IN THE COMPETITION APPEAL TRIBUNAL

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

Victoria House,
Bloomsbury Place,
London WC1A 2EB

16th 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 (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 THREE

THE VAUGHAN: Before we start I wonder if I could hand something in.

THE CHAIRMAN: This is by way of retaliation, is it?

MR. VAUGHAN: It was done overnight. (Document handed to the Tribunal) There are two papers. One is called "Our answers to Professor Bain's points", and it is the best we can do trying to answer his points, particularly on other income, and the valuation of the data stream. The slight problem with that is that in fact there was no value ever put on it because they were licences to be agreed, and this is the best we have been able to do, and it is made slightly more difficult by the fact that Mr. Nicholls was not there at the time. The second one is our response to the paper that my friend is going through at the moment on collective selling price. Thank you very much indeed.

THE CHAIRMAN: Thank you, Mr. Vaughan. Yes, Mr. Thompson.

MR. THOMPSON: Can I thank Mr. Vaughan for the additional material. I am not quite sure that he characterised my response quite correctly in that I have literally seen just the front of the paper, which was handed to me as the Tribunal was coming in, so I cannot respond to it now.

MR. VAUGHAN: It is not meant to be for a response, it is just basically what I am going to take you through in answers to the – so that you have got something in writing.

THE CHAIRMAN: I think Mr. Thompson is entitled to respond to it at some convenient point, but it sounds as if that may not be before two o'clock.

MR. THOMPSON: Yes, whether I can read it and deal with it at two o'clock, and take five minutes then, that may be the most convenient course.

THE CHAIRMAN: Yes.

MR. THOMPSON: The Tribunal will recall that yesterday we were at an interesting stage in the history when Channel 4 had made an offer to the Super 12 and there was initially a response of some horror and concern on the part of the smaller courses that they were going to be left out of the "super" new world, and I think that is quite well illustrated by a document that appears at bundle 14, tab 11. We looked at the top of that page yesterday, but the bottom of the page includes a further article dated the same date.

> "The smaller tracks outside the Super 12 are getting together in a mood of self-preservation amid fears that they could get left behind in the multi-million pound discussions over media rights. On the day the Super 12 announced the £25 million deal a meeting of more than 20 senior representatives of the independent courses was held at Stratford yesterday and delegates decided to press the Racecourse Association to conduct future negotiations on behalf of every track."

So that is the position, and then further down it says:

"We did not have anyone from Arena Leisure or Northern Racing here. We want them to be involved. We are all united behind the Racecourse Association which we want to deal with the media rights for racing, and we will be asking the RCA to progress the strategy document on the issue."

So the position appears to have been, and you will see it from the documentary record more generally, that Mr. Crichton-Miller of the Racecourse Association had expressed concerns to Mr. Hillyard of RHT, who was the chair of the Super 12, that the effect of this would be very divisive. The offer was made and publicised and the smaller courses then got together in what they call a "mood of self-preservation", which of course is entirely consistent with the RBB analysis and the fact that these were effectively substitutable courses who were going to be left behind if they were in a sort of free-for-all in the background of the Super 12 arrangement.

The case that is now put is that Channel 4 wanted, indeed needed, an arrangement with all 59 of the courses, and that somehow it fell to bits because this was an individual response by the smaller courses. However, even the appellants' own evidence is not entirely consistent with that. If I may show you just one illustration of that; it is the statement of Mr. Johnson, the managing director of the RHT, which appears at bundle RCA7, and it is the first tab. If one turns into the statement to para.6.4, Mr. Johnson says:

"… whilst C4 clearly wish to have all 59 racecourses included within their deal, they also made it clear during the presentations on 27th/28th/29th March 2000 …"

Those are the presentations to the smaller courses:

"… to the 47 racecourses that, whilst they wished for a 59 racecourse deal, they were happy at that time to contract solely with the Super 12:

'Channel 4 impressed upon us twice that they would get racing from abroad if the smaller courses did not join them …'

The fact that C4 did not then believe that they needed the other courses is also evidenced by the comment of Kim Deshayes, Managing Director of Newmarket and spokesman for the Super 12 Courses, who said:

'We have got the deal we wanted and it is under no threat. It never has been dependent on the other courses coming in with us and the new digital racing service on Channel 4 will definitely start in November.'"

Then there is reference to offers made to each of the 47 individual courses at para.6.8, and then over the page at 6.11, you find:

"At the end of March 2000, whilst C4 clearly wanted a 59 racecourse deal, it had not yet made it a condition of its offer. Over the next three months, I believe C4 changed

its plans. I believe that at the outset C4 thought it would sign nearly all the courses with ease. The reaction that the presentations received at the end of March ('crumbs from a rich man's table') appeared to jolt C4 severely. As a result, C4 became more focused on the need to secure the 47 courses outside the Super 12."

And then Mr. Johnson goes directly on to the offer made on the 3rd July, and what I would like to do is look at the contemporary documents for the period between the jolt received by Channel 4 in March and the offer made on the 3rd July because that casts the matter in a rather different light.

If we then go back to my note, I think we had reached para.4(c):

"When Channel 4 approached the 42 it envisaged that each course would make an independent decision as to whether to sign up and that not all the courses were needed."

And that is then evidenced by our skeleton argument, section 5, paras.25 to 31, which simply summarises some evidence, but it may be convenient just to turn that up. So it is the OFT skeleton argument, section 5, p.74 of the skeleton. So the position of the OFT is that it considers that, following the provisional agreement between them, both the Super 12 and Channel 4 considered it possible the courses would make independent decisions in relation to offers. Some would sign up to the project and some would not. The minutes of the Consortium's ninth task force meeting held on the 3rd February 2000 note that NTL confirmed £1.5 million a year would be available for signing up other racecourses to the new interactive racing channel, this in addition to the fees paid to the Consortium. There was therefore no indication at that stage that Channel 4 or Super 12 was dependent on all other courses signing up. Subsequently, Mr. Smallberg, the acting chairman of Super 12, stated in a newspaper article on the 24th March – and I think we looked at that yesterday – if there are 17, 20, 25 courses involved it would be a pity but not a disaster.

In his witness statement Mr. Gould attempts to suggest that this view, expressed by the chairman of Super 12, did not in fact represent the view of Channel 4. However, this ignores the fact that on the 27th March the Racing Post published an article based on an interview with Mr. Brook, Channel 4's director of strategy and development. It stated as follows:

"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 will effectively be free to viewers, has to offer"

But Mr. Brook insists that Channel 4 could be quite flexible about its plans, particularly concerning the internet and interactive betting, adding:

"I believe this deal would 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 there is a reference again to Channel 4: "Our policy for coverage on the Channel will obviously depend on the courses that sign up to the deal" which clearly implies not all of them had to. Then the OFT concludes: "But we would wish to create the strongest editorial offering every day of the week." I should say that there is no dispute between the OFT and the parties that one needed a spread of racing to create an effective schedule, the question is simply how far?

MR. VAUGHAN: Can I also ask my friend does he also accept that they had the opportunity to go to other sports, if he relies on that, if they did not get what they wanted – he relies upon Mr. Brook. It is an important part of our case that they had alternatives – does he accept that?

MR. THOMPSON: I am not quite sure what Mr. Vaughan ----

THE CHAIRMAN: I am not sure that you are entitled to cross-examine Mr. Thompson.

MR. VAUGHAN: Very well.

THE CHAIRMAN: He is making his submissions.

MR. THOMPSON: If it is helpful to the Tribunal I think there is a passage in the Decision where the OFT finds that even if one took into account greyhound racing and foreign racing, the market shares in terms of betting revenue would be so trivial that it makes no difference to the definition because effectively the Crown jewels of betting were on any view British Horseracing. I think that was stressed by everyone, and recognised by everyone at the time, so I think that is the substantive answer. I think it is also implicit in the Appellant's case that critical mass in terms of British Horseracing was a requirement and that it could not have been simply batched together with greyhound racing and Australian racing – I think it is rather inconsistent to suggest otherwise.

So that is the evidence there which is confirmed by Mr. Johnson's own direct evidence.

As Channel 4 correctly considered that none of the 42 courses individually held a veto, it allocated only a modest amount to acquire their rights." As a response and to avoid the other courses achieving a very low price for their rights the RCA created counter grouping, the 42, and I think we looked at that evidence yesterday – that it rightly judged to enjoy a veto over the Channel 4 Super 12 interactive deal contrary to the Channel 4 and Super 12 expectations.

At this point I would like to interpolate some minutes of the Consortium Group which, in my submission strongly confirm this description of the events. First, tab 27 in bundle 14 and you will find at para.2.2 Mr. Deshayes reporting that the Media Consortium felt

disappointed that the racing consortium had been unable to deliver the other racecourses to the Consortium.

Then at 2.13 you find:

> "All agreed that now the nature of the deal had changed with the Racing Consortium being asked to consider funding the offer to the other racecourses as its minimum guarantee it was essential …"

I am sorry; I jumped to the wrong reference. I am sorry; I have gone straight to tab 30. Tab 27, I am sorry, it is paras. 3.7 and 3.8. You find Mr. Deshayes again reporting that:

> "Andrew Brown of Channel 4 had stated that if the non-Consortium racecourses wanted additional money then this should be met by the Racing Consortium. All agreed not to go down this avenue at this stage. Mr. Townley I think stated that in his view the Media Consortium would go ahead even if no further racecourses were signed up. The Premium Brand UK Racing content of the Racing Consortium under interactive channel could form part of the sports betting channel."

Then further down:

> "The value of non-consortium UK racing in the US market may not be as great as the smaller courses expect. All agreed that the added value that the non-Consortium courses would bring to a racing Channel would need to be carefully considered."

So these are minutes of 30th March, so just after the presentation to the smaller courses, and you find the members of the Super 12 hoping not to have to pay any more to get the smaller courses on board, and Mr. Townley suggesting that that is not going to be necessary – he appears to have been their media adviser from Active Rights Management.

If one then turns forward to tab 30 – I am sorry about going out of my way before – it is 10th April 2000, so 10 days later we find Mr. Deshayes, as I said, at para.2.2 reporting that the Media Consortium felt disappointed that the Racing Consortium had been unable to deliver the other racecourses to the consortium. Then:

> "All agreed it was very difficult to sell the proposition without the Media Consortium's business plan and details of the programming on the new Racing Channel. The Media Consortium were not prepared to give additional guarantees to the other racecourses, and had called on the Racing Consortium to fund any shortfall and minimum guarantees from the deal the Media Consortium had offered to it. All agreed that the Racing Consortium were not prepared to do this at this stage, more information was needed from then Media Consortium to make an informed decision."

We then go forward to tab 33, which is a meeting two weeks later on 25th April 2000, and there you find para.3.2:

"Concern was expressed that Mr. Scott [Channel 4 leading light] appears to have stretched, NTL have switched their focus to the football, that BBC are still on the sidelines.
Mr. Deshayes stated that Mr. Scott had underestimated the effort required to incorporate the other 42 racecourses and felt that the Racing Consortium had not done enough to facilitate this process."

Then at para. 9.4 one finds this:

> "The Group agreed that no offers or approaches would be made to non-Consortium racecourses at the moment. This would give these courses a chance to explore their own options. DEC asked Mr. Crichton-Miller, if Mr. Crichton-Miller could sign up the other 42 racecourses to another deal without coming back to the Consortium first. Mr. Hillyard said that Mr. Crichton-Miller had undertaken to revert to Mr. Hillyard before any decision would be taken. Mr. Smallberg [the Chairman of the Super 12] reported that when Mr. Scott asked Mr. Crichton-Miller for his bottom line to sign up the other two 42 racecourses, Mr. Crichton-Miller had responded £10 million per year minimum guarantee."

So in our terms that would be £100 million required – five year deal, access to business plan, and guarantees regarding coverage. So that is the position on 25th April. The 42 have substantially beefed up their demands and are now asking for £100 million and Channel 4 appears to be overstretched, presumably because they could not fund an arrangement of that kind without substantial help from the Super 12 reducing their price.

Then at the next tab, 34, you find a file note of the 2nd May 2000 of a meeting between the RCA and its media rights consultants, Hawk Point, and under the heading "Introduction" you see the view I think of Hawk Point rather than anybody else, saying they are disappointed with the initial offers that have been received. They feel there is strength in the 42 remaining as one group or, better still, all 59 racecourses, and then basic parameters, at the end of the first bullet, they consider that £10 million per year should be sought. Then over the page, at the end, the conclusion is reached:

> "The final advice from the RCA was that if any approaches are made to individual racecourses we should state that the 42 are looking for £10 million per year …"

So the £100 million again:

> "… as a guaranteed sum."

So that was the negotiating history and, in short form, that took place in the month or two after the Channel 4 presentations to the small courses. The small courses got together, they got themselves some smart media consultants, and they jacked up their asking price from £1.2

million a year being offered by Channel 4 to £10 million a year being demanded by the 42 collectively.

If we turn against that background to the first Arena bid in June 2000, the Tribunal will of course be aware that Arena would have been aware of all this because they were the owner of some of the 42 courses. Their first bid, on the 19th June 2000, can be seen in headline terms at tab 39, and you will see at para.1.1 that it is a comprehensive bid, in the middle, to manage the rights in all forms of media, including terrestrial, Channel 4 and the BBC, satellite, cable and digital television, internet and interactive television. At 1.2, it is for the total sum of £81.3 million, and the relevant figure is £71.1 million of the total guaranteed amount to be shared between all the courses in accordance with para.1.3, and one sees at 1.3 the basis for it, which is that each course will be entitled to receive a pro rata share of each annual payment of the guaranteed non-terrestrial amount equal to its share of the preceding year's total annual UK off-course betting revenue; and then at 1.5 there is further reference to the revenues in relation to Pari-Mutuel betting activities at (a), and any other betting activities at (b), and then non-betting activities at (c). But, in my submission, it is clear that, although I understand exactly the point that Professor Bain has put, the primary focus of the non-terrestrial figure was clearly on the betting business.

If one looks then at schedule 1, if one turns through, you will find if you count them there are in fact 42 courses there, so it was the non-Consortium, non-RHT courses who were being offered this money, so this was money that was going to be paid excluding not only the Super 12 but the RHT altogether.

Then if you turn over the next page, you see the breakdown of the payments. It was projected to be an up-front payment of £17,500 in respect of the non-terrestrial amount, £2,500 for the terrestrial amount, and £20 million for the total guaranteed amount. I think I may have been out by the factor of a thousand. Then at the bottom line we see the total sum, 71.1, 10.2 and £81.3 million.

So what we say there is Arena's bid in June 2000 demonstrated that the 42 acting collectively were capable of increasing the value of their rights dramatically from somewhere between £12 to £15 million to over £70 million. They held a collective veto over any other deal, making the Channel 4 deal with Super 12 impossible to finalise. And then at 3, they were considered by Arena to be capable of delivering critical mass without the involvement of the Super 12 or the RHT at all, so they threatened to show not only that the 42 held a collective veto but that the Super12 and RHT did not do so. One can see that from the contemporary documents at tab 41. You will have seen reference in the earlier minutes to the possibility that

the 42 might sign up with somebody else. Well, that is evidenced also by this letter to the 42 racecourse chairmen dated the 22nd June, and under sub-para.(iii) it says:

"We and our advisers are now focusing on …"

And then:

"… gaining access to the business plans, following perusal of the business plans, refining and improving the offers."

And then 3, "Developing the go it alone option", and then 4:

"Discussing with the Consortium the possibility of a 59 racecourse deal."

So at that point it seems that the RCA considered there was a realistic possibility at least of a go it alone option, i.e. an option based on the 19th June bid or some improvement thereof.

We then move, as it were, back into the official history that Mr. Johnson evidenced in his statement, which is the counter-bid by Channel 4. We say that the Super 12 responded reluctantly by contributing to a bid by Channel 4 seeking to satisfy the requirements of the 42 or 47, i.e. surrendering part of their monopoly price originally offered to them by Channel 4, and in fact it was not just a small concession, it was actually one-third of the amount of £108 million, which we have seen in the January bid, and one finds that from tab 43, which is the letter which I think Mr. Vajda took the Tribunal to briefly on Monday, where you see Mr. Scott writing to Mr. Hamilton-Fairley, one of his partners in the Media Consortium, attaching a note of the revised bid which will be made to the 47 courses in the next couple of days.

"Last week we decided there should be an element of terrestrial fee which we have set at £5.5 million. There will be a non-recoupable amount for Go Racing."

And then in the fourth paragraph it says:

"The net effect of these changes is to add £4.5 million cost to our business plan.

I know that will be unwelcome, but we have to do so if our bid is to be in the same ball park as Arena's."

It is quite easy from the arithmetic to see that the increase in the bid from £12 to £15 million up to £70 million was more than £4.5 million, and one can see the working out of the figures on the next page and, in particular, in the left-hand column, under the heading "12", you see a contribution of £3.5 million a year totalling £35 million, which, as I understand it, was a contribution to be made by the Super 12 in order to facilitate this deal. However, you will recall that the 42 were demanding £100 million, and this was an offer for just over £70 million, and the 42 acting collectively were not satisfied with the increased Channel 4 bid which was in fact £70 million, and one finds that at tab 42. The fees are set out at para.2.1, and one finds that the total sum is £75.5 million, of which 5.5 will be allocated in respect of the terrestrial, so £70 million is for the non-terrestrial rights. I think it is not in dispute that that offer was rejected,

and likewise the bids made by Arena on the 19th June and the 14th July were also rejected, and one finds the first at tab 40, a letter from Mr. Crichton-Miller to Mr. Pope of Arena, where he starts concisely by saying:

> "I have been mandated by the 42 racecourses to respond to your letter to each of them, dated the 19th June."

And then in the last paragraph:

> "This letter formally, on behalf of the 42, declines your offer of the 19th June, and looks forward to a revised offer in due course."

So we rely on that not only for converted practice but also as evidencing the response in terms of price.

Then on the 14th July a further offer was made by Arena subsequent to Channel 4's withdrawal from the process. Channel 4's withdrawal is I think not in doubt, and is evidenced at tab 45, and is dated the 11th July 2000. There was some uncertainty about the precise date of the further offer documents made by Arena, which was the subject of correspondence between the parties in January. It is now evidenced, helpfully, by a letter from RCA's solicitors, which appears in the OFT's bundles attached to its skeleton argument, at RCA19. It is tab 29 in that bundle. The history of this is that the RCA appellants had asserted at para.231 of their Reply that the 19th June offer for the 42's rights could not be taken at face value on the basis it was merely a spoiler trying to stop Channel 4 reaching an agreement. On the face of it it would have been a very expensive spoiler if it had been taken up, and we are asked to believe that it was a genuine offer.

MR. VAJDA: Excuse me, I do not have any objection to my friend – but he must not misrepresent the document. The document of Arena says it is subject to contract and it talks about the proposal and offer. It was never one to be taken up. I think that is important; if you are going to be producing a document you must describe it accurately.

MR. THOMPSON: Yes, I mean, I ----

THE CHAIRMAN: They could not have said "Snap".

MR. THOMPSON: No, they could not have said "Snap". There was provision for effectively another sort of lock-out period in terms of negotiation, but it was not an offer capable of acceptance on its face, that is correct.

MR. VAJDA: Can I just – my files are numbered incorrectly. Could you give me the reference to this again?

MR. THOMPSON: It is bundle 19. It is called "Skeleton argument on behalf of the OFT, bundle of documents".

MR. VAJDA: And the particular tab is?

MR. THOMPSON: Tab 29. It is the third tab from the back. So there is a letter from Denton Wilde Sapte, and, as Mr. Vajda correctly points out, in that letter there are some quite detailed points made by Denton Wilde Sapte about the status of the 19th June document proposal. But there is also appended to it helpfully a fax which has led to some ingenious detective work by Mr. Gregory to try and understand its rather inconsistent terms, because if one turns first of all to the very last page of the tab, you find a timetable set out stating:

"14th July 2000. Offer letter sent by Arena to Hawk Point."

Whereas if you go back to the beginning of the fax you find a date on a letter from Arena addressed to Mr. Ralph of Hawk Point, which is apparently dated the 11th July, but on the same page it says, "Date received, 14th July", so there is obviously a curiosity in that either the fax took three days to arrive or there is some form of mistake, and that is confirmed, when you go to the second page, where you see at the top left-hand corner, in my submission reasonably clearly, the 14th July 2000, 3.38 p.m. from Arena Leisure. So our submission would be that although the letter is dated the 11th July it is obvious that in fact it was a fax sent and received on the 14th July, which is consistent with its terms, the significance of that being that if it was sent on the 14th July it was clearly sent after Channel 4 had withdrawn from the negotiating process, and was not a spoiler designed to send Channel 4 out of the negotiating process.

In any event, that offer – I am sorry, if you have still got it out, I should take you to the terms of offer which were very similar to the earlier offer except in one important respect, namely that it was quite significantly more advantageous in terms of money, the total guaranteed amount having gone from some £80 million to some £90 million. The offer/proposal was in the form of two options which differed both in the breakdown of the sums offered and of the totals, and one finds that at the two schedule 2s, which one finds at respectively pages 6 and 12 of the fax. If you hold the two open you find that the total guaranteed amount in the first option is £94.6 million, whereas in the second one it is £97 million, the explanation for that being that in the second offer an additional £2.4 is offered for the non-terrestrial rights, but the other difference being that the structure of the payments is different in the two offers. In the first one the initial payment is £20 million – the non-terrestrial guarantee, whereas in the second one the initial guarantee is only £8.75 million, so they were structured differently in terms of risk. One sees, going down the column that the principal payment under the second offer was to be made in 2006. Effectively it was conditional on the scheme being a success, so they were differently structured and reached different amounts. But they were increased in terms of their total amount.

So the position on reaches in July is that there have been two proposals/offers, admittedly not binding offers that could have been bitten off by the courses, which they rejected.

Channel 4 were not prepared to resolve the stand-off between the Super 12 and the 42 by offering additional money and they withdrew their offer on 11th July 2000. There is a letter explaining the position at tab 46 from Mr. Scott and Mr. Hamilton-Fairley to Mr. Deshayes.

PROFESSOR BAIN: Before we leave this, this latest offer **here** was to the same courses, was it, as the previous one?

MR. THOMPSON: Yes, the same 42.

PROFESSOR BAIN: It did not include the additional five with terrestrial cover?

MR. THOMPSON: No, it did not.

PROFESSOR BAIN: So there was a substantial increase in the guaranteed terrestrial amount with no change in the courses to whom they were being offered?

MR. THOMPSON: That is right. I have given some thought as to why that might have been, but it would be speculation on my part, but the speculation would be that there was a particular tension for those courses that were part of the 42 but also had significant terrestrial rights and they were the ones who were most torn between going in with the established terrestrial courses, the Super 12, or staying with their smaller brethren, and it may that that was why this at this interim stage they were particularly favoured – I do not know, that would be my speculation.

At tab 46 one finds the letter to Mr. Deshayes, and at the bottom you see:

"The financial terms which it seems we would have to offer in order possibly to secure the rights of the other 47 courses would mean that this venture is no longer a viable proposition for us. As we discussed last week, we believe that the business plan is already stretched by fixed costs and we do not wish to add any more."

Then over the page:

"Your proposal was that the Media Consortium should take on another … of fixed costs to bring the bid to £75 million …"

It is not a clear photocopy in mine, but it seems to be £75 million.

"That we feel unable to do because of the additional financial cost and also following your advice last week that such a bid was likely to fail within our timescale. We also had severe doubts about whether it would provide the basis for bringing in Arena and Northern courses, both of which we believe to be crucial to a full solution."

So that is the position there. The Racing Consortium were saying "Why don't we put the offer up to £75 million and see what happens?" and Channel 4 at that point, its financial muscle gave out and so they withdrew. There is a better copy of that letter at RCA7, tab 98, sub-tab 18.

I do not know if the Tribunal wants to look at that letter. It is the first tab, it is

Mr. Johnson and appended to Mr. Johnson is a whole mass of documents. It is a cleaner copy, although it suggests in the second line that the figure should have been £9 million. So the proposal was that the Media Consortium should take on another £9 million in fixed costs to bring the bid to £75 million. I am not quite clear how the maths of that works out, but it is clear that the Channel 4 business plan did not support that additional cost and so at that point they withdrew, though they also complained – perhaps understandably – that the racing industry had proved particularly unhelpful in trying to reach a conclusion, and that the factionalism between the smaller and bigger courses had made the whole deal impossible.

The conclusions we draw from that are that Channel 4 were not prepared to resolve the stand-off by offering additional money, indeed, the terms of that letter suggest that they were not able to, responsibly in the terms of their business plan. I would say in passing that in my submission, the answer to the point made by Mr. Vajda on the first day where he took the Tribunal to the business plan and the reason why it was a matter of such importance both to the courses and to the bidders, of course these were very large amounts of money that they were being asked to put up and if the business plan did not support those very large amounts of money then the deal was not viable for the bidder and therefore was not viable for the seller. It does not suggest that they simply bid whatever figure appeared in the business plan, which seemed to be Mr. Vajda's suggestion. The point was that if the business plan was based on a false assumption then these enormous sums of money were not going to be achievable for the relevant bidder, and that was why Channel 4 pulled out at this stage, and that is why ATR were so upset at the end of 2003. In my submission that is the proper reading of those documents.

The second Arena bid on 14th July in my submission is an important document because it demonstrates that Arena considered that 50 per cent. would be sufficient for a viable interactive betting service to be launched. That is not simply a figure plucked out of the air because it is consistent with the document which the RCA itself appended to its Reply in and appeared in the documents before the Tribunal I think for the first time at that point, which is at RCA14 – indeed, we may have looked at it already. It is at tab 36 – no I do not think we have looked at it already. This is going back slightly in the chronology to a meeting between Mr. Scott and various other interested parties. We have only the minutes, we do not have the agenda but one can understand, broadly speaking what is going on. It says:

> "After some introductions David Scott [Channel 4] led straight in to the issue of the other racecourses and whether we had agreed to apply some of our minimum guarantee for their benefit."

So it is the same issue. Then over the page you will find Media Consortium at para. C:

"Media Consortium recognise there may be enough content for two channels but felt that two channels could not operate economically."

And then Media Consortium clearly stating that the deal is contingent on the other UK racecourses joining. The point that we make is that the Arena bid is, in fact, consistent with that analysis because it was suggesting that as long as you got, as it were, over 50 per cent. then you would have the only show in town. That would be enough content for you and it would also guarantee that you were the leading operator in the area. So that is why we say that in this particular market it is consistent with 50 per cent. being critical mass to get the show off the ground.

Then we move on to the position after 14th July 2000. The stand-off between the Super 12 and the 42 was ultimately resolved by co-ordination led by the RCA and its advisers Hawk Point leading to 59 course bids from Arena on 31st July 2000, and 20th September 2000 and the creation of the Terrestrial Rights Group with members from both the Super 12 and the 42 on, I think, 8th August 2000. That is evidenced – the offers are set out at tabs 47 and 52 and the document concerning the TRG Group is at tab 50, if I have my referencing right.

We have looked briefly at the 31st July offer, which is at tab 47 before. This offer is a letter from Martin Pope of Arena. It is in similar terms to the previous offers in its general form, except that it excludes the terrestrial broadcasting rights, so it was simply for the non-terrestrial rights. This then introduces a much higher critical mass condition and the Office of Fair Trading submits that the obvious reason for that was that the bid was at a much higher financial level and, indeed, was also covering rights that Arena for itself did not particularly want or need. I am sorry, that it was covering a much larger amount of rights in a much wider number of courses, and in order to protect the investment significant conditions were then introduced, which one finds at the end of the offer at point 2 of the document. Then you will find at schedule 2 again a different structure of the payments but leading to a total bid of £178 million.

MR. VAUGHAN: There was no evidence at all of that, it was just conjecture, and I would be grateful if my friend at some stage identified the evidence he relies on to support that proposition.

THE CHAIRMAN: That is up to you, Mr. Thompson.

MR. THOMPSON: I am sorry, my Junior was telling me something so I am afraid I did not hear what Mr. Vaughan wanted.

THE CHAIRMAN: Mr. Vaughan is inviting you to identify the evidence you are relying upon for your proposition in relation to this offer.

MR. THOMPSON: I do not think I am going to do that any more because we have got a very detailed written case on all this; I am simply going through the documents.

The TRG document is at tab 50, and I do not think it is necessary to do more than see that that is there, and that it is dated the 9th August 2000, and the 20th September bid is at tab 52, and the first paragraph of the letter, which is again from Mr. Pope – the one we have was addressed to Mr. Fabricius of Goodwood Racecourse, but it states:

> "On the 31st July we set out our offer of £178 million for all rights, excluding terrestrial television and those covered under the SIS agreement. Since that time we have been in extensive negotiations with the RCA and its advisers who have been instrumental in requesting us to extend our offer to include terrestrial television, which we have now done. In our offer we have acknowledged that the RCA appointed Terrestrial Rights Group will choose the appropriate terrestrial broadcaster for the terrestrial television coverage, without consent, and that we will work with the Terrestrial Rights Group to achieve the best outcome for UK racing."

And then there is a description of the total offer at £320 million, which is indeed the final offer that was made, in headline terms, at the end of this process, and we obviously rely on this document to demonstrate how the collective muscle, as it were, of the 59 had been used against Arena up to the period of the 20th September, including to require it to offer for a set of rights for which on the face of it Arena had no particular usage. So we say that this created a collective selling arrangement for all the courses, both interactive and terrestrial rights, and then co-ordinated responses were made from then on, and one can see that evidenced at tab 48. This is a letter from Mr. Atkin, who had then taken over as chief executive of the Racecourse Association, to all the racecourse managers and chairmen, thanking them for the tremendous turnout which was achieved on Monday, and that they had reached a consensual agreement on the two matters under review. Then over the page, in relation to the way in which the media rights were going to be dealt with:

> "The mandate instructed us to:
>
> continue discussions with Arena on an improved basis
>
> pursue alternative offers and avenues
>
> attempt to conclude a seal with SIS for the continuation of the Racing Channel
>
> initiate negotiations for a terrestrial deal
>
> develop the embryo distribution formula to cover the interactive side

The first two points are being followed up hard and a meeting is being held with Arena this evening. We are in discussions with SIS and hope to conclude a deal by the end of this week.

On the terrestrial side we have approached a prominent member to be the Chairman of the group to negotiate this: he will respond by the end of the week."

And then at the bottom:

"… I will be in touch next week: meantime members should not accept the Arena offer."

So, in my submission, that is clear evidence of how it was worked out at this stage, and just as the RCA had previously been acting as the co-ordinating body for the 42, it was now the co-ordinating body for all 59 courses.

At the end of November 2000 the courses entered into a period of exclusivity with Attheraces, and this is jumping over the bids from Carlton and Attheraces itself and the negotiations and changes that were made in that respect, and I think I have already shown the Tribunal that at the start of my submissions. Although 10 courses withdrew from the arrangement on the 12th April 2001, the final agreement of the necessary proportion of courses was not achieved until the 3rd May 2001, and I think Mr. Vajda took the Tribunal to that.

Finally, to achieve that final deal the smaller courses were forced to concede a lower share of the total pot, leading to ten of them to defect to a differently structured deal with GG Media, and that is evidenced in the other bundle of contemporary documents, which one finds in bundle 15. This is a draft memorandum enclosing an assessment by the RCA of the GG Media ----

THE CHAIRMAN: Which divider is this?

MR. THOMPSON: I am sorry, tab 83. There was obviously some interest from the smaller courses, and so the RCA agreed to act, as it were, as consultant to the smaller courses as to the impact of the GG Media contract, and you will see at the top that it is the 12th April 2001, the RCA assessment, and if one turns to p.11 you will see that it is the 11th April 2001. I do not think it is necessary to go into the details of the nature of the deal or the merits of it, but one sees at the end of the document, on the penultimate page, there is a document headed "26 independent racecourses, Go Racing distribution", and that appears to set out the distribution under the ATRD. Then in the right-hand column you will see five years GG, and, as I understand it, it is comparing the nominal fees, GG Media, to the figures achievable under the ATR arrangement, and if you compare them you will see that the figures are substantially higher. So, as I understand it, that is part of the reason why some of the smaller courses defected and why the other smaller courses who stayed felt very unhappy.

PROFESSOR BAIN: Mr. Thompson, could you confirm that the GG figures included the LBO rights as well as the non-LBO?

MR. THOMPSON: Yes, that is right, yes.

PROFESSOR BAIN: So that could account for some difference. We do not have any figures as to what the smaller racecourses were getting for LBO rights elsewhere?

MR. THOMPSON: It is not an easy one. I have not tried to master the particular interests of Fakenham or ----

PROFESSOR BAIN: Okay, thank you.

MR. THOMPSON: ---- and decided which deal ----

MR. VAUGHAN: The s.26 responses explain why some preferred one than the other, which the OFT did not consider.

MR. THOMPSON: I do not think it is a material question why. But, in any event, at tab 84 there is a letter which I think Mr. Vajda already referred you to, a letter dated the 12th April 2001, to the directors and executives of independent racecourses explaining the nature of it, and in the first paragraph saying:

> "The deadline for signing the contract has been moved from Friday 13th April to midnight on Friday 20th April."

And then at tab 92 there is a letter from Sedgefield which sets out the view of Mr. Bowden, who is a key advocate of the 59 course deal to start with at this time, and was obviously strongly in favour of the GG Media proposal, and, for example, right at the end we find in the third but last paragraph::

> "The GG Media proposals gives the independent racecourses, autonomy, control of their own income stream, freedom from large course influences and allows you to control your own destiny, plan your business in order to expand and complete against other leisure activities, ensuring long term success for all involved in your racecourse."

Possibly that is one of the reasons why some of the courses favoured this deal.

However, there was another reason, namely that the small courses were particularly aggrieved at the distribution formula, and one finds the basis of that in the second statement of Mr. Atkin, which one finds at RCA bundle 7, tab 106, and it is at paras.10 to 21 where he discusses the distribution formula, and then, in particular, at para.20 he reaches the conclusion or he describes the outcome of the distribution discussions, and he says:

> "It should be appreciated that even with the compromise referred to above, the distribution formula very much favoured RHT, the Super 12 and the courses mentioned in Clause 2.2.2(1) of the Rights Agreement. For example, the courses

mentioned din Clause 2.2.2(i) account for 67.2 per cent. of fixtures and 73.7 per cent. of off course betting turnover, and under the agreement with SIS received 72.7 per cent. of the rights fees. However, under the distribution they were to receive 81.7% of the rights fees for interactive rights under the Rights Agreement. Within these figures RHT accounted for 21.8% of fixtures, 26.9% of off-course betting turnover, and under the SIS formula would have received 26.5% of fees. RHT was allocated 33.8% of the fees offered to the 59 courses … By contrast, the small independent racecourses were being offered 18.3 per cent. of the interactive fees in return for providing 32.8 per cent. of fixtures (and for which they would have received 27.3 per cent. under the SIS formula)."

So that is a further aspect which Mr. Atkin himself recognises was somewhat adverse in relation to the smaller courses.

Mr. Gregory helpfully pointed out to me that this was actually an issue that was considered in the Decision, and I apologise for not noticing that myself. This is at bundle 8, tab 2, p.104 of the Decision, under the heading "No solidarity in fact".

MR. VAUGHAN: Can you start at the bit above, 383.

MR. THOMPSON: Yes. This is a reference to an answer to a written reply to the European Commission, where the Commission has referred to solidarity between economically stronger or weaker participants and between professional amateur sport and sport played by young people. That is in fact correct, and which is a point that the OFT recognises, that the Community has taken into account, and it was a factor in think in the *Premier League* case in the Restrictive Practices Court, that where there is evidence of, as it were, mutual benefit between – then that can be taken into account in assessing the overall effect of the agreement. But the point here is that the OFT, under the heading "No solidarity in fact", said:

"Even if the principle of solidarity …"

MR. VAUGHAN: Sorry to interrupt but would you read 384?

THE CHAIRMAN: We will read 384 to ourselves.

MR. THOMPSON: I was honestly hoping that the Tribunal will read all the documents. I am not intending to read everything.

THE CHAIRMAN: We certainly will, but we do not want to miss the full weight of Mr. Vaughan's points.

MR. THOMPSON: Yes, absolutely.

THE CHAIRMAN (After a pause): Yes.

MR. THOMPSON: That is the point, that just simply because you have got two sporting venues, as it were, Pontefract and Carmel, then that is not the principle of solidarity that is normally

understood. Normally they are members of the same league or they are amateurs getting a flow down from professionals or something of that kind.

> "Even if the principle of solidarity justified redistribution between racecourses, the OFT does not consider that the Notified Agreement redistributes income from economically stronger racecourses to weaker ones.
>
> Hamilton (one of the Courses) stated that 'the Attheraces income went quite disproportionately to the top 17 courses …' GG Media stated that one reason why some courses became disillusioned with the RCA's negotiations with Attheraces was 'the poor value offered to the smaller independent horse racecourses, because the proposed distribution of funds was slanted in favour of the large racecourses …'"

That is GG Media's response, and then:

> "Similarly Kelso (one of the GG Media racecourses) stated that the Attheraces 'deal was desperately disadvantageous to small racecourses that were not part of a larger group … The GG Media [agreement] offered greater financial rewards …'"

And I note that that is in fact Kelso section 26 notice, so it is clear, at least on that issue, the OFT did take that into account.

The other reference in the note is to a further letter from the redoubtable Mr. Hutchinson of Rippon Racecourse, but I do not think it is necessary to go into that. Suffice to say, he also was somewhat aggrieved by the outcome of the deal, and that is tab 62 of bundle 14, ND1.

So what we draw from all this is that, in our submission, it is quite clear that there was an impact on price resulting from collective selling. Initially the Super 12 plainly achieved a very high bid. The collective action of the 42, co-ordinated by the RCA, radically strengthened the position of those smaller courses who, as I think both Mr. Vajda and Mr. Vaughan have been at pains to stress, stated to the OFT that individually their rights would have been effectively worthless, and that is to some degree recognised by the £1.5 million offer that was – not offer but pool that was put together to buy up the rights of the smaller courses. However, by co-ordinating their action and creating a veto over the big courses' deal, it will be recalled that they between them had almost 60 per cent. of the betting revenue, and they were able to increase the offers made to them eightfold from about £12 million to about £70 to £80 million, and were then able to form part of a larger consortium which then achieved a bid of £180 million. So, in my submission, the Super 12 first of all, and the 42 subsequently, set out to follow this policy to protect themselves from the adverse consequences of having to negotiate on their own. They put together a collective selling arrangement covering the entire industry

and conventional theory was clearly borne out in practice in that they achieved what they set out to achieve, a very substantial increase in price.

We also say there clearly was a concerted practice, if not an agreement, as I said at the start of my submissions. It is also clear that smaller deals were possible. In particular the GG Media deal shows that even the small courses were capable of acting together in a small unit to achieve an alternative media arrangement.

Finally, it shows that the collective arrangement was clearly driven by the RCA and its advisers and not by bidders, and that that is manifest from the various internal minutes which are now before the Tribunal.

In the remainder of my time I would like briefly to touch on what are in fact quite substantial questions, and I cannot possibly do them full justice in the time that is left, but which we have addressed very fully in writing: first of all, the alternative pricing models which have been considered in the skeleton argument, two of them prompted by questions from Professor Bain and one by what has become called the "BHB model" initiated by BHB primarily in its reply, although, with the benefit of hindsight, one can see its trail to some degree in some of the earlier documents. So I would like to deal first of all with alternative pricing models, secondly with the issue of incentives, thirdly exemption, and then I would like, essentially responsively, to deal with the nature of the Decision and certain errors which we say there are in the appellants' submissions.

Before I do that I would like to just go back briefly to the *Gottrup-Klim* case, which I touched on yesterday, which is a leading case I think on any view, and where we need to be quite clear what it does and does not decide. The first point I make is that first of all I would submit that it is common ground between the parties that necessity arguments must be considered in their market context. Secondly, and this appears not only in *Gottrup-Klim* but also in *Wouters* and also in the Commission Notice, that restrictions must not go beyond what is necessary to achieve their legitimate purpose.

The first point I take is that it is relevant in my submission that a different approach has traditionally been taken by the Community and the Commission to co-operative buying and selling arrangements, and one finds that clearly set out in the Notice on Horizontal Arrangements, which I took the Tribunal to briefly at the start of my submissions. One finds that at bundle 24, tab 28. The Tribunal will appreciate that this was a co-operative buying arrangement in *Gottrup-Klim* and I think it is worth looking at how the Commission generally treats joint purchasing as against joint selling. One finds that at tab38 of bundle 2, paras. 115 and following under the "Purchasing Agreements". First of all "Definition":

"This chapter focuses on agreements concerning the joint buying of products. Joint buying can be carried out by a jointly controlled company, by a company in which many firms hold a small stake, by contractual arrangement or even looser form of co-operation.

Then, in my submission, relevantly:

"Purchasing agreements are often concluded by small and medium sized enterprises to achieve volumes and discounts similar to their bigger competitors. These agreements between small and medium-sized enterprises are therefore normally pro-competitive. Even if a moderate degree of market power is created. This may be outweighed by economies of scale provided the parties actually bundle volume."

That is the initial reaction. If one then looks at the assessment under Article 81(1) which appears on the next page, I think the most relevant part is at para.125. It says:

"Most purchasing agreements have to be analysed in their legal and economic context. The analysis has to cover both the purchasing and the selling markets".

The starting point for the analysis is examination of the parties' buying power.

"Buying power can be assumed if purchasing agreement accounts were a sufficiently large proportion of volume of purchasing market so that prices can be driven down below the competitive level, or access to the market can be foreclosed to competing buyers. A high degree of buying power over the suppliers of a market may bring about inefficiencies such as quality reductions, lessening of innovation efforts or ultimately sub-optimal supply. However, the primary concerns in the context of buying power are that lower prices may not be passed on to customers further downstream. It may cause cost increases for the purchaser's competitors on the selling markets because either suppliers will try to recover price reductions for one group of customers by increasing prices for other customers, or competitors have less access to efficient suppliers. Consequently purchasing markets and selling markets are characterised by interdependencies as set out below."

The point I am making is that the contrast is quite striking between the way that joint purchasing is treated and joint selling. You will recall that the concern of the Commission in relation to joint selling was that in the normal case it would be tantamount to price fixing between the participants in the joint selling arrangement; and, of course, in formal terms that was clearly the case here in that the distribution formula reflected the amount of money received between the parties and there was no independent pricing of the individual courses.

If one then looks at *Gottrup-Klim* itself. That is at bundle 21, tab 2. In my submission, with that advice in our ears it is reasonably clear what approach was taken by the

court and it is evidenced in particular by the opinion of Advocate General Tesauro who, as is normally the case, goes into the matter in more detail than the court in its judgment. One can see that at p.8 of his opinion, it is the second document in the tab, at para.18.

> "That said, it must also be observed that the setting up of a purchasing cooperative such as DLG brings into play a form of cooperation between undertakings (or associations of undertakings) which meets typical requirements of the agricultural sector and, for that reason, is looked on favourably both by national legislation and by the Community authorities. Such cooperation in purchasing promotes the efficiency of undertakings and, as a result, workable competition between them of the kind referred to in the Metro judgment.
>
> A cooperative, in fact, by making collective purchases of basic agricultural products can, particularly in certain sectors, counterbalance the contractual strength of producers and suppliers. That applies especially to sectors, such as that of fertilizers and pesticides, in which production is concentrated at world level in the hands of a relatively small number o9f undertakings and in which it is an established fact that selling prices may vary considerably according to the volumes of products ordered. In such circumstances, the establishment of a purchasing co-operative is the natural response to the contractual strength of suppliers whereby the terms of trade are improved in favour of the buyers."

So in my submission this is a standard application of the approach described in the Commission Notice, and in the particular circumstances of relatively small purchasers faced by, as it were, worldwide suppliers. That is evidenced also by the counter argument at para.24 where Advocate General Tesauro is considering the circumstances in which there might be problems. He is effectively saying "where might there be a problem?" He says:

"That could be the case where the cooperative held a very high market share, considerably larger than those of its competitors, and where, through the existence of significant barriers to access (in particular, the need to have very substantial financial, technological or business capabilities or the fact that the established traders enjoy considerable customer loyalty) the entry of new economic agents into the market in question would be difficult. In such a situation, to further strengthen the existing bonds between the cooperative and its members (who are also its trading partners) is likely to deprive competitors (actual and potential) of the possibility of finding sufficient commercial outlets."

So he is saying that in particular circumstances which he describes as "rarefied competition" then there might be a problem, but he reaches his conclusion on the point at para.25 in relation to the position here:

"In the present case, however, subject to those findings which are a matter for the national court, there is clearly no risk of excessive ratification of the competition, since….

the entry of new traders into the market did not encounter insurmountable obstacles, either because, apparently, the financial, technological and business capabilities required in order to gain access to a national wholesale distribution market are not enormous or because, in the present case, the new trader was nothing more than a new form of cooperative organization, nationally based, set up by local associations already present in the market."

So they are saying that this problem does not arise here. It is also relevant to consider later in the opinion the analysis under Article 86 (now 82) of the Treaty which is the abuse of a dominant position, as the Tribunal will be aware and that appears at pages 14 to 15, para.32. The question was whether or not it was possible that the co-operative in this case effectively had a dominant position and para.32 they set out the law and at the top of 15, they say:

"It is incumbent on the national court to apply those criteria in the case before it. It should also be made clear that in this case the information in the documents before the Court, relating in particular to:

DLG's small market share at the material time,

the substantial balance between the market shares of DLG and those of its competitors,

the Landsoforeningen's considerable capacity to compete, together with the great potential for competition because of the lack of any significant barriers to access,

And the evolution of the respective market shares of DLG and the Landsoreningen,

Indicate that DLG did not hold a dominant position within the meaning of Article 86."

So the position there was that the general position was reasonably benign towards cooperative purchasing arrangements, and the market position was relatively modest and, indeed, there were powerful operators on the other side. So we say that the position is, in substance, the opposite here and, in particular, the collective selling arrangement in this case is not only a collective selling arrangement, but represented something like 90 per cent. of the relevant selling market. There is also the point, which I think is something which is common ground between the parties that, on any view, the barriers to entry, so the possibility of somebody else entering to compete with the collective sellers on the British Horseracing market were very high. Partly it was a matter of investment and partly the rules for entering the market were complicated and difficult, so that I think only one racecourse had entered the market in the

previous 50 years, something of that kind, so in my submission *Gottrup-Klim* does not get the Appellants home.

If we turn now to alternative pricing models, that is addressed in detail in our skeleton argument and I am intending to be brief, though obviously I will do my best to answer any questions that may arise. The relevant section is s.5, paras.7-134. At 5.7 we start with what we say is the conventional position. In the Defence the OFT noted that it is basic commonsense as well as basic economic theory that collective selling will increase prices. The OFT also noted that the RCA's own economic analysis accepted that in the absence of Veto holders collective selling would increase prices. So that is where we start. We then set out what is a transcript of Professor Bain's question that he raised on 22nd October, and we then note that the RCA subsequently suggested that the increases in the price of the rights was attributable to competition between bidders. All I intended to do was to note our responses to that. At 5.10:

> "In the following section the OFT sets out its understanding of the point raised by Professor Bain, however the OFT then explains why, in the absence of collective behaviour between the courses, competition between bidders would not have driven up the price to the same level as under collective selling. The primary reason for this conclusion is that bidders emerged sequentially and only rarely bid simultaneously against one another. The final stage of the bidding process, where Carlton and ATR did bid against each other simultaneously was the outcome of a long process of collective negotiation during which the RCA and the TRG have been able to exercise substantial control over the timing and sequence of bids in such a way as to create an effective auction between two bidders. The documentary record makes it clear that this would not have occurred in the absence of the courses' collective behaviour. The secondary reason is that even if bidders had bid against one another simultaneously in a context of independent selling by the individual courses, which the OFT maintains would not have been a likely outcome, the specific conditions necessary for this process to drive up the price of the rights to the same level as under collective selling were clearly not present in this case. In particular there were substantial differences between the bidders in terms of the value that they placed on the rights and considerable lack of transparency in the bidding process."

So I think in summary our response to this particular question is that we see this as a theoretical possibility that in particular conditions of the market, where you have very direct competition between bidders you could achieve a situation analogous to collective selling. However, we say that this was not the position here, at least initially one had a relatively diffuse selection of bidders who emerged sequentially, so initially Channel 4 entered the market, then there was a

brief overlap between Arena and Channel 4, and then Arena held the field from June through to September and all through that period the RCA and its media advisers were working very hard to co-ordinate the responses of the courses and to generate effectively an auction which, perhaps at the last stage, can be said to have approximated to the position that is hypothesised, but which certainly to start with was a much more open textured negotiating process, and in my submission it is not appropriate to assume that a direct auction for the rights would have eventuated if there had not been collective selling. That is the first point.

The second point is that, even if that were not the case, and even looking at the position in October and November where one could say that Carlton and the ATR Consortium were competing directly, and ignoring the fact that that was orchestrated by the RCA acting on behalf of all the courses, even then one cannot say that the conditions for, as it were, perfect competition between the two bidders was present because of the particular characteristics of Carlton as primarily a terrestrial broadcaster with the virtues and weaknesses that that manifested as against ATR with a consortium with a range of skills which ultimately won the day as far as RHT and the major courses was concerned, leaving the smaller courses either with GG Media or with the rather unsatisfactory position that they complained of. That is our basic answer.

PROFESSOR BAIN: Mr. Thompson, are you suggesting that the OFT is saying that we should be looking for perfect competition rather than workable competition?

MR. THOMPSON: No, I am not saying that. I am saying that the possibility of this scenario having been equivalent to a collective sale, would require perfect competition on the buying side, and that the reality of the situation, the realistic counterfactual and indeed the realistic factual, did not conform to that. That is our position, I think. Can I just look around and see whether I have got that right? (After a pause) Yes, Mr. Ray is my consultant on such questions. That is what I wanted to say on that.

The second economic question was raised again by Professor Bain at the same case management conference, and is dealt with by the OFT at para.72 and following on p.89 of skeleton argument. Our understanding was that there were two possible limbs to this question. The question in this case was whether or not the fact that the BHB was at least treated as having a monopoly control over the data rights which were necessary for the operability of this arrangement to go forward, whether that had any impact on the analysis of the position in this case. We took that to have two limbs. One, which I think touches on the question that Professor Bain put to me yesterday about the monopoly power of BHB and whether or not it could have achieved the similar effects as the collective sale by the courses using that monopoly power, i.e. in commonsense terms it could have held out for the full value of the rights in any event.

Alternatively, the point relates to the fact that I think it is agreed that the interactive betting rights and the data rights were complementary in that the data was required and whether or not the fact that a monopolist held a complementary right in some way influenced the analysis in relation to collective selling.

We address the first point at paras.74 to 82, and I draw in particular attention to paras.77 and 78, where we say that, as a matter of law, the OFT has explained in part 2 why the rights in the BHB's data rights do not fall in the same product market, accordingly, for the purposes of s.2 the questions whether collective selling increased the price of the rights. The counterfactual being proposed is one in which the price of the rights would be lower absent collective selling but the price of another product would be higher. In such a counterfactual the OFT's case would be made out. The fact that the price of another product would be higher is not relevant.

As to legal policy, the above argument implies that had the 59 courses sold their rights independently as well as at a low price, the BHB would have used its monopoly power to demand a very high price so the bidders would have been no better of, so, i.e. instead of the successful bidder's profits being appropriated by a selling cartel they would have been appropriated by a monopolistic single seller. The policy implications of accepting that such consideration could lead to the conclusion that what might be otherwise anti-competitive behaviour might not be prohibited, so obviously you cannot read a policy that the OFT considers the 1998 Act must be interpreted in such a way as to exclude the possibility of such an analysis. If this were not the case it would suggest that any cartel relating to a product that was complimentary to another product controlled by a monopolist could argue that its policies were of no anti-competitive effect because they could be replicated by the monopolist with the consequence that consumers would be no better off and presumably the monopolist could argue the converse in relation to any abuse of which it was accused.

In my submission, that is a proper paradox for us to put before the Tribunal and I would note that it appears to have been the view of those advising the RCA at the time that this was not a realistic possibility. If one turns again to bundle 15, tab 74 this time – these are minutes of the Racecourse Association meeting on the 28th November, when the decision about the rights was taken. If one turns through the tab to the third from last page, you should find a heading "Pooling of Rights". It says at the top:

> "Counsel's opinion had been received which confirmed that under Competition Law the BHB could not refuse access to its pre-race data, providing a reasonable price is paid. This is a matter for negotiation although Counsel had indicated a range of possible bases. It was agreed that this advice would be kept strictly confidential."

I do not know whether BHB was given the same advice or whether it was happy to take it, but the position of the RCA appears to have been the same as the position of the OFT, that one cannot defend a cartel by saying that its effect could be replicated by a monopolist.

PROFESSOR BAIN: Could I just clarify then, on 577, first of all, the OFT's position is – well, in its case it argued that the party that benefited was the ATR. Had it been the BHB instead the case would still have stood, so you are not under any obligation to say who is affected by the deal. What you seem to be saying is that the fact that the price of another product would be higher is not relevant, and it does not matter whether the OFT has identified the right product or not. Is that your case?

MR. THOMPSON: I do not think that is our case.

PROFESSOR BAIN: That is what I thought you were saying in 577.

MR. THOMPSON: As I understand it, it has not been suggested that – it has not been any part of either the BHB's or the RCA's case that in fact the RCA was, as it were, a conduit pipe to the BHB, and that what we are really concerned with here is the market power of the BHB. I do not think the RCA has ever alleged it, and I do not think the BHB has ever asserted that it did in fact assert its market power in an anti-competitive way.

PROFESSOR BAIN: I am just trying to understand what you are saying in 577, Mr. Thompson. I know what the RCA and the BHB have argued, but here you seem to be saying that the OFT's case would be made out, and the fact that the price of another product would be higher is not relevant. In effect it is another product.

MR. THOMPSON: It would be a different case.

PROFESSOR BAIN: Agreed. It is not the case you have made.

MR. THOMPSON: As I understood it, the point that is being put to me by the Tribunal is what about a counterfactual, not an actual factual but a counterfactual. Supposing the position had been that the BHB had actually appropriated a monopoly rent from the courses; what would have been the position in relation to – does that render the application of competition law to the collective selling arrangement irrelevant? We take the counterfactual seriously. So, supposing there had been no collective arrangement, the courses had sold their prices individually or in small groups, maybe 25 per cent., whatever is acceptable, the price had been lower but BHB had then said, "Fantastic, we'll come in and we'll take the £180 million ourselves", that would have been a quite different case, and we say the mere fact that in that case we would not have had any case against the courses and we would have been focusing our attention on BHB is not relevant to the question of whether in this case the collective selling did lead to an increase in price.

PROFESSOR BAIN: Okay, but there is an issue as to whether or not – there could be an issue as to whether or not BHB had effective veto power, and there could be an issue as to whether or not they did in fact exercise their negotiating position in this case.

On the second point, I am not quite clear that I can distinguish between the holder of intellectual property rights being allowed to extract the value of those rights in whatever way the holder chooses and what you seem to be suggesting is an abuse of monopoly power. Let me just expand slightly: if one thinks of music rights it is, I think, traditional that working men's clubs pay a lower royalty rate than discos. Would it be proper for the BHB to charge different licence fee rates to LBOs and non-LBOs. It seems to me they have agreed that they will charge the same rates to non-LBOs or to anybody distributing in the same way as ATR. They have not said anything, as I understand it, about equating the licence fees between LBOs and non-LBOs, and in fact, so far as I can see from the slightly limited figures I have available, they do not charge the same rates to LBOs and non-LBOs. So for them to say in this particular case, "We can charge a high licence fee, higher than we can to LBOs", would seem to me to be comparable to what is done in the music industry, and it may or may not be illegal – I do not know – but if it was not illegal that is precisely what I would expect them to do if they were trying to extract the full value of their rights as it appears that the Government plans that they should do.

You seem to be saying in 578 that that would be quite improper. Are you?

MR. THOMPSON: There are various points here. The licensing policies of collecting societies under Article 82 or the Chapter II prohibition of the Competition Act is a topic which itself would justify, in appropriate circumstances, a complicated and detailed case. There have been many such cases, and the text books and the case law is replete with cases about whether or not particular aspects of a licensing policy fall within the scope of Article 82. I make no apology for the fact that this is not a case where anybody has invited us to make a finding that BHB is in breach of s.18 of the Competition Act. If I were to now say, "Well, that's a possibility", then I suspect Mr. Vaughan would have justification to stand up and make some fairly vigorous submissions. That is not our case.

But I perfectly accept that if that issue were to come before the Tribunal, not necessarily with these parties at all but some other parties, there would be all sorts of questions about the application of s.18 of the Competition Act to the licensing policy of a monopolist. But, in my submission, that does not detract from the point that we are making here.

PROFESSOR BAIN: You seem to be taking a particular position on it in 578, if you look at your last sentence there, for example. I do not think we need pursue this, Chairman, as this point.

Would it be convenient for me to raise other issues at this point?

THE CHAIRMAN: Yes, of course.

PROFESSOR BAIN: There are, Mr. Thompson, a number of aspects of the counterfactual which we would like clarified just so that we understand fully the comparison between what did happen and what the OFT suggest might or would otherwise have happened.

MR. THOMPSON: Yes.

PROFESSOR BAIN: The first point refers to the Super 12. In the OFT's counterfactual do you take the Super 12 as a fact of life or do you assume that they did not exist as a group?

MR. THOMPSON: The answer in the Decision is that we recognise that there was collective action, or we assert that there was collective action both by the Super 12 and by the 42, and where that comes up is in the context of whether or not Channel 4's bid failure is evidence that individual selling could not have succeeded. It is towards the end of the Decision, just to give you the reference – it is in the early 400s. It is under the heading "Failure of Super 12 offer demonstrates that individual negotiations would fail", paras.405 through to 419 and, in particular, para.414. That is after the description of the Super 12 and 42's conduct, where the OFT concludes:

> "The Super 12 Offer shows that buyers were not in a position to play courses off against one another, because the racecourses were acting collectively. The OFT notes that such co-ordinated action appears to comprise the knowing substitution of practical cooperation for the risks of competition and, as such, may itself have fallen within the Chapter I prohibition. The OFT has not investigated this case and so has no concluded view on the matter."

So the position in the Decision was that there was no finding that either the Super 12 arrangement itself or the counter-arrangement between the 42 were themselves contrary to the s.2 prohibition, and the reason for that was that this was a notified agreement and what we were considering was whether or not to grant an exemption to that notified agreement, which gave us enough on our plate to be worrying about.

PROFESSOR BAIN: So does it follow from that then that if we are trying to establish what the world would have been like absent the RCA/ATR agreement we should assume that the Super 12 existed and ATR could have made an agreement with them?

MR. THOMPSON: Sorry, I want another reference. I think a formal answer to the point is that the OFT somewhere in the Decision, and I cannot immediately find it, reminds itself that it normally takes the view that up to 25 per cent. of the market is acceptable and creates no problems, whereas – yes, it is footnote 458 at p.109.

PROFESSOR BAIN: Yes, I understand that, Mr. Thompson, but the question really is for the counterfactual in this particular case, where there has been no finding against the Super 12; are

we to assume that the Super 12 was in existence or not, and, in particular, does the OFT for its counterfactual assume that they are in existence or not? From what you are saying, given that footnote, the OFT is assuming that they are not in existence despite the fact that there is no finding against them; is that correct?

MR. THOMPSON: No, I do not think that is right, sir. If I gave you a counterfactual which might be useful to the Tribunal. It is actually tab 3 of RCA14. What was envisaged in that case – this is the original internet proposal of Arena under the heading "Attheraces", and if one turns through to p.8 you will find a timetable which suggested that the big 12, so the Super 12, Arena and Northern Racing would sign up to the plan, whereas the remaining racecourses would sign up via the RCA. So that is an alternative proposal where you have the Super 12, Arena and Northern each negotiating their rights individually, and the remaining courses negotiating via the RCA. So that is a concrete alternative.

If one looks at the figures which Mr. Vaughan has usefully appended to his skeleton argument, at tab 2 – sorry, it is called schedule B – you will see the total betting turnover of the Super 12 is stated to be 37.1 per cent., the betting turnover of Northern Racing, if one tots up the different shares – yes, you find 11.9 per cent. Arena, you find 19.1 per cent. So if one does that arithmetically, you find that the remaining courses – you would have 37.1 plus 19.1 plus 11.9, and that leaves just over 30 per cent. for the other courses.

PROFESSOR BAIN: So groupings of that kind where you have the Super 12 as one group fall within the counterfactual as the OFT sees it

MR. THOMPSON: That is a concrete counterfactual that I am suggesting. In my submission, there you would have had two collective groupings, the Super 12 and the other courses, who would have been in the thirties, and you would have had two substantial sellers, Arena and Northern, both with over 10 per cent. In my submission, that might have raised questions under the s.2 prohibition, but it is obviously a much more competitive market structure than the one that we are concerned with here. Whether or not if the Super 12 had stuck together on its own and everybody else had bid individually there would have still been a case against the Super 12, in my submission, that is not the right question to ask. The right question to ask is whether this arrangement, 90 per cent., was anti-competitive and to have a realistic counterfactual which was significantly more competitive, and this is one such counterfactual.

PROFESSOR BAIN: Thank you. In looking at the alleged damage for the agreement in putting up prices and distorting markets, we have to envisage what would have happened otherwise. Taking it from what you say, that an arrangement such as that proposed by Arena would fall within the range of what the OFT would imagine might have happened otherwise.

MR. THOMPSON: That is evidence of an alternative structure.

PROFESSOR BAIN: Yes. I am a little surprised because I thought the OFT would have thought that the groupings there were too large, but if that is something we can have in mind as your alternative structure, we are happy to work with that.

MR. THOMPSON: I think this is an important question, it raises policy questions, because I do not want to be standing here saying this or that would be okay. I do not think that is my role today.

PROFESSOR BAIN: I am not asking whether it is okay, I am simply trying to get a realistic counterfactual by reference to which we can compare what actually happened with what would have happened.

MR. THOMPSON: That is the reason why I gave that example, because it is concrete. I should say that the note that has come up to me is if there are detailed questions of this kind I would have appreciated an opportunity to take instructions from the OFT before I reply to them because they are obviously important questions, so I do not know if there are other policy issues ----

PROFESSOR BAIN: There are other questions about the counterfactual which perhaps I can go on to, and if you do not want to answer them immediately take them away and come back after the break and give us an answer.

The second one concerns strategic behaviour. Channel 4 clearly behaves strategically by signing up the Super 12 first. Arena could, on some interpretations, be said to have behaved strategically by trying to sign up the other 42 together.

MR. THOMPSON: Yes.

PROFESSOR BAIN: Could have been. Supposing there had not been any agreements either amongst the Super 12 or the involvement of the RCA more generally, does the OFT counterfactual include or exclude comparable strategic behaviour by groups – sorry, I mean by the buying groups in this case. If there had been much freer competition amongst the racecourses do you think that Channel 4 would still have gone along to try to sign up the Super 12 individually, RHT plus the others individually, and then come along and tried to buy up – to get the rest to do a deal, or do you think that they would not have behaved strategically because, you know, markets where there is strategic behaviour tend to be somewhat different from the widget market that we keep coming back to. So what is the OFT's view about strategic behaviour? It does not come out of the Decision.

MR. THOMPSON: There are points in the Decision where it is addressed.

PROFESSOR BAIN: But it is the counterfactual. What I want to know is what is your counterfactual? What we have had some difficulty with, Mr. Thompson, is actually identifying precisely what the OFT's counterfactual is, and we have made a number of efforts to get to that and now we are coming to a point where we are beginning to have to look at decisions, so we

really do have to try to get this clear. If you want to take it away and come back after lunch with the answer fine.

MR. THOMPSON: I think if there are a set of specific questions of this kind then it would be – are there more questions?

PROFESSOR BAIN: There are another two questions.

MR. THOMPSON: It would be helpful before I commit myself to anything further.

PROFESSOR BAIN: The third question has to do with the process of how the bidders decide how much they are going to offer to each course. You are going out to these courses, you are making individual offers to them, how do you decide that Perth are going to get 50,000, Haydock Park 100 and Aintree either 20 or 200? There must be some sort of model in mind as to how each bidder goes out. What kind of model have you? In the case of the agreement there was a distribution formula – an aggregate amount and a distribution formula. Now, if it had been bidders operating in your competitive counterfactual what kind of process would have been involved? Perhaps I should say, thinking about it ourselves, we have assumed any bidder would have had to have their own allocation formula in some way. You just do not think, "Oh, 20,000 for Perth, what shall we say for Musselborough, oh, 55". Now, you have got some kind of allocation formula which must be based on something. Does the OFT imagine that the alternative bidders would have the same allocation formulas or different allocation formulas? I would like to know because again the implications for how the market will work are different. So what is the process that the OFT has in mind for its counterfactual; that is the second point.

The next point has to do with the minimum guarantees, and you may be able to answer some of this. Does the OFT accept that the minimum guarantees in the MRA create a presumption that that is what the courses wanted? They seem to have been there, on your argument, because the courses negotiated to get them. So if that is the case that seems to me, subject to correction from you, to create a presumption that that is what the courses want. If so, does it imply that the OFT would accept that its counterfactual, which involves much less weight being given to minimum guarantees and more to payments related to turnover, that implies that in trying to get the agreement of courses to a deal the bidders who, remember, are vying with each other for the rights, would not structure their bids in a way that was likely to be attractive to the courses. Is that the implication? If I am right that the fact that the minimum guarantees were negotiated gives us a presumption that that is what the courses wanted, the OFT's counterfactual seems to be saying that the bidders, who are in competition with each other, would not structure their bids in the way that the courses wanted on a balance of probabilities.

Now, you may again want to go away and think about that.

MR. THOMPSON: I think it would be sensible, given the time, to take all the points together. I must say, on the last one, I am slightly puzzled by the question because I am not quite sure what is being assumed about the market power of the courses. It is obvious that it was very attractive to the courses to have a very high minimum guarantee and to minimise its risks in relation to the project, and that is indeed one of the things that complaint is made of in relation to incentives, but quite why that is an argument against the OFT's analysis at the moment I am not fully understanding because there are many things that many sellers would want, but the fact that they are in competition with one another means they cannot always get them.

PROFESSOR BAIN: It is not necessarily fatal to the OFT's analysis. It is perfectly conceivable that you might be right that, on a balance of probability, this would have been so unattractive to the bidders that they would not have done it if they had not been compelled to by the agreement. That may be your argument, but ----

MR. THOMPSON: Well, it is our argument because that is how it was at the start, and that is not how it was at the end.

PROFESSOR BAIN: But if I could come back to my first point: if you take the Super 12 as a fact of life and that agreement as a fact of life, that consisted largely of minimum guarantees so it was in the market. Now, if you say we cannot take the Super 12 as a fact of life then it opens up a different analysis of what would have happened in the market. So the points are related, Mr. Thompson. It is quite critical.

MR. THOMPSON: Yes.

PROFESSOR BAIN: My final point is actually quite separate from this, and it has to do with market definition. Mr. Vaughan took us to a document on market definition yesterday, which happened to be the December 2004 issue of the market definition, whereas the one that was current at the time the Decision was taken, and has been current until really quite recently, had at the relevant para.5.4 a statement about complements and secondary products, and perhaps I could just read it to you.

> "Market definition normally involves identifying groups of substitutes, but markets can be defined to include groups of complements. Complements are products which are consumed together, coffee and milk, or produced together, petrol and diesel oil. Complements are included in the same market when competition to supply one product constrains the prices charged for the other."

Now, does the OFT regard itself bound by the guidance in that paragraph that was current at the time or does it not? That paragraph has been dropped from the more recent version although the application of it to after markets has been retained.

MR. THOMPSON: Again without pouring over what the difference is between the 2004 version and this version, I would be reluctant to commit myself as to why there has been any change and whether or not there has been any change of policy.

PROFESSOR BAIN: I do not really want to know why there has been a change. What I really want to know is whether the OFT regards it as reasonable for us to work on the basis of the guidelines that were current at the time.

MR. THOMPSON: I would have thought that that was the position, but I have made submissions on this issue already, and whether or not we accept there is any inconsistency between those two, given the time perhaps I could come back on that at 2 o'clock as well. Those are obviously substantial questions, it is a matter really for the Tribunal whether it would be more convenient for me to take instructions for the OFT now with a view to answering the questions as soon as possible or whether to deal with another discrete topic and then come back on it at 2 o'clock. I think realistically I am not going to be able to deal with everything in the next half hour.

MR. VAJDA: From the point of view of myself it would be more convenient if Mr. Thompson were to continue because obviously we have to reply and I prefer that he goes on to 1 o'clock and have a little longer over lunch.

THE CHAIRMAN: How long do you think your and Mr. Vaughan's replies are likely to take?

MR. THOMPSON: I have to say this, as I said at the outset my clients are facing an unquantified action for damages against ATR, the Mr. Gundills of this world, there is quite a lot of material I have to deal with. If we stick to the formula I should finish by 3.30 and I will certainly seek to do that. But this is a matter of the utmost concern to those instructing me. This is the only opportunity we have on the facts and so I may seek the permission of the Tribunal to go a little longer if necessary. The President did indicate at the last CMC that there was a fourth day spare. I certainly would want to finish by 3.30 but, on the other hand, given the importance of this to my clients who will be facing a damages action where we do not go into issues of liability it is important that they get the opportunity to put the bare points to this Tribunal.

MR. VAUGHAN: If I could help, Sir, I think I will be about 45 minutes.

THE CHAIRMAN: I think we will continue until 1, but if Mr. Thompson finds that by 2 he has not got himself into a proper position to deal with the points which Professor Bain has put to him, then we will reconsider the timing, but I think if it is all right with you, Mr. Thompson, we will continue with your next point now and hope that you can assist us in the OFT's response to the various questions at 2. But we do not want to put you under any undue difficulty in that connection and we may have to re-look at the timing if you are not ready to provide the response.

MR. THOMPSON: Yes, well I am sorry if it looks as if I am going to overrun a bit in any event.

THE CHAIRMAN: That is not your fault.

MR. THOMPSON: We obviously want to give helpful answers.

THE CHAIRMAN: Quite, let us carry on until 1, and then we will review the position at 2, if we may.

MR. THOMPSON: I am grateful. There is a third economic question which his the BHB model which his still formally at least in the field, although it did not feature particularly prominently in the skeleton arguments of the two Appellants. I would like to just say three things. First, as I understood it, Mr. Vaughan yesterday said that the paper appended to the OFT's skeleton argument, which appears to be the theoretical basis for the BHB model, as it was called, is in fact the standard model of pricing. It is perhaps a pedantic point but in my submission it certainly is not a standard model. It is an entirely non-standard model for a very particular set of assumptions and, in particular, it concerns the effects of buying rather than selling, and it sets out a number of quite particular assumptions about markets in America, and it is not the same model, and is expressly stated to be a particular set of assumptions.

The second, and perhaps more attractive and intuitive point is simply to go back to the OFT's point on the facts, which appears at paras. 128-133 of s.5 of the OFT's skeleton argument. In particular, there is a quotation from the BHB note that was sent to the Office of Fair Trading, which appears at tab 5 of bundle RCA19, it is in footnote 73, and it sets out a key assumption for the purposes of the BHB model, which says:

> "The more racecourses ATR contracts with the greater is the value of the ATR product. Racecourses are therefore not very good substitutes for each other and, as such, can generally command substantial prices for their rights when negotiating individually. It is common ground that the value of the ATR product would increase the more fixtures it is able to broadcast and, in this context, racecourses are not likely to be effective substitutes for each other and even smaller racecourses are likely to add significant value not least because they are able to offer fixtures at times when no other racing is scheduled."

Then the OFT responds:

> "While it is common ground that traditional courses might add some incremental value, it is not common ground that courses were not effective substitutes or that additional courses will add significant incremental value, particularly once critical mass is reached. The BHB model is thus based on a radical over estimation of the degree of incremental value added by additional courses, the basic model assuming that each course adds equal value so that bidders will pay as much for the rights of the last course as for the first, and they would have agreed to pay as much for rights they

did not need as for rights that were essential to the viability of their business model. This is a highly implausible assumption that again fails to take account of the actual circumstances of this case."

In particular the s.26 notices on which the Appellants placed considerable emphasis in their opening particularly emphasise the fact that the smaller courses' rights were effectively valueless, which is hardly consistent with the suggestion that effectively you go on buying more and more courses at full value up until the last course, which seemed to be a principle feature of the BHB model. So in summary we say that the model is completely inconsistent with the central planks of BHB's own case, and in particular the statements of Mr. Nichols, and the correspondence between Mr. Hutchinson and Mr. Saville of the Rippon Racecourse, and the BHB Chairman.

The next topic I would like to deal with, again fairly briefly, is the question of incentives. We say that it is a significant additional element in the case, it appears at paras. 312-314 of the Decision, and we say that in a sense it is a form of restriction on output in that there is no competition between the courses over 10 years in relation to one of their significant income streams because they get fixed payments – or largely fixed payments – regardless of their performance on that market. We accept that the impact is some degree limited by the other rules restricting competition – or limiting competition perhaps I should say – between the courses, but we say that it is important to protect residual competition and, as I understand it, there is no dispute between the parties on that issue. The point is discussed at paras.172-182 of the Defence – I do not know that it is necessary to turn it up, it is by reference to *Suiker Unie* again, and also a Commission Decision in the cigarette market. It is particularly para.E176 p.144. The Decision is, as I say, in the tobacco market, and the Commission states there:

"It is even more important in situations where the scope of competition is limited by legislation that firms should not make agreements or engage in practices to eliminate the scope for competition that remains."

At E.178 we say:

"The OFT submits the same approach should be applied to this argument as was applied by the ECJ and the Commission in the above cases, namely, even if the effect of the orders and rules is to limit competition between the courses, s.2 of the 1998 Act continues to be applicable in respect of any residual competition."

So that is the basic point we make. In response to that, in the Notice of Appeal, which is quoted – it is probably easiest to stay with the Defence, we get the relevant points set out – at para.E.167:

"The Appellants advance three arguments in response to this part of the Decision.

(i) ATR would not have been prepared to pay additional sums above what it was contractually bound to pay,

(ii) that BHB's control of the fixture list would have precluded courses improving the attractiveness of their output; and

(iii) the effect of other sources of income for the courses was such that even had they been structured differently payments for the rights would not have had any appreciable effect on courses' determination of their output."

We say that the nub of those points is (ii) and (iii). (i) is essentially a formal point as we would say in that the point we make is that the prices have been driven up to a monopoly price, so it is not surprising that the ATR were not prepared in practice to pay any more.

Essentially the issue then became one of appreciability. That was then addressed in the RCA Reply, and one can find that in s.4, para.93 on p.51 and following in the Reply. The principal response to the Defence – there is an issue about the question of the BAGS contracts, but the principal issue remains one of appreciability at paras 104 and following where the RCA Appellants do not dispute the general need to protect residual competition. The Defence says that there was a possibility of residual competition but the Defence does not however explain in which market that residual competition occurs.

"As already stated the courses were not in competition on the market for the sale of interactive rights for a betting finance TV service. In so far as the Defence is relying on competition in some other market the Defence fails to explain why the distribution formula restricts competition contrary to section 2. Leaving to one side the question of in what market the alleged restriction of competition is said to occur, the Defence points out that there is scope for changing fixtures and applications have been made to change fixtures since the Rights Agreement came into force, but that is not evidence that the distribution formula had the effect, let alone an appreciable effect, of limiting changes in the fixtures. On the contrary it is evidence that the distribution formula had no impact."

And then there is reference to witness statements from Mr. Gundill and Mr. Atkin, which are said to address the question again of appreciability. So in our skeleton we came back on this question at s.6, and in particular 6.3 sets out the structure of the argument, and 6.8 sets out the relevant points raised by the RCA as we understood them. The relevant section is at 6.34 and following in relation to appreciability, where first of all we say that there has been a misunderstanding of the issue, but then we go on to the substance at s.4, para.37 dealing with the counterfactual. 6.39:

"It is necessary to consider what incentives would have been likely to have existed in the absence in the course's collective behaviour if a bidder had successfully negotiated to acquire a critical mass of the rights through .. negotiations"

Then the core of the issue is at 6.43 and 44, where we address Mr. Atkin's argument and so we conclude the principal point being at 6.45. At 6.43 we note that the concede that in principle a conjunction of the sums available under this agreement, and other sums available of the kind Mr. Vajda identified in reference to Mr. Gundill's statement in relation to Pontefract, that in principle those could have an effect on competition on the incentives available to courses, and we address the point specifically at 6.45 and following. We say:

"The RCA's reasoning appears to be based to a large degree on whether it would be economic to introduce an entirely new fixture in order to meet the interests of an interactive betting provider. That is not the correct question. Changes to the nature, quality and timing of races that are capable of increasing betting revenue on downstream interactive betting services are not limited to the creation of new fixtures. On the contrary, such changes could be brought about, for example by holding a race at a different time, changing the nature of the race, changing the class of the race or changing the number of runners. Consequently, properly stated the RCA's appreciability case now rests solely on the improbable proposition that changes to the nature, timing and quality of races which would have been likely to increase downstream interactive betting revenue would invariably have taken those cases outside of the criteria that had to be met if a course was to maintain other revenue streams such as those from the Levy Board and under the BAGS contract."

So the gist of the point, the OFT takes the view that it appears to be common ground that in principle the incentive payments in this market could have worked in conjunction with incentives in other markets to increase competition between the courses, and that on the facts there is no reason to assume that that is not what would have actually occurred if there had been appropriate incentives included in the contracts for the courses as there had been in relation to other types of rights, in particular the BAGS' rights. So in my submission there is a substantial point here; it is set out in a great deal of detail in the OFT's Decision, Defence and Skeleton argument. The question of whether or not the skeleton goes beyond the legitimate scope of the decision in this respect is addressed in some detail in the note that we handed up yesterday, and I would not propose to go over that material again, given the time and given the other things that need to be addressed.

If I could turn briefly to the question of exemption. The RCA, as we understand it, whereas at an earlier stage a central part of its case appeared to be that there should be an

exemption because this arrangement was indispensable to the launch of a new product, that point does not feature in their Skeleton argument before the Tribunal where the issue of indispensability relates only to the question of an income stream for the courses and relatedly to the issue of solidarity, and also to the question of transaction costs. One finds that at paras. 17-19 of Part 6 of the RCA Skeleton. The point that was made by the OFT in its skeleton to which this responded, is para.3 of s.7 of the OFT Skeleton. The OFT, under the heading "Section 9 An Exemption":

> "We note that the Tribunal identified the following issue, the application of the exemption criteria in s.9 of the Competition Act to the facts of this case. In that regard whether the degree of collective behaviour was indispensable to achieve the purported benefits flowing from the agreements in question."

So the Tribunal identified the issue of indispensability as central and then at 7.2 we say:

> "As Part 3 of this Skeleton argument makes clear, the OFT also agrees with the Tribunal the present case raises certain particular issues concerning the relationship between indispensability and necessity under s.2. These issues were fully addressed in Part F of the Defence, in particular at para.F.4.2 where the OFT noted the difficulties that faced the Appellants under s.9 if their necessity arguments fail under s.2. If collective selling was not necessary for the creation of interrupted betting service then it is very difficult for the Appellants to show that the restrictions underlying the Rights' Agreement were indispensable to achieve the benefits of that service.

So given the focus on this issue from the Tribunal's point of view, it was interesting to note that when the RCA come to address this point in their Skeleton at paras.17-19 of s.6, the feature of the new product has completely disappeared. One finds that at ps.27-28 under the heading "Indispensability". There are two formal paragraphs 6.15 and 6.16, and then 6.17:

> "In the present case the Decision committed a major error in finding that the income stream was not a benefit of the agreement. That inevitably means the analysis under the indispensability condition is flawed, since it precluded the argument that collective selling was indispensable to the income stream."

Then in the next paragraph they just say briefly:

> "Equally, this aspect of the Decision is flawed because of the finding that reduced transaction costs were not a benefit."

Presumably that is intended to mean that that benefit could not have been achieved without collective selling so the collective selling was indispensable to reduced transaction costs. So it seems that the case against us has been limited to those two points at this stage.

MR. VAJDA: It has always been accepted by the OFT that the new product passes the first hurdle, so that is not an issue. The question is, is the income stream going through the first hurdle? That is the issue.

MR. THOMPSON: No, I understand that perfectly. We are now on the third hurdle, and as I understand it there are two runners in that particular race, which is income stream and transaction costs. In relation to transaction costs I will take it briefly, the point is addressed at paras. 3.61 to 4 of the Decision and 4.26 to 9. I would simply like to remind the Tribunal of the terms of the Commission Notice on this issue, paras. 50 and 56 – that is at tab 4 of bundle 21. The relevant paragraphs are 50 and 56 on pages 104 and 105. The Commission says:

> "First, the purpose of the first condition of Article 81(3) is to define the types of efficiency gains that can be taken into account and be subject to the further tests of the second and third conditions of Article 81(3). The aim of the analysis is to ascertain what are the objective benefits created by the Agreement, what is the economic importance of such efficiencies, given that for Article 81(3) to apply, the pro-competitive effects flowing from the Agreement must outweigh its anti-competitive effects. It is necessary to verify what is the link between the Agreement and the claimed efficiencies and what is the value of these efficiencies."

Then at 56:

> "In the case of claimed cost efficiencies the undertakings invoking the benefit of Article 81(3) must as accurately as reasonably possible calculate or estimate the value of the efficiencies and describe in detail how the amount has been computed. They must also describe the methods by which the efficiencies have been or will be achieved. The dates submitted must be verifiable so that there can be a sufficient degree of certainty that the efficiencies have materialised or are likely to materialise."

So the point on transaction costs, which is set out in the Decision, which I will not go to, is that the OFT was not satisfied for the purposes of s.9 that there had been a saving in transaction costs, there had been long and complex negotiations, there had been stand-offs between the large and the small courses, and there have been difficult negotiations of the distribution formula so that they were not satisfied that the 56 requirements were satisfied. Further, under para.50 they were not satisfied that any savings in transaction costs that there might have been were outweighed by the impact on price and non-price competition which they found for the purposes of the s.2 analysis so that even if there had been some modest reduction in transaction costs the OFT formed the view that they were heavily outweighed by the impact on prices, so that in terms of the balancing exercise any savings in transaction costs could not be enough to exempt this arrangement.

In relation to increased income and solidarity, the OFT takes a variety of points. The first point is that the additional income resulting from collective selling is not accepted by the OFT as itself a benefit on the basis that it is too indirect a consequence because there is no necessary benefit to competition from the fact that the seller in this market obtains more money. The second point is that even if solidarity is taken into account, here there was no solidarity in fact because each of the courses appears to be out for itself and in particular the big courses seem to have taken the lion's share of the profits and so the question of whether or not this could be brought within the scope of solidarity had to be answered in the negative, and this we have already looked at in the context of the earlier points.

The legal point that is taken again arises under the Commission's notice and here it is para.43, slightly before the previous paragraph, where the Commission states:

> "The assessment under Article 81(3) of benefits flowing from restrictive agreements is in principle made within the confines of each relevant market to which the agreement relates. Community Competition Rules have as their objective the protection of competition on the market and cannot be detached from this objective. Moreover, the condition that consumers must receive a fair share of the benefits implies in general that efficiencies generated by the restrictive agreement within a relevant market must be sufficient to outweigh the anti-competitive effects produced by the agreement within that same relevant market."

And then the same point is made in the next sentence that you cannot normally take into account positive effects of consumers in another unrelated geographic market or product market and even where they are related one has to find an overlap between the consumers, the group of consumers affected by the restriction of benefiting from the efficiency gains are substantially the same.

I think Mr. Vajda raised the possibility that in some cases the Commission has been prepared to take into account environmental benefits which accrue to everybody – that is a matter dealt with in the skeleton argument. The point we take is the fact that the seats may have been more comfortable at Rippon or Pontefract was not a sufficient direct benefit to ATR for that to be taken into account for the purposes of Article 81(3). There had to be a correlation between the benefits of the increased income and the detriments to competition.

So that is our case on transaction costs and income. I see the time. I had two other sections that I wished to deal with. Effectively, there is a need, I think, to respond to the robust criticisms that were made by Mr. Vaughan and Mr. Vajda which I can do quite quickly, but it is a discrete section which I am afraid I have not got to, and then there is the answer to Professor

Bain's question. Those are the two areas. How long exactly I will take on the second of them I think depends slightly on the discussions that take place in the next hour.

THE CHAIRMAN: How long on the first, do you think?

MR. THOMPSON: I would think 20 minutes.

THE CHAIRMAN: Well, I suppose, bearing in mind you are meeting two Appellants who between them occupied rather more than you had otherwise been allowed, it would not I think be unreasonable to give you the necessary extension to add your 20 minutes on the first point, or whatever is needed to deal with Professor Bain, and then we will see how we can accommodate the replies after that.

MR. THOMPSON: The alternative, obviously, is to have a partially written procedure, but I do not ----

THE CHAIRMAN: I think it is better if it is dealt with orally and then we can hear the oral response to it.

MR. THOMPSON: I apologise, it is no criticism of anyone but clearly these are quite far reaching questions.

THE CHAIRMAN: There is no need to apologise, the timing of one's submissions when you are up against the clock is not easily done and you have all, if I may say so, done remarkably well, but I think it is not unreasonable to give you a bit of extra time and I am sure we can fit the replies in comfortably.

MR. VAUGHAN: Can I say, it would not be a problem to us, I am not inviting it if we went into tomorrow, we did tomorrow morning. Mr. Nichols I think has to get to Cheltenham tonight, but he can get up early.

THE CHAIRMAN: We are not ruling that out, Mr. Vaughan, but we will see how we go. 2 o'clock.

(Adjourned for a short time)

THE CHAIRMAN: Yes, Mr. Thompson.

MR. THOMPSON: Sir, a certain amount of white smoke is coming out of Blue Bank House, so if I can deliver what the result is. First of all, we would say that the questions raised by Professor Bain raise a question of law as to what exactly the OFT's obligations are in this sort of case. First of all, we accept that we have a positive obligation to show that there was an increase in price from collective selling, and we say that we discharged that on the basis of the material I have put before you and the material in the Decision. We say that the correct test for the counterfactual is conveniently set out at para.18(2) of the Commission Notice in a case of this kind where an issue of necessity is raised – I do not know whether the Tribunal wants to turn it up. It is probably suitable to do that.

THE CHAIRMAN: Yes.

MR. THOMPSON: It is bundle 21, tab 4. I am afraid it is quite a circumlocution, but it is the passage in the middle.

THE CHAIRMAN: Sorry, the passage in the middle of what?

MR. THOMPSON: I am sorry, in the middle of 18(2) on p.99 of the Notice.

THE CHAIRMAN: Yes, this is what you have just shown us.

MR. THOMPSON: We have looked at it already. It says:

> "… 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."

And then this is the part on which I think it is probably an appropriate test:

> "The question is not whether the parties in their particular situation would not have accepted to conclude a less restrictive agreement, but …"

And this is the point:

> "… 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."

So the question there is that is the question that has got to be addressed.

THE CHAIRMAN: That suggests you do not have to nail your colours to any particular counterfactual at all.

MR. THOMPSON: Indeed; that is the point I am coming to. We say that it is not for the Office of Fair Trading to approve some other form of arrangement but to satisfy the Tribunal that there was at least one realistic alternative that was less restrictive of competition, which is why before lunch I showed, for example, the structure of the original Arena bid is a concrete possibility which is materially less restrictive than a 90 per cent. collective selling arrangement. The OFT does not have to specify a particular counterfactual; indeed, it would be invidious for the OFT to find that a particular historical arrangement did infringe s.2, and would obviously raise a number of legal problems if that were to be found without the statement of objectives or rule 14 notice or appropriate procedures having been followed. Equally, it would be unsatisfactory to find that a state of affairs did not infringe s.2 on a declaratory basis without investigating it.

The position is therefore inevitably somewhat vague, but it is obviously a very familiar situation to a court and to a public body that one, in reality, decides the question before one and not an academic question, however interesting and important. The reality of the

situation is that when a case of this kind is decided it necessarily has implications for the industry in question, and the industry has to go away and take legal advice and the OFT may or may not be called on to police whatever happens as a result.

To take another example, there was for many years an arrangement called the "net book agreement" which stood in place and was defended before the Future Practices Court and then before the EC Commission, but eventually it collapsed. It was not necessary in deciding whether or not the net book agreement should continue to specify exactly how books should be sold if retail price maintenance for books was prevented, and, in my submission, it is not for the OFT to finally say how these rights should be sold. So that is by way of legal submission.

In terms of the specific question, the OFT's position is that it is at least clear that the creation of a veto holding position by collective action would be unacceptable under s.2 and, given the position we have been content to assume in terms of critical mass, I think it would necessarily follow that a 50 per cent. arrangement between the courses would infringe s.2.

MR. VAUGHAN: But the OFT have accepted 50 per cent. would be perfectly adequate. I do not understand this submission.

MR. THOMPSON: No, Mr. Vaughan may not understand it, but, in my submission, 100 minus 50 is 50, and if you need 50 to have critical mass then if somebody else has got 50 they have got a veto; that is the point.

MR. VAUGHAN: That is completely new. Sir, I am sorry for interrupting again, but this is wholly new, everything here being said. Nothing has foreshadowed this in any of the Decision or anything like that, or in the skeleton or anything.

THE CHAIRMAN: That should encourage, Mr. Vaughan, should it not?

MR. VAJDA: Well, probably, but it does mean I may be a little longer in my reply.

MR. THOMPSON: I am not sure – if I am asked a new question I cannot see how I can be criticised for giving an answer to it. In terms of timing it is obviously – if I make my point then I am very happy for Mr. Vaughan then to make his.

THE CHAIRMAN: Yes, by all means, Mr. Thompson.

MR. THOMPSON: As to whether the creation of the Super 12 or the 42 or any arrangements with bidders pursuant to those arrangements infringe s.2, as I have said the OFT did not pursue those questions and it would not be appropriate for the OFT to express any specific view on that question.

In relation to the other questions, we do take, as we hope, a realistic approach, so that we would take account of strategic behaviour, and we think it would be appropriate for the Tribunal to take account of such strategic behaviour. How a particular bidder or more than one bidder would have treated a negotiation in a more competitive market structure is again not for

the OFT to specify. However, we would say that buyers would have had considerably greater market negotiating power where it was not faced with a 100 per cent. or 90 per cent. collective selling arrangement, and that would, in our submission, have led to an incentivised pricing structure and a lower overall price in which it would have been for the bidder rather than for the courses to determine the allocation between the selling bodies or the individual courses, depending on how it had emerged, and we say that that is sufficient for our case. It is not for us to say exactly how the bidding process would have progressed, or the particular sums that would have been paid to particular courses.

So that is our answer to the questions, unless there are any other questions.

In terms of the OFT guideline, my own view is it is not the most felicitously phrased paragraph in the OFT's guidelines, in particular the third sentence:

> "Complements are included in the same market when competition to supply one product constrains the prices charged for the other."

The wording "competition to supply" is perhaps not the most felicitous. What I understand it to be saying is that where, if one put it in Smith terms, a small but significant increase in the price of one would have an impact on the price of the other, so I think it leads back to the question that we were debating yesterday. I think the example might be where competition to supply, for example cars, constrains the prices charged for car parts, then it might be appropriate to take the two as a single market. We would say here, for the reasons we discussed yesterday, that a small but significant increase or competition to supply the rights would not constrain the prices charged for data because of the BHB's independence and also its market power and the rigid demand for data, the points that I think were made yesterday. That is the answer. So we would say that this was consistent with the OFT's case and would be content to follow it, although it is fair to say that this has been changed in the latest version, perhaps because it is not very happily drafted.

If I can now turn to the question which I think occupied most of my learned friends' oral submissions, which was a general attack on the Decision and its alleged inadequacies. The Decision, contrary to what might be thought from my learned friends' submissions, is in fact an exceptionally full and carefully reasoned document which rightly focused on the formal responses of the RCA and the BHB, and, in particular, the RCA response to the rule 14 document. I do not have time to go through that, but, in my submission, the line of criticism that the Decision focused on the RCA's rule 14 response is a particularly inappropriate one in that that is exactly what one would expect a responsible administrator to do, to focus on the representations made by the principal notifying body who was making formal legal representations on behalf of its parties.

The assertions of failure to take account point is misconceived and failed to take account of the cross-reference and detailed structure of the Decision, which I will try and illustrate reasonably briefly by the principal examples. To take the first case, the impossibility of individual negotiations, or to take first the impossibility of individual negotiations, this is analysed in paras.400 to 402 of the Decision, and 433. My general submission is that what happened was that the OFT preferred the actual evidence of what had happened to statements of impossibility, and that the position has been clarified by the fact that in the 2004 negotiations individual selling seems to have been perfectly possible, and it does not seem to be disputed that that was the case.

In relation to the s.26 point, I would invite the Tribunal to consider what were the small courses really saying. In my submission, what they were saying was that their rights were not valuable when viewed in isolation, and that they had no experience of marketing, and that point is addressed by the OFT in the Decision on the substance that they could get together up to something like 25 per cent., which is set out at footnote 458 to the Decision, and that the GG Media negotiations showed that even the smallest courses in the weakest position were capable of appointing agents to negotiate on their behalf.

In relation to solidarity and income to the courses, which is allegedly not considered, I would refer the Tribunal to paras.379 to 390, and paras.350 to 354 and, in particular, to para.351 of the Decision where the trickle down point, which featured prominently in Mr. Vaughan's submissions yesterday, is expressly referred to in terms. In relation to the sporting exception, which was allegedly overlooked, there is in fact a specific section devoted to that, paras.239 to 253. I would note in particular paras.239, 251 and 253. The fact that the arguments put forward by the appellants on this and other points were not accepted is hardly a fatal procedural objection.

The other point that featured prominently was what is sometimes called "the whole show" or "British Racing point", which was apparently overlooked. That is addressed at paras.63 to 64, 65 to 71, 1159 to 161, 258 to 258, 263 to 266, 283 to 289, 380 to 381, and 383 to 393, and the principal cross-references being given at para.71.

The burden of Mr. Vajda's point about the alleged expansion or change of case seemed to focus on the contemporary documents. They are quite carefully analysed at paras.405 to 418, and I note, in particular, 411 and 415.

In relation to the briefing paper and the alleged failure to consider it, I think it might be worth looking briefly at the transcript of day 1 of this issue, if the Tribunal has it. At pp.56 to 57 Mr. Vajda makes particular reference to a footnote at the bottom of the page, at line 31:

"The OFT suggested that ATR could have entered into contingent agreements with the separate courses … The parties are unable to see how in practice this outcome would have been any different to the courses selling their rights individually under a deal negotiated by the RCA since contingent agreements would have effectively resulted in links between the courses and transparency in the market. In any event, it is the view of ATR and its shareholders that contingent agreements would not have been the most likely outcome of individual negotiations. In practice, ATR would have simply concentrated its efforts on concluding agreements with the largest and most successful courses which the previous experiences of the negotiations between the ATR and the Super 12 courses indicates would have failed."

If one compares that to paras.420 and 421 of the Decision, it comes under the heading "Conditional Contracts, the OFT says:

"In the Rule 14 Notice, the OFT argued that conditional contracts would allow buyers to assemble the necessary critical mass of rights … Before receiving the Rule 14 Notice, the RCA stated that, if it had not negotiated on behalf of the Courses, conditional contracts were not the most likely outcome. Instead, Attheraces would have concentrated on concluding agreements only with the largest, most successful courses."

And the footnote reference is to the footnote that Mr. Vajda read out.

"The RCA also suggested that conditional contracts effectively result in links between the Courses and transparency in the market."

Then at 421 the OFT points out that the RCA representations did not maintain this view.

"Instead the RCA put forward a different argument, namely that conditional contracts contain a financial instrument known as an option."

Which is then addressed.

I would refer you also to footnote 491, on the next page, which addresses the question about transparency in the market, and also footnote 456 on p.108, where the OFT rejects the RCA's claim that:

"… in order to obtain funding, Attheraces had to secure sufficient rights at the outset, rather than gradually building a portfolio of rights."

So the very point again that Mr. Vajda took the Tribunal to on day 1.

So, in my submission, the procedural objection that the Decision is defective in failing to take account of the briefing paper has a somewhat hollow ring to it, and in fact the briefing

paper is considered at paras.254, 315, 346, 350, 401, 405, 420 and 438 of the Decision. I have taken that at a fair gallop but I hope that the point is made.

In summary, the OFT did not accept the RCA's and the BHB's points, but the OFT has concentrated at each stage on the points put to them by the appellants, so that at the Decision stage the OFT concentrated on points made in the rule 14 responses. In the defence the OFT concentrated on points made in the very lengthy Notices of Appeal. In the skeleton argument we concentrated on the points made in the replies, and in my oral submissions I have sought to respond to the oral submissions of Mr. Vaughan and Mr. Vajda. So, in my submission, and also for the reasons given in our written document handed in yesterday, we would say that there was no basis for the appellants' procedural complaints which we would invite the Tribunal to reject and to concentrate on the substance of the matter by reference to the documents.

Finally, there are two points that I think I should point out by way of correction. The first one relates to the status of the briefing paper and whether or not Arena approved the briefing paper or endorsed it. There is in fact evidence on that in the papers, at RCA7, tab 101. I know that Mr. Vaughan in particular takes the view that anything coming out of Freshfields is very reliable in 2002 but ceased to be reliable in 2003, but the relevant statement is at p.4 of the letter, the paragraph under "Arena's previous comments".

> "Mr. Atkin refers to a number of statements made by Arena, which he uses to support his position that it was ATR that demanded joint selling … Nothing in Mr. Pope's statement contained in Arena's listing particulars can be read as endorsing or requiring joint selling: it was also made after the Media Rights Agreement had been executed (in May 2001). The submission of 3 March 2003 was, as the Office is aware, made on behalf of the RCA. Whilst it is true that ATR and its shareholders saw drafts of this document and were able to make observations on it, they did not 'endorse' it and it remains a document of the RCA, and expresses the views of the RCA alone."

That is the first point, as it were, a point of detail.

The second point was a question that arose as to whether or not the OFT could or should have cross-examined witnesses ----

THE CHAIRMAN: I am sorry, is that a reference to the document you have just ----

MR. THOMPSON: I am sorry, I am perhaps taking it too fast. Yes, it is.

THE CHAIRMAN: Is that what Mr. Vajda was referring us to?

MR. THOMPSON: Yes. It is the briefing paper ----

THE CHAIRMAN: That is the point which I raised, and I thought he satisfied me that it had Teresa Walsh's endorsement ----

MR. VAJDA: Yes. That document is at RCA6, tab 90, and that was the document I referred to, a letter of the 25th July 2003, where she says that the OFT should refer back to the briefing paper submitted by Attheraces to the OFT on the 4th March 2003, and that was the point that I made, that that is the only briefing paper on the OFT's file, and Teresa Walsh described it as the briefing paper submitted by Attheraces to the OFT. That was the point that was made, and I comment on that shortly ----

MR. THOMPSON: Obviously Mr. Vajda is entitled to comment, but that is the legal position taken by Freshfields on behalf of Attheraces.

The other point was the question of cross-examination and whether or not the OFT could or should have cross-examined. Again as a point of information, this is an issue that arose in the *Argos* case, and there is a short judgment in the case which I think is probably worth handing up really as a point of information. As I say, it is a short procedural judgment, and the relevant paragraph is para.16, and there the President says:

> "Although at least *Argos* apparently invited the representatives of the OFT to put questions to its witnesses there exists no formal possibility for the questioning of witnesses in the course of the administrative procedure envisaged by rule 14 of the Director's Rules. In particular, the administrative procedure which the OFT follows before taking a Decision does not provide for the possibility of questioning witnesses under oath or cross-examining witnesses in a manner equivalent to the well known procedures of the court room."

And then in this case there was no cross-examination of witnesses at the administrative stage, although the representative of the OFT asked a few clarificatory questions at the oral hearing.

The position in this case was that the BHB alone asked for an oral hearing and made oral submissions, and the transcript is in the papers, and there were indeed one or two questions, exchanges, but the other parties did not request an oral hearing and, in the absence of such a request, there was in effect no opportunity for any form of oral examination of the parties. So that is again on a point of information.

THE CHAIRMAN: I thought *Napp* said something different from that, or have I misunderstood what *Napp* had to say about the capacity to cross-examine?

MR. THOMPSON: I think that they were addressing the power of the Tribunal and the power of both parties to require witnesses to attend for cross-examination.

THE CHAIRMAN: We will not go back to it if that is the position. I had recollected it as referring to the OFT's initial investigation.

MR. THOMPSON: I do not think that refers to that. Obviously I will get that right if I can.
THE CHAIRMAN: Shall we just quickly look at it? I have probably mis-remembered the relevant paragraph.
MR. THOMPSON: That judgment is in bundle 24. At para.120 on p.29 there is reference to Napp having had the opportunity to cross-examine the directors' witnesses.
THE CHAIRMAN: Yes, I think that is probably what I had in mind.
MR. THOMPSON: I think that is at the Tribunal stage.
THE CHAIRMAN: Yes, it certainly does appear to be referring to the Tribunal stage.
MR. THOMPSON: Yes. There is reference in the *Aberdeen Journals* case as well to cross-examination, I think, but again I thin that is witnesses at the Tribunal stage.
THE CHAIRMAN: Mr. Vajda, do you accept what Mr. Thompson says about this, or do you not
MR. VAJDA: Broadly, yes. I have a submission to make on it in a moment, but I am very content to proceed on the basis that it certainly has not been the practice for there to be cross-examination, but whether there is power may be a different matter.
MR. VAUGHAN: Our request is still if there is any reliance placed on the 2003 statements to cross-examine.
THE CHAIRMAN: Yes, that relates to cross-examination before us. I was ----
MR. VAUGHAN: Before you, yes.
THE CHAIRMAN: I was inquiring about the practice before the director.
MR. VAUGHAN: Yes, normally you do not have live witnesses, in my experience, proving the Office of Fair Trading's case. In a way that is why, if it is necessary to look at these matters, it has got to be resolved here, not in the OFT ----
THE CHAIRMAN: Right. Well, we will set aside tomorrow for that, shall we!
MR. THOMPSON: Can I just ask if anybody behind me wants me to say anything else, otherwise I think I am finished. Those are the OFT submissions.
THE CHAIRMAN: That is excellent timing, Mr. Thompson, thank you very much.
MR. THOMPSON: Sorry, there is one point: I have had not had a chance to read, let alone respond to, Mr. Vaughan's document. I hope there will be nothing that requires a response, but I do not know if I could reserve my position on that.
THE CHAIRMAN: We are quite keen to finish the oral argument today. I do not know if those instructing you have had a chance to look at it and whether they will want you to respond in some manner to it. I realise that they cannot do two things at once, but we would, if possible, like to have any response today.
MR. THOMPSON: Indeed. I will do my best.
THE CHAIRMAN: Thank you very much. Yes, Mr. Vajda.

MR. VAJDA: Could I start by taking two matters out of order but so they are fresh in people's mind and they are also fresh in my mind so I will not forget them. First of all, in relation to the cross-examination of witnesses, what I might call the first *Argos* point, as I have indicated we accept that that may not be the fact, but one of the points that we have made, and I will make again, is the OFT's failure to issue s.26 notices to get the underlying business plans of all the other bidders, Channel 4, Carlton, Arena, because this goes to the heart of what the OFT says, that we take an objective approach, we do not take the – I will be dealing with that. They say you take the objective approach, and what I will say is that what the OFT is seeking to do in this Tribunal is what we call in English law to draw inferences from a number of documents, and what I am going to say is that this Tribunal has to be extremely cautious to draw any inferences from those documents in the absence of a s.26 application having been directed to, say, Arena, to find out why Arena made the particular offer it did in June 2000. Professor Bain thought it may have been strategic behaviour, the words that he used, and the RCA have used the word "spoiler", but, whatever it is, in order to get to the bottom of that one would need to have disclosure.

The second point, if I can just deal with it again out of order, is in relation to the Freshfields letter that Mr. Thompson just took us to. This is the letter of the 21st November 2003, and of course – and the reason I got up to interrupt Mr. Thompson was professionals are acting for Arena, they are not acting for ATR, and I had no idea on what basis Matthew O'Regan made that statement in that letter, but we have the letter of Mrs. Walsh, which is in the file, which refers to it as the Attheraces briefing paper.

What I would like to do, and I hope this is convenient for the Tribunal, is to start with, as it were, the statutory background, the framework of the relationship between the Tribunal and the OFT. It is a point that I know the Chairman expressed some interest in, and the Tribunal has heard some submissions, and I will call this, if you like, "the *Argos* point", and I will in the course of dealing with this hope to pick up a number of written submissions made by the OFT on procedure. Happily, and not surprisingly, the starting point is common ground, which is the statutory framework set out in schedule 8. What I say at the beginning, and it might be helpful to have the OFT's paper because it sets out that provision, and it sets out very helpfully on p.3 – I will in due course explain the rationale for the powers of the Tribunal in schedule 8, but we accept of course that the Tribunal has a number of options, and what we say is that the Tribunal in determining which option to adopt must have regard, first of all, to the statutory scheme, secondly to the principles developed both under UK and EC law, and, thirdly, basic administrative law principles of fairness.

So far as the *Argos* case is concerned, and this is the *Argos* case that we rely on in our skeleton – all these cases have come to the Tribunal on a number of occasions, but if I can call it "the main *Argos* case". As I read Mr. Thompson's skeleton, it is not suggested that the principles laid down in *Argos* are not good law. The point that the OFT makes, which obviously I need to deal with, is effectively this is a different situation from *Argos*.

Can I go back to *Argos* because again *Argos* is important as it sets out some of the statutory framework, and that is in bundle 21 at tab 1, and if we go to p.3 of the judgment, which we looked at on Monday, although it seems perhaps longer ago than that, I read out rule 14, which I think will be familiar to the Tribunal, the procedure, and also importantly rule 15, which is on p.5.

"Rule 15 of the Director's Rules …"

Just pausing there, these Director's Rules are in fact – this is legislation, this is Parliamentary legislation, it is secondary legislation, but it is not any guidance of the OFT. This is what Parliament has laid down by way of secondary legislation. It states expressly that in the Decision the director has to state the facts on which he bases it and his reasons for making it, so that is a very different regime from, say, a normal Judicial Review. Here Parliament has actually laid down what is required to be contained in the Decision.

We say that the helpful analysis by the President of the Tribunal, which I took this Tribunal to on Monday, at para.66, is, and it has not been suggested otherwise, a distillation of all the current case law, including *Napp* and *Aberdeen Journals*, and we see the way that the Tribunal did this is that it started – if you look at p.14, the Tribunal looked at the previous decisions, then looks at the two *Napp* decisions, it looks at *Aberdeen Journals*, and they say at p.26:

> "The above survey of the statutory framework, the Tribunal's Rules and the Tribunal's previous decisions thus illustrates the specific nature of the procedures to be followed in relation to decisions of infringement [under] Chapter I …"

So the conclusions that are reached at 66 are based on *Napp* 1 and 2 and *Aberdeen Journals*.

What we say next is that one cannot construe, and plainly one should not construe, the power of the Tribunal, at para.3.2(e), set out in Mr. Thompson's skeleton, that it may make any other decision which the OFT could itself have made. It cannot construe that as nullifying the effect of rule 15, and that plainly cannot be the position because that would be destroying the intention of Parliament in laying down rule 15.

The next point I want to make is this, that rule 15 itself, which, as I said, is laid down expressly here – the OFT decision has not only to be reasoned but set out the facts on which it relies – is not ambiguous, nor are the scope of the Tribunal's powers, at para.3.2(e), ambiguous,

and this is therefore not a case where the court should engage in what I would call a *Pepper v. Hart* analysis. We have a little bundle which I can hand up. Certainly the Chairman will know there has been in a sense a move – *Pepper v. Hart* is a controversial decision, and it is important that one is aware of the limitations of *Pepper v. Hart*. I am going to show the Tribunal a short passage from the speech of Lord Bingham in the *Pepper v. Hart* case which says that you only start to look at *Pepper v. Hart* if there is an ambiguity of obscurity, and that is if we take flag 4 of this bundle at p.15 of the printout.

"In *Pepper v. Hart* the House (Lord Mackay … dissenting) relaxed the general rule which had been understood to preclude reference in the courts of this country to statements made in Parliament for the purpose of construing a statutory provision. In his leading speech, Lord Browne-Wilkinson made plain that such reference was permissible only where: (a) legislation was ambiguous or obscure, or led to an absurdity ..."

And Lord Bingham says further down:

"Unless the first of the conditions is strictly insisted upon, the real risk exists, feared by Lord Mackay, that the legal advisers to parties engaged in disputes on statutory construction will required to comb through Hansard in practically every case … This would clearly defeat the intention of Lord Bridge that such cases should be rare … and the submission of counsel that such cases should be exceptional ..."

So we say that although the President did refer to *Pepper v. Hart* in one of the *Napp* cases, on proper analysis this is not a case where, in my submission, the court should seek to engage in any *Pepper v. Hart* analysis, because the basic provisions are totally clear.

So what then is the purpose of the power in 3.2(e) for the Tribunal to make any other decision? The purpose of this, in our respectful submission, is to give the Tribunal what is called, and I think Mr. Thompson used the expression himself yesterday (the French is pliens jurisdiction) full jurisdiction in cases that are limited – in all cases, not just in penalty cases, and Mr. Thompson made the observation yesterday that in Community law, the equivalent in the CFI, there is a distinction between the powers of the CFI when it is hearing a penalty case and the powers when it is hearing an ordinary appeal.

If I could just invite the Tribunal to look at flag 2 of the bundle we have handed up, just to make good that point by reference to the book by Kerse and Khan on EC Antitrust Procedure. It says, "Nature of Article 229", and that is 229 of the EC Treaty, "The court's 'Unlimited' Jurisdiction", and in the case of competition law we see at p.460 that:

"'The Court shall have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine, or periodic penalty payment; it may cancel, reduce or increase the fine or a periodical penalty payment imposed.'"

That is the power that it has. The learned authors then go on to say at 8.o21:

> "Article 229 does not go so far as to permit the Court to escape the parameters of judicial review in all respects."

And they say, going further down:

> "Moreover, as the CFI opined in *Italian Flat Glass*, although the Court may, as part of the judicial review of the Community administration, partially annul a Commission decision in the field of competition, this does not mean that it has jurisdiction to remake the contested decision."

We then have Article 230, which is dealt with at p.467 of the book. Before reading the text, an obvious way of remaking a decision under Article 229 is, for example, if an undertaking is fined, say, €10 million, and you do not just say, "Is it upheld or quash it", you can say, "Well, we think that a bit of this analysis is wrong, we are going to reduce the fine to 6 million".

Article 230 is the power of the court in a non-fine case - this is the CFI in Luxembourg – and we see at the bottom of p.467 the authors say:

> "In contrast to the position under Article 229, where the Court can substitute its own judgment for that of the Commission so far as the fine is concerned, under Article 230 the Court is concerned to see that the limits of the Commission's discretion have not been exceeded and that no error of law has been made. Competition cases frequently involve complicated economic assessments and it is recognised that the Commission enjoys a considerable measure of discretion, especially as regards the evaluation of complex economic issues. The Court will be concerned to verify whether the relevant procedural rules have been complied with, whether the facts have been accurately stated and whether there has been a manifest error of appraisal or a misuse of powers."

So the power of the CFI under 230 is, if you like, a bit of a hybrid; it is not quite English style judicial review but it is not full appeal either because it is limited to seeing whether, so far as the Commission's appraisal is concerned, there has been a manifest error of appraisal or misuse of power.

What Parliament was, in our submission, seeking to do under para.3.2(e) was to give this Tribunal, the Competition Tribunal, effectively what one would call full jurisdiction in all cases, and we will see how that works in *JJB*, the replica kit cartel case. So, in other words, Parliament was giving people like my clients and Mr. Vaughan's clients greater rights under this procedure in front of the Tribunal where there is an appeal on the merits than the equivalent rights under Article 230 of the EC Treaty.

The principles that were laid down in *Argos* that I took the Tribunal to on Monday are based, as we saw, heavily on what are called, if I can put it like this, the EC principles of the rights of defence, and again there is an analogy to be drawn between English and Community law on this aspect, because if we look again at the bundle the first case is a case called *Pernod Ricard*, a recent case of this Tribunal, where the President decided that, as a matter of procedure, the same principles should apply in domestic – under the Competition Act as under 81 and 82, and the relevant passage is at p.65, where he sets out, or the Tribunal set out, what is probably familiar to the members of the Tribunal, s.60 of the Competition Act.

> "The purpose of this section is to ensure that so far as is possible (having regard to any relevant differences between the provisions concerned), questions arising under this Part in relation to competition within the United Kingdom are dealt with in a manner which is consistent with the treatment of corresponding questions arising in Community law …"

Then in effect the issue in *Pernod Ricard* was whether or not you could apply s.60 to procedural matters because a view had been formed that s.60 only applied to matters of substance, not matters of procedure, and, as the Tribunal observes at para.230 on p.66:

> "As to 'any relevant differences between the provisions concerned', to which the Tribunal must have regard, there is nothing in the Act or the Director's Rules which prevents the participation of the complaint in the ways indicated above."

That was a rights of defence, as it were, or rights of the complainant to have access to documents, and what the Tribunal did there was effectively to say that a complainant should have the same rights under our own legislation, our own scheme, as the complainant would have under Community law.

We say that the consequence of *Pernod Ricard* and what I have shown the Tribunal is that para.95 of ENS that Mr. Vaughan took the Tribunal to yesterday, and if I can just give the reference – I will not go back to it unless the Tribunal wishes to because I am conscious of the clock, but it is at bundle 22, tab 2, and that was the passage where, if you remember, the Chairman asked Mr. Vaughan whether in fact his skeleton argument was, as it were, consistent with what para.95 said. Does the Chairman ----

THE CHAIRMAN: I remember the exchange, but I cannot quite remember how it arose.

MR. VAJDA: Then we had better have a look at that. It is bundle 22, tab 2 at flag 11. I think it was Mr. Vaughan who took the Tribunal to it. It was on p.19 of the printout, and it was the last sentence that I think you, the Chairman, asked him a question about.

"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 it is not sufficient for it to be produced subsequently for the first time before the court."

And I think you, Sir, said that might be quite a rigorous test. We say that there is ----

THE CHAIRMAN: But what does that really mean? Does it mean that the Decision must be self-explanatory as to how it has arrived at the decision it has, and you cannot, as it were, explain it subsequently? That is what it appears to be saying on its face.

MR. VAJDA: Yes, you cannot explain it, but also what you cannot have is, and perhaps putting it in the more homely language of our own courts, or as the Tribunal put it, you cannot have moving targets. That was the point that was made in *Argos*. The significance of this again, and as the Chairman may well be familiar – in judicial review, for example, there is sometimes a more liberal attitude taken, and if somebody in an affidavit to the court then gives a reason that perhaps was not in the Decision itself, you might say, "Well, that's not a reason to quash the Decision". There is an interesting debate as to what extent ex post reasoning can ----

THE CHAIRMAN: I do not know; there might be a very good reason to quash the Decision if it was a relevant reason.

MR. VAJDA: It may or may not be, but there is case law. But the point I am making is in fact rule 15 goes further than the relevant provision in ----

THE CHAIRMAN: Sorry, I have lost my reference to rule 15. Where do we find that again?

MR. VAJDA: We find it in *Argos*, which is flag 1 of RCA21.

THE CHAIRMAN: Yes, and which page is it?

MR. VAJDA: Page 5, and that is a very specific rule to this area of public law making, stating in the Decision the facts on which he bases it and his reasons for making it. Could I draw to the Tribunal's attention that although this is, if you like, based on Article 190 of the EC Treaty, it goes further than Article 190 of the Treaty because Article 190 simply says that a Decision must be reasoned. Here Parliament has gone further and said it must state the facts on which he bases it and his reasons for making it, and we certainly say that there is absolutely no warrant to interpret Article 15 in a more liberal fashion than the European Court interpreted Article 190 in the *European Night Services* case. On the contrary, it is plain that Parliament was looking at something a little stricter than Article 190. We have not got 190 I think in the bundles, but that is I suspect a familiar enough provision. It is now Article 253 under the renumbered Treaty.

THE CHAIRMAN: Where does this take you, Mr. Vajda. What is the submission you are building on?

MR. VAJDA: We had a 26-page, or whatever it was, submission from the OFT yesterday to say why we cannot apply *Argos* but nowhere in that submission did they touch on rule 15, the

significance of rule 15, because we come back to the point I made in opening that, in our submission, one has to see whether or not the evidence relied on in the Decision is sufficient for the Decision to stand. What we say is that the only relevant difference in the United Kingdom legislation and the Community legislation in this respect is that there is a full appeal in all cases under UK law and the Tribunal can make any decision which the OFT could itself have made, but we cannot, we say, say that the domestic protection therefore as a result of the Tribunal being given greater powers, is less than the equivalent protection at the Community law level. That would be an extremely bizarre result. By enlarging the powers the Tribunal want could not reduce the rights of defence at the administrative stage.

The main point, as I said, that the OFT seemed to make is not that *Argos* is wrong, which plainly it cannot be, but this case is factually different from *Argos* and that is para.12 of their submission. Before looking at how one applies the *Argos* principles to this case, can we look very briefly at the *JJB* case, which is I think a useful illustration of the wider role of this Tribunal than the Court of First Instance in particular cases, and that is flag 9 of tab 21. This is the case that Mr. Thompson took the Tribunal to yesterday, really for the proposition, as I understood it, that the Tribunal can look at evidence generated at the Tribunal level, and that is perfectly correct on the basis of the *JJB* case. We just need to look at that briefly. It is p.83

The background to this, this was a secret cartel to price fixing. This was a real cartel object to fix the prices of football shirts, and Mr. Thompson I think read to the Tribunal para.284, but we need to see this in the context of this particular case, and if I could invite the Tribunal to p.35, at para.142 there were requests made by the Appellants in that case, and also by the Tribunal for a large number of documents and witness evidence, and one can see then just glancing down at 143 and 144, 5, and 6, that there was a huge amount of witness evidence, and then going over the page, to 147 one sees that there was a hearing which took place in this Tribunal over 14 days, and we see from para.143 that 57 witness statements were submitted and the original witnesses were called for cross-examination. That was what was happening there.

Then when one goes to the procedural issues, what then happens with the evidence generally, Mr. Thompson took us to some other passages and if I could ask the Tribunal to look at p.210 where it is headed "XVI Procedural Issues", what happened – to cut it short – and I hope to deal with this in a fair way, is that the OFT sought to mo9dify its case before the Tribunal compared to what it was in the Decision but, as a result of evidence that had come out in the Tribunal, the OFT sought to go back to its original case. That, not surprisingly, was accepted by the Tribunal. If we look at p.212 at para. 733.

> "The evidence as it came out in cross-examination in our view now shows the OFT had no need to adhere to the paragraphs of the Decision referred to above."

And that was effectively the OFT concession. Then we see at para.735, the Tribunal observes:

> "In our view this situation unforeseen by the OFT has largely arisen from (a) the OFT's entirely proper concern, in its pleading, not to put its case any higher than it then thought the evidence warranted; and (b) the appellant's decision to cross-examine the OFT's witnesses. As a result of that cross-examination, a great deal of detail emerged about the events with which we are concerned. We do not think the appellants can reasonably complain if the Tribunal takes into account evidence which the appellants themselves brought out in the course of cross-examination."

So that is a case where one can see the benefits of this Tribunal having what we would call full jurisdiction in the continental sense, and being able to look at it afresh. The question that we have to consider in this case is how the *Argos* principles, if I can call them that, apply here. What I wish to do briefly is to just run through the history of the position here. At the time the OFT issued the Rule 14 Notice in April 2003, it had a whole wealth of evidence in front of it, including the notification, all the s.26 answers, and they are all at BHB7.4, and not only did it have the answers, it had most of the contemporary documents, because it actually sought those contemporary documents under the s.26 Notice. It also had the briefing paper for what that is worth, in a sense, because that is obviously a matter of some contention – I have made my submissions on that.

We then have one paragraph, which I showed the Tribunal on Monday, para.194 in the Rule 14 Notice, which dealt with the anti-competitive effect of what the OFT consider to be collect selling. The RCA then put in a full Reply in June 2003 – we will not go to that, but the reference is 5 flag 84, and it explained why, in its view, there was no restriction of competition and it explained in particular that there was no evidence to support the OFT's case, particularly it is the counterfactual, and if I can just give the references without going to it, it is 348 to 349, and it also relied on the response of Arena to the s.26 Notice and that is at 3.5.9. The reality, we say, is that at the time of the Rule 14 Notice the OFT had no evidence to support its counterfactual.

The next thing that happened was that as we know the ATR business model failed, for the reasons outlined by Mr. Vaughan, and also the drop in the take out rate that I mentioned on Monday. As we know, ATR in a sense changed sides, and they said the MRO was anti-competitive and that they were a victim of an unlawful price.

We have then the three letters and I just give the reference. We have seen them, it is RCA 6.91, that is the first letter of 7th August, we then have the Arena submission, which is RCA 11.69 and we have the ATR fax, which is RCA6.94.

The OFT then issued what is called a "Supplemental Rule 14 Notice in August 2003, in which it said that it considered ATR to be a consumer for the purpose of competition law, and therefore benefited from the protection of s.2. At the same time it disclosed the new material – at least it disclosed it to the RCA Appellants, the ATR and Arena material. The RCA then replied to the supplemental notice and Mr. Stephen Atkin made a statement which is at RCA6/97, which sought to rebut the evidence, or the points made by ATR and Arena about the history of the negotiations. That is s.4 of his statement.

The OFT then adopted its Decision in April 2004, and it relied, so far as the counterfactual is concerned, exclusively, we say, on the 2003 statements. It took the view, rightly or wrongly, that the negotiation document, which it has had since 2001, since the s.26 Notice, did not help to prove its case, otherwise it is impossible to see why there was no reference to these other matters in the Decision, let alone in the Rule 14 Notice. The Office must have been well aware of its obligations to comply with Rule 15 that I have indicated.

There is then a challenge in this Tribunal to that Decision and that challenge in the Notice of Appeal was both to the facts, reasoning and law relied on in the Decision. There was a considerable amount of submission as to why the evidence relied on in the Decision was not credible, and in support of that the Appellants put in some of the history which they had already relied on in answer to the Rule 14 Notice, but as I said had not been taken account of in the Decision.

We then had the OFT Defence, and the Reply in a number of places criticised the OFT's Defence for seeking to bolster the Decision by reference to reasoning not in the Decision – again, if I can just give the references because of time. The Reply 427-428, 432, 449-453, and 457 – that is effectively to the counterfactual.

Plainly, in order to avoid any accusation that one is not doing one's job properly for one's clients, the RCA adopted a belt and braces policy of also then dealing with in a sense the substantive points made in the Defence. But the fact that in the Reply the RCA dealt with the new arguments and evidence that had been put forward, does not in my submission mean that the RCA somehow was estopped from relying on the defects in the Decision. We are dealing her with public law; we are dealing with the rights of Defence under Rule 14, and the requirement under Rule 15.

Turning to the increase in price, the relevant passage in the Reply is 489, which focuses on para.303 which is the reasoning as to why the alleged high price harmed ATR. So

far as the incentives are concerned, I can give the following references, 495 to 497, and the extreme nature of the OFT's position is illustrated by the reply 4.100 to 4.102 where, for the very first time they rely on the BAGS Agreement, and we say that this is wholly impermissible. We say that the OFT cannot have it both ways, to say on the one hand that we are running away from arguments on the substance because we have no answer to them, and then saying that because we are answering it on the substance our *Argos* point is without merit. In my submission they have to deal with both. What we say is that the Decision has to be judged pursuant to Rule 15 by what is in the Decision. We say the Decision can be shown to be defective by reference to the evidence that the OFT ignored.

THE CHAIRMAN: I confess I find these extremely difficult. The *JJB* case demonstrated that at the Tribunal level there was a mass of new evidence, new witnesses which presumably was all taken account of in deciding whether the actual Decision of the OFT was or was not correct. To the extent that there is new evidence before us in the way of documents, or whatever, and which no one has sought to shut out, I simply do not understand why, by way of parity and reasoning for the OFT is not entitled to rely on that if and to the extent it can to support the Decision made by the Director?

MR. VADJA: One has to give Rule 15 content, of course, as I said on Monday ----

THE CHAIRMAN: Rule 15 has nothing to do with the appellate process. Rule 15 is simply a rule which entitles those whose transaction has been the subject of investigation to know what the Decision is and what it has been based on. It has nothing to do with what happens before the Appeal Tribunal.

MR. VADJA: With respect, no, because as we saw in E&S Article 190 of the Treaty, it is a ground of Appeal. If a Decision in Community Law fails to meet the requirements of Article 190 it can be annulled.

THE CHAIRMAN: If the Decision is, on its face, deficient because it does not give reasons, then I am not quite sure what the remedy is, when you say it can be annulled ----

MR. VADJA: Well that is Community ----

THE CHAIRMAN: That is Community-speak.

MR. VADJA: Yes.

THE CHAIRMAN: Let us assume that this Decision had been unreasoned in material respects and on the face of it you could not see how the OFT came to the Decision it did, and you appealed against it, would it – the OFT – be precluded from adducing evidence on the Appeal to demonstrate that in fact the Decision was a correct one?

MR. VADJA: It depends very much on the case, and one has to bear in mind principles of fairness. If, for instance, there was absolutely no evidence at all in the Decision, and the OFT came

along with a host of new material, I suspect people who had sought to defend themselves in front of the OFT, where one does not get costs, or anything like that, it is an administrative procedure, might say that this was not a proper way to proceed. On the other hand, you can have the other extreme which is *JJB* where the parties have a secret cartel where, unlike here, effectively nobody has sought to hide anything from the OFT, material has been given, there has been the Notification, it has been drawn to the Office's attention and the question is whether, having had all this material for such a long time, and the OFT for whatever reason choosing not to rely on it, and choosing to rely on the 2003 statements, can now say well we still rely on the 2003, but if effectively the Tribunal were to find that the credibility of those statements is not very satisfactory we would now like to rely on something else because we say that that should have been gone into at an earlier stage. If we look, for example, at the Arena bid, which we shall come to in a moment, the Arena bid does not state anywhere that 50 per cent. critical mass will give Arena a viable interactive betting service – it is an inference one has to draw from that Document. The Arena document does not state that Arena wants to have individual negotiations with 59 courses – I am not sure that Mr. Thompson is seeking to draw that inference – but effectively what we have is, we have documents here, a whole series of documents from which inferences are sought to be drawn, and we say that it is not right, particularly so far ----

THE CHAIRMAN: You see this is what I do not understand. I can quite see you are entitled to say that we should not draw inferences from documents which might depend on oral explanation of the documents, or further investigation into how those documents came into being if we do not have that underlying material, and that is a perfectly fair point to make in response to whatever reliance is placed on them by the other side. But the documents are before us – are you saying that we cannot look at them?

MR. VADJA: No, I am not ----

THE CHAIRMAN: So if we can look at them why can Mr. Thompson not rely on them to the extent that he can?

MR. VADJA: The documents are before the Tribunal. What we have sought to show is that the evidence that is relied on in the Decision, there is a lot of evidence that the OFT had – s.26 Notice, for example – that is inconsistent with that. If the Arena document had said on its face "A viable interactive service could have been offered with 50 per cent. critical mass, and that was then relied on for the first time, it was actually plain on its face, relied on the first time in this Tribunal then of course the Tribunal will have to consider what I would call, if you like, the *Argos* principles, the Tribunal might then take the view, on that particular document if in fact it would have been produced by the RCA Appellants, that in a sense this would be one of

those exceptional circumstances, where, in a sense, a moving target would be permitted. But what I am saying is that one has to look at this in the context of the particular case and here we have a situation where the parties made a voluntary notification to the OFT a long, long time ago. They have not sought to hide anything from the OFT, they have given the OFT everything. They have spent an awful lot of money in administrative procedure. They have spent an awful lot of money in answering the Rule 14 Notice, and then they come here and what they do say is that it is not proper and fair for the Tribunal if it were so minded – we say we have our belt and braces – it would not be appropriate effectively to remake a Decision in the circumstances of this particular procedure. That is my point. As I said, there is no dispute that the *Argos* principles are correct, the question is to what extent do they apply in this case? I accept that this is not, if you like, a black and white argument. I am not saying that this evidence is inadmissible – I am not saying that. What I am saying is that the Tribunal needs to exercise caution, we say. It would not be appropriate in this case on the basis of the background that I have outlined, for the Tribunal then to say "We do not think that you can place reliance on the 2003 documents, but you can place reliance on something else." If the Tribunal takes the view that 2003 documents are fine, then in a sense our Appeal fails, and it may be that the Tribunal then said: "We are not persuaded by the value of these other documents". That is again a permissible option to take.

THE CHAIRMAN: Well it sounds as if you are really saying that these further documents are admissible as evidence, but to the extent that we are minded to rely on them in a way which is adverse to your clients we should not do so. Is that really what it comes to?

MR. VADJA: No, not entirely because, as I say, we put these documents in and if the Tribunal were to take these documents as simply they are not worth the paper they are written on, and the Tribunal reached the view that the 2003 statements are fine, then the Appeal fails. The issue really arises on the assumption that the Tribunal takes the view that the 2003 documents do not support the case – what weight, if at all, to place on these documents, and what the Tribunal should do.

THE CHAIRMAN: If I were to stop you there, that seems to be a perfectly legitimate stance to take. If we were to conclude that the 2003 documents were not sufficient to support the case the OFT came to we presumably would have to consider whether there is anything else before us which shows that in fact it was the right Decision if arrived at by the wrong route. But you are not going so far as to say we cannot consider that, are you?

MR. VADJA: No, one of the options that the Tribunal has, not that we are suggesting that at all, in fact we resist that, as one saw in the powers is to remit the matter to the OFT, and why is that there? Because in the sense, if you like, the right to Defence, Rule 14. These are not

submissions made in watertight compartments. What we are saying is that the Tribunal has to look at this in the round.

THE CHAIRMAN: If we were to conclude that 2003 documents were not enough to support the case, there was other material which, if properly examined and investigated might have, but which we are not – or at any rate to date – in a position to evaluate, then the remission might be an alternative.

MR. VADJA: Yes. For example, and one can see this, say, in a cartel case, which is *Argos*, supposing the OFT wanted to substantiate their case – which is exactly what happened in *Argos* – the Tribunal says "We are not going to allow you to do that" but we think there is something here, a cartel is against the public interest, the best thing is to send it back and let the OFT have a second Decision." In that case that is what they did.

In this case, we would say that would be wholly inappropriate, but the Tribunal has a discretion under para.8, Schedule 8 to do that. The question is always whether a Tribunal body in exercising discretion, "Should one exercise discretion on the facts of this particular case?" So in deciding effectively what option to take, what to select from the menu – if I can put it like this – in Schedule 8, and whether or not this is an appropriate case to remake the Decision, what I am saying is that the Tribunal needs to bear in mind the history that I have outlined, and also the fact that I will come to in a moment that these particular documents that are being relied on for the counterfactual. There are two points, one is that effectively one has to draw inferences, but the second is that they are flatly inconsistent with a number of other evidence that the Tribunal has, that is the difficulty.

THE CHAIRMAN: Yes.

MR. VADJA: Can I then effectively go to the counterfactual, because as Professor Bain and I think everybody realises that is the key issue in the case. There are really two counterfactuals that the Tribunal has to consider. One, which is what would happen if there was no collective selling, assuming there is collective selling; and secondly, and this is if you like the incentives counterfactual, which is if there was individual selling would there have been incentives, by which Mr. Thompson means profit share basically?

What I am going to do, and I do this in a sense by way of illustration because otherwise we could be here for a very long time, but to take the Arena bid documents of June and July 2000 which the OFT rely on very heavily before this Tribunal to make out their case on the counterfactual. As I pointed out, what the OFT is seeking to do is to draw a number of inferences from that document. The first inference that it sought to draw is that a critical mass of 50 per cent. would be sufficient to support a viable interactive channel. We say that there are a number of objections to that. First, we say that it is unsafe to draw such an inference

without disclosure of the relevant Arena document or business plan. If I can put it like this, assume for the moment – and indeed it may not be, sadly, fanciful – that we were in the Chancery Division and this was a private competition action which could perfectly well have happened, brought by Arena and ATR against Attheraces for breach of s.2, and in the pleading it was suggested that because of the Arena bid that showed that a critical mass of 50 per cent. was viable, we say in those circumstances the RCA Appellants would be entitled, under the normal Rules, to seek disclosure of the underlying documents if ATR/Arena was seeking to make good the argument put forward in its pleadings. We would go on to say that we would be surprised if any Chancery Judge could possibly seek to draw an inference against the RCA Defendants in that case without giving the necessary disclosure, yet this is in a sense precisely what the OFT is seeking to do in this case because it failed to make the s.26 inquiry, and the OFT is given very wide powers. In this context the Tribunal will no doubt appreciate that whereas powers of disclosure in civil litigation is basically to the parties to the dispute, the OFT has much wider powers, it can send a s.26 Notice to anybody. So the OFT could perfectly well have sent a s.26 Notice to Channel 4, to Carlton and to Arena effectively to get the relevant documents, because all of them must have had a business plan, to see what the level of critical mass they said they would have. That is, if you like, the first objection.

The second objection is that we only have one business plan before this Tribunal, and that is the business plan that I took the Tribunal to, which is the ATR business plan, I give the reference which is RCA4.47. That is based on 100 per cent. of the courses and again if I can remind the Tribunal of Mr. Hogg's letter at RCA7.100, his letter of 24th March 2000(he is from HTR) He explains that the basis of the business plan, the fact that the £181 figure, was a figure worked backwards.

Thirdly, we say that to seek to draw effectively the inference from the Arena document is contrary to the evidence of Mrs. Walsh in the letter of 25th July 2003, which is RCA 690, that the purpose of clause 2.2.2(i) was to give sufficient revenue for the betting service of ATR. Next, it is also contrary to the submission made by Arena which is, in fact, precisely the document (one of the last documents) Mr. Thompson took us to, which is at 6.93 where Freshfields or Arena say that 70 per cent. of off course revenue was necessary to satisfy ATR's business plan, but the point there being made was that it was not "more than", it was 70 per cent. The point that we made in the Reply at 481, because the OFT criticise my clients for relying on the Attheraces business plan showing 100 per cent., because that is a static model, the Tribunal may recall that. It lies, we say, ill in the mouth of the OFT to criticise is for relying only on that because that is the only business model that we have seen. I come back to

the point that the OFT should therefore, if they wish to rely on other bidders to draw various inferences, they should have sought the business plan.

It also faces the difficulty that we saw that Go Racing issued a press release on 4th May 2001 to encourage – if I could put it that way – the independents to join even though they already had 71 per cent. of the courses sewn up. That strongly suggests – and we will look at the figures – but it strongly suggests that in fact they needed to have more than 71 per cent.

The next point that we make is that it lies ill in the mouth of the OFT to say that you have to look at objective not subjective once, because if one is looking at objective, plainly one would want to look at the business plan of other bidders. The fact that we have only got the business plan of ATR and since most of the documents relate to ATR it is not the fault of the RCA – if one is wanting to look at what other people would have wanted one wanted to get full evidence on it.

THE CHAIRMAN: I am not quite sure how that amounts to objective – it is subjective, is it not?

MR. VAJDA: Objective/subjective and I think what is said is the fact that ATR may have wanted whatever is not good enough because you have to look at it objectively, and if one is going to take the objective approach quite strictly – if I can put it like that – then the obvious thing would be to find out what the position of other bidders were in terms of detailed s.26.

THE CHAIRMAN: I do not understand how that is an objective approach, but there we are, it is merely an analysis of somebody else's subjective approach.

MR. VAJDA: Yes, but as we will show the Tribunal in a moment, when on goes back in the case, this difference between objective and subjective is, to some extent, a distinction without a difference. The passage that Mr. Thompson relied on in the horizontal notice, what subjective means is that you cannot, as an individual, simply go along to the European Commission or the OFT and say "This is what I want, therefore it must be necessary". That is effectively what they are saying, there has to be objective evidence.

THE CHAIRMAN: Yes.

MR. VAJDA: We say that so far as ATR is concerned there is objective evidence, but we make the point that, in so far as one is looking at other bids one needs to look at he whole picture, and the OFT, of course, with the s.26 powers was in a position to do that.

The final point, and this really goes to July, the Option A and Option B.

Mr. Thompson referred to what he called his "Junior's detective work" in relation to when the fax was received, and there has been recent correspondence in 2005 between my solicitors and the OFT as to whether or not this offer was ever received by the RCA, whether it was sent on 14th July, whether it was only sent to Hawk Point – those are precisely the sorts of points which

we say ought to have been explored at an earlier stage and not for the first time here and, indeed, in correspondence only a few weeks before the matter came to trial.

Broadly speaking, we say that the same problem arises in relation to the other documents – when I say "documents" I mean snippet of documents – for example, one is looking at minutes of meetings, that sort of thing. We say that none of the other material, when looked at as a whole, and plainly one has to look at the totality of the evidence, states that there could be a viable interactive service at less than 70 per cent., or that the bidders wanted individual negotiations with individual courses.

We say, and we have said in relation to the Arena bid that there is a considerable amount of other evidence that would contradict any such inference if one sought to draw that inference from those documents. Courts and, indeed, the CAT must not speculate, courts obviously need to approach the evidence carefully in relation to what is before them.

Can I then turn to clause 2.2.2(i) of the MRA, which is obviously important in the context of both critical mass and in terms of veto. We know that the Decision was silent by reference to what the level of critical mass was, but it said that it could have been less than in that clause. This was a point that was taken up by Mr. Vaughan and the Chairman. If I could ask the Tribunal to look again at bundle 15 flag 88. The relevant page is p.22, and as Mr. Vaughan pointed out: "If any of the following conditions precedent are not satisfied" we then go to p.23 "… then this Agreement shall automatically terminate."

We know that this clause was introduced at the behest of ATR, the evidence for that is in Mrs. Walsh's letter of 25th July 2003, RCA6.90. What has been suggested by the OFT is that somehow ATR could have waived this clause. There are two things to say. The first point, which is a point that Mr. Vaughan made and I would emphasise is that this clause is not drafted as a waiver at all, and if I can put it like this, assume that the 70 per cent. condition of not being satisfied would ATR have been able to get specific performance against the courses, say if 60 per cent. had signed up and we say "No". Of course, there is an important point her because although it may have been put in for the benefit of ATR one also has to consider the dynamics of the market, the counterfactual, because of course we see from the answer to the s.26 notices there was a choice – an invidious choice – that was being made by courses, should they go with GG, should they go with Attheraces? So one cannot assume that in fact the 70 per cent. threshold was not met. If ATR had come along and said "We still want to deal", there may have been a deal, there may not, but we then enter into the realm of speculation.

The next point that, even assuming, that one can construe this clause as a waiver, which we say you cannot ----

THE CHAIRMAN: You cannot construe it as a waiver. The question is if the condition were not satisfied there would be an implied right for ATR to waive it and you normally answer that question by asking yourself whether the condition is exclusively for ATR's benefit?

MR. VAJDA: Yes, but what I am saying is it would be wrong for this Tribunal effectively to reach a finding of law that ATR could have waited because the point is we have got the dynamics of the market, we have seen the pressure that was being put on these 26 courses "Sign up with us", because as we see GG was offering them more money.

THE CHAIRMAN: Yes.

MR. VAJDA: That is very important. This comes back to a point that Professor Bain was putting to Mr. Thompson, that one has to look at realistic counterfactual, and what is in the counterfactual? What we say has to be in the counterfactual here at this stage is that there is GG, who have put in an offer which is being accepted, and which was accepted, we know, by 10 courses, and the offer in fact went to 26 courses.

The Tribunal will also have seen that there is evidence that for the courses it was not necessarily a win-win situation to have this deal, because some of them thought it might affect other sources of income. So in my submission one is entering into the realm of speculation as to what would have happened had the 70 per cent. condition not been satisfied.

The next point is that there is no contemporary evidence at all that ATR wished to waive the clause. The contemporary evidence is completely the reverse, because the press release, which was issued on 2nd May 2001, when they had already got the 17.1 per cent., was "Please sign up". It was putting pressure on them, and the reason for that, there is a little table we have done for that, is effectively Mr. Thompson is right in this, that you could get the smaller courses for a small amount of money but you could then get a lot of betting from them, so it was a well worthwhile exercise for ATR because you would be getting a lot of betting revenue for quite a small amount of money, and in fact what the Tribunal will probably already have appreciated is that the smaller courses when in fact selling their rights at a discount to the percentage of betting turnover. So it was very much in the interests of ATR to get that. The reason it was very much in the interests of the ATR, we come back to the point this was a new venture, they had to make sure there were as few holes as possible in the service, because if you have not got the races, as Mr. Vaughan said, on the Monday then people will use internet betting, or telephone betting or go to William Hill or whatever and you are going to lose the eyeball contact which is so critical when you launch a new product.

THE CHAIRMAN: Or they may have to go to Plumpton in person and do a bit of on-course betting, I suppose.

MR. VAJDA: Yes. The other point about 2.2.2(i) is that the requirement is that it is all of the TRG courses, together with all of the non-TRG courses. I went through that in opening. The point there is it does not give the TRG courses merely collectively a veto but it gives each of them a veto because you have to sign up each of them, and this is, if you like, the Ayr point because in the Defence the OFT said if Ayr had not signed up it would not have been the end of the world, but if Ayr had not signed up that condition would not have been satisfied and the reason it was put in, it did not say the majority of TRG courses, or 10 out of 12, it said "every one", that is what they wanted, they wanted every single TRG course. In fact, they did not just want every single TRG course, they wanted also all the courses in common ownership with all the TRG courses. It really does not wash to say "We can forget about Ayr", because if you could forget about Ayr why did you not have provision in this Agreement which effectively said we will be satisfied with 15 out of the 17 TRG courses. That is not how this was drafted, and we know from the evidence of Mrs. Walsh that ATR wanted to have this in regardless of whether the courses wanted it in or not. That is all I want to say about the negotiation documents and the minutes.

Can I then, in relation to presumptions, deal with the RBB model, the point that I think Mr. Thompson made yesterday? Again, there is a degree of common ground here. He quite rightly accepted that there is no presumption of anti-competitive effect, and he said that one can draw inferences from primary evidence – obviously whether one can or cannot will be a matter for the Tribunal. What we say is that you cannot draw any inferences in this case that collective selling led to a higher price and, in particular, you cannot draw any inferences, based on the RBB Report. I am not going to go to the RBB Report, or Reports. The first one is at 687. What RBB said was that the outcome of the negotiations would be critically dependent on the following factors: first, a structure of the market, secondly, the nature of the product that the buyer is trying to create with the purchase from the sellers; and thirdly, the extent to which the output of the sellers is substitutable or complementary.

What the RBB Report said was that the OFT model that collective selling leads to higher prices works in a case where it eliminates competition between the sellers, and that much is obvious, and this comes back to Mr. Vaughan's widget point. If the four big supermarkets in this country engage in collective selling of baked beans that eliminates competition between them, but it does not follow from that that collective selling – if there is collective selling – by courses in relation to interactive betting rights achieves the same result. This is, I think, what I would call the OFT's "cartel fallacy", because it ignores the fact that the courses, we say, are not able to sell their rights individually. It ignores the fact that the courses are not substitutes. If you want to have, as Mr. Vaughan said, Plumpton on Monday afternoon

then because of the fixture constraints you need to have coverage so that Royal Ascot in May is not going to be a substitute for Plumpton on a Monday afternoon in February. That is why these are not substitutes.

It also ignores the fact that in this case the buyers were not wanting to play one course off against the other, they were wanting to do a deal with all of them. They buyer here is in a very different position from, say, the buyer of baked beans at Tesco's or the sugar buyer in the Sugar case, because they needed to have a product which they themselves could market to consumers and make a profit on, and that is the innovative model which is financed by betting; and that takes us back to the ATR business plan at 4.47. We say that there is nothing in the RBB model and inferences that entitles one to seek to draw the inference that Mr. Thompson wishes to draw.

Can I now deal with some of the other points that have been raised? First, the issue of collective selling, which is a point that we did not touch on in opening.

THE CHAIRMAN: Can I just mention, Mr. Vajda, we are quite happy to sit late tonight, or late-ish, to enable everyone to finish, provisionally we thought perhaps 5 o'clock might enable you and Mr. Vaughan to make your submissions. I do not know whether that will work or not?

MR. VAJDA: I would certainly hope to finish in about no more than 20 minutes I would have thought.

THE CHAIRMAN: Mr. Vaughan, would 5 o'clock then leave you ----

MR. VAUGHAN: Well I think I will be a bit longer than I might have thought originally.

THE CHAIRMAN: Yes, well we know what that means!

MR. VAUGHAN: And if we had a short break between the two, if we could?

THE CHAIRMAN: Certainly.

MR. VAUGHAN: We are very much in your hands.

THE CHAIRMAN: We would quite like to finish this evening, but I quite understand why you would like a short break. I think we might as well.

MR. VAUGHAN: I do not necessarily mean now.

MR. VAJDA: I am sorry my submissions are having that effect on Mr. Vaughan! [Laughter]

THE CHAIRMAN: If we aim at rising at 5, would it be sensible to have a break now in fact?

MR. VAJDA: I would certainly welcome it, yes. When would you like us back?

THE CHAIRMAN: Is five minutes enough?

MR. VAUGHAN: Yes.

THE CHAIRMAN: Right.

(Short break)

THE CHAIRMAN: Yes, Mr. Vajda?

MR. VAJDA: A point in relation to RBB, which is that the simple point is a failure to carry out a proper market analysis, and what we say is that the OFT proceeds on the basis of a *per se* inference that collective selling always increases prices to buyers and we say that that is not the case, you need to have the market analysis.

On the question, was there an agreement on collective selling – I can be very brief on this – I really take it up because Mr. Thompson dealt with this in his submissions yesterday and he started off by dealing with a number of documents in 2000. He said there was a concerted practice between the Super 12 in early 2000, for example. It was at that point that I interrupted him, and I did so essentially for two reasons. One is, as Mr. Thompson has indicated, the Decision does not proceed on the basis that the concerted practice between the Super 12 is a s.2 infringement.

Equally importantly, what the Super12 did or did not do in 2000 is not evidence of an agreement *inter se* between all 49 courses in May 2001. We ask the Tribunal to look again at the s.26 responses of the 16 courses who received the BHGG offer but signed with ATR, and that is at BHB4, flag C. We say it is clear from those responses that each course there took an individual decision whether or not to go with ATR or GG. The second point, and I have made this in relation to critical mass, is what on earth is the point of ATR issuing a press release on 3rd May 2001 directed to the smaller courses, urging them to join, if there was an agreement between them and all the other courses that they were already in the bag and the point is they were not in the bag and it was precisely because they were not in the bag that the press release was issued to stop them jumping into the GG bag.

Moving then to the cases that Mr. Thompson relied on, sugar – a simple point, para.26, there the cartel led to conditions of competition which do not correspond to the normal conditions of the market. Again you come back to the point what is a normal condition of the market. *UEFA*, again a simple point – para.128 – the counterfactual was that there was competition in the selling of the rights, and the Tribunal will observe that at para.131 of the *UEFA* decision the Commission found that there was individual selling in relation to the UEFA Cup – that is the smaller of the two UEFA tournaments that arise. So there was plainly a counterfactual in that case, and there was also a sale of rights individually in some Member States. So that was a case where, if you like, the counterfactual argument failed on its facts. *Remia* exactly the same point, what is the counterfactual? The 81.3 Notice, where it said that one needs to look at objective facts not subjective views. I have already explained "subjective views" means plainly you cannot go along to the Commission and say "This is what I think", you have to have some objective factors. But we say the objective factors in the present case are: first, the riskiness of the new venture, that was plainly an objective factor, and the need for

high visibility. Secondly, the need for commercial success because the bankers needed to fund the rights' issue from Arena. Thirdly, the need we saw in the Media Partners' Agreement notes to have enough content to stop a rival channel. It was not just a question of having enough for one's own channel if you had to stop a rival.

We say also that the ATR business plan, and the ATR contracts are objective factors that can be taken into account, and that the ATR contract terms are little different from the contract terms that Carlton was offering at the same time, and that was, as the Chairman put it, something that one could go "snap" on, it was a real offer.

Gottrup-Klim, I detected some suggestion that one ought to confine this to a case all about little agricultural co-operatives in Denmark, and that it might not be relevant to any wider principle. We would say that that is plainly not the case. There is nothing in the Commission notice to suggest that the "*Klim* principle" – if I can put it like that – is limited to joint purchasing of small co-operatives, and if I could just give the Tribunal the references in *Metropole*, which is 21, flag 5, paras.75-76, which is a pay TV case, where they refer to *Klim*. There is nothing to suggest that it is just an agricultural co-operative case. They referred to the *Luttikhuis* case, which I said on Monday followed *Gottrup-Klim*, and then *Wouters* itself. At para.109 they refer to *Gottrup-Klim*. There is nothing to suggest that it is confined to its own facts.

So that is all I need to say on the law. Coming to the question now, having dealt with critical mass, to price – what do the documents show? We say firstly that the OFT's analysis, which is effectively that the price of the rights went up, and we have dealt with that in detail in the written pleadings, but it ignores the fundamental fact that there was competition between the bidders. It also ignores the fact that 10 courses who did not have market power – 10 small courses – sold their rights for a larger amount to GG, and if we can just look quickly at RCA 15, flag 83, which is a document Mr. Thompson took us to before lunch. Mr. Thompson took us to the penultimate page of the flag, just before flag 84 – the typed is what you get under ATR, and the manuscript is what you get under GG, and the GG is a guarantee. Perhaps I should just explain a point on p.12 of the document which says:

> "The comparable value of the GG Media offer is not measurable as there are no minimum guarantees, and it could therefore be anything."

As I understand it the reference there to minimum guarantees simply means that there was no parent company guarantee unlike in the case of Attheraces, but hey were plainly fixed sums, guaranteed sums, and one can see that they were higher than what was being offered by ATR. I will not ask the Tribunal to take it out, but if I could just read the answer of Fakenham – this is one of the s.26 courses that went to GG:

"The GG Media offer was more attractive to us because it was for five years as opposed to 10, but it guaranteed us £32,500 per fixture."

That is BHB7, flag D, tab3. The position is broadly as Mr. Thompson described in terms of income of the courses. Could I ask the Tribunal to take up this bundle and look at a table at flag 7?

THE CHAIRMAN: I am sorry, which one is that?

MR. VAJDA: This is the last one, RCA25. One will see there that the price of the interactive rights for all courses was £195 million, that would offer you 100 per cent. The courses that were signed up by 3rd May accounted for 70-odd per cent. of the betting rights, but they got a larger share of the cake from ATR. If you look at the independent courses, the remaining courses – the independents – those are the so-called 42, they accounted for nearly 30 per cent. of the off course betting rights, just under 30 per cent. but they were only getting 20.7 per cent. of the cake from ATR. We set out where these figures are derived from, and we say at footnote 3:

"The figures for the remaining courses demonstrate that the independent courses, who have initially been approached by GG Media and decide to sell their rights to ATR did so at a discount. In other words, a per cent. of the price offered by ATR, which was accounted for by those courses was significantly lower than a percentage of the off course betting turnover generated by the same course."

This is precisely the same point that is made by Mr. Atkin in his second statement that Mr. Thompson took us to before lunch. We say the fact that RHT, Arena, TRG and Northern sold their rights at a premium, confirms what we say that those courses effectively had a veto.

Then one can see at 5 why ATR was so anxious to get all the courses, because the reduction in price accounted for the loss of 10 GG Media courses was only 6.73 per cent., yet those courses accounted for 9.2 per cent. of betting turnover, and the point is that one can bet on anything – one could even bet on a virtual horse race nowadays, so that is why it was so important to get as many into the pool as possible. Then we say that the GG Media courses were in fact offered a higher price, and we refer to the s.26 responses. Although obviously we accept that you cannot make a direct comparison because GG includes LBO as well. If one looks at the answers of the courses, and one looks at the analysis that Mr. Atkin made at flag 83, we find it difficult therefore to see how it can be said that the price that the 16 smaller courses got was anything above a competitive price.

Before we put that document away, **that** document – the GG comparison – is important for another reason. As Professor Bain pointed out to Mr. Thompson this morning, in relation to the incentives' point what the buyer has to do is to offer something that is going to be of interest to the seller, and what GG were offering were fixed amounts. That was what

attracted the 10 to go to GG. The inference that we say one can plainly draw from that, if GG had simply said "We are going to give you a profit share, not a fixed amount" they would have not gone. What the courses wanted were fixed payments. They did not want to take the risk, whether they were acting individually or collectively.

Mr. Szlezinger points out that two figures have been transposed on this table in relation to RHT courses, the figure of 26.2 should be in the middle column, the percentage of off course betting turnover accounted by them, and the figure of 33.8 should be in the right hand column.

So that deals with price. On incentives I have made the main point, which is effectively Professor Bain's point which is that no bidder would make an unattractive offer to any course and there is no evidence, we say, that any course acting individually or on a non-collective basis would have accepted a profit-share arrangement with no minimum guarantee. It is probably my fault, I should have done this in opening – could we just go to flag 6? This is the new bundle. This also may help to answer Professor Bain's question about the other income. If one looks at the MRA what the courses are entitled to is 3 per cent. of the gross Pari-Mutuel income, that is 3 per cent. before the 22.5 per cent. is taken off. You can see the figure there that they are entitled to. They are then entitled to 40 per cent. of the net (not the gross) fixed-odd income, that is effectively the click through to the traditional better. They are then entitled to 25 per cent. of the other income which we say includes income from advertising but we cannot be more specific because ATR did not provide details to the courses at the time.

Then there is an item which is the irrecoverable gross profits tax. The Tribunal will well recall that when we went to the business plan on Monday there was a column for irrecoverable VAT, and we explain here that that was because there was a change in the way that bookmakers were taxed; effectively that was a cost that was going to be borne by the courses. One then has the figure of £204 million, and then you have the minimum guarantee, and the difference between the two is effectively the tot-up income, which was then we saw going to come in year 10. So the way that this was structured was, if you like, a profit share, and what was important to the courses was that it had a guaranteed minimum floor, and in fact there would have been more profit share had it not been for the irrecoverable VAT, so that is the way that it was structured.

The point here is that all the evidence shows that what the courses were interested in, individually or collectively, was guaranteed fixed sums, because they had to take a Decision, and we see that in the s.26 answers, whether it was worthwhile accepting one offer or anther, and they were looking at fixed sums. That was what they were concerned to achieve.

That then takes me finally to exemption, which I can be very brief on. I am sure that Mr. Thompson did not intend to misrepresent my argument yesterday when he said we were contradictory on the income stream. We certainly are not contradictory on the income stream. Exemption only comes in the alternative, that is to say, if we lose the argument on s.2 then we rely on the income stream – that is how it fits in. In relation to income the only point that I to make is a legal point, which is that comfortable seats at Rippon are not one of the benefits to ATR. We simply do not follow that because that does not follow from the UEFA application of the Nice declaration. The point is a question of law: is this a benefit? We say that plainly Nice says that where collective selling is engaged by sporting bodies that is a benefit. It is then said that we cannot rely on solidarity because we did not redistribute to the smaller courses. It is perfectly true there is no redistribution to the smaller courses but the point that we have made in the skeleton is that if we lose off s.2 and the OFT's counterfactual is correct, then there would have been a large number of courses that would have got nothing, and so the solidarity comes in because everybody got something, albeit the smaller courses got less than they would otherwise have wished to get.

On reduced transaction costs, which is simply a question of evidence, because the OFT accepts that this can be a relevant benefit, they simply say we have not proved it. We rely obviously on the evidence that I took the Tribunal to before, and I would simply say that there is an iron here because it seems to us that the OFT is imposing a higher standard on the party seeking to justify the reduced transaction costs and it is imposing on itself to show an increased price under s.2 because it certainly did not need to quantify the increased price. We say that if you look at the *UEFA Champions League* case, and all the other exemption cases there is plenty of evidence here to justify a finding of reduced transaction costs.

Finally, Mr. Szlezinger asks me to remind the Tribunal that the reason that we did not mention the new product point in the skeleton is simply because that is a point that was accepted by the OFT as being of benefit under the first condition, but in no shape or form is the RCA resiling from that as an important benefit and, indeed, as the Chairman observed on Monday, the fact that one does not rely orally or in one's skeleton on a particular argument does not obviously mean that one abandons it either. So subject to that, those are my submissions in reply.

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

MR. VAUGHAN: May it please you, Sirs, gentlemen, my lady. On the term sheet points we have given in our paper at the beginning of this morning, and that is really the best we can do on the matters. You may say it is not very much, but one of the things you have to bear in mind, of course, is when the ATR Agreement came to an end, the term sheet automatically came to an

end. The effect of the Commission's decision on the ATR Agreement automatically affected us, not because we were unlawful, but we were dependent upon that agreement to have any effect at all on the term sheet, so in fact virtually nothing ever happened, or very little happened under the term sheet agreement. Obviously there was expectation it would continue for the 10/11 years but it never did because of that. That is one of the reasons why we intervened and got leave to intervene in the matter before the Rule 14 Notice in that stage. We have set out what we can and what we have been able to find out. It has involved asking quite a lot of people about a lot of things from quite a long time ago, and that is the best we can do.

On *Argos*, the point that I would like to make is in paras. 65 and 66, 66 is in Mr. Vajda's skeleton, but I think it is probably convenient to look at 65 as well. *Argos* is at 21, tab 1. It is important to bear in mind that it is not just an open-ended appeal where little or no holes are barred. It is subject to very strict control, and new points and new evidence is strictly controlled. Page 27, para.65:

> "(1) The appeal before the Tribunal is directed against "the decision that the Chapter I or Chapter II prohibition has been infringed" which necessarily implies that the appeal is directed against the facts and matters set out in the decision and not against other facts and matters not set out in the decision."

That is confirmed by Schedule 8.

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

So it is a fairly limited jurisdiction to look at these matters. It then deals with the passages which Mr. Vajda quotes at the beginning of his skeleton. Paragraph 66:

> "(1) The Director should normally be prepared to defend the decision on the basis of material before him when he took the decision. The decision should not be seen as something that can be elaborated on, embroidered or adapted at will once the matter reaches the Tribunal. It is a final administrative act which fixes the Director's position. An attempt to strengthen by better evidence a decision already taken should not in general be countenanced..
>
> (2) Were it otherwise …"

and then there is the moving target point.

"(3) There is therefore a presumption against permitting the Director to submit new evidence that could have been made available in the administrative procedure."

I will come back to the question of whether the 2003 statements are new evidence.

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

That is obviously pretty critical on some of the counterfactual points, on some of the matters where he seeks to draw inferences from documents which may be correct inferences, and may not be correct inferences in that context.

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

That is expressly the 2003 statements. They were not put in the Rule 14 Notice, and were not put to us and we were refused access to them. So those letters on that basis should not be considered, albeit they are in the Decision.

THE CHAIRMAN: That is not the point dealt with in para. 5 though, is it?

MR. VAUGHAN: No, but we say it flows on from that. 5 makes a different point, but we say it flows on from that, because otherwise you can just add in, after the oral hearing, all sorts of things, and then put them in the Decision and then say "Ha! Ha! They are in the Decision, you cannot complain about it." It goes to the rules of the natural justice of these matters. Then:

"(6) The Tribunal should resist a situation in which matters of fact, or the meaning to be attributed to particular documents, are canvassed for the first time …"

This is very important:

"… at the level of the Tribunal, when they could and should have been raised in the administrative procedure and dealt with in the decision."

That is particularly important about the inferences sought to be drawn from certain documents in the negotiation processes, particularly one document I recollect when Mr. Thompson said, "Well, the natural inference of that was so-and-so", and I said, "There's no evidence of that" – I interrupted him. In fact that is exactly the sort of example where that should not be allowed in that situation. So that is broadly the background to this whole matter, and obviously it is up to you to apply that to the situation you have got before you.

Basically we say that the 2003 documents are not admissible even though they are in the Decision because we never had an opportunity to deal with them at all and, in so far as we have had an opportunity subsequently, it is a wholly inadequate opportunity unless we have full disclosure and full cross-examination. Even if they were admissible then we would say they

should be given no weight at all or such small weight that they can be disregarded for the purpose of this decision, for this appeal, and if that is right virtually all the evidence on effect goes out of the window because, as we have demonstrated, almost all the evidence on the effect comes from these documents.

The other point is that the inferences that my learned friend invites you to draw from the documents, where they are capable of having different interpretations, particularly as regards motive and things like that, that should not be allowed. All you can do is just look at the document and see whether in fact you cannot draw an inference adverse to the appellants in the absence of documents, in the absence of evidence, in that situation, because that would be to deny us the right to deal with the matter. And, on this matter, its subjective element is important because the conduct of the negotiations was intensely subjective. What Arena was planning, what they had in their back pocket was, was the Channel 4 bid originally a genuine bid or was it just an attempt to act as a sort of scouting horse for the others, was the Arena a spoiler bid or was it a genuine bid – all that sort of thing is completely up in the air, and, in our submission, you cannot, as it were, draw adverse conclusions from those documents adverse to the appellants. These are exactly the sort of documents which it is said in *Argos* should have been dealt with by evidence in that way. And on that I entirely agree with Mr. Vajda, that the extraordinary thing about this case is it is a lopsided case.

You have got a lot of documents, internal documents, board minutes, minutes, general minutes, from the RCA side but nothing, other than exchanges which are in the possession of the RCA, from the other side. We know nothing about Channel 4's ambitions, hopes, bottom line, top line, were in the negotiations or any of the other people. We do not know anything about whether 70 was really their target or the minimum target, or whether there was a maximum target or anything like that, and it is a completely unsatisfactory basis on which to invite you to uphold the Decision in that situation. Even-handedness, equality of arms, would at least depend – suggest that the OFT should have obtained these documents, and particularly on the 203 situation, when they rely so strongly on these last-minute documents obtained at a very late stage by the OFT and not shown to us to be questioned. If we had seen those we would have certainly, as we had to do to intervene, obtained them by judicial review in order to get access to the documents and cross-examination if it had been refused.

But it does look though from the other cases we have looked at that even at that stage you cannot cross-examine, and in order to cross-examine you have to come here. So if one is looking at a what do we do next situation, going back to the OFT would not cure that problem because cross-examination by us can only take place here and discovery of documents can only take place here, and indeed one of the reasons we suspect ATR did not intervene was because

they would be subject to discovery orders in this particular matter. They had a chance to intervene and did not intervene in this matter.

The other point, by way of introduction, is that this case has very considerable importance to all sports and obviously other cooperative exercises, but sports in particular, and when this notice was issued the press notice was issued by the OFT, and this is the beginning of our Notice of Appeal, para.16 of our Notice of Appeal, and pointed out the importance of this Decision to all sporting bodies in this way. It is not just racing, it is football, racing, cricket, bowls, snooker, whatever you like; it is every single sporting or game activity which is dependent upon financing its activities through intellectual property rights in this way. So it is not just racing, it is a matter of the greatest importance, and it is not just in this ATR agreement that BHB is concerned, it is all its other commercial activities which is of great concern to it in this way.

The basic headings I want to go through in my time, and first of all reasons, procedure and evidence, context, product and market definition, effect on price, including the counterfactual, and effect on competition and necessity, rule of reason in this matter, and I will try and go through these matters as quickly as I can.

As regards burden of proof, we say our case is right, that they have to prove everything. We have produced explanations and *Marks & Spencer* correctly sets out what the law is. We just have to produce an explanation and they have to prove that their case is made out in the light of that explanation.

As regards standard of proof, our Notice of Appeal we say sets out the position correctly. It is a high standard and the Notice of Appeal, para.129, sets out basically a quotation from *Napp*, from *Aberdeen Journals*, and a case called *McCann*, and all those cases work on the basis of strong and convincing evidence, and *McCann* is a particularly interesting case in the House of Lords where they dealt with the heightened civil standard, and they said there is little, if any, difference between the two tests, heightened civil and the criminal test in a case which has severe consequences, and this case obviously has massive consequences not just for the parties but obviously for the whole of racing, and indeed other sports.

We have made the points about the 2003 statements in this matter. Basically we say the 2003 statements should be either inadmissible or given no weight at all. They were wholly inconsistent with what was said in the Notification, wholly inconsistent with what they said at meetings with the OFT, and I have taken you to some of those meetings in those matters, and they do not even condescend, even to realise, what they are saying is conflicting with that. Basically what they are saying is they were the victims of an unlawful cartel effectively, and that is their position now, but what was their position at the notification? You just have to read

it, when they eulogise the whole thing, saying it was good for racing, good for the consumers, good for broadcasting and good for everything. It is a complete difference of approach. And if that goes then all the evidence, as we developed in our Rely on effect, goes in this matter. They rely upon that for extra transaction costs, they rely upon that for a higher price and so on, and if you take that out the remaining evidence is really not worth the candle. It does not show with strong and convincing evidence that effect is made out. All you have got is, at most, a few inferences, and a few presumptions at that. There is no evidence, as anyone would expect to see evidence.

The other point is of course the 2003 statements were the only reason for rejecting the Notification, the s.26 responses on which, as we have explained, they give contradictory – they do not give explanations as to why they did not refer to it, but we would invite you to say that they did not refer to it because they did not support their case and reject what was said in the meetings. The s.26 notices all go one way. It is not as though one or two support us and one or two support them. Nobody supports them except for the people who went with GG and felt they were getting too little out of ATR, but of course the critical thing is that everyone, other than the must haves, had a chance; they either went one or the other, and some of them – the original proposal of GG was for a much bigger group and they split 17 to 10 I think, going 17 to ATR and 10 to the other. But they all advanced logical reasons why they preferred one to the other. Some preferred ATR because it gave them more terrestrial coverage, some preferred GG because it gave them more money in the pocket in that sense. Maybe some took a longer term view and some took a shorter term view, but they were all good valid reasons in that way.

Turning now to the context of this whole thing: the context is not just the non-LBO context, the context is the much wider context, and I refer back again to the zero one fallacy, that, whatever your product and market is, you have got to look much wider. You have got to look at this in the sporting context and the broadcasting, betting context. On the sporting side, I would ask you to read very carefully the passages set out in our Notice of Appeal which deal with the particular legal considerations which apply in the sporting context, and this is paras.186 to 227, and then running on with the United States approach on to para.235. What is abundantly clear is everyone there thinks that *Gottrup-Klim* is of general application, everyone who considers this point. It is not just a buyer's cartel point or a buyer's cooperative point, it is of general application in sport. Everyone seems to see that sport is different and you cannot read over Article 81 or its equivalent into sport just straight, you have got to take into account the particular characteristics of sport, and it is not just the jockey and the horse, it is the much wider and/or the professional or the amateur. It is not just Mr. Beckham subsidising an amateur club or something like that, it is a much, much wider thing than that, and they explain

in those passages what it is. It is quite instructive, and we deal with the various Commission statements about these matters, written statements, speeches given. We deal with the *Premier League* case, we deal with the *UEFA* case, and also they all accept solidarity as being a much wider concept in this whole field than the Office of Fair Trading acknowledge in this matter. It involves trickle down, it involves all the sort of benefits that you get. It involves the benefits to breeding and so on right down the racing chain, down to spectators, and covers things like better seats at Rippon. That is all part of the whole thing, that better seats at Rippon mean more people at Rippon watching the racing. It means more money through the turnstiles, probably more prize money, better horses coming to Rippon, more people coming to Rippon and so on in that way.

But it is quite interesting. My friend said, "Oh well, *Gottrup-Klim* has a very narrow meaning. At para.210 of our Notice of Appeal – I wonder if I can take you to it. It is a particularly telling passage, it seems to me. It is from the 2003 European Commission Report. It is done in terms of football, but we made clear in this whole field that football is just an example of the general statement. This is the Report on Competition issued by the Commission. It is a public document, and of great importance.

> "However, the Commission recognises that a joint selling arrangement has the potential to improve production and distribution to the advantage of football clubs, broadcasters and viewers. A joint selling arrangement creates a single point of sale for the acquisition of a branded and packaged league media product. It can lead to substantial lowering of transaction costs."

Which is music to my ears.

> "Obviously, a joint selling arrangement should not contain restrictions of competition that are not indispensable to achieving these efficiencies and consumer benefits."

So they saw basically that they were good things providing they did not overstep the mark. The OFT in this case does not seem to accept the whole sporting good thing nature of these particular agreements, and we say we have not overstepped the mark, or the RCA had not overstepped the mark in that way. But I think the whole of that passage is well worth reading. It has references to learned books, cases and so on, about this whole matter, but it is not widget world, it is sporting world; this is different. It is not the sporting exception my friend tends to categorise this as being. We do not say Article 81 does not apply to sport, but it applies in a moderated way.

Also on this whole context, the passage we refer to in **Bellamy & Child**, which we quoted in para.13 of our skeleton – I do not want to take you back to that at the moment – raises three particular problems that arise out of broadcasting rights, the joint collective sale of

broadcasting rights in this whole context. One is market failure, the fear of market failure, the risk of market failure, i.e. you cannot get agreement at all or it is much worse than you might have thought; concentration on the buyer's side, which was extreme in this case. At most there were probably two or three, but it only came down to one in the end, which was a cooperative of some of the most powerful figures in the sporting broadcasting world. And then there is product definition. In various ways this case exemplifies the three problems that were dealt with in that case, and interesting enough in para.24 of the document, the Commission document, which is at bundle 24, tab 28, it makes the point that certain agreements, and I am not going to take you to it now, there is not enough time – but it makes the point that some agreements do not fall within 81(1), i.e. cooperation between non-competitors. That is exactly the case; the racecourses were not competitors in any sort of sense of the word, they were pushing their own facilities in that matter. It does not apply to cooperation between competing companies that cannot independently carry out the project or actively covered by the cooperation, and that goes to the point the Commission made in their statement – cooperation concerning an activity which does not influence the relevant parameters of competition, and we say that applies here because all that happens is that the question is who ends up with the money, is it the racecourses or the broadcaster, because there is money or should be money there, it is just a question of whose pocket it goes into, and that is not the stuff of competition law.

It goes on to say:

> "Categories of co-operation could only come under Article 81 if they involve firms with significant market power and likely to cause foreclosure problems vis-à-vis third parties."

That was the point made in **Bellamy & Child**, that competition law is not concerned with these sort of agreements. Nobody has complained about the market power in this case. There is no case advanced on 82 in this case at all. The OFT accept that 50 per cent. would have been acceptable, which presumably is market power in that sense, but it was not because other people – but they accept that no other programme could compete. It was only one person who could get in, Professor Bain's buying into the market situation.

The other side of the context – that is the racing, as it were, side of the context. The other side of the context is the ATR, the broadcasters', position. Broadcasters were a very powerful buyer. BSkyB is not a pushover in negotiations, and I suspect not many people have bettered BSkyB in any negotiations, and the thought of BSkyB paying more than they thought they ought to is laughable in many ways. They know the value of everything and the price of everything, I suspect, as well.

They also had considerable alternatives if they did not get into racing, and that was the quotation from Mr. Scott of Channel 4, who said he had always got other options. Mr. Thompson seemed to say, "Well, you could have gone to South Africa, go racing from South Africa". The answer was the alternatives were cricket, football, rugby or whatever you like to do; there were alternatives they could do, they did not need to go into racing. ATR itself might have needed to go into racing, and Arena might have needed to go into racing, but the others did not need to go into racing in this way.

ATR wanted and indeed needed to get one agreement signed by everyone who was participating, and that is clause 2.2, and it required 75 per cent. acceptances – that is the must haves, and even if they might have accepted 74.5 that does not detract from the position if Ayr could be left out in that way, and I do not think you can tell many Scotsmen that Ayr is not an important racetrack; it is the Ascot of Scotland, if that is not a wrong way of describing it. It is the crucial racecourse of Scotland and has all the main races there. So it needed 75 per cent. acceptances in this matter, and it needed to have the term sheet agreed by BHB. These were the conditions precedent that they had. And, as Mr. Vajda said, there is no evidence at all that they would have waived or even considered waiving any of these conditions. Indeed, they, as he said, pushed for more when they got over 75 per cent.

As we have explained in our schedule B to our skeleton, the must haves accounted for 75 per cent., so you would not have had an agreement unless you were 75 per cent. or nearly that, and there was no way you could get an agreement with 50 per cent. if you had to do that, and the OFT does not suggest clause 2.2 is unlawful. They do not suggest that ATR was acting unlawfully in insisting upon that clause. They accept that is a perfectly genuine thing, they do not seem to mind very much what ATR did in this sense. But the effect is that they accepted the need to have 75 per cent. The thing would not have taken off unless there was 75 per cent. or it was waived. If you work through it, the Super 12, the Consortium courses, had to be in because they were there because they were the jewels in the crown, then the common ownership courses, Northern Racing and RHT, non-Super 12 courses, had to be in, the Arena courses had to be in, and so, however you did it, you got over 70 per cent., and if you left out Ayr you probably would get 1 or 2 per cent. less than that, and it includes important courses like Chepstow and Chester as well as a floating course over and above the number. So you are left with 18 courses which had a choice. Eighteen plus 10, 28 courses, had the choice, and they represented 25 per cent., 19 for those that went to ATR and 6 per cent. went the other way. So basically the whole case has to be that it was wrong of ATR to insist upon – or to accept these other companies coming in. They should have been pushed off with GG because everyone would have accepted that GG would not have created a problem; it would have been less than

25 per cent. But these courses did not want to go with GG. They had taken a rational and objective decision, based on advice, that they were better off not with GG. So the only alternative the OFT have got is these people could not go anywhere in that way, and even though they thought ATR was better for them they were not allowed to do it or else they would have to then go along cap in hand and negotiate individually with ATR, ATR having got its 75 per cent., and you can see what the negotiating process of that would have been. Some might have been valuable, the Plumptons with Monday racing may have been valuable, but the fourth course having races on a Thursday may not have got anything in that situation.

So basically you have got to look at this whole thing in the context of the racing side and of the broadcasting side and what ATR wanted in this matter.

On product and market definition, I can deal quite quickly with that, because it is obvious to anyone, absent the OFT, that data and pictures are strictly complementary. We are told that suggestion is absurd because of the fridge example, but the fridge example is in its turn absurd. It does not fit in with their definition of complementarity in the 5.4 of these matters. A fridge, chilled food, electricity, could not possibly fit in with the sort of complementary things that any educated economist would talk about in this sense. So therefore they start at the wrong place, they start with non-LBO rights when in fact all the rights were in play. Non-LBO may have been significant but all the rights were in play, including the rights to the term sheet agreement in that way.

Our case has always been that they have never put forward a counterfactual at all, or certainly anything of any significance. It seemed today they were rather suggesting that they have gone off the idea of counterfactuals in this world, but you cannot apply a SSNIP test without counterfactuals. You have got to see what the other situation is. You cannot see how much the price has risen without a counterfactual, and they were completely at sea, in our submission, when trying to find a valid counterfactual in this situation. Paragraph 138 of the Decision, and para.C.38 of the defence seems to suggest they do not think a counterfactual is necessary, but the whole part of competition law is what is the counterfactual and how much does what has happened depart from the proper counterfactual.

They suggest that we have been saying that British Racing is the relevant market. We have never said that. They always seem to come out with that statement and then dismiss it as absurd, as they do in their skeleton in this matter. But British Racing is important as part of the context in which one understands what this case is about and not to understand that is a grave fallacy and not to understand what was said in the Notification, and not to accept what was said in the Notification, certified as being correct by not only RCA's solicitors and their chief executive but also by distinguished firms and distinguished chief executives in other

companies, all agreeing on one thing, that is, it is good for everyone and the virtuous circle was created. Basically our arguments on market and product definition remain unanswered because the answer is there is no answer to them, they are obviously right.

They base their price in fact on three points. One is they say we wanted to maximise our profits, or the RCA courses want to, and indeed BHB want to, maximise its return from the deal, but of course that is what companies are in business to do, to maximise profits in this sense, to get full value for their rights, and that is what everyone tries to do. And these are intellectual property rights which are notoriously difficult to value. Arbitration tribunals and all sorts of bodies are there to determine what is the royalty rate of a patent licence or that sort of thing, and it is extraordinarily difficult to say that that is too high or too low, and reprehensibly is too high. The mere fact it might be slightly higher than other people might give does not mean it is too high in competition terms, and showing it was too high had to be shown by evidence, and that only could be done by looking at the counterfactual. Again going back to **Bellamy & Child**, para.2-101, the effect of the agreement is to be judged by reference to the competitive competition which will occur in the absence of the agreement in question, i.e. the counterfactual. It is the whole heart of competition law, so saying, "Oh, it doesn't really matter", and, "We don't really need to show what it is" is not right. The OFT guidelines, which are at RCA2.17, also makes the same point, and we give the references in our Notice of Appeal at para.294. And wanting full value is not the same as accepting that price is anti-competitive. Everyone wants full value. The labourer is deserving of his toil – I have forgotten the quotation – but whether a labourer gets £20 or £10 it does not mean the £20 per hour labourer is getting too much or the £10 is getting too little, it has got to be judged on other bases, and it has got to be done objectively by empirical studies in this way, and nothing has been done on that, and they merely rely upon the so-called presumption, which we will come on to in a moment.

The second point they raise is they place great reliance on the history of the negotiations. Mr. Vajda has dealt with that, but of course one has got to bear in mind that, first of all, we are concerned with the ATR agreement itself, not with the attempts to reach agreement with Carlton, Arena and Channel 4, it is the ATR agreement one is concerned with. Also it is no part of the Decision that there is any question of object in this case, or intent, the question is what is the effect in this matter. So what happened in the early days, what happened with the Super 12 and that sort of thing, is not relevant to this question, first of all because it goes to intent, and secondly it is not the agreement that we are looking at in this case. Of course it can inform one as to what things might happen, but bear in mind that you only know part of the equation because you do not know what was in the mind, and again subjective

mind is important in this context, of the ATR agreements; where were their bottom lines and so on.

The other note we put in this morning is the note on dealing with the points first of all made in Mr. Thompson's note on collective selling, and secondly some points which flow from that on the bargaining model, because we had assumed Mr. Thompson was going to spend time on the bargaining model. He started on that and then gave up, having made one point I think on that. But basically I am going to ask you to take into consideration particularly para.678 which deals, as it were, with the history of the negotiations, the points we draw from those, and at the end of para.8, as Professor Bain pointed out, the OFT cannot put forward different versions of the counterfactual. Whenever they had a counterfactual there were various versions which one has to rely upon. But competition law is not based on that, it is based upon a steady constant counterfactual in that way.

In the next paragraphs we deal with the various criticisms and comments we have on their approach to our model in that matter. If the worst I have done is to say it is the standard as opposed to a standard, I apologise for that, if that is the only economic fault I have made in this case. But basically this sets out why the BHB approach is right, and why on the facts of this case, where the products are what they were, and where the sunk costs are what they are or were, or were going to be, then we say our approach is right. We do not say they would have been higher or they would have been lower, but they could have been higher or lower depending upon the situation. But the OFT has got to prove they would certainly have been lower if they had bid in a different way. Of course you can just imagine how individual bidding could have had all sorts of different effects – who came first, who came second, who came closer to the 70 per cent. which they needed in order to start the service is obviously of critical importance.

The third point they make on price is the presumption, and we have dealt I think sufficiently with the presumption point. The only point Mr. Thompson seemed to raise against us was we said at one stage that little courses add little value, but of course little courses by themselves do add little value or may add little value if they are just little courses by themselves, and we have got to bear mind – and he simply tied this in with the statement, that only one new course had come in in the last 50 years – but you have got to bear in mind the fact that some 30 or so courses have gone out of business in the last 30 years, so it is not really surprising that there are not many people queuing up to enter into this market in this way. But basically it is the question of where the small course is and how it relates -- Plumpton on Monday gets enormous value simply because it offers betting opportunities on the Monday when there might be nothing else in that way.

On the effect on competition, we have made I think probably the points we really want to make, that this agreement does not foreclose any competition, and it goes back to the first of our four legal issues right at the beginning of our submissions. There is no foreclosure, there is no effect upon consumers in any normal sense of the word; the only effect was upon parties to the agreement and, as we all know, competition law does not protect parties to the agreement from adverse effects of an agreement they might have entered into, and we know in this particular case that this agreement would have been extremely successful but for certain things that went wrong.

We deal with necessity and rule of reason, and we have dealt I think probably with the that, and the main point is that clause 2.2 was inserted at the insistence of ATR, and, as Mr. Vajda says, the chances are they wanted more because getting 75 per cent. did not necessarily give you the coverage. Seventy-five per cent. of the betting apparently gives you 62 per cent. of the races, so they probably needed more races in that sort of situation, but we do not know, and we have not had a chance to talk to ATR and ask them about these sort of matters. He relies on *UEFA*, or the OFT director does, and we make various points about the *UEFA* case. As Mr. Vajda said, the reason why *UEFA* infringed Article 81 in that case was the collective action was between competitors, and that is completely different from the situation here; and necessity in that case had not been proved on the facts, or made out on the facts. But we, as we said in para.208, find *UEFA* very helpful to us, because once you have got over that problem, once you have found these are not competitors and it is necessary then all the points they found in that case, in *UEFA*, for giving exemption are extremely important in this case.

We also rely upon the Restrictive Practices Court in *Premier League* and the approach of the Chancery Division in *Hendry* to show the sensible approach, the reliance upon subsidiarity, if one reads through that, the reliance upon the fact that it is a sporting event, and that case is quite interesting because the Arsenal I think gave evidence saying they would make much money if they sold it themselves, but they took the view they would rather hang together with all the others for the benefit of football rather than get every penny they could out of exploiting their individual rights in that case.

So taking all those matters into account, our contention is that from almost every way one approaches it this Decision does not stack up. Far from establishing the firm evidence of burden of proof in this case, almost everything one looks at fails in that way, and we would invite you to quash the order in this case.

You raised the question about whether you could refer it back in my original speech. We would say it would be wholly inappropriate here. Everything is just so wrong. All the proceedings were wrong. We could not cross-examine the witnesses in the OFT procedures,

we would have to come back here again to do that. The agreement has been dead for quite a long time, and it is a long time ago that these matters took place. We would say it would be wrong to go back to look at things.

Also the other problem is that the OFT has obviously taken a particular view about the particular companies and what they said in 2003, and no doubt if they came back again they would say exactly the same and then we would have to challenge exactly the same situation, because we would not get the documents from the OFT and we would not have a chance to cross-examine in those ways, and no doubt they would form the same view as they have this first time round, and we say this should be the last time round.

Thank you very much.

THE CHAIRMAN: Thank you very much, Mr. Vaughan. Mr. Thompson, do you want to comment on Mr. Vaughan's document?

MR. THOMPSON: I do not want to trespass on your time, but I have three very short remarks to make, which I think will be of relevance and use. The first is there is no need for me to make any further response to Mr. Vaughan's two documents. The pricing document seems to be largely directed to the skeleton argument.

The only two points that I would like to make are points of information, which have not been raised. The first is of course that the BHB is a third party, or was a third party, before the OFT. There is no complaint, as I understand it, from Mr. Vajda that he was not able to make submissions on the 2003 Arena statements.

The other is simply a point of information in relation to the waiver point where the Tribunal itself has shown some interest. There is one document in the papers which may be of relevance, which is the first page of the BHB binding term sheet, which is at BHB2, tab 12. The reason I point that out is there are conditions in relation to the term sheet, the first of which is that the parties agree that this term sheet shall only become legally binding upon, and the first one is all of the conditions other than the grant of licences by the BHB and Arena's fund-raising in the rights agreement being satisfied or waived by close of business on the 25th June 2001. So I would simply bring that to the Tribunal's attention.

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

Thank you all very much, and we will reserve our judgment.