IN THE COMPETITION APPEAL TRIBUNAL

Case No. : 1351/5/7/20

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP
(Remote Hearing)

Thursday 14 April 2022

Before:
The Honourable Mr Justice Zacaroli
Paul Lomas
Derek Ridyard
(Sitting as a Tribunal in England and Wales)

BETWEEN:

Churchill Gowns Limited and Student Gowns Limited **Claimants**

v

Ede & Ravenscroft Limited and Others **Defendants**

A P P E A R AN C E S

Fergus Randolph QC and Derek Spitz (On behalf of Churchill Gowns)
Conall Patton QC and Michael Armitage (On behalf of Ede & Ravenscroft)

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Thursday, 14 April 2022

(10.30 am)

Closing submissions by MR PATTON (continued)

THE CHAIRMAN: Yes.

MR PATTON: Good morning, my Lord. I do not know if you wanted to give the warning or ...

THE CHAIRMAN: I do, thank you for reminding my, yes. Just to remind everyone this hearing is being live streamed but it is to be treated as if it is in court and a recording is being made and it is an offence to take any recording audio or visual of the proceedings.

MR PATTON: Sir, I was proposing to move on to the question of abuse and, just as a preliminary point, much of the debate yesterday concerned pinning down what the claimants' case on abuse is, and we respectfully suggest that the tribunal is right to seek that clarity. It may require no authority to say that an abuse has to be identified with precision, but we do have, and I thought I would just briefly show to you the decision from last September in the Forrest Fresh Foods case, which is {AUTH1/3/10}.

This is a decision of the tribunal chaired by Mrs Justice Bacon, September 2021, in a strike out of summary judgment application, and if you could read from paragraph 26 to the bottom of the page. (Pause).

You can see in paragraph 28 a citation from Sel-Imperial, which we have also cited.

And then over the page {AUTH1/ 3/11}, if we can just look at paragraph 30, it makes the obvious point that:

"The onus is on a claimant advancing a claim of infringement of competition law to identify ... the relevant primary facts which are the foundation of that claim ... the way in which those facts are said to infringe the relevant competition law provisions ... [and] the way in which ..."

That alleged infringement is said to have resulted in the loss of damage claim, and then it deals with the strike out of summary judgment.

And it says you cannot resist that:

"... without advancing any coherent submission... as to what further particulars might be forthcoming ..."

In 32 it says:

"... invites the Tribunal to speculate as to what case might be potentially advanced if it were to be repleaded. But this is not the function of this Tribunal or any court. The tribunal's role is to assess the case on the materials before it. It is not for the Tribunal to suggest to a claimant how its case might properly be pleaded; nor can the Tribunal even begin to assess an amorphous hypothetical case that might be put

forward if the claimant were to be permitted to go away and have another go."

Obviously in an interlocutory context, but we say the same must be true at trial, you decide the case on the basis that it has been pleaded and not on some other basis, obviously.

That is a point of general application. We would just ask you to bear in mind that it is going to be particularly important in this case because this is a case concerned with ongoing contractual arrangements between the defendants and the universities. There will be graduation ceremonies this summer and, of course, at other points in time to a lesser extent during the year. If the tribunal were to conclude contrary to the submissions I am making that the defendants have been committing and are committing an abuse or some other infringement, it will be essential for the defendants to know precisely what conduct is said to constitute that infringement, because obviously the defendants will need to stop that conduct, the infringing conduct, but they will continue to be bound by the balance of their contractual obligations in the OSA, so it will be essential that there is clarity, and for the tribunal to be able to bring clarity to that the claimants have been required to bring clarity to their case.

Just looking at the three aspects of the abuse case in more detail. We deal with these starting at page 20 of our closing, {A2/4/20}, starting with the exclusivity point at paragraph 52. If I can just walk through these points.

Paragraph 53 we note that it is common ground that, as I think Mr Lomas put to Mr Randolph yesterday, the OSAs do not purport to bind the students and nor could they do so because they are non-parties, so that is common ground.

Paragraph 54 then raises a question of whether on a proper construction of the OSAs they impose an obligation on the university to instruct the students to hire only from the defendants. The tribunal pressed Mr Randolph as to which particular clauses of the OSAs he was relying on, and at one stage he suggested it was item 13 only, but I think where he landed up was that it was items 12 and 13 together in the table that you have got.

But whichever way he puts it whether it is 13 alone or 12 plus 13, we say that simply as a matter of construction, those clauses plainly do not impose an obligation on the universities to instruct students to hire their gowns exclusively from the defendants. I think Mr Randolph actually said at one stage that it

does not say that, and we agree. What he submitted ultimately was that if you stand back from the contract that in some way you nevertheless reach the conclusion that that is the obligation it imposes. We say as a matter of construction that is simply wrong. It is not suggested there is any form of implied term but that would be hopeless in this context. There is not a contractual obligation to instruct the students to hire only from the defendants.

Now, obviously we recognise -- and this is the point we make at the top of page 21 -- that in a competition law context that might not be conclusive if in fact the evidence demonstrate that the real agreement -- whatever might be said in the written contract, that the real agreement was otherwise. But that would be a point for evidence and, as we say --

MR LOMAS: Can I just interrupt you, just before you go on to that --

MR PATTON: Yes.

MR LOMAS: -- the second point, just back on the contractual point, I think the case that is put against you is that in, I say clause 12, the clause at line 12, is that exclusive provider has a context and a meaning, and that at its heart means the relationship between the university and the supplier is intended by both sides to

have the effect that all gowns for graduation ceremonies come from that supplier. Now, from a matter of contractual analysis, is that not the case?

MR PATTON: No, it is not the case. What it means is that the only person whom the university will appoint to be an official supplier is the defendants. It will not appoint anyone else.

MR LOMAS: That is part 1 of the clause.

MR PATTON: Yes, and the defendants will be the only person who supplies services to the university, and the services which are supplied to the university include making gowns available for hire to the students.

MR LOMAS: So to speak, the service is the making available of the gowns, the underwriting of the operation.

MR PATTON: Exactly, and that does not prevent a supplier such as the claimants who simply want to supply students direct, because that is not the provision of any service to the university. That is simply a direct engagement between the claimants and the relevant student.

MR LOMAS: I thought that was probably your position but I thought we should clarify it at this stage.

MR PATTON: I am grateful.

That is how we -- and just to make the obvious point, if it were the case that the intention -- the intention of the parties was that no other supplier --

that the universities should not permit any other supplier to supply gowns to their students we would be very easy to say that. Now, I know that is not always the most helpful submission when one is construing a contract, but it is true here and that is simply not what it says, so it would be a very artificial construction to decide that that is what it means.

I was just pointing out what we say at the top of page 21, which is it would be a matter for evidence if it was going to be alleged, well, no matter what the contracts say, the real deal here was that the defendants required the universities to instruct the students, and we say that Ms Middleton's evidence about that was extremely clear, it could not have been more clear, and it was not challenged in cross-examination, and no material was identified that would suggest that there was some other deal outside the written agreement to that effect.

Then in the third and fourth points on that page we say that the defendants have consistently stated both in public and in private that students are not required to hire their gowns from them. It is not just relying on the construction of the contract, the absence of evidence, but a positive -- there was positive evidence that whenever the question arises the defendants make it

clear that students are free to choose and are not obliged to hire from the defendants.

You may recall that the correspondence that we set out at subparagraph (4) is the correspondence that was disclosed during the trial that should have been disclosed earlier, as I accepted, but it was disclosed during the trial, but it is completely consistent with our case on this, and in particular the last sentence that I quote in subparagraph (4) {A2/4/21}:

"Nor does the agreement oblige the College to prohibit or prevent Graduates from hiring their Academic Dress from other providers."

So it deals squarely with the point at issue.

The tribunal will not be wear of this but, as I say, we disclosed this material during the trial and we were asked to check whether there was anything else, and we did find one other document, which we disclosed. It was a document to of no consequence to either party, so it has not been added to the trial bundles, but something Mr Lomas said yesterday prompted me to mention it, which is that the email chain with the Arts University College Bournemouth started with the university saying that a particular student, the student who had been corresponding, wanted his mother to make his gown, so that was a starting -- that is where this all started

off. When you -- Mr Lomas, when you postulated yesterday these --

MR LOMAS: Hypothetically.

MR PATTON: As an absurd hypothetical example it is actually not that unlikely, so it did actually arise in this very context. So then answer that we gave -- that the defendants gave to the university that is set out in paragraph 4 was specifically directed to your hypothetical example. We would not seek to prevent the university from letting the student appear in whatever dress they wanted. Obviously the university might have concerns that if the student's mother is making the robes it may not correspond precisely to the regulations, but that is obviously a matter for the university. That is a different point.

MR RIDYARD: Can you comment on that aspect? Because the Bristol University website we were taken to yesterday sort of seems to suggest a pretty effective enforcement by the university only for the graduates only to use the official supplier, so where does that fit into the story that -- into the points that you are making here?

MR PATTON: It is simply -- and it is really the last point we make here at paragraph 5. We accept that some of the universities are pretty forthright in what they tell the students as to where they should get their gowns and

that is the universities' unilateral conduct. It is not conduct that they are obliged to take as a result of the agreement. Therefore, if there is a complaint about that, that is a complaint that would be brought against the universities. It might have been argued that the universities were abusing a dominant position, but that is not a case that has been made.

MR RIDYARD: You say some, and I know we were only taken to one, but the overall market evidence seems to suggest that the universities in general do a pretty effective job of ensuring that the official supplier gets to rent almost all of the -- hire almost all of the academic wear to the graduates.

MR PATTON: No one else is seeking to do that business apart from the claimants, and they have targeted I think in the end around high 60s, 70 universities, so they are not seeking to target all the universities. They have a limited amount of stock for each for even those universities, so they could not supply more than, say, I think 60 students at each university. That was Ms Nicholls evidence. There is no other evidence anyone else is trying to do what they are doing, but subject to that, I accept the evidence -- as far as one can make out on the evidence, most students buy from the official supplier. In some cases the language is more directive

than others and you could peruse the slight variations in the language.

MR RIDYARD: I accept the language varies but the outcome --

MR PATTON: The outcome is the same.

MR RIDYARD: -- does not seem to vary, does it?

MR PATTON: No.

MR RIDYARD: I do not think Churchill is the first to try this route to market.

MR PATTON: No, there is evidence that there were one or two others, then an IP dispute arose between the defendants and the others, and that was settled on the basis of the others accepted that they were infringing the IP rights.

MR RIDYARD: Yes.

MR PATTON: So that may be is not very informative in relation to that.

I accept that the evidence suggests that universities do bring about a situation where -- whether because of the language they use or for any other reason most of the students buy from the official supplier.

MR RIDYARD: You say most, but it is all, is it not, more or less?

MR PATTON: Well, all except for those who --

MR RIDYARD: Who do not turn up.

MR PATTON: No, I accept that, but the question is, well, what is the -- so what? I mean, what is the --

MR RIDYARD: No, no, I accept that is not the end of the story but I just wanted to see where that fitted into the picture you were describing, yes.

MR PATTON: Yes.

In response to a question from Mr Lomas yesterday Mr Randolph adopted the idea that the universities were using the language that they do on the websites out of a general perception of exclusivity, so not necessarily because of any obligation on the contract but because of some general perception. Mr Randolph very fairly said that he could not prove that because he did not have any disclosure showing that. That is page 7 {Day1/7:1} of the transcript. So we would suggest that is just not a finding that is open to you, although he adopted the suggestion that you put to him.

He made a more perhaps significant point in response to some questions from Mr Ridyard where you put to him that his case was that if items 12 and 13 were not in the OSAs, then the universities would not say this. That, as far as we are aware, has never been suggested before. It has not ever been put in those terms certainly, and we would suggest that there is no evidence to support it.

There are two points I ought to make about this as a kind of preliminary point. No one is suggesting that

items 12 and 13 appear in all the OSAs. That probably goes without saying but, as you recall, the table is simply extracts from some of the OSAs.

There is a spreadsheet attached to Dr Niels' report at appendix 3 which is {E6/2/1}. Column I of that spreadsheet goes through the language that is used in the various OSAs, so it does not add anything to what the OSAs themselves say but it is a convenient place where you would find set out what the contractual provisions are. You can see that in clause I.

So he has called that "Exclusivity clauses (e.g. negative pledge?) Then he effectively sets out for each of the OSAs what it says.

I am not proposing to do this now but we have calculated that 32 of the 70 OSAs contain item 13, so that is the negative pledge. In other words, it is a minority of the OSAs that contain item 13. Insofar as Mr Randolph's case depends on that, then that is a case he can only make in relation to a minority of the OSAs.

So far as item 12 is concerned, we have not been able to come to a concluded view as to the numbers, but there are certainly some OSAs which do not say anything like that, and indeed I think that must be common ground, since it has not been suggested otherwise.

I just wanted to show you an example of such an OSA

which is at {F2/96/2}. If one simply turns the pages to page 2 {F2/96/2}, you can see the way in which this contract is expressed. One can see that -- one can see the university at the top of the page as well. So far as we can see, the word "exclusive" does not appear anywhere in any meaning in this OSA and there are a number of other OSAs of which the same is true.

If we now turn to {E1/6/10}.

THE CHAIRMAN: Sorry, the evidence is that this university, there is the same outcome in terms of students.

MR PATTON: That is just what I was going to show you, yes. That is a bad reference. It is {E1/6/9}, sorry. This is the the website for the same university, and if you could just look at the second paragraph beginning:

"Ede & Ravenscroft are the official gown suppliers or Aston University. All gowns should either be hired or purchased from Ede & Ravenscroft and not from any supplier."

So the language is at the high end of the directive language.

That is simply an illustration. There are other contracts of which the same is true and of which the website is in the same language, but even without item 12, let alone item 13, the university expresses itself in the same way.

Insofar as Mr Randolph was inviting you yesterday to infer or to find that if these items were not present in the OSA the universities would not have said what they said, that is just not true, that is just not the case, as this example shows. There is no other evidence he relies on in support of that proposition.

I was going to move on to commission payments. I thought it would be helpful to take you to some of the key cases because, as you know, we say that the commission payments in this case do not raise competition concerns in the way that the cases have analysed things.

I was going to start with Hoffman-La Roche, which is {AUTH1/21/1}. If we could start at page 45 {AUTH1/21/45}, and just at the foot of the page you will see this is the judgment itself, the decision of the court begins. As you can see over the page at paragraph 2 {AUTH1/21/46}, this was a case where the Commission found that Roche had a dominant position in the markets for selling vitamins and that it had abused that position by entering into agreements with purchasers of the vitamins which contained:

"... an obligation upon the purchasers, or by the grant of fidelity rebates offer them an incentive, to buy all or most of their requirements of vitamins

exclusively or in preference from Roche ..."

And then if we could turn to page 72 {AUTH1/21/72}. You can see the heading in the middle of the page "The existence of an abuse of a dominant position", so this is where the analysis of the question of abuse begins. It may be helpful just to see on page 75, {AUTH1/21/75}, paragraph 83 contains a helpful summary of what provisions are actually in issue in Hoffman-La Roche:

"Some of the contracts contained a specific undertaking by the purchaser to obtain exclusively from Roche either:

"(a) All or almost all of its requirements of bulk vitamins manufactured by Roche ...

"(b) on all its requirements of certain vitamins therein expressly mentioned ..."

So that is very similar.

"(c) on a percentage stipulated in the contract of its total requirements ..."

So in other words, the purchaser had to take a percentage of what it needed from Hoffman-La Roche:

"(d) on 'the major part' ... of its requirements ..."

So major part rather than a percentage.

Then the analysis of the court begins at page -- on the next page, 76, paragraph 89 at the foot of the page

{AUTH1/21/76}. A well-known passage:

"An undertaking which is in a dominant position on a market and ties purchasers -- even if it does so at their request -- by an obligation or promise on their part to obtain all or most of their requirements exclusively from the said undertaking abuses its dominant position ... whether the obligation in question is stipulated without further qualification or whether it is undertaken in consideration of the grant of a rebate."

Just pausing there. We say that -- for the reasons I have given that that simply does not arise here that there is not an obligation on the universities to obtain all or most of their requirements exclusively from the defendants. The universities do not actually hire the gowns at all but there is no university -- there is no obligation on the universities to cause all of the students to hire their gowns from the defendants.

That is in relation to an obligation. Then in the second half of the paragraph it says:

"The same applies if the said undertaking, without tying the purchasers by a formal obligation, applies, either under the terms of agreements concluded with these purchasers or unilaterally, a system of fidelity rebates, that is too say ..."

So this is what fidelity rebates means:

"... discounts conditional on the customer's obtaining all or most of its requirements -- whether the quantity be large or small -- from an undertaking in a dominant position."

So a fidelity rebate is one where the rebate is -- the discount is conditional on you exclusively purchasing from the dominant undertaking. Again, we say that does not arise here because the commissions that are in the OSAs are not conditional in that way. They do not say: if all of the students take their gowns from the defendants you will get X% discount, and if they do not you will not or you will get a lesser discount. That does not arise here, and that is what the court treats as a fidelity rebate.

MR LOMAS: Mr Patton, I could not resist looking down the payment schedule for the Aston University one you just showed us --

MR PATTON: Yes.

MR LOMAS: -- and that does contain some progressive provisions on volume.

MR PATTON: Yes, and I am going to come to that because I wanted to correct something that we had said in our written closing. We noticed the same point this morning and I was going to make a correction, but it is a --

MR LOMAS: It is one example.
MR PATTON: It is one example but it is a volume based.
MR LOMAS: It is a total revenue based progressive discount.
MR PATTON: Yes, it is not a fidelity rebate in the sense that it is not conditional on the undertakings getting all of its or most of its requirements from the defendants.
MR LOMAS: Although is there not a slightly deeper point here -- I have broken your flow for which I apologise -- that, yes, that is the case in Hoffman-La Roche because they were progressive, but the evil that is being attacked here is an incentive structure that embeds the power of the dominant party and makes it more difficult for any competitor to enter the market? It could be progressive. It could be with thresholds. There are a number of ways it can be structured, but the point is it sets incentives for the counterparty which reinforce the competitively attractive position of the supplier.
MR PATTON: My submission in relation to that is --
MR LOMAS: It is not a black letter issue. It is a conceptual issue.
MR PATTON: My submission, which I will make once I have completed the review of the cases, is that none of the cases goes that far. That is a very broad principle to suggest anything which incentivises someone to buy from

the dominant undertaking or anything which incentivises them to buy from them rather than from someone else that that is likely to be an abuse. That is too extreme a position.

Just looking at paragraph 90 of Hoffman-La Roche, so here one gets the explanation from the court as to why the fidelity rebates, the conditional rebates are suspect. What the court says:

"Obligations of this kind to obtain suppliers exclusive I from a particular undertaking ..."

Then in the fourth line they say, "are incompatible with the objective of undistorted competition".

Then four lines from the bottom:

"... because ... they are not based on an economic transaction which justifies this burden or benefit but are designed to deprive the purchaser of or restrict his possible choices of sources of supply and to deny other producers access to the market.

"The fidelity rebate, unlike quantity rebates exclusively linked with the volume of purchases from the producer concerned, is designed through the grant of a financial advantage to prevent customers from obtaining their suppliers from competing producers.

"Furthermore the effect of fidelity rebates is to apply dissimilar conditions to equivalent transactions

with other trading parties in that two purchasers pay a different price for the same quantity of the same product depending on whether they obtain their supplies exclusively from the undertaking in a dominant position or have several sources of supply."

The point being made in that part of this paragraph is a discrimination point. Fidelity rebates are discriminatory because the buyer who takes all of their product from the dominant undertaking gets the fidelity rebate. The supplier who does not, who only takes some, does not get the same rebate, and so there is discrimination.

Then:

"Finally these practices ... tend to consolidate this position by means of a form of competition which is not based on the transactions effected and is therefore distorted."

MR RIDYARD: Are those being looked at in Hoffman-La Roche is not distortion because of price discrimination it is exclusion, is it not, there?

MR PATTON: That is true, that is the heart, but the point the court -- one of the points the court makes is the why fidelity rebates are objectionable is because it introduces discrimination. I think that is a point the court actually makes also at an earlier stage. If you

look at page 72, paragraph 81 {AUTH1/21/72}, just in the -- sorry, it is not 81, it is the second bit of 80 at the bottom of 72:

"According to the Commission ... the exclusivity agreements and the fidelity rebates complained of are an abuse ... on the one hand, because they distort competition between producers by depriving customers of the undertaking in a dominant position of the opportunity to choose their source of supply and, on the other hand, because their effect was to apply dissimilar conditions to equivalent transactions with other trading partners, thereby placing them at a competitive disadvantage ..."

And then it repeats the point I have just identified. So clearly the court sees the discriminatory aspect as an important reason as to why this type of fidelity rebate is objectionable on competition grounds.

If we could then go to page 78 {AUTH1/21/78}, you can see at paragraph 92 that the argument of Roche was that these were:

"... quantity and not fidelity rebates or that they correspond to an economic transaction with the customer justifying consideration of this kind."

Then the court analyses whether that is true,

whether they are quantity or not or fidelity rebates. It does so, first of all, by looking at the fixed rebates and then looking at those which are progressive.

In 94 it rejects the argument that they are volume rebates in relation to the fixed rate rebate.

In 95:

"... none of the said contracts includes any undertaking relating [sorry, this is in this third line] to fixed or only estimated quantities or linked to the volume of purchases but they all refer to 'requirements' or a proportion of said requirements."

So the point the court is making is it is not simply a numerical figure, if you go over 100 you get a better discount, if you go over 200 you get a better discount. It is by reference to what you need, what your requirements are from us and that is why it is not a volume rebate.

Then over the page at paragraph 97 {AUTH1/21/79}, it deals with the progressive rebates. So those are where the discount increases as you go up. That is just explaining what they are.

Then over the page at 98 {AUTH1/21/80} it says:

"Although the contracts at issue contain elements which appear at first sight to be of a quantitative nature ... an examination of them shows that they are in

fact a specially worked out form of fidelity rebate.

"In the first place it is noticeable that this particular form of rebate is incorporated in those very contracts in which the undertaking by the purchaser to obtain supplies was drawn up in the form which placed him under the least constraint ..."

Ie the one which said "most of his requirements".

And they say:

"The indeterminate nature of the undertaking thus worded is to a great extent offset by an estimate of annual requirements and by granting of a rebate increasing in accordance with the percentage of the requirements ... and this progressive rate is clearly a power incentive to obtain the maximum percentage of the said requirements from Roche.

"This method of calculating the rebates differs from the granting of quantitative rebates, linked solely to volume of purchases from the producers concerned in that the rebates at issue are not dependent on quantities fixed objectively and applicable to all possible purchasers but on estimates made, from case to case, for each customer according to the latter's presumed capacity of absorption, the objective which is sought to attain being not the maximum quantity but the maximum requirements."

So it is not just trying to make more sales, it is trying to get more of your requirements for these products.

We say that none of the commission arrangements in this case, it has not been suggested that any of them operates in this way. We had said in our written closing at paragraph 63 {A2/4/23}, that none of them was even a volume rebate, and the point that Mr Lomas has spotted is the same point that we spotted this morning, if you look at {F2/96/17}.

MR LOMAS: I think it goes the other way, does it not?

MR PATTON: Yes, that is right. You are right. So if we go to page -- so it is {F2/96/17}.

MR LOMAS: It is a reducing commission.

MR PATTON: It is non-progressive. It is the opposite, exactly. My learned friend Mr Armitage makes the same point to me.

You can see there, it's in paragraph 1.1, there is a higher commission for the first volume, and then there is a lower commission for sales above that. So it is a purely volume-based commission, so it is not a fidelity rebate, and the court makes clear that volume rebates -- even if you regard it as a volume rebate it is unlikely to give rise to competition concerns.

THE CHAIRMAN: The direct comparison in Hoffman-La Roche is

if Ede & Ravenscroft were supplying the gowns to the university.

MR PATTON: Correct.

THE CHAIRMAN: Is there any difference, because this is not a commission which incentivises the university to hire from Ede & Ravenscroft but it incentivises to persuade others to do so, ie students?

MR PATTON: It is a farther remove, so for that reason any attempt to apply that case law in this context is attenuated, so it would be a novel proposition, we say, to suggest that a commission which is directed at third parties is objectionable. So that would be novel.

I am going to show you the British Airways case in a moment, which is more similar to that, but that is not the only point we make. We do not merely stop there and say, well, it is not the university that is buying, it is the student. We make the point that the university's commission is unrelated to whether all or most of the students get their gowns from the defendants. It is either, as here, there is a volume aspect to it or it is a flat rate.

MR RIDYARD: It is contingent -- the commission is contingent on E&R being the successful bidder in this case, winning the OSAs, and in that sense it is contingent on exclusivity, is it not, because if you win

the OSA you become the exclusive supplier?

MR PATTON: You mean exclusive in the sense that the evidence is that not many other people are going to be selling to these students?

MR RIDYARD: No one else is going to be selling, yes.

MR PATTON: Apart from the claimants. That is not -- if it were the case that the claimants had been more successful in the sales that they made that would make no difference to the university's commission. It would mean the absolute amount that the university received was less because there were fewer sales, but there was nothing in the commission structure that requires the university to procure that all of the students buy from the defendants. That is really it. I will reflect further on the point you have just made in case I have not fully answered it, but --

MR RIDYARD: Okay, thank you.

MR PATTON: I was just going to show you the British Airways case to make clear this does not stop at Hoffman-La Roche. This is not just one old case which makes this point. British Airways is at authorities 1 tab 78 {AUTH1/78/1}. If we could turn to page 5 {AUTH1/78/5}, please.

Just in terms of the background, this was an appeal by BA against a fine imposed by the Commission for

having colluded with virgin in relation to the price of airline tickets. It was quite -- no, sorry, this is in relation to the arrangements for incentive payments to travel agents, I am sorry.

So if we look at paragraph 3 on page 5, so just towards the bottom part of the page. It says:

"BA, which is the largest UK airline, concluded agreements with travel agents established in the [UK] and accredited by the International Air Transport Association ... which included not only a basic commission system for sales by those agents of tickets on BA flights ... but also three distinct systems of financial insensitives: 'marketing agreements', 'global agreements', and, a 'performance reward scheme' ..."

Just pausing there. You can see that the court identifies that there is a basic commission system for sales, so, in other words, each sale by a travel agent of a BA ticket they get whatever per cent from BA as commission on that. That is the last -- I think it is correct to say that is the last you hear of that commission -- the basic commission arrangement in this judgment, and there is nothing in the Commission decision or the decision of the court at first instance about that either. So that is uncontroversial. There was no complaint made about the basic commission system.

And then just in terms of what the arrangement were impugned, one see it is first one at paragraph 4:

"The marketing agreements enabled certain travels agents, namely those with at least GBP 500,000 in annual sales of BA tickets, to receive payments in addition to their basic commission, in particular a performance reward calculated on a sliding scale, based on the extent to which a travel agent increased the value of its sales of BA tickets, and subject to the agent's increasinging the its sales of such tickets from one year to the next."

So it gets a reward for how it performs year to year relative to how it has performed in previous years. That is the first impugned measure.

Then at paragraph 7, {AUTH1/78/6}:

"The second type of incentive agreements, known as global agreements, was concluded with three travel agents, entitling them to receive additional commissions calculated by reference to the growth of BA's share in their worldwide sales."

So how much -- if you favour BA over the other airlines in your sales then you get a special reward for that.

And then at paragraph 8 they refer to the third type of incentive, which is called the new performance reward

scheme, and that is explained over the page at paragraph 9 {AUTH1/78/7}:

"Under the that system, the basic commission rate was reduced to 7% for ... BA tickets [from higher levels before] ... but each agent could earn an additional commission of up to 3% ... The size of the additional variable element depended on the travel agents' performance in selling BA tickets. The agents' performance was measured by comparing the total revenue arising from the sales of BA tickets issued by an agent in a particular calendar month with that achieved during the corresponding month in the previous year. The benchmark above which the additional variable element became payable was 95% and its maximum level ... was 125%."

So, again, that is an incentive scheme which depends on you increasing your sale of BA tickets compared to what you had achieved in the same month in the previous year.

Then you see in paragraph 11, the foot of the page, "the Commission adopted the contested decision", and the abuse is simply those three schemes, and, as I said, there is no suggestion that a basic commission structure is objectionable at all.

Then if we go to page 25 {AUTH1/78/25}, this is

where the court's analysis of the effect of the bonus schemes begins at the top of the page at paragraph 60, and the court cites from Hoffman-La Roche and the subsequent Michelin decision, and I was going to go straight to page 28, which is the core of the reasoning {AUTH1/78/28}, so at paragraph 70 they say:

"With regard to the first aspect ..."

Which is whether the bonus scheme is exclusionary or has the exclusionary effect, they say:

"... The case-law gives indications as to the cases in which discount or bonus schemes of an undertaking in a dominant position are not merely the expression of a particularly favourable offer on the market, but give rise to an exclusionary effect.

"First, an exclusionary effect may arise from goal-related discounts or bonuses, that is to say those granting of which is linked to the attainment of sales objectives defined individually ..."

Meaning individually to that particular customer or travel agent in this case. In other words, not defined objectively in a manner of general application saying: for you, you should achieve this volume of sales and we will give you a discount if you do that.

Then 72 it is clear from the findings of the court of first instance:

"... that the bonus schemes at issue were drawn up by reference to the individual sales objectives, since the rate of the bonuses depended on the evolution of the turnover arising from BA ticket sales by each travel agent during a given period."

Then at 73:

"It is also apparent from the case-law that the commitment of co-contractors towards the undertaking in a dominant position and the pressure exerted upon them may be particularly strong where a discount or bonus does not relate solely to the growth in turnover in relation to purchases or sales of projects of that undertaking, but extends also to the whole of the turnover relating to those purchases or sales. In that way, relatively modest variations -- whether upwards or downwards -- in the turnover figures relating to the products of the dominant undertaking have disproportionate effects on co-contractors ..."

So, in other words, what it is saying is if what happens is you hit the target and that gives you, say, an extra 3% bonus or discount and then that discount is given to you not just for the excess over the target but across the whole piece, then that is going to have a disproportionate effect on how you behave simply because it makes a very radical difference to the bonus

or discount you get as to whether you go beyond the discount or target or not.

Then 74 {AUTH1/78/29} they say:

"The Court of First Instance found that the bonus schemes at issue gave rise to a similar situation. Attainment of the sales progression objectives gave rise to an increase in the commission paid on all BA tickets sold by the travel agent concerned, and not just on those sold after those objectives had been attained ... It could therefore be of decisive importance for the commission income of a travel agent as a whole whether or not he sold a few extra BA tickets after achieving a certain turnover ..."

The court of first instance states that:

"... the progressive nature of the increased commission rates had a 'very noticeable effect at the margin' and emphasises the radical effects which a small reduction in sales of BA tickets could have on the rates of performance-related bonus."

Then, finally:

"... the Court took the view that the pressure excerpted on resellers by an undertaking in a dominant position which granted bonuses with those characteristics is further strengthened where that understood taking holds a very much larger market share

than its competitors ... It held that, in those circumstances it is particularly difficult for competitors of that undertaking to outbid it in the face of discounts or bonuses based on overall sales volume. By reason of its significantly higher market share, the undertaking in a dominant position generally constitutes an unavoidable business partner in this market. Most often, discounts or bonuses granted by such an undertaking on the basis of overall turnover largely take precedence in absolute terms, even over more generous offers of its competitors. In order to attract the co-contractors of the undertaking ... those competitors would have to offer them significantly higher rates of discount or bonus."

In other words, if you are a minion airline because the volume of sales that you will achieve will in absolute terms be much smaller you would have to offer a 10% discount or a 15% discount. Whereas BA, because it is such a large volume of sales, can offer a 3% discount and in absolute terms that would be much more valuable to the travel agent.

So 76 {AUTH1/78/30}:

"In the present case, the Court of First Instance held ... that BA's market share was significantly higher ... It concluded ... that the rival airlines

were not in a position to grant travel agents the same advantages as BA, since they were not capable of attaining in the [UK] a level of revenue capable of constituting a sufficiently broad financial base to allow them effectively to establish a reward scheme similar to BA's ..."

Therefore, the court was right to examine whether the bonus schemes had a fidelity building effect capable of producing an exclusionary effect.

We say the commission arrangements in the OSAs have none of these features, these features which are identified by the court as being problematic. In relation to the last point, it is true, as we debated yesterday, that the defendants have a large share of the OSAs in the UK, but that does not affect its ability to offer -- the ability of other suppliers to offer commissions of a similar or higher amount. We saw that in the evidence.

We would suggest that none of the features which the court has identified in this consistent run of cases as being problematic as being what it describe as fidelity related rebates arises in relation to what we have here, which, subject to the example we have identified this morning of a volume-related aspect, is just a basic commission structure. The university has an obligation

to promote us in the sense that it identifies us as the official supplier, and Ms Middleton said that it had to circulate a leaflet about the defendants' offering, and it receives a commission on every sale that is achieved. That is simply a basic commission regime of the kind that was not even worth mentioning in the BA infringement proceedings.

Yesterday in response to our reliance on these cases Mr Randolph said, well, we had overlooked the key case on which he said was the Tomra case. That is at authorities 1, tab 57 {AUTH1/57/1}.

If we could go to page 14 {AUTH1/57/14}, the only paragraph I thought really worth mentioning to you is paragraph 75, and it say:

"In that regard, the General Court observed, more particularly, that, according to the contested decision, in the first place, the incentive to obtain supplies exclusively or almost exclusively from Tomra was particularly strong when thresholds, such as those applied by Tomra, were combined with a system whereby the achievement of the bonus threshold or, as the case may be, a more advantageous threshold benefited all the purchases made by the customer during the reference period and not exclusively the purchasing volume exceeding the threshold concerned ..."

So that is the same point as we saw in BA. It is a retrospective increase in the discount that applies across the board:

"Secondly, the rebate schemes were individual to each customer and the thresholds were established on the basis of the customer's estimated requirements and/or past purchasing volumes and represented a strong incentive for buying all or almost all the equipment needed from Tomra and artificially raised the costs of switching to a different supplier ..."

That is again the same point that we saw in the British Airways case, and indeed in Hoffman-La Roche, where you work out what that particular customer needs and then you introduce a rebate scheme which is designed to force that customer or to highly incentivise it to get all its needs from the dominant undertaking:

"Third, the retroactive rebates often applied to some of the largest customers of the Tomra group with the aim of ensuring their loyalty ..."

That seems to be a discrimination point that they picked off the biggest customers and, again, that does not arise here. There is no suggestion of any discrimination in the way the commission arrangements operate.

Then objective justification is the last point.

So the concerns are consistently identified in these cases and we would submit that they do not apply to the sort of basic commission structure that arises here.

In response to the point you were putting to me, Mr Lomas, we say it goes far too far, it would be well beyond what the cases decide that are focused on this issue to say, well, if you have commission, that will incentivise you to get the commission. That is obviously true. But the cases do not suggest that commission is in and of itself suspect. It is fidelity rebates of the kind the cases have analysed are a thing in themselves.

MR LOMAS: Sorry, these cases you have been citing, Mr Patton, are not ones where there is any form of contractual exclusivity. They are just ones where there was an incentive structure set up through various forms of commission arrangements and percentage requirements. I think it is put against you here that the commission arrangements sit within a structure of contractual exclusivity whatever its extent and whatever it means but within an official supply arrangement. Does that change your analysis at all?

MR PATTON: No, I mean, Hoffman-La Roche obviously begins by saying that if you have an obligation to purchase exclusively from the dominant undertaking that in itself

could be an abuse, but that is the first abuse that we have already addressed. I am now addressing effectively the argument that the commission structure is an abuse. The idea that you can add something which is not an exclusive obligation to something which is not a fidelity rebate and create an abuse, there is no authority for that, and I am not sure I can say anything more than that. I do not accept that that would be legitimate. All that one has is an obligation on the part of the university not to promote -- in the cases where item 13 exists, not to promote or endorse anyone else, an obligation where item 12 exists to appoint only the defendants as the official supplier, coupled with commission on every sale that is achieved, subject to the example we saw.

There is really no basis in the -- the cases which have focused on this very point and really the line of cases that the claimants rely on upon there is no basis to suggest that if you add those together that takes you into the realm of abuse.

THE CHAIRMAN: Is it so simple as saying, well, there are rule on commissions and fidelity rebates and we fall on one side of that line, or does one have to step back and say these rules are always made in the context of specific cases where the facts are highly specific, and

the overriding question has always to be: is what ever the abusive conduct which is complained of capable of having a foreclosing effect on the market?

MR PATTON: I accept that. It is not about form. It is about effect. On capable, I will come back to capable but that is not I think the focus of the point that you are putting to me.

No, I accept that what you can take comfort from is that the court has at least said that volume-based rebates of commission are not likely to give rise to competition concerns. That was the argument that was run in Hoffman-La Roche but did not apply on the facts, so you may think it is unlikely that you are going to find the facts, but obviously that will depend on the evidence of the particular case.

We say actually -- this is a point I will develop -- that -- we have said all along it is not about attaching labels to particular features. It is about establishing an anti-competitive effect, which we say the claimants cannot do, but the claimants have put their argument really on the basis of saying, well, the cases say these are likely to be suspect and you should look particularly carefully, and we say we simply fall outside that body of cases.

Can I just deal with one small point. In our

written closing, page 37, paragraph 1065. This is the Edinburgh University not charging commission point which Mr Randolph queried yesterday.

Just in relation to that, it was Ms Middleton's evidence in her witness statement at {D4/2/10}, this is paragraph 31(n) of her first witness statement. You can see at the foot of that paragraph the evidence she gave about that. That was not challenged in cross-examination. I think Mr Ridyard asked a question about it at the end of Ms Middleton's evidence as to how that then affected the price at Edinburgh University, so that is unchallenged evidence.

In addition to that, the OSA itself is in the bundle. It is at {F2/107}. So you can see for yourself that it does not require commission to be paid.

It is dated, as you can see on the front, August 2018. So it applies with effect from the 2019 academic year, so that will be why Mr Randolph discovered that commission to be paid in 2018 and 2019, that is before this agreement was entered into, so that is that point.

I was going to deal briefly with the question of bundling. As you know, one point we have made about that is that it has never been pleaded as an abuse, and the reason we say that simply is because if you look at

the claim form at {B/1/23}, paragraph 71 is the plea of abuse, and it is the plea is that by entering into the exclusivity agreements E&R has abused its dominant position, so that was the abuse. The terms of the exclusivity agreement constitute the abuse.

I quite accept that the claim form contains various references to bundling, I have never suggested otherwise, and there is a reference at the end of this paragraph, at (e), over the page {B/1/24}, to the exclusivity agreements being part of an overall strategy, and there is a cross-reference back to bundling. The simple point we make is that it was never alleged that the bundling was in itself an abuse.

More substantively we say that there has been no attempt -- and this was the point we make at paragraph 76 of the closing, page 26 {A2/4/21} -- no attempt to address what would be needed for a bundling abuse, a tying abuse, which is a well known type of abuse, including in particular the need for there to be separate products.

The point we make in paragraph 77 is that Dr Maher did not say that the gown and the hood are separate products. That was not her evidence.

Mr Randolph said yesterday that they are, but that was not Dr Maher's analysis. She did not think it was

necessary to look at that quite understandably, we say, because it was not actually being suggested that was an abuse.

Can I deal with one small point over the page at paragraph 78 {A2/4/27}, and it is the second line. We say:

"... there is no serious analysis in Dr Maher's reports of the effects of bundling on competition in the B2C market ..."

When Mr Randolph dealt with this yesterday I think he misread that and he said that our complaint was that she had not analysed bundling in the B2C market -- that is page 73 {Day1/73:1} of the transcript -- but that is obviously not the point we were making. What we were making is that if this was being run as an abuse point, why does it matter? What is the argument for saying that it has actually affected competition in the B2C market? Such evidence as there is about that is completely exiguous.

We also say at paragraph 80 that we have an effective justification defence here by reference to the reasons given in evidence as to why the defendants do sell as a package.

Those are the three features which we understand the claimants to rely on as an abuse.

Picking up on the point the chairman put to me earlier, in the end you have to decide -- the test for an abuse is, is there a departure from competition on the merits and has an anti-competitive effect been shown? Those are interrelated questions.

I think in opening I commended to the tribunal the relatively recently opinion of Advocate General Rantos in the Servizio Elettrico case. It may be unnecessary to do this if you have had a chance to look at it, but I was going to highlight a few of the paragraphs in it because it is a very helpful synthesis of what the law is in this area.

It is at {AUTH1/49/1}. Just in terms of the background, this was a request for a preliminary ruling from the Italian courts in the context of an investigation by the Italian competition regulator into the market for the supply of electricity. The allegation being looked at was that the incumbent operator had used data in a discriminatory way relating to customers which before the electricity market had been liberalised was available to one of the affiliates in its group. What was being argued was that it used that data in order to make offers to those customers which would be designed to keep them within the group rather than have them move to a new supplier, and it was

said that was an abuse of its dominant position.

If we could look at page 7 {AUTH1/49/7}, paragraph 39. This identifies the second part of the question that the Italian court was asking, whether particular conduct may be classified as abusive merely because of the potentially restrictive effects it has on the relevant market.

There is quite a useful analysis, but I can probably go straight to paragraph 46 {AUTH1/49/8}, on the next page, which it says that:

"In light of the foregoing analysis ... for conduct, such as exclusionary practice to be classified as abusive ... it is necessary for it to be anticompetitive with the result that it is capable of having an (actual or potential) restrictive effect on the reference market. However, in order to assess the anti-competitive nature of that conduct it is necessary to establish whether the dominant undertaking used methods other than those of 'normal' competition."

That is dealt with the other questions.

The simple point that the advocate general is making in this part of his opinion is that not every exclusionary effect undermines competition. Indeed, if competition is working you will expect people to fail, you will expect people to be driven out, and that is not

in itself anti-competitive. You have got to really focus on these requirements.

Then the third part is not relevant I think.

Then on page 9 {AUTH1/49/9}, the fourth part at paragraph 52, the referring court asks what you think is the $64 million question: what is the line between practices that come within the scope of so-called normal competition and those which do not? And that goes to the heart of what constitutes an abuse.

In paragraph 53 the advocate general says in fairness that is not an easy question, and in the last sentence he says:

"[The] complexity the linked, inevitably, to the objective difficulty of distinguishing in advance conduct which reveals aggressive, but lawful competitiveness from anticompetitive conduct."

Then paragraph 55 is helpful:

"The concept of 'competition on the merits' is therefore abstract, since it does not correspond to a specific form of practice and cannot be defined in such a way as to make it possible to determine in advance whether or not particular conduct comes within the scope ... the Court has excluded the idea of an 'abuse in itself' ... which is to say the existence of a practice that is inherently abusive, independently of

any anticompetitive effect ..."

But, again, that goes back to the chairman's question, just because one particular feature does not render itself abusive:

"The concept of 'competition on the merits' thus expresses an economic ideal the background to which is the current trend in EU competition law to favour an analysis of the anticompetitive effects of the conduct ('effects-based approach') rather than analysis based on its form ..."

So it is not about the form, it is about the effects, and I certainly accept that and indeed rely on it.

And then he says:

"It follows that the question as to whether an exclusionary practice is a means consistent with competition on the merits is closely linked to the factual, legal and economic context of that practice."

It must be considered in the light of the specific circumstances as well. That may or may not be helpful.

Then over the page on page 10 {AUTH1/49/10} at paragraph 61 he has made a point -- his first point is about the special responsibility of the dominant understand taking.

Then paragraph 61 in the second place, the form or

type of conduct is not decisive in itself, so that is really the same point.

Then he says:

"However, if conduct clearly departs from normal market practice, that may be considered a relevant factor to be taken into account in the seas of whether there is abuse ..."

So the departure from normal market practice can be supportive of an argument of abuse. We would say here not only is there no departure from normal market practice, it is completely consistent with normal market practice.

MR RIDYARD: Would you accept that there are situations where a dominant firm doing something which was normal, in other words similar to what other competitors were doing, could be abusive because it was dominant --

MR PATTON: Yes.

MR RIDYARD: -- when it would not be abusive when it was not.

MR PATTON: Absolutely, and he says exactly that I think at paragraph -- I think it is 59. But, sir, I absolutely accept that. That is absolutely axiomatic.

THE CHAIRMAN: When he talks about abuse, is he talking about abuse of a dominant position only?

MR PATTON: Yes.

THE CHAIRMAN: So by definition, the fact is that conduct by the dominant might be perfectly normal for somebody else but becomes a problematic when it is the dominant so --

MR PATTON: It may be. The fact that it is normal makes it less likely that it is abusive. There may be situations where everyone is doing something and it is an abuse for the dominant undertaking to do that, and I accept that. But that is not the core case of an abuse of dominance. The most likely case of a an abuse of dominance is where the dominant undertaking is doing something that no one else is doing and which it is doing because it has particular market power it can squeeze the suppliers or it can excerpt pressure.

So you should not assume that the normal situation is that of a dominant undertaking doing something that everything else is doing but it falls into the trap of being an abuse. What he is saying I think is that is not going to be the usual case of an abuse because if one reads on -- I think I was on 61. 62 he says:

"In the third place, conduct does not come within the concept of competition on the merits the generally characterised by the fact that it is not based on obvious economic reasons or objective reasons. Examples of competition on the merits therefore, would include conduct which reduces the cost of the dominant

undertaking by increasing efficiency in some way and which has the effect of broadening consumer choice by putting new goods on the market or by increasing the quantity or quality of the goods. By contrast, if there is no justification of the conduct other than to harm competitors, that conduct will necessarily not come within the scope of the competition on the merits."

So the fact that it is normal is some reason to doubt that it is an abuse. It is not definitive because, as he says in 59, the dominant undertaking is subject to different rules. But it is at least less likely to be an abuse if it is perfectly normal.

It is going to be an abuse if it is abnormal in the sense that there is no obvious economic reason or indeed objective reason why it is doing it. The reason it is doing it is, looked at objectively, to harm its competitors.

MR LOMAS: It depends on the circumstances. You could say, yes, in relation to say predatory pricing. That is targeted to exclude a competitor, but excessive pricing which is still an abuse would be a benefit because it simply increases your revenue stream. So does it not go back to the fact that each one of these definitions or at least findings of abuse is quite context specific and looks at the effects on the market concerned and it is

quite difficult to move to a rules based structure.

MR PATTON: No, I agree, there are no bright lines, but I submit that what the Advocate General is drawing from the cases, trying to bring them together, are some indications that you can take into account but they will obviously bend to a particular scenario.

Then just on page 11, on paragraph 69, just to finish this off:

"Indeed the case law of the court, in my view, confirms that exclusionary conduct of a dominant undertaking which can be replicated by equally efficient competitors does not represent, in principle, conduct that may lead to anti-competitive foreclosure and therefore comes within the scope of competition on the merits."

So again, if someone else who is equally efficient can do it then in principle it is unlikely to be an abuse.

MR LOMAS: It is quite difficult to translate that test, is it not, to what I think Churchill would describe itself as a disruptive new entrant with a different business model. The as efficient competitor test is about people competing in the same market with broadly the same cost structure. It does not easily translate to the circumstances which are posited here.

MR PATTON: Yes, I am not suggesting that the claimants are not equally efficient, but I do say that in B2B market there are equally efficient competitors who are doing exactly the same thing as the defendants are doing, and in 69 the advocate general is saying that that fact in principle in the case that it is not going to be an abuse.

It may be that is a convenient moment. The only other paragraph I was going to take you to is on page 13 {AUTH1/49/13}, which is paragraph 81, and that is really just the overall conclusion where he draws all the threads together, but I think it really repeats points that I have already drawn to your attention.

THE CHAIRMAN: We will break until five to.

MR PATTON: Yes.

(11.48 am)

(A short break)

(11.55 am)

MR PATTON: In responding to Mr Lomas's question as to whether I was suggesting the claimants were an equally efficient competitor that actually takes one to the point that Mr Randolph made yesterday where he suggested that in relation as to whether there was competition on the merits, the competition on the merits has got in a case where what is being said is that a related market

has been foreclosed the competition on the merits is only relevant if it occurs on that related market.

We say that there is no authority for that proposition, and the passage to which he took you yesterday certainly does not say that. It would not make sense here in any event, because the B2C market is a market at the moment where there is no competition. Only the claimants are, apart from the bricks and mortar suppliers in Oxbridge, are active in that market, and we are not competing in that market and do not seek to compete in that market. So if he were right in that submission, it would amount to saying that it is impossible for the defendants to compete on the merits and that obviously cannot be right.

So when you are looking to see whether the defendants are simply competing on the merits, what is relevant is competition in the B2B market because that is the market where competition is actually happening. Therefore, it is the -- when you are looking for an equally efficient competitor you are looking at the other competitors in the B2B market, as the evidence demonstrated. For example, there is no problem about the other suppliers offering commission, for example, there is no suggestion that they cannot offer the same amount of competition or the same rate of commission as

the defendants do, or in relation to any of the aspects that are complained of as an abuse. There is no suggestion that they are unable to replicate that when they seek to become the official supplier.

We say that what is happening here is simply competition on the merits on the part of the defendants not an abuse.

MR RIDYARD: Suppose we were really concerned about foreclosure in the B2C market, if we thought that something happening in the B2B market was causing that foreclosure to happen, are you saying we cannot look at that or should not look at it?

MR PATTON: I was really dealing with the narrower point that Mr Randolph was making yesterday. The question of competition on the merits as the advocate general says, the other side to have coin in many ways of the question of anti-competitive effect, so if you were to conclude there was an anti-competitive effect that might lead you to the question whether there was competition on the merits or, in any event, if you found there was an anti-competitive effect I accept that that would be indicative of abuse. Indeed, that would be an abuse if there was an anti-competitive effect. So you can look at it in that way.

The only point I was making to suggest that we

cannot make a case of competition on the merits unless we compete in the B2C market that obviously cannot be right.

Turning to the question of anti-competitive effect. There were a few points of law I wanted to address orally.

The first is one that the tribunal raised by its question 2, which is whether you are concerned with actual foreclosure or just a reasonable and credible risk of foreclosure. As you know, we say that depends whether you are dealing with something prospectively, whether you are dealing with the prospective effect of conduct or whether you are dealing with conduct which has actually happened on a historic basis.

We rely on the Krka decision for that, which is in {AUTH1/25/1}. This is a sort of so-called pay for a delay case between the patent holder of a drug and a generic manufacturer of the drug. By a settlement agreement, the generic agreed to withdraw its opposition to the patent in return for a payment and to buy the drug from the patent holder. The Commission found that to be a breach of Article 101, and that was appealed to the general court. That is the context.

If we could go to page 56 {AUTH1/25/56}. This is where the court deals with the question I am now

dressing.

At paragraph 358 the court says:

"... in most of the cases in which the EU Courts have applied to an agreement [etc] ... the Commission decision at issue did not penalise past conduct constituting a restriction by effect, but rather prevented the occurrence of such conduct by envisaging the effects of the measures in question could have if they were applied."

And it gives some examples.

And then 359:

"There is therefore no previous case-law concerning agreements ... in which the Court of Justice or the General Court has accepted that the Commission may rely only on the potential effects of the measure at issue in order to find that an infringement has been committed and impose a fine on the infringers on the basis of that finding."

360:

"It appears paradoxical -- where the clauses of an agreement have been implemented and their impact on competition can be measured by taking into account the relevant factual developments, including those subsequent to the conclusion of the agreement, which took place before the Commission issued its decision --

to allow the Commission to demonstrate merely the anticompetitive effects that such clauses are likely to have and, to that end, to make the comparison mentioned ... above without taking those developments into account.

"It also appears paradoxical to allow the Commission, in order to find that an infringement ... was committed ... to rely on the mere fact that clauses of an agreement that were implemented are likely to have anticompetitive effects and not on whether they had such effects ..."

And then just dropping down to four lines from the end of that 361:

"If it were possible for the Commission to rely, in relation to agreement, which have been implemented, solely on the effects that they are likely to have, in order to demonstrate that they had an anticompetitive effect, the distinction between restrict ups by competition by object and by effect, established by art.101(1) ... would lose its relevance."

So it is a pretty common-sense analysis as to why that would be a paradoxical approach.

The only point that Mr Randolph made about this yesterday is that Krka is an Article 101 case, and that is true, but we would suggest that there is nothing to

suggest that a different approach should be adopted in an abuse case where the abuse is said to be historic abuse that has been implemented for a significant period of time.

We would suggest that is particularly so where, as here, the abuse is said to consist of entering into an agreement, the OSAs. That is how it is pleaded that the abuse is entering into the OSAs. It would be extremely odd if the fact that the entry into the agreement is analysed by reference to the actual effects for the purposes of Chapter I but you ignore the actual effects or you do not require any analysis of the actual effects for the purposes of Chapter II.

That is the submission we make about the correct approach. If we are wrong about that, that is to say that you have to show an actual effect, we say that what has happened or what has not happened would in any event be a highly relevant piece of evidence for you to take into account in relation to whether there is likely to be an effect. We make that point at footnote 136 of our closing. We give the reference there at {A2/4/30} to the Streetmap case, which says effectively that it is highly relevant to look at what actually happened.

In any event, we would suggest that you should not be misled, or "misled" may be the wrong word, but not be

led astray by the fact that the case law of the court sometimes uses the word "capable of having an effect" when it refers to the requirements for an abuse -- this was the point I made to the chairman earlier that I would come back to -- because when the court talks about "capable of having an effect", what it is talking about is whether it is at least likely -- more likely than not to have an effect.

I can make that good by reference to the opinion of the advocate general, Advocate General Whal in the Intel decision, which is at {AUTH1/23}, and if we could go to page 28 {AUTH1/23/28}. I should in fairness draw attention to paragraph 114 at the top where he says:

"Certainly, evidence of actual effects does not need to be presented."

That was said before the Krka decision. This is an opinion from 2017 and Krka is 2019. So that does not detract from the submission I have just been making, and in relation to an historic conduct case.

Then he says:

"This is because it is sufficient, in relation to conduct that it is presumptively unlawful, that the impugned conduct be capable of restricting competition. Importantly, however, that capability cannot merely be hypothetical or theoretically possible."

And then he says in 115:

"True, there is some discrepancy in the case law regarding the terminology employed. The case law refers to capability and likelihood, sometimes even interchangeably. It is my understanding that those terms designate one and the same compulsory step in an analysis seeking to determine whether the use of loyalty rebates amounts to an abuse of a dominant position.

"But what degree of probability of anti-competitive foreclosure is required?"

Then in 117 his view is:

"The aim of the assessment of capability is to ascertain whether, in all likelihood, the impugned conduct has an anti-competitive foreclosure effect. For that reason, likelihood must be considerably more than a mere possibility that certain behaviour may restrict competition. Contrariwise, the fact that an exclusionary effect appears more likely than not is simply not enough."

Just pausing there. You can see a footnote, 87, to -- it says:

"See, however, the Opinion of Advocate General Kokott in Post Danmark II, point 82"

That is not in the bundling, the footnote, but can I just explain what point is being made here. Advocate

General Whal is saying but more likely than not and on the balance of probabilities he says even that is not enough. He suggests that the test is whether in all likelihood there will be a foreclosure effect.

If you were to chase down the reference to footnote 87 to Advocate General Kokott's opinion he says that likelihood, ie more likely than not, is sufficient and you do not need to go further and say it is very likely or particularly likely. But that is the debate between the advocates general as to whether it is more likely than not or some even higher threshold of likelihood, such as very likely or particularly likely. But what is not in dispute is that at the very least you have to show the likelihood on the balance of probabilities.

That is so even when you see language like "capable", which might just suggest, oh, is there a chance that there will be an anti-competitive effect or there is a chance there be foreclosure, that does not mean anything different from likely.

MR LOMAS: Did the court's decision pick up on this point?

MR PATTON: Yes. This is in Intel were your asking or --

MR LOMAS: Yes, in Intel.

MR PATTON: Can I get the reference for that over the break.

MR LOMAS: Yes.

MR PATTON: Let me just check if I have got it.

MR RANDOLPH: It is in the bundle.

MR PATTON: Yes. So it did not -- I think it is fair to say -- let me come back to it. I have looked at it but I will just make sure that I have got the most relevant bit. It does not address this question of the precise degree.

MR LOMAS: That was what my question went to, yes.

MR PATTON: It does not do that. It just recites the usual formulae without adjudicating on that debate.

There is a suggestion by the claimants that actually all you need to ask is whether there might be a foreclosure effect. That is in their written closing at paragraph 11 in answer to question 3 {A2/3/5}. That is based on the decision of the Court of Justice in the *Mastercard* decision and that is at {AUTH1/28/1}. If we could look at page 78 {AUTH1/28/78}.

Just at the foot of the page, paragraph 96 is where this is dealt with, and the only point I really wanted to identify is that what the court is considering in *Mastercard* at this point of its analysis is objective justification. It is not considering the question of whether there is a restriction of competition, an anti-competitive restriction in the first place, it is assuming that, and then it is asking, well, is there an

objective justification for that restriction.

In that context what it is considering, if one then turns to page 80 {AUTH1/28/80} and it starts at 106. It says in the middle of that paragraph:

"As regards the substance ... the appellants are critical of fact that the General Court relied on the premise% of a prohibition of ex post pricing -- a scenario which, in their view, would not occur, in the absence of MIF ..."

So in other words, the general court had, well, said your objective justification first because there is a less restrictive scenario that is relevant.

At paragraph 109 the court says that:

"... In order to contest the ancillary nature of restriction ..."

So this is in the context of objective justification:

"... the Commission may rely on the existence of realistic alternatives that are less restrictive of competition than the restriction at issue."

Then at 111 at the bottom of the page:

"... the alternatives on which the Commission may rely on the context of the assessment of the objective necessity of a restriction are not limited to the situation that would arise from the absence of the

restriction in question but may also extend to other counterfactual hypotheses based, inter alia, on realistic situations that might arise ..."

Just over the page:

"... that might arise in the absence of that restriction."

So what the court is saying here is when you are in objective justification and you are asking, well, is there another scenario where there would have been a lesser restriction, you can consider counterfactuals not necessarily that would have happened but at least might have happened.

That is not relevant here because what we are concerned with at this stage of the analysis is as to whether there is an anti-competitive effect, which is a prior question. The test for that is: what would have happened? What would in the absence of the infringing conduct have happened? There is clear authority for that, as we have said, in our written closing. I will give you a reference.

That leads to the other question that the tribunal asked, which is, should you use or does one use a counterfactual to decide in an abuse case whether there has been an anti-competitive effect? The claimants accepted that that was the right approach in

their skeleton at paragraph 132 -- that is {A2/1/35}, a point I made in opening -- and they have now withdrawn that concession. They say that at the very least it is more flexible and nuanced in a Chapter II case as to whether you use the counterfactual or not.

As we say in our closing at paragraph 88, page 31 {A2/4/31}, there is clear authority that the assessment of anti-competitive effects in a Chapter II case as in a Chapter I case involves a comparison with a counterfactual, and that is the Socrates case that we have cited, and it is also what the European Commission's guidance says.

The argument advanced by the claimants seems to be that some sort of distinction is to be drawn between Chapter I and Chapter II in this respect and that there was some reason to suppose that although you would use a counterfactual for Chapter I, as they accept, you would not for Chapter II.

MR RANDOLPH: Sorry, just to be clear, I did not say "would not", I said "may not". It is in the discretion of the court. Just to get that right.

MR PATTON: There is some additional discretion in a Chapter II case which does not exist in a Chapter I, as I understand the argument. So far as we are aware, there is no authority that draws that distinction.

There is no case which says that there is a different approach depending -- to the counterfactual depending whether you are in Chapter I or Chapter II.

We have dealt at paragraph 89 with the two cases that they cite in their closing, but neither of them actually comments at all on any distinction between Chapter I and Chapter II. It seems that the claimants really rely on the fact that the court says it may be appropriate to use a counterfactual and that that is intended to suggest some form of discretion. But the court certainly is not saying that that discretion is any different as between Chapter I and Chapter II. That distinction is simply not drawn.

Be that as it may, as we say in paragraph 90 of our written closing {A2/4/32}, it is one thing to say that you do not always need a counterfactual to prove an infringement of competition law but it is quite another to say that where one has been put forward and has not succeeded, has not established the existence of an anti-competitive effect that you can then dispense with it.

That is the way in which the claimants have put their case on abuse and in relation to Chapter I that there is an anti-competitive effect by reference to a counterfactual and in which the infringing features do

not exist. If they cannot sustain that contention, what is the basis on which you could decide that there is an abuse? What is the alternative? It is all very well saying you do not have to use a counterfactual in an abuse case, but what is left? We would suggest there is nothing left because that is how the case was pleaded. That is how Dr Maher sought to establish an anti-competitive effect, and if you reject the way in which they seek to make their counterfactual case you simply have nothing left.

That is fatal to the abuse case because, as the opinion in Servizio Elettrico makes clear, it is about it is an effects based approach nowadays to deciding whether there is an abuse. You could establish that there has been an anti-competitive effect by reference to a counterfactual, but if you have not done that, that has gone. There is nothing left.

MR LOMAS: Is that entirely right because in a sense there is a greater degree of precision in some of the Chapter I cases. In a Chapter II case where you have got a dominant party you are looking at whether the abuse affects the quality of competition in the market and whether that has adverse consequences for the equality of competition and ultimately consumer welfare. You might not need to be as precise about what your

counterfactual case is and the credit card cases are a specific cases in Chapter I where there were very precise figure driven counterfactuals as to MIFs and things like this.

In a broader dominance abuse case do you need the same degree of precision as to what you say the counterfactual would be to establish whether the quality of competition in the marketplace has been damaged? More of a margin of appreciation for the tribunal.

MR PATTON: I cannot see why it would be any different. Some of the older abuse cases obviously they were decided at a time when the court was more formalistic about its approach and as the advocate general has explained that is not the approach nowadays.

If what you are looking for is an anti-competitive effect you have to show that there would be more vibrant competition in the absence of the infringement that constitutes the abuse. So in principle it is exactly the same question. That is particularly so here where the abuse, as I have already said, is said to consist in the entry into of agreements. It would be quite surprising if you were to say that the entry into the agreement quai abuse allowed an effect to be demonstrated at a sort of less precise level but the entry into the very same agreement quai

Chapter I infringement something different applied. It is quite hard to see how one could reason that.

Of course what the claimants are doing is making a more fundamental point, not so much about the precision of the formulation of their counterfactual but really saying that they can somehow get home without a counterfactual case at all, which is an even more extreme position.

As you know, the counterfactual case that we put forward is one whereby the other suppliers fill the void effectively left because we are disabled from whatever it is you might find to be an infringement. Mr Randolph suggested that was inappropriate because it would render nugatory the rule that a dominant undertaking cannot do certain things that other undertakings can do. The special responsibility, the point that Mr Ridyard put to me earlier.

The way they put this in their written closinging with to was to say that our counterfactual would licence the hypothetical -- would involve using the hypothetical conduct of non-dominant undertakings to licence the otherwise abuse of conduct of a dominant undertaking so they suggest it is sort of wrong in principle to take into account what the other undertakings would do.

The answer to that is yes, it is true that

a dominant undertaking has a special responsibility but the special responsibility is not to engage in conduct that either departs from competition on the merits or has anti-competitive effect.

What is particular about the dominant undertaking is it is restricted from doing that even unilaterally, whereas for any other undertaking they would only be in breach if they did it by way of an agreement.

But that is the limit of the special responsibility and so you still need to establish that what the dominant undertaking has done will have an anti-competitive effect and the classic way in which you test that is by postulating a counterfactual. If it is apparent from the counterfactual that there is not an anti-competitive effect, then there is no breach of the special responsibility.

As I said earlier, in many cases it will not be realistic or likely to suppose that if the dominant undertaking does not do something the other competitors will do exactly the same thing. That will often not be realistic because it will be by virtue of its dominance that the dominant undertaking is able to do the thing that it is doing that is being complained of. So then the counterfactual of the kind we are contending for, it would not work because it would not be realistic and

that would be an answer to it.

But if, as here, the conduct of the dominant undertaking is one that every other undertaking in the market in the B2B market I mean, is free to -- is able to imitate and indeed we say is actually already imitating in relation to their own universities there is absolutely no reason why you should ignore that in considering the counterfactual, or putting it positively, that is a correct counterfactual because that is what is likely to happen. There is no special exclusionary rule that excludes that counterfactual from consideration.

THE CHAIRMAN: You are positing two counterfactuals because that is what is being put forward. The claimants say essentially the counterfactual will involve one where there are no OSAs by anybody and therefore the B2C market springs up. I think that is what they say.

MR PATTON: I think that is what they say. That is difficult to understand because they are not contending, as you sought to establish yesterday, they are not contending that the OSA in itself is impermissible. So, for example, if you have a contract of the kind I showed you earlier where there is no item 12 and item 13, perhaps also no commission they would say, they are not saying that is an infringement. So there is no reason

why you write the whole of the OSA out of the picture. It it is only the infringing conduct that you would.

THE CHAIRMAN: I think importantly they also say no other supplier would in the counterfactual be using the same terms, whatever they may be, that are found to be objectionable by us. That is their case. So that is one extreme. So there are no suppliers engaging in the same anti-competitive terms, whatever they may be, that Ede & Ravenscroft is currently doing. That is their counterfactual.

Yours, on the other hand, if Ede & Ravenscroft were not allowed to compete in the B2B market in the way they are currently doing, the void would be filled by the other suppliers. It may be more nuanced by that. You both may be too extreme.

We are not limited, are we, to concluding that they are right or you are right? There has to be some middle ground. For example, Ede & Ravenscroft would still be in the market with a very dominant share, would want to try and preserve as much of that share as they can by means, contractual terms or otherwise, which ensure that as many students as they can properly encourage are encouraged to hire their gowns.

In order to reach a conclusion as to what that looks like we are going to have to have absolute precision as

to what terms are and are not allowed in OSAs but putting that aside, there is that middle ground possibility, is there not?

MR PATTON: Yes, I agree it is open to you. Obviously it would be helpful if you give us an opportunity to address you if you have other possibilities in mind, but I accept that you do not have -- obviously having assessed all of the evidence you might find there is a different counterfactual that is the realistic one. I accept that.

If one starts going down the route of supposing that Ede & Ravenscroft continues to bid for OSAs with one hand tied behind its back, as Dr Niels said, that gives rise to quite a lot of complexity because the question then is from the university's point of view is that a less, at least in some respects, it is a less appealing offering where it will receive zero commission from Ede & Ravenscroft because it can be said that the defendants are not allowed to pay it but if it engages Wippells it will give the same commission as it would have done before. So following that through gives rise to significant complexity.

THE CHAIRMAN: Maybe two particular categories of complexity which depend upon the university's actions. The first is what would their reaction be to Ede & Ravenscroft's

bids with their hand tied behind their back? The second would be even if Ede & Ravenscroft were successful in concluding a different shape of deal, would the universities be less incentivised to direct their students towards Ede & Ravenscroft who were still underwriting the graduation ceremony?

MR PATTON: Yes, yes. That goes to a point that you made yesterday that the commission is an incentive for the universities to wish for their students to hire from the defendants, but the university also has other incentives as to why it wants that because it has a single supplier who is going to provide enough regalia for all of the students and that is extremely attractive and desirable from the university's point of view. It means the ceremony will happen smoothly. It means there will not be disappointed students. There is no price discrimination between the students. But there are still incentives for universities to direct the students to the official supplier even in the absence of these features that are impugned.

As to whether ours is, we would suggest, the most likely alternative scenario, I mean, obviously we do not have disclosure from the other suppliers and we do not have their contracts before you. But from what we have seen in relation to feedback in relation to their bids,

for example -- I went through one of them with Dr Maher -- it is pretty clear that commission is something that is being sought from all of the alternative official suppliers and is being offered by all of the alternative official suppliers. That is not something which distinguishes the defendants from any of the official suppliers. Mr Ridyard asked Ms Nicholls at the end of her evidence: have you found any difference in your experience of seeking to supplying universities where other suppliers were the official supplier, and she very fairly said: no, it is broadly comparable.

So there is no suggestion that in relation to exclusivity that there is any difference at universities where somehow the defendants are in position.

That is why we say not only is it realistic to think that the other suppliers, because they are free to do so, would seek to provide the official suppliers services on the same terms as we do, but so far as one can tell from the evidence that is available that is actually what they are doing at the moment at the universities where they have been appointed and it is entirely rational to suppose that if we are prevented from bidding for OSAs on that basis they will continue to compete with us for new OSAs and potentially have the ability to outbid us because they will be able to offer

something which we are prevented from offering.

MR RIDYARD: Just to test that a little bit. We are only having this discussion in a context where there has been a finding of dominance because obviously if there is a dominance then all bets are off. If there is dominance then arguably there is probably some brand advantage or incumbency advantage or something which E&R enjoys which makes it more attractive than one of these rivals.

In that scenario yes, the other rivals might be able to offer the same, similar looking deals but the universities might well think, well it is worth trading off a bit less commission or zero commission or some other kind of remuneration other than commission which is still permissible under whatever ruling one makes about what the abuse is and is not, and even if E&R is competing with one hand tied behind its back, which I accept it would be, it might still be that E&R wins a good chunk of these contracts even in that asymmetric world.

MR PATTON: It is possible. There one is really entering the realm of speculation because you do not have any evidence from universities as to how they would react in that situation and you do not have any evidence from the other suppliers as to how they would react, and given

that what you are looking for is a counterfactual which is likely on the balance of probabilities, that scenario in my submission is not one that you could find is the likely alternative if you were to find against us in terms of looking at what would happen in the absence of these features because it is so speculative.

MR LOMAS: I think that might have been why I was posing questions with a degree of margin of appreciation because I think in these circumstances wherever you take your starting point it gets quite hypothetical but you could include, for example, the proposition that E&R was entitled to reward universities with a lump sum rather than a commission basis. It does not remove incentives but it changes them. So there are quite a number before of elements and a lot of commercial packages, a lot of individual parties making individually negotiated decision that would lead to the market structure that would then evolve.

MR PATTON: Yes, I can understand that. The only thing I would say about that is that you have not heard from the economics experts for example on that point so you would be making judgments as to whether there would be greater competition in a world where commissions are for an absolute amount rather than a percentage on the basis of no real evidence. Again, what you are seeking to

arrive at is what is the likely scenario on the balance of probabilities. I mean you would do that by reference to the evidence that you have heard and that is why we submit that you should resist the temptation to speculate.

In fact, there is a very obvious alternative scenario if Ede & Ravenscroft is under a particular disability which is that you have all these other people who have been bidding against Ede & Ravenscroft and who would be well able to.

MR LOMAS: Could I put another hypothetical to you then. It may be difficult to be precise about a particular counterfactual because it is hypothetical uncertain. But at least conceptually you could say there would be a range of possibilities as to how the market could evolve over time because it would not happen instantly, the market would adapt progressively to the changed circumstances and in most of those there is at least a chink in the fortress that enables Churchill to build for a period of time a viable business model. It makes a part of the market accessible for a period of time. We cannot say which of those markets structures would likely evolve but in most of them it gives sufficient commercial opportunity for the Churchill model to be tested on its merits.

And that might be the solution that we could reach with a sufficient degree of confidence even though we were not specific as to which particular model applied because that outcome was common to a variety of different models.

MR PATTON: I think if you felt able to say that on the balance of probabilities regardless of which hypothesis you explore that is going to be the outcome, then I am not sure I can object to that form of analysis. What I would query is the evidential basis on which you would be able to make such a finding because of course to an extent during the hot tubbing the experts were invited to think quite broadly and widely and you asked them questions to explore their thinking which if counsel had asked would probably have been objected to as questions for speculation. The answers reflected that in the sense that the experts would say, well I think this is likely to happen or something, it will evolve and it will get better. But none of it was really solidly the case. It is not a case you have got a model that you could look at which gives you an adequate evidential basis for that sort of conclusion. If you look at the reports you will not find any sustained analysis that takes you through how that is going to happen.

It is not really satisfactory, if you are going to

make a finding of an abuse, which is obviously an extremely serious finding, to say, well, you know, this is our theory as to how this market might develop, without really any solid foundation for that, and that is why although my counterfactual is much more prosaic than that, I do suggest that that is the right approach. If you are deciding it on the basis of the evidence that we heard at the trial that is a likely counterfactual which is inherently likely. Anything else is likely to involve such a degree of speculation that it is not a finding that you can make on the balance of probabilities.

One of the answers that the claimants put forward in response to our counterfactual is to say, well, it does not work for a different reason which is that it would be unlawful for the other suppliers to enter into these contracts. We have a number of points in answer to that, some of which I have made before, but first of all, as I showed you in opening, the claimants do not allege, and indeed have disavowed an allegation that any of the arrangements currently made by the other suppliers are unlawful. Just to remind you of that. That is at {B/9/13}.

Just if we could scroll down a little bit, please to the foot of the page. Question 33:

"Do the claimants allege that Wippells, GGC [etc] contravened section 2 and/or section 18 by virtue of their alleged exclusivity or preferred supplier agreements or otherwise? If not why not?

"No such allegation is made in these proceedings. It is not a necessary part of the Claimants' case in these proceedings that the said other suppliers have contravened section 2 and/or section 18 ... ".

MR RANDOLPH: Could you continue?

MR PATTON: By all means:

"The agreements to which they are/have been party are instead relevant to the question of whether the cumulative effect of the exclusivity agreements is to deny a substantially limited access to new and existing suppliers."

So it simply goes to effect and there is no allegation that they are unlawful.

Yesterday the chairman put to Mr Randolph that logically on the claimants' case the existing OSAs with other suppliers must be unlawful and he said absolutely, and that is page 90 of yesterday's transcript.

That is plainly contrary to their case. That is not part of their case. It is not a point that is open to them.

It is not just that that was their position in

relation to the actual agreements but, as you know, if I can just show you, {B/7/40} of our defence. This is our defence where in the block of green text we plead this counterfactual. So it is one that has been clearly advanced on the pleadings. We said what it was. We pointed out that they did not make any allegation that their agreements breached either section 2 or section 18 and therefore there were no affects on competition.

In the reply you will not find any plea in response to this which says that counterfactual is not workable because if the other suppliers did this they would be in breach of section 2 or section 18. That is not a case that has been made.

Had their point been pleaded, it would have been necessary to give consideration to the position of the other parties, so the other suppliers. Some of the issues that we would have had to consider are first of all whether they should be joined to the proceedings because in effect what would be being said is that their agreements are or will be if they step in anti-competitive infringements of the act. It might be said if you are going to make that sort of allegation they should be joined or they might wish to intervene because if the tribunal is going to say anything about whether their conduct is or would be an infringement,

that may be a point on which they would wish to be heard as an intervener for which there is obviously provision in the CAT rules.

If it had been pleaded it would have been necessary to consider whether third party disclosure should be sought from them because if there was a pleaded case being advanced that their agreements are/would be infringing then plainly that would be potentially relevant.

One would have also had to consider and invite the experts to consider whether there might be arguments available to those suppliers which would not be available to the defendants in relation to whether they are infringing.

One obvious example, and I accept it does not work on our market definition, but is the vertical block exemption. If on the claimants' market definition they have small market shares, then it may be that their agreements are exempt by virtue of the vertical blocking exemption. That is not a point that would be available to us in view of our market share but it might be available to them.

In the result there is no economic evidence from any of the experts analysing the position of the other suppliers because that was not a point on the table.

And so even if you were to decide that they were free to advance this case there is not actually any evidence to support it, with the idea that their agreements are/would be illegal.

Yesterday, Mr Ridyard anticipated a point that I might make when Mr Randolph said, well, on our market share, our market definition Wippells, for example, would have 100% market share at a particular university where it was appointed as a supplier, as the official supplier, and Mr Randolph suggested then it would be dominant.

That is a point that we have made in our written closing at page 35, paragraph 101(2) {A2/4/35}. This is the point Mr Ridyard put to Mr Randolph. We do say that even the fact that on our market definition of would have 100% of market share even that is not in itself conclusive on the question of whether they would be dominant. So the idea that it can be suggested for the first time really in the written closing that these rivals would be abusing a dominant position in the counterfactual is not pleaded and is not supported by any evidence or any analysis.

We would say it is also inconsistent with the express acceptance and the further information because if what they now say is true, they would presumably

equally say that Wippells is dominant in, at least on our market definition, in every case where it is an existing official supplier and it is abusing that dominant position insofar as it has arrangements for commission and exclusivity.

Can I just mention one other point that we make in relation to this question of the counterfactual at a high level which is that if you go to page 37 of our written closing, paragraph 106(4) {A2/4/37} we point out that there are actually real world examples in the UK of universities where there is no commission arrangement. I mentioned earlier an example of a university which does not have any provision about exclusivity in its OSA and we give the example at subparagraph (5) of Edinburgh. So that is a university where there is not commission and we point out that there is no evidence at all that that has made any difference from the claimants' point of view. Indeed, I think it is right to say that the claimants are in litigation with Edinburgh University because Edinburgh University is alleging passing off and that is to be heard in the Scottish courts.

So although there is no commission, that has not led to the claimants having any success at Edinburgh University.

In subparagraph (6) {A2/4/38} we give an example of another university which does not charge commission and again no evidence of any flourishing B2C competition there.

You do have some examples which are relevant to the counterfactual from real life which can be used to test the hypothesis that if commission, for example, were taken away would that improve matters and the answer is no.

I was not proposing to go through the detail because we have dealt with it very fully in writing of each of the analogues that were relied upon by the claimants, so Ireland, school uniforms, at one point Australia and Oxford and Cambridge. But we do say that when you look at the evidence in relation to those they simply do not support a conclusion that there would be a more competitive situation in the absence of the things that are said to be abuses in this case.

We would suggest that is not a surprising conclusion because the claimants have not been able to point to any country in the world where there is a successful B2C market for graduation gowns, so it is not actually surprising to find that is the case. I do not think this reference is given in the written closing but at Day 2, page 26, {Day2/26:1}, I asked Mr Muff about this,

about the research that he had done before they decided to enter the UK and I was quoting from a document that said:

"There is no comprehensive B2C graduation market in the UK or anywhere else in the world that we are aware of. Was that your understanding at the time?

"Answer: I believe so.

"Question: Was that based on some research you had done?

"Answer: Yes.

So there is no an example. This is not a case where you can look at the UK and think something has gone wrong here because in other countries this is how it works, people get their graduation regalia directly from the supplier. There is no evidence that that happens anywhere.

Then the final point that I wanted to make on the counterfactual is at page 48 of our written closing, paragraph 141. We make the point that there is no evidence that the parameters of competition would be improved in any realistic counterfactual. I think this may go to the point that Mr Lomas was putting to me earlier. The question for you is not, could the claimants make a good go at it in the counterfactual? That is a question that you may have to consider in

relation to causation but in relation to the counterfactual competition law exists to protect consumers and it only protects the structure of the market insofar as that affects consumers and that is the point that the advocate general reinforces in the Servizio Elettrico case.

Therefore, what one would expect is to see the claimants supported by evidence saying, well, in this counterfactual students would pay lower prices or would have better quality outfits or something of that kind. We say on the basis of Dr Maher's evidence which we have set out in detail in paragraph 141, that is not the likely outcome in relation to this case because she accepted that prices for some outfits would go up and she accepted that in any counterfactual the services that the defendants provide under the OSAs would still have to be provided and would have to be paid for. We submit that the most likely way in which they would be paid for is by the university charging the students for them. There is evidence that is what happened at Edinburgh where there is not commission. The university increased its tuition fees and recovered the costs in that way. That does not lead to any better outcome for students. Indeed, it may lead to a worse outcome for students if they have to pay more and it would be

perverse if the outcome of this case were that you were to bring about a situation where students pay more for their graduation ceremonies than they currently do.

MR RIDYARD: Where is the evidence that Edinburgh increased their fees to pay?

MR PATTON: Yes, if you have bundle page 49 of our closing internal page 46. At the top of the page, which is 41(3) and we have given a footnote 237 {A2/4/49}. Sorry, it is footnote 239. It was evidence that Mr Middleton gave and we have given the reference in footnote 239 that once the commission had gone Edinburgh charged higher fees to the students.

MR RIDYARD: So was this an admission charged to the graduation ceremony?

MR PATTON: I do not think it is a discrete charge. It is just that it is overall fees charged to students. He did not give any detail about how precisely the charge was levied but that was his evidence that the costs of the graduation ceremonies were passed on in higher fees to the students.

THE CHAIRMAN: Did he explain where he got that evidence from?

MR PATTON: No, but he was not challenged on that.

The Chapter I case, this obviously requires the claimants to prove an appreciable anti-competitive

effect. They accept in this context that it should be done by reference to the counterfactual, so the debate earlier about whether there is some difference with Chapter II, that does not arise here.

We say for the same reasons as I sought to summarise in relation to abuse, they have not demonstrated an anti-competitive effect by reference to the likely counterfactual and therefore that is fatal to the Chapter I case as well.

An additional point that Mr Randolph makes in relation to the Chapter I case is what he calls price fixing. That is, in other words, the OSA says this is the fee that the students will be charged for hire, £45 or whatever it might. He recognised yesterday that we had pointed out that there is no case of an object restriction. Price fixing if you hear that sounds like an object restriction, certainly in a horizontal agreement. But he made clear he is not seeking to run that case. He has not pleaded that and he is not seeking to run it now.

The question is, well what is the anti-competitive effect that has been demonstrated in relation to the fact that the OSAs say this is the hire fee that you will charge the students? In relation to that we say there is no evidence that stating the hire fee or

stipulating the hire fee in the OSA has any anti-competitive effect.

If you have our written closing at page 59, {A2/4/59}, bottom of page 58, sorry, paragraph 165. The obvious place if the claimants were seeking to prove that that stipulation of the price had an anti-competitive effect would be to look at Dr Maher's reports to see where does she deal with this, where does she say that the prices in the OSA has an anti-competitive effect? But she made very clear, as we say, over the page, that she had not looked at the 101 allegation.

MR LOMAS: Do we know how the OSAs actually specified the price at which E&R should make gowns available to students? Is that a standard term that is in them or is it some do and some do not?

MR PATTON: May I check that over the lunch adjournment.

So she said she had not looked at the 101 allegation. This is a point which arises only in relation to 101. It is true, in any event, if you look at her reports you will not find any evidence explaining why the fact that the prices in the OSA has any anti-competitive effect. That is not just something that she analysed.

The claimants seek to get round that hole in the

evidence by placing some reliance on what Dr Niels said in cross-examination. Perhaps we can just look at that. It is {Day8/42:1}. If you would just read from line 8 to the bottom of the page and then if you let me know when you have read that. It begins:

" ...you are a delight to have as an expert ..."

(Pause)

If we could go over the page, the question you can see continues to line 9 and then you have the answer between line 10 and 17. (Pause)

Now, you may recall that at the end of Dr Niels' cross-examination I said that there had been one very long question which if I had a transcript I might have wanted to break down and ask about in re-examination and that was the question I had in mind and predictably it has been relied upon by my learned friends.

They say that this is an admission by Dr Niels that the inclusion of the price of the OSAs has an anti-competitive effect. We say that is an impossible reading of that answer, not least because the question contains so many different parts but when you read what the answer says and I think it was the impression as well when Dr Niels was giving his evidence, all he was saying is: yes, it is true that if you have a bidding market and there is competition for the OSA once the OSA

is awarded that restricts certain things for other people. He was not at all suggesting that the fact that the prices in the OSA gives rise to an anti-competitive effect.

That is the only evidence I believe which is relied upon for this part of the case.

I do not know if that is a convenient moment.

THE CHAIRMAN: Yes. 2 o'clock.

(12.57 pm)

(Luncheon Adjournment)

(2.00 pm)

MR PATTON: May I just deal with a few matters arising.

Mr Lomas asked me whether the Intel judgment dealt with this question of the standard of proof, and it does not.

Can I just give you a reference to another judgment which does, a judgment of the court, which is the Post Danmark II case, which is {AUTH1/39/10}. You can see that, if we could just scroll down a little bit, please, it is paragraph 68 and 69, and I simply highlight that in 68 you see in the opening, in the first line the word "capable" being used.

Then if you look at 69 in the second line that is equated with an actual or likely exclusionary effect. So they are interchangeable as the advocate general said.

Then just completing that on the next page, page 11 {AUTH1/39/11}, paragraph 74 of the conclusion is it follows from the foregoing that in order to fall within the scope of that Article 82, the anti-competitive effect must be probable. So that is an endorsement by the court.

MR LOMAS: Thank you.

MR PATTON: The second point I wanted to deal with was the point that Mr Ridyard put to me about a possible counterfactual where the defendants are not free to pay commission but they still succeed in obtaining OSA appointments because they are so good on the quality of their service. Just in addition to what I said in answer, there were just one or two other points I wanted to make.

First of all, that is not a point that was explored with any of our factual witnesses, so it may be that is something if my learned friend had been running that case that could have been explored with our factual witnesses and they would have had something to say about how likely or otherwise that scenario is, but there is not any evidence about that.

We would suggest that it is very unrealistic to suppose -- I think the tribunal has taken on board Dr Niels' graphic expression of the one hand tied behind

the back. What it amounts to is that for one of the criteria which the universities apply in a tender, the defendants would automatically get a score of zero for that criteria.

Can I just show you some examples of the scoring criteria. I am not suggesting these are representative. These are perhaps the best case in relation to this point, but if I can show you two of them. One is the LSE, which is at {F1/145/4}.

If we could look at the bottom part of the page. These are the LSE's criteria, and you can see that the first criterion is cost level of fees offered to LSE, so that is the commission, and the waiting is 40%. So that would be an automatic zero for the defendants on 40% of the scoring.

MR RIDYARD: They might offer a lump sum instead of commission.

MR PATTON: I did not understand that to be part of the point you were putting to me. I will come back to the lump sum point.

Just another example, just in relation to the scoring {F1/419/7}. This is Birmingham City University, as you can see at the top of the page, and if we scroll down to the bottom part of the page, you can see just in the final three rows, "Price (overall weighting)" 50%.

The price lists, so that is how much students are charged, 20%, and then commission rates 30%.

So certainly if we were precluded from offering any commission or fee at least on these criteria there is going to be a very, very difficult obstacle to overcome or very difficult disability, because if you assume that all of the other suppliers are competent, they may not be as brilliant as we are, we still have to outperform them by zero or 40% on the other scores, and I suggest that is just not realistic.

MR LOMAS: If hypothetically, again three times, you were to prevent the market leader with 75% from offering a commission-based deal, you would have thought their evaluation forms would adapt to the new market conditions and measure what they thought they wanted to get, so I suspect measuring a new situation against an old form has limited utility.

MR PATTON: I understand why you say that. I do endorse what you said about that building hypothetically a hypothetical, because I do submit that the tribunal has no evidence about any of this and it would be engaging in speculation. It is not the case that has been pleaded by the claimants. It is not a case they have sought to put to our witnesses to support by expert evidence. You would really be theorising on the basis,

I would submit, of nothing and so that is why -- that is my I hope not impolite submission in response to that kind of point that really one is in the role of speculation, that is not a solid footing for a finding in relation to the counterfactual.

In relation to the possibility of a fixed concession fees were not a percentage commission, which was a point Mr Lomas raised with me earlier and which Mr Ridyard has just alluded to, again, just to emphasise that has never been part of the claimants' case in these proceedings, that a concession fee would be a permissible alternative or a preferable alternative to the existing arrangements. It is not a point that their expert opined upon. It is not a point that was raised with the expert in the oral evidence -- with either the experts in the oral evidence. So, again, you would be going on the basis of no evidence in the trial in relation to a point like that.

The only thing I wanted to add to that is that I took you in opening to the Irish tender documents for the Irish universities, and that is {Day1/81-85:1} and I showed you some of the tender documents, and it appears, reading the documents, that a fixed concession fee is what is sought by the universities in Ireland or at least by some of them. It is described as

a concession fee in the documents and it is not described as a commission or a percentage.

What one takes from that, in our submission, is that there is no evidence of that having had any impact on the development of a B2C market in Ireland. So from what we do know of a jurisdiction which appears to have a fixed concession fee it has not had any pro-competitive impact that one can discern. Obviously there is only very limited material before you about that in terms of what the tender documents actually say.

The next point I wanted to address was Mr Lomas just before the break asked me about the fixing of payment or the price in the OSAs, and the answer to that is again found in the spreadsheet at {E6/2/1}, which is appendix 3 to Dr Niels' report. If you look in column H -- we were previously looking at column I -- in column H what Dr Niels has done is to go through the OSAs and to identify whether there is or is not a fixed price.

What you can see is that the picture is quite varied. I think we have counted that there is a fixed -- there is a price fixed in some way in about 30 of the 70 OSAs. So --

MR LOMAS: Sorry, 30 out of 70 not 30%?

MR PATTON: No, 30 out of 70. Yes, exactly.

When I say fixed in some way, in some cases that will be by stipulation of the price, £45, for example, but if you look at -- if you look at row 16, you can see that it is an obligation for the parties to review and agree and to keep any increases within RPI, so it is fixed in that way rather than necessarily a specific number.

This table of Dr Niels' also identifies in column C the procurement type where he knows what that is, whether it is a tender an RFP and so on, and impressionistically, although we have not done any sums on this, the price is more likely to be fixed where there is a tender process, which stands to reason, because one of the things the tenderer will ask is: what price are you proposing to charge the students? That is clearly one of the key criteria that they ask about, and so it is natural that if that has been the subject of the tender that that will then be put into the contract, which reflects the outcome of the tender.

We would say more positively than the point I made before the adjournment that the fixing of the price is actually an indication of the university's buyer power being exercised, because what they are saying is: this is what you will be free to charge the students and no more. If your costs change that is a risk that you

take. This is a price that is fixed for the duration of the contract. We know that that is a price that you will charge all of our students without any discrimination between them, and you will not be able to increase it.

So far from being anti-competitive that is an example of conduct on the part of the defendants that is an example of the universities for the protection of their students stipulating a price that the students will be charged.

The last point arising is just a correction to something I mistakenly said. I said that the claimants were in litigation with Edinburgh University and they are not, they are in litigation with St Andrews, so that was a bad point, so I correct that.

I was going to move on to the question of objective justification. As I hope we have made clear, we are running two distinct but separate arguments under this heading. The first we call objective necessity, and that is referred to often in the Chapter I context as the ancillary restraints doctrine, which is perhaps not the most helpful label, but it is not disputed that there is an equivalent doctrine of objective necessity in Chapter II. So that is our first argument.

Then our second argument is that the efficiencies

generated by the alleged restrictions outweigh any anti-competitive effects if there are any, so that is effectively a net benefit -- a net competitive benefit overall argument.

That argument arises under section 9 of the Competition Act in relation to Chapter I, and it is simply described as an efficiency defence under Chapter 11. Again, it is, I think, not controversial that it exists for both causes of action.

I wanted to deal with each of those separately because the analysis is somewhat different.

In relation to objective necessity, the first way in which we advance our argument, there is a dispute about the burden of proof which I should just address. Our case is that the burden of proof is that it is -- it applies in this way: we must raise the plea if we want to raise it and produce some evidence in support of it, and then it is for the claimants to knock down the argument so, in other words, the burden is on them to dislodge our objective necessity argument.

There is some authority on this. The authority on which we first rely is the decision in Purple Parking of Mr Justice Mann, that is {AUTH1/40/59}. It is paragraph 184. It is dealt with quite shortly:

"HAL having set up its case [that is the Heathrow

Airport, that is the defendant], and advanced some evidence in support of it, it is accepted by the claimants that they then have the burden of knocking that down. Since ... [it] is advanced, the claimants accept that burden."

So it appears to have been conceded by the claimants in that case that they bore the burden, but that was the approach that Mr Justice Mann, he did not query that, so that is the extent that one gets out of it.

The claimants rely on a different case, a decision of the tribunal in the Socrates case, which is {AUTH1/52/36}. Then you can see at paragraph 88 the passage on which they rely. Objective justification they say:

"The fifth element does not appear on the face of the sect. 18, but is well-recognised. If it is raised by the defendant, then it is for the defendant to show that the its conduct is objectively justified. In that respect, the Law Society accepted that it bore the burden proof."

So there is a concession in that case by the defendant that they bear the burden, so there are competing concessions in the domestic authorities.

We say that the route through this is to have regard to the European jurisprudence, and we rely on the

Microsoft case, which is {AUTH1/31/147}. It is paragraph 688. If you would just read that, please.

(Pause)

That is in the context of infringement proceedings before the Commission, but we say it would be very surprising if the position were any different in a standalone case because quite often cases in front of the tribunal will be founded on a decision of the Commission in a follow-on case, and there is no logical reason why the burden -- the incidence of the burden would be any difference in a standalone case.

So we say that Microsoft shows you that the correct approach is the one for which we contend.

We also rely, just finally, on what is said in *Bellamy & Child* in relation to the ancillary restraints documents, so that is as it applies in Chapter I. That is at {AUTH5/2/1}, and if we could just expand the -- yes, exactly. You can just see burden of proof -- the evidential -- at 2.200:

"The evidential burden lies on the undertaking to bring itself within the ancillary restraint doctrine. It is then for the person alleging the infringement to refute any such arguments and discharge the legal burden of proving the infringement."

MR LOMAS: And footnote 852 is a reference to -- can we go

down a fraction?

MR PATTON: Yes.

MR LOMAS: From *Mastercard*.

MR PATTON: So there is our position on the burden in relation to objective necessity.

So far as the substance of the defence is concerned, there is a helpful summary of this by the tribunal in Gascoigne Halman case, which is {AUTH1/2/96}. It is at the foot of the page, you can see the heading "Objective necessity: the law and our our approach", and they refer to the *Mastercard* decision of the Court of Justice.

Then if we can go over the page {AUTH1/2/97}, please, they cite from the decision in *Mastercard* but it may be most helpful just to look at the stages that the tribunal identifies underneath that at 153. So they say:

"First, there must be a given 'operation' or 'activity' that is not caught by the prohibition because of its neutrality or positive effect in terms of competition."

We say in relation to that that the given operation or activity is the OSA shorn of any alleged infringing features, because there is nothing anti-competitive in principle about having an agreement whereby an official supplier agrees to supply services to the university and

to make gowns available for hire. On the contrary, we say that serves obvious economic purposes. So the bear of OSA is the main operation.

Then:

"Secondly, there must be inherent to this operation or activity, but ancillary to it, a restriction of commercial active that would -- but for its relation to that operation or activity -- be caught by Chapter I prohibition."

That is the alleged abuses or the alleged infringements,.

And then:

"Thirdly, the relationship between the 'operation' or 'activity' not prohibited and the restriction that would otherwise be prohibited must be such that, without restriction, the primary operation or activity could not be carried out. In a sense, this requirement is captured by the words 'inherent' and 'ancillary' ... but the test is a stringent one. The mere fact that the removal of the restriction would render the primary operation or activity less profitable or more difficult or would have adverse consequences for its functioning is not enough. In the other words of the CJEU, 'it is necessary to inquire whether that operation would be impossible ..."

And then fourthly, the restriction must not only be necessary but proportionate.

And then you can see at 154 the way the tribunal summarises it in the fourth line:

"The question really is whether the ancillary restriction can be detached from the primary operation or activity without rendering that operation or activity impossible to carry on, and as with the consideration of restrictive effects, the response is helped by some consideration of the counterfactual situation."

The way in which we say that that test is satisfied is set out in our written closing at paragraphs 188 and following starting at {A2/4/63}. The two points in summary that we make are, first of all, that the OSA requires relationship-specific investments and that no supplier would be willing to commit to the level of investment required by the university, save in return for an assurance of a revenue scheme of the kind that is achieved by the promotion obligations in the OSA.

Another way of putting that, the way Dr Nielss put it, is that unless a degree of exclusivity is afforded there is a risk of a hold-up problem where no supplier is willing to provide all of the services that the university needs. That is the first point we make.

Then at paragraph 199 on page 66 of the bundle

{A2/4/66}, the second point we make is perhaps the converse of the first but the risk of free-riding in the absence of these arrangements. Now, whether that is free-riding by the other suppliers or whether it is seen as free-riding by the students who are supplied by those other suppliers it amounts to the same thing. The simple point is that the other suppliers needed to be a graduation ceremony that is attractive to students because otherwise they are out of business and yet they avoid paying for the cost of putting on that ceremony. So they free ride on the investment of the official supplier.

That essentially is how we put the objective necessity point. The other way in which we put the case on justification is that the efficiencies outweigh any anti-competitive effects.

In relation to that, we accept that the burden of proof is on us. That is clear under Chapter I, because section 9 of the Act, which is where this defence is to be found, it says so. It says the burden is on us. In relation to the equivalent defence to Chapter II, we accept that the burden is the same. So the burden is on us in relation to showing that the efficiencies outweigh any anti-competitive effects.

As to how you analyse section 9, there is a helpful

analysis by the Court of Appeal in the Achilles case, which is {AUTH1/35/33}. Effectively they set out how section 9 works, and it is the same approach in both. They say an agreement is examined. If it satisfies four cumulative conditions, two positive and two negative, the two positive conditions, conditions 1 and 2 are, one, the agreement must contribute to improving production of distribution or promoting technical or economic progress and, two, the agreement must allow consumers a fair share of the benefit resulting from condition 1, and then the negative conditions 3 and 4.

We have set out -- as Mr Randolph said yesterday, both sides have dealt with this quite succinctly, but we have set out our analysis of the four conditions at paragraphs 205-208 of our written closing at page 68 {A2/4/68}. So we say if you are against us on whether there is an anti-competitive effect you should find for the reasons that we give that the benefits of these arrangements, as Dr Niels said in his evidence, would outweigh any such effect.

The next issue we dealt with in our written closing is causation. This is not so much a competition law issue. It is simply a feature of the cause of action. The burden is on the claimants to prove that they suffered loss, even if they were to succeed on

everything else. It is common ground that this was a trial of the question of causation. Questions of quantum are left over for a future date but proving the mechanism by which the claimants say they suffered loss was a matter for this trial.

As you can see, we have dealt with this at some length between pages 68 and 75 {A2/4/68-75} of our written closing. Very little has been said in opposition to that either in their written closing or orally yesterday. So we invite you -- these are points about the evidence, but just to be clear, although we have advanced a number of positive reasons as to why they have not proved any loss, our starting point is that the burden is on them to demonstrate that the infringement, if they establish an infringement, caused them loss, and we say that they simply have not managed to do that, and that it is quite telling that they have not set out for you a route map as to how they say loss has been caused.

I was then going to move on to illegality. As you know, we put the case on illegality on two bases.

First of all, we say that the claimants made certain fraudulent misrepresentations and there are two representations which we say were made in respect of the period before 2021, so before this issue came to light

in the litigation.

First, that the gowns were made 100% from recycled plastic bottles.

Second of all, and in any event, that they were made from 100% recycled plastic.

It is not clear whether the claimants actually dispute making those representations. On the face of the pleading they have never accepted that they made them at all, but I think Mr Spitz accepted in response to the chairman yesterday that certainly there was a misrepresentation in respect of the 100 recycled plastic bottles for the second and subsequent batches of gowns, because it is common ground that they were at best 70%, so I take it that the making of the misrepresentation, at least in that respect, is not in dispute. Obviously, there is a dispute about the state of mind and culpability.

As Mr Spitz rightly said yesterday, we make the allegation of fraud only in relation to the second and subsequent batches of gowns. We do not make that allegation in respect of the first batch of gowns, which are the ones that were delivered in May 2017.

Then we also allege fraud in relation to the implied representation that we say was made in the period from 2021 onwards after this came to light in the litigation.

In relation to the fraudulent misrepresentations and what we say were the fraudulent misrepresentations, we say, as we do at paragraph 298 of our written closing at page 95 {A2/4/95}, that it is the dishonest that constitutes the relevant illegality. That is the key point, and the questions of inducement and loss caused by the dishonesty are less relevant or inessential. Dishonesty is obviously very well established as a form of illegality and Lord Sumption said that in the Servizio Elettrico case.

The alternative where we put the illegality point is if the representations were not made fraudulently and obviously in respect of the first batch where we do not allege fraud, we say that they were at are very least made negligently, and that that is a criminal offence and for that reason constitutes illegality.
Lord Sumption said in *Abotex* that criminal conduct is the paradigm, an example of illegality.

The regulations are in the authorities 2, {AUTH2/2/1}. These are *The Consumer Protection* from Unfair Trading Regulations 2008, and I should show you the key provisions. Page 5, regulation 3 {AUTH2/2/5}. Subparagraph 1:

"Unfair commercial practices are prohibited."

Those are identified in 3 and 4., and the relevant

one is 4(a):

"A commercial practice is unfair if --

"It is a misleading action you under the provisions of regulation 5."

Regulation 5 is over the page at page 6 6 {AUTH2/2/6}.:

"A commercial practice is a misleading action if it satisfies the conditions in either ... (2) or ... (3)."

And (2) is the one on which we rely:

"A commercial practice satisfies the conditions of this paragraph --

"(a) if it contains false information and is therefore untruthful in relation to any of the matters in paragraph (4) ..."

And pausing there. If you look at paragraph 4(b) one of those matters is:

"the main characteristics of the product (as defined paragraph 5)."

Then 5(e) one of the main characteristics of the product are the "composition of the product".

So we say that there has been false information, which is, therefore, untruthful in relation to the composition of the product, namely whether they are made from 100% recycled plastic bottles or recycled plastic.

Then going back to subparagraph 2(b), it is also

necessary -- just at the top of the page, please:

"it causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise."

We say that the likely to cause the average consumer to take a transactional decision he would not have taken otherwise is made out here. The only point of the claimants making these representations was that it was something that was likely to induce a student to hire a gown when otherwise they would not have done.

Mr Spitz said there was not evidence about that. We could not have called a student to say what they would have done because that would not have been evidence about the average consumer, and I would suggest we could not have called an expert to say that that is what they think students would do because that would not be admissible expert evidence, and so we submit what you need to do in order to decide whether this requirement has been satisfied is simply to ask whether it is likely as a matter of inference that the average consumer would have taken the transactional decision that they would not have done otherwise, and that the most powerful point about is that, well, why would the claimants have said these things unless that was intended and likely to happen?

We have also given references in our written closing to examples. This is on page 96 {A2/4/96} in the footnote at 558 we have given a number of examples, a large number of examples of students commenting on Trustpilot specifically about the 23 plastic bottles from which it was apparent that was a point of importance for consumers.

Just going back to the regulations. If we could go to {AUTH2/2/10}, and then at the foot of the page regulation 9:

"A trader is guilty of an offence if he engages in a commercial practice which is a misleading action under regulation 5 otherwise than by reason of the commercial practice satisfying the condition in regulation 5(3)(b)."

We do not rely on 5(3)(b), we rely on 5(2), so the proviso it is not relevant, so it is a criminal offence.

Then on page 12 {AUTH2/2/12}, regulation 13:

"A person guilty of an offence under regulation ... 9 [among others] ... shall be liable --

"on summary conviction, to to a fine not exceeding the statutory maximum; or.

"on conviction on indictment, to a fine or imprisonment for a term not exceeding two years or both."

So it is an offence. It is a serious criminal offence, and it is an offence that has been created for the protection of the public, so it does engage the public interest.

At page 14 {AUTH2/2/14}, we see regulation 17 and that says that:

"In any proceedings against a person for an offence under regulation 9 ... it is a defence for that person to prove ..."

The burden being on them:

"that the commission of the offence was due to --

"a mistake;

"reliance on information supplied by another person ..."

And so on.

And:

"that he took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence by himself or any person under his control."

It was suggested for the first time in the claimants' written closing, having never previously been suggested, that the claimants would wish to advance a defence under regulation 17, and Mr Spitz said that yesterday as well, and we would suggest that that is not

open to them, and we have set this out in our written closing at paragraph 302, page 97 of the bundle {A2/4/97}.

The first point we make is that we pleaded the offence under the regulations in clear detail and if they wanted to say that they had a defence under regulation 17 they would have needed to plead that in their reply, and they never did that.

This is not a kind of a technical point, a pleading point in that sense being raised now for the first time. We have set out in subparagraph (2) that there was considerable correspondence on this very point that the claimants had not raised on the pleading any due diligence arguments, and that arose because when we approached the chairman seeking permission for expert evidence about the composition of the gowns, the claimant said, "Well, we would like expert evidence on due diligence in supply chains", and we said, "Well, what would be the reason for that expert evidence? You are not running that point. That point does not appear anywhere in the pleadings". We put that correspondence before the chairman and the chairman refused permission for the expert evidence that the claimants were seeking and granted only permission for the expert evidence that we were seeking, which was the expert evidence about the

chemical composition of the gowns.

This has all been gone into many months ago and plainly a deliberate decision was taken not to run -- for whatever reason not to run a due diligence defence or not to plead it.

Having been refused permission for expert evidence by the chairman on that occasion, the claimants never reconsidered the position. They never introduced a due diligence defence and they did not renew an application for expert evidence in support of that, so you have had no expert evidence to show what the claimants did was in accordance with any standard practice in the industry. What they did is that, having been refused permission for expert evidence, they simply exhibited to Ms Nicholls's witness statement a copy of the Anthesis report simply as a piece of paper that went into the bundles, but that does not give it the status of expert evidence, since it has not been permitted. We have not had an opportunity to cross-examine anyone from Anthesis and nor have we called any expert evidence of our own, as plainly we would have done if this has been an issue and if there had been permission for expert evidence in relation to this point.

We say, first of all, that they should not -- and, of course, in their opening there was still no

suggestion of this defence being run. This is not a technical point. It was not even mentioned in the opening skeleton or in the opening oral arguments. We got it, first of all, once the evidence had close after the trial.

So we say it is not open to them to run this point for the first time in the closing submissions, but even if you were against me on that point, there simply is not any admissible evidence to support a due diligence defence on this point. It was telling that the chairman had to ask my learned friend Mr Spitz: what were the representations of this defence being run in relation to, for example? And the reason you would have to ask that question is because you have no formulation of what the defence is or how it arises anywhere except really in the written closing.

We have set out the evidence, as we see it, in relation to the question of whether the representations were made, what the state of mind of the claimants was, whether they had acted fraudulently or negligently in each respect, and we have done that in detail, and I was not proposing to go over that.

The question of law that then arises is whether, assuming we make good those contentions on the evidence, whether that is a bar to the claimants being brought.

It is common ground between us that the applicable test is that in Patel v Mirza {AUTH1/37/1}, and my learned friend took you to paragraph 120 of Patel yesterday. We have set out what we say in relation to each of the requirements at paragraph 303 of our written closing at page 98 {A2/4/98}.

I did want to deal just with one point in relation to proportionality that Mr Spitz made yesterday because he picked up on the fact that we say on page 99 {A2/4/99} at (3) that in third line we say:

"If fraud is established, the Claimants' illegality was intentional and would significantly outweigh any culpability on the part of the Defendants, who do not stand accused of any dishonesty."

Mr Spitz said that that involved drawing a comparison between the relative culpability of the claimants and the defendants, which he said was not an appropriate approach, and he relied for that on what Lord Hughes had said in the Hounga decision.

Just in relation to that, if you could look at Patel v Mirza at paragraph 107, which is in authorities 1 {AUTH1/36/31}. This is where Lord Toulson addresses what is relevant to proportionality, the third limb of his test, and if one sees at the foot of the page he says:

"Potentially relevant factors include the seriousness of the conduct, its centrality to the contract, whether it was intentional and whether there was marked disparity in the parties' respective culpability."

We say that in the light of Patel v Mirza the parties' respective culpability is a relevant consideration or at least a potentially relevant consideration. Hounga, of course, as anyone who was following this debate between the appellate courts as to what the law of illegality was, was one of the decisions at a point in time when the law of illegality was still very uncertain. One had Lord Sumption in one camp in the *Abotex* case, and Lord Wilson and other in the Hounga case expressing different views, and the whole point of Patel v Mirza was to settle the debate by having a full bench of the Supreme Court to decide upon it, and it is now Lord Toulson's judgment which sets out the principles that are to be applied. So we would suggest that is the recent and binding authority on what is relevant to questions of proportionality.

A principal argument made by the claimants is that they say there is not a sufficiently close connection between the illegality in this case and the claim. We submit that that is not correct and that there is

a close connection between the illegality and the claim for breach of competition law in this case. We would ask you to -- in that regard to bear in mind what we say at page 75 of our written closing, just at the foot of the page {A2/4/75}. It is the heading "The importance of the eco-claims to the claimants' business".

We set out in the paragraphs that follow, 235-238 -- for example, at 236 {A2/4/76} we make the point about three lines down that when this idea of marketing on the basis of recycled polyester sort of had its birth Mr Ramsey thought it was a fantastic edge to the story of Ede & Ravenscroft in the UK, and there is a lot of similar evidence. This was seen as a key unique selling point for the claimants and a way in which they would set out to compete with the defendants and distinguish themselves from the offering of the defendants and the other suppliers.

If that was all untrue or misleading, if the basis on which they set out to compete in that way was based on a lie or based on a negligent seriously negligent representation, one which was a criminal offence, we would suggest that it is very difficult to see why they should be free to seek damages on the basis of a much more technical breach of the law of competition of the kind that they articulate in these proceedings.

That leaves the topic of joint and several liability. Obviously this issue arises only if you are against us on liability in some respect, liability for damages in some respect. The first point that Mr Spitz addressed you on yesterday was whether D1, so Ede & Ravenscroft, was liable for an infringement by D3 and D4, that is Northams and the Irish company. The primary basis on which he says D1 is liable for an infringement by D3 and D4 is that he says D1 participated in the infringement committed by D3 and D4.

We say that there is simply no evidence of that. There is no evidence that the first defendant participated in an infringement committed by the third and fourth defendants, and the reason we say that is that if one is concerned with an infringement by D3 and D4, the infringement must be the OSAs that they entered into. Indeed, it must be right that each OSA that they entered into that has the impugned features is an infringement in and of itself. One can test it this way by reference to a point I made earlier.

If D3 entered into an OSA that did not have any of the features that Mr Randolph says are abusive or anti-competitive, so an OSA that had no exclusivity provision, no commission, and then leave aside bundling, which does not really arise, that is not an

infringement. There is no infringement at all in that case. So what one has to do is look at it on an OSA-by-OSA basis to identify whether there has been an infringement or not.

Northams entered into the OSA that it is a party to with the relevant universities. What is the basis for saying that that infringement is one in which the first defendant participated? The first defendant is a contracting party to its own OSAs, but there is no evidence, it was not put to anyone in cross-examination, it was not explored in any way that anyone referable to the first defendant caused Northam's entry into the OSAs that it did enter into here or participated in some other way in those infringements.

We say that the participation point is just without any evidential basis.

His alternative argument is that D1 is liable for infringements committed by D3 and D4 simply by virtue of being part of the same undertaking, and that is a point of law.

As you know, we rely on the tribunal's decision in Sainsbury's, and my learned friend took you to that yesterday, and it is very clear what Sainsbury's says, and my learned friend does not dispute this. Sainsbury's says that being a member of the undertaking

does not in itself make you jointly and severally liable for the infringement committed by any member of that undertaking. That is what it decided and that is not controversial.

My learned friend says to you that you should decline to follow a previous decision of the tribunal on this very point, and he does so by relying on two more recent cases. So the question is: do the two more recent cases justify you in departing from what the tribunal decided in Sainsbury's? We say it does not.

The first of the two cases is the GEA case. That is in {AUTH1/71/9}. This is the passage that -- one of the passages that Mr Spitz took you to. In fact, over the page at page 10 {AUTH1/71/10} he took you I think to paragraphs 46 and 48, possibly amongst others.

We rely in particular on paragraph 52 of the judgment where the court says that it follows -- I am sorry, paragraph 51 {AUTH1/71/8}. Consequently in circumstances where the existence of an infringement has been established as regards the parent company it is possible for the victim of that infringement to seek -- I am so sorry, I have gone to -- I am reading from the wrong case, which is why I confused myself.

MR LOMAS: The paragraph numbers seem to be off, yes.

MR PATTON: I am so sorry. Just give me one second.

(Pause).

It is the previous tab, I do apologise {AUTH1/71/9}, so it was page 9, which I think you were all looking at and I was looking at something completely different. And it was paragraph 61 of the judgment that Mr Spitz relied upon.

The first thing to say is that he suggested to you that this was binding, so in a sense you do not have any choice but to follow this if it stands for the proposition that he contends it stands for, and we say that is not correct because section 60A of the *Withdrawal Act* allows you to depart even from -- the Competition Act, I am sorry, allows you to depart from case law that was decided before the departure from the EU and the end of the transition period if you think it is appropriate to do so, so it is not strictly binding in that sense.

More importantly, perhaps, we make two points on the GEA decision. The first point is that if you go back in the judgment to page 2, which sets out the background to the dispute {AUTH1/71/2}, and can I just invite you perhaps not now to read from paragraphs 4-15, which is really that page and the next page, which sets out the facts. There were quite a few different corporate entities involved, so it is somewhat complex. We say

when you understand what is being described in relation to the facts, this is simply a common or garden case of joint and several liability where you have the entities that actually participated in the infringement and a parent company which exercised decisive influence over those companies. It is an absolutely classic case for joint and several liability, not deciding any new or novel point.

The second aspect is that the only issue under consideration by the court in the GEA case was whether these entities were liable to be fined by the Commission. There was no issue in this case about civil liability, liability in damages for an infringement.

If we go back to page 9, paragraph 61 {AUTH1/71/9}, which I had intended to go to initially, the proposition that the court sets out in 61:

"As the EU law concept of joint and several liability for payment of a fine is merely the manifestation of an ipso jure legal effect of the concept of an 'undertaking', the determination of the amount of the fine in respect of which the Commission may demand payment in full by each of those held jointly and severally liable derives, in any individual case, from the application of that concept of an undertaking ..."

That is a completely trite point of EU law at this stage. You can see that they are simply reciting something that was said in 2014 in another case. They are not seeking to decide any novel point.

It has not got to do with -- it is not saying anything new about fining and it is not saying anything about civil liability. If the case law had ended there and Mr Spitz was inviting you to depart from Sainsbury's by reference to this case alone, we would suggest that that would be a forlorn submission. It is certainly not apparent at all from this judgment that the court is seeking to say anything at all about whether there is a joint and several liability in damages for an infringement committed by another member of the undertaking.

Mr Spitz does need the Sumal case, and that is in the {AUTH1/76}. As you can see, the date of this is very important, it is October 2021, so it is nine months after the end of the transition period. The significance of that is that you are not bound in any way by this decision. You are not even obliged to have regard to it. As Mr Spitz I think misspoke yesterday, he suggested that you were required to have regard to it. That is at page 127 {Day1/127:1}. But you are not. You are free to have regard to it. You are not

precluded from looking at it. But that is the extent of the obligation.

One sees that in the *Withdrawal Act*, this time at section 6, which is {AUTH2/6/1}. You can see 6.1:

"A court or tribunal --

"is not bound by any principle laid down, or any decision made, on or after exit day by the European Court."

So that is making the point that you are not bound.

And:

"Subject to this and subsections (3) to (6), a court or tribunal may have regard to any anything done on or after exit day ..."

So it is an entirely optional question for you.

So far as what the case actually decides, it is not necessarily an easy read, with respect, but we do suggest if you look at {AUTH1/76/11}, the passage which we suggest is helpful is that it says:

"Consequently, in circumstances where the existence of an infringement ... has been established as regards the parent company, it is possible for the victim of that infringement to seek to invoke the civil liability of a subsidiary of that parent company rather than that of the parent company ..."

So plainly this decision is now squarely addressing

a question of civil liability, I accept that, unlike GEA:

"The liability of that subsidiary cannot however be invoked unless the victim proves ..."

And then it addresses ways in which you prove it:

"... that, having regard, first, to the economic, organisational and legal links referred to paragraphs 43 and 47 of the present judgment and, second, to the existence of a specific link between the economic activity of that subsidiary and the subject matter of the infringement for which the parent company was held to be responsible, that subsidiary, together with its parent company, constituted an economic unit.

"It follows from the foregoing considerations that such an action for damages brought against a subsidiary presupposes that the claimant must prove, in order for it to be found that the parent company and the subsidiary form an economic unit ... the links uniting those companies referred to in the preceding paragraph, as well as the specific link referred to in the same paragraph, between the economic activity of that subsidiary company and the subject matter of the infringement for which the parent company has been held responsible."

We would suggest that the court is not here

jettisoning the requirement as it was previously understood, and as Sainsbury's explains, for a specific link between the economic activity of the subsidiary and the subject matter of the infringement and, therefore, that it is not saying that from now on all you have to show is that companies are in the same undertaking and then they are all liable for anything done by any of them. If it is saying that we do respectfully suggest that you should not follow it.

We have a decision of the tribunal in this jurisdiction which focused squarely on this very question and reached a different conclusion, and we would suggest that it does go too far by saying merely by virtue of being part of an economic unit every company which forms a part of that economic unit is liable for every infringement committed by another company.

MR LOMAS: I am not sure if that is quite the case that is put against you actually or in any event can we test it this way: you got into this by essentially proceeding on the basis that each OSA was a separate abuse, if it contained restrictions. I think the case put against you is a rather wider one that the E&R undertaking had a strategy and approach of using exclusivity clauses in its various OSAs to foreclose the market, and that was

1 something that was conducted both by defendant 1 and 3
2 and 4. I know you do not accept that, but were that to
3 be established, would that not affect your analysis of
4 joint and several liability?
5 MR PATTON: The difficulty I think I have with that is I am
6 not sure what that really meaning. The abuse is the
7 entry into the OSAs. That is --
8 MR LOMAS: Or a pattern into entering OSAs which create
9 exclusivities in the market and foreclose the related
10 market.
11 MR PATTON: My understanding is that the claimants' case is
12 advanced irrespective of whether there is a pattern.
13 The pattern is not -- as I understand it, the pattern is
14 not relied upon as --
15 MR LOMAS: Or a series of agreements then. "Pattern" may be
16 the wrong term because it implies a coherent strategy,
17 but a series of agreement across a whole set of
18 relationships of different universities, in this case
19 through at least two subsidiaries in the UK and then the
20 Ireland one which create a market structure or had the
21 effect of creating a market structure.
22 MR PATTON: Yes.
23 MR LOMAS: I wonder if the Sainsbury's case was really on
24 all fours with that hypothesis.
25 MR PATTON: I accept the Sainsbury's case was not dealing

with that scenario. On the other hand the Sainsbury's case did identify a question of law. The participation in the infringement required by a company which has sought to be held liable for it? Or in the case of a parent company is the exercise of decisive influence enough? One of those two. Or do you simply stand back and ask: did a company in the undertaking commit the infringement and if so can that be imputed to each of the other companies in the undertaking. So that is the question of law and it is the question of law which we have joined issue. It seems to me that the point you are putting to me implies that there is participation by all the companies of the undertaking in the infringement.

MR LOMAS: Widely defined, yes.

MR PATTON: Yes, and my answer on that is that that has not been the subject of any evidence. There is no evidence to that effect. It is not simply a matter of assertion.

THE CHAIRMAN: Is it not necessarily so because this is an abuse of dominance? I do not think there is any evidence that each of the companies is dominant. The undertaking is dominant; therefore, that is the essential link, is it not, between them?

MR PATTON: I accept that dominance is assessed on an undertaking wide basis and so that is why we have not

distinguished between the Northams contracts and the E&R contracts in relation to questions of market share for example. But once the undertaking is dominant the next question is well, which company has committed the infringement? We say in relation to that that if the infringement consists of entering into the OSA, then that infringement is on the face of it committed only by the contracting party who enters into it.

THE CHAIRMAN: It cannot be, can it, because it is lawful conduct unless it is conduct by a dominant party?

MR PATTON: The company is subject to the rules on abuse of dominance because it is part of an undertaking which is on this hypothesis dominant. But it is not the case that the undertaking has entered into the OSAs. Plainly as a matter of English law it is not the contracting party and so if it is being said that despite what on the face of the contract appears to be the position it is actually the -- other companies and the undertaking have joined in that endeavour into entering into the infringement then I say that would be a matter of evidence.

I entirely accept that dominance is to be assessed on an undertaking wide basis but if that were right in every abuse of dominance case it would follow that the abuse is committed by all the companies in the

undertaking. I do not believe that is correct. I do not believe there is any authority that says that if the undertaking is dominant every company has committed the infringement, necessarily.

If that were so, some of the jurisdiction battles for example that have been had as to whether there is an anchor defendant in this jurisdiction, the answer would have been much simpler because it would simply say, you are a company in the undertaking that is dominant and necessarily since dominance is decided on an undertaking wide basis I can sue any of the companies within that undertaking.

MR LOMAS: I understand that. But that is not quite a fair comparator to what we have here. What we have here, at least assuming everything against you, is the three companies in the same undertaking, each of which have entered into at least some agreements which contain the clauses which are alleged to be an abuse. So it is a pattern of conduct by each company, each of which exhibits similar features in an undertaking which as a whole is dominant. That does seem to me to go some way from the authorities you were citing.

MR PATTON: I think I would be repeating myself. If there was evidence, for example, that the decision by the Northams company to enter into the OSA on its terms,

which are different from the terms of the Ede & Ravenscroft OSAs, that I think is -- you have seen one or two of the Northams contracts in the course of the trial. They are often two pages on a letterhead. They are pretty short. They do not follow the template that has been said to reflect the Ede & Ravenscroft contracts. If there were evidence that the management of Northams agreed on that course of conduct with the management of Ede & Ravenscroft, for example, then obviously that you can take into account. In my submission there is not any evidence of that. It is really an evidential point.

I think that only leaves the last point which is the question of whether D2, the R&T company, is liable for the infringements by D3 and D4 on the basis that it exercises decisive influence over them. That certainly is a question for evidence. I think that is common ground.

We say that the heavy reliance that is placed on the accounts as showing the exercise of decisive influence does not show anything of the kind. What the accounts simply reflect is the relationship between a parent and a subsidiary. It reflects the existence of control but not the exercise of control. Mr Middleton said in cross-examination: if you are aware of any documents

which show R&T actually exercising decisive influence over the conduct of D3 and D4, please present it to me, and that rhetorical question was never answered. There is not any material. There has been disclosure obviously on these issues and no material has been identified. His evidence was that that sort of exercise of control was not happening.

We accept that there is a presumption because of the parent subsidiary relationship of the exercise of control but we say that in the face of his evidence that has been rebutted.

Would it be convenient to the tribunal to break now? I think I have a few more minutes if I need it and then I could check whether I have said anything stupid or missed anything out.

(3.08 pm)

(A short break)

(3.20 pm)

MR PATTON: The only other thing I wanted to tell you is that literally while I have been on my feet Mr Justice Picken has handed down a judgment in relation to Sumal and we are not completely -- I was completely surprised by this, but my learned friend Mr Armitage who appeared in the case, so he had some inkling it might be coming, but obviously he did not tell me anything about

it. Anyway, we thought we should just let you know that it was there. It is on Bailey today. It is a case called JJH Enterprises v Microsoft Corporation [2022] EWHC 929 Commercial.

It is a jurisdiction challenge of the kind that I was mentioning against a Microsoft entity and Microsoft were resisting jurisdiction on the basis that there was no pleaded case that the UK Microsoft entity -- there was no sufficiently arguable case was liable.

In that context the Sumal point was taken against Microsoft by the claimants and effectively I think from my quick review the judge says that in the context of a jurisdiction challenge he is not going to decide the question of whether it is appropriate for the English court to follow Sumal or to depart from it and, on that basis, it was sufficiently arguable that mere membership of an undertaking was a basis to found jurisdiction. So I do not think, from what I have seen so far, that it gives you a huge amount of assistance but, given Mr Armitage in particular had some insider knowledge, I did not want to withhold the information from you.

THE CHAIRMAN: Thank you very much.

MR PATTON: But subject to that, unless you have any questions for me those are my submissions.

THE CHAIRMAN: No, thank you. Very much.

Reply submissions by MR RANDOLPH

MR RANDOLPH: Gentlemen, I can be brief, I hope.

Mr Patton said yesterday that everything can change when the contract expires. The evidence that you have before you from our expert at least is that contracts are often rolled over and, for your note, that is paragraph 41 of Dr Maher's second report {E4/7/14} and then sections 8 .6 and 8.7 of her first report {E4/1/51-54}.

Secondly, Mr Patton counted RFPs as part of the competitive approach, and those are the words used, transcript Day 9, it's yesterday {Day1/169:25}, and then 170, line 1 {Day1/170:1}.

If one could go -- could we go to {E4/1/54}, please, Dr Maher's first report, paragraph 222 and 2 -- could we go back one, please {E4/1/53}. So 220:

"In their witness statement the E&R Undertaking claims that even if there is no formal tender process, universities 'test the market' by informal discussion with multiple suppliers. For example, E&R has indicated that at least 19 of the contracts active in 2018/19 were entered into on the basis of 'requests for proposal' ('RFPs').

"I have looked at the disclosure relating to those

universities that, according to the E&R Undertaking, have made use of these RFPs. What I have seen suggests that at least some of these discussions were more akin to buy lateral negotiation.

"The E&R undertaking has suggested that the university of East Anglia used an RFP before entering into an OSA with the E&R undertaking in 2018. A communication in 2016, however, suggest that is the signing of a contract is 'just a formality'. That contract is eventually signed in 2018, with an E&R Undertaking supplying the university throughout; and

"The E&R undertaking has suggested that Birkbeck used an RFP before entering into an OSA with the E&R Undertaking in 2016. A communication in 2016, however, suggests that the E&R Undertaking simply provides the standard form OSA to the university as a means to extending the current services."

Moving on from that to revenue. Mr Patton said yesterday, {Day9/176:22-25} that the only revenue Ede & Ravenscroft receives is from students. That is not correct.

{F4/557/1}, please. Could you go -- once you have clicked on the thing you have got to click on to, button, could you go to the reconciliation tab, please, thank you. There you can see -- and I am not going

to -- I do not know whether the items are confidential on the left-hand side under the heading "Revenue". Are they confidential? Anyway, it does not really matter. You can see that there are a number of items other than academic, and that is revenue to Ede & Ravenscroft.

THE CHAIRMAN: Right.

MR RANDOLPH: The point that Mr Patton was making the only revenue Ede & Ravenscroft made was from students.

THE CHAIRMAN: I thought he meant when they were entering into an OSA, the revenue from the OSA.

MR RANDOLPH: I am just going from the transcript, sir.

THE CHAIRMAN: Are you talking about the revenue of the company more generally?

MR RANDOLPH: It was in the context of profitability, so I just thought I would make that point. It is a short point.

Third party evidence for the tribunal. Mr Patton made the point at the end of his submissions yesterday about the limited evidence from the universities. It will be recalled that normal disclosure was not ordered in this case. This is before my time. But annex -- so you and the Chair will recall that the order of 12 January last year set out annex B where -- set out the various disclosure obligations. Interestingly, one of those, which I had not picked up before but I was

looking at it this morning, item 34 requires disclosure of documents from the claim period containing market analysis in relation to that supply of academic dress for use by students at graduation ceremonies, including analysis of profit margins achieved by the defendants.

I know Mr Ridyard back in the day I think in the hot tub we were asking about analysis of profit margins. I am not aware of anything apart from the management accounts that have been produced. That is at {C4/12/1}, but what we have done overnight, just as a summary table taken from -- this is not a new thing, it is just a summary of third party evidence that was produced through disclosure and put into the expert reports. You can just see where -- the Opus reference, where it was relied upon and what the description is. If I may, I can hand that up. So that just shows there has been quite a lot of disclosure in relation to communications between the universities and Ede & Ravenscroft. (Handed).

That is the table. Then moving on to today. I am not going to go through it. It just shows the communications between the universities and Ede & Ravenscroft.

THE CHAIRMAN: Sorry, it goes to which point?

MR RANDOLPH: This was a point, it was said against us there

was limited evidence from the universities and the universities were not party to -- this is near the end of Mr Patton's submissions yesterday. It was about issues in relation to information evidence from universities and whether -- the fact there was -- given that paucity of evidence what weight could be given to the evidence that remained and could you come to -- essentially this was in the context of had we actually made out the burden in terms of proving whatever we had to prove in terms of dominance. It was just a general point about there was limited evidence. All I am trying to show there is that actually that is what we have managed to dig out overnight in terms of evidence from third parties.

Quickly, this morning the first authority Mr Patton took you to was Forrest. That obviously was a strike-out application.

In terms of the OSAs, Mr Patton took you to appendix 3 to Dr Niels' first report {E/6/2}. We do not need to turn that up. You will recall the various lines saying exclusivity or not.

You will recall that I rather slowly, and I apologise for that, took Dr Niels through the materials on which he had relied to come to his report, one of which was that -- and we can turn if we may, to

paragraph 4 in his first report, it will be {E5/1/1}, please. Can you go to the next page, please, {E5/1/2}, and the next page, and the next page. And the next page. And the next page. Next page, please. Sorry, {E5/1/10}, paragraph 4:

"An Excel document named '20211011 ...' appended to this report at appendix 3 ..."

The {E/6/2} is appendix 3. That was the thing you were taken to, and where he says:

"... where:

"Tab labelled 'ITTs' contains a summary compiled by 12 AL ..."

That's Alius Law, and then tab labelled 'OSAs' contains a summary put together by AL. Just the point that it is again it is not his data. It is not his database put together by Alius Law but possibly more significantly is the comment that he makes in the joint report.

Could we turn to {E7/1/22}, please, {E7/1/22}, 4.1. This is in reference to the statement:

"The E&R undertaking's exclusive supply arrangements with the universities from foreclosed Churchill Gowns ..."

Dr Niels unsurprisingly disagrees, but what he does say in the far column:

"The use of the term 'foreclosure' presupposes an anticompetitive effect. For the purpose of my own analysis I assume that the agreements between E&R and universities are exclusive ..."

So that is his assumption. And so the suggestion that actually only a minority or a small number of the agreements actually contain exclusive provisions is not the basis upon which Dr Niels actually assessed the position, and when we look at Dr Maher's report who, of course, did look at everything, all the agreements that she put together and analysed, if we could turn to her report {E4/1/12}.

MR LOMAS: I think is not Dr Niels assuming against himself that they all contain exclusivities as a basis, a conservative basis for then considering whether they were economically justified?

MR RANDOLPH: Exactly, but the assumption is it is exclusive. It is not saying they are all exclusive --

MR LOMAS: It is just an assumption --

MR RANDOLPH: It is just an assumption. That is -- I am not saying they are but what I am going to do is take you to Dr Maher's report, if I may, so we were at {E4/1/12}, please, 6.1:

"As a general rule, contractual interpretation is a task reserved for lawyers."

And so she talks about that. And then:

"Contrary to the claims of the E&R Undertaking, the following characteristics of the arrangements speak to exclusive supply.

"The E&r undertaking's contracts almost invariably state that they are 'exclusive' ..."

And there is a footnote.

Could you possibly drop down. Thank you so much.

And I am not going to read that out because a large -- in fact all of it is highlighted.

And then could you go -- so that is what she says, which is confidential.

Could we go back up to where I was. Thank you.

So:

"The E&R undertaking contracts almost invariably state they are 'exclusive'. My review of the evidence indicates that of the 64 universities currently supplied by the E&R Undertaking under a formal written contract ..."

And then the tribunal will read to itself what it says.

And then you will read the second sentence at least arrangements were the result of a tender process to appoint a single supplier, and then:

"this contractual language is buttressed by

statements made by universities on their websites. Of the 68 universities currently supplied by E&R ... on an ad hoc basis, 45 of the universities identify the E&R Undertaking as the official supplier of Academic Dress. Whether consciously or otherwise, the universities clearly believe that they are in an exclusive contractual relationship."

That is that point.

In terms of -- we spent some time or rather Mr Patton spent some time dealing with Hoffman-La Roche. I wonder if we could -- and in that context Mr Patton went to a number of authorities and came round to the Tomra case, that was {AUTH1/57/1}, but we actually. That is the appeal. That is the main court. We were relying on the general court judgment at 58 {AUTH1/58/1}. We can pick that up at {A1/1/27}, please. We can see there -- this is at 127 and 128 -- sorry, 105:

"The General Court held that obligations to obtain supplies exclusively from a particular undertaking are incompatible with the objective of undistorted competition within the market."

And this is paragraph -- we then go to 296 {AUTH1/58/85}in the general court rather than the appeal:

"In fact, the obligations of this kind to obtain supplies exclusively from a particular undertaking, whether or not they are in consideration of rebates or of the granting of fidelity rebates intended to give the purchaser an incentive ..."

So whether or not are incompatible.

So that is our answer, and that was not picked up or otherwise opposed or not followed by the appeal court, in other words the main court in Luxembourg. That is the Commission's point.

In terms of bundling, a point was made in relation to pleading again and lack of evidence. I would just point the tribunal to -- and we do not need to go there -- actually, can we. It is Dr Maher's report {E4/1/47}. It is paragraphs 194/195. This is dealing with what the effect of bundling was:

"The effect of this bundling practice by the E&R Undertaking is to prevent other suppliers from offering individual components of the Academic Dress, such as the gowns and caps, to the students.

"Furthermore, the bundling of the procurement of graduation-ceremony services (such as event management, ticketing and photography) with the right supply Academic Dress to students enables the E&R Undertaking to create a barrier to entry for those suppliers who

only want to supply Academic Dress to students."

That sets out the position clearly, insofar as we say it in relation to bundling and its effect qua abuse.

Edinburgh, you saw in passing, gentlemen, footnote 237 to the defendants' closing submissions. I am not going to take you there, but it just sets out -- not least because it is confidential -- it sets out the schedule 4 to the Edinburgh OSA, which points out what the commission structure is. It is not in relation to payments, but I cannot say what it is in relation to, because it is confidential. But I would just ask you to see what that relates to, so footnote 237 to the defendants' closing submissions. I will be coming back to Edinburgh very shortly.

MR LOMAS: Is it possible just to see that?

MR RANDOLPH: Yes, of course. It is {A2/4/49}.

MR LOMAS: I see, thank you.

MR RANDOLPH: Actually, given the fact that we have gone there, it was said again that Edinburgh -- so I take the point entirely about 2019 because it was a 2018 OSA and we have a new commission structure, different commission structure. But actually looked at in the light of what Mr Patton was saying, looked at the Edinburgh University website because, of course, the evidence from Mr Middleton was that -- and I think the evidence was

that the fees increased to students. Yes, that is what was said. I am going to hand this up because it is just from their website and it says this:

"If you choose to attend the graduation ceremony in person you will need to fill in an application form. NB: there are no graduation fees at the University of Edinburgh. There is, however, a charge for the hiring of your hood and gown from Ede & Ravenscroft."

And then there is a link. I tried to access that link but obviously I am persona no grata, so I could not get in, but I do not believe anyone can get in unless there is a student, so I cannot tell -- because it says if you want to see what the prices are those are they. (Handed).

So it would appear from their own website there are no graduation ceremony fees and there is just a payment to Ede & Ravenscroft but we cannot tell what that payment structure is. We cannot tell what the charges are because I am not a student.

That is the position in so far -- so that does not seem to chime with the evidence that Mr Middleton gave, but we do not know, because I cannot actually access the fees and, therefore, I cannot do the charges and I cannot do a comparison, but there is certainly no graduation fee charges.

That is that. The tribunal mentioned this idea of a counterfactuals on two ends of the spectrum and then the possibility of finding a counterfactual in the middle and of course the tribunal has a complete discretion so far as counterfactuals are concerned and the tribunal will be well aware of the *Sainsbury's v Mastercard* case where the tribunal posited a counterfactual that no party had actually posited so it can do it. What happened to it thereafter is neither here nor there, but it is a fact. It is a fact and so that is very good. So you have discretion.

A small point. Mr Patton mentioned that I had apparently said that at page 90 {Day9/90:1} of yesterday's transcript in relation to the OSAs being unlawful and he was saying that goes against your pleaded case etc etc but actually when you read it, and I am not going to take you to it, it is all in the context of network. That is the whole point. They are not individually but it is in the network and we go back to the Delimitis point and everything else. It is the sort of joint tainting.

I am nearly through. Insofar as the consumer benefit might arise in the counterfactual, obviously a hypothetical scenario, it was said that Dr Maher did not really deal with this but in fact she did.

If I could take you very briefly to her second report. {E4/7/29} at paragraph 103.

"As noted in the Irish competition authority's settlement in the academic dress market, consumers lose out when a dominant firm does not face competition from other rivals ... In a counterfactual world where universities must pay for the services they require and dead-weight loss from monopoly pricing would be removed. So although students may have to pay more for some services they would still be better off than they were under the current supply arrangements."

Could we then move to five pages on, {E4/7/34}, please. Paragraph 124:

"Whether or not the OSAs stripped of their provisions regarding supply of academic dress and photography could satisfy the requirements of Section 9 is conjecture and would depend upon the provisions in the resultant supply arrangements. Dr Niels asserts, without reference to any evidence, that in a counterfactual scenario where there are no commission payments made to the universities and the other benefits are not provided free of charge 'universities would either have to increase tuition fess to students, or charge for the ceremony costs separately or reduce service provision in other areas.

"This ignores the possibility that the universities could simply change the format [I think that was a point raised by the tribunal] and other aspects of the graduation ceremonies to bring them into line with what is affordable for graduands and their families. In any event, price/cost transparency of this kind would be preferable to hidden charges/subsidiaries being levied on graduands via academic dress hire and official photography. Any increases in charges elsewhere will be more than offset by the significant reductions in prices and improvements in service quality for dress hire and photography engendered by the liberalised market and the resultant competition between multiple competing 'official' suppliers and alternate business models and technologies."

So that is her evidence. I have just showed you the Edinburgh issue in relation to what happens when the commission structure is changed, not got rid of but changed.

Mr Patton suggested that the claimants' approach to competition on the merits was wrong because Ede & Ravenscroft did not compete on the B2C market but this goes back to this famous distinction between B2B and B2C. Actually, as I said in opening my closings, when you look at the question 5, the manner in which

that has been put together. So essentially there is one big market. This is one way of looking at it and there are different access routes and Ede & Ravenscroft use one and Churchill use another. So everybody is existing in one market. It matters not.

That seems to me, the manner in which question 5 was framed, helps frame the issue with regard to relevant market and also competition on the merits because it is all about the supply of academic dress to students. It is a question of how that supply is channelled, what the avenues are, and there are two, maybe even more, but there are two present channels and, as is clear from the premise of question 5, you can either put it, as we have done originally, the neighbouring point or subset within one single market.

Finally, insofar as objective justification is concerned, irrespective of the burden point, and I am not in any way, shape or form seeking to admit or accept the propositions being put forward by my learned friend I do not, stand by Socrates, it is common ground that the test to be applied is impossibility. There is no other way that academic dress could be supplied. Would it be impossible without an OSA? And clearly that is not the case.

I would leave you with this: the evidence of

Mr Halls, which I referred to in the opening of my closings, and this is their evidence, the defendants' evidence where he said the commission payment structure was diametrically opposed to the interests of students. If you have that evidence from a defendants' witness that must undercut, I would submit with respect, both objective justification and any section 9 exemption because, as I started, and I will finish on this, competition law is all about choice and consumer protection, and if something is an integral part of the pattern of behaviour of the E&R undertaking is the payment for commission which binds everything in, the inducement aspects, if that structure and payments are diametrically opposed to the interests of students, I say rhetorically, how can that be pro-competitive or objectively justified?

If I may, and unless you have any questions, if I may pass to Mr Spitz.

THE CHAIRMAN: Yes.

MR RANDOLPH: Mr Patton said that if you were minded to go that middle way or somewhere along the spectrum on the counterfactual, he would be keen to be able to assist the tribunal insofar as it went down that particular path. I mentioned *Sainsbury's* v *Mastercard* where that did not happen.

Obviously if you were minded to do that, we would like to do the same but we are not saying that you must. It is a matter for you. You have full discretion and you will balance, you will weigh everything, all the evidence and you will, if you are not tempted by either end of the spectrum and you need to go to the counterfactual, which I hope you will, then you will find based on the evidence what is a realistic counterfactual.

We may be able to assist you but on the other hand, for me, I have to say, we start getting into slight problems of satellite submissions and then everybody wants another go. Personally I am quite keen to crack on and finish things and I have complete confidence in the tribunal that if it wishes to exercise its discretion in this regard it will do so correctly.

Reply submissions by MR SPITZ

MR SPITZ: Thank you, sir. Just one short point to pick up in relation to what Mr Patton had to say about illegality. He said that the important, the essential aspect of it is dishonesty. That is, what is essential to illegality and that questions of loss and reliance are either not relevant or less relevant.

The point is simply this: that those questions of loss and reliance are indeed relevant to the way in

which the three factors in Patel v Mirza are to be applied and should be taken into account. He said the connection between the wrong and the claim was a close one. We say of course that the connection is far too tenuous and the denial of the claim would be fundamentally disproportionate. That is so because the claimants do not found their claim on any alleged wrong. There is no evidence of any loss caused by any alleged wrong. There is no primary witness evidence of any reliance on any alleged wrong and the alleged wrong is ancillary to a perfectly valid and good claim for damages for breach of competition law on our facts.

If there is to be, and this is the final point to make, if there is to be any need to take account of the alleged wrong, that can be done if it is appropriate when it comes to the quantification of damages. If it has any impact, we do not accept that it does, but that would be at the very least a proportionate way of looking at the question. That is the only point I wanted to make about the illegality analysis.

THE CHAIRMAN: Is it common ground that insofar as we are dealing with causation, then as a matter of principle when considering and calculating loss the assumption would be that no misrepresentations are being made in the literature by the claimants.

MR SPITZ: I understand.
THE CHAIRMAN: That was an issue that was to be determined at this trial. We have not had any argument about it but I think that is the position, is it not?
MR SPITZ: I understand that is so.
THE CHAIRMAN: It is a matter for you I think.
MR PATTON: I think we started off in opening by confirming that that was the position.
MR LOMAS: Can I put one point to you, Mr Spitz. It is obviously the case that Churchill is here because it feels it has suffered loss and wants to pursue a claim. Given that its claims are essentially around abuse of a dominant position and actions taken entirely by the E&R undertaking, in a sense the case that you are bringing could be brought by any party. You have locus standi here because you have suffered loss and you want compensation for your loss. I understand that. But in the same way that at one stage you approached the regulators and asked them to address the market, the predicate acts that you allege make up the cause of actin are entirely disconnected from your own behaviour. I wondered if that fact that -- we are talking about a market wide effect here from, if you were right, a series of allegations about the behaviour of E&R undertakings and therefore foreclosure affecting the

market. That would apply whether the claimant was Churchill or Eden or Castlereagh or any other Prime Minister of the country selling gowns.

What I am trying to work out in relation to the ex turpi point is your argument affected by the fact that the case you make is not actually in any way dependent on your own behaviour and could be made by any other party?

MR SPITZ: Mr Lomas, that is why we say that ex turpi does not apply in this context to shut us out. It used to be the case of course when the reliance principle was understood to be the principle to determine all of that this that that would have been the end of the inquiry. Do you found on the basis of your own wrong? Can you plead your claim without reference to your own wrong? If you can and if you do not found on your own wrong, as my understanding is, that is the end of the analysis.

That has changed --

MR LOMAS: Yes, of course.

MR SPITZ: -- in the sense that that is a factor but not decisive.

MR LOMAS: That is very helpful. I see the point. Thank you.

MR SPITZ: Thank you.

MR PATTON: Can I in fairness to Mr Halls, point out that we

do not accept that the summary of his evidence about diametrically opposed is an entirely fair one and it does not matter. It is at {Day4/81:1} but I did not want to leave that remark.

MR RANDOLPH: I think it just remains for me to thank the tribunal very much for its consideration and on behalf of all the legal team and the clients wish all of you a happy Easter, unless you have any further questions. I was being rather presumptive here hoping it is going to close off.

THE CHAIRMAN: No, we have no further questions so we wish you all a merry Christmas -- merry Christmas? -- and thank you very much to all counsel, solicitors and the parties for their succinct presentation of the case over the last two days and for your very thorough written submissions which we will go away and digest at more leisure.

You will not be surprised to hear that we will consider our decision and let you know in due course. But thank you all very much.

(4.01 pm)

(The hearing concluded)

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