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IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1009/1/1/02

Court of Session
Edinburgh

Wednesday, 29th January 2003

Before:
SIR CHRISTOPHER BELLAMY, QC
(The President)
PROFESSOR ANDREW BAIN, OBE, FRSE
PATRICIA QUIGLEY, WS

B E T W E E N :

ABERDEEN JOURNALS LIMITED

Appellant

and

THE DIRECTOR GENERAL OF FAIR TRADING

Respondent

supported by

ABERDEEN INDEPENDENT LIMITED

Intervener

MR NICHOLAS GREEN, QC (instructed by Messrs Herbert Smith)
appeared for the Appellant

MR MARK HOSKINS (instructed by the Director of Legal Services,
Office of Fair Trading) appeared for the Respondent

MR JOHN HILL of Messrs Shoosmiths appeared for the Intervener

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P R O C E E D I N G S

1 THE PRESIDENT: Good morning, Mr Green, ladies and
2 gentlemen. I think, if I may say so, we have had an
3 enormous amount of paper and documents in this case,
4 including all the earlier proceedings, so at this stage
5 what is going to help us most, I think, is just for
6 everybody to concentrate on what really are the very main
7 points so that we have those well in mind; so I hope we
8 will be able to go fairly quickly this morning on that
9 basis. Mr Green.

10 MR GREEN: Indeed. As the Tribunal knows, I appear for the
11 applicant; Mr Hoskins appears for the Director General;
12 and Mr John Hill from Shoosmiths is attending today on
13 behalf of the Intervener. I should say that I would
14 propose to be between an hour and a half and two hours in
15 dealing with the issues and I intend to concentrate almost
16 exclusively on what we see the purpose of today as being,
17 namely, to concentrate on the question of product market.

18 Stripped to its very barest of essentials this part of
19 the case in our submission concerns the weight to be
20 attached to different types of evidence which are relevant
21 to determining a relevant product market. We have set out
22 in our skeleton argument factors we submit which should in
23 principle guide the Tribunal in assessing the evidence in
24 this case and I think it is helpful to observe that our
25 researches in this case have not unearthed any authority at
26 the EC level or indeed from any member state of the EC or
27 indeed from the United States of the Commonwealth which
28 focuses in any systematic manner upon the evidential issues
29 arising in a product market case and which arise in a case
30 such as this.

31 The issue of the weight to be attached to relevant
32 evidence does, however, arise acutely in this case because
33 of the fact that in the Tribunal's first ruling the
34 Tribunal embarked upon the process of addressing the issue
35 of the correct approach to product market. It arises in
36 particular because the Director in this case very

1 deliberately has relied upon only one category of evidence
2 identified in the judgment and again deliberately declined
3 to address and rely upon the two other categories of
4 evidence which we submit are highly relevant to any proper
5 analysis of product market. No question of the weight to
6 be attached to evidence can be divorced from the legal
7 principle of the burden and the standard of proof and the
8 Director acknowledges that he bears the burden of proof and
9 that it is to the Napp standard.

10 We submit that the central question in law is whether
11 the Director, in relying upon a limited category of
12 evidence, can meet that standard. In the Director's
13 defence and in his skeleton argument the Director
14 emphasises repeatedly that he relies upon this evidence
15 which falls within a narrow compass. He has given an
16 explanation for why he has not examined the other
17 categories of evidence and we submit it is for the Tribunal
18 to evaluate whether the reasons given are proper and good
19 reasons.

20 THE PRESIDENT: Mr Green, could I just ask one question about
21 the Napp standard. I am just wondering whether within the
22 Napp standard on a question like relevant product market
23 there is not a nuance, that is to say, when one is looking
24 at particular facts as to whether a certain thing did or
25 did not happen it is quite normal to apply the normal kind
26 of approach to proof that you would apply in civil or
27 criminal proceedings. When you get to relevant product
28 market there are of course many underlying facts but at the
29 end of the day there is also an area of bringing to bear a
30 certain amount of judgment on those facts, whether based on
31 economic evidence or experience or whatever, and I am just
32 wondering how this sort of area of judgment fits in with
33 the standard of proof, as it were, which the Director is
34 expected to meet.

35 MR GREEN: I think that it varies upon the type of evidence
36 one is examining. For example, in this case the Director
37 relies upon what we have categorised as subjective or

1 tertiary evidence, for instance, the weight to be attached
2 to a statement made by an individual. When one is
3 examining something like an individual statement one has to
4 understand that individual's motivation.

5 When one is looking at that sort of evidence, which is
6 precisely the sort of evidence normally tested in the
7 crucible of cross-examination in a civil or criminal trial,
8 then one might apply a different standard to the analysis
9 of the inferences to be drawn from statistical data. So it
10 may be that there are differences as between different
11 categories of evidence, albeit that it is all evidence
12 bearing upon the question what is the relevant product
13 market. I do not think we would suggest that when one is
14 examining statistical data one can apply the same sort of
15 test as one does to a witness in the box giving evidence
16 when you are testing the credibility and veracity of the
17 statements made.

18 In this case one of our principal submissions is that
19 the Director has placed predominant weight upon statements
20 made by individuals, inferences drawn from conduct, and it
21 is precisely that sort of evidence which one would have
22 tried in the ordinary way in a civil or criminal case
23 through cross-examination and the tribunal or the court
24 would then be required to weigh the veracity of the
25 evidence given and the motivation of the author of the
26 statement, and you may very well apply to that category of
27 evidence a fairly high standard of proof.

28 Our criticism is that the Director has relied
29 predominantly upon that sort of evidence. If he is going
30 to advance that sort of evidence to fine a company it has
31 to be of a very high quality and it has to be unequivocal,
32 pointing entirely one way and consistent with logic,
33 consistent with other conclusions, particularly if that
34 evidence is not to be tested, again, as I say, in the
35 ordinary way through cross-examination, it is simply
36 tendered because a statement was made in an informal
37 meeting to the Director or was tendered because it is

1 recorded in a minute of a meeting between the parties; it
2 is a very naked statement from which to draw conclusions
3 unless it is very vigorously tested. But we would submit
4 there may be very different approaches to be adopted to
5 different categories of evidence.

6 THE PRESIDENT: As regards the evidence that the Director
7 relies on from executives of Aberdeen Journals would it be
8 a fair approach or not for the Tribunal to say, "Well, we
9 read these documents. We give what is said in the
10 documents the ordinary meaning that the words seem to bear
11 and we give what weight we think right to those documents"?

12 If somebody wishes to contend that those documents do not
13 bear their normal meaning what we would need is a witness
14 statement from someone saying, "I didn't actually mean what
15 I said there," or, "I wish to put this into a wider context
16 because what I really meant was something quite different".

17 Then we would look at that witness statement and you might
18 want to cross-examine about it, or whatever; but absent
19 any explanatory statement from the witness as far as those
20 documents are concerned we simply read them and give them
21 an ordinary meaning. Is that a fair approach?

22 MR GREEN: It is certainly true to say that any
23 statement in a document has to be read in context, and
24 again putting that proposition in the context of this case
25 the Director has drawn inferences from statements made by
26 employees of Aberdeen Journals. Our criticism is not only
27 that looked at in isolation the document does not
28 necessarily mean what the Director says it means but that
29 in order to understand what Aberdeen Journals was doing at
30 any particular time you have to also critically understand
31 the stimulus which led to that comment being made in the
32 first place.

33 For example, there are statements which the Director
34 relies upon towards the end of 1999/beginning of 2000 which
35 respond to points made to Aberdeen Journals by the
36 Independent. If one understands what the Independent was
37 up to, and it is a matter I am going to address, then one

1 begins to understand what the response of Aberdeen Journals
2 actually means. The Director bears the burden of
3 establishing to the requisite standard that there was an
4 infringement. A defendant's burden in a case such as this
5 is simply in legal terms to point out that the Director's
6 analysis may not be the only analysis, if there is a
7 plausible, other analysis ---

8 THE PRESIDENT: Yes, a plausible explanation.

9 MR GREEN: Yes. In strict legal terms all this means is
10 that the applicant, the defendant in the administrative
11 proceedings enjoys the presumption of innocence.

12 THE PRESIDENT: Yes.

13 MR GREEN: But as for the general proposition should the
14 Tribunal look at evidence in the round, I think plainly
15 yes. As to the mechanical issue should the Tribunal accept
16 a statement at face value unless there is an explanatory
17 witness statement, we perhaps might say the same thing as
18 the Director General; he has accepted a great deal of
19 evidence which is equivocal or partial without proper
20 assessment and if he has the burden of proof then one would
21 have expected him to come forward with statements from in
22 particular the Independent addressing issues which are not
23 addressed in evidence in order to make good some of the
24 propositions which he is required to make good. So it
25 would be a principle which applies to both parties.

26 It is not my purpose this morning to deal in any detail
27 with the contents of documents. You have detailed analyses
28 of all the parties on those documents and I do not think
29 that incremental value will be added to the process if I
30 simply repeat what has already been said. By way of
31 introduction what I would ask the Tribunal to do is to
32 stand back from the facts of this case and consider as a
33 question of common sense whether a free and a paid for
34 title would normally be expected to fall into the same
35 product market. In this respect there is no MMC report or
36 Competition Commission report on whether a free weekly and
37 a paid for daily compete.

1 THE PRESIDENT: You are looking at it from the
2 advertiser's point of view?

3 MR GREEN: From the advertiser's point of view, yes, and
4 indeed you recognised in your first judgment that this
5 issue, the issue of periodicity, was in fact a key issue
6 and in this you were absolutely right. The difference to
7 an advertiser between a weekly and a daily paper is very
8 great and the evidence in this case, which is predominantly
9 found in volume 1, tab 4 -- I do not ask you to turn it up
10 -- is that many advertisers are only interested in
11 advertising media which can deliver an advertising message
12 in a way which is achievable only through a daily vehicle.
13 For example, advertisers very often would view Wednesday
14 as the prime day for situations vacant; apparently
15 Thursday is the prime day for homes and gardens; and these
16 common choices can only be satisfied by an advertising
17 medium which is not weekly, in other words, it is daily.

18 The evidence in this case is that in Aberdeen, for
19 example, motor vehicle advertisers want to advertise in a
20 manner which maximises the impact over a weekend because it
21 is then that most buyers visit car showrooms, and this
22 means that the ability to focus advertising on a Friday or
23 a Saturday is important. A daily vehicle also gives the
24 newspaper the ability to enhance the value of the
25 advertising by the inclusion of special features, special
26 editorial features, for example, which concentrate on homes
27 and properties or motor vehicles or the employment market.

28 Further still, a daily vehicle enables a newspaper to
29 focus in a highly concentrated form different types of
30 advertising and customers are likely if they want to buy a
31 house or a car to buy the paper on the allotted day simply
32 to locate the advertisements, and this applies even if they
33 do not buy the paper on any other day.

34 Having a daily vehicle enables one to concentrate
35 advertising of a particular nature in a particular way.
36 None of these facilities are open to a weekly paper, yet
37 these facilities are perceived as key differences by

1 advertisers. To the extent that an advertiser uses weekly
2 papers at all then our evidence is that this is likely to
3 be as a complementary top-up.

4 Over and above questions of periodicity there are other
5 differences, other characteristics which are attributable
6 to local economic context or to history or to other factors
7 which will reinforce the conclusion that free and paid for
8 papers are inherently likely to reflect different
9 advertising needs. The evidence in this case so far as
10 Aberdeen is concerned, as set out in a witness statement of
11 Mr Scott, volume 1, tab 4, around page 170, is as follows,
12 and I am summarising briefly the evidence which is
13 contained there.

14 Readership per copy of a paid for paper is twice that
15 of a free paper. Apparently it is 2.3 persons per copy for
16 the Evening Express and only 1.4 for the Herald & Post.
17 Further, readers of free papers apparently spend half the
18 time perusing the paper relative to readers of a paid for
19 paper. For the purposes of the Herald & Post the average
20 reader spends 15.1 minutes reading it, whereas for the
21 Evening Express it is 30.6 minutes, which works out at
22 three hours per week if you take the paper every day. The
23 Evening Express has a readership which is weighted towards
24 readers aged 15 to 44 and the Herald & Post has a
25 readership weighted towards readers aged over 45. Equally,
26 the Herald & Post has a quite different proportion of A and
27 B readers than does the Evening Express.

28 On top of this, the free papers are much more
29 concentrated in the urban areas than the Evening Express
30 which is geographically more widely distributed. As you
31 know, 27 per cent of the Evening Express circulation falls
32 outside Aberdeen. Finally, the Herald & Post and the free
33 papers are just shoved through people's letterboxes whereas
34 paid for papers are purchased at kiosks, shops and through
35 subscription. If one stands back, therefore, from two
36 newspapers, one which has a weekly circulation and the
37 other a daily circulation, it is, we submit, common sense

1 that advertisers would view them as quite different
2 vehicles serving different purposes and if they saw a
3 relationship between them at all it is inherently likely
4 that it would be one of complementarity.

5 It is in that light that I turn to consider the
6 Director's actual approach in this case. In broad terms,
7 the Director relies on evidence of the Independent's
8 intentions and its conduct and upon the reaction of
9 Aberdeen Journals to the Independent's conduct. As I
10 propose to show you, the Director's approach is in our
11 submission very seriously misguided. You will have seen
12 from the evidence and from the pleadings that the Director
13 places a very great deal of reliance upon evidence
14 submitted by the Independent; if I can just give you the
15 references in the defence, paragraphs 14(c), 14(e), 15,
16 16(c); in those paragraphs of the defence the Director
17 attaches an enormous amount of weight to the reliability of
18 evidence tendered by the Independent.

19 For example in paragraph 14(c) of the defence the
20 Director states that the reliability of evidence of the
21 Independent's strategy is bolstered by the Director
22 General's assumption that Mr Barwell, and I am quoting,
23 believed that the Independent was capable of competing with
24 the Evening Express. Mr Barwell's perception of what he
25 could or could not do is critical, a point reflected
26 throughout the other paragraphs of the defence that I have
27 cited. And, as you know, in the decision and elsewhere
28 the Director attaches great weight to Mr Barwell's
29 experience in the industry, the fact that he has launched a
30 large number of papers and the fact that he has by his own
31 admission made very substantial sums from selling them on.

32 In reality the intentions of Mr Barwell and the
33 Independent and his observed conduct need to be examined
34 with very great caution, a caution which the Director
35 palpably has not applied to the evidence. The evidence
36 strongly suggests that the business strategy of the
37 Independent was substantially and possibly wholly motivated

1 by a desire simply to create the Independent as a form of
2 fire ship, designed to wreak havoc in the Northcliffe fleet
3 and critically induce Northcliffe to buy out the
4 Independent. We submit this is probably, and I only have
5 to show that this is probable, the guiding motivation
6 behind the Independent's strategy in this case.

7 In this regard I want to show you a number of documents
8 which suggest very strongly that Mr Barwell's conduct vis-
9 a-vis his own title, the Independent, was designed to make
10 it as troublesome as possible to Northcliffe and Aberdeen
11 Journals with the explicit purpose of selling the
12 Independent to Northcliffe and to attract a buyer's premium
13 which reflects the removal of the nuisance value. If that
14 is at least a plausible explanation of their conduct it
15 means that you cannot draw inferences from that conduct for
16 the purpose of defining product market because it is an
17 artificial strategy which does not reflect normal market
18 conditions. The starting point is Mr Barwell's statement
19 just under a year ago to the Office of Fair Trading in
20 April of 2002 and it is found in bundle 5 at page 2057.
21 Just under half way down that page there is a short
22 paragraph comprising two sentences which says:

23 "AD [that is Miss Amanda Dadley from the Office of Fair
24 Trading] asked KB [that is Keith Barwell] if he was
25 approached by Aberdeen Journals offering to buy the
26 Independent. KB responded that he had not been
27 approached."

28 So we have a fairly explicit statement by Mr Barwell
29 that he had never been approached by Aberdeen Journals with
30 a view to selling the Independent. It appears that Miss
31 Dadley smelt a rat, wanted to know the answer to the
32 question, "Were you trying to sell the Independent?" and
33 that might very well have been because had the answer been,
34 "Well, yes, and we were negotiating at the time for the
35 sale of the title," the Director General would have had to
36 have considered whether that affected the conduct of both
37 parties and in particular the Independent, and if that had

1 been the case the Director would have been forced to
2 examine the Independent's statements and motivation through
3 that particular optic.

4 I am going to return to this note of a meeting later
5 and it may be convenient just to extract it from the file
6 to save you having to go backwards and forwards to it.

7 THE PRESIDENT: I think we will leave it in the file,
8 Mr Green, otherwise we get into considerable difficulties.

9 MR GREEN: If you go from there to a series of documents
10 in old volume 1, which I think is your volume 3, page 399,
11 you will see the statement made by Mr Barwell. This is a
12 document which the Director relies upon. It is a summary
13 of a meeting with Mr Barwell at the Pitfodels Hotel on 5th
14 August 1999. It is between Mr Barwell and Mr Alan Scott
15 with Mr Andrew Blair attending. The Director relies upon
16 it for the proposition about two thirds of the way down the
17 first page on 399 which starts:

18 "He believes now that particularly with the H&P and the
19 Independent both having a distribution of 125,000 each that
20 the response from frees is better than Evening Express. He
21 saw the P&J as being unassailable but the Evening Express
22 was vulnerable and the Herald & Post was irrelevant."
23 He then says, if I could read this paragraph now and come
24 back to it later:

25 "Later on in the conversation he said it would make
26 sense for both of us to reduce distribution to a more
27 reasonable level. This does not tie in with the logic of
28 his previous statement but is an implied acceptance that he
29 cannot make money at the current distribution level. He
30 did say that in previous situations with other frees he had
31 struck a deal to raise yields bilaterally but admitted that
32 these had never held and would not suggest that to us."

33 What I would like you to read is the sentence starting
34 at the bottom of that page which says, "KB said his
35 turnover," to the end of the third paragraph on the next
36 page, the paragraph starting, "He again repeated," if I
37 could ask you to read that, please. (Pause)

1 Here the note records Mr Barwell as saying he would not
2 sell in the next five to 10 years. One wonders why he was
3 so interested in informing Northcliffe and Aberdeen
4 Journals as to the prospect of a sale. With the benefit of
5 hindsight it becomes quite clear what he was actually
6 saying here. He was talking the threat of the Independent
7 up; he was saying, "I'm here in the long run, I'm going to
8 be a thorn in your side for years, but in the longer term,
9 maybe in five years plus, I will sell, or I might sell".

10 Bearing that in mind, if one goes to the Northcliffe
11 Newspapers' internal memo on page 401, the next page, if
12 you would please read paragraphs 1 and 2 of this internal
13 memo, which is dated 6th December 1999, please. (Pause)
14 As of 6th December it was being contemplated within
15 Northcliffe that the Independent might be for sale, one can
16 see that from the second paragraph, and this is taken up as
17 a theme in the famous memorandum of 5th January 2000; and
18 would you please in that memo on page 402 read paragraphs 2
19 and 5. (Pause) You will see that in paragraph 5 they are
20 aware of the buy-out record of Mr Barwell.

21 THE PRESIDENT: Yes.

22 MR GREEN: If you turn next to page 405, under the
23 heading, "The Independent's current position continued,"
24 the second paragraph down says:

25 "Interestingly, the Independent has not reduced its
26 circulation levels following the lead from the Herald &
27 Post. One argument for them not following suit is that
28 Barwell is targeting the Evening Express and requires these
29 high coverage levels to achieve the required advertising
30 response. Peter Harkness notes in his report that Barwell
31 thinks he is on a roll at present and says that local
32 factors such as the OFT investigation and his good
33 relationships with local politicians all bode well for the
34 Independent."

35 As you will know, we have put into a very short witness
36 statement an explanation of who Mr Harkness is. Mr
37 Harkness was the managing director of a company that had

1 been purchased by Northcliffe just under a year earlier.
2 He had been on a 12 months consultancy contract and one of
3 his tasks was to enquire as to the opportunities for
4 purchases of other titles. He had been instructed to
5 contact the Independent with a view to seeing whether they
6 were prepared to sell and this is referring to Mr Harkness
7 and his report. If you go to the bottom of page 407, under
8 the heading, "To purchase the Aberdeen Independent":

9 "Following discussions with Barwell both Peter Harkness
10 and Alan Scott believe a sale of the Independent to
11 Northcliffe is possible. Barwell concedes that on any
12 normal valuation the Independent is not very valuable. The
13 best price he can achieve is via a sale to Northcliffe as
14 we can justify a higher price by reducing our own losses.
15 I prepared a cash flow valuation grid summarising the IRR
16 at various purchase prices. This is included at Appendix
17 1."

18 On page 408 there is a reference again to the possible
19 purchase of the Independent in the paragraph above the
20 heading, "Recommended NMG strategy":

21 "NMG can afford to pay a higher price for the
22 Independent than any other external publisher due to the
23 internal savings available."

24 And then under the heading, "Recommended NMG strategy":

25 "The preferred alternative is to purchase the
26 Independent from Barwell and merge the title with our own
27 free title. All indications are that Barwell is prepared
28 to sell the title to NMG and appreciates that NMG is the
29 only publisher who can justify a value close to the price
30 he wants/requires."

31 Then at the bottom:

32 "Unfortunately Barwell is currently on a roll and may
33 feel that he can demand a higher price. NMG will therefore
34 need to move forward by developing the Herald & Post and
35 increasing the pressure on Barwell."

36 There was of course no sale of the title; Aberdeen
37 Journals had of course to consider regulatory requirements

1 at the time and no sale therefore occurred; and the
2 relevance of this to the case is as follows. In April 2002
3 when the Director asked a direct question to Mr Barwell
4 they were given an answer which does not accord with the
5 facts. The Director General appears from the note of that
6 meeting in April to have ---

7 THE PRESIDENT: This is back at bundle 5, page 2057, is it?

8 MR GREEN: That is right.

9 THE PRESIDENT: Did Aberdeen Journals offer to buy the
10 Independent? 2057 is: "AD asked KB if he was approached
11 by Aberdeen Journals offering to buy the Independent".

12 MR GREEN: Yes, there are a number of alternative
13 explanations. Plainly what the Director was getting at was
14 whether there was the prospect of a sale. It is less
15 important who initiated it if both parties are willing at
16 the end of the day. What the evidence suggests is that Mr
17 Barwell was very keen to effect a sale and he had
18 notwithstanding his statement in April 2002 been engaged
19 fully in a debate with Northcliffe towards the end of 1999
20 and the beginning of 2000 as to the possibility of a sale
21 of the title.

22 This suggests that the Director smelt or scented a
23 possible rat because in assessing the credibility of the
24 Independent's statements for the purpose of relying upon
25 them in a decision against Aberdeen Journals the Director
26 did need to know a number of matters. He needed to know
27 that what he was being told by the Independent at all
28 relevant times was accurate and reflected the truth and
29 indeed was reflective of conduct in a normal market. He
30 needed to know that in drawing inferences from the conduct
31 of the Independent there were no extraneous motives or
32 factors affecting Mr Barwell's decision making which made
33 observable conduct unreliable as a guide to what would
34 happen in a normal market. But these events show a number
35 of possibilities or likelihoods which cannot be ignored, as
36 the Director has, in assessing events subsequent to 1996.

37 I should add one further thing about the period in

1 April of last year and this is something which the Director
2 does not know but Mr Barwell emphatically does know, which
3 was that seven days before he went to see the Director
4 General of Fair Trading on the 26th he had signed a
5 confidentiality agreement with Northcliffe in which he was
6 proposing to offer to sell the Independent.

7 MR HOSKINS: Sir, I hesitate to interrupt but Mr Green is
8 giving evidence. As you have said, we have piles of files
9 in front of us. It is an absolutely extraordinary
10 statement to make.

11 THE PRESIDENT: We will see what is going to come up.

12 MR GREEN: I am perfectly happy to make good anything I say
13 on this by production at any stage of all of the documents.

14 THE PRESIDENT: I think if you want to rely on a major
15 document like this, Mr Green, you have got to have some
16 evidence on it.

17 MR GREEN: Yes, I understand that.

18 MR HILL: Can I just make a point, please. There is
19 the confidentiality agreement and I do not understand why
20 this is being raised in the Tribunal in an open way.

21 MR GREEN: The confidentiality agreement does not
22 relate to this; it was simply as to the use of some
23 financial information which Mr Barwell wished to put.

24 THE PRESIDENT: Let us take this in stages. Just go
25 over again for me what you have said this document is.

26 MR GREEN: On 19th April ---

27 THE PRESIDENT: This is 2002, is that right?

28 MR GREEN: 2002.

29 THE PRESIDENT: That is three weeks after our earlier
30 decision.

31 MR GREEN: Yes. A confidentiality agreement was entered
32 into, signed by Mr Barwell, and it concerned the
33 confidentiality of certain information which Mr Barwell
34 wished to provide to Northcliffe, and plainly I am not
35 referring to that information. This was in the context of
36 an approach made by Barwell at the beginning of the year to
37 sell his titles. This is all documented in letters with

1 his name on them and we can produce them to the Director,
2 to Mr Barwell because he has them, and we can produce them
3 to the Tribunal. The statement made seven days later was
4 palpably misleading. The relevance of this to this
5 case ---

6 THE PRESIDENT: I think, just before we go on, are these
7 documents available? Have you physically got them here?

8 MR GREEN: I do not have them physically here but I can
9 produce them within 24 hours, if that would be of
10 assistance.

11 THE PRESIDENT: I think it is very difficult for you to
12 rely on documents that we have not seen and the Director
13 has not seen.

14 MR GREEN: No, I appreciate that, and I have to confess
15 I only learned about this as we were coming up on the train
16 yesterday; that is no excuse, I understand, and that is
17 why I would only be saying this if I was confident that I
18 had instructions to make available the documents.

19 THE PRESIDENT: Is there anyone in the room who has actually
20 seen the documents?

21 MR GREEN: Yes, Mr Palozzi, because he was the recipient
22 of the letter from Mr Barwell.

23 THE PRESIDENT: Mr Hill, do you know anything about this?

24 MR HILL: Absolutely nothing at all, I am afraid.

25 MR GREEN: I think the relevance of it is quite clear.
26 If it is the case that Mr Barwell's conduct vis-a-vis the
27 Independent was as a fire ship which had as its purpose the
28 stimulation of an offer to purchase from Northcliffe then
29 that would profoundly affect the analysis of any statement
30 made by him. You can see that in 1999 it is apparent from
31 the documents and the references to the reports of Mr
32 Harkness that there were discussions about a sale.

33 THE PRESIDENT: Have we got Mr Harkness's reports?

34 MR GREEN: We do not, no. The documents from 1999, though,
35 largely speak for themselves. They refer to the
36 possibility of a sale. They refer to the fact that
37 Northcliffe was contemplating a purchase. They actually

1 refer to discussions between Mr Harkness and Mr Barwell in
2 the context of a sale. All I have to do is to persuade the
3 Tribunal that there is an alternative explanation for these
4 events. The Director's failure to verify or follow up the
5 inconsistency between the statement made in April and the
6 perfectly clear inferences flowing from the 1999
7 correspondence, with respect, does reveal a naivety on the
8 part of the Director and a failure to apply a proper degree
9 of circumspection to the evidence.

10 This bears directly upon the paragraph which the
11 Director relies upon where it is recorded that Mr Barwell
12 believes that the Evening Express is vulnerable to the
13 Independent. The Director relies upon that statement,
14 amongst others. He says, "Well, if Mr Barwell believes
15 that and he is an experienced man, and his vehicle, the
16 Independent is rendering the Evening Express vulnerable,
17 that is evidence that they are in the same product market".

18 But what if the real motivation is something different;
19 if the Independent is creating an advertising vehicle which
20 is completely unsustainable in the real world but is
21 entirely logical from the perspective of Mr Barwell if he
22 is trying to force a sale?

23 In those circumstances it is not possible to draw an
24 inference that they are in the same product market simply
25 because a disfigured commercial vehicle has been created
26 for the perfectly rational purpose of forcing or
27 stimulating a sale to the incumbent. What the Director on
28 the other hand is saying is that you can look at the
29 conduct in the market and you can assume that it is normal
30 commercial conduct, untainted by any extraneous factors,
31 and you can deduce from that that if Mr Barwell thinks that
32 the two papers are in the same product market, so be it,
33 that is evidence which can be taken at face value.

34 Setting aside anything which happens later in 2002,
35 which is outside the relevant period, what one can see even
36 from the 1999 documents is that there is a perfectly
37 possible alternative explanation which renders the

1 Director's reliance upon that evidence utterly
2 unconvincing. And even if it were the case that in 1999
3 the Independent had been created as a vehicle which did
4 render the Evening Express vulnerable, again that would not
5 show that they were in the same product market if the
6 Independent was an artificial vehicle which had this
7 ulterior motive attached to it, namely, to stimulate a
8 sale. Even the words in that memo relied upon by the
9 Director which makes it vulnerable are equivocal; they
10 suggest only that the Independent is coming close to making
11 the Evening Express vulnerable; it does not say it is
12 vulnerable or is affected, the word "vulnerable" can mean
13 simply potentially subject to a competitor's constraint but
14 not yet.

15 If the Director has the burden of proof he must
16 convince you that statements made by the Independent are
17 worthy of considerable weight. If there is evidence that
18 Mr Barwell or the Independent conveyed inaccurate or
19 misleading information or if there is evidence that the
20 Independent's conduct was motivated by artificial or
21 extraneous considerations then it is impossible for the
22 Director to put these forward as statements or conduct from
23 which you can safely draw conclusions.

24 We have criticised in our notice of application and
25 elsewhere the Director for also adopting a selective
26 approach to the evidence. There are two occasions upon
27 which the Independent has stated to the Director that the
28 product market is in actual fact three papers only; these
29 are ignored by the Director. I think you have probably
30 seen both of these already and perhaps it suffices to give
31 you the references. First in volume 2, page 762, there is
32 a letter from the Independent to the Office of Fair Trading
33 of 8th March 2000.

34 THE PRESIDENT: I think we had better look at it, Mr Green.

35 MR GREEN: I think it would probably be sensible. If you
36 could start, please, at 760 which is a question asked by
37 the Director General to the Independent, a question asked

1 on 29th February 2000 to Mr Paul Robins. Question 1 is:
2 "Please set out your views of the relevant product and
3 geographic markets in which the Herald & Post competes in
4 the light of the OFT's guidelines on market definition".
5 The answer to that question is on the next page, 762: "The
6 relevant product market that the Herald & Post competes in
7 is the local newspaper market and more specifically the
8 local free newspaper market. The geographic market is
9 primarily the city of Aberdeen although the Herald & Post
10 cover some small villages on the outskirts of the city. We
11 are their only direct competitor within both these markets
12 [that is, the geographic and the product market]. Both the
13 other newspapers within Aberdeen are daily paid for titles
14 owned by Aberdeen Journals".

15 That is an explicit statement which really cannot be
16 nuanced in any way, it says that the product markets are
17 the local free newspapers.

18 THE PRESIDENT: I have always had a little bit of difficulty
19 with the point you make on this because it seems to me that
20 Mr Robins is actually saying something slightly different.

21 He starts off by saying, "The relevant product market that
22 the Herald & Post competes in is the local newspaper
23 market".

24 MR GREEN: Yes, and then the words, "and more specifically".

25 THE PRESIDENT: Yes, no-one doubts that the Herald & Post
26 and the Independent do compete in the local free newspaper
27 market but he does seem to be expressing it slightly more
28 wider than that, he is talking about the local newspaper
29 market.

30 MR GREEN: The local newspaper market would logically
31 include something like the Press & Journal which is a
32 journal which they accept ---

33 THE PRESIDENT: When he says "both these markets" in
34 number 2, what is he referring to?

35 MR GREEN: The geographic market and the product market,
36 because he was asked the question about the product market
37 and the geographic market, therefore two discrete markets

1 were asked about and that is his answer. Free newspaper;
2 he is talking about the local free newspaper market in the
3 first sentence; he does not say "markets," he describes it
4 quite specifically as "the free market" and then the
5 geographic market is primarily Aberdeen. Adding those two
6 markets together you get the free newspaper market in
7 Aberdeen. Then he says, "We are the only direct competitor
8 within both these markets," i.e. free and in Aberdeen.
9 "The other newspapers," so he is then identifying papers
10 which are outside of the market, and he is referring to
11 both of them, "are daily paid for titles owned by Aberdeen
12 Journals." The exclusion in that last sentence helps one
13 explain what he is saying in the remainder of paragraphs 1
14 and 2.

15 The other reference to product market was at the
16 meeting of 26th April, page 2057 of volume 5.

17 THE PRESIDENT: This is in 2002 now?

18 MR GREEN: This is in 2002, indeed. At the bottom of 2057,
19 the last full paragraph, starting, "KB questioned":

20 "KB questioned that he had addressed the complements
21 substitute issue. He noted that from Aberdeen Journals'
22 perspective the Herald & Post and the Evening Express were
23 complements and not competitors due to the low quality of
24 the Herald & Post. AD [that is, Miss Dadley from the
25 Office of Fair Trading] pointed out this contradicted his
26 earlier statements?"

27 Mr Barwell is here saying that from AJ's perspective
28 the free and the paid for papers were complements, not
29 competitors. The Office of Fair Trading pointed out that
30 this was contradictory. Mr Barwell did not in response to
31 that say, "Well, no, this is absolutely incorrect, I've
32 made a mistake". The OFT apparently took it to reflect Mr
33 Barwell's view; obviously troubled by it, they noted it
34 was inconsistent with his earlier statements. There is a
35 question mark added at the end of that paragraph which
36 might possibly suggest this was something which the
37 Director was going to follow up but there is no recorded

1 retraction or qualification by Mr Barwell and there is no
2 follow up correspondence from the Office of Fair Trading on
3 this point.

4 What one has here are two statements which from
5 different perspectives suggest that looking at the market
6 in 2000 the products were complementary but not
7 competitive. The Director can ignore them if he wishes, he
8 simply adopts a selective approach to the evidence and does
9 not try to follow them up, but there they are, they are in
10 the evidence, two statements, two years apart, both
11 reflecting the period circa March 2000.

12 The Director also relies upon conduct. One of the
13 matters that the Director relies upon quite heavily is the
14 advertising sales methodology of the Independent and he
15 relies upon the fact that the sales staff of the
16 Independent cold called advertisers in the Evening Express.

17 He relies upon a statement made by a former employee of
18 Aberdeen Journals who subsequently became employed by Mr
19 Barwell, and we have set this out in our notice of
20 application at paragraphs 5.51 to 5.54. I do not intend to
21 go over the points we have already made but I would like to
22 make a number of observations about the relevance of this
23 sort of conduct.

24 What the actual evidence shows is that the sales staff
25 of the Independent reviewed the advertising pages of
26 numerous magazines and papers simply to identify who was
27 advertising. Mr Barwell in his witness statement, and I
28 would ask you to go to this, please, in volume 5, page
29 2361, page 4 of the statement, the bottom paragraph, says
30 here:

31 "In targeting potential new advertisers, whether one is
32 the advertising manager of a free or paid for title, the
33 approach is to look through the pages of the other local
34 newspapers and magazines to see who is advertising in these
35 and seek to acquire those advertisers at the same time as
36 preserving one's own. All newspapers have a substantial
37 number of field and telesales staff whose job it is to

1 contact potential customers to persuade them to advertise
2 in these papers. When the Independent opened business it
3 had 10 members of staff engaged in these spheres of
4 activity. They spend and still spend a large proportion of
5 their time talking to Aberdeen Journals' advertisers."

6 What Mr Barwell is saying is that quite sensibly
7 advertisers will buy a series of other papers and magazines
8 and will flick through to see who is advertising. Amongst
9 that range of titles will necessarily be those titles of
10 your nearest competitor, the Evening Express, if you think
11 you might suck up some customers from them, the Herald &
12 Post, who knows, Hare and Hounds, Country Life; it depends
13 upon the advertiser whether they have an interest in
14 advertising in Aberdeen or the region. But this is an
15 ordinary technique; it does not connote any particular
16 view about product market. On Mr Barwell's evidence sales
17 staff would target, to use his words, newspapers and
18 magazines to see who was advertising, equally and without
19 distinction. It does not say that simply because you
20 amongst others look in the Evening Express to see who is
21 advertising you necessarily think they will all switch to
22 you. You may be doing it because they are complementary
23 advertisers who may allocate a portion of their advertising
24 budget to you.

25 The Director's finessing of the evidence on this point
26 is an example of what we criticise in this case. In the
27 second rule 14 notice the Director said only of this self
28 same evidence that the Independent saw Evening Express
29 advertisers as a potential source of business; the
30 reference to that is volume 4, page 1453, paragraph 131.
31 He says there that the Independent evidence to him was that
32 the Independent could attract what were described as
33 marginal advertisers. But in the decision we find an
34 entirely different analysis of the same point. In the
35 decision he draws a much stronger inference though for no
36 apparent reason, and not by reference to cogent or new
37 evidence.

1 In truth, even if the Independent did persuade an
2 advertiser in the Evening Express to take up an advert in
3 the Independent it does not show switching because it is
4 much more likely to represent complementary usage. Again,
5 if I could take you back to the meeting in April 2002 there
6 is a reflection of this very point which was expressed by
7 the Independent to the Director General; this is on page
8 2056. I wonder if I could ask you please to read the four
9 paragraphs under the heading, "Targeting the Evening
10 Express," on page 3, and the important paragraph, which I
11 will return to, is the third paragraph. It is page 2056,
12 page 3 of the numbering of the internal memorandum.

13 (Pause) The point being made here by the Director was:

14 "BM [Mr McGrath] suggested that the fact that a company
15 that advertised in both the Evening Express and the Herald
16 & Post could be a double edged sword. On the one hand it
17 could be evidence that the newspapers are within the same
18 market but on the other hand it could suggest that the
19 newspapers are complements. In response KB stated that
20 advertisers are promiscuous and will for example use an
21 alternative newspaper in addition for a trial paper before
22 switching all its advertising business to the newspaper.
23 PR [that is, Mr Robins] agreed stating that advertisers do
24 not only use one newspaper but often cross promote in a
25 number of publications."

26 What is being accepted is that in reality you may very
27 well get complementary usage, you may get complementary
28 usage or you may find that an advertiser tests out a new
29 paper so that you get double usage for a period of time and
30 at that point they may or may not switch, depending upon
31 the reaction they get to advertising in the complementary
32 or potentially substitutable vehicle. But it is not
33 evidence that simply because you target the advertisers of
34 the Evening Express you necessarily can draw the conclusion
35 that there is substitutability, as the Director does. Even
36 the Independent's evidence is that this may be
37 complementarity, as the Director himself recognised, and Mr

1 Robins expressly stated that advertisers often cross
2 promote in a number of publications; he does not elaborate
3 upon what is meant by that but that is perfectly consistent
4 with complementarity, not substitutability.

5 THE PRESIDENT: It may be, Mr Green, I do not know, in this
6 case there is not a clear dividing line between
7 substitutability and complementarity, that is to say, there
8 is a sort of middle ground where one might be using both
9 papers and as the Director says one might shift the balance
10 of the papers according to the effect of cut and thrust
11 rates and so forth, in which case you have a mixed picture
12 that is partly complementarity and partly substitution, and
13 you might have to ask yourself a question whether that
14 situation is a competitive constraint in the battle for
15 those, as it were, floating voters.

16 MR GREEN: In theory one can speculate that that might be
17 the case. Our submission is the Director has not come
18 remotely close to establishing either that that is the case
19 or that if it is it is sufficient to exert a competitive
20 restraint upon the free and paid for titles. Indeed when I
21 come to comment upon the Director's own statistical
22 analysis, we deride as counter intuitive the results of his
23 own analysis; we actually believe that, far from being
24 counter intuitive, they are only explicable with there
25 being complementarity, properly so defined, and nothing
26 else. I will come to that shortly.

27 One other point about the evidence which the Director
28 relies upon, and our criticism is that again it is
29 selective, I will deal with this point shortly because we
30 have dealt with it fully in writing; we say that an aspect
31 of Mr Barwell's approach towards the Independent was to
32 mislead advertisers into believing that the Independent
33 could compete with the Evening Express, and we have set out
34 in some detail the complaints which were made to the
35 advertising authorities.

36 THE PRESIDENT: Yes, we have read all that.

37 MR GREEN: You have read all that. Our complaint is that

1 the Director simply ignores that but it is consistent with
2 our own analysis of the events of 1999 and earlier which is
3 that the two products that do not actually compete, in
4 order to make them compete the Independent had to turn its
5 free title into a vehicle which it palpably could not be,
6 it could not be sustained in that form, and also had to
7 mislead advertisers into believing it was something that it
8 was not, in other words, that it was closer to the Evening
9 Express than actually it was. One of the adverts we
10 objected to, and our complaint was upheld, was an
11 representation that the Evening Express's circulation had
12 come dramatically down, thereby narrowing the gap with the
13 Independent. That was a false allegation which the
14 authorities upheld as being false. That is evidence which
15 the Director should take into account but he did not.

16 Moving on to just a few brief points about the reaction
17 of Aberdeen Journals to this, I wanted to make one
18 observation about the single piece of evidence in witness
19 statement form that is being relied upon to show this
20 question of targeting of the Evening Express's advertising.

21 There was a statement from a Mr Farquharson which was
22 produced by the Independent, for your reference it is
23 volume 5, page 2277; this evidence is blatantly biased and
24 self serving. Mr Farquharson was employed, as he
25 explained, by the applicant until 1998. He quite candidly
26 explains in his witness statement, paragraph 5, that he
27 hated having meetings with Mr Alan Scott; he described his
28 meetings as ill tempered affairs, in paragraph 5, and he
29 left the company. He makes a series of quite extraordinary
30 allegations but in paragraph 17 concedes that there is not
31 a single bit of paper which he can exhibit or which exists
32 to support his allegations, and he is manifestly the
33 classic disgruntled employee.

34 In the meeting of 26th April Mr Barwell promised the
35 names of five ex employees who could produce similar
36 evidence, employees of Aberdeen Journals, and five
37 advertisers who would support that analysis, yet all we get

1 is Mr Farquharson, a man who hated Mr Alan Scott, who had
2 ill tempered meetings with him, who has not got a single
3 bit of paper to support his propositions, and in a normal
4 civil or criminal context a man whose evidence would be
5 tested most vigorously in cross-examination. This is an
6 example of evidence relied upon which cannot possibly have
7 weight, whether it is supportive of a Napp standard or any
8 standard.

9 THE PRESIDENT: Just remind me where it is relied upon,
10 Mr Green.

11 MR GREEN: It is in relation to the issue of -- perhaps I can
12 ask those around me just to get the reference and come back
13 to that.

14 Can I turn from an analysis of the weight attached by
15 the Director to the motives of the Independent to the
16 reaction of the Aberdeen Journals. The Director relies
17 upon the reaction of the Aberdeen Journals to the entry of
18 the Independent in 1996. Again we have set out fully our
19 analysis of the documents in writing and I am not going to
20 repeat the points made there. I would like only to make
21 two broad points at this stage. The first point is this,
22 that this case concerns a 21 or 28 day period, depending
23 upon whose analysis one accepts, in March of 2000, not
24 events occurring four years earlier.

25 The evidence here of events prior to March 2000 is
26 really very different to the evidence which the Tribunal
27 heard in the Napp case, for instance, where analysis of
28 documents and intention during the course of 1999 was said
29 to bear upon the position in 2000 and there was nothing to
30 break in the Tribunal's view the chain of causation between
31 the two relevant periods. In the present case the evidence
32 is not as to intent, it is as to whether proper inferences
33 may be drawn from much earlier conduct as to product market
34 at a much later point in time, and the only circumstances
35 when archaeological evidence of this nature could be
36 relevant would be if the products which allegedly fell
37 within the same product market retained constant

1 characteristics over the years. But this is not the case,
2 as the Director himself recognises in his decision and in
3 his defence and skeleton argument; this is because
4 newspapers are an infinitely flexible product whose appeal
5 to advertisers depends upon such variable factors as price,
6 circulation, geographical coverage, editorial content and
7 so on, and these play a major part in influencing the
8 readership profile of the paper.

9 As these parameters change so the desirability of the
10 paper changes to advertisers. In the context of a full
11 frontal battle between the Herald & Post and the
12 Independent the parameters of the titles were changing
13 quite dramatically over the four year period and therefore
14 on any view the ability of these titles to even approach a
15 position where they could attract customers of other paid
16 for titles will vary enormously. The actual position on
17 the facts of this case is quite stark; from 1996 onwards
18 until late 1999 the applicant improved the quality of the
19 Herald & Post as it competed with the Independent; the
20 price was coming down, editorial content improved,
21 circulation extended, and so on. For both of these titles
22 it is common ground this was an unsustainable policy, which
23 is why they were losing money. Can I just give you the
24 reference to where this is relied upon by the Director, Mr
25 Farquharson's statement; it is the Director's skeleton
26 argument, paragraph 23 refers to paragraph 3 of Mr
27 Farquharson's witness statement which is page 2277 of
28 volume 5; so that is paragraph 23 of the Director's
29 skeleton argument.

30 THE PRESIDENT: What I was hoping for was a reference in
31 the decision which was relied on.

32 MR GREEN: I will ask those behind to check that.

33 I do not intend to go over this line of documents but
34 you will have seen that in autumn/winter 1999 Northcliffe
35 made it clear to the management of Aberdeen Journals that
36 they had to put in place a strategy which made the Herald &
37 Post viable. In other words, the then operative policy

1 could not be sustained and from late 1999/beginning of 2000
2 onwards one sees that the Herald & Post changed its shape;
3 it reduced its attractiveness, it became a much lower
4 quality paper and by March it was verging on travelling
5 over the cusp of average variable cost, and it is accepted
6 by the Director that after March there was no infringement
7 of chapter 2.

8 By March of 2000 the Herald & Post was losing market
9 share in droves to the Independent and the statistics and
10 the graphs which show this were attached to Mr Scott's
11 witness statement in the first proceedings in volume 1,
12 which I think is your volume 3. We have set out the
13 details in the skeleton argument and it was in the
14 proceedings first time round. But it is accordingly very
15 misleading to rely upon the position of the Herald & Post
16 in the period prior to March 2000 as at all indicative of
17 the position in March 2000, and indeed this is acknowledged
18 by the Director in his decision in paragraph 94 and in the
19 last sentence of paragraph 95. For your note, that is
20 volume 4, tab 67, pages 1681 and 1682. The point being
21 made by the Director there is that because of
22 differences ---

23 THE PRESIDENT: Just let us have a quick look at that.

24 MR GREEN: This is in the context of the Director
25 defending himself against the charge that he should have
26 carried out economic and econometric analyses.

27 THE PRESIDENT: Yes.

28 MR GREEN: One of his reasons for so saying is that
29 because of alterations in the nature of the product over
30 time the market rate may already be at an uncompetitive or
31 distorted level and you cannot therefore draw conclusions
32 about it. Precisely the same point applies to observable
33 conduct at the time. If that observable conduct reflects
34 these distorted market conditions for exactly the same
35 reasons you cannot draw conclusions from them without a
36 great deal of caveating and provisoing.

37 I now have the reference to Mr Farquharson's statement

1 in the decision. It is the second decision, paragraphs 118
2 and 119, volume 4, page 1690. Paragraph 118 quotes from
3 paragraph 4 of Mr Farquharson's statement.

4 THE PRESIDENT: Thank you. I think in very broad terms, and
5 I am probably hopelessly over-simplifying a complicated
6 situation, in very broad terms I think the Director is
7 saying that in 1996 there was the Evening Express and the
8 Herald & Post was a somewhat low grade free newspaper with
9 not very many pages in the Aberdeen area. The Independent
10 comes along as a kind of quality free, if you can put it
11 that way, if you put it rather broadly, which the Director
12 says was capable of taking business from the Evening
13 Express because it was of a quality, unlike the previous
14 version, the Herald & Post, it was of a quality likely to
15 compete with the Evening Express, and that the reaction of
16 Aberdeen Journals was to convert the Herald & Post into a
17 free that would compete with the new competitor and that
18 meant in some ways the Herald & Post raising its game, as
19 it were, in terms of distribution and numbers of pages and
20 editorial content and so forth so as to fight off the
21 threat to the Evening Express and in so doing ran itself at
22 a very considerable loss for a very considerable period of
23 time. That is his analysis of what is going on.

24 MR GREEN: Yes. Assuming that to be correct, it does not
25 prove his point for two reasons. First of all, assuming
26 that the Herald & Post, as it did, improved its quality in
27 competition with the Independent, and there was nothing
28 wrong with that, it was simply a competitive response to
29 improve the quality in order to compete, the Independent
30 also improved its quality. If it was ever going to be in a
31 position to compete with the Evening Express one would have
32 begun to have seen this during the period during which it
33 was at the zenith of its quality in its competitive battle
34 with the H&P, yet Mr Barwell in his meeting with the Office
35 of Fair Trading last year freely says, "Well, so far as the
36 H&P is concerned that was never remotely competitive with
37 the Evening Express," yet the Director is saying, "Well,

1 there was this ping-pong battle between the H&P and the
2 Independent, both improving their quality over time"; yet
3 at the end of the day come 2000 the H&P was still not
4 competitive and in the same product market as the Evening
5 Express, it was complementary; that begins to shed a
6 considerable amount of light upon the position of the
7 Independent, notwithstanding Mr Barwell's claims motivated
8 by possibly other reasons that the Independent could also
9 compete with the Evening Express.

10 The fact that there was a ding dong battle between the
11 Herald & Post and the Independent does not tell you a great
12 deal about whether you include the Evening Express in that
13 battle. One still has the question lurking, was it ever
14 feasible for a weekly free paper to improve itself to such
15 a level as to be able to really attack the daily Evening
16 Express. So even taking the Director's case at high point
17 we say it does not get him to the point he wants to get to.

18 THE PRESIDENT: The Director I think is saying, among other
19 things, that Aberdeen Journals' reaction with the Herald &
20 Post is not credibly explicable simply by reference to a
21 desire to defend the Herald & Post; nobody would incur
22 that kind of loss for that kind of period and go to those
23 efforts just to defend the old style Herald & Post; it is
24 only commercially explicable by a desire to defend the
25 Evening Express as well and that commercial rationale is
26 supported by the documents; that is what he says.

27 MR GREEN: Yes, that is what he says. The question is has
28 he proven it. One then comes back to the stimulus which
29 led to Aberdeen Journals' own response. We say entirely
30 credibly that the Independent's motivation in puffing up
31 its vehicle, increasing circulation and so on, was to bring
32 it as close as possible to the Evening Express with a view
33 to forcing a buy-out.

34 In the meeting which occurred in August 1999 Mr Barwell
35 suggests to the Aberdeen Journals staff that they should
36 reduce the circulation of the respective titles to what Mr
37 Barwell described as more reasonable levels, down from

1 125,000. At 125,000 there is a hint in Mr Barwell's
2 statement that he can make the Evening Express,
3 quote/unquote, "vulnerable"; whether that means they are
4 actually competitive is another matter, but he views that
5 as an unreasonable level of circulation for his own title
6 and he wants the Aberdeen Journals' titles to come down
7 with him from 125,000, thereby moving away from the Evening
8 Express. So ---

9 THE PRESIDENT: Would it not be -- and I am just thinking
10 aloud and provisionally -- on this line of argument and
11 Aberdeen Journals' professed willingness, at least in the
12 documents you have shown us, considered the option of
13 buying the Independent, on this line of argument I think
14 you might have to say, "Well, the Independent had got
15 sufficiently close to competing with the Evening Express to
16 make it worthwhile considering a buy-out, and it may well
17 have been Mr Barwell's intention on this line of argument
18 to bring the Independent sufficiently close to the Evening
19 Express to make that buy-out commercially viable," so that
20 there is a sense in which they are competing with each
21 other but, so your argument would run, they may be
22 competing with each other on this scenario but it is an
23 artificial sort of competition which does not really give
24 you a foundation for analysing what the relevant market
25 would be in normal competitive circumstances. In other
26 words, you would have to concede competition but say it was
27 artificial rather than say there was no competition.

28 MR GREEN: There are three points. First, the 1999
29 documents explain the rationale for purchasing the
30 Independent firstly in terms of stemming losses to the H&P.
31 Secondly, in so far as it is moving towards being a threat
32 to the Evening Express it appears inevitable that one draws
33 the conclusion from the documents that that could only be
34 achieved on a basis which was unsustainable on the part of
35 the Independent and the Director certainly has not proven
36 that to compete with the Evening Express the Independent
37 could make money. One has to remember that it must be

1 intrinsically very difficult to do that as a weekly paper
2 competing against a daily paper.

3 We have evidence from that August 1999 meeting that Mr
4 Barwell viewed a circulation of his own title of 125,000 as
5 unreasonable because he was asking the Aberdeen Journals
6 staff to reduce it, to bring it down. He says on a number
7 of occasions, which we have recorded in the skeleton
8 argument and the notice of application, that circulation
9 was an important element for Mr Barwell in persuading
10 advertisers that he could compete with the Evening Express.

11 So the evidence, such as it is, suggests that he could not
12 viably on a sustainable basis use the Independent to
13 compete with the Evening Express. If he ever got to that
14 stage, and the Director has not put forward analysis
15 showing that he did get to that stage, it could only have
16 been on an artificial basis and the motivation was only to
17 stir up a hornets nest within Northcliffe to persuade them
18 to buy the title.

19 None of that in our submission proves a sufficiently
20 close relationship between the products for them to fall
21 into the same market. Indeed, if that is a plausible
22 explanation for the documents, which we submit it is, then
23 the observable reaction of the H&P during this period
24 becomes irrelevant. If the Independent is operating in the
25 market place with an unrealistic or unsustainable business
26 plan or one which is only realistic in the context of the
27 motive to be bought out then such an artificial stimulus
28 will trigger a reaction which itself is likely to be a
29 departure from normal competitive reactions. The Aberdeen
30 Journals titles had to compete, it was perfectly lawful for
31 them to compete during the period, the Competition Act was
32 not in place; nothing prevented them from vigorously
33 competing, if they had not done so the H&P would have lost
34 market share and even more revenue. The reaction of
35 Aberdeen Journals cannot therefore be analysed in terms of
36 evidence of product market without understanding a very
37 great deal more about the stimulus to the reaction.

1 In this context, since Mr Barwell spouted the mantra
2 that he was out to get the Evening Express then it is
3 hardly a surprise to see the mantra reflected in internal
4 Aberdeen Journals documents but again one cannot without a
5 great deal of further reflection upon what really happened
6 use that as cogent evidence of product market. If there is
7 an artificial stimulus and you reflect that in your
8 internal documents then that may not reflect the true
9 position.

10 Of course we are dealing with a period prior to March
11 2000 and one should not forget that whether or not you
12 conclude that Aberdeen Journals managed to meet AVC in
13 March it was certainly moving towards that and very shortly
14 after March did reach AVC and moved on upwards, so the
15 period around March is probably the best way of looking at
16 the reaction of Aberdeen Journals; that is the relevant
17 period we are concerned with, and no other period; during
18 that period on any view, whether we succeeded in achieving
19 AVC or not, on any view they were trying to achieve AVC and
20 they either fell short by £14,000 or £15,000 or let it,
21 depending on whose view of the meaning of costs one takes.

22 But at that point in time they were losing market share,
23 that was the reaction, they were losing market share
24 because they had recreated the Herald & Post into an
25 inferior product and the Independent had now positioned
26 itself above the H&P and was taking away market share.
27 That is the reaction that we invite the Tribunal to
28 examine, not a reaction months earlier in a different
29 economic climate.

30 As to the difference between those relevant points in
31 time, a point we have set out in the notice of application,
32 Mr Barwell himself acknowledged that in March 2000 Aberdeen
33 Journals was engaged in what he described as drastic
34 action. He refers to a sharp increase in advertising rates
35 and drastic action and reducing quality, and the reference
36 to that is volume 2, pages 856 and 857, it is a letter of
37 18th April 2000. So even the Intervener recognises, if you

1 wish to look at it, pages 856 and 857 ---

2 THE PRESIDENT: This is 18th April.

3 MR GREEN: Yes. I think I might have a wrong reference.

4 For example on 857, this is April: "If Aberdeen Journals
5 maintain ... why are they taking such drastic action?" And
6 on the previous page, in the middle: "The following list
7 shows advertisers who report sharp increases in advertising
8 rates within the H&P over the last couple of weeks. All
9 report being told that the OFT is forcing Aberdeen Journals
10 to increase rates because of our complaint". That is
11 evidence of reaction. It is a quite different reaction to
12 that a number of months earlier.

13 I will finish this section of my submissions in a
14 couple of minutes.

15 THE PRESIDENT: Then we will rise for a short break.

16 MR GREEN: Yes, and I want to make some short submissions
17 pulling together some conclusions about the Director's
18 analysis of this type of evidence.

19 The first point is that it is all indirect, tertiary
20 evidence which does not flow from anyone connected with
21 advertisers. It is largely multiple hearsay and it
22 reflects at the very best an extremely indirect source of
23 evidence.

24 The second point is the Director's approach has been
25 selective. He has omitted references which are
26 inconsistent and issues which are highly relevant to the
27 analysis.

28 The third point is that his faith in the accuracy of
29 evidence submitted by the Independent is misguided.
30 Throughout the entire period the relevant motivation behind
31 the Independent's strategy was never properly examined by
32 the Director. Moreover, the implications of that motive
33 for the reliability of evidence tendered by the Independent
34 were not considered. Mr Barwell's statement about his
35 desire to sell the Independent in April 2002 whilst the
36 decision was being prepared appears to have diverted the
37 Director's team from considering this issue but, with

1 respect, it palpably was a live issue even on the basis of
2 the documents already on the file.

3 Fourthly, no consideration is given by the Director to
4 the fact that the relationship between the free and the
5 paid for papers could very well have varied over time. It
6 is a species of the cellophane fallacy to assume as the
7 Director does in this regard that he can observe conduct in
8 1996 and 1997 and onwards and draw conclusions relevant to
9 March 2000.

10 Fifthly and finally, if the Director is to be entitled
11 to ignore statistical or survey evidence then evidence of
12 this type we submit to have any real evidential value would
13 have to be absolutely unequivocal and consistent with
14 logic. Moreover, the Director should be required to prove
15 to a high standard that it was impossible to collect higher
16 quality evidence. In all these ways we believe the
17 Director's assessment of the weight to be attached to these
18 different types of evidence is defective.

19 I am now moving on to deal briefly with the question of
20 the survey evidence, if that is an appropriate moment.

21 THE PRESIDENT: Yes, we will rise until 12 o'clock.

22 (A short adjournment)

23 MR GREEN: I would like to turn now to the question of
24 the survey evidence. As you know, our criticism is that
25 the Director should have but did not conduct any form of
26 survey of advertisers' views. The Director's reasons in
27 the decision not to conduct a survey are set out; he
28 elaborates upon them in paragraph 79 of the defence; the
29 gist of the Director's position is as follows. First, his
30 2000 survey was inconclusive. Secondly, therefore, he did
31 not rely upon the 2000 survey; and accordingly it was
32 reasonable for the Director not to conduct any further
33 survey. Thirdly, as the Tribunal recognised in paragraph
34 102 of its first judgment, surveys might not be conclusive
35 because of the difficulties of obtaining reliable data.
36 Fourthly, and we say bizarrely, the Director's failure to
37 obtain survey evidence, and I quote, "provides a further

1 example of the Director's careful assessment of all
2 available evidence".

3 So far as the value of survey evidence is concerned
4 there are two short points to make. In your first judgment
5 you identify the product market in orthodox legal terms is
6 determined largely by reference to demand side
7 substitutability. The classic definition of demand side
8 substitutability focuses upon whether consumers view the
9 products in issue as substitutable in terms of price,
10 quality and intended use.

11 Secondly, in the decision at paragraph 36 the Director
12 himself recognises that it is critical to focus upon the
13 actual requirements of the advertisers in issue. Legally
14 speaking this must be correct because it is the advertisers
15 who reflect the demand side and it is the demand side which
16 is the most important test in law of product market. The
17 real reason for the Director failing to conduct a survey in
18 this case is really quite prosaic.

19 We have set out in our skeleton argument the e-mails
20 which reflect this and I do not think I need to go back to
21 them, but the relevant documentation is set out in volume
22 5, page 2051. In an e-mail of 18th April 2002, almost a
23 month to the day after the first judgment on 19th March,
24 the complainant strongly urged the Director to speak to
25 advertisers. He suggested, we say misleadingly but
26 nonetheless he did suggest, that advertisers, had their
27 views been canvassed, would have confirmed that they were
28 switching. The Director's response was to agree that this
29 was, and I am quoting from the response of the Director,
30 "just the kind of thing we will be looking at when we
31 prepare our new market definition argument". However, he
32 goes on to say that because of time constraints there would
33 be insufficient time to interview advertisers.

34 It is apparent, therefore, from the Director's position
35 that the responsible case officer's response was that the
36 Office agreed that advertisers' views were key, that the
37 Office had not as of 18th April commenced detailed work on

1 the product market argument but that because of time
2 constraints no survey would be possible. There is no
3 mention in the reasons given of the 2000 survey or the
4 reasons set out in the defence. On the contrary, the
5 Director had no reason to suppose that a survey could not
6 be carried out and he accepted that it was important.

7 So far as a survey itself is concerned our submission
8 is he should have conducted a survey. In this regard I
9 think the quickest way to explain some of the relevant
10 points is to ask you to go in the authorities bundle to tab
11 36, which is the Johnston Press v Trinity Mirror
12 Competition Commission report of May 2002. I think the
13 most convenient course I can take given time constraints is
14 to identify the paragraphs and tell you in summary form
15 what is in them and make my points as I go through.

16 The first relevant paragraph is 2.22, page 12, in which
17 the Competition Commission identify that they conducted a
18 survey the details of which are in appendix 5.4, which we
19 have put in the bundle, and they believed that the survey
20 was large enough to shed light on the general
21 characteristics of the market; that is stated in 2.22.

22 In 5.110 on page 86 they refer to previous Competition
23 Commission reports and they make it clear that the
24 questionnaire which they conducted was sufficiently large
25 to enable certain findings to be made. If you turn to
26 appendix 5.4, which is on the next page, 180, paragraphs 1
27 and 2 explain that they were conducting a survey in a
28 larger conurbation than in the present case. There were
29 three conurbations they were examining, not just one,
30 Aberdeen, and they were looking amongst other things at
31 switching between weekly titles, that is evident from
32 paragraph 2.

33 In paragraph 13 on page 181 they explain they
34 commissioned ORC to conduct a telephone survey and it is
35 plain that it was a broad survey involving a large sample
36 of nearly 500 addressees and it shows that an approach
37 based on the sampling of only a portion of advertisers was

1 possible in the Competition Commission's view to generate
2 an indicative result. It also shows that errors can occur
3 but without undermining the reliability of the inferences
4 which the Competition Commission felt able to draw because
5 they set out some of the errors which crept into the
6 sampling and the ways in which they considered that they
7 were or were not significant.

8 If you jump to page 198, the Competition Commission
9 sets out limitations of the survey in a series of
10 paragraphs up to 103. They identified limitations; they
11 also explained why certain limitations of sampling still
12 meant that the sample was perfectly acceptable.

13 Then if you go to pages 205 to 209 there is a record of
14 the 36 questions which were actually asked. They were able
15 to conduct a survey of 476 advertisers in the course of 16
16 days; the interviews lasted approximately 15 minutes each;
17 quick, effective and sufficient for the Competition
18 Commission to be able to draw some conclusions.

19 What would the Director have found if he had conducted
20 a survey? The decision does not address the
21 characteristics of the readership in Aberdeen, although
22 evidence is before the Tribunal of that and I referred to
23 it at the outset of today's hearing. In your March 2002
24 ruling you made clear, however, that it was the particular
25 reactions of the particular advertisers in the particular
26 area which mattered, and for this reason the general
27 Competition Commission reports and their findings could not
28 be substitutes for actual findings. We submit that the
29 decision is deficient in failing to analyse actual reader
30 profiles.

31 But there is this evidence which we adduced last time
32 showing that readers of the frees and paid for weekly and
33 daily titles are quite different. This being so, it begins
34 to explain why advertisers would view free and paid for
35 papers as complements but not substitutes. Mr Scott's
36 evidence, if I can just give you the full reference, is
37 volume 1, which I think is your volume 3, tab 4, pages 168

1 to 172; that sets out the evidence in some detail. Had a
2 survey been carried out as of March 2002 to assess the
3 impact of the free and paid for titles in March 2000 the
4 evidence is overwhelmingly likely to have confirmed the
5 conclusion set out in our evidence in the first
6 proceedings; in other words, the difference between weekly
7 and daily is critical; the difference in periodicity would
8 have been exacerbated by other differences in profile of
9 readers in free and paid for titles; different age groups,
10 social standing, different numbers of readers per copy,
11 different amounts of time the frees and the paid for are
12 read; different geographical coverage, different methods
13 of distribution; we submit that a survey would have
14 concluded that the free weekly was a complement but not a
15 substitute.

16 This, after all, was the trend which flowed out of the
17 very limited exercise which the Director conducted in 2000.

18 We accept its imitations but if one is to deduce any
19 trends from it at all they are that the products were
20 complements, not substitutes. I will not go back to that
21 but we analyse that in our first skeleton argument which is
22 at volume 3, tab 39, pages 921 to 923, especially paragraph
23 34.

24 What conclusions does one draw for this case from the
25 Director's failure to conduct a survey?

26 Firstly, it is directly relevant evidence as the
27 Tribunal recognised in its first judgment and the Director
28 recognised that it was directly relevant in discussions
29 with the Independent and in his decision.

30 Secondly, it is evidence which bears directly upon the
31 legal test of product market because it sets out to measure
32 and assess actual responses to demand side factors, and it
33 is axiomatic that at least prima facie demand side
34 substitutability, price, quality, intended use, in the eyes
35 of the advertiser is the key legal test.

36 Thirdly, in the realm of assessing product markets in
37 newspaper cases the Competition Commission has shown that

1 such surveys can be undertaken quickly and effectively and
2 in a manner which generates indicative results.

3 Fourthly, given that the Director has staked out such a
4 firm objection to performing statistical analysis in order
5 to measure demand side factors it was, we would submit,
6 incumbent upon him to pay extra attention to the only other
7 means of assessing those self same demand side factors,
8 namely, a survey. If he had laid before the Tribunal a
9 report based on statistical analysis then perhaps his
10 decision not to conduct a survey would have been justified,
11 but in the event he has done neither a statistical analysis
12 nor a survey.

13 Fifthly, his actual reasons for not conducting a survey
14 are not convincing. The exchange of e-mails in April 2002
15 suggests that it was time and time alone that deterred the
16 Director from surveying advertisers' views. The Tribunal
17 gave the Director two months to prepare a new decision.
18 The e-mail exchange whereby the Independent urged the
19 Director to conduct a review of advertisers' views occurred
20 half way along the two month period and a month had already
21 been wasted and no such exercise had been commenced.

22 Sixthly, all concerned with this case, including the
23 Intervener -- can I just give you the reference; at page
24 2059, volume 5, where Mr Barwell said at the OFT meeting in
25 April last year that the newspaper industry was most
26 interested in this case and viewed it as a precedent --
27 acknowledged that the ruling will create an authority or a
28 precedent.

29 If the Tribunal endorses the Director's approach that
30 survey evidence is not needed then it will be in these
31 circumstances that the Tribunal will come to that result.
32 It will be in circumstances whereby the Director concedes
33 it is valuable, in circumstances where it plainly could
34 have been undertaken; thirdly in circumstances where it is
35 a technique found useful in the proven course of battle by
36 the Competition Commission reporting side; and, fourthly,
37 where the Director has failed also to conduct a statistical

1 analysis of actual yield and volume data to assess demand
2 side features. We submit that it would be unfortunate if
3 the Director could justify his omission by the excuses that
4 he advances when it was so easily available to him and in
5 all likelihood it would have revealed a result which proved
6 our case of complementarity, not substitutability.

7 Turning from that to the statistical analysis, the
8 starting point is paragraph 145 of your ruling last time
9 round. On that occasion in paragraph 145 you identified
10 the central question as whether and to what extent
11 advertising in the H&P and the Independent represents a
12 substitute for advertising in the Evening Express. RBB
13 Economics was instructed to examine this question and its
14 conclusions are in various reports. It is worth observing
15 that the Director seems confused about this.

16 First, RBB did not consider switching between the
17 Independent and the H&P, that was not the issue set out in
18 paragraph 145 of the ruling, it is a different issue.
19 Secondly, it did not consider switching between the
20 Independent, the Herald & Post, the Evening Express and the
21 Press & journal, which again is a different issue. On the
22 contrary, RBB was asked to do that limited exercise
23 contemplated in paragraph 145.

24 The first and second RBB reports provide evidence
25 demonstrating that there is no material reason for
26 concluding that advertisers considered the daily paid for
27 and weekly frees to be substitutes as opposed to
28 complements. For the purpose of this appeal the relevance
29 of this evidence is that it shows first that a statistical
30 analysis is perfectly feasible and indeed it is clear that
31 it is much easier for the Director to conduct one than it
32 is for Aberdeen Journals to conduct one; and, secondly,
33 that had the Director conducted his own proper analysis in
34 all probability he would have discovered that the results
35 showed complementarity but not switching.

36 The only points I wish to deal with this morning are
37 limited points because the evidence is there to be seen and

1 if you have difficulties with it we have already offered to
2 tender the economists and it has been suggested that if you
3 would like to see them they can be made available at a
4 subsequent occasion to answer any points that you have.
5 The criticisms which the Director has levelled however do
6 serve a useful purpose. Every time a point is raised it
7 means it can be checked and if it is found to contain even
8 a germ of truth it means that the RBB analysis could be
9 adjusted accordingly.

10 The Director's somewhat hysterical attacks have enabled
11 RBB to fine tune its report and its ultimate conclusion is
12 that in 77.3 per cent of cases the result is not consistent
13 with viewing the titles as effective substitutes; in 11.1
14 of cases data was not possible to interpret either way;
15 and in 11.6 of cases it was not possible to examine the
16 data.

17 Could the Director have concluded his own analysis? We
18 know that the Director did conclude an analysis of his own
19 and he found his own analysis to be wanting. I have seven
20 points to make about that analysis, one of which is very
21 important because it shows that the Director has profoundly
22 misunderstood the relevance of his own examination.

23 The first point is that the Director's reason for not
24 conducting his own exercise as set out in paragraphs 95 and
25 96 of the decision is that the prices are not transparent
26 because discounts are given off rate card, and I quote from
27 the decision, "and it is not possible to generate
28 meaningful data for analysis". This, with respect, is a
29 hopeless excuse because actual data was available; the
30 applicant had submitted some actual data in 2000 and RBB
31 used actual invoice data, not rate card date. The Director
32 could very easily have got that data from the Independent
33 and from the applicant.Commission

34 The second point is that the Director says that his
35 statistical analysis used data from 1995 onwards. He says
36 that this was likely to generate misleading results because
37 switching would depend on, and again I am quoting from his

1 position, "relative prices at any moment in time," in other
2 words, he makes the same point as we do, namely, the
3 distortions in the market brought about by abnormal conduct
4 vis-a-vis price, distribution and circulation can affect
5 conclusions as to switching. He makes the same point in
6 paragraphs 28, 44 and 66 of his defence.

7 We entirely agree with the Director on this point. We
8 make exactly the same point in concluding that you cannot
9 draw inferences from earlier conduct. The problem,
10 however, is cured not by looking at data from 1995 or
11 onwards but by looking at data around March 2000, and as to
12 this that is precisely what RBB did.

13 The third point really follows from the previous point.

14 If prices were below their competitive level during the
15 period 1996 to 2000 then we submit this would amount to a
16 perfectly adequate laboratory for testing whether there is
17 substitution. If during that period there was no
18 substitutability that would be proof positive of no
19 substitution because it is a more extreme case than would
20 have occurred in March 2000. The products were at their
21 most attractive and therefore exerted a higher
22 gravitational pull upon the advertisers in the Evening
23 Express than at the later period, March 2000.

24 So if the conclusion was there was no switching that
25 would be a very firm and useful conclusion. If there was
26 some switching then it does not prove substitutability
27 because the Director accepts you are looking at a distorted
28 market place but it would at least assist in beginning to
29 identify the outer limits of switching. Hence the
30 Director's broad point is in any event incorrect.

31 The next point is perhaps the most important. It is
32 the Director's point that the results he arrived at were
33 counter intuitive. What he says is as follows, and I need
34 to take this a little bit more slowly. The Director
35 observed that price increases in the Evening Express led to
36 a reduction in usage in the free titles; that was the
37 conclusion which his analysis led him to and he says that

1 is counter intuitive. We submit that in fact it is
2 entirely intuitive for the following reason and is best
3 demonstrated in a short example.

4 An advertiser has a fixed budget of £100; he allocates
5 that budget upon a complementary basis £80 to the Evening
6 Express and £20 to the free title. Then the price of the
7 Evening Express increases. In order for the advertiser to
8 retain the same volume in the Evening Express he now has to
9 spend £90 out of his £100 and therefore only £10 is
10 allocated to the top-up free title.

11 What one then sees is that an increase in the price of
12 the Evening Express leads to a decrease in the volume of
13 the free title and that arises because with a fixed budget
14 and complementary usage that is the natural corollary of an
15 increase in price in the paid for title. That is not
16 counter intuitive, that is in fact entirely logical if you
17 assume that the products are complementary as opposed to
18 substitutes.

19 The fifth point is that the Director's survey sought to
20 test the substitutability of the titles including the Press
21 & Journal but on the Director's own case the Press &
22 Journal has already been rejected as part of the same
23 product market and he therefore conducted an exercise
24 including upon his own case an irrelevant title. There is
25 no explanation as to why the Press & Journal was included.

26 Sixthly, the Director General has failed to disclose
27 his workings and we submit this reflects the paucity of the
28 analysis and the lack of confidence in his argument. I
29 will not go into the analysis of why the Director rejected
30 our application for disclosure; we have set that out fully
31 in the notice of application and in the skeleton argument.

32 His reasons are false in law. He says that he refused to
33 disclose his workings to us because it was an internal
34 document but, with the greatest respect, he relies upon his
35 workings, in particular in paragraphs 93 to 96 of the
36 decision, to explain why he did not conduct statistical and
37 econometric analysis and therefore why he was entitled to

1 rely upon tertiary and subjective evidence. It is part of
2 his reasoning for relying upon other categories of
3 evidence. It is clearly a part of his express reasoning in
4 the decision.

5 THE PRESIDENT: What are those paragraphs, again?

6 MR GREEN: 93 to 96.

7 THE PRESIDENT: Yes, I am just looking at it.

8 MR GREEN: In particular 96 addresses it, and it is
9 the Director's case, emphasised in the skeleton argument,
10 that RBB's own analysis demonstrates why it is absolutely
11 impossible to conduct any form of statistical analysis. We
12 say his own reasoning would have disclosed the flaws in his
13 approach; he should have disclosed it to us; we asked for
14 that data to be disclosed so it could be critiqued; we
15 were given a letter which raised more questions than it
16 answered but were told we could not see the underlying
17 workings.

18 But it is part of his reasoning, it is part of the
19 justification for not carrying out this sort of analysis
20 and the Tribunal first time round said that in some
21 circumstances this sort of analysis may not be feasible if
22 the market is too complex. So he is addressing here a
23 point which the Tribunal raised first time round, it is his
24 justification for not carrying out this analysis and he
25 therefore says he is entitled to rely upon what we submit
26 are inferior categories of evidence.

27 The final point I wish to make concerns the policy
28 implications of this because we submit that the Director's
29 conclusion has some serious longer term implications. It
30 means that statistical analysis will be relevant in a large
31 number of chapter 2 type cases because it will be common to
32 all chapter 2 cases that if the dominant undertaking's
33 behaviour has distorted the market, which is the reason the
34 Director advances here, he thereby is forgiven the need to
35 conduct a statistical analysis. This would we submit be a
36 very dangerous precedent to set. In reality examining in a
37 statistically robust manner the conduct of undertakings in

1 issue even during periods of distorted behaviour can lead
2 to definitive results because if no switching occurs when
3 the conditions encouraging it have been exacerbated it is
4 thereby proven that there is no substitutability between
5 the products in issue. That was the third point that I
6 made. But if some switching occurs, even in this distorted
7 laboratory test, it may still provide some indicative
8 evidence of the parameters of switching.

9 So we submit that the Director's own analysis of this
10 evidence is inadequate. He really cannot come to the
11 Tribunal and say, "It's impossible for us to conduct this
12 exercise," and, "Look, we did it ourselves and it didn't
13 prove viable," without disclosing that material. We asked
14 for it on a repeated number of occasions and we had point
15 blank refusals. What we then get is the Director being
16 forced into a corner; not having carried out his own
17 exercise, he has to perforce engage in a detailed and
18 persistent attack upon RBB. In relation to that I do not
19 intend to go into that for the purpose of this morning,
20 time does not allow it, but in fact it is the economists
21 who are best placed to answer any questions that you have
22 about that. All I would like to say about that is really
23 as follows.

24 THE PRESIDENT: Can I just, before you go on to that,
25 Mr Green, clarify; in relation to this, as I understand
26 it, the thrust of the appeal is that the defendant has not
27 made the requisite evidential standard.

28 MR GREEN: Yes.

29 THE PRESIDENT: As a part of that you make a number of
30 complaints about this statistical analysis but I do not
31 actually find in the notice of appeal a plea of breach of
32 essential procedural requirements, as it were, basic rights
33 of defence.

34 MR GREEN: No, that is not our point.

35 THE PRESIDENT: That is not your point?

36 MR GREEN: No, it is not the point. We obviously
37 considered whether or not to run that and we thought if the

1 Director refuses to disclose it that is for him and it
2 leaves us perfectly entitled to say if he really was going
3 to rely upon the inadequacy of the exercise it was up to
4 him to prove to you that it could not possibly be done and
5 that meant disclosing his workings and subjecting them to
6 the light of day. If he chooses not to do that we invite
7 you to draw negative inferences.

8 THE PRESIDENT: I see; yes.

9 MR GREEN: We also put into the same scales the fact
10 that RBB conducted an analysis and that analysis, having
11 been subjected to a series of criticisms, ultimately comes
12 up with the result which RBB have produced in response, the
13 reply to the statement of intervention from the Intervener
14 and the Director's new criticisms, a result which remains
15 sound. You can make as many knocking attempts at the
16 report as you wish but if you are going to knock its
17 central conclusion it has to be established that these
18 criticisms go to its heart and are not de minimis.

19 RBB's conclusion, as reflected in the flow diagram
20 generated in the last few days, demonstrates, as I said a
21 few moments ago, that nearly 80 per cent of the evidence or
22 of the cases examined shows no evidence of switching. We
23 have taken into account the criticisms made in the
24 Director's skeleton argument and in the statement of
25 intervention and RBB conducted an exhaustive re-review of
26 every single document along with a team from Aberdeen
27 Journals and they went over every single advert again, a
28 huge team replicating the exercise, in order to work out
29 how many manual errors had been made, what percentage of
30 the total this represented and whether it was statistically
31 significant.

32 The Director could no doubt go on picking holes for
33 ever and a day but this would simply help one identify that
34 in fact the exercise can be done. If he is going to say,
35 "It simply is impossible," he would have to have disclosed
36 his workings. If he is going to say, "RBB's exercise is
37 deficient in the following methodological respects," then

1 he can say that but all he does is to improve our argument
2 which is that it can be done. For example, he says it
3 should have been done over a period longer than 10 months.

4 So be it, let the Director do it over a period longer than
5 10 months. He says, "I can't do it because I've only got
6 rate card data". So be it; get invoice level data. He
7 said that RBB are to be criticised because they make
8 assumptions about the Independent's prices. Let the
9 Director get the Independent's prices. He says the sample
10 was not big enough; get more data; and so on. If you
11 make a criticism of that nature and you simply identify how
12 the methodology could have been improved, you are not
13 saying it cannot be done, you are saying, "We know how to
14 do it better".

15 THE PRESIDENT: On this general aspect, Mr Green, could we
16 ask you, indeed everybody, to think about over the short
17 adjournment one particular point which is that, as we
18 understand it, most of these prices are negotiated prices,
19 that is to say, what is in the invoice data is a negotiated
20 price, and what we are wondering to ourselves is how much
21 such data can tell one about substitutability because it
22 may be that in a typical situation with a particular
23 advertiser you are trying to raise the price and he says in
24 response, "Well, if you're going to put up my price I shall
25 simply have to transfer my business or some proportion of
26 my business to the Independent," in which case you back
27 down and the price stays the same. So the absence of any
28 price change does not necessarily show lack of
29 substitutability in that circumstance; it may equally show
30 that one simply negotiated a price at a level to avoid
31 substitutability taking place; and in that connection one
32 can see, I think there are a number of price changes, up
33 and down and so forth, and one wonders to oneself why did
34 not all the prices of the Evening Express simply go up if
35 there was no possibility of some substitution in favour of
36 the Independent. I put that point in very general terms,
37 somewhat layman's terms but perhaps you would just think

1 about it over the adjournment and come back to it later.

2 MR GREEN: Yes, indeed.

3 In terms of conclusions on the question of statistical
4 analysis, and we will obviously consider that point, there
5 has been a long drawn out series of snipes and replies
6 which we say show that an exercise such as this is quite
7 feasible. The Director's refusal to explain the reasons
8 for not carrying out his exercise are inadequate; he
9 should have disclosed his workings. They actually showed
10 that there was no nexus; he described that as counter
11 intuitive but in fact it is perfectly consistent with there
12 being complementarity, not substitutability, and the
13 conclusion of no nexus is plainly not counter intuitive.

14 More importantly, it is consistent with the point I
15 made right at the very outset that it is what one would
16 expect to see by reference to common sense in a market
17 where you are comparing a weekly with a daily paper. It is
18 interesting that even in the Trinity Mirror Competition
19 Commission inquiry where they were dealing with two weekly
20 papers, even in those circumstances only 50 per cent of the
21 advertisers said they viewed them as competitive. Even
22 when they were going head to head on a day by day basis
23 quite a large number of advertisers did not feel there was
24 substitutability but the crucial distinction here is the
25 difference in periodicity.

26 THE PRESIDENT: On that point I think the Director makes
27 something of the fact, as I think you did earlier, that
28 there are specific days when you major on particular types
29 of advertisements, there is a specific day for motors, a
30 specific day for property, a specific day for recruitment
31 and all the rest of it; you might help us in due course on
32 why exactly, if you are advertising in the Evening Express
33 on Thursday, say, for motors, advertisements in the
34 Independent on Friday for motors are not an alternative
35 open to the advertiser who is trying to sell a motor. You
36 are still getting in one day in each case a periodicity
37 point that perhaps needs to be looked at from that angle.

1 MR GREEN: Yes, of course it rather depends upon the day of
2 the week.

3 THE PRESIDENT: Yes. We have got some information about
4 days of the week; I cannot right here remember exactly
5 which day of the week it is.

6 MR GREEN: What you cannot do, though, with a weekly paper,
7 and which is the key to the daily paper being successful,
8 is congregate or concentrate a great spread of a particular
9 type of advertising, say, to the Sits Vac, "You go into
10 Wednesday and we will run an editorial concentrating our
11 commentary on sits vac on Wednesday; on Friday we really
12 want the motor vehicle dealers to concentrate their efforts
13 and we will run some editorial comment which highlights and
14 improves the readership of the paper on that day. You
15 cannot do that with a weekly paper because you just accept
16 ---

17 THE PRESIDENT: My recollection is, and of course I will be
18 corrected if I am wrong, in the papers that we have seen
19 that all three of them tend to concentrate on motors
20 towards the end of the week. If I am trying to sell my
21 motor and if I am a private customer or indeed if I am a
22 car dealer, I am not quiet at the moment seeing why the
23 free newspaper is not a possible alternative to the paid
24 for paper on the day when everybody is selling motors.

25 MR GREEN: The evidence in Mr Scott's witness statement is
26 that I think 30 per cent of the advertising for vehicles
27 concentrates at the weekend because that is the new
28 vehicles and they try to differentiate the new from the
29 second hand and the second hand vehicles tend to be
30 advertised earlier in the week. That is set out in Mr
31 Scott's statement. Of course you can only nuance your
32 advertising in that way if you have a vehicle which runs on
33 a daily basis. I will find the exact reference to that but
34 his statement is that a portion of the motor vehicle
35 advertising occurs at the end of the week and the second
36 hand occurs at a slightly different period.

37 THE PRESIDENT: We were provided with various copies of

1 the newspapers in the course of these proceedings. We will
2 not go into it now but we might actually have a look at
3 them at some stage later in the day just to see whether
4 they give us any kind of flavour for what is going on in
5 this case.

6 MR GREEN: I have to say if one is going to draw conclusions
7 from the configuration of any one paper that really
8 highlights precisely why the Director should have conducted
9 a survey, it is precisely the reason why a sort of
10 anecdotal approach to looking at a few copies of papers
11 could lead to something which was indicative or not. If
12 you are going to get a true flavour of what advertisers
13 really think for the reasons which you set out in your
14 first judgment a survey is really quite key.

15 THE PRESIDENT: Yes.

16 MR GREEN: I want to move from the question of statistical
17 surveys to pick up very finally two short points. I said
18 at the outset that I was predominantly concerned with
19 product market and I have finished that. I would like to
20 spend five minutes in conclusion just highlighting two
21 points that may not have been given sufficient attention,
22 and I will deal with these very briefly.

23 The first concerns effect on trade and it is a point
24 which we raised in our first skeleton argument. It is a
25 point which I wish to emphasise because the decision in
26 this case, paragraphs 210 to 212, tab 67, volume 4, page
27 1723, copy what was said in the first decision but do not
28 in our submission address the right legal point. I simply
29 want to identify what we say the correct legal point is
30 which needs to be addressed. In determining whether there
31 is an effect on trade if one is applying by analogy the EC
32 law test then it is necessary to identify the nexus between
33 the abuse alleged and the effect.

34 On this hypothesis I am assuming that you find that the
35 applicant was guilty of a chapter 2 infringement during
36 March. If that is the case then the extent to which
37 Aberdeen Journals failed to cover average available cost is

1 in the region of £14,000 or £15,000. Therefore that is the
2 abuse. The abuse was failing to cover average available
3 cost because the Director accepts that if prices were above
4 AVC in March eh would not have found an abuse. If he is
5 going to show there is an effect flowing from the abuse he
6 must show the effect flowing from the failure to meet AVC
7 to the tune of £14,000 or £15,000.

8 THE PRESIDENT: So it is a de minimis, you say.

9 MR GREEN: It is absolutely de minimis. The points he makes
10 in his decision address entirely irrelevant issues. He has
11 to address this nexus, and that is what the law says if one
12 was applying under section 60 the Article 82 analogy; for
13 effect on trade between member states it must flow from the
14 abuse, there must be a causal connection.

15 He refers to things such as the impact upon third
16 parties, the reputational effect. The reputational effect,
17 if it exists at all, and there is not a shred of evidence
18 to suggest it does, is something which arises out of the
19 period 1996 to 2000 when the heat of battle was at its
20 greatest. In March 2000 by common accord Aberdeen Journals
21 was engaged in drastic action to make itself less
22 attractive. How can that as a single piece of conduct give
23 rise to a reputation for aggression? On the contrary, Mr
24 Barwell accepts in his own evidence that the Aberdeen
25 Journals titles were bending over backwards to comply with
26 the Competition Act; I showed you the quote earlier. That
27 cannot be a reputation for aggression in March 2000,
28 whatever may have been the situation six months earlier.

29 So the legal point is that the effect has to flow from
30 the nexus between the abuse and that since this is an
31 integral part of the infringement, it is jurisdictional, if
32 the Director cannot establish it, we say he must establish
33 it to the high Napp standard. He fails to identify the
34 evidence he relies upon. The third parties who he says
35 might be deterred are unidentified; no evidence exists to
36 support his conclusion. The reputation for aggression is
37 unproven, it is merely asserted. There is no other entrant

1 or possible entrant who has been identified who has given
2 evidence in support of the Director and there is no
3 analysis at all of whether a loss, whether for 21 or 28
4 days, of approximately £14,000 affects trade appreciably.
5 His statement that the effects are likely is, we submit,
6 not enough to found jurisdiction in a criminal or quasi
7 criminal case. We set out the points in a little bit of
8 detail in paragraphs 69 and onwards of our first skeleton
9 argument and I will not go back over those again.

10 Finally, on alternative product market the nub of the
11 point that we make on the facts is that the moment the
12 product market is treated as free papers only then to
13 determine the alternative product market the Director
14 requires a much more detailed factual analysis. For
15 example, he needs to examine the relationship between the
16 Evening Express and the Press & Journal. If the Press &
17 Journal is then included one would need to examine whether
18 other regional papers have any impact because one then has
19 quite a different set of scenarios for price and quality.
20 And if the Press & Journal and even some regional papers
21 were included then there is the position of the Scottish
22 edition of some national papers and the impact upon certain
23 of the advertisers within those papers.

24 Our real point is that the Director simply has not
25 addressed at all the questions which are relevant to
26 substitutability which you identified even in the first
27 judgment in his alternative hypothesis; he simply jumps to
28 the conclusion that the Evening Express would be a product
29 market in its own right, and that is too glib and too
30 flimsy a basis upon which ---

31 THE PRESIDENT: Is not that the logic of the whole of your
32 case? You argue strongly to the Director that the Press &
33 Journal ought to be excluded and you have also argued that
34 the real market is the Herald & Post and the Independent.

35 MR GREEN: We have argued that the Herald & Post and
36 the Independent are their own market because in March 2000
37 the Independent had a higher market share than the Herald &

1 Post. We have simply argued that the other paid for titles
2 do not form part of the same market; we have not addressed
3 in any detail substitutability between paid for titles,
4 that has never been the focus of attention. We have sought
5 to argue that the paid fors must be excluded and the
6 Director says, "Yes, one but not the other," but we have
7 not gone further than that an examined the relationship
8 between the paid fors and indeed any other type.

9 THE PRESIDENT: I had the impression, made a long time ago
10 now but I had the impression that in the very first half of
11 the proceedings the Director originally included the Press
12 & Journal and your clients said, "No, no, that's quite
13 wrong, you should exclude the Press & Journal".

14 MR GREEN: And the Evening Express. So we were arguing by
15 exclusion saying you must exclude all the paid for because
16 they are in a different product market.

17 THE PRESIDENT: Yes.

18 MR GREEN: Very, very finally, in relation to the abuse of
19 process point I notice from the notice of application that
20 we have not given you what I think is the most important
21 reference to the legal basis for the argument, which is the
22 Johnson v Gore Wood case, but I think it probably suffices,
23 given time, simply to identify the relevant page number;
24 it is page 90A-F of the authority and the authority is tab
25 34. This is the House of Lords' recent judgment in Johnson
26 v Gore Wood on the most modern rendition of the doctrine of
27 abuse of process.

28 It is Lord Bingham's judgment, starting at page 90.
29 There is a long survey of the relevant authorities and then
30 he sets out what he says is the underlying public interest
31 and public policy which is the finality of litigation. The
32 crucial point that we say makes this an abuse of process to
33 raise the alternative product market is that the Director
34 did raise alternative product market in his first rule 14
35 notice and in his decision; he then abandoned it, and that
36 is crucial, he abandoned his case on alternative product
37 market, and the references are in our notice of application

1 and skeleton argument.

2 THE PRESIDENT: I am sorry; it was in the first rule 14
3 notice?

4 MR GREEN: Yes. Well, no, not the first rule 14 notice, in
5 the decision.

6 THE PRESIDENT: It was certainly in the first decision.

7 MR GREEN: It was in the first decision.

8 THE PRESIDENT: And I understood that he abandoned it at
9 the last hearing for the purposes of that hearing because
10 it was not in the first rule 14 notice.

11 MR GREEN: That is not so. That is what he said, that is
12 what he says in his skeleton argument; it is not what is
13 actually recorded in his defence in the first proceedings.
14 It does not matter why he abandoned it, though.

15 THE PRESIDENT: It may matter.

16 MR GREEN: If he abandons it because of some admitted ---

17 THE PRESIDENT: If he abandoned it because at that stage it
18 had not been put and if it is subsequently put so that your
19 rights to defence be respected, he might still be within
20 his rights, subject to this abuse of process point.

21 MR GREEN: With respect, we would respectfully disagree.

22 The Director ran the argument in the decision. He could
23 have run it before the Tribunal.

24 THE PRESIDENT: He would not have got very far.

25 MR GREEN: Well, eh might or he might not. It is no
26 answer to the point to say, "Well, I accept it's a bad
27 point". If you abandon something, if you abandon a point,
28 abandon an entire line of argument, and abandon an entire
29 case on abuse, an alternative case on abuse, simply because
30 you by your own admission have acted inadequately, why does
31 that justify you taking the point the second time round
32 because it was not for the Tribunal to rule on first time
33 round.

34 That is a crucial point. The Tribunal did not rule
35 upon the point and therefore it was not within the scope of
36 the remittal, it was not a matter remitted, it was not in
37 the ruling. It never got to the point of being in front of

1 the Tribunal because the Director waived the point, he
2 abandoned it. If he had run with it, advanced it forcibly
3 in front of the Tribunal in whichever way he saw fit, and
4 failed it would have been a matter that the Tribunal would
5 have ruled upon and it could conceivably have formed part
6 of the remittal. He waived any chance of winning the
7 point, whether it was a good point or a bad point is
8 irrelevant for this purpose, but he abandoned any chance of
9 winning the point by dropping it.

10 THE PRESIDENT: Lord Bingham really indicates that we
11 should adopt a broad merits based judgment taking account
12 of the public and private interests involved and asking
13 ourselves whether the parties' conduct is an abuse. That
14 is the general.

15 MR GREEN: That is the general, but the broad public interest
16 he refers to is the finality of litigation.

17 THE PRESIDENT: Yes.

18 MR GREEN: Any litigant, particularly a public litigant, can
19 say, "Well, there's a broad public interest in me having
20 lots of goes". On the other hand, we would say the real
21 public interest which is identified here is everybody
22 should have one go and there should be finality of
23 litigation and we would say that applies with even greater
24 force to a public authority, not lesser force, but a public
25 authority who has a public duty to get it right and not
26 waste public resources and not harass a defendant on
27 multiple occasions should be subject to the same duty to a
28 high level. Certainly that was the case in the old White
29 Book abuse of process for want of prosecution, public
30 authorities had no immunity from the argument. I do not
31 want to go over this in great detail; it is set out in the
32 skeleton argument and notice of application.

33 THE PRESIDENT: Thank you.

34 MR GREEN: The reference to the motor vehicle advertising
35 and the evidence on that is volume 1, tab 4, pages 170 and
36 171. sir, unless I can assist you further, those are my
37 submissions.

1 THE PRESIDENT: Thank you very much, Mr Green.
2 MR HOSKINS: Sir, can I just raise a timing practical issue.
3 THE PRESIDENT: Yes.
4 MR HOSKINS: What I would like to do this afternoon, rather
5 than going through my skeleton argument, which you have
6 already read, I trust, is respond to Mr Green's arguments.
7 THE PRESIDENT: Yes.
8 MR HOSKINS: Because he has not followed his skeleton argument
9 closely, and I make no complaint about that, it would help
10 me if we could have an extra, say, 15 minutes and that
11 would allow me to get my thoughts in order and hopefully I
12 will be more fluent then.
13 THE PRESIDENT: Then is 2.15 all right?
14 MR HOSKINS: I will work to 2.15 and that will be all right.
15 Thank you, sir.
16 (The short adjournment)
17 MR HOSKINS: Sir, thank you very much for the extra time.
18 I am aware that places a burden on me to keep my promise
19 and to be relatively fluent so I will do my best.
20 If I can deal first with the question of the proper
21 approach to the evidence, the burden and standard of proof,
22 the test is, as we have said at paragraph 1 of the skeleton
23 argument, we accept generally it is as stated in that,
24 strong compelling evidence. But, sir, we do take the view,
25 which was a point that you raised with Mr Green very early
26 on, that when you are looking at what is strong compelling
27 evidence that test will depend on the context. So if one
28 has a question was Mr Smith outside the Black Bull pub at
29 8 pm on Sunday 13th June there is a yes or no answer but
30 when one is looking at market definition, I think the way
31 you put it, sir, or suggested it might be put was there is
32 more of a matter of judgment there, and just as one finds
33 for example in the civil context the notion of a sliding
34 burden of proof, that is not perhaps an attractive way to
35 put it, but the way we would put it is ---
36 THE PRESIDENT: The burden of proof does not slide, does it?
37 MR HOSKINS: I am sorry, the standard.

1 THE PRESIDENT: The burden of proof does not slide.

2 MR HOSKINS: It does not; it is my fault for not ---

3 THE PRESIDENT: The burden of proof stays where it is.

4 MR HOSKINS: My promise to be fluent has gone out of the
5 window already, sir. I am sorry.

6 In relation to the standard of proof we say the proper
7 approach is for the Tribunal to stand back, to look at all
8 the evidence in the round and say, "Are we satisfied there
9 is strong compelling evidence?" I am sorry that is not
10 very scientific; it is probably a matter for the Tribunal
11 when it reads to know whether it is satisfied to that
12 extent or not.

13 THE PRESIDENT: Yes.

14 MR HOSKINS: One of the high points of Mr Green's
15 submissions was, he put it this way, the Director must show
16 to a high standard that it was impossible to collect higher
17 quality evidence. Sir, in our submission that simply
18 cannot be the case. It is trite law that it is generally
19 not appropriate to require anyone, even the Director
20 General of Fair Trading, to prove a negative. But to
21 suggest that in this case the Director has to go through
22 looking at all the different categories of evidence or
23 within each category of evidence and show that it was
24 impossible to get higher quality evidence is nonsense.

25 The test is has the Director produced strong compelling
26 evidence in this case of the relevant product market.
27 There should be no question of proving a negative. That is
28 important because when one comes to the question of survey,
29 statistical evidence etc, it is not, as Mr Green puts it,
30 for us to prove that so-and-so was impossible. We have put
31 forward our positive evidence. We rely on that. We say it
32 is strong and compelling. We have given explanations as to
33 why we think we could not obtain appropriate survey or
34 statistical evidence. If Mr Green wants to come before the
35 Tribunal and say, "Ahah, it could have been done this way,"
36 or, "it could have been done that way," I am afraid that is
37 not a burden which falls on the Director; it cannot be so;

1 it is for Mr Green to come with evidence and to put that
2 doubt in the Tribunal's mind.

3 THE PRESIDENT: The Director has to prove the case on the
4 evidence that he relies on.

5 MR HOSKINS: Precisely.

6 THE PRESIDENT: And that is the question.

7 MR HOSKINS: Precisely, sir. Mr Green referred on a number
8 of occasions to the evidence relied on by the Director as
9 secondary or tertiary evidence, multiple hearsay etc, all
10 sorts of words. With respect, that is not correct. The
11 evidence is direct evidence from the people most concerned
12 with taking commercial decisions in the market place,
13 whatever that market may be. It is contemporaneous
14 evidence and one sees two different types of direct
15 contemporaneous evidence; one sees the statements of
16 intent of assessment of the market and one has what they
17 actually did for a period of four years from March 1996 to
18 March 2000. That is not secondary or tertiary or inferior,
19 it is strong and compelling.

20 As to the approach to be adopted to documents, to the
21 statements, sir, again I think you suggested to Mr Green
22 that one way in which the Tribunal could approach the
23 matter would be to read the documents, to give what is said
24 in them the ordinary meaning and to give the weight that
25 the Tribunal thinks is right. We wholeheartedly agree with
26 that. That is precisely what the Director has done and it
27 is the only sensible approach: one reads the statement,
28 one sees the context and one attaches the weight one thinks
29 is right on the basis of the ordinary meaning. We also do
30 put the point that if the claimant wishes to disagree with
31 the ordinary meaning, if he wishes to say, "Well, in the
32 context we can see how someone might think this means X but
33 in fact what I meant to say was Y," then I am afraid they
34 have to come up with a witness statement from the relevant
35 person saying, "That is not what I meant". The Director
36 has been relying on this evidence for a long time now and
37 there have been plenty of occasions upon which the

1 claimants could have done so. There is a lot of paper in
2 this case. There is no paper which seeks to say that the
3 ordinary meaning of any of the statements we rely on was
4 not the correct meaning.

5 Sir, if I can then move on to Mr Green's fire ship
6 point, the suggestion was that Mr Barwell launched the
7 Independent purely to provoke a situation where Northcliffe
8 would seek to buy that newspaper. That is the first
9 element but there is also a second element which is that,
10 and this is the artificial competition point, I think, the
11 way it was put in exchange with Mr Green, which is that the
12 business plan or the economics which lay behind the
13 launching of the Independent were unsustainable, so in so
14 far as there was any competition between the Independent
15 and the Evening Express that was artificial competition and
16 therefore could not give an indication of the true market.

17 THE PRESIDENT: Yes, those are the two points.

18 MR HOSKINS: Those are the two points. In relation to the
19 first point there is no evidence that Mr Barwell intended
20 to launch the newspaper to force Northcliffe to purchase
21 it. On the contrary, the evidence shows that it was
22 Aberdeen Journals who wanted to purchase the Independent to
23 get it out of the way and that was only rational, spending
24 money to drive the Independent out, to protect the revenues
25 of the Evening Express because the Herald & Post before the
26 Independent came along was a very sorry publication indeed.

27 Mr Green took the Tribunal through the documents. I am
28 not sure whether it is necessary to go through them again;
29 one has the trail, the Tribunal has the references. If
30 one goes through one sees the 5th August 1999 meeting in
31 bundle 3, page 399; Mr Green took you to the section where
32 Mr Barwell said he would not sell ---

33 THE PRESIDENT: I think we had better have it and follow it,
34 Mr Hoskins.

35 MR HOSKINS: I am sorry, sir.

36 THE PRESIDENT: 399.

37 MR HOSKINS: I think that was the Tribunal's numbering. So

1 it is the first volume of documents, now numbered 3, at
2 page 399. It is a meeting between representatives of
3 Aberdeen Journals with Mr Barwell; Mr Green took you to
4 the bottom of 399 and what is said there flatly contradicts
5 the point Mr Green would like to make. Mr Barwell said his
6 turnover this year would be about £1.4 million with costs
7 of £2.1 million. His loss would be £0.7 million," etc.
8 "Next year he expects the loss to be about £0.4 million as
9 turnover grew again. He stressed he was in it for the long
10 term and if it took 10 to 15 years he would do that".
11 With respect, that is not a come-on to Northcliffe, "Come
12 and buy me"; that is, "I'm not planning to sell this
13 newspaper for 10 to 15 years".

14 The next document was at page 401, just over the page,
15 and here one sees quite clearly that the notion of
16 purchasing the Independent is Northcliffe's, not the
17 Independent's, because the strategy is being outlined. In
18 paragraph 2:

19 "You agreed to produce two scenarios as far as the
20 Independent is concerned. The first assumes we acquire
21 them. The second assumes you are given a capital sum of
22 money to neutralise them."

23 This is wholly consistent with the Herald & Post being
24 used as a means of driving the Independent out of the
25 market and it will either be done by making sure that the
26 Independent becomes so unprofitable that Mr Barwell will
27 not fund it or becomes so unprofitable that he will sell it
28 to Aberdeen Journals who will then be free to revert to the
29 monopoly position they had. But there is no suggestion
30 here of Mr Barwell looking for a sale, it is the opposite.

31 It is the same at 402, an internal memo to Mr Ezat,
32 paragraph 2:

33 "The purpose of your visit is to help Aberdeen
34 construct three operational and financial scenarios
35 relating to the Aberdeen Independent. These can be
36 summarised as ...

37 "2.1 Continue with the existing policy.

1 "2.2 To purchase the Aberdeen Independent."

2 The idea of purchase is all Northcliffe's, it is part
3 of the strategy of removing the Independent from the
4 market.

5 THE PRESIDENT: What about paragraph 5 on that page,
6 page 402, the second line:

7 "His [that is, Mr Barwell's] track record has been one
8 of launching publications and then getting interested
9 publishers to buy him out at high valuations. He has been
10 very successful in this strategy to date."

11 MR HOSKINS: That is perfectly possible but that is
12 Aberdeen Journals' take on Mr Barwell's track record. If
13 one looks for evidence that Mr Barwell was simply setting
14 up the Independent solely to force a sale one cannot find
15 any because if there was some Mr Green would have taken us
16 to it this morning.

17 THE PRESIDENT: I suppose you look at the top of 404, for
18 example, page 1, the first paragraph, which is I think Mr
19 Ezat's document, which has a summary there of the alleged
20 strategy, which on that summary might look a perfectly
21 normal strategy.

22 MR HOSKINS: Sir, precisely. This notion of a fire ship
23 only surfaced for the first time in February 2000 when Mr
24 Scott wrote to the OFT. So the notion of a fire ship only
25 arises when they know they are in trouble. All the other
26 documents, the contemporaneous documents where there is no
27 shadow of the OFT, give a very strong indication that
28 Aberdeen Journals believed that the Independent was capable
29 of doing very serious damage to the Evening Express and the
30 notion of a fire ship is, with respect, a defence thought
31 up after the event to explain or to attempt to explain what
32 was clearly predatory behaviour.

33 Sir, 405 was the next reference Mr Green took us to
34 this morning, the third paragraph down: Peter Harkness
35 notes in his report that Barwell thinks he is on a roll at
36 present and says that local factors such as the OFT
37 investigation and his good relationships with local

1 politicians all bode well for the Independent. Again, with
2 respect, that is not Mr Barwell saying, "I can't wait to
3 sell the Independent". Mr Barwell thinks he is on a roll
4 and things bode well for the Independent. It is completely
5 the opposite. And remember that Mr Harkness was sent
6 specifically by Aberdeen Journals to test the water to see
7 if Mr Barwell was going to be interested in selling; one
8 gets quite the opposite.

9 Then 407, and it is the third paragraph from the
10 bottom:

11 "Following discussions with Barwell both Peter Harkness
12 and Alan Scott believe a sale of the Independent to
13 Northcliffe is possible."

14 That is Aberdeen Journals' view, if they approach Mr
15 Barwell they believe he may sell, but again there is no
16 sense of Mr Barwell saying, "Come and get me".

17 Then 408, one sees above "Recommended NMG strategy," Mr
18 Green referred to that paragraph:

19 "Northcliffe can afford to pay a higher price for the
20 Independent than any other external publisher due to the
21 internal savings available."

22 That is all coming from Northcliffe. And then the next
23 paragraph:

24 "The preferred alternative is to purchase the
25 Independent from Mr Barwell and merge the title with our
26 own free title. All indications are that Barwell is
27 prepared to sell the title to NMG and appreciates NMG is
28 the only publisher who can justify a value close to the
29 price he wants/requires."

30 MR Green points to the all indications but where are
31 they? Again this is Northcliffe's view of its strategy for
32 removing the Independent from the market. There is no
33 evidence that Mr Barwell launched the Independent as a fire
34 ship with the pure intention and sole intention of making
35 sure that Northcliffe had to buy the paper. It was
36 launched as a business that he believed would succeed.

37 Mr Green also referred to the interview at the OFT that

1 Mr Barwell gave. That was in bundle 5, page 2057, four
2 paragraphs up from the bottom:

3 "AD [Amanda Dadley] asked Mr Barwell if he was
4 approached by Aberdeen Journals offering to buy the
5 Independent. Mr Barwell responded he had not been
6 approached."

7 The question was, "Have you been approached by Aberdeen
8 Journals?" not, "Did you when you set up the Independent
9 set out with a strategy which was geared solely to
10 achieving a sale of the Independent to Northcliffe?" I
11 think, sir, you made that point to Mr Green. It is not the
12 point he would like it to be. None of these extracts are
13 what Mr Green would like them to be. And in relation to
14 that Mr Green says that the reason why Miss Dadley asked
15 that question was because the Director smelled a rat; he
16 needed to know, according to Mr Green, that what he was
17 being told by the Independent was accurate.

18 Mr Green is too suspicious. One can well imagine why
19 Miss Dadley would have been interested in knowing whether
20 Aberdeen Journals had offered to by the Independent because
21 that would have been further evidence of exclusionary
22 intent, i.e. was Aberdeen Journals trying to create a
23 situation where the Independent would lead the market.
24 Again, it is completely the opposite point. To suggest
25 that the Director smelled a rat just simply does not stack
26 up.

27 Sir, there is very little I can say about Mr Green's
28 rabbit out of the hat this morning. It is an offence to
29 mislead the Director. On the basis of what Mr Green has
30 put in our submission it would not be appropriate to assume
31 that Mr Barwell has behaved improperly in any way and
32 indeed from looking at the note of the meeting with Miss
33 Dadley there is nothing there to suggest that he has
34 misled. We do not know the circumstances leading up to
35 this alleged confidentiality agreement. But Mr Green's
36 suggestion that the Director failed to follow up
37 inconsistent statements does not stack up because of course

1 there was no inconsistency. The material that the Director
2 had in front of him did not give rise to the inconsistency
3 that Mr Green now seeks to identify. So, with all due
4 respect, our submission is that the rabbit should be pushed
5 back into the hat.

6 I have dealt with the first aspect of this fire ship
7 argument which is was the motivation for launching the
8 Independent to engineer a sale or an offer to buy by
9 Northcliffe. The second element is the artificial
10 competition argument which is was a disfigured commercial
11 vehicle created, that was the way that Mr Green put it.
12 Again there is no evidence which supports that submission.

13 There is no evidence that the Independent would not have
14 been commercially viable in normal competitive
15 circumstances. Let me explain what I mean by that. At the
16 last hearing I made the submission that Aberdeen Journals
17 was not trying to compete with the Independent. If one
18 looks at the graphs at annex 2 to the decision,
19 particularly graphs 1, 2 and 7 ---

20 THE PRESIDENT: I think you need to take us there,
21 Mr Hoskins.

22 MR HOSKINS: I am sorry, sir; thank you very much. The
23 decision is in Tribunal bundle 6, it is the original bundle
24 4, it is behind tab 67 and the graphs are at the end.
25 Graph 1 is at 1729 and one sees the advertising rates are
26 slashed as soon as the Independent comes in. Graph 2 shows
27 the monthly pagination building. Perhaps the best graph
28 for this purpose is graph 7, which is at 1735. In my
29 submission what that shows is the reaction of the Herald &
30 Post as it immediately drops its price, it immediately
31 undercuts. It is not responding to competition, it is
32 pursuing a policy of predation. It is the Herald & Post
33 that drives the price down, it is not that it is competing
34 with the Independent because the Independent comes on to
35 the market and seeks to price competitively. The whole
36 process is driven ---

37 THE PRESIDENT: According to this graph, and I think we

1 have seen it, if we go over the figures the Independent
2 actually comes in at a higher rate than the Herald & Post
3 and then quite soon afterwards comes down in apparent
4 response to the Herald & Post coming down even further; is
5 that right?

6 MR HOSKINS: That is precisely the point I wished to get
7 across, sir, yes.

8 THE PRESIDENT: So it is not particularly the case, as
9 far as we know, that the Independent comes in at a price
10 pitched initially at least below that of the Herald & Post.

11 MR HOSKINS: Precisely, sir, that is not the position.
12 What that shows us is that at the launch of the
13 Independent, and we would submit that graph shows
14 throughout, it is not the case of the Herald & Post
15 struggling to compete with an inefficient entrant. The
16 Herald & Post took the view in March 1996 that it had to do
17 something about the Independent to drive it out of the
18 market and the only basis upon which that was rational is
19 if it feared that the Independent was going to damage the
20 Evening Express because the level of losses sustained in
21 relation to the Herald & Post, given its profitability and
22 turnover prior to the entry of the Independent, simply do
23 not justify the strategy that followed.

24 So the idea that the Independent was launched on an
25 inefficient basis is misleading. The Independent was
26 launched and then found itself being predated against by
27 the Herald & Post, and it was on that basis that Mr Barwell
28 bankrolled the Independent.

29 Sir, if I can ask you to turn now to Tribunal bundle 3,
30 original bundle 1, page 368, which is behind tab 13, this
31 is appendix 2 to Mr Scott's letter to the OFT of February
32 2000. I want to look at this to demonstrate that Aberdeen
33 Journals did not consider that the Independent was
34 inefficient at launch. First of all, if one goes to page
35 368 and looks at the second last paragraph, within 12
36 months of launching the Independent's distribution area
37 matched that of the Evening Express's core area, extending

1 way beyond the Herald & Post's city centre area into the
2 commuter belt. So it is only within 12 months of launch
3 that one finds that elevated distribution area.

4 Then over the page at 369, under the heading, "The cost
5 base of the Independent is not viable in the long term":

6 "The Independent's strategy has been to target itself
7 at the Evening Express and its customer base. In order for
8 that to be credible with advertisers it has sought to
9 replicate the EE's core area and therefore has expanded its
10 distribution area until it mirrors the EE's circulation
11 area, i.e. expanding beyond Aberdeen city to include
12 outlying commuter towns. This has resulted in a
13 distribution in excess of 120,000 and a cost base well in
14 excess of £1.5 million per annum. It is very difficult to
15 understand how the Independent can build a viable long term
16 business with this cost base. It does, however, become
17 substantial ... in the EE's business in the shorter term
18 which was Barwell's primary objective."

19 So Mr Scott's fire ship argument, which is only put as,
20 "It is very difficult to understand how the Independent can
21 build," etc, is premised on the distribution figures 12
22 months after launch, not at the time of launch. Then the
23 second last paragraph on 369 ---

24 THE PRESIDENT: If as you contend the Independent always was
25 a competitor of the Evening Express one would expect the
26 Independent to be building up to a distribution area
27 equivalent to that of the Evening Express, would one not?

28 MR HOSKINS: Sir, the point I am trying to make here is
29 at launch the Aberdeen Journals believed that the
30 Independent was a threat to the Evening Express. At
31 launch, as we have seen from graph 7, Aberdeen Journals
32 immediately went for the throat by driving the price down
33 on the Herald & Post. So if the Independent was a
34 disfigured commercial vehicle the only reason for that was
35 because it was competing in a market which had been
36 disfigured by the Herald & Post. It was not that the
37 Independent was launched deliberately to make a loss,

1 albeit to force a sale.

2 THE PRESIDENT: Yes.

3 MR HOSKINS: One sees that again, at page 369, the second
4 last paragraph:

5 "The only defence available to us has been to try to
6 compete on the same level. We therefore have followed
7 their moves on distribution and sought to compete on every
8 piece of advertising ..."

9 With respect, graph 7 gives the lie to that statement.
10 They were not seeking to compete, they were seeking to
11 drive them out of the market.

12 "... the premise being that as we have a significantly
13 lower cost base on our title we can offer better value
14 rates to advertisers. With hindsight though this premise
15 assumes the Independent as a viable long term business
16 model we believe it does not."

17 With hindsight; so that proves my point, that at the
18 date of launch of the Independent Aberdeen Journals did not
19 consider that the Independent was uneconomic. On the
20 contrary, it considered it was viable and that was why it
21 went for the jugular, and the reason why it went for the
22 jugular was because it was worried about the Evening
23 Express's advertisers.

24 THE PRESIDENT: So all this question mark over viability
25 of the Independent is according to you no more than the
26 result of the Herald & Post's reaction to the entry into
27 the market of the Independent.

28 MR HOSKINS: Precisely. Sir, I think I can make that
29 even stronger because if one looks at page 304, still in
30 this bundle, one should look at 302 first just to see that
31 this is the covering letter to Mr Scott's 10th February
32 2000 submission to the OFT. Then at 303, paragraph 2.4 at
33 the bottom of the page:

34 "The figures attached at appendix 1 show that the
35 Herald & Post has been a loss making title for four years
36 now since the introduction of the Independent. It is,
37 however, important to look at the level of prices over this

1 period in its proper context. Firstly, Independent was
2 launched as a title specifically targeted at our paid for
3 Evening Express title and its distribution area was focused
4 squarely on the principal circulation of our evening paper.
5 We believe that coupled with the advertising rates charged
6 by the Independent this was an inherently unprofitable
7 prospect for a free newspaper."

8 That is crucial because this notion of it being
9 uneconomic is dependent on the advertising rates charged by
10 the Independent and, as I have demonstrated from graph 7,
11 the only reason why the advertising rates of the
12 Independent were as low as they were was because of the
13 Herald & Post's predation. So any argument in relation to
14 a fire ship simply does not stack up. It was not launched
15 on the basis that it would be bankrolled to cause maximum
16 damage. It was launched as a credible commercial
17 operation; Mr Barwell found himself having to bankroll
18 losses because of the predation and the reason why Mr
19 Barwell was prepared to do that was because he wanted the
20 prize at the end of the day, i.e. the Evening Express's
21 advertisers.

22 The first time one sees in the documents this notion of
23 a fire ship of uneconomic entry is Mr Scott's letter to the
24 OFT on 10th February 2000. My submission is that that is
25 simply an attempt to dig themselves out of the hole they
26 were in. It is not reflected in any of the contemporaneous
27 documents and in particular and most importantly it is not
28 reflected in Mr Ezat's statement, which is bundle 1, tab
29 13. Sir, you were referred to a paragraph of that which
30 showed that Mr Ezat was presuming that the Independent
31 could come into profitability and that is precisely the
32 point I wish to make.

33 THE PRESIDENT: What page?

34 MR HOSKINS: It was at 404, sir. 404 is his view of what
35 Mr Barwell believed but at 406 one sees Mr Ezat's own view,
36 the second paragraph:

37 "In terms of the Herald & Post increasing its

1 distribution levels there are two schools of thought. The
2 first school believes that Barwell will maintain his level
3 at 125,000 regardless of the Herald & Post levels as he is
4 targeting the Express and therefore Aberdeen Journals can
5 run at lower distribution levels to contain their losses.
6 The second school believes that Aberdeen Journals should
7 not allow Barwell any opportunity to reduce his print and
8 distribution costs as that would give him a chance to break
9 even and Aberdeen Journals should therefore increase its
10 distribution level up to 120,000, preventing Barwell from
11 reducing his distribution level."

12 So this report, January 2000, indicates that within
13 Aberdeen Journals there was a school of thought that
14 envisaged Barwell breaking even.

15 Sir, the final point in relation to this comes from the
16 Intervener's written submissions where they report that the
17 Independent is now trading profitably, i.e. absent the
18 predatory activity of Aberdeen Journals the Independent is
19 making a profit. It was and always has been capable of
20 being a viable commercial enterprise and the only reason it
21 suffered such heavy losses was precisely because of
22 Aberdeen Journals' reaction to this entry.

23 To summarise this fire ship point, firstly there is no
24 evidence whatsoever that the Aberdeen Independent was
25 launched solely with the intention to sell to Northcliffe,
26 i.e. just to create trouble, and, secondly, even if there
27 were evidence which suggested that it would not make a
28 difference because the evidence I have just taken the
29 Tribunal to shows that one can have a strategy where one
30 wants to engineer a sale but that does not mean that one
31 has to be uneconomic. In fact the best way to engineer a
32 sale is to come up with a damn good product because then
33 the other side is going to have to pay more to get it off
34 the market, and that is precisely what happened.

35 Sir, I can move on from the fire ship point unless
36 there any other points that I can help you with. Mr Green
37 said there are inconsistent statements from Aberdeen

1 Independent which the Director has ignored. The first of
2 those was the letter from Mr Paul Robins which was at
3 bundle 2, page 760. I do not know whether I need to take
4 you back to that because you had an exchange with Mr Green
5 on that this morning. It is at page 760 of bundle 2, if
6 you wish to turn it up, 760 is the question and 762 is the
7 response. We dealt with this at the last hearing and I
8 simply put it like this. That statement is ambiguous. It
9 is not exactly clear what point Mr Robins is making. It is
10 not clear contradictory evidence. But in any event even if
11 it did bear the clear meaning that Mr Green says it does
12 the fact that there are inconsistent statements coming from
13 representatives of the Aberdeen Independent is a matter
14 which shows that they are credible providers of evidence.
15 If in providing evidence to the Director the sole
16 motivation was to say what the Director wants to hear, if I
17 can put it like that, then one would not tend to find
18 inconsistency, so the very fact that they try to be honest
19 and they put forward views is a factor which weighs in
20 favour of credibility.

21 The second allegedly inconsistent statement was in
22 bundle 5, page 2057. It is the paragraph, the second
23 bottom of the page:

24 "Mr Barwell questioned if the OFT had addressed the
25 complement/substitute issue. He noted that from Aberdeen
26 Journals' perspective the Herald & Post and Evening Express
27 were complements and not competitors due to the policy of
28 the Herald & Post. Amanda Dadley pointed out this
29 contradicted his earlier statement."

30 One point to note is that Mr Barwell is saying he noted
31 from Aberdeen Journals' perspective the Herald & Post and
32 Evening Express were complements and not competitors. It
33 is not his view of the market. He is noting that that is
34 Aberdeen Journals' perspective and Amanda Dadley is quite
35 right to point out that that is not his case, that is not
36 the position he has been putting. But we do not know where
37 that conversation went. There is no inconsistent statement

1 from Mr Barwell because he is simply saying, "I note what
2 Aberdeen Journals' position is".

3 So one has the weight of evidence which is set out in
4 the decision; I have summarised it in the skeleton
5 argument for ease of access; and one has the inconsistent
6 statements. One is clearly not inconsistent, one is
7 ambiguous. It is still quite clear that the evidence that
8 is available is strong and compelling.

9 Sir, the next point I would like to deal with is Mr
10 Farquharson who was the ex employee of Aberdeen Journals
11 who provided a witness statement to the Director. Mr
12 Farquharson is dealt with at paragraph 118 of the decision,
13 I think that was the reference that was given to you, and
14 it may be worth just having a quick look at that. The
15 decision is in bundle 4 behind tab 67 and it is page 1690.

16 One sees that one of the items relied on is this reference
17 to previous sales employees and it is Mr Farquharson who is
18 quoted. It is not the main piece of evidence but it is
19 part of the evidence.

20 Mr Green says in relation to that statement that it is
21 blatantly biased and self serving. With respect, that does
22 a great discredit to Mr Farquharson. If I can ask you to
23 turn to the statement itself, it is in bundle 5 at page
24 2277. What is actually stated in the decision is only half
25 the matter. At 2277 paragraphs 1 and 2 he introduces his
26 role with Aberdeen Independent and before that Aberdeen
27 Journals. At 3:

28 "After the inauguration of the Independent I was
29 involved in weekly meetings with Alan Scott, the MD of
30 Aberdeen Journals, together with the sales director,
31 classified advertisement manager and the national sales
32 manager. We all met together to discuss the Independent,
33 that was the purpose of the meeting. The meeting had one
34 purpose only which was to discuss any advertising which
35 appeared in the Independent and the reasons why those
36 advertisements were still appearing there and what the
37 staff and journalists were doing to prevent it happening.

1 Whilst I was not directly involved as a manager of staff at
2 the Herald & Post I was the display ads manager for the
3 Evening Express and Press & Journal."

4 So Mr Farquharson was not a manager of staff at the
5 Herald & Post; he was there in his role as a
6 representative of the Evening Express and Press & Journal
7 at a meeting at which the sole purpose was to discuss why
8 people were still advertising in the Independent, so there
9 is a clear indication again that Aberdeen Journals believed
10 that the Evening Express was vulnerable, was being attacked
11 by the Independent.

12 "As such I was able to arrange deals in relation to
13 these two newspapers for customers of the Independent.
14 "One of the sales team from the Evening Express for example
15 would make contact with a customer of the Independent and
16 offer them a deal in relation to a rate for their business
17 if they transferred across to the Evening Express.
18 Basically the staff were free to do whatever deal they
19 wanted to in relation to advertising in the Herald & Post.

20 The idea was to protect the Evening Express from the
21 Independent. Generally in terms of doing a deal with those
22 customers who wished to transfer it was the profits of the
23 Herald & Post which were sacrificed and if possible the
24 rates were kept up in the Evening Express."

25 I probably could not put the Director's case any better
26 than that. Then paragraph 5:

27 "I can say that I hated the meetings which we had with
28 Alan Scott which were often ill tempered affairs. Although
29 I was responsible for display ads this is a less critical
30 area in terms of advertising revenue and the classified
31 advertisements were dealt with by Donna Henderson. As part
32 of the unofficial group charged with removing Independent
33 from the Aberdeen market I understood what the strategy
34 was."

35 He does not say he hated Alan Scott; he says he hated
36 having meetings which were geared to driving the
37 Independent from the market. So there is no personal

1 animosity of the sort Mr Green suggests. But even more
2 importantly, the very fact that Mr Farquharson refers to
3 the fact that he hated these meetings shows that he is
4 being honest. Again if this was, in Mr Green's words,
5 blatantly biased and self serving one would not find that
6 sort of statement contained in the witness statement. Mr
7 Farquharson is being completely honest about what he ws
8 doing and how he felt about it. So Mr Farquharson's
9 evidence is relevant and is in my submission very strong
10 evidence of what Aberdeen Journals were up to.

11 Sir, if I can move on then to the issue of Aberdeen
12 Journals' reaction to the Independent's entry into the
13 market I think the most powerful point I can make in
14 relation to that is the one I have already made, which is
15 graph 7. Mr Green said what we are concerned about in this
16 decision is a period in March 2000, not events of four
17 years earlier, and he referred to the fact that in Napp
18 there was nothing to break the chain of causation.

19 With respect, there is nothing to break the chain of
20 causation here. I went through this in some detail at the
21 last hearing and I do not intend to do that again. The
22 simple point is this. The evidence that the Director
23 relies on includes Mr Ezat's review which is dated 18th
24 January 2000 and also Mr Scott's letter of 10th February
25 2000. The alleged abuse took place in March 2000. To
26 suggest that the Director is relying simply on evidence
27 which is four years old is not correct. One simply has to
28 look at the decision to see that one starts with how
29 Aberdeen Journals reacted to the Independent and the
30 evidence shows that that was consistent throughout the
31 period.

32 The next point I wish to deal with again is something
33 that was dealt with at the last hearing so I can deal with
34 it very briefly, which is that Mr Green said on a number of
35 occasions the Herald & Post was moving towards AVC in
36 March, therefore the best way of looking at the reaction of
37 Aberdeen Journals is to look at what it was doing in March

1 2000. I submitted last time that no meaningful steps were
2 taken by Aberdeen Journals in relation to the Herald & Post
3 until the end of March and I do not need to go through that
4 again. If I can simply refer you to my skeleton argument
5 this time round at paragraph 64(b), that gives the
6 references to last time. Indeed one also has to remember
7 that when they did finally act at the end of March 2000
8 they were not acting because of commercial considerations,
9 they were acting because the Director was on to them, so
10 that is hardly good evidence of what they viewed the market
11 to be, quite the opposite.

12 Mr Green also said in relation to this that Mr Barwell
13 accepted that Aberdeen Journals had acted drastically in
14 March 2000; again that is simply not correct. If I can
15 take you to the documents Mr Green relied on, it is bundle
16 2 at page 856. It is rather blurred but one can see the
17 date underneath the lion, it is 18th April 2000, so it is
18 in April that Mr Barwell raises the fact that there have
19 been sharp increases in advertising rates in the Herald &
20 Post over the last couple of weeks; that is the fourth
21 paragraph down. Mr Barwell is not saying drastic action
22 was taken in March, quite the opposite, he is saying that
23 drastic action was taken at the beginning of April. It is
24 the same or a similar point at 857 at the bottom:

25 "If Aberdeen Journals maintain they are innocent of
26 predation why are they taking such drastic action?"

27 I think actually that should go with the letter of 18th
28 April 2000, it is the letter from Mr Robins, it is the same
29 letter. It is the same point. So the Aberdeen Independent
30 did not accept that drastic steps took place in March, they
31 say they took place in April.

32 Sir, unless you have any further questions that
33 concludes all I wish to say in relation to the
34 contemporaneous evidence of views and conduct in relation
35 to product market. I still have obviously the survey
36 evidence and economic evidence to deal with.

37 THE PRESIDENT: Yes.

1 MR HOSKINS: In relation to survey evidence I have a number
2 of points to make. The first point is that as the Tribunal
3 said in its first judgment survey data if any may be
4 inconclusive because of the hypothetical nature of the
5 question or the difficulty of obtaining sufficiently
6 informed responses. I think I have shown hopefully since
7 lunchtime that this market had been distorted by pricing
8 below AVC for four years. One looks at graph 7 and also,
9 as I have said, in the skeleton argument, Aberdeen Journals
10 has never denied pricing below AVC from March 1996 until
11 March 2000 save that at a late stage they have queried
12 March 2000, that is purposely dealt with, they accept
13 prices below AVC for four years. If you look at graph 7
14 this market was distorted.

15 Mr Green placed great reliance on the Trinity Mirror
16 survey but Trinity Mirror was a different context. It was
17 not a question of the market being distorted there.

18 THE PRESIDENT: He says that among other things even if the
19 market had been distorted the consequently very low prices
20 being charged for the Independent and Herald & Post ought
21 on any reasonable view to indicate at least some switching
22 or a greater degree of switching away from the Evening
23 Express than there would have been had the market not been
24 distorted.

25 MR HOSKINS: Sir, the true position is that there was
26 switching and that is Mr Ezat's statement. Probably the
27 quickest way is if I can ask you to turn up my skeleton
28 argument in relation to this. It is paragraph 15 of my
29 skeleton argument and I have set out the quote:

30 "This table clearly shows the effect of the battle
31 between the Independent and Herald & Post on the Evening
32 Express. Average weekly revenues have declined from
33 £95,000 per week to £75,000 per week," etc. "Half of the
34 decline can be attributed to the following since ...
35 revenues is not related to the Independent. However, a
36 considerable proportion of the remainder is due to reduced
37 retail property revenues which can be partly attributed to

1 the Independent."Commission

2 Sir, what one finds in the latest round of pleadings
3 was that Aberdeen Journals suggested that Mr Ezat had got
4 it wrong and I have dealt with that in detail in the
5 defence in the skeleton argument. We do not accept that
6 that is the case but even if it is the case there is still
7 evidence of switching. The crucial fact here is that Mr
8 Ezat was asked to conduct a review and to make
9 recommendations in January 2000; he did that; he
10 identified a serious impact on the Evening Express due to
11 the pricing of the Independent and the Herald & Post and
12 his recommendation was to increase the pressure.

13 If the appellant wants to say that Mr Ezat got it wrong
14 and that is not in fact the position where is the witness
15 statement from Mr Ezat? It is glaringly absent. As at
16 January 2000 -- Mr Ezat tracks it over a period of years --
17 there was a substantial loss of business from the Evening
18 Express to the free newspapers, so, theorise as much as
19 anyone wants, that is the hard fact in this case.

20 Sir, it is not simply the case that the Director said,
21 "We don't fancy conducting a survey". A survey was
22 conducted on a limited basis. Paragraph 51 of the skeleton
23 argument again is probably the quickest way to look at this
24 point:

25 "In the context of the original investigation the
26 Director sent a standard enquiry to 41 companies. Ten
27 replied. The Director did not rely on these responses in
28 his original decision as they were inconclusive. This was
29 precisely the position adopted by Aberdeen Journals in its
30 reply, so it accepted they were inconclusive. Given that
31 the original limited survey did not provide any useful
32 results and given the strength of other evidence it was
33 perfectly reasonable for the Director not to embark on a
34 substantial survey of the sort now suggested by Aberdeen
35 Journals."

36 So one has a limited survey, it produces no results and
37 Mr Green says, "Ah, but you should have done a much bigger

1 survey". With respect, that does not follow and in any
2 event, we will come back to what I said at the start but
3 one simply stands back and looks at the evidence that the
4 Director relies on and says is it strong and compelling
5 evidence. We say it is.

6 There is another factor in relation to this, and this
7 applies both to the survey and statistical evidence. In
8 this case the issue is actually very narrow. There are
9 only two companies involved. We are only looking at three
10 products and the question we are asking ourselves is a
11 narrow one; we are saying is the market two products or is
12 it three products. We say it is precisely that sort of
13 case where if one has such compelling evidence of the views
14 of the parties and the parties' conduct in the market that,
15 yes, there is no need to go beyond that to look at survey
16 or statistical evidence because the direct evidence of how
17 the parties acted is enough in that very confined scenario.

18 Another point in relation to survey is timing. I do
19 not want to major on that because I do not want the
20 Director to say, "We didn't have enough time because the
21 Tribunal only gave us X months," etc. Either a survey was
22 relevant or not. But the reality is, yes, it took 16 days
23 to conduct the Trinity Mirror field work but, as I have
24 indicated at paragraph 52 of the skeleton argument, setting
25 up a survey takes a lot longer. I simply want to make that
26 point. It is not simply a quick and clean exercise, it
27 takes months to set something like that up.

28 The final point on this is that Mr Green says had a
29 survey been carried out of the sort that he suggests it
30 would have confirmed the claimant's evidence in the first
31 proceedings. With respect that is pure speculation. Again
32 one has to be very careful about the burden of proof,
33 standard of proof etc. It is not for the Director to prove
34 a negative. If Mr Green wishes to make the case that a
35 survey would have shown that he was correct then Aberdeen
36 Journals should have canvassed advertisers and should have
37 produced that evidence. It did it on the economic analysis

1 side with RBB. It could have conducted some form of survey
2 if it had wanted; I fully appreciate it does not have the
3 Director's powers; simply to come to the Tribunal and say,
4 "A survey would have proved us right," does not take anyone
5 anywhere.

6 If I can move on to the question of economic analysis,
7 perhaps I could ask you to turn to paragraph 26 of my
8 skeleton argument. Mr Green submits that the RBB reports
9 show that statistical analysis was feasible. All the RBB
10 reports show is that they tried to carry out a statistical
11 analysis and the Director's position is it is fundamentally
12 flawed for the reasons we have set out. It does not show
13 that it is feasible. Mr Green says had the Director
14 conducted his own analysis he would have discovered
15 complementarity, not switching. Again that is just
16 speculation.

17 When the RBB material was first presented it was
18 presented as the answer, "Here's proof of no switching".
19 It is very noticeable that by the time the skeleton
20 argument came reliance on the RBB had been reduced to, "RBB
21 shows that if it had been done better it might have been
22 possible to do it". It does not do that. The Director's
23 objection to RBB is not simply that if a longer time had
24 been taken or if more information had been available this
25 might have been possible.

26 We say the methodology is clearly fundamentally flawed
27 and one of the reasons why we say that is the point that if
28 one takes the methodology adopted by RBB, which is to plot
29 distribution changes and to note price changes, what RBB
30 then does is it looks at the position the week before the
31 change and the week after and if there is no evidence of
32 switching he says, "Ahah, no switching". We say that
33 simply does not work and the reason one can see why it does
34 not work is if one looks at the relationship between the
35 Herald & Post and the Independent.

36 The one thing we all agree on is that they compete and
37 if one looks at the graphs, I have indicated some of the

1 scales and I am quite happy to work through an example if
2 that is considered necessary but I think it is hopefully a
3 straightforward point. One simply has to apply the same
4 methodology and it does not work between the Herald & Post
5 and the Independent. If it does not show switching between
6 them then how on earth can one expect it to be valid
7 evidence of whether there is switching between the paid for
8 and the frees.

9 The point is made, RBB was not asked to look at that
10 relationship, but it does not matter because we have 90
11 advertisers and every single one of those advertisers, even
12 I accept sometimes just for one week, used a free and the
13 Evening Express, but a lot of them show a consistent
14 pattern. Particularly the bigger advertisers one finds in
15 the first graph, so it is the ones I have identified in the
16 skeleton argument, are ones where there is clearly an
17 interplay between all three newspapers, and if one
18 concentrates on those graphs that is where one sees no
19 switching between the frees.

20 So our case is not simply it could have been done
21 better and we would have got a result. We say we do not
22 know why it does not work, that is not for us to say, but
23 it simply does not work and that is the end of it.

24 The other point at paragraph 40 of the skeleton
25 argument, is the manner in which RBB have applied their
26 methodology. Sir, as I said, it is almost like a child's
27 arithmetic lesson where you colour in the boxes. One looks
28 at the change in distribution and if in the immediately
29 following week there is not obvious switching one says,
30 "Ah, there's no switching". But the market is not like
31 that; one has to look and see where there is a pattern
32 because switching might come up, say, two or three weeks
33 later. One simply does not know; there are too many
34 imponderables. It is not simply that there is information
35 that could be obtained to make it better; there are two
36 many imponderables; this system will never work. Again I
37 have set out some of the worked examples; I am quite happy

1 to go through them if necessary but hopefully the
2 references will suffice.

3 another of Mr Green's points was, "Well, we could have
4 got more information about this, that and the other," but
5 one of the crucial aspects which is missing is information
6 on the Independent's prices charged to individual
7 customers. To try to conduct this allegedly detailed
8 analysis of switching for particular advertisers looking at
9 each particular week, one simply cannot do that without
10 knowledge of actual prices which the Independent were
11 quoting to and charging customers in those weeks.

12 THE PRESIDENT: It is a bit difficult to criticise RBB
13 or the applicant for that because they have not got access
14 to that data, so they are doing the best they can.

15 MR HOSKINS: Sir, that is precisely my point, neither
16 does the Director, because that information is not
17 available from the Independent. The reference for that is
18 bundle 4, tab 95, page 1985. This is the letter from the
19 Office to Herbert Smith when they asked for information
20 about the Director's own analysis. One of the questions
21 asked was, "What raw data was used?" and the final data
22 deals with what information is and is not available from
23 the Independent. One sees in the second last sentence:

24 "The Office was informed by the Independent that more
25 detailed figures were not available for the period in
26 question."

27 So the detailed information of the Independent's pricing to
28 individual customers is simply not available in this case.

29 Sir, I could go round in circles on this; even if it
30 were available one would still have the flaws that are
31 identified. So RBB takes us nowhere. Yes, they have made
32 a valiant attempt but they have failed and it simply does
33 not work, the methodology they have adopted simply does not
34 work, so it is not a question of more information.

35 If one turns to the analysis carried out by the
36 Director or that the Director attempted to carry out, Mr
37 Green made a number of points in relation to that. First

1 of all, he referred to the fact the Director had said that
2 the reason for not conducting his exercise was that prices
3 were not transparent as discounts were given off rate
4 cards. That is the point we have just looked at. Mr Green
5 said the actual data was available because the applicant
6 supplied it in 2000 but of course the Independent did not
7 supply it because it did not have it and one cannot conduct
8 these sorts of analyses without all the sides of the
9 equation.

10 He posited, and I think this is a point we have already
11 dealt with, that if prices were below the competitive level
12 then that was an acceptable laboratory, was the way he put
13 it, because if there is no substitution in that context
14 then there is never going to be substitution. The problem
15 is that Mr Green's example is based on an assumption which
16 is not correct because Mr Ezat shows that there was
17 substantial loss of business in the Evening Express because
18 of the Herald & Post and the Independent. So it is all
19 very well saying, "What if - ?" We know what the position
20 was because Mr Ezat has told us.

21 He also made the point the Director said that the
22 results that he had achieved were counter intuitive, and Mr
23 Green said the Director observed that price increases in
24 the Independent led to reduction in the use of the free
25 titles, and he says that is intuitive because it shows
26 complementarity, and he gave the example who advertised
27 earlier, of switches. We submit that argument does not
28 take us anywhere for two reasons. First of all the example
29 that MR Green gave us is self serving. It presumes that
30 everyone who advertises in the Evening Express and the
31 Herald & Post views them as pure complements and that they
32 will always keep the same volume in the Evening Express
33 regardless of what happens to its price. Mr Green's
34 example was the Evening Express price goes up and rather
35 than switching you just have less in the free.

36 But that is untenable as a matter of theory because
37 there must always be a price at which it will be, if I can

1 use the colloquial or use the layman's term, better value
2 to reduce volume in Evening Express and to switch the
3 budget to the Herald & Post. If, for example, the starting
4 price in the Evening Express is £1 per square centimetre
5 then if it is raised to £3 one might follow Mr Green's
6 example. If the Evening Express for whatever reason
7 suddenly puts its price up to £20 per square centimetre one
8 falls into the grey area between complement and substitute,
9 sir, that you raised with Mr Green. There will come a
10 stage at which the price will mean that volume is not
11 retained in the Evening Express but rather is switched to
12 the Herald & Post. Mr Green's example does not take
13 account of that; that is why it is self serving.

14 The other point is that even if Mr Green's example were
15 valid it would not affect the Director's conclusion as to
16 why his attempt at analysis is unacceptable. It is the
17 document I am afraid we have just looked at, it is bundle
18 4, tab 95 at page 1987. This is the letter that was sent
19 from the OFT to Herbert Smith indicating what had happened.

20 On page 1986 one has the initial analysis and one has the
21 charts plotted. Then at the top of 1897:

22 "The first of these charts appeared to show the
23 anticipated negative relationship to the Independent's own
24 prices and its advertising volumes."

25 I.e. if the Independent put its price up you would expect
26 its volumes to drop.

27 "When compared with prices for the Aberdeen Journals'
28 titles, the three other charts, however, the results were
29 counter intuitive in showing an apparent negative
30 relationship between the Independent's volumes and the
31 prices for all three Aberdeen Journals' newspapers, i.e.
32 when the prices of each of the three Aberdeen Journals'
33 titles went up there appeared to be a fall in the
34 Independent's volumes rather than a rise."

35 The same methodology is being used to look at the
36 relationship between the Independent and each of the
37 Aberdeen Journals' titles. Negative crossed elasticity

1 between the Independent and the Herald & Post, which is
2 what was found, cannot be explained on the basis that every
3 advertiser saw them as complements, which was Mr Green's
4 example, and the reason why that cannot be done is even
5 Aberdeen Journals accept that the Herald & Post and the
6 Independent competed in the same market. So what this
7 shows is that the methodology produces a result where the
8 relationship between the Independent and the Herald & Post
9 is counter intuitive because it goes the wrong way, it does
10 not make economic sense.

11 It cannot be explained with a complementarity argument
12 because we know they compete, everyone accepts that, and if
13 the methodology fails in relation to that relationship then
14 it must also fail in relation to the others. If the
15 methodology is wrong it is wrong and there is no going
16 round that. So when the Director says the results were
17 counter intuitive it is no more or less than that,
18 economically it simply does not make sense.

19 We come to the non disclosure issue, if you like. Mr
20 Green is not taking a procedural fairness point but I have
21 dealt with this in the skeleton argument at paragraph 50.
22 an I just pick up two points. Yes, it is referred to in
23 the decision but it is not relied on to make any positive
24 case; it is simply we carried out or we attempted to carry
25 out the statistical survey and we did not succeed. That is
26 not the same as seeking to rely on a point in a particular
27 document against someone.

28 But the other point is this. It is an oddity because
29 the Director certainly should not be in a worse position
30 than if he had made no mention at all of his attempt in the
31 decision. The Director could have carried out this
32 analysis and said nothing. In fact he referred to the
33 decision and he provided a detailed summary to Herbert
34 Smith to comment upon.

35 The worst case scenario, as the Tribunal says, "We are
36 not going to allow the Director to rely on that paragraph
37 of the decision". If that is the case, so be it because we

1 rely on the strong and compelling evidence which is our
2 positive case. If Mr Green wants to say economic analysis
3 was necessary in this case it is for him to make that case,
4 not for us to disprove or to prove the negative, rather.

5 Sir, I have very nearly finished. The effect on trade
6 point popped up out of the blue again this morning. It is
7 clear from the decision that the Director took the view in
8 the decision that the conduct in March affected the
9 Independent's business position, i.e. if the Herald & Post
10 had not priced below AVC in March the market position of
11 the Independent may well have been stronger; the
12 competitive position was distorted. Mr Green said it is a
13 de minimis point. How do we know? Again he comes and he
14 says it is a de minimis point but that is for him to make
15 good. The Director said, "Here's an effect on trade". Mr
16 Green pops up at the last moment in the hearing and says,
17 "It's de minimis," but there is no way to put that in
18 context. so we simply cannot take that any further, I
19 cannot take that any further.

20 The alternative product market point I can deal with
21 very briefly, simply to make two points. Mr Green relies
22 on Johnson v Gore Wood. Sir, you were referred to the fact
23 the approach to be adopted is a broad one based on the
24 merits. Here we have a case where the Director did not
25 pursue a particular point at the first hearing because it
26 had not been put in the administrative procedure.

27 The matter is remitted. If, and we have submitted that
28 this is the position, the remittal included this
29 alternative product market point then it was perfectly
30 proper for the Director to go through that process properly
31 in the administrative procedure and to deal with it today.

32 There is no abuse involved in that. Equally, the
33 principle upon which Mr Green seeks to rely, that attempt
34 is wholly misconceived.

35 Johnson v Gore Wood deals with finality in litigation,
36 it is based on Henderson v Henderson, but here this is the
37 same litigation. We had the first hearing, there was a

1 remittal and the matter is raised in the context of the
2 same proceedings, so it is not a Henderson v Henderson type
3 case where someone runs a piece of litigation, it stops,
4 and then tries to run the same point in a different piece
5 of litigation. This is the same procedure.

6 THE PRESIDENT: Could you just help me a little bit on the
7 alternative market issue, assuming hypothetically that you
8 are entitled to rely on it. Where does the alternative
9 market analysis take one? On the alternative market
10 analysis the Independent and the Herald & Post are in one
11 market and the Evening Express is in another market. If
12 for argument's sake the Evening Express is dominant in its
13 allegedly separate market what exactly is the abuse? The
14 abuse can only be using the Herald & Post in the other
15 market to protect the Evening Express from potential attack
16 of the Independent, and if that is the abuse it involves
17 the supposition that they are all in one market in the
18 first place, otherwise there would not be anything to
19 protect it from. So I am not completely clear on what
20 basis the alternative market hypotheses actually advances
21 the matter.

22 MR HOSKINS: I think the decision itself reflects that
23 tension, from memory, sir. If we are wrong on the product
24 market it suggests that there is not sufficient
25 competition, sufficient substitutability for the products
26 to be considered in the same product market. One can still
27 nonetheless envisage a situation where a company like
28 Aberdeen Journals rightly or wrongly perceives a threat
29 from the Independent in a different market and in order to
30 deal with that perceived threat takes the steps that it
31 does, i.e. there are separate product markets and a company
32 which is dominant in one of them takes abusive steps in the
33 other because it believes that is necessary to protect its
34 position, even if factually that is not in fact the case.
35 I think that is the only way it can arise, sir.

36 Unless I can help you any further, those are the
37 Director's submissions.

1 THE PRESIDENT: No. Thank you, Mr Hoskins.
2 MR HILL: Sir, I am here on behalf of the Independent and
3 I think earlier on you were saying that you would quite
4 like to have a look at the papers that were available.
5 THE PRESIDENT: We have been provided with some of the
6 newspapers and I just wanted to mention that fact so that
7 everybody knew what we had actually got. I will ask the
8 Registrar to pass them across. You probably already know
9 this but just so that everybody knows, I think we were
10 actually provided with various copies of these various
11 papers in March and April 2000. I am sorting them out
12 without really having done so before and we have several
13 copies of the Evening Express for 21st March, 22nd March
14 and 23rd March 2000; we have the Independent for 23rd
15 arch; the Evening Express for 27th March; the Herald &
16 Post for 22nd March. So, just to take a representative
17 sample, in the week that begins 20th March we have the
18 Evening Express for Monday, Tuesday, Wednesday, Thursday
19 and Friday, we have the Herald & Post for Wednesday, 22nd
20 March, and we have the Independent for Thursday, 23rd
21 March, just as a one week sample with all the limitations
22 that such a sample in itself has. We asked for those
23 papers as illustrative background just to give us a feel
24 for what we are talking about. Does that help you at all?
25 MR HILL: Yes, it does. I wonder if we might just have a
26 look at the first page of the Independent on 23rd March.
27 There we see effectively what you might call the
28 supplements. We have Motoring and North East; if you go
29 to page 47 you will find all the motor adverts, of which
30 there are many pages. If you look at Recruitment you will
31 see jobs I think on page 42 and then there follows about
32 four or five pages of jobs.
33 THE PRESIDENT: We have one copy and we are looking at it
34 between the three of us at the moment.
35 MR HILL: I have another copy here, sir. I did ask for
36 copies to be made available, actually. I do not have
37 another one of the Independent, I am afraid.

1 THE PRESIDENT: We have another copy of the Independent.
2 MR HILL: So Home Sweet Home is the property section.
3 THE PRESIDENT: So 23rd March, you said Home Sweet Home.
4 MR HILL: Those are the property pages and you will see
5 there is a massive property advertisement, I think it is
6 probably about 10 or 15 pages of property advertising. I
7 think in his initial submissions Mr Green was saying that
8 there is a major difference between daily papers that run
9 supplements, say, for motoring on one day and for property
10 on another day, but I think what we see in the Independent
11 is the fact that all these supplements are just rolled up
12 into one weekly edition, so that all the separate daily
13 editions are effectively combined into one weekly edition.
14 I think there is no strength in the argument that there
15 is a difference in terms of advertising between the daily
16 papers and the weekly papers in respect of these
17 supplements. As you can see, the Independent supplement
18 contains a lot of advertising, so it is obviously a
19 successful supplement.
20 I was then going to perhaps just have a look at the
21 types of different advertising that appear in these
22 newspapers and perhaps it might be best to have a look at
23 the Evening Express. Unfortunately I have the one for
24 Saturday, 25th March.
25 THE PRESIDENT: Let me have a look to see if we have that.
26 No, I do not think I can put my hand on it.
27 MR HOSKINS: I think we may have a spare Saturday one.
28 MR HILL: Sir, I have the original for 23rd March. If we
29 look through this, it is the Evening Express I am looking
30 at at the moment, and we are looking through it on 25th
31 March; what you see there is the first few pages contain
32 the news and articles, and these I believe are called
33 Display advertisements. Because Saturday is not a very
34 popular day there are not many Display adverts which
35 appear. Later on in the paper you get to what are called
36 the Classifieds, which appear effectively from page 28
37 onwards. I really want to make two points about this.

1 The first is, you can see the main business advertising
2 goes in the Display advertising; the smaller business
3 comes in the Classified. The Classified is made up of a
4 large number of personal advertisements made by members of
5 the public and of course personal advertising is a very
6 important part of a local newspaper because people read the
7 paper, people look through the paper because they are
8 interested in the Classified advertisements, but generally
9 speaking they do not pay particularly well. If you are
10 selling a paid for paper they will increase your
11 circulation. If you are selling a free newspaper it will
12 encourage people to read it because they like to see the
13 Classified advertisements, but they do not particularly
14 pay.

15 The first point I want to make about this is that when
16 we looked at the analysis carried out by the economists,
17 there is a flow chart which we I think have available which
18 shows where the advertisements are. There is a number of
19 different options in response to the question. This is
20 what was table 2, I think, in appendix 2 to the report
21 attached to the application. It says, "Of the advertisers
22 using the Evening Express in March 2000 which also used a
23 free title in March 2000?" and the answer to that is, "No,
24 3,694," which is an extraordinary number of people or
25 advertisers. It was 61.4 per cent in terms of volume. You
26 then look to the next question, "Did they use a free title
27 in September 1999 to June 2000?" and the answer to that is,
28 "No, 3,385 advertisers," 42 per cent by volume. the big
29 question is this; what of those no figures which are 3,385
30 are made up of these Classified advertisers.

31 THE PRESIDENT: You mean these very small personal ads?

32 MR HILL: Yes, because those advertisers will not be
33 regular advertisers, many of them will only advertise once
34 or maybe not at all in future years to come; it is just an
35 imponderable to know what their future plans are in terms
36 of advertising. Some of these particular adverts for
37 example are relating to specific events or the sale of a

1 house or the sale of a car, which will not be repeated. So
2 I have a lot of difficulty with this analysis in terms of
3 does it take into account the fact that there are some of
4 these advertisers who will not be substituting their
5 advertising within 10 months, they may not be substituting
6 their advertising at all.

7 THE PRESIDENT: So the question is what is the treatment in
8 this survey of the small ads, the birthday greetings, the
9 adverts for one's holiday home, the local community
10 centre's afternoon tea, the lonely hearts, and so forth and
11 so on, perhaps even some of the job advertisements.

12 MR HILL: I have actually counted up the number of adverts
13 in these different categories and I think the figure came
14 to 40 Display advertisements and 1,100 in terms of the
15 Saturday edition Classified advertisements. I do not
16 believe that RBB in carrying out their analysis have
17 included all these Classified advertisements in their
18 figure of 3,385, it is impossible to tell, and this I think
19 brings me back to the whole problem I have and my clients
20 have with the RBB analysis, that it is just impossible to
21 work out on what criteria they are working. They do not
22 set out as they should the basis of how they have treated
23 the statistics and the errors and problems they have with
24 them in a scientific way.

25 I am hampered in this because unfortunately, as you
26 will recall, at the last hearing which we had in London
27 there was a considerable amount of confidentiality which
28 was prescribed in relation to the documents. You may be
29 interested to know that in terms of that the items which
30 were deleted from the bundle I got, and perhaps you might
31 like to note it, it was table 2, pages 80 to 81, all the
32 charts from pages 82 ---

33 THE PRESIDENT: I am sorry, I need to have the document
34 in front of me. Yes, I now have the application.

35 MR HILL: The application notices.

36 THE PRESIDENT: Yes.

37 MR HILL: If you go to pages 80 and 81, all the information

1 on that page was deleted. In terms of the charts on which
2 the method was explained as to how RBB achieved the results
3 they said they had achieved, those run from pages 82 to
4 175. Also deleted and I have not seen are the figures in
5 the first report, which is in volume 4, if you would like
6 to have a look at that, which run from pages 1569 to 1615.

7 Sir, I have not seen the data, the calculations or the
8 conclusions which come from those reports.

9 What did happen of course was that when we started to
10 look at what little data we did have available to us we
11 realised immediately that table 2 was incorrect in terms of
12 showing the number of advertisers using free pages during
13 March 2000 and since then there has been an attempt to
14 patch up the earlier three reports in a fourth report which
15 is most unsatisfactory.

16 My clients are concerned that their data has been
17 interpreted in confidential reports. They do not know how
18 their data has been treated. They have not had the
19 opportunity to check the data that they have been quoted as
20 having. So the situation is entirely unsatisfactory as far
21 as they are concerned, which brings me on to the subject of
22 how much reliance can be placed on the reports from RBB in
23 terms of the proceedings.

24 In the submissions and skeleton argument which I have
25 lodged with the Tribunal I have dealt with that and I do
26 not propose to go through the arguments I have about the
27 way that those reports have been prepared. At the end of
28 the day it is a matter for the Tribunal to decide what
29 weight if any to put on those reports. I would like to
30 just move on to the situation relating to the meeting that
31 took place last year at the offices of the Office of Fair
32 Trading.

33 This was a meeting that I was present at and reference
34 has been made by Mr Green to page 2057 which is in
35 volume 5. The purpose of that meeting was to consider the
36 position as in March 2000. Mr Barwell shortly after the
37 hearing which we had here in December 2001 was taken very

1 seriously ill and during the course of January I think it
2 is fair to say that it was touch and go as to whether he
3 would live or die.

4 THE PRESIDENT: You said he was ill when? I am sorry,
5 Mr Hill.

6 MR HILL: January 2002. When the OFT suggested that we
7 might meet to talk about this matter Mr Barwell had only
8 recently come out of hospital. I am not entirely sure
9 whether I might be provided with a copy of a
10 confidentiality agreement when MR Green stands up to give
11 his further submissions but if he does so I think it should
12 be put in the context of a situation where Mr Barwell had
13 recently come out of hospital after having a number of
14 major operations and was looking at his business possibly
15 in a totally different way to the way that he had been
16 looking at it in March 2000 for the obvious reason that he
17 was recovering from major surgery and had been advised -- I
18 can tell you this because I know -- that he had to wind
19 down his business commitments.

20 The other matter I wanted to pick up on was the matter
21 of the letters written by Mr Robins; it is really only a
22 very brief point. I do not particularly need to add to
23 what Mr Hoskins has said other than to make the point that
24 I think it has generally been accepted that the Herald &
25 Post vis-a-vis the Independent is a poorer quality
26 newspaper and that any remarks made about the Herald & Post
27 should not be interpreted as showing any indication by the
28 Independent that they regard their newspaper as being of
29 the same quality as the Herald & Post. They place the
30 quality of their publication, and I do not think this is
31 particularly disputed by any party, as being substantially
32 higher and better than the Herald & Post.

33 The next issue that I wanted to mention is the subject
34 of the circulation figures which I understand Mr Green
35 thinks are significant in terms of the attitude that the
36 Journals took to the Independent at the relevant time. Mr
37 Randall when he appeared for us on the last occasion in his

1 closing submissions did actually deal with this; it is on
2 page 1179 of volume 3. I do not think I need to take you
3 to it. He said:

4 "My client has asked me specifically to point out to
5 the Tribunal that under the Newspaper Society Rules, which
6 I am sure the Aberdeen Journals know well, there is a gross
7 period of eight weeks between a change in, if there is a
8 change in the number of copies distributed one has eight
9 weeks in which to inform the relevant authorities. It is a
10 natural assumption that in most cases that eight week
11 period will be used, and it was in this case, but there is
12 nothing underhand or wrong about that action. It is
13 completely in conformity with the rules governing
14 newspapers."

15 That is repeated and I have not seen anything that
16 convinces me otherwise; there has not been, as I
17 understand it, and I have spoken to Mr Robins about this,
18 an official finding by the relevant authority, which is the
19 Joint Industry Committee for Regional Press, that there has
20 been anything untoward done by the Independent in relation
21 to the figures that they have produced. It is fair to say
22 that there was a complaint made to the Advertising
23 Standards Authority, who rules that two adverts which were
24 produced by the Independent should not be repeated. This
25 was then followed by a complaint by the Independent against
26 the Evening Express to the Advertising Standards Authority
27 which finished in a ruling by the Advertising Standards
28 Authority that two advertisements had put out should also
29 not be repeated, and I think it ended up as a two-all draw,
30 really.

31 I have just two or three points more to finish off
32 with. Mr Farquharson's witness statement we have had a
33 look at and I have just a couple of points to mention about
34 that. Mr Farquharson makes it quite clear that at the
35 period before he left the Journals he was working in
36 Inverness and of course Mr Scott works in Aberdeen, so this
37 alleged problem between Mr Scott and Mr Farquharson was not

1 something that really caused any difficulty and it will be
2 noted from his witness statement that he actually worked
3 the full period of notice, which one might find rather
4 surprising if he was going to work for a competitor.

5 The final point I want to move on to is the question of
6 survey evidence, and perhaps we can have another look at
7 the Evening Express just to get some idea about what the
8 parameters are in terms of newspaper advertising.

9 THE PRESIDENT: What one do you want to look at?

10 MR HILL: Let us have a look at Saturday again because

11 I know everyone has got that. I think it is fair to say
12 that buying advertising in a paper is much closer in terms
13 of decision making to buying a house than to buying a pot
14 of paint because there are a lot of different sorts of
15 parameters which are involved with buying advertising,
16 particularly if you buy quite a bit of advertising.
17 Perhaps I could just run through the sort of things that
18 might be uppermost in your mind in terms of what you are
19 going to get for the pound that you pay for the
20 advertising.

21 First of all the frequency of advertising; obviously
22 if you advertise more frequently you get a better rate; so
23 if you want to improve the rate you get per centimetre then
24 you will advertise more frequently. There will be a
25 difference between Display or Classified, a difference
26 between a special category and another category; there
27 will be differences between, for example, property and
28 motor cars in terms of what you pay. For the Evening
29 Express there will be a difference according to the day of
30 the week you put your advertisement in. Saturday is a bad
31 day and most advertisers will avoid a Saturday because the
32 numbers of papers sold on a Saturday are less than they are
33 during the weekdays. There are such factors as prominence
34 in the paper; if you pay more you will get on the front
35 page. Some advertisers prefer to be on different pages to
36 other advertisers.

37 There are certain sorts of advertising which are

1 generally more profitable; recruitment, for example, is
2 generally regarded as being a more profitable area of
3 advertising than, for example, the sale of motor cars. So
4 when negotiating these things are always negotiated with
5 larger advertisers; all these different types of matter
6 come into consideration, all these parameters come into
7 consideration.

8 This I think does emphasise the point the Director has
9 been making which is to obtain reliable statistical
10 evidence as to substitution is very difficult with all
11 these variables in place. It is not just a question of
12 price, it is a whole range of other factors.

13 Sir, those are my submissions and unless there are any
14 questions I will finish.

15 THE PRESIDENT: Thank you very much, Mr Hill. Mr Green,
16 I just have myself one or two questions and then perhaps we
17 might rise for a minute before you have your final say.

18 MR GREEN: Yes, of course.

19 THE PRESIDENT: I will just collect up my thoughts. I think
20 the first question is one that I already had in mind but Mr
21 Hill has highlighted it. In the RBB work how have the
22 small ads, as it were, been taken into account? There are
23 in all newspapers pages of advertisements for individual
24 cars or lettings or lonely hearts or personal ads or
25 whatever and I am not at the moment clear how that has been
26 picked up in the work that has been done. So it is just
27 asking for information; that is the first question.

28 The second question is a clarification of one sentence
29 in the notice of application. It is paragraph 550 on page
30 26, the last sentence on that page: "As the applicant
31 informed the Director in its response to the R14M2, it was
32 selling all advertising in the Herald & Post on a solus
33 basis immediately prior to March 2002." What is meant
34 there by a solus basis, that is the question.

35 The third question is are you seeking to cross-examine
36 anyone in this case who has given evidence? We have Mr
37 Barwell's witness statement, Mr Farquharson's witness

1 statement. Are you seeking to cross-examine and if you are
2 not what in your submission is the weight that we should
3 give to the statements that we have got?

4 Lastly, at least from my point of view, bearing in mind
5 your earlier comments, quite correctly, about not relying
6 on anecdotal evidence, etc, etc, if for argument's sake we
7 simply take the Evening Express for 23rd March 2000, which
8 I happen to have in front of me, we find in there about 14
9 pages of advertisements for motor cars under the heading
10 Motoring Express, and there is a great mixture of
11 individual advertisements for motor dealers and so forth,
12 and in the Independent for the same date, 23rd March 2000,
13 we find a section that is headed "Indy Cars" which goes
14 from page 47 through to page 62, so that is about 15 pages,
15 that is about the same number of pages, and if you turn
16 through the pages one's first impression is that these look
17 really rather similar. I have not noticed vast numbers of
18 advertisements for cars on other days of the week as far as
19 the Evening Express is concerned and if you have any
20 comments on what conclusion, if any, we should draw from
21 that sort of visual comparison, please by all means draw it
22 to our attention.

23 I do not know if my colleagues have any points they
24 would like to raise. Yes, there is a last point. We will
25 leave a copy behind but there is an earlier Competition
26 Commission report, Trinity plc and Mirror Group plc, which
27 is Cmnd 4393, July 1999, and at paragraph 4.33 and again at
28 4.104 the Commission is considering what titles compete
29 with which, and in that connection Trinity, who are
30 apparently one of the parties, at that stage told the
31 Commission that weekly titles compete for advertising with
32 evening regional titles. It is true that that is Trinity's
33 view and it is simply reported by the Commission but one
34 might perhaps infer that the idea that a weekly title is in
35 competition with an evening daily title, even a paid for
36 title, is not completely unrealistic, especially given the
37 kind of content comparison that I have just mentioned. I

1 will just leave that quote behind with the Registrar for
2 you to have a look at so that everything is, as it were,
3 out on the table.

4 We will rise, then, until half past 4. If you want
5 more time, let me know.

6 (A short adjournment)

7 MR GREEN: Can I start with your five questions, provide
8 the answers to those, and then go to my points and fillet
9 where necessary.

10 THE PRESIDENT: Yes. Thank you.

11 MR GREEN: The first question posed concerns small ads.
12 The position so far as RBB is concerned was that all small
13 advertisements in the H&P and the Evening Express were
14 included because the identity of the advertiser was
15 transparent and their overlap was analysed vis-a-vis the
16 Evening Express. So far as the Independent is concerned
17 where there was a name attributed to the advert then that
18 was taken and compared with the database of advertisers.

19 THE PRESIDENT: You mean, just to be clear, looking at the
20 internal Evening Express and Herald & Post database you are
21 saying that for a small ad that gave a box number you would
22 actually have a name for it?

23 MR GREEN: Yes, that is right, for Aberdeen Journals titles,
24 and so far as the Independent was concerned where it was
25 possible to identify the name then that also can be checked
26 against the database of advertisers in the Evening Express
27 to see if there was some overlap. Where there was no name
28 then the information was taken in an aggregated form, so it
29 was not ignored, and the method of the aggregation was
30 explained in the RBB first report and in the most recent
31 note.

32 Free advertising was excluded. You will see from the
33 Independent, for example the personal ads, the, "Silent
34 dark lady aged 31 seeks company," type of ad, which there
35 are a number of in the Independent, those are specified to
36 be free of charge and those were excluded because if no
37 consideration was being paid for them they were not going

1 to affect, not to any material degree, substitutability.
2 so that is how it was dealt with in the RBB report.
3 THE PRESIDENT: I am sorry; just to get my head round
4 that, I suppose the private customer who is selling his car
5 or something will advertise just now and again.
6 MR GREEN: Yes.
7 THE PRESIDENT: And you might pick him up or you hope you
8 have picked him up by name when he advertises in the
9 Evening Express or the Herald & Post but one will not
10 necessarily have picked him up by name if nine months later
11 he chooses to advertise the sofa in the Independent.
12 MR GREEN: That is right. If his name is there of course
13 you can identify it. If his name is not there then you
14 have to find some other way of measuring the effect of that
15 advertisement.
16 THE PRESIDENT: Yes.
17 MR GREEN: The second question concerned the sentence in
18 paragraph 550 of the notice of application. We dealt with
19 this specifically in the skeleton argument at paragraph 47.
20 THE PRESIDENT: Yes, I am sorry.
21 MR GREEN: At paragraph 47, we refer to that particular
22 sentence and say, this is on page 20 of the skeleton
23 argument: "Reference to solus means single, i.e. unbundled
24 with no price advantage made available to the advertiser
25 for advertising in more than one publication". So it does
26 not mean exclusive as it sometimes means; it means
27 completely sold in isolation.
28 THE PRESIDENT: Yes.
29 MR GREEN: The third question concerns the witness
30 statements of Mr Barwell and Mr Farquharson. I think in
31 principle the position is as follows. In civil proceedings
32 a witness statement can be admitted into evidence without
33 it being cross-examined. That does not mean that simply
34 because it is conceded as being admitted in evidence it is
35 taken as read. It is then a matter of weight for the court
36 or tribunal as to its contents which is the position we
37 submit applies here. We have not applied to cross-examine

1 those deponents and we therefore cannot object to it being
2 admitted as evidence per se but we are entitled to make
3 submissions about its contents and say that the Tribunal
4 should pay very little weight to the contents. In
5 particular we submit it does not follow that one simply
6 takes as read what is stated in a statement; one has to
7 test its veracity and whether or not it is logical or
8 whether or not the statement is motivated by some ulterior
9 purpose.

10 In this regard I wonder if I could just ask you to look
11 at a quotation from the recent report of the Competition
12 Commission in the Vivendi Water case which is cited on page
13 8 of our skeleton argument.

14 THE PRESIDENT: Yes, I think we recall the quote.

15 MR GREEN: Perhaps you do not need to turn it up; it can
16 be looked at later. It is a very recent inquiry. The
17 Commission was investigating a merger in the water
18 industry.

19 THE PRESIDENT: Yes, and they came to the same point.

20 MR GREEN: they came to the same point, that one has to
21 examine the motive of the declarant of the statement in
22 order to decide whether it is a self interested statement,
23 and if it is self interested then one has to see whether or
24 not it is consistent with other evidence before one gives
25 it weight.

26 THE PRESIDENT: Yes.

27 MR GREEN: So far as such conclusions as may be drawn from
28 an anecdotal perusal of the papers is concerned could I ask
29 you to turn to bundle 4 at pages 1577-8. This is part of
30 the first RBB report. Table 1 on page 1577 sets out yield
31 per column centimetre by category in March 2000. You will
32 see in the middle of the table under the heading Motors
33 there is a breakdown of the data into Classified and
34 Display and an aggregated position at the bottom. For the
35 Independent the yield per column is £1.02.

36 THE PRESIDENT: Yes. Just let us read the figures to
37 ourselves because there may be some issue as to

1 confidentiality here; I do not know.

2 MR GREEN: I do not think so.

3 THE PRESIDENT: My copy is marked "All figures
4 confidential".

5 MR GREEN: Yes, I am sorry, they are confidential.

6 THE PRESIDENT: Anyway, the point you make is that the
7 yields are different. Is that right?

8 MR GREEN: The yields are quite substantially different
9 and of course it recognises that there is motor advertising
10 between the timings but the yields are significantly
11 different. If you turn over to page 1578 one sees an
12 analysis of the evolution of actual yields and this says,
13 and I think this should be treated as confidential as well,
14 you will see that the yield of the Evening Express at the
15 top remained largely static irrespective of the fact that
16 the yields from the Independent and the Herald & Post
17 dropped dramatically upon entry. The Evening Express was
18 largely unaffected or indeed wholly unaffected by anything
19 which happened in the free market. In fact this deals with
20 the point made by Mr Hoskins in the course of his
21 submissions about the Evening Express being a protected
22 creature from the battle which was going on between the two
23 paid for titles. with prices going that low one would have
24 expected to see some impact upon the Evening Express yields
25 if there was in fact a relationship between the two.

26 That is context to the evidence which was put in on the
27 first occasion by Mr Scott in his witness statement. This
28 is your volume 3, my volume 1, pages 170-171. He deals
29 with the distribution of motor vehicle advertising between
30 the various titles. He says, "It is very rare that new car
31 advertising appears in the free newspapers in Aberdeen
32 whereas it represents a significant portion of motor
33 advertising in our paid for papers," and he gives a
34 confidential figure. "The free papers are used by most of
35 the major motor dealers as a top-up to their advertising of
36 second hand cars in paid for. They also provide a cost
37 effective platform for small independent car dealers who

1 cannot afford to advertise in paid for papers." So he
2 recognises that they do advertise in the frees but for what
3 he describes as a complementary reason.

4 whilst I am at it, to save having to come back to it,
5 could I ask you to look at page 173, the paragraph
6 starting, "The absence of," in the middle:

7 "The absence of competition between paid for and free
8 titles is also illustrated by the response of advertisers
9 to increases in the advertising rates in the H&P. The
10 observed increases in H&P advertising rates since March
11 2000 relative to those in our paid for titles has had
12 little effect on the volumes of advertising in the paid for
13 titles. Indeed even during those periods of very low
14 advertising rates in the H&P and the Independent I did not
15 detect advertisers switching volumes of advertising from
16 the paid for titles to the free titles as a result. If
17 that had been the case I would have been forced by the
18 market to reduce advertising rates in the paid for titles."

19 Although it is on a different point it is a point which
20 you asked me about before the luncheon adjournment which
21 was were there negotiated discounts off rate cards in
22 relation to the Evening Express. Mr Scott's evidence is
23 that there were not, therefore the RBB report has to be
24 seen in the context of the fact that so far as the Evening
25 Express was concerned there was no need to provide
26 discounts.

27 THE PRESIDENT: I understood it to be common ground that
28 the rate card as such does not give one an indication of
29 the actual prices being charged in the market because they
30 are the subject of discussion with individual advertisers.

31 MR GREEN: Yes. I think the crucial distinction to be
32 drawn is the discount off a rate card because the
33 advertiser might be subject to a competitive quote for the
34 free title and a discount which be an ordinary volume
35 related discount, and Mr Scott is saying that he was not
36 forced by the market, in other words, what was going on in
37 relation to the free titles, to reduce rates in the paid

1 for titles. He is not addressing the ordinary volume
2 related discount which may arise.

3 The question and I think the proposition which you
4 advanced was that in theory an advertiser in the Evening
5 Express might not switch but only because the advertiser
6 had said to the newspaper, "If you don't give me a discount
7 I'm going to go to the Independent," and therefore he had
8 got the discount but stayed but the lack of switching would
9 then be said to be proof of substitution, not disproof of
10 it. If there is no discounting of the rate card in the
11 Evening Express to take account of that competitive
12 challenge then that rather suggests that there is no
13 competitive constraint being exercised.

14 This evidence has been in place for two years and it
15 was put in a witness statement to deal with the very
16 question which is now being posed and one can see what
17 happened statistically on page 186, attachment 3, during
18 March and onwards because in attachment 3 there are three
19 tables showing what happened to market share in the free
20 papers during 2000. During that period if one takes the
21 volume market share figures at the top by way of
22 illustration the Herald & Post went from circa 46 per cent
23 to 30 per cent, a drop of 16 per cent, and the Independent
24 went from approximately 54 to 70 per cent, so the H&P lost
25 16 per cent and the Independent gained 16 per cent. It was
26 a direct take from one to the other. There does not appear
27 to have been any incremental volume attributed to the
28 Independent because it has taken it away from the Evening
29 Express.

30 But the central point in relation to the question asked
31 before lunch was is there evidence as to what happened in
32 terms of negotiated discounts in the Evening Express and Mr
33 Scott deals with this and says, "I didn't have to respond
34 to pricing in the free market by granting extra discounts
35 in the paid for market". That is the evidence which has
36 been in existence for some two years and has not been
37 challenged by the Director.

1 So far as periodicity therefore is concerned and the
2 inferences that one might draw from the examples of
3 newspapers that we have seen, if it suggests anything what
4 it might suggest is that the Director has wrongly defined
5 the product market. If the paid for papers and the free
6 papers go head to head on a particular day then there is
7 the possibility of them being complements or substitutes.
8 If that day happens to be the day upon which the motor
9 vehicle distributors wish to advertise then they do have a
10 choice.

11 THE PRESIDENT: They could be a sort of mixture, could they
12 not?

13 MR GREEN: They could be a sort of mixture, it is possible.

14 THE PRESIDENT: It is the contestable ground in the middle
15 that is ---

16 MR GREEN: There might be. It has not been established
17 that there is. By parity of reasoning if the motor vehicle
18 distributors concentrate on the Thursday or Friday but the
19 Sits Vac and the Homes & Gardens tend to be Wednesday then
20 by definition the Sits Vac and Homes & Gardens advertisers
21 cannot possibly view free and paid for as substitutable
22 because there is not any free and paid in the market place
23 at that time, unless someone has hung on to the free paper
24 for six or seven days from the previous Thursday or Friday.

25 THE PRESIDENT: If we take property, for example, again
26 on this relevant wing, as far as I can see, and I may be
27 wrong, the Herald & Post comes out on a Wednesday, the
28 Independent comes out on the Thursday and the Evening
29 Express Property is on the Friday, so they sort of bracket
30 each other, as it were.

31 MR GREEN: Ultimately the substitutability or absence of
32 it between the titles will necessarily depend upon the
33 perceptions of the advertiser.

34 THE PRESIDENT: Yes.

35 MR GREEN: The very fact that you have here the free titles
36 coming out at the end of the week by definition means that
37 they cannot capture any advertisers' demand that tends to

1 be met at a different time in the week, particularly at an
2 earlier time in the week, and to the extent that they
3 provide any form of parallel vehicle it still begs the
4 question as to whether there is complementarity, and
5 switching and the evidence we submit suggests extremely
6 strongly that in so far as there is parallel use it is
7 complementarity and not substitutability.

8 Can I turn now to the fifth question asked which
9 concerned Trinity Mirror. Having looked at the quotes, and
10 one of them is even in parentheses, they are very much
11 throw away lines. The context, as I understand it, was a
12 merger of the daily morning title with Trinity's current
13 Belfast Telegraph and Trinity was forensically seeking to
14 paint as broad a product market picture as it possibly
15 could because that helped with the analysis.

16 The Competition Commission did not come to any
17 conclusion about that, it simply records that that was an
18 argument advanced. Really the Vivendi point applies to it,
19 that they would look at the argument and say it was plainly
20 in the interests of Trinity to argue the point in that way:

21 "First of all, is it relevant to our analysis; secondly,
22 is it consistent with anything else that we are examining?"
23 We know that in the event I understand Trinity was forced
24 to divest the Belfast Telegraph but there is no statement
25 as to the Competition Commission's view on that particular
26 point. So we would respectfully, very respectfully,
27 suggest it is a flimsy statement which really does not
28 advance the analysis.

29 Can I now turn to the points I was going to make and I
30 will fillet them because I have dealt with some in
31 answering your questions. First, the fire ship; Mr
32 Hoskins' submissions on this really miss the point. The
33 fact that there was a battle royal between the H&P and the
34 Independent proves nothing save that there was a battle.
35 The applicant's point, the point I was making this morning,
36 was that in 1999 the Independent was engineering a sale and
37 that fact must be viewed as context to the statement made

1 in the Pitfodels Hotel in August that Mr Barwell thought
2 that the Independent could make the Evening Express
3 vulnerable.

4 The Director General relies upon Mr Barwell's conduct
5 in 1999 and his statement made in that year and the 1999
6 documents are, we submit, taken in isolation of anything
7 else, quite clear. One must remember that Northcliffe did
8 not buy the Independent, they refused twice; not evidence
9 of a desire to buy the Independent out when there is a
10 persistent refusal. The evidence is commensurate with the
11 Independent wanting to be sold. Even if the documents in
12 1999 are equivocal, if that was the least that they were,
13 it would cast serious doubt upon the motives of the
14 Independent.

15 THE PRESIDENT: So the point you are making here is that
16 this evidence relied on by the Director is not reliable
17 because of the alleged ulterior motive.

18 MR GREEN: That would apply to anything relied on by the
19 Director which is tainted by that issue.

20 THE PRESIDENT: Yes.

21 MR GREEN: Then there is the question of what happens
22 to evidence of conduct at an earlier point in time. Even
23 if one assumes for the sake of argument that Mr Barwell did
24 not enter the market with the explicit view of selling it,
25 though as to that, I will not take you to it but his own
26 witness statements explain very clearly that he made, as he
27 describes it, a substantial sum by selling off all his
28 papers to the Thomson Group and, as he explains, when he
29 sold his papers to the Thomson Group Thomson owned Aberdeen
30 Journals and he was part of the management team that sold
31 Aberdeen Journals to Northcliffe, so he made a great deal
32 of money by the practice of selling papers.

33 But the documents show a real and genuine conundrum as
34 to Mr Barwell's motives. The Director places great
35 reliance upon his motives. He has a history of selling
36 papers and moving on and it is entirely credible that that
37 was his strategy in 1999 and possibly earlier.

1 This brings me on to the distorted market point which
2 really raises the question of what happened earlier. The
3 Director relies heavily on conduct in 1996 and inferences
4 drawn from this. He accepts the distortions make product
5 market analysis unreliable in his decision, paragraphs 95
6 and 96 in his skeleton argument, but at the launch the
7 Independent said, as you will recollect, that it could
8 compete with the Press & Journal. We know that that was
9 wrong, even though its business plan contains page after
10 page of bragging about how it might undermine the Press &
11 Journal we know that that was wrong. This is evidence of
12 irrational, ill educated assumptions.

13 Four years later he knows that this is a false claim.
14 He knows that he cannot possibly say that the Press &
15 Journal is anything other than unassailable. What we do
16 know is that in the later years, 1997 to 1999, he makes
17 false statements to advertisers with a view to persuading
18 them that the Evening Express might be in the same market
19 place, and in the August 1999 meeting he says to Mr Scott a
20 circulation of 125,000 is unreasonable. He has not after
21 three or four years got to the position where he is able
22 categorically to say the Independent is a vehicle which
23 competes with the Evening Express.

24 You can test the fallacy of the Director's point in the
25 following way. Let us assume that the Independent entered
26 the market believing that it could get advertisers from the
27 Evening Express. Assume also that Aberdeen Journals
28 believed this. Assume also that the Aberdeen Journals'
29 title, the H&P, attacked the Independent because the
30 Aberdeen Journals management perceived a threat to the
31 Evening Express. So Aberdeen Journals therefore via the
32 H&P attacks the Independent and what we do know is that as
33 a result both titles improved in quality, the price went
34 down, circulation etc went up.

35 Logic dictates that this battle would as it progressed
36 suck advertisers away from the Evening Express but there is
37 no evidence of this. Indeed the tables I have just shown

1 you show that throughout this period the yield of the
2 Evening Express remained remarkably resilient. In 1999 we
3 know that Mr Barwell was unhappy with the circulation of
4 125,000. That is not a fact which suggests he was
5 confident he could attack the Evening Express three years
6 into the battle. In 2000 from the statistics attached to
7 Mr Scott's witness statement we know that he did take
8 market share substantially away from the H&P.

9 Mr Hoskins relies upon the Intervener saying it is now
10 profitable but this is presumably because the Independent
11 is creaming off the free market. There is not a scintilla
12 of evidence to say that its profitability is at the expense
13 of the Evening Express advertisers. So even if one makes
14 all the assumptions against Aberdeen Journals as to its
15 conduct and its motivation in 1996/97 the net effect of
16 that is simply to make the free titles ever increasingly
17 attractive to the advertisers in the Evening Express, and
18 that being so, as the market progresses throughout 1996 and
19 onwards one would have expected to see an ever increasing
20 switch of advertisers from the Evening Express but there is
21 no evidence of that. Whichever way one looks at the period
22 prior to March 2000 we submit that it does not enable the
23 Director to draw proper inferences or any inferences.

24 Can I turn from that to the question of the survey.
25 The survey we suggest the Director should have carried out
26 would have focused upon the market in March of 2000, not in
27 the period 1996 and onwards which the Director says was a
28 distorted market. I do not know why Mr Hoskins suggests
29 that 1996 to 2000 is a relevant period for a survey. But
30 even a survey on a distorted market can reveal answers
31 which are indicative for reasons which have been discussed.

32 There was switching then.

33 THE PRESIDENT: Yes.

34 MR GREEN: I will not go into those. He relies upon the
35 Ezat memorandum but this concerns a period before the
36 relevant period by a number of months and Mr Ezat's
37 memorandum does not show, as my friend put it, a serious

1 impact on the Evening Express. On the basis of what is
2 said in the memorandum the effect if at all is de minimis,
3 but one must remember that it was at the time that Mr
4 Barwell was maintaining the Independent at the unreasonable
5 in his view level of circulation of 125,000, a view he
6 considers to be unsustainable. So if there was an impact
7 we say it is de minimis but it would have been an
8 artificial impact for the very reasons that Mr Hoskins has
9 accepted elsewhere.

10 So far as the 2000 survey is concerned we have never
11 accepted that it is inconclusive and indeed on the last
12 occasion we made detailed submissions as to why it was
13 indicative. I will not ask you to go to it again; i.t is
14 the first skeleton argument, paragraph 34, pages 921 and
15 922 of the bundle; we set out the detailed analysis of the
16 statistics and the inferences that one can draw from the
17 2000 survey and the conclusion that we reach in the first
18 skeleton argument is that it shows complementarity, not
19 substitutability. We submit that there is a strong
20 inference to be drawn from that data as to complementarity
21 and it is set out in some considerable detail with all the
22 references to the relevant page numbers elsewhere in the
23 bundles which relate to the questionnaires and the answers
24 given.

25 Finally on survey, I do not need to deal with it in any
26 detail, the question of timing. It seems apparent to us
27 that the inability to finish the exercise in the one month
28 that the Director had left was the reason. If the Director
29 had really been pushed for time he could always have
30 applied to the Tribunal for an extra few weeks; within the
31 time scale it would not have been beyond his powers to do
32 that.

33 Finally, so far as statistical analysis is concerned I
34 have dealt with the question of negotiations with
35 advertisers; I just want to pick up a few random points.
36 As to the Director's failure to get evidence from the
37 Independent you were referred to various paragraphs in the

1 Director's explanatory letter. Those behind me as they
2 were listening to the points that the Independent did not
3 have the data have made enquiries from Herbert Smith's tax
4 department who say, and I have not had a chance to check
5 this, that Regulation 31A5 of the Value Added Tax
6 Regulations 1995, IS 2518, states companies must keep VAT
7 invoices they issue, in other words the invoices to
8 advertisers, for at least six years, and most advertisers
9 in the Independent would be VAT registered. We find it
10 quite incredible that data was not available from the
11 Independent and the Director did not apparently issue a
12 section 26 request requiring it.

13 The Director had data given to him of an actual invoice
14 nature in 2000 and he could have conducted the exercise
15 then. If it be the case the data was not available some
16 two years later it is as a result of the delay brought
17 about by the Director having failed on the first occasion.

18 One other point in relation to the survey, the only
19 point of substance raised by Mr Hoskins this afternoon as
20 to switching between the H&P and the Independent; he says
21 that the RBB report is inadequate because it does not
22 reveal switching between the H&P and the Independent. This
23 was a new point which the Director dreamt up in the course
24 of the exchange after the decision but it is a bad point.
25 First, and the context of this is paragraph 145 of your
26 prior ruling, which takes it as read that there is
27 competition between the free titles and the question
28 therefore is whether the paid for titles fall into the
29 market, the Director's criticism is misplaced.

30 The sample taken by RBB in response to paragraph 145
31 was of advertisers in the Evening Express only, it was not
32 all advertisers, and it is our case that the advertisers in
33 the Evening Express, being the larger advertisers who use
34 paid for titles, are least likely to use free titles as
35 substitute as opposed to in a complementary manner. They
36 therefore reflects the group of advertisers who may be
37 least attractive to free papers.

1 The second point is that the Director does not anywhere
2 state whether he would expect switching between free and
3 paid for papers in the period prior to March, it is not a
4 matter which has been analysed. But in fact there is no
5 obvious reason why there would be a substantial degree of
6 switching necessarily between the two free titles which are
7 head to head in battle. If the free titles simply adjust
8 to each other, if the H&P and the Independent follow each
9 other in terms of changes to price and characteristics,
10 distribution and so on, then there may be no need for an
11 advertiser to switch because they get the benefit of the
12 competition without the need to switch. It is not a self
13 evident proposition that you would see switching, so the
14 failure to show these features is therefore we submit an
15 irrelevant criticism.

16 I do not think I need to say any more about the
17 Director's failure to disclose; I think we have made our
18 position clear in writing and orally. So far as the final
19 points are concerned, effect on trade, with respect to Mr
20 Hoskins he has the burden of proof. He accepted in his
21 argument that he did not know whether the effect was de
22 minimis or not. He says he cannot be expected to prove an
23 effect, this is a jurisdictional matter and as a matter of
24 law it is up to the Director to prove that there is an
25 effect to the Napp standard. His admission that he does
26 not know and the Director does not know we submit is a
27 fatal admission.

28 So far as the argument on abuse of process is concerned
29 may I make one point.

30 THE PRESIDENT: Just before you leave the effect on trade,
31 it might be quite an interesting point to know whether the
32 de minimis rule which exists at Community level, which is a
33 rule basically designed for drawing the dividing line
34 between what is Community jurisdiction and national
35 jurisdiction, should be read over for this particular Act,
36 whether there is a category of de minimis infringements
37 that, as it were, drop out presumably both chapter 1 and

1 chapter 2.

2 MR GREEN: It is true that if one thinks of cases like
3 Heugin there simply because an undertaking is dominant it
4 does not mean to say you assume an effect on trade.
5 Plainly we are not dealing with Community jurisdiction and
6 that is clear, so a direct read across by virtue of section
7 60 may be inappropriate. But the words are there in the
8 Act and they ape the words in Articles 81 and 82, and at
9 the very least they introduce a de minimis concept because
10 they would be otiose otherwise. If there was no de minimis
11 concept and no requirement to show a proper effect,
12 something more than de minimis, then it is hard to see how
13 anything could ever ---

14 THE PRESIDENT: They may be dealing with other situations
15 like agreements that affect things like education or wage
16 rates or trade unions or various things that are not
17 necessarily obviously trade.

18 MR GREEN: They might do, but they are not cast in such
19 narrow terms; they are cast in broad and generic terms
20 that there must be an effect on trade within the United
21 Kingdom. One would ask in reality what conceivable public
22 policy could there be in attacking a piece of conduct which
23 was utterly irrelevant because it was insignificant. Why
24 would that be abusive? Why would that be a restriction of
25 competition? The very notion of a restriction of
26 competition in chapter 1 presupposes some appreciability
27 and it really makes the words "effect on trade" redundant
28 if they do not have to have some quantitative impact
29 associated with them.

30 Mr Pouncey refers me to paragraph 6.51 of our notice of
31 application and the text around that. We have dealt with
32 this in some detail but we would ask you in due course to
33 look at that.

34 THE PRESIDENT: Thank you for that reference.

35 MR GREEN: So far as abuse of process is concerned,
36 Mr Hoskins said that these were the same proceedings. With
37 respect, we disagree, they are not the same proceedings;

1 last time you quashed the decision. As a matter of
2 convenience the proceedings have been updated and costs
3 remain outstanding in the first proceedings, but there are
4 two sets of proceedings with further rule 14 notices,
5 further decisions and the applicants having a challenge at
6 an entirely fresh decision. Once the first decision was
7 quashed it was quashed.

8 THE PRESIDENT: Yes.

9 MR GREEN: Very finally, on alternative product market, we
10 submit the Director's analysis is circular for the reasons
11 which you identified. If he fails on one product market he
12 really cannot advance an alternative product market case
13 because by virtue of exactly the same factual conclusion he
14 could never be using or Aberdeen Journals could never be
15 using the free titles as a protective shield for the
16 Evening Express. It simply cannot happen once you have
17 come to the conclusion that they are in different product
18 markets, even at a marginal level there is no
19 substitutability.

20 We submit that really is fatal to the analysis. The
21 point that in some way chapter 2 then protects someone who
22 was misguided enough to think that he could do that, there
23 would be no impact whatsoever upon trade; he would never
24 be able to establish that the abuse was anything more than
25 non-existent and it just did not impact upon the market at
26 all by definition, so it cannot be abuse for that reason.

27 Unless I can assist you further, sir, those are my
28 submissions.

29 THE PRESIDENT: I think a moment ago you referred us to the
30 Independent's business plan. Could somebody just give us
31 for my note or pass through the reference to that
32 particular document because I do not have it in my head.

33 MR HOSKINS: It is bundle 5, page 2093.

34 THE PRESIDENT: Thank you very much.

35 MR GREEN: I think the only final matter is that so far
36 as the 2002 documents are concerned, which I referred to
37 this morning, I shall just make sure we have got an

1 exhaustive set and I shall simply provide them to the
2 Director, to Mr Hill and to yourselves.

3 THE PRESIDENT: Yes, I think that had better be done
4 within seven days.

5 MR GREEN: I would imagine we would do that tomorrow,
6 in fact.

7 THE PRESIDENT: And if there are any further comments
8 or submissions to be made as a result of that perhaps the
9 other parties will make them within seven days thereafter.

10 MR GREEN: We will endeavour to do that tomorrow. I think
11 that will be possible.

12 THE PRESIDENT: What according to you, Mr Green, are we to
13 make in particular of paragraph 124 of the Director's
14 decision which is on page 1692, which quotes the memorandum
15 of 21st May 1999 from Mr Palozzi to Mr Davidson? We have
16 not got any evidence about this as far as I know, apart
17 from what is stated in the decision. It is on the question
18 of what effect the competitive situation is having on
19 various discounts.

20 MR GREEN: Yes, I think I know the document you are talking
21 about. I think it is in bundle 1 as well; this is page
22 1692.

23 THE PRESIDENT: That is the decision. It is quoted in
24 the decision at paragraph 124, which is page 1692.

25 MR GREEN: I think this is referring to the relationship
26 between the free papers. It does not say that it is a
27 consequence which is manifesting itself in relation to the
28 paid for papers.

29 THE PRESIDENT: I think in the absence of other evidence
30 we just make of it what we can.

31 MR GREEN: Just looking at it, it does not say where the
32 discounts are going to be granted. It does not say that
33 they would be granted against the Evening Express rate
34 card. It simply says, "We have submitted to advertisers
35 ... switching to the Independent by granting higher
36 discounts," and all say that without knowing what is
37 underlying it it is difficult to know with precision but

1 even if there were some switching again we are at a point
2 in time, which is May 1999, when any decisions may be
3 distorted by the artificial nature of the products which
4 are in the market at that point. But what we do know if
5 you compare May 1999 with March 2000 is the Herald & Post
6 was an entirely different product a year later than it was
7 in May 1999 and the Independent also was beginning to
8 respond to the changes in the Herald & Post. At this stage
9 I do not think there is any more I can realistically say
10 about it.

11 THE PRESIDENT: Thank you. I would like to thank you all
12 very much indeed for the help we have had today. I would
13 particularly like to thank our shorthand writer and the
14 administration of the Court of Session who have enabled us
15 to sit once again in this magnificent setting. Thank you
16 all very much. We will produce our judgment as soon as we
17 can.

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