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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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Tuesday, 1 February 2022

(10.30 am)

DR MARIA MAHER (continued)

DR GUNNAR NIELS (continued)

MR SPITZ: Good morning, sir.

THE CHAIRMAN: Morning.

MR SPITZ: Members of the tribunal. A short update just on the timetabling. We do not require Mr Chan Chi Kin to attend for cross-examination. He was scheduled to attend early one morning, but we are not going to require him.

THE CHAIRMAN: Right, so a 10.30 start tomorrow, as usual.

MR SPITZ: Indeed.

Questions from THE PANEL

MR RIDYARD: So we are on to section 5 of our list of issues: economic justification for E&R's conduct.

So the first set of questions is in relation to OSAs and so-called "relationship-specific investments".

Dr Maher, I know in your reports you are sceptical about this claim of relationship-specific investments, so could we start by asking you, what do you understand by that term in kind of economic theory, as it were, and why do you think it does not apply to the current case?

DR MAHER: So, what we normally think of as

relationship-specific investment is investment that

1 a supplier or a buyer needs to undertake that is
2 specific to the buyer/supplier relationship; and given
3 that it is specific to that relationship, if that
4 relationship were to fall apart, that investment would
5 be sunk; there are no other alternative uses for that
6 investment.

7 So, this leads to what is often known
8 as "the hold-up problem" in economics; in other words,
9 if a -- one of the parties in the relationship
10 (inaudible) needs to take relationship-specific
11 investment, ex ante, they need to undertake that
12 investment, but ex post, they find themselves in
13 a bilateral monopoly. So there is an incentive for one
14 of the parties to expropriate some of the rents
15 associated with the investment that has been made by
16 the other party; and that leads to underinvestment from
17 an economic welfare point of view.

18 MR RIDYARD: Yes.

19 DR MAHER: So ...

20 MR RIDYARD: Okay.

21 So, in this case, let us talk through the different
22 elements of the OSA. Let us start with the particular
23 university's hood; let us say that is unique to that
24 university. So within the OSA framework, would
25 the investments that the supplier makes to buying in

1 those -- that particular colour hood for that particular
2 university, would that be a relationship-specific
3 investment?

4 DR MAHER: No, because the reason I do not consider these
5 investments to be relationship-specific is for
6 the reason I have said, that there is an alternative
7 use. Let us say a supplier produces the hoods for
8 a particular university and then the next year,
9 the following year, they are no longer the official
10 supplier. That does not mean that they still cannot
11 sell. If they are supposed to be allowed to sell
12 directly to students, they can still sell to students at
13 that university. So there are alternative uses. It is
14 not sunk.

15 MR RIDYARD: Okay.

16 Let us take another category, then. Let us take,
17 the university asks for a contribution to a graduate
18 prize. So it asks for a lump of cash which the
19 university holds and then gives to, you know, the top
20 student in a category. Would that be
21 a relationship-specific investment, in your criteria?

22 DR MAHER: I think that goes to -- it goes to incentivising.
23 I do not think it is specific to the relationship.
24 I view the payments as being loyalty-inducing. So
25 I view them as being different in that regard; I do not

1 view them as being relationship-specific, in the sense
2 that, do you require having to make those payments in
3 order to put on a graduation ceremony?

4 So, for example, if I am thinking about an
5 investment that is particular, usually it involves
6 a huge capital investment that is specific, like
7 building some type of specialist construction equipment
8 for a one-off job, and once that job is finished, that
9 specialised equipment has no other, alternative use.

10 The payments, the commission payments that
11 the suppliers are making under an OSA I think are what
12 is driving a lot of the problems with regard
13 to competition in the B2C market.

14 MR RIDYARD: I take that as a good explanation which
15 I understand. Let me just push a bit, though.

16 So the money that is -- let us say you are talking
17 about a student prize, a graduate prize, the person
18 who -- the OSA bidder who commits to funding that prize,
19 the only way for it to get its money back is on the hire
20 of graduation gowns, and maybe photography as well. So
21 in that sense, it can only get its money back from that
22 investment, if you want to call it that, by having some
23 degree of security of getting access to the students to
24 whom it relates to. Would that be fair?

25 DR MAHER: I think that would be fair. I think one way

1 I might look at it, let us say -- I mean, I view this
2 market that it would develop or you would still maybe
3 have, you know, multiple suppliers being appointed, say
4 one or two suppliers being appointed as official
5 suppliers of the university, so recognised; and then you
6 would have a multiplicity in the B2C market. So to
7 the extent that a supplier is also -- is appointed as an
8 OSA, as one of the preferred suppliers of
9 the university, I think it would still expect to
10 generate some revenue from that. So then what
11 investment it wants to make in making that contribution
12 to a prize, I think they would take that into account
13 when considering what -- how many sales that would be
14 generated from being appointed as one of the preferred
15 suppliers.

16 MR RIDYARD: Okay, right.

17 THE CHAIRMAN: Going back to the hoods problem, whether that
18 is a relationship-specific investment, let us assume
19 that the OSA supplier needs to have a thousand hoods,
20 because that is the number of students expected to turn
21 up for graduation each year. If it loses the OSA
22 relationship, and you say, well, it is not sunk, because
23 it can then hire directly to students on the direct hire
24 market, even on your analysis of that market, there is
25 no way that that supplier would be able to supply

1 a thousand gowns in that direct hire market, is there?

2 DR MAHER: Well, the only reason it is having to produce
3 the thousand gowns is because of the requirement of
4 having to meet all needs, okay? Now, the requirement to
5 meet all needs, in my view, is generated by the fact
6 that you are offering -- the supplier is offering
7 commissions, in return, they are given exclusive right
8 or access to the students; and because that has been
9 given, the students, therefore, in practice, have no
10 other alternatives. So that comes back to
11 the university therefore having to say: well, because
12 the students have no alternatives, I am going to have to
13 require you to meet all needs.

14 So in a competitive market where you have
15 a multiplicity of suppliers, I do not think the supplier
16 would necessarily produce a thousand hoods.

17 THE CHAIRMAN: Right, so they are different.

18 DR MAHER: Yes.

19 THE CHAIRMAN: If the market were organised differently --

20 DR MAHER: Yes.

21 THE CHAIRMAN: -- this would not be a problem.

22 DR MAHER: Yes.

23 THE CHAIRMAN: But the way the market is organised, does
24 that not equate to a sunk cost in
25 the relationship-specific analysis? To a degree at

1 least, because it cannot -- (overspeaking) --

2 DR MAHER: To a degree at least, yes.

3 MR RIDYARD: Let me just ask a brief follow-up on that.

4 What about something like a PhD hood? That example,
5 that was a thousand hoods. But let us say this
6 university only had ten PhD students in a particular
7 category and they had a particular hood, so a tiny, tiny
8 market. How would the whole thing work there? At
9 the moment I can understand how it works: the university
10 says, "I think we will have ten PhD graduates," and
11 therefore the OSA suppliers makes nine or ten hoods,
12 whatever they do. But how would it work with the B2C?

13 DR MAHER: I mean, if there is demand, that is how markets
14 work: if there is demand for something, there will be
15 supply. I think it will take a bit longer for this,
16 because it is more costly to make. We are still not --
17 we are not talking about huge cost to produce these
18 gowns. As I gave an example yesterday, the hoods cost
19 about £6 to produce. A PhD regalia, I do not know, just
20 surmising, just in general, thinking of how much
21 the BA kit costs to produce, which is on the order -- my
22 understanding is the cost of that is recovered from
23 the first sale. PhD regalia, say it gets twice as much,
24 three times as much. All it means is that, therefore,
25 once a supplier has produced it, it will take maybe

1 instead of recovering that cost in the first year, it
2 might take two or three years to recover it.

3 But I think what you would see is there would still
4 be some suppliers -- not all suppliers would be
5 targeting that market, but there would be some -- it
6 would still be a profitable market to ...

7 MR RIDYARD: Okay.

8 Dr Niels?

9 DR NIELS: Yes, Dr Maher has correctly described
10 the economic definition of relationship-specific
11 investments.

12 Perhaps the only thing I would add to that is a time
13 dimension, because investment is something that you
14 invest in in one period and then you get revenues from
15 it over multiple periods. So, for example,
16 the expenditure on the ceremony itself, or the awards in
17 a specific year, I would not call that
18 relationship-specific investment, because you can kind
19 of -- it is more an ongoing cost in that sense, and you
20 can recover it or in the structure it is being recovered
21 through that year's revenues from hires. They could
22 still be free-riding on that, but that is a topic we
23 will come to later.

24 What I see as relationship-specific investments in
25 this market is very much the academic dress itself; not

1 just the hoods, there the example is clearest; but also
2 gowns. My analysis of the crossover rates also
3 indicates that a significant proportion of gowns are
4 also very specific to universities, and cannot be easily
5 reused outside the relationship.

6 Why I said an investment, because there is
7 a multi-period dimension to it. You cannot recover
8 the costs -- you cannot create all this dress for one
9 university and recover it all in one graduation
10 ceremony; it does take a number of years. Again, there
11 are some questions about the exact duration, and that
12 may vary by university. But to me it is clear it is not
13 a one-year thing, therefore you need this multiple-year
14 official supplier status. So that, to me, is
15 the relationship-specific investment.

16 There was a bit of discussion: now, where does that
17 come from? I think this ultimately comes from the need
18 by universities to have indeed the security of supply
19 that we already talked about. Universities want every
20 student who attends a ceremony to have access to dress;
21 and that simply requires investment. The B2C model
22 would not guarantee such a thing, or at least it is not
23 currently perceived as being able to guarantee such
24 a thing.

25 That need, to me, is a very rational need, and is in

1 line with what I understand universities want out of --
2 want to offer to their students. To me, it is not
3 realistic to say, well, that is caused by the fact the
4 university's commission -- receive a commission, and
5 therefore they give ... that, to me, is the causation,
6 not the right way round. Universities, sensibly, want
7 all their students to be served.

8 It is also driven by the need of university -- I do
9 not know where that need comes from, but the need to be
10 special, and the need to have your own
11 university-specific design. If this market -- if in
12 this market -- this market would be a lot simpler if all
13 universities offered one single design, but that is not
14 for me as a expert to say, nor probably for
15 policy-makers to say, to intervene in the market, that
16 you should not -- universities should not want their own
17 dress.

18 So I think it is a given. I take that need by
19 universities as a given, and therefore there are
20 relationship-specific investments in this market, and
21 the current organisation of procuring demand through
22 OSAs is a way of dealing, it is a market way of dealing
23 with that need.

24 MR RIDYARD: Where do you stand on -- okay, with
25 the academic dress itself, you know, we discussed that

1 and I understand what both of you are saying, but where
2 do you stand in relation to the other financial
3 commitments that the OSA maker makes, you know,
4 the prize money and the commitment to buy the gowns for
5 the academic staff? Are those parts of the story on
6 relationship-specific investments, in your view?

7 DR NIELS: They are more -- they are part of the story -- an
8 essential part of the story of the free-riding. So that
9 is another justification of these OSA relationships.

10 It comes to, again, how do you recover your costs;
11 because I take that as a given: there is a need for
12 someone to organise the ceremony and to have all these
13 services available on the day and before the event, et
14 cetera. The way it is indeed currently recovered is by
15 the OSA supplier paying for those services. So
16 therefore the OSA supplier wants to recover that through
17 its rentals of the academic dress. Therefore, you can
18 get free-riding on that if you just come in as a B2C
19 player. But that is not -- that is slightly --
20 economically, that is slightly different, but it is
21 certainly in addition to the relationship-specific
22 investment.

23 MR RIDYARD: We will come and talk about free-riding in
24 a second.

25 So you do not see those other commitments as being

1 part of the relationship-specific aspects, but obviously
2 I understand you think they are important for other
3 aspects?

4 DR NIELS: Yes -- well, they are -- they are therefore --
5 they are relationship-specific: like, you incur those
6 costs specifically for that relationship. But in
7 a sense, as I explained, they are not investment as
8 such, because my understanding is that those you can
9 kind of recover on. In particular, the graduation
10 itself, the organisation of the ceremony. The free
11 dress for the professional staff, that is, again,
12 a slightly -- it is an open question whether you recover
13 that immediately or also you kind of recover that over
14 the years of the duration of the OSA.

15 So, maybe -- so "relationship-specific" is a broader
16 term than "relationship-specific investment".

17 MR LOMAS: Also -- this is a somewhat technical one -- as
18 I understand it, the academic dress for the faculty and
19 for the senior staff is not actually university-specific
20 because they wear the dress of their previous highest
21 degree. So if you have an OSA, for example, with
22 Bristol, but your staff were educated at Aberystwyth,
23 you need Aberystwyth senior robes. So they have a more
24 multiple-use nature than just your Bristol-specific OSA;
25 is that not right?

1 DR NIELS: I am not fully on top of the factual situation
2 there. For example -- yes, for the dress for
3 professional staff. But I would say -- so the reason
4 why you would still need an Aberystwyth dress is because
5 of your relationship with this university -- let us say
6 Leicester -- where there is a staff member who needs
7 that dress. So the only reason --

8 MR LOMAS: Or Leicester, or Newcastle, or Bournemouth, or
9 wherever. The Aberystwyth graduates could be
10 distributed around the university system.

11 DR NIELS: Yes.

12 MR LOMAS: So you could need them for any university.

13 DR NIELS: In that sense, yes. But if it is not available
14 anywhere else, then someone still needs to create such
15 a dress.

16 MR RIDYARD: Dr Maher, do you want to say anything else on
17 this relationship-specific thing before we go on to
18 the free-rider point?

19 DR MAHER: No, I am actually, on reflection, thinking a bit
20 about what you said.

21 I think you invite the point (inaudible) there are
22 all these -- (inaudible) in fact, in the ceremony profit
23 analysis spreadsheet that you had both Dr Gunnar and
24 myself look at last night. In the profit and loss you
25 can see that the -- E&R breaks out that profit and loss

1 by what they call the "contract costs", which are
2 the costs of the prizes, the, I guess, free academic
3 dress hire -- well, actually, the commission payments.
4 I do not think the free academic dress hire might be in
5 there specifically. And then they break out their
6 ceremony costs. So they do that both for
7 the academic -- for the hire and for the photography.

8 So, the point that you made about once -- if I am
9 actually making those commission payments and I am doing
10 that and I would basically -- I would not be able to
11 make those commission payments in a market where you had
12 a multiplicity of suppliers. So in that sense, I do not
13 think that they are sunk investments. You would not be
14 making them in the absence of having the exclusivity,
15 because you would not be able to --

16 MR RIDYARD: Yes, I understand that, yes, yes. Yes, indeed.

17 Okay.

18 Let us move on to this free-rider point. We may be
19 covering some similar ground again. But I wanted to ask
20 you, Dr Maher: in your report, you say you do not think
21 this is a free-rider situation in the way it is
22 understood by economists. Can you just tell us what you
23 understand in principle by the free-rider problem and
24 then why you think it does not apply to this particular
25 case.

1 DR MAHER: So, often, a classic example of the free-rider
2 problem that you often see in economic textbooks are, if
3 you live on a street, you know, multiple houses live on
4 a street, and it is very poorly lit, and one of
5 the owners of a house on the street, if they were to pay
6 for and invest and put a lamp on the street, others who
7 did not contribute to that investment would also benefit
8 from the fact that there is lighting on the street. So
9 it is about benefitting in some way from someone else's
10 investment.

11 MR RIDYARD: Yes.

12 DR MAHER: You want me to ...? So that is what I think is
13 a classic example of free-riding.

14 MR RIDYARD: So why does it not apply in this case?

15 DR MAHER: Because the B2C provider is not providing
16 graduation services, it is only providing
17 academic dress. It makes its own costs, its own
18 investments in the academic dress. Those include,
19 you know, staff costs, ordering systems, you know,
20 whatever direct and variable costs that they incur in
21 providing those services. So they are not benefitting
22 off of -- you know, they have to make the investment
23 themselves also in the academic dress. So --

24 MR LOMAS: Does it not depend on the perspective from which
25 you are looking at it? I mean, from the point of view

1 of the B2C supplier, they are choosing essentially to
2 cherry-pick a part of the market that they can supply
3 relatively easy with a predictable cost base. But from
4 the point of view of the graduand, they are
5 the free-rider, because they are paying a lower price on
6 the B2C market for access to a gown, but getting
7 the benefits of the ceremony that people who have
8 purchased from the official supplier at a higher rate
9 are financing.

10 So is not the free-rider problem seen from the point
11 of view of the graduand rather than Churchill?
12 Churchill is seeing it from the perspective of whether
13 they are cherry-picking part of the market. Or have
14 I got that wrong?

15 DR MAHER: My understanding is Dr Niels has made
16 the argument that Churchill is cherry-picking or
17 free-riding off of E&R's investments. That is my
18 understanding of how he has made the argument.

19 In terms of students free-riding, again, I mean,
20 the graduands, they are just purchasing academic dress.
21 I think this comes back to, in terms of what
22 the graduand is getting and what they need to pay for --

23 MR LOMAS: They are the ones not putting up the streetlight.
24 The guy next door who is paying £45 for those
25 -- (overspeaking) -- is putting up the streetlights.

1 DR MAHER: Yes, so in the current system, they are paying
2 for all of the ceremony services through
3 the academic dress. But that is not the same as saying
4 that Churchill is free-riding. So the fact that
5 Churchill would want to cherry-pick, or any other
6 direct-hire provider would want to cherry-pick, I think
7 that is just the normal course of business. Where you
8 see opportunities, you ...

9 MR RIDYARD: Yes, but let us think of a -- let us construct
10 an example. If I hire from the OSA supplier as
11 a graduand, it is going to cost £45, but here is a B2C
12 operator who is offering me the gown at £35, so I can
13 save £10, which is attractive to me as a graduand. But
14 if £10 of that £45 is going to fund the venue or
15 the student prize or the show that I am going to attend,
16 as a student, as a graduand, I am -- I mean, that is
17 making this a more attractive event for me to turn up
18 to. So is it (inaudible), yes, the student is
19 free-riding, because they are only paying for the gown
20 but they are benefitting from the show?

21 DR MAHER: So I think we addressed this a little bit
22 yesterday when we discussed what would happen in
23 the absence of that and where the price in the direct
24 hire market would reflect the cost of the gown's price
25 marginal cost -- reflects marginal cost in a competitive

1 market.

2 MR RIDYARD: Yes.

3 DR MAHER: I agree that the price to the graduand, and maybe
4 not just to the graduand, the university may decide to
5 provide that out of its general revenues. They may
6 decide to charge slightly more for ticketing. So, in
7 one way or another, yes, I think they would still have
8 to pay for it. But I think overall, when you look at it
9 from a general equilibrium welfare point of view, you
10 would be removing the inefficiencies that are existing
11 from the monopoly pricing in this market and removing
12 sort of what we would call the "deadweight loss"; and
13 I think overall, in moving to a more competitive
14 structure, the student, even if it has to pay more on
15 another aspect, would still be better off.

16 MR RIDYARD: I see the logic of that argument, if you are
17 talking about moving the market completely to the B2C
18 model. But if you are operating in a kind of hybrid of
19 the two, then is it not the case that the graduand or
20 the supplier who is supplying, you know, without having
21 to pay the tax, if you like, is free-riding on
22 the operator who is paying the tax?

23 DR MAHER: Could you rephrase that question slightly for me?

24 MR RIDYARD: If the situation is that there is an OSA
25 provider, they are having to pay the commission to

1 the university; and just to keep the numbers easy, let
2 us say that is £10. So both academic dress suppliers'
3 costs are the same, they are both costs of £35 for
4 supplying the dress, but the OSA provider has to charge
5 45 to cover the commission, nice and simple. If those
6 two models are operating side by side, so the B2C
7 operator is coming in, seeing an opportunity to offer
8 students a lower price, in that scenario where the two
9 are sitting side by side, would you agree there is
10 a free-rider problem going on, because the person paying
11 £35 is benefitting from the show which is being financed
12 by the £10 but not paying the £10?

13 DR MAHER: So I think my answer to that is that I think that
14 if we were to move -- if you were to remove
15 the restrictions that are causing the impediment to
16 entry into the B2C market, I think that over time you
17 would see that the commission levels that are paid to
18 universities under an OSA would not be sustainable over
19 time.

20 MR RIDYARD: Yes.

21 DR MAHER: That is where I think the market would go to.

22 MR RIDYARD: So the university would have to find another
23 way of financing the show.

24 DR MAHER: Yes.

25 MR RIDYARD: Yes.

1 Dr Niels, your views on this?

2 DR NIELS: Yes, so streetlights are one classic example of
3 free-riding. The other classic example that you often
4 see in the competition policy literature justifying
5 exclusivity in vertical distribution arrangements, for
6 example, is the example of exclusive territories or
7 exclusivity in distribution systems.

8 Take the example -- and this is a classic -- it is
9 just a stylised classic example, but car manufacturing.
10 The manufacturer wants its dealers to offer consumers
11 a range of services, like, you know, information about
12 the car, test rides, pre-sale services. Pre-sale
13 services that you generally cannot charge for.

14 Now, to incentivise those dealers to give those
15 services, it will typically award those dealers a degree
16 of exclusivity; for example, they are the only dealer of
17 that manufacturer in town, for example. Because where
18 does free-riding come in? So let us say you have
19 a dealer who does offer all those pre-sale services that
20 the manufacturer wants. Obviously that dealer has to
21 recover those -- the costs of those services through
22 the sale of the car, if he eventually sells the car.
23 But if there is then a dealer next door who --
24 a no-frills dealer who does not offer any of these
25 services, the consumer can just take all the services

1 from one dealer, go next door and get the car at a much
2 cheaper price. That is a classic situation of
3 free-riding; and that is a situation in which certain
4 exclusivity is therefore justified from an economic
5 perspective; it is also rational from a business
6 perspective.

7 A good question: who is the free-rider? Is it
8 the no-frills dealer or the consumer? I think
9 the literature is actually not so specific about that.
10 It is probably both: they both free ride on the efforts
11 by the full service dealer.

12 The equivalent here would be the university wants
13 the OSA providers to provide the full range of services
14 at the highest quality at the graduation ceremony, but
15 if students then en masse can go to a B2C provider and
16 get their are gowns from them, then at some point there
17 is a breaking point where the OSA supplier would not
18 offer those services any more, and perhaps you would not
19 even get any graduation services offered anymore.

20 MR RIDYARD: Okay, thanks.

21 The next set of questions under 5(c) was really
22 asking questions about how -- if there were no OSAs,
23 we would like you to talk about how the B2C model --
24 what sort of outcomes you would observe in the B2C
25 model. We list in that question, you know, various

1 sub-questions or categories.

2 Dr Maher, can I ask you to comment on each one of
3 those ones. You do not have to do it in great deal if
4 you think you have already covered it in some of
5 the discussion already.

6 DR NIELS: Apologies, I do not have the list

7 -- (overspeaking) --

8 MR RIDYARD: Okay. So the list was, if it was not for
9 the OSAs, what would the B2C market model -- what would
10 the properties of the B2C market look like in regard to
11 the range of products --

12 MR PATTON: Sorry, Mr Ridyard, it is now on Magnum at C/13.

13 MR RIDYARD: Okay.

14 I see Dr Niels has it in front of me. We need to go
15 to page -- I am not sure what page it would be,
16 actually.

17 THE CHAIRMAN: Page 5 {C/13/5}.

18 MR RIDYARD: So if you see in 5(c) there are four
19 subcategories there. But I think it would be more
20 efficient if we just talk generally, rather than go
21 through each one individually.

22 DR MAHER: So I think to some extent I have already answered
23 this question in reply to a previous question.

24 So I think you would still see the full range of
25 academic dress being provided. I think some items, you

1 would see the price of those going up. Maybe not
2 substantially, if a supplier chooses to recover that.
3 So the PhD regalia, for example, might be the one
4 that -- may be the one that is going to experience most
5 of the price increase, because the volumes are lower and
6 it is just going to take longer to recover the cost of
7 manufacturing that PhD regalia.

8 But I still think you would see it. There might be
9 more specialised suppliers who might, you know, decide
10 to target that market. I think there are various
11 outcomes, but I think, you know, from an economist --
12 a competition economist, I think that the markets would
13 decide how that will be done.

14 I think you will see this still being provided as
15 a bundle, as we see in a lot of markets. I think what
16 you might end up seeing is that, even though
17 the individual components will still be offered,
18 probably the demand for individual components will be
19 less than the bundle, because often what you might see
20 developing in the market is there might be discounts
21 offered if you were to purchase the bundle vis-à-vis
22 just purchasing singular components.

23 So, yes, there is a risk. So going to the third
24 one -- point, there is a risk to a supplier associated
25 with the lower volumes, but as I said, I think it will

1 just take a longer period of time. But, you know,
2 businesses make these decisions all the time, so ...

3 MR RIDYARD: Yes.

4 Dr Niels, would you like to comment on that?

5 DR NIELS: Yes, it is a bit sort of, of course, speculating
6 what would happen.

7 MR RIDYARD: Yes.

8 DR NIELS: My first reaction to this is, from my
9 understanding of the universities, is they would be
10 extremely nervous about a model like this, because they
11 would be very nervous about, well, can the supplier --
12 can these suppliers in a B2C model give me the required
13 quality that I want from -- on the day of the graduation
14 service? Can they give me that supply of last resort
15 urgency on the day, someone who turns up without
16 a dress, is there anyone who offers that?

17 So absent OSAs is probably a situation that would
18 only arise if universities were sort of, in a way,
19 forced or requested not to have these OSAs anymore. So
20 it is certainly not a demand-side-driven phenomenon,
21 I would say.

22 But let us say, in the situation where you have no
23 OSAs and you have only B2C, I think up to a point
24 I agree with Dr Maher that, of course, you know, other
25 suppliers would come in, because there is a market at

1 the end of the day, there is some demand. But whether
2 the market -- the supplier could live up to the quality
3 requirements and also the need for full service,
4 you know, meeting all needs of all students, I would
5 question that. I would -- yes, I would question that,
6 because the incentives are not there. The incentives
7 are there to go for the most profitable, the most
8 obvious universities. Even just there may not even be
9 for all universities supply. Suppliers may pick
10 the most -- the largest universities, for example, they
11 may not bother, because they still have to invest
12 in university-specific gowns. There is no suggestion in
13 this scenario that the dress also becomes uniform. So
14 there is still some investment required. So they would
15 still pick the most lucrative, the largest universities.
16 There would be serious doubts about the smaller
17 universities, or indeed smaller courses, the more --
18 you know, masters, PhD courses. I am speculating as to
19 what would happen.

20 MR LOMAS: You are speculating, but I think it was you who
21 commented yesterday about markets', you know,
22 considerable flexibility and adaptability to changing
23 circumstances. I find it quite difficult to see why it
24 is that certain smaller universities or courses would
25 not be served by the market in some way. It is a price

1 point, is it not? The prices are going to adjust, the
2 suppliers are going to adjust. But at the end of
3 the day, if students want a ceremony to graduate and
4 the universities want to put it on, the market will find
5 a way of delivering that.

6 DR NIELS: That is right in principle -- (overspeaking) --

7 MR LOMAS: You can get a package in your universal
8 coverage -- universal service obligation, you can get
9 a package delivered to the Hebrides, you just have to
10 pay more for it.

11 DR NIELS: Yes, correct, but there are -- the economic
12 incentives -- so the economic problems are still there
13 in terms of you need to have a relationship. So
14 the relationship-specific investment -- I am thinking
15 aloud now -- relationship-specific investments and
16 free-riding and the need to provide a universal service,
17 those are what economists call "potential market
18 failures". So it is about thinking through: well, can
19 the market actually survive or deliver it without some
20 form of intervention where you give some degree of
21 exclusivity, some degree of certainty of -- to
22 the suppliers?

23 Price could be a mechanism. Like, okay, you just
24 get a higher price. But I am thinking aloud: even
25 a small university, there would still be the free-rider

1 problem, because that supplier would still invest in --
2 let us say, small university, 50 students: it would
3 still invest in that -- in those 50 gowns. Yes, one
4 mechanism would be a much higher price. I do not know
5 how much higher, but -- (overspeaking) --

6 MR LOMAS: Or some university chooses a gown design that
7 replicates one that is available elsewhere and a low
8 cost -- (overspeaking) -- there are many different
9 responses to that problem.

10 DR NIELS: There could be, yes. Yes, that is right.

11 MR RIDYARD: I think that is fine for that topic.

12 I appreciate it is kind of hard to speculate, but
13 nevertheless quite useful sometimes just to think about
14 how that would work through.

15 That brings us to the end of section 5, so I do not
16 know whether counsel have any clarification points to
17 make.

18 Questions from COUNSEL

19 MR PATTON: (Speaker off-mic) I just have a few questions
20 for Dr Maher, please. I think this question may really
21 just be a variant on the question that the chairman put
22 to you, Dr Maher.

23 You were explaining your view that the (inaudible)
24 are not a relationship-specific investment by
25 the supplier, because if they do not end up being

1 reappointed as the official supplier, they could sell
2 the hoods to students. I just wanted to clarify what
3 you mean by that. Is it they could sell it on a B2C
4 basis?

5 DR MAHER: Yes, that is correct.

6 MR PATTON: By "sell", do you mean sell or hire.

7 DR MAHER: Hire. Both, sell or hire.

8 MR PATTON: (Speaker off-mic) So are you assuming for
9 the purpose of that explanation that there is a B2C
10 market that is not foreclosed?

11 DR MAHER: Yes.

12 MR PATTON: That is different from essentially the basis on
13 which you express the other views in your report; is
14 that fair?

15 DR MAHER: I am not sure what you mean by that.

16 MR PATTON: Well, I understood your general view to be that
17 the B2C market is foreclosed.

18 DR MAHER: I think what I mean by that is the market is
19 foreclosed due to the exclusivity that I would consider
20 anti-competitive conduct which arises through
21 the payment of the commissions which are
22 loyalty-inducing, and require -- they are basically
23 to -- so it goes to the incentives issues you asked me
24 about yesterday, Mr Lomas, in terms of how do I define
25 exclusivity; and it goes to the whole incentive issue,

1 not from a legal point of view. So I am talking about
2 removing the impediments that cause that exclusivity --
3 the incentives for that exclusivity to arise. So yes,
4 I am saying that if the B2C market will remove those
5 impediments, then yes, they could (inaudible).

6 MR PATTON: (Speaker off-mic) (inaudible) that may be
7 something you have already said.

8 In other words, if the changes that you think should
9 happen happen, then it would be open to the official
10 supplier to sell the hoods or hire the hoods to
11 students, and so there would not be an
12 investment-specific relationship. But just looking at
13 the way the market is at the moment, would you accept
14 that they are a relationship-specific investment?

15 DR MAHER: Given the way the market -- it is basically
16 asking me, if there is no other way that I can sell this
17 and -- which is -- my understanding is the defendants
18 have pleaded there is allowed a B2C market, but if
19 I were to say the B2C market were not allowed, then yes.

20 MR PATTON: Leaving aside whether it is allowed or not, if,
21 as I think you say, there is not an effective B2C market
22 at the moment, then the same answer would follow?

23 DR MAHER: No, if you have an effective B2C market, then
24 the supplier would be able to sell in the B2C market.

25 MR PATTON: Sorry, my question may have been unclear.

1 If there is not -- if there is not an effective B2C
2 market at the moment, leaving aside whether it is
3 permitted legally or not, but if there is not an
4 effective B2C market, then you would accept that
5 the hoods are a relationship-specific investment?

6 DR MAHER: I think what I am saying is that I do not see why
7 there would not be able to be an effective B2C market in
8 the absence of the impediments. So I think that is my
9 answer to that.

10 MR PATTON: Okay.

11 Can I just ask you about the PhD regalia. Could
12 I ask you to just have a look at Mr Adkins' witness
13 statement. It is at {D2/2/18}. If you could look at
14 paragraph 74, he says:

15 "We also currently have no intention of supplying
16 PhD regalia because the price to manufacture the gowns
17 is too high and the demand is insignificant compared to
18 that of master's students or bachelors."

19 Does that reflect the evidence that you were giving
20 earlier about PhD regalia and the particular issues that
21 would arise in relation to that?

22 DR MAHER: Yes, I think the point I was making is I agree
23 that the PhD regalia, you know, will be more expensive.

24 Mr Adkins has testified that they do not have any
25 intention of supplying that PhD regalia. I think my

1 point is that there is no reason why there might not be
2 other suppliers who would be willing to supply it.

3 The other thing is that a lot of PhD students have
4 an intention of going into academia, and often also
5 choose to purchase; you might see more purchasing of
6 the PhD regalia by students getting their PhD degrees,
7 rather than hiring.

8 MR PATTON: Do you accept that there is a risk that
9 the other suppliers might reach the same commercial
10 judgment as Mr Adkins has in paragraph 74 if it is just
11 a B2C market?

12 DR MAHER: I can only -- this is only Mr Adkins' testimony.
13 I think that in any market, where there is demand there
14 will be the supply that will come to meet it. So that
15 is how markets work. I think there will be a profit
16 point where there will be suppliers who will need to
17 provide that PhD regalia, it will just be a lower volume
18 business.

19 MR PATTON: Is it possible that it is only one supplier that
20 would make the judgment that is different from
21 Mr Adkins' judgment that it is actually worth supplying
22 the PhD regalia?

23 DR MAHER: I do not think it would only be one. I do not
24 see why. I think -- I would have to look at how many
25 PhD students are graduating every year. It would

1 probably vary across universities.

2 I think prior to all of these -- the way the market
3 currently operates, there were robemakers that
4 actually -- small tailors that actually made a lot of
5 this -- the academic dress. So you might also begin to
6 see, you now, small tailors again doing some of this
7 business.

8 MR PATTON: I think I understood correctly that you accept
9 that in a world where there is not an OSA which requires
10 the official supplier to create the PhD regalia, in that
11 world, the price for the PhD regalia might go up
12 compared to the price that is currently being paid?

13 DR MAHER: Yes.

14 MR PATTON: Thank you very much.

15 Questions from THE PANEL

16 MR RIDYARD: Thanks.

17 Okay, so we are on to our final topic, which is
18 the question of the counterfactuals.

19 So the first question here, which I would like to
20 address to Dr Maher in the first instance, is three
21 analogues have been suggested as being potentially
22 informative about the counterfactual. There is
23 the Oxford and Cambridge situation that we discussed
24 briefly yesterday, then there is the intervention that
25 took place in the UK school uniforms market, and

1 the interventions that took place in the Irish academic
2 hire market.

3 I guess the question is: what weight should we be
4 placing on those analogues; and can you expand a bit on
5 why we should be considering those to be relevant to our
6 considerations?

7 DR MAHER: Well, I think they are relevant counterfactuals
8 because they have similarities to this case, and they
9 are actual counterfactuals rather than hypotheticals.

10 So, in Oxford and Cambridge, you do see the B2C
11 market; and the funding of graduation ceremonies is not
12 done through the payment of commissions on
13 academic dress hire. So I think that is an actual
14 counterfactual model.

15 The Irish consumer competition commission looked at
16 the Irish market. There is little public information
17 about how that market existed, or what were the example
18 problems. But the Irish competition authority did
19 identify that there were basically, you know, similar
20 things as in this case, where you had suppliers,
21 you know, being reappointed again and again. So
22 long-term supply relationships, very little tendering,
23 it resulted in one dominant supplier on the market. So,
24 basically, you know, what they have arrived at there are
25 commitments, rather than seeing an actual investigation

1 and then forcing something through; so as a result of
2 commissions that we found in that market.

3 The school uniforms, if I can remember correctly,
4 again, you had a market where you had exclusive
5 suppliers of the school providing the school uniforms.
6 The main difference between that market and this market
7 is, in this market you have one big supplier of
8 the academic dress, and school uniforms it was basically
9 a lot of small suppliers but they have exclusivity
10 arrangements with the schools.

11 You know, there was the CMA letter. I think it is
12 actually -- the government has now introduced statutory
13 guidelines in that market, where they have basically
14 prohibited the cash-back payments, so what is equivalent
15 to the commission payments.

16 They have recommended keeping branding down to
17 a minimum. Basically, they highlighted the damages --
18 the benefits to, you know, parents of moving toward
19 a market where you have competition and where
20 the purchaser of the actual school uniform has a choice.

21 MR RIDYARD: But I think it is notable that the Irish
22 intervention, insofar as we understand it, seems to be
23 operating on the universities telling them to dilute
24 the OSAs in some form; and the school uniforms one is
25 acting on the schools.

1 This case is -- you know, the universities are not
2 in the dock, as it were, on this case, but it is
3 Ede & Ravenscroft not the universities. So how does
4 that impact on our assessment of the counterfactual?

5 DR MAHER: So, just to quickly answer the point about
6 the school uniforms being on the schools, I think it is
7 also on the suppliers, because they wanted
8 the prohibition of the cashback payments, so that
9 incentivised all of that exclusivity.

10 In terms of the Irish situation, yes, there is --
11 the commitment was on the universities having to make it
12 clear to the students that they have a choice, that they
13 do not have to purchase their academic dress from
14 the OSA. Again, this was a result of commitments that
15 were arrived at; and so I think that is very different
16 from an outcome where you do have a competition or
17 a case in litigation. So it was arrived at -- often
18 the commitments are often arrived at as a basis of
19 compromise.

20 So I do not -- so in doing that, I think implicitly
21 it will have an effect on the supplier. So even if
22 the commitment is not on the supplier, at the end of
23 the day, whatever might exist currently in the Irish
24 market in terms of whether there are commission payments
25 or not, I do not know, there is not enough -- there is

1 no public information that was released in the details
2 of the case. But I think, having done that, that will
3 incentivise the suppliers in different ways.

4 So does that answer your question?

5 MR RIDYARD: Well, it is an answer, yes, yes.

6 DR MAHER: But I am not sure if I have ...

7 MR RIDYARD: Let us -- we will come back on that point.

8 DR MAHER: Okay.

9 MR RIDYARD: Maybe if we give Dr Niels a chance to comment
10 at this point.

11 DR NIELS: Yes, so counterfactuals, so economists like
12 talking about counterfactuals. I think it is useful
13 analytically to make a distinction between three
14 different ways a counterfactual can come into a case
15 before I go to these examples.

16 So there is -- the first one is this -- the blue
17 pencil type approach under section 2 of
18 the Competition Act. So you just strike out the bit
19 that is anti-competitive, and you then hypothesise what
20 would happen without that: would the competitive
21 situation be better or worse without it.

22 The second type of counterfactual is more
23 a counterfactual and a question of: well, how could this
24 market be organised differently? Often, you know,
25 whether with policy intervention or not. I will come to

1 it, but some of these counterfactuals that we are
2 looking at here, to me, fit more in that category.

3 A third type of counterfactual is more in
4 the damages claim sense. So what position would
5 the claimant have been in in the absence of
6 the infringement?

7 Actually, on the last one, I am clearest, as I have
8 said in my report, that in the absence of exclusive
9 agreements by E&R with the universities, it would be
10 other full service providers, B2B providers, getting
11 those contracts, not Churchill.

12 So I think that is a useful distinction when
13 thinking about counterfactuals.

14 Briefly my views on each of these. So Oxbridge:
15 Oxford and Cambridge are different in many ways,
16 traditionally. Historically, they have had a different
17 structure. I live in Oxford and I do see all these
18 shops, you know, the bricks and mortar places where they
19 do do academic dress hire and sale, et cetera. That
20 happens -- in the factual evidence there have been some
21 differences mentioned between Oxford, Cambridge and
22 other universities.

23 MR LOMAS: One distinction which came from the evidence of
24 Churchill which I think is important for Oxbridge, which
25 is the tradition there is students buying their gowns at

1 the beginning of their university time and using them
2 during the three years, rather than hiring them just for
3 a ceremony. So the gown part of the market at least is
4 going to be treated separately.

5 DR NIELS: Yes, and --

6 MR LOMAS: Which changes the dynamic of it.

7 DR NIELS: Yes, absolutely. It gives rise to different
8 underlying economics of selling, hiring, investing in
9 the stock.

10 UK school uniforms: again, it is more a policy
11 intervention type counterfactual. I have pointed out in
12 my report, there is lots of differences in
13 the underlying economics between school uniforms and
14 academic dress. Purchasing versus hiring: the fact that
15 school uniforms, probably there is a deep and more
16 liquid market, if you like, in selling the stuff, rather
17 than this once a year big graduation event. So again,
18 there are limitations as to how useful that is as
19 a counterfactual.

20 Then the Irish analogy. Again, the Irish case:
21 there is not enough really information available. For
22 example, the Irish authority, as far as I am aware, only
23 published a press release, rather than a full analysis
24 of the market. It would actually be really interesting
25 to compare how -- you know, what was the competitive

1 dynamics in the Irish market relative to the UK markets
2 and what has it been since the remedies were imposed.
3 That is all I can comment on.

4 MR LOMAS: Can I ask one question?

5 I understand your distinction between
6 the blue-pencil test, the regulatory intervention and
7 the damages calculation; although I think 1 and 3 might
8 move into quite close alignment. I do understand, in
9 a market investigation, the powers are different and
10 the issues are different and the evidence is different.

11 I suspect the description of a blue-pencil test may
12 be a little disparaging in this sense. It is obviously
13 a matter for legal submission, and we will hear from
14 the parties on that, so I am not seeking to pre-judge
15 that. But if the test were not so much blue pencil but
16 what would be the counterfactual if you removed
17 the abuse, which is not the same as removing
18 the dominant position, because there is nothing illegal
19 in being dominant. But if you remove the abuse, so
20 something around exclusivity or incentive structures,
21 but left the market shares where they were, I suspect
22 a question that it would be helpful to understand is
23 your views on what, as a matter of fact or logic, would
24 happen to the evolution of the market; because it could
25 be said that the counterfactual we are interested in

1 is: what will happen in this marketplace if you remove
2 the abuse?

3 DR NIELS: Yes, so my difficulty, of course, in this is,
4 well, what is the abuse -- (overspeaking) --

5 MR LOMAS: Exactly, yes --

6 DR NIELS: -- (overspeaking) -- a circularity.

7 MR LOMAS: That is why I said there is a lot of room for
8 legal submission here.

9 DR NIELS: Indeed.

10 But the abuse, as I understand it, in this case it
11 is -- the claim is against E&R. So removing the abuse,
12 in that sense, would mean E&R can no longer have these
13 exclusive or, you know, these OSAs: what would happen?
14 Let us say that is the question.

15 I think what would happen is universities would
16 continue to procure their services as currently, and
17 other suppliers, like Wippell/Marstons, would probably
18 sense a huge opportunity to say, "Oh, E&R is now no
19 longer there; they were the biggest supplier, so there
20 is now a lot more space for me to participate in even
21 more tenders than I currently do."

22 MR LOMAS: I'm sorry to push back on that, but what you have
23 effectively said in that counterfactual is that E&R
24 could not trade on the basis of OSAs; and I think that
25 might be an overreach in the logic, because there is

1 nothing intrinsically wrong with an OSA, what matters is
2 the content within it.

3 So, to take one example, you could say that
4 the counterfactual involves E&R with 75% of the market
5 contracting on the basis of an OSA, but maybe that OSA
6 does not have the commission structure in it, or has
7 some other financial arrangement. If it were held that
8 the abuse was that commission structure rather than
9 anything else, not the label of being official robemaker
10 but the commission structure, and you take that out, one
11 of the questions that we might need to understand
12 is: well, how would the market evolve in that
13 circumstance if E&R could not have that commission
14 structure but other competitors could; what would happen
15 then?

16 DR NIELS: Yes. No, I think that is actually an interesting
17 way of looking at it; and it is different from
18 the previous set of questions, where we speculated about
19 a world without OSAs at all. So I picked up on that.

20 But, yes, the bids in the OSA that are abusive.
21 Again, my understanding of the claim, it is not very
22 explicit about which bits, but let us say potentially it
23 is the duration or the commissions.

24 MR LOMAS: It could be a number of things

25 -- (overspeaking) --

1 DR NIELS: It could be, yes. So for each of these you could
2 indeed try to speculate what might happen in absence.

3 On commissions, my first reaction again is
4 the commissions itself, again, I see nothing
5 anti-competitive as such, because the test for
6 commissions to me, from an economic perspective, would
7 be the same as a -- you know, in any
8 As-Efficient-Competitor test or, you know, loyalty
9 rebate discounting test is can other competitors match
10 it. So, to me, it is not an anti-competitive thing, as
11 such.

12 But let us say this: let us say E&R could not offer
13 commissions anymore, there was a cap on commissions.
14 Well, then, I think what would happen in the bidding
15 processes is probably other suppliers, like the other
16 full service B2B suppliers, would find it easier to
17 outbid E&R. Now, whether that is a more competitive
18 situation, because obviously E&R falls away as
19 a competitor, or becomes slightly less effective, a bit
20 more hampered, hands tied behind its back --

21 MR LOMAS: Competes on different angles as well.

22 DR NIELS: Has to then compete on different angles. That is
23 indeed the other aspect one would need to consider is,
24 as we discussed yesterday, there is an interplay between
25 commissions and indeed the other aspects. So you may

1 get some sort of waterbed effect: if you cannot really
2 compete on commission, then you offer on -- offering
3 lots of staff regalia, or whatever -- staff -- dress for
4 staff.

5 But in essence, I think it still comes down to
6 the universities would continue to run these procurement
7 processes in the way they currently do in a full service
8 way, rather than suddenly open up to B2C.

9 MR LOMAS: Would it be possible to push the conch shell back
10 to Dr Maher in this respect on that topic of, if one
11 goes beyond -- and Oxbridge being a little bit different
12 because of the structure there -- the regulatory
13 inventions in Ireland and school uniforms, and go back
14 to the question of if you were to, without using blue
15 pencil, but to take out some form of narrowly defined
16 "abuse", what is the likely factual set of consequences
17 that would flow from that in the market?

18 DR MAHER: So, I think -- if I think of Dr Niels'
19 counterfactual, is that he is saying that if E&R can no
20 longer participate in these things, you would see
21 the other suppliers --

22 MR LOMAS: My point was not necessarily compete on the same
23 terms as they are at the moment.

24 DR MAHER: No, that is fine, but I think the point -- so it
25 goes to answering Mr Ridyard's third point in

1 the counterfactual -- second point: how would a finding
2 against E&R be expected to impact the conduct of
3 universities and other B2B academic dress suppliers?

4 I think an adverse finding would cause
5 the universities and other B2B suppliers to question or
6 look at their OSAs in particular, and whether they
7 contain elements of those contracts that might be an
8 infringement of competition law.

9 I am not a lawyer, but they might be hesitant to
10 want to enter -- to continue to enter; because if you
11 think about going back to the university-specific
12 market -- and again, it goes back to I do not think that
13 this is a market where there is tendering. But if there
14 is tendering, it still gives you 100% market share,
15 you know, it is a "winner take all" type of model. So
16 at the university-specific market, maybe that university
17 or supplier may be concerned about the elements of their
18 contract if there had been an adverse finding in this
19 case.

20 So I am not sure that that would be a realistic
21 counterfactual. I think the suppliers and
22 the universities might begin to question some of
23 the elements of their supplier arrangements.

24 MR RIDYARD: But let us suppose that, you know, we are
25 thinking about Marstons or Graduation Attire, or one of

1 the small suppliers. In this scenario, in this
2 hypothetical, E&R has been told to stop doing something
3 which is deemed to be anti-competitive; but Marstons is
4 not going to say, "I need to worry about this because of
5 abuse of dominance," is it? I mean, maybe it is, I do
6 not know; or maybe that is not a question that you can
7 answer.

8 DR MAHER: I think the point I was going to make is if you
9 think of the market as being university-specific, they
10 would be dominant then ex-post to having won an OSA.

11 MR RIDYARD: In the market was a university-specific market?

12 DR MAHER: A university-specific market.

13 MR RIDYARD: That is not even your -- (overspeaking) --

14 DR MAHER: But that is not the way I see the market, no. So
15 that is absolutely right.

16 But maybe Graduation Attire might want to continue,
17 but maybe the university itself might question. So I am
18 not -- I am not clear, maybe some would and maybe some
19 would not. So it is ... I think --

20 THE CHAIRMAN: I think -- sorry, go on.

21 DR MAHER: I think that you would begin to see a lot of
22 decrease in the commission payments over time. That is
23 what I see this market would evolve into, that a lot of
24 impediments would naturally --

25 MR RIDYARD: Why? I think we need to understand why that

1 would be the case. What would cause the commission
2 payments to go down? The universities still like
3 the commission payments. I think you said yesterday,
4 you know, having been given them, they are probably
5 quite keen to keep hold of them. So why would they go
6 down?

7 DR MAHER: I think if you were to have a -- if the B2C
8 market had no impediments to it, and so you could have
9 a multiplicity of suppliers in that market, it would be
10 very difficult to sustain a model where a supplier
11 offered large commission payments to a university.

12 MR RIDYARD: Yes, but that is not -- sorry, but that is not
13 the scenario that we are talking about here, is it? We
14 are talking about a scenario where E&R has been told to
15 stop doing something, whether that is offering
16 commissions or requiring exclusivity, but other bidders
17 in the market are not being told to do that.

18 DR MAHER: I think there still might be ways in which other
19 suppliers would find innovative ways in order to still
20 reach. You might have an exclusivity with
21 the university, but other suppliers might find
22 innovative ways in order to sell to the students in
23 a direct hire way.

24 So, for example, I am not quite sure how Dr Niels
25 has done his substitutability across the gowns, but my

1 understanding from looking at the witness statements and
2 the evidence is there is a fair degree of
3 substitutability across gowns amongst universities. So,
4 students may find a way to -- you know,
5 Graduation Attire or other new B2C entrants into
6 the market, students -- they might be able to directly
7 market to students and find a way to sell to them.

8 So I think, over time, there would still be pressure
9 for that type of OSA-type of agreement to become less
10 prevalent in the market.

11 MR RIDYARD: But the reason why the B2C activity is
12 effectively foreclosed now is because the universities,
13 you know, are not keen on that happening; and indeed E&R
14 is not keen either; I understand both parties are not
15 keen on that happening, and they have found ways to make
16 it very difficult, apparently, for B2C sales to take
17 place. That seems to be a --

18 DR MAHER: Well, I do not think that overnight -- so E&R
19 currently has 75%/80% of the market. If overnight they
20 have to stop having these exclusivity provisions in
21 the contract that prevent entry into the B2C market for
22 those sets of universities, first of all, not all of
23 those universities -- very few of the universities
24 actually tender. E&R is not going to lose its supply to
25 those universities overnight, even if the -- to Wippell

1 or Marstons, or any of them. But over time, you would
2 see -- I think you would see a -- I am not saying that
3 the OSAs would not continue in this market. I think
4 the market would develop where you still would have
5 OSAs. Whether a university then provides for a single
6 OSA supplier or has a preferred supplier list could be
7 a way it develops. But I think you would begin to see
8 a multitude of different ways of doing this.

9 MR RIDYARD: Okay, but initially -- I take your point that
10 E&R we know has 75% or so of the universities. On day
11 one, E&R is told to stop insisting on exclusivity in
12 some form or another, and so the universities are free
13 to allow students to hire from whoever they want at
14 those 75% of universities. You are saying that in those
15 situations, those universities would become -- E&R would
16 still be the approved supplier, so still may well get
17 a good chunk of the business; so its power to exclude
18 others from B2C sales would be diluted.

19 DR MAHER: Yes, and I think you would begin to see Wippell,
20 Marston and not just Churchill, but the other OSA
21 suppliers to other universities beginning to supply to
22 the B2C in those markets.

23 THE CHAIRMAN: The assumption you are working on is E&R
24 remain the official supplier to the relevant university
25 but is no longer able to demand an exclusivity, and

1 presumably is therefore not paying commissions. So you
2 are imagining a world where the agreement remains in
3 place but a completely different agreement on
4 commissions --

5 DR MAHER: No, it is the conduct within the agreements that
6 causes the exclusivity. So if you remove the aspect of
7 the agreements which is what's causing the foreclosure
8 in the B2C market --

9 THE CHAIRMAN: But is that not the commission on
10 -- (overspeaking) --

11 DR MAHER: Yes -- (overspeaking) --

12 THE CHAIRMAN: -- (overspeaking) -- payable.

13 DR MAHER: So that is what I am saying, is that I do not
14 think that those -- so the universities themselves would
15 have to find a different way of funding their graduation
16 ceremonies. It would not be able to be funded out of
17 the commission payments. So I think we have discussed
18 that and agree on that point, that it would go -- prices
19 would go up in a different way to students. I think
20 what we would begin to see is that the other suppliers
21 in this market, ones that current supply on a B2B basis,
22 would begin to supply direct B2C on those markets that
23 were now opened up; and you would also begin to see
24 possibly new B2C suppliers entering the market in
25 addition to Churchill.

1 MR LOMAS: Can we just take this in steps, because this is
2 always the problem with counterfactuals, there are so
3 many potential moving pieces that it is quite difficult
4 to nail them down.

5 If you take what the chairman was just saying,
6 assume that Ede & Ravenscroft still have 75% of
7 the market, because there is nothing wrong with that and
8 that is fine. You take out an element of their offering
9 under the current OSAs -- let us call it the "commission
10 payment" -- where, at least potentially, the incentive
11 aspect of the commission payment is that the more people
12 who buy their gowns, the more money the university has
13 got, so the university has got an incentive to encourage
14 people to rent their gowns from the official supplier,
15 and you change that economic relationship, there could
16 still be a payment, but it is not a payment by volume,
17 it is a different form of financial arrangement, but
18 Marston, Wippell and so forth could absolutely enter
19 into the existing OSA structures and pay commissions
20 they wish because they are not dominant. Are you not
21 going to have two slightly competing sets of commercial
22 terms, as seen from the university, and the university
23 is making a choice, therefore, between: do I want to buy
24 from -- offer an OSA-type agreement to
25 Ede & Ravenscroft, but it will have one set of

1 commercial terms, or do I want to get into an OSA
2 relationship with another supplier, which may have my
3 traditional commission structure in it, which I am
4 familiar with and which works for me? And then beyond
5 that, you have got the separate decision for, say,
6 a Wippell, which is a university that has an OSA with
7 Ede & Ravenscroft is a more contestable market for me
8 than it had previously been, and therefore I have got an
9 additional marginal decision as to whether I want to
10 open up a B2C business line in competition with
11 Churchill. Are those two different stages?

12 DR MAHER: So I am not quite sure the example you gave where
13 you said E&R is still the official supplier and another
14 OSA supplier -- B2B supplier also offers commissions and
15 is given an OSA -- (overspeaking) --

16 MR LOMAS: Sorry. If we go for a university that has gone
17 out for tender, the University of Leicester, gone out
18 for tender, it will have in front of it traditional OSA
19 commission relationships from Wippell and Marston,
20 whoever, because they are not dominant and they can
21 offer that. But if you were to have "blue penciled", in
22 Dr Niels' terminology, a very specific abuse, and that
23 abuse was commission-related, you would have a different
24 financial proposal from Ede & Ravenscroft with different
25 elements that, on this hypothetical counterfactual, are

1 not abusive or loyalty-inducing. But that gives
2 the university a choice, and they may go for
3 the exclusive arrangement with Wippell, or they may go
4 for a less exclusive arrangement, less
5 commission-driven, less incentivised relationship, with
6 Ede & Ravenscroft, and they will make those choices.

7 DR MAHER: I think that is possible, but I also think it is
8 possible that the universities might be concerned about
9 continuing to request commission payments.

10 MR LOMAS: -- (overspeaking) --

11 DR MAHER: Pardon?

12 MR LOMAS: At all?

13 DR MAHER: No, I am just saying it is a possibility.

14 The fact that -- I am just -- I think what I am
15 saying here is that Ede & Ravenscroft, if there is
16 a finding against them with regard to these aspects,
17 that there may be some hesitancy both on the part of
18 other B2B suppliers and also on the part of
19 universities. I am not saying that -- I am not saying
20 that is a hundred per cent sure; again, we are in
21 hypotheticals.

22 MR RIDYARD: Of course, understood. But I think we are
23 asking you to consider the scenario where that was not
24 the case. So the universities were fine about doing
25 a standard OSA with Marstons or Graduation Attire, but

1 only for Ede & Ravenscroft is that proposition
2 constrained, and E&R cannot offer the commission on
3 the current model. So that is -- there is still that
4 sort of choice for the university. How would it work
5 out then, is the question.

6 DR MAHER: So, I think one of the possibilities I said that
7 could happen is yes, the university might want to do
8 that, but I think once you start to open up the market
9 to a B2B feasibility, that even if a university has an
10 OSA with a supplier, with exclusivity, given that
11 the other suppliers in the market now know that they can
12 target, and they might try to target students in
13 a different way, they would still try to enter those
14 markets on a B2C level, if they thought -- particularly
15 large universities, where there might be -- it would be
16 cherry-picking, basically.

17 MR LOMAS: I am not sure I am understanding that, because
18 I think there are two separate debates here.

19 If you assume that they are normally economically
20 rational entities, the suppliers, and they have got
21 legal advice that says if you are not dominant, there is
22 no problem with offering those exclusivities, and with
23 a 3% market share you are not dominant, surely they will
24 say: universities like commission arrangements, I can
25 offer them a commission arrangement, so I will do an

1 exclusivity deal, in your terminology, with Leicester.

2 Down the road, at Northampton or something,
3 Ede & Ravenscroft has entered into a less exclusive deal
4 because their, for the purpose of this hypothesis,
5 abusive aspect has been struck out and the market is
6 more open, Wippell, assume they had won Leicester, may
7 say, "Fantastic, I can now enter a B2C market in
8 Northampton, because that is more open to me." But that
9 is a different university and different circumstances.
10 They have still got their exclusive commission-based
11 deal with Leicester, because there is no reason why they
12 cannot have that, and they may say: it is commercially
13 advantageous to me in a competitive market to make that
14 offer.

15 So are we not at risk of conflating the two business
16 streams here?

17 MR RANDOLPH: Sir, I hesitate to stand up, but all that has
18 been predicated -- that interesting question has been
19 predicated on abuse of dominance. Dr Maher has not been
20 asked to look at the alternative aspect of our case,
21 which is on 101/section 2. So in fairness to Dr Maher,
22 I think it cannot be said that these agreements stand or
23 fall on abuse. According to our case they do not.
24 I thought I should raise that, because otherwise
25 Dr Maher may be having to answer on not a full basis;

1 and of course, her report -- neither report from
2 the experts look at 101/section 2.

3 MR LOMAS: You are quite right, this was a Chapter II
4 counterfactual.

5 MR RANDOLPH: Exactly, but obviously the Chapter I point is
6 still there; and I do not think either expert can really
7 answer that, but that is a matter.

8 Anyway, I thought I would raise it. I do apologise
9 for rising.

10 DR MAHER: But just to follow up on that, I think that does
11 go to the issue of whether the universities and
12 the suppliers would still have an incentive to enter
13 into these agreements on Chapter I --

14 THE CHAIRMAN: (Speaker off-mic).

15 DR MAHER: In the Chapter I sense.

16 THE CHAIRMAN: What goes to that? You
17 said -- (overspeaking) --

18 DR MAHER: Whether there was -- whether the agreement
19 itself -- an agreement between undertakings forecloses
20 competition in the market or inhibits competition in
21 the market, and whether there could have been other ways
22 in which you could have had that agreement or supply
23 that was less restrictive.

24 So it is -- it is something I have not looked at,
25 and neither has Dr Niels, but ...

1 DR NIELS: Just maybe one observation. I do not really
2 understand the comment that the experts have not looked
3 at the Chapter I -- I need to get my chapters right --
4 101 and only looked at abuse, because I think both
5 experts, we have looked -- we have assessed the facts on
6 competition, and this question also of counterfactual,
7 with both legal frameworks in mind. I just wanted to
8 clarify that.

9 MR RIDYARD: Dr Niels, do you have any observations on
10 the discussion that has just been taking place for
11 the last few minutes?

12 DR NIELS: No -- well, the only sort of added thought
13 I would give, I think it might be useful, because there
14 is a lot of emphasis in that discussion on commissions,
15 and perhaps sort of -- I mean, not -- maybe that is not
16 intended, but sort of an impression one gets is that
17 perhaps the sense is that these tenders are decided on
18 commissions. So I just wanted to put that in
19 the bidding context. If you look at my table 3.10, that
20 is just an objective actual assessment -- overview of
21 the tenders, and so the scoring mechanisms in
22 the tenders.

23 MR RIDYARD: Can we get that -- put the reference to that --
24 get that on to the screens, please.

25 NEW SPEAKER: Paragraph 3.98.

1 DR NIELS: So it is in my first report.

2 MR PATTON: It is {E6/1/69}.

3 DR NIELS: So we are not going into the detail here, but
4 I have always been clear looking at this that
5 commissions is an important factor, as is price, to the
6 students, as we discussed. But very much the other
7 factors are also very important. That is consistent
8 with my understanding of what universities are really
9 after. Also the rationale for appointing an OSA
10 supplier.

11 So take the first one, Leeds Beckett: 20% weighing
12 each for price, and price includes commission and price
13 to students. But then the other 80% is experience,
14 customer service, quality, innovation and smart
15 technology.

16 And another clear one is London South Bank
17 University, which -- I do not know if it is actually a
18 large university or not, but it also had this scoring
19 mechanism, where price is then 30%, of which -- well,
20 you can see the breakdown there.

21 But my main point being universities, in
22 the counterfactual, even with some limitations on
23 commissions, one thing that universities would still be
24 looking for is this security of supply and high quality,
25 guarantee of high quality of supply; and one way of

1 achieving that is through an OSA. So there is
2 a natural -- in my mind, a natural economic tendency of
3 this market to go towards OSA-type relationships.

4 MR RIDYARD: Does that not suggest, though, that E&R could
5 happily bid for these contracts without requiring
6 commission, and without insisting on -- or without
7 insisting on exclusivity, assuming that those -- for
8 the purposes of this discussion, that those had been
9 outlawed, and still have a good chance of winning some
10 of these university contracts?

11 DR NIELS: In a counterfactual where the others could offer
12 commissions then?

13 MR RIDYARD: Yes.

14 DR NIELS: Yes, potentially. You could try to win on
15 the other aspects, yes. But obviously you would -- yes,
16 no, you would. But it is bidding with one hand tied
17 behind your back if you cannot bid along all these
18 criteria in the same way as your competitors. But you
19 can bid along the other criteria, yes.

20 MR RIDYARD: Yes. But just to go back to you, Dr Maher,
21 your -- just to re-emphasise what Mr Lomas has already
22 said. We appreciate that some of these questions are
23 kind of bumping up against the legal questions, but we
24 are trying to explore the extent to which the economic
25 experts can help us to deal with the counterfactuals;

1 and obviously we will be hearing from legal arguments on
2 the counterfactuals, too. So we appreciate there is --
3 you know, we are in a kind of a -- an intermediate zone
4 here.

5 But the question I wanted to ask you, Dr Maher, was,
6 in your comments on the counterfactual, are you taking
7 the view that no university would do an exclusive
8 deal -- an exclusive OSA deal, because if whatever E&R
9 is doing is declared to be unlawful, it would be
10 unlawful for Marston or anyone else to do it, too?

11 DR MAHER: That is one possibility, but --

12 MR RIDYARD: But is it the possibility that you are banking
13 on --

14 DR MAHER: No.

15 MR RIDYARD: -- in all of your counterfactuals?

16 DR MAHER: No. So maybe I have not explained -- and this
17 goes back to answering your question, Mr Lomas.

18 So, taking the example where E&R can no longer have
19 an exclusive OSA with, say, University of Leicester,
20 okay? So Wippell comes along and offers a commission,
21 and is now the exclusive supplier. But in my
22 counterfactual world, you could still have that, but
23 over time what I think would happen is that you would
24 begin to see cherry-picking, because suppliers now know
25 that they can supply B2C, okay?

1 So, even if, say, Wippell has an exclusive
2 arrangement with University of Leicester, other OSAs,
3 you might begin to see they become more accustomed to
4 directly marketing to students and doing it direct. So
5 they will have different routes to market. So they will
6 try to still -- I think you might see that other OSAs --
7 sorry, other B2C suppliers may try to still cherry-pick
8 in the markets where you do have exclusive agreements
9 for an OSA with the commission payment. So that is what
10 I meant, is that over time, I think you would begin to
11 see a lot of pressure in the market.

12 MR RIDYARD: But I think we have established that they have
13 been very unsuccessful doing that now. So how would
14 that differ in this future scenario? What has changed
15 for Churchill, or anyone else?

16 DR MAHER: I think because the knowledge in the market that
17 now they know that they can do that.

18 THE CHAIRMAN: Where does that knowledge come from?

19 DR MAHER: It is a hypothetical. I am just trying to think
20 of how the market might develop. When I am thinking of
21 a counterfactual, I think that what would happen is that
22 since E&R has 75%/80% of the market, and so a lot of
23 that market would open up to other B2C -- other B2B
24 suppliers that would be able to now put into the B2C.
25 Whether you would continue to see -- there are very few

1 of the universities that actually tender in the market.
2 I did not mention this yesterday, but in Dr Niels'
3 report, I think there is an overemphasis on some of
4 the tendering that is actually going on. Some of those
5 were repeat tenders by the same institutions. So I am
6 talking about the number of institutions. So there are
7 very few institution that actually tender for these
8 things. They may continue -- they may try to develop an
9 OSA through bilateral negotiation that has some type of
10 exclusivity provision in it. I am just not sure,
11 I guess I would answer that.

12 MR RIDYARD: Dr Niels' original prediction, which was
13 that -- which may have been overtaken by events and
14 the discussion, but was that, you know, given that
15 universities like the commission income and the other
16 things, if E&R was unable to offer that to them, then
17 they would start to go to tender, even if they have not
18 done up to now, and they would get in one of these
19 smaller suppliers who is still able to offer the kind of
20 deal, the structure of deal that the universities get
21 now. So what do you think about that prediction?

22 DR MAHER: So I think that goes back to my thinking about,
23 well, it would be a different case. I think then one
24 might say that you're looking at the market from
25 a university-specific, where it is only that. So if you

1 are looking at it as a "winner take all" model, that
2 agreement would still be to a supplier that has
3 a dominant position in supplying that particular
4 university.

5 So there are other things that might arise.

6 You know, another supplier may decide to attack that
7 outcome.

8 MR RIDYARD: Okay.

9 DR MAHER: I think the issue is whether -- I think there
10 would be concern if there was a finding that these
11 were -- that there were anti-competitive aspects to
12 these contracts that was foreclosing competition.

13 I think, in -- more realistically, other suppliers and
14 the universities may have concerns about wanting to
15 enter those type of agreements.

16 I think the incentives for the universities are
17 still there; they would still like the commission
18 payments, but they may be concerned. So I think that
19 goes into more of a legal territory of them taking
20 advice as to, you know, whether those agreements would
21 be an infringement or not. I am saying that it is not
22 necessarily clear that another supplier would not be
23 concerned about that, or a university would not be
24 concerned about that.

25 MR RIDYARD: That would be a good time to take a short

1 break. Why do we not say a ten-minute break, and we
2 will come back and finish this one-off.

3 (11.56 am)

4 (A short break)

5 (12.16 pm)

6 MR LOMAS: Dr Maher, we were thinking about this during
7 the break, and reverting to the discussion we were
8 having, it may be, in a sense, almost an unanswerable
9 question, but I think the issue that we were trying to
10 look at, to sort of re-base the discussion a little bit,
11 is if -- and it is an assumption -- the allegation about
12 abuse really boils down to the incentive structures set
13 on the universities, because of the commission
14 arrangement, to maximise the number of graduands who
15 hire from Ede & Ravenscroft in a circumstance where it
16 is the dominant supplier, they are the official
17 roblemaker to that university, in that circumstance, if
18 the offering of those incentives through the commission
19 structure were to be decided to be an abuse and to be
20 struck out, and some other financial arrangement was
21 reached between Ede & Ravenscroft and the university,
22 what sort of impact would that have on the revenue
23 stream that Ede & Ravenscroft get from gown hire over
24 time, and what would that reduction in the revenue
25 stream that they have mean for the development of both

1 the B2B market and potentially the B2C market? I think
2 that is what we are trying to get at, to try and
3 understand the range of counterfactuals.

4 I was not asking for a number-specific outcome,
5 because obviously that is difficult to project, but
6 I mean just conceptually.

7 DR MAHER: Conceptually. I think, so let me just clarify on
8 one thing. Dr Niels had said that we had -- both
9 experts had looked at the 101 allegation. I have not
10 looked at or done any analysis in relation to that. So
11 I think the sort of whole what I was getting at in terms
12 of incentives was whether they would -- if E&R was
13 precluded from entering into these type of exclusivity
14 OSAs, the counterfactual where the other OSAs might want
15 to offer those type of conditions relate more to whether
16 that is realistic under a 101 finding. So I have not
17 analysed that. So I think that is fair to say. So
18 I think that is why I was having a bit of difficulty in
19 answering that.

20 In terms of a counterfactual world, I think what
21 I have tried to say is that I think, over time, if there
22 is an allegation that these type of payments are found
23 to be in difficulty, what we would see is that -- and
24 the market were opened up, so these type of impediments
25 to the B2C competition was allowed, then you would begin

1 to see -- it would have an impact on the revenue
2 structure for the suppliers and for the universities.

3 In terms of where the incentives come from, I think
4 we addressed this a bit yesterday: what came first,
5 the chicken or the egg? It is true that
6 the universities have an incentive to want to have
7 these, because these payments help them fund -- they are
8 basically not paying the cost of putting on their
9 graduation ceremonies.

10 But it also could be the incentive from the supplier
11 to want to offer those type of commission structures,
12 because from the suppliers' point of view, it is
13 giving -- the university in return has to give it
14 exclusivity because of the incentives; and so
15 the supplier has an incentive to offer that in order to
16 get that sort of guaranteed revenue stream.

17 MR LOMAS: I think -- and again, we have not yet had
18 detailed legal submissions on this. But I think
19 the point that will be made by Ede & Ravenscroft is that
20 when you look at the content of the OSAs, they do not
21 mandate the universities to prevent graduands getting
22 gowns from elsewhere. So they would say, as a matter of
23 fact -- and we see this because Churchill have some
24 business -- graduands can go elsewhere, so they are not
25 legally barred.

1 I suspect the argument that comes back from
2 the Churchill side -- and we saw that with some of
3 the correspondence with Bournemouth, and we see it in
4 some of the other stuff in the witness statements --
5 is: ah, yes, but the universities in fact, whether
6 legally required to under the OSAs or not, take a series
7 of actions which make it more difficult for graduands to
8 hire from Churchill and send them towards
9 Ede & Ravenscroft, as the official robe supplier.

10 Now, one reason why they would do that is their own
11 revenue stream is enhanced because they are remunerated
12 on a commission basis.

13 So the problem in that scenario would not be that
14 there is money moving from Ede & Ravenscroft to
15 the universities, it would be that the amount of money
16 is a function of the university's success in directing
17 the revenue stream to Ede & Ravenscroft rather than
18 somebody else.

19 Now, if that were analytically correct, you could
20 remove that abuse by changing that precise commission
21 arrangement; and that would affect the revenue. But
22 what one is trying to understand, I think, for the
23 counterfactual is, assume Ede & Ravenscroft stay there
24 with 75% but cannot offer that per-capita, if you like,
25 commission-type increase, so the incentives on

1 the universities change but there is still money moving,
2 there are probably two sets of outcomes. The first is,
3 it changes the dynamics in the B2B market, because
4 Ede & Ravenscroft are competing, I think as Dr Niels
5 said, with one hand partially behind their back, but
6 only on one element of the competitive environment, but
7 you would also find that in the Ede & Ravenscroft
8 succeeding university arrangements, where they still
9 succeeded, they had a more open marketplace, so the B2C
10 market could grow in those universities.

11 I think what we are trying to understand is your
12 view on how those fact patterns are likely to unroll
13 over a two, five-year, six-year time frame, because that
14 tells us what the counterfactuals, or the range of
15 counterfactuals might be.

16 Sorry, that is a very long description, I apologise.

17 DR MAHER: Yes. So, if I had to hypothesise, yes, one
18 possible outcome could be that you might see other B2B
19 suppliers offering commissions -- large commissions that
20 Ede & Ravenscroft is no longer able to offer.
21 The universities would have an incentive to still
22 continue to therefore direct supply exclusively to that
23 supplier who is providing them with those commissions.
24 So that might be a possible outcome.

25 I think the way I was trying to answer that question

1 is: do I think that is likely to occur? I think,
2 given -- and that is what I tried to say earlier, is
3 I have not looked at it from a 101 perspective. So
4 I think from a 101 perspective, there might be some
5 concerns. What I was trying to say is that
6 the universities themselves and some of the B2B
7 suppliers may have some concerns in wanting to enter
8 those type of agreements.

9 MR LOMAS: If we stay in the 102 world.

10 DR MAHER: But if we stay in the 102 world, yes, that is
11 possible.

12 MR LOMAS: Sorry, what is possible?

13 DR MAHER: That the other B2B suppliers might have -- would
14 have, not just -- I do not think it is just
15 a possibility. They would have an incentive to offer
16 those commissions and take the business off of E&R.

17 THE CHAIRMAN: In the 101 world, I think your answer was,
18 although you have not considered it, I think you are
19 saying there, because there would be a legal concern --

20 DR MAHER: Yes.

21 THE CHAIRMAN: -- that would put university and other
22 suppliers off. That is your point there, I think,
23 is it?

24 DR MAHER: Yes.

25 THE CHAIRMAN: Yes, I understand.

1 DR NIELS: Maybe if I can offer just one additional thought
2 to that. It is an interesting question about the link
3 between the commission structure and then the incentives
4 that has directly on universities to then also sort of
5 promote the OSA supplier.

6 I just wanted to put this again in the context --
7 and Dr Maher also just referred to it -- the discussion
8 yesterday we had about the chicken and egg, what comes
9 first. I do have to refer again to Mr Ridyard's
10 article. It might be at some point useful to look at
11 it. It is a very short bit in that article sets out
12 a very clear framework for why do we see these
13 arrangements. This is relevant for this question,
14 because there are two possibilities as to why you get
15 this exclusivity. One is the monopoly leveraging, so
16 that is a supplier-driven exclusivity. So that is very
17 much in the world of: I, as a supplier, offer you
18 a commission, and therefore I induce you to give me
19 exclusivity.

20 The other scenario is very much the buyer-driven
21 world, where it is in the buyer's interest to actually
22 want to offer exclusivity, because that is sort of
23 a carrot you dangle in front of bidders. That is not
24 just a commission. That is the only point I wanted to
25 make: that is not just a competition, you invite

1 competition along all the dimensions of competition, so
2 all the award criteria that I outlined earlier. So that
3 is a mechanism in which the buyer, in this case
4 universities, can ensure that there are competitive
5 offers along all dimensions; and there is therefore, in
6 theory, an incentive for universities to offer
7 exclusivity on that basis and not just because of
8 the commission.

9 So I just wanted to add that as an extra thought.

10 MR LOMAS: And consider the time period for which they offer
11 that, because that may also have impacts on the rents
12 they can extract from the arrangement and the degree of
13 lock-in, which has a cost for them.

14 DR NIELS: Yes, indeed. So a rational -- in that scenario,
15 a rational buyer would not give so much exclusivity that
16 it becomes then effectively beholden or locked in to
17 that supplier.

18 MR LOMAS: There will be a sweet spot.

19 DR NIELS: Sorry?

20 MR LOMAS: There will be a sweet spot for them?

21 DR NIELS: Yes, indeed, an optimal duration, an optimal
22 scope of the exclusivity, yes.

23 MR RIDYARD: With that, I think we have pretty much come to
24 the end of this part of the agenda.

25 I would just like to finish by saying thank you very

1 much to both of you -- of course, we will give you
2 the chance to ask any clarification points. But before
3 you go, I just wanted to thank the two experts for
4 a very helpful and, you know, well -- a good exchange of
5 views, which is exactly what we were hoping to achieve.

6 Now I would invite counsel to ask any questions of
7 clarifications.

8 MR RANDOLPH: I am very grateful.

9 I would just raise, before going to a few
10 clarificatory questions, and I mentioned this to my
11 learned friends, you gave the experts homework last
12 night.

13 MR RIDYARD: Indeed.

14 MR RANDOLPH: I do not know whether you would like them to
15 discuss that or not. We are very much in your hands.
16 If they did the work, it might be of interest. I do not
17 know what it is, Mr Patton does not know what it is. We
18 are agog.

19 MR RIDYARD: Yes, thanks for the reminder. Yes, it would be
20 useful.

21 Now, we did not want you to go away and write
22 another 100-page report on analysing those numbers
23 necessarily, but I think the interest really was, in
24 principle -- yes, the question was: in principle,
25 the data in that spreadsheet, was it capable of testing

1 some of the hypotheses we were talking about. One was
2 about whether outcomes were different between ITTs and
3 ad hoc arrangements, and the other was whether outcomes
4 were different as between incumbency or renewal
5 arrangements and de novo OSA arrangements.

6 Dr Niels, did you have any observations on those two
7 things?

8 DR NIELS: Yes, I can share my high level observations. So,
9 I think yes is the answer. It is possible to do
10 the kind of analysis that Mr Ridyard posited yesterday,
11 in principle, because we have a database of all
12 the contracts and then one can, in principle, map that
13 onto the spreadsheet that we were looking at yesterday.
14 So one could envisage an analysis, a spreadsheet where
15 you have all the contracts, you categorise them by
16 was it an ITT or RFP or other model, and you could
17 categorise them by was this a renewed -- was this
18 the same provider -- did this go to the same provider or
19 did this change. Then you could have a column on
20 the price or the prices, a column on the commission and
21 a column on the margins. I mean subject to that
22 information this the spreadsheet; one needs to carefully
23 check that. I will come back to that as well. So in
24 principle, you could have that -- a spreadsheet like
25 that, and then you could look at averages and see if

1 there are statistically significantly different averages
2 across the categories. So that is additional
3 interesting information.

4 Now, I reflected as to the reasons why I actually
5 have not done such an analysis to date. I think there
6 are two reasons. So, one is that, at the time of
7 the first report, my emphasis was really on -- my focus
8 was really on the university buyer power, which was
9 a big theme, of course, to analyse and develop, and as
10 I saw evidence of buyer power being exercised across
11 the various types of procurement model, I did not really
12 put so much emphasis on the differences between
13 the various procurement process types. We exchanged
14 expert reports, and Dr Maher made the -- or argued in
15 her first report the point about ITTs are competitive
16 but all the other procurement methods are not
17 competitive. So that crystallised in my mind that there
18 is perhaps more of a question indeed about how do these
19 different methods compare to each other.

20 The reply report period was compressed, so what
21 I emphasised in my reply report was that the outcomes
22 that I observed by looking at the outcomes in
23 the contracts database were very similar between
24 the different types of procurement, and as I said
25 yesterday, that is more an overall impression rather

1 than a statistical analysis, and therefore I accept that
2 an analysis of the kind we just discussed could provide
3 additional insight into that question. Again, it is --
4 it provides insight into the question of relativities,
5 so are bilateral negotiations relatively -- you know,
6 how do they compare relatively to RFPs and ITTs. In
7 absolute terms, I still think I have seen evidence of
8 all these models resulting in competitive outcomes.

9 .

10 The second reason why I did not do this analysis --
11 and this is in particular in relation to margin
12 analysis. I did, early on, explore whether -- and this
13 was more in the context of market power and the question
14 of is this a market in which E&R, given its position,
15 can make profits or charges prices that are above
16 competitive levels. So I did explore the financial
17 information in the management accounts in particular.
18 But what I -- I have to say, what I struggled with to
19 get really a grip on is the margin information in
20 the management accounts and in spreadsheets like the one
21 discussed yesterday, and in particular to get a good
22 handle on costs and the way costs are treated and
23 allocated.

24 So if you look at the overall business of E&R --
25 that is in the management account -- as I mentioned

1 yesterday, its overall EBIT margins are, on the face of
2 it, not particularly high, single digit figures,
3 probably confidential. But of course, I have not
4 pursued that line of enquiry, so I cannot really say
5 therefore that is good evidence, because -- and
6 the reason why I did not pursue it further, because
7 the other difficulty, in addition to cost allocation, is
8 that -- that I foresaw in such an analysis is that you
9 have to compare those EBIT margin data with comparators,
10 so other industries or other companies, and I struggled
11 to find good comparators, or comparators that would
12 provide more clarity than raise questions. So one could
13 think, in principle, of other events organisation
14 companies or clothing companies.

15 So, for those reasons that I just described,
16 relatively early on, I decided not to pursue that line
17 of enquiry of looking at margins.

18 MR LOMAS: But surely, Dr Niels, you could look at the EBIT
19 margin analysis as between to those that were full
20 competitive tenders, those that were requests for
21 expressions of interest and those that were bilaterally
22 negotiated, because you can categorise the contracts
23 that way and you know the margin by contract, so you can
24 produce some comparative data between those different
25 baskets, can you not, theoretically?

1 DR NIELS: Yes. No, that was the point that I started with,
2 that one can do that --

3 MR LOMAS: You can, okay yes --

4 DR NIELS: -- and I explained why I had not done it.

5 MR LOMAS: It is just the external comparator.

6 DR NIELS: There is some -- one does need to be careful,
7 generally, I have found, when looking at these margins.
8 One need to be really clear about, okay, which costs
9 have now been included and which ones have not.

10 MR LOMAS: Yes.

11 MR RIDYARD: Dr Maher?

12 DR MAHER: So, I have not completed the analysis, because in
13 the -- I have to say, I was aware and I have used
14 the ceremony profit analysis worksheet in my -- in
15 referencing my report. I used it mainly for -- a lot of
16 what was in the defence was the difference in these type
17 of contractual arrangements, so -- and where
18 the defendants were, like, not supplying. So a lot of
19 it was trying to identify where there was any evidence
20 of actual supply, so trying to identify who was
21 the actual supplier over the claim period.

22 But if I can step back a bit -- and this maybe will
23 go to, you know, starting the analysis -- is I first
24 tried to identify what were the institutions that were
25 in the -- what is the addressable market here. So

1 I start off with the government UK list, which
2 identifies degree-awarding institutions. I compared
3 that with the Higher Education Statistical Agency's,
4 identification of those institutions. I will not go
5 into all the detail; that is in the annex of my report.
6 I also then compared it with the ones that E&R included
7 in the addressable market. There were some that they
8 excluded that were on the Gov list, but they also
9 included others that were not on the Gov list, and
10 I included them in my addressable market if they were
11 also in the HESA data. So that gives me my 174
12 institutions, and where I looked at all of
13 the contracts, supply arrangements. So I did not -- at
14 the time, I did not look in detail at the ceremony
15 profit spreadsheet, because I was concentrating more on
16 trying to identify who was supplying, what were
17 the supply arrangements and things like that.

18 Having looked at that now and having looked at --
19 tried to address Mr Ridyard's question, are there
20 a difference in outcomes that we observe between tenders
21 and no tender, and as I have said, I have not completed
22 the analysis, but from my preliminary review -- and
23 I will not give the numbers because they are
24 confidential, I would presume, but it is what
25 I expected. Where you have the profit margins, they, by

1 institution, are greater for Ede & Ravenscroft both on
2 the hire market and on the photography market when there
3 is no tender. So, the difference between no tender and
4 tender: their profit margin is around 3% higher when
5 there is no tender on the hire market, and slightly more
6 than 10% higher when there is no tender on
7 the photography market.

8 MR RIDYARD: Those are percentage point differences, are
9 they?

10 DR MAHER: Yes.

11 I also looked to see whether there was a difference
12 between when there is joint or hire-only supply --
13 I think that was one of your questions yesterday -- and
14 doing that over all of the contracts. As I have said,
15 I have not completed filling out the spreadsheet,
16 because -- the reason I started talking about
17 the addressable market is because in that spreadsheet
18 there is over 600 institutions that they have listed and
19 I have to narrow it down to finding the 174 that are in
20 my market.

21 A couple of other observations on that list, which
22 I should have looked at in more detail at the time, is
23 that the actual running of the ceremony, the costs that
24 E&R identifies as the ceremony-running, you know, costs
25 associated with the ceremony, are actually quite small

1 in relation to what they identify as the contract costs,
2 which include the commission payments and the other
3 freebies, so the one-off payments and things like that.
4 If you look at that break between -- and they break it
5 down by allocating these ceremony costs to
6 the academic dress hire and the ceremony costs that are
7 associated with photography, and I had not looked at
8 that in detail before, and what -- brief review of it,
9 most of the ceremony costs are actually related to
10 photography and not academic dress hire. In fact,
11 I think the difference is about 80%. Just ballpark.
12 These are observations. As I said, I have not completed
13 the analysis. The ceremony-running costs were more
14 related to the photography element.

15 MR LOMAS: The question is -- it may perhaps be better
16 addressed to one of the cost accountants -- do they
17 depreciate the stock, the gowns and so forth, and is
18 that part of the cost structure as calculated per event?

19 DR MAHER: Yes, so that is one of the reasons why I did not
20 look at this before, because it does not seem to
21 allocate any capital costs in this, so the stock.

22 The other reason why I did not think it was helpful
23 in that analysis, because as I have said, I think that
24 actually the stock -- that manufacturing of the stock
25 can pretty much be recovered from the first sale of

1 the item.

2 DR NIELS: Just to confirm that when I referred to
3 difficulties in, you know, information -- in getting
4 clarity on costs, this is exactly one of the issues, so
5 the how stock is depreciated over time.

6 MR LOMAS: Not a straightforward question.

7 MR RANDOLPH: Sir, in the light of that evidence from both
8 experts, who obviously worked hard overnight, I am not
9 sure how the tribunal would like to have that evidence
10 presented in written format, because obviously Dr Niels
11 can look at it in one way and Dr Maher has given her
12 evidence in relation to her partial but not complete
13 analysis of the papers -- of the Excel spreadsheet.
14 I have not had an opportunity to discuss with my learned
15 friend, but insofar as that analysis is going to be
16 carried out, or is partially carried out and needs to be
17 completed, it would seem at least reasonable to suggest
18 that a short period of time were given to both experts
19 to complete that analysis, because otherwise what you
20 have is a partial analysis.

21 Now, of course, that may have an impact --
22 a consequential impact, but the work was done,
23 the evidence has been given, but in oral form and it is
24 not complete, and I am sure Dr Niels -- I cannot speak
25 for Dr Niels, obviously, but he might want to do some

1 more work on it. So I am in your hands, and I am sure
2 Mr Patton is as well, but I thought I would raise it.

3 THE CHAIRMAN: We will discuss that over lunch and come back
4 to you at whenever "after lunch" is going to be.

5 MR RANDOLPH: Yes, well, during lunch or after lunch?

6 THE CHAIRMAN: We will discuss it during lunch.

7 MR RANDOLPH: Then you will share that conversation.

8 THE CHAIRMAN: Yes.

9 MR RANDOLPH: Splendid. Good.

10 Sir, if I may, I have -- I do not know whether you
11 want to take me now. I probably could finish before --
12 it depends on the answers from Dr Maher. I do not have
13 any questions for Dr Niels.

14 THE CHAIRMAN: If it is just a clarification, let us do that
15 now.

16 MR RANDOLPH: Yes, okay.

17 Questions from COUNSEL

18 Just one very small point, Dr Maher. This is in
19 relation to a question that was asked by Mr Lomas in
20 relation to the position at Oxbridge and essentially
21 the issue of "subfusc".

22 I wonder if I could ask you to turn to paragraph 139
23 of your second witness statement, which can be found at
24 {E4/7/36}. So, you will recall that Mr Lomas raised
25 the issue of: oh, well, the position at Oxbridge is

1 different because they have their gowns and they can
2 wear them all the way through. I wonder if you could
3 read out paragraph 139(a) and (b).

4 DR MAHER: Yes, thank you. I did not have an opportunity to
5 make that point previously, but that is the case
6 {E4/7/27}:

7 "Students at Oxford and Cambridge will buy their
8 'commoners' gowns and mortarboards at the start of their
9 academic careers to be worn as part of the day-to-day
10 formal academic dress, sometimes referred to as subfusc.
11 At the end of their degree they will still need to hire
12 a graduation gown and hood for their graduation
13 ceremony, just as students at other universities do.
14 The early experience in no way informs or impacts what
15 they need to do three years later."

16 MR LOMAS: Thank you. I had overlooked that decision.

17 Thank you.

18 DR MAHER: We have moved on to the conversation that I could
19 not --

20 MR RANDOLPH: No, no. Well, there we are. That may not
21 change the course of this case, but accuracy is,
22 I think, important.

23 Could we stay in the same witness statement and go
24 up to -- this is in the context of counterfactuals and
25 the properly functioning counterfactual market. I think

1 both experts, but you, Dr Maher, have been asked a lot
2 of questions about a properly functioning counterfactual
3 market. Do you see what you say at paragraph 123
4 {E4/7/33}? What would be helpful is, could you read
5 123, 124 and 125 to yourself.

6 DR MAHER: Which ones again?

7 MR RANDOLPH: I am so sorry. This is {E4/7/33} of your
8 second witness statement -- sorry, your second
9 responsive expert report.

10 DR MAHER: You want me to read it all to myself?

11 MR RANDOLPH: Yes, why do you not read it to yourself.

12 (Pause)

13 DR MAHER: Can you turn down the page?

14 MR RANDOLPH: Sorry, can we have the next page, please. 34
15 {E4/7/34}.

16 (Pause)

17 Do you have it now?

18 DR MAHER: Yes.

19 MR RANDOLPH: Good.

20 (Pause)

21 DR MAHER: Okay.

22 MR RANDOLPH: Does that assist in your recollection of your
23 evidence and the evidence you gave to the tribunal in
24 relation to the properly functioning counterfactual
25 without the -- I am going to use this phrase --

1 anti-competitive conduct, the unlawful anti-competitive
2 conduct -- I am not going to put it into a Chapter I or
3 Chapter II box -- the unlawful anti-competitive conduct
4 in the OSAs if such anti-competitive conduct were to be
5 found? Does that assist in trying to bottom out where
6 you think one would land in a realistic counterfactual
7 where those unlawful elements were stripped out?

8 DR MAHER: I think when I was looking at this I was looking
9 at the unlawful elements being stripped out in
10 the market as a whole, and so my point was -- and
11 I think both Dr Niels and I agree that there would have
12 to be -- the ceremonies would have to be funded in some
13 other way, but this is the point I have made before,
14 that I think that any increase in charges elsewhere will
15 be more than offset by the significant reduction in
16 prices and in improvements in service and quality for
17 the dress hire and photography.

18 MR RANDOLPH: Just going to the point of -- rather than
19 the market as a whole but looking at the unlawful
20 restrictions, were they to be found such, in
21 the agreements themselves, the OSAs themselves, because
22 I think that is what the tribunal was concentrating on.
23 Just imagine the counterfactual world there. Can you
24 actually describe, because there seemed to be -- I am
25 not going say a lack of clarity, but it would be

1 helpful, I think, to have further clarification as to
2 where you see the agreements stripped down, having taken
3 out the unlawful aspects of them. So if you could have
4 your blue pencil that we mentioned a while back, what
5 would be taken out and how would that play out in
6 the market?

7 DR MAHER: So, I think what would be taken out would be
8 the financial incentives in the OSAs that the supplier
9 currently is offering to the universities which
10 incentivise the universities to foreclose the B2C
11 market. So if those were removed, I would -- in
12 the counterfactual world, I would see the B2C market
13 developing with all -- you know, there would be
14 a multitude of suppliers competing in the B2C market.
15 But I do think you would still see universities wanting
16 to have -- well, they still have to put on
17 the ceremonies. I do not think that is -- unlike
18 Dr Niels, I think graduation ceremonies would continue
19 to be put on, but you would -- I think they would go
20 towards more having a preferred supplier list, that
21 might be one option, or they may not and you just open
22 up the market completely, but they may, say, have a list
23 of suppliers that meet their requirements and
24 the students would be able to purchase their gowns from
25 any supplier that met them.

1 MR RANDOLPH: So thereby taking out the exclusivity
2 provisions?

3 DR MAHER: It is the commissions that lead to -- again, I do
4 not want to deal with the legal aspect, I deal with
5 the incentives. So, it is the commission payments that
6 the suppliers offer that basically induce the incentive
7 to have exclusivity in order to protect that revenue
8 stream, both for the university and for the B2B
9 supplier.

10 MR RANDOLPH: So they go together?

11 DR MAHER: Yes.

12 MR RANDOLPH: So stripping out -- in that perfect
13 counterfactual but realistic world, you would strip out,
14 so you would have -- just clarify this for me.
15 The commissions would go and the exclusivity would go,
16 because they are part and parcel of the same equation,
17 and then you would have what? I think you just said one
18 of the options would be preferred suppliers -- several
19 preferred suppliers.

20 DR MAHER: Yes.

21 MR RANDOLPH: How would that play out on the B2C market?

22 DR MAHER: You would have multiple suppliers. Students
23 would have a choice.

24 MR RANDOLPH: Which would do what?

25 DR MAHER: Which would reduce prices for the academic dress

1 and photography services provided at graduation
2 ceremonies.

3 MR RANDOLPH: Thank you very much, Dr Maher.

4 I am in your hands, sir. That is me done.

5 THE CHAIRMAN: You have finished?

6 MR RANDOLPH: I am done, yes.

7 THE CHAIRMAN: Let us just see if Mr Patton has any
8 clarification.

9 MR PATTON: (Speaker off-mic) Yes, just a few questions, I
10 think, to finish the task, if that is okay.

11 Dr Maher, you were asked some questions about how
12 other suppliers would behave in a counterfactual where
13 the assumption is that E&R is prevented from seeking
14 exclusivity or from offering commissions and you
15 referred to universities or suppliers being worried
16 about a finding against E&R. Do you recall saying that?

17 DR MAHER: Yes.

18 MR PATTON: Can I just check, that is on the assumption,
19 is it, that there will have been a judgment of
20 the CAT in these proceedings?

21 DR MAHER: Yes.

22 MR PATTON: So is that part of what you are taking into
23 account in the counterfactual, the judgment in these
24 proceedings?

25 DR MAHER: Yes.

1 MR PATTON: I am just trying to understand how that works.
2 I mean, the claim in these proceedings concerns conduct
3 looking back to the start of the claim period in 2016;
4 and so I just wondered if you could explain how it is
5 that, if the tribunal is looking at what
6 the counterfactual is for 2016, how could it take into
7 account the judgment that it is yet to give today in
8 2022?

9 DR MAHER: I am not sure I understand the question.

10 THE CHAIRMAN: Is that not a question of law?

11 MR RANDOLPH: No, exactly.

12 MR PATTON: I was just testing if that is the way she was
13 analysing that.

14 THE CHAIRMAN: But you have that answer. That is
15 -- (overspeaking) --

16 MR PATTON: Yes.

17 THE CHAIRMAN: Good, thank you. I think it is probably
18 sensible if we take a break now, because we have to
19 rearrange the room for the cross-examination.

20 Where are we on timing? Have you any idea where ...

21 MR RANDOLPH: We are going well, insofar as one wants to
22 finish before the end of the timetable. Mr Patton's got
23 Dr Maher this afternoon and I have got Dr Niels tomorrow
24 morning.

25 THE CHAIRMAN: It is anticipated we will be taking a full

1 half day?

2 MR RANDOLPH: I do not know. I cannot speak for Mr Patton.

3 MR PATTON: Yes, I think I will.

4 MR RANDOLPH: And I think I will.

5 THE CHAIRMAN: In which case, we will break now and resume
6 at 2 o'clock.

7 (12.55 pm)

8 (The short adjournment)

9 (2.02 pm)

10 THE CHAIRMAN: Before we resume, just a couple of points.

11 First of all, because of a commitment I have, we need to
12 finish at 4.20 today.

13 Secondly, on the question of whether we require any
14 further work from the experts, we are not going to
15 require any further input from the experts to us, so
16 certainly no further report of any kind.

17 The raw material, the evidence on which this point
18 that arose today, is in the documents. It is not
19 actually an expert economist's task probably to find
20 that data and collate it.

21 To the extent that either of you wishes to make
22 submissions on the basis of it, of course you are free
23 to do so in the course of your closing submissions. You
24 may talk to your experts about that if you wish, but we
25 do not think it requires any further reports from them.

1 But thank you very much, both of you, for your
2 assistance on it.

3 DR MARIA MAHER (continued)

4 Cross-examination by MR PATTON

5 MR PATTON: Good afternoon, Dr Maher. Could I just start in
6 the joint statement at {E7/1/10} of the joint statement,
7 and it is also on the screen. Feel free to look at it
8 in hard copy. I just want to look at paragraph 3.2 at
9 the bottom of the page. In the first column, your
10 column, you say:

11 "I consider that the relevant market in this case is
12 the direct hire of academic dress to students (ie
13 the B2C market)."

14 Did you see the sentence, just the first sentence?
15 Is that a fair summary of your view about the relevant
16 market in this case?

17 A. It is one of the relevant markets, yes.

18 Q. So you are talking here about the direct hire, the B2C
19 market, as being the relevant market; is that right?

20 A. It is my understanding that that is the market on which
21 the competitor effects have been alleged.

22 Q. Who are the participants, in your view, in that market?

23 A. Currently, that I am aware of, it is Churchill Gowns;
24 and in Cambridge and Oxford, there are a number of other
25 direct hire suppliers, I think, (inaudible) in my

1 report.

2 Q. So apart from Oxford and Cambridge, you would say that
3 Churchill Gowns is the only participant in this market?

4 A. That I am aware of.

5 Q. I am grateful.

6 Now, if I could ask you to go, in your first report,
7 {E4/1/46}, paragraph 191, you say that:

8 "The conduct of a dominant firm is another relevant
9 factor to be considered in the assessment of whether it
10 possesses market power."

11 Do you see that?

12 A. Yes.

13 Q. Just picking up a point that the chairman made, you
14 would agree that does not involve conflating the abuse
15 with the question of dominance?

16 A. Sorry, can you repeat the question?

17 Q. Yes, looking at the conduct of a dominant firm, that
18 does not involve conflating the question of abuse with
19 dominance, it is reasonable to look at the conduct of
20 a firm in assessing whether it is dominant?

21 A. Yes, the effects of the conduct.

22 Q. Then if I could just look over the page at page 47
23 {E4/1/47}, at paragraph 197, you say:

24 "... I find that the E&R Undertaking has sought to
25 convince universities to avoid formal tender processes."

1 Do you see that?

2 A. Sorry, which one is it?

3 Q. Sorry, 197. It is the bottom paragraph.

4 A. Yes.

5 Q. You give two examples. If I could just look at
6 the first example, University for the Creative Arts.

7 You quote from a document:

8 "Please be aware that UCA currently do not have
9 a valid [contract] with us and have not had [one] for
10 a couple of years I believe. I have asked them whether
11 we can arrange a contractual discussion at this stage
12 and see whether we can come to an agreement outside of
13 a procurement process however they are not ready to have
14 this conversation and feel it will have to go through
15 procurement due to the value of the contract."

16 Do you see that?

17 A. Yes.

18 Q. So in the first example you give, although the E&R
19 undertaking has raised the possibility of an agreement
20 outside the procurement process, it has not succeeded in
21 achieving that; do you agree?

22 A. In that specific instance, yes.

23 Q. Then, just looking at the second example, University of
24 the West of England, Bristol:

25 "'UWE is one of our biggest earning clients at E&R

1 and unfortunately they do not have a contract with us
2 which has led to their procurement department wanting to
3 run a tender for all graduation services. Initially
4 they were only going to use the LUPC framework ...'"

5 That is the London University framework; is it not?

6 A. Yes.

7 Q. "... however we have been pushing very hard for an
8 invite to tender regardless of not being on LUPC
9 supplier list which I believe Vicky and Sarah our
10 contacts will also encourage. Jim is aware of
11 the [contract] going to tender but you will need to stay
12 close to them to find out what progress is being made
13 with this as they can be quite tight lipped. This
14 summer for the first time FSM have delivered streaming
15 services for the university as their previous supplier
16 let them down and asked for a huge amount of money to
17 stream the ceremonies. No dvd sales ..."

18 A. Sorry, can you --

19 Q. Sorry, you are slightly behind. I am sorry about that:

20 "No dvd sales only streaming. Despite no contract
21 in place we have agreed with the university that we will
22 be delivering our services for gowning, photography and
23 also videography for this summer ceremonies and their
24 winter ceremonies'."

25 So is that not an example of E&R asking to be put on

1 the invitation list, even though they are outside
2 the London University's framework?

3 A. Yes.

4 Q. It is not an example of E&R seeking to stop there being
5 a tender?

6 A. Yes.

7 Q. Even if it were, they did not succeed, do you agree, on
8 the basis of the material you have identified?

9 A. I do not know what the outcome of that was.

10 Q. So, I mean, do you agree that in assessing market
11 strength, it is important to look at whether E&R was
12 actually able to stop there being a tender?

13 A. Where there are tenders.

14 Q. Absolutely. But the question -- it is important to take
15 into account whether E&R achieved there not being
16 a tender.

17 A. It goes to what -- I am not sure what question you are
18 trying to address in that --

19 Q. In relation to dominance.

20 A. In relation to dominance, which I think relates to more
21 the incumbency advantages and where the incumbent --
22 there is evidence that they have helped in designing
23 the tender process would be an indication that they do
24 affect the tender process.

25 Q. But just looking at what you are talking about in 197,

1 which is seeking to convince the universities to avoid
2 a formal tender process, it is important to look at
3 whether they were successful in that endeavour, if it
4 happened?

5 A. I think so.

6 Q. Now, in your first report, can we go to page 16
7 {E4/1/16}.

8 A. 60 or 16?

9 Q. 1-6.

10 So, you see the heading, "The absence of
11 a successful B2C competitor is surprising"; do you see
12 that?

13 A. Yes.

14 Q. Is it fair to summarise your analysis here as follows.
15 You identify in (a) (b) (c) (d) and (e) those features
16 of the claimants' offering, yes?

17 A. Yes.

18 Q. Your view is that they are attractive?

19 A. Yes.

20 Q. You say -- that is why you say it is surprising that
21 someone like the claimants has not been more successful?

22 A. Yes.

23 Q. You infer from that that that must be because of
24 anti-competitive conduct; is that fair?

25 A. I think what I am inferring there is that one then needs

1 to look at what might be causing that.

2 Q. Right.

3 But just looking at the parts of the offering at (a)
4 to (c), at (a) you refer to the difference between
5 the Churchill hire price and the E&R price, the average
6 difference, which you say is around 11%; do you see
7 that?

8 A. Yes.

9 Q. Were you aware when you prepared your report that
10 Churchill also charges late fees for the late return of
11 its regalia?

12 A. Yes.

13 Q. Do you know how much they are?

14 A. Not off of recollection.

15 Q. But do you agree that that might be something that would
16 put students off -- the risk of having to pay a late fee
17 might be something that would put students off taking
18 that option rather than the traditional option?

19 A. Possible.

20 Q. Just while we are on this point, the Churchill price of
21 £39, the average hire price, do you regard that as
22 a competitive price?

23 A. It is not an analysis I have done.

24 Q. Right.

25 I mean, when you say in 49 that in your view,

1 Churchill "is an efficient and innovative new entrant",
2 you are not making any claim about whether their price
3 is a competitive price?

4 A. No.

5 Q. Just on the difference in price, you have calculated it
6 as being 11%. Can I just remind you of the calculation.
7 It is at {E4/6/21}. As you can see, this is annex F --
8 oh, sorry.

9 A. It has not come up yet.

10 Q. Yes, I am sorry. I will wait.

11 A. Mm-hm.

12 Q. Yes.

13 This is annex F from your report; and that is
14 a spreadsheet where you have averaged all of the E&R
15 hire prices that you have found; correct?

16 A. Yes.

17 Q. If we look at table B, you have given the figure for
18 the E&R average hire price for BA and MA regalia, yes?

19 A. Yes.

20 Q. Although you have kindly marked it "confidential", given
21 that the £39 is in the public domain and the 11% is in
22 the public domain, it is probably not a secret to see
23 that the figure you have come to is £43.69; do you see
24 that?

25 A. Yes.

1 Q. So that is the calculation.

2 Now, one of the points that has been discussed in
3 the hot tub is that E&R is often paying commission to
4 the universities, and I will ask some questions about
5 that later.

6 Now, can I just check this with you. If you
7 assume -- just for the sake of argument, if you assume
8 that the commission that E&R is paying to the university
9 is at least equal to 11%, so 15% or 20%, something of
10 that order, if you assume that, and if you assume that
11 the commission is then taken out of the equation, so it
12 comes off the price that E&R charges, because they do
13 not have to pay it and they pass on that saving, do you
14 agree that E&R's hire price would then be equal to or
15 lesser than the Churchill price?

16 A. I think this goes to the point that I am not sure that
17 Churchill's price is the market competitive price to
18 begin with.

19 Q. Right. I am not at the moment putting that to you, but
20 do you agree that, broadly speaking, if the difference
21 is 11%, if you take the 15% or 20% commission off
22 the E&R price, E&R will be the same as or slightly below
23 the Churchill price?

24 A. There would be a -- that is just mathematics. They
25 would be able to offer a low price, yes.

- 1 Q. I am sorry, I did not catch what you just said.
- 2 A. Yes, they would be able to.
- 3 Q. That would be so even though we have taken commission
4 out of the equation, but E&R, for its hire price, is
5 also providing the ceremony services?
- 6 A. Yes.
- 7 Q. Because you have recognised, have you not, that the E&R
8 hire price is not directly comparable with the Churchill
9 price for that reason, because E&R is also recovering
10 the costs of its services within its hire price?
- 11 A. Yes.
- 12 Q. Do you agree -- well, on the assumption that
13 the Churchill price is competitive, which you say you
14 have not looked at, do you agree that that does not
15 suggest that E&R is making excessive profits on its hire
16 price?
- 17 A. No, I would not agree with that.
- 18 Q. Even on the assumption that the Churchill price is
19 competitive?
- 20 A. I would not assume that their price is competitive.
- 21 Q. Right, but if you assume that, do you agree that that
22 would suggest -- so if you simply make that
23 consumption -- I am not going to suggest that you have
24 agreed with that point. If you make the assumption that
25 the Churchill price is competitive, do you agree that

1 that suggests that the E&R price is not one that makes
2 excessive profits?

3 A. It is not something I have looked at.

4 Q. Right.

5 I mean, the point I was going to put to you is that
6 if you take commission out of the equation, E&R is
7 providing the ceremony services and the hire of the gown
8 for a price that is equal to or less than the Churchill
9 price.

10 A. Mm-hm.

11 Q. Is there anything you wanted to say about that?

12 A. Only that if I looked at -- when I looked over -- last
13 night at the actual ceremony costs, they are actually
14 quite small.

15 Q. But they do exist --

16 A. They do exist, yes.

17 Q. Does that not suggest that E&R, leaving aside
18 commission, is at least as efficient as Churchill,
19 because that is reflected in the price?

20 A. Again, I do not think the prices are reflecting that at
21 all. I cannot make any assumption in that regard.

22 Q. Okay.

23 Now, if we could just go back to your report at
24 page 16 {E4/1/16}. If we now look at (b), which is
25 the direct-to-door delivery service. You say:

1 "... on its face, should be an attractive and more
2 convenient service ..."

3 You have not referred to any data about that
4 question as to whether it is attractive or not?

5 A. No, I think I was just thinking that if it were me,
6 I probably would want to avoid queuing on the day.

7 Q. I see, it is just a personal opinion?

8 A. Yes.

9 Q. You are not, in a sense, giving an economic view about
10 that?

11 A. Agreed, yes.

12 Q. Thank you.

13 Obviously you receive the robes via the post, but
14 you have then got to find a way of returning them;
15 perhaps going to a Hermes collection point or a post
16 office some days after your graduation service; that is
17 something you would have to take into account as well;
18 do you agree?

19 A. Yes.

20 Q. Again, just in (c), you have referred to the fact that
21 the Churchill hire period of five days is longer; and
22 again, you have not looked for any data as to whether
23 that is attractive or not attractive to students?

24 A. No.

25 Q. (d) is the avoiding the queues point; and I think,

1 again, that is just a personal reflection of how you
2 would feel about it?

3 A. Yes, and my understanding, that that is also what
4 the claimants have viewed as being something -- and they
5 have analysed the market, so they would be able to
6 address that point.

7 Q. I see; so it is a matter for them but not a matter for
8 you?

9 A. Yes.

10 Q. You have not, for example, looked at what the average
11 queue length is, and whether that is --

12 A. No, no.

13 Q. Just on the point that you make about friends and
14 family, I mean, there is nothing to stop students
15 queuing with their friends when they are collecting
16 their robes; do you agree?

17 A. No, I agree.

18 Q. Would you also agree that graduation day is in a sense
19 one long queue to get across the stage? Is that not
20 part of the whole day?

21 A. Yes.

22 Q. If we look at (e), the other component you refer to is
23 that students might have inherited parts of the regalia;
24 and again, you have not looked for any data about how
25 frequently that happens?

- 1 A. No, not -- not in terms of frequency.
- 2 Q. So, is it fair to say that the conclusion you reach at
3 49, that in your view it is an efficient and innovative
4 new entrant, is more of a personal reflection as to how
5 you react to their product?
- 6 A. I do not think it is just a personal view, in the sense
7 that if I look at what has happened over the last
8 two years in the COVID pandemic, their model has
9 actually been very attractive; so they have been able to
10 increase sales quite substantially.
- 11 Q. That is in the peculiar situation, historically
12 peculiar, where you are not having real life ceremonies,
13 do you agree?
- 14 A. Yes.
- 15 Q. Fingers crossed, that is not something we are going to
16 have to deal with for the future; do you agree?
- 17 A. I do not know.
- 18 Q. No, that I am not seeking your evidence about. But
19 the point about the pandemic is a very specific feature
20 of the last couple of years, where events have been
21 prohibited by law.
- 22 A. I think there is also evidence in disclosure that
23 the other suppliers were late to catch up to that, so
24 that was an innovative way of approaching this market,
25 so ...

1 Q. In response to the specific features of the pandemic?

2 A. Yes.

3 Q. Just when you say in disclosure, can I just ask: have
4 you been given free reign to read the whole of
5 the disclosure, or were you given certain documents to
6 look at?

7 A. No, I had free reign. Having said that, I cannot say
8 that I have gone through every single document in
9 disclosure. I think you need to be aware of that.

10 Q. Now, at the top of page 17 {E4/1/17}, so still in
11 the same paragraph, you say that your view is:

12 "... reinforced by the fact that Trustpilot gives
13 Churchill an excellent quality rating ... compared to
14 the E&R Undertaking's average rating which [was]
15 poor~..."

16 When you expressed that view back in your first
17 report, did you know anything about the commercial
18 relationship between Churchill and Trustpilot?

19 A. No.

20 Q. Did you look at what percentage of Churchill's orders
21 were represented by the reviews on the site?

22 A. I looked at the number of reviews that they had.
23 I believe -- I cannot remember right now. It might be
24 in my report. I do not know if I have cited it. I did
25 not cite the number, but --

1 Q. Yes -- go ahead.

2 A. But did I look at the proportion of overall reviews?

3 No.

4 Q. I meant specifically the proportion of reviews to orders
5 placed with Churchill?

6 A. I am not quite sure if you are referring to the issue of
7 verified versus organic reviews -- (overspeaking) --

8 Q. Not yet. It is really just what proportion of orders
9 have resulted in a review. Was that something that you
10 looked at -- (overspeaking) --

11 A. No, I did not.

12 Q. Thank you.

13 If we just look at footnote 52 on this page, you set
14 out one particularly gruesome review for E&R. That just
15 happened to be the last one on the list the day you
16 looked at it; is that right?

17 A. Which one?

18 Q. It is just footnote 52. It is the first footnote.

19 A. Yes.

20 Q. But it has not got any statistical or evidential
21 significance?

22 A. No, it is just an example.

23 Q. Now, just in relation to E&R's rating, did you look at
24 the number of reviews that it had received?

25 A. Again, I looked at the number, but I did not look at --

1 again, in proportion to the overall sales, no.

2 Q. Right. Do you recall that there was something like 240
3 reviews for E&R?

4 A. I -- I think it might have been slightly higher, but
5 I could be wrong.

6 Q. -- (overspeaking) --

7 A. -- but it might be around that.

8 Q. In the low hundreds, effectively?

9 A. I think so.

10 Q. Since you have done your report, you have seen what sort
11 of percentage of E&R's total sales that represents; is
12 that fair?

13 A. No, I have not looked at it.

14 Q. Okay, you may have forgotten. It is {E6/1/119}.

15 This is Dr Niels' first report, and just at
16 the bottom of the page, 5.27, he says:

17 "... the number of reviews on E&R ('over 240')
18 represents ..."

19 Then he gives a percentage, which I think is only
20 confidential because the next piece of information may
21 be confidential:

22 "... of E&R's total hires ..."

23 In that year, and then it is that percentage of the
24 total hires over a particular period; do you see that?
25 Do you remember seeing that? Probably?

- 1 A. Probably. Off the top of my head, I do not remember
2 actually specifically addressing this, yes.
- 3 Q. Okay, but you do not take issue with his percentages?
- 4 A. No, I --
- 5 Q. So they are infinitesimally small as a percentage of
6 the total number of people who have taken up hire with
7 E&R; do you agree?
- 8 A. Yes.
- 9 Q. So do you agree that is not going to be a statistically
10 reliable representation of how E&R's customers feel in
11 general?
- 12 A. From the students?
- 13 Q. Yes.
- 14 A. Whether it is statistically representative, probably
15 not.
- 16 Q. No.
- 17 Would you also accept -- I think you may have
18 accepted this already, but do you accept that if there
19 is no commercial arrangement between E&R and Trustpilot
20 where people are asked to -- this is
21 the verified/non-verified point: if there is no
22 commercial arrangement about that, do you agree that
23 the people who end up leaving a review for E&R are
24 likely to be self-selecting?
- 25 A. Possibly.

1 Q. I mean, is that not inherently likely, that it will be
2 people who are cross about something who will go to
3 the trouble of leaving a review, or possibly people who
4 are delighted about the experience?

5 A. Exactly.

6 Q. People who feel more strongly?

7 A. Yes.

8 Q. Now, if you look back in your first report at {E4/1/18},
9 paragraph 55, and if you just look in the third line,
10 you say:

11 "Put plainly, students are having to pay more than
12 they would otherwise to use a 'costume' for a few hours
13 which they are obliged to rent from a company that they
14 consider provides them with very poor-quality
15 service ..."

16 Do you see that?

17 A. Yes.

18 Q. The basis for that statement is the Trustpilot material
19 that we have just been looking at?

20 A. Yes.

21 Q. Would you accept, in the light of what we have been
22 looking at, that that is not really a defensible
23 statement, because you do not have the evidential basis
24 to say that?

25 A. It is not statistical, it is -- yes.

1 Q. Thank you.

2 Now, could you be shown {F4/465}. So this is
3 a confidential document. I think the whole thing is
4 marked confidential, but I just wanted to draw it to
5 your attention.

6 This is a document you are familiar with, are you
7 not?

8 A. This is -- if this is the document where there were
9 surveys that E&R conducted with the universities.

10 Q. With the students.

11 A. No, I am not sure if I have --

12 Q. I think -- (overspeaking) --

13 A. -- (inaudible) this one.

14 Q. I think you referred -- well, you have referred to this
15 document in your second report in relation to
16 the question of whether the photography is in or out.
17 I can give you a reference or you can take it from me?

18 A. I can take it from you.

19 Q. Thank you.

20 If we look at page 2 {F4/465/2}, you can see
21 the number of respondents. If you just read what is in
22 bold there. Do you see that is the students rather than
23 the universities?

24 A. (inaudible).

25 Q. Do you recall seeing this document now?

- 1 A. Yes.
- 2 Q. Would you agree that that is a considerably bigger
3 sample size than the Trustpilot reviews?
- 4 A. Yes.
- 5 Q. Then if we could look at page 3 {F4/465/3}, we can just
6 read -- if you read to yourself what it says in bold.
7 Have you had a chance to read that?
- 8 A. Yes.
- 9 Q. If we could also look at page 7 {F4/465/7}. You can see
10 actually it does give some data on the point we have
11 just been talking about, and then you can see
12 the summary.
- 13 Could I also just ask you to look at the graph --
14 the four graphs, the one in the right-hand top corner.
- 15 A. Yes.
- 16 Q. You have also referred to -- there is a similar survey
17 from 2020, do you recall that, which you have also
18 referred to on this question of photography?
- 19 A. I do not recall it at the moment.
- 20 Q. If you are happy to take it from me. The reference is
21 {F4/502}, but it is a very similar document.
22 Would you agree that this material is relevant to
23 the question that you were addressing in 55 as to what
24 students think of the service they are given by
25 Ede & Ravenscroft?

1 A. Yes.

2 Q. If you were writing your report again, can I take it
3 that that is something that you would have wanted to
4 take into account before you expressed the views that
5 you did?

6 A. Yes.

7 Q. If I can ask you to look in your second report at
8 {E4/7/31}.

9 Then can I just -- in the second line, you say --
10 did I give a paragraph reference? I am not sure I did.
11 Paragraph 110, just towards the top of the page.

12 If you look in the second line, you say -- you have
13 referred to Trustpilot and you say:

14 "Dr Niels notes that this evidence should be treated
15 with caution and provides evidence of positive reviews
16 from universities. While I do not dispute this
17 evidence, it needs to be noted that it is not
18 the universities who are paying for the service.
19 The fact that the Trustpilot reviews contrast sharply
20 with the survey feedback E&R gets from universities
21 shows how misaligned universities are with their
22 students' needs."

23 Now, in the light of the student surveys, that
24 statement is not defensible; do you agree?

25 A. I think I would not be as strongly stated, but I think

1 there is still other evidence (inaudible) -- although
2 statistically not significant, I still think
3 the Trustpilot reviews are public, students do see them.
4 It is an anecdotal ...

5 Q. Okay, I will not go back over that.

6 Now, you refer to positive reviews from universities
7 for E&R in this paragraph. Have you looked at
8 the feedback that Churchill has received from
9 the universities?

10 A. Not that I recall.

11 Q. Okay.

12 Now, could we look at {F2/33}. This is a partly
13 confidential document, but not entirely. So the first
14 bit is not, I think, confidential; there is no
15 highlighting on it.

16 Can you see this is a letter from the University of
17 Winchester, dated 1 May 2020; and you can see it refers
18 in the first sentence -- paragraph to:

19 "... the recent competition for: Graduation Gown
20 Hire ..."

21 Do you see that? It is addressed to Student Gowns
22 Limited, sorry, in the top right-hand corner:

23 "The evaluation process has now been completed and I
24 regret to inform you that on this occasion you have not
25 been successful."

1 Then if you look towards the end of the next
2 paragraph, can you see that it says that the university
3 is going to enter into a contract with Wippell on
4 12 May 2020? Do you see that?

5 A. Where do I see that?

6 Q. It is just -- it is the big paragraph in the middle of
7 the letter, right at the end of that?

8 A. Yes.

9 Q. So this is a tender, a competition that was won by
10 Wippell, rather than by Ede & Ravenscroft?

11 A. Mm-hm.

12 Q. Now, this does not ring any bells; is that fair? This
13 was not one of the documents that you saw?

14 A. I would have to go back to one of my annexes where I did
15 look at the tenders and outcomes.

16 Q. Right, okay.

17 Then if you go over the page to page 2 {F2/33/2},
18 now, there is some confidential material here, which
19 I think is what's -- I understand is highlighted in
20 yellow. Can you see that the table essentially sets out
21 the criteria, the weighting, Churchill's score,
22 comments, the winning supplier's score and comments on
23 that. Do you see that is the structure of the document?

24 A. This is the University of Winchester's --

25 Q. Correct, feedback.

- 1 A. -- feedback?
- 2 Q. Feedback to Churchill on why it has not been successful.
3 Is that clear? Yes.
- 4 If we look at page 3 {F2/33/3}, can you see
5 the heading towards the top "Quality"? Let me know when
6 you have it.
- 7 A. Yes.
- 8 Q. Do you see that is given a weighting of 25%?
- 9 A. Mm-hm.
- 10 Q. Then if you look in the question underneath that, can
11 you find the Churchill column which sets out
12 the feedback that Churchill was given in relation to
13 quality?
- 14 A. Yes.
- 15 Q. So I will not read it out, but you would not suggest
16 that is anything other than the university's genuine
17 view on that issue?
- 18 A. Yes.
- 19 Q. You have no reason to doubt that it was based on an
20 objective consideration of the samples that were given?
- 21 So I have shown you that the quality was 25%.
- 22 If we just go back to page 2 {F2/33/2}, if you look
23 at the top, can you see "Price"?
- 24 A. Yes.
- 25 Q. In fairness, if you read the example:

1 "Taking an example set of 3,000 bachelor gowns and
2 working on the basis of charging £45.00 for a gown,
3 please detail the commission rate that you would offer
4 the University."

5 So that is what they were looking at; and you can
6 see that the weighting here is 10%; do you see that?

7 A. Yes.

8 Q. Based on your review of the tenders, there are certainly
9 tenders there where quality is given a bigger weighting
10 than commission, for example, in relation to the tender?

11 A. I do not remember the details.

12 Q. Okay.

13 If we could go on to a similar document, so it is
14 {F4/818}. It is actually the same university, if you
15 have got it, but a year on, so 8 March 2021, and it is
16 addressed to Student Gowns Limited again; and there has
17 been another competition and Churchill is not
18 successful. Again, if you look towards the big
19 paragraph at the end of that, again the successful
20 bidder was Wippell; do you see that?

21 Then if we could just go over the page {F4/818/2},
22 I will come back, if I may, to page 2 later. But can
23 I ask you just to look at page 4 {F4/818/4}. Do you
24 see "Quality" in the middle of the page?

25 A. Yes.

1 Q. It is a 30% weighting. Then can you again find the --
2 it says:

3 "Please supply samples ..."

4 Then can you see what the Churchill comment is? It
5 is not marked "confidential", but I do not know if that
6 is intentional or not, so if you could just read that to
7 yourself.

8 Again, you would not suggest that is anything other
9 than their genuine view based on their objective
10 consideration?

11 A. No.

12 Q. Was that sort of feedback that Churchill had received in
13 relation to quality, was that something that you took
14 into account in your reports?

15 A. No.

16 Q. Can I ask you to go to your report, the first report at
17 page 12, so that is {E4/1/12}. You are dealing here
18 with the question of whether the agreements were
19 exclusive, and you say in paragraph 43 that:

20 "... contractual interpretation is a task reserved
21 for lawyers."

22 So I will not ask you about that, about how
23 understand the contracts to mean.

24 But then you say:

25 "Determining whether the agreements are de facto

1 exclusive (ie exclusive in their effect), however, is
2 something that also falls to economists."

3 I just wanted to ask you what you mean by "de facto
4 exclusive", because Mr Lomas said yesterday -- I do not
5 know if you remember -- that it is very important to be
6 precise about what one means by "exclusive" in different
7 contexts.

8 Now, Mr Ridyard asked Dr Niels yesterday if
9 the official supplier is in practice getting all
10 the sales, or practically all the sales, would he regard
11 that as de facto exclusive; and is that a situation that
12 you would describe as being de facto exclusive, simply
13 that the official supplier is getting all or practically
14 all of the sales from the students?

15 A. Yes.

16 Q. Would that be true even though no one is telling
17 the students that they have to buy from the official
18 supplier?

19 A. Yes.

20 Q. So it is simply the fact that all or practically all of
21 the students are buying from one supplier; that is what
22 you regard as being de facto exclusivity?

23 A. It is evidence that all the supply is going to one, yes.

24 Q. So, I mean, suppose -- you are aware that Churchill has
25 only targeted certain universities so far --

- 1 A. Yes.
- 2 Q. -- for gowns and hoods and so on. So suppose you were
3 a university that Churchill has not yet decided to
4 target, so it is not offering the regalia for that
5 university, and therefore it is bound to be the case
6 that students -- assuming no one else is doing that,
7 the students are going to buy from the official
8 supplier. Again, would you call that de facto
9 exclusivity.
- 10 A. Yes.
- 11 Q. So is it right to say that there is a distinction
12 between a question of de facto exclusivity in the sense
13 in which you have been explaining it and the question of
14 whether a B2C supplier has been foreclosed from
15 supplying?
- 16 A. I think one would -- when I am thinking of de facto
17 exclusivity, I need to see if there are some barriers
18 that are creating all of the supply to go to one
19 supplier. So that is what I mean by "de facto". Why?
20 So in the example that you gave, where Churchill has not
21 currently manufactured academic dress for a current
22 university, or something, they have not attempted to
23 enter, so they have not been foreclosed on to that
24 university, in that sense.
- 25 Q. But you would still say that that university is de facto

1 exclusive, because that simply involves asking are all
2 or practically all the students --

3 A. Yes.

4 Q. -- buying from the supplier?

5 A. Yes.

6 Q. Okay, thank you.

7 If I could just ask you on page 13 about paragraph
8 (c) {E4/1/13}; this is just in your discussion of
9 exclusive supply. You say:

10 "Rights ..."

11 Is that confidential? I see. I think that is
12 confidential. You say:

13 "... the only supplier entitled to have a 'market
14 stall' ..."

15 Do you see that?

16 A. Yes.

17 Q. Can I just ask you, the vast majority of students will
18 have arranged their gowns or their robe hire before
19 graduation day; agreed?

20 A. Yes.

21 Q. Do you agree, therefore, that this point in (c) is not
22 actually relevant to the ability to attract sales or
23 hires in advance of graduation day?

24 A. It is not something that I have looked at, but it could
25 possibly, in the sense that, you know, one of the things

1 that Churchill offers is home delivery, but they do not
2 have the possibility currently to offer pickup on
3 the day.

4 Q. Right. But, for example, in relation to providing
5 a robing service on the day, that is not part of
6 Churchill's B2C model; do you agree? Are you aware of
7 that?

8 A. Well, I think my point here is that they are precluded
9 from offering that by the rights of access that are
10 granted only to one supplier.

11 Q. Right. They would be precluded from doing it on campus,
12 they would not be precluded from doing it off campus,
13 for example?

14 A. I do not know.

15 Q. Okay.

16 Now, if you can go on to page 14 of your report
17 {E4/1/14} -- first report, and at paragraph 46 at
18 the bottom of the page -- we are now on to the subject
19 of commissions; and you say some confidential words, and
20 then:

21 "... supply agreements ... that I have reviewed
22 contain provisions which require the E&R Undertaking to
23 make commission payments to the universities for each of
24 their students supplied with Academic Dress by the E&R
25 Undertaking."

1 You give some numbers if we go over the page. Then
2 you say:

3 "... [this] must induce fidelity to the E&R
4 Undertaking on the part of universities."

5 Do you see that?

6 A. Yes.

7 Q. Now, do you accept that the vast majority of
8 universities ask for commission from anyone who wants to
9 be the official supplier?

10 A. I think that is the case, but we -- I have not reviewed
11 any of the -- in disclosure we do not have contracts
12 with the other suppliers, so I do not know.

13 Q. But you have not got any particular reason to think that
14 it would be different for the other suppliers?

15 A. No.

16 Q. We saw just now the -- a tender that was not won
17 -- (overspeaking) --

18 A. Yes.

19 Q. I am sorry, you will just have to -- it is very natural
20 to speak as you are doing, and it is not a criticism, it
21 is just, I think, possibly for the transcript, if you
22 can try to wait until I have finished the question, but
23 it is not a problem.

24 We saw the tender that was won by Wippells, and
25 there is no reason to think that the commission is

1 any -- is it not a feature of that; do you agree?

2 A. Agreed, where there is a tender.

3 Q. Yes.

4 Now, I think you said yesterday -- and the reference
5 is {Day6/172} -- that you thought that the universities
6 put as their primary consideration the commissions and
7 the free academic dress hire. Do you recall saying
8 something like that?

9 A. Yes.

10 Q. It is right, is it not, that you have not carried out
11 any systematic analysis as to what weight is given to
12 commission in the tenders that have happened as distinct
13 from other factors?

14 A. Yes.

15 Q. Could we go to {F4/85}, please.

16 So as you can see, this is feedback, or it is
17 the contract award notice from London South Bank
18 University from 10 February 2017 to Churchill Gowns; can
19 you see that?

20 A. Yes.

21 Q. It gives feedback. If we could go over the page
22 {F4/85/2}, there is some confidential bits, but they do
23 not affect the point I wanted to discuss with you.

24 Can you see the criteria on the left-hand side and
25 then the weighting in the next column; do you see that?

- 1 A. Yes.
- 2 Q. If we look at the top one, which is price totalling 30%,
3 do you see that the purchase and the hire price is given
4 a 20% weighting?
- 5 A. Yes.
- 6 Q. Then commission is given a 5% weighting?
- 7 A. Yes.
- 8 Q. Then free or added value items 5%; do you see that?
- 9 A. Yes.
- 10 Q. So that is an example, is it not, of a tender where
11 the university is giving more weight to the price that
12 will be charged to students than it is to
13 the commission?
- 14 A. Yes.
- 15 Q. If we could go back, as I think I said I would, to
16 {F4/818}. This was the University of Winchester
17 feedback; and we saw at page 2 {F4/818/2}, I think
18 I mentioned this, that 10% is given for price in
19 relation to commission, it seems; do you see that?
- 20 A. Yes.
- 21 Q. Now, if you look at the scores, which I will not read
22 out, in relation to commission, can you see, with an
23 orange marking on it for confidentiality, the Churchill
24 score in relation to commission?
- 25 A. Is that in --

1 Q. Orange, I think.

2 A. Yes.

3 Q. Yes.

4 Then can you compare that --

5 A. In relation to commission -- yes, okay.

6 Q. Well, I think it is in relation to commission. So I say
7 that because if you read underneath "Price" -- I think
8 I read this earlier -- that is what they ask for:

9 "... please detail the commission rate that you
10 would offer ..."

11 So can you see the Churchill score. Then if you
12 look over, not marked I think as confidential,
13 the winning score, that is 6.8% --

14 A. Yes.

15 Q. -- do you see that?

16 Now, would you agree that it is open to suppliers to
17 compete in relation to commission if they are applying
18 for a tender in the B2B market?

19 A. Yes.

20 Q. Now, would you agree -- I mean, I am not going to go
21 through (inaudible) examples. But in the examples
22 I have shown you, where commission is given a relatively
23 small weighting compared to the price to students, or
24 compared to quality as another factor, would you agree
25 that those criteria are not consistent with

1 the university treating commission as the primary
2 consideration in relation to whom they appoint as
3 the official supplier?

4 A. For those specific examples, yes.

5 Q. You have not sought to -- as I think you have confirmed,
6 you have not sought to analyse what the frequency of
7 that is?

8 A. No, not in terms of frequency. I believe, from
9 recollection, there are other tenders that put more
10 weight on commissions.

11 Q. But it is an impressionistic point you are making?

12 A. Yes.

13 Q. You are not aware of any data to suggest that commission
14 rates are different where it is paid by someone other
15 than E&R as an official supplier, as compared with what
16 E&R pays?

17 A. No, I only have the commission rates for E&R.

18 Q. It is right, is it not, that in relation to
19 the procurement process, so whether it is a tender or an
20 RFP or a negotiation, you have not sought in your
21 reports to do any systematic analysis of how that
22 affects the rate of commission?

23 A. If I recollect, Mr Ridyard asked me that, and I have
24 looked at that.

25 Q. But is it fair to say --

1 A. -- (overspeaking) --

2 Q. -- (inaudible)?

3 A. Yes.

4 Q. I was just saying, you had not done in your reports, but
5 you did it at the weekend in preparation for giving
6 evidence?

7 A. Yes.

8 Q. I think what you said yesterday is that where there was
9 a tender process, you found that the commission rates
10 were higher --

11 A. Higher, yes.

12 Q. -- than in other cases.

13 Now, that point -- just on that, we have not got
14 your analysis for that, but assuming that to be so, do
15 you agree that that is not really consistent with
16 the idea that commission is the way in which the
17 supplier induces loyalty on the part of the university?
18 But if it is the case that where there is a tender,
19 commission is higher, does that not suggest that
20 commission is actually something that the university is
21 extracting for its own benefit?

22 A. Yes, I think that would go to the point that I am
23 making, that the vast majority of the supply
24 arrangements in this market are not via a tender
25 process; and so the fact that you do see that

1 the universities extract some higher commissions when
2 there is a tender suggests that they are able to extract
3 more of the monopoly rents that E&R has.

4 Q. Had you finished?

5 A. No, that is fine.

6 Q. Does not the fact that where there is clearly -- I think
7 you would accept, if there is a tender, there is clearly
8 competition for the role of official supplier; do you
9 agree?

10 A. Yes.

11 Q. Where there is competition for that role, the university
12 extracts more by way of commission, that is --

13 A. Yes.

14 Q. -- your view.

15 Does that not suggest that commission is not
16 something that the supplier is using to induce loyalty
17 from the university, it is something that the university
18 is seeking to extract from whichever supplier is willing
19 to offer it?

20 A. I think it also goes to evidence that you could
21 interpret the evidence in various ways. It might also
22 going to the fact of showing that where there is no
23 tender, that E&R has an incumbency advantage, but it
24 does not need to offer as many -- as high of
25 a commission as it needs to offer when there is

1 competition.

2 Q. Now, if we look in your second report at {E4/7/27},
3 the point that you make in the heading that we see here,
4 you say that:

5 "Universities incentives are misaligned with those
6 of students."

7 Do you see that?

8 A. Yes.

9 Q. Would you accept that that is not true in cases where
10 the university is giving weight to the prices to be paid
11 by the student as part of its decision for the tender?

12 A. No, I do not think I would agree with that.

13 Q. If you look at footnote 135, you say that your:

14 "... review of the correspondence uncovered evidence
15 of E&R Undertaking actively encouraging universities to
16 consider higher prices for students in order to achieve
17 higher commissions for themselves ..."

18 And you give one reference. Then you say:

19 "... while also setting out what would happen to
20 commission rates should prices to students come
21 down ..."

22 Do you see that?

23 A. Yes.

24 Q. Then you quote from another document.

25 Now, I just want to briefly look at what those

1 documents are. The reference you have given, or that
2 has been given -- I think probably inserted for
3 the first document is {F4/448}, but the correct
4 reference is actually {F2/448}. So you can see that is
5 the document that you were referring to?

6 A. Likely, yes.

7 Q. Likely, yes.

8 So we can see the name of the university on
9 the cover there. If we could go to page 8 {F2/448/8},
10 can you see the heading to the graph at the top of
11 the page?

12 A. Yes.

13 Q. Then if you look, can you see that it is comparing
14 a price for a particular institution with prices
15 generally; can you see that?

16 A. Yes.

17 Q. Similarly, the table immediately underneath the graph is
18 making the same point; can you see that?

19 A. Yes.

20 Q. Can you see that the price for the particular
21 institution is lower in all cases than the price
22 generally, yes?

23 A. Yes.

24 Q. Now, if we then read the bottom of the page, underneath
25 the heading number 3, can you just read the first and

1 second sentence of that passage.

2 A. Yes.

3 Q. Then if we go over the page {F2/448/9}, can you see that
4 it sets out various options; and can I ask you just to
5 focus on the fifth column, which has the words "base
6 hire" in them; can you see that?

7 A. Yes.

8 Q. So that is the current position.

9 Then if you look at the other options, if you find
10 that same column again with "base hire" in it, can you
11 see that the numbers are the same?

12 A. Yes.

13 Q. So do you agree, there is no benefit here to
14 the defendants in this proposal?

15 A. I am not sure. I would have to review the document
16 again.

17 Q. Okay.

18 Would you agree that all that is being done here is
19 setting out options for the institution to consider?

20 A. Yes.

21 Q. Then if you go to {F4/593/3}, can you see the bottom
22 email from Mr Doubleday dated 21 March 2019? That seems
23 to be the covering email for the document we have just
24 been looking at. Can you just read what he says in
25 the covering email?

1 A. On the top or further down?

2 Q. Just the bottom email:

3 "Please find ..."

4 Do you see that?

5 A. Yes.

6 Q. Can you see the last words -- they are not confidential
7 in themselves -- "for absolute clarity". That is a fair
8 description of what the document we are looking at does?

9 A. Yes.

10 Q. If we can just go on in this chain to page 2 {F4/593/2},
11 there is an email from Mr Doubleday at the bottom of
12 the page dated 22 March 2019; do you see that?

13 A. Yes.

14 Q. Then can you see the big paragraph that begins:

15 "Again ..."

16 Can you just read that to yourself, please.

17 (Pause)

18 A. Yes.

19 Q. Can you see the words, just (inaudible) "during a period
20 of", and I will not read out the next words; do you see
21 that?

22 A. Yes.

23 Q. Do you understand that to be part of the context for
24 this proposal?

25 A. Yes. I think my reference to this was just showing that

1 there was some consideration and some tradeoff between
2 commissions and price.

3 Q. But you were not suggesting that the defendants were
4 putting the university up to it?

5 A. No.

6 Q. They were not actively encouraging the university to
7 increase the price?

8 A. No.

9 Q. No, I am grateful.

10 In that case, I do not think I need to go to
11 the other document, because it is the same point.

12 Could you just look at {F2/516}. So this is
13 a Churchill document, which is confidential in part but
14 not I think in whole. Can you see that it is a tender
15 response to the University of Greenwich Regalia
16 Services; do you see that?

17 A. Yes.

18 Q. Could we go to page 4, please, {F2/516/4}. Can you see
19 at the foot of the page the heading "Price &
20 Commission". I will just read it out. It says:

21 "Our goal is to provide the best value possible, to
22 help the maximum number of students attend their
23 ceremony. However, we recognise the need for some
24 institutions to generate revenue streams from their
25 ceremonies to help fund other worthy projects. As such,

1 we are more than happy to work with the university to
2 find a pricing structure and commission rate that suits
3 your needs. We suggest the following pricing
4 structure~..."

5 Then if we just go over the page {F2/516/5}, this is
6 page 5, so there is confidential material highlighted in
7 yellow, but if I could just identify, there is a table
8 at the top "Hire Price"; do you see that?

9 A. Yes.

10 Q. Then the first row is the "Commission Rate"; do you see
11 that?

12 A. Yes.

13 Q. Then the other rows are the price; do you see that?

14 A. Yes.

15 Q. This, similarly, is just a transparent setting-out of
16 the options for the university; would you agree?

17 A. Yes.

18 Q. It is essentially the same exercise as the document that
19 you had quoted in your footnote; do you agree?

20 A. Yes.

21 Q. Now, I think you said earlier this morning that
22 commission -- the provision for commission to be paid to
23 the university, that that incentivises the university to
24 seek exclusivity. Is that a fair summary of one of
25 the things that you said?

1 A. Yes.

2 Q. I think you suggested that without commission,
3 the exclusivity would effectively go away. Is that also
4 a fair reflection of your view?

5 A. I think there would be -- the incentives to have
6 exclusivity would decrease.

7 Q. Right.

8 Would you agree that one way of testing that would
9 be to see what has happened at universities that do not
10 charge commission?

11 A. Possibly.

12 Q. Is that something --

13 A. I would have to look at it -- yes.

14 Q. Is that something that you have done --

15 A. No.

16 Q. -- as part of your analysis?

17 A. No.

18 Q. Could we look at {D4/2/10}. This is Ms Middleton's
19 witness statement; and if you can see -- can you see
20 there is a reference in the margin on the right-hand
21 side?

22 A. Yes.

23 Q. If you can just see the sentence next to that:
24 "One exception of which I am aware is ..."
25 She names a university, which is not confidential

1 but in fact it has been referred to in open court in
2 the rest of the evidence. So one exception of which she
3 is aware is that:

4 "... which does not require a commission for
5 the official supplier appointment."

6 You were aware of that when you did your analysis?

7 A. I believe so.

8 Q. Now, in your -- is it fair to say this university, you
9 have not investigated what the effect is of there not
10 being commission payable at that university?

11 A. No.

12 Q. Now, in your report you have helpfully collated what
13 the university websites say; you recall that? In your
14 annex E. Can we just have a look at {E1/6/62}.

15 So this is the website that you have compiled for
16 this university; do you see that?

17 A. Yes.

18 Q. If we look at the heading "Graduands" at the bottom of
19 the page, it says:

20 "Robes for your graduation must be ordered from
21 Ede & Ravenscroft prior to the ceremony. It is
22 necessary that you wear the correct academic dress
23 during your graduation."

24 Do you see that?

25 A. Yes.

- 1 Q. So this is one of the examples of the firmer language
2 that you sometimes quote in your report that some of
3 the universities have used: "must"?
- 4 A. Yes.
- 5 Q. This university continues to use the "must" language,
6 even though the evidence is that it does not have
7 a commission at all; do you agree?
- 8 A. Yes, I would have to go back and look at the data
9 compiled. They may offer other things, like free
10 academic dress hire to staff, I do not know.
- 11 Q. Does this not suggest that the university has other
12 reasons for wanting its students to use the robes from
13 the official supplier, such as uniformity of dress,
14 security of supply and so on?
- 15 A. I would have to look at what other incentives were
16 offered. So I would have to go back to the particular
17 OSA.
- 18 Q. Now, Mr Middleton gave evidence on Day 5 at page 23
19 {Day5/23} that this university was now charging more for
20 its university fee in order to cover the costs of
21 the ceremony. Is that something that you have analysed,
22 how a university which does not charge commission, how
23 it is covering its other costs of the ceremony?
- 24 A. No, it is not something I have analysed, how they would
25 do it.

1 Q. Now, if we could look at another document. It is
2 {F4/696/3}. So this is part of the exhibit to
3 Ms Middleton's statement, which you will have read,
4 I think. Perhaps if we can just go back a page to
5 {F4/696/2}. It is an exchange we have been looking at
6 recently in this trial, because it is a student, can you
7 see, from the Arts University Bournemouth. Are you
8 familiar with that?

9 A. Yes.

10 Q. Then if we just go back to page 3 {F4/696/3}, he says --
11 if you find just in the middle of the page,
12 the words "benefits and commission" are in purple, can
13 you see, at the middle of the page? It is right at
14 the top of our page now; can you see that?

15 A. Yes.

16 Q. So he says:

17 "If I understand correctly university is denying
18 a right to attend a graduation show to students, because
19 you provide them with benefits and commission?"

20 Then there is a sentence which says:

21 "AUB receives commissions from photography sales,
22 but there is no mention of gowns."

23 Do you see that?

24 A. Yes.

25 Q. Have you looked at the OSA for the Arts University of

1 Bournemouth to see whether there is or is not
2 commission?

3 A. The information is compiled in one of my annexes. I do
4 not remember for all of the 174 institutions off the top
5 of my head.

6 Q. No, and you have not looked to see -- well, I think you
7 have already answered that question.

8 Now could I go to your second report, still on this
9 question of the incentives {E4/7/28}. At the top of
10 the page, at paragraph (a) you say:

11 "Universities receive enormous benefits from using
12 their graduation ceremonies in marketing campaigns to
13 attract new students to attend their university and
14 arrangements ..."

15 Then you go on to make a point about:

16 "... arrangements which facilitate staff and
17 officers wearing academic dress and official regalia
18 contribute to that ..."

19 This is a point you are making in support of
20 the idea that it is really the universities not
21 the students who gain from the way in which ceremonies
22 are currently run?

23 A. They are an important aspect of -- you know, you see it
24 in universities' marketing brochures, websites, yes.

25 Q. The marketing is directed at whom?

1 A. It is directed at attracting universities to -- students
2 to attend their university instead of another
3 university.

4 Q. So presumably the universities' thinking must be that
5 photographs of colourful, appealing graduation
6 ceremonies are attractive to prospective students; do
7 you agree?

8 A. It is one way of saying, yes, we are ...

9 Q. Does that not suggest that this is actually -- that
10 the colourful, attractive graduation ceremonies are
11 something that are done for the benefit of the students?

12 A. I do not think I would necessarily draw that conclusion.
13 I think it is to the benefit of the university, in that
14 they can attract more students to attend their
15 university, they get more in tuition, in revenue to
16 the university.

17 Q. But the reason why you say it is good marketing for
18 the universities is because these ceremonies are
19 attractive to prospective students. I mean, there is no
20 reason to think that there is a difference of opinion
21 between the prospective students and the actual
22 students, is there?

23 A. I am not sure about the point you are trying to make.

24 What I am saying is that in the sense that
25 universities market their universities and they want to

1 show smiling, colourful, happy students to give an
2 indication that their university is better than another,
3 it is advertising; and that attracts -- hopefully, if
4 the advertising works, more students will attend your
5 university, and the university gets more tuition
6 revenue.

7 Q. But does not the rationale for that marketing approach,
8 does that not presuppose that students are attracted by
9 this type of ceremony?

10 A. Presumably. I do not know.

11 MR PATTON: Sir, I am about to --

12 THE CHAIRMAN: Yes.

13 MR PATTON: Is that a convenient moment?

14 THE CHAIRMAN: Yes, we will take a break now.

15 (3.09 pm)

16 (A short break)

17 (3.18 pm)

18 MR PATTON: Dr Maher, just moving on to the question of
19 the counterfactual, you spoke a bit this morning about
20 Oxford and Cambridge.

21 A. Yes.

22 Q. On your analysis, Oxford and Cambridge would be a good
23 setting in which to test whether the advantages that
24 you -- or possible advantages of the claimants' offering
25 were successful with students; do you agree?

1 A. I do not think that was the way I framed it in terms of
2 the claimants' offering. It is a counterfactual in
3 which it shows that you can have a B2C market.

4 Q. But you regard it as a properly functioning market,
5 the Oxford and Cambridge market?

6 A. Yes, students have choice.

7 Q. Would you not agree, therefore, that that would be
8 a good real life -- that could be tested in real life by
9 looking at whether the claimants' offering had been
10 successful in that market?

11 A. Not necessarily. I do not know.

12 Q. That is not something you have considered --

13 A. No.

14 Q. -- in your reports?

15 Now, if I can just -- you referred to this earlier.

16 If I can just look in your second report at {E4/7/37} --
17 start at {E4/7/36}. Can you see at the foot of the page
18 at 139, you say:

19 "I understand from my own research that Dr Niels'
20 position is based on the following misunderstandings:

21 "While it is true that ceremonies take place
22 throughout the year at Oxford and Cambridge they are for
23 distinct groups. Undergraduate ceremonies happen over
24 a single continuous period ..."

25 Blah blah blah.

1 A. Yes.

2 Q. Then at (b), this is the point you were asked to read
3 out I think or read this morning.

4 A. Yes.

5 Q. "Students at Oxford and Cambridge ..."

6 Then you finish by saying:

7 "The early experience in no way informs or impacts
8 what they need to do three years later."

9 Do you see that?

10 As Mr Randolph said, this may not be the biggest
11 point in the case. But can I just ask you to look at
12 {F3/2651}. Can we rotate that 180 degrees, please. Can
13 you just see, towards the foot of our screen,
14 the question "Do I need a special gown?" This is some
15 advice published by Corpus Christi College; do you see
16 that?

17 A. Yes.

18 Q. Can you see the question: "Do I need a special gown?"
19 And it says: "No, you wear your usual gown." Do you see
20 that?

21 A. Yes.

22 Q. Then if we could just look at page 2 {F3/2651/2}.
23 Perhaps you could enlarge that.

24 So this is taken from the University of Cambridge's
25 own website. I think you actually have exhibited

1 the same screenshot in your report. But can you see,
2 right at the top, the heading, "Undergraduates and
3 affiliated students" in bold? The first bullet point.
4 Then it says:

5 "Undergraduate gown of your college and the hood of
6 the highest degree that you are about to receive."

7 Do you see that?

8 A. No, but I --

9 Q. It is right at the top of the page, the first bullet
10 point, yes? Can you see that?

11 Just to complete this, if you could look at
12 the transcript from last week {Day1/139}. Have you been
13 following the proceedings last week?

14 A. Yes, but ...

15 Q. Now, can you find line 19. This is the oral evidence of
16 Ms Nicholls; and if you can see line 19, I said:

17 "So the fact that you have not made a single hire at
18 Cambridge, that has nothing to do with OSAs; correct?"

19 She said:

20 "That is true, yes. The main reason we did not
21 manufacturer at Cambridge initially was because we were
22 primarily targeting bachelor students at the beginning,
23 because they kind of form the largest market group, and
24 in Cambridge, bachelor students actually wear their
25 undergraduate gown to their graduation ceremony and

1 mortarboards are not part of Cambridge academic dress,
2 so essentially students only hire a hood for their
3 graduation ceremony."

4 Do you see that?

5 A. Yes.

6 Q. Would you accept that actually Dr Niels was right about
7 that, the point in relation to Cambridge?

8 A. I would have to clarify that. My understanding is
9 the subfusc is something different, so I would not --
10 I cannot answer that at the moment.

11 Q. Okay, fine.

12 In terms of the research you have done, there is
13 nothing else that you --

14 A. No.

15 Q. -- want to point to?

16 A. No.

17 Q. No.

18 Do you agree -- I mean, do you agree that
19 the colleges and university at Oxford and Cambridge are
20 wealthier than almost any -- well, than any other
21 British university?

22 A. I cannot answer that.

23 Q. Right. I mean, there is information about that.

24 Are you aware one of the points Dr Niels has made is
25 that the colleges have their own in-house officers who

1 deal with graduation, the praelector; is that something
2 that you have taken into account?

3 A. No.

4 Q. Okay.

5 Can I ask you about Ireland. If you can look in
6 your first report {E4/1/56}. At paragraph 227, you say:

7 "Fortunately, in this particular instance, there
8 have been regulated outcomes in two markets which could
9 be considered either close or identical analogues
10 sharing very similar characteristics ..."

11 One of those is Ireland, yes?

12 A. Yes.

13 Q. So you are saying that Ireland is either close or
14 identical analogue to the UK market?

15 A. I think it was a presumption on my part to say it is
16 identical.

17 Q. Right.

18 A. But I would say it is close.

19 Q. Okay.

20 At 228, you say:

21 "In 2017, the Irish competition authority issued
22 a press release ..."

23 Then footnote 254, and you give a reference for
24 the press release, and you say:

25 "No additional information regarding the details of

1 the CCPC's investigation is available in the public
2 domain or from the CCPC itself."

3 So did you make contact with them to see if there
4 was any further information?

5 A. No.

6 Q. Oh, I see. When you say "or from the CCPC itself", what
7 was that a reference to?

8 A. Just that they had not released information, other than
9 the press release.

10 Q. I see, okay.

11 Now, can I just shed one small point. If you go to
12 your joint statement on this {E7/1/30}. Can you see 6.2
13 has got to do with Ireland; can you see that?

14 A. Yes.

15 Q. Then if we go over the page to {E7/1/31}, just in
16 the third paragraph of your answer, where it says:

17 "The CCPC secured commitments ..."

18 You say:

19 "... from suppliers ..."

20 A. Yes.

21 Q. That is just an error?

22 A. It would be if it was not in the press release.

23 Q. Do you recall that the press release only referred to
24 commitments from the universities?

25 A. I do not recall right now. I would have to look at

1 the press release again. It is a memory test. I am
2 not --

3 Q. No, no, I am not seeking to do a memory test.

4 If we look at -- it is in authorities 4, tab 4,
5 page 1 {AUTH/4/1}. This is the press release you have
6 in mind, is it not?

7 A. In reading the paragraph, I can see what -- so
8 basically, of particular relevance was the -- yes, this
9 is the press release.

10 Q. If you find the paragraph just before the bullet points,
11 it is talking about commitments given by
12 the universities not by the suppliers; do you agree?

13 A. Yes.

14 Q. So is it fair to say that the reference to commitments
15 from the suppliers, that was just a mistake?

16 A. Yes.

17 Q. Would you accept that the fact that the commitments have
18 been secured from the universities indicates that they
19 are the key drivers of the competitive outcomes in
20 Ireland and the Irish market?

21 A. No, I would not necessarily draw that conclusion.
22 Again, the incentive structure works both ways.

23 Q. Now, if we can just look at the bullet points, just in
24 relation to the first bullet point:

25 "A reduction in the length of the supply

1 contracts ..."

2 That is not something that you say would affect
3 the foreclosure that you think exists of the B2C market;
4 would you agree?

5 A. I think long term supply contracts do foreclose part of
6 the market, particularly when it is a large share of
7 the market, and if those contract arrangements are in
8 place for a long duration, which in this case, in E&R's
9 case, many of those supply arrangements have lasted for
10 decades.

11 Q. When you say "many" there, can you put a figure on that?

12 A. No, I would have to do an in-depth analysis; and
13 I think, in many cases, given the disclosure, I do not
14 have information for just how long a lot of those
15 arrangements have been in place, but I was able to look
16 at some evidence, which showed that some of them had
17 gone back for decades.

18 Q. When you say that they foreclose the market, which
19 market are you referring to there, the long term nature
20 foreclosures?

21 A. Both B2B and B2C.

22 Q. Why does the long term nature foreclose in B2C?

23 A. Well, long-term contractual relationships, normally, you
24 would observe long-term contracts when there is a reason
25 for them, which I do not think there is an economic

- 1 justification for that in this case.
- 2 Q. Leave aside whether they are justified or not. Why does
3 the tenure(?), or the duration of the B2B contracts, why
4 does that particularly have anything to do with
5 foreclosure of the B2C market?
- 6 A. Well, it is the supply arrangements in their entirety;
7 and so if you are the only supplier and it is lasting
8 for decades, then it forecloses both the B2B and B2C.
- 9 Q. Okay, but suppose that there was a reduction and suppose
10 that it was required that -- suppose that this
11 requirement, number one, was the only change that was
12 made to the market in the UK. You do not suggest that
13 that would open up the B2C market sufficiently, do you?
- 14 A. I think one needs to also look at the third requirement.
- 15 Q. Right, but the first on its own?
- 16 A. No, it would introduce more competition into
17 the market --
- 18 Q. -- (overspeaking) --
- 19 A. -- (inaudible).
- 20 Q. Into the B2B market?
- 21 A. Yes.
- 22 Q. But not the B2C market?
- 23 A. Not necessarily.
- 24 Q. Did you say "not necessarily"?
- 25 A. Not necessarily, yes.

1 Q. Yes.

2 Now, just going back to your first report at
3 {E4/1/57}, if we look at paragraph 232, you say:

4 "The remedies agreed between the CCPC and the Irish
5 universities are similar to the ones being advocated by
6 the Claimants. As those remedies were part of
7 a settlement agreement, details have not been disclosed.
8 It would appear, however, that the arrangements
9 prevalent in the United Kingdom contain other
10 significant impediments to fair competition that may not
11 be found in Ireland, or at least were not addressed by
12 the settlement."

13 Now, just on "may not be found in Ireland", did you
14 make any attempt before you put in your first report to
15 establish whether they were or they were not?

16 A. No, it is based on the press release, which did not
17 mention the commissions.

18 Q. Right. So, in a sense, "that may not be found in
19 Ireland, or at least were not addressed by
20 the settlement", that is just one point?

21 A. Yes, the point I am making is I do not have that
22 information.

23 Q. And since they are not addressed by the settlement, you
24 think maybe they do not exist?

25 A. No, it is just that I do not have the information.

1 Q. No, I know, but when you said "may not be found in
2 Ireland", that was simply because they are not addressed
3 by the settlement?

4 A. Yes.

5 Q. That was the only reason you said "may not be found"?

6 A. Yes.

7 Q. And the alternative explanation for why they are not
8 addressed by the settlement is that they are found there
9 but have not been found to be problematic by
10 the regulator?

11 A. I cannot say whether the regulator found it problematic
12 or not.

13 Q. No, but that is an alternative explanation for why they
14 are not mentioned in the press release?

15 A. Not necessarily, no. I would not go to that conclusion,
16 necessarily.

17 Q. Not necessarily but it may be. I mean, it is
18 a slight --

19 A. I mean, the other commitments that they have asked for,
20 for example, ensuring that students must be informed
21 that they can purchase or hire their academic dress from
22 any supplier might have dealt with that concern, if
23 there was a concern there.

24 Q. Might address with what concern?

25 A. The commissions.

- 1 Q. Why so?
- 2 A. As I have explained, where, if you have the market
3 opened up to B2C supply, I think over the long term you
4 will see a reduction in commission payments, because
5 they will not be able to be sustainable.
- 6 Q. Okay, well, I might come back to that point.
- 7 There are a number of tenders for Irish universities
8 available publicly online. Are you aware of that?
- 9 A. No, it is not something I looked for.
- 10 Q. Have you read the -- did you follow the first day of
11 this hearing, the opening speeches?
- 12 A. Yes.
- 13 Q. You saw the references that were made there to various
14 tenders by Irish universities?
- 15 A. I do not recall at the moment. Yes, but I am sure that
16 there were --
- 17 Q. That's fine -- (overspeaking) --
- 18 A. -- (inaudible).
- 19 Q. You do not recall that being something that was
20 mentioned?
- 21 A. Yes, I do not remember. I cannot remember from three
22 days ago.
- 23 Q. That is fine.
- 24 You have not looked at any of those tenders --
- 25 A. No.

1 Q. -- in preparation for today?

2 A. No, I have not.

3 Q. I mean, can I just look at one of them. It is at
4 {F3/3014}.

5 So this is one of the ones I mentioned, perhaps not
6 very memorably, on the first day. This is a tender this
7 year -- 2021, in fact, last year, from DCU. You can
8 take it from me, DCU is one of the universities that
9 gave commitments, according to the press release.

10 If we could just look at page {F3/3014/5}. Can you
11 see right at the foot of the page "Specification of
12 Required Services (Lot 1)"; it is literally the last set
13 of words on the page?

14 A. Yes.

15 Q. It is kind of a dangling heading.

16 Then, if we go over to page {F3/3014/6}, can you
17 see there are two paragraphs, 1 and 2, in about
18 the middle of the page?

19 A. Yes.

20 Q. If you look at 1, it says:

21 "The service will comprise of two key strands:

22 "1. A concession model for provision of
23 academic dress hire to graduates on the basis of set
24 prices outlined in the contract, for which the provider
25 will pay DCU a fixed annual fee ..."

- 1 Do you see that?
- 2 A. Yes.
- 3 Q. So do you accept that this appears to be a concession
- 4 fee model of tendering?
- 5 A. If that is what it says.
- 6 Q. You are simply going on the -- I understand, okay.
- 7 Just to complete that, if you look at item 2:
- 8 "The provision of academic dress to honorary
- 9 graduates ..."
- 10 Et cetera, and a long list of grandees. Then it
- 11 says at the end:
- 12 "... at no charge to [these] individuals or
- 13 the University."
- 14 Do you see that?
- 15 A. Yes.
- 16 Q. Then if we just look at page 7 {F3/3014/7}, if you look
- 17 in the middle of the page, can you see
- 18 the word "occasionally" with (a) and (b) underneath it,
- 19 just below the table?
- 20 A. Yes.
- 21 Q. "Occasionally, the provider may also be required, at no
- 22 additional cost, to:
- 23 "(a) clean and maintain academic robes of officers
- 24 of the University; and
- 25 "(b) assist DCU in the design of new items of

1 academic dress, consistent with DCU's existing suite of
2 academic dress ..."

3 For the university. Those are similar to some of
4 the services that you have seen OSAs in the UK.

5 A. Yes.

6 Q. That they are to be provided for no extra charge in
7 the UK OSAs.

8 If we just finally look at page 8 {F3/3014/8}, can
9 you see the first paragraph:

10 "Provision of sufficient experienced staff to ensure
11 that graduates and their families are dealt with
12 courteously, smoothly and efficiently on site around
13 conferring times."

14 Do you see that?

15 A. Yes.

16 Q. If you go to your second report {E4/7/35}, can you see
17 paragraph 131, towards the bottom? It says:

18 "As explained in my Report, the regulators in
19 Ireland and the United Kingdom have mapped out a way
20 forward, namely that markets such as this must take
21 steps to ensure that consumers have a choice regarding
22 supply wherever possible and that cash-back/commission
23 arrangements are to be avoided."

24 Do you see that?

25 A. Yes.

- 1 Q. Now, do you accept, in the light of these materials,
2 that the Irish regulator has not required that
3 commission arrangements be avoided?
- 4 A. My reference there was to the school uniforms, United
5 Kingdom.
- 6 Q. Right. So if anyone had read that as meaning that
7 the regulator in Ireland as well had required that, you
8 would accept that is not the case?
- 9 A. Yes.
- 10 Q. Do I understand from the evidence you have been giving,
11 you have seen the press release, but you have not done
12 any further research into how the market in Ireland is
13 currently operating?
- 14 A. That is correct.
- 15 Q. So for example, in relation to whether graduation
16 services are bundled with academic dress, that is not
17 something you have looked at? In relation to whether
18 the university can simply promote one supplier whilst
19 making clear that the students can go elsewhere if they
20 like, but they only promote one, you have not looked
21 into all of that --
- 22 A. No.
- 23 Q. -- happening?
- 24 You have not looked into whether commission is being
25 paid still and how much?

- 1 A. No.
- 2 Q. You have not looked into whether the suppliers in
3 Ireland are bundling the full set of academic dress
4 together?
- 5 A. No.
- 6 Q. Do you say that the Irish market is a properly
7 functioning market.
- 8 A. I am not sure. I would say no, in the sense that if
9 the Irish Competition Commission looked at it, they were
10 concerned that it was not properly functioning, and they
11 have received commitments.
- 12 Q. So that was in 2017.
- 13 A. Yes.
- 14 Q. I mean, do you express a view today as to whether
15 the Irish market, since 2017, is a competitive market or
16 not?
- 17 A. No, I have no view on that. The only addition I would
18 add to that is just that things take time for markets to
19 develop, it does not happen overnight.
- 20 Q. You have not looked at whether the effect of the press
21 release, whether that has had any effect on the prices
22 paid by students in Ireland?
- 23 A. No, I have not.
- 24 Q. If we can move on to school uniforms. If we pick up in
25 your first report at {E4/1/57}. So you can see -- do

1 you see at the foot of the page the heading "School
2 uniforms"? If you just go over the page {E4/1/58} to
3 paragraph 239, you say that:

4 "... the CMA views [on school uniforms] are very
5 much in tune with those of the Claimants."

6 Do you see that?

7 A. Yes.

8 Q. Now, do you agree that the school uniform market is
9 almost exclusively dealing with sales rather than hire?

10 A. Yes.

11 Q. School uniforms are worn by school pupils on an ongoing
12 day-to-day basis, not on one special day?

13 A. Yes.

14 Q. That means that they will be purchased and replaced
15 throughout the year as may be required?

16 A. Yes.

17 Q. There is not any issue, in relation to school uniforms,
18 about having a large stock available to meet the entire
19 demand on one day of the year?

20 A. It is not something I have looked, in the sense that
21 students might need to purchase it at the beginning of
22 the school year, there might be a peak in demand.

23 Q. There might be a peak, but there is not a single day for
24 which stock has to be kept available?

25 A. No.

- 1 Q. School uniform suppliers: there is no market in which
2 school uniform suppliers provide event management
3 services, as far as you know?
- 4 A. No.
- 5 Q. Would you agree that a number of the components of
6 a school uniform are simply generic, so, for example
7 a white shirt?
- 8 A. Yes.
- 9 Q. Maybe black shoes?
- 10 A. Yes.
- 11 Q. Possibly the trousers?
- 12 A. Yes.
- 13 Q. Or a skirt.
- 14 Those are items that could be supplied, for example,
15 by a supermarket?
- 16 A. Yes.
- 17 Q. These are not, on the whole -- I mean, leaving aside
18 perhaps a crest on a blazer, these are not specialist
19 garments, are they, school uniforms?
- 20 A. I think there is some design in the school uniforms.
21 There is branding in them. I think that was one of
22 the guidelines that came out of that, is to try to
23 minimise that type of branding to make them specific to
24 the school.
- 25 Q. Right.

1 Would you accept that all of those features
2 distinguish the school uniforms market from the markets
3 with which we are concerned in this case?

4 A. Yes, and I think there are other features that make
5 it analogous.

6 Q. Right, and what do you have in mind?

7 A. That there are the cashback payments that incentivise --
8 that they are exclusive, so that I think one of
9 the concerns that they had in that market was that the
10 purchasers of the school uniforms had to exclusively buy
11 from that supplier.

12 Q. Those are the --

13 A. I think, yes, I would probably have others to add if
14 I thought about it more.

15 Q. Okay.

16 If we can look at the next page of your report at
17 {E4/1/59}. This is paragraph 241, where you say --
18 these are things:

19 "The assessment of what a competitive ... market in
20 the UK might look like includes considering
21 the following either separately or together."

22 Can you see that?

23 A. Yes.

24 Q. Can I just look at (b), which says:

25 "Where universities do appoint an official supplier,

1 universities clearly stating that students have
2 the option to purchase their Academic Dress from other
3 suppliers."

4 That was one of the three commitments that was given
5 in Ireland?

6 A. Yes.

7 Q. Now, if we can look at annex D to your first report,
8 that is {E1/5}, which is a spreadsheet. Can we look at
9 row 31, please. So this is the annex of your report
10 where you quote from each of the websites?

11 A. Yes.

12 Q. It is fair to say, is it not, that there is a variety of
13 different statements? You have quoted in your report
14 some of the "must" statements, but there are various
15 degrees of expression used by the different
16 universities; do you agree?

17 A. I think the vast majority go more towards what was
18 reflected in my report.

19 Q. You have not done a quantitative analysis?

20 A. No, but I have provided --

21 Q. We can look at it, and see. No, that is fine.

22 If you look at row 31, that is Canterbury Christ
23 Church University, and do you see in column D the text
24 from their website?

25 A. Yes.

1 Q. So:

2 "Gowns can be hired via our preferred suppliers, Ede
3 & Ravenscroft. You can source your gown from elsewhere
4 but please note that a student arriving in inappropriate
5 academic dress or not gowned will be unable to join the
6 procession and will not be presented for their award
7 during the ceremony."

8 So would you accept that is within the scope of what
9 you are describing in 241 (b), that the university
10 clearly states there is an option to go somewhere else?

11 A. Yes.

12 Q. Have you looked to see whether the fact that this text
13 is on Canterbury Christ Church University's website, how
14 has that affected the parameters of competition in
15 respect of that university?

16 A. I have not looked at that in particular in that regard.
17 I think the evidence I was putting here was to show
18 that -- well, that this is more of an exception rather
19 than the rule, that the vast majority direct
20 the students.

21 Q. In principle, it would be interesting, would it not, to
22 know, if it were the case that this text had led to
23 different competitive conditions, for example in
24 relation to price, that would have been supportive of
25 the opinions that you express in your report?

1 A. Possibly. Not necessarily. If there is an expectation
2 by students that given the way it has worked -- I do not
3 know, in the sense that given the way it is wording,
4 I could also think that a student might think, "Well,
5 I will just get it from Ede & Ravenscroft."

6 Q. So do you think this wording is objectionable,
7 the wording that I just ...?

8 A. No, that is not the conclusion I am drawing. I am just
9 saying -- I have no idea. The supplier might still have
10 a certain expectation of how much the revenue in hires
11 they will have from that university.

12 Q. Can we just look at row 96. Can you see that? I do not
13 know if you have it yet. 96 is London Metropolitan
14 University; do you see that?

15 A. Yes.

16 Q. We have not got the text in the spreadsheet here. You
17 have given the web link but not the text itself. So for
18 that can we go to {E1/6/112}. Do you have that,
19 Dr Maher?

20 Can we enlarge just the foot of the page, please.

21 So just so you are aware, you have got your
22 spreadsheet, but you have also compiled the printouts of
23 the websites, have you not, in your annex --

24 A. Yes.

25 Q. -- D or E, I think.

1 A. Yes.

2 Q. This is just taken from that; so this is your document,
3 as it were.

4 If you see the heading "Academic dress". Then if
5 you skip the first paragraph, it says:

6 "Ede & Ravenscroft provide the University officials'
7 gowns and also provide a gowning service for graduates
8 which can be booked online in advance ... Information
9 about how to use this service will be sent in your
10 invitation. Other suppliers are also available and if
11 you choose to use them you will be required to bring
12 your academic dress with you on the day."

13 This is, again, consistent with your counterfactual
14 paragraph (b); this is text that you would be happy
15 with?

16 A. Yes.

17 Q. Have you -- you have not done any analysis to see
18 whether the fact that London Met has been saying this
19 has had any effect on the parameters(?) of competition?

20 A. No.

21 Q. Can I ask you to look at page -- in your first report,
22 page 28 {E4/1/28}. At paragraph 119, you refer to
23 the convention that academic staff -- I think Mr Lomas
24 mentioned this earlier -- wear the academic dress
25 applicable to their highest degree at the time they were

1 awarded it, from whatever university that might be; you
2 recall that?

3 A. Yes.

4 Q. Then if you go over the page {E4/1/29}, at
5 paragraph 121, you say:

6 "I am not aware, however, of any reason why
7 alternative approaches could not be adopted."

8 Then at footnote 118, you say:

9 "I understand that the right to wear a particular
10 institution's Academic Dress is generally linked to
11 having achieved a qualification from that institution,
12 hence the rationale for this tradition."

13 That understanding is based on ...?

14 A. Well, it seems to me that it is based on the fact that
15 they are allowed to wear the academic dress of
16 the institution for which they received their highest
17 degree.

18 Q. I see, so it is a logical deduction.

19 When then you say:

20 "One alternative is that universities could create
21 a design of Academic Dress to be worn by those staff
22 attending graduation ceremonies."

23 A. Mm-hm.

24 Q. Now, how does this proposal or option, how does it fit
25 with your analysis of the counterfactual?

1 A. I think, in those terms, it was that, again, I think
2 having colourful pictures where staff of the university
3 are wearing many different academic robes from their
4 institution's leads to more colourful pictures, it shows
5 that you have a more -- you know, a faculty with degrees
6 from across a number universities, and it is used in
7 their marketing campaigns, in the sense that you have --
8 can show that, from a photographic point of view, in
9 marketing material and in brochures.

10 Q. It is beneficial to the university?

11 A. I think so.

12 Q. In the counterfactual, do you say that this would change
13 in the way that you have proposed in the footnote?

14 A. I think the counterfactual is one in which -- where
15 the universities, or the staff of the university, had to
16 bear the costs themselves, rather than the students,
17 that we might see alternatives -- models coming out.

18 Q. Now, I think you accepted that, in the counterfactual,
19 suppose there are not OSAs, for example, or suppose E&R
20 does not bid for an OSA, because it is not guaranteed,
21 or it is not given exclusivity, in the counterfactuals
22 that you consider, I think you accept that the services
23 that E&R provides for the ceremony, say ticketing/event
24 management, they would still have to be provided by
25 someone?

1 A. Yes.

2 Q. Therefore the costs of those services would have to be
3 covered in some way?

4 A. Yes.

5 Q. Similarly, the university would still be incurring
6 the costs, for example, of the venue hire?

7 A. Yes.

8 Q. Catering?

9 A. Yes.

10 Q. Someone would have to pay for those costs as well?

11 A. Yes.

12 Q. If we go in your first report to page 34 {E4/1/34} --
13 I am sorry, it is a bad reference. It is your second
14 report, page 4 {E4/7/34}. So you say:

15 "This ignores the possibility that the universities
16 could simply change the format and other aspects of
17 the graduation ..."

18 A. Which ...?

19 Q. Oh, I am sorry. Paragraph 125:

20 "This ignores the possibility that the universities
21 could simply change the format and other aspects of
22 graduation ceremonies to bring them into line with what
23 is affordable for graduands and their families."

24 Now, you are not giving any evidence about how
25 likely it is that universities would do that or not, you

1 are simply saying that is a possibility?

2 A. Yes.

3 Q. Then you say:

4 "In any event, price/cost transparency of this kind
5 would be preferable to hidden charges/subsidies being
6 levied on graduands via academic dress hire and official
7 photography."

8 Then you say:

9 "Any increases in charges elsewhere will be more
10 than offset by significant reductions in prices and
11 improvements in service quality for dress hire and
12 photography engendered by the liberalised market ..."

13 Just on the first bit of that sentence, "any
14 increases in charges elsewhere", so what you are
15 contemplating is that, for example, the university fee
16 may be increased?

17 A. Yes.

18 Q. Or there may be a higher price for tickets to attend
19 the ceremony?

20 A. Yes.

21 Q. Now, just in relation to "will be more than offset",
22 where is the economic analysis in your reports that
23 justifies that statement?

24 A. The argument there lies on the fact that, in the current
25 market, I think the price reflects more -- it reflects

1 the price that you are a monopoly supplier, you are
2 selling all -- you have basically a captured market and
3 you are able to set a monopoly price, and so if one were
4 to move more towards a competitive market price where
5 price reflects marginal costs, from an economics point
6 of view, you are meeting a lot of inefficiencies in
7 the market. So, yes, even though price would increase
8 in some other way to fund them, I do not think it would
9 increase as much.

10 Q. When you talk about a monopoly price, what you are
11 talking about is the price for the gown hire only; is
12 that fair?

13 A. I have not done an analysis on the photography, but
14 given commissions are also paid on photography and you
15 have a captured market on the day, the students at that
16 university, and there is an expectation of how much
17 revenue that would generate, but I have not addressed
18 that.

19 Q. I think I asked you a question about this yesterday.
20 When you say there is a monopoly price on the gown hire,
21 what you are saying is, from the student's point of view
22 it is paying, as the student would see it, for the robe
23 hire, and when you say there is a monopoly price, you
24 mean simply for the academic dress, you are not saying
25 that it is a monopoly price in relation to ticket

- 1 management, event services and so on?
- 2 A. That is correct.
- 3 Q. So, I think you confirmed earlier you have not done any
4 analysis as to whether the price charged by
5 the defendants in respect of both the academic dress
6 hire and the event management services, you have not
7 done any analysis of that price as to whether it is
8 a competitive price or not?
- 9 A. No, it is because it is for -- it is the B2B.
- 10 Q. Right. So you say that is not the price from the point
11 of view of the student?
- 12 A. The student, exactly.
- 13 Q. But if you have not done that analysis, how can you say
14 that in a B2C market, that whatever charges
15 the university may impose for the event, either through
16 tuition fees or ticket services or whatever, how can you
17 say that that will be "more than offset" by reductions
18 in the price of the gown hire?
- 19 A. Well, I do not think that there is effective competition
20 in the B2B market either, so I think that tendering is
21 very minimal in this market, and given that there are
22 not competitive pressures in the B2B market,
23 Ede & Ravenscroft has a large share of the market,
24 75/80% of the market, they are the exclusive supplier to
25 those universities, they are able to charge a monopoly

1 price, and then they are -- because they are the sole
2 supplier, and then part of those rents are then paid
3 back to the university via commissions, and so I think
4 that also goes to the point that you see a difference in
5 the commissions when there is a tender and when there is
6 not a tender.

7 Q. Right. Let us just focus on the subset of OSAs that are
8 awarded by a tender and ignore -- I know you say it is
9 only a small proportion, but ignore the ones that are
10 not decided by a tender. In relation to the ones that
11 are decided by a tender, you are not saying that
12 the price of the successful bidder in the tender is
13 a non-competitive price?

14 A. Yes, I am. Even in a tender, because it is an exclusive
15 monopoly supply, there are going to be the rents from
16 that price, and then the tender process,
17 the universities are able to extract more of that
18 monopoly rents, but I still think it is an above market
19 competitive price --

20 Q. Okay, but --

21 A. -- for the academic dress only.

22 Q. But that is because of the commission, is it not?
23 Commission and freebies?

24 A. Yes.

25 Q. But in relation to the services, the event management

1 services, the graduation services provided under
2 the contracts, if you strip out the commission, you are
3 not suggesting that that is a non-competitive price that
4 is being offered by the winning bidder in the tender?

5 A. Could you repeat that?

6 Q. Yes. If you ignore the commission and the freebies for
7 the time being, you are not suggesting that the base
8 price offered by the winning bidder in a tender for an
9 official supplier position, you are not suggesting that
10 that is a non-competitive price?

11 A. I am not sure I understand. In the sense that you have
12 a price to the students, whether there is commissions
13 from that or not, or that it is covering graduation
14 ceremony costs, which are actually -- the ceremony costs
15 are actually quite small, it is still a monopoly price
16 in the sense that you have the sole monopoly market on
17 that.

18 Q. But in terms of your statement that any increases in
19 the charges will be "more than offset" by
20 the significant reductions in price, is there some model
21 that you have devised which enables you to illustrate
22 that?

23 A. No, I think it is just basic economic theory that if you
24 move from a market where there are inefficiencies and
25 deadweight loss that arises from distortions in

1 the market, that is why economists tend to prefer
2 competitive markets and competitive pressures, because
3 it brings about incentives for efficiencies, reduced
4 costs and where price reflects those costs.

5 Q. So is it fair to say the statement you make here is
6 simply the other side of the coin of your view that
7 there is a monopoly price being paid by the students
8 under the existing system?

9 A. I am not sure what the ...

10 Q. You are simply saying that because of your view that
11 there is a monopoly price being paid by the students
12 currently it follows that, if there are increases in
13 charges, they will be more than offset by price
14 reductions?

15 A. Well, currently, the price that is being charged to
16 students includes the various payback of the rents that
17 are being derived in the market. I mean, I think
18 the point I am making is that it is a monopoly price
19 because you are the sole supplier, so you have
20 the freedom to set that price.

21 MR PATTON: Okay.

22 Those were all my questions. Thank you very much.

23 A. Thank you.

24 Re-examination by MR RANDOLPH

25 MR RANDOLPH: Thank you, sir.

1 Good afternoon, Dr Maher. Could you turn to
2 paragraph 197 of your first report. That is {E4/1/47}.

3 You were taken to this; do you remember?

4 A. Which paragraph?

5 Q. 197.

6 A. Yes.

7 Q. At the start of your cross-examination by Mr Patton,
8 yes?

9 A. Yes.

10 Q. You answered various questions about the University for
11 the Creative Arts and the University of the West of
12 England?

13 A. Yes.

14 Q. In connection with your statement that, at 197:

15 "... I find that the E&R Undertaking has sought to
16 convince universities to avoid formal tender processes."

17 Yes?

18 A. Yes.

19 Q. It was put to you that, effectively, they have been
20 unsuccessful.

21 Could you turn to {E4/5/5}. This is, I think, one
22 of your annexes to your report. Can you see UCA on
23 there? It is about seven columns down -- sorry, rows
24 down, "University for the Creative Arts".

25 A. Yes.

1 Q. Can you read across -- well, first of all, can you tell
2 the tribunal what the various columns are. Maybe, if
3 you cannot remember --

4 A. So --

5 Q. You can remember, good.

6 A. -- the first column is the institution; the second
7 column is the supplier; the third column is whether it
8 has been described as being, you know, under a contract,
9 or whether the supply is ad hoc.

10 Q. In that case, it is?

11 A. Ad hoc.

12 Q. Thank you.

13 Can we go to page 12 of this document {E4/5/12}.

14 Thank you. Can you see "The University of West of
15 England, Bristol"? Can you see, that is about eight
16 rows from the bottom?

17 A. Yes.

18 Q. What does that say? Can you read across the columns?

19 A. Okay, E&R is the supplier, and it supplies on an ad hoc
20 basis.

21 Q. Right. So, your evidence is that both of those
22 universities are supplied on an ad hoc basis.

23 Just for timing purposes --

24 A. Not via a tender process.

25 Q. Not via a tender process.

- 1 A. Yes.
- 2 Q. Thank you very much indeed.
- 3 Just so the tribunal gets this right, this data is
4 relevant as of when? The date of putting it together,
5 or~...?
- 6 A. The date of -- yes.
- 7 Q. So that would be the date of your first report?
- 8 A. Yes.
- 9 Q. Good. Which was --
- 10 A. I think in November some time.
- 11 Q. 10th.
- 12 A. 10 November.
- 13 Q. Thank you.
- 14 You were taken to a student survey carried out by
15 Ede & Ravenscroft. So {F4/465}. This was
16 a confidential document, so we are not going to go into
17 it, but do you remember going to it?
- 18 Can we go to the next page, please {F4/465/2}.
- 19 Do you remember being taken to the first row in
20 bold?
- 21 A. Yes.
- 22 Q. You were pointed to the number of survey respondents.
- 23 A. Yes.
- 24 Q. The point being made to you in cross-examination was
25 that was a greater number than the number you referred

1 to in your Trustpilot --

2 A. Yes.

3 Q. -- yes? Right.

4 Could we go to Dr Niels' first report {E6/1/119}.

5 Now, again, we did go to this. So paragraph 5.27, and

6 the grey is redacted, but you can see in the second line

7 the total hires of academic dress in 2019, yes?

8 A. Yes.

9 Q. Right.

10 Insofar as the figure you looked at a moment ago

11 comprising the Ede & Ravenscroft survey number compared

12 to the number you can see there on the second line, what

13 is that in terms of a percentage?

14 A. I do not have a calculator --

15 Q. No, but roughly?

16 A. -- but the difference is very small, de minimis.

17 Q. Thank you.

18 You were taken to the Edinburgh -- oh, were you?

19 I am just thinking. Sorry, I do apologise. I was just

20 wondering whether that was confidential.

21 THE CHAIRMAN: She was taken to it on the basis that it was

22 confidential, but the name had been referred to

23 earlier --

24 MR RANDOLPH: Okay, well, I have just referred to it again,

25 for which apologies, but you were taken to an agreement

1 of an institution north of London, and we can see at
2 that {F2/107/1}. Could we go to page 10, please
3 {F2/107/10}. Excellent. Thank you so much.

4 You can see the numbering, and you can see 9,
5 the number 9, yes? Can you see the number 9?

6 A. Can you enhance that, please?

7 Q. Oh, right, yes, your screen is a bit slower than mine.
8 Is that better?

9 A. Yes.

10 Q. Good. Can you see the number 9?

11 A. Yes.

12 Q. Good.

13 Can you see, just above that number 9, a title? Do
14 not speak it. Then can you just read to yourself 9.1
15 and the tribunal will do the same.

16 A. Okay.

17 (Pause)

18 Q. Yes? Sorry. Just tell me when you have finished.

19 A. Yes.

20 Q. Thank you.

21 Can we go to 39 in the same document, please
22 {F2/107/39}. So this is schedule 4.

23 A. It has not come up yet.

24 Q. Okay. This is schedule 4. Has that come up yet?

25 A. Yes.

1 Q. Good. Excellent.

2 You can see what the description of schedule 4 is,
3 and you can read to yourself and the tribunal will read
4 to itself what the paragraph 1 says of schedule 4.

5 A. Yes. (Pause)

6 Yes.

7 Q. Does that assist in terms of the questions you were
8 asked in relation to what the position was in relation
9 to this institution north of London insofar as there was
10 no commission being charged?

11 A. If I recall correctly, what I responded to that was
12 precisely this point. I would need to look at
13 the contract to see if there were other benefits that
14 were -- financial type of benefits that were being
15 provided and this would fall in that category.

16 Q. Thank you very much.

17 Paragraph 139(b) of your second expert report, your
18 responsive report, please. That is {E4/7/37}. Ah yes,
19 this is the point that is not going to decide the case
20 but we want to clarify for the purpose of -- well, maybe
21 it will decide the case. This is the "subfusc" point,
22 yes?

23 Can we squash the page a bit, in that technical
24 term, so that we can see the footnotes. Perfect. It is
25 very squashed indeed now.

1 You can see that the first footnote is to Dr Niels'
2 report; and if we could go to the page in a normal
3 fashion, so that we can see that to which the footnote
4 is referring. So that is 202. Could we go to
5 the previous page, please {E4/7/36}:

6 "I understand from my own research that Dr Niels'
7 position is based on the following misunderstandings:

8 "(a) while it is true that ceremonies take place
9 throughout the year at Oxford and Cambridge they are for
10 distinct groups. Undergraduate ceremonies happen ..."

11 Then over the page, please {E4/7/37}:

12 "... over a single continuous period, normally,
13 during the summer but all of the other events are for
14 post-graduate students each with their own regalia.
15 Demand, therefore, will be lumpy as it is at other
16 universities ..."

17 Then you mention the subfusc point, and you have
18 a footnote, which is 203, which is to Dr Niels' at
19 paragraph 4.100.

20 Could we go to Dr Niels' first report at {E6/1/108}.

21 A. Is that 108 or 10 ...?

22 Q. No, I am not talking about the footnote. This is
23 the page reference in Dr Niels' first report, which has
24 just come up on screen, yes?

25 Could we actually go to the previous page, please

1 {E6/1/107}. Thank you very much.

2 So this is Dr Niels' report.

3 A. Could we enhance that a bit, please?

4 Q. 4.99:

5 "In addition, I understand from E&R ..."

6 This is Dr Niels speaking:

7 "... that the following features also apply:

8 "1. The universities do not need the full suite of
9 services that are required in other universities because
10 the collegiate structure the universities have ..."

11 Over the page:

12 "... ancient officer roles to manage events ..."

13 Then 2:

14 "Graduation ceremonies take place more often and
15 throughout the year."

16 3:

17 "Academic staff attend functions throughout
18 the year ..."

19 Then 4:

20 "The academic dress used for events other than
21 graduation is not college-specific at Oxford but it is
22 college-specific at Cambridge for undergraduate students
23 (and this academic dress is not worn at graduation)."

24 So does that assist, Dr Maher, in reference to
25 the questions that were being posed of you in relation

1 to specific colleges, or a specific college, Corpus
2 Christi, at Cambridge, and the University of Cambridge
3 guidance?

4 A. Yes, I think that goes to the point that I was making,
5 that if I have referred to this, it would have been that
6 using (inaudible), they do have to hire academic dress
7 that is -- for their graduation ceremonies.

8 Q. "They" being?

9 A. The students.

10 MR RANDOLPH: Thank you.

11 Sir, those are my questions in re-examination. I do
12 not know whether you have any questions?

13 THE CHAIRMAN: No, we do not. Thank you.

14 MR RANDOLPH: May Dr Maher be released?

15 THE CHAIRMAN: Indeed.

16 Thank you, Dr Maher, for your assistance over
17 the last two days. Thank you very much.

18 A. Thank you.

19 THE CHAIRMAN: I think we will --

20 MR RANDOLPH: Perfect timing.

21 THE CHAIRMAN: -- draw stumps there, and we will recommence
22 with Dr Niels at 10.30 tomorrow.

23 MR RANDOLPH: I hope very, very much, that we can finish in
24 the morning session, and then maybe we can have
25 a discussion about closings.

1 THE CHAIRMAN: Yes.

2 MR RANDOLPH: Thank you.

3 (4.15 pm)

4 (The Court adjourned until 10.30 am on Wednesday,

5 2 February 2022)

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