IN THE COMPETITION APPEAL TRIBUNAL

Case No. : 1351/5/7/20

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

Wednesday 13 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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Wednesday, 13 April 2022

(10.30 am)

MR RANDOLPH: Good morning, sir.

THE CHAIRMAN: Good morning.

Before you start, can I just remind everyone that the proceedings are being live streamed, so these proceedings although they may be being live streamed are taking place in a physical tribunal. The recording is being made; a transcript will be produced. It is strictly prohibited for anyone to make any unauthorised recording, audio or visual, and that is punishable by contempt of court.

Thank you.

Closing submissions by MR RANDOLPH

MR RANDOLPH: Good morning, sir. Good morning, gentlemen.

Further to the tribunal's decision on 25 March that there should be an equal division of time, which is obviously right for the closings, and further to the decision that it is up to the claimants to divide their time between the main closings, oral closings and reply, we, just as a heads up, intend to try to finish anyway in good time for this afternoon, so that my learned friend Mr Patton has a chance to be on his feet and that obviously gives us time to reply.

As in openings, I will be taking the competition

aspects, save for joint and several liability which my learned friend Mr Spitz will be dealing with and he will also deal with the eco claims.

Just so you know, I haven't timed how long I am going to be, and obviously I am more than happy to answer any questions for the tribunal, but I am hoping that you will have heard enough from me by lunchtime. That is the aim.

The summary position is this: you, the tribunal, have received lengthy opening written submissions, quite focused opening oral submissions and then eight days of evidence, and you have been presented with several thousand pages of disclosure, expert reports and evidence. That might seem slightly overwhelming.

But actually, at the end of the day, your task may not be described as straightforward but the matters to decide, we say, are well defined and actually quite easy to encapsulate.

And we would ask the tribunal to bear in mind the following during the closing submissions and indeed obviously during their determination of the matters before them.

Competition law exists in large part to protect consumers through the offering of choice in the market; it is not the only part of the competition law but it is

a major part of competition law. Many students in the UK, who are the consumers in this case, in reality do not have that choice. They do not have that choice because we say that the defendants, and in particular Ede & Ravenscroft, have substantially tied the market up for the use of exclusive supply agreements, many of which contain the following standard term.

And for the note, for the tribunal's note this can be seen at {G6/32/1-2} in the bundle, items 12 and 13:

"During the term of this agreement and subject to its terms, the Institution appoints the Supplier -- [here, Ede & Ravenscroft or the defendants] -- ... as its exclusive provider of the Services ..."

So that is the first sentence. Then the second sentence:

"The institution shall not, during the term of this agreement, endorse or recommend any other provider to supply and/or hire academic dress to Students or provide any Student with the name or details of any other provider."

The tribunal will remember all the debate we had about those provisions.

The lack of choice that we say comes from that, flows from that, and in competition law terms that is described as foreclosing access to the market we say for

the hire and sale of academic dress, is, we submit, anti-competitive and abusive. That, in a nutshell, is what this case is all about.

Now, we say that there has been -- the defendants are entitled obviously to defend themselves and they have put forward their case. Now, we have described it in our closings as seeking to obscure matters and possibly camouflage matters, but they are entitled to do that. That is their right, but what they cannot do is complain, or at least they can but it is hardly compelling when we point out what we describe with respect as dissembling tactics.

On that point, and I am not going to labour this because we have made the point in our closings, but we do point and we do ask the tribunal to recall what I would describe as a Nelsonian blindness adopted by Ms Middleton who doggedly focused on the first sentence in that phrase I read out, that term I read out, and was very reluctantly dragged on to the second sentence and we say its obvious exclusionary effect.

And that effect, the exclusionary effect, is still around, and as can be seen from the Bristol University website dealing with April 2022 graduation ceremonies. That can be seen -- can we have this up, please -- at {F3/3026/1}. I raised this document with my learned

friend because there had been some correspondence between the parties on this, but he is content for this document to be shown to the tribunal. It is quite small typeface, being of a certain age. Perfect, thank you.

The tribunal will see that "You will need" at the top:

"You will need to wear University of Bristol academic dress. You can buy your own gown and hat ..."

And then, "Order [the] gown":

"You need to order your gown and hat from Ede & Ravenscroft."

And then I think further down, I think it says somewhere, under "Deadline":

"The deadline for ordering your gown and hat is Tuesday ... Please note, you will not be able to graduate without the correct gown."

So cannot graduate without an Ede & Ravenscroft gown, and that is April 22 so we say it is still ongoing. Obviously, my learned friend can address that, and what he said in his closings is that this is a unilateral decision by the university. I think it is up to the tribunal to decide what the position is, not least because we have seen that these agreements, these typical official supply agreements or exclusive supply agreements are drafted in large part, or have been

drafted in the past based on a template put together by Ede & Ravenscroft.

We also, and I am not going to dwell on this but I do want to mention it, again, the defendants are entitled to defend their case as they see fit, but we think it is instructive, and we press this, that the tribunal was -- or rather the identity of those who did not assist the tribunal, in other words, those witnesses who were not called.

MR LOMAS: Before you move on, can I just ...?

MR RANDOLPH: Yes, of course.

MR LOMAS: It is not part of your case that the wording that we see here on the Bristol guidance is wording that Ede & Ravenscroft can contractually oblige the university to put in.

MR RANDOLPH: No.

MR LOMAS: You are not making a case based on the particular OSA between Bristol and E&R.

MR RANDOLPH: No.

MR LOMAS: You are saying, what, that this flows from the general perception of exclusivity that flows, that the university is interpreted and implemented this way?

MR RANDOLPH: Yes, and just for the tribunal's note, the exclusive supply agreement with Bristol is at {F2/85/13}:

"The institution shall not during the term of this agreement endorse or recommend and any other provider to supply or hire ..."

We say it is a natural consequence of that.

I cannot prove, because I do not have disclosure showing that, but all I can do is point to the second sentence of clause 2.1 and I can point to this statement on their website saying you cannot graduate without an Ede & Ravenscroft gown. That is all I am pointing to.

MR RIDYARD: So you are saying that if these clauses, 12 and 13 from the prior document, were not there then in the Bristol communication to students that communication would not be there either?

MR RANDOLPH: Yes, at least on that is a reasonable -- I cannot say 100%, but it is a reasonable matter on which to place my response. Yes, it is a reasonable response to that hypothesis, without 12 and 13, particularly 13, that statement would not have been made.

Mr Lomas, I hope -- have I answered your ...?

MR LOMAS: Yes.

MR RANDOLPH: Thank you.

The tribunal wasn't assisted by Mr Doubleday, the man who apparently did all the actual mechanics, nor Mr Bottley, the man who, according to the defendant's

written closing submissions at paragraph 320(1), has "full authority to run all operational aspects of the business".

That is their quote, not ours.

Nor Mr James Middleton, who is in overall charge of academic dress supply and graduation ceremonies.

It is said against us when we made this point in our written closings that no attempt had been made to identify what relevant evidence could have been given. We disagree. It is clear from our paragraph 3 of our written closings what evidence would have been relevant, and it is clear from what I have just said how relevant those individuals were.

Now, again, obviously I cannot compel the defendants to call witnesses, but the tribunal will note who has and who has not been called. Finally, when we are talking about the evidence, we do note, and it was not put in our written closings but it did not come out in cross-examination, the frankly extraordinary evidence from Mr Telfer, the group financial controller, who is unable to identify which companies aside from Ede & Ravenscroft form part of the group of which he was the financial controller. For your note, that is transcript {Day5/45:22-23}.

It seemed sensible to our side when preparing for

today and tomorrow that the most help that we could give the tribunal would be to concentrate on the questions that were asked of us, and you will recall that in our closings we set out the questions and answers at paragraph 11 {A1/5/4}, and I hope they were of assistance.

If we go to the first of those, so question 1. This is at paragraph 11 of our closings, written closings. The question sought precision as to what constitutes the abuse and the evidence of how that abuse is said to lead to foreclosure. Then we set out:

"The E&R undertaking abused its dominant position by operating a network of exclusive exclusionary supply agreements, buttressed by fidelity rebates in the form of substantial commissions. Those agreements unlawfully bundled academic dress and separately academic dress and photography. Those actions had the effect of foreclosing inter alia the B2C market -- see further Section D2 ... and in particular D2(d)."

Then we say why it is not confined to -- or why our case is not confined to the foreclosure effect of commissions and we follow that through there, and particularly point 2, sections D2 and D2(d).

It is obviously common ground, and it is trite, that in order for us to make good our case on abuse we have

to make good our case on dominance, and in order to make good our case on dominance we have to identify the relevant market on which the E&R undertaking is said to be dominant.

The claimants have noted that question 1 presupposes that dominance is made out; but we are careful. Had that been the only question, we could have possibly jumped quite quickly over the issue of dominance of relevant market, but question 4 presupposes an absence of dominance, and it seemed to us, therefore, that we would need, hopefully quite briefly, to tackle the issue of dominance, not least because my learned friends Mr Patton and Mr Armitage go at some length on the issue of relevant market and dominance.

I would be more than happy to skip over that, but I assume that were I to ask the tribunal would they be happy for me to skip over, the answer would be in the usual form: you must take your own course, Mr Randolph, and I assume that will be the response? It is, good.

On that basis, I will deal with the relevant market and dominance briefly, but it is important, because we spent a lot of time on what the relevant market was, and the claimant's case is straightforward and we say reflective of reality. The relevant market is for the supply of academic dress. You can see that at

paragraph 22 of our closing written submissions and paragraph 83 of our re-amended claim form which is at {B1/28}.

You will recall that the defendants' expert accepted that relevant market could exist, that is paragraph 1.1 of the joint statement. He just said it was not going to be terribly helpful, but he said it could exist.

The tribunal will also note from our written closings, at paragraph 22, that the legal analysis does not change whether the relevant market is defined as both indirect and direct, ie B2B, B2C, or whether the direct supply market, B2C, is regarded as a separate but closely related indirect supply market, B2B.

That mirrors the premise of the tribunal's question 5. I wonder if we could just turn to that, because I think it is important to get this absolutely -- nail this down. Question 5 {A1/5/7}:

"When considering the application of existing principles and case law, the parties are asked to take account of the fact that academic dress suppliers are able to compete with E&R in the B2B market, and that what is alleged to be foreclosed is the ability of those suppliers to compete for a part only of the services provided at the B2B level ..."

And this is the important section, so in the

parentheses:

"... (whether analysed as a competing new B2C market or as part of an existing B2B market)."

We do not mind which it is, and the tribunal will take its own course. Our case works either in terms of foreclosure on the same market where the B2C market is a sub-market within the greater B2C market -- sorry, B2B market, or whether it is a closely neighbouring market, because that is covered in the authorities from the European Court where a dominant company can abuse its dominance by foreclosing the market, the neighbouring closely related market, and we would say the B2C market is that. But either way we do not really mind and we do not think that -- well, it is not that we do not think, it does not affect our analysis, as can be seen at paragraph 22 of our written closings.

That is our case and we say that chimes neatly with the way question 5 has been put. The defendants' case is different; it appears to have shifted from earlier on and at the start of these proceedings, but we say, even with the shift, it is neither straightforward nor reflective of reality. In their opening skeleton argument, in their opening submissions, they posited the relevant market as being the market in which the OSAs, so the agreements, are concluded. That is paragraph 37,

{A/1/29}.

Aside from the fact that that market on its own, we say, does not exist in the real world, it also faced the problem that it did not chime with their expert's report. Dr Niels' preferred relevant market was one for academic dress and other graduation day services, excluding photography. The defendants in terms of their pleaded case have now moved in line with that and, sir, you will recall we had the PTR and the amendment was made to the relevant parts of their re-amended defence to bring that in line with their expert's opinion.

Our position on that market definition is set out in paragraphs 43 and 44 of our opening skeleton argument. Essentially, we say that market is not reflective of reality and its artificial construct simply highlights the egregious nature of funding graduation services by students who have no other choice -- this goes back right the way to our start, which is choice is key -- and also without their knowledge.

The tribunal will recall the discussions with the experts in the hot tub, where Dr Niels accepted that revenues from photography services could affect the outcome of tenders. For your note, that is transcript {Day6/63:18-23}.

He also accepted, that is Dr Niels, that it would be

of interest for the tribunal when looking at the case in the round to consider the revenues and profit contribution that is achieved on photography business when photography is in the contract alongside academic hire. That is the same day, {Day6/62:13-18}.

So that is the relevant market where we stand, where the parties stand. We say, essentially, our position chimes with --

THE CHAIRMAN: You do not dispute, do you, that there is a market for providing graduation services to universities?

MR RANDOLPH: Yes. Yes.

THE CHAIRMAN: All right.

MR RANDOLPH: But we say --

THE CHAIRMAN: I thought you were just then.

MR RANDOLPH: Sorry?

THE CHAIRMAN: I thought you were disputing that.

MR RANDOLPH: No, because you will recall, sir, from the joint statement of the experts?

THE CHAIRMAN: No, I understand, previously I thought it was common ground. I thought you were just now saying that there was no such market.

MR RANDOLPH: No, no, no. No, I am sorry, sir. What I said in terms was, the market in which the OSAs are concluded, just that as a market does not exist in

reality. There is a difference, because, of course, graduation services could be provided without an OSA. Sorry, I did not make myself clear.

THE CHAIRMAN: Right.

MR RANDOLPH: It was a narrow forensic point rather than anything -- but we are faced with reality here, and we say that question 5, the manner in which question 5 has been posited is far closer to reality than that which is put forward by the defendants. But let us see what the defendants say about dominance on their relevant market. So not our relevant market, on their relevant market. So they spent about 20 paragraphs trying to show that they are not dominant on the market. They have identified.

We would say that one -- before we get there, one short legal point needs to be addressed. The defendants quote, at paragraph 21 of their closing written submissions from paragraph 119 of *Socrates*, {AUTH1/52/45}, but they do so selectively. We set out the quotes fully in our opening skeleton argument at paragraph 51. I wonder if we could possibly go to that. Paragraph 51 of our opening skeleton argument {A1/1/15}. Gentlemen, you can see how we have set out *Socrates*:

"The classic definition of dominance ...

"... a position of economic strength enjoyed by an

undertaking which enables it to hinder the effective competition ... by allowing it to behave to an appreciable extent independently of its competitors ..."

Then *Hoffman*:

"In a position of strength which makes it an unavoidable trading partner ..."

That is where it stopped in the defendants' closings, but then what continues is important:

"... and which, already because of this, secures for it, at the very least during relatively long periods, that freedom of action which is the special feature of a dominant position."

We say that is very important. It is not a concept that is stuck in aspic. Things can change over time and competitors can come and go as indeed they must, unless a dominant undertaking is 100% of the market, but nonetheless, here, we say and the tribunal has seen the very high market share over a long period of time on their relevant market, as they define it. We say that, with respect, the defendants attempt to dodge a finding of dominance on their market, not on our market, but on their market, is doomed for the following reasons.

It is common ground that the defendants held between 75% and 80% of the graduation service supply market during the claim period. It is their market. That is

paragraph 23 of the defendants' closing submissions. Despite that being common ground, the defendants, we say, have tried to backtrack suggesting, at paragraph 26(4), that E&R holds only a relatively large share of the OSAs offered by universities in the UK. They go on to say that Dr Niels' analysis of the universities' evaluation of the defendants' bids was unchallenged so that the claimant's case, that the defendants enjoy incumbency advantages, was unsubstantiated.

I am going to take those individually. As to the relatively high assertion, Dr Niels stated in terms that the market share I have just referred to, 75 to 80%, is a very high market share. That is transcript {Day6/80:9-10}.

As to the other two assertions, we say they are simply wishful thinking. Dr Niels' analysis in terms of the defendants' bids was rebutted in section 3.4 of the second report by Dr Maher and Dr Maher clearly sets out the incumbency advantages and what they were, as can be seen from the claimants' written closing submissions, at paragraph 25N, and those asserted advantages were not challenged by the defendants.

That is the first point. High market share, very high market share. That is not my words. Those are the

words of Dr Niels.

The second point. It is common ground that only a quarter of universities have gone through a competitive tendering process. It is common ground, see paragraph 26 of the defendants' closing written submissions. That is the second point.

The third point. The defendants' reliance, at paragraph 26(3) of their closing submissions, on Dr Niels' win-loss analysis, is, we say, flawed because of what is set out in column S in annex C to Dr Maher's report. I am just going to pause there. The tribunal will have seen, possibly, hopefully that there is annex C to Dr Mayer's first report and then there is an amended annex C, essentially picking up the issue of profit margins, which is to her second report. That is way at the end of section E in the Opus bundle. I am talking about the first report. Also I think Mr Ridyard correctly pointed out that this was an unbelievably treacly document to navigate because it was in pdf rather than an excel form -- and I found that out recently as well -- and so hopefully the excel version of this will be put up, but insofar as it is not, the relevant parts of that treacly document, the one that is stuck in aspic because it is pdf rather than an Excel spreadsheet, and the data in column S can be seen at

{E4/5/47-50}. So it is right at the end of that document, but it does not really help because it is in photographic bits and you cannot see it across, but we are where we are. Hopefully, you will be able to see them in the excel version, but once you actually interrogate that document at those pages, you can see that E&R only lost a tender when it was incumbent on five occasions. Only lost a tender when it was an incumbent on five occasions.

We say it is wrong to assert, as the defendants do at paragraph 27 of their closing written submissions, that the B2B market is competitive and that the defendants are certainly not unavoidable trading partners. That is what they say. We say, no. The simple answer is that for a long time the market was extremely uncompetitive, and we say still remains uncompetitive, and the defendants dominated that market in the factual and legal sense of that word.

We say the position is a fortiori in the light of the analysis of Ede & Ravenscroft profit margins, which brings me to the revised annex C in the second reply report.

Because this data is confidential, I have produced a note which has the figures highlighted in yellow and I will not obviously read them out. I wonder, is it

possible for these to be -- would that be all right, to hand those up to the tribunal? They are hole punched. (Handed).

Could I just ask the tribunal to read that little note to themselves. (Pause).

You see the point.

MR RIDYARD: What is the competitive margin then?

MR RANDOLPH: This is very difficult, because we do not have access to all the data. We are basing ourselves on the data that has been produced and we are responding to the note from Dr Niels on Dr Maher's revised annex 3 for her second report, where he referred specifically to, amongst other things, net profit margins. One of the main points I am seeking to take out of this is that actually net profit margins tell you absolutely nothing about where the real profit levels are because obviously one can -- and I am going to use this word advisedly, I am not saying it is unlawful, but manipulate from gross to net for obvious reasons, for tax reasons and whatever, perfectly lawfully, but it does not tell you where the -- so we are just pointing to the figures and saying, in terms of a business, this is high. We do not have, it is absolutely right, we do not have data in this area showing what other profit margins are, but we would suggest that purely empirically these figures seem

very high. I cannot go beyond that because I do not have access -- it is not -- we are not providing the service. We would like to, and certainly --

MR RIDYARD: You are making a statement that these margins are extremely high, are you not?

MR RANDOLPH: Yes.

MR RIDYARD: I just wondered what your benchmark was for that statement.

MR RANDOLPH: The benchmark is that if one looked at ordinary profit margins in ordinary industries in this country, I would think that company bosses would bite my hand off if I could say, your profit margin is going to be what they are. I cannot refer to them obviously. They would be going, thank you very much, my shareholders will be super happy.

MR RIDYARD: Do you remember what margins Churchill used in -- when it was -- in its claim for the damages?

MR RANDOLPH: I cannot, but I am sure I can be told. Yes, absolutely. It is a good point. We will get that data to you.

We say that the position -- the position is we say a fortiori in the light of those profit margins. We say the position is made even more clear by the defendants' submission that if on its own hypothesis the market is university specific, they would enjoy a near 100% share

of the market for graduation services at the universities where they are the official supplier, and that is agreed. That is at paragraph 31 of the defendants' written closing submissions.

As we know, the defendants main defence to, or argument as to why it is not dominant, given all its necessary admissions in the light of the evidence heard, is the bidding market defence. You can see that at paragraph 33 of the defendants' closing written submissions. They go even as far as to suggest that even with a near 100% of a given market that in itself is not an indication of dominance.

We say that is extraordinary, with respect, given that their own expert accepted the statement that I put to him from the *GE Alstom* commission decision that even in a bidding market, stable market shares indicate market strength. That is paragraph 27E of the claimants' closing written submissions.

The defendants rely, in terms of the bidding market defence, heavily on the *IMS* case and that is {AUTH1/83}. I am not going to take you to it because of interests of time. That is in support of their argument as to the supposed existence of a bidding market. You can see their argument at paragraphs 33 and 34 of their closing written submissions.

We say that that reliance is misconceived. First of all, in *IMS*, that market, the broadcast market, or part of the broadcast market was characterised by competitive tendering. Here, it is not. It is common ground that the competitive tendering only makes up circa 25%. Yet, despite that, the defendants assert, at paragraph 35 of their closing written submissions, that the graduation services market is characterised by the award of a large number of high value contracts. But that is simply not correct. The large majority of any such "awards" are not by competitive tender. They might have been awarded the supply contract, but they were not by competitive tender. Unlike the position in *IMS*.

The market shares in *IMS* are completely different to those in the present case and reflect an oligopolistic market or a market where there are equal, everybody has got roughly similar shares, 30-40% or maybe a bit below. You can see that at paragraph 35 of the judgment, page 12. Then, OFCOM's definition of a bidding market completely undercuts the defendants' position. I wonder actually could we put this up, please.

It is {AUTH1/83/14}, paragraph 41. So 41, and about six lines down in the middle:

"A 'bidding market', OFCOM stated, is one where the majority of sales are made by competitive tenders. In

such markets, if competition at the bidding stage is effective, an undertaking which has a high share of sales over a period of time may not in fact have market power because most or all of those sales could be lost to a competitor in the next bidding round."

Critical. "A bidding market ... is one where the majority of sales are made by competitive tenders."

The minority of sales in our case, circa 25% are made by competitive tender. So *IMS* does not assist at all. In fact, it helps the claimants' case.

We say, with respect, that the defendants also mischaracterised Dr Maher's position, at paragraph 36 of their written submissions. They say that her only response on the bidding market theory, relied on so heavily by them, was that the formal tenders had been used by -- only by circa 25% or in 25% of cases. Again, we submit that that is wishful thinking. Dr Mayer clearly explained in her report and in live evidence that the reason why the bidding market did not exist was because not only were only a quarter of contracts awarded by tender, but crucially, this has been sort of just forgotten about, crucially the market is characterised by a relatively small number of long-term supply agreements lasting in many cases for decades, thereby giving the defendants a substantial incumbency

advantage. That can be seen from the transcript {Day6/123-124:14-25}, and then onto the next page, {Day6/125:1-17}.

The defendants also seek to rely on the RFPs, that is paragraph 362 of their closing submissions, for which there has been very little direct evidence, but as can be seen from 26(2) they admit that it is not uncommon for universities to roll over existing OSAs, which rather undercuts their argument. They also seek to rely in the same paragraph on the number of universities that have entered into such agreements, so OSAs, with the defendants' rivals without a tender. We say that is wholly uncompelling for the reasons set out at paragraph 30(b) of our closing written submissions. They also rely on *Klemperer*, but our closing submissions clearly set out why the four criteria were not met.

What they do not do is they do not seek to contradict Dr Maher's evidence on low switching rates. See paragraph 36.6 of their closing written submissions. They seek to undermine their relevance, but they do not seek to contradict it. We say that attempt is misconceived. Low switching rates when taken with long-term supply agreements clearly indicate market power.

The defendants then make another point about

barriers to entry by reference to the relevant market definition, which is at paragraph 38 of their closing submissions. We say that that is a non-point because Dr Niels stated in terms, the B2C providers who want to provide only dress, they face an entry barrier into the market for graduation services. That is transcript {Day8/48:2-5}. That chimes what I was discussing earlier and the tribunal's question 5, where the direct hire market could be seen as part of the existing B2B market, or indeed it could be seen as a neighbouring market; it does not matter. We say that it is telling that the defendants do not deal at all with the claimants' main submission on barriers to entry, at paragraph 29 of their written closing submissions, where at -- and I apologise because it is in a footnote and often the tribunals or courts are looking at things and think, do I have to look at the footnotes, and in retrospect we probably should not have put it in the footnote, so apologies, but anyway footnote 120 {A1/5/19} to paragraph 29 of our written closings, sets out the pleaded barriers to entry. That has not been challenged -- or addressed.

The final straw in the defendants' argument against the finding of dominance is made under the heading of competitive restraints and buyer power, which is at

paragraphs 38-45 of their closing written submissions. Paragraph 38 simply repeats the assertion that there are successful competitors to E&R on the B2B market. Now, we say it is telling that there is no attempt to explain how that assertion fits with their earlier admission that on their own university specific market they would have almost 100% of the market where, by definition, there would not be anybody else.

Paragraphs 41-43 deal with pricing issues. Now, there is quite a lot made in the defendants' case across the piece about pricing. The main abuse case is exclusionary not exploitative, and accordingly, prices are not, for that, the relevant metric. In terms of anti-competitive conduct under Chapter I, pricing is more relevant, but in terms of abuse, and we are looking at abuse here because we are looking at dominance, essentially this is a largely exclusionary claim because the claim is they are foreclosing the market. They are stopping choice. They are stopping an entrant. It is not about squeezing the pips and being able to charge what they like under that heading of abuse.

To the extent that pricing is relevant, the tribunal will recall Dr Maher's evidence that students are the end consumers. So we go back right to the start, the end consumers need choice. That is a point -- principle

of competition law. They were paying a price that covered costs other than those just for pure academic dress hire, so for free academic dress to staff, commissions etc. She made that point and that is true. There is no choice. You come to us, you are in Bristol, you have got to graduate, you have got to use a gown and you have got to pay for all the add-ons. Have the students been asked? No, they have not. So that is transcript {Day6/136-137}.

Paragraph 44 deals with alleged buyer power in tender situations, but again, fails to remind the reader that it is common ground that this only takes place in around a quarter of agreements, and secondly, importantly, the substantial incumbency advantage enjoyed by Ede & Ravenscroft in this respect, including through the possession of stock, knowledge of the specific needs of the individual universities in question, and in several cases because of their assistance to institutions in drafting bidding terms which we saw during the course of the trial.

Finally, paragraph 45 of their closings raises the debate between the experts on the difference in E&R margins between those institutions that attended for OSAs and those that did not. This had been raised, I think during the course of the hot tub, and Dr Niels

says in his note, at paragraph 3.8, that Dr Mayer did not produce any details. We say that is incorrect because an analysis of her updated version of annex C, so this is not the old annex C, but this is the new annex C to her second report, that is {E4/13}, shows that the hire profit margins in 2019, when there was a tender, were -- and I am just going to not read out the numbers until I have checked whether they are -- I would imagine they will be confidential and it may be that I -- or maybe they will not be. But I do not want to tread on that. So anyway, they were -- put it this way: they were higher -- the hire profits, let me just see, when there was no tender and they were -- so, essentially where there is more competition by definition -- sorry, there is more competition in a tender and accordingly, university tendering is able to extract some of the monopoly rents that E&R gains as an exclusive for a supplier where there is no tender. So the profit margins were lower when there was a tender. But I will check with the people behind me just to make sure that those figures can be produced in open court. If they cannot I will do a short note which sets them out. It is not a huge difference, but it is a difference nonetheless, and it is dealing with Dr Niels' comment that Dr Mayer did not produce any

details. She did.

Accordingly, the arguments put forward by the defendants --

THE CHAIRMAN: Just a moment, Mr Randolph.

MR RANDOLPH: Yes. I am so sorry.

MR RIDYARD: I do not want to stop your flow, but just a question on this while it is live in my mind at least. I take what you say about your arguments about this not being a proper bidding market and so forth. But if it were, if there was evidence that 100% of universities put these things out to a formal tender every three years or whatever and there was real competition between different B2B suppliers for those contracts, and then, you know, you would then see on your analysis, you would see lower margins for the successful bidders across the board. Would that -- so then you would have effective competition in the B2B activity or the B2B market. Would that solve any of Churchill's problems?

MR RANDOLPH: It might. What it would do, it would -- it could -- it would certainly tick the box of buyer power. So it would certainly impact on dominance. That is clear. I cannot say it would not. I mean, it is obvious. If 100% of the market look at *IMS* and look what OFCOM said and look what the CAT said. They said no abuse because no dominance. I totally get that. So

in terms of this case we would not have a dominance case, but we are not there.

In terms of market outcomes, which I think is where you are coming from, it could. It is difficult to know because, in such a position, the B2C market would become uber competitive, which it is not at the moment. It is tied up.

MR RIDYARD: The B2C market?

MR RANDOLPH: Sorry, the B2B market. I do apologise.

MR RIDYARD: Yes.

MR RANDOLPH: The B2B market would become uber competitive because everything would be re-tendered, and this actually flows into school uniforms and the counterfactual there, where they say, actually you cannot enter into long-term contracts unless they are tendered on a regular basis. So that is where the regulator is and that is where the CAT is in *IMS*.

Where does it take you? We would suggest that insofar as the market itself became more competitive, that might assist. The problem: the problem still is that insofar as that competitive market was still tied up with exclusionary tie ups, then that might not assist in terms of access to the market. But, being devil's advocate, I could not then claim, hey, that is an abuse of a dominant position because there would be no

dominant position.

I think, in short, that it could assist in terms of -- if Churchill looked at that and said, okay, this market is not tied up, people -- bona fide competitors can come in, well, maybe they might have changed their business operations and said actually we can compete on the B2C market as such with these exclusive supply arrangements. Equally, they might say -- sorry, on the B2B market. Equally, they might say, okay, there is a competitive B2C market -- sorry, a competitive B2B market. In terms of the B2C market, which is either a subset of the C market or a stand -- the B market or a standalone as a B2C market, then essentially there might be further access, and actually, if there were more competition, I think the evidence that you heard from the experts were that in such likelihood the payment of commissions, for example, would be likely to be less and therefore the incentive on the universities to agree these agreements with substantial commission payments would be less. Thereby freeing up the market more substantially and thereby allowing not only new entrants into the B2B, but also new entrants into the whole of the general market, if I can call it that.

MR RIDYARD: I do not really follow that, because if there was more competitive activity in the B2B market, it

would manifest itself in higher commissions to the universities, would it not, because universities would be setting up a much more effective bidding process for these contracts, and the way you win one of these contracts is to offer the university more, so the commissions would intend to go up rather than down in that scenario?

MR RANDOLPH: I will check over the short adjournment, but I had thought that certainly Dr Maher's evidence was that insofar as there was more competition in the B2B, the likely would be that commissions would go down. But if I can sort of just pause that.

MR RIDYARD: I think the evidence you took us to earlier was her evidence saying that when there was a proper competition -- the margins of E&R were lower, and one of the reasons you might have lower margins is because you had given up more in commission.

MR RANDOLPH: Yes --

MR RIDYARD: There are other ways, of course, of giving up money into the deal with the university, but --

MR RANDOLPH: Yes, I will, if I may, I will come back on that because I seem to recall that it was Dr Maher's evidence on that fact. But more essentially, at the end of the day, yes, it would change. It would change my legal position, clearly, I cannot get away from that.

What is critical is that we are not there. We are nowhere near there.

MR RIDYARD: Okay, but one reason -- you may be right there, but one reason why it is potentially interesting is I am trying to understand what is the link -- I can understand the case saying that E&R is dominant, but I am looking for an explanation of how that really affects your foreclosure concerns in the B2C market. Because even if there was no dominance in the B2B market, it seems to me that Churchill might be just as foreclosed from the B2C market and consumer choice, you know, the graduand choice would be just as constrained as it is right now. So if there is no link between dominance and the thing that you are complaining about, you are concerned about, that is something I think which is relevant for us to consider.

MR RANDOLPH: You are absolutely right to identify and I think the answer is this: activity that is carried out by a non-dominant firm can be perfectly lawful, even if it is marginally anti-competitive for ordinary reasons, but insofar as one is dominant, one cannot do that which one could do were one not dominant. So here we have a situation where we say E&R is dominant. That colours everything they do. If they were not dominant in your hypothesis of a perfect competitive market

characterised -- super characterised by bidding, in that situation, they would not be dominant and ergo entering into these exclusive agreements per se would not be unlawful, and the defendants make this point time and time again, the agreements per se are not unlawful.

We say two arguments to that. First of all, yes, they are insofar as they are operated by a dominant undertaking. We also say, in terms of Chapter I, that we have the network effect. In answer to your question, sir, the fact that E&R is dominant is critical here, because if you strip that away everything else goes. But I can make the argument that insofar as E&R is dominant, they cannot do -- they have a position of special responsibility as someone who climbed quite high in the competition tree, far higher than I have managed to -- said, and I may have put this in opening, being in a dominant position is being like an elephant in a room full of eggs. You really have to tread very carefully.

Ede & Ravenscroft have to tread -- and the Ede & Ravenscroft undertaking has to trade very carefully. What they could do as a Wippell or as a small player, they cannot do at Ede & Ravenscroft, and insofar as they are entering into these agreements which have a foreclosure effect they cannot -- that is abusive and that is unlawful. It all hinges on the dominance

actually, and that is why the bidding market point is so important. That is why it is being run doubtless, because it is the attempt to sort of laser through the argument that we have, the case that we have. Without it, without bidding market, there is -- and without that being successful, there is clear dominance, and insofar as there is clear dominance, we say Ede & Ravenscroft simply cannot allow itself to be part of these exclusive and we say exclusionary supply agreements.

I think that is the only answer I can give you because that is the proper, I would suggest, with respect, legal analysis. There is this huge difference between dominant and non-dominant and we go back to all the cases of special responsibility which we have put before the court. You just cannot do certain things. That is the problem.

THE CHAIRMAN: And it is not suggested that anything Ede & Ravenscroft is doing is having any foreclosure effect in the B2B market.

MR RANDOLPH: It is foreclosing -- our case is it is foreclosing the B2C market. Or the subset of the B2B -- however we want to describe it. What I really -- I do not want to fall between two stools here. There is clear authority that we have referred to about impacting neighbouring markets through foreclosure. If the

tribunal was not with me, I really do not want to go down on this because, oh, well, it is not a subset. It is either a subset of the same market or it is a neighbouring market. Either way, that is our case. We are not making a case that the B2B market -- it is not for us, we are not in that. That market -- and I am not going to describe it as a B2B because otherwise it confuses it -- but we are not in that. Our market is what has been described to date as the B2C and that is where we had to put our case.

MR LOMAS: Just to cut through the terminology, it is not part of your case that B2B competitors, like Wippell or Marston, are suffering a foreclosure effect?

MR RANDOLPH: It is not our case.

MR LOMAS: Okay.

MR RANDOLPH: It is not for me to argue that in any event, but it is not our case.

MR RIDYARD: Can I just briefly pursue the neighbouring market because you have mentioned neighbouring market several times. Most of the neighbouring market cases that I can think of relate to two supplementary activities, nails and nail guns or internet browsers and -- (overspeaking) -- yes, etc. So they are complementary activities.

MR RANDOLPH: Yes.

MR RIDYARD: In this case, the relationship between the B2C market and the B2B market does not neatly fall into that sort of description. So I just wondered whether you had in mind a neighbouring market case that fits the mould of the facts of this case or whether this is a truly unique situation? It is an issue we have been thinking about.

MR RANDOLPH: I do not see it as a truly unique situation. I mean the separate(?) market's distinctions in the manner in which products are packaged, like sort of orange juice cartons. I think that was a pretty clear distinction in terms of neighbouring market. Let us not forget that here, we have got two things. First of all, academic dress supply forms part, forms a crucial part of the B2B market, without it there would be no graduation. We have just seen that from Bristol. If you do not have a gown, you do not graduate. So all the add-ons are fine. It is not totally removed. It is not construction of buildings and flying of planes. These are two parts of a market where one is a greater part than the other, but where the core is the same: the supply of academic dress. Because without that, as I say, there would be no graduation.

We say that, yes, it is -- it certainly falls within scope in terms of neighbouring market doctrine and it

has not, I had not understood that it was alleged against us that somehow the neighbouring market doctrine per se was somehow, or the criteria for it were not met. We have put forward our case on why it is relevant, and to date, I had not thought that we were going to have a battle on that, and it does seem to me that the simple answer is there is -- it is a bit like those circles where there is something in the middle, the something in the middle is the gown, is the hire of the gown, and all the other bits around it are different and add-ons, and as I say -- or there could be two circles, one for academic dress and one for graduation services, but that actually would not work because there is that overlap in the middle.

You do get the two of the six Olympic rings and you do get that core in the middle which is the academic dress supply. I do not -- I mean all facts are decided -- sorry, all cases are decided on their facts. There has not, to my mind, been a case that is directly on point, but obviously, using the usual lawyers approach to life, you seek to find that which is most analogous and even if it is not terribly analogous because you try and rely on it where it assists. I am sure if that if, over the short adjournment, my learned junior comes up with a wizard authority that he can give

us I will do so.

MR RIDYARD: Thank you.

MR RANDOLPH: I am just wondering, sir, whether you wanted to take a short break.

THE CHAIRMAN: We are a little bit early for that.

MR RANDOLPH: Oh, are we? I am so sorry.

THE CHAIRMAN: I would say in about ten minutes time.

MR RANDOLPH: Oh, good. Good.

Essentially, we argue and submit, with respect, that this tribunal can easily find that the defendants were and remain dominant on the relevant market.

Now we go back to question 1, paragraph 11, and we have seen that. Just while we are talking about -- we have been talking about foreclosure and we set it out clearly in our answer to question 1. We say it is important for the tribunal to bear in mind the evidence given to it in relation to foreclosure on the B2C market. The first key admission from Dr Niels was that the exclusive supply agreements do impose barriers to entry on the B2C market, and we have seen that. B2C suppliers struggle -- in fact, we saw something similar but not the same evidence. B2C suppliers struggle to gain a foot hold in the market, whichever the market is, that is not surprising given the way the market is organised. So that --

MR RIDYARD: So he is not saying it is because of the agreements there, is he?

MR RANDOLPH: He is saying given the way, it is the way the market is organised --

MR RIDYARD: Yes.

MR RANDOLPH: -- and the way the market is organised must encompass the agreements because they operate. That is transcript {Day8/45:16-19}, so it is the last day of evidence, and that evidence was given when confirming his statement in the joint report at paragraph 3.21, which is at {E7/1/18}, that the fact -- and this is what was said in the report:

"The fact that direct hire suppliers find entry difficult follows from the assumption that the agreements between the universities and exclusive suppliers are exclusive, and from the way the market for graduation services is currently organised."

So that picks up your point, sir.

The second key admission was from Ms Middleton who admitted that in terms that the effect of the exclusive supply agreements, and in particular the second sentence of the clause we looked at, was that it shut off the students from direct access with competitors. That is transcript {Day3/199:5-11}.

The third key admission from was from Dr Niels

again, when he accepted that his conclusion that there were not significant barriers to entry in the market for the supply of graduation services, so the B2C market, was predicated on the Ds being able to submit competitive bids. This goes back to the point that you, sir, were just making. That is transcript {Day8/50:7-11}. So his evidence, clear evidence was no significant barriers to entry but that is predicated on the defendants being, or submitting competitive bids, and that ties back with the question that you, sir, were asking me about how would things change if there was a market which was characterised by wholesale competitive bidding. It would radically change it. Not only in terms of what I was suggesting in terms of buyer power, but actually, as Dr Niels was saying, in terms of just general significant barriers to entry. So again, everything changes.

MR RIDYARD: How would it radically change Churchill's difficulties of gaining access to the B2C market?

MR RANDOLPH: If there are no competitive tenders, we are where we are. Dr Niels is simply saying no significant barriers to entry, but that evidence is predicated on there being competitive tendering. If there is not competitive tendering and there is only competitive tendering for 25% of the market, in that situation which

we find ourselves right now, we are foreclosed.

MR RIDYARD: But if there were competitive tendering, it actually would still be foreclosed, would it not?

MR RANDOLPH: I tried to answer as clearly as I could without possibly sitting on the fence, but I think it would change the situation, but for the reasons I said, first of all, it is not a reality, and I think that given that and given my answer about the special responsibility for dominant players not to engage in activity which could otherwise be lawful, but which is not if you were dominant, then I think that must be the answer to that.

THE CHAIRMAN: But where there is competitive tendering, which is 25% of the market --

MR RANDOLPH: Yes, yes.

THE CHAIRMAN: -- the fact is Churchill is as foreclosed as in the rest of the market, is it not? That is what the evidence suggests, is it not?

MR RANDOLPH: Fine, but -- I said fine, sorry, I did not mean that. That sounds incredibly crass. Yes, but they are not seeking -- at the moment, their operations are predicated on not entering the B2B market, but the B2C market, right? And so it is the fact that the B2C market and particularly the Ede & Ravenscroft undertaking holds a high market share in that market

which is not characterised by competitive tendering. On that basis, it must be -- Dr Niels' evidence is that there are significant barriers to entry, and we say that all the bidding market defences disappear as well, so they are dominant.

It is that behaviour, it is that characterisation of the market, yes, 25% may be open to competitive tendering, but 75% is not, and it is that characterisation of that market which means that the effect is -- of that is to foreclose the market, the neighbouring or the subset of the B2B market, by virtue of their exclusionary -- of the exclusionary effect of the agreements which are not subject to tendering. It is --

MR LOMAS: I am really confused here.

MR RANDOLPH: Sorry.

MR LOMAS: Surely the competitive tendering point goes to the question of dominance?

MR RANDOLPH: Yes.

MR LOMAS: The foreclosure point goes to the question of abuse.

MR RANDOLPH: Indeed.

MR RIDYARD: So are we not running the risk of conflating these two tests?

MR RANDOLPH: We may be, and that was probably my fault in

seeking to reply in a sort of portmanteau fashion to Mr Ridyard's question. I entirely agree, bidding markets and tenders go to dominance. That is how it has been -- that is the defence. We say, for all the reasons we have gone through, that is not a good defence, ergo they are dominant. We then look at foreclosure, which is the abuse, and that is what we set out at question 1, which is --

MR LOMAS: Sorry, it is not, is it? Forensically, the foreclosure would be, on your case, the consequence of the abuse.

MR RANDOLPH: I am so sorry, yes. You are absolutely -- sorry, yes.

Yes, as we say, the Ede & Ravenscroft undertaking abused its dominant position by operating a network of exclusive exclusionary supply agreements buttressed by fidelity rebates in the form of substantial commissions. Those agreements, unlawfully bundled academic dress and separate academic dress, and those actions, this is your point, sir, had the effect of foreclosing, amongst others, the B2C market.

MR LOMAS: Because I think that is what some of this question is going at. One can understand your case on dominance. One can understand your case that Churchill had been foreclosed. I think the issue that we are

trying to clarify is: what precisely is the abuse and how has that caused the foreclosure?

MR RANDOLPH: Yes, which is why you asked the question.

MR LOMAS: Yes. It is the answer we are seeking to get.

MR RANDOLPH: We had hoped that we had given it, but as I say, maybe this would be a convenient moment, because we have -- we have sought to set out the link between the dominance, the operation of the E&R undertaking and how that had the consequence of foreclosing the position on the B2C market in our answer to question 1. But insofar as that is unclear, it may be that we just need to go to section D2, and D2(d) in more detail on that.

THE CHAIRMAN: Before we do that, can I just raise this as an overarching question to think about. We will take a break then. I understand your case that commissions is part of -- is in itself the abuse you are complaining of. You mentioned bundling, we will come back to that, and the pleading point about that. But you also rely upon the agreements themselves.

MR RANDOLPH: Yes.

THE CHAIRMAN: Now, as we saw from the evidence about Bristol University, the university is --

Bristol University appears to be incentivised to direct its students to do things which it is not obliged to do by the contract. As you accept, it goes beyond the

obligations under the contract. There is a spectrum here. Take one end of the spectrum, that is a supplier who agrees from year to year to supply enough gowns to service all the students who might turn up at a graduation ceremony. That is a very valuable thing to the university because that is what it wants. It wants uniformity. It is incentivised, it might be said, to direct students towards that supplier so that that supplier continues the next year to offer the same thing. I do not think you would suggest in any way there is anything abusive about that.

MR RANDOLPH: No.

THE CHAIRMAN: The opposite end of the spectrum is a contract where the supplier says, you must agree with us that you will direct all your students to come to us alone.

MR RANDOLPH: Yes.

THE CHAIRMAN: Again, we do not have that, but that would be the opposite end where the university has to do that. In between, there are all sorts of provisions which, to a lesser or greater extent, might incentivise the university to push students towards the supplier. The critical question is, which of those in this case, which of the provisions in this case do you say cross the line into abuse as opposed to not abuse?

MR RANDOLPH: 13. Item 13, which is 2.1 circumstances.

THE CHAIRMAN: That is it?

MR RANDOLPH: That is essentially it, yes, but it has to be read in the context of the dominant position taken by Ede & Ravenscroft, because we are -- you, sir, used the word "direct". Absolutely, not a problem. But here we have Bristol in April 2022 or re April 2022 ceremonies, saying "you must use". Now, as it happens, we can see, as we have seen from their OSA, that the equivalent of clause 2.1 is replicated therein.

We say that there is a direct link between the second clause in 2.1 and what was put out on the website. What they did not do is direct, so it is not that end of the spectrum. What they did not -- and they have gone all the way to the other end of the spectrum which is: thou shalt not. It is not only thou shalt not, but you cannot even graduate, so I literally do not know what that means in terms of getting a degree. Are you allowed your degree if you have not graduated? I do not know, but it is a pretty serious -- even if it is just social, rather than academic, it is a pretty serious stop on your development.

But here, we have -- so essentially, on that spectrum, we say item 13 is really close to the wrong end and we say it is the wrong end. It is at that far

end. It is not the thou shalt not, but it is very close to it, and we say it is totally understandable why, in the light of that item 13, clause 2.1, second sentence, Bristol said what it has said, and then you can actually -- you can put a counterfactual here: what would the universities have done had the second sentence of clause 2.1, so item 13, not been in existence? Would they, because all it would have -- then it would just be an exclusive supplier. Would they been able to turn round and tell their students, especially when -- and we have seen this in the evidence, especially when some of their students ring up and say, well, hang on, I would quite like to hire from someone else. You cannot do that. Would they be able to stand over their statement, saying you shall not -- you do not have a choice, you must be gowned by Ede & Ravenscroft and you cannot graduate. My submission, our respectful submission is, without the comfort blanket of the second sentence of clause 2.2, ie item 13 in the standard terms, they would not and could not have done that.

THE CHAIRMAN: Yes.

MR LOMAS: Are you talking 13 or are you talking 12?

MR RANDOLPH: Sorry -- (overspeaking) -- because I thought it was --

MR LOMAS: The second part of 13 is:

" ...or provide any Student with the name or details of any other provider."

The second part of 12 is:

"... exclusive provider of the Services (or any equivalent or substantially similar services).

Just make sure we are relating your comments to the right clause in the schedule.

MR RANDOLPH: You are absolutely right, sir. I had thought, and I have it here, I had thought it was -- here we are, 13, because 12, as you say, sir, is during the term -- this is {G6/32/1}:

"During the term of this agreement and subject to its terms, the Institution appoints the Supplier as the Institutions 'Official Robemaker ...' ... for the [purpose] ... as its exclusive provider of ... Services."

And then -- this is 13 {G6/32/2}:

"The institution shall not [so the institution the university] shall not during the term of this agreement, endorse or recommend any other provider to supply ... or hire academic dress to Students or provide any Student with the name or dials of any other provider."

THE CHAIRMAN: So it is 13.

MR RANDOLPH: Yes.

THE CHAIRMAN: So we have got commissions, bundling and

clause 13. That is it, is it, in terms of abuse?

MR RANDOLPH: I will, if I may come back to you, sir, after the very short break. I think that is our case, but I do want to just -- obviously that is in terms of abuse. And we are not going to forget the Chapter I.

THE CHAIRMAN: No, indeed, but this question is identified with precision.

MR RANDOLPH: Exactly, which we sought to do and insofar as everything is there and do not forget that we have said a network of exclusive exclusionary supply agreements.

THE CHAIRMAN: That is what we are trying to get precision about. When you say that what is it you mean about the agreements which is abusive?

MR RANDOLPH: Sorry, we did then cross-refer to D2 I think but we will check that.

THE CHAIRMAN: Let us take a break now because this is a very important question in terms of the precision of the abuse, so let us take a break now.

MR RANDOLPH: Actually I have just looked at it and we do identify the three points under abuse of dominance at D2(d). 48, exclusive exclusionary agreements and we refer specifically to clause 2.1 in that.

THE CHAIRMAN: Which is 13.

MR RANDOLPH: Which is 13 but, yes. We then refer to the system of commission rebates or loyalty rebates at 56

and then we refer to the bundling of hoods, caps and gowns, so there are three. You, sir, are absolutely right, spot on, thank you, and it is there.

THE CHAIRMAN: Good.

MR RANDOLPH: So it is another thing I do not have to hopefully deal with.

THE CHAIRMAN: We will take a short break then. Let us say five to.

MR RANDOLPH: Thank you.

(11.49 am)

(A short break)

(11.55 am)

MR RANDOLPH: I am glad to say that I was part right on commissions, not wholly right though. I am grateful to the team for telling me what the evidence was.

If there is full competition on the B2B market, so 100% tendering, then you are right, sir, commissions would go up because there would be a spiral upwards. If, on the other hand, there was competition, proper competition, as we say, in the B2C market, or a subset of the B -- B2B market being direct hire, then commissions in the B2B market for graduation services would diminish over time, and that was the evidence from Dr Maher, because the incentives -- there would be such a demand pulled from students that universities would

not be able to ask for the commissions in the manner that they do at the moment on the -- it is not a foreclosed market, on a closed market, because we are not saying the B2B market is foreclosed. We have had this discussion already. It is the B2C market that is foreclosed.

To that extent, what I was remembering, or slightly mis-remembering, was the fact that if we were in a position of proper competition on the market on which we are concentrating, which is the B2C market, then the present structure, the present, we say, exclusionary structure of these exclusive supply agreements, bolstered, I think is the word we used, by commission payments would just wither on the vine. So that is the answer.

I am sorry if I got the commissions going up and down wrong on the B2B market, but that is I think the answer, if that assists.

THE CHAIRMAN: Going back to question 1, having had a chance to just think about it, just in a nutshell, the points of abuse that you say exist are what?

MR RANDOLPH: In question 1, we cross-referred to D2(d), which is at paragraphs 41 and following in our closings. There we say, at 48 {A1/5/27}, as I say:

"The exclusive exclusionary agreements are an abuse

of dominance in themselves, and not only because of the incentive structure created by the commission arrangements which they embody as a consideration for the grant of exclusivity. This is because the agreements overwhelmingly dominate the market and prevent rivals such as the Claimants ... obtaining a foothold on the related[/neighbouring] market for direct supply ... The agreements are frequently of long duration and confer near-monopoly [status] on the Defendants to the exclusion of significant competitors or prospective competitors."

On that point, it is actually important to note that these are one off transactions, unless you are going to be a multiple graduand. Most of us, fortunate to have gone to university, graduate once. Some of us graduate twice. Some of us even graduate three times, but that is about it. Most of the time, it is once. If you cannot have access the market, if you have no choice for that one time, that is it. It is not like buying a car or buying a pint of milk. It is a one-off or a very rare transaction. That is the exclusionary agreement point.

We then point out, at 49, we talk at (a) about article -- clause 2.1, exclusive provider, so that is item 12, and then services, and then I think we set out

as well, or if we -- we should have done, the item -- yes, at 51 {A1/5/28}:

"Indeed, [we say] the contracts go one step further, and proactively provide that the universities 'shall not, during the term of this agreement, endorse or recommend ...'"

So that is the item 13 that we saw:

"To comply with this contractual obligation the universities have warned students against using academic dress supplied by competitors ..."

And we cross-refer there to the transcript at Day 1. And:

"... sometimes threatening students with sanctions if they do obtain academic dress from competitors."

Another cross-reference. And {A1/5/29}:

"Further, the evidence established that these agreements cover the vast majority of the market both by university numbers and potential student demand."

Then, 52:

"... the exclusivity agreements enable (or require) universities to act as gatekeepers in relation to student demand, controlling the messaging students receive, the official channels of communication ... and access to student demand as the final consumers. Thus, it is not merely the anticompetitive effect on the

Claimants that is relevant but also the damaging effect on the final consumers -- the students -- and on the structure of competition ...

"... [They] misalign the interests of students and universities [and] radically reduce the consumer choice ..."

Then, they "disfigure the structure of the market".

This is the point I was making:

"The space for rival suppliers is very restrictive ... since 75 - 80% of the market is effectively foreclosed."

Because it is a one-off transaction. You are not going down next week to have another graduation:

"[The] incumbency advantages enable the Defendants to reproduce their dominance over time."

Then we turn to the second part.

MR LOMAS: I struggled with this when I was reading the written closings at 54. The space for rival suppliers in the B2B market is restricted because, as a matter of fact, E&R has some 75-80% of the B2B market. That is not foreclosure in a sense. That happens to be their market share. It goes back to the point that Mr Ridyard was making. If the remaining 25% of operators in the B2B market are also using similar contractual terms, why is that market share of 75% foreclosing the B2C market?

MR RANDOLPH: For the reason I just mentioned. And this is the link.

MR LOMAS: The market share as opposed to some other behaviour?

MR RANDOLPH: No, sorry, the market share indicates dominance.

MR LOMAS: Right. Okay. So long as we are -- (overspeaking) -- but that is not what 54 says.

MR RANDOLPH: This is all predicated. This is under abuse rather than dominance, so we had rather carelessly, maybe, suggested -- moved on. So we are saying we only get to abuse if we are dominant. So we hope to park that and have made that good. This whole section is predicated on the defendants being dominant.

MR LOMAS: Yes, I understand.

MR RANDOLPH: Absolutely. Insofar as that is concerned, we are saying, yes, because of the way in which the market is structured and the exclusionary effect of these exclusive agreements which are reached insofar as this case is concerned by a dominant supplier, being the Ede & Ravenscroft undertaking, in that situation, the effect on the neighbouring/near market, which is the B2C market, is one of foreclosure by virtue of the fact, as I have just said, that insofar as the market is essentially tied up for -- students do not have

a choice. For the vast, vast bulk of cases they do not have a choice. We have seen Bristol: you have got to come to Ede & Ravenscroft. As I say, you only want a gown once. You probably only want to hire it rather than buy it. So if you have not got that choice at the relevant time, you will never have that choice.

MR LOMAS: I think the point that is troubling me and I am trying to get at is, even a dominant supplier does not have a positive obligation to provide choice to a consumer. Your foreclosure effect has got to be linked to an identified example of abuse.

MR RANDOLPH: Exactly. Yes.

MR LOMAS: And that is the link we are trying to understand I think.

MR RANDOLPH: Absolutely. I am very grateful for you raising this. We say, as I said, that these exclusive exclusionary arrangements are an abuse in themselves because they dominate the market and prevent -- and we say prevent rivals, such as the claimants, in the neighbouring market, because it is --

THE CHAIRMAN: Sorry to interrupt.

MR RANDOLPH: Absolutely right.

THE CHAIRMAN: I understand that, but exclusive exclusionary agreements is a label -- I am not complaining it is a label; labels are very helpful -- but an agreement is

a series of rights and obligations.

MR RANDOLPH: Yes.

THE CHAIRMAN: What I was asking you before the break was, in these agreements, which right or obligation do you say it is an abuse to have entered into to have included as a term in the agreement. Your answer was clause 13. Now, you have taken us through paragraphs 48-52 which seem to go broader than that --

MR RANDOLPH: Yes.

THE CHAIRMAN: -- but I want to -- so is that -- is it not just clause 13?

MR RANDOLPH: Sorry, it is typified by that because that is the exclusionary point. The fact is anybody, I could have entered into agreement; it would have been fine. But given the fact that I am dominant, I cannot, because the consequential effect of it is to foreclose the market. You enter into this. You stop choice, and I agree with Mr Lomas that competition law does not say that -- well, competition law says that you must not prevent choice if you are in a dominant position, so I think that is the -- it is a negative rather than a positive. Here, we have a situation where Ede & Ravenscroft have these large number of exclusive agreements and which tie up, essentially tie up the market and avoid choice or restrict choice for students.

Given that, taken with the commissions, taken with the bundling, given all that, it is not so much the terms of the agreements, it is the operation of those terms by a dominant undertaking. As I say, I could have entered into these agreements; no problem. The tribunal could have entered into them; no problem. But insofar as they are entered into by a dominant undertaking that has, 75 to 80% of the market, that means that the choice that is part and parcel of competition law is simply not there. There is not competition on the merits by virtue of the fact that only 25% of the market is openly competitively tendered and that is on the B2B market.

But obviously we are concerned with the B2C market, however you want to structure it, and it is simply the consequence of these -- these effects of these agreements -- okay, let us call them exclusive without going to exclusionary. These exclusive agreements, the effect of those, taken with what happens underneath them, which is the commission, what happens underneath them, the bundling, and the bundling of not only, as it happens, gowns and hats, but also all the other -- the graduation services, the ticketing and everything else that goes with it, all of that means that insofar as there is another rival competitor on a neighbouring, not a completely distant market, that would be very -- it

would be impossible to run. This is either a subset of the same market or a very close neighbouring market, because it is dealing with the same key product, the gown. Insofar as that rival, that bona fide competitor cannot access that neighbouring market or a subset of the main market because of the way in which, and this goes back to Dr Niels' evidence, the way in which the market is organised, and that is characterised by these agreements, take out these agreements, the market then becomes open.

THE CHAIRMAN: Now again, you are referring to "these agreements".

MR RANDOLPH: Sorry, the parts.

THE CHAIRMAN: The question is: which part? The best way to test the question, which part of the agreements is objectionable is to say, well, let us take that part out, would the rest of the terms constitute an abuse? If we took out clause 13, would the remaining contract be an abuse?

MR RANDOLPH: And 12, because 12 -- items 12 and 13 have to be read together. They are in the same clause in the actual agreements, we have just split them because that was the way it was agreed to be split, but they all are part and parcel. Because if there was not exclusivity, it would not matter what the second sentence said.

THE CHAIRMAN: Right. So take out clauses 12 and 13, no abuse, is that right? Well, take out clauses 12 -- take out the exclusivity. Take out the points that are set out because we identify, at 49, the provisions in the agreement that come together and show that the agreements are problematic. So we talk about 2.1, then we describe services, but essentially it is, in essence, if you stripped these agreements of their exclusivity and the second sentence of clause 2.1, which says you shall not recommend or endorse and you will not provide students with any details or names of any other provider, which is the exclusionary, so there is the exclusive and then the exclusionary aspect, if you take that out, then you get an ordinary supply contract between the supplier and the purchaser, and we have said that is where the harm lies.

That is why in our counterfactual we say strip out -- and there is a contest to be had on the blue test pencil, that is well known. Mr Lomas and I am sure the rest of the tribunal will know, the authorities in terms of the blue pencil test: can the agreement stand having blue pencilled? Sir, you will be very aware of this in pure contractual terms. Can the agreement stand without it? Answer, I would submit: yes. There would not be the commissions, they would fall as well, because the

commissions are part and parcel of the exclusivity. Because obviously, a university -- or payments will not be made by a supplier if it is not exclusive. So the agreement becomes just a bog standard supply agreement, and then everybody can compete on a level playing field. You can say, right, we are going to provide graduation services, or you can say, we are going to provide direct hire, and then let the best people win.

But what we say is the problem is the way in which the market is characterised, to use Dr Niels' word, by operation of these agreements to which a dominant undertaking, Ede & Ravenscroft, is part, that is where the problem lies. And, in addition, or in the alternative, but we say mainly in addition, even if quad nom Ede & Ravenscroft were not dominant, then this network of exclusive and we say exclusionary agreements is such as to fall clearly within the *Delimitis* case law and gives rise to a breach of Chapter I by one of the parties to those agreements, and that party is Ede & Ravenscroft, but I am moving on slightly there, but it is -- I think it has got to be seen -- I am not quite sure whether I should use the word holistically, but everybody seems to use it nowadays -- it has to be seen in the round. This cannot be looked at in a pure mechanical fashion. I would submit competition law is

about substance rather than form and has been so for a very long time.

Where you have this undertaking with this very substantial market share with no real buyer power, indicating dominance and the relevant market is what it is, the effect of these -- it is the effect, rather than the wording per se, it is the effect of them, given the market position of one of the parties to them, which is to essentially restrict access to the market or a neighbouring market. That restriction of access is the foreclosure.

MR RIDYARD: Sorry, but it has to be -- the foreclosure, as you showed with the Bristol University letter, has been effected, is being delivered by the university in those letters to the students.

MR RANDOLPH: Yes.

MR RIDYARD: Is it your contention that if you take out 12 and 13 from the agreement between E&R and the university that Bristol University would not include that in its letter?

MR RANDOLPH: Absolutely. It will not, sir. It was on the website.

MR RIDYARD: The website, yes, in the communication to the students anyway.

MR RANDOLPH: Yes, that is exactly what we are saying.

MR RIDYARD: So just clause 12 and 13.

MR RANDOLPH: Together with the exclusive supply, because obviously you have got to read the schedule which says what we can supply --

MR RIDYARD: This is why question 1 asks for precision as to what it is you want to take out of E&R's conduct.

MR RANDOLPH: Sir, with the greatest possible respect, we do state in terms in our submissions that one should look at -- this is the first part of the answer {A1/5/4}:

"The [Ede & Ravenscroft] Undertaking abused its dominant operating a network of exclusive exclusionary supply agreements, buttressed by fidelity rebates in the form of substantial commissions. Those agreements unlawfully bundled academic dress and separately academic dress and photography. Those actions have the effect [inter alia] of foreclosing ... the B2C market -- see further sections D2 and in particular D2(d)."

Which is -- and D2(d) is what I was reading from just a moment ago, and which is where we have paragraphs 48, which set out in terms clause 2.1, services, schedule 1 etc, and where we refer to the system of commission payments and where we refer to the bundling of hoods, caps and gowns.

So our answer, we did not want to sort of have this mini book on the answer. We set out a summary of the

answer at A1 and then said please see further section D2 below and in particular D2(d). The alternative would have been to set out all of that in -- but we thought that summarising it with a cross-reference would help, and I apologise if that was not as helpful as it might have been.

I would respectfully encourage the tribunal to read that section really carefully, the whole of D2, and in particular, D2(b), because it does pick up not only the general abuse points and the expert evidence given in the hot tub, but also the legal submissions in terms of what is an abuse in this case. There we also talk about the neighbouring market and the potential effects, and we will come to that in a moment.

Then, we actually specifically set out those three aspects of the operation which we say is a further abuse in terms of their behaviour. I think that is how we would see it.

THE CHAIRMAN: Those further three aspects, what are you talking about then?

MR RANDOLPH: As I say, 48 and following, exclusive exclusionary agreements --

THE CHAIRMAN: (overspeaking - inaudible).

MR RANDOLPH: (overspeaking - inaudible) -- it is more than -- we said 12 and 13, yes, but they have got to be

read with the other parts in -- because it is all part and parcel of -- because if you do not have -- if you do not know what the services are, then stripping out just item 12 will mean nothing insofar as services still exist in a schedule. Everything is consequential, but those points, those parts of the OSAs that are set out in paragraph 49, plus the system of commission payments, which is also part and parcel of the agreements, and the bundling of hoods, caps and gowns which comes last.

THE CHAIRMAN: Right, so just -- so we should look at paragraph 49 --

MR RANDOLPH: You should look at all of that section.

THE CHAIRMAN: Yes, yes, but for the parts of the agreement that you say constitutes an abuse, it is 49?

MR RANDOLPH: 49. 49. Sorry, 49 and 52, because we -- sorry, 51, because we mention the second sentence in clause 2.1 there.

THE CHAIRMAN: Right. Yes.

MR RANDOLPH: So it is 49 -- I would prefer you -- we have said in our counterfactual you should not have the OSAs at all. If the tribunal is happy to go down the path on the counterfactual of saying, okay, well, blue pencil, we will take the blue pencil test, fine. As long as those aspects of the official supplier agreement which allow for the market to be restricted insofar as

a dominant undertaking is concerned, and we really do not need to worry ourselves about non-dominant issues for the moment, then insofar as that is concerned, then we would be content to go along that particular path. All we have done at 49 and 51 is to identify those aspects of the agreement which in the round comprise or constitute an abuse of dominance in themselves by their operation by a dominant undertaking.

THE CHAIRMAN: Let us move on to bundling if I may.

MR RANDOLPH: Yes, of course.

THE CHAIRMAN: It is not bundling of academic dress with photography; that is not your case?

MR RANDOLPH: We have not -- in the closings here, we are talking about bundling of hoods, caps and gowns.

THE CHAIRMAN: Yes, so it is not your case that there is an abuse to bundle, because there is not, I think, bundling of dress with photography as such. So in relation to bundling of hoods, caps and gowns, the point taken against you -- one point taken against you is this is not a pleaded abuse.

MR RANDOLPH: Yes, and we do not -- so we would say, sir, that, before we get there and I am aware of the time, I would just like to deal with commission payments, if I may, very quickly.

THE CHAIRMAN: Yes.

MR RANDOLPH: Because the defendants deal with that and they seek to deal with that by reference to question 5, and they say the case law relied on by the claimants has no application because the exclusive supply agreements do not entitle the universities to rebates at all and the case law is only concerned with rebates. That is paragraphs 61 and 63. They go on to say that the economic rationale for the universities demanding commission payments is to cover the cost of putting on the ceremony, but again, the defendants adduce very little evidence on this.

We say those submissions do not go anywhere and the reason is obvious. The main authority we refer to and rely on is *Tomra*, and the defendants have not sought to deal with that at all. The case is set out in detail in our opening skeleton argument at section B3(2) {A1/1/27} and of particular note is, for the sake of time, paragraph 296 in the General Court's judgment as set out in paragraph 105 of our opening skeleton argument, so that will be on the transcript. I would ask the tribunal, with respect, to read that carefully. So that is commission.

In terms of bundling, the defendants deal with this at paragraphs 73-81 and much of the section is made up of -- with the suggestion that the allegation is not

pleaded as an abuse, and that is the point you have made, sir. We say that is simply wrong.

If we turn to the re-amended claim form, which is at {B/1/17}. So this should be paragraph 47. Could we Zoom that out a bit. So this is "Other activity by E&R":

"The following activity by E&R is relied on as further evidence of its strategy to exclude or stifle competition on the relevant market(s)."

Could we go to the next page, please. {B/1/18}. Then move forward to, sorry, the page after that, 12 paragraph 52. {B/1/19}:

"It is also the case that E&R will only supply academic dress as a bundle: for example, it is not possible for students only to hire a hood from E&R."

Then we give an example and then we repeat 42(d) which we could go to, which is at I think {B/1/16}:

"In commenting on the same email ... Janet Taylor of the University of Sheffield stated to her counterparts ... that 'Ede's are aware. I have been in contact with our client manager ... Ede's will not supply hood only and so any student who orders a robe and mortarboard are stuck without the hood!'"

Then if we could go on to 71(e) which is page 24, 25 please, {B/1/24}. So 71(e):

"The Exclusivity Agreements were part of an overall strategy on the part of E&R to exclude or hobble competitors in the relevant market(s). Paragraphs 47 to 53 above are repeated."

And obviously one of those is 47 and one of those is also 52. We saw in 47 and 52 -- sorry, 47 played into 52 which specifically referred to bundling. So it is pleaded.

THE CHAIRMAN: It is pleaded as something ...

MR RANDOLPH: As an abuse.

THE CHAIRMAN: Right. So where is the pleading of abuse? Paragraph 70, I think it starts at.

MR RANDOLPH: Well:

"The Exclusivity Agreements were part of an overall strategy on the part of E&R to exclude or hobble [the] competitors in the relevant market(s). Paragraphs 47 to 53 above are repeated."

Then we go back to 47. This is all part -- it is in the abuse section, sir. I am slightly concerned that -- I hope this -- (inaudible) pleading point on this. This is under abuse. "Other activity", here we are:

"The following activity by E&R is relied on as further evidence of its strategy to exclude or stifle competition on the relevant market(s)."

That is abuse. So that is it. It is pleaded.

It is obviously plain from the defendants then legal team, because they pleaded back to paragraph 52 at 52.3 of their re-re-amended defence. Could we go to {B/7/29}, please:

"The inference in the fourth sentence is noted. It is denied, if alleged, that the reasons for the Defendants' practice of bundling -- [bundling] -- hoods, gowns and/or mortarboards ... include the reason pleaded by the Claimants."

And then they set out why they do it. So there, it is perfectly clear.

They then also rely, in terms of bundling, on the *Socrates* case, and that is set out at paragraphs 76-78 of their written closings, where essentially they are talking about the need for there to be different products. We say that that reliance on *Socrates* there, at 76-78 -- 76, "a bundling abuse will only arise if there are distinct products ..."

We say that the criticism or the reliance on *Socrates*is misplaced. As Dr Maher made clear in her report, her concern about bundling included bundling the academic hire with other aspects of the graduation ceremony, so the conditions mentioned in *Socrates*about distinct products are clearly met. But in any event they are distinct products as set out in terms of hoods

and gowns.

And we say that it is -- I was going to say it is frankly fallacious but that is probably a bit strong. We say it is wrong for the defendants to suggest that Dr Maher should be criticised for not presenting evidence of bundling on the B2C market. That is what they say at paragraph 78 of their written closings. Of course she did not because there was no bundling on that market. The bundling took place on the B2B market and that bundling was part of the defendants' anti-competitive behaviour which helped foreclose the B2C market.

That is question 1. Before passing to question 2, the defendants assert that there is no doubt that if there was any or were any restriction on competition in the B2C market, that is only a result of competition on the merits in the B2B market and they say that at paragraph 83 {A1/6/28} of their written closing submissions. That assertion is bold, very bold we say because there is no competition on the merits in the B2B market. It is common ground that only some 25% of that market is subject to competitive tendering.

THE CHAIRMAN: Does that mean there is no competition at all?

MR RANDOLPH: No, it means there is no substantial

competition on the market in the B2B market. This is the point Mr Lomas made. The whole point about competition in that market, the B2B market, goes to the bidding market, goes to buyer power, goes to dominance. Not about abuse.

But it is just simply raised -- I deal with it because it is raised at this point by the defendants at paragraph 83 so in the abuse section.

"There is no doubt [this is them], if there is any restriction on competition in the B2C market, that is only as a result of competition on the merits on the B2C market."

This is under their section competition on the merits.

So we are saying, well actually no. There is no real competition, no appreciable competition on the merits. Again, it is not a question of simply saying there is a bit of it because it is in the 25%. There is no appreciable competition on the merits. It is not a competitive market in any way, shape or form because only a quarter of it is open to competitive tendering and therefore that position taken by the defendants does not arise.

We also say that their position is flawed, fundamentally flawed because in the opinion of the

Advocate General in the Servizio Elettrico case and in the Genzyme case to which the claimants refer at paragraph 45 of their closing submissions it is clear that the competition on the merits points have to be analysed in relation to the elimination of competition on the affected market. The affected market is the B2C market. Paragraph 83 of the defendants' written closing submissions deals with competition on the merits. It is all about the B2B market and therefore irrelevant for that purpose. Obviously the linkage between the two is hyper relevant in terms of abuse but this is not about that, but I felt I had to deal with it because it is raised by my learned friend in his.

THE CHAIRMAN: Your point is that in the cases on the effect of abuse in a related market where it says it is not abusive if it is the result of competition on the merits, you say that when the cases talk about competition of the merits there, they are talking only about in that related market, and where is the authority for that? You mentioned some opinion I think.

MR RANDOLPH: Servizio Elettricoand the Genzyme case and we refer to that at paragraph 45 of our closing submissions.

So 45 --

THE CHAIRMAN: Is it Genzyme?

MR RANDOLPH: It is Genzyme.
THE CHAIRMAN: And that is where the last line of the quote talks about it is not the result of competition on the merits.
MR RANDOLPH: Exactly.
THE CHAIRMAN: It does not tell you which market that is talking about.
MR RANDOLPH: "If the elimination of competition in the related market is not the result of competition on the merits then an abuse may be found."
THE CHAIRMAN: You are reading that as it must be competition in the related market.
MR RANDOLPH: Yes.
THE CHAIRMAN: And was there something else you rely upon for that proposition?
MR RANDOLPH: We were referring as well to Servizio Elettrico case and probably over the short adjournment I will get the actual quotation from that or my learned junior can find that but I will dig that out.
Question 2. I am aware of the time. This is short. Question 2 goes to:
"Is it necessary to show actual foreclosure or just reasonable or credible risk of foreclosure?"
We say reasonable and credible risk is sufficient. The defendants assert that you need to show actual

affects flies in the face of all the relevant authorities. I would ask for the sake of time Michelin II, {AUTH1/30/79}. That is paragraph 239. It is only necessary to show that the abusive conduct tends to restrain competition.

Then *Tomra*, {AUTH1/58/83}, paragraph 289. The general court held that the exclusivity arrangements and retrospective rebates were unlawful holding for the purpose of Article 102 it is sufficient to show conduct tends to restrict competition, and there is no distinction in those authorities between considering conduct prospectively or conduct that has been implemented over a period of time.

There is a reliance by the defendants on the case which I cannot pronounce called Krka. And at paragraph 85.1 {A1/6/30} they rely on paragraphs 359-362 of that case to say that when one is looking at agreements that have been implemented for some time it is necessary to show that the agreement must have had such effects, but as the defendants accept that was a 101 case and this is how we pleaded it back in our re-amended claim form. We referred to there in that case, in the amended reply at paragraph 47(a)(i), we place reliance on -- again, it is a case I cannot pronounce, but it is easier known as the Lithuania

Railways case. They famously dug up some track in the other country which was pretty remarkable because trains cannot run without tracks.

MR LOMAS: I think we can all agree that is an extreme case of foreclosure.

MR RANDOLPH: It certainly was, extraordinary the defence that they put up, but anyway it failed. I may be alleging many times but I am not asserting that Ede & Ravenscroft have dug up any railway tracks.

I would simply refer to {AUTH1/26/11}, paragraph 80 which is at page 11 which shows very clearly in an abuse of dominance case one only has to show that conduct of the dominant undertaking tends to restrict competition or, in other words, that it is capable of having that effect, and that is bourne out by the Advocate General in the Servizio Elettrico case and I will just simply refer to the paragraphs. Paragraph 46 {AUTH1/49/8} where he says that it is necessary for the conduct or exclusionary practice to be anti-competitive with the result that it is capable of having an actual or potential effect. 49 is to the same effect. 110 {AUTH1/49/17} is to the same effect. 112 is to the same effect where he quotes the judgment in *Tomra* where he said that the court held that for the purposes of an abuse of a dominant position within the meaning of

article 102 it is sufficient to show that the abusive conduct of the undertaking in a dominant position tends to restrict competition or that the conduct is capable of having that effect.

And then we also rely on paragraphs 113 and 114.

So that is question 2.

Question 3 is in relation to the counterfactual and whether the relevance of the counterfactual and the question whether there was an abuse of dominance under Chapter II and the question of whether there was a distortion of competition on Chapter I.

What we have done here is say there is a distinction to be drawn between Chapter I and Chapter II. Chapter I, absolutely no doubt Technique Minière, back in the day made it absolutely clear that one had to use a counterfactual. I say one, regulators or courts had to use a counterfactual to measure what the anticompetitive effect was and how competition would be impacted without the restrictions.

The position we say under Chapter II is more nuanced, more flexible, may and often does apply a counterfactual analysis. It is not obliged to and in that regard we refer to Lord Justice Richards in *National Grid* where he says:

"What is appropriate by way of counterfactual

however is a matter of judgment. There is no rule of law that the counterfactual has to take a particular form. The purpose of the counterfactual is simply to cast light on the effect of the conduct. It is for the decision maker [and that here is you] to determine whether a counterfactual is sufficiently realistic to be useful."

We are not very far apart on this and we are perfectly happy for you to proceed on the basis of a counterfactual and we say please ours. It has to be the key underlying point with counterfactuals and it is a wonderful instrument and has been greatly used by many very serious and worthy economists and the lawyers have caught up slowly. It has to be realistic. So if you are and we have seen this in other cases in *Mastercard* as well, if you as the decision maker, the court says, we have not got any realistic counterfactual, then you just had to proceed on that basis, but we say you have a realistic counterfactual and we have given you what that counterfactual is.

Just turning to that, the submissions on the Chapter II counterfactual and the factual position related to our positive counterfactual. I need to address you, if I may, on the defendants' positive counterfactual as described in our closing submissions

at paragraph 78. {A1/5/37}

"The Defendants' pleaded counterfactual is that the universities concerned would have ventured into equivalent OSAs ..."

So OSAs not blue pencil.

"... equivalent OSAs ... other than the Defendants but not with the Claimants, whose business model has, at all material times, been to supply academic dress directly to students rather than entering into OSAs with universities."

And you can see that from the re-re-amended defence at paragraph 77.3 and then subparagraph (aaa).

So we have set out what we think that counterfactual is wrong at section F2 of our closing submissions and the position is summarised at paragraph 88, and there are two points. The first point is the idea that non-dominant firms would simply fill the breach is if Ede & Ravenscroft were removed from the OSA operations is simply unrealistic on the defendants' own case, namely on the assumption that the relevant market is university specific. On that case each undertaking concluding an exclusivity agreement or OSA with the university would by definition hold 100% or very, very near 100% of that relevant tiny market and would therefore be in a dominant position in any event, and

accordingly subject to the special responsibilities such dominance entails. They would therefore be constrained in their conduct under Chapter II of the prohibition.

MR RIDYARD: Is that your case then?

MR RANDOLPH: That is our case insofar as why their counterfactual, which is anybody but us will have OSAs, why that is unrealistic, and the key point about that is that you can have all sorts of counterfactuals but the one thing you cannot have is something which is nonrealistic.

MR RIDYARD: Not realistic because it is unlawful. It is unlawful for Wippell to have an OSA.

MR RANDOLPH: On their supposed relevant market which is a university specific they have pleaded this, so on that basis if you had an undertaking that had an agreement with the university on a university by university specific market basis by definition, and they have admitted this, that incumbent, that supplier on that university specific market must have 100% of that market which we say would make that undertaking dominant, and by entering into an OSA without any blue pencils, and you would have the exclusivity and all the exclusionary, that in itself would be -- you would just be recreating that which you sought to get rid of. That is the whole point of a counterfactual. You would get rid of the

bad. And.

MR RIDYARD: I fully understand that. So are you saying that you think Wippell's OSAs, assuming they are comparable to believe E&R's, are an abuse and therefore unlawful in themselves.

MR RANDOLPH: Only on the defendants' positive market.

MR RIDYARD: If the defendants have got their relevant market wrong and you have it right --

MR RANDOLPH: But, sir, with the greatest possible respect I am having to deal with the defendants' case. The defendants' case is our counterfactual is this ie anybody can do what they like as long as it is not Ede & Ravenscroft, so Ede & Ravenscroft, they have got no OSAs but everybody else has. All I am showing is that that does not work as a legal construct because it has to be fed in to all of the defendants' construct which includes our relevant market which is necessary to determine whether there has been an abuse and ties in with the counterfactual because the relevant market cannot change between finding the abuse and the counterfactual. The relevant market must be the same in the real world and the hypothetical world and so the relevant market for the defendants is OSAs for everybody except E&R.

On that basis, Wippell, or anybody else who is not

E&R, entering into an OSA on the relevant market, which they posit as being university specific and they specifically amended their pleading to plead that, on that basis, Wippell would then de facto and de jure become dominant on that specific market. If it is dominant on that specific market, it is becoming a mini E&R.

MR RIDYARD: I am sure they will -- (overspeaking) -- but they might argue that 100% does not give you dominance because of the unique characteristics of their --

MR RANDOLPH: They might. They might. But I can only deal with what has been said against me and I am saying that, and they can -- I am sure Mr Patton is all ears, or maybe he is not, and he will do what he wants to and I will do how I feel about replying, but that is our argument.

MR RIDYARD: If we focus on your argument about your case though, do you consider that the smaller suppliers who have OSAs, their agreements are unlawful as well as E&R's?

MR RANDOLPH: No, we have not said that on an individual company basis. What we have said is that the problem lies on an individual non-dominant basis with the network of agreements.

We do not need to get into the Wippell type of

arrangement. Insofar as Wippell is non-dominant, insofar as our relevant market were the relevant market, then there might be an argument, I do not have to make it, there might be an argument to say, well, Wippell can do what they like, because we go back to the special responsibility; they do not have a special responsibility. But on the defendants case, they have a special responsibility. So, I think for that purpose --

MR RIDYARD: I do not think their case is that Wippell is dominant, is it?

MR RANDOLPH: No, but the point is that it is the logical conclusion of their case insofar as they are positing a relevant market on a university by university basis. If Wippell, or whoever, non-E&R, has an OSA which is exclusive, exactly the same as the ones we have seen with items 12 and 13 and schedule 1 in it, that would have an exclusionary abusive effect on that university specific market. It would have to, we would say. But, of course, Mr Patton can say what he wants to say and I am sure he will. I am sure he will.

MR LOMAS: Just for a second, assume on your market definition -- assume we are with you on your market definition, it is a UK wide market. So Wippell and Marston are not dominant. Your argument seems to be

they still cannot put these exclusivity clauses, as you term them, in because there would be a network of them. Is that not to translate a *Delimitis* type thinking into a Chapter II type case?

MR RANDOLPH: No.

MR LOMAS: Is that not a little counter intuitive and also having very, very significant effects on the development of competition law? Because otherwise a term that is not abusive becomes abusive for non-dominant parties because they are all linked together without interfering with the collective dominance theory which we have not touched on. So are you not conflating two areas of law here?

MR RANDOLPH: I am trying not to and I apologise if it looks as if we have. We have been very -- I have tried to make this as distinct as possible. We have our -- you are absolutely right, we have our dominance and abuse case. Then, aside from that, we have our network of our *Delimitis* point. Now, the *Delimitis* point could go as far as you posited, sir, or it could go as far as the network of agreements that are operated by the defendants.

MR LOMAS: Sorry, we are not talking a Chapter I case here --

MR RANDOLPH: Yes, we are. No, we are only talking about

Chapter I.

MR LOMAS: No, no. Well, I did not think we were.

I thought we were trying to find a counterfactual reference point for the abuse case.

MR RANDOLPH: Exactly --

MR LOMAS: The point that I think Mr Ridyard is making is, the types of clauses you have been talking about in 12 and 13 do not, on their face, appear to be problematic for a non-dominant party.

MR RANDOLPH: Exactly. And then I answered back, that is fine, but on their counterfactual they would be dominant because it is university specific. Then you put to me, what happens if it is UK wide?

MR LOMAS: Correct.

MR RANDOLPH: And then we are in non-dominance, and so we have moved away from Chapter II.

MR LOMAS: Well, that is very helpful. So at that point you are saying you are --

MR RANDOLPH: Yes. There is no Chapter II point. I am not raising a network or collective dominance or any of those shipping conference cases where everybody is collectively dominant and tarred with the same brush under Chapter II. I do not go --

MR LOMAS: So for that purpose, you admit from the point of view of the counterfactual to your Chapter II case, it

would be legitimate for the Wippells and Marstons of this world or a non-dominant E&R to include the equivalent of clauses that you have listed at 12 and 13.

MR RANDOLPH: I think that would naturally have to follow insofar as we did not push, because I am saying -- insofar as we did not push the *Delimitis* point to cover all such agreements. At the moment, it has been pleaded on the basis that the network effects, that applies to the defendants. I can check this over the short adjournment, but I am pretty sure that we said the defendants cannot do what they do because there is a network effect of their agreements. I did not go as far -- or, in fact, I did not plead it, but it does not matter, but it was not put as far as all such agreements should be wrapped into one big network. If that were the case, then Wippell et al would not be able to get through it, but it would not be a Chapter II point.

MR LOMAS: (overspeaking - inaudible).

MR RANDOLPH: It is a Chapter I point. Yes.

On Chapter II, we are very clear, this is the position, it does not work on their counterfactual. That is the first point.

The second point is that even if -- sorry, this is the second point we raise. Even if the undertakings were not dominant, so the Wippells, they would be

constrained and could not simply embark on the same conduct from which the defendants were prohibited because their conduct would nevertheless infringe Chapter I. So actually that that is the answer. So those non-dom would be concluded by concluding a series or network of anti-competitive agreements by which the parties involved collusively set the prices.

Yes, I take back what I said a moment ago. This is the answer to your question, sir. So it is covering, the network covers everything.

THE CHAIRMAN: Although you, a moment ago, mentioned you had not pleaded that.

MR RANDOLPH: No, I said I thought I had not.

THE CHAIRMAN: Oh, I see.

MR RANDOLPH: Yes. I literally did not plead it.

THE CHAIRMAN: No.

MR RANDOLPH: I am not going to Jesuitical about it. I am standing in somebody's shoes and I am happy to do so.

I think it is pleaded. We have set it out there at 88(b), and therefore it is the network point. So insofar as we are right, the UK market -- the relevant market is the UK market, it is not university specific, then they still could not -- the Wippells et al still could not go into an OSA arrangement, because to do so would join everybody up in terms of a network. All

those who wish to involve themselves in the operation of the supply of academic dress via OSAs, in other words, provision of graduation services, that would be impacted by the *Delimitis* authority and therefore it would fall foul of Chapter I. Not a Chapter II point; a Chapter I point.

THE CHAIRMAN: Logically, that must be the case now, must it not? (overspeaking - inaudible) -- must be in breach of Chapter I now in that case.

MR RANDOLPH: Absolutely. That is the argument. So we have an actual abuse by a dominant undertaking and we also have a network effect which is such as to infringe competition, or not only -- and that is not solely on a foreclosure point. That is much more, and we will see it very shortly -- there is price fixing and supply restrictions, and as you are aware, as the tribunal is very aware, there is a different approach to Chapter I to Chapter II. If you are in a price fixing situation, and I know we have used the word hardcore and another pleading point has been taken against us: "You never alleged object" -- we are not alleging object. We just happened to state that price fixing is known as hardcore. It does not matter whether -- we are not asking you, the tribunal, to find an object infringement. What we are saying is that there is the

effect or potential -- the actual or potential effect on competition via this network of anti-competitive agreements posited on our relevant -- our relevant market, which includes, but is not restricted to, price fixing.

But we will come to that in a moment. I am very aware of the time and I do want to leave Mr Spitz some time, but I also want to leave my learned friend Mr Patton some time this afternoon.

That is 88(b), and I think -- yes, the defendants seek to deal with 88(b) which I have just gone to at paragraph 100 of their closing submissions. That is what they say, they say there are two flaws. Firstly:

"... it assumes that the Claimants win their Chapter I, which is a separate question."

Agreed:

"[Separately], the Claimants have expressly disavowed any allegations that the OSAs made by ... B2B suppliers fall foul ... [and] although the concession ... was highlighted in the Defendants' skeleton and oral opening, and ... flagged by the Claimants as a matter specifically to 'be addressed ...', the Claimants' closing says literally nothing about it."

Well, we say that is literally wrong. Because, first, the defendants seek to suggest that the claimants

have expressly disavowed any allegations that the OSAs made by other B2B suppliers fall foul of either Chapter I or Chapter II, and they cross-refer to paragraph 94 in their closings, which in turn cross-refers to the claimants' response to paragraph 33 in the defendants' request for further information. I am not asking you to turn this up -- for the record, it is {B/9/13-14} -- but as can be seen from there, the cumulative effect point, which is the *Delimitis* point we were just discussing, is expressly mentioned. We have not gone to it but it does not matter. It is expressly mentioned and that express mention chimes with paragraph 48(a)(ii) of the amended reply, which is {B/8/22}, which specifically pleads operation of agreement similar in content and effect to exclusivity arrangements or agreements. Secondly, they say that our closings literally say nothing about it. We have just said something about it in paragraph 88(b), but that is a small little jury point.

As to the submissions on the law in this regard, they deal with this, at paragraphs 89, in terms of the relevance of a counterfactual. I will be very brief on this because for the reasons I have just suggested.

I would ask the tribunal to look at *National Grid*, {AUTH1/33/21} at paragraph 53, which quotes the

Commission's Article 82 guidance, and the court, also in the same judgment at paragraph 70 {AUTH1/33/27}, which states in terms that there is no requirement, legal requirement for a counterfactual at all, and that cannot be gloss to mean that there isn't. So that is *National Grid*. *Google Shopping*, very recent, {AUTH1/19/67} at paragraph 374, the Commission criticised the counterfactual that Google used because it neutralised the effect of the forms, and at paragraph 376, the court said that the only counterfactual scenario that could properly have been put forward would have been one which took account of the full effect.

Paragraph 378 {AUTH1/19/68} does indeed support the proposition that it is not always necessary to establish a counterfactual scenario in order to find anti-competitive foreclosure. So 378 I would invite your attention to.

And then the defendants seek to dismiss Dr Maher's evidence on the position in the counterfactual world, at paragraphs 102-107 of their closings, but that analysis, as can be seen from 102, is predicated on a false assumption, ie that the counterfactual world would be one in which other non-dominant suppliers would be able to enter OSAs with the universities which is the point

we have just discussed, but as we have seen, that is not the correct counterfactual, as shown at paragraph 88 of our closings, which I have just taken you to.

So Dr Maher was simply answering questions based on the wrong premise. That is entirely I am not criticising Mr Patton at all for that. He is entitled to ask whatever questions he might, but they were not the right questions and therefore maybe the answers were not terribly instructive on that particular point.

In fact, Dr Niels confirmed that the correct premise is one where there is no preferential access and suppliers compete to provide academic dress to students directly. So there is no preferential access and suppliers compete to provide academic dress to students. That is at transcript {Day8/41:5-25} and then {Day8/42:1-7}. It is clear that on that premise, uncontaminated by unlawful anti-competitive behaviour, the competitive landscape would have been distinctly improved.

There is one issue in relation to Edinburgh. It is mentioned at 106 and I think it has got a little -- 106(5), E&R does not pay commission to Edinburgh University. That does not seem to chime with the E&R ceremony profit spreadsheet which shows such commissions being paid. That is at {F4/824}. I am not going to go

there, but it should be noted, and this is a point against me, that there is an entry for '16, '17, '18, but not '19, as in years. So you go across, and then nothing. In that connection, Dr Niels' responsive note, which is {E6/31} at paragraph 2.3 and footnote 5, seeks to explain this, where he says that, so paragraph 2.3 {E6/31/2}:

"... commission costs are missing for most observations in the spreadsheet for 2019 ... and for a significant number of observations for 2018."

Then, there is a footnote 5:

"Based on the list of 122 institutions for which the file Contract Summary ... provides information ... 70% have no commission costs allocated to in 2019, 39% in 2018 and 12% in 2017. I understand from E&R that this issue is due to the fact that the commissions costs are added to the spreadsheet with a lag (when invoiced by the university/as needed for a calculation)."

Obviously it is not my document. It is not my client's document. I simply don't know, but the mere fact that there is a gap in 2019, because these spreadsheets go from to 2016 to 2019, so we have not seen 2020, for example, which might actually refer back then to 2017, '18, '19. I simply do not know the answer, but I thought I would raise it.

All we do is say that Dr Maher did actually -- states that -- or rather we join issue with the statement at paragraph 106.5 where they say that E&R does not pay commission predicated on ... because I was going to say when I looked at it first, oh well, they do not pay commissions, but then, reading Dr Niels, there may be an explanation for this. I just put it out there. My learned friend obviously is in a position to correct that or not or clarify it.

Also, at paragraph 106.6 -- and I am looking at the time, this is my last point -- in the written submissions, and this is in -- I cannot identify the name of the institution because it has been highlighted, but in 106.6 it is said that that institution does not charge commissions to the defendants. It does so -- it certainly does so in respect of photography and that can be found at {F4/8/24}. Then after the break if I may very quickly deal with the analogues, counterfactual analogues, so that is Ireland, Oxbridge, Australia, and then whizz through, I am very close to the end then, and then I will leave Mr Spitz to effortlessly play out our innings.

THE CHAIRMAN: Just a quick question, you may want to come back to this at 2 o'clock. Your case is that the counterfactual, and your only case I think is that

the counterfactual is one in which there are no OSAs with the abusive terms, including clause 12, 13, commissions, or anything else which you say is foreclosing competition?

MR RANDOLPH: Exactly.

THE CHAIRMAN: That is the only counterfactual you are asking us to find?

MR RANDOLPH: Yes. There is no different counterfactual as between Chapter I and Chapter II. That is it. Yes.

THE CHAIRMAN: Right. 2 o'clock then.

MR RANDOLPH: Thank you.

(1.06 pm)

(Luncheon Adjournment)

(2.00 pm)

MR RANDOLPH: A couple of points. In relation to the question from Mr Ridyard about profit margins and the case of, or the data from the claimants. It is set out, the figure, which is not confidential, 39%, is set out in the re-amended claim form {B/1/32}, paragraph 90(iv). It is 39%.

MR RIDYARD: Thank you.

MR RANDOLPH: Insofar -- I just want to touch on very briefly, the linkage we discussed before the adjournment, the linkage between the abuse, the alleged abuse and the foreclosure. If I may take you to

Dr Maher's first report, and if we could go to paragraph 52, please, which is {E4/1/17}, paragraph 52:

"I deal in more detail below as to whether there is a genuine and/or relevant bidding market ... My summary view, on both counts, is that there is not. But even if there were -- [so this picks the point Mr Ridyard was making] -- it is difficult to avoid the conclusion that the proposition itself leads to a cul-de-sac for the E&R Undertaking because it has been long established that holding a competition for the market does not obviate the need to ensure that there is nothing untoward/anti-competitive taking place with regard to competition in the market ..."

Then she cites the position put out in *Achilles*:

"The tender exercise that was carried out, and the possibility of a further tender exercise for the market in the future, do not affect, justify or compensate for the elimination of competition in the meantime."

At 53, she says:

"There are no compelling pro-competitive reasons why there should be only one ... supplier ..."

If we could turn on to 215(d), that is {E4/1/52}. I think it is over the page, sorry, {E4/1/53}:

"The manner in which universities procure the supply of graduation ceremony services favours suppliers

offering to provide the bundle of services. As noted in Section 8.5 this forecloses competitors who only want to supply Academic Dress services to students."

And 8.5 {E4/1/44}, and I am not going to -- because we do not have the time, but I would ask the tribunal to read this because it deals with "Barriers to entry indicate that E&R Undertaking has market power on the relevant markets". Then 8.5.1, "Long-term supply relationship on an exclusive basis" and how that forecloses the market. Financial inducements in relation to commissions and free hire of some or all of the academic degrees dress requirements of the university staff, the design, manufacture and maintenance of the officers' robes, and offering students prizes. Then the conduct itself of the E&R undertaking. All that is set out in some detail together with switching costs and other impediments. So I would invite the tribunal to read that section because it will probably do the job far better than I was able to do in pointing technically to the linkage between the dominance, the abuse and the -- or not so much the dominance, but the abuse and the foreclosure on the same or sub-market.

I think those are all the points I wanted to make. Before turning very quickly to the analogues in terms of

the counterfactuals. These were put before the tribunal in order to assist the tribunal. Rare it is in a competition case to actually have real life analogues. Analogues are what they say on the tin. They do not have to be exact, but they hopefully help in terms of reviewing the competitive landscape, and all of them, Ireland -- well, certainly two of them, Ireland and Australia, show that regulators can impact on, or rather that regulators have found that there are issues with the competition in this particular sector. The Oxbridge example analogue shows what actually happens when these anti-competitive effects are not felt on the market. In other words, where there is a free competitive landscape.

In relation to Ireland, we simply note and endorse the comments of the Irish regulator cited by the defendants at paragraph 110. They cite that, but then they leave out the critical conclusion from the Irish commissioner that {E4/1/57}:

"The strong market position of a main supplier in providing graduation gowns to universities meant that students were not provided with adequate choice when hiring graduation gowns."

That goes all the way back to the first point I made:

"The situation was compounded by the lack of sufficient information that universities offered to students about their right to shop around for alternative suppliers to the one appointed by the university."

If that sounds familiar, it really is, because that is item 13. They cannot do that. Yes, apologies, when I was talking about the analogues, I mentioned Australia. I did not mean that. I meant school uniforms. So in terms of Ireland, yes, they noted that there was a problem, and yes, one of the problems was the issue of not being -- students not being given the choice. So we say it is a useful analogue indeed.

As to school uniforms, we note with interest that the defendants remind the tribunal, at paragraph 121 of their closings, of the obligation on schools to put their supply contracts out to open tender. That is a summary. The actual wording, and I have gone to the Government website and I have printed off the guidance printed on the 19 June. Could I possibly hand up three copies to tribunal. Thank you. (Handed).

I very thoughtlessly did not think about the (inaudible) which I should definitely have done.

Unfortunately, these are not numbered, but at four pages in from the back, under the heading "Arrangements

for the supply of uniforms", so if the tribunal has that. At the bottom, so four pages in:

"Arrangements for the supply of uniforms.

"Single supplier contracts should be avoided unless regular tendering competitions are run where more than one supplier can compete for the contract and where the best value is secured."

So essentially, should not have exclusive without tendering, and this contract should be re-tendered at least every five years, reviewing the policy does not necessarily have to result in changes being made. So they clearly --

MR LOMAS: Sorry, this is guidance from the Department of Education, is that right?

MR RANDOLPH: Yes.

MR LOMAS: Not the output from a regulatory process?

MR RANDOLPH: Sorry, no, it is guidance. It is following on from a --

MR LOMAS: It is policy.

MR RANDOLPH: It is following on from an investigation and the investigation, and there was an act, rather bizarrely, saying you should produce guidance. This is the guidance.

MR LOMAS: Okay. Thank you.

MR RANDOLPH: Sorry, I probably characterised it as

regulatory. It is consequential on regulatory activity because the Government actually said, you must produce guidance, but this is the guidance. So I am not saying it is -- it is guidance for schools; yes?

MR LOMAS: Yes. So the regulator says government should be sending signals to the market on what it needs to do here and these are the signals that a particular government has chosen to send.

MR RANDOLPH: Exactly. In 2019, so recently. Obviously, it is not binding on this tribunal, but it is instructive, we would submit.

Then in terms of Oxbridge, it is telling, we say, that the defendants do not deny that they are properly functioning and competitive. See paragraph 130 of their closings. They seek to suggest somehow that because they are rich, and indeed not all colleges are, that makes a difference. They then seek to discredit the analogue of Oxbridge by reference to the claimants' supposed lack of success in those analogue markets. That is in the same paragraph, 130. But the fact that my clients may not have been successful in those markets does not impact on the relevance of Oxbridge as an analogue in the context of what would happen without the anti-competitive arrangements in play.

Not least because it shows that the market for

academic dress supply which is critical here, and I was trying to think of the word -- and I am sorry I could not think of it -- Venn diagram. It is the thing in the middle. The thing in the middle in the bit of the Venn diagram that is the middle, the hub is the supply of academic dress, and that is what this case is all about: access for students to the supply of academic dress. There may be different channels and you want to dress it up as B2B, B2C, sub-market within B2C -- within B2B; it is about access and it is about access routes and we say that the access routes have been restricted unlawfully.

They also say in Oxbridge, at the end of their conclusions on why Oxbridge is not a decent analogue, which we contest, they once again rely on the asserted fact that Edinburgh does not require the payment of commissions on that. You have heard me on that. It would appear that is not the case, but I await confirmation of the position with regard to 2019 et seq.

They then seek to rely on pricing data. The parties pleaded position on pricing is interesting. The claimants' re-amended claim form at paragraph 73, {B/1/24}, asserts that the OSAs have enabled E&R to charge higher prices than would be the case on competitive markets such as Oxbridge where prices are lower. The defendants admit, at paragraph 79.1, of

their re-re-amended defence, {B/7/44}, that academic suppliers at Oxbridge generally charge lower prices than other universities.

The defendants assert that Dr Niels' evidence showed declining prices by reference to the defendants' list prices, and that is paragraph 145 of their closings. It is his evidence, by reference to academic dress hire prices charged for bachelors, masters and PhD, that is at paragraph 513 of his first report, {E6/1/114}, appears to show that that is indeed the case.

What it does not show is the prices of graduation services, which is the prices which they charge out at, and there is no evidence that such prices have gone down over the relevant period. The defendants were put on notice about this point in Dr Maher's responsive report at paragraph 109, {E2/130}, and no evidence was adduced by the defendants to rebut that point.

Very quickly, question 4. This is about exemption, Chapter I prohibition. Our submissions on that can be found at section E. As noted in there, the defendants' expert accepted that the prices at which Ede & Ravenscroft sells its services to students are prenegotiated -- those are the prices -- with the relevant university and cannot be renegotiated by the end consumer. That is transcript {Day8/40:18-25} to

{Day8/41:1-3}.

Dr Niels also accepted that on the defendants' positive relevant market -- so we have been there, the university specific market -- the effect of the OSAs would be to restrict prices and to restrict access to other suppliers with the consequence that they would deny or restrict access to the market and impact on prices. That reference is the transcript {Day8/42:22-25} to {Day8/43:1-10}. The attempt by the defendants to avoid the impact of that important evidence, as they seek to do at paragraph 166 of their closing, carries no weight, and obviously it is a matter for the tribunal to weigh the evidence, but it is there before you and I have given you the cross-references.

You will also recall the revelatory evidence from Mr Halls, who was giving evidence for the defendants, that the payment of commissions by the defendants to universities was "diametrically opposed" to the idea that only value could be guaranteed for students, {Day4/81:1-16}.

And we dealt with *Delimitis* so I will not deal with that.

Question 5 we have already dealt with in terms of abuse.

Question 6 is dealing with the issue of exemption.

Sorry, I apologise. Question 4 is dealing with networks. Question 6 is dealing with exemption. I can deal with this very shortly. It is simply not correct that they do not have to show that it was impossible to provide academic dress to students without the OSAs, as they suggest at paragraph 185 of their closings. As they admit, the objective justification and defence can only work when it is shown that the main operation is impossible -- impossible underlined -- to carry out in the absence of the restriction in question. That is paragraph 178 of their closings. Another way of putting the same point can be seen in the *Sainsbury*'s v *Mastercard* judgment {AUTH1/44/20}, paragraph 61:

"Only those restrictions which are necessary in order for the main operation to be able to function in any event may be regarded as falling within the scope of ... ancillary restrictions."

So we say our argument is correct. Insofar as relationship specific investments are concerned, the defendants demonstrate the weakness of their position by suggesting that Dr Maher was wrong to say that the test was whether investments were necessary in order to put on a graduation ceremony. They say that at paragraph 193. They say that because the relevant investment was a requirement of the universities it

somehow does not count, but that simply does not work. That turns their face from the very test they have admitted is the restriction necessary.

Dr Niels posited the relationship specific investments on the basis that they demonstrated the supposed need for the OSAs. They are clearly not necessary, nor indeed are any other restrictions, such as exclusivity and the payment of commissions, for the reasons we summarise at paragraph 110 of our closings.

In any event, our primary case is that there are no relationship specific investments in general as can be seen from Dr Maher's reply report at section 4.2, {E2/122}, and Dr Niels' admissions in cross-examination are summarised at paragraph 118 of our closings.

Insofar as concerns the free riding point, we say that is really easily answered. The position is set out at 120 and 121 of our closings which points have not been addressed by the defendants in their closings. In short, to have a free rider issue you have got to have a free rider and we are not free riding.

As to section 9, which is obviously relevant to exemption, the parties have set out their position succinctly. We have set it out in our answer to question 9 and the defendants have done that at paragraphs 205 and 208 of their closings. We do not

accept their submissions, for the avoidance of any doubt, and it will be recalled that the burden on the defendants is a high one and we set out the law at 107 in our closings.

Finally, causation, which I can take really shortly. The claimants' case on causation is, as the rest of the case is, extremely straightforward. But for the anti-competitive behaviour, be it Chapter II, be it Chapter I, but engendered by the exclusive exclusionary agreements under both heads, or either heads, Churchill would have been able to compete effectively and take advantage of students being able to choose their supplier, to segue into Mr Spitz and pay homage to the Chair's recent experience in the music business, one does not need to take a deep dive or climb up to the castle on the hill to see the shape of the landscape, it is staring one in the face.

One just needs to see, finally, what has happened in the pandemic, because the pandemic is another real life matter. Sadly, very tragic for many people, but in this case it is the defendants' clear evidence that most graduation ceremonies were cancelled or postponed in 2020/2021, and you can see that from Ms Middleton's evidence at paragraph 22, {D4/2/5}. Those ceremonies were put on pursuant to the OSAs and would have been

exclusive to the defendants. When they were cancelled, there was choice in the market for virtual ceremonies, which might sound odd, but essentially the ceremonies took place in one's sitting room or living room or kitchen, and they were B2C supplied. With that choice came success for Churchill and we have seen that from the evidence of Ms Nicholls.

The defendants, we say, fall into the cellophane trap. They crow about Churchill's lack of success without taking into account the extreme difficulty of accessing the market because of the anti-competitive behaviour, and we have seen that from Dr Maher's section in her report that I mentioned at the beginning of this afternoon's session. Take that away and what happens? The students exercise their freedom to choose, and the cross-reference to the evidence showing the impact of the anti-competitive behaviour on the claimants' ability to enter and thrive in the market are at footnote 283 at 124 of our closings. I am just going to very briefly go there. Paragraph 124 {A1/5/51}. Again, we probably should not have put it into a footnote. Yes, these are the references, cross-references to the evidence before the tribunal in relation to this issue and I would again ask the tribunal to carefully peruse that.

Let us not forget that it took Ede & Ravenscroft

nearly 40 years to establish a wig making business, which is why most of us, certainly at the bar, go there after the company was founded. Rome was not founded in a day and Churchill has demonstrated, in a much shorter period of time, that once the anti-competitive shackles imposed by the defendants are removed, it is fleet of foot and capable of giving consumers what they want: choice.

Gentlemen, those are my submissions. May I hand over to Mr Spitz who will deal -- unless you have any further comments of course. You do. Good.

MR LOMAS: I fear it is returning to well-trod territory, but can we come back, just before you sit down, Mr Randolph, to lines 12 and 13 on this infamous schedule.

MR RANDOLPH: Yes.

MR LOMAS: Just to make sure that we fully understand what your case is. If we start with 12, which of course is an agreement between the university and the supplier, I think it is trite that that obviously does not bind the graduand, the student; they are unaffected by it. So if they wish to acquire a gown from Churchill, or indeed make one for themselves, there is nothing in this clause that prevents the student doing that. Do you read into this clause something that says that the

university owes an obligation to the supplier not to allow a student who, in the extreme hypotheticals, made their own but compliant gown to turn up to a graduation ceremony with that gown?

MR RANDOLPH: I read this clause -- this item with item 13 because --

MR LOMAS: No, I am asking -- can I just, first of all, focus on 12. Does 12 create an obligation on the university to prevent an undergraduate with a home made but perfectly compliant gown, to take Churchill out of the picture for a second, turning up at a graduation ceremony and seeking to graduate?

MR RANDOLPH: On its face, it does not say that. Absolutely. But there is no evidence before you that anything of that kind has ever been done and there is plenty of evidence before the tribunal that when students have sought to source their gowns from a non-official supplier they have been told you cannot.

MR LOMAS: I understand that and we have seen that. I am just trying to work out where within the structure between the university and the supplier you say that abusive constraint comes. If that is the case for 12, how does 13, which prevents essentially the university actively promoting somebody else, increase the obligation on the university to prevent this

hypothetical graduand turning up in a gown sourced from somewhere else.

MR RANDOLPH: Because they are the exclusive supplier --

MR LOMAS: No, no. No, sorry, line 13 in this says you are not allowed to recommend or provide the students another supplier. How far do you take that obligation?

MR RANDOLPH: As with all contractual constructions, sir, you have to read it in the round. You cannot split sentence 2 from sentence 1. Sentence 1 gives exclusivity of supply to the supplier. So here Ede & Ravenscroft. The second sentence says, actually, the institution cannot assist or recommend or endorse any other further provider, so thereby closing off any choice to the student.

That has to be read in the context also as we pointed out I think in the section I took you to in our closings when we identified -- 49, when we identified what are the services. So the supplier shall provide academic dress hire services and photography services at and in respect of ceremonies during the term of this agreement. So that is schedule 1.

Then, the detailed description of services, which is part of 12, because they mention services there, provide, the service, E&R in this case, shall provide academic dress for hire to students for each ceremony.

So what it is saying is we run the ceremonies. Insofar as students are going to attend those ceremonies, they can only do so pursuant to the -- essentially they can only do so compliant with the terms of this agreement which is that Ede & Ravenscroft is the exclusive supplier of services and those services are defined as providing academic dress for hire by students.

So insofar as anybody else did that, I think a contractual, a commercial lawyer could well argue that such provision would be out with the exclusivity that has been granted pursuant to section 2.1 because it breaches the reality of 2.1 as seen in the light of schedule 1, and in particular clause 2.1(d) therein. Because otherwise, if it did not mean what it said and anybody could supply a gown, there would not be exclusivity of supply and Ede & Ravenscroft could turn round to the university and say, excuse me, hang on, we have exclusivity of supply. We have got to provide services, and in fact we are paying you a large sum of money to do that through commissions. Pursuant that to we must provide you. It is not maybe -- well, it might be a nice idea on a wet Wednesday afternoon. It is we must provide academic dress for hire to students for each ceremony. It is not might. These students can only go to those ceremonies attired by

Ede & Ravenscroft, and that is what 2.1 plus the schedule and item 12 cross-refers to services in its terms. So I think one has to read, sir, the agreement as a whole and you definitely have to read all those points that are raised specifically, the terms that are raised specifically at 49, and that is why, the proof of the eating is in the pudding -- the proof of the pudding is in the eating. That is why Bristol University, April 2022, can say, you cannot come to the ceremony if you do not have the official gown.

MR LOMAS: I completely understand that Bristol University's website says that, but all I am trying to do is -- whether that is a fact of Bristol University's motion or as a consequence of the legal obligations in the OSA. I think I heard you say that you construe, and I realise we are talking clauses not specific agreements, you construe the OSA arrangement as a commitment to Ede & Ravenscroft or the supplier that graduands will come to the ceremony attired by the supplier.

MR RANDOLPH: Exactly, the exclusive supplier.

MR LOMAS: Okay.

MR RANDOLPH: Very happy to answer any other questions. Or maybe I should not have said that.

MR RIDYARD: Just one detailed point. I did not follow I am afraid, but you made a point about Dr Niels' price trend

analysis.

MR RANDOLPH: Yes.

MR RIDYARD: Can you just repeat that so I can understand what the criticism was?

MR RANDOLPH: Yes, I can and I will. This was in the context of pricing. This was in the context of academic dress. Dr Niels, at 5.13 of his first report, {E6/1/114}, says pricing of academic dress hire in relation to bachelors, masters and PhD gowns and kit declined over time --

MR RIDYARD: Yes.

MR RANDOLPH: -- and that is fine. What he does not -- what is not shown is the prices of graduation services. Because, of course, one of the issues in this case is, it is said it is all about academic dress supply and how -- access to that particular market, but Ede & Ravenscroft are operational on the graduation services market which everybody admits exists. The question is whether it is relevant. All I was saying was a small sort of tiny forensic point was that Dr Niels' data, at 5.13, only goes to academic dress hire prices; it does not go to prices of graduation services all in, so all of it, and we just do not have any evidence. So he can say, oh, yes, sure, the AD dress prices have gone down, but we do not know whether

the prices of graduation services have gone down, up or anywhere else.

MR RIDYARD: What other graduation services does Ede & Ravenscroft supply? It does not charge for other things, does it? Does it charge for other aspects?

MR RANDOLPH: No, but the point is that these -- well, it is prices in general. The point was being made though that the pricing in the market is going down. That is how I had understood it.

MR RIDYARD: Yes.

MR RANDOLPH: So it is prices of graduations, because students are charged a price for the graduation service.

MR RIDYARD: They are charged a hire price which happens to cover those other things.

MR RANDOLPH: Well, it -- that is the point. That was all. It is a very small point. It was just we found it instructive or interesting or may be not that Dr Niels' concentrated for almost the first time in his evidence on academic dress hire when everything else had been all about graduation services. It may be it may not go very far. It may be, as you say, sir, that actually because Ede & Ravenscroft have a list price it goes down, but actually when you look at the market, their market as a whole in terms of graduation services, what are the prices that are being paid for by the students, who are

the consumers? Where are they going? If they are including, and they do include, more than just the pure academic dress, because we know that, because they have all the add-ons.

MR RIDYARD: Which add-ons?

MR RANDOLPH: The add-ons that they have got to -- that essentially -- well, you mentioned, sir, the add-ons are not just the hire, but it is about the fact that the ceremony has got to take place and the organisation and everything else. Those are the add-ons that you just mentioned. These are the add-ons that the universities will be adding on, one assumes. Because this is the whole point, this is the difference between pure academic dress hire and graduation services.

MR RIDYARD: No, I understand that the academic dress hire charges by E&R covers the cost of giving prize money and gowns to the academic staff, but Dr Niels' analysis is looking at that price, the trend in that price over time, so I just do not understand what you are saying about this not being -- not including everything. I just do not understand the point that you are raising here.

MR RANDOLPH: It was a very, very small point, and it may not go anywhere, which is the fact that we were interested by the fact that it was just concentrating on

the academic dress hire prices rather than the prices for graduation services as a whole. But, of course, you are absolutely right, sir, Ede & Ravenscroft, their list of prices will not be charging out, but in any event -- sorry, will not be dealing with that, but we do not have any data in relation to where those prices are.

At the end of the day, pricing is only relevant insofar as the Chapter I prohibition is concerned because it is common ground, or at least it should be, that prices are fixed; there is no possibility of renegotiation. So insofar as there is a Chapter I problem then that is price fixing per se and that is only relevant, as I say, insofar as Chapter I is concerned, and we only get there insofar as we can show a network effect.

And as I said near the start, the abuse about which we are complaining is mainly exclusionary. It is not mainly exploitative, ergo issues of pricing are not terribly relevant insofar as the abuse is concerned. It is more relevant to the Chapter I prohibition. It may be that, sir, the point we raised in relation to the distinction between academic dress hire and prices of graduation services do not go anywhere.

The only point I would make is that Dr Maher pointed out in her responsive report, at paragraph 109, and this

is why it was raised, so paragraph 109, and my learned junior will tell me where that is as I -- in the --

MR RIDYARD: I do not want to waste --

MR RANDOLPH: No, no, no --

MR RIDYARD: We can look this up afterwards.

MR RANDOLPH: I think this is probably going to be the answers {E2/1/30}:

"While the prices charged by the E & R Undertaking and CG are not directly comparable - because they reflect the costs of providing different 'products' with the E&R Undertaking providing graduation ceremony services and CG providing B2C academic dress to students - they do provide an indication as regards how much 'extra' students are paying for the hire of their academic dress and subsidising the universities' graduation ceremonies. Given that CG's prices -- [that is Churchill Gowns] -- are considerably lower than the E&R Undertaking, it is surprising that CG has not been able to penetrate the B2C hire market in any meaningful way, and in my opinion this is due to the exclusive supply arrangements between the E&R Undertaking and universities which enable the E&R Undertaking to foreclose entry into the B2C market."

We stand by that. The only point I was making is they did not come back on the point of, oh well,

Dr Niels did not -- they have not come back to rebut the point about given the CG prices are considerably lower than E&R's undertaking, and so that is where that goes. It goes to the point about how much extra students are paying for the hire without their free choice. It is a take it or leave it: you either take it or you do not have it. If you do not have it, according to Bristol, you do not graduate.

MR RIDYARD: You do not attend the ceremony.

MR RANDOLPH: Yes. Who knows whether maybe you could graduate without it, but that would, you know, from a social impact, you cannot graduate from the university in the ceremony which is part of the student experience apparently.

THE CHAIRMAN: Thank you very much, Mr Randolph.

MR RANDOLPH: Thank you very much. I will give way.

Closing submissions by MR SPITZ

MR SPITZ: Thank you very much, sir, and members of the tribunal. There are two topics that I am going to cover. The first is joint and several liability and the second is the legality defence and its application or non-application, sometimes referred to as the eco claims.

The joint and several liability point, the issues are quite crisp. They are firstly, whether

Ede & Ravenscroft, and that is the first defendant, which is admittedly part of the same undertaking as the third and fourth defendants, is jointly and severally liable with all of the entities that make up the undertaking for all losses caused to the claimants. The answer to the question depends on either (a) whether the first defendant contributed to the infringement or if not (b) whether joint and several liability follows as a consequence of membership of the undertaking as recent EU decisions say. The claimants say of course that the first defendant is jointly and severally liable. That is the issue in relation to the first defendant.

The second issue concerns the holding company, Radcliffe & Taylor, that is the second defendant, D2, and whether that holding company is also part of the same undertaking with the other defendants. This depends on whether the defendants can rebut the presumption that as the parent of its wholly owned subsidiaries' D3 and D4 D2 exercises decisive influence over the conduct of those subsidiaries.

The claimants say that the presumption has not been rebutted and that the evidence shows that the second defendant, the holding company, in fact exercised actual control as the holding company over its subsidiaries and that it is part of the undertaking and accordingly,

jointly and severally liable as the parent of its subsidiaries.

I will take those two in turn and concentrate first on the liability of the first defendant. We deal with it in paragraphs 128-133 of our written closings. The defendants admit that D1 is a member of the same undertaking as the third and fourth defendants. That is not in issue. They say, however, that this does not mean that D1 is jointly and severally liable for the claimants' losses. They say that mere membership of the undertaking is insufficient without more to fix the members with liability. In support of their position they rely on a passage from this tribunal's judgment in *Sainsbury*'s v *Mastercard*.

If we can turn it up. It is paragraph 363 (23). It is in {AUTH1/1/225}. The subparagraph is on the next page, subparagraph (23). Let us take 22 and 23 together because they are both relevant. Subparagraph 22:

"On that basis a legal person may be liable for a breach of competition law:

(i) because he, she or it has in some way participated in that breach, as a part of the single economic unit or 'undertaking' that has infringed the law; and/or (ii) because he, she or it has exercised a decisive influence over one or more of the persons

within the 'undertaking' who have participated in the infringement."

Then the subparagraph on which the defendants rely:

"On the other hand, in our view a person is not ipso facto liable for an infringement of Article 101 by reason only of the fact that he, she or it is a member of an undertaking responsible as a matter of EU law for the infringement, in circumstances where the person in question neither participated in the infringement nor had decisive influence over the conduct in the relevant market of other members of the undertaking who did participate."

It is really the sentence that refers to the fact that a person is not ipso facto liable by reason only of the fact that it is a member of the undertaking that the defendants rely.

We say that they overlook the preceding subparagraph that we have just looked at and so even if this test set out in the *Sainsbury*'s decision is correct, we say that it is not correct and I will get to that, the reasons for that shortly. But even if it is correct we say that the first defendant satisfies the requirements for liability for the infringement. This is because under subparagraph (22)(i) Ede & Ravenscroft plainly participated in the breach of chapter -- the

Chapter I and II prohibitions.

As far as the Chapter II is concerned, the breach in question is the breach of dominance which foreclosed the market and D1 participated in that breach by concluding the exclusive arrangement, paying commissions, bundling hoods and gowns and that is sufficient under the *Sainsbury*'s test to make D1 jointly and severally liable for the infringement with the other members of the undertaking.

That limb of the test is what the defendants previously ignored in their reliance on subparagraph (23) and when one looks at the test in both elements it is clear that D1 is part of the undertaking, clearly participated in the infringement and that is sufficient for joint and several liability.

The defendants' attempt at paragraph 316 of their written closings is to re-define the nature of the infringement so as to contend that each OSA was a separate infringement and they suggest, they say that to try and avoid the first of those two elements of the test from biting.

There is no authority that is cited in support of that and it is inconsistent with the focus in competition law on the infringing conduct of undertakings.

While a number of anti-competitive activities contribute to the undertakings' overall breach the breach is under Chapter II the abuse of dominance by the undertaking which infringes that prohibition.

In the event that that point is insufficient to meet the requirements laid down in the *Sainsbury*'s case and only if it is insufficient, then we say that the test articulated in *Sainsbury*'s by the tribunal is with respect clearly wrong in light of more recent EU authorities. One of those authorities is binding on the UK courts under section 60 of the Competition Act because it is a pre-Brexit case. The other requires due regard to be paid to it under section 60A of the Competition Act because it is a post-Brexit case. Both of these decisions adopt precisely the same position and that position is in flat contradiction with the statement in the *Sainsbury*'s case on which the defendants rely.

The tribunal in *Sainsbury*'s says that it does not follow ipso facto from membership of the undertaking that there is joint and several liability and the Court of Justice says precisely the opposite. Those EU decisions make it clear that once the entity is determined to be part of the undertaking it is indeed jointly and severally liable for the undertaking's

infringements by reason only of the fact that it is part of that undertaking.

The focus in other words, is on determining which are the entities that constitute the undertaking. Once one has done that exercise and determined that certain legal consequences follow and the important legal consequence that follows for our purposes is joint and several liability.

The defendants have admitted that D1 is a member of the undertaking, so one does not embark on that enquiry at all.

Just to show the tribunal briefly the two decisions of the Court of Justice, the first one is the GEA decision and that is authorities {AUTH1/71/9} and I am looking in particular at paragraph 61. This provides:

"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."

If one then looks at paragraph 72 further down the page or just on to the next page. {AUTH1/71/10}.

I will not read that aloud but if the tribunal just has a look at that. It is to similar effect. (Pause)

It is really the first part of the first sentence that is the critical bit. (Pause)

Joint and several liability is merely a manifestation of an ipso jure effect of an undertaking.

We say that makes it absolutely clear that joint and several liability does indeed flow as a necessary legal effect of the concept of an undertaking without more.

To the extent that the statement in *Sainsbury*'s that we have looked at is to the contrary, it is incorrect. As I have already said, one does not need to decide this point if one concludes that on the basis of the *Sainsbury*'s test as it is D1 is in any event jointly and severally liable. So this is the alternative argument.

The defendants say that this decision that we have been looking at was in the peculiar context of determining fines but that misses the point of the decision. Once an entity is part of the relevant undertaking the Court of Justice says in terms the joint and several liability is the legal effect of the concept of undertaking. There is no room for ambiguity. It has nothing to do with the basis on which a parent is responsible for the conduct of its subsidiaries. It is

simply a necessary legal consequence of being part of the undertaking.

The relevant enquiry, as I have said, is into whether the entity is part of the undertaking and that is what the defendants have already admitted with respect to D1. That is the first decision.

The second decision of the Court of Justice, the more recent one, is to precisely the same effect. Indeed, it cites the GEA case that we have just looked at as authority for the proposition in questions. So the post-Brexit case cites the pre-Brexit case.

THE CHAIRMAN: Do we need it if the same thing or is it a different context?

MR SPITZ: Let me put it this way. I will simply refer to it but we will not go there. It is even clearer than the previous authority so to that extent it is worth bearing in mind should you need it, but I can simply refer to it. The reference for your note, and we do not need to turn it up, it is {AUTH1/76/10} at paragraph 44.

THE CHAIRMAN: What is the name?

MR SPITZ: It is Sumal, the Sumal decision and it is 44 and 48, both of which are instructive.

This was a case where what was at issue, it was not a fining case, that was not the issue. It was in the context of an action for damages for breach of

Article 101. So the effort that the defendants make to try and distinguish the GEA decision on the basis that that concerned fines does not apply to the second decision, the Sumal case which was an action for damages. The principle that is established is the same principle.

The defendants refer to paragraphs 46 and 47 of that case at paragraph 313 of their written closing, but the issue that is being considered is precisely the question of which entities are part of the undertaking and not any other question.

Both of those decisions are diametrically opposed to the tribunal's statement in *Sainsbury*'s. If it is necessary to go there, *Sainsbury*'s on this issue is wrong and should not be followed. That is D1, joint and several liability.

The second question here is whether the second defendant, the holding company, is also jointly and severally liable. It is paragraphs 134-152 of our written closings and the defendants make one short point in opposition. They accept, as they must, that as the parent of the wholly owned subsidiaries the holding company D2 presumptively exercises decisive influence over those subsidiaries. But they say they have rebutted the presumption of decisive influence because

Mr Middleton and the holding company let the subsidiaries conduct their own business. I do not advance any authority in support of the argument to show that that is sufficient to rebut the presumption and it is not sufficient. The presumption is a difficult one to rebut. In fact, it is only if it could be shown that the holding company's interest in the subsidiaries was purely as an investment vehicle with no other links that one might have an argument that the presumption does not apply but that is not the case that the defendants have advanced.

They could not advance it begin given the series of different ways in which the holding company exercises control over the activities of the subsidiaries. That is reflected in the analysis that we did in the cross-examination of Mr Middleton and in the analysis in the written closings.

What the defendants say is that the lines of control set out in the annual report and the financial statements simply show that the second defendant is capable of exercising control, not that it actually exercises control. Again, that submission is unsupported by authority and it is wrong. The annual report in fact illustrates the many ways in which the holding company actually exercises influence over the

subsidiaries and we have summarised these at paragraph 139 of our written closings and Mr Middleton in fact admitted that the subsidiaries are controlled by the second defendant, and the power to govern the financial and operating policies of the subsidiaries we set out at paragraph 148 of our written closings.

On the joint and several liability point the first defendant is admittedly part of the undertaking and that is sufficient. In any event, it participated directly in the infringement and it is jointly and severally liable. The second defendant is also part of the undertaking. The presumption of decisive influence has not been rebutted.

That is what I wanted to say on joint and several liability and I will turn now to the illegality defence ex turpi causa.

We have set out the law in some detail in the written opening submissions and in the written closing submissions and there are a handful of points that I would like to emphasise on illegality.

The first one is that even if the claimants were to establish that unlawful misrepresentations were made, whether intentionally or negligently, the doctrine of illegality would not operate to deprive them of the right to pursue their competition law claim for damages

against the defendants for the competition law infringements. So in that sense the microscopic analysis of the evidence that the defendants have engaged in is somewhat beside the point.

Their case on the applicability of the doctrine of illegality to attempt to shut out the claimants' claim is a weak case.

The second point is that the defendants have adduced no evidence to show that the claimants can be said in any way to have profited from their alleged wrong. The claimants are not seeking and they would not be receiving compensation for loss suffered as a consequence of their alleged wrongful act. Contrary to what the defendants suggest in paragraph 234 of their written closings, the claimants do not found their cause of action on an immoral or illegal act. Instead they seek compensation for the injury caused to them by the defendants anti-competitive conduct.

The third point to highlight in relation to the applicability of the illegality defence is that the claimants' claim is a claim for damages in tort for breach of statutory law and although the same framework applies to both tort and contract, and that is the framework established in Patel v Mirza, nevertheless, as we have set out in paragraph 222 of the written closings

courts are generally somewhat more reluctant to shut out a claimant with a good tort claim on the basis of the illegality defence and the reluctance is driven by two reasons.

The first is that it would leave the claimants totally uncompensated for the loss of something that was theirs by right. One would not be depriving them of the fruits of their illegal conduct. One would be refusing them compensation for an injury that they have certainly suffered and for which they are otherwise entitled to recover.

Secondly, one would be treating the claimants as outlaws. That is, as persons outside the protection of the law. We have dealt with this in some detail in paragraph 22 and following of the written closings.

That is the third point. The fourth point, and then I will turn to the Patel v Mirza framework, the fourth point is the well-known observation of Lord Bingham in Saunders v Edwards to the effect that where the plaintiff's action in truth arises directly ex turpi causa they are likely to fail but where the plaintiff has suffered a genuine wrong to which the allegedly unlawful conduct is incidental, they are likely to succeed. That statement is particularly apposite in this case. I do not think we need to turn up the

authority but the reference is to {AUTH1/46} and the relevant passage is at page 19. {AUTH/1/46/19}.

In paragraph 170 of our written opening submissions we quote Lord Toulson in Patel who says that the essential rationale of the illegality doctrine is that:

"It would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system."

That overarching question is addressed by focusing on three specific matters. I will go through those matters and the submission unsurprisingly is that we say the defendants fail on each of those matters.

The first one under the Patel v Mirza framework is the question of harm to the integrity of the legal system. It is whether the underlying purpose of the prohibition which has been transgressed. It is what is the underlying purpose and whether that purpose will be enhanced by denying the claim.

We say that here enforcing the claim would not be harmful to the integrity of the legal system because the claimants ex hypothesi have suffered a genuine wrong arising out of the defendants' anti-competitive claim. As I have already mentioned, they did not found their claim on their own alleged wrong. They have not profited from their alleged wrong and if they have that

is a question that can be taken into account in the quantification of damages.

There is no direct evidence that anyone was actually induced to act on the basis of the alleged misrepresentations and there is no evidence that the claimants have profited from the alleged wrong.

That is why our references to the absence of a complete cause of action for misrepresentation or deceit is important. The alleged wrong is not the effective cause or indeed any cause of the claimants' loss. The claim for damages is for a breach of competition law intended to put the claimants in the position they would have been in but for the defendants' anti-competitive behaviour and under this first factor any connection between that and the claimants' alleged wrong is simply too tenuous to justify barring the claim.

There are also remedies for persons injured by misrepresentation in civil and criminal law and because the defendants have not alleged that they suffered harm as a result of the alleged misrepresentations and because the claimants have not profited from their wrong, allowing them to enforce the claim for such damages as they have suffered would not harm the integrity of the legal system in any way. It would be

open to the courts to deal with any profit by the claimants arising from their alleged wrong in the course of the assessment of damages.

There is an additional factor to take into account under this first frame, this first matter and that is the importance of the private right of action to claim damages for loss suffered as a result of anti-competitive conduct. This is a point that we make at paragraph 224 of the written closing submissions.

Any person is entitled to claim compensation for the harm suffered where there is a causal connection between the harm and the breach of competition law and these private rights of action are an integral part of the system of competition law enforcement. It is part of the coherence of the law.

Again, allowing the claim in the circumstances of the case would not harm the integrity of the legal system or the coherence of the law.

The second factor under the Patel v Mirza framework is whether there are any other public policy considerations on which denial of the claim would have an impact. There is another public policy consideration and that is set out in paragraph 179 of our written opening and at paragraph 224, that is 224 of our written closing submissions and it concerns the important policy

behind protecting private rights of action to claim damages. That is an additional factor to take into account.

The defendants dismiss this by saying, paragraph 303(2) of their written closing submissions, that those who wish to exercise the private right of action for damages for breach of competition law must refrain from making allegedly misleading statements. But that is not the law. The claimants refer to the enforcement objectivities behind the private right of action to claim damages as a factor to take into account and if the defendants were correct, an entirely valid claim for damages furthering the policy objectives of preventing anti-competitive conduct would be defeated even though the defendants did not profit from their wrong, the claimants did not found their claim on their wrong and there were no proven losses caused and finally, where punishment is a matter for the criminal courts.

On the second of the three factors the defendants ought not to succeed either.

The third factor concerns proportionality. This is set out by Lord Toulson in Patel and we quote it at paragraph 170 of our written opening and here the tribunal is required to consider whether the denial of

the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts.

Under this factor the closeness of the connection between the wrong and the claim is again highly relevant. The need for a close rather than a tenuous connection between the wrong done and the claim made is critical. It is important to stress that the proportionality under consideration concerns the relationship between the wrong and the claim. It does not aim to measure relative turpitude between the claimant and the defendant.

At paragraph 177 of our written opening submissions we refer again to Lord Toulson's observation in Patel that unless the law is applied with a due sense of proportionality there is a risk of overkill.

The defendants' submission on proportional involves an exercise in assessing comparative turpitude. That is at paragraph 303(3) of their written closings, but as I have just submitted proportionality is not concerned with weighing relative turpitude, relative degrees of turpitude between the parties.

As we put it in paragraph 173 of our written opening submissions in reliance on Lord Hughes in Hounga v Allen the proportionality is between the claimants' wrongdoing

and the claimants' claim. It is not between the claimant's alleged turpitude and that of the defendants.

So the conclusions on the law concerning illegality are the following: the closeness of the connection between the illegality and the claim is relevant to both the first and the third of the three considerations enumerated in Patel v Mirza. That is clear from the way the enquiry is dealt with in the decision in Henderson. We do not need to turn that up and we have explained that in paragraph 171 of the written opening submissions.

The defendants say that the claimants are turning the closeness of the connection into a trump card and that it is no longer a trump card following from the fact that the law has moved on from the reliance theory to a more policy orientated approach.

We disagree. We are not turning it into a trump card, but the way in which the relevant factors are weighed in any particular case depends on the facts of that case and here the closeness of the connection is highly relevant to whether allowing the claim would be harmful to the integrity or coherence of the law and insofar as it bears on the question of proportionality. In our case the connection is a tenuous one. The claimants' claim is independent of any alleged

wrongdoing.

The conclusion on this aspect on the claimants' case is allowing the claim would not damage the integrity of the law by permitting incoherence. The policy considerations underpinning the private right to claim damages for breach of competition law are relevant factors to be taken into account and it would be disproportionate to deny the claim in the circumstances of the case.

Turning briefly to the specific allegations themselves, the allegations of fraud and negligent misrepresentation.

THE CHAIRMAN: Would that be a good time for a break then. We will break until 20 past.

(3.12 pm)

(A short break)

(3.20 pm)

MR SPITZ: In this last section of my submissions I am going to deal very briefly with the defendants' misrepresentation allegations in their written closing submissions. We have dealt with it in detail in paragraphs 155-216 of the written closing arguments and in the written opening submissions, paragraphs 150-167. I propose to be no more than about ten minutes in going through this aspect.

So there are three relevant misrepresentations or alleged misrepresentations. The first one is that the defendants contend there was no proper basis for the 100% plastic bottles representation in respect of the first batch of gowns. They do not allege that the 100% plastic bottles representation in respect of the first batch was made fraudulently.

We say there was a proper basis for the 100% plastic bottles representations in respect of the first batch. Mr Muff's evidence was that he honestly believed, although he was mistaken, that he was buying 100% PET fabric. He took the documentation to with which he was supplied at face value and he believed on that basis that the gowns in the first batch were indeed made from 100% plastic bottles.

The defendants then contend that the 100% plastic bottles representation in respect of the second and subsequent batches was made fraudulently by Mr Muff who the defendants say knew that the gowns were a blend of 70% polyester and 30% viscose. Alternatively, they say that the representation was made with no proper basis.

We submit that this allegation ought not to stand. Mr Muff's evidence was that until 7 January 2021 he believed that the gowns were being manufactured entirely from recycled polyester. This was his genuine belief at

the time, although again he accepts that he was mistaken in that belief.

THE CHAIRMAN: Sorry, just on this one there is no doubt there is a misrepresentation, is there, in terms of saying it is 100?%.

MR SPITZ: That is correct because of the 70%/30% blend.

The evidence of Mr Muff is referred to at paragraphs 186-188 of the claimants' written closing argument and as to the alternative contention that the representation was made without a proper basis the claimants submit that Mr Muff's view with hindsight as to what he would do differently now does not entail that he was negligent at the time.

The implied plastic bottles representation is one I would like to spend a little bit more time on. It is contended that the implied plastic bottles representation was fraudulently made in that the implication was that the gowns were made from recycled plastic bottles. This implication was false and Ms Nicholls and Mr Adkins intended the implied meaning knowing it to be false. That is the third of the relevant relation representations.

As to this one, Ms Nicholls and Mr Adkins explained what the statement means or at least what they intended it to mean, and they were adamant that the statement in

question "which equates to at least 28500 ml plastic bottles" did not imply that the gowns were made from recycled plastic bottles and neither of them intended to suggest that they were. The defendants do not believe them.

But their reasons for disbelieving Ms Nicholls and Mr Adkins are unconvincing and what was never explored in evidence is why the claimants would wish to mislead a customer into thinking that the gowns were made out of recycled plastic bottles as opposed to other recycled plastic material.

The defendants say that the claimants intended the implied meaning because Ms Nicholls appreciated the obvious import of the language she deliberately crafted. That is at paragraph 289 of the defendants' written closings.

However, Ms Nicholls's evidence was firmly to the contrary and it remained clear and consistent throughout. Some of that evidence is set out in paragraphs 207-208 of our written closing argument and there is no reason to disbelieve her on the point.

Mr Adkins's evidence was also consistent in that the reference to equivalence was intended as a visual metaphor. Some of this evidence is set out at paragraph 210 of our written closings.

The defendants go on to say that each of the claimants knew the implied representation was false. However, because the implied representation, as the defendants have characterised it, was not in fact made and was not intended in the manner that the defendants seek to interpret it, no issue as to its falsity arises.

In fact, Ms Nicholls said that in light of the Intertek reports she did not think that we should advertise that our gowns were made from plastic bottles and that is why the claimants did not in fact do so. It is why the implied representation was not in fact made.

Notwithstanding the defendants' arguments to the contrary, there is no basis for finding guilty knowledge on the part of either Mr Adkins or Ms Nicholls and although Mr Muff is said to have acted fraudulently in relation to the implied representation as well, the written closing arguments do not address his evidence in relation to the implied representation.

In the alternative on this one, the defendants say that the claimants were guilty of serious negligence but that submission is entirely undeveloped in the written closings. An intention to use a visual metaphor as a means of conveying the idea that the gowns contain recycled material can hardly be construed as negligent conduct.

The final point to make relates to the consumer protection from unfair trading regulations on which the defendants rely as an alternative to their fraud case and in particular they rely on regulation 5 of the consumer protection regulations. Here there are two points briefly to make.

The first is that the defendants have not adduced evidence that the conduct complained of caused or is likely to cause the average consumer to take a transactional decision he would not otherwise have taken, and that is one of the elements of a contravention in terms of regulation 5.

The second point to make is that the claimants have a due diligence defence under regulation 7 of the regulations and that is set out in paragraph 217 of the written closing submissions.

Mr Muff believed that the claimants undertook the level of due diligence in line with the resources available at the time and the Anthesis report supports this and concluded that the claimants acted in manner that is common in the industry in terms of due diligence focusing on agreed contract terms and local certificates provided by suppliers.

THE CHAIRMAN: What is that addressing?

MR SPITZ: That is addressing the question of due diligence

under regulation 17.

THE CHAIRMAN: Sorry, in relation to which representation?

MR SPITZ: It is in relation -- I am sorry, it is in relation to each occasion where what is suggested is that there was no rational basis, no reasonable basis for the representations being made. So it applies to all.

THE CHAIRMAN: Can it apply to the 100% for the second and further batches?

MR SPITZ: Yes, as a due diligence defence. Because the composition of the gowns was 70/30, but there was a reasonable belief that it was 100% and so the defence, we say, applies to that as well.

THE CHAIRMAN: I can see it applies in theory but it was fairly clear, was it not, on the documentation that it was only 70% and Mr Muff's defence is well, I did not realise that. I was not being fraudulent because I did not realise that, but if you look at it it is fairly clear.

MR SPITZ: That is correct.

The other point to make about the Anthesis report is it has obviously not been the subject of cross-examination but it should nevertheless be given some weight in the tribunal's considerations, at least as evidence that an external body held the view recorded

in the Anthesis report that the claimants acted with due diligence, so it was not been tested but it ought at least to be given that weight.

On these three topics the claimants' case is that each of the defendants is jointly and severally liable for all of the loss caused to the claimants as a result of the anti-competitive conduct. The doctrine of illegality does not bar the claimants from advancing their claims against the defendants for anti-competitive conduct and the defendants have not established the misrepresentations for which they contend.

That is all that I wanted to say in relation to these two topics.

THE CHAIRMAN: Thank you very much, Mr Spitz.

MR SPITZ: Thank you very much.

Closing submissions by MR PATTON

MR PATTON: Good afternoon, members of the tribunal. I was proposing in my oral submissions to follow generally the structure of our written closing but, as you know, that is quite a full document. We have tried to deal with everything as comprehensively as we can so that you have the references to the evidence that you need when you are preparing a judgment. We have given accurate and we hope helpful citations for those points. I was not proposing in the oral submissions to go into every point

because it simply would not be possible and I am not sure it would be helpful to you.

What I was proposing to do was to take you principally to the key legal authorities that provide the framework for the case because that is not something that has really happened so far in these proceedings.

That approach means that I will not necessarily respond to all of the points that were made by Mr Randolph orally. In some cases that would be because I take the view that we have already said what we need to say about that in writing and I do not really have anything else to add. Obviously I will review the transcript tonight and see whether there are any points I feel I ought to address proactively but of course if you want to put any points to me as I go, please of course do so and, as I say, I will be following effectively the same structure as the claimants have adopted.

The first topic that both sides have dealt with is market definition. We have dealt with that in our closing at pages 7-9. I am not actually sure in the light of Mr Randolph's submissions this morning that there is any live dispute between the parties. It seems to be common ground that the question of dominance is to be considered in relation to the B2B market because that

is the market in which competition is currently taking place and that is the only market in which we could be dominant since we are not active in the B2C market. Conversely, Dr Maher's evidence was that as far as she was aware the claimants are the only undertaking who are participating in the B2C market apart from some bricks and mortars, shops in Oxford and Cambridge, and so it would not make sense to ask whether we are dominant in the B2C market anyway. I do not have anything to add to what we have said in writing about that unless the tribunal had any questions.

I was going to proceed next to the question of dominance. We deal with this in our written closing between pages 9 and 19. I wanted to take you to one of the authorities that we rely upon. We rely on it at paragraph 34 which is on page 14 of our written closing. It is the Independent Media Support case. And Mr Randolph mentioned it earlier as well. It is at {AUTH1/83}. This is relevant to the bidding market point and its importance in the context of the question of dominance.

As you will see from the front page, this was a decision of the tribunal and chaired by Vivien Rose as she then was. If we turn to the second page, {AUTH1/83/3}, paragraph 3. In paragraph 3 you can see

that this was an appeal by *IMS* against a decision of OFCOM. *IMS* was a provider of access services to broadcasters, access services being services which address the needs of deaf and blind people so, for example, subtitling, signing, audio description and so on.

What happened is that following a tender Channel 4 awarded its contract for access services to a company which is referred to in the judgment as BBCB. It was formally owned by the BBC but I think was then spun out.

IMS contended before OFCOM that that was an abuse on the part of BBCB by means of predatory pricing or that the contract between BBCB and Channel 4 was a breach of Chapter I, Article 81.

If you could be shown page 12 of the judgment, {AUTH1/83/12}. At paragraph 34, this is describing OFCOM's decision, the decision that was under appeal. You can see that OFCOM considered it was appropriate to apply the guidance. This is about vertical restraints when assessing market shares and its calculation of market shares is set out in the table. If we just scroll down, you can see that BBCB is given a market share of either 0 to 10% if you exclude its own in-house supply. That is to say, supply from it to the BBC which it was in-house at the time and then that rises to 30 to

40% if you include the in-house supply.

There was an issue in the case about whether in fact you should also take into account when calculating market share the additional market share that it acquired on getting this contract from Channel 4., so that is not an issue that arises in this case.

If we turn to page 14, {AUTH1/83/14}, you can see at paragraph 41 it refers to a part of the decision which considered whether there were special features of this market which meant that it was not appropriate to rely solely on market share analysis to decide whether BBCB was dominant.

"OFCOM noted that in this market contracts are awarded infrequently and so market shares may change substantially on the award of a major contract. Market share data for markets which exhibit features of a bidding market need therefore to be interpreted cautiously. A 'bidding market', OFCOM stated, is one where the majority of sales are made by competitive tenders."

That was the passage my learned friend referred to this morning, and it goes on to say:

"In such markets, if competition at the bidding stage is effective, an undertaking which has a high share of sales over a period of time may not in fact

have market power because most or all of those sales could be lost to a competitor in the next bidding round."

And then 42 summarises what OFCOM found of the relevant market and perhaps you could just quickly read that. (Pause)

Then if we could turn to page 19, {AUTH1/83/19}. Just at the foot of the page there is a heading "The second issue" which is concerned with dominance and one can see at paragraph 60 that *IMS*'s challenge to the findings OFCOM made in relation to dominance can be summarised as follows.

"*IMS* argues that it is safe to assume that market share exceeds 50% ..."

And there are various factual points which need not concern us. Then over the page {AUTH1/83/20}, at paragraph 61:

"*IMS* submits that OFCOM also erred by overestimating other factors which it found undermined reliance on ... market share figures as indicators of market power. Referring to the judgment in Azko ... *IMS* disputes OFCOM's conclusion that because the relevant market displays some characteristics of a bidding market, BBCB did not hold a dominant position."

It makes some further factual points about that.

Then right at the foot of the page, page 20 one sees paragraph 64, the tribunal's assessment, and it begins at 64 by setting out the standard *Hoffman-La Roche* test of dominance.

Then the most helpful passages begin then over the page at paragraph 65 AUTH1/83/21}:

"In order to establish that a dominant position exists, the importance of market shares may vary from one market to another. A very high market share, which has continued throughout the period of infringement may well be sufficient, depending on the circumstances, to infer the existence of dominance."

Then in paragraph 66:

"We have described earlier how OFCOM analysed the market to arrive at the conclusion that BBCB was not dominant."

That is the passage I showed you at 35-42.

"Although not formally accepting that the relevant marks was a 'bidding market', *IMS* accepted before the tribunal that it did not challenge the facts as found by OFCOM ..."

Then importantly:

"...including that one characteristic of this market is the award of a limited number of high-value contracts."

That is the feature of the market which is singled out by the tribunal as being a key point which was not challenged by *IMS* on the appeal.

"In the Tribunal's judgment, this means that the fact that a particular company has had a number of recent 'wins' does not necessarily mean that one of its competitors will not be successful in the next contract to be tendered. Provided that its reputation, experience and track record satisfy UK broadcasters -- and it can offer a competitive price, a competitor can always win a large contract and increase its market share considerably at one go. In these circumstances ... such a market share is unlikely to give an access services provider the power to prevent the maintenance of effective competition..."

Then effectively the tribunal sets out the test for dominance again.

And then in 67:

"The Tribunal therefore upholds OFCOM's finding that access service providers' market shares as at a given date are less significant for the analysis of competitive conditions in the UK market ... than might normally be the case. It is necessary to look at and weigh up all relevant economic facts, including the 'winner takes all' aspect of those access services

subject to competitive tender. The existence of a dominant position will be the outcome of a number of a number of factors, including any barriers to, and the likelihood of, new entry and any countervailing buyer power."

Then it goes on at paragraph 68 to set out the points that were particularly important here. I draw attention, although it may be of limited value, some features which are strikingly similar to this case. (a):

"Most UK broadcasters prefer not to have more than one provider for all access services, and accordingly, to award exclusive contracts."

That is obviously similar to what we say is the position of universities who prefer to have a single single supplier and then they say:

"94% of all origination hours are currently served by the three largest suppliers..."

That is not relevant.

(c):

"The market was characterised by a few, large contests to supply broadcasters and those contests are open to at least three providers which have the necessary reputation and experience..."

In our case obviously there are more contests

because there are many more universities than there were broadcasters, but where there is a contest for the OSA there are at least three suppliers who can compete with Ede & Ravenscroft for the OSA.

MR RIDYARD: You would accept, would you, that the market does not involve large contracts relative to the total market size?

MR PATTON: If the total market is the UK, I accept that. Because there are 100 universities you cannot say that. If the market is a university then obviously it is large relative to that market. But I do not accept the fact that they are not large simply because there is a large number of universities makes any material difference. That simply reflects the fact that there are over 100 universities. Each of them contracts for its own official provider. On the whole they do not do it as part of an alliance with the exception of London.

MR RIDYARD: The lumpiness of the market is singled out as a factor in this judgment you are taking us to.

MR PATTON: Yes. In this context it is a few large contests because there are few broadcasters. There are only three broadcasters at this point in time. The contests are large in the sense that the OSA is -- the supplier is competing to acquire effectively all or substantially all of the supply of gowns at that university, so it is

lumpy in that sense. I think that was the point Dr Niels made when he went through the *Klemperer* article.

(d):

"The incumbent provider does not have a particular advantage over the other bidders when a contract comes to be re-tendered."

We say that is true here as well. Dr Niels accepted there was some element of incumbency advantage. It may be for example you already have some stock and you do not have to start completely from scratch but equally you have to renew your stock because there is a certain amount of loss. The incumbency advantages are not such that another supplier is prevented from having a genuine chance at taking over the contracts.

(e):

"No significant capacity constraints in the access services market because the ... equipment is readily available..."

Again, there is no suggestion in the B2B market of any capacity constraint. There are a number of suppliers who are able to supply a university.

(f):

"An established reputation and relationships with broadcasters are important pre-conditions to be able to

compete effectively..."

That is equally true in the OSA market. One sees that in the university's own feedback in tender situations where they emphasise the importance of reputation and experience when they are choosing an official supplier.

MR RIDYARD: Going back to the incumbency point, Dr Niels did acknowledge there was some incumbency.

MR PATTON: He did.

MR RIDYARD: One proxy measure of incumbency would be the rate of churn or the rate of switching observed in the market. I mean that is certainly alleged to be very low. What is your response to that as being an indicator that incumbency may be is quite high if churn is so low.

MR PATTON: I accept it is a factor you can take into account but the difficulty is that one does not know -- what we have in the evidence is a large amount of material from the universities where they say they are satisfied with the services that Ede & Ravenscroft is providing. We also I think saw the service where the student expressed satisfaction with the service they were getting. So the issues do see relatively low rates of churn as simply reflective that the incumbent is doing a very good job as opposed to it being evidence of

something else, evidence of market power.

What is the evidence that Ede & Ravenscroft's sides is preventing universities from selecting a new official supplier? We submit there is not evidence of that kind. There is nothing to suggest that the fact that Ede & Ravenscroft has 80 or 85%, or whatever it is, of the UK universities that does not make it any more difficult for one university to choose someone else next time around.

Then just concluding this part of the judgment at paragraph 69 on page 23 of the bundle {AUTH1/83/23} the conclusion of the tribunal:

"Much of this factual background was accepted by *IMS* although they disputed some aspects of it such as the significance of switching costs or the likelihood of broadcasters sponsoring market entry. However, we do not consider that the facts as found by OFCOM suggest that BBCB is able to behave, to an appreciable extent, independently of its competitors, its customers and ultimately of its consumers with the meaning of the *Hoffman-La Roche* test."

Although obviously you have to make up your mind about dominance by reference to the evidence in this case, we do suggest that there are striking similarities with the approach adopted in the *IMS* case.

It is true that this was a case where the main broadcasters tendered which was a point that Mr Randolph made this morning but, as I pointed out, the feature on which the tribunal, as opposed to OFCOM, focused was that these were winner takes all contracts and that is so here in relation to the OSAs. It is not the particular procurement model that the tribunal focuses on in its analysis.

THE CHAIRMAN: Just picking up on Mr Ridyard's point and your closing skeleton at 34 and 35. At 34 you comment that the tribunal held in *IMS* where the market is characterised by the award of a limited number of high-value contracts. In 35 you said the case is the same here where there is an award of a large number of high-value contracts. That is not the same, is it, by definition?

MR PATTON: No, I accept, I apologise if the skeleton is inaccurate. I am just trying to -- yes, the award of a large number. I accept there is a large number of high value. Here it is simply because there is a large number of universities that there are --

THE CHAIRMAN: I know why there were contracts but that feature that you pick out in *IMS* as being of particular importance just is not present in this case then.

MR PATTON: But what is present -- the feature that I really

say is the same as in *IMS* is that the university decides to appoint an official supplier. It does so either by a tender process or by an RFP or by bi-lateral negotiations and once it has chosen its official supplier the official supplier then has the whole of the university's business under that OSA. That is the feature which we say is common to both cases and which means that looking at market share is not informative in the way that it might be in a normal case as an indicator of dominance because --

MR LOMAS: I think you said in response to a question to Mr Ridyard that is ex hypothesi true on a university specific market.

MR PATTON: Yes.

MR LOMAS: And by definition not true on a UK wide market.

MR PATTON: That is true. That feature is not true. If you look at the UK wide market then every single contract may represent only a small proportion of the UK wide --

MR LOMAS: Precisely, so the parallel with the *IMS* case does not apply.

MR PATTON: That is true. The parallel does not apply. The point that Dr Niels made, why does the fact that you have quite a few contracts, contracts with a large number of universities, why does that give you market power when the way in which the industry works is that

the next university -- suppose you have got 99 out of 100 contracts and then the next university, the 100th university holds a tender for its OSA, why does the fact that you have got the 99 OSAs make any difference as to whether you get the 100th OSA.

If it is as extreme as that, it may be because there is no one else with the experience but if one changes it to 80 to 85 with a number of other suppliers who also hold OSAs, so also have adequate experience, it does not give you market power in relation to the award of the next OSA. That is why it is not informative to simply look at how many OSAs you have overall. Because each OSA is merely to supply the academic dress at that particular university.

The point that Dr Niels makes is still a good point. It may not be the precise parallel with the *IMS* case but the question is, why does a large market share actually indicate market power in a situation where each university has its own OSA and where the supply of regalia under that OSA is specific to that university?

MR LOMAS: Is that not true in any market where you have somebody with a 75% market share, the marginal contract can be competed for?

MR PATTON: The distinguishing feature is that the products here are university specific, so the regalia is for

a particular university and that is not going to be true in most instances. If you have widgets, for example it is not specific to a particular --

MR LOMAS: It is a standard which is being competed on a margin rather than a buyer specific widget.

MR PATTON: Exactly. You may say that takes you back to the question of whether the market is university specific because the reason we say that at least the product market is to be regarded as university specific is because the regalia is designed for that university and Dr Niels' analysis is that there is very low level of interchangeability with other universities but even if that does not lead you to see the market as being university specific, it is still a feature of the way in which this industry works.

MR RIDYARD: When we pressed Dr Niels on this, when we said, what about a point at which the contracts were being awarded, I mean, he was certainly less clear that the markets were university specific then because I think he thought that any kind of ex ante example where a particular university is about to put its requirements out to tender or to have it contested in some other way then because it would be a five year exclusive contract, then it would be equally possible for any bidder to meet the requirements of that without much trouble.

So from that point of view in an ex ante situation which is where competition actually happens there is not really -- obviously some are red and some are blue but there is not really an important difference between the universities at that point because anyone who is in the business of providing academic dress hire can get hold of the red or the blue hoods that are necessary to meet the requirements.

So from that point of view there does not seem to be a necessarily important distinction between one university's requirements and another in that ex ante stage in the B2B market.

MR PATTON: Yes, I accept that. I think that point was being raised with them specifically in relation to whether this was to do with the product of the geographic market and he accepted that suppliers anywhere in the country would be able to supply any particular university.

MR RIDYARD: The geographic market point I think is very simple and that is it. But this is about the product market to my mind anyway.

MR PATTON: Yes. I think what Dr Niels was also saying was that market definition is not an end in itself. It is about something which is informative and helpful in terms of understanding the other issues in the case and

the reason why he felt it was important to -- one of the reasons for looking at it as a market which is specific to each university is because that brings the focus on the fact that in relation to that university the suppliers compete for effectively the whole of the university's business. In other words, to become the official supplier and what that reveals is that the fact that you have got university A, B and C does not tell you anything about whether you are going to become the official supplier at university D and that is revealing as to whether you have market power in any meaningful sense.

It also is revealing because when the university next looks to appoint its official supplier everything may change. You lose that university. You lose the supply of that university. Suddenly your market share is different and therefore, it is more informative to approach questions of market definition in that way because it puts the focus really on that feature of the way the industry works.

THE CHAIRMAN: It might help me just to understand the comparison. I take that point and say university -- there is an element of university specificity because the hoods in particular need to be made for each university and that does not give you an advantage

having 85 in looking for the 86th.

Let us say there are 100 factories there the country which require widgets and those are generic and you already have contracts to supply all the widget needs of 85 factories. There one is taking away the particular fact you are relying upon here. What is the difference? Why does having 85 give you an advantage with the 86th there?

MR PATTON: The difference may be, for example, your shear scale means that you can negotiate much better rates with the wholesalers or with the retailers, that you can get exclusivity at that stage of the supply chain. I mean, the scale then -- because you are supplying a generic product and you may be supplying that across the whole of the country, you have the power that scale brings in terms of your negotiating power, for example. The point that we make is that that is just not the case because the only person you need to convince is the next university which is appointing a new official supplier and scale does not help now. It may be a factor but it does not give you the power to say to that university, you really have no choice but to take us. That would not be true. The university is free to choose any of the other suppliers and they are all perfectly capable of doing what is required.

THE CHAIRMAN: So you have got an unfair advantage on competing on price if you have got large scale. Is there anything else?

MR PATTON: It may not be price alone. It may be Band v Birr(?), one of the well-known cases. You have such a scale that you supply the shops with the freezer for the ice creams when you say you can only have our ice creams in those freezers and because you are the big supplier of ice cream the shops will say, fine, we will do that. But that means that the other suppliers of ice cream do not get stocked or do not get stocked in such a prominent position in the shops.

Simply because, as the case law says, you are the unavoidable trading partner you have a lot of leverage with all sorts of market connectors, whereas we say if you ask the question -- it is an expression used in *Hoffman-La Roche* -- is Ede & Ravenscroft an unavoidable trading partner for a university, we say plainly not. The fact that it that has convinced 85% of the universities to appoint it does not change that.

MR RIDYARD: If I was a university I could certainly have a bit more comfort that E&R is capable of providing my university with gowns given that it has done it in many other cases over many years, whereas if the alternative is a new supplier or a niche supplier then I might have

a few more qualms about its ability to step up.

MR PATTON: That is true of the comparisons with the Ede & Ravenscroft and the new supplier but the evidence is there are a number of established new suppliers. So if the only choice were between Ede & Ravenscroft and, say, Churchill who have just arrived on the scene and have never done then E&R might be an unavoidable trading partner. But here we have Wippells, Marston, graduation gowning there are a number of alternatives and, as Dr Niels said, the question is, can the university hold over the head of Ede & Ravenscroft, well, if you do not give us the deal we want we will go somewhere else, and the evidence is plainly the university has that ability. Then whether it chooses to exercise that will be a matter for its commercial judgment and it is entitled to say -- the university is entitled to take account that Ede & Ravenscroft is good at what it does but that in itself is not evidence of dominance.

The point that the claimants make in relation to our reliance on the bidding market concept is that there is not a tender in the majority of cases in this industry and we accept that. The evidence is not controversial that there is tendering in about 25% of cases and then there are RFPs in another 20% of cases, so about 45% were there is something that on any view would be

regarded as a competitive approach.

There is limited evidence about how the universities go about procuring their official supplier in other cases. There is evidence from Ms Middleton that they are likely to test the market at any time but Ede & Ravenscroft may not necessarily have any insight into that.

That is certainly a point for you to weigh in the balance in relation to how useful you find the bidding market concept. But our answer to that is that Dr Niels has looked at or his evidence was that you do not find a material difference in outcomes if you compare the situation where the official supplier has been appointed as a result of a tender as distinct from one where the official supplier has been appointed by some other process.

If the claimants accept that a tender is certainly a proper competitive process for appointment, if you find that there is no material difference in outcomes in other situations then there is no reason to think that they are any less competitive. That is really our submission on that.

That point is supported by the note that we put in with the written closings from Dr Niels which you have at {E6/31}. This was really a note in answer to the

analysis that Dr Maher produced during the trial and after the trial suggesting that there was a notable distinction between the margins and the level of commission depending on the type of procurement process that was adopted.

If you look at page 3 of this document, {E6/31/3}, of Dr Niels' note and if we can just show the table in the middle of the page, please, you can see the outcome of Dr Niels' analysis of the figures where there is no material difference between margins, regardless of whether it is a tender or a non-tender approach to procurement. So we would suggest that that does support the contention that the method of procurement is equally competitive whether it is a tender or not.

Can I deal in this context with the points that Mr Randolph made this morning by reference to the additional note that he handed up. He sought to suggest that the evidence revealed extremely high margins on the part of the defendants and that this was a clear indication of dominance.

There are a number of points I just want to make in response to that. The main point he makes or a critical point that he seeks to make is to suggest that you should ignore the net profit margin figures and he suggests that you should do that on the basis that they

take into account tax and therefore are not useful for that reason. He suggests they might be manipulated to take into account tax.

It is important that you should know that that is wrong. As you would expect, the net profit figures are before tax, and I can make that point good just by showing you the management accounts which are at {F4/557}. If you could go to the worksheet that is just to the left of the one that is open which is E&R summary P&L. Thank you very much.

If you could find cell L57. And you can see that that is the figure for NPM so for net profit margin. If you just look at the formula it is L43 over L13 and if we scroll up L43 is EBIT, earnings before interest and tax, and L13, if we scroll up, is revenue. So it is EBIT over revenue. That is what the net margin figures are. So they are not post tax figures as was suggested. That is really the most important point.

Now, so far as the gross profit margin figures are concerned which are also sought to be emphasised you recall if we could go back, please, to Dr Niels' note at {E6/31/2} and it is paragraph 2.2 at the top of the page. He makes the point that the gross margin figures in the spreadsheet that Mr Ridyard asked the experts to look at records:

"... only a small subset of the total costs that the official supplier incurs to provide its services to the institution. A number of sizeable cost items are not included in the spreadsheet, including capital depreciation of the stock of gowns, labour and personnel costs, IT costs and customer service costs. Therefore, the margins figures ... provide an incomplete picture of individual contract profitability."

We would suggest given that those very important heads of costs are not taken into account in the gross profit margin figures that they do not really tell you anything informative.

I think Mr Randolph has dealt with my next point, which was that Mr Ridyard asked about the claimants' margin figure. If you look at that, it is at {B/1/32}. This is the claim form, and if you have got (iv) at the top of the page, they say:

"The Claimants' costs of sales and operating costs would be greater as a percentage of revenues in the first years of operation ... but as at the date of the Claim Form ..."

So that is 2020, I think ... yes, the original claim form:

"... their profit margins would be 39%."

Given that that is a profit margin that is relied on

for the damages figure, that must be a net profit margin figure rather than a gross profit margin figure. So that gives you something to compare to the very small figures that you saw in the Ede & Ravenscroft table.

But in any event, as Mr Ridyard effectively put to my learned friend this morning, if one goes back to Dr Niels' note at {E6/31/5}, at the foot of the page, 4.5, Dr Niels makes the point that:

"... for a margins analysis to provide meaningful insight on whether there was excessive profitability, one would need to identify appropriate comparators and choose the correct margins figure for such a comparison ..."

Then you see what he says in the rest of that paragraph.

We respectfully submit that Dr Niels is right about that. You cannot simply take absolute figures and say, well look at those. Those are jolly big figures. That is not a way of establishing that margins are made at a level that would be consistent with a finding of dominance.

Dr Maher never sought to carry out the kind of analysis that Dr Niels indicates would be necessary, ie to identify comparator figures and to show that the level of margin being earned by the defendants was

excessive compared to that. That exercise was not done by her. It was not done by Dr Niels, who did not think it was possible on the materials he had, and therefore there is no evidence before you in relation to margins that we say would support a finding of dominance.

MR RIDYARD: It depends which way you look at that, does it not? You could take the view that someone with a 75% market share has got -- you know, it is a rebuttable presumption of dominance and therefore the onus is on E&R to present the analysis of profitability that would discount that hypothesis, but I take your point.

MR PATTON: That takes one back to our points about the bidding markets.

Of course, that is not the -- that is not the only point that we make in relation to dominance, and I would invite the tribunal just to bear in mind if you have our closing at page 17 {A2/4/17}, that we make a number of headings in relation to competitive constraints and buyer power as further reasons why the defendants are not dominant. Paragraph 40 is a point I have made already that there are multiple suppliers who can and do compete for entry into OSAs. Paragraph 41 is that the defendants' prices are in line with the prices charged by its competitors. So it is not a case where it can be said that the defendants' market power enables it to

charge a higher price than the competitors in the B2B market, and that was common ground effectively between the experts.

MR RIDYARD: On that point, I mean, is the -- we are talking about the price that is charged to the graduand --

MR PATTON: Yes.

MR RIDYARD: The £45 or whatever it is. But that is -- I mean, is that really the price that is being charged? That is the price that is being charged to the consumer. I get that. But there is quite a lot of other factors, other parameters that go into the mix of the deal that the academic dress supplier makes with the university when competing for and winning OSAs. So is it right just to focus on this one element of the deal and really to understand how competitive -- you know, what profit that deal generates, you would really want to put all the elements together in one place, would you not?

MR PATTON: Well, I mean, what the OSA creates is a further cost for the defendants. I mean, the OSA certainly does not create any further revenue for the defendants.

MR RIDYARD: True.

MR PATTON: The only revenue is the revenue received from the student, and so the point we certainly can make is that in terms of revenue earning the price that we charge the students is in line with the price that

everyone else charges the students. What the OSA may tell you is, do we incur more costs than the other students? That would have the effect of -- or less costs.

MR RIDYARD: Less costs really.

MR PATTON: If there were more costs, then that would go to reduce our margins and therefore would not be a point in favour of dominance.

MR RIDYARD: Obviously I was thinking of the other way round, because maybe a smaller supplier might need to offer more in terms of prize money to graduate prizes or more to sort of soften the disadvantage of not being the number one player in the market.

MR PATTON: Yes.

MR RIDYARD: All I am saying is the only way to test that would be to look at the deal in the round rather than just element of the deal.

MR PATTON: That is true. But also, in order to do that, one would need to have quite a lot of confidential information about what the other suppliers do and you do not have that.

MR RIDYARD: No, no, I accept that.

MR PATTON: Yes. There is a point I will come back to in relation to that in a moment which is the position in which the tribunal finds itself where it might have

found it extremely interesting to know what other suppliers in the market do, but where they are not party to the proceedings, or indeed what the universities do and they are not party to the proceedings and so you have to make up your mind on the basis of the evidence that you have got as between the parties who are in the proceedings.

In 42, we make the point that no one is suggesting that the defendants charge supra competitive prices but there is no evidence to that effect.

Mr Randolph said this morning that what is being alleged is an exclusionary abuse not an exploitative abuse and so price is not relevant. That is true in relation to abuse, but in relation to the question of dominance, you might expect that if it is being sought to prove that we are dominant that it would be said, well, you are charging much more than a competitive price and that is an indication of the market power you have. That is not alleged. That is not an analysis that has been made.

At 43, we make the point that our prices have actually decreased over the claim period and we would suggest that is a powerful factor in suggesting that we are not dominant. Now, Mr Ridyard is going to say, well, that may depend on what has happened to costs in

that period, and we would suggest that Dr Niels having made this point in his first report that there had been a decline in the price being charged, if Dr Maher had felt able to say, well, actually the costs have decreased and that is the explanation, you would have expected her to put that point forward in her reply report, and that has not been done. That is not a point that has ever been made, that there is no evidence that there has been a trend in reducing costs.

MR RIDYARD: There are many points one could make of that. One of the other points that I might make would be, or questions I might ask would be, if you found that a dominant firm's pricing had declined by 10% over time, that does not really tell you anything about the levels because it might have declined from £100 to £90 but the competitive price level could be £15. So the fact of the decline in price might mean it is a bit less, had a bit less market power than it had five years ago, but it would not mean to say it did not have substantial market power. I am just not sure what you can conclude one way or the other on the basis of price levels.

MR PATTON: Yes, I certainly accept that as a point of theory. One of the points I put to Dr Maher was that if you take off the commission, which is a cost that the defendants incur, then our price -- if you just take

just the commission and you ignore all the other services that we provide and the costs that that would involve, take off the commission, our price is then lower than the claimants' price. Does that not suggest that our price is a competitive price because all you are adding back on is a commission that we have to pay and they do not have to pay?

Her answer to that, as you will recall, was, well, she was not saying that the claimants' price was competitive. I can see that is an answer she is able to give; she had not done that analysis. But it would have been slightly surprising if the claimants themselves are saying that their price is non-competitive. I mean, that would be --

MR LOMAS: Is it? If there is an artificially high price in the market and you have a new entrant, why would they not price as high as they thought they could consistent with their strategy? They do not have to price it at a competitive price if they have got headroom to go higher.

MR PATTON: I accept that is possible. It would not be the most attractive position for a claimant in competition proceedings to take the position that their price is not competitive, but --

MR LOMAS: Well, not the market clearing, perfect

competition competitive price, but it is competitive given the pricing structure that is in the market.

MR PATTON: I accept that. I cannot disagree with that. So the position is that no one has analysed whether the claimants' price is a competitive price, but what one can say is that the defendants' price is lower than that if you take the commission off. That is as far as one can go. But I accept that no one has -- there is no analysis on either side as to what a pure competitive price would be, so you do not have that information. You have the information that we have identified here, which is the decline in price and the fact that we charge in line with the other suppliers, who at least compete ex ante for OSAs with price being an important factor taken into account by the universities. Ultimately, we would say, if you think it would have been useful to have that further analysis about what is a competitive price, then we rely on the burden of proof and we say the burden is on the claimants to prove dominance. If you do not have that, if that is an important part of the evidence that is not there, then they have failed to discharge their burden of proof.

That may be a sensible point at which just to show you the authority that I had in mind, which is in {AUTH1/2/98}. This is really an authority on

the importance, or the potential importance of the burden of proof in a standalone competition case like this one. If we could scroll down to paragraph 156. This is the *Agents Mutual Limited* case and it is a decision of the tribunal. Like this case, it was a standalone case where there was no regulatory finding of infringement and so the tribunal were having to start fresh, and it is a case about arrangements in the real estate agents industry.

If you could just read paragraph 156. (Pause).

Then when you are ready, if we could turn over the page, please {AUTH1/2/99}. In 157, you see they make the point that the person running the competition case:

"... makes allegations regarding the market relations between the a large number of estate agents, who are not party to these proceedings, and whose documents have not therefore been disclosed. Equally, [they] ... make allegations as to how Zoopla -- [another estate agent] -- has been adversely affected ..."

Zoopla had provided limited voluntary disclosure and one of the others had provided none. Then if you could just read 158. (Pause).

So that is all fact specific effectively as to who had and had not given disclosure or witness evidence. Then, if we could turn over the page {AUTH1/2/100}, 159

and 160. (Pause).

There are some parallels with this case where there are issues about, as the exchanges with Mr Ridyard make clear, what is the position of the other suppliers who are not party to these proceedings? Obviously, you have only some limited evidence about the universities, either such evidence as our witnesses have been able to give or what the universities have said in public statements or in the communications with us which we have been able to disclose or indeed communications with the claimants.

The point we make is that as the tribunal said in the *Agents Mutual* case, if that means that there are lacuna in the evidence, we would suggest that the right approach, as in that case, where you do not have a regulatory position making findings, is to pay attention to the burden of proof. In relation to dominance and also obviously abuse, plainly, the burden of proof is on the claimants. So if there are gaps in the evidence then that is something that may result in the claim failing for that reason.

I was about to move to a new topic so it may be that that is a convenient moment.

THE CHAIRMAN: Yes. We will break until 10.30 tomorrow.

(4.26 pm)

(The hearing adjourned until Thursday, 14 April at 10.30 am)

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