IN THE COMPETITION APPEAL TRIBUNAL

Case Nos 1035/1/1/04
1041/2/1/04

Victoria House,
Bloomsbury Place,
London WC1A 2EB

14th March, 2005

Before:
THE HONOURABLE MR. JUSTICE RIMER
(The Chairman)
PROFESSOR ANDREW BAIN
MRS SHEILA HEWITT

Sitting as a Tribunal in England and Wales

BETWEEN:

THE RACECOURSE ASSOCIATION AND OTHERS

Appellants

and

OFFICE OF FAIR TRADING

Respondent

AND

THE BRITISH HORSERACING BOARD

Appellant

and

OFFICE OF FAIR TRADING

Respondent

Mr. Christopher Vajda QC (instructed by Denton Wilde Sapte) appeared for the Appellants, the Racecourse Association and Others

Mr. Rhodri Thompson QC and Mr. Julian Gregory (instructed by the Solicitor to the Office of Fair Trading) appeared for the Respondents.

Mr. David Vaughan QC and Miss Maya Lester (instructed by Addleshaw Goddard) appeared for the Appellant, the British Horseracing Board.

Transcribed from tape by
Beverley F. Nunnery & Co.
Official Shorthand Writers and Tape Transcribers
Quality House, Quality Court, Chancery Lane, London WC2A 1HP
Tel: 020 7831 5627 Fax: 020 7831 7737

HEARING: DAY ONE

THE CHAIRMAN: Yes, Mr. Vajda.

MR. VAJDA: May it please the Tribunal. I appear on behalf the RCA Appellants with Mr. Szlezinger, who sits to my left. Mr. Vaughan and Miss Lester to my right appear for the BHB, and Mr. Thompson and Mr. Gregory, to my far left, appear for the OFT.

What I propose to do, given I have only got a day is to open some of the background facts – who the parties are, what ATR is, the purpose of ATR, and I will do so by reference to the notification Decision and I am going to try and follow my skeleton and highlight some key points.

Can I begin by reminding the Tribunal as we set out at para. 1.6 of our skeleton that so far as my clients are concerned ----

THE CHAIRMAN: Can I just find where all the things are?

MR. VAJDA: Yes, the skeleton of the RCA Appellant should be at RCA flag 20.

THE CHAIRMAN: I do not want to convey I have not read these documents I just have not been responsible for filing them. I now have your skeleton, Mr. Vajda.

MR. VAJDA: Right, perhaps while we are on housekeeping matters the other two documents that I am going to be referring to will be the OFT Decision which I hope I have the correct reference for, it is RCA8 at tab 2.

THE CHAIRMAN: Yes.

MR. VAJDA: That is the confidential version and that is annexed to the OFT's defence. I will also be referring to the notification which should be in RCA4 at flag 58. If I could ask the Tribunal to check so far as the notification is concerned that it now has the confidential version?

THE CHAIRMAN: Yes.

MR. VAJDA: I am grateful. Looking at para.1.6 of the RCA Appellant's skeleton, I remind the Tribunal that this is a matter of the utmost concern to my clients because the RCA and 31 courses are currently being sued by Attheraces for an alleged breach of the MRA. I will come on to this later in relation to the price that was agreed. Also ATR has expressly reserved the right to bring a claim for competition damages if they are successful because the argument will be that they pay too much for the right and they are then going to have a piggy-back action on the basis of the Decision of this Tribunal. As we point out at 1.6 that is now permissible under the Rules set out in the Competition Act 1998, so it is obviously of critical importance that his Tribunal, as I am sure it will, examines this appeal with the utmost care.

Looking at the parties we can start by looking at the Decision, which is RCA 8 at tab 2. If one goes to annex 1 – there are two important annexes we are going to look at, annex 1 and annex 4 of the Decision. I am handing up to the Tribunal now an annotated version of annex 1 and 4 just to explain to the Tribunal who the parties are. One starts off with

Racecourse Investments Limited, which is effectively RHT, and if one goes to p.2 of the document which has just been handed in, the key, one can see in the left hand column "Owner Operator", the companies in bold are the Appellants in this case, they are 23 undertakings with 36 courses. That is effectively virtually all the courses that signed up the MRA, 49 courses signed up the MRA and Arena and Northern, who own 6 and 5 respectively are not Appellants.

Just going down the list, if we start with RHT we see that it at the time owned 12 courses. The courses in red are what are called "Super 12 Courses", you will see that 7 out of the 12 RHT courses were Super 12. If we then go down to Ascot, Ascot is, if you like, a one-course company it owns the Ascot Racecourse, but the Ascot Racecourse is, as we can see, a member of the Super 12. There are then five courses that were added later to the Super 12 to form part of what was called the TRG, the "Terrestrial Rights Group", and they are the ones that are in the right hand column in green. So one sees Ayr, Chepstow, Chester. Then going over the page one sees Newcastle and Uttoxeter, and they are underlined. The reason that they are underlined is because they are part of the second corporate group which is Northern. Northern had at the time five courses, two of which Newcastle and Uttoxeter were TRG courses and if I can point out, I do not think it is going to be at all material to the outcome of this Appeal, but there is an error in annex 1 of the Decision because you will see that Uttoxeter is not there listed as a subsidiary of Northern, it does not have a little "b" by it. This is annex 1 of the Decision. In fact if we then go to annex 4 of the Decision, which shows the racecourses by betting share revenue, you see by footnote 3:

> "Northern. At the time that the rights to the Agreement were executed Northern controlled the following courses: Bath, Brighton, Hereford, Newcastle, Sedgefield and Uttoxeter."

And so Uttoxeter was a Northern course. I think that it in fact acquired Sedgefield shortly after the rights agreement came into being.

So if we go back to the annotated annex 1, we have looked now at RHT which has 12 courses both super 12 and non super 12. We have looked at some TRG courses, we have looked at the next corporate group, which is Northern, which own five courses, two of which were TRG; and then if we go down to the last course on p.1, one has Folkestone in blue, and the courses in blue are courses that were owned by Arena, and Arena owed six courses, and the Tribunal will note that none of the Arena courses were either super12 or TRG. I think three of Arena's courses are what are called all weather courses.

So if one just stands back to see how this looks overall, one has three corporate groups who at the time owned 23 courses between them. One then had 26 single courses making up the 49 courses that signed the MRA. Then there are the 10 courses that signed up

with GG Media. You should have what has been handed up to you, an extract which sets out the GG Media courses, just one piece of paper, starting with the name Exeter, and that is extracted from annex 4 to the Decision.

Then if we could just look at the annotated annex 4 for a moment, which has also been handed up, one will see that the three corporates between them accounted for 53 per cent. of off course betting revenue. So the Tribunal will have noted on the OFT's latest version of critical mass which appeared in the skeleton that would have been satisfied had a deal just been done with the three corporates; you would not have needed anybody else. I will come back to the significance of that later.

So far as the structure of the corporates are concerned, RHT is ultimately owned by the Jockey Club, and the Jockey Club is a non-profit-making organisation which makes available any profit from RHT's activities for reinvestment in the courses and racing. Arena and Northern are both listed companies.

As one can see from annex 4 there is an extremely long tail in the sense that 34 courses, which is the non-corporates, accounted for 47 per cent. of the off course betting revenue, and of those 28 accounted for 2 per cent. or less than the betting revenue, and to give the Tribunal a snapshot of what one of the smaller courses looks like, we can look at the evidence in relation to one of those courses, which is Pontefract, which, as you can see from annex 4, accounted for 1.3 per cent. of betting revenue share. So it is not at the bottom, it is, if anything, slightly up at the top end of the tail.

If I could ask the Tribunal to look at RCA7, and the statement there should be at flag 105, a statement of Mr. James Norman Gundill. You can see at para.1 he sets out he is a qualified solicitor and there is a great family tradition of working the Pontefract course, and you can see that he is currently not only the company secretary but also the managing director and clerk of the course, and he was on the board of BHB until recently. If one goes to para.5, he says this, and this is a point we will come back to when we look at the notification:

> "Pontefract stages flat racing from the end of March/early April until October each year. At present we put on 16 racing days a season."

So just pausing there, for 349 days of the year the assets are not being used. It is very, very difficult from a sort of Tesco's situation because for most of the year the assets are not being used at all.

He then explains the types of meetings they have, and then what happened prior to the agreement with ATR, that the courses had sold their off course betting rights, what are called the LBO rights, to Satellite Information Services. That is the bookmakers, so that if one goes into the ordinary bookmaker like William Hill and one sees a race on the screen that is what

was called the SIS deal. That was, and still is, very important income for the courses, and the SIS deal came to an end and has been replaced by BAGS, the bookmaker's afternoon greyhound service.

He then explains at para.7 what the income of this little course is, and it effectively breaks down into race day income and then other forms of income. We have got race day income of £687,000, and then one has the money from the Levy Board, which is effectively money that ultimately comes from the bookmakers of £79,000-odd. One then has what is called "media rights" income, and media rights income, which is £544,343, is split as between BAGS, and you can see the majority of the media rights income came from BAGS and then the remainder came from Attheraces, and the Attheraces bit was split in that year into two, because one was the upfront payment and the other was the annual payment. One can see, according to my arithmetic the total income was £1,311,822 of which the Media Rights' (MRA) the Attheraces income represented 12 per cent. If one goes in fact to the accounts, which are a few pages on in the first exhibit, the second page of the accounts, one can see the gross race day receipts, that is the figure we have seen of £687,929, and you see that in fact you then have to deduct from that contribution to prize day money and race day expenditure, so that if the course was simply relying on its receipts that it got at the date on those 16 days it would have made a loss in 2003, but it then receives other income and one sees the two items that I have referred to – Media Rights, which we have looked at £544,343 and the Levy Board Income of just under £80,000. So one can see how important it is for a course to obtain income other than from the gate.

If we can put that away.

MR. VAUGHAN: I am sorry, can you read the next paragraph, what he used the money for, reinvestment.

MR. VAJDA: Can we now put that away and move to the notification. That should be RCA4 at flag 58. What I am going to do is just run through the parties. Page 15, these are the parties to what I call the MRA. The bottom of p.15:

> "The RCA is a private company limited by guarantee which represents and protects the interests of 59 courses, each of the 59 courses is a member of the RCA and holds one voting share. The RCA has historically been responsible for negotiating various agreements, the exploitation of certain media rights on behalf of RCA members, including those for broadcast to off course licence, betting services."

and that, Sir, is the SIS and BHE Agreements that we have looked at. In addition it undertakes a number of marketing, administrative and representative functions for its member courses.

"Each member racecourse is, however, the legal owner of all the media rights for events in its course."

You will have seen that some courses sold there rights to GG Media and some to ATR, so it is not a case where you assign the rights to the RCA.

"The RCA, only its members are represented in any negotiation if the exploitation of such rights has been authorised as such in relation to the notified agreements."

The only other thing that I wish to say about the RCA at the moment is that it also is one of the four shareholders in BHB (British Horse Racing Board) Mr. Vaughan's client – Mr. Vaughan will explain to the Tribunal the role of BHB, and also the RCA nominates two of the 12 BHB directors. BHB, as the Tribunal will be aware, was not a party to the MRA itself, although there is a separate agreement for the licence of the data rights.

If we look at the other parties to the agreement and we do this by reference – if then notification can be kept open, as it were, but look at the Decision because what has happened – I will show the Tribunal – is that in quite a lot of areas the Decision reproduces what is in the notification, although in quite important other areas the Decision quite simply omits what is in the notification. But if we go to the Decision at paras.11 and 12 they then describe Attheraces, and paras. 11 and 12 are lifted very heavily from the notification. As the Tribunal knows, Attheraces in effect is a joint venture company which was formed by Arena. We know who Arena is, BSkyB, and Channel 4, and we know whom they are in connection with their joint bid for the right offered by the 59 courses. Then they say that the principal business of Attheraces is exploitation of these rights through broadcasting a basic TV channel – the channel and the website we will look at in a moment. Then there is a short passage on Arena – I have really dealt with Arena there is nothing that I wish to add on that. We all know about BSkyB, the OFT Decision tells the reader what the turnover of BSkyB is – it is obviously one of the largest broadcasting companies in Europe. We see the turnover figure at the top of p.11, Channel 4 is also a well known broadcaster. I need say no more about that.

What we can now do is then turn to the notification at p.25. Paragraphs 25 to 30 contain important background information to the notified agreement, and there are two points I want to make. First, none of this material, p.25-30 is effectively dealt with anywhere in the Decision, unlike, for instance, the description of the parties. Secondly, because none of this is dealt with in the Decision none of it is disputed by the OFT either, but we say it is of critical importance to make a competition analysis to understand the background. It is a matter of regret that the OFT have swept all this under the carpet in their Decision. A proper consideration of the notified agreement requires an understanding of the circumstances in

which it has been entered into, and the particular circumstances in which the British Horse Racing Industry currently finds itself.

Then going to the bottom of p.25:

> "British Horse Racing faces significant challenges from uncertainty over its future funding, and increased competition from other leisure pursuits. According to the BHB and other industry participants, British Horse Racing is, in comparison with racings in other countries, significantly under funded. The position of racecourses is precarious. They are in general fairly profitable and only make minimal returns on investment, often less than 1.5 per cent."

One of the reasons is, as I have already pointed out, that they can only use their assets on very few days of the year, and indeed, this is borne out by the next sentence, that only 6 out of the 59 courses declare dividends. Cash is due to pure need to finance the capital works needed to maintain and improve facilities but may be used for as few as six days in a year, average use is about 15 to 20 days. None of this is disputed. This comes from the BHB future funding plan, for the Tribunal's note – I am not going to take you to it – it is at RCA3, flag 29 at p.28.

One of the reasons that the fixtures are so few is because the BHB control for a number of good reasons the number of fixtures. If I could invite the Tribunal to look very briefly at the Notice of Appeal by the RCA Appellants, which I am afraid means another volume, RCA1. It is paras.17-20. I am not going to read it all out, but if I could just flag up para.17.

> "Racecourses operate subject to the rules and orders of racing promulgated by the BHB and Jockey Club. Order 1(1)(a) gives the Directors of the BHB the power to determine the date and time of any fixture, and to control the numbers of fixtures which a racecourse can hold and to determine the programmes and conditions of any race."

So that is, if you like the first constraint. There are other constraints which are referred to by Mr. Atkin, who is the chief executive of the Racecourse Association and that is second witness statement at paras. 43-45. I am not going to go to it, I will give the Tribunal the reference. If I can just summarise the points that he makes. First, that the Levy Board will pay for fixtures only if they are wanted by the bookmakers. So, for example, simultaneous fixtures are not flavour of the month, as it were, of the bookmakers. The bookmakers want sequence not races at the same time.

Secondly, the size of the horse population, obviously there are not unlimited horses. Thirdly, turf management issues, I mean most courses are not all weather, and therefore they need looking after, and on that point I would ask the Tribunal to look at the s.26 answers by the

courses, which is BHB7, flag 4 where a number of them make the point you just cannot have a race everyday because there is not going to be much grass left.

Fourthly, and this is a point made in the Notice of Appeal and also in Mr. Atkin's statement, and I can give you the reference RCA7, flag 106. There is something called "The European Patent Committee" which means that in relation to major races there is regulation to European level as to when you can operate. So if we just stand back for a moment and contrast this industry with another industry. If we take, for example, supermarkets, this would be as if supermarkets could only open 15 to 20 days a year. Tesco's could not decide the time at which it wished to open its supermarket. It could only open its supermarket during certain hours. There is a very good reason why there are these rules in this industry and not in the supermarket industry, but the point that I am making here, which is one which has really been totally ignored in the Decision is that this explains why this particular sport is very different from most normal commercial industries and needs to be considered in that respect when you make the competition analysis, and we will be looking at the case like *Gottrup-Klim* you have to look at the market; and none of this, which was all in the notification has been taken on board by the OFT in its Decision.

Going back then to p.26 of the notification, the point is then made, after having done the six days a year fixtures, this under funding not only affects the racecourses themselves, but also the horse owners as ownership expenses considerably exceed the returns from prize money. It affects public attendance at racecourses, public interest in the sport, facilities at many of the racecourses are under developed due to the lack of funds for investment.

Pausing there, the Tribunal will have seen that there is reference to the principle of solidarity, principally in relation to exemption; but, just to pause there for the moment, why is there the principle of solidarity? Why is it the European Council in Nice said that income from media rights was so important for sport? Because sport is very different from the Tesco's of this world because effectively their assets are being used for a few days a year, and in order for them to generate sufficient income you need to have income from media as well as from people actually going through your stores and paying for a nice lunch and things like that. So the principle of solidarity is not some sort of abstract Euro thing, it is because they are a real problem with sport that you have these expensive facilities that are only used on a few days of the year.

There is another particular problem which was peculiar to the British industry, the horseracing industry, which was that at that time, and indeed still now, to remedy this underfunding the racing industry was dependent largely on state funding by the Levy Board.

This is a statutory levy which is imposed on bookmakers which then goes to the courses, and what the notification says is:

> "The Levy Board systems contributed to the lack of commercial funding by preventing British horseracing from fully exploiting its product on a proper commercial basis."

Then going over the page to p.27, the Government took the view in 2000, and we can see this from halfway down, that this should change. The need for a commercially funded future for British horseracing was acknowledged on the 2nd March 2000 when the then Home Secretary announced that the Government intended to abolish the Levy Board, and then he asked the BHB to prepare a realistic plan which shows how racing can be run as a national sport without the levy. Obviously you have to put in place something else that is going to produce income.

We then see that the Home Office Minister said on the same day:

> "This is racing's opportunity to determine its own destiny and to demonstrate that it is imaginative and forward thinking. There will never be a better opportunity for the industry to come together. This will inevitably require racing interests to act with a common purpose and to be more ready to combine their collective know how and negotiating strength for the good of the industry as a whole."

So the plain intention there is effectively that there should be new commercial arrangements done on a collective basis to effectively fill the funding gap that was going to be left by the abolition of the levy.

If we then go over the page, the BHB did publish a proposal, and I am not going to go to that; I have already given the reference to that, and that is RCA3.29, the future funding plan. Then we see just above the heading "Competition from other leisure pursuits" the Home Office issued a consultation paper, and again I am not going to go to that, but, for the Tribunal's note, that is RCA4 at 41, and I just read the last sentence there:

> "However, it is clear the Government wishes to see British racing operating like other sports on a fully commercial basis …"

So that is absolutely critical. That was the key This is what my clients and Mr. Vaughan's clients were up against because this was right at the time that this agreement was being negotiated, when the Government were saying, "We're going to stop state funding".

There is also the problem about competition from other leisure pursuits, and I am not going to take time up now on that, and I would like to move to p.29, to the Attheraces proposition, and this sets out the services that will be offered by Attheraces, and the first is

enhanced terrestrial coverage, i.e. that there will be more horseracing on Channel 4, and I just want to read the last sentence there:

> "In view of the wide reach of analogue terrestrial channels maintenance of analogue terrestrial coverage is integral to the requirements of Attheraces and the courses to boost the image and public profile of British horseracing over the term of the notified agreement."

And that is why the Attheraces bid, which offered less money, was preferred to the Carlton bid. It was not simply a question of who was going to offer most money, it was also you had to have good terrestrial coverage. So when the OFT in their skeleton at 5.150 say there is no need for terrestrial coverage that simply ignores what is being said here.

The notification then explains the new and innovative services, and from here on we do find replication in the Decision, and the cross-reference is paras.60 to 61 of the Decision, and so effectively having ignored everything from pp.25 to 29 the OFT in their Decision take account of what is said from 29 onwards. That is paras.60 and 61 and going over the page to para.62, and perhaps I could just ask the Tribunal to take up the Decision. We can look at that briefly through both paragraphs in the Decision. There are two ways that you could access this new service – para.60, you could do it through interactive digital TV, whereby you can press a button on the digital TV remote while watching the channel, results and coverage continuing to be shown on a quarter of the screen, and the sound is uninterrupted, and text fills the remaining three-quarters of the screen. So you have a split screen, and that is how you access it through your TV. But you can also access it through the website, and that we see at para.62, the website that was set up, and this is a website which incorporates live screen video coverage of horseracing, allowing punters to watch races on which they have bets. So this was totally new, and of course what was also totally new, and we will see this if we go back to the notification, is that there is a very innovative way of funding this, which is it was going to be funded by betting revenue, and that we see if we go back to the Notification at p.31.

The Attheraces business model – we will look in a moment at the Attheraces business model, because that is actually in the papers. The business model underpinning the notified agreement is novel. Under the model Attheraces principal revenue will be betting revenues derived primarily from pool betting that Attheraces will provide, and from a share of the revenues the fixed odd betting so that the providers and users of the channel and users of the website will be able to access, and, as the Tribunal will have seen, most of the money was going to be earnt on the pool betting.

Betting revenues account for approximately – and I will not read out the figure, but one sees a figure for Attheraces total forecast revenue over 10 years. Traditionally, commercial

TV channels are funded by advertising revenue or a combination of advertising and subscription remedy. The drawback of funding a channel via subscription revenue is that a subscription charge will deter such potential viewers, because the idea is to get as many people onto this channel as possible so they can bet, so you do not want to have a subscription channel, so this was carried as a basic channel so if you get Sky or something you would get this without paying extra for it. We see how this works further on. In the case of a television channel dedicated to horseracing even a relatively low charge is likely to deter a large number of potential viewers from subscribing. The objectives of the racing industry are to develop a broader public interest and participation in horseracing and of Attheraces to develop an alternative source of revenue from betting in which the courses wish to share and could not be achieved through a premium channel with restricted distribution. Attheraces therefore develop the proposition of funding a channel by predominantly a share betting revenue earned from interactive services. In doing so the interests of the course and Attheraces are aligned, and, as you know, this is a joint notification by all the parties, in the sense that they are both interested in achieving a high profile for the sport entailing that the channel is available as widely as possible in order to develop and expand its audience for horseracing, greater public participation in sport and therefore increased revenues for the sport.

Under the model the ability to offer betting and interactive functionality is integral to the right to distribute coverage of the races. The model creates a virtuous circle, increased coverage of racing linked to increased opportunities to place bets leads to greater revenues being paid to the courses, enabling them to invest in improved facilities and prize money, thereby raising the standard of British racing and attracting new interest in horseracing and betting among the UK public. Separating out the right to offer betting and interactive functionality from the coverage rights, and coverage rights there means terrestrial coverage rights, would not create the same benefits for British racing; that is so important, the two are absolutely linked.

Now can we look at the business model of ATR that is referred to there. It is an important document, and that is at RCA4.47. This is in fact, as one sees from the first page, schedule 11 to the shareholders' agreement, that is the shareholders' agreement of ATR. It is the only business model that the Tribunal or the OFT have, and we will see from a letter that was written by ATR to my clients that in fact this was shown to my clients before this arrangement was entered into, and it is this business plan that led to the price being offered to the courses for the interactive rights. If we go to p.3 we see – does the Tribunal have p.3?

THE CHAIRMAN: No. We go straight to p.4, I am afraid.

MR. VAJDA: That is most unfortunate.

MR. GREGORY: It is annexed to the defence.

MR. VAJDA: I am very grateful to Mr. Gregrory.

MR. GREGORY: It is RCA9, tab 20.

MR. VAJDA: I am very grateful. Does the Tribunal now have it?

THE CHAIRMAN: Yes.

MR. VAJDA: If we go to p.3, what one has there is income. This is income of ATR. If we can just look at the first line, which says "Net Pari-Mutuel", net Pari-Mutuel means, and we will see this in a moment, it is 22.5 per cent. of the amount put on the bet, it is what is called the "take out rate". So you put 100 and the operator will take out £22.50 and you will only distribute the rest to the winners. That is effectively where ATR was going to make its money, or hoped to make its money, because you can see then if you go to the total – this is expressed in millions – £1.484 over the 10 year period. You can see that there was going to be some money earned on fixed odds, but much less. Then BBC Channel 4, Sky licence fee income, the Tribunal will recollect that part of the price was simply recouped by licence on to the terrestrial broadcast, so the Tribunal might note that ATR paid £125 million for the terrestrial and it was hoping to get £130 from the licences, so it was going to make a little turn on that.

If we just go to p.5 for a moment, we see gross PM revenue. This is all on the basis of 59 courses. We see that there is then a figure of £6,597,313 and we see that that is the amount that was going to be staked on Pari-Mutuel. So nearly£7 billion. Then one sees three lines down the column "Net PM revenue at 22.5 per cent. gross. One then sees that figure £1,484, which I showed the Tribunal on p.3, and that gives the total net income of the ATR, this is simply in relation to Pari-Mutuel income, to which you then add the income, the terrestrial fees from the BBC, Channel 4 and the like. Then you have further down "media guarantees" which you see in the right hand column is £320. In fact, as we know, it was £306 because only 49 signed up. But as I said this business plan was done on the basis that all 59 would join. One then has top up revenues and if one goes to p.6 one sees that there were going to be interactive top up revenues on this plan kicking in the last year.

If we now go back to p.3, we see that what ATR was expecting on the business plan was profits before interest of tax of £663, on an income of £1,814, which I make a 36 per cent. return on turnover, that is what they were hoping to get. That of course compares very favourably to the sort of income levels that the courses were getting we saw from the notification.

THE CHAIRMAN: Mr. Vajda, I wonder if I could just interrupt you before you leave this. I have been a little puzzled in trying to understand what was going on by the "other income" which appears on p.3, after "fixed odds income" there is "other income" before a net PM revenue. I

would like at some point in the next three days if somebody could simply elaborate on what the other income was and to what extent getting that income generated additional cost. It is clear that with the main betting revenue there was lots of cost incurred in getting that, because it does seem to me to affect the payments that were being made for the various rights.

MR. VAUGHAN: PriceWaterhouse have done an analysis of this, which is tab 2 of our reply and also at schedule C to our skeleton has it in pictorial form. You probably prefer raw figures but I do not.

THE CHAIRMAN: Well, Mr. Vaughan, that has not quite actually answered the questions that were in my mind. I really would like to understand this order of magnitude from that that feeds through to the average of £18 million a year.

MR. VAUGHAN: Yes.

MR. VAJDA: There is one last table that I would like to draw to the Tribunal's attention, which is on p.7, this is at the holdings level, where you see a profit before interest and VAT. You see the figure of £663 million by the "total" column, and then you will see below that the 10 per cent. Does the Tribunal have that?

THE CHAIRMAN: Yes.

MR. VAJDA: Now that is 10 per cent. of the Pari-Mutuel income, because if you go back to p.5 you see "Gross PM revenue of £659 – that is its 10 per cent. The money that ATR is getting is only 22.5 per cent. of that. As I said, this is a highly significant document that was shown to the courses before the agreement was signed up and I would like to take the Tribunal to a letter which ATR wrote the courses on 24th October 2003 (RCA7, flag 100). As the Tribunal know, ATR gave notice to terminate and this letter explains why. If we go to the second para.

> "By letter dated 10th July 2003 ATR gave notice to RCA, the triggering event for the purpose of clause 24(3) [MRA] namely the reduction of total take out rate below 20 per cent. over a consecutive period of 3 months during the period March to June 2003.

That, of course, impacts the 22.5 per cent. here.

> Now, if we then go to the penultimate paragraph on this page:
>
> "As you are aware the initial Go Racing deal anticipated that £182 million would be paid over 10 years for the other rights including interactive rights based on a Pari-Mutuel model."

Just pausing there, the other rights is £182 million, and I can cross-refer to para. 64 by a Notice of Appeal, because in fact it was not all for the interactive, it does not terribly matter, because there were some overseas' rights. But the important point that the writer of this letter is making is that the £182 million was calculated on the basis of this model. He then goes on to say, Mr. Hogg (the managing director of ATR):

"One of the basic assumptions of the model was a 22.5 per cent. blended tote margin or tote take out rate across all at the racer's platform. When ATR calculated its business plan in 2001 it used a tote take out rate of 22.5 per cent., which was deliberately pitched at a more prudent level slightly below the actual tote take out rate of 22.5 per cent."

Then if we drop down two paragraphs:

"As you are aware the business plan was attached to ATR Holdings Limited shareholders' agreement which was disclosed to the RCA prior to the MRI being signed. The business plan indicated what Pari-Mutuel betting turnover ATR planned to achieve. This same plan was used to calculate the minimum guarantees that could be offered under the MRA and were central to the winning of the rights in the first place. The business plan contained a gross Pari-Mutuel betting revenue income stream of around £6,600 million over ten years …"

We have seen that figure.

"…with a tote take out rate of 22.5 per cent., the forecast gross margin was £1,484 million. It was on this basis that ATR offered £180 million for the other rights."

I will come back to the significance of that in a moment, but just finishing the letter. It said:

"… in addition, without prejudice to ATR's reliance on the business plan as a basis for showing an adverse impact on its business, ATR has experienced other significant adverse impacts on its business by the reduction of the tote take out rate as follows…"

And it then mentions various other things that have affected the business plan. But we say that there are four points that emerge. First, the £181 million for the non-terrestrial rights was calculated on the basis of a 22.5 per cent. margin on Pari-Mutuel betting which would produce profits of £663 million over 10 years. The £181 figure was effectively working backwards from the gross revenue from Pari-Mutuel income which in turn was based on ATR acquiring the rights to all 59 courses. So all this theory that the OFT has about the price being increased by a critical mass is flatly contradicted by this letter.

We can put away the business plan now and move back to the notification. Page 32, this is then the description of the Rights Agreement. The primary agreement giving effect to the notified arrangement is that by which the courses agree to grant certain of their media rights to Attheraces. That rights agreements structured in a single agreement executed by each of the courses who wish to participate in return for a payment to RCA to be divided between the courses on the basis of a formula agreed between the courses and the RCA. The next paragraph is making the point that the RCA make that there was no collective selling. I am not going to read that out. The next paragraph deals with critical mass:

"The Rights Agreement was conditional upon certain matters, all of which were satisfied on or before 30th June 2001. The conditions include the raising by Arena of funding of at least £60 million on an unconditional basis by 30th June 2001. The participation of certain courses accounting for not less than 70 per cent. of total UK off course betting revenue for 2000. The participation of a minimum number of courses measured by betting revenue rather than by numbers or meetings or races necessary for the model to work. A channel dedicated primarily to British racing and funded largely by betting revenue clearly needs sufficient programming including live coverage of races both to fill the available hours and to encourage viewers to bet."

Then moving on to p.35.

MR. VAUGHAN: Can you deal with 33? There is reference to the term sheet agreement with us on p.33. I do not want to spend time going through this agreement again.

MR. VAJDA: Page 35 the benefits of the notified agreement. The notified agreement has been signed in accordance with the model to boost the level of public interest and involvement in horse racing thus reversing the industry's current position of relative decline. The agreement will deliver a number of benefits which are set out below in more detail in s.9. They make the point in the last paragraph on p.35 about how it is important that you do not charge for the channel, because a racing channel, which was a premium channel, only attracted 35,000 viewers. Going over the page, we have seen what interactive functionality is now with improvement in pool betting services, and then improvements to the British horse racing industry. Then at p.37, the applicants say – and that is all the applicants including ATR – they believe the notified arrangements are the most efficient and effective means of delivering the benefits both to consumers and British horse racing that are identified above. They also believe the notified agreement does not result in any appreciable prevention, restriction or distortion of competition.

Then if we go to p.41: "Aspects of the notified agreement that may be of possible interest to the Office". If we go to the penultimate paragraph there:

"The Rights Agreement was conditional upon acceptance by a minimum number of the racecourses. The participation of a minimum number of racecourses was objectively necessary to create an attractive product capable of commercial exploitation by a purchaser in particular with regard to the need to secure revenue stream through interactive and internet betting. None of the courses had sufficient rights to offer a purchaser on an individual basis."

We will see coming back to the s.26 notices that I will be taking the Tribunal to that there was plenty of evidence to show that none of the courses could individually sell their rights.

Without a level of critical mass no person would have been able to have made a commercially sustainable offer that would have been attractive to the courses.

Then over the page, p.42, the purchase of the rights by ATR. They explain in the second paragraph why there was collaboration between the three bidders. Obviously that reduced competition, or may have reduced competition between Arena, BSkyB and Channel 4, but they say in the second paragraph that there was a competitive and fair bidding process. Then in the next paragraph:

> "In the absence of the Attheraces JV the individual shareholders could not have successfully bid for the rights on their own. In such a case in the absence of other bidders Carlton Communications [the other party that came in with a bid] would have faced no or educed competition for the rights, and the courses could have been expected to have received a lower amount or less favourable terms than if there had been a competitive bidding process."

Then the duration and exclusivity of the rights, and this is an important point, although it does not feature very much form this Decision, but it was 10 years, and the reason it had to be 10 years was because it was a new product, there was a lot of uncertainty, and one has seen the business plan effectively ATR were going to be losing money for the first three years and they were not going to get their shareholders and the banks to approve this if it was not going to give them a sufficient pay back. Page 42, if I could refer here to the document that Mr. Vaughan referred to, which his the PWC analysis of the ATR business plan, because PWC point out there that the payment to the courses are under 20 per cent. of the total costs. The reference is BHB 7 at flag 1.

Then going over to p.43 they deal with exclusive grant of the rights, because obviously this was a concern to the parties, and the fact that ATR were giving the rights in exclusivity might be said to infringe competition law and they set out the arguments why not. Then an interesting footnote at footnote 46 where reference is made to the Commission Decision in *Eurovision* that the Commission noted that as a result of new entrants and increased capacity devoted to sports' broadcast they are … contest to obtain valuable sports' broadcasting rights. The effect of that seems to be a transfer of profits away from downstream broadcasts and towards upstream rights owners. That is because of exclusivity. Effectively, if you are bidding for something it has a value if it is exclusive and it is because of the exclusivity that BSkyB will pay more for football or another body will pay more for some other sporting rights.

Then going over to p.44, they explain why the exclusivity is indispensable both to the business plan of ATR and the desire of the courses to maximise the value of their rights. This

is the shared interest point which we make at para.4.6.1 of our reply. And they say that in the absence of exclusivity Attheraces consider it would have been unable to establish the channel, and they go on to make the point:

> "Equally, if the course did not sell the rights on an exclusive basis the level of revenue they could earn would be substantially diminished. This would damage significantly the prospects of reversing the current relative decline in the industry through investing in improvement of facilities … particularly given the move away from levy funding."

So that, I think, is all that I am going to say on the notification, and, as the Tribunal knows, the OFT did not challenge the agreement between the ATR shareholders, that is to say, Arena, BSkyB and Channel 4. It did not challenge the exclusivity granted to ATR, and it did not challenge the 10 years duration of the agreement.

We can put away the notification now and move to the ----

THE CHAIRMAN: Have you shown us anything in it which is regarded as still confidential for any relevant purpose?

MR. VAJDA: The one figure which I did not mention in open court, which is at p.31, is the figure in square brackets there. It is a long time ago now ----

THE CHAIRMAN: But confidentiality is still asserted in respect of material parts of this notification; is that correct?

MR. VAJDA: This is a joint notification to the OFT. We consider it important that the Tribunal has precisely the information the OFT has.

THE CHAIRMAN: Yes. I am only concerned to what extent any of the parties ----

MR. VAJDA: So far as the parties present here are concerned, this is not confidential.

THE CHAIRMAN: Yes, thank you.

MR. VAUGHAN: If I can just add in, sir, the ATR companies have known that these issues were going to be raised in the notice of appeal. We were going to raise points anyhow on the notification. That has been published on the website, and they have had a chance to either intervene in the case, which they have not done, or to take any point of confidentiality equally they have not done.

THE CHAIRMAN: Yes. They have not expressly been invited to waive any confidentiality which they might have regarded as attaching to this notification?

MR. VAUGHAN: No, but they have known this notification was going to be the subject-matter of this Decision. Indeed some of it is in the Decision itself, a tiny bit.

THE CHAIRMAN: Yes, thank you.

MR. THOMPSON: Just to confirm, as far as I am aware, the OFT has not had any waiver from ATR, so we are simply left with the position that ATR are potentially prejudiced, but, as

Mr. Vaughan has said, they have not positively asserted any confidentiality either.

THE CHAIRMAN: Yes, but I suppose it would require an express waiver if the document was submitted on any originally confidential basis.

MR. THOMPSON: I think that must be right. I will obviously take further instructions, but that is my understanding.

THE CHAIRMAN: We might have to consider how we can deal with that.

MR. THOMPSON: I am grateful.

MR. VAJDA: I have been informed there is actually a representative of Attheraces here in court, although not on the front bench. But I think for the purposes of my submission we are not seeking for the Tribunal to reproduce that figure in its judgment. It is just to see the overall flavour of what is happening, and the significance can be expressed in what I would call a non-confidential way.

THE CHAIRMAN: Yes, thank you.

MR. VAJDA: What I would like to do next, having described the background by reference to the notification, and pointed out that a lot of that was not reproduced in the Decision, is to look at a little bit, but I hope not too much, law, and to do that by reference to section 3 of our skeleton. What we have done at para.3.1 is set out what we think are three propositions that must be common ground between the parties, and can I just make two little comments on (b) and (c). As regards (b), when one is looking at restriction of competition here one is looking at restrictions on the parties, and I will be coming to the Commission notice on Article 81(3) which makes that position clear, and of course here this agreement is – the restrictions that the OFT say infringe s.2 are restrictions on the parties to the agreement. And (c); of course, as we know, the Commission abandoned any object case. Their case is based solely on effect – the OFT.

There is still debate as to what is meant by the word "necessary" and whether one takes a relatively abstract approach, as the OFT seems to suggest, or what we could call a market evidence approach. We say it is plain that one takes a market evidence approach. The first case that I invite the Tribunal to take up on that is RCA.21, flag 2, the *Gottrup-Klim* case. This is a reference to the European Court from a Danish court. The facts are quite simple: there were two co-operatives here. The DLG co-operative introduced a rule which prevented its members from becoming or remainding members of another co-operative, the LAG co-operative, and the question was whether that rule infringed Article 85, which is now Article 81, and of course s.2 is informed by Article 81.

Paragraph 3 describes the DLG co-operative, and this is on p.3 of the printout.

"DLG is a co-operative society with limited liability which has existed in its present form since 1969. Its object is to provide its members with farm supplies, including fertilizers and plant protection products …"

I think what in ordinary jargon is called pesticides:

"… at the lowest prices."

So that is the object of the co-operative, and this is important when one looks at the Article 81 analysis.

Then if one goes to para.5 one sees that the competing co-operative, LAG, was formed in 1975, and following this, at para.6, DLG amended its statutes because of increasing competition from LAG, and para.7 of the statutes was amended:

"… membership of, or any other kind of participation in, associations, societies or other forms of co-operative … in competition with this association on the wholesale market … shall be regarded … as incompatible with membership of DLG."

So you have got to be with us or the others, you cannot be with both. And that led the Danish court to ask 17 questions to the European Court, and the European Court quite sensibly groups them under five main heads, and one sees that at p.7 of the printout at para.20, and we are going to look at the second, as it were, heading, which is the concept of restriction of competition in 85(1), which begins at p.8, under "Restriction of competition", just above para.28. Then they set out effectively the second set of questions:

"… the national court seeks to ascertain whether a provision in the statutes of a co-operative purchasing association, the effect of which is to forbid its members to participate in other forms of organized co-operation which are in direct competition with it, is caught by the prohibition in Article 85(1) …"

And the plaintiffs claim that the object or effect was to restrict competition because the object, if pursued, was to put to an end to the "B" members purchasing LAG in competition with DLG.

Then we have the court's analysis at para.31.

"The compatibility of the statutes of such an association with the Community rules on competition cannot be assessed in the abstract. It will depend on the particular clauses in the statutes and the economic conditions prevailing on the markets concerned.

32. In a market where product prices vary according to the volume of orders, the activities of co-operative purchasing associations may, depending on the size of their membership, constitute a significant counterweight to the contractual power of large producers and make way for more effective competition.

> 33. Where some members of two competing co-operative purchasing associations belong to both at the same time, the result is to make each association less capable of pursuing its objectives for the benefit of the rest of its members …"

Just pausing there, the reference to "its objectives" is a reference back to the objectives which were set out at para.3, which was to purchase these products at the lowest possible price. So you look at the objectives. The court goes on to say at 34:

> "It follows that such dual membership would jeopardize both the proper functioning of the co-operative and its contractual power in relation to producers. Prohibition of dual membership does not, therefore, necessarily constitute a restriction of competition within the meaning of Article 85(1) … and may even have beneficial effects on competition."

And then they go on to say it has got to be limited to what is necessary to ensure the co-operative functions properly, at para.35, but when it says "functions properly" it means functions properly by reference to its objectives. It then carries out a factual analysis which we do not need to concern ourselves with because it was a different market from our market, but it then concludes, at para.40 – this is the court:

> "Taking all those factors into account, it would not seem that restrictions laid down in the statutes, of the kind imposed on DLG members, go beyond what is necessary to ensure that the co-operative functions properly and maintains its contractual power in relation to producers."

And then it effectively answers the national court at para.45 of the judgment.

So the point here is, first, that the European Court examines the clause in the light of the objectives of the co-operative and, secondly, by reference to the market of fertilizers and pesticides; so it is a market-focused test.

Can we then look very briefly at the opinion of the Advocate General, and if we pick that up at p.6 of the printout of his opinion, the guiding criteria laid down by the court, and then if we go to p.8, and this is all under the guiding criteria, and he says this:

> "Moreover, as I have said, the fact that an agreement does not have an anti-competitive object does not mean that, in the specific economic context in which it is intended to operate, it cannot have effects that are irreconcilable with the interplay of competition in the common market. There is nothing therefore to prevent an agreement which is not anti-competitive in intent from being regarded, in a particular market situation, as incompatible with the common market, whereas the same agreement, in a different market situation, will be regarded as conforming to the requirements of the protection of competition."

And that highlights the critical importance of having the market analysis; you can have exactly the same agreement in market A that falls under 81, but in market B it does not fall under Article 81. And the Advocate General goes on:

> "For the purposes of such an analysis, account must be taken in particular of the level of competition, actual and potential, existing in the relevant market or markets, regardless of any intent, and it must be decided whether or not the agreement contributes significantly to a further restriction of competition in that market."

And then he makes the point which we echo:

> "To summarize, therefore, the analysis of the object and the analysis of the effect are to be clearly distinguished."

We are looking at an effects case in this case.

> "The first [this is object] is intended to assess, in the abstract, the objective function of a particular set of conditions in its contractual context. The second, on the other hand [that is the effect], is designed to establish whether, specifically, an agreement whose object is not anti-competitive is nevertheless liable, in the specific market context in which it is to operate, appreciably to affect competition in the common market."

The objective of the co-operative there, as I pointed out, was to buy the products at the lowest possible price. It was not suggested that dual membership would prevent the co-operative buying the products, the co-operative could still have continued to function but it would not have functioned as well in relation to its objective, which was to buy them at the lowest possible price. So that shows one has to look very carefully at what the objective is to see whether or not the disputed clause is necessary for that particular objective. It is not open to a court or a competition body to effectively change the objective; the starting point is you look at the objective that the parties themselves have sought, and that is the point that we seek to make at paras.3.6 and 3.7 of our skeleton. We say at 3.6 that the case law makes it clear that in looking at whether something is objectively necessary one looks at the actual transaction entered into by the parties, not some theoretical other transaction that the parties may have entered into, and we go on to say at 3.7 that the analysis in *Gottrup-Klim* shows that one cannot ignore the "wants" of the parties, and the Tribunal will recall this distinction that the OFT first introduced in its defence, because the want, if I can use the OFT terminology, in *Gottrup-Klim* was to purchase the fertilizers at the lowest possible cost, and that was a lawful want and the question was whether the prohibition on dual membership was necessary to achieve that lawful want.

The next case that I would like to go to, and I hope that I am pronouncing it correctly, is the *Wouters* case, which is in the next tab 3. *Gottrup-Klim* is European Court of Justice, so is

Wouters European Court of Justice, and we will be looking at another case in a moment called *Metropole*, which is the lower court, the court of first instance. In *Wouters* the issue was whether or not the prohibition in the Dutch Bar which prevented you becoming a partner with an accountant fell within Article 81 of the Treaty, was it anti-competitive, and the court held, unlike the Advocate General, that there was no infringement of Article 81. Can we pick this up at p.13 of the printout at para.73, the European Court says:

> "By its second question the national court seeks, essentially, to ascertain whether a regulation such as the 1993 Regulation … has the object or effect of restricting competition within the common market and is likely to affect trade between Member States."

If we can then go to para.80 over the page, the court then sets out the anti-competitive effects, this is from para.80 that the plaintiffs in that case relied on. For example, 81:

> "They maintain that multi-disciplinary partnerships of members of the Bar and accountants would make it possible to respond better to the needs of clients` operating an ever more complex and international environment."

They are better placed to offer their clients a wide range of legal services. The conclusion that the court then reaches on that is at para.86. "It appears to the Court that the national legislation in issue …" I should say "national legislation" because what happened is slightly different from the position in this country is that the Dutch Bar Rules were then incorporated into legislation and that is why they refer to legislation, but the origin of the legislation were rules, and it was because they were rules between undertakings – lawyers being undertakings – that Article 81 applied in the first place.

> "It appears to the Court that the national legislation issue had an adverse effect on competition and may affect trade between Member States."

So they start off by saying yes, there is an anti-competitive effect. Then if we go to para. 93 and 94 they elaborate on that and particularly in 94 they say:

> "Nevertheless, in so far as the preservation of a sufficient degree of competition on the market in legal services could be guaranteed by less extreme measures than national rules … which prohibits absolutely any form of multi-disciplinary partnership …those rules restrict competition."

So they are saying that they do not really even preserve a sufficient degree of competition. Then we go to para.97 and the European Court says, and this is now very much in line with what was said in *Klim*:

> "However, not every agreement between undertakings … necessarily falls within the prohibition of Article 85. For the purposes of application of that provision to a

particular case, account must first of all be taken of the overall context in which the decision … was taken or produces its effects. More particularly account must be taken of its objectives which are here connected with the need to make rules relating to organisations, professional ethics, supervision and liability, in order to ensure that the ultimate consumers of legal services and sound administration of justice are provided with the necessary guarantees in relation to integrity and experience. It then has to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives."

The answer that the court gave in that case is "yes". So just pausing there, the analysis at para.97, the analysis is exactly the same as in *Gottrup Klim* which is you look at the objectives and then are the effects inherent or necessary for the pursuit of those objectives? We can see how the court dealt with this case on these facts at 105, p.17, it looks at the aim of the regulation to ensure that:

"… in the Member State concerned the rules of professional conduct for members of the Bar are complied with having regard to the prevailing perceptions of the profession in that State. The Bar of the Netherlands was entitled to consider that members of the Bar might no longer be in a position to advise and represent their clients independently and in the observance of strict professional secrecy if they belonged to an organisation which was also responsible for producing an account of the financial results of transactions in respect of which their services were called upon and for certifying those accounts."

"107 A Regulation such as [this one] could therefore reasonably be considered to be necessary in order to ensure the proper practice of the legal profession, as it is organised in the Member State concerned. "

They elaborate on that at 108:

"Furthermore, the fact that different rules may be applicable in another Member State does not mean that the rules in force in the former State are incompatible with Community Law. Even if MDP partnerships are allowed in some Member States, the Bar of the Netherlands is entitled to consider that the objectives pursued by the 1993 Regulation cannot, having regard in particular to the legal regimes by which members of the Bar and accountants are respectively governed in the Netherlands, be attained by less restrictive means."

So they then conclude at 109:

"In the light of these considerations, it does not appear that the effects restrictive of competition such as those resulting for members of the Bar practising in the

Netherlands … go beyond what is necessary to ensure the proper practice of the legal profession."

I said that this took up the analysis of *Klim* and the court will observe that the reference to DLG is in fact, that is the *Gottrup Klim* case.

So the points that we say emerge from *Wouters* are these: first, you look at the objective of the parties. Secondly, on the facts of that case the Dutch Bar was entitled to consider that the prohibition on MDP partnership did not go beyond what was necessary to achieve its objectives. The objectives in that case were effectively independence of the legal profession.

Thirdly, the Dutch Bar was entitled to reach a conclusion even though other Bars did not have that rule. So I reinforce the point that you look at the specific objectives of the parties. Fourthly, the fact that that prohibition hade an appreciable restrictive effect on competition which we saw the court found, did not prevent it in the circumstances of that particular case falling outside Article 81. In that respect, if I could just refer the Tribunal to para.251 of the Decision. I am limited in time so I am going to deal with this briefly, this is RCA 8, tab 2. The OFT summarises the case law. You will see that they do not refer there to the *Wouters* case, and we do not accept the sense it follows from this case law that if an agreement is inconsistent with workable competition it renders the relevant market excessively rigid or significantly increases barriers to entry or expansion, then the agreement will be caught by Article 81(1) even if it promotes legitimate benefits. We have seen the cross reference is *Wouters* paras. 93 to 94.

Moving on, the next case is the *Metropole* case, which is at flag 5. This was an Appeal to the Court of First Instance by a number of French companies who had set up a new pay TV channel, and the Commission had found that these agreements infringed Article 81(1), but granted an exemption under 81(3). The main thrust of the Appeal was that the parties were not happy that the Commission had found an infringement of 81(1) and the main argument that those parties put to the Court of First Instance – or in fact they were arguing – that Community Law had what is called a "rule of reason" in Article 81 equivalent to what is found in the Sherman Act in the United States. In other words, that you balance the pro and anti-competitive effects to decide whether or not there is an infringement of Article 81. That submission had inherent difficulties, because unlike the Sherman Act we have 81(1) and 81(3). That was a submission that was rejected by the CFI. We say that there is nothing in *Metropole* that is inconsistent when properly analysed with either *Gottrup Klim* or *Wouters*. *Wouters* in any event is not only a higher court but it post-dates *Metropole* and if the Tribunal has any doubt

that there is a conflict between these Decisions plainly one follows *Gottrup Klim* and *Wouters*. But we say properly analysed *Metropole* does not reach a different conclusion..

If we can take it up on p.9 of the print-out, para.72, they reject the argument we see:

"It should, however, be observed, first of all, that contrary to the applicants' assertions the existence of such a rule…"

that is the rule of reason which is referred to in the first line of 72:

"…has not, as such, been confirmed by the Community courts."

Then if we go over the page, they then say at para.75:

"It is true that in a number of judgments the Court of Justice and the CFI have favoured a more flexible interpretation of the prohibition laid down in Article 85(1).

Then they refer to a number of cases including DLG, which is the *Gottrup Klim* case.

"76 Those judgments cannot, however, be interpreted as establishing the existence of a rule of reason in Community competition law. They are, rather, part of a broader trend in the case-law according to which it is not necessary to hold abstractly and without drawing any distinction, that nay agreement restricting the freedom of action of one or more of the parties is necessarily caught by the prohibition in Article 85(1) ... In assessing the applicability of Article 85(1) to an agreement, account should be taken of the actual conditions in which it functions."

So that is absolutely bang on, straight *Gottrup Klim*.

"In particular, the economic context in which the undertakings operate, the products or services covered by the agreement the actual structure of the market concerned…"

and they refer to *Night Services* and a number of other cases.

"77 That interpretation, while observing the substantive scheme of Article 85 … and particularly preserving the effectiveness of Article 85(3) makes it possible to prevent the prohibition in Article 85(1) from extending wholly abstractly and without distinction to all agreements whose effect is to restrict the freedom of action of one or more of the parties."

So pausing there, what they are saying is that this case law, including *Klim* says you do not extend 81 abstractly. I ask this Tribunal to note the word "parties" because I am going to come to the Commission Notice on 81(3) which places great importance on restrictions on the parties to the agreement. "It must, however, be emphasised that such an approach…" this is effectively what I call the market approach:

"… does not mean that it is necessary to weigh the pro and anti-competitive effects of an agreement when determining whether the prohibition laid down in Article 85(1) applies."

So what they are saying is rule of reason where you do a weighing up exercise is different from what is being done in *Klim* but it does not mean that you ignore the market when you do a *Klim* analysis.

We can then move on to p.13 ----

THE CHAIRMAN: Was *Wouters* not a weighing up analysis?

MR. VAJDA: Well to some extent it may well be and there are in fact some textbook writers who said this may be the court having introduced a rule of reason. For my part I do not wish or need to go into the debate. The point that I wish to make to the Tribunal is that when one is applying the necessity test, the objective necessity, you are looking at the market and that is absolutely clear from *Metropole*, and the point that is being made **here** is simply that first, there is a need for critical mass, and I will come on to the evidence obviously in due course; and secondly, that collective behaviour was necessary in order for the ATR to launch its channel, and you are not deciding that question. This Tribunal has to look at it by reference to the evidence of this market which is before this Tribunal and not by reference to any abstract theory.

THE CHAIRMAN: Yes.

MR. VAJDA: In a sense *Wouters* is, if anything, icing on the cake – if I can put it like that – because that may even go further. But these submissions are primarily directed to the suggestion by the OFT in its pleadings that if one looks at this question of necessity in a relatively abstract way and I say that is a fundamental mis-reading of the trend of competition law over the last 10 or 15 years of which the *Klim* case in 1994 is a very good example, but there are many other examples in the case law of the court.

If we then look at paras. 103 onwards, because we come then to a passage that the OFT relies on. The Court of First Instance is then looking at what is called the "ancillary restraint". What it says is:

"The concept of "ancillary restriction".

"104 In Community competition law the concept of an 'ancillary restriction' covers any restriction which is directly related and necessary to the implementation of a main operation.

"105 In its notice on ancillary restrictions the Commission rightly stated that a restriction directly related to implementation of a main operation must be understood to be any restriction which is subordinate to the implementation of that operation, which has an evident link with it."

Then they go on to say at 107:

"As regards the objective necessity of a restriction, it must be observed that in as much as, as has been shown in paragraph 73 et seq. above, the existence of a rule of reason in Community competition law cannot be upheld, it would be wrong, when classifying ancillary restrictions, to interpret the requirement for objective necessity as implying a need to weigh the pro and anti-competitive effects of an agreement. Such an analysis can take place only in a specific framework of 85(3)."

So what they are effectively saying to the parties here is you are simply re-running your rule of reason argument with a different label. Then they go on to explain the need to preserve the effectiveness of 85(3) and then 109 importantly begins with the word "Consequently", because that is in rejecting the rule of reason argument.

"109 Consequently, as the Commission has correctly asserted, examination of the objective necessity of a restriction in relation to the main operation cannot but be relatively abstract. It is not a question of analysing whether, in the light of the competitive situation on the relevant market, the restrict ion is indispensable to the commercial success of the main operation but of determining whether, in the specific context of the main operation, the restriction is necessary to implement that operation. If, without the restriction, the main operation is difficult or even impossible to implement, the restriction may be regarded as objectively necessary…"

They then go on to refer to the *Remia* case, which is an earlier case, and then they go on to refer also at para.111 to what the Commission has said in its notice, and I can just read that:

"Similarly, in its decisions, the Commission has found that a number of restrictions were objectively necessary to implementing certain operations. Failing such restrictions, the operation in question 'could not be implemented…"

and then I stress these words:

"… or could only be implemented under more uncertain conditions, at substantially higher cost, over an appreciably longer period, or with considerably less probability of success'"

So that is quite a flexible test, that is what they are saying, that is in the context of joint ventures. So coming back to para.109, what we say is that in so far as the CFI is seeking to draw a rigid distinction between something being necessary for a commercial success as opposed to the implementation of that operation, we say that that is not reflected in the case law of the court, and we refer back to *Gottrup Klim* because one looked at the commercial success. As I pointed out the co-operative could have continued purchasing the fertilizer and pesticides but it would not have achieved its objective. The importance of commercial

success is again highlighted by para.111 of the Judgment where the Commission's own views, which are:

"Failing such restrictions, the operation in question 'could not be implemented or could only be implemented under more uncertain conditions, at substantially higher cost, over an appreciably longer period or with considerably less probability of success."

So what we say is that the first two sentences in para.109 of *Metropole* are to be understood as saying that in looking at whether something is necessary to a main operation one does not do a competition analysis but one still does a market analysis. You ask the question "Is this necessary for the main venture to succeed commercially?" But you do not ask the question. subject to the Tribunal's comment about *Wouters*, you do not ask the question "Are the effects more pro-competitive than anti-competitive?" But you do not omit the market analysis. That is the absolutely fundamental point.

Perhaps we can keep this bundle open, because I am going to come to the Commission Notice in a moment, but if we can go back to the skeleton, I have dealt now with *Metropole*. We then say at 3.10 the question in the present case boils down to whether the main operation, namely the sale of the interactive rights to ATR, for the purposes of establishing the new ATR channel, that is the objective, would have been difficult or even impossible, without collective selling. Indeed, I would ask the Tribunal also to add in the words that we see at 111 of *Metropole*, whether it could have been implemented under more uncertain conditions or with less chance of success? We say any other approach to the question of objectiveness would be an assessment in the abstract contrary to the well-established case law of the court.

We banged on about this in our Notice of Appeal and I will just give the Tribunal the cross reference without going to it, but we have dealt with this – possibly it might be said 'at excessive lengths' but we have certainly dealt with it – it is really paras. 111 to 126. We make the point 111, which I will come back to, made by this Tribunal in the *Gist* case, that even where you have high market shares an agreement may not have an appreciable effect, you have to carry out a market analysis, and that is exactly the same point as made in the Commission Notice that we will look at in a moment. What I can give the Tribunal if they wish are the cross references. *European Night Services* which we refer to at para. 115 is at RCA22 flag 11, the horizontal guidelines, which is 116, is RCA 24,28. The 81(3) Guidelines, referred to in para.121 is RCA21 flag 4.

I will come on to the evidence shortly, but what we say at 3.12 of our skeleton is that when one is analysing, as this Tribunal will have to, the counterfactual of the OFT, the counterfactual is that rights could have been sold either through individual negotiation or

between a bidder and a small group of courses, one needs t o examine that very carefully because, as is common ground here, we are dealing with rights that had never previously been sold. This was a highly innovative arrangement for a service that had never previously been available. For instance, in the *Metropole* case the Commission was able to rely successfully on how other pay TV channels had been launched in the past. Of course, that approach simply is not open on the facts in this case. (Para.122 *Metropole*)

Paragraph 3.13, this is about the burden of proof point, who has the burden of proving objective necessity? We do not accept the analysis of *Metropole* in the passage from Korah and O'Sullivan. What we say is that yes, plainly the parties have to bring forward evidence, because obviously one needs to have evidence as to what the objective is, because if you do not have full evidence of the objective you cannot possibly start looking at objective necessity. But what we say at the end of 3.13 is that while there is an evidential burden on a party to put forward the evidence, this does not discharge the legal burden which remains on the OFT to prove an infringement under s.2.

THE CHAIRMAN: How does that work in practice? The OFT says this is prima facie anti-competitive. You say no, it is against a background where objectively it was necessary to deal in this manner, and you advance your argument as to why you say that. So you raise the point. Do you say at that point the burden shifts back to the OFT to prove on the balance of probabilities that your assertion is wrong?

MR. VAJDA: What we say is that as one saw in the *Wouters* case, which of course was a reference not a decision by a competition authority, is that the correct approach is that when a party produces the evidence then the burden is on the relevant body, be it a court or authority, to examine that evidence with care and then to reach its own conclusion. The burden so far as proving a s. 2 infringement remains always with the OFT. This is simply an aspect of proving the s.2 infringement.

THE CHAIRMAN: So effectively you put all this material into the pot.

MR. VAJDA: Yes.

THE CHAIRMAN: And it is all there ----

MR. VAJDA: Yes, I mean the OFT has to satisfy, the burden is on the OFT to satisfy this Tribunal on the basis of the evidence in the Decision that its counterfactual stacks up.

THE CHAIRMAN: Yes.

MR. VAJDA: Now, proposition 3 we deal with very briefly at 3.14. This is the point that one must look at effect, and I would invite the Tribunal now to go to the Guidelines which are at flag 4 of this bundle, RCA21. Given that there have been rival views as to what para.24 says the best

thing to do is to read it out and then to take the Tribunal to one or two footnotes. It is on p.100 of the Official Journal. C101/100.

> "If an agreement is not restrictive of competition by object it must be examined whether it has restrictive effects on competition. Account must be taken both of actual and potential effects. In other words the agreement must have likely anti-competitive effects. In the case of restrictions of competition by effect there is no presumption of anti-competitive effects."]

We have stressed that point in our pleadings.

> "For an agreement to be restricted by effect, it must effect actual or potential competition to such an effect that on the relative market negative effects on prices, output, innovation, variety or quality of goods or service can be expected with a reasonable degree of probability."

Then there is reference to footnote 31. If we can go to p.116 this is what footnote 31 says:

"It is not sufficient in itself that the agreement restricts the freedom of action of one or more of the parties, see paras.76 and 77 of *Metropole*."

That is the passage I took the Tribunal to, but this is the market analysis that we look at nowadays.

> "This is in line with the fact that the object of Article 81 is to protect competition on the market for the benefit of the consumers."

So there is the Commission making another very important point, that is made both by myself and Mr. Vaughan, that you are looking at the position of the consumer ultimately, and the fact that a party to the agreement may be restricted does not mean that it has an anti-competitive effect.

> "Such negative effects must be appreciable. The prohibition rule of Article 81 does not apply when identified anti-competitive effects are insignificant."

And we can look at footnote 32 as well. It refers to a case called *Volk*, and that was effectively where you have a small market share.

> "Guidance on the issue of appreciability can be found in the Commission notice of agreements of minor importance."

And then importantly it goes on to say this:

> "Agreements which fall outside the scope of the de minimis notice do not necessarily have appreciable restrictive effects and individual assessment is required."

And that is exactly the same point that we made at para.111 of our notice of appeal relying on GISC which is even if you have got a high market share you cannot assume anything, you have to carry out an individual market analysis.

Going back to para.24:

"This test reflects the economic approach which the Commission is applying. The prohibition of Article 81(1) only applies where on the basis of proper market analysis it can be concluded that the agreement has likely anti-competitive effects on the market. It is insufficient for such a finding that the market shares of the parties exceed the thresholds set out in the Commission's de minimise notice."

I have made that point. The reference at footnote 33 is to *European Night Services*, which is referred to both in RCA and BHB's pleadings.

So we say this, not surprisingly, is an entirely accurate summary of the approach of the European Court in cases such as *Gottrup-Klim*, which is you have to do an individual analysis on the facts.

So that is all that I wish to say on the ----

MR. VAUGHAN: Can you just refer to 27 as well ----

MR. VAJDA: Yes. Mr. Vaughan says 27. We have referred in our skeleton to 28 to 31, and perhaps if we could ask the Tribunal to read paras.27 to 31. Paragraph 27 I think goes to the market point that Mr. Vaughan will be addressing you on, and also we have made a market point in our written observations, but we are not going to be addressing the Tribunal on that; and paras.28 to 31 effectively deal with ancillary restraints ----

THE CHAIRMAN: Your market point does not I think feature in your skeleton argument, although it occupies a certain amount of space in the notice of appeal.

MR. VAJDA: Yes. It simply is a matter of pressure of time and ----

THE CHAIRMAN: I take it you are not abandoning it in any way?

MR. VAJDA: Certainly not, no. I should make it clear the fact that – I mean, this is very much continental style proceedings and the fact that one is not – I am not going to be addressing the court on the law does not mean that it is being abandoned.

THE CHAIRMAN: No, I had rather understood that. Do you want us to read 28 to 31 now or at our leisure?

MR. VAJDA: I would have thought probably later because ----

THE CHAIRMAN: You are short of time!

MR. VAJDA: It is effectively 28 to 31, which we say really reproduce what has been said in *Metropole*. If we go back to our skeleton, at 3.8 we in fact refer to para.29 of these guidelines. I think it should have perhaps started at the paragraph before and end at 31. If one is going to look at it very briefly, at para.30 they make the point that you do not weigh up the pro and anti-competitive effect. That is *Metropole*, and that is obviously their analysis of that. Then at para.31 it says, halfway down:

"If on the basis of objective of objective factors it can be concluded that without the restriction the main non-restrictive transaction would be difficult or impossible to implement, the restriction may be regarded as objectively necessary for its implementation and proportionate to it."

And in fact they cite authority for that another case, which we have not looked at, called the *Pronuptia* case, which is a franchising case, but all these cases are making the same point, which is you look at the main objective and obviously you look at the position of the parties in the particular transaction. Plainly the main objective has to be a lawful objective, and then you consider whether or not the restriction is necessary to that, and I am sure that you, sir, whilst familiar in the Chancery Division with restrictive covenants, for example, on the sale of a business where years ago one had this debate in community law, if you sell a business and there is a restrictive covenant on the vendor did that fall within 81, and what the court said in a case called *Remia* was, well, no, provided it was necessary in effect to transport the value of the business it did not because otherwise the transaction would be a commercial nonsense. So that is ----

THE CHAIRMAN: The same as the English courts have held for years.

MR. VAJDA: Yes, not at all a surprising approach. This is all quite sort of common sense stuff. Even though it comes across from the other side of the Channel a very similar approach has been adopted – very similar to the approach of our courts for years and years.

THE CHAIRMAN: All law is ultimately the same wherever it is applied.

MR. VAJDA: That is all that I wish to say on law in relation to s.2, and what I would now like to do is put away this bundle and move to s.4 of our skeleton. What we address here is whether the sale of interactive rights appreciably restricts competition, and we look at it by reference to the evidence. If I could just say in relation to 4.1 that this is effectively going to proposition 1, are the courses competitors, and what we are looking at is (a), whether it was practically feasible for courses to market and sell their interactive rights in competition with each other, which is what I think is called in the jargon looking at it from the supply side; and then (b) whether there was a demand from the potential buyers for the purchase of interactive rights from individual courses, effectively the demand side.

The relevant findings of the Decision are quite short, and if we can just take those up at p.77. The first point that the OFT make is that the courses' rights are not complements in the economic sense, and that is effectively what I call the "not complements" point, and that is really what the OFT deals with at paras.284 to 289, which we refer to at para.4.2, and I will look at that in a moment, although Mr. Vaughan will deal with this aspect of the case in greater detail.

Then if we can just look at the other passage, which is at 431 at p.117. The Tribunal will observe that this is in fact s.9, and this is in fact in the exemption bit of the Decision, because if you go to p.102 one sees under the heading "Restrictions which were indispensable to the attainment of the objectives", and then there are a number of points, and point No.9, which is made at 117, is that some courses are incapable of selling their rights individually. However, the OFT in their skeleton, and the reference is IV.4.3, cross-refer to this bit of the Decision saying this is where they deal with whether courses are capable of selling rights individually. So that is effectively the two bits of evidence that one has in the Decision.

We say that in fact there was ample evidence that it was not practically feasible for individual courses to market their interactive rights individually, and in order to look at that evidence, which I will ask the Tribunal to do, we need to look at BHB bundle 7 at tab 4. Just to remind the Tribunal, the OFT not surprisingly, as a competition authority, has extensive fact-gathering powers, because obviously the OFT needs to proceed on the basis of evidence, not assertion. So one of the tools the OFT can use is s.26, which effectively enables it to write to parties asking questions and asking for answers to those questions, and that evidence then can be used, and we can see that in relation to the s.26 notice the OFT has in certain bits of the Decision relied on s.26 notices where in the sense it has been helpful to its case. But the point here that I am making is in relation to whether or not it was feasible for individual courses to sell their rights individually. There is a lot of evidence in the s.26 notice which does not find its way into the decision at all. This has been fairly helpful, if I compliment as opposed to complement my friends to my right. They have produced this set, and if we can just have a look and see how it has been set out at flag 4. These were s.26 notices which were sent to all courses, and one will see that they have been divided into four sets. Set A is, if you like, the big three, Northern, Arena and RHT, set B are the next major courses, courses like at Ascot, which we will look at in a moment, and then at C and D were the GG Media courses, and the Tribunal will recollect that 26 courses were approached by GG Media, but in fact only 10 signed up with GG Media.

If we start with Arena, because, as we know, Arena made submissions to the OFT in 2003 which the OFT has relied on very heavily in this case, so it is obviously of some interest to see what Arena was itself saying when it answered the OFT's question. If we look at Arena, which is at flag 2 behind flag A, what Arena did is it answers the question in two tranches. The first letter is dated the 18th December 2001, which we can ignore, and then about 10 pages on, a page which is stamped "290", they then answered the relevant questions we are going to look at by letter of the 18th January 2002. Unfortunately this has not been paginated, but if we then go to p.9 of the response, you will see question 15:

"How easy would it be for course owners to market their audio visual rights individually? What are the benefits of BHB/RCA doing this for you?"

And in relation to audio visual rights Arena makes the point that certain of the larger courses may have the resources to sell their audio visual rights individually, and they refer to courses such as Ascot, Aintree, Cheltenham, Newbury and Newmarket, but they make the point lower down:

"However, the typical course will not have these resources".

We have seen the very long tail that I showed the Tribunal this morning. Indeed many courses have traditionally barely featured on terrestrial television.

So that is what they say by way of introduction, and then they look at sale of audio visual rights to traditional broadcasters. Traditional broadcasters are effectively the Channel 4s of this world, i.e. broadcasters are not financed by betting, and they make the point in the second paragraph:

"Broadcasters are only interested …"

MR. VAUGHAN: Sorry, can you read the last sentence of the one before.

MR. VAJDA: Yes.

"However, this may be economically inefficient for both broadcasters and courses. It would necessitate multiple negotiations."

That is relevant to the reduced transaction cost where the OFT say there is not sufficient evidence.

"Broadcasters are only interested in acquiring content that has value to them, i.e. must be able to attract viewers. Free to air broadcasters need viewers in order to attract advertising and pay TV broadcasters need viewers in order to generate both subscription and advertising revenue. Broadcasters of a new funding model, such as ATR, need content that will both attract viewers and encourage them to purchase related or complementary services such as internet base betting in order to generate revenues."

Just pausing there, that is of course absolutely critical, because if you have got a service which is funded by betting you want to have as many races on as possible so that as many people will bet as possible because that is going to increase your revenues, and that is why the interests of the courses and the interests of ATR were so strongly aligned, because ATR – and we saw the business model on 59 courses – if you can have effectively wall-to-wall coverage, even though it may be an unimportant race, put it on the channel because you may get some people who will bet on it and therefore you will increase the ATR income. It is so important to realise that this is funded by betting and the more betting you get the better, and

therefore the more races you get on the channel the better, and this was the proposal that ATR and Arena were having to sell to the bankers in the City, that this was going to work.

Then going on:

"The typical race course outside the TRG Group will hold few, if any, fixtures of any intrinsic value to a broadcaster and therefore could not make a commercially attractive offer to a broadcaster."

Skipping a line:

"Therefore, except possibly for the very largest courses, a course may not be able to sell any audio visual rights at all unless it does so as part of some wider negotiating process where the broadcaster requires a larger package of rights that together are of value for both parties. For most courses the sale of rights individually is simply not a viable commercial option for either the courses or the broadcasters."

They then go on to consider the position of the new broadcasters and LBOs – those are the traditional bookmakers, the William Hills of the world.

"LBOs require audio visual rights in order that their customers can view races while in their betting shops. The typical punter will spend some time in an LBO and place bets throughout his visit. The ability of LBOs to show pictures and races may therefore be an important part of their product offering although it is clear that pictures are by no means essential and vital in order to successfully operate an off course betting business. LBOs may therefore seek to show pictures of races held as at many as possible of the 59 courses in order to provide their customers with a complete or near complete offering of live pictures throughout the day and throughout the year."

And of course the position of ATR is exactly the same, because ATR was effectively operating on an LBO model. It was going to get the 22.5 per cent. cut of the Pari-Mutuel betting. And then it goes on to say:

"New broadcasters such as ATR require audio visual rights to a large percentage of British races in order to support their entire business model which is based on revenues from Internet, interactive and telephone betting. They therefore require a critical mass of rights from a number of individual sellers. It is therefore economically efficient for both LBOs and new broadcasters on the one hand and rights owners on the other to negotiate a single multi-party contract. For almost all courses this is the only option that is commercially viable."

And then more to the same effect. Then it goes on to make some points about Arena, which of course, as it points out, they are unique and particularly strong. It has a unique and particularly

strong portfolio of rights because it invested in all weather tracks. But it goes on to say later on:

> "For the avoidance of doubt, the following points must be made. No other group of race courses, with the possible exception we believe of the Northern group of racecourses, could individually sell their audio visual rights to LBOs as this requires a degree of scale which only Arena has by virtue of having a number of racecourses, including the three all weather tracks. No other group of courses accounts for more than 10% of total fixtures which is too small to be of interest to LBOs."

And then they make the point about the power of the LBOs.

One would have expected to find something of this in the Decision, particularly because it came from Arena, whose evidence the OFT relies upon heavily. One searches the Decision in vain to find anything here.

What I am going to do, because there is a limit on time I cannot go through every s.26 response, and I will no doubt be accused of being selective, but the point I am making is that at least I am going to show the Tribunal some of these. The problem with the Decision was that none of this was in the Decision at all.

THE CHAIRMAN: I have read a few of them already so you do not need to go through all of them. I do not know about my colleagues.

MR. VAJDA: I will flick through some of them rapidly. If we look at RHT, which is behind flag 5, which is another big course. This is two pages from the end, the same question:

> "Whilst clearly there will always be the top few racecourses in the UK that can sell these rights individually, the vast majority of the 59 racecourses would not command any worthwhile fee individually."

They have got nothing to sell; that is the same point that Arena was making.

If we then turn to Ascot, which is a super 12 course, one of the best known courses in this country, and that is now behind flag B of tab 2, at 15, even Ascot says:

> "It would not be easy for us to sell our interactive audio visual rights associated with betting and a racing channel on our own because we do not have sufficient product."

Ascot has only, I think we saw, under 4 per cent. of the betting turnover.

If we go behind flag 4, Catterick, p.4 of its answer, at the bottom of that paragraph:

> "It follows therefore that there is no scope for the majority of racecourses, including Catterick, to sell their media rights individually. This option exists only for those racecourses that stage racing of such quality that terrestrial broadcasters are prepared to acquire the rights for broadcast entertainment purposes."

Then if we go to some of the smaller courses, if we look at Beverley, which is behind flag C, and then flag 3, this time, and it has now become the relevant question, question 16:

"It would be extremely difficult for a course such as Beverley to market its audio visual rights individually as an independent course providing racing action on 18 days of the year."

And we saw Pontefract, 16:

"Our product is literally worthless without a supporting cast."

Then if we go to Hamilton, and I mention Hamilton because this is a course that the OFT relies on for evidence elsewhere. That is behind flag 6, and it is the third page:

"In relation to media rights, the product of racecourse market racing is permanently selling a betting product which requires continuous action. Individual racecourses cannot offer a cohesive product. It is also more efficient not to sell individually as it would be duplicating the efforts of the 59 courses if … the business is to run."

Ludlow, and I mention that, at flag 7, and perhaps I can just also then give the reference to the evidence of Mr. Davis, because he produced witness evidence. I am not going to go to it, but for the Tribunal's note it is RCA7 at flag 107, paras.11 to 13, 17 to 18, and says exactly what we see in the Ludlow response at flag 7.

Musselborough exactly the same. Then I mention Pontefract, because we have seen the evidence of Mr. Gundill, and if I can give the Tribunal the reference to Mr. Gundill's evidence, which is paras.22 to 26, RCA7 at 105, and that is totally consistent with what Pontefract tell the OFT in their s.26 response in answer to the s.26 notice. Then I will go to the last lot of courses, which is behind flag D. These are the courses that signed up with GG Media. I just take two of them. If we take Fakenham, which is behind flag 3, the answer at 16:

"It would obviously be impossible for Fakenham to market its own audio visual rights."

Then finally if we look at Taunton, which is behind flag 7, in answer to 15, and it is the last page of the Taunton letter, para.15:

"It would be extremely difficult for a small independent racecourse with no terrestrial television to market its own audio visual rights."

And they then express dissatisfaction with the way that RCA carried out the business of doing that, but the point is they make the point that they cannot do it individually.

So none of that evidence is to be found at paras.431 to 433 of the OFT's Decision that we looked at a moment ago, and indeed if we just look at that again, it is in a sense quite extraordinary what the Decision tells us. At para.432 it says:

"Some courses are capable of concluding their own deals as part of a large group."

It then refers to Arena which does not refer to the s.26 response to Arena – absolutely extraordinary. And then it makes the point:

> "Free to air rights have previously been negotiated either by individual racecourses or by small racecourses."

It refers to the BHB document. It does not refer – for instance, Ascot, one of those well known courses in this country, it does not refer to Ascot's s.26 response. It is absolutely silent on that.

THE CHAIRMAN: Mr. Vajda, do you think you are reaching a convenient moment?

MR. VAJDA: Yes.

THE CHAIRMAN: Two o'clock.

(Adjourned for a short time)

THE CHAIRMAN: Yes, Mr. Vajda.

MR. VAJDA: Moving on, if we could look at the relevant findings of the Tribunal on the demand side, at para.262 they accept the need for a critical mass, but they do not anywhere in the Decision address their mind to what the critical mass is, and I say that is a fundamental flaw because you cannot determine whether or not collective selling is or is not necessary until you ascertain what the critical mass is, and I will come back to that.

We then see further down para.262 they also refer to paras.397 to 404, and that is in the exemption section, and if we can look at that at p.107. Again this is a very short section. There is a point made about the veto holders, which we have dealt with in writing, and that is at 398 and 399, and then there is a very short passage at 400 to 402 where they say that buyers can assemble the necessary portfolio of rights, and this is effectively the self-assembly point, which I shall come back to, because there is very, very limited evidence that is relied on there, and it is effectively the evidence about the races and Arena.

In the pleadings before the Tribunal the RCA appellants have explained, by reference to the history of negotiations, first of all that the two ATR conditions were the minimum necessary for critical mass, in other words, the TRG condition and the 70 per cent., so we have set out what the evidence is on critical mass; and, secondly, we said it was not commercially feasible for ATR to launch the new service other than dealing collectively with the courses.

In the course of their pleadings before this Tribunal the OFT has sought to rebut much of the evidence relied on by us, and also seeks to rely on points in the history of negotiations to support its counterfactual, and that, in our respectful submission, is wholly impermissible, and in order to make good that point can I take the Tribunal to *Argos*, which is in RCA21 at flag 1. If we could start off by looking at p.2, because what the Tribunal under its president, Sir Christopher Bellamy, very helpful does is to set out the statutory background. On p.2 it sets out s.3 of the Act which provides that before making a decision the OFT must give written

notice of a person likely to be affected by the proposed Decision and give that person the opportunity to make representations. Then there is what called rule 14 of the Director's Rules, which gives rise to the rule 14 notice, and it says at sub-para.(3):

> "A written notice given under paragraph (1) or (2) above shall state the facts on which the Director relies, the matters to which he has taken objection, the action he proposes and his reasons for it."

Then (5):

> "… the Director shall give each person referred to … a reasonable opportunity to inspect the documents …"

And in (7) to make written representations, and in (8) to make oral representations, and, as the Tribunal observed at the bottom of p.3:

> "Like the statement of objections [in Community law] … the Rule 14 notice sets out in detail the infringements alleged, the evidence relied on and the conclusion the OFT proposes to draw from the evidence set out in the notice."

If we then go to p.5, para.18, rule 15 of the Director's Rules provides, in relation to the Decision, that he has to state in the Decision the facts on which he bases it and his reasons for making it; so that has to be set out in the Decision.

If we can then move on to para.26, the Tribunal has a helpful analysis which begins at para.61, and we do not need 61, we can go to 62.

> "In particular, the statutory scheme is quite unlike the procedure that is normally followed in a criminal prosecution, where the offence is stated with short particulars in the indictment, but the facts relied on by the prosecuting authorities are essentially set out in witness statements then given by way of oral evidence from the witness box before the jury, subject to the detailed rules of evidence in criminal cases. Similarly, the procedure is not akin to that followed in the former [RPC] and other civil litigation, where there is a pleading, such as a statement of case, summarising shortly the OFT's contentions of fact and law, which is supported by separate witness statements which contain the evidence.
>
> 65. In the system set up under the 1998 Act the OFT in the administrative stage acts as investigator, prosecutor and, ultimately, decision maker. Broadly speaking, the OFT moves from the mode of investigation to the mode of prosecution when it is decided to issue a Rule 14 notice. At that stage, however, the safeguards provided under Rule 14 apply. The OFT must serve a written notice stating 'the facts on which the [OFT] relies, the matters to which [it] has taken objection, the action [it] proposes and [its] reasons …"

Etc., etc. it sets all that out, and then para.64:

> "It is also important to appreciate that the purpose of the Rule 14 procedure is not just to give the parties the 'right to be heard' …"

Important though that is.

> "… it is an important instrument enabling the OFT to reach findings on what facts it accepts, what facts it does not accept, and, to the extent that the OFT rejects the parties' representations, to state on what basis it does so. Thus, when it comes to framing a Rule 14 notice, or a subsequent decision, the OFT does not simply serve witness statements on the undertaking against whom it proposes to take a decision stating that it relies on the contents of the statements to prove a concerted practice to such and such an effect … On the contrary, the OFT sets out in detail in the Rule 14 notice and in the decision the facts it has found and the inferences it has drawn on the basis of the material it has, and identifies the items of evidence relied on …"

That is to say, in the Decision:

> "… for that finding or inference."

And they follow the practice of the European Commission. Then they note, in para.65, that there is an appeal against the Decision, and in sub-para.(2), that the appeal is principally concerned with the facts as found in the Decision, not other facts, and this is critically important in this case.

> "(3) The Tribunal must determine the appeal on the merits, but by reference to the grounds of appeal set out in the notice … Since the notice of appeal must refer to and so far as necessary put into issues the facts as set out in the decision, it follows that the Tribunal is concerned with the facts in the decision, as contested in the notice of appeal, and not with the correctness of other facts sought to be adduced as evidence of the infringement after the notice of appeal has been lodged and which, by definition, the notice of appeal has not dealt with."

Then they distil a number of principles, which we have set out in our skeleton, at para.1.2, and, just to flag up the key points, at the bottom of p.27, the decision:

> "It is a final administrative act which fixes the Director's position. An attempt to strengthen by better evidence a decision already taken should not in general be countenanced.
>
> (2) Were it otherwise, the important procedural safeguards envisaged by Rule 14 … would be much diminished or even circumvented altogether. There would be a risk that appellants would be faced with a 'moving target'."

And that is precisely what we have in relation to critical mass, which has moved all over the shop, in our respectful submission.

> "There is therefore a presumption against permitting the Director to submit new evidence that could have been made available in the administrative procedure …"

Just pausing there, that is not just new witness evidence, it is relying on material that was in the Director's file, that he relies on for the first time in pleadings before this Tribunal.

> "That presumption may be rebutted, notably, where what the OFT wishes to do is to adduce evidence in rebuttal of a case made on appeal, as distinct from evidence that is intrinsic to the proof of the infringement alleged in the decision …"

And I will come back to that.

> "On the other hand, where the new evidence goes to an essential part of the case which it was up to the OFT to make in the decision, the Tribunal will not admit evidence that was not put to the parties in the course of the Rule 14 procedure …"

And then (6):

> "The Tribunal should resist a situation in which matters of fact … are canvassed for the first time at the level of the Tribunal …"

And there is a lot of that, we say, in the OFT's pleading.

They then applied that principle to *Argos*, and what happened in *Argos* was that, unlike the situation here, the OFT sought to add to its evidence by introducing new witness statements which the Tribunal said was not permissible because, as we see at para.71, neither of those witness statements, and then importantly:

> "… nor the detailed facts and matters alleged therein, were put to Argos or Littlewoods during the Rule 14 procedure."

And we say the vast majority of what we find in the defence and the skeleton are points that were not effectively put to the appellants and are not in the Decision in relation to why collective selling was not necessary.

> "Equally, the decision does not … set out many of the detailed facts and matters which are described in the witness statements but which are not referred to in the notes of interview."

And then 77, a cautionary reminder on p.31, the second sentence:

> "… the fact that new elements may come naturally to light during the appeal process does not seem to us to be a justification for permitting the OFT to present new evidence that should have been available during the administrative procedure."

So that is the framework that we say this Tribunal should operate in this case.

To illustrate the point which I was making, how the *Argos* principle applies here, as I have indicated the OFT has not in this case served witness statements but has relied on documents. For example, the Tribunal will have observed that in the skeleton, and indeed in the defence, they rely very heavily on the fact that Arena made a proposal only to 47 of the courses in June 2000, and indeed the Tribunal will see that there is even correspondence between the – the OFT wrote to my clients after the last CMC to get some further information, which is completely impermissible because this question is absolutely central to the OFT's counterfactual. If the OFT were going to rely as part of the counterfactual why collective selling was not necessary, the fact that Arena made an offer only to 47 of the 59 courses, that should have been put in the rule 14 notice, which I now ask the Tribunal to look at, which is in RCA5 at 76.

There is only one paragraph in the rule 14 notice on this issue, and that is to be found at p.48, para.194. The stated objections proceeded both on object and effect. Object was dropped but the decision is based on effect, and the only paragraph that I can find dealing with effect on increased price is at 194, which simply says that joint selling reduced competition between courses in selling their rights and increased their collective power, and consequently the price paid for the right to produce programmes of Attheraces was increased. And then that was dropped, and then elimination of competition between courses, that is the incentive point which was retained. So that is all that the OFT relied on at the rule 14 notice.

The Decision is fuller in that respect because, as I pointed out, they refer, and this is no doubt taking up some of the points that were made in the administrative procedure – the Decision does refer to critical mass. I have taken the Tribunal to 262, and also I should take the Tribunal to para.275 of the Decision where it accepts that Attheraces required a significant portfolio of horse racing for its services to have a critical mass. It does not tell us what that significant portfolio is. It then goes on to say that no one had a veto, and of course one cannot decide who has a veto until one knows what the critical mass is; it is hopeless.

They then go on to conclude, in the Decision, at 278 to 279, that the OFT does not accept that the clauses in the ATR agreement were necessary for critical mass, and I will come back to that because the evidence that they rely on to reject that is their three pieces of evidence, and I can just give the Tribunal the cross-references because they are referred to at footnote 294 on p.76. The Attheraces letter is RCA6.91. The Arena observations are at 693, and in fact regrettably that version has got some manuscript annotations. If the Tribunal want a clean version that is at RCA11.60, and the Freshfields letter is at RCA7.101. So that is the sum total of the evidence relied on in the Decision, and we see that there is no reference there to any of the history of negotiations or anything of that sort.

As I have said, in order to determine whether collective selling was necessary one must start by ascertaining what is the level of critical mass. If the level of critical mass is 50 per cent. or 40 per cent. or 30 per cent. or 60 per cent. or 70 per cent., that will have obviously a major impact on how one assesses whether collective selling is necessary, and also whether certain courses have veto rights or not; but the OFT did not explain its position on that in the Decision. It is not sufficient, as I say, to be got in, as it were, now by way of rebuttal evidence; what we say is that the evidence of negotiations can be properly used by the appellants to rebut the very limited evidence that I have just taken the Tribunal to, the 2003 evidence that is relied on in the Decision. But the evidence of negotiation cannot be used by the OFT as additional evidence, i.e. evidence in addition to the 2003 evidence, to improve its case on the counterfactual.

THE CHAIRMAN: Does that mean you can rely on evidence but the OFT cannot rely on it in defensive response, if I can put it that way?

MR. VAJDA: No. They can say that the evidence that we rely on does not, as it were, stack up, but what they cannot do is effectively latch on to some of that evidence, and I give an example, for instance, the Arena 47 course offer and say, as they do, in the defence and skeleton, "Well, this shows that collective selling was not necessary". If that showed that collective selling was not necessary that needed to be in the rule 14 notice, it needed to be in the Decision for the reasons that the Tribunal laid down in *Argos*. It is, to some extent, a one-way street, but that is because of the statutory framework and the rule 14 notice, but it was not like that; all the problems and breaches of rights to defence that the Tribunal referred to in *Argos* would emerge in case after case after case. This is an appeal from a decision, and the task of this Tribunal, informed or otherwise by the evidence that is before the Tribunal, is whether the evidence relied on in the Decision can stand or not, and the evidence relied on in the Decision is the Attheraces and ATR letters of 2003. That is the correct approach, in our submission.

Having said that, what I propose to do but rapidly because I am aware that I will be time expired in two hours and ten minutes, is to look at some of the negotiation documents, and the reason for doing that is, as I said, because we say that they cast doubt on the evidence that was relied on, those three little bits of evidence that are relied on in the Decision, and I will actually deal also with those three bits of evidence that are relied on in due course, the Attheraces and the ATR letters. Really the intention of looking at some of these document is to try and give the Tribunal a flavour of what was happening from the period 1999 to 2001.

Conveniently though we can look at them, they are only in two bundles, so if we start with RCA14, and the first document I would like to look at is the first Arena proposal. As

I say, this is not intended to be comprehensive. It is flag 3. Although this is headed "Attheraces" this was Arena, the company that we know, the six course company, acting at this stage on its own, and again if I can just cross-reference – we deal with this document in our reply at paras.210 to 213. I would just like to take the Tribunal to para.1.8. It talks about a unique opportunity to shape the destiny of UK horse racing, and we see further down that it allows all 59 racecourses to have access to the potential benefits of on-line gaming.

Pausing there, there is, and I hope the Tribunal has got this well on board, a fundamental difference between terrestrial rights and off course betting rights. Terrestrial rights, it is very nice if you can get the Derby or some racing at Ascot that is absolutely fine, but when you are looking at off course betting rights, whether it is in the bookmaker, a physical bookmaker or, if you like, the virtual bookmaker on the screen or on the telly, what you need to have is you need to have quantity because you need to have a continuing diet of races where people can place bets. You also obviously want to have, if you like, the icing on the cake, because if you do not have the plums on the icing then people might think it is not a very credible cake, but you need to have lots and lots of races because the more races you have the more bets will be placed, the more profitable and more viable the venture will be. So critical mass is absolutely critical, and the higher the critical mass the more important because each additional racecourse, even though it may not cost very much to add, can generate a very substantial increase in profits when one considers that 80 per cent. of this is effectively a fixed cost operation.

Then if we can go to p.4 of this document, they make the point, which again is made over and over again in the document – this is in relation to the ownership structure of the ATR and the third bullet is the recognition of the value of the big 12, because these are what is called the super 12, and so they were going to get a decent share of the ownership, and then they refer to a recognition of the value of importance of race courses with a high number of fixtures, and you see RHT, Arena and Northern Racing.

Then if we go to p.8 they set out their proposed timetable, and you see there that they suggest signing up first of all by the 1st February the big 12, Arena and Northern, but of course they do not want to stop there. They then go on, "We want to sign up the remaining racecourses via the RCA", and I say this is not just altruism on the part of the racecourses, but they want those races to improve the financial viability of the model.

I mention in passing that the OFT in its skeleton at 3, para.47, says that more reliable guidance can be given to proposals at the beginning of the process. Well, whether that is right or not this is certainly a document at the beginning of the process.

If we can turn to the next flag, flag 4, Channel 4 were at this time in negotiation with the super 12, and the only point I want to make here is in the last paragraph of this letter, where you see that they say:

> "… consistently avoided tying up any deals with third parties until we have agreement with the consortium."

And then:

> "There may be other parties offering large advances for particular rights."

So that must be a reference to Arena. Everybody knew or Channel 4 knew that there was a competitor in the wings, and, as you have seen from our pleadings, Channel 4 managed to secure an agreement whereby the super 12 would be in exclusive negotiation with it to try and effectively stop them going with the 47, and that is relevant when one looks at the Arena bid to the 47, which came in the summer of 2000.

The next document I would like to look at is at flag 7. This is, if you like, a revised proposal to the super 12 document. The cross-reference to our reply is 2.14 to 2.19, and if one can look at p.4 and 6 we see at p.4 two media elements, interacted racing channel, intention to carry races from other RCA courses, and one can see the difference there between terrestrial where you are effectively just wanting some of the plums, because of course for terrestrial there is only a limited amount of air time that Channel 4 and the BBC has, whereas interactive, which is a dedicated racing channel wants to have the lot. Then we see at p.7 of this document the commercial proposition, even at this stage although Channel 4 are only in discussions with the principal forces they say that an additional rights payment will be offered to the other RCA courses.

If we then move to flag 20, this is then an invitation by Channel 4 to effectively the non-Super 12 courses to attend a meeting in London and they say in this letter "Channel 4 Strategy for Racing".

> "We are extremely keen to work with all 59 courses in achieving a profitable and exciting future for racing."

One of the points that the Tribunal may wish to reflect is that the only business plan that the OFT got is the one that I showed the Tribunal this morning. It would have been the easiest thing in the world for the OFT in relation to their counterfactual to send s.26 notices to Channel 4 to say "Let us have a look at your business plan, what did it actually involve?" None of that was done. Then the presentation is flag 23. This is the presentation that they made to the 47. The cross-reference in our pleading is 2.24, 2.25 of the Reply. If we go to the Q&A's as applied by the RCA, these were effectively RCA forwarded questions which Channel 4 then answered. If you look on p.2:

"Please outline the overall business plan for the Channel 4 concept". We [Channel 4] have outlined the overall commercial proposition overall"

So it is an overall proposition.

"And the long term revenue opportunities and the growth of interactive betting revenue by sharing these revenues equally and between the course and the media consortium we ensure that both parties share the same objective and maximum revenue generation."

That is the shared objective and, of course, all this is consistent with the notification that I showed the Tribunal this morning.

If we then move to flag 28, this is just a sample letter sent to one of the courses by Channel 4, it was sent to Huntingdon. The Tribunal will be aware that there is dispute as to whether this is an individual or collective offer. The relevant passage in our reply is 2.26 to 2.27. The Tribunal will observe that in the second paragraph it says: "We believe a single racing proposition", and the Tribunal will also have seen on p.2 of this document or perhaps I can remind them, below the three bullets: "The media consortium will work with all British racecourses". This was an offer – when I say an "offer" this was effectively as it said, a proposition which was not capable of acceptance, it was not an offer in the legal sense that it could be accepted by Huntingdon on its own or any of the individual courses. We have dealt with that in the pleading.

The next document is a meeting of the Super 12, which is at flag 30. This is dated 10th April 2000 and the passage I draw to the Tribunal's attention is a 2.2: "KD [Kim Deshayes, Newmarket] reported the media consortium, that is effectively Channel 4, "felt disappointed that the racing consortium had been unable to deliver the other racecourses to the consortium." So what effectively Channel 4 was wanting to do was to get the Super 12 to help them get the others into the Channel 4 tent. We will see later on that Super 12 denied that they ever gave such an undertaking to Channel 4.

If I could then look at 2.7 over the page, in terms of competition we see at 2.7 "C4 are concerned that Sky may now employ…" at this stage, of course, Sky and Channel 4 were not in the same consortium, and there was obviously a concern that Sky would come in, and the previous paragraph deals with Arena. We have seen that Arena at this stage were also going it alone, and there was talk as to whether or not Arena could come into the consortium with Channel 4.

Then flag 31, this is the letter from the RCA rejecting the offer in respect of the 42. It is not disputed that this is a collective rejection, but it does not go to the point that individual offers were made and indeed, we see at (i) "your offers individually and collectively are

acknowledged." The reason for that is that the financial arrangements are not acceptable. One will see throughout this whole process, and it has been described in the written pleadings, that there was a concern from the 47 that they were not getting – the expression – "crumbs from a rich man's table", that is why in the end 10 of the courses opted for GG rather than this arrangement, but one will see also when you look at them – one sees this very clearly from annex 1 to our reply – where all the price is analysed throughout the bidding process, that there was not a significant increase in the price of the rights at all; and I will come back to the price. But one saw this morning from the letter from ATR that, in fact, what determined the figure of £181 million was in fact a working back from the margin that ATR could get on the Pari-Mutuel betting. That is what led them to the £181 million figure.

Then the next document is at flag 35. This is a note of a discussion with Ian Penrose. He is Arena, the Group financial director – I think he now is the MD of Arena – and from somebody (an appropriate name) William Derby, who obviously is employed by Ascot, he reports as follows, under Sky: "Arena and Sky have been talking, Sky want an all 59 racecourse interactive racing channel and have the eyeballs and kit to deliver revenues." So this is again indication from somebody else that they wanted 59 courses, and of course, one can understand hwy they wanted 59 courses, because it is to make the betting model stack up. We deal with this, this is the reply 2.30. Then flag 36, this is a note of conversation, David Scott is from Channel 4 – this is a meeting between Channel 4 and the Super 12. Importantly at p.2 of this note at 3(c) it says "The media consortium [Channel 4] recognise that there may be enough content for two channels but felt that two channels could not operate economically." So it is absolutely clear, and this is not surprising if you are trying to raise £60 million from sceptical bankers in the City of London for a new venture you have to be able to show that you are not going to have a competitor.

3(e)"media consortium clearly stating that this deal is contingent on the other UK courses joining." So that is Channel 4 saying that this deal is contingent on the other. Channel 4 already had a deal with the Super 12, they could have said "Right, let's go snap", they did not. They wanted and they needed to have the 47. They were hoping to get the Super 12 to bring them in and we can see that from the next flag, which is 37, where the "Dear David" letter to David Scott at Channel 4, the second sentence:

> "You were very clear at the meeting however, that the racing consortium [Super 12] had provided an undertaking to you to deliver the other racecourses and it was the view of the racing consortium that the other racecourses could indeed be delivered for the sum of £1.5 million per year."

He says:

"I am simply writing to record that neither your proposal, nor the draft heads of agreement placed any such obligation on the racing consortium."

So there we can see Channel 4 wanting to get the Super 12 to bring in the others – why? Because they needed the others.

Can we then move to flag 39? This is the Arena proposal of June 2000, on which the OFT, not in their Decision but in their Defence and Skeleton, place very heavy reliance. We have dealt with this and I can give the Tribunal the cross reference. It is Reply 2.31 to 2.36 and our skeleton at 4.28 to 4.30. We say that the new theory that the OFT has advanced, which is that you could have had critical mass at 50 per cent. which is the theory that has been put forward in the skeleton, certainly does not derive any support from this document – even if the OFT had relied on this document in the Rule 14 Notice or in the Decision. There are four reasons for that, all of which we have dealt with; first, that Super 12 are probably still in negotiation with Channel 4, that was the knock out point (para.2.32 of our Reply). Secondly, because Arena wanted to become part of the media consortium, this is the spoiler point, which is dealt with in the evidence of Mr. Gould, which is at RCA 17, flag 4, paras. 4.1 and 4.4. Then if I could ask the Tribunal to maintain a finger at flag 39 and look at flag 47. This is then a subsequent proposal by Arena and we see that the second sentence:

"We stated at the meeting of 19th June it was our aim to bring together all 59 racecourses, and following the request from the RCA this current offer is now made available to 59 courses."

That meeting on the 19th is exactly the same day that this letter, which we see at flag 39 is dated. I hope the Tribunal has ----

THE CHAIRMAN: I am sorry, what was the date of the document at 47?

MR. VAJDA: The date of the document at 47 is 31st July. If I could just remind the Tribunal at the cross-reference that we had in the reply to this document is incorrect. It should be the cross reference that I have given to the Tribunal just now. If one goes to p.11 of our reply, footnote 49 in those days it was labelled ND1, but it should be 47 not 39, and the reference at footnote 50 should be 44 and not 36. So Arena said on 19th June that it wanted to bring together all 59 courses, and that was before the rejection of its proposal by the 42 courses, the proposal of 19th June.

The next document I would like to look at is flag 42 of this RCA 14 bundle. This is now a revised Channel 4 offer of the 3rd July 2000. The cross reference in our pleading is reply 2.39 to 2.43. Although this is a revised offer, which was only made to the 47 what I wish to draw the Tribunal's attention to is the conditions on p.3, and you will see:

"Acquisitions of rights are subject to the following conditions. We acquire the rights of all of the courses."

And the courses there are set out at appendix A, they are the 47. "… and that we acquire the rights in respect of the Super 12." That was effectively at that stage 59 courses. We say that this condition was not insisted on by the Super 12, the RCA or any of the courses. The evidence that we rely on is the statement of Richard Johnson, bundle RCA7 and I will give the Tribunal the tab number in a moment. That is significant, because that evidence was given in the course of the administrative procedure. The statement was of 9th October 2003, and the OFT did not seek Channel 4's comments as to whether or not what Mr. Johnson said was correct or otherwise.

The next point that I wish to draw the Tribunal's attention to is at flag 43, which is the letter from Channel 4 to one of the joint venture partners. There has been some re-jiggling around with the money but what he says in the penultimate paragraph is:

"The net effect of these changes add £4.5 million cost t our business plan. I know that to be unwelcome, but we feel we have to do so if our bid is to be in the same ball park as Arena's."

Again, if that did not mean what it said it would have been perfectly open to the OFT to send a s.26 Notice to Channel 4 to explain why that did not mean what it appeared to mean on the face of the document. Richard Johnson's statement is at flag 98 of RCA 7.

Then flag 44, this is a discussion on the current status of the bids, because at this stage there were two on the table effectively, there is Arena and Channel 4 and this is a little attendance note from Richard Johnson. One sees as one goes to the last page of this flag, RJ, he is the author of this note. "RJMB Consortium, July 2000", and he refers on the first page to the Arena proposal, and this is of course before the proposal of 31st July, or the proposal of 14th July. He says the proposal is as far as the rights of all 59 participating courses will be put into a new company. So again that is another nail in the coffin of the argument now advanced for the first time in the pleading that that June offer is an indication that you did not need to have all 59 courses.

Arena then make a formal proposal for the 59 courses. I am not going to go to that, that is the document which we have at flag 47. We have dealt with that in our reply at 2.44 to 2.47. We also then have at this flag, the options A and B, which again the OFT have latched on to in their pleadings before this court. They have latched on to it because if you go to Option A, the second page, there is condition 2C which is that Arena acquires rights from such quarters as account for not less than 50 per cent. of the total. The short answer to this is if they wanted to rely on this they should have put it in the Rule 14 Notice, and it should be in the

Decision and it is in neither, instead of which it is still being debated in correspondence in 2005 and I give the reference to the Tribunal, it is RCA 19, flag 29. I say no more about that.

We then move to the proposal of September 2000, which is at flag 52. We deal with this at para.2.48 of our reply, and we see on the second page of Mr. Pope's letter there is a specimen letter to Goodwood Racecourse, the penultimate paragraph:

> "Inevitably, due to the excessive length of these negotiations we and the RCA have been endeavouring to produce a 59 racecourse solution".

Again it is the common interest. Obviously the courses want to be included, but equally importantly from the point of view of the interactive betting channel they want a 59 racecourse solution.

Then we can look at Carlton. Carlton come into the picture for the first time in September 2000, and that is to be found at flag 55, if we go there first. This is, as it were, the invitation to treat the sort of taster, and it goes to the Honourable David Sieff at Newbury.

> "In the light of the publicity for the Arena offer, I am writing to inform you that Carlton has over the past six weeks developed a detailed proposal for maximising the value of your horse racing rights. We would like the opportunity …"

And there had been no contact at this stage, they were coming in as a competitor to Arena.

> "We would like the opportunity to make a detailed offer for all the interactive media and TV rights. We are ready to present our proposal before 30th September to all racecourse owners."

Then they talk about what they have done for other sports, how they can help horseracing.

The actual proposal is then at flag 57, and this proposal is worth £350 million, so it is worth £30 million than the Arena offer that is then accepted, which was at £320, in fact was only £306 because 10 courses did not join in.

Now if we go to the Carlton offer document, I say that the second page, where it is headed "Strictly private and confidential, subject to contract", so it is all subject to contract, but importantly we see not only that the rights will be exclusive, and we know the reason for that at 1.3, but they then set out acceptance criteria – this is Carlton who, of course, are in competition with Arena, so they are not going to start, one would hope, exchanging information as to acceptance criteria, and in fact they are slightly different acceptance criteria from the ones of Arena, but one can see that they are well above only 50 per cent. It is courses hosting horse races which capture 80 per cent. of a total TV audience for horse races, and at least 7 of the following courses. Then going over the page, courses hosting horse races which capture 70 per cent. of the total of horse betting revenue. Again, it would have been the easiest thing in the world for the OFT to send a s.26 Notice to Carlton to ask for the business plan, because

presumably the acceptance criteria did not come out of the blue, there must have been a reason for it, but they chosen not to do so.

If we go to the riposte from Arena to Carlton and that we can see at flag 60. The Carlton offer that we looked at, that was made on 9th October. Two days later, on 11th October, a press release is issued which says this: "You will be aware that Arena's bid for the right to UK horse racing …" There was also an Arena bid that was out for acceptance, which I have not taken the Tribunal to.

> "We are all conscious of the requirement to maximise the value of UK horseracing by securing as wide a distribution of coverage as possible across all platforms."

That is of course now, I hope, well understood by the Tribunal. The press release goes on:

> "We are delighted to announce that exclusive agreements have been signed between Channel 4, BSkyB and Arena in order to prepare a bid for the media rights to UK horseracing. The bid will be announced within the next 14 days in conjunction with a full presentation to all racecourses. The members of the consortium combine a strength of terrestrial coverage [Channel 4] The UK broadband entertainment leader [BSkyB] multi-media gaming platform utilising the world's largest Pari-Mutuel gaining operator…."

I did not take the Tribunal to that this morning, Arena had acquired something called 'Track Play' from the United States which is the technology to allow all this to work.

> "…together with unparalleled global distribution and racecourse contacts and connections."

So they basically say: "This is the best thing since sliced bread", and of course the reason they were so keen to get this out is because they wanted the courses to go with them and not with Carlton. Then we can go to the actual offer document, which is at flag 63. Again I say "offer"; it is subject to contact. This was sent to every racecourse, but this is plainly a global offer, as one can see, at 1.2, because it says:

> "Go Racing shall during the period commencing … pay to the courses a guaranteed minimum of £320 million."

That, as I said, assumes all 59 courses.

They then set out what they are proposing to do, and they also have a critical mass condition, which is, as one might expect, similar but not identical to the Carlton critical mass condition, and that is to be found at condition 10.

> "The willingness of Go Racing to proceed with this proposal and complete the acquisition of the rights is conditional upon the following conditions …"

And then we have (e):

> "Go Racing acquiring the rights from all the TRG courses and such of the non TRG courses which together with the TRG courses account for not less than 70% of the total annual UK off course betting revenue as determined by reference to the RCA's revenue distribution procedure."

And that is pretty well although not quite as tough as the conditions in the MRA that we will look at.

We see of course that the Decision poured a lot of cold water on these conditions, and again it would of course have been the easiest thing in the world for the OFT to send a s.26 notice to these people saying, "Let's have your business plan, where's the supporting document for this", and none of that was done. You will see that the way that that is phrased as well is it requires minimum courses, it is not a maximum; it is minimum is what they needed, and we see in fact they wanted more than the minimum, but that was the floor, and again there is more than a suggestion, an assertion in the Decision, that in fact one of these courses could have been Ayr. There is suggestion that it would have gone ahead without Ayr. There is absolutely nothing in the contemporary documents to support that at all.

We then have the Carlton riposte to this, and if we can now take out RCA15. Perhaps while we are on bundle 15 we can look at flag 65 to see that there is then a comparison that was carried out by Hawk Point, who were the advisers to the RCA, comparing the bids of Carlton and Go Racing, and one can see, as I have already indicated on p.2, that the Carlton bid was going to give more money, £367 million as opposed to £320 million. It is important to remember these figures are for both terrestrial and interactive. So Carlton's riposte is at flag 71 and, not surprisingly, they tell the recipients of this letter, the racecourse owner, in the second paragraph: "We believe our bid will again be the best offer on the table and that we are the only party able to act as an independent broker for the British racing industry."

That was perhaps a side-swipe at Arena because Arena was in the other camp, and Arena was of course a racecourse owner.

> "Compared with the Arena Consortium last offer, Carlton offers more to racing at every revenue level. Our guaranteed cash bid is higher, £350 million as opposed to £320 million. We calculate that our profit share formula will pay more at an earlier date."

And they got those esteemed accounts, Pricewaterhousecooper, to review the calculations and confirm that the numbers are correct.

They then set out on p.3 the conditions of their offer, and you see that in fact there has been a slight modification to the conditions in the earlier document, the proposal that we saw at flag 57 of R14, because it is all TRG courses and for the total number of racecourses

accounting for 65 per cent. of the betting. So there is a slight variation of that again. If it is going to be central to the OFT's case on critical mass one would have expected Carlton to be asked why there was a change.

Then the next document I would like to look at is at flag 73, which is a letter of the 28th November from Mr. Creighton-Miller, who was the chairman of the RCA, to racecourse managers, and what he says in the third paragraph is:

"RHT has elected principally in the light of the broadcast uncertainties …"

That is with Carlton because the question was could Carlton and ITV guarantee the sort of terrestrial TV coverage that they got in the past with Channel 4 and the BBC, to accept the Go Racing offer of a short period of exclusivity, because again there was competition here what Go Racing did and was able to achieve was to negotiate a period of exclusivity, and this has all been explained in the pleadings, and one will recall that in fact the period of negotiating exclusivity did not prevent GG coming in at a later stage and then making its bid, because what would happen is the RCA would come in and out of exclusivity. But the important point here is that we see later on that the board basically have to follow the approach of RHT, and this is obviously relevant to the question of whether – which we say is obvious, that RHT had a veto. They had the largest percentage of off course betting.

I mentioned the GG Media bid, and if we can go to flag 84, and GG Media are of course no friends of ATR or Arena, and this is a letter from Captain Leese, who is the clerk of the course at Leicester, which is a GG course, and this goes to the directors and executives. There were 26 recipients of this letter. I just want to read between the two hole punches.

"GG Media's solicitors have made it very clear that they are unwilling to hold 26 sets of negotiations with 26 race courses and end up with 26 different contracts."

So that is again another bidder coming in for far fewer than – because the GG proposal, to remind the Tribunal, was different in nature from the Attheraces proposal because the GG proposal was to acquire all the rights, both the interactive rights and also the traditional – what we call the LBO rights. So critical mass was not important to GG because the main interest to the people who were paying for the GG bid, which was the bookmakers, was to get the rights to go into their High Street stores. But it is interesting that even at the level of 26 they are not willing to have individual negotiation - again a document one might have thought the OFT would refer to in its Decision, particularly when we look at what the OFT say in their Decision about self-assembly of rights.

Then can we look at the agreement itself, the MRA, which is at flag 88, and this is the agreement that the OFT found was anti-competitive, and if we can go to p.22. This is the conditionality. 2.2:

"If any of the following conditions precedent are not satisfied …"

And at 2.2.2(i) is:

"All the TRG courses together with all of the non TRG courses whose races are under common ownership or control with any racecourse …"

Just pausing there, looking at that condition, that means all the RHT courses, including those that are not TRG, which is Huntingdon, Market Raisen, Nottingham, Warwick and Wincanton, so you add an extra – there are 17 TRG course, and you add five extra for the non-TRG/RHT courses. If you take Northern, Northern had three non-TRG courses, so you add those in, so that brings you up to 25 courses. If you add the six Arena courses, none of which were TRG courses – you are obviously bound to accept, given that Arena was part of the consortium, you come to 31 courses, and in fact the significance of the (i) condition is that it was essentially self-fulfilling, because by combining RHT, Northern and Arena you already were above the 70 per cent. threshold, and, just to make good that point, if we can flick forward in this file to flag 90, this is a press release that was issued on the 3rd May before the courses had received the offer, and we deal with this in our notice of appeal. The cross-reference is para.62 of the notice of appeal. This is a bit of sort of public relations, because what Go Racing say is:

"As of today, 3rd May 2001, we have received acceptances from race courses representing over 71% of betting turnover."

And then you look at the bottom:

"The race courses that have signed this contract are …"

TRG, RHT, Northern, because you have to bring in all those courses because of 221, and of course Arena for the reasons that I have indicated. So this press release plainly shows that they wanted to do more than 70 per cent., they really wanted to go that extra mile, that extra furlong, to get as many other courses as possible, and that, in the absence of any other contrary explanation, must be the reason why, if we go back to the MRA at 2.2.2(i), was framed in the way that it is, because effectively there was no need for (ii) because it would be redundant. But there is (ii) as well, which is that we need to have not less than 70 per cent. of the total revenue.

Of course this is all very important because, as we saw from the discussions between Channel 4 and Super 12, the Media Rights Consortium was aware that there could be sufficient content for two channels, but two channels could not be economically viable, so why you wanted to scoop all the rights was not just in the sense that you got wall to wall but that the other person has not even got a few patches on the carpet, as it were; that is the idea, to hoover it all up.

The reason, as I say, that in the press release of the 3rd May Go Racing was still encouraging the independents to join was that that would increase critical mass, even though it

would cost more, because every time you get an extra course to join you would have to pay more, but it was plainly in the financial interest of the bidder to get all the extra courses that they could.

So we say that so far as the contemporaneous evidence is concerned, there is absolutely nothing in May 2001 to suggest that ATR would have waived either of those two conditions. The contemporary evidence is to the reverse.

None of the evidence that I have shown the Tribunal was considered let alone relied on in the Decision when the Decision considered the question of critical mass, and I would now like to go back to see what actually the Decision did rely on, and if we can go to para.262 again. The OFT accepts the need for critical mass, it does not tell us what that is, and I have explained the criticism that we direct against that given that a Decision has to be properly reasoned, and then it goes on to make this statement:

> "However, it finds that collective selling by all the courses together was not necessary to achieve this aim."

That looks as if it is a finding of fact. So let us just now examine this finding of fact, which is at p.107, where the OFT rejects the RCA's claim that horizontal co-ordination was essential to ensure that the race courses' rights are sold:

> "… first, because the OFT find that there were no veto holders in fact."

On veto, because of the time I am not going to deal with that. That is deal with in our written submissions, it is dealt with in our skeleton, so I will just see if I can give the Tribunal the reference. It is at 4.8 of our skeleton. Then it goes on, in its second finding, "By implication …", and I am not quite sure by "implication":

> "… buyers should be able to compile the necessary critical mass without collective selling by race courses, i.e. buyers can handle the practical and logical aspects of assembling the necessary portfolio of rights."

And then they ----

THE CHAIRMAN: I think they must mean by inference, must they not, but they do not say from what they are inferring it.

MR. VAJDA: No. The only thing that they can be inferring it from is the evidence that they rely on at para.400 and following, under the heading "Buyers can assemble the necessary portfolio of rights". What I would like to do now is examine – this is the only evidence that is relied on. If we can take the first inference that is drawn, and that is the ATR statement which is referred to at footnote 454, and that is at RCA6.94, so if we can look at that document now. What is relied on here is paras.2 and 3 and para.7, so let us look at what is said. Paragraph 3 is the critical one, and para.2 simply recites what the RCA says.

"ATR does not accept that this statement is correct."

Pausing there, this is a document – and it is important that one has the chronology – of the 15th August 2003. This is para.3:

"… nor as far as ATR are aware Carlton, the other bidder …"

Pausing there, we are slightly astonished that ATR knows what a competitor is doing, but leave that side:

"… would not have been able to bid for the rights individually given that the RCA was only interested in offering the rights as a single passage."

We do not accept that. First of all, there is, we say, a plain non sequitur, because the fact it was only being offered as a – even if that is right, does not stop an individual bid, and a good example of that is GG. GG made a bid for 26.

But the next point is that there is no evidence to suggest that that is what ATR wanted to do at the time. Can we just look a little bit further back in this bundle to another document which is at flag 91. This is dealing with critical mass, which I will have to come back to in a moment, but it says here in the middle:

"I confirm it is not essential for Attheraces to have signed up with all of these courses so the ATR channel website could have been viable without some of them."

If we then go forward again to flag 90 we see another letter to the OFT from ATR which is dated the 25th July 2000, so there is only the space of a few weeks between the letter of the 25th July and the two August letters, and it says there, and again it is astonishing that this is not referred to in the Decision:

"Attheraces required clause 221 to be included in the rights agreement. Clause 221 was included to ensure Attheraces would have from the outset sufficient programming and media rights in order to generate sufficient revenue for its betting surface on the Attheraces channel."

And it is precisely the point I have been making today.

"The OFT should refer back to the briefing paper submitted by Attheraces to the OFT on the 4th March 2003, and in particular at paragraph 3.9."

I apologise, we will have to keep this file open and go to another file to look at this briefing paper, which is RCA5.74. What we have at flag 74 is a letter from Mr. Szlezinger of Denton Wilde Sapte to Mr. Bethell enclosing a briefing paper. If one goes over the page, it says the The Racecourse Association, Briefing Paper to the Office of Fair Trading. If we go to the last page, p.7, we see the date of this briefing paper is the 4th March 2003, and we have checked the OFT's file and there is no other briefing paper of that date, so the reference that is made in the Attheraces letter of the 25th July 2003 we say can only be to this briefing paper.

If we then go to 3.9, and this is the briefing paper to which – I think it is Teresa Walsh very helpfully refers to the OFT to. I should add that this briefing paper was given to the OFT only in the context of exemption and that is why it is referring to indispensability. But clearly Teresa Walsh, who is very well familiar with the negotiations, thought that what the briefing paper said in relation to exemption was relevant to this clause. She direct the OFT's attention to 3.9 which says:

> "The OFT should also take into account in evaluating the indispensability of the manner in which the rights were sold, the preference of potential buyers of the rights to negotiate through a single entity for as much of the broadcasting and interactive rights of British racing as possible. Had the bidders been faced with the need to negotiate directly with 38 sellers, it is likely that they would not have proceeded, and there were no other potential purchasers that could have offered a deal …"

So that was what Teresa Walsh was telling the OFT on the 25th July 2003, and cross-referring, and she then goes on – if we can just read on here, at 3.10, at the bottom of the paragraph:

> "The whole ATR venture …"

These were the people who were paying Mrs. Walsh's salary:

> "… was contingent upon Arena Leisure plc raising £85 million by way of rights issue in order to fund its investment in ATR. It would not have been possible to obtain this level of funding on a piecemeal basis as and when rights were acquired."

And then the footnote points out that Arena Listing particulars were issued at a point when the courses accounting for 70 per cent. of off course betting revenues had already signed up with the ATR proposal. That was the basis upon which the bankers in the City were going to lend Arena money. Then they go on to make some points about complexity which is relevant to reduce transaction costs which the OFT says there is no evidence about, and they have just chosen to ignore this.

Then if we go over the page to 3.12 this is what was said:

> "The combination of these factors would have made any other method of negotiation to the one adopted impractical on the grounds of the complexity of the negotiations and, as a result, the cost and length of time required to conclude negotiations."

And then it says at footnote 12:

> "The OFT suggested that ATR could have entered into contingent agreements with the separate course owners. The parties are unable to see how in practice this outcome would have been any different to the courses selling their rights individually under a deal negotiated by the RCA, since contingent agreements would have effectively resulted in links between the courses and transparency in the market. In

any event, it is the view of ATR and its shareholders that contingent agreements would not have been the most likely outcome of individual negotiations. In practice ATR would have simply concentrated its efforts on concluding agreements with the largest and most successful courses, which the previous experience of the negotiations between ATR … and the Super 12 courses indicates would have failed."

We have seen from footnote 11 that they would not have got funding from the banks had they not got the 70 per cent. condition.

THE CHAIRMAN: Sorry, I am not quite sure I have understood this. This is by the Racecourse Association, is it?

MR. VAJDA: It is submitted by the Racecourse Association, and if we look at the covering letter at 1.1 it says:

"Attheraces and its shareholders have received and commented on the contents of this submission."

And then ----

THE CHAIRMAN: I see. So it has had their endorsement, as it were.

MR. VAJDA: Yes, but the important thing in relation to endorsement is the Attheraces letter of the 25th July 2003, going back, if we can just look again at that, and RCA 6, 90. Teresa Walsh, very helpfully drew the OFT's attention to that briefing paper. She refers to it as a briefing paper submitted by Attheraces to OFT, but as I say we cannot find, and certainly the OFT has never disclosed to is any other briefing paper. The only one that is in the file on 4th March was the briefing paper that I have taken the Tribunal to.

THE CHAIRMAN: Yes, I see.

MR. VAJDA: So again it is somewhat astonishing that none of this finds its way into the Decision. So if we could go back now to flag 94 of RCA 6. When one sees the last sentence of para.3, it is somewhat incomplete phrase in the light of what I have just shown the Tribunal, because here is Attheraces saying on 15th August to the OFT that HL would not have been able to bid. So it gives the impression which is one that the OFT picked up, it was effectively the RCA that was blocking all this but when one actually looks at what the ATR the OFT only a few weeks earlier it was that individual negotiation would not be possible, they would not have been able to raise the money.

Then if we look at para. 7, going back to the footnote 454 of the Decision para.7 is referred to at that footnote in the OFT Decision. They refer to para.7 and 2 and 3. Paragraph 7 rubbishes the RCA suggestion that ATR sought joint sale of the rights. It says

> "…not only is this argument incorrect, it is also unrealistic and at variance with ATR's business plan which depended on acquiring rights that covered courses accounting for 70 per cent. of UK betting turnover."

Just pausing there, the only business plan that we have seen is the one that I took the Tribunal to this morning. I do not know whether this is the same, but plainly any response from a public authority in light of the fact that as recently of 25th July they had been referring to a document which said that they needed to have had joint sale, would not have taken this at face value and said "Let us have a look at the underlying business document, where is it? What does it say?" – not done. They make the point about what happens in other markets which, in a sense, is neither here nor there because of the doctrine of the *Klim* line of authority.

If I just look at para.11: "Business plan forming on the base of the right to 70 per cent. of the courses was sufficient." Again no sight of that business plan. The OFT – this is one of the major problems with effectively the OFT's moving target, they come up in the skeleton saying "Oh, 50 per cent., that would be fine. What about this? It says their business plan was based on 70 per cent." This is precisely why you have administrative procedure. You do not start making new points at this time. They then make another point at para.12, which is that the OFT may be interested to know that Arena, Leisure, Northern and Super 12 have each individually approached ATR indicating a willingness to negotiate separate agreements for the sale of the respective courses to ATR were the OFT to adopt a decision that had the effect of rendering the MRA void and unenforceable. Again that is looking at the future. It is effectively inviting the OFT to smash the agreement. It is certainly not evidence as to what he position was in the past at the relevant time. So all in all it is not a very impressive submission.

Then let us look at the next document that the OFT rely on, which is the observations of Arena. I invite the Tribunal to look at this in the clean version which is in RCA 11, 69. This is a lengthy document. The passage that the Decision relies on here is para.23, we can see that from footnote 455. Let us look at para.23.

> "The 70 per cent. threshold is achieved with a combined output of Arena, Northern and the Super 12 courses. The rights of certain other terrestrial courses were acquired by ATR in order to secure sub-licensing arrangement with the British and foreign broadcasters and to provide ATR with visibility on British terrestrial television, although ATR would still have been able to proceed had not all of the TRG courses sold their rights to it."

Well there is absolutely no evidence at the time, this is being put forward by Freshfields in 2000, there was no evidence at the time that that was the case. Then it says:

> "Whilst ATR would no doubt have acquired additional rights above this threshold if they had been favourable to it at an acceptable price."

Again, I do not know what the writer means by "acceptable", there was a price that had already been agreed, and we have seen in fact that Go Racing wanted to acquire all 59 rights. There was no commercial imperative to do so under its business plan. It then goes on to say at the end of that paragraph that Arena takes issue with the RCA's suggestion that absent joint selling no rights would have been sold.

I make all the same points about this paragraph as I did in relation to the ATR one, and also ask the Tribunal to bear in mind what Arena said in its s.26 response to the OFT, that we looked at this morning, where it pointed out the difficulty of most courses, other than Arena which was the exception – possibly Northern – of selling rights individually. So we say that that does not support the foundation, does not carry the weight that the OFT sought in the Decision to rely on at para.401.

Can I then look at the evidence that is relied on in the Decision on critical mass, and why the OFT rejects this 70 per cent. This is p.75 of the Decision. We have had a look at para.275 sets out what the condition was in the Rights Agreement, and then 277 it sets out Clause 2.2.2(i) but the Tribunal will have seen that they have actually misread the clause because they have not taken account of courses in common ownership with the TRG courses. It is probably not, in the context of the Decision, the worst error that the OFT has made. The evidence relied on that effectively that clause did not mean what it said is to be found at footnote 294 and again we rely on the statement, this is a letter from Attheraces dated 7th August, and I give the reference, RCA 6, 91. Perhaps we ought to look at that again. Miss Teresa Walsh once again. What she says is:

> "Having discussed this question with the relevant persons involved with the Go Racing negotiations I can confirm that it was not essential for Attheraces to have signed up with all of these courses, so that the ATR channel and website could have been viable without some of them."

There is absolutely no contemporary evidence to support that at all. The next bit of evidence relied on at footnote 294 is the Arena observations which I have already dealt with at RCA 6, 93, that is the annotated version, and 11, 69 the clean version. What I should do, because we have not seen it, is go to the Freshfield's fax relied on, the last piece of evidence relied on here, and that is at RCA 7, 101. The passage that is relied on is the first paragraph on p.4 of the Freshfield's letter. This is a comment on Mr. Atkin's and Mr. Johnson's statement about critical mass.

"Mr. Atkin's reference to the participation of the "TRG" courses takes the views of Arena out of context, Arena's comment…"

This is the comment we have seen.

"… that ATR could have proceeded without some of the TRG courses reflected the practical reality of a (hypothetical) …

I do not know why "hypothetical" is in brackets.

"… situation where a small number of TRG courses had not accepted ATR's offer. In Arena's view, in such circumstances, ATR would have proceeded, rather than losing the entire deal provided enough TRG courses had accepted it to enable the business plan to be successfully executed, notwithstanding the precedent."

As Freshfield's themselves point out about the hypotheticals, this is pure speculation, and it is speculation that finds no support in any contemporary document.

So we say it is a rather sorry tale in terms of the evidence the OFT relies on in its counterfactual, both in relation to critical mass – we have just looked at that – how they are saying you cannot read clause 2 as it was intended to be read, and also the same sorry state of affairs in relation to evidence of individual sales, which is the other important aspect of the critical mass.

THE CHAIRMAN: The trouble with all this is, the making by the OFT of these sort of findings involved making findings on material which really cries out for cross-examination. There is just no procedure for that, I suppose?

MR. VAJDA: There is procedure.

THE CHAIRMAN: Is there?

MR. VAJDA: There is procedure, but in competition cases generally what one does is one looks primarily at the contemporary and internal documents, supplemented where necessary by witness evidence. We have quite a lot of documentation which is the history of the negotiations. There is quite a lot of documentation which the bidders would have had. We see the reference to the business plan, the only business plan that we have seen is the one that I showed the Tribunal this morning. Indeed, there was an application made which has been resisted by the OFT to seek disclosure of these other business plans. In a sense that does not matter because the fact is the OFT needed to get its act together at the stage of the Rule 14 notice, not now. That is the problem that the OFT is faced with, despite the strenuous efforts of Mr. Thompson and Mr. Gregory in effectively trying to rewrite the Decision, they cannot do it. However successful the Decision stands or falls by what is in the Decision, and that is because of the procedure we have laid down under the Competition Act which was fully explained by this Tribunal in *Argos*.

THE CHAIRMAN: I was referring to cross-examination at the time of making the Decision. I was not referring to cross-examination now.

MR. VAJDA: No, there is a procedure where oral hearing applications can be made, and so on and so forth. The basic problem here, my criticism of the Decision is, as we have seen, the relevant bit relying almost exclusively on 2003 statements when it is not as if no evidence of contemporary documents, there is masses of evidence of contemporary documents, and most of what we have seen in 2003 statements is either flatly contrary to the s.26 responses for people like Arena, or in relation to ATR is making a general assertion without the OFT ever asking ATR for the underlying documents that they could have done to support that assertion. We saw this morning the very frank letter from Mr. Hogg of ATR to my client, Mr. Atkin, saying, "Why did we get to the figure of £181?" "It was on the basis of our business plan, we have these large sums of money in our eyes, 22.5 per cent. was what we could get, we can therefore pay you this amount." It is as simple as that, and if the OFT says "No, there is a different counterfactual" then it was incumbent on the OFT to find evidence, and they have not done it.

MR. VAUGHAN: I wonder if I could interrupt just for one moment? We have still an application outstanding on cross-examination, if you look in the third case management conference, 17th January 2005, p.12. But the more fundamental point, probably is it was not in the Rule 14 Notice at all, and that is one of our complaints. When we had our oral hearing we did not know about these letters at all. We only got to know about these letters when we saw RCA's Appeal in this matter. There is not a squeak of mention in these, as far as I know in the Rule 14 Notice.

THE CHAIRMAN: So you had no prior notice as to what the OFT was going to rely on?

MR. VAUGHAN: In fact, to be correct, we knew that certain people had made interventions in the course of our Judicial Review proceedings, when we were allowed into these proceedings, but we did not know what they were. We were not told what they were. There was nothing in the Rule 14 Notice which intimated anything about these, and as soon as we saw these we asked this Tribunal for leave to cross-examine these people if any reliance was placed on them.

THE CHAIRMAN: Right, well I do not think we want to cut into Mr. Vajda's valuable time.

MR. VAJDA: In a sense I have not pursued the cross-examination because it is too late. We have seen *Argos*, it should have been done years ago. In relation to self-assembly, which is individual negotiation, I have dealt with para.400. I have just made the point which we have made time and time again in our pleadings that what BSkyB and Channel 4 did on other markets is neither here nor there (bottom of p.108), it is our Skeleton at 4.16 and it is the *Gottrup Klim* point all over again. What you may do if you are going to acquire "Friends" or something like that is not going to be relevant to how you acquire rights for interactive betting. Again, I stress the point, the OFT on their market definition say that there is a separate market

for interactive rights, so even what happens on the market for terrestrial rights is not necessarily relevant to this market if the OFT are right on their market definition. That is effectively the end of section 4 of our Skeleton, and no doubt the Tribunal will read what we have to say at s.4, but I have very much my eye on the clock, and unless the Tribunal wishes me to address any particular point on s.4, I would now like to move on to s.5?

THE CHAIRMAN: Yes.

MR. VAJDA: This deals with the question, what is the evidence in relation to price increase, and again the starting point has to be the Decision, and the relevant paragraphs in the Decision are 293 to 305 on p. 81 to 85. The OFT's approach here, what they rely on, is they say that the evidence used by the RCA and RHT to justify their claim that collective selling did not increase the price is not persuasive. What I am going to do in the time remaining, if one looks at our skeleton at 5.2, is to deal with (c) which is that there was evidence of a price increase. The first point to make in relation to price increases is to look at footnote 321, p.81 of the Decision, where the OFT states:

> "The OFT does not consider it necessary to provide an estimate of what the competitive price actually is in order to find that the Chapter 1 prohibition has not been infringed."

We say again that is a significant error, because as is common ground, one has to show that if there is a restriction of competition it has an appreciable effect. So it is no good doing a Pontius Pilate and saying, "We are not going to get into this". We say you have to give some idea, magnitude of effect, because if you do not know what the magnitude of effect is how can you say that it is appreciable? That is the first point.

Then you look at footnote 322, because this is what the OFT says is:

> "The fact that Attheraces and Carlton did not increase their bids is not relevant to whether or not their bids were above the competitive level".

They then rely on, and to be fair to the OFT here, unlike in relation to critical mass they do actually refer to the Arena offers of July and September, and they rely on a letter that the RCA wrote, and if I give the Tribunal the reference to that letter in the bundle, that is RCA 14, 54. In view of the time I am not going to go to it, but we have dealt with that letter in our skeleton at 5.13 and in our Reply at 246 to 248. The considerable improvement needs to be read in the light of appendix 8. The main change was that the original Arena offer did not include terrestrial rights.

295, the next paragraph in the Decision, then rejects an argument put forward by the RCA, which is the relevance or accuracy of the RCA's comparison of the cost of the non-LBO Bookmaking Rights with Attheraces' costs, where PWC have done a very useful analysis

which Mr. Vaughan referred to, which is in BHB7. Of course, in this context I remind the Tribunal of the letter of 24th October 2003, which is at RCA7, 100, which explains that it was the basis of the business plan that led to the figure of £181 million, and it was working backwards from the 22.5 per cent. slice of the Pari-Mutuel income that was coming to ATR, and that is Mr. Hogg himself of ATR who says that, that is direct evidence as to how the £181 million is calculated. That is entirely inconsistent with the approach of the OFT.

Then going over the page, this is p.82 of the Decision, there is a dispute as to whether or not RHT had misinterpreted the prices in relation to the various bids, and there we see in footnote 325 there is an analysis and we say that the answer to these points – there are effectively two points made at 325, and the answer to both those points is to be found at paras.171 to 172 of our notice of appeal. This is effectively seeking to compare the price of the bids. Also we would ask the Tribunal to look again at annex 1 to the Reply which sets out the chronology and the prices.

Then the next point that the OFT makes in relation to its findings, because this is just going back to p.81 – these are all described as OFT's findings, and their first finding is that the evidence is not persuasive, and of course that is in a sense reversing the burden of proof, because we have seen in relation to an agreement on effect there are no presumptions, it is for the OFT to prove.

The next evidence that is relied on starts at 298 and is under the heading "Parties believe that the Courses could collectively raise prices". This is if somebody has got a wicked intent you can effectively do him for that, but the difficulty with that argument is that even if there was, to paraphrase what the OFT says, a wicked intent, that is evidence of intent, not evidence of effect, and we have made that point at 174 to 194 of our notice of appeal, and we do not in fact accept the OFT's analysis of that evidence, and the point that we have made time and time again, and I have made time and time again today, is there was a common interest in relation to ATR and the courses to maximise revenue for the reasons that I have indicated.

Can we then move to the next question, which is let us assume for the moment that the OFT was able to prove an increase in price, and that is what we deal with at 5.3 to 5.20 of our skeleton, and what I have done is looked at the evidence in the Decision and the point we make again at 5.4, because a lot of what is in the skeleton and the defence are points that were not made in the Decision and are, in any event, bad points for the reasons that we set out in the skeleton.

I said I am not going to say anything on veto rights, I do not want to go back on that, but I make the point at the bottom of p.16 – I have made it already actually – that one cannot decide the veto point before one decides what the critical mass is, so that is plainly an error.

And so far as the veto power of RHT is concerned, at 5.16, I did not in fact – yes, I did, I took the Tribunal to RCA 15 and 74, which was that the board felt obliged to follow the Decision of RHT which had come out in favour of the ATR offer.

We then go to para.5.21 in the skeleton. Let us assume against both me and Mr. Vaughan that the OFT has in fact proved that there was an increase in price as a result of collective selling, and let us assume also the OFT has proof. The question is, is that anti-competitive, and there is remarkably only one paragraph in the Decision that deals with that, and if I could invite the Tribunal to look at that on p.85. This is under the heading "Increased Prices of Competitively Neutral Transfer from Attheraces to the Courses".

> "Whilst the OFT aims to use its power to ensure that markets work well for consumers a finding of direct detriment to … consumers is not a condition for finding infringement of Chapter 1."

And we agree with that.

> "The key legal question is whether an agreement prevents, restricts or distorts competition on the relevant market. That market need not be a retail market."

Again we agree with that, although subject to the point that, rather importantly, the OFT have omitted the word "appreciably", which of course is an ingredient of the infringement.

As we say in the skeleton, at 5.22, the Decision devotes just one paragraph to explain there was an anti-competitive effect, but the Decision is gravely defective in explaining how competition on this non-retail ;market was prevented, restricted or distorted. Indeed it is totally silent on this point, and this is a point that goes to rule 15 of the Director's Rules. There is no reasoning whatsoever. To say that competition can be prevented on a particular market does not mean that it has been prevented, distorted or restricted, and we say that the complete absence of reasoning is fatal not only because one has to show how competition has been prevented but how that effect was appreciable, and we go on to make the point at 5.23 that this is not what might not in the old days be called a sort of pleading point or a technical point on lack of reasoning because, as we pointed out, and Mr. Vaughan has pointed out, competition law is not intended to mend bad commercial bargains, so it would have required quite full reasoning, supported by evidence, as to why an increase in price had an appreciable anti-competitive effect and what that effect was.

So that is all therefore that I am saying on price, and I now come to the second aspect of the OFT's s.2 case, which is the incentives point.

THE CHAIRMAN: Supposing they had proved an appreciable increase in price. What would you8r position be in relation to your para.303 point?

MR. VAJDA: Our position would be exactly the same because they still have not explained how competition has been prevented, restricted or distorted. It is no function of competition law to interfere in commercial bargains, so there are two defects, if you like, in 303. The first in a sense flows from the earlier point that they have not begun to work out what the increase in prices is, but even if they had in fact indicated what the price increase was they would still have to explain that distorted competition, and the point we have made in our pleadings and Mr. Vaughan has made in his – merely because somebody has paid X as opposed to Y does not mean that there has been distortion of competition.

PROFESSOR BAIN: Does this depend on the difference between the competitor price and monopoly price being a pure economic rent?

MR. VAJDA: Yes.

THE CHAIRMAN: What you are saying is if there is a pure economic rent there it does not matter in the end who gets it?

MR. VAJDA: Yes.

THE CHAIRMAN: That is the point we have to consider, whether you are right.

MR. VAJDA: Yes, and again in this context one has to remind oneself of what Mr. Hobb said in that letter of October 2003, how he reached that price, which was working backwards from the ATR business plan.

Moving on to incentives, that is dealt with in the Decision, and we have set this out at 5.25 onwards, and the first point that I would like to make here is the fact that there is no incentive in the agreement does not necessarily mean that there is a restriction of competition. What is being said is you are not being given, if you like, four months related pay. The bar until very recently – you were not allowed to accept a contingency fee, and I do not think anybody has suggested that, in a sense, barristers were not competing amongst themselves even though you were not paid by results. So the fact that 94 per cent. of the income is fixed and 6 per cent. is what you might call performance related, there is no presumption that that is not in any way anti-competitive, you have got to prove it, and some arrangements may have a performance related aspect but some may not, and again what the OFT says in their skeleton as to what may happen in films or whatever, or we are dragging in new material that was never in the rule 14 notice or Decision is neither here nor there. They are all different. One has to look at what the position would have been at this time in this market, and that is what we deal with at 5.27, because there is effective a second counterfactual that comes into play here which is absent collective selling there would have been incentives negotiated by the buyers, and we say that is another counterfactual.

Assuming the Decision is correct that absent collective selling there would have been individual deals, it does not follow that those individual deals would have had incentive clauses, and by incentive clauses effectively what we are saying is – what the OFT is saying is you have got to have a sort of performance related element, you cannot have a fixed payment, because a fixed payment – a brief fee does not incentivise you sufficiently.

What we say again here is you need evidence. These cannot be theories dreamt up in Fleet Bank House. There is nothing in the Decision in relation to this. The nearest the Decision comes to relying on evidence is to rely on the Arena response to the s.26 notice, and if we can just look at the Decision, para.312. It says:

> "This anticipated distortion of incentives is supported by evidence provided to the OFT. In the context of another case …"

That was the case against BHB, and this is the Arena response to the s.26 notice. (I am grateful to my friend.) It is not the notice that we have seen this morning, it is another notice. Where one finds it in the documentation, and we have set it out in our skeleton, is RCA15 at 96. Perhaps we should just look at that. I think it is the same one. It is a different question. It shows I have got to be very careful to accept any suggestion from my friend! I am trying to find the relevant passage. I have got the wrong reference, so put that away and let me do it without reference to the document. We will try and correct that tomorrow.

The point that we make in the skeleton is the fact that ATR had an understandable desire to alter the configuration of the courses' output, in other word to change the fixtures, does not mean that in the absence of collective selling bidders would have wanted, let alone obtained, incentive provisions, and in this respect what is important is to look not only at the position of the bidders but also the courses, and what we say is that what the courses wanted were fixed fees, and if I can just give references to three courses who chose GG over Go Racing, and the reason that they chose GG was they were going to get a higher fixed payment, and the reference is Fakenham, which is BHB7, flag 4B, flag 3. They refer to the guaranteed £32,500 per fixture, not an incentive fee but a fixed fee; Stratford, which is at flag D, flag 6, £31,000 per fixture; Taunton, flag D, flag 7, £31,000 per fixture. What of course was going on here, and this is the point we make at 5.30, that from the point of view of the courses they wanted a fixed amount because for the courses, unlike for the ATR, it was not all win-win because the courses had to take account of the fact that they might lose other income. They had to do a trade off and that comes from the evidence of Mr. Gundill and Mr. Davis, which we refer to at 5.30, and indeed one of the reasons that 10 courses were so dissatisfied with the ATR deal was that they were not getting a sufficient amount of money, and what the courses wanted was certainty. So the point that we are making here is that no course, whether individually or

collectively, would have wanted to do a deal, this type of deal, an interactive deal, other than on the basis of there being a substantial fixed payment, and we say that the evidence of those courses that entered into an arrangement with GG supports that. So we say that there is nothing in, and there is no evidence to support – indeed the evidence before this Tribunal goes the other way, to support the OFT's counterfactual that had there been no collective selling one would have had lots of agreements with courses so that Fakenham would have said, "Oh yes, we don't need any fixed payment", or "We need only, say, £10 fixed payment of the rest of it will simply be linked to the profitability of ATR".

So that is why we say the counterfactual does not work.

I do not think I need add anything to the next points. Just on p.21, if I can correct a couple of references and add in a reference. At 5.33 the reference should be to RCA4.66 not 5.66. The reference to the email is RCA17, flag 1, exhibit 4 to Mr. Atkin's third statement. Then the reference to the OFT skeleton is erroneous and should be para.VI.48.3 not Roman IV. Then we say at the top of p.22 that, in a sense, this is all beside the main point in the case, which is that neither the proposal to the BHB for change in fixtures nor the email is evidence of that the lack of individual revenue sharing had an anti-competitive effect, let alone an appreciable effect on non-price competition.

Then the point about the £18 million guaranteed payment, together with other incentives, could have generated significant changes in the courses' behaviour. If we just look at the Decision, and this is paras.330 to 331. What the OFT have done there is they have latched onto a statement by the RCA which says that incentives arising from the notified agreement may be limited, those incentives in conjunction with incentives arising from other areas of the courses' business can be powerful. But we say at 5.37 of the skeleton that what the RCA appellants were saying was that there were incentives from other income streams which could justify an additional fixture, but it does not follow that the perceived absence of incentives in the MRA is an appreciable restriction of competition.

We then have a lot more embroidery and elaboration of the Decision in the skeleton, and defence about fixed incentive schemes and BAGS and all the rest of it we can forget all about that, because that is plainly inadmissible at this stage.

So that takes me really to the end of incentives, and then I come lastly, and I will just say a few brief words on exemption. We accept, in relation to exemption, that there is an evidential burden on the applicants to produce evidence, but what we say is that there is no dispute on the evidence other than in relation to reduce transaction costs, and that is where the OFT does not accept our evidence, and we say the OFT is wrong to do that. But critically important, on the question of income stream, there can be no dispute that the MRA produced

an income stream for the courses. The issue, and this is an issue purely of law, is whether that income stream constitutes a benefit for the purpose of the first condition. So there is no question of burden of proof here or anything like this. The OFT is either right or wrong as a matter of law, and we say they are wrong as a matter of law. It is simply a question of law for this Tribunal to decide whether the income stream constitutes a benefit, and we have set out in our written observations why that is the case. Again for the Tribunal's note, at the bottom of p.23, the relevant passage in the Decision on income stream is quite short, paras.352 to 353, and we refer over the page, p.24, to the UEFA Champion's League Decision, and I am not going to go to it now, but the reference is RCA21 at flag 6, and then we refer to the Nice Declaration which was endorsed by the Commission in the field of competition law, and the Nice Declaration which is referred to at para.6.5 is RCA21 at flag 7 and I come back to the point that I made this morning: why is it that the Governmental authorities look favourably on the sale of rights by sporting bodies, it is because sporting bodies are not able to use their assets in the way that the Tescos of this world are able to do, and this is particularly true as we see in the horse racing industry. They need to have the income to provide the facilities and the quality of sport that people at the beginning of the 21st century wish to enjoy.

The OFT then says well, you cannot rely on solidarity because in fact the small courses did not do terribly well out of the deal and it is perfectly true in a sense the small courses did not do as well proportionately as the big courses and that is why some of the small courses went to GG Media, but it is a fallacy to suggest that because of that the principle of solidarity was not achieved because the point that we make here, and this of course proceeds on the basis that the Tribunal agrees with the OFT that we are wrong on s.2, that if one looks at, and if we take it up at para.6.9 of our skeleton, if you like the model of competition that prevails in Fleetbank House is well everybody can do what they like, and that it would mean that Channel 4 could just have picked off, as they put it, a handful of courses from the 42, that is the scenario that the OFT would have liked, so you do not need to deal with all these people. That is precisely the point that we, the parties, have made in relation to the exemption, that if that is the analysis, if that is the right counterfactual then plainly this agreement contributed to solidarity because it meant that there was an income stream available to all the courses instead of an income stream being available simply to the Super 12 plus a handful of others. That is all I want to say on income stream.

Reduced transaction costs over the page, p.26. Can I just give a couple of extra references of evidence on reduced transaction costs? We refer to the s.26 responses. What is particularly unfortunate is that the OFT relies on the response of Ripon under the s.26 Notice, footnote 414 to para.361, but it ignores the responses of every single other course, and that is

not a proper way to proceed. If I just give you two, we looked at some this morning, Arena at p.11 of its letter of 18th January 2002 and Beverley, which was one of the smaller courses we looked at which is B7/2/C/3. Also, I remind the Tribunal of the GG Media document which I showed the Tribunal earlier this afternoon, which is that they were not going to negotiate with 26 courses, that is RCA 15, 84, and I would also finally remind the Tribunal of the briefing paper which is RCA 5, 74 which Teresa Walsh so helpfully endorsed as recently as 25th July 2003, as expressing the sincere view of ATR. That then deals with reduced transaction costs.

In relation to indispensability, in a sense the key point here is that because the OFT committed the error of law in not recognising the income stream as a benefit they did not consider it under indispensability. But plainly if the income stream is a benefit for the reasons that I have indicated then there would be no other way in which every course would have obtained an income stream, and that is the point that we are making at 6.15 and following. In this context if one looks at para.429, this is in fact in relation to the transaction costs being indispensable also to reduced transaction costs, because that is the other point that is made. 429 is flatly contrary, it says: "Collective selling is likely to be particularly harmful to such a company". Just read that on one piece of paper and then read what is said on the briefing paper, which is RCA 5 at flag 74 on the other, when Teresa Walsh was endorsing that, and saying that is the way forward for ATR, Arena could not raise the £60 million unless it had been done in the way that it was done.

Finally, on elimination of competition, if I could give the reference to *TPS*. *TPS* was the Decision that was appealed against in *Metropole* and the reference is RCA 21,8. The short point here on elimination of competition is that the OFT have really missed the big picture completely because this was a new pro-competitive service. This is where you do balance out under 85(3) unlike under 85(1), and for the reasons that we also add in our Skeleton we say plainly this condition was satisfied as well.

That brings me to the end.

THE CHAIRMAN: Thank you very much indeed, Mr. Vajda. Mr. Vaughan, we will hear from you tomorrow.

MR. VAUGHAN: Tomorrow morning, yes.

THE CHAIRMAN: Half past 10?

MR. VAUGHAN: Yes. Thank you very much indeed.

(Adjourned until 10.30 a.m. on Tuesday, 15th March 2003)