IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1106/5/7/08

Victoria House,
Bloomsbury Place,
London WC1A 2EB

16 September 2009

Before:

LORD CARLILE OF BERRIEW Q.C.
(Chairman)
RICHARD PROSSER OBE
GRAHAM MATHER

Sitting as a Tribunal in England and Wales

BETWEEN:

ENRON COAL SERVICES LIMITED
(in liquidation)

Claimant

– v –

ENGLISH WELSH & SCOTTISH RAILWAY LIMITED

Defendant

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HEARING – DAY ONE

APPEARANCES

Mr. Paul Lasok Q.C., Mr. Daniel Beard and Mr. Rob Williams (instructed by Orrick, Herrington & Sutcliffe (Europe) LLP) appeared for the Claimant.

Mr. Mark Brealey Q.C. and Ms Maya Lester (instructed by Freshfields Bruckhaus Deringer LLP) appeared for the Defendant.

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MR. LASOK: May it please you, Sir, my learned friends, Mr. Beard, Mr. Williams and myself represent the claimant.

THE CHAIRMAN: Yes, Mr. Lasok.

MR. LASOK: We represent the claimant, and I will probably refer to that as "ECSL". My learned friends, Mr. Brealey and Miss Lester appear on behalf of the defendant, EWS. As the Tribunal is aware this is a so-called follow-on action under s.47A of the Competition Act, which arises from a decision of the Office of Rail Regulation ("ORR"), and it is in respect of loss and damage caused by some rather unpleasant conduct perpetrated by EWS that consisted of a deliberate and sustained campaign to prevent ECSL doing business with, here, one of its customers that I shall describe as "EME", in the documents it is sometimes referred to as "Edison."

The claim that we are concerned with is the loss of a contract with EME and it is pleaded – I will just refer to the amended claim form, the easiest way is probably just to look at bundle A, tab 4.

THE CHAIRMAN: Forgive me for interrupting at so early a stage, Mr. Lasok, you can assume that we have read all the background documents, including of course the very helpful skeleton arguments for which we were very grateful.

MR. LASOK: Yes, and if you go to p.129 of the bundle, at the bottom of the page there is the section entitled "Loss of EME contract", that runs on to para. 50 – I am not going to read it, I am doing this just to show the Tribunal where in the pleadings the claim is.

This is the only claim that we are concerned with in this hearing. It is pleaded to in the defence, which is in the next tab at paras. 33 to 41. Paragraph 33 starts at p.159 of the bundle, and I am not going to go through that. What you see is the general argument outlined by the defendant. I will only draw the Tribunal's attention to one particular point which arises at p.161 at the bottom. It is para. 36(h) where it is pleaded as follows:

> "As the Claimant admits at paragraph 46 of the Claim, EME's invitation to tender was for haulage to Fiddler's Ferry and Ferrybridge, whereas ECSL's bid was for E2E supply of coal."

` What then happens is that there is then a pleaded case based on the admission that the ECSL bid in response to the EME response to tender was for an E2E supply of coal. We will come to what an E2E supply of coal is, but I am sure that you are well aware of what it is from your reading of the papers.

There was some attempt in footnote 13 to EWS's summary response to our skeleton argument to row back from what their pleaded case actually is but currently the position is

that as pleaded there is no issue between the parties on the point that ECSL was at the material time going for an E2E contract with EME.

MR. BREALEY: As Mr. Lasok knows there is a huge debate between the parties as to the meaning of that paragraph, as we have set out in our response. In their skeleton they say we have conceded the point. We have not conceded the point. Our position is quite clear, they did not bid on an E2E basis, that is to say they did not bid for coal supply; that is apparent from our witness evidence, it is apparent from the decision itself, we say, it is apparent from the documents and, more importantly, it is apparent from Mr. Staley's own witness statement.

If Mr. Lasok is going to kick off this trial with a pleading point that we have conceded that they bid on an E2E basis then it may well be that we have to argue the point, clarify that paragraph, but he is under no illusion that that is not what we mean by bidding for an E2E contract, and we do not concede that point whatsoever. If we are going to have to have an argument about it, we may have to clarify the pleading in the light of Mr. Staley's own witness statement. As I say, it is quite clear that there was no bid on an E2E basis.

THE CHAIRMAN: Thank you. Mr. Lasok?

MR. LASOK: The case has developed in a rather peculiar way because the defence that has been advanced by EWS is that, despite the fact that, at the material time, more or less I think it is May to October 2000 EWS was engaged in a sustained and deliberate campaign to get ECSL away from EME, that is of course what the ORR found. Nonetheless, according to EWS that deliberate and sustained campaign did not have its intended effect.

Furthermore, the defence is that prior to the period of the infringement, that is to say, prior to the period of this sustained and deliberate campaign, EWS knew that there was no chance of ECSL getting a deal with EME. That is the case that they are advancing in their evidence, and in their skeleton argument. If one pauses to think it is a remarkably peculiar claim to advance. Why would EWS engage in this deliberate and sustained attempt to exclude ECSL from the market if it already had known that ECSL had no chance of doing business with EME. The upshot is that in a nutshell the defence simply does not ring true.

Now, what I am going to do is to move on to consider the nature of follow-on actions and the importance of the ORR's decision. The Tribunal will already be familiar with the terms of s.47A of the Competition Act. So, I do not need to go to that. For the sake of the Tribunal's note, the Authorities Bundle I is divided into I1 and I2. S.47 is to be found in I1, Tab 3. More importantly, however, it is necessary to look at the decision of the Court of Appeal in this case which sets out, in our submission, the guidance as to the meaning and

effect of s.47 that the Tribunal has to follow. The Court of Appeal decision is in I2, Tab 18. This, of course, is the appeal which was brought before the Court of Appeal in the present case at an earlier stage. For that reason I do not need to explain the background to it. What I will do is just turn directly to the relevant paragraphs in the judgment beginning with para. 28 at p.572 of the bundle. If you have para. 28, starting in the second line, Lord Justice Patten here says,

> "… the role of the Tribunal is limited to the determination of loss which results from a finding of infringement by a regulator. The Tribunal is not therefore concerned with the correctness of that finding but only with whether it has been made".

Then there is a reference to ss.46 and 47A. Lord Justice Patten says,

> "The Tribunal is, for those purposes (that is to say, for the purposes of s.47A) bound by the finding which the regulator has made".

He there cross-refers to s.47A(9) which contains the obligation of the Tribunal to follow the findings which the regulator has made. In the next sentence,

> "Its function is to do no more than to identify the findings of infringement in the decision".

If you go further to paras. 30 - 31 on p.574 -- As this is a relatively long extract, what I would respectfully suggest is that the Tribunal reads those two paragraphs in silence.

THE CHAIRMAN: (After a pause) We focus on the words 'actually decided' and 'relevant and definitive finding' presumably?

MR. LASOK: I would focus, firstly, on the last sentence of para. 30.

> "It operates to determine and define the limits of that claim and the Tribunal's jurisdiction in respect of it".

Now, that relates to the finding of infringement. So, it is the finding of infringement that determines and defines the limits of the claim and the Tribunal's jurisdiction. Then that is different from the other findings of fact made as part of the overall decision. You see that in the third line of para. 31. The use of the word 'decision' makes it clear that s.47A is differentiating between findings of fact as to the conduct of the defendant made as part of the overall decision and a determination by the regulator that particular conduct amounts to an infringement of the Chapter 2 prohibition. Then he says,

> "It is not open to a claimant to seek to recover damages through the medium of 47A simply by identifying findings of fact which could arguably amount to an

infringement unless the regulators actually decided that such conduct constitutes an infringement".

It is important to note that this is entirely in the context of the jurisdiction of the Tribunal and it is concerned with defining the extent of the claim - that is to say, if you like, the cause of action for the damages or the loss that is being suffered. That is quite distinct from a separate question that arises in cases of this sort. That is the question whether or not the Tribunal is bound by the findings of fact made by the ORR - bound not for the purpose of defining the Tribunal's jurisdiction, but bound for the purpose of the exercise by the Tribunal of its jurisdiction. In other words, if you like, it has got the jurisdiction defined by the scope of the infringement, but when it comes to look at the questions that follow on from the finding of infringement, causation, quantification, and so forth, it then is faced with a completely separate issue, and that concerns the question of the extent to which, when it makes those consequential findings and decides those issues, it is bound in those circumstances by findings of fact made by the regulator.

That is a completely separate question that was not the subject of discussion by the Court of Appeal, but in any event there is a provision in the Act which deals with that. That provision is s.58 of the Competition Act. Because it seems to be a bit controversial, it may be worthwhile looking at that. We are back to Bundle I1. Now that I look at I1 I think I gave you a wrong reference to s.47A because it is actually in Tab 2 - not Tab 3. At the moment we are looking at s.58 which is in Tab 3. This operates parallel to the provisions that deal with the binding nature of a finding of infringement . S.58(1) says,

"Unless the court directs otherwise ..., an OFT's finding [but, of course, that applies to other regulators] which is relevant to an issue arising in Part I proceedings is binding on the parties if -- (a) the time for bringing an appeal has expired and the relevant party has not brought such an appeal".

Then we see in (2) there is a definition of what an OFT's finding means - that means a finding of fact made by the OFT in the course of conducting an investigation. There is also a definition of Part I proceedings which are proceedings brought otherwise than by the OFT and we are looking at infringement of the Chapter II prohibition and Article 82. Then there is a definition of "Relevant Party". So far as Chapter II and Article 82 are concerned, "Relevant Party" means, and it is in (b), the undertaking whose conduct is alleged to have infringed the prohibition.

So the upshot is that s.58 covers the situation that arises where in the course of an investigation, and that effectively means in the decision concluding the investigation, the

Regulator makes a finding and that finding is then relevant to an issue arising in subsequent Part I proceedings. These proceedings are of course Part 1 proceedings – for example, s.47A is to be found in Part 1 of the Act.

All that makes sense from the policy perspective because the clear policy behind s.47A(9), which is the bit that says that the finding of an infringement is binding on the Tribunal, and the purpose of s.58, which we have just seen, is to prevent the wrongdoer from re-litigating matters that have already been investigated and decided by the relevant Competition authority.

In the defendant's summary response in para.22 an argument has been launched to the effect that the interpretation of s.58 that I have just put forward to the Tribunal is inconsistent with submissions made by my client in the context of a petition to the Supreme Court, formerly of course the House of Lords, in a proposed appeal against the Court of Appeal decision that we have just looked at. However, that is a simple misreading of the submission that has been made to the Supreme Court and there is no inconsistency in the position of ECSL as between the submission I have just made today and the submissions made in writing to the Supreme Court, so we do not need to ----

THE CHAIRMAN: I have not read the submission to the Supreme Court.

MR. LASOK: I am sure that if my learned friend feels moved he will draw it to the Tribunal's attention. If he feels, on reflection, that there is a passage in it that he ought to draw to the attention of the Tribunal then I am sure that he will. Unfortunately we cannot find any suggestion of the sort that he has made. I have made my submission on this point. There is no inconsistency and in any event the submission I have just made on s.58 is the submission that we are advancing before the Tribunal.

There is a parallel of course to this and that is the situation regarding Commission decisions, an example of which can be found in the *Betws Anthracite* case which is in the authorities bundle, bundle I, volume 1, tab 12. If you just run down through the headnote, effectively it is the bit in the bold, "Adopted this Decision". What had happened here was that there had been a Commission decision – a decision not of the Competition Commission but the European Commission – finding that there had been a grant of State aid by Germany and that a particular company had misused State aid and the claimant, a Welsh company, sought to run a damages action against the defendant company, which was not an addressee of the Commission decision on the basis of the finding made by the Commission that unlawful State aid had been used.

This was a case in which the court came to the conclusion that there was no cause of action in Community law for the claim advanced. You see that from the holding at the bottom of the page. Therefore, what we are doing is looking at a passage in the judgment that is, strictly speaking, an obiter passage. If you go to p.17 of 27, para.39, the first two sentences:

> "The second issue is the extent to which the decision of the commission is binding on this court, is the decision merely that which is contained in the articles ..."

which of course is the finding of infringement –

> "... or does it include the preamble which sets out the commission's findings and reasoning leading to the conclusions? On this issue I am sure that Mr. Brealey is correct."

Then a few lines further down the judge says:

> "Merely to regard the decision as soon as comprising the six articles ..."

that is the operative part of the decision –

> "... would emasculate the decision. A decision without reasons is not a lawful decision."

Then he sets out the reasons, and I would draw particular attention to (b) in the middle of the page, where he says:

> "It would be contrary to public policy to allow persons who have been involved in competition proceedings in Europe to deny in the English courts the correctness of the conclusions reached by the commission."

Then if you go to the bottom of the page under the heading "The Merits of Betws' Claim", he says:

> "Had I been required to consider the merits of the claim made by Betws, it would first have been necessary to identify those parts of the facts found by the commission which would be binding upon me."

Then he sets out in the next paragraph findings that he regarded as binding upon him and that he could not go behind. These are extensive findings of background fact which I will not read through, but the Tribunal can see for itself that they go on to p.19 of 27.

I advance that case as an illustration of the basic principle. We see it encapsulated in s.58 of the Act, of public policy as the judge expresses it, that people who have been involved in competition proceedings in subsequent actions following on from those earlier proceedings simply cannot be heard to deny the correctness of the findings of fact made in the earlier proceedings.

That is, in our submission, quite a useful illustration of the point that although the jurisdiction of the Tribunal, the scope of the claim, is limited by the finding of an infringement, when the Tribunal has to grapple with the consequential issues, it is nonetheless still bound by the findings of fact made by the Regulator whose decision, whose finding of infringement, founds the cause of action.

In a nutshell, of course, the three issues that are before the Tribunal clearly identified in the Court of Appeal's judgment are, what was the infringement, and then the two questions, causation and quantum. I am going to articulate my submissions around those three questions, beginning with what was the infringement. We have made submissions in our skeleton argument, paras.73 to 103, which I am of course not going to read out. In summary, what we are dealing with is an infringement that consists of two fundamental elements. We can derive these fundamental elements from the provision that was said to have been infringed, and that is of course the Chapter II prohibition in the Competition Act and Article 82, and if we just remind ourselves of what those provisions state, if you go back to the authorities bundle, bundle I, vol.1, tab 1, this is the way the Chapter II prohibition is formulated and it reflects the wording of Article 82 of the EC Treaty. 18(1) starts off by referring to:

> "any conduct on the part of one or more undertakings which amounts the abuse of a dominant position is prohibited."

18(2) sets out illustrations of an abuse, the one we are looking at is (c), which is:

> "applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage."

And there we see the two elements. The first can be described by the simple word "discrimination", it is the applying of dissimilar conditions to equivalent transactions, but the second and necessary element of the infringement is the placing of the affected party at a competitive disadvantage, because it is not discrimination *per se* that constitutes an abuse, it is discrimination that places the person in question at a competitive disadvantage. Those are the two factors that are a necessary part of the finding of an infringement.

Of course, what I need to do is the rather fearsome task of going through the ORR's decision identifying the material passages, and I have to do this for two purposes, one is to deal with the question: "What is the infringement?" but the other one also is to identify relevant findings of fact made by the ORR that are pursuant to s.58, binding on the Tribunal. But before I do that I am going to use my own words to summarise the infringement that was found by the ORR.

The gist of it was that at the material time, which is a period which I think was March or May to October 2000, EWS engaged in abusive, discriminatory conduct directed at ECSL that formed part of a sustained and deliberate campaign to exclude ECSL from the market. The ORR found that that discriminatory conduct did result in the imposition on ECSL of a competitive disadvantage in relation to ECSL's ability to obtain business from two power generators, one which I will call "BE" and the other one "EME".

The ORR also found that EWS was, in fact, unsuccessful in its exclusionary strategy in relation to BE. BE had sought tenders on a basis similar to what EME did around about the same time in that year, but despite the fact that EWS and ECSL were effectively in competition with each other for the business of BE, ECSL won a three year E2E contract with BE and it actually succeeded in fending off competition from EWS. So EWS's strategy failed in that instance. According to the ORR that reflected BE's subjective preferences for coal treatment.

What I have just said, which is part of the background, we can see in the decision itself, and I ought to make good what I have just said. The decision is in bundle B, I think it is better to go to bundle BII, bundle BI has the non-confidential version of the entirety of the ORR's decision, and BII has extracts from, I think, the confidential version insofar as it has been made available to us. If you go to p.599 of bundle BII this is in a section of the decision called "IIB", and if you just look at para. B71 to B74, you can see what happens in October 2000 BE had issued an invitation to tender for rail supply requirements. EWS provided prices as part of its bid, as in fact did ECSL, because what then happened was that if you look at B72, you see that ECSL was awarded a contract on an E2E basis. If you look at B74 second sentence, you will see that there is a finding that in relation to this particular contract exercise that EWS's strategy had been:

> " …intended not only to impose selectively higher prices on ECSL and to limit its ability to negotiate with BE on an indirect E2E basis, but also to foreclose potential opportunities…"

for another rival described there as "FHH" as a new entrant. The bit where I said that the conclusion was that ECSL's success reflected BE subjective preferences is to be found on p.607 at para. B98, I will just read the first two sentences:

> "… there is evidence that EWS's strategy risked undermining ECSL's negotiations with BE. The final outcome of the tender process reflects BE's subjective preferences …"

So what we have is a situation in which it was not inevitable that the conduct of EWS in seeking to exclude ECSL from the market would be successful. It was not successful in relation to BE and what EWS seeks to do in relation to the EME contract is effectively to run the argument that for different reasons peculiar to EME, EWS's sustained and deliberate campaign to exclude ECSL from the market did not place ECSL at a competitive disadvantage in relation to the EME contract because due to reasons peculiar to EME, EME had no intention of doing business with ECSL.

As I said at the outset their defence also is, and their evidence is, that they knew that EME had no intention of doing business with ECSL before they embarked upon this campaign. Nonetheless, they embarked upon it. That, as I have submitted, raises a serious question mark about the plausibility of this defence. What EWS tried to do in order to substantiate this defence, which is in clear contradiction with the ORR's finding that EWS' behaviour did impose a competitive disadvantage on ECSL is to seek, to navigate a way through the ORR decision and various findings of fact made by the ORR in the course of conducting its investigation and adduce new material - or perhaps it is material that was before the ORR but simply was not believed by the ORR and they do this in order to make out this case which is fundamentally inconsistent with the findings made by the ORR.

That brings me to the ORR's decision itself. What I want to do is to go as quickly as I can through the material parts. The best way, regrettably, to do it is to start with Bundle B1 which is the full, albeit non-confidential version. When I get to Part IIB I am going to switch to Bundle B2 because of the fact that that is the unredacted confidential version. If we start at p.1 - and I promise I am not going to go through every single wretched page of this document - we see that the decision was prompted by two complaints. There is a summary in para. 3 of the ECSL complaint. If you look at the bullet points (the first of which is at the bottom of the page), the complaint raised firstly was an allegation of discriminatory pricing between the purchases of coal freight services. Then, if you go to the next page (the second bullet from the top of that page) another complaint was that there was a refusal to deal with ECSL, in particular refusing to agree a performance based contract. This is a contract which has got conditions in it which effectively amount to promises by EWS to reach certain targets or minimum levels of performance. Initially what had happened was that the contract between ECSL and EWS under which ECSL was transporting coal to its customers did not contain performance standards, and there never ever was a contract between the two that did do so. That was part of the complaint.

If you go to p.4, para. 14, We have the first paragraph in which the ORR says it has concluded something. There it says that it had concluded that the facts underlying the complaint of a refusal to deal in discrimination were the same. So, it rolled the two part that I have just drawn your attention to together. It said the essence of the abuse of conduct is discrimination in relation to prices offered to ECSL.

> "Taken together, the conduct amounts to a sustained and deliberate campaign by EWS to protect its own dominant position from competition and disadvantage ECSL and FHH".

In the next paragraph we see the ORR's finding is that,

> "All three types of infringing conduct set out in Parts A to C of Part II below form part of a continuing strategy to seek to exclude or restrict EWS' potential competitors' participation in the market for coal haulage by rail".

I think we can now jump ahead. If you go to p.6 you will see a section headed 'The Facts'. It is relevant to look at a couple of the facts that were found by the ORR because they informed the ORR's decision. If you go to p.9, there is a heading here 'The Complainants' and then 'Enron Coal Services Ltd.'. There is a brief description of ECSL. But, what I wanted to do was to ask you to look in particular at para. 32. That is a paragraph which sets out the ORR's finding as to the types of contractual options considered by users of coal. That is where you get, effectively, a description of what is known later on in the decision as a DIY option, and also later on as an E2E arrangement. So, you have a description at para. 33 of ECSL's business and at para. 34, at the end, there is a reference to the fact that ECSL accounted for 50 percent of coal imports into the UK and 95 percent of the coal it supplied to its UK customers was sourced from other coal producing countries which demonstrates ECSL's importance at the material time. The fact is also repeated - and I give the Tribunal the reference, but I am not going to go to it - in Mr. Staley's first witness statement at para. 22. The reference is to Bundle D1, p.9.

Then we can go to p.15. This is a section dealing with facts found by the ORR concerning the electricity supply industry. If you look at paras. 55 to 57 you see the findings made by the ORR concerning how generating companies source coal. Paragraph 55 sets out the gist of it - that they do so according to the lowest delivered price taking account both of the cost of the coal and the cost of transportation, and the costs associated with the qualities of the coal. Then there is reference to the evidence obtained by the ORR in support of that finding. If you go to p.17, para. 61 there is a reference to the fact that owners of the generating stations provide E2E prices in competition with other third party intermediaries such as

ECSL. There is also reference in the penultimate sentence to the fact that the legacy rail contracts - the contracts put in place at the time of the privatisation and divestment which led up to the introduction of competition in the industry - created incentives to re-sell on an E2E basis, exploiting prices for coal haulage by rail in the legacy contracts with EWS.

I can go through a large part of the rest of the decision fairly quickly. If you look at p.111 of the bundle you will see the finding of market definition at para. 335, which you can just note. If you then go to p.137, para. 418 which says that only three substantial contracts were put out to tender during the relevant period at a time when FHH was capacity-constrained -- It says that one of these tenders, of course, was the tender that we are concerned with in this case - the EME tender. These tenders and ECSL's involvement in bidding for them on an E2E basis created FHH's route to market. I am not going to describe too much about FHH. It was one of the rail companies in the background. It was coming on stream in 2001 and therefore was interested in the course of 2000 in trying to get somebody who would do a deal with it for the provision of rail haulage services. As you have seen, the finding made by the ORR was that EWS' exclusionary strategy was directed not simply at ECSL but also at FHH, but we are not concerned specifically with FHH here because we are looking at the damage that was inflicted upon ECSL.

Then if we go to p.158, this is a finding in para.499 that ECSL itself did not provide generators with an alternative to EWS. It was not in competition with EWS as such, because what it was was an E2E supplier. That, in fact, was a point that had been made to the ORR by EWS itself. It is probably that that lies at the heart of the pleading issue that originally EWS's view was that, as you can see here, ECSL was not a competitor of EWS because it simply operated as an E2E supplier, and so its offer of rail haulage would always be perceived as forming part of an E2E offer. Of course, it is a bit difficult in the context of these proceedings for EWS to run that point, which may explain why they wish to drop it.

At all events, if we move on now, I think, to the foot of 167, this is the introduction to Part II of the decision. You can see that it starts off with an assessment of abuse of dominance and an overview of the ORR's objections. The paragraphing of the decision is a bit peculiar because we are starting back at para.1, but there we are. Paragraph 1 recites the three allegations, and then in para.2 the ORR refers to the fact that the behaviour has to be seen in the context of the prevailing conditions of competition. I would just ask you to look at the second half of para.2. It is the bit which says:

"Further, between May 2000 and November 2000, EWS engaged in discriminatory pricing by setting ECSL higher prices whilst offering significant reductions direct to ECSL's customers ...."

There is then a reference to EME and BE.

"This conduct had the actual or potential effect of making it more difficult for ECSL to negotiate E2E and intermediary deals with those generating companies ..."

so it is both of them –

"... and was also intended to determine ECSL from sponsoring the entry of an alternative freight train operator."

The alternative that ECSL at the time was forced to fall back on was FHH.

Then in para.4 we see the finding that this covers all the three types of behaviour, but our concern is only with the second, the discriminatory practices, so I will just read it like that:

"EWS's operation of ... discriminatory ... practices had the aim of limiting actual or potential competition, by foreclosing new entrants from the market ..."

that is FHH –

"... and/or by reducing the opportunities for new entrants to compete with EWS."

I think that is FHH.

"This behaviour is inconsistent with the obligations of a dominant company not to hinder the maintenance of the degree of competition still existing in the market or the growth of that competition."

Then in para.5:

"... all three types of infringing conduct ... form part of a continuing strategy to seek to exclude or restrict EWS's potential competitors' participation in the market for coal haulage by rail."

I think we now go to bundle B2 for section 2, starting at p.582 of the bundle. In paras.B2 and B3 we see again the characterisation of the infringement by the ORR. It is effectively in two parts. It is the higher prices without objective justification referred to in B2 and it is part of a wider strategy to exclude. You see in B3 that EWS have been concerned that:

"... ECSL could facilitate new entry by developing an intermediary role, including through the negotiation of E2E contracts with new owners of power stations. EWS sought to constrain this competitive threat by ensuring that it, and not ECSL, secured direct contracts with the power stations."

So that was what it was trying to do.

Then there is another description of ECSL in B4, and then at B5(a) we have the finding in the opening words of B5 that the:

> "... discriminatory treatment of ECSL placed ECSL at a competitive disadvantage in respect of two specific sets of flows ..."

and the one we are concerned about is in (a), and you see the specific finding that the imposition of higher prices between May 2000 and October 2000:

> "... placed ECSL at a competitive disadvantage in its contractual negotiations with EME relating to coal haulage supply to Fiddler's Ferry and Ferrybridge power station."

The finding was that ECSL had supplied on an E2E basis following the period of discriminatory pricing and ECSL was unsuccessful in renewing that relationship.

Then if you go to p.584, the last word on 584, funnily enough, the word "The", and carry on to p.585, there is a reference to market developments – this is part of the analysis made by the ORR of the relevant market context. You see that there were new opportunities in the market threatening EWS's market position, and (b), (c) and (d) relate to ECSL and the threat that it posed.

Then B18, which I will not read out, the threat posed by ECSL was recognised by EWS and its response was to try to secure direct contacts for the generators, and that of course is what this case is about. EWS's success in securing a direct contract with EME shouldering ECSL out of the way.

Then B19 is part of the background. Effectively B19 through to B25 at the bottom of p.586 are passages that perhaps if the Tribunal could it should highlight or make a note in the margin that they are passages that we respectfully submit the Tribunal ought to have a good look at. B24 effectively summarises the assessment that the ORR makes in the ensuing paragraphs that in the period in question EWS did apply dissimilar conditions to equivalent transactions and placed ECSL at a competitive disadvantage.

Then at the bottom we have evidence of exclusionary intent, and that initiates a new section dealing with the evidence relied on by the ORR for its finding of EWS's intent to limit ECSL's ability to negotiate terms with the new owners of power stations such as EME. I am not going to read all this stuff, I will just draw your attention not the conclusion, the finding on p.588, para. B31.

> "These e-mails are evidence of EWS's aim to keep ECSL at arms' length and offer contractual terms to ECSL which would preserve EWS's ability to negotiate directly with EME".

Then there is a reference to an internal EWS handwritten note that is well worth reading. You will note the bits in bold in the first quote refer to the fact that EWS was charging ENRON much higher prices than it was charging others, and also the last paragraph you will note again the bits in bold, this relates to the absence of a performance based contract, it was a deliberate stance taken by EWS.

Then if you go to the next page we have some more findings. B34, 35, 37 are all contain findings made by the ORR as to what was going on; they are essentially directed at finding EWS's intention so far as ECSL is concerned and we see again in B38 and 39 reference to another document that was relied on. If you look at the end of B38, the reliance of that document led to the conclusion that EWS wanted to manage ECSL's ability to offer indirect rail haulage supply. B39 refers to EWS's intention to work with the generators for the purpose of forestalling what is described as "open access" threats, and also Enron's continuing relationship with EME – "Edison Mission" there refers to EME.

If you look at B41, this follows a quote in B40 of a phone conversation. In the second line of 41, the conclusion, the finding made by the ORR is that the text demonstrates:

> "… that a powerful driver behind contract negotiations between EWS and ECSL was EWS's desire to ensure that ECSL could not emerge as a potential competitive threat."

Then B42 refers to the part of the factual basis, that is to say an agreement between EME and EWS to negotiate for a direct contract which would replace the previous E2E arrangements. Then there is a reference to an internal email, and that is quoted on the top of p.591. The bits in bold are quite interesting. The last one at the end of the quote:

> "**But we have got them out of Fiddler's Ferry and Ferrybridge – a big step forward**."

EWS was crediting itself for having broken the relationship between ECSL and EME, and so the finding in B43 is:

> "This e-mail is evidence of both EWS's intent and, indeed, its success in stopping ECSL from carrying out indirect supplies to EME, one of the new generating companies."

This is one of the findings, of course, that EWS is effectively contesting in these proceedings. B44, the first sentence refers to the general intent.

What happens next is that there is a section dealing with haulage to EME power stations at Fiddler's Ferry and Ferrybridge that runs to p.597, and that contains the specific analysis and findings made by the ORR relating to the issue, or at least the situation that is actually

before the Tribunal in this follow-on action, so it is quite an important section of the decision. We have firstly in B45 and following some historical findings, starting off with the relationship being with ECSL on an E2E basis with ECSL using EWS as its haulier, under EWS's standard conditions of carriage.

Then we get on the next page under the heading "Specific instances of discriminatory prices" the ORR's analysis of the situation. You will see at the beginning of 49 that the ORR took this very, very seriously, because it says that in its investigation it was persistent in its attempts to understand EWS's internal price setting practices and cost modelling, and the underlying thinking of those taking decisions.

Then it deals with the rates, and I would simply ask you to side-line these – it should be all the paragraphs in this particular section – it would be tedious to go through them all at this juncture but what you see is a situation in which EWS persistently set higher prices for ECSL than is set for others.

Then there is a reference to the negotiations that took place between EWS and EME, and all this leads to this finding and if you go to p.596, B57 in the middle of the page:

> "On the basis of all this evidence, EWS is found to have offered selective price reductions to EME, with prices considerably lower than those offered to ECSL in May 2000. EWS has not provided an objective justification for the price differences."

Then there are two other paragraphs that are important in terms of the approach of the ORR, because effectively you have a finding of discrimination in B58 and B59 refers to the question of objective justification which was dealt with later in the decision.

After that we get to "Competitive disadvantage" which, of course, was the other fundamental part of the exercise that the ORR was carrying out at the time, because it could not stop at a finding of discrimination. What it had to do was find that there was a competitive disadvantage. What we have here and this is done in relation to the EME contract which is the subject matter of the proceedings before the Tribunal is a brief summary of the background in B60. Then, the tender negotiations in B61. The ORR notes that ECSL have been asked to bid. At the last two lines ECSL was in the tender competing directly with EWS for coal haulage by rail as well as other operators.

Then you have paras. B62 to B65 which are all important. If the Tribunal could just read those ----

THE CHAIRMAN: Mr. Lasok, if at any stage you want a ten minute break ----

MR. LASOK: I am in the hands of the Tribunal on that. If the Tribunal would like a ten minute break at this stage, then that is fine with me.

THE CHAIRMAN: It is very interesting, and we are concentrating hard. A ten minute break might be a good idea. Perhaps we might hold it now and take this page out with us.

(Short break)

THE CHAIRMAN: Thank you. We have read that.

MR. LASOK: You will have observed from B65 that the ORR said it was not possible to conclude that ECSL was displaced from supplying EME as a result only of the discriminatory terms from EWS. That was a perfectly fair point for the ORR to make and, indeed, it is not relevant for the purpose of present proceedings because it is not necessary for ECSL to prove that it was displaced from supplying EME solely because of the discriminatory terms. That is not the correct test. I do not think, actually, it is contended by EWS that that is the correct test.

We can now jump to p.608. Paragraph B100 on that page sets out a conclusion. The conclusion, right in the middle of the paragraph, was that the discriminatory pricing placed ECSL at a competitive disadvantage when negotiating intermediary contracts including E2E deals with generating companies. Then you have the rest of the constituent elements of the finding of infringement, the distortion of the competitive process at the end of the paragraph, and the finding that the conduct was abusive.

What then happened was that the ORR considered arguments advanced by EWS concerned largely with the objective justification of their pricing conduct. However, I think what we can do is to go to p.610. At the end of B109 there is an acknowledgement by the ORR that the difference in prices may be objectively justified and would not constitute an abuse if they were incapable of placing a trading partner at a competitive disadvantage. But, of course, the finding was that there was an abuse because they were not objectively justified and did place ECSL at a competitive disadvantage.

If you go to p.611, para. B116, that is a finding that EWS was fully aware that it was engaging in discriminatory treatment. What I would do is to go to p.617. Paragraph B139 at the top of the page - there is reference to the fact that the finding - and this is effectively the finding of infringement - is not discrimination against ECSL overall but during a particular time period, and this is specified as being the time period when ECSL was seeking general terms for haulage that would allow it to then bid for direct contracts with the generators including on an E2E basis.

Then go to p.618, bottom of the page, the last three lines,

"The material validly demonstrates how EWS had the intention from the outset of preventing ECSL becoming the principal in the relationship with generators".

Then I would go to p.625. In the middle of the page there is a section called "Effect on Competition". It begins in para. B175 with arguments advanced by EWS that actually pre-suppose that the matter at issue - the case that it was answering - concerned an E2E contract. Then you get the answer given by the ORR. Effectively it is the entire sequence from B176 to B187 that, with all due respect, it would be useful if the Tribunal could read. Given the time, what I would respectfully suggest is that the Tribunal simply sidelines this sequence ----

THE CHAIRMAN: We will all have read this before anyway.

MR. LASOK: Yes. B178 refers to the fact that the power generators were willing to consider contracting for coal haulage, either directly through an intermediary, including the E2E option, or directly with the rail operator. So, the analysis of the ORR is focused on the effect on ECSL as an intermediary offering an E2E option. You have the last two sentences actually,

"ECSL was at a competitive disadvantage vis-à-vis other actual and potential competing suppliers to BE and EME. These parties included EWS as well as other suppliers of coal, whether on an E2E basis or not".

B182, of course, contains a rejection of a contention that the price differences were insufficient to place ECSL at a material competitive handicap. Therefore, there was a finding that it was a material competitive handicap. There is a reference in B183. It is going into the negotiations in 2000, suffering from a competitive disadvantage. So, one important aspect of the competitive disadvantage that ECSL faced was that it went into tender negotiations in 2000 having failed to agree with EWS the performance-related deal for coal haulage that it had sought. So, that placed ECSL in a difficult position. It refers to the bearing of business risks that it would not otherwise have borne.

An argument is put forward by EWS in B184 which is rejected in B185. At B187 the ORR concludes that the intent of EWS was relevant. You can see that it says its primary concern was the fact that effectively EWS had been conducting itself in this way deliberately in order to remove the competitive threat that ECSL posed to EWS by establishing customer relationships with the generating companies.

We can then go to B189, which again explains the ORR's approach. We can go to the next page, p.629. At the bottom of the page, the bottom half of B195,

"The discriminatory treatment accorded to ECSL was the result of anti-competitive intent on the part of EWS. It is therefore not possible to infer from a finding of a discriminatory abuse in these circumstances that EWS would be unduly constrained from competing against FHH at a point in time when the market conditions are different and when actions are not actuated by an anti-competitive intent as in the present case".

B197 and then the conclusion at B198. In B197, the second half,

"The abuse is that EWS discriminated against ECSL and did so with the aim of impairing the development of competition in the market for coal haulage".

Then, B198 sets out the conclusion. That is specifically directed to the competitive disadvantage that EWS' conduct imposed on ECSL in its contractual negotiations with, among others, EME.

That is the decision. We can put that away. What I am going to turn to now is the question of causation which is dealt with in our skeleton argument at paras. 104 to 243.

THE CHAIRMAN: Please bear with me for one moment, Mr. Lasok, if only because the copy I have been working on of your skeleton argument has managed to fall apart..

MR. LASOK: I am just giving you the references, but what I am going to do orally is to look specifically at two cases and one passage in a third case. The first case that I want to look at is a case called *Normans Bay*, which is in the Authorities Bundle I, Vol.1, Tab 14. This is a decision of the Court of Appeal. I will give you the background to the case as one derives it from the judgment of Lord Justice Waller. If you go to p.369, para. 2, you see that in late 1993, IML (which was later Normans Bay - it changed its name) tendered for 49 percent of the shares in a Russian company under a privatisation programme. What happened is that its advisor was Coudert Brothers. The whole thing went wrong, and eventually the tender was set aside and IML lost the investment. We get that in paras. 8 to 9 on the next page, which basically explains how the transaction fell apart. What happened was that IML commenced proceedings against Coudert – we see that in para.10 – to recover their losses based essentially on the fact that Coudert had acted negligently. If you look at the end of para.10, four lines from the bottom, they were asserting that there was a strong chance that the transaction, the validity of the tender, would not have been challenged if Coudert had given proper advice.

If you go to para.12 – para.11 refers to a pleading issue that arose because a separate claim was made against Coudert on another point concerning advice about the Russian anti-monopoly committee. That plea was abandoned, or at least it was abandoned by

amendment, and what then happened was that in para.12 Coudert pleaded that anti-monopoly permission would have been necessary and on that independent ground the transaction would have been declared invalid anyway and Coudert asserted that broke the chain of causation. So you had a situation in which there were effectively two grounds on which Coudert could have been regarded as negligent. It was originally sued on both of them. The second one was dropped. The first one was proceeded with and then Coudert turned round and said, "Ah, but we would have been negligent anyway under ground two, that breaks the chain of causation so far as ground one is concerned, so the claim is unsustainable".

That gave rise to consideration by the Court of Appeal as to the question of whether or not a defendant can rely upon its own conduct as breaking the chain of causation. This is dealt with in the judgment at paras.42 to 46. If you go to para.42 you see that in the second sentence Lord Justice Waller makes the point that if the limitation period had not expired the point would not have arisen – in other words, the problem was that Coudert was able to run this curious defence relying on its other negligent act because, as a result of the expiry of a limitation period, it could not be sued.

That is parallel to a situation in the present case. Let us suppose that the jurisdiction of this Tribunal is limited to a particular infringement found by the ORR, and its defence EWS says, "There is no causal connection between that infringement and the loss suffered because we did something else and that something else broke the chain of causation and the Tribunal does not have jurisdiction to rule on that something else because its jurisdiction is defined by the ORR's decision". This is effectively the argument that arises out of the performance contract, the details of which you have seen in the ORR's decision, because what is said is that our complaint about the absence of a performance contract which was rolled up by the ORR into the discriminatory conduct case, it is said against us, "That does not form part of the infringement that is defined, we may have acted wrongly in relation to that, but if so that breaks the causation, no problem, it is not something that you can complain about".

The difficulty is that *Normans Bay* is just that kind of case. What we see is the discussion that really starts at para.45. It is introduced in para.44. The question of intervening acts that cannot be taken into account by the trial court in the *Normans Bay* case, the reason I could not do so, was because of the expiry of the limitation period. A reference is made to a case called *Bolitho*, which is quoted at the bottom of that page. If you go to the next page in the *Bolitho* case, if you go to the second line from the top, it was held:

> "A defendant cannot escape liability by saying that the damage would have occurred in any event because he would have committed some other breach of duty thereafter."

That was accepted as a statement of the law. Paragraph 46 deals with the fact that the *Normans Bay* case was rather different, but if you go down to the second half of para.46, there is a passage:

> "It is Coudert who want to reduce the value of the chance, by asserting they failed to do something which would have lowered the chance. Is there a principle which disallows a defendant from relying on a wrong which he has committed in order to reduce the damages that would otherwise flow ..."

Then the judge says:

> "It seems to me that there should be such a principle, and that is what Lord Browne-Wilkinson was recognising."

That is a reference to the *Bolitha* case. Then he refers to the public policy reasons for it. So the upshot is that in this case when one looks at what has been described, for example, by Professor Ordover at the "but for" world, the world as it would have existed in the absence of the infringement found by the ORR, that world is a world in which there is no breach of the Chapter II prohibition, no breach of Article 82 of any sort. That is the hypothesis against which we contrast what actually happened.

With that I want to turned to *Allied Maples*, which is a case also cited by my learned friend in his skeleton argument. That is in the same bundle at tab 9. It may assist the Tribunal if I hand up a speaking note dealing with *Allied Maples*, because I think it may speed things up a bit. (Same handed) I am not going to read the whole of it out. It is there for the ease of the Tribunal, but if we go to *Allied Maples*, tab 9, this is a case of solicitors' negligence in which the defendants' solicitors had failed to include a particular clause in a draft agreement which would have given the plaintiffs, who were buyers of a company, protection a historical liability incurred by the vendors or by the entity that was sold. The problem was that if the clause had been included in the negotiations it would only have protected the plaintiffs if the other party had agreed to it. So this is one of those cases, rather like the present, in which you are dealing with what is effectively the loss of a chance. If you go to p.1609C, after observing that the question of breach of duty was related to causation and also quantification, Lord Justice Stuart-Smith says that these latter questions, and he is there referring to causation and quantification which are of course the questions before the Tribunal in this case:

"... depend upon what (a) the plaintiffs and (b) Gillow would have done in a hypothetical situation ..."

What I am going to do is to describe (a) what the plaintiffs would have done as the (a) question, and (b) what Gillow would have done as the (b) question. If you go to 1609F, further down on that page you see that when it is said, "the court pointed out to Mr. Jackson", this is recording the fact that the Court of Appeal had interrupted Mr. Jackson's submissions saying that he was approaching the case on the wrong basis. Then we have the (a) and the (b) questions. The (a) question is introduced by the words:

"Once the judge had found that the plaintiffs would have sought to negotiate to with Gillow to obtain appropriate protection ..."

that is the (a) question; and then the (b) question emerges:

"... provided there was a real and not a mere speculative chance that they would have succeeded in the negotiation, that aspect of the case fell to be considered on the basis of evaluating the chance, a question of quantum, and not causation; and that issue did not depend on a balance of probability."

So there are two clear steps in the process and the second one, the (b) question, is not dependent on the balance of probability. If you go to 1610 at G, this is the (a) question:

"Although the question is a hypothetical one it is well established that the plaintiff must prove on balance of probability that he would have taken action to obtain the benefit or avoid the risk."

If you go to 1623A which is I think from the judgment of Lord Justice Millett (as he then was) he refers to the second head of loss. He says in the middle of that paragraph:

"This depended on (i) whether the plaintiffs would have sought to reopen the negotiations to obtain such protection and (ii) whether and if so how far they would have been successful."

The first of these again depended on what the plaintiffs themselves would have done in a hypothetical situation and accordingly had to be established on the balance of probabilities. So the first question, the (a) question, the balance of probabilities.

Then if we go to 1626 C, what he does there, he says he would set aside the judge's order and substitute declarations, and then you have four declarations, the third one is that had the defendants given proper advice the plaintiffs would have sought the reinstatement of the warranty or some alternative protection against first tenant liability. That emphasises the fact which appears in the passages concerning the (a) question that what one is concerned about is a question that is not as precise as all that in the sense that you have got whether the

plaintiffs would have sought to open the negotiations to obtain such protection – that is a reading from 1623, just before B, and it is the reinstatement of the warranty or some alternative protection. The claimant on the (b) question does not have to show these are the words, the terms of the clause that I would have put forward, all he has t o do is to say: "This is what I would have done; I would have sought this protection", that is the (a) question. That is balance of probabilities. But then when we get to the (b) question, which is what I want to have a look at now, if we go back to 1609 and go back to F, which is where I said that we see the (a) and the (b) questions appearing, and in the bit between F and G, when Lord Justice Stuart-Smith is referring to the (b) question he says that it does not depend on the balance of probability.

If you go to 1611 A to B, this is point (iii) where the judge refers to the plaintiff's loss, depending on the hypothetical actions of a third party, and in the third line he says:

> "In such a case, does the plaintiff have to prove on balance of probability, as Mr. Jackson submits, that the third party would have acted so as to confer the benefit or avoid the risk to the plaintiff, or can the plaintiff succeed provided he shows that he had a substantial chance rather than a speculative one, the evaluation of the substantial chance being a question of quantification of damages?"

He says:

> "I have no doubt that Mr. Jackson's submission is wrong and the second alternative is correct."

THE CHAIRMAN: Mr. Lasok, I have glanced at para. 10 of your speaking note, and I am just wondering before we develop this much further if there is any real difference between the parties on this matter of law.

MR. LASOK: I had got the impression that there was in large part from a reading of the summary response.

THE CHAIRMAN: Can Mr. Brealey help us because I must say I had not got that impression, I thought there was very little between the parties on this summary of the law.

MR. BREALEY: To be quite frank, I am not sure. Certainly there was a dispute originally because as the Tribunal picked up, Mr. Lasok did not refer to what the claimant would have done in the original skeleton and that is why we said in our response when one looks at *Allied Maples* you have these two questions, question (a) and (b). In the original skeleton Mr. Lasok only emphasised the loss of the chance, what Edison would have done and not what the claimants would have done, so there was some disagreement, but whether there is now I am not sure.

THE CHAIRMAN: Okay, well carry on, I was merely giving my impression that there was really, at most, a piece of paper between the two sides.

MR. BREALEY: It could well be. If Mr. Lasok is agreeing that there is a question (a) what the claimants would have done, in the "but for" world, and then question (b) what the third party would have done to confer the benefit, then we are probably in agreement.

THE CHAIRMAN: I have probably caused what I did not invite, which is further argument.

MR. LASOK: I do not think so. It is right to say this, and I am very grateful to Mr. Brealey for making those observations, there is undoubtedly a difference of views between the parties as to what the (a) question is, because the way Mr. Brealey puts it, as I understand it at any rate, is he says that we have to prove on the balance of probabilities that we would have proffered a contract which contained clause 1, clause 2, clause 3, clause 4, clause 5 and so forth, so we have to produce the contract, whereas when you look at what is said in *Allied Maples* that is actually nothing of the sort because the (a) question is not defined in that way by the Court of Appeal in *Allied Maples* and one can see this perhaps most clearly stated in the passages from the judgment of Lord Justice Millett that I have drawn your attention to, where he expressly veers away from any attempt to pin the (a) question down to the advancing of a particular clause in the course of the negotiations, and we say it is implicit in what Lord Justice Stuart-Smith says, because he too is using general wording, the phrase – I am taking it now from 1609 at F – is "sought to negotiate with Gillow to obtain appropriate protection." This is perfectly understandable because what one is looking at is a hypothetical situation and we all know that in the real world what happens is that people put in an opening bid, there are then negotiations and at the end of the negotiations people finalise the terms of the contract. It is very, very difficult to predict how exactly negotiations would have conducted themselves.

So the critical point is on the (a) question: would, on a balance of probabilities ECSL have sought to negotiate a contract involving coal supply? If on the balance of probabilities that is what ECSL would have done then you move on to the (b) question. The other relevant factor to note is that in the context of the (b) question we have the guidance from Lord Justice Simon Brown in *Mount v Barker Austin* which is quoted in the speaking note that we have handed up, about what are the duties of evidence, who has the burden of proof in relation to the (b) question.

So, perhaps by way of summary of the position, we submit that on the (a) question it is quite clear that on a balance of probabilities ECSL would have sought to negotiate a contract involving coal haulage. That is what it was in the market for. On the (b) question we submit

that when you look at it in the way it is approached by the Court of Appeal in *Allied Maple*s it is quite obvious, on the basis of the evidence, that there was, to put it fairly neutrally, a real and substantial chance that the contract would have been obtained and, as *Mount v. Barker Austin* shows, the evidential burden lies on the defendants to adduce evidence and to prove that there are factors that justify a reduction in the percentage chance of success down from one hundred to some lower figure. That is the way it works.

If you look at *Mount v. Barker Austin* (Bundle I1, Tab 10) -- I do not propose you actually look at it. You can just take it from the note because the relevant quote is there. You have para. 1 in the quote:

> "The legal burden lies on the plaintiff to prove that in losing the opportunity to pursue its claim he has lost something of value - that is, his claim had a real and substantial rather than a merely negligible prospect of success …"

and then, the evidential burden lies on the defendants to show that effectively there was no value in the claim".

That of course is formulated in a way that is specific to solicitors' negligence cases. But, you see the gist of it. The evidential burden, as I submitted a moment ago, lies on the defendants to show that there are factors justifying a reduction in the percentage that you would award effectively at the quantification stage.

The last point on this is a quick reference to a more recent case, *Law Debenture Trust*, to Bundle I, Vol.II. I think in what I said a moment ago I accidentally conflated two questions. I need to get this right. We have the (a) question which is the balance of probabilities. We have the (b) question which is dealt with in *Mount* at paras. 1 to 3. Then the (c) question is actually the quantification question. Having said that, *Law Debenture Trust* is Tab 18 of Bundle 1, Vol.II. I am not going to go into the facts. It contains a statement of the law that we have cited in our skeleton argument. I only wanted to draw the Tribunal's attention to the passage on p.626 of the bundle, at para. 166.

> "A court's assessment of the value of a lost chance of a beneficial outcome for the claimant is not a precise science, but is rather an exercise in which it may well be appropriate for the court to weigh a range of factors with a view to forming a broad view of the value of hat has been lost".

So, in our submission, the upshot is that on the A question all that it is necessary for the claimant to show on a balance of probabilities is that it would, in the words of Lord Justice Stuart-Smith in *Allied Maples*, have sought to negotiate a contract of the sort here in question with EME, and what then happens is that if we pass that (which, in our submission,

is really and open and shut question), we get to the B question which is whether or not there was a non-negligible chance of entering into the arrangement but for the abusive acts and there the evidential burden lies with EWS to show that EME would not have entered into a contract of that sort. Finally, it is for the Tribunal, after looking at all that, to assess the scale of the chance, adopting the approach indicated in *Law Debenture*, but also what, in our submission, is a generous assessment in favour of the claimant. The reality is that in all these cases the court is confronted with a situation in which the claimant has, to put it colloquially, been dropped in it by an illegal act of the defendant. The defendant then seeks to get out of it by waving its arms in the air and saying, "Well, because we are dealing with a hypothetical situation, all kinds of things could have happened". In those circumstances the courts tend to take a rather strict view with the defendant because what the courts are really interested in is the defendant coming up with some really good, sound defence which reduces the value of the chance that the claimant is asserting that it has got. That is the approach.

I suppose you could see it in this way: it is another example of the adage that dirty dogs do not win, or, at any event, if you are a dirty dog, you have to go the extra mile in order to convince the court that despite your unacceptable and unlawful conduct, you should not be held responsible for the damage that has resulted to the person that you have been injuring. In this instance we have got a very, very straightforward case of a defendant that has been engaging, over a period of time, in deliberate, knowing conduct designed to exclude somebody from the market. It has come about that its intended result has occurred and then it turns round and says, "Well, there is no causal connection".

In those circumstances, in our submission, the courts and this Tribunal ought to look very, very searchingly at what the defendant is advancing in order to test really whether the defence hold water. As I said at the outset, there is one extremely peculiar aspect of this case which is that the defendant contends that it knew from the outset that there was no chance whatsoever of ECSL getting the type of contract we are looking at from EME. That inevitably raises the question: If that was what you actually believed, why did you do this? That is a question that is not addressed by the defendant, but is a question that they will have to address in the course of these proceedings.

Finally, what I probably ought to do - but I am aware of the time - is to deal very, very briefly, I think, with quantum and interest. It is the subject of a very, very short passage in the defendant's skeleton argument. If you could go to that in Bundle A at Tab 7, para. 68 it is said there that there are a number of respects on which the calculations are exaggerated

or unjustified. These are the ones that EWS thought were strong enough to mention in the skeleton argument. The first one is a rather peculiar one, which is that losses were quantified on the basis that deliveries would have been on an E2E basis. But, there has, in fact, been no reason at all why quantification on that basis is incorrect.

Then it is said, and this is (b), that there has to an upper band in the form of the total losses that would have been necessary for Enron to incur in order to overcome the competitive disadvantage. This is a rather strange way of putting things and I am not sure what it means. The problem is that the hypothesis in the quantification exercise is that there is no competitive disadvantage emanating from EWS that ECSL had to overcome. That is the *Normans Bay* case. So you do not factor in competitive disadvantage.

Then the point in (c) is that Enron went into administration in November 2001, and it is basically said that consideration should have been given to the question of whether the contract would have been terminated at that time. The problem there is that there is simply no basis in the evidence for believing that any such contract would have been terminated when Enron went into liquidation. It would have remained an item of value that would have been sold as other items of value were sold to AEP. There is evidence on that, and that is the subject of Mr. Kahn's witness statement. So it would have remained an item of value and would simply have been sold.

The last point, (d), is the assertion that Mr. Fisher, who of course is ECSL's expert, wrongly assumed that all coal transported between 2001 and 2004 would have been delivered by Enron. Just pausing there, the problem with that is that that is the kind of argument that the defendant bears the burden of proving. The illustration of that is the ancient *Armory* case, which is in the first bundle of authorities at tab 7. This is a rather picturesque case. It was decided in 1722. It is always good in a case to have a really ancient authority. It is an illustration that if the wrongdoer wishes to make an assertion that, as it were, devalues the value of the claim made by the plaintiff, then the burden of proof lies on the wrongdoer. Of course, the facts were extreme because you can see that it was effectively a theft from the poor chimney sweep, or the chimney sweeper's boy, who had discovered the jewel. It has been cited in subsequent cases. In the kind of case that we are concerned with dealing with causation, as an illustration of the adage that everything is presumed against the wrongdoer.

THE CHAIRMAN: Sadly we are not told what the assessment by the jury was!

MR. LASOK: No, but we assume that the chimney sweeper's boy was happy at the end of the process!

THE CHAIRMAN: Yes, he probably ceased to be a chimney sweeper's boy!

MR. LASOK: Going back to para.68 of my learned friend's skeleton argument, the rest of para.(d) does not appear to be relevant. It looks, on the face of it, a causation point, that would have been resolved at an earlier stage in the exercise.

I have gone through the case, and it may have seemed extremely tedious to the Tribunal, particularly when we were going through the ORR's decision, but it was necessary to do that because the findings of the ORR are, in our submission, quite important by reason of s.47A(9), and also s.58 of the Act. I do not want to weary the Tribunal too much. You have already got the gist of the case that we are putting forward and the basic approach to the law as we have submitted it to be.

There is one final point of a factual nature that I wanted to deal with actually through handing up a note, which I hope will short-circuit things, and this is a chronology dealing with one aspect of the case, and that is the famous performance contract. I am not going to go through it orally. I would respectfully suggest that the Tribunal, if it has a moment, although I suspect that its moments may be infrequent, read it without me having to go through it orally today. I think that what I have done is to summarise effectively what the case is. It is one of these situations in which you have EME, rather like BE, putting out into the market an invitation to tender, initially for a haulage contract. There is then competition for that contract. When we come to some of the documents which we will see when the witnesses are cross-examined, you will see that the offer, the tender that ECSL was envisaging, was not simply for the haulage, but it was designed to lead on to a coal contract. Whereas in the case of BE, BE decided that it would go along with the idea of an E2E arrangement, in the case of EME that did not happen. The main area of dispute between the parties concerns why it did not happen. That really, going back to the (a) and (b) questions in *Allied Maples*, is a (b) question, it is not an (a) question. The (a) question on the evidence is quite clear, we submit, and that is that ECSL was going for, wanted to have, a coal supply contract. If it did not put in a bid for the haulage contract and somebody else got a four year haulage contract, no prospect existed of ECSL being able to get an E2E deal because the haulage element would have gone.

So the reason why, after receiving an invitation from EME, it put in a response to the tender for the haulage contract was that it wanted that to keep open the doorway to a coal supply agreement. That, in our submission, is quite clear on the face of the contemporary documents. What then happened was that it failed, and it failed, we submit, because of the discrimination, the abusive discriminatory practices of EWS as found by the ORR, because

ECSL was simply in no position to put in a competitive bid. That was the clear finding of the ORR and that destroyed its chance. That in a nutshell is the case.

Unless I can assist you any further at this stage, those are our opening submissions.

THE CHAIRMAN: Thank you very much indeed, Mr. Lasok. Mr. Brealey, do you want to get a few fast overs in before lunch or do you want to adjourn now and start a little later?

MR. BREALEY: A spinner or a fast bowler! Can I kick off because ----

THE CHAIRMAN: Yes, absolutely.

MR. BREALEY: Can I just hand up – I appreciate you have been inundated with paper but this should save the Tribunal's pen. (Document handed to the Tribunal)

THE CHAIRMAN: Thank you.

MR. BREALEY: Can I make an opening comment which is that in my submission it is absolutely remarkable – remarkable – that in the two and a quarter hours of opening Mr. Lasok has not referred to one single document in this case. This is a case on causation and all he has done is go through again the ORR decision.

I make the forensic point: why has he done that because he has only got the decision? When we have a look at the documents, and we are going to go through some of the documents in a moment, that is all he has, the decision. When one looks at the documents in the G files it is absolutely clear that he does not have a case. It is quite remarkable that not one document has been referred to in opening.

The first page of this paper – I will go through it – is the crux of what we say the Enron have to prove. Then over the next two or three pages there are page references to certain documents which we say are key, and which show that Enron never had a chance of anything.

If I can start by trying to summarise the contractual relations, and I set it out there. We say there are at least two contractual relations that the Tribunal must have regard to in assessing Enron's damages for the loss of a four year E2E contract, and one has to remember that it is the loss of a four year E2E contract.

The first contractual relation we set out is the contractual relations between EWS and Enron. To a certain extent this is Mr. Lasok's question (a). Had EWS in May 2000 offered none discriminatory pricing, and that is the abuse, the discriminatory pricing, what would Enron have done? What it would have done it must prove on a balance of probabilities. So, for example, would it have contracted with EWS and, if so, on what terms? We are not asking here for a detailed breakdown of 50 clauses in a contract, but we are asking to particularise what sort of terms you are talking about which would then have led Edison to

have given you the benefit of the tender. So when we say: "On what terms?" they have to articulate broadly on what terms they say – if they say it at all – they would have contracted with EWS. Or, (ii) would it have still concluded the deal with Freightliner? We are going to come on to the evidence of Freightliner probably after lunch. So those are the contractual relations between EWS and Enron – the question (a) what is it they say they would have done? If EWS in May 2000 had said: "Here you are, the rates, they are brilliant rates, non-discriminatory rates, what is it that Enron say they would have done?", and we criticise them because they never really articulate that.

The second contractual relation is then between Enron and Edison. In many respect 2(i) is the killer for Enron, because it asks: "What was on offer by Edison to Enron in August/September 2000: did Edison invite tenders for coal supply or haulage only?" The "(b/p)" means "balance of probabilities".

So when one is looking at loss of a chance – a chance of what? It is highly material to ask yourself the question: "What was Edison offering?" What was Edison offering in August/September.

Then (ii): "What did Enron tender for …" – this is the pleading point we may have to deal with after lunch – was it on a four year E2E coal contract, or was it for haulage only? Even in opening Mr. Lasok is inconsistent, because he seems to say it was on an E2E basis, and then almost his closing submission was: "Of course we would have sought to negotiate, there was a door, a window that could have been opened."

So again, what was Enron tendering for? What was it responding to the invitation to tender? That has to be proved on the balance of probabilities.

Then: "(iii) Did Enron lose a substantial chance of being awarded the haulage contract?" and that substantial chance has to be proved on a balance of probabilities.

Then "(iv) Did Enron lose a substantial chance of being awarded the 4 year E2E coal supply contract?"

What we have tried to do in a third of a page is encapsulate some of the really key issues that the Tribunal has to decide in order to determine whether they have lost a chance and their claim for damages succeeds, and that is in addition to the quantum issues, the evaluation of any chance, whether the master agreement was terminated, etc.

Having set out what are the key issues, in this document I have tried to set out what is the key factual background. There are three crucial elements to the factual background and we set them out here on the first page. When one looks at the first one, the 1999 Master Coal Agreement we do not get very much of this in the ORR decision, we certainly do not have

very much of it from Mr. Lasok's opening. But the first crucial part of the factual background relates to the 1999 Master Coal Agreement, and the fact that in June 2000 it was renegotiated, and when we come to the evidence that is what I am going to start with. Why is it relevant to look at the renegotiation of the Master Coal Agreement? The relevance is, and this is when one is assessing the loss of a chance of the haulage coal supply contract, what actually happened in June 2000? (a) Enron and Edison abandoned the E2E model, abandoned it completely. (b) Enron supplied the same volume of coal over a longer period of time with an uplift in prices, but crucially the renegotiation was that its coal was only going to be supplied to Fiddler's Ferry on the Liverpool side, not to Ferrybridge. So they abandoned the E2E model – (a) and then Enron, under the renegotiation in June 2000 is only going to supply coal to Fiddler's Ferry not Ferrybridge, remembering that their claim for damages is based on a four year coal contract that is going to go to Ferrybridge. (1)(c) should read "Edison" assumed responsibility for", so again, in June 2000 they assume responsibility for the delivery of coal, both to Fiddler's Ferry and to Ferrybridge. That was the reason for the coal haulage tender. So, under the re-negotiation signed in July, but backdated to June (it took effect as from 12th June), Edison assumed responsibility for the delivery of coal to both power stations. So, it was assuming the delivery of coal - Enron's coal - to Fiddler's Ferry (because Enron is now supplying all the coal to Fiddler's Ferry), and it is also going to arrange for delivery of coal to Ferrybridge where Powergen were probably going to -- the Powergen coal was primarily going to Ferrybridge. That was the reason for the tender. So, Enron dropped out of delivery and then Edison said, "Well, we need a tender".

What also happened is that Edison took in-house the negotiation of coal supply contracts and agreements with port - because one cannot forget that Mr. Crosland also wanted to negotiate directly with ports. He took in-house the negotiation of coal supply contracts, particularly at Ferrybridge where Enron was no longer supplying coal. So, under the re-negotiation Enron says, "I am going to send all my coal to Fiddler's Ferry". The Tribunal has seen from Mr. Staley's witness statement that it was a very good deal for them. They are no longer supplying coal to Ferrybridge.

So, that is the first part of the factual matrix I want to emphasise - this re-negotiation. When one looks at the tender in the light of the re-negotiation, can it seriously be contended that Enron had a substantial chance of a four year E2E contract for delivery and coal supply at Ferrybridge? We say, with the greatest respect, that it is laughable.

The second point is the Freightliner deal with Enron, and in particular the importance Enron placed on it. So, when assessing the chance of Enron being awarded this coal haulage contract - the coal supply contract - one has to look at how Enron looked at Freightliner. Lastly, in looking at the factual evidence, the Enron bid in response to the Edison invitation to tender. It is absolutely clear that the response to the invitation to tender was for haulage only. That is the evidence of Enron itself. That is the evidence of Mr. Staley. Coal supply - particularly a committed four-year supply contract - was simply not on offer, and that is not what they tendered for.

Those are my opening shots. I will continue with the documents I would like to refer to in opening.

(Adjourned for a short time)

THE CHAIRMAN: Yes, Mr. Brealey, I have got to the bottom of the first page, I think.

MR. BREALEY: On the second page, what I would like to do is look at the documents for the next hour or so. It is under three headings, just so the Tribunal knows where I am going. The first heading is under "Restructuring". What I would like to do, before I get to bundle G2, I am going to go bundle G1 – the first heading is "Restructuring", then the Freightliner contract, and then over the page, the tender. So these are the documents relating to these three contracts that I would like to draw the Tribunal's attention to.

Can I start with para.28 of Mr. Staley, so I will start with the restructuring. Could the Tribunal just turn up Mr. Staley's statement, bundle D1, tab 1. Paragraphs 24, 25, 26, 27 and 28: this is the background to the restructuring. 24, Enron started supplying coal to power station Fiddler's Ferry and Ferrybridge in the summer of 1999. Then it negotiated a contract with Edison Mission in August 1999 for the supply of coal. That is the Master Coal Purchase Agreement, and that is at – I am going to refer to the G bundles, if I can, but just before we get on to the difficulties with that, so that we can identify that, I do not know if the Tribunal has seen it at all, but it is at G1, p.111. Could we go to G1, p.111, just to see what this Master Coal Purchase Agreement is. At p.111 we have the Master Coal Purchase and Sale Agreements for Fiddler's Ferry and Ferrybridge, entered into on 13th August 1999. Then clause 1.2 says that the parties will execute certain written confirmations - "will execute and send a written confirmation in the form of the exhibit". Then, if one goes ahead to 156, there are various confirmations, but just to see what the confirmation looks like at 156, we have got the seller, Enron, buyer, Edison, term, through to April 30th, etc,

and then prices for firm deliveries, it has got tonnages. Over the page it has got delivery points, delivery schedules, sources, so the sort of coal that was going to be supplied, Colombia – Carbocol – make a note of "Colombia – Carbocol", because that actually comes into the documents a bit later on. Then Colombia – Drummond, Edison liked the Drummond coal. So this is the sort of specifications.

Then at 159 we have Attachment A, delivery schedules, "Delivery Schedule of Enron Coal for Ferrybridge". There is a firm commitment of 160,000, etc.

It is important to recognise that this 100 agreement was a true E2E contract, whereby Enron negotiated the price of coal with a coal mine, it negotiated the agreements with the ports, and it arranged for the inland delivery of the coal. The price is a price to stockpile. It is an all-inclusive price. They are charging a price all-inclusive, a delivered price to stockpile, stockpile to the generator.

Just to identify, the Master Coal Purchase Agreement concluded between Edison and Enron in 1999 ----

THE CHAIRMAN: This may be obvious, but I just want to be absolutely certain I understand what E2E means, E2E, as I understand it, means that all other parties are not involved in the contracting process with the purchaser of the end product, the supplier makes whatever contracts they wish with third parties but from beginning to end, to the delivery on to the stockpile it is their entire responsibility?

MR. BREALEY: Yes, Enron's entire responsibility. Just to pick up on that point, that was a major factor in Mr. Crosland, Edison, wanting to get out of the E2E concept, because he wanted to have direct negotiations for example with the coal suppliers.

THE CHAIRMAN: Yes, I see.

MR. BREALEY: It is not just a question of having direct negotiations with EWS as to delivery, it is the ports and the coal suppliers. Basically what happened, as we will see in two seconds is that Edison over ordered, it was committed to too much coal. Enron agreed to sell that coal, Edison agreed to take it, but because of the nature of the E2E model, and the position of the intermediary Enron had back to back contracts with, for example, the coal mines. So when Edison said: "There is too much coal coming into my power station, can you do anything about it?" "Well, no, we cannot, because we have these back to back contracts" – Mr. Crosland will have to speak for himself, but it is our case that the E2E model was inflexible and that is why in June 2000 they parted company with the model. So that was the August 1999 true E2E concept.

Paragraph 26 of Mr. Staley, we see him there referring to the confirmation, which we have just seen. We can put bundle G1 away, because we are going to go on to G2 and G3. He now starts referring to the relationship between Enron and EME deteriorating in the first half of 2000 and this is common ground between the parties in this case, because Mr. Crosland says in his witness statement – this is Mr. Staley (Enron's witness) – he says the main reason was the poor performance of EWS, well we will have to have a look at that. At 28 he says it was not the only factor, and this is what I am going to concentrate on for the next 10 minutes.

> "EME (Edison) had wildly overestimated then umber of hours that it would be able to economically operate its power stations, thus they had committed to purchase far more coal from Enron that they were able to burn or stockpile.. When these erroneous assumptions became apparent over time, EME sought to reduce the volumes supplied under the contract with Enron, but they were unwilling to share in any of the costs associated with the restructuring the contract. This further increased the tension n our relationship."

So what I would like to do is have a look in bundle GII at how the relationship did actually break down, how there was mistrust between the parties, and this is all relevant to whether Enron really realistically said that it had a chance of a four year deal in September.

The first document I would like to refer to which is on this sheet of paper that I have handed up, is on p.422.

Clearly, as far as time – we have to cross-examine Mr. Kahn today as well, but these are the important documents on these topics. This is a letter or an email from Mr. McClellan, who is essentially the 'top dog' of Enron in Houston, so this is at a high level, to Nigel Petrie at EME:

> "Based on the tenor of the weekly meeting held today at Fiddler's Ferry it seems that we are in danger of having fairly divergent ideas on how best to handle our business going forward."

Then the third paragraph:

> "Based on Mission's revised burn plan it is obvious that you will not require the quantity of imported coal already purchased from us for delivery through June 2001. the purpose of the proposal we made during our meeting last week was to recognise the reality of your situation and make appropriate adjustments to our coal supply contracts."

Then he says:

> "We are obviously not in a position to forgive our coal supply contracts with Mission, especially as we are on mark to market accounting."

Again, I would be grateful if the Tribunal could look at these documents at their leisure, but at the bottom he says:

> "In short we are here to work with you regarding the present difficulties. … We now have a one week window of opportunity to restructure our contracts with Mission, otherwise our obligations with our coal supply and transport counterparties will become very cumbersome, and expensive to unwind."

- again showing how an E2E contract can be inflexible, because if you have this back to back contract and the generator wants to get out of it, it may not be able to renegotiate because of these commitments on a back to back basis. Then he says: "I suggest that the two of us sit down …" He talks about "continued frustration and poor business practices by both of us". So that is Enron writing to Edison saying: "Look, we have to restructure this deal, there is too much coal."

Then we get p.428: "I look forward to seeing you on Friday … anxious to see these problems resolved". Over the page on 429:

> "You will not be surprised I am sure if I tell you that amongst the options that we have to consider for dealing with this situation is that we proceed with a notice of default on your part and formal termination of the contract between us. In this respect therefore, I must ask you to confirm in the meantime that you have not and will not enter into any new commitments on our behalf until the differences between us are settled …"

So it is getting to a serious stage in February, talking about terminating the contract. "Do not enter into commitments that are going to bind us". Then we get the reply (p.428) from Mr. McClellan: "I am a bit surprised at receiving your message which does not set a positive tone", and he refers to various problems that I just have not got time to go through, but he talks about "your inability to accept coal, the issue with Carbocol, and the penultimate paragraph: "Enron will not hesitate to pursue its rights under the terms of the various agreements between us."

Other contemporaneous documents that the Tribunal may have picked up that talk about squaring up for a major contractual disagreement, this is putting the flesh to that.

The next document is p.439 this is not between Enron and Edison, it is a document that we have flagged in our skeleton, but 439 is an EWS document, the important bit is under point 2, third paragraph:

"Discussions with Edison Mission have confirmed their intention to deal directly with EWS from 2001 and to dispense with the services of Enron."

So evening February 2000 there is word coming out that Edison does not want Enron to be delivering their coal.

The next document is p.502/503. This gives a flavour of the difficulties – as far as Mr. Crosland is concerned he was happy. This is a letter from Mr. Crosland, who can be cross-examined about it, but it was on the file. He says at 503:

"Stu,

I understand that your people have again reverted to the practice of negotiating contract variations direct with the stations, and also direct with Powergen."

So basically he is complaining there that Enron are going behind his back and trying to negotiate contract variations. He says:

"Having just been instructed by Peter not to talk to a particular coal supplier because 'it's your contract' I would be grateful if you could arrange for us to be shown the same courtesy by discussing anything other than very minor operational matters with either …."

and it goes on. To pick up a point that you made, sir, "Can you talk direct?", this is showing that Enron does not want Edison/Mr. Crosland to be talking direct to the coal suppliers because it is their contract. Then we get a response from Mr. Staley - he disagrees that he has been negotiating contract variations directly with the station.

"I would describe what we have been doing as 'scheduling trains'. If you are referring to the now famous Clause 8.14 …"

So, there is a dispute between the parties - essentially Clause 8.14 - as to whether the station should be open at weekends to accept delivery of coal. Then, at the end,

"With respect to our communications with Powergen and LBT, these never have been anything other than operational in nature (much like your communications with EWS and Hull, both parties with whom we have contracts). For you to equate our discussions with Powergen LBT to your request to contact, ...[which I think Mr. Crosland has been talking about] Weglokoks in an effort to change restrictions in our contract is (in my estimation) utterly ridiculous".

I refer to that because, again, one can see the deterioration (as Mr. Staley puts it) in the relationship between the two parties.

The next document is p.520. This is 27th April, 2000. This is a letter from James Courtis-Pond, who is an in-house lawyer with Edison, writing to Enron. Obviously there had been

some negotiations about restructuring the deal. He complains about not receiving a reply to my letter.

> "As you will appreciate, it is not possible to have a sensible negotiation leading to a responsible restructuring of the contracts without this information ... We have tried to be extremely constructive and hope that the negotiations will continue to be so, but without a breakdown --"

Essentially, what he is complaining about is that, obviously, Enron is saying, "We want compensation" and this guy, Mr. James Courtis-Pond, is saying, "What is the breakdown of this compensation?

> "How am I able to determine whether we would be paying you a windfall payment? Could you kindly contact me ----"

At p.521 we see a document which gives an idea of the problems that Fiddler's Ferry was having. I have bigger copies if you need it. This is an internal EWS letter. Basically what is happening is you have the two main coal suppliers - Enron and Powergen - pushing far too much coal into the power stations. The whole thing is a mess. You have Enron ordering too much. You have Powergen ordering too much. What on earth is EWS to do? This is a very good example of what was happening. First of all, he is saying,

> "Problem is that the combined orders of Enron (52,600) and Powergen (32,200) exceed 66,666 tonnes by 18,134 tonnes. Edison refuse point blank to tell their coal suppliers to reduce their orders see below ... However if Fiddler's bottle it - and I think I have called their bluff - the problem reappears the following week --"

It does. Enron have done exactly the same. So have Powergen. They have ordered too many trains.

> "I think Edison want to clear as much Powergen coal now to reduce the supply in the winter so that they can take Enron coal when they want to burn it."

So, this is an example ----

MR. LASOK: You have omitted the previous sentence - I assume deliberately.

MR. BREALEY: You do not assume deliberately.

THE CHAIRMAN: There is a bit of vernacular in this paragraph I am afraid I do not understand. The use of the word 'cereal' ----

MR. MATHER: I do not understand it either.

MR. BREALEY: It is not part of my family's vernacular. 'Cereal' yes, but not a metaphorical meaning.

MR. LASOK: We think it is 'surreal'.

MR. BREALEY: "For reasons that seem surreal to me Edison want and have negotiated ----"

THE CHAIRMAN: Forgive me. Yes.

MR. BREALEY: They want EWS to favour Powergen over Enron. What this document is showing is that there is a complete mess. There are too many trains being ordered, too much coal being delivered.

THE CHAIRMAN: When you say it is really too much coal, you are not saying that it is non-contracted coal. This is coal which Enron should be providing under the contract.

MR. BREALEY: As I understand it, yes. When it comes to the restructuring, they do not give up their volume of coal. What happens is that the same volume of coal gets delivered over a slightly longer period and they get an uplift in prices in the third year. But, Enron were absolutely categorical - as I understand it, because of this market accounting - that they would not forego the volumes of coal they had agreed to supply Edison.

THE CHAIRMAN: The point being that you are less likely to deal with an inflexible counterparty.

MR. BREALEY: So, that is the too much coal. Page 523 is the next one. This is: what could the power generator do when too much coal was being supplied to its power station? Well, it says to its supplier here - Enron - "Look, let us do a bit of trading. Don't get it delivered to me. Can we on-sell it?" What pp.523 and 524 are going to is that Mr. Crosland is saying to Enron,

> "It appears to be taking a very long time to work out what I would have thought was a fairly easy calculation to determine".

What he wants is some flexibility to on-sell the coal. Essentially the intermediary, Enron, is saying, "Well, we're still waiting back on with our suppliers", or, "It's going to be very difficult to be done. The deliveries are coming". The bottom line is that Mr. Crosland cannot contact the coal supplier direct. That, again, is causing problems.

Page 525 is a further letter from Mr. McClellan. We are now 5th May. In manuscript, "Edison Mission Restructuring".

> "Nigel, It doesn't look like we have been making too much progress of late with regard to restructuring our coal supply agreements. I would like to get both of our groups to focus on reaching a settlement, and get back to developing a stronger customer relationship between Enron and Mission".

So, he wants a revised settlement proposal. Then, in the penultimate paragraph,

> "It is fairly obvious t hat the existing contract format is unworkable, and needs to be restructured".

He hopes that they can get agreement. So, this E2E model, for Mr. Crosland, is proving to be unworkable.

The next document is at p.529. This shows the mis-trust that Enron had about Edison and what it perceived to be Edison's deliberate restriction of Enron delivering coal.

> "Given the current situation with Edison Mission, we need to start logging and monitoring every single incident of perceived (or otherwise) obstruction of coal delivery by Fiddler's Ferry and Ferrybridge. Every instance where Edison Mission restricts the delivery of our coal through plant failure, changing loading hours, pushing back trains, or other needs to be recorded".

Then he has an Edison Mission Incident Report log sheet. Again one can see the deterioration in the relationship between the two parties, because the next paragraph, "This evidence could be used in court". So it is very important that we fill this information, and then one sees over the page an example of a log sheet. I think, I am not sure, this may be a draft that Mr. Kearney has drafted, but one sees, "Description of incident", "Fiddler's Ferry cancels trains due to belt failure". So this is a problem at Fiddler's Ferry due to the belt failure. "When did we find out?" "Who informed Enron?" David White of EWS informed Enron. "Reasons for the incident", "belt tear in one conveyer". "Consequence of incident, nine trains completely cancelled". So one sees here Enron thinking they may be going into court, having a log sheet which is going to list every incident where Edison, not EWS, Edison is frustrating the delivery of coal.

The next page is 563. Again, strangely enough, this is dated May 12th, which is the famous date within the whole case. At the bottom, again showing the deterioration in the relationship between Enron and Edison:

> "This is getting to be very silly and I think to stage where EME are frustrating our business unfairly."

Then the complaint here is about some sort of agreement that Edison would allow Enron to deliver the coal by trucks. They seem to be reneging on that agreement and giving Powergen some sort of preferential treatment.

Then at the top of that page, the reply says:

> "What's the latest on restructure? That's still the best option."

Then we get to 564, which is an email from Mr. Staley. By May 13th, as I understand it, negotiations of sorts have been going on, but do not forget that under the second deal – this is an indirect reference to a second deal with Mission. He says:

"... there is both a premium and a penalty for sulphur content in the volumes ... We will make some extra $$ on this change, so make sure we bill them for it as soon as the volumes under the new contract commence."

So this is a reference to some sort of new contract.

Then at 575 – we are almost finished with the restructuring – 15th May, this is another letter from George McClellan, this time to Mr. Willie Heller, copied to Stuart Staley. It is headed "Mission restructuring", and there is a list of complaints about Edison's treatment of Enron. The second paragraph says:

"I indicated during our meeting that we have made a number of recommendations to EME coal team over the past 6 months regarding vessel schedules ... It is obvious to everyone that the LBT schedule is unrealistic and that Fiddler's Ferry is incapable of accepting full contractual deliveries of imported coal in a timely manner."

Then the beginning of the next paragraph:

"My London coal team has consistently held the belief ... that the EME local operations and coal team are frustrating our attempt to deliver imported coal to the stations."

So again "our London coal team", this is the Enron coal team, "have a belief that you, Edison, are frustrating our attempt to deliver coal".

Then he makes the complaint about the trucks, that there is a breach of the truck agreement, and then he refers to the issue of "hot coal".

I am trying to take this as quickly as I can. Over the page at 576, the paragraph beginning:

"Our message to EME regarding the need to restructure our coal supply contracts has been fairly consistent for the past 4 months."

He goes on to refer to negotiations which have not resulted in anything because Enron say they are too expensive.

"I am, however, fairly certain that a prompt restructuring of our agreement will be cheaper than the alternative of letting someone else do it for us."

"i.e. let us try and do it before the courts get involved". There is no reference there to EWS at all, it is all about our London coal team have the belief that Edison is frustrating the delivery of imported coal.

Then at 605 we have an important document. Essentially at the bottom of p.605 is Mr. Crosland to Staley saying, "Here is a Word document with the termsheet for a revised deal". Then Staley forwards that to various people. Before we get to the termsheet one sees at 606

the reply, or a note. Mr. Crosland refers to a note by Mr. Heller replying to the McClellan letter. Again, I would ask the Tribunal to read it, but the last two paragraphs are important:

> "To date every avenue we have explored to resolve the situation has led us down one of two paths ... In the latter case Enron were asked to explain the basis of the calculation, as the basis for a negotiation but nothing has been forthcoming."

Then this is sentence is important, because this is flagging up the abandonment by Enron of delivery:

> "Indeed all alternative solutions, which remove the delivery risk from Enron and leave us to manage the volume problem, have not been followed up."

So there have been obviously discussions about Enron getting out of the delivery of the coal to Fiddler's Ferry and Ferrybridge. He says, "I am anxious to resolve the problem", and basically he does not want to see it in the courts.

The termsheet – and this is essentially the last document that we see on the re-negotiation. These are the only documents that we have had disclosure of. This is the termsheet for the restructuring deal. It refers to the September confirmations, the December confirmations, and then amended Fiddler's Ferry confirmations. I remind the Tribunal that under the restructuring, no coal to Ferrybridge because the Powergen coal is going to Ferrybridge. Then right at the bottom, iv, this is an obligation on Enron to use reasonable endeavours to accept tonnages at Fiddler's Ferry in accordance with the delivery schedules. Then there is an alternative:

> "Alternatively, to remove Enron from any UK logistics risk, [Edison] would accept delivery on a CIF LBT basis or an FOB Columbia basis. Prices for this to be based on Delivered to Station Price as above less actual port and delivery costs."

So this is clearly the proposal whereby Enron are no longer going to deliver coal either to Ferrybridge or to Fiddler's Ferry. That is exactly, as we said just before lunch, what happened under the restructuring, namely that all the committed tonnage was diverted to Fiddler's Ferry, no coal to Ferrybridge any more. Ferrybridge was going to be operated with Powergen coal, and Mr. Crosland said if Ferrybridge needed imported coal he was going to do it on a spot basis, and Enron to get out of the delivery. I need to go to G2, but the last document on restructuring is at G3.

THE CHAIRMAN: Just before you get there, I have just looked over the page, at p.609, sub-paragraph (v), is there any contradiction between (iv) and (v)? I do not quite understand what (v) means, given what you have told us about (iv).

MR. BREALEY: Well they have the option to direct coal to Ferrybridge. In (ii) one of the things under the renegotiation Edison have the right to sell on coal at its sole discretion, so that gets rid of a problem that existed. Edison have the option to direct coal to alternative locations in the UK or Europe, it is giving an option to Edison if too much coal is coming into Fiddler's Ferry it can direct it to other locations in the UK or Europe, and (v) it can also have the option to direct coal to Ferrybridge. So it is giving Mr. Crosland at Edison far more flexibility as to where the coal is going to go if too much is being delivered at Fiddler's Ferry – far more flexibility.

THE CHAIRMAN: I see.

MR. BREALEY: The last document on restructuring is in G3, as I say try and keep open G2. G3, p.620, this is from EWS to Mr. Kearney: "Tom", and then the last sentence:

> "I understand from Sunday 11th June we will no longer be carrying coal for you to Ferrybridge and Fiddler's Ferry. Can you please confirm?"

Then the reply from Mr. Kearney – again the second sentence:

> "As for Ferrybridge and FF, it is our intention to hand over rail deliveries to our client on Sunday 11th June 2000. This agreement is not signed so no guarantees."

But as we know, that is exactly what happened, Sunday 11th, Enron ceased to deliver any coal to Fiddler's Ferry and Ferrybridge, and handed over the responsibility of delivering to Edison. Hence, the reason for the tender, because a few weeks after that Mr. Crosland at Edison then puts out a contract for tender. If Enron is not going to do it, who then is going to deliver that coal?

It was only after Enron then had negotiated its deal with Freightliner, almost at the 11th hour, it put its bid in, and Freightliner one sees the note we go to now.

I start with the Freightliner contract, just referring to what Enron say through Mr. Staley at para. 21 of his statement. He says at the bottom of para. 21:

"Given our inability to agree a performance based contract with EWS" – we will have to cross-examine him on that – "Enron ultimately entered into rail haulage contract with Freightliner in June 2000 that underpinned their entry into the dry bulk rail haulage market. While this contract with Freightliner delivered to Enron much of the performance certainty that we were seeking …" Mr. Lasok has handed up a very lengthy note on performance which we have yet to read and work out its relevance, but there you see Mr. Staley saying

> "The Freightliner deal delivered to Enron much of the performance certainty that we were seeking, it only came as a result of our unwillingness to take the

significant risks associated with committing to enough firm ('take-or-pay') volumes."

Just pausing there, the risks – we can try and work out the extent of the risks that Enron say it had, but that was the competitive disadvantage that the ORR is referring to in its decision at para. B62 I think. If I can just read it – B62, the competitive disadvantage:

"Having failed to agree the performance related contract that it sought from EWS, Enron was in the position of having neither its own coal haulage operations nor a suitable contract with EWS. This would have impeded Enron's ability to offer competitive rates for coal haulage. In bidding to supply EME Enron would have had to bear the business risks …"

This is the competitive advantage that the ORR is referring to:

"… would have had to bear the business risks subsequently needed to reopen negotiations with EWS".

So do you reopen negotiations with EWS, or assist the new entry, Freightliner? When one looks at B62 and one can cross-refer it to what Mr. Staley is referring to in para. 21. He is referring to the Freightliner deal, and I start in bundle 2 at p.475. This is not to do with Freightliner, this is to do with the EWS Enron agreement relevant to what Mr. Lasok calls "question (a)".

"Met with David Griffiths and David White this morning. Today was the easy day because we did not discuss prices. EWS did react very positively to our term sheet and we have agreement on the general structure of our next contract.

The main positives from the meeting:

* EWS agree to a Base Train Plan"

- and then the fourth bullet: "EWS agreed to the concept of Performance Incentives/Penalties."

So this was a meeting, 16th March, where basically EWS had agreed everything, subject to the difficult issue of prices.

We then have p. 559, which is the famous May 12th quote, and those rates are the rates that the Regulator found to be discriminatory, but at p.560 we see "Points Agreed at Meeting on 16th March". We still really do not know where Mr. Lasok is going to go down on his performance issue. But, what we can say is that it is absolutely crystal clear from the decision that there is no finding of an abuse relating to any performance-based issues, and there is absolutely no finding that EWS refused to give performance based criteria at the critical time between May and November. That is the time that we are talking about. One

goes back to previous hearings -- This is the time period - May to November. Yes, there was a failure to agree a contract because of the high prices -- or partly because of the high prices. We will see whether it is solely or predominantly in a moment. But, there is no refusal to offer a performance-based regime. What actually happens - and this is 12th May, the famous May rates -- There has been a 16th March meeting where there has been some sort of agreement on the EWS/Enron relationship/contract. These are the rates and the term sheet. One goes - and this is highly relevant to causation - back a page to p.558 and sees what Enron actually does on receipt of the 12th May quotes. A mere 1.5 hours after receiving the quote we get,

> "EWS proposed rate structure. First offer. Advise we delay on contract as much as poss. BRS is looking good".

'Advise that we delay on contract as much as poss.' That is exactly what Enron did. They never came back to EWS for any further rates. What they did do, as Mr. Kearney says, is to jump into bed with Freightliner.

THE CHAIRMAN: What is the significance of the DRS? They are Direct Rail Services.

MR. BREALEY: I think what was happening is that at the time Mr. Kearney was having a discussion with DRS to be its haulier, and whether at this time, or very soon after, with Freightliner. So, at the time that the 12th May quotes came in, Enron were having an eye as to who else could deliver coal for them, and, therefore, are delaying the contract with EWS, as they say, 'as much as poss'. It is highly relevant to an issue of causation.

We can put Bundle 2 away for the time being.

G3. Page 621. 2nd June. Enron received the quotes from Freightliner. What I would like to convey -- the message that I would like to convey from the following documents is that Enron did jump into bed with Freightliner. It got competitive rates. It used those competitive rates in its tender. It thought that the Freightliner deal was a very good deal. So, it got very competitive rates from Freightliner. It used those rates in its bid to Edison. We will see that they were popping the champagne. So, here we have the rates -- This is just the beginning. On the face of it Freightliner is attractive. I would ask the Tribunal to look at this in some detail.

THE CHAIRMAN: The bottom of p.622 you would presumably draw our attention to.

MR. BREALEY: The suggested response - they are going to go back to Freightliner and the rates -- going forward, both Freightliner and DRS offer significant potential value to the business. So, here this is Enron internally - and we see this again.

"Both Freightliner and DRS offer significant potential value to our business. Freightliner offers significant short term/tactical value in talking tonnes away from EWS --"

When it comes to causation and what they would have done in the absence of the May prices -- what they would have done -- Here they are, saying they want to take tonnes away from EWS.

That is the start of Freightliner. Then we go to p.644 - return sheet from Freightliner. I would ask the Tribunal to note the rates: £3.30 - Redcar-Aire; Immingham - Aire - £2.75. Then there was a discount of 10p per ton after 1 million tons. Another discount after 1.25 million. There is an issue - again we have seen Mr. Staley refers to this in his statement - about Freightliner wanting a commitment of 1.1 million tons. That is a business risk that Enron had to assess. But, they are prepared to take that business risk because Freightliner, as they say, agrees to 95 percent performance target.

Bottom line:

"We will introduce real competition in the rail transport of coal for the first time ever. We have effectively frozen or improved our current rates until end 2001."

So, yes, the rates that EWS offered were higher, but how, as a matter of causation, Enron reacted to this in reality --

We go on to p.673 - the competitive disadvantage identified by ORR was having to assume the business risk. B62. Here is how in fact Enron did assess that business risk. One sees at the bottom that Freightliner is providing Enron with service levels of 95 percent , when the current industry level is 80 percent. So, that is why Mr. Staley said that the service levels were basically more than satisfied. "Why do you want it?" They assess the risk and in cross-examination and/or in closing we can refer back to this. But, I would ask the Tribunal to read it. It is Enron - a multi-billion pound company, after all - assessing the business risk. On my note, over the page, at p.688, there is a further assessment which, given the time I will just ask the Tribunal to note. We have not seen yet the Freightliner Agreement. That is at p.691. It is dated 30th June, 2000. The one thing I would ask the Tribunal to note is p.706 which contains the rates. 2.75 Immingham to Aire, 3.30 Redcar to Aire, 2.85 Hull to Aire. Just for the Tribunal's note, if one writes next to "Immingham to Aire Valley" 2.70, and Redcar to Aire Valley, 3.20, and then Hull 2.75. So if one writes 2.70, 3.20 and 2.75, those are the rates that Enron quoted in its bid. Mr. Kearney says that when Enron bid it used these rates, which is fairly obvious, and the rates it quoted for Immingham to Aire was 2.70, Redcar to Aire 3.20 and Hull to Aire 2.75. So on two routes it was going to make a

loss just on these figures of 10p; on the other route it was going to make a loss of 5p. However, if it did get the haulage contract from Edison, 600,000 tonnes, it would have then got the 10p discount so it was not going to lose anything at all.

THE CHAIRMAN:

MR. MATHER: Does this represent a change? Did the original coal come into Liverpool and it is now coming from the East Coast, from Hull and Immingham?

MR. BREALEY: Essentially Enron was delivering before this, it was delivering coal to Fiddler's Ferry and Ferrybridge. Fiddler's Ferry would have been coming from Liverpool; and to Ferrybridge it would have been coming, as I understand it, basically from Hull. They are now out of this, so they are not delivering any coal at all. What this contract, as I understand it, is really underpinning is Enron's BE bid. Enron have joined forces with Freightliner for Freightliner to deliver coal to BE's power station at Eggborough. That coal is going to come from the East Coast. That is why, when it says a "Risk Assessment", we have got this commitment to 1.1 million tonnes. 600,000 of that, say, is going to go to the BE/Eggborough, which we know is going to happen. We are not saying here that we know anything about the bid, but what would happen is that if they put the bid in for the EME contract and they got another 600,000 tonnes then they would get the discount of 10p and they would just wash their hands.

Then 752, this is the Freightliner deal concluded on 30th June. They are not saying here, "Woe is me, if only I had an EWS deal life would be so much easier", what McClellan actually says is, "Tom, great job on the Freightliner deal, it's amazing the portfolio of port and rail deals you guys are putting together", "Great job", highly relevant to causation,

At 859 we have the press release. What happens is they keep it quiet. They want to keep it confidential. We do not know for what reason. It was signed on 30th June, but they wait the whole of July and two weeks of August before they publicise the deal. They keep it quiet, and there is an email saying, "Let's keep it confidential, don't talk about it". This is then the press release of the Freightliner-Enron deal:

> "Today for the first time since rail privatisation, the UK coal transportation industry has a new rail freight services supplier ... landmark agreement ... 'We welcome Freightliner Heavy Haul's entry into the coal transportation business', said Stuart Staley, 'and we strongly believe this agreement will allow Enron to provide a reliable service at competitive prices to our customers over the long term.'"

It was on the basis of the Freightliner agreement that they bid for the Edison tender.

Given the time, we do not have to go to the last two. 872 is another email saying, "Great, well done, you're the man", and 876 is EWS's reaction, "Enron are saying it is wonderful that EWS's share price has fallen on receipt of this news". EWS were apparently shocked, according to Enron, by the news.

That is the second part of the factual matrix that I want to emphasise. The first is the re-negotiation, and the second is Enron's perception of its deal with Freightliner.

The third piece of this jigsaw is the tender itself.

I am asked to ask, does the Tribunal need a break?

THE CHAIRMAN: Yes, we might have a seven minute break, or something like that now, just to stretch our legs.

MR. BREALEY: I will try and finish at half past, twenty five to, and then we have got Mr. Kahn.

THE CHAIRMAN: Fine.

(Short break)

THE CHAIRMAN: Yes, Mr. Brealey?

MR. BREALEY: The last piece of the jigsaw is the tender, which is quite an important piece. I have tried to list out all the major documents here, we will not have time to go through them all, but can I begin by referring the Tribunal to paragraph 32 of Mr. Staley's evidence, and if we have to amend the pleading in the defence we will, or we will apply to, but para. 32 is about as clear as it can be as to what Enron's evidence is. Everyone is agreed – I think – that the invitation to tender was for haulage, and we are going to come to that document in a moment, but the first sentence of para. 32 says that "Enron submitted a tender for rail haulage services to EME in September 2000."

The first point to make is that not only in the light of the witness statement, but also the documents that we are going to see, it is clear that what Enron were doing was tendering for rail haulage. Yes, as we will see, they inserted a clause which said: "We will give you 25p off the haulage rate if you our coal, but that is the only mention of coal. It is quite clear, we say, that they were tendering for haulage services, which leads me to p.685 of bundle G3.

This is the invitation to tender. The backdrop of this is that we saw the document bundle G3 620, Enron have given up delivery services as at 12th June, so Enron 12th June – this is dated 26th June. EWS is hauling Enron coal, Powergen coal, all the coal – Enron coal on a three month spot basis, and the reason for this tender is because of the renegotiation. So, as a result of the renegotiation Enron as we have seen is only supplying coal to Fiddler's Ferry and has given up delivery, and so what Mr. Crosland now needs to do is to put a tender out for someone to deliver the coal that Enron have agreed not to deliver, hence the tender.

When one looks at the tender it is quite clearly for haulage. It talks about the cost of inland transport from port or mine, everything about this is about haulage, the rates, the services, the tonnages, even Enron do not say this is an invitation to supply coal. That is the invitation to tender dated 26th June 2000.

Just quickly going through the bullet points – 748.1 is the Freightliner bid in response to this tender. So the invitation to tender has not been sent to Enron – it has not been sent to Enron. Why? Because they have just given it up. So it has not been sent to Enron, 26th June. July 2000 document, 748.1 Freightliner submit a bid. Then at 750 we have Mendip Rail, so Mendip Rail fall out, they are not able to put the elements together in the timescale. Page 800 is EWS: "Dear Max, Rail Haulage of coal to Ferrybridge and Fiddlers Ferry". Page 805, 21st July there is a further EWS response. At p.810 we have the DRS bid, these are all hauliers, p.828 GB Railways. Then at 834 there is a summary of responses.

THE CHAIRMAN: Whose summary is this?

MR. BREALEY: This is by Roger ----

THE CHAIRMAN: It is an EME summary.

MR. BREALEY: It is slightly independent, Mr. Crosland is seeking Mr. Roger Pettit's advice, so he has looked through ----

THE CHAIRMAN: He is a consultant of some kind?

MR. BREALEY: A de facto consultant, because I think still at this time he is going to go and work with Freightliner, but nothing about coal supply. This is 31st July the summary of the responses, and DRS, EWS and Freightliner, the three of them there. Again, Mr. Crosland can be asked questions about that. But obviously no Enron because Enron have not been invited to bid at this stage, let alone put a tender in.

Whizzing through it, p.851 is a note that Mr. Crosland wants to have "a meaningful discussion on prices with EWS" because as I understand it hardly an prices had been put in by this time.

Then on 10th August, p.852 there is a meeting, Mr. Crosland can be asked questions about this, but this is a file note of a meeting between EWS and himself. Page 856 is the August rates.

Just pausing for a moment, if one goes back to p.846, this is where Enron start coming back on to the scene. It has signed the deal with Freightliner on 30th June. We know it does not get publicised until 14th August, but we have Mr. Staley talking to Mr. Crosland, saying:

"I believe you are on holiday but wanted to drop you a quick note now that the restructuring has been agreed, I would like to get together over a beer or a dinner to put past disagreements behind us and find a way forward."

This is p.847, this is 27th July, Crosland being asked out for a beer to put the past disagreements behind. Then Mr. Crosland writes back, and says; "Yes, quite agree, we should put the past behind us", and then Staley "a call tomorrow."

If one then goes to p.864. 14th August. So, this is the date of the press release when the Freightliner deals becomes public. That is why we get,

> "Max, As foreshadowed. Would like to discuss joint opportunities over the coming weeks".

This is when Enron start coming back. This is after the invitation to tender. At p.886, dated 23rd August, one week after Enron have publicised the deal with Freightliner, we get Edison sending the same invitation to tender that had been issued in June to Enron. This is Mr. Crosland saying to Enron, "Okay. I can see you have got a deal now with Freightliner" ... invitation to tender. Page 885 - we get the internal Enron missive.

> "After news about Drax wanting to talk to us regarding rail services, the next customer to be knocking at our door is none other than Mission. Max gave me a call today indicating that they would like to receive offers staring 2001 for: Immingham/Redcar; Hunterston .. LBT/Fiddler's Ferry. I'll be getting the details today, but I already reiterated our desire to rebuild a great long-term relationship with them, and the fact that we would be happy to quote both rail and an into the stockpile price --"

So, there they are saying they would be happy to quote both rail and stockpile price.

As we will see, that never happened. This is internal. It never happened. We get at the top of the page,

> "You are a glutton for punishment!"

Again, really, "Do you really want to go down this railroad?"

Page 890. Again, another rather sarcastic comment, "Don't you just love points 5 and 6!" of their tender. This is Points 5 and 6 of the invitation to tender. "We believe that highly motivated workforce working together as a team ... We believe in working closely with our chosen suppliers --" Obviously Enron were still a bit sore with the notion that Edison and Enron could be working as a team.

But, be that as it may, I think that is all we need on Bundle G3.

If we could go to Bundle G4, p.903, this is Mr. Roger Pettit again. After this, as I understand it, he leaves to take a post at Freightliner. He says,

> "Further to my interim report of 28 august, I have now received the revised proposal from DRS, which I am sorry to say I believe eliminates them also ... This leaves a two horse race [big surprise - eh?] I cannot now comment in detail on the pricing between EWS and Freightliner as I am not party to the former's submission --"

He turns to the pricing issues. So, again, Enron have not submitted a bid by this stage. 23rd August their invitation came. No bid yet. A two-horse race. Then you do get Points 1, 2, and 3.

> "Award the entire contract to either EWS or FHH.
>
> 2. Split the contract . . .
>
> 3. Were you to award a coal contract to Enron, it is possible that FHH would haul the coal under the publicly announced agreement between these companies".

That is all there is. At that time it is a two-horse race. No bid from Enron.

Page 940. 15th September. We get the Enron bid. There is no way on earth - nor does Mr. Staley do it, I should add - that this Enron bid could be described as an E2E four years of coal supply bid. So, the question, as I said right at the beginning, is: What actually did Enron bid for? One looks at this document and it is just inconceivable that you could describe this as bidding for a four year E2E coal delivery haulage agreement whereby somehow Edison were going to commit themselves to purchasing coal on a four year basis. It is entitled 'Coal Carriage Agreement'. That is what Enron themselves call it in their covering letter - 'Coal Carriage Agreement'.

> "Enron is pleased to submit this response to your tender for coal haulage".

That is the first sentence on p.940. That is exactly what it is doing.

> "We have tried to meet Edison Mission's need for flexibility in sourcing its fuel from multiple locations as well as its desire to drive down costs in all parts of the value chain.
>
> In order to meet your requirements we have created a volume route structure --"

Then you get a couple of paragraphs.

> "Should you wish, we can help gain additional efficiencies, particularly given our active involvement with UK ports and our presence in the international freight markets. Any combination of our haulage, freight and port throughput services will help Edison Mission to streamline its import activities and minimise costs.

There are many options that can be explored and we would like to meet with you ----"

One cannot conceivably turn those paragraphs into a bid for a four year supply of coal. Going over the page at p.941 we see actually what they are offering. 'Coal Carriage Agreement. Term Sheet'. Not a coal supply agreement. It is a coal carriage agreement (at the top of the page, p.941). Everything in this term sheet is concerned with haulage. The programme schedule. The service. What is the service here? How do they define 'service'? "Provision of rail haulage services to the Ferrybridge power station--" They do not bid for Fiddler's Ferry - as Mr. Staley says there is actually nothing in it for them. Loading points. Operational Parameters. Then, the obligations on the buyer. Loading sites. Discharge times. All concerned with haulage. Then we have, at p.943, routes and prices. I have already referred to those. Those are the rates that they are quoting. When we looked at the Freightliner contract, Mr. Kearney's evidence, these are the rates based on that contract. They are competitive. The fundamental point to note from a point of causation is that when Mr. Crosland rejected Enron's bid based on these rates, these rates were better than the rates being offered by EWS. They were better. So if one asks the question, "What would have happened had EWS offered non-discriminatory rates?" in my submission, and this is what we will submit, the result would have been exactly the same. The bid would have been rejected. So had EWS offered non-discriminatory rates so they could have put rates in some hypothetical tender, the fact that these rates were actually better than EWS's and lower and it still got rejected means that when it comes to causation the price factor in Mr. Crosland's mind, the difference had no bearing, because their rates were better than EWS's. Notwithstanding the fact that their rates were better he still rejected them. He still rejected the bid. That is a very important reason why we say that the non-discriminatory May 2000 rates had no bearing on why Enron's bid for haulage was rejected. It cannot have had any impact if their bid actually gets rejected at a time when they are offering better rates than EWS.

Coming back to the E2E point, the only reference to coal supply is underneath the rates and prices, as we have seen, all trains carrying Enron coal will be subject to a minimum discount of 25p per tonne for rail haulage. There is an offer there, that if any train carries whatever, it does not specify, if any train carries Enron coal you get a 25p discount off the rail haulage.

THE CHAIRMAN: If the attitude was, "We are not going to deal with Enron anyway because we do not like them, we have had a disagreement with them in the past", what is the point of the discrimination against them?

MR. BREALEY: There is a huge issue in the case in front of the Tribunal as to what Mr. Crosland and Edison would have done. It comes back to the example that we gave in our skeleton about the 2.45 at Ascot. I do not know whether anyone picked that up. You can put a competitive disadvantage on somebody, but that competitive disadvantage can have absolutely no cause of any loss. The example we gave of the 2.45 at Ascot is that if the handicapper puts too much weight on a horse wrongly, and just before the off that horse is lame, it was a competitive disadvantage but it did not cause it any loss because it never had a chance of winning the race.

THE CHAIRMAN: The difference is that the handicapper at Ascot is entirely neutral, whereas in this instance the handicapper is not neutral. He has been found by the Regulator to have malignant intention, or a malign intention.

MR. BREALEY: An intention has no bearing on whether someone has, in fact, been caused any loss.

THE CHAIRMAN: I understand the point.

MR. BREALEY: What Enron and Mr. Lasok have got to do is show how this discriminatory pricing caused Enron loss. We say there was a host of reasons why Enron did not stand any real chance of getting the haulage contract. They had just given it up. Mr. Crosland wanted to do it in house, he wanted to talk direct to the haulier. There is a host of reasons why Mr. Crosland did not want Enron to do the job. So, yes, in May 2000 ORR has found there was a competitive disadvantage, but did that competitive disadvantage in law and in fact cause any loss? It leads into question (a) and question (b).

As I said earlier on, the real killer, we say, is that there was never a coal contract on offer. So far we have been talking about haulage, but they do not want loss of profits based on a loss of a coal haulage contract, because there are not any, they are not a haulier. They want £20 million, or whatever it is, based on loss of a coal supply contract. To say that the discriminatory pricing relating to haulage somehow caused them to lose that chance is, we say, fanciful. In a nutshell, the notion of competitive disadvantage and causation of loss are not the same.

THE CHAIRMAN: No, I understand.

MR. BREALEY: Just on this, in the ORR decision when one looks at the competitive disadvantage passage to EME and the competitive disadvantage to BE, the Regulator, when

it is talking about BE, it is quite clear, it refers to BE as being willing to accept E2E contracts. When we see it in the EME section that passage is missing completely. BE, we know, and it refers to the subjective preference of quite liking an E2E contract, so the ORR saw that BE subjectively quite liked E2E contracts, but subjectively EME did not like E2E contracts, let alone with Enron, but more importantly did not want any coal. I cannot emphasise that enough, that Enron's volume of coal was going to Fiddler's Ferry, no longer going to Ferrybridge because of all the problems and somehow their case is constructed in that now Mr. Crosland wants not only Enron delivery but a further four year contract whereby Edison is committed to taking coal. All the coal that Mr. Crosland bought on a spot basis, all the coal, would have been Enron's.

MR. MATHER: Mr. Pettit at 903 is quite closely involved in this, yet he seems to contemplate at para.3 them awarding a coal contract to Enron?

MR. BREALEY: That is not quite correct, sir, because although I would say he has flagged it – he is not giving evidence – but one of the reasons he has flagged it is because he is off to Freightliner, but that does not detract from what he has already said, that this leaves a two horse race. Yes, there is a reference there, Enron refer to point 3 as in some way that there was a four year coal supply contract there for the taking, to which we say, "Where, on the balance of probabilities can you identify any offer by Edison of a coal supply contract?"

THE CHAIRMAN: All right, I will not interrupt you. I am looking at the short passage headed "Price initiative", and just reflecting on – I am now interrupting you – on Mr. Lasok's opening in which he made the point, and I will be corrected if I have got this wrong, that although you may be invited to tender for a contract in Form X, an invitation to tender is not a statute, one is entitled to respond in a – to use a word that appears in the papers here – "imaginative" way, and it may be that part of the imagination is offering what is in effect a reduction of 25p per tonne from the figures in the table above at p.943.

MR. BREALEY: And without accepting it 25p could be imaginative, but where is the Enron offer. Forget Edison for the moment, where is Enron saying: "Please, it would be brilliant if we could negotiate a four year deal whereby you committed yourself to certain tonnages of coal. 25p off the haulage rate, well what does that tell Mr. Crosland? Okay, he gets 25p off, but what is the price of the coal going to be? It could be 25p off coal where they have just put a premium of 25p. It does not take it anywhere.

The bottom line is where is the offer by Edison of a coal contract. All the evidence is haulage, and when they do reply to the haulage invitation to tender, Enron only reply on a haulage basis. There is not even an "annex A" to the invitation to tender which says: "If

you give us this haulage contract we think that we should get all the coal for the four years, this is the sort of coal that we are talking about. We would think the prices would be this", so Mr. Crosland could say "25p off it is …" – there is nothing like that. There is no offer by Edison and no response by Enron.

I will finish, because we will need to get Mr. Kahn. There are other pages there, p.999 is a summary, again Mr. Crosland's evidence is that the notion of an Enron contract in late September, but at 999 there is a summary of his decision. All the reasons are haulage related. It does not mention once that "I am giving up a very lucrative or favourable possibility of concluding a four year E2E contract with Enron whereby I am going to be committed for four years to purchase coal from them in circumstances where I have just ripped up that agreement after some acrimonious battle a few weeks before."

We are running out of time, just very quickly on certain issues of law that Mr. Lasok dealt with. There is this issue as to whether the primary findings of fact, and what he calls the "collateral" or "secondary" findings of fact, which is the whole decision is binding. Of course, we accept the findings of fact, which underpin the infringement decision are binding. But to say that all findings of fact in this decision are binding we just say does not have any support in law whatsoever. We will have to articulate this in closing, but it is contrary, we say, to the Court of Appeal in this case, it is contrary to the Court of Appeal in the Vitamins limitation case. What Mr. Lasok did not do was refer to s.58A and I would ask the Tribunal to look at s.58A which shows that there is a distinction between the court and the Tribunal, and to say that all findings of fact in this decision are binding we say is a non-starter.

On the *Allied Maples* there is a sheet of paper more or less between us. I think the only thing that we would disagree on, Mr. Lasok seems to say that on question (a) he can be very vague as to what he would have done, and we say a proper reading of *Allied Maples* does not support that he can be very vague, he has actually got to prove on the balance of probabilities what he would have done differently, because in order to show what he would have done differently is a very important element of causation – "Had I not got those discriminatory rates, I would have done this". We do not want him to write a contract but he has at least got to put forward some sort of case to say how he would have acted differently.

I think those are the two points, *Allied Maples* we are very close, we are very far apart on whether every single finding of fact in the decision was binding.

MR. LASOK: Sir, I wonder whether I could raise one thing, that concerns my learned friend's submission on s.58, because it would be highly advantageous for us to know what that submission was. So far as I understand it, we have a situation in which my learned friend objects to the interpretation that we have put on s.58. We have explained it at length in our skeleton argument at much greater length than I did today. I have repeated the submission at some length this morning. What I have got from my learned friend is an assertion that the submission is contrary to the Court of Appeal's decision in this case, there is no reference to any passage in the Court of Appeal judgment ----

THE CHAIRMAN: Forgive me for interrupting, Mr. Lasok, but I feel a moment for Mr. Beard and Miss Lester coming on here. Perhaps they could put together a document with two columns in it in which the competing interpretations or submissions appear and then we can consider that further.

MR. LASOK: I am much obliged for that. The reason I raised it at this stage was that it would be unsatisfactory if we simply had no explanation of what this case was about.

THE CHAIRMAN: I am all in favour of that, the condition is that Leading counsel do not have to do it, unless they want to.

MR. BREALEY: No, we can prepare a document overnight which highlights why findings of fact are not binding on s.58A. I will just repeat it is quite clear ----

THE CHAIRMAN: I am trying to stop you, Mr. Brealey, I have been very polite about it! I am expecting your very experienced and skilled Junior counsel to communicate out of hours on this one.

MR. BREALEY: Thank you.

MR. LASOK: I think, Sir, we come to Mr. Kahn.

<u>Mr. NEVILLE KAHN, Sworn</u>

<u>Examined by Mr. LASOK</u>

MR. LASOK: The Tribunal ought to have Mr. Kahn's witness statement in bundle D1 at tab 17. Mr. Kahn, could you reach behind you and see if there is a bundle D, vol.1? If you have that, there should be a tab 17, it will be at p.116.

A Yes.

Q Could you just look at that, and in particular the last page of it and tell us whether or not that is your statement, and whether or not at the end of it there is your signature?

A Yes, that is my statement and that is my signature.

MR. LASOK: Thank you very much. Now, Sir, if it is all right with the Tribunal, what I propose is now just to sit down, because we will proceed on the basis.

THE CHAIRMAN: CPR Rules, yes, absolutely. Thank you, Mr. Lasok, that is what we hoped. Yes, Mr. Brealey.

Cross-examined by Mr. BREALEY

Q Good afternoon. There are some files behind you. You will need to refer to your witness statement, which you have got. You will need to go also to Bundle G5. While we are on the documents, in G5 can you go to p.1308? We need to identify that as the administration order which I am going to ask you about in a moment. At p.1311 we see the Business Sale Agreement. Page 1333 - Schedule 1 - the customer contracts that are said to have been passed to AEP. Correct?

A Yes.

Q What I also need to do, sir, is hand up a further bundle of documents which we prepared yesterday. There is nothing surprising in them, but they are just certain contracts which are supposed to be annexed to the Business Sale Agreement which we will need to have a look at. What I am handing up are some copies of the Agreements which are listed in Schedule 1. (Same handed)

THE CHAIRMAN: This is a selection of the contracts that were sold by Mr. Kahn, as administrator.

MR. BREALEY: Yes.

MR. LASOK: I rise to say that it would have been more efficient had my learned friend provided Mr. Kahn in advance with this material. It is the first time we have seen this.

MR. BREALEY: I understand the point. It has been done very quickly.

THE CHAIRMAN: I doubt you are going to go through these contracts in detail ----

MR. BREALEY: I am not, no.

THE CHAIRMAN: There we are. Go on.

MR. BREALEY: Mr. Kahn, if you go to para. 7 of your witness statement you say that on 29th November, 2001 you were appointed joint administrator, and there had been discussions with senior Enron management for two weeks prior. If we go back to p.1308, is that the administration order - you do not actually refer to it -- It is not an annexe -- Is that the administration order that you are referring to?

A That's correct.

Q You are mentioned there, Mr. Kahn. You are administrator for the company on 29th November.

A That is correct.

Q What had actually gone wrong with Enron? Why was it in administration?

A Because it was insolvent.
Q Why was it insolvent?
A Because it could not pay its debts as they fell due.
Q Which meant?
A Well, the directors of the two Enron companies that are referred to there took the decision to seek the protection of the courts.
Q Going over the page, you say that essentially the first thing you had to do was to get some cash; is that correct?
A Correct.
Q Why was cash critical?
A At the date that Enron went into administration there was very little cash within the UK companies. From memory, I think it was 10 million. I can't actually recall if it was dollars or pounds. Because the cash was swept on a regular basis back to the US, there was little cash available in those companies at that time. Obviously, they had certain overhead costs. There were certain expenses that would need to be funded. So, there was a need for cash.
Q I am looking at para. 11. In the first week you closed down various trades. What did you actually do there? What were these trades?
A In effect, in particular, ECTRL was the trading arm of Enron in Europe and had various trades of different commodities or different securities. Those which were in the money and could be closed out, were closed out as they could.
Q In this first week you made redundant about 1,000 people.
A That's correct.
Q Can you give us an idea? Who were these people who were made redundant? Was this like Lehman Brothers? Just people with their trays walking out the doors? How did it operate? What did you do?
A Well, immediately on our appointment we reviewed the staff position with some of the heads of the departments and then went through a process on their recommendation, seeing how many people we thought could still be employed. Then, on the next day those that stayed were informed of that, and those that couldn't were then made redundant through a process.
Q What were these 1,000 people doing? What was left? What was left of the company that you were looking after?
A Enron was a pretty complex business. They traded many, many different types of commodities. They then had back-up support for counting functions -- in-house counsel,

tax, etc. It had many people doing such tasks, but on the basis that, because of the lack of cashflow, we could not employ that many people, and it was decided to slim them down.

Q As I understand it from your evidence, para. 11 is the first week. So, you get appointed on 29th November. The first week you close out the trades. You make redundant the 1,000 people. Then from para. 12 I get that you shifted your focus to the developing of a strategy for the sale of the business.

A Well, in that first week certain trades were closed out. Not all of them were closed out. But, as some of those were closed out, that realised cash, and that then was an available fund. Then, once we had got control of the business, yes, we looked at all avenues in order to maximise recoveries.

THE CHAIRMAN: I understand from your statement that you are the liquidator of Woolworths.

A The administrator, sir.

Q From what you are saying I take it that this is the same process, but much less visible because Woolworths sat on the High Street. The principle is exactly the same.

A That's correct.

Q So, you can take it that we are pretty familiar with the principle, Mr. Brealey, unless there is anything idiosyncratic that you want to highlight about this particular process.

MR. BREALEY: What I would like to tease out is that the first week you basically get rid of most of the workforce and close the trades. In the second week you shift your focus to selling the business. Is that correct? That is what you say in para. 12.

A That's not what I say. I said that in the first week certain trades were closed down. So, there was more cash. But, all the way through the process we were looking at ways to maximise whatever recoveries we could, and that was a mix of selling businesses or maximising recovery from the assets generally.

Q But it happened very quickly because the contract that you negotiated and then concluded was dated 12th December.

A That's right.

Q So, that is even before the end of there second week.

A That's correct.

Q What I am trying to get a sense of is that your first priority is to get the cash. You get rid of 1,000 people. You close certain trades. Then you say, once you had done that you shifted your focus to selling the business, or whatever. But, it happened very quickly. It happened within four or five days of you shifting your focus.

A To sell a business that's been in this situation for two weeks is not a particularly quick timescale from the businesses we sell. They often do get sold within two weeks - sometimes less.

Q Are they fire sales? You say it is not a fire sale, but why was this not a fire sale?

A Well, in respect of this particular business we did have interest from various different parties?

Q Who were they?

A I recall certain names. I remember Glencore was one in particular that was particularly interested in it, and other parties. I can't recall off the top of my head the others without reference or assistance from notes at the time. We had various parties who were interested and we carried out a quick process to try and realise the best amount of cash we could?

Q It was a quick process to realise some value from this business?

A It was a quick process, yes.

Q So even if you say it was not a fire sale, it was as close as it can get to a fire sale – three or four days?

A That depends how you define "fire sale".

Q It does, but you mention it. I am just trying to work it out. Anyway, we have got "quick". Where did this all take place? Where were all the negotiations, at your offices – where did it all take place?

A Predominantly at Enron's building in Victoria.

Q Do you know who Mr. Crosland is?

A No, other than I've heard him referred to whilst I've been sitting at the back of this room.

Q He was the Fuels Director at Edison. Are you aware that he says, and will say, that he believes that the Master Coal Purchase Agreement was terminated?

A I'm aware that it has been said that there was a termination notice, yes.

Q If you go to bundle DII, p.178, it says:

> "Enron went into administration in about November 2001. In December 2001, AEP Energy Services acquired not only some of the coal business of Enron but it also acquired Fiddler's Ferry and Ferrybridge from EME. The 2000 Confirmation would have been half way through its second year at that time. With effect from June 2002, the 'uplift' in prices introduced to 'reward' Enron for its 'flexibility' in negotiating the coal supply arrangements with Edison would have taken effect. I believe that Edison (or AEP) took the opportunity of serving Enron with notice that it was terminating the 2000 Confirmation at or about the time Enron went into

liquidation. This is because we regarded it as preferable to be rid of the contractual obligations which came with 2000 Confirmation as well as advantageous to avoid the uplift in prices ..."

Did you have any knowledge of this notice of termination? Were you aware that a Master Agreement had been terminated?

A This refers to the time when Enron went into liquidation. I wasn't there at the time it went into liquidation, I was there when it was in administration. I left PWC in May 2002. At that time I think the Enron companies were still in ----

Q I think it might be loose language, we will have to ask him about that. Assume that he meant at the time that Enron went into administration, because he is talking about Edison or AEP. I take it that Edison would not have given notice, because that was taken over. Can you assume that ----

THE CHAIRMAN: You cannot ask him to assume. Is this something that he would know about? If he is not there he cannot give evidence about it, can he?

MR. BREALEY: Let me ask the question again. (To the witness) Were you aware that in November or early December 2001, Edison gave notice of termination of the Master Sale Agreement?

A Not as far as I can recall.

Q Are you aware that it is a live issue now?

A I am aware that it is in issue now, yes.

Q Have you made any investigations as to whether such a document exists?

A No.

Q Why not?

A Because I haven't been asked to. I'm no longer the ----

THE CHAIRMAN: Is this the witness for these questions? I understand the misapprehension that has led to them. He is here as a witness of fact, as I understand it.

MR. LASOK: Yes, and one has to bear in mind that Mr. Crosland's evidence was that he believed that notice of termination had been given at the time of liquidation, whereas what Mr. Brealey is doing is cross-examining the witness on the point in time at which the company was in administration. There is no reason why the witness should have focused on the question and looked for documents when the suggestion is that there is a belief about what happened at a later point in time.

THE CHAIRMAN: Do you want to park this point so that you can give it further thought?

MR. BREALEY: (To the witness) You obviously have termination in mind because at para.17 you refer to the fact that you were concerned about termination of contracts – is that correct? Were you concerned about counterparties terminating contracts at the time that you were the administrator in November and December 2001?

Q Various counterparties I'm aware did seek to terminate various contracts, yes, whilst I was the administrator.

Q As regards the agreements listed in the schedule to the Business Sale Agreement, did you investigate whether any of those agreements had been terminated or the counterparty had purported to terminate them?

A I would have expected that the team involved would have looked at – and we would have considered our knowledge of what would have been terminated at that time, yes, but I, personally, didn't, no.

Q You, personally, do not know whether this agreement was terminated or not?

A The agreement at – sorry?

Q If you look at the agreement at 14 and 15 on 1533, you, personally, do not know whether that agreement had been terminated or not?

A Correct.

Q You say that you were seeking to obtain cash. The consideration in this Business Sale Agreement – I am looking at p.1317 – is for the cash sum of £7 million. Was it important to you that it was a cash sum?

Q It would have been important for any immediate consideration, yes, to be paid immediately. I also note the consideration as well. The amounts paid immediately would have to be, effectively, cash, yes.

Q When one looks at the 39 agreements listed in the schedule, how are they valued?

A They are effectively valued by us going through a marketing process for the markets to be able to tell us by coming in for bids for the business and for them being aware of what the assets of the company are, and therefore informing us of what market value is at that time.

Q You said that Glencore made a bid, did you?

A They certainly were one of the parties, yes.

Q If they came in at a bid of £5 million and AEP came in with a bid of £7 million, that was the market, was it?

A That would have been the market at that time if we were to sell at that time, yes.

Q And that is what mark to market means, is it? You take a valuation at that time?

A I think mark to market is a term used by traders rather than administrators.

Q Well that is the basis, if you want to look at clause 3.5 on 1317, on which the business was valued, and I am just looking at clause 3.5, Mark-to-Market valuation?

A I think that is in respect of the deferred consideration rather than the £7 million cash sum.

Q So the £7 million would essentially taken as the best offer?

A It was taken as the best offer and whilst we also considered the alternatives, but that was the best offer to sell at that time.

Q They did not really look at the contracts and value each individual contract?

A That is correct.

Q Basically it was a bit of a job lot?

A I wouldn't describe it as a job lot, no.

THE CHAIRMAN: Well correct me if I have got this wrong, but you have various kind of contracts – cash contracts would be one species?

A Yes.

Q In which you sell for what you can get, having regard to the interest. Then there would be some deferred consideration contracts?

A I think how we saw this was there were certain contracts which clearly I think were actually assignable over to the purchaser and there were certain ones which needed the counterparty's consent, which it was not certain would go over, so therefore, as far as I can recall, that is what was really the focus here for these deferred situations. Obviously the purchaser only wants to pay for something if they know they are going to get it, so if they do not know they are going to get it, therefore we put in a mechanism to try and value the further contracts which they, if you like, can get comfortable were definitely going to come over.

Q So you are creating a market for those contracts when there is not an immediate consideration available??

A Correct, it is trying to come up to a mechanism to put a value on those if they do go over to the purchaser.

MR. BREALEY: The point is that you did not value the 39 contracts individually, you said, but you still grouped them together, and you presented them as a package and then various people bid for that package?

A As any administrator, what we try and do is to identify whatever possible assets there are and show those to the potential bidders and they will then, if you like inform us of how much they are willing to pay for them, so yes, we try and put it altogether to extract whatever possible value we can.

Q So you did not look at individual tonnages of the agreement to see how much they were worth, you just put them together and you offered them as a package to the interested parties and then took the best offer?

A We made our decisions in consultation with the management team of Enron to form a view of what is the best way forward, and so there was, if you like, an informed view from people who were aware of the business.

Q If you look at these contracts in schedule 1, it is some time ago but do you remember any of them? Any of them important?

THE CHAIRMAN: Is it 1333 onwards?

MR. BREALEY: Yes, there are 39 of them.?

A Okay, I'll peruse. (After a pause) With the exception of one, none of them are particularly stand out. That exception is no.35 because I do believe I was called to give a witness on a dispute on that particular – Cantabrico.

Q Can you tell me what that is, because I cannot see it – I can see "Cantabrico"?

A I can see "Cantabrico", and I do know there were some subsequent discussions around that, and that is why that particular ….

THE CHAIRMAN: It is entitled "Coal purchase agreement between Cantabrico Trading SA and Enron Coal Services."

MR. BREALEY: Mine is completely blanked out. ?

A That is the only one that, as I go through this, really particularly comes out, but I do know that was subject to further discussions.

Q If I could just ask you in this bundle that was handed up to you, which says: "Selected contracts assigned AEP, if you look at bundle 1, that is the contract in item 5. You see there these are coal supply agreements, and you see there a contract quantity of 700,000 metric tonnes?

A No.

Q You need to go to tab 1, and it is item 5 of the schedule 1, just so you know what the contract is.

THE CHAIRMAN: It is contract no.5 of the 39?

MR. BREALEY: Number 5 of the 39. (To the witness) You see the contract quantity is 700,000 tonnes?

A Sorry, which page is it?

Q We are in this new bundle "Selected contracts assigned to AEP", tab 1, p.1?

A Yes.

Q That is 700,000 metric tonnes. If you go to tab 2, p.23, do you see there "Contract tonnage" at p.23 - correct?

A Yes.

Q Keep on going. Go to tab 3: "Contract quantity 2.3 million tonnes", this is p.24 – I will get to the question!

THE CHAIRMAN: I am being dense, I know, but I am not seeing the point of this line of questioning.

MR. BREALEY: I will put it to you, you say that you did not value these contracts individually?

A Yes.

Q When you add up even the tonnages of coal in these agreements, it amounts to fairly substantial quantities of coal. I will put it to you, but of all the contracts in schedule 1, say there are 14 million tonnes of coal, can you remember whether that was about the ball park of coal that was subject to these contracts?

A I don't recall ----

Q The volume of coal that you were transferring to AEP at the time?

A I don't recall the overall quantum, no.

Q It is a substantial quantity of coal, 14 million tonnes, and the cash consideration under this business sale agreement was £7 million cash and that would work out at about 50p per tonne. As you know, this case is about damages for a lost contract which Enron say would have been contract no.40. I take it, it would be your evidence, consistent with what you have just said to the Tribunal, that had this contract No. 40 for just over 3 million tonnes – had that contract been in existence you would not have valued that individually either.

A Correct.

Q What I am putting to you is that if this hypothetical contract had existed and was No. 40, the strong likelihood is that you would have accepted the £7 million cash consideration.

A I can't say there would be a strong likelihood because we would've seen if there was any value in that contract and then expected to extract value against that contract..

Q But I thought you just said you did not value them individually.

A I did say that - but that doesn't mean that when you then add it into a bundle of assets which you're looking to sell -- I would expect if that had a positive value, for that value to get added to the consideration.

Q The BE contract at Eggborough is 2.3 million tons. The overall tonnage is round about 14 million. If this contract had been in existence for, say, 3 million -- I put it to you again that

even if you had looked at it, 3 million is not out of the ordinary to some of the other contracts in Schedule 1 and you would have still accepted £7 million cash.

A I would have accepted the best offer, having shown the assets to the parties. If the parties having seen the assets, I thought that £7 million was the best offer we could get, then that would be the case. But I would have an expectation if there was something which was an asset that the number would be higher.

Q If it is 14 million tonnes - £7 million cash - it works out at about 50 pence per ton.

A You are making assumptions about the ownership of the coal there. When you are looking at each of these contracts, people would, I would have thought, been looking at what the margin or the net profits of these contracts would be. I would expect that each contract would therefore come up at a different level. So, I wouldn't apply a simple average.

Q You would not apply a simple average. What would you do then?

A As I explained to you, effectively we would put it to the market in order to see what value they could make out of these assets, and then we would be negotiating from that perspective.

Q Assuming that the margin in this hypothetical fortieth contract was the same margin as the BE/Egborough contract for 2.3 million tons, which is essentially what one of the experts say in this case -- Assume that the margin was the same.

A One contract could be strategically more important to one than another. That is why, effectively - I keep coming back to it - you put it to the market and see how they are valued because one contract to one person could be worth something else to another person.

Q That is true. But, we are trying to work out what has happened in this Business Sale Agreement had a fortieth contract, which is similar to the others, been included. Are you able to give any assistance on that at all?

A No.

THE CHAIRMAN: It sounds awfully like the time when I used to watch people selling sheep at Welshpool market every Monday. You tend to expect to sell 250 sheep for more than you would get for 200 sheep, but it may depend on the sheep - like, how fat they are; how woolly they are. Is this really any different from the selling of sheep, cars, or anything else that is sold in bulk?

MR. BREALEY: It is a very important point because you have a business sale where you are selling essentially well over 10 million tons. You have accepted a cash consideration for £7 million. I am trying to ask you what in your view the administrators would have accepted had another contract come along with 3 million tonnes of coal. It is not a difficult question.

It may be a hypothetical question because this is the nature of the case. But, I am trying to ascertain from you your reaction had this fortieth contract been in existence for 3 million tons.

A My reaction to that is an additional sum which would reflect the value to the relevant potential purchasers.

Q You did not value the contracts individually. You have said that. Can you give the Tribunal any idea as to how, bar just accepting £7 million, you valued these contracts?

A As I said earlier, we worked effectively with the Enron coal team - their senior team. We worked with them in order to try and see how we could extract maximum value with them. Frankly, we rely on them, because they are experts in their field, to assist us in that matter.

Q Bar just kind of accepting the highest offer, was there a discount because it was a quick sale?

A It's difficult to say. I mean, we looked at whether we would sell at that point or take a longer term view. We would've taken the view at that point that it was better to maximise recoveries for the estate in order to sell at that point.

Q If you adopt the valuation that Mr. Fisher has put on the present coal contract it works out at about £20 million. Between £10 and £20 million pounds. That is the damages that Enron are claiming from EWS. What I am trying to ascertain from you is: Are you really saying that had this contract been in existence in November/December 2001 there would have been a cash consideration of £17 to £27 million?

A I haven't said anything like that. I haven't put a value on the contract. I haven't put a value on that contract and I haven't been asked to.

Q You remember the BE contract?

A Not specifically, no.

Q It is a contract for the sale of 2.3 million.

A British Energy.

Q British Energy. Worth more than £7 million. Absent any administration, worth more than £7 million. Correct? Or you just have no idea?

A I couldn't offer an opinion on that.

Q You say you valued this. You cannot be exact as to how you valued it. But, you do not seem to be giving very much detail as to how you valued it.

A I think I said I didn't value them. You asked me whether I valued the contracts, and I said, 'No'. I said that we went to market and effectively the market then tells us the value that we can get.

Q So, you are not able - although you have come to the Tribunal and you say, "I cannot recall the exact details of the sale or how those assets were valued" - to say how you would have valued the business had this fortieth contract been in existence.

A As I said, I would expect the market to have given the feedback if we were going to include it in a bundle for sale at that time. I would've used that in comparison to whether we would have held it, which we discussed with the senior management team of Enron Coal.

Q Thank you.

Re-examined by Mr. LASOK

Q I was just going to ask you one thing: let us suppose that at the time Enron, or one of the entities, had got a coal contract covering the period from the beginning of 2001 to, let us say, 2004. If we look at the date - November/December 2001 - would the value of that contract reflect the outstanding tonnage to be delivered?

A We're looking to sell assets. It's the future income or benefit at that time that we can derive into the estate.

Q So, the value of the contract would be dependent on the market's perception and that in turn would depend on how much had been delivered under the contract before November/December 2001.

A Yes, and the costs associated with further deliveries.

Q Thank you.

(The witness withdrew)

MR. BREALEY: We are out of order because of Mr. Staley's unavailability. We have Crosland and White, and then I think we are going to the RCJ. Then we have Staley and Kearney.

THE CHAIRMAN: We will adjourn until 10.30 tomorrow morning.

(Adjourned until 10.30 a.m. on Thursday, 17th September 2009)