so it is explicitly laid out there.

Equally, it does not quite use the language of the Competition Act, where you have appeals against infringement decisions in relation to chapter 1 and chapter 2 prohibitions.

Just for your notes, we have not got it in the bundle but just for your notes, there schedule 8 to the Competition Act 1998, paragraph 3.1 says:

"The Tribunal must determine the appeal on the merits by reference to the grounds of appeal set out in the notice of appeal."

So you have different wordings in relation to different schemes, and as far as we are aware there is no authority on what "appropriate" means in these

circumstances. We understand the Tribunal guidance itself, when it is running through the various types of case which can come before the Tribunal, does refer to these sorts of appeals being appeals on the merits and therefore associating them in the direction of the Competition Act type appeals. But, as I say, no authority on this point.

I think the difficulty we encounter is it would not be appropriate to be treating this as judicial review, given that you have got elsewhere in the Enterprise Act very specific and clear language saying this is judicial review standard. But it is clearly not a de novo hearing. I think that we can see. So we end up to some extent unclear precisely where we are, but tending towards a merits appeal-type approach.

But we do say that when you are talking about penalties in these circumstances, so the imposition of penalties, criminal sanctions, one does need to be extraordinarily cautious in relation to the extent to which -- and obviously I will come on to this -- the decision-maker can expand these matters and indeed use the notion of a merits appeal to put forward new reasons.

What I will come on to show you is the case law that indicates that that is not appropriate even in the full

merits-type cases under the Competition Act, and we say a fortiori in this context.

It is perhaps just worth noting, albeit with a degree of irony, that the CMA's defence argues that the Tribunal's role is limited to assessing whether the CMA's reasons are intelligible and adequate. That is defence bundle A, tab 5, paragraph 68 and 69. That obviously points very much back towards a judicial review threshold. That is obviously not the approach that has been adopted by the CMA henceforth in these proceedings. But irony, I recognise, is not a ground of challenge in these circumstances.

MR. LOMAS: Not traditionally.

MR. BEARD: No, sadly.

MR. LOMAS: What guidance do you say could be drawn from Article 6 and the quasi-criminal nature of the penalty?

MR. BEARD: There are two issues that tend to arise in these circumstances. One is what sort of standard of proof are we talking about; and obviously we are not here saying it is anything other than a civil standard of proof. That is entirely consistent with an HRA or Human Rights Convention approach to these matters. There has been all sorts of case law discussing whether the threshold of evidence has to be particularly clear and compelling given the seriousness of sanction. I am not

going to go into those issues; it is dangerous territory. Some of the early CAT authorities have effectively been at least distinguished and possibly overturned in relation to how they characterised these matters.

Nonetheless, what it does do is (a) mean that the benefit of any doubt must go, in relation to any factual assessment, to those subject to penalty.

Second of all, because it is a criminal sanction, high standards of procedural fairness matter here. As I say, that may well be a further and additional reason why the idea that you can supplement, embroider, reinterpret your reasons in the decision and bring it before the Tribunal is inappropriate, because you are undermining the fair procedure in these circumstances, which is one where you are supposed to be given a provisional account of what penalty is going to be imposed and why, because it includes the breach. You are then entitled to make written and oral representations, as occurred in this case, and then appeal the decision.

You are allowed to fire at that target; not a moving target, that target.

We will see that that sense of approach is actually reflected even in the "on the merits" competition cases

that I will come on to.

THE CHAIRMAN: This is purely hypothetical, but if the Tribunal decided that the only facts that matter were uncontentious, what approach should we take to the decision of the CMA? Should we only interfere if it is plainly wrong, or what approach should we take?

MR. BEARD: No, I do not think -- you do not then -- just because facts happen not to be uncontentious does not take you into judicial review territory. That cannot, obviously, change the threshold in relation to these matters. The fact that you would have uncontentious facts would still mean that in relation to, for these purposes, the reasonable excuse you would need to carry out a fuller assessment than merely saying: was it, for instance, irrational? It would have to go further than that. It would have to look at whether or not the Tribunal considered it was wrong in the circumstances.

But we do say that if you have got a situation where actually there are not that many factual disputes -- and, as we have said, we do not think there are actually that many factual disputes between the parties in relation to these matters. The CMA have tried to be creative about post-decision matters or post-conversation matters at least, but those issues do not take the assessment further forward, we say. You

still have to look at it and say: was it a reasonable excuse, and was the CMA's decision sound in relation to that? That does mean that they are held to their reasons.

So it is not as if you lose the judicial review-type grounds. It is just that there are more things as well that can be criticised by an appellant. Because that is essentially what is going on when you have a merits appeal in relation to a competition case. You say, "No, no, it is not just a judicial review standard, there is more than that". So it is intended to be more liberal for the appellant, for the challenger. We have seen this made manifest very recently, because in relation to telecommunications appeals, following a long and eventually successful campaign by Ofcom, the standard in relation to telecoms appeals before this Tribunal has moved from being a merits appeal a la Competition Act now to judicial review.

So we say the judicial review-type grounds still exist, but there is more there. It can be wrong even if it does not fail, for instance, because of reasoning issues or unfairness issues, or it is rational, it can be rational but still wrong.

THE CHAIRMAN: Just to be clear, so if we reached a position where we thought that the jury question which the CMA

had to answer and the jury question which we have to answer, which is, was there a reasonable excuse, in relation to that there was room for differing views, where do we go then?

MR. BEARD: You can decide that their approach was wrong. So if there is room -- if you differ from them, yes, you can find that they are wrong. The point I am making is, if their initial reasoning in their decision does not stack up, it falls anyway; but if you allow them future leeway, this standard must allow you to say it is wrong. That is what -- because what you will be doing is saying: it is appropriate to quash this decision in all the circumstances.

As I say, we do not get a lot of help from the statutory language, and I recognise that here I am using the framework of merits appeals and the Competition Act as the default. But as I say, in relation to Competition Act cases you can have a situation where things are found to be wrong.

THE CHAIRMAN: Just one more question. The use of the word "appropriate", in relation to that, do we approach the issue of whether there was a reasonable excuse as an issue of fact or an issue of law or a combination of the two?

MR. BEARD: I think reasonable excuse is probably going to

inevitably be a mixed question of fact and law. I am always slightly concerned that we can all lapse into a degree of bad science in trying to categorise matters as pure fact or pure law or mixed fact and law, and frankly it is generally easier to treat them as mixed fact and law. Because the question of reasonableness, which I will come on to, which is picked up, must engender some sort of assessment of parameters, albeit I say broad parameters, and that must be a legal issue as well as involving what are the factual matters that go to whether or not the excuse was reasonable.

I am sorry, that is a slightly lazy answer but I do not think it would be right to either say reasonable excuse is purely a matter of law, there are obviously legal elements to it. It is plainly also not just a pure matter of fact.

THE CHAIRMAN: Thank you.

MR. BEARD: I am going to come back to the reasonableness question, if I may. For the moment I am just going to stick with some of these review standard matters, and the extent to which one can expand the reasons you have set out in a decision in the course of submissions.

In opening I briefly took you to the *Napp* case and I want to go back to that. That is in authorities bundle 1 in tab 3.

I am going to pick it up at page 29. I took you to paragraph 77. I am just putting that slightly in context because I have got slightly more time.

This is a case heard in the context of a full merits appeal, in circumstances where at this stage they are considering a range of case management matters, including in particular the permission to adduce further evidence, and witness statements in particular, by the Authority, which is defending its decision.

Just picking it up at 75:

"As regards the judicial stage [so this is the appellate stage] we have already set out the provisions in the Act and the rules which provide that the appeal is a full appeal on the merits, conducted by reference to witnesses and documents under the discretionary control of the Tribunal. The ample nature of that appeal seems to us to equate to that under consideration in *Lloyd v McMahon* , where the House of Lords indicated that a court enjoying such a jurisdiction could in certain circumstances legitimately correct unfairness which may have occurred in the administrative procedure below, without necessarily quashing the decision below. In that connection we note that the appellant is not limited to placing before this tribunal the evidence he has placed before the director, but may

expand, enlarge upon or indeed abandon that evidence and present a new case. Since there is no right to test of the evidence of witnesses before the director, it is at this judicial stage of the proceedings that the applicant may apply to test by cross-examination the evidence of all the witnesses against him. We doubt, however, whether exactly the same liberal approach to the submission of new evidence can be applied to the director. In our view, the exercise of the discretion to allow new evidence by the director at the appeal stage should take strongly into account the principle that the director should normally be prepared to defend the decision on the basis of the material before him when he took that decision. It is particularly important that the director's decision should not be seen as something that can be elaborated upon, embroidered or adapted at will once matter reaches the Tribunal. It is a final administrative act with important legal consequences, which in principle fixes the director's position.

"In our view, further investigations after the decision of primary facts in an attempt to strengthen by better evidence a decision already taken should not in general be countenanced."

We say that is the starting point for setting out a principle here. Whilst we accept, and I will come on

to this, that you can put in rebuttal evidence, that rebuttal evidence cannot be a sort of Trojan horse for putting forward a new case and new material.

"Were it otherwise, the important procedural safeguards envisaged by rule 14 of the directors' rules would be much diminished or even circumvented altogether."

An important consideration. I raised this in opening. Rule 14 is the process in relation to substantive competition appeals: that a statement of objections has to be put forward, that the parties can then engage with and make representations. Here the analogy is with the provisional findings document.

"There would be a risk that appellants could be faced with a moving target."

Well, that is exactly what we have got here:

"The Tribunal itself would be in difficulties if instead of determining the appeal essentially by reference to the merits of the decision in the light of the material relied on by the director at the time, the Tribunal was effectively adjudicating on a bolstered version of the decision. The director himself concedes that he cannot make a new case before the Tribunal."

So 79:

"For these reasons, our provisional conclusion is

that there should be a presumption against permitting the director to submit new evidence that could properly have been made available during the administrative procedure."

Ms. Demetriou, to anticipate what I am going to say, took you to *Allsports* and said: there, look, they did let in other evidence. Yes, we accept that. We accept it was quite an unusual case, *Allsports*, involving the football kit cartel, and there were some remarkable and entertaining characters who had given some very interesting evidence along the way, some of whom are now, I think, involved with running football clubs or perhaps not. But nonetheless, I think because of the circumstances of that case it is not so much an exception that proves the rule but it is recognising that there can be scope for admitting further evidence, but it is not saying you can supplement the reasons for your decision, and you have to consider it in the context of its facts.

I am not going to take you to more of this particular *Napp* decision. That was a happy saga that engendered several judgments. The next one is at tab 4.

THE CHAIRMAN: Before you go there, to what extent, if any, is it relevant that, as I understand it, you do not make

any complaint that you have been unable to deal properly with the so-called additional or new material?

MR. BEARD: No, I am sorry, sir, we do make objection. For instance, if Ms. Demetriou is going to say actually there was a real issue with Mr. Colley and whether or not there was a conflict of interest and how that undermined it, that is a real problem for us. We trailed it in correspondence. We said: if you are saying that, that needed to be pleaded. Because that is a very good example of a situation where someone is being impugned as to the way in which they acted, even if it does not amount to an allegation of dishonesty. That is plainly something that should have been set out, should have been made clear to us in these circumstances.

THE CHAIRMAN: What about the perhaps more central issue of the discussions between Mr. Gopal and Mr. Brown? Are you saying that you have been unable to deal properly with the material adduced by the CMA in relation to that matter?

MR. BEARD: No, I am not saying that in relation to those matters, particularly on reversibility and so on, we have not been able to do so. It would be wrong for us to say that.

The point I am making is, the reason why that

constraint is in place is because there may be circumstances where you can deal with the relevant evidence, and perhaps the reversibility issue may be one of them, but in relation to other issues that is not as clear; and that is why the Tribunal is saying actually you should be focusing on the decision.

THE CHAIRMAN: Yes.

MR. BEARD: The difficulty is you are moving away from that.

THE CHAIRMAN: Yes.

MR. BEARD: *Napp* substantive judgment. I am just going to pick it up at page 31, just under the heading "*The Ermakov* issue."

Tab 4, page 31, halfway down the page, "The Ermakov issue".

You will see at 131 Napp has been arguing that the directors' case against it, this was in relation to drug pricing arrangements, had shifted significantly away from the case made in the decision. This is particularly so, says Napp, in respect of the directors' case on excess pricing but other matters are complained of as well. 132:

"Napp now argues on the basis of The Queen v ex parte *Ermakov*, followed in Nash v The Chelsea *RCA* that the director should not be permitted to change the reasons for his decision before

the Tribunal, nor add supplementary reasons, given in particular the director is a specialist decision-maker. In *Ermakov* the Court of Appeal decided that in certain proceedings under the Housing Act the decision-maker should be held to the reasons given in his original decision, in the interests of fairness and efficient decision-making."

So it is not just a pure fairness issue, sir, there are other public interest considerations that apply:

"On this point, for the same reasons that we consider our discretion to allow the director to submit further evidence should be exercised only sparingly [which we have already averted to), we accept Napp's basic submission that in principle the director should not be permitted to advance a wholly new case at the judicial stage nor rely on new reasons. To decide otherwise would make the administrative procedure and the safeguards it provides largely devoid of purpose. The function of this Tribunal is not to try a wholly new case. If the director wishes to make a new case, the proper course is for the director to withdraw the decision, adopt a new decision or for this Tribunal to remit. However, given the powers of this Tribunal it seems to us that the analogy with *Ermakov* does not go as far as *Napp* submits. In

those circumstances, it is inevitable that at the judicial stage certain aspects of the decision are explored in more detail than during the administrative procedure, and are in consequence further elaborated on by the director.

"As already indicated, these are not purely judicial review proceedings. Before this tribunal procedure it is the merits of the decision which are in issue. It may also be appropriate for this Tribunal to receive further evidence and hear witnesses. Under the Act, Parliament appears to have intended that this Tribunal should be equipped to take its own decision, where appropriate, in substitution for that of a director. For these reasons, while we accept the force of the general principle that lies behind *Ermakov*, the analogy is not exact."

Then it goes on:

"In the present case, for the reasons given in more detail below, we have reached the view that Napp's allegations as to the director's alleged change of case do not in fact have the significance that Napp alleges."

So it is taking the judicial review approach in *Ermakov* and saying, "Look, we are in a different position. The principle is sound but it is not as strict as in judicial review, one has to look at the

circumstances". We entirely accept that. But what we do say is that what is being precluded, and it is clear from 133, is new reasons being put forward. That is what is being said in relation to 133.

The next case I am going to deal with is actually not in the bundle. It is the case of *Imperial Tobacco* litigation. I have provided my learned friends with a copy first thing and I have now mislaid mine. (Handed)

This is the decision of Vivien Rose, the chairman as she then was, in relation to the tobacco litigation, something of an infamous saga where the OFT had made findings of unlawful pricing arrangements between tobacco manufacturers and retailers, which went to trial.

So appeal on the merits, the appeal being brought by Imperial Tobacco and some of the retailers, Co-op, Morrison, Safeway and Asda in particular.

Now, what had happened in this case was after an extensive enquiry there had been a very large decision taken, with some very heavy fines imposed on it. An appeal had been brought. The appeal was moving forward. Clearly, from the OFT's point of view things were not going quite as well as they had hoped in the appeal, and what then transpired was the OFT sought to put forward

what it referred to as a "refined case".

I am not going to comment on whether or not that is euphemistic, but it is worth picking it up at paragraph 40, page 16, the OFT submissions as to how the case would proceed. The court is taking a breath and saying, "Look, hang on a second, you are now putting forward this refined case, how does this work?" Needless to say, the appellants were protesting, saying it did not work and should not proceed:

"The OFT's primary case was that the restraints set out in the paragraphs of the refined case reflected part but not whole of the decision. The appeals could and should proceed on that basis."

In other words, you could proceed on the basis that you were hanging on to some parts of the decision and they should be seen as this refined case, but they were dropping other bits of it:

"The appeals could and should proceed on that basis. If the tribunal disagreed with that submission, the appeals could nonetheless proceed by reference to the Tribunal's powers under paragraph 3 of schedule 8 of the 1998 Act."

You will recall that I quoted that to you, that is the general merits powers. Or I had referred to it, I am sorry; I only quoted a part of it.

I am not going to go through all the delights of this decision, but if we could turn on to page 18, issue 1:

"Are the referring case restraints part of the decision?"

This issue that the Tribunal is dealing with is how do you actually read a decision in these circumstances? Can you have a refined case put forward on the basis of the decision?

Picking it up at 43:

"The first question that we need to decide is whether the refined case restraints are part of or within the decision such that if the existence of those restraints is established on the evidence and if, further, all other issues are determined in the OFT's favour, the Tribunal could dispose of the appeals."

44:

"The starting point is section 46 of the 1998 Act, which provides that the appealable decision which may be brought to the tribunal is the decision of the OFT as to whether the Chapter 1 prohibition has been infringed. There is no definition in the 1998 Act of what constitutes the 'decision' for this purpose ... In *MasterCard* ... the Tribunal noted ... that:

"'... it is particularly important to be able to

identify clearly what findings are made in the decision by the OFT, upon what basis those findings are made, and whether those findings are maintained. Moreover, from the point of view of the parties it is important that, when appealing, they are in a position to identify precisely the findings that are in issue, and the basis for those findings. It is also important for the Tribunal to be able to identify clearly the findings in issue, bearing in mind that the Tribunal's jurisdiction under section 46 of the Act arises in respect of the decision and not otherwise.'"

Then it goes on and quotes from *Argos* which was a case concerning pricing arrangements in relation to toys and games, that was appealed:

"... the Tribunal stated at paragraph 65:

"'(1) The appeal before the Tribunal is directed against "the decision that the Chapter 1 or Chapter II prohibition has been infringed", which necessarily implies that the appeal is directed against the facts and matters set out in the decision and not against other facts and matters not set out in the decision ...

"'(3) The Tribunal must determine the appeal on the merits but by reference to the grounds of appeal set out in the notice of appeal. Since the notice of appeal

must refer to and so far as necessary put in issue the facts as set out in the decision, it follows that the Tribunal is concerned with the facts in the decision, as contested in the notice of appeal, and not with the correctness of other facts sought to be adduced as evidence of the infringement after the notice of appeal has been lodged and which, by definition, the notice of appeal has not dealt with.'"

Then 46:

"In our judgment it is not enough simply to be able to point to disparate passages in the decision where it is said that the OFT found that the refined case restraints were accepted by the retailers and that they arguably restricted competition. Conversely it is not enough that one might construe paragraph 8.2 of the decision, read in isolation, as wide enough to cover the refined case constraints. There has to be a link or bridge in the reasoning set out in the decision between the findings of fact and the conclusion as to infringement. In order for those restraints to be within or part of the decision for present purposes, we must, therefore, be satisfied that the decision includes findings that the refined case restraints constituted object infringements of the Chapter 1 prohibition."

So it is actually taking a very strict approach in

relation to these matters.

It then goes on and considers the particular terms of the decision and says no, actually we do not see this refined -- sorry.

MR. LOMAS: A link or a bridge permits a certain level of flexibility, does it not?

MR. BEARD: There is a certain level of flexibility, we understand that. We are not saying this is -- it is the nature of a merits appeal, as we have already seen, that there will be some development. As I say, we recognise that. But the question is how far can one go in relation to these matters, and obviously I anticipate a decision that says "This decision is very narrowly reasoned, the story you are hearing today is very different".

That is actually to do with the interpretation of the decision. Now if we move on to page 24 there is a further discussion on whether the appeal should still proceed. This is really dealing with very much the questions that I have already adverted to in citing *Napp*.

Indeed, one can see this if one picks it up at paragraph 65. This is under the sub-heading "Does the Tribunal have jurisdiction to continue?" This is, even if your decision does not have your refined case in it,

because we are dealing with these matters on the evidence and because there has been evidence heard by the Tribunal, can we go on and determine this case in any event?

The Tribunal in line, Mr. Lomas, with the point you were just raising, says at 65:

"This is not to say that cases never change after the appeal is first lodged. Arguments may be adapted or abandoned during the course of the proceedings. Any such proposed changes should be brought to the attention of the Tribunal and, where necessary, set out clearly in amendments to the pleadings made with the Tribunal's consent. The Tribunal's case law shows that the test applied under rule 11 of the Tribunal rules for allowing amendments is a stringent one. We have in mind what the Tribunal said in earlier cases where the evidence emerging during the course of a long hearing has diverged from the material analysed in the relevant decision."

There we have the citation of the second *Napp* case that I have just taken you to at 134:

"This approach was also applied by the Tribunal in ..." *JJB Sports* paragraph 284.

You will recall that is the case that Ms. Demetriou took you to as an additional authority in opening:

"... where the Tribunal said that provided each party has a proper opportunity to answer the allegation made and that the issues remain within the broad framework of the original decision, the Tribunal should determine the appeal on the basis of all the material placed before it during the appeal.

"Nothing that we say here is intended to cast doubt on the potential for flexibility described in those cases. We do not have, however, regard those statements as authority for the proposition that wherever evidence emerges during the trial that indicates that an infringement of the competition rules has been committed ..."

Sorry, I read that with the wrong emphasis:

"... wherever evidence emerges during the trial that indicates that an infringement of the competition rules has been committed, the Tribunal is entitled to make a finding to that effect, even if that infringement has not formed a part of the decision and is not therefore addressed in the pleadings served in the appeal."

Now, I recognise here that it is being talked about in terms of pleadings. I recognise also that there is quite rightly being said to be flexibility. But it is plainly a matter of degree, and we have the authority of *Napp* which is being cited here, 134, and

indeed 133, about expanding or changing your reasons.

So we say you cannot just reinterpret your decision and fish around for the rationale for it if it is not really there. That is what the first part of *Imperial Tobacco* is saying, and you cannot add to your reasons and change the basis on which you are putting your case forward. That deals with the issue that Ms. Demetriou was seeking to rely upon *JJB* for.

Just to pick up the *Allsports* case, I have said it is an unusual one. It is just worth noting it. Of course it long pre-dates the tobacco judgment, and I place reliance on that, but it is also worth noting. It is in authorities bundle 1 at tab 5.

Page 22, you will see that the Tribunal actually runs through the case law that I have been referring to, *Napp*, *Aberdeen Journals*, which is also referred to I think in the *Imperial Tobacco* decision, and in particular *Argos*. But then goes on to say, if you go on, it then goes on to summarise this position in 59:

"So it seems to us to emerge from *Napp*, *Aberdeen Journals* and *Argos*, [sorry, paragraph 59 on page 27] that the statutory procedural scheme must, so far as possible, be respected. That the

procedure taken as a whole and the procedure before the Tribunal in particular must be fair, and that the public interest in the proper enforcement of Chapter 1 and Chapter II has to be given due weight. In that latter regard it is to be noted that even where the Tribunal has found a procedural error (*Aberdeen Journals* and *Argos*), the Tribunal has given the OFT an opportunity to correct that procedural error rather than entering immediate final judgment for the defendant."

That is essentially remittal back saying: you have not justifiably changed your position, you have got to go back and issue a new decision or a modified decision.

Then we have got the paragraphs that Ms. Demetriou took you to where, in this case in particular, the context is emphasised that there is a degree of flexibility. I am not going to take you through the rest of the judgment talking about the particular circumstances but, as I say, it is a rather unusual case.

So it is not an absolutely bright line. We do not submit that. There is a degree of flexibility. But there are principles here, articulated in *Napp,* that militate very strongly against any sort of extensive change being the basis for a decision

that has been put forward, and that this Tribunal should not be putting itself in the position of essentially being a primary decision-maker in relation to those sorts of issues.

That, of course, is particularly important in the context of what may be seen as criminal penalties. In those circumstances, as I have already said, the whole structure is put in place, effectively, to protect the interests of the potential appellant, the affected party.

Those are some submissions on standard of review and approach to considering decision.

If I may, I will come on to reasonable excuse now. I will deal first directly with the point raised by Mr. Lomas.

As I have already said, reasonable excuse is going to be a matter of mixed fact and law. The three questions as I have noted them, and I apologise if I have wrongly noted them:

Is it relevant to the assessment of reasonableness whether or not a breach was clear at the time? We say yes, that is plainly relevant to the assessment of reasonableness. There can be no doubt about that.

The second was more case-specific but it could apply in most merger-type cases, in the sense that in many

cases Monitoring Trustees will be appointed.

Could a conversation with a Monitoring Trustee be relevant? The out-turn of that conversation in particular, rather than just the simple fact of contact, could the content of that conversation be relevant to the assessment of reasonableness? Again, we say yes, it plainly can. Indeed, it would be somewhat odd if it could not, in circumstances where, as we have seen, in the direction and in particular in direction 13, we have a situation where if you have any doubts you are required to go to the Monitoring Trustee in relation to these matters and seek clarification. If you were to do so and have that sort of clarification or comfort given by the Monitoring Trustee, but that could not be relevant to the assessment of the reasonableness of your position, that, to us, would be something of a surprising outcome, because it is plain that where the structure exists for a Monitoring Trustee, who has to have the relevant experience, who has to be approved by the CMA before they are appointed, is there put in a position where you are under a requirement to go and speak to them, you do so and you get a response in relation to your doubts, to suggest that that is irrelevant to the assessment of reasonableness is, we say, plainly wrong.

The third consideration was commercial reasons. The answer to this question, as to whether commercial reasons go to the assessment of reasonableness, will be: it depends. Here they do matter, and the reason they matter here is because the critical reasons for the actions that were being taken were consistent with, and consciously consistent with, the overall purpose of the interim order and the directions themselves.

I think in opening I hope I fairly said there are two aspects to the interim order and direction scheme. One is keeping separate and the other is ensuring health. There is no dispute between us and the CMA in relation to those matters.

Plainly the actions here that were being undertaken were consistent with the keeping of separation between the merging entities, there is no doubt about that; and they were plainly undertaken with a view to maintaining the health of that business, indeed to giving it more flexibility in circumstances where remedies were being contemplated, and of course the potential for a purchaser coming forward was there.

So we say it depends, but in this case they do matter.

Those are the answers to the specific questions that Mr. Lomas poses.

I have already referred, I think in responses to questions from Mr. Chairman, to the nature of the reasonable excuse test being one of mixed fact and law.

Now, Ms. Demetriou was very critical of the fact that I drew any analogy at all with issues to do with judicial review. I understand that judicial review is different. I would like to make that clear. That is the nature of analogy. I do not want to get into a fight about the proximity of analogy; that is not productive here.

My point is that when you are talking about reasonableness, the reasonableness of an excuse, an excuse can be reasonable even if you disagree with it. Even if there can be a range of different views as to whether or not an excuse or a position should have been taken, a range of positions may be reasonable. Therefore, if you have a range of views on whether or not the conduct was appropriate, permissible or excusable, the latter being the relevant test, as long as those views are reasonable, then in those circumstances it is going to be appropriate to allow the appeal.

That is the only point I am making, that actually the concept of reasonableness is a relatively broad one. That was the only point I am drawing from judicial

review. Because we see it on the other side constantly, by regulators saying the concept of reasonableness is terribly broad because you can have lots of differing views. We are saying, well, actually you need to take the concept of reasonableness as broad here.

I do not need to get into discussions about whether or not this equates to some notion of rationality. I am just talking about there being a broad concept here.

The further submission which I made is in response to the CMA's written case, that the CMA should be afforded a wide margin of discretion in relation to these matters. I am saying that is getting it the wrong way round here. Because you have got a broader concept of reasonableness, and you should not be affording the CMA a broad margin of discretion in circumstances where we are not dealing with technical economic issues of assessment, where one recognises that broad margins of assessments may apply.

MR. LOMAS: It may be that not very much turns on it, but there is a slight distinction between a broad concept of reasonableness and the wording in the Act, which is you need have an excuse which is reasonable. They are not quite the same thing.

MR. BEARD: Yes, I can see that they are not absolutely the same thing, sir, that is completely true, but the

question that one is asking oneself is: what is Parliament essentially getting at when it puts in place a provision that says, "Look, there are errors that may be made, there may be breaches committed, but you may not impose a fine in these circumstances if there was a reasonable excuse".

MR. LOMAS: Yes.

MR. BEARD: We say what it is recognising is that in the course of a merger process, where you have got these potentially complex situations arising, that in those circumstances if someone turns up with a reasonable excuse it is not trying to limit the scope in some unnatural and narrow way. That means that actually the benefit of that concept under the scheme of the statute should inure to the appellant, broadly speaking, and the CMA cannot drag that back by saying "We have got discretion, we did not think that was reasonable here". That is all we are saying.

But I recognise that there are different formulations. I recognise that in other cases in other fields the term "reasonable" is used differently. I understand that. I understand that in VAT cases, if you are trying to avoid a fine for late payment, the concept of "reasonableness" in the statute may be dealt with differently because you are dealing with

a different statutory scheme. We make no issue of that at all.

THE CHAIRMAN: At some point you will no doubt identify precisely what the reasonable excuse was, but let us hypothesise.

If it was a belief that Mr. Brown entertained, is it your position that we, the Tribunal, have to assess whether that belief was a reasonable belief in the circumstances? It may be that you want to deal with that later.

MR. BEARD: No, I can pick that up now if that is of assistance.

I think we recognise that if someone holds an entirely unreasonable belief, then in those circumstances acting on an unreasonable belief is going to struggle conceptually to amount to a reasonable excuse. So we do see that. It would be bizarre if it were some other way round. We recognise that.

MR. LOMAS: Without getting too analytical about it, it is the company that is the target of the order, not the individual.

MR. BEARD: Yes.

MR. LOMAS: So whilst it is easy to focus on Mr. Brown because we have seen him and he has given evidence and he was obviously the CEO, strictly speaking the

reasonableness needs to be applied to the excuse that the company has for --

MR. BEARD: I think that must be correct as a matter of legal propriety. But I do not think what could ever be said is that because the company is a legal person it never has any mind and one can move away from that.

MR. LOMAS: No, I was not making that point.

MR. BEARD: No, no, I did not assume that you were.

In those circumstances, we have proffered evidence from the person who was most closely involved in this. Therefore, by whichever particular fiction one works, the views and attitudes and actions of people to the legal person that they are acting for, and thinking on behalf of, that needs to operate here. That is all I am saying.

But I entirely take the point that formally the company -- it is companies here that are dealing with these matters, absolutely. There is no doubt about that.

It might well be worth just picking up the answer to the question posed by you, Mr. Chairman: what is the reasonable excuse?

Our case is and always has been rather simple and actually, as I have already anticipated, does not depend on your making findings on all points of detail raised

by the CMA insofar as they are in dispute. I think you are fairly familiar with it and I can take it very quickly.

The CMA made an interim order. They directed Electro Rent, under the directions made under that order, to seek guidance from the Monitoring Trustee in cases of doubt. Mr. Brown, who was the CEO of Electro Rent, confirmed that this was the appropriate protocol in a discussion with Mr. Polito. Electro Rent was considering serving a Break Notice in relation to the premises at Sunbury. Mr. Brown thought that doing so would be compatible with the order but out of an abundance of caution, and in case of any doubt, he did precisely what he had been directed to do and had been indicated to him as the appropriate process, he consulted the Monitoring Trustee. The Monitoring Trustee told Mr. Brown that in his view it was fine, in terms of the clarification given, and that Electro Rent could proceed with the service of the Break Notice. Electro Rent did rely on that guidance from or clarification from the Monitoring Trustee and duly proceeded to serve.

As we know, it approached the Monitoring Trustee on the basis of its commercial views about the premises. Essentially, they saw them as a great beige elephant

that they were paying an awful lot of money for unnecessarily, and that they saw that as potentially an impediment also to smooth purchase of the UK branch.

MR. LOMAS: Just picking that up, what you seem to be saying is that the excuse for this purpose is that Mr. Brown consulted the Monitoring Trustee and therefore the reasonableness would have to go to whether it was reasonable for him to rely on what the Monitoring Trustee told him.

MR. BEARD: I do not know whether or not it is -- I can see how one can break the structure down. I am not sure they are trying to allocate particular aspects to reasonableness or excuse, because I think it can well be said that in circumstances where you have a Monitoring Trustee scheme in place, contacting them and getting guidance from them is both an excuse and is reasonable in the circumstances. I am not sure. It may not matter how one allocates.

MR. LOMAS: Because that could then become quite a blanket exception, which runs closely to the question of whether the Monitoring Trustee has the power to give points of binding interpretation.

MR. BEARD: No, it would not be a blanket exception, because the scheme for the Monitoring Trustee is where you have doubts about a matter, and you go along and you talk to

them in those circumstances, and plainly the Monitoring Trustee, although they are independent and are paid for, are acting on behalf of the CMA. Essentially, what the Monitoring Trustee role does is outsource all the complex monitoring that might be required that the CMA does not have the staffing to deal with. It essentially foists that bill on the merging parties rather than the public purse.

There is no criticism of that scheme, but that is what is going on here, and in those circumstances it is not surprising that it would be, in many circumstances, an entirely reasonable excuse to contact the Monitoring Trustee, the Monitoring Trustee to say "Actually we do not have a problem with this" and then for you to proceed.

If you do that in circumstances where your intentions are nefarious, there is obviously a problem. If you are doing it in circumstances where your reasons for doing it may not be nefarious but are clearly antithetical to the approach that is being required under the interim order and the directions in terms of their broad purpose, I can also see that that could be a problem. But in many circumstances it may well be quite correct.

Indeed, if one asked a layman, "You have got

a Monitoring Trustee, that is the first port of call that you ask about these things, they give you an answer and they are experienced people", without wanting to sound too much from the 1990s, the man on the Clapham omnibus might well say, "Yes, I completely understand why you did that then".

MR. LOMAS: Without wanting to push the point too far, I do not want to take up your time, how much of your case is predicated on the basis that you discharge the burden of reasonableness if you approach the Monitoring Trustee, and how much on the question of whether you have to be reasonable in relying on what the Monitoring Trustee then tells you?

MR. BEARD: I am not trying to apportion those matters because they both inure to our benefit. If this Tribunal thought that one or the other was sufficient I am entirely content with that matter. They reinforce one another in these circumstances, as indeed does the account given by Mr. Brown as to why he thought this was in the ordinary course of business, given that he was dealing with office space that was under-utilised and he thought needed to be moved on.

All of those factors are material, so I do not try and apportion particular percentages of reasonableness or potential reasonableness to each other of them.

I think that would be dangerous to do so. Any one of them may be sufficient, but in any event we say cumulatively they clearly do amount to a basis for reasonable excuse.

SIR IAIN MCMILLAN: I just want to be very clear about this, if I may, Mr. Beard.

What you appear to be telling the Panel is that having received the advice of the Monitoring Trustee, it was an entirely reasonable excuse for Mr. Brown not to take his enquiry forward to the CMA for a formal decision, although it appeared that that was required in the interim order.

MR. BEARD: We say it does not appear in the interim order that that was required. But yes, to be clear, we are saying it was reasonable for Mr. Brown not to take matters forward to the CMA, because the basis on which he approached the Monitoring Trustee, in line with direction 13, was: if you have any doubts you approach the Monitoring Trustee. You are required to do so to seek clarification.

He did not really have doubts, as we heard, but he did so out of the abundance of caution. That was the appropriate approach. Once you have had those doubts allayed or potential doubts allayed, you do not have a basis for going to the CMA, you do not need to, it is

not appropriate. Therefore, it is not a matter that is required under the interim order; and it would only be on that aspect of your question, sir, that I would take issue.

SIR IAIN MCMILLAN: Thank you.

MR. BEARD: I hope in dealing with those matters I have, to some extent, explained in summary what we say are reasonable excuses. It has these different elements, we entirely accept that, but we do rely in particular on the structure of the interim order and the directions, the requirement under direction 13, the response of the Monitoring Trustee, the basis on which we were approaching, and the evidence that you have heard as to why it is that an error was made in terms of consideration of whether or not it was in the ordinary course of business.

THE CHAIRMAN: Mr. Beard, am I right in understanding that in relation to the six or so factors that you rely upon, if the Tribunal were not to accept one or other of them you would still wish us to consider what is left --

MR. BEARD: Yes.

THE CHAIRMAN: -- whether that amounts to a reasonable excuse?

MR. BEARD: Absolutely we would.

THE CHAIRMAN: But you are not addressing us on which, if

any, of these are critical to your case. For example, in the light of our discussion a few minutes ago, if the Tribunal held that Mr. Brown's belief that serving the Break Notice was compatible with the order, the Tribunal rejected that, you want us to simply consider whether what is left amounts to reasonable excuse.

MR. BEARD: Yes, we do. We say that must be the right approach here, because we do say that the process of going through the direction 13 mechanism is also reasonable. But we do not fight shy of the point that we say that, in the circumstances, the belief he had was not outwith the scope of reasonable beliefs to have in all the circumstances, given that it was entirely consistent with the mischief and direction of travel of the whole interim order scheme.

THE CHAIRMAN: Yes. Are you going to address us at some point on 5.2(e), which prohibits disposals of assets except in the ordinary course of business?

MR. BEARD: I just picked up in relation to the issues that plainly in relation to 5(e) the asset in question here would be a lease. We do not demur. But the question is: in the circumstances, was it reasonable to consider that terminating or issuing the service clause was in the ordinary course of business? Plainly, we do not challenge that as a breach, so we recognise that the

conclusion on that was wrong. But we do say that it was reasonable for Mr. Brown to have that belief in all the circumstances, given the overall scheme of the directives, given what he was trying to achieve in relation to these matters, given what was actually the subject matter, this office space. We say that that position was reasonable, and reinforced by the fact that you had the Monitoring Trustee saying "I am fine with it" in those circumstances.

As I will come on to submit, in relation to the Monitoring Trustee's own analysis when he finally engages specifically with 5(e), he says, "No, I am fine with that, save for the issue that it would not be in the ordinary course of business because the notice period was wrong", to which we say that cannot change the ordinary course of business analysis. That is just -- that is a category error in analysis.

Then the second point he makes is, "Well, it was not in the ordinary course of business, on reflection, because it was in the course of a merger where purchasers were coming forwarded, and that was a factor for you doing it."

We do recognise that. That is the problem that leaves us with a breach here. We recognise that. But that, we say, does not mean that it was unreasonable for

Mr. Brown or indeed for the Monitoring Trustee to consider these matters were in the ordinary course of business otherwise.

THE CHAIRMAN: Just one final question. It may well be submitted by Ms. Demetriou that your case depends critically upon the reasonableness of Mr. Brown's belief that the Break Notice was compatible with the order. If I understand you correctly, you say that even if you lose on that point, the Tribunal should consider all the other factors.

MR. BEARD: Yes, we do say that. We absolutely do say that. But this, of course, is without prejudice to the points that I am about to make in relation to the decision itself.

THE CHAIRMAN: Yes.

MR. BEARD: We do say that is the case. But we do also say that Mr. Brown gave evidence that it was his assessment, in good faith, that the notice was served in the ordinary course of business because it was a matter connected with the day-to-day supply of goods and services.

You had at these offices a sales executive which, as Mr. Brown gave evidence, was out and about, and you had a logistics person who was not really doing logistics, and someone who was a finance clerk. In those

circumstances, moving them or giving the possibility of their moving, because that is actually what we are talking about here, is very much connected to the day-to-day supply of goods and services. In those circumstances, that is a perfectly intelligible interpretation of the clause.

It may be wrong. We understand that. It may be wrong, the CMA may disagree with that. But to say it is an unreasonable belief in those circumstances is just not tenable on the part of the CMA.

THE CHAIRMAN: Thank you.

MR. BEARD: It is worth bearing in mind that the key language is "matter connected with". It is matter connected with the supply of. I do not really understand how one can say it is not a matter connected with the day-to-day supply of goods and services by the business. But certainly, even if you disagree about it, that does not mean it is wrong.

With that in mind, I am going to go to the decision, if I may. I am conscious that I have quite a lot to wheel through.

The decision, as we have already seen, is in bundle A at tab 3.

We have seen bits of the decision previously. It starts, obviously, at 4 with an executive summary.

I think, as I fairly pointed out, it is the one place in the decision where there is a purported reference to reasoning in paragraph 4(d) of the response of the Monitoring Trustee.

But as we then go on to see, we have a consideration of the factual background at section B, and there Ms. Demetriou took you to the reference to contact with the Monitoring Trustee.

Then we have got a legal assessment. So this is where the reasoning really begins. You have got the statutory provision, this is 12 and 13, and you go on to 14 on those matters. Then we reach the section on "without reasonable excuse".

The first point to make in relation to this section is that it prays in aid a case, the *ICE Trayport* case, which is not about reasonable excuse. It has no consideration of reasonable excuse. It is concerned with when a breach will arise.

We say that the CMA is absolutely right to say it is not directly on point. Indeed, what we actually see is that this is distracting from what needed to be the key reasoning of the CMA because, as we see when we get into the actual reasons, there is an obsession with talking about the breach and not the reasonableness of the excuse. So we say *ICE Trayport* simply takes

matters no further forward in terms of the overall analysis.

Then at 51 we do have some summary of some of the points that were put by Electro Rent in response to the provisional penalty notice. You will note there at 51 that you have got (a) questions about rationale that were being put forward, (b) consideration of the directions, in particular direction 13, and (c) no reason to believe it should inform the CMA or discuss the issue with its legal advisers, because the Monitoring Trustee did not indicate to Electro Rent that the proposed issuing of the notice might be in breach of the interim order or that Electro Rent should either inform the CMA or discuss the issue with its legal advisers.

That was the point that we were putting forward in that process.

Then points that it was consistent with the directions, that Electro Rent understood from the Monitoring Trustee that the CMA would be generally kept informed, draft of the compliance reports were shared with the Monitoring Trustee before submission, Electro Rent was led to believe that its conduct in relation to the lease had been brought to the CMA's prompt attention, and Electro Rent's actions were at all

times motivated by a desire to further the commercial interests of Electro Rent UK's business.

So there is a whole range of propositions being put forward, but in particular the points that we are emphasising today, to do with commercial purpose, the role of the Monitoring Trustee, the role of directions in relation to these matters and the structure that was in place.

It is with that in mind that the reasoning in 52 is particularly strikingly empty. Because, just to rehearse what I said in opening.

(a) It simply refers to the fact of a statutory duty.

(b) Interim order required prior consent before issuing the notice. Well, that is the question at issue; a breach is found but it does not go to reasonable excuse.

(c) Merging parties can discuss matters with the Monitoring Trustee but the obligations under the order are not changed. We accept that, and it does not take you further in relation to the assessment of reasonable excuse.

"Monitoring Trustee is required to act in accordance with the instructions of CMA", that is absolutely true.

"Monitoring Trustee has no delegated authority to

give consent." Agreed. That is a different scheme, that is not to do with reasonable excuse.

"(e) Electro Rent raised the proposed issuing of the notice with the Monitoring Trustee, which suggests it had formed the view that it was a matter that might have aroused the concern of CMA."

You have the explanation for this. Direction 13 is that if you have any doubts you are required to go to the Monitoring Trustee. That is what we did. We were not required to go to the CMA in those circumstances. What we were required to do as a first port of call was go to the Monitoring Trustee, and we did that. The fact that we did that out of an abundance of caution does not mean that we thought we were in breach; it just does not follow. It would only be if we thought we were in breach that in those circumstances we would have the obligation to go to the CMA.

So it is logically flawed.

(f), which we discussed in opening:

"Electro Rent understood the requirement to seek prior consent from the CMA."

Yes, in relation to matters that it thought would be in breach.

"It had previously sought consent direct from the CMA."

Yes, because it knew that. Mr. Brown had given evidence on it.

"On those occasions Electro Rent had not notified the Monitoring Trustee about the intended course of action and then relied on the Monitoring Trustee to notify the CMA."

We accept that, because we knew that we needed derogation, we needed consent. So we went straight to the CMA because we knew the Monitoring Trustee could not give that.

"Electro Rent ought to have suspected that by not seeking the CMA's consent before issuing the notice it was failing to comply with the interim order."

That is just not telling us anything here. It is not giving a reason why, in circumstances where we did not have doubts and the Monitoring Trustee did not have doubts, we should have gone to the CMA.

Now, in opening Ms. Demetriou said "Ah, and this sentence, this carries with it the import of our case on obviousness". With respect to Ms. Demetriou, it plainly does not. There is a vast difference between, on the words of this, having a suspicion about something and something being obvious, that is absolutely trite. Actually, this language of suspicion is just a confusion of language which is positively unhelpful, because if

one goes to the directions themselves -- and just in this bundle at tab 14, it is worth just keeping a thumb in this section -- there is a striking difference between direction 13 and direction 14.

You will see 13: if we have any doubt as to whether any action or communication would infringe the interim order we are required to contact the Monitoring Trustee for clarification. If Electro Rent and Microlease has any reason to suspect that the interim order may have been breached -- so you have got a positive suspicion that it may have been breached -- then you must contact the CMA. We reasonably did not have that suspicion.

In circumstances where we are talking about the operation of direction 13, it is particularly inapposite to talk about suspicion but, more importantly, it does not remotely make any finding of obviousness here. That is no part of the reasoning.

Then we have the final sentence, which is quite remarkable:

"Although Electro Rent contacted the Monitoring Trustee prior to the issuing of the notice this does not amount to a reasonable excuse."

It is simply astonishing, in circumstances where we know that these matters were put forward and the response of the Monitoring Trustee, not the fact of

contact, was critical, it is just not dealt with here.

Then we have got (g) as we have said before:

"Arguments as to whether Electro Rent has complied with the directions are not relevant."

How on earth can compliance with directions that are made against you under statute not be relevant to questions of reasonableness in this context?

There is again a fallacy in the CMA's reasoning because it says:

"They are not relevant because the CMA has not alleged they are breached."

That does not affect the relevance of the compliance with the directions. It means there is not a factual contention about the compliance with the directions, but they are plainly relevant still in the circumstances.

Then:

"Arguments as to whether Electro Rent had a reasonable commercial rationale are again not relevant."

We say that is wrong. It goes to, Mr. Lomas, the third of your questions. We say it depends, and here they are relevant, they are important; and they are just dismissed. The fact that it had a relevant commercial rationale is just treated as irrelevant, there is no consideration of it. We say that is fundamentally

wrong.

Then we are into the guidance point.

MR. LOMAS: That comes back to the point that we discussed yesterday, I think, that if the order -- and I know you may say this is not the case, but if the order said, "Do not do X, black and white, do not do X, finish", and the company goes off and does X because they think it is a good commercial idea, you would still say, even though it was an absolutely blatant, prima facie breach of the order, that was a reasonable -- or it went to the reasonableness of their excuse that they thought that it was a good commercial idea.

MR. BEARD: I think in that extreme case --

MR. LOMAS: I am speaking hypothetically.

MR. BEARD: Yes. In that extreme case I think what you cannot do is say: any commercial rationale is just per se irrelevant. In the case you are talking about, it is very difficult to see how any commercial rationale in those circumstances would be material, and at that point whether or not that particular commercial rationale could be relevant.

MR. LOMAS: Because you are not saying that a good commercial excuse gives the company the right to override the CMA's view.

MR. BEARD: No, absolutely not. We are not saying that at

all.

MR. LOMAS: Exactly.

MR. BEARD: We are not saying that. What we say is that you have to look at that commercial rationale. You cannot just say that any arguments about commercial rationale are irrelevant. You have got to look at what it is. That is what we are saying.

In the extreme case you are dealing with, it would not take very long to dismiss them, I think is the correct legal analysis. But to say they are irrelevant is wrong.

As I say, the reasoning is profoundly flawed. Ms. Demetriou tried to pray in aid the fact that we had raised points that are in part summarised in part 51, that that somehow amplified the reasoning. It does not. It condemns it further. Because it is clear that all of these matters were before the CMA and they did not deal with them properly.

Just to pick up the point that, Mr. Chairman, you made on yesterday, it is in the transcript at page 71, lines 6 to 11, the relevant material on all of this was before the CMA. If it wanted to investigate any of these issues it plainly could do. It could have investigated all of the matters that are now being traversed by it, that are now being made the subject of

submissions by it, and it did not do so.

Moving on to obviousness. I am going to have to skate along relatively quickly in relation to some of these matters.

Ms. Demetriou expressed surprise that we were saying this case on obviousness, it was completely obvious, is a new case. Well, I have just taken you through the key parts of the decision. I have not done a word search on it; I am guessing there is no reference to "obviousness" anywhere in this decision. I am sure it would have been referred to.

In these circumstances, the idea that the position was obvious is just not spelt out. I have taken you through 52. That line of argument is not there. Ms. Demetriou was clutching at the penultimate sentence of paragraph (f) in relation to these matters. That is precisely what the Tribunal in *Imperial Tobacco* was saying do not do with a decision. In any event it is not there, because "ought to have suspected" is a completely different test from "it was obvious that". You can suspect all sorts of things that are not obvious. A whole world of conspiracy theory lies there.

To use the language of Ms. Demetriou's own chosen authority, *JJB*, what we say is that the

Commission's new case is not within the broad framework of the reasoning of the original decision.

She kept saying to Mr. Brown, "It was as plain as a pikestaff that consent was required under 5(e)". You have Mr. Brown's evidence on that. Mr. Brown's evidence was that his assessment was that notice was served in the ordinary course of business. He explained why, he said it was a matter connected with the day-to-day supply of the goods and services. He may have been wrong, we accept that, but that does not mean his position was unreasonable.

So we are miles away from one of Mr. Lomas' particularly clear examples. We are not in crystal clear or plain as a pikestaff territory.

Ms. Demetriou also tried to cross-examine Mr. Brown on how he would have approached a hypothetical situation where he considered it likely that a step would infringe the order when the Monitoring Trustee said it was fine.

I am not sure that really takes matters anywhere. Mr. Brown, if he had thought the matter was likely to breach, in those circumstances we would accept you are in different territory. We recognise that. So does Mr. Brown. But it does not matter, because what is important is what Mr. Brown and Electro Rent are doing in relation to this case.

The further point that we have is that Mr. Brown's view is corroborated by the approach taken by the Monitoring Trustee. By saying this, we are not just talking about the 15 March conversation, we are talking about his continued position through the compliance report and the engagement with the CMA, that in fact there was not a breach here.

In particular, in relation to 5(e), as I have already mentioned in my submissions, his approach was that issuing the notice for the break clause was perfectly normal, save for two reasons.

One was the error in relation to the notice period. That is not relevant to ordinary course of business with respect to Mr. Gopal.

The second was -- to put it another way, in the ordinary course of business people make mistakes. But that does not make it out of the ordinary and it does not mean that the issuing of the notice itself is outside the ordinary course of business, the fact that you did it earlier than you needed to.

The second is, furthermore, in relation to this he says, well, it is not the ordinary course of business because it was in the context of a merger situation.

As I say, we understand that, but to someone like Mr. Brown that is not obvious that it is outside the

ordinary course of business in all the circumstances. We recognise it can take it outside the ordinary course of business and that is why you end up with an appeal today hanging on the reasonable excuse issue.

THE CHAIRMAN: Are you suggesting that Mr. Gopal's evidence on ordinary course of business should be taken as an adminicle of evidence that it was reasonable for Mr. Brown to conclude that the service of the Break Notice was in the ordinary course of business?

MR. BEARD: What we say is that the fact that an experienced Monitoring Trustee takes that view in relation to these matters is material to the question of whether or not the view being formed was reasonable. Yes, we do say that.

THE CHAIRMAN: Despite the fact that you attack the basis upon which Mr. Gopal reached that view.

MR. BEARD: Well, in relation to these matters, what I am pointing out in relation to 5(e) is that Mr. Gopal reaches the view that it is not in the ordinary course of business. What are the reasons for him doing so? I say those two reasons, one of them is wrong, and the other one of which is one that we recognise may be correct but is not obvious. Therefore, that considered reasoning of Mr. Gopal in relation to 5(e), we say, is relevant and material to considering whether or not it

is reasonable.

We recognise that there are all sorts of other things said by Mr. Gopal in relation to reversibility of leases and so on that do not make sense, but in relation to this question about ordinary course of business we do.

THE CHAIRMAN: Thank you.

MR. BEARD: Picking up very briefly from the skeleton argument, there are four reasons that the CMA relies upon for saying that it was obvious that serving the Break Notice would breach the clause.

The first was that the Sunbury premises were an integral part of one of the three remedies. That does not take matters any further forward, because it was inevitable that the Sunbury premises would potentially be part of any remedy, given that one of the remedies being contemplated as far back as 15 February 2018 was divestment of Electro Rent UK.

There was much play made of the fact, well, this site was going to be referred to in the remedies package. Of course it was going to be referred to in the remedies package, because that was the site that at the time Electro Rent UK had. That was inevitably going to be the case. But that does not tell you whether or not it had to be that site. Quite properly, Mr. Polito

recognised, although he did not like the term particularly, that this sort of phraseology that appears in remedies packages of wanting a site by freehold or, if relevant, leasehold over the relevant site, was not particular to this case, it is a standard provision. But it is also not placing any emphasis on the particular site that is held at the moment, and quite understandably. Because, of course, although Mr. Polito in his witness statement referred to it as having a laboratory, which might to the uninitiated suggest it was of real significance, he quite rightly accepted that was not the case, and there was no particular significance to the particular office building that we were talking about here.

In those circumstances, the idea that because the Sunbury premises were going to be part of any divestment package that meant that we should have known that issuing the service of a notice was problematic is clearly wrong. Indeed, as I made clear in opening, it would be perverse for Mr. Brown to have done anything that might jeopardise that remedies package, because that is precisely what he wanted, was the divestment of the Electro Rent UK entity. He did not want a more intrusive remedy at all. So it was not in his interests at all to try and avoid the consequences.

MR. LOMAS: I think the point that is put against you is not whether it was in his interests or Electro Rent's interests, but whether it was his judgment call to make or whether it was the CMA's judgment call to make.

MR. BEARD: That is of course the point that is being put in terms of the need to refer the matter to the CMA. We entirely understand that is the case against us. What we are saying is that in circumstances where it is said against us, "Ah, you knew that this was terribly important, you should have notified us because it was going to be part of the remedies package", we say remedies packages will always for a business include the relevant land sites, leases or freeholds. You can see from the terms of it, it talks about freeholds, it talks about multiple sites. It is obvious in those circumstances it is not focused on this particular site or this particular entity, it says any sites that are relevant to the business must be in the remedies package.

Of course that is going to be the case. But it does not tell you that that gives particular significance to whether or not you serve a Break Notice in relation to the site at all, the particular site that you are on at the moment. Because, as Mr. Brown fairly put it, if the divestment occurs before the Break Notice operates,

it is Sunbury in the package, if the divestment occurs after the Break Notice then there would have been a discussion as to what site was going to be used.

But it was not that the business was going to be stopped, it was not that the personnel was going to be made redundant, it was not that they were going to stop supplying TME through the UK, through its footprint in the UK. There was no suggestion of that.

MR. LOMAS: Was not Mr. Polito's evidence yesterday that although the wording was wider in fact the conversations with Electro Rent were premised on the basis that they were all talking at the time about the Sunbury lease?

MR. BEARD: They were all talking about the activities that went on through Sunbury. That is entirely true and there is no issue taken. So to that extent the premise of any discussion is going to be about Sunbury, but there was no emphasis on these matters. Indeed, as Mr. Polito quite properly accepted, when it came to consideration of the composition risks in relation to the remedies package, the composition risks that are described -- and I will just give you the reference, it is in bundle C2 at tab 12 -- the composition risk that existed was not focused there at all on anything to do with leases or land sites; it is all to do with things like inventory and customer contacts, because

that is the core of this business. Essentially it is mainly a web-based business as I understand it but you need administration of it. That is of course true, and you have sales personnel that have a base and go out to places. But the composition risk is not about whether or not you hold an overly large mixed-use beige building with offices and potential warehouse space. That is perfectly proper.

I will give you the matter for your notes. Mr. Polito was referred in particular to paragraph 88 in that remedies working paper, but it cross-refers to paragraphs 148 to 151. There you will identify what it is that were the composition risks, and none of those were concerned with land sites or leases.

The next point is this Break Notice could deprive a purchaser of an established UK presence. That is not correct. You have the evidence of Mr. Brown in relation to these matters. There is no realistic scenario which Electro Rent UK would not be able to obtain suitable premises in the UK. It was no part of this to move Electro Rent out of the UK or have it with no established UK presence. To the contrary, we know that Mr. Brown precisely wanted that to be the case because he knew if you did not have that you would not be able to have that as the purchase remedy, the divestment

remedy.

So in those circumstances that did not make it obvious at all that serving a Break Notice in these circumstances, which actually generated flexibility -- because what the CMA are concerned about, about having an established UK base, is that you are attractive to purchasers and that you are not undermining the health of the business that is going to be sold. But that does not make it obvious because he had that plainly in mind when he was thinking about these issues.

Indeed, in the provisional findings, just at paragraph 5.7, I will just give it to you for your notes, bundle B1/7/55, at page 88, paragraph 5.7:

"An established UK presence is important when competing to supply some UK-based customers. Electro Rent has taken steps to develop a physical UK presence."

Yes, absolutely it has, but it did not need to be in those offices at that address in Sunbury.

As you have seen from the photos, and you have absolutely no doubt about and Mr. Polito fairly accepted, it is a relatively generic building, that is Day 1/205 lines 2 to 6, and it was not being properly used.

The third point that is raised on obviousness:

Electro Rent may not have the resources to pursue its pre-merger developments plans. As Mr. Brown explained in his unchallenged evidence ...

Sorry, I should have made the point in relation to that previous argument on obviousness that of course you have the evidence of Mr. Peterman that is unchallenged in relation to these matters.

Mr. Brown in his unchallenged evidence said there were no formal pre-merger plans and so the argument that it was obvious that the notice should not be served because that might mean that UK Electro Rent might not have the resources to pursue its pre-merger development plans is wrong in two dimensions. One, there were not pre-merger developments plans as is being referred to, as Mr. Brown explained, paragraph 57 of his witness statement. But more than that, you saw through the course of cross-examination by reference to the new documents that the CMA had wanted to include in the bundle, A/53, 26 and 27 you saw Electro Rent's account of how matters had gone in relation to its UK presence, how it had started off with a good deal of optimism and then had rowed back from that, but more than that the question about lack of resources to pursue its pre-merger developments plans, in circumstances where the whole purpose of what Mr. Brown was doing was to

ensure that it was a healthy business and a flexible business, they do not show any obviousness as to his error at all.

The fourth point they raise as suggesting that it was obvious was it was a significant operational change that might have destabilised Electro Rent's UK staff. We have heard evidence in relation to that. Mr. Brown deals with this in his second witness statement. As we have explained, what he was doing was actually trying to ensure that there was no possible risk even of matters that in his view would not mean any detriment or any increased detriment or risk to staff. Obviously there are risks to staff during the course of a merger; no doubt about that. That is without doubt. But what he was concerned to do was not be communicating any matters that in fact did not change their risk, but might in those circumstances be seen otherwise. He wanted to avoid that. That was perfectly sensible and certainly it does not make it obvious to someone like Mr. Brown who is taking those sorts of steps that actually this was problematic or could result in breach.

So we say that in those circumstances there is no good case on obviousness here. The points raised by the CMA are flawed. You have the account of evidence. I have already articulated that this is our alternative

case because this is not the point and reasoning set out in the decision.

I will leave the other three points that the CMA has raised about the derogations and the reading of the interim order because I have dealt with those in relation to my previous submissions.

That then takes me finally to my fourth point on ground 1, which I will have to deal with relatively quickly. But this is the CMA's new claims which appear to be that the Monitoring Trustee was misled and therefore no reliance could be placed on the account given by the Monitoring Trustee or the response given by the Monitoring Trustee when direction 13 was followed by Mr. Brown.

Now it is said by Ms. Demetriou it is entirely proper for us to raise all of these points because you said in your notice of appeal that you were dealing honestly and openly in these matters. That of course was a basic predicate of what was going on here. If every time some one said, "I am dealing honestly in relation to a matter" that gave licence to someone to raise a new case that actually they can adduce any evidence as to misleading nature, and as a public authority amplify their decision in that way, Trojan horse does not quite capture the sense of import of new

reasoning and decision-making that is going on.

So we say it is plainly wrong what is being done here, because the CMA does not have licence to run a completely new case on the basis of these matters, and it is going well beyond the scope of any leeway on rebuttal.

In particular I do pick up the fact that insofar as any reliance is placed on the reference to honesty, if dishonesty is ever to be challenged in proceedings, of course there are strict rules about how it has to be pleaded and dealt with, certainly in the CPR, and no doubt this Tribunal would deal with matters in a similar way.

I would refer the court just by reference -- it is not in the authorities -- to Belmont Finance Corporation v Williams Furniture, 1979 Chancery Division 250 at 268, Lord Justice Buckley:

"An allegation of dishonesty must be pleaded clearly and with particularity."

So honesty, putting it in your notice, does not mean "We can come along and do anything else", nor does a reference to openness in those circumstances.

THE CHAIRMAN: Mr Beard, I think the case against you is not so much to do with honesty or dishonesty. It is an assertion that is made by you in your notice of appeal

that in effect the Monitoring Trustee was put in a position to make a properly informed judgment about the matter that Mr. Brown raised with him.

MR. BEARD: Yes. Let us just deal with it on that basis alone.

THE CHAIRMAN: Yes.

MR. BEARD: We say (a) those are all issues that could have been explored, canvassed and relied upon in the decision. So that does not advance Ms. Demetriou in terms of putting in a new case. It is still a new case. But in any event when we come to consider what is actually being said, Mr. Gopal and the CMA say, actually, there was only one option, that Mr. Brown said to Mr. Gopal the Break Notice was the only option. We have heard evidence. That is not true. Mr. Gopal has accepted that he is not sure what words he used or what words Mr. Brown used in those circumstances. It is not mentioned in Mr. Gopal's manuscript notes, although one would have expected it to have been so. In those circumstances there is no evidence to support the claim that Mr. Brown gave that impression and Mr. Brown says otherwise.

So that element, the first element -- I am just going to work through them -- there is no sense in which Mr. Gopal was being told anything other than what the

proper position was.

The next one was the suggestion that Mr. Gopal puts forward that Mr. Brown gave an impression that the break clause needed to be served urgently that day.

Now, Mr. Chairman, you picked up with Mr. Gopal the incoherence of that position when he was saying, "Oh, yes, actually I thought they were going to be consulting the CMA and lawyers", whilst at the same time saying "I thought it was going to be served that day", that just does not make any sense. In the end he started saying, "Perhaps they were going to consult afterwards", which again does not make any sense.

I should note in fairness to Mr. Gopal that of course yesterday he said, "I thought it might need to be within the week". So actually there is a variant. One or other of his tale is not quite squarely true, but the idea that there was an impression that it needed to be served early in the day and Mr. Brown is painting a wrong impression is quite unfair.

THE CHAIRMAN: I think when it comes to the discussions between Mr. Brown and Mr. Gopal, the Tribunal may well -- and we have not obviously made up our minds on this at all -- be in a position, except insofar as we have Mr. Gopal's notes, of not being able to make findings of fact about what precisely was said but rather as to the

general thrust of what was said, and might it not be said against you in relation to "served later that day", that there is a certain amount of corroboration of that by the fact that it was served the very following day?

MR. BEARD: No, I think the point was that he said that during that conversation it was said that it was urgent and he would serve later that day. That is not the case. Actually, what we see is the email that goes back to Mr. Gopal, the one that gives the second of the mechanisms for potential reversibility, in other words, do not comply with the break clause provisions, the landlord will probably therefore hold it against you. The bottom of that says: we are going to serve the notice later today. That is the email that sends over the lease and talks about those matters. At that point, having had the conversation with the Monitoring Trustee, it is then that Mr. Brown is saying: I am going to serve later today.

So no, to the contrary, the very fact that that email says that implies that the general thrust of that discussion was not about serving later today.

So of course this Tribunal can make findings as to general thrusts of discussion, but you do need to be extraordinarily careful. I am not going to become a broken record repeating the points about benefit of the doubt

being for the appellant in these circumstances, but it is important that there may well be a degree of hindsight being brought to bear by Mr. Gopal, having referred to the email chain, the subsequent email talking about service later that day, it gets interpolated back into his evidence.

THE CHAIRMAN: Yes. Thank you.

MR. BEARD: I am conscious of the time.

THE CHAIRMAN: I think according to the timetable I have, you are speaking until 1.15 and we are having lunch 1.15 to 2.15. Is that correct?

MR. BEARD: Yes, I think I will need to run on in relation to these matters. Obviously I started somewhat later, at 20 past 11.

THE CHAIRMAN: I wonder how we are going to manage this. Would it be feasible for counsel to put their submissions on penalty in writing?

MR. BEARD: I think that might be the most sensible course.

THE CHAIRMAN: Perhaps you could discuss it with Ms. Demetriou.

MR. BEARD: I will.

I can get through the remainder of submissions in relation to ground 1, but I will struggle to deal with ground 2. I apologise, I have tried to build it to the --

THE CHAIRMAN: No, no, it is a tight timetable.

Do you wish to carry on until 1.15 or do you want to stop now?

MR. BEARD: I am happy to stop for the moment and come back and deal with the rest at 2 o'clock, if that works for everybody.

THE CHAIRMAN: Shortly after 2 o'clock. We will do it that way.

(1.05 pm)

(The short adjournment)

(2.05 pm)

MR. BEARD: Mr. Chairman, members of the Tribunal, over the short adjournment I have agreed with Ms. Demetriou that we will deal with ground 2 in writing, if that is acceptable to the Tribunal.

THE CHAIRMAN: Yes.

I think we are due to finish at 4.45 today. We would be happy to sit until 5 o'clock if that helped us getting finished. Obviously we would prefer not to, but if necessary that would be fine.

MR. BEARD: Unless you indicate otherwise, I will leave ground 2 to be dealt with in writing.

THE CHAIRMAN: Yes, that is fine.

MR. BEARD: Then if we finish earlier, I imagine we will consider that a bonus for the day.

THE CHAIRMAN: Yes, thank you, and I think we are going to break about 3.30.

MR. BEARD: By then Ms. Demetriou will be well on her feet, I imagine.

I was dealing before the short adjournment, under my fourth heading, with the claims that somehow the Monitoring Trustee had been provided with inaccurate and incomplete information.

I had dealt with the issues about the allegation that Mr. Brown had given the impression to Mr. Gopal that service of the Break Notice was the only option which, as we have traversed, Mr. Gopal recognised was not something that there were any particular words to do with, and indeed that if this important issue had been spelled out it was the sort of thing that one would have expected in his notes.

I also dealt with the impression that Mr. Gopal contended he had, that the matter needed to be dealt with urgently that day.

The third point that Mr. Gopal made was that the Break Notice had to be served to protect the viability of Electro Rent UK, and I think many people would read that as being: could it fail without this Break Notice. But Mr. Gopal, in cross-examination, quite properly accepted that really what he meant there was maintaining

the operations of the business going forward and ensuring its health, giving optionality, in fact, in relation to purchasers. Plainly that was something that Mr. Brown had at the forefront of his mind and was discussing with Mr. Gopal, and therefore there is no issue about the incompleteness of information in that regard.

It is also clear from cross-examination that Mr. Brown did not say or indicate that he was going to be communicating with any of his lawyers, nor that he would be talking to Electro Rent UK personnel in relation to these matters.

There is the further point that was raised, there was no evidence that there was any basis for his assumption in that regard.

As to the question about whether or not the Monitoring Trustee was somehow ill-informed that divestment of Electro Rent UK was a potentially key remedy, I think the position, properly accepted by Mr. Gopal, was that he knew that there were three remedies, one of which was Electro Rent UK's divestiture. It clearly was an important remedy, he was well aware of it.

The point he repeatedly made, that he did not have the proposed remedies notice two days before is,

frankly, completely irrelevant, and actually betrays an attempt in effect to bolster or colour his previous position. The proper remedies -- the proposed remedies notice, or the remedies notice served in February was clear. He was well aware that new purchaser was very much at the forefront of the consideration, and we saw that from his notes.

In relation to issues about reversibility it is clear, and Mr. Gopal accepts, that Mr. Brown used the term to refer to two mechanisms; one was the possibility of commercial renegotiation and the other, which was dealt with in the email at page 224, bundle B1, tab 7, of not complying with the requirements of notice, on the basis that the landlord would not then consent to the Break Notice.

It appears that Mr. Gopal had a misunderstanding about what the operation of a break clause might mean, and seemed to think that there was some sort of permanent optionality for a tenant in relation to these matters. With respect to Mr. Gopal, that position does not make a great deal of sense.

The key point here is that, of course, Mr. Brown had fairly set out the two mechanisms by which he thought there could be reversal, and Mr. Gopal, under cross-examination, accepted that neither of those was an

absolute guarantee.

Of course, the approach that Mr. Brown was putting forward, and indeed he repeated under cross-examination, was entirely consistent with the position of Investec, the landlord, who was essentially saying: no, there is not a unilateral power to reverse; it would require our consent. But that is simply axiomatic from, essentially, the structure of a break clause in these circumstances.

We should also add in this connection that, as we saw from Mr. Gopal's further reasoning, in any event the considerations about reversibility did not feed into his analysis and consideration of whether or not there was -- whether or not serving the Break Notice would be in the ordinary course of business. I took you to, and I took Mr. Gopal to the notes of his meeting, notes that he had prepared, and then the subsequent emails where he spelled out the two mechanisms that Mr. Brown had properly articulated to him.

You heard, of course, cross-examination of Mr. Brown. The CMA cross-examined Mr. Brown rather hard on the email exchanges and what had been put to him, but Mr. Brown was clear about what it was that he had said and explained to the Monitoring Trustee in these circumstances. There is no suggestion that Mr. Brown

either said or indeed implied that there was some sort of unilateral break clause in any of those conversations.

As to the point that it is suggested that he was not informed about risks of destabilising effects on employees. The problem with this point, of course, is that Mr. Brown was acting so as to retain staff. He wanted the remedy to work. He wanted to ensure the separable Electro Rent UK business was healthy and attractive to purchasers. The order already meant that there were these key staff retention packages in place, and the CMA is trying to suggest that Electro Rent could not rely on the Monitoring Trustee's statements because it had not told him that it was doing something that was precisely in line with the order's purpose, effectively. It is a very strange criticism of him indeed.

Of course, in the circumstances, as Mr. Brown explained, he was doing these things out of an abundance of caution. Just to pick up, of course Mr. Gopal simply said that if he had known about these things he would have raised it with Mr. Sullivan.

The next point that has been raised against us is that the role played by Mr. Colley in relation to the Sunbury premises and serving Break Notice was not explained to the Monitoring Trustee. Of course, this

point is not in the decision, it is not in the pleadings. I have made these points before. It is plainly not a point open to the CMA to raise. But leaving those points to one side, it is very difficult to see how that can possibly be relevant to the ability to rely on the Monitoring Trustee's statements in these circumstances. What was key was simply the fact that the notice was being served. It is there a situation where it is vanishingly difficult to see why these matters were of any potential impact to the analysis of whether or not the Break Notice could or should have been served, or whether or not there should be any doubts in relation to these matters.

As it is, you do have clear evidence from Mr. Brown about the involvement of Mr. Colley, a senior businessman that Mr. Brown had known for some 35 years. That is Transcript Day 1/144, line 2. He explained his confidence in Mr. Colley's integrity, that Mr. Colley had been providing property advice to Electro Rent since 2014, and of course we also know that Mr. Brown was the person responsible for property issues.

Mr. Brown of course was not asking Mr. Colley to decide whether the Break Notice should be served, and he gave clear evidence in that regard. He was asking Mr. Colley to provide the basic factual advice about the

Break Notice period, where he had been immersed in the detail for more than 12 months.

Ms. Demetriou tested Mr. Brown on this point and he was clear; he may have informed Mr. Colley about his wish to terminate the lease but it was his, Mr. Brown's, decision alone, and not involving Mr. Colley, to do so.

Of course, at the time of the 15 March conversation one matter we accept that there was an error in relation to the information provided to the Monitoring Trustee was the duration of the notice period. But in the circumstances, I have already explained why it is that that error cannot, in the circumstances, suggest that there was no basis to rely on the Monitoring Trustee's response in all the circumstances.

So all of the allegations that are made as to incomplete information that were raised during the written proceedings prior to this oral proceeding do not suggest that there was any good reason why Electro Rent and Mr. Brown could not sensibly rely on what the Monitoring Trustee was saying to him, in circumstances where he had followed the proper procedure under direction 13, in circumstances where he did not have doubts but out of an abundance of caution was contacting the Monitoring Trustee.

Mr. Gopal did try to go further and the CMA tried to

suggest that actually if Mr. Gopal had known various things he would have done things differently. Of course, it is not clear on what basis it is said this must be relevant. The real question here is whether or not the Monitoring Trustee had sufficient relevant information so that it was reasonable to rely on his approach. We say yes, plainly he did.

Of course, he did not ask any further questions in relation to those matters beyond those that have been highlighted in the course of the emails and correspondence we have reviewed in the course of submissions and cross-examination.

As it was, in relation to in particular the reversibility of the Break Notice, where Mr. Gopal suggests that this would have made a real difference, actually we see in the April 17 response to the CMA that he does not rely on that as being any basis for any conclusion that there was a breach.

Ms. Demetriou, in re-examination, referred to matters in relation -- the points that were made in relation to interim order paragraph 4(c), where there was reference to Investec and there was reference to reversibility, but of course the conclusion there was, by Mr. Gopal, no, there was not a breach. So for him to turn around now and say, "If I had known about

reversibility it would have made a difference in relation to 4(c)", that is simply not credible. Also, when it comes to 5(e) in that note, what we see is no reference to any issues of reversibility, and it was put to him in cross-examination and he was not able to suggest that actually he would have determined those matters differently.

When it comes to the effects of not being told about the supposed increased risk of effects on UK staff, his response in re-examination, of course, was to say, "Well, actually I would have just talked to Mike Sullivan". So his evidence orally was much more limited than the assertion he made in his witness statement.

As to the existence or contents of the CMA's remedies working paper which came out two days before the conversation, that plainly could not have made any difference because it was simply spelling out the remedies that had already been spelled out, albeit indicating those matters in more detail and indicating the CMA's preference. But so far as the Monitoring Trustee was concerned, he was well aware that one of the potential remedies was the divestment of Electro Rent UK. If he had thought that serving notice gave rise to any concern in relation to that, he was well aware that

that was a remedy that was on the table, and he fairly accepted that he was well aware of all of those remedies and indeed that he was cognisant of the particular potential divestment of Electro Rent UK.

In those circumstances, we say that all of the matters previously put forward and suggested that would have made a difference to his view do not assist him.

Towards the culmination of Ms. Demetriou's re-examination she led him to give his practised answer, it certainly sounded practised, as to a screed of other matters which he said he was unaware of, which included in particular things like whether or not John Hafferty was in fact a director in the relevant circumstances.

I have to say, I struggled to understand what it was that was being suggested were key pieces of information about which he was unaware and on what basis it could possibly have made any difference to him.

The key point is that the issues on which he had information were the key matters here. He may have misunderstood some of that material, but nonetheless the information was available to him and had been given by Mr. Brown.

In the circumstances, it was plainly open to Electro Rent, and indeed reasonable for Electro Rent, to

take into account and indeed rely upon the clarification provided by the Monitoring Trustee, in circumstances where they had properly followed the directions process that was laid down in the interim order and directions.

So if we go back to the issues of reasonable excuse and take them in the round, we say there is a reasonable excuse here. It is a case where there was reasonable doubt as to whether or not there was a breach. In particular because it was reasonable to consider that in fact clause 5(e) in particular, that the lease was being terminated in the ordinary course of business, was what was being undertaken there because it was, as Mr. Brown put it, connected with the sale of goods and services. Whilst the CMA may disagree, whilst others may disagree with that approach, it was a reasonable approach in all the circumstances, in particular given that the approach being adopted to these matters was entirely in line with the gravamen, the mischief of the interim order and indeed the directions to maintain separation and to maintain the independent health of the business.

In those circumstances, where there was a doubt that there was a breach and it had been reasonably raised, and you had adhered to the process that had been laid down through the directions and a clarification is given by the Monitoring Trustee in these circumstances, that

clarification can reasonably be relied upon even if it transpires that your understanding of "in the ordinary course of business" was wrong, and indeed that the Monitoring Trustee's conclusions and clarification were also wrong nonetheless.

THE CHAIRMAN: Can I just ask you this question, Mr. Beard: was it reasonable or is it your submission that it was reasonable for Mr. Brown to proceed upon his own view of "ordinary course of business" without taking legal advice?

MR. BEARD: Yes.

THE CHAIRMAN: Why is that?

MR. BEARD: Because in those circumstances you are asking a business person to consider whether or not matters are in the ordinary course of business. He showed that he knew about the terms of "ordinary course of business" as referred to in the interim order, matters connected with the sale of goods and services. He had that in mind. He is entitled, as anyone is, to reach a view in relation to those matters. It was a reasonable view.

The assessment of what is in the ordinary course of business is not a pure matter of law. It is going to be a matter of primarily assessment of factual issues, but it is undoubtedly a matter of fact and law, I completely accept that. But the fact that you have a question that

is a mixed issue of fact and law does not preclude businessmen or any other person from reaching a view in relation to it.

Lawyers of course, as we know, are very special and people to be prized and contacted at all times, but nonetheless it is reasonable, on occasion, not to do so before you take any particular steps.

So in those circumstances -- and furthermore, it is important to bear in mind that of course he was not just doing this on his own; he was following the course of the directions and talking to the Monitoring Trustee about these issues. The experienced Monitoring Trustee, who had been approved by the CMA and who was well aware of the terms of the interim order and directions, and the circumstances of the business with which he was dealing.

In those circumstances, we say there was reasonable excuse. I will not reiterate the points that any benefits of the doubt must go to us, nor also the nature and scope of the principle of reasonableness in this context.

Unless I can assist the Tribunal further, those are the submissions on ground 1.

THE CHAIRMAN: Thank you, Mr. Beard. Thank you.

Ms. Demetriou.

(2.27 pm)

Closing submissions by MS. DEMETRIOU

MS. DEMETRIOU: Mr. Chairman, members of the Tribunal, I intend to make my submissions in the following order: I am going to deal with some legal points first, primarily in relation to the test and the standard of review.

Second, I will explain why ground 1 of Electro Rent's appeal should fail. To foreshadow what I am going to say, there are two reasons for that. The first reason is that, as the CMA found in the decision, Electro Rent should have realised that they needed to obtain the CMA's written consent before issuing the Break Notice. That is because issuing the Break Notice in these circumstances was a clear breach of the order, and in particular paragraph 5(e). It was therefore not a reasonable excuse to rely on the views of the Monitoring Trustee. That is the first submission under ground 1.

The second submission arises as a result of Electro Rent's appeal, which seeks to rely on the conversation between Mr. Gopal, the Monitoring Trustee, and Mr. Brown. We say that insofar as that is capable of giving rise to a reasonable excuse, insofar as it is relevant at all, then on all the evidence before the

Tribunal it was not reasonable. Given the circumstances of that conversation and the circumstances in which it took place, it was not reasonable for Electro Rent to rely on it and to issue the Break Notice.

That, in summary, is how I am going to put our substantive submissions under ground 1.

Then, finally, I will address the issue of whether the CMA is running an impermissible new case. The reason I am doing that at the end is because I think it might be helpful for the Tribunal to hear exactly how we put our case before I make submissions on that point in response to Mr. Beard.

I would like to start with the proper approach, some legal issues, including the proper approach for the Tribunal.

Mr. Beard took to you section 114 of the Enterprise Act. I do not think we need to go back to it but I do want to address a point he made in relation to Article 6 of the Convention, because he made a submission that Article 6 applies and he says because what we are talking about here are criminal sanctions. We do not accept that, we do not accept that these are criminal sanctions. These are administrative sanctions. They are administrative fines which are imposed in order to enable the CMA properly to administer the process. In

a sense one sees that -- if the Tribunal goes back, in considering this matter, and looks at section 114 again, you will see that it applies not only to penalties for breaches of interim orders but also, for example, for failures to comply with requests for information, in respect of which the CMA has an ability to impose a daily fine.

So to say that all of these are criminal penalties, we say is not a fair reflection of the statutory scheme.

MR. LOMAS: I think the key point in this case is: is this fine sufficient to engage Article 6? Whatever terminology one uses.

MS. DEMETRIOU: I make two submissions in relation to that.

We say no, because one is not looking at this fine in this case, one is looking at fines imposed for breaches of interim orders; and we say no, it is not right to engage Article 6.

Mr. Beard made a submission, he said that these circumstances are a fortiori, he said, the Competition Act. We say that is plainly wrong because, under the Competition Act, following a procedure, an involved procedure, the CMA imposes often very substantial fines for breaches of substantive provisions. That has all been considered. These are not the same. These are administrative penalties for breaches which do

not attract the same degree of opprobrium as a breach of the Chapter 1 prohibition might, for example.

The second point we make is that Mr. Beard's submission did not go anywhere in the end, because the Tribunal said to him, "What do you say is the effect of Article 6 applying?" and he said, "We are not saying there is a different standard of proof". We agree, there is no different standard of proof. Then he said, "But we do say that the benefit of the doubt should inure to the undertaking". We say that that submission is nonsensical, with respect, because if the standard of proof is the same, what does he mean? Either the standard of proof is the conventional standard of proof or it is not. You do not have some additional standard of giving the benefit of the doubt to the undertaking. We say that just does not make any sense at all.

I am going to turn now -- so that is what I wanted to say about Article 6. I want to look now at the concept of reasonable excuse.

Mr. Beard does not press the point that "reasonable" means the same as "reasonable" in the judicial review context, so I do not need to go back to the submissions that I made about that. But we do respectfully endorse the point that Mr. Lomas put to Mr. Beard in the context of his submissions, and I think Mr. Beard, to be fair to

him, accepted, which is that one is not looking at whether the action, the conduct, is reasonable in some broad sense. One is looking at whether there is a reasonable excuse for non-compliance. That is a different thing.

It may be that somebody looking at this in the abstract might look at somebody's conduct, an undertaking's conduct, and say: that seems quite reasonable because it all accords with business good sense. That is not the question. The question is: was the excuse for not complying with the interim order, was it reasonable? We say that that is the relevant question. It has to be objectively reasonable; and again, I do not think that is in dispute because Mr. Beard accepted that Mr. Brown's subjective beliefs by themselves are not sufficient.

We also make the point, we have made the point in our skeleton -- again, I do not think that either of these points are in dispute -- that all relevant circumstances have to be taken into account, and that of course the meaning to be given to "reasonable excuse" and its scope has to be informed by the statutory context.

I just want to turn to make a few short submissions about the statutory context and what we say about that.

Broadly, I think the Tribunal has my point from opening, which is that we say that this requires the Tribunal to place weight on the importance for the mergers regime of compliance with interim measures. I think it may be helpful to turn to section 81, which I do not think we have gone to, which is in the first authorities bundle, so E1, tab 1, page 46.

This contains the CMA's power to make an interim order, and you see that from subsection 2, and the meaning of "pre-emptive action", so:

"The CMA may by order, for the purpose of preventing pre-emptive action, prohibit or restrict the doing of things which the CMA considers would constitute pre-emptive action and (b) impose on any person concerned obligations as to the carrying on of any activities or the safeguarding of any assets."

You see there the reference directly in the primary legislation to "assets", which is then reflected in this interim order at paragraph 5(e). To get the meaning of "pre-emptive action", that is defined in section 80, subparagraph 10, which is a few pages back on page 41. "Pre-emptive action" is defined as:

"Action which might prejudice the reference concerned or impede the taking of any action under this part which may be justified by the CMA's decisions on

the reference."

You see the word "might"; so this is a precautionary approach that is adopted in the legislation, that is enshrined in the primary legislation.

That is also reflected in this Tribunal's decision in *Stericycle*, which is in the bundle of authorities, it is in the same volume behind tab 7. I'll just take you to paragraph 129 at page 44, which considers precisely those provisions. That is page 44, paragraph 129. That considers the statutory provisions I just showed you, and then says:

"Moreover, the word 'might' implies a relatively low threshold of expectation that the outcome of the reference might be impeded. At the time the CC is considering whether to exercise its powers it necessarily cannot be sure whether any action being taken will ultimately impede any action. The power under section 81 enables the CC to intervene where it considers that there is at least some risk of that happening."

Also I think helpful to see are two guidance documents, and they are in bundle C2. I am going to take you first to the CMA's guidance on -- the mergers guidance on the CMA's jurisdictional procedure, which is C2, behind tab 7. It is a very lengthy document but

if you could turn towards the back of the document, to page 174. This is an appendix which is concerned with interim orders and C.11, so paragraph C.11 on page 174, makes a point which is of relevance to the present case, which is that the risk of pre-emptive action in a completed merger, of course of which this is one, is generally much higher than in an anticipated merger:

"This is particularly so where post merger integration has already begun. Given these higher risks, the range of forms that such pre-emptive action can take and the asymmetry between the parties and the CMA at the preliminary stage of mergers enquiries ..."

It goes on to explain why completed mergers are in a different circumstance. That reinforces the submission we made in our skeleton argument, and Mr. Polito emphasises in his witness statement, about the importance of compliance with interim orders, particularly when it comes to completed mergers.

Now, turning over to page 176, there is a heading "Requests for derogation". This is at C.19 and C.20. We say it is interesting to note what is generally considered good practice when applying for a derogation, and that is set out in C.20. You see there:

"Derogation requests are more likely to be granted if parties are able to demonstrate that allowing the

derogation would not create a risk of pre-emptive action that would be costly or difficult to reverse and/or is necessary for the effective continuation of the acquired business. Parties can help the CMA to deal efficiently with derogation requests by ensuring that requests are fully reasoned and supported by relevant evidence, including ..."

Then it goes on to explain what sort of evidence it is good practice to include.

We say the point that I draw from this is that when -- that really the contrast between what is expected when applying for a derogation to the CMA and what happened in this case, in the conversation between Mr. Brown and Mr. Gopal, and that is a point that I will come back to.

Now the second piece of guidance is behind tab 8, which is immediately the next tab. That is the statement of policy on administrative penalties. I just ask you to look at first of all -- I am not going read it out, but just perhaps to note it, on page 10, paragraph 3.1 explains the importance of the policy objectives underlying the CMA's interim measures powers.

Then at paragraph 4.4, which is on page 13, you have a heading "Reasonable excuse". The Tribunal may have seen this already, but this is the guidance for what

constitutes a reasonable excuse.

I respectfully submit to you that the guidance is completely accurate and well-founded. It says it points out that the legislation does not define the phrase, and then it says:

"The circumstances that constitute a reasonable excuse are not fixed, and the CMA will consider whether any reasons for failure to comply amount to a reasonable excuse on a case-by-case basis."

I say that is correct:

"However, the CMA will consider whether a significant and genuinely unforeseeable or unusual event and/or an event beyond P's control has caused the failure and the failure would not otherwise have taken place. For example, a significant and demonstrable IT failure (which could not reasonably have been foreseen or avoided) which prevented P from meeting a deadline might, depending upon the circumstances, amount to a reasonable excuse."

That is plainly an example that is given, and so we do not say that the circumstances cannot fall outside the scope of examples like that. Of course we do not say that. But we say it is indicative of the kind of thing that the Tribunal and that the CMA should be looking for when determining whether there is

a reasonable excuse.

Now, in particular we say that the kind of thing that is not generally relevant is: well, we thought we were acting in the interests of the business. Coming back to the points put to both of us by Mr. Lomas at the outset this morning, we say in relation to those points -- this may be a good time just to give you very briefly what our answer is, since I have already addressed one of them -- that in relation to whether or not it is -- I am so sorry, if you bear with me for a moment. In relation to whether or not Mr. Brown's belief, I think that was the first point, as to whether or not the breach is obvious -- do I have that correct? If that is not right --

MR. LOMAS: I think it was the third, but it does not matter.

MS. DEMETRIOU: I am sorry, I have obviously got them out of order.

MR. LOMAS: That is all right.

MS. DEMETRIOU: One of the points was: is Mr. Brown's belief that this was not a breach, is that relevant?

MR. LOMAS: That it was not a breach, yes, that is correct. Yes.

MS. DEMETRIOU: In relation to that we say no, because it is an objective test. I think Mr. Beard accepts that,

I think he accepted that. So if Mr. Brown believes that something is not a breach and his belief is unfounded and it is not reasonable, then that is not relevant.

Then we say, the second point I think was: is it --

MR. LOMAS: I think the way it was phrased was actually whether the legal requirements of the order were sufficiently unclear that it was objectively possible for there to be a reasonable excuse.

MS. DEMETRIOU: Yes, I am very sorry, that is quite right. I have now got it.

MR. LOMAS: It was not just a subjective belief.

MS. DEMETRIOU: It teaches me to try and answer the question without going back to it and checking.

Yes, you are quite right. The answer to that is yes. So we say that where the terms of the order are clear, so where the terms of the order are clear, and this really harks back to my first submission that I have foreshadowed and I am going to make, such that it is clear that there is a breach, then that is, we say, plainly a relevant circumstance. We say in this case it is the overwhelmingly relevant circumstance.

The second point was whether the conversation with the Monitoring Trustee could potentially be a relevant factor going to whether or not there is a reasonable excuse.

We say in this case no, and that is the first way in which we -- that is the first way in which we put our answer to the appeal. But we do not exclude that there may be other cases in which the factual circumstances are different; where, for example, the wording of the order is not clear or it is very, very far from clear that there is a breach, that that might be a relevant consideration. So we do not exclude that it might be a relevant consideration in some cases, but we think it would be a rare case and it is not this case.

The third question was: how about good commercial reasons for doing what they did? Again, we say that in the circumstances of this case that is entirely irrelevant. We find it hard to conceive of circumstances where there is a breach of the order and the party is turning round and saying, "Well, we thought it was in the best commercial interests of the company" could be a reasonable excuse, but we do not exclude that there may ever be such a case. So for example, one can think of a situation, a hypothetical situation, where the company has to cease producing something because it becomes clear that it is posing a danger and has to act very, very urgently. So it may be that the combined circumstances of acting in the company's best interests and the urgency would give rise to a reasonable excuse

in those circumstances. But in this case we say not.

I wanted to say a very few short words about standard of review. The reason I say a few short words is because of the way that things have evolved, I do not apprehend that in the circumstances of this particular case very much is going to turn on this. The reason I say that is that it is common ground, and the CMA has never said otherwise, that unlike a challenge under section 120 of the Enterprise Act, the relevant section here does not specify that the standard is judicial review. So it is common ground that the statute does not say that you are confined when challenging the penalty to a judicial review. Indeed, that does not seem right when you look at the wording of the Act, because it talks about the Tribunal having powers, if it considers it appropriate to do so, to quash the penalty.

However, we do say that there are cases in which the question of an appeal under the section arises, an appeal against a finding that administrative -- an interim order has been breached, where it will be appropriate to give weight to the reasons of the CMA. We say that would arise certainly in circumstances where the appeal turns on questions within the expert, perhaps economic, assessment of the CMA. That may be the case, for example, if there is a debate about whether there

has been a breach at all.

But we recognise that in the circumstances of this case, those considerations are much less relevant. So the questions of deference are much less relevant in the circumstances of this case, because this does not really turn on questions of expert economic judgment. It is a question of, factually, is there a reasonable excuse because of the conversation with the Monitoring Trustee? It does not, it seems to us, turn on the exercise of an expert judgment. That is how we put it.

So I think in the circumstances of this case not much is going to turn on that debate, although in future cases it may well do. There may well be a debate in future cases about standard of review.

I want now to turn, having made those submissions on the law, I would like now to turn to ground 1.

THE CHAIRMAN: Before you do that, Ms. Demetriou, does that mean that it would be open to us to allow the appeal if we disagreed with the CMA's decision, or do we need more than that?

MS. DEMETRIOU: Do you mean if you just take a different view?

THE CHAIRMAN: Yes.

MS. DEMETRIOU: Yes, because the CMA's decision is -- I do not want to concede something which I am then going to

address, which is the new case point. So I am not, in answering your question, conceding --

THE CHAIRMAN: Yes, I did not have that in mind at all. I simply wanted to know whether it is enough, leaving aside the circle of the new case point, for us to disagree with the CMA's decision or whether we need to disagree and something more?

MS. DEMETRIOU: No, sir, I think if, for example -- can I just give you an example to make sure we are on the same page?

THE CHAIRMAN: Yes.

MS. DEMETRIOU: If, for example, you disagree with the CMA's conclusion that Electro Rent should have realised that it had to approach the CMA and it was not enough to go to the Monitoring Trustee, if you disagree with that, then I accept that you can allow an appeal.

THE CHAIRMAN: That answers my question. Thank you.

MS. DEMETRIOU: Now I am turning to ground 1 and I am going to address it, as I foreshadowed, in two parts.

I have a primary submission that I am going to make, and that does not really depend on the ins and outs of what was discussed between Mr. Brown and Mr. Gopal. So according to our primary case, we say that precisely what happened is neither here nor there.

We say that, as set out in the decision, it could

not be a reasonable excuse in this case for Electro Rent to rely on the Monitoring Trustee's views. That is because, firstly, Electro Rent should have known, as the decision puts it at paragraphs 52(e) and (f), and I will come back to the decision, but should have known, or it ought to have suspected that it needed to seek the CMA's consent. That is because it is clear on the face of the order that prior written consent of the CMA was required, and we say that the application of paragraph 5(e) of the order in particular in this case -- although of course the CMA has established that other provisions of the order were breached too and that is not subject to challenge -- is plain.

Thirdly, nothing in the order or in the directions provide that the Monitoring Trustee is able to give consent himself, and that is common ground, or give a definitive view as to whether a proposed action is a breach of the order or not, and that is also common ground.

Electro Rent, as the decision found at paragraph 62, is a well-resourced company which had engaged lawyers and had previously been involved in seeking derogations from the CMA. So it knew how this worked. We say that relying on the Monitoring Trustee's views was not, in those circumstances, in those circumstances I have just

set out, a reasonable excuse.

Now, I am going to go back to the decision because Mr. Beard says: well, you do not say any of that in the decision. We say that we plainly do say that in the decision, so I want to go back to the decision and make some brief submissions about that.

THE CHAIRMAN: Before you do that, the way you have formulate it, "It could not be a reasonable excuse because Electro Rent should have known", and then I think you said "or ought to have suspected"; is it one or the other, or are you treating this as both one and the same?

MS. DEMETRIOU: I am very grateful for you raising that point, Mr. Chairman, because Mr. Beard makes a semantic point about obviousness not being part of our case. Can I answer the question by reference to the decision, because I am going to grapple with it head on.

THE CHAIRMAN: Yes, that is fine.

MS. DEMETRIOU: If we turn to the decision behind tab 3. Before I make my submissions, I think I will just tell you in a nutshell what my answer is going to be and then I will deal with it in more detail, if that is acceptable.

THE CHAIRMAN: Yes, that is fine.

MS. DEMETRIOU: What we say is that the decision talks about

'it ought to have known that the onus was on Electro Rent'. You can see this from 5(e). It ought to have known that the onus was it on seek the consent of the CMA, and it says that it ought to have suspected that by not seeking the CMA's consent it was failing to comply with the interim order. That is our case.

It is true that in our skeleton argument and defence, for forensic reasons, we have gone beyond and we have said this is an even clearer case, because not only should they have suspected or foreseen it, it was obvious. I have said in my submissions, I think, it is as plain as a pikestaff. That does not mean that we are elevating "obviousness" or "plain as a pikestaff" into a legal test that has to be satisfied. The CMA's position is here in the decision. The reason I am talking about "obviousness" or "plain" or "plain as a pikestaff" is for forensic reasons, to emphasise that not only is this standard met but more than that standard is met.

THE CHAIRMAN: If we look at 52(f), is it your position that "ought to have suspected" is enough for you?

MS. DEMETRIOU: Yes, that is our position. But if it were not our position, we say that in this case -- if that were not the test, then we say in this case it was obvious.

But we say that this is enough for us. They should have known in the circumstances that it was not enough to go to the Monitoring Trustee. Or to put it another way, it was not reasonable for them, it was not reasonable for them to go to the Monitoring Trustee and not to go to the CMA. That is our case.

Mr. Beard can play semantics games with "obvious" and "reasonably foreseeable", but it is very clear what our case is, and the fact that I have referred to the position in more extreme terms for forensic reasons does not mean that is the legal test that I am advocating at all.

Going back to paragraph 51, because it is important, because Mr. Beard made a broader point about none of this stuff about the Monitoring Trustee being in the decision. That is an unfair criticism. The reason that that is an unfair criticism is that the decision is responding to the points made by Electro Rent. Those are summarised at paragraph 51. If you look at paragraph 51 and if the Tribunal reads paragraph 51 carefully, you will see that, yes, Electro Rent's excuse was that it relied on the Monitoring Trustee. But how did it frame that argument? It did not go into all the detail about the discussion with the Monitoring Trustee. It was taking a rather more abstract point.

It was saying: look at paragraph 13 of the directions -- that is at (b) -- that tells us to go to the Monitoring Trustee.

It was saying at (c) it had no reason to believe that it should inform the CMA or discuss the issue with its legal advisers.

So it was taking a point about the directions, paragraph 13: we just did what we said the directions told us to do, we went to the Monitoring Trustee, that is what he said, there is our answer, that is a reasonable excuse.

In paragraph 52, the CMA is responding to the way that that case is put, so the CMA is saying: no, an interim order requires the prior consent of the CMA, nothing to do with the Monitoring Trustee's prior consent. It is unpicking those submissions.

Then it is saying, in relation to 5(c), Electro Rent had no reason to believe it should inform the CMA, it is then saying at 52(e) and (f): that is wrong, it ought to have suspected that it should have gone to the CMA. So it is responding in kind to the submissions that were being made. That is the long and short of it.

It is very interesting, in our submission, that when it comes to Electro Rent's skeleton argument, which is at tab 1, if you could just turn that up, because they

make a song and dance about new case in their skeleton argument, that that is all under the heading just above paragraph 33, and they explain what they mean there by "new case" at paragraph 34. So they say:

"Nevertheless, the CMA seeks in its defence to introduce an entirely new case that Electro Rent provided inaccurate information to the Monitoring Trustee, such that it was not reasonable to rely on his confirmation. It is unclear whether the CMA is now contending that the Monitoring Trustee was deliberately misled. That would be a serious allegation. Neither of these allegations [in other words, inaccurate information or conscious misleading] was made in the decision."

That is the extent, in the skeleton argument, to which Electro Rent is saying that the CMA is advancing a new case. Now they say: oh no there is an additional new case, you cannot run the obviousness point. We say that simply does not get off the ground.

Now in his submissions, and I think in response to a question that the Tribunal put, Mr. Beard accepted, and I think this may have been in response to one of Mr. Lomas' questions, that it is unlikely to be a reasonable excuse, where there is a clear breach, simply to bypass the CMA and contact the Monitoring

Trustee. I think it was put to him: if the breach is clear, then do you say it could be a reasonable excuse?

I think he recognised that he would be in difficulty if he had to advance that submission, but he said that there is, however, a reasonable excuse where the act, the relevant act, does not conflict with the purpose of the interim order. So he is saying that if there is a clear breach of it, then that might be one thing, it might not be reasonable to go to the Monitoring Trustee and not the CMA, but somehow if it is consistent with the purpose that might put a different spin on things.

We say that that is not a good distinction, for two reasons. Because for whatever the purpose in this case, whatever the purpose, there was a clear breach. Secondly, the question whether or not something conflicts, whether a proposed act by the company or an act by the company conflicts with the purpose of the interim order is simply not the company's call to make. That is the CMA's call to make. That is why we say that distinction does not work.

Mr. Brown, of course, says something similar. He says it was not obvious to him that serving the Break Notice would breach the interim order. The basis that he puts forward for saying that is that the breach would be in the company's best interests. I have made

my submission on that; we say that that is not a relevant consideration, especially in the circumstances of this case, it is rarely likely to be a relevant consideration, and it should not be, because you see that from the statutory framework that I have already taken you to. The purpose of interim measures is precisely to preserve the status quo and to place constraints on the ability of a company to take decisions that might prejudice the merger process, even if such decisions would also be in the best interests of the company.

That is the whole purpose of the regime. The regime provides that it is for the CMA on a derogation application to make that judgment call, and not for the parties unilaterally to determine whether such action is permissible.

Now it would of course have been open, of course, to Electro Rent to apply to the CMA for a derogation and to have made all of these points that Mr. Brown makes about the company's interests and flexibility and optionality and other premises being available and how long it would take to locate them. He could have made all of those points to the CMA, and the CMA would have been in a position to weigh up those points, weigh up Mr. Brown's view as to what would serve the best

interests of the company and even Mr. Brown's view about what might facilitate the merger process. They could have weighed those up in the light of the remedies that the CMA was considering at the time, and it would be for the CMA to decide whether it agreed with Mr. Brown's assessment about the unsuitable nature of the premises and his views about the service of the Break Notice, and the CMA would then decide whether such action could potentially compromise the outcome of the merger enquiry.

But what has happened here is that Mr. Brown jumped the gun and decided those questions for himself following a quick chat with the Monitoring Trustee, and that is not permissible under this legislative scheme.

So we say that on this basis there is no need for the Tribunal to consider the detail of the discussion between Mr. Brown and Mr. Gopal, because the long and short of it is that Electro Rent should have realised, should have suspected, they should have realised that contacting the Monitoring Trustee about something that so plainly required the CMA's written consent was insufficient.

The context in which all of this took place reinforces, strongly reinforces our submissions, and this is a point that the CMA had well in mind and you

see that from paragraph 55 of the decision.

I would remind -- I am sure the Tribunal is completely aware of this, but there are several cases in relation to how one goes about reading a decision of the Competition Authority, that you do not read it like a statue, that you read it as a whole and you are not analysing it in a sort of very pernickety way.

There is *Tesco v the Competition Commission*, which is as 2009, CAT 6, paragraph 79 for your note. Mr. Bailey knows all of these things off by heart. I wish I did.

Now, there is a large measure of agreement about what the context was, so the context in which all of this took place.

First of all, the Break Notice was served just three days after the Competition and Market Authority's remedies working paper.

Secondly, the remedies working paper, like the notice on possible remedies that had been issued, published in February, identified three possible remedies. This is all common ground. The CMA had not yet made up its mind about which remedy to impose and, as the remedies working paper makes clear, in fact the CMA had serious doubts as to whether or not divestiture of Electro Rent's UK business would be viable and

effective. You saw those provisions; I took Mr. Brown to them in my cross-examination.

The CMA made clear that the divestiture package in respect of the UK premises would have to include the lease, and I am going to come back to what that means, and Electro Rent was strongly urging the CMA to adopt that third remedy, divestiture of the UK business, because it was the least intrusive remedy and the least commercially destructive remedy. That is again common ground.

By the date that the Break Notice was served, which is of course 16 March, Electro Rent had responded to the notice on possible remedies and had attended the response hearing on 1 March, and had on 7 March made their formal written remedies proposal. That is what was going on, in precisely the same time frame as the Break Notice was served. The Tribunal can see that that proposal, so their proposal, which is at C1 -- perhaps we could just turn that up and I can remind the Tribunal of it. It is C1, tab 4, page 71. This is following the hearing.

This is designed to persuade the CMA to adopt this remedy, and you can see at (a) the transfer of Electro Rent's lease over its registered place of business in the UK, the transfer of the physical

facilities relating to the operation of the Electro Rent UK business at its site, at its office, including warehousing, et cetera, et cetera, and those are really the key points. You have at (h), over the page, rights to receive services and utilities currently being provided at Electro Rent UK's sites.

So that is what is said by the parties themselves, and the simple point that we make in relation to the concurrent circumstances, so what was going on with remedies in the investigation, is that if it were not otherwise, so if Electro Rent should not otherwise have reasonably suspected or suspected that they had to go to the CMA to get permission, a derogation for serving the Break Notice, these concurrent events must have made it amply clear to it.

It certainly was not reasonable in those circumstances, so in circumstances where the remedies package being pressed on the CMA by Electro Rent itself, which included the lease and access to the physical site, certainly not reasonable for Mr. Brown to have thought that it was in the ordinary course of business suddenly to terminate that lease. Certainly not reasonable.

No doubt alive to that point, Mr. Brown sought in his evidence to engage in what I would describe as

a creative exercise of interpretation when it comes to these documents. He argued that "lease" in these various documents meant something other, could mean something other than the Sunbury lease. So he suggested that the reference to the divestment package including the lease did not necessarily mean the Sunbury lease but it might mean the lease to some other premises that Electro Rent might have. The reference in the transcript, for your note, is T/136, 4 to 10.

Would it help for me to hand up printed copies of the transcript, because we have got them. No, you have got them there.

Mr. Brown also said that the requirement that the package include a lease might also mean no lease at all in the event that the purchaser does not require any premises because they already have them. You see that from page 136, lines 11 to 15, so Day 1/136, 11 to 15. But my submission is that it is clear beyond any reasonable argument that the CMA's requirements as to the composition of the divestiture package included the lease to the Sunbury premises. Because not only does Mr. Brown's interpretation not accord with the plain meaning of what was said in the documents, it was not how those documents were understood at the time, and it does not accord with how the regime works and I will

come back to that point.

As to the wording of the contemporaneous documents, I have shown you Electro Rent's own remedies proposal, and the natural meaning of those words is the Sunbury lease. That is their place of business.

Now, Mr. Polito in his witness statement explains what was understood at the time. Can I just remind you of that. That is in bundle A, tab 11, paragraph 33 and then 37. Of course, Mr. Polito was cross-examined very lightly by Mr. Beard, so it is very important not to lose sight of what he actually said in his witness statement, which is largely unchallenged.

You see at 33 a reference to the notice of possible remedies, and then at 37:

"During the hearing I was given the impression that Electro Rent's representatives and advisers were well aware of the significance of having a presence in the UK, and that the UK site might be important to any remedial action taken by the group, and as Mr. Brown was present at this hearing I also considered he was aware of the importance of the UK site to any potential remedy. I gained this impression from the following submissions made during the hearing ..."

Then you have an explanation of why he said that.

When Mr. Polito was cross-examined about that he

said -- and I think I do want to take you to this part of the transcript, so this is page 217 of yesterday's transcript -- he was cross-examined at this point and he says at 217, his answer at line 15 is:

"... it is important to remember that when we are looking at remedies, if we are going to accept remedies we need to be certain at that time that there is a certain fixed package that will be available to a purchaser."

Pausing there. Of course, it is a different question whether the purchaser ultimately or whether the purchaser chosen ultimately chooses to keep the premises:

"It may be later on in the day, if we have identified that and we are satisfied about the package, that is fine. But we would not have been satisfied with a situation if someone had come to and us said 'Well, actually, rather than Sunbury, we think that we will probably manage to find somewhere else that will do'. That would not have been an acceptable package. We need to be absolutely certain that there will be an offer of a particular package.

"I mention that because I think it is relevant in terms of timing, and I think it was mentioned later ..."

That is where he is referring to Mr. Brown's evidence:

"... on that of course the CMA can take a view later on, once the package has been identified and you have prospective purchasers, that some people do not want it at all. But that does not mean to say that up front, when we are considering remedies, we do not have to satisfy ourselves that there are assets there that a purchaser who wants premises can take if he wants to."

That is a very important point, because Electro Rent's position would give rise to intolerable uncertainty, in fact to a moving target as to what the remedies package would be, because of course the CMA needs to decide before its final report on whether this remedy, this third option, which it was not -- it needed some persuading to adopt, it had doubts about, it needs to decide whether that is going to be an effective remedy to address the SLC. So it needs to do that in its final report. So it needs to know before the final report what the elements of the package are.

It might be that after the final report, if that is the remedy that is chosen, that a purchaser then says, "We do not want that site, we are going to go somewhere else", and the divestment package can then be perhaps adjusted. But what the CMA needs to know at the time of the final report is that this divestiture package will remedy the SLC, because this is what we are making

available to the purchaser.

You know, because you have seen the CMA's reasoning in the possible remedies notice, that it had serious doubts at that stage as to whether this would be a viable competitive business and whether there would be a purchaser that could be found.

Now Mr. Polito said, and again this is in the transcript at 215, lines 22 to 23 -- I do not ask you necessarily to turn to it, but just for your note -- that the CMA never contemplated the possibility that there would be another site. That is what he said, the CMA never contemplated that possibility.

Of course it did not contemplate that possibility, because Electro Rent never told the CMA that it had any misgivings about the suitability of the Sunbury premises. Still less did Electro Rent explain to the CMA the four reasons that Mr. Brown now sets out in paragraphs 23 to 27 of his first witness statement. Mr. Brown accepted that. That is Transcript Day 1, 172, lines 1 to 5.

Of course it did not express these misgivings to the CMA, because it was actively trying to convince the CMA that Electro Rent's UK business was a standalone business that could be operated on a standalone basis from day one. That explains why it did not go to the

CMA and say, "Actually, we think its only UK premises are not fit for purpose".

Instead, what does Mr. Brown say about that, he says all of this information was somehow implied by the photos of the office that formed part of the slide presentation during the site visit. He says that at Day 1, page 182, lines 7 to 15.

What Mr. Brown meant by that, as he explained, is that the photos do not show any activity or many staff members, so it was obvious or should have been obvious, he said, or it was implied that they were too large for the purposes of Electro Rent's UK business. But as Mr. Polito explained, that was not because of any inherent defect in the premises themselves; that was because Electro Rent had put on ice its UK business, had put their plans which existed at the outset to expand on ice because of the impending merger with Microlease. You see Mr. Polito say that at page 206, lines 5 to 25 for your note.

Now, that is also reflected in the provisional findings. You have in the bundle a non-confidential version of the provisional findings. I am going to hand up a confidential version because the relevant passage is actually in confidential form.

I am handing up something totally different, which

is the final report, which is not in the bundle at all. (Handed) This is also in the provisional findings too, so this did not appear out of nowhere.

MR. LOMAS: You are not arguing that Mr. Brown was wrong, Ms. Demetriou, in saying that a better business proposition for the business was to have the lease terminated and have the optionality. You are saying that is not the relevant question.

MS. DEMETRIOU: I am saying that was not a call for him to make.

MR. LOMAS: Yes, I understand. But you are not challenging the analysis, for current purposes.

MS. DEMETRIOU: I think in the event what the CMA decided was the appropriate course was that the lease for these premises should be renegotiated. So it certainly did not leap at Mr. Brown's suggestion to say: you should start looking around for other premises.

I am addressing a point that Mr. Brown made, where he said, "Look, the photos imply all of these defects in the premises", and we say they do not, because the reason they look too big and too empty is precisely because of the merger. This is a point made at 6.53 in the final report.

So to say somehow that not only did we not tell the CMA that we thought the premises were not fit for

purpose, not only did we not give them my four reasons, but we thought we would leave it to them to work out because it looks empty in the photo, is completely unfounded, because what the group thought, as Mr. Polito said in his evidence, is it looks empty in the photo because plans to expand had been put on ice because of the merger itself.

I think to summarise or to conclude on my first submission, and my primary submission under ground 1, we say that in circumstances where at the very time the Break Notice was served the CMA was making it clear that divestiture of UK business would have to include all the assets, including the lease, and the whole thing was pretty much on a knife edge, as you have seen, and Electro Rent wanted to convince the CMA that this was the appropriate package, that is what was happening. Electro Rent certainly was not disputing that the lease should be included. In fact, it adopted that enthusiastically and put forward its remedies proposal and said it includes the lease.

It should have been all the more clear to Electro Rent, in those circumstances, that it needed the CMA's consent before terminating the lease, and it was not a reasonable excuse to rely on the Monitoring Trustee's view.

We say that that should be the end of it. So you can and should, we say, decide the case on the basis that I have just put to you.

Now the second submission is that if, contrary to what I have just said, the Tribunal takes the view that in principle the discussion with the Monitoring Trustee might, in the circumstances of this case, give rise to a reasonable excuse, then we say that in all the relevant circumstances relating to Mr. Brown's conversation with Mr. Gopal, it was not a reasonable excuse, it was not a reasonable excuse for them to rely on what the Monitoring Trustee said in the circumstances of the case.

Now I think Mr. Lomas put to Mr. Beard whether the existence of a reasonable excuse depended on whether it was reasonable for Electro Rent to rely on what Mr. Gopal had told Mr. Brown. I think that was the question that you put. We say that they do have to show that it was reasonable for Mr. Brown to have relied on Mr. Gopal's view. How do you determine whether it was reasonable for him to have relied on Mr. Gopal's view? That depends, we say, on whether Mr. Gopal was furnished with all the proper information that he needed to reach a proper, robust decision on the issue.

This is not a case where, this is very far from

a case where Mr. Brown emailed Mr. Gopal and said, "I have got a question about the following paragraphs of the interim order, including paragraph 5(e), and I am wondering whether or not this is all within the reasonable course of business, and it is not very clear, can you advise me on this, and here is the lease, here are all the relevant facts, can you get back to me with an answer".

We are not in that type of situation at all. It was a rushed ten-minute phone conversation, and the Monitoring Trustee was not provided -- was not provided -- with all the relevant information which enabled him to take a robust decision.

I am going to make a few submissions.

The first submission I make is that that conversation must be viewed in the context I have just described in relation do my first submission.

In other words, the fact that the breach was clear and the fact that the CMA was actively considering a divestiture remedy that included the Sunbury premises, so all of that context is relevant to assessing whether it was reasonable for Mr. Brown to rely on the Monitoring Trustee's view.

Second, although -- and I should interject here, and say I accept what I think the Chairman put to Mr. Beard, or

put to Mr. Beard in his submissions, that we think it may be difficult for the Tribunal to make precise findings of fact about what was said and what was not said in the conversation, but we are content to say that the thrust of what happened renders it unreasonable for Electro Rent to have relied on that conversation.

Second, the second point is that although Mr. Brown repeatedly said that the reason he had asked the Monitoring Trustee for advice was that that is what he had been told to do, he said he was following the instructions of Mr. Polito, he also accepted that neither Mr. Polito nor the directions, nor paragraph 13 of the directions, required Electro Rent only to contact the Monitoring Trustee and not the CMA. He also accepted that he did not understand these directions or instructions to confer a power on the Monitoring Trustee either to grant a derogation or to determine definitively whether something was a breach of the order or not.

I can just give you for your notes some transcript references to his evidence. So there is transcript 104, lines 3 to 5. I think in the interests of speed I am not particularly asking you to turn these up, but it will come out on the transcript and I hope it may be helpful later to then go back.

THE CHAIRMAN: Can I just ask you a question. You have mentioned the directions. Could you go to paragraph 13, which is in A1, tab 14 at page 5.

MS. DEMETRIOU: Yes.

THE CHAIRMAN: So 13 tells Electro Rent to contact the MT if it is in any doubt about whether there might be an infringement of the interim order. 14 directs Electro Rent to notify the MT and the CMA.

MS. DEMETRIOU: Yes.

THE CHAIRMAN: There is no requirement in 13 that if Microlease is in any doubt it should contact the CMA.

MS. DEMETRIOU: No.

THE CHAIRMAN: So what is the point of the direction to Electro Rent, if it is in any doubt, to contact the MT? What is the point of that?

MS. DEMETRIOU: Yes, that is a good question, if I may say so. The difference between -- just before I answer it, the difference between 13 and 14 is that in 14 a breach -- that is where a breach may have happened.

THE CHAIRMAN: Yes.

MS. DEMETRIOU: So that is looking backwards. So of course it is then very important to contact the CMA directly.

Now in relation to 13, you asked what is the purpose of this.

THE CHAIRMAN: Yes.

MS. DEMETRIOU: In circumstances where, of course, it is only the CMA that can grant derogations, we say that the purpose of it is to provide a day-to-day resource for any queries about what the order means. So if it is unclear, then the Monitoring Trustee acts as a first port of call and may be able to very quickly give a steer.

That does not mean that it is permissible for a party to rely on the Monitoring Trustee's view. So it may be, for example, that it is very clear that something is going to be a breach and the Monitoring Trustee says "Yes, that is very clear, you need to go to the CMA", or it may be that something falls totally outside the order and the Monitoring Trustee is able to say "That does not look to me like it is within the order". So they provide a first port of call, because there may be lots of these questions that arise on a very frequent basis.

THE CHAIRMAN: What does not seem to be made clear is in what circumstances, if Electro Rent contacts the MT, it still has to contact the CMA for consent.

MS. DEMETRIOU: We say that the interim order makes that clear because only the CMA can grant derogations. So if there is any -- in a sense, the Monitoring Trustee is the first port of call. It is an administrative -- it

provides an administrative facility whereby parties can speak in the first instance to the Monitoring Trustee. But that does not negate from the fundamental obligation under the order, which is to seek a derogation from the CMA.

Also, the order of course says as well, so the order also -- no, maybe that is not --

THE CHAIRMAN: I am having difficulty in understanding the practical utility of this, because effectively what the CMA is saying, if I can put it colloquially, is, "You have gone to the MT. So what? In every circumstance you have to come to us". Is that fair? When the context is a possible infringement of the interim order.

MS. DEMETRIOU: What we say -- and under the "Functions of the Monitoring Trustee" this makes it clear in the directions themselves, so 9(e) is without prejudice to the right of the parties to go to the CMA, to respond to questions.

THE CHAIRMAN: That is the right to go to the CMA. What I am looking for or wondering is why there is not in existence in this document a clear indication to Electro Rent that going to the Monitoring Trustee where there is an issue about whether there might be an infringement does not take them anywhere, because it does not matter what the Monitoring Trustee says,

according to you they still have to go to the CMA.

MS. DEMETRIOU: Sir, we say that the fundamental obligation is to seek a derogation from the CMA. Now there may be cases where the Monitoring Trustee is able with confidence, because for example something may be very clearly not a breach or a party may be misinterpreting the order, to say "No, this is okay, you are misinterpreting the order, this only precludes X". Or there may be cases, and Mr. Brown was only able to find one other example in his evidence of this happening with Electro Rent, so you will recall that in paragraph 13(a) of his evidence he says "We did sometimes go to the Monitoring Trustee and there are emails where he says that is fine" and that all related to one issue, which was this issue of the ERP, the ERP in respect of which Electro Rent had sought and received a derogation subject to conditions from the CMA. So that provides an example.

So the CMA granted the derogation and said it is subject to conditions about protecting confidentiality, so you have got these nondisclosure agreements. So then what would happen is that Electro Rent wanted to add another employee to the nondisclosure arrangements and they were able, without formally approaching the CMA, to get a steer that that would be okay from the Monitoring

Trustee.

In circumstances like that, it serves a very important function. But we say we are a million miles from that case, because this is a case where they should have realised, because of all the circumstances I have just explained about the concurrent events going on with the remedies, the clear nature of the breach, that it was not sufficient to rely on the Monitoring Trustee, because ultimately it is only the CMA that can grant the derogation.

THE CHAIRMAN: In this case it goes beyond that. Effectively what you are saying is there is no utility at all or no point in Electro Rent going to the Monitoring Trustee. Is that right?

MS. DEMETRIOU: I think in effect that is correct, yes.

THE CHAIRMAN: Okay.

MS. DEMETRIOU: They should have proceeded to the CMA.

THE CHAIRMAN: Would this be a convenient point to take our mid-afternoon break?

MS. DEMETRIOU: It would be a very convenient point.

SIR IAIN MCMILLAN: I have a question about that, if I may. That paragraph 13 is really predicated on if there is any doubt.

MS. DEMETRIOU: Yes.

SIR IAIN MCMILLAN: What you are arguing to the Panel is

that there ought to have been doubt.

MS. DEMETRIOU: Exactly. We are arguing that there ought to have been doubt.

If there is doubt and a party goes to the Monitoring Trustee as the first port of call, of course given the terms of the order they do that at risk, because if the Monitoring Trustee gets it wrong then they have got to establish that was a reasonable excuse, which will depend on -- and it may well not be, as we say it is not in this case.

(3.30 pm)

(Short break)

(3.40 pm)

MS. DEMETRIOU: I think during the last exchange I had made the point about paragraph 13(a) of Mr. Brown's witness statement and the context of that interaction with the Monitoring Trustee. I would also like to say or make a similar point, which is that not only is that the only occasion which has been identified where Electro Rent did approach the Monitoring Trustee directly about something like this, and not go to the CMA -- and we say it is of a totally different nature, for the reasons that I gave -- but it is clear that Electro Rent generally involved its solicitors, Latham & Watkins, in seeking derogations from the CMA, and that they had, as

Mr. Brown says in his statement, directly proceeded to the CMA without first contacting the Monitoring Trustee on other occasions.

Of course, an example of that is the derogation that they sought in respect of the dormant subsidiaries, which is referred to in Mr. Brown's first statement at paragraph 14. Now that act, striking off and liquidating non-trading, dormant entities is, we say, plainly much less likely to raise an issue under the interim order than termination of the lease. In fact, we say it is trivial compared to what happened here. In those circumstances, what did they do, they instructed their solicitors and made a formal application for a derogation.

The third submission I make under this head, pursuant to my second main submission, is that it is not the case that Electro Rent provided the Monitoring Trustee with complete and accurate information in this case. Quite the contrary. What happened here was a short ten-minute or so conversation on the phone. No documents were provided to Mr. Gopal in advance of that conversation. It came, as far as he was concerned, out of the blue, and Mr. Brown, in our submission, took a cavalier approach to the issue when approaching Mr. Gopal. This is evidenced by his error in relation

to the notice period. Indeed, he himself says that in relying on Mr. Colley's advice and not checking the documents thoroughly himself, he said "There was a duty of care for me to have looked more thoroughly at it", and he said that yesterday in is evidence at page 171, lines 1 to 5.

We also know that when Mr. Brown phoned, when he called, when he spoke on the phone to Mr. Gopal, we know that Mr. Brown had not looked at the lease himself. The reference is Day 1, page 166, lines 18 to 20. He had not looked at the heads of terms, which the Tribunal has probably seen the heads of terms but they make the position crystal clear. That is Transcript Day 1, page 166, lines 21 to 22.

He had seen but he had not properly read the draft notice to terminate the lease, because that draft notice correctly states that the notice period is six months. He did not speak to Latham & Watkins about any of this. He relied on the advice of Mr. Colley, whose advice was not impartial, could not have been impartial.

Electro Rent submits, Mr. Beard submitted, that the mistake about the notice period in particular could not have made any difference, he said, because it made business sense to terminate the lease and so the notice period was neither here nor there. But we do not accept

that, because had Mr. Gopal known about the error with the notice period there would not have been any need for him to feel that he had to make a decision there and then. Regardless of precisely how urgently he thought the notice had to be served, it is clear that he did feel it needed to be done pretty imminently.

As he says in his witness statement at paragraph 62, and this aspect of his evidence was not challenged, he would have advised Electro Rent, had he known about the position, that they could have waited until after the CMA's investigation was complete. It stands to reason, it is common sense; because if you are in Mr. Gopal's shoes and somebody is calling you up saying, "We want to terminate this lease over the premises and we do not have to issue the Break Notice for another six months, what do you say?" then Mr. Gopal, it stands to reason, is not going to feel that in his hotel room in Beijing on the phone he has to make a judgment call about it at that stage, particularly when the investigation is proceeding.

Now it is also clear from the contemporaneous documents and from Mr. Gopal's evidence that Mr. Brown told Mr. Gopal that the Break Notice was reversible. It is clear that Mr. Gopal understood that this meant it was reversible at the option of the tenant. Now

Mr. Beard makes the submission that that is commercially an unrealistic view to have taken, but Mr. Gopal has explained that he was not someone experienced in dealing with leases and that is the impression, he says, and he was very clear in this, that is the impression that he took, and we see that from the contemporaneous documents.

In my submission, in a case like this, where parties are explaining things with the benefit of hindsight, the contemporaneous documents themselves take on great importance because they provide the best guide to what happened at the time.

We have first of all the contemporaneous note of the call where Mr. Gopal notes "Can reverse", and you will recall that. It is handwritten and there is a transcription, that is at C1/6, 25; I do not ask you to turn it up again. Then we have the email of 15 March, and I would like to look at that again; that is in bundle B1, tab 7, page 222. This is on the same day, so 15 March. Bundle B1, tab 7, page 222. You will see:

"Nigel.

"Many thanks again for the call earlier. You mentioned the break period remains in force until spring 2019 with one year notice and that the decision can be

reversed. Is there a time limit within which the decision can be reversed? Can you please send us the page of the lease which states these conditions for our records."

This shows, first of all, the importance of the reversibility point to Mr. Gopal, because he is asking about it expressly just very shortly after the call took place. It also demonstrates his understanding of what Mr. Brown told him, "You said that the decision can be reversed". Nothing about "can be renegotiated" or "subject to the landlord's consent". "Can be reversed".

We then have Mr. Brown's response, which is on page 224. That says, and you have seen it before but it says:

"The break clause is effective in April 2019 provided we comply with the conditions of termination. If we do not comply with any of the termination provisions then the Break Notice is not effective. So if we choose not to vacate the premises we merely have to not comply or serve a notice saying we will not comply with the Break Notice for the lease so to continue. This is all standard stuff ... [much] more onerous to terminate than to continue the agreement."

Nothing here about "Well, the landlord has to consent" or "Maybe the landlord might have had other

tenants in the meantime". It is unqualified and it is clear on its face.

Mr. Brown, when he was asked about it, and you will see what he said in the transcript -- if you could turn this up, this is page 185 of the transcript, and it really goes through to page 188 but I am just going to show you one passage on page 186, because I questioned him about this at some length and what he said was that he says no -- this is on page 186, I say:

"So what you are saying here is that it is all at the option of the tenant, are you not?

"Answer: No, I am not. The option is always with the landlord."

Then I say:

"... I just want to go back to the terms ... You are saying that if the tenant chooses not to comply with the Break Notice, for example by not vacating, then the lease will continue. That is what you are saying.

"Answer: That is not my intention ...

"Question: ... Do you accept that is what you say?

"Answer: No ...

"My intention is that we can renegotiate a new lease, which is obviously what we have done ... or, if we defaulted on any of these points, the landlord would have the right to waive the notice."

I say:

"You do not mention the landlord here ..."

So it goes on. I would ask you, when you are looking back at the transcript, to read the whole of this section, because none of what Mr. Brown said about renegotiating or the landlord can waive the notice, none of that is in this email.

The email, the email exchange, which is really the best evidence along with Mr. Gopal's contemporaneous note, because this happened on the day, that is the best evidence as to what Mr. Gopal understood the position was.

We have corroborating text messages, and they are also important because they are consistent. They are at bundle C1, tab 6 at page 47. Again, this is now in April, so this is after the CMA has appreciated -- so it is not contemporaneous with the call, but it is corroborative of the impression that Mr. Gopal had and of the contemporaneous emails. Because first of all it is demonstrating the importance to Mr. Gopal of the reversibility point; he is expressly going back to Mr. Brown saying, "Well, how is it reversible? Where is the document?"

Then over the page on 48:

"I recall that you mentioned that this was

reversible. And you said that was possible. Please refer to the contract where possible."

Then again:

"It is reversible if you simply pay late or do not meet any of the other lease obligations. In addition, you can renegotiate with the landlord."

Now it is mentioning renegotiation, but he does not qualify, "if you simply pay late or do not meet any of the other obligations". There is nothing there about the landlord waiving the Break Notice.

So Mr. Beard can make his submission about that is a commercially unrealistic view, but it is plain on the contemporaneous documents, we say, that that is the view that Mr. Gopal gained, because that is what he was told and you can see it on the face of the emails.

When Sir Iain asked Mr. Gopal yesterday whether it was his opinion that if the reversibility was going to be exercised then notice would be given to the landlord that they wanted to annul and that would put them back in exactly the same position that they were, Mr. Gopal confirmed that that was his understanding, so that is what he understood.

Of course, in relation to that, what Mr. Gopal's evidence is in his witness statement is that he says that had he known now what he -- had he known then what

he knows now about the lack of reversibility in the sense that he understood it, then he would have acted differently. That was not challenged. That is in his witness statement and that was not challenged.

MR. BEARD: Yes, that is challenged. It was clearly challenged by reference to the subsequent notes.

MS. DEMETRIOU: Mr. Beard can make his submissions in reply, but we say it is not challenged.

What Mr. Beard did put to him was the email of 17 April. You will recall that email where Mr. Gopal talked about -- he has his bullet points, and in relation to 4(c), in relation to the breach under 4(c) he explains that he now appreciates that it is not reversible because he has spoken to Investec. What was put to him by Mr. Beard was, "Hey presto, at the end of this you say there is no breach". But what I put to him, I asked him in re-examination to look at the bullet points above that, where he says that Electro Rent ought to have sought consent or a steer from the CMA, written consent or a steer from the CMA. That may not make very much sense. In fact it does not, because if he thought that they needed to get consent he should have found that there was a breach at the end of the email. But it is not correct to say: oh well, he thought this was fine, despite reversibility. He does not say that. In

his bullet points he says that Electro Rent should have sought written consent from the CMA.

Now, in relation to destabilising the employees, Mr. Brown explains in paragraph 47 of his first witness statement that he did not involve the UK employees in the decision because this risked destabilising them, and he accepted that that would create problems under the interim order. Mr. Brown also accepted that he did not explain that to Mr. Gopal.

Mr. Gopal's evidence is that that would have led him to have acted differently, and that is obviously right because the CMA were very concerned about Electro Rent UK's remaining staff, as indeed Mr. Brown accepted.

You can see this from the letter in bundle C1, if we could just turn that up. I do not think the Tribunal -- I think neither of us have taken you directly to that yet. It is bundle C1, tab 4, page 91. This is a letter from Mr. Polito as inquiry group chair, and it is in February. It states that:

"The CMA was informed that Mr. Lisanti, an account manager, had resigned. […] We understand that this was as a result of the level of uncertainty associated with his job. […] Electro Rent had previously considered ways to mitigate the potential risk of key staff resigning and informed the CMA that it would consider providing

Mr Lisanti with a financial incentive […] [but] we understand that no such financial incentives were offered to Mr Lisanti prior to his resignation.

The Parties appear to have undertaken no action to prevent Mr Lisanti's departure. The CMA has serious concerns that his departure could result in a material degradation in Electro Rent's ongoing UK operations. […]

Accordingly, we are directing the Monitoring Trustee to further investigate the reasons [so the Monitoring Trustee was put on notice that this was an important issue] in order to confirm the information provided to date, and to continue to monitor any impact this resignation has on the business."

Over the page we see that the remaining three staff are key staff, as contemplated by the interim order. We see that at the end of second paragraph on the next page, and the parties should provide the three key staff identified in this letter with explicit up front financial incentives.

So we see there that this was very much an issue on the CMA's agenda and they placed it on Mr. Gopal's agenda too, because they were concerned about the circumstances of Mr. Lisanti's departure and were concerned that Electro Rent had not made sufficient

efforts to prevent him leaving or incentivised him not to leave.

To say that that is not a relevant factor, the risk of destabilisation, that did not need to be put to Mr. Gopal, we say is wrong.

In response to this point Mr. Brown, in his second witness statement at paragraph 36, splits hairs. He says that he tries to distinguish between informing the staff about service of the Break Notice, which he accepts in his first statement risks destabilising them, and actually serving the Break Notice. So he says, "Well, when I was talking to Mr. Gopal it was about serving the Break Notice and that did not require me to tell him", but that, with respect to Mr. Brown, is a distinction without any difference at all, because obviously serving the Break Notice itself ran the risk, as Mr. Brown then accepted, that the staff would hear about the lease ending and so that would risk destabilising them, as he accepts in his first statement.

Indeed, that is what happened in this case. They did hear about the Break Notice being served.

A further point that has emerged during this appeal relates to the role of Mr Colley. Mr. Brown accepts that he did not tell Mr. Colley -- sorry, did not tell

Mr. Gopal about Mr. Colley's role when he spoke to him on 15 March. Mr. Gopal's evidence, and it is paragraphs 40 to 41 of his statement, is that he was surprised that this was not mentioned. So Mr. Gopal in that respect too was not given the full picture and had no opportunity to ask any questions about Mr. Colley's role.

The involvement of Mr. Colley, we say, is yet another matter which makes it all the more unreasonable for Electro Rent to rely on this brief conversation with the Monitoring Trustee as giving rise to a reasonable excuse, and that is because, on any view, Mr. Colley had a potential conflict of interest. We say he had a plain conflict of interest. Because although Mr. Brown may not have thought there was a problem, Mr. Colley was chairman of one of the potential purchasers of the UK business, and indeed his company had been put forward by Electro Rent as a purchaser. That company, as Mr. Brown knew, had its own premises and would have had no need for the Sunbury premises, for the Sunbury site.

At the same time -- so Mr. Colley's interests qua chairman of this other company, this potential purchaser, was to terminate the lease, because he knew that they did not want it.

At the same time, Mr. Colley was giving advice to

Electro Rent about the lease and had been giving advice about the lease for a considerable period of time. Mr. Brown says since 2016.

It is obvious, we say, that Mr. Colley's interests as chairman of an interested purchaser of Electro Rent UK were not necessarily aligned with those of Electro Rent UK itself, because the true interests of Electro Rent UK were to preserve the lease, because this was an essential part of the divestiture package that they were seeking to persuade the CMA to adopt.

Mr. Beard says it would not have made any sense for Mr. Brown purposefully to have misled the Monitoring Trustee or the CMA because Eletro Rent has every interest in not prejudicing this third remedy option.

In relation to that we make three points. We say first of all it is no part of our case, we do not have to show that Mr. Brown positively misled either the CMA or the Monitoring Trustee. We are not making an allegation of dishonesty, so Mr. Beard can put his authorities away. We do not have to show there was anything about his behaviour that amounted to dishonesty or positively misleading. But in any event, we say that the premise for Mr. Beard's submission that it was in Electro Rent's UK's interests not to prejudice the third remedy option, and therefore serving the Break Notice

must be fully consistent with the interim order, with the purpose of the interim order is how he puts it, is wrong, because as I have explained, and I am not going to repeat my submissions, those calls, those questions of judgment, are questions for the CMA and not for Mr. Brown.

Thirdly, we say it is certainly not necessarily the case that the objectives of the regulator, the CMA, were aligned precisely with the interests of the company. Because in this case the CMA's objectives were to satisfy itself, in the course of reaching a final decision, that the divestment package was effective. So the CMA wanted to know, wanted to establish what the constituent elements of the package were.

Electro Rent UK's interests included, as Mr. Brown accepted when I cross-examined him, a desire not to be saddled with an expensive lease should a purchaser not want the premises, should the eventual purchaser not want the premises. You heard from Mr. Brown that his view was that most purchasers would not want the premises, and indeed Mr. Colley, he knew, did not want the premises.

So we say in all of the circumstances of the case, we are not asking the Tribunal to find precisely in detail what was said in every respect on the call, but

we say that it is clear from all the evidence that you have heard that Mr. Gopal was not directly asked to reach a reasoned view on whether or not the service of the Break Notice contravened particular parts of the interim order, or whether or not it amounted to something in the ordinary course of business. Even taking the terms on which the call was made at face value, so even on the informal basis on which the call happened, he certainly was not given complete information that enabled him properly to consider the point, for all the reasons that I have said.

So if the Tribunal thinks that any of this is relevant to the question of whether there is not a reasonable excuse, of course our primary submission is that the point does not get off the ground. But if the Tribunal thinks that this is potentially relevant, we say that it is clear in the circumstances of this case, circumstances where Mr. Gopal made clear that he felt under some pressure to make a decision, he had thought that the Break Notice was reversible, he says in his evidence he said "Fine, on the basis that it is reversible, fine", that was obviously an important matter for him, and the other aspects of this that I have described, we say that it was not reasonable in all those circumstances to rely on that conversation

rather than proceed to speak to the CMA and seek a derogation.

That is really what I wanted to say about how we put our second submission under ground 1, but I do want to deal with the allegation about new case. Unless there are any particular questions about what I have said so far, I will go on to make some brief submissions on new case.

I am not going to repeat what I said in opening, and I showed the Tribunal *Allsports* and *JJB*. I just want to show you one other paragraph in *Napp*, which I do not think Mr. Beard took you to this paragraph. He may have done, in which case I apologise; but if he did not, that is also relevant. That is authorities 1, tab 3, paragraph 81.

What is being said there is that one factor that is going to be relevant in assessing this kind of point is the fairness of the appeal process, because the appellant will have submitted pleadings, witness statements, documents, and the CMA, so the director at that stage, may not always be able to foresee what direction an appeal is going to take. So a situation whereby the appellant could always have a free run before the Tribunal but the director is then confined to

the material used in the administrative procedure could lead to a significant lack of balance and fairness in the appeal process.

We say that really is the upshot -- that result, a lack of fairness in the appeal procedure, is the upshot of Mr. Beard's submissions, because he is saying to you on the one hand, he is saying you cannot grant the CMA's reasoning any deference here, so you just decide the point. He is saying that this is not a judicial review, so we can adduce all of this evidence. Then he is saying that the CMA is bound to argue the appeal, we can only respond by reference to the precise points set out in the decision. We say that is plainly wrong and it would be grossly unfair.

I want to take you also very briefly to the *Tesco* judgment, which is also in the second authorities bundle, that is at tab 13. It is paragraphs 133 to 134. What is said there -- so you can see the nature of the argument.

MR. LOMAS: Paragraph 133?

MS. DEMETRIOU: Paragraphs 133 to 134, so it is page 51, sir.

You can see the nature of the argument. It says:

"It was suggested for the first time in closing that the Tribunal's case law, summarised in paragraph 124

above, prohibited the OFT from calling witnesses since this would have amounted to bolstering its case on appeal. We consider this argument to be without merit. The OFT could not be accused of impermissibly augmenting, changing or bolstering its case if it were to call witnesses to counter or rebut claims made by witnesses called by an appellant. The OFT would still be relying upon the findings and analysis contained in the decision. Various decisions of this Tribunal made it very clear ..."

Then it goes on. I would also ask you to read paragraph 134.

Essentially, what we say is that the CMA is not here seeking to embroider its decision or put forward some new basis for the decision; it is responding to the appeal, and it is responding to the evidence that is put forward by Electro Rent.

Electro Rent has adduced evidence which explains in detail, which it did not do before in the administrative proceedings, what went on in that phone conversation; and the basis for its appeal is that that phone conversation and the advice given by Mr. Gopal at the end of it amounts to a reasonable excuse.

MR. LOMAS: I was thinking about this earlier on. That is a clear submission that you can make in relation to

reversibility and notice period. Can you make it in exactly the same terms in relation to destabilising employees?

MS. DEMETRIOU: Yes, we can, because the point was never -- we did not know about -- we did not know about this point until Mr. Brown, in his evidence, said that that is why he did not speak to Electro Rent UK.

The way that I am putting it -- and at that point we asked -- of course we asked Mr. Gopal to address it in his witness statement, and we asked Mr. Gopal whether he had been told that by Mr. Brown. So the point I am putting to you, I am not relying on destabilisation as a sort of self-contained basis for breach of the order. If I were doing that --

MR. LOMAS: You would have a problem.

MS. DEMETRIOU: I would have a problem. I completely accept that.

If I were now turning round to the Tribunal and saying: actually, we accept there might be some wrinkles in the Break Notice, in clause 5(e), but what we do think, having seen Mr. Brown's evidence, is that we want to add a different basis and that is ...

MR. LOMAS: Conflict of interest.

MS. DEMETRIOU: We could not do that, no. So we accept that completely.

The reason that we are referring to the destabilisation of employees is not to found a separate breach or to embroider the breach that we have already got; it is directly to address the point of Eletro Rent, which is that it was okay to rely on Mr. Gopal's advice. We say no, that was not okay, it was not reasonable, and it was not reasonable because he did not have all the information.

MR. LOMAS: That is a sin of omission rather than a sin of commission, is it not? Because the first two points, reversibility and period, you would say that the Monitoring Trustee was misled. The last two points, conflict of interest and employees, are things that you say he ought to have been told and was not.

MS. DEMETRIOU: Yes, that is right, but we say it amounts to pretty much the same thing. Because whether you are told something which is wrong or not told something material, those are both -- as long as they are relevant matters -- so, you know, a bit like in a judicial review, when you are saying a public body has either taken account of the relevant considerations or failed to take account of relevance.

MR. LOMAS: Or the law of deceit.

MS. DEMETRIOU: Or the law of deceit, exactly. So I agree with the characterisation of it being omission, but we

say it amounts to the same thing.

I think that the *Tobacco* judgment, the answer that I have just given to you really helps explain why the *Tobacco* judgment is not on point, because what you see from paragraph 67 of that, so if the Tribunal would not mind turning to that -- I know that Mr. Beard took you to it already, but I think it might be the easiest way of making my submission. Paragraph 67, having reviewed the authorities including *JJB*, the Tribunal says:

"Nothing that we say here is intended to cast doubt on the potential for flexibility described in those cases. We do not, however, regard those statements as authority for the proposition that wherever evidence emerges during the trial that indicates ..."

I am so sorry, it was handed up loose. It is paragraph 67 that Mr. Beard particularly relied on, and what the Tribunal are saying there is that it has reviewed the authorities like *JJB* and it says that nothing is intended to cast doubt on what those authorities say about flexibility:

"However, we do not regard those statements as authority for the proposition that wherever evidence emerges during the trial that indicates that an

infringement of the competition rules has been committed the Tribunal is entitled to make a finding to that effect, even if that infringement has not formed part of the decision and is therefore not addressed in the pleadings."

So, sir, that really relates to the point I was just putting in answer to your question, that were it the case that this evidence then revealed some other breach of the interim order or a different -- yes, some different breach. So if we were to say the breach of the Break Notice, not only was it a breach of 5(e) it is also a breach of the provision relating to key staff, then I accept I would not be able to do that. I would be in difficulty.

But we are not doing that. We are responding, we have put in responsive evidence. We are responding to the submission, the ground of appeal, which is very clearly set out in the notice of appeal, which is that the conversation between Mr. Brown and Mr. Gopal amounts to a reasonable excuse.

They have put in evidence explaining what that conversation is. We are entitled to put in rebuttal evidence. The idea that somehow the Tribunal has to discount that rebuttal evidence is simply unfounded.

Also, one point that the Chairman put to Mr. Beard

was: well, do you say that Electro Rent has suffered any unfairness, is there anything that you could not have dealt with? It is illuminating, the answer that Mr. Beard gave was actually a really bad point for him, because he gave as an example Mr. Colley. So he said: well, we could not deal with anything the CMA might say about Mr Colley. But that is a bad point because it is only in Mr. Brown's witness statement that we found out that Mr. Colley had given him advice, and it is only after that that we were able to make some enquiries about what Mr. Colley's role was.

So there was no way of finding out before Mr. Brown's witness statement that he was being advised by someone who was also chairman of a company who was a potential purchaser of Electro Rent's UK business. So the idea that that is something that the CMA could have dealt with in the procedure is just wholly misconceived.

Unless the Tribunal has any questions, I have dealt quite swiftly with new case, it has two elements, I dealt with the obviousness point earlier and I hope I have dealt with this point now, but if you have any particular questions arising I am happy to answer them, otherwise those are my submissions.

THE CHAIRMAN: Thank you very much, Ms. Demetriou.

(4.22 pm)

Reply submissions by MR. BEARD

MR. BEARD: I am grateful.

I will just deal with the new case jurisprudence since the Tribunal might still have it still in front of you.

In relation to the position in relation to *Tobacco* I have already articulated the position previously that there are clear limitations on the extent to which you can use this rebuttal evidence mechanism to put forward new material.

You actually see it dealt with in particular over the page from the paragraph that Ms. Demetriou was dealing with, paragraph 72, where there are certain submissions from Mr. Howard in relation to these matters being dealt with, and there is then the danger of allowing the regulator to change its case on appeal. *Aberdeen Journals*:

"Such an approach could give rise to a tendency to transform this Tribunal from an essentially appellate tribunal to a court of trial where matters of fact or the meaning to be attributed to particular documents are canvassed for the first time at the level of the Tribunal, when they could and should have been raised in the administrative procedure and dealt with in the

decision. We do not think that such a development will be conducive to appropriate rigour in administrative decision-making or to a healthy and fair system of appeals."

I just emphasise that in particular because, picking up a point from the interaction between Mr. Lomas and Ms. Demetriou, it is important to bear in mind that in relation to all the matters such as reversibility and the way in which Mr. Gopal's conversation had gone, all of that material was before the CMA, because they had specifically asked for it. Those emails that we saw were actually in response to CMA questions, so that had been fed into the CMA. If they then decide that that is not relevant to their decision-making, it is not open to them now to say, "Oh well, this has been referred to in evidence, we are going to add this to our decision-making process". That is not sound.

In fact, in the *Tesco* judgment, the paragraph to which Ms. Demetriou referred is instructive. It is the final sentence she referred to in paragraph 133. In that case it was permitted to allow the witnesses to be called.

As I say, we have not objected to witnesses being called. We understand that they can be called:

"The OFT would still be relying upon the findings

and analysis in the decision."

Not the head of challenge, not whether it was 5(e) or not, but the findings and analysis. You cannot depart from that.

So what the Tribunal is there saying is: yes, you can bring in further witness material, but only when it is in support of the findings and analysis in the decision.

Ms. Demetriou protests: this is not very fair, is it? You are saying, Mr. Beard, that the Tribunal can look at evidence and decide the point and it is not merely a judicial review, and yet we cannot expand our decision.

Well, that is the way it goes. That is the position here in relation to a situation where you, as a State body, have the power to impose a very significant penalty on a party such as Electro Rent. That is the way the system is set up, and that is why all of this case law is very concerned about the extent to which there can be supplementary material reasons or argument.

Now just finishing briefly in reply, I am going to pick up a few --

MR. LOMAS: Sorry, without going back into the realms of irony, which I think we dismissed earlier in the day, that point, of course, does not run for conflict of

interest or destabilising, does it? Because these were not before the CMA at decision time, and they only came up in rebuttal to the evidence.

MR. BEARD: That I do accept must be right in relation to those issues, because they were not matters that were specifically before the CMA. But in relation to those matters, you have had our submissions in relation to conflict of interest. We say it was a factual issue, there was no basis for impugning the integrity of Mr Colley in relation to these things. Actually, without getting into the world of irony again, it would have been profoundly the most rubbish sort of conspiracy imaginable if he thought that by sending over a copy of a lease that then he had to count on other people not looking at his error in relation to the service of a notice period was then perpetuated. He had no possible way of doing that.

The point I was making about Mr. Colley was that if you are going to impugn and raise conflicts of interest issues in relation to these matters, they should have been properly set out in the decision and they should have been properly set out in these circumstances if you thought there was going be a problem.

Ms. Demetriou will protest, "But I did not know about Mr. Colley". No questions were asked of Mr. Brown

or of Electro Rent how that error was made, when it was plain on the face of all of the materials that the error had been made when they were considering both the provisional findings on penalty and subsequently the decision.

Just picking up some other legal points.

Interestingly, Ms. Demetriou started with a protest about an objection to the position on human rights. We pleaded the position, in our notice of application paragraph 52, that the HRA applied here. We set that out in our skeleton. We had not understood or seen any objection to that treatment and approach in any of the material from the CMA to date. It is wrong. It is appropriate to look -- I will give you the references, I am not going to take you to it, but in *Napp,* authorities bundle 3, tab 69, the Director General there actually conceded that the Competition Act 1998 provisions were criminal. There is a reference to the European case C235/92P, *Montecatini*, which is concerned with these matters.

Ms. Demetriou comes up with the remarkable proposition: because you might get situations where there are low penalties under these provisions, somehow that means if you are going to be faced with large penalties they are not counted as criminal. That, with

respect, is a remarkable submission and is wrong.

THE CHAIRMAN: Mr. Beard, can I just raise one point. It seemed to us that in relation to the legal approach that the Tribunal should take the issue between the parties has narrowed very considerably in the course of the hearing.

MR. BEARD: Yes.

THE CHAIRMAN: One remaining dispute does seem to be as to whether Article 6 is engaged or applies.

MR. BEARD: Yes.

THE CHAIRMAN: But in practical terms, is the only matter that you say this results in is your submission that in addition to the Tribunal applying the test of the balance of probabilities, it should also give the appellant the benefit of the doubt? Is that the only --

MR. BEARD: There are two aspects that we emphasise.

Yes, benefit of the doubt. Ms. Demetriou made a point about that which is simply wrong. She said that the benefit of the doubt does not add anything to balance of probabilities. That is plainly wrong.

THE CHAIRMAN: Yes.

MR. BEARD: You apply the benefit of the doubt standard when you are making findings in relation to fact. Those findings in relation to fact will then go to your assessment on the balance of probabilities as to whether

or not these matters are dealt with.

THE CHAIRMAN: I am not sure I have followed that, but you have answered my question to some extent. So yes, your submission about the engagement part of 6 leads to the appellant being given the benefit of the doubt. You said there was another one.

MR. BEARD: Yes, it is in relation to the level of fairness, the procedural fairness that is required in relation to this. One has to recognise that it is particularly important in the context of criminal penalty that the higher standards of procedural fairness are applied. Those are the two elements.

Going back to the former point. If you are making an assessment as the Tribunal of a factual matter and you have some doubt about it, the benefit of that doubt must go to the party in question. But when you are making your overall consideration on the balance of probabilities, then in those circumstances we recognise that that is the civil standard.

THE CHAIRMAN: But in relation to the primary facts we would have to apply the balance of probabilities test.

MR. BEARD: Yes, you would have also to do that, and you have to give us any benefit of the doubt in relation to considering each of the primary facts.

THE CHAIRMAN: Does not a finding of fact on the balance of

probabilities implicitly recognise that there may be 49% of doubt as to whether that finding is correct?

MR. BEARD: That may well be right, but when you are considering each of these issues I emphasise that position, because that is the position that is articulated in the Convention case law and the Human Rights case law in relation to these matters. So there is the emphasis.

In relation to the next range of legal issues we have got the consideration of the term "reasonable".

Now Ms. Demetriou tried to say: well, one needs to look at the interpretation of term "reasonable" within its statutory context, and she took you to sections 80 and 81 and *Stericycle* and the guidance in relation to these matters. But what clearly is being focused on there is the threshold for breach. But, of course, what is particularly important here is that Parliament may have put in place a threshold for breach which is then to be interpreted as relatively -- is to be crossed, on Ms. Demetriou's analysis, relatively straightforwardly because of the importance of compliance, but you cannot automatically carry that analysis over to the interpretation of the specific statutory exception that they are putting in place, which is broadly worded in terms of "reasonable excuse",

and we say nothing in the guidance can qualify that.

Therefore, to some extent her submissions in relation to the statutory context, which are concerned with sections 80 and 81, as I say, and the interpretation in *Stericycle*, do not take her further forward in relation to the reasonable excuse test.

She referred to the guidance where there is an example of if something catastrophic happens to your IT system that was entirely unforeseeable. One can see that if it was very much foreseeable that your IT would collapse and therefore you were not going to be able to hit a deadline, for instance, there may be issues. The situation is wholly different here, because of course what we are talking about is whether or not someone had doubts in the context of thinking about things, not something wholly unexpected. So the guidance and that example do not help you in interpreting those issues.

What I do note from Ms. Demetriou's submissions is that they have moved now substantially away from the position that was set out in paragraphs 68 to 70 of the defence, because in 68 to 70 of the defence what we see -- just for your notes this is at bundle A, tab 5, on the proper approach to ground 1, page 16 -- you will see that there what is being said:

"In determining whether the CMA erred in concluding that Eletro Rent had no reasonable excuse, the Tribunal should attach due weight to the decision and to the reasons underlying it."

Then it goes on:

"In particular, this is not a de novo hearing" and so on.

Then at 70:

"It follows that the role of the Tribunal is not therefore to determine the issue afresh but to determine whether the reasons of the CMA are intelligible and adequate, or whether the CMA has made some other error in its reasoning."

That was the approach that they were putting forward, which is a very narrow approach. They are saying essentially: unless we get the reasoning wrong, there is nothing more to see here, and therefore the scope of reasonableness is one where you confer a vast discretion on us, in our assessment.

Quite properly now, in closing, the CMA have moved away from that and accepted that if you disagree with the CMA's analysis, that is sufficient.

There is, of course, an irony in all of this again, that the reasoning in the decision is inadequate on its face.

So in the circumstances, we have a situation where the decision, which as you know is at tab 3, includes reasons which we say do not properly engage with the submissions, and in particular our account of what the justification, what the reasonableness of excuse was, and in particular the response that was given by the Monitoring Trustee.

Mr. Chairman, you picked up Ms. Demetriou when she said at one point: well, the case is "should have known", "ought to have suspected" and equated the two. With respect, that is quite a significant equation that the CMA are trying to draw, because "should have known" or "it is obvious that" is completely different from some sort of threshold of suspicion.

Sir Iain, you raised the question of whether "ought to have suspected", when that is referred to, you are asking yourself whether or not there ought to have been doubt, I think was the question you raised, and Ms. Demetriou agreed with that proposition. But of course in doing so she reveals the problem with the decision. Because, as we know, in relation to direction 13 it is if you have doubts you go to the Monitoring Trustee. Her case is: oh, it was all perfectly obvious, it was not a question of doubt.

So by acceding to the equation that you were putting

forward, Ms. Demetriou is accepting that in 52(f) what you have is less than the case on obviousness. You are actually referring to a situation of doubt, and in those circumstances that is not good enough for this finding.

So I think it is important in addition to recognise that although she says "Ought to have had doubts" is enough, and we say plainly not enough because that is what triggers you going through Direction 13, in fact her case is not just a question of some forensic agility in her drafting, or whoever was involved in the drafting of pleadings, it is fundamental to the case as she put it forward in opening.

I just refer you to Day 1, page 52, lines 20 to 25, and then the final line on 53. She says:

"What seems to be said is in addition to that the idea that it should have been obvious on the face of the order that it was not sufficient to rely on the Monitoring Trustee's view, that was a new case. That is not a new case; that is the entire basis for, that is the thrust of the CMA's decision and it is the basis for its decision."

That was her submission in opening. Obviousness was the basis for the CMA's decision. She does not have any grounds in the reasons that we are talking about for saying that obviousness is the relevant test. As I say,

the sentence that she fixes on in (f), "Ought to have suspected", that really equates with doubts and therefore moves to a situation where we are talking about the engagement of Direction 13; not a situation where we should have been going to the CMA, and that is critical.

The Tribunal has already raised these questions. It is critically important that the directions are differently posed in 13 and 14. 13 is dealing with a situation where you are proposing to do something and you will have doubts about whether it would infringe the order. That is the essence of it.

MR. LOMAS: Yes. Who do you think, Mr. Beard, paragraph 13 is there to benefit?

MR. BEARD: The simple answer is of course society, sir.

MR. LOMAS: Something a bit more specific to the case, perhaps.

MR. BEARD: But in the circumstances what it is plainly intended to do is ensure that by having the mechanism of essentially outsourced monitoring through the Monitoring Trustee you have a mechanism that, before anything happens that might give rise to a potential breach, the parties involved are obliged to talk to the Monitoring Trustee and the Monitoring Trustee can give clarification and wave a flag, which means that the CMA

and its remedial and investigatory process is protected, because of course the Monitoring Trustee if it has any concerns can talk to the CMA and does. But it also is of benefit to the parties themselves because it means they can go to the Monitoring Trustee and say, "We have these doubts", or in this case, "Out of the abundance of caution we are coming in any event", and they get clarification from someone who is experienced. That is the reason why not everyone can turn up and be a Monitoring Trustee.

MR. LOMAS: Can we just spend a second on that. This is under the heading "Obligations of Electro Rent and Microlease". What you could see is that 13 and 14 -- and it is not inconsistent with 12 -- 13 and 14 are essentially in the parlance self-reporting or transparency provisions. They are obligations imposed on the addressees of the order to disclose to the Monitoring Trustee, for 13, or to the CMA for 14, issues that they would want to know about. So it is a positive obligation on them to give transparency.

MR. BEARD: I think that if one wants to cast it in those terms I think what you are losing there is the threshold that you have to come there if you have any doubt about compliance with the order.

So it is where you have any potential concerns that

you are obliged to come forward under 13, and 14 is rather different, to see that as a transparency provision because, as Ms. Demetriou did rightly point out, in relation to 14 you are dealing with events that have occurred and therefore it is not so much a matter of transparency, it is a matter of disclosure that there has been a problem.

So I am not trying to suggest that there is not an element of transparency here, but to talk about these simply in terms of transparency I think loses in part some of the function that they have both for ensuring that the monitoring scheme works, but also providing benefits to the parties in relation to these matters.

Whether or not one puts that under the head of "transparency" perhaps is less critical, but that is the way that I say these things work. There is a salient difference between the two which is built in here: in relation to doubts on infringement you go to the Monitoring Trustee. As the Tribunal has already raised with Ms. Demetriou, the problem with the CMA's submission is why ever go to a Monitoring Trustee; what is the point of it in these circumstances if you have doubts as to infringement. That is the reason why I talk about --

MR. LOMAS: One answer to that would be because its purpose

is transparency. It is to force the company that is subject to the order proactively to disclose prospectively to the Monitoring Trustee, retrospectively to the CMA, issues where there is a prospect of there being or having been a breach. So it is an obligation -- it is under the "Obligations" heading -- proactively to disclose so that it assists the regulator, whether through the Monitoring Trustee or itself, to have a very clear focus on what has been going on within the company because it imposes an obligation on the company proactively to disclose.

MR. BEARD: That may well be correct in the sense that it imposes an obligation in relation to the company. It is, as you say, under the obligations, and the obligation is being imposed that if you are in doubt on any matter of infringements you do come forward, but you come forward to the Monitoring Trustee, and it is not purely about transparency because you are required to contact the Monitoring Trustee for clarification.

So it is envisaging the Monitoring Trustee bringing to bear their experience and knowledge in relation to these matters to assist this process.

The truth is that in relation to these sort of merger situations there are lots of things going on all the time. Yes, you do have to go and have a first port

of call that will give you a steer in relation to these things. It is not giving derogations. It is not giving consents. But it is giving steers. If you cannot rely on those steers in those circumstances or, as Ms. Demetriou put it, it will be a very rare case when you can do, you are undermining the very function of the Monitoring Trustee in those circumstances because you will need to be going to the CMA all the time in relation to these matters because otherwise you can end up in the sort of situation with which you are dealing here even if you do not have real doubts or if you only have doubts.

So in those circumstances we say there is a salient difference. Even though there is a transparency element the clarification role of the Monitoring Trustee is important and you must be able to rely on it.

There is just one other thing in relation to the terms of the decision. Our submissions in relation to the provisional findings on remedies are found in particular at bundle C1, tab 4, paragraph 93. There we did emphasise, particularly at paragraph 6, the fact that we had had a positive response from the Monitoring Trustee. So that was very much four-square before the CMA in the context of all the other material that it had.

So for Ms. Demetriou to say, "We were just dealing with the stuff that was put in front of us", actually that summary in paragraph 51 does not capture all of those aspects and, in particular, the positive nature of the response, and certainly and critically the reasoning in the decision does not deal with it thereafter.

On the questions of "obviousness" I think I have dealt with most of the points already in anticipation in my closing submissions. We say that here it is perfectly right that it was not obvious that this was a breach of 5(e) because, as Mr. Brown set out very clearly both in his witness statement and in evidence under cross-examination, he believed that:

"In the ordinary course of business my duty as an officer of the company is to try and enable the business to perform in the most appropriate manner and carrying inappropriate and unnecessary high overheads is not conducive to that behaviour."

That is transcript, page 141, lines 20 to 24.

As he put it in his witness statement, he considered:

"... what we were dealing with here was a matter connected to the day-to-day supply of goods and services."

He may have been wrong but that was a reasonable

interpretation in all of the circumstances, in particular where his interpretation was in line with the general thrust of the interim order and directions.

As I have emphasised previously, that is where the commercial rationale and reasons matter in the context of these submissions.

So we say that the decision is flawed and that it is wrong to now bring the benefit of hindsight in relation to these matters.

Just picking up a number of the points very briefly that Ms. Demetriou raised on particulars in relation to her second case on "misled". Yes, it is absolutely right that they went to solicitors for derogations, because that is for derogations rather than the sort of clarification that we are talking about.

On "reversibility" Ms. Demetriou highlighted the fact that texts involved no references to the landlords. Mr. Gopal said that Mr. Brown had explained things in layman's terms. That is Day 1, page 234, lines 10 to 14. He may well have misunderstood what was being said to him, but it was clear that there was no guarantee as to reversibility and indeed he suggested in various of his notes that that was in fact the case.

It was raised by Ms. Demetriou: "Why did Mr. Brown not reformulate his questions in an email?"

The difficulty was that, I suppose, Mr. Gopal did not say, "If I have got any concerns, if I have got any lack of understanding, I will get back to you. I will contact the CMA."

He said it was okay and in those circumstances there was not a particular reason for Mr. Brown to go back.

In relation to the inclusion of Sunbury in the remedy, yes of course it was included in the remedy; yes we understood that. It is important to bear in mind the relevant paragraphs that deal with issues on composition, risks and concerns about the remedy. They did not focus on any issues about uncertainty in relation to sites. Those are not the sorts of matters that were relevant to this business: C2, tab 12, just for your reference, in particular paragraphs 145 to 147, and thereafter on the asset risks.

I have dealt in passing I think with the position in relation to Mr. Colley.

As regards the staff position, I have set out our position in relation to that. No part of these matters -- "sins of omission", as I think it might be called, Mr. Lomas -- undermine the ability or the appropriateness of the reliance by Mr. Brown and Electro Rent on the statements made by the Monitoring Trustee.

Ms. Demetriou at the end said, "Well, in relation to these matters it was emphasised that nothing done by Mr. Brown was intended to undermine the position of Electro Rent UK, but the position of the CMA and the company may not be perfectly aligned."

I think that probably understates the position of a company going through a merger process. It is not aligned, but it recognises that it has to comply with the obligations. It does take those obligations very seriously. This company did do that. It did follow the process that was laid down through the directions and interim order. It did make a mistake in relation to whether or not the divestment was in the ordinary course of business, but it was recognising that there was a good reason for considering it to have done so, and that that fitted overall with the purpose and intent of those directions. It was not obvious that there would have been a breach and the Monitoring Trustee's comments, which are part of the proper process for enabling parties to deal with this merger scheme, could properly be relied on.

In all the circumstances, there was plainly a reasonable excuse for the non-compliance by Electro Rent in these circumstances.

Unless I can assist the Tribunal further I am

grateful.

THE CHAIRMAN: Thank you, Mr. Beard.

You are going to submit your submissions on ground 2 in writing. Would it be feasible to have those lodged with the Tribunal by close of business a week today?

MR. BEARD: Yes.

THE CHAIRMAN: In that case I think all that remains for me to say is thank you very much to the parties and their legal advisers for preparing and presenting the case which enabled us to get through it in two days. We will seek to be as efficient in the production of our judgment. Thank you.

(4.50 pm)

(The hearing concluded)

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