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5 **IN THE COMPETITION**

Case No. : 1365/1/12/20

6 **APPEAL TRIBUNAL**

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8  
9 Salisbury Square House  
10 8 Salisbury Square  
11 London EC4Y 8AP  
12 (Remote Hearing)

13 Wednesday 9<sup>th</sup> December – 10<sup>th</sup> December 2020

14  
15 Before:

16 Andrew Lenon QC

17 Michael Cutting

18 Pauline Weetman

19 (Sitting as a Tribunal in England and Wales)

20  
21  
22 BETWEEN:

23  
24  
25 (1) Roland (U.K.) Limited

26 (2) Roland Corporation

27  
28 -v-

29  
30 Competition and Markets Authority

31  
32  
33  
34  
35  
36 **A P P E A R A N C E S**

37  
38 Mr Daniel Piccinin (On behalf of Roland)

39 Marie Demetriou QC and Mr David Bailey (On behalf of CMA)

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**(10.00 am)**

**(Open Session)**

**Submissions by MR PICCININ (continued)**

**THE CHAIRMAN:** Good morning.

**MR PICCININ:** Good morning, are we ready to start?

**THE CHAIRMAN:** I believe so.

**MR PICCININ:** Very good. I am very grateful to everyone, including the court staff, for the early start.

I just wanted to pick up where we left off yesterday, with Mr Cutting's question about why you would need or want RPM, in addition to the contractual requirements to invest in promoting the products in various ways. The reference that I had in mind yesterday when I gave my nutshell answer, was page 802 of the authorities bundle and that's Leegin and I don't think we need to turn it up. It says what I said it says yesterday. You can also see the same point expressed in characteristically gloomier terms in the European Commission's guidance in the footnote to paragraph 225 which we were looking at yesterday and then that gives you a cross-reference back to a more general point at paragraph 107A of the European Commission's guidance and what the Commission says there is that the pro-competitive benefits I was talking about yesterday, about incentives to invest in promotion, only arise if it's not practical for the manufacturer to impose by contract and I quote here, "effective promotion requirements", and my emphasis there is on the word effective. What you have to be able to do, as Mr Justice Kennedy explains in Leegin, is you have to be able to run around and monitor the details of all of this, right across more than 100 resellers across the whole country and be

1 able to enforce that perfectly before the RPM becomes irrelevant. You also  
2 have my submission from yesterday that it helps if your distributors have an  
3 incentive to do the things you want them to do rather than just having an  
4 obligation to do them. And bear in mind there as well, that if it becomes  
5 unprofitable for them to do the things you want them to do, they are not going  
6 to want to be involved at all or falling slightly short of that, they might not want  
7 to have quite so many of your products taking quite so much of their floor  
8 space and staff time. So that's all why you might want to have RPM, in  
9 addition to these contractual requirements.

10 But, ultimately, I need to clarify that I am not trying to persuade you, the tribunal, that  
11 Roland's RPM in this case was justified by those pro-competitive objectives.  
12 I am just saying it's nowhere near serious enough to be put in the 16 to 23  
13 club we were looking at yesterday. That was for the two reasons that I gave  
14 you yesterday, even before we get on to the market coverage. Those two  
15 reasons were, firstly, about what RPM does not do, it does not restrict  
16 interbrand competition and, secondly, it's about what it does do, or to put it  
17 another way, what it's for, which is the promotion of interbrand competition.

18 So just moving on then. If I am right that we are not in the 16 to 23 club, where are  
19 we? How far below 16 to 23 do we need to go? Ultimately, this is an  
20 evaluative judgment and it's for you, the tribunal, to make up your own minds  
21 about that. But we say, at least to anchor that discussion, why not take a look  
22 at how the European Commission and other regulators who have to answer  
23 exactly the same question, where on the zero to 30 per cent scale to put  
24 RPM, what do they do? We say, after all, that the Commission is the peak  
25 enforcer of the very same prohibition that the tribunal is applying today.

26 As you will have seen from the materials, the European Commission has five recent

1 RPM decisions that cover a range of different industries. In every single case,  
2 it was a 7 per cent penalty, except for one which was Pioneer, where it was  
3 8 per cent but that one had to cover other forms of infringing behaviour as  
4 well. I am not going to spend time turning them up because they just say the  
5 answer is 7 per cent because RPM is less restrictive and serious than  
6 horizontal agreements and that's a characteristic European Commission  
7 shorthand for all of the sort of points I have been making, including by  
8 reference to what the European Commission itself has said, in the guidance  
9 that I showed you yesterday.

10 So that's what's it's about, that's why they reached the conclusion they do on  
11 seriousness.

12 I want to be clear here about what I am and am not saying about the Commission's  
13 decisions because they seem to have produced a bit of an allergic reaction  
14 from my learned friends. I am not saying that the Commission's approach is  
15 binding on either the CMA or on the tribunal. What I am saying is this: in light  
16 of everything else I have said to you about how RPM compares to the other  
17 forms of conduct we need to fit into the zero to 30 per cent scale, the  
18 Commission also needs to fit into its zero to 30 per cent scale. These  
19 decisions by the peak enforcer of Article 101 in the union are instructive as to  
20 what the right approach is and I would just add this: that they really can't both  
21 be right. It's not like one of them is saying the answer is 16 and the other is  
22 saying 18. The gap between 7 out of 30 and 19 out of 30 is so large that it  
23 really can't be bridged.

24 Now the CMA says these decisions, these finding decisions are not comparable and  
25 the main reason it says that is because they say the Commission does not  
26 take into account general deterrence when setting its starting point. The CMA

1 says instead of taking into account, general deterrence at that stage, the  
2 Commission deals with deterrence by adding something else which is called  
3 an additional amount or sometimes the entry fee, in the jargon, to the basic  
4 amount of the fine. And that's an amount, just so you understand it, that is  
5 calculated without reference to the duration of the infringement. You do the  
6 same thing the CMA does, percentage times turnover times duration, that's  
7 the basic amount and then on top of that, you add this additional amount  
8 which doesn't depend on duration and the CMA says it's only that additional  
9 amount that has anything to do with deterrence.

10 Now I am going to see how the CMA puts this in argument because I don't want to  
11 waste time on points that don't go anywhere but if they take you through the  
12 guidance in the authorities they've cited in their skeleton, I think what you'll  
13 see is deterrence, including general deterrence, as you might expect,  
14 underpins the entirety of the Commission's penalty setting process. And  
15 that's why we can short circuit this. The point goes absolutely nowhere in all  
16 five of the cases that I rely on. The only penalty that was imposed was the 7  
17 or 8 per cent starting point. There was no additional amount. No entry fee.  
18 So the Commission, and the CMA must accept this, the Commission was  
19 required, by its own guidance and by the authorities that the CMA has cited to  
20 this tribunal, to satisfy itself that the 7 per cent penalty imposed in those cases  
21 was appropriate for general deterrence. It had to do that. So it's absolutely  
22 fine for the CMA to tell you that the Commission was wrong or that the CMA  
23 takes a different view from the Commission about the seriousness of RPM.  
24 I accept that, happy to have that argument. I have been having that  
25 argument. What they can't sensibly dispute though, is that the Commission  
26 was answering the same question that this tribunal has to answer, which is

1 about the seriousness of and therefore the need to, deter RPM.

2 So drawing the threads together, we say that the right approach for RPM generally,  
3 other than in special circumstances, like where it comes in the context of  
4 a horizontal cartel, with one (inaudible) the other, other than in those cases,  
5 the right approach for RPM generally, is 7 per cent but in any event, we say it  
6 has to be a long way down from 19 per cent.

7 **THE CHAIRMAN:** What do you say to the point that the CMA makes, that RPM is  
8 a particularly serious problem in the UK economy?

9 **MR PICCININ:** So, yes, I think what they really mean by that, sir, is there is a lot of it  
10 about. This is the point I was trying to flag up yesterday. Their basis for  
11 saying there is a lot of it about is they get a lot of complaints and they write  
12 a lot of warning letters in response. Firstly, to say those aren't actually  
13 findings of RPM, they are complaints that are made and warning letters that  
14 are sent. If you look at the decisional practice of the CMA, they have some  
15 decisions but they don't have 13 decisions, like the 13 horizontal decisions  
16 I showed you yesterday, so comparatively speaking, I am not sure they have  
17 really made out it's more serious than any other forms of conduct. But there's  
18 also a fundamental point, and I am going to show you this when I get to  
19 specific deterrence but the same can be said of general deterrence, that you  
20 can't separate general deterrence and deterrence from culpability and  
21 seriousness, they are actually two sides of the same coin. I will just give you  
22 this hypothetical example, just to illustrate my point. Suppose that there was  
23 some unique opportunity for a unique restriction of competition that arose  
24 from, say, I don't know, the government's unique approach to Covid PPE  
25 procurement this year and someone came up with an opportunistic, unique,  
26 brilliant way to rig that procurement process that was an infringement of

1 Article 101 and was very serious, 28 per cent sort of seriousness. If I acted  
2 for that company and I turned up at the CMA and I said look, this was  
3 a one-off, could never happen again, it's never happened before, then surely  
4 you don't need to worry about deterrence. I accept it was serious but can  
5 I have a lower penalty? They'd say: no, that's wrong in principle and the  
6 reason they would be right to say that is because the reason we penalise  
7 serious conduct is to deter undertakings from engaging in similarly serious  
8 conduct, whether it's the same type of conduct or not. And that's why the  
9 actual prevalence of it or how common it is, does not really bear on the  
10 question much. It's an illustration of why a general deterrence is important  
11 and that's why it's there and in the decision -- and I don't criticise them for  
12 referring to it at all -- but if you are with me on seriousness, in terms of how  
13 harmful it is, then ultimately, we say you can't reach a higher figure.

14 But I will show you -- I'll come back to that when we get to specific deterrence  
15 because it's really a related point. Before we move on, I just want to say  
16 a word about Ping as well. I don't think we need to turn it up. The facts of  
17 that -- you weren't involved, like me -- the facts were the infringement was  
18 a total ban on online selling of golf clubs across an entire distribution network  
19 and the purpose was, as here, to enhance interbrand competition. You can  
20 remember I pointed you to what Justice Kennedy said about that from Leegin  
21 yesterday which is that all vertical restraints are actually about the same thing,  
22 which is restricting intrabrand competition to promote interbrand competition.  
23 In Ping specifically, it was about encouraging custom fittings of their golf clubs  
24 but that's just one particular way of promoting the product in question. The  
25 penalty in that case was a 12 per cent starting point.

26 Now that's just one data point. We say it's another useful one that goes into the mix

1 you consider. We say that the restriction in that case was actually more  
2 pervasive than this one because it was a total ban on online selling right  
3 across the network rather than just restriction on the price at which the things  
4 could be sold online. We say it makes sense to treat online RPM generally  
5 less severely than that, less severely than 12 per cent. I don't want to make  
6 too much of it, it's just one data point, so I accept it goes -- a bit less useful,  
7 perhaps, than the whole suite of the 16 to 23 club that I took you to earlier.

8 So that's the end of my first point on ground one.

9 My second point is a specific one about market coverage. The point here is really  
10 simple. The CMA's guidance accepts "the market coverage of an  
11 infringement is relevant to the penalty." For your note, it's paragraph 2.8 of  
12 the penalties guidance, third bullet. That's for an obvious reason. If the  
13 infringement covers a larger part of the market, you would expect it to have  
14 a bigger effect than if it covers a small part of the market. I want to stress that  
15 that is true, even if, as will usually be the case, the infringement had wider  
16 knock-on consequences. It's often the case that an infringement that affects  
17 one group of competitors in the market, will have an impact on the other  
18 competitors in the market and the behaviour of those other competitors.  
19 That's what the competitive process is. For instance, if you have a cartel in  
20 which half of the market is involved, then that will tend to affect the pricing of  
21 the other competitors because they are now facing less competition in the  
22 market.

23 But it's obviously true that those effects will be larger, you would expect, if the cartel  
24 covered the whole of the market. The same is true of RPM. Of course, if you  
25 stop one reseller from discounting, that may have an effect on the others  
26 because they no longer have to worry about that one reseller discounting.



1 That's kind of the point. But the CMA didn't and could not have sensibly found  
2 that that effect was likely to be very large in this case, if it was only looking at  
3 the effect of one RPM agreement in relation to a tiny slither of the network.  
4 Especially so when there is such competition from other brands as well. So,  
5 again, you would expect that RPM imposed by a brand that has a high market  
6 share would have more impact on the market than if it had a lower market  
7 share and faced more competition.

8 At the very least, it must be right that the effect would be larger if the RPM covered  
9 more of the market.

10 Now the CMA seems to accept that last point as a matter of principle but I really  
11 want to nail this down because it's important. And so there are three sources  
12 that I want to run through that all point in that direction and I want to go  
13 through them methodically to triangulate. The first source is this: you can  
14 remember from yesterday that when I was dealing with the CMA's  
15 submissions on the 16 to 23 club, I explained that quite a lot of the points the  
16 CMA had made about why those cases were 16 to 23 instead of, say, 28 to  
17 30, were points about market coverage. But, in fact, they were much weaker  
18 points about market coverage than the points I have today because every  
19 single one of those cases involved more than one brand manufacturer. Some  
20 of them had customer limitations but I don't think any of them were limited to  
21 just one customer, like reseller one, for those multiple brands. So the CMA  
22 seems to accept that weaker points than the one I am making can explain  
23 how you get -- perhaps along with some other points -- explain how you get  
24 down from 28 to 30, all the way down to 16 to 23.

25 That's source number 1.

26 Source number 2 is the CMA's decision in Fender. Now Fender was a case a lot like

1 this one because it was another online RPM case in the music industry; it's  
2 guitars. What we see in Fender is that the CMA actually gave a discount for  
3 this reason, at step four of the process. If I can just show you that. It's in  
4 authorities bundle F3.3, tab 50. It's paragraph 5.47 which I think is at  
5 page 5618. I feel slightly embarrassed about those page numbers every time.

6 What the CMA says there is that:

7 "The penalty for the infringement after step three is [something]. The CMA considers  
8 this figure should be reduced, in order to be proportionate. In reaching this  
9 view, the CMA has had regard, in particular, to the following factors. The first  
10 factor is Fender's size and financial position. The second factor is the nature  
11 of the infringement. The CMA's finding relates to an agreement between  
12 Fender and one reseller."

13 There is a footnote there, you can see, very similar to what you saw in our case:

14 "As a result, the turnover directly affected by it was lower than the relevant turnover."

15 That relevant turnover, I am sure you picked up, is the turnover to which the starting  
16 point is applied.

17 So you can see that one of the reasons for the discount which must have contributed  
18 to it, otherwise why was it mentioned, was this very point I am making today  
19 and there's no similar discount that's given in our case.

20 Finally though and perhaps even more importantly, the CMA has eventually been  
21 driven to conceding the point of principle I am making to you here, in this very  
22 case as well. I want to show you that in the skeleton argument. It's A2, tab 3,  
23 and it's page 2915, paragraph 49.

24 What they say there is that if, as Roland suggests, the CMA had found Roland had  
25 implemented RPM in respect of multiple resellers, as in more than one, and/or  
26 in relation to in-store drum sales, not just online, that would have rendered the

1 infringement more serious and warranted a higher starting point than  
2 19 per cent. So they accept the point it makes a difference, though they are  
3 saying 19 per cent is what you get for the tiniest, tiny, tiny, tiny of RPM, that's  
4 the minimum. Then if you do anything more than that, then you get a bigger  
5 penalty.

6 So my question is: how big? If the CMA had found network-wide RPM, would the  
7 penalty have gone up to, what, 25 per cent? 28 per cent? What if it had been  
8 network-wide RPM by a manufacturer that had a 60 per cent market share  
9 instead of less than 15 per cent, what then? Would it have been a 30 per cent  
10 penalty? Surely even the CMA can see that that would be absurd.

11 If they aren't willing to go there, then their answer has to be this. It has to be that  
12 moving from -- I will try and take this slowly -- moving from RPM that's applied  
13 to less than 10 per cent of a manufacturer's network, where that manufacturer  
14 has a market share of less than 15 per cent, that's our case, moving from that  
15 to RPM applied to 100 per cent of the sales of a manufacturer who holds  
16 a dominant position, like 60 per cent say, that has to be worth only one or two  
17 percentage points. If it's not going to accept what I said before, about really  
18 getting up into the top end of this range, then that has to be their case. But in  
19 light of what I have said about market coverage and what it means and what  
20 they've done in the horizontal cases, that just doesn't make any sense either.  
21 What are you to do with all this? It's not easy to put a number on it. It's  
22 a judgment call. It's another evaluative one. It's for you to make, tribunal.  
23 We say that a 50 per cent reduction is the least you should apply for this issue  
24 because we really are talking about the very tiniest of tiny slithers of RPM in  
25 this case.

26 Again, I remind the tribunal that it's not like they picked one that was a maverick or

1 was the only one who ever discounted or anything like that. You can imagine  
2 circumstances in which this market coverage point might be weak or weaker,  
3 but this is a case where there's actually no reason to treat this tiny slither as  
4 being particularly significant.

5 So whatever the tribunal ultimately thinks the network RPM is worth, we say this  
6 RPM is worth no more than half of that.

7 That then takes me on to specific deterrence because what the CMA says is that  
8 even if I am right about seriousness, including about market coverage, it just  
9 so happens that the penalty that the CMA imposed on Roland is also the  
10 minimum penalty necessary to provide specific deterrence. We don't need to  
11 turn it up, but in their defence, I think it's paragraph 85, the sole pleaded basis  
12 for that submission was Roland's worldwide turnover was quite large. They  
13 don't compare the penalty to any other financial metrics and they don't  
14 actually make anything you could recognise as a submission, about why that  
15 penalty is the minimum necessary. Now to understand why that's not okay,  
16 then we need to go back to my old friend Kier which is in bundle F2 of the  
17 authorities, tab 15. This time we want to go to page 859.

18 **MR CUTTING:** Sorry, could you give the reference again, please?

19 **MR PICCININ:** Of course, I am sorry. It's F2, tab 15.

20 **MR CUTTING:** Thanks.

21 **MR PICCININ:** This is actually what the Kier decision is most famous for, not the  
22 points I was making about starting point yesterday.

23 Just picking it up from paragraph 45, you can see the tribunal says:

24 "In the decision, the OFT emphasised that deterrence is an important aspect of its  
25 fining policy and that it took two forms, vis-a-vis the parties to the  
26 infringement, specific deterrence, and vis-a-vis other undertakings who may

1 be considering engaging in peer-driven(?) activities, general deterrence.

2 "The OFT was concerned that in some cases where the infringing undertaking's  
3 turnover in the relevant market represented a low proportion of its total  
4 worldwide turnover, because the economic unit of which the infringing  
5 company formed a part may have significant activities in markets other than  
6 the relevant market, that the penalty reached after steps one and two would  
7 be small in relation to that total worldwide turnover. In order to ensure what it  
8 regarded as an appropriate deterrence, having regard to the overall size of  
9 the economic undertaking, in step three, where necessary, the OFT increased  
10 the penalty to a level equivalent to a specific proportion of the undertaking's  
11 total worldwide turnover in the last business year. The minimum deterrence  
12 threshold, as its name applies, represents the OFT's view of the minimum  
13 figure needed to deter the undertaking concerned, and other similar sized  
14 undertakings, from engaging in unlawful behaviour of this kind."

15 And just note there again, that this is talking about both general and specific  
16 deterrence and what the tribunal goes on to say about it is likewise. But to  
17 pick that up, we go to paragraph 170 which is on page 903. What the tribunal  
18 says here is:

19 "We agree with the present appellants, that in relying, to the extent that it has, on the  
20 product of the MDT mechanism, the OFT has used worldwide turnover as the  
21 sole indication of the size and financial position of a company and has largely  
22 left out of account, other financial measures and indicators of the deterrent  
23 impact its penalties would have on the infringers and other companies.  
24 Turnover is, of course, an indication of the size and financial status of the  
25 commercial entity. It is not the only one and it too can be subject to distortion,  
26 as asserted by some of the present appellants, whose reported turnover was

1           said to include invoiced amounts ... "

2 Paragraph 174 is where I want to go next. You can see the point made here is you

3           can't just look at turnover. Paragraph 174, the tribunal goes on. It says:

4 "Next we turn to the contention [and this is sort of what I was getting at earlier,  
5           Mr Chairman, about the link between seriousness and deterrence] that there  
6           must be a link between culpability and the deterrent element in the penalty  
7           and that the ...(Reading to the words).. It's a cardinal principle that the ultimate  
8           penalty imposed must satisfy the requirements of proportionality. While  
9           deterrence is a relevant consideration when assessing proportionality in this  
10          context, so equally, is the culpability of the offender or seriousness of the  
11          offence. If these two considerations pull in different directions, a fair balance  
12          should be sought. Where a provisional penalty ...(Reading to the words)...  
13          insufficient for the purpose of deterrence, it is proper to increase it. But the  
14          culpability consideration must not be lost to view and it may well impose some  
15          limit on the extent of any increase, based purely on deterrence. Ultimately,  
16          the question will be, is the final penalty reasonable and proportionate, having  
17          regard to the twin objectives set out in paragraph 1.4 of the guidance. We are  
18          not aware that any of the above is controversial."

19 If I just ask you to read on down to -- actually, it's only one more paragraph:

20 "The MDT has the effect of changing the basis of assessing the penalty from  
21          a relevant turnover [which is here, Roland (UK)'s turnover] to total worldwide  
22          turnover. Wherever the MDT was applicable, it rendered the provisional  
23          assessment of seriousness considerably less relevant."

24 And then the tribunal goes on to illustrate that.

25 I think that's all we need from that passage. The point is here, that you can't elevate  
26          deterrence above everything else and treat it as though it was somehow

1       separable from seriousness and culpability. Again, I say that's true, both for  
2       general and specific deterrence. You have to look at these things but you  
3       can't throw everything else out.

4       Against that background, we say that the CMA's defence on this falls woefully short.

5       They have just done exactly the thing the tribunal told them not to do in Kier.  
6       Now we have pointed this out in our reply and I would like to make my  
7       submissions on this by reference to that, if I may. It's A2, tab 9, paragraph 38,  
8       which is page 319. The first point is the one I am making at paragraph 38.  
9       I can understand why the analysis we are talking about here was not set out  
10      in the decision and the CMA actually explains that in their skeleton argument.  
11      It was not relevant but if they wanted to make this argument and conduct this  
12      sort of specific deterrence analysis, they needed to put their case in the  
13      defence, but what they pleaded in their defence was completely hopeless.  
14      We don't stop there, we go on at paragraph 39 because we accept the  
15      tribunal is entitled to take its own view of this, as part of its determination of  
16      ground one and if the tribunal wants to do that, what we have given you here  
17      is a range of metrics, together with actual submissions on them and how they  
18      relate to deterrence. I just want to take you through the highlights.

19     Point A, you can see we say the penalty we propose would actually wipe out 3 years'  
20     worth of Roland (UK)'s profit before tax and that's across all of its product  
21     lines, not just drums. The accounts, if you are interested in following that up,  
22     are at bundle C1, tabs 41 to 43.

23     We say that for misconduct in just one product line, to wipe out 3 years of profits  
24     across all product lines, plus all the costs and the distraction of the  
25     investigation, that's a very serious matter. It's just unreal to suggest that  
26     Roland would regard that as something to be treated lightly.

1 Point B, we then turn to Roland Corporation and we look at Roland Corporation's  
2 global profits across all geographies and all product lines and we show how  
3 much of that would be wiped out by the penalty we are talking about here.  
4 Again, we say that those are the sorts of numbers that would be taken  
5 seriously on a company board.

6 Also, just note what we say at paragraph C, if I could just ask you to read that.

7 **(Pause)** We say that's important too. If you are talking about specific  
8 deterrence, you are talking about Roland, Roland is a company that takes its  
9 compliance obligations very seriously and it has brought an end to this. It  
10 tried to bring an end to this before the CMA even got to it and didn't quite  
11 succeed in doing enough but the CMA accepts that Roland has taken  
12 significant steps on compliance since the decision. And so it's just not right to  
13 say that you need some big penalty now, to make Roland not do this again:  
14 they understand.

15 Finally, we have point D, a really important point which puts CMA's defence in a very  
16 unfavourable light. Because even if you are just interested in worldwide  
17 turnover which is the only thing the CMA relied on in its defence, the CMA  
18 actually has quite a few decisions, including one recent one for RPM, where  
19 the percentage of global turnover was lower than the fine that we, Roland, are  
20 proposing in this case, and that just show how hopeless this point is. The  
21 CMA says the penalty we propose is too low as a share of turnover to deter  
22 Roland but the CMA itself has recently formed the view that an even lower  
23 share of turnover is not too low, it's perfectly appropriate for exactly the same  
24 from of conduct.

25 We invite the tribunal to bear that in mind, not just on this point of specific deterrence  
26 but when assessing the whole thing in the round. Because given the points



1 that I have been making to you on my ground one in general, you might have  
2 expected an appellant in the position of Roland to come to this tribunal with  
3 a bit of a gambit, like you'd approach a negotiation, with a low ball offer,  
4 saying you should wipe out, essentially, all of the penalty. I have shown you  
5 that market coverage is like less than half a per cent, it's nothing. So I might  
6 have suggested that there should be only a tiny penalty imposed, in the hope  
7 that the tribunal would split the difference and up somewhere reasonable.  
8 That's not what we have done here. We have had a good hard look at it,  
9 a really proper think about it and we've taken a conservative approach. We've  
10 recognised that there was wrongdoing here and that it's serious wrongdoing.  
11 As the tribunal said in Kier, it's always serious wrongdoing and that deserves  
12 a serious penalty. That's what we've proposed and it's actually in line with, on  
13 some of these metrics, what the CMA itself has done in other cases.

14 Let's just see what they say about this in their skeleton argument. We can pick that  
15 up -- it's going back to tab 3, paragraph 53. Somewhat incredibly, if you just  
16 go on, page 209.17, the second last sentence before you get to the list of  
17 metrics, somewhat incredibly, they tell us they actually agree with us that  
18 global turnover is not the only metric. But if that's right, why was it the only  
19 metric they relied on in the defence? But, in any event, what they do here in  
20 the skeleton is also inadequate, we say. It's just a bunch of numbers, entirely  
21 orphaned from any context of analysis. Which ones are important? Why are  
22 they important? How do they compare with other cases? There is just no  
23 engagement here with any of the arguments we've pleaded, quite properly, in  
24 our reply.

25 That's what I have to say about ground one. Where it takes you to is a penalty that  
26 is about a sixth of the penalty that the CMA is talking about there, before we

1 get on to leniency.

2 That takes it into ground 2, which is leniency.

3 **THE CHAIRMAN:** Before you move on, Mr Piccinin, I wanted to ask a question  
4 about one of the proffers. So it may be appropriate, I don't know, do you want  
5 to look at it? It's in tab 36, bundle B3.

6 **MR PICCININ:** Yes.

7 **THE CHAIRMAN:** I wanted to ask a question about paragraph 2.5. That's at  
8 page 710.

9 **MR PICCININ:** Yes.

10 **THE CHAIRMAN:** Perhaps for present purposes, without the need to go into closed  
11 session, I could ask you as a general point, is it relevant to take that into  
12 account for proposal made by Roland in assessing the appropriateness of the  
13 19 per cent starting point?

14 **MR PICCININ:** Sir, my answer to that is it's not actually relevant but in any event, if  
15 you read it carefully and I know the CMA has referred to this as well, but if  
16 I could just point to the second sentence of that paragraph and the words at  
17 the lower end of the range, that's lower end of the zero to 30 range, Roland  
18 was not asking the CMA to impose a penalty of 18 to 19 per cent in this case,  
19 for the reasons that it gave in the whole of this document, including the next  
20 paragraph, it was asking it to do less than that. You can also see the  
21 submissions over the previous page, 2.3A.

22 **THE CHAIRMAN:** All right. But more specifically, what about the point about  
23 consistency that's made in 2.5 and the fact that there are other RPM decisions  
24 where a starting point of 18 to 19 per cent was used?

25 **MR PICCININ:** Sir, yes, that's a fair point and I have to accept that the submissions  
26 that Roland made to the CMA are not the same submissions that Roland is

1 making to you now. But that's the way the process works under the  
2 Competition Act. There's no limitation. There are rules in the CAT's guidance  
3 and rules that limit the evidence that you can put forward, so I can't go and put  
4 forward fresh evidence unless there is a good reason why I did not put it  
5 before the CMA, but there's no restriction at all on the arguments that we are  
6 entitled to make and we are entitled to have the tribunal reach its  
7 determination based on the arguments that I have put forward to you today  
8 and yesterday, and I don't actually understand the CMA to dispute that at all.  
9 There's no estoppel. There's nothing like that. So we just are where we are.

10 I would also say, sir, it does not make any difference because the CMA have seen  
11 my arguments and they don't like them, they don't agree, so even if Roland  
12 had instructed me to do this process and I had made these submissions, we'd  
13 still end up in the same place. So that's just where we are.

14 **THE CHAIRMAN:** Okay.

15 **MR PICCININ:** I am grateful for you raising the question actually, because I had  
16 wanted to mention that. I think the CMA has misread paragraph 2.5 in their  
17 skeleton.

18 Moving on to ground 2. Sir, it's common ground that my client qualified for type B  
19 leniency in this case. It did not qualify for type A leniency immunity because it  
20 came forward after the investigation had already begun but it qualified for type  
21 B because Roland was first in after the investigation started and it provided  
22 material that was of significant value to the CMA. The dispute is about the  
23 level of the discount. I just want to start by showing you the guidance on that  
24 topic which is at bundle F5, and it's tab 68 and it's quite a long way into tab 68  
25 when you get there. It's page 7230. It's paragraph 6.8 on 7230.

26 **THE CHAIRMAN:** Right.

1 **MR PICCININ:** So what the CMA tells us here is that the key criterion, this is  
2 common ground, is the overall added value of the material that's provided.  
3 The CMA also tells us how you assess that and it says it's generally a function  
4 of three things. Firstly, the stage at which you come forward; secondly,  
5 there's the evidence already in possession by the CMA; and thirdly, there's  
6 the probative value of the evidence that's put forward. They also say at the  
7 end, in the final sentence, they will take into account the overall level of  
8 cooperation.

9 Then at paragraph 6.9, perhaps we don't need to read it out but there are really two  
10 points made there. In relation to type B leniency, what they say is you can get  
11 up to 100 per cent but it's not likely to be close to 100 per cent because then  
12 they would have just given you immunity. You can see here as well that for  
13 type C applications, and type C applicants are not even first in, so they come  
14 in second or third, they say you can generally expect to achieve discounts in  
15 the range of 25 to 50 per cent. That's what you could generally expect,  
16 although of course, it's possible you could get less than that. I just want to  
17 step back for a moment and just take a look at the facts of our case. We  
18 came in first. We came in the day after the investigation started, while the  
19 raid was still in progress. We came in with witness interviews that took place  
20 the very next day. It just doesn't get any quicker than that. Any quicker, and  
21 you are in type A guaranteed immunity territory. Something must have gone  
22 pretty badly wrong for us to get a 20 per cent discount that's less than what  
23 a bog standard type C applicant can expect to get. We are not a type C  
24 applicant, we are type B, so all else equal, we'd normally expect to get more  
25 than that. I accept it's only all else equal.

26 What happened here? What went so catastrophically wrong? I would like to take

1 Ms Pope's witness statement which is A2, tab 8 and it's page 297. You can  
2 see there is a heading here -- sorry, you are getting there. The heading says  
3 "Evidence already in the CMA's possession and probative value." Ms Pope is  
4 quite fair to us here. She says at paragraph 40, she recognises we submitted  
5 a substantial volume of material and that that's including in relation to the  
6 second period which is the period we are interested in. You can see at  
7 paragraph 41, she says that not much of the documentary material was  
8 additional and that's because it came after the dawn raid, during the dawn raid  
9 anyway. But the point about that is that's almost always true. It's inherent in it  
10 being a type B application because a type B application happens after the  
11 investigation starts.

12 Then we've got paragraph 42 which is the more serious point and I think what this is  
13 really about. She says that the evidence we submitted was of limited  
14 probative value, documentary evidence was fragmentary and ambiguous and  
15 that's important because Ms Pope says that it required clear witness  
16 testimony to fill the gaps and she explains that's actually what you would  
17 expect in an RPM case. Again, so far, so normal. This is where we get to the  
18 problem. She says Roland didn't help much. Our evidence was actually  
19 unhelpful because it contradicted the documentary evidence and denied  
20 Roland's involvement in RPM.

21 Then she gives a couple of examples of our lack of helpfulness. There's one at  
22 paragraph 43 which is pretty minor. I can see what the CMA says about it but  
23 it's about one particular email that was more than 5 years old and there's no  
24 suggestion we gave evidence that was inconsistent with it. But the second  
25 one is at paragraph 44 and that's interesting and quite important. See what  
26 she says there, is that four of our employees stated in interview that the

1 documentary evidence could not be interpreted as evidencing that Roland  
2 threatened sanctions. In contrast, she says that reseller one's evidence was  
3 that it had a clear understanding that there was a threat of sanctions. I just  
4 want to remind you, this is why we looked at it yesterday, that what reseller  
5 one actually said was there were no express threats ever but that he  
6 understood that a threat was implied. Now that's still a threat but it's important  
7 you have that context in mind.

8 The point that Ms Pope is making here is obviously important. She carries it further  
9 in paragraph 48 of her statement. She says that -- she's right to say this --  
10 that "where the employees say something that's counter to the admission,  
11 Roland was expected to bring this to the CMA's attention and to address it." I  
12 absolutely accept that but it's important to note and I think this is common  
13 ground, that the mere fact that the witness has said something that was  
14 counter to the admission, can't be held against us. It's our job, and the CMA  
15 says this in their skeleton, to bring relevant evidence to the CMA, whether that  
16 evidence is inculpatory or exculpatory. What Ms Pope is saying is that if the  
17 evidence is too exculpatory so that it undermines the admission we have to  
18 come forward and correct it, and that's right.

19 Now there's a lot of detail here and I don't want to spend too much time on it. The  
20 CMA will say what it wants about it and I will come back to it. It seems to me  
21 the crux of it really comes at paragraph D, where what Ms Pope says is:

22 "After various bits of back and forth over the years, the CMA conducted some further  
23 interviews in January 2020."

24 And to see what that evidence was and what was wrong with it, we need to head  
25 over to Ms Pope's second witness statement which I hope you all have  
26 somewhere. Because what Ms Pope says in her second witness statement is

1 that she's actually realised that the interviews she was quoting from in her first  
2 witness statement are the wrong interviews, that they were from a couple of  
3 years earlier in the investigation. So if you have her second witness  
4 statement in front of you which I think is in the next tab, it's paragraph 3.

5 **THE CHAIRMAN:** I am not sure I know where it is actually.

6 **MR PICCININ:** I am sorry, I am hoping someone on WhatsApp will help me. I have  
7 mine loose.

8 **MS WEETMAN:** I have mine in a separate bundle.

9 **MS DEMETRIOU:** Sorry, I think it's tab 8A, if that helps.

10 **THE CHAIRMAN:** Yes, thanks. Thanks very much.

11 **MR PICCININ:** It's paragraph 3. You can see she sets out there what she actually  
12 meant to refer to which is fine and it's an interview that took place on  
13 13 January 2020. The actual quotes are highlighted confidential so I won't  
14 read them out but I would just ask you to read them briefly.

15 **(Pause)**

16 I just want to highlight in particular, the last two lines of B. Because I think when you  
17 look at that, you will see it's not an absolute denial of the point that was being  
18 discussed, it's saying you can see from the documents that some people  
19 seem to have done this sometimes, the thing we are discussing.

20 If we can just go back now to what Ms Pope says about that in paragraph D of her  
21 first statement, tab 8 of the first bundle, A2, and if I could just ask you to read  
22 down to the end of paragraph D. **(Pause)**

23 What you can see there is just two weeks after the interview we've just seen, after  
24 prompting, I have to accept, we provided the ten page document I told you  
25 about when I was showing you this bit of the decision yesterday. Again, just  
26 for your note, it's B2, 27 and the whole point of that ten page document was to

1 unpick the evidence from these interviews, to explain why Roland's admission  
2 of RPM was still correct and the CMA relied on that in its decision and you  
3 can see why the CMA wanted to rely on it in its decision because without that  
4 ten page document, all the CMA had were the documents Ms Pope has just  
5 told you were ambiguous and a statement from reseller one, saying -- or from  
6 a person at reseller one, saying what he thought the documents implied. So  
7 the decision is, at the very least, much stronger, if it has as well, an  
8 explanation from Roland, confirming it did engage in RPM and it's not just  
9 a bland admission either, it's an actual explanation and as I've said, the  
10 decision reflects that.

11 We can see what Ms Pope says at paragraph 49. She says that:

12 "Roland's provision of contradictory evidence made it more difficult for the CMA to  
13 prove its case and created more work for the case team."

14 At a human level, I can see what she means and we've all been there, I can feel the  
15 case team's pain. Compared with a case where the infringement and the  
16 evidence were clear-cut and easy, this case was more work for the CMA. But  
17 that's looking at the wrong counter-factual. As Ms Pope admits, she was  
18 always going to need witness evidence to fill in the gaps. Realistically, the  
19 case team was always going to have to ask Roland's witnesses what they  
20 thought the documents meant or how those gaps could be filled. Even if  
21 Roland had not been a leniency applicant, those same interviews would have  
22 taken place. So the case team is always going to have do this extra work, this  
23 is just a messier and harder case than some of other ones the CMA has had  
24 to do but that's just what the evidence was, it's not my client's fault.

25 The key difference that Roland's leniency application made was that time and again,  
26 the CMA could ask Roland to undermine its own witnesses' evidence and time



1 and again, Roland did so. It's just unreal to suggest Roland's ten page  
2 January 2020 proffer was not a huge help to the CMA's case. If anything, it's  
3 more important and more valuable, in a case where the truth and the  
4 evidence are messier.

5 Before we leave Ms Pope's statement, there's also paragraph 50 and I don't want to  
6 ignore it. There are two instances here where it's said we failed to provide  
7 something and they needed to ask. If I can just give you the reference to our  
8 answer to this point. It's paragraph 48 of our reply, where we go through each  
9 one. A2, tab 9, 323, and we say these are really trivial points. If the CMA  
10 wants to make something of them, I can address it in reply.

11 So where does that leave us? The only real criticism that the CMA can make of  
12 Roland is that they had to chase us a few times rather than Roland realising  
13 the problem and fixing it proactively. I accept that's a fair criticism they are  
14 entitled to make but how much is it worth? Now as you will have seen by  
15 now, I like to answer those sorts of imponderable questions by making them  
16 a bit more concrete by picking up benchmarks from where other people have  
17 done the wrong thing and look at how they have been treated. The best  
18 possible benchmark I've been able to find is the Fender case which as I've  
19 said, was another RPM case, another leniency application, with a 60 per cent  
20 discount this time.

21 Now that one was submitted much later than ours, so Fender left the CMA to stew in  
22 the morass of evidence gathered in the raid and in long(?) leniency interviews,  
23 for three months after the investigation began. What's worse than that?  
24 During a dawn raid, a senior officer of Fender Europe deliberately concealed  
25 notebooks and misled the CMA about them and they weren't just any  
26 notebooks, they were notebooks that were relevant to the investigation, to the

1 finding of an infringement. I don't think we need turn it up, I think we've all  
2 seen it. You can read all the gory detail in the decision at F3.2, tab 45.  
3 Honestly, it's the most appalling dawn raid story ever encountered. It's the  
4 stuff of competition lawyer nightmares. So that level of cooperation gets  
5 a 60 per cent discount, while my clients get 20 per cent. We say that's just  
6 not right. Now the CMA's response is that: look, it's fine because Fender was  
7 separately penalised for that deliberate breach. Okay, so what was the  
8 penalty? The penalty was £25,000. I have not missed any zeros there.  
9 Fender has to pay £25,000 and it then gets 40 percentage points of additional  
10 leniency discount. The CMA doesn't even attempt to explain how that can be  
11 fair in their skeleton argument and that's because there is no explanation. We  
12 say Fender's 60 per cent discount is a perfectly reasonable benchmark for our  
13 case. So that's ground 2.

14 That takes me to the final issue which is the settlement discount and I don't want to  
15 say too much about this because there is a real risk of over-complicating  
16 what's actually quite a simple point. I do want to just set the scene though,  
17 because I can accept, if you are not someone who's steeped in competition  
18 law procedure, you might actually think this whole appeal is a bit odd. Sir,  
19 Mr Chairman, I have in mind the points you were putting to me not long ago.  
20 You might say we agreed a leniency discount with the CMA. You might say  
21 we agreed to pay the penalty and we got a settlement discount for that and  
22 yet here we are, now you have me, telling you we want a lower penalty and  
23 we want to keep the discount too. It might sound a bit like wanting to have  
24 our cake and eat it and there is a bit of a flavour in that, in some of the  
25 arguments you can see the CMA is making. Never quite reaches the level of  
26 an actual argument though.

1 But although it's called a settlement, I want to make clear it's not like a settlement of  
2 a commercial dispute. Where you have a commercial dispute and you have  
3 a negotiation and you agree on what the outcome is, it's then settled for all  
4 time, you can't appeal the settlement. It's agreed. What's happening here is  
5 something completely different. The settlement process is a procedural  
6 device, the purpose of which is to shorten the process and save costs for both  
7 sides. There is always a right of appeal and the CMA does not dispute that.  
8 As I have said before, the CMA does not say we are estopped from making  
9 any of the points we are making here and they're right to accept that.

10 What the settlement agreement says though, is that if we exercise that right of  
11 appeal, the CMA can apply to the tribunal to increase the penalty, to take  
12 away the settlement discount and in addition, the CMA can ask the tribunal to  
13 order costs in any event, so even if I win. We can see that, just to turn it up,  
14 at bundle B3, tab 39, and page 788.

15 I just note while you are getting that up (inaudible) quite clearly about why this  
16 document was confidential yesterday. You may have seen we've now  
17 provided a redacted version. If you are interested in why the bit's still  
18 highlighted --

19 **MR CUTTING:** Sorry, can you give me reference again?

20 **MR PICCININ:** I am very sorry, B3, tab 39. The page is 788.

21 If you are interested in why this is still redacted at all, it's because settlement  
22 submissions are treated as highly confidential under schedule 8A of the  
23 Competition Act and some of this counts as a settlement submission but  
24 anyway. This bit of it, I think is not confidential.

25 The point I want to make about paragraph 30 is it does not say that Roland agrees  
26 that the CMA should make the application that's referred to there in every

1 case and it does not say that Roland agrees that if the CMA does make that  
2 application, that the tribunal should grant it. If making the application that the  
3 CMA has made is the thing the CMA might do and they are obviously entitled  
4 to do it. We say that what you should do -- again, as with everything in this  
5 appeal is really very simple. You should just step back, consider the  
6 application in all of the circumstances of the case and those circumstances  
7 include four things. Point one: is the fact that our settlement actually did  
8 enable the CMA to save time and cost in the administrative phase and those  
9 savings are still there, notwithstanding we've appealed and Ms Pope accepts  
10 that quite clearly at paragraph 65 of her statement. They have to be worth  
11 something.

12 The second point is that my appeal is extremely narrow in scope. We are not  
13 challenging liability. It goes further than that and some penalty appeals can  
14 run for days and days. We are not challenging any of the facts. It's quite  
15 a narrow appeal, even as far as penalty appeals go.

16 The third point is that if you agree the appeal was meritorious, that's if, then the fact  
17 that appealing was the only way of vindicating my client's rights, is another  
18 relevant factor.

19 The fourth point is kind of related to that one, it follows on from that. I would like to  
20 contemplate the counter-factual. What is it that the CMA would like us to  
21 have done? Because you have a real disagreement here on what the penalty  
22 is, so how should we have resolved that? The only alternative to settling was  
23 refusing to settle but refusing to settle would have been even worse for  
24 everyone. The CMA would have lost the benefit of a streamlined,  
25 administrative phase and would still have said the same thing because you  
26 know they disagree with me. Then we'd have still been here but probably this

1 time next year rather than today. So since the settlement actually did bring  
2 about benefits to the CMA, we say it's right that we should retain, at the very  
3 least, some of the corresponding discount.

4 So in addition to those points, we say that there is also a policy issue at stake. If  
5 there is to be an automatic withdrawal of the settlement discount, even where  
6 there is no cost basis for doing so, then the settlement process effectively  
7 shields the CMA from scrutiny. It becomes Hobson's choice. The CMA says  
8 it's voluntary, but it's Hobson's choice. It's just as voluntary as Hobson's  
9 customs. The CMA offers you a penalty that is quite a bit too high and then it  
10 offers you a settlement discount of 20 per cent which is going to be revoked if  
11 you appeal. What are you supposed to do? Do you take the cost and risk of  
12 litigation and then see a correction of the CMA's errors wiped out by the  
13 revocation of the settlement discount? The consequence of that approach is  
14 that the CMA sets penalties that are systematically too high, I don't say  
15 deliberately, it's just a thing that can happen, without there ever being an  
16 appeal to correct it.

17 Now it just so happens that the errors in this case are really egregious and clear-cut  
18 and so even with the sword of Damocles of this application swinging over my  
19 appeal, there was an obvious business case for this particular appeal. This  
20 penalty should be cut by 90 per cent, we say, and again, that's not gambitry,  
21 that's the result of our serious submissions on serious points. After you've  
22 done that the 20 per cent discount is not such a big deal, but in a more  
23 marginal case it's easy to see how this threat would dissuade a meritorious  
24 appeal and the CMA's errors would go uncorrected.

25 The final point I would just make about this is that in terms of cake having and cake  
26 eating, the CMA's double approach to this issue, which is to say: first, we'll

1 have the 20 per cent discount back, thank you very much, and then we'll also  
2 have the costs of the appeal in any event, that is really double dipping  
3 because if they are right that almost all of the benefit of the settlement was  
4 avoiding an appeal and so all of the cost of Roland now going back on the  
5 settlement is that they incur the costs of the appeal, if that's right, then I just  
6 don't understand what the basis is for saying they should get both their costs  
7 of the appeal and also revoke the 20 per cent settlement discount. It just  
8 does not seem right to me. That's why we say in this case, there's no need  
9 for any adjustment but in any event, certainly not the full 20 per cent.

10 Unless anyone tugs my virtual gown over WhatsApp or unless the tribunal has any  
11 further questions, those are my submissions.

12 **THE CHAIRMAN:** Thank you, Mr Piccinin. I don't know whether other members of  
13 the tribunal have any questions at this stage?

14 **MR PICCININ:** I have nothing from WhatsApp. I wonder then, we've finished a bit  
15 ahead of time, I wonder whether now might be good time for the break for the  
16 transcribers?

17 **THE CHAIRMAN:** Yes, let's have a 5 minute break then.

18 **(11.04 am)**

19 **(A short break)**

20 **(11.15 am)**

21  
22 **Submissions by MS DEMETRIOU**

23 **MS DEMETRIOU:** Sir, would you be happy for me to start?

24 **THE CHAIRMAN:** Yes, please.

25 **MS DEMETRIOU:** I am proposing to address the tribunal on ground one and also  
26 on the settlement discount issue which I will do in one go, if that's all right, and

1 Mr Bailey will then address the tribunal on leniency.

2 I would like to start by saying a few words about the issue of principle that  
3 Mr Piccinin addressed you on yesterday, so the proper approach of the  
4 tribunal to this appeal and to appeals like this. There is a good amount of  
5 common ground on this point, so it is common ground that this is not a judicial  
6 review and that it's a full merits appeal, of course. So it's common ground that  
7 the tribunal is not restricted to intervening on judicial review grounds. So an  
8 appellant does not have to show that the CMA's committed an error of law.

9 Now Mr Piccinin said it's very simple, the tribunal must hear the appellant's  
10 submissions and then the CMA's submissions and make up its own mind. Of  
11 course, that is true, so we don't demur from that as a general proposition but it  
12 does rather beg the question of how the tribunal is supposed to go about that  
13 in practice, in a case like this. We say that's an important question in a case  
14 like this because Roland's appeal in this case, specifically challenges the  
15 evaluative judgments made by the CMA on particular areas in which it, as the  
16 regulator, has expertise, namely the seriousness and the need for deterrence  
17 in relation to a particular type of competition infringement and also the  
18 application of its own leniency policy.

19 Now on the one hand, of course, the tribunal has the CMA's decision and the CMA's  
20 evidence in the form of the witness statement from Ms Pope, who explains,  
21 for example, why it is that the CMA has prioritised the enforcement of RPM in  
22 this country. On the other hand, the tribunal has the submissions, not  
23 evidence but submissions, of Roland and Roland is not, of course, an  
24 impartial observer in any of this, nor is it of course an expert, and it is certainly  
25 not appraised of the CMA's expertise in regulating and enforcing competition  
26 infringements.

1 So what that leads to, in my submission, is that the tribunal will need to think  
2 carefully about the weight it places on the CMA's assessment in this case and  
3 the CMA's evidence. Of course, it is possible, in principle, for the tribunal to  
4 reach a different view to that of the CMA on the issue of the proper starting  
5 point and Mr Piccinin showed you an example of that in the tribunal's Kier  
6 judgment. But in our submission, the correct approach is for the tribunal to  
7 attribute significant weight to the CMA's assessment on that issue in  
8 determining Roland's appeal and the way we put it in the skeleton, as you've  
9 seen, is to say the tribunal is not starting with a blank slate. The way that the  
10 tribunal, including the tribunal in other cases, including the tribunal in Ping,  
11 have expressed the same concept, is to say that in relation to certain matters,  
12 it will be inappropriate to intervene unless the CMA's decision was outside the  
13 margin of appreciation afforded to it. That's really another way, in my  
14 submission -- it's not importing JI(?) rationality, no, of course it's not, what it's  
15 doing is saying weight has to be placed on the CMA's assessment because  
16 it's an expert.

17 Could I just take you, please, to Ping, which is in authorities F2, tab 24 at page 1788.

18 Could I just ask Ms Weetman if that's volume 4 in hard copy? It's my  
19 volume 4 and if it is, I will give you the bundle numbers too, I don't want do  
20 that if we have different versions.

21 **MS WEETMAN:** I am okay, I have the tabs, it's just running round the bedroom to  
22 find them.

23 **MS DEMETRIOU:** Thank you. The paragraph I wanted to take you to is  
24 paragraph 241 on page 1788 and this relates to the starting point for the  
25 penalty calculation. The tribunal there says:

26 "We reject Ping's submissions on the starting point for the penalty calculation. We



1 note that the starting point adopted by the CMA was well below the midway  
2 point available to it. This decision was, in our view, well within the margin of  
3 appreciation afforded to the CMA. It's also clearly appropriate for the CMA to  
4 take into account the nature of an infringement and one aspect of its nature  
5 will be whether it's restriction by object or effect."

6 Which, again, is an aspect in the present case:

7 "Whether or not the infringement was less serious than that in Pierre Fabre is beside  
8 the point. The CMA did not and did not need to draw any comparison with  
9 Pierre Fabre."

10 Again, I draw an analogy here and it's a point I will come back to, with what  
11 Mr Piccinin says about the US Supreme Court and the European Commission  
12 and the French and Belgian competition authorities:

13 "More pertinently, the CMA did correctly take into account Ping's legitimate aim while  
14 setting the starting point. We see no error in the CMA's assessment of the  
15 impact of the internet policy on consumers and retailers. The CMA was also  
16 correct to consider deterrents on Ping and other golf manufacturers and other  
17 manufacturers and wholesalers in retail sectors more generally. Whilst  
18 objective justification and ...(Reading to the words)... having first satisfied  
19 themselves that they are able to justify their internet policies."

20 Now, of course, that finding was upheld by the Court of Appeal. Now can I take you  
21 also in a similar vein, please, to the Argos judgment. The Argos judgment is  
22 in F2, tab 10. I want to take you, please, to page 571. Paragraph 215.  
23 Again, this was upheld by the Court of Appeal. You see the tribunal in Argos  
24 at 215 on page 571, again looking at the starting percentage. Now  
25 10 per cent was the maximum under the guidance then in force:

26 "In our judgment, in the light of the above factors, the OFT was within its margin of

1 appreciation in deciding that a starting percentage of 10 per cent was  
2 appropriate."

3 Then you see at 216:

4 "It's true that in applying the guidance, the OFT needs to leave itself room for  
5 manoeuvre. For that reason, the maximum statutory penalty is only rarely  
6 applied. However, under the system envisaged by the guidance, the  
7 seriousness of a particular case can be further taken into account by the  
8 cumulative adjustments for duration, deterrence and for aggravating factors at  
9 step four."

10 So there's no objection to the OFT applying the maximum.

11 Now one further authority before -- I am going to take you to two further authorities.

12 The next is Eden Brown and then I will deal with the phenytoin case that my  
13 learned friend took you to. Eden Brown is in F2, tab 17. I want to take you,  
14 please, to page 1098. You see at paragraph 78 on that page, the tribunal is  
15 there saying that:

16 "The OFT is not bound by previous decisions but we accept there should be broad  
17 consistency in the OFT's approach."

18 Of course, we say that there is broad consistency in the CMA's approach here  
19 because you have seen the five decisions it's taken in the context of re-sale  
20 price maintenance in the musical instruments sector.

21 Then you see at 79 -- again, this is all in the same vein as the previous two  
22 judgments:

23 "Having regard to all the circumstances, we do not regard a seriousness factor of  
24 9 per cent as so out of line or inappropriate as to amount to a misapplication  
25 by the OFT of its guidance."

26 So what the tribunal is doing in those three cases, in my respectful submission, is not

1 somehow importing judicial review principles into this because the tribunal in  
2 these cases, also accepts it's a full merits appeal, but the tribunal will have to  
3 give weight to the evaluation conducted by the expert regulator. And so in  
4 considering, we say, on the one hand, Roland's submission about the  
5 seriousness of RPM and the CMA's evaluation as the expert regulator and  
6 deciding which is right, what these judgments are saying is that the tribunal  
7 can and should place weight on the CMA's evaluation.

8 I would like now to go to Phenytoin, which is at F2, tab 29. If you could turn, please,  
9 to page 2245. That may be a wrong reference. No, that's right, sorry.  
10 Mr Piccinin placed weight on the preceding section and he did point you to  
11 this section but took it rather more quickly. So it's the section I am looking at  
12 under the heading "The limits of an appellate jurisdiction", and I would like to  
13 just have a look at that in a bit more detail. At 141, this is the point that we put  
14 in the skeleton as being the sort of no blank slate, that the tribunal is not  
15 starting with a blank slate:

16 "Notwithstanding the above, the jurisdiction of the tribunal was not unfettered. This  
17 flows primarily from the fact that the appeal is not a de novo hearing that  
18 takes the decision as its starting, middle and end point. And so the focus  
19 upon the impugned decision is reflected in the procedural rules of the tribunal.  
20 The appellant has to identify the decision under appeal and set out why it is in  
21 error."

22 Then if you turn over the page, so then at 143, you have the point that the error has  
23 to be a material error, so if you look at the second sentence there, it's to  
24 look --

25 "The role of the tribunal is -- "

26 Let's take it from the beginning:

1 "In T-Mobile and OFCOM, it was observed that the task of the tribunal was not to  
2 serve as a fully equipped, duplicate regulatory body, waiting in the wings just  
3 for appeal. It is to look into whether the regulator has got something  
4 materially wrong."

5 So we say again, it's all consistent with the tribunal judgments I have just taken you  
6 to and three others, in Ping, Argos and Eden Brown.

7 Then over the page at 145, let's have a look at the types of error that the tribunal  
8 might consider material. So at 145, there's no fixed list of errors but:

9 "Case law indicates the following might be relevant. Failing to take account of  
10 relevant evidence, taking into account irrelevant evidence, failing properly to  
11 construe significant documents or evidence, drawing inferences of fact about  
12 relevant matters which are illogical or unjustified, failing adequately to  
13 investigate."

14 So that's what's meant by material error.

15 Then at 146, you have the point about:

16 "It is consistent with the merits appeal for the tribunal, even having heard the  
17 evidence, to conclude that the approach taken by the CMA are reasonable in  
18 all the circumstances and to refrain from interfering upon that basis."

19 Now of course, in Phenytoin, the question was very different to the question raised  
20 by the current appeal because Phenytoin was all about whether the CMA had  
21 erred in applying substantive competition law Article 102. But by contrast, in  
22 the present case, the question is whether the CMA has erred in applying its  
23 guidance, more specifically, particular parts of its guidance that require an  
24 expert evaluation and which require, for example, the CMA to evaluate the  
25 seriousness of a particular type of infringement and the need to deter it in the  
26 United Kingdom, the extent to which it should be prioritised and the degree to

1 which fines should be used as a tool to achieve general deterrence. Those  
2 are all questions that are very unlike how should Article 102 be applied to this  
3 set of facts? Because they are bound up with the regulator's expert task of  
4 enforcing competition law in this country.

5 So in those circumstances, more weight needs to be placed on the CMA's  
6 assessment by the tribunal in the present case than would be true of a case  
7 where what's being said is that the tribunal has misapplied the substantive  
8 competition rules.

9 That is why we say that Phenytoin is completely consistent, and I'll show you the  
10 paragraphs that are, with the three authorities I took you to earlier but those  
11 three authorities are more on point in terms of what they are looking at, so the  
12 type of decision that's under attack.

13 That's what I wanted to say about the approach of the tribunal. I will now turn to  
14 ground one and the CMA contends that it was entitled to find, it did not make  
15 any error in finding that 19 per cent starting point was appropriate for the RPM  
16 infringement committed by Roland in the circumstances of this case and also,  
17 we say that had the CMA chosen a lower starting point percentage, the  
18 penalty would not have constituted sufficient specific deterrence to Roland  
19 and the CMA would have had to have applied an uplift at step four. I will  
20 come on to that in more detail but you see the bottom line of Mr Piccinin's  
21 submissions is that he's inviting and urging the tribunal to substitute the  
22 penalty that has been imposed by the CMA, with a penalty of £400,000. We  
23 say that in the context where this is a multinational company, so  
24 Roland Corporation is a multinational company, that in the relevant year had  
25 a turnover of more than [...][&<, £400,000 is a drop in the ocean and would  
26 not constitute specific deterrence. As I say, I will come to that point.

1 The other point that I make in terms of at the outset is that Roland has not, of course,  
2 in this case, as it could have done, it's not argued that the fine imposed by the  
3 CMA is disproportionate and offends the principle of proportionality. So it's  
4 not advanced a ground of appeal on the basis of proportionality by reference  
5 to the financial standing of the company. It was completely right not to do that  
6 because it could not have hoped to have established that the penalty imposed  
7 is disproportionate in all the circumstances of this case. That's why, no doubt,  
8 it's focused its ammunition on these specific granular points about starting  
9 point and leniency. Now I would like to take you first, please, to the  
10 settlement guidance and that is behind tab 70 of the authorities. So it's F5,  
11 tab 70. At page 7302, you see the twin objectives of the CMA's policy on  
12 financial penalties. So that's paragraph 1.3:

13 "The twin objectives are to impose penalties on infringing undertakings which reflect  
14 the seriousness of the infringement and ... "

15 Over the page:

16 "... to ensure that the threat of penalties would deter both the infringing undertakings  
17 and other undertakings that may be considering anti-competitive activities  
18 from engaging in them."

19 Just pausing there, could I ask you also -- we are going to come back to this, so if  
20 you have it in hard copy, please don't put it away, but could I ask you also to  
21 pick up F1 behind tab 1 which is the statute, page 22. You see there that  
22 those twin objectives reflect a statutory duty and this is section 36,  
23 subsection 7A. You see that on page 22. So:

24 "In fixing a penalty under this section, the CMA must [and I emphasise 'must'] have  
25 regard to the seriousness of the infringement concerned and [again, I  
26 emphasise 'and'] the desirability of deterring both the undertaking on whom

1 the penalty is imposed and others, from entering into agreements which  
2 infringe competition law."

3 So that's the statutory duty on the CMA to have regard to both of those objectives.

4 The reason I am emphasising that is that in Roland's submission, my learned  
5 friend's submissions, he very much conflates and de-emphasises the  
6 deterrence aspect. So you note that when the question was put to him by the  
7 chairman, by you sir, he said: well it's all wrapped up together, general  
8 deterrence and seriousness have to be considered hand in hand. In doing  
9 that, what he's doing is brushing under the carpet, all of the very important  
10 evaluation that the CMA has taken into account, in terms of the prevalence of  
11 RPM in this country and, in particular, in the musical instrument sector and the  
12 need for the penalty to be sufficient to deter that activity.

13 So I am going to come back to that point in more detail but what we say is it's clear  
14 from the statute that those two points cannot be conflated. That would be  
15 inconsistent with the statutory scheme.

16 Now moving back, please, to the guidance. I am moving forward to paragraph 2.3,  
17 the step one starting point on page 7308. You see that the starting point is  
18 calculated having regard to the seriousness of the infringement and the need  
19 for general deterrence and the relevant turnover of the undertaking. Then  
20 what you see is it's a case specific assessment, so you see that from  
21 paragraph 2.5 and the guidance divides this into two stages. So there are two  
22 stages, as Mr Piccinin explained, to this part of step one. That's before you  
23 get to general deterrence.

24 The first is how likely it is for the type of infringement at issue, by its nature, to harm  
25 competition and the second, you then drill down into the specific relevant  
26 circumstances of the individual case. Then you have, thirdly, whether the

1 starting point is sufficient for the purpose of general deterrence. Now the  
2 reason I am emphasising those points is because Mr Piccinin's submissions  
3 placed a lot of emphasis on bullet two, a little bit of emphasis on bullet one but  
4 almost none on bullet three and so, actually, his submission on the first bullet,  
5 seriousness, were on analysis, really bound up with the individual  
6 circumstances of this case. So he made a few points about Leegin and a few  
7 economic submissions which related to the first submission but the weight of  
8 his argument was really focused on the single reseller point. But that's only  
9 part of the picture.

10 Now, then paragraph 2.6, you see there's no preset tariff, tariffs for the starting point  
11 and you then see over the page, "The CMA will have reference to the  
12 following principles", and you see the first bullet is the starting point between  
13 21 and 30 per cent for the most serious types of infringement, you've seen  
14 that in the decision, the CMA had regard to that and that "includes cartel  
15 activities, such as price fixing, market sharing and other non-cartel object  
16 infringements which are inherently likely to cause significant harm to  
17 competition."

18 Then you see at the second bullet point:

19 "A starting point between 10 and 20 per cent is more likely to be appropriate for  
20 certain less serious object infringements than for infringements by effect."

21 Then you see at 2.7:

22 "The above principles do not prevent the CMA from applying a starting point of below  
23 10 per cent. However, the CMA considers that this is likely to occur as  
24 a result of the CMA having made a downward adjustment to reflect the  
25 particular circumstances of the case, as described below."

26 Just pausing there, even in cases which are not object infringements and which are



1 infringements by effect, so a whole economic analysis has to be conducted,  
2 even to see in the first place, whether there's an infringement of competition  
3 law. The guidance says it's unlikely that the starting point will be below  
4 10 per cent and where it is below 10 per cent, that will be because of the  
5 particular circumstances of the case.

6 Of course, in this case, just to get some perspective, just to throw some perspective  
7 on what Roland is asking for, they are saying that the starting point should be  
8 3.5 per cent and we say that the tribunal would have to have a very good  
9 reason for disregarding this provision of the guidance.

10 Now you then see at 2.8, the second stage of this which is taking into account the  
11 particular circumstances of the case and you see that, of course, all relevant  
12 circumstances may be taken into account and so the bullets here, the five  
13 bullet points, are examples, as the guidance says. And in my learned friend's  
14 submissions, he focused almost entirely on market coverage, so that's  
15 a submission I am going to make at the outset, which is that the market  
16 coverage point, and he called it his market coverage point, so I don't think  
17 there's any dispute about that, that's what he focused on and we say that's  
18 only part of the picture, as the guidance makes clear. I will come on to  
19 explain the other factors which the CMA says it fed into its assessment and  
20 justified it in reaching the conclusion that 19 per cent was the appropriate  
21 starting point.

22 Then you see at paragraph 2.9 that "The CMA then will consider whether the starting  
23 point is sufficient for the purpose of general deterrence", and so that is an  
24 important point I am highlighting again. The CMA does not consider that  
25 Roland's approach of the 3.5 per cent starting point is sufficient to meet that  
26 objective. Both the decision and Ms Pope's evidence explain that RPM is

1 very prevalent in the United Kingdom and that's not an assertion that's  
2 plucked out of the air, that's based on the CMA's experience, as I will come to  
3 show you.

4 We say that it's wrong to conflate that issue, to sweep it under the carpet and say  
5 that doesn't really matter because deterrence is really the same thing as  
6 seriousness of infringement which is what Mr Piccinin is trying to persuade the  
7 tribunal to do. He said yesterday and he repeated today, just because -- the  
8 way he put it yesterday was that it's impermissible, it would be impermissible  
9 to take a very high starting point in respect of a very unserious, if I can put it  
10 that way, infringement, just because it's very common. That's the way he put  
11 it yesterday. The way he put it today was the converse. He said imagine  
12 there was an extremely exceptional one-off infringement relating to PPE,  
13 would it then be okay for an appellant to say: well general deterrence is not  
14 needed because this is not going to happen very often, so you should apply  
15 a very low starting point. And he said: well that's not right either.

16 But with respect, what he's done in each case is taken a very extreme example and,  
17 as a result, he's overstated his submission and conflated the two concepts  
18 because it is, of course, a matter of degree and expert evaluation and I accept  
19 that it might well be unlawful in any particular case for the CMA, say, to adopt  
20 a 30 per cent starting point in respect of a not very serious infringement of  
21 competition, just because it goes on a lot but that does not mean that the  
22 CMA is not entitled to take the need for general deterrence and prevalence  
23 into account.

24 Let's imagine that RPM were not prevalent at all, then the need for general  
25 deterrence would be less and the CMA might well adopt, might well be  
26 justified in adopting a lower starting point in that case. So in a sense, in

1 a nutshell, my submission is that Mr Piccinin takes an overly rigid black and  
2 white approach to this and in so doing, he has conflated the two limbs of the  
3 statutory duty and we say that that is the wrong approach and that it's  
4 necessary to give weight to the deterrence aspect. I am going to come back  
5 to that when looking at Ms Pope's witness statement.

6 Now just quickly going through the guidance, you see at step four -- can I take you,  
7 while we are on this document, to step four at page 7314. Now this relates to  
8 the adjustment for specific deterrence and proportionality. You can see that  
9 by referring to those two things in the same place. You see that at  
10 paragraph 2.20, that what the CMA is doing at this stage, it's really a stock  
11 take. It's saying: look at the financial size and condition of the undertaking. Is  
12 where we've got to at the end of step three, adequate to deter this undertaking  
13 from doing the same again or is it proportionate or disproportionate? So it's  
14 the same kind of stock take analysis. What the guidance doesn't say and  
15 what the CMA didn't do in this case, is apply the rigid minimum deterrence  
16 threshold that the OFT did in the construction decisions. So in those  
17 decisions, it adopted a particularly rigid approach and said that it had to come  
18 up with a minimum deterrence threshold and that's not what the guidance  
19 says and it's not what the CMA did in this case. So the CMA, in this case,  
20 looked at the penalty at the end of step three which is about £6 million and  
21 said: is this disproportionate, given the undertaking size? Answer: no. And is  
22 it sufficient to deter it? Answer: yes. And so that was adequate.

23 Then if we move on to step five, you see the statutory cap. Now I am pausing there  
24 because it's not in issue in this case because the reason it's not in issue is  
25 because it did not need to be applied because the penalty imposed by the  
26 CMA came well, well below the maximum statutory penalty it could have

1 imposed which would have been about [...][?<], based on 10 per cent of the  
2 relevant turnover of Roland.

3 Then you see at 2.29 and 2.30, the reductions for leniency and settlement. I am  
4 going to come back to separate guidance dealing with settlement when I deal  
5 with that part of the argument. But sticking with ground one for the moment  
6 and moving away from the guidance and just recapping Roland's argument.  
7 So it says that the seriousness starting point should be 3.5 per cent rather  
8 than 19 per cent and it's two arguments are, first of all, the starting point for  
9 RPM in general, should be 7 per cent and, second, that this should be  
10 reduced further to 3.5 per cent to reflect the fact that the CMA established an  
11 infringement in respect of one reseller, so that's the market coverage point.

12 Essentially, its first point and the 7 per cent point relates to stage one of step one  
13 and the 3.5 per cent figure is arrived at through stage two of step one which  
14 looks at the individual factors.

15 First of all, dealing with the first point, which is the submission that the CMA has  
16 overstated the seriousness of RPM. Now even though that submission by  
17 Roland purports to address RPM in general, Mr Piccinin's submissions  
18 yesterday rather blurred the distinction, in my submission, between stage one  
19 and stage two because you will recall that he took you, in the context of  
20 arguing about the appropriate starting point for RPM in general, he took the  
21 tribunal to the Commission's vertical restraints guidelines which set out what  
22 he called the seven deadly sins of RPM. So that was a colourful description  
23 which I am going to adopt for present purposes. He said that only sin  
24 number 4, namely increasing prices to consumers, was established by the  
25 CMA in this case. But pausing there, pausing there first of all, before making  
26 my main point, we say parenthetically, that increasing prices to consumers is

1 a very important vice of RPM, as the decision was at pains to emphasise. But  
2 the separate point that I make at this stage is that we, the CMA, are entitled to  
3 have regard to all seven of the deadly sins of RPM in considering the  
4 seriousness of RPM in general which is stage one of step one.

5 At stage one of step one which is looking at the type of infringement, before you get  
6 on to stage two which is the facts of this case, the CMA is entitled to say RPM  
7 is a serious infringement because it can lead to all of these seven things, as  
8 the Commission's guidelines make clear, including the possibility of facilitating  
9 horizontal collusion.

10 So that's the first point we make, that that is something that Mr Piccinin didn't  
11 address. So he seeks to say this case is very different, and of course, the  
12 analysis has to be fact-specific but that first stage of step one is looking at the  
13 type of infringement. As Mr Piccinin recognised in his other submissions,  
14 where he makes general submissions about the relative importance of  
15 interbrand and intrabrand competition.

16 Now Mr Piccinin then said that there is a spectrum of seriousness when it comes to  
17 competition infringements and the CMA agrees with that. There is a spectrum  
18 of seriousness but, and this is where we diverge, it's not as rigid as Roland  
19 seeks to make out on this appeal. In particular, my learned friend draws  
20 a stark distinction between horizontal infringements on the one hand, vertical  
21 infringements on the other hand. Now in general terms, the CMA agrees and  
22 the CMA said this in both its guidance and in this decision, that lots of  
23 horizontal infringements are more serious than lots of vertical infringements.  
24 Indeed, I would go so far as to say most horizontal infringements are more  
25 serious than most vertical infringements. But, and this is the critical thing,  
26 there is an overlap. So the two categories are not hermetically sealed off from

1 one another and RPM is, in the CMA's assessment, the most serious form of  
2 vertical infringement. So the CMA's view is that RPM is as serious and,  
3 indeed, more serious than some forms of horizontal cooperation, for all of the  
4 reasons set out in the vertical restraints guidelines, all of the seven deadly  
5 sins.

6 Just to take one example, and it's not in the bundle but I just want to explain by  
7 reference to an illustration why it's wrong to draw this stark distinction  
8 between horizontal and vertical, compare the General Insurance Council  
9 case, the GICS case, which was the CAT's first ever case which concerned --  
10 where members of the General Insurance Council agreed not to deal with  
11 intermediaries, that was a horizontal agreement, unless they were members  
12 of GICS. The CAT held that that was a horizontal infringement by object but  
13 found that it wasn't appropriate to impose any fine. And so I am taking an  
14 example which Mr Piccinin will no doubt say is at one end of the spectrum but  
15 really, I am just wanting to illustrate the point that it's wrong to have this very  
16 stark distinction between horizontal and vertical because there is an overlap  
17 and we are in overlap territory in this case, that's why it's important to make  
18 the point.

19 Now turning to the decision which is in, as you know, tab 1, behind -- A1, tab 1 and  
20 going to page 173. So this is the section on penalty. You see there at 5.26,  
21 the express recognition by the CMA of this decision, of the fact that:

22 "Although RPM is a serious infringement by object, it's generally less serious than  
23 horizontal price fixing, market sharing and other cartel activities."

24 Now that's careful phraseology. It's not saying there -- "which would ordinarily attract  
25 a starting point towards the upper end of the 21 to 30 per cent range." So the  
26 upper end of that range. So not 21 per cent but the upper end of that range.

1 So that's careful language because the CMA is not saying there that RPM is  
2 less serious than all horizontal cooperation because it simply does not believe  
3 that to be correct.

4 Really, Mr Piccinin's submissions rely on this rigid distinction between all forms of  
5 horizontal cooperation and all forms of vertical cooperation and we say that  
6 we are in overlap territory. Then note paragraph 5.28 over the page:

7 "General deterrence."

8 And again, this is something I have alluded to, it's something I am going to come  
9 back to but the CMA has taken that into account and, in particular, the CMA  
10 notes "the high prevalence of RPM related letters on the register of warning  
11 and advisory letters issued by the CMA in recent years, including in 2018 and  
12 2019."

13 So this is something that Ms Pope explains in her statement. I am going to come to  
14 this but it's high prevalence means it's a problem and needs deterrence  
15 because it's a serious infringement which is taking place often.

16 Now so far, so good. But Mr Piccinin then complains that there are other types of  
17 horizontal activity which have attracted a range between 16 to 23 per cent  
18 which he says are more serious than RPM. He took the tribunal, you will  
19 remember, yesterday, to paragraph 50 of his notice of appeal and his survey  
20 of recent cases and perhaps we could just turn that up. That is at page 226 of  
21 the bundle behind tab A25. Bundle A2, tab 5, page 226.

22 Now clearly, the tribunal has that, so clearly, some of these cases impose much  
23 higher starting points and so don't assist Roland at all. And I am looking, for  
24 example, at B, so that's 28 per cent, and then C, 30 per cent. H is another  
25 one, 29 per cent. Furniture supplies are I, 28 per cent. Then we have  
26 26 per cent at M, in online sales posted. So those cases don't help Roland at

1 all because the CMA has acknowledged that those are more serious  
2 infringements and has acted accordingly in those cases. What we say is that  
3 it's notable that those cases in this list which do fall within the 16 to  
4 23 per cent range, are mostly information exchange cases. And an  
5 information exchange, so just pausing briefly there, an information exchange  
6 relating to prices is not the same thing as a price fixing agreement. Now that's  
7 a rather trite point but it's a point that Mr Piccinin rather blurred in his  
8 submissions yesterday, when he said: well it's very serious because it's all  
9 about horizontal price fixing. But exchanging information is not the same as  
10 fixing prices, otherwise the CMA would have said so. In fact, in Galvanised  
11 Steel Tanks which is at J, the CMA -- there were two cartels and the CMA  
12 found there was a cartel and imposed a 30 per cent starting point and then  
13 when it came to the information exchange, imposed a lower starting point, as  
14 you have seen. The issue here is it can often be difficult to determine whether  
15 or not an information exchange is lawful or unlawful and that's because it's not  
16 unlawful for competitors to exchange all information between each other.  
17 Whether or not it's unlawful would depend on whether the effect, whether the  
18 impact, whether the information exchanged is of a nature as is liable to restrict  
19 competition in the relevant market.

20 That depends, usually, on the precise nature of the information exchanged. So is it  
21 sensitive or is it not sensitive information? So there will often be in cases --  
22 very often be in these cases, quite a granular assessment, argument from the  
23 undertakings concerned, going to that point. So saying: well it looks here like  
24 we are exchanging information about our plans, but actually, this is all in the  
25 public domain. Have a look at these documents in the public domain, this is  
26 not sensitive information at all, it's just chit-chat at a trade conference which



1 goes nowhere because it's information everyone knows. So there is,  
2 accordingly, often a very fine distinction in these cases between an  
3 infringement and no infringement at all and that's something which is  
4 obviously relevant to the starting point. Now, of course, the starting points  
5 and this is an important point in all of these cases, take account not only of  
6 the general nature of the infringement, so stage one of step one, but also of  
7 the particular circumstances of the case and the requirements of general  
8 deterrence. So my overriding submission is that it's very difficult simply to  
9 look at a survey like this and the facts which have been extracted by Roland  
10 and say: well what this is saying, this looks a bit unfair because in Galvanised  
11 Steel Tanks they've taken 18 per cent, almost the same as 19 per cent, for  
12 a horizontal price information exchange, and oh, gosh, that's horizontal, that  
13 has to be more serious than RPM in this case which is essentially the  
14 approach that Roland is taking. And the reason it's not safe to draw that kind  
15 of comparison is because in each of these cases, the CMA took account not  
16 only of the nature of the infringement in general but of the factual  
17 circumstances of the case, stage two of step one, and of the need for general  
18 deterrence. So all of those three factors have gone into determining the  
19 starting point.

20 I just want to take two examples. I will look at Galvanised Steel Tanks because it  
21 illustrates the point I wish to make. You will find that the main -- there are two  
22 decisions. So the main cartel decision is in F3.1, tab 37. If the tribunal could  
23 briefly turn that up at page 3717, that would be helpful. And so you see here  
24 at paragraph 5.25, what the CMA says. In assessing the seriousness of the  
25 main cartel infringement, the conduct involved three of the most serious cartel  
26 behaviours, so price fixing, bid rigging and market sharing, by way of

1 customer allocation. Also involved all the major suppliers and took place over  
2 a period of more than 7 years. Also, it concerned a product that was part of  
3 fire safety equipment. The CMA therefore considers that the starting point for  
4 the main cartel infringement should be at the highest end of the range and so  
5 it's set a 30 per cent starting point.

6 Now the decision in respect of the information exchange is in the previous tab,  
7 tab 36. There, of course, the CMA adopted a starting point of 18 per cent.  
8 Now this infringement related to an exchange of information at a single  
9 meeting. Now Mr Piccinin said yesterday: well why does that matter? Well, of  
10 course it matters because if there's a one-off exchange of information in  
11 a single meeting, it's unlikely to have much enduring impact. This took place  
12 at a single meeting between a new entrant Balmoral and the existing  
13 cartelists, which were all of the addressees of the other decision you've just  
14 seen, in which the existing cartelists encouraged the new entrant to join the  
15 main cartel.

16 If you could turn to the relevant section on penalty, so starting at page 3604,  
17 paragraph 5.25, you see there that:

18 "The CMA considers that the infringement in question constitutes an infringement of  
19 competition by object and the nature of the conduct involved. Exchange of  
20 commercially sensitive information regarding current pricing and future pricing  
21 intentions is serious and inherently risks creating significant anti-competitive  
22 harm."

23 So it takes that into account but then notes at 5.26, that:

24 "Balmoral made it clear that it was not prepared to participate in the main cartel."

25 Of course, this is a fine directed at Balmoral.

26 Balmoral was not prepared to -- "made it clear that it was not prepared to participate

1 in the main cartel." And then at 5.27:

2 "The information exchange was capable of reducing uncertainty regarding  
3 competitors' prices in the market."

4 But, of course, there was no finding that it did and then we see at 5.28 that:

5 "The infringement is based on the exchange of information at a single meeting and is  
6 not part of an ongoing series of exchanges or regular discussions regarding  
7 pricing strategy."

8 There was then evidence, if you look at 5.30, so "evidence of specific harm to  
9 consumers is limited." There's then evidence that "Balmoral continued to  
10 compete and priced below the level discussed in the meeting." You see that  
11 at 5.30.

12 So those are all very different facts. Of course, each case turns on its own facts but  
13 this was a particularly extreme case, if I can put it in that way because  
14 Balmoral was at this meeting and had made it clear in the meeting that it didn't  
15 want to be part of the cartel, even though that's what everyone else was trying  
16 to persuade it to do.

17 I would like also just to look at the Cleanroom Laundry Services case and that is one  
18 of the other examples that my learned friend expressly referred to yesterday  
19 in his oral submissions. That's behind tab 42. F3.2, behind tab 42. If you  
20 could first of all, please turn up page A, 272. So the introduction to the  
21 decision. The thing about this case is that it had a very unusual context  
22 because the parties had been involved in a long running joint venture which  
23 had started off as a lawful joint venture. So it was a lawful arrangement. You  
24 see that from 1.3 to 1.4. The joint venture agreement, so the arrangements  
25 that were being tackled by the CMA in this case, were arrangements that had  
26 existed pursuant to the joint venture arrangement between various

1 businesses since the 1980s, when the relevant markets were nascent. Then  
2 you see at 1.4 that the agreements were signed in the context of those joint  
3 venture arrangements between the parties.

4 But what had happened was that as time had gone on, the justification for the joint  
5 venture arrangements back in the day, which were penetrating new markets,  
6 had ceased to exist and so there was now no pro-competitive justification for  
7 these restrictions between the parties.

8 Then you will see, if we skip forward to the penalty section, so page 4418, you see at  
9 paragraph 5.143, for example, that those were the submissions the parties  
10 were making:

11 "The addressees have submitted that the restrictions were objectively necessary to  
12 give each party the incentive to invest at the start of the joint venture and  
13 during its lifetime, to avoid customer confusion, to ensure high and consistent  
14 service standards."

15 So they were relying on the JV arrangements that had been in place for some  
16 considerable time.

17 Then you see that the CMA did not accept that. You see that at paragraph 5.162,  
18 which is on page 4425. You see:

19 "Conclusion on less restrictive options. The CMA is satisfied there would have been  
20 other realistic counter-factual options that would have avoided the need for  
21 these restrictions."

22 And in fact, makes no findings. I rather overstated my submission at the outset,  
23 when I said the JV was lawful. In fact, the CMA expressly made no findings  
24 as to whether it was lawful at the outset, so let me correct what I said.

25 Then 4461, if we skip forward in the decision, as far as the penalties concerned, the  
26 CMA adopted a 16 per cent starting point. You see that from 6.48. Then at

1 6.49, you see that the CMA considers that the infringement was infringement  
2 by object. They say that "among the most serious competition law  
3 infringements." But then you see that there are specific features of the case  
4 which merited a lower starting point, in particular that the restrictions formed  
5 part of a wider joint venture. You see that at 6.50, "the market sharing wasn't  
6 covert." Then you see at 6.50B, the point about the restrictions originating in  
7 the wider joint venture which was started in the 1980s:

8 "It's possible that any restriction similar to and predating the restrictions may have  
9 been justified in competition law terms for a period of time, ie before the  
10 period under investigation. However, the CMA has not reached a view on  
11 this, given this is the focus of the CMA's investigation on the relevant period  
12 and insufficient evidence."

13 The CMA is there saying, this could have all been lawful. We are not reaching  
14 a finding on it but it might have been lawful at the outset. The parties have  
15 been open about it and so you can see there that's a particular circumstance  
16 that this is an open JV agreement which may have been lawful in its origins  
17 and what has happened is through effluxion of time and changes of market  
18 conditions, it's now reached a point where these restrictions are certainly  
19 unlawful.

20 Then you see at 6.50C, the point that horizontal cooperation between undertakings  
21 to develop new products can provide significant consumer benefits.

22 Then you have the point at D, that there is an agreement not to enforce the  
23 restrictions from a certain point in time. So although this case concerned  
24 what is normally regarded as a serious horizontal infringement and you have  
25 seen in other cases -- the CMA is certainly not saying horizontal market  
26 sharing is not serious because you've just seen in Galvanised Steel that they

1 have said it's the most serious type of horizontal restriction. They say that in  
2 the guidance. So there's no finding here that horizontal market sharing  
3 restrictions are not serious, quite the opposite, but the CMA has, in stage two  
4 of step one, looked carefully at the individual circumstances of this particularly  
5 unusual case and held that 18 per cent is the relevant starting point.

6 Now finally on comparisons, Mr Piccinin referred to the Ping case and the CMA  
7 takes a different view of Ping to Mr Piccinin. Mr Piccinin says: well it's actually  
8 more serious than RPM because Ping was banning all Internet sales. But no,  
9 the reason why the tribunal and the Court of Appeal found that the internet  
10 sales ban in Ping was a restriction of competition by object, despite Ping's  
11 submissions to the contrary, was because even though internet sales were  
12 much less of a feature in that market, and I am sure the Chairman will recall  
13 the small percentage of internet sales in that market, as compared to the  
14 current market which is much wider, the tribunal accepted and the Court of  
15 Appeal agreed that any internet sales are important when it comes to price  
16 competition. So it was all about a softening effect on intrabrand competition.  
17 Of course, when you have RPM, it's not just a softening of price competition,  
18 it's getting rid of intrabrand price competition all together.

19 Now the other factor in Ping which I am sure the Chairman will remember very  
20 clearly, was that Ping, in that case, sought to justify its internet sales ban on  
21 the basis that it was necessary in order to give effect to its custom fitting of  
22 golf clubs policy. It fought very hard and adduced lots of evidence to seek to  
23 demonstrate that the advancement of that custom fitting policy increased  
24 interbrand competition considerably and was, therefore, a legitimate thing for  
25 it to be doing.

26 The CMA accepted that the custom fitting policy was a legitimate aim and that's

1 recorded, of course, in the tribunal's judgment. So by contrast to the present  
2 case, where there are no findings in this case, no findings in the Commission  
3 decision, no evidence adduced by Roland that, actually, on the facts of this  
4 case, there are pro-competitive benefits of Roland's pricing policy, no  
5 evidence of that, no evidence, so all Mr Piccinin can point to is the commercial  
6 aim of the policy recorded in the decision, but no evidence that, actually, it  
7 had pro-competitive benefits in this case and no finding of that by the CMA.  
8 Very different to the Ping case, where obviously, that was the focus of the  
9 argument and the evidence.

10 Now turning to Ms Pope's witness statement. This is at tab 8, B1, tab 8. You will  
11 have seen from -- page 288, Ann Pope is the senior director for anti-trust  
12 enforcement at the CMA and if I could take you, please, first to paragraph 8,  
13 under the heading "RPM" on page 289. So she says there that:

14 "The CMA regards RPM as a serious infringement of competition law. RPM can lead  
15 consumers to paying higher prices than they otherwise would have done.  
16 Indeed, in 2018, the CMA commissioned empirical research by an economic  
17 consultancy DotEcon which evaluated the direct and indirect effects of the  
18 CMA's enforcement action in two RPM cases. This research demonstrated  
19 that the CMA's intervention had led to an estimated fall in prices of round  
20 17 per cent."

21 I will come back to the DotEcon report after I have taken you to a few more  
22 passages in this statement.

23 Then at paragraph 9:

24 "RPM is a particular concern when it takes place online. As the CMA noted in the  
25 decision, the ability to sell or advertise at discounted prices on the Internet  
26 can intensify price competition, not only between online resellers but also

1 between online and bricks and mortar resellers, due to the increased  
2 transparency and reduced search cost from internet shopping. Conversely,  
3 preventing or restricting the ability for resellers to determine their own online  
4 resell prices is likely to reduce price competition and, in turn, undermine a key  
5 benefit of, potentially, consumers' trust in the benefits of e-commerce."

6 Just pausing there, that's relevant and it's a point the CMA picks up in the decision in  
7 this case. That's relevant to the submissions that Mr Piccinin made about the  
8 relative volumes of online commerce in this sector and offline commerce. And  
9 so you will recall he took you to a part of the decision that said 40 per cent of  
10 sales are online and he said: oh, yes, but another way of putting that is  
11 60 per cent are offline and are therefore not tackled by RPM. But we say  
12 that's the CMA's view and it's a very old-fashioned way of looking at matters  
13 because it's the online commerce that is important in stimulating price  
14 competition because that's where you get the transparency of prices. That's  
15 the point that Ms Pope is making at paragraph 9 of the statement.

16 Then you see at paragraph 10:

17 "The CMA receives more complaints about RPM than any other type of  
18 anti-competitive behaviour. Since the CMA was established in 2014, more  
19 than a quarter of all complaints considered by the CMA's pipeline team is  
20 ...(reading to the words)... investigations related to RPM."

21 Now again, that's a point that Mr Piccinin, in answer to the chairman's question,  
22 sought to minimise. So he said: well the CMA asserts that it's prevalent, but it  
23 doesn't assert it, it has evidence because the complaints coming in from  
24 consumers are very significantly, so more than a quarter, about RPM. And, of  
25 course, the CMA is there to protect consumers, to make sure that markets are  
26 functioning competitively and to protect consumers. So where its efforts result



1 in a 17 per cent price fall and where a multitude of complaints are coming in  
2 about RPM, obviously it's sensible for the CMA to take the view that this is an  
3 enforcement priority and greater deterrence is required. You see that at  
4 paragraph 11:

5 "Given the serious nature of RPM and the fact that it appears to remain widespread  
6 in the wider economy in the UK, there is a need for penalties to be a  
7 sufficiently significant sum, act as an adequate deterrent, both to the party  
8 concerned and others more generally. Tackling RPM has therefore been and  
9 continues to be an enforcement priority for the CMA. The CMA prioritises its  
10 RPM enforcement action on those cases where the CMA considers that  
11 there's likely to be the most consumer harm, in particular where there's  
12 evidence that the practice is widespread within a sector."

13 Then you see footnote 5:

14 "The prioritisation principles."

15 Those reflect prioritisation principles and what that says is that:

16 "The CMA is entitled to adopt its own enforcement policy and to form its own view in  
17 light of UK specific conditions of what infringements to prioritise and what  
18 infringements are serious in the UK context. Although the CMA will only  
19 prioritise RPM cases where it considers there's likely to be ...(Reading to the  
20 words)... only one or a limited number of resellers. If the CMA were to  
21 evidence an agreement between a supplier and a large number of resellers,  
22 this would likely require significant additional time and resources."

23 Now that point I am going to come back to, the latter part of that point, in relation to  
24 the market coverage issue. But for present purposes, the point that I make is  
25 that CMA has a wide discretion, as the expert regulator, to set its enforcement  
26 priorities. It has here prioritised RPM that's likely to result in consumer harm

1 and you see that at paragraph 12, that since it was established, the CMA has  
2 adopted eight infringement decisions relating to RPM and five of those  
3 decisions were in the musical instruments sector which has been identified as  
4 being particularly problematic. And the CMA decided to prioritise those cases  
5 in light of evidence, including directly from consumers, that RPM was  
6 widespread in that sector:

7 "This was further borne out by the evidence gathered in these investigations. It sent  
8 over 80 warning letters to firms, asking them how they would ensure that they  
9 would comply with competition law going forward. The majority of the warning  
10 letters related to ...(reading to the words)... various sectors of the economy."

11 Then at 13:

12 "The CMA has also undertaken various other steps in recent years to amplify the  
13 deterrent impact of its enforcement action against RPM, including publishing  
14 open letters, issuing case studies, publishing guidance on the CMA's websites  
15 and on social media, as well as speaking at industry conferences. The CMA  
16 has also developed an in-house price monitoring tool which allows it to  
17 monitor price levels in a given sector, enhancing its market intelligence."

18 So sir, members of the tribunal, we say that this is all a strategy, a conclusion, the  
19 prioritisation of RPM in this sector and in the UK economy, that the CMA has  
20 arrived at, after evaluating the evidence available to it and using its expert  
21 knowledge and experience, including developing price monitoring tools.

22 And also including by commissioning expert reports such as the DotEcon report  
23 which the CMA commissioned. Perhaps we could just have a look at that.  
24 That's in the second hearing bundle hard copies. It's tab 47. So that's C2, 47.  
25 I am just going to take you to the executive summary. 914, the beginning, the  
26 first paragraph:

1 "The DotEcon was commissioned by the CMA --

2 **THE CHAIRMAN:** Can you hold on. I have not found that. Can you give me the  
3 bundle reference again?

4 **MS DEMETRIOU:** Yes, so sorry, it's C2, tab 47, page 914.

5 **THE CHAIRMAN:** Yes.

6 **MS DEMETRIOU:** So in view of the time, I am going to take this quite briefly by  
7 reference to the executive summary but you see the origins of the report that  
8 was commissioned in the first paragraph and you see that the focus of the  
9 evaluation that DotEcon conducted was to assess the deterrent effects of  
10 enforcement, including fines. So you see that in the first paragraph.

11 Then over the page on 915, you see that the assessment focused on four cases. So  
12 three of those cases were RPM cases, light fittings, bathroom fittings and  
13 mobility scooters.

14 At 916, you see the 17 per cent figure. If you go two-thirds of the way down, under  
15 the heading "Direct impact", the second paragraph under that:

16 "Both the bathroom fittings and light fittings case, comparison of prices from during  
17 and after ...(Reading to the words)... of around 17 per cent. However, we  
18 report concerns from some parties that the rise in online discounting has led  
19 to greater concerns about the provision of pre-sale support and advice, as  
20 online retailer free ride on the service provided in stores. We are told how  
21 bricks and mortar stores are finding it increasingly difficult to compete."

22 Now pausing there, the first part of that paragraph, the 17 per cent price fall, the  
23 CMA says is highly significant. So where you are looking at the fourth vice,  
24 the fourth deadly sin, which is the impact on prices to consumers, here, there  
25 is empirical evidence that has been commissioned by the CMA, showing that  
26 enforcement against RPM can lead to considerable benefits, 17 per cent,

1 a substantial benefit, to consumers.

2 Now what the consultants then go on to make are the points that are being pressed  
3 on you by Mr Piccinin which is: well sometimes RPM can be helpful in  
4 stimulating interbrand competition. But the point which I make is that the  
5 CMA knows that, of course, and has weighed that in the balance. So the  
6 CMA knows it and has been told it and, of course, has considered the US  
7 case law and the various economic points pressed upon the tribunal by  
8 Mr Piccinin. Of course, the CMA knows all of that, but considers that,  
9 nonetheless, its expert judgment, taking that into account, is that RPM is  
10 a serious infringement and should be enforced against because it leads to  
11 significant detriments to consumers. See what is said here about the price  
12 rises.

13 So it's not as though the CMA somehow, in its assessment, has just ignored the  
14 interbrand consideration that Mr Piccinin is asking the tribunal to take account  
15 of.

16 Now then you see, if you move forward to page 925 in the document, under  
17 "Conclusions and possible implications for the CMA":

18 "We have found evidence of a clear link between CMA intervention and greater  
19 levels of awareness and understanding of competition law in our selected  
20 cases. This demonstrates the value of intervention and follow on work in  
21 raising awareness of specific cases."

22 Then over the page at 926, under "Impact of different sanctions", that's at the bottom  
23 of the page:

24 "In terms of the impact of sanctions imposed upon a finding of anti-competitive  
25 conduct, fines for the company appear to be an important factor in influencing  
26 indirect effects."

1 So fines for the company was the most commonly reported sanction listed by  
2 respondents, when testing awareness of possible penalties. Then it says:

3 "We found significant differences in the mobility scooters case where fines were not  
4 imposed ...(Reading to the words)... lowest in direct to direct impact ratios."

5 What's being said there is that fines are an important factor in achieving the deterrent  
6 effect that enforcement seeks to achieve and that the CMA is required to take  
7 account of when setting its penalties.

8 Then just while we are in this bundle, I just want to show you an example of one of  
9 the open letters that Ms Pope referred to. You can find that behind tab 50, so  
10 C2, tab 50. Page 1086. This is an example of one of the open letters the  
11 CMA has written as part of its prioritisation of RPM enforcement. And you can  
12 see there, first line news, as it were, is the fines, the penalties. That's  
13 consistent with what DotEcon are saying about the importance of fines in  
14 deterring such conduct. Then you see over the page, under "Warning letters",  
15 a reference there to the in-house price monitoring tool to detect activity.

16 Now I think we can put this bundle away now, either physically or electronically. But  
17 as Ms Pope explained in her statement, the CMA has adopted five  
18 infringement decisions relating to RPM, including this one in the musical  
19 instruments sector and there has been, as you have seen, broad consistency  
20 in the CMA's starting point in those cases, as the tribunal in Eden Brown says  
21 is appropriate. And, importantly, the cases are materially similar in important  
22 respects, in the key respect. So in each case, the decision found an RPM  
23 agreement between one supplier and one reseller, the prioritisation reasons,  
24 reasons of administrative efficiency. That's how the CMA proceeded. The  
25 circumstances were similar to those in the present case in terms of the  
26 demand for the musical instruments online, the market position of the

1 supplier, the market coverage of the infringement and its wider effects  
2 dampening retail price competition. So all of those factors listed in the  
3 guidance, as key factors under stage two of step one.

4 The CMA took into account in each case, the need for general deterrence of online  
5 RPM and applied a starting point of 19 per cent. In view of the time, I am not  
6 going to take you to each of the decisions. It may be that we can just take  
7 one of them by way of example.

8 If we take up digital pianos in F3, 47, and go to paragraph 5.31 which is on  
9 page 5022. These paragraphs make good the points I have just made in  
10 relation to this particular decision. This is page 5022 and you have the  
11 section "Nature of the infringement", starting at paragraph 5.31 on page 5022.  
12 You see at 5.33 again, an acknowledgement that this is not analogous to the  
13 most serious type of horizontal restrictions which would fall at the upper end  
14 of the 21 to 30 per cent range. Then you have the stage two analysis which is  
15 very similar to the present case. If you look down to the third bullet, you see  
16 that again, the infringement was pursued in relation to one reseller. So the  
17 market coverage point was the same, but then you see in the following bullet  
18 that it was likely that this would have had a wider effect in the market.

19 Then you see at 5.35, the same point about general deterrence being needed in  
20 relation to RPM in the United Kingdom.

21 Now dealing briefly with, if I can put it this way, the economic submissions, the  
22 submissions about economics made by Mr Piccinin, and essentially, he said  
23 that RPM is not as serious as horizontal collusion because it can have  
24 pro-competitive effects on the interbrand plane. I am going to make two  
25 submissions in response to that. So the first submission is, of course, that the  
26 CMA accepts that RPM might have pro-competitive effects on the interbrand

1 plane in some cases. The Chairman will recall that in Ping, it was also  
2 argued -- and, in fact, expert economic evidence was adduced from an expert  
3 economist -- it was also argued that the ban on Internet selling in that case  
4 had a pro-competitive object and pro-competitive effects for interbrand  
5 competition, in that it allowed Ping to compete on quality with its competitor  
6 manufacturers and prevented free riding in the market. The free riding  
7 arguments and evidence was rejected by the tribunal and also by the Court of  
8 Appeal. But pertinently, the ban in Ping also plainly restricted intrabrand  
9 competition and so the tribunal and the Court of Appeal found that the CMA  
10 had correctly characterised it as restriction of competition by object and the  
11 same, of course, applies but we say even more strongly because RPM is  
12 more serious to RPM.

13 It might, in a particular case, have some pro-competitive effects at the intrabrand  
14 level but it's not permissible, it's still a restriction, serious restriction of  
15 competition by object. And if I could just take you briefly to the Court of  
16 Appeal in Ping at bundle F2, tab 27, at page 2088. It's paragraphs 108 to  
17 109. You see at 107, there the Court of Appeal is upholding the tribunal's  
18 conclusion. Then they were saying they don't doubt the genuineness of  
19 Ping's disappointment and indignation in finding themselves the subject of an  
20 infringement decision and penalty.

21 Then you see at 109 that:

22 "For this reason [ie this reason being that the competition law allows the  
23 manufacturer to control the way it sells its goods], EU competition rules have  
24 respected to some extent a manufacturer's choices as to how best to promote  
25 its product but only to some extent. The CJEU has never been content to rely  
26 only on the kind of self regulation to which ...(Reading to the words)... That

1 judgment established that the court does not regard interbrand competition as  
2 sufficient to bring about the optimal use of resources. The competition rules  
3 do not rely on suppliers self regulating, by leaving them free to set the terms  
4 on which undertakings further down the distribution chain market their goods  
5 to the ultimate consumer. The retailer also has a commercial interest and  
6 expertise in marketing the goods successfully.

7 "Since Consten and Grundig, the dividing line ...(Reading to the words)... has been  
8 carefully drawn."

9 Then you see:

10 "The detailed provisions of regulation 330 and the vertical guidelines, show the  
11 drawing of boundaries between active and passive sales ...(Reading to the  
12 words)... internet sales and restrictions. The argument underlying Ping's  
13 case, that it should be allowed to decide for itself how best dealers should  
14 market its goods, is not an argument that's found favour and cannot be  
15 accepted here."

16 Now that is the approach of the courts. We also see recognition of this in the  
17 guidelines. If you turn, please, to the CMA's vertical guidelines, which are in  
18 F5, behind tab 65, paragraph 7.7 on page 7103, you see there a reference to  
19 re-sale price maintenance under "Vertical constraints".

20 It's said:

21 "These are hardcore restrictions which will almost invariably infringe Article 81 and  
22 the chapter 1 prohibition. Price fixing agreements, by their very nature,  
23 restrict competition to an appreciable extent. Maximum prices and  
24 recommended ...(Reading to the words)... fix prices and dampen price  
25 competition."

26 So a hardcore restriction which are almost invariably unlawful.



1 Just to take you to one further passage of the Commission's -- just before the seven  
2 deadly sins, the vertical restraints guidelines behind tab 67. F5, 67,  
3 page 7163, and it's recital 223. So it's the recital just before the one  
4 Mr Piccinin took you to:

5 "Re-sale price maintenance are to be treated as a hardcore restriction. Where an  
6 agreement includes RPM, that agreement is presumed to restrict competition  
7 and thus to fall within Article 101.1. It also gives rise to the presumption that  
8 the agreement's unlikely to fulfil the conditions of 101.3, for which reason the  
9 block exemption does not apply. However, undertakings have the possibility  
10 to plead an efficiency defence under 101.3 to an individual case. Incumbent  
11 on the parties to substantiate that likely efficiencies result from including RPM  
12 in their agreement and demonstrate that the conditions of Article 101.3 are  
13 fulfilled."

14 So this really goes to the point about the limited weight to be placed -- we say that  
15 very limited weight is to be placed on Mr Piccinin's argument that there can be  
16 pro-competitive effects on the interbrand plane. That's because despite that  
17 possibility, the law recognises that it's a serious infringement because it  
18 results in prices being fixed, to the dis-benefit of consumers and to intrabrand  
19 competition being suppressed. There is a possibility for RPM to be justified  
20 under Article 101.3 but then evidence is required and, of course, that goes  
21 back to the point I was making that there was no evidence to substantiate  
22 such a defence in this case. And so for that reason, a theoretical possibility  
23 that the anti-competitive restrictions on the intrabrand plane are somehow  
24 ameliorated by the possibility of enhanced interbrand competition, does not go  
25 anywhere because it's just not been proven in this case. It may be a point in  
26 another case but it's certainly not a point in this case.

1 Now that's really my second submission which is that there was no finding in this  
2 case that the infringement had pro-competitive effects, still less that somehow  
3 those could be prayed in aid to say that the anti-competitive restrictions are  
4 somehow less serious or ameliorated and Mr Piccinin relied in this context on  
5 paragraph 3.46 of the decision.

6 Perhaps we could just turn that up. That's F1(?), tab 1, page 83. 3.46 is at the  
7 bottom of the page, page 33:

8 "The evidence shows that Roland (UK)'s ...(reading to the words)... aims [so  
9 commercial aims] for introducing the Roland pricing policy were at least  
10 twofold."

11 Then you will see the bullet points that Mr Piccinin has read to you already. The  
12 point I make is that this was about Roland's commercial aim. There's no  
13 evidence that, in fact, there was a pro-competitive impact or effect. There's  
14 no evidence of that at all in this case.

15 Going back to the very pertinent question, in my respectful submission, that  
16 Mr Cutting put to my learned friend at the end of yesterday, we say that  
17 Roland has a selective distribution system which is designed and justified on  
18 the basis that it's required, in order that its resellers meet certain standards.  
19 And so in those circumstances, the argument that RPM might be needed in  
20 order to promote interbrand competition, is very hollow. That's the purpose of  
21 the selective distribution system.

22 Now Mr Piccinin's response to that was to say: well it's very difficult to police  
23 selective distribution requirements, but the problem with his submission in  
24 turn, is that RPM doesn't remove the need for policing those requirements  
25 because there's absolutely no guarantee, if no policing takes place, that the  
26 resellers will use their extra margin to invest, they might just pocket the

1 money. So we say that's not a good point.

2 Now Mr Piccinin then prayed in aid the Commission's approach and his skeleton also  
3 refers and notice of appeal refers to France and Belgium but he focused on  
4 the Commission in his oral submissions. In relation to that, we make the  
5 following points. So we say, first of all, the CMA is entitled to adopt its own  
6 enforcement policy, provided of course, that it's compatible with EU law and  
7 the Act and there's no suggestion that there is any breach of EU law here, and  
8 it's entitled to form its own view of the seriousness of online RPM, informed by  
9 its own experience of RPM and its understanding of the prevalence of RPM  
10 and the impact on consumers across the UK economy. And that's what we  
11 saw from Ms Pope's witness statement.

12 It's not bound to adopt the same approach that the Commission has taken or other  
13 competition authorities have taken, when they set their own priorities on the  
14 basis of their own experience in other countries.

15 Now Mr Piccinin said I had an allergic reaction to his submission. It's not an allergic  
16 reaction at all, it's simply to make the point that the CMA doesn't want to lose  
17 sight of the fact that it's for the CMA in the UK, to determine how serious RPM  
18 is in this country and what's needed by way of deterrence. And you can see  
19 all of the things it's done to inform itself.

20 Stepping back, what Roland is asking the tribunal to do under this head of its  
21 submission is to say: well the Commission has reached a different view -- we  
22 don't quite accept that, I am going to come back to explain why -- because it  
23 adopts a starting point of 7 per cent, so therefore, the tribunal should find that  
24 despite all of this work and valuation that the CMA has done on tackling RPM  
25 in this country, the tribunal is going to step in, should step in and say: no,  
26 CMA, you have got that wrong, you should be doing what the Commission is

1 doing because the Commission has reached its own view about the  
2 seriousness of RPM. And we say that that really comes back to the weight  
3 that the tribunal should place on the CMA's analysis and evaluation.

4 I think Mr Piccinin is not saying, so he's fairly not saying, that the CMA is bound in  
5 any respect by the Commission. He could not say that and we see, in fact,  
6 from the Commission staff working document which you will find in bundle C3,  
7 behind tab 54A, page 1135.67 -- this now getting quite complicated. I don't  
8 know where mine has gone, I am just going to ask my junior.

9 It may be that I come back to that point. My copy seems to have disappeared from  
10 my bundle.

11 Apologies.

12 I want to just address you on the point about the difference between the  
13 European Commission's binding guidelines and the CMA's penalty guidance  
14 which means that the analogy pressed on the tribunal by Mr Piccinin is not the  
15 right -- the precise analogy. It's not right to say: well the Commission takes  
16 a 7 per cent starting point and that can be directly compared with the  
17 19 per cent starting point in the CMA's decision. Because quite apart from the  
18 fact, we do also make the point that the seriousness of an infringement, that  
19 you have to take account of stage two of step one, so the individual  
20 circumstances of the case, and also the deterrence which is going to be  
21 different, depending on the nature of the problem in any particular area, any  
22 particular jurisdiction, quite apart from that, there are relevant differences  
23 between the Commission's penalty guidance and that of the CMA. The  
24 Commission's penalty guidance you should have at tab 75. So F5, 75. If  
25 I could ask you just to turn that up. If you look at page 7488, we see under  
26 the heading "Determination of the basic amount of the fine", that's the

1 equivalent to the starting point. You see there that:

2 "It relates to a proportion of the value of sales, depending on the gravity of the  
3 infringement, multiplied by the number of years of infringement, made on  
4 a case-by-case basis for all types of infringement, taking account of all the  
5 relevant circumstances of the case."

6 What you don't have here under this heading is a reference to general deterrence.

7 So by contrast with the UK Act and the guidance, you then have under recital  
8 25, paragraph 25, the additional amount that can be imposed. You see there  
9 that the additional amount is to deter undertakings from even entering into  
10 anti-competitive restrictions. We make the point in our skeleton, it's not  
11 limited to horizontal infringements.

12 Now what Mr Piccinin says is, he says: well if you look at the case law and if you  
13 look at this document, deterrence goes all the way through, so deterrence is  
14 a factor that the Commission has to take account of all the way through its  
15 analysis and we agree with that. However, the difficulty with his submission is  
16 that, yes, the Commission has to take account of it in its analysis, but it  
17 doesn't have to specifically take account of it at step one, in determining the  
18 starting point. That's why there's no precise analogy so, yes, of course the  
19 Commission has to have regard to deterrence in determining what the fine is  
20 but it doesn't, at step one, at the starting point, have to at that stage, find that  
21 the 7 per cent is sufficient for general deterrence, as long as the overall fine  
22 is. Let me just show you one authority. If you could turn to F2, tab 12. F2 of  
23 the authorities, tab 12. This is the BASF case. This is the vitamins cartel. It's  
24 just one paragraph that makes good the point I was just making. It's  
25 paragraph 226 on page 682. This is the point here:

26 "It should be noted that as deterrence is an objective of the fine, the need to ensure

1 it's a general requirement which must be a reference point for the Commission  
2 throughout the calculation of the fine, does not necessarily require that there  
3 be a specific step in that calculation in which an overall assessment is made  
4 of all the relevant circumstances for the purpose of attaining that objective."

5 You see that's where it's different to step one in the CMA's penalty guidance, where  
6 the CMA is required, as a matter of statutory duty, to ensure that the starting  
7 point is where general deterrence is taken into account. The starting point  
8 must meet the objective of general deterrence, you see that in the guidance  
9 and that's not the case for the European Commission. So the  
10 European Commission has to take it into account generally but it does not  
11 have to do it under step one, so it's not right to say that you can look at the  
12 7 per cent and say that that is a direct comparator with the 19 per cent. What  
13 you do is you look at the ultimate fine imposed by the Commission and the  
14 Commission will look at the ultimate fine. As long as somewhere in its  
15 calculation, it's taken account of general deterrence, that's okay. So it does  
16 not have to take all account of general deterrence under the starting point and  
17 that's why it's not right to seek to draw this precise analogy.

18 I was going to come back to the staff working document which is at C3, 54A. It's just  
19 one provision which is on page 1335.67. So it's paragraph 216. That's C3,  
20 54A, 1335.67. All it says, it just makes clear and this is not in dispute but it's  
21 important not to lose sight of it, that:

22 "Sanctions imposed by national competition authorities for infringement of the EU  
23 competition rules are not harmonised. Member States are therefore free in  
24 their choice of sanctions, as long as they're effective, proportionate and  
25 dissuasive."

26 Not harmonised. The CMA can, and we say it should, take a UK specific view in the

1 light of its own particular experience.

2 Sir, I am going to go on now to deal with stage two of step one which is the scope of  
3 the infringement and the market coverage point. Can I just say in outline what  
4 my submission is going to be and then after lunch, I will make it in a little bit  
5 more detail. I think I am doing quite well on time. I think we are on course to  
6 finish today, so I think in accordance with the timetable, Mr Bailey and I,  
7 between us collectively, need to finish at 4 o'clock, to give my learned friend  
8 his opportunity for reply. I think that we should be able to do that. I hope  
9 that's not famous last words. But we'll do our best and we were helped by  
10 Mr Piccinin making very good progress this morning. But just in a nutshell,  
11 Roland contends that the starting point fails to reflect the narrow scope of the  
12 infringement which applied to online sales of Roland drums sold by reseller  
13 one. That's their argument. We say that that argument is based on market  
14 coverage which is just one of the factors mentioned at paragraph 2.8 of the  
15 penalty guidance. I have shown you that already. The CMA also took  
16 account of the other factors referred to in the guidance and can I, just before  
17 we break for lunch, just take you back to the decision at paragraph 5.27 on  
18 page 173.

19 You see there the bullets reflecting the key factors set out in the penalty guidance.

20 The first bullet is that 40 per cent of the sales of the relevant products are  
21 online. Here you have the point that I made earlier, that price competition  
22 online is important to price competition offline too and that's spelled out in  
23 terms in this bullet and I can take you to the parts of the decision where that is  
24 said earlier.

25 Then you see the second bullet, "Structure of the market"; the third bullet, "Market  
26 coverage", that's the one that is really emphasised and relied on by my

1 learned friend. But then we have the actual or potential effect of the  
2 infringement on competitors and third parties. And this is really important in  
3 the circumstances of this case. The reason it's important is this: throughout  
4 his submissions, my learned friend sought, for very understandable reasons  
5 because, obviously, it helps his argument, his end point, but sought to  
6 characterise the relevant facts here as being extremely narrow. So one might  
7 almost be forgiven if you just heard my learned friend's submissions, for  
8 thinking: well this was a one-off isolated instance of re-sale price maintenance  
9 and, of course, that's not the position. So for administrative prioritisation  
10 reasons, the infringement established was in respect of reseller one but what  
11 I am going to be explaining after lunch, what I am going to be submitting after  
12 lunch is that because of the nature of the market and because of the price  
13 transparency in the market and the software that was being used to monitor  
14 prices, that infringement was amplified in terms of its effects or potential  
15 effects and we see this from the third bullet. We see the summary there in the  
16 third bullet.

17 Another point that I am going to be making after lunch is that the CMA found, and if  
18 we look at the third bullet -- the first inset bullet, if I can put it that way -- the  
19 evidence shows Roland UK applied the Roland pricing policy to its musical  
20 instrument resellers and monitored their compliance, including through the  
21 use of online (inaudible).

22 Now all through the decision are many findings of fact about that, many findings of  
23 fact establishing that Roland sought to impose its pricing policy on all of its  
24 online resellers, so that is found as a fact and is admitted by Roland.

25 Now what the CMA didn't then do is carry out the very granular exercise that  
26 Mr Piccinin praised yesterday, the CMA, for having done, of going through all



1 of the documents in respect of the other resellers and finding that for their  
2 part, the reseller had agreed to comply with the policy, such that there is an  
3 agreement required for an infringement. It did not do that, but in my  
4 submission, the CMA is entitled to take account of the contextual facts when  
5 fining and it's entitled to do that not only because these were facts admitted by  
6 Roland but because they are relevant to deterrence and to the impact of this  
7 infringement.

8 I am going to be explaining that after lunch, but I wanted to foreshadow what my  
9 submission is going to be.

10 **THE CHAIRMAN:** I think that's an important point, Mr Piccinin, because at the  
11 moment, it does seem to me that the first of the inset bullet points there does  
12 pre-suppose there have been infringements by other resellers, apart from  
13 reseller one, and it's not clear to me to what extent it's legitimate for the CMA  
14 to take that into account, in terms of the penalty for the infringement that's the  
15 subject of the decision.

16 **MS DEMETRIOU:** Yes, sir. What we say in a nutshell about that is the CMA is  
17 entitled to take into account the impacts of this infringement, the wider  
18 potential impacts in the market, and I am going to come to explain how it did  
19 do that, but it's also entitled to take into account the facts surrounding the  
20 infringement. The CMA has made clear in the decision that it has not found  
21 multiple agreements by multiple other resellers, but it doesn't follow from that,  
22 that the CMA has to treat this as though -- close its eyes to the fact there are  
23 all sorts of admitted facts about what Roland was trying to do here.

24 It's a fine distinction but it's an important distinction, because what Roland was trying  
25 to do, and this is admitted, was impose its pricing policy, impose retail price  
26 maintenance, agree re-sale price maintenance with all of its online resellers,

1 and so when it comes to deterrence, that's something that the CMA was  
2 entitled to take into account. It's not entitled to say: well, we found 24  
3 infringements. Had it done that, then no doubt it could have imposed a higher  
4 fine, but what it is entitled to do is say -- it does not have to close its eyes to  
5 the fact Roland was trying to do something pretty bad here and admitted that  
6 is what it was trying to do, that's what I am going to be submitting. I hope, in  
7 a nutshell, that foreshadows the answer to your question.

8 **THE CHAIRMAN:** Good. 2 o'clock then.

9 **MS DEMETRIOU:** Thank you.

10 **THE CHAIRMAN:** Thank you very much.

11 **(1.02 pm)**

12 **(The luncheon adjournment)**

13 **(2.00 pm)**

14 **THE CHAIRMAN:** Thank you.

15 **MS DEMETRIOU:** Sir, members of the tribunal, I was -- I think we have lost  
16 Ms Weetman or is it just my screen that she's disappeared from?

17 **THE CHAIRMAN:** No, I think we have lost Ms Weetman for the time being. **(Pause)**  
18 There we are.

19 **MS DEMETRIOU:** I was starting to deal with the market coverage submission and  
20 could I ask the tribunal, please, to pick up the decision at page 150. So A1,  
21 tab 1, page 150 and paragraph 4.181.

22 Paragraph 4.181 is under the heading, as you've seen, "Content of the agreement."

23 So this is the agreement with reseller one that constitutes the infringement,  
24 comprises the infringement. You see there:

25 "As set out above, in the CMA's view, the agreement between Roland (UK) and  
26 reseller one stipulated that reseller one would not advertise or sell the relevant

1 products online below the minimum price, in accordance with the Roland  
2 pricing policy."

3 So in a way, just pausing there, Mr Piccinin's submissions focus only on that first  
4 bullet, so he characterises it as a narrow infringement on that basis but the  
5 second bullet:

6 "Reseller one's commitment to adhere to the Roland pricing policy was reinforced by  
7 measures on the part of Roland (UK) and that of other musical instrument  
8 resellers to monitor the market and identify musical instrument resellers who'd  
9 advertised or sold the products online below the minimum price, including in  
10 case of Roland (UK) and some resellers by way of using automated price  
11 tracking software. It was also reinforced by a credible threat of sanctions by  
12 Roland (UK) for non-compliance with the pricing policy. As set out above,  
13 Roland (UK) threatened reseller one with certain sanctions in relation to  
14 non-adherence. Such threats were significant to reseller one's business."

15 So we do place emphasis on the second bullet which is focused on the infringement  
16 found with reseller one but in defining and characterising the infringement, the  
17 CMA is here saying it comprises measures taken by Roland (UK) and  
18 other musical instrument resellers. That's all part and parcel of the  
19 infringement because they reinforce the point in bullet one, the agreement  
20 between Roland and reseller one.

21 We see, if we can turn back in the decision to page 50, going to section 3 here, that  
22 surveys all of the evidence, and paragraph 310, you see here reference to the  
23 automated price tracking software that the CMA was referring to in  
24 a paragraph I just took you to. You see at paragraph 3.110 that:

25 "Roland (UK) paid for a subscription to Insight Track which provided bespoke  
26 automated daily pricing reports, identifying musical instrument resellers who

1 were pricing below the minimum price. The evidence shows that -- "

2 There are three bullets, and if you look at the third bullet:

3 "The scope of the monitoring was to cover the most important musical instrument  
4 resellers and those who at times did not comply with the Roland pricing policy  
5 and covered higher end products with a view to incentivising compliance more  
6 generally across all the relevant products, due to the threat of being caught."

7 Then at 3.14, you see the design of the report, so a bespoke -- and they enabled  
8 Roland to identify those musical instrument resellers who were not adhering  
9 to the pricing policy and to take swift enforcement action.

10 Then over the page, you see in the second bullet there, that the Insight Track reports  
11 also identified exactly by how much the reseller was below the minimum price.  
12 So it's a sophisticated automated system. Then you see the scope at 3.15  
13 onwards. At 3.119, you see the CMA concludes that:

14 "Monitoring and enforcement through Insight Track was targeted with a view to  
15 improving compliance with the Roland pricing policy across all relevant  
16 products, albeit with a focus on higher value products."

17 Then this at 3.120 which is important:

18 "The CMA notes the importance of Insight Track reports as a monitoring and  
19 enforcement tool, as they could highlight price reductions quickly and so allow  
20 for swifter intervention.

21 "This point was underlined by [and I won't read the name], when he stated in  
22 interview that once one MI reseller changed its price, changes by other MI  
23 resellers would follow immediately, as due to the Internet, it would spark  
24 a chain reaction across Europe."

25 So that's part of why, when my learned friend urges the tribunal to focus on the small  
26 market share that any particular reseller, including reseller one, has, share of

1 Roland's products they have, we say he's missing the point because that may  
2 have been a good point several years ago, before the internet assumed  
3 importance and before this type of technology allowed price movements to be  
4 tracked but it's not a good point now. Because what this makes clear is that  
5 the adherence of reseller one to the pricing policy was highly visible, it was  
6 highly visible to other resellers and it would have had the effect of bringing  
7 other resellers into line or at least had the potential to do that which is really  
8 the test in the guidance.

9 Now I just want to pause here to make a point about the relative importance of  
10 reseller one because Mr Piccinin was keen to suggest that reseller one is very  
11 unimportant. If you could turn to paragraph 3.20 which is at page 23, you see  
12 there the figures. This is the musical instrument sector generally and I am  
13 going to take you to Roland in particular but you see this report estimated that  
14 four resellers accounted for just under, and you have 30 to 40 per cent, of the  
15 total estimated industry revenue.

16 If you look at the footnote, 93, they include reseller one. Then if you turn to  
17 page 158 of the decision and paragraph 4.211 and the second bullet on page  
18 158, the second bullet, you see the point there that "reseller one was one of  
19 the top five resellers of Roland branded products." I am not disputing, of  
20 course -- I understand there are lots of resellers, but this is still -- Mr Piccinin  
21 is nodding, so we've all got that point, that there were lots of resellers -- he's  
22 nodding again -- so I am happy to agree with that, but the point is that of the  
23 lots of resellers, reseller one was an important one and marrying that up with  
24 the point at paragraph 3.120, where the CMA has found that given the highly  
25 transparent nature of Internet sales and given the Insight Track monitoring  
26 that Roland were doing, once one reseller changed its price, that had

1 a knock-on effect because it was highly visible and would spark a chain  
2 reaction, meaning that other resellers would then adhere to the policy. That's  
3 why that's a key reason why the CMA was entitled to find at paragraph 5.27,  
4 that this one infringement had an actual or potential amplified effect in the  
5 market. We can also see in the decision, and this is a further point, that the  
6 CMA found as a fact, and don't forget of course, these facts were all admitted  
7 by Roland, that reseller one, in adhering to the agreement, monitored and  
8 reported other resellers who did not comply with Roland's pricing policy and  
9 so that was also another way in which the agreement with reseller one had  
10 wider effects.

11 Let me just show you some of that, some of those findings, it's by no means all of  
12 them. If you could turn to page 105 and paragraph 4.37. So this is under the  
13 heading "Reseller one's agreement with the Roland pricing policy", and if you  
14 look at 4.37, second half of that paragraph:

15 "To this end, reseller one would monitor other MI resellers' prices of relevant  
16 products during the relevant period and report those advertising below the  
17 minimum price to Roland (UK), in the expectation had Roland (UK) would  
18 contact such resellers and instruct them to revert to the minimum price."

19 So you can see there that reseller one's compliance or agreement to RPM had  
20 a wider impact because they were actively monitoring other resellers, to try  
21 and bring them into line. Then you turn to page 109 at 4.53 to 4.54. You see  
22 again the CMA saying the same thing: there was monitoring and reporting by  
23 reseller one and that at 4.54, Roland (UK) would respond to reseller one when  
24 it complained to Roland (UK) about other resellers, using words such as "on  
25 to it" or "you should see movement over the next few days." So that's why  
26 reseller one had an expectation that as a result of its agreement with Roland,

1 that agreement would have wider repercussions, in terms of what else went  
2 on in terms of other resellers' prices.

3 Then turning forward to page 112, paragraph 4.63, you can see, again, a reference  
4 to reseller one's expectation that Roland would take steps to enforce the  
5 pricing policy against other MI resellers who were subject to the same  
6 selective distribution arrangements.

7 Then you can see the conclusion on this at 4.144 at page 141. "Conclusion on the  
8 agreement between Roland (UK) and reseller one", and then if you look at the  
9 last bullet:

10 "On multiple occasions throughout the relevant period, reseller one reported other MI  
11 resellers to Roland (UK) for advertising ...(Reading to the words)... applied to  
12 the vast majority of MI resellers."

13 Then at paragraph 4.186 on page 151, you see that the main objective of the  
14 agreement was to fix a minimum price at which reseller one and other  
15 resellers adhering to the Roland pricing policy would sell the relevant  
16 products. You can see why that is said because of the points I have just  
17 taken you to about the understanding of reseller one that if it reported other  
18 resellers, action would be taken.

19 So albeit the CMA has not, for reasons of administrative efficiency, gone on to  
20 analyse all the documents to show that the other resellers agreed and so the  
21 agreement is complete, what the CMA did find in spades, was that Roland  
22 was seeking to impose this minimum pricing policy on all of its online sellers  
23 but reseller one understood that, that reseller one's actions in complying with  
24 the policy, would have been highly visible to all of the other resellers who  
25 would have fallen into line and that reseller one's agreement with Roland  
26 included an understanding that reseller one would report other resellers and

1 that action would be taken.

2 Over the page, you see -- just on that paragraph:

3 "The totality of the evidence in the CMA's possession shows that the aim [the aim of  
4 this agreement] was to ... "

5 And then you have the bullets:

6 "Reduce downward pressure on online prices of the relevant products."

7 So not just the relevant products sold by reseller one. Second bullet:

8 "Reduce price competition between reseller one and other resellers of the relevant  
9 products and stabilise prices, thereby protecting or improving the margins of  
10 MI resellers, including reseller one."

11 Not limited to reseller one.

12 So that is why the CMA found at paragraph 5.27 that this particular infringement has  
13 wider actual or potential effects on competition and it was fully justified in  
14 finding that and it's wrong to -- my learned friend's characterisation, with  
15 respect, is wrong because what he is seeking to do is characterise this as  
16 some kind of one-off, isolated instance of RPM, with a single reseller who is of  
17 no importance and that just is not the findings that are made and is not the  
18 admissions that were made by Roland. Of course, Roland doesn't challenge  
19 any of these findings that go to the infringement in this appeal.

20 Now we also say that my learned friend's approach ignores the fact that when  
21 establishing the infringement, and this is a similar point, the CMA made  
22 detailed factual findings about Roland's actions, about Roland's pricing policy  
23 in general which showed that it was seeking to impose it on all of its resellers.  
24 If you can turn, please, to page 103 and paragraph 4.28, you see that. So  
25 under the heading "Roland (UK)'s communication of the Roland pricing  
26 policy":



1 "The CMA has found that as part of the Roland pricing policy during the relevant  
2 period, Roland (UK) instructed its resellers, including reseller one, not to  
3 advertise or sell the relevant products online below the minimum price,  
4 monitored MI resellers and contacted those, including reseller one, who  
5 offered the relevant products for sale ...(Reading to the words)... the threat of  
6 sanctions in relation to reseller one."

7 So what the CMA has found is that as far as Roland's side of things is concerned,  
8 Roland was trying to do much more than simply enter into an agreement with  
9 reseller one, it was seeking to impose this pricing policy, generally, on all of its  
10 online resellers.

11 Now, for reasons of administrative priority, the CMA did not go on to prove that each  
12 of those other resellers, for their part, agreed to this. So it did not go on to  
13 find lots of separate infringements of competition law and that's explained in  
14 the next paragraphs in the decision. So 4.29, you see:

15 "The CMA has reasonable grounds for suspecting that at least 24 resellers were  
16 subject to and generally agreed."

17 That's resellers agreed to adhere but that's reasonable suspicion, reasonable  
18 grounds for suspecting:

19 "However, for reasons of administrative efficiency, the CMA has chosen to focus its  
20 assessment of whether there was an agreement with Roland (UK) on one  
21 reseller only. Nonetheless, the CMA considers that the Roland pricing policy  
22 could only be effective in its aim of protecting margins if there was general  
23 adherence to it ...(Reading to the words)... with the Roland pricing policy and  
24 other resellers had little choice but to comply."

25 But they don't make findings in respect of the other MI resellers.

26 So you can see, and Ms Pope explains in her evidence, that's the footnote I took you

1 to, that for reasons of administrative priority and efficiency, the exercise which  
2 is done in the rest of chapter-four which looks in very great detail at the  
3 documents to establish agreement on the part of reseller one for its part, the  
4 CMA did not pursue that. But that would have entailed a great deal more  
5 work to establish from the reseller's perspective, their agreement. But that  
6 does not mean -- the CMA did not find -- rather, to put it another way, the  
7 CMA did find that Roland, for its part, did seek to achieve its aim and what it  
8 was doing was seeking to achieve general adherence. We say that it's unreal  
9 to suggest the CMA should be required to close its eyes to all of those facts  
10 when determining the appropriate fine in this case. We see that the CMA did  
11 take it into account and you have seen paragraph 5.27.

12 To put it another way, the CMA was not required to treat the agreement or to  
13 assume that Roland was only seeking to impose its pricing policy vis-a-vis  
14 reseller one. It was not required to proceed on that basis. That would have  
15 been unreal and it was entitled to take into account the fact that Roland was  
16 seeking to do much more and there was substantial evidence showing it was  
17 seeking to do much more.

18 If we could just go back to the decision to page 28, just to show you a little bit more  
19 of the evidence that the CMA had in this respect. Looking at 3.35 to 3.36 on  
20 page 28. That's the conclusion that Roland operated a wide ranging policy,  
21 the purpose of which was to ensure that MI resellers would not advertise or  
22 sell the relevant products online. You see at 3.36, the scope of what Roland  
23 was trying to do.

24 Then moving to page 41 to 42, 3.77 -- you see the scope. I am not going to read this  
25 out but you see the scope applied to online pricing, applied to all relevant  
26 products, applied to all Roland MI resellers, at the top of 3.85. Then you

1 have, if you go forward to page 45, monitoring and enforcement of the Roland  
2 pricing policy. If you look at 3.92 again, the findings are that the monitoring  
3 and enforcement (inaudible) all of its resellers.

4 Then you see -- I am not going to take you in detail to this, I just want to show you  
5 what the decision covers. You then have on page 48, the passages I have  
6 taken you to already, relating to the pricing -- this is a slightly different point.  
7 This is pricing reports that Roland (UK) received which identified MI resellers  
8 not selling at the minimum price. So again, there's general measures that  
9 it took.

10 Then you see at 3.105 to 3.108 on page 49, monitoring by other musical instrument  
11 resellers. Then you have over the page, the Insight Track. We've already  
12 seen that. Then skipping forward to page 54, "Consequences", so you can  
13 see at 3.122 that:

14 "The contemporaneous documentary evidence shows that Roland (UK) considered  
15 imposing sanctions on MI resellers and senior staff instructed Roland (UK)  
16 sales managers to impose sanctions on MI resellers. Threatened MI resellers  
17 did, on occasion, impose sanctions for non-compliance."

18 That's, again, in relation to all resellers.

19 Then moving forward to paragraph 3.147 on page 61, you have a section in which  
20 the CMA explains that the evidence shows that Roland (UK) understood that  
21 its communications and interactions with its networks were not legal. And  
22 look, for example, at some of the evidence in 3.149. So again, a key area,  
23 retail price maintenance is not directly referred to for legal reasons but I can  
24 bring you up to speed with this. 3.151, again, a reference to EU competition  
25 law.

26 Then you see, moving forward to page 72, that documents were destroyed within

1 Roland because the documents showed that they were behaving unlawfully,  
2 so you see that, for example, at 3.194:

3 "Delete all text messages, no more e-mails, reprice."

4 3.196:

5 "The evidence shows that ...(Reading to the words)... communications relating to it."

6 Then 3.201, the conclusion:

7 "Roland (UK) knew that the implementation was illegal and undertook measures to  
8 conceal the Roland pricing policy."

9 Then all the way through the rest of chapter 3, you see examples from the  
10 contemporaneous documents, strong evidence of Roland monitoring and  
11 enforcing its pricing policy across the board. So we say that, yes, the CMA is  
12 penalising the infringement but it's entitled -- and it's not penalising lots of  
13 infringements, so in order to do that, it would have had to have made findings  
14 about the resellers, the other resellers' agreement. But in penalising the  
15 infringement, it's entitled to take into account the conduct of Roland in  
16 infringing competition law. You have seen that, first of all, the infringement  
17 with reseller one had the actual or potential wider repercussions because of  
18 the transparency point and the technology used to track prices and because  
19 reseller one was itself monitoring and reporting other resellers. And you see  
20 also that in infringing, in committing this infringement, Roland was trying to do  
21 much more and that's behaviour which, when it comes to general deterrence,  
22 the CMA is entitled to take into account.

23 Really, on that, I would be repeating myself but you've seen already that RPM  
24 seriously is prevalent in the United Kingdom and a particular problem in the  
25 musical instruments sector and general deterrence is something that the CMA  
26 was required to take in to account when setting the starting point. In our

1 submission, the CMA quite properly, in fulfilling that statutory duty, looked at  
2 these wider -- took account of these wider findings of fact it had made in terms  
3 of what Roland was trying to do.

4 Now my learned friend makes a point about Fender, so he said in relation to Fender  
5 that Fender was an example of a case in which a deduction had been made  
6 to reflect the fact that the infringement had been pursued in respect of one  
7 reseller. Now of course, I have already submitted to you that Fender and the  
8 other musical instruments cases are consistent with the present case, in that  
9 the CMA did take account of the fact in all of the cases. So they say in terms  
10 in the present case and in the other cases, under the market coverage head,  
11 that this is a single infringement with one reseller. They've taken that into  
12 account but there are other factors about wider potential impact which were  
13 equally taken into account in arriving at the 19 per cent starting point. Now as  
14 regards Fender, Fender is actually a case which is in our favour, not my  
15 learned friend's favour because the CMA, in Fender, did not take account of --  
16 it did not make a deduction from the 19 per cent, so it adopted the same  
17 starting point of 19 per cent in that case, even though that similarly, that case  
18 was a case relating to a single reseller. So it adopted the same approach.  
19 But what it then did -- so Fender is not authority for 'you have to have a lower  
20 starting point if you have a case with one reseller', it's not that at all, it  
21 supports the CMA's position on that point.

22 But what it then did at step four was when it applied the global assessment to look at  
23 whether or not the fine was proportionate, whether it was sufficient specific  
24 deterrence, it then at that point, found that the fine was too high and so it  
25 reduced it, in view of the fact that there was an agreement with a single  
26 reseller. Now in our case, the fine wasn't too high at step four, so even

1           though that's potentially a relevant factor, it did not have to do that and step  
2           four is the global assessment, the sense check: is this proportionate, is the  
3           amount a deterrent amount, in view of the financial standing of the company?

4   So it's not a point that helps -- it's not a case that helps my learned friend at all.

5   **MR CUTTING:** Can I ask a question there?

6   **MS DEMETRIOU:** Of course.

7   **MR CUTTING:** Given the way you've taken us through chapter 3, and the evidence  
8           referred to in chapter 3 for Roland's efforts, broader than in relation to reseller  
9           one, you then set us up for the conclusion at 5.27 and say the CMA can take  
10          account of those wider efforts or that wider policy in relation to RPM. Does  
11          that suggest that the fine is the level of fine that would apply to a network-wide  
12          policy by Roland because if so, I am then struggling to see how you get -- for  
13          the same fine for a network-wide policy and a fine where you have an  
14          infringement based only on one agreement. Because inherently, I would have  
15          thought the one is more serious than the second, even though -- I mean it  
16          begs the question what you have to prove for the network-wide one, I can see  
17          that but without anticipating too much what we are going to get in the reply -- I  
18          can see Mr Piccinin's face here -- I just wondered if you could help me with  
19          that because that seems to me the logic of where your description of section 3  
20          goes.

21   **MS DEMETRIOU:** Sir, yes, of course, I am grateful for the question. So we don't  
22          say that the fine is the same fine as could have been imposed if the CMA had  
23          gone on to do all of the work to establish lots of separate infringements. In  
24          fact, the CMA said that in terms in the decision. It said, first of all, it has not  
25          gone on to establish separate infringements and, secondly, at 5.27, it has  
26          expressly taken into account the market coverage is limited to the relevant

1 products sold by reseller one.

2 So it's taken that into account and so it follows from that, in our submission, that had  
3 the CMA chosen to approach things differently, and had established lots of  
4 individual infringements, it could have imposed a higher fine.

5 Now what Mr Piccinin said about that in his submission is: well, that beggars belief  
6 because you can't impose -- have a starting point of 30 per cent but, of  
7 course, the CMA wouldn't have imposed a starting point of 30 per cent but it  
8 could have imposed and in my submission, likely would have imposed,  
9 a higher fine, if it had reached a finding of lots of separate infringements.

10 Sir, just returning to your question, what Mr Piccinin says is -- so his argument is sort  
11 of extreme in the other direction. So he says that because of market  
12 coverage, it's got to be way, way lower. But we say well, no, that's taking too  
13 stark and extreme a view because what the CMA has found, it's found two  
14 things, if I could just encapsulate the submissions I have been making. One  
15 is that if you focus in on this agreement, single agreement with reseller one,  
16 and I took you to the paragraph in the decision that explains what that  
17 agreement compromises and what its objects were, its object, the object of  
18 that single agreement and what the agreement comprises, is much more than  
19 just suppressing reseller one's prices. Sorry, not suppressing, maintaining  
20 reseller one's prices because -- and that's for the reasons I took you to earlier  
21 which are the software that's involved, the monitoring that goes on and the  
22 fact that if reseller one falls into line, everybody else will follow, like a chain  
23 reaction. That's what the CMA found.

24 Also that as part of this agreement, reseller one is monitoring other resellers' prices,  
25 reporting them and expecting that action will be taken. So that's part and  
26 parcel of this single infringement, so that's the first point.

1 The second point is that the CMA is also entitled to take account of what Roland was  
2 trying to do, for its part, more generally and that's the sort of second point we  
3 make. They are separate points. So the first really zeros in on the agreement  
4 as found and the second says that the CMA is entitled to take account of what  
5 Roland was trying to do and not close its mind to that.

6 But in each case, sir, in answer to your question, we say that there is a distinction  
7 between finding a single infringement, albeit it had wider effects and going on  
8 to find lots of infringements and in the latter case, the CMA could have  
9 imposed a larger fine but we are not in that case.

10 **MR CUTTING:** But I understand that but then at paragraph 69 of your defence, you  
11 say: RPM deserves a starting point, at least at the upper end of ten to 20, as  
12 it's a serious infringement and you went for 19 in this case, so you have said  
13 it's at the upper end of your range within 69. Maybe it gives you 1 per cent  
14 more to go. But you still only found a single infringement but then you've  
15 taken into account, network-wide efforts, effectively.

16 **MS DEMETRIOU:** Sir, we've taken into account network-wide efforts, that's correct,  
17 but we have not taken into account multiple infringements. That's the basis  
18 on which the CMA proceeded.

19 **MR CUTTING:** I am just trying to work out in relation to what headroom there would  
20 be for a worse case of RPM than this. By going for the full 19 per cent  
21 pricing -- setting it on the basis of network-wide effects without proving  
22 network-wide consensual adherence, has the CMA left itself a gap or is it  
23 effectively saying that 19 is a right but a fairly senior number for RPM, taking  
24 paragraph 69 of your defence, and this is as egregious a case as we are ever  
25 going to find? Isn't that an inference from the description of chapter 3, leading  
26 up to the 19 per cent? I am putting the case as hard as possible, in



1 understanding where the gravity is.

2 **MS DEMETRIOU:** Sir, I understand. So first of all, I would dispute, with respect,  
3 your starting point which is that 19 per cent is the maximum for RPM because  
4 the CMA has not said that in its decision.

5 **MR CUTTING:** No, but in your defence, last sentence of paragraph 69.

6 **MS DEMETRIOU:** The last sentence. Can I just have a look at that. Yes, it may be  
7 that that -- I think that when we drafted that, that wasn't intending to limit the  
8 CMA's room for manoeuvre in particularly egregious RPM cases. It's not how  
9 it's said -- so what we are doing there is contrasting 21 and 30 per cent and  
10 ten to 20 and it may be a slightly infelicitous way of wording it but it's not what  
11 is said in the decision and it's not what's said in the other musical instruments  
12 decisions.

13 The CMA could go above 19 per cent in appropriate cases and going back to the  
14 decision at paragraph 5.23 on page 173, there the decision says that:

15 "The CMA will generally use a starting point between 21 and 30 per cent of the  
16 relevant turnover for the most serious types of infringement."

17 And you see at 5.26, the contrast with more serious types of cartel activity which are  
18 at the upper end of 21 to 30, so say 26 to 28. So nowhere here has the CMA  
19 sought to box itself in by saying 19 per cent is the maximum for RPM. So it  
20 might well be appropriate in a more egregious case, although this is quite an  
21 egregious case, we would say, where the CMA's proceeded to find multiple --  
22 established multiple different infringements, to go above 19 per cent.

23 So, sir, that's really our answer to your point, sir. We say there is sufficient  
24 headroom but, really, in approaching fine and assessing the need for  
25 deterrence, the CMA is entitled to look at the contextual factors and to look at,  
26 in particular, the wider impact of this infringement which is what 5.27 says. So

1 it's not an isolated infringement and it was entitled to proceed on that basis.  
2 When I say not isolated infringement, that's the wrong way of putting it. It's  
3 one infringement but it has a wider impact beyond just reseller one's products  
4 and that's been established. In appropriate cases, the CMA would have  
5 latitude, in my submission, to go higher than 19 per cent.

6 That brings me on to the final point under ground one which is specific deterrence  
7 and in fact it's related to the answer I've just given you which is that, of  
8 course, specific deterrence is something which needs to be addressed at step  
9 four and in this case, the CMA found that the amount of penalty at that stage  
10 was adequate for sufficient deterrence, was adequate deterrence -- for  
11 specific deterrence and was not disproportionate. That's the global sense  
12 check that the CMA took at that stage.

13 The factual findings that I've taken you to through the decision are also highly  
14 relevant here because at this stage, in terms of determining what needs to be  
15 done specifically to deter Roland, then we say it's obviously relevant that  
16 Roland was trying to do something very widespread. So, in terms of deterring  
17 it from taking infringing action going forward, it's obviously relevant that they  
18 were trying to impose this on all of their resellers, that's what needed to be  
19 deterred. If the tribunal could pick up the Argos case in the tribunal, so that's  
20 behind tab 10 of the authorities. It's tab 10. F2, tab 10, page 559 at  
21 page 173. This is the point really we are trying to make here.

22 The tribunal says here:

23 "In the present case ...(Reading to the words)... step one led to a penalty of  
24 £19.2 million for Argos, the OFT considered that that penalty was sufficient to  
25 act as an effective deterrent for Argos and in consequence decided not to  
26 apply a multiplier to that figure at step three."

1 So that's the same as what we are saying here:

2 "In our view, it cannot be assumed that the OFT would have applied no multiplier at  
3 step three if the step one calculation had been done differently, producing  
4 a lower figure."

5 That is what we are contending in this case too.

6 Then, just while we're on this case, if we could turn to page 577, and this really goes  
7 to the point I was making earlier, before lunch, about proportionality and the  
8 statutory maximum, you can see here the tribunal stepping back and saying:

9 "The statutory maximum in that case was 260 million, the penalty was 17.28 million,  
10 it's therefore less than one-tenth of the statutory maximum."

11 It says what their annual turnover was and we say that this is not at all  
12 disproportionate. We say in this case, of course, as I said, Roland is not  
13 running a proportionality argument and the fine that's imposed is a fraction of  
14 the statutory maximum in this case too.

15 But going back to specific deterrence, if Roland were correct in its submission that  
16 the starting point is 3.5 per cent, this would have led to a penalty at step three  
17 of just over 1 million and, actually, a final penalty of £400,000 and the CMA  
18 does not regard that sum as being sufficient for specific deterrence. So as  
19 we've said, in particular, this figure is small by comparison with Roland's total  
20 turnover of [...] and where a step three penalty is small, having regard to  
21 an undertaking's financial position, including -- not limited to but including its  
22 total turnover, the impact of the penalty on that undertaking may be very  
23 limited. It's only when -- this is trite -- penalties are sufficiently high to make  
24 a real impact on the undertaking, that the CMA considers that the specific  
25 deterrence objective is met.

26 That is one of the reasons why an adjustment can be made at step four.

1 Now in our skeleton argument and Mr Piccinin referred to this, so he took a pleading  
2 point about what we say in our defence and we say that that really goes  
3 nowhere because, of course, in the decision in this case, the CMA says in  
4 terms it had made reference -- of course, it did not go through the exercise of  
5 adding a figure at step four because it felt it considered the figure at step four  
6 was sufficient for the purposes of specific deterrence -- but the decision  
7 makes clear -- and this is at page 179 of the decision. So 179,  
8 paragraph 5.47B, and you can see there at footnote 691:

9 "The CMA has considered a range of financial indicators in this regard, based on the  
10 last 3 years' worth of public accounting information, including relevant  
11 turnover, worldwide turnover, operating profit, profit after tax, net assets and  
12 dividends."

13 And because of the point made in my learned friend's reply, we've elaborated on that  
14 in our skeleton argument and they obviously have had plenty of opportunity to  
15 deal with this. So the pleading point as such, does not go anywhere, it was  
16 obviously considered in the decision by the CMA at the time.

17 But turning to our skeleton, behind tab 3, you see there a summary of those  
18 indicators referred to in the footnote at paragraph 53, starting on 209.16 and  
19 over the page on 209.17. I am not going to read it out because the figures are  
20 confidential but it's explained there why the step four penalty of 6 million is  
21 assessed to be appropriate to achieve the objective of specific deterrence by  
22 the CMA.

23 **MS WEETMAN:** Can I ask you about those numbers, without quoting the numbers.  
24 Is there any guidance or indication anywhere of how those are interpreted?  
25 They just look like numbers to me. How one would know how those  
26 percentages relate to percentages anywhere else? If I were an auditor, I'd

1 have a feeling for audit materiality but how would I know those figures or  
2 interpret those figures?

3 **MS DEMETRIOU:** Do you mean how would they relate -- sorry, I am not sure  
4 I understand the question.

5 **MS WEETMAN:** Is there a benchmark anywhere that would tell me those figures  
6 seem to be within an acceptable range? There are four different percentages  
7 there. Would there be a benchmark or I can read them as --

8 **MS DEMETRIOU:** No, and you've seen that it's not addressed in the CMA's  
9 guidance and this is one of those points that's a matter for the CMA's expert  
10 judgment and evaluation, so as the enforcer, as the regulator, you have seen  
11 that it has commissioned research. We saw that in the DotEcon report.  
12 Mr Piccinin looks sceptical but he'll have his chance to come back. The CMA  
13 has commissioned research, it does enforce the competition rules, that's its  
14 job and it takes the view, it reaches a judgment in any particular case, in every  
15 case, as to what is required, in terms of making the penalty felt. You know, it  
16 needs to be felt by the company, otherwise it won't constitute deterrence at all  
17 and in this case, in circumstances where Roland has a turnover, relevant  
18 turnover of [...][?<], the ultimate fine proposed by my learned friend of  
19 400,000, is a drop in the ocean in our submission. That wouldn't be felt.  
20 That's not sufficient for specific deterrence.

21 If one looks at these figures -- I am not going to read them but at D, so 53D which  
22 relates to proportion of dividend payments, just so you see where that is. So  
23 that is at tab 46A. C1, tab 46A, page 910.5 and this is all confidential, so I am  
24 not going to read it out but you see the table there and you see in the  
25 left-hand column, the dates and in the right-hand column, the total dividends  
26 that are paid out to shareholders and this is one of the factors. Of course, the

1 dividends that are paid out are a sign of a company's financial health, in the  
2 CMA's submission, and so the CMA takes the view that if very healthy  
3 dividends are being paid out to shareholders, then the fine needs to be felt,  
4 otherwise if shareholders keep getting very healthy dividends, then there is no  
5 real incentive on the company to change its behaviour.

6 **MS WEETMAN:** Thank you.

7 **MS DEMETRIOU:** The answer -- it's a good question, madam. The answer, really,  
8 is that there is no benchmark but it's a matter for expert assessment and  
9 judgment in every case by the CMA.

10 **MS WEETMAN:** Okay, thank you.

11 **MS DEMETRIOU:** Now unless the tribunal has any -- **(Pause)**

12 Sorry, I am being handed notes. If you will just bear with me for a minute. Yes, so  
13 this goes back to Mr Cutting's question. Can I just supplement my answer to  
14 that, in light of what I am being told by Mr Bailey and my instructing solicitors.  
15 So the point that Mr Bailey has asked me to make which is a good point, is  
16 that the guidance says that 21 to 30 per cent applies to the most serious  
17 infringements, including price fixing and price fixing is defined at  
18 paragraph 3.1 to include RPM. So, in principle, that higher amount can apply  
19 to RPM and if you can go ... I am asked to take you just to note -- footnote 11  
20 makes it clear that paragraph 3.1 contains a definition of cartel activities for  
21 the purpose of the guidance that applies to the whole guidance and includes  
22 RPM.

23 The other case that I am just asked to draw to your attention is the Casio case at  
24 tab 47. Page 5022. Yes, I have marked this up, so I have been meaning to  
25 go to this. You see at paragraph 5.32 there, do you have that? Page 5022,  
26 paragraph 5.32:

1 "The infringement in this case amounted to RPM which constitutes vertical price  
2 fixing and so a hard core restriction within the meaning of Article 4A  
3 ...(Reading to the words)... generally attract a starting point between 21 and  
4 30 per cent of relevant turnover."

5 So that's actually a much better answer than I gave to your question, Mr Cutting. So  
6 what the CMA was --

7 **MR CUTTING:** Except that paragraph 5.33 of Casio then says it isn't.

8 **MS DEMETRIOU:** No, because what 5.33 says, that's the same as in the decision.  
9 It says the starting point towards the upper end of 21 to 30 per cent range,  
10 meaning, for example, 26 to 30 per cent. So it's saying RPM would --

11 **MR CUTTING:** Okay.

12 **MS DEMETRIOU:** So that's the distinction. I emphasised that point in the decision  
13 and our decision says the same thing. It talks about upper end for serious  
14 price fixing.

15 That is what I wanted to say about ground one. I am now going to turn to the  
16 settlement discount, if I may. To summarise our submission in a nutshell, the  
17 settlement by Roland was entirely voluntary. It was afforded proper rights of  
18 defence. It was able to make representations, some of which were accepted  
19 by the CMA and it specifically agreed to the maximum penalty amount that  
20 was imposed by the CMA. Further, Roland were aware and confirmed it was  
21 aware that the 20 per cent discount was being afforded to it on condition that  
22 it complied with the settlement conditions. Now by bringing this appeal,  
23 Roland has ceased complying with the settlement conditions and the obvious  
24 and straightforward consequence of that is the 20 per cent discount should be  
25 revoked and we submit that any other result would seriously undermine the  
26 CMA's settlement policy. I am going to come back to that in more detail but in

1 a nutshell, we say the CMA spends time and resources conducting the  
2 settlement policy procedure. It does so in order to make efficiency gains and  
3 it rewards undertakings for those gains and those efficiency gains enable the  
4 CMA to direct its resources to other cases in the public interest. If it were  
5 open to an undertaking to settle and pocket the 20 per cent discount and  
6 appeal and achieve a result that includes retaining the discount or some of it,  
7 then the incentives for the CMA to maintain its settlement policy in its current  
8 form would be seriously undermined. The CMA then, on an appeal, has to  
9 redirect resources back to the proceedings and this means that they can't be  
10 employed on other cases.

11 Now going back briefly to the decision, at page 18, you see that at paragraph 2.22,  
12 the CMA issues a statement of objections which was sent, of course, to  
13 Roland. 2.25, Roland submitted representations and information in relation to  
14 mitigating factors to be taken into account in the calculation of any financial  
15 penalty. Having made submissions on the SO - you see that at 2.24. 2.26,  
16 Roland offered to settle. Voluntarily, clearly and unequivocally admitted the  
17 facts allegations of the infringement. 2.27, CMA confirmed it would settle and  
18 it intended to proceed to an infringement decision.

19 Turning to the CMA's guidance relating to the settlement procedure. This is at F5,  
20 tab 74. If you could turn, please, to page 7463. Paragraph 14.7.  
21 Requirements for --

22 **THE CHAIRMAN:** Can you give us a little longer to find the place.

23 **MS DEMETRIOU:** I am so sorry. So that is F5, tab 74, page 7463.

24 **THE CHAIRMAN:** Yes.

25 **MS DEMETRIOU:** Then you see:

26 "At a minimum, the CMA will require the settling businesses to ... "



1 And there are three bullets. The first is:

2 "Clear and unequivocal admission of liability."

3 The third one is:

4 "Confirm it will pay a penalty set out at a maximum amount. As set out in  
5 paragraph 4.29E below, this maximum penalty which will apply, provided the  
6 business continues to follow the requirements of settlement, will reflect the  
7 application of the settlement discount to the penalty that would otherwise have  
8 been imposed."

9 Then you see at 14.8 in the penultimate bullet:

10 "If the settling business appeals the decision, it will no longer benefit from the  
11 settlement discount. The CMA will remain free to use the admissions made."

12 So that's clear in the guidance. If you appeal, you no longer benefit from the  
13 settlement discount. So everybody knows that when they go into the  
14 settlement procedure voluntarily. Then you see at 14.9:

15 "A settling business may withdraw from settlement discussions at any time, before  
16 confirming its acceptance of the requirements for settlement."

17 And so it was open to Roland to withdraw from the settlement procedure at any time,  
18 had it disagreed with the maximum amount of the penalty put to it by the  
19 CMA. It could have said: well we don't like that, that's far too high for RPM,  
20 we want out and we are going to contest this. It could have done that. It  
21 didn't do it. It chose not to do it.

22 Then 14.15, you see under the heading "Draft penalty calculation", on page 7465,  
23 so:

24 "Where settlement is being considered prior to an issue of a statement of objections  
25 ... "

26 That's 14.15. And 14.16 is:

1 "... after receipt of the statement of objections ..."

2 Which was the case -- this was prior to the statement of objections:

3 "... the business considering settlement would be presented with a draft penalty  
4 calculation and the CMA will give each business the opportunity to make  
5 limited representations on the draft penalty calculation within a specified  
6 time frame, as part of settlement discussions, provided these are not  
7 inconsistent with its admission of liability.

8 Then at 14.25 over the page:

9 "If the settlement discussions are not successful, the case reverts to the usual  
10 administrative procedure."

11 Then:

12 "Any decision to issue an infringement decision and any resulting penalty will be for  
13 a case decision group. That means any penalty imposed may be different."

14 So one of the benefits that the settling party has is some certainty about what the  
15 penalty is going to be because it's told it, told the maximum amount.

16 Then at 14.28:

17 "As part of the minimum requirements for settlement, a business must accept it will  
18 pay a maximum penalty."

19 Then:

20 "In the infringement decision, the CMA will set out the total penalty, less the specified  
21 discount, provided the settling business follows any continuing requirements  
22 of settlement."

23 Then 14.13:

24 "The settlement discount will no longer apply if a settling business appeals the  
25 infringement decision to the Competition Appeal Tribunal. The  
26 Competition Appeal Tribunal has full jurisdiction to review the appropriate

1 level of penalty."

2 Then you see that the settlement discount is capped at a level of 20 per cent. So the  
3 maximum was awarded in this case to Roland. Then 14.32:

4 "The CMA retains the rights to withdraw from the settlement procedure if the settling  
5 business does not follow the requirements for settlement and will notify the  
6 settling business it has considered it's not following the requirements of  
7 settlement."

8 So that's what the guidance says and it couldn't be clearer, in my submission.

9 Going now back to Ms Pope's witness statement, A2, tab 8, to the latter part of the  
10 witness statement, starting at paragraph 67. So that's page 304. So that's  
11 A2, tab 8, page 304. So you see there at paragraph 67, she sets out what  
12 happened procedurally in this case and you see the point which is highlighted  
13 in the paragraph that the Chairman has already put to Mr Piccinin. I will come  
14 back to that in a moment. But then you see that Roland was sent the  
15 statement of objections, had an opportunity to make representations, was  
16 then sent a draft penalty calculation on 22 April, given an opportunity to  
17 respond, both in writing and at the settlement meeting, where its general  
18 counsel and team of lawyers were in attendance and in a further written  
19 submission in May:

20 "These submissions did not contain any further representations in relation to the  
21 CMA's proposed starting point. Roland's written and oral submissions were  
22 taken into account before the final penalty calculation was determined."

23 In fact, it was reduced in light of some of those submissions. So:

24 "Following consideration at its board meeting in full knowledge of the final penalty  
25 calculation with the benefit of legal advice, Roland agreed to the terms of the  
26 settlement."

1 Then Ms Pope makes the point at 68 that Roland was advised throughout by a team,  
2 an experienced team of lawyers and had every opportunity and did make  
3 submissions on a proposed penalty. Then you see at 69, the point I was  
4 seeking to make before, about the benefit for an undertaking of knowing what  
5 its maximum liability is in good time and in these circumstances, Roland was  
6 planning an IPO later in the year and had explained the increased urgency to  
7 the CMA and the importance to it of knowing what the fine range was. So  
8 there was a very specific benefit accruing to Roland in this case, by knowing  
9 the maximum amount of penalty the CMA was going to impose. Had it not  
10 settled, then that decision would have gone back to the case team. So it  
11 wanted to know quickly and the settlement procedure enabled it to do that.

12 Then you see the point at 70 that I was just making, that the case team would have  
13 had to have considered the issue of penalty afresh. Roland chose not to go  
14 down this route but willingly signed the terms of settlement.

15 Just pausing there, and going back, please, to the settlement submission at tab 36.  
16 So this is the submission that the Chairman put to Mr Piccinin earlier. So it's  
17 tab 36, page 708 and the important bit is at page 710. You see there the  
18 heading "Assessment of seriousness", and the starting point. I don't think the  
19 heading can be confidential. You see what is said. What we take from this is  
20 we say it's very clear that Roland was, in fact, expressly urging the CMA to  
21 take the approach that it took. Now Mr Piccinin says: oh, that's not what it  
22 says. Well it's precisely what it says. It's precisely what it says, which is why  
23 they are praying in aid the consistent treatment point.

24 Now what then happened was at tab 37, you see the draft penalty calculation which  
25 included the 19 per cent starting point. That's tab 37 and you see that at  
26 page 719. We know from Ms Pope's witness statement that none of the

1 further submissions made by Roland on the draft penalty statement took issue  
2 with the starting point. None of them made these submissions now being  
3 made or urged the CMA to take a different approach.

4 **MR CUTTING:** Can I ask a question there which is I suppose that by virtue of tab 36  
5 and then the detailed content of annex 1 of tab 37 which we are all being  
6 careful not to disclose, is it any part of your case that the acceptance by  
7 Roland of those numbers suggests that those numbers are reasonable or are  
8 you accepting at its broadest, Mr Piccinin's case that there's no estoppel and,  
9 of course, they can challenge the decision on grounds of the type he's doing  
10 now? I just want to be clear in my own mind what the status or what weight or  
11 how, if at all, we are or are not allowed to take this stuff into account.  
12 Because I find that quite difficult and it's not something which any of the  
13 pleadings have gone into in any detail which is leaving me struggling to work  
14 out quite what the law is confronting the tribunal who have to make this  
15 decision on, in effect, a merits basis, where we've got a whole bunch of  
16 material in front of us which may or may not be contested but it's clearly been  
17 said at one point someone would sign up to this.

18 **MS DEMETRIOU:** Sir, yes. What we say is it's not -- Roland's not estopped from  
19 arguing these points, it's perfectly entitled to bring an appeal and to argue  
20 points it didn't argue for, so we are not saying that it's precluded from running  
21 these arguments. But what we do say is that it goes to this point. We say  
22 that this issue before the tribunal is whether Roland should be permitted to  
23 argue these points and keep the 20 per cent discount. So that's the issue it  
24 goes to, so we say, yes, Roland can argue these points on appeal but what  
25 it can't do is keep the 20 per cent discount because the 20 per cent discount  
26 was granted to it on the basis it would not appeal.

1 **MR CUTTING:** Okay.

2 **MS DEMETRIOU:** What you can do is you can appeal and you can run different  
3 arguments but you can't say: well we agree with this maximum penalty, we'll  
4 pocket the 20 per cent discount and now we are going to try our luck before  
5 the tribunal. And the reason you can't do that is that that would seriously  
6 compromise the CMA's settlement policy. It would mean, essentially, that  
7 firms could gain a substantial discount on their fine and then run new points  
8 on appeal, entitled to do that and then say: but we don't think we should have  
9 to give back the discount for settling, we want to keep that but get a further  
10 reduction too and we say that that is what this point goes to. That's unfair, it's  
11 not what they signed up to. You can see that the guidance makes it  
12 absolutely clear that you forego the discount if you stop complying with the  
13 settlement conditions. The settlement agreement makes that clear. Perhaps  
14 we can just quickly turn that up. That's behind tab 39, starting on page 779. If  
15 we look at 781, we see the maximum penalty is accepted there. Then 784, if  
16 you look at paragraph 15, given the draft penalty calculation -- has been given  
17 an opportunity to make submissions. Those have been taken into account.  
18 Then you see at 22, in recognition of the settling party's admission. You then  
19 see at D, the settling party is committed -- the settlement infringement, that  
20 the maximum penalty will be imposed and the discount will be applied.

21 Then 25 to 26, termination post-infringement decision:

22 "CMA may determine that the terms no longer apply if the settling party has not  
23 complied with one or more of the conditions."

24 Then at 26:

25 "... will no longer apply the following ...(reading to the words)... settling party appeals  
26 ..."

1 Which they've done, so they've gone into this with their eyes open and then you see  
2 29 and 30, that Mr Piccinin took you to, the CMA can go to the CAT, asking  
3 for the settlement discount to be revoked. So this is all apiece. The  
4 settlement guidance makes it clear, the settlement agreement makes it clear,  
5 and that's the deal. That's the deal, because that is why the CMA runs its  
6 settlement procedures to gain these efficiencies and it no longer gains them if  
7 it has to deal with an appeal.

8 **THE CHAIRMAN:** Can I just interrupt. I think what you are implicitly accepting is  
9 that what was said by Roland vis-a-vis the starting point is not something  
10 that's relevant when we come to consider the stage one. In other words, what  
11 was conceded before can't be held against Roland now because they are free  
12 to make fresh arguments and it wouldn't be right for us to say: well it's odd  
13 you are now saying this is unreasonable, when previously you said it was  
14 reasonable. That's something we should not get into. We should give them a  
15 clean slate but when it comes to the settlement, then it's something that's  
16 relevant to consider.

17 **MS DEMETRIOU:** Exactly. That's exactly our point.

18 **THE CHAIRMAN:** Okay, fine.

19 **MS DEMETRIOU:** Now just going back to Ms Pope's witness statement -- sorry to  
20 go backwards and forwards but that's behind tab 8. A2, tab 8 and just ask  
21 you to look at paragraph 71 and 73 on page 306. I am not going to read them  
22 out but that's the evidence substantiating the submissions I am making.

23 Now what does Roland say in response? So Roland's argument, let's be clear about  
24 this, is it should not have to forego any of the 20 per cent discount it was  
25 accorded because it says the CMA has not lost all of its administrative  
26 savings but that's not logical, it's not a logical submission. Because it's true

1 that had Roland also appealed on liability, then even more CMA resources  
2 would have had to have been used in order to engage with a lengthier appeal,  
3 so that might have been true but that's besides the point, because the point is  
4 that the settlement procedure is predicated on the CMA gaining all of the  
5 efficiency advantages envisaged because any engagement with the case  
6 after the decision on appeal means that the case team, as Ms Pope says, has  
7 to re-engage and be diverted from other cases, other work being carried out in  
8 the public interest and that's the basis on which the CMA operates its policy.  
9 And as I say, it's made crystal clear in the guidance and was made crystal  
10 clear to Roland throughout the process and it's what Roland agreed to. We  
11 say it's fair and appropriate that Roland should forego the discount it received  
12 or settlement, in circumstances where it has not kept its side of the bargain  
13 and any other outcome, we say would lead to a position whereby  
14 undertakings could gain substantial rewards in return for agreeing to settle,  
15 resile from the settlement and still retain some or all of the reward. That's why  
16 we say it's not appropriate for the tribunal to permit Roland to retain its  
17 discounts and certainly the tribunal should not be engaged in some kind of  
18 cost assessment of working out precisely what administrative savings have  
19 been made by the CMA in this process. Indeed, Mr Piccinin is not even  
20 arguing for that. He says it's an all or nothing thing as well, that he should  
21 keep all of it. He's shaking his head, he's now putting it differently. His  
22 skeleton argument says he should keep all of it. Anyway, you have my  
23 answer to the point, it's not for the tribunal to start analysing, nor could it,  
24 precisely how many administrative savings have been made in this case. The  
25 settlement procedure is predicated on the conditions which are set out clearly  
26 in the guidance and were agreed to by Roland and includes very, very clearly,



1 no appeal, no appeal on liability, no appeal on penalty.

2 In any event, as Ms Pope explains, the administrative efficiencies in fact realised by  
3 the CMA during the investigation, as a consequence of Roland's settlement,  
4 were limited by the fact that Roland was a leniency applicant which had  
5 admitted the infringement and were, in any event, obliged to cooperate with  
6 the investigation. So the most significant resource saving here was the  
7 prospect of no appeal and that's the saving that allows CMA staff to be  
8 reassigned to work on other cases.

9 **THE CHAIRMAN:** What do you say to Mr Piccinin's double dipping point that if you  
10 hang on to the settlement discount or if a discount has to be repaid and you  
11 get your costs, there will be some sort of double recovery?

12 **MS DEMETRIOU:** I think that's a point that does not need to be decided now  
13 because the costs of this appeal are a matter which should be decided once  
14 we've seen the tribunal's judgment. So at the moment, I am not proposing,  
15 really, to make argument on that, I think that's a point that's a hypothetical  
16 point at the moment, that we should address once we've seen the tribunal's  
17 judgment because there are all sorts of considerations that go into costs. And  
18 so at the moment, what I am concerned about is the discount and that's the  
19 really important point for the CMA because, frankly, as I have said, it would  
20 seriously jeopardise the policy.

21 So Mr Piccinin made another point about his Hobson's choice point, if I could put it  
22 that way. So he said that the revocation of the discount would result in  
23 settlement being used in a coercive way or would shield the CMA from proper  
24 scrutiny. Now in relation to that, we say that that argument is incorrect  
25 because the settlement procedure is voluntary and nobody has to settle, so  
26 they can withdraw at any time from the settlement process if they don't like it.

1 But there's nothing unfair or coercive in saying if you voluntarily choose to  
2 settle and take the 20 per cent discount, then you should forego it, if you want  
3 to turn this into a contested procedure. There's nothing coercive about that.  
4 You can turn it into a contested procedure and take your chances but then  
5 you can't keep the discount at the same time.

6 In any event, we say that this argument, and this is where Mr Cutting's question  
7 comes in, that argument is entirely theoretical in the circumstances of this  
8 particular case because the CMA has not been shielded from any proper  
9 scrutiny because it adopted the position on penalty that Roland argued for  
10 expressly, so how can the CMA have coerced Roland by settling this case  
11 into some position it was not arguing for? That's why this point does become  
12 rather relevant in considering the arguments made by Roland. So had Roland  
13 concluded, despite its submission to the contrary at the time and despite its  
14 agreement, the settlement agreement, the proposed fine was too high after  
15 all, and had it changed its mind, it could have changed its mind, could have  
16 brought this appeal, but we say what is impermissible is to keep the  
17 20 per cent in those circumstances. It's not what it agreed to do, it's not what  
18 the guidance says, it would jeopardise the policy and it is, I am afraid, a cake  
19 and eat it approach.

20 Just finally, my final point is that we've sent another authority to the tribunal which  
21 I don't know if it's reached you but it's the Trucks, recent judgment of the  
22 Court of Appeal in Trucks.

23 **THE CHAIRMAN:** It has reached us, yes.

24 **MS DEMETRIOU:** Can I just make a point by analogy. This is a different case in  
25 which the issue was whether the addressees of a Commission decision, who  
26 had not appealed, could re-argue points before the national court or whether it

1 would be an abuse of process for them to do that. The Court of Appeal  
2 upheld the CAT's finding that it would be an abuse of process or might well be  
3 an abuse of process and rejected the arguments made that this would  
4 somehow result in there being some unfairness if they couldn't appeal  
5 findings. So it's relevant by analogy. It's relevant because the findings to  
6 which they would have been bound were admissions, they were findings in  
7 a settlement decision which as a matter of EU law, were not essential to the  
8 operative part of the decision and could not have been the subject of an  
9 appeal in the Luxembourg courts.

10 You see at paragraph 145, this -- and I just raise it because it's tangentially relevant.

11 It's a recent authority and I just think the tribunal should be aware of it. At  
12 145, the court said:

13 "I am satisfied that the CAT was entitled to conclude, for the reasons it gave, that  
14 there would be manifest unfairness to the claimants [those are the claimants  
15 seeking damages as a result of the cartel] if the addressees were ...(Reading  
16 to the words)... future significance."

17 So what the Court of Appeal was saying there was there does not need to be an  
18 opportunity to contest these findings because they have all been agreed to in  
19 the settlement process. By analogy, sir, I am not saying it's directly on point  
20 but by analogy, the tribunal should take Mr Piccinin's argument about  
21 Hobson's choice and coercion with a pinch of salt because, frankly, this was  
22 a settlement procedure that was voluntary, they signed up to it, they had  
23 every opportunity to demur from the maximum penalty and the starting point  
24 and they didn't to it. No, they are not bound by it, they are not estopped from  
25 arguing the contrary now but what they should not do is pocket the  
26 20 per cent and argue to the contrary now (inaudible).

1 **MR CUTTING:** Can I ask a question about the breadth for us of 145 that you've just  
2 brought to our attention.

3 **MS DEMETRIOU:** Yes.

4 **MR CUTTING:** "People aren't entitled to contest admissions freely made in the  
5 settlement process."

6 I don't know whether this is something Mr Bailey was going to come upon in the  
7 context of the leniency discussion but the file before us which includes the  
8 detailed profits made during the leniency and settlement process, call them  
9 what you will, contain what I think can fairly be described as some admissions  
10 on -- the ones I had in mind are sort of round about page 537 and page 594 to  
11 95 of the bundle. It's not clear to me whether they are limited to the  
12 agreement in relation to reseller one and so I wondered whether they are  
13 relevant to your scope of infringement argument and whether 145 of Trucks  
14 suggests that we should have those in mind or whether they are behind the  
15 veil, if you like, and insufficiently captured by the decision for us to have  
16 regard to them in the context of deciding the case on the merits, as contained  
17 in the voluminous papers before us.

18 **MS DEMETRIOU:** Yes. No, I can't say to you that -- no, I mean Trucks, the Court of  
19 Appeal authority is not authority for the proposition that you can go behind the  
20 decision and look at leniency submissions, so I am not submitting that to you.

21 **MR CUTTING:** Okay.

22 **MS DEMETRIOU:** It's not authority for that at all.

23 Sir, members of the tribunal, those are my submissions. I was going to hand over to  
24 Mr Bailey to deal with leniency, unless the tribunal has any questions for me?

25 **THE CHAIRMAN:** I don't have any questions. I don't believe the other members do,  
26 so thank you very much, Ms Demetriou.

1 **MS DEMETRIOU:** Thank you. I am going to have to physically change places if  
2 that's all right, if you just give us a moment.

3 **THE CHAIRMAN:** Would this be a convenient moment to have a break?

4 **MS DEMETRIOU:** It might be, before I fall over my chair.

5 **THE CHAIRMAN:** We'll have a 5 minute break then.

6 **MS DEMETRIOU:** Thank you.

7 **(3.24 pm)**

8 **(A short break)**

9 **(3.29 pm)**

10 **Submissions by MR BAILEY**

11 **THE CHAIRMAN:** Yes, Mr Bailey.

12 **MR BAILEY:** May it please the tribunal, I am going to address you on ground 2 and  
13 I am going to structure my submissions in three parts. First, I would like to  
14 briefly draw the tribunal's attention to a few key features of the CMA's leniency  
15 policy.

16 Second, I would like to take a quick look at the approach that was taken by the  
17 senior responsible officer in her letters to Roland on 3 and 17 March which  
18 deal with the leniency discount.

19 Thirdly, I would like to respond to the key arguments that my learned friend made  
20 this morning.

21 Sir, in that regard, I would like to start in open court but for reasons I hope will be  
22 apparent when I come to look at the letters, I would request that the tribunal  
23 sit in private. I have raised that with my learned friend. Roland and its  
24 solicitors, of course, can stay online but it's basically impossible for me to go  
25 to the material without having to refer to its contents. I have tried to keep that  
26 as narrow as possible and I can indicate when but I hope that will be

1 acceptable to the tribunal.

2 **THE CHAIRMAN:** Yes.

3 **MR BAILEY:** I am grateful.

4 If we could start, please, with the penalty guidance. That's to be found in --

5 **THE CHAIRMAN:** Mr Bailey, can you just hold on one second. It's being pointed

6 out to me that before we go into closed session, there will have to be a short

7 break to arrange for IT to cut off people who are not privy to the hearing.

8 **MR BAILEY:** I understand, sir, I will give an indication when I am about to go to that

9 material.

10 **THE CHAIRMAN:** Sure.

11 **MR BAILEY:** So if we could start, please, with the penalty guidance. That's to be

12 found in F5, tab 70 and the relevant page is 7318.

13 **THE CHAIRMAN:** Yes.

14 **MR BAILEY:** The reason why I am starting with this, sir, is because this is guidance

15 that was prepared and published under section 38 of the Competition Act and

16 this is guidance to which both the CMA and the tribunal are statutorily obliged

17 to have regard under section 38, subsection 8 and that's different from the

18 leniency guidance to which we will come which was not issued under any

19 statutory enactment, so this important.

20 I would like to make three points if I may. The first is you might have wondered why

21 the CMA reduces fines on infringers and paragraph 3.3 explains that:

22 "It's in the interest of the UK economy and at least until the end of the year, the

23 European Union, to have a policy of lenient treatment to undertakings which

24 inform it of cartel activities and then cooperate in the circumstances set out

25 below."

26 It goes on to explain that it's the interests of customers and consumers in detecting

1 such activities and prohibiting them, that outweigh the other policy objective,  
2 to which my learned friend Ms Demetriou referred to this morning, in terms of  
3 properly penalising infringers. So there has to be a balance struck.

4 If I could ask you then for my second point, to turn on to page 7321 and 7322. What  
5 you will see here is that the guidance is setting out both immunity, that's on  
6 7321, and that's only available where the undertaking is first in the door to the  
7 CMA, with evidence of the cartel, and there is no pre-existing investigation.  
8 That's what is known as type A immunity. You can see in paragraph 3.13, the  
9 various conditions that must be met. I am going to just draw your attention to  
10 the fact that in those circumstances, there is a lower threshold that applies.  
11 You see that at 3.14, that you just have to provide a sufficient basis for taking  
12 forward a credible investigation and that's all because what we want to  
13 encourage are undertakings to tell the CMA about activities they don't already  
14 know about. In those circumstances, you will -- it's guaranteed immunity.  
15 Now that's not in this case because my learned friend recognises we didn't  
16 have a type A immunity application so we go forward to paragraph 3.16 and  
17 you can see here, two things. The first is that it is a discretion that the CMA  
18 has, an undertaking may benefit, anywhere up to 100 per cent and here, the  
19 threshold at the third bullet on paragraph 3.16 is you have to add significant  
20 value to the CMA's investigation, must genuinely advance the investigation.

21 The third point, sir, is that in paragraph 3.7, you see it emphasises, again, the  
22 discretion and then it says:

23 "When calculating the level of the reduction in the penalty [in other words the  
24 discount], it looks at the overall added value and then sets out four factors.  
25 That's the stage at which the undertaking comes forward, the information  
26 already in the CMA's possession, it's probative value and the level of

1 cooperation."

2 Now that is exactly the same as paragraph 6.8 of the leniency guidance to which my  
3 learned friend referred but, of course, it's this guidance to which the CMA and  
4 the tribunal must have regard under the statute.

5 That's the penalty guidance. That contains the leniency policy. But that has then  
6 been fleshed out in detail by the leniency guidance and I would like to take  
7 you to just five points in that long document which is to be found in F5, tab 68,  
8 starting at page 7165. It's referred to as an OFT document, in other words the  
9 predecessor to the CMA but it was adopted by the CMA board, so it's a CMA  
10 document now.

11 The first point I would like to draw your attention to is to be found on page 7173 at  
12 paragraph 1.8. This is simply for your note. The key features of the UK  
13 leniency system. It's a very helpful, concise series of bullets and over the  
14 page, page 7174, the third bullet on that page, you'll see:

15 "The availability of a reduced penalty where an applicant is the first to approach but  
16 there's already an investigation."

17 So that is this case. That's what's referred to as type B leniency.

18 But a further key feature which is going to be relevant later is if you go down to  
19 paragraph 1.9 and the final bullet at the top of page 7175, you will see that the  
20 CMA hopes that in a case where it is genuinely a close call, that it will err in  
21 favour of the applicant, insofar as the grant of leniency goes. So if there's  
22 a borderline case, then the benefit of the doubt is given to the leniency  
23 applicant.

24 Now if I could ask you then to go to my second point and that is to be found at  
25 paragraph 2.18 at page 7184. This appears under the heading "Type B  
26 immunity and leniency." The point I wanted to draw your attention to is that



1 this is referring to the fact that the CMA has to exercise a discretion as to  
2 where the public interest lies. So there is a balance that has to be done. In  
3 essence, you can see that it refers to, on the one hand, the benefit of gaining  
4 additional evidence and that can be rewarded with leniency but of course,  
5 there is a dis-benefit on the other hand, where one reduces penalties after an  
6 investigation has commenced, resources have been expended, we may  
7 already have evidence in our possession and so there has to be a balance,  
8 there has to be a judgment call as to where the benefit has been given.

9 I am going to come on to how the CMA exercised that balancing test in a moment.

10 The third point I take from this document is that could you go, please, to  
11 page 7217 and paragraph 5.4. I am conscious that this has been referred to  
12 in the pleadings and the skeletons, so I will simply refer to it very briefly. But  
13 at the bottom of page 7217, you can see the CMA explain that one of the  
14 threshold conditions for leniency is "continuous and complete cooperation",  
15 and what that means is that you have to take a constructive approach and  
16 turning over the page, and I emphasise this:

17 "It has to genuinely assist the CMA in both efficiently and effectively, detect,  
18 investigate and take enforcement action against cartel conduct."

19 Which as Ms Demetriou referred, includes RPM for this purpose.

20 That then, is explained in a bit more detail if we turn on which is my fourth point, to  
21 paragraph 5.38 on page 7227 because what the CMA goes on to explain is  
22 that this cooperation obligation imposes a positive duty on the applicant to  
23 inform the CMA without delay about any concerns relating to the cooperation  
24 of employees and that includes concerns about the completeness and the  
25 accuracy of any statements made by any of the employees. That's an  
26 important point which we will come back to when we look at Ms Pope's first

1 witness statement.

2 The final point in this document, if could ask you to turn to page 7230, my learned  
3 friend referred to paragraph 6.8. I am not going to repeat that. He also did  
4 refer to paragraph 6.9. I would just like to make two points about  
5 paragraph 6.9. The first is you will see that it says:

6 "The OFT then and it remains the CMA now, has insufficient experience of type B  
7 reductions in penalty to give any general guidance about percentage  
8 reductions."

9 So in my submission, what that means is it will be a question of fact, case by case.

10 The other point, my learned friend noted that where one is second in the door or third  
11 or fourth and you are a type C leniency applicant, then you can expect  
12 between 25 to 50 per cent reduction, but the final sentence does say:

13 "It's possible that low value and/or late applications may gain awards of less than  
14 25 per cent."

15 Now all that is to indicate that one has a spectrum in terms of the discount that will  
16 be granted and that will be informed by the CMA's assessment in the round,  
17 of all the factors in paragraph 6.8 but if, ultimately, it is of a relatively lower  
18 value, then one already sees in this document that that might mean that the  
19 discount is less than 25 per cent.

20 Now, sir, that concludes the survey of the guidance of the CMA's leniency policy. At  
21 this point I wanted to go to the CMA's letters deciding leniency and therefore,  
22 please could we sit in private.

23 **THE CHAIRMAN:** Yes. We will have a 5 minute break.

24 **MR BAILEY:** Thank you.

25 **(3.45 pm)**

26 **(A short break)**

1 (3.50 pm)

2 (Closed session see separate transcript)

3 (4.24 pm)

4 **MR BAILEY:** I am grateful.

5 **THE CHAIRMAN:** Before we do so, can I ask Mr Piccinin how long he anticipates  
6 being in reply?

7 **MR PICCININ:** Yes, sir. I mean it's difficult to say precisely but less than half an  
8 hour but I am not sure how much less.

9 **THE CHAIRMAN:** It's really a question of whether we try and wrap up today or  
10 whether we carry on tomorrow.

11 **MR PICCININ:** I am ready and very happy to do it and I can take it as quickly as  
12 I can but that may leave us here until 5 o'clock, so I am in your hands.

13 **MR BAILEY:** Sir, I promise to be no more than 5 minutes.

14 **THE CHAIRMAN:** All right. In that case, unless anybody disagrees with me, I think  
15 we'll carry on and finish this evening. Please carry on, Mr Bailey.

16 **MR BAILEY:** I am grateful, sir.

17 Turning then to the third argument, so this is the leitmotif that runs through ground 2,  
18 where Roland looks at the Fender case, sees that Fender is granted  
19 a 60 per cent discount and says: me too. In my submission, that comparison  
20 is misplaced. First of all, of course, Roland got 100 per cent reduction in its  
21 fine for the first two-year period, so better than Fender.

22 But the second point and I would like you to have a look at paragraph 53 of  
23 Ms Pope's witness statement which is to be found at page 301, tab 8 in A2.  
24 Ms Pope explains that "Fender and Roland are, in my words, chalk and  
25 cheese." They are materially different. There are four features of the Fender  
26 case that stand out. The first is, as Ms Pope says, Fender provided some

1 eight consistent and very helpful witness statements that really added  
2 significant value to the investigation. Unfortunately, the same cannot be said  
3 of this case.

4 Second, Fender was proactive in providing its witnesses. There wasn't any need for  
5 prompting or prodding and again, unfortunately, that isn't true here. The third  
6 point that Ms Pope makes is that the evidence from Fender's witnesses saved  
7 the CMA having to do further evidence gathering. You can see that it's sort of  
8 about six lines up from the bottom of the page of paragraph 53. Again, the  
9 opposite is true here, where further fact-finding was necessary to try and get  
10 to the bottom of what happened.

11 Then just over the page, page 302, the fourth point, Fender was fully cooperative,  
12 facilitating procedural efficiencies. But sir, members of the tribunal, you will  
13 have seen that in the letter of 17 March, the CMA found Roland's cooperation  
14 fell short and led to material inefficiencies. Now, against that, my learned  
15 friend draws attention to the fact that Fender and one of its employees had  
16 concealed a notebook from the CMA for which it was fined £25,000. My  
17 learned friend says: well that's just pocket change for some people. I would  
18 just note that the maximum penalty that can be imposed for such a procedural  
19 infringement is £30,000, under section 40A, section 4. So actually, it was  
20 imposed almost to the statutory maximum for that type of infringement. But  
21 the more important point is the one that Ms Pope makes in paragraph 54 and  
22 that is that Fender's breach occurred before it applied for leniency. So, yes, it  
23 committed that breach, yes, it was penalised, but it turned over a new leaf, as  
24 all of us can do, and once it had done, it added real value and was given  
25 a 60 per cent discount.

26 Sir, members of the tribunal, in conclusion, I would like to conclude with a thought

1 experiment, if I may. Competition lawyers are very fond of counter-factuals  
2 and my learned friend has referred to a few and so I would like to finish with  
3 a counter-factual. What could Roland have done differently? The first thing  
4 that we suggest it could have done differently is it could have come to the  
5 CMA before the dawn raid took place. It was well aware of competition law.  
6 We saw that when Ms Demetriou took you to paragraph 3.153. There was an  
7 awareness of competition law and competition authorities and its better  
8 angels(?) could have led it to the CMA prior to an investigation. That's point  
9 one.

10 Point two is its level of cooperation. That was well within its control. Roland could  
11 have been on the front foot, could have taken the initiative, spotted  
12 inaccuracies, discrepancies, inconsistencies and sorted them out, whereas  
13 time and again it was the CMA having to chase down and work out what's  
14 what. That really isn't how the leniency policy is meant to work.

15 The third thing it could have done differently is provided one clear comprehensive  
16 proffer that admitted RPM and thereby avoided this sort of toing and froing,  
17 teasing out what Roland's true position was. I suppose the final point is  
18 this: in reality, there may be an upper limit as to what Roland could have  
19 done. Witnesses' memories are fallible, they fade. There's a limit to the  
20 paper trail in a case like this because we have in the decision, Roland  
21 destroyed documents, refrained from putting things down and, of course, the  
22 CMA's investigation was underway and, of course, the reason why I make that  
23 point is because, actually, it means there's only so much that Roland could do  
24 and, therefore, that must affect the leniency discount. So in my submission,  
25 the 20 per cent discount was a fair and reasonable judgment. It reflected all  
26 the considerations in paragraph 6.8 of the leniency guidance. It was well

1 within the CMA's margin of appreciation and I invite the tribunal to dismiss the  
2 second ground of appeal. Unless there is anything further, sir?

3 **THE CHAIRMAN:** No.

4 **MR BAILEY:** Those are my submissions.

5 **THE CHAIRMAN:** Thank you very much, Mr Bailey. Mr Piccinin. Let's have  
6 a 5 minute break.

7 **(4.31 pm)**

8 **(A short break)**

9 **(4.36 pm)**

10 **Submissions in reply by MR PICCININ**

11 **MR PICCININ:** Can I just check, are we still waiting for Ms Weetman?

12 **THE CHAIRMAN:** Yes, I believe we are.

13 **MR PICCININ:** Okay. Good. Wonderful.

14 If everyone is ready, I would just like to start by saying I am really very grateful to  
15 everyone for not only having sat early today but now also sitting late as well.  
16 I will be as quick as I can. I have eight topics but please don't have a heart  
17 attack because almost all of them are extremely short. I don't think we are  
18 going to need to turn anything up at all, I just want to make sure you have my  
19 position on each of the main topics. The topics are approach to merits  
20 appeal. Number 2, relevance of prevalence. Number 3, analysis of the 16 to  
21 23 club. Number 4, the economics of RPM. Number 5, market coverage,  
22 that's probably the main one. Number 6, specific deterrence. Number 7,  
23 settlement discount and then finally, of course, leniency.

24 On the first topic the question of approach, it now seems that what the CMA is  
25 saying is only that you should give extra weight to their evaluative judgments  
26 and place them a bit higher in the scales or maybe lower in the scales as

1 compared with my submissions. My position on that is that when you read the  
2 authorities that Ms Demetriou showed you, it's clear you should just give such  
3 weight to their evidence and to their submissions as they deserve, on the  
4 merits. Every case that comes to this tribunal concerns evaluative judgments  
5 in which the CMA has some expertise but this is also a specialist tribunal, it's  
6 what it's here for and my clients are entitled to have your evaluative  
7 judgments on these points that have been raised in the notice of appeal. First  
8 topic done.

9 Topic two, relevance of prevalence. Now Ms Demetriou says I am brushing general  
10 deterrence under the carpet and that is just not correct. It's  
11 a mischaracterisation of my submission. All of my submissions about RPM  
12 today and yesterday and about the harm that's caused by RPM, are  
13 submissions about the need for general deterrence. The real issue here is  
14 actually on the CMA's part. They are eliding prevalence which is one thing,  
15 with the appropriate penalty to achieve deterrence, which is something else  
16 entirely. If I can just give you an example to illustrate that point. This is  
17 a general approach to deterrence and prevalence that we take right across  
18 the board. If you think about speeding fines for a moment, it's probably  
19 obvious that speeding infringements are much more common when they are 2  
20 or 3 miles above the limit, than if they are 20 or 30 miles above the limit but  
21 we want to deter the 20 to 30 miles above the limit much more fully, so we  
22 apply higher penalties to them. That's why with deterrence, it's relevant to  
23 look at the seriousness and the harm and that's really the question. I stress  
24 that prevalence, unlike deterrence, is not mentioned in the statute that  
25 Ms Demetriou showed you and it's not mentioned in the guidance she showed  
26 you either. It's, of course, relevant to the enforcement priorities of the CMA,

1 which cases it chooses to take and how fully they investigate them, how wide  
2 (inaudible) they put the effort into make, but it does not, on its own, affect the  
3 appropriate penalty for general deterrence.

4 The CMA has not shown you any authority for that proposition and it's actually quite  
5 inconsistent with what the CMA has said and this tribunal have said in the few  
6 cases of quite unusual low prevalence conduct that we've seen. I refer there  
7 to the laundry case that Ms Demetriou showed you, which is quite an unusual  
8 set of facts, but nowhere was it said that deterrence wasn't important, and  
9 then also your judgment, sir, Mr Chairman, in Ping, paragraph 241. Again,  
10 although the circumstances of that case were quite unusual, you said it was  
11 still important for deterrence more generally.

12 Finally, on this topic of prevalence, if it's relevant, we do say that the CMA's evidence  
13 does not actually establish what the relative prevalence of RPM is. All it  
14 shows is you get more complainants than you get, for example, for cartel  
15 conduct but that's because there are more people who could complain about it  
16 because they know about it and are unhappy. Those are retailers who want  
17 to do discounting. That's the second topic.

18 Third topic, the analysis and the role of the 16 to 23 club in my submissions. Now  
19 the CMA says I drew a rigid distinction between horizontal and vertical  
20 infringements. And that's not correct. What it actually did is set up  
21 a benchmark of the 13 most recent horizontal cases that had been considered  
22 by the CMA in the past 4 years. I did that so we would have something  
23 concrete to compare RPM to.

24 Now the CMA tried to grapple with that, sought to distinguish those decisions as  
25 being confined to their facts. Ms Demetriou said some of them were just  
26 information sharing. Now I've never heard a competition authority say that



1 before but in any event, they were not just information exchanges. As  
2 I showed you, the information exchange ones were exchanges of future price  
3 intentions and it's crystal clear to any undergraduate that that is unlawful.  
4 Further, they weren't just exchanges of future price intentions that happened  
5 to take place, they were for a purpose, they were for the purpose of  
6 maintaining prices and that's much more serious than RPM. I have in mind in  
7 particular, the example of Nortriptyline. I also just noted that many of the  
8 other cases we looked at were not information exchanges. In my paragraph  
9 50 of notice of appeal, it's D, E, F, G and K, not information exchanges.

10 More generally, Ms Demetriou said each of the cases turns on its facts. The answer  
11 to that is that's why I didn't just rely on one, I did a whole survey and I also  
12 fairly accepted every single qualification that the CMA made about those  
13 cases when I was setting up the benchmark, so we would have something to  
14 compare with. I went through all of them, Ms Demetriou only went through  
15 two. She had some fair points to make about Galvanised Steel and  
16 Cleanroom Laundry. I already accepted those in my submissions, but the  
17 other ones, the main points CMA were making, were market coverage points  
18 and I explained how they can't be used to justify putting RPM in the same  
19 bucket.

20 Just to conclude on this point, the fundamental problem with what the CMA had to  
21 say about this is that they just didn't grapple with the nature of my argument  
22 which was that these 16 to 23 club members are much more serious and  
23 much more worthy of deterrence than RPM is or at least for RPM of the kind  
24 we are talking about here. And that's because of the points that I made about  
25 the comparative economics of RPM as against the kind of conduct that we  
26 saw in the 16 to 23 club.

1 That takes me to the next topic which is the comparative economics of RPM. I make  
2 two points that, again, I don't think have been adequately answered. The first  
3 one was about what RPM does not do, restrict interbrand competition. The  
4 second one is about what it does do or what it's for which is to promote  
5 interbrand competition. The first of those points, Ms Demetriou said  
6 something interesting which was that the CMA actually set the 19 per cent  
7 penalty in this case on the basis that RPM can bring about all seven of the  
8 seven deadly sins of RPM, including horizontal cartel collusion. The reason  
9 the CMA did that was because all seven of those deadly sins are relevant, in  
10 principle, to RPM generally and I have two answers to that. The first point is  
11 this: that as to whether Ms Demetriou is right that in the first stage of step one,  
12 you are only supposed to look at RPM generally, as in all of it, well that  
13 depends on how narrowly you characterise the type of infringement at issue.  
14 I would have thought we'd distinguish between RPM that's actually part of a  
15 cartel, that's quite a different type of infringement from RPM that's not part of  
16 a cartel but just for normal vertical reasons.

17 But, in any event, I just can't see how that submission makes any difference. I don't  
18 really mind whether you cut my client's penalty at stage one of step one or  
19 whether you do it at stage two, you have to end up at the same place, and this  
20 tribunal doesn't even need to decide who is right about that. If you want to  
21 start RPM generally at 19 per cent because it might be part of a cartel, then  
22 the first thing you do when you get to stage 2 is you have to cut that out and  
23 go back to a penalty that's appropriate for RPM that's got nothing to do with a  
24 cartel. That's about the lack of restriction of interbrand competition. The  
25 second point here under this heading, concerns the pro-competitive effects  
26 and the objects of RPM. As to that, Ms Demetriou says there's no evidence in

1 this case and it's not justified and it's true there's no evidence, there's no  
2 evidence of any effects in this case. This is an object case and my  
3 submission is about the object of RPM. The submission I put to you is that  
4 seriousness of RPM, as distinct from the seriousness of the members of the  
5 16 to 23 club, is much lower because of the object that's being pursued by  
6 RPM which is pro-competitive, whereas those 16 to 23 club ones were not  
7 pursuing those kinds of objectives.

8 So I do urge the tribunal to go back to paragraph 50 of my notice in due course and  
9 bear those two points in mind when you go through them and try to pin for  
10 yourself, it's like pin the tail on the donkey, where do you put RPM on the  
11 scale from zero to 30? My answer is not in that club. So that's that topic.

12 The next one is market coverage. This one is important. Now the first thing is the  
13 CMA complains I was just only focusing on one of the factors under stage two  
14 of step one. You remember the list of factors which appear in the guidance  
15 and also in paragraph 5.27. That's just not right. When I opened this case,  
16 I went through every single one of those bullet points and what I explained  
17 was how the point about market coverage infects all of them. The other point  
18 of clarification before I get into the meat of this, is just to say Ms Demetriou  
19 said I don't have an appeal on the basis of proportionality. That's not right  
20 either. I said all of my points under step one can also be made under step  
21 four and you'll see that in paragraph 38 of my notice.

22 So now we get to the main point under market coverage and here I need to  
23 distinguish between the two different types of argument that Ms Demetriou  
24 made. The first argument and just drawing on Mr Cutting's terminology is an  
25 item that I might call the network-wide effects argument. The second  
26 argument we need to look at is what I might call the network-wide efforts part

1 of the argument. I want to distinguish between the two. Starting with the  
2 network-wide effects. That argument is that this particular infringement, just  
3 reseller one, had wider effects because of contextual things like price  
4 monitoring software being deployed by the other parties, everyone looking at  
5 each other. So the others would see every time reseller one cut its prices and  
6 so Roland was likely to know and could prevent reseller one from doing that.  
7 That's a legitimate argument and I showed that point to you in 5.27 in opening  
8 and embraced it. And that's the point I made about infringements having  
9 effects on other competitors in every case. I also said the whole point about  
10 RPM is you are worried about the effect of discounting by one reseller on the  
11 others. My answer to this is it does not take you very far because those  
12 effects only arise to the limited extent of the infringement and so we are only  
13 looking at the consequences that flow, preventing reseller one, in particular,  
14 from cutting its prices. And then I think you have all of my submissions about  
15 why reseller one cutting its prices is not a particularly significant thing in this  
16 case. It's not a maverick, it doesn't account for much market share, it wasn't  
17 much interested in discounting. This case would be different, this argument  
18 would be different if the CMA had shown that reseller one was the only  
19 reseller that had any interest in discounting. If those were the facts, then  
20 I could see it wouldn't matter much what the market coverage was. But on the  
21 facts of this case, the CMA's decision records at least 23 others that  
22 discounted from time to time and needed to be spoken to but the infringement  
23 you are penalising here did nothing at all to prevent those retailers from  
24 discounting. So that's the network-wide effects argument.

25 The network-wide efforts argument is that we should get the higher penalty because  
26 Roland was also trying to prevent other resellers from discounting. And that's

1 just not a proper basis for a penalty. It's not in the decision, it's not in the  
2 defence, it's not in the skeletons. In any event, it's not in section 36 of the  
3 Competition Act. The CMA only has jurisdiction to set a penalty for the  
4 infringement, not for attempts at infringement. Now the CMA, quite properly,  
5 took an administrative priority decision not to investigate whether there was  
6 any wider infringement and that's reflected in the complete disavowal  
7 I showed you in opening, paragraph 3, point 206, and what the CMA can't do  
8 now is go back on that and penalise us or ask you to penalise us on the  
9 assumption that there was a new wider infringement. That's just not on. So  
10 ultimately then, for all the cleverness and all the subtlety of Ms Demetriou's  
11 submissions, of which there was much, there is a basic point here that's just  
12 inescapable and it's the point Mr Cutting anticipated in our argument.  
13 Notwithstanding these points about market effects, it just has as to be right  
14 that it would have been much, much worse if we had RPM agreements in  
15 place, with all of the resellers because then, on every occasion when one of  
16 the other 90 per cent plus of resellers discounted, that would have been  
17 nipped in the bundle as well by RPM. It would have been much, much worse  
18 again if Roland's market share had been 60 per cent instead of less than  
19 15 per cent.

20 The question is, what would the penalty have been in those cases? Ms Demetriou  
21 says the answer is above 19 per cent. She then gave a supplemental answer  
22 which I didn't fully understand, about how high it should be above 19 per cent.  
23 For a while I thought she was going to say it should be up at 26 to 30. I don't  
24 know if that's what they do say but it does seem to me to be the logical  
25 conclusion of their argument but it's madness. Even network-wide RPM for  
26 a manufacturer with a 60 per cent market share is nowhere near as serious as

1 horizontal collusion between multiple competitors. Ultimately, this is  
2 a dilemma with a bull that has two horns and they can't sit in between them.  
3 They've gone with 19 per cent in this decision. One of two problems arises  
4 from that. Either they've not left themselves enough room for more expansive  
5 RPM or they've not left themselves enough room above that for more serious  
6 horizontal conduct. So that's the end of that topic.

7 Moving on to specific deterrence. All I want to do about this is adopt the point made  
8 by Ms Weetman in argument. All the CMA has given you is some numbers  
9 with no context. The question for you, it's not for them, it's for you, is what the  
10 numbers we're talking about here mean and, in particular, whether they are  
11 enough to make Roland take this seriously. And you have my submissions on  
12 that.

13 Moving on to settlement discount, my penultimate topic. The basic point is this. This  
14 is the question I would like the tribunal to answer: or at least to consider.  
15 Ms Demetriou says we could have withdrawn from the settlement process at  
16 any time and she's right about that. My question is, would things have been  
17 better or worse for the CMA if we had done that on the facts of this case,  
18 given the arguments? If we had put them to the full trouble of the full  
19 administrative procedure and then appealed, would things have been better or  
20 worse? If you find that things would have been even worse for the CMA, then  
21 why shouldn't we get the benefit of the benefits they derived from our  
22 cooperation and settlement during the procedure? I am not saying everyone  
23 should keep the settlement discount when they appeal, it depends on the  
24 circumstances, the nature of appeal, the points taken, all of those factors. I  
25 am just saying the tribunal needs to make its own assessment of the impact  
26 on the CMA in this case, bearing in mind all the circumstances I pointed to

1 you previously. Finally on this topic, it's never been my case that this is all or  
2 nothing. If you go back over my notice and my skeleton, it's clear I am saying  
3 I would like all, please, but I will take anything more than nothing.

4 That takes us on to the leniency. First brief point is that the discount that we got, the  
5 100 per cent discount we got on the first two-year period, is just a red herring.  
6 Mr Bailey showed you why we got a 100 per cent for that. It was a but for  
7 causation point. It was fully deserved. It does not affect the analysis of what  
8 we should get for the rest. For the rest, the key point is the counter-factual  
9 and I think Mr Bailey, in the end, at least impliedly accepts, that the position  
10 would have been much, much worse for the CMA in this case, without the  
11 benefit of where Roland got to with its leniency submissions. Given the lack  
12 of clarity in the facts and the lack of clarity in the evidence, including the  
13 witness evidence in this case, things would have been much harder for the  
14 CMA if they didn't have, in particular, that crucial January 2020 proffer. His  
15 answer to that, in a nutshell, just cutting through it, is that it's not the  
16 destination, it's the journey and the CMA didn't enjoy the journey with Roland.  
17 Okay, I accept that. But as with everything that we do in this case, the  
18 question is, how much is it worth? Having to chase my clients up to clarify  
19 points, just can't explain how you get from 60 percentage points of discount in  
20 Fender, down to 20 percentage points of discounts in this case. That's 40  
21 percentage points of leniency discount. We say that's particularly so in  
22 circumstances where Fender had the extraordinary behaviour which it had  
23 which only warranted a 25K penalty. Now Mr Bailey did his best to answer  
24 that last point. He said the 25K penalty is close to the statutory maximum and  
25 that's fine, I don't say it should have been any higher but my point is it didn't  
26 rate a mention when they got on to dealing with the leniency discount. And if

1 that lack of cooperation didn't rate a mention, then I can't understand how the  
2 pretty trivial points taken against my clients can possibly justify 40 percentage  
3 points of difference. The second answer S Mr Bailey gave to that, in my  
4 submission, is quite extraordinary. He said: oh well, that happened before the  
5 leniency application was made. In other words, Fender gets the bigger  
6 discount -- this nasty comment does not get taken into account because its  
7 leniency application was later than my client's application. If their leniency  
8 application had been made earlier, at the same time as my client's one, they  
9 would have been stuck with it as a relevant consideration. I am sorry, that just  
10 doesn't make sense. Coming back to the basic point, we need to bear in mind  
11 again, that the facts in this case are more nuanced, less clear-cut, messier,  
12 like life, than in some other cases but at the end of the day, when you look at  
13 the destination, my client has helped an awful lot and they deserve a bit more  
14 than a paltry 20 percentage points of discount in recognition for that. So  
15 unless the tribunal has any questions for me, then those are my submissions.

16 **THE CHAIRMAN:** Thank you very much, Mr Piccinin. I don't believe the tribunal  
17 has any more questions. I am reminded to ask if the parties could possibly  
18 review the documents and the passages referred to in the course of the  
19 hearing to see what can be unredacted, if there are any additional documents.

20 **MR PICCININ:** Yes.

21 **THE CHAIRMAN:** Apart from that, I just would like on behalf of the tribunal, to thank  
22 both sides for their very helpful submissions and for whoever put the bundles  
23 together and the stenographers assisting with the hearing.

24 **MR PICCININ:** I am very grateful.

25 **MS DEMETRIOU:** Thank you very much for sitting late, we are really grateful, thank  
26 you.



1 **THE CHAIRMAN:** Not at all, it's partly my fault anyway, for finishing early yesterday.

2 Thank you anyway.

3 **MR PICCININ:** Thank you.

4 **MS WEETMAN:** Thank you.

5 **(4.59 pm)**

6 **(The hearing concluded)**

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