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IN THE COMPETITION
APPEAL
TRIBUNAL

Case No: 1351/5/7/20

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Monday 24 January – Wednesday 2 February 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

-v-

Ede & Ravenscroft Limited and Others

A P P E A R A N C E S

Fergus Randolph QC & Derek Spitz (On behalf of Churchill Gowns Limited and Student Gowns Limited)

Conall Patton QC & Michael Armitage (On behalf of Ede & Ravenscroft Limited and Others)

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Monday, 31 January 2022

(10.30 am)

Housekeeping

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

Just a couple of housekeeping points, one more important than the other.

The first one is in relation to closings. Neither Mr Patton nor I wanted to finish this week without getting some kind of clarity on the tribunal's indication insofar as written, both insofar as content and timing is concerned. I think that is up in the air. So I just raise that. Obviously we are in your hands, sir.

THE CHAIRMAN: Yes.

MR RANDOLPH: Now we have a date for the oral closings, which is quite a long way away, it does not mean that we should fill that gap by not doing anything.

THE CHAIRMAN: I can deal with that straight away; we have been discussing that. It appears to us that although I had floated the idea of separate written closings on legal issues or factual issues, as things have developed, I think that is probably not a good idea. There is such intertwining of matters. Therefore, we think that you should provide your written closings in the normal way, as if we were going to have a hearing

1 fairly soon --

2 MR RANDOLPH: Yes.

3 THE CHAIRMAN: -- on all issues.

4 MR RANDOLPH: Yes.

5 THE CHAIRMAN: We think sequential closings remain sensible.

6 There is time for that.

7 MR RANDOLPH: Yes.

8 THE CHAIRMAN: Claimants to go first, followed by
9 defendants.

10 MR RANDOLPH: Yes.

11 THE CHAIRMAN: That should happen nearer to this hearing
12 than to the next hearing; and we were thinking something
13 like a week for yours and a week thereafter for
14 Mr Patton's, but to be discussed between you.

15 MR RANDOLPH: Very grateful. Thank you very much for that
16 indication.

17 THE CHAIRMAN: That would give us a long time thereafter
18 before the hearing. But that is, I am afraid, just
19 because we could not be -- (overspeaking) --

20 MR RANDOLPH: No, no, totally understand that, sir; and
21 I will discuss that with Mr Patton. There may be some
22 issues with regard to availability -- timing
23 availability, and that may slide. But obviously we hear
24 what you say, both of us hear what you say, in terms of
25 not delaying. Rather like the Court of Appeal: if you

1 are renewing permission, it has to be done quickly,
2 because it is in here.

3 THE CHAIRMAN: Well, it will be easier for you --

4 MR RANDOLPH: That is the point.

5 THE CHAIRMAN: We will no doubt have some comments/requests
6 to make as to things we will like you to focus on, and
7 we will do that before we finish this week.

8 Submissions re disclosure by MR RANDOLPH

9 MR RANDOLPH: Very grateful.

10 Sir, the second point relates to disclosure, and
11 specifically disclosure arising out of
12 the cross-examination of Ms Middleton and the tribunal's
13 questions of her in relation to the Arts University of
14 Bournemouth. What I have done is I have printed out
15 the relevant correspondence that has been disclosed.
16 The reasons I have done that is because it is not on
17 the Opus system, and the manner in which it was redacted
18 made it rather difficult because you had to flip between
19 confidential and non-confidential. So what I did was
20 have a happy half hour colouring in last night. Those
21 are the documents; I wonder if they could be handed up
22 for the tribunal.

23 (Handed).

24 The first letter is dated 28 January, and that is
25 the day after the discussion between Ms Middleton and

1 the bench took place. We just need to go to (ii),
2 "Follow up by Mr Doubleday and the Arts University
3 Bournemouth after receipt of the email", which is
4 exhibit EM2:

5 "Your request does not fall within the categories.
6 But as the chairman asked yesterday a question about
7 follow up we enclose for completeness letters dated
8 18 and 23 June from this firm to the AUB, which predates
9 the response from Mr Doubleday at exhibit EM2. There
10 were no further communications after this. We have
11 checked. We do not have a note of the conversation to
12 which the letter dated 23 June refers. We are also
13 disclosing, for completeness, a chaser email." [As
14 read]

15 So the first of those letters is the 18th, which is
16 over the page. I have marked in blue that which is
17 confidential. On that letter there are only two things:
18 the name of the individual twice, both in the address
19 and the greeting. So:

20 "Dear [X],

21 "My firm ..."

22 This is Alius Law, and the author is Bree Taylor,
23 who is the partner in charge:

24 "My firm acts for Ede & Ravenscroft, which has an
25 official robemaker and supplier contract with your

1 institution. E&R is concerned and little perplexed to
2 receive emails from someone who says he is a student at
3 AUCB. As you can see, the first email says I was
4 supposed to graduate this month but cannot attend it
5 without hiring a gown specifically from
6 Ede & Ravenscroft. Our client obviously does not know
7 what AUCB has told the student or any student, but we
8 wish to point out that nothing in the agreement between
9 E&R and AUCB binds students or requires any student of
10 AUCB to hire his/her academic dress from E&R.

11 The appointment is a sole appointment only in that
12 AUCB has agreed to name E&R and not any other supplier
13 as its robemaker and official supplier for the term of
14 the contract. We wish to draw your attention that if
15 AUCB were giving instructions to students of the sort
16 claimed, that may well be unlawful. AUCB would need to
17 take its own legal advice on it." [As read]

18 So that is 18 June.

19 It is said to be 23 June in the covering letter of
20 18 January, but actually it is dated 24 June. I have
21 assumed that it is the same but would like clarification
22 of this. This has been more firmly redacted. So we
23 have the name of the individual and the greeting, and
24 the clauses, 1.1, 2.1 and 2.2 are redacted. So this is
25 to this individual:

1 "Thank you very much for taking the time to talk to
2 me yesterday."

3 That was on the 23rd, according to this letter:

4 "As promised, I am setting out the key provisions of
5 the official supplier agreement to clear up any
6 confusion about what it means as a matter of legal
7 interpretation. The agreement recites that the company,
8 E&R, wishes to provide academic dress to graduates and
9 their families at the college's academic award
10 ceremonies and the college is prepared to agree to do so
11 under the terms of the agreement." [As read]

12 It sets out the terms, and you can see them there.
13 They are familiar to the tribunal.

14 Then, over the page:

15 "In summary, the college has appointed the company
16 and only the company as its official robemaker and
17 supplier of academic dress for the purposes of
18 the ceremonies. The college is not, therefore, free to
19 appoint any other company to that position. The college
20 has agreed to allow the company the sole right to
21 provide the services. This means the college is not
22 free to take any positive steps to allow any other
23 entities to provide the services, such as by undertaking
24 the act specified in clause 2.2 of the agreement for
25 the benefit of other providers of academic dress.

1 The agreement is exclusive as between the company and
2 college. However, the agreement does not bind graduates
3 and does not therefore seek to prohibit or prevent
4 graduates from hiring academic dress from their supplier
5 of choice. Nor does the agreement oblige the college to
6 prohibit or prevent graduates from hiring their
7 academic dress from other providers. The college's only
8 obligation in relation to promoting the company is to
9 distribute its leaflets." [As read]

10 Then the next paragraph:

11 "You say in your letter ..."

12 I will come to that in a moment:

13 "... that successive account managers at the company
14 [E&R] have described the agreement as exclusive, and you
15 raise a concern as to whether you have been provided
16 with inaccurate information. We are unable to comment
17 on what you say in the absence of any supporting
18 details, but we should make it clear that the company
19 does not accept that any inaccurate information would
20 have been provided. The agreement does refer to a sole
21 right, but this is a sole right for the company to be
22 the college's official supplier." [As read]

23 So there we have the clear admission that
24 the agreement is exclusive and the sole provider of
25 services. That is fine.

1 Now, that was all we got on 28 January, further to
2 the direction from the tribunal that communications be
3 disclosed. Then yesterday, late afternoon, we got
4 a letter, which is the next letter in the tab,
5 30 January:

6 "Further to the disclosure of letters from this firm
7 to AUCB under cover of our letter dated the 28th, we
8 ought also to have disclosed the letter dated 2 June
9 which is part of this exchange and which we enclose with
10 this letter. We apologise for this oversight." [As
11 read]

12 Going over the page, the only piece that is redacted
13 on this letter is the mobile telephone of the individual
14 in question, and his name and signature. So this is
15 22 June. So in the middle of the correspondence that we
16 looked at before:

17 "I am responding to your letter of the 18th (sent by
18 email). AUB makes the following observations.

19 "Successive account managers at Ede & Ravenscroft
20 have been very clear to colleagues at AUB that
21 the contract between the two organisations is exclusive.
22 Your letter implies that this is not the case. We are
23 concerned that we may have been provided with inaccurate
24 information over a number of years and ask that you
25 clarify in writing whether the contract is exclusive or

1 whether graduands are entitled to engage with
2 the supplier of their choice." [As read]

3 We now what the answer to that is.

4 Then:

5 "Secondly, you will be aware that under the Freedom
6 of Information Act 2000, contracts which the University
7 holds with commercial organisations will normally be
8 disclosable on request. The inclusion of a clause which
9 states that a contract falls outside the scope of
10 the FIA holds no legal force. The only grounds for
11 non-disclosure would be that its contents held
12 privileged information, and this is an exemption which
13 can only be used in exceptional circumstances. It is
14 not our judgment that this threshold was reached. In
15 common with other HEIs ..." [As read]

16 That is higher educational institutes or
17 institutions:

18 "... we have previously disclosed this contract when
19 we were required to do so, and informed
20 Ede & Ravenscroft of this. In this case, I understand
21 the contract has in fact not been shared to the best of
22 our understanding." [As read]

23 Then it continues:

24 "We believe that one email between Mr Doubleday and
25 the university has been shared as part of the subject

1 access request. We do not believe that this email
2 contained any sensitive information." [As read]

3 Now, it seems to us, sir, that two points arise out
4 of that. The first is the reference to communications
5 from, or rather between, the AUB and successive account
6 managers at Ede & Ravenscroft, who, in the words of
7 the author of this letter, have been -- and I quote:

8 "... very clear to colleagues at AUB that
9 the contract between the two organisations is
10 exclusive."

11 We have seen no such communications. I am not going
12 to go round this particular block again, but the issue
13 of exclusivity is key. That is why a lot of time was
14 spent on cross-examination. That is why, in part,
15 the tribunal ordered the disclosure of the templates,
16 which were disclosed just after 10 o'clock this morning,
17 and we say there is no doubt but that any such
18 communications should be disclosed, and we ask for that
19 to be done as soon as possible.

20 Because there have been difficulties with
21 disclosure -- and I use the word "difficulties" in its
22 loosest sense -- we would seek that the disclosure is
23 backed by an affidavit. Now, the tribunal will
24 obviously know that solicitors not only act on behalf of
25 their clients but they are officers of the court; and

1 where there are issues in relation to disclosure and
2 whether that disclosure has been correctly operated,
3 often it is the case that the solicitors will be
4 required to produce an affidavit, which obviously is
5 different from a witness statement in that regard. So
6 we would ask for all such communications to be disclosed
7 within 24 hours. The reason, obviously, for the short
8 period of time is that we are running out of time in
9 terms of the trial in terms of live evidence.

10 It is not thought -- I am certainly not hoping --
11 that we would seek for any witnesses to be recalled. It
12 will essentially be a matter for submission. But we do
13 need, we would submit, with respect, to seek these
14 communications, because if that is right, it would
15 appear that Ede & Ravenscroft is saying one thing to
16 institutions and another thing in its defence, where, as
17 you will recall, sir, and I said in my openings, they
18 mark their disapproval of the use of the
19 word "exclusivity", they call it tendentious, saying it
20 is not exclusive. No mention was made in Ms Middleton's
21 evidence of the word "exclusive"; "exclusivity" was used
22 once, and that was in connection with a phrase that we
23 had used.

24 So the evidence given by Ms Middleton is at odds
25 with what is set out here in terms of what apparently

1 successive account managers have said to institutions
2 over the years. So that is why we would seek to have
3 those communications disclosed.

4 I just make a belt and braces point, which is that
5 Ms Taylor, the partner at the defendants' solicitors,
6 has signed off at the end of Ms Middleton's witness
7 statement a requisite certificate of conformity in line
8 with the relevant practice direction, practice direction
9 57AC, and paragraph 2.2 of that practice direction makes
10 the important point -- well known point but important
11 nonetheless -- that:

12 "The use of witness statements promotes
13 the overriding objective by inter alia helping to put
14 the parties on an equal footing."

15 For your note, or the transcript, that is the White
16 Book 2021, page 2188.

17 Ms Taylor must have shown, we submit, the letter
18 from AUB, this last letter of 22 June, to her clients
19 before responding on their behalf two days' later; or,
20 if she did not, there is a problem there. Yet, that
21 correspondence chain, disclosed late and mid-trial,
22 simply was not referred to in Ms Middleton's witness
23 statement. Thereby, I have to say, giving an incomplete
24 and not clear and potentially misleading picture both to
25 the claimants, but much more importantly to you, members

1 of this tribunal.

2 So we are where we are on that, and we do request
3 that a direction is made in the terms that I have
4 suggested.

5 On the second point -- the second point relates to
6 redactions -- we are surprised, to say the least, that
7 AUB has taken the view that its agreement with E&R is
8 not confidential and is normally disclosable, and
9 actually has been disclosed. He says:

10 "In common with other [higher education institutes
11 or institutions] we have previously disclosed this
12 contract when required to do so."

13 We have faced a -- "minefield" is an inappropriate
14 word. We have faced managing this trial quite a lot of
15 difficulty in working through cross-examination, as you
16 will have seen, because of the manner in which
17 the defendants have sought to redact all or very
18 substantial parts of agreements, and it has taken
19 a great deal of time to get to the helpful extract of
20 contractual terms; but nonetheless the better option
21 would be to have the agreements in question. This
22 institution has clearly disclosed this agreement in
23 the past, and the author refers to other institutions
24 doing the same.

25 So, again, we would say that, in the light of that,

1 the appropriate position would be to order that
2 the official supplier agreements, to use the defendants'
3 terminology, that are listed in schedule 1 to
4 Ms Middleton's first witness statement, which are
5 the OSAs in force as at the time of the making of her
6 statement, which was in August 2021, should be
7 unredacted save insofar as concerns niche financial
8 commercial information that is sensitive to
9 Ede & Ravenscroft. In other words, for example,
10 commission rates rather than the fact that
11 the commissions were paid, and any particular payments
12 that were or were not going to be made.

13 So those are my submissions arising out of this
14 disclosure.

15 THE CHAIRMAN: Thank you.

16 Mr Patton?

17 MR PATTON: Sir, although I had a discussion with
18 Mr Randolph just before the tribunal came in about
19 the closings, he did not give me any notice that he was
20 intending to raise the question of disclosure. So would
21 it be permissible for me to take instructions over
22 the short adjournment and then address you at some
23 appropriate moment this afternoon?

24 THE CHAIRMAN: Yes, that is fair. So we will hear you at
25 2 o'clock on this.

1 MR PATTON: I am grateful.

2 MR RANDOLPH: Thank you, sir. So that deals with
3 the housekeeping, if you will. So we are in your hands,
4 but would you like Mr Patton and I sequentially to
5 identify the relevant expert evidence --

6 THE CHAIRMAN: As we discussed on Friday.

7 MR RANDOLPH: -- as we discussed on Friday?

8 THE CHAIRMAN: Yes.

9 I think they should both be sworn in first, should
10 they not?

11 MR RANDOLPH: They should.

12 THE CHAIRMAN: Yes, we will do that now.

13 MR RANDOLPH: Thank you.

14 DR GUNNAR NIELS (affirmed)

15 DR MARIA MAHER (affirmed)

16 THE CHAIRMAN: Yes, Mr Randolph.

17 Examination-in-chief by MR RANDOLPH

18 MR RANDOLPH: Thank you so much.

19 As previously, I am going to identify
20 the confidential versions?

21 THE CHAIRMAN: Yes.

22 MR RANDOLPH: Thank you.

23 Doctor, good morning. Do you have your first expert
24 report, confidential version, in front of you?

25 DR MAHER: Yes, I do.

1 MR RANDOLPH: You have that in hard copy, do you?

2 DR MAHER: Yes, I do.

3 MR RANDOLPH: For the EPE operator, it is at {E4/1/1}.

4 First of all, can you identify, is that your expert
5 report?

6 DR MAHER: Yes, it is.

7 MR RANDOLPH: Thank you.

8 Can you go to the end of your report, please
9 {E4/1/59}. Sorry, can you go not to the end of your
10 report, can you go four pages in, please, {E4/1/4}.
11 Next page, please {E4/1/5}.

12 Right, that is interesting. There does not appear
13 to be a signature on that page. I have a signature on
14 my hard copy. I cannot ask her to identify something
15 that is not there.

16 THE CHAIRMAN: Let us cut through this. You can ask her
17 whether it is her report, the usual question as to
18 whether it represents her evidence.

19 MR RANDOLPH: Yes.

20 Is this your report, Dr Maher?

21 DR MAHER: Yes, it is.

22 MR RANDOLPH: Does it represent your evidence?

23 DR MAHER: Yes, it does.

24 MR RANDOLPH: You have read the statement of truth?

25 DR MAHER: Yes, I have.

1 MR RANDOLPH: You confirm that is true?

2 DR MAHER: Yes, I do.

3 MR RANDOLPH: Are there any additions, amendments or
4 comments you would wish to make in relation to this
5 witness statement.

6 DR MAHER: No.

7 MR RANDOLPH: Good.

8 There are a number of appendices that are set out to
9 the annexes and appendices, yes?

10 DR MAHER: Yes.

11 MR RANDOLPH: I do not intend to take you to all of them,
12 but those are the annexes and appendices that you
13 personally or have had appended to your report?

14 DR MAHER: Yes, they are.

15 MR RANDOLPH: Thank you.

16 Could we then turn to your second, your reply
17 evidence, please. Do you have a hard copy of that?

18 DR MAHER: Yes, I do.

19 MR RANDOLPH: For the tribunal, there are two versions of
20 the reply expert evidence from Dr Maher, the claimants'
21 version and the defendants' version.

22 Dr Maher, could you explain the difference to
23 the tribunal.

24 DR MAHER: I am not sure what the question is. I mean,
25 I have my --

1 MR RANDOLPH: You have your version.

2 DR MAHER: I have my version.

3 MR RANDOLPH: Well, insofar as reference is made, certainly
4 from our side, it will be to what is called, on
5 the electronic system, the confidential reply expert
6 report, claimants' version, which is at {E4/7}.

7 Could that be brought up, please. Thank you so
8 much. Could we turn to internal page 4, which is
9 {E4/7/4}. Is that up?

10 DR MAHER: Yes.

11 MR RANDOLPH: Is that your signature?

12 DR MAHER: Yes, it is.

13 MR RANDOLPH: Is that your statement of truth?

14 DR MAHER: Yes, it is.

15 MR RANDOLPH: Do you confirm that that is correct?

16 DR MAHER: Yes.

17 MR RANDOLPH: Is this your report?

18 DR MAHER: Yes, it is.

19 MR RANDOLPH: Do you have any comments, amendments or other
20 matters you wish to bring to the notice of the tribunal
21 in relation to this reply expert report?

22 DR MAHER: No.

23 MR RANDOLPH: You do not?

24 DR MAHER: No.

25 MR RANDOLPH: Now, do you have anything else with you on

1 your desk?

2 DR MAHER: Yes, I have a hard copy of the joint expert
3 witness statement report; I have a hard copy of
4 Dr Niels' second report, but not a hard copy of his
5 first report; I have a hard copy of just the documents
6 and some of the bundle reference numbers to assist me;
7 and if the tribunal will allow me, I also have a hard
8 copy but of notes that I have made to myself in reply to
9 the questions that we have been asked by the tribunal to
10 prepare for this.

11 THE CHAIRMAN: There is no objection to that, Mr Patton?

12 MR PATTON: It is a little unusual, sir, for the witness to
13 have notes.

14 THE CHAIRMAN: It is unusual to have questions posed to them
15 in advance of the hearing, I would also say.

16 MR PATTON: It is a matter for you.

17 MR RANDOLPH: I am grateful, thank you.

18 Thank you, sir.

19 MR PATTON: I do not know, it probably does not matter, but
20 did you confirm the joint statement with ...?

21 MR RANDOLPH: Oh, I am so sorry, I did not. You are
22 absolutely right.

23 Could we go to the joint statement, please. You
24 have that in front of you in hard copy?

25 DR MAHER: Yes.

1 MR RANDOLPH: You should find that at {E7/1}. There is
2 a confidential and a non-confidential version. We are
3 going to go to the non-confidential version. That can
4 be found at {E7/1/1}. On the electronic version there
5 appear to be no signatures.

6 Can you confirm --

7 DR MAHER: There may be a last page with my signature.

8 MR RANDOLPH: Very good. Perfect, well done, thank you.
9 {E7/1/34}. Is that your signature?

10 DR MAHER: Yes, it is.

11 MR RANDOLPH: You have read the declaration?

12 DR MAHER: Yes, I have.

13 MR RANDOLPH: Is this the joint expert statement that you
14 contributed to?

15 DR MAHER: Yes, it is.

16 MR RANDOLPH: Those are the words that you set out therein
17 under your column?

18 DR MAHER: Yes.

19 MR RANDOLPH: Thank you very much indeed; and thank you to
20 my learned friend for raising the point.

21 Examination-in-chief by MR PATTON

22 MR PATTON: Good morning, Dr Niels.

23 I think you have a hard copy of your reports and
24 Dr Maher's reports with you; correct?

25 DR NIELS: Yes, except my second report, which I left at

1 home this morning.

2 MR PATTON: Would it be okay if we were to supply him with
3 a hard copy in due course?

4 Okay. Could you be shown {E6/1/1}. Is that
5 the first report that you prepared for the purpose of
6 these proceedings?

7 DR NIELS: Yes.

8 MR PATTON: Could you turn to {E6/1/124}, please. You see
9 the signature underneath the expert declaration. Is
10 that your signature?

11 DR NIELS: Yes.

12 MR PATTON: Could you be shown {E6/29}, please. Is that
13 the reply report that you have prepared for the purpose
14 of these proceedings?

15 DR NIELS: Yes.

16 MR PATTON: If you could turn to page 31 {E6/29/31}.
17 Underneath the expert declaration, is that your
18 signature?

19 DR NIELS: Yes.

20 MR PATTON: Then could you be shown {E7/1}, please. Did you
21 contribute your opinions to the joint expert statement
22 with Dr Maher?

23 DR NIELS: Yes.

24 MR PATTON: If you could turn to page 2, please {E7/1/2}.
25 On the right-hand side, is that your signature?

1 DR NIELS: Yes.

2 MR PATTON: Are the opinions that you express in your two
3 reports and in the part of the joint statement that sets
4 out your opinions, are they your true and complete
5 professional opinions on the matters that you address?

6 DR NIELS: Yes.

7 MR PATTON: Thank you very much.

8 THE CHAIRMAN: Thank you.

9 Now, as you know, Mr Ridyard will be leading, to
10 start with, certainly the questioning of both experts.

11 Can I just remind counsel that of course, despite
12 the fact that it is the panel that will be controlling
13 the process, as it were, for the next day or so, if
14 there is an issue which you see coming or you are
15 concerned about, of course stand up and make
16 submissions. In particular, I am thinking if you think
17 we may be straying into confidential areas. You are
18 free, of course, to comment on that.

19 Questions from THE TRIBUNAL

20 MR RIDYARD: Good morning. As you know, we are planning to
21 cover the six topics which are the six topics in your
22 joint report. The plan is that I will initially address
23 questions to one or other of you and then give both of
24 you a chance to comment on each of the questions as we
25 go through those questions. I am sure that other

1 members of the panel will also contribute to
2 the discussion as it unfolds on the individual topics.

3 At the end of each of the six topics, counsel will
4 have an opportunity to ask questions of clarification
5 only, bearing in mind that counsel will have an
6 opportunity to cross-examine both of you later on in
7 the process.

8 Just briefly, the purpose of this concurrent
9 exercise is to help us to sort of synthesise
10 the economic issues as quickly and as efficiently as
11 possible. In the course of that, we may well ask, at
12 some point, some probing or some challenging questions.
13 This is just part of the process of us searching to get
14 to the bottom of the issues. So I am sure you won't
15 read anything into those questions in themselves; we are
16 just trying to get to, as quickly as possible,
17 understand the economics of the case.

18 So with that in mind, let us turn to the first
19 topic, which is the question of market definition.

20 My first question I would like to address initially
21 to Dr Maher.

22 I think you understand the distinction that has been
23 made between the B2B market and the B2C market. Those
24 are terms which we are going to be using quite a bit
25 this morning. I think my first question, Dr Maher, is:

1 in practice, do you agree that competition in this
2 market operates mainly at the B2B level, in other words
3 bidding for OSA contracts for individual universities
4 when we are talking about academic dress hire contracts?

5 DR MAHER: Yes.

6 MR RIDYARD: You agree. Thank you.

7 Dr Niels, do you have anything to add or comment on
8 that?

9 DR NIELS: No, I would also agree, but it is perhaps useful
10 to clarify some of the terminology used here.

11 I think there is the terminology "B2B"/"B2C", which
12 in my report I originally called more a provision of
13 full services and direct hire of dress. But that is to
14 be read as the same as "B2B" and "B2C"; so I am happy to
15 use that terminology.

16 But when it comes to market definition, I think
17 the markets, as we looked -- "we" as in Dr Maher and
18 myself, when we commented on market definition,
19 the questions we addressed was: is there a market for
20 graduation services, so all services? Or is there also
21 a market -- that was also actually the questions by
22 the tribunal originally: is there also a market for
23 the hire of academic dress, the academic gowns only?

24 So it is more a question of is it a bundle of
25 services as opposed to these services individually.

1 That is not fully the same as B2B/B2C, because B2B/B2C
2 are more the supply-side business models, if you like,
3 of the suppliers, that they apply to meet these
4 services.

5 So that is just a clarification. But I am happy to
6 go with the terminology "B2B"/"B2C".

7 MR RIDYARD: I think we will come to some of those points as
8 we go through.

9 The second question which I would like to address,
10 initially to Dr Niels, is: in principle, given that you
11 agree that the market currently in practice works mainly
12 in the B2B format, could this market operate on a B2C
13 basis; in other words, consumers choosing between
14 competing academic dress suppliers when we are talking
15 about the hiring of academic dress?

16 DR NIELS: Yes, I think that is an interesting question that
17 actually goes already I think beyond market definition.
18 It is the question I think that also Mr Lomas asked on
19 the opening when I was here, is: can this market be
20 organised differently? Can this market function
21 differently?

22 Now, I am sure we will come to more detail on that,
23 but just to answer the question: can this market
24 function differently? Can it be organised differently?
25 I think an economist always finds it interesting to look

1 at the market and answer that question: can it be
2 organised more efficiently?

3 I would say three things to that. I would say,
4 first of all, a good starting point is the way
5 the market is organised currently. You know, markets
6 tend to be quite good over time at finding the best
7 mechanisms to get the amount and supply to interact with
8 each other. So that is a good way of assessing
9 a market.

10 Secondly, if you really want to address this
11 question of could this market also function differently,
12 then you would have to look into the market and study it
13 in great depth. I would even say in more depth than has
14 been done in this case.

15 To give an example, you know, if the CMA were to do
16 a market investigation -- that is just a reference
17 point -- it does look at these markets in a lot of
18 detail; it also looks at the various parties. It would
19 look at a question like that -- could it function
20 B2C? -- in a lot of detail. It would have to analyse
21 the cost and benefits of all these potential
22 alternatives.

23 Thirdly, I would say, I have tried to assess this
24 market in as much detail as I could; and in my opinion,
25 based on the analysis I have presented in my reports,

1 the B2C business model is not one that meets the needs
2 of universities. There are a number of economic
3 mechanisms that would be missing if the market were B2C.

4 MR RIDYARD: Understood. But are you saying that you do not
5 know whether it could work B2C, or that it could work --
6 we understand that you think the B2B model is fine, and
7 maybe in your opinion better, but could it work as a B2C
8 market?

9 DR NIELS: You would need to overcome -- so it is
10 the flipside of the B2C. So the economic rationale of
11 the B2C model, which I have assessed and I am sure we
12 will come to in more detail, so the fact that there are
13 relationships per se -- (overspeaking) --

14 MR RIDYARD: Yes -- (overspeaking) --

15 DR NIELS: In a B2C setting, you would need to overcome
16 that. To me, it is not clear, having looked at
17 the evidence, how that would work.

18 To put it more in specific terms, in a B2C model,
19 when students hire the dress only directly, one still
20 has to organise the graduation ceremony, one still has
21 to do a lot around the annual event. One also has to
22 invest in stock and get to security of supply. So to
23 make sure that there is enough stock to supply all
24 students.

25 MR RIDYARD: Yes.

1 DR NIELS: In a B2C model, that is much less clear, how that
2 would work.

3 MR RIDYARD: Dr Maher?

4 DR MAHER: I am just going to make a couple of minor points,
5 because I think we will go into discussion in detail
6 later.

7 One, I think Dr Niels and I both have stated that
8 the B2C is a relevant market. So in answering your
9 question, yes, it is a market where it can function; it
10 is a relevant market in this case.

11 It is also the market in which the alleged
12 foreclosure has arisen. So focus is on that market to
13 see, you know, whether there might be competitive
14 constraints going on that might have arisen to
15 foreclosure in the market.

16 Lastly, I will just make the point that Dr Niels has
17 taken the approach to say that, you know, this is just
18 the way the market is organised. I do not think that
19 that is a sufficient answer to the question of whether
20 there has been anti-competitive conduct in this market.
21 You know, we can observe an outcome in a market. It
22 could also be the outcome that arises from
23 anti-competitive conduct.

24 MR RIDYARD: Yes, but to be clear, this question is, do we
25 think the market could work on a B2C basis --

1 DR MAHER: Yes.

2 MR RIDYARD: -- and your view is yes.

3 DR MAHER: Yes.

4 MR RIDYARD: The next question, Dr Niels maybe could go
5 first on, is: when we are doing our competition
6 assessment, do you think we need to consider both modes
7 of operation, or just to look at one, given the fact
8 that we have agreed that, in practice, B2B is the main
9 way that competition and rivalry does work out between
10 the suppliers, but maybe the market could work
11 differently? Do you think it is important for us to
12 look at both modes of possible competition in this
13 market?

14 DR NIELS: Yes, I think for the overall competition analysis
15 and for market definition within that it is relevant of
16 course to look at both business models, just to have
17 the complete picture.

18 I also think that the debate about market definition
19 is not an either/or. Actually, I do not understand why
20 it has been put as an either/or. It is either
21 the market for graduation services, so the whole bundle,
22 or it is the market just for academic dress. As I have
23 said in my report, you can define both markets. Market
24 definition, the aim is ultimately, as is commonly
25 accepted, to inform the competitive analysis. In my

1 view, one has to look at the market for graduation
2 services to identify the competitive dynamics; and those
3 dynamics explain a lot of the market outcome. So it is
4 not either/or.

5 In any competition case, you can have multiple
6 relevant markets, as is also commonly accepted. You can
7 have the market where there is the source of market
8 power; you can have the market where the conduct takes
9 place; and you can have the market where the effects
10 take place. Now, those can all be relevant in
11 a specific case to look at.

12 Here, as I have said, yes, you can define a relevant
13 market for the academic dress hire only. So let us call
14 it "B2C". You could. But as I have said in the report,
15 that does not shed much additional light on
16 the competitive dynamics and on power, which is all
17 deriving in the market for the graduation services.

18 MR RIDYARD: So when you talk about you could look at it as
19 an academic dress hire market, you are referring to
20 the supplier of academic dress hire to graduands, are
21 you? Or are you talking about -- I was not clear
22 whether you were talking about the supply graduands, in
23 other words, what I would say the B2C, or whether you
24 were talking about the academic dress hire that happens
25 to be bundled up in the OSA contracts to businesses.

1 DR NIELS: Yes, that is a fair question. I think it is
2 clearer -- what I also have in mind is -- I called
3 it "direct hire". So yes, let us call it "direct hire"
4 or "B2C", so basically the model that Churchill follows.

5 MR RIDYARD: Thank you, that is helpful.

6 Dr Maher?

7 DR MAHER: I am sorry, could you repeat the ...?

8 MR RIDYARD: Yes, it was a long time ago, was it not?

9 The question is: do you think it is important for us
10 to look at both ways in which the market operates, both
11 the B2C and the B2B?

12 DR MAHER: Yes, I would agree with that.

13 MR RIDYARD: I should say, we certainly have not jumped to
14 any conclusions about whether this is an either/or
15 comparison, but certainly we are interested in how
16 the market works in a generic way, and we will be
17 putting those pieces together over the next few weeks
18 and months.

19 Okay, the next question, which I would like to
20 address to Dr Maher first of all, that relates to
21 the so-called "snip test" approach to how you go about
22 defining markets.

23 Do you agree that that is the right framework that
24 one should be using for defining markets, in this case
25 and generally?

1 DR MAHER: Yes, in general, I think it does. The snip test
2 basically, it is looking at what are the relevant
3 substitutes that would be available, so competitive
4 constraints that may arise in response to a price
5 increase by a hypothetical monopolist. So, yes, I do
6 think it is the right framework. I think often it is
7 not applied in practice, it is more of a theoretical
8 conceptual exercise, to help us understand about the
9 demand-side and supply-side substitution effects in
10 the market.

11 MR RIDYARD: Thank you.

12 Dr Niels?

13 DR NIELS: Yes, I agree that the snip framework is a helpful
14 framework, and it is a framework that you apply thought
15 experiment about substitution after a hypothetical price
16 increase.

17 In this case, the snip test, as such, the thinking
18 behind the snip test is there in questions like,
19 you know, is there supply-side substitution, is there
20 substitution on the demand side between universities, or
21 for example between academic dress and other dress, like
22 judicial dress, et cetera. So in that sense, yes, it is
23 a helpful framework.

24 However, I think in this case there are also
25 a number of other important market definition questions,

1 where it is not so much about the snip framework but it
2 is more other conceptual questions or market definition
3 come in. In particular, this question of is there, in
4 this case, a market for a bundle, or is it the single,
5 separate products. And that requires more than just
6 a snip test; that requires some conceptual thinking on
7 market definition in that area.

8 The other area is the whole question of bidding
9 markets: how does one define markets in bidding markets.

10 So those are also conceptual frameworks you have to
11 take into account.

12 MR RIDYARD: Okay, we will come to both of those very
13 shortly.

14 THE CHAIRMAN: Before you move on, can I just ask Dr Maher
15 one point of clarification. At the very beginning,
16 Dr Niels, when asked about B2B or B2C, gave a
17 clarification of what he understood by "B2B", which is a
18 market whereby you are providing a bundle of services to
19 the universities. Did you agree with his clarification?

20 DR MAHER: Yes.

21 THE CHAIRMAN: You did.

22 DR MAHER: Yes.

23 MR LOMAS: One question. Could I open this up in a slightly
24 different terminology, and it may be covering ground
25 than you have just been covering, as a non-economist.

1 In each case, the revenue stream for the supplier
2 comes from the graduands, because they are paying
3 the money and they have the contract, the hire contract.
4 Do we risk a conceptual error in looking at this if we
5 get too trapped by B2B and B2C competing market
6 terminology? Because that leads you into a framework
7 that asks the question: is Ede & Ravenscroft dominant in
8 the B2B market, and is it foreclosing in some way
9 the development of the B2C market?

10 Now, that is a framework, and I understand that.
11 But is there an alternative framework which says that
12 there is essentially one market, and the question is,
13 are Churchill trying to cherry-pick or to get access to
14 a particular, as you said, Dr Niels, business model --
15 but a business model is not the same as a market --
16 a particular business model that operates within this
17 market, and therefore to see this discussion as
18 the competition between two different types of market is
19 an error, you should be looking at the competitive
20 impact within one market from simply a different
21 business model?

22 DR MAHER: I think the way I have looked at it is that

23 I think there are two separate relevant markets. One
24 market is where you are supplying graduation services.
25 That would be the B2B. And there is a model where you

1 can have just direct hire. My understanding from
2 the allegations in this case is there has been
3 foreclosure on the B2C, the direct hire market, and that
4 foreclosure has arisen from anti-competitive conduct in
5 the B2C. So that is why --

6 MR LOMAS: At least that is the allegation.

7 DR MAHER: So that is the allegation. So that is why you
8 need to look at both markets.

9 I think they are separate markets in the sense that
10 as many providers of services you can purchase bundles
11 or you can purchase individual components. I mean, you
12 might have a market for mobile telephony, for example,
13 and you can have a market for the bundle of services,
14 but they are not the same.

15 MR LOMAS: So you would say it is not a conceptual error
16 -- (overspeaking) --

17 DR MAHER: No, I don't think it's a conceptual error
18 -- (overspeaking) --

19 MR LOMAS: -- (overspeaking) -- look at two separate markets
20 -- (overspeaking) --

21 DR MAHER: Yes, you need to look at both in this case.

22 DR NIELS: The way I have analysed and the way I see this
23 case is actually very much aligned with your --
24 Mr Lomas' first way of describing it, that there is
25 a market for graduation services, it has existed, that

1 is where universities demand or purchase the service,
2 that is how suppliers who generally follow the B2B model
3 meet this demand. Yes, now there is another player who
4 wants to come in with a B2B business model, and what is
5 the effect on that --

6 MR LOMAS: B2C business model.

7 DR NIELS: Yes, B2C, sorry, I also sometimes get confused.

8 Yes, with a different business model. I think we are
9 all clear on that, that that is the theory of harm, that
10 is the allegation here.

11 I think it is not a conceptual error, perhaps that
12 might be overstating it. As I have said, it is not
13 wrong to also see it as a relevant market. But to me,
14 the relevant market is the one for graduation services.
15 The other market as such does not currently exist, it is
16 a market that is said to be hindered from developing.

17 MR LOMAS: Okay, thank you.

18 MR RIDYARD: Thanks.

19 Let us just move on now to the question about
20 whether the market, whichever way in which one describes
21 the market, is university-specific or UK-wide.

22 First of all, Dr Maher, can you tell us what
23 factors, whether it is on the demand side or the supply
24 side, should determine the choice about whether we see
25 the affected markets as being university-specific or

1 wider.

2 DR MAHER: I think I cannot speak for -- I think we agree on
3 this that the product market at least is to some extent
4 university-specific in that the academic dress that
5 graduands need to wear is university-specific. So it is
6 set out by the universities. But from my review of
7 disclosure, the witness statements and what I have
8 looked at in this case, there is some degree of
9 substitutability across where universities -- some
10 universities might use the same gowns, for example. So
11 you could use a particular type of gown, a B1 gown,
12 across several universities. That is also particularly
13 the case for the caps. But the hoods in and of
14 themselves are university-specific. So in that sense,
15 yes, we look at the market as being a university --
16 the market for the academic dress.

17 In terms of defining the market on a more
18 geographical basis, how wide is this market, I have not
19 defined the market as being university-specific. What
20 I have looked at in the evidence, in order for me to
21 draw that conclusion, has been looking at supply-side
22 substitution.

23 So if I look at both the EU and the OFT guidelines
24 on market definition, we can often also take into
25 account supply-side substitution at the market

1 definition stage, where entry by alternative suppliers
2 would not incur excessive cost to enter the market and
3 could be done within a relatively short time frame.

4 I believe the OFT guidelines -- if you would like
5 me to draw you to that, I can. But the OFT guidelines
6 say that within a year. And what we have seen in
7 the evidence in this case is that -- and I think in some
8 of the other cases I have seen maybe less than
9 six months to a year would be the time frame.

10 Now, in this market, we have existing suppliers that
11 do produce academic dress. They have the technical
12 knowledge, the expertise and the ability in order to
13 say, if they got an order from a university or were
14 to -- they could enter that market and they could
15 produce that kit in a time frame of, say, two to
16 three months at most. So that is why I have defined
17 the market at being UK-wide.

18 Does that answer your question?

19 MR RIDYARD: Yes. So you are saying, on the demand side,
20 there is little or no substitution between, certainly on
21 the hoods: the Southampton University hood is
22 differently from the Leicester University hood, and you
23 would not switch between them if you were a consumer.
24 But on the supply side, because it is relatively quick
25 to switch from supplying one to the other, you do not

1 think that a hypothetical monopoly supplier of
2 Southampton University academic dress hire could raise
3 price above the competitive level, because unless
4 the university supplier would have the time to switch
5 from the red hoods to the blue hoods, or whatever
6 the colour happened to be, to thwart that price rise?
7 Is that your ...

8 DR MAHER: I think, a little bit more specifically, that
9 the hood for, say, University of Bath supplied by
10 Wippell or a University of Bath hood provided by Ede &
11 Ravenscroft or by Churchill are equally substitutable as
12 long as it is a University of Bath hood; and all of
13 the suppliers could produce that hood in a relatively
14 short time frame.

15 MR RIDYARD: Yes, and your time frame you are working on
16 there was?

17 DR MAHER: It is based on the witness statements. If we
18 draw up -- well, would you like me to --

19 MR RIDYARD: No, conceptually, the time frame you are using
20 when you are making -- (overspeaking) --

21 DR MAHER: I think it was two to three months from, say,
22 getting an order and being able to provide the student
23 with the kit. At most, three months.

24 MR RIDYARD: Dr Niels?

25 DR NIELS: In my opinion, it is most helpful to analyse this

1 market as university-specific market, because that is
2 where the competitive dynamics take place. I have also
3 based that on an assessment of demand side and supply
4 side substitutions. So on the demand side, it is agreed
5 that universities have their specific demands. I have
6 also included what is called a "crossover analysis", to
7 actually quantify this, you know, what is actually
8 the substitutability between universities. This
9 crossover, even for gowns, there is actually -- it is
10 all a matter of degree of course, but the degree of
11 crossover, so the differences between universities, is
12 sufficiently high for this to be really
13 a university-specific market.

14 In addition to that, there are also limitations to
15 supply side substitution because of the timing of these
16 ceremonies. They tend to take place within a certain
17 part of the year, and therefore you cannot just -- you
18 still need to make sure that you have enough of
19 the stock available for that particular ceremony. So
20 you cannot just use it for another ceremony the next day
21 or the same day.

22 So those two factors really limit the degree
23 of supply side substitution, and therefore contribute to
24 this being a university-specific market.

25 MR RIDYARD: Can I just, on that, there, you are talking in

1 terms of the B2B competition, are you, specifically? So
2 if I have got an OSA with one particular university and
3 I have obviously had to commit to providing the stock
4 that will be required to fulfil that contract with that
5 university, I obviously could not -- even though that
6 university uses the same gowns as another one, I could
7 not use them interchangeably, because if their degree
8 ceremonies clashed on the same day, then having
9 committed it to one university, I obviously cannot use
10 it for another one. So you are talking very much in
11 terms of the B2B model here when you are talking about
12 this competition?

13 DR NIELS: Yes, correct. Yes, which is the way I see
14 competition working -- (overspeaking) --

15 MR RIDYARD: Yes, I understand, yes.

16 DR NIELS: -- in this market.

17 Now, of course, for any new competition that comes
18 up, or any university that sort of puts this out for
19 tender or requests a proposal, et cetera, their
20 suppliers who do not currently supply those
21 universities, there is an element of -- that those other
22 suppliers being able to compete.

23 So from that perspective, yes, they can design gowns
24 or dress for that university within a time frame to
25 participate in the next tender, or the next competitive

1 process. But that is the way I look at -- that means it
2 is still a university-specific market. That is the way
3 I look at this substitution possibility. So it is, yes,
4 very much in this B2B competition forward-market
5 framework.

6 MR RIDYARD: Yes, okay.

7 The next question is whether, given those
8 conclusions that you both believe there is
9 university-specific markets, is it therefore necessary
10 when we do the competition assessment and looking at
11 the existence of market power or not, that we look at
12 each individual university and consider the different
13 levels of market power that might exist?

14 Dr Niels?

15 DR NIELS: Yes, well, I would say thankfully not. If you
16 look at the various stages of the competition analysis,
17 in particular from the economic perspective, in some
18 stages you may want to look at each university, but
19 actually most of the stages you do not need to. So
20 market definition, that is all -- well, as I have done
21 in my report, you can answer a lot of these questions in
22 general, in a generalised way, about the way the market
23 works. You do not -- and you do then look at --
24 I have -- as I have done, to support the conclusion, you
25 look at the detail of some of those universities; and

1 indeed, you look at a database of all universities, as
2 I have -- as both experts have done, but you do not need
3 to look at each contract specifically.

4 Likewise, on the question of market power, you can
5 answer that in a general way, you know, where are
6 these incumbency advantages, et cetera. And then when
7 it comes to the economic rationale, which is another
8 part of my economic analysis, you can also answer that
9 question in a general way, without having to go,
10 you know, contract by contract.

11 When it comes to market outcomes -- so I have
12 assessed prices, for example -- I have looked at all
13 the contracts together, but not analysed it contract by
14 contract.

15 So there is a lot you can do in this competition
16 economics analysis of the case without having to do
17 a market-by-market -- university-by-university analysis.

18 One area where you might want to do that, but I have
19 not done that, the experts have not done it, because
20 I think the question has not really sort of come up in
21 that sense, is the question of the relationship-specific
22 investment for each university and then the duration of
23 each contract. You could do an analysis contract by
24 contract, because we see quite some variety in
25 the market between durations, also size of

1 the investment in stock, et cetera. So one could, in
2 principle, look at it contract by contract in that
3 sense, but in my opinion that is not necessary to reach
4 the conclusions about this case from an economic
5 perspective.

6 MR RIDYARD: Dr Maher, I will give you a chance to comment
7 on this in a moment, but I would just like to ask one
8 follow-up there.

9 Going back to the use of the snip test, I mean,
10 perhaps over-simplistically, but to my mind, the notion
11 of a market defined in the snip test is something that
12 it could worthwhile to monopolise. So if X is a market
13 and a monopoly supplier, or 100% supplier of X would
14 have the power to raise price above the competitive
15 level, and you have sort of accepted broadly that you
16 agreed with that snip test approach, but given that, and
17 given the view that the markets are university-specific,
18 does that not imply that one could have a concern with
19 competition at Leicester University, even though
20 Southampton University was not problematic, and
21 therefore it would be necessary to look at each
22 individual market as you have defined them, to see
23 whether one had a competition problem whilst another
24 might not, and therefore this generalisation that you
25 have just adopted is maybe a bit surprising?

1 DR NIELS: Well, potentially. But I have actually
2 assessed -- so it is not university by university
3 individually, but when drawing conclusions on, for
4 example, buyer power by universities, which is a big
5 theme in this, the example -- the analysis I have done,
6 the examples I give, they do actually look at the full
7 database of individual universities. And what I -- but
8 that is where I make the jump from individual cases.
9 There is a lot of detail in the materials and also in my
10 report on that, on specific universities, you know, what
11 did they do, how did they go about, what is the outcome
12 of the contract. But where I jump to -- or then -- well
13 "jump" is maybe a big word, but go to general
14 conclusions is what I observe is that whether
15 a university has done a tender, a request for proposal
16 or a negotiation, what is labelled "bilateral
17 negotiation", my analysis shows that the outcomes tend
18 to be the same, and also the process, actually. So if
19 you see how the university goes about exercising its
20 buyer power, making its demands.

21 So from that analysis, there was no indication for
22 me to conclude, ah, there may be these five or ten
23 universities that do not have buyer power, that are more
24 beholden to Ede & Ravenscroft. I have not seen any of
25 that.

1 So from that perspective, maybe I gave the wrong
2 impression by saying I only do general. I have very
3 much built up my analysis by looking at those individual
4 contracts as well.

5 MR RIDYARD: Okay, thank you.

6 Dr Maher, sorry to have neglected you for
7 a few minutes there.

8 DR MAHER: No, I think the point that you made is a very
9 good one in that, you know, I have not defined
10 the market as being university-specific, I have defined
11 it as UK-wide. But, however, I do agree that if
12 the market is defined as being university-specific, then
13 one should look at the competitive effects on
14 the relevant market that one has defined.

15 MR RIDYARD: Okay, thank you.

16 This is a very specific question, it might be
17 a slightly sort of academic one, but when we are talk
18 about whether the market is university-specific or
19 UK-wide, do you see that as an issue of geographic
20 market definition or of the product market?

21 I guess what is behind that question is, to me,
22 a geographic market is when there is transport costs or
23 there is time delays, or whatever, in getting from one
24 bit of the country to another, and that is why you would
25 have separate geographic markets, whereas most of

1 the things we have been describing seem to me to be
2 product market distinctions. So I was a bit confused
3 that there was mention of geographic markets here rather
4 than product markets, when we are talking about
5 the differentiation.

6 So, Dr Maher?

7 DR MAHER: So I think it also goes to product market and not
8 just geographic market. And for the example I gave
9 earlier, where in the B2C market where there were no
10 impediments or barriers to academic dress suppliers
11 supplying to any university that they wanted, then,
12 you know, a supplier -- an existing supplier who is in
13 the market could produce that kit and choose to supply
14 it in a free market in a short time frame, between two
15 to three months. So when I think of
16 university-specific, it is just that you are selling
17 the product to the University of, say, Bath, okay? But
18 it could be Wippell, Marston, Churchill
19 Ede & Ravenscroft. So any of those suppliers could
20 supply Leeds or Bath or something, with that
21 academic dress for that.

22 MR RIDYARD: So is transport costs or logistics ever an
23 issue in any of these substitution questions?

24 DR MAHER: I think, yes. I mean, so one has to look at what
25 costs are on the substitution that allow them to be

1 supply-side substitutability in terms of defining
2 the relevant product. And the evidence in the case has
3 been that, you know, for example, Churchill,
4 Ruth Nicholls and Oliver Adkins in their witness
5 statements have said that most of this kit can be
6 produced within a relatively short time frame. So --
7 and that includes bringing it over, sending the orders
8 to China and bringing it over.

9 MR RIDYARD: Yes, so the difference between one university
10 and another, is that ever material? Does it matter?

11 DR MAHER: No, in the sense that any supplier could supply
12 any university.

13 MR RIDYARD: In the UK at least, yes?

14 DR MAHER: In the UK, yes.

15 MR RIDYARD: Dr Niels, where are you on this, because I sort
16 of detected a slight change in your position on it
17 between your first report and the joint report? Maybe
18 I was misreading what was being said.

19 DR NIELS: You mean with respect to whether it is product or
20 geographic?

21 MR RIDYARD: Yes.

22 DR NIELS: Yes. Well, as I said in my first report, I see
23 this as another product dimension. Again, these are
24 just two labels, "product dimension", "geographic
25 dimension". Often, even the product dimension you can

1 have multiple different labels there. And ultimately
2 not much hinges on it. So I see this as a product
3 dimension, but because there is a geographic dimension
4 to universities, then, yes, you could -- if the market
5 is university-specific, then almost by definition --
6 sometimes you have a geographic market just by based on
7 where the customer, the purchaser is located. So I do
8 see it as a product dimension.

9 As I have also commented in my reports, if one had
10 to define a geographic dimension, I have not looked at
11 that in great detail, and if it is not -- if you
12 treat university-specific markets as the product
13 dimension, then what is the geographic dimension? Well,
14 in my analysis of these are, you know, bidding contests,
15 the bidders what you typically observe are UK-based
16 suppliers. So in that sense, let us just pragmatically
17 say it is the geographic market from that sense would be
18 the UK.

19 MR RIDYARD: Yes.

20 DR NIELS: As I have said in my report.

21 MR RIDYARD: I think we have probably covered the questions
22 about how you would look at supply-side substitution.
23 Let me give you an opportunity. Is there anything more
24 you would like to say about how you evaluate supply-side
25 substitution in these markets?

1 Dr Niels, anything else to say on that? You do not
2 have to say anything.

3 DR NIELS: No, I think we have covered it.

4 THE CHAIRMAN: Dr Maher?

5 DR MAHER: Just to repeat again, I think the supply-side
6 substitution entry, the time frame for existing
7 suppliers to produce any of the kit is fairly short.

8 DR NIELS: So -- apologies. So, for me, where that comes in
9 is that means and that confirms that other suppliers can
10 take part in bids whenever the next university puts its
11 business out for competition. Not in the sense of
12 supply-side substitution at the stage where is it --
13 you know, can anybody supply any other university, and
14 therefore is the market all universities or
15 university-specific. So it just comes in at a different
16 stage of the analysis, that ability to substitute.

17 MR RIDYARD: Okay.

18 Now, one specific question, still on this --
19 the last question really on this sort of product market
20 definition or whether markets are university-specific,
21 and it specifically relates to the sort of B2B mode in
22 the marketplace, and that is: within that B2B framework,
23 when we look at supply-side substitution between
24 different universities, if we take the ex-ante setting
25 of where a new OSA is just coming up for tender,

1 Dr Niels, is it your view that it is completely flexible
2 at that point in that anyone who is bidding for these
3 OSA contracts could equally well bid for any contract,
4 whether that happened to be blue hoods or red hoods or
5 one gown type or another, because in the ex-ante stage
6 you are obviously not committing to anything until you
7 have won the contract?

8 DR NIELS: Yes, at the ex-ante stage, so before -- when
9 the next university puts out its demand there for
10 competition, yes, very much, because it requires --
11 whether you are -- well, let me go step by step.

12 It requires for each bidder for that contract, each
13 bidder needs to make relationship-specific investments.
14 Each of the bidders will have to invest in stock that is
15 specific to that university; and they have to do that at
16 the right levels of quantity to ensure that security of
17 supply that all universities typically ask for.

18 So clearly, all bidders are in that sense in an
19 equal position, because they have to invest in
20 the stock. That, of course -- we'll come to it later --
21 links to this rationale of having some exclusivity or
22 preferred supplier status for more than one year.

23 There is a difference I have also assessed that when
24 you are the incumbent, then of course your
25 relationship-specific investments may be lower because

1 you may still have some stock. But even there, as
2 I have analysed, that is a matter of degree, because
3 even if you are the existing supplier, you have to
4 replenish -- keep replenishing the stock. There are
5 some data on how often that happens. So even
6 the existing supplier is subject to some continued,
7 you know, need for relationship-specific investment.
8 What you see in practice, and I have also analysed it,
9 is that incumbency advantage is not always decisive.
10 There are several examples where actually universities
11 have switched away from the incumbent to a new
12 competitor; and there are also ways to facilitate that,
13 as if you are the university organising that
14 competition.

15 MR RIDYARD: Right. So, given that you see that in
16 the ex-ante setting anyone of the bidders -- I mean,
17 this is your -- I am paraphrasing, I think, your
18 argumentation: any one of the bidders to one of these
19 contracts could equally turn their hand to any one of
20 the UK universities. It is the outcome of that bidding
21 processes that determines competition in the market.
22 Does not the logic of that drive you towards saying,
23 well, the market is just the UK market for bidding for
24 these contracts?

25 I am a little bit unsure why you still believe

1 that markets are university-specific when you said first
2 of all that any bidder can bid for any of these
3 contracts, and all bets are off at the initial stage,
4 you are quite flexible about how you do it, and you do
5 not have to make commitments until after you have won
6 the contract, and your argument that conditions of --
7 which is your argument -- I know it is not accepted by
8 Dr Maher -- that conditions of competition ultimately
9 are the same across all of these markets because
10 everyone is equally able to bid for them all. So why do
11 you not then say that the market is the UK market for
12 bidding for OSA contracts?

13 DR NIELS: I think that is actually another way of
14 describing this market. That is not a bad way of
15 describing it, because that also captures the essence of
16 this market.

17 I guess the way I have described it, what I really
18 wanted to get at is -- I mean, market definition, let us
19 also be pragmatic, it is just framing the analysis, it
20 is not an end in itself. The analysis -- you need to
21 frame it such that it is informative about
22 the competitive dynamics.

23 What I found important to identify, that is why
24 I call it "university-specific", is that each
25 university-specific demand is a competition in itself.

1 That is -- you always have that with bidding markets,
2 whether you say it is one wider market but all these
3 bids take place, or you say, well, no, each of these
4 bids is a separate market on its own ultimately does not
5 matter, as long as your competition analysis is correct,
6 which is that what is the competitive constraint for
7 each of those bids. So that is why I described it in
8 one way. But you could describe it in the other way, to
9 call this, yes, the UK market for these bids.

10 But what is really important to bear in mind,
11 whichever way you define the market, is that competition
12 takes place for each new bid, you know, that is then
13 commonly accepted. But also, very importantly, it
14 breaks the link from this -- what you have in other
15 markets between market share in that wider market and --

16 MR RIDYARD: We will come to that. Believe me.

17 I understand the argument and we will come to it.

18 Dr Maher, do you want to comment on that?

19 DR MAHER: I think we are going to be coming to it. I think
20 the only comment I would make is I do not think that
21 this market can be represented as a bidding market,
22 which we are going to come to.

23 MR RIDYARD: It is not surprising to hear you say that, and
24 we will indeed -- (overspeaking) --

25 DR MAHER: Yes.

1 MR RIDYARD: We will take a short five-minute break now, and
2 come back in a moment. Thank you.

3 MR RANDOLPH: Sir, sorry, I assume that the experts are in
4 sort of hot tub purdah?

5 THE CHAIRMAN: Yes, I think in five minutes, that is
6 unlikely.

7 (11.47 am)

8 (A short break)

9 (11.57 am)

10 MR RIDYARD: Right, I think we just had one more aspect of
11 the first section to go, and that was looking at
12 the breadth, if you like, of the market and whether it
13 should include items in addition to the academic dress
14 hire.

15 So, Dr Maher, I would like to ask you, do you think
16 products other than academic dress hire itself should be
17 included in the relevant product market?

18 DR MAHER: No. Legal and clerical dress, for example, no,
19 I did not include them. I thought it was just
20 academic dress. If you would like me to expand on that
21 a bit?

22 MR RIDYARD: Well, particularly where do you stand on
23 the question of photography services then?

24 DR MAHER: Oh, in terms of the graduation -- of the B2B
25 market, then, yes, I do think that photography services

1 should be included in the B2B market.

2 MR RIDYARD: Why?

3 DR MAHER: If one were -- in looking at the evidence, for
4 the most part, it is the same supplier. So in, I think,
5 it is 56% of the cases, there is joint supply of
6 academic dress and photography services.

7 The claimants -- sorry, the defendants themselves in
8 their witness statement have said that this is one of
9 the services they supply under the OSA. I mean, just in
10 looking at how the market is supplied, I find that there
11 is often joint supply. And in fact, Ede & Ravenscroft's
12 market share of the photography services market, when
13 they have an OSA along with their academic dress,
14 I think is at 54%.

15 MR LOMAS: Could I just understand that, because as
16 I understand the analysis done by Dr Niels, in many
17 cases, universities were offering that on an unbundled
18 basis, and making separate decisions in relation to
19 the photography supplier and the rest of graduation
20 services, with some people winning bids on one or
21 the other, sometimes bundles sometimes changing. So it
22 looked, from the point of view of the university at
23 least, as if they were making quite separate decision
24 choices.

25 DR MAHER: Yes, that might be the case where there is

1 a tender, but I find that there is only 24% of
2 the market by number of institutions actually tender for
3 their supply. More often than not, it is often you
4 would have a bidder winning both.

5 So I do not know if all tenders have them separately
6 or they are looking for -- so they might do it in lots
7 or not. But, again, it is a very small portion of
8 the market that actually does tender. So if one were to
9 look at the market overall as a whole, that is not
10 the case. You basically have -- under the OSAs, it is
11 supplying both.

12 And I should also point out that there are some
13 other services within that bundle that are also maybe
14 not supplied by the academic -- or the OSA,
15 the supplier. For example, ticketing in some cases
16 might be provided by the university itself. So there
17 are different components within the bundle that could be
18 provided both as a bundle or it could be provided as
19 individual components.

20 MR LOMAS: Thank you.

21 MR RIDYARD: Dr Niels, what is your take on this one?

22 DR NIELS: Yes, the economic principle that I have followed
23 in this is that when you have a market in which there
24 are bundled services, the way you define markets has to
25 be informative. A very pragmatic way of doing that is

1 by basing it on what is actually happening on the demand
2 side and the supply side. So if the majority of
3 customers purchase the product in a bundle and/or
4 the majority of suppliers supply it in a bundle, then it
5 makes sense to define a market for bundles, so for these
6 services together.

7 On that basis, I have defined the market as
8 the market for graduation services, so not just
9 the academic dress, but also all the other services that
10 come with it, because invariably that is how
11 universities currently purchase these services and also
12 how the B2C suppliers -- B2B suppliers supply them.

13 So, it makes sense to define the market for
14 graduation services.

15 I have said you can also look at separate products.
16 That is a discussion we had earlier this morning. But
17 the informative assessment here is it is a bundle of
18 services.

19 Then, for completeness, I looked at also
20 photography, because photography sort of is a slightly
21 different animal. Photography is not always included.
22 In my analysis, it is -- in around 40% of the tenders it
23 was actually jointly commissioned, but as Mr Lomas
24 pointed out, that in many other cases it is actually
25 seen as separate. Therefore, based on that same

1 economic principle, if most of the times or half of
2 the times it is in a bundle and half of the times it is
3 not, then let us look at that separately.

4 I also have said in my report that actually not --
5 in my opinion, nothing hinges in this case on
6 photography, whether it is in or out. If this was
7 a case where a photography supplier filed an abuse of
8 dominance claim against Ede & Ravenscroft for being
9 foreclosed by these OSAs, then maybe it might be
10 relevant to look into photography a bit more. To me, in
11 this case, nothing hinges on whether photography is in
12 or out. I think there is a good basis -- empirical
13 basis for saying well, it is actually a related market,
14 but it is separate.

15 MR RIDYARD: I will come back to it. But if you had found
16 that 51% of the time photography had been included, then
17 your pragmatic approach or your principled approach, or
18 whatever it was, would have led you towards including
19 photography, would it?

20 DR NIELS: My pragmatic approach would be to look at both.
21 So you would say, well, there is a market for a bundle,
22 and let us analyse competitive dynamics there, and also
23 let us analyse it separately. So in this case you would
24 look also at the market for photography separately, but
25 as I said, that is not really where any of

1 the competition concerns arise.

2 MR LOMAS: That is quite helpful, because I have to say, one
3 of the things I was struggling with is trying to work
4 out how the decisions in front of us were affected by
5 whether photography was in or out. It seemed to me it
6 was an interesting question, but it did not necessarily
7 help us with the decisions that we had to make.

8 DR NIELS: In my opinion, it does not. Maybe Dr Maher may
9 have a different opinion. But in my opinion it does not
10 make a difference to the competition analysis.

11 It is interesting to look at photography and
12 the dynamics there. In particular, what I found
13 interesting is that you do -- and this comes to
14 the question of competitiveness and entry. You do see
15 examples of photography providers who are also able to
16 bid for the whole OSA, including gowns, on the back of
17 their position in photography. So it is another route
18 into this market that you see in practice.

19 MR LOMAS: Can I ask the same question of Dr Maher, then.

20 To what extent do you think the questions in front of us
21 are helped in terms of being answered by the question of
22 whether photography is in or out of the defined market?

23 DR MAHER: Well, I think the last point Dr Niels made
24 actually makes my point for me, that in some of
25 the tenders you have actually seen it be a photography

1 supplier who has bid for the OSA and won the OSA. So it
2 is not just the academic dress suppliers who bid for
3 the OSAs. It has been in a couple of cases that I am
4 aware of where it has been the photography supplier that
5 has won all of the lots, including the academic dress.
6 So that is one reason why I think it should be included.

7 Just in looking at the market overall, seeing how it
8 in practice is supplied, is the bundle photography more
9 often than not is included; it is a joint. So just in
10 terms of looking at common sense of how this market is
11 supplied I think goes to saying it should be included.

12 And lastly I would make the point that for the OSAs,
13 commissions that they pay to universities on photography
14 are often as great if not more than the commissions that
15 they are paying on academic dress, and so go to also
16 the funding of the bundle of graduation services.

17 THE CHAIRMAN: So what is the answer to the question what
18 difference does it make to the commission analysis?

19 DR MAHER: I think it does, because it goes to part of
20 the revenues that go to covering the graduation
21 ceremonies.

22 MR LOMAS: That is helpful, because until the chairman
23 intervened, I was going to make precisely that point.

24 If the debate is about whether or not, if we are
25 accepting this analysis, the B2C market is foreclosed by

1 dominance in the B2B market and that B2C market is not
2 about photography it is about academic dress, I am
3 struggling to see how relevant photography was, at least
4 at this stage. I think your answer is, it enhances
5 revenues, and therefore incentives, in terms of
6 acquiring a quasi exclusive access to the cashflow that
7 comes from the graduands. So it dials up, if you like,
8 the revenue stream.

9 DR MAHER: Yes.

10 MR LOMAS: Is that the connection?

11 DR MAHER: Yes.

12 MR LOMAS: Okay, thank you.

13 MR RIDYARD: Dr Niels, would you agree that in looking at
14 the case in the round, it is relevant for us to consider
15 the revenues and the profit contribution that is
16 achieved on photography business when the photography is
17 in the contract alongside the academic dress hire?

18 DR NIELS: It could potentially be of interest to look at.

19 I think it is of very limited interest. Also
20 the picture is mixed, and it introduces a lot of
21 additional complications, because photography, unlike,
22 say, the other services, like ticketing, that are
23 included in the bundle, photography has a separate
24 monetary stream, because in my understanding, students
25 decide whether to pay for it or not but pay for it

1 separately from the gown. So you get a different
2 dynamic there in terms of monetary flows and incentives,
3 which I think just makes it -- blurs the question --
4 the questions that we have -- that we have here.

5 MR RIDYARD: Well, it certainly makes life more complicated,
6 but that is not a reason necessarily for not looking at
7 it, because I just had in mind that you could have two
8 contract, sort of, opportunities side by side, one
9 including photography and the other not; and if all
10 the other terms were identical, all of the commissions
11 on the academic dress hire, the obligations that the OSA
12 bidder has to make to the university could be identical,
13 having the photography alongside it and having a profit
14 contribution from that photography as well as the profit
15 contribution from the gowns could make that bid
16 profitable in one case to the bidder and unprofitable in
17 the other case, if you took the photography revenues
18 out. So in other words, the photography revenues could
19 affect the kind of commitments, the amount of free stuff
20 you would be prepared to offer to the university, and it
21 could affect the outcome of the tender depending on
22 whether or not that photography revenue was in there.

23 Is that not a reasonable assessment?

24 DR NIELS: Potentially that could be the case. I still
25 think it is both up to the universities and also to

1 the suppliers to make choices on that. Therefore, to
2 me, it does not change the competition analysis in this
3 case. So the universities can decide: do I want
4 photography together or am I okay if it is a separate
5 lot and I am okay if it is separate providers. What you
6 often then see is suppliers also just teaming up with
7 a photography provider.

8 So if the question is, you know, does this make
9 bidding -- does this somehow enhance any foreclosure
10 effect in this market, does it make bidding more
11 difficult, I do not think it does, because what you see
12 in the evidence is that gown suppliers who do not have
13 their own photography services are able to team up with
14 photography suppliers, and equally photography
15 suppliers, as I mentioned before, who are not
16 necessarily core gown suppliers, have been able to enter
17 the market and bid for contracts for the whole thing.

18 So to me, it just really does not add much to
19 the competition questions at hand.

20 MR RIDYARD: I think there were one or two instances -- or
21 maybe more -- but some instances where Ede & Ravenscroft
22 has put in a bid to a university saying that: the amount
23 of commission we are prepared to give on academic dress
24 could be higher if we also win the photography element
25 of the contract. Did I make that up or misremember

1 that?

2 DR MAHER: I do not recall at the moment. I can look into
3 that, definitely.

4 DR NIELS: I do not recall it. But, again, sir, if that
5 were to happen, this goes to the theory of harm.
6 I mean, what is being -- is there a question here of
7 Ede & Ravenscroft leveraging its position in gowns into
8 photography? If that was a relevant competition
9 question, which I do not understand it to be, then, yes,
10 you would want to get to the bottom of those instances,
11 but not in this case.

12 MR RIDYARD: Okay.

13 MR LOMAS: This photographer bidding issue is quite limited,
14 is it not? I mean, if I look at the 11 contracts that
15 Ede & Ravenscroft lost over the claim period -- Marston
16 2, Graduation Attire 2, Wippell 2, Graduate Gowning
17 Company 2, Phelan Conan and Success Photography --
18 I guess Success Photography is a photography firm.
19 Phelan Conan, are they a photography term?

20 DR NIELS: I would not know off the top of my head.

21 MR LOMAS: So on that basis, it is 10% of the ones that E&R
22 lost. So university graduation services switching to
23 photography firms is not a terribly big effect in
24 the market.

25 DR NIELS: I think that is correct.

1 MR LOMAS: We should not overstate it.

2 DR NIELS: In terms of quantum, it is not -- you could call
3 it limited. I found it an interesting example in
4 a competitive situation that there are players like that
5 company, who are core photography service providers, who
6 could enter.

7 MR LOMAS: Presumably, whether it is gowning or photography,
8 one bids for the contract and subcontracts the other
9 side? Or do Ede & Ravenscroft have their own in-house
10 photography capability, or do they subcontract it?

11 DR NIELS: That will be a factual question. I do not know
12 exactly. But my understanding is that it can certainly
13 be done by subcontracting. Whether some of these
14 suppliers also have it in-house or not, I do not know.
15 But subcontracting is certainly what you often see.

16 DR MAHER: If it might help, I think we heard testimony last
17 week from Telfer that Ede & Ravenscroft does do its own
18 in-house photography, if I recall correctly.
19 Tempest Photography partners with Graduate Gowning
20 Company, and Marston has recently purchased Success
21 Photography.

22 MR LOMAS: Oh right, okay. Thank you.

23 DR MAHER: Yes.

24 MR RIDYARD: Incidentally, I think it was footnote 22 of
25 your second report which refers to conditional

1 commission rates depending on whether or not
2 the photography was included in the bid. But --

3 DR MAHER: I think it might be -- where was it?

4 MR RIDYARD: It was footnote 22, I think, of your second
5 report.

6 DR MAHER: Of my second report.

7 MR RIDYARD: I will not say any more, just in case it is
8 (inaudible), but I do not think the fact of that is
9 confidential, but obviously the details behind it would
10 be.

11 Okay, that, I think, brings us to

12 -- (overspeaking) --

13 DR MAHER: Ah, yes, that -- (overspeaking) --

14 MR RIDYARD: I know your report better than you.

15 That brings us to the end of the first section,
16 I believe, unless there are any further questions.

17 So are there any points of clarification that
18 counsel would like to raise?

19 Questions from COUNSEL

20 MR RANDOLPH: Just two, if I may, sir.

21 You just referred to footnote 22, I think, in
22 Dr Maher's second report. I think in this connection,
23 the conditionality point and photography, paragraph 31
24 in the same report deals with the matter as well, which
25 can be found.

1 Whilst we are on that page, Dr Maher, you have just
2 recently been discussing this issue of photography and
3 answering Mr Lomas' questions in particular about
4 the relevance of photography. I wonder if you could
5 look at paragraphs 35, 36 and 37 of your second witness
6 statement, which is, for EPE, {E4/7/12}. Does that
7 assist or corroborate that which you have said in oral
8 evidence?

9 DR MAHER: Yes. I mean, there are reasons why I think
10 photography should be included in the market. If you
11 will give me a moment to just read.

12 There are the points that I have made. I think that
13 for the majority of cases, photography is (inaudible).
14 I think the point you have reminded me of, yes, the
15 commissions are often higher, if they are joint-supply.
16 There are instances of that. It is also the students
17 who are paying for both of the services; and
18 the commissions on both are used to pay for -- subsidise
19 the graduation ceremonies.

20 MR RANDOLPH: Does footnote 31 assist in terms of
21 the specific point -- and do not read it out, because it
22 is redacted -- on that point? Probably, just reading
23 it, I have got it absolutely spot on in terms of
24 footnote 22 and not 31, but I thought that might go to
25 it as well.

1 DR MAHER: Yes, that goes to the point that Mr Ridyard made
2 earlier.

3 MR RANDOLPH: I am very grateful.

4 The only other question is in relation to B2C/direct
5 hire. Interestingly enough, I notice in the joint
6 statement that I think both terms are used. So 2.12,
7 for example:

8 "CG is a B2C/direct hire supplier ..."

9 We have been discussing, or, rather, the tribunal
10 has been discussing the B2C/direct hire market. First
11 question, does the slash mean that it is equal to
12 exactly?

13 DR MAHER: Yes.

14 MR RANDOLPH: Okay.

15 DR MAHER: They are used interchangeably.

16 MR RANDOLPH: Thank you.

17 The second point is, we have looked at
18 Churchill Gowns on the B2C/direct hire market. Are
19 there other players on that market in the UK?

20 DR MAHER: None that I am aware of.

21 MR RANDOLPH: Thank you.

22 MR PATTON: Nothing from me at this stage, thank you.

23 Questions from THE TRIBUNAL

24 MR RIDYARD: So moving on to the second topic, which is
25 market structure. Dr Maher, I would like to address

1 this question to you in the first instance.

2 We see the prevalence of B2B contracts in
3 the market, and our question really is: do you think
4 that that prevalence is attributable to incentives
5 acting on the opportunity or to the behaviour of
6 Ede & Ravenscroft on the supply side, as it were? Or is
7 there a way of distinguishing between why we see such
8 a prevalence of those contracts?

9 DR MAHER: I mean, all I can say to that is that given
10 the time frame and limitations on disclosure, I cannot
11 really answer that question, whether it is due to
12 the universities or whether it is due to
13 Ede & Ravenscroft. I think there is some limited
14 evidence in Michael Middleton's witness statement.
15 I believe it is {D/4/1}. Where he said that it was
16 the supplier who first offered the commission payments,
17 and therefore they also started off commission payments.
18 So -- (overspeaking) --

19 MR RIDYARD: I think he said it was a supplier --
20 a competing supplier to E&R -- (overspeaking) --

21 DR MAHER: Yes, first. That is what he said. So that would
22 lead me to think that these type of arrangements usually
23 started on the part of suppliers, but I think now, given
24 the disclosure, there was no evidence.

25 MR RIDYARD: So you are saying you think it is not possible

1 to disentangle -- it is partly a kind of historical
2 question, I suppose.

3 DR MAHER: Yes.

4 MR RIDYARD: And partly it is a kind of economics question
5 about where the incentives are originating.

6 DR MAHER: It is kind of asking: what came first,
7 the chicken or the egg? And it is difficult to say.
8 Given that you are paying the commissions, then
9 the universities have incentives. Would
10 the universities have had the incentives without
11 the commissions? I do not know. There is nothing in
12 the evidence that allows me to answer that.

13 MR RIDYARD: Thank you.

14 Dr Niels?

15 DR NIELS: Yes, it is an interesting question about
16 causation, chicken and egg. From an economic
17 perspective, certainly in my analysis
18 the universities -- there is a strong economic rationale
19 and an entirely sensible reason for the way they
20 currently procure these services. So from that
21 perspective, you know, I would say it is not surprising
22 that you see this structure in the market.

23 Now, Mr Ridyard, you actually -- you may remember or
24 not, but in -- I recently looked at it -- but in a paper
25 that you wrote in 2008, this was in a debate on

1 the reform of Article 102, I think you provided actually
2 a very interesting economic framework that actually goes
3 precisely to this question.

4 So, when you observe exclusivity, the way you
5 described it, but it is a good economic framework, there
6 can be two reasons or two explanations for this kind of
7 exclusivity. One is the monopoly leveraging
8 explanation, which is, you know, a dominant company has
9 already got 70%/80% of the market, and now uses these
10 commissions or rebates to leverage its position even
11 more into the market, to keep others out of the market.

12 The other explanation is that it is actually
13 the buyers who have a strong incentive, even if they
14 face a dominant company, to have a strong -- but if they
15 have a choice between a dominant company and others,
16 they actually have an incentive to create a bit of
17 competition in the market by saying, "Well, I am going
18 to give you all my demand for a certain period, so
19 exclusivity, but you have to compete for it." So
20 thereby, it is the buyers who create competition, and
21 that allows them to exercise their buyer power that
22 makes the suppliers compete more fiercely for the bids.
23 It also gives the suppliers certain incentive and
24 security if they have to make relationship-specific
25 investments in order to get that contract.

1 Now, in my opinion, the current case is much closer
2 to that second scenario, so it is driven by customers,
3 who create -- who procure their services in that way,
4 than by the first scenario, which is a monopoly
5 leveraging argument scenario. I am sure we will come to
6 it, but the theories of harm on commissions, my opinion
7 on that is that they are also very different from
8 theories of harm on commissions rebates that we have
9 seen in other cases in competition law. But I am sure
10 we will come to that.

11 MR LOMAS: Is that not quite a convenient analysis,
12 Dr Niels, bearing in mind the evidence that we heard
13 last week was that there were not commission structures
14 in the market, as I think was just being said, until
15 I think the 1980s, when a competitor decided to
16 introduce them? So I understand the economic
17 rationality point from the point of view of
18 universities, but they did not seem to wake up to that
19 for some 90 years, until a competing graduate services
20 supplier put it on the table, and we know not all of
21 them have adopted that model.

22 DR NIELS: Possibly. I mean, there is a historic way of
23 looking at this, of course.

24 One thing I did see also in the factual evidence is
25 that universities -- but, again, I cannot put a time

1 frame on it. But universities have also got more savvy
2 over the years. Maybe 100 years ago, who knows how
3 these -- (overspeaking) --

4 MR LOMAS: Economic irrational, but asleep?

5 DR NIELS: Possibly.

6 What I observe now from the evidence of the relevant
7 period is that this is the way universities procure
8 these services, virtually all of them. This is the way
9 then suppliers respond to it. Indeed, all suppliers do
10 that. Well, all the B2C suppliers. They all offer
11 commissions. That is just the way the market currently
12 operates.

13 MR LOMAS: B2B.

14 DR NIELS: Yes, I keep making that mistake, apologies. B2B.

15 That is how the market currently operates. There is an
16 economic rationale for it. To do the competition
17 analysis of that, you observe what is currently
18 happening in the market. Therefore, whether who was
19 first historically in a way, from an economic
20 perspective, does not matter too much.

21 THE CHAIRMAN: Can I just ask Dr Maher that question. What
22 do you say is the importance of who started it, as it
23 were, who came up with the idea and first either offered
24 commissions or asked for commissions? Why does that
25 matter?

1 DR MAHER: Well, I think it goes to show that if,
2 historically, they did not exist, then the market can
3 operate without having to have these type of
4 arrangements. So I think it is important that once
5 the suppliers began offering this, this does entrench
6 their positions. It provides the universities,
7 therefore -- I think this might answer one of your
8 questions, do the universities have incentives to keep
9 adopting this model. And the answer to that is yes,
10 once, you know, someone is giving you something for
11 free, then my incentive is I would like to keep it.

12 MR RIDYARD: Dr Maher, in your reports you put quite a bit
13 of stress on the fact that only, in your view, 25% of
14 the market -- of the universities operate by a formal
15 tender process. If that was different, if the facts
16 were different and it was, you know, 100% of
17 the universities issued formal invitations to tender,
18 would your approach on this question -- would your
19 answer to this question be any different?

20 DR MAHER: I think if it were -- I think one would -- there
21 are a couple of things I would want to ask in trying to
22 address that question, is I would want to look at --
23 well, no, actually, where I am going will not answer it,
24 because if all of the universities, if you have 100% of
25 the market creating -- putting things out to tender,

1 then I think the market would be different. I would
2 need to analyse that differently. It would be much more
3 of a bidding market. I would need to still look at
4 whether there might be -- if it is university-specific,
5 I think then you need to look at each university, what
6 the incumbency advantages might be, whether the tender
7 actually is competitive. You would need to analyse
8 the market differently.

9 I think, regardless, even if 100% of
10 the universities did put out the markets to tender, my
11 understanding is they still should not have to impede
12 competition, and the defendants have claimed that
13 suppliers are allowed to supply direct to students in
14 the direct hire market. So I would still want to look
15 at what were the constraints, what might be prohibiting
16 supply into that B2C market.

17 Does that ...?

18 MR RIDYARD: Again, we will come back on this point,
19 certainly, later, but that is useful.

20 DR NIELS: Apologies if I --

21 MR RIDYARD: Yes, sorry, go ahead, yes.

22 DR NIELS: -- if I just also may make comment on that.

23 As I have shown in my analysis, if you look at
24 this -- at these contracts and the process they got to
25 the contracts in practice, you find that there is very

1 little, if any, difference between whether something is
2 an official ITT or a request for a proposal, or indeed
3 some -- (overspeaking) --

4 MR RIDYARD: We will come to this.

5 DR NIELS: Okay.

6 MR RIDYARD: It is an interesting point, and I promise you
7 we will come to that in some detail in a moment.

8 Just before we leave this point, maybe there is not
9 much more to say on this, but the question is --
10 the second question really was: do the universities have
11 an incentive to sustain this model given that it exists?

12 Dr Maher, do you have anything more to say on that?

13 DR MAHER: No, I think I have said, yes, that they do have
14 an incentive to sustain financial inducements, or
15 a strong incentive.

16 MR RIDYARD: Dr Niels?

17 DR NIELS: Yes, I think the universities have an incentive
18 to sustain. But by this model, let us also be clear,
19 you know, the commissions is just one aspect of it and
20 there are perhaps other, you know, history of it, and
21 commissions may also arise on other bids that happen on
22 the university premises, like catering, et cetera. So
23 that is one part of what we call -- what has just been
24 described as this model.

25 The other part is just the fact that they -- when

1 they put the business out for tender or request for
2 proposal, they do want all these services together.
3 They want the gown, the security of supply,
4 the ticketing, et cetera. The fact that it then also
5 comes with a commission, I think that is part and parcel
6 of it. So I would say, yes, the university have an
7 incentive to keep that current structure, including
8 the full services, and they get a commission for it.

9 MR RIDYARD: Okay, thank you.

10 So that is the end of that topic. It was a very
11 short topic. Are there any points for counsel?

12 MR RANDOLPH: Not from me, thank you.

13 MR RIDYARD: If I could just move on to dominance/market
14 power, the third topic.

15 The first question which, Dr Niels, I would like to
16 address to you in the first instance is, I think
17 the experts more or less agree that the market share is
18 somewhere around 75% for Ede & Ravenscroft, or the group
19 of Ede & Ravenscroft companies. So given those high
20 shares, does that indicate the existence of market
21 power?

22 DR NIELS: So from an economic perspective, I would say not
23 necessarily, in general. In particular, if
24 the marketing question, like here, in my opinion, has
25 features of a bidding market. Now, what does that mean

1 in practice? It means that you cannot really use or
2 leverage your existing 80% to say now you have to also
3 take the other 20% from me. This is a very important
4 difference, at least from an economic perspective, also
5 if other cases involving loyalty rebates and commissions
6 and discounts, et cetera, because the most harmful of
7 those cases, especially from an economic perspective,
8 are where you actually use your existing market share,
9 your market power, let us say, 75%, to also induce
10 the purchasers to get the rest from you. I mean, that
11 is where, for example, you have these cases.

12 In many of the cases it had been cited, like Intel.
13 Although Intel has gone away recently by the Luxembourg
14 court. But that was about loyalty rebates and
15 exclusionary rebates. So, there, the mechanism is
16 explicitly that the dominant supplier says -- let us say
17 Intel says to Dell or Hewlett Packard: you already buy
18 75% of your chipsets from me, if you buy 85% or 95% from
19 me, I will give you more discounts; and not just on
20 the extra 20% but on the whole thing. So there
21 explicitly you are using your dominant position, your
22 existing market share, to also pry open, you know, or
23 leave or foreclose the rest of the market.

24 In this case it is just different. The fact that
25 you have 75% of existing contracts, whenever there is

1 a new contract coming up for tender, say, or request for
2 proposal, yes, you may use that fact in your favour by
3 saying, "Look how much experience we have," but there is
4 no mechanism through which you say, "Look, I already
5 have 75%; you really have to -- you cannot get around
6 me; you know, I am an unavoidable trading partner,"
7 which is a key concept in these Intel type cases. That
8 is just not the case here.

9 Therefore, yes, it is a very high market share, 75%,
10 maybe also partly historically driven. But nonetheless
11 I would say in any bid, universities are not beholden to
12 Ede & Ravenscroft.

13 MR RIDYARD: Dr Maher?

14 DR MAHER: I think market shares -- so I'll specifically
15 answer the question: do market shares indicate
16 the existence of market power? think both Dr Niels and
17 I would agree that market shares in and of themselves do
18 not necessarily indicate market power.

19 I think one needs to look at market shares in
20 the round with other factors in the market, whether
21 there are entry barriers, whether there is buyer power,
22 these various aspects. When one looks at that, then one
23 can say whether or not market shares are an indication
24 of market power in this case. But you do need to look
25 at it in the round.

1 MR RIDYARD: Just a brief follow-up.

2 Dr Niels, when I introduced the question, I was
3 talking about the 75% market share, which was across
4 the UK as a whole. But on your approach to markets, you
5 have gone with university-specific markets, so some of
6 these shares were 100%. So your answer still holds even
7 though you are talking about 100% of a market which has
8 been defined according to snip test principles?

9 DR NIELS: Yes. So in a bidding market you have
10 that peculiar feature obviously that actually all market
11 shares are zero by definition, unless of course you have
12 an incumbency advantage, but then you have the question
13 how strong is that incumbency advantage. So I already
14 have 100 or in fact everyone has zero. The fact that
15 you have 75% of other contracts in the market is
16 a factor, but it is not the same as a market share.

17 MR RIDYARD: Okay. I just thought I should give you
18 the chance to comment on that aspect, as I have not
19 before.

20 So the next question, which is potentially quite an
21 interesting one is, is there effective --

22 THE CHAIRMAN: Sorry, can I just come back to Dr Niels on
23 your answer to the question whether the market share
24 itself, 75%/80%, is indicative at least of dominance.

25 I understood your answer then to effectively say,

1 well, it depends what you do with that dominance. You
2 talked about if you used that dominant position to your
3 advantage by foreclosing others from coming into
4 the market. Does that not risk eliding the concepts of
5 dominance on the one hand and abuse of that dominance on
6 the other?

7 DR NIELS: Yes, it is very much an economic perspective that
8 I have just shared, which is that, yes, dominance, of
9 course it is a legal threshold, so from my perspective
10 that is different. But from an economic perspective,
11 very much, you know, what matters -- why do you define
12 dominance? Because it is part of the assessment of
13 the abuse, of the effect. So, for example, the degree
14 of dominance, the degree of market power matters. If
15 you have 95%, you have more market power generally than
16 if you have, say, 40%, even though legally you might be
17 called dominant in both.

18 Then where it also, from an economic perspective,
19 comes in in my mind is how do you actually -- it is
20 called "abuse of dominance", so how are you abusing
21 actually the dominant position. That is very often not
22 made explicit in competition cases in these theories of
23 harm, and legally perhaps it does not need to. But
24 there needs to be some link to, okay, you are dominant
25 in the market, but how are you actually applying that

1 dominance to leverage your position and abuse it in that
2 market or in some other market? That is why I think it
3 is important for the theory of harm to understand,
4 you know, the dominance, what is it based on and how
5 is it used.

6 THE CHAIRMAN: Just a follow-up. In that case, what is
7 the relevance to your analysis of dominance if a person
8 like E&R, with a large, 80%, share of the B2B market, in
9 fact has used that position in order to foreclose others
10 on a direct hire market? So the fact is that, assuming
11 it is correct that others cannot enter the direct hire
12 market because of the -- in any of those universities
13 where E&R has a contract, which is a very high
14 percentage, why is that not relevant to the question of
15 dominance, on your analysis?

16 DR NIELS: Yes, so there, again, there is an implied
17 causality, like, it is the fault of Ede & Ravenscroft
18 that these others are foreclosed. I would just say
19 again there, in my analysis it is the universities, so
20 we get back to that question of -- it is actually
21 the universities who wants the market to work that way
22 and who procure the services that way. So,
23 Ede & Ravenscroft, let us assume they had to compete for
24 that just as much as others. The fact that they won 80%
25 of the contracts, that in itself is not foreclosing

1 others if others had the chance to bid for it. Now,
2 the other -- Churchill including, if they also were --
3 you know, if they bid for the B2B contract, if you like.
4 Equally you could say, well, the other 20%, which is
5 supplied by, you know, people like Marston and Wippel,
6 they are equally foreclosing, in that sense, Churchill,
7 because they occupy the other 20% of the market.

8 So I do not think you can say, "Oh, because you have
9 80% it is you who have foreclosed the market". It is --
10 again, it comes back, it is the way the markets operate.
11 It is the way the universities have organised it.

12 THE CHAIRMAN: Could I just ask Dr Maher for a response to
13 that, if you wish to.

14 DR MAHER: No, that is fine.

15 MR RIDYARD: So, the next question really was whether there
16 is effective competition amongst bidders for individual
17 OSAs.

18 Dr Maher, can I ask you to kick off on that one.

19 DR MAHER: Well, I think I have already mentioned previously
20 that there is very little tender -- this is a market in
21 which some tendering occurs. So at most 25% of
22 the institutions in the addressable market have
23 actually -- have their current contracts that have been
24 awarded via, you know, a tender or a competitive
25 (inaudible) process. So I do not think that we can

1 describe the market as a bidding market.

2 If I could maybe ask -- I mean, given that
3 the emphasis in this case is a lot on bidding markets,
4 maybe there is a point -- there is a point I would like
5 to make at the outset on this, on bidding markets. If
6 we can maybe pull up Klemperer's market (sic) on bidding
7 markets. It is F/2553 {F3/2552}. I mean, there are
8 certain conditions that -- if a market is a bidding
9 market, then that allows us to say that market -- that
10 competition for the market can actually replace
11 competition in the market, but you need to have it
12 actually be -- certain conditions have to be met of what
13 constitutes a bidding market in order to draw that
14 conclusion.

15 MR RIDYARD: Can we get that reference up on the screen?

16 THE CHAIRMAN: What was it again?

17 DR MAHER: It was {F3/2553}. So this is a paper that
18 Professor Paul Klemperer for with
19 the Competition Commission.

20 If we could go down. Keep going. Keep going.
21 {F3/2553/4}.

22 So I think that the point that Professor Klemperer
23 is trying to make is that we often -- I think if we go
24 down. He is making the point that often economists will
25 argue that markets are bidding markets and that we can

1 take -- competition for the market can be replaced by
2 competition in the market. He offers, basically,
3 the criteria for which -- you know, he criticises
4 consultants, such as economic consultants, that are
5 often making the argument that market power is
6 impossible in bidding markets. I will just read it out:

7 "We discuss the characteristics that are often
8 claimed for bidding markets, and notes that the extreme
9 assumptions of an idealized bidding market can indeed
10 yield the extreme conclusions that are often claimed for
11 them."

12 In other words, that competition for the market can
13 replace competition in the market.

14 "However ... [there are very few processes that]
15 satisfy all these extreme assumptions, and once we relax
16 ... them we are quickly back into the familiar world of
17 problems of dominance and unilateral and coordinated
18 effects.

19 "Furthermore, the characteristics of (imperfect)
20 bidding markets that cause these problems are
21 the standard ones that are commonplace in the checklists
22 that competition authorities use worldwide to identify
23 these problems in 'ordinary markets'."

24 So, if we can go down. Let me see if I can find --
25 219 would be -- paragraph 2.2 -- I guess maybe they are

1 not listed in the -- can you go down {F3/2553/7}, 2.2,
2 and to the next -- I cannot find it right away, but
3 basically, the conditions that are laid out for what
4 characterises a bidding market is that competition is
5 one where winner takes all.

6 THE CHAIRMAN: It is 2.1, I think, so page 6, I think
7 {F3/2553/6}.

8 MR RIDYARD: Yes, page 6.

9 DR MAHER: Okay, so:

10 "Competition is [where] 'winner takes all' ..."

11 That:

12 "Competition is 'lumpy'."

13 That clearly is not the case. So in other words,
14 the competition for the tender, the tender has to be one
15 in which it would represent a large portion of
16 a supplier's revenue.

17 So for example, if you have Boeing putting out
18 a tender or bid for suppliers of jet engines for its new
19 model plane, there would be very few suppliers, but
20 the revenue that would be generated to them would be
21 a large share of their revenues.

22 So this is not a case where we have a competition --
23 the revenues. Any single university represents a very
24 small portion of E&R's overall --

25 MR LOMAS: Is another classic example when we are bidding

1 for G4, G4 or G5 licences, which would then define
2 the market going forward in telecoms?

3 DR MAHER: Pardon? I'm not sure I ...

4 MR LOMAS: Is not another classic example of that in
5 the telecoms markets where bidding for a G3, G4 or G5
6 licence defines your business model going forward?

7 DR MAHER: Yes. Yes, exactly.

8 And that:

9 "Competition often begins afresh for each new
10 contract, and for each customer."

11 Again, as I have stated, there is only 25% of
12 the market of the universities have actually tended for
13 their supply, so we do not observe, in my review of
14 the evidence in this case, that we are seeing
15 competition by -- 75% of the market is not engaging in
16 repeat competition all the time for their supply.

17 MR RIDYARD: On the first of those points, the size of
18 the contracts, I mean, I take your point that no
19 individual university is particularly pivotal or crucial
20 for the overall UK market for academic dress hire, but
21 why is that important? Why does that make it -- why
22 would that make it less competitive? I mean,
23 the opportunity comes up, it is the only way of getting
24 to those particular students, so why would that be
25 important, that it should be very large in relation to

1 the total?

2 DR MAHER: I guess the point I am trying to make is that in
3 order -- you know, we have a set of assumptions that
4 lead to a conclusion. When those assumptions no longer
5 hold, I think the point that Klemperer is making is that
6 we cannot immediately jump to say, well, the conclusions
7 are still fine. That is the point I am trying to make.

8 So, I think, just if one looks overall at this
9 market, I think it is one that is very far from what
10 would be described by the assumptions that are needed in
11 order to jump to the conclusion that competition for
12 the market can replace competition in the market.

13 I think that is the point that I am trying to make.

14 THE CHAIRMAN: Just so I can follow that, why is
15 the assumption that competition is lumpy irrelevant?

16 DR MAHER: Because these are one -- normally it is bidding
17 markets where we say that competition for the market can
18 replace competition in the market. These are normally
19 markets that are -- as I gave the example of, you know,
20 jet engines for a new Boeing plane, or as Mr Lomas has
21 pointed out, you know, options for 4G/3G spectrum, you
22 know, they are one big-off markets and it is difficult
23 to organise those markets without having some type of
24 a bidding process. So those markets tend to be
25 characterised by bidding.

1 MR RIDYARD: Dr Niels, can we get your perspective on this
2 one then, please?

3 DR NIELS: Yes, sure. If I may, I will come back to
4 the question of the tenders versus the RFPs, because
5 I think that is how we started this bit.

6 Now that we have the Klemperer paper on screen,
7 I think it is probably useful that I start with that.
8 So, the Klemperer paper is indeed, sort of, a well
9 respected reference for bidding markets, and the theory
10 and the concept of bidding markets. Klemperer himself
11 describes this -- also uses this term of
12 the "idealised", or "pure" bidding markets, and these
13 are indeed the four accepted conditions.

14 Now, as with many things in competition analysis,
15 these are matters of degree, and my opinion is that
16 the current market has very much -- has very strong
17 characteristics, features of bidding markets along these
18 four dimensions. So they are not pure -- I am not
19 saying these are pure bidding markets in the theoretical
20 Klemperer sense, but they certainly share many of these
21 features and therefore the competition analysis can
22 usefully be carried out in the context of, you know,
23 what -- how does competition work.

24 So, let us go through all four conditions briefly.
25 You know:

1 "Competition is 'winner takes all' ..."

2 Again, that sounds rather dramatic, but I think it
3 is understood in this case that, you know,
4 the competition is to be the preferred supplier. Debate
5 about whether that means exclusive or near-exclusive,
6 but the competition is for that contract for a certain
7 time period, so it is, in that sense, winner takes all.

8 "Competition is 'lumpy'."

9 Again, it is not extremely dramatic, like, in the --
10 that your -- your company sense. But yes, as Mr Ridyard
11 was saying, you know, these are -- you know, in order --
12 these services take place, you know, not very often and
13 they -- you know, by winning the contract you get access
14 to the whole university and there is no other way of
15 getting access to them other than, perhaps, the B2C
16 model. So in that sense, I think definitely there is an
17 element of "Competition is 'lumpy'".

18 "'Competition begins afresh for each contract ...'"

19 That is also the case. Each university does it
20 separately. There is therefore no relation. If I am
21 the University of Leicester, you know, I do not care
22 what University of Bournemouth has done in particular,
23 or what has happened there. Of course, there is -- he
24 does note the point about incumbency and lock-in. Now,
25 that's -- but that is something you need to analyse,

1 whether the existing supplier has some sort of
2 incumbency advantage. That is part of the competitive
3 assessment, that does not change this being a bidding
4 market or not.

5 The fourth criterion, again, it is, in the extreme,
6 its entry is easy, so, you know, anyone can bid. Now,
7 of course, in no market is entry easy. The question is,
8 is entry feasible enough so that entrants provide
9 a serious, you know, competitive constraint in these
10 bids, and my opinion is -- or my analysis shows that it
11 is.

12 I now actually cannot recall exactly the phrasing of
13 the original question that led to this, but I do
14 remember that I had an answer to it.

15 MR RIDYARD: Is the competition between bidders effective?
16 Competition for OSAs, is that competition effective or
17 not?

18 DR NIELS: Yes, so in my -- according to the analysis that
19 I have done and I have described in my reports it is,
20 the evidence shows that it is, and it is, actually, both
21 for ITTs and for RFPs. So ITTs, I agree. I have shown
22 that in my table 3.3, so we have seen -- or the tribunal
23 has seen the proportions. So roughly 25%, say, is ITTs,
24 then another very big chunk is RFPs and then another
25 chunk is bilateral negotiations.

1 If you look at the evidence, the detailed evidence
2 on the process that took place, the way the university,
3 you know, put out this -- put out its demands, the way
4 the university engaged with the suppliers, with
5 the bidders, the way it assessed the bids and then
6 the decisions it made, those, to me, suggest that, yes,
7 there is -- the competition where it takes place is
8 effective, and that is -- and you get the same process
9 and outcome effectiveness whether it is an ITT or an
10 RFP.

11 MR RIDYARD: Okay, thank you.

12 Dr Maher, I think you have said -- obviously you
13 disagree with many aspects on this point, but in
14 particular you have said that, you know, you do not
15 agree that all parts of the market are the same.
16 I mean, I think in one point in your first report you
17 say the thing about invitations to tender is that they
18 are a competitive process, but they only account for 25%
19 of the market --

20 DR MAHER: Yes.

21 MR RIDYARD: -- and for the other 75%, by implication, there
22 is not a proper competition. Is that your position, or
23 can you just explain where you are on the difference
24 between the formal ITTs and the rest of the contests for
25 OSAs?

1 DR MAHER: So, I looked at all of what I could throughout
2 the disclosure, and I have looked at all of the supply
3 arrangements that E&R has. So, to address your first
4 question, as I said, when I say that 25% of the market
5 has actually engaged in an ITT or a tender, or in some
6 instances what -- Dr Niels has been provided with a list
7 of -- by counsel on the other side of what were RFPs,
8 and things like that, and in reviewing that list, I also
9 looked at whether there was an actual request for
10 proposals that was sort of public. So, I have put those
11 in a separate category. So I think there is
12 a competitive process going on when bidding for an OSA.
13 So we are talking about the B2B market. Then, contracts
14 that are awarded not via some competitive tender
15 process, I would put it as in -- were in the bilateral
16 negotiation, or just the negotiation part of things.
17 I think there is a big difference between the two in
18 that there are issues of incumbency advantages that
19 arise in the latter case where there is not a public
20 competitive tender process going on. So one needs to
21 look at the evidence to see what incumbency advantages
22 might arise.

23 Also, this -- I looked at some of the things
24 the other day over the weekend in response to one of
25 the questions you asked as to whether we observe

1 a difference in outcomes whether there is a formal
2 tender process versus some type of informal negotiation.
3 I looked at -- there is actually very little switching
4 of suppliers that goes on in this market. I think in my
5 first report I think it is something like 6.3% that we
6 have actually seen suppliers switching over the claim
7 period.

8 This weekend I then looked at breaking that down to
9 the percentage of switching where we have some type of
10 public procurement or competitive tender process, and
11 the switching rates there were much higher. It was,
12 like, 18% of the market we do see the university
13 switching supplier, but there is practically no
14 switching going on in the other side of the market.
15 I think it was 2.3% of the market.

16 So I think there are differences, and we do observe
17 it in the outcomes also.

18 MR RIDYARD: How do you justify that last comment?

19 DR MAHER: How did I get to -- (overspeaking) --

20 MR RIDYARD: There are differences in that -- I take your
21 point about the switching, but what about the outcomes
22 of the contracts and how competitive the terms of
23 the contract are?

24 DR MAHER: So, I did also briefly look at whether there were
25 differences in commission rates that were paid to

1 the universities when you had a competitive tender
2 process versus where you did not have a competitive
3 tender process.

4 MR RIDYARD: Is this in your reports?

5 DR MAHER: No, it is not. It was something I looked at
6 this weekend in response to the questions you had asked
7 last week. Again, there are not a lot of observations,
8 but what it does show is that the commissions were
9 higher to the universities when there is a public
10 procurement process.

11 MR RIDYARD: Okay, thank you.

12 MR LOMAS: Could I just make sure, Dr Niels. Your table 3.3
13 in your first report -- and I am afraid I do not have
14 the EPE reference for that, because I am working off the
15 original report itself, but it is your summary of E&R
16 contracts over the claim period. I am sure you are
17 super-familiar with it.

18 DR NIELS: Yes.

19 MR LOMAS: Just help me understand. Is what that is telling
20 us -- and it goes in a sense to Dr Maher's point -- that
21 essentially between a quarter and a third of the E&R
22 OSAs come from either an ITT or an RFP process? Is that
23 the figure we should have in our head? It is about 40
24 out of 120, or a little bit below, depending on which
25 year you take.

1 DR NIELS: Yes.

2 MR LOMAS: It is as simple as that? About a third come from
3 the competitive process?

4 MR RANDOLPH: It is {E6/1/58}.

5 MR LOMAS: Thank you.

6 DR MAHER: Can we have that?

7 MR LOMAS: Yes, sorry, can we have it up on the page?

8 DR NIELS: Yes, indeed. This is my understanding of
9 the factual situation.

10 Now, my comment was that of course in terms of form
11 and process, there are differences, it is a matter of
12 degree, between an ITT, as in so many other markets --
13 between an ITT, an RFP and -- (overspeaking) --
14 bilateral negotiations.

15 But what I was saying, my evidence shows that even
16 in bilateral negotiations, if you look at the examples
17 of how did the process go and what is the outcome, you
18 do not observe any systematic differences between
19 the OSAs awarded through bilateral negotiations, RFPs,
20 and ITTs.

21 MR LOMAS: Yes, but the point I was trying to get at is I am
22 not sure that Klemperer's analysis would include
23 bilateral negotiation as part of a bidding market.

24 I think he was presumably looking for process a bit more
25 open than that. So it seems that even on a maximalist

1 interpretation of 3.3, taking E&R as a proxy for
2 the market, about a third of the contracts are awarded
3 by a process that Klemperer would regard as the sort of
4 process you would see in a bidding market?

5 DR NIELS: That is --

6 MR LOMAS: I wanted to check whether drawing that deduction
7 was fair or not.

8 DR NIELS: It does raise the question about the form of --
9 the form of the process and the actual, you know,
10 competitive dynamics. Even Klemperer talks about,
11 somewhere in his paper, about informal bidding and
12 formal bidding.

13 What I do not know -- yes, it is correct in
14 the sense that if it is bilateral -- so let us start
15 from scratch.

16 I would say what matters for the bidding market is
17 each university, you know, can it invoke competition,
18 can it create competition? Now, I do not know what, in
19 practice, the extent to which --

20 MR LOMAS: Sorry, is it whether it can invoke competition or
21 whether, for current purposes, it does
22 -- (overspeaking) --

23 DR NIELS: No, whether they can. No, for me, it is whether
24 they can. If that means that in practice they have
25 a bilateral negotiation, it is all about is the threat

1 to go somewhere else, is that implicit or explicit.
2 Sometimes in these bilateral negotiations it is made
3 explicitly as well.

4 So, you are absolutely right that that is not
5 a formal or even an RFP-type process, but
6 the competitive dynamics can still be the same. Like in
7 so many other markets where, even in a bilateral
8 negotiation, you do a bilateral negotiation in
9 the context of knowing, well, what are the alternative
10 outside options of your negotiations
11 -- (overspeaking) --

12 MR LOMAS: They may be or they may not, depending on how
13 aggressive the negotiation is, or your category of
14 awarded bilaterally could also include a simple
15 rollover, without very much competitive action at all.
16 Could include it.

17 DR NIELS: Indeed, yes. I have seen evidence -- it is in
18 the evidence -- that there are certainly instances of
19 bilateral process -- OSAs classed as bilateral
20 negotiation that was very strong pushback from
21 the purchaser, and indeed changes in the price from one
22 year to the other, from one contract to the next.

23 MR LOMAS: I think it is also fair to say, is it not -- it
24 is not a criticism at all -- but in doing your analysis,
25 you found it difficult to form a view of how many

1 bidders there were as a general rule; and sometimes you
2 could identify competing bidders, and you have named
3 them in your report. But you do not have any general
4 feel for how many bids went in for those ITT or RFP
5 responses.

6 DR NIELS: Correct.

7 MR LOMAS: Okay, thank you.

8 MR RIDYARD: I am just looking at the time. Do you think we
9 should make a break now? Interesting though this is,
10 I think it is time to make a break.

11 THE CHAIRMAN: Shall we go for a one-hour break?

12 MR RIDYARD: Back at 2 o'clock, please.

13 (1.01 pm)

14 (The short adjournment)

15 (2.01 pm)

16 Submissions re disclosure by MR PATTON

17 MR PATTON: I was going to address you on my learned
18 friend's disclosure application.

19 So if I could just start with -- in terms of
20 the clip that was handed up, if you have the last page
21 of that, which is the letter from the Arts University
22 Bournemouth.

23 THE CHAIRMAN: Yes.

24 MR PATTON: The passage that is relied on is at the start of
25 the second paragraph, which says:

1 "Successive account managers at Ede & Ravenscroft
2 have been very clear to colleagues at AUB that
3 the contract between the two organisations is
4 exclusive."

5 So that is the statement that is relied upon. Just
6 to make the obvious point that no details are given as
7 to what exactly that means; and it does not state that
8 there have been any written communications or emails, or
9 anything of that kind; and it does not state what period
10 is being referred to, what period of time in which
11 the communications might have happened.

12 Then I think you will have in mind, in the Alius
13 letter, which is in the clip, the second one,
14 24 June 2021, on the second page of that, the third
15 paragraph from the bottom, the paragraph beginning:

16 "You say in your letter ..."

17 So it essentially recites what has been said, and
18 says:

19 "... we are unable to comment on what you say in
20 the absence of any supporting details."

21 Then it goes on to make the company's position
22 clear, and that there has been no follow-up
23 correspondence in this chain, so there has been no
24 provision of supporting details as to what was meant by
25 that statement.

1 So just to make the point that this correspondence
2 that we have disclosed, it does not establish that there
3 is other disclosure that has not been given, it simply
4 says what it says.

5 Now, in relation to the disclosure that has been
6 given, if I could ask you to turn up your order in
7 relation to disclosure. It is at {C/4/9}. These are
8 the categories of disclosure that we were to give.

9 THE CHAIRMAN: Just a moment.

10 MR PATTON: Do you have that, sir?

11 THE CHAIRMAN: Yes.

12 MR PATTON: Yes, thank you.

13 If I could just directed you to -- paragraph 3 is
14 the most relevant paragraph:

15 "Documents relating to directions given (during
16 the claim period) ..."

17 And obviously that was all of the claimants'
18 disclosure requests were limited to the claim period
19 from 2016 onwards; they did not seek any disclosure
20 before that. So:

21 "... relating to directions given ... by any
22 University to whose students the Defendants have
23 supplied academic dress at any time during the claim
24 period to its students to the relevant Defendant's
25 services in relation to academic dress supply."

1 My instructing solicitors have confirmed to me that
2 any documents within the documents that have been
3 collated for disclosure purposes falling within that
4 paragraph, disclosure will have been given of those.
5 That is the approach that was adopted to disclosure.

6 Just to be clear as to how that was understood, that
7 would -- paragraph 3 was understood to include documents
8 relating to whether the universities tell the students
9 that they are required to hire from Ede & Ravenscroft or
10 whether they are free to use other suppliers. So if
11 there have been communications during the claim period
12 in our control in the documents that have been reviewed
13 which discuss whether students have to buy or hire from
14 Ede & Ravenscroft or are free to go elsewhere, those
15 documents will have been disclosed. That is
16 the approach that has been taken to the review.

17 So, on the face of it, if there were communications
18 of the kind described in the letter of 22 June 2021,
19 insofar as that is to be understood as suggesting that
20 students were not free to go to other suppliers --
21 I mean, if that is what the university meant in that
22 case -- then the approaches being taken to disclosure
23 would have been to give disclosure of those
24 communications.

25 THE CHAIRMAN: Well, it is in response to a letter from your

1 solicitors, which said:

2 "Nothing in agreement between E&R and the university
3 buying students or requires any student to hire his or
4 her academic dress from E&R."

5 MR PATTON: Yes.

6 THE CHAIRMAN: So the response to that is: well, that is not
7 the way we have understood it.

8 MR PATTON: Yes, that is our case. I mean, that is our
9 position on the effect of the agreements. But if
10 communications have been found in disclosure where
11 the universities suggest a different approach --

12 THE CHAIRMAN: Yes, but does that not exactly describe
13 the letter of 22 June 2021?

14 MR PATTON: I accept that letter should have been disclosed.
15 I do accept that, absolutely, no. And I apologise for
16 that, that that was not disclosed. That should have
17 been disclosed.

18 So the point I am making is not that that -- those
19 letters should have been disclosed and they were not and
20 we apologise for that. But the approach that has been
21 taken to disclosure would have been to -- this is
22 obviously quite a recent letter, probably after
23 the disclosure process had happened. That is not an
24 excuse; there is an ongoing duty of disclosure. But in
25 terms of the approach that was taken to disclosure, it

1 would have been to disclose documents concerning whether
2 students were free to hire from Ede & Ravenscroft or
3 from another supplier. So that is just in relation to
4 the approach that has been taken.

5 Now, in the light of -- obviously this document
6 should have been disclosed and was not. What we propose
7 to do is to do another search or searches, targeted
8 searches on the documents that Alius Law have on their
9 Relativity platform for communications with the Arts
10 University Bournemouth, to make sure that nothing has
11 been missed falling within that description. So falling
12 within paragraph 3 as I have explained it; in other
13 words, anything to do with whether students have to hire
14 from Ede & Ravenscroft or whether they are free to get
15 it from another supplier. We will do that as soon as
16 possible and report back if we find anything that has
17 not been disclosed that should be disclosed.

18 So I hope that essentially deals with the thrust of
19 what is being asked for.

20 Mr Randolph suggested that an affidavit should be
21 sworn in relation to those searches. We would
22 respectfully suggest he has not really identified a good
23 reason for that, or indeed any basis for making that
24 submission. It has not been established yet that there
25 were documents that had been collated that have not been

1 disclosed and should have been.

2 As regards these documents, these should have been
3 disclosed, I accept that. But these are communications
4 with Alius Law; these are communications that my
5 solicitors had. There is no suggestion that
6 the defendants have done anything wrong in relation to
7 the non-disclosure of these documents. It is not being
8 suggested that my solicitors are not to be trusted in
9 conducting the disclosure process. My learned friend
10 did not say that, and I am sure he would not say that.
11 So that was on the question of disclosure.

12 The second aspect of the application was in relation
13 to confidentiality. The point that is taken here is
14 that in the letter from the university they say that
15 they have given disclosure of OSAs under the Freedom of
16 Information Act. That is, as I understand it, the only
17 reason why the confidentiality application has been made
18 now.

19 Now, we do not know to whom the university may have
20 disclosed a copy of the OSA, and we do not know in what
21 format it did that, whether it had any redactions, or
22 whether it asked for any undertakings to be given as to
23 what use might be made of it. There is no suggestion
24 that the terms of this OSA have entered the public
25 domain, or that the claimants have seen it. So there is

1 no suggestion that confidentiality has gone as a result
2 of whatever disclosure was made by the university under
3 its freedom of information obligations. So we would
4 suggest that is not a reason to revisit the approach
5 that has been taken to the confidentiality of the OSAs
6 until now.

7 Also, there is no purpose identified in doing that
8 now. The approach that has been adopted by discussion
9 and compromise between the parties is to have prepared
10 the extracts of the contracts that have been put before
11 you in the form of a table, and my learned friend has
12 cross-examined on those. That part of the trial has now
13 happened. It is very difficult to see what would be
14 the purpose of requiring us to go back to what is in
15 this OSA. But I think my learned friend even went
16 further and suggested every other OSA and to redo all
17 the confidentiality designations.

18 So we would suggest there is simply no basis for
19 that, but also no good reason to do it.

20 THE CHAIRMAN: Yes.

21 MR PATTON: I am grateful.

22 Further submissions re disclosure by MR RANDOLPH

23 MR RANDOLPH: Sir, I can be brief.

24 Insofar as my learned friend complained about --
25 well, did not complain, just said, correctly as it turns

1 out, there was no particular detail of the first
2 sentence of the second paragraph:

3 "Successive account managers at Ede & Ravenscroft
4 have been very clear to colleagues that the contract
5 between two organisations is exclusive."

6 He said: well, it does not descend into particulars
7 of whether they were in writing, and if so, what type of
8 writing and what time period. One would have imagined
9 that they might have made enquiries. It is their -- it
10 is successive managers at Ede & Ravenscroft. So that
11 can be easily done. I would ask for that to be ordered,
12 in any event.

13 THE CHAIRMAN: They are going to do a search of any
14 documents, as I understand it, that respond to that sort
15 of enquiry -- (overspeaking) --

16 MR RANDOLPH: Well, I just hope that -- if that is correct,
17 if it is focused on that, so communications -- any
18 communications, both between Alius Law and
19 the institution, and, particularly, successive account
20 managers or anybody at Ede & Ravenscroft dealing with
21 this, because that was where it was triggered, and
22 the words are "successive account managers", I just do
23 not know what that means, but I would suggest, and
24 particularly given the fact that disclosure on
25 the Relativity platform will go back during the claim

1 period, that that search ought to look through the claim
2 period. That would seem to make sense.

3 In terms of my application was for other
4 universities as well, insofar it is far from realistic
5 to suggest that the only communications between
6 Ede & Ravenscroft account managers on this topic of
7 exclusivity were with AUB; and I would ask,
8 respectfully, that the direction from the tribunal is
9 not only in relation to that which has been acceded to
10 by my learned friend, for which I am grateful, but also
11 to the other OSAs that are currently in force and set
12 out at schedule 1 to Ms Middleton's affidavit. In other
13 words, those OSAs that are presently in force.

14 This is not some poor trainee having to schlep
15 through thousands of documents, it is done by
16 algorithmic search methods; it is a very straightforward
17 task. So we think that it could be very easily done.

18 Insofar as the redaction issue is concerned,
19 the question is: should they have been redacted? It
20 would appear not. The fact that it may not be relevant
21 to cross-examination now, because factual
22 cross-examination has finished, nonetheless, interests
23 of justice normally mean that matters that should not be
24 covered up are not covered up. By "covered up", I do
25 not mean that in a bad sentence, I mean redacted.

1 Open justice is very important. It is very
2 important for people outside this courtroom to
3 understand what the position was. That may be more
4 complex if the tribunal has to have reference to, better
5 though it was, the extracts table.

6 So to that extent, if something should not have been
7 redacted, then the mere fact that it may not be used
8 during the course of cross-examination because that
9 cross-examination has finished does not mean that it
10 should not be unredacted, it should be, on the basis of
11 open justice.

12 THE CHAIRMAN: Is this submission directed at the one
13 contract or all OSAs?

14 MR RANDOLPH: Not all, sir. Those that are set out in
15 schedule 1 to Ms Middleton's witness statement, which
16 are those OSAs that are currently in force.

17 THE CHAIRMAN: What is the basis for saying that they also
18 ought to be -- assuming your point is that this document
19 has been disclosed by the Bournemouth Arts University --

20 MR RANDOLPH: Well, the reference "in common with other
21 HEIs", higher education institutions, "we have
22 previously disclosed the contract". So: in common with
23 other institutions, we have previously disclosed this
24 contract.

25 Now, one assumes that what the author meant was: in

1 common with other HEIs, we have previously disclosed
2 this contract, or the contracts which the other HEIs
3 were able to disclose, because obviously they cannot
4 disclose somebody else's. That is the basis, sir.

5 THE CHAIRMAN: Yes.

6 MR RANDOLPH: I am not going to press the affidavit point,
7 if that is going to slow things down. But my learned
8 friend has, very fairly and very frankly, and we are
9 very grateful, admitted that there was a mistake
10 committed insofar as the disclosure of these documents
11 were concerned; and I accept that and I am grateful
12 for it. I am just saying, in those circumstances, there
13 is a small issue of disclosure issue here. We have been
14 concerned in the past, but if it is going to delay
15 matters, that is the last thing I want.

16 THE CHAIRMAN: What was the date for disclosure?

17 MR RANDOLPH: There were several tranches. I think June and
18 then August possibly, but there was an initial -- this
19 disclosure order, I think, was May, right? Anyway --

20 MR PATTON: We believe this disclosure was to be given on
21 30 April 2021.

22 MR RANDOLPH: But then there was successive -- there was
23 another disclosure round, as I understand it. There is,
24 as my learned friend correctly identified, obviously
25 a continuing --

1 THE CHAIRMAN: The order required the defendants to give
2 disclosure -- no, sorry, that was -- the documents at
3 annex B, which is I think where we were looking, that
4 was by 9 April. That was not pushed back then, was it?

5 MR RANDOLPH: I think it was pushed back to 30 April.

6 August, October and November were further disclosure
7 tranches, if you will.

8 THE CHAIRMAN: What, in breach of the order, they were not
9 disclosed in April? But how did that work? Was it
10 different aspects of disclosure that were in issue?

11 MR RANDOLPH: No, these were, as I understand it, ongoing
12 duty and documents that had somehow slipped through
13 the net. There was no -- I think the parties were quite
14 happy to understand each other's problems.

15 THE CHAIRMAN: Right.

16 Further submissions re disclosure by MR PATTON

17 MR PATTON: Sir, can I just make two further points, I
18 think.

19 One is that my note -- it may not be a precise note
20 of what my learned friend was seeking on disclosure.
21 What I wrote down was: disclosure of the discussions
22 with AUB referred to in the letter of 22 June. He seems
23 to have expanded the disclosure application now to
24 basically any discussions about exclusivity with
25 the universities. But that all falls within paragraph 3

1 of the order. So that is simply restating what
2 the order required. We have given disclosure in
3 accordance with that order. They have documents. It is
4 a matter for them as to what they make of them. But it
5 has never been suggested, for example, that there was
6 a nil return on that paragraph. So that is (inaudible).

7 The other thing, on confidentiality, it is slightly
8 hard to parse, but I should have drawn attention to
9 the last sentence of that paragraph in the university's
10 letter. They say:

11 "In this case, I understand the contract has in fact
12 not been shared, to the best of our understanding."

13 But I am not quite sure ...

14 MR RANDOLPH: Well, if it assists -- I do not want to keep
15 on popping up and down -- but the penultimate sentence
16 of the third paragraph is:

17 "In common with other institutions, we have
18 previously disclosed this contract when required to do
19 so, and informed Ede & Ravenscroft of this. In this
20 case, I understand that the contract has in fact not
21 been shared."

22 So "in this case", that in previous instances it has
23 and other institutions have.

24 THE CHAIRMAN: Thank you very much.

25 We will discuss this briefly. But not now. I think

1 we will get on with the experts, and we will take an
2 appropriate moment in the afternoon.

3 MR RANDOLPH: Very grateful.

4 THE CHAIRMAN: Right, carry on.

5 Questions from THE TRIBUNAL (continued)

6 MR RIDYARD: We were just discussing under the topic 3,
7 the dominance/market power.

8 The next question I wanted to ask, which follows on
9 directly from the conversation we had just prior to
10 the break -- Dr Maher, perhaps you would take the lead
11 on this question: do you think we observe a difference
12 in the outcomes compared to formal tendering and
13 informal or ad hoc arrangements that take place?

14 DR MAHER: Yes, I do. So, a couple of the differences that
15 we find is one in switching rates. So where we observe
16 the actual -- some type of formal tendering process has
17 occurred, I calculate the switching rate to be about
18 18%. Where it is just the other OSAs, there is no
19 evidence of there having been some type of public
20 procurement process, the switching rate was 2.3%.

21 MR RIDYARD: Are those percentages over the entire period,
22 are they per annum or over the entire period?

23 DR MAHER: They are over the entire period. So over
24 the entire claim period there have only ever been 11
25 switches. I calculate there have been 44 institutions

1 that have tendered. There has been 11 switches of
2 supplier during the claim period. Of those, two of
3 those switches have been from other suppliers. So from,
4 say, Wippel to Graduate Gowning Company, for example.

5 In fact -- it is in my annex C -- the other switches
6 that we have seen, where there has been a tender, E&R
7 has not been able to win any tenders where it is not
8 already the existing incumbent. So where there is
9 public procurement, the risk to E&R has basically been
10 that it has lost its OSAs; they have not been able to
11 actually win any OSAs off of an existing -- off of
12 another supplier.

13 So basically they -- as I say, they only win when
14 they are already the incumbent.

15 What else do I want to say about switching? So,
16 I think that basically goes to the main points, that
17 there is very little tendering in the market; switching
18 is also very low, and the evidence is that where there
19 is tendering, E&R has lost, but where there is no
20 tendering, it has not actually lost.

21 MR RIDYARD: Okay. So your conclusion from that is that you
22 get a different kind of competition, a more effective
23 form of competition when there is formal tendering than
24 when there is not?

25 DR MAHER: Yes.

1 THE CHAIRMAN: Dr Niels, what is your perspective on this
2 one?

3 DR NIELS: Yes, so my detailed analysis of the outcomes of
4 the processes in terms of the -- you know, what is in
5 the contract in terms of prices, commissions, other
6 services that are being included, and also my analysis
7 of the process, so some correspondence that was there in
8 the process, or indeed a feedback document about
9 the ITTs, or correspondence about, you know, certain
10 terms that were offered in the first bid, my conclusion,
11 as I have said in my first report, is that I see no
12 systematic difference in outcome between whether
13 something was done through an ITT or an RFP, or indeed
14 the bilateral negotiation.

15 If you look at the terms of the OSAs, they are very
16 similar in all of those instances.

17 MR RIDYARD: What do you mean by that? Do you mean that
18 they all have commission, or that the commission is
19 always X per cent?

20 DR NIELS: Well, a bit of both. So they all have a similar
21 structure in terms of what -- yes, that there is
22 a price, there is a commission and there is -- there are
23 those additional services.

24 Now, the level of the commissions and the level of
25 price, they do differ some. But, again, there is no

1 systematic difference in commission; it can go both in
2 different directions. But, yes -- so the outcome, there
3 is no systematic difference in -- I am not saying they
4 are all the same, they do not all have the same price or
5 commission, but they all have very similar outcomes.
6 From that I conclude, and also from the analysis of
7 the process that I have done, is that maybe ITT are
8 the most competitive, because it is a formal tender, but
9 if you look at what happens on the RFPs and
10 the bilateral negotiations, there is also some pretty
11 sharp negotiation and competition going on. So from
12 that perspective, I see little difference.

13 Now, could this -- another interesting policy
14 question, of course, is should universities tender more,
15 should they do more RFPs? The answer is probably, well,
16 yes. But the question here is: are there any reasons
17 why they could not do? So it is the point again about
18 can they do it or do they do it.

19 I do not know why those universities that selected
20 bilateral negotiations, why they chose that. But can
21 they, if they wanted to, sharpen up their procurement
22 process? I see no barrier for them -- or my analysis
23 shows no barrier for them doing it. Also, it does
24 not -- there is no indication that those universities
25 that do only bilateral negotiation are somehow in

1 the pocket of Ede & Ravenscroft.

2 MR RIDYARD: Just to go back on the commissions. You say
3 you do not find any systematic difference in
4 the commission rates. Have you presented evidence on
5 the commissions and reported those in a way that we can
6 follow, or is that just your impressionistic kind of
7 conclusion?

8 DR NIELS: Yes, it is fair to say it is an impressionistic
9 analysis. So that bit of the analysis, I have not done
10 a statistical analysis, for example, to draw, you know,
11 averages. It might be interesting to do that. But the
12 impressionistic assessment, you know, actually,
13 literally looking row by row in the contract database
14 that both experts have worked off, you see many examples
15 of tenders where you have, you know, these things like
16 commissions; or even annotations like, you know, where
17 the same university had one arrangement and then another
18 one in the same claim period and then they lowered
19 the price, there are examples of that happening both for
20 tender, for RFPs, and also in bilateral negotiations.

21 So it is impressionistic; I have not done
22 a statistical analysis of that.

23 MR RIDYARD: One could take this to the next level and say,
24 rather than just look at commissions, because
25 the commission is obviously just one parameter of

1 a contract which has many parameters, I mean, the sort
2 of -- the way to aggregate those would be to look at
3 the actual margins to Ede & Ravenscroft from
4 a particular bid. So that would include both the cost
5 of the commitments that it was making upfront and
6 the expected revenues it was going to get from
7 the commissions on anything that it was selling.
8 Presumably you also have not done that kind of analysis,
9 that sort of systematic analysis, to see whether
10 the gross margin or the contribution margin or something
11 was different where there was an ITT than when there was
12 not?

13 DR NIELS: Correct, yes. I have not done a systematic
14 analysis in that sense of the margins.

15 The prior point about there being interplay between
16 the various aspects of a tender or a bid, that is indeed
17 common in many markets.

18 MR RIDYARD: Yes.

19 DR NIELS: And of course, there is a bit of give and take,
20 especially in ITTs, where there are, you know, specific
21 percentages, you know, award criteria, then the bidder
22 can actually explicitly play around with those
23 trade-offs. But in any commercial negotiation or an
24 RFP, there is a bit of interplay between the various
25 factors. So some may offer a slightly higher

1 commission, some may offer a bit more, you know, free
2 dress for the lecturers at the university, et cetera.
3 There will be a bit of, you know, give and take.

4 MR RIDYARD: Interaction.

5 DR NIELS: And therefore you do observe variation across
6 the contracts.

7 MR RIDYARD: I am curious to know why you did not take this
8 further actually, because it sounds like -- I mean,
9 the hypothesis is, or the claim is that the conditions
10 of competition are the same whether it is an ITT or an
11 RFP or an ad hoc arrangement. So why did you not then
12 test that hypothesis by looking to see whether
13 the margins were different in one category of
14 contract to another?

15 DR NIELS: Yes, it is a fair -- I am just thinking. It is
16 a fair point that could have been an interesting or
17 insightful analysis. I am just thinking -- yes -- no,
18 I agree, it could have been an insightful analysis.

19 There is some -- there was always some doubt about
20 the exact classification of the procurement method.
21 Although ITTs are fairly clear. Yes, so, I formed an
22 impressionistic view, not a statistically tested view.

23 MR RIDYARD: I do not want to sort of flog this to death,
24 but you did have the evidence to do that, I think, did
25 you? Am I right in thinking there was a spreadsheet or

1 at least an analysis by E&R of the margins on different
2 OSAs?

3 DR NIELS: Well, margins, that is a different point.

4 The terms of the OSAs -- so for example commission
5 rates and prices -- well, those are quantitative terms,
6 the rest is a bit more qualitative -- there, I agree
7 that it might have been interesting to look at
8 the average -- you know, average commission for ITT/RFP
9 negotiation and average prices, for example. Although
10 prices, I did look systematically at price levels.

11 But margins, margins there was no systematic
12 information on the exact profit margin of E&R on each
13 contract. That is -- I started looking into that
14 through another -- or I considered looking into it
15 through another route, which is the management accounts,
16 but there you cannot see information contract by
17 contract. So, on margins versus the method of
18 procurement, there I do not think it was feasible for me
19 to do a systematic analysis.

20 MR RIDYARD: Dr Maher, did you consider taking further this
21 kind of comparison looking at differences in outcomes
22 between different types of contract?

23 DR MAHER: No, I did not. I did not look at the margins.

24 I am not sure if there was enough information that
25 I looked at that would allow to actually do the margins,

1 calculate the margins, but there is the -- you are
2 right, there is the ceremony profit analysis spreadsheet
3 that E&R has.

4 MR RIDYARD: Yes, I think that was the document that
5 I was -- I think it came up in the -- last week in
6 the evidence. It was like a pdf photocopy of an
7 extremely large spreadsheet. So obviously it would not
8 have been a very easy thing to analyse in the pdf
9 format. But if you could have the Excel file behind
10 that, I would have thought it would lent itself to some
11 sort of margin comparison. But I could not re-read this
12 spreadsheet any more than anyone else could, because of
13 the format in which it was presented.

14 DR MAHER: My reliance on that spreadsheet was to evidence
15 the fact that both the commissions on photography and on
16 academic dress both go into the ceremony profit
17 analysis.

18 MR RIDYARD: I just found the document. I think it was
19 {F4/549/1}.

20 DR NIELS: Is it something you can put on
21 -- (overspeaking) --

22 MR RIDYARD: You can put it on. I am not sure it would be
23 that useful to look at it right now, because it is very,
24 very hard to read it in the pdf. But I just wondered
25 whether you had gone further in looking into that.

1 DR NIELS: Not into that document, no. We had very detailed
2 analysis of all the contracts in the OSAs, and that is
3 what I focused on, and then there was the management
4 account analysis.

5 MR RIDYARD: So let us move on to -- well, a closely related
6 question; and this is not comparing ITTs versus ad hoc
7 arrangements, but it is looking at the question of
8 incumbency advantage.

9 Dr Maher first. I mean, do you think -- I believe
10 you do think there is an incumbency advantage; I think
11 you both actually agree on that. But can you tell me
12 how you would go about identifying what the incumbency
13 advantage is and why it would matter for our assessment?

14 DR MAHER: Well, I think there are several incumbency
15 advantages. One in particular is the long term nature
16 of the supply agreements that E&R has had with
17 the universities that in many cases go back decades.
18 That, in and of itself, you know, I think provide --
19 long term relationships, supply relationships, you know,
20 you develop, you know, a relationship with
21 the procurement manager, whatever; do you provide some
22 type of incumbency advantage. There tends to be, just
23 in general, unless one seriously -- a supplier seriously
24 messes up a contract, there tends to be a certain level
25 of customer inertia. So I think that is one indication

1 of an incumbency advantage is just arising out of
2 the long-term nature of these supply agreements.

3 Another incumbency advantage is that as
4 the incumbent supplier of the academic dress to
5 the university, E&R can -- has more insight to
6 the design specifications, which are not always publicly
7 available to all of the other academic dress suppliers.
8 So it does have that advantage.

9 There has also been some evidence in disclosure that
10 they have an incumbency advantage even when there -- it
11 comes to a tender process, where we have seen that in
12 some instances they have advised the university on some
13 of -- how to go about the tender or what some of
14 the specifications you might want to put into a tender,
15 which of course then gives the incumbent an advantage,
16 because it can advise in a way that might make
17 the tender to his advantage -- his or her advantage.

18 MR RIDYARD: Yes, and if sum incumbency advantages existed,
19 how would they manifest themselves? What would be
20 the outcome of that?

21 DR MAHER: Well, again, I think the way I evidenced
22 the outcomes was to look at the difference in switching
23 costs between where there is a public procurement
24 process and where there is not. So I looked at that.
25 In terms of the evidence, again it is the same things as

1 I have said. If you look at where E&R does lose,
2 you know, it has been when it actually has been a public
3 procurement process. We have not seen any switching
4 away from E&R where it actually -- there is not a public
5 procurement process.

6 MR RIDYARD: And -- sorry.

7 DR MAHER: So in terms of other incumbency advantages, one,
8 again, I go back to the design feature -- I am just
9 looking to see -- often there also might be some type of
10 lock-in effects, switching costs that are imposed by
11 the contractual obligations. So, for example, where
12 Ede & Ravenscroft is the supplier of free academic dress
13 to staff and (inaudible) that the contract may specify
14 that if they were to switch supplier, that they would
15 have to purchase that free academic dress that they had
16 been providing, they would have to purchase that from
17 E&R at the market rate. So again, that imposes some
18 type of lock-in effects.

19 MR RIDYARD: How many of these incumbency -- or which of
20 these incumbency advantages do you think can be fixed by
21 the right kind of invitation to tender process, and
22 which of them are -- would be present even if you had
23 a perfect process for putting things out to tender?

24 DR MAHER: Well, you cannot correct the long-term nature of
25 the agreements, of the supply arrangements, overnight.

1 So I think putting things out to tender over the whole
2 market would encourage more switching. We have seen
3 that suppliers -- sorry, universities do switch
4 suppliers when E&R has been the incumbent. However,
5 that does not address the competition concerns in
6 the B2C market, which relate more to the exclusivity
7 arrangements that exist. So one of the other incumbency
8 advantages that E&R has in relation to the B2C market is
9 being assigned the exclusive right to supply that
10 academic dress to students, which makes it very
11 difficult for any entrant to enter into the B2C market.

12 MR RIDYARD: Okay, indeed. But that -- I can see that
13 problem, but that problem -- does that problem not exist
14 whether the university has been super-professional and
15 hard nosed in its negotiations with its OSA supplier or
16 lax and lazy in its approach? I mean, it is the same --
17 is not the same -- the B2C outcome is the same either
18 way, is it not?

19 DR MAHER: I think the exclusivity is what creates a barrier
20 to entry into the B2C market, because it incentivises
21 all of the supply to have to go to the OSA supplier. So
22 it does create a barrier to entry. So, yes, what I am
23 saying is that if you do have tendering over the whole
24 market, that will not correct the problem of the barrier
25 to entry in the B2C market. I am not sure if that --

1 MR RIDYARD: Yes, that is a clear enough answer. So why do
2 we care about how competitive the tenders are?

3 DR MAHER: I think it goes to evidence -- well, it has to do
4 with whether there is competition in the B2B market,
5 which was not my primary concern. The alleged
6 foreclosure here is in the B2C market, not in the B2B
7 market, would be my answer to that.

8 So I think the issue of how competitive things are
9 go -- in the B2B market, goes to demonstrate whether
10 Ede & Ravenscroft has an incumbency advantage. So when
11 one looks at where there is no tender, we observe very
12 little switching, which would go to say that there is
13 very little -- basically, what we want to look at,
14 the tender process is one where you are applying
15 competitive constraints; are the rivals imposing any
16 competitive constraints. I do not think there is much
17 evidence outside of the tender process that we see that
18 other suppliers actually do impose constraints on
19 Ede & Ravenscroft.

20 MR RIDYARD: So if that was true, you would expect
21 Ede & Ravenscroft to be able to retain those contracts
22 on terms that made lots of profit for Ede & Ravenscroft,
23 because they did not have to work, or did not have to
24 worry about the competition.

25 DR MAHER: Yes.

1 MR RIDYARD: Whereas with an effective ITT, they might be
2 very concerned about losing the contract, and therefore,
3 you know, to offer the university a better deal. But in
4 either case, you are saying, Churchill's problem is
5 equally bad. It is just the same, is it not? I mean,
6 they are -- it is the exclusivity that keeps Churchill
7 out of the direct sales operation?

8 DR MAHER: Yes.

9 MR RIDYARD: Okay, thanks.

10 Dr Niels, I know there is quite an agenda there, but
11 if you could do your best to try and address the points
12 that we have just been discussing.

13 DR NIELS: Yes, so starting with incumbency advantage. Yes,
14 there are incumbency advantages, like there are in so
15 many markets where, you know, you are the existing
16 supplier.

17 The advantage is that you have -- in this case, you
18 have invested in the relationship-specific stock, so you
19 may still have -- you have more stock than those that
20 would have to invest from scratch. You may -- as
21 Dr Maher also said, you may know the client better, and
22 therefore already have a sort of working relationship,
23 et cetera.

24 But the question is, are those incumbency advantages
25 strong enough to prevent anyone else from credibly

1 bidding and competitively bidding. There, the evidence
2 is just, no, because there is evidence of others bidding
3 for the same contracts, successfully bidding for
4 the same contracts, even, you know, beating
5 Ede & Ravenscroft. There is also evidence of even
6 contracts where Ede & Ravenscroft won the contest,
7 the other bidders were actually quite close. There is
8 some -- this is my analysis with the feedback from after
9 tenders. Others were very close and almost matched E&R.

10 There is also evidence of, indeed, some universities
11 in the specification of the tender being very
12 professional about it and actually allowing for -- or
13 enabling those who are not the incumbent to make
14 credible bids, such as -- I have referred to some
15 clauses, some of these ITTs say, "Well, even if you do
16 not have, you know, experience with us or in the market,
17 you know, describe how you would do this," that kind of
18 thing.

19 So there is nothing -- and then also the design
20 itself. I am not -- certainly not a factual expert on
21 the design, nor the legal expert on what IP is involved,
22 but my reading of those contracts is also that there are
23 sometimes, often or not I do not know, but provisions
24 where -- so having the -- having sort of -- being
25 able -- having the -- some sort of, I do not know, IP or

1 copyright over the design, that can also be passed on to
2 any next bidder. So there are mechanisms that some
3 universities use also to facilitate -- to overcome that
4 sort of -- indeed, to avoid being locked in by their
5 existing supplier.

6 So overall I would say the incumbency advantages are
7 not so strong as to prevent effective competition.

8 MR RIDYARD: In the B2B activities, you are saying?

9 DR NIELS: Yes.

10 MR RIDYARD: Do you have any observations on Dr Maher's
11 comments about switching being higher in ITT contracts
12 than in non-ITT contracts?

13 DR NIELS: I have not done the actual statistics on that, so
14 it could be. I mean, I would have to look at that.

15 My observations are that -- I mean, the -- my
16 analysis of switching, the win/loss analysis, is there,
17 and I think we agreed that there were in the period 11
18 circumstances, and all slightly different. But -- so
19 maybe not overly high levels of switching, but certainly
20 there is switching, and it just indicates to me that if
21 a university wants a competitive contest, then it can
22 get one. It often gets one, and E&R does face
23 competition in those processes.

24 MR RIDYARD: Yes, but saying that the university could, if
25 it wanted to, set up an effective bidding contest is not

1 the same as saying that it actually does that in all
2 cases. Is there not quite a gap between what it could
3 do and what it might do in practice?

4 DR NIELS: Yes, certainly, as we discussed, there is a gap
5 there. You know, you add up the ITTs and RFPs, 40% of
6 the market do it. But, yes, my point is others can.
7 And that is sort of the most relevant for the overall
8 competition analysis, or indeed for attributing,
9 you know, the causal -- sort of the who caused this
10 market structure to arise, and who -- how could you
11 potentially improve it. Well, maybe universities could,
12 if they wanted to.

13 But then there are also reasons perhaps why a
14 university is perfectly happy. So this point of
15 inertia, that can of course also in many markets go both
16 ways. It can be, like, you (inaudible) inert customers
17 and you get ripped off. But it can also be an instance
18 of: we are just happy with the current provider. You
19 keep them on their toes by, you know, periodic bilateral
20 negotiations. There is evidence of that, that that
21 happens. Then you stay for a long time, because it is
22 just also convenient for you.

23 So that can also explain why you do not see perhaps
24 higher percentages of more formal processes.

25 MR RIDYARD: Maybe we will come on to that point in

1 a moment. But just on the -- I mean, we are talking
2 about this because we are interested in assessment of
3 whether E&R is dominant or not. If one were to find
4 that -- I will put this simplistically -- in a quarter
5 of the cases, you know, the customers were very
6 effective in setting up the bidding process and they
7 made sure they got a competitive outcome out of it, in
8 three-quarters of the cases the customers were sleep,
9 and therefore they allowed the incumbent, which in most
10 cases is E&R, to get away with a nice fat margin without
11 them worrying about losing their business, is it not
12 quite plausible that when you added up the numbers at
13 the end of it all, you would find that the incumbent, in
14 this case E&R, had indeed earned profits that were well
15 ahead of the competitive level; and is that not really
16 one of the hallmarks of dominance?

17 I mean, why should we not conclude that from
18 the information that we have just been discussing?

19 DR NIELS: So I think the analysis -- I think the conceptual
20 analysis, I think that is correct. There are markets,
21 and you could posit that if 25% of customers are,
22 you know, sharp and get a good deal but the others are
23 asleep and therefore get -- you know, lets the dominant
24 supplier get away with it and rip them off, yes, then
25 you would conclude that there is a competition problem

1 here.

2 Now, I have tried to address that question, and
3 these are always matters of degree. But what I find is
4 that -- well, I have given the percentages of the -- of
5 ITTs and RFPs, and then also bilateral negotiations. So
6 what I see from that is that actually, no, you cannot
7 conclude, therefore, that there is a problem, because
8 also the outcomes in terms of what the universities get
9 is as competitive, very comparable whether it is an ITT
10 or another process, and also the prices. So the most
11 direct sort of indication of dominance would be through
12 the price charged to the students, because that is
13 ultimately the price that generates the profit --

14 MR RIDYARD: Possibly, but we are -- I promise you we are
15 coming to that evidence. But I guess -- yes, we will
16 deal with that when we come to the evidence on pricing.

17 DR NIELS: Apologies, all I -- I only brought in prices
18 because you asked about margin. So from that -- and we
19 will come to it, I accept that. But from that, I also
20 concluded that there is no indication that this is
21 a market where the incumbent gets fat profit margins,
22 because the price levels are the same as -- across
23 different types of contracts and also over time.

24 MR RIDYARD: Okay. I think the best place to deal with that
25 is in a couple of questions' time actually. We will

1 come back to that, and I will give you both a chance to
2 comment on that evidence.

3 MR LOMAS: Can I pose one point of clarification to
4 Dr Maher. This is an issue that may come up at various
5 stages.

6 In talking, as you were, about the way the market
7 operated, you were talking about essentially
8 the foreclosure of the B2C market. And I think
9 Mr Ridyard asked you why, and you said, "Well, because
10 of the exclusivity."

11 Do we not need to be quite careful in the portfolio
12 use of this term "exclusivity", because it is contested,
13 I think what "exclusivity" means? I think it is
14 accepted that there is an exclusive appointment as
15 the universities' robemaker. What is contentious is
16 what level of exclusivity that gives in terms of
17 the choices that the graduands can make as to from where
18 they hire their robes. So I think we have to be quite
19 careful in not using "exclusivity" in a hand-waving way
20 to say that is the problem, without thinking about
21 what "exclusivity" really means.

22 Within that, there is a particular issue which gets
23 close to what you are saying, which is the commission
24 structure. When you are talking about foreclosure,
25 is it really that what you are saying is that

1 the commission arrangements that are in each of these
2 exclusive contracts create incentives for
3 the institution, or are you talking about exclusivity in
4 some other way? I was just slightly confused by the way
5 in which you adopted the term, and I think we need to
6 unpack it a little, and I think we need to be very
7 careful over the next day and a half, when we talk
8 about "exclusivity", being very precise about what
9 aspect of exclusivity we really mean.

10 DR MAHER: Okay. So, if I can clarify that. I mean
11 exclusive in the sense of they are effectively
12 exclusive, de facto exclusive. I am not referring to
13 any legal exclusive term. So the evidence would suggest
14 that E&R does have an -- is basically a monopoly
15 supplier to the students. How that arises is through
16 a contractual obligation but which, if you look,
17 evidence shows that, for example, if you go on a number
18 of the universities' websites. So it is about barriers
19 to entry. When we talk about "foreclosure", what I mean
20 as an economist is what barriers to entry may be
21 existing. Here I am talking about the barriers to entry
22 in the B2C market.

23 So, if you have the university on its website where
24 it says students must purchase their gown from
25 Ede & Ravenscroft or they will not be allowed to attend

1 the graduation ceremony, that creates a barrier to
2 entry. So it is in that context that I use --

3 MR LOMAS: Just pursuing that example, that is a barrier
4 created by the university --

5 DR MAHER: Yes.

6 MR LOMAS: -- which I think Ede & Ravenscroft would say
7 the contract does not oblige the university to create.
8 At least I think they would say that. I think that's
9 the argument.

10 DR MAHER: Yes, that is what they would say. But if I look
11 at how -- you know, in looking over the disclosure
12 evidence and how the universities -- so, yes, you are
13 right, but I think that it also goes to incentives. So
14 if I try to stay away from the wording so that we do not
15 get into a legal versus economic --

16 MR LOMAS: Yes, I understand.

17 DR MAHER: So if I go to the incentives that the parties
18 have, okay, that in the absence of having the sole -- of
19 being the monopoly supplier, you would not be able to
20 retain sort of the commission structure that supports
21 that outcome. The reason for that is, in order to pay
22 the commissions, you need to be able to charge a price
23 that reflects all of the graduation ceremony service
24 costs, including the free academic dress that you need
25 to provide for staff, the commissions.

1 So the price is greater than that which -- I am
2 already jumping, sorry, to where we are going to go
3 later.

4 The price is already greater than a price that you
5 would observe in a competitive market, where you would
6 expect price to equal marginal -- "marginal costs" is
7 the shorthand that economists often use -- for that
8 product, which is the academic dress in and of itself in
9 the B2C market.

10 So it is in that sense that I am talking about
11 the incentives that the parties have which result in
12 de facto exclusive supply.

13 MR LOMAS: Right, thank you. But from an economist's
14 viewpoint, you are interested in the sense of the
15 incentive structure, rather than the wording of
16 the contract.

17 DR MAHER: Yes.

18 MR LOMAS: Okay, thank you.

19 MR RIDYARD: This question you might feel we have covered it
20 adequately already, but let me just ask it anyway, just
21 for completeness.

22 Dr Niels, in your report, and I think also just
23 a few moments ago, you said something similar to
24 the following. You said: when we observe there has not
25 been much switching, I mean, that could reflect barriers

1 to switching or entry barriers, or it could reflect
2 the fact that customers are very happy with that they
3 have already been receiving and/or customers can quite
4 credibly threaten the existing supplier with another
5 supplier; and if that threat is very credible, then both
6 parties would realise it does not make sense to do
7 something that would trigger that threat.

8 So I can see that it is possible that a lack of
9 switching could be consistent with a competitive bidding
10 market, but it could also be consistent with a very
11 uncompetitive market in which there were huge switching
12 barriers and great incumbency advantages.

13 So is there anything more you can tell us about how
14 we would distinguish between -- how we would test
15 between those two hypotheses of the observation of low
16 switching?

17 DR NIELS: Yes, so I have looked at that in a number of ways
18 by looking, yes, a bit deeper into which of the two
19 is it.

20 So, one is, as I have already referred to, my
21 analysis of bidding outcomes; and this is necessarily
22 limited to ITTs, because that is where the information
23 is available. But if you look at the way -- and I have
24 looked at that in detail in section 2 of my report. If
25 you look at the way universities have actually carefully

1 scrutinised these bids, that gives to me the impression,
2 yes, this is a market where universities have buyer
3 power, or certainly can exercise choice.

4 Then, even in those instances where they continue to
5 stay in E&R, that was, by and large -- from my analysis
6 of some of the feedback documents, that was by and large
7 because they were satisfied with the terms they were
8 offered by E&R. So all for positive reasons, at least
9 if you look at that bit of the analysis.

10 The other bit of the analysis -- and, again, we will
11 come to it, but it is just what I did is to look at
12 market outcomes. So look at prices. Because if
13 the theory were true, the theory of harm that no
14 switching, that is because of inertia, and you just --
15 you know, you get ripped off, my analysis of pricing is
16 just not consistent with that.

17 MR RIDYARD: Dr Maher, do you want to comment further on
18 that point?

19 DR MAHER: No.

20 MR RIDYARD: Thank you.

21 This might be just a good moment to mention one
22 thing which I would be interested in getting your
23 responses on maybe tomorrow, would be whether that
24 document that I have referred to earlier, the price --
25 I think it was called "Price Variances", it was

1 {F4/549}, whether that document could have been capable
2 of generating more information about margins and
3 doing -- testing some of these hypotheses by looking at
4 the overall margins on contracts or not. But do not
5 come back to me on that right now, but I would like to
6 know what you think about the possibility of that
7 document being more useful.

8 MR RANDOLPH: I hate to interrupt. I have been informed
9 that actually that document F4 at that tab is in pdf
10 form, and therefore deeply unfriendly in terms of use.
11 It is available in its native format, as I understand
12 it, Excel spreadsheet, in the disclosure. So not in
13 the trial bundle per se but in the disclosure.

14 We will do our best -- (inaudible) it is not our
15 document. But we will do our best to try and give
16 everybody the right AL number, which it is, and then
17 magic can happen in terms of being actually able to use
18 a spreadsheet as a spreadsheet, rather than just
19 a document to read.

20 I do not know whether that assists, sir?

21 MR RIDYARD: Yes. Really, my question is in principle
22 whether that could have been used in a way which could
23 have answered some of the questions we have been
24 discussing. But come back to me on that, you know, once
25 you have had a better chance to look at it and consider

1 it.

2 DR NIELS: Does that magic include the legal teams providing
3 that document to us, or do I have to trawl through
4 the documents?

5 MR PATTON: (inaudible) to the experts. We can simply --
6 I mean, what we have done in other cases where there is
7 an Excel document is simply upload the Excel directly
8 onto Opus. So we will do that so that the tribunal and
9 we all have it, but we will email it directly to
10 the experts, if you are content?

11 MR RIDYARD: Thank you. That is very helpful.

12 So the next issue or question we had is on this
13 question of de facto exclusivity. So I think, Dr Niels,
14 it would be helpful if you started us off here.
15 The question is: is there sufficient evidence to assess
16 whether the OSA arrangements create de facto exclusivity
17 in the market?

18 DR NIELS: Yes, so as an economist and for pragmatic
19 reasons, I have assumed that these contracts give
20 exclusivity or near-exclusivity.

21 The reason why I say I have assumed it is I knew --
22 I was aware there was some debate about, you know,
23 the actual contractual meaning of "exclusive"; is it
24 fully exclusive or not. For all intents and purposes,
25 my understanding of these contracts is that you are

1 the official supplier, and you can expect and in
2 practice do get the great majority of the -- you know,
3 you supply the great majority of the students, whether
4 that is near-exclusivity or full exclusivity, I cannot
5 tell with precision.

6 Therefore, I have assumed that they are fully or
7 near-fully exclusive. That informed my analysis.
8 I mean, to me, that was the most informative analysis;
9 and, actually, also, the analysis that is sort of most
10 consist with a claim by the claimants about there being
11 exclusivity and therefore they are foreclosed.

12 MR RIDYARD: But you said you cannot be sure whether it is
13 perhaps absolute exclusivity or almost absolute
14 exclusivity. Is that the only uncertainty in your mind
15 about whether it is 99.5% or 100%?

16 DR NIELS: In my mind as an economist, what I would expect
17 from such contracts, yes. I mean, there is some data
18 from Churchill Gowns' sales, which are relatively low,
19 which suggest that it is, you know, not 100% exclusivity
20 but maybe 99, in practice. But then there is also, yes,
21 the more legal contractual questions, which
22 -- (overspeaking) --

23 MR RIDYARD: I am not quizzing you about the legal
24 contractual questions, I just want to know about, as an
25 economist, what your assessment of the market outcomes

1 is. We know more or less what Churchill's share is, and
2 it is not very high. Is there anything else in there
3 that is going to whittle away at that 95%?

4 DR NIELS: No, it is -- well, it is fair to say it is
5 near-exclusive or almost fully exclusive, yes.

6 MR RIDYARD: I just wanted to be clear that we are all clear
7 that it is de facto, it is exclusive. Is that what you
8 are saying?

9 DR NIELS: Yes, I am, yes. I have certainly carried out my
10 analysis on that basis.

11 MR RIDYARD: I know, but I would just -- I just was not
12 clear where -- your wording is sometimes a bit
13 convoluted on this, and I just wanted to cut to
14 the chase, as to what you exactly think is happening in
15 the marketplace.

16 DR NIELS: Yes. Well, so that is what I think, that these
17 contracts are almost exclusive, near-exclusive.

18 MR RIDYARD: Okay, yes.

19 Dr Maher, I am not sure -- (overspeaking) -- much to
20 say on that topic (inaudible).

21 DR MAHER: -- (overspeaking) --

22 MR RIDYARD: Thank you.

23 Okay, let us touch on the question of prices and
24 margins.

25 Dr Maher, if I can address this question to you. Oh

1 yes, sorry. The question I wanted to ask was the topic
2 I think that you just did touch on in your answer to
3 Mr Lomas a moment ago; and that is: if we were to
4 compare Ede & Ravenscroft's rental prices to graduands
5 with those that Churchill would like to or can offer
6 onto the marketplace, we know there is a difference
7 in -- we know -- well, we believe there is probably
8 a difference in those price levels. Do you accept that
9 that is not comparing like with like?

10 DR MAHER: Yes, I accept that they are not comparing like
11 with like. But let me qualify that, in the sense that
12 the Ede & Ravenscroft price will be a price for
13 academic dress that is a price for all of --
14 incorporates all of graduation ceremony services. Maybe
15 not all of it, because you do have the photography side
16 also providing some of the commissions. But from
17 the students' point of view that has to purchase, they
18 are directly comparable.

19 MR RIDYARD: For the students it is the same
20 -- (overspeaking) --

21 DR MAHER: For the student it is the same.

22 MR RIDYARD: -- (overspeaking) -- wanted to get the dress on
23 the graduation day.

24 But I would like to drill down a little bit more
25 into the price difference, because the commission rates

1 that the OSA holder pays, I think we all have a pretty
2 good idea of what those commission rates are; and that
3 is one of the factors that makes it different from
4 the price that Churchill can charge, because it is
5 obviously not paying commissions because it does not
6 have OSAs in its direct-to-the-consumer model. But what
7 about the other elements, the other costs, as it were,
8 that the OSA, it has committed to, and presumably those
9 are being -- you believe those are being reflected in
10 the prices that the OSA holders are charging to
11 graduands?

12 DR MAHER: Right. So some of those other costs would be
13 the other benefits that they are providing
14 the university. So the free academic dress for staff,
15 if they are providing prizes or other benefits
16 -- (overspeaking) -- those financial inducements, those
17 would also be part of the cost base. So I think those
18 are not costs that a direct hire supplier would be
19 incurring.

20 There are some costs that the B2B supplier incurs
21 that also the B2C suppliers incur. So, for example,
22 having to have an ordering system, you know, maintenance
23 of the staff robes, cleaning, you know, those are costs
24 that are similar, that are related specifically to
25 academic dress.

1 MR RIDYARD: Yes. But do you have any feel for how -- put
2 it this way. If we said that the effects of
3 the commission -- that there is no symmetry between
4 these two -- (temporary loss of audio) -- face-to-face,
5 they are both facing the consumer, saying "hire my
6 academic dress for the graduation day", one of them,
7 though, has gone through an OSA, and therefore it has to
8 pay the commission to the university, and let us say the
9 value of that commission was 100, what about the other
10 commitments that the OSA supplier had made to
11 the university? Do you have any sense of whether that
12 would add another 100 to that 100, or another 20 to that
13 100, or 5 or -- do you have any sense of how important
14 that is in the scheme of things?

15 DR MAHER: I think it would vary by university, and it would
16 vary depending -- I think the other great cost component
17 that they would probably incur is the one related to
18 the provision of the free academic dress. I think that
19 would vary very much by university and their
20 requirements; how large the university is, for example,
21 would impact that.

22 MR RIDYARD: Sure.

23 Dr Niels, do you have a handle on that question?

24 DR NIELS: Yes, though not in detail. I think there is
25 agreement, clearly, the prices are not directly

1 comparable between B2B and B2C. The B2B supply model,
2 the price of -- charge to students needs to cover all
3 the other elements.

4 Now, the relativities of those other elements,
5 I know commissions are sometimes being singled out, but
6 my understanding is certainly the others are significant
7 cost items, the ticketing, just the organisation of
8 the event (inaudible). There is a whole list I have
9 provided in the document. It is also in factual
10 evidence. So there are a number of significant --
11 I would have thought a number of significant costs. But
12 have I got to the bottom in detail? It may also
13 actually vary by university, but even on average I do
14 not have that -- I do not have a good handle on how
15 large, for example, the commission is relative to these
16 other costs.

17 MR RIDYARD: Do you have even a bad handle on it? So can
18 you say is it likely to be at least another 50 or
19 another 100 or another 10?

20 DR NIELS: I could not say, but my -- the way I had
21 understood is when always reading it is that it would
22 be -- I had not singled out commission as the biggest
23 item, to put it -- to put it that way round; I had
24 thought of this as this is a full bundle of services;
25 there are lots of activities and costs being incurred;

1 and yes, commission is one.

2 But maybe this information is obtainable but I do
3 not have -- it is certainly not in -- for example, in
4 the management accounts. You cannot --

5 MR RIDYARD: Yes. No, I had looked there too, and couldn't
6 see it. I just wondered whether you might have gone
7 through that process, but that is okay.

8 So put that to one side and we will come back to
9 that asymmetry later on, I think. But what are other
10 ways of looking at the prices that Ede & Ravenscroft
11 charges to graduands? If you compared it with
12 the prices that, I do not know, Marston's, or some other
13 OSA-holder which wasn't E&R charge to consumers,
14 Dr Maher, would you say that was an interesting
15 comparison to make or not?

16 DR MAHER: The answer to that is I am not sure. I will give
17 you a couple of reasons as to why I am not sure.

18 One, given that the structure of the OSAs are fairly
19 similar, I would expect to see some similarity in
20 pricing.

21 Two, there is a lot of -- there is economic models
22 where, you know, you often see, where there is
23 a dominant supplier that has sort of 80% of the market
24 and there is a competitive fringe, usually the prices
25 set by the competitive fringe are not that far different

1 from that of the dominant supplier. So I am not sure
2 whether it would give us any information.

3 MR RIDYARD: So that would be a so-called kind of "umbrella"
4 effect, where the smaller suppliers were sheltering
5 under the umbrella created by the larger one?

6 DR MAHER: Exactly.

7 But, secondly, we do not have the prices of
8 the other suppliers, so that is not a comparison that
9 I was able to make.

10 I did try to go on some of the other websites and
11 see if I could see what their prices are, but often you
12 needed to click through -- be a student and click
13 through to actually order your gown in order to see
14 that, so ...

15 MR RIDYARD: Okay, fine.

16 Dr Niels, did you want to comment on that one?

17 DR NIELS: Yes, I have actually given some examples of
18 the prices charged by the others -- by some of
19 the others; and they are very similar, if not
20 the same -- the same levels. I think that is highly
21 informative for the case, because normally if you think
22 about the dominant firm, the definition of dominance is
23 that you are able to charge a price -- an economic
24 definition is you are able to charge a price above
25 the competitive level. If you are not dominant, you are

1 not. So the fact that also the other parties, like
2 Wipfel and Marston, when they win a bid, they charge
3 it -- they win it on the basis of a similar price, that
4 to me indicates that there is nothing outstanding about
5 E&R in terms of dominance.

6 The umbrella effect, of course, in theory, that can
7 work in markets, but that is usually not in markets
8 where there is precisely this bidding contest to get
9 the contract, because you cannot really observe prices
10 so clearly. So it is a theoretical possibility I cannot
11 preclude, but that is not consistent with what I have
12 seen on how competitive the bidding is for these
13 tenders.

14 So I do think it is a highly informative comparison,
15 as is the other analysis I did, which is the prices of
16 E&R itself over time, including for universities where
17 it had to -- where it sort of had -- it got into
18 a second contract during the period.

19 MR RIDYARD: This is my next question really, which I think
20 it makes sense to address to you, Dr Niels, first of
21 all, and that is your analysis of the prices for
22 academic dress hire over time, which you present in your
23 report, both in nominal and real terms.

24 Can you just briefly explain to us why you think
25 that is a good test of whether Ede & Ravenscroft is

1 dominant.

2 DR NIELS: Yes, so to me it is a relevant test. It is not
3 the test, and certainly it is not a conclusive in its
4 own right, but to me it is very informative evidence.
5 Not just on the question of dominance, but also -- and
6 that is actually why I presented it in terms of
7 the question of out -- competitive outcomes of
8 the market: is this a market where you see prices being,
9 you know, increasingly worsened.

10 What I find is that actually the opposite, so prices
11 decrease in real terms over time. Again, I have no full
12 explanation of it; it is not exclusive in its own right.
13 But it is certainly consistent with the market being
14 competitive; or, rather, the other way round: it is
15 inconsistent with there being market power, you know,
16 universities --

17 MR RIDYARD: Okay, but those two propositions are very
18 different from one another. Saying it is consistent
19 with it being competitive is not the same -- is not
20 really as ambitious as saying it is inconsistent with
21 there being dominance.

22 DR NIELS: True, yes. So I would make both statements; and
23 actually both statements apply in this case. So but I
24 tried to build it up cautiously. The fact that these
25 prices decline over time, and actually also the fact

1 that E&R had to -- you know, had two contracts in
2 the same period and the prices also went down even for
3 the same university, that is inconsistent with E&R being
4 dominant, but it is also consistent with the market
5 producing competitive outcomes. Again, not conclusive
6 in its own right, because there is a question about
7 the level, but I have seen no indication that, you know,
8 the typical level of £45, that that is, you know, an
9 outrageously expensive or exploitative price. So the
10 fact that the price goes down over time to me suggests
11 that, yes, this market produces competitive outcomes.

12 MR RIDYARD: I must be careful on the wording here, because
13 when you say you think it is inconsistent with a finding
14 that there is dominance, I mean, that is saying it is
15 conclusive, is it not? You are saying you are rejecting
16 the hypothesis that E&R is dominant. That is a very --
17 I mean, you know, that may be -- that conclusion may be
18 justified, it may not, but it is a very big conclusion,
19 it seems to me.

20 DR NIELS: Well, I think when I say it is "inconsistent
21 with", it is not meant to be a conclusive-only
22 conclusion, because there are other factors that you
23 could look at, or that one should look at when assessing
24 dominance. But the fact -- so, for example, one reason
25 why -- one caveat which I have been clear about in my

1 report as well is that, of course, price levels in
2 themselves may not necessarily -- and price movements
3 over time in themselves may not be fully informative if
4 the -- for example, the price level at the start was
5 already so high that that was already a monopoly price,
6 and, you know, the fact that they do not decrease does
7 not tell you much.

8 So that is my caveat to this whole pricing analysis,
9 but non- -- but taking into account that caveat, when
10 I see that prices over time decrease, to me that is,
11 yes, I would say inconsistent with there being
12 dominance, because if there was dominance, then you
13 would have seen a different effect, and you would
14 probably have seen prices going up year after year.

15 MR RIDYARD: Let me give Dr Maher a chance to comment on
16 that.

17 DR MAHER: I do not really have much to add, except that on
18 the adjustment that Dr Niels has made for those prices
19 has been to adjust for inflation. I think if we want to
20 look at what has happened to prices over a period of
21 time, one would also need to take into account any other
22 factors, like decreases in costs or increases in
23 efficiencies that would also account for that. So I do
24 not think it is very informative in and of itself.

25 MR RIDYARD: Can I ask on that point, Dr Niels, did you --

1 has E&R done nothing to reduce its costs over this
2 period? Have you looked at that?

3 DR NIELS: So I tried to look at costs, again from
4 the management accounts; and I accept that for
5 a complete analysis it would also have been interesting
6 of course to look at margins. We have looked at margins
7 a number of times. So my price analysis is only that:
8 it is a price analysis.

9 I have -- again, the accounts, it does raise
10 complicated questions of -- for example, of cost
11 allocation and, you know, what do you compare margin
12 levels to. But I have seen no indication in
13 the accounts that the cost would have -- there would
14 have been some structural change or a significant change
15 in costs that would drive a cost -- you know, that costs
16 would have decreased even more than prices. I do not
17 observe that from the management accounts.

18 The more specific question: has E&R done anything to
19 be more efficient? I mean, I cannot say. I have not
20 analysed it like that in detail. I am trying to
21 remember. There were some -- there were some maybe
22 small examples of innovative things that were being done
23 in the offering in a particular tender, but I would not
24 be able to answer that question as such.

25 MR RIDYARD: We will break in a moment, but I just had in

1 mind that a profit-maximising monopoly price could well
2 fall over time if the costs -- if the marginal costs of
3 the monopolists were to fall over time. So reduction
4 even in real prices could be consistent with, you know,
5 continued monopoly pricing if costs had fallen, and
6 therefore the monopoly price had also fallen. But that
7 is not something -- you know, it is not something that
8 you have analysed in your --

9 DR NIELS: No, you are absolutely right. So all I did was,
10 I explored it, but it is -- the picture from
11 the management accounts is just not clear enough.

12 One thing -- I mean, the management accounts are in
13 the disclosure. If you do look at, let us say,
14 the overall EBIT margins of Ede & Ravenscroft over time,
15 over the claim period, again, you do not see wild
16 fluctuations. It is probably confidential information.
17 But also the absolute level of those margins did not
18 strike me as particularly, oh, this is very high degrees
19 of market power. But again, I have not analysed that in
20 detail or done a formal comparison with margins in other
21 sectors.

22 MR RIDYARD: Okay. Let us just do one more question before
23 we have a brief break, because it gets us to the end of
24 section 4, and that is this question about inefficiency
25 and innovation.

1 Dr Maher, do you think the B2B model is inherently
2 protective of inefficiency or stifling of innovation in
3 the marketplace?

4 DR MAHER: Well, I think there is a tendency for monopolies
5 to be inherently inefficient, what we often refer to is
6 what we call "X inefficiencies", you know, the fat, lazy
7 monopolist.

8 Also, there is less incentive for monopolists to
9 innovate. That, in economics, is often known as
10 the "replacement effect". So if the monopolist does
11 innovate to some extent, it is only replacing itself, so
12 there is a decreased incentive for monopolies to
13 innovate.

14 My looking at the evidence in disclosure, there is
15 evidence that Ede & Ravenscroft itself admits --
16 recognises that its costs are higher, and they have not
17 been innovating.

18 MR RIDYARD: Do you think that is inherent in having B2B
19 competition as the way in which competition works?
20 I understand what you are saying about
21 Ede & Ravenscroft. But is it inherent to the B2B
22 process that you get that -- that you find that you get
23 that outcome?

24 DR MAHER: That is asking a very broad question, for which
25 there could be many answers. So, for example, if I am

1 thinking of a B2B model where there is tendering every
2 year for a new contract, I think the incentives for
3 inefficiencies would be reduced. Even though you have
4 an ex-post monopoly, it would only be for one year; you
5 could lose that; it would be constantly under pressure.
6 That is not what we are observing in this market.

7 I would go back to the way this market is, where you
8 have the incumbent with the 75%/80% market share, a very
9 safe position, there have been -- there is a tendency
10 for inefficiency not as much incentive to innovate.
11 Disclosure evidence on the part of E&R shows that they
12 themselves recognise that, that their costs ...

13 MR RIDYARD: Dr Niels, on this one?

14 DR NIELS: So the question was about both inefficiency and
15 innovation. I think on inefficiency the evidence does
16 indicate that universities have means and do keep
17 suppliers like E&R on their toes. So, you know, there
18 are some inherent safeguards against, you know,
19 the monopoly ex-inefficiency, in that sense.

20 In terms of innovation, I think, again,
21 the universities, you do see -- now, whether this is
22 really substantial or not I cannot say, but you do see
23 examples in the ITT where, for example, the universities
24 give some space for the bidders to come up with some
25 creative options for, you know, gifts for -- you know,

1 awards for students, et cetera. But I mean I would not
2 call that "innovation" in the massive competition or
3 market sense. But there is some -- there is not
4 anything that inherently stifles innovation in that
5 sense.

6 Now, the one bit that the B2B -- the current market
7 structure does limit, and I think for a rational reason,
8 and I accept that this is then the complaint also by
9 Churchill, it does limit of course the B2C model; and,
10 you know, one way of looking at it is the B2C model is
11 an innovative business model, just like in other markets
12 you can have suddenly a disruptive business model that,
13 you know, disrupts the existing order. That can be good
14 in some markets, so I am certainly not saying that that
15 is always bad.

16 In this case, though, for the reasons I have given
17 and I have analysed, there are rationales behind
18 the current structure; and not all disruptive or new
19 innovative business model improves market outcomes.

20 I mean, to give one example, you know, in
21 restaurants that offer, you know, other amenities, like
22 a band playing in the background, you also do not charge
23 for all your services, you get -- you know,
24 the restaurant makes its profit margin on the bottle of
25 sparkling water which is £4.50 for example, not on

1 customers paying for the band specifically.

2 Now, an innovative business model would be to go --
3 someone to go round on the trolley through, you know,
4 St Paul's area or some other restaurant area, going into
5 the restaurant and offer the bottles for 50p, because
6 that is the marginal cost of those bottles. But that
7 would not be an innovative business model that improves
8 market functioning. But that is just an absurd example
9 which I would also sort of -- when I think about
10 innovation, I would also think of that kind of example.

11 MR RIDYARD: Thank you. I think we will take a five-minute
12 break there and ...

13 (3.23 pm)

14 (A short break)

15 (3.36 pm)

16 Ruling

17 This is our conclusion on the two disclosure
18 requests that were made today.

19 So far as the request that the defendants undertake
20 a further search for all communications with all
21 universities of a type referred to in the correspondence
22 disclosed with the Arts University of Bournemouth, there
23 has been a frank acceptance by the defendants that an
24 exchange of letters from last summer that does fall
25 within paragraph 3 of the schedule of documents to be

1 disclosed was, wrongly, not disclosed. The defendants
2 have agreed to run a further search for any
3 documents/communications with Arts University of
4 Bournemouth as potentially referred to in that
5 correspondence.

6 We do not accept that this failure, a single failure
7 (and one which related to the continuing obligation to
8 provide disclosure of new documents, principal
9 disclosure having been provided pursuant to the searches
10 that would no doubt have taken place prior to that in
11 April of last year), provides any compelling reason to
12 conclude that there has been such a failure in
13 disclosure by the defendants that they must be ordered
14 to redo that exercise or carry out a similar exercise
15 across all universities.

16 For similar reasons, we do not think that the
17 threshold for requiring any new search to be verified on
18 affidavit has been reached.

19 As to the application for an unredacted copy of the
20 OSA with Arts University of Bournemouth, the contention
21 is that the agreement has lost its confidentiality
22 because it has already been disclosed. The letter of 22
23 June 2021 from Arts University of Bournemouth does, we
24 think, indicate that that OSA had in fact been
25 disclosed, at least on some prior occasion, in response

1 to a freedom of information request.

2 We do not know, however, under what terms, for
3 example as to confidentiality, it was disclosed, or with
4 what, if any, redactions. Without that information, it
5 is simply not possible to say that the agreement as a
6 whole has been disclosed so as to destroy its
7 confidentiality.

8 Mr Randolph is right to say that, as a matter of
9 principle, redactions ought not to be allowed to
10 continue if there is no continuing confidentiality in a
11 document, but we do not accept that it is sufficiently
12 clearly established in this case that there has been
13 such disclosure that confidentiality has been lost.

14 As to all other existing in-force OSAs in relation
15 to which a similar request is made, the basis of the
16 request that they be fully disclosed is a reference in
17 the letter to the disclosure pursuant to a freedom of
18 information request being done in common with other
19 HEIs. That is not, in our view, a sufficient basis to
20 conclude that any particular OSA has been disclosed, let
21 alone disclosed in a way that it has lost its
22 confidential nature, so we refuse that application for
23 the unredacted documents as well.

24 MR PATTON: I am grateful, sir.

25

Housekeeping

1
2 THE CHAIRMAN: You will be doing a search --

3 MR PATTON: We will.

4 THE CHAIRMAN: -- as soon as possible. Is there
5 a timescale?

6 MR PATTON: I believe it is already in train, so we will get
7 back to you as soon as we possibly can.

8 Can I just raise a point of clarification with
9 Mr Ridyard about the document that he would like
10 the experts to take a look at?

11 Can I just start at {D4/4/2}. This is Mr Telfer's
12 witness statement. You can see in the table, sort of
13 towards the middle of the page, the first document is
14 called "E&R profit per ceremony period", and a document
15 reference is given there, which is {F4/550}, which is
16 one along from the document reference you gave earlier,
17 sir, of {F4/549}. Perhaps we could bring up {F4/550}
18 briefly, which is another extremely long pdf.

19 This is a document that Mr Randolph took the witness
20 to during his cross-examination, and there was a point
21 about the fact that it was all grey.

22 So we thought, at least on this side, and I think
23 maybe Mr Randolph agrees, that this may be the document
24 you had in mind, rather than {F4/549}. If so,
25 the native file for that is in the bundle at {F4/824},

1 but we will send a standalone copy to both of
2 the experts simultaneously after court today, if that is
3 convenient.

4 MR RIDYARD: Thanks, that is very helpful.

5 MR PATTON: Should I continue, or would you rather have
6 Mr Randolph's follow up? Had you reached the end --

7 MR RIDYARD: Yes, we have reached the end of that section,
8 so the floor is open to ...

9 Questions from COUNSEL

10 MR RANDOLPH: Sorry, I just have one clarificatory question
11 in relation to Dr Maher. And it is in relation to
12 the issue of -- because we have covered quite a lot in
13 this section -- universities holding an exercising buyer
14 power when procuring graduation services.

15 Dr Maher, you had a discussion with the panel about
16 market share and market share in relation to bidding
17 markets and all of that. I think you also mentioned
18 students as being in that particular mix in relation to
19 your analysis of whether universities do hold buyer
20 power. I wonder if I could ask you to look at
21 paragraph 3.8 -- item 3.8 in the joint experts'
22 statement, which can be found at -- you have that, do
23 you?

24 DR MAHER: Yes.

25 MR RANDOLPH: That can be found at {E7/1} and it does not

1 really matter if we look at the confidential. For
2 the EPE operator, that is at 3.8. Do you have 3.8,
3 Dr Maher? {E7/1/12}.

4 DR MAHER: Yes, I do.

5 MR RANDOLPH: Could you read out that section, of yours:

6 DR MAHER: "The evidence indicates that the market for
7 graduation services is not a bidding market. Dr Niels'
8 assertion that universities have significant buyer power
9 is based on limited selection of contracts that have
10 been awarded through a competitive procurement process
11 and on which he has applied his conclusions regarding
12 the ERU's market power and universities' buyer power to
13 the market as a whole. Only circa 25% of universities
14 have entered their current supply arrangements using a
15 competitive procurement process.

16 "Further, students -- who are the ones paying for
17 both their academic dress and graduation services
18 (through the prices for the hire of their academic dress
19 and photography) are not a party to the arrangements and
20 cannot exercise any buyer power."

21 MR RANDOLPH: Is that the point you were referring to when
22 you mentioned students in the context of this issue
23 about universities holding or not holding buyer power?

24 DR MAHER: I do not recall.

25 MR RANDOLPH: Okay. But do you stand by what you say there?

1 DR MAHER: Yes, I do. The students do not have any buyer
2 power. That is clear.

3 MR RANDOLPH: Why is that relevant to whether
4 the universities hold buyer power?

5 DR MAHER: It is not relevant to whether the universities
6 have buyer power, it is relevant to imposing -- normally
7 we think of competitive constraints in a market where
8 consumers have choice. In this instance, the students
9 who are purchasing the academic dress have no choice.
10 They basically have to buy their academic dress from
11 the incumbent supplier. So they are not able to
12 exercise any buyer power in that supply and demand
13 interaction.

14 MR LOMAS: But even if you had an active B2C market,
15 Churchill actually on campus advertising, they still
16 would not have very much buyer power, would they? They
17 might have a choice, but they would not have very much
18 buyer power vis-à-vis the suppliers? Or would you
19 say --

20 DR MAHER: The point is that there were multiple -- in my
21 opinion and looking at the evidence, there are barriers
22 that are inhibiting entry into the B2C market. If that
23 market were free of any of those entry barriers, I think
24 you would have a well developed B2C market; and it would
25 not just be Churchill in that market, it would be also,

1 in my view, a lot of the other current suppliers that
2 supply under OSAs. In that sense, students could shop
3 around and would be exercising demand-side substitution.

4 MR RANDOLPH: I am very grateful.

5 MR PATTON: If I could start with Dr Niels.

6 Dr Niels, you gave some evidence about whether a,
7 say, 75% of the OSAs was evidence of dominance; and one
8 of the points you mentioned was the question of whether
9 E&R was using that 75% share, for example, to get
10 the next OSA, or to put itself in a stronger position to
11 get the next OSA from the next university to tender; and
12 the Chairman asked you whether, looking at what E&R had
13 actually done, whether that might involve conflating
14 the question of dominance with the question of an abuse.

15 What I wanted to ask you was this. If you leave
16 aside entirely the question of what E&R has actually
17 done, so whether it has in fact used that power to get
18 the next OSA or not, would it be relevant in relation to
19 dominance to consider whether E&R's 75% share gives it
20 the potential or the capacity to stop someone else from
21 getting the next OSA that is put up for tender by
22 a university?

23 DR NIELS: Yes, I think that is the point I was trying to
24 get to, that from an economic perspective, it is not
25 just your current market position, but it is also how

1 you use that market position to abuse it, if you like,
2 making competition even more difficult than it is. So
3 that is the simple point I was trying to convey, that if
4 you have 75% of existing contracts, it is relevant also
5 to consider, when considering the abuse, like, is that
6 actually relevant for the way competition works in
7 the market and ... yes.

8 MR PATTON: In the answer just now, you used the (inaudible)
9 "how you use it". What I wanted to ask you to focus on
10 was whether that market share or the share of the number
11 of OSAs gives you the potential or the capacity to
12 effectively (inaudible) OSA.

13 DR NIELS: So I think, as I also tried to convey this
14 morning, or earlier today, is that the answer to that
15 question is no. Having 75% of previous or current
16 contracts does not give you any specific power to force
17 the next university that comes along, that organises the
18 next context, to also take you as the supplier.

19 As I said, I nuance that slightly by saying, of
20 course, having 75% of contracts gives you some
21 credibility in the market, and that is a factor you can
22 emphasise in your bid. But it is not -- you are not
23 using those -- that 75% as a lever to make your market
24 power even bigger.

25 MR PATTON: Then, somewhat later in your evidence, you said

1 you had given in your report some examples -- you said
2 this in response to Mr Ridyard -- you had given examples
3 of the prices that were charged for gown hire by other
4 suppliers.

5 Could I ask you to look at {E6/1/113}. Can you see
6 paragraph 5.10 you say:

7 "In addition, evidence provided to me by [Alius Law]
8 indicates that prices offered or charged by other
9 official suppliers that are required to offer similar
10 several to E&R, are in line with those charged by E&R.
11 In particular, some of the feedback documents provided
12 to my by [Alius Law] contained information on prices
13 submitted by E&R's competitors (or alternatively,
14 allowed for comparisons of the scores received by E&R
15 and others on their proposed pricing). These show
16 the following."

17 Then, 1, you refer to:

18 "... a tender by the University of Cumbria in year
19 2018, E&R and Tempest submitted prices of ..."

20 And that is confidential:

21 "... whereas Marston and Wippell proposed a price of
22 £46. The winner of the tender was E&R and charged the
23 proposed price."

24 Then over the page {E6/1/114}, you give a further
25 example in relation to a tender by Kingston University;

1 do you see that?

2 DR NIELS: Yes.

3 MR PATTON: Then, if you just read the next paragraph, 5.11:

4 "In addition, my own research of Wippell's and
5 Marston's websites confirms the similarities in prices."

6 Then if you just look at footnote 189, you say:

7 "Wippell charges £49 for the academic dress (full
8 set, independently of award) of Aberystwyth University,
9 University of Hertfordshire, University of Southampton
10 and Brighton; and £46 at the University of
11 Staffordshire. Marston charges £49.5 for the academic
12 dress ..."

13 You name some universities there. Is that
14 the evidence that you were referring to earlier?

15 DR NIELS: Yes.

16 MR PATTON: Thank you.

17 May I just ask some questions of Dr Maher.

18 Dr Maher, is it fair to say that you have not taken
19 issue with the passages that I have just taken Dr Niels
20 to in relation to the prices charged by other suppliers?

21 DR MAHER: Yes, that is true.

22 MR PATTON: Thank you.

23 When Mr Ridyard asked you about that, you alluded to
24 the possibility that the price charged by other
25 suppliers might be the result of an umbrella effect.

1 Is it right to say that is not something you have raised
2 in your reports so far?

3 DR MAHER: I believe so. I would have to check, but
4 I believe that is correct.

5 MR PATTON: You have not done any analysis to support any
6 proposition that these prices are the result of an
7 umbrella effect?

8 DR MAHER: No.

9 MR PATTON: Then can I also, Dr Maher, just ask you this.
10 You said at one stage -- you referred to whether
11 the price was above -- I think I heard you correctly
12 say "the marginal cost of the product". Is that
13 correct? You may have said "marginal" something else
14 cost.

15 DR MAHER: Yes.

16 MR PATTON: I think you said that your view on the price
17 here charged by the defendants was above the marginal
18 cost of the product, but I think you made it clear that
19 that was on the basis that the product is simply
20 the academic dress hire alone; is that right?

21 DR MAHER: Yes.

22 MR PATTON: Now, if the product is seen as not just
23 the academic dress but also the running of a ceremony,
24 so if one takes that view of the product, which I know
25 is not your view, but if you take that view, is it fair

1 to say that you have not conducted any analysis to
2 suggest that the defendants' price is above the marginal
3 cost of that product?

4 DR MAHER: I think the point that I made in answer to
5 Mr Ridyard's question was that in a competitive market
6 you expect price to reflect the underlying cost of
7 the product, and the B2C is a relevant market.
8 I recognise that the B2B price that the incumbent
9 charges is not just the price of the academic dress, but
10 that -- so they are not directly comparable in that
11 sense. But from the student's point of view, who is
12 the one that is purchasing the academic dress, they are
13 comparable. In other words, the student does not know
14 that it is just purchasing its academic dress.

15 MR PATTON: No, and I understand that is a point you have
16 made. But what I just wanted to check is, if you
17 assume, for the sake of argument, that what the student
18 is buying is both the academic dress hire and a ceremony
19 and the services provided at that ceremony, you have not
20 done any analysis to suggest that the defendants' price
21 for that bundle of products is above the marginal cost?

22 DR MAHER: No, if it was the price that was for graduation
23 services, no, I have not done that analysis, because it
24 is not a price for graduation services that is being
25 charged to the student, it is a price of academic dress.

1 MR PATTON: There were some questions towards the end about
2 whether there were trends in the defendants' costs of
3 providing graduation services over the claim period; and
4 is it fair to say that you have not conducted any
5 analysis as to whether there is any trend in that
6 regard?

7 DR MAHER: Yes, that is correct.

8 MR PATTON: I am grateful.

9 Questions from THE TRIBUNAL

10 MR RIDYARD: Thank you.

11 Okay. So, we will move on to topic 4 on our list --
12 Dr Niels, maybe you can go first on this question -- and
13 that is: is there a misalignment of consumer and
14 university interests when the gown hire is provided
15 through the B2B model?

16 DR NIELS: My review of the evidence, my assessment suggests
17 that there is not. There are no indications that there
18 is. What do I base that on? When I see the way
19 universities describe how they -- you know, what they
20 want in a contest, in a procurement process, it is very
21 much also in the interests of the students.

22 I mean, the general terminology is about, you know,
23 a student's -- I am not the industry expert, obviously,
24 but I think that is the factual evidence, universities
25 want these events to be run at the highest quality,

1 you know, reliable, memorable; they want it to be
2 something special. That is then also presumably with an
3 eye on offering the students -- you know, it is part of
4 the student experience, it is the final part, the cherry
5 on top, of the whole experience at the university. So
6 from that perspective, I think universities do have
7 the students' interests at mind, and their own.

8 Then specifically on the price, again the evidence
9 indicates that price -- the price charged to students is
10 very much top of mind and in the specifications of their
11 demands of the universities as well. That to me
12 indicates that the universities do care; they do not
13 want students to be priced out of the market, or indeed
14 they do not want prices to be so high that
15 the universities do not attend the ceremony, they want
16 the ceremony to succeed.

17 So you do see the explicit requirements in
18 the tenders about, you know, price is a factor,
19 the price to the student; and that is a scoring factor
20 in the award of the contract. You also see ample
21 evidence of there being correspondence, or indeed
22 scorings or feedback, from universities to
23 Ede & Ravenscroft about the price to the students.

24 So my analysis -- my answer to that question is yes,
25 or, rather, it is: no, there is no misalignment, there

1 is no indication of a misalignment.

2 MR RIDYARD: Dr Maher?

3 DR MAHER: In my opinion, I think there is a misalignment of
4 the incentives of the university and the students.

5 The university -- I mean, financial inducements to
6 the university is a very strong incentive. I do not
7 think that the evidence shows that the universities put
8 price to the students as the primary consideration.

9 I mean, what I would think they put as their primary
10 consideration in looking at the evidence were
11 the commissions and free academic dress hire, which is
12 also important to the university; and it is not clear to
13 me how the students benefit from all of the free
14 academic dress that goes to staff. So that is another
15 area where I think that incentives are misaligned.

16 I think students do not have a lot of money; I think
17 price is a very important component to them; but -- so,
18 yes, I think my answer to that question is I do think
19 that the universities' incentive -- the university has
20 an incentive, yes, to put on a very good ceremony, but
21 they are the primary beneficiaries of that, to some
22 extent.

23 You can see from -- you know, their marketing
24 material for their universities inevitably always have
25 colourful pictures of their graduation ceremonies. So

1 the universities are, I think, one of the primary
2 beneficiaries also. I mean, the students, at the end of
3 the day, they have graduated, they want to attend their
4 ceremony, and publicly do not like to -- not have to pay
5 too much for their academic dress.

6 MR RIDYARD: Do you think the students get any benefit from
7 these extras?

8 DR MAHER: From the extras in terms of -- I mean, you do
9 want to have an efficiently-run, smooth ceremony.
10 Whether those commission payments are necessary to have
11 that done is a separate question. So I think students,
12 if they attend, they want to have a nice day,
13 presumably, so that is what they benefit, but the other
14 benefits, I think, are primarily to the universities, so
15 in that sense, I think the incentives are misaligned.
16 Insofar as the universities' incentives are in
17 the financial inducements that come to them -- and there
18 is some very limited evidence in disclosure that there
19 have been instances where some universities have asked
20 what would be the effect on commission if they were to
21 charge a lower price -- that has not been something that
22 is systematic.

23 I have not looked at the tenders, all of them, in
24 detail to see the scoring. Price is one factor.
25 I believe. However, there might have been one I looked

1 at where the commissions were, again, the largest factor
2 that was rated in the ranking. So ...

3 MR RIDYARD: So would it be your contention that the other
4 services are -- an excessively large amount of the other
5 services are provided because the students are paying
6 for it but, at least in your analysis, it is the
7 university that benefits from those services?

8 DR MAHER: No, I think the -- it is not -- that is not
9 the reason. I think the reason it was an
10 overconsumption of the services or, what I would say,
11 excessive quality in some cases, is that they are not
12 bearing the cost. The universities are not bearing
13 the cost of it.

14 MR RIDYARD: Yes.

15 Dr Niels, what is your thought on that?

16 DR NIELS: Can I come back later to the point of
17 the overconsumption, because I do not know if that is
18 explicitly related?

19 MR RIDYARD: Yes.

20 DR NIELS: But on the -- just going back to the commissions,
21 I have provided in my report -- I cannot remember if it
22 is the first or the second -- I have given an overview
23 of these ITTs and where the information was available,
24 in terms of what scores they gave to the commission and
25 the price, and sometimes --

1 MR RIDYARD: It is in the first report, yes.

2 DR NIELS: Yes. And it is a bit of a mix.

3 But economically, in terms of the incentives,
4 I think that actually is a very interesting one, and
5 I also note -- thought about this during some of
6 the factual evidence, about this idea that there is
7 therefore a tradeoff between price and commission.
8 I think, by putting both as relevant criteria, that is
9 actually clever procurement, because it means that
10 bidders have to be competitive on both, and of course
11 any individual bidder always, you know, wants to get
12 as -- you know, make as much money out of a bid as
13 possible, so any individual bidder of course will make
14 some tradeoff internally between, "Okay, do I give in
15 a bit on the commission, or do I give in a bit more on
16 the price?", and that is where you see the tradeoff.
17 But overall, the result is still a competitive outcome
18 in which all bidders are forced to, overall, be
19 competitive on both.

20 It would be worse if the criteria said only
21 commissions, and of course then you would get completely
22 a competition on commissions, but -- or if they said
23 only student price, then perhaps there would be more
24 emphasis on the price to students, but because they say
25 both, that is, to me, the inherent mechanism to, again,

1 align the incentives and get a competitive -- get
2 competitive bids.

3 MR RIDYARD: Does that align the incentives though? I mean,
4 it certainly introduces the tradeoff, I understand that
5 of course, compared to a situation where the university
6 just said, "I just want to make as much money out of
7 this as possible", but it says in the invitations to
8 tender that, "We are asking you, the bidder, to aim at
9 two targets simultaneously", and they conflict with one
10 another, so how can you be sure that what the students
11 would want would be to have this mix of, you know,
12 lowish prices and money that is spent on academic --
13 the teaching staff dress, or the prize money for
14 students, or indeed for the other things that
15 the commission money goes to?

16 DR NIELS: Yes, I think it is probably correct, it is fair
17 to say the incentives are not fully aligned in that
18 sense. Clearly, the universities, when they want, they
19 prescribe what they need. That is not all fully what
20 the students would need. So it is a difficult question
21 also to ask of: what do the students really want other
22 than low prices. They also want other things, and there
23 the universities may -- you know, maybe it is a bit
24 paternalistic, but they want things for the students,
25 and sometimes if you ask students, well, maybe they do

1 not want it. But that is a complicated question on
2 which I think economists, but possibly even
3 policy-makers looking at this market, cannot easily say,
4 well, this is -- you should not ask for this and you
5 should not ask for this.

6 So, I was also going to say in that sense -- and we
7 will come to the question of free riding, and certainly
8 on the consumption, but what students certainly want,
9 I think, is that the graduation ceremony happens in
10 the first place. Now, maybe they do not want it overly
11 fancy, so fancy as they are currently, but they
12 certainly want it to happen, and the costs of those --
13 this is an important economic principle -- the costs of
14 the ceremony have to be paid somehow, and at the moment
15 the market model is that the costs are paid by, partly,
16 the supplier, the official supplier also incurring some
17 of those costs, like ticketing, organisation of the day,
18 et cetera, but some of the other costs of the ceremony,
19 my understanding of the factual evidence, is paid out of
20 those commissions by the universities.

21 So, one cannot really say, "Oh, if there were no
22 commissions, is that fully in the interests of
23 students"? Well, you do not know, because there may not
24 be graduation ceremonies in the first place, or they
25 would have to be charged through some other means,

1 potentially tuition fees, so the students end up paying
2 in that sense as well. This is just one way the market
3 has ended up, in terms of a mechanism, whereby
4 the students pay for the service they get.

5 MR RIDYARD: Yes, we were trying to explore the properties
6 of this particular solution, but I mean -- maybe it is
7 simplistic, but the standard sort of welfare economics
8 of this, would it not be to say: let us charge
9 the students the price of the academic dress hire for
10 the academic dress hire, and if you want to charge them
11 something for putting on a show, we could maybe make
12 that a separate charge and then they could decide
13 whether they thought it was worth turning up for that
14 show or not? Would that not -- it is just a question.
15 Would that not give a more (inaudible) efficient
16 solution?

17 DR NIELS: That is an interesting question from a welfare
18 economics perspective, and Dr Maher referred to it, like
19 in welfare economics, often the price reflects,
20 you know, the marginal costs of each bid and there is
21 choice in each bid.

22 But in this particular market -- again, I am not an
23 industry expert and I did not study myself in the UK,
24 but the idea that you give the students the choice,
25 like, is this a kind of event I go to or not, just does

1 not sound to me very attractive from the universities'
2 perspective, because there is also -- there is other
3 economic factors in all. There is externalities.
4 The universities want a critical mass of these students
5 to attend, because if every student got a choice -- do
6 I go, do I not, depending on the price of the actual
7 event -- the universities could not be sure that it
8 would actually be -- you know, you would get negative
9 externalities, and therefore universities -- to me, it
10 sounds quite -- the reasons I have seen sound quite
11 sensible as to why they want to procure all of this all
12 together.

13 It is also just very -- so it is both in terms of
14 you get -- you want -- actually you want to offer
15 students the full service, but it is also a lot more
16 practical and efficient -- so, again, from a welfare
17 perspective -- to procure those services jointly and
18 have them offered by a single provider. Even within
19 the category of dress, there is the hoods, the gowns and
20 the mortarboards. Again, there was some suggestion
21 maybe at some point that even those could be done
22 separately, but you can see, perhaps -- or intuitively,
23 that that is entirely impractical. Equally, on the day,
24 you want there not to be multiple suppliers, one doing
25 the ticketing, one doing the robing and one actually

1 providing the dress.

2 There are simple efficiency and pragmatic reasons
3 why you offer those services together, and again, in
4 many competitive markets, or markets that we would all,
5 in practice, describe as reasonably competitive, you get
6 outcomes where not all individual parts -- components of
7 a service are charged at their marginal cost. I gave
8 the example of the restaurant --

9 MR RIDYARD: The bottle of water, yes.

10 DR NIELS: -- and the sparkling water earlier.

11 MR RIDYARD: Dr Maher, what is your take on that?

12 DR MAHER: I think we are going to encounter some of
13 the points later, but just briefly I would say how one
14 procures and how it is paid for do not -- you know,
15 I think Dr Niels is assuming that the procurement has to
16 be related to how it is paid for through
17 the academic dress, which I do not think is necessary
18 for graduation ceremonies to continue to be put on, or
19 procured as a bundle.

20 MR RIDYARD: So just expand on that. How -- you know, just
21 expand on that.

22 DR MAHER: I think the point was made, you know, so if,
23 you know, you did not have commissions, the universities
24 would still have to put on graduation ceremonies.
25 I think that is correct; they would still want to put on

1 graduation ceremonies. There are many ways in which
2 this can be funded and we do see other models where
3 there is B2C supply. Ticketing is -- you know, often
4 sometimes universities do their own ticketing, that is
5 not something that is done by the OSA. So I was just
6 saying that ...

7 MR RIDYARD: Yes.

8 DR MAHER: But how they -- he was talking about them wanting
9 the incentive to procure, and I am just saying that, you
10 know, yes, they might still want to procure graduation
11 ceremonies and the events management person. There
12 might be very many different ways that --

13 MR RIDYARD: But if the university wanted to procure, and
14 its sole -- or its primary objective was to keep prices
15 down for graduands, and it could put exclusive tenders
16 out to a bidding process and say the winner of this
17 tender will be the one who comes up with the lowest
18 academic dress hire price --

19 DR MAHER: Yes, rather than -- so there being no commissions
20 in that tender, for example.

21 MR RIDYARD: What would that do for B2C competitors?

22 DR MAHER: I think, again, this relates back to whether --
23 well, it goes to incentives again, from an economic
24 point of view. So let me break that up into a couple of
25 things.

1 In the absence of financial inducements, the --
2 I think that would remove a lot of the incentives for
3 the universities to have an exclusive supplier. There
4 could be multiple suppliers of the academic dress to
5 students, so students could still have choice. That is
6 what you observe in Cambridge and in the Oxbridge
7 universities. So, that is one way.

8 Alternatively, they could still say, "We want you to
9 provide the lowest price to students for the gowns",
10 you know, but they may fund it themselves. They could
11 charge more on the ticketing, for example, or they -- as
12 Dr Niels has said, they might increase tuition. They
13 could also fund it out of the general revenues that
14 the university has.

15 MR RIDYARD: No, I was more concerned about what it would
16 mean to somebody who wanted to sell direct to
17 the consumer. So if I bid -- if I am an academic dress
18 hire supplier and I bid for an OSA contract as I just
19 described it, there is no commission involved, all
20 the university cares about is low price, I might go and
21 say, "Right, I will offer it for £30 a set", or
22 something, for a very low price. I mean, I would do
23 that hoping that at that low price at least I would get
24 all the students at the university, so would that also
25 just exclude people who want to sell direct to

1 the consumer?

2 DR MAHER: No, I do not think so, because I think on one
3 level you might ask them, "Okay, I will give you
4 the contract to provide the students, you have offered
5 this low price". I think the problem would be -- there
6 is a problem if you fix the price in the contract. If
7 it says, "Okay, you bid, you have offered the lowest
8 price, but now this will be the price that will be set",
9 there is going to still -- there would be problems for
10 the supplier in that model, because you could have
11 someone who is more efficient, had lower costs and could
12 charge a lower price and undercut.

13 I am not sure if that --

14 MR RIDYARD: Maybe we will move on.

15 DR MAHER: Okay.

16 MR RIDYARD: It might not be that useful a digression.

17 Okay, let us move to the question which has been
18 referenced very briefly already, and that is
19 the bundling -- what I call bundling of the three
20 elements of the academic dress hire.

21 Dr Maher, that practice of making the academic dress
22 available only with the three elements in one bundle,
23 does that add additional problems to the problems you
24 have already identified from Churchill's perspective on
25 the exclusion of B2C competitors?

1 DR MAHER: Well, I think it does in the sense that it
2 inhibits entry into -- for suppliers who may just want
3 to supply a component of that academic dress, so
4 the gown and the cap and not the hood, for example.

5 MR RIDYARD: But is that the way you think B2C commission
6 would work, that some people would compete for the gowns
7 and the caps but not compete for the hoods?

8 DR MAHER: I am not sure how it might develop. I think that
9 there is some substitutability amongst the gowns, as
10 I discussed earlier. There are other models that could
11 happen. So for example, New College of the Humanities,
12 it is my understanding that both Churchill and E&R
13 provide the academic dress. E&R is the supplier --
14 official supplier to students and Churchill has actually
15 sold hoods to the university themselves, but then sells --
16 or provides those hoods to the students. I do not know
17 if they rent them out to the students or just give it to
18 them.

19 So I think there are -- I think we should allow
20 competition to develop in different ways. There are
21 many products or services where I think, where it is
22 possible to provide things as components and bundles,
23 you see those markets having both models available. So
24 for example, I can purchase my internet service without
25 necessarily purchasing television, internet and

1 telephony, for example, or I can bundle my mobile
2 services with that or separately.

3 MR RIDYARD: I mean, but the hoods are the most problematic
4 item, because there are just a lot more of them
5 throughout the UK, you know, a much greater variety, so
6 it is more of a headache in terms of risk-taking and
7 stock-holding. So that is the element which you would
8 be least likely to see being supplied in the B2C model?

9 DR MAHER: Well, I am not sure that that is the case,
10 because I think, from evidence from -- in Ms Nicholls'
11 and Oliver Adkins' witness statements, my understanding
12 was the hood is actually the simplest thing to make,
13 that, you know, you do not need any specialised
14 equipment to actually make the hood, it is the gowns
15 that maybe require some complicating pleating, that
16 actually the hoods -- you know, if you have a sewing
17 machine and know what the colours are and know how to
18 sew, you can do it yourself.

19 MR RIDYARD: Okay.

20 Dr Niels, where are you on bundling?

21 DR NIELS: Yes, you know, bundling, an interesting question,
22 of course, from an economic perspective. The unbundling
23 of hoods, gowns, and mortarboards would perhaps allow
24 more competition in that sense, but it would certainly
25 also increase some economic difficulties and some

1 economic problems in this market in terms of market
2 failures. Or rather, I think you asked the question
3 the other way round: would it improve matters? Or, no,
4 you asked would it make -- does it -- does the bundling
5 make it more difficult?

6 Let me start again.

7 The bundling does making, potentially, competition
8 more difficult for standalone providers, yes, but it
9 also is there to have -- to resolve the underlying
10 market failures and inefficiencies that you get in this
11 market, that are inherent in this market, and
12 the bundling has been a solution to that. So it is not
13 just the practicalities of, you know, having just one
14 provider providing everything together. In this market
15 in particular -- and we will come to it -- it is
16 the relationship-specific investment. Someone needs to
17 invest in the university-specific stock and gowns to
18 a sufficient degree that the universities can be sure
19 that there is enough supply, and that just -- that
20 requirement in itself creates probably most of
21 the problems in this market but is also the solution in
22 this market that you see, because someone needs to do
23 it.

24 If you go to a B2C model, then nobody --
25 the universities cannot be sure that there is someone

1 who actually supplies -- you know, provides that
2 security of supply. You get a lot of cherry-picking;
3 and indeed Churchill would cherry-pick in that sense --
4 so I have used the terms "cherry-picking" and
5 "free-riding", and we will come to that -- will
6 cherry-pick the most profitable opportunities. You can
7 also see that in there, you know, in the business plans
8 and evidence.

9 Perhaps one can draw the analogy with, you know,
10 postal services. There is such a thing as universal
11 service. Now, that sounds a bit grand, but
12 the principle is the same. You want your --
13 traditionally, postal markets were sort of, you know,
14 kept exclusive to a monopoly provider, because you
15 wanted that provider also to offer postal, you know,
16 delivery to grannies in Scotland or, you know, rural
17 areas. If you introduce competition, you get
18 cherry-picking, you get competition for the most
19 profitable, lucrative opportunities, and the problem
20 then is -- or the tradeoff you have to make as
21 policy-maker is that leaves universal service provider
22 with the rump of the service, and if the market is not
23 sufficiently attractive, no one will provide that rump
24 of, you know, extra, more costly supply.

25 So from that perspective, again I would say that

1 the current market solution, so bundling and a degree of
2 exclusivity for a certain dimension, gets around that
3 problem of the necessary relationship-specific
4 investment in stock, in gowns.

5 MR LOMAS: Could I just clarify in one context, and of
6 course, the universal service obligation has given rise
7 to a whole set of competition law issues. Using legal
8 language a little bit, is it fair to summarise what you
9 are saying on the bundling point that the bundling is in
10 a sense distortive of competition, if I am not putting
11 words in your mouth, because it restricts the numbers of
12 offerings that are available in the marketplace, but you
13 would regard that as justifiable on an objective
14 justification basis because of the efficiencies --
15 the economic efficiencies that are generated by that
16 bundling? Is that the context in which you put it, or
17 are you saying something different?

18 DR NIELS: No, in economic terms, that is one way of looking
19 at bundling. So "yes" is the answer.

20 But I think what I am also -- so, I am not saying
21 this is -- therefore bundling is restrictive of
22 competition, because that question itself requires some
23 kind other things as well, because usually, where you
24 look at it in an abuse of dominance case, it is
25 As-Efficient-Competitor test. So, yes, bundling can

1 make it harder for individual, you know,
2 product-by-product providers to compete, but the real
3 question in bundling cases is can other competitors
4 compete also on a bundle-to-bundle basis?

5 MR LOMAS: Sure.

6 DR NIELS: And in this market, my analysis says, yes,
7 the other suppliers, Marstons/Wippells, can also offer
8 a bundle; that is not the competition concern here.

9 But yes, when it comes to bundling in itself, it has
10 efficiency benefits. Yes, okay, I do not want to place
11 it in the right legal framework, but from the economic
12 perspective, that is how I look at it.

13 MR LOMAS: Yes.

14 MR RIDYARD: Just before we leave this topic -- Dr Maher,
15 I do not know if you want to try and answer this
16 question, but let me try it anyway. If you had
17 full-blown B2C competition, so there was no B2B
18 competition going on in this market, I mean, do you
19 think you would observe the predominant pattern being
20 that the competitors would compete to supply the full
21 bundle, or do you think you would get disaggregation of
22 the bundle in that market, or do you just not know?

23 DR MAHER: I cannot say that I know completely, but
24 I suspect that you would see both.

25 Also I just want to raise on point on the universal

1 supply and the need to meet all students graduating.
2 There is no evidence to suggest that the B2C market
3 would not be able to provide that. I mean, most market
4 sets, the way they work, their, you know, supply meets
5 demand and suppliers make their investment and their
6 choices and take their risks based on their view of
7 the market and how demand will develop, so ...

8 MR RIDYARD: Okay.

9 Then the next question, which is the last question
10 in this section of the agenda, is about the extent to
11 which universities take consumer prices into account
12 when contracting for OSAs, so in the B2B activities. In
13 a way, we have kind of covered this, but I would like to
14 just cover it again.

15 Dr Niels, what is your position on this? I mean, to
16 what extent are universities interested in consumer
17 prices?

18 DR NIELS: Well, yes, I think I have explained in my -- my
19 analysis suggests that almost every university has price
20 as one of its factors that it cares about. Certainly in
21 the more formal ITTs you see that evidenced clearly:
22 price is a factor they care about, and it's a
23 significant percentage of weight they give to that.

24 Equally, what I have also seen evidence of is in
25 bilateral negotiations where the university actually

1 negotiates down from one contract to the next the price
2 to students. So, again, that -- to me, that is
3 consistent with universities caring about the price that
4 the students pay.

5 MR RIDYARD: It is one thing to say they care about price,
6 but on the other hand, we sort of know for a fact that
7 the prices we observe through these OSAs, the consumer
8 prices, are much higher than they would need to be just
9 to cover the costs of the academic dress hire, or
10 substantially higher. We know there is a margin there,
11 do we not, because we talked about the apples and pears
12 and the non-comparability of the two prices? So could
13 one say that whatever considerations the university take
14 into account, they are not enough, there are not as
15 much -- they are not putting the consumer price as
16 the sole priority in what they are doing?

17 DR NIELS: No, it is not -- that is right, it is not
18 the sole priority, but it is certainly a priority; and
19 I say "caring", but it is more than that: they also then
20 proactively put pressure on -- you know, they use that
21 as a tool -- as one of the dimensions on which they put
22 pressure on the suppliers. So that is where they are
23 allied in that sense, or they give way to price --
24 the price that students pay.

25 Now, on this question of the gowns plus the other

1 services, maybe economically the way to look at it is
2 they procure a bundle of services; and of course there
3 is one dimension of price, which is for the gown. But
4 if I were -- you know, and from an economic perspective,
5 if I were an economist at the university, I would
6 consider the whole outcome -- I would consider,
7 therefore, that price is a composite price; and what do
8 I get for this price, say £45, well, I get not just my
9 students being supplied with a gown, I also get all
10 these other services. Again, these are the services to
11 be able to offer the ceremony to students. So I think,
12 yes, it is a more composite picture in which price is
13 not the sole factor, that is right, but it is an
14 important factor.

15 MR RIDYARD: But it is the university that determines what
16 other things are going to be put into that price that
17 the consumer pays.

18 DR NIELS: Yes. Yes, in this market the university
19 determines a lot of things on behalf of students, yes.

20 MR RIDYARD: Dr Maher, anything to add on that point?

21 DR MAHER: No.

22 MR RIDYARD: That brings us to the end of that section.

23 I am just offering counsel a chance to offer any
24 clarifications on that before we close?

25 MR RANDOLPH: Yes, we could do that now, or we could do that

1 tomorrow morning. I am in your hands.

2 THE CHAIRMAN: Well, if there is any clarification, we have
3 five minutes now, if you are ready?

4 Questions from COUNSEL

5 MR RANDOLPH: Yes, I am ready.

6 Dr Maher, you mentioned when discussing the issue of
7 procurement and payment not being the same thing -- you
8 remember the line of conversation that you were having;
9 and you mentioned in passing Oxbridge, so Oxford and
10 Cambridge. Can you clarify that a bit? Was that in
11 the context of the B2C market?

12 DR MAHER: Yes. Also what I -- also what I think that I was
13 trying to get at is that you can have a (inaudible) for
14 a bundle of graduation ceremony services; and then how
15 you fund that purchase of that graduation ceremony
16 services that you are procuring can be separate. In
17 this model, they have chosen to fund it by giving
18 exclusive rights to the OSA and having a monopoly market
19 to the supply to students. But you can still procure
20 graduation ceremony services; you do not necessarily
21 have to fund it in that way. As we discussed, it could
22 be through ticket prices going up, could be tuition.
23 I think that in my opinion, overall the students would
24 still be better off. I think I have discussed that in
25 my reports.

1 MR RANDOLPH: But can you just describe how Oxbridge
2 colleges do deal with ceremonies in that fashion,
3 because you are drawing a distinction between
4 the Oxbridge position and the non-Oxbridge position.

5 DR MAHER: Well, I think we are going to be discussing
6 counterfactuals, as part of --

7 MR RIDYARD: We are, yes.

8 DR MAHER: Yes, so all I will say now is just, in
9 the Oxbridge model, there is multiple suppliers that
10 supply academic dress directly to the students. I think
11 the university -- I am not quite sure exactly how
12 the university -- I may have discussed it in my report,
13 I would have to look at it again -- but how they fund
14 the rest of their ceremonies. They have their own
15 venues for the events. So at least that is an internal
16 cost to the university, but you have competition. Their
17 are ceremonies that are not funded out of academic dress
18 hire.

19 MR RANDOLPH: Thank you.

20 Just to clarify, I asked you earlier, when I asked
21 you whether Oxbridge -- sorry, Oxford and Cambridge,
22 comprised the B2C market for this purpose/the direct
23 hire market, and you said "yes". When I asked you
24 earlier about who was operating in the B2C market, you
25 just said Churchill. Can you reconcile those two

1 statements, please.

2 DR MAHER: Yes, I think I was excluding Oxford and Cambridge
3 from my answer. But, yes, there are a number of direct
4 hire suppliers in -- to Oxford and university -- Oxford
5 and Cambridge University students.

6 MR RANDOLPH: Any other institution, or are we just looking
7 at Oxford and Cambridge and Churchill?

8 DR MAHER: Those are the two that I am aware of.

9 MR RANDOLPH: Thank you very much. No further questions.

10 THE CHAIRMAN: Good. We will break there now until 10.30
11 tomorrow.

12 I remind the experts that both of you are not
13 allowed to talk about the case overnight.

14 (4.29 pm)

15 (The Court adjourned until 10.30 am on Tuesday,
16 1 February 2022)

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