IN THE COMPETITION APPEAL TRIBUNAL

Case No:1579/4/12/23

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Monday 10th July – Wednesday 12th July 2023

Before:

Hodge Malek KC
Michael Cutting
Derek Ridyard

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Applicants

(1) Cérélia Group Holdings SAS
(2) Cérélia UK Limited

V

Respondents

Competition and Markets Authority

A P P E A R AN C E S

Brian Kennelly KC and Alison Berridge (On behalf of Cérélia) Instructed by Willkie Farr & Gallagher (UK) LLP

Robert Palmer KC and Mike Armitage (On behalf of Competition and Markets Authority)

Digital Transcription by Epiq Europe Ltd
Lower Ground 20 Furnival Street London EC4A 1JS
Tel No: 020 7404 1400 Fax No: 020 7404 1424
Email: ukclient@epiqglobal.co.uk

Wednesday, 12 July 2023

(10.15 am)

Submissions by MR PALMER (continued)

THE CHAIR: Mr Palmer, I have looked at the Final Report and the word "threat" is used quite a lot of times but mainly in the submissions of Cérélia and that, insofar as it is referred to as part of the CMA's assessment, it does seem that the vast majority of the ones I have looked at are threat in the same sense of risk, as you have said. Obviously, Mr Kennelly can come back on that but you don't need to show me all the references.

MR PALMER: I don't plan to do that. I have done a similar exercise and thought better than trying to take the tribunal through it. You will see it when you read the documents as a whole and do a search. The phrase "implicit rebalancing threat" is Cérélia's phrase, never the CMA's phrase, and what is meant, insofar as that is applied by the CMA, is that implicit risk which suppliers face.

THE CHAIR: What it is, let's see if I have understood it, what it is, is that the retailers, if they are faced with a request for an increase in price, either buy Cérélia or Jus-Rol, depending on which channel you are looking at. If the price rise makes it no longer in their interests to go down that channel, they will reduce volume one way or another or shelf space and they will go to the other channel more and they have various options. One is to absorb the increase themselves. Another option is to pass it on to the customers, so they have to look at how the customers are likely to react to it.

But what it really means is that everyone must appreciate that there are other possibilities out there when you ask for an increase or you have, let's say, a reduction in quality, that other things may happen and that when one looks at it, insofar as they could lose business as a result of a reduction in quality or increase in price, they could lose business in a number of ways and it could go to a number of directions. It could go to another PL supplier; it could go down the Jus-Rol route.

But your case must be that those possibilities are out there but that does put a constraint on the supplier because they know that there are other options and other possibilities.

MR PALMER: That's exactly right, sir. That's how we put it. It's what the retailers told the CMA. It's what the CMA found and so that's the implicit understanding, exactly as you have captured it, sir.

THE CHAIR: Yes. The other thing I was thinking about overnight was Mr Kennelly's point about special reasons and that, obviously, there are two possibilities, aren't there? We can either say there are no special reasons or we can say that there are special reasons and if we say there aren't special reasons, and you will have to persuade us all and say why these are special reasons, what's unusual about this particular case, but if we are against you on that, what are the implications?

Because it's not like a limitation period, where it's quite clear where you are going. What it is, is that you've given a decision later than you should have done, and does that mean that the decision that you have given is basically null and void and so the merger should go ahead? That must be the consequence and Mr Kennelly is saying: just look at the wording of the statute and you just fall off the cliff. So as soon as you get to day one over the limit and it's later decided you shouldn't have had an extension, it means whatever you have issued, it's a worthless piece of paper and it's gone. And that I tried to get some sort of authorities from him that would help me on that decision and he didn't really help me on that, and he's saying: well, it's down to you, look at the construction of the statute, look at Apple and all of that. I would like some help on this, probably from both of you, as to if there's any learning that really deals with a decision that is later than it should have been issued on the back of an extension.

But it's for you to deal with later on in the afternoon. I think the law on all the other

points is clear in my mind. I know that there are slight differences between you but the differences between you on the law are not as big as it may have seemed and yesterday, I was saying: well how I see what the tests are, and you will know from Dye and the other decisions I have given, where I broadly go. I don't think this is a case, necessarily, where I want to reinvent the wheel.

But I do want to get a message across which I made yesterday, that both people in Mr Kennelly's position and people in my position, we rely on the CMA, that when it provides the gist, that that gist is not misleading. And I am not going to be strict if you get some facts mixed up or whatever, we all make mistakes, that's fine, but if it's something that's positively misleading, then that is something that I would be concerned about.

MR PALMER: Certainly in principle, on the facts of this case, there's not been identified, any --

THE CHAIR: I am waiting for Mr Kennelly's schedule and --

MR PALMER: Wait with bated breath but it shouldn't introduce a new ground of application --

THE CHAIR: There's enough in the Notice of Application or the skeleton argument to make this point. It's a thrust of his case that certainly in one of the grounds, that they didn't have a proper opportunity and there wasn't full disclosure.

MR PALMER: Yes.

THE CHAIR: The answer to that is: well we've given you the gist. Now if you have given the gist and it's a fair summary of the gist, that is absolutely fine and that is one of the issues we are going to decide. But if there are significant and material, let's say, misrepresentations of what the material is, ie the gist is misleading, I will want to look at that and decide what the implications are. I am not saying I have found any --

MR PALMER: No, no.

THE CHAIR: -- but I am saying the difficulty about this case is that Mr Kennelly is inviting us to do a deep dive on the evidence which I don't normally do; okay? I did it on Tobii, it's very time-consuming, but he has every right to say: this is one of those cases where things have gone wrong in a judicial review sense and the only way I can get that answer is to go through the material.

It may be, at the end of the day, I will come back and say: look, Mr Kennelly, I have looked at it all and I think there is sufficient evidence and they haven't misrepresented it, in which case it's a nil return. But I can't tell you today, whether it's going to be a nil return because although I have looked at some of the stuff before, it does need the schedule and just spending the time to go through.

MR PALMER: (Several inaudible words) in terms of another schedule being prepared, following the dimensions, if you like, that you set out on Monday morning, sir.

THE CHAIR: Yes.

MR PALMER: What you do already have and I don't think anyone proposes to replicate, is what is schedule 3 to the Notice of Application but then that's incorporated within annex 1 of our defence which --

THE CHAIR: I have been through all of that.

MR PALMER: Exactly.

THE CHAIR: You can be sure I've done that.

MR PALMER: I don't propose to replicate that exercise. I do propose to commend it to the tribunal's attention in terms of our detailed points, about what is said --

THE CHAIR: Look, but the problem with that and that is why I have asked for the other schedule, is that I need to have the basic structure of everything, so where there is one of their points, I want to see where is it in their Notice of Application, where is it dealt with in your amended defence, where is it dealt with in the various schedules. Then I need to know where is it in the Final Report. If it's relevant for me to look at it

in the provisional findings because that may be relevant for them saying: you haven't given us the gist or whatever. Give me that reference and then references to any underlying documents you think I need to read; either of you think I need to read.

So although reading those schedules is helpful, there is a bit more that I need.

MR PALMER: I know that work is going on on that. I will in due course be submitting there are one or two shortcuts in the sense that, as I put it yesterday, in my submission, what Mr Kennelly was searching for as he went through all those documents saying: is there evidence of these threats, was directed at the wrong task. And the evidence he dismissed as irrelevant because it related to an aspect of consumer demand or it related to something happening at retail level or something of that which he -- on his version of events, all of that was irrelevant to the CMA's theory of harm. The quick answer is, for the reasons you articulated when you came in, sir, to me, that's not irrelevant, it is the evidence that was relied upon, it's the evidence which the CMA identified, relevant to competitive constraint, that would lost as a result of the merger.

So what I propose to do and, of course, I spent some time yesterday afternoon, no doubt tediously, going through the Final Report, is address the specific complaints which are made under ground 1A, often by simply referring back. I don't intend, necessarily, every time, to turn up the decision to show you again what I have already shown you but, of course, if there's something which the tribunal would benefit from seeing again, would like to see again, I have no doubt you will let me know.

THE CHAIR: Just for now, you just need to give us the paragraph numbers of the report where you think that fits in with your submissions.

MR PALMER: That is my primary intention.

THE CHAIR: That's absolutely fine.

MR PALMER: I am very grateful.

THE CHAIR: It was useful yesterday, you going through the report. I know you said

it was tedious but it was useful because it shows the structure and how the CMA applied the guidelines.

MR PALMER: The analysis, yes.

THE CHAIR: And the various steps you go through, so it was helpful to have that, even though, as you say, it's hard work.

MR PALMER: It's hard work.

THE CHAIR: It's not such hard work for us but it's probably hard work for you, that's for sure.

MR PALMER: Let me address the complaints under ground 1A. The tribunal will recall there are a number of limbs to ground 1A and the first primary limb advanced by Mr Kennelly on Monday morning was an alleged failure by the CMA to consider the abilities and incentives to rebalance their demand, if they were unhappy with any aspect of the supplier's offer or to consider the financial impact of such actions on the supplier.

This complaint is necessarily put, given it's a rationality challenge, in stark terms. Can I ask the tribunal, in the core bundle, to turn up page 18 and to look at paragraph 65A of the Notice of Application. Cérélia's complaint is that the CMA failed to investigate at all, the abilities and incentives of the parties involved and without such an understanding of those abilities and incentives, the CMA cannot predict how a market may change as a result. It is said how the CMA reaches an understanding of these issues is a matter, primarily, for it. Cérélia does not prescribe a specific series of analyses. Cérélia's complaint is that the CMA failed at a more fundamental level, to undertake any analysis at all. Despite that, this was quickly resolved in the submissions, to a consequential submission that, in fact, what is meant here is that the CMA erred because any rational regulator would have, for example, undertaken a diversion analysis. For example, would have calculated the costs and benefits of

various moves on the retailers' part to adjust their supply.

We say all of that is plainly wrong. The abilities and incentives of retailers to flex volumes, to get the best deals from its competing suppliers, were identified. A conclusion, the tribunal will recall Final Report 9.101 to 102, which was built on a raft of evidence from retailers, competing suppliers and the merged parties' internal documents which I took you through yesterday and the Final Report. The evidence that retailers can rebalance and do, is referred to, for example, at paragraph 7.30 to 7.38, 9.54 to 9.61 and 9.75 to 9.92.

THE CHAIR: Just give me that last reference.

MR PALMER: 9.75 to 9.92.

MR RIDYARD: The one before, sorry.

MR PALMER: 9.54 to 9.61.

The CMA considered also the abilities and incentives of merged parties to increase prices or degrade products post-merger. You will remember I took you to it yesterday. The reference is from 9.379 through to 9.406. You remember that most important in the CMA's assessment was the ability and incentive to degrade both channels simultaneously. That's 9.381. And this question, when it comes to degrading, both there was nothing put forward to suggest from Cérélia that there is no incentive to do so. They focussed on a claimed lack of ability to do so and that was analysed, of course, by reference to the alternative competitive constraints section which I'll come to later which I have not taken you to in any detail yet.

The incentives, insofar as relevant, were analysed separately in a way, insofar as relevant to the incentive to degrade one or the other, you will recall, and those incentives differ but were particularly strong in relation to the incentive to degrade the PL channel which was 9.394 to 395.

The incentive to degrade both are dealt with at 9.398 and 9.401. So it's not right to

say there's no analysis at all. The fact Cérélia fall back on is, in fact, the suggestion that particular forms of more elaborate analysis were required. But the critique falls short of establishing irrationality on the part of the CMA because of a claimed failure to undertake a full analysis of diversion ratios and quantification of the effects.

Can I first of all deal with this at a level of principle. I know I covered some of this argument yesterday but perhaps I could go in the authorities bundle to the MAGs again. That's authorities bundle 5, at tab 56. It's page 3998. Paragraph 2.19, under the heading "How the CMA assesses evidence", starting at a high level of generality, of course, but the CMA doesn't have a prescriptive list of evidence it will take into account in its assessments:

"Undertake in each case, reasonable evidence gathering. Consider the relevant available evidence to decide the weight ..."

I just ask the tribunal to read the rest of that paragraph.

Again, what further analysis is required is very fact dependent. At 220:

"Obviously, reasonable steps must be taken to equate itself with the relevant information to answer each of the statutory questions."

That's in BAA. But where the CMA has persuasive evidence of a particular proposition, there may be little additional value of gathering further evidence on the same proposition and evidence submitted on those points may need to be more persuasive to counter it.

The CAT have said it won't intervene:

"... merely because it considers that further enquiries would have been desirable or sensible but will assess whether the CMA has sufficient basis, in light of the totality of the evidence available, for making assessments and reaching the assessment decisions it did."

That's a reference to BAA. You will be familiar with it. I won't turn it up. It's the famous

paragraph 20 and it's subparagraph 2.

THE CHAIR: The guidance, how regularly is it being updated?

MR PALMER: This is March 2021 but this case law is well settled.

THE CHAIR: Yes.

MR PALMER: It's up to and includes the Tobii, JD Sports and so forth. I don't think anyone is suggesting the law has moved on from those decisions. BAA is referred to there at paragraph 22.

Then 2.21:

"A wide margin of appreciation and its use of evidence and the case-specific nature may apply different analytical methodologies and approaches in different cases. The CMA is not required to make precise predictions about the future, such as whether any particular innovations will take place or whether a specific price rise or particular degrading of service quality will take place after a merger ..."

That's BSkyB, Intercontinental Exchange:

"... nor will the CMA normally quantify the expected loss of competition or detriment to customers. The CAT has confirmed the CMA is not required to quantify any SLC, although there may be occasions when the CMA will estimate some quantification of the SLC or adverse effect ..."

That's Tobii, of course:

"... and notwithstanding this position, any direct evidence that price increases, deteriorations and non-price competitive parameters or losses of innovation would occur, may be considered as evidence that the merger is likely to give rise to an SLC. However, the CMA is not required to separately assess the expected impact of a merger on each parameter of competition [which includes price] in order to identify an SLC."

That's JD Sports.

"... and don't consider specific pieces of evidence in isolation. It's common to weight pieces of evidence differently."

2.24:

"The previous experience of the CMA is that the evidence it uses, the weight that is attached, evolve over time, with decision or practice, so increasing a trend to interrogating internal documents, for example when considering losses of actual or potential competition."

Finally, 2.25:

"In attaching weight to different pieces of evidence, there is no set hierarchy between quantitative evidence, such as consumer surveys or statistical or econometric analysis and qualitative evidence, such as internal documents, statements or conduct and the CMA may attach greater weight to one or the other, as appropriate in the circumstances, depending on the relative quality of --"

THE CHAIR: Some of these involve some pretty difficult judgment calls.

MR PALMER: They do.

THE CHAIR: It's one of the well known facts that there is very little learning on how you assess evidence.

MR PALMER: Yes.

THE CHAIR: There's lots of learning on what evidence is admissible or not, different types of evidence. It's the interrelationship between the different types.

MR PALMER: Yes.

THE CHAIR: A lot of that seems very sensible.

MR PALMER: Yes. Well I have taken a shortcut of taking you to that rather than to each authority in turn.

THE CHAIR: I am aware of all the points.

MR PALMER: Yes, that summarises our position on the approach to evidence. So

it's not a question of whether additional evidence could have been helpful or informative or might have been pursued or might be adopted. The question is whether, given that large area of judgment and given the predictive nature of merger analysis in general, it's actually irrational to fail to obtain such evidence, such that there is a missing link in the chain of reasoning, so that there is no probative evidence available to the CMA, in consequence of a failure to obtain it to support a crucial and necessary part of the analysis and the findings which it found. We say this falls a long way short of that.

I am going to show you now that the critique you were given by Mr Kennelly on Monday as to why he said that something further was required, was based on this false premise of what kind of threat was being aimed at and that is why he said that this further analysis would be required. Again, once it's understood what, actually, the theory of harm is, the need for any additional evidence, on any view, but particularly as a matter or rationality, falls away completely.

But the fundamental point is that in this case, the approach that the CMA took was that obtaining quantitative evidence of that kind would not add any real value. Certainly you asked yesterday, I think, whether any party had submitted anything like this and the answer was no. There was no material about the level of diversion from a horizontal perspective. By that we mean survey results with diversion data. Obviously, to get meaningful diversion ratios, you need sufficiently large samples of relevant data, data that will tell you where a customer will go if they cannot buy from each of the merging firms. In this case we're talking but wholesale level at this point and that could come from a survey or it could come from rich data.

Now there could have been an analysis of retail data, of which of course, there was plenty. That's a very rich data field, with many customers producing many data points with price variation over time. But there's no such data at the wholesale level. There's

a small number of retailer customers for which data is not available.

Now if we had done some analysis on the retail level data, what that would have shown is there to be a high diversion. We know that already from other sources. It wouldn't have added any value. The parties had conceded that private label and Jus-Rol products compete closely at the retail level. That was described as common ground and, indeed, the broader evidence is overwhelming on this. I am going to show you one or two references a bit later as well.

The parties, during the investigation, were arguing all the time that they do not compete with each other at the wholesale level and the data as to levels of competition wasn't there. Small set of customers, meaningful diversion analysis in that situation is not an option.

But it was clear that there was closeness of competition at the retail level and that corresponded, as I showed you yesterday, to closeness of competition at the wholesale level. So the CMA chose, in its discretion, to spend its energies not on doing diversion analysis at the retail level which it judged would not add value but on showing that the parties did, in fact, compete closely at the wholesale level and I took you through that analysis of closeness of competition at the wholesale level yesterday.

So, of course, if there were limitless resources available to the CMA and endless time and a time constraint investigation anyway and it was thought to be necessary to add value, no doubt such analysis could, in theory, have been done. But the judgment was that's not going to add enough value to justify the exercise, in circumstances where we know the high level of diversion at the retail level. I am going to come to Mr Kennelly's attempt to show that somehow the evidence pointed in an entirely different direction, in due course.

In terms of what Cérélia did submit, they did submit one working paper with an analysis which included some reference to assumed diversion levels but in the context of their

theory of the case which was a vertical foreclosure assessment. So it wasn't in the format of the sort of exercise I described above. It was something which they were deploying to show whether or not there would be total or partial foreclosure but on the basis there was not this dynamic of horizontal competition between the two at wholesale level which would not have been and was not informative of the CMA's conclusions, nor was there any data underpinning that analysis. It was purely indicative, an attempt to support their case as to whether or not there was a vertical theory of harm and whether or not there would have been an incentive to foreclose but that was not the approach, as I showed you yesterday, which the CMA adopted.

Let me just take separately ability, incentive and then there is a separate point about the impact of that (inaudible) anyway, given Cérélia's vertical link with Jus-Rol. Starting with ability, we say there was already strong evidence that consumers saw branded and equivalent private label products as substitutable and that products competed closely. Obviously, at the retail level, I gave you the references yesterday in the report, 9.123 to 9.128. That's closeness of competition at the retail level.

But then, of course, you have that vast analysis of closeness at the wholesale level, 9.21, all the way through to 114. You had the analysis that the retailers' stocking decisions are informed by consumer demand and a range of commercial considerations. That's at 9.101, reflecting 7.7 through to 7.13 and 7.30 to 7.34.

At 9.102, this extends to anticipated consumer demand, including how demand will change in response to a deterioration in the offering across PQRS. Again, you'll see that certainly insofar as what was happening at the retail level, there was significant common ground about this. If I could take out hearing bundle 1, tab 7, page 183. This is the parties' merger notice.

You can see that here, the parties were addressing retailer own label brands and remarking that:

"Retailers have full control [they said] of every aspect of development and sale of dough-to-bake products brought to market under their own label brands. Each of the following decisions are determined at the sole discretion of retailers, according to their independent business judgment."

And that extends not only to the product and the branding, et cetera, but also at D:

"The volumes of these products that they bring to market, at which stores they stock these products ..."

For example, convenience stores versus the ordinary supermarkets versus the large-scale supermarkets:

"... and where they are positioned on their shelves."

And, of course, the retail prices of these products.

At page 196, I think I showed you this before in fact. 196 -- it's paragraph 419, A and B. I have shown you that already.

So ample evidence in the report and in that, of the ability of the retailers to choose their volumes. Now the focus of Mr Kennelly's attack on this was on paragraph 7.90 of the Final Report. That, he said, was the core finding that he challenged and that, the tribunal will recall, was the paragraph that said switching between existing suppliers and between branded and PL channels was relatively easy and costless. That was the focus of his attack, that finding.

THE CHAIR: What paragraph is that?

MR PALMER: 7.90. So that's part of the switching analysis.

THE CHAIR: Yes.

MR PALMER: You will recall that switching within channels branded is virtually impossible because of Jus-Rol's dominance. In PL, it's difficult, according to most retailers or very difficult. Some thought was easier. But if you have two existing suppliers talking about flexing volumes between the two, that was described as being

relatively easy and costless by the CMA. That was the focus of the attack on Monday morning. The attack was based upon the proposition that that would depend, whether it was easy and costless, would depend on how retail customers responded to the change, how would they react.

But the premise behind that point is that the decision to flex volumes as a result of a supplier not acceding to this notional threat, had not been made with anticipated customer reaction very much in mind. That is, of course, not the position and not the basis of the CMA's finding as to easy and costless switching. What is at the heart of the retailers' purchasing decisions is consumer reaction, both anticipated and within a very short time. If consumer reaction is not as anticipated, the supermarkets can flex again to respond to actual demand if they've got it wrong in some sense. We have evidence about that. Within four weeks, they can adjust the position.

Once retailers are acknowledged to be acting within that context, seeking to serve their customers and their commercial self interest as best they can, not within the context of threats levied in some kind of vacuum independently of that dynamic, this point falls away.

Cérélia seeks to cherry pick evidence and misrepresent it, to claim that retailers have no ability to do this and that the CMA could not rationally conclude otherwise. So I am going to take you to the documents that Mr Kennelly took you to, to try and make this good. It's in the parties' disclosure bundle 2, PDB2.

THE CHAIR: So it's not in that one that your CMA --

MR PALMER: No, this is the parties' one. This is a document which in fact played no major part and was before the CMA. It wasn't the focus at the time of attention, I am told, but it's within that bundle at tab 58 which starts at page 867. It's a nearly 200 page long presentation produced by Jus-Rol, internal document. You were taken within that to page 1035. The tribunal will recall this document. The figure in the red

ring and in the yellow --

MR RIDYARD: Sorry, could you give me the page reference?

MR PALMER: It's 1035, sir. This was put forward on the basis that that figure, it was said, in the red ring and in the yellow bar, as to those who would switch to another brand, it was said, was low and if you deduct that figure from 100, you get the percentage of those who would rather walk away if they haven't got their brand available to them. So in other words, this was viewed as some sort of measure of brand loyalty. This is nothing of the sort. You will see the heading at the top, as to the level of substitutability within the category and how that is described.

You'll then see what do you do if your product isn't available but the specific question asked is then in smaller type underneath:

"Q. Think about the size/amount and type/flavour [of whatever brand you bought on your last trip that you bought]. If this had not been available, which of these would you have most likely done?"

So they are asking to be -- thought of a specific product. That might be a bag of frozen croissant dough which they bought on impulse. It might be that they went to the shops with the intention of making a pie which required a puff pastry topping, so they were only interested in getting puff pastry because that's the recipe they had in mind. It might be any number of scenarios you can think of. But they are asked to think of whatever they did last and what they would have done in that scenario.

That number said they would have bought another brand. Certain others would have bought another size or amount of exactly what they went for in the first place. Some, another type or flavour. It doesn't mean no sale. Those were all sale situations. A relatively small amount said they'd gone to another store. You might well do that if you have a particular ingredient in mind for something you want to make. Bought something else instead. You might well do. Bought nothing. If it was only an impulse

buy in the first place, for example, or would have simply delayed buying it until next time. It's a very context specific question. It's probably a very product specific question.

All of those figures, all of those percentages, add up to 100, as you would expect. What that tells you is that they weren't allowed to pick multiple options. They weren't sort of first choice, second choice, third choice or: I might have done this or I might have done that. Their first choice might have been to buy another size or amount but then the question would be, what if that wasn't available either? Might you then have bought another brand if that was available? We don't know. The survey doesn't tell us, it doesn't begin to tell us.

So the proposition that the CMA irrationally ignored this evidence which, as I say, played no major part, as an indication of a low level of substitutability and a high level of brand loyalty, is, with respect, baseless and certainly the suggestion it's irrational to conclude otherwise.

Indeed, you can see that even from the slide above, the previous page, 1034, Mr Kennelly briefly referred to and look at how pastry is described as a segment by Jus-Rol and how much PL is considered and the percentage of shoppers willing to consider private label chilled pastry and, in particular, the big four.

MR RIDYARD: Just to ask a clarification question. I think this was dealt with, actually, when the evidence came up but in the context of this question for a big four retailer that has a branded and a private label version of a croissant or whatever the thing is, this answer would -- buying another brand would be, in effect -- most likely would be switching between private label and branded products.

MR PALMER: Mr Kennelly said that and I certainly agree with that. We are talking about brand in the sense we've been using it here.

MR RIDYARD: So in that sense, you could interpret this as showing that the closest

competitor to a branded croissant is a private label croissant and vice versa.

MR PALMER: And vice versa, yes. Indeed, going back to the yellow box on 1035, you'll note even -- my submission is artificially low. We don't know what would have happened if someone had not been able to buy another type or flavour or size or amount instead. Even that though, is said to rank -- I won't say that's the case, that's confidential -- but in a certain proportion of all categories which is consistent with the main headline.

So the idea that this is very difficult, no ability to encourage switching products, is entirely baseless and certainly this document establishes no irrationality. It's a pure merits argument that was advanced before you on this and it's not even a very good one.

The other document in this bundle you were taken to is at tab 67.

THE CHAIR: It does show how important it is to have your product on the shelf.

MR PALMER: Well, yes. This is why the big supermarkets, as you've seen, deploy an active strategy of giving their consumers choice and stocking both, but in what proportions will depend, of course, on consumer demand, on profit margins and many other things. But at what prominence it's displayed, at what eye level it's displayed, at what extent it's discounted or promoted, are all dimensions of that retail competition. Again, the stark proposition advanced by my learned friend is the CMA was irrational in concluding that retailers even have the ability to influence retail demand in this way and that is not borne out by the evidence, certainly probative evidence, which shows otherwise.

At tab 67, page 1311, first of all, you will recall you were shown this next by Mr Kennelly which was an email about a certain retailer's decision to de-list certain Jus-Rol products. You will see there that there is -- I won't go back through the whole of the email, you have seen it, you will remember it -- but the protest from Jus-Rol is

at 1312, saying: I don't see Jus-Rol block shoppers switching into Jus-Rol sheets or retailers' own label and there's a response to that. There's an explanation as to why these are being de-listed. I won't read all that out. But then you'll see the Dunnhumby score as a metric -- Dunnhumby being a specialist data provider to retailers generally -- is a composite metric that looks at sales frequency, favourite share, customers numbers, giving a score and that's been reviewed and various conclusions have been drawn, compared to the total category average and that indicating how strongly they perform for that retailer's customers.

Then the heading "Substitutability":

"I have reviewed the substitutability of the lines [so that is Jus-Rol versus private label] and the tool indicates that [a certain percentage] on a particular product [this time] and [a certain percentage] on another particular product will trade into either another [that's own label product in the range, that's what in the range means] or into an alternative Jus-Rol product."

Indeed, on the previous page, confirmation at 1310, the confirmation of that de-list decision with respect to those products there. As I explained, the reasons for this decision are a low CPS, along with what's described as high levels of substitutability on these lines.

So the retailer's view is given what it thinks of as high levels of substitutability. That's a switch that it can perform. It certainly has the ability, it certainly has the incentive, in its view, obviously, to do that.

MR RIDYARD: Just to be -- when this says about high levels of substitutability and you gave us some numbers from the Dunnhumby analysis a moment ago, substitutability, can you just remind me, away from these de-listed products but to what?

MR PALMER: You see that at the bottom of 1311. It's a combination, not broken

down here, between own label range and alternative products in Jus-Rol.

MR RIDYARD: Being sold by the same retailer.

MR PALMER: Being sold --

MR RIDYARD: Just to be clear on what that refers to, thanks.

MR PALMER: The idea they can't flex their volumes on particular products in response to performance of that product and that, of course, is related to the margins and the commercial performance of those products is not correct.

The next document is in -- I can put this bundle away. If we can go to the CMA prepared confidential bundle of documents which has almost all of the core documents in for this kind. It's tab 105 which is the record of a hearing with a major retailer in September last year. You were taken on this document to page 883. This is, if you like, the hardest case because you might think instinctively and there's certainly evidence to reflect this, that a consumer who was very price sensitive and typically buys the cheaper own brand product, might be less likely to switch into a more expensive premium product and so the question here was directed at that case at line 16:

"If you weren't happy with the price charged by Cérélia for the input that you use for your own branded product, what would you say to them? Would you say: I'd buy less or whatever?"

And it's acknowledged by the retailer that:

"Our options are more limited on own brand because, ultimately, you can't as easily impact sales of own brand."

So you can more easily the other way round. You can make some tweaks to your range. You might carry the Jus-Rol product in our convenience stores and pull back on own label. There's a limit to what you can do because it is the entry price point into the range and an important position for customers. But, nonetheless, that's one of the

dimensions we saw earlier in which that rebalancing happens, deciding which products you are going to store, where your shelf space is even more limited in the smaller, convenience style stores. Which product are you going to put on display there without offering a choice in that context to your customers. And that is obviously going to be affected by the offer, the expected volumes you are going to sell, the retail margin, other strategic considerations. But the offer made on a wholesale level is an important part of that. It affects the relative attractiveness for the retailer of stocking one product over another. So that's a clear dimension of competition that will be lost when the PQRS offering is set by the same person in respect of both products. That's even in the hard case, if you like.

So there's still that ability and it's not right that there is no evidence or no probative evidence of any ability, even in that.

There is an instructive submission by Mr Kennelly in the transcript. Does the tribunal have the transcripts available to it easily? I am not sure if I have asked this before. The transcript from Day 1, page 38. It's line 20:

"The CMA's theory is that the retailer says to Jus-Rol and Cérélia: you need to give us better terms and conditions, better quality or lower prices, otherwise we will switch volumes away from you to Jus-Rol. It's not enough simply to say you are something compared to them. There has to be a threat to switch from one to the other. How credible is that threat, in circumstances where customers will not buy the replaced product in significant numbers."

Now multiple problems with this. One is it's built on this idea of threat rather than the true dynamic I have shown you and which the tribunal has seen. But the second point is, again, this is just a pure merits point that this whole point is advanced on. It's a disagreement with the evidence that the CMA had and considered. He said:

"For that threat to be credible, the CMA needs to analyse the analysis the retailers

would do before making that threat. The threat is no use if it's a bluff. The retailers have to calculate if we reduce volumes or de-list this product, what will the costs be, how will we lose customers."

But this is, again, living in a world where this dynamic is supposed to be happening independently of the everyday, routine calculations that retailers do in respect of their entire set of product lines, in respect of all their stores all the time. They are constantly assessing incentives and the effect of what they stock on what customers are doing. If they make a decision, we say it is because they have reached a conclusion on that and a key input into that decision is the quality of the offering across all of those dimensions.

Next, under the heading of "Incentive", rather than ability, again the notice of Appeal -- we can put away the current bundle we have open -- at core 22, at paragraph 73 to 74, just picking up on that last point I have just shown you:

"The CMA should also have addressed the financial impact of such diversion on retailers if rebalancing. Is costly for retailers, then its credibility as a threat is limited. This would have involved understanding how retailers make decisions about what product to stock, how much shelf space to allocate to each, how a reduction in range of shelf space may affect the overall attractiveness of the store, as well as the specific financial consequences for the retailer, as customers whose usual or preferred product is not available, so that they have to divert to alternatives."

Again, there are multiple problems with this. First of all, it oversimplifies findings on how consumer demand does affect stocking decisions. Secondly, it's based on a non sequitur. It assumes that the only tool in the retailer's toolbox is to de-list a product rather than to flex on shelf space. And, thirdly, there's the suggestion because a form of diversion pattern sometimes is undertaken in other cases, it should be done here. For the reasons I have suggested, we reject that.

It's all built on this notion that the CMA believes that the retailers are in the habit or routinely take recourse to making empty threats which are destructive of their own commercial interests. Again, that's not our position. We don't say they make empty threats, we say they make real life decisions on how much to stock, based on what's being offered to them and that's what gives rise to the flex.

So, again, we have more selective evidence quotation that follows. I just want to show you two documents that you were taken to. The first is in the confidential bundle, again at tab 84. Mr Kennelly took you to page 654, seizing on the first sentence in paragraph 12:

"Where a product is important to customers, [the retailer] is unlikely --"

Sorry, if I can ask you to strike that from the transcript.

"-- [the retailer] is unlikely to consider de-listing it or reducing the volume of product stocked."

That being in support of a submission there was no evidence they had even the incentive to change their stocking decisions, according to the offerings they were being provided. But, of course, if we read this document as a whole, we get an entirely different picture. If we go to paragraph 5 on the previous page, where we can see that the retailer is -- it tells the CMA that reconsidering promotional space and the range of branded products presents an option, that there is more scope to move branded into own label than there is the other way round, for reasons which we've discussed. It's also possible to edit some of the promotional space currently offered and that this volume would most likely be moved into own label, as there is a good degree of cross-shop between branded and own label products in this category. So that's this product category.

That notion of cross-shop, if you go to paragraph 9 under the heading "Substitutability", you'll see the reference to the high degree of substitutability between

the two lines and that when the retailer promotes branded products -- you'll see what's said there.

According to that Dunnhumby data, this retailer -- and it gives a figure of the total value of sales coming from customers that would buy both branded and private label in the same time period. That's what they refer to as a high degree of cross-shop across the category which may be instinctive. Of course, there may be some devoted fans of Jus-Rol we, acknowledge that, but of course, there'll be a category of customers who only ever buy a cheaper own label product because they are very price sensitive. We understand that.

But there will be many customers and in this product category, you see the percentage of them, who actually will choose the best deal as they see it, on the shelf which suits them. Will look at both and make a choice, depending on what is on offer, without being wedded to one or the other. So, again, the notion that Mr Kennelly repeatedly made to you, that if these stocking decisions change, there will be customers who are left without what they want, is unreal. Of course, in a radical, extreme de-listing move, where whole swathes of products disappear completely, then there may be customers who don't get what they want but the option here, the consideration here, is when you are stocking both, as the big ones do, what balance are you going to achieve? Bearing in mind that a high proportion of the customers are open to either and will choose the best deal for them and will be sensitive to innovation, new products coming along, sensitive to quality, as they perceive it from their previous purchases or how they perceive it from the brand value. Will be conscious of the price which is on offer, the promotion. All the other dimensions of that competitive framework.

MR RIDYARD: Mr Palmer, there's a lot of emphasis on de-listing and changing of your shelf space. There's very little discussion about pricing. That's the other thing the retailers do every day, is decide what price to charge for the branded products and

the private label products.

MR PALMER: That's what the promotion refers to obviously. That's sort of advertised discounts, whether that's loyalty card based or brand promotion or any of other --

MR RIDYARD: Would you say flexing or changing the relative retail price of private label or branded products is another way the retailer can determine --

MR PALMER: Yes.

MR RIDYARD: -- what the consumer ends up doing or at least influence what the consumer does?

MR PALMER: Yes, it is highly influential, particularly for those customers who were not wedded to one or the other. Obviously, it's going to have -- basic economic theory would suggest it has an influence on purchase decisions.

MR RIDYARD: It would.

MR PALMER: In particular, given that many purchases in this product category are impulsive: I fancy some croissant.

MR RIDYARD: I can see why it makes sense to focus in on these rather rare instances of de-listing but what's happening literally every day is pricing decisions and that's --

MR PALMER: Retail dynamic across all the products the supermarkets sell. And, again, although we have heard a lot about de-listing from Mr Kennelly, I showed you yesterday that, actually, that's regarded as the extreme event. It's possible and there are instances of it but nobody is suggesting the CMA is routinely de-listing products as a means of threatening and so forth. It's balancing, it's promoting, it's seeking to serve its customers and it's responding to what the data tells it at retail level and how products do at various price points and, therefore, what the implications are for their margins et cetera.

Whilst we are on this document, if we could turn to paragraph 19 on page 656. I won't

read this out at all, even though it's in lavender which suggests I have inadvertently identified -- I will leave you just to read that paragraph.

MR RIDYARD: Sorry, may I just ask another one, sorry to interrupt again. Just this comment just reminds me of something which has not come up much but which is in the report and that's relating to private label. There are some cases at least, where the retailer has two private label suppliers on the go at once. Is that a sort of footnote really or is it significant?

MR PALMER: It's comparatively rare. You know of one high profile retailer who shifted some of its demand into one particular producer and we'll come to that later. That was a centre piece of Mr Kennelly's argument over --

MR RIDYARD: That was an instance of switching but what I am asking about is where, as a matter of policy, a retailer has two on the go at once, two private labels on the go simultaneously. I think it's referenced somewhere or other in the report.

MR PALMER: It tends to be referenced by particular product categories, such as that one I have just referred to and there are also references, I'm afraid I can't recall them instantly, to hand, to suggest that most retailers, they prefer to have a single supplier to simplify their negotiations. Throughout the supply processes, they have one fewer supplier to deal with. So many are reluctant to do that. But, of course, if there were a situation within the PL channel where you could vary volumes within that channel between suppliers, well no doubt that would be less difficult than if you are going out to tender and all the rest of it.

MR RIDYARD: Yes.

MR PALMER: That would depend on the set-up and capacity of the suppliers concerned. In particular, some -- we've seen references -- again, I won't, for confidentiality, identify them now but we've seen some references to producers who are specialists in puff pastry but don't have the equipment to produce filo pastry which

is a more complicated product to manufacture. So there are natural constraints on your ability to flex to that extent.

I want to take you to a second retailer which is if I go to tab 113 and page 996. You were taken to this page at line 14 which is in orange, so I won't read it out. But you'll recall Mr Kennelly sought to again say that there is no real ability or incentive for this flexing to happen. For that reason, what appears at line 14, 15, 16 and reading the rest of the paragraph. That was what my learned friend took you to in this document. This really highlights the danger of this sort of exercise in the context of a rationality challenge because although Mr Kennelly was at pains to say: I want to take you to all the documents, I recognise I must show you everything, he didn't take you to all of the documents, inevitably, there wouldn't be enough time to do that. It's no criticism but it's notable, if you turn back to page 986 in this same document. I am going to invite the tribunal in due course -- I won't take all the time now, but can I particularly mark this document from 986 through to 994, a special reading request. I don't want to be cherry-picking any more than anyone else should but that range -- of course, you have the whole document which you're free to read as well but you'll see it's introduced on 986 from line 12 and that this reads -- the question from the CMA goes into the issue of competitive interaction and he refers to what has been explained in previous responses, that's in purple:

"We'd like to really understand better how this occurred in practice and how the merger will affect that going forwards. In that context, could you please explain to us whether you've ever done what's described there."

The answer is:

"We've not done that, [ie that form of competition, as I told you yesterday] but we had a conversation with Jus-Rol regarding the relationship and what growth opportunities it could potentially present to us through support of that brand [I guess in this sense,

typically means distribution points] and sales activity to grow the brand. We've gone through a process ... "

And you see what follows there and at who's expense:

"... because it was felt that was the right outcome for the category and for our customers at that point in time."

So another question:

"Let me ask that, perhaps you can elaborate a bit more. You've explained previously that [certain matter] is what creates the competitive tension. Please can you explain how that works."

Then from line 16, you see what is meant by this notion of leveraging the relationship. It's "to deliver a best outcome for our business and consumers." So in this example, it's a question of how we get what is being sought that enables us to execute and elevate and improve customer offer, versus what we can do ourselves under the own brand offer. So that is essential.

But what they are trading off is the ability of each to be able to grow the category, in this retailer's view. At the top of 988, a further answer from a different representative of the same retailer, just adding:

"If you think you have a finite amount of shelf space for these products and we have a choice to make about which supplier's products, we don't do that through a tender. There's elements of GSCOP regulations that prevent us from hard ball tendering space in that kind of dynamic but the way we make those decisions about who gets which share has a competitive element to it in the background."

I just ask you to read that paragraph.

Again, over into 989. We see going down -- if you've got this far, to the foot of 989, to the top of 990. Putting themselves into a customer mindset:

"Where do we think we need to be? Which of the relationships and the offer or the

proposition best enables us ... "

We see the commercial consideration there as well. It's a fairly obvious one. It's essentially:

"What we are doing, which supplier ticks the box, which supplier can give us that route forward."

It's going to be a mix of multiple considerations.

But this is what is meant when we get later to the reference to: oh it's all about the customer. It's not like we don't have any freedom to influence anything, it's like how we generate this and how we play the suppliers off and leverage that tension to get the best.

Then this orange -- I really can't read it out, from 17, page 990, line 17. You can see the bit which isn't orange. Their decisions are informed by the data from internal systems on customer behaviour and so "If those types of dynamic play out, we will very quickly ..."

And you will see what's said:

"We will respond to that dynamic."

It's not really any more sophisticated than that, if I am honest but it is that dynamic really:

"We are constantly iterating our ranges in response to that, so that whilst we have set moments in the year where there will be big reviews, we can do that at [certain junctures], whatever we decide."

So it's a live, ongoing conversation. You remember yesterday I stressed the words in the report about the ongoing process.

Then some questions about:

"Do you literally put one supplier's offer expressly to the other?"

There's concerns here about competition law which in fact, contrary to what my

learned friend said, is real. As you'll see at the foot of that page, obviously they are not going to go into specifics in that way but it's not just competition law, it's also GSCOP has principles of fairness and certain retailers, including this one, interpret that as not allowing them, in accordance with GSCOP and Fair Trading and not exercising duress and so forth, of entering into that kind of threatening dynamic which is being explored here. The CMA has asked about that. But then you get the question at page 992 at line 7:

"How important is that implicit understanding that you refer to, that one party knows that the other party is there in the background, providing a similar product? Is that an important dynamic?"

"Yes, I think this is what drives the supplier to continuously improve and get better and offer us better products, better service, better cost prices. Implicit knowledge that there is somebody else who is ready to take their space if they do not keep their game up or do not keep moving the bar higher. I think without that tension, without that drive, then there is nothing to incentivise the supplier to do any of those things to get better, to offer us better things for our customers and moving forward ..."

Over the page -- I will ask you again to read it all, I don't want to be cherry-picking but at the bottom of 993, line 21:

"What I was saying was that the incentive, that drive for supplier, doesn't just sit at a SKU level. Using these suppliers, for example, Jus-Rol's incentive to keep performing is if they do that, it might open the door for them to get new NPD, new product development, into the mix, so we benefit across the whole of their range by their desire to do something different and new with us in the future. Likewise, Cérélia would be incentivised if they want to do something different with us, they will offer a better proposition across the whole of their range. I think that competitive drive is not just about SKU on SKU, although clearly it can be, it's about how the total

relationships and the total portfolios of the two organisations are driven as a whole.

"Thank you, that makes sense."

It goes on to explain none of this is unique to dough-to-bake, we have lots of categories where there's --

THE CHAIR: I have read up to 994.

MR PALMER: I am very grateful to you, sir. So, again, none of this is surprising, its direct evidence of probative value from a retailer. I won't perform a similar exercise, going through all the other transcripts we have from other retailers. The point drawn from all this is this is what all the retailers were consistent about and coherent about and clear about.

So it wasn't just the word of one retailer without support. CMA was independently hearing this across the board. One retailer a bit more nuanced but that, of course, was taken into account, in a public law sense and dealt with and reasons given for ascribing less weight to what that retailer had said. But amongst the others, the clear and cohesive and broadly coherent view, it was described as, is taken into account. Is there probative evidence underlying it? Of course there is. This is evidence and you don't need the underlying figures informing that sort of dynamic to accept that evidence. So that constant process of flexing -- I am conscious we will need a short break soon but if I can just finish this point, then that's a good moment.

THE CHAIR: Okay.

MR PALMER: So the ultimate point made by Mr Kennelly about this is that de-listing a product or even when pushed, he said, reducing quantity, that is favoured by a consumer. He said it's far from costless and easy, it's difficult and expensive and upsets customers, he said. We don't have evidence about that. What you do have is this constant effort, in fact, not to upset customers but provide customers with what they want at a competitive price and good quality and so forth. Retailers' evidence

was quite the contrary. They respond to changes in price, changes in quality, innovation, the very things on which competing suppliers are themselves competing on. There's cross-shop, customers may be attracted from one to the other by a good price, a new product and retailers can seek to achieve the best deal, the best margins, volumes. No difficulty at all. That is what the CMA is describing. It's not irrational. There is no reason to disbelieve this consistent account of retailers and seek to reconstruct the precise diversion rates at retail level in any number of different scenarios which might be hypothesised. They are telling the CMA that's how they operate, not just in this category but across the board. They have the ability to do this. They have the incentive to do that. If I understand Mr Kennelly correctly, I am not sure he even doubts any of that. He doubts that retailers would cause themselves pain by following through on a threat to de-list or reduce range, simply to obtain better terms, pursuant to some other dynamic, ie exercise of market power and he says there's no evidence to support that theory, including from retailers. So further analysis would be needed, as if it was going to be maintained, which on its own terms, makes sense but the trouble with the whole submission is that is not the theory and the CMA, in fact, relied directly on what retailers did, in fact, say which was reflected by other evidence as well, in the internal documents which we will look at later and that's enough. That's probative evidence on which, rationally, you can reach a conclusion as to the nature of this competitive dynamic. Taken with all the other evidence, the mosaic of evidence you have across the board, it's part of it but it's probative evidence, it can't be said there's no evidence or no probative evidence.

That would be a good pause point.

THE CHAIR: That's fine.

(11.37 am)

(A short break)

(11.49 am)

THE CHAIR: Yes, Mr Palmer.

MR PALMER: The next aspect of this first limb of ground 1A appears at core bundle page 24.

THE CHAIR: Do we still need this one out or not?

MR PALMER: No, not for the moment. Thank you very much.

So it's core bundle page 24. This is the next and final aspect of this first form of attack which was focused on evidence that any rebalancing, even if achieved, would have had no or limited impact on Cérélia. In other words, this limb is concerned with what I have described as the vertical aspect of the relationship, the fact that Cérélia manufactured some of Jus-Rol's products.

Again, what is said in stark terms at paragraph 77, the Final Report does not investigate at all whether a rebalancing was, pre-merger, a real and effective threat to Cérélia. Again, in failing to do so, it ignored the evidence before it, indicating the matters set out there. So that's a proper public law point, failure to take into account relevant considerations, failure to investigate. But somewhat undermined, the tribunal may feel, paragraph 79, the CMA addresses this point in the report. In other words, it does take it into account and it does so and what follows in the rest of those paragraphs of this section descends then into an argument on the merits about the conclusions of those points. So just to remind you for your note, we saw this yesterday, the significance of the vertical relationship was expressly dealt with, in particular, at 9.140 to 9.143. 9.387 to 9.390.

But this complaint culminates at paragraph 81 of the NOA, core 25 and you see the point there that "This demonstrates that Cérélia does not [something] in either channel." The only rational conclusion from this -- put high, it has to be -- is that Cérélia did not, pre-merger, have a preference for making sales through either

channel.

The first point to make is that as you will recall, whatever the position on margins, which you will remember are assessed at 9.140A, data on that, in fact, was ambiguous as to whether that was true, that premise. You see 9.140B. But in any event, Jus-Rol unambiguously did have such preference, 9.142C, a point with which Cérélia have not grappled.

Cérélia also must -- they must have had a preference concerning Jus-Rol products it did not, in fact, manufacture. It must have had a preference for its own label products and that -- a substantial proportion of which it did not see, 2.13 of the Final Report.

A third point that Cérélia's point in respect of the remainder was, in any event, time limited and based on a purely contractual relationship, as distinct from the structural change of the merger which would give Cérélia the ability to control all aspects of Jus-Rol's commercial strategy. You'll remember this point.

They are all set out, those points, in our amended defence at paragraph 62. They are not answered in the claimant's skeleton argument. It's all a long way from establishing, as my learned friend does assert, paragraph 24 of his skeleton, that this threat is inherently implausible and that there was no rational evidential basis for the CMA's SLC finding at all, a long way from that.

Now Mr Kennelly sought to resolve that by saying that the CMA's findings that margins were uncertain and variable over time meant "That it is highly unlikely that this implicit threat to divert volumes between channels was real". That's the transcript, Day 1, page 47, line 20. A merits point, if ever there was one.

THE CHAIR: Sorry, what page on the transcript?

MR PALMER: Page 47, line 20. He asserts that is what generated a need for documentary proof about these rebalancing decisions and so forth. The main answer to that, as you've seen the evidence, I have shown you the evidence on the

rebalancing, what its true nature was, but since it was also a repeated refrain as we went through the documents, Mr Kennelly said: it's crying out for substantiation, crying out for documentary proof and it is important and relevant and noticeable that none was produced.

Paragraph 77.4 of our defence deals with this, for your note. There is no reason to expect GSCOP notices being issued with written reasons in respect of this sort of rebalancing that we've been describing, as that is only required, either upon actual de-listing which is rare or when there is a significant rebalancing of volumes under the code.

Now the code doesn't further define significant. The groceries adjudicator, in fact, has given some very high level general guidance about what should be taken into account. We have not troubled you with that, so I won't take it further but there's some guidance, including, for example, whether the products are branded or own label because you imagine if a certain supplier has put all their eggs in one basket to supply a particular retailer with a particular product and they are then significantly reduced, that will have a greater impact than if you have a branded product if you are selling across the board. It's very context specific and in this context, we are dealing with, in particular, four major groceries who are huge, they are nationwide, dealing with high volumes. They are rebalancing not by de-listing absolutely or cutting dramatically but constantly finding that combination of best offers, best offer to their customers, particularly for those who will happily cross-shop and choose between the two products and so forth, they are constantly doing that.

There's nothing to suggest that that needs to have dramatic day-to-day effects between one week and the next and the retailers didn't suggest that it did. That is because the effect of this competitive dynamic is that they are both constantly producing their best offers. They are both constantly seeking to stay up to the mark

and, indeed, one of the results of that is a sort of equilibrium on prices generally being reached, that there isn't wild price variation, for example, because they are both seeking to maintain a competitive position vis-a-vis the other and with respect to their supplier.

So there's no reason to think just from this dynamic, as properly captured and understood, it's going to lead to delay notices under GSCOP or weekly or anything of the kind but the evidence was -- and I will give you the reference. It's in the confidential disclosure bundle at tab 19 at page 162 -- that because of this competitive tension, this was not usually required, not wild swings from one to the other. So, again, there's evidence about that properly taken into account.

So no basis for the assertion that you ought to expect them. Different, of course, when you are running a formal tender process, where that will typically be well evidenced by documents. That's the nature of the exercise. But what retailers explained in the context of this dynamic is there wouldn't be emails. We wouldn't expect to have emails because it would be dealt with orally. It's conversations. Now, obviously, you ask for documents if you are the CMA because you don't know in advance whether there are going to be documents and you are seeking the best evidence that is available but if the answer comes back: we don't have any because these are oral dealings and we wouldn't expect to have any, that doesn't mean you discount the evidence entirely or can't rationally treat it as having any probative value. It means you act on the best evidence you have and that is what the CMA did.

So, again, this is at heart, a merits point. It is not a judicial review point. It cannot be said that the CMA acted unreasonably and accepting what retailers told them, that this was a dynamic played out in an oral context and it would be very rare to have any emails or documents about it, although indeed, as you were shown, even by Mr Kennelly, there are some.

So that concludes the first limb of ground 1A and then we move to the second limb which was the -- you can see if you still have core page 25 open, but it's the uncritical reliance on the statements of retailers. Which is an unpromising start, if I may say so, because straight away it's in the context of a rationality challenge. To say: our complaint is that your reliance on these statements was uncritical, is really a way of saying: we quarrel with the weight that you attached to these pieces of evidence.

It doesn't acknowledge this whole attack, that of course, the retailers' evidence was only part of the evidence and that the CMA had regard to the evidence as a whole, including the internal documents in particular.

But you see in the claimant's skeleton -- I need not turn it up but it's at paragraph 25 -- that the complaint is that the CMA "materially overstates the extent of retailer support for its SLC", that's the CMA has identified their SLC.

THE CHAIR: What paragraph of the defence?

MR PALMER: 25.

THE CHAIR: Thank you.

MR PALMER: Again, this presages an attack, disguised as a rationality attack but it's an attack, on the weight and the merits of the decision, based on what the CMA made of this evidence.

Now, again, there are a number of sub-limbs to this branch of ground 1A. If I may take you through them briefly.

If you turn to core 26, you see that the first sub-limb is only a limited number of retailers recognise the rebalancing threat. This wasn't pursued orally. We've dealt with it in our skeleton argument. It's in our defence, amended defence, paragraph 71.

The key point I do make orally now though and draw out because it has some significance later on, is it's obvious that the position of the big four will carry particular weight, given their share of the overall market which the tribunal has seen. And so it's

not just a tally of how many retailers identified X or Y or Z, five out of nine or six out of nine or whatever it is, it's who and their share of the market. So if you look at paragraph 88 of the Notice of Application, the statements made by four retailers, and you see who they are, that's what carries the weight. While stating that a further two and then two smaller ones and there was an attack on -- including the second of those two in that context, and we do acknowledge in our defence that's an error but point out that that second one, share of the market, is less than 2 per cent and it doesn't detract from the main point which is being made here which is the combination of retailers which are the first four mentioned and then one of the other next bigger ones then mentioned, is really what matters here.

So that is our position on that and, indeed, all these points are made in the decision, Final Report 9.347 to 349. If you turn in the core-bundle to page 106, and look at table 5.1 -- I don't think I showed you this yesterday, you will have seen it no doubt -- that is where you get those shares. The first column particularly is significant for these purposes.

You can see that list down the left-hand side doesn't include Ocado there. Just for clarity, I asked and want to clarify it doesn't fall into M&S and other, as you might have assumed. That's because this source of data was only restricted, if you like, to those retailers who have bricks and mortar premises. They might have an online operation as well but it excludes those who operate only online. But separate figures appear, as I have mentioned. So that's where that fits in, if I can square that circle, if the tribunal is with me.

The next and main limb of this ground is that the CMA has -- and here you have it, the heading of "Materially overstated", page 26 again, "the extent of retailer support for its SLC." The assertion put forward here is that, in fact, the evidence from the large retailers was "mixed and equivocal", in Cérélia's assessment, rather than "broadly

consistent and coherent", which is what the CMA found. Again, not a promising basis for an argument based on irrationality and its assessment of overall effect on the evidence.

Obviously, in the context of an irrationality challenge, your question is whether the CMA reasonably arrived at a conclusion, based on the body of evidence as a whole and picking out single elements doesn't work.

The key theme here is that statements from retailers about their concerns about the merger and about their descriptions of how things operate pre-merger, are probative evidence, as I have said, even if not supported by specific contemporaneous documents. Again, no hierarchy of evidence. As the chairman picked up on Day 1, Cérélia's case in fact amounts to an argument that the retailers were wrong about this and/or deluded about how competition works in this industry, including in the context of their own ability to negotiate and trade off these suppliers in order to get the best offer. There's no basis for that suggestion and there's no basis for suggesting the evaluation of the evidence that the CMA made, as set out in annex 1 to our defence, is in some way irrational.

Now a line by line going through of annex 1 and comparing it to the points which are made in my learned friend's schedule 3, many of which he developed, is unlikely to assist the tribunal, given that you have it in --

THE CHAIR: It will not assist.

MR PALMER: I am relieved to hear that. I am going to start with one retailer and just try to draw out some points which have a sort of wider resonance and I am going to try to avoid repetition as best I can. But you will recall we went through retailer by retailer analysis, chronologically, of what they'd said over time, with the constant refrain being: no evidence of this supposed threat. If that's a misconceived exercise, that's the quick answer to all of that because you do see a clear underpinning for what

the CMA did in fact find and do so consistently.

So that's the first general point. You have to have the correct theory of harm and evidential findings in mind. The second theme which came out of this and, indeed, other documents, is that Mr Kennelly said that what the retailers were saying was speculative. Of course, there is a degree of speculation as to what the effect of the merger will be post-merger. That's not something which the retailers have any data on but they do have commercial good sense and the notion of considering on a forward looking and to an extent speculative, in the sense identified by the chairman in one of your interventions, sir, is of course inevitable in any merger investigation. That's the nature of the beast. We are always looking forward to what will happen, in a world that has not yet eventuated. What weight is to be given to those forward looking predictions from retailers is first and foremost a matter for the CMA.

The third general theme I have already mentioned is that the CMA will always seek best evidence and ask for documents and examples, but if those documents aren't available, it doesn't matter, you discount what they've said entirely.

I want to just give some examples of the sorts of misplaced concern which was brought out by Mr Kennelly. If I can take up the confidential bundle of documents at tab 76. This was a phase 1 questionnaire and the first in the run of documents for this retailer. You will be reminded it appears on the following page.

You were taken to question 15 on page 549. Sorry, 548, it should have been, question 15. Which is the question specifically about de-listing rather than rebalancing, of course, and: have you de-listed and why? The retailer says:

"A number of products have been de-listed due to poor performance and product reformulation of those branded de-lists and in most instances replaced by branded like for like or own label equivalent."

Mr Kennelly emphasised: ah, but this is due to poor performance, not because of

unsatisfactory commercial terms being offered by Cérélia or Jus-Rol. Again, that was the constant refrain. We say that mischaracterises what we are looking for. The performance of a product covers any number of angles of its competitive performance and that will include the volumes, margins that it achieves, obviously. That's the sort of performance which you are looking at.

The margin which a retailer will impose and the effect on volumes that will have, will of course be closely related to the wholesale price they are offered. These are all dimensions, these are all aspects of the constant incentive to avoid that sort of relatively extreme result of de-listing but also to avoid rebalancing in the long term and on that ongoing process.

So this is part of, not separate or independent from, but part of what the CMA identified as the competitive constraint.

At question 16C, this is on the next page, whether the wholesale prices are a factor. Again, you were taken to the answer "No" there. But again, this is all dealt with in the Final Report at 9.40. The CMA acknowledges that branded products are differentiated by brand value. So you don't simply set the price of a private label by reference to branded or vice versa. You are looking at that differential and that brand value.

It doesn't follow from that that there is no competitive tension in respect of the branded channel as to which the retailers' broader evidence -- again, looking at everything as a whole, not focussing on one little answer in one questionnaire -- was clear and you see that at Final Report 9.54C. There was evidence from other retailers that wholesale prices of private label did help determine prices of branded in any event. You see that in the Final Report at 9.57 and in documents, you need not turn them up, tab 73, page 507; tab 75, 535. So that sort of question, it depends who you ask and you have to look at all the evidence and in the wider context.

Question 18 on page 550 which was about the effect on competition and you will recall

that answer that was given. We say that provides clear support for the theory of harm. It's referred in the Final Report at 9.60C. All that Mr Kennelly says about that, he says it cries out for substantiation which is his way of saying it's irrational to accept that answer, unless you have some form of documentary proof or documentary evidence underlying it. But, again, given that it's specifically caveated about the nature, the predictive nature of what is being talked about, it's very difficult to imagine what documentary evidence as to the future effect of the merger they are expected to provide. Clearly you take it into account, alongside all other matters. It's capable of having weight attached to it.

You were taken then to a document at tab 80 at page 590. In particular, I think the focus was on C but we regard, the CMA regarded all of those answers, A, B and C on page 590, as attracting weight.

The request for examples to be provided is met with a clear explanation as to why they cannot be given. Mr Kennelly submits in response to that, transcript page 53, line 23: "So it's entirely implicit. The CMA has asked for examples, any substantiation. It has nothing."

But it doesn't have nothing. It has its explanation that leverage does not operate, as might have been understood in some quarters, it seems, in terms of explicit threats, but in the implicit way I have described, with satisfactory outcomes, which play with the grain, not against the grain, but go with the grain of the retailers' commercial strategies and offer to customers.

So it's capable of being accepted, it's capable of having weight attached to it. You can't say no probative value can be attached to that. If you look at what followed, indeed, that answer, there was a challenge from Mr Ridyard at that point to Mr Kennelly. That's in the transcript at page 54, Day 1 transcript, page 54, where Mr Ridyard said:

"Sorry but is that right, that it has nothing? Doesn't this response say: we do use leverage or we could use leverage, but because we can use leverage we don't have to?"

The example was given about nuclear deterrents. I am not going to get sucked into analogies because they are always a dangerous thing.

But you go past the analogy and you see Mr Kennelly's answer here at line 8:

"Here, the CMA goes into this exercise hopefully with real concerns about whether this kind of threat is credible at all because they know already, or they will learn [he asserts] how costly and difficult it is for the retailers to switch between private label and own brand -- sorry, between private label and Jus-Rol, from the perspective of their customers, the most important people from their perspective.

"So already this implicit rebalancing threat is very counter-intuitive before one asks the retailers: well, how does it happen? The retailers say, at least at the beginning, it's implicit and it never needs to be articulated because it always works. That again is highly unlikely in a market where there is competition ..."

Again, forgive me, this is argument on the merits, it is assertion as to the likelihood or plausibility of various claims. And separate point, what lies behind it is a misunderstanding, as I have constantly said, about what they are actually saying and what is actually being looked for. But this is not a rationality challenge, it's an argument with the findings and a disagreement with the amount of weight which is being attached to those answers.

An important document which I would like to turn up now is at tab 84, some weight was put on this, of the confidential bundle. I have done that one, sorry. It's an important document but I have already been there. I don't need to go back.

I am going to go to tab 86 which is the phase 2 questionnaire for this retailer. Again, at page 684, questions seven and eight, you have very clear support for the theory of

harm, again marginalised by Mr Kennelly because it refers to poor performance and driven by promotions in the branded case. This is precisely the competitive dynamic identified by the CMA. Again, Mr Kennelly is hunting the snark, a creature of his or Cérélia's own imagination.

Again, questions 15 and 16, clear support for the finding that alternatives were very limited. At question 15:

"What would you do?"

"A number of meetings ... request changes to be made ... discussions may be challenging and if not successful [there's a particular strategy] but that would be as a last resort."

This is in the context of: what would you do if you are not happy with your PL offering? And, indeed, a supply review process may be launched to consider other options and: "Alternatives options are very limited", this retailer says.

So that's considering, effectively, the question of: what do you do about switching your PL supply? Of course, that's not going to this dynamic here.

26 to 29, question 26 and 29, pages 695 to 697. Again, a different retailer from the one I took you to earlier, the hearing note. A very consistent account at the top of page 696 of what we saw and what we heard from others. 27.

A similar figure at 27. A certain proportion of customers will shop both within chilled pastry. Those shoppers are responsible for a certain percentage of the total volume value in the category.

At 29, "Key factors." This is between convenience stores and other physical stores. It refers to space ability and ability to stock but also customer preferences, profit are considered. Of course they are. It's rather inconsistent with our theory. As Mr Kennelly suggested, entirely consistent.

Then there was an attack on what's said in question 31 -- there is goes across all the

questionnaires, so I am not going through all of them but question 31 and 32, again very clear answers here, question 31. But the attack is: well this is a leading question, as if the CMA should not have made such an enquiry at all, as in: would you rebalance? It's a perfectly legitimate question. Two boxes follow, "Yes", or "No." "If yes, then explain." It's the explanation to which you give weight, as well as the answer "Yes". Of course, you give weight to that in the context of your subsequent and fuller discussions, when you go back to these answers, not in a leading way but: you told us this in the questionnaire, please can you explain that some more, please can you help us. You get the same answer to question 32 in respect of the other way round and question 33 --

THE CHAIR: Yes, but they say presumably, it's leading because it could have said: if the wholesale price of your private label products were to increase beyond the level you thought reasonable, what would you have done? That is --

MR PALMER: Well --

THE CHAIR: We are not before a jury but that would be the normal way if you were calling a witness in the Crown Court.

MR PALMER: Yes.

THE CHAIR: But we are not there.

MR PALMER: We are not in that context. We don't have strict rules of evidence. But more to the point, this is at phase 2 which is developing and building upon concerns which have already been articulated not only in the phase 1 questionnaire but the earlier meetings, where retailers have already been saying this. So these questionnaires go out across the board to all the retailers and certain retailers have specifically mentioned this, particularly the ones who stock both products, obviously, products through both channels and so they are being asked not just: you do, don't you? They are being asked: do you, yes or no? And if so, explain that some more.

And that's what gets revisited.

32 we'll come back to. That deals with the separate issue of alternative competitive constraints but, again, a very clear account of the position.

That's that questionnaire. Then you get precisely what I've just described at document 100 in relation to page 838, document 100 in this bundle which is the small type document, where a very good example of that happening at the bottom of the page. They are picking up what has been said on a previous call, playing it back to them and asking for further evidence in respect of that.

Of course, what the substance of that answer was concerned about was the future position post-merger, when you read it again. The retailer cannot predict with any certainty what the merging parties' commercial strategy will be as a result but we may lose leverage compared to the previous situation, where it could create a competitive tension having both, et cetera.

So they do provide further detail. But as to the future element of that, they say at the top of the page, in answer:

"The concerns raised were forward looking and speculative."

And again repeating:

"We can't predict with any certainty what the merging parties' commercial strategy would be."

That's not a reason to discount, therefore, everything of what's said. It's them properly recognising: this is the limit of what we can say but we make certain assumptions based on our past experience but it's forward looking.

Then the second main point which is that:

"Supplier negotiations tend to take place verbally, either face-to-face or on calls and in the light of this, any negotiations where the leverage would have taken place would be unlikely to be documented on emails."

Again, that is clearly explained. But then a further answer under number 1, of giving an example asked for, of an instance of actual de-listing which as I have said, is extreme.

So, again, the idea that this is all destructive of any ability to treat this as probative is entirely unreal and misplaced and falls short of the high hurdle of irrationality.

The last -- I will just finish the run of this. I don't intend to go, as I said, through every retailer but this was the first one. Document 105 is the last document that was gone to which is at page 875 and reliance was placed on the answer at 891, the answer beginning at 12:

"We will still be a significant part of the volume at that site. I do think we have to have natural leverage in there in terms of what we can impact, the volumes at that site. That would probably be at the detriment of customers if we were to do that.

"I also think [and here is the key point] the current dynamics in this category, it's actually a growing category [this is pre-merger, the current dynamic, it's actually a growing category]. While those dynamics are there, it's in no one's interest to halt the growth of that category through either innovation or through investment in promotions. I think it's when those dynamics of growth are not there that I think there is more of a risk."

So what Mr Kennelly read into this was some sort of suggestion that the retailer was saying they weren't concerned about innovation post-merger, but in fact, what the answer is, is comparing pre-merger with post-merger. At the moment it's growing, there's innovation. It's when those dynamics change, that there's more of a risk.

"At the moment, we would still have an impact on their business if we chose to reduce volumes with them and sell more of different products or more of other categories because we are an important customer. However, it would have a detrimental impact because we would need to remove choice and make ourselves less competitive if they

were to remove options."

So, again, it's clear they are talking about pre-merger versus post-merger, when you read it as a whole.

So that was the whole run of the first retailer. Then Mr Kennelly moved to the second. I am not going to repeat the whole exercise in a similar way because it's many of the current themes and I would be repeating myself. The tribunal has the point. But there was a discrete point made about the second retailer which was dealt with and you see this in the notice of Appeal, paragraph 98B, which is in the core bundle at page 29. What was said here at B1 is that that retailer that you can see was approached by the CMA and provided views on the merger no fewer than three times, without raising the issue of rebalancing. Something which only appears in evidence, following the idea of a rebalancing threat being specifically suggested to it by the CMA and that should have affected weight, so it's an argument of weight, but it's not acknowledged. At the footnote you have "No bad faith is suggested", but it's relevant to weight and whether a concern is raised spontaneously in response to open questions or merely an agreement with another person's suggestion.

So the premise is they didn't mention it themselves, they didn't raise it themselves, until the CMA put it to them. Of course, what undermines that submission is the narrow conception of what Mr Kennelly is referring to, when he refers to the implicit rebalancing threat which is looking for instances of people actually threatening to get better commercial terms, independently of the process we've seen. But when you have the right conception of what is meant by rebalancing, you see the retailer mentioning it from the outset.

So this is nothing more than the fact the retailer didn't use the precise word "rebalancing", without engaging with what they actually did say.

Now the first interaction was a very brief email indeed, somewhat on the hoof. It wasn't

the main investigation but since it's been raised, it's at tab 10 of the confidential bundle. It's at page 90 to 91. You can see this is very early, this is January 2022. A short response, very introductory, starting with a brief description of the products at very early stages. Secondly, a brief description of the retailer's current relationship with the parties is dealt with. Thirdly, at the top of page 91, views on the impact in four bullets, and you can straight away see being identified as an impact is the fact that:

"The merged party may increase the price charged for the supply of our own brand product. The merged party will have the ability and the incentive to increase price because we have very limited alternatives."

The third bullet point:

"... may suffer from the deterioration of quality of the supplied own brand product again."

And various other concerns.

But, of course, the obvious question which arises from that is: well, why do you feel that will happen post-merger in a way that doesn't happen pre-merger? What is it about the merger that's going to cause that? That's the first interaction. So then you get the second interaction which was a call at tab 71 of the same bundle. It's tab 71, page 477, where the document begins. You can see it's a discussion in March 2022. I would like to go, please, to page 479. You can see paragraphs 13 to 19 are dealing with -- I think we will probably deal with that later. That's dealing with alternative suppliers. Paragraph 23, regarding the closeness of competition:

"The retailer stated that these two categories of products have that relationship. The retailer achieves certain market share through its private label range ... describes the interplay between JR products and corresponding own label products, in the sense that ..."

Then you have a particular relationship there. Then:

"The retailer does consider the two businesses to be competitors, on the basis that they do the same job."

Ultimately, the products are the same.

25:

"With them no longer pitching against each for the growth of the categories and their own businesses, the acquisition will create challenges for the retailer and in terms of pricing, the competitive tension plays out by them, trading them off against each other. There's expectations that the brand will have more value if it's done on a case by a case basis, based on the premium ... consumer led ... look at how close they are and the differential."

Of course, when you read that with the later explanations which I took you to earlier, very clearly they are talking about pitching each other, the leveraging, using the competitive tension to rebalance.

At paragraph 30, the concern expressed as to the future by the retailers that there will not be any competitive tension from a sourcing model perspective across the product range, their being more acute for a certain sub-category of product which counts for a large proportion of their sales. That was the second interaction.

The third was the phase 1 questionnaire which you have at tab 74 and in particular, page 520, in answer to question 15 which was:

"Have you de-listed?"

And they refer to certain of those products and those, they say, weren't -- I can't read that but there you are, you see what the answer is on that, in respect of that de-listing. But the point made by Mr Kennelly about this was: but now look at question 16. Looking at the process, he said: there's nothing, there's no answer to 16, nor 17, nor 18:

"Please indicate if you have any views."

Nothing at all. And you might expect them, if this was a serious concern, to say something about that.

But the answer to that submission is very, very clear. Tab 78, page 558. At the foot of page 558 is an email dated 11 April which says:

"Please see attached our response to the CMA's questionnaire, phase 1. We are happy that the note [that's the note of the March 2022 call] reflects the call that we had with the CMA team and request that the transcript be considered our response to questions nine to 13, 16 to 18 inclusive which were discussed on the call."

So they filtered out selectively and said: you have our answers already to those questions.

Then the fourth occasion where Mr Kennelly suggests that the CMA planted rebalancing in the mind of the retailer and for reasons unexplained, they gratefully lapped it up and endorsed it -- I am not quite sure how that theory is supposed to work but it's at tab 29. Some follow-up questions on page 568, where you see they're building on the answers which had previously been given:

"How does this pitching against each other work in practice? You've referred to it, tell us how it works."

Then the answer is:

"How we prioritise volume and the prioritisation is based on the respective terms and attractiveness of our separate business plans with them."

The second question, whether the leverage they've mentioned:

"... was limited to price or whether it extends to other terms, perhaps to quality and innovation?

"Not exhaustively, it includes all those matters. Anything that can be used to drive customer awareness, footfall and volume for competitive advantage.

"What was the source of leverage? What options did you have before the merger that

underpinned this?"

Again: you are saying it's going to change, what's the difference? For example, the threat to reduce or expand and allocate more shelf space.

The answer to that is:

"Yes, exactly, the ability to trade one off against the other."

This is what they have been driving at with their previous answers about the leverage, that they had the ability to get them to pitch against other, the leverage that could be exercised:

"And please could you give any examples of this leverage?"

And this has brought up business plans:

"We increased our range of Jus-Rol's SKUs to improve that category and that came at the expense of own label volumes."

So a practical example of a rebalancing exercise, designed to boost their overall commercial returns, based on what they were being offered. So the idea that this has been planted in their mind is completely unreal. And then, of course, you've got -- and I won't go back to it -- the earlier hearing. This is the document -- you will remember it's the one I asked you to read about eight/ten pages of, the same retailer, where they fully explain in their words exactly how this works. Then you have emails at tab 94, page 798, I won't take you to that now. Tab 95, 799, showing a practical example of rebalancing of volumes between the two channels, alongside all other evidence.

Again, clear evidence of rebalancing of volumes actually happening.

There's further answers. It's worth looking at 107 (inaudible). That's document 107, page 899. Again, the CMA continuing to investigate, continuing to probe, continuing to seek to understand. So asking again about the pre-merger situation at question two: just please explain. And (a):

"Please explain how you can use this competition to trade off against each other to

get a good deal in practice."

And what is said:

"The presence of two separate and viable suppliers, each offering high quality products, creates -- "

Again, I will leave that to be read but there's two viable suppliers trade off against each other and competing across a range of commercial factors.

He's asking the right offer for the customer. See our previous submissions, where we've explained this. It works both ways in (b). At three:

"How will this affect -- what happened post-merger?"

And, again, it's the foot of that page, 900:

"Post-merger, we will lose, for example, the ability to compare, contrast, challenge cost, including as to cost price justifications and the competitive tension referred to above."

Top of the next page:

"The ability to meaningfully compare, contrast, challenge the quality and potentially access to more wide ranging innovations and new product development."

And so it goes on. I said I wouldn't go through it all. I won't. It's tempting always but, you know, to say there's no probative evidence of this theory is just a nonsense.

Sir, you look like you have a question on your lips?

THE CHAIR: No, I have no question.

MR PALMER: Retailer three, again clear and consistent accounts. I won't go through it all. I think I will do that one by reference to our annex 1, dealing with the particular answers.

But, again, where there is suggestion that somehow we were leading them or looking for a -- putting ideas in their heads, the questions which are being referred to are based on their previous questionnaire responses. Each time it's playing back to them

something which they've previously said and asking for more detail. Of course with retailer four there is a full critique of the findings on that retailer's evidence provided by Mr Kennelly but even though the CMA expressly decided to attach less weight to that evidence, which is at 9.350 in the Final Report to 9.351.

There's just one point about that I would like to draw out. No, I am going to leave that. I think I've dealt with that adequately already in response to other retailers.

But it is right that at times this retailer's answers were assessed to be contradictory. That is what was taken into account. The reference for that is in the Final Report at 9.108 to 9.109. But that doesn't mean that you can take one of those answers, as Mr Kennelly does, at point 88 of their table, for your note, and say: look, look at this answer, that supports us, you couldn't rationally have decided anything else, without acknowledging that there was another answer which goes the other way and that you have to read everything as a whole.

Equally misconceived is the analysis in Cérélia's schedule 4, to which we have responded in annex 2 of our defence. I am just going to deal briefly with some of those complaints. This is schedule 4 heading, which the tribunal will recall is the sort of last flank of: you were too generous in believing what retailers were telling you, you should have been more critical of their evidence. This is the suggestion that there were several propositions which were irrational because they lacked no proper founding.

The first finding of the CMA which is said to have been irrational is that Cérélia and Jus-Rol compete at the wholesale level. That's in schedule 4, paragraphs 5 to 9 of the Notice of Application. But in making that submission in schedule 4, what my learned friend does --

THE CHAIR: What page is that?

MR PALMER: Yes, it's in the Notice of Application, which is core bundle, page 57.45. There, you see at paragraph 2 they set out five key propositions, grounds on which

they say the CMA's analysis is organised. It's not actually. What they've done is pick out certain statements in one section of the process of competition analysis and elevated, for example, (e), which is a statement of fact, to a key proposition.

But three of these are challenged. They are, first, Cérélia and Jus-Rol compete at wholesale level, and you see that developed beneath that, in paragraphs 5 through to 9. This is reduced to a single footnote reference to a single paragraph of the report saying all of this turns on, and only on, the parties' answer to question 25 of its phase 2 questionnaire. But that question asked about competition in general and the term "wholesale" formed no part of it.

"Do you consider that Cérélia and Jus-Rol compete with each other in the supply of dough-to-bake products in the UK? Please explain."

The word "wholesale" is an important gloss on that, and it's clear that the retailers were misled by this: this is just complete nonsense. The retailers are well aware that Cérélia and Jus-Rol are their wholesale suppliers of DTB products and that whole basis is about the terms which they can secure on a wholesale basis and they can retail those products in the supermarkets. The idea that there's some misunderstanding about this is utterly bizarre, in our submission. So that is hopeless, we respectfully say. But we deal with that in our defence, in particular, also at paragraph 34.

The second key proposition which is challenged is at the foot of core bundle 57.46. It's 2, there is a degree of competitive tension between the parties that grocery retailers can use as a lever in negotiations. This is the one where it says we found two-thirds of the grocery retailers, six out of nine who responded, and they are identified, told us that there is a degree of competitive tension. The concern about that is the inclusion of that last one, which we accept is an error but an utterly immaterial one.

None of this comes close to establishing irrationality. But, in fact, they did identify at least one dynamic and you can see that in paragraph 9 of our annex 2 which is at

page 58.143. Again, the suggestion that this vitiates the overall conclusions is ridiculous. The decision obviously doesn't turn on the head count: it turns on the substance and the volume of sales and it gives weight accordingly.

The third challenge is to a claimed lack of contemporaneous evidence of replacement of Jus-Rol products with own brand. You see that in paragraph 16 of their schedule 4, which is on page 57.47, where the challenge is to the statement of fact, rather than the proposition, that a number of retailers provided examples of stocking decisions that included changing Jus-Rol products for PL. It's said it's notable that this relates to replacements and doesn't go further and say that these were examples of what Cérélia terms as implicit rebalancing threat inaction.

In fact, what is the short answer to that is that the competitive constraint is not so narrowly defined. Replacement of one JR product for a PL product in order to secure better wholesale terms in that threatening way is not the basis that provides evidence of substitutability from a wholesale perspective. So, again, we've answered that in our defence. I don't need to elaborate.

Then there's a complaint also in schedule 4 as to what is said to be a lack of contemporaneous evidence and again we have dealt with that along the way, largely. I don't think I need to repeat that.

So you've got this forensic root and branch attack, but it is another disguised attack on the merits and far from irrational.

I am just seeing if there are any further references I need to give you on that. No.

Then the grounds do not engage at all with the substantial points drawn from the parties' documents which we have set out in our defence at paragraph 34.4.4, that is at page 58.16 of the core bundle, which concerns the internal documents. Again, I have touched on this, certain limitations in the availability of relevant internal documents, but the Final Report cites clear documentary evidence showing that

Cérélia monitors the sales and retail prices of Jus-Rol products and that it regards Jus-Rol as a competitor. You see the footnote there to the relevant paragraphs in the Final Report.

Similarly, GMI's internal documents show it monitors and benchmarks against PL products, Cérélia being far the largest supplier in the UK market. In each case, the parties' monitoring of retail prices reflects the fact demand at the wholesale level is significantly influenced.

Again, there's no real response to that. The engagement we had from Mr Kennelly on the internal documents was looking at various internal documents to which we had drawn attention, where the parties had, in particular Jus-Rol, internally drawn attention to the fact that they were losing share to PL brand.

His response to all of that evidence was: well, that does nothing to support this alleged threatening behaviour and all the rest of it, it's completely irrelevant to that, but of course the tribunal only has to rewind and think of the bigger picture which the CMA was concerned with, which is that this was a context in which the parties' own case was that they were not competing with each other and didn't regard each other as competitors. It's that proposition that was being relied upon in relation to these documents. So none of this is a fruitful basis upon which to impugn the rationality of the conclusions.

Now where that takes me then is I think an end to that aspect of ground 1A, which revolves around the retailer evidence, and we are on next to the alleged failure to assess alternative competitive threats.

I see the time. We are a few minutes before one, but that may be the most convenient place to pause.

THE CHAIR: How are we doing for timing?

MR PALMER: We are doing well, I think. I think I am on target. I am due to finish by

four and Mr Kennelly then has -- we are assuming at present that the tribunal has until five o'clock today, if necessary.

THE CHAIR: We have until five.

Mr Kennelly, you are not feeling squeezed? That's all right, is it?

MR KENNELLY: If Mr Palmer does finish at four, then that's fine. But I will need the hour --

THE CHAIR: Yes, that's fine.

MR KENNELLY: -- just to do a reply. I understand the tribunal wants pure reply points only.

THE CHAIR: Yes. And the schedules I have asked for, will any be ready by five?

MR KENNELLY: I will check over lunch.

THE CHAIR: I know, because it's not just your side, it's both sides. Yes. Okay, we'll rise until two.

(12.57 pm)

(The luncheon adjournment)

(2.00 pm)

THE CHAIR: Yes, Mr Palmer.

MR PALMER: I am grateful. I turn now to the alleged failure to assess alternative competitive threats. Now this was a section of the Final Report that I skipped over yesterday so that I could concentrate on the competitive assessment. Of course, I come back to it now in detail.

THE CHAIR: Yes.

MR PALMER: It's core bundle page 240.

THE CHAIR: Yes.

MR PALMER: You can see once again, the CMA directs itself in its introduction in accordance with its MAGs at 9.158. I need not read it out. We are now concerned

whether there are sufficient remaining good alternatives to constrain the merged entity post-merger. So, of course, we are starting from a position where we assume for the purposes of this exercise, that it was reasonable for the CMA to conclude that there was a material competitive interaction between the merger parties that would be removed as a result of the merger.

So the question is, was it reasonable for the CMA, having reached that conclusion on the competitive relationship between the parties, to conclude that other competitive constraints did not prevent an SLC from arising?

That, of course, is a largely predictive assessment. You are looking to the post-merger world to see what role those alternative competitive constraints will play at that stage. That requires an assessment of the evidence, requiring a large measure of judgment as to the strength or otherwise, not just the existence of a competitive constraint of some degree of materiality but the strength, such that taken individually or cumulatively, they are sufficient, remaining good alternatives to constrain, notwithstanding that relationship.

So the first point is this is a judgment-laden, predictive, assessment-heavy part of the assessment. Again, not fertile ground for a charge of irrationality, save in extreme circumstances, where there is simply no evidence to support those assessment made. So in that regard, the CMA did consider the strength of the constraint imposed by a range of other PL suppliers which are dealt with. First, UK based ones and then non-UK based ones, as well as alternative consumer brands, also out of market constraints. Large swathes of that analysis are completely unchallenged and, instead, Cérélia focuses its fire only on the CMA's analysis of two particular suppliers, Bells and Henglein.

Now just to set this in some context, can we just go back in the assessment to page 181 of the core bundle.

THE CHAIR: And as regards the -- when did you find out about the matter at 175D?

MR PALMER: Sorry?

THE CHAIR: The contract, when did you find out about that contract?

MR PALMER: Sorry, I did not -- you gave me a reference.

THE CHAIR: 9.175D. When did you find out about that contract being awarded?

MR PALMER: I think after it happened because the initial interaction --

THE CHAIR: I know that but what is the date?

MR PALMER: I will ask for the precise date when we've found it out.

THE CHAIR: You don't need to do it now but if someone can give me the precise date.

MR PALMER: I will find it out.

THE CHAIR: Because it could be relevant for ground 4 because there is a lot of things for you to consider --

MR PALMER: Yes.

THE CHAIR: -- during phase 2 and this is one of the things you were considering during phase 2.

MR PALMER: Further consultation, I'll come to that.

THE CHAIR: And all of that. So I just want to have where that fits in the timeline.

MR PALMER: Thank you for the question. We will provide the exact date. We are on it.

THE CHAIR: Yes, okay, someone is doing it.

MR PALMER: Someone is doing it.

THE CHAIR: They have until five.

MR PALMER: I was just going to turn back to page 181 for a moment of the core bundle, just for context, the table we looked at yesterday, table 9.1. You asked a question about that table yesterday, sir, which I answered on my feet but I have

taken further instructions now. The question was whether, other than the Jus-Rol figures, the brands were all contained in the other branded row.

THE CHAIR: Yes, that's it.

MR PALMER: That is the case. So I think I was wrong in what I told you because the rows for Cérélia, some of those names are redacted but you can see them, but including the two we are concerned with, they are all PL supplies. Now Bells does, as footnoted, also have a brand.

THE CHAIR: That's what --

MR PALMER: But that's captured in the other branded, that's where the cross represents other branded with that cross mark. So the Bells in the branded channel go into other. So what you have in the rest of it is all PL.

THE CHAIR: So when you look at Bells, at one point it's there in relation to its supply for the PL chain, but insofar as it has its own brand, that is within that --

MR PALMER: That's within other branded.

THE CHAIR: Within other branded. That's what I wanted to clarify and you've done that now.

MR PALMER: I have taken instructions and make that clear.

THE CHAIR: That's fine.

MR PALMER: We see the position though, in this table -- I can't say which way round but you can see Henglein and Bells appear on that table and thus, there are in the third and fourth positions on that table but their individual shares are obviously much lower than those of Jus-Rol and Cérélia. You have them over a three year period. Obviously, the 2023 is based on predictive share rather than actual.

But it's no doubt for that reason, we understand, that Mr Kennelly places such emphasis on what he says is the alleged excess capacity of Henglein and Bells. You may recall on Monday, Mr Kennelly said there was "massive spare capacity in the PL

manufacturing market". That's transcript Day 1, page 8, lines 9 to 4. But what I want to show you is, firstly, that the CMA fully recognised the existence of the spare capacity on the part of both and yet concluded that they nonetheless each posed only a limited competitive constraint on the merged entity, partly by reference to some qualifiers on the headline information as to how many kilo tonnes of pastry they had the capacity to churn out overall but also by reference to other metrics beyond capacity which is not the sole factor in considering --

THE CHAIR: Well, perhaps it's not the sole factor. But if you are a company that it is, let's say, doing less for the UK and no great appetite to expand your business there and your thoughts are elsewhere, even if you have spare capacity somewhere else in Europe, it doesn't necessarily mean that you are going to be going out, hunting for work there.

MR PALMER: That's one of the points when we get to Henglein, exactly so.

THE CHAIR: Yes.

MR PALMER: You don't just look at the headline figures and Mr Kennelly's submissions are all preceded by how many kilo tonnes of pastry is spare and within their existing capacity.

When we refer to existing capacity, we mean precisely that in this exercise. The possibilities of entry and expansion were dealt with in chapter 10 and there has been no challenge to the reasoning or conclusions in chapter 10. So existing capacity includes Bells' capacity beyond the contract which they took, they have some limited capacity on top of that left over which was expressly considered. I will take you through that but you probably remember that. But the idea they might expand further beyond that in some as yet undefined, unplanned, unannounced, undecided upon way, that was considered in chapter 10 and there has been no challenge to that, so I am focusing on the alternative competitive constraints in terms of existing capacity

from existing PL suppliers, namely Bells and Henglein in this context.

Again, before I get into the detail, there's another fundamental point. My learned friend puts his case, necessarily, incredibly highly on this point. He went as far as saying that the small market shares of the other suppliers, including Bells and Henglein, is irrelevant. But, of course, the merger assessment guidelines make clear at paragraph 4.4 that market shares are a recognised way of assessing whether there are sufficient remaining alternatives.

Now neither I nor the merger assessment guidelines say: you just look at those shares and that's the end of the matter, that answers the question. That's not our case at all and I will come to the point my learned friend makes, to say: this a bidding market, so it doesn't matter what your existing merger share, it matters if you have capacity. That's an oversimplification. They still have relevance in terms of the quality and nature and extent of the constraint they provide in practice.

To say these things are irrelevant and that the CMA was misdirecting itself entirely in even looking and placing any weight on that, is an extreme submission and not one which has the force of any authority behind it.

So in the present case, there's evidence that the merger parties' combined market shares, as you know, were far higher than even the combined current shares of the next two largest market participants. That was relevant, probative evidence as to the limited alternative competitive constraints which we'll see the CMA considered, alongside a range of other probative evidence pointing in the same direction.

So let me deal first with Bells and the analysis as to Bells begins at 9.172. That's core bundle, page 244. In normal fashion, the CMA begins by setting out the evidence that it's received on this topic which runs through to 9.191. Then it produces its assessment, 9.192 to 198. Let's start with the evidence.

The first point. This is in 2022. You see that most of its revenue came from a different

source, not DTB at all and DTB products for retail sale generate that much revenue which is -- you can see the overall significance for its total revenues. But, nonetheless, it's said to be important, for the reason that you see there.

But its main DTB products are branded, ready rolled puff pastry and puff pastry blocks predominantly sold in a chilled state to retailers. Indeed, it was described by one of the supermarket customers as a puff pastry specialist. We'll see that in due course.

Bells also supplies DTB products to food manufacturers and you see what that accounts for in turnover and supplied a small amount to two identified retailers there but stopped doing so, for reasons that were given there. So up to that point, its share of all DTB supply to UK grocery retailers was a small amount that you can see, so not a big player.

You see maximum capacity set out 9.174 and the comparison of that with Cérélia.

Now following the developments which happened, as you see at 9.177 --

THE CHAIR: I have just figured out why I am a bit confused. The footnote on page 245 --

MR PALMER: It should say --

THE CHAIR: 663. The actual response is 2022.

MR PALMER: Yes, it's a typo.

THE CHAIR: It is, isn't it?

MR PALMER: Yes.

THE CHAIR: So you just need to confirm whether or not that's the trigger point for you becoming aware.

MR PALMER: We'll get that confirmation.

THE CHAIR: Because that is where I have seen it.

MR PALMER: That's a typo. It should be 2022, there's no doubt about that.

THE CHAIR: Let me just note that down.

MR PALMER: (Several inaudible words due to overspeaking) no indication.

But there you are. So there's a development at this point, of the type described at 9.177. On that basis, you see the changed forecast which is an increase in the share of supply up to that new level.

Now in relation to that, the very retailer who was responsible for awarding that contract said the three matters set out over the page at A, B and C. Of course, it's the first two. The third explains why they got the contract but it's the first two which are of significance. The key point to emphasise here, as I will show you in a moment, is that first point isn't just about kilo tonnes and spare capacity in that sense. It's an important point to take on board.

There is the precarious nature of this is a new contract, new supplier doing something which they've not done before at this scale and this nature to retailers and that's a point which the retailer and Bells is acutely aware of at this stage, as we will see.

So that's what [the retailer] said.

Then what Bells said is at 9.178. There is a bit of speculation as to why they thought they might have got the contract. There, you get the point reflecting the newness of the contract and the lack of any certainty as to any promise after that. But sensible reasons why, which both sides appreciated. You can see the reflection there. But you might expect to find more optimism on the Bells' side for the matter to be determined.

Now 9.180 is all marked as confidential and I will go to the document in a moment but needs to be read with some care. We'll go to the original. But you'll see there a description of a preference. The point I want to draw out, you'll see in the original, you may have noted it before, is this is what Bells' management said and Bells' management qualified what they said by reference to what shareholders, small privately owned business, would agree to or not.

THE CHAIR: Yes, obviously, they don't want to be in a situation they go down one

route, it doesn't work out and then they lose the other route that they've had and are known for.

MR PALMER: Yes, exactly. They have a big presence in Scotland, where they are a familiar brand name in Scotland --

THE CHAIR: Yes, I can see that.

MR PALMER: They don't want to do anything to undermine that. So those are the factors which management are keen on and they tell the CMA that. They also tell the CMA the matters at 9.181 --

THE CHAIR: Yes.

MR PALMER: -- which qualifies what went before. As does the second sentence of 9.181:

"Moreover, if it switched ..."

That's a relevant factor in making that decision, casting doubt on what shareholders would or wouldn't decide to do in due course.

Obviously, there is countervailing advantages, there's things that point both ways on that decision. That's a classic commercial decision to be weighed up and evaluated in due course. You see the final sentence, giving some idea of the extent of that identified difference which is enough, you might think, on the face of it, to cast real doubt on what they might decide to do.

9.182, you have the further points that if they are separately shifting production to retail, it could also, so beyond that choice, do what is said there which you'll see the reference to the consequence of that would be -- in terms of scale, compared to the contract they'd just taken on, you can see that four lines down.

THE CHAIR: Yes.

MR PALMER: But then you see what it says about preferences. It's one thing to have capacity, it's another thing to say: well just because we've got this notional capacity,

we'd rather focus on getting it right, effectively, and making sure we can manage it. It's not just a question of what your production line can handle.

Then at 9.183 -- so in principle, it could do what's said there but anything further would require one of those two courses to be taken and before committing to that, you can see what it wanted to do. And that's where you get the point referring to the role that shareholders play and we consider the ability of Bells to expand in chapter 10. You have that point there.

So that's all from their perspective. Then, of course, we are on to perceptions. One out of nine said initially, this is at the phase 1 stage, main supplier but since that, that finished. Then 9.185, one identified retailer there in the phase 2 questionnaire, I showed you that earlier, submitted that if it was to switch PL supplier, it would switch to Bells and this retailer -- this is obviously in advance of the subsequent development -- this retailer commented that Bells is a puff pastry specialist, that's the reference I gave you earlier, and is able to produce in line with its guidelines. Factory capacity and ability to expand is a concern and that includes, as I will show you, (inaudible) other products.

19.186:

"One grocery retailer told us it probably had some limited interactions with Bells but from its understanding ..."

Now this was condemned as being wrong, plain wrong by Mr Kennelly. He said this retailer had not understood the situation. I am going to show you a document that shows that's incorrect. What is being referred to is not just capacity in terms of, as I say, kilo tonnes but the ability to provide the full range of what would be required, were that retailer to switch its volumes to another PL supplier. On that, they have made no error at all:

"Another grocery retailer told us it had previously considered Bells as part of this

exercise to consider capacity ...(reading to the words)... but it concluded that it was better served by Cérélia."

So no appetite, certainly in the short-term, to switch to them on quality grounds which we think would weigh heavily. Another one said it holds tenders for the majority of its product lines on an annual basis and was planning what it says there but that hadn't progressed and obviously no guarantee as to its outcome.

9.18, none of them, that's the competitors, we're on to the competitors now, not the retailers, who responded, saw them as a competitor themselves or as an alternative or competitor to Cérélia. Of course, in those terms, they are not, once you get to the limited identification of what capacity they do in fact have.

Only one competitor considered Bells to be an alternative or competitive supplier to Jus-Rol on the branded front. Internal documents indicated what their view, what Cérélia's view was of Bells as a competitor and there's some reference to that in those terms. You can see the dates to which those relate and May 2018, April 2018, obviously nothing materialised of any extent until the time which you have seen.

9.190, concerning negotiations with another large retailer, indicated the extent to which, in that specific context, Bells was seen as a credible threat. The detail is there set out. It didn't -- well I can't read out 9.191. That is in contrast to what you've been told about what was found in those documents concerning Cérélia. They featured very, very heavily.

Now that is the review of the evidence and we'll come to some of the underlying basis for the suggestions there's no probative evidence supporting these conclusions which then come. But the assessment of Bells, in my submission, manifestly is rational. So 9.192 makes it on the strength of that constraint, albeit a constraint, as recognised. Evidence from retailers not currently received. Again, that's qualified in relation to one observation.

9.193, we recognise that Bells may be able to meet the PL needs of an additional large retailer in that way specified. The share of supply calculations to which Cérélia refers, gives Bells an anticipated share of supply of that amount of the total DTB market almost entirely arising from its win in that other retailer's contract. But even if Bells was to win an equivalent size contract, again the proposition which was being explored, at which point that would be it, effectively, its share of the market would be that which is identified.

Now at that point, my learned friend says: market shares are irrelevant but at that point, you are full capacity, you are not able then, any longer, to compete in any future tenders without abandoning one of your existing customers, unless you get into the territory of expansion in chapter 10 and at that point, that is the maximum extent of that constraint.

MR RIDYARD: But isn't key question if this extra capacity is hanging over the market, how painful would it be for Cérélia to lose that chunk of capacity and what impact does that have on its conduct? So if the answer to that question was: it would be very painful for Cérélia to lose a chunk of private label because, you know, it's very dependent on volumes, then you would expect it to be very exercised about the threat, assuming that capacity was low-cost and of a sufficient quality, obviously. Whereas, if it was indifferent to losing that chunk of capacity, then it would be less of a threat. The question is, what sort of damage would that do to the incumbent's business. Isn't that really the question that's the most important here?

MR PALMER: To what extent would that exert competitive pressure on the merged parties, taking them together as that larger entity, given their market share of -- the figures between 60 and 70 per cent of the market at that time, that increment that's available in the proportion of that, you can see as -- I can't say it out loud but the numbers will be clear to you, sir.

MR RIDYARD: Yes, but in some industries, you know, the loss of 5 percentage points of market share, just to use a random number, you know, is very significant; in other industries, it might not be that significant. The question is how scared is the incumbent about losing those percentage points of market share and that will determine whether it sees this other supplier as a threat or not, wouldn't it?

MR PALMER: So that's the assessment the CMA have to make, about whether that fear would be strong enough to condition -- that's where -- the materiality of the competitive constraint isn't in issue. It's whether you think that is likely in the future. It's not something you can just ask Cérélia: would you be worried about this? "Oh, yes, we always worry about it." Well, that's that then. You have to make a predictive assessment as to the market conditions and how it's going to be working in the future and the use of the word "limited" in this context is shorthand for saying: not so strong as to mean it is less likely rather than more likely than not that there will not be an SLC which is a predictive assessment falling well within the capability of the CMA. It's its job to arrive at that assessment and there's plenty of authority the tribunal will be familiar with, about how not likely to interfere with predictive assessments and that's precisely the evaluative exercise you have to do. If what lies behind the question is: well surely then you have to perform some sort of quantitative assessment of exactly what the tipping point would be.

The answer is no, you don't have to perform a quantitative assess of exactly what the tipping point would be, you'd take the qualitative evidence which the parties have provided as to their likely reaction and their business model and you make an assessment of how that will change in the future and what the materiality of this relatively low percentage, compared to theirs, of capacity, is going to have to them. Do you need a full cost benefit analysis of precisely what implications -- what extent that would constrain their price? No, you don't. Once that capacity has gone, let's say

that they take the pain, whatever level that is, it's gone, it's gone.

There's then, Henglein aside, which I'll come to --

MR RIDYARD: Nothing left.

MR PALMER: -- no other way for anyone to go.

That is what is at 9.104, you see that assumption, that any contract won by Bells would be at the expense of the parties rather than another provider because that's the other factor of significance, obviously. If they are simply winning it from another provider in the market, that has no impact at all. Bells would remain less than one quarter of the size of the merged entity which, even after that loss, would hold a share of over 50 per cent, you see the extent and have -- that's the key point which I have just made, I think, following -- whereas the parties would, by contrast, have that.

So even if, the evaluation the CMA enter into, 9.105, Bells can take on the contract equivalent to the size:

"We note that the market position of Bells would remain modest and significantly smaller than the merged entity."

Again, here is where market shares really are relevant, not irrelevant, as my learned friend suggested:

"We note, in addition, the majority of grocery retailers do not consider Bells to be credible. On this basis, we consider that Bells provides a limited constraint."

So that's the conclusion, noting that Bells' ability to expand in the longer term is as described but that considered in more detail in chapter 10.

Then further consideration then of the evidence in the consultation paper which was said to mean that the provisional findings to the same effect were incorrect and the CMA agreed that that further evidence upon which they had consulted, clarified that matter and that's been taken into account in what has been set out above:

"... and we continue to consider that Bells provides only a limited constraint, just not

strong enough. We believe that the ultimate conclusion, Bells have exercised limited pressure on the merging parties over the next one to two years [that's the time spans you are looking at], remains unchanged in relation to Bells. The other evidence that we took into account in assessing the strength of Bells as a competitor, including uncertainty about its appetite for further expansion into the retail segment, its limited overall market position, even if it was successful, and its perception with customers remains unchanged."

Now all of that my learned friend says is irrational because look at the kilo tonnes they can do but my point to you is that's a massive oversimplification of the position.

In particular, I want to take you -- can I just give you, first of all -- on the future expansion point, chapter 10, can I just give you a list of paragraphs to look at that are not challenged, any of these, but fully considered. It's 10.47, 10.51, 10.69C, 10.129, 10.137, 10.179 to 180, 10.190, 10.197.

So where it's referring at 9.198 to the uncertainty of Bells' appetite for further expansion, it's referring to those. That point is not the question of Bells' existing capacity to supply an additional largish contract.

Indeed, Mr Kennelly missed that point yesterday when he said that this part of the FR, of the Final Report, 9.198, was contradicted, he said, by Bells' internal documents. He confused those two separate questions of utilising more of Bells' existing capacity which is fully taken into account, with the possibility of Bells creating new capacity which the CMA found to be far more uncertain and the finding, as I say, that's not challenged.

Now the point I want to take you to in the confidential bundle is, first of all, at tab 67. This is the minutes of a discussion with Bells in August 2022, page 457. At page 458, you have the reports which Bells give to the CMA of its interaction with that retailer from paragraph 3. We can see that. You can see the description at paragraph 4 of

its current strong brand presence in Scotland and reputation.

Then at 5:

"The recent award of volume is confined to puff pastry."

Then that further point, possible product, which is mentioned in the FR:

"But it [that is the retailer] will assess how Bells perform regarding quality on this initial contract. They had a salmonella scare. As Bells currently manufactures between those hours, it has some capacity to increase. Certain products, however, would not be core for Bells. For example, filo pastry which is difficult to manufacture. There were also packaging challenges with some products, like croissant pastry. Bells currently has two bakeries."

That's described:

"It remains [top of the next page] a family owned company and it's possible [management say] that the shareholders with the board may agree to invest in additional capacity in the future. They will gauge capacity to expand after trading with the retailer for a year or so."

So that is the initial interaction.

There is a further interaction with Bells -- I am just looking now for my reference. It's tab 66. Yes, thank you. We are at page 443. At the bottom there, you see the reference there to the specialist pastry, investment being required, investment risk, significant cost of equipment in relation to another product. So my learned friend stressed on page 453, the answer in block capital letters to question 17. The first obvious point is that has to be read in the context of what has gone before. It also has to be read in the context of this date of this document, which is July 2022, where we know what they are referring to.

Yes, I have gone out of order. It was a month before the call. Yes, the answer -- I have not got a more precise answer at the moment but it was July 2022

that the CMA was told, in fact, by the retailer that the contract had been awarded to Bells and that's at paragraph 153 of the Notice of Appeal. It appears paragraph 153, the reference is core bundle, 42. 21 July. It's a phase 2 response from [the retailer].

THE CHAIR: That's what we looked at earlier.

MR PALMER: Sorry, I shouldn't say that name.

THE CHAIR: It's the same document I referred to earlier so that's fine, that's the document.

MR PALMER: Now I just want to take you to some further documents. The next is at page 477 which is tab 71.

You can see there's a retailer concerned. This is the retailer who is said to have made a gross simple error as to Bells' capacity. You can see that there is already, as mentioned, an existing relationship, paragraph 3, with this retailer. They only use Bells in Scotland for regional set of SKUs. Puff pastry only, across 12 stores.

Then there's confidential words there but notice the two of them and the difference between them. It's not just about capacity.

Then, over the page, at paragraph 4, "Despite this ongoing relationship", so they know them, and again, it's confidential, but again, what they are concerned with here and are saying and referring to, refers to all of that retailer's specified needs.

That, respectfully, is an assessment of the picture as it stood and as it was known to be. Entirely accurate and indeed reflected some of the observations made by the retailer who had awarded a puff pastry contract. Indeed, with respect to that retailer, if we go to page 690 in the bundle, which is behind tab 86 -- this is the phase 2 questionnaire I was mentioning a moment ago. You see that reference at question 18 which is specifically asking about switching to alternative suppliers of private label products:

"Who would you switch to? Please indicate their suitability and provide reasons for

your choice."

Whilst we are here, we can see Henglein, the brand name Golden Acre, is referred to and the score that they get from this retailer, with reasons. We'll come back to that in due course but whilst we are here, I ask you to note that. Extent to which they can cover all the products which is required and whether their products are suitable.

Then when it comes to Bells, again a much higher score, four, but that's short of five which is "fully meet your requirements."

"Puff pastry specialist is able to produce, in line with our guidelines. However, factory capacity and ability to expand is a concern but they are chosen to that extent because of the quality of the product ..."

And so forth. That's 690.

Then the same questionnaire at 693, question 22.

The question was:

"How easy or difficult it is to switch suppliers of private label dough-to-bake products?"

Their answer was:

"Difficult."

Explanation of that answer is there were limited options in the market for an own label switch. The only two viable options are set out there:

"Each have challenges when it comes to ingredients, range capability and/or capacity at site. We've made a decision to switch part of our own label requirements to Bells, as indicated above. Bells are unable to service the entirety of our own label dough-to-bake demand."

But the very same observation which, independently, that other retailer I was referring to a moment ago also made. My learned friend says a gross error. Because this evidence which the CMA is entitled to accept, not least where, as we've seen, as I've tried to draw out, this does not resolve itself just to: how many kilo tonnes can you run

off your production line?

The last reference I want to give you is in the tab 105. This, you will see at page 875, is the hearing with the same retailer I was referring to a moment ago, the one who gave the contract, the puff pastry contract. If we turn within that to page 16 -- sorry, that's bundle page 890 would be a more helpful reference -- where the representative from that retailer answers the question similar to the one that was being put to me earlier:

"In the event of a price rise coming through, our ability to move volumes to other suppliers to mitigate the impact of that price on customers, is impeded because there is limited capacity in the market elsewhere. Clearly, since we submitted our first submission, we have been able to move some volume into Bells, so some of that concern has been alleviated, albeit we moved the maximum amount of volume that we could into Bells and there is no free capacity to do any further, so I still think there is a limit to our ability to move volume to alternative sources in the new world to mitigate any price inflation."

Now before it's said, well, that's wrong, we know that they had extra capacity, again, from an informed reader's point of view, we know that just because you have capacity to produce more puff pastry, that doesn't mean you have capacity to produce the rest. That's what they mean when they say "we moved the maximum we could." As we've seen, they moved the puff pastry but they had concerns over moving anything else.

So with respect to my learned friend, that is a consistent evidential picture coming out as to the limits of that capacity and the question then becomes: well how is that characterised as a public law error on judicial review grounds? That appears in my learned friend's skeleton at paragraph 40, as all being a manifestly incorrect assumption, ie something not based on any evidence and wrong.

But there's no assumption at all. It's the product of careful consideration of the

evidence before it, resulting in a permissible view of that evidence. No doubt one could argue the toss and say: ah well, this and that and maybe with a bit of investment here and investment there, such and such could be done. But that's a reasonable reading of the evidence.

I just want to find also the document, the note of call on 25 November 2022, just to complete that run, which I think is at -- I think it's in a different bundle, that's why I have lost it. I am so sorry, I have lost the reference because I have flagged it in this bundle and that's because it's not there. I will dig it out now. Yes, I have it, I have flagged it here. It's in the full version of the March disclosure bundle, volume 3, at tab 144.

So we can put away the CMA's confidential bundle, if that is still out. The March disclosure bundle, tab 144. This is just to make good what I said earlier. It's page 1428. You can see it's the minutes of discussion with Bells. Now we are in November 2022. You can see here is the reference which I made earlier, paragraph 2, to Bells' management. It's clearly set out there. It prefers producing for the retail sector and so forth. It's marked as confidential in the reports. I won't read on further.

Over the page, you see the concerns at paragraph 5 as to what would happen if Bells switched production. There's pros and cons set out there which I referred to earlier. At paragraph 7 is the limits on their production capacity at the moment. At 8, if a similar opportunity came up, they could look at whether that's worthwhile but they say -- again, I will let you read it, it's confidential -- what they would like to do first, given the new national basis, before making that switch.

Again, under the next subheading, "Confirmation as to the contract", observations as to the margin and how that relates to other margins. 10, Bells' commercial team are keen on one plan but the unknowns there. Then at 11, they are no longer talking about the commercial team or management, they are talking about the shareholders and what they may do. Everything is currently done under one roof, in terms of the bakery.

At 12, confirmed what it could do with its current capacity, so that's the additional amount the CMA allowed for in its assessment. There's the point that something slightly smaller would -- what is said there.

THE CHAIR: But is that current capacity dependent upon moving --

MR PALMER: No.

THE CHAIR: I have to be a bit cryptic.

MR PALMER: No, that's what was clarified, that's what was ascertained by this point --

THE CHAIR: Yes.

MR PALMER: -- is they were contemplating a wider but no decision on that. It depended on -- management had one view, pros and cons, nothing certain. But beyond that, they still had an amount of capacity available, not that they wanted to use it all.

THE CHAIR: That's by increasing the number of hours and stuff like that, isn't it?

MR PALMER: Yes.

THE CHAIR: You have the point at 10, which is you've got switching from one to another and you are saying: ignore that, it's the stuff at paragraph 7 that they'd have to do to get to paragraph 12; is that right?

MR PALMER: Yes, they could do that. That's how they would do it on existing capacity without making any other changes.

THE CHAIR: Yes.

MR PALMER: That's what, if you like, the CMA assumes in its favour they could do and looks at what the result of that would be. That's fully taken on board. Again, it's all qualified and 12 and 13 goes on into what they'd do beyond that.

THE CHAIR: But even that's not clear because they've got a caveat in the second line from the end, in the second and third lines at the end, in paragraph 7.

MR PALMER: Yes, and you see their priorities reflected at 18 and 19 which now they are being asked to consider what they'd do if Cérélia was made to sell the Jus-Rol business as a consequence of the CMA's decision and again it's qualified at 19. They describe themselves. That's all secondary consideration because that's obviously on the basis of what would happen if we go back to the pre-merger situation. But, again, it's where their focus lies and the extent to which they see themselves as a competitor to the existing model of Cérélia, so a pre-merger version of Cérélia and, indeed, Jus-Rol.

So, sorry, that was because it's in a different bundle, I couldn't find it but that completes the run of that evidence and you see that provided an evidential basis for that predictive assessment which is we either agree or disagree with the conclusions but they are not irrational and can't be said it's not based on relevant probative evidence.

So that's Bells. Then we come to Henglein and that means going back to the core bundle and the Final Report at 9.226. You see, again, there's a review of the evidence on this which is quite extensive. It runs from 9.226 through to 9.241, with the assessment of that evidence from 9.242 through to 9.246.

The complaint at 9.246 was like Bells, that this supplier offered only a limited competitive constraint on the parties. Now my learned friend's oral submissions on Henglein focused on the scale of Henglein's operations and its capacity compared to Cérélia's and he relied in that regard on 9.230 which is on page 259 and the capacity figures there and the existence, therefore, of some spare capacity, being the figure between those two sums.

The statement shaded in grey on the third and fourth lines, that's what he relied upon. But this overlooked the point, the CMA's analysis about the lack of constraint or the limited nature of constraint, I should say, posed by Henglein, was not based on any misapprehension about its capacity levels, first of all. We see that from FR9.243 to

244. Some retailers didn't consider Henglein an attractive alternative, due to its use of alcohol, gaps in its range, that was the point I asked you to note when we were looking back at one party's phase 2 questionnaire, when they were asked to address the suitability of Henglein and gave the two, that was one of the points they identified, and retailers' preference for UK based supply.

However, some, including its current customers, considered it a strong alternative. So its positioning as a non-UK based suppliers, seen by retailers to pose some barriers although only to a degree. And while it appears to operate close to its capacity, it confirmed what is said there which is relied upon by my learned friend.

At 9.244:

"As ready outlined, the CMA's concern about the limited nature of the constraint imposed arises not from its absence of capacity but from the express preferences of major, larger UK grocery retailers to use UK based suppliers and suppliers whose recipe formulation does not include alcohol or otherwise able to meet their technical requirements."

There's conclusions there where at 9.245, two particular retailers do not consider Henglein a credible alternative, for really one or other or a combination of those reasons. I need not go through what is set out there at 9.245, A and B.

So the first point in terms of, again, applying a judicial review test, the CMA here is explicitly recognising and taking into account the points prayed in aid by Mr Kennelly about Henglein's excess capacity but emphasising its view about the limited constraint provided by Henglein is based on other considerations, namely express preferences of UK retailers.

So the first point, limited nature of constraint arising from express preferences of major retailers, that's 9.245 and that is particularly important in respect of the first of those two named retailers, given -- if you just keep a finger in that page and turn back to 106,

core 106 -- where that retailer lies in the first column, in terms of its overall percentage share of DTB sales compared to others. That's knocked out, as is the next one, as made clear at 9.245B.

Importantly and consistently with what the CMA was told by those retailers, Henglein itself acknowledged the limitations on its ability to compete in the UK, see 9.245B:

"It acknowledged its ability to compete had been affected by recent changes in market conditions, including Brexit. In particular, less flexibility from customs handling, custom fee and entry costs exchange rates. Increase in transportation and petrol costs made it expensive and have to export ..."

And that's what was in line with evidence which was also received independently from two retailers.

They suggest they had a preference for UK based suppliers for two reasons:

"Supply chain disruption risks [that goes back to post-Brexit and so forth] and reduced their carbon footprint."

So Henglein itself's view was to the same effect and the CMA also relied on the fact that Henglein's presence in the UK has gone in a particular way since 2016. Can we look at 9.246. You see that five lines down:

"Despite its established position with some retailers in the UK retail market about its ability to meet the capacity ..."

The CMA notes that its presence in the UK has done what's described there, since 2016, in particular due to those events involving the two retailers. It's not the same two as the couple (inaudible) we've been dealing with, there's a new entry, as it were.

"Henglein's estimated share in 2023 would therefore be only slightly over one sixth of the merged entity."

Also further limitations described in 237, making it less suitable and that's about product specification issues and gaps in the product range. And that's turning back to

237. So that's a combination of some of the things we've seen before, such as alcohol but also gaps in the range and one retailer saying there are key products missing.

Also relevant to note, in terms of the evidence before the CMA, the views of other DTB suppliers. Reading my learned friend's pleadings and skeleton argument, one would be forgiven for thinking that the CMA had only sought evidence from retailers in this investigation but, in fact, there's a good example of relevant and probative evidence being provided by other DTB suppliers at FR9.238 on page 262.

You see those references there.

So a bedrock of probative evidence to the effect that competitive constraint was only limited, notwithstanding the headline news about its capacity on which my learned friend relies and which, of course, was taken full account of.

Can I just give one other reference. This is to the Final Report, also at 7.48 through to 56 which are the identification of the other parameters of competition and you see some of these points reiterated, making clear it's not just a question of: give me your capacity. Innovation is important. But when asked about a specific manufacturer, who's there identified in 7.49, one retailer highlighted its limitation in range, one retailer mentioned its strict requirements in relation to the use of ingredients. Again, I have mentioned that. Others who do use this supplier are less worried about that fact. Sustainability is a parameter of competition. You can see those conclusions through to 7.56. So all of those parameters of competition were taken into account in reaching this assessment as to the limited or otherwise nature of the constraint.

We say that's rational, there's probative evidence underlying it. Again, one can agree or disagree but it's a nonsense just to say: look at the capacity, that's the end of it. No rational regulator could have arrived at this conclusion.

Now that only leaves Cérélia's complaint that the CMA changed its mind about Henglein between the provisional findings and the Final Report. That's the main way

in which the complaint about Henglein is put in the written submissions which the tribunal has had. There's only a glancing reference to it in oral submissions yesterday. But the key point is that there was no material change between the provisional findings to the Final Report, in terms of the substantive assessment of the constraint provided by Henglein.

The conclusions in the provisional findings, you need to turn to the core bundle 10 -- sorry, tab 10, page 652. If you read 9.261. I am particularly concerned with B. So it's:

"A material constraint mainly in case of its current retail customers [you saw earlier who they are] but weaker competitive constraint in case of the large retailers. This is because Henglein, although it has some spare capacity, presents a less compelling offer to them."

That is what is said there in the PS. Indeed earlier, at 9.220, that's at page 640, which is the provisional conclusion that:

"PL suppliers individually and in aggregate, exert only a limited competitive constraint on Cérélia, even less on Jus-Rol."

Then the provisional conclusions over the page in respect of Henglein at B.

THE CHAIR: Sorry, what page are you on?

MR PALMER: Top of 641.

THE CHAIR: Yes.

MR PALMER: "... dealing with PL suppliers based in the EEA offer some competitive constraint. In particular, while the competition that Henglein is likely to offer in relation to its current retail customer is material, it would be less likely to constrain the parties when it comes to contracts to supply large retailers. This is because Henglein presents a less compelling offer to them, due to its use of alcohol, gaps in its range and retailers' preference for UK based supply."

9.197, just turning back further, page 635, through to 199, this passage that my learned friend refers to in his submissions, in particular at 9.199:

"We consider Henglein to represent a material constraint on the parties, particularly in relation to competition for smaller supply contracts of the sort it has now. That it's likely to be weaker when it comes to competition to supply large retailers, for the reasons described immediately above ... provisionally conclude that the constraint is likely to be confined to PL supply, with minimal impact on Jus-Rol."

My learned friend says all of this is a big change but it isn't, as far as we tell it. Clearly it's a limited material, yes, but limited and limited in the important respects which are identified and relied upon.

It's said that nothing changed. In fact, I don't want to overegg the point but there was additional evidence relevant to it. I am not saying everything turned on that because nothing really changed. But some of the evidence was gathered post PS. I'll just give you the reference. 9.232 of the Final Report in footnote 759. I am not saying that's a game changer but the main point is there is no real change. The key point is the overall assessment of Henglein in the Final Report at 9.310 to 3.13. The reference for that is core bundle, 283 to 284.

That's where we end up, particularly at B, where again, you have the same language at page 283:

"Henglein do represent a material constraint, mainly in respect of its current retail customers but a more limited competitive constraint in respect of others."

Familiar explanation as to why that is. So we do not detect any change. It's all to the same ultimate effect and it doesn't disclose any irrationality.

Now although I don't recall that this formed part of his written argument, my learned friend yesterday, also sought to rely in oral submissions on a point on the competitive constraint that would be imposed by a combination of Bells and Henglein. He went so

far as suggesting this combination could "wipe out" Cérélia. But the first point is, for reasons I have shown you, the CMA was entitled, unlike my learned friend's submissions, to conclude that in each case, the constraint was limited and, two, limited constraints don't automatically amount to a material constraint in the aggregate, see 9.267 at core bundle 270. Where, again, an assessment deals with that in the round and concludes that individually or in aggregate, they are likely to pose a weak constraint. Sorry, that's on others apart from Henglein. Have I given you the right reference there? 9.267, yes, again you see those conclusions.

Yes:

"For reasons set out, we conclude that PL suppliers individually and in aggregate, exert only a limited competitive constraint on Cérélia, even less on Jus-Rol."

The second point is, of course, to remind the tribunal we should not make unrealistic assumptions about how competition post-merger would operate. In order to get to this positive state of affairs in which Bells and Henglein might pose a more significant constraint, my learned friend was essentially inviting you to make a number of contrived assumptions that involve Bells winning exactly the right contracts, the ones which Henglein can't win, for the reasons the retailers have identified. So Bells would have to step into those ones and Henglein also, in its own words, reconfiguring its production, at 9.230, to supply another, different large retailer which as it happens, would reverse the observed decline in its market shares over time and involve winning back a customer who has said that it left them because of the quality of its products.

Now take Henglein as the example. We've seen, essentially, it's not an option for two of the largest retailers because of their concerns identified. We know that it lost a tender run by another major retailer in 2017, that's at 9.227, and there really were good reasons in this, a rational basis, to doubt that it was a credible alternative.

The MAGs do not require, rightly, the SPA to make assumptions of this kind about: well

if this person won that contract and this other supplier won this contract, collectively they'd have a bit more muscle in the market. That isn't required when assessing the strength of alternative competitive constraints because what we are doing is standing back and saying: look, is it more likely or not likely there is, bearing in mind the extent of the constraints together, an SLC, bearing in mind what we know about the loss of the competitive constraints? We don't have to assume a planned economy in which various eventualities turn out.

That would be a crude approach and, of course, it wouldn't pay any regard to what we know about the preferences of the retailers and the views of other suppliers.

So even if one makes these heroic assumptions in Cérélia's favour, there's no basis, in my submission, for the suggestion the merged entity would be wiped out and no analysis has been offered to support that speculative suggestion. Cérélia cannot escape that the merger involves a combination of by far the two largest suppliers and having regard to the probative evidence we've seen, it cannot impugn the conclusion that, together and individually, they represented a limited competitive constraint.

That's that point. I think that deals with ground 1A. There was one final point at the tail of ground 1A about the scope of the SLC being irrationally broad but that, again, is based on the now familiar misconception that the implicit competitive tension can only manifest itself in the context of a negotiation, where a retailer currently sources both JR, Jus-Rol, and PL products. The constraint is wider than that. This is fully considered in the report at 9.369 to 9.378 and a reasoned response was provided, upon which I rely. I simply say it demonstrates no irrationality. I am going to deal with the remaining grounds at a similar pace my learned friend did and focus on the points that he took in oral submissions. You have, of course, our written response in particular to the skeleton but also the amended defence, point by point, with every point pleaded.

THE CHAIR: Yes, I think you have a limited amount of time left.

MR PALMER: Yes.

THE CHAIR: And that grounds 2 and 3, you can take fairly quickly because it's all in there and we've read that. But, obviously, tell us your big points and ones in reply. On ground 4, I think we want help on, really, two things. What was the magnitude of the task when you've got to phase 2, to justify the extension? You are going to have to show us what was actually being put before the CMA, what was all the new stuff, how does Bells fit in, all that. I need to have those elements pulled together for me.

MR PALMER: Okay.

THE CHAIR: Then we've got the legal point where I want some assistance on which I mentioned earlier. We will take a break now but you know what we would like you to focus on. Okay.

(3.20 pm)

(A short break)

(3.31 pm)

MR PALMER: Now I am going to deal with grounds 1B, 2 and 3 in pretty much one sentence formulations on each of the points which Mr Kennelly still pursued in oral submissions, before turning to ground 4.

On ground 1B, that's the irrational investigation, again a high hurdle, the main point that my learned friend stressed was a failure, he said an irrational failure to tell one retailer that they were wrong about their understanding of Bells' capacity. There are two quick answers to that. One is they weren't wrong, for the reasons that I have given you. What they said was correct and reflected what they were looking for in a PL supplier, the ability to handle all of their needs which goes beyond kilo tonnes.

Secondly, even if there had been such a misunderstanding, the information which we are told we should have communicated, was and remains currently, marked with

confidentiality. At the time you are gathering this evidence, there is a separate process to go through as to what is confidential, what is market sensitive. The idea that rather than gathering evidence from parties, saying: tell us what your perception is, tell us what you know and then evaluating that, rather than doing that, you should be: no, no, you've got that wrong, let us tell you about the market, let us tell you about how it works, is completely unprecedented and quite wrong.

If someone does say something which is wrong, you can take that into account, that forms part of your evaluation. But in fact, it wasn't wrong and there was nothing to feed back, even if that had been an appropriate exercise to do which we say firmly it was not.

The second point under ground 1B was the suggestion, wholly unevidenced and without foundation, that the CMA might have been acting on a basis of a confirmation bias rather than from a position of an independent, neutral, fair-minded regulator who was prepared to change its views as evidence developed. We are firmly in that second category. I know, sir, it was you, the chairman, who drew that distinction. But the CMA does and has reversed its conclusions expressed in the provisional determinations, in response to evidence that's been obtained and there's nothing in this case for any evidential finding to the contrary and none was suggested by my learned friend.

Lastly on ground 1B, there still seemed to be a complaint about the fact that the CMA consulted in a rational consultation process, it was said, in the consultation of 19 December 2022 which is at tab 17 of the core bundle, page 753. I won't take time on it now, I invite the tribunal to read paragraphs 1 to 9 of that document which is the introduction, explaining the background to that consultation. Having gathered additional evidence, it was not irrational to consult upon it, it was fair to consult upon it. Additional information which was not in the PFs which was put to the parties for

their comment and feedback. That's called a fair process. So it's not an irrational consultation, what this boils down to that somehow, it was irrational to go on gathering information.

THE CHAIR: What's the bundle reference for that?

MR PALMER: Core bundle 753, behind tab 17.

THE CHAIR: Okay.

MR PALMER: So it really must be some kind of complaint it was irrational to carry on gathering information. But the MAGs make clear that evidence will always continue to be gathered during the whole course of the investigation and those interviews which are set out at paragraph 4 of the consultation documents, oral hearings and written evidence from certain parties, arose because of parties' responses to the provisional findings that what you are meant to do if you are the regulator, you are meant to respond. You are meant to say: well that raises a question I need to investigate. If it had failed to investigate those matters, my learned friend on the other side would be jumping up and saying: this is a Tameside case where, irrationally, the regulator failed to investigate, failed to make reasonable enquiries. There's nothing in it whatsoever.

Ground 2 is the remedy. You have our written submissions on that. There was only one point that was developed in oral submissions, concerning the geographic scope of the divestiture remedy and its inclusion of the Republic of Ireland, rather than just Northern Ireland. Three potential risks were explored at paragraphs 12.82 to 85 of the Final Report. Those were the passages that my learned friend took you to, without taking you to the introduction and making clear what the CMA was doing was exploring the potential for various risks, before saying that the real risk it was concerned about was one of consumer confusion.

But what my learned friend didn't take you to was paragraph 12.87 of the report which is on core bundle page 383, where the CMA explain what it was going to do about the

concern it had identified which was not simply to insist on a full divestment but to create a carve-out, allowing Cérélia the option, as part of the divestiture process, to seek to agree a carve-out of brand and other IP rights in the Republic of Ireland during the subsequent negotiations, on terms acceptable to the CMA and to the purchaser. And so that would turn on whether or not they could find a suitable purchaser willing to agree to Cérélia retaining Republic of Ireland and happy to buy, no doubt at a lower price than it otherwise would be paying, the rights for the UK only. That's the very measure of a tailored proportionate approach, well within the margin of appreciation afforded to the CMA on such matters and we explain that in the defence, we explain that in the skeleton argument. My learned friend didn't even mention it.

Let me put it this way. Having raised it explicitly in our defence, having raised it explicitly in our skeleton argument, my learned friend has not dealt with it. It's not appropriate to pop up and reply with a new point for the first time. It's nowhere dealt with in writing, it's no answer in oral submissions. It goes nowhere.

That was the only point explored in oral submissions on ground 2. I rely on our written defence in respect of everything else in the skeleton argument.

Ground 3 was the so-called procedurally unfair investigation. Again, what was explored here in oral submissions was the refusal of disclosure requests, to which the answer is, sir, as you have alighted upon: well that all depends on whether the gist was provided. And our submission is a very full gist was provided in an entirely fair way. Even before the provisional findings, the annotated issues statements and the working papers provided very full information as to the CMA's consideration.

The criticism, specific criticisms of the questionnaires that my learned friend makes, is not a gisting complaint at all. This is about the criticism that it didn't refer to wholesale suppliers rather than retail and make the question clear which I have already addressed and said to be unreal. No separate point on unfair process arises.

So you've asked for a document on that. We've received a draft document this afternoon. I have not had time -- it came during the course of my submissions since lunch but I understand it doesn't do what you asked for which is to identify aspects of the gist in the provisional findings or earlier which were positively misleading. That's the exercise as we understood you asked to be done. None are identified in the Notice of Application. I understand and I have only had a quick review on my phone during the break. I couldn't see. Rather, they've addressed findings in the Final Report which they say are based on misleading evidence which is not the same thing at all as -- again, it's going back to the ground 1A points, not this --

THE CHAIR: Even that schedule would be some help.

MR PALMER: Sorry, sir?

THE CHAIR: Even that last bit that you have mentioned, it's still going to be helpful to have that.

MR PALMER: In connection with ground 1A, potentially, but not in connection with ground 3. I say no more about that. It might be I'm being unfair, on a slow review of this draft that we've just received. We'll deal with that as soon as we can. So ground 4, if I may.

The meaning of special, special reasons. The key point here, firstly, is as to the framework. We are largely agreed, in fact, as to the approach. Obviously, the meaning of words in a statute are a question of law and it's for the court always to interpret what they mean. My concern about the difficult job that the tribunal has in that regard in this case is it is really important, just like in the South Yorkshire case which you've seen reference to, and just as warned against in that case, that the tribunal doesn't approach that job of substituting the words "special reasons", with different words which, in fact, put a different gloss on those words and change or narrow the breadth of the meaning. Which is "special reasons", on its face, is

a particularly broad concept. It's my submission that Parliament was deliberate in providing a broad concept. That doesn't mean unlimited. That doesn't mean we couldn't identify things, just as in the South Yorkshire case, which fall outside the definition of special. For example, routine or ordinary wouldn't be special. It doesn't really help you answer the question though, as to what is special. A central submission though and, again, I risk -- even in saying that might give rise to confusion, when I say: well, routine wouldn't be special, is instantly I've used a term which might suggest that this might depend on the frequency with which such reasons arise from case to case.

Indeed, that's the way my learned friend puts it to you. He says it must be unusual or exceptional, again suggesting it must not come up very often, such reasons. Any reason that comes up frequently can't be special. That, in my submission, is flat wrong. I don't want to be, you know, glib but all of my children are special in their different ways. I don't say to one: you are special -- they are all special in different ways. It doesn't matter how many I have, they are all going to be special. You can have many special things, you can have special things occurring frequently. What make them special is the fact they don't fit within the normal expectation of the workings of the process which Parliament provided for.

If I were to attempt a definition, I would seek to model myself as closely as I could on the approach that the House of Lords took which you'll see in authorities bundle 1 at tab eight, the South Yorkshire case and the speech of Lord Mustill.

THE CHAIR: I think we are fairly familiar with it. Just give me the paragraph number.

MR PALMER: It's the page in this but there are two passages --

THE CHAIR: Yes.

MR PALMER: -- I would like to refer you to. The first is at 29(c):

"The courts have repeatedly warned against the dangers of taking an inherently

imprecise word and by redefining it thrusting on it a serious degree of precision. I will try to avoid such an error."

And to do that, he adopts the words of Lord Justice Nourse, in that case talking about substantial. He is saying:

"... worthy of consideration for the purpose of the Act."

Later, having rejected various definitions which the parties have relied on at 31H to 32B, he says:

"Well, having rejected all those definitions, the parties could reasonably expect, since the test for which the respondents contend has been rejected, another would be proposed in its place. I am reluctant to go far in this direction because it would substitute non-statutory words for the words of the Act which the Commissioners are obliged to apply and partly because it's impossible to frame a definition which would not unduly fetter the judgment of the Commission in some future situation, not now foreseen.

"Nevertheless, I believe ...(Reading to the words)... with one qualification, the words of Lord Justice Nourse ..."

Then he develops that into the case of substantial meaning:

"... of such size, character and importance as to make it worth consideration for the purposes of the Act."

Now we can attempt some similar exercise in the context here, as long as we link it with the purposes of the Act. The reasons must, in other words, be sufficiently special to justify a departure, limited departure, the eight week extension provided for, within the context of the Act.

In my submission, a special reason is one which arises from circumstances which prevent the CMA from fulfilling its statutory duty within the specified time despite all reasonable efforts to do so with all due expedition.

Now there might be any number of circumstances. Some of them would be completely extraneous to investigation. The examples given in the explanatory notes included a member of the panel falling ill. That just means you are not going to be able to do the job you have. You have a duty to identify whether or not there's an SLC and a duty, a statutory duty, if there is, to identify the remedy. And if you have an illness, it's going to stop you from doing that. If circumstances change in the competitive conditions because of some extraneous development in the market which means everything that you've been assessing so far has to go out the window, you have to begin again because the landscape is different, well that would be a special reason because you can no longer do that which is demanded of you within the time.

What my learned friend wants to do is to introduce a constraint and say its intrinsic circumstances only. You can't have anything intrinsic to the investigation but which has the same effect. My submission to you is there is no basis in law for that at all. You can have an investigation which simply cannot be completed in the circumstances of the case within the ordinary time permitted. Bearing in mind, although there is this, on its face, statutory duty to complete it within the initial time, subject to the special reasons arising, the CMA has other duties as well; those duties being to act fairly, to consult, to allow sufficient time for consultation, not to unreasonably curtail it, to take into account all of the evidence and submissions which are made to it by the parties, conduct such further enquiries as may be required arising out of that, consult on that, as in this case, produce a reasoned decision.

Now it may be said all of that happens in any case. Yes, of course it does but in some cases it will be literally impossible to do that fairly and taking everything into account and producing a reasoned response and allowing sufficient time for everyone to respond and so forth to the PFs and the annotated statements within that time. My learned friend says that can't be special. I say it can because they are special enough

when they have a volume of material to consider, the complexity of what is raised. It's not just volume, it's not just feel the width, it's potentially equivalent to hearing bundle 2 that was produced in response, much longer than the documents that had been provided at the annotated issues statement stage and working paper stage for the parties to comment on.

You've got to work through that. Now you've got a limited number of options. If my learned friend is right, you can't extend time. You can either say: I am not giving you so much time to respond or you could say: in fact, I am not going to consult you over the annotated issues statement at all or provide you with the working papers. It's not provided in the statute, it's a matter of the CMA's practice. You could cut that out in order to squeeze everything routinely into the tighter timetable. That is an option but it would be (a) contrary to existing guidance and published procedures which would raise its own problems, and (b), obviously it would lead to a deterioration in the quality of the CMA's decision making.

THE CHAIR: Mr Palmer, you have 9 minutes left. What I am looking for, I thought I made it clear earlier, is on this topic. Just tell me what is the volume of material, what makes it outside the norm. It's not enough just to say there are a lot of submissions or: it's complicated. Explain why, explain what was coming in, what you had to deal with. That's what I am looking for, with cross-references.

MR PALMER: We've got --

THE CHAIR: And it --

MR PALMER: Hearing bundle 2, I started to open up the index --

THE CHAIR: Okay, hearing bundle 2. Yes.

MR PALMER: The index is quite helpful to serve as a chronology in a way, as well as a guide to documents but you can see the page at the top.

THE CHAIR: Give me the relevant -- when does the clock start?

MR PALMER: The clock starts from --

THE CHAIR: End of phase 1, isn't it?

MR PALMER: End of phase 1 decision. You see that, 15 July.

THE CHAIR: 15 July.

MR PALMER: Issues statement is issued on that date.

THE CHAIR: Yes, that's --

MR PALMER: Issues statement on that date. The response to the issues statement from Cérélia comes in a couple of weeks later, on 2 August.

THE CHAIR: Let's just have a look at this. Which tab are we looking at?

MR PALMER: Tab 17 is the response to the issues statement. That's fine. That leads to the annotated issues statement which provides the first real thinking on behalf of the CMA as to how it sees at that early stage, the points arising, the issues arising. What comes then in volume 2, after those initial emails at tabs 22 and 23, including -- it's 24 is Cérélia's response to the annotated issues statement. Then from tab 24, all the way through to tab 48, they are all dated 13 September. All the responses to the various working papers on the various issues. It's the sort of basis of what ends up being part of the eventual provisional findings and then Final Report on each issue, the working papers, the thinking and all of that.

Now you can see that that run, which arrives on 13 September, runs from page 579 through to page 1115 at the end of tab 48. There's also a response the next day to a section 109 notice and further considerations.

Now that is the point you see in Ms Daly's witness statement. She says: right, given how the parties have responded -- it's not just, of course, the volume, you can flip through the content to get an idea of the complexity and what was being faced with but we need serious analysis here, we need to engage with this, we need more time. It's identified right at that point.

So although the notice of extension comes on 5 October, that's tab 53, you get from Margot Daly's witness statement that decision was made in principle the previous week, at the end of September, having seen and reviewed, initially reviewed, what had been sent in.

That, of course, is when a decision is made. Now we know there were further complications when you got the provisional findings. There were responses to that that led to further consultation which needed time, until you get, obviously, to the Final Report.

But the call as to the need for extra time was made at that relatively earlier stage, given the complexity, given it wasn't just a simple horizontal, unilateral theory case, according to Cérélia. They had an entirely different theory, vertical input foreclosure and a detailed account of what they said, the reasons why they said that the CMA's concerns didn't arise and couldn't arise.

You have to make a judgment call, the CMA. Can we feasibly deal with this in the permitted time? If that were not capable of being special, that would put a serious constraint on the CMA's future consideration of all other appeals, all other merger investigations. Because the alternative is to say: you know what, we haven't got time to consider this, so we won't. We will do a superficial analysis only. The consequence of either course, the copper bottom appeal points taking time and delay, leading to remittal, in which case they can reconsider it, having had the benefit of time to absorb all that information which is a perverse outcome because the timetable doesn't constrain the ability to reconsider on remittal. So if you've done the best you can in the limited time, despite the impossibility of doing so, chuck something out and say: that will have to do because we haven't got any special reasons to say this needs more time, you end up in the perverse situation of certainly risking and potentially, inevitably, producing a report which doesn't properly take account of what has been said or

curtailing the length of time the parties have to respond to your provisional findings. In my submission, there could not be a more special reason than the obligation on the CMA to act fairly and properly and fully, in response to whatever the parties provide.

MR CUTTING: But that duty applies in all cases.

MR PALMER: Yes.

MR CUTTING: We are not saying there are special reasons in all cases?

MR PALMER: No, it's fact dependent.

MR CUTTING: It's fact dependent. So where in this timeline do things start getting out of sync with normal expectation?

MR PALMER: (Several inaudible words) that material on 13 September. That is what Ms Daly tells you in her witness statement which is admissible. It's not adding to the reasons. It's explaining the circumstances which lie behind the reasons. It's a mere public law principle, and my learned friend accepts it's admissible. Though she is saying: look, when we looked at this, we already have a tight timetable, it's already constrained. But, look, have you seen what they produced, there's a whole series of economic reports, there's more, there's this, there's that. We've sized up the size of the task. You cannot physically do this. You cannot do this within the time.

Now that is special and it is special, even if that situation occurs frequently because special is not a measure of frequency and there is no such limitation in the Act.

THE CHAIR: As a very minimum, on our own we are going to have to look through those submissions, perhaps not reading every page, to get a feel of the enormity of the task.

MR PALMER: Yes, I invite you to do so but when you do so, having decided the issue of law, if you are with me that it's capable, depending on the size of task, of being special as a matter of fact and degree, then we are in, as my learned friend accepts, a rationality challenge, where the CMA are completely barking mad to think we need

more time on this. Not: did they or didn't they or could they or couldn't they, which would be a totally unreasonable expectation to put on you, as a tribunal, if I may say so, but also, as a matter of law, wrong in a judicial review context.

MR CUTTING: But those responses were made, what two and a half weeks after the annotated issues statement?

MR PALMER: Yes.

MR CUTTING: So you wouldn't say that was necessarily delay by the parties.

MR PALMER: No, no, I think the short extension of time, I think was only a day. Again, if this wasn't going to be special, you would have to say no to every extension of time: we haven't got time for that but lose all flexibility to act fairly. But one can take it from all these that although some of the comments were limited to annotated, literally annotating the documents which had been provided, other reports had been provided from fresh.

Indeed, if you turn to Ms Daly's witness statement which is a convenient summary of what was provided there so you can see it in black and while, that's in hearing bundle volume 3 at tab 82.

Page 1514, paragraph 19, there is the list of what was provided and its nature. The point being that it's not only voluminous but the economic papers include complex analysis on the basis of vertical, as opposed to horizontal (inaudible). In other words, there was a completely different theory of harm being advocated and then rebutted, quite separately from the theory of harm. Because --

THE CHAIR: I understand that.

MR PALMER: Cérélia refused to be put into --

MR CUTTING: I don't know whether the other side are going to do this but the fact that they've been banging the vertical drum can't have come as news to you because they had been banging the vertical drum since the day of the --

MR PALMER: Of course that wasn't news. But the question is, how much time is it going to take us to assess what they've been provided in support of this. It's not just the mere fact of it being vertical. There's a whole economist's report and an indicative incentives analysis premised on that vertical input theory and so forth and much more. Look, were they barking mad? Were they irrational to say we can't deal with this in the time? I think time proved them right. When you look at the subsequent timetable and what they did and the further investigations that had to take place, they were right to anticipate that this would take, inevitably, extra time.

I need to cut, I know, to finish -- I know the other burning question in the chairman's mind is this: well, what if there isn't a special reason? And there's two answers to that. The first is this isn't a jurisdictional point. There's nothing in the statute suggested by my learned friend which suggests that if you miss the deadline, it's void. It's a statutory duty with which the CMA must comply. But the consequences of a failure to comply with a statutory duty to produce a report on time does not have the consequence the report is void. It's a procedural irregularity and the consequence of that has to be assessed first by reference to what Parliament's intention was and, second, as to the reasons, in fact, your basis for the overrun.

What is being said -- of course, there wasn't overrun on my case because time was extended and the CMA proceeded on the basis that time had been extended. What's being said now is although we didn't run to court then and get an interim injunction or direction from the tribunal or administrative court to say: no, you may not extend time, you've got to produce your Final Report by the original deadline, they can come retrospectively and say: although it was a lawful decision, as it was, all administrative decisions being lawful at the time that they're made, unless and until quashed, we can come retrospectively to the tribunal and seek to quash a decision to extend time and thereby seek to persuade the tribunal to quash the report because it wasn't done in

time. That's a series of logical fallacies because this appeal isn't an appeal against the decision to extend time, it's an appeal against the finding of SLC in the Final Report.

There is no separate challenge or judicial review of that decision to extend time. If that was validly made at the time the CMA acted on that basis and has produced the report on this time. If even within that, the tribunal were to identify some error of law which, in my strong submission, it should not, what would be the consequence? The consequence would be one of discretion. In this case, whether there should be a discretionary quashing remedy, it's obviously clear, in my submission, there should not be. Applying the common law principle articulated in the Simplex case, where a procedural irregularity wouldn't have made any difference to the outcome, you don't quash. If you can say with complete confidence it's inevitable the outcome would be the same.

THE CHAIR: Where is the reference to the Simplex case in the bundle?

MR PALMER: We haven't got that. It's arisen from the question you asked, sir, so we'll provide that.

THE CHAIR: Yes, provide that and then we'll add it to the bundle.

MR PALMER: Sorry, I made a mistake, I should correct myself. It's the referral date, not the P1 decision, not the phase 1 decision. The clock starts running from the referral date. I should have made that clear.

By the time of the phase 1 decision, you can see how matters progressed. There's no complaint of delay up to that point.

So that is the point. But there is a second point, what if there was no special reason here, in the estimation of the tribunal? The point I wish to make is it's not just a question of what is the consequences for this decision, the question would be: what would be the consequence for all decisions?

The CMA, as a public body, public authority which will always seek and does, comply with its statutory duties. If it was right, my learned friend was right that complexity and volume and the size of the task can't, in principle, make any difference, or can't amount to a special reason, the CMA would have to approach all future investigations on that basis which would require radical reforms to the procedure it adopts in any case of complexity. It would have to cut out steps which could still be done for simpler cases, such as the annotated issues statement. You would have time in a simple case to do that but if you have a complex case, such as the Microsoft and Activision in this world, something like that, you would have to cut out steps in order to do that within the original time frame. That's another case in which time was extended owing to complexity.

You have to go back to the original Parliamentary intention and say: is that really what Parliament intended by making this deadline? The answer is no, emphatically not. What it intended was that merger enquiries should proceed with expedition but fairly. So the 2002 Act and, of course, what one bears in mind is at that time, merger decisions tended to be a lot shorter, investigations tended to be simpler and expert reports tended to be less voluminous and so that's why the examples given refer to extraneous rather than intrinsic features.

But regardless of that, no such limitation was put on the meaning of the word special. This would have radical consequences. My learned friend said: it doesn't matter, leave it to Parliament. We say no, Parliament's intention is already clear. It wants things, in the interests of the parties, dealt with on an expeditious basis but sometimes expedition can run against the interests of the parties because it means, in practice, either they don't get sufficient time to respond or the CMA is left in a position where it doesn't have time to take into account what they've said. It would be perverse to conclude that that is what Parliament intended, that the deadline was so important that

it trumped those considerations. Of course it doesn't. It cannot.

So I say that both in the context of this case and with a view to the wider picture, I don't say that you can do this routinely and say: ah, we can just do that. Of course there's individual considerations. There's conscientious decision making, that's what Ms Daly tells you about in her witness statement, with consideration given upon receipt of this material. But if judgment is made in good faith on a responsible basis, in a way which is fully rational, it would be wholly wrong, in my submission, for the tribunal to disturb that conclusion.

THE CHAIR: Thank you, Mr Palmer.

Mr Kennelly.

MR KENNELLY: Yes, sir.

Reply submissions by MR KENNELLY

MR KENNELLY: I make three overall points which come before ground 4 which I will deal with last.

But on ground 1 and common ground 1A, in particular, I make three overall points. The first is it is very important to pin the CMA down as to what the alleged constraint is in this decision because the SLC depends on it. Mr Palmer ducked and dived about this constraint but, ultimately, he is stuck with what the CMA said in the Final Report. Whether it's called a threat or a risk of losing volume to the other channel doesn't matter. The CMA found in paragraph 9.101 and elsewhere that the retailers exercise a negotiating lever that they use to get better terms from Cérélia and Jus-Rol and that lever is the prospect or the threat or the risk of switching volumes between Cérélia and Jus-Rol.

Crucially, the CMA found that the use of this lever did not depend on the preferences of the retailers' customers. The CMA said that expressly in paragraph 9.101.

My second point is that even if the constraint is the one described by Mr Palmer, he had no answer to the fundamental flaw in the SLC because the SLC depends on retailers passing through any price rises by the merged entity to its customers. If the documents show us anything, it's that the retailers are not passive agents. If the retailers believe a price rise will cause their customers to stop buying Jus-Rol, for example, and not buy any other dough-to-bake product, then the retailer may absorb the change.

So whether the lever is realistic, depends on the retailer's own cost benefit assessment and diversion between private label and Jus-Rol.

That analysis isn't required in every case but on the evidence gathered by the CMA, it was obviously necessary here and it was irrational to assume in those circumstances, that the CMA's alleged lever would in fact be deployed.

Thirdly, in any event, I will come to the point in reply that Cérélia is constrained by Bells and Henglein and on the CMA's own case, that prevents price rises by the merged entity on the Jus-Rol side.

So I will go to the first point in reply, the constraint upon the SLC, the constraint upon which the SLC depends. On this, my learned friend Mr Palmer was very confused because, initially, he spent a lot of time telling us what the constraint was not. He said that the term "threat" had been invented by the parties, although as the chairman pointed out today, it was also adopted by the CMA. Although as I said a moment ago, nothing turns on that because Mr Palmer said the constraint wasn't a threat that the retailers would switch volumes, he said it was the risk that the retailers would do that which Cérélia and Jus-Rol understood, when they decided which terms to offer. It's hard to see the difference between those two things as a matter of substance.

Mr Palmer said this on page 103, line 17 to 23 yesterday. He said:

"If you are talking to Jus-Rol and they are seeking to increase their volumes there, you

might well be asking them, if you are a retailer, questions about what promotions you can offer."

And that's being done against the background where Jus-Rol knows they need to make it attractive if they are going to get those volumes, in circumstances where the PL supplier, Cérélia, would also be doing its best to be as attractive as they can.

Now I struggle to see the difference between that and an implicit threat that a retailer will switch volumes between Cérélia and Jus-Rol in order to get the most attractive terms from both of them. The real question is what is driving the use of that lever? Mr Palmer said I mischaracterised the constraint when I submitted that it was not dependent on consumer preferences. He went further and suggested I characterised the constraint as the retailers negotiating against their own commercial interests or ignoring commercial realities. I said nothing of the sort.

But that's a distraction. Mr Palmer tried to argue that the negotiating lever in the decision was driven exclusively by the current and anticipated demand of their customers. He said that again today, just before 11 am. That's just plain wrong. The CMA claimed that their negotiating lever or threat does not just track anticipated customer demand and we need to go back to the Final Report to see this. It's in the core, bundle as you know, on page 221. We should look very closely at paragraph 9.101. Page 221.

9.101:

"We have found that it's possible for retailers to adjust the share of their shelves allocated to private label and branded products."

Now this:

"While the preferences of end consumers are an important factor in these stocking decisions, retailers take into account various commercial considerations, such as which supplier gives the best offer on cost of goods."

So regardless of whether retailers pass on a wholesale price increase to their end consumers, we have found their optimal shelf allocation across PL and branded products will shift away from the channel which deteriorates its offer."

When the CMA says regardless of whether the retailers pass on, the CMA means the retailers not asking themselves in this scenario, how their customers will react. They are negotiating for a better offer and will, presumably, if it's a real threat, follow through on that threat or lever.

The Final Report made this finding based on a previous finding. Certainly a previous finding was prayed in aid of it at 7.10. We see that earlier in the document at page 137.

So before 7.10, just before 7.10, at 7.9, there's a reference to wholesale competition being linked to competitive dynamics at a retail level and the CMA says:

"Demand at the retail level significantly influences the amount that grocery retailers purchase."

That's the point that Mr Palmer said is the exclusive bedrock of the SLC.

But at 7.10, the CMA says:

"However [this is a different point], retailers' decisions about which DTB products to stock and the volume they purchase are also informed by broader commercial and strategic considerations."

Those are set out in the subparagraphs that follow.

The disconnect between the constraint and the particular current and anticipated customer demand, that disconnect, is echoed in the following paragraphs. I am just going to give you the references, in view of the time. 7.13, all from the Final Report, 7.34, 9.54(d) 9.60A.

So when the chairman said this morning, encapsulating I think, the CMA's constraint here -- and, sir, you said:

"When the retailer faces a request for an increased price from Cérélia or Jus-Rol and

if the price rise is no longer in the interests of the retailer, that retailer will decide whether to reduce volume or shelf space and take various steps."

The key question is what is meant by "no longer in the interests of the retailer."

Mr Palmer said that is tracking current and anticipated consumer demand. My point is the SLC identified in the decision, the constraint they identified that I've shown you, is on its own terms, not dependent on current or anticipated customer demand.

The question that you raised this morning, sir, about how realistic is the exercise of that lever, is a separate question which I'll come to. Now Mr Palmer went on to say that paragraph 9.101 is linked to paragraph 9.102. He rather glided over the two, to suggest I think, it was all the same point but there are two separate points. 9.102 says:

"In addition, we have found evidence that retailers adjust their mix to reflect anticipated end consumer demand".

That's a different point. And the answer to that, of course, as I have said earlier, is there is no discussion of what incentives the retailers actually have to absorb a price which is higher than the negotiating demand and I will come back to that. That's my second point about retailer incentives.

But sticking, if I may, with 9.101 and the true constraint which we see in the Final Report which Mr Palmer, with all due respect, sought to hide from, that is why I ask that question again: why are there no documents evidencing that constraint? That's the point that we make in opening and we make it again in reply. If the tribunal is with me that the constraint is not dependent on current and anticipated end consumer demand, if it's something else, then where are the documents evidencing that?

Now Mr Palmer, my learned friend, said yesterday it may be because the parties don't compete directly which is odd because the transcript refers to an earlier submission they do compete directly, albeit not in tenders, but the comment, in my submission, is

revealing. They are not competing directly and the extent of their competition at the wholesale level is revealed by the lack of documents showing any such competition. There's an exchange yesterday between Mr Ridyard and my learned friend about this lack of documentary evidence and as Mr Ridyard said at page 113, [paraphrasing]:

"But if there is this threat, it works pretty well in a tender negotiating process and you can see why in a tender situation lots of those kinds of threats would be made. You know your rival is bidding a better price. Unless you can match them, you are out of the contest sort of thing. Why aren't retailers using the same tools in this cross channel setting?"

My learned friend said:

"It's a different dynamic at work. In the tender context, a supermarket is looking for one supplier to provide its PL channel products. It's going from one to the other for a contract [for] ... a specific period of time ... to say: you are going to provide all of my needs through this channel, manufacture all of the ... products I want. It's clearly going to play them off against each other in that context, to get the best deal they can.

"In this context we are concerned with here, if you are talking about flexing volume, they are not looking for all their suppliers from one, they are looking to supply, particularly big supermarkets, products in both ... they want to supply both."

With respect --

THE CHAIR: What page are we on the transcript?

MR KENNELLY: This is on page 113.

THE CHAIR: I just need it for my note. Don't worry, yes.

MR KENNELLY: With respect, that answer does not make any sense. But when it comes to using a negotiating lever, what is the difference, whether you are negotiating to switch supplier entirely or switching significant volumes between existing suppliers? Because to ground a meaningful SLC, the volume switching must be significant. The

CMA has to persuade you there is significant volume switching here to generate a constraint upon which they base the SLC. On the CMA's SLC case, the negotiating lever they allege is just as real and just as potent as the one that is used in tenders because on the CMA's case, there is significant switching between channels and these products are regarded as substitutes.

Why would we not see on that case, the retailers saying somewhere, in all these commercial interactions which Mr Palmer says arise between retailers and Cérélia and Jus-Rol: if you persist with this price increase or that poor promotion, we will shift X volumes to private label or Jus-Rol, as the case may be?

Now the CMA says it's allowed to take bits of statements from the retailers at face value and in some cases, it is of course rational to take statements at face value. In these circumstances, on the basis of the evidence before the CMA, it was not rational to take those statements at face value in the absence of substantiation.

Mr Palmer showed you in the Final Report at paragraph 9.95, a statement by a retailer, saying that this lever or threat was "arising in every negotiation over the last few years".

THE CHAIR: But on that threat point, the first half of the threat which is: we could go to another PL supplier, was there before the merger and is there after the merger, subject to the points we know about.

The second one -- and so that is the one we need to sort of focus on, ie the threat to Cérélia or whatever, that: if you don't give me a proper offering, I can shift more to the Jus-Rol and that is the one we need to focus on. Because I think there is the bit about competition from -- or the competitive threat or whatever from other PL suppliers. That's there, whatever happens.

MR KENNELLY: Indeed, and --

THE CHAIR: And that is why it's important to focus on what is the additional threat or

additional tension caused by having the branded product.

MR KENNELLY: Indeed. To what extent is Jus-Rol constraining the PL supplier. To what extent is there a credible threat to shift volumes to Jus-Rol away from the private label products. The evidence there is overwhelming. Even the retailers themselves said it's very hard to shift, to divert customers from the private label product, the entry level product which is cheap, to the more expensive, significantly more expensive branded product. The CMA was confronted consistently with evidence saying: that is not a major constraint and you've seen it. One of the major retailers said: a much bigger constraint is the constraint within the PL supplier channel. That is at page 883 in the confidential bundle.

THE CHAIR: Yes, what's the tab number?

MR KENNELLY: Sorry, I will tell you now.

THE CHAIR: I don't want to turn it up. Just give it to me.

MR KENNELLY: I will give it to you.

THE CHAIR: I know exactly the bit you mean.

MR KENNELLY: It's on tab 105.

THE CHAIR: Yes.

MR KENNELLY: It's from lines 21 to 25 and over the page on 884. I fully understand the point that is made by my learned friend about how second guessing evidence is tricky territory for someone making an irrationality argument but on the question of the evidence base showing a constraint by Jus-Rol on private label pricing, there is no probative evidence to support that finding. There are some very general statements by retailers but nothing to substantiate. On the contrary, when the CMA dug deeper, the overwhelming evidence was that that is not --

THE CHAIR: You need to look at it the other way as well, don't you, the constraint on Jus-Rol in having the PL channel?

MR KENNELLY: Of course, but for both, there needs to be documentation other than documents tracking current and anticipated consumer demand. The retailers, we know, are not shy to deploy negotiating levers. GSCOP is a further reason why I would expect written materials and critically here, as the CMA put to the retailers -- and just to the point later about Bells and to the extent to which the CMA has a duty to put facts to retailers, Mr Palmer said it's ridiculous that we'd ever be expected to properly inform the people we consult. Well in this context, in this context, the CMA did quite properly put to the retailers: well it's odd you say there this constraint because Jus-Rol and Cérélia don't recognise it, the people who were supposed to be threatened don't know what you are talking about. And the CMA properly put that to the retailers and the retailers said: it's all implicit.

Our submission is to be real, this alleged lever should really be appreciated by those upon whom it's being exercised. It's their behaviour which is said to be constrained. Mr Palmer said in response: well it's all oral and that was an interesting submission because even if this is an implicit threat, the CMA appears to accept to some extent there is some oral interactions between the parties, where this lever or risk or threat is being exercised.

But even then, we'd expect to see a document, a memo, an internal email. There's nothing.

You have the point that the extent to which these competitive interactions happen is not as often as Mr Palmer made out. But in any event, you'd still expect to see a record recording the exercise of the constraint. So it's no surprise, we say, the CMA pressed again and again for written evidence, even after it was told it was all implicit. The problem was having pressed for documents, quite properly, and explanations, having been told that it was all implicit, instead of saying: well, really, that's not good enough to reach a rational finding that this constraint exists, the CMA went and said: okay,

we'll make the finding based on these unsubstantiated assertions by a small number of retailers, although commanding market shares.

MR RIDYARD: Oh come on, it's a small number but they are quite important, aren't they?

MR KENNELLY: It's a large market share, I fully accept that. The point is the size does not diminish the need for substantiation. I quite accept -- I am not making a point about the number of retailers.

MR RIDYARD: So what do we then do with the fact that these small number of quite large retailers have said they don't like the merger because they have said quite in terms, haven't they, that they do play off the two merging parties and they like that and they don't want it to stop? Do we override that because there isn't sufficient proof of that? Is that your submission?

MR KENNELLY: No, it's not for you to -- this is judicial review. The question is, was it for the CMA to override the concerns they were expressing to the CMA? And the answer is, rationally, yes, because when the CMA dug deeper, it saw nothing to support the particular constraint that they ultimately identified.

What was confusing the CMA and confuses my learned friend even now, is there a distinction between the retailer saying to the suppliers: our consumers want X or: our consumers want Y and you need to reflect that in the products you give and we'll shift shelf space to reflect that. That's never been in dispute. The CMA made a different finding, they found there was this other constraint, a lever which could be exercised that was not dependent on simply tracking anticipated consumer demand. And the CMA, when it didn't find documents to support that and it didn't find any examples or internal documents, it should have said: you obviously don't like the merger but there's nothing to back up this constraint.

The CMA hears complaints from people opposed to mergers all the time. It has to

either accept them or dismiss them, depending on substantiation. It cannot just take them at face value.

Just to be clear, Mr Ridyard, to the point you raised at the beginning of yesterday, nothing that I have said so far depends on any vertical theory. The threat is the constraint found by the CMA. That's not a function of any argument based on a vertical relationship. Our case does not depend on any vertical theory. I am dealing directly with the CMA's theory of harm as they articulated it, as a horizontal theory and the possibility of this rebalancing.

Now Mr Palmer suggested it was central to our case and that's not what my skeleton says and it's not what you heard from me yesterday or today.

MR RIDYARD: Sorry to interrupt, but when you say it doesn't depend on the vertical theory, do you mean it will be just the same if Cérélia wasn't making the products for Jus-Rol?

MR KENNELLY: It wouldn't be just the same because there is a relevant point that arises from that vertical relationship.

MR RIDYARD: Yes.

MR KENNELLY: And is the one I made to you yesterday, that for Cérélia, the CMA investigated whether Cérélia was indifferent as to whether products were shifted on the shelves between private label and Jus-Rol, since Cérélia is making both. And the question then is, that is highly material to whether the alleged lever or threat has any impact on Cérélia, if it's indifferent --

MR RIDYARD: Yes, I understand that but are you saying that the point you are making here would stand, even if it so happened that someone else was making -- or Jus-Rol was making its own product?

MR KENNELLY: I hesitate to give an answer on a hypothetical.

MR RIDYARD: Maybe it's an irrelevant hypothetical.

MR KENNELLY: I don't want to give up the points in my favour that arise from --

MR RIDYARD: No, we fully understand that does factor into the equation, don't get me wrong but I just wanted to know whether the point you were making was standing separately from that.

MR KENNELLY: Yes. Yes, it is indeed. And it's very important too, when you retire to reflect on what I have said in my skeleton and what I have said to you orally, rather than what Mr Palmer says is my case.

THE CHAIR: You can both do the same thing. You both say that the other one is misconstruing your case and both say they are false targets.

Mr Kennelly, one thing, just to help you while it's on my mind. When you look at the test of -- on SLC, you can say that I understand the bit that the situation that has resulted in SLC and that is a decision and, presumably, that will have to be on the balance of probabilities.

MR KENNELLY: Yes.

THE CHAIR: Is that right? But when it has the maybe expected, you know the other bit, how does that fit in?

MR KENNELLY: They simply show on the balance of probabilities, an SLC will arise. That is still the test. Yes, it's covered in Meta, it's covered in other --

THE CHAIR: It is, isn't? I have had this argument a number of times.

MR KENNELLY: It's not on the balance of probabilities, it may arise, they have to show on the balance of probabilities, it will arise. If Mr Palmer disagrees with that, he's happy to stand up but --

THE CHAIR: No, look, I have had that argument before, I just wanted to make sure.

MR PALMER: I think the wording reflects the difference between a completed merger and an anticipated merger.

THE CHAIR: Yes, that's absolutely fine.

MR KENNELLY: I will move on, if I may, to the second of my three points, before I get to ground 4 and this is even if the constraint is the one described by Mr Palmer, he still hasn't addressed the fundamental flaw in the SLC because it's addressed adequately. If the SLC depends on retailers passing through any price rises by the merged entity to its customers -- and I am repeating myself, but it was a point that he addressed and I am replying to him on this point -- if the retailers believe a price rise will cause customers to stop buying Jus-Rol and not buy anything else instead, then the retailers may absorb the change. So whether this constraint is realistic depends on the retailers' own cost benefit assessment. That depends on diversion between private label and Jus-Rol.

Because even if the retailer is thinking about current and anticipated consumer demand, if he's faced with a price increase, he has to decide whether or not to resist it. He has to decide whether or not to absorb the price rise, if the product is sufficiently important to its customers that they may not buy anything else if that product is not on the shelves.

That assessment is critical to whether this constraint is real or not which is why diversion is so important. I fully accept that diversion analysis is not required in every case but in this case, where it was so important to the question of whether the constraint was real, it was irrational for the CMA not to ask this question.

That's not least because of the material they did see about diversion between private label and Jus-Rol. Mr Ridyard, you asked or suggested yesterday that perhaps it was for the parties to put forward diversion studies to the CMA. Of course, it's very difficult for the parties to put forward retail diversion analysis because it's really retail diversion we are looking at here, because the question is to what extent are the customers of the retailers switching between private label and branded. And I am not saying it's impossible but it is extremely difficult for the parties to produce that kind of diversion

analysis at the retail level. Whereas the CMA has the tools to do that, not least because it is engaging with the retailers in these discussions and it has done so in other contexts without difficulty, even in the tight time frames available to the CMA in these cases.

On the question of diversion, the reason why it was so important is because of what the CMA was seeing (inaudible). Now my learned friend made a very surprising submission. He said there's no need to do a diversion analysis, he said, because if we had looked, we would have seen very high diversion. But in fact, what the CMA saw was what the tribunal saw and the picture is mixed. We have fragments of evidence because the full analysis was never done, but you did see again, as Mr Palmer -- the presentation on the Jus-Rol side on page 1035 of the confidential bundle, referring to percentage of customers who will not buy any dough-to-bake product if Jus-Rol isn't available.

Now that very large percentage that I referred to, of course did refer to a situation where no Jus-Rol product was available and then they would not buy any Jus-Rol or private label, they would not buy any dough-to-bake. I fully accept if there's some Jus-Rol there, a much smaller percentage will divert to those other Jus-Rol products but it was a very striking number of customers who would not buy any dough-to-bake product if there was no Jus-Rol available for them. That should have alerted the CMA to the real importance of this question.

Mr Palmer next took you to a document which showed what happens, what could happen where there is still some Jus-Rol on the shelves but just not the product that the customer might want. And there, the customers who won't buy any dough-to-bake, the percentage is smaller. It's still not much below 50 per cent, it's a confidential number but that's still a significant number which obviously feeds into the cost benefit analysis that any retailer would do before exercising this alleged lever. That was at

page 1311 of the confidential bundle.

Again, on this point, my learned friend took you to a document, confidential bundle-tab 84, page 654, which again gave a percentage of customers of that particular retailer who will buy both private label and branded. It was at paragraph 9 of that document. I am not going to take it up because I know you have seen it already. I am not going to waste any time. But it was a very large percentage. But the percentage of people who would not buy any dough-to-bake product, one can calculate very easily from that figure. From that retailer's perspective, the percentage of customers they would lose entirely in the dough-to-bake category if the Jus-Rol product wasn't there, again was highly significant.

It's those very large percentages of customers that would be lost to dough-to-bake entirely, that should have alerted the CMA to the importance of this issue.

Mr Ridyard put to my learned friend the question of retail pricing: to what extent is it relevant to ask when wholesale prices change, are the retail prices being flexed? It makes sense, said Mr Ridyard, on de-listing, to look at volumes changing in de-listing, to look at retail pricing decisions. Again, I would submit that goes directly to the point I am making, that in asking if this alleged threat is credible as part of the cost benefit analysis the retailers are doing, one has to look at impact on sales and impact on retail pricing, as a response to these kinds of volume flexes and price increases. We just don't see that at all.

THE CHAIR: I think the point you are making -- maybe it's not the point you are making -- when you are a decision maker, you make a decision on the basis of the evidence before you and you make it normally in a civil context on the balance of probabilities. You just have to make it with whatever you've got before you and you'll come and reach a decision.

But where you are the investigator and the decision maker, it's a different scenario

because if, as an investigator, you only go out and get one piece of evidence and you say: well looking at that one piece of evidence, it goes this particular way, so there is an SLC. They may make the right decision in those terms, assessing that piece of evidence, that's right, but if in fact, they would have a duty to go out and get other types of evidence which you've been outlining, then when it comes to making that decision, that decision could be flawed because you can say: well, on the basis of what they had, we can understand why they find an SLC. But if that is only part of the universe that you need to consider to make the right decision, then it's a different kettle of fish.

So it's not merely a question of just looking at what they've got, it's a question of looking at what they ought to have got and what material they ought to have got before them, in order to reach the decision.

So I think that's a fundamental distinction that I think you are making and I hope I have fairly summarised what your case is on that.

MR KENNELLY: Sir, yes. And that's why we invite the tribunal, in a rationality sense, to say that there is no probative evidence to support this particular constraint because among other things, it lacks the necessary foundation from the retailer's own cost benefit analysis, the retailer's own incentives and ability to actually exercise this threat. In the absence of that analysis, you can't have probative evidence to support the ultimate constraint that they found. That's just a gap so large that the SLC cannot stand.

MR RIDYARD: It could be argued one way of sort of closing that gap or the CMA may argue it has closed the gap by reference to the information about performance of products on the retailer's shelves. Because if you think about -- a wholesale price increase occurs for whatever reason. Now the retailer has then a tricky problem as to whether to pass that through the higher retail price or to absorb it in full or in part. We

understand that's a tricky problem. You've talked about some of the dilemmas that might face the retailer in making that choice.

But either way -- let's say -- let's look at the two extremes, one extreme, it passes through the wholesale price increase to a higher retail price. As a result of that, the sales of that product are likely to go down. Higher prices mean lower sales and, therefore, that product is going to perform less well on the shelves.

The other extreme is that the retailer says: I am going to absorb that price rise because I don't want all those nasty things to happen downstream, in which case the retailer's margin gets squeezed horribly and, again, the product will perform less well on the retailers' shelves. Either way, whether it passes the wholesale price on or not, the retailer can still, one could argue, go back to the supplier, saying: because you've raised the wholesale price, that product is not performing as well on these shelves and because there's only a fixed amount of shelves available for these products, that is putting you down on my pecking order. Your product is doing less well than it was doing before you raised price. And that's a bad thing and unless you do something about it, you know, you are in trouble. I mean, very crudely, that is the story I think one might have been hearing from the CMA.

So on that basis, it's the performance of the products on the retailers' shelves that is the focal point for all of these changes that are taking place. Could it not be argued that retailers do seem to be quite focussed on that? There's plenty of correspondence on that and toing and froing on those questions about whether products are performing or not and if so, what do we do about it and that could be where the actions is, if you like?

MR KENNELLY: Sir, to answer that question, the first is I come back to paragraph 9.101 because the constraint which the CMA identified in that paragraph is not about tracking current and anticipated consumer demand. The constraint there is

not the customers don't like your product or they won't like your product. The CMA is very careful to separate that separate consideration from a power to exercise to get better terms, better conditions which the retailer can deploy. That's the first point. But the second point is even on the hypothesis put to me by you, sir, for the retailer to use this constraint, for it to be a realistic lever, they have to be able to follow through and say: if you don't do this, I will pull your product. The retailer won't make that threat, won't follow through on it and it has to be real if it has to be threatened at all.

MR RIDYARD: It very seldom pulls the product but I am not talking about pulling -- de-listing party talking about -- saying there's a consequence of that action and it was actually paragraph 9.101 that prompted me to make the point I have just made because that is where I think the CMA would argue at least, that these two things do come together.

MR KENNELLY: Indeed, but even then, the retailer has to assess for itself whether to even make the threat because it will depend on whether the product can actually be pulled -- or the volumes reduced because customers want those volumes or not. That is the assessment retailers have to make and the CMA doesn't engage with that at all. The CMA assumes that the price rises that are threatened produce instant impact on the customers, as if they were selling to them directly. They've not analysed how the retailers deal with those threats, with those threatened price rises and they have to do that in a systematic way because it makes a huge difference to whether this threat is real or not. My point, which comes out really clearly from the documents, is many, many customers with large percentages want the particular product and will not divert to the other and that should have a massive impact on whether this threat is real or not and that is what the CMA haven't analysed.

THE CHAIR: One of the things is that some of the enquiries you say should have been made, the CMA say: well we've got enough, we don't need to make those

enquiries, we can establish the SLC on the basis of what we've got. I presume what you say is -- well you can't assume that the additional enquiries that you say should be made will actually support their case. It may be that when you do those enquiries, they will come back with an answer that doesn't look -- in the same way as perhaps the CMA put in the case at the moment.

So it's difficult for me to say: well, I am going to presume that if certain enquiries were made, maybe they were made. But if, in fact, at the end of the day, there were certain enquiries which weren't made, it may be difficult to come to a view as to what the result of those enquiries would have been.

MR KENNELLY: I see that --

THE CHAIR: On timing, as long as everyone is happy to stay a bit longer, I think we do need to be a bit longer because we have questions and it is slowing you down and although you might think you would have had enough time, I doubt that you are going to be able to finish in 12 minutes.

MR KENNELLY: No.

THE CHAIR: So as long as everyone else is happy, I am happy to go on until 5.30 to let you -- because we have more questions as they come. As I have asked Mr Palmer a lot of questions, it may be that as we go along, I will have some further questions on other topics.

MR KENNELLY: I am grateful. On this point though, my case is not just if they ask more questions, evidence might have come through which would support me. My point is that based on the evidence that they have, there isn't a rational foundation for the SLC because the evidence they've gathered begs more questions than it answers.

THE CHAIR: I know what you say. You say the evidence they've got is not enough, on the balance of probabilities, to establish an SLC. I understand that point. I was making a different point.

MR KENNELLY: No, I understand that, sir, I just wanted to make sure.

THE CHAIR: I am not losing your first point which is obvious. You have been making that for the last couple of days. It's the second element that I was talking about.

MR KENNELLY: (Several inaudible words). I will move on now to the final point in reply on ground 1.

THE CHAIR: Yes.

MR KENNELLY: That's that the retailers enjoy strong competition in the private label channel, with Bells and Henglein willing and able to take on substantial contracts. You have my point that post-merger, this also protects retailers in relation to Jus-Rol because retailers can punish a Jus-Rol price increase by tendering out the private label contract.

That was the point I made on the first day. But the basic core of the CMA's case on this is in Final Report 9.312. Three pillars to establishing its finding on Bells and Henglein. The first was they have a small market share. Second, this is high level, was Bells' capacity and the third was Henglein's attractiveness to retailers. My submission is that each of those findings was irrational.

The first point about the small market share, I can deal with very shortly. It's obvious that the current market share or even the future short-term market shares of these companies, Bells and Henglein, are of very limited relevance here.

My learned friend said: well the MAGs said you always need to look at market share and I am not saying the CMA was wrong to look at market shares but in this context, market shares tell the CMA very, very little indeed. What is critical is the capacity and capability of these competitors in the PL channel.

Here, again, I want to turn to the point put by Mr Ridyard to my learned friend about the relevance of capacity because the CMA's error was that it compared Bells and Henglein to Cérélia and said: well Bells and Henglein are smaller than Cérélia and

each of them have drawbacks or flaws which mean that they are a limited constraint, full stop.

But what the CMA did not analyse was how painful, to use Mr Ridyard's words, was it for Cérélia to lose that chunk of capacity that Bells and Henglein could take and what was the impact on Cérélia of having that hanging over the market. That is the critical question. The presence of Bells and Henglein created a significant risk for Cérélia that operates as a constraint. It's not necessary to show that they can wipe Cérélia out. The question is how painful is it for Cérélia to lose the share they can take and is that a sufficient constraint.

THE CHAIR: Do we not need to factor in the perception of Cérélia itself on that? Because if Cérélia itself thinks: actually, these two companies could come in, irrespective of whether or not they can and take market share, then it may be more careful about what it does on pricing and quality of product because they are going to say: well, look, we think that there is spare capacity and we think these two people could come in and take some of our share if we don't keep our socks up.

MR KENNELLY: Absolutely.

THE CHAIR: And that applies both pre and post merger. So the question is, how much of a competitive constraint this gives and so I would just like for you to just focus on what Cérélia thought. It's in the report.

MR KENNELLY: Cérélia's concerns about Henglein?

THE CHAIR: About other participants on the PL supply line coming in, if they -- and so there are documents on this and it's best just to look at what is in the Final Report.

MR KENNELLY: Ms Berridge --

THE CHAIR: Ms Berridge will get the references both in the report itself and any underlying documents. I know there are references to the underlying documents.

MR KENNELLY: So it's obviously important to look at what Cérélia itself says.

However, ultimately, the real question is, did the CMA rationally analyse the evidence it had from everybody --

THE CHAIR: Of course, you are dealing -- I am just saying there's another limb to the analysis and not just the first bit.

MR KENNELLY: I am sorry, one second, sir. On the question of how painful it would be for Cérélia, one thing that the CMA did find and it is relevant, is that Cérélia itself had spare capacity in the market. And that's at paragraph 9.194 in the Final Report. Cérélia's very anxious to use its capacity to -- and we'll come back to this when we look at Cérélia's deal rationale -- to use that capacity to win business and there is significant capacity in the market generally.

So if we are looking at the pain to Cérélia if it loses business, that is a material question which the CMA didn't ask. Mr Palmer said: well it was rational for it to look at this and say: well it's all very limited, but they leapt from the particular inadequacies the CMA identified with Henglein and Bells, to limited constraint on Cérélia, without really asking: well how would Cérélia react to losing another national retailer, for example? That question was never asked.

So I will look at the Bells and Henglein in turn and I will begin with Mr Palmer's analysis and I will respond only to the points he made because he only looked at two retailers in this regard. And I will begin with the first -- it was the retailer which I began with also and its capacity and capability in order.

Now he relied on a statement by that retailer which is in the confidential bundle, tab 105, page 890, where that retailer said: we have no free capacity to do more -- sorry, they were saying that Bells had no free capacity to do more, having awarded Bells the contract that the tribunal noted earlier.

But to be clear, and I think my learned friend acknowledged this, that's a point about the fact that there are products, private label products that that retailer sells, filo pastry

and croissant, that Bells doesn't make. So that's about saying that Bells has a limited range.

But as the tribunal knows, Cérélia doesn't make filo pastry or croissant pastry. It's very important, when looking at the constraint that Bells and Henglein apply, to compare apples and apples and Cérélia does not make filo or croissant either. So that is a distraction from the key question which is how much spare capacity does Bells have, even after the large contract which it has won?

For that point and the point about the relevance of filo pastry and range, you will see the significance of filo pastry relative to puff and my learned friend showed you this and I am just going to give you the reference. You've seen it already, there's a figure 5.3 on page 107 of the core bundle. It's in the Final Report and it shows the significance of puff pastry as against filo and in my submission, filo is another distraction. Puff pastry is the main game and that's the main core product where these large manufacturers compete. And so when you see in that retailer's evidence, concerns about capacity to do more, about range, that's the concern it would express about Cérélia also. On capability, the willingness of this particular manufacturer to sell into retail and to expand beyond its current, very large extension, the recent contract which it has, you will have seen clear evidence of Bells' willingness to expand into retail and that's at page 1428 of the confidential bundle.

THE CHAIR: You will have to give me the tab number.

MR KENNELLY: Sorry, I was expecting that question. One second.

THE CHAIR: While we do that, we'll have a short break for the transcriber because it's not fair to expect them --

MR KENNELLY: It's at tab 144, sir.

(5.00 pm)

(A short break)

(5.10 pm)

MR KENNELLY: I was giving you a reference. I am not taking you to the particular document because you've got it in your notes and my learned friend took you to it, but just in reply to the point he made about Bells' willingness or capability to --

THE CHAIR: Yes, what was the reference again? Let me write it down.

MR KENNELLY: Confidential bundle-tab 144, page 1428. And my submission is that there was such overwhelming evidence of Bells' desire to do what I am about to describe, it was irrational to find otherwise.

Bells explained its commercial interest in moving into retail and, in particular, its interest in supplying a different retailer from the one it had just obtained. This is confidential but the tribunal have seen why it had a particular interest in supplying more than one retailer in this segment.

That demonstrates as clear as could be their interest in -- their intention to compete for other suppliers, other retailers in the market, and to supply a particular level of demand and we know what that level of demand would include, from the likely demands of the retailers we saw estimated in paragraph 9.175D of the Final Report.

So when Bells says: ideally, we would be supplying a different retailer with X kilo tonnes and you look at 9.175D, you can see what that would cover. And that's powerful evidence which the CMA found, of the competitive constraint that Bells exercises, not only in respect of the retailer it has just won but another large national retailer.

Moving on to another large national retailer. And the tribunal will see the link between what I have just been describing and the retailer I have in mind. This is the retailer where concerns were expressed about capacity and my learned friend tried to say: well when this retailer said it had concerns about capacity, it meant capacity to cover the full range because there is a suggestion in the text, full range is envisaged.

Again, if the concern is about an inability to supply filo or croissant dough, the examples given by my learned friend, well that's irrelevant because Cérélia doesn't supply those either.

We are looking at, to quote Mr Ridyard, how painful for Cérélia will it be if the chunk of this capacity is hanging over the market.

The problem with this particular retailer is they are asked questions about their perception of Bells' capacity, in circumstances where they are unaware of Bells' demonstrable capacity and capability. The CMA might have been forgiven for not putting this to this retailer at the beginning of the process but they were informed in June and it was obvious in July 2022 that Bells had won this very large contract from a major national retailer.

They were then consulting with this other retailer in August and September and November 2022. In circumstances where the retailer is saying: well we've concerns about Bells' capacity and capability to supply us, a retailer with a smaller demand than that in issue, it was irrational for the CMA not to say to them, as they did, for example, when they were putting the reality of the constraint, to say: well are you aware that one of your major competitors has switched a huge amount of capacity to this very company that you say lacks capacity and capability?

In order to properly inform the consultee in a consultation, it's incumbent upon the CMA to ensure consultees are properly informed and at the very least, if they are not properly informed, to be very careful about the weight to be given to their responses.

On the contrary, the CMA relies upon the fact this retailer says: we doubt that Bells has the capacity and capability to satisfy our requirements, in circumstances where it appears this retailer wasn't aware that Bells had, in fact, provided significant capacity to someone else and it demonstrated, thereby, its capability of doing that.

I will move on then if may -- sorry, before I leave Bells, obviously Cérélia's own view

of the Bells constraint is highly material because the question is to what extent is Cérélia constrained, to what extent is Cérélia worried about the pain it will suffer if Bells wins another major national retailer out of the four? Putting to one side the fact that doesn't even use up all of Bells' spare capacity on the findings that the CMA has made or at least not disagreed with the estimates given by the parties. And Cérélia's concerns about Bells are well documented. I will just give you the references, in view of the time. 9.189, in the Final Report. 9.192, and for the tribunal's reference, the underlying documents supporting this are in -- I will give you the PDB file because I don't think these are in the confidential file. It's PDB, first volume, tab 5, page 37; tab 4; tab 49; tab 50; tab 14 and tab 27.

So I will move on, if I may, to Henglein. The point that the CMA has about Henglein depends on the preferences of two retailers. It's not about capacity. That's not their concern. It's about the perception of Henglein by two UK retailers. One raised a concern about alcohol in the Henglein recipe. In considering the effect of that perception on the constraint, one has to take into consideration that retailer's perception of Bells as an alternative to Cérélia. For the other retailer, that's the one that suggests they want a UK supplier, for that retailer also, the tribunal has to bear in mind what that retailer understood or misunderstood about Bells' ability to supply its needs.

What about the other two of the four large national retailers? One of them said in terms it was open to Bells and the other is recorded as saying that Brexit difficulties had been overcome and we rely upon its comments to the CMA, including at 9.231(f)(ii).

Of course, there are other supermarkets, large supermarkets, but not in the big four, in the market already supplied by Henglein. One of those supermarkets had agreed a contract with Henglein to supply a quantity larger than one of the big four and that's

at 9.231D in the Final Report.

These are all facts found by the CMA. So stepping back, we can see that Bells can cover two of the big four retailers, to the extent you've seen in the papers and Henglein is a viable competitor for two of the four. In asking whether that creates a concern in the mind of Cérélia, one has to look at both of them combined. Both of them combined, fall short. On any rational view, is going to create pain for Cérélia, if they were to lose even part of the chunk of capacity that these alternative suppliers bring to the market. It was irrational to dismiss these alternative competitive constraints in the manner that the CMA did. The evidence they had wasn't probative to find that these retailers only exercised a limited constraint on the ability of Cérélia to raise prices.

I will move on now, if I may, to the very final point on this issue which is the question of degradation and at one point -- there were three degradation arguments raised by my learned friend. The first was that the CMA found that the merged entity could degrade private label to divert sales to branded. I have addressed that. Would degrade Jus-Rol to divert sales to private label. Again, that's been covered already. But there was the point about degrading both. I just want to address this very briefly because this was not a rational finding either by the CMA.

No retailer suggested that the merged entity would degrade both Jus-Rol and private label. We saw one retailer saying expressly, and Mr Palmer told you this -- showed you the document today, that it was unlikely that this would happen because the category was growing and it was in no one's interest to degrade either channel. That's tab 105, page 891.

The CMA never asked -- Mr Palmer said: well that's the current situation, where the category is growing, it does not mean the category may not grow in the future. But there's no analysis in the decision. There's no sign of the CMA asking: well, when will the category stop growing? Or: what's the likelihood of the category not growing in

the future, when this risk of degradation would arise? All of the evidence is the category is growing and the evidence is while it's growing, there's no suggestion that it's in Cérélia's interest, as a merged entity, to degrade anything.

The tribunal has seen that in many ways dough-to-bake is not a must-have for customers and, when we look to see what is the likely outcome in terms of degradation of the category, the deal rationale of Cérélia is of central importance. I am not going to take you to it. It's in the Final Report at paragraph 2.27, 2.29. The CMA accepts at 2.32 that Cérélia is buying Jus-Rol in order to increase this category of dough-to-bake generally. You have seen in that evidence that the United Kingdom's consumption of dough-to-bake is a far smaller as a percentage of population than France and other continental countries. Cérélia is buying Jus-Rol in order to strengthen Jus-Rol as a leading brand and drive category growth throughout dough-to-bake. That is the very rationale underlying the transaction, and the CMA accepted that; and that, along with the retailers' evidence, provides an answer to the concern about degradation. It's not rational to find that, in those circumstances, a risk that both private label and branded will be degraded by the merged entity.

I am going to move on now, if I may --

THE CHAIR: It's an interesting point because one of the reasons why the owner of Jus-Rol wanted to get rid of it was that they were losing interest and were not going to be inclined to put money into it. We've now got a transaction whereby you have someone who is willing to put money into it and to develop the product.

A lot of the points you are making I can understand and I can see why different people can come to a different view, but the difficulty we have, well, you've got rather, is what the test is for judicial review. If this was a merits-based review, I could -- well, the decision could be -- different views could be reached on all of this. It's the limited review that is difficult and that's why it's important that you focus on the sorts of things

I have outlined both on Monday and today as to how you put your case.

MR KENNELLY: Indeed, and I hope I have, at least I hope I have tried to confine my arguments to those. I don't shy away for a moment from the threshold that I have to cross.

THE CHAIR: Yes, I know. Yes, I understand that.

MR KENNELLY: When I say "no probative evidence", I do invite the tribunal to take on that onerous task of looking at this and asking: can a reasonable regulator, looking at this evidence as a whole, say, for example: Bells and Henglein exercise only a limited constraint on Cérélia?

THE CHAIR: It depends what you mean by "limited constraint" because "limited" can mean all sorts of things. You can say that the amount of constraint it implies can still be fairly significant without it -- and still be limited in that sense.

MR KENNELLY: It has to be limited for the purposes of the SLC --

THE CHAIR: Exactly.

MR KENNELLY: (Several inaudible words due to overspeaking) -- how limited it needs to be, and it's the SLC standard.

THE CHAIR: Exactly.

MR KENNELLY: So it doesn't have to be a complete -- it doesn't have to, as I say, wipe them out completely.

THE CHAIR: No, it has to be enough to get rid of the SLC.

MR KENNELLY: Precisely, and that is, in my submission, the only rational answer when one looks at the evidence they gathered themselves on Bells and Henglein. I am not seeking to go behind that and say: well, this document can be read one way or the other. On the Final Report's own finding on Bells and Henglein, it's irrational to say: this is just a limited constraint which means the SLC still arises.

I will move on. Notwithstanding the indulgence the tribunal has given me, I am still

running up against the clock and I want to get on to the special reasons point because it's very important because --

THE CHAIR: Yes, on special reasons, one thing that I would like you to do is -- Palmer is going to refer to Simplex, or whatever -- if there are any authorities that any party wants to rely on, over and above the ones that are already cited in their skeletons, can we have a list by Friday.

MR KENNELLY: By Friday.

THE CHAIR: And what you should do is say what the proposition is, what's the case. I don't want submissions longer than four pages from anyone but a four page document from both sides could be quite helpful for us. It's not going to be a difficult job to do it, so what I would hope is that you both would liaise with each other in advance of close of business on Friday, ie let's say by 10 o'clock on Friday morning, what authorities you are going to put in your own respective notes and so none of it comes as a surprise, because I don't want to have another round of submissions.

So both of you can have four pages on remedy. You tell the other side by 10 o'clock on Friday morning which cases you are going to put in your note, and so that you will have time by the end of the day to put in any other authorities that go against that. But I don't want to have lots of paper, I don't want to have another round of it, but I do want at least some help on this.

MR KENNELLY: In that four pager, sir, may I then make my reply submission on it, because I can make it in four pages --

THE CHAIR: No, that's fine.

MR KENNELLY: -- rather than doing it now?

THE CHAIR: No, you can make your reply submissions on what you say is a special reason, okay. I want that today.

MR KENNELLY: Okay.

THE CHAIR: This note is solely going to be, as a matter of law, what is the consequence of this tribunal finding that there are no special reasons in this case. Nothing else. I don't want to hear anything else.

MR KENNELLY: That's very clear.

THE CHAIR: You set out the proposition you want to run, on what cases you cite with it, precise page number or paragraph number that you want.

MR KENNELLY: I am grateful.

THE CHAIR: By 4 o'clock on Friday.

MR KENNELLY: That will be done.

THE CHAIR: Yes.

MR KENNELLY: So I will then address you quickly on the points in reply on this issue. First is the question of construction, the second is the question of rationality.

THE CHAIR: Correct.

MR KENNELLY: The first is Mr Palmer, my learned friend, accepted I think -- and of course he accepted because it's obvious and it's right -- that the tribunal construes the words "special reasons". He said, correctly, that the tribunal shouldn't give spurious precision to language that is not precise, you must not fetter the discretion that Parliament has sought to grant to the CMA, and he then sought to construe or to invite you to construe special reasons in a particular way.

That is where my learned friend went very badly wrong because he gave you a construction which is quite far from both the natural language of special reasons and the intention that must be behind that language in the Act. He said that special reasons means circumstances which prevent the CMA fulfilling its statutory duty, despite reasonable efforts by the CMA. That construction is untethered to anything special or unusual.

He went on to characterise it differently. He said -- and I am paraphrasing, I'm afraid,

this may not be precisely what he said; the transcript will be more fair to him -- that special reasons means whenever the CMA finds that it's very difficult to reach a decision on time it may extend time -- acting properly -- it may extend time on that basis.

Now there are two problems with that. First of all, that comes very close to the CMA deciding what is special and not special. But, secondly, as a matter of construction that could be used in every single case. That is a construction which simply means when the CMA, reasonably and in good faith, needs more time it may get it, and that is not what the statute said. The statute could have said: time may be extended by a particular period where the CMA needs it, and that is not what Parliament said. As Mr Cutting said, that meaning of special reasons could be invoked in every single case.

It is obvious, we say, based on the language of the statute and Parliamentary intention, that special reasons means reasons which are unusual or exceptional. That is obviously right when you are construing words that have those meanings in a Parliamentary scheme where strict time limits are of central importance, a scheme which has struck a balance between the need for expedition between the parties, for the parties' benefit and the CMA, but also time to allow the CMA properly to reach its decisions.

Mr Palmer said his construction should be favoured because it is necessary to be able to consult fairly, to receive submissions and give proper reasons and that that's paramount. But as I said in opening and I say it again in reply, the time that is required to consult properly and fairly and produce reasons is obviously built into the scheme that you have. It is built into the words "special reasons". Special reasons contemplates that the CMA can consult fairly and produce reasons, even if it is constrained by extensions requiring special reasons and not in every circumstance

where the CMA needs it. So I'm afraid on the question of construction Mr Palmer's construction is quite wrong, wrong on the language and wrong on the statutory purpose.

Then we come to what it might mean. As I said, our construction, which is consistent with the language and the purpose, is that it should be invoked where there are proper reasons demonstrating something unusual or exceptional. It does not have to be extrinsic, contrary to my learned friend's submission, it can be intrinsic, but it must be exceptional or unusual, something that falls within the natural and purposive meaning of special reasons.

My learned friend said: well, in 2002 maybe the cases were more straightforward. Even within the current scheme, to the extent that the tribunal is worried about floodgates, the CMA is empowered to require -- to ask for documents according to its demands. It can tailor its own demands, based on what it can properly and reasonably analyse in the time available to it, and it sets deadlines. It sets very tight deadlines on parties, in order to give it proper time to examine the material that it receives.

But if -- and I think this really was the heart of Mr Palmer's submission -- in reality, these cases are now so big that special reasons have to be invoked regularly and the 2002 deadlines are no longer appropriate, that is a matter for Parliament, it is not an invitation to the tribunal to stretch the language of the statute beyond its proper meaning.

In any event, as the tribunal knows, there is a bill before Parliament, the Digital Markets Competition and Consumer Bill, which at clause 127 changes the rules on extensions. It allows for unlimited extensions by consent. So the floodgates in terrorem submission that Mr Palmer made isn't appropriate. The rules are changing anyway. It's not on all fours with this case but one can imagine that extensions will be granted by consent, and one can see why the parties would have an interest in consenting to

extensions in order to avoid a prohibition decision.

So that floodgates argument isn't a good one. Even on the current framework, there are cases which genuinely attract the special reasons justification. Mr Palmer referred to Microsoft/Activision. Of course there are cases where the CMA can say: in this case there is such a volume of material that the circumstances are such that it is just impossible because of the various unusual circumstances that have arisen, and therefore we need, because of the exceptional nature of this investigation, the extra time.

THE CHAIR: But I wouldn't put the test in impossibility. I'd probably put it in terms of it's just not practicable, not feasible. "Impossibility" probably puts it too high. What I --

MR KENNELLY: (Several inaudible words due to overspeaking) I agree, sorry.

THE CHAIR: Yes, you are just probably summarising. But what I am conscious of, I am conscious of the 50 per cent statistic, okay, and I don't think that's great, to be honest, but that may be remedied by this new bill.

But all I have to look at is not what happens in other cases, whether or not they should have been extended or not, it's just to look at this individual case. That's why I was saying to Palmer: you just show me what was the enormity of the task that necessitated an extension of time, and that's what -- he's given me the references and we'll have to look at that material and come to a view.

MR KENNELLY: But, in that regard, one must be very careful not to stray beyond the reasons in the decision itself.

THE CHAIR: Oh, I agree. I think that the reasons in the decision are there and we would -- you say those reasons, even if they are right, don't amount to special reasons. I fully understand that.

MR KENNELLY: But this is the case of one theory of harm, one market. This tribunal has that in many more complex cases than this one. There's nothing we've seen, even

in the documents Mr Palmer has referred you to --

THE CHAIR: None of these cases are easy.

MR KENNELLY: None of them are easy but you've certainly had harder ones than this.

THE CHAIR: I certainly have done.

MR KENNELLY: There is nothing unusual or exceptional. More importantly, the CMA hasn't told us anything to suggest that there was anything exceptional or unusual about the enquiry in this case. Ms Daly's statement does not help us at all and the reasons in the notice of extension are manifestly inadequate.

So that really is the -- the idea that the Bells contract made a difference doesn't take them anywhere. That was produced in June or July.

THE CHAIR: July 2022. They knew from something like 22 July 2022.

MR KENNELLY: The crux -- so actually that's the rationality question: have they properly invoked the special reasons justification? The stated reasons in the exceptional decision are manifestly inadequate. The test is not, as Mr Palmer said: have we been barking mad in the way we've invoked the special reasons exception? I will forgive him that's because it's getting late in the day. I don't think the test for rationality here is barking mad. But even with the broad approach that the CMA has allowed in invoking this exception, they haven't come close --

THE CHAIR: It's for us to look at it and say (a) what do special reasons mean, (b) does what is contended by the CMA actually amount to special reasons --

MR KENNELLY: Yes.

THE CHAIR: -- within the meaning of special reasons.

MR KENNELLY: Yes.

THE CHAIR: But obviously they have a great deal of margin in how they deal with the question from their perspective. But there are building blocks before you get to that.

MR KENNELLY: On the extent of their margin, this, just to be very clear, they have a margin but this is an exception from the proper approach.

THE CHAIR: Yes.

MR KENNELLY: It should be more narrowly construed as such, and therefore it can't be lightly invoked. This is an exception and therefore should not be the rule; and that should inform both its construction but also the margin that the CMA has when it uses it. It has a margin, of course it has, but it's not as wide as Mr Palmer suggested to you.

I won't deal with the consequences. I was going to come to that, but I will deal with that in the four page document that we send.

THE CHAIR: Each party have liberty to file submissions on what is the remedy in the event it's found that the CMA decision that special reasons exist is not well founded by 4 pm on 14 July 2023, limited to setting out propositions of law, no more than four pages, and by reference to the authorities.

MR KENNELLY: That's it. I will just quickly check. Unless I can be of any further assistance, that's --

THE CHAIR: No, you have both been of great assistance and we have been asking questions as we go along, and we've only done that because both you and Palmer are capable of responding to questions.

Sometimes I have faced a situation where I know I am -- there's no point asking the questions. But with you two, you are both able to answer. You shouldn't take any question as saying: well, we've made up our mind, for and against. We just need to shake the tree, see what comes out of it and then form a view.

As regards timing, as you know I ordinarily try and get these out quickly. But Tobii took us something like six weeks. I don't want this to be a Tobii but we'll just have to see how long it takes. We are going to do it as quickly as we can. I don't think this is

a situation where time is urgent, urgent; you've got a regime in place. But I do want to get it out, if I can, if we can, as soon as possible, expeditiously.

Okay.

MR KENNELLY: I am sure both of us want to thank the court staff for sitting late and for everyone who isn't here for all their help.

THE CHAIR: Yes.

(5.40 pm)

(The hearing adjourned)