IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1106/5/7/08

Victoria House,
Bloomsbury Place,
London WC1A 2EB

22 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 FIVE

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 Miss Maya Lester (instructed by Freshfields Bruckhaus Deringer LLP) appeared for the Defendant.

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Mr. ZOLTAN BIRO, Recalled

Cross-examined by Mr. LASOK, Continued

THE CHAIRMAN: Good morning, Mr. Biro. We are sorry about the delay, we thought we had better wait until after the fire test which we knew was happening.

MR. LASOK: Mr. Biro, I had got to p.224 of bundle E.

THE CHAIRMAN: Nice to see Mr. Beard back this morning, though ----

MR. LASOK: Sadly, Mr. Williams is not here. In the middle of para.63, you advance the argument that Mr. Fisher's methodology regarding quantification was flawed because you say that any loss incurred by ECSL should be limited to the difference between the haulage rates offered by EWS to ECSL on the one hand and EME on the other. Is that correct?

A Yes.

Q Then in 64 you give an illustration using figures and you carry on with this to the end of 66. Do you still hold to this view?

A I would say the following: if one were to adopt the framework of the rational economic decision maker, then absolutely. This follows from the logic of what a rational economic decision maker would have done. If in the real world it would have departed from rational economic decisions then this would no longer hold.

Q I think that both Mr. Fisher and Professor Ordover disagree on this.

A I saw in the joint report that I wrote with Mr. Fisher that apparently not only he disagreed, but Professor Ordover too, and all I would say is that I am puzzled by that because there is no explanation as to why Professor Ordover disagrees and, given what I have said entirely follows from Professor Ordover's own logic, without such an explanation I am simply puzzled by that.

Q I suppose another difficulty we have is that Professor Ordover and Mr. Fisher were not cross-examined on this point either, but that is not your problem. I wonder whether you could look at something which I am going to hand up. (Same handed) I am not an expert in anything, but I just wonder whether you could have a look at this. What I have done is a "but for" world and I have done a real world in order to identify the quantum of loss. If you look at the "but for" world, the way I have put it is that EWS agrees to supply coal haulage to ECSL. I have used Redcar to Ferrybridge because that is an actual price of £3 per tonne. You have got the source there. It is table 16.D, we do not need to go to that. It is just there so that everybody knows where I get the figure from. £3 is what EWS actually offered at the end of the day to EME, but in the "but for" world we are looking at EWS acting lawfully, and therefore it is offering a non-discriminatory price to ECSL, which I am taking

at £3. Then we look at ECSL. My suggestion is - and this is a hypothesis, of course - that ECSL knows that acting lawfully EWS cannot offer EME terms that are so different as to put ECSL at a competitive disadvantage. But, ECSL also knows that it has to better EWS' offer in some way of course in order to get the coal haulage contract. What I then do is to look at your hypothetical example in para. 64 of your report where you hypothesise that anticipated profits on associated coal sales are £1 per tonne. So, I have factored your hypothesis into this scenario. Again, following what you say in para. 64, ECSL could theoretically reduce its haulage bid by up to £1 per tonne in order to win the haulage contract and associated coal sales. Of course, if it did that, then there would be no point in the exercise at all because no profit at all would be being made. But, there we are. You say, again in para. 64, that it would not be necessary for ECSL to reduce its coal haulage bid all the way - in other words, to compete away all the profit on the associated coal sales. You hypothesise a 30 pence reduction per tonne to win the haulage contract. So, working on your hypothesis, ECSL puts in a bid for haulage of £2.70, 30 pence below the EWS price. The hypothesis - and, again, this is what you say in para. 64 of your report - is that ECSL wins the haulage contract and makes associated coal sales. So, in this "but for" world ECSL makes a loss of 30 pence per tonne on haulage, but it makes a profit on associated coal sales of £1 per tonne. We set one off against the other. The result is an overall profit of 70 pence per tonne. Do you follow that so far?

A Not quite. Can I just clarify one matter. We are in a "but for" world here where EWS bids £3.

Q Yes.

A And Enron also has a £3 offer from EWS; is that correct?

Q Yes.

A So, why do they need to go 30 pence below in this example?

Q That's your para. 64. I am taking this from you.

A But, in my para. 64 I am looking at the actual world where hypothetically there's a 30 pence competitive disadvantage due to the abuse. I'm not looking at the "but for" world.

Q I am looking at the "but for" world in this example.

A In the "but for" world they wouldn't need to come 30 pence under to be more attractive than EWS. They could come in at less than that even.

Q Okay. Well, let us say it is not 30 pence. Let us say it is 10 pence.

A Whatever the figure is.

Q Whatever the figure is.

A Fine.

Q But would you accept that what you do is you set off the loss on the haulage contract against the profit on the associated coal sales?

A But, in the "but for" world there wouldn't obviously be one. What I was trying to do in para. 64 is to say that in the real world, if you're faced with a competitive disadvantage due to an abuse, but there's a lot more coal profit to be had that's much bigger than, if you like, the size of that competitive disadvantage, one could naturally have reduced one's actual offer to offset the competitive disadvantage in order to win that profit.

Q You see, I am looking at it from the perspective of the economic theory that you are advancing. I am applying this theory to a comparison between the "but for" world and the real world. What I am putting to you is that following the logic of your argument, in the "but for" world you would end up with ECSL getting the contract and making a profit. It would be a net profit. It would not be the £1. It would be reduced by the loss on the haulage contract. Do you accept that as a hypothetical?

A What I'm saying is that if there really were a £1 of profit to be had, then not only in the "but for" world should Enron actually have been putting in a loss leading offer on the rail in order to win that, actually in the actual world it should also be doing that. In both of those scenarios it should be doing that if all that profit is there to be had.

Q Right. You are moving away to a different point. What I want to do is to ask you to look at this point. Now, do you accept that on the scenario that I have put forward here, in the "but for" world if we try to calculate what ECSL gains in the "but for" world it is a net profit, on my example, of 70 pence per tonne - because you reduce the £1 by the 30 pence lost on the coal haulage contract. If it was a 10 pence loss on the coal haulage contract you would reduce the £1 by 10 pence. Do you accept that as a matter of principle?

A I think I'm saying 'Yes'. Can I just tell you what I do accept? What I do accept is in this example what's happened is EWS has put in a bid for £3 for the rail haulage contract; Enron has put in a bid for £2.70 - that is, 30 pence cheaper. We are assuming - let's get rid of all performance issues or anything else - because it's 30 pence cheaper, assuming away all other matters, that the customer therefore goes with Enron instead of EWS, because it's 30 pence cheaper. Then what we are doing is we're also assuming that having done that for the rail haulage contract there is naturally a series of coal sales one can then make. We're assuming that Enron would then make those coal sales and those coal sales would then have had a 70 pence profit associated with them, if they had then followed. Yes, I agree with all of that.

Q Yes. Now, if we look at the real world - and of course this is a hypothetical real world to some extent - we start off with EWS abusing its dominant position. Of course, that is not hypothetical. It offers haulage at £3.60 per tonne to ECSL and £3 per tonne to EME. Now, the figures are drawn from the ORR decision for the Redcar to Ferrybridge route, because according to the ORR those figures are the figures that EWS offered to ECSL, and it is the figure - £3 - that EWS agreed with EME. So, those are actual figures. Then we look at the reaction. ECSL offers EME £3.20 per tonne. That is an actual figure. It is taken from G3, p.999. So, what we see here is ECSL in the real world seeking to undercut EWS. But, of course, the problem is that it does not know what EWS' price is, but, also, EWS is abusing a dominant position, and EWS is putting in a discriminatory price.

The result is that ECSL fails to get the haulage contract. At this point, I accept, you may say, "That is a bit of a hypothetical", but let us take it as a hypothetical for the purposes of the present exercise. Because ECSL fails to get the haulage contract and fails to make associated coal sales, what we see, when we compare the "but for" world with the real word, is that ECSL's loss is the loss of profit. It is the loss of the overall profit that it would have made in the "but for" world. It is not the difference between the rates offered by EWS to ECSL, on the one hand, and EME.

A But we've departed from what I think is the rational economic framework. That's why we've got this hypothetical example.

Q I do not follow you. I am putting to you ----

A Shall I explain why?

Q Please do.

A Right. What we have is we have a situation in which the EWS competitive offer is £3. That's the market rate. We have Enron, we are assuming, with £1 of coal profit to be had if they won the rail. What we're assuming is that they, however, come in with an uncompetitive bid nevertheless that fails to secure the rail haulage contract. It's not rational for them to do that.

Q I think you are missing my point. I apologise for not making it clear. What I am trying to get at is identifying the quantum of loss because you and Mr. Fisher are disputing the quantum of loss. You are saying that the loss is the difference between the rate offered by EWS to ECSL and the rate that it should have offered if it was not abusing a dominant position. Do I understand that correct?

A If you adopt the rational economic decision-making framework of Professor Ordover -- if you follow that through, that's absolutely correct. This hypothetical situation wouldn't be

consistent with that rational economic framework because the Enron bid would never have been £3.20 in the first place.

Q No. I am putting to you a different point altogether - that is, that for the purpose of quantification you compare the "but for" world with the real world. In the "but for" world the hypothesis is that you would have got the contract and the associated coal sales. In the real world you do not get the haulage contract and the associated coal sales, therefore the measure of damages is your loss of profit. Why is that incorrect?

A If you are saying one should be comparing the actual world against the “but for” world, those are relevant comparisons. What I am saying is your example of the real world, as you put it, that you have asked me to consider is an example that is inconsistent with the rational economic decision making that Professor Ordover has put forward. So what I am uncomfortable with are the numbers here and the purported losses.

Q What I have done is simply take actual figures?

A The £1 is not an actual figure. What we are trying to do is work out is there really a £1 to be had. What you are doing is assuming there is a £1.

Q No, in the real world I do not have the £1 do I?

A The whole point of this proceedings is to see if there is a £1 there or not, that is why we are all here ----

Q No, it is not.

A -- and you are starting by assuming it is there.

Q You’re getting a bit argumentative, are you not?

A Well only because you are suggesting I should agree with something that I disagree with.

Q I am trying to find out why it is that you say the measure of loss has to be the difference between the two rates. This is something I simply do not understand?

A If there were more coal profit really there then the rational economic bidder should actually put in a lower bid in the first place and should have won the contract, it would not actually have lost it; it would only have lost it if the profit were not there to be had.

Q We are talking about the “but for” are we?

A Also in the real world. The only difference between the real world and the “but for” world is that in the real world there is a competitive disadvantage to offset, in the “but for” world there is not.

THE CHAIRMAN: Forgive me, I am not sure I am understanding this. In the real world are you saying that the bid for the haulage contract, if there was profit to be had on the sale of coal, would have been pitched at a much lower level?

A That's what I am saying. What I am saying is the fact that it wasn't suggests to me that either some big error was made or that profit was not actually there.

Q There are two possibilities, are there not?

A Yes.

Q It is not merely that there was no profit there, it could have been an error of judgment of the price, this being an art rather than a science?

A But what we are in a world of is thinking about what would it be rational as a bidder to seek to do, and if this bidder did know broadly speaking what competitive market rates were, and what I am saying is it pitched its bid exactly in line with the market rate, and its bid did not reflect the fact that there was a lot of extra profit to be had and so all the facts do not suggest that those profits were there.

Q What I do not understand is if one strips out all the anti-competitive practices found by the ORR, whatever specific findings of fact are made, that is the broad thrust of it?

A Yes.

Q If one strips all that out and one has a real price from Redcar to Ferrybridge of £3 a tonne, which one can identify, we know it is true, it exists, why is that not the correct starting point for quantum, if quantum there be in this case?

A If we go through Mr. Lasok's example. Mr. Lasok is assuming for present purposes there is in fact there is a £1 of coal profit to be had if Enron had won the road haulage contract – yes? So if we just keep with that assumption just for a moment, what I am saying is if that really were the case and if the competitive rail haulage price for rail haulage alone is £3 and Enron would have a feel for that because it is negotiated to do with Freightliner, it knows broadly speaking what competitive rail haulage rates look like. If then it had put in a bid at £3.20 it would have lost the contract and it would not have won that £1 of profit, it is just not rational to do that. What you would have done is come in with a price that beats the £3 in order to make all that coal profit. You would not have just put in the £3.20 bid in that lot.

MR. MATHER: If I could just chime in here, Enron has been offered £3.60 by EWS, that is a very relevant factor, is it not? It knows it has been offered that rate. It does not know what EWS have offered Edison?

A But it does know from Freightliner, from having negotiated with Freightliner what proper costs and competitive rates would look like, and the Freightliner contract pretty much matched EWS's actual bid to EME, it has that additional knowledge of what competitive rail freight prices look like.

Q Yes, that may or may not be the case, but on the face of the example, Mr. Lasok has given as taking real figures, as I understand it, it is coming in with a difference of £3.20 as against £3.60, why is that not the action of a rational bidder? How far would it have to go before it became rational?

A What a rational bidder would have done is recognising that EWS is likely to bid around about £3 because you have learned that from having negotiated with Freightliner. Let us say there is a margin of error around that of say, 10p, 20p and you have £1 of coal profit to be had, what you should have then bid is either if you knew it was £3 you should have come in at under £3 to make yourself attractive to the customer. If there is a margin of error and an uncertainty knock 20p off, come in at £2.80 it is still a highly profitable bid if there is all that £1 of coal profit to be had. What you should not do is come in at £3.20 which is an unrealistic offer which you are bound to lose.

MR. LASOK: Well we need to think about that, because you are saying you should come in at £2.80 when EWS has offered you £3.60 and that means that your opening bid involves competing away 80 per cent of your anticipated profit on the coal sales. If you are vulnerable to the need to contract with EWS, and in particular if Freightliner's capacity is constrained, you accept that Freightliner's capacity was constrained and there were problems at the beginning of 2001?

A Can we just take those bits in turn? What I would say is in this hypothetical example with these numbers, with that margin of uncertainty if you had had to come in at £2.80 to be sure, yes, you would be giving 80p away from the £1 and there would only be 20p left. It is still rational because you would still be getting the 20p, it is better than losing the contract; that is the first point.

The second point is in that hypothetical world under the framework I put forward in my report the damage would have been 80p – well actually it would have been 60p because there still may have been the uncertainty of 20p.

THE CHAIRMAN: I still do not understand why, when EWS offer Enron £3.60 it is less rational to come in at £3.20 than at £3; it is just a judgment call, is it not?

A It is more than a judgment call if you have a feeling for what the competitive rail haulage rate is, and you have a feeling that the winning rate is £3 which you have, having just negotiated with Freightliner. If you have no idea what competitive rates are ----

Q Okay, you have that piece of knowledge of £3, but do you not in the real world bear in mind not only that piece of knowledge but the price at which EWS have come in which is £3.60, which we now know is anti-competitive?

A Sorry, just on that, I think there are various points there. If you knew with certainty what the market rate was then you would undercut the £3. If you did not know with certainty what the market rate is, which is what you were suggesting, I don't think what you would do is to start thinking that the offer that you found abusive, that you complained to the ORR about, and that led you to negotiate with Freightliner I do not think you would take that genuinely into consideration when thinking about what EWS would have bid EME. What you might do is not bid at just under £3, because there is uncertainty, you might, as we were discussing earlier have to go down to £2.80 because there is uncertainty that you might lose out.

Q Can I just try one other question on you? Supposing that EWS had not been anti-competitive, and had pitched in with a figure less than £3.60 – one cannot be precise as to what that figure would be because they would have an element of discretion as to how to pitch it even in a competitive world?

A Yes.

Q What then would you have expected the rational bid by Enron to have been?

A I would have asked myself how uncertain am I, and let's say there is some swing to the tune of 20p either way, I would have knocked an extra 20p off my bid to make sure I don't lose out in winning all those coal profits. So I would have discounted further just to be sure I win. The one thing I wouldn't do was go in high, knowing I'll, as a consequence, lose all my coal profit.

MR. LASOK: Can we go back to p.237 of your report, and I think this is really just to tie up loose ends. Page 237 is where, in your commentary on Mr. Fisher, you deal with the point that we have just been discussing, paras.87 to 89. I do not need to go over the whole thing all over again, because I think we have covered that.

A Yes.

Q You next go, on p.238, to calculation of loss, and 239, para.94, under the heading "Volume of coal supplied", you have got the comment in the third line that Mr. Fisher assumed that coal transported under the contract would also have been supplied by ECSL, and then you say that there is no basis for this assumption. Did you bring any economic analysis to bear to put forward your own view as to what the volumes might have been?

A I have done two things in my report. The entirety of section 2.4 addresses the question of whether coal sellers were likely to have been associated with rail haulage contracts.

Q That is not the question, I am looking at volume.

A Sorry, there is obviously a whole volume issue underpinning whether there would have been any coal sellers at all, but what I have done separately is, in this later section of my

report, just move on from section 2.4 and just assumed that there would, in fact, have been a coal supply agreement that would have followed. I then ask myself the question, if there had been one, what would those volumes have looked like. I have assumed for the moment that what that actually means is for every tonne hauled under the contract Enron would, in fact, have made the sales, which is an assumption, and it's purely an assumption; and then I asked myself, if one were to make that assumption, what is the best measure of the numbers. Then there is a discussion between Mr. Fisher and myself about whether one should be using the MIS database which records what EWS actually hauled, or whether one should be using the volumes that were in the original ITT, which were subsequently proven to be quite inaccurate because in the real world actual volumes turned out to be quite different to those specified in the original ITT.

Q Could you go to p.285, please. This is in the joint statement that you and Mr. Fisher signed, and if you go to the bottom you have got a heading "Volumes and prices", and you have issue 4, and this is the issue of whether the volumes shown in the ITT or the actual volumes supplied are a reasonable basis, and if you look in the second column from the right, which is Mr. Fisher's column, and he says that there is a variation between the coal volumes shown by the ITT, the ECSL response, the MIS database, and then he says on the next page, p.286, that there is some evidence to suggest that the MIS database volumes do not reflect the amounts which would have been delivered. Then he sets out two factors and refers to an email dated 19th December 2001. For the Tribunal's note, that email is in bundle G5, p.1352. We have got your comment in the right hand column, and in the last paragraph you say:

> "Mr. Fisher states that he considers the MIS data to be unreliable ..."

and I jump over intervening words and your comment is –

> "However, I do not see the relevance of coal transported by parties other than EWS without an explanation as to why ECSL would have been excluded from supplying these to EME as a result of EWS's abusive conduct."

Of course, the point here is whether the MIS database figures are accurate bearing in mind the comments made by Mr. Fisher, and whether one makes reasonable assumptions based on the information available. As far as I can see, you do not really seem to have applied any expert's economic analysis to the issues raised by Mr. Fisher – is that correct?

A Well, there's quite a lot underpinning all of this, so if we break this down. There are actually two important issues when considering the MIS database. The first one is whether it records all of the coal bought by EME, and the answer is not in relation to road and barge,

because it is measuring what EWS delivered. What I explain is I think, if one is going to think about an E2E contract, that is the right thing, and excluding road and barge is the right thing, because we are talking about an E2E contract which is coal sales associated with a rail haulage contract. That is what we have set up as what we are seeking to measure. So I think it is wholly appropriate to exclude road and barge, given what we are asking ourselves and what we would, should be measuring. There is then a separate question as to whether that database accurately records the actual rail shipments themselves. There are two issues that Mr. Fisher has raised in that context. The first is the email of David White, which is in the joint report before us. What that is doing is saying that the outturn in 02/03 differed from a projection in 01. I am not sure one can read anything into that about the reliability of the database about actual volumes, because all you are doing is comparing it to a projection that happened from a previous time period. So it could just well be that the projection was wrong. In paras.4.9 to 4.12 of Mr. Fisher's report, he cites other reasons why the MIS database may not be quite right. What it comes to is really some marginal differences based on certain assumptions. So what that leaves you with is a database that looks broadly right in terms of how much was actually hauled by rail. Specifically there could be the odd omission, I don't know, but it seems the obvious place to look. What we do know is that the ITT, which is what Mr. Fisher is inviting us to look at, is definitely wrong. So I would say that we should look at something that is broadly right, but may be specifically wrong, compared with something that is definitely wrong.

Q Would you accept that the MIS database figures provide really a minimum level because they indicate what coal was hauled by rail, but what coal was purchased and hauled is likely to be a figure greater than that?

A They are a minimum measure of all the coal sales that might have been associated with a rail haulage contract if, off the back of winning a rail haulage contract, one would have made every single coal sale that was associated with that rail haulage. On the proviso of that big "if", which is just an assumption, but if that is what one is seeking to measure then it is a minimum bound because it's – but it seems to me a fairly accurate one.

Q Okay, so it is a minimum?

A An accurate minimum.

Q Could you go back to p.240, please? I think I ought to note, perhaps for the Tribunal's record, that as far as I can see paras.100 to 103 of your report relate to matters of fact for the Tribunal. If we go to paras. 104 to 105, under the 'Price of Coal Supply', again, would you

agree that these paragraphs relate to matters of fact - not expert analysis, or at least not expert economic analysis?

A It's not a matter of accounting either. One has to take a view on what is the most likely coal price that would have been associated with any lost coal sales. Both Mr. Fisher and I have had a look at that issue and reached similar views.

Q Go on to the next page, under the heading 'Margins'. This appears to be a situation in which the difference between you and Mr. Fisher concerns matters of accounting.

A It's not just matters of accounting. I think it's an interpretation of accounting information.

Q So, how does this fall within your area of expertise?

A Because for the last twenty years as an economist, on an on-going basis, as an important part of my job, I have needed to measure economic and accounting profit. It's part of what I have to do. I went to the London Business School specifically to learn those skills as part of my economic -- to be able to provide economic advice that I'm asked to provide. I feel sufficiently comfortable with accounting information to ask certain questions of that information.

Q Do you have any qualification in that domain?

A Have I passed accountancy exams? No, I haven't, but I feel I should explain what the debate between Mr. Fisher and myself is because I don't think you need to be an accountant to understand it.

Q Go on.

A Right. There is limited accounting information available on the margins that Enron was earning in supplying -- that ECSL were supplying. If we'd had the relevant information in relation to both the 2001 to 2004 time period -- Clearly we can't have it for this contract because Enron never won it, but for comparable contracts, for the right time period -- Then it's unambiguously the case that the audited accounts are the right starting point. I don't think Mr. Fisher and I would ever disagree about that. The problem is that we don't have that information. We have information of an aggregate nature, and, more importantly, information for the period 1999 to 2000. That's the only audited accounting information there is.

Now, what there also is is unaudited accounting information that runs into 2001, which is the relevant time period, and the question we should be asking ourselves is whether one should attach any weight to that at all, or whether one just ignores all of that and one uses audited accounting information for the wrong time period. Mr. Fisher's decided to do the latter. What I have questioned is whether that is in fact appropriate. In order to answer that

question one needs to understand what is it that the auditors did, and what adjustments did they make? What I observe is, firstly, there's no explanation, or little explanation, of that in Mr. Fisher's report. When we met and I sought to discuss this, Mr. Fisher didn't know. As a consequence I felt that it's unreasonable simply to look at audited information for the wrong time period, and totally discount information for the relevant time period, albeit unadjusted. There's just a lot of uncertainty in this area. That's the real problem.

Q You accept that adjustments are normally made to management accounts when you're deriving the audited statutory accounts.

A Absolutely. Those adjustments are for specific reasons to do with accounts in particular time periods. It doesn't mean that that then follows for all other time periods. Audited accounts for one year are therefore better information of what would've happened in another year than unadjusted accounts.

Q What work did you do, falling within your area of expertise, in order to examine this question because you criticise Mr. Fisher, but what work do you do -- what positive effort do you make?

A I'll tell you what I did. I asked Mr. Fisher to go through, assumption by assumption -- Sorry. Not 'assumption'. -- adjustment by adjustment, what is it that the auditors did in the year where the accounts were audited? Then we can ask ourselves whether it's reasonable to therefore use the audited accounts for later periods, or not. The problem is that it wasn't really a very fruitful conversation because Mr. Fisher was unable to go through those assumptions and so I was unable to have a conversation about that.

Q You deal with the compilation of an expert's report on the basis of conversations?

A No. What I did was I asked, "What adjustments were made by the auditors to those accounts?" and then we could consider the reasonableness of those and whether they should be carried over to the 2001 period.

Q What did you make in order to identify margins?

A I was asked to comment on Mr. Fisher's report. I have just described exactly what I did. I did no more than what I did.

Q So, you did not feel that it was appropriate for you to carry out your own economic analysis of the facts in order to arrive at an estimate, or a figure, of the margins?

A No. I wasn't asked to do that. I wasn't asked to measure these numbers. I was asked to comment on, and review, Mr. Fisher's report. Those were my instructions and that's what I have done.

Q Are you sure that you did ask Mr. Fisher adjustment by adjustment?

A I said ‘certain adjustments’. There were at least seventeen, if I recall, he cited were made in his report. A couple of them were described in his report. I asked him what the others were, and he said that for lots of them he didn’t know. He said it would be a huge exercise to unravel all of that beyond the scope of what he found feasible.

Q If we turn to p.244 we get a heading ‘Combined Effect of these factors with Mr. Fisher’s quantum estimate’. Then, at para. 113 you say that you make adjustments to his calculations. Can we just go through these? (a) is the volume issue, which we have dealt with. (b) - you make an assumption that no volumes would have been delivered after 2001; is that correct?

A This is in the context of an illustration simply to show that the various issues that I have commented upon have material implications. This is illustrative. I think the surrounding text makes it quite clear that this is simply illustrative to show how much these various issues could matter.

Q (b) of course raises a matter of fact for the Tribunal, does it not?

A Yes. As I say, it’s illustrative.

Q (c) is also a matter of fact for the Tribunal.

A Ultimately, of course. I have views on it, but ultimately, of course.

Q Then, (d) -- I do not see how this falls within your area of expertise.

A All I’m doing is doing a simple mathematical calculation that says that if one adopted a different margin, look how much this really matters to the results. It is simply to illustrate that the debate that we’ve just had is meaningful and really matters for the answer. It’s no more, no less.

Q What you have done is an arithmetical calculation. I would suggest to you that what you have not done is to place that calculation in a context of economic analysis that actually justifies doing the calculation at all.

A What I haven’t done is independently gone through all of the relevant accounting and other information and sought myself to measure quantum. I wasn’t asked to do that. Those weren’t my instructions, and I didn’t. What I did do was go through Mr. Fisher’s report. I went through his numbers and his assumptions. I questioned various numbers and assumptions that Mr. Fisher put forward. All I have done here is to illustrate that the implications of those questions are material. Therefore, they are, if you like, real issues.

Q If you go to the next page, we have another heading - ‘Assumption of No Opportunity Costs’. At para. 118 you simply say that you do not have a full understanding of the ECSL business model, and you are therefore unable to reach a view as to whether serving the

EME contract would have involved ECSL foregoing other profitable opportunities. You know what Mr. Fisher said about this.

A Mr. Fisher said that in certain areas there were no obvious capacity constraints. There was no analysis of whether, as I've mentioned here by way of an example -- There were no constraints on purchasing the right type of coal at the right prices, for example. But, I don't think this is a big issue. It's just another area where I felt, having read Mr. Fisher's report, I wasn't fully satisfied as to what the real situation was.

Q Could you go to p.290, please? Page 290 has issue number 9, which is this opportunity cost issue, so we have Mr. Fisher saying that he had seen no evidence to support the idea that there was an opportunity cost and the first sentence in your box is: "I am unable to reach a view on this issue" and that is it, is it?

A That's all.

MR. LASOK: Thank you very much.

<u>Re-examined by Mr. BREALEY</u>

Q Can I ask one question in re-examination concerning capacity constraints, and could Mr. Biro go to the transcript of yesterday, this will be day 4. It was put to you by Mr. Lasok that you had accepted yesterday that Freightliner was capacity constrained. Could you go to p.66 of the day 4 transcript, start at line 25 and just quickly read to p.69 where you are giving your evidence on questions concerning capacity restraint?

A (After a pause) Yes. I have reviewed it briefly because I remember the conversation.

Q So in response to Mr. Lasok's statement that you have accepted that Freightliner was capacity constrained could you clarify to the Tribunal what is your evidence on this, whether you have accepted it or not?

A My evidence yesterday and when you re-asked the question today, is that there was a brief period commencing April 2001 where there are real questions as to whether Freightliner could have served all of the demands placed upon it, that was a temporary period that would have lasted for some of the volumes demanded of it for a fairly short time period and that would have accounted for a very small proportion indeed of the volumes that were associated with the EME ITT. So basically all the evidence suggests Freightliner could really have met all of Enron's demands with the exception of certain volumes for a handful of months in the second quarter of 2001.

Q Is that also dependent on Freightliner carrying all of BE's requirements?

A That takes into account Drax and BE; it is Drax and BE coming in that then creates that temporary issue.

Q So what would happen if Enron was chosen first for the EME contract rather than the BE contract?

A What happened is the British Energy contract was I think negotiated in October 2000.

MR. LASOK: This is a question of fact, not ----

A Can I answer the question, I am just trying to give it some context. The EME ITT was, I think, before that, September was the Enron bit. It is possible that Enron did not know that it would have won the British Energy contract and therefore would not have fully considered that Freightliner would have been capacity constrained, because at the time of bidding for EME it would not have known ----

THE CHAIRMAN: The short point is there was virtually no capacity constraint in his opinion.

MR. BREALEY: Thank you.

THE CHAIRMAN: Yes, thank you very much indeed, Mr. Biro. Thank you so much for coming back this morning, and you are free to leave.

(The witness withdrew)

MR. LASOK: I do not know whether the Tribunal wants to take its customary break at this stage?

THE CHAIRMAN: Well it might be advantageous for counsel if we take a 10 minute break now so that you can get your tackle in order before we start with submissions.

MR. BREALEY: We have prepared overnight some closing submissions in writing. I obviously want to take the Tribunal through them, obviously I am not going to read them, but highlight the main points. Would you prepare it now and have it for 15 minutes, or shall I just give it to you?

THE CHAIRMAN: I think that is over to you? It is a question of what technique you prefer?

MR. BREALEY: I will hand them up in 15 minutes time.

THE CHAIRMAN: Right.

(Short break)

MR. LASOK: Sir, before Mr. Brealey starts, there is one thing that perhaps I ought to mention. During the break Mr. Fisher told us that he was a bit upset about a couple of answers that Mr. Biro gave concerning the quantification issue, and a conversation or series of conversations that Mr. Biro said took place between him and Mr. Fisher, because Mr. Fisher's recollection is not consistent with Mr. Biro's answers to those questions. Mr. Fisher was not cross-examined on this at all and therefore he has not actually had the opportunity to address directly that particular aspect of, shall we say, the relationship between himself and Mr. Biro. That would lead me to request the Tribunal for an

opportunity to recall Mr. Fisher simply to ask him to state his own position on the evidence of Mr. Biro on that particular point, which is the question of the adjustments, and that is an application I am making.

THE CHAIRMAN: Yes.

MR. LASOK: I am much obliged.

THE CHAIRMAN: I am not taken by surprise about this, as I can see Mr. Fisher from here and you cannot.

Mr. JOHN JAMES NORMAN WALDRON FISHER, Recalled

Further examined by Mr. LASOK

THE CHAIRMAN: The oath that you took is still binding on you, Mr. Fisher.

MR. LASOK: Mr. Fisher, you heard Mr. Biro's evidence on the question of the conversations that took place between you and him concerning adjustments. Do you understand what I am referring to here?

A Yes, I do, yes.

Q Could you give the Tribunal your own account of what you remember having happened?

A Certainly. This was at the meeting to discuss the joint statement and I certainly didn't go through each adjustment one by one. I'm not sure where the number 17 comes from, I don't recall it. My position is that there are 39 adjustments that I have identified between the management accounts and the UK GAAP accounts. Some of those related to adjustments made to comply with the differences between the US accounting standards and UK accounting standards, and some of them are the normal sort of adjustments you would expect to see at any year end for timing adjustments for accruing for orders received, and all that sort of thing. It is fair to say that I have not had access to the detailed schedules supporting those adjustments. I know what the debits and credits are, and it might be debit something, credit something, for £1 million. I don't know the make-up of that, but I understand the nature of the adjustment.

Q Can you give an illustration of what you mean by the "nature of the adjustment"?

A Can I refer to my report?

Q I am sure, yes, it is in bundle E.

A I do give an example where ----

Q I think your report starts at p.82.

A So on p.126 of bundle E, I am talking here about the non-accounting standard difference, adjustments and non-gap adjustments, and I give two examples, 13 and 17, and I explain what their nature is, which is that, in the first case at year end you have a look and you look

for stock deliveries into your warehouse, or whatever it might be, and you make sure you've picked up the invoice for them, and you make an accounting adjustment to increase your creditors and increase your stock accordingly. On Adjustment 17 it's the other way round. So I presumably made sales in the period that I haven't yet recorded. So, I've made an adjustment to increase my turnover and increase the debtors from the sales accordingly. Those are the nature of the type of adjustments.

Q What is the relevance of these adjustments?

A Well, they are essential in order to correct management accounting information to produce the statutory accounts that will show a true and fair view. It's clear to me from the scale of the adjustments that the management accounts that we've seen are wholly unreliable.

MR. BREALEY: I have no further questions.

(The witness withdrew)

THE CHAIRMAN: Just for the purposes of my note, Mr. Brealey, are you going to follow the order - if you do not use every word - in this document?

MR. BREALEY: I am going to follow this document, not word for word ----

THE CHAIRMAN: I can use it as the basis for my note.

MR. BREALEY: Yes, sir. I would like to take it fairly carefully, but if I could just, in broad terms, try and tell the Tribunal what we have done -- At para. 2 we give the issue for the tribunal. There are certain preliminary points that I need to refer to. In para. 6 we set out what we submit are the key issues in the case. These are essentially the issues of Questions A and B in *Allied Maples*. We will come on to those in a minute. Those are the issues. What we have tried to do, by reference to those key issues, is to inform the Tribunal as to what we say the evidence is relating to those key issues. So, for example, at III, para. 8 we set out the evidence as to what Enron would have agreed with EWS in the "but for" world. That is the first step. We deal with the evidence relating to that. At p.7 of this note we set out the evidence as to what Enron would have offered to Edison. As I say, the first thing is what Edison would have done with EWS; the second is what Enron would have done with Edison; and then, going on to V at p.13 we set out our submission as to the evidence as to what Edison would have done in the "but for" world. Right at the end, we deal with the quantum. What we have tried to do is to set out the evidence by relevance to the key issues in the case.

Going back to the beginning, para. 1 is, in my submission, probably the most important point in the case. There are lots of important points, but this is probably the most important. You see there Enron claims about £20 million for the loss of a four year contract to supply

coal to Ferrybridge. We say it must fail at the first hurdle because for reasons unconnected with EWS' infringing conduct Edison did not wish to enter into a four year contract for the supply of coal to Ferrybridge with anyone. At this point I think one has to be crystal clear that Edison put out various spot contracts, short term supply contracts with suppliers of its choice. It negotiated contracts with some Russian suppliers during that period. Enron's case is that it would have taken every single tonne of coal. So, Enron would have replaced all the spot contracts and all the short-term contracts, including those tenders where Enron actually did participate for the short term tenders and lost. We have seen there are cases where Enron did participate in a tender and it did not even make the first hurdle.

That is the nature of Enron's case - that all the spot contracts that Mr. Crosland put out to tender - the short term contracts - would have been replaced by Enron. That, we say, by way of introduction, is the key. Edison simply did not want a long-term four year supply contract with anybody.

Then we set out the issues for the Tribunal. There are certain preliminary points to make. At para. 2 we make the forensic point - and this was clear in opening by Enron - that they really only come to court with the decision. It is to be noted that they have not called anybody from Edison. So, Enron, for example, have not called Mr. Crosland's bosses. They refer to Mr. Crosland's bosses. Would they have accepted any recommendation? But, they never called anybody from Edison to gainsay what Mr. Crosland says. They have never called anybody bar Mr. Staley from Enron. They have never called anybody to give evidence as to the market value of this contract.

They say, as we say in para. 2, that it is inherent in the finding of competitive disadvantage that there was some sort of loss. We say that is incorrect as a matter of law and fact. We rely to a certain extent on Enron's own expert, who quite clearly distinguishes between competitive disadvantage and causation.

Paragraph 4. We are not seeking to re-litigate. Contrary to Enron's misplaced allegations that EWS is seeking in some way to re-litigate findings of infringement, we are not. We do accept there was a binding infringement -- price discrimination. I think it is important at this stage to emphasise that it was price discrimination. It is not concerned with performance obligations, poor service, anything else. The infringement was price discrimination as one sees time and time again from the ORR's decision.

As the Tribunal knows, s.47A provides that the Tribunal and the parties are bound by the finding of infringement. But - and this comes to para. 5 - we say that when one looks at the whole decision the Tribunal is clearly not bound by every single statement in the decision.

We put a note in on s.58. Could I ask the Tribunal to also have a look at the Competition Act?

THE CHAIRMAN: Just so that I am clear in my own mind, Mr. Brealey, about the difference between s.47A and s.58, s.47A of the Competition Act 1998 (as amended) relates only to follow-on actions in this Tribunal.

MR. BREALEY: Yes.

THE CHAIRMAN: Sections 58 and 58A relate to stand-alone actions and some follow-on actions.

MR. BREALEY: In the court.

THE CHAIRMAN: In the court, which you say is the High Court.

MR. BREALEY: It includes the High Court, but it would include the Court of Appeal. I say that because it is relevant to ----

THE CHAIRMAN: My next question was going to be, "What is the effect of s.59 in your submission, definition of the "court". Well, it is self-evident what it says, what is the effect of s.59 in its provision of the definition of the "court"?

MR. BREALEY: The answer to that is s.28. What s.59 does is say that for the purposes of all the sections bar s.58 and 58A, "court" means High Court. Why does it need to do that? Because when you get to s.28, which is the OFT's ability to enter business premises under a warrant, we see that the OFT has to apply to the court and according to the rules of court. What the OFT has to do is to apply to the judge of which court? Have a look at s.59, it is the High Court, and that is in practice what happens. So s.59 is informing the reader that when the OFT is applying for a warrant it has to apply to the High Court hence the limitation purpose of s.59. You then apply to the Court of Appeal for a warrant, you apply to the High Court (s.28). Section 47A is concerned with the Tribunal, s.58 and s.59 are concerned with Chapter I proceedings, where there is an alleged infringement, so arguably does not include follow-on actions, s.58. Section 58A would include follow-on actions because s.58A says that a finding of infringement is binding. Section 58 is merely concerned with findings of fact in relation to alleged infringements. Section 58A, and this is one of our construction points, if "court" means "Tribunal", and Mr. Lasok says "court" means "Tribunal" and therefore when you read s.58 and a reference to "court" it covers everything – court, Tribunal, you name it.

If that is really the case, it is completely inconsistent with the follow-on section, s.58A, which says, as regards findings of infringement, the court – which would include the High Court and the Court of Appeal – is bound by findings of the Tribunal. So in s.58A, there is

clearly a distinction being made by a court and the Tribunal, because a decision by the Tribunal that Chapter 1 prohibition has been infringed will bind the High Court and it will bind the Court of Appeal; it cannot be reopened. So "court" in s.58A cannot mean both the Tribunal and court of law (High Court, Court of Appeal) and it would stretch beyond belief the interpretation of the word "court" in s.58 then to say notwithstanding that court only means High Court and Court of Appeal and maybe the County Court in 58A, in s.58 it includes the Tribunal.

So s.58 is concerned, as it says, with an OFT's finding which is relevant to an issue arising in Part 1 proceedings. These proceedings, there is no issue, are not Part 1 proceedings. Part 1 proceedings are defined in respect of an alleged infringement. So as we say in our note, s.58 is referring to an alleged infringement.

Just as a matter of practice, it cannot be right that every single statement in, for example, a 1000 page document is binding on the parties, because how does that then fit in to someone's right of appeal? Is it binding on Enron? It says "binding on the parties" – is the finding of fact binding on Enron, who is merely a complainant. If there is a finding of fact which is completely and utterly unrelated to the finding of infringement, can it really be the case that if the infringer does not appeal because it accepts it infringed the Act, that it is bound by some unrelated finding of fact which can be used against it in a follow-on action for damages.

THE CHAIRMAN: Was this point discussed before the Court of Appeal, because the Court of Appeal in a passage that is quoted in one of your documents, seems to place upon us a stricture which relates closely to s.47A, and the way in which we are to look for what one might define as an infringement under s.47A. Was the s.58 point taken in the Court of Appeal?

MR. BREALEY: There were two Court of Appeal judgments, one in the *Vitamins*' judgment, and one in this case. In the *Vitamins*' case, which concerned time limit periods, if you remember, Sir, the question of when time started to run in this was in the *BCL* case. There, there was a discussion about findings of fact, and findings of infringement, because the Court of Appeal in that case did note that s.47A was broadly the equivalent of s.58A, so 47A, para. 9:

> "In determining a claim to which this section applies the Tribunal is bound by any decision mentioned in subsection (6)."

So that is the decision which says that the Tribunal is bound by a finding which establishes infringement. That is the equivalent, we say and I submitted to the Court of Appeal, of

s.58A, where a court would be bound by a finding of infringement. In a nutshell 47A(9) is equivalent to s.58A. s.47 applies to the Tribunal, s.58 to the Court. The argument was the time does not run until all findings of fact have been determined, so said the claimants in that case, and the Court of Appeal drew a distinction between findings of fact and findings of infringement.

In the Court of Appeal in this case I cannot remember whether s.58 and s.58A were expressly argued, but what was clear from the submissions was that we were submitting that there had to be a clearly defined infringement that would be binding on the parties. We would say it is implicit in the Court of Appeal's judgment that having said that you need to carefully look at the infringement, which is going to bind the parties, the Court of Appeal certainly did not have in mind that not only would the infringement, carefully defined, be binding, but every single finding of fact would binding. But I do recognise that in the Court of Appeal we did not debate at length whether "court" in s.58 includes Tribunal.

THE CHAIRMAN: Is there any difference between the following and, if so, does it matter: s.47A(9), which you have drawn our attention to, and the sentence at para.31 of the Court of Appeal's decision in this case, which reads:

> "No right of action exists unless the regulator has actually decided that such conduct constitutes an infringement of the relevant prohibition as defined."

Do they mean the same or not, because the language is different? Sub-section (9) talks about, "Any decision ... which establishes that the prohibition in question has been infringed", whereas the Court of Appeal seems to talk in narrower language of conduct which actually constitutes an infringement. Is there a difference or not?

MR. BREALEY: No. With respect, sir, what the Court of Appeal was doing is saying that the Tribunal is bound by the decision which establishes the prohibition in question. In order to decide the extent to which the prohibition in question has been infringed, one has to look at the conduct.

THE CHAIRMAN: We are bound by the Court of Appeal anyway.

MR. BREALEY: Yes.

THE CHAIRMAN: I understand that there is the possibility of an appeal from the Court of Appeal to the Supreme Court, but we have to ignore for the time being. I see Mr. Beard nodding with great enthusiasm at that one!

MR. BREALEY: Apparently it is the first case that has been lodged, but whether it gets there I do not know. The Court of Appeal had in mind that you had to carefully define the infringement, which means you have to carefully define the conduct. In a nutshell, we say

that the conduct that was found to have infringed the prohibition in this case was the price discrimination. The May rates were discriminatory, and what the Court of Appeal said should not happen is that Enron should not scrabble around the decision to find further findings of fact that could arguably constitute an infringement.

THE CHAIRMAN: Of course, whether it makes any practical difference may be quite another question.

MR. BREALEY: This is why, in our written submissions, we have said this seems to be becoming a big point but does it really matter. We say, no, it does not, because, first of all, we accept that the finding of infringement is binding; but the claimant has not articulated what collateral findings of fact are relevant which are said to be binding on us. I come back to the practical point that if Mr. Lasok is right we could not appeal collateral findings of fact. We can appeal to the Court of Appeal or to the Tribunal findings of infringement, but no one can appeal collateral findings of fact – that 30th June was a Wednesday, or whatever.

THE CHAIRMAN: I promise not to behave like Lord Justice ... again, if I can help myself, so let us move on from that point.

MR. BREALEY: So we are not seeking to re-litigate. We say that not all the findings of fact are binding. Then at para.6 we come to the really key issue. We say that in order to succeed in its claim Enron must prove that on the balance of probabilities what, in the "but for" world Enron would have agreed with EWS, and what in the "but for" world Enron would have offered Edison on the basis of the EWS/Enron contract. Just to put that in context, had there not been any price discrimination – so had that May 12th email contained lawful rates, what would they have done? What would Enron have done had those May rates not been unlawful? We will come on to *Allied Maples* just to pin this down. That is essentially the question (a), what would the claimant have done? That has got to be proved on the balance of probabilities.

Then 6(ii) is, did they lose a substantial chance? That is question (b). As a result of the infringement Enron lost a substantial chance that Edison would have awarded a four year coal supply contract to Enron on a exclusive basis thereby depriving Mr. Crosland the ability to put out spot contracts. Then on the balance of probabilities the quantum of loss. So those are the key issues. As I say, in our note we set out the key by relevance to the facts.

Could I just quickly go to the *Allied Maples* case, which is bundle I I, tab 9. The important point, before I get to the passages, I would like to emphasise here is that in opening Mr. Lasok referred to the word "negotiation" and said, "Aha, whenever there is a chance to

negotiate then you are into the realms of chance". In law, context is everything. I think it is important to see what the Court of Appeal had in mind. The headnote at p.20 of the bundle, 1602, clearly sets out the questions (a) and (b), in evaluating the damages, what would the claimant have done; and then loss of chance.

Page 1610 picks up what the claimant must show that it would have done. So this is the passage which supports question (a):

> "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. But again, if he does establish that, there is no discount because the balance is only just tipped in his favour. In the present case the plaintiffs had to prove that if they had been given the right advice, they would have sought to negotiate with Gillow to obtain protection. The judge held that they would have done so. I accept Mr. Jackson's submission that, since this is a matter of inference, this court will more readily interfere with a trial judge's findings ..."

But the point is there that the judge found that the claimants would have accepted as they said they would have acted.

Then one goes on to 1614 at D:

> "... the plaintiff must prove as a matter of causation that he has a real or substantial chance as opposed to a speculative one."

In essence that is the test the Tribunal has to apply in this loss of this four year exclusive E2E contract. Is it speculative or did they have a real chance? Did they have a real or substantial chance of this contract, which Mr. Crosland did not want?

Then at the bottom of 1614 ----

THE CHAIRMAN: Are we to take "real or substantial" as a tautology?

MR. BREALEY: I think it emphasises the fact that it has got to be a really, really good chance. It has got to be real and substantial.

THE CHAIRMAN: This says "real or substantial". That is why I ask the question.

MR. BREALEY: Real or substantial.

THE CHAIRMAN: You say "real and substantial".

MR. BREALEY: I take the point. Real or substantial.

MR. MATHER: "Substantial" may be less powerful than "real" in this case. It is a lesser degree, perhaps.

THE CHAIRMAN: Let us park that for the moment.

MR. BREALEY: Real or substantial. If we go on to E and F --

"All that the plaintiffs had to show on causation on this aspect of the case is that there was a substantial chance that they would have been successful in negotiating total or partial ----"

If I could just ask the court to read E and F? (After a pause) The real key passage, in my respectful submission, to put this real or substantial chance in context is p.1620. Essentially, in my submission, that nails Mr. Lasok's submission about, "Well, if it's negotiation then you have always got a chance". If I could ask the Tribunal just to read that page, and then I can just highlight certain points. (After a pause) The first point is, as I said earlier, that the evidence from the third party is highly material. We get that from B. The evidence of Mr. Crosland is highly material. But, the relevance of the passage at D, E, F, and G shows that in this case the parties had entered into very detailed negotiations. They were actually in negotiation to such an extent that the clause had been put in, and been taken out. The question was whether they would have proceeded with it being in or out, or what would have happened. But, they were actually in detailed negotiations with legal advice. The trial judge in the Court of Appeal said, "Well, in that context, I can take a view as to what might have happened".

In the present case there is no detailed negotiation. There is an invitation to bid and a response. There is no evidence that they actually negotiated anything. No evidence that there were any negotiations on the haulage contract, let alone on the coal supply contract. So, the present case is vastly removed from the facts of this case. In this case there were current negotiations. In Enron's case what Mr. Lasok is saying is, "Well, if I could get a foot in the door with the haulage, I may have been able to negotiate a coal supply agreement".

In our respectful submission that cannot represent the law. The fact that you can put a bid in, not negotiate, and say, "Well, had I got that I might have been able to negotiate something else. Moreover, the third party did not want, and I would have had to persuade them of the value of it". We will come on to the evidence in a moment, but the law on loss of the chance does not extend to this speculation upon speculation upon speculation. You can always say, "Well, if I had done this, I could have then gone to see him next Thursday and I could have negotiated something".

THE CHAIRMAN: But you are never going to have an *Allied Maples* situation in a case like this, where there is bad faith throughout by one party. The *Allied Maples* case is a typical commercial situation in which there are heads of agreement reached for a takeover and then the real negotiation, the nitty-gritty negotiation, starts. But, where you have anti-

competitive practice of this kind with one party - forgive the shorthand - acting with bad faith throughout towards the other, you are never going to have anything remotely approaching an Allied Maples situation in fact.

MR. BREALEY: First of all, sir, I take issue with the bad faith. I mean, there was an intent to exclude, which was found to be an infringement.

THE CHAIRMAN: Is that good faith?

MR. BREALEY: Is it bad faith? Bad faith has a certain ----

THE CHAIRMAN: Forgive the language. I was using it in general terms.

MR. BREALEY: Even if there was bad faith, this is not the exercise that the Tribunal is concerned with. EWS has been fined for its infringement, for its bad faith conduct, for its intent. The question is: Has Enron suffered any loss? The question is: Had those bad faith May 2000 rates never occurred, what would Enron have done? One of the submissions we are going to be making is that it may have said, “Well, I do not really care about those -- I understand I’m at a competitive disadvantage, but it will not cause me a mess because I have got this fantastic deal with this other person, and I am going to put that on the table”. That just breaks the chain of causation.

With that, can I then go to para. 8 onwards which is the evidence as to what Enron would have agreed with EWS in the "but for" world. So, nothing to do with bad faith. We have to assume, on the causation issue, that the May 2000 e-mail had the same, or similar, rates.

Paragraph 8 - Enron must first prove on the balance of probabilities the nature of the contractual terms that it says EWS would have offered to Enron. So, first of all, is it correct to say that Enron would have concluded a deal with EWS? Enron, we say, is completely vague about the terms that it says it would have concluded a contract with EWS. We deal in the next paragraphs, on p.4, with price and performance. Those are the two elements that Professor Ordover refers to.

Paragraphs 10 and 11 concern price. We say that if you take a fair reading of the ORR decision it is not at all clear that the price should have been identical. The price difference was unlawful. But, should the price that was offered to Edison have been the same? When EWS negotiated its rates with Edison, should it have given the same rates or similar rates? At first base - and this is very much first base - have Enron shown what price they would have concluded with EWS?

Then Enron make a big play about performance terms. Paragraphs 12 to 20 are trying to deal with their case on performance terms. I will come to the evidence, but if I could ask the Tribunal to go to para. 20? Although this seems to be a big point by Enron, how

relevant is it at the end of the day? Because even Professor Ordover says the performance terms would have been the same, and therefore it was moot. All that means therefore is that on performance the contract that Enron was submitting would have been the same as EWS, so it just washed through. There would have been no competitive advantage that EWS had, it would just be moot. Then the question is: would that bid have been rejected for all the other host of reasons that Mr. Crosland says it would have been rejected?

This performance obligation seems to have taken on a life of its own if only they had had the performance terms, but at the end of the day all it shows is that the question would have been moot. It does not actually solve any of the other reasons that Mr. Crosland puts forward.

Going back to para. 12 and the evidence on performance, Enron never articulate what performance terms EWS should have offered it. We say it is just incorrect that EWS refused. It failed to agree a contract, yes, but there was absolutely no finding (para.14), the ORR never made a finding that EWS should have offered Enron any particular term as to performance, simply recorded as a matter of fact that EWS and Enron had not entered into the performance based contract they had been negotiating.

If Mr. Lasok submits to the Tribunal that it was an abuse because Article 82 and s.18 says you have to offer the same terms in the ideal "but for" world, which is what he is submitting, that does not take him anywhere at all, because the flipside of that is that he is asking the Tribunal to find that if we did not, it would an abuse. The Court of Appeal have said that it is not open to the Tribunal to find conduct abusive which has not already been found abusive by the Regulator. So his submission that in the "ideal world" Article 82 and s.18 would have meant this, would have meant that, that all the terms must have been non-discriminatory, cannot be right, as I said, because the flipside of that is that if we had failed to do that it would have been an abuse, and nowhere in your decision is such a finding. The abuse is on price.

Very quickly on this performance issue, because in my respectful submission it is a non-issue, 14 says we submit the ORR has made no finding, 15 – Enron has not pointed to any evidence, and 16, the documents in G2, which we have set out there, clearly show that EWS have agreed certain performance terms with Enron. 17 – if they are arguing there was no term guaranteeing punctual delivery, those 17, 1, 2, 3, 4 and 5 clearly show that at the material time Mr. Tom Kearney had changed his mind. Just for the Tribunal's note, compare the document at 416 to 418, if I can just give you the key passages, 416 to 418, where there was the original February proposal by Mr. Kearney. Then 464 where Mr.

Kearney leaves a voicemail saying: "We have changed our mind". Then the new proposal that he puts forward at 467. If, and we do not really know, if the complaint is that there was no punctual delivery agreed between EWS and Enron, it is because Mr. Kearney did not want it.

In a nutshell, on this first threshold question, what would Enron have done? If they were going to enter into contract with EWS what would the terms have been? There is very little credible evidence as to the terms that Enron say they would have concluded with EWS.

THE CHAIRMAN: And in the "but for" world we remove the abuse and assume that EWS would not abuse its dominant position in any other way?

MR. BREALEY: Yes, you have to.

THE CHAIRMAN: That must be right, must it not?

MR. BREALEY: Yes. That is what the Court of Appeal says. That leads to the issue at IV, p.7, para. 21. Assuming now that Enron has shown to the Tribunal there was a contract, that it would have concluded with EWS the rates and performance terms, what would it actually have done in the "but for" world. So on 13th May (they have this email on 12th May) they say: "Great terms from EWS. The performance terms are all there, it looks good". Would they have still used the EWS contract and this is the issue in IV, because we say at para.21 that the clear evidence in this case is that they would have still contracted with Freightliner. Even if it is incorrect, even if they would not have contracted with Freightliner and they would have used EWS as its haulier, what terms would Enron have offered Edison, what would have been different? So in this "but for" world we have lost on the fact that they would have gone with Freightliner, and they would have gone with EWS, what are the actual terms that they would have given Edison? What would have been different? These are the issues that we try and tease out in this section.

The first issue – I was cross-examining certain witnesses on Freightliner and the beauty of the Freightliner deal, because I was trying to establish with the witnesses whether, notwithstanding that they could have got an EWS deal, the Freightliner deal would have been the one that they would have preferred anyway, and if it is the deal they would have preferred anyway that breaks the chain of causation.

Paragraph 23 – the evidence shows that if we say EWS had not offered discriminatory terms, Enron would still have contracted with Freightliner rather than with EWS. If the Tribunal finds that is a fact then it has to dismiss the claim because it breaks the chain of causation.

In the following paragraphs we list the evidence that we say clearly shows that Enron would have gone with Freightliner. (i) on p.8, the famous 12th May email, when they get the rates: "Advise we delay on contract as much as poss…" So at that time Enron clearly had in mind to contract with another haulier – "Advise we delay", "DRS was looking good".

MR. MATHER: Mr. Brealey, is one interpretation of this section that Enron was simply playing for time rather than deciding to contract with someone else? Would that not be an equally possible interpretation? The words you have just quoted suggest playing for time?

MR. BREALEY: No, with respect, I would not. To a certain extent, yes, they are playing for time, but the clear inference here is, "forget EWS, let us see what else is in the market". So it may be playing for time, but, as I say, the clear inference is that they find someone better they will go with them. Even if they were playing for time, in the "but for" world where does that take the claimant? So they play for time for six weeks. They then make a decision on 30th June to go with Freightliner rather than with EWS. They made a choice. It is a big company.

Then at (ii), we set out the evidence. The contract that Enron signed with Freightliner would be negotiated by Tom Kearney. We know it was very lucrative for Enron.

Tom Kearney stated that Enron considered that it had achieved a very favourable and profitable deal from these negotiations and described the Freightliner contract as a very, very lucrative incentive scheme, by which we shipped and would continue to ship coal.

Mr. Staley recalls Enron was quite excited about the contract and believed that the Freightliner would "allow Enron to provide a reliable service at competitive prices to our customers over the long term". If the Tribunal remembers – and we set it out here – it was a "good fit". The Tribunal will remember Mr. Staley saying that the Freightliner deal was a "good fit" for its business.

We say at (iv) that there is no suggestion in any of the documents that Enron was disadvantaged by having made an agreement with Freightliner saying that it was a "better fit", and even if EWS had offered rates broadly similar to those offered by Freightliner Enron would have contracted with Freightliner because of Freightliner's performance terms. That is a very important piece of information, piece of evidence. Mr. Staley said that the Freightliner was a "better fit", and "even if EWS had offered rates broadly similar to those offered by Freightliner Enron would have contracted with Freightliner because of the performance terms".

THE CHAIRMAN: I am looking at your reference 35, footnote 35, or I would be if I had day 3 in my file. Yes. It was not that I did not trust your note, Mr. Brealey, I just wanted to read it for myself in context.

MR. MATHER: There is a follow on answer, is there not, at line 9. I just wondered if you would comment on that?

MR. BREALEY: Line 9:

> "Well, if EWS had agreed to the same terms, performance terms and everything, it probably would have come down to other elements, perceived ability to execute and credit risk, things of that nature."

This is coming back to what are you going to purge? If you are going to purge everything then the evidence is that he may have gone either way, but if, as we say, you just purge the pricing element and it happened that the Freightliner offer of performance, which we know is 95 per cent compared to 80 per cent standard, was going to incentivise Enron to go with Freightliner, then it breaks a chain of causation. It comes down to – and this is why Mr. Lasok, I think, continues to submit that all things should be purged.

MR. LASOK: It may be efficient to do it in this way. No doubt the Tribunal has noted p.30, it is the same page, but it is actually lines 20 and 21, where what he is agreeing to is the proposal that they would go with Freightliner if the prices were similar; Freightliner offered performance guarantees, but EWS did not. That was what he was agreeing to.

MR. BREALEY: I do not think it takes it any further.

The point is that the finding is of price discrimination, and the point being put to him was, "Had the prices been similar who would you have gone with? I would have gone with Freightliner." You cannot just purge other negotiations on performance terms, as Mr. Lasok wants to do.

The rest of this section again is emphasising the Freightliner contract with its favourable performance obligations.

Then Mr. Staley, (v), p.9, in his first statement emphasises the Freightliner performance obligations, "delivered to Enron much of the performance certainty that we were seeking". It was better than the EWS offer.

Paragraph 24 is a late argument which was Freightliner could not have done it anyway, although they have negotiated this contract with certain minimum tonnages of 1.1 million, they would not have been able to do it. We set out the reasons there. We say it is based on an erroneous reading of para.389 because the capacity constraint there was about Freightliner as an independent contractor. There is no real evidence that the Freightliner

capacity would have been a huge problem for Enron if it had got the EME contract.

Certainly paras.389 to 390 of the decision clearly states that Freightliner only had a capacity problem net – net – of its contractual relations with Enron. That is 389. We say that is a complete red herring, the capacity constraint.

That is the first issue on what Enron would have done and what would it have put forward on the Edison table.

Then we come, obviously, to a very important factual issue. If we are wrong on this and they would not have gone to Freightliner, they would have used EWS. For the sake of argument they have got competitive prices, non-discriminatory prices. They have got the same performance terms, etc., etc. What kind of E2E contract would Enron have offered Edison. So, assuming they have got this coal haulage deal with EWS, what would they have done with it?

The best evidence that one has is what they actually did. They never say they would do anything differently with the EWS deal. The only evidence the Tribunal has is what they actually did. So, what they actually did, using Freightliner, but you can substitute EWS -- Paragraph 25 -- It has not set out its case on this crucial issue of what its offering to Edison would have looked like. Paragraph 26 - so far as coal supply is concerned, Edison has never said it would have done anything differently had it had a contract with EWS. Then we set out the reasons. We emphasise that the evidence of the actual world shows you what Edison would have done in the "but for" world.

Paragraph 27. First, the evidence from both Mr. Kearney and Mr. Staley is that Enron never communicated any type of deal to Mr. Crosland which would put him on notice that Enron wanted a four year E2E coal supply agreement. It was put to Mr. Staley, as the Tribunal will remember, and Mr. Staley said, “Well, okay. We really did not have a chance”. This evidence applies in the "but for" world as it does in the actual world.

Again, armed with an EWS agreement it puts forward to Edison no negotiation of any sort; no real offer of anything. It was not only an *Allied Maples* negotiation -- It was put to Mr. Staley, and he agreed right at the end of his cross-examination, “Okay, it really did not have a chance”. This lack of any proposal that could be in Mr. Crosland’s mind is fatal to Enron’s case. That is the first point at para. 27 - Mr. Staley accepting that he really did not have a chance.

MR. LASOK: That is the precise opposite of what he said.

MR. BREALEY: Mr. Lasok can make submissions.

Paragraph 28 of our note. In my submission, para. 33 of Mr. Staley's second statement is a very important paragraph, a very important piece of evidence in this case, because it does show his true feelings. We are going to come on to this in a moment, but we know that they had been re-negotiating, and that the re-negotiation had been acrimonious. What does Mr. Staley say in para. 33? He says, "Well, in March 2001 I put out certain feelers". Why March 2001? Because there had been bad feeling. Clear the air. If one is trying to infer Mr. Staley's state of mind and whether he really thought he had any chance of a four year exclusive coal supply agreement with Edison, this shows it - because he has waited six months for the air to clear. If the Tribunal is looking for a steer as to Mr. Staley's mind in addition to his concession, admission, "We really did not have a chance", then para. 33 is very important because it is there his own evidence saying, "I waited six months for the air to clear". If you wait six months for the air to clear, it is not realistic to suppose you really had in mind a four year contract six months on.

At paras. 29 and 30 we set out what Enron's perception was of Mr. Crosland and how the Tribunal can infer from this evidence Enron's state of mind and the reason it was not putting forward any E2E four year exclusive coal supply agreement.

Paragraph 32 of Mr. Staley's second statement (para. 29 of the note). Mr. Staley admits in that paragraph that he knew that Mr. Crosland did not really value the Enron business model. This had been in the context, as the Tribunal knows, of the re-negotiations where the E2E agreement had been torn up. Delivery was now in the hands of Edison. All coal was going to Fiddler's Ferry and not to Ferrybridge.

The re-negotiations are, in my respectful submission, a very, very important background fact as to whether Enron really stood a chance of a four year exclusive supply coal contract with Edison because only a few weeks previous to the invitation to tender coming out - 26th June - they had torn-up a deal, they had separated the two E2E suppliers -- So, they had separated Enron and put Enron into Fiddler's Ferry and they had put Powergen into Ferrybridge. Can it realistically be supposed that Mr. Crosland would have wanted, a few weeks later, to have Powergen on an E2E basis at Ferrybridge, now with Enron back at Ferrybridge with another E2E contract? It just does not make sense.

I am jumping around here, but in circumstances where Mr. Crosland, as we know, wanted spot contracts -- As a result of the re-negotiation, all of Enron's imported coal was going to Fiddler's Ferry. Ferrybridge - he wants to do it himself. He does not want a long-term commitment. What do we actually see from Mr. Fisher's figures for the damages

calculation? That the volume of coal that was actually hauled was less than in the tender. So, less than in the invitation to tender and less than in Enron's response.

To use Mr. Biro's words, actually Mr. Crosland was quite canny in not entering into a long-term agreement because had he entered into a long-term agreement he could have ended up in the same old mess that he was in the beginning and the middle of 2000 - that is to say, with two E2E suppliers of coal thrashing it out between themselves, supplying more coal than he actually wanted.

Paragraphs 30 and 31 are just picking up on what we say Enron's perception was of Mr. Crosland's perception of its E2E model.

Can I go to paras. 33 and 34, just to finish off this second section? This essentially is, assuming that there is an Enron/EWS contract with performance terms -- Now I am against myself and that there are Freightliner-esque performance terms in the EWS agreement. Can it be assumed by the Tribunal, as Enron would have the Tribunal assume, that merely because there are performance terms in the EWS/Enron agreement these will be passed on to Edison. Again, what actually happened in the actual world is relevant to what would have happened in the "but for" world and, as we know, Freightliner guaranteed 95 per cent performance criteria and, as we saw in cross-examination of Professor Ordover, it does not find its way into the Enron bid. So Freightliner agree 95 per cent performance was never inserted into the Enron bid to Edison, to which Professor Ordover says that could have been up to the negotiation, so we are yet to further negotiation in circumstances where a bid at least is your opening shot. You put a bid in and it tends to get rejected, you do not go back and say: "If only I had put this in", or "that in"; you put a bid in to get through the door, and if your bid is not good enough, that is it. So to say, as Professor Ordover does, that it would all have been up for negotiation again just piles more speculation on what Enron would have done.

So far we have been concentrating on what Enron would have done, and again the critical pieces of evidence in the previous sections is, even if it had had an EWS coal haulage agreement would it have done anything differently insofar as offering Edison this coal supply agreement? We say "no".

Section V is concerned with essentially question B. We move away from question A – what Enron would have done – and now we are into: did they have a real or substantial chance of a coal haulage four year exclusive supply agreement on an E2E basis. In my respectful submission, the evidence of Mr. Crosland of Edison is central on this issue. One can cross-refer also to the ORR decision, which I have referred to on the admissibility of the

expert evidence, para. B90 onwards relating to BE, where the Regulator clearly accepts the subjective preferences of the generators as being a relevant consideration. Here we are dealing with how Mr. Crosland would have perceived a contract. At para.37 we say it is clear beyond any doubt that Edison was offering a four year haulage contract only when it did not want and had never offered or negotiated a four year E2E contract for supply with anyone, let alone Enron. The invitation to tender was for haulage only; that is what Mr. Crosland wanted. He did not want a four year coal supply agreement, and this is one of the complete mysteries in this case, the disconnect between the offer by Mr. Crosland, and the response, which we know there is no evidence of, but the response that Enron say: "We may have had a chance to negotiate" – absolute disconnect between the two.

At para.38 we say the real world is the same as the "but for" world, and the reasons for not wanting a four year E2E exclusive coal supply agreement with nothing whatsoever to do with any infringing conduct on the part of EWS is found by the ORR. They are completely separate. In para. 39 we set out the reasons why they did not want a long term contract. They did not want a long term contract with anyone. First, they did not want a contract with anybody, secondly, they certainly did not want a contract with Enron on a four year basis. Then we deal with the reasons why Enron's haulage bid was rejected, and then we deal with EWS's submission that these reasons would have remained constant in the "but for" world. Then we deal with EWS's submission that even if Enron had any chance of winning the haulage tender they had no chance of being awarded a four year contract, and lastly the evidence that Enron itself recognised it had no chance. This is a fairly lengthy section, but it is dealt with under these sections.

So we will begin at para. 40, the reasons why Edison did not want a long term E2E contract for coal supply to Ferrybridge with anybody, so this is not just Enron, but with anybody. It was put to Professor Ordover, were these rational, and these are rational reasons. We set out the reasons. First, a long term contract for E2E supply of coal to Ferrybridge would have been entirely inconsistent with renegotiated arrangements that had just been agreed. I have just made that point but I do emphasise it.

Edison had just taken in-house the delivery. It is inconceivable that it is going to out source it a few weeks later. Edison has just separated Powergen and Enron and wants to do the coal procurement itself in-house, inconceivable that it then gets Enron to do it at Ferrybridge.

Paragraph 42: a major impetus for the renegotiated agreement was that Edison wished to purchase coal on a spot and short term basis, and that is what it wanted to do – a rational

consideration. Mr. Crosland's evidence – there was a problem with the market that developed, with power generation, it was almost impossible to predict, that is what was in his mind, that in the year 2000 power generation was very, very difficult to predict. Why on earth would we commit to a long term guaranteed volume of coal in those circumstances?

Paragraph 43: Mr. Crosland considered that E2E contracts generally were inflexible, so we are not talking about just Enron's inflexibility here, we are talking about E2E contracts generally. He wanted to do it himself, this is the DIY model. We set out there at para.44 why he wanted flexibility. One has to think in fairly brutal terms, if he had entered into an E2E agreement with Enron where does that leave his own position and that of his coal team? Did his boss say: "There's some duplication in costs now. You have just arrived but here is your P45?" He has a mortgage or whatever he is looking for his own employment prospects to be quite brutal about it, if he is going to outsource it all to Mr. Staley where does that leave his own position?

Continuing again – I know the Tribunal will read this, and I am obviously not going to go through it paragraph by paragraph – para.48, as we saw, Mr. Crosland found it extremely frustrating that he could not deal with the counterparties direct. Whether that is a good thing or a bad thing or the Enron business model can do whatever, the decision maker in this case found it frustrating that he could not talk to the coal suppliers direct. We are not just talking about talking to EWS, we are talking about coal suppliers and the ports. We have set out there a certain exchange between the Chairman and Mr. Crosland, where Mr. Crosland demonstrated why he felt it frustrating that he could not speak direct to the mine.

When one looks at that, what is Enron's case, that it can thrust its own model on Mr. Crosland? As I say, there is a complete disconnect between what the decision maker wanted and the £20 million odd that Enron is claiming that it suffered because it could not get its own way, circumstances were never articulated, it said.

So that is the first reason why Edison did not want an E2E model, it wanted to have it in-house, its DIY model.

Then at para.50 we deal with some of the matters explored at the trial, which is the particular reasons why Edison did not wish to contract with Enron, and I email Enron. This does concern negative feelings. They had had a bust up. You cannot ignore the fact. The first point of this is essentially customer relations, in the sense that they had had negative experience dealing with Enron, there had been a fairly stormy relationship. The first point really is there was not good customer service because, as we say, Enron was more focused

on its bonuses than serving its customers. So para.50 is about customer focus, Mr. Crosland's perception of what Enron was doing on a customer basis.

Paragraph 51 is concerned with the personal level, the bad temper, the negative experience of the renegotiation. It is clear on both sides that the Enron/Edison relationship did deteriorate. I think that is absolutely clear from both Enron's evidence and Edison's evidence. In opening I went through some of the documents which put flesh to this breakdown in the relationship between the parties, and we set that out at para.53, that it was a bust up.

The last point on this – to a certain extent they are all slightly connected, but the last point at para.54 is that the perception by Mr. Crosland was not only E2E models were inflexible, but the way it was operated by Enron in particular was inflexible, and we have set out the evidence relating to that.

Then at para.55 we set out the reasons why Enron's haulage bid was rejected. So we are not even into coal supply yet. This is that the haulage bid was rejected. What we have done here is set out for the Tribunal's convenience Mr. Crosland's witness statement, which, in my respectful submission, remained unchanged as a result of the cross-examination. Essentially it was a two horse race – Freightliner and EWS. If it was a three horse, as it was put to Mr. Crosland, well, the third horse was left at the starting line.

The Tribunal are aware of all the reasons why Mr. Crosland did not want a haulage contract with Enron. These are all reasons independently of any abusive conduct, "We purged the main rates". These reasons still stand. I take one example, para.47(a) at p.24. One of the reasons he gave was because Enron had only bid for some routes – i.e. for Ferrybridge. That has got absolutely nothing to do with the May 12th rates. It has got everything to do with the renegotiation. As Mr. Staley says in his statement, as a result of the renegotiation and it becoming a CIF contract, the rail haulage at Fiddler's Ferry was of no value to it. So it has got its profit on the coal supply at Fiddler's Ferry. He says in his statement that haulage was no value to it, and that is the reason that he does not bid for the Fiddler's Ferry haulage. He is only bidding for Ferrybridge for a reason unconnected with any discriminatory rates.

THE CHAIRMAN: I think you can take it, Mr. Brealey, that we are fully cognisant of everything that goes up to and including para.57.

MR. BREALEY: I am grateful.

THE CHAIRMAN: It is a very helpful recounting of the evidence, if I may say so. The only thing that I have a little difficulty is para.57(iii), and that is the use of the phrase "is wrong

in law". The question of whether Professor Ordover has correctly summarised Mr. Crosland's evidence seems to me to be a question of fact and credibility, not a question of law, or I have misunderstood the paragraph?

MR. BREALEY: I think that was inserted, probably by me actually, probably wrongly. "In fact and in law": the reason that it was "in law" is because, in my submission – I accept that the evidence is admissible, but his statement that this Tribunal should give no weight whatsoever to the evidence of Mr. Crosland is wrong in law.

THE CHAIRMAN: I see what you mean.

MR. BREALEY: The Court of Appeal have said that the evidence of a third party is highly material. That is the purpose of that, but I do see that it should be "wrong in law and in fact".

THE CHAIRMAN: It is a very small point.

MR. BREALEY: It is, yes.

THE CHAIRMAN: I think, on the whole, I prefer Miss Lester's version.

MR. BREALEY: Thank you.

Those are reasons in the actual world. Would those reasons have been different in Mr. Lasok's "but for" world? We said absolutely, the reasons would have remained the same, they would not have been different. Mr. Crosland deals with his in his statement, and he dealt with this in cross-examination. Paragraph 58,

> "If Enron had come in on the same terms [as EWS], we would still have gone with EWS because EWS owned the rolling stock" [and that is nothing to do with any abuse] and EWS were a known entity" [that is nothing to do with any abuse] and we would have been able to deal with them direct. [That has got nothing to do with an abuse] We didn't really want to deal with Enron. [That is a matter between Enron and Edison - it is certainly nothing to do with any abuse.] We did not want Enron as our rail haulage operator. [Nothing whatsoever to do with the abuse.] If a comparable deal or Enron's marginally better. 'I believe the senior management at Edison would have turned it down'."

It is clear for all the reasons that we have set out previously why Edison did not want a long-term E2E contract for the supply of coal and as to why Edison did not want a contract with Enron. In the "but for" world, absent the abuse as found by the ORR, it still re-negotiated its arrangements, and still wished to purchase coal on a spot basis. We set out the reasons there.

Paragraph 61. We just pick up the evidence in particular as regards the rates. The first statement of Mr. Crosland at para. 52.

> "The reasons why Enron did not come close to winning the June 2000 coal haulage tender were not because of the prices Enron was offering".

That, in my respectful submission, must nail Enron's case if Mr. Crosland is going to be believed, and he is a credible witness. He comes to court an independent third party and he says that Enron was rejected not because of the prices Enron was offering.

> "Accordingly, even if Enron's price had been lower, they would not have had any chance of winning this tender."

That is the haulage contract he is talking about - not a coal supply contract. At para. 62, the performance terms. He actually says that they did not reject it because of anything to do with performance terms. I still maintain that the performance terms is a bit of a red herring. Going to para. 64, Mr. Crosland having said that Enron had no chance of getting the haulage contract, what is the evidence about this unspecified, hypothetical coal supply contract? The way that it seems to have been teased out at trial is that. "Well, if only we had got the coal haulage contract there would have been an 'angle' or a foot in the door to the coal supply contract". We, with the greatest respect, at para. 66 say that that is just hopeless - and we give the reasons.

Paragraph 67. First, Mr. Crosland makes it clear in his statement that there is no link between haulage and supply. That is as true in the "but for" world as in the real world. Again, I know that the Tribunal has read this. We do rely, for example, heavily on para. 55(d) of his statement.

> "Having already contracted with Powergen for significant volumes of coal over a long period of time, Edison did not wish to enter into any further long-term contracts for the supply of significant volumes of coal. To have done so would have starved us of the flexibility that was critical to our financial viability.
>
> In order to supplement Ferrybridge's core coal supply needs, we would certainly not have entered into a four year coal supply agreement with any coal supplier (unless that coal supplier was offering low sulphur, low ash, low dust coal for a price that was significantly below market prices for the duration of the contract).
>
> In all my years in the coal industry, I have never known such an offer to be made - ---"

What he wanted to do, as I have submitted time and time again -- (f). Again, in my respectful submission Enron simply do not have an answer to this. What Mr. Crosland

wanted to do was to do it himself on spot basis, short-term contracts. I repeat the point that I made at the beginning of these submissions - that that is exactly what Mr. Crosland did for the 3 million tonnes of coal that he went out to market on numerous occasions, seeking spot contracts. Enron was invited to participate and failed, as we have seen. Yet, in those circumstances what Enron is saying to this Tribunal is that all those spot contracts, all those different third party suppliers Enron would have won. So, no spot contracts, no short-term contracts. They just displace everything. Every single tonne of imported coal Enron now get. We say that it is fanciful.

Paragraph 68. We set out the evidence of Mr. Crosland. It was clear beyond doubt in his oral evidence that there was no associated coal contract to be won. Again, we set out what he said in cross-examination - for example, at (ii)

> "We weren't looking for an into stockpile price on anything .. there was never a coal contract associated with the rail haulage contract ...
>
> (iii) we were not looking for E2E arrangements, and there was no coal contract offered or implied with this tender ... there was no E2E contract associated with this tender ...
>
> (iv) we had no intention of entering into any long term contracts with anyone ...
>
> (v) ... we wouldn't have accepted that".

That is the evidence of Mr. Crosland, the highly material witness. Then we also get the evidence from him wrong.

We all remember Mr. Kearney. He was adamant -- He is the man who kind of originated the complaint. Is one looking at total impartiality? Someone who was employed by Enron, who was behind the complaint, and who still comes to the Tribunal and says, "We never had a chance of this coal haulage contract, let alone a coal supply contract". It has to be given some weight, in my respectful submission. We set that out there.

Then, at para. 71, I make the point - and para. 71 is an important paragraph - that Mr. Staley (at (iii)) did accept in cross-examination that because they were not in any sort of negotiation with Edison they never really had a chance of getting -- If one is looking for evidence from the claimant as to the sort of chance they had of the coal supply contract, and Enron's own witness in cross-examination says, "We really did not have a chance", it is powerful, powerful evidence. Again, I come back to para. 33. It took six months to put feeler's out again. It shows Enron's true state of mind in September 2000. They never thought there was any chance of a four year coal supply contract.

That is the evidence we would respectfully put before the Tribunal on the *Allied Maples* issue. What the claimant would have done -- Would it have done anything differently? We say, "No, it would still have gone to Freightliner". Even if it had not gone to Freightliner and gone with EWS, what bid would it have put to Edison? There was never a chance of this coal contract.

I can finish, subject to anything I have missed. You have the quantum submissions. I would like to emphasise one point on quantum. It is that thorny issue of the market value of this hypothetical contract. Mr Fisher calculates the loss of profit on this hypothetical contract - Contract No. 40 - as between £3 and £6 a tonne. That is what Enron is seeking at this Tribunal, between £3 and £6 per tonne depending on the profit margin and that is as if in December 2001 that was the market value of that contract that we know. In late November/early December Enron went into administration. We saw Mr. Kahn's evidence, the first thing they did was to sack 1000 people and get some cash in. These contracts (39 plus the hypothetical 1) were sold within three or four days for a cash consideration of £7 million. If you add up the tonnages in those 39 contracts it comes nowhere near to the £3, £6 loss of profit on coal supplied, at most you could say it is less than £1. If you take the tonnage of the coal that was going to be supplied, and that is the best evidence, we say, of market value because we know in the business sale agreement, the business was valued at market value, that mark to market accounting, and that £7 million is the best evidence of what the market was prepared to pay for these contracts, and the market was not prepared to pay between £3 and £6 a tonne. It was a package and they paid £7 million cash. It is wholly unrealistic for the claimant, Enron, to come to court and say that this 40th contract would have been transferred at the same time, it would have been listed as contract no.40. Although the other contracts were sold for £7 million the cash consideration would have gone up to £27 million, because that is essentially what they are submitting.

Those are the closing submissions of the defendant.

THE CHAIRMAN: Thank you very much, and thank you for keeping within time.

MR. LASOK: I hate to disrupt your appetite or zest for lunch – maybe it would encourage your zest for lunch – but I would like to hand up at this stage if I could a written closing that we will embark upon at 2 o'clock, though it does obviously not come with an applied assumption or injunction that when you return at 2 o'clock there will be sandwich crumbs or whatever, or other signs of food having been eaten while the thing has been perused.

THE CHAIRMAN: This Tribunal has one advantage over all other courts or Tribunal I have ever sat in and that is that it provides a civilised lunch for the members.

MR. LASOK: Thank you very much.

THE CHAIRMAN: I do not think we are going to break that habit, presumably we will follow a similar process, Mr. Lasok, as we did this morning?

MR. LASOK: That is right, yes.

THE CHAIRMAN: We will adjourn now until 10 past 2.

(Adjourned for a short time)

THE CHAIRMAN: Yes, Mr. Lasok?

MR. LASOK: Thank you very much. What I am going to do is just draw out a couple of points from the written closing and point out its structure, then I am going to make some general observations, and lastly, I am going to run through my learned friend's oral submissions picking up a number of points that I noted as we went through it. I am not going to go through the written closing in great detail. It is there for the Tribunal to read.

As you can see from the written closing, if you turn to para.6, we have set out there the legal questions that in our submission the Tribunal has to deal with when looking at the questions of causation and quantification that are before it. Those questions are phrased specifically in the way that we have put them in order to reflect what the cases say the correct questions are. Immediately you will notice that those questions do not reflect the way in which EWS phrases the questions. In the written closing we set out written reasons as to why, in our submission, the correct questions to be addressed are the ones as we have formulated them.

I am calling these questions the (a), (b) and (c) questions. The (a) question starts off at para.17 and I will just indicate, if you have para.17, p.4, and go to para.21 at the bottom of p.7, that sets out how in the subsequent sub-sections of the closing submissions we deal with the evidence, starting off with the relevant findings of the ORR that have a bearing on the (a) question and then the extrinsic evidence.

The (b) question follows at para.72, and it follows the same format. Paragraph 72 is on p.22. The (c) question is at para.221, the bottom of p.64, and then in the last page and a bit there are a few paragraphs dealing with the topic of duration and termination.

As the Tribunal will appreciate, the questions of law that the Tribunal has to address are to be answered, certainly as we submit it and to a great extent it is not disputed, on the basis of the findings made by the ORR in its decision, those findings, as supplemented obviously where it is necessary, but not contradicted, by additional findings that the Tribunal must make in the light of the additional evidence that it has for the purpose of answering, gathering together the facts that it needs in order to answer, the questions of law it has to decide.

It is obvious, in our submission, that the ORR's decision is quite important, even in relation to the question of causation that is before the Tribunal, because the ORR itself had to consider causation. The particular matter of causation that was before it was the question of a causal connection between the discrimination or the discriminatory abuse that it found to have existed and the competitive advantage that was a necessary component of the finding of an infringement. Of course, what it did was to identify that causal connection and those two elements in, among other things, the EME contract that is the subject of the present proceedings.

Before advancing further, I suppose I ought to make this, I think, parenthetical observation: both parties in their closing submissions have cross-referred to the evidence and in particular to the transcripts, but it is obvious that in the case of both parties it is necessary for the Tribunal to go back to the original material, even if it is only to ensure that the parties have properly reflected in their written closings what the evidence actually says. I will take an example, in para.27 of EWS's closing submissions at footnote 46 there is reference to what Mr. Staley says on day 3, and it is more particularly the bit I think at p.37, line 3. That is an answer consisting of the single word "Okay". The problem with the word "okay" is that its meaning depends on the intonation. "Okay" in this particular instance was used in the same way as some of us would use the expression "I hear what you say". It is not assent. I use that as an illustration simply of the fact that it is very easy for both parties – I am not saying that we are immune from this ourselves because we may have had little slips like this – to be a bit over-optimistic about the answers that witnesses have given. I just mention that. The Tribunal does need, in relation to both of the written closings, to go back to the original material in order to ensure that each of the parties has actually put in the correct reference and that what they are drawing from it is actually to be found in the material that they are citing.

MR. MATHER: Did Mr. Staley confirm that, Mr. Lasok, that your interpretation of his intonation is correct?

MR. LASOK: If you look at his evidence in the transcript you will see that he does that on more than one occasion. When you look at the entire sequence of what he says, he has earlier given answers to this point, and I think I drew attention to one of the lines where he does this, that it is not consistent with an "Okay", "Yes, I admit it. It was I what done it, guv".

MR. MATHER: It sounded to me like an, okay, he was assenting to the proposition.

THE CHAIRMAN: It is a matter for the Tribunal, is it not?

MR. LASOK: That is a matter for the Tribunal. I have drawn attention to that fact. No doubt the Tribunal will look at the totality of his evidence to see instances in which he did respond with the word, "Okay". My impression - and my impression does not count - is that in instances like that, it seemed to me that the 'Okay' was, "I acknowledge the fact that you are asking the question".

MR. LASOK: I am told that we clarified that in re-examination.

THE CHAIRMAN: I was just looking at that. Please draw attention to it if you did because that answer may not be without significance.

MR. LASOK: I am told p.39, the second line. The question was, "Does para. 35 express your view?" One has got to bear in mind that on p.37 there is a curious question.

> "On that basis you really did not have a chance if you never actually communicated it to him".

It was actually a hypothetical.

Moving from there, in our submission there are three strange and unexplained aspects of EWS' case. The first is that all the individuals giving evidence to the Tribunal on behalf of EWS - Mr. Crosland, Mr. Kearney, Mr. White, Mr. Biro - participated in one capacity or another in the proceedings before the ORR. One would have thought that what they have to say in terms of evidence of fact or expert economic analysis was important to the ORR's analysis and its findings concerning competitive disadvantage. We see none of what they have told the Tribunal reflected in the ORR's decision. Instead, we have, notwithstanding, for example, Mr. Kearney's own claims, a clear finding in the ORR's decision of competitive disadvantage in relation to the EME contract we are discussing.

Secondly, if EWS is right its sustained and deliberate campaign to exclude ECSL from the market was pointless and known by EWS to be pointless in advance of their commencement of the campaign. But, no reason has been given by EWS to explain why it carried on with this campaign.

Thirdly, EWS' explanation of events is intrinsically implausible. It provides no rational explanation for ECSL's behaviour at the time, and is simply inconsistent with contemporaneous documentary evidence. Thus, the Tribunal is asked to believe that ECSL threw in a bid for rail haulage without any intention of using it to get a coal supply contract without any intention of entering into negotiations with EME even though the risk was that it would end up, if it won the contract, with having to commit resources - that is to say, haulage capacity obtained from somebody else under a contract - for a haulage contract with EME that according to Mr. Biro would maybe break even. He doubted whether it would

even make a small gross profit. What was the point of doing all that? Companies do not work in that way, in our submission. They go for deals that are going to get them a profit. They are not going to go for break-even deals that expose them to a risk. In order to sustain its interpretation of the facts, EWS simply has not provided any rational explanation for what it asserts to have been the conduct and the motivations of ECSL.

The only common-sense conclusion that one can draw from the facts is that ECSL did make a bid for haulage that on the basis of the information that it had was a competitive opening shot. It did that with the intention of getting an E2E deal and knowing that if it failed to get the rail haulage contract -- the making of a four year rail haulage contract with a haulier like EWS, would effectively bar ECSL from doing business on an E2E basis with EME for a four year period until 2004 because the removal of the haulage element would remove one element of the E2E offer that it regarded as the model on the basis of which it was conducting its coal supply business.

In the "but for" world, if we move to that, ECSL would have been able to price its opening bid on the basis of non-discriminatory rates offered by EWS and would not have been hampered by the absence of competitive performance terms, or by the need to use the untried Freightliner for all or any part of the EME contract. After all, Freightliner came into the picture as ECSL's reaction to the dominance of EWS and ECSL's perception (and indeed rightly perceived) that EWS was engaged in the abuse of that dominant position.

So, in the "but for" world we sweep away all unlawful acts, and we look at a world untainted by the sustained and deliberate abusive campaign conducted by EWS. In that world we have an untainted EWS. In that world we have no need for ECSL to engage Freightliner at all because it can get competitive terms from EWS. That is the "but for" world. On the evidence, in our submission, ECSL would have used the opportunity presented by the "but for" world to have pursued the opportunity of obtaining a coal supply contract with EME. It had every incentive to do so, no rational explanation has been provided to the Tribunal for why ECSL would not take advantage of that opportunity.

In that connection we can perhaps make a couple of observations about Mr. Biro's theory that ECSL did not anticipate making a loss on the EME contract because it priced close to the Freightliner rates, which appears to be the only support for EWS's case, at least on this particular aspect of the debate between the parties.

Mr. Biro's theory collapsed as soon as he accepted that, as a matter of economic theory, in a negotiation the prospective buyer will try to negotiate prices downwards, because as soon as

he accepted that then in terms of economic theory the whole edifice that he had constructed fell to the ground. It was sustained only by one assumption piled on top of another.

The idea that there was no anticipation on the part of ECSL to take a loss on rail haulage disappears completely once one accepts that an opening bid is nothing other than an opening bid and that in the normal course of events attempts will be made to negotiate it downwards. Hence, even if hypothetically the opening bid is not itself a loss leader bid, but if it is a break even bid, and it is the opening bid, the anticipation, the risk is that the bid must become a loss leader in the course of negotiation. That, in our submission, is how economic theory would analyse it, and there is nothing in Mr. Biro's evidence against that, he would accept that.

That raises the point that when one looks at this aspect of Mr. Biro's case it is not sufficient to look at economic theory because then you have to transpose the theory to the facts, the evidence before the Tribunal. Mr. Biro's theory, and everything else that he built around it is sustainable only if the Tribunal has evidence before it that at the material time ECSL's opening bid was its final bid; that it would never have accepted a negotiation downwards. But if EME had reverted to ECSL and said: "We think that the price ought to go down", then at that point ECSL would have backed off. That is the only element that is capable of sustaining Mr. Biro's theory, and there is simply no evidence to support that idea, no evidence whatsoever that ECSL was not prepared to negotiate on the basis of its opening bid, there being no evidence of that nature it follows that the whole of Mr. Biro's theory collapses because his economic theory, when applied to the known facts, produces the conclusion that ECSL must have been anticipating the possibility that in the course of negotiations with EME the result would be a loss leading transaction. That is the only conclusion in our submission that one can reach on that aspect of the case in the light of the evidence before the Tribunal.

If we move on from that and now consider EME's position at the time of all this, and look at it in the early part of October, what do we have? We have precious little in terms of contemporaneous documentary evidence internal to EWS that enables us to work out what was going on. We have one important document, and that is the famous piece of paper on which Mr. Crosland sets out various reasons for selecting EWS and the table of prices. It is a selective table of prices, it does not cover all the routes, and it has three contenders in it. It has EWS, Freightliner and ECSL. That, at one point, was I think described by Mr. Crosland as the "three horse race", but he did not think much of the third horse, ECSL. The odd thing about this is the mere fact that ECSL figures in that document. What is ECSL

doing there? Viewing it from the theory advanced by EWS, ECSL's presence is wholly incomprehensible. It is inconsistent with EWS's view of the facts of what was going on. Why on earth did EME include ECSL in this document? Why on earth did EME invite ECSL to submit a tender? What was the purpose? What did EME believe that it was going to get out of that exercise?

EME knew certain facts. It knew that ECSL did not have any rolling stock. It knew that ECSL's business was coal supply, not coal haulage. So why on earth does a coal supplier figure in the document? Another additional fact – there were only two hauliers in the market at this time, EWS and Freightliner. Freightliner, itself, was in the market in the sense that it was seeking business. It was actually going to start hauling in January 2001. EME must, therefore, have known that ECSL could only have competed for the rail haulage contract as a re-seller of haulage services provided either by EWS or Freightliner. Each of them, EWS and Freightliner, were contenders for the contract. They were the two horses in the original two horse race noted by Mr. Pettit at the end of July when he carried out an assessment of the various companies that had responded to the invitation to tender prior to the invitation being extended to ECSL. Why on earth was a coal supplier, who could only have been re-selling haulage services provided by one of the other horses, invited to join the race? What is the rational explanation?

From EWS there is a deafening silence, but in our submission the rational explanation is quite obvious. That is EME thought that extending an invitation to ECSL to participate in the tender might offer EME something. What could that something be? Rationally, it could only have been something that EWS and Freightliner could not be providing because otherwise there was simply no meaning, no sense whatsoever in extending the invitation to tender to ECSL.

THE CHAIRMAN: Where do we find any documentary support for that proposition?

MR. LASOK: It is an inference from the known facts. What we have, as I have tried to submit, is this: we have got a situation in which we have two horses in the race – we know that – two horses in the race by the end of July, because that is Mr. Pettit's memorandum, which he sends to Mr. Crosland, in which he analyses the different contenders and he actually raises in that document the possibility of ECSL supplying the coal as well. He raises that as a possibility.

You then have in August the sending of the invitation to tender to ECSL. There has been some evidence about this. We have Mr. Kearney saying that it was done at the request of ECSL, but he is very, very imprecise about what the source of that is. He does not know

who told him, and he does not really know between whom the conversations took place. He is speculating. The main problem though is that Mr. Crosland does not remember this incident at all. The best Mr. Crosland can do is to say that it may have been that he had a conversation with somebody from ECSL who told him, Mr. Crosland, about the fact that ECSL had got a haulage agreement with Freightliner. Mr. Crosland does not remember this conversation ending up with the person from ECSL saying to Mr. Crosland, "Please send us the invitation to tender". Mr. Crosland has no recollection of this. He feels that that conversation may have taken place, but his evidence is that he took the initiative of sending the invitation to tender to ECSL. That inevitably raises the question, "To what end?"

THE CHAIRMAN: If we are talking about inferences, Mr. Lasok, why is it that EME are so coy? This is a fairly small industry in terms of the number of entities involved, at least in the area we are talking about. They all plainly know one another. They may not like one another, but they plainly know one another, we can see that from the emails. If a coal supply agreement is envisaged why do we not find anything suggesting that someone from EME went to someone in Enron and said, "What about a coal supply agreement?"

MR. LASOK: I am going to come to that in a minute, because I think the answer is this: that the way it worked was that Mr. Crosland decided to send the invitation to tender to ECSL. As I have said rhetorically, that is a very strange thing to do bearing in mind that there were only two players as hauliers, EWS and Freightliner, and before you asked the first question of me I was about to make the point that Mr. Crosland's vague recollection, but it is entirely credible, is that he was led into this because he had been informed about the fact that ECSL had made an agreement with Freightliner.

The thing is, what was the point of inviting somebody who could only have been re-selling haulage services, what was the point of inviting them to participate in the activity? It does not make sense, because they could never have brought anything to the party, as it were, that the other two hauliers who were in the race were already bringing. The only thing that they could have brought to the party was the fact that they were an intermediary re-selling the haulage services, but it makes no sense, if you are only interested in haulage services, to go for ECSL unless you believe that ECSL may be able to do something that the hauliers could not do or would not do.

The thing about it is that we can only work on the basis of the facts and the evidence that we have got and by drawing reasonable inferences from the material. At that point, we cannot infer that EME actually had the intention at that stage of negotiating a coal supply contract. That is not what I am saying. What I am saying is that when you look at this scenario, it is

an extremely peculiar set of facts if EWS's case is correct because it raises questions about the behaviour of EME and its motivations that EWS's case does not answer. So it raises questions without answering them.

THE CHAIRMAN: That is why I asked you at a much earlier stage in the case during the evidence whether you were putting any allegations that EME and EWS had, as it were – and I do not think I put it in that way at the time – had connived.

MR. LASOK: There is no evidence that they connived. Had they connived then presumably the invitation to tender would never have been sent to ECSL in the first place. The thing is, it was sent to ECSL. On the evidence that we have got it was sent to ECSL for a purpose. Even Mr. Crosland does not say that it was sent to ECSL without a purpose. If you look at what he says as to what the purpose was, it is quite interesting to look at his evidence and how it shifts. It shifts in an extremely strange way. One thing, one core element, in what he says is that EME was interested in getting the best deal that it could. He never ever stated, certainly in his oral testimony that the EME door was closed to ECSL. He accepted that even an E2E agreement had never, ever been excluded. The question, if you look at it from the totality of his evidence, was simply, "Who would produce the best deal?"

So, if you look at it from the perspective of ECSL, the process - the invitation to tender process - was something that fell within its main area of activity not because, as ECSL viewed it, it was simply a coal haulage contract, but because it opened up the opportunity of entering into a coal supply agreement with EME. As I said a few moments ago, if you look at the other side of the coin from ECSL's perspective, the position was very tricky because if a long-term four year rail contract was entered into by EME, effectively the door would then have been shut for that period of four years in terms of ECSL's attempts to sell an E2E arrangement with EME. Hence, a reasonable interpretation of the facts is that certainly on ECSL's side its intention was genuinely to put in a serious bid for the rail haulage contract with a view to trying to get a coal supply contract.

We can see this expressly stated in the contemporaneous internal ECSL documentation. You will remember the internal e-mail that goes from Riaz Rizvi to various people in ECSL when he reports to them of the making of the invitation to tender by EME. He reports what his immediate reaction had been, which in fact was to do a sales pitch for a coal supply contract. He reports all this internally within ECSL.

Then there is another e-mail from Mr. McClellan, which is the 'gluttons for punishment' e-mail. Why send an e-mail saying that people are gluttons for punishment? It is obvious that it was because internally within ECSL, or within Enron generally, the belief was that a

serious pitch was going to be made for business with EME. That is why it is a glutton for punishment. If you just put in a jokey bid and you do not intend it, you are not a glutton for punishment because you are not going to get any punishment. A glutton for punishment is somebody who is going for it.

However, I wanted actually to focus a little bit more on EME and its perspective on events. EME had started the ball rolling with an invitation to tender that in the very first paragraph referred to the fact that it was re-assessing - I cannot remember the correct verb it was using - its coal purchasing strategy for 2001-2004. The coal haulage contract was being offered in that context. The context of the re-assessment of the coal purchasing strategy. Then what we see, as I have said, is that initially we have a two-horse race. We have Mr. Pettit raising the possibility of a third horse in the form of ECSL. ECSL are not at that stage being involved in the process at all, but he raises the suggestion in the context of a coal supply deal. Lo and behold, a couple of weeks later, the invitation to tender is sent to ECSL. Lo and behold, Mr. Rizvi, as I have mentioned, immediately says to Mr. Crosland, "Well, what about coal supply?" That is not exactly the wording he used in his email - he used a slightly different form of words, but his meaning was including coal supply in the bid -- or, not quite in the bid, but in the discussions. Mr. Crosland cannot remember what response, if any, he gave to that. So, we have a slight gap here.

But, surely if Mr. Crosland at the time - or whoever it was in EME who was the guiding hand behind all this - was interested in only coal haulage and did not want anything else, he would have said to Mr. Rivzi, "You have got the wrong end of the stick. This is only coal haulage". Then, Mr. Rivzi's internal e-mail would have been worded completely differently. But, that never happened.

The upshot is, in our submission, that we have a scenario in which the natural and reasonable interpretation of events at the material time was, firstly, that ECSL was putting in a serious bid with the intention of going for a coal supply contract and EME had not shut the door to that possibility. I emphasise, it had not shut the door. I am not asserting that the evidence shows categorically that EME was openly and expressly inviting a bid for a coal supply contract. What I am saying is that the reasonable inference to draw from the evidence is that that particular door was not shut. From ECSL's perspective it was open.

I am reminded that I have mentioned Mr. Pettit a number of times, but I did not give you the reference. In the closing submissions, it is para. 100. Part of the importance of Mr. Pettit's memorandum - which I think actually I have mentioned - is that he identified ECSL as a possibility were there to be a coal contract. He did it before the ECSL bid was received. I

think actually the note I have here is that I was wrong in suggesting that Mr. Pettit wrote his memo before the invitation to tender was sent to ECSL - it was afterwards. So, I think the sequence was, as I understand it, but I will be corrected, that there must have been some conversation -- or, there may have been some conversation between somebody in ECSL and Mr. Crosland. Then Mr. Crosland sends the invitation to tender to ECSL. Then Mr. Pettit composes his assessment of the existing bids.

In our submission one simply cannot say, on the basis of that evidence, that EME had excluded the possibility that including ECSL in the tender process might lead to a coal supply contract. We can talk about what kind of coal supply contract it would have been. The difficulty about that is that in our submission the evidence suggests that the objection at that point in 2000 to a coal supply contract was to a long-term supply contract that required EME to take specified quantities because that was the difficulty that EME had got itself into in the course of 1999 and on the basis of all the evidence that we have it did not want to go down that road. But the point was made in cross-examination that that difficulty had been overcome. You can still have a long term contract – exclusive, non-exclusive – which operates on the basis of call-off contracts, that is actually very, very similar to the structure that was in place in 1999 when you had a framework agreement and then you had these commitments, and it all depends on the framing of the commitment because they can be done on any basis that is negotiated by the other party.

If one is contemplating this particular problem about a long term contract in our submission one has to bear in mind what EME's objection actually was. It was to a firm commitment to tonnages and that, as I have said, could have been overcome simply by the terms of negotiation. You will obviously have appreciated that I have focused on an objection to volumes, and I have not mentioned an objection to the idea of an E2E arrangement. The reason why I have done that is because, when you look at the evidence, there is no basis for asserting that EME had an objection in principle to E2E arrangements. We can see that in a number of points. We have, for example, the settlement offer that was made early in 2000 to ECSL by EME (G2, p.608). That settlement offer, which emanated actually so far as we can see from Mr. Heller, was the one that pre-supposed an eager continuation of the E2E arrangement. 608 is the relevant page, and what you see at "iv" in the first sentence is the E2E version, and then you have alternatives and you cut back from an E2E arrangement, you go first to a CIF basis and then you go to an FOB basis.

In our submission that document is quite significant. True, it was composed in the context of settlement negotiations, it dates back to May 2000 however, it is not all that early. But

the point is that if, by May 2000, EME had simply got an objection in principle to E2E deals you would have expected a settlement offer that was reversed. You would have expected CIF, FOB and then possibly their fall back position might be that they might go for E2E. You would not have expected to see them putting E2E as the first and the others as the alternatives. The other factor we have to bear in mind, of course, is that we know that at the end of August an invitation to tender was sent to ECSL, a tender on an E2E basis. Again, Mr. Crosland's evidence, he did not say that E2E was excluded. So we have a combination of things. They inevitably raise the question of the true role of Mr. Crosland, but of course he accepted that he was somebody who made recommendations. The decisions were actually made higher up – Mr. Heller. Whatever recommendation was made had to be justified and, at the end of the day, Mr. Crosland's evidence is that EME in broad terms was acting like a rational profit maximiser. At the end of the day they wanted value. Hence, if you look at it in that light, in our submission, again you do not have a basis for inferring from the fact that at this stage – this point in time at which we are looking – the door was shut to an E2E deal, even an E2E deal involving Enron. A lot of this, of course, is dealt with in the written closing submissions. The offer from Mr. Heller is dealt with in paras. 120 to 123.

I wanted at this juncture to revert to this idea of the three horse race. The curiosity of the 12th October document in which Mr. Crosland summarises the bids focusing essentially on matters of price, or financial matters rather than anything else. The three horse race did not involve ECSL as a lame horse. It was, if you like, an outsider, but an outsider brought in – a literal outsider, not in the race at all – brought in at a late stage by EME itself. If, at a relatively late stage in a tender procedure, the prospective buyer goes out of its way to invite somebody to join the competition, somebody who was an outsider in another sense, because it was not a coal haulier it was a coal supplier that, in our submission, is highly significant in terms of drawing inferences as to what was in the mind of EME.

With that I am going to turn to make various submissions on a number of points made orally by my learned friend. I will begin perhaps by retracing the steps a little, and going very, very briefly to the section 58 issue about the question of the findings of fact made by the ORR. I am only going to make two points on this topic because, in our submission, the different arguments are set out at length in writing in submissions that the Tribunal has. The two points I am going to make orally are: first, none of this was addressed by the Court of Appeal in the appeal from the Tribunal's decision in this case. Secondly, EWS's interpretation of the Competition Act produces a very peculiar result and I fear that I am

going to be drawn into describing EWS's submissions time and time again as "strange, unexplained and peculiar", because in virtually every respect one can think of they are. But in this particular instance the peculiar result is a disparity between the High Court and the Tribunal because according to my learned friend's submissions, the High Court would be bound by findings of fact pursuant to s.58 whereas the Tribunal in a follow-on action would not be.

That interpretation of the statute is nothing short of bizarre and my learned friend has not advanced any theory as to the purpose that Parliament might have had in mind in bringing about that result. These days the interpretation of legislation is purposive, it is not literary. Of course, we discern purpose largely from the terms used by Parliament and the language that it uses. At the end of the day, one does not look at Acts of Parliament with a pre-supposition that Parliament was intending to bring about a bizarre result. The inevitable tendency must therefore be to construe the language of the legislation so as to produce a result that makes sense and is consistent with the policy pursued by Parliament and manifested in the terms of the statute. That, for the reasons we have given in writing, supports our interpretation of s.58.

I think a little interpretation of s.59 also produces the same result.

I want to turn to a short point about *Allied Maples* and the phrase "real and substantial". This will only take me a few seconds. The Tribunal has already seen it, I think, that there is "real or substantial" and a few lines further down from the spot that you were looking at the word "substantial" alone appears.

The other thing to bear in mind, largely for the Tribunal's note, I think, is if you look at the *Mount* case, which is one of the other Court of Appeal cases and is in bundle I1, at tab 10, and go to p.69, and if you go to p.69, it is para.1, the third line contains the phrase "real and substantial", but that is contrasted with the phrase "merely a negligible prospect of success".

THE CHAIRMAN: This time it is "real and substantial".

MR. LASOK: Yes, that is right, it is fun, it is not!

THE CHAIRMAN: Yes, it is!

MR. LASOK: It is a sad thing though that lawyers earn money dealing with this kind of problem.

THE CHAIRMAN: You don't look sad!

MR. LASOK: Then of course in brackets he says that by "negligible" he does not mean "speculative". This is Lord Justice Simon Brown, as he then was.

Moving on, I wanted to go to a point raised by my learned friend in his closing submissions. In the context of what ECSL would have agreed with the EWS in the "but for" world. This

is section 3 of my learned friend's closing submissions, which runs from para.8 to, I think, para.20. My learned friend dealt with it orally in two ways. Firstly, he focused on price and then he looked at performance terms. In relation to price he suggested that it is unclear whether it should be same or similar rates, but in that connection, in our submission, Professor Ordover correctly and properly adopted the appropriate legal test. Professor Ordover is in bundle E, and it is para.72 on p.26, and in the second line he says:

> "The starting point for characterising the but-for world is to what a non-discriminatory price to ECSL for rail haulage would have been."

He then says:

> "The most plausible non-discriminatory price would have been the rate that EWS offered to EME directly for the same flows and service quality. This price reflects the extent of competition in the market at that time and EWS's costs to serve."

In our submission, that is a correct approach.

Then when one turns to consider performance terms, and I think I have made this submission before, the difficulty that EWS faced and faces is that it lies under a legal obligation not to infringe the Chapter II prohibition and Article 82, which in the present context requires to deal with customers on an even handed basis so as to avoid imposing upon them a competitive disadvantage. The result is that EWS could not lawfully have discriminated between ECSL and EME in performance terms which are recognised to be a factor of competition because if it did do so then it would impose on the disadvantaged party a competitive disadvantage. It is the same logic that leads to the conclusion that a difference in price that also imposes a competitive disadvantage would amount to an abuse. We know that what actually happened in the ORR's decision is that it viewed the matter in economic terms and rolled up the question of performance into the question of the pricing of the contract. If we are unrolling the whole thing and looking at them separately, then the same logic that applied to discriminatory pricing would apply to discriminatory terms in relation to performance. That is very, very different from asserting that the jurisdiction of the Tribunal is suddenly expanded to encompass a claim for damages based on loss arising from discriminatory performance terms.

It is a point about the "but for" world and it is a point that is relevant in the present context also for the reasons set out in the *Norman's Bay* case. In other words, that a defendant cannot rely on another unlawful act that it has committed in order to interrupt the chain of causation running from one unlawful act to the loss and damage resulting from it.

Of course, my learned friend effectively accepted – I think he disputes the *Norman's Bay* point, but he accepted, in answer to a question from the Chairman, that in the "but for" world it is necessary to exclude any abuse by EWS in any other way, not only the particular way that it was found to have infringed the Chapter II prohibition and Article 82 by the ORR.

I think I also ought to add this in the context of the performance terms debate: that, in our submission, it is clear from the fact of EWS's unlawful strategy, and Mr. White actually admitted in evidence that EWS had no intention at all of offering ECSL equivalent performance terms, but in the "but for" world EWS would, in our submission, have been obliged to do so, and hence applying *Norman's Bay* and the general approach to the "but for" world one has to work on the basis that the performance terms would have been, in material respects, indistinguishable from the terms that EWS actually offered at the end of the day to EME.

I move on to another point made shortly after the submissions I have just been dealing with, which is the question that my learned friend raised rhetorically, "What would ECSL have done?" He asked, "Would they have still used EWS?" He asserted that the clear evidence is that in the absence of the abuse, as I understand it, they would have used Freightliner.

In our submission, the problem with that argument is that the evidence before the Tribunal is that ECSL contracted with Freightliner as a reaction to EWS' dominant position and ECSL's belief that EWS was abusing that dominant position, as indeed it was. So, in the "but for" world that raises the question, "Would there have been Freightliner at all?" because in the "but for" world you sweep away all the abuses and you sweep away the consequences. So, you have a completely different commercial atmosphere. You have a commercial atmosphere in which ECSL does not apprehend that it is going to be the victim of abusive conduct. So, you have a different dynamic in the commercial relationship between ECSL and EWS. In that "but for" world, where you remove all the illegality and the taste of illegality in your mouth, the scent of illegality -- It all goes. In that "but for" world, in our submission, it is highly probable that ECSL would have dealt with EWS and there is even a likelihood - at the very least a possibility - that Freightliner would never even have featured at all.

The problem with my learned friend's point, in terms of causation, is a bit like this example: suppose, because I think my learned friend has set the style in terms of analogies as focusing on horse racing -- Let us suppose that you have got a racehorse owner who dopes his rival's best horse, forcing the rival to put into the race an untried horse. How would one

deal with the claim by the racehorse owner guilty of the doping that there is no causal connection between the doping and the rival's failure to win the race? After all, putting it rhetorically, why did the racehorse owner engage in the doping in the first place?

In our submission, in terms of causation, the Freightliner argument just does not run.

I move on now to a separate topic dealt with by my learned friend, which is the question: What kind of E2E contract would Enron have offered EME? I am just going to check whether, actually, that note is correct.

THE CHAIRMAN: Mr. Lasok, would you want to have a break?

MR. LASOK: Would that be appropriate for a break? I have actually got one and a half pages of notes. I suspect that that is maybe twenty/twenty-five minutes.

(Short break)

MR. LASOK: On the topic of what kind of E2E terms ECSL would have offered EME in the "but for" world, most of my learned friend's submissions go to peripheral matters. These touch upon the question why it was that EME decided not to contract with ECSL. I am going to come to that in about two or three minutes. If one looks, however, at what kind of E2E terms it would have offered, it is difficult, because everybody accepts – when I say "everybody" it is a matter of commonsense – that these things are for commercial negotiation. At the end of the day you have Mr. Crosland accepting that if the deal was good enough then he would go for it. It is a matter of repetition to point out that in the evidence we do not have any contemporaneous material that indicates that EME had decided not to, never to enter into an E2E arrangement. As I said a while ago (albeit this afternoon) the real problem that Mr. Crosland had concerned a commitment on EME's part to fixed tonnages, that he wanted to avoid. But that was not something that was a necessary part of any E2E arrangement that ECSL would have been interested in putting forward.

The other factor to bear in mind is that the situation as it presented itself at this time was very reminiscent of the situation that had arisen in relation to BE. For example, and this is a document which perhaps we could at this stage just look at, it is quoted in our closing, but we may as well look at the document itself, G2, p.500. This is a note of a meeting between representatives of EWS and British Energy. If you look at the fifth paragraph which starts with the words: "The arrangements with Enron" and go to the second line it says: "It is a flexible arrangement but ..." and this is the important bit:

> "… clearly BE intend to do their own coal and logistics resourcing after April 2001. We went on to talk about the forward position after April 2001 when BE will be managing their own sourcing of coals."

On the face of it, the BE position in 2000 was even clearer than the EME position, because there is fairly clear evidence that BE, which had it is own internal coal procurement team, had decided to go for a DIY solution. The evidence concerning EME's position in that respect is much more ephemeral and largely turns on Mr. Crosland who, as I have said repeatedly, is somebody who admits that at the end of the day the question is: what is the deal?

The BE situation, which is dealt with at length in our written closing, was a situation in which BE started off with its coal procurement team minded to do a DIY operation and ended up with an E2E arrangement after a bidding process in which both EWS and ECSL had participated.

MR. MATHER: Mr. Lasok, you keep coming back to Mr. Crosland's evidence about it being a three horse race and so on. I was just looking at the transcript on that, and it did seem to me that he had qualified that quite considerably.

MR. LASOK: Oh he did, yes. He regarded ECSL as the third horse which was limping or something like that, or was pretty far behind. I suppose I may as well move on to Mr. Crosland now – or can you allow me to leave this over until I get to the reasons for not contracting with ECSL?

MR. MATHER: Surely.

MR. LASOK: But just at this point if we look at what deal would be on offer, the reality is it would have to be a negotiated deal, but at least ECSL would have the possibility of offering a wide range of solutions because of the portfolios that it had and the different variations and options, the different parts of the package that it could put together in order to put an attractive deal forward for EME.

So far as price is concerned, as I understand it Mr. Biro this morning seems to have accepted, but I do not know whether he accepted this as a real world hypothesis, or a "but for" world hypothesis, but he seemed to have accepted that ECSL would not have needed to go below EWS in terms of price by very much at all. Hence, if one starts off with ECSL's original opening shot, had in the "but for" world ECSL knowledge of EWS's prices it could in the course of negotiations have produced in our submission with very little effort a deal that in terms of price would have been attractive to EME.

Passing on now to performance terms, there has been a suggestion that ECSL would not have passed on the benefit of any performance terms to EME. Now, this theory is based upon the Freightliner scenario, and the problem with the Freightliner scenario is that Freightliner was untried. Hence if you were reselling Freightliner's services you would

have to be cautious about passing on the same performance terms to the person that you were reselling the haulage services to. That, of course, is a problem about passing on the benefit of performance terms, or trying to better a deal when you are reselling by improving performance terms, because the one thing that you cannot do in order to better a deal is to offer to the buyer from you performance terms that are better than the one that you are getting from the service provider whose services you are buying in, because if you do that you are walking into a breach of contract.

So it is simply structurally, if you like, impossible to pass on improved performance terms in that way. In our submission it is perfect commonsense to say that a reseller would be cautious about the performance terms that they offered. Price is different because you can take a hit on the price if you are working on the basis that you are going to be selling a package, or that there is going to be some related product that you are selling and so that you can take into account the profit that you make on that other transaction.

Of course, the other factor to bear in mind about all this is why was it that the ORR rolled up performance into price? That is because in economic terms, and Professor Ordover also says this, there is this relationship – variations in performance can work through into differences in price. Ultimately, that is the reason why performance blends into price but, as I have said, there is inevitably a difficulty when you are the reseller in terms of passing on the benefit of performance terms that you have, particularly if you are buying from another operator. If your position is ECSL you are in a worse position because the problem is that you might have to use EWS for all or a part of the contract, so you do not know that Freightliner will actually be able to perform the contract for you. You know that you have to have somebody who is going to do it, it is either Freightliner or EWS or a combination of the two. Hence on performance terms, you would probably be rather cautious about that.

What I want to do now is this: in my notes I have got a number of comments on the topic of why EME did not want a long term contract, but I think I have already dealt with those apart from two points. One is that there was a clear advantage in a E2E or a longer term arrangement, but I will say an E2E arrangement with ECSL, and that was the possibility of smoothing price risks and exchange rate risks.

The other point to make, and this concerns the suggestion that because EME had got its own in-house coal procurement team, that in itself meant that it was never, ever going to do an E2E deal. In that respect, of course, the problem is that EME actually had about the smallest coal team that you could possibly imagine, because there were only about three people in it. If you look at BE, it also had a coal procurement team, but there is no

suggestion anywhere that as a result of the E2E deal that it did with ECSL it dismissed anybody. Of course, one has to bear in mind that the famous EME coal procurement team had been put in place at the beginning of November 1999, which of course was several weeks before the December 1999 confirmations.

Perhaps I ought to put a little footnote here about the December 1999 confirmations. The story here is extremely strange because what we have is Mr. Crosland saying that, effectively, there was a change of policy, that the original idea, E2E, was for a short period of time, in comes the new coal procurement team, everything changes, no more E2E, although under cross-examination he accepts, "Well, E2E was never excluded", but nonetheless he suggests there was a policy to go of DIY rather than E2E.

Then we have Mr. Crosland turning up at the very beginning of November. We have got correspondence with him round about the 9th or 10th November that we have seen, and then in December, what do we have? The extension of the E2E agreement by a period of one year. When asked about this, Mr. Crosland says he cannot remember and the negotiations, as opposed to the signing off the agreement, must have taken place some time before.

Mr. Staley says, "Well, the negotiations took place with people in London, there were people in the United States who were also involved" – he is here talking about EME personnel – "but the negotiations involved people in London". Mr. Staley's belief is that Mr. Crosland must have been involved in the December 1999 confirmations. At all events, you have here a scenario that is wholly inconsistent with the idea that an E2E agreement threatened the job of Mr. Crosland, because quite obviously what they did was they recruited the coal procurement team. Whether they did at the same time as they were considering the negotiation of the December commitment or they did it afterwards does not really matter, because at the time when the December commitments were entered into extending the period of the E2E arrangement for one year they had the coal procurement team there. Hence, the fact that they had a small coal procurement team did not mean that they were not intending to have an E2E agreement, nor in fact does it indicate that they were averse to an E2E agreement.

MR. MATHER: But Mr. Crosland gave us evidence that several named officials, including Nigel Petrie, the European Vice-President in charge of the London office, Derek Lumb, Lori Garrett, all wanted to manage their own coal supply chain.

MR. LASOK: It is puzzling, is it not?

MR. MATHER: It is fairly clear, that statement.

THE CHAIRMAN: There is an awful lot of people we have not heard from in this case whose names have featured in various aspects of the correspondence.

MR. LASOK: One of the problems is that if you actually look at objectively ascertainable facts, which we can see from contemporaneous documents, we do not see this reluctance on the part of any of these people to engage in an E2E arrangement. I revert again to that document – I think it is G2, 608 – which is the settlement offer from Mr. Heller. Why on earth was that settlement offer framed in that way if their desired target was to get out of E2E agreements? We know, when we look back at the renegotiations at that stage, why it was that ECSL would be best advised to get out of the leg from LBT to Fiddler's Ferry. We know why, because we have got all the exchanges – well, not all the exchanges – we have got a very good range of exchanges, emails and letters, running from the period November, December, into probably April or May 2000, which indicate that there was a serious problem that EME had been unable to resolve. Various people attribute the cause of all this to different things. So we have EWS suspecting EME. We have the "Mr. Crosland leading people up the garden path" theory, we have got Powergen gaming the situation because Powergen has got a performance based contract and ECSL does not, which means that because ECSL lacks performance terms with EWS it is always going to lose out. We have got ECSL believing that it is being messed up around purposely by EWS. We have got Mr. Crosland blaming other people. We have got the suggestion that maybe it could have been resolved if EME had taken a more active part. Finally, we have got Mr. Staley saying in his evidence that ECSL believed that EME might have been engineering the situation in order to put them in breach of contract.

That was a serious situation, an endemic problem that had gone unresolved for months. It actually makes commercial sense in those circumstances to back out of the risk posed by that particular leg. So we can understand why it was that at the end of the day the E2E agreement was lost as a result of the restructuring.

What is extremely puzzling is a settlement offer that starts off in that (iv) as effectively the primary option with the maintenance of the E2E nature of the arrangements. You would have thought that if, at that stage – we are told that this change in policy occurred much earlier, we are told that it happened round about the time of the recruitment of Mr. Crosland. We are told of this by him, that the change of the policy occurred when he was recruited in or around September 1999. Yet, when we get to, I think it is, May 2000 Mr. Heller pops up with a settlement offer that is based on the continuation of the E2E nature of the arrangement.

THE CHAIRMAN: The existence of a procurement group, if I can call it that, in a company of itself demonstrates nothing, does it? One has to look at the evidence. One procurement group might be in favour of buying in an E2E concept in any industry. Another procurement group might be interested in having a mixed concept. One really has to look at the weight that the Tribunal attaches to Mr. Crosland's evidence essentially.

MR. LASOK: Absolutely. A number of points can be made about Mr. Crosland's evidence. One I would like to get out of the way - that is, Professor Ordover's concern that what has happened with Mr. Crosland is that he has, as it were, been too close to the circumstances. What has happened is that there is a risk that he has been influenced by all the noise. What I mean by 'the noise' is the things that are associated with the abuse. The abuse, after all, was a sustained and deliberate campaign. Now, sustained and deliberate campaigns go on over a period of time. You cannot assume that they do not create, as it were, vibrations that have effects on people. Here we have got Mr. Crosland being asked to think back to that period some time ago and tell us in detail what was going on. What is interesting is when Mr. Crosland does address his mind to his approach to the ECSL offer and dealing with Enron. Why is it that he cannot give one explanation of his position?

THE CHAIRMAN: Sorry. There is one point I have not followed. I understand your point about vibrations. Why would the vibrations of a campaign in EWS make Mr. Crosland tremble?

MR. LASOK: No. No. Not him trembling. If you are engaged in a sustained and deliberate campaign to get somebody out of the market is it not a case of 'Nudge, nudge, wink, wink' with other potential customers? Things like that? You have got the problem associated with that. You have got all these various satellite issues. Somebody on the fringes, like Mr. Crosland, is not necessarily immune to all this. He, himself, is a target of EWS. EME is a target of EWS. EWS wants to do business with EME and it wants to get rid of ECSL. So, you cannot exclude the possibility that in the general noise and atmosphere of what is going on, somebody's view can be affected. That is really Professor Ordover's point - that you can have situations in which ordinary profit maximising behaviour -- or, at least a recollection of it is affected by involvement in the events. That is why he takes the view that you should take a rather purist approach unless he says there is evidence that the relevant decision-makers habitually behave in a different way. That is his point. There is a factual control on it. He says that it may be that a particular operator in the market is not behaving like an ordinary profit-maximising operator. Maybe. But you would expect to see evidence of that. What we would expect to see, if EWS was running this point seriously, was a bit more evidence - I would say objective evidence - in the sense that it is removed from a particular

situation that we have here of this sustained and deliberate campaign to demonstrate that EME had a completely different view of the world.

After all, you have got to bear in mind - and in our submission this is quite important - that the ORR took care in its decision to take evidence about how generators behave. What it did was to make a finding, and that finding was something that informed its analysis because its analysis of things like competitive disadvantage is based in part upon how generators behave. What EWS is actually saying is that EME was an exception. It did not behave like the other generators. That, in our submission, does pose a problem. Certainly it poses a problem if the correct legal starting point is to take the investigation made by the ORR into this question of how generators behave and proceed on that basis. EWS is necessarily on this point asking you to diverge from a finding made by the ORR.

MR. MATHER: Could I just go back to what Mr. Crosland actually said? He said that, "EWS to us represented a far greater value than Enron would have done at comparable, or even better, prices".

MR. LASOK: Why did he send the invitation to tender to ECSL? That was a rhetorical question? We know the answer. Because when we look at his evidence, both in his first witness statement and in his cross-examination he cannot avoid admitting that at the end of the day it comes back to the deal. It comes back to whether or not the deal is a good one. It is commercial at the end of the day. One cannot exclude the possibility that there are psychological reasons for all this - because it is perfectly arguable, on the basis of what we know, that what we have is a situation in which Mr. Crosland feels under some pressure because, in effect, it is being suggested to him that EME may have conducted its business in a way that looks a trifle odd, and that may be the explanation why his evidence comes out in the rather peculiar way that it does. But, there is no doubt that it is peculiar because of the sequence in his witness statement. It is very, very strange. But, maybe that is just the way he is. But, the real point is that when you get to the core of what he is saying, and strip away all the fringe elements, he admits that at the end of the day the question is, "What is the deal?"

If we come to the topic that I wanted to embark upon, which is, "Why did ECSL fail?", this perhaps is connected with that. When you look at the situation he may well have inferred that ECSL was making an offer on the back of Freightliner because he knew of the Freightliner agreement. So, it was simple enough for him to look at the offer and say, "Well, on the one hand I have got EWS. EWS is a long-standing operator. They are offering me the best terms in relation to price. Performance is something that I can manage,

I can understand, I can grasp because they have got a track record [almost literally]. Freightliner is different. Freightliner's price is not as good as EWS, but Freightliner is untried. They may be offering me good terms in relation to performance, but the problem is that they are untried. Then there is ECSL. ECSL is offering me good prices, but not as good as EWS. But, the question is performance".

If he was working on the basis that ECSL was going to obtain the haulage services from Freightliner, and ECSL never said where it was getting the haulage services from - because in fact it had not committed itself, and it was not doing it on the basis of a back-to-back arrangement with Freightliner - then he could well have said: "That knocks out ECSL", because ECSL are not giving a bid that is as good as EWS in terms of price.

THE CHAIRMAN: What account should we take of the fact that at a time when there is not found to be anti-competitive practices ECSL were thought, it would appear, to be performing badly in the previous E2E contract, and were thought to be difficult to deal with and inflexible?

MR. LASOK: In our submission you need to evaluate that evidence.

THE CHAIRMAN: I am not sure how much evaluation, if any, Professor Ordover gave to that?

MR. LASOK: If I understand Professor Ordover correctly he basically says that was in the past and what commercial people do is move on. But can I come back ----

THE CHAIRMAN: Sorry – is that remotely realistic, though? If you buy a car from garage A and they give you bad service, and you are choosing to change your car, then you are going to go to garage B before you return to garage A unless something unusual has happened in the interim to persuade you that garage A is worth dealing with again. It is commonsense, is it not?

MR. LASOK: Yes, but for that reason my initial answer to your question was that you need to evaluate the evidence. The reason for that is that when you look at the evidence in our submission what you actually find is that ECSL was not inflexible. I drew the Tribunal's attention to the documents that show that. It was effectively in the course of cross-examination of Mr. Crosland. It was not inflexible. I t understood the problems that EME faced. It took a positive attitude to the renegotiation. By that I do not mean that it simply rolled over, because it had its own legitimate concerns. The material that we have seen does not indicate that ECSL's position was inflexible in relation to dealing with EME's concerns. It was prepared to help out EME in relation to the reselling of excess coal. We have seen emails to that effect. All these things indicate, in our submission, a company that was attuned to customer relations and did have customer focus.

When you look at the question of performance of the rail service, we have also seen all the documents that were floating around at that time, and in our submission there is not actually a legitimate basis for criticising ECSL.

Now, let us look at EME's subjective perception of this, because obviously it may be that an objective observer would say that ECSL is performing in an acceptable manner, but the counterparty might take a different view.

The problem we have here is that we have Mr. Crosland putting forward his view – is it the view of the EME? What do the contemporary documents say? Some of the contemporary documents are aggressive exchanges that you expect to see as Mr. Staley put it, where two American companies are gearing up in order to go to court, so you have to discount for that. Then in our submission you have to ask the next question which is that if these are two American companies gearing up to go to court what happens when a settlement is reached. You then look at the contemporaneous documentation that sheds light on relations at that point. What we actually see is documentation with people saying: "Let's go out to a pizzeria" or something like that "and get this all over with". On the face of it you have a perfectly normal commercial scenario in which there has been a disagreement, people have taken different stances. One may take the view that ECSL was acting more reasonably than EME but there is a determined effort by both parties to put the past disagreements on one side and move on.

At the end of the day these entities are, or should be, profit maximising entities. In the case of Mr. Crosland he accepts that whatever he recommended would have to be justifiable, and is it seriously to be supposed that he could have put forward to Mr. Heller and others a recommendation which was based upon a recommendation not to go with ECSL, which was based upon the fact that there had been a bust up between EME and ECSL earlier in 2000. On the face of it that simply is not credible, and similarly if you looked at the question of performance we all know what the performance difficulties were, I mentioned them a moment ago, there are a multiplicity of factors involved, and one of the factors was that ECSL did not have the performance contract with EWS; it had never been in the situation in which it could get out of EWS performance to the same standard as Powergen. But if it turned up in a bid submitted to EME in August/September 2000 based on EWS prices and EWS performance, what then? What would have been the commercial reason for not going with ECSL?

That brings me to an aspect of this case and of Mr. Crosland's evidence that I wanted to get across. I put it to Mr. Crosland in cross-examination, and that is that when you look at the

reasons given by Mr. Crosland to explain why it was that ECSL did not win the coal haulage contract the reasons fall into two parts. There are a group of reasons that were known to Mr. Crosland before the invitation to tender was sent out to ECSL – things like ECSL did not have rolling stock. Then there are things that Mr. Crosland could have known only as a result of seeing the response to the invitation to tender and these are such things as ECSL tendered only for certain routes but not others, prices and other indication the 25p reduction if they hauled Enron coal, and so on.

In our submission it is extremely odd to say that the factors that were known to Mr. Crosland could have been material in the real world in his decision making process, because if they had been material he would never have sent out invitation to tender. Therefore, those reasons must have been reasons that might have been floating around in the back of his mind, but they cannot have been the material reasons. The material reasons logically, reasonably, commonsensically must have been the factors that came to his knowledge as a result of reading the tender.

When we look at those reasons we can dismiss the failure to tender for all routes because the invitation to tender actually said that you could do that – you did not have to tender for all routes. When I heard that, there is a House of Lords' case decided in the mid-60s, the only problem is I cannot remember its name, but it begins with "H", in which the House of Lords said that if you organised a process like that and you do not comply with the terms, you are in breach of contract. So if, for example, you send out an invitation to tender and you say "you do not have to tender for all routes" and then somebody does not tender for all routes but you kick them out on that ground that is breach of contract. That is why, when you look at this kind of document ordinarily they are splattered with clauses that say: "This document does not give rise to contractual relations", and the invitation to tender here did not say that. We will put that on one side. The point is, whatever the legality of it all was, the invitation to tender itself stated in express terms that you could bid only for certain routes.

So what else is there? What else is there brings us to the "but for" world, because the "what else" disappears in the "but for" world. In the "but for" world there is not "is", there is probably no Freightliner, there is EWS and the price of a competitor for EWS and the performance is competitive with, not the same as, as I said earlier, you cannot quite pass on performance regimes in the same way, but you can deal with that through price. At the end of the day it is price. You look at the 12th October in which Mr. Crosland sets out what is effectively the only contemporaneous evidence of the reasoning process that led to the

decision on the award of the coal haulage contract. What is it? It is financial. There is one bit about performance, but essentially it is financial, and I took Mr. Crosland through that in cross-examination. In our submission, that is the end result. When you strip away all the fringe elements, the noise, as it were, what was material in the award of the contract must have been what Mr. Crosland discovered when he read the tenders. That is what must have been material. When one begins to analyse that, as I submitted, at the end of the day it all boils down to the question of price.

I cannot remember now whether I mentioned the fact that earlier this morning I got the impression that Mr. Biro was suggesting that it would have been sufficient for ECSL to have undercut EWS by a relatively small amount.

THE CHAIRMAN: You did mention that.

MR. LASOK: I think actually that takes me to my last point.

THE CHAIRMAN: We will not hold you to it, Mr. Beard may pass you up a few more, or has he run out of sticky notes!

MR. BEARD: No, there are plenty!

THE CHAIRMAN: I thought there might be!

MR. LASOK: That concerns the question of valuation of the contract. This, of course, is a matter of dispute between the parties. In our submission, one would have some sympathy with EWS if they had adduced evidence of their own as to the valuation of the contract. In fact, they have declined to do so. All that we have is a rough and ready calculation done by those instructing my learned friend. A valuation exercise cannot be done in that way. The upshot is that Mr. Fisher's valuation stands. I can understand my learned friend disagreeing with it, but the fact is that for a valuation exercise you have got to have the application of some sort of skill in valuation. The only person who has done that is Mr. Fisher. Therefore, in our submission, it is perfectly reasonable to work on the basis of the value that he has placed upon the contract.

THE CHAIRMAN: Does the process run something like this, Mr. Lasok: the administrator of a company, again taking it in the abstract, when he commences the administration, is faced with a large number of existing and subsisting contracts. He has to exercise a judgment as to which to sell as a job lot, a fire sale, and which to treat as so valuable that you sell them as individual items on the open market at a non-fire sale valuation. The real issue here is which of those should the Tribunal adopt, Mr. Fisher having valued the latter?

MR. LASOK: Yes, and one does not know what would have happened if this particular contract, had it of course existed, been in the package, because we know that Mr. Kahn would have

tried to get the best that he could. I cannot remember now what his evidence was on what steps he took to do it.

THE CHAIRMAN: I am not sure that we heard much.

MR. LASOK: Yes, if you have a package, you may have negative elements in it as well as positive ones. The negative ones tend to reduce the value. If it is sold as a package an individual contract may well have its value defined as a result of that. The problem that we have got is, as Mr. Kahn pointed out, one of the options was actually to have carried on running the business. That would have depended on a number of ----

THE CHAIRMAN: It is like any collection, is it not? You may have a collection of 20 paintings, one which is by Degas. The others may be rubbish but plainly it will pull up the value of the whole group because somebody will want the Degas.

MR. LASOK: Yes. I perhaps ought to end with this final point: the way I have put it in dealing with Mr. Brealey's submissions is not an acceptance of the way he has constructed his case. The way we have constructed our case is rather different because of the different approach that we have taken from EWS to how you formulate in particular the (a) and (b) questions. The final remark is this: the cases all show that in this kind of exercise, when you deal with the (a) and (b) questions, the first one, of course, is balance of probabilities. The burden of proof lies on the claimant. When you get into the (b) side of the equation, you are into this area in which you have got these other considerations like that 1722 case that I referred the Tribunal in opening, in which the burden works the other way. It is for the defendant to discharge an evidential burden of proof in order to demonstrate that either the chance was not real and significant, or however the phrase is put, or to reduce the percentage that would be applied in answer to the (c) question. Much of what I have been making submissions on has been formulated almost as if we were bearing the burden of proof, but for most of the things that I have been making submissions on it does not work like that, because actually the burden lies on the defendant.

THE CHAIRMAN: Thank you very much. I am sure we will all leave this case with the image in our minds of Mr. Lasok QC playing the role of the chimney sweep's boy!

I am sure I speak for both my colleagues, and certainly myself, when I say we are most grateful to counsel and those instructing them, and I mean all counsel because I know how much work has been done by junior counsel, in, first of all, making the case so interesting, keeping to the relevant and keeping within the timetable that we set which please the Registrar beyond belief, I can assure you. We shall give judgment in due course.