IN THE COMPETITION APPEAL TRIBUNAL
Victoria House,
Bloomsbury Place,
London WC1A 2EB

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

15th March, 2005

Before:
THE HON. 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 and Mr. Sam Szlezinger (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.

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HEARING: DAY TWO

MR. VAJDA: I am aware that the Tribunal wishes to hear from Mr. Vaughan and not myself.

THE CHAIRMAN: Have another day, Mr. Vajda!

MR. VAJDA: If I could have another minute and give one reference that I was unable to find yesterday and that is 5.28 of our skeleton at p.20. This was the s.26, the Arena response of 9th October 2002, and it was in fact another s.26 Notice, and the reference is RCA 11/55 and the reference that is given in the text is wrong, and so that should be struck out, it is not 15/96, it is 11/55.

THE CHAIRMAN: Thank you very much.

MR. VAJDA: The only other matter in terms of reference is if one goes to 2.2 of the skeleton which is on the point of whether or not there was a collective sale. We said that our submissions are set out in the written pleadings. If I could simply add, we have asked the Tribunal in that respect to look at the s.26 responses of the 16 courses that were sent the GG offer, but went for the RCA and the reference there – we looked at some of them yesterday – is BHB 7, 4C, and the point there is that you can see they each of them give their own reason why they went for the RCA rather than the GG offer.

THE CHAIRMAN: Thank you very much, Mr. Vajda. Yes, Mr. Vaughan.

MR. VAUGHAN: May it please you, Sir, madam. What I propose to do is to take you through very briefly what ground we are going to cover in the form of submissions and if I could hand in **this**, which is really the ground we are planning to cover. (Document handed to the Tribunal) I am not necessarily following this order in my order of presentations but it shows the conclusions that we hope to persuade the Tribunal to reach. Basically, we are trying to establish the following propositions, but obviously you have to see our Notice of Appeal and all the other documents for more detail about that.

The first point is that the investigation was totally inadequate, and in particular they did not examine at all the Rights Agreement in the context of British Racing at all, and the need for British Racing to commercialise pictures and data. They were fundamental points which we made, as one will see, in our oral presentation and our written presentation at our oral hearing in response to the Rule 14 Notice, and there is not a scrap of mention of that in the Decision. Whatever the relevant market is it is fundamental to an appreciation in competition terms to look wider than the relevant market to see the context in which it all appears. Not doing so is known as the "zero one fallacy". Sir John Vickers has written an article in the European Competition Law Review, March 2003, in which at p.100 he describes this zero one fallacy; that is to say, when you are looking at the market it you just stop at the market and do not look at anything wider – it is all or nothing, zero one.

First, they did not look at all at racing as a concept, as a sport in this context. Obviously, it is extremely important in our submission to look at that. This was all dealt with in great detail in the notification, as you have already seen, by all the parties but that was wholly disregarded in the Decision. That is a fundamental error.

Secondly, the procedures they adopted were defective in the extreme. It rejected certain evidence without explaining why it did so – for example, the notification matters. Not putting contrary arguments to the relevant parties, that is particularly the 2003 statements to us, either in the original Rule 14 Notice, or an amended Rule 14 Notice, an additional Rule 14 Notice, which they can do, and which, for the first time appeared in the Decision; appeared not in a transitory way but in a critical way, as Mr. Vajda has demonstrated to you yesterday. These procedural errors led to fundamental substantive errors, particularly in his reliance upon these 2003 statements as almost the sole evidence of effect in this case, as we will make good.

The third point is the burden of proof, and the standard of proof. They entirely accept they have the burden of proof of showing this case, but as we will show you – and as we dealt with in our Notice of Appeal – at various significant times they have reversed the burden of proof. They said we have not produced enough evidence on certain points and/or they are not convinced by our evidence on these matters. That is not good enough; they have to produce convincing evidence to show that the Decision is made out.

In this cont ext they have also moved certain things from breach to exemption, which is unjustifiable, we say, and therefore reversed to some extent the burden of proof – the particular matter on that is solidarity which we say is a critical part of the understanding the rates, that is that all parties hang together, and that is particularly true in racing. It is not just the horse and the jockey, it is the breeder, the trainer, the jockey, the punter, the spectator, the stable lad, and everyone is part of that. Everyone expects to get the benefits of the money that flows into the industry flowing out again in terms of prize money and better facilities in this way. One of the factors in this case is that the money that the courses receive was going to go for better prize money, which in turn meant better horses running, better racing, better betting – the virtuous circle described in the notification.

The next point is that the evidence was totally inadequate in order to back up their case. Many times it states conclusions without any evidence at all, or sufficient evidence to reject the evidence. The first point is the notification, which I have already made. Everyone who was notified – and that we shall show you was a signed document, signed by the chief executives of all the companies, not only ATR but the companies that made up ATR, BSkyB and so on, as well as the Racecourse Association, and they all agreed that this was a good thing, this agreement. Nobody complained about the price at all. Nobody complained about the method by which it was organised. Indeed the opposite; they were saying that they needed to form this agreement in this way in order to achieve this result, and that is clear from the notification.

All that was rejected simply on the basis of the 2003 statements, which we will say are inadmissible, and if you take those out, you strip those statements out ----

THE CHAIRMAN: Inadmissible; why should they be inadmissible?

MR. VAUGHAN: Because they were not put to us at all. Nobody put those statements to us at the appropriate time, we did not have a chance to deal with them, and therefore if you strip them out the notification is the only thing that remains; if you strip them out there is no effect on the – the effects established in this case.

The second particular thing is the s.26 notice. We in our answer to the rule 14 Notice in our written observations made the point that what they were saying was completely contrary to what was said by almost all courses in the rule 26 notices. So even before the Decision they knew this was an issue in this matter, but they only picked the notices which supported their case; they did not take any of the other notices which did not support their case, and we will come back to that in a moment.

Thirdly on this matter, they did not deal at all with what was said at the meetings with the OFT by the racecourses, which we have dealt with in our reply in particular because we did not see those documents at the time of our Notice of Appeal, only subsequently, when we complained bitterly about not seeing these documents, and which show very much that the ATR forces consistently were supporting this until the situation changed and they decided to come out against the agreement.

The next point is the reasoning is totally inadequate in this matter, and I will come back to the legal obligation to give reasoning, and the way in which they have been defective in their reasoning in this matter.

On more substantive matters, they have got the wrong product. They have taken the non-LBO betting market as the relevant product but, as we know, that was just one bit of the ATR agreement – significantly, but only just one bit of the whole agreement – and they did not take into account anything other than that in that respect, and they did not take into account at all the term sheet agreement, which was the data agreement, in that matter. That was an agreement they knew about, they were told about, we told them about it, but they did not take any notice at all about that, and that obviously has consequential effects, which I will come on to later.

On market definition, we have shown in our Notice of Appeal and the other documents that the market definition was totally inadequate. There was not a counterfactual price set out in its analysis which it needs to have in order to be able to carry it out properly, and it does not mention substitutability but only the value of the rights. The issue in the slip test is substitutability, and all they rely upon is that the buyers value these rights highly. Of course that is right, and that is why they paid these sums for it, they were important rights, but that is not the test, and if that is the test then everyone who values anything creates a different market; and, indeed, it adds in subjectivity which, in our submission, is inappropriate in this context. They have not shown any anti-competitive effect at all. They have not shown any price increase at all; all they do is to assume that because they bid – sold collectively therefore the price must automatically go up. That includes -- if one was looking at the model that we have put forward which, incidentally, is the same model that they put forward in their analysis, they do not take into account fundamental assumptions which they ought to have done.

On non-price competition they are equally defective, and even if they did show that the price went up because of collective buying that is not an answer to the whole question; the question is, what is anti-competitive conduct? And merely by putting the price up, increasing restriction, is not necessarily in all circumstances wrong, and *Wouters* and cases like that show that is clear. The mere fact that it restricts competition does not necessarily mean that it does, but it has an anti-competitive effect when you take into account necessity and the other considerations.

They have failed to take into account fairly fundamental aspects of competition law. Basically, competition law is not there to unravel, whether by a competition authority or by a private individual, agreements which turn sour in order to unravel them. Secondly, they view the whole thing as, as it were, a cartel of widget makers, which everyone accepts would be unlawful, but that is not the case here, and we will take you to *Premier League* where that matter in the Restrictive Practices Court was dealt with extremely succinctly and correctly, in our submission, and we rely very much on that case. One of the strange things in this case is that no mention at all is made of the *Premier League* cases, which is the leading case on this aspect. Also they condemn as anti-competitive things that had no effect at all upon ultimate consumers; the only parties who even imaginably had any effect at all were parties to the agreement, and we will show you that competition law does not concern itself with parties to the agreement and damage to parties to the agreement unless there is an element of foreclosure in the market, and nobody suggests there was any foreclosure in this particular market.

Finally, they failed to take into account the legal principles in particular in the *Wouters,* the *Gottrup-Klim* and the *Premier League* case. *Wouters,* although we refer to it extensively in our submissions on the rule 14 Notice, is not mentioned at all in the Decision; *Gottrup-Klim* I think justifies two footnotes. But those are essential critical cases, and the reasoning has to explain why those cases either are not relevant or whatever their position is on that, but from the Decision we do not know anything about that.

So basically that is the outline of the points I would like to take you to, but not necessarily in that order.

The first point really is British Racing, and what I would like you to do is take you very shortly to the submissions that we made in the other rule 14 notice, which is the one against the Jockey Club and the Horseracing Board about governance, which the Office of Fair Trading discontinued and we say won on that matter. But it does not really matter what the result was. We set out there and have annexed in BHB4, tab 39, as it were, a description of British Racing, and part 9 is British Racing, and then there is another part which deals with part 8, the governance of sport, but I would like to take you very briefly to show you the sort of things which we say are relevant to consider this case as much as the other case. I am not going to take you through it but just to refer to you what seem to be the critical passages of that.

First of all, in 2015 we point out the fact that British Racing is much wider than just merely the race; it is the whole episode from the birth of the foal to the birth of the next foal or the death of the horse and so on in this way, and indeed it goes on much longer because breeding obviously is a very long-term basis and involves many generations of horse in order to produce the right type of horse who might end up winning today at Cheltenham or not, as the case may be. We point out that everyone who has looked at this question looks at horseracing as being, in 2017, interlocking activities and sectors involving the whole thing. So when you are talking about the sale of rights of a race you are talking about the sale of the rights of not just any old race, it is a race of BHB/British Racing, quality, and all the evidence agrees that British Racing is second to none in the world. In the other case we had a lot of great experts from France and America who made the same point about the thing; it is the variety and the width and the depth of the racing and the year-long activity that is involved and makes this big difference.

In 2018 we talk about the breeding matters, and heritage is the next matter, and in 2020 the importance to punters makes it very important in this way, and indeed, as one will see later, it is the sport that is bet on probably more than any sport at all. We make the point in 2021 that although it is referred to as an industrial product it is not just any old product in the same way. It goes on in broad terms, 2022 showing the economic importance of racing in the context of this matter. 2024, the importance of the integrity, that is the integrity of the race but much wider than that; competitive balance. “D” on p.13, solidarity, and this is where we explain what we mean by solidarity. The OFT seems to see solidarity as being something that only involves jockeys and horses as a sort of glue that tethers the jockey on to the horse, or something like that. That is the complete travesty of the doctrine of solidarity – it is a much wider concept. There are various quotations in the footnote on the need for solidarity in sporting events. It is really that everyone hangs together and everyone is inter-dependent, and everyone expects that they will all get benefits out of the whole thing. That is one of the essential reasons why BHB is so concerned about this case, because the moneys that are coming in from here are going to be moneys which are going to better the prize money, and so on, in the virtuous circle, which everyone in the notification accepted as important.

It is also important, the role of the BHB in the financing of British Racing. It has, as one of its main objectives in its statutes the objective of ensuring money coming into the industry. It has a duty to ensure (225) proper financing of the industry. BHB has this particular role and 2049 deals with the financing of British Racing. You have heard little bits about the Levy Board. It describes the Levy Board – my friend described it as a State aid, I am not sure that that is right. It is money that is taken from the bookmakers, that is taken from the bets that are placed and then divided up amongst the racecourses in order to help in other activities, such as veterinary science and various other matters in order to better British Racing. The problem, as one saw from the notification, is that this was going to come to an end, and therefore British Racing was going to be left to stand on its own feet. 2053 and so on deal with that. Adequate money coming into racing is an extremely important matter for racing generally. We deal with the development of British racing, and then at BHB 5, tab 42 is Mr. Nichols, the chief executive, who is here today – and missing the first day of Cheltenham – and so if you have questions on this whole area he will be able to deal with it. His witness statement at BHB 5, tab 42 deals really with the importance of this whole question in that way.

The chapter before this, in 4, 39 deals with the governance of sport generally, and we include there a large number of statements by various bodies who emphasise the importance of sports hanging together, and particularly if one looks at p.5 of that, at para.207F, it has a financing role. Sporting Bodies like BHB have a financing role for maximising and distributing revenue for the development of sport is support for the principle of solidarity. When we say "maximising" that does not mean an anti-competitive price, it means getting as good a price as one can for one's product in this sense. So that is the essential question. All companies intend to maximise their profits. Not all companies behave anti-competitively in doing that.

Basically, one of the questions you have to decide is did everyone overstep the mark? When looking to get full value or maximising the value you need to ensure that the sport is properly run. If the sport does not have enough money coming into it everything suffers, security, integrity, everything suffers in that way; and the Government and everyone has recognised the importance of racing standing on its own feet, and replacing the levy with commercial exploitation of this matter.

The only other point I want to make about British Racing is, and we deal with this in our Notice of Appeal in paras. 91-104, is basically that we had to fight hard to get into this case at all. The OFT did not want us to intervene in this case and we had, as we describe there, to go to Judicial Review in order to get the right to establish and make our written observations, and oral observations in this matter. It might be quite relevant, if one looked at bit at what we said when we were given that right, and that is in our observations to the Rule 14 Notice, which is at RSB4, 37. These are our written submissions in reply to the Rule 14 Notice which was issued, and this is what we did, having got the right to make our written observations. I will just take you quickly through it. At paras.96 –104, we essentially make the same points there about *Gottrup-Klim* and *Wouters* as we did in our Notice of Appeal and there is no mention at all of that in the Decision. We point out in 105 the importance of looking at the sporting arrangements when one is looking at competition law (paras.105-136). Then we talk about defects of their approach on restrictions of competition. Interestingly enough we make the very point that Mr. Vajda makes about the absence of evidence of effect, on p.66 – para.114 (iv). We make the very point that Mr. Vajda makes that there is not a scrap of evidence that the price was increased by elective buying in that way, or indeed that it was unlawful.

So they have known about all these issues before they took the Decision and nowhere have they either dealt with it or provided any answer to those matters. That is basically the background. When one is looking at the context in which this appears it is not a little narrow context of the ATR agreement, or indeed a little subset of that agreement, British Racing is the context and a sport, which is the context in which this matter has to be looked at.

We set out in our skeleton, and this is moving on to the next point, at BHB 8, paras. 2, 3, 4 and 5 basically what we say is the duty of the OFT in a case such as this. Basically, it is a pretty obvious duty just as much in European law as in English law – para.2.

They have to carry out their investigation in a fair and objective manner, examining all the available facts and evidence, not just cherry picking bits that suit them in this matter. They must reach reasonable objectively justifiable decisions on the basis of relevant and not irrelevant considerations, based on relevant facts to support its conclusions. It must not disregard relevant evidence because it does not fit with its analysis. It must satisfy its burden of proof by showing with strong and convincing evidence that its conclusions of an actual anti-competitive effect are unassailable, and that it has not rejected alternative explanations other than on the basis of compelling evidence. So that is basically building up its public law duty as a body with its duty to the burden of proof and the standard of proof.

The second point, it has to provide sufficient reasoning to show that the matter has been investigated and evaluated in accordance with proper procedures. That is the right to be heard, making available all documents and evidence to be cross-examined or dealt with accordingly, and to explain his conclusions including the evidence on which they are based so that everyone can know the basis of the Decision; and know the reasons why submissions or evidence has been rejected.

It can subsequently explain or amplify the reasons, but cannot put forward – this is the point Mr. Vajda makes and *Argos* makes – new facts or evidence, particularly when not put to the Appellant in the course of the administrative proceedings prior to the Decision in support of its decision. On reasoning, the case of *ENS – European Nights Services* – is of particular relevance. That comes in at bundle 22, tab 11 – para.95 to provide authority for those propositions.

> "It is settled law that whilst, in stating the reasons for the decisions which it takes to enforce the rules on competition, the Commission is not required to discuss all the issues of fact and law and the considerations which have led it to adopt its decision, it is none the less required under Article 190 of the Treaty …."

and the same goes for English law under the Competition Act:

> "… to set out at least the facts and considerations having decisive importance in the context of the decision in order to make clear to the Court and the persons concerned the circumstances in which it has applied the Treaty.

and then various cases are given as authority for that.

> "It is also clear from the case-law that, other than in exceptional circumstances, the statement of reasons must be contained in the decision itself, and is not sufficient for it to be explained subsequently for the first time before the court."

and that is the *Argos* point. So it is not just an English quirk that provides that, it is the competition law and the procedures that apply just as much in this court as they do ----

THE CHAIRMAN: That last sentence suggests that the right of the OFT to defend its Decision is rather more limited than I had understood you to accept. I thought you earlier indicated that they can indeed explain their Decision; what they cannot do is adduce, as it were, new evidence in support of it.

MR. VAUGHAN: That is right.

THE CHAIRMAN: But para.95 suggests that they cannot even explain their reasoning which must be free standing and self-explanatory.

MR. VAUGHAN: It cannot explain the basic Decision.

THE CHAIRMAN: I thought you accepted that they could. So are you changing your position slightly on that?

MR. VAUGHAN: I think I probably am, yes. I think probably the paraphrase is probably not correct – my paraphrase in 3. I probably go further than that and say you have to follow *European Night Services* – it is the law, as it were. I think that is the same as *Argos*.

THE CHAIRMAN: Well I cannot remember whether it is or not, but taking para.95 at face value, it is a fairly restrictive circumscribing of what the OFT can do, is it not?

MR. VAUGHAN: That is right, because the Decision is the thing one is looking at. The trouble is these cases are – the Decision has long since past and is sort of having a pleading battle going on, but basically the Decision is the critical thing that one has to be looking at, and indeed I can give you a reference to **Bellamy & Child**, para.12.126, which I can hand in – I do not want to read it to you – if you can put it in the appropriate bundle, at the back of bundle 16, tab 22 – sorry, 136.

THE CHAIRMAN: This needs to go into divider 16?

MR. VAUGHAN: Divider 16, can you put it at the back of that. Basically it makes the same point and sets out what the law is. But it is, as you remarked, Sir, circumscribed, the ways which they can extend. Obviously they can defend themselves but what they cannot do is advance a new case in that way.

We also in passages 4 and 5, as it were, set out what we say are the roles of the Tribunal in this context. Basically your role is to review the Decision and to form a view whether it can be justified or not, and supported or not, on the reasoning ----

THE CHAIRMAN: In a sense, it is a sort of Judicial Review application, is it?

MR. VAUGHAN: Yes, a slightly extended Judicial Review.

THE CHAIRMAN: Is that a fair analogy?

MR. VAUGHAN: It is a bit wider than Judicial Review. It is a full appeal but it comes close to a Judicial Review. It is closer to a Judicial Review than a trial, and it is an appeal so it is not a first instance decision. One of the points they repeatedly make is that it is for you to weigh up rival evidence, and this is point 5 of our skeleton; it is not for you, in our respectful submission, to weight up the evidence in that way, it is to say, given all the evidence there is, is the decision justifiable to the requisites ----

THE CHAIRMAN: Given all the evidence that the OFT had.

MR. VAUGHAN: Or should have had.

THE CHAIRMAN: Or should have had.

MR. VAUGHAN: Well, “had” will do for the moment.

THE CHAIRMAN: I should have thought "had" is the highest you can reasonably put it.

MR. VAUGHAN: Yes, yes.

THE CHAIRMAN: Given all the evidence that the Tribunal had, did it reach a decision which it could reasonably have reached?

MR. VAUGHAN: No – sorry, with respect, no.

THE CHAIRMAN: All right. I want your help on this.

MR. VAUGHAN: Did it reach a correct decision? It is not a reasonable test at that stage, it is did they reach a correct decision, because otherwise one could sweep all sorts of things under "reasonableness" and then it would become irrational, is the decision irrational, and clearly that is not the right test in this way.

We have set out, and I do not want to repeat in any great depth, burden of proof in our Notice of Appeal, and at paras.126 and onwards we deal with that. The only significant difference between us is on this question of necessity, and we say, with Mr. Vajda, that where somebody is relying upon it was necessary to do something, first of all that only becomes necessary if it is potentially anti-competitive to do at all. But if you get to that stage we say it is, at most, an evidential burden, to provide an explanation, and exactly this point was dealt with by Mr. Justice Moses in the *Marks & Spencer* case, one of the several cases which were dealt with in that, and can I take you to *Marks & Spencer* at 22, tab 15. The issue was in a slightly different context, it appeared. It was inevitably a VAT case, almost inevitably a VAT case, and the issue was where it was contended that it had been passed on, the benefit of the unlawful tax had been passed on, the question was who had the burden of proof, as it were, in that situation. Mr. Justice Moses in that case, in para.87:

"In his Opinion in that case …"

That is *Les Rils de Jules Bianco*, I think:

"… did, however, envisage the fiscal administration being able to produce sufficient evidence to call for rebuttal by the trader. If the burden is not on the applicant to show that the charge has not been passed on, does it lie on the Administration to show that it has been passed on and that there has been an unjust enrichment? It seems to me that, if the burden is not initially on the applicant [that is the taxpayer] it is for the Administration to raise this issue and if it can to prove it. It may, however, produce evidence which points to there being a passing-on or unjust enrichment sufficient to call for rebuttal by the claimant. The evidentiary burden may thus, as is common-place, shift during the case. The question at the end of the day is whether on the evidence as a whole the charge has been passed on so that, in the light of any profits it is alleged may have been lost, repayment in whole or in part would result in unjust enrichment. …

It seems to me obvious that in cases where the Commissioners have established that a wrongly charged tax was passed on and that is all the evidence in the case then the Commissioners will succeed. But if the taxpayer …"

And this is what Marks & Spencer were doing in that case:

"… asserts that it has suffered damage in passing on the excessive charge and produces material on which that assertion is based then the Tribunal will have to consider that material and decide whether, in the light of that material, the Commissioners have made good the defence of unjust enrichment. I am not sure it assists to speak of an evidential 'burden of proof'. It is no more than a, possibly, convenient shorthand designed to indicate that unless the trader asserts that it has been damaged and provides some material for the tribunal of fact to consider, the Commissioners will succeed merely by proving that the tax was passed on. There is, perhaps, a danger in referring to shifts in the burden of proof. A reference to that shift may obscure the proposition that it is for the Commissioners to prove unjust enrichment if it can and that burden never shifts. In raising the issue of damage in consequence of having passed on the burden of a wrongly charged tax and producing material to support that assertion, in my judgment, the trader does not take upon itself any burden of proving that it was not unjustly enriched."

So he basically takes the point which we do, that the burden effectively never shifts; it requires an explanation and raising of matters which cast doubt upon the other matter, and that, in our submission, is a correct statement of the law in competition law just as much as anywhere else in that way.

We then in our skeleton, and this is on to a new point – this is the point that we developed at the end at para.10 of our little brief opening, and I think it is quite important to go through this in a bit of detail. I think these all should be pretty well uncontroverted statements. Competition law places great respect to freedom to negotiate a commercial agreement unless it has an appreciably foreclosing effect on third party suppliers or customers which the OFT does not allege in the Decision.

THE CHAIRMAN: I am sorry, where are you reading from?

MR. VAUGHAN: Paragraph 9(1) of our skeleton. Just to show that that is not just our special pleading, as it were, if one looks at RCA22.16, these are the passages from **Bellamy & Child** one relies on. This is basically Professor Bain's point about the transfer. It is item 2.115, and it points out that in the old days, as it were, the Commission was pretty strict on this.

> "At one time, the Commission was inclined to hold that Article 81(1) could apply to an agreement on the basis that it had the effect of making one of the parties 'less competitive', for example where a licensee was subject to an onerous obligation to pay royalties after the expiry of a patent. But the current approach pays greater respect to a freely negotiated commercial agreement, unless it has an appreciable foreclosure effect on third party suppliers or customers."

That is outside the parties to the agreement, and he gives various authorities for that proposition. And then:

> "The purpose of Article 81(1) is not to provide a general escape route for those wishing to avoid complying with contractual obligations which turn out to be more onerous than expected."

And that is *Chemidus Wavin*, both judgments in the Chancery Division, Mr. Justice Walton I think it was, and also on appeal in that matter, and those are in the bundle at 13 and 14 of 222.

So the basic point therefore is that this type of agreement does not, at least in the ordinary event, fall within the ambit of competition law unless there is an element of foreclosure. These types of agreements tend to be looked at where the resulting element gives BSkyB or somebody a monopoly in broadcasting rights, and these football cases – the problem there for the companies was the downstream competition in the broadcasting area. There were no problems in those sorts of cases at this sort of level we are looking at. And competition law is not really concerned with whether Mr. So-and-so pays too much for his goods or not in the case unless there is this element of foreclosure, which nobody suggests here.

The other point under this is that competition law is ensuring workable competition, not perfect competition, which involves, we say, and this is quoting again from **Bellamy & Child** in the same 2.116 – basically what one is looking at there. So one has got to look at realistic situations, not perfect situations, and this really flows, if one looks at – and this is the passage immediately following on from the previous one at 2.081, and it is really drawing a conclusion from the *European Night Services* case, and I am not going to read to you the whole of that case.

> "The court's judgment presents one of the clearest articulations of the division of restrictive provisions in agreements into two categories. For 'hard-core' restrictions, there is effectively a presumption that they fall within Article 81(1); the assessment can therefore proceed straight away to ask whether the conditions for exemption might be satisfied. But for any other form of restriction, careful consideration of the effect of the agreement is required. This involves examination of the realistic …"

And this bit we quote:

> "… as opposed to the theoretically possible, commercial options for the parties in the absence of such an agreement, having regard to the market affected. In that determination, the court leaves scope for the pro-competitive effects of the agreement to be brought into account. Significantly, the court referred to both *Delimitis* and *Gottrup-Klim* ..."

Delimitis was the *BR* case on which this case in the Chancery Division was based.

> "This judgment served as a catalyst of the Commissions' adoption of an economically more realistic approach to the analysis of the effect on competition which had previously been employed in some of the joint venture decisions but had not been adopted on a consistent basis. It is now the dominating feature of the new block exemptions and Guidelines ..."

So basically it is workable competition in a realistic situation one is looking at, and a realistic situation in this case is the situation with Mr. Vajda described of the rival parties wanting to bid into the market, Carlton and the ATR and various people wanting to get into the market, fighting against each other in order to get in the market, producing different baskets or formats which they hope will be more attractive to the others in this particular way, and they were basically wanting to get into the market.

On workable competition we have got a little passage in our Notice of Appeal describing what we say is workable competition. It is in our Notice of Appeal which is BHB1. You will remember workable competition was, I think, referred to in *Gottrup-Klim* as being an objective to be achieved in that matter. At para.174 of BHB1

> "The concept of workable competition is defined in *Metro* as being the degree of competition necessary to ensure the observance and the basic requirements and attainments of the objectives of the Treaty, emphasising the nature and intensiveness of competition may vary to an extent dictated by the products and services in question, and the economic structure of the relevant market sector. In this context workable competition must be contrasted with perfect competition to the extent to which competition is workable will vary."

We refer to an article by Mr. Sosnick in the footnote, who deals with these questions. When one is looking at this case it is not theoretical position, it is not the abstract analysis which the OFT proceeds upon, it is looking at the fact, what the market wanted, what the market demanded. What the market demanded (and needed) was getting all the rights, or as many as they could get in these things. Mr. Vajda has explained why that was necessary, because they needed a wide possibility of broadcasting over the whole period in that case, constant betting opportunities effectively and constant viewing opportunities for those who liked watching but not necessarily betting – not everyone bets – some people like horse racing for its own sake.

Going back to para.9.2, this is really making the point I have already made, the only persons alleged to be adversely affected are the parties to the Agreement itself. So the only parties they say are adversely affected essentially are the ATR companies. None of those complained at all about anything in the notification, and that is fundamental to the whole thing. So when you are looking at workable competition in the real world nobody complained at all – I am talking about two years later – about anything that happened. Indeed, they went out of their way to approve it. These agreements promoted solidarity between the various parts of British Racing, that is the courses could provide more prize money, owners got more prize money, breeders got more money, breeders bred more horses and so on, and so it went upstream and downstream – the benefits of this.

The third point is that context is everything in competition law, particularly when one is dealing with the things which are not hard core agreements, which is this sort of agreement and particularly in the case of collective buying or selling. Sometimes it is essential to have that in order to achieve what is desired, and one saw *Gottrup-Klim* is a very good example of that. I am not going to take you to it, but if you look at the Advocate General's opinion, he said on the first reading it looked anti-competitive, but when you began to look at it in more detail it was not in his view, and the court agreed with him that it was not in that sense. The context one is looking at here is the context of racing rights, for media rights, which are very different from the ordinary widget example which is normally dealt with. In this context if I can take you to another passage from Bellamy & Child, which we cite in our skeleton, BHB8 para.13 (and 22 tab 16) where deals with the joint selling of rights.

> "Particular difficulties arise in relation to the collective sale of intellectual property rights, for example, the rights in music or film recordings, or broadcasting rights to sporting events. The problems which will be recognised by the Community Authorities derive from three main sources. (i) risks of administrative chaos or market failure for markets involving the supply of intellectual property in the absence of central sale…"

i.e. if everyone sold their own rights. Plumpton is the only one that races on Monday, if they do not get Plumpton in then they have nothing on Monday for example. So you have administrative chaos or market failure so there is no betting on Mondays if that was the scenario, or not enough betting on Mondays. "(ii) concentration in the buying market for such rights." Obviously here we have very extreme concentration in the buying market. There were two and then there was one. Also, they were powerful bidders. One must not forget that

Carlton at that stage was a massively powerful buyer of sporting rights until things went wrong with football, and then BSkyB is not insignificant in this world, and Channel 4 is probably the major purveyor of terrestrial rights. Then the last point:

> "(iii) difficulties in defining the relevant product where rights are sold to broadcast a sporting competition which is centrally organised [British Racing] but involves a group of economically independent undertakers [courses] whether the participating clubs or teams or national organisers of a new class or series of events. In those circumstances the concept of workable competition is exceptionally difficult to define in particular for the purpose of defining a competitive price level and a competitive level of output."

All of that is critical, none of that finds its way through into the Decision at all, no recognition about these problems about this matter. They deal with it as though it was widgets, as we say. On the Widget point I would like to take you to the *Premier League* case, which is in bundle 22, 10. This was the football league television case under the Restrictive Trade Practice Act, but a lot of it is very relevant indeed. What was happening there was the Football League, acting collectively on behalf of all the clubs were selling their rights, and the Office of Fair Trading case was that basically this was a cartel of clubs coming together to sell collectively their rights – a very similar factual situation. They had a rule which required everyone to hand over their rights to the central body. Basically, the two rival contentions were Professor Cave, for the Office of Fair Trading, who said this is pure cartel, widget selling. Professor Yamey, for the clubs, who said no, it is completely different. Professor Cave's evidence is very similar to what is said in the Decision in this case – p.44. I am not going to read it to you, but his is the right hand of p.44, the left hand half of 45 and half of the next part of 45.

Then Professor Yamey gave the contrary evidence, which the court accepted as being the right analysis, and that was Mr. Justice Ferris, Mr. Currie and Mr. Summers, were the members of the court in that case – Mr. Summers I think was Managing Director of Butterworths at one stage. I am not sure what Mr. Currie's experience was, but they obviously knew a lot about the world. Professor Yamey's evidence is extremely significant, and I would ask you to read that because he shows and destroys the cartel widget analysis. They are quite short passages there – bottom of p.46 on the right hand side:

> "We take the view of the analysis advanced by Professor Yamey and those economists who took a similar view is to be preferred to that advanced by Professor Cave. The 1976 Act does not proceed on the basis of whether an organisation is, or operates as, a cartel. We consider that it is unsafe to evaluate rule D.7.3 and the exclusivity clauses in terms of whether or not the Premier League may be said to be

a cartel or dangers to argue that, as cartels typically operate against the public interest by restricting production in order to maintain prices..”

Essentially we say that encapsulates the difference between us and them, and we set all this out in our reply at para.114 in particular and ask you to read that, and in our Notice of Appeal. That was the case we referred them to, as you remember, in our response to the Rule 14 Notice, but there is not a mention of that anywhere, I think I am right in saying, in the Decision or indeed in any subsequent development by the OFT in its argument. In many ways the heart of the whole question is that they have proceeded on the basis that because people get together and sell jointly – if that is the way they sell – then it inevitably pushes the price up, because they are substitutable products and in that situation they go up, so all racecourses are essentially substitutable. We know that is nonsense, we know that Ascot and Plumpton are different. We know that Cheltenham is different from Fakenham, and they all have their own particular advantages. Some have rather hidden advantages, like the example of Plumpton, which I gave, which may have racing on a Monday, when Cheltenham is not being raced, for example, in that way. So it is impossible to talk about these as being equally substitutable, and indeed a great deal of their economic analysis proceeds on that basis that all courses are widgets and all courses are equally substitutable. It is very difficult to tell what the rival values are – betting turnover may be one factor, but there may also be other factors which may increase or reduce the attractiveness of a course not only for a betting purpose but also for a viewing purpose, because this agreement had this dual or more purpose on this case. So basically we say that they approached the matter in the wrong way.

The next aspect really was to take you to the term sheet which you have really looked at and at the data agreement, which you have not looked at. You looked at the conditionality provisions of the agreement, but one of the things that you did not look at is the agreement, the ATR Agreement itself – I do not want to take you to it – the Data Agreement was also a condition. So if the Data Agreement had not been reached that whole agreement would have collapsed. Actually, I had better take you to it, it is the ATR Agreement is in RCA15, flag 88. The conditionality is on p.21 of that. 2.2 If any of the following conditions precedent are not satisfied then the consequence of that was – you have to go down to the end of the next page just before 2.3

“… then this agreement shall automatically terminate without any party owing any liability to the other and without any party owing any liability to the other in respect of conditions precedent set forth in the agreement.

That is important because the suggestion that if we did not get everyone in we would have just gone ahead is wrong. If they did not get everyone in they needed then the agreement came to an end and they had to negotiate again in that context. So when Arena or somebody says that they are just wrong on the terms of the agreement.

2.22 you have looked at, that is TRG and the other companies, and the 70 per cent. Then 2.23:

> "The execution of the agreement by no later than 30th June with the BHB and/or RCA for the provision of information and data required in clause 3.4.1 on the terms set out in that clause or on such other terms acceptable to Go Racing and the RCA. For avoidance of doubt execution of the RCA of this agreement shall not satisfy this condition precedent."

So they had to reach another agreement which is the term sheet agreement which covered the data, and obviously there are different views as to what data can be, but it is things like form, previous running arrangements, the number of the horse and the place it has in the stalls, the silks, or the jerseys in National Hunt, which the jockeys wear, all that is data. Pictures, by themselves, we say, have very little value because nobody is going to look at television with the sound off because you need the information and the commentator needs the information to be able to make something better than that. So they are all closely strictly complementary.

THE CHAIRMAN: Is data not defined somewhere in the Agreement? I assume there is a definition.

MR. VAUGHAN: The same definition as set out in the term sheet. The term sheet itself is ----

THE CHAIRMAN: Where is the definition in this contract?

MR. VAUGHAN: It is p.6 and then you have to go to the term sheet.

THE CHAIRMAN: Yes, I see.

MR. VAUGHAN: The data does include all those sort of things, and also the closures are which horses are running, because, as you probably know, all sorts of people enter into races but only a few will end up running in that particular race, and it all runs through a thing called "Wetherbys" in that way.

This comes on, as it were, also to this highly important point on the definition of the market whether they are right in just looking at pictures by themselves and not looking at data at all, because their whole case depends upon picture being separate from data in this matter. We reach this term sheet agreement, the BHB, in this matter. It is probably quite convenient, as it were, who the signatories were. At schedule B of our skeleton it, I hope helpfully, sets out basically the same schedule as we had in our Notice of Appeal but with percentages added in. I find it easier than Mr. Vajda's way of explaining it. Group 1 we call the "Must have" courses, and these are the must haves because of either terms of 2.2.1 or essential inevitably because they were Arena. Our calculations make it that 75 per cent. If you add in the consortium courses, which were the Super 12, the other added courses, which are added in under 2.2.1, the other five courses, add in the courses under common ownership, which is also required, you then get to 37+8+29, and then you add in Arena's courses which, as Arena is on the other side of the Agreement, inevitably was going to go together, get to 75 per cent. So this agreement, on its very terms, was going to have 75 per cent. of the betting market in, and therefore was going to beat the 70 per cent. on the 2222.

The other courses, which represented something like 25 per cent., had an option whether to go GG or ATR, and 18 went ATR, they thought it was better, and 10 went GG because they thought it was better. And the only issue really as far as we can see is if you assume that the market reality was 75 per cent. were going to follow the terms of the agreement and go with the agreement, because nobody suggests that that clause is unlawful, so 2221 is not suggested to be unlawful or in any sense, the only question is were the other courses, the 18, entitled, as it were, to go along or did they have to enter into new agreements and enter into new negotiations. But in fact the GG people all went in one group to GG.

So the situation, far from the 50 per cent., which the OFT now accept they could have had – there is no way you could get to 50 per cent., all you could do was to get to 95 per cent. under this – 75 per cent. under the terms of 2221, and if that is so then the whole case falls to pieces, because the other part of that agreement was that all the parties have to sign the same agreement, and that is 2221 of the ATR agreement. They all had to sign the same agreement.

To cross-refer, we have dealt in our Notice of Appeal at para.46 with the ATR arrangements, and we have dealt with data rights in para.64 onwards in that way, in that case. But what is relevant, and I think for later on is a fact to appreciate, is that the rights that were granted under the ATR agreements were lots of different rights. There is the access rights, that is, to get onto the course at all, there were the terrestrial rights, but if you did not have the access rights you could not do anything. But that is kept out of the market. You could not use your non-LBO or your other betting rights unless you had access to the course, but the OFT disregard that. There are the terrestrial rights, which are extremely important, as one saw from the Notification, because this agreement gave much better opportunity for people to view and, unlike football, where it seems to be a fault that if there is too much televising of football people will not go to football, in racing it is very much the opposite; if there is more exposure of racing then more people will go racing because they like the look of what they are seeing, and like the fun and the social opportunities that it gives which is rather distinct from some other sports.

The next issue to go on to is to look briefly at the income streams and why the whole system collapsed. What we have done is to set out in our Notice of Appeal at paras.105 to 125, which I am not going to take you to now but just as a way of cross-referencing, but if I could take you to the work that Pricewaterhouse have done on the business plan analysis, because what one saw from what Mr. Vajda said is that the ATR companies thought they were going to make a great deal of money out of this. The rate of return that was expected was exceptionally high, and maybe that is necessary for a new venture, but it was a very high return and a very high profit margin. We have done two exercises: one is in BHB7, tab1, first of all, in our Reply. What Pricewaterhouse have done for us is to analyse the business plan, and, as you know, the business plan was in front of the OFT when they considered this whole question, it was part of the notification, and was considered, and should have been considered, but there is not any mention at all of this other than as part of the narrative of this matter. Indeed I do not think there is even a mention of this at all.

The first point to make is at p.4, strong revenue growth, and it refers to the chart on the following page showing revenue was forecast to come from the following sources, Pari-Mutuel, and that is tote betting, fixed odds, and that does not really matter, sub-licences, and that is terrestrial, and other income, that is Professor Bain's point on that.

"As can be seen from the chart …"

And what also might be convenient is if you take schedule B, because we have got colour charts to show you in tab C of our skeleton, and our skeleton is at BHB8. That is the chart or is one of the charts which – sorry, I will come on to that. If you could keep that to one side for the moment.

"As can be seen from the chart …"

One can look at the chart on p.5, which is the revenues, broken down by revenue source, and the revenue was almost all going to come from tote PM betting. We have got the gross and the chart on p.6, we have got the gross PM revenue and the net – sorry, from the websites, and from ITV, and so a very large amount of profit was expected to some from that. Sorry, I turned over two pages. On that the revenues were going to come almost entirely from PM betting. The net PM revenue, less tote fees and things like that, are the big block at the bottom of these things. The fixed odds income is the next one going up, which is small in comparison. These are in 100,000s, so they are in millions. The betting was going to lead to – revenue growth was going up to 292 million or is that billion – 292 million in the final year. The fixed odds income was expected to be small. The other income was always going to be small, 12 million at the most, starting off at a small sum, and then sub-licence fees, that is the terrestrial rights, which were going to remain constant at 13 million over the period. The average revenue growth was forecast to be very high, an average annual growth rate of 36 per cent. In addition, in later years the business plan continued to forecast double digit growth. The average growth rate for revenue was forecast to be even higher from PM betting; that was 49 per cent. from the different sources. It did not intend to exploit the terrestrial rights itself, and entered into sub-licences, so it is granted to Sky and to the shareholders, the rights under that, but that was fixed. Then the other income, and this is Professor Bain's point, includes a number of smaller revenue streams. The three largest are overseas terrestrial free to air sales, TV advertising and premium rate revenue. And I think that is like 3G use, 3G and things like that, in order to do that, but they were always expected to be pretty small.

> "The business plan provides an estimate of net present value based on discounting the annual profit after tax by a discount rate which represents the required rate of return."

And the plan was cash positive using a discount rate of 12 per cent. The expected rate of return, in the last sentence there, on the investment is more than four times the required rate of return.

PROFESSOR BAIN: Mr. Vaughan, could I ask you a little more about the other income. It adds up to perhaps something over 60 million over the period.

MR. VAUGHAN: Yes.

PROFESSOR BAIN: What I am unclear about is how that got treated in the rights agreement. If we take the 130 million-odd for terrestrial television, that eventually fed straight through to the racecourses.

MR. VAUGHAN: Yes.

PROFESSOR BAIN: What happened to this other income? It is not like the PM revenue, it is different in character from that. Should we be treating that as, say, 60 million to come off the 180 million? It is not for non-LBO bookmaking rights in the UK. Should we take that 60 million off and say that the rest was for non-LBO bookmaking rights, including the data rights, or should it be treated in some other way? I have seen nothing in the papers to help me on this and I would like to try to get the orders of magnitude right in my mind. That was what was behind my question yesterday. I am just unclear about this. And I am also unclear, while I am speaking, about fairly precisely what the BHB's expected data stream was from this under BHB's agreement because when I look at the offer made by ATR in November, part of that offer, at appendix B, para.1.2, said that the RCA and/or the racecourses had to deliver the BHB data free of charge so that the bid at that stage was for all the rights, including the BHB data, and I know there was a separate agreement for that.

MR. VAUGHAN: Yes, yes.

PROFESSOR BAIN: But how much, in the end, of that 180 million was going to the BHB? I will not take you through it. There are various figures around in the papers, not any of which are consistent, so I would rather like to have a reasonably authoritative figure of what the BHB expected to get.

MR. VAUGHAN: I think it is about 3 million a year, I think, they were hoping to get out of that. I think Mr. Nicholls on his evidence at the oral hearing originally said about 3 million a year. Mr. Nicholls nods.

PROFESSOR BAIN: Yes. On the other hand, it could be 20 per cent. of the additional income which comes to something else, or it could be a figure of 20 million, which I think comes from the response from the RCA to the rule 14 notice. It could include payments to BHB over and above what comes from the RCA, whether it is a suggestion that there are not any, but if you look at the term sheet it seems to be 3 million. So what I would like to know is what the facts actually are. Thank you.

MR. VAUGHAN: Can I not answer it on my feet. I hope you were not expecting that. We will all go away over the short adjournment and we will think what the answer is.

Basically this paper shows it was expected to be extremely profitable, but something went wrong, and in our Notice of Appeal at para.117 we show some of the things that went wrong. Paragraph 117 on p.37 of our Notice of Appeal, which is BHB1. Some of them were technical, some of them were practical, some of them were just based upon over-optimistic viewing. The internet sites, and this is 117, were launched three months late. That was quite significant because the people saw the racing but could not bet on the racing, so therefore they bet with their own bookmakers or bet on the betting exchanges, and they got into the habit of doing that. The international betting was intended to be carried out by commingling, and that never really happened because of software problems, and then there was this other problem in (c). Basically the result of this is that the whole thing started off in a bad way and got worse and worse, and in the skeleton at tab C we set out and show graphically what actually did happen. If one looks at the last graph of that and the last pages it shows effectively what went wrong, or what the result of things going wrong was. Sorry, they are not numbered, it is the second last page, where there is a blue line, and the first stop is December 2001. Have you got that because I have got a coded thing at the bottom? Then there is December 2002 and December 2003. What the forecast was showing, and that is the blue line, was – it was starting off at 4.7 betting revenue, million betting revenue, going up to 16 and going up to 45. What happened was it crept along the bottom for those three years, and that is significant because it was in about the third year that the ATR companies turned against the scheme. No doubt they hoped they could resuscitate something and solve something, but three bad years was in fact a disaster, and, whatever the precise justifications, the whole thing came to an end. The last page gives the figures upon which those are based, and it is looking at their profit and loss sources, consolidated with the business plan. So the whole thing went pear-shaped, as it were – partly their own fault, partly it was over-optimism, but basically everything went wrong. So the value of the thing became nothing really as far as they were concerned, and to them as a bidder, as it were, the great dreams of 180 million and so on were worthless in that sense.

But neither the ATR agreement, nor the reasons for failure, nor the reasons for the possibility of explanation why the ATR companies changed their tune in 2003, is dealt with at all in the Decision, and that almost by itself is defective reasoning, and indeed it has not been made good, even if they could do that, by any subsequent matters at all.

The next point was to look a bit more at the context. Mr. Vajda has taken you through the notification, and we deal with the notification in our Notice of Appeal (I am not going to take you to it in detail) at paras.79 to 90 of that. I think what I would like to do though is to show you – I am not sure you have been shown – where everyone signed up to the whole thing, the notification. If we can look at the notification which is RCA4, tab 58. It is not just to make a forensic point, it is important to appreciate what everyone was saying. This is at p.112 of the notification, at the very end, where they sign the declarations. Sorry, it is after 112, they are not paginated. The first one is the Racecourse Association. He is warned that it is a criminal offence to give misleading evidence about that matter. It is signed by Mr. Atkin, chief executive of the RCA. The next one is challenged by Mr. Scott – I think that must be David Scott – the one whose letters we have seen on behalf of the Channel 4. Mr. Goswami, commercial director, signed on behalf of BSkyB; Arena, Mr. Penrose, whose name we have seen repeatedly in that, and Christopher Stoddart for Attheraces. I think Mr. Stoddart, one will see somewhere, fell on his sword at some stage before the agreement came to an end and resigned, or was dismissed, from Attheraces Holdings. It is very clear from the documents that they all were advised by very experienced solicitors – extremely experienced – in this field. If one looks at p.17 of the notification the Arena had Freshfields Bruckhaus Deringer, Mr. Spearing, who is one of the senior partners dealing with competition law, dealing with that matter. BSkyB had Oswangs representing them and one will see the name of the representative, very experienced particularly in the competition media field. Denton Hall, whom we see to day, Mr. Szlezinger, who was the contact person. So they were all represented by extremely experienced people who knew what they were talking about. It is not just a one-sided version of the RCA positive spin and somebody else's negative spin, it is all rowing in the same direction, and all pulling in the same direction, and everyone agrees it is important – important for them, for the ATR companies, important for British Racing and Mr. Vajda has taken you through those passages in that and I do not want to go through that again.

All that happens is that the notification is totally disregarded in the Decision, except when they wanted to copy out things about the technical matters, but all the positive things are left out and it is put in the balance against the 2003 statements and is found wanting. Basically, one has to say that Mr. Szlezinger, Mr. Spearing and all the chief executives, having considered the position carefully, under threats of prosecution, got it wrong in that matter. The statements about BHB are not just opinions, these are statements of fact about British Racing, obviously you can be wrong on market shares or market definitions in that way without having a criminal offence, but this is going into much greater detail than that. The 2003 statements are the only evidence against the notification. If you read the notification you would have no doubt at all that it was a good thing, this agreement – important. Everyone was doing well out of the agreement and nobody was doing badly – there was no foreclosure of anyone in any upstream or downstream market, or in any way at all.

The next thing I would like to deal with quite quickly is the investigation and that is one of the first points in my opening. We complain bitterly about the quality of the investigation in this matter. You have seen the notification point. They either disregarded it or rejected it, because of subsequent statements, when the situation had changed completely. On the investigation point, we have dealt with that in our Notice of Appeal paras.115 – 157. It is quite interesting because you can see how we got the 2003 statements, which is our Notice of Appeal which is BHB 1, para.153 to 156.

> "It transpired in the course of the judicial review proceedings that the OFT had received 5 sets of submissions responding to the RCA's submissions on the Rights Agreement."

We did not have an index of the documents provided to us until 22nd August, and a table containing comments on certain of them.

> "It would seem insofar as these documents were dated prior to 22nd August the documents were referred to in the index of additional documents. They OFT refused, however, to disclose to BHJB the documents so listed."

and you can see the authority for that statement, BHB 3.36C. We asked to see them, they refused.

> "The OFT also refused to BHB certain responses which it had received to BHB's submission of 12th August or to the Rule 14 Notice dated 23rd August."

So basically we were faced with a refusal to show us these things. We had had our oral submissions, and we had or oral and written participation. We make the point that they place great reliance in the Decision on these documents which they never disclosed to us.

> "… the OFT has carried out no investigations, asked no questions, nor sought discovery of ay relevant documents to verify what was said in the letters or submissions."

They did not query what the companies were saying as opposed to what they had said in the notification, apart from the matters set out above. Accordingly we applied for production of these documents, and in the end we got these documents, and at 156 set out these documents we got, I think, from the RCA annexes to their Notice of Appeal.

"157 If the Tribunal does not consider that the absence of proper investigations into these matters is sufficient to result in the annulment of the ATR Decision…"

that is our basic point.

> "… BHB request an opportunity to cross-examine the relevant executives of the ATR companies on their above responses and on the relationship between those responses and the Notification, and to request production by them of all relevant documents relating to the financial expectations of the companies in 2001 and the financial difficulties of those companies encountered in 2003, and such documents as are relevant to the issue whether the Rights Agreement and the form in which it is of which the OFT makes a complaint, could possibly have caused such difficulties as they now allege."

So our basic point is that not showing it to us is sufficient. But even if one looks at these things we say first of all they do not have any weight at all as against other sworn statements.

The second point about the investigation is that subsequently we discovered that effectively the OFT had various meetings with various bodies and one can see these in BHB 7, annex 3. These sometimes include the RCA. If you could also take up our Reply document, which is BHB 6. These are the documents which we got subsequently, and referred to in our Reply. Broadly speaking if one goes to p.3, it is a note of a meeting on 5th December with Mr. Ray of the OFT. Meeting with Attheraces applicants. They explained in broad terms the benefits of everything that was happening. Probably the most convenient thing is if I can take you to our Reply itself, because we quote there the nuggets, because otherwise we are going to spend hours trying to find out where those nuggets are. In our Reply, tab 6, at p.76. The notes are typed up presumably from handwritten notes. Basically they were all saying what a good thing it was, this agreement, and the notification itself was in November, so it was probably the first meeting. The nuggets, as it were, that we pick out: competition from other leisure pursuits, development of new betting forms. So they were saying that racing is just in competition with everything else, which is obviously true. Development of new betting forms, which they accept; bespoke betting product, high expenditure on integrity – that is important because it was not just any old betting, they regarded it as bespoke. The aim was to increase income to courses, and it therefore needed a critical mass. A critical mass was not only in the notification but also here. This split up FL in to 59 courses which is not attractive, therefore

FL (Fixture List) broadcasters, plus LBO's. So it is interesting they were putting those two together, not just the non-LBOs. Under the section of bidding processes, they say that historically RCA are not involved. The Super 12 negotiated but not attractive to others, and they explained that.

Channel 4, they said it would be easier to negotiate ATR deal if it had been a single racing entity, a New Co. So they were complaining that they were not dealing with one entity, Channel 4, they were having to deal through RCA with lots of different entities, and then Arena claim UK racing viewed as best in the world, due to integrity. That is going back to the initial point and obviously we agree with that view of Arena.

Then on the next meeting, on 5th February, p.8 of that annex, it is not clear who was at these meetings. Regarding the issue of collective sale it was stated no formal agreement, Bet courses, courses kept freedom to go elsewhere. It goes on to say:

> "Initial deal with individual courses but was conditional on others signing, therefore RCA took a role of negotiating the deal with ATR and Carlton. Much discussion of solidarity and indispensability."

Everyone regards solidarity as a very important factor, and insofar as the RCA see this – I am not sure there is a difference – as an exemption point, we see solidarity as very much a context point to see whether things are right or not. Indispensability, not joint negotiating, tying other – has not worked. Russ Phillips, he is another Commission official, covers this history.

Then 6 going down, there are various other things which are obviously helpful. 6 shows it can lead to critical mass and to cover costs it is stated that in respect of horse racing you need a large amount of horse racing to cover the costs, the critical mass. References to LBOs, so it is not just non-LBOs. Then in a meeting with Mr. Russ Phillips of the OFT, on the top of p.79, individual courses would be exploited, countervailing power, that is the second point in Sir Christopher Bellamy's points in the book, where there were three points identified – countervailing power was a big matter. They would have needed to sign a conditional contract, so that if anyone wanted to go individually they would have to all sign individual contracts, separately negotiate but made conditional upon the numbers being arrived at in that situation. Media rights compete with LBO rights.

Then the transcript of Russ Phillip's last one, simpler and unnecessary a complication of purchaser to buy rights from two people. Basically they were saying this was simpler and unnecessarily complicated, i.e. it goes to transaction costs, explaining why they wanted, and why it was a good thing to have joint negotiation of these matters, but none of these meetings were put to us, but even more seriously – even more seriously – none of them were dealt with in the Decision at all. All of that is highly supportive of the notification and highly contrary to the 2003 statements that were made.

The next thing I was going to deal with was the s.26 responses, but I think Mr. Vajda has dealt sufficiently with that, but what I would like to do is to take you to our Reply at p.28. We complain bitterly – or hysterically as they sometimes suggest – about the whole procedures, and footnote 21 is of some significance, because they give different reasons for not referring to the 26 Notices. Sorry, p.28 of the Reply, which is at BHB Reply tab 6 – footnote 21 at para.59.

THE CHAIRMAN: I am sorry, which paragraph of the Reply are you referring to?

MR. VAUGHAN: I am sorry, this should be the Skeleton, BHB 8, footnote 21. I think I am right in saying in our written observations to the Rule 14 Notice we drew their attention to the Rule 26 responses, which we had seen in the BHB matter. I will give you the reference in a moment. They give two completely conflicting versions of why they did not refer to the s.26 answers. If I can give the cross-reference to that, to our written observations to Rule 14, which is BHB vol4. tab37, p.16, where we point out the fact that they have not dealt with them at all in the Rule 14 Notice.

They explain the OFT's failure to deal with the vast majority of s.26 response. They explain on the grounds that the RCA did not place great reliance on them. Well that cannot be relevant. We certainly placed reliance on them, and I do not know whether they did or not, but that cannot be a reason for not looking at evidence. We say it does not justify that.

They then go on, because they have to consider all the evidence in front of them, in another place in the same skeleton to explain it as they did not refer to them because it did not accept the opinions expressed in them without any attempt to elaborate. So they give two completely conflicting reasons for not referring to it. The first is defective, because they have to consider all the evidence. The second is defective because first of all there is no basis laid at all for not accepting what the racecourses said. Clearly, what the racecourses said was their honest view in that situation and they all stack up in the same direction. It is not just a few cherry picked ones give one particular view, they all give the same broad view of these questions. We say we have grave doubt whether in fact they did look at these matters at all. Anyhow the burden on them is to prove that they did look at these matters.

The Rule 26 responses, and even the ones that they rely on are basically supportive of our position when read in the round.

We then come on in the investigation to the question of what has become known as the *volte-face* which is the 2003 situation. We have shown in our reply, and I am not going to take you to it, but just as a cross reference, the very considerable reliance that is placed upon these statements in the Decision, and indeed it is very difficult to see – if one were to strip out the 2003 decisions it is very difficult to see what evidence they have at all on almost any point that they were making. If one looks at our skeleton, BHB8 at para.64 – this is quite a lot of jumping around I am afraid, but it is necessary – and at the same time one has to take the Decision itself, we say that if one were to perform the exercise of crossing out all the 2003 statements, and then see what one has left, the section of the Decision (RCA2) and we are working from the non-confidential version. If one just performs a brief exercise of looking what the Decision would look without these statements, and bear in mind that these were the statements rejecting the notification. So if the Decision did not have these in would have all the good points from the notification itself. If one looks at the Decision itself at 275 to 281, on Veto Holding Courses, which s basically their decision, the only evidence that they rely upon – the only real evidence they rely upon – is footnote 275 under "Veto Holding Courses" is the letter from Attheraces, and also from Arena at 278. If one would therefore cross out that one is left with a very different looking Decision and complements the next section which is their finding on 284 to 289. At 288 is reliance upon the 2003 statement. Increasing prices, their position, is on p.81 of the Decision, where they say our evidence is not persuasive. I think that ought to be "BHB", rather than "RHT" in that passage. They rely upon that. First of all they say our evidence is not persuasive, which is reversing the burden of proof anyhow in this matter. Then the footnote 326, 327 – 2003 documents – certain documents in that – certainly those documents. So one can go through and if one just crosses them out one is left, and reduced transaction costs is quite a dramatic point, which is 361 to 364. This is transaction costs where they come to the conclusion that single negotiation would be cheaper to do. They rely only on 415, which his a letter from Attheraces saying the Attheraces agreement took 7 months to negotiate – considerably longer than they anticipated because the RCA sought to negotiate various measures which benefited specific courses. That is really the only evidence of that matter. It then goes on to say the individual negotiation may be simpler to negotiate than the single over arching agreement – seeks to reconcile the interests of 49 horses. They rely upon the Atthraces statement at 262, and so on. Basically there is not a scrap of evidence on that. They say we should have adduced evidence of that, when all the evidence that one has seen, and Mr. Vajda has dealt with it, shows conclusively that everyone regarded collective as being a better, cheaper and more efficient way of going ahead.

I am not going to spend time going through, because I am running out of time, our Reply, our Skeleton, and our analysis of the documents in schedule A to our Skeleton, as to why we say these documents do not help. What they do do, when they do help they provide some element of support, because what they did say originally was they needed the 70 per cent. critical mass. The OFT then went back to them to ask them, "Do you really mean that?", it would seem, and they said, "We could have managed without one or two", but of course, as we have seen from the agreement, without one or two of these must haves then the agreement would fall down and a new agreement would have to be reached in that situation. So that is basically that part of our submission.

The next part is really trying to look at the product market and the relevant market.

THE CHAIRMAN: Could they have waived any such non-agreement?

MR. VAUGHAN: No, I do not think so. They would have to start again.

THE CHAIRMAN: That depends whether that condition is exclusively for the benefit of ATR, does it not?

MR. VAUGHAN: Could be, but it may be for everyone's benefit, for the other people's benefit, for the remaining people to keep together in that sense, because if they lost one they would have lost a large number, because, as we have seen from the groupings, if they lost most of the must haves then they would lose a grouping which was quite significant, because if they lost the consortium they would all tend to move together, and if you lost the consortium group or the additional ones, to take TRG, or the Northern or the other common exercise ones – it is not just losing one, you would lose a lot in that situation. Of course it may be possible to say, "Well, if you lost Ayr or something like that that would be all right, but if you're losing any significant number then the economics of the whole thing would go". It may well be that the bankers would not have been happy if they had lost a chunk which took them below 70 in that situation, so they would then have to go back and renegotiate with the bankers presumably.

On product and relevant market, I have got, as it were, half an hour to cover a bit of ground. Basically what I would like to do is to refer you essentially to the main points. We deal with it in our Notice of Appeal at 249 to 336, our Reply at 17 to 89, and our skeleton at 12 to 29. There are two parts of this exercise: one is to look at what is the product that you are looking at and, secondly, to look at the market and try to define what is the relevant market in that sense. We say that the product is not the product that the OFT define, the product is the bundle of rights which were moving in this sense, moving to the ATR companies, not just the LBOs and the non-LBOs but all the rights, and also the data rights that were moving in that situation. Of course if we are right on any of the previous points then it is not relevant to look at any of these points, but we need to deal with them for appropriateness. Everyone seems to agree in competition economics you have got to start from the right product, and if you do not start from the right product you will probably get to the wrong market, if you get to the wrong market you will get to the wrong market power, and if you get to the wrong market power you get to the wrong effects. So basically you must start from the right place in order to understand it, and we say basically they started from the wrong place and ended up with the wrong answer in this matter.

I think we have a helpful paper, or it is helpful to me anyhow, which we have annexed to our skeleton, written by Mr. Morrison, one of our team in this matter, on the importance of product, and also the difficulty in defining product in this sense. Of course it could be said, "Oh well, he's part of your team, he would say it, wouldn't he", but he is a distinguished economist who has written a paper for the Competition Commission, a very recent paper, with Mr. Elliott reviewing the Decisions over the last few years, so it is not just any old economist, as it were, that one is looking at.

Basically we say they start with the wrong product. They take a very narrow grouping of other rights under the definition of the ATR agreement, and they disregard the complementary rights of data rights, because in this situation the parties could have split up the value of the rights in whatever way they wanted because pictures without data were worth not much, data without pictures is probably not all that valuable to non-LBO bookmakers or bookmakers generally, so you need to get a combination of these things, and pictures without data are pretty unimpressive if you are looking at terrestrial rights, and any of these rights without access are nothing; you have got to get the access onto the course in order to be able to exercise any of these rights. What they do is they leap in without any proper analysis, we say, into the non-LBO bookmaking rights, without looking at LBO rights in any sort of detailed analysis, without looking at any of these other rights under the ATR agreement, without looking at data rights, and indeed they expressly disregard any consideration of data rights at all and look at these entirely by themselves. It was a matter, as it were, for the companies or the parties how the cake should be split for all these rights. If BHB for its data got 25 million, say, and the others got 160, or whatever the figures were in that way, that could have been changed depending upon where the benefits were designed to go in any particular way, and the object was to ensure better racing, better prize money, better facilities, better facilities for horses, better facilities for trainers, better security systems and all that sort of thing, and all this was going to be part of the benefit of the whole thing.

When it takes its product it takes a product which cannot be valued. There is no such thing as a value other than the price which happens to be achieved, if it is sold individually for these particular rights, whether separately or individually. Nobody can say £1 million is too much for Plumpton non-LBO rights and 2 million is too little for Ascot. Nobody can actually say that is possible to do. There is no way you can do it, whether you do it individually or globally. There is no way you can value these rights other than what people subjectively placed upon them based upon their analysis of what success they are going to make of it in the market. It is a very subjective element of the valuation. It is like bidding for a Picasso in an auction; nobody can say what is the right value. You can estimate what its value is but you cannot say, “That’s too much” or, “That’s too little for a Picasso” in that situation. So they are starting on a very difficult tack, and the agreement does not help them at all because the agreement does not value the non-LBO anywhere, and you cannot actually work out – you can get an approximation but you cannot actually work out what is the value of these rights.

It also ignores the full facts of these matters, what in fact was being obtained and why, and everything like that, and why the value placed upon the ATR agreement was higher than on the Carlton, although the price was lower, but one of the reasons was because of the extraterrestrial rights that are gained and the exposure of courses and racing to these benefits. It also ignores its own guidelines. This is the OFT guidelines on market definition at para.5.4, which is at tab 17 of RCA22.

> “Throughout this guideline, the test has been couched in terms of a hypothetical monopolist profitably sustaining prices above competitive levels.”

I.e. what is the competitive level? And that is what you have got to work out, and there is no such thing as a competitive level for these sort of prices, and there is no evidence to do that. All they say is you have got more, but more does not actually tell you whether it is above or below the competitive level. If I was faced with negotiation with an extremely powerful buyer and I got more than I might otherwise have got I might still be getting less; you do not know. You have got to ask yourself what is the competitive level, and there is no basis at all for saying what is the competitive level in that sense.

Then, as it were, to add insult to indignity, in their skeleton they accuse us of having absurd arguments based upon an example of a fridge of chilled food and electricity, which it considers are compliments. Of course you cannot use a fridge without electricity but you do not have to have chilled food in a fridge. You can have beer, wine, anything in a fridge; they are not necessary compliments, and they are not compliments in any normal sense of the word. They are not demanded and used at equivalent rates, they are not bought or sold at equivalent rates, and to accuse us of being absurd because we would say what they think are compliments are not compliments in our submission is just not right. So basically we say that they are just wrong on product, where they start.

The next area in which they are wrong is in their market definition, and we have dealt with that in our various documents, and I am not going to take very long. They start at the wrong point which is quite a fundamental weakness of anyone’s analysis to do, because they mis-define the product. They ignore substitutability and they only consider the value judgments of the buyers. It is because they thought these things were very valuable, therefore they thought it was a different market, but that is, first all, using subjective elements in the wrong way, and it does not, however people value things, help on whether these are substitutes. The value somebody places on a Picasso has no idea about what are the substitutes for a Picasso that somebody might want, and different people may have different views on what the substitutes are. It does not take any account of a counterfactual price in this way, and that is a major problem when carrying out the slip test, as we have developed in our submissions. It proceeds on the basis that all courses are perfect substitutes, and I have made the point that Plumpton and Ascot are not perfect substitutes, though they may be substitutes in some senses of the word. It overstates the powers of the racecourses in the negotiation process. It undervalues the powers of the buyers in this sense. It does not consider at all the value and the problems of the critical mass which will change at different times when you get nearer or further from the critical mass. It ignores the possibility that if they were asking, really asking, for too much, which everyone agrees they were not, of course the ATR companies could have walked away. Maybe ATR as a company was a racing-dedicated person, but the shareholders were not racing-dedicated people. If BSkyB had found it too high then they could have gone and done cricket or something else with their money, and the same with Channel 4. They did not have to go into this field, and this is one of the other great elements of this case, is they wholly ignored the problem of the difference between buying in the market and buying into the market, which Professor Bain raised in our earlier CMCs on the question, and it totally ignores what all the companies say in the notification.

So basically, for the reasons we have set out in our written observations, we say they have got the product and the relevant market wholly wrong.

On the law, Mr. Vajda, and this is turning to another subject, has really dealt perfectly strongly and adequately with the cooperative agreements. And necessity, we take exactly the same view as they do on this. You have got to look at the whole thing in the proper context and the full context.

The other point we do deal with, which he did not deal with, is how *Wouters* and things apply themselves into the sporting context, and our Notice of Appeal does that, and I would just like to give you the references to that. Our Notice of Appeal is at BHB1.186 and the following pages. This is a very important section because it does show that competition law – we have never suggested there is a thing called the "sporting exception", which some people say, but you have got to look at sporting events differently from any other events, partly for some of the reasons which **Bellamy & Child** mentioned, which we dealt with. But *Gottrup-Klim* and other cases, and *Wouters*, have been applied through into the sporting context, and I would ask you very much to take into account paras.186 to 227, and, only for advanced readers, our analysis of the American cases, which we say come to the same analysis of these matters, which follows on from 228 to 235, with a vast number of references which are relevant to that question. But it is highly important to understand the particular way, which the Commission accepts entirely, that sporting events have got to be looked at, and it has got to be adjusted to take into account the peculiarities and particularities of sporting events.

In the Notice of Appeal at 240 we make the point that really they do not deal at all in the Decision – the conclusion we draw at 240 to 248, particularly the fact that they do not really appreciate – the Decision gives no understanding of appreciating that sporting events are different. They do not, as I have said, mention *Wouters*. They make a passing reference to *Gottrup-Klim*. They rely upon cases which rely upon foreclosure in the downstream market, which is not relevant here, to support themselves. They do not deal with *Premier League*, they do not deal with the *Hendry* case, which is in the bundle and I am not going to take you to it. It is point 5, which is Mr. Justice Lloyd on the snooker case. They accepted that there was a major benefit to snooker of having joint negotiation of sporting rights in order to distribute the benefits of that, and if I can give you a reference to that in the bundle; it is 22, tab 12, and the relevant passages are paras.114 of Mr. Justice Lloyd's judgment -- yes, it is paras.114 and 115 where he deals with that, and particularly para.115, the benefits to snooker of having television rights not fragmented but for the benefit of snooker as a whole, and we say that that is highly relevant in this case.

So on the effects part of the case, I really repeat what Mr. Vajda said, that the – sorry, I do not really repeat what he said because I do not need to. We say that the effect on price competition is not shown at all in this case; it is merely, as it were, at worst a transfer of rent, in Professor Bain's wording, I think, from one party to another. Nobody suffers, but, equally, as they said in the Notification, it was a virtuous circle where everyone was gaining at all stages in that way.

The last point really is the economic point, and I think what I would like to very briefly mention is these arise particularly from two sources; one is from Professor Bain's questions at previous CMCs, and the other is the criticism of the economic model. I think we entirely support the idea that bidding for the market, which is what happened here, and bidding in the market are completely different things. ATR was trying to get into the market, a new market, an innovative market, to create that, as well as another market. So they were trying to get into the market. That is a very different situation from when people already are in the market and they gang up in any sense of the word, which is an old-fashioned cartel. It is also very different when you are talking about substitutable goods and goods which are not substitutable, and also complimentary goods as opposed to goods which are entirely separate.

On the question of market definition, that is very much a question for the OFT and we will let them deal with that.

We have made various points in our skeleton about the model which we used. The important thing to understand is that the model we use is exactly the same model as they use. We mention in our footnote to our Notice of Appeal, in para.310, which is bundle BHB1 – and if one looks at the footnote we make it very clear that we are using Alexander Raskovich's model, which is exactly the same model as they use, and they annex the paper which he worked from to their skeleton. So we are all using the same model, but the difference is we are using different assumptions. We are using what we say is the real assumptions as opposed to the other sort of assumptions that one has. Basically the whole difference in this case, as we explained in our skeleton, is that the – again we are accused by using this model of arriving at absurd inconsistent with evidence results, but basically the difference between us and them is that we put in the true facts, which is that some costs are very different and are quite considerable in this particular case, and the assumptions about substitutability which the OFT make, i.e. that all racecourses are exactly the same and you might as well go to Plumpton as you would go to Cheltenham this afternoon, is an assumption put forward by somebody who does not understand what the market is about or what racing is about.

We have set out in our skeleton, in para.36, basically our broad points on why we say their criticism of our model is defective in that way. We say it is a perfectly genuine and sensible piece of work which shows that you cannot assume in this case that the price of individual negotiation would have been lower than the price of collective negotiation. It is a difficult exercise to undertake anyhow because you have got to know how people were bidding, because if Ascot bid first as the most valuable course, it would be different if Ascot bid last as the most valuable course, because if you have not got Ascot in you may well be disappointed. So you have got to put in all sorts of factors which make the whole thing extremely difficult to calculate in that way. But broadly speaking, we say that we are right about that; you cannot assume that collective selling got more, and anyhow even if it did get more it is not about the competitive price, and even if it was about the competitive price cases such as *Wouters* and *Gottrup-Klim* show that is not an end of the matter, you have got to carry out a much more detailed analysis, and we say that applying any sort of analysis we would easily get through the *Gottrup-Klim/Wouters* way, but of course that is not the test, the test is have they shown that we do not, and they have not and they have not begun to show that in any sort of convincing way. It is not for us to produce models, it is for them to produce answers, and the idea that you can prove anything by the use of any model is a somewhat wild statement, it seems to us, to show the depths to which they have sunk in their understanding of the economics. If every model can prove anything then it is extraordinarily difficult to see what on earth is the purpose of economics even, if anything will prove anything in that sense, and it is not really a respectable way to argue cases. But of course it is the Decision that counts, and merely accusing our arguments of being absurd does not advance the understanding of what their case, and we say that our case is right.

So, broadly speaking, our contention is that for the procedural reasons they have failed to even begin to comply with their obligations under public law, private law, European law, as to how to carry out these matters. They have not looked at things they ought to have looked at, they have looked at things they ought not to have looked at, and they have not carried out the proper procedures by giving us the proper benefit of our rights of defence in this case.

As regards the more substantive points, they have not looked at the market in the full, in the proper context of the market in the racing context, they have not looked at it in the sporting context of the market, they have not looked at the law correctly, they have not looked at the economics correctly, the product market, the market definition, the effect definition or the economics. So, all in all, it is a Decision which, however you approach it, cannot stand.

Miss Lester, being a great Judicial Review expert, reminds me of the *Freeserve* case. I may have gone too far in agreeing with you about Judicial Review. I hope I did not agree entirely with you on that.

THE CHAIRMAN: I do not think you did actually, Mr. Vaughan, so I should not worry about it!

MR. VAUGHAN: Then Miss Lester is right to draw me back from that – the case called *Freeserve v. The Director General of Telecommunications*. But it does divorce from the fact – it says basically that it is a full appeal, but it is not a full appeal in the civil appeal sort of sense, it is not a retrial.

THE CHAIRMAN: Normally the sort of criticisms you have made of the OFT with regard to their alleged deficiencies of procedure would, in a conventional appeal, justify a rehearing. That is not an option which is open to us, as I understand it.

MR. VAUGHAN: In some cases it is, but we say it is not in this case. If it was just one little thing it possibly could be, but we say it is not something that could possibly be done. First of all, the length of time now – we have been under way so long, the agreement is so long it disappears in this sense, so we say it is not. But, to some extent, it is a mixture of new hearing, a proper full appeal and Judicial Review, because to some extent the procedural questions are questions which very often would be subject to Judicial Review. You have gone about it in the wrong way to arrive at your decision. Even if your decision was right you have gone about it the wrong way. So that part is, in our submission, much closer to Judicial Review than the other part. The economic part may well be, and the substantive part, closer to a full appeal in that sense.

It is one o'clock.

THE CHAIRMAN: Thank you very much. We will resume at two o'clock.

(Adjourned for a short time)

THE CHAIRMAN: Yes, Mr. Thompson.

MR. THOMPSON: As the Tribunal will appreciate I have a split presentation to make this afternoon and tomorrow morning. The way I am proposing to use my time this afternoon is first of all to make some general remarks by way of introduction and then to deal with five topics, namely, the general question of collective selling and price, one discrete issue in relation to market definition is the second topic, the third topic is the question of necessity, fourthly procedural questions; and fifthly, and by reference to the contemporary documents, the effect of collective selling on price competition. I suspect that that will take me all afternoon. Tomorrow, I will probably be more in reactive mode and try and deal with some of the challenges that have been put to me by the Appellants in their opening speeches, and indeed some of the alternative questions raised partly by Professor Bain and dealt with in our skeleton argument in particular.

THE CHAIRMAN: Yes.

MR. THOMPSON: By way of introductory remarks, the OFT's essential case is that the courses were a party to a series of collective selling arrangements from 1999 continuing through into 2001 that had the effect of increasing the price paid for the rights necessary for the launch of an interactive betting service on the internet and on digital interactive television, and of reducing the economic incentives for the courses to compete with one another on that market. Although this is denied by the Appellants, the basis for their denial suffers from a number of obvious weaknesses.

First, both Appellants had been inconsistent on the central question of whether collective selling had had its customary effect of eliminating effective price competition between the courses and increasing prices. At some point, notably in relation to exemption, they effectively concede the point and argue that the increased revenue resulting from collective selling is the principal benefit of the Rights' Agreement; and secondly, that collective selling was indispensable to that benefit.

At other points they deny both the collective sale and the effect on price. Indeed, the BHB has gone so far as to flirt with the submission that collective selling may have reduced, rather than increased, the price paid for the rights.

The RCA's case has suffered from two striking defects. First, in the Notice of Appeal the central planks of the RCA's case were the economic model advanced by RBB and a detailed chronology of the negotiating process. However, the Office of Fair Trading in response, in its Defence comprehensively demolished this part of the RCA's case showing that the documentary record was, on its natural reading, flatly inconsistent with the RCA's case, and secondly, that the standard result of economic theory, recognised by RBB that collective selling increases prices, applies here with full force. It is notable that the RCA did not refer to RBB's analysis in either its skeleton argument or in the oral submissions made by Mr. Vajda yesterday.

The RCA's Appeal has further emerged as fundamentally flawed in confusing two things which we say must be carefully kept separate. First, the natural desire of potential purchasers of the rights to maximise their profits by obtaining as many rights as possible and secondly, the objective needs of bidders for a critical mass of rights sufficient for the launch of a new interactive betting service. Again, once that confusion is exposed it can be seen that the RCA's arguments, as to necessity and impossibility are radically unsound.

So far as the BHB is concerned, the great majority of its arguments can be dealt with shortly as unprincipled and rhetorical assault on the OFT and its procedures. The two distinctive arguments advanced by the BHB concern, first of all, its control over data rights, used in combination with the rights at issue in this case; and secondly, the economic model developed in the BHB's Reply producing the surprising and counterintuitive result that the effect of collective selling in this case may have been to reduce rather than to increase prices contrary to all the contemporary evidence.

If I may, I will take the Tribunal straight to one piece of evidence which is particularly striking in this regard, the statement of Mr. Nichols of the BHB, which appears at bundle 5 of the BHB papers, tab 42. The Tribunal will see that Mr. Nichols was at the relevant time, the chief executive the British Horseracing Board, and he describes his qualification. The relevant part for my purposes is s.4 of the statement where he describes what he says will be the consequences of the OFT's approach. Mr. Nichols says:

"4.1 The principle of collective selling, whether it is the Attheraces deal, LBO picture deal or industry data rights, is essential if the industry is to prosper. Collective selling ensures realisation of the true value of British Racing's assets. To undermine this fundamental influence on industry revenues will consign the industry to be a subsidiary of betting platforms. In the first instance a replication of the British Greyhound Racing industry, an industry that has suffered significantly because of vertical integration. I am adamant that collective selling is crucial to almost all sports both to participants and customers.

"4.2 The alternative proposed by the OFT pits a disparate group of racecourses against a collective buyer (bookmakers) which would inevitably lead to a diminution of industry revenues that undoubtedly would not flow back to the customer in the form of enhanced value but manifest itself in the bottom line of profit and loss accounts of bookmakers. This is blindingly obvious to anyone with any experience, not only of British Racing but of horseracing in other countries – the Big 3 Bookmakers have a realisable capital value exceeding £5 billion, even in today's deflated market, as against racecourses with an aggregate market capitalisation value not approaching 10 per cent. of the Big 3 Bookmakers, exclusive of any value ascribed to the remainder of British Bookmakers.

"4.3 The consequence of a disparate seller and collective buyer relationship would be an unmitigated disaster. We have recently witnessed a significant decline in Levy yield from that projected only 18months ago by the Department for Culture, Media and Sport when determining that Gross Profits rather than turnover should be the basis of the Levy."

I do not need to go into the detail but perhaps the last sentence:

"It is likely that the volatility of the Levy yield would be further accentuated should the principle of collective selling be dismantled and should responsibility for deriving true value be transferred to individual racecourses and/or racecourse groups confronted by a collective buyer of an incompatible magnitude to the disparate seller.

"4.4 If the OFT were to decide in the way it envisages in the ATR Rule 14 Notice, this would prejudice the satisfactory realisation of the Government's plan to bring the Levy Board to an end, while ensuring that British Racing can remain a truly national sport without statutory underpinning."

Now there are obviously two themes there on which Mr. Vajda and Mr. Vaughan rely, namely the need for additional money to displace the Levy Board, but what that statement could not be taken to be would be consistent with the suggestion that collective selling reduced rather than increased prices which featured prominently in the BHB Reply. So I say that the OFT has shown that these arguments advanced by BHB are insubstantial and lead to absurd conclusions when compared to the actual facts of the case. More generally the OFT submits that the further analysis of the case resulting from the issues raised by the appellants themselves and by the Tribunal confirms that the OFT's standard economic analysis is correct.

Faced with these serious problems, the Appellants and particularly the RCA have changed tack again. Whereas their stance up to and including the last Case Management Conference was that the OFT must make its position clear by reference to the main issues in the case, and with full consideration of the contemporary evidence their position now seems to be that the Tribunal should avoid consideration of the underlying merits of the case and should focus narrowly on the precise arguments deployed by the OFT in its Decision.

The OFT finds it hard to avoid the suspicion that the Appellants have embarked on this new strategy at this late stage because they have come to recognise that detailed scrutiny of the documentary record unveils the feebleness of their case.

With that by way of introduction, I turn to the first issue, collective selling and price. I want to deal with two questions. First, the case law on concerted practices and how it applies in this case; and secondly, the general stance of the European Community which his relevant by reference to s.60 of the 1998 Act to collective selling arrangements and their effect on price.

Taking the first point, the first authority I would like to go to is *Suiker Unie* which is referred to in our Defence at para.D 7 to 12, but the authority is at bundle 23 tab 18. It is a very long judgment and it is about a very complicated series of facts involving international sugar sales, but I am happy to inform the Tribunal that we do not have to worry about that because we are going to it simply for a statement of principle at paras.25 to 28, which is pages 8 and 9 of the judgment. It is section III of the judgment; at that time they structured the judgments somewhat differently from the way they structure them nowadays. The court said:

> "25 As several of the complaints made by the Commission blame the undertakings concerned for having engaged in 'concerted practices' within the meaning of Article 85 of the Treaty [now Article 81], it is advisable to restate the scope of this concept and the way in which it must be applied in a case of this kind.
>
> "26 The concept of a 'concerted practice' refers to a form of co-ordination between undertakings, which, without having been taken to the stage where an agreement properly so-called has been concluded, knowingly substitutes for the risks of competition, practical co-operation between them which leads to conditions of competition which do not correspond to the normal conditions of the market having regard to the nature of the products, the importance and number of the undertakings, as well as the size and nature of the said market.
>
> "27 Such practical co-operation amounts to a concerted practice, particularly if it enables the persons concerned to consolidate established positions to the detriment of effective freedom of movement of the products in the common market, and the freedom of consumers to choose their suppliers.
>
> "28 In a case of this kind the question whether there has been a concerted practice can only be properly evaluated if the facts relied on by the Commission are considered not separately but as a whole, after taking into account the characteristics of the market in question."

I am perfectly content to operate on that basis and, in my submission, when one looks at the documentary record it may be that there are arguments that at certain points prior to the Media Rights Agreement there were other forms of formal agreement falling within the scope of Article 81, but what I submit is blindingly obvious is that there was at the least a concerted practice between the courses which can be manifested in various ways by the documents.

As I will submit later on, in my submission the proper approach in a case of this kind is to give particular weight to the particular documentary record, given the overlay that there has been during the period 2002/03 by submissions made by all parties, as indeed Mr Vajda debated with you, Sir, yesterday afternoon.

Looking at just three documents at this stage. First, bundle 14, tab 13. This is in fact a draft document, but I do not think there is any dispute that it was a document that was ultimately signed up to by all the members of the Super 12 group of courses, although I believe Doncaster was somewhat laggardly in signing up. Both paragraphs 1 and 2 make the point sufficiently.

> "In consideration of our agreeing to pay to the Racing Consortium [the Super 12 courses] on demand the sum of £1, the Racing Consortium hereby agrees that as from the date of signature of this letter agreement, it shall forthwith discontinue and shall procure that each of its members and subsidiaries from time to time, and its agents, representatives and advisers from time to time shall so discontinue any discussions or negotiations which it may currently have with any third party in relation to the exploitation of all video and/or visual and/or interactive and/or related rights including without limitation race card information in relation to horse races run on the racecourses owned or operated by the members of the Racing Consortium (Rights)."

In my submission that is plainly a manifestation of, at the very least, a concerted practice between the Super 12 courses, not to deal with anybody else for the period of this Agreement.

MR. VAJDA: You have to be a bit more specific than that. I would be grateful if my friend would specify precisely what submission he is making on this. It is not a document that is referred to in the Decision, when he says this has been done for the purpose of this agreement, what agreement is he talking about?

MR. THOMPSON: I am not entirely understanding what Mr. Vajda's concern is, it is quite clear from the record at that period that the Super 12 entered into a lock out.

MR. VAJDA: What is the period you are referring to?

MR. THOMPSON: It started on 8th February, and then the next point I was going to make was that Mr. Johnson, in a subsequent statement referred to at para.D38 of our Defence, said that thereafter all parties proceeded on the basis that this arrangement stayed in place. All I am saying is that this is a clear starting point of the Super 12 arrangement, even though there is evidence that it went back to the Summer of 1999, but this is a clear contemporary document manifesting the deliberate binding of the Super 12 to act in a particular way and not to act in another way.

The second set of documents to which I refer are at tabs 19 and 31 of this bundle. First, at 19 is a letter from the Racecourse Association dated 6th March. It is simply the first paragraph and the last paragraph of the letter. This is a letter to the Racecourse managers, excluding the consortium or RHT, so that is the 42, as it has come to be called.

> "As most of you know, Channel 4 expects to write by the end of this week to the RCA 42 Racecourses with their offer to each of you which flows from their deal under negotiation with the consortium. I have no ideas what the offers may be."

Then over the page one can see Mr. Creighton-Miller, the chief executive of the Racecourse Association saying:

> "Meanwhile I am glad to report that the area meetings demonstrated a unanimous determination among the 42 to stick together and exploit their considerable leverage. If everyone keeps their nerve and sense of purpose I am confident a remunerative conclusion will be reached."

In my submission, again that may not be a formal agreement, but that is clearly sufficient for the purposes of concerted practice.

The third document is at tab 31, and it is the first refusal letter, if I may call it that, from the Racecourse Association, this time to Channel 4.

THE CHAIRMAN: Are you putting the case solely on concerted practice rather than agreement?

MR. THOMPSON: No, it is put in both ways, but all I need is concerted practice.

THE CHAIRMAN: Well I realise you only need one, but you are relying on both, are you?

MR. THOMPSON: Yes, well the way we have put it in the Defence is that there clearly was an agreement, namely the right agreement, which was notified, so in a sense there is no formal difficulty, but the matter to which we ----

THE CHAIRMAN: The Rights' Agreement itself does not prove that it was entered into pursuant to an agreement between the participating racecourses, does it?

MR. THOMPSON: No, it does not.

THE CHAIRMAN: So you have either to identify some prior agreement between them that they would act in a particular way or, alternatively, identify a concerted practice, which I understand you are now doing, or both. I just wanted to know what the case is that you are making. The Decision I think found an agreement, did it not?

MR. THOMPSON: Agreement or concerted practice. It was put in those terms. It is para.237 of the Decision.

THE CHAIRMAN: Yes.

MR. THOMPSON: The findings are 234 and 237.

THE CHAIRMAN: Yes.

MR. THOMPSON: On 11th April 2000, the Racecourse Association wrote to Mr. Scott of Channel 4 television and it is the paragraph starting "Whilst…" He stated:

> "Whilst the Racecourses are likely to respond individually to your letters, let me respond on behalf of all of them as follows. Your offer is individually and collectively acknowledged. Whilst there were attractive aspects to the proposals the financial arrangements are not acceptable and the proposals are therefore rejected. You are aware of the aspects that were of greatest concern."

Then the last paragraph:

> "42 have asked the RCA to pursue all negotiations on their joint behalf. Your points of contact should be Malcolm Armstrong or myself at the RCA and Charlie Ralph or Kevin Bone at Hawkpoint".

Hawkpoint being the media consultants who had been appointed to advise on the deal for the RCA and who continued as advisers thereafter.

The next document is the Racecourse Association response to the first Arena bid at tab 40. This time Mr Creighton-Miller to Mr. Pope, where he states:

> "Dear Martin, I have been mandated by the 42 Racecourses to respond to your letter to each of them dated 19th June. This letter formally on behalf of the 42 declines your offer of 19th June, but looks forward to a revised offer in due course. Whilst writing I thank you and your team for the excellent presentation and the great efforts made by all of you, it was much appreciated."

Again, in my submission, that is amply sufficient for a concerted practice between the 42.

Then directly responding to the Tribunal's question in relation to the Agreement itself, if one turns to the next bundle, bundle 15, tab 73. This is a letter dated 28th November to the Racecourse manager informing them of the recommendation of the RCA in relation to the two bids, the Carlton bid and the ATR bid. Paragraph 3 states:

> "……has elected principally in the light of broadcast uncertainties to accept the Go Racing offer of a short period of exclusivity to expire on 15th December 2000. Accordingly RCA Board would recommend members to similarly accept the Go Racing offer. Members will of course be aware that under clause 1.8 of that offer Racecourses who do not respond by 30th November may, at the discretion of the

> bidder, receive a reduced guaranteed payment. We would ask that you amend the Go Racing confirmation by deleting the words 'and to execute as indicated' and initial the alteration. The result of this would be that the final long form agreement, having been agreed by the RCA and Go Racing, would be sent to Racecourses before execution is due on 15th December."

You will see appendix A is a confirmation signed on behalf of the individual course, and if one then turns to tab 75 we find another letter from Mr. Creighton-Miller exhibiting a press release and over the page you will find Mr. Creighton-Miller asserting in the press release:

> "I am delighted at the response of our members whatever their individual preference, and Carlton had their supporters, they have overwhelmingly recognised the priority is to get on and try to conclude a satisfactory 59 racecourse deal with Go Racing. Whilst I am disappointed that two racecourses have not yet signed I hope they may do so later today".

So the position was that as at 30th November 2000, 57 of the 59 courses had signed up. As I understand it, although I have not seen evidence to that effect, but it appears to have been assumed, thereafter the final two did sign up. There was then a process of extending the periods of exclusivity which is evidenced by the emails in this tab, until a period in April 2001 when 10 courses, and I think at one point 11 courses, defected from the arrangement, and one finds that if you turn through, there is an email from a Nicholas Fitzpatrick to a Mr. Zeffman, dated 12th April 2001. If you turn through it is about the fifth or sixth page through, still at the same tab. It is the fourth page through. There is an email dated 12th April 2001. You will see that there are a number of these extensions. This one says:

> "I am instructed that the RCA has agreed to extend exclusivity on the same basis as last week's agreement until 5.30 on 19th April with the exception that the following courses have no renewed exclusivity."

And then there is a list starting with Cartmel and ending with Towcester. The substance of it being that on 28th November the RCA agreed to recommend the ATR bid, the courses then all signed up to an exclusivity arrangement with ATR, which stayed in place up to and including the conclusion of the bid itself. So in my submission there clearly was either an agreement, or at least an arrangement, between the courses to give exclusivity to ATR between the period November 2000 and May 2001. If I turn now to the question of collective selling and price, this is set out in paras 1-5 in section E of the Defence, which is bundle 8 I think. It is p.78 of the Defence. It starts with a quotation from Fall and Nickpay, one of the leading textbooks in this area written by a number of Commission Officials. It states:

> "In principle, all joint selling arrangements between competitors not being small or medium sized enterprises are caught by Article 81(1) as they normally lead to the co-ordination of prices and sales conditions and sometimes even to output restrictions or market sharing."

Then there is a quotation from a 1993 Notice on Co-operative Joint Ventures, which starts:

> "Sales joint ventures selling the products of competing manufacturers restrict competition between the parents on the supply side and limit the choice of purchases. They belong to the category of traditional horizontal cartels which are subject to the prohibition of Article 81(1) when they have an appreciable effect on the market."

I do not think it is necessary to read the second paragraph.

> "Thirdly, in the Notice on horizontal agreements the Commission expressed similar concerns."

The italicised wording in para.139:

> "*At one end of the spectrum there is joint selling that leads to a joint determination of all commercial aspects related to the sale of the product including price*".

Then in 144:

> "The principal competition concern about a commercialisation agreement between competitors is price fixing. Agreements limited to joint selling have as a rule the object and effect of co-ordinating the pricing policy of competing manufacturers. In this case, they not only eliminate price competition between the parties but also restrict the volume of products to be delivered by the participants within the framework of the system for allocating orders. They therefore restrict competition between the parties on the supply side and limit the choice of purchases and fall under Article 81(1)."

Then:

> "The appreciation does not change if the agreement is non-exclusive. Article 81(1) continues to apply even where the parties are free to sell outside the agreement as long as it can be presumed that the agreement will lead to an overall co-ordination of the prices charged by the parties."

So that is the general position. The point that is made, particularly, I think by the BHB, is that there is some difference in relation to collective selling in the sports' sector and, in particular, there is a reference to the Premier League case. I will come on to the specific differences between this case and the UEFA or Premier League case in a moment, but I would note, para.E.4 of the Defence, which states:

> "The Commission has taken the same approach in relation to the joint selling of sports' rights in its recent decision in *UEFA* and two Article 19(3) Notices in relation to

> national joint selling arrangements for the principal football competitions in Germany and England. The Commission found that Article 81(1) was clearly infringed because of the adverse effects on price competition."

So first of all in UEFA they found that the joint selling body restricts competition in the sense that it determines prices and all other trading conditions on behalf of all individual football clubs producing the UEFA Champions League content. Then, further on:

> "The reduction in competition caused by the joint selling arrangement therefore leads to uniform prices compared to a situation with individual selling."

Then in relation to Premier League the Commission found that the arrangements were strict competition in the upstream market with the acquisition of media rights of football, and in the *Bundeslege* case they found that it restricted competition on the upstream market for the acquisition of television rights for football matches played regularly and the corresponding rights for mobile telecommunications and internet broadcasting.

In my submission that is all relevant by way of background to the analysis of this case. The references to the two Notices, which are in the bundles, are at bundle 24 tab 26, and the horizontal Notice is at tab 24, tab 27. If I may, I will take the Tribunal to *UEFA* in the context of the necessity issue rather than now, because in my submission the *UEFA* Decision of the EC Commission, although it features quite prominently in the pleadings has not been referred to expressly by either Mr. Vaughan or Mr. Vajda, in my submission it is a relevant and recent authority which takes into account the *Wouters* and *Gottrup-Klim* line of authority and therefore is something that I think the Tribunal will wish to take into account.

I would like now to turn to the question of market definition. It has been dealt with at some length, particularly by the BHB and is addressed in the Decision at considerable length, and in considerable detail. I will just give the Tribunal the reference. The section on market definition – relevant products and markets – is part 3 of the Decision, paras. 51-175, and the specific analysis in relation to the non-LBO bookmaking rights is para.78 to 162. In the Defence, this is addressed in some detail in Section C of the Defence, and in the Skeleton argument it is addressed in part 2 of the skeleton and, in particular, we have sought to address a question raised by Professor Bain at, I think, the last case management conference. The only point I wanted to address in my oral submissions is a debate between Mr. Vaughan and myself, which is manifested by section 2, paras. 29-33 of our skeleton argument and para.17 of the BHB skeleton argument. The question relates to whether or not the data rights sold by, or owned by BHB at the relevant time should have been taken into account as part of the relevant product market in this case. Mr. Vaughan makes a number of points at para.17 of his skeleton argument. The BHB states:

"The grounds on which the OFT rejects BHB's view that complementary products must be aggregated for the purposes of identifying the correct product upon which to carry out the SSNIP test for market definition are flawed".

So standing back from this, the OFT reasoned in its Decision and in its subsequent pleadings that the relevant question was whether or not a monopoly holder of the interactive betting rights – to use a convenient shorthand – could have raised the price for those rights without a sufficiently adverse effect on its profits, leading it to have to reduce its prices again, the classical SSNIP test. The difficulty in applying that test here obviously related to the fact that this was a new product and also to the fact that there was really no obvious substitute for these rights for a business in the position of ATR, and so as we have argued in our skeleton argument the appropriate issue to consider is whether or not other content might have been substitutable for the British Horse Racing rights and the only other obvious candidates appeared to be greyhound racing or foreign horse racing, and the OFT found on the basis of detailed evidence that they were not effective substitutes in its Decision. Or the only alternative, which is to some extent raised by the RTA in its pleadings, was to go over to a different model altogether, either telephone bookmaking, or possibly bookmaking without the use of pictures if that made any sense, either on the internet or interactive digital television.

The point that is raised by Mr. Vaughan is that as part of the overall sale there had to be not only the rights, but also access to the BHB's data and his submission is that for that reason the market should have been broader than the OFT's market and should have taken account of the data rights. Quite where the leads on the argument and how it fits in with his broader case that British Racing was the relevant market is something of a mystery. But it is at least one of his arguments that we need to take account of the data rights.

In my submission, the OFT's case on this is in fact correct and it can be seen to be correct for at least three reasons. The OFT submits that it is not appropriate to take into account the BHB data rights, first of all because on the BHB's own case the demand for its data rights was effectively completely inelastic so that whatever had been the price for the interactive betting rights that would have had no material impact on the demand for the BHB data, which were necessary for that purpose in any event.

PROFESSOR BAIN: I wonder if I could just ask you about that. It would not affect the quantity demanded, would it not affect the price? The demand is now to be thought of as a demand curve, which has both price and quantity elements. In that case the quantity is fixed, but surely if these product were strict complements in the way that they are, if more is paid for the audio-visual rights then less will be available for the data rights, as I think Mr. Saville pointed out in one piece of evidence?

MR. THOMPSON: That would not have reduced the demand for those rights, that is the point I am making.

PROFESSOR BAIN: It would not affect the quantity, but it would have shifted the demand function by moving down the price for a given quantity.

MR. THOMPSON: It would have reduced the price that the purchaser of the data was willing to pay.

PROFESSOR BAIN: Correct, that is a shift of the demand function. That is a change in demand. I think you have been using "demand" to equate to quantity rather than the combination of demand and price, which was the demand function.

MR. THOMPSON: The point I am making is that I think Mr. Vaughan himself stresses the market power of the BHB as a monopoly supplier of something for which there is an inelastic demand, so although there might have been pressure to reduce the price, on his own case he would have been able to resist that pressure, so it would have had no actual impact in relation to the demand for the interactive betting rights.

PROFESSOR BAIN: Well we can look at that.

MR. THOMPSON: That is one point. The second point, which perhaps answers your question more directly is that given that BHB was the owner of those rights but was not the owner of the interactive betting rights, in our submission the supplier of interactive betting rights would have had no reason to take account of any adverse impact in relation to BHB because it would not have fed through to the interactive betting rights' owners profitability and so would not have led him to reduce his prices so on the classical SSNIP test there would be no reason to take account of any adverse impact in relation to BHB, so that seems to be the second theoretical point which I think addresses the substance of the point just put to me.

The third point, and this is a point which arises from the paper appended to Mr. Vaughan's skeleton argument as well as a matter of theory, is that the question of market definition is not an entirely abstract science, but is undertaken for specific purposes in relation to specific problems that have arisen in the market. Here, where the very issue is whether or not the price of interactive betting rights has been increased by a collective arrangement between the courses who own those rights, in my submission it is appropriate to focus the market definition on that question and the issue is conveniently summarised in the paper that Mr. Vaughan exhibits in relation to a different market for orange juice. If I could take the Tribunal to that, it is the annex – I am not sure if they are numbered, I only had a fax – it is the back of the fax. "PWC Economics Competition notes", and there are two interesting papers. The first one is about damages in competition cases, which I do not think is included as relevant to this case. The second one (page 4 of the article) is called "The Relevant Product –

Making a Good Start in Market Definition". The passage that I refer to is headed "Whose Product? Why the Purpose of Market Definition Matters." Mr. Morrison says:

> "Suppose there is a merger between a manufacturer of fresh orange juice and another manufacturer who produces an orange flavoured fizzy drink. Further suppose that the closest substitutes to fresh orange juice are other fruit juices followed by squashes and cordials, whilst the closest substitutes to the fizzy orange drink are lemonades colas and other carbonated soft drinks, how should we define the relevant product? Here there are at least three choices for the relevant product, the fresh orange juice, the fizzy orange drink, or the products of both of the merging parties, e.g. orange flavoured drinks. To see how the choice of starting point matters, supposing we take fresh orange juice as a relevant product this is likely to lead to the relevant market being defined as fresh orange juice, or perhaps fresh fruit juices or even perhaps fresh fruit juices, squashes and cordials. If however, we choose the fizzy orange drink as the relevant product then the relevant market might be fizzy orange drinks or perhaps carbonated soft drinks. If instead we started with the much broader product of orange flavoured drinks then this is likely to be a relevant market in its own right."

Then the answer to this is given in the next section:

> "The three different starting points lead to three different market definitions, so which should we choose? The choice of the relevant product will depend upon the competition issues that are being explored. If the main issue is whether the merger may allow the price of fresh orange juice to rise, we need to identify the closest substitutes to fresh orange juice and so would choose this as the relevant product. Similarly, if the issue is whether the merger might allow the price of fizzy orange drink to rise we need to start the market definition process with the fizzy drink. If both issues were concerned then both of these relevant products would need to be chosen. A broader definition of the relevant product such as orange flavoured drinks could be appropriate if the competition concern was that the merger might increase the risk of tacit collusion in the wider market, or if the merger was thought likely to raise buyer power issues."

In my submission, here the issue relates to the price of interactive betting rights, and for this reason as well it is appropriate to focus on that aspect of the market.

I now turn to another testing topic, but in a different ----

PROFESSOR BAIN: Are you leaving market definition?

MR. THOMPSON: Yes.

PROFESSOR BAIN: Could I just ask you, on your para.2.24 in the skeleton, where you dealt with the issue I raised, at A you seemed to be having as your counterfactual for that purpose that there were largely guaranteed payments, and only a small element connected to turnover. At 2.24.2 you go for the alternative counterfactual, the one that you support in your discussion of price distortion, where you say that the counterfactual is one in which the payments would have been largely related to turnover. I am not clear in my mind how the OFT can run two alternative views, and I wondered if you shared my concern about that and, if you did, which of the two you would plump for?

MR. THOMPSON: I am not sure I understood the question you put to me, if I can come back to it?

PROFESSOR BAIN: If we come back to it, at the last CMC I pointed out that in your Decision, when you were referring to market definition you were assuming there was a fixed payment. That is a key element, it appears at para.92 and a number of other places, absolutely key. When you looked at market distortion you were assuming that the payments were largely variable, and so it seemed to me at that time that the two parts of the case had different underlying counterfactuals. When you come to para.2.24 here, at 2.24.1 you say well, it is possible to have fixed payments and still have incentives. Then at 2.24.2 you are saying that equally if the payments are variable you will have incentives. Now that seems to me that you are trying to have two possible counterfactuals.

You have one counterfactual where you say it is fixed, which is 2.24.1 and a different counterfactual at 2.24.2 where you say it is variable – the latter one being compatible with what you say about distortion in the market. What I am saying is, and I am not a lawyer as you know, it seems a little surprising to me that the OFT can be arguing with two alternative counterfactuals. I can understand how applicants can have 15 different contradictory theories and so long as one stands they win. But for the OFT you have your counterfactual and you are arguing your case, as I understand it, on the basis of a counterfactual.

What I am asking you is, which is it?

MR. THOMPSON: I think it may not have been clear – we tried to make it clear but it may be that what we are saying does not come across as clear as we had hoped. In 2.24.1 what we are saying is that as a matter of fact, looking at this actual market there is no actual inconsistency because incentives can be provided in this market while retaining fixed costs, so that the ----

PROFESSOR BAIN: I understand that is what you are saying.

MR. THOMPSON: -- so the issue as a matter of fact does not necessarily arise. That is the first point we make.

PROFESSOR BAIN: Yes, counterfactual on a balance of probability, this is what you think would have happened if there had not been the agreement. What I want to know is what, on a balance of probability the OFT think would have happened in this respect about the nature of the payments. I accept that theoretically what you say could be so, in 2.24.1, but the OFT has to have a counterfactual, as I understand it, that says “On the balance of probability this is what we think would have happened.” It seemed to me that now in your skeleton you come down very firmly on the competitive counterfactual having variable payments.

MR. THOMPSON: You mean in the section on incentives?

PROFESSOR BAIN: In the section on price distortion, and what I am really asking you now is whether you are prepared to say that is the counterfactual throughout your Decision, or whether you want to try to run a different counterfactual for this part, which I find a little difficult.

MR. THOMPSON: I think for the purpose of incentives in my submission the answer at 2.24.1 is a perfectly proper answer, because our objection in the incentives’ section is to a lack of incentives and if incentives had been provided they could have been provided in one of two ways as we indicate. They could have been provided in a way that raises no theoretical inconsistency of the kind pointed out, or they could have been raised in a way which we address in para.24.2 where there is the theoretical point that if the market had developed in a different way, for example if one of the earlier offers had been entered into where there had been a degree of revenue sharing which would have provided an incentive, which I think is the point that is being put to me, then the question would be how should you define the relevant market in that case, and the point we make, we make in two ways.

First, as a matter of principle we think that it would be analogous to the cellophane fallacy to ignore the actual market and assume that a hypothetical monopolist would have been unable to shift to a fixed fees system, because that would threaten to underestimate the market power of the monopolist and, indeed, is manifested in this case where there are fixed payments by a virtual monopolist in the form of the courses in this case. So we say that as a matter of principle it would be fallacious to ignore that fact, at least on this particular market. We also, by reference to authority refer to two cases, not precisely the same, one of which I was involved in – and indeed Mr. Vaughan was involved in – where this issue did arise and where the Tribunal was prepared to accept that it should take into account the actual circumstances of the market in operating a SSNIP test rather than working on a purely hypothetical basis.

PROFESSOR BAIN: I understand the argument you are making, Mr. Thompson, on 24.2, where you are suggesting that we look at it in a particular way and obviously we will consider that. It is simply that it seems to me that if we are assessing the validity of the OFT’s case on market definition we have to know what the OFT thinks would be the counterfactual – not “it would be this, or it would be that”, but what, on a balance of probability you think it would be.

MR. THOMPSON: I think that is where I am a little ----

PROFESSOR BAIN: Perhaps we cannot take this any further, but I still have some difficulty with the position that we have to consider two alternatives in evaluating your case there.

MR. THOMPSON: I have to say I am not convinced that they are necessarily even a prima facie problem of principle, because the SSNIP test is concerned with a very particular question, namely, what would have happened if a hypothetical monopolist had raised its prices and whether there would have been sufficient defection from the market to operate as a discipline to require him to bring his prices down again. So that is an entirely theoretical exercise which is not necessarily the same as saying what would have happened if these courses had not agreed to do this? What would have happened in those circumstances? They are two different, although related intellectual exercises. In so far as there is simply a straight question: what do I, standing here on behalf of the OFT, think would be the most likely thing would have happened if these arrangements had not been entered into, then as you have clearly put to us, the actual documentary record in this particular case, though not in other related markets such as the current bags market, where I think a different form of incentives has been provided, the evidence in this case appears to be that revenue sharing was at least on the bidders agenda, and that they were gradually forced to increase the minimum guaranteed sums in a way that gradually drove out any material incentive based on share of revenue, and so in so far as the contemporary record can show what would have happened that seems to be the most likely thing.

PROFESSOR BAIN: Yes, well I understand your argument on that.

MR. THOMPSON: It is simply a matter of time. There are obviously a number of interesting questions in a number of areas of this case. I dealt with one particular point which is obviously outstanding on market definition, but otherwise I am content to rely on our written case on that issue.

If I may, I now turn to the question of necessity, which we dealt with at some length in section 3 of our skeleton argument and rather more briefly at para.B14 of our Defence. If I can start with the short discussion in the Defence. I do not propose to go through the long theoretical debate in section 3 of our skeleton – or I certainly would invite the Tribunal to read it as it is a detailed treatment of that issue. The discussion in the Defence starts at para.B8, although there is also a discussion in section E in the context, first of all, of the sporting exemption, as it is now called or not called, and also in relation to the critical mass issue. So at B8 we say that one significant qualification to this structure, that being the normal position that the burden falls exclusively on the OFT in relation to Article 81 in relation to s.2, or the Commission in relation to Article 81(1), arises from the fact that Article 81(1) in certain circumstances requires a decision-maker to decide whether what appears on a preliminary analysis to be a prima facie restriction of competition is in fact justified by the particular circumstances of the case, so that it does not, in the final analysis, prevent, restrict or distort competition, and then there is reference forward to part E and the *Wouters* and *Metropole* cases.

B10, in such circumstances the Commission will require a demonstration of what appears to be a restriction of competition falls outside the scope of Article 81(1) in the light of the particular circumstances of the case. There is therefore an onus on an undertaking or an association of undertakings wishing to maintain that Article 81(1) does not apply in a case of this kind, to demonstrate that the apparent restriction is ancillary to a pro-competitive wider arrangement or otherwise necessary to achieve some legitimate benefit.

Then at B13 and 14, in such cases it will be necessary for the parties to show that the restrictions are inherent in the operation concerned and do not go beyond what is necessary to achieve the relevant benefit. Thus in *Metropole*, in considering whether a particular clause can be considered as an ancillary restriction, the CFI concluded that the applicants, despite having the burden of proof in that regard, have not adduced any evidence to invalidate that assessment. Similarly, in *UEFA*, in considering whether a collective selling arrangement was necessary in order to promote solidarity between all levels and areas of sport, the Commission concluded that *UEFA* had not demonstrated that a joint selling arrangement is an indispensable prerequisite of the redistribution of revenue, and then we conclude that, overall therefore, although the legal burden of proof remains on the party asserting a breach of Article 81(1), in such cases, as here, a party who maintains a prima facie anti-competitive term in an agreement is, for example, necessary to achieve a pro-competitive outcome will need to produce both evidence and either authority or strong arguments of principle to support its case. So that was our basic position.

Then we develop the matter in greater detail in section E of the Defence. First of all, we quoted a long section from *UEFA*, at para.E38, pp.93 to 94, and at E57 we quoted a long section from what is called the Article 81(3) Notice, and that is the Notice produced by the EC Commission as effectively a helpful guide and summary of the case law on Article 81 at the time when the EC competition rules were modernised with effect from the 1st May last year.

What I would like to do is turn first of all to an old case in this area, the *Remia and Nutricia* case cited in our skeleton argument, which is at bundle 23, tab 20. For once there is a headnote on p.2 which sets out a summary of the legal issues.

> "The fact that non-competition clauses are included in an agreement for the transfer of an undertaking is not of itself sufficient to remove such clauses from the scope of Article 85(1) of the Treaty. In order to determine whether or not such clauses come

within the prohibition in Article 85(1), it is necessary to examine what would be the state of competition if those clauses did not exist. If no non-competition clause is laid down, and if the vendor and the purchaser remain competitors after the transfer, it is clear that the agreement for the transfer of the undertaking cannot be given effect. The vendor, with his particularly detailed knowledge of the transferred undertaking, will still be in a position to win back his former customers immediately after the transfer and thereby drive the undertaking out of business. Against that background non-competition clauses incorporated in an agreement for the transfer of an undertaking in principle have the merit of ensuring that the transfer has the effect intended. By virtue of that very fact they contribute to the promotion of competition because they lead to an increase in the number of undertakings in the market in question."

Reasoning which perhaps in different wording would be very familiar to you, Sir, in relation to restraint of trade, as I think was discussed yesterday.

The relevant part of the judgment is at para.17 and following. Paragraphs 17 to 20:

"It should be stated at the outset that the Commission has rightly submitted – and the applicants have not contradicted it on that point – that the fact that non-competition clauses are included in an agreement for the sale of an undertaking is not of itself sufficient to remove such clauses from the scope of Article 85(1) of the Treaty.

18. In order to determine whether or not such clauses come within the prohibition of Article 85(1), it is necessary to examine what would be the state of competition if those clauses did not exist.

19. If that were the case, and should the vendor and the purchaser remain competitors after the transfer, it is clear that the agreement for the transfer of the undertaking could not be given effect. The vendor, with his particularly detailed knowledge of the transferred …"

In fact that is the very same wording that I have just read out, and then para.20 is the conclusion:

"… in order to have that beneficial effect on competition, such clauses must be necessary to the transfer of the undertaking concerned and their duration and scope must be strictly limited to that purpose. The Commission was therefore right in holding that where those conditions are satisfied such clauses are free of the prohibition laid down in Article 85(1)."

That was at a relatively early stage in 1985 in the development of EC competition law. After that, and particularly in the context of merger control, which became part of EC competition law in 1989, a concept of ancillary restraints was developed whereby one would, particularly in the context of a merger, consider the question whether or not a merger was itself pro or anti-competitive, and one would then look at contractual clauses of this kind to see whether or not they were reasonably inherent in the transfer, so that although in themselves they might appear to be anti-competitive when one looked at the actual deal that had been approved by the Commission one found that these additional restrictions were effectively inherent in the operation, and as long as they did not go too far, i.e. they were not too long or they were not too broad in their scope, then they could be permitted, and it is that idea which, in my submission, is at the heart of this necessity question, which can be broadened out into a wider principle that applies to prima facie anti-competitive measures of the kind discussed in cases such as *Wouters* and *Metropole*.

One finds the reasoning developed in the Commission's notice at paras.18 and 24, which is at bundle 21, tab 4, and in my submission this is a particularly useful type of document in that it has, as it were, two forms of relevance for this case: first of all, under s.60 of the Competition Act it represents an effective summary of what the position under Community law is as at the 27th April 2004, when it was published; secondly, for the very purpose of these guidelines was, as it were, an accompanying document for the purposes of modernisation and thus to give national courts and competent authorities guidance as to how to apply the new powers that they enjoyed as a result of Regulation 1 of 2003, which modernised EC competition law by giving additional powers to the domestic authorities and courts to apply the EC competition rules.

Paragraph 18 of the notice on p.99 comes under the heading, before para.17, "The basic principles for assessing agreements under Article 81(1), and, in particular, para.18 starts:

> "For the purpose of assessing whether an agreement or its individual parts may restrict inter-brand competition and/or intra-brand competition it needs to be considered how and to what extent the agreement affects or is likely to affect competition on the market. The following two questions provide a useful framework for making this assessment. The first question relates to the impact of the agreement on inter-brand competition while the second question relates to … intra-brand competition."

And the relevant section under 18(2):

> "Does the agreement restrict actual or potential competition that would have existed in the absence of the contractual restraint(s)? If so, the agreement may be caught by Article 81(1). For instance, where a supplier restricts its distributors from competing with each other, (potential) competition that could have existed between the

distributors absent the restraints is restricted. Such restrictions include resale price maintenance and territorial or customer sales restrictions between distributors."

And then this is the key passage:

"However, certain restraints may in certain cases not be caught by Article 81(1) when the restraint is objectively necessary for the existence of an agreement of that type or that nature. Such exclusion of the application of Article 81(1) can only be made on the basis of objective factors external to the parties themselves and not the subjective views and characteristics of the parties. The question is not whether the parties in their particular situation would not have accepted to conclude a less restrictive agreement, but whether given the nature of the agreement and the characteristics of the market a less restrictive agreement would not have been concluded by undertakings in a similar setting."

And then it gives a number of examples. So, in my submission, that is bang on point here, and is the essential point on which the OFT relies. It is not good enough for the appellants to say that we would not have made this lovely agreement which generated so much money, they have got to say that nobody would have entered into an agreement for the creation of an interactive betting service unless there had been collective selling, which is, in my submission, a significantly higher hurdle and one which the evidence does not suggest that they can pass.

If I can take the authorities that were relied on by Mr. Vajda yesterday, and in particular the *Wouters* case and *Gottrup-Klim*, and one asks the question what were they really about, the question in *Wouters* is what is inherent in national rules of legal professional conduct, which is obviously an objective question, and in my submission at least with the benefit of hindsight it is not surprising that the Court of Justice gave the member states and the national professions some leeway in determining what legal professional conduct rules should be applied in the particular states.

In relation to *Gottrup-Klim*, the question was what is inherent in a cooperative which has been set up to balance the substantial selling power of major industrial groupings on the international agricultural markets. The purpose there was not to drive prices down to zero so that farmers in the Denmark could operate for free, the point was that these were very small little farms and the community had traditionally been benign towards the general concept of cooperation in the agricultural sector, and that in order to counter the very substantial selling power of the major industrial groupings it was appropriate for the cooperatives to be able to protect themselves. So the question was certainly by reference to that particular market in each case, but it related to the objective characteristics in that market, in one case legal professional rules, in the other case agricultural cooperatives, and they were saying what is inherent in the legitimate aim of protecting small farmers or protecting the objectives of legal professional rules. In my submission, that does not get the appellants as far as they need to get; the question here is, what was inherent in 1999 to 2001 in the launch of an interactive betting service and a sale of rights for the purpose of the launch of such a service? It is not what is inherent in a sale of these rights at the highest possible price so as to maximise the revenues of the courses, because that in effect would render competition law entirely barren because any cartel who was sufficiently affected could say, "We couldn't manage to achieve the magnificent profit without this cartel, and therefore *Wouters* is authority that cartel laws can be consigned to the dustbin", and, in my submission, that is not the law.

If we now look at the *UEFA* case, because, in my submission, it is a relevant authority because it is in the sporting sector and it addressed a number of issues both under Article 81(1) and Article 81(3), including the question of necessity. That can be found at tab 6 in the same bundle. What this case concerned one can find at para.1 of the reasoning on p.27.

> "This Decision relates to the rules, regulations and all implementing decisions taken by … UEFA and its members concerning the joint selling arrangement regarding the sale of the commercial rights of the UEFA Champions League, a pan-European club football competition. The Regulations of UEFA … provide UEFA, as a joint selling body, with the exclusive right to sell certain commercial rights of the UEFA Champions League on behalf of the participating football clubs. The joint selling arrangement restricts competition among the football clubs in the sense that it has the effect of coordinating the pricing policy and all other tradition conditions on behalf of all individual football clubs producing the UEFA Champions League content. However, the Commission considers that such restrictive rules can be exempted in the specific circumstances of this case. UEFA's joint selling arrangement provides the consumer with the benefit of league focused media products from this pan-European football club competition that is sold via a single point of sale and which could not otherwise be produced and distributed equally efficiently."

That obviously gives a summary of the case but there are two points that should be borne in mind. First of all, this was a set of rules which had been notified to the Commission for the purposes of an exemption but which the Commission, initially at least, took exception to, and negotiated with the governing body of football a number of significant amendments which were reflected both in this decision but also in the conditions attached to the exemption at p.55, and which is explained at para.199.

> "The exemption should therefore be subject to the condition that football clubs must not be prevented from selling their live TV rights to free-TV broadcasters where there

> is no reasonable offer from any pay-TV broadcaster. The Commission considers that no reasonable offer would exist, in particular, when there is no offer from any pay-TV broadcaster, which is comparable to the offer from the free-TV broadcaster."

Now, whatever problems that may give rise to, the point there was that this was a notified agreement to which the Commission initially took exception, which was significantly modified in response to the Commission's concerns and which was exempted pursuant to Article 81(3) rather than found to fall outside the scope of Article 81(1) altogether. And one finds the reasoning in this respect in the Decision. It is quite lengthy reasoning so I will not go to all of it, but the relevant section is at p.43 through to p.46, starting at para.113, under the heading "Restriction of competition". Paragraph 113 describes the arrangement again, and para.114 says:

> "UEFA's joint selling arrangement has the effect that through the agreement to jointly exploit the commercial rights of the UEFA Champions League on an exclusive basis through a joint selling body, UEFA, prevents the individual football clubs from individually marketing such rights. This prevents competition between the football clubs and also between UEFA and the football clubs in supplying in parallel media rights to the UEFA Champions League to interested buyers in the upstream markets. This means that third parties only have one single source of supply. Third-party commercial operators are therefore forced to purchase the relevant rights under the conditions jointly determined in the context of the invitation to bid, which is issued by the joint selling body. This means that the joint selling body restricts competition in the sense that it determines prices and all other trading conditions on behalf of all individual football clubs producing the UEFA Champions League content. In the absence of the joint selling agreement the football clubs would set such prices and conditions independently of one another and in competition with one another. The reduction in competition caused by the joint selling arrangement therefore leads to uniform prices compared to a situation with individual selling."

So that was the central finding in relation to price competition.

Over the page there is a section broken into three sub-sections, under the heading 6.5, "Applicability of Article 81(1) of the Treaty", and it addresses three points: first of all, League rights and individual football clubs' rights; secondly, on p.45, the special characteristics of sport; and, thirdly, the question of appreciability, which you will see is dealt with reasonably shortly. Each of them is relevant to the reliance that, in particular, Mr. Vaughan placed on the *Premier League* case, and indeed to certain points in **Bellamy & Child** where there was reference to the difficulties of defining the market for certain types of sporting competition.

Under the heading, "League rights and individual footballer rights", the Commission grapples with the question of how you define a market where the clubs are not only the owners of their grounds but also participants in a league competition which is organised by the same body who sells the television rights. So, for example, at para.119 the Commission finds:

> "Looking at a whole football tournament, it would seem that each football club would have a stake in the rights in the different constellations in which they play …"

That means the different matches that they take part in:

> "… but their ownership could not be considered to extend beyond that. Therefore, there are in a football tournament a large number of individual ownership constellations that are independent of one another. The fact that football clubs play in a football tournament does not mean that ownership extends to involve all matches in the tournament. Nor does it mean that ownership is inter-linked to an extent where it must be held that all clubs have an ownership share in the whole league as such and in each individual match."

Then over the page, at para.123, the Commission concludes.

> "The Commission therefore proceeds on the basis that there is co-ownership between the football clubs and UEFA for the individual matches, but that the co-ownership does not concern horizontally all the rights arising from a football tournament. It is not considered necessary for the purpose of this case to quantify the respective ownership shares."

So the Commission is addressing a quite particular feature of league sport competition which has been considered in a number of American cases and also featured in the *Premier League* case, where it is quite difficult to define exactly who owns these rights because they are rights that have a particular characteristic, namely that they are jointly produced so that there is a sort of curious overlapping joint venture between the participants in a football league competition, or at least that is what the Commission found.

The next section on the question of the special characteristics of sport addresses the particular arguments put forward by the parties to that case in relation to exemption from Article 81 for sporting competitions, and, in particular, at paras.128 and 129:

> "UEFA and the football clubs are economic competitors in selling commercial rights … to football matches. If there were no joint selling arrangement these parties would be selling the rights individually and in competition with one another.
>
> In fact, the object of the notified agreement is not the organisation of the UEFA Champions League but the sale of the commercial rights of the UEFA Champions League. The Commission is aware that some form of cooperation among the

> participants is necessary to organise a football league and that there is, in this context, certain independence among clubs. This interdependence between all clubs does not, however, extend to all activities of the UEFA Champions League participants. Clubs already compete in the areas of sponsorship, stadium advertising and merchandising. Clubs also compete for players. Consequently, the decision of an association of associations of undertakings to sell the commercial rights jointly on behalf of its members, which is an area in which the clubs are economic competitors, is not necessary in terms of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement to stage a football league. These provisions are therefore applicable to such an arrangement. Any need to take the specific characteristics of sport into account, such as the possible need to protect weaker clubs through a cross-subsidisation of funds from the richer to the poorer clubs, or by any other means, must be considered under Article 81(3) of the Treaty …"

And then down towards the bottom of the page, para.131, there is consideration of the Nice declaration, which I think is in the papers.

> "The Commission fully endorses the specificity of sport, as expressed, for example, in the declaration of the European Council in Nice in December 2000. On that occasion the Council encouraged the mutualisation of part of the revenue from the sales of TV rights, at the appropriate levels, as beneficial to the principle of solidarity between all levels and areas of sport. However, while UEFA's interest in the commercial aspects is understandable, it has not demonstrated that a joint selling arrangement is an indispensable prerequisite for the redistribution of revenue. The UEFA Cup demonstrates that a pan-European football competition can exist without a joint selling arrangement for the sale of the TV rights, as in this case the individual football clubs are selling the TV rights individually."

So I have, to some extent, telescoped the sporting issue and the *Wouters* issue, but what the Commission, in my submission, was saying there was that issues of solidarity and the particular characteristics of sport, including the JV aspect of a football league competition, is not enough to take one outside the scope of Article 81 altogether and, in my submission, that is a highly material piece of reasoning when one comes to consider the sort of points that were being made to the Tribunal by Mr. Vajda in relation to the need to preserve the courses' turf or the issues of solidarity raised by Mr. Vaughan earlier this morning.

I should say at this point that I have made some reference to the joint venture feature of a football league competition because, in my submission, that is a notable contrast to the present case. Although there are some references in the papers to the Super 12 in particular wanting to establish a premier league of racecourses, in reality there is no competition between courses of the kind that there is between Manchester United and Chelsea, that, in reality, racecourses are separate undertakings who own their own television rights, and there is no overarching sporting competition which has any real analogy to the football league competition.

I would now like to move on to the question of procedural issues under a number of headings, the first of which is relevant to the point that was raised with Mr. Vaughan right at the end of his submissions, and once or twice during the course of the morning, namely the nature of the hearing before the Tribunal and the extent to which it can be treated as analogous either to a Judicial Review or to the procedure before the court of first instance under what is now Article 229 and 230 of the EC Treaty. If I give the Tribunal first of all my submission. The particular nature of the appeal in this case is determined by schedule 8 to the Competition Act 1998 and gives proceedings before the Tribunal the character of a statutory appeal subject to specific statutory conditions. As such, it is neither a Judicial Review nor is it an action for annulment of the kind familiar from the court of first instance, and evidenced by the *European Night Services* case to which the Tribunal was taken this morning. As such, s.60 of the Competition Act does not directly apply to the procedures adopted before the court of first instance because s.60 specifically requires the English courts of this Tribunal to take account of statutory differences between the two regimes in comparing them and following EC case law where appropriate.

In my submission, the essential point is that this is a hearing on the merits, and that is a matter that appears not only from the case law of the Tribunal but also from the wording of schedule 8 itself and from statements made in Parliament, which have already been referred to by this Tribunal in the initial case, the *Napp* case which is referred to in *Argos* and which, in my submission, is simply summarised but is not departed from in the *Argos* case.

Given the centrality of the procedural issues that have now been taken, particularly by Mr. Vajda in his skeleton argument and his oral submissions, the Office has put together a further document which I would like to hand up now. I do not propose to go through it now but it puts on notice our position and it also sets out the statutory regime and the relevant authorities in what I hope will be a convenient form. (Document handed to the Tribunal) As I say, I do not propose to go through this paper now but it does contain the relevant statutory provisions on p.3, para.8, where you will see that para.3 of part 1 of Schedule 8 is set out, and provides materially as follows:

> "1. The Tribunal must determine the appeal on the merits by reference to the grounds of appeal set out in the Notice of Appeal."

So that is quite clear, it is an appeal on the merits, and the scope of the appeal is determined by the grounds of appeal set out in the Notice of Appeal. And then para.3.2 sets out extensive powers which are conferred on the Tribunal. It may confirm or set aside the Decision which is the subject of the appeal or any part of it, and may (a) admit the matter to the OFT, (b) impose or revoke or vary the amount of a penalty, (c) I am afraid I cannot remember, (d) give such directions or take such other steps that the OFT could itself have given or taken, and (e) is particularly important, in my submission, make any other decision which the OFT could itself have made, and then any decision of the Tribunal on appeal has the effect and may be enforced in the same manner as a decision of the OFT. So, in my submission, particularly 3.1, 3.2(e) and 3.3 make it clear that this is not a Judicial Review either in the sense understood by the Administrative Court or in the sense laid down by the EC Treaty. This is not simply an action for annulment and the remedies which the Tribunal can give are not limited to certiorari mandamus or prohibition or prohibition mandatory orders or quashing orders. So, in my submission, that is the starting point.

The next point is I think best addressed by looking at the original *Napp* decision, which is found at tab 25 of bundle 24. It is p.28 of the transcript, starting at para.117.

> "If and when a matter moves to the judicial stage before this Tribunal, what was previously an administrative procedure, in which the Director combines the roles of 'prosecutor' and 'decision maker', becomes a judicial proceeding. There is, at that stage, no inhibition on the applicant attacking the Decision on any ground he chooses, including new evidence, whether or not that ground or evidence was put before the Director. The Tribunal, for its part, is not limited to the traditional role of judicial review but is required by paragraph 3(1) of Schedule 8 of the Act to decide the case 'on the merits' and may, if necessary and appropriate, 'make any other decision which the Director could have made' … If confirming a decision, the Tribunal may nonetheless set aside a finding of fact by the Director … Unlike the normal practice in judicial review proceedings, the Act and the Tribunal Rules envisage that the Tribunal may order the production of documents, hear witnesses and appoint experts … and may do so even if the evidence was not available to the Director when he took the decision …
>
> In elucidation of these provisions, we refer to the statement made in the House of Commons by the then Minister for Competition and Consumer Affairs (Mr. Griffiths) during the passage of the Competition Bill on 18 June 1998 …
>
> > 'It is our intention that the tribunal should be primarily concerned with the correctness or otherwise of the conclusions contained in the appealed decision

> and not with how the decision was reached or the reasoning expressed in it. That will apply unless defects in how the decision was reached or the reasoning make it impracticable for the tribunal fairly to determine the correctness or otherwise of the conclusions or of any directions contained in the decision. Wherever possible, we want the tribunal to decide a case on the facts before it, even where there has been a procedural error, and to avoid remitting the case to the director general. We intend to reflect that policy in the tribunal rules.
>
> This is an important aspect of our policy, and I shall explain the rational behind our approach. The Bill provides for a full appeal on the merits of the case, which is an essential part of ensuring the fairness and transparency of the new regime. It enables undertakings to appeal the substance of the decision including in those cases where it is believed that a failure on the part of the director general to follow proper procedures has led him to reach an incorrect conclusion. The fact that the tribunal will be reconsidering the decision on the merits will enable it to remedy the consequences of any defects in the director general's procedures.'

As we have already said in our judgment of 8 August 2001, if, at the judicial stage, an applicant launches an attack which places under close scrutiny particular aspects of the Decision, n principle we do not think that the Director should be denied a reasonable opportunity to reply by adducing rebuttal evidence in support of the points already made in the Decision. Thus we do not accept Napp's principal submission that nothing may be relied on before the Tribunal unless it was relied on in the administrative procedure.

Nor do we accept Napp's submission that it (Napp) is entitled to rely on the Director's new evidence but that we (the Tribunal) must close our eyes and ears if the witness on whom Napp relies states something unfavourable to Napp's case."

In my submission, this is a fortiori such a case. The submissions that I will be making and have made in the defence and in the skeleton argument are based on contemporary documents which were largely appended to the Notice of Appeal filed by the RCA itself, or indeed were additionally added in the Reply filed by RCA. In my submission, it is a particularly unattractive submission for the appellants to turn around and say that the Tribunal should not read or not consider what the natural meaning of those documents is or that I should be precluded as, for example, it appeared that Mr. Vajda did not want me to refer to the consortium agreement with Channel 4 for the purposes of deciding whether or not the issues found in the Decision were properly found.

THE CHAIRMAN: I rather understood Mr. Vajda yesterday to say – I think his words were that it was something of a one-way street, which I rather understood him to mean that he produced new evidence by way of challenge but that you could not adduce it by way of support, which I think he agrees with me as being a correct summary, but it does not appear to me to lie very happily with para.119.

MR. THOMPSON: Indeed, and that is why I have taken the Tribunal to this and, in particular, there is a further discussion at paras.131 and following. I do not know whether the Tribunal is familiar with a case called *Ermakov*. It is a case of no particular significance on its facts, but it is authority in the Court of Appeal, which is referred to at para.132, and the last sentence:

> "In *Ermakov*, the Court of Appeal decided that, in certain proceedings under the Housing Act 1996, the decision maker should be held to the reasons given in his original decision, in the interests of fairness and efficient decision making …"

So it is a particular point about judicial review. Then the Tribunal goes on:

> "On this point, for the same reasons that we consider that our discretion to allow the Director to submit further evidence should be exercised only sparingly, we accept Napp's basic submission that, in principle, the Director should not be permitted to advance a wholly new case at the judicial stage, nor rely on new reasons. To decide otherwise would make the administrative procedure, and the safeguards it provides, largely devoid of purpose; the function of this Tribunal is not to try a wholly new case. If the Director wishes to make a new case, the proper course is for the Director to withdraw the decision and adopt a new decision, or for this Tribunal to remit."

But then it goes on:

> "However, given the powers of this Tribunal, it seems to us the analogy with *Ermakov* does not go as far as Napp submits. In those circumstances it is virtually inevitable that, at the judicial stage, certain aspects of the Decision are explored in more detail than during the administrative procedure and are, in consequence, further elaborated upon by the Director. As already indicated, these are not purely judicial review proceedings. Before this Tribunal, it is the merits of the Decision which are in issue. It may also be appropriate for this Tribunal to receive further evidence and hear witnesses. Under the Act, Parliament appears to have intended that this Tribunal should be equipped to take its own decision, where appropriate, in substitution for that of the Director. For these reasons, while we accept the force of the general principle that lies behind *Ermakov*, the analogy is not exact."

So that was the original leading case where these issues were first aired.

More recently, in the various cases concerning price fixing of football shirts, the issue was revisited, and there is another case in the bundles, *JJB*, which appears at tab 9 of bundle 21. It is para.284 on p.83 of the transcript.

> "The Tribunal has now heard a great deal of evidence, much of which is not referred to in the decision. Such a situation is a common occurrence in appeals to the Tribunal which are appeals 'on the merits' and effectively take the form of a new hearing: see Schedule 8, paragraph 3(1) of the Act. Indeed, as the Tribunal observed in *Napp*, cited above, at [134], it is virtually inevitable that, at the appeal stage, matters will be gone into in considerably more detail than was the case at the administrative stage. New witness statements may be filed; new documents may come to light; a witness may say something in the witness box that has never been said before. Sometimes a new development will favour the OFT, sometimes it will favour the appellants. In our view, provided each party has a proper opportunity to answer the allegations made, and that the issues remain within the broad framework of the original decision, we should determine this appeal on the basis of all the material now before us …"

In my submission, that is also highly relevant.

There are three other short procedural points that I think I should address; first of all, the question of the burden of proof which has been put against me from time to time in the submissions made by particularly Mr. Vaughan. Our position on the burden of proof is set out at paras.2 to 18 of section B of the defence, and I note in particular para.B5, which I should have taken the Tribunal to before, but I did not, which is on p.17 of the defence. I think the Tribunal will wish to be aware that the modernisation regulation that I referred to earlier already has a specific provision in relation to the burden of proof under Article 81(1), and states that:

> "In any national or Community proceedings for the application of Article 81 of the Treaty the burden of proof on the infringement of Article 81(1) shall rest on the party or the authority alleging the infringement. The undertaking or association of undertakings claiming the benefit of Article 81(3) shall bear the burden of proving the conditions of that paragraph are satisfied."

And then we make the submission there is no reason for the 1998 Act to be interpreted in any different sense. In my submission, there is no reason why s.60 should not be applied to that provision, although s.60 is primarily concerned with judgments and decisions of the Community authorities, and so that sets out the sort of headline position on the burden of proof.

In relation to the necessity question, I think I have already taken the Tribunal to para.14 of section B, where the CFI concluded in *Metropole* that at least in relation to ancillary restraints the burden of proof was on the applicants in that case, and a similar point seems to have been taken by the Commission in *UEFA*. As to whether or not that is a legal or an evidential burden, I think the best authority that I am aware of in this area is quoted at B17 of the defence from the *Genzyme* case where instead of the issue being one of necessity the question was whether or not prima facie anti-competitive conduct infringing s.18 of the Act could be objectively justified in the jargon of the Court of Justice, and for that purpose the Tribunal concluded, I think at para.578:

> "At the stage of appeal to the Tribunal the dominant undertaking may raise further matters of objective justification. In our view, at that stage the Tribunal must be satisfied that the conduct in question is not objectively justified. Leaving aside such possibilities as the Tribunal raising matters itself, it is essentially, in our view, for the dominant undertaking to put forward the matters that it relies upon by way of objective justification, for the OFT to put forward its arguments in rebuttal, and for the Tribunal to decide whether it is satisfied that the conduct is not objectively justified."

So that appears to, as it were, put the onus onto the appellants to put forward their case on objective justification, and it is then for the OFT to rebut those arguments if it can, and then the Tribunal to satisfy itself whether or not the conduct is not objectively justified. So I think the purpose of that is that the legal burden remains with the Office but there is a substantial evidential burden on the appellants to put forward their case on necessity for the purposes of rebuttal by the OFT. I think that is the structure that is laid down in the *Genzyme* case, which is in the bundles at bundle 24, tab 26, but I do not think it is necessary to go to that case.

The next question is a very short point concerning the standard of proof. In its skeleton argument at para.1.5 the RCA says that the standard of proof is somewhere between the civil and the criminal standard. Formally, in my submission, that is not correct. The *Napp* case at tab 25 states, at para.109, that the standard is the civil standard, that:

> "It is for the Director to satisfy us in each case, on the basis of strong and compelling evidence, taking account of the seriousness of what is alleged, that the infringement is duly proved, the undertaking being entitled to the presumption of innocence …"

So the position is formally a question of the civil standard but it takes into account the seriousness of what is to be proved in a particular case.

The third small but significant point, and there I think it is necessary to turn up

Mr. Vajda's skeleton argument on this point, relates to the question of presumptions. In para.3.14 the RCA addresses the question of whether or not the Decision or the OFT can rely on any presumptions, and this refers back to what in the skeleton argument is called "Proposition 3", which is para.3.1(c) on p.4 of the skeleton argument, where it is asserted that in the case of restriction of competition by effect, as here, there is no presumption of anti-competitive effect. I have got no argument with that formulation, all that means is that there is an onus on the OFT to prove its case. However, a different point is made at para.3.14, in the second sentence, where the RCA state that, in other words, the Decision cannot rely on presumptions, intuition and the like, it needs evidence. In my submission, that is a quite different point. It is true that there is no presumption of an effect on trade or an effect on competition, but that does not mean that we cannot rely on presumptions, and indeed it is contrary to authority, which I would like to show you, which is again the *Napp* case at para.110. Tab 25 in bundle 24, p.26 of the judgment, paras.110 and 111. In para.110 the Tribunal have just addressed the question of the standard of proof, and then goes on:

> "That approach does not in our view preclude the Director, in discharging the burden of proof, from relying, in certain circumstances, from inferences or presumptions that would, in the absence of any countervailing indications, normally flow from a given set of facts, for example that dominance may be inferred from very high market shares … that sales below average variable costs may, in the absence of rebuttal, be presumed to be predatory … or that an undertaking's presence at a meeting with a manifestly anti-competitive purpose implies, in the absence of explanation, participation in the cartel alleged …
>
> Presumptions of this kind simply reflect inferences that can, in normal circumstances, be drawn from the evidence: they do not reverse the burden of proof or set aside the presumption of innocence: … Being essential evidential in character, such presumptions are hardly equivalent to statutory 'reverse onus' provisions of the kind considered in *R v Lambert*, cited above."

So the point I am making is that it is entirely consistent with Mr. Vajda's proposition 3 or the different formulation in *Napp* for the OFT to say that collective selling normally increases prices so that if you want to explain why it does not, and it also normally eliminates price competition between the parties to the arrangement, you need to explain why it is that the normal chain of events does not follow. In my submission, there is no inconsistency there, and the OFT is perfectly entitled to rely on a presumption in relation to the effects of collective selling.

I am running slightly behind my clock, but my last procedural point relates to the evidence, and it is a point that was set out at paras.6 and 7 of section 1 of the skeleton argument by reference to the *Aberdeen Journals* decision of this Tribunal, and in particular paras.130 to 132. *Aberdeen Journals* is in bundle 23 at tab 22, and the relevant paragraphs are at paras.130 to 132. In fact it is a longer section starting at para.126 on p.43. You can see from para.126 that there was a submission that there should be some form of hierarchy of evidence followed by the Tribunal. The Tribunal rejected that and they argued there is no set hierarchy of evidence in Community law on issues such as market definition, and then it sets out a quotation from the EC Commission, in particular the last two sentences:

> "The Commission follows an open approach to empirical evidence, aimed at making an effective use of all available information which may be relevant in individual cases. The Commission does not follow a rigid hierarchy of different sources of information or types of evidence."

And then the Tribunal goes on:

> "Similarly, although evidence of the attitudes of consumers or users will often be highly pertinent to an analysis of the relevant product market, there is in our view no rule of law which requires the Director to base his case on consumer surveys or market studies if he considers that his case is sufficiently proved by other evidence. What evidence the Director chooses to rely on to establish a relevant product market is a matter for him. Whether that evidence is sufficient to prove the case is ultimately a matter for the Tribunal. In deciding whether the evidence is sufficient, the Tribunal will pay attention to evidence about the attitudes of consumers or users, or the absence thereof, but that is only one element of the Tribunal's assessment of the evidence as a whole. In this case we propose to look at the evidence 'in the round' in reaching our conclusion."

And there is a reference to the nature of the evidence in that case, and then a reference to rule 20(2) of the Tribunal's rules, which I think is now rule 22(2) of the new rules.

> "The Tribunal may admit or exclude evidence, whether or not the evidence was available to the respondent when the disputed decision was taken and notwithstanding any enactment or rule of law relating to the admissibility of evidence in proceedings before a court."

The Tribunal then goes on:

> "… the question of whether a document is 'inadmissible' in evidence in the traditional sense will rarely arise. However, many factors, including whether the document contains 'hearsay', may affect the weight to be given to the document in question.

The Tribunal's normal approach to documentary evidence is to give the document in question what appears to be its natural meaning and accord it such weight as appears appropriate, given the time, and circumstances in which, it was prepared, the identity of the author, and any particular factors likely to undermine its credibility. If, as is the case here, the applicant wishes to contest the meaning or significance of a document emanating from the applicant and relied on by the Director, it is open to the applicant to produce a witness statement from the author of the document to clarify, place in context, or explain away the document in question. The Director, if he thought fit, would then be entitled to seek to cross-examine the witness … In the absence of any such witness statement, the Tribunal will normally feel entitled to take a document at face value, giving it such weight as is appropriate."

In the skeleton argument we refer to para.164 of the *Suiker Unie* case, but I do not think it is necessary to turn it up. There is, however, one other case I think we should look at again, which is the *JJB* case, which is in bundle 21 at tab 9. We looked at it earlier, and it is at p.84 of the transcript, under the heading "The evidence generally". The Tribunal starts at 286:

"The evidence in this case comes from (1) the economic and market context, (2) documents and (3) witness evidence. We regard background evidence as to the economic and market context both before and after the alleged agreements as relevant to our assessment as to whether the alleged agreements or concerted practices are likely to have occurred. As regards the contemporaneous documents, it seems to us that a document prepared at the time, which the author never anticipated would see the light of day is likely to be more credible than explanations given later. We have therefore given weight to contemporary documents unless there is good reason not to do so."

And then there are specific references, at 288:

"As far as witnesses are concerned, in this case we have no independent witness in the sense of an impartial third party who is free of the suggestion that he may have an axe to grind. On the contrary all the witnesses in this case are open to the contention that their evidence is coloured, at least subconsciously, by various factors. For example, it has been suggested that Mr. Ashley's evidence…"

I do not think I need to go into the detail of the facts. Then the conclusion is reached at para.292 after considering the specific facts:

"Moreover the hearing before the Tribunal took place four years after the events in question. However conscientious a witness may be we remind ourselves that memory is apt to play tricks and recollections may be mistaken or incomplete. It is extremely difficult to remember details regarding dates, times and the sequence of events, even a short time after a particular happening, let alone four years ago. When businessmen are frequently engaged in meetings conducting business on the telephone it is difficult to identify precisely what was said at an individual meeting or during a particular phone call. In addition, witnesses may find themselves in an unfamiliar situation when asked to prepare written statements. They understandably rely on lawyers to turn their raw material into draft which are then approved. In the course of that process nuances may be lost or the draft may not capture in the witness's words what the witness is trying to say. Indeed, the quality of a witness statement may to some extend depend on whether the lawyer who took the proof did his job properly or not. Similarly the witness may be shown a document of which he has no particular recollection and then given explanation in good faith which turns out to be mistaken. Later events, such as the service of subsequent witness statements by others may lead a witness generally to correct his earlier evidence or prompt the recollection of matters previously forgotten. In this process, inconsistency or late recollection does not necessarily mean that a witness is dishonest, but it does mean that the Tribunal must ask itself whether the witness's evidence is reliable. In all these circumstances our general approach to the witness evidence whether given on behalf of the OFT or on behalf of the Appellants is to be cautious and to look for corroboration whether from context, documents or other witnesses wherever possible."

I am not saying that this is directly relevant because in that case there was a contested hearing on credibility between various different witnesses so that was the specific context in which it arose, but in my submission the general approach at the start of para.287 is highly material, particularly where, as here, there is an avalanche of competing accounts of this market, all drafted by lawyers and pointing in a variety of different directions. In my submission in that situation it is particularly valuable to have a look at what the actual documents, which were written at the time actually say, if one wants to reach a conclusion as to what was actually going on and so what I propose to do, either now or tomorrow morning, is to look at some of the contemporary documents. I do not know how long the Tribunal wants, or is willing to go on tonight.

THE CHAIRMAN: Well I think if you have a fair crack of the whip you are entitled to go on until half past four, Mr. Thompson.

MR. THOMPSON: Well, in that case, if I could hand in ----

THE CHAIRMAN: I think, would be exactly the same time as Mr. Vajda, would it not?

MR. THOMPSON: That is fine. I do not know how far we will get in going through this note, but

I have done this, which I hope will speed things up and give a focus as to where we are going.

MR. VAUGHAN: If my friend has some other notes up his sleeve, or wherever he keeps them, it would be helpful to have them tonight, so that we have a chance to consider them.

MR. THOMPSON: Obviously the same is true the other way around.

MR. VAUGHAN: Yes. We have nothing but evidence! [Laughter]

MR. THOMPSON: So the structure of this footnote is effectively in two parts and it addresses the question of collective selling on price competition, first of all by reference to the standard pricing model which appears at various places in the paper, but in particular it appears in the RBB paper, the later version is referred to there at tab 104 of bundle 7. I am sure Professor Bain has had a look at it, but whether the other members of the Tribunal have had a chance to consider it. In my submission it is a useful document, it is quite short and it sets out the relevant considerations in quite an elegant and reasonably comprehensive way, even to a non-economist such as myself.

The first point we take is by reference to the theoretical model and we say that although the RCA introduced it to support its case, the RBB model of negotiation is merely a refinement of the OFT's conventional analysis. It underpinned its finding, the collective selling increased the price for the rights, set out for example, at paras. 284-9 of the Decision. The correctness of this basic model appears now to be common ground, as even BHB now concedes it to be correct subject to the issue of substitutability, and I give the references there para.23 and 36 of the BHB skeleton.

The basic analysis is as follows. Without collective selling purchases would have been based on the incremental value of rights held by individual courses. If all courses were perfectly substitutable and the incremental value was very low that would lead to a very low overall price. Even if courses were not perfectly substitutable, even attractive courses would have been in an individually weak bargaining position unless their rights were necessary to a deal, particularly if only one deal was possible. By contrast, with collective selling purchases would be based on the maximum value placed by the purchaser on the totality of the courses' rights. So that is the basic OFT model. The RBB refinements relate to vetoes and critical mass. The first point that is taken is if one course, or grouping of courses was necessary to critical mass that course or grouping would enjoy veto power that enabled it to obtain the overwhelming share of the proceeds secured by the racecourses as a whole, whereas if more than one course or grouping were necessary to critical mass, there would be co-ordination problems that would have to be resolved if a deal were to be concluded with each veto holder surrendering some part of its monopoly price to make a deal possible. So, so far so good, that is the basic theoretical argument put forward by the RCA and the RBB at the administrative stage and in the Notice of Appeal.

The purpose of this note is to apply that model to the history of the negotiations as they appear from the documentary record in the papers. We say that the history of the negotiations in this case is a clear exemplar of this analysis in practice, confirming the OFT's essential conclusion that the collective selling in this case created market power and inflated the price of the rights.

Stage 1, the creation of the Super 12 Consortium created a grouping that was wrongly believed by Channel 4's Consortium to found a sufficient foundation for an interactive betting service as an adjunct with traditional terrestrial services, so that a high initial price was offered to those courses. One finds that at ND1, bundle 14, tab 7, p.6. I think the references are old references, ND1 is 14 and ND2 is 15, I apologise for that.

THE CHAIRMAN: Do you want to go to that?

MR. THOMPSON: I think it is worth just looking at that, yes. If one turns through the presentation document and looks at the numbers in the bottom corner – I am not sure we have got all the pages here, but it is p.6 of the tab, where it sets out the financial proposition, and it fell into two categories, UK television and other rights. I think it has always been assumed that the bulk of the other rights at least related to interactive betting, but if I can take that further or anyone else can take that further we will obviously do our homework overnight.

THE CHAIRMAN: Yes, I would just like confirmation of that.

MR. THOMPSON: Yes. You will see that the pricing that was proposed at that time in the original proposition was £6 million in 2000, £8 million in 2001, £10 million 2002, and £12 million annually thereafter to 2009, giving a total of £108 million, and one will see as one goes through that the offers changed in structure, but I will tend to focus on the total figure because that is the easiest like for like comparison to make. So it was £108 million at that stage. Then over the page one sees, at the penultimate bullet, it says that this bid only pertains to principal courses, which means the Super 12, and then it says:

"An additional rights payment will be offered to other RCA courses."

It is not specified what the payment is, but at the next tab one finds the minutes of a meeting, and the Consortium Task Force was a body that represented the Super 12, as far as I understand it, and was chaired by Mr. Hillyard of the RHT. These minutes are to a large extent concerned with media issues at this stage, understandably, and at para.4 or section 4 of the document, the minutes, it is headed "Review of proposals", and at para.4.2.1:

"NTL confirmed £1.5 million per annum would be available for signing up other racecourses to the new interactive racing channel, this in addition to fees paid to the consortium."

So, comparing like for like, the proposal was that £108 million would go to the Super 12 and £15 million to what is sometimes called the "not so Super 47".

The second point was that it was the universal view that the creation of the Super 12 had led to a higher price being offered by Channel 4 and the quotations there set out the contemporary views of a number of informed parties, first of all the Super 12 itself, and one finds that at tab 5 of bundle 14. If one looks, for example, at the third paragraph – this is another set of minutes. This is the RCA EGM held on the 16th December 1999.

"Mr. Deshayes said that the core object of the consortium racecourses was to maximise the value of their media rights and in doing so to unlock the potential of the racing industry. Their vehicle to achieve this would be collective and proactive management and exploitation of new opportunities."

So that was clearly what they were trying to do at the end of 1999, and that was the whole point of the consortium.

The question of whether they had achieved it can be seen, for example, by the document at tab 10, which gives the RHT view, and again one can look at the third paragraph.

"The headline sum involved was over £200 million, together with a further sum of £25 million in respect of marketing support, and is substantially more than any previous arrangement involving racecourses' media rights, and, in addition, there is a revenue sharing arrangement from which the racecourses should derive further income and which in due course should be developed to provide even more to the participating racecourses."

Then if one turns back to tab 7, we find in the second paragraph:

"The key to our proposal is a significantly improved financial offer and guaranteed minimum of £221 million over 10 years, and the security of continued terrestrial coverage for racing on the BBC and Channel 4, and believe that to be in the interests of the 12 courses and the wider racing industry."

Then perhaps most strikingly was the view of the BHB itself, which one finds at tab 15. It is a letter dated the 29th February, so shortly after the deal had been announced, and in the second paragraph:

"I think it is important first of all to realise that the racecourses in question have previously always negotiated their own media rights for terrestrial television. I am quite sure that for them to have got closer together to negotiate as a group is one of

> the reasons why the income stream that will flow to those courses is substantially greater than it has previously been."

And that was the view not only of the chairman of the British Horseracing Board but also the person to whom he was addressing his letter, Mr. Hutchinson of Rippon Racecourse.

MR. VAUGHAN: I would be grateful if my friend would read the last paragraph and then over onto the next page.

MR. THOMPSON: Yes. This is a letter to Rippon Racecourse.

> "The smaller courses will benefit from the renewal of the SIS contract, development of interactive and internet betting, to which their product is ideally suited. Hopefully a more realistic percentage of betting turnover will be negotiated in the deal which all 59 racecourses, including Rippon, had accepted in the past."

Do you want the next paragraph?

MR. VAUGHAN: I would just ask my friend not to read on but for you to make a note of the importance of this for racing generally.

MR. THOMPSON: Again I am happy to read it all.

MR. VAUGHAN: Can you read it then.

MR. THOMPSON: All of it or just the paragraph?

THE CHAIRMAN: We can read the rest of it; thank you very much. (After a pause): Yes.

MR. THOMPSON: Then the response to this letter sets out the view of the smaller courses insofar as Mr. Hutchinson of Rippon can be regarded as representative, and that is at tab 80. I do not know whether Mr. Vaughan wants me to read out about Mr. Hutchinson's father and such matters at the start of the letter, but it is obviously of some relevance to the issue of British Racing. But at the bottom it says:

> "First, of course I agree that it is sensible to band together to get a better deal for the six courses hosting the classics and the then United Racecourses banded together to negotiate the original Channel 4 contract. What I would have liked to have seen was 59 racecourses banding together, not just 12. I believe that more money could have been wrung out of the media by someone negotiating in an orderly manner on behalf of all the courses without creating this unsavoury divide which endows 12 courses with super status, as inevitably caused."

Then there is a reference to Arena, and thirdly:

> "… endowing courses with super status cannot be good for those who are thereby deemed not super. Sponsors will want to put their money with these courses and corporate entertainers will feel that they have to take their guests to a super course in order to impress them most."

So the concern was that the effect of this would be to undermine the position of the smaller courses and to make them unattractive not only in this particular narrow context but more generally.

MR. VAUGHAN: He also makes points in the second last paragraph about the benefits to the staff and wages in this important ----

MR. THOMPSON: Yes, and I am grateful for that!

MR. VAUGHAN: I thought you would be!

MR. THOMPSON: As a response, and to avoid the other courses achieving a very low price for their rights, as I have said, it appears that £15 million was the total for the 47 courses who accounted for approximately 60 per cent. of the interactive betting revenues at that time.

RCA created a counter-grouping, the 42, and one can see that quite clearly from two documents either side of this letter at tabs 17 and 19. The first is a letter dated the 6th March to racecourse chairmen, excluding Consortium and RHT, and one can see at sub-para.1:

> "Although much of the detail has to be finalised the Consortium Channel 4 deal was unconditional and not dependent on the 42 coming in."

Then:

> "Channel 4 would deal direct with the RCA 42 and it would be an independent decision by the 42 as to whether they wanted to join or not."

Then:

> "In the light of the above I have been a bit surprised to learn that Consortium members have been contacting and lobbying many of the Chairmen of the 42 even before Channel 4 has made an offer. I imagine the lobbying will intensify after the offers arrive. The purpose of this note is to ask you to make no commitment to Channel 4, or any other offer, until all the 42 have been able to assess t he options available. As you can see from the notes to racecourse managers we will be holding regular meetings at which, among other things any party bidding for rights will have opportunity to make a pitch. The 42 owe it to each other to avoid fragmentation and so maintain the considerable strength they have. This is not to say the Channel 4 route is the wrong one, but one can only take that view after a calm assessment of the alternatives."

In my submission that letter is of very material significance to a variety of points. It does not suggest that at that time the RCA was considering that it would have been impossible for the members of the 42 to have gone in with Channel 4, in fact it rather suggests that it was concerned that it was all too possible. The reference to fragmentation was fairly obviously to the possibility that an attractive offer might come to Mr. Hutchison in Rippon or Mr. Gundill in Pontefract, and he might be attempted to accept that money which would undermine the position of all the other racecourses, and in my submission that is relevant in weighing up what the realities of that market were at this time.

If one then goes on to another letter written on the same date by the RCA to the same Racecourse managers, I referred the Tribunal to the last paragraph already in relation to concerted practice, in fact I do not need to go to that again, but it is relevant to this issue, and I draw the Tribunal's attention to it. The other feature that is pointed out at point D in the note – I think I have been working off an earlier draft, which is why there has been some interference but the communications are now back on track again. The position was a surprise to Channel 4 and the Super 12, and that is set out in four documents that I refer to there. First tab 11 of bundle 14. This is misleadingly dated 10th May 2004, but it is actually a publication from the Racing News, dated 5th February 2000, by Mr. Howard Wright.

> "Britain's top 12 racecourses yesterday announced the makings of a 10 year television deal with a partnership of Channel 4, BBC and cable company NTL, worth about £22.5 million a year, three times the amount they receive at present from showing live racing to the terrestrial audience. Most viewers will see little or no immediate change in coverage. Those with digital technology will have access to a dedicated racing channel which is likely to be free to air when it is launched in the Autumn. The key to the whole £22.5 million arrangement, according to a Channel 4 spokesman, is that the Super 12 tracks have given an undertaking to bring the remaining 47 racecourses into the daily digital mix."

So the picture was clearly intended to be that the 47 would be signed up for the £15 million as part of the deal – or that was the understanding at that time. One can see this further from the press coverage at tabs 21 and 22 of this same bundle. This is an article headed "Super 12 deal will not be scuppered", and it quotes a Mr. Smallberg, the acting Chairman of the Super 12. If you look at the middle column you will see a paragraph starting "He explained…"

> "We have always said that this is a very good deal for the whole of racing and we are very keen that everybody should have the opportunity to come into it. I very much hope all the racecourses come together but the deal is not reliant on it."

He added:

> "It is not going to fall apart, it is obviously going to be much better to have a racing channel with as many courses as possible but we certainly do not need 59 courses for this to happen. If there are 17, 20, 25 courses involved it would be a pity but not a disaster."

Then the next tab, the Super 12 "Chance for racing to take control of its own destiny", about two-thirds of the way down there is a paragraph starting "Channel 4 wants …"

> "Channel 4 wants as many of Britain's courses to sign up to the deal as possible, the more courses it has on board the more the digital racing channel, which is effectively free to viewers, has to offer."

He insists that Channel 4 can be quite flexible about its plans, particularly concerning internet and interactive betting, adding:

> "I believe this deal to be beneficial for the whole of racing and would like to see as many courses participating as possible. But if they choose not to we have alternatives in terms of other sports."

Then at 26 there is a quotation from the Evening Standard where, in the fourth paragraph it says:

> "It is hoped that the remaining 47 tracks will sign up to the deal despite the fact there is no extra funds available to them in the agreed total. These lesser courses currently command very little terrestrial TV rights income. Provisional figures agreed their rating generates around 65 per cent. of betting turnover. Despite this input Channel 4's plans for a 24 hour racing channel said to be launched this November using foreign racing. If Britain's lesser courses refuse to sign up then its crucial role in the development of interactive betting less the 47 can expect only £1.5 million from this deal."

Then 26 sets out the telephone conversation between I think Mr. Hillyard and Mr. Scott of Channel 4, where Mr. Scott is complaining that he is despondent about three days of battering throughout the presentation, it was aggressive and rude. What this refers to is that there was a meeting between the smaller courses, the 47 and Channel 4 where the smaller courses complained that the offer being made to them was too low.

I see the time. I think it may be that it would be convenient to stop there and I will regroup and come back to these interesting questions tomorrow.

THE CHAIRMAN: Right. Thank you very much, Mr. Thompson.

(<u>Adjourned until 10.30 a.m. on Wednesday, 16th March 2005</u>)