IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1106/5/7/08

Victoria House,
Bloomsbury Place,
London WC1A 2EB

5th February 2009

Before:

LORD CARLILE OF BERRIEW QC
(Chairman)

RICHARD PROSSER OBE
GRAHAM MATHER

Sitting as a Tribunal in England and Wales

BETWEEN:

ENRON COAL SERVICES LIMITED (in liquidation)

Claimant

- v –

ENGLISH WELSH & SCOTTISH RAILWAY LIMITED

Defendant

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HEARING
(RULE 40 APPLICATION)

APPEARANCES

Mr. Daniel Beard (instructed by Orrick, Herrington & Sutcliffe) appeared for Enron Coal Services Limited (in liquidation).

Mr. Mark Brealey QC and Miss Maya Lester (instructed by Freshfields Bruckhaus Deringer LLP) appeared for the Defendant.

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THE CHAIRMAN: Good morning. Just a couple of things before we start, if I may. I understand that for the time being at least we are dealing with the application to strike out and not with the other application – is that right?

MR. BREALEY: That is correct, sir.

THE CHAIRMAN: Thank you. I should say that of course we have read the skeletons and much of the accompanying documentation. I hope that will be borne in mind. Indeed, it is our hope that the oral argument might be completed in the morning, but we will have to see how we go. We are not going to be prescriptive.

Finally, Mr. Brealey, I thought I would mention that our understanding is that the broad test to be applied in relation to this application is the "bound to fail" test, is it not, in respect of each part or aspect of the claim that is brought into question. Is that right as a general proposition?

MR. BREALEY: As a general proposition, yes. Whether you call it "bound to fail", or "whether it has a realistic prospect of success", it is the same thing. We obviously say you can decide the question of law today.

THE CHAIRMAN: Yes, certainly, and you made that point very clearly, if I may say so, in your skeleton, that if the point is clear then we should not shirk the responsibility of deciding the point of law. I do not think we are going to need wide reference to authority for that proposition. Thank you. That is not going to be in dispute, is it?

MR. BEARD: If it was a clear point of law then obviously it is sensible to dispose of it.

THE CHAIRMAN: It does not seem to me there is much difference on the law between the two skeletons.

MR. BEARD: On the test for rejection/strike out, no.

THE CHAIRMAN: Right. Yes, Mr. Brealey?

MR. BREALEY: I think the Tribunal have indicated that we would have round about an hour for oral submissions. I think you indicated that at the last CMC. I will try and fit within the hour.

THE CHAIRMAN: Yes. That is why I mentioned the morning just now, just to give you a little bit of wriggle room.

MR. BREALEY: What I would like to do is address the Tribunal on four issues which essentially take the same format as the skeleton. The first issue is the nature of the overcharge claim made in the amended particulars of claim. The second is the relevant principles behind s.47A, which hopefully will not take too long. The third, in the light of what you have just said, sir, I was going to deal with the relevant principles under Rule 40, but we can take that

very quickly, I think. Then, fourth, the relevant parts of the Decision, which we say show why the overcharge claim is untenable.

So, first, the nature of the overcharge claim in the particulars of claim; second, s.47A; third, Rule 40; and then, fourth and finally, the relevant parts of the Decision.

Before we examine those four issues, could I just pose what we see as the core question, the core question that the Tribunal has to decide. This is so far as we are concerned. The core question is this: did the Regulator only determine that the May 2000 rates were contrary to s.18? So did the Regulator only determine that the May 2000 rates were contrary to s.18, and that is what we say; or did the Regulator determine that other rates charged by EWS were contrary to s.18? In a nutshell, is the Decision limited to the May 2000 rates, saying that the May 2000 rate infringes s.18 or did the Regulator determine that other rates were contrary to s.18 as the claimants say?

So, for example, and the Tribunal have this well in mind, the parties did agree rates in June and July 1999. That is a given. So applying the core question to those rates, does the Decision determine that the 1999 rates were unlawful? If the Regulator did determine that the 1999 rates were unlawful, then ECSL has a claim for overcharge, and we lose on this application.

If the Regulator did not determine that the 1999 rates were unlawful then ECSL has no overcharge claim, and its claim for overcharge should be rejected. That is the one key issue that we say falls for determination today: was the Decision limited to determining whether the May 2000 rates were unlawful, or did it extend back in 1999 or into 2001? We say that on any fair reading of the Decision, the infringement decision is limited to May 2000. As we know, no coal was hauled under the May 2000 rates, no coal whatsoever was hauled under the May 2000 rates, and therefore there is no claim for an overcharge.

Yes, as we say in the skeleton, lost opportunity. They can advance that claim. They are claiming £77 million for a lost opportunity as a result of the May 2000 rates. So there is a remedy here. The lost EME contract that they say they did not get because of the discriminatory May 2000 rates. They value that at £77 million. That is for another day. They can advance that claim as a matter of law but they cannot advance as a matter of law the claim for overcharge.

Can I, with that introduction, go to the first issue, which is the overcharge claim and go to the particulars of claim. I do not know whether the Tribunal has the amended particulars of claim. It is not actually in the bundle, but we have got copies if need be. Although I am

going to the Decision under the fourth issue, could I ask that the Tribunal has open the relevant passages of the Decision.

THE CHAIRMAN: You have put those into a separate bundle?

MR. BREALEY: Yes, tab 10. So the particulars of claim, the Decision and the overcharge claim is also set out in two annexes, annex 3 and annex 4 – annex 3 for EME and annex 4 for BE. My annexes were extremely tiny, I could not read them so I had them blown up and I can hand up the blown up versions.

THE CHAIRMAN: That might be helpful.

MR. BREALEY: I have three copies – I apologise, there is a bit of manuscript on it but I do not think it matters at all. (Documents handed) If I just quickly identify the amended particulars of claim. We have the summary, it is a monetary claim pursuant to s.47A and it is in respect of damages by reason of the breaches of the Chapter II prohibition, that is para. 1. I am just identifying the amended particulars of claim. Para. 1, where we see it is a monetary claim, s. 47A damages caused to the claimant by reason of its breaches. So just as in the High Court the Tribunal is concerned with a cause of action. It has to be a breach of Chapter II s.18 for there to be a cause of action which sounds in damages.

Then for the purpose of s.47A(6) the Decision relied upon is the Decision of ORR which we know. We get the background parties – I think that the only relevant facts to note in the background of the parties for today is para. 5 we see that ECSL won its first contract in 1999. So essentially it started business in June/July.

Over the page at para. 7 it was placed into administration in November 2001. So it was operating from mid-1999 to the end of November 2001.

Then we have para. 14, ECSL set out the Decision; this is the Decision which is relied up on to establish the breach of s.18. I would ask the Tribunal to note that (iii) on p.7 (para.16(iii)) there is:

> "The ORR found that the Defendant engaged in price discrimination against ECSL on rail haulage to three UK power generators."

It sets out the quotes which we will see a bit later on:

> "EWS discriminated against ECSL between May 2000 and November 2000 in respect of prices for coal haulage."

So there setting out what the ORR found. I move on to para. 17, again this is not in dispute:

> "Pursuant to s.47A(9)of the CA98, the Tribunal is bound by the Decision which establishes that the Chapter II prohibition … has been infringed."

So the determination of breach is binding for the Tribunal.

Paragraph 21 those breaches are a breach of statutory duty (paras. 21 onwards). So the breaches are, as we know, breach of statutory duty, it is a tort that gives rise to a claim in damages.

Then we have loss and damage, para. 27, and 27(a) is the overcharge claim: "The defendant caused ECSL loss and damage in that it overcharged ECSL for coal haulage."

THE CHAIRMAN: Just a moment. (After a pause) I just happen to have noted this, I do not know if there is any significance in it, but counsel will be able to help us if there is. There is a difference in language between s.47A(1), which talks of "loss or damage as a result of the infringement of a relevant prohibition", and I am not sure what the word "result" means at this stage. The language in para. 27 of the particulars of claim which uses the term "as a […] consequence of the breaches of statutory duty and/or the use of unlawful means". I do not know if anything is to be made of the difference between the two sets of terms.

MR. BREALEY: Can I reflect on it, but my immediate reaction is nothing.

THE CHAIRMAN: Thank you.

MR. BREALEY: There is a breach and what one is trying to do is identify what is the consequence of that breach, what was the result of that breach?

THE CHAIRMAN: So the term: "as a result" may be of some interest and concern to the Tribunal.

MR. BREALEY: In damages claims there are three issues: one is liability, the second is causation, and the third is quantum. We submit, and I do not know whether the claimants disagree with this, that liability is not for the Tribunal on a s.47A. It is concerned with causation, what happened as a result of the breach, and quantum.

THE CHAIRMAN: You have absolutely identified what was in my mind, which is, is there a difference between causation and the meaning of the term "as a result"? Possibly not, but it was something I think that had exercised all of us as we looked at this claim.

MR. BREALEY: With the greatest respect I think it is probably just semantics, because what the Tribunal is concerned with is identifying damage suffered as a result of the infringement and one could easily read s.47A damage as a consequence of the infringement.

MR. MATHER You do not think "consequence" goes wider than "result"?

MR. BREALEY: (After a pause) If it does the law is still the same, that if we get to the issue there has to be a causation, a causal link between the breach and the loss. My immediate reaction is that it may in consequence be wider, but it is more semantics. I am going to have to pin my colours on that mast. One sees pleadings all the time which say, "As a consequence of the breach I have suffered this loss", or, "I have suffered this loss as a result

of the breach". The primary task of the Tribunal and the court is to determine the issue of causation. The issue of causation has a factual element which goes to Chitty or Clerk & Lindsell. You will see that there is a factual element and a legal element. The factual element is often the 'but for' -- "But for the breach would I have suffered this loss?" Then you look at the legal element which is to identify the relevant causes - in other words, was the cause the credit crunch? Was the cause the intervening act of a third party? What was the predominant cause of the loss? So, if one looks at Clerk & Lindsell and the test of causation, there is a 'but for' which is the factual test and the legal test. What is the predominant cause?

MR. MATHER: Thank you.

MR. BREALEY: We obviously say that the May 2000 quotes constituted the breach. That was the discriminatory pricing. Whichever way you look at it - whether it is a consequence or a result - that cannot have caused loss in 1999 - even if Mr. Beard transformed himself into the new Dr. Who he cannot submit that an act which happens in May 2000 causes something nine months earlier. That is why he has to - if he is going to get home on this overcharge claim - identify the passages in the decision where the regulator determined that the 1999 prices were also a breach. I think that is what he is going to try to do. He says our reading is tendentious. We say our reading is accurate.

If I could move on from para. 27, we get to the guts of the coal haulage charge. This is paras. 30 to 43. These are the paragraphs essentially we are concerned with. They set the scene in para. 30.

> "The ORR found that the Defendant price discriminated against ECSL on rail haulage to at least three UK power generators in respect of prices for coal haulage: (1) Fiddler's Ferry; (2) Ferrybridge; and (3) Eggborough."

So, the first two are the EME; the last one is BE.

The first point to note there is that that is true as far as it goes, but note there is no date there. When was there price discrimination? Was it 1999? Was it 2000? 2001? Yes, we accept there was price discrimination. That is what the ORR found. But, it is a general assertion. Then we get to the EME contract. We see,

> "During the period from Summer 1999 to July 2000 ECSL supplied coal to Fiddler's Ferry and Ferrybridge using coal rail haulage services provided by the Defendant".

So, yes. Then we go straight into an allegation of overcharge. There are no particulars of this.

"The overcharge is estimated as the difference between the Defendant's price charged to ECSL and the Defendant's price offered to EME".

You will see then a paragraph of the Decision which I am going to have a look at in a minute. So, stopping there, we go straight into an allegation of overcharge. In any discrimination claim there is a favoured price and an unfavoured price. So, obviously what they are saying here is that the favoured price is that offered to EME (see B56), and the unfavoured price - the price which is essentially the unlawful bit - is the price as charged. This must refer to the 1999 prices. Just to put the flesh on the bones here - and this is quite clear from the Decision - the coal that was hauled from Summer 1999 to July 2000 was hauled as a result of prices agreed first of all in June/July 1999 and then December 1999. That is a given. So, for that period of time - that one year - the coal was hauled under what we can call the 1999 prices.

There is then a plea in the alternative:

"-- the difference between the price charged to ECSL and the price the Defendant should have charged had it not price discriminated against ECSL".

So, now we are slightly moving away from the EME price and we are looking at what we should have charged. In other words, we are going to have to look at what the lawful price should have been and that will involve looking at various costs -- all sorts of detailed analysis as to what should have been charged. Then they claim,

"In the premises, the best estimate of loss in respect of the overcharging ... is £2,347,000 ... Details of this calculation is at Annex 3 hereto".

So, if we quickly then go to Annex 3, which is the big sheet of A3 paper ----

THE CHAIRMAN: It is the monthly overcharge - the lower table.

MR. BREALEY: It is. Annex 3 - there is a monthly volume, one sees the beginning of July 1999. The monthly overcharge from various docks to the destination. So, if one looks at the second main row under 'Monthly Overcharge' we see on the left-hand side 'From Liverpool Dock - Destination - Fiddler's Ferry'. We see the ECSL price. Footnote 2: based on the prices charged by EWS during the period March 2000 -- So, they have not actually looked at the invoices for 1999 by the looks of it. But, again, it is a given that the prices charged for this coal were agreed in June/July 1999 and December 1999. We will see that in a moment. Then we see the EME price. When one looks at Footnote 3 – "ORR finding at paragraph B56 of the Decision". So, that is essentially what it is doing - it is comparing the EME price that was offered in the summer of 2000 with the 1999 prices and it is claiming the overcharge.

THE CHAIRMAN: Just as a matter of interest, is the £2.347 million - for, for that matter, the £312,000 - to be reduced by reason of the percentage set out in Note 1, or has that already been taken into account in the calculation? Mr. Beard, can you help with that?

MR. BEARD: Can I just go through that and come back to you when I make my submissions. I will happily deal with it. Thank you.

THE CHAIRMAN: It is either a 'Yes' or a 'No'. It is not germane to today, but it just gives me a snapshot of the figures.

MR. BREALEY: So, that is the nature of the overcharge. It is not based on the May 2000 prices. It is based on a comparison of the rates agreed in 1999-- June/July 1999 -- December '99 with what was offered to EME in the negotiations in 2000.

So, the reference is made both at para. 31 of the particulars of claim and in Footnote 3 to B56. Although we are going to come on to the Decision in a moment, I think it is advisable just to see exactly what is being said here at B56. If we could go the Decision. his is in the section which relates to the haulage to EME power stations at Fiddler's Ferry and Ferrybridge. It starts at B45. B56 is just a snapshot which says that, as can be seen from the tables – this is the paragraph of the Decision that they rely on:

> "… EWS's prices to EME directly during the 2000 negotiations for rail haulage are lower than offered to ECSL …"

In other words, what is being said here is that you have got the May 2000 quotes, and the May 2000 quotes are higher than that offered to EME. So, yes, is the answer, we see that.

If we could have a look at what actually is happening, and pick this up at B54 – we have made this point forcefully in our skeleton, but when one looks at para.B54, and the tables, all the way to B59, it is as plain as a pikestaff that all the Regulator is doing is looking at the May 2000 quote.

THE CHAIRMAN: It is summarised in B58, is it not? That is the essence of your point.

MR. BREALEY: They are summarised in B58. At B54, if we just quickly look at this, this is what is happening. When one has a price discrimination one has to look at the comparisons and compare one price with another. So tables 15 and 16A to D show comparisons of prices that EWS offered to ECSL in May 2000 within the prices that EWS had previously set. As you will see from our skeleton, what the ORR does first of all is compare the May quotes with the 1999 prices and prices that EWS subsequently offered to EME, so it is doing two things. The flows selected are flows to Fiddler's Ferry and Ferrybridge, for which a May 2000 ECSL quote can be compared against a quote to EME for the same flow. So again there is a direct comparison being made between the May 2000 quote and the

quote to EME. So those are the comparable transactions. That is how one works out whether there is discrimination. It is comparing the May 2000 quote with the quote to EME. The ORR says:

> "The figures in the Tables below demonstrate two aspects of discriminatory pricing."

So how is this May 2000 quote discriminatory? It looks at two aspects. First of all, in (a):

> "EWS set ECSL higher prices in May 2000 (compared to those in December 1999) …"

The rest of the text is very important, and I would ask the Tribunal to highlight it because it cross-refers to paras.B139 and B140. So if one, for ease of reference, cross-refers B54 to B139 and B140, and we will come on to that in a moment. What is happening here is that the prices quoted in May 2000 are said to be higher than in December 1999:

> "… once ECSL started to seek quotes for the haulage of coal *generally* (i.e. in order to provide haulage prices as an intermediary, including supply on an E2E basis, and not just in respect of a pre-existing E2E contract with a specific generator) …"

– "which is what is happening in 1999", you could add –

> "… and when EWS had become more concerned about the threat posed by ECSL as a facilitator of new entry to the market for coal haulage by rail."

So this is putting the factual scene on the May 2000 quotes. Note, it is higher than the 1999. The Regulator is not saying the 1999 prices are discriminatory, it is saying the May 2000 quote, part of the evidence as to why the May 2000 quote is discriminatory, is because it was higher than it was before, higher than the 1999 prices. That is the first aspect of the discriminatory pricing. Then (b):

> "EWS in May 2000 …"

again in May 2000 –

> "… set ECSL higher prices than it subsequently set EME for direct supply in respect of the same flows."

So those are the two aspects of why the May 2000 quote is discriminatory. Then we have the tables.

Just as an aside, at the moment the thrust of my argument is all about whether, as a matter of the correct interpretation, as a matter of law, the Regulator is only saying that the May 2000 quotes are discriminatory. In the tables at p.79, the Regulator sets out the various quotes. The EWS for Hunterston to Fiddler's Ferry, that is the first flow, the Fiddler's

Ferry flow. You see there that there are three rates. The first one is the one for December 1999 at £5.90. Then we have what we say is what is being concentrated on, and as I understand it this has been highlighted. The highlighting is by the Regulator not by the parties. Then we get the 12th May 2000 quote, which is £1 more. Then we get the EME quote which is £6.25. So this is the two aspects of discriminatory pricing that we have just seen in B54. The vice is the May 2000 quote. It is higher than the December 1999 quote by £1. The May 2000 quote is higher than that subsequently offered to EME. That is the (a) and (b) in our para.54 that we have just seen.

THE CHAIRMAN: When did ECSL first start to look for direct contracts with generators? Was that in 1999 or in 2000?

MR. BREALEY: In 2000.

MR. BEARD: I do not think that is quite correct, I think they were looking for contracts sooner than that.

THE CHAIRMAN: I think that the Regulator had a comment to make about that at some point.

MR. BREALEY: We see that in (a), and we will see it in a minute. If we go back to 54(a):

> "EWS set ECSL higher prices in May 2000 … once ECSL started to seek quotes for the haulage of coal *generally* … and when EWS had become more concerned about the threat posed by ECSL as a facilitator of new entry to the market for coal haulage by rail."

So that is, as I say, the factual scene.

Coming back to the first column of this table 15 and why it is ludicrous to suggest that the 1999 prices are discriminatory or ECSL is entitled to an overcharge, compare the £5.90 with the £6.25. The lowest quote is the one that ECSL gets in December 1999. So what Mr. Beard, or whoever, is doing in the pleading when they say at para.31:

> "During the period from Summer 1999 to July 2000 [hauled coal] …"

and then they go straight into an overcharge, there cannot be any overcharge. The December 1999 price is lower than the EME price at £6.25. Just as a matter of fact, there is no discrimination there, let alone the main thrust of our argument, which is that the Regulator is simply not examining whether the 1999 prices are discriminatory. I make the same point with table 16A, the December ECSL quote at £5.90 is still lower than that offered to EME in the summer/autumn 2000. There are some instances where the December quote is higher than the subsequent 2000 negotiations. But it just goes to show that the ORR is simply not focusing on whether the 1999 prices are discriminatory.

So just carrying on with the relevant passage of the Decision, we have seen B54, B55 is at the bottom of the table:

> "As can be seen from the Tables above, in each instance the price to ECSL in May 2000 is greater than that made available to ECSL in December 1999."

So again, why is the May 2000 quote discriminatory? Part of the matrix is because it was higher than the 1999 prices. Then we get B56 – from B56 it cannot be referring to the 1999 prices because we have just seen the very first column the 1999 prices to ECSL are the lowest possible. But then we get B57:

> "On the basis of all this evidence, EWS is found to have offered selective price reductions to EME, with prices considerably lower than those offered to ECSL in May 2000. EWS has not provided an objective justification for the price differences."

Then, as you said, Sir, it is summarised at B58 again.

THE CHAIRMAN: And you say this is reinforced in B139, which I have now glanced at?

MR. BREALEY: B139, in my submission, is a killer for the claim. The claim should be dead by now, but B139 and B140 is in the section – back a page – "Overall pattern of discrimination against ECSL", and what EWS is submitting to the Regulator is that if you look at the prices over a period, remembering that ECSL started in mid-1999, went on into 2001, if you look at it over a longer period there is no price discrimination. Sometimes it was lower, sometimes it was higher. At B138 the ORR says: No, it does not underestimate our findings set out above, which in my submission is the May 2000 quote is discriminatory:

> "First, the finding of discriminatory abuse is confined to flows to Fiddler's Ferry, Ferrybridge and Eggborough."

So three specific flows, that is all they are concentrating on, they could have gone to many, many more, and many, many more were in dispute. They have concentrated on three specific flows, and then the real killer, in my respectful submission, at B139 and B140 is:

> "… the discrimination identified in this Decision is not discrimination against ECSL overall, but discrimination against ECSL during a particular time period."

- "a particular time period". What is that time period? This is the time period when ECSL was seeking general terms for haulage that would allow it to then bid for direct contracts with the generators, including on an E2E basis.

THE CHAIRMAN: Is there any significance in the fact that the EME prices are stated as taking effect in January 2001?

MR. BREALEY: Not that I can think of. B140: "This time period was also after …" so there is an "after" there, this is why I asked the Tribunal to cross-refer this to para: B54(a) at p.77:

> "… after EWS had become concerned about the threat posed by ECSL as a potential facilitator …"

That is the same word: "facilitator" we see at 54(a):

> "… of the entry of a new freight train competitor [FF] to EWS. This time period …"

This is a critical sentence:

> "This time period excludes the time of ECSL's initial operation as an E2E supplier."

That quite clearly is a reference back – again the word "initial" is used, that is a reference back to paras. B67 and 68 where ECSL initially started operations. I will come back to this but "This time period excludes the time of ECS initial operation as an E2E supplier", that is the killer for EME, it is also a killer for BE, but it is also a killer for the second part of the BE which is as well as the subsequent time period from 2001, when ECSL had won the BE contract and had the opportunity to use Freightliner at least for some of its coal.

So it is quite clear that there is a very specific time period that the ORR is concentrating on.

THE CHAIRMAN: If the situation were as you say that under s.47A the claimants are only entitled to recover the loss resulting from the infringement, which you say is an infringement within a limited time period, does that exclude their having some other remedy, for example, an ordinary action of some kind, or an account or unjust enrichment, or whatever, in the High Court?

MR. BREALEY: Absolutely not, they can claim damages. We say they are not without a remedy here. At the time all this is going on they can issue a protective claim form, the old protected writ, get it stayed so there is no time limit period, and if they do not like the findings in the Decision ----

THE CHAIRMAN: They can bring another action, but this is a box with a heading.

MR. BREALEY: And they have a choice.

THE CHAIRMAN: But they do not even have to choose, they can do both if they want.

MR. BREALEY: They can do both, yes. So if they complain about the 1999 prices being too high, discriminatory in some way they can issue a claim form in the Chancery Division, Commercial Court and claim damages on that basis, they are not without a remedy.

So that is the EME – I am slightly running out of time.

THE CHAIRMAN: Do not worry. We will discount referee time.

MR. BREALEY: That is the EME claim. If I go back to the BE claim, which is at paras. 34 to 43 – here we need to get the particulars of claim, annex 4 to the Decision. Paragraph 34:

> "Following BE's acquisition of the Eggborough power station … ECSL successfully tendered for the contract to supply coal to BE for use at Eggborough. ECSL supplied BE with coal to its Eggborough power station under an E2E contract from 1 April to 31 March 2001."

So coal was hauled for that one year period. Again, it is not in dispute, as I understand it - the prices were agreed in either March or April 2000. As far as BE is concerned there are two aspects to its discriminatory pricing claim. First, at para. 34 it is claiming an overcharge for the period 1st April, 2000 to 31st March, 2001 (para. 34) for which it then, at para. 35, it then refers to B81 of the Decision. Paragraph 36 claimed £1.8 million. That is calculated at Annex 4. Then there was coal hauled in October 2001 to November 2001 (paras. 38 to 41) right at the end of ECSL's life. It claims an overcharge for October 2001 and November 2001. So, if one looks at Annex 4 we see this in more detail: Estimated overcharge - we have the monthly volumes. Now, just on the volumes, and also the prices, what happened was that April 2000 to March 2001 ECSL was hauling coal using EWS' services, but at rates agreed in March/April 2000. Nothing whatsoever to do with the May 2000 quotes which we say ORR focuses on. Then, as you will pick up from the Decision, the tender to deliver coal to BE -- That started in April 2001. So, in other words, ECSL won the two tenders. It got the first tender starting in April 2000 and it was awarded the second tender in April 2001. But, you will see the blanks in April 2001, May, June, July, August and September because it was using FF as its haulage provider.

THE CHAIRMAN: Do you mean EWS or do you mean Freightliner?

MR. BREALEY: I mean Freightliner. That is why there is a blank. There is no overcharge claim. So, we say again that we look at the Decision and the regulator is quite clearly concerned only with the May 2000 quote. It is not concerned with the March/April 2000 prices, and it is not concerned with coal hauled in 2001. Again, I come back to that paragraph at B139/140 where this time period the time period under consideration - excludes the time of ECSL's initial operation as an E2E supplier as well as the subsequent time period from 2001 when ECSL had won the BE contract and had the opportunity to use FHH for at least some of its coal haulage.

If we have a look at B81 very, very quickly and the table at 17A -- Again, we see what is being compared. We need to pick this up at the tables at B78. Table 17A to 17D show comparisons. This is at B78.

"Tables 17.A to 17.D show comparisons of prices EWS offered to ECSL in May 2000 with prices that EWS had previously set --"

So, that again is the first aspect of the discrimination. What the regulator is saying there is that the May 2000 quote was higher than the March/April 2000 prices. It is not saying that the March/April prices are discriminatory. It is saying that the May 2000 quote is discriminatory. Why? Well, the first bit of the evidence is that they were higher than previously agreed. "The flows selected [so, this is the comparison] are flows to Eggborough ... for which a May 2000 ECSL quote can be compared against a quote to BE for the same flow".

So, that is the comparable transaction that the regulator is undertaking. It is comparing a May 2000 quote against a quote to BE for the same flow. That is why, when we come to Table 17.A, 17.B -- What are the prices that are being compared? We get the ECSL quote on 12th May and then compare 8th March, etc., etc. So, at 17.B - the second column down - flow Hunterston to Eggborough -- On 7th April it is £5.90. Then on 12th May it goes up by a pound to £6.90. Compare the May quote with 8th March or 27th November. Again, just as a matter of fact, forgetting construing the Decision in its proper legal form, how on earth can one claim an overcharge when the price is £5.90 compared to £6.45? It is quite clear that the ORR is not focusing on the April 2000 price. It is not determining the April 2000 price is discriminatory or in breach of s.18.

MR. MATHER: At B79, can you help me on sub-paragraph (1): "It imposed large price increases on ECSL between March 2000 and May 2000". What is the significance of the March?

MR. BREALEY: The significance of March is that it did, but it is only concluding that the May was discriminatory. I come back to a very important point that the claimants do not grapple with, which is that just because there is a price increase does not mean to say that it is discriminatory. So, the ORR is focusing on May 2000 and it is saying, "Why is May 2000 discriminatory?" First of all, because there was an increase in the price from that previously set - in this case, March 2000. So, there was a price increase on ECSL between March 2000 and May 2000. So, that is the first aspect of the discrimination. Then, it offered lower prices to BE in October 2000. So, that is the second. So, that is why if one looks at Table 17C -- I think this puts in figures what you are saying to me, sir -- In March 2000 the price was £2.80. Then there was an increase to £3.40. That increase the regulator uses as evidence to show that the May 2000 quote is unlawful. This is the second aspect of the discrimination. That May 2000 quote is higher than that subsequently offered to BE. That is in essence what the Regulator is saying at B79, but it is not saying by any stretch of the

imagination that the March 2000 price or the April 2000 price was, itself, discriminatory. We see that because it goes through all the evidence and at B90:

> Taking together the evidence of EWS's price increases to ECSL …"

That is what we have just looked at, which is the increase March to May –

> "… the evidence of the price reductions made available to BE but not ECSL and the evidence above of EWS's intent to impede ECSL's operations, EWS is found to have discriminated against ECSL between May 2000 and November 2000 in respect of prices of coal …"

Again, it all centres on the May 2000 quotes. That is why we say that when the claimants are claiming for an overcharge as regards EME for prices that were agreed in 1999, or the prices that were agreed in March/April 2000, they are not entitled to claim an overcharge for those prices. We have seen that in some cases the prices are beneficial. They are lower than the subsequent EME price.

I know I have taken an hour now, but I am going to try and speed up. We have set out in the skeleton the relevant passages of the Decision. To a certain extent it is pointless me repeating them. That is the first issue. What is the claim? A claim for the overcharge and I have tried to show why that is untenable in the light of certain passages in the Decision.

Can I go to jurisdiction which is at para.12 of the skeleton. We have looked at this to a certain extent already, but I just need to emphasise the fact that it is a claim for damages which have been suffered as a result of the infringement of a relevant prohibition. We say that the only – and one looks at the legal conclusion, which we have set out at the end of our skeleton – legal conclusion that the Regulator makes is that the May 2000 quotes were unlawful. One has to then work out what is the loss or damage suffered as a result of the discriminatory pricing as regards the May quotes. Obviously s.47A(5) is important:

> "But no claim may be made in such proceedings until a decision mentioned in sub-section (6) [i.e. the breach] has established that the relevant prohibition in question has been infringed."

So the Tribunal needs a decision from the competent Authority that the relevant prohibition has been infringed. So you read obviously (1) and (5) together.

THE CHAIRMAN: You are saying that the use of the definite article before infringement is material?

MR. BREALEY: It is, absolutely, the "relevant prohibition".

THE CHAIRMAN: That introduces an element of fact, a very large element of fact, as you have already submitted.

MR. BREALEY: It establishes the liability. As we say in this section, in our submission, it cannot be the case that there is a decision, either from the European Commission or the OFT or the Regulator, which says that there was a price fixing cartel in the UK, and then the claimants come and say, "Well, there was also a price fixing cartel in France and I want damages for that as well".

THE CHAIRMAN: Yes, you said that in the skeleton.

MR. BREALEY: There is always a geographical limitation, there is a product service market limitation and there must be a temporal limitation. If the Regulator says that the defendant company abused its dominant position in May 2000 it is not open to it to say that it also abused its dominant position a year earlier, particularly when, as we have set out in the skeleton, this is a question of discriminatory pricing and there are three legal ingredients: one, the comparable transactions, no objective justification, third, there has to be a competitive disadvantage. The ORR examines the May quotes in the light of all those three ingredients and you determine as a matter of law that the May quotes were unlawful, it never, ever does that, it never analyses the 1999 prices in the context of those three legal ingredients, comparable transactions, competitive disadvantage and objective justification.

THE CHAIRMAN: Supposing the Tribunal was of the view that if ORR had examined the 1999 prices it would have concluded, indeed should have concluded, that there was an overcharge for an earlier period and that the evidence of that was sufficiently clear to satisfy the normal standard of proof required here, you are saying that we are debarred from including any consequences of that earlier overcharge, however plain as a pikestaff it might be to us, in the assessment of damages?

MR. BREALEY: I am afraid, sir, that that is a simple question, and the simple answer to that is yes, because the Act says that there has to be a determination of an infringement.

THE CHAIRMAN: Is that not treating ORR's determination as though it were a pleading in effect? Is it not an over-restrictive interpretation of the ORR report?

MR. BREALEY: Obviously Mr. Beard says you cannot read it like a statute or a pleading, you have got to give it a wide interpretation. We say, whatever you want to do, you have got to put it within the confines of the Act. The question of liability in a s.47A claim for damages is not for the Tribunal. If the Tribunal was to go down the road that you have suggested to me, sir, it would be arrogating to itself the task of establishing liability. It is saying, "Okay, the Regulator made a determination of infringement for May 2000, when one looks at the evidence, May 1999 there was also an overcharge. We are going to decide that in May 1999 there was also an infringement". That is contrary to what the Tribunal said in *BCL*,

which we have set out at para.16. It is contrary to the interpretation of the Act. It says no decision, and we come back to the "relevant" infringement. That is the issue and, in our view, the answer to that is crystal clear, the Tribunal cannot take a decision. It may well be that if one takes that path the Tribunal would say: "I am going to find other facts not actually in the decision and find that the defendant is liable for something else". Where does it end? Is it discriminatory pricing, it may be predatory pricing.

THE CHAIRMAN: The quotes or figures offered to EME and BE between May and November 2000 were not offered, were they, to ECSL?

MR. BREALEY: No.

THE CHAIRMAN: Well that is certainly arguably unlawful. If so, is that not an element of the price discrimination we are entitled to take into account?

MR. BREALEY: The simple answer is "no" because one has to take the facts as found and then what is the legal determination by the Regulator? Has the Regulator found that the 1999 prices are unlawful? The answer, in our submission, is "no".

THE CHAIRMAN: Right.

MR. BREALEY: The question that you have just posed to me did not offer those prices, did not offer the 1999 prices to EME, so if you take the 1999 prices, say they are too high. We know as a matter of fact in some cases they are not, because we have just seen the tables, but as we say in the skeleton, just offering the prices, or failing to offer the prices in summer 2000 is only part of the equation. Where is the analysis that the 1999 prices were not objectively justified? Where is the analysis that the 1999 prices placed ECSL at a competitive disadvantage. In every single part of the three legal ingredients that are referred to in our skeleton the objective justification that competitive disadvantage is only concerned with the May 2000 quotes. So never once do they say ----

THE CHAIRMAN: Just bear with us for a moment, if you would not mind.

MR. MATHER: (After a pause) What I am looking at, and it may not be significant, is B49, which is a paragraph which addresses specific instances of discriminatory prices. The last sentence says: "The base period chosen is the year commencing April 2000" – I just wondered is the Regulator saying that it has chosen the base period simply because it is convenient, or that it is in some way limiting its review of prices?

MR. BREALEY: What 49 is doing here is looking at various costs, and it is a five year investigation and it has gone through a lot of the costs – what are the comparable transactions? It has gone into some detail, and the fact that it is choosing the year as April

2000 excludes analysis of EWS's costs in 1999. In my submission B49 clearly supports the view that what the Regulator is doing is concentrating on the May 2000 quote.

THE CHAIRMAN: Having received full submissions from anyone who wished to make them.

MR. BREALEY: Absolutely, and one sees in the annexes that there was a mass of evidence and costs and the Regulator trying to understand the nature of the contracts. We have referred to some of this in the skeleton, but when one looks – for example, very quickly if we go to para. B101, which is the responses to EWS's arguments (p.92), it sets out its conclusion at B 100, which is between May 2000 and November 2000 discriminatory pricing against ECSL: "… competitive disadvantage when negotiating [the] contracts." So it could not be clearer that it is the May 2000 quote which is impacting on the negotiation of the contract, it has nothing whatsoever to do with the 1999 ----

THE CHAIRMAN: I am bound to say, having read the ORR report as part of my Christmas reading, as if it were a book, I do not think there were may stones they did not turn over.

MR. BREALEY: It was a five year investigation, absolutely.

THE CHAIRMAN: The methodology actually left me somewhat perplexed, even irritated, because I suspect that the prolixity of it could have been reduced substantially by a more efficient methodology. I may get into trouble for saying that. It is a reflection of my reaction to reading this rather less entertaining of my Christmas books, but they certainly took everything into account.

MR. BREALEY: They did. Then when we get to the responses to BWS's argument at B102: "… insofar as they relate to specific flows to Fiddler's Ferry … between May 2000 and November 2000", is structured below, and then they deal with the various arguments and the first one is: "Price discrimination and equivalence of transactions". We set this out in the skeleton but, for example, at B118 we see there the Regulator dealing with an argument that the transactions for the 1999 rates were different to the May 2000 transactions. You see quite clearly there at B118 the Regulator accepting that the transactions in respect of the 1999 rates were different. Then one gets back into what was the ORR doing, it was comparing May 2000 transactions and prices with that subsequently offered to EME. Throughout this section, which is replying to the arguments advanced by EWS, it is quite clear that it is only dealing with the May 2000 quotes.

In my submission if this were to go to trial it would be open to EWS to say: "Where is the determination that the 1999 prices placed ECSL at a competitive disadvantage? We want to adduce evidence on that." There is nothing in the ORR's Decision which says that the 1999

prices which, in some cases, were the best prices around, that placed them at a competitive disadvantage, let alone with the negotiations for the new contract.

What Mr. Beard is trying to persuade the Tribunal to do is depart from the determination by the Regulator of breach and to assume the jurisdiction in a s.47A claim for damages to declare that other conduct is in breach of the Act then award damages on that basis, and that would be so irrespective of whether there are findings of fact in the Decision upon which the Tribunal could rely, or further findings of fact. That was not the purpose of the s.47A, that is why we emphasised at para. 16 of the skeleton, *BCL v BASF*:

> "The effect of s.47A is to enable a person who has suffered loss as a result of an infringement of the EC or UK competition rules to rely upon a relevant decision of the EC or UK competition authority establishing the infringement in question, rather than having to establish the infringement independently"

THE CHAIRMAN: Forgive me, Mr. Brealey, I mean no offence if I say that I think you are repeating something that has already been discussed. I wanted to ask you a specific question which is connected with your citation of the judgment of Lord Justice Moore-Bick in *ICI Chemicals and Polymers -v- TTE Training* at para. 26. This is the equivalent of a Part 24 application. I am thinking about the 'bound to fail test' as I put it. You could have made this application in two different ways: one is as a strike-out application, which you have done; the other is asking for a hearing on a discreet point - not as part of a Part 24-type application, but simply as a preliminary point which might otherwise affect the length and issues in the trial. Does it make any difference to the way in which we approach this that you have made a strike out application?

MR. BREALEY: 'No' is the answer, and for this reason: in the High Court you can go for summary judgment or you can go for strike out. The only difference why the House of Lords said this in *Three Rivers* -- The only real difference between a summary judgment and a strike out is that on a strike out basically you take the facts as given, whereas on a summary judgment there may be some facts where you say, "Even if they bring these facts to court, you are bound to fail". But, the test is the same whether it is a strike out or a summary judgment: does the defendant, or the claimant, have a realistic prospect of success? Is it bound to fail? What Lord Justice Moore-Bick does in ICI -- Can we go quickly to that case in the bundle of authorities at Tab 2? If one just looks at para. 1, the second sentence gives you the sense of what was happening.

"The claimant in this case, ICI Chemicals and Polymers Ltd., is seeking to recover from the defendant, TTE Training Ltd., the sum of £359,763 said to be due as a debt due under or pursuant to an agreement made in March 1990".

If you go straight to para. 9, the very last sentence gives you a flavour of what the defence is:

"More importantly for present purposes however TTE relied on the agreement of 10th June, 2002 as constituting a novation [so, the issue was whether there was a novation] ... TTE issued an application under CPR Part 24 for summary judgment against C&P on the grounds that ... the claim was bound to fail".

So, again, we get the same test - 'bound to fail ... realistic prospect of success' They are same thing. What happened was that there was an issue on the construction of the agreement and the judge decided that he was not going to decide that issue on the summary judgment ----

THE CHAIRMAN: My point exactly.

MR. BREALEY: The Court of Appeal said that the judge should have done. That is why we rely on para. 12 which we set out in the skeleton.

"In my view the judge should have followed his original instinct. It is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary ----"

Just stopping there. What more does the Tribunal want from the parties? What else is going to happen in September? We are going to look at the Decision and we are going to have the same legal argument.

THE CHAIRMAN: I am just reading para. 13 as well.

MR. BREALEY: Paragraph 14 I have highlighted because this, to a certain extent, deals with Mr. Beard's submission:

"Well, don't do it now". But, why not? The last sentence: "However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction".

We have the Decision which we can read today or in September. We have s. 47A which we can construe today or September. There is absolutely nothing that is going to happen between today and September which is going to alter the legal arguments we are advancing today. So, para. 18:

"This was a case, therefore, in which all the relevant material was before the judge and in which the parties were ready, as they subsequently demonstrated, to argue the point fully".

Then they conclude at para. 28,

"In my judgment the agreement on its true construction did have the effect of transferring ----

Therefore he would allow the appeal.

"That being so, the claim has no real prospect of success; indeed it is bound to fail."

THE CHAIRMAN: So, the court examined all the documents there and decided there was a novation. The Court of Appeal made that decision.

MR. BREALEY: Yes. I put just for completeness, Lady Justice Arden did the same thing in *Price Meats* on the strike out. She looked at the pleadings ----

THE CHAIRMAN: It is the same point.

MR. BREALEY: It is a short point of law. What is the Tribunal's jurisdiction and how do I apply that to the facts of the case? Does the Tribunal have jurisdiction to determine that the 1999 prices were a breach of s.18? If the answer is, 'Yes' then our application fails. If the answer is 'No' then in our submission out application succeeds. I think EWS would vigorously contest that in the absence of any determination by the regulator that the 1999 prices were lawful, then everything is up for grabs, and just as Mr. Beard is then saying to the Tribunal, "Well you can decide, O Tribunal", we can say, "Well, we want to put in evidence on costs prior to April 2000 -- competitive disadvantage --" It would be a full-blown trial on liability, which is not something that s.47A was designed for.

It is twelve o'clock. I have taken one and a half hours. I will rest there.

THE CHAIRMAN: Mr. Beard, you will probably tell me I am being over-simplistic, and I will not take offence in the slightest if you simply say that, of course, but let me try this analogy on you: I trip over a paving stone (and that usually happens in Liverpool, does it not, on the authorities?) in January 2008 and I break my left leg. I bring no action. I claim no damages. I trip over the same paving stone in January 2009 and break my right leg. I bring an action as a finding or admission of liability and a quantum-only claim is heard before the court. It may be perfectly obvious to the court that I tripped over the same paving stone which was just as negligently maintained by the corporation in 2008 as it was in 2009. But, the court cannot give me damages for the trip in 2008 however evident it may be that I

really ought to be entitled to them. My remedy is to bring another action. What is the difference?

MR. BEARD: It is an entirely separate cause of action in relation to the injury in 2008. What we say here is that the finding of the ORR is such that damages flow both in relation to loss of a chance, but also in relation to overcharge, and that is because Mr. Brealey, in his submissions, is failing to recognise what is the key finding in relation to the ORR's decision, which, just focusing on May 2000 to November for present purposes is that it was discriminatory not to offer ECSL the prices that were offered to EME and BE. That is where the objective justification test goes. There are various points in the skeleton argument and in submissions today. There has been reference to the notion that somehow the higher prices had to be justified, and that really what is going on here is a price discrimination finding in relation to an interval in prices. That is not the case. It is, of course, true that the ORR looked at, and focused upon, and I will come back to deal with Mr. Mather's question as to why it focused on that particular time period in due course. It focused on the prices that were being offered respectively to ECSL on the one hand and EME and BE as part of its analysis of whether or not there was price discrimination here. The simple point is this: the ORR found that the transactions of hauling coal by ECSL to EME and BE were comparable to the arrangements of EWS hauling coal to EME and BE. Then it said, "There is no objective justification for the pricing between the two sets of transactions". There is no doubt here that in terms of a discrimination claim what we are talking about is treating similar situations differently. There are, of course, two ways that discrimination can work. I do not mean to state the obvious. You can have discrimination whereby the same case is treated differently, or you can have different cases treated in the same way. The question then is: is there an objective justification for those, either similarities in treatment in the latter case, or differences in treatment in the former case? Here we are dealing with the former case. There is ample finding in this ORR Decision that we are dealing with comparable situations and there was no objective justification for the difference in prices provided. In other words, what the ORR said was, "You, EWS, should have made available to ECSL the EME prices and the BE prices".

That is a completely different situation from a situation where you have two entirely distinct infringements in your trips example. What you have here is a finding, and we say there are different flows of damages that come from it. We lost the opportunity to win that contract with EME going forward, but what also applies is the price discrimination finding saying, "You, EWS, as part of an intentional persistent targeted abuse, offered prices to people to

cut us out of the market, you should not have done that, you should have offered those prices to ECSL", and if EWS should have offered those prices to ECSL and we were, in fact, paying more, we are entitled to the difference. The fact that we were not paying the even higher prices you were offering to us at the same time does not change our entitlement to that quantum of damage. Indeed, it has never been our case that we were entitled to a measure of quantum that was the difference between the May 2000 prices offered to ECSL and the May 2000 prices offered to EME and BE respectively. That is absolutely plain from our pleadings and from those annexes.

THE CHAIRMAN: That may be right as a broad judgment of the whole situation, but how do you deal with what appears to be very specific language at para.B139, for example, of the ORR Decision? I ask you the question because I, and I am sure my colleagues are concerned to define what "the infringement" is.

MR. BEARD: The difficulty, as is already well recognised by your comments, sir, is that this is not an entirely straightforward Decision to read. The findings that are made are in places a little diffuse. In places they are absolutely damning. Some of those damning findings, it is difficult precisely to understand how they fit into the final reasoning and conclusions that are reached by the ORR. We accept that this is not an entirely straightforward decision to read. That is material to the way in which this Tribunal should deal with this application. Mr. Brealey has said in relation to the nature of this application, "Well, here we have a situation where you do not need to find any facts, there is no real further enquiry, it is really just a point of law", although he does shift his position. He starts off defining it as, "What was the finding of the ORR?" which is, of course, not really a question of law. Here we are shading into issues of law and fact, because in practice your interpretation, as the Tribunal, of what constitutes the infringement of what the relevant findings are is effectively an enquiry of fact and interpretation. It is not the same factual enquiry, I quite accept, as occurs in other situations where one is drawing on swathes of external third party evidence, but the argument about the interpretation of this Decision is material here because drawing the analogy between a strike out application and a summary judgment application, we would say our interpretation is plainly right, and I will work my way through the Decision. In any event, on a strike out application, on a Rule 40 application, you must be giving us the benefit of the doubt in relation to any interpretive disputes, because of course it is right that in due course there will be argument about what the scope of this Decision is, what its impact may be, and so on.

In those circumstances, if one turns to particular passages one has to read them in context. Sir, you have asked me to deal with 139 and 140. If I may, I would like to work my way through the relevant parts of the Decision and put that in context. Before I do that perhaps I could just divert slightly backwards to the relevant test that has to be applied here. I have already trailed to some extent what I would say in relation to these matters. It is worth stressing what Rule 40 is about. It is not the same as the summary judgment procedure because there is a separate summary judgment procedure within the Rules, under Rule 41. In so far as an equivalent is to be drawn, it is undoubtedly between Rule 40 and CPR 3.4. The power to reject in Rule 40 is no reasonable grounds for making the claim, or part of the claim. I quite accept that it can be bits, it does not have to be the whole thing. In 40(1)(b) there are specific provisions relating to consumer claims under section 47B. Rule 40(1)(c) is the vexatious and persistent.

THE CHAIRMAN: Sorry, what page are you on?

MR. BEARD: Sorry, I am in the Tribunal Rules, Rule 40. The page in this Purple Book is 308 (top right hand corner). I am merely reciting the text effectively of Rule 40, I am saying no more than that. I am simply stressing that. Here you have Rule 40 power to reject, which is extreme circumstances, no reasonably arguable case on the basis of the pleadings. This is not a matter where one should start making inquiries into facts or carrying out any detailed analysis. If one looks at the four heads that fall under 41 it is plain that that is what is concerned here. It is: no reasonable grounds for making the claim, issues to do with consumer claims which are not particularly pertinent here, and vexatious proceedings, or situations where there has been a breach of a prior order. In other words, a non-compliance with what this Tribunal has told someone to do. Then effectively this hangs a Damoclean Sword over the relevant party saying: “Be gone” or “Be gone in part, because you have not been listening to what we have told you to do.”

41, on the other hand, Summary Judgment, does mirror CPR 24 pretty much identically because it uses the same language: “no real prospect of succeeding on a claim”, and this is not the application that is being brought today. I have already highlighted why that might be material here; there are two key reasons, one is that if there is any dispute about interpretation, factual analysis and so on, then that dispute must be presumed in our favour essentially. We must have the benefit of the doubt because that is the salient difference between those two procedures. Furthermore, even when one is dealing with matters of law, and we say this is not a pure matter of law, we say it is an analysis in part of the legal basis of the Tribunal’s jurisdiction, in part a detailed consideration of the ORR decision and in

part a consideration of how those jurisdictional provisions and the interpretation of the ORR Decision interact, so we say it is much more complex. But even if one is only dealing with legal issues we have already highlighted the fact that what we are dealing with here is a developing and difficult area of law. There are no cases which set out how one is supposed to deal with s.47A in the face of lengthy and complex decisions, not just of the ORR, but of other regulators.

There has been no damages claim litigated to conclusion before this Tribunal and indeed none in any domestic court as far as I am aware, and those behind me are aware, where there has been specific reliance placed on a prior public decision because if one thinks about cases where there has been full litigation: *Arkin*, where a claim was made peripherally, the central claim was in relation to liability for an infringement, that was a matter where there was not a prior infringement, that did reach conclusion and it was rejected. *Crehan*, the grand saga of Mr. Crehan heading all the way out to Luxembourg, back and up to the House of Lords and so on. That was litigated, he did get some damages in the end, but the very essence of the problem in *Crehan* was that there was no prior finding and one of the disputes that arose was the effect of certain Commission material that had been put forward considering beer tie arrangements, but I leave that to one side. The point is that this is a new and difficult developing area. I will come on after I have dealt with consideration of the ORR's Decision, to look at the specific terms of 47A, because it is not quite so straightforward as people assume in terms of its proper interpretation. Just to emphasise the novelty and development, and the importance of this area, it is worth noting of course that both the EC Commission and the OFT over the past couple of years have been publishing papers and consultations about how it is that private damages claims can be encouraged to be brought more efficiently and more effectively. The Commission has had a full consultation involving Green and White Papers. It is presently tendering and, indeed, I understand the tender has been awarded, in relation to issues to do with quantification of harm in cases concerning competition law damages. As I say, the OFT has done a similar thing in relation to November 2007 and a series of seminars that it held, it published OFT document 916: "Private Actions in Competition Law Effective Redress for Consumers and Business", clearly concerned with the developing and new area of law. We have included in the bundle one or two cases where it is highlighted, as is noted in the White Book, that where one is dealing with novel areas of law, even where they can be delineated as discrete issues, and we say it is not here. You should not, except in the most exceptional

circumstances, be striking out such claims, because they can be properly explored more fully in due course.

Now, we recognise that those cases talked about the benefits of seeing the full facts before one made conclusions in relation to legal issues, and that one should not deal with difficult legal issues in abstract. We recognise that in relation to these jurisdictional points the issue is slightly different here, we are not talking about all the quantum evidence being material to those jurisdiction issues, but we do say that the proper interpretation of an infringement decision is a difficult issue that is going to be the subject of substantive argument, and therefore our case is that, even if this were a discrete point of law, that learning from the courts should be applied in this context as well. We say in the circumstances that really is the end of this matter. We have had the situation where we got a four page skeleton some time ago and we said: "Fair enough", we dealt with it in accordance with the Tribunal's order, set out our skeleton on 26th January, nothing more received. On 30th we receive a 25 page skeleton argument saying "This is all unarguable". We have said in a letter, that we copied to the Tribunal, that we thought this was out of order ----

THE CHAIRMAN: Read it.

MR. BEARD: -- in two senses, one in terms of sequencing but also perhaps in the Denis Waterman in 'Minder' sense, that this is somewhat taking liberties with the proper approach that we thought was being adopted. But leaving that aside, such a skeleton is tending towards the oxymoronic. If it takes so much time and detail to say that a point is absolutely unarguable, the skeleton is at least self-defeating if not self-contradictory we would say. You have effectively got enough there to say: "This is reasonably arguable, there is a reasonable argument going on here, that is the end of this strike out application."

In any event, we go further, and we say the interpretation placed on the ORR's decision by EWS is wrong. It is an unsurprising attempt, both to read the Decision incredibly narrowly and the statutory provisions incredibly narrowly, and to bring the two together in order to try and diminish to vanishing point the scope for a damages claim in relation to overcharge matters.

So in the light of those submissions concerning the relevance of the test and the context in which it should be considered, I will turn if I may to the ORR's decision and work through that. In doing so I will trail four points which are broad points about how this Decision must be interpreted, and what the key findings are.

The first general point I make, which is set out in our skeleton at para. 17 and also cites *National House Building Association,* and it is a proposition that barely requires ----

THE CHAIRMAN: The 'not a pleading' point?

MR. BEARD: We accept that this was done in the context of judicial review, we are not saying that this is a case that was concerned with precisely the same sorts of issues, what we are saying is, as a matter of common sense and as a matter of law that when one comes to read a detailed, complex decision, such as an MMC report, such as a regulatory decision, as we are concerned with here, it is imperative it is not read as a pleading or a statute. I think it is relatively plain already that that would not be possible in relation to this Decision in any event. But it is an important caveat given the points that are being made against ECSL today in the context of a strike-out application. The second issue which I have already trailed is that the relevant findings in the Decision can be summed up in three simple propositions: rail haulage of coal to EME and BE provided directly by EWS was a comparable service to that offered to ECSL by EWS for hauling coal to EME and BE, given that it would have been the same truck, the same train, the same track, the same destination, and the same point of departure. That is hardly a surprising insight, but it is one that is vital to the proper understanding of the Decision.

The second simple proposition is that price discrimination arises where you treat similar comparable cases differently without objective justification. Here there was no objective justification for offering ECSL any different prices from those offered to EME and BE. That tri-partite analysis amounts to the finding of price discrimination. In simple terms, ECSL should have had the same prices as offered to EME and BE. Not doing so was unlawful. It is important to note that the infringement does not hinge on the precise prices offered to, or charged by, EWS to ECSL. ECSL's contention is that this decision is saying, "ECSL's prices should have been lower". Of course, when considering whether there was price discrimination, the ORR looked at all the facts - the pattern of the campaign; the degree of intent; the particular offers that were made between May 2000 and November 2000. There is no getting away from that, and we do not seek to. But, the fact is that whilst it was busy discounting to EME and BE it was actually pushing its prices up to ECSL and that was relevant evidence for the ORR. It was all part of the exclusionary strategy pursued by EWS.

The third key issue that I would raise - which again I have trailed at the outset - is that it follows from this analysis of the decision and the nature of the price discrimination infringement that it is not correct to suggest that it was the prices offered or charged to ECSL which required objective justification. Mr. Brealey earlier referred to Dr. Who. In fact, the problem here is that we have been engaged on an alternative Wallace & Gromit

adventure. It is a case of the wrong prices. The relevant question was whether or not the EME and BE prices were objectively justified - not the prices offered to ECSL. This is an error made in the skeleton at para. 65. It also explains why, in a twenty-five page skeleton, barely a page looks at objective justification because the wrong focus has been brought to bear on the analysis of the ORR.

The fourth point I will highlight before dealing with the terms of the Decision is that the interpretation of the Decision urged by EWS is legally flawed as well because although Mr. Brealey stressed the distinction between liability, causation and quantum - and for these purposes one can slightly conflate causation and quantum because there is no dispute that those are matters that fall to be dealt with by this Tribunal - but actually the interpretation set out by EWS conflates liability and quantum because what it is effectively saying is that the only price discrimination is in relation to that precise gap -- the precise difference between the prices offered to ECSL in May 2000 and the prices offered to, respectively, EME and BE in 2000. If, it must follow from that analysis, there is any variation from those prices beyond, I assume, a de minimis (but it is not entirely clear why even then), one then ends up with a situation where there is no finding of infringement in relation to the matter. In other words, liability sets the precise parameters of quantum. That is an unusual and strange analysis, and one that should lead us to question how it could be the ORR was, without saying anything about it, delimiting the quantum issue in relation to this case.

Turning then to the Decision, I realise that the Tribunal has it in the back of the bundle. There is a passage to which I am going to refer which is outside that selection. Now, most of what I am going to refer to is in that bundle. So, if the Tribunal has been marking up, as it has gone along, the version in the bundle, it is perhaps easiest to stick with that for the moment and then when I go further off piste into one of the annexes, we can deal with it in due course.

THE CHAIRMAN: We do have the whole Decision available to us in File 1.

MR. BEARD: Yes. (After a pause): If we could start at p.66 in the version in the back of the bundle. It is slightly unfortunate because there is a slight mis-match between the pagination between the one that was submitted as part of the pleading and this version. I think it is because this version includes confidential material.

THE CHAIRMAN: This is unredacted, yes.

MR. BEARD: So, there is a difference in pagination. But, I will steer away from page references and stick with paragraphs because they do not drift. B2.

> "EWS has engaged in abusive discrimination between its customers. In particular, EWS set an existing customer, ECSL, selectively higher prices than it charged other customers directly for the same flows without objective justification. This behaviour was a further manifestation of EWS's wider strategy to exclude or limit competitive opportunities for potential new entrants to the market for coal haulage by rail in Great Britain".

If one turns on then to B6 -- This is important. Whilst ECSL has not brought along detailed judgments, authorities and case law in relation to price discrimination, it relies here - and, indeed, for the purposes of this strike out application so must this Tribunal - on the applicable legal principles set out in B6 onwards in relation to discriminatory pricing. There will be a familiarity to the language used here, given the submissions that have already been made.

> "Discriminatory pricing by a dominant company falls under the third head of abuse listed in the Chapter II prohibition/Article 82, i.e. applying dissimilar conditions to equivalent transactions, thereby placing trading parties at a competitive disadvantage".

There is, therefore, just one thing I should say - although I describe discrimination as having two potential manifestations, similar cases being treated differently; different cases being treated in a similar manner - for reasons that are not entirely clear to either academics or practitioners, Article 82 and the Chapter II prohibition only refer to dissimilar conditions for similar cases as a specific example.

Nonetheless, at B7 the ORR goes on to recognise the two basic forms:

> "(a) An undertaking might charge different prices to different customers, or categories of customers, for the same product, where the differences in prices do not reflect any differences in relative cost, quantity, quality or any other characteristics of the products supplied".

So, that is same cases treated differently. Or,

> "(b) An undertaking might charge difference customers, or categories of customers, the same price even though the costs of supplying the produce are in fact very different".

That is not what we are concerned with here. It is plain that we are concerned with Type A discrimination.

When one works through B10 there is an analysis of the BA cases, and at B11 some quotations, in particular from the CFI at 326:

"By remunerating at different levels, services that were nevertheless identical and supplied during the same reference period, those performance reward schemes distorted the level of remuneration which the parties concerned received in the form of commissions paid by BA.

"B12 Price discrimination refers to situations where the difference in prices cannot be justified by differences in costs or other objective criteria."

At B13, ORR describe the relevant market context and refers back to part II A. I will not do that, but it sets out that the conduct of a dominant company has to be seen in the context of the prevailing market conditions, and therefore a wide ranging exploration of the material will be required.

If one turns on to B20 under the heading "Focus of the assessment of alleged discriminatory abuse":

"In this section ORR assesses whether EWS engaged in an abuse of its dominant position by discriminating between customers, without proper justification, and to the competitive disadvantage of ECSL.

The objection concerns three particular aspects of the negotiations …

(a) around May 2000, when EWS offered ECSL rates significantly higher than rates EWS had previously offered ECSL;

(b) the period between May 2000 and November 2000 when EWS offered significantly lower rates to other customers; and

(c) during the same time period, when active contractual negotiations between the two parties ceased and ECSL was not offered reductions similar to those offered to other customers of EWS."

In one sense, the dispute between the two sides boils down to this: Mr. Brealey and EWS say, "All that we are concerned with in this Decision is (a) and (b), there is nothing more there, we can close our eyes and pretend that (c) has not happened". We say, no, (a) and (b) and (c) are important, and in fact what this Decision says is that taking into account the evidence in (a) and (b) and (c) the conclusion was that ECSL was not offered price reductions similar to those offered to other customers of EWS, and that was an infringement. The reason we say that is when one comes down to B24:

"The assessment demonstrates that, between May 2000 and November 2000, EWS applied dissimilar conditions to equivalent transactions, with its customers for coal haulage by rail, and placed ECSL at a competitive disadvantage."

There is no issue but the customers in question are, on the one side, ECSL and on the other EME and BE. There is no doubt. That is the key finding that we rely upon. We say we should have had those prices, we did not have those prices, we are entitled to claim the difference between those prices and what we actually paid.

The Decision goes on, "Evidence of exclusionary intent", and there is substantial material that is relevant to the proper interpretation of this Decision. It is damning. It suggests that what was going on was clear targeted abusive behaviour and the ORR accordingly find that.

During the course of questions to Mr. Brealey, sir, you asked whether it was the case that if there were relevant factual matters – leave aside the case that we are putting today which is this finding of infringement is a proper basis for these overcharge claims that we are making. Sir, you went further and asked whether or not if there were specific findings of fact from which the unavoidable conclusion was that there was an infringement, that was the sort of matter that could be considered by this Tribunal. We say that is the correct approach and we will deal with that in relation to the interpretation of s.47A. We say you do not need to go that far at all, but if the Tribunal has any question about that we say, yes, you can go that far, you should go that far, it was the intention of Parliament in conferring the jurisdiction on the Tribunal under s.47A that you should be able to go that far. We recognise that if issues came up that related to autonomous matters where one was relying on findings of fact not finding of infringement and reaching a conclusion of necessary infringement, effectively, that there was countervailing evidence, we see the difficulties there. We accept that. That is not the case here in any event.

Turning further on through, the analysis of the context of conduct is summarised rather neatly in B43 and B44:

> "This e-mail is evidence of both EWS's intent and, indeed, its success in stopping ECSL from carrying out indirect supplies to EME …"

It is re-emphasised in B44.

Then we get on to the passages within Part 2B, which are considered with haulage to the EME power stations at Fiddler's Ferry and Ferrybridge – in other words, the EME power stations – and then in due course at B66 to the British Energy power station.

First of all, it is important to note the structure of the analysis that is carried out here. It starts with the contractual background, what was going on, a recognition of how coal was being hauled. Then under the sub-heading at B49, "Specific instances of discriminatory prices" – so this is all part of the general pattern, and then this is considering the specific instance:

> "In its investigation of EWS's pricing behaviour, ORR was persistent in its attempts to understand EWS's internal price setting practices and cost modelling, and the underlying thinking of those taking decisions on rates for coal haulage."

Of course, the reason why that is important is because it goes to whether or not the particular prices that were being offered to EME and BE being lower had an objective justification. Mr. Mather raised the question of whether or not really this was the ORR simply saying, "We are only interested in May 2000 to November 2000, we are not really interested in anything else". We say (a) that is enough, the price discrimination finding over that period flows into damages that concern the EME flows more generally and the BE flows more generally. You have already been taken to the amended claim where it is actually pleaded in the alternative. Nonetheless, for the purposes of this strike out, this strike out fails if during the period May 2000 to November 2000 we have a claim for overcharge. The answer to Mr. Mather's question would be one that will be fleshed out more fully in due course in disclosure but it appears from annex G, which I will come on to, that actually the ORR was trying to find out more material, but given EWS's attitudes to the disclosure of information and the manner in which it carried itself in the course of the investigation, perhaps understandably EWS did not necessarily feel too warm towards the ORR at the time, but the ORR essentially gave up on trying to get earlier material in relation to these matters, it seems. As I say, those are matters that will be dealt with as evidence in due course when these documents will be before the Tribunal. I will come on to annex G, in any event, because it is relevant to the discussion of objective justification which we say is so important here.

Then B51:

> "The initial rates agreed with ECSL were significantly higher than those charged to other customers of EWS for the same flows."

There are citations of various emails suggesting the fact, and it is right that we do make a claim in relation to those periods.

Mr. Brealey has placed great weight on B54 and the tables set out there. He says, look at tables 15 and 16, they show comparisons of EWS prices in May 2000 to ECSL and EWS prices to EME and BE, and that was the only thing that the ORR was concerned about. We say, no, that is what the ORR is concerned about there in terms of making findings of evidence as to whether or not there was price discrimination. It is, of course, right that in those tables, as Mr. Brealey has said, some of the pricing that appears to have applied in relation to ECSL in a prior period, looks like it would give rise to no quantum claim, but

that is a matter of the assessment of quantum. It is not a question of whether or not there is a viable claim for damages in principle in relation to the price discrimination issues arising here. That is of course true in B54, the focus of the discussion is on the May 2000 prices because that is what the ORR is analysing here. "EWS set ECSL higher prices from May 2000 (compared to those in December 1999)" What the ORR is saying is that as part of the evidence in our reaching a conclusion of price discrimination we noted that it was not just a matter of them holding steady the prices they were offering to ECSL in the relevant period, they were actually trying to jack them up; it really could not be clearer. This is the cherry on the top of the analysis of price discrimination and, of course, the ORR focused on that. It was right to do so, but that does not mean that the overall analysis carried out by the ORR is only in relation to those May 2000 prices, nor that the price discrimination finding only relates to those May 2000 prices. One can see that when one reads through B55 and B56, the comments that are being made about the various different percentage increases and comparisons that exist.

> "On the basis of all this evidence, EWS is found to have offered selective price reductions to EME, with prices considerably lower than those offered to ECSL in May 2000. EWS has not provided an objective justification for the price differences."

There was no basis for EWS offering ECSL any prices higher than those offered to EME and BE. Then:

> "Taken together with the evidence of the price increase to ECSL, compared to the rates ECSL had previously been granted, and the evidence above of EWS's intent to impede ECSL's ability to contract directly with the generators for rail haulage …"

So again, taking the evidence in the round –

> "… including by way of E2E supply, this evidence supports the finding that EWS discriminated against ECSL between May 2000 and November 2000 in respect of prices for coal haulage on the flows to Fiddler's Ferry and Ferrybridge.
>
> B59 The section below *Response to EWS's Arguments* explains why the differences in prices cannot be justified by differences in the performance regime that ECSL sought, or by any objective justification."

and that, we say, is crucial. If I may I will jump ahead now to that section which is at B101 in the Decision, p.92 in the bundle before the Tribunal. B101 sets out, perhaps unsurprisingly, that:

> "… EWS denied that it had engaged in price discrimination so as to place ECSL at a competitive disadvantage and disputed ORR's preliminary finding that differentials in its pricing were exclusionary."

So unsurprisingly someone faced with a Decision that was against it argued that that was going to be a wrong decision to take. In B102 the six heads of argument put forward by EWS in apparently extensive submissions are traversed. Working through them at (a), from B103 onwards, the contention from EWS was there was no price discrimination and there was not an equivalence of transactions. I am not going to take the Tribunal through it but I just note B116 in rejecting the submissions that there was no price discrimination, or that the transactions were not equivalent, the ORR went as far as to say:

> "Internal EWS documents leave no doubt that EWS's representatives themselves viewed the rates charged to ECSL as directly comparable to the rates charged to the generators directly, and that EWS's representatives were, moreover, fully aware that they were engaging in discriminatory treatment …"

So these are the views of EWS's internal documents that are accepted by the ORR; that EWS, in the rates it was charging, engaged in discriminatory conduct. That is part of the rejection of the arguments from EWS that somehow these transactions were not equivalent, and therefore there was a justification or more exactly at this stage there was no price discrimination, because at (b) – para. B124 onwards, there is a detailed analysis of objective justification for prices. EWS submitted:

> "Even if, contrary to EWS submissions, the ORR continues to consider that it has compared equivalent transactions …."

which, of course, it did –

> " … and that EWS rates to Enron were based on the application of discriminatory criteria …"

which it did –

> "… EWS considers that any differentials in rates quoted to Enron were objectively justified by legitimate commercial considerations."

Well, as a matter of principle, it must be recognised that there may be in certain cases commercial justifications for pricing differently to apparently similar cases. But what the ORR does here is it goes through EWS's arguments and says: "No, those are spurious arguments, we do not accept them; they are wrong. What we have here is equivalent transactions and you intentionally discriminatorily priced, you have no objective justification for treating ECSL differently from EME and BE."

That is summed-up in a way at B129:

> "… there is no evidence from EWS, contemporaneous or otherwise, that would substantiate the claim that during that period there were differences in market conditions that would lead to justifiable differences in price."

I will not take the Tribunal through that part further, but I would ask the Tribunal to turn on just briefly to Annex G, which is not in the bundle, it is an annex to the claim, therefore it is in bundle 1.

THE CHAIRMAN: "Understanding EWS's Pricing"?

MR. BEARD: Yes, it is effectively an expanded analysis of what was being dealt with in relation to the matters which I have already covered to some extent in the section from para. B101 onwards.

> "1. ORR has, since May 2001, been persistent in its pursuit of contemporaneous documents which might assist in understanding the relationship between EWS's prices and costs."

In other words, it is looking at whether or not there is material that could lead to a finding of non-price discrimination – to put it another way: that there was objective justification for any differences.

In paras. 2 and 3 it indicates that it has sent out formal s.26 notices in order to pursue information from EWS. I note para.4:

> " ORR, in a section 26 notice of 19 March 2002, extended the search to documents created prior to 1 March 2000, in order to disclose documents which might have established EWS's pricing strategies and methodologies during the investigatory period. The final file of documents was not provided until 4 December …"

So, that is something like seven or eight months later.

> "ORR, at that stage, concluded there was likely to be no further value in pursuing this line of questioning and decided that its assessment of price differences would need to rely on explanations created by EWS"

'Created by EWS' is a somewhat contentious term that is highlighted later on in response to a s.26 request already received. One turns over: "Relationship between cost and prices". Here it indicates the detailed inquiry into EWS's price setting and cost modelling prior to the introduction of the frontier model which was a cost and price model prepared by an esteemed group of economists. It is worth noting perhaps at para. 9,

"However, it is not possible to deduce from the spreadsheets or from the coal market strategy papers provided, that any difference in price for the haulage of coal over the same route arose out of a difference in the product being offered or any identified difference in the contract or service terms. The six files of archived electronic documents received in response to a further s.26 notice of 10th August, 2001, provided no further assistance in this respect. ...

11. In a covering letter to a further s.26 of 19th March, 2002, ORR pursued this point again ----"

Then it deals with the response. At para. 12 it shows that the ORR was continuing to press for understanding why it is that they did not offer ECSL the same terms as EME and BE. It is obvious from comments made by ORR in para. 16 that the ORR was rather concerned that EWS had failed to address certain requests for information and that certain requests for information were unduly vague and it found it difficult to deal with them.

Then, at para. 26 of this annex there is actually a more detailed analysis of objective justification for differences in prices quoted. There it is notable that in considering these matters what the ORR is doing is looking at the evidence in its entirety - not just in the period May 2000 to November 2000 in considering these matters. It did canvas matters very fully.

A number of these e-mails are actually quoted in the main body of the Decision. I will not take you to those.

THE CHAIRMAN: In the light of that, they produce for better or worse, the terminology which includes the words 'discrimination during a particular time period' in para. B139. What are we to do with that?

MR. BEARD: Let us go back to B139 now. I was working my way through objective justification. The next section is B135 to B140. 'Overall Pattern of Discrimination Against ECSL.' It is important to note what was being dealt with here. "B135. At para. 7.269(b) -- [we are, I should say, given that length of paragraph numbering, looking forward enormously to seeing these documents and reading them] -- of EWS's response, EWS submitted that prices to ECSL were not generally higher than those to other customers but in some cases they were lower. Figure 5 of the Response showed a chart that was described as providing a comparison, for a series of different routes, of average rates to ECSL against average rates to other customers on the same routes".

So, what EWS was seeming to try to do here - and, of course, we are not sure, and I am only trying to interpret what is in this Decision; we have not seen the underlying documents -

was to say, "Look, if you take it in the round, rough with the smooth, ECSL does okay, because in some deals it does better, some deals it does worse. That's the way you should look at these things. Don't worry too much. It comes out in the wash". Okay. There was clearly a great deal of technical material behind that. But, what the ORR then says is that this sort of analysis does not undermine the analysis set out above. It is saying that here one made findings of discriminatory abuse, but it made them in a limited way. It was not considering the entirety of the dealings between EWS and ECSL ----

THE CHAIRMAN: It was considering three power stations.

MR. BEARD: Three power stations. Three flows.

THE CHAIRMAN: If the discrimination is narrowed down and we are bound to consider only discrimination in relation to three power stations, by the same token you have not claimed in relation to anywhere else.

MR. BEARD: No, we are not claiming in relation to anywhere else. It is those three power stations.

THE CHAIRMAN: If we are limited by your claim, and, indeed, by the context to consideration of three power stations because of the way in which ORR expressed its conclusions, why are we not, by the same token, limited to the period for which ORR expressed its conclusions?

MR. BEARD: It is important to take it in two stages. As I said at the outset of these submissions, I am focusing on a period May 2000 to November 2000 here. If this Tribunal accepts that we have an arguable claim, because that is what we have to say, then we say it is a plain claim on the basis of the proper analysis of this decision. But, if this Tribunal thinks that we have an arguable claim, then the strike out application fails because we are entitled to claim, even on that analysis, for the overcharge in the period May to November 2000. The strike-out application against us today is not going beyond that. It is saying, "We can't claim anything". Therefore, once we have said that we can claim something, that is the end of the strike out application. The next question is: If we are entitled to an overcharge claim on the basis of this Decision, and the focus of that Decision is the analysis between May 2000 and November 2000, the question that then arises is: What flows from that, because we have an infringement decision and we say that you can go further than limiting yourself to May 2000 to November 2000 (although it is pleaded in the alternative). We say you must go further and you must consider the position in relation to British Energy, in relation to the transactions and dealings with British Energy going beyond that period because, of course,

if we had had those prices offered to us, we would have been able to deal on those prices and maintain that going forward.

In those circumstances we cannot for the life of us see why, as a matter of a damages claim flowing from an infringement during a period when we were not being offered prices that should have been offered to us at a low rate - they were obviously obtained for a period longer than May to November 2000 - that we cannot claim further damages in relation to that. We say it necessarily flows. We therefore say that if we succeed in rejecting this strike out application in relation to the May to November 2000 period, we also say we must be able to take the benefit of that going forward, because otherwise the limitation on this Tribunal's jurisdiction would mean that in reality what would have happened by those prices being offered, on the terms that were being offered to EME and BE, would not be being properly recompensed. You would not be compensating us in relation to the discrimination we suffered. The fact that that discrimination, as Mr. Brealey puts it, is limited in filing for that time period does not mean that all consequential losses are limited to that time period. Therefore, we can go beyond May to November 2000. We do go beyond May to November 2000, and we say that this Tribunal both may and must go beyond May to November 2000 because to fail to do so would not be properly recognising the impact of the discrimination that has been found.

We also make the claim for the period prior to May 2000. We do that on the basis that it is the logical corollary of this Decision. We say in those circumstances that there is no good reason why we cannot claim those earlier differences in relation to the same flows. In that regard we do say that it is important to have regard to the whole context of the Decision in deciding what logically flows from it. We do not say that you need to go on and make a separate finding in relation to these matters on the basis of the facts found. We say you could. We say you are entitled to, but we say you do not need to. The reason for that is interlinked with the proper interpretation of s.47A.

I should not think I will be much longer in relation to the Decision itself. I think the Tribunal probably has the basic point that we are making in relation to that.

In relation to s.47A, I should imagine I will be ten to fifteen minutes. In relation to the difficulties that obtain in relation to delimiting ----

THE CHAIRMAN: I think for the administrative arrangements here it is more convenient to pause now and resume at two o'clock because we would be resuming at two o'clock in any event.

(Adjourned for a short time)

THE CHAIRMAN: Yes, Mr. Beard?

MR. BEARD: I estimate that I will be about half an hour.

THE CHAIRMAN: That was my estimate about how long you would be as well.

MR. BEARD: (No microphone…) Just before the short adjournment I was referring to B139 and … If I could go back and finish off working through the earlier parts of the Decision – I will try and take this fairly quickly – at B60, p.81 here we have the section on "Competitive disadvantage". It has been suggested by Mr. Brealey that this is a key component of the price discrimination analysis. It is clearly part of the analysis that the ORR undertook in making its findings of price discrimination, so to that extent we do not disagree. Where we part company with EWS is the suggestion that because this is or was the key component, or a key component, of a finding of price discrimination all the damages claim that can be brought is in relation to the loss of a chance or loss of a contracting opportunity with EME subsequently. Beyond that, we would reiterate the points we have made in relation to the earlier analysis.

There is one point to be noted in relation to B63:

> "Furthermore, when EWS made its lowest offer to EME, it indicated that the further rate reductions were available to EME on the assumption that EME would be using EWS on an exclusive basis."

There is a quote. B64:

> "EWS was therefore prepared to offer selective price cuts to EME as part of its 'wider offer' and in exchange for exclusivity."

The reason I highlight that is simply because in the course of his submissions Mr. Brealey referred at para.31 of the amended particulars of claim to our second sentence where it is said:

> "The overcharge is estimated as the difference between the Defendant's price charge to ECSL and the Defendant's price offered to EME …"

This is just in connection with EME billings –

> "… or alternatively the difference between the price charged to ECSL and the price the Defendant should have charged had it not price discriminated against ECSL."

Mr. Brealey raised the prospect of a "monstrous" enquiry into costs and justifications, and so on, in relation to this alternative pleading. To be clear, all that is being said here is that if, in fact, EME was charged at rates even lower than those offered because of the discounts that are trailed and referred to in the Decision, then the appropriate quantum would be between what EME was actually charged and what ECSL was actually charged in relation

to the same flows. So it is just covering the situation that those matters are raised in the Decision and therefore they are covered off in the pleading, but it is not a suggestion that one should go on some sort of broader frolic here. It may be that, therefore, nothing turns on this, nothing comes of it, and it is not an issue. It was pleaded in order that if material came out in disclosure that indicated even lower prices being provided to EME we were not faced with the allegation that we had not pleaded it at the outset and therefore could not rely on the matter.

B65 then is the conclusion in relation to the EME matter, but it is the conclusion in relation to just that part relating to the EME contract loss of a chance. It is not, we say, the entirety of the finding in relation to price discrimination or, more exactly, the terms of B65 do not constrain the impact of the price discrimination finding. The fact that the ORR says it is not possible to conclude that ECSL was displaced – in other words, that on the balance of probabilities on the basis of the material before the ORR, it could not conclude that ECSL would have won the EME contract. It does not mean either that ECSL lost no chance – indeed, we say it is plain and obvious and binding on this Tribunal that ECSL was clearly placed at a competitive disadvantage when competing and did lose a material and substantial chance of obtaining that contract, but more particularly we say that is not the only effect in terms of damages claims by dint of the infringement finding on EME.

I will then move on very quickly to the BE material. I hope to deal with this very swiftly, because of course the structure of the analysis in relation to haulage on flows to BE's Eggborough plant is very similar to that which exists in relation to the EME analysis, so if I can effectively say *mutatis mutandis* with my previous submissions the same analysis applies here – I will touch on one or two points if I may going through. Contractual background again, 66 through to 77. 67 and 68 consider a bidding process for haulage to BE that in fact ECSL was successful in winning and it is that contract – and only in relation to that contract – that ECSL says the better prices that were offered to BE should have been available to us and therefore we would have been able to provide the service to BE that we in fact won on a more profitable basis than we did, and again the quantum of that is the difference between what we were actually charged by EWS when we were performing that contract and what EWS was offering BE. As has already been adverted to that contract runs beyond the period May 2000 to November 2000 but we say plain and obviously those terms that we would have accepted, given that we were already dealing with EWS, if we had been offered better terms it would have effectively been a 'no-brainer' for us to have taken the BE style terms to us, and those would have obtained throughout the period of the contract.

Having gone through the contractual background at B77: "ORR relies on these documents as evidence of EWS's exclusionary intent", so the same sort of finding as made previously, and then we move on to specific instances of discriminatory pricing, and we have the same sorts of tables. Just in passing it is worth noting that although Mr. Brealey's main points about supposed anomalous pricing and so on, that is disclosed in these tables, and pre-May 2000 suggests that there was no quantum of loss, it is perhaps worth the Tribunal being well aware that when the amended particulars of claim were put forward, of course, we did not have sight of any of these numbers, they have only been provided to us relatively recently, we do not have a full confidential copy of the ORR's Decision yet. Very sensibly EWS have provided those tables to us, but we will have to take into account that data in relation to the nature of our quantum claim in due course.

> B79, after table 17, it is the same tripartite analysis that one saw in relation to EME. "Between May and November 2000, EWS pursued a practice of discriminatory pricing … (i) it imposed large price increases on ECSL between March 2000 and May 2000. (ii) it offered lower prices to BE in October 2000 than it had offered to ECSL … (iii) it offered BE further reduced prices in November …"

Then some more details about the various levels. More analysis in B82. B84:

> "Whilst EWS was willing to make price reductions available to BE, reductions from May 2000 quotes were not offered to ECSL. Furthermore, in specific instances where ECSL had contacted EWS in order to ask for lower rates on flows to Eggborough … EWS showed reluctance to negotiate downwards …"
>
> "B86 It appears that EWS's reluctance to negotiate downwards on price was demonstrated again between May 2000 and October 2000."

Then B90, the conclusion on the specific instance of price discrimination:

> "Taking together the evidence of EWS's price increases to ECSL, the evidence of the price reductions made available to BE but not ECSL and the evidence above of EWS's intent to impede ECSL's operations, EWS is found to have discriminated against ECSL between May 2000 and November 2000 in respect of prices for coal haulage on the flows to [the plant] at Eggborough. The section below *Response to EWS's Arguments* explains why the differences in prices cannot be justified by differences in the performance regime that ECSL sought, or by any objective justification."

And I have already taken the Tribunal to that section, I will not do so again. Then we move on to the competitive disadvantage finding, which again rather mirrors what was dealt with in relation to EME.

Then at B100 we have the conclusion:

"On the basis of all the evidence set out above, and the points made in response to EWS's arguments below …"

So again one has to consider matters in the round –

> "… it is found that between May 2000 and November 2000, EWS pursued discriminatory pricing practices against ECSL. This discriminatory pricing placed ECSL at a competitive disadvantage when negotiating intermediary contracts (including E2E deals) with generating companies. EWS's intention was to reduce the threat that ECSL posed to its position in the market for coal haulage by rail in Great Britain. EWS has advanced no credible objective justification for the higher prices charged to ECSL. EWS's conduct distorted the competitive process and is inconsistent with the obligations of a dominant company. EWS's behaviour towards ECSL is therefore found to be abusive."

And we do place weight on the penultimate sentence in that paragraph: "no credible objective justification for the higher prices" – in other words, prices higher than those to EME and BE – "… charged to ECSL."

I will not go further through. I have taken the Tribunal through chunks of the response section, but there is further material in there dealing with exclusionary intent at B141, and through effect on competition at B175, the implications of a finding of price discrimination – that was a section where EWS had said that if you find price discrimination here, we will never be able to vary our prices, essentially, and the ORR said: "No, that is not what we are finding here at all" – and reinforcement of the conclusion at the end. So there we have the interpretation of the Decision as we say it should be read, and we say that that clearly indicates the basis upon which we are entitled to bring our overcharged claims.

Turning now to 47A points that have been made, it may be helpful if the Tribunal could turn up s.57A in the Purple Book, it is at p.47. In its skeleton argument (the most recent one) effectively EWS has said that this is all terribly straight forward, these are follow-on claims, you have to look very acutely at the precise nature of the infringement, and that defines precisely what it is that can be dealt with subsequently, and characterise the infringement very narrowly in their reading of the ORR's Decision. They make relatively limited

submissions on the nature of s.47A beyond that. We say actually s.47A is not quite so straightforward as EWS suggest. If one reads 47A:

> "(1) this section applies to
>
> (a) any claim for damages, or
>
> (b) any other claim for a sum of money
>
> which a person who has suffered loss or damage as a result of the infringement of a relevant prohibition may make in civil proceedings brought in any part of the United Kingdom."

On the face of that, that is a completely open jurisdiction. If it was not for the subsequent qualifications one reads that and says: You, Tribunal, have a jurisdiction in relation to any infringement.

We quite recognise that when one reads on to s.47A(5) it says,

> "But no claim may be made in such proceedings
>
> (a) until a decision mentioned in (6) has established that the relevant prohibition has been infringed;
>
> (6) The decisions which may be relied upon for the purposes of proceedings under this section are ----"

and they include an ORR decision, although the ORR is not referred to there. I think we all accept the terms of the Railways Act and the relevant provisions here. The ORR's decision has the same effect. So, the language is that under (6) decisions which may be relied upon for the purposes of claims brought under (1) are there defined. However, it is in terms of general reliance that the provision specifies the need for there to have been a prior decision. The extent to which reliance on an infringement decision enables this Tribunal to consider consequential damages claims arising from that decision -- Of course, the decision in (6) is a decision of the OFT that one of the prohibitions has been infringed -- or, in this case, the ORR. So, you need to have an infringement decision before this Tribunal can be engaged. That is a predicate step, but once the jurisdiction of this Tribunal is engaged ----

THE CHAIRMAN: It can bring any claim.

MR. BEARD: No. It clearly cannot be any claim - because it must be a claim reliant on the decision that has been taken here. But, the point we make -- therefore, it cannot be that there is a general jurisdiction because you must have had an infringement decision. But, the infringement decision is specified broadly here, and then the term 'reliance' is used -- or 'rely'. I do not mean to paraphrase, because the precise wording may be important.

Clearly, once there has been a decision and you are entitled to rely upon it, then you can bring claims relating to it by virtue of subsection 1.

THE CHAIRMAN: Let us be clear about what you are saying. Are you saying that such a claim is not limited to loss or damage as a result of the infringement?

MR. BEARD: It must be as a result of the infringement.

THE CHAIRMAN: It must be, must it not?

MR. BEARD: We are not suggesting any difference, but when the wording 'as a result of the infringement' is used, one has to bear in mind that it is 'as a result of the infringement' that we are entitled to rely upon. Therefore, the scope of what may be damage resulting from the infringement in circumstances where it is a broad notion of reliance that is specified in (6) suggests that when the Tribunal comes to identify which flows of damage result from an infringement decision, it should approach that question broadly.

THE CHAIRMAN: I am not sure that I understand what you are saying. I want to be absolutely clear. Let us take the simple analogy of liability. What equates to liability here is a finding of an infringement. Is that right?

MR. BEARD: Well, certainly a finding of infringement is prior, but, of course, it is not quite right because what s.47A(1) says is that this section 'applies to any claim for damages or other claim for a sum of money which a person who suffered loss or damage as a result of the infringement may bring'. Therefore, the causes of action that sound in damages flowing from an infringement are actually the relevant liability provisions when you are coming before this Tribunal. It can be made a concrete point here. The claims are brought not only as breaches of statutory duty, but also as unlawful means infringements.

THE CHAIRMAN: I am sure it is my fault, Mr. Beard. You will have to forgive me. But, I really do not yet understand what the proposition you are making is. Let me use my rather clumsy tripping over a paving stone analogy. I cannot recover damages until I have got a judgment of liability in negligence against the authority that created the trip.

MR. BEARD: Yes.

THE CHAIRMAN: You cannot recover damages here without a finding of an infringement.

MR. BEARD: Yes.

THE CHAIRMAN: So, the starting point is the liability issue - infringement. Do bear with me, just for a moment. One then comes to the question of damages, and there is a causation issue here. In the tripping case I can recover damage which has been caused by the breach of duty of the council.

MR. BEARD: Because that is an ingredient of negligence, yes.

THE CHAIRMAN: Here you can recover damages which are, to use the term in the subsection, 'a result of the infringement'. Is that right?

MR. BEARD: Yes.

THE CHAIRMAN: Full stop?

MR. BEARD: Yes, but it is not treated as a *sui generis* claim as resultant damages for an infringement. You have to be able to bring an autonomous cause of action because s.47A(1) says, "You can bring a claim here, where there has been a prior infringement decision, if the claim is a result of the infringement and you could have brought it in civil proceedings." It is that latter caveat. That was the only reason I cavilled at agreeing to the term 'liability' because you actually have to show that you could bring this claim as a claim in civil proceedings which is how you end up having to say, "It's a breach of statutory duty", or, "It's causing loss by unlawful means". Those are heads of claim that are recognised outside this Tribunal in the High Court. It must be the liability for those that is, strictly speaking, the relevant liability if one is taking the point in terms of interpretation here. Now, that does not move away from our accepting that a predicate to being able to bring those claims -- the causes of action in this Tribunal is the existence of a prior infringement decision ----

THE CHAIRMAN: It is 'the' infringement, is it not? It is not 'an' infringement. It is 'the' infringement.

MR. BEARD: Sorry, yes. I was talking generically about the ability. But, if you are talking about one case, then, yes, it is 'the' infringement. But, it is the infringement decision, of course, because what you have to have is an infringement decision and then the damages flow from the infringement. Actually, there is something of a lack of clarity here because what you have got in (6) is a decision of infringement and then in (1) a necessary ingredient of the civil proceedings being 'the' infringement. Of course, a decision on an infringement could actually encompass a range of specific infringements. It is not quite clear how the two mesh. It is just a slightly odd phraseology that (1) gives a broad apparent jurisdiction so long as you can bring a claim in civil proceedings. It predicates it on the existence of a decision relating to infringement, and then feeds the thing back by reference to the notion of 'reliance' in subsection (6) and 'result' in subsection (1). The only point that we are making here is that actually these terms that are being set out in this provision are such that it gives this Tribunal capacity to read its jurisdiction broadly. We make no further point than that in relation to these matters.

MR. MATHER: I would just to follow up on the term 'relied upon'. You are saying essentially that that concerns founding our jurisdiction. It is part of the chain in determining which cases can come before it -- that there has to be a decision of the sort enumerated there.

MR. BEARD: Absolutely. Yes.

MR. MATHER: But, if I understand you correctly, you are not using the term 'relied upon' in any further sense as to constraining the scope of the damage decision.

MR. BEARD: I think what we say is that what will constitute reliance and what is going beyond reliance in relation to any particular infringement decision will depend on the precise terms of that infringement decision. That is what we are saying. That is why we say that the language of s.47A is sufficient to give the Tribunal a broader jurisdiction than it appears EWS says it has.

THE CHAIRMAN: What do subsections (9) and (10) mean?

MR. BEARD: I was going to come on to those because subsection (9) is slightly odd, because if all of the conclusions that have thus been drawn in relation to subsections (1), (5) and (6) are drawn it is not really clear why (9) is actually necessary, because if it were the case that (1), (5) and (6) conferred the jurisdiction then you do not actually need, strictly speaking, to be requiring the Tribunal to be bound, because as soon as the Tribunal strayed from the Decision in question then it would not have any jurisdiction and there would be no issue as to whether or not it was bound. It could not revisit matters.

THE CHAIRMAN: Forgive me for interrupting you again, if you look at subsection (9) the last parenthesis which establishes that the prohibition in question has been infringed and in a sense it is surplusage, just there to explain the rest of the subsection, but the words "the Tribunal is bound by any Decision" mentioned in subsection (6) would seem, on the face of it, to restrict the Tribunal to the Decision.

MR. BEARD: That is right, but it is clearly restricting it to the decision, you are bound by the Decision, and we heavily rely on that fact, because we say you cannot go behind the findings in the Decision. The point we are making here is that the nature of the Decision, as has been adequately illustrated by going through parts of it, is that involves all sorts of elements and findings. To say you are bound by them and then to say in subsection (6) that any claimant can rely on those matters in relation to damages claims that this Tribunal has jurisdiction for in relation to subsection (1) simply means that when one comes to look at that Decision and say, "We cannot unpick that Decision, we have to accept it as it is, we may struggle to interpret it", as I think is going to necessarily be the case in places in relation to this Decision, "but we will do our best, and once we have reached an

interpretation of that Decision, we cannot then diverge from it by making a collateral finding of fact which would undermine those conclusions on the interpretation.

THE CHAIRMAN: Are you not trying to have it both ways? I am sure you are, and so many advocates do try and have it both ways!

MR. BEARD: Yes, I would feel I was failing otherwise!

THE CHAIRMAN: Of course, you are to be congratulated on trying to have it both ways, Mr. Beard, but to get back to the point, are you not trying to have it both ways in the sense that you are saying that the Tribunal cannot go behind the Decision, but you are saying the Tribunal can go beyond the Decision?

MR. BEARD: No, I am saying it cannot go behind the Decision in terms of what the findings have been, both in terms of facts and in terms of conclusion, but when one comes to ask oneself, "What did that Decision cause in terms of loss?" you are able to rely on the findings, both of fact and of law in relation to the Decision, and you do have scope to consider those matters in the round. Sir, as you referred to earlier, if the matter was that in relation to components of the claim there were findings of fact in the Decision and those findings of fact led to a conclusion that you are entitled to damages, in circumstances where they were part of an infringement decision that was being relied upon and this Tribunal is bound by those findings, we say you will be able under subsection (1) to consider those and be bound by them for the purposes of a damages claim under subsection (1). That is how this issue may become material in due course.

The point we are making here is simply that this is just not quite so straightforward as is assumed because the manner in which the structure of s.47A has been put together does not necessarily enable us to reach the simple conclusions about a very limited jurisdiction that are being put by EWS. The reason that matters is because it is only really one part of the proper approach to interpretation of this subsection in any event, or indeed the whole of s.47A. One has to look at the purpose of it, the mischief of this subsection, the public policy intentions behind this subsection and the alternatives of reading jurisdiction narrowly. The efficiency of having all matters related to an infringement decision that flow from that Decision and flow from binding findings in that Decision in one place, not having them hived off to another court, is plain and obvious. That militates in favour of this Tribunal adopting a broader approach to jurisdiction than is being urged by EWS in these circumstances. It is important to note, of course, as Mr. Brealey rightly said, that the fact that this part of the claim could not be brought before this Tribunal does not mean it is a bad claim, it means it should not be here. Of course, if one looks at ss.58 and 58A, what you

have is a situation where the courts are bound by both the findings of fact and the findings of infringements that would appear in an infringement decision.

So the court would end up in the same position as the Tribunal, being bound by the entirety of the Decision, including factual findings, and therefore any damages claim that flowed from the factual findings in relation to that Decision could be brought in a court, and could not be unpicked by the bringing of collateral evidence in the circumstances.

What we are saying is that when you read s.47A you should take into account the possibility that such claims should be brought here because it makes a great deal more sense for them to be brought and dealt with here when you are dealing with a central claim or a series of claims that are plainly predicated on an infringement decision as a matter of law.

Of course, this Tribunal does have the power under Rule 48 of the CAT Tribunal Rules to transfer out parts of claims to the High Court for whatever reason. Ironically, that, in a way, is a complete answer to the strike out application, because if what Mr. Brealey says is right then his application should not be to have this bit struck out, it should be to have this bit transferred out to the High Court. It is not being said that this is a claim without a merit, it is being said whether or not it has got merit – we say not ----

THE CHAIRMAN: A different cause of action.

MR. BEARD: A different cause of action, a different court. No, not necessarily a different cause of action, I am sorry. It would not be a different cause of action. It would, in fact, be a breach of statutory duty claim that would be brought.

THE CHAIRMAN: Why?

MR. BEARD: Because that is how it would sound in damages. It could also be causing loss by unlawful means, but in relation to an overcharge claim it is much more likely to be a breach of statutory duty claim. You would end up with a situation where if that were your concern about a component of this claim you would end up shifting it out to the High Court. We can anticipate that if that were to happen what would immediately be raised against any component of a claim shifted to the High Court, apart from it being a strange thing to do to hive off bits of a claim where it is all really inter-related and the consideration of the Decision and evidence and quantum, and so on, should all really be dealt with together, is that one would end up in a situation where one would be facing a contention that it was beyond the limitation period. Of course, in the High Court you do not have the same limitation periods as apply in relation to this Tribunal.

We might argue that if it is a case where the claim or part of the claim is transferred out under Rule 48, the CAT limitation rule should apply to that component of the claim that is

then heard in the High Court. No doubt, quite understandably, EWS would turn round and say, "No, no, once you are in the High Court you are on High Court Rules, and once you are on High Court Rules we can bring a limitation claim against you". If that were the case, again you end up with a situation where public policy and the intentions of the statute is to afford claimants such as ECSL the benefit of a limitation period which relates to an infringement decision. If you were hiving bits off and shipping them to the High Court with a risk that they would actually be subject to limitation challenges, you would be in a situation where you would be undermining the overall purpose of this statutory scheme which is to enable you to bring damages claims that flow from infringement decisions under special rules, including special limitation rules.

Again, when one begins to look at the statutory scheme in the round what one sees is, both as a matter of efficiency keeping all related claims that pertain to an infringement in the same place to be heard together, but also the public policy of affording claimants such as ECSL the opportunity to come before a specialist Tribunal to benefit from special limitation terms, and have the expertise of the Tribunal rather than just an ordinary High Court hearing to be brought to bear in relation to these claims. That would be undermined if you could hive little bits off or, indeed, require that the whole claim was transferred up to the High Court because bits of it cannot be heard by the Tribunal. So to go back to your tripping and injury case in broad terms what we are saying here, and without getting back into the discussion about the precise nature of liabilities, you might claim for your broken leg, but you would also be able to claim for osteoarthritis if that had been exacerbated by the injury. We say that those matters are matters that go to the nature of the claim as it has been put here in relation to overcharge over the relevant period. Obviously we are slightly concerned to be trespassing on these areas because it is not the nature of the strike out application that has been made against it. The strike out application that has been made is that the Decision does not afford you any overcharge claim at all because it was focused on a comparison of pricing – two sets of prices, there was no infringement finding that sounds as overcharge. We say that is plainly wrong but, in any event, we say it is reasonably arguable. Once we have crossed that threshold we say that this is not an appropriate matter now to start trying to chip away at different bits of the claim when that is not the challenge that has been brought and, in circumstances where, for reasons of efficiency, public policy and in the light of terms within s.47A which, although they look as if they are going to be straightforward, actually afford that breadth in the light of those broader goals, to allow the Tribunal to carry out the sort of analysis that you, sir, referred to as a possibility, or put as a question more

accurately to Mr. Brealey earlier, those are matters that should clearly be left over and aired properly in due course. We assume in this context we are focusing upon pre-May 2000 claims relating to EME flows, because the post-November 2000 claims plainly flow out of the infringement Decision.

In conclusion, we have said high threshold because it is a strike out, it should not be conflated with summary judgment, *TTE Training Limited* and *Price Meats*, we are not disputing the general principle that if you can hive something off which is discrete you should deal with it, we say it is more complicated here, it is an inter-relationship between the interpretation of the Decision, difficult legal issues, and we say that we are plainly in the right about the justification for the overcharge claim given the nature of price discrimination findings generally, and in particular the wording of the Decision and its emphasis on the finding that EME and BE prices were not offered to ECSL and there was no objective justification for that failure to do so. So in those circumstances we say that this strikeout application is to be dealt with briefly and should be rejected. If it is now being suggested that bits of the claim can be hived off. We do not accept that, we think that the exercise is more complicated than is being suggested and actually the interpretation of s.47A is not as straight forward as has been suggested by Mr. Brealey, that whilst we have a plain case in relation to May to November, and subsequently, we also have a strong case in relation to the prior period given the findings of fact that were made, and the circumstance that we will rely upon that effectively this Tribunal is in a Martin Luther position of once you have the acceptance of the infringement sounding as a claim for an overcharge for May 2000 onwards, you cannot but accept the claim for the period July 1999 through to May 2000 in relation to the EME losses and, in any event, this is a matter that should be for further submission in due course.

There is one final matter ----

THE CHAIRMAN: Before you come to your final matter, can I just take you back to the Tribunal Rules, and to Rules 40 and 41?

MR. BEARD: Yes.

THE CHAIRMAN: It is a matter for the defendants which of the Rules they brought their application under, but is there a material difference between Rule 40 and the term "No reasonable grounds for making the claim", and Rule 41(1)(a): "…no reasonable prospect of succeeding on the claim or issue"?

MR. BEARD: There is "no real prospect of succeeding".

THE CHAIRMAN: "… no real prospect of succeeding on the claim or issue". I am partly concerned with the difference between the phrase "making the claim", and the other phrase: "succeeding on the claim", because they are different phrases and one has to assume there is a reason for them.

MR. BEARD: Yes, well I think the difficulty is, these phrases obviously have not been teased out in case law before this Tribunal, but when one moves across and looks at the relevantly similar phrases that are used in the CPR 3.4(2) and CPR 24 – is it helpful just to refer to it.

THE CHAIRMAN: I was looking at it earlier.

MR. BEARD: 3.4(2) is in almost precisely the same terms as Rule 40. "Bringing or defending" rather than "making"

THE CHAIRMAN: The note on p.67 of the White Book, at 3.4.2 ----

MR. BEARD: I do not know whether it helps the Members of the Tribunal I actually have copies of the notes at 3.4.2 – I do not have 24 because I had not envisaged ----

THE CHAIRMAN: If you have copies of the notes it might be helpful.

MR. BEARD: I do not pretend this is a full extract, it is just 3.4 through to p.69.

THE CHAIRMAN: If you read the first paragraph of that note – I am looking at p.67 of vol.1 of the White Book.

MR. BEARD: Yes, 3.4.2.

THE CHAIRMAN: The first paragraph of that note seems to foresee a category of cases which comes very close or near to being the vexatious or frivolous.

MR. BEARD: Well that was the initial submission we made at the outset earlier this morning, that when one looks at the four heads under Rule 40 the reasonably arguable test that is there referred to – "reasonable grounds for making the claim" – has to be seen alongside the other heads, and leaving aside the consumer head, because it is a slightly odd one, but (c) is vexatious and (b) is when you have broken the rules. Therefore we do say that when you are interpreting Rule 40 you must have that in mind when assessing the test, and we do say that there is a relevant difference between Rule 40 and Rule 41, and it may be that the relevant difference is – as, sir, you have indicated, might possibly be a difference – that when one is looking at Rule 40 you area asking yourself could you sensibly have brought the claim, or really is this just a grotesque try-on? Whereas in 41 what you are saying is that once you have got the claim you can have a situation where a challenge can properly be brought essentially to forestall further work on a part of the claim because it is not going to have any real prospect of success, and we say that is a materially different test and it is not the test that should be applied here. Although Mr. Brealey is happy to conflate the two that

does not reflect the difference in purpose between these two provisions. What is hard is to refer to particular cases in this regard because, of course, even in relation to summary judgment CPR 24 cases, the equivalent of Rule 41on the facts what you often find is a phraseology or language being used by a judge who says: "There is no real prospect of success, it is not reasonably arguable here; there is no real basis for making the claim" and so they begin to conflate the terminology, but that should not mean that the two tests are conflated. Rule 40 is a very, very high threshold.

As we said at the outset, when you have to serve a twenty-five page skeleton argument indulging in detailed analysis of a decision and tendentious argument about an untested part of the law, you are not in a position to make good your submission on strike out. So, we do say there is a difference - it is a material difference, and one that the Tribunal should have reference to. As I say, I apologise if I had not clarified adequately what we were saying at the outset about the threshold. But we do think the reference to vexatious or rule-breaking claims as being the sort of thing that you knock out on this basis is material.

THE CHAIRMAN: You said, 'And finally --'

MR. BEARD: And, finally, the answer to the question in relation to Annex 3 was, "Yes" - the relevant discounts referred to in the footnotes were taken into account in the figures that were provided.

THE CHAIRMAN: Thank you very much.

Mr. Brealey, why is this application made under Rule 40 and not Rule 41?

MR. BREALEY: Because a lack of jurisdiction -- because quite clearly it shows no reasonable grounds for bringing a claim. If there is a lack of jurisdiction in the Tribunal to hear this claim for damages -- if there is a lack of jurisdiction which we say there is, there is no reasonable grounds for bringing the claim. It is as simple as that. That is the short answer to the point.

A couple more things on the powers. Mr. Beard's submission that the power to strike out - which is Part 3.4 or Rule 40 - is somehow read by reference to vexatious claims is completely wrong.

THE CHAIRMAN: I think I put that in his mouth. It is clear from the cases that are referred to later in the note that that is wrong. That is an over-simplification.

MR. BREALEY: That is not our submission. It is a matter for comparison.

THE CHAIRMAN: Yes. I understand. You will have to forgive me for the use of the word 'vexatious'.

MR. BREALEY: One only has to go to the first case in the bundle of authorities - *Price Meats* - to see what Mrs. Justice Arden was doing in deciding a point of law on a strike out, at para. 13 saying, "This has got to be decided now, to save court time and so that there is no unnecessary disclosure". So, points of law are decided on strike outs and on summary judgments. That is the second point.

The third point: if one looks at the second case in the bundle - the *ICI Chemicals* case that I have referred to - Lord Justice Moore-Bick refers to 'bound to fail', 'no real prospect of succeeding' almost interchangeably. So, for the Tribunal's note, if one looks at para. 10, para. 12, and para. 28 - 'no realistic prospect of success', 'bound to fail'. Interchangeable.

I come back to the main point that I made before, which is that a strike out essentially is done on accepted facts. One looks at the pleadings. One looks at the accepted facts and says, "Is there a valid case for bringing this claim?"

When one comes to summary judgment there is usually more evidence that is going to be put into the pot and then it has to be tested as to whether it is fanciful and whether the claim is ever going to realistically succeed on the claim in the light of the evidence that is adduced. That is the difference between summary judgment and strike out. Strike out - and one sees this from the House of Lords in *Three Rivers* - is essentially an accepted fact. Summary judgment - there is some more evidence in the pot. The test is almost identical as one can see from Lord Justice Moore-Bick.

I would say that if it is the case that it is felt that it is brought under the wrong rule, the Tribunal can determine what we have been arguing today under Rule 41. There are no prejudices being suffered at all.

That is the power point. The one point that I really want to just spend five minutes on is what I regard as Mr. Beard's core point. He described it as 'the key issue'. Early on in his submissions he said this was the key issue. Essentially his key issue is this: that ECSL should have been offered the same reduced prices as were offered to EME in August 2000. That is his key issue. This is his discrimination. ECSL should have been offered the same reduced prices offered to EME or BE in August 2000. We will just call it EME for the moment. He says, "Well, that is the discrimination". I must say that I am still unclear as to whether he is saying that is loss or an infringement. So, in other words, whether it is open to the Tribunal to declare that that key issue is an infringement - so, the broader s.47A - or whether he is saying that on a proper interpretation of the decision the regulator did find that that failure to give the lower prices was itself an infringement.

I am going to concentrate on whether the ORR found that this was an infringement. I repeat my submission: it is not open, in the absence of ORR finding that it is an infringement, to the Tribunal to independently (to use the Tribunal's own word in BCL) determine that this is an infringement.

So, this key issue is: ECSL should have been offered the same reduced prices to EME in August 2000. At the end of his submission, he emphasised the last couple of sentences in the Decision at para.B100 where he said,

> "EWS had advanced no credible objective justification for the higher prices charged to ECSL".

He said, "I place great emphasis on that". So, that ties in with what is his key issue. What one needs to do is, is where we get 'no credible objective justification for the higher prices charged to ECSL' is put, "When?" What Mr. Beard singularly fails to do in his skeleton and in his oral submissions is ever really identify when ECSL should have been given these lower prices because what he is essentially saying is that if you take the lower prices to EME, for example in August 2000 - and we will come on to this in a minute - what that means is that ECSL should have had them back-dated to June 1999. That is the essence of his submission - that in August 2000 EME was offered a lower price as part of this tendering process. His key issue is: "Well, that means that we should have always had that lower price, and it goes back to June 1999, backdated". Was that failure to offer the EME lower prices generally a finding of infringement by the regulator? We say that on any fair reading of this Decision the answer is clearly, 'No'.

If I could just refer to two reasons why I say that is so, in other words, "Do we have to backdate the lower prices to 1999?" The first one can see if we go to B57 of the Decision. The first reason why it is wrong is that it is not what the Decision says on comparable transactions – it is simply not what it says. This is why, in my submission, and in opening this morning I said the key issue is whether the Decision is limited to May 2000. One sees there B57:

> "On the basis of all this evidence, EWS is found to have offered selective price reductions to EME, with prices considerably lower than those offered to ECSL in May 2000. EWS has not provided an objective justification …"

It does not say found to have offered selective price reduction to EME with prices considerably lower than those offered to ECSL in June 1999, it says in May 2000. So that is the first reason why Mr. Beard's key issue, his key finding, if he is trying to persuade the

Tribunal that ORR found that this failure to give low prices generally was a finding of infringement, B57 clearly shows that to be incorrect.

The second reason is that it is wholly inconsistent with the following paragraphs on competitive disadvantage. It is quite clear when one reads the paragraphs B60 to B62 that the competitive disadvantage caused by the price discrimination results from the May 2000 quotes, because the vice is the alleged disadvantage in bidding for the prospective consent, in bidding for the new contract. So, for example, B62:

> "In bidding as part of these negotiations, EWS's discriminatory treatment of ECSL, placed ECSL at a competitive disadvantage in two main ways …"

There is absolutely no analysis there that failing to give August 2000 EME prices backdated to June 1999 placed ECSL at a competitive disadvantage in its ability to bid for this new contract. What Mr. Beard does is just have a general concept of failing to give his client lower prices.

I finish with this, which relates to competitive disadvantage, and going back to the table: when one looks at the very first column, the EWS prices, table 15, p.79, one asks the question, "What on earth is the competitive disadvantage or the discriminatory treatment that Mr. Beard's clients are complaining about?" All one needs to do is look at those three entries in table 15 – December 1999, the quote to ECSL was £5.90. The quote, 12th May, ECSL, it had gone up to £6.90. The quote, 10th August, £6.25. Where is the competitive disadvantage in not giving ECSL the August price? Is it really seriously contending that there is discrimination or a competitive disadvantage by giving ECSL the price of £6.25 as opposed to the lower price of £5.90? That is why when B57 says "On the basis of all this evidence", it is concentrating on the May 2000. There cannot conceivably be any discrimination or competitive disadvantage by giving ECSL a price of £5.90 rather than the higher price of £6.25.

Mr. Beard says, "That is not a question of discrimination, it is a question of quantum, it may be the quantum is zero". With the greatest respect to Mr. Beard, that is a truly hopeless submission. It is not a question of quantum, it is a question of liability, it is a question of discrimination putting his client at a competitive disadvantage. That table quite clearly shows why the ORR was not considering the 1999 prices to be discriminatory or putting Mr. Beard's clients at a competitive disadvantage.

Those are my submissions.

THE CHAIRMAN: Thank you very much. What I think we are going to endeavour to do, no guarantees offered, is reach our decision this afternoon and announce the decision and give reasons later.

MR. BREALEY: That would be extremely helpful and we would be very grateful.

MR. BEARD: That would be welcomed by both sides.

THE CHAIRMAN: I think the giving of reasons may take a little bit of time. You have got time for a cup of tea. I suspect it is going to take us a minimum of half an hour to discuss this matter. In fact, if you were to aim to be back by about 3.40, but you may find that you are kicking your heels for a bit, so bring a newspaper.

(Short break)

THE CHAIRMAN: As I said earlier, we shall give our reasons in due course but we have reached the following decision. In relation to ECSL's claim for damages in respect of discriminatory prices in relation to EME from July 1999 to July 2000 that claim will be struck out. In relation to ECSL's claim in relation to BE from April 2000 to November 2001 that part of the claim will not be struck out. Is there anything else?

MR. BEARD: Could I just clarify the date in relation to the EME ----

THE CHAIRMAN: Yes, I am sorry, I was using the dates as a matter of shorthand from the beginning of the defendant's skeleton, which sets out the nature of the application, by which we mean in relation to paras. 31 to 33 of the claim, that will be struck out, but in relation to paras 34 to 43 of the claim that will not be struck out; I hope that makes it clear.

MR. BEARD: Thank you.

MR. BREALEY: Thank you very much.

THE CHAIRMAN: Is there anything else?

MR. BEARD: Only one matter, of course, in relation to any appeals there are specific provisions that provide for a month after the decision for any appeal to be put forward in writing. Alternatively, appeals can be applied for orally at any hearing at which the decision is delivered, whilst we do not want to get into a discussion whether or not this was the delivery of the decision or whether or not that would be when the reasons were given, we would ask if any applications are going to be made the time running should be considered from the time of the reasons being given.

THE CHAIRMAN: It seems entirely sensible to all of us.

MR. BEARD: Thank you very much.

THE CHAIRMAN: Thank you all for your help.