

Case No: 1262/5/7/16 (T)
IN THE COMPETITION APPEAL TRIBUNAL

Competition Appeal Tribunal
Victoria House
Bloomsbury Place
London
WC1A 2EB

Before:

MR JUSTICE MARCUS SMITH
MR PETER FREEMAN CBE, QC (Hon) and MR BRIAN LANDERS

Between:

AGENTS' MUTUAL LIMITED
Claimant

and

GASCOIGNE HALMAN LIMITED (T/A GASCOIGNE HALMAN)
Defendant

MR ALAN MACLEAN QC and MR JOSH HOLMES appeared on behalf of
the Claimant

MR PAUL HARRIS QC and MR PHILIP WOOLFE appeared on behalf of
the Defendant

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| <p>1 Tuesday, 14 February 2017 2 (10.00 am) 3 THE CHAIRMAN: We were going to come back to you on timing 4 for written closings. We have read and taken into 5 account Quinn Emanuel's letter of last night, but the 6 points there made notwithstanding, we think that given 7 that we are half a day behind schedule it is appropriate 8 to tack on half a day to the time frame, so we'll say 9 midday on Friday for the closing submissions. 10 We won't make any direction as to the length of 11 those submissions because we're all too conscious how 12 easy those directions can be evaded by annexes, 13 footnotes and cunningly selected fonts, but we would be 14 assisted by submissions that were closer to the 50 pages 15 than to the 100, but that's all we're saying. 16 One further point while we are on the point of 17 closing submissions for Mr Harris. We would be assisted 18 by a fairly clear statement in terms of the horizontal 19 restraints that you are alleging. We noticed that you 20 quite properly took Mr Springett through the geography. 21 To the extent that you have specific cases regarding 22 specific geographic areas it would be useful to have 23 a list of the key documents and submissions that you 24 make in relation to those documents area by area. 25 MR HARRIS: Yes, sir, thank you. Can I make one comment on</p> <p style="text-align: center;">Page 2</p> | <p>1 provided. I think we had reached the stage where 2 Mr Parker said his two pennies worth and we were going 3 over to you, Mr Bishop. 4 MR BISHOP: Okay. I think as we had a discussion at the end 5 of yesterday afternoon, estate agents will want to reach 6 an audience of potential house vendors, property 7 seekers, whichever term you want to use, and the more of 8 those that there are, and in particular the more unique 9 ones of those visiting that portal, the more valuable 10 listing on that portal will be to that estate agent. 11 THE CHAIRMAN: I mean, in a sense, what we are asking is: 12 what attracts the visitors, by which I mean the property 13 purchasers or prospective property purchasers, to 14 a particular site? And what we are trying to do, 15 I suppose, is parse the factors that attract them 16 because it is that which leads the estate agents to see 17 value in subscribing. In a sense the question is a very 18 simple one. The difficulty is identifying what factors 19 make the house purchasers want to go to one or more 20 sites. Is that a rather simplistic but fair way of 21 putting it? 22 MR BISHOP: I think it is a very fair way of putting it. 23 Obviously the more properties that a portal is listing 24 in the area that the property seeker is considering, the 25 better. But I think it is also relevant to what the</p> <p style="text-align: center;">Page 4</p> |
| <p>1 the 12 o'clock deadline? 2 THE CHAIRMAN: Yes. 3 MR HARRIS: I'm assuming, and I would certainly hope, that 4 was a hard deadline. The reason I raise it is because 5 the last two skeleton deadlines have not been adhered to 6 on the part of Agents' Mutual by more than several 7 hours. 8 THE CHAIRMAN: Yes. It is a hard deadline because we will 9 have to read them. Again, I am not going to make an 10 order. The fact is if you don't get it in by midday, 11 we'll be reading whatever you do put in by midday and 12 whoever is late is going to suffer the consequence of 13 effectively compressing the ability of the Tribunal to 14 consider what's put in. 15 So I am not making an order. I am saying midday, 16 and if it's not midday, then you take the consequences. 17 MR HARRIS: Certainly. 18 MR SIMON BISHOP (continued) 19 MR DAVID PARKER (continued) 20 Questions by THE TRIBUNAL (continued) 21 THE CHAIRMAN: Good morning, Mr Bishop and Mr Parker. We 22 left things in sort of the middle of a debate about the 23 two-sided market and what sort of actuated the two 24 sides. We were discussing what factors caused estate 25 agents to want to pay for the service that was being</p> <p style="text-align: center;">Page 3</p> | <p>1 visitor is using the site for. I mean, are they using 2 it as a sense of "Wouldn't it be nice one day to move to 3 Cornwall and I will just have a quick check of what 4 properties are available," to "I am going to move to 5 Cornwall and I'm very serious," and in the latter the 6 extent to which I visit various portals may well vary 7 than it would do in the first scenario. 8 THE CHAIRMAN: Mr Parker, do you have anything to add to 9 that? You gave us a very full answer. 10 MR FREEMAN: Can I just say, we agreed yesterday there is 11 actually no objective evidence of viewer preferences we 12 can refer to. There's the witnesses. We have listened 13 to the witnesses but there is no across-the-industry 14 survey evidence or other evidence of what attracts 15 viewers in these particular categories to particular 16 property portals? 17 MR BISHOP: Not that I'm aware of. 18 MR FREEMAN: So we are on our own? 19 MR PARKER: I don't think so. I agree there is no survey 20 evidence but I think what you can look at it is how -- 21 what has played out in the market and what that shows 22 you. Perhaps I can take you to some charts against the 23 backdrop of what is attracting house-hunters and we are 24 in agreement that as a portal what you want to do is 25 attract as many house-hunter/vendors as possible.</p> <p style="text-align: center;">Page 5</p> |

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| <p>1 I think if you look at, first of all, figure 7 of my 2 first report, so 35. So for the moment let's do this in 3 a world before we look at the effect of OTM and the OOP 4 rule. So if you look at the early part of figure 7 we 5 have near parity at that point between the number of 6 agent branches on Rightmove and Zoopla/Primelocation. 7 Now that situation occurred, that parity only occurred 8 after the merger because prior to the merger we had 9 FindaProperty, Primelocation and you had Zoopla and you 10 had some overlap in the agent branches, some listing on 11 all three but you had a fair amount of unique branches 12 and neither FindaProperty, Primelocation or Zoopla had 13 full property stock. 14 So Rightmove essentially has had the largest share 15 of agents throughout the period. So that's the first 16 piece of evidence. 17 And then what we can see is if you look at, say, 18 figure 5, two pages before that, you can see that the 19 Zoopla/Primelocation share pre-merger is in the high 20s 20 and then the line is when the merger was cleared but 21 actually I understood subsequently from the evidence of 22 Mr Notely that the actual operational integration 23 happened in October and at that point you have a jump up 24 in the share of visits for Zoopla/Primelocation. 25 Now, coupled with that, so that's -- and then you</p> <p style="text-align: center;">Page 6</p> | <p>1 to your website, and then providing something additional 2 to the property stock that they want to see when they 3 get there as in these innovations, from both Rightmove 4 and Zoopla, I think that to me indicates that those are 5 the factors that people care about and the fact that 6 Zoopla was trying very hard has led to this narrowing of 7 the shares in 2013 and 2014 and to the extent we have 8 data we see a similar sort of picture in the page views 9 data although that data series doesn't go quite so far 10 back. 11 So to me, I think those are the factors that are 12 important and this is the same as what the factual 13 witnesses were saying as well. 14 MR FREEMAN: The visits are all visits? 15 MR PARKER: The visits, yes, are all visits. 16 MR FREEMAN: Including idle speculation and serious 17 intention? It is all visits? 18 MR PARKER: I think that's right. As a portal you would 19 want to encourage the idle speculators as well as the 20 serious people to visit because the idle speculator 21 today is potentially the serious person tomorrow. So if 22 you get people coming back to your site on a regular 23 basis for idle speculation, just to see -- nose around 24 what the properties in their area are going for or look 25 at other interesting information and editorial content</p> <p style="text-align: center;">Page 8</p> |
| <p>1 see, at least before we get to where some of the effects 2 of OTM's entry come in, an increasing share, and I think 3 that is a combination of there is now parity, on the 4 number of properties. 5 Then if you go to figure 14, which is on page 68, 6 what else is going on in that period is that Zoopla is 7 very considerably in 2013 and 2014 outspending Rightmove 8 in this case on the above-the-line marketing. So it is 9 trying very hard to attract people to its portal and it 10 has the advantage of or the portal -- no longer has the 11 disadvantage of, having a less attractive property 12 portfolio so it is carrying out a lot of above-the-line 13 marketing and it has a similar property stock. 14 Then I think one would also -- it would be worth 15 having a look at in section 8, which is on page 102, you 16 can see there a list of what you might call innovations, 17 really house-hunter/vendor-focused innovations and 18 Rightmove -- 19 MR FREEMAN: I can hardly see it, I have to say. 20 MR PARKER: I am sorry for that. I know that some of it is 21 marked up for confidential reasons. 22 MR FREEMAN: That's what you have got. 23 MR PARKER: So I think the combination of those factors, so 24 property stock, as Mr Bishop says, marketing, as I think 25 we are both agreed is a way of trying to attract people</p> <p style="text-align: center;">Page 7</p> | <p>1 that brings them back, then you're best placed when they 2 do decide that they want to move or they are getting 3 more serious about it and to the extent they generate 4 a lead, then you are already in that place because you 5 are encouraging them to use you on a regular basis. 6 MR FREEMAN: And above-the-line marketing spending, that is 7 all marketing spending? 8 MR PARKER: "Above-the-line" is a particular term of art. 9 It means non -- it is non-digital. 10 MR FREEMAN: What I mean is it is advertising of all kinds? 11 MR PARKER: It is advertising of all kinds, but not digital 12 advertising, by which I mean Pay Per Click or similar. 13 So it is TV, it is magazines, it is radio. I am not 14 sure that it includes posters, but it's the majority, 15 I think, of outdoor -- sorry, of conventional non-online 16 marketing. There is also online marketing that 17 potentially would be very important but this is the 18 non-online aspect in large part. 19 MR FREEMAN: Do you have any comment on that, Mr Bishop? 20 MR BISHOP: I think Mr Parker has identified the parameters 21 of competition between portals and the one which I think 22 he has alluded to but not really mentioned is attracting 23 estate agents and obviously one of the ways -- the 24 parameters of competition between portals is price, the 25 listing fees that portals are charging to estate agents</p> <p style="text-align: center;">Page 9</p> |

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| <p>1 to list. And that's obviously an important parameter of 2 competition as well.</p> <p>3 MR FREEMAN: So it is not just the quality of the viewers, 4 it is the price charged for the listing service.</p> <p>5 MR BISHOP: It is both. Obviously there is the feedback 6 because the more estate agents I have, the more likely 7 I'm going to have higher visitors, which then makes it 8 more attractive and vice versa. But the listing fee is 9 an important parameter of competition and if I can go 10 back, if you permit me, to the discussion we had 11 yesterday afternoon, it does matter whether we have 12 multi-listing or single listing.</p> <p>13 Mr Parker says it is a red herring and I disagree. 14 I think it's kind of self-evident that if an estate 15 agent is choosing to list on portal A or portal B, it 16 would be in a better bargaining position than if it is 17 choosing to list on both portal A and portal B.</p> <p>18 THE CHAIRMAN: Let's cut to the specifics and looking at the 19 period of time before OnTheMarket entered the market, 20 you say, Mr Parker, that Zoopla acted as a constraint, 21 a competitive constraint on Rightmove. What is the 22 evidence for that?</p> <p>23 MR PARKER: So we have covered quite a bit from theory. 24 I think that the most obvious evidence -- I mean, it is 25 clear from what I have just described in the data Zoopla</p> <p style="text-align: center;">Page 10</p> | <p>1 been flat up to the very recent period.</p> <p>2 So that at least to me indicates that Zoopla is 3 holding Rightmove's power in check in a way that 4 historically it was just increasing prior to the merger 5 because it was managing to charge this increasing cost 6 per lead.</p> <p>7 Perhaps just to clarify what it was that Rightmove 8 did to record its leads in a different way, up to 9 H2/2012 it was -- when it put phone numbers on its 10 website those were 0843 numbers which were essentially 11 a revenue stream for Rightmove, as I understand it, and 12 that led to quite expensive phone calls for customers 13 and they found that customers were working around those 14 because -- you know, looking up the estate agent's phone 15 number directly on another website or just trying to 16 find their website and then phone them up. So although 17 Rightmove was essentially generating the lead, the 18 agents weren't seeing that. So what it did was it 19 instead put in some local rate phone numbers so that 20 whilst it didn't get a revenue stream it gained credit, 21 if you like, for the leads it was generating in a way 22 that it wasn't before. So that is why the total lead 23 numbers between 2012 and 2013 are not comparable and why 24 I don't think you should draw anything from the change 25 in the levels. I think we should look at the change in</p> <p style="text-align: center;">Page 12</p> |
| <p>1 was trying to compete to win more house-hunters and to 2 win -- and to innovate and those are dimensions of the 3 competition which it is trying to attract agents to its 4 site. You can't attract -- sorry, to attract 5 house-hunters to its site and therefore be more 6 attractive to agents.</p> <p>7 You would like to attract unique house-hunters that 8 you can't get anywhere but by the nature of it you may 9 well also attract people who are looking at the other 10 site at the same time. So, if you like, the two things 11 go together. You try to get more people to your site. 12 You hope that some of them are unique. It may well be 13 that some of them are overlapping and they may reduce 14 the number of unique people on another website. So that 15 is one aspect.</p> <p>16 Then the other evidence that I think is relevant 17 here is if you look at page 108, so this is how 18 Rightmove's cost per lead has evolved pre and post the 19 merger. And what you see is prior to the merger up to 20 the end of 2012 Rightmove is able to increase its cost 21 per lead very substantially. Since the merger, and we 22 shouldn't make too much about the levels difference 23 because there was a change in what Rightmove, the way it 24 recorded its leads, pretty much at the point at which 25 the merger came in, but since then it has essentially</p> <p style="text-align: center;">Page 11</p> | <p>1 the trends.</p> <p>2 MR LANDERS: The trend is quite difficult to work out. An 3 alternative way of looking at that figure on page 108 is 4 to say that after the merger the Rightmove price went 5 down from 3.85 to 3.43 as an instant response and since 6 then the trend has been back up again just as it was 7 before.</p> <p>8 MR PARKER: I agree.</p> <p>9 MR LANDERS: It is only six points. It is very difficult to 10 draw any conclusion, isn't it?</p> <p>11 MR PARKER: Well, I think one can at least -- we can come 12 back perhaps to the other issues with the post trend 13 which we'll cover later, but it seems to me, to the 14 extent that we can draw things from trends in this 15 graph, there is a very clear upwards trend in the first 16 four points and precisely what you say about the trend 17 in the second half -- it is a little bit tricky but it 18 isn't continually going up as it was in the first half 19 of the graph.</p> <p>20 MR FREEMAN: That is disputed, isn't it?</p> <p>21 MR PARKER: The trend in the second half or the trend in the 22 first half?</p> <p>23 MR FREEMAN: What this figure actually tells us is disputed.</p> <p>24 MR PARKER: I am sure that Mr Bishop will tell you why he 25 disagrees in a minute.</p> <p style="text-align: center;">Page 13</p> |

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| <p>1 THE CHAIRMAN: I think before he does I want to ask you 2 about essentially what are and what are not reliable 3 metrics. In a sense, when we are trying to work out 4 what the value that is being delivered by a portal is 5 you can take the revenue figure and you choose to divide 6 it by something to get a per something value and you, 7 Mr Parker, have chosen to select the per lead value. So 8 you get, as we see throughout your report, a price per 9 lead. 10 My concern with that is that we heard from a number 11 of estate agents that they didn't regard the leads that 12 they got as particularly valuable. We saw a somewhat 13 dismissive attitude on the part of some estate agents to 14 leads that they got. 15 We also heard evidence about how there were 16 differences in terms of the measurement of leads in 17 terms of how the various portals recorded what they 18 regarded as a lead. And that's not in any sense 19 a criticism. It's simply a reflection of the fact that 20 we are talking about something which is in essence quite 21 subjective. 22 What I want to debate for a couple of minutes at 23 least is whether one oughtn't to focus on a measure of 24 value that is a little bit more objective and two 25 I think spring to mind.</p> <p style="text-align: center;">Page 14</p> | <p>1 a property on your books", or they want an email that 2 provides the same thing, and what portals really focus 3 on is providing people with leads. 4 We also see that, I think every estate agent here 5 has talked about what they want, is value for money and 6 so in terms of they are paying out a listing fee but 7 what are they getting back for it? What they are 8 getting is leads, which are revenue-generating 9 opportunities, and that's very common to any advertising 10 market. So if you advertise in a magazine you want 11 people to contact you in order that you can sell them 12 your product. 13 Now price per page tells you something but it is not 14 a very -- what that tells you is: I get a page. But it 15 doesn't tell you what the value of the advert is. So 16 I think a good way to think about value is the leads 17 that I get. 18 MR FREEMAN: Is that right? I mean, there's lots of 19 advertising, different forms. If you advertise 20 a strapline at a football match, for example, you don't 21 expect people to ring you up and buy your product. You 22 are getting your name out into the public arena. And 23 there is a certain amount of that in portal advertising, 24 surely? 25 MR PARKER: There is some of that, and I think Mr Notely</p> <p style="text-align: center;">Page 16</p> |
| <p>1 Ought we perhaps to have a look at the price per 2 agent branch or the price per property listed as 3 a reflection of what it is that an estate agent is 4 getting when subscribing to a portal rather than a price 5 per lead? 6 There may be other measures. One could I suppose 7 create a measure based upon the revenue divided by the 8 number of visits, though I must say when I fiddled with 9 the data I found that quite a hard thing to compute 10 because we have rather granular detail on the number of 11 visits and actually rather episodic data on revenue. So 12 you have to mesh one with the other. 13 But purely in general terms I think it would be 14 helpful for us to hear from you both about the 15 reliability of these measures and I think it is probably 16 fair to start with you, Mr Parker, because I think you 17 are the proponent of the price per lead and then we'll 18 hear from Mr Bishop in response. 19 MR PARKER: Yes. So I think price per lead is a good 20 measure of value for money because ultimately what 21 agents want is leads. 22 Now, we can I think come back to a discussion of 23 precisely what a lead is and so on. But what they want 24 is leads. They want people to ring them up and say: 25 "I have a property for sale" or "I'm interested in</p> <p style="text-align: center;">Page 15</p> | <p>1 says there's basically three things that people want. 2 They want leads for selling houses, they want leads for 3 renting houses or -- whether there is a sale or 4 appraisal leads we'll come back to -- they want 5 increased brand awareness. But ultimately increased 6 brand awareness is essentially saying: "We want to have 7 a better brand so that we can generate more sales, more 8 leads, more opportunities". I agree it's more diffuse 9 and there's quite a lot of ways in which you can develop 10 that kind of brand awareness. 11 MR FREEMAN: The obvious example is estate agents 12 advertising in magazines properties which are sold. You 13 are clearly not going to generate any business on that 14 property but they are getting their brand out into the 15 arena. 16 MR PARKER: That is true and they'll have a choice and 17 a portfolio of advertising opportunities but I think 18 what we saw from the Enders data on how people have 19 shifted their balance of spend across different 20 advertising channels, they have shifted it heavily to 21 portals. I think there is a lot of evidence in, for 22 example, the analysts' reports about the importance of 23 leads and the importance of a route to market in terms 24 of generating sales. 25 So I think that would be why I would look at leads</p> <p style="text-align: center;">Page 17</p> |

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| <p>1 because that's ultimately what they're getting, is 2 they're getting leads. 3 THE CHAIRMAN: I think what troubles me is that the choice 4 of which portal and how many portals may well be taken 5 at a much more impressionistic level. We heard from one 6 of the estate agents, I am afraid I can't remember who 7 it was, but one said that the reason he subscribed to 8 Rightmove was that he regarded it as something that his 9 customer base in the sense of people who walked through 10 the door and prospective purchasers expected him to be 11 signed up to. In other words, he wasn't really looking 12 at leads at all. What he was looking at was market 13 expectation of what a competent estate agent would 14 provide and that was based upon a sense of what 15 prospective house purchasers would expect which then fed 16 into what his direct clients, the vendors, would expect 17 him to provide as a service. 18 In a sense, his process of reasoning was almost 19 entirely detached from this per lead assessment and 20 I suppose what I am concerned about is that we are here 21 talking about an impressionistic process, about what is 22 good for an estate agent's business, which portal and 23 how many portals one signs up to. And what you have 24 done, Mr Parker, is sort of bottled it in a very clear 25 way and I am wondering whether it isn't too precise</p> <p style="text-align: center;">Page 18</p> | <p>1 to list on property portals if their own search 2 behaviour includes those property portals: I'm on 3 Rightmove all the time and I know lots of my friends and 4 people that I come across also look on Rightmove and 5 I've heard of Rightmove and maybe I'd say the same about 6 Zoopla and perhaps I don't say quite the same about 7 OnTheMarket. 8 So I think that will ultimately all feedback to, to 9 the extent that vendors have that perception, it is 10 going to be a function of the popularity of that portal 11 in terms of attracting visits and I think there is 12 a relationship between visits and leads. 13 So I think it will ultimately come back to leads but 14 I accept that there are some more complexities. 15 THE CHAIRMAN: I suppose we also need to be very clear as to 16 why we are interested in this particular measure because 17 what we are trying to gauge is less the value that an 18 estate agent attaches to a particular portal and more 19 the extent to which the two portals, and we are still 20 looking at the two-party situation of Zoopla and 21 Rightmove, the extent to which one is constraining the 22 other. 23 So that's really why we are trying to work out an 24 objective price. We have the revenue figure but you 25 need to somehow unitise the revenue figure and the</p> <p style="text-align: center;">Page 20</p> |
| <p>1 a measure for something which is essentially 2 a subjective decision. I didn't put that very well but 3 you see my concern. 4 MR PARKER: I do. So I understand that there may be 5 influences outside of cost per lead potentially, but one 6 of them, if we talk about the "I'm getting vendor 7 pressure to put my property on Rightmove," for example, 8 which seems to be a common theme, that is essentially 9 a driver of competition between estate agents to try and 10 list your property on a variety of different places, and 11 so if everyone else in the local area is on Rightmove 12 you need to be on Rightmove and if everyone's on Zoopla 13 then it may well be that you need to be on Zoopla as 14 well. But you will go to Rightmove and/or Zoopla and 15 have a negotiation with them to say: "Well, I've got 16 people telling me this but what are you actually 17 offering me as a product?" And I don't think that can 18 be removed in the abstract, if you like, from the fact 19 that what they are really getting is leads and whether 20 they are getting leads in a proactive fashion because 21 they are on a portal and no one else is or whether they 22 are getting leads in a defensive action because the rest 23 of the estate agents in the area are on a particular 24 portal and they are not and they need to catch up. 25 I also think that vendors will be expecting people</p> <p style="text-align: center;">Page 19</p> | <p>1 question is what that unit should be. And why should we 2 not have regard to, let us say, a price per branch which 3 is effectively, as I understand it, the way in which 4 both Zoopla and Rightmove price their services? As 5 I understand it, although one has got variants, it is 6 effectively a monthly fee for a branch. 7 You might be able to achieve a discount by way of 8 duration and you might be able to achieve a discount by 9 way of bulk but at the end of the day the price, as 10 I understand the evidence, that is charged is a per 11 branch fee. 12 I would be interested to understand, again, 13 Mr Bishop, you will get your look in, but from you, 14 Mr Parker, why that isn't a better metric than the per 15 lead metric. 16 MR LANDERS: Can I just check that the Chairman is right 17 there? None of the major portals to your knowledge has 18 ever tried to charge on a price per lead basis, have 19 they? 20 MR PARKER: Not to my knowledge. 21 MR FREEMAN: And just to add to what the Chairman said, 22 the price per branch, when there is evidence of 23 discounting to win back agents, that is also on the -- 24 it is a discount of the price per branch. It is not 25 something which is related to leads either?</p> <p style="text-align: center;">Page 21</p> |

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| <p>1 MR PARKER: I agree that the form in which these prices end 2 up being negotiated is on a price per branch basis, but 3 the level at which you end up with the price per branch 4 is dependent on the value that that portal gives you, so 5 if you look at figure 25 on page 78 of DP1, there we 6 have the evolution of average revenue per agent, 7 ie agent branch in this case and office, for OTM and 8 that tells you that these are, if you like, the listing 9 fees in this case plus also the add-on products, the 10 average of the sum of those two, and people are 11 negotiating on those, but it doesn't explain why 12 Rightmove is able to charge two and a half times as much 13 as Zoopla. So whilst that is the form, if you like, 14 that doesn't really tell you very much about why you 15 have ended up with the ARPA's that you have ended up 16 with. But I think a fairly logical explanation for that 17 is if you look on figure 24 on the previous page, it's 18 that Rightmove is delivering very substantially more by 19 way of leads. 20 So -- 21 MR FREEMAN: That's an argument based on correlation, is it 22 not? 23 MR PARKER: Well, it is an argument based on the commercial 24 incentives of the agent. I wouldn't pay £830 per month 25 on Rightmove and be prepared to do so if I didn't get</p> <p style="text-align: center;">Page 22</p> | <p>1 obviously be partly based upon leads but may be based 2 upon a whole range of other matters and I suppose that's 3 why I'm wondering whether either a metric based upon 4 price per branch or perhaps price per property, but that 5 is in itself going a little way down the road that I'm 6 concerned about, it's safer to be objective and then 7 simply acknowledge that there are reasons but they are 8 varied reasons as to why that price will be paid. 9 MR PARKER: So I don't think I would agree with that. 10 I think ultimately if you look at all the reasons that 11 we talk about that might affect why an estate agent goes 12 on a portal, they will ultimately boil down to leads. 13 And there's a lot of examples in the disclosure, 14 particularly following OTM's entry, where OTM's agents, 15 many of them, are contacting OTM to say, "I've signed up 16 to you but I'm not getting any leads. Where are my 17 leads? I need leads. I'm in real trouble". Because 18 that's -- if you like, the life blood of an estate 19 agency is having leads about properties to sell. 20 They are not saying: "Thank you, you are charging me 21 exactly what we contractually agreed on a per branch 22 basis." What they are saying is: "I'm in real trouble 23 because I'm not getting the value for money that 24 I need." 25 So if we think about sort of some of the points that</p> <p style="text-align: center;">Page 24</p> |
| <p>1 considerably more out of that than I would from Zoopla. 2 So we can think about an analogy. If I have two 3 shops and they're both selling bags of apples and one 4 sells a bag of apples with five apples in and it costs 5 a pound, and another one sells a bag of apples with ten 6 apples in and it costs £1.50, if we look at things on an 7 agent branch, we would say: well, the bag of apples 8 which costs a pound is cheaper, because it costs a 9 pound, but I think it is fairly clear that the bag of 10 ten apples which costs £1.50 is better value for money 11 because you get more for what you're buying. 12 So if you like, whilst the form there, it may not be 13 that these things are sold on a per apple basis, that is 14 still essentially the calculation people are making. 15 THE CHAIRMAN: Yes, the difficulty I have, I think, is that 16 when one is -- I entirely take your point that when one 17 looks simply at the ARPA figures all you see is the 18 price that is paid by the estate agent, but isn't that 19 a safer platform for us because of the subjective way in 20 which estate agents gauge the value of what they're 21 getting? Of course I entirely accept that a branch of 22 an estate agency is only going to pay, to look at the 23 top line of your graph, the amount to Rightmove that you 24 there state, if it thinks it's worth it. But what 25 drives the estate agent to that conclusion will</p> <p style="text-align: center;">Page 23</p> | <p>1 have been raised about the type of -- the other factors 2 that might go into this, so, for example, the vendor 3 saying, "You've got to put me on Rightmove," well, 4 ultimately the agent is thinking, "If I don't put them 5 on Rightmove then I might lose this instruction 6 entirely". And that's part of the lead, if you like, 7 a revenue-generating opportunity that Rightmove is 8 giving me because the vendor is saying: "If you're not 9 on Rightmove, I'm not going to give you that." 10 So whilst I agree there are some challenges in 11 identifying exactly what a lead is and what's most 12 valuable and so on, and we can come to those, it seems 13 to me that one would be completely throwing the baby out 14 with the bath water if you didn't try and look at this 15 on a value for money basis and instead looked at the two 16 bags of apples and said that the one with five apples 17 was cheaper because it's only a pound. I think that 18 really would -- by trying to solve a small problem that 19 I don't think is a particular problem, and we can come 20 to that, I think you create a much bigger problem by 21 removing any end element of value and we can see that 22 all the estate agents in their witness statements have 23 said: "What we are looking for is value for money". 24 MR FREEMAN: So when you flip the point over and look at the 25 evidence, we also heard of estate agents listing with</p> <p style="text-align: center;">Page 25</p> |

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| <p>1 Rightmove, presumably getting lots of leads because 2 Rightmove generates lots of leads, complaining that 3 their listing fees have gone up too high, then you would 4 say that's just because they don't think the fee 5 provides value for money by reference to the leads they 6 get; is that right? Or they just don't like paying 7 higher prices? 8 MR PARKER: I suspect that if I was an estate agent and 9 I was looking at my monthly outgoings, and if we see 10 from the Enders' analysis and then also from, for 11 example, 78, if I see that every year the amount that 12 I'm paying to Rightmove is going up, I might be quite 13 frustrated and think I would rather not pay that amount, 14 and that seems perfectly understandable. I would rather 15 not pay out £830. I would rather pay £50 a month. That 16 would be much better. 17 MR FREEMAN: According to your analysis they would say: "But 18 I am getting lots of leads". 19 MR PARKER: And that is why they continue to list but I am 20 sure they would prefer to have much lower prices. I am 21 sure we would all like to have much lower prices but 22 when it comes to it they are all making these value for 23 money choices: is it worth me listing on Rightmove at 24 £830 a month? And as we can see from the data on the 25 number of agents, pretty much everyone is listing on</p> <p style="text-align: center;">Page 26</p> | <p>1 the back of their minds be thinking is: "Well, do I need 2 to be on Zoopla because can I get everything I need from 3 my other routes to market, most obviously Rightmove?" 4 And so these ARPA figures are very much 5 individualised -- they are the outcome of lots of 6 individualised negotiations. It is not to take it or 7 leave it -- 8 MR LANDERS: So the implication is that different branches 9 will pay different amounts depending on how valuable 10 they see the leads from that particular portal? 11 MR PARKER: Probably not branches but agents as a whole, 12 I would expect. If those agents find a lot of value 13 from a particular portal they probably wouldn't reveal 14 that in the negotiation. You'd keep that under wraps. 15 But the portal would be advised to try and persuade the 16 estate agent of the value that it thinks it is bringing 17 to them, and that's how I would expect the negotiations 18 to pertain and then you try -- you would typically 19 settle on a price through this negotiation which, if you 20 like, shares the joint value that's created of access to 21 a new market. 22 MR LANDERS: Although the evidence we had from Connells was 23 that they would expect to pay less than smaller agencies 24 so is the implication they are getting less value? 25 MR PARKER: I think actually the implication is that they</p> <p style="text-align: center;">Page 28</p> |
| <p>1 Rightmove so thinking it is value for money but I am 2 sure they would want to have more value for money. 3 MR LANDERS: Is this the way the negotiations actually go? 4 You were saying that if everybody else in an area is on 5 Rightmove you would have to be on Rightmove. You are 6 saying if customers come in and say "I want property on 7 Rightmove," that might persuade you to go to Rightmove. 8 Don't you then get into a negotiation with Rightmove 9 that is essentially saying: I will or I won't? Or maybe 10 I have misunderstood it. 11 I don't know how the negotiations work, but is it 12 the case that the Rightmove or Zoopla rep actually comes 13 along and you have a negotiation about price or do you 14 just have a negotiation about I'm in or I'm not in? 15 MR PARKER: I think you have a negotiation entirely about 16 price. The evidence as I understand it from Mr Notely 17 is he will go along and try to persuade people to join 18 Zoopla or stay on Zoopla and if he can he will try to 19 persuade them to pay him more money but he'll only be 20 able to persuade them to pay him more money if he's 21 delivering something that's of greater value to them. 22 So, for example, he was talking about the number of 23 leads, the unique audience, the elements of value that 24 he thinks he can use in his negotiation and what the 25 estate agents will be doing is saying, or at least in</p> <p style="text-align: center;">Page 27</p> | <p>1 are providing more value to the portal because they 2 bring a lot of agents at once and that enhances the 3 quality of their proposition, as we see from the 4 discussions between Mr Springett and the three big 5 corporate agencies. If you get another 500 to 2,000 6 people on to your platform that's quite considerable, 7 and I think that also plays through in -- for smaller 8 agencies but multiple office agencies. If they are 9 concentrated in a local area they might be really very 10 attractive in terms of enhancing my proposition in that 11 local area and that's why you tend to see, I think, 12 branch discounts. You can see those throughout the 13 contracts that OTM was giving to its members. There are 14 branch discounts if you are a larger firm and that to me 15 is where I think that comes from. 16 MR FREEMAN: I was going to say we don't have that kind of 17 agent by agent price data for Rightmove. 18 MR PARKER: No. 19 MR FREEMAN: We have anecdotes from Zoopla and we have some 20 evidence from OnTheMarket itself but that's the extent 21 of the data from which you're reasoning. 22 MR PARKER: Yes, that's right. 23 THE CHAIRMAN: Mr Bishop, you have been very patient. We 24 are really talking about what measure we use and we 25 would be very grateful to have your views on that and</p> <p style="text-align: center;">Page 29</p> |

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| <p>1 indeed on what Mr Parker has been saying is the 2 appropriate measure. 3 MR BISHOP: I think the appropriate measure is the one which 4 agents actually negotiate, which is either average 5 revenue per agent or average revenue per agent branch. 6 I mean those two things are broadly comparable. That's 7 what the negotiations are over. Those negotiations do 8 take into account leads but they also take into account 9 that different agents may value one lead differently 10 from another. 11 So it seems to me that moving to a cost per lead 12 measure is actually introducing a number of 13 idiosyncrasies which are actually taking us away from 14 reality and I will mention a number of points. 15 The first one is cost per lead is ex post, and in 16 the data we have, there is reference to six or seven 17 data points but the reality is we actually have less 18 than that because agents are negotiating on an annual 19 basis. So a change from one semi-year to the next is 20 going to be driven by the changes in the number of leads 21 rather than the changes in pricing power. So we are 22 introducing some spurious variation into the data. 23 Secondly, this is average and, as I said, some 24 agents will value leads differently from others. You 25 can imagine that an estate agent in London who is</p> <p style="text-align: center;">Page 30</p> | <p>1 pricing power and that's what we're trying to address 2 here. 3 Mr Parker is using cost per lead to infer that 4 Rightmove has enhanced pricing power following the entry 5 of OnTheMarket and I don't think that just observing, 6 even if you take his econometric analysis as read, that 7 the increase in the cost per lead by itself allows him 8 to make that conclusion for all the reasons I have just 9 given. 10 THE CHAIRMAN: So, if I may, your critique of both 11 Mr Parker's cost per lead, and indeed my cost per 12 property, is a twofold one. 13 First of all, you are saying that the data we have 14 is not as good as the ARPA rate that has been paid, we 15 have a certain limit in terms of what we know. But 16 secondly, I think you are saying even if that, 17 a deficit, didn't exist, you are concerned that the 18 measure is not a good one and that the measure you would 19 favour for the reasons you have given is the price that 20 is actually paid. 21 MR BISHOP: It is what agents are paying, yes. Stick with 22 -- there's no reason to move away from that. 23 THE CHAIRMAN: No. And before we allow Mr Parker to come 24 back, you will recall yesterday we tried to disentangle 25 the various inputs or strands that might feed into the</p> <p style="text-align: center;">Page 32</p> |
| <p>1 selling properties at a million pounds will value a lead 2 greater than someone in Darlington selling a house for 3 100,000 simply because of the commission they get on 4 selling the house would be very different. 5 The number of leads will vary over time for a number 6 of factors which will confound expectations, so it can 7 also change on what property stock an estate agent has. 8 So we are actually -- we have got a good measure, 9 which is average revenue per agent or per agent branch, 10 and I can't see there is any good reason to move away to 11 cost per lead and I think if I can just come in on the 12 revenue per property listing, I think that kind of 13 suffers from some of the similar issues. 14 First of all, the data we have available for 15 Rightmove is pretty aggregated. I mean, I think if 16 I remember correctly it goes 1.1 million, 1.1 million, 17 1.2 million, 1.1 million. So any variations are 18 reserving that: are they really that meaningful? And 19 secondly, again, an estate agent can have some 20 expectations about how many properties it is going to be 21 listing going forward for the year but that may 22 underestimate or may overestimate. 23 Again, we would be introducing some -- we wouldn't 24 actually be capturing -- the change in that "measure of 25 price" wouldn't necessarily be reflecting the changes in</p> <p style="text-align: center;">Page 31</p> | <p>1 overall revenue and one of the potential reasons that 2 revenue might be higher than it otherwise would be was 3 the existence of an ability on the part of one of the 4 players in the market to price without reference to 5 others in the market; the sort of dominant point if we 6 can call it that. 7 Would it be fair to say that if one looks at 8 a measure that is other than the price actually paid, 9 that one might actually lose sight of that ability to 10 price without reference to competitors if it exists? 11 MR BISHOP: I think, as I think I mentioned yesterday, the 12 point here we are trying to look at is whether the entry 13 of OTM with the OOP rule has enhanced Rightmove's market 14 power and, therefore, I think one can be agnostic about 15 whether we are looking at enhancing Rightmove's market 16 power from a competitive benchmark, whatever that is, or 17 a so-called dominant benchmark. I think the analysis is 18 the same. 19 THE CHAIRMAN: But I suppose what I am asking is: which 20 measure best assists us in conducting that analysis? 21 MR BISHOP: The analysis of enhanced pricing power, I would 22 say it's the -- ideally we would have information on 23 listing fees by agent. We don't have that. We have 24 average data across all agents on average revenue per 25 agent. I would use that data.</p> <p style="text-align: center;">Page 33</p> |

1 THE CHAIRMAN: Mr Parker?
 2 MR PARKER: Well, I think the problem with -- I would agree
 3 that I don't think average revenue per property is
 4 a particularly useful metric.
 5 MR FREEMAN: That is very polite.
 6 MR PARKER: I will start by being polite. I think the --
 7 I do think it's probably not ideal to use ARPA because
 8 if we lose sight of the value that is being generated we
 9 don't have any ability to understand why the different
 10 levels of ARPA prevail in the market. If it is just
 11 about ARPA and all we are doing is competing on ARPA,
 12 why doesn't everyone leave Rightmove and why don't they
 13 join Zoopla, or indeed why don't they all join OTM
 14 because that has the lowest ARPA of all?
 15 It seems to me that OTM does not have an attractive
 16 proposition commercially for new agents, for two
 17 reasons, but one of them is it is not providing enough
 18 leads at the moment relative to the cost of listing.
 19 But the second reason is the OOP rule is a direct
 20 disincentive for people to join, but we will come back
 21 to that no doubt in subsequent discussions.
 22 But if it was the case that all we need to look at
 23 is ARPA because what we negotiate -- what we pay is
 24 ARPA, or we pay listing fees that go into ARPA, it
 25 wouldn't explain why everyone doesn't come off Rightmove

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1 and immediately join Zoopla because they have a lower
 2 ARPA. It seems to me the only way you can reconcile
 3 that is by saying: well, that's because Rightmove is
 4 delivering a lot more value for the agent than Zoopla.
 5 That's what explains, and we can see it may be
 6 a correlation but it is certainly a coincidence, and
 7 perhaps theoretically an unsurprising coincidence, that
 8 the firm that provides the most leads is able to
 9 provide -- is to generate the highest ARPA and the firm
 10 that provides fewer leads is able to provide only --
 11 only able to achieve a lower ARPA.
 12 So I think whilst the form of the negotiations is
 13 around a listing fee plus add-ons, which can be
 14 ultimately captured by ARPA, I do think we really would
 15 be throwing a very large baby out with a tiny bit of
 16 bath water if we somehow tried to move away from having
 17 some element of the value here because, if you like, we
 18 lose all ability to explain what's actually going on and
 19 that I think is difficult for me.
 20 THE CHAIRMAN: Let me put your point the other way and do,
 21 as you are, feel free to push back as strongly as you
 22 like, because that is the point of this exercise.
 23 You said a moment ago, looking at ARPA: because
 24 Rightmove's is higher why doesn't everyone leave
 25 Rightmove and why don't they join Zoopla because it's

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1 lower? And what you are saying is: yes, we need to
 2 understand the reason why -- why they don't or why they
 3 do. But doesn't one get a certain amount of information
 4 from the bare levels of price? If, for instance, one is
 5 looking, and we'll have to come to the limited amount of
 6 data one has even on an ARPA basis in a moment, but
 7 simply looking at the ARPA figures, it appears that both
 8 the rates for Rightmove and the rates for Zoopla, in the
 9 period before OnTheMarket came on the market, were going
 10 up.
 11 MR PARKER: That's correct.
 12 THE CHAIRMAN: Now, doesn't that bare fact suggest that
 13 estate agents are independently attaching value to both,
 14 such that both can increase their rates?
 15 MR PARKER: So I agree with that as well, but let's sort of
 16 unpack that a bit. Do you have DP1, page 78 and 77?
 17 MR FREEMAN: It never leaves my side, Mr Parker.
 18 MR PARKER: How very reassuring.
 19 THE CHAIRMAN: Which bit of DP1?
 20 MR PARKER: 77 and 78.
 21 THE CHAIRMAN: I have that open in fact.
 22 MR PARKER: It is true that over the period 2013/2014 ARPAs
 23 have been going up for both Rightmove and Zoopla. It is
 24 also true, if you look at the data on leads, that the
 25 number of leads has been going up over that period as

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1 well and that perhaps is also related to the data in
 2 figure 2 on page 25 which is the data on the growth in
 3 the total number of visitors to property portals, in
 4 particular the three property portals with which we are
 5 most concerned at the moment.
 6 So I think just looking at ARPA probably doesn't
 7 paint anywhere near the whole picture and it seems to me
 8 if you just looked at ARPA or average price then I'd end
 9 up buying five apples for a pound rather than ten apples
 10 for £1.50 because those ones are only a pound.
 11 THE CHAIRMAN: Except estate agents we will presume are
 12 rational entities and there will be, we suggest to you,
 13 and again do push back, there will be some reason why
 14 they are adopting what appears on the way you have put
 15 it an irrational approach. So in other words, there is
 16 some other factor as to why they're buying what you are
 17 suggesting is the uneconomic per apple price and that
 18 may be --
 19 MR PARKER: I am not saying they are. I am just saying if
 20 you just looked --
 21 THE CHAIRMAN: I am suggesting they may be. In other words,
 22 if one sees, and of course in your example there is an
 23 element of irrationality because the per apple price is
 24 lower in one case than the other. But let us suppose
 25 they are buying the higher per apple price for £1.50,

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1 even though the £1 packet is better value for money. It
 2 may be because they are stupid. It may be because they
 3 are beautifully marketed. It may be because there is
 4 some form of additional pressure which impels the
 5 purchaser to go for the least value option.
 6 I suppose what I am putting to you is that there is
 7 a great danger -- is there a great danger in adopting
 8 a measure other than the market price because what you
 9 are doing is you are attaching too much weight upon the
 10 fact that you have picked rather than the factors that
 11 the market may be picking?
 12 MR PARKER: So, I think that --
 13 THE CHAIRMAN: And be as rude as you like, Mr Parker.
 14 MR PARKER: -- question has inherent in it a concept of
 15 value for money. You would be prepared to pay person X
 16 for their services depending what value you get for
 17 those services and you would be prepared to pay person Y
 18 for their services depending on what value you get from
 19 their services and all the estate agents that we have
 20 heard have talked about value for money. So I think the
 21 problem with the ARPA measure is it contains no element
 22 of value at all, so that if you like is the baby which
 23 I think is being thrown out by using ARPA. So whilst
 24 I accept that leads may not be a perfect or only measure
 25 of value, entirely throwing them away and just looking

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1 at, if you like, the form of the price that is
 2 ultimately decided upon without asking why that is
 3 the price you end up with, I think that really would
 4 take us a long way away from the economics of this.
 5 MR FREEMAN: I don't think Mr Bishop was saying he was
 6 entirely throwing them away.
 7 THE CHAIRMAN: Let us hear what Mr Bishop has to say.
 8 MR BISHOP: I agree with Mr Freeman. We are not throwing
 9 them away. They are actually encapsulated in the ARPA
 10 figure. The estate agent will pay more if it thinks its
 11 return is more. So if it gets lots of leads or very
 12 valuable leads, all else equal it will be prepared to
 13 pay more. So the ARPA incorporates the value already.
 14 So it has not been thrown away.
 15 And I know analogies are always dangerous but let me
 16 try. In Sainsbury's there are baked beans, three sizes
 17 of tins, so a small one at 65p, a middle one at 85p and
 18 a large one at 120p.
 19 Mr Parker's view was, well, everyone should buy the
 20 65p small can, because that is the cheapest price. Of
 21 course they don't and they also don't always buy the
 22 biggest one which has probably got the lowest cost per
 23 bean. And they can't do that, they can't buy on a cost
 24 per bean. They can only buy one of these three
 25 elements.

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1 So what we need to do here is to keep focusing on
 2 what people are actually negotiating over rather than
 3 introducing some spurious measure.
 4 MR FREEMAN: Is this a problem of assumed rationality?
 5 I know that's what economists argue about these days.
 6 I mean, you are assuming that estate agents, who we
 7 established yesterday were in analytical terms
 8 consumers, would act rationally in the purchase of
 9 listing services from portals. Isn't that what your
 10 argument rests on? Whereas I sense Mr Bishop is saying:
 11 if only we could find out what they actually do then we
 12 would know what actually happened, and that is our
 13 dilemma, isn't it?
 14 MR PARKER: I think it must be the case that estate agents
 15 are acting in their own commercial interests.
 16 MR FREEMAN: I hope so.
 17 MR PARKER: One would think so.
 18 MR FREEMAN: My experience is that businessmen do not
 19 necessarily act in their own commercial interests
 20 despite the requirements of models that they should.
 21 Sorry, that is maybe a diversion from your theory, but
 22 you push back on it if you want.
 23 MR PARKER: I am not completely sure I understood where
 24 Mr Bishop was coming from, but I think he's saying that
 25 ARPA does reflect value for money, the amount you are

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1 prepared to pay for the different portals is dependent
 2 on what you think you are going to get from those
 3 portals and the differences in those portals are -- the
 4 value propositions of the portals would then get
 5 reflected in ARPA that is ultimately decided upon. That
 6 I think was his position.
 7 And I would agree that where you end up on the ARPA
 8 does include within it this concept of value for money.
 9 It seems to me if we are trying to think of whether the
 10 portals have become better or less good value for money,
 11 trying to control what we can in terms of what we think
 12 generates value for money has got to be helpful rather
 13 than just leaving it all a bit of a mystery. Because we
 14 know that they do care about leads, so it seems to me
 15 trying to control for at least one of the important
 16 things that estate agents care about has got to be
 17 better than not trying to control it.
 18 THE CHAIRMAN: Thank you. What I am going to try and do is
 19 encapsulate what I think are the rival positions and
 20 invite you to tell me how far I've got it wrong.
 21 As I understand it, Mr Bishop, you are saying that
 22 the ARPA inevitably reflects all of the factors that an
 23 estate agent is taking into account when deciding to
 24 purchase and the price at which to purchase listing on
 25 a portal.

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| <p>1 MR BISHOP: Correct.</p> <p>2 THE CHAIRMAN: And you don't see any value, I think, indeed</p> <p>3 you would go further and say it is distorting the</p> <p>4 position, if one tries to slice out of the bare price or</p> <p>5 a particular driver of that price. In other words, you</p> <p>6 simply say: "Look at the market, I accept that leads are</p> <p>7 a relevant factor that will be taken into account by an</p> <p>8 estate agent but I am not going to go down that route</p> <p>9 because I don't regard it as helpful, reliable,"</p> <p>10 whatever term you want to use, "to try and parse out</p> <p>11 this particular element".</p> <p>12 If we move over instead to Mr Parker's stance, you</p> <p>13 are saying: no, there is a value to be derived from</p> <p>14 isolating what is the value in the product that is being</p> <p>15 purchased by estate agents and you are saying that the</p> <p>16 value at the end of the day is the leads that are</p> <p>17 generated and so you want to have a metric that focuses</p> <p>18 on that.</p> <p>19 MR PARKER: That's correct from my perspective, yes.</p> <p>20 THE CHAIRMAN: I think I got a nod from Mr Bishop as well.</p> <p>21 MR BISHOP: You did, yes.</p> <p>22 THE CHAIRMAN: Excellent. I will give myself a pat on the</p> <p>23 back.</p> <p>24 Now --</p> <p>25 MR FREEMAN: When the Chairman said he had been fiddling</p> <p style="text-align: center;">Page 42</p> | <p>1 data points?</p> <p>2 MR PARKER: So I think perhaps just taking a step back, the</p> <p>3 cost per lead analysis that I do is by no means the only</p> <p>4 item of evidence that I think I bring to bear. I take</p> <p>5 my conclusions looking at all the evidence in the round</p> <p>6 and that starts by looking at, if you like, the</p> <p>7 theoretical expectation of how I think the One Other</p> <p>8 Portal rule has affected the market. It then goes</p> <p>9 through some predictions as to how I would expect</p> <p>10 house-hunters and agents to then respond and in</p> <p>11 particular, I expect, because the One Other Portal rule</p> <p>12 has led to many more agents coming off Zoopla than</p> <p>13 Rightmove, it has opened up this wedge. Now Rightmove</p> <p>14 looks relatively more attractive compared to Zoopla from</p> <p>15 the perspective of house-hunters, because the</p> <p>16 house-hunters can get the full suite of properties</p> <p>17 available and they can't do that from Zoopla.</p> <p>18 We see in the data following OTM's entry Rightmove</p> <p>19 has tended to become more attractive on the house-hunter</p> <p>20 side. Zoopla has tended to become less attractive and</p> <p>21 so that is, if you like, a theoretical prediction which</p> <p>22 is then confirmed by the evidence.</p> <p>23 I then look at what the third parties say and the</p> <p>24 third parties essentially come to the same conclusions</p> <p>25 as me in terms of Rightmove being strengthened, Zoopla</p> <p style="text-align: center;">Page 44</p> |
| <p>1 with the data he didn't mean fiddling with the data, he</p> <p>2 meant playing with it.</p> <p>3 THE CHAIRMAN: Can I also just close out alternatives. In</p> <p>4 terms of the metrics in town, I think you're both saying</p> <p>5 that it is really a choice between Mr Bishop's measure</p> <p>6 and Mr Parker's measure, and very politely you have</p> <p>7 indicated to me that going for a third measure, such as</p> <p>8 a per property measure or something like that, is really</p> <p>9 not what you would consider helpful.</p> <p>10 MR BISHOP: Correct.</p> <p>11 THE CHAIRMAN: Thanks for that. I'll obviously take that</p> <p>12 into account.</p> <p>13 Before we move on to another area of major</p> <p>14 disagreement, which is going to be the effect of</p> <p>15 OnTheMarket's entry, can I just ask you about the amount</p> <p>16 of data we have and it seems to me that this is a factor</p> <p>17 in whichever measure we adopt.</p> <p>18 As I see it, we have nine data points in the revenue</p> <p>19 figures that you have provided us for Rightmove, less</p> <p>20 for Zoopla, marginally less, and of course much less for</p> <p>21 OnTheMarket. So we have a very limited data pool and in</p> <p>22 a sense you need to have revenue points in order to do</p> <p>23 either your per lead assessment or your ARPA assessment.</p> <p>24 Are you concerned and does it affect the reliability</p> <p>25 of conclusions that we can draw that we have such few</p> <p style="text-align: center;">Page 43</p> | <p>1 being weakened and OTM not particularly being a major</p> <p>2 presence.</p> <p>3 Then right at the end of all of that I look at cost</p> <p>4 per lead as well. So if we look solely at the cost per</p> <p>5 lead analysis then the nine data points, ideally one</p> <p>6 would have more, but those are the data we have. So</p> <p>7 I think from my perspective one needs to take all the</p> <p>8 evidence in the round and draw from it what you can,</p> <p>9 think about whether it paints a consistent picture and</p> <p>10 then place appropriate weight on it and on the different</p> <p>11 elements of it.</p> <p>12 So whilst it would be great if we had a lot more</p> <p>13 data, economists always like more data, it seems to me</p> <p>14 we shouldn't throw out elements of the data that we have</p> <p>15 because there isn't enough data there for us to be able</p> <p>16 to do something more whizz bang. So I think we should</p> <p>17 take the data, all the data together and think about</p> <p>18 what that shows.</p> <p>19 THE CHAIRMAN: Mr Bishop?</p> <p>20 MR BISHOP: That is quite a long answer from Mr Parker. So</p> <p>21 I mean I think here we need to establish whether any</p> <p>22 increase in Rightmove's price, however measured, is</p> <p>23 generated by enhanced pricing power, as Mr Parker</p> <p>24 suggests, or whether it's generated by other factors.</p> <p>25 You know, for example, if its unique audience increased</p> <p style="text-align: center;">Page 45</p> |

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| <p>1 I think we would both agree that estate agents would 2 find that more valuable. But I don't think anyone would 3 view that as enhanced pricing power.</p> <p>4 I think Mr Parker's theoretical framework doesn't 5 take into account price. It is all based on a sense of 6 if we lose agents Zoopla goes into a downward spiral, 7 but it's not really articulated how that actually 8 impinges on the outcome of pricing negotiations and 9 here, as I think we have been discussing earlier, these 10 pricing negotiations are on an individual basis and we 11 can go and look at some evidence of how those pricing 12 negotiations have actually taken place after the entry 13 of OTM and you can refer to Mr Notely's evidence and 14 also I think even Mr Parker's own report accepts that 15 some agents have managed to negotiate lower listing 16 fees.</p> <p>17 When it comes to the data, we have seven data points 18 in this econometric analysis of which really we should 19 only have four because if these pricing negotiations are 20 annually based then we should have annual data, not 21 semiannual data, but even taking that to one side, if 22 you are going to place any weight on this at all you 23 should apply standard statistical analysis and against 24 those criteria both on economic significance and 25 statistical significance of the trend line forecast and</p> <p style="text-align: center;">Page 46</p> | <p>1 THE CHAIRMAN: That is very clear. Mr Parker, you will want 2 to come back on that and I will invite you to.</p> <p>3 MR PARKER: I think it is not the only piece of empirical 4 data I use.</p> <p>5 THE CHAIRMAN: I accept that. I think the battle line is 6 that I don't think Mr Bishop is suggesting that it isn't 7 the only piece of data you use; he is saying that when 8 you are throwing all the data into the pot this is one 9 particular ingredient that you should leave out. 10 I think that's what he is saying.</p> <p>11 MR PARKER: Yes, I understand that's his position. I note 12 that it doesn't seem to me that it can be a sort of 13 consistent philosophical position for Mr Bishop because 14 he manages to reach his conclusions with no data at all. 15 I at least have some data. I have looked at the data 16 that is available. I have put it together. Mr Bishop 17 manages to reach his conclusions essentially on the 18 basis of theory alone.</p> <p>19 So it seems to me one needs to look at all the data 20 one has, not to throw it away, if you like disregard it 21 entirely without then scrutinising it and then place 22 appropriate weight on the different parts of that 23 evidence.</p> <p>24 THE CHAIRMAN: Okay, Mr Bishop, you can come back. 25 MR BISHOP: If I just come back on that?</p> <p style="text-align: center;">Page 48</p> |
| <p>1 then using that to forecast whether there has been the 2 alleged increase in Rightmove's cost per lead, I think 3 Mr Parker's analysis is deeply deficient on all three 4 grounds.</p> <p>5 You can say: look at the evidence in the round and 6 we can discuss the other evidence that Mr Parker alludes 7 to, but this econometric evidence should simply be 8 disregarded in my view.</p> <p>9 THE CHAIRMAN: Again, let me try and encapsulate before 10 Mr Parker comes back on that.</p> <p>11 I think Mr Parker's line was one needs to look at 12 everything in the round and the data we've got is one 13 aspect that goes into the pot when one is looking at it 14 in the round. But I think you, Mr Bishop, are saying 15 obviously one does look at all the data but this 16 particular set of data is so tiny that it is 17 statistically insignificant and it isn't worth the 18 spreadsheet that it's written on. Am I being a little 19 bit over the top in stating that?</p> <p>20 MR BISHOP: I would go further. It is not economically 21 significant and it's not statistically significant and 22 we shouldn't rely upon it.</p> <p>23 THE CHAIRMAN: So it should be left out of account even in 24 an on the round analysis?</p> <p>25 MR BISHOP: Correct.</p> <p style="text-align: center;">Page 47</p> | <p>1 THE CHAIRMAN: Of course.</p> <p>2 MR BISHOP: I think I stupidly thought this was a case 3 between Agents' Mutual and Gascoigne Halman and in my 4 first report I looked at the impact of that vertical 5 agreement on the likely competitive effects and here, 6 and I know there's a lot of disagreement on this, but 7 there are some pretty standard economic presumptions 8 that vertical agreements between firms without market 9 power do not give rise to anti-competitive effects. So 10 that is one presumption.</p> <p>11 The second presumption is that entry is normally 12 pro-competitive. Now, as presumptions those are 13 rebuttable. But I would like to see some very strong 14 evidence to overturn that and indeed, there is a third 15 element, which is kind of unusual in Mr Parker's theory 16 of harm, that this is not either party to the vertical 17 agreement benefitting, but it's Rightmove.</p> <p>18 So now we have estate agents, however they have done 19 it, entering into an agreement with Agents' Mutual to 20 actually adversely affect themselves. So that sort of 21 suggests they have two outcomes here. Either these 22 estate agents don't know how to run their business or 23 Mr Parker's theory of harm is wrong.</p> <p>24 THE CHAIRMAN: I think that leads, I don't want to cut you 25 off, Mr Parker, but I think that leads actually quite</p> <p style="text-align: center;">Page 49</p> |

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| <p>1 neatly into the next topic that I was going to go on to, 2 so if you want to say anything do. 3 MR PARKER: Perhaps I should just come back on the 4 statistical significance point because we may not come 5 back to that if we are moving topic. 6 THE CHAIRMAN: That is right, we probably won't. 7 MR PARKER: So I think there are conventional measures of 8 statistical significance and those would be set at 90 or 9 95 per cent confidence that you are getting the result 10 you expect. So I completely accept from Mr Bishop that 11 my results don't, by virtue of the very limited number 12 of data points, reach those conventional levels of 13 statistical significance, but they do still show that 14 the effect that I have identified is more likely than 15 not because I am getting this positive effect. So 16 there's then a question of: what does that positive 17 effect arise from? So it is a more likely than not 18 effect that Rightmove's cost per lead has gone up. What 19 does it arise from? 20 Well, Mr Bishop raises quite extensive criticism of 21 my approach and about all the things that I don't take 22 into account, but he also then suggests that there is no 23 data available on these matters which could be taken 24 into account and what he doesn't do also is say why if 25 one included these factors one would expect that result</p> <p style="text-align: center;">Page 50</p> | <p>1 somewhat lower quality leads then the effective cost per 2 lead should all be moved up for Zoopla. But the 3 analysis that I do for Zoopla relates Zoopla against its 4 prediction for Zoopla, and the analysis I do for 5 Rightmove relates Rightmove against a prediction for 6 Rightmove. 7 So differences in the relative quality of the leads 8 would move the Zoopla line up and the Zoopla 9 counter-factual line up or the Rightmove line up or down 10 and the Rightmove counter-factual line but it wouldn't 11 change the outcome which is the difference between 12 Rightmove versus Rightmove in the counter-factual. 13 So that is the only point of data, if you like, that 14 Mr Bishop relies on. Even there, the data he presents 15 is very much: there is a press release out here that 16 gives you one data point and there is an analyst's 17 report which is suggestive of something else. So it is 18 not the same as looking at -- there is no annual report 19 systematic evidence. 20 So it seems to me -- I understand where Mr Bishop is 21 coming from, but it seems to me one wouldn't want to 22 throw away the data that one has on the basis that there 23 are factors that we can't control for on which we have 24 no information. 25 THE CHAIRMAN: Okay.</p> <p style="text-align: center;">Page 52</p> |
| <p>1 to disappear. 2 So he raises a variety of points that where if one 3 had the data it could go either way, it could strengthen 4 my result or make it less strong, but he doesn't raise 5 anywhere, as far as I can tell, a good theoretical 6 reason why one would expect the result I have of 7 Rightmove being strengthened to be overturned in 8 a particular direction. He just says there's a lot of 9 factors that we can't take into account and therefore we 10 can't do anything. And it seems to me either you need 11 to look for additional data, put that into the analysis 12 and try and show that the result disappears, or you need 13 to have a very strong theoretical reason why including 14 one of these factors would push the analysis in 15 a particular direction, and I think the only place that 16 Mr Bishop raises some, if you like, points where there 17 is some data is around the different quality of leads 18 that you get from different portals, so Zoopla versus 19 Rightmove. 20 But my analysis doesn't really depend on differences 21 in the relative quality of leads across different 22 portals. If you like -- I'm just trying to find the 23 picture -- if you look at 92, figure 33, DPI, 24 differences in the relative quality of leads between 25 Rightmove and Zoopla, if Zoopla has systematically</p> <p style="text-align: center;">Page 51</p> | <p>1 MR BISHOP: Can I just make -- 2 THE CHAIRMAN: Briefly. 3 MR BISHOP: -- a very brief comment. I mean, just to say 4 this essential estimate is more likely than not departs 5 from all standard econometric analysis. It is -- you 6 know, I'm quite shocked that Mr Parker says that and 7 moreover, he's using an outer sample forecast and if you 8 correct his data it's not even more likely than not that 9 he gets this effect. 10 THE CHAIRMAN: Let's move now to factoring in Agents' Mutual 11 coming on to the market. The first question on that 12 that I have is: how significant is it that the One Other 13 Portal or OOP provision is not imposed on estate agents 14 in the sense that they all sign up willingly to the 15 restriction as part of the general terms? In other 16 words, this is a consequence of a choice that the estate 17 agent makes to sign up to this particular portal. 18 MR PARKER: If I answer first. I am not sure that 19 willingness or otherwise makes any difference to the 20 analysis of the economic effects except in this 21 following way: the One Other Portal rule makes it less 22 attractive for someone to join OnTheMarket, either 23 because if they are already multi-listing with Zoopla 24 and Rightmove they have to give up one of those in order 25 to comply with the One Other Portal rule. And so that</p> <p style="text-align: center;">Page 53</p> |

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| <p>1 gives up a surplus that they would have gained from 2 listing on one of those other portals. So independently 3 it is not in their interests to try to restrict 4 themselves in that fashion. 5 So then the question arises: why would an estate 6 agent wish to limit itself in that fashion? Because it 7 is trying to compete for vendors, at least partly by 8 offering different routes to market and if other estate 9 agents in its local areas are offering a wider reach of 10 portals, potentially getting more leads in as a result 11 of having its wider reach of portals, one does I think 12 have to explore the question of why an individual agent 13 would want to tie its hands. 14 It seems to me that an answer to that might be: 15 I will only be willing to tie my hands if I'm confident 16 that other people, particularly a local estate agent in 17 my local area, are willing to do the same. And then -- 18 so it has an element of collectivity about it relative 19 to the counter-factual situation where OTM was 20 encouraging people to join OTM as my counter-factual 2 21 without using this sort of restriction. 22 So I think a willingness element relates to why we 23 think estate agents would be willing to tie their hands 24 in this way but I don't think whether -- once we have 25 put that to one side I am not sure there is anything in</p> <p style="text-align: center;">Page 54</p> | <p>1 achieve that and I think the answer is of itself it 2 doesn't. What it does is it affects the relative 3 attractiveness of other offerings in the market because 4 if a large number of agents sign up to the One Other 5 Portal rule and then come off one of the other portals, 6 the fact that they have signed up doesn't of itself, the 7 One Other Portal rule then doesn't improve OnTheMarket's 8 proposition in absolute terms. It is not that more 9 agents signed up. In fact it probably got fewer because 10 it is a disincentive to agents to sign up because they 11 know they have to tie their hands in this way. So the 12 restrictivity then means in this case, as it has 13 transpired, the main effect has been on Zoopla, a very 14 large number of estate agents have come off Zoopla and 15 there is potentially -- it becomes -- OTM is relatively 16 more attractive to Zoopla but not because its 17 proposition has actively improved but because Zoopla's 18 proposition has worsened and you can see that -- 19 THE CHAIRMAN: Let me pause there, though, because the One 20 Other Portal rule is in the factual world an intrinsic 21 part of OnTheMarket's offering. I don't think you 22 can -- I appreciate for a counter-factual purpose, and 23 we'll come to that, you have to decide what the 24 appropriate counter-factual is. But on the facts, you 25 can only sign up to the Agents' Mutual's proposal with</p> <p style="text-align: center;">Page 56</p> |
| <p>1 the point that people entered into something willingly 2 that necessarily tells me very much about what the 3 economic effects are. I think those come out of the 4 data. 5 THE CHAIRMAN: Mr Bishop? 6 MR BISHOP: Well, I obviously disagree. I obviously think 7 it's highly relevant that agents entered into these 8 agreements willingly with a firm without market power 9 because the economic assessment of the implications of 10 that vertical agreement are very different if it's 11 between a firm with market power who can potentially 12 coerce firms with ones with a firm without market power, 13 who can't. So I think it's highly relevant. 14 I think what is also important as a kind of 15 background element is: why were estate agents wishing to 16 do this? Why were they entering these agreements and 17 willingly constraining their commercial behaviour if the 18 market outcomes that they were achieving prior to the 19 entry of OTM were so competitive? 20 THE CHAIRMAN: Because in a sense, we ought to be able to 21 say at least this: that there has to be enough in 22 OnTheMarket's offering for the estate agent to willingly 23 forego the advantage of listing on more than two. 24 MR PARKER: I think that's right. I think we might want to 25 explore how the One Other Portal rule helps them to</p> <p style="text-align: center;">Page 55</p> | <p>1 this rider attached. So it is an intrinsic part of the 2 offering of OnTheMarket and I think that can't seriously 3 be disputed or do you want to push back on that? 4 MR PARKER: No, I think that is right as the way that they 5 have chosen to do it. 6 THE CHAIRMAN: The way that they have chosen to do it, of 7 course. 8 MR PARKER: The chose the One Other Portal rule and that 9 does seem to me inherent in the way they have tried to 10 do things. 11 THE CHAIRMAN: So we are looking at the mindset of the 12 estate agent that chooses to do that because obviously 13 the estate agent will know that this is part of the 14 deal. 15 So doesn't the estate agent know that the effect of 16 signing up is that later on down the line that estate 17 agent is going to have to make a choice between 18 Rightmove and Zoopla? That's the consequence of signing 19 up to Agents' Mutual and what they are doing is they are 20 voluntarily accepting that they have to make that 21 choice. 22 MR PARKER: They are voluntarily accepting that they have to 23 make that choice if they sign up to Agents' Mutual. 24 That's absolutely right. I think the implications of 25 the voluntary nature of that for the effects, I'm not</p> <p style="text-align: center;">Page 57</p> |

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| <p>1 sure that voluntary or otherwise necessarily makes 2 a difference. 3 MR FREEMAN: I think it just means that they don't have to 4 do it, so -- 5 MR PARKER: They don't have to sign up but people have 6 signed up. 7 MR FREEMAN: Sorry for interrupting you. But just to get 8 the question out. If on your analysis joining 9 Agents' Mutual on its present OTM offering is 10 unattractive, against an agent's self-interest and 11 damaging, I can't quite see why OTM has made the 12 progress that it has because, as Mr Bishop says, it has 13 absolutely no market power, it is a new entry. It can't 14 force agents to do this. It can put its offering up for 15 sale. I think you are trying to put to us that because 16 it is voluntary it leads us into the collective area, 17 therefore it is worse in some way. But I don't quite 18 see how you get there. I mean, it is a voluntary thing. 19 It had no right to succeed at all. On your analysis it 20 shouldn't have made any progress, not the progress it's 21 made because it is so unattractive for the reasons you 22 give, and the agent's own interest. 23 MR PARKER: I think perhaps if we look at figure 39 that 24 might be revealing. So there is one issue about how 25 people -- how estate agents were thinking prior to the</p> <p style="text-align: center;">Page 58</p> | <p>1 come into the equation which was: let's offer some 2 heavily discounted offerings, and these were these LOIX 3 and LOIXNM contracts which are on more attractive terms. 4 But although they were on still considerably more 5 attractive terms, agents seemed apparently still to be 6 reluctant to sign up to those terms because a corollary 7 of signing up to those terms was that they took on the 8 One Other Portal rule and either dropped an existing 9 portal which they were already listing on and presumably 10 getting some value from or they give up the right to 11 list on multiple portals should they wish to do so in 12 the future, and I think probably the latter of those is 13 a lower value option, if you like. It is an option 14 rather than an actual event. 15 So OTM's strategy was then to target agents that 16 were currently only listing on one, because the adverse 17 effect of the One Other Portal rule was if you like 18 maybe reduced and that did lead to a fair number of new 19 agents coming into the market but at the same time other 20 agents who were on shorter term contracts had been 21 leaving, and what we see as from around 22 about August 2016, perhaps, we start seeing a decline in 23 the number of agents. 24 So I think my interpretation of all of this would 25 be, great expectations to begin with. When reality</p> <p style="text-align: center;">Page 60</p> |
| <p>1 launch of OTM in terms of signing up and I can see that 2 there was a variety of things going on there from the 3 evidence that comes out, some of which were that people 4 were genuinely attracted by the proposition of being 5 a mutual and they were keen to see it succeed. 6 But I think what's happened is, if you look at this 7 data which is on agent numbers, following entry there 8 was an element of momentum and people continued to join 9 but as of about May 2015 there was essentially 10 stagnation and people weren't signing up at that point. 11 I think that is because OTM's offer had then 12 crystallised in the market. There may have been great 13 expectations and great hopes for how well it would do, 14 but the offer crystallised in the market and the cost 15 per lead for Agents' Mutual was very unattractive, and 16 so you have an offer that is not very attractive to an 17 estate agent on a value for money perspective, because 18 the prices at which they were being offered relative to 19 what they were getting were not attractive, and there is 20 a lot of evidence in disclosure that agents who had 21 signed up were quite unhappy and I suspect that feedback 22 was getting around. 23 You then have a period of stagnation from around 24 about May 2015 to October 2015 in terms of agent 25 numbers. At that point, a new strategy seems to have</p> <p style="text-align: center;">Page 59</p> | <p>1 started to bite, OTM has responded by trying to 2 encourage people in but it's hobbled by the One Other 3 Portal rule because it is making itself a less 4 attractive destination for a new agent and gradually 5 what's happening is a combination of finding it 6 difficult to get new agents in, adverse cost per lead, 7 and existing agents leaving is meaning that its agent 8 pool is now starting to drop back. 9 THE CHAIRMAN: That's a quite hefty combination of factual 10 analysis with economic opinion on top. Clearly we'll 11 have to unpack the factual elements and the opinion 12 aspects but before I get on to my next question, 13 Mr Bishop, do you want to come back on that? 14 MR BISHOP: Well, I just want to make one point which is 15 kind of absent from Mr Parker's response, which is what 16 was the impact on the price negotiations between 17 Rightmove and Zoopla on an individual estate agent 18 level? Prior -- if you think of agents who were only 19 listing on one, who then signed up with the OOP, how has 20 that actually affected the other portal? They weren't 21 listing with that estate agent anyway. 22 To the extent that the estate agent was listing on 23 both Rightmove and Zoopla and then willingly signed up 24 and constrained its behaviour, well then it's -- I would 25 argue yes, it has given up some value in one level but</p> <p style="text-align: center;">Page 61</p> |

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| <p>1 it's also gaining some negotiating power because now 2 Rightmove and Zoopla know that it's only going to be on 3 one of those and we have heard evidence of competitive 4 price responses in response to the entry of OTM. 5 THE CHAIRMAN: We'll rise for a break in a moment but I just 6 want to ask how far the anti-competitive questions that 7 we are considering turn on how the questions are framed. 8 On one level one can say that, indeed, Mr Parker does, 9 it is a good thing to have free choice between as many 10 portals as choose to go on the market and the constraint 11 that the OOP rule contains is therefore a bad thing. 12 But the problem, and I am acting really as devil's 13 advocate here, is that it doesn't place very much weight 14 on the relative merits of portals in the sense that you 15 can sign up to as many as you wish and it is really 16 a question of how many you want to sign up to, but you 17 are not forced into a choice between one and the other. 18 Now, what I want to put to you both is this: the 19 effect or could it be said that the effect of the OOP 20 rule is to create a choice as to the specific merits of 21 portals at two junctures? First, at the juncture when 22 the estate agent is choosing to sign up to OnTheMarket 23 in the first place, what the agent then has to consider 24 is it has to look at the OnTheMarket offering and say, 25 "Is this offering sufficiently good for me to choose to</p> <p style="text-align: center;">Page 62</p> | <p>1 their expectations, and I agree entirely for those who 2 are signed up it does mean that there is now more direct 3 competition between Rightmove and Zoopla. 4 Now, going forward, OnTheMarket has entered. 5 I don't know whether it's going to be successful or not. 6 I don't think anyone really knows, but each estate agent 7 will now take a view on whether to sign up to the OOP 8 rule and again, that will have an impact on, I would 9 expect, both Rightmove and Zoopla in their negotiations 10 with that estate agent before it enters into an 11 agreement with the OOP rule. 12 So I agree it is actually engendering more direct 13 price competition between the portals, the two major 14 portals. 15 THE CHAIRMAN: Mr Parker, I know you disagree, it is more 16 why you disagree. 17 MR PARKER: So the reason I disagree is because what the One 18 Other Portal rule does is create some distortion into 19 competition, so it does force this choice but this 20 choice is a bit of an artificial choice because 21 previously you could list on both of these portals very 22 happily and if an individual portal provided you with 23 some value, to go back to this, it provided you with 24 some access to a different route to market, some 25 customers, then you would negotiate with the portal</p> <p style="text-align: center;">Page 64</p> |
| <p>1 subscribe to the OOP rule as part of the price of 2 signing up?" So you get a relative merits question 3 there. 4 And then having signed up, if the merits of 5 OnTheMarket are sufficiently great you then get another 6 choice. Effectively that choice is between Zoopla and 7 Rightmove and you have to work out which is better 8 there. 9 It is a very long run up to a fairly short question 10 which is this: isn't it a good thing competitively to 11 force a one-on-one battle at these two stages between 12 portals so they actually have so say, "We need to ensure 13 that our offering is better than the rival's at these 14 two stages" because a choice is being made and it is the 15 OOP rule that is forcing that choice? 16 I quite deliberately put that quite tendentiously 17 and I think perhaps because I anticipate that, 18 Mr Bishop, you will agree with more of that than 19 Mr Parker, why don't you go first and, Mr Parker, you 20 can go second. 21 MR BISHOP: I think I would agree exactly with that analysis 22 and I think if we can think of agents who signed up with 23 OTM prior to entry they were taking a choice about what 24 that would mean in terms of both their satisfaction with 25 the current competitive outcomes they were getting and</p> <p style="text-align: center;">Page 63</p> | <p>1 about the value that that portal was bringing net of the 2 competition that it had with the other portal because of 3 the overlap in the customer base. So that's where the 4 competition is. And then there's part of it which is 5 the additional value that portal will consume. 6 So what the One Other Portal rule does is it changes 7 estate agents' decisions from: I will choose this portal 8 depending on whether that portal independently gives me, 9 the price it is giving me provides me with surplus, 10 ie I value it more than the price they are prepared to 11 sell it to me for. Because now I need to take into 12 account a linkage between the value I get from one of 13 the portals and the other of the portals because now to 14 persuade someone to join Rightmove I have to persuade 15 them also to come off Zoopla for these agents that have 16 signed up to OTM and to persuade someone to join Zoopla 17 I also have to persuade them to come off Rightmove. 18 We saw a lot of evidence that Mr Notely had been 19 trying very hard to encourage all the estate agents that 20 had joined OnTheMarket to join Zoopla but he was facing 21 an uphill battle. He was clearly offering some 22 substantially commercially attractive terms but whilst 23 those were being offered, they were hardly ever working 24 because we know that 90 per cent plus of all the agents 25 that joined OnTheMarket have remained with Rightmove and</p> <p style="text-align: center;">Page 65</p> |

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| <p>1 that's because he wasn't just fighting to try and get 2 them to join Zoopla, he was also having to fight to 3 compensate the agents for coming off Rightmove. 4 And so it seems to me it's unsurprising that, if you 5 like, what the One Other Portal rule does is it drives 6 a wedge between genuinely what the portals are offering 7 in terms of value to the estate agent and actually how 8 one portal can attract someone from another portal. 9 So we see, I understand that Mr Bishop says, well 10 Zoopla should just be trying harder to get them back and 11 it should offer cheaper prices, but we know that in 12 practice, whilst it may well have been trying harder, 13 that hasn't worked and it seems to me that is because it 14 is facing -- the restriction, if you like, is that to 15 win someone back it has to encourage them to come off 16 Rightmove and that is in a market where people regularly 17 multi-list, I don't think that actually enhances 18 competition. I think it ultimately distorts it. 19 MR FREEMAN: Aren't you leaving out the effect of the entry? 20 It is not as if there were three portals, one of whom 21 suddenly decided to apply an OOP rule. The OOP rule is 22 the nature of the market entry, so when you had two 23 portals, agents listed on both and the choice didn't 24 have to be made, the choice the Chairman referred to. 25 So the entry of the third portal with the rule has made</p> <p style="text-align: center;">Page 66</p> | <p>1 customers because I know as an estate agent I can get 2 those overlap customers from either portal there is 3 perfect competition happening between portals for that 4 group of customers. 5 MR FREEMAN: But the prices were going up for both portals. 6 MR PARKER: And the prices were going up because there were 7 more unique customers and more leads being generated. 8 MR FREEMAN: So even if there was competition it wasn't 9 having obvious benefits for the customers. 10 MR PARKER: So we need to then -- this is where we start 11 getting into counter-factual territory. 12 MR FREEMAN: Also we get back into how you measure. 13 THE CHAIRMAN: We also get back to the lead versus something 14 else. 15 Mr Bishop, a quick response and then we'll rise for 16 five minutes. 17 MR BISHOP: Obviously the fact that Zoopla is competing 18 aggressively on price and been unsuccessful in getting 19 an estate agent to choose it rather than Rightmove as 20 its one other portal doesn't tell us that is a failure 21 of competition. We don't know what happened to 22 the prices that Rightmove have been responding to, to 23 also remain as that choice and to the extent that Zoopla 24 is competing with Rightmove and if Zoopla cuts its price 25 you would expect Rightmove to be reducing its price too.</p> <p style="text-align: center;">Page 68</p> |
| <p>1 for some agents a necessity to choose and as between the 2 established portals they have to compete for the 3 business of those agents. Isn't that better than just 4 a happy duopoly? I am being devil's advocate too. 5 MR PARKER: It obviously follows directly from the entry 6 with the OOP rule that this type of choice is inherent 7 in that. I am not actually sure that you can sort of 8 divorce the choice to join OTM from the -- even though 9 in time there is a choice that then needed to be made 10 about you coming off, I think estate agents will have 11 been making those choices, if you like, all at the same 12 time or recognising that there was a consequence. 13 I think some of this goes back to the question of 14 what the right counter-factual is and would entry have 15 happened and we can come to that. 16 MR FREEMAN: I understand that. 17 MR PARKER: But I do think that estate agents have chosen to 18 give up in many cases surplus they were getting from 19 listing on two portals and we now have this 20 distortion -- there was already competition going on 21 between Rightmove and Zoopla I say. 22 MR FREEMAN: You say. 23 MR PARKER: I say, because, if you like, if we go back to 24 this model, there is some unique customers about who 25 there isn't competition. But in all the overlap</p> <p style="text-align: center;">Page 67</p> | <p>1 So even if Zoopla is unsuccessful, it has had 2 a beneficial impact on competitive outcomes. 3 THE CHAIRMAN: All right. We'll rise for five minutes and 4 we'll have counter-factuals when we get back. 5 (11.53 am) 6 (A short break) 7 (12.00 pm) 8 THE CHAIRMAN: Before we resume, Miss Boyle, our very 9 helpful referendaire, has indicated that a member of the 10 public in the room has approached her with a view to 11 handing over what he no doubt regards as helpful 12 material for the Tribunal to take into account. I just 13 want to make absolutely clear that the material, helpful 14 or not, has been refused and we obviously won't be 15 looking at it. I think it would also be helpful to 16 indicate to the gentleman that the reason we are not 17 going to look at that material and why I would rather 18 you didn't try to hand it up in the future is because we 19 will decide the matter on the evidence that is adduced 20 by the parties before us and that is the only evidence 21 that we will be looking at. So I just want to put that 22 on the record. 23 Let's resume now with counter-factuals. Just to 24 indicate to both of the experts that I think we do see 25 this essentially as a question of fact. We are going to</p> <p style="text-align: center;">Page 69</p> |

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| <p>1 skate quite lightly over counter-factuals but we 2 nevertheless want the benefit of your views. 3 Perhaps we can start by identifying the 4 counter-factuals that are, as it were, the candidates 5 that we have to choose from. As I see it, there are 6 three potential counter-factuals. One, that OnTheMarket 7 simply doesn't enter the market; the alternative is that 8 OnTheMarket enters with a more stringent form of rule 9 exclusivity, and thirdly, that it simply enters the 10 market without any rule at all. Those I think are 11 theoretically the options and if first of all, perhaps 12 if you have a fourth candidate why don't you let us know 13 and if you don't have a fourth candidate perhaps you 14 could indicate to us which you think is the more 15 appropriate or most appropriate counter-factual and why. 16 Why don't we start on this occasion with Mr Bishop and 17 then we'll have Mr Parker. 18 MR BISHOP: I think the relevant counter-factual is the 19 first one which is no entry. As a matter of fact we can 20 only look at the economic effects of the entry of OTM 21 with the OOP rule. It is simply not possible to then 22 discriminate between entry of OTM under an alternative 23 basis whether more restrictive or with no restriction at 24 all. 25 Now, Mr Parker makes some assumptions about what</p> <p style="text-align: center;">Page 70</p> | <p>1 It seems to me that on the factual basis, the 2 difference between those is whether essentially the OOP 3 rule was indispensable for entry. That is a question 4 that has been debated elsewhere in these proceedings. 5 I think nonetheless even in the absence of data 6 I think one can look at the outcomes under 7 counter-factual 2 because there is a strong prediction 8 I think that in that world there would have been -- if 9 OTM had entered that would have created a further choice 10 within the market without damaging any of the quality of 11 the existing propositions in the market and therefore 12 I think it is very clear that that would have been the 13 best situation of all. That would have been an entirely 14 pro-competitive entry. There would be no adverse 15 horizontal effect on other portals in the market. So it 16 seems to me under that world that must be better than 17 the current situation and, therefore, that's the best 18 and, therefore, I think there is a critical role of 19 indispensability in these proceedings as to whether the 20 OOP rule was in fact indispensable or not. 21 THE CHAIRMAN: Isn't one of the questions that we need to 22 debate whether the simple entry without the OOP rule 23 will result in duplicated entries, whereas the effect or 24 one of the effects of the OOP rule is to cause agents to 25 move. In other words, you don't get a multiplicity of</p> <p style="text-align: center;">Page 72</p> |
| <p>1 would happen under his alternative counter-factual but 2 those are assumptions. Those are not ones which can 3 actually be properly assessed. And therefore I think it 4 is the first counter-factual. That's what we are 5 dealing with and only if one were to conclude that the 6 entry of OTM with the OOP rule gave rise to adverse 7 competitive effects would one then want to go into some 8 alternative analysis. If you can satisfy oneself that 9 the entry of OTM with the OOP rule has not given rise to 10 adverse competitive effects, I don't see there is any 11 reason to assess any alternative counter-factuals. 12 THE CHAIRMAN: Mr Parker. 13 MR PARKER: I think for me there are two and they probably 14 relate to the first and the third counter-factuals that 15 you identify. I haven't considered the counter-factual 16 where OTM entered with full exclusivity partly because 17 I understand that was ruled out very early on in the 18 thinking within Agents' Mutual and for me that is not on 19 the table. 20 I think there's a counter-factual where absent -- so 21 I think we need a counter-factual to look at the effects 22 of the OOP rule. If, absent the OOP rule, OTM wouldn't 23 have entered then that is one counter-factual and there 24 is an alternative counter-factual where even if they 25 hadn't had the OOP rule they would still have entered.</p> <p style="text-align: center;">Page 71</p> | <p>1 listings across, let us say, three portals. What you 2 get is you get a choice, and let's assume just three 3 players. What happens is either the agents choose not 4 to move in which case they don't participate in 5 OnTheMarket or they choose to move in which case they 6 depart from one or the other and that is really, would 7 you agree, the key effect of the OOP rule? 8 MR PARKER: It is clear that the key effect of the OOP rule 9 is that for those who have signed up they then have to 10 come off one other portal and that has various 11 consequences. 12 I think the point that you are raising I think, but 13 forgive me if I have not fully understood, goes to the 14 question of whether OTM will have a unique offering in 15 the market. 16 THE CHAIRMAN: I am not sure I was framing it that way. 17 That may be a consequence but what I was suggesting was 18 that one of the consequences, and perhaps quite 19 a material one of the rule, is that agents don't, they 20 can't duplicate, they have to move. 21 MR PARKER: Yes, so I agree with that and I think if you 22 perhaps look at -- so figure 12 on page 64 of my report 23 and perhaps I should also take you to Mr Springett's 24 first witness statement at paragraph 12. 25 THE CHAIRMAN: You certainly know your evidence, Mr Parker.</p> <p style="text-align: center;">Page 73</p> |

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| <p>1 MR PARKER: So the effect, if we look at just the picture in 2 the first instance, the effect of the OOP rule has for 3 those people who have signed up they have chosen to come 4 off one of the other portals, that is the direct 5 consequence. In practice what has happened is that the 6 vast majority of those have come off Zoopla. There is 7 some debate as to the exact number. I don't think we 8 fully know but the number that is commonly in the 9 disclosure is 90 per cent. And that's what's opened 10 this wedge up. 11 So that's the effect of the OOP rule. That is, it 12 is reducing the value of the attractiveness of the 13 Zoopla proposition to house-hunters. We then see, once 14 you start seeing how that feeds through into the market, 15 house-hunters are starting to find that proposition less 16 attractive and the Rightmove proposition is relatively 17 more attractive. 18 This may be coming back over territory that you have 19 already covered, so I think perhaps -- 20 THE CHAIRMAN: Yes, I think it is to some extent. 21 MR PARKER: -- I should stop there and maybe you could 22 perhaps remind me of your question because I think 23 I might have led you down a different path. 24 THE CHAIRMAN: I was putting a fairly theoretical point 25 about the significant effect of OnTheMarket, and</p> <p style="text-align: center;">Page 74</p> | <p>1 had entered without the One Other Portal rule all those 2 choices would still be available. One could choose with 3 any combination of two and in addition one could choose 4 on all three. I think it depends on which 5 counter-factual we are in. 6 THE CHAIRMAN: Yes, I think I used the words "force the 7 choice" which I think is the effect of the rule. 8 Whereas you are saying, quite rightly, that without an 9 OOP rule there can still be choice and I don't think 10 anyone would disagree with that. 11 MR PARKER: Yes. 12 MR BISHOP: Assuming there's entry. 13 THE CHAIRMAN: Assuming there's entry. 14 The last area that we want to touch upon but we want 15 to do it really very briefly because it is much more 16 factual than for opinion evidence is the horizontal 17 effects. Obviously we are going to hear a great deal of 18 submission on the facts then. I don't want to draw you 19 gentlemen into those debates at all. But you will 20 recall in the course of, I think it was his submissions, 21 Mr Harris put the question of a mutual as being one of 22 horizontal visibility in that one agent who had either 23 signed up or was going to sign up to Agents' Mutual 24 would by virtue of that fact know the basis, in the 25 sense of the terms and conditions, on which the others</p> <p style="text-align: center;">Page 76</p> |
| <p>1 I wasn't relating it to the facts, was that without that 2 OOP rule you will find a duplication of listings, in 3 other words, what you are going to get is with three 4 entrants you might find three listings. What the rule 5 does is it compels a choice to lose one of those three 6 portals. 7 MR PARKER: That is correct, yes. 8 THE CHAIRMAN: In a sense it goes back to the debate we had 9 before the short adjournment. 10 MR BISHOP: Just to be precise, it only compels those who 11 enter into the agreement. 12 THE CHAIRMAN: Actually if you assume only three portals, 13 then the choice operates either you choose to list on 14 two -- 15 MR BISHOP: That is, right. 16 THE CHAIRMAN: And don't go on the one with the OOP rule or 17 you go on to the OOP portal and you lose one of the 18 other two. So although it is staggered it does seem to 19 me that the key effect, maybe I'm over stating and if 20 you think I am do say so, the key effect is to force 21 a choice. Whether that is good, bad or indifferent is 22 obviously a matter of debate but I am trying to nail 23 the -- 24 MR PARKER: I think in addition to that one can always 25 choose now not to list on various portals and if they</p> <p style="text-align: center;">Page 75</p> | <p>1 were signing up as well, and put that way it seems to me 2 fairly trite. 3 The question I have for you, gentlemen, is whether 4 that is something that you regard as a specific factor 5 of a mutual organisation or whether actually it arises 6 in any context where one has got an entity that is 7 offering its services on standard terms and conditions. 8 MR PARKER: I think that any entity that you sign up to 9 which has standard terms and conditions and you know 10 that other people might sign up to that entity, they 11 would be on the same standard terms and conditions. 12 That is clearly correct. I am not sure in this case it 13 takes you quite far enough because I think you need to 14 think about the One Other Portal rule as essentially 15 having very much horizontal effect in the portal market. 16 You know that if you sign up you will be coming off 17 another portal and you know that everyone else will also 18 be signing up and coming off another portal as well. So 19 I think, if you like, here I am, I'm Agents' Mutual, I'm 20 doing a vertical agreement with an estate agent. An 21 estate agent by doing so will come off one of these 22 other portals so it has horizontal effects at this 23 level. 24 The question I think you are asking is about the 25 horizontal effects, the potential horizontal effects at</p> <p style="text-align: center;">Page 77</p> |

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| <p>1 that level. I think one might distinguish between 2 a world of if you are just signing up to a long-term 3 contract with no other horizontal restrictions, then you 4 are putting some money into that and you are listing for 5 the duration of the contractual term, but you are not 6 tying your hands in some other way, if you like. 7 So going back to the point that I was making about 8 I am signing up and I'm signing up knowing that I'm 9 tying my hands and everyone else is signing up and 10 I know that they are also tying their hands and then 11 maybe the virtue of the letter of intent process is that 12 I'm confident that there are enough people out there who 13 are also tying their hands. Maybe that helps me make 14 the decision as well. 15 Now, you could also have a letter of intent process 16 purely on, are there enough people joining this for 17 a long-term contract absent any kind of OOP rule? Are 18 enough people putting their money into this venture to 19 make it worth it? That seems to me all very sensible 20 and pro-competitive. 21 I think once you start putting the OOP rule into 22 that mix you start getting into quite different 23 dynamics. 24 THE CHAIRMAN: Mr Bishop. 25 MR BISHOP: This strikes me more of a kind of legal</p> <p style="text-align: center;">Page 78</p> | <p>1 pro-competitive. 2 MR FREEMAN: Its effects come back to the same group of 3 customers and consumers. 4 MR BISHOP: Exactly. 5 MR FREEMAN: Okay, thank you. 6 MR PARKER: Can I make one comment in response? 7 THE CHAIRMAN: Do, please. 8 MR PARKER: I think Mr Bishop characterises these as purely 9 vertical arrangements. I think that to me doesn't 10 really capture the whole story when you have one other 11 portal which have these horizontal agreements. What you 12 have actually ended up with is the vast majority of the 13 people who have signed up to OnTheMarket have come off 14 Zoopla and have remained on Rightmove and so it's as if 15 from an effects perspective 4,000 agents have decided to 16 become near exclusive with Rightmove and they become 17 near exclusive because OnTheMarket is very small. It is 18 not really providing very much by way of leads. It 19 hasn't got much house-hunters type market presence that 20 it is delivering for agents. So those agents who are on 21 Rightmove and they are on OnTheMarket will on average be 22 getting almost all of their requirements from Rightmove. 23 So this is a little bit like that 4,000 agents deciding 24 to become near exclusive with Rightmove. 25 We can see from the evidence of Mr Livesey average</p> <p style="text-align: center;">Page 80</p> |
| <p>1 question, but if you can imagine that rather than the 2 OOP rule it was your, I think your second 3 counter-factual of exclusivity, you know, would we be 4 having these same concerns about sort of collective 5 boycott? I don't think we would. 6 The only other point -- two other points I would 7 make is first of all these estate agents may not be 8 competitors to one another. Some of them may be but 9 some of them are operating in different relevant 10 markets, and the result of this was to enter into the 11 online portal market and in the same way as we discussed 12 yesterday, whether there was a possibility of online 13 portal markets operating estate agents and we said that 14 would probably be a pro-competitive thing, I think the 15 same applies here. 16 MR FREEMAN: Just to pick Mr Bishop up on that last one. 17 Are you saying that because one could theorize that 18 portals becoming estate agents is pro-competitive, that 19 it puts competitive pressure on estate agents and 20 improves the service to customers and consumers, but the 21 converse applies and if estate agents decide to become 22 portals, that is inherently competitive because -- why? 23 MR BISHOP: Because it would be an agreement to enter into 24 a vertical market, a vertical agreement between firms 25 without market power and its entry is presumptively</p> <p style="text-align: center;">Page 79</p> | <p>1 leads per branch for Rightmove I think he said was 329 2 and the average for Gascoigne Halman was 26. So if you 3 take those as representative of agents as a whole, 4 someone who signed up for Rightmove and OTM is 5 essentially getting 90 plus per cent of their overall 6 portal requirements from Rightmove rather than OTM. So 7 I think that's one way of thinking about the 8 horizontality of these effects and it doesn't seem to me 9 that characterising these as just a purely vertical 10 relationship really gets you very far. 11 THE CHAIRMAN: Do you want to come back on that, Mr Bishop? 12 I am inviting you. 13 MR BISHOP: No, I can let this one go. 14 THE CHAIRMAN: Mr Landers I think had a question. 15 MR LANDERS: Yes, just following on, Mr Parker, you were 16 saying it makes sense essentially for other people in 17 the local market to have some idea of what their 18 competitors in the market are going to do in terms of 19 signing up to a new portal. There is a particular 20 section in Mr Bishop's report that I wanted to ask you 21 about following on from that which is on page 14, 22 paragraph 59 but I will read it out to you. 23 MR PARKER: Which report? 24 MR LANDERS: In his first report, page 14, paragraph 59. 25 What he is saying, I will read it out is:</p> <p style="text-align: center;">Page 81</p> |

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| <p>1 "Establishing a new portal therefore requires some 2 form of commitment on one side of the market and that 3 this is most easily achieved on the listing side of the 4 market, estate agency." 5 Do you think that's right? 6 MR PARKER: I do think that's right and that type of 7 commitment could be achieved via a long-term contract 8 for example, which we have a long-term contract here. 9 What we also have is the One Other Portal rule but the 10 listing -- the commitment, if you like, could happen 11 through a long-term contract. That would provide a 12 guaranteed revenue stream of whatever listing fee you 13 have agreed for the duration, so it seems to me that's 14 a way of creating a long-term commitment. 15 The One Other Portal rule, its effects are then 16 about quality of the propositions of the other rivals in 17 the market, but you have already had the long-term and 18 then there is a commitment for those effects to be 19 maintained as well, but it is often the case that to get 20 entry what you need is people who are prepared to sign 21 up with you for a considerable period of time but you 22 can get that just through the long-term contract 23 (inaudible). 24 THE CHAIRMAN: Mr Bishop, you may want to agree with 25 yourself but if you have anything to add then do add.</p> <p style="text-align: center;">Page 82</p> | <p>1 bundle F, defendant's experts reports, and open it at 2 tab number 1. Do you recognise that as the front page 3 of an expert report you prepared for use in these 4 proceedings? 5 A. Yes, that's right. 6 Q. And on the final page of that tab -- well, actually, 7 I think it is not quite the final page, is it? If we 8 turn within the tab to page 127 of the bundle numberings 9 -- 10 A. Yes. 11 Q. -- 126 of the report, is that a copy of your signature? 12 A. Yes, it is. 13 Q. Are the contents of this expert report true and accurate 14 evidence that you wish to give to this Tribunal on these 15 matters? 16 A. Yes, they are. 17 Q. And I gather you have a couple of words of clarification 18 on one or two of the paragraphs, is that right or typos? 19 A. Yes, small typos, but for clarification I think it would 20 be helpful. So paragraph 1.9.1(c), which is on page 16 21 of the bundle referencing, the last sentence after 22 "Rightmove", you should insert "and so". So: "a loss of 23 constraint from Rightmove and so entry has not enhanced 24 competition". 25 Q. Just two missing words. So if we add in the words "and</p> <p style="text-align: center;">Page 84</p> |
| <p>1 MR BISHOP: Nothing to add, no. 2 THE CHAIRMAN: Gentlemen, thank you very much. That 3 concludes the joint examination by the Tribunal stage 4 and what we will do is we will rise until 2 o'clock and 5 that will give your respective legal teams, but 6 particularly Mr Harris, an hour and a half to discuss 7 any aspects that he may be advised to discuss with you 8 before you, Mr Parker, enter into the witness box for 9 cross-examination. Obviously it follows from that but 10 I just want to make it explicitly clear that you are 11 released from your purdah obligations and those 12 obligations will resume but on a unilateral basis when 13 you are giving evidence yourselves. 14 But I will just put on record my gratitude for your 15 help in this part of the examination. Thank you very 16 much. We'll rise until 2 o'clock. 17 (12.30 pm) 18 (Luncheon Adjournment) 19 (2.00 pm) 20 MR HARRIS: Sir, with your permission I would like to call 21 Mr Parker to the formal cross-examination stand. 22 THE CHAIRMAN: Please do, thank you, Mr Harris. 23 MR DAVID PARKER (affirmed) 24 Examination-in-chief by MR HARRIS 25 MR HARRIS: Mr Parker, if you could please be handed trial</p> <p style="text-align: center;">Page 83</p> | <p>1 so" between "Rightmove" and "entry", that clarifies it, 2 does it? 3 A. Yes, it does. 4 Q. Thank you. Do you have any more clarifications or 5 missing words? 6 A. 6.2.10, the relevant bit of which here is page 68, the 7 bundle referencing, again the last sentence, if you see 8 four words from the end we have "of". That should 9 instead read "targeted at". 10 Q. Thank you. Any others? 11 A. 7.2.2, the word "populations" there should be deleted. 12 That is just ... 13 Q. It has somehow crept in, has it, the word "populations"? 14 A. It has. 15 Q. Thank you. Any others? 16 A. Then in the data agreements and disagreements, I think 17 the colloquial term perhaps, "The expert's response to 18 Tribunal's information request dated 12 January 2017". 19 Q. I don't suppose you know where that is in the bundle. 20 You have lost me. Does the Tribunal have that, sir? 21 THE CHAIRMAN: We do, yes. 22 A. I am not completely sure. 23 MR HARRIS: In any event, why don't you go ahead with the 24 correction or clarification? 25 A. You will see on page 3 in the second column there is</p> <p style="text-align: center;">Page 85</p> |

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| <p>1 a discussion about Hitwise, where it says: 2 "The Hitwise data is based upon a sample of circa 3 8 million users in the UK." 4 I understand that the more up-to-date figure is 5 circa 3 million users. 6 Q. Thank you. So some millions but not 8, 3? 7 A. That's correct. 8 Q. Any other points of clarification or typo-type 9 adjustments to report for number 1? 10 A. No. 11 Q. Can you turn over in bundle F then, the defendant's 12 expert's reports, to tab number 2, please. Do you 13 recognise that as the front page of a reply expert 14 report that you have created? 15 A. Yes, that's correct. 16 Q. And similarly, if you go to internal page bundle 220, so 17 just before your annex A, is that a copy of your 18 signature? 19 A. Yes, it is. 20 Q. Are the contents of this reply expert report also true 21 and accurate evidence that you wish to give, opinion 22 evidence that you wish to give to this Tribunal? 23 A. Yes, they are. 24 Q. And are there any corrections or changes to this report? 25 A. Nothing material.</p> <p style="text-align: center;">Page 86</p> | <p>1 Q. Right. 2 A. But I think the way you expressed it was agents acting 3 independently couldn't create a portal, and of course 4 Zoopla created a portal without being part of an agent 5 organisation. 6 Q. Do you agree that the involvement of multiple agents, by 7 which I mean the type of structure that Agents' Mutual 8 has, is unproblematic to the economic analysis, in other 9 words, the economic analysis would be the same whether 10 Agents' Mutual was a mutual organisation or some other 11 type of organisation, at least in terms of the OOP rule? 12 A. So to the extent that rules such as the OOP rule are 13 inherent to that, then that's one issue. But assuming 14 that they are not and it is just something about the 15 mutuality by which it is an organisation of estate 16 agents, that doesn't seem to me inherently to add much 17 other than it is clear that there is a vertical 18 relationship between the agents at one end, who are 19 suppliers to the portal, and the agents who are the 20 members of the portal and essentially the beneficiaries 21 of it. 22 Q. Yes, between the company which they have come together 23 to create on the one hand and they as the purchasers of 24 the services from the portal on the other hand? 25 A. Yes, that's right. So I mean, if the alternative was</p> <p style="text-align: center;">Page 88</p> |
| <p>1 MR HARRIS: Thank you very much. I think Mr Maclean has 2 some questions for you. 3 Cross-examination by MR MACLEAN 4 MR MACLEAN: Good afternoon, Mr Parker. I am going to look 5 now and again at bundle F and bundle E and also 6 bundle G, which is the joint statement, so if you can 7 manage to have those three open I will try to keep to 8 a minimum the number of other bundles that I have to 9 show you. 10 Let's see if we can agree on some basic 11 propositions, Mr Parker. Do you agree with me that 12 because of the network effects in this market, the 13 estate agents and property portals market in particular, 14 a critical mass of properties is needed to attract 15 house-hunters and vendors to the portal? 16 A. Yes, I do. 17 Q. And do you agree that none of the estate agents acting 18 individually could have set up a portal realistically by 19 themselves? 20 A. I'm not completely sure what you mean. 21 Q. Only with their own listings on it. It just wouldn't 22 work, it wouldn't have the critical mass? 23 A. Certainly. I agree that if there was only one or 24 a handful of agents that would not make for a compelling 25 portal.</p> <p style="text-align: center;">Page 87</p> | <p>1 you have a limited company but where all the shares are 2 held by agents, that would seem to me to be essentially 3 similar from an economic perspective. 4 Q. When were you first instructed to do some work in your 5 professional capacity as an expert economist in relation 6 to property portals, Mr Parker? 7 A. That would have been in the middle of 2011. 8 Q. And by whom were you engaged? 9 A. I was engaged by the Digital Property Group. 10 Q. And that was in the context of the then forthcoming 11 merger? 12 A. That's correct, yes, as I mentioned I think it's in the 13 second paragraph of my first report. 14 Q. And over what period since then have you been working 15 for Digital Property Group or one of its corporate 16 successors? 17 A. Well, its corporate successor is Zoopla. I have done 18 some work for Zoopla over the period. I did some in 19 2015. 20 Q. And you were a major contributor to the contributions 21 made by Digital Property Group to the OFT at the time of 22 the merger; is that right? 23 A. Well, I was advising Digital Property Group on issues to 24 do with merger clearance and so to the extent that you 25 think that the views of an economist are helpful in that</p> <p style="text-align: center;">Page 89</p> |

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| <p>1 process I hope I assisted.</p> <p>2 Q. The OOP rule is a vertical restraint, isn't it?</p> <p>3 A. The OOP is a vertical restraint with horizontal</p> <p>4 consequences as is inherent in the term "one other</p> <p>5 portal". It is clear that there is a portal, it is</p> <p>6 imposing -- has a vertical agreement with some suppliers</p> <p>7 but then has consequences for other portals, the One</p> <p>8 Other Portal rule, so it has these -- it is a vertical</p> <p>9 agreement but with horizontal consequences.</p> <p>10 Q. Do you agree with me that the OOP rule is contained in</p> <p>11 a set of vertical agreements between Agents' Mutual and</p> <p>12 various estate agents?</p> <p>13 A. Yes, I do.</p> <p>14 Q. And you don't consider that fact to be material to the</p> <p>15 economic analysis; is that right?</p> <p>16 A. Which fact?</p> <p>17 Q. The fact that the OOP rule is contained in a set of</p> <p>18 vertical agreements between Agents' Mutual and its</p> <p>19 various estate agents?</p> <p>20 A. No, well, I think that the relevant approach is to look</p> <p>21 at the effects of the OOP rule. In this case I think</p> <p>22 the effects are largely felt horizontally within the</p> <p>23 portals market and the fact that that outcome is --</p> <p>24 what's the right word? -- occurs by virtue of a vertical</p> <p>25 agreement between a portal and an estate agent that then</p> <p style="text-align: center;">Page 90</p> | <p>1 economic analysis. Do you agree that the standard</p> <p>2 economic analysis in relation to such a restraint takes</p> <p>3 account of the share of the purchasing market that is</p> <p>4 subject to the restraint?</p> <p>5 A. Yes.</p> <p>6 Q. And do you agree that Agents' Mutual had no power when</p> <p>7 it entered into the listing, no market power when it</p> <p>8 entered into the listing agreement with Gascoigne</p> <p>9 Halman?</p> <p>10 A. Yes.</p> <p>11 Q. Do you agree that unless either party to a vertical</p> <p>12 agreement possesses market power, vertical agreements</p> <p>13 are presumed to be pro-competitive?</p> <p>14 A. Do I agree that that's a presumption or do I agree that</p> <p>15 that presumption applies in this case?</p> <p>16 Q. Let me try again. Do you agree that unless either party</p> <p>17 to a vertical agreement possesses market power, vertical</p> <p>18 agreements are presumed to be pro-competitive?</p> <p>19 A. I think -- I am not completely sure -- I think in this</p> <p>20 case one needs to look at the effects of this particular</p> <p>21 agreement.</p> <p>22 Q. Well, if you take bundle G, Mr Parker. I am not sure to</p> <p>23 the extent to which the Tribunal has in its own reading,</p> <p>24 as it were, familiarised itself with this joint</p> <p>25 statement and we haven't been there very often in the</p> <p style="text-align: center;">Page 92</p> |
| <p>1 affects the behaviour of that estate agent with respect</p> <p>2 to other portals, that to me does not seem particularly</p> <p>3 interesting from an economic effects perspective.</p> <p>4 Q. Mr Parker, that's a very long answer and it is going to</p> <p>5 be a very long afternoon if you give answers which are</p> <p>6 as long as that to all of the questions because we are</p> <p>7 still just limbering up on the touchline here, all</p> <p>8 right? So if you could just give me an answer and</p> <p>9 I will ask you another question, if you can, okay?</p> <p>10 Now a new entry such as my clients embarked upon</p> <p>11 in January 2015 would generally be presumed to be</p> <p>12 pro-competitive, wouldn't it?</p> <p>13 A. New entry absent restrictions that could damage other</p> <p>14 competitors in the market or other ancillary</p> <p>15 restrictions which have anti-competitive consequences,</p> <p>16 then yes, I agree. That is my counter-factual 2 and the</p> <p>17 conclusions of my analysis of counter-factual 2.</p> <p>18 Q. The standard economic analysis in relation to a</p> <p>19 restraint such as the OOP rule, vertical restraint,</p> <p>20 would take account of the share of the purchasing market</p> <p>21 that is subject to the restraint, wouldn't it?</p> <p>22 A. The standard analysis would. I don't think this is</p> <p>23 a standard case, but the standard analysis would do</p> <p>24 that.</p> <p>25 Q. There is an example. I am asking you about the standard</p> <p style="text-align: center;">Page 91</p> | <p>1 course of the hearing but I am sure the Tribunal has</p> <p>2 waded through.</p> <p>3 MR FREEMAN: We have familiarised ourselves with the joint</p> <p>4 statement.</p> <p>5 MR MACLEAN: I am very grateful.</p> <p>6 Would you turn, Mr Parker, to page 2 of bundle G and</p> <p>7 do you see proposition number 2?</p> <p>8 A. Yes.</p> <p>9 Q. Which is what I have just read to you, do you see?</p> <p>10 A. Yes.</p> <p>11 Q. And you disagree due to oversimplification, do you see</p> <p>12 that?</p> <p>13 A. Yes.</p> <p>14 Q. If you turn over the page to page 3, what you say is,</p> <p>15 you refer to the Commission's vertical guidelines and</p> <p>16 then you make three observations; do you see that?</p> <p>17 A. Yes.</p> <p>18 Q. I want you to look at the third of those observations</p> <p>19 beginning "Third". At the bottom of the page you say:</p> <p>20 "Specifically I note that the proportion of agents</p> <p>21 who have entered into a vertical agreement with OTM was</p> <p>22 over 23 per cent at launch and is now over 31 per cent."</p> <p>23 Then you give a reference to your second report?</p> <p>24 A. Yes.</p> <p>25 Q. And then you suggest:</p> <p style="text-align: center;">Page 93</p> |

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| <p>1 "This is sufficient from an economic perspective to 2 have a material impact on the property portals market as 3 I show in my analysis." 4 Now, the 31 per cent that you refer to there isn't 5 a measure of OnTheMarket's importance that you have 6 previously relied on in your first report, is it? 7 A. Well, I think that's not right. If you look at -- 8 Q. Let's look at 1.5.3 of your first report, Mr Parker. 9 A. Perhaps if I could answer the question. If you look at 10 figure 12 on page 65 this shows a number of agent 11 branches over time. It shows that at the point that 12 OnTheMarket came into the market it had -- I mean, it 13 had 4,600 branches but this is the H1 overall figure and 14 what we see is that in that H1 what we see is that 15 Zoopla, as I think is common territory, lost a large 16 number of agents and that large number of agents, that's 17 the consequence of the One Other Portal rule. 18 Q. Where is the 31 per cent there, Mr Parker? 19 A. The 31 per cent isn't there but this is essentially 20 saying that because there is a large number of agents on 21 OnTheMarket and a large number of those agents, 22 90 per cent, have come off Zoopla that is sufficient to 23 have a very material impact on Zoopla's agent 24 proposition. 25 Q. Mr Parker --</p> <p style="text-align: center;">Page 94</p> | <p>1 first report, don't you, and those are respectively 2 revenue, website visits and page views; is that right? 3 A. Well, if we go to section 4 -- 4 Q. Go to 1.5.3, Mr Parker, please. 5 A. I see those, yes. 6 Q. Page 8: 7 "Market shares in the UK property portals market can 8 be measured in a variety of metrics." 9 Then the first one is customer visits, the second 10 one is customer page views, and the last one is revenue? 11 A. That's correct. And if I can take you to 4.4.10 -- 12 Q. No, thank you, Mr Parker. On all of those metrics you 13 found that OnTheMarket had a market share of 5 per cent 14 or less, didn't you? 15 A. I did and I think it is common ground that OnTheMarket 16 from a house-hunter perspective has not been very 17 successful but what it does have is from an agent 18 perspective a considerable sizeable proportion of the 19 agents and that's where I point out in 4.4.9 and 4.4.10, 20 where you have the same chart after that that I have 21 just taken you to, which comes up a couple of times in 22 my report because it is important, as I have just 23 explained, I say it is not meaningful to interpret the 24 numbers as a share given the prevalence of dual listing. 25 Q. At page 34, there is figure 5, that is the graph showing</p> <p style="text-align: center;">Page 96</p> |
| <p>1 A. That impact on Zoopla's agent proposition then has 2 a very material ability on Zoopla's ability to compete. 3 Q. Mr Parker, the 31 per cent you referred to at page 4 of 4 bundle G, are you or are you not suggesting that that is 5 a measure of market share, the 31 per cent? 6 A. I am suggesting that it is the share of agents that are 7 listing on OTM and therefore to whom the OOP rule 8 applies. 9 Q. Try again, Mr Parker. Are you or are you not suggesting 10 that is a measure of market share of OnTheMarket? 11 A. Well, I am suggesting it's a share of agents to which 12 the One Other Portal rule applies and I don't think 13 that's a market share in a revenue sense. 14 Q. Or in any other sense, is it? 15 A. It is a share of agents. I am not suggesting that -- 16 just to be clear, I am not suggesting that it is 17 a market share in the sense that agents multi-list and 18 therefore Rightmove has near 100 per cent of the agents, 19 Zoopla has 70 per cent of the agents, OnTheMarket has 20 30 per cent of the agents. So in the sense of you 21 can -- when you are looking at revenues you can allocate 22 shares. 23 Q. Right, let's do that. Let's look at paragraph 1.5.3 of 24 your first report because you do in fact propose three 25 different possible measures of market share in your</p> <p style="text-align: center;">Page 95</p> | <p>1 total visits, right? Figure 6 is page views and then, 2 fairly starkly, page 37, figure 8, that is the revenue 3 graph showing Rightmove's revenue, a smidgen over 4 60 per cent, Zoopla's about 34 or 33 or thereabouts -- 5 THE CHAIRMAN: Are we in danger of going into the yellow? 6 MR MACLEAN: Yes, we can see what the numbers are, can't we, 7 Mr Parker? Rightmove, Zoopla and OnTheMarket, figure 8, 8 right? 9 A. Yes, we can. 10 Q. Let's go back to -- just before we go back to anything, 11 you agree, don't you, your view is that Agents' Mutual 12 won't have established or is not likely to establish 13 a secure market position after five years of trading; is 14 that right? Is that your view? 15 A. Yes, that's my best prediction on the basis of the 16 evidence and analysis that I have looked at. 17 Q. And we get that in a number of places but perhaps you'd 18 agree with me if we turn in bundle F to page 219, that 19 is the point you are making in 6.4.12, is that right? 20 You make it in a number of other places but -- 21 A. Sorry, 6.4 point? 22 Q. 6.4.12. You see the first sentence? 23 A. Yes, that's correct. 24 Q. Let's go back to bundle G to page 3. We looked at the 25 31 per cent point that you make, which is the third of</p> <p style="text-align: center;">Page 97</p> |

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| <p>1 those points. Do you remember you make three 2 observations in your disagreement to the proposition 3 that I put to you ten minutes ago? 4 The first point is in relation to the guidelines and 5 then the third point we have dealt with but let's look 6 at the second point, please, at page 3: 7 "Second, there is substantial market power in the 8 market in which OTM operates but this market power is 9 held by the dominant property portal, Rightmove, rather 10 than OTM". 11 I agree with that, right? But do you or do you not 12 suggest that that is a factor which negates the 13 application of the presumption which proposition 2 is 14 concerned with? So you have pointed to the market power 15 of somebody else; not to OTM's market power but to 16 somebody else's market power? 17 A. I am pointing to that and from an economics effects 18 perspective the reason for that is that the consequence 19 of the One Other Portal rule is that it has strengthened 20 Rightmove and that with Rightmove being the person with 21 the market power, that is potentially liable to lead to 22 detrimental consequences. 23 Q. The fact that Rightmove does or does not have market 24 power isn't a reason, is it, for disapplying the 25 presumption that proposition 2 is concerned with, is it?</p> <p style="text-align: center;">Page 98</p> | <p>1 searching on my part for the words "one other portal" 2 only comes up with this situation and no other -- 3 Q. So what -- 4 A. If you add to that the fact that this is a two-sided 5 market with indirect network effects, which is 6 relatively unusual as well -- it is not unheard of but 7 it is relatively unusual -- if you put together two 8 factors that are somewhat unusual I think you need to 9 look at the market context properly and that might lead 10 you to unusual outcomes but that's because your fact 11 pattern is unusual. 12 Q. But it doesn't involve ditching the usual presumptions 13 that economic theory teaches us to apply, does it? It 14 might be a reason -- 15 A. Explain which usual presumption you are talking about. 16 Q. The one we are concerned with, Mr Parker, that unless 17 either party to a vertical agreement possesses market 18 power, vertical agreements are presumed to be 19 pro-competitive. 20 A. I don't think that's an economic presumption. In this 21 case the unusual circumstances are that the effect of 22 the One Other Portal rule has been to damage Zoopla and 23 to strengthen Rightmove. As it happens, it has arisen 24 due to the actions of Agents' Mutual which is, I accept, 25 on a revenue page views or customer visits basis</p> <p style="text-align: center;">Page 100</p> |
| <p>1 A. It seems to me that is a legal question. From an 2 economic perspective, if you have a clause or a policy 3 that in this case acts to strengthen the firm in the 4 market that has the market power, from an economics 5 perspective it doesn't seem to me that it matters 6 whether that clause was imposed by the person with the 7 market power so as to further their market power or 8 whether it has been imposed in some other way by some 9 other party but it has had the effect of strengthening 10 the firm with the market power. 11 Q. You don't suggest that the guidelines have ever been 12 applied in such a way, in other words to disapply the 13 presumption, in circumstances where somebody else had 14 the market power rather than one of the parties to the 15 vertical restraint, do you? 16 A. I don't. I think this is a very unusual case. 17 Q. Your suggestion that these are reasons for disapplying 18 the presumption are, I suggest to you, rather eccentric, 19 Mr Parker, aren't they, these reasons you give here, all 20 three of them are rather eccentric? 21 A. Well, to the extent that this is a non-standard case, 22 for example, as far as I'm aware the One Other Portal 23 rule is completely unique, Mr Notely I think has said 24 that there is no other example of the One Other Portal 25 rule that he's ever come across, a bit of Google</p> <p style="text-align: center;">Page 99</p> | <p>1 OnTheMarket is very small -- 2 Q. Tiny? 3 A. Tiny, yes, but from an agent perspective it has quite 4 a chunk of the agents and it is that that gives rise to 5 a potentially material effect in this case in favour of 6 Rightmove. 7 Q. But when you say it has 31 per cent of agents that 8 doesn't mean that it has three-tenths of the total 9 number of agents listing, in the sense that agents can 10 be listed usually on two or sometimes more portals, 11 right? 12 A. I accept that for dual listing that's not something that 13 translates specifically into a market share but it still 14 has the consequences that I have described. 15 Q. Do you accept that harm to a competitor is not the same 16 thing as harm to competition? 17 A. Not necessarily, yes, I agree. 18 Q. Do you accept that the -- you get vertical guidelines 19 that you refer to in bundle G at pages 2 to 4. Do you 20 agree that, as Mr Bishop explained, the standard 21 competition concerns arise because of the risk of 22 anti-competitive foreclosure? That is the usual 23 enquiry, right? 24 A. That is the usual enquiry but the one other portal is an 25 extremely unusual policy and so I think -- I am not</p> <p style="text-align: center;">Page 101</p> |

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| <p>1 completely sure I understand the relevance of the usual 2 enquiry. 3 Q. The firms that aren't of material importance in a market 4 can't engage in foreclosure, can they? 5 A. Well, let's think about that in this context of the One 6 Other Portal rule. We have a mutually owned OTM. 7 Q. Why does that matter? I thought we had agreed it didn't 8 matter it was mutually owned. 9 A. So an agent-owned, and I don't care whether it is 10 mutually owned or a limited company, to be clear, but 11 the key thing is it is agent-owned and those agents are 12 having vertical relationships with -- the portal has 13 vertical agreements with 30 plus per cent of the agents 14 and the consequence of those agreements is that 30 15 plus per cent of those agents have to choose between 16 Rightmove and Zoopla. And the further consequence is 17 that -- well, what has happened is that 90 per cent or 18 so of those agents have chosen to retain Rightmove and 19 come off Zoopla and that then gives you these horizontal 20 effects, which perhaps now would be a good time to turn 21 to Mr Springett's first witness statement. 22 Q. You might think that, Mr Parker, but I am trying to ask 23 you some questions, all right? Mr Harris can take you 24 to some other documents in re-examination if you wish. 25 Cross-examination is not a seminar, all right?</p> <p style="text-align: center;">Page 102</p> | <p>1 the presumption is particularly relevant. 2 Q. Do you agree that where customers are unhappy with 3 the price or specifications of some goods or service or 4 product that they are being sold then they may well 5 decide to buy or launch their own supplier? 6 A. Yes, I do. 7 Q. And there is nothing objectionable about that as 8 a matter of principle, is there? 9 A. No. 10 Q. I think I have really covered this already but the 11 standard assessment of the effects of the OOP rule would 12 consider whether there was any risk of foreclosure on 13 the portals market having regard to the market share 14 represented by the agents subject to the rule. That 15 would be the usual analysis wouldn't it? 16 A. Well, I think that -- I agree with that. I mean, what 17 we have is we have 30 plus per cent of agents who are 18 saying you have to come off one or other of the rival 19 portals, and we don't have a situation of full 20 foreclosure here but we have a situation where, because 21 of the indirect network effects, Zoopla's proposition 22 has been damaged because it's lost a large chunk of its 23 agent base. The fact -- 24 Q. A large chunk of its? 25 A. Agent base.</p> <p style="text-align: center;">Page 104</p> |
| <p>1 Let me ask you something else. Do you agree that 2 upward vertical integration is a widespread and benign 3 practice? 4 A. I think it's certainly a widespread practice and whether 5 it is benign or not depends on the circumstances. 6 Q. It is mostly benign, isn't it, as the OFT merger 7 assessment guidelines set out? They are in the bundle. 8 In fact I think they are in one of your exhibits at 9 F2/584. That is the start of the document. Then if you 10 turn to page 632 -- 11 A. Yes. 12 Q. -- in the context of non-horizontal merger, do you see 13 that at 5.6.1, the third line: 14 "Non-horizontal mergers do not involve a direct loss 15 of competition between firms in the same market and it 16 is a well-established principle that most are benign and 17 do not raise competition concerns. Nevertheless some 18 can weaken competition and may result in a substantial 19 lessening of competition." 20 A. So I agree with everything that it says here. So whilst 21 this is not a vertical agreement, because the One Other 22 Portal rule has consequences down here it has horizontal 23 effects. So I don't really see how we can restrict 24 ourselves to just thinking of this as purely being 25 a vertical situation and therefore I am not sure that</p> <p style="text-align: center;">Page 103</p> | <p>1 Q. Yes. 2 A. Now that it's lost a large chunk of its agent base, 3 house-hunters are increasingly moving away from using 4 Zoopla. That reduces the implicit threat that Zoopla 5 places on Rightmove with the result that Rightmove is 6 strengthened. 7 If you look at the PR agency briefing of OnTheMarket 8 in April 2016 they say that it is a fact that Rightmove 9 has been strengthened by the entry of OTM. 10 Q. And you rely on the PR briefing by OnTheMarket to help 11 you to underpin your economic analysis, do you, 12 Mr Parker? 13 A. There is also -- 14 Q. Do you, Mr Parker? 15 A. There is -- there is also a present -- 16 Q. Do you rely on that? 17 A. There is also a presentation by Mr Springett of 18 12 April 2016 in which he makes the same point and there 19 are papers in the October 2015 board which make the same 20 point: Rightmove strengthened, Zoopla weakened. 21 OnTheMarket has not yet overcome that. 22 Q. Mr Parker, do you agree that Rightmove and Zoopla both 23 have strong brand awareness? 24 A. Yes, I do. 25 Q. And do you agree that they are both operating in</p> <p style="text-align: center;">Page 105</p> |

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| <p>1 a well-entrenched and concentrated market?</p> <p>2 A. What do you mean by "well-entrenched"? It is a mature</p> <p>3 market.</p> <p>4 Q. Do you agree or disagree with the proposition, or don't</p> <p>5 you understand the question, that they are both</p> <p>6 operating in a well-entrenched and concentrated market?</p> <p>7 A. So are they in a concentrated market? Yes, because by</p> <p>8 conventional measures of concentration there are two --</p> <p>9 prior to OTM's entry there are two large firms in this</p> <p>10 market and a tail of smaller firms and on conventional</p> <p>11 measures of concentration I agree that that is</p> <p>12 concentrated. I am not completely sure what you mean by</p> <p>13 a well-entrenched market so perhaps you could explain.</p> <p>14 Q. Well, they are well dug into the market which has high</p> <p>15 barriers to success, aren't they, Zoopla and Rightmove?</p> <p>16 A. Yes, I think that's correct. The interesting thing</p> <p>17 about this market is there are barriers to entry, as is</p> <p>18 common ground, but there are actually barriers to</p> <p>19 expansion all the way up and so whilst there are -- if</p> <p>20 you have two people operating at the same level in the</p> <p>21 market they are similarly attractive. Once you pull</p> <p>22 someone further back from that existing person, that</p> <p>23 person faces barriers to expansion relative to the</p> <p>24 leading player in the market.</p> <p>25 So I agree that there are barriers to entry for any</p> <p style="text-align: center;">Page 106</p> | <p>1 I won't be terribly interested in listing on it.</p> <p>2 So what tends to happen in these sorts of markets is</p> <p>3 the less effective players ultimately, because you need</p> <p>4 some fixed costs to incur to survive in terms of</p> <p>5 marketing and website and so on, the smaller players</p> <p>6 disappear or get folded up into other players. But this</p> <p>7 is true -- for the reasons I have just talked about in</p> <p>8 terms of barriers to entry and expansion, it is true</p> <p>9 throughout, these markets do have a tendency to</p> <p>10 consolidate and we see that in an awful lot of online</p> <p>11 portal markets. That tendency to consolidation is</p> <p>12 naturally there.</p> <p>13 Q. Do you agree with me, Mr Parker, that the OOP rule is</p> <p>14 a weaker form of purchasing commitment, certainly by</p> <p>15 comparison to full exclusivity?</p> <p>16 A. It is a weaker form of restriction than full</p> <p>17 exclusivity, that is correct.</p> <p>18 Q. Would you turn to bundle E2, please, page 520. Are you</p> <p>19 familiar with this document, Mr Parker? I know you have</p> <p>20 been in court every minute of this trial, certainly much</p> <p>21 more than Mr Holmes has been.</p> <p>22 A. Sadly I haven't had the sort of excuse that Mr Holmes</p> <p>23 has had.</p> <p>24 Q. No, I suppose that is right, Mr Parker. Are you</p> <p>25 familiar with this document on page 520?</p> <p style="text-align: center;">Page 108</p> |
| <p>1 new portal trying to get in by virtue of these indirect</p> <p>2 add-on effects, but then there are further barriers to</p> <p>3 expansion from getting to be a small portal to being</p> <p>4 a medium sized portal and a medium sized portal to being</p> <p>5 a larger portal and then to being the largest portal.</p> <p>6 So I am in agreement with you that there are</p> <p>7 barriers to entry and expansion but these barriers to</p> <p>8 entry and expansion are relevant throughout the market.</p> <p>9 Q. Do you agree that the online property portal market has</p> <p>10 grown enormously in the last decade?</p> <p>11 A. Yes, I do.</p> <p>12 Q. And that the market has consolidated into a situation</p> <p>13 where the two largest portals, Rightmove and Zoopla,</p> <p>14 together account for about 94 per cent of the market by</p> <p>15 revenue?</p> <p>16 A. I think that's correct, yes. And I think that probably</p> <p>17 follows from one of the charts you took me to earlier.</p> <p>18 But just to be clear, this is the sort of market where</p> <p>19 one would expect to see consolidation over time because</p> <p>20 you need to have a certain critical mass of agents and</p> <p>21 house-hunters. If you don't have enough agents you will</p> <p>22 be unattractive for house-hunters because there's not</p> <p>23 enough properties there, so I won't be very interested</p> <p>24 as a house-hunter to go and see that portal. And if</p> <p>25 there aren't enough house-hunters there then as an agent</p> <p style="text-align: center;">Page 107</p> | <p>1 A. I think I've seen this document, yes.</p> <p>2 Q. Would you turn to page 540.</p> <p>3 A. Yes.</p> <p>4 Q. So this is a Zoopla document, right? This is</p> <p>5 Mr Chesterman's presentation of his own company's 2014</p> <p>6 results, right?</p> <p>7 A. Yes.</p> <p>8 Q. So Zoopla's description of itself is that it has an</p> <p>9 excellent position in the market with high barriers to</p> <p>10 success. It is in a well-entrenched and concentrated</p> <p>11 market, and on the right-hand side those are the unique</p> <p>12 audiences, aren't they? 28 per cent of portal users</p> <p>13 don't visit Rightmove, 35 per cent of portal users don't</p> <p>14 visit Zoopla, and 37 per cent are in the middle visiting</p> <p>15 both?</p> <p>16 A. Yes, I see these numbers.</p> <p>17 Q. And in the bottom left-hand corner, what is the 89 and</p> <p>18 the 88, the 89 per cent and 88 per cent, Mr Parker?</p> <p>19 A. So this is Zoopla's penetration, so it is not quite</p> <p>20 a share because of the multi-listing point but it is the</p> <p>21 proportion --</p> <p>22 Q. It is nothing like a share at all. It is penetration,</p> <p>23 exactly.</p> <p>24 A. It is penetration as we discussed earlier.</p> <p>25 Q. 89 per cent for Zoopla and 88 per cent for Rightmove?</p> <p style="text-align: center;">Page 109</p> |

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| <p>1 A. That's correct.</p> <p>2 Q. And there must be a substantial overlap between that.</p> <p>3 We don't know what it is but we can do the maths and</p> <p>4 there is a minimum of 77 per cent share?</p> <p>5 A. Yes, I agree there is a lot of multi-listing.</p> <p>6 Q. Okay.</p> <p>7 A. So at that point Rightmove and Zoopla had very similar</p> <p>8 agent propositions and that meant that from a property</p> <p>9 stock perspective they are very close competitors in the</p> <p>10 eyes of house-hunters because if I'm a house-hunter and</p> <p>11 I go on Rightmove I see a similar set of agents to the</p> <p>12 house-hunter if I go on Zoopla.</p> <p>13 Q. Don't worry, I'm coming to all of that, Mr Parker.</p> <p>14 A. I'm looking forward.</p> <p>15 Q. Now, do you agree that once OnTheMarket entered the</p> <p>16 property portal market there's competition by the other</p> <p>17 portals, with the other portals, for estate agent</p> <p>18 customers when those customers are deciding whether to</p> <p>19 sign up to the new entrant; they can compete?</p> <p>20 A. So let me just check I understand the question.</p> <p>21 Q. Zoopla, for example, can go along to the estate agent</p> <p>22 and say to Gascoigne Halman, for example, "Don't sign up</p> <p>23 to OnTheMarket. Here's our offering instead"?</p> <p>24 A. I agree with that.</p> <p>25 Q. And there's competition for all the other customers in</p> <p style="text-align: center;">Page 110</p> | <p>1 page 16. This is Mr Bishop's first report. Just have</p> <p>2 a look at paragraph 68. Mr Bishop says this -- do you</p> <p>3 have it, Mr Parker?</p> <p>4 A. I do. Let me just read it, yes.</p> <p>5 Q. "An important consideration is the extent to which</p> <p>6 Zoopla constrained the level of listing fees on</p> <p>7 Rightmove prior to the entry of OTM and vice versa."</p> <p>8 You agree with that, don't you? That is an</p> <p>9 important consideration?</p> <p>10 A. An important consideration for what?</p> <p>11 Q. Well, for the economic analysis that you and Mr Bishop</p> <p>12 are engaged in?</p> <p>13 A. I think it is important for the economic effects --</p> <p>14 Q. Right.</p> <p>15 A. -- to think about what the effect of the rule is.</p> <p>16 Q. I know you may disagree about what it shows but do you</p> <p>17 agree that is an important consideration?</p> <p>18 A. Well, I think the most important thing is to look at</p> <p>19 what the effect of the rule is and the level of</p> <p>20 competition prior is what it is, prior to the</p> <p>21 application of the One Other Portal rule, and so what</p> <p>22 you need to do is start from that perspective and then</p> <p>23 say: has it been made better or worse?</p> <p>24 Now, that pre-entry, pre-application of the OOP rule</p> <p>25 situation could be made -- could be super-competitive,</p> <p style="text-align: center;">Page 112</p> |
| <p>1 the market who do not become subject to the restraint?</p> <p>2 Obviously those who don't sign up to OnTheMarket,</p> <p>3 they're still up for grabs for the other portals, right?</p> <p>4 A. That's correct.</p> <p>5 Q. And once an estate agent has signed up to OnTheMarket,</p> <p>6 Rightmove and Zoopla are able to compete to become the</p> <p>7 one other portal to be chosen by that other market</p> <p>8 member, aren't they?</p> <p>9 A. That competition is distorted for the reasons that we</p> <p>10 discussed earlier. If you can only choose to be on one</p> <p>11 or the other, then you're not just competing on the</p> <p>12 merits of your own proposition, but you are also having</p> <p>13 to say, "Well, come on my portal and I will give you</p> <p>14 something that might not be as valuable from my</p> <p>15 perspective but I have to compensate you for the loss of</p> <p>16 value that you get from not being on the other portal."</p> <p>17 Q. But you agree, Mr Parker, don't you, that the OOP rule</p> <p>18 doesn't prevent Zoopla from competing for any estate</p> <p>19 agent?</p> <p>20 A. I agree it doesn't contractually foreclose it.</p> <p>21 Q. It doesn't prevent it, does it?</p> <p>22 A. But it distorts that competition, so it doesn't prevent</p> <p>23 it but it distorts it.</p> <p>24 Q. You see, let's take bundle E, please, Mr Parker, if you</p> <p>25 have that in front of you. I think you have. Tab 1,</p> <p style="text-align: center;">Page 111</p> | <p>1 it could be not very competitive, but it seems to me the</p> <p>2 relevant issue that I have been asked to look at is the</p> <p>3 effect of the OOP rule -- for me to start from whatever</p> <p>4 the background is and then say: have things got better</p> <p>5 or worse?</p> <p>6 Q. I suggest that that is an important consideration. Let</p> <p>7 us look at the next sentence:</p> <p>8 "Zoopla would provide an effective competitive</p> <p>9 constraint on Rightmove in terms of listing fees if</p> <p>10 estate agents considered, prior to the entry of OTM</p> <p>11 listing their properties on Zoopla as an effective</p> <p>12 alternative to listing those properties on Rightmove."</p> <p>13 That is obviously right, isn't it?</p> <p>14 A. Yes, that's correct.</p> <p>15 Q. The next sentence:</p> <p>16 "To the extent an estate agent would be prepared to</p> <p>17 list on only one of these portals it can be seen that</p> <p>18 the estate agent would be in a position to play off one</p> <p>19 portal against the other and in consequence seek to</p> <p>20 secure lower listing fees."</p> <p>21 That is economic common sense, isn't it?</p> <p>22 A. That is where I part company with this particular line</p> <p>23 of reasoning, Mr Maclean. You don't have to be prepared</p> <p>24 to list only on one of those portals in order to</p> <p>25 generate competition. If those portals are, say,</p> <p style="text-align: center;">Page 113</p> |

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| <p>1 virtually overlapping -- 2 Q. This is your threat point, is it? 3 A. This is the threat point. 4 Q. We are coming to your threat point. 5 A. I think it is relevant to this point because you have 6 put to me that this is economic common sense and I am 7 telling you that is not the case. The relevance is in 8 the threat, and the threat is if the two portals have 9 very close, overlapping customer bases but with some 10 uniqueness around each side, all of this bit in the 11 middle is essentially competitive because I can get it 12 on either portal. So if I take this away I can still 13 get all of these customers in the middle. If I take 14 this away I can still get all these customers in the 15 middle. 16 So it doesn't at all follow that you have to switch 17 from one to the other to achieve that. The negotiation 18 will recognise the fact that the threat point exists, 19 the walk-away option exists, but that doesn't mean you 20 have to end up only listing on one. In fact, as we go 21 back to the example of the people listing on 22 supermarkets -- 23 Q. I think if I may say so -- 24 A. -- we see that everyone who lists on supermarkets, they 25 tend to list on every single supermarket.</p> <p style="text-align: center;">Page 114</p> | <p>1 I understand that but it would follow from Mr Bishop's 2 premise, wouldn't it? 3 A. Rightmove and Zoopla could be considered to be effective 4 substitutes from an agent's perspective if they have 5 similar house-hunter bases that are very much 6 overlapping. In that point they are very close 7 substitutes. If they have less close house-hunter 8 overlap then they are less close substitutes but they 9 are still substitutes to some extent. 10 Q. Paragraph 69: 11 "However, to the extent that estate agents were 12 listing their properties on both Rightmove and Zoopla 13 prior to the launch of OTM then the degree of direct 14 competition with respect to the level of listing fees 15 would have been more limited." 16 That rather careful cautious statement is obviously 17 right, isn't it? 18 A. For the reasons I have just given it is not correct. 19 Q. You say that is wrong, do you? 20 A. Yes, it's unrelated to the -- it is not about whether 21 you are multi-listing or single listing. The relevant 22 driver of competition is the level of overlap as you can 23 see from the pictures in annex A of my second report. 24 Q. And I suggest to you that that's also a simple, 25 straightforward and obviously correct and sound</p> <p style="text-align: center;">Page 116</p> |
| <p>1 Q. If I may -- 2 A. It doesn't mean that you have to switch from one 3 supermarket to the next and you have cornflakes only in 4 Asda this week and then six months later you have 5 cornflakes only in Tesco and then six months later you 6 have cornflakes only in Sainsbury's. 7 Q. Mr Parker, I think with respect you may be reading too 8 much into Mr Bishop's sentence, which simply is a matter 9 of simple fact: 10 "To the extent that an estate agent would be 11 prepared to list on only one of these portals it can be 12 seen that the estate agent would be in a position to 13 play off one portal against the other and in consequence 14 seek to secure lower listing fees." 15 I suggest to you that is a simple statement of 16 economic common sense. 17 A. No, the first part of that statement is not correct. 18 Q. The next sentence -- 19 A. You don't have to be prepared to list on only one of the 20 portals in order to generate competition. 21 Q. "In such a setting, Zoopla and Rightmove could be 22 considered to be effective substitutes." 23 That would follow, wouldn't it? 24 A. I don't agree with the premise. 25 Q. I know you don't agree with the premise, Mr Parker.</p> <p style="text-align: center;">Page 115</p> | <p>1 analysis. Paragraph 70: 2 "That competitive dynamic has been altered by the 3 entry of OTM. As a consequence of the OOP rule there is 4 now direct competition between Rightmove and Zoopla, 5 most notably for those estate agents that are subject to 6 the OOP rule." 7 That is also sound analysis, isn't it? 8 A. Well, the competitive dynamic has been altered by the 9 entry of OTM -- 10 Q. Right. 11 A. -- which is not agreeing with the second part of the 12 statement, to be very clear. 13 Q. Right. 14 A. I mean it clearly has, because we see that the -- 15 obviously there is a big change in the relative agent 16 propositions. What that has led to if we go to figure 17 21 and 22 of my report, DP1, which are on 75 and 76 of 18 the bundle references in F, the competitive dynamic has 19 been altered and it has been altered because Zoopla's 20 agent proposition is now less attractive. That has 21 meant to house-hunters, the house-hunters have started 22 switching away on a page views basis from Zoopla and 23 going to Rightmove and similarly, we see a reduction, 24 although it has stabilised somewhat, in terms of visits 25 in figure 22. Whereas in both cases Rightmove's share</p> <p style="text-align: center;">Page 117</p> |

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| <p>1 and page views have been continually going up, and in 2 terms of visits it went up quite sharply and then it's 3 moderated somewhat but it is higher than it was when OTM 4 entered.</p> <p>5 So that is the change in the competitive dynamic. 6 You asked me a question about the competitive dynamic. 7 It is that that causes then the change in the 8 competitive dynamic and the level of competition between 9 Rightmove and Zoopla.</p> <p>10 Q. I asked you a very simple question as to whether you 11 agreed with the fact that the competitive dynamic has 12 been altered and I think we are agreed that it has been 13 altered, right?</p> <p>14 A. Yes.</p> <p>15 Q. Let us look at your first report at 1.10.1, please, at 16 page 17. You say: 17 "In the particular circumstances of this market 18 I have found that the entry of OTM combined with the OOP 19 rule has damaged competition. I am aware that this is 20 an unusual result. In most industries, economic theory 21 would suggest a greater number of firms would increase 22 competition. Similarly, provisions such as the OOP rule 23 are typically of concern only when enacted by dominant 24 firms, ie firms with substantial market power." 25 That goes back to your comment in bundle G, page 2</p> <p style="text-align: center;">Page 118</p> | <p>1 A. Yes.</p> <p>2 Q. One of the third party commentators that you refer to 3 and cite in your report is Morgan Stanley; is that 4 right?</p> <p>5 A. Could you take me to the reference, please.</p> <p>6 Q. I can, but have you forgotten that you cite Morgan 7 Stanley? You do know that, don't you?</p> <p>8 A. Yes.</p> <p>9 Q. So you agree that Morgan Stanley is a well-respected 10 market analyst, do you?</p> <p>11 A. Yes, it's one of many.</p> <p>12 Q. The reference, I am not going to turn it up but so that 13 I can demonstrate that I have done my homework too, it 14 is DP1, 9.3.3 at page 111 of this bundle. 15 Now, do you agree that Enders are also 16 well-respected market analysts?</p> <p>17 A. That's also true.</p> <p>18 Q. And you cite them as well, don't you at DP1, 9.3.6 at 19 page 112?</p> <p>20 A. Yes, I do.</p> <p>21 Q. And do you agree that Exane Paribas are also 22 well-respected market analysts?</p> <p>23 A. Yes, I do.</p> <p>24 Q. And you cite from them as well, don't you, at paragraph 25 9.3.2 at page 111?</p> <p style="text-align: center;">Page 120</p> |
| <p>1 and 3, right, and we have discussed that? And then you 2 go on, don't you, to draw comfort from the OFT's 3 analysis? See your paragraph 1.10.3. Do you see that?</p> <p>4 A. Yes.</p> <p>5 Q. "My analysis and predictions are consistent with those 6 of the UK and German competition authorities when 7 looking at analogous merger cases in the property portal 8 sector." 9 So you draw comfort, don't you, from the OFT's 10 analysis?</p> <p>11 A. I do and perhaps if we -- we have skipped over 1.10.2.</p> <p>12 Q. Yes, we have, Mr Parker because I have only got an 13 afternoon, you understand, and I have a number of 14 questions for you. So if we just stick to the 15 questions. Mr Harris can take you to other passages if 16 he thinks that's going to be helpful, all right. 17 Otherwise we are going to be here for hours and hours 18 and hours.</p> <p>19 A. In relation to 1.10.3, I do say that in conjunction with 20 a wide variety of other third party evidence that is 21 supportive of the predictions that I make that the OFT 22 is one of those.</p> <p>23 Q. That's very helpful. You refer to a number of third 24 parties, as you say, 1.10.4, do you see that, the 25 extensive third party commentaries?</p> <p style="text-align: center;">Page 119</p> | <p>1 A. Yes, I do.</p> <p>2 Q. If those market analysts, especially if they were all to 3 be essentially singing the same tune one way or the 4 other as to the structure of the market, that's 5 something which somebody in your position would draw 6 comfort from as supporting your conclusions if that's 7 what their analysis did; is that right? That's what you 8 are doing in 1.10.4?</p> <p>9 A. Well, I wouldn't necessarily purely rely on having not 10 looked at that, not looked at the factual circumstances 11 of whatever issue you are talking about.</p> <p>12 Q. Of course not.</p> <p>13 A. But are they respectable analysts? Yes, they are.</p> <p>14 Q. You see, I am just trying to unpick your section 1.10. 15 You start by acknowledging that you have an unusual 16 result. You then suggest that your empirical evidence 17 has confirmed that competition has been harmed, that is 18 paragraph 2?</p> <p>19 A. Mmm.</p> <p>20 Q. And then you point to the OFT, that is paragraph 3, and 21 then you point to the extensive third party commentary, 22 that is paragraph 4?</p> <p>23 A. Yes.</p> <p>24 Q. And that's then the place, if you like, at which you 25 then are able, you say, to place weights to prop up your</p> <p style="text-align: center;">Page 121</p> |

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| <p>1 analysis. You point to the OFT, you point to the third 2 party commentary, you point to your empirical analysis? 3 A. I point to economic theory as well. 4 Q. Well, albeit that it is an unusual result because 5 typically provisions such as the OOP rule are only 6 concerned and enacted by dominant firms and you accept 7 that's not the case with OnTheMarket obviously? 8 A. I go on to say: 9 "However in the specific circumstances of this 10 market, economic theory suggests that competition has 11 been reduced by OTM's entry of the OOP rule." 12 So I think it is very important when you have an 13 unusual market and a unique policy that you need to look 14 at the specific market context. 15 Q. Let me see if I have understood this. This I think is 16 your analysis, isn't it, but tell me if I'm wrong. Let 17 me just run through it if you don't mind. You suggest 18 that adverse effects have arisen in the portal market on 19 the following basis. First, you say you advance 20 a theory of harm whereby my client's entry has reduced 21 Zoopla's ability to act as a pricing constraint on 22 Rightmove, right? 23 A. Well, there are a number of steps before you get there 24 but, yes. 25 Q. Right. Then you say you have conducted an empirical</p> <p style="text-align: center;">Page 122</p> | <p>1 Q. I thought it was one of the building blocks of your 2 anti-competitive harm that you identify? 3 A. I think the main anti-competitive harm is the 4 strengthening of Rightmove, which is obviously the firm 5 which has the market power in this market. 6 Q. So we can forget about OTM's cost per lead being higher 7 as being anti-competitive harm; it is just merely harm, 8 is it? 9 A. I think it is harm. 10 Q. Not anti-competitive harm? 11 A. Yes, I think that's right. 12 Q. So we can forget about that for the purposes of the 13 analysis? 14 A. For the purposes of the analysis of anti-competitive 15 harm. 16 Q. And what about ZPG's cost per lead having increased? Is 17 that part of the anti-competitive harm? 18 A. Well, I have predicted in this report that ZPG's costs 19 will come down again, the cost per lead will come down 20 again. 21 Q. So that is a temporary phenomenon if it's harm, is that 22 right? 23 A. That is a temporary phenomenon, and actually as I was 24 trying to say earlier, having looked at what's happened 25 in H2/2016, so there was one further data point which</p> <p style="text-align: center;">Page 124</p> |
| <p>1 analysis which you say shows that Rightmove's costs per 2 lead, which you consider to be a reliable measure of 3 quality adjusted price, don't you, have increased by 4 comparison with their trend prior to OTM's launch? 5 A. I do say that. But that is not the only thing I do in 6 terms of looking at the empirical analysis. 7 Q. Then your empirical analysis also shows, you say, that 8 ZPG's cost per lead has also increased? 9 A. I do. 10 Q. And that is a result which your theory of harm does not 11 predict, right? 12 A. That is correct, and what I say is I expect that to 13 unwind and I have actually looked at the H2/2016 numbers 14 for Zoopla. 15 Q. We'll come to that. We are just trying to set out the 16 stages of the analysis. You also say that OTM's costs 17 per lead are higher than those of Rightmove and Zoopla 18 and you characterise that also as being part of the 19 anti-competitive harm that you identify, don't you? 20 A. Well, I think it's clearly harm to those people who have 21 signed up with OTM. I think it's only -- it is 22 a consequence of the OOP rule if the OOP rule was what 23 was necessary to get OTM into the market. I wouldn't 24 necessarily characterise it as anti-competitive harm but 25 it is harm.</p> <p style="text-align: center;">Page 123</p> | <p>1 has become available after this, after the finalising of 2 my first report, ZPG's cost per lead has indeed come 3 down again. 4 Q. Your proposition is that the higher cost per lead for 5 Rightmove, and indeed for ZPG, wouldn't have occurred in 6 a counter-factual where Agents' Mutual didn't enter the 7 market at all, right? 8 A. Well, I think the counter-factual estimate that I have 9 is the best estimate of the counter-factual cost per 10 lead that would have prevailed and Zoopla's I think 11 would have gone up slightly and -- 12 Q. Mr Parker, it is a simple proposition. I understood it 13 to be uncontentious. It was my understanding of your 14 case. Your suggestion is that the higher cost per lead 15 for Zoopla and Rightmove, and indeed the higher prices, 16 on your analysis, paid by agents listing with 17 Agents' Mutual, would not have occurred in the 18 counter-factual where Agent's Mutual didn't enter at 19 all. Is that right or have I got it wrong? 20 A. Well, a higher cost per lead than the counter-factual, 21 yes, I think -- 22 Q. I have got it right, have I? 23 A. I have to say I found the question a little bit 24 confusing, so I am trying to clarify it. Do I think 25 that Rightmove or Zoopla's cost per lead may have</p> <p style="text-align: center;">Page 125</p> |

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| <p>1 increased anyway? The best guess on Zoopla's cost per 2 lead was that it was going up a bit over time. The best 3 guess on Rightmove's cost per lead is that it is coming 4 down a bit. On Mr Bishop's reworking of my figures, 5 which come to a broadly similar overall conclusion, the 6 Rightmove cost per lead has been broadly flat for 7 a while. So if the question is, what would I have 8 expected Rightmove and Zoopla's cost per lead to have 9 done in the counter-factual, then the counter-factual 10 lines tell you what I think it would have done in the 11 counter-factual. If I think, has it gone up more than 12 in the counter-factual, then I think the answer is yes, 13 in particular Rightmove.</p> <p>14 Q. Right. You have two counter-factuals that you suggest. 15 The second counter-factual is one where Agents' Mutual 16 entered but without the OOP rule; is that right?</p> <p>17 A. That is right.</p> <p>18 Q. And you say that that counter-factual is unambiguously 19 pro-competitive, do you?</p> <p>20 A. Yes, I do.</p> <p>21 Q. Now, your theory of harm rests on the assumption, 22 doesn't it, that Zoopla exerted a strong competitive 23 constraint on Rightmove's pricing before the launch of 24 OnTheMarket?</p> <p>25 A. No, my theory of harm rests on the fact that whatever</p> <p style="text-align: center;">Page 126</p> | <p>1 customers.</p> <p>2 Q. And that was a feature which would tend to make Zoopla, 3 pre-merger Zoopla, a complement rather than a substitute 4 for Rightmove, wouldn't it?</p> <p>5 A. Well, these firms are both complements and substitutes. 6 They are substitutes to the extent that they have 7 overlapping house-hunter bases, in respect of agents, 8 and they are complements to the extent that they have 9 unique house-hunter bases, and the fact that everyone 10 has a unique house-hunter base to some extent, possibly 11 with the exception of OTM, means that agents would like 12 to multi-list because they would like to get access to 13 this unique customer base over here and this unique 14 customer base over here, but the fact that there is 15 overlap between all these customer bases places 16 competitive constraints as between the parties.</p> <p>17 Q. Do you agree that, other things being equal, portals 18 will compete more closely with each other if they offer 19 estate agents access to the same house-hunters or 20 vendors?</p> <p>21 A. Yes, I do.</p> <p>22 Q. And the converse is also true, isn't it?</p> <p>23 A. So if two portals have entirely separate customer bases, 24 yes, I agree they don't compete. If they have entirely 25 the same house-hunter/vendor base they compete very</p> <p style="text-align: center;">Page 128</p> |
| <p>1 level of constraint Zoopla applied to Rightmove prior to 2 the entry of OnTheMarket, that level of constraint has 3 now been weakened. So it doesn't particularly relate to 4 any particular level of constraint. What I am looking 5 at is the change that has happened since the entry of 6 OnTheMarket and the OOP rule.</p> <p>7 Q. But if Rightmove's pricing was unconstrained by Zoopla 8 or anybody else before OnTheMarket entered, then the 9 harmful effect that you claim to have identified 10 wouldn't exist, would it?</p> <p>11 A. If Rightmove's pricing was completely unconstrained then 12 I agree that that's the case. But you have helpfully 13 pointed me to page 540 in bundle E2 which looks at the 14 overlap. It is clear that there is a big overlap; 15 37 per cent of portal users visit both as of 2014.</p> <p>16 Q. Yes.</p> <p>17 A. That is creating a competitive constraint from Zoopla on 18 Rightmove and vice versa. So I don't accept the 19 proposition that there was no constraint on Rightmove 20 prior to the entry of OnTheMarket.</p> <p>21 Q. Do you accept that Zoopla's advertising prior to the 22 merger emphasised its own sizeable unique audience?</p> <p>23 A. I am sure that's correct and I would certainly expect 24 them to do so to try and encourage agents to list on 25 them so that they could get access to a new group of</p> <p style="text-align: center;">Page 127</p> | <p>1 strongly. If they're somewhere in the middle then they 2 compete but they don't completely compete in a perfect 3 fashion.</p> <p>4 Q. Do you agree that Zoopla maintains today a unique 5 audience of a similar size to that which it had when 6 OnTheMarket entered the market?</p> <p>7 A. No, I completely disagree. We can look at that in 8 Mr Bishop's second expert report.</p> <p>9 Q. You probably know where that is, Mr Parker, but I 10 apprehend the Tribunal might need a little more help.</p> <p>11 A. It is figure 5. Sorry, I am probably not looking at the 12 right bundle reference.</p> <p>13 Q. You are quite right, Mr Parker. E/2/65 and 66 are the 14 page numbers, paragraphs 158 and 159. 158: 15 "Since OTM's entry, the proportion of property 16 seekers/vendors ... has remained roughly constant 17 according to the data presented by Mr Parker."</p> <p>18 A. It seems to me this is a very peculiar interpretation of 19 the data in the graph.</p> <p>20 THE CHAIRMAN: I am sorry, Mr Maclean. E2?</p> <p>21 MR MACLEAN: No, it is E/2. It is Mr Bishop's report. So 22 it is E, tab 2, page 65 and 66, paragraphs 158 and 159.</p> <p>23 THE CHAIRMAN: I have it, thank you.</p> <p>24 MR MACLEAN: And I think Mr Parker is telling us about 25 Mr Bishop's figure 5, which is itself based on, as you</p> <p style="text-align: center;">Page 129</p> |

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| <p>1 see in the parenthesis, an adaptation of Mr Parker's own 2 figure 23. Is that right, Mr Parker?</p> <p>3 A. Yes, that's correct. So what this shows is the 4 proportion of house-hunter/vendors in any particular 5 month who only looked at Rightmove in the red bar, 6 Zoopla in the blue bar or OTM in the gold bar. If you 7 look at Zoopla, which is what we are discussing here, 8 they were at around about let us call it 25 per cent, 9 perhaps, prior to OTM's entry. You can see the dotted 10 line is OTM's entry. And then since that point the 11 proportion of unique users on Zoopla is, shall we say, 12 18/19 per cent, fairly consistently.</p> <p>13 Q. It seems to me, Mr Parker, at the dotted line it is 14 about 22, 23 and by October 16 it is sticking its nose 15 above 20 again. So it has gone from 22 or 23 to 20 and 16 a bit, hasn't it?</p> <p>17 A. There is clearly some variation from month to month. If 18 you look at October 2014 to December 2014 then --</p> <p>19 Q. It doesn't look like some sort of game-changing falling 20 off a cliff of the unique audience, does it, since --</p> <p>21 A. It has clearly declined from about 24 per cent to about 22 19 per cent so that is a quarter or maybe a fifth of the 23 overall house-hunter population. So that seems to me 24 fairly clear evidence of a material adverse effect on 25 Zoopla.</p> <p style="text-align: center;">Page 130</p> | <p>1 presumably would be some agents who have had increased 2 listing fees, some of whom have had reduced listing 3 fees. We can see the average listing fee or at least we 4 can see the average ARPA by using the ARPA numbers.</p> <p>5 Q. I am coming to ARPA. So in the absence of the listing 6 fees you do have ARPA, don't you, so there is publicly 7 available data in relation to Rightmove and Zoopla's 8 average revenue per advertiser, isn't there?</p> <p>9 A. Yes, there is.</p> <p>10 Q. So if we go to bundle E, tab 2, Mr Bishop's report, 11 page 47, now, the one thing we can definitely agree 12 about, Mr Parker, is that you are more than familiar 13 with all of these tables in not only your report but 14 Mr Bishop's, so you will be familiar with figure 1 and 15 you know that what this figure is doing is reproducing 16 your figure 32 from DPI using only the ARPA figures that 17 are reported on a yearly basis?</p> <p>18 A. Yes.</p> <p>19 Q. And then Mr Bishop had slotted in a 2016 figure for OTM 20 calculated in the ten months of data available which 21 I think wasn't available to you when you prepared your 22 report, right? What we can see is that Rightmove's ARPA 23 has increased steadily at a fairly constant rate from 24 2009 up to 2015, hasn't it?</p> <p>25 A. That's correct. I think it probably is worth also</p> <p style="text-align: center;">Page 132</p> |
| <p>1 Q. Mr Parker, Zoopla has disclosed some data to you, hasn't 2 it, in the course of the work that you have done for 3 Zoopla and indeed in the preparation of your report in 4 these proceedings as I understand it?</p> <p>5 A. That's correct.</p> <p>6 Q. But they have not disclosed data relating to the listing 7 fees which they charge to agents, is that right?</p> <p>8 A. That's correct, yes.</p> <p>9 Q. And that would have been of assistance to you if you had 10 had that data. Indeed, it would have been of assistance 11 to Mr Bishop as well, wouldn't it?</p> <p>12 A. I think one needs to -- I have told you the data I have 13 relied on for my report.</p> <p>14 Q. Yes, I understand that. I am not criticising you. You 15 can only work with the data you have got. But I am 16 suggesting to you it would have been of assistance to 17 have had the listing fees data, wouldn't it?</p> <p>18 A. I am not completely sure, I haven't particularly 19 addressed my mind to this, but do you mean having 20 individual data for all of the estate agents and the 21 listing fees that Zoopla was charging?</p> <p>22 Q. That would have helped, wouldn't it?</p> <p>23 A. Well, I think on a whole of market basis I am not sure 24 that does particularly help. I mean potentially you 25 would get a more fine-grained analysis and there</p> <p style="text-align: center;">Page 131</p> | <p>1 looking at figure 32 in DPI.</p> <p>2 Q. I just want to look at this figure for the moment.</p> <p>3 A. I understand why you want to do that, Mr Maclean. 4 I think it would assist the Tribunal if we looked at 5 figure 32, which is an extended version of the ARPA 6 series which includes the H1/2016 figure for Rightmove 7 which is directly relevant to the point, Mr Maclean.</p> <p>8 Q. Let me just look at this figure, Mr Parker, and then 9 I promise I will take you to figure 32, all right?</p> <p>10 A. It is a deal.</p> <p>11 Q. It is not a game, Mr Parker. So what we see is that 12 Rightmove's ARPA has sailed on at the same rate with no 13 detectable change before and after the Zoopla merger 14 which was in 2012, right?</p> <p>15 A. Yes, that's correct.</p> <p>16 Q. And we can see from this figure that Zoopla's ARPA has 17 also increased every year since the merger, albeit at 18 a slower rate since the launch of OTM. Do you see that, 19 264 to 312 to 342 to 350? Do you see that?</p> <p>20 A. Yes, that's correct.</p> <p>21 Q. And this figure, figure 1, is based on the same data 22 that you use in your figure 32, which you are desperate 23 to go to in bundle F1 at page 91, right?</p> <p>24 A. Yes, that's correct.</p> <p>25 Q. What you have done in figure 32 is to break down the</p> <p style="text-align: center;">Page 133</p> |

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| <p>1 data into what you say are six-month cohorts of data, 2 right? 3 A. Yes, that's right. 4 Q. I haven't got time to debate with you why that's 5 actually not an appropriate exercise but there is an 6 issue, isn't there, in the reports between you and 7 Mr Bishop as to whether your breaking down of this data 8 into six-monthly chunks rather than annual chunks is 9 a legitimate exercise, isn't there? 10 A. There is a debate, yes. 11 Q. I am afraid I don't have time to have that out with you 12 here but that is the difference, isn't it, that is the 13 key difference between figure 32 in your report and 14 figure 1 in Mr Bishop's report? 15 A. I just make one additional point, I think. What we see 16 is that Rightmove's ARPA tends to jump up more in the 17 first half of the year and it jumps up a little bit in 18 the second half of the year. 19 Q. And that is because to the extent that ARPA is 20 a reflection, it is not a perfect reflection but it 21 reflects amongst other things the listing fees, doesn't 22 it? 23 A. It does. 24 Q. And the listing fees we know on the evidence are 25 negotiated on an annual basis with the estate agents,</p> <p style="text-align: center;">Page 134</p> | <p>1 Mr Bishop's chart on figure 1, paragraph 80 of his 2 second report. 3 Q. But do you see just below figure 32 you say: 4 "I do not think there is a clear picture on whether 5 Rightmove's ARPA has increased above its general trend." 6 Do you see that? 7 A. Yes, I think that's true. 8 Q. Mr Bishop takes the view that the competitive constraint 9 posed by Zoopla to Rightmove's listing fees prior to the 10 entry of OTM was limited, doesn't he? 11 A. I think he does, yes. 12 Q. He does. I will give you the reference. You don't need 13 to turn it up. It is bundle E, tab 1, page 21, 14 paragraphs 97 to 99. He makes the point that a large 15 majority of agents listed on both Rightmove and Zoopla 16 prior to OnTheMarket's entry. We know that's true, 17 don't we, Mr Parker? 18 A. Yes, it is true that there was considerable agent 19 overlap prior. 20 Q. And indeed we looked earlier at the Zoopla full year 21 presentations for 2014 which showed 89 per cent of UK 22 agents and developers listed on Zoopla and 88 per cent 23 listed with Rightmove, right, we saw that earlier? 24 A. Yes, I mean, I should also say that I don't think 25 Mr Bishop is correct to say that there is limited</p> <p style="text-align: center;">Page 136</p> |
| <p>1 right? 2 A. That's right and I think the majority of those 3 negotiations, but not necessarily all, take place in the 4 second half of the calendar year which is the first half 5 -- 6 Q. So it takes effect from early in the calendar year? 7 A. Yes, that's correct. 8 Q. Which is why if you are going to break it down on 9 a six-monthly basis in the way you do, which Mr Bishop 10 doesn't think is entirely correct, that would explain 11 why you see the spikes in the first six months of the 12 year, not the second? 13 A. That is why you see a differential. In the second half 14 of the year what you get is, as I understand it, people 15 start opting in -- as well as some other listing fee 16 negotiations, where the fees tend to go up, you also, 17 perhaps in smaller proportions, you also get people 18 opting in to add-on products throughout the course of 19 the year. So it tends to be the case that the H2 figure 20 is higher. That has certainly been the case in the last 21 three years -- somewhat higher by maybe £14 or so in 22 each of those periods, and the only point I was going to 23 make is that the H1 figure jump for 2016 is very 24 sizeable. It is the largest single year increase that 25 has been recorded so this is the one that's omitted from</p> <p style="text-align: center;">Page 135</p> | <p>1 competition as a result of there being multi-listing for 2 the reasons we discussed earlier but I won't go over 3 that again. 4 Q. Let us not discuss something we discussed earlier. We 5 haven't got time for that. 6 Now, do you agree with me that suppliers that offer 7 services that are effective substitutes have no 8 multi-listing customers? 9 A. So it is a question of degree. I think it would be very 10 strange to say in the example of supermarkets, for 11 example, that they weren't effective substitutes and yet 12 you have firms that list on all four supermarkets and 13 have done for a generation. So I think it's entirely 14 wrong to say that multi-listing is in any way relevant 15 to the question of whether those firms are effective 16 substitutes or not. 17 Q. Do you agree that prior to the launch of OnTheMarket, or 18 prior to the impending launch of OnTheMarket which we 19 know happened in January 2015, there was limited 20 switching from Rightmove to Zoopla or vice versa? 21 A. Well, I think in terms of were there people who were 22 stopping to list on Rightmove and starting to list on 23 Zoopla, there's at least some evidence, I think at 7.4.4 24 of my report that there is some churn for Zoopla, the 25 base level churn seemed to be about 100 agents.</p> <p style="text-align: center;">Page 137</p> |

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| <p>1 Q. The key part of my question was limited. Try and focus 2 on that.</p> <p>3 A. Could you repeat the question, please?</p> <p>4 Q. Do you agree that prior to the launch of OnTheMarket, or 5 prior to the impending launch of OnTheMarket which 6 happened in January 2015, there was limited switching 7 from Rightmove to Zoopla or vice versa?</p> <p>8 A. I do but I don't think that has any bearing on the 9 extent of the competitive constraint imposed between the 10 two.</p> <p>11 Q. If we look at your 7.4.4, which is the paragraph that 12 you mentioned -- this is bundle F, tab 1, page 88. This 13 is in blue because it's confidential to -- yes, I see. 14 So just look in the 7.4.4. Does the Tribunal see (a) 15 beginning "In May and June"?</p> <p>16 THE CHAIRMAN: Yes.</p> <p>17 MR MACLEAN: We see the number at the end of (a). Do you 18 see that number, Mr Parker? It is a round number; do 19 you see it?</p> <p>20 A. Yes.</p> <p>21 Q. So that was in May and June and what you explain in this 22 paragraph is that the churn picked up, didn't it, as we 23 headed towards the impending launch of OnTheMarket 24 in January 2015, right?</p> <p>25 A. Yes. That is my understanding.</p> <p style="text-align: center;">Page 138</p> | <p>1 A. Yes.</p> <p>2 Q. What I want you to do, Mr Parker, is to read to 3 yourself, and would the Tribunal do the same, please, 4 the paragraph under the heading "Multi-homing, single 5 homing and competitive bottlenecks" on the right-hand 6 side of that page, beginning "As a general rule".</p> <p>7 THE CHAIRMAN: How far do you want us to read, Mr Maclean?</p> <p>8 MR MACLEAN: That paragraph, down to "significant", please, 9 sir. (Pause)</p> <p>10 Have you read that, Mr Parker?</p> <p>11 A. I have.</p> <p>12 Q. Do you agree with that analysis?</p> <p>13 A. I do. It is exactly this analysis so it says if all the 14 house-hunters are listing on -- if all house-hunters 15 visit both portals then agents can perfectly choose 16 between each of those portals and you will get very 17 strong competition. So it's entirely consistent with 18 the view that I have expressed that what really matters 19 is the extent to which there is overlap, from the agent 20 perspective that there is overlap between the 21 house-hunter base, from house-hunters what matters is 22 they overlap in the agent base, and what we have seen is 23 the effect of the OOP rule is that it reduces that 24 overlap in the agent base and that's what starts 25 weakening the competition.</p> <p style="text-align: center;">Page 140</p> |
| <p>1 Q. If prior to OnTheMarket's impending launch the two 2 portals had really been engaged in intensive 3 negotiations with agents over price, with agents 4 threatening to list only on one of those big portals, 5 doesn't it seem odd that that rarely or so rarely led to 6 any agent actually exercising the threat to leave?</p> <p>7 A. No, I completely disagree with that for the reasons we 8 have discussed. The competition is here, but because 9 they are both operating complementary routes to market 10 due to the number of unique customers, you would expect 11 to see people being able to do a deal with Rightmove for 12 this group of its customers, with Zoopla for that group 13 of its customers but all of the customers in the middle 14 who are overlapping, that is what generates the 15 competition. So I would expect to see people continuing 16 to list on both, because they get additional value from 17 both, but that to me doesn't tell me anything about the 18 extent of the competition.</p> <p>19 Q. Would you take, please, bundle E3. Would you turn to 20 page 1188, please, Mr Parker, and you should be looking 21 at an article by Mr Vannini. Do you know who Mr Vannini 22 is?</p> <p>23 A. I can read footnote 1.</p> <p>24 Q. So he's a director-general for competition, chief 25 economist team at the commission, yes?</p> <p style="text-align: center;">Page 139</p> | <p>1 Q. Do you agree, on the factual premise that Rightmove was 2 the must-have portal prior to OnTheMarket, whether that 3 is right or not is a matter of fact, not a matter of 4 your opinion or my opinion, but on that factual premise, 5 how could estate agents credibly have threatened to 6 leave Rightmove prior to my client's entry if that was 7 the must-have portal?</p> <p>8 A. To the extent that there was competition for it, the 9 competition was Zoopla.</p> <p>10 Q. But if it was a must-have portal you can't leave the 11 must-have portal, otherwise you won't have what you must 12 have?</p> <p>13 A. Well, I agree with that in principle that there is -- if 14 agents would have to be on Rightmove and would be 15 prepared to pay any amount of money then of course 16 Rightmove could charge anything that it likes, but 17 agents, whilst the term "must-have" is bandied around, 18 there are still competitive constraints even on, in this 19 case, Rightmove by the existence of Zoopla.</p> <p>20 Now, there's clearly some debate about the extent to 21 which it was providing a constraint but if Zoopla wasn't 22 there at all my expectation would have been that 23 Rightmove, if Rightmove really was the only portal and 24 literally the only portal available, then the situation 25 would be worse.</p> <p style="text-align: center;">Page 141</p> |

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| <p>1 Q. If one was looking at Mr Bishop's figure 1 we looked at 2 earlier, Mr Bishop's figure 1 doesn't suggest that the 3 merger between DPG and Zoopla had any effect on 4 Rightmove's ARPA, does it?</p> <p>5 A. Well, I think that's right. But that's because ARPA, as 6 I have described, is not a very helpful measure because 7 it doesn't take account of the value for money which is 8 being offered by the portals and we know that that has 9 happened, as that chart refers to a situation in which 10 there was very rapid growth in the use of portals which 11 is figure 2 of my report.</p> <p>12 Q. Not after the merger. That's been a phenomenon that has 13 been going on for years, hasn't it?</p> <p>14 A. Yes, it has been a phenomenon that has been going on for 15 years but it has continued through that period.</p> <p>16 Q. But if ARPA was one's chosen metric then neither 17 Mr Bishop's figure 1 nor indeed your figure 32 which 18 breaks it out into six monthly stages shows that the 19 merger had any check, any detectable check on Rightmove 20 at all, does it?</p> <p>21 A. Well, I don't think that ARPA is a very good metric.</p> <p>22 Q. I know you don't. I understand that, Mr Parker. I have 23 got that point. But on the basis that one was using 24 ARPA as one's chosen metric for whatever, as you would 25 no doubt would say, illogical reason, if one was looking</p> <p style="text-align: center;">Page 142</p> | <p>1 harder to switch from one portal to the other than it 2 would be if the listing was on a property-by-property 3 basis?</p> <p>4 A. Well, it depends, do you mean take some properties off 5 one portal and put them on another portal?</p> <p>6 Q. Since, at least in Great Britain, agents can at least in 7 effect threaten Rightmove with complete delisting in 8 favour of Zoopla, it is harder to switch, harder to play 9 off one portal against the other than it would be if 10 these listings were on a property-by-property basis 11 rather than an office-by-office basis. It seems 12 a common sense proposition to me.</p> <p>13 A. Yes, I think that's right.</p> <p>14 Q. Due to the fact of Rightmove's large unique audience the 15 threat to leave Rightmove, completely to delist from 16 Rightmove is not likely to be a credible one, is it, 17 prior to my client's entry?</p> <p>18 A. As it has transpired when we have seen a situation where 19 5,000 agents have been forced to choose between one or 20 the other even though the shares on a -- relative shares 21 on a page views or a house-hunter visits basis are 80/20 22 or 60/40 or 70/30 actually the switching, the people who 23 choose Rightmove given that they have to choose either 24 Rightmove or Zoopla, that's 90/10 or I think even more 25 than 90 per cent have chosen to remain on Rightmove. So</p> <p style="text-align: center;">Page 144</p> |
| <p>1 at ARPA I am suggesting to you that we see from 2 Mr Bishop's 1 or your figure 32 that the merger between 3 DPG and Zoopla had no material impact on Rightmove's 4 ARPA at all, did it? It sailed the same trajectory as 5 it had been sailing since at least 2009?</p> <p>6 A. I haven't particularly looked at that question but --</p> <p>7 Q. Look at it now.</p> <p>8 A. And if you let me finish, I was going to say I think 9 that does look right, at least from an absolute increase 10 perspective.</p> <p>11 Q. Do you agree that estate agents pay a fixed fee per 12 branch and can list as many properties at least in 13 Great Britain -- leave Northern Ireland to one side -- 14 can list as many properties as they like on the portal 15 in consideration for the listing fee?</p> <p>16 A. Yes, that's my understanding. I wouldn't say it is 17 a fixed fee. It is a negotiated fee but from the 18 perspective you mean it I think, yes, just to be clear.</p> <p>19 Q. I stand corrected, Mr Parker. Now, it follows from that 20 that there is no saving available to the estate agent 21 from removing some of their properties from, say, 22 Rightmove, and placing them instead on Zoopla because 23 it's all or nothing?</p> <p>24 A. I agree.</p> <p>25 Q. And that facet of the estate agent market makes it</p> <p style="text-align: center;">Page 143</p> | <p>1 to that extent, if you like, competition -- if you force 2 people to choose one or the other it's understandable 3 that they will choose the one that they perceive to be 4 the must have and it seems to me a competition where you 5 essentially enhance the advantages of the leading firm, 6 a competitive metric that leads you in that direction 7 probably isn't ultimately going to be good for 8 competition.</p> <p>9 THE CHAIRMAN: Mr Maclean, was your question directed at the 10 pre-Agents' Mutual threat rather than post?</p> <p>11 MR MACLEAN: Yes.</p> <p>12 THE CHAIRMAN: It wasn't clear from the question. I think 13 the witness may not have got that. Mr Parker, I think 14 Mr Maclean's question --</p> <p>15 MR MACLEAN: I think at the very end of the question --</p> <p>16 THE CHAIRMAN: No, you are quite right. I am so sorry. 17 Well perhaps you had better try again.</p> <p>18 A. I apologise if I haven't properly --</p> <p>19 MR MACLEAN: The question was: 20 Due to the fact of Rightmove's large unique audience 21 the threat to leave Rightmove, completely to delist from 22 Rightmove is not likely to be a credible one, is it, 23 prior to my client's entry?"</p> <p>24 A. Sorry, I apologise that I got slightly derailed there. 25 I think we don't know the answers about full delisting,</p> <p style="text-align: center;">Page 145</p> |

1 **but, as I've said a number of times, the threat is --**
 2 **the extent of the threat is given by the extent to which**
 3 **Zoopla is a credible substitute and that you can access**
 4 **the same or similar numbers of house-hunters or indeed**
 5 **the identical house-hunters.**
 6 Q. The same ones is what matters?
 7 **A. And the same ones and I think we have seen from that**
 8 **document you took me to and the Zoopla annual report**
 9 **that 30 per cent of people visit both. So I do accept**
 10 **that there is a larger unique house-hunter base and**
 11 **I think we have seen that the data shows that that has**
 12 **changed over time. But I don't accept that there was no**
 13 **competition between Rightmove and Zoopla pre-merger --**
 14 **sorry, pre-entry of OTM.**
 15 MR MACLEAN: Sir, I am conscious of the time. Can I just
 16 say that I think we are beginning to pick up the pace of
 17 the building. I am about halfway through which is
 18 a little behind schedule but not too bad. But obviously
 19 we need to have a break at some stage and this is
 20 probably as good a time as any.
 21 THE CHAIRMAN: Then let's rise for five minutes.
 22 (3.26 pm)
 23 (A short break)
 24 (3.31 pm)
 25 MR MACLEAN: Mr Parker, can I turn to the empirical analysis

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1 that you rely on?
 2 **A. Yes, of course.**
 3 Q. You use average cost per lead paid by estate agents as
 4 your proxy for quality adjusted price, right?
 5 **A. That's correct.**
 6 Q. But we are agreed that agents don't actually buy portal
 7 listings on a per lead basis, do they?
 8 **A. Not in form but in effect I think that's broadly what's**
 9 **going on. Agents are looking for value for money. The**
 10 **primary value of being on a property portal is the leads**
 11 **that they receive which turn into revenue generating**
 12 **opportunities for them. So the outcome of whatever the**
 13 **negotiation is on the listing fee will be determined by**
 14 **the value and that's essentially determined by the**
 15 **leads.**
 16 Q. What they actually pay, Mr Parker is an annually
 17 negotiated listing fee based on a price per branch per
 18 month, don't they?
 19 **A. Yes, that's correct, that is the form of it.**
 20 Q. That is the substance, Mr Parker, it is not just the
 21 form, it is the substance, isn't it?
 22 **A. The level of the listing fee is determined by the value**
 23 **that they generate and the form generates.**
 24 Q. If you take Mr Bishop's second report, this is bundle E,
 25 tab 2 at paragraph 34. Do you see right at the bottom:

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1 "Property portals do not set price on the basis of
 2 cost per lead. I agree that an estate agent's decision
 3 whether to pay the listing fee being sought by a
 4 property portal will depend on the expected return the
 5 estate agent can expect to receive."?
 6 **A. I'm very sorry, I don't have the reference.**
 7 Q. I am sorry, Mr Parker, I am going too quickly. It is
 8 bundle E, tab 2, Mr Bishop's second report, page 38 at
 9 the bottom, paragraph 34 and I have just read the first
 10 two sentences.
 11 **A. Yes.**
 12 Q. I think you agree, don't you, with both those first two
 13 sentences which takes you up to "receive" over the page?
 14 **A. I agree with the first sentence. In form sense, that's**
 15 **correct. And I agree with the second sentence.**
 16 Q. And then the third sentence:
 17 "But it is not possible for estate agents to buy
 18 listing on a property portal on a per lead basis."
 19 That is true, isn't it?
 20 **A. That's also true for the reasons we discussed earlier.**
 21 Q. The next sentence is also true as we just discussed.
 22 "Estate agents listing fees are based on a price per
 23 branch per month."
 24 **A. That's correct.**
 25 Q. The next sentence is also right:

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1 "The branch can list as many properties it has
 2 available for sale or rent at any time."
 3 **A. Correct.**
 4 Q. "The prices are usually negotiated on an annual basis."
 5 **A. And there I think is where we need to just pause**
 6 **slightly. The level that they end up negotiating will**
 7 **be determined by the value for money. That will be**
 8 **determined by the leads that they get. So yes, they**
 9 **are. All of these previous statements are true but the**
 10 **bit that's missed is the price that you end up with will**
 11 **end up being a reflection of the value for money of the**
 12 **portal which will be determined by the number of leads.**
 13 Q. Your metric of average cost per lead divides a fix cost
 14 by a variable output, doesn't it? The fixed cost is
 15 fixed in the sense we discussed earlier?
 16 **A. Yes.**
 17 Q. Negotiated, but essentially on an annual basis fixed
 18 monthly cost --
 19 **A. Yes.**
 20 Q. -- is divided by the variable output, namely the number
 21 of leads? That's what it is. That is what average cost
 22 per lead is?
 23 **A. It is. The price you agree relative to what you get**
 24 **back for it, yes.**
 25 Q. So that is not a measure of a marginal price or an

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| <p>1 incremental price, is it?</p> <p>2 A. It is a measure of an average price, it is an average</p> <p>3 price per lead.</p> <p>4 Q. I am not sure I agree with that but it is certainly not</p> <p>5 a marginal or incremental price, is it?</p> <p>6 A. It is an average price.</p> <p>7 THE CHAIRMAN: It is an average.</p> <p>8 MR MACLEAN: It is an average of something.</p> <p>9 THE CHAIRMAN: It is an average of something. I think we</p> <p>10 can agree with that. Let's leave the price label to one</p> <p>11 side.</p> <p>12 MR MACLEAN: That is very helpful.</p> <p>13 While we are pausing here, I just want to unpack</p> <p>14 a couple of assumptions on terms and it may be that the</p> <p>15 legal teams can help us on whether the assumptions are</p> <p>16 right.</p> <p>17 Am I right in assuming, Mr Parker, that when you are</p> <p>18 talking about switching you have assumed that one can</p> <p>19 only move one's entire portfolio as an agent from one</p> <p>20 portal to another? In other words, you sign up</p> <p>21 everything or nothing?</p> <p>22 A. Well, I think in principle you could move part of your</p> <p>23 portfolio but it wouldn't pay you to do so because</p> <p>24 having signed up for one and paying the price you can</p> <p>25 list as many properties as you like, there would be no</p> <p style="text-align: center;">Page 150</p> | <p>1 Whereas if you look at the text on the OOP you can't do</p> <p>2 that with OTM. I am paraphrasing but it says all of</p> <p>3 your UK listed residential properties.</p> <p>4 MR MACLEAN: Now, we know that Zoopla sees average cost per</p> <p>5 lead as an indicator of the value of the service it</p> <p>6 provides to the estate agent; is that right?</p> <p>7 A. Can you point me to the reference?</p> <p>8 Q. Never mind the reference, Mr Parker. Just answer the</p> <p>9 question. I am suggesting to you that you do know, but</p> <p>10 do you know that Zoopla sees average cost per lead as an</p> <p>11 indicator of the value of the service it provides to</p> <p>12 estate agents?</p> <p>13 A. I don't particularly as far as I recall have awareness</p> <p>14 of what Zoopla thinks but I think that from an economic</p> <p>15 perspective it is a good measure of value for money,</p> <p>16 yes.</p> <p>17 Q. If you take bundle E1, so the first volume of the Es and</p> <p>18 turn to page 198. It is a document that I think</p> <p>19 I looked at with Mr Springett yesterday in</p> <p>20 re-examination. Do you see the paragraph headed "ARPA"</p> <p>21 at page 198? Do you see that, Mr Parker?</p> <p>22 A. Yes.</p> <p>23 Q. Let me tell you what this is. You probably know. But</p> <p>24 this is the Zoopla IPO prospectus, right. It starts</p> <p>25 at 123.</p> <p style="text-align: center;">Page 152</p> |
| <p>1 advantage. So I think in principle it is possible but</p> <p>2 in practice very unlikely.</p> <p>3 THE CHAIRMAN: So your point is that the rate is in no way</p> <p>4 dependent upon the number of properties you put on so</p> <p>5 a rational estate agent will put all the properties on</p> <p>6 its books on to the portal --</p> <p>7 A. Exactly.</p> <p>8 THE CHAIRMAN: -- because the fee stays the same?</p> <p>9 A. Yes.</p> <p>10 THE CHAIRMAN: I think it would be helpful to know whether</p> <p>11 one could, even if the price is the same, have a partial</p> <p>12 listing of stock contractually speaking. In other</p> <p>13 words, whether I as an estate agent could choose whether</p> <p>14 or not it is economically or rational to put half the</p> <p>15 stock on.</p> <p>16 MR FREEMAN: I think it would also be helpful to know</p> <p>17 whether the price needs stay the same and where this</p> <p>18 practice comes from, which side of the market.</p> <p>19 MR MACLEAN: I understand.</p> <p>20 MR HARRIS: The evidence so far is that you can do that with</p> <p>21 Zoopla and Rightmove. You don't have to list all of</p> <p>22 your properties.</p> <p>23 MR FREEMAN: But you get a lower fee.</p> <p>24 MR HARRIS: I don't believe there is any evidence on whether</p> <p>25 that results in a lower fee or not but you can do it.</p> <p style="text-align: center;">Page 151</p> | <p>1 A. Yes.</p> <p>2 Q. You are familiar with this document?</p> <p>3 A. I can't say I'm familiar with every page of it, no.</p> <p>4 Q. Let us get familiar with 198, shall we? So under the</p> <p>5 heading "ARPA" do you see in the middle of that</p> <p>6 paragraph a sentence beginning "The group's cost per</p> <p>7 lead per members." Do you see that?</p> <p>8 A. Yes, I see that.</p> <p>9 Q. It is about seven lines down:</p> <p>10 "The group's cost per lead calculated for each</p> <p>11 member as a subscription fee divided by the number of</p> <p>12 leads generated by the group measures what the directors</p> <p>13 believe to be the group's value to members as a cost</p> <p>14 effective means of reaching a wide user audience."</p> <p>15 Do you see that?</p> <p>16 A. I see that.</p> <p>17 Q. What we saw with Mr Notely, if you take bundle H1. I am</p> <p>18 not going to go to the H bundles very much at all with</p> <p>19 you, Mr Parker for obvious reasons.</p> <p>20 A. Can I just point to another interesting sentence in that</p> <p>21 paragraph?</p> <p>22 Q. If you can find one, yes.</p> <p>23 A. If we go further up, the second sentence:</p> <p>24 "ARPA is primarily driven by the value the group is</p> <p>25 able to demonstrate to its members through the number</p> <p style="text-align: center;">Page 153</p> |

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| <p>1 and quality of leads generated as well as the innovative 2 products offered to members." 3 Q. And one of the interesting words in that sentence is 4 "quality", isn't it, Mr Parker? 5 A. That is one of the interesting words. 6 Q. Which your analysis focusing only on quantity of leads 7 and assuming all leads have the same quality rather 8 leaves out of account, doesn't it? 9 A. As I understand it, Mr Bishop prefers ARPA. ARPA 10 doesn't take account of either quantity or quality of 11 leads and it seems to me that many of Mr Bishop's 12 criticisms, and no doubt we will come to these, are 13 about: I should take account of factors for which no 14 data is available but if we use ARPA then we are not 15 taking account of the fact for which data is available, 16 namely the number of leads. 17 Q. Mr Parker, take bundle H1, please, and turn to page 394. 18 We looked at this with Mr Notely but what I am 19 suggesting to you is that there is a good reason why 20 Zoopla's directors use cost per lead to measure what 21 they believed to be the group's value to members, 22 because it suits Zoopla to do so. If you look at 23 page 394 I don't want to get into the factual detail 24 with you, Mr Parker, because that wouldn't be right, but 25 do you see that what has happened is that after the</p> <p style="text-align: center;">Page 154</p> | <p>1 Q. Yes. 2 A. So it seems to me pretty self-evident that if 3 a proposition gets considerably more valuable then in 4 the negotiation for the price for that the provider of 5 that increasingly valuable service will be able to 6 extract some of that value in terms of higher prices 7 because they are providing something additional to their 8 customers. So I think I agree with that. 9 Q. The clever salesman from Zoopla who was making that 10 suggestion to the estate agent was committing the same 11 solecism as you do in your report, Mr Parker, because 12 they were simply equating number of leads with 13 concomitant quality of leads and therefore value of the 14 service provided by the portal to the estate agent? 15 A. Is there a question? 16 Q. I am suggesting to you that that's what's going on. If 17 you assume that if the number of leads doubles then the 18 value of the service provided by the portal doubles, 19 then there might be some basis for doubling the listing 20 fee. But if there isn't that correlation between the 21 number of leads and the quality of the service provided 22 by the portal, then the proposition from the Zoopla 23 salesman doesn't stack up. My suggestion to you is that 24 it doesn't stack up in the same way as your approach 25 doesn't stack up because you simply focus on the pure</p> <p style="text-align: center;">Page 156</p> |
| <p>1 merger there has been some negotiation about Zoopla and 2 Zoopla wants to put the price up. That's what's going 3 on. If you just cast your eye beginning: "As you are 4 all aware I have had the pleasure". Do you see the 5 words in yellow? 6 A. Yes. 7 Q. If you can just read those. The point is that the 8 justification for putting the price up to that extent 9 was that the merger had brought about an increase in the 10 number of leads. Do you see that? "The basis for such 11 a large increase year on year." Do you see that 12 paragraph? 13 A. Yes, I see that. 14 Q. So it suited Zoopla to suggest to estate agents that 15 cost per lead was a reliable measure of the value of the 16 service that Zoopla was providing because the effect of 17 the merger between DPG and Zoopla was, at a stroke, 18 enormously to increase the number of leads that Zoopla 19 was providing and hence this was a very convenient 20 metric for Zoopla to use in trying to extract very large 21 increases in listing fees as we see from this example, 22 right? 23 A. Well, it seems to me that Zoopla is saying the value of 24 my proposition to you has gone up by 40 per cent and I'm 25 seeking a price increase of 30 per cent.</p> <p style="text-align: center;">Page 155</p> | <p>1 number of leads and just assume as economists are wont 2 to do that the quality of leads rises by the same 3 proportion as the number of quantity of leads, don't 4 you? 5 A. Well, agents clearly care about the number of leads and 6 the quality of lead, by which I would interpret that as 7 being the chance that a particular lead leads to 8 a revenue generating opportunity. So holding quality 9 constant, if the number of leads doubles and the average 10 quality of those leads is identical, then that does seem 11 to me entirely right that the value of the proposition 12 to that estate agent has then doubled. 13 So then I think your question is about: shouldn't we 14 control for the quality of leads? Nothing in here tells 15 me as far as I can see that there has been any change in 16 the quality of leads, and that's similar to the approach 17 in my report. There doesn't seem to be any data, 18 Mr Bishop does not provide any, of the quality of leads 19 changing over time for any individual portal. 20 Q. It is not Mr Bishop's job to provide information which 21 might give you a credible theory, Mr Parker. That is 22 your job, isn't it? 23 A. Well, my job is to assist the Tribunal. 24 Q. Yes, of course. 25 A. I think if there is a criticism of my report which is</p> <p style="text-align: center;">Page 157</p> |

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| <p>1 I haven't controlled for factors that one can't control 2 for because the data is not available, then I am not 3 sure that gets you very far. 4 Q. Very helpful. 5 A. Because if it can't be done it can't be done. 6 Q. Do you agree with me, Mr Parker, that cost per lead will 7 vary for reasons which are unrelated to the bargaining 8 position of either the portal or the estate agent? 9 A. I think it is in principle possible and I have said that 10 but I would be -- 11 Q. And it is in practice very likely, isn't it? 12 A. That I don't know. We'd have to look at what the 13 evidence was on these other factors. 14 Q. And you can't do that because you haven't got the 15 evidence? 16 A. The evidence simply isn't available, so I have used all 17 the available evidence that there is. 18 Q. You see, I suggest to you that Mr Bishop's obviously 19 right when he suggests that cost per lead is apt, likely 20 indeed, to vary for reasons unrelated to the bargaining 21 position of either party and if that is right, then 22 conclusions based on the movement in this metric cost 23 per lead, average costs per lead are going to be 24 economically unilluminating, aren't they? 25 A. So if there were other features out there that affected</p> <p style="text-align: center;">Page 158</p> | <p>1 might change the results, then in principle that could 2 be true. 3 Q. It is deeper than that. 4 A. It could change the results either in a way that 5 strengthens my conclusions or that weakens them but in 6 the absence of data or strong theory we don't have any 7 reason to think that my results would be invalidated. 8 Q. It is what Lord Justice Laws if he was here would call 9 a deeper point, Mr Parker. Your average cost per lead 10 is not the meaningful measure of price at all, is it? 11 A. Well, I think it is a measure of value for money and 12 I think that's an appropriate thing to do when looking 13 at the relative offers of different portals. Let's 14 suppose we looked at a pure measure of price, ARPA, a 15 fairly pure measure of price. That wouldn't control for 16 a very obvious factor for which we do have data, namely 17 the total number of leads and we have seen just from the 18 Zoopla analysis that number of leads is important. It 19 seems to me that we need to take account -- 20 Q. It is important to Zoopla. 21 A. They say it is important to their members. 22 Q. Zoopla are telling the estate agent that it is important 23 to them and they are saying, "Look, look how whizz bang 24 we are after the merger. Look how many leads we've got. 25 Therefore we are going to extract more money from your</p> <p style="text-align: center;">Page 160</p> |
| <p>1 cost per lead, that which we had some information about, 2 then we could take them into account in the analysis. 3 Q. Take a simple example. Two agents might be paying the 4 same listing fee per branch per month to the same portal 5 but face a very different cost per lead as a result of 6 the underlying difference in their respective property 7 inventories, right? 8 A. That's correct, but we don't have any evidence upon or 9 data on the individual property inventories of 10 individual agents or the number of leads that they 11 receive from those and I have looked at the whole of the 12 market analysis which smooths out all these average 13 effects. 14 Q. But one of those agents might have a higher cost per 15 lead than the other but it wouldn't be possible to draw 16 any reliable conclusion as to which of those agents was 17 receiving a better value of service from the portal or 18 whether indeed both branches were receiving exactly the 19 same level of service from the portal, would it? 20 A. Well, I am not sure looking at this from the perspective 21 of any individual estate agent is particularly 22 illuminating. I am looking at things on an average 23 basis across all estate agents. If this is a variant of 24 the point that there might be other things out there 25 which, if we had data for we could control for and that</p> <p style="text-align: center;">Page 159</p> | <p>1 pocket" 2 A. The disclosure is littered with examples of agents 3 saying how important leads are to them. So I don't 4 think it's merely a figment of Zoopla's imagination. It 5 seems completely clear that estate agents want leads 6 because that's what turns into revenue generation 7 opportunities. The idea that estate agents don't want 8 leads seems to be very peculiar. 9 Q. Well, Mr Parker, I am going to come to reducto absurdum 10 shortly, but I respectfully suggest that that, as you 11 know, is not what I have been suggesting to you at all. 12 You acknowledge that leads received from the 13 different portals are of different quality, don't you? 14 A. I acknowledge that they may be, yes. It is some point 15 early in my first report. Section 5, maybe. 16 Q. I think it might be 5.4.8, Mr Parker. So you get one 17 mark for that recall. 5.4.8, page 52. 18 "It is possible that different property portals will 19 deliver leads of different average quality." 20 Right, first sentence? 21 A. Yes. 22 Q. And then in 5.4.9: 23 "In principle therefore it would be possible to 24 assess differences in quality across leads." 25 A. "However I am not aware of clear quantifiable evidence</p> <p style="text-align: center;">Page 161</p> |

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| <p>1 of relative lead quality across the portals."</p> <p>2 Q. I see that, Mr Parker. We can read, thank you.</p> <p>3 You agree in principle, don't you, with the</p> <p>4 proposition, it's proposition 21 in the joint statement.</p> <p>5 Let me just read it to you. You agree in principle with</p> <p>6 this:</p> <p>7 "Leads can vary in terms of quality between portals</p> <p>8 and over time as measured by the likelihood that a given</p> <p>9 lead generates revenue."</p> <p>10 That is bundle G, page 21. You agree with that in</p> <p>11 principle, don't you?</p> <p>12 A. Yes, I do.</p> <p>13 Q. Let's just take bundle G because we just need to see</p> <p>14 what you say about it. You say in bundle G at page 21,</p> <p>15 about eight or ten lines from the bottom of the page,</p> <p>16 the sentence beginning "Differences", do you see that?</p> <p>17 A. Yes.</p> <p>18 Q. "Differences in quality." Just read that to yourself</p> <p>19 down to "identical fashion".</p> <p>20 A. Yes.</p> <p>21 Q. But that assumes, doesn't it, that the quality</p> <p>22 differences between the portals are constant over time,</p> <p>23 doesn't it?</p> <p>24 A. Yes, the relevant issue is quality over time. To the</p> <p>25 extent that there is quality over time differences,</p> <p style="text-align: center;">Page 162</p> | <p>1 A. Well, I agree that it is possible that quality of leads</p> <p>2 may have changed over time but we don't know whether</p> <p>3 it's increased or decreased and if it's decreased, if</p> <p>4 Rightmove's quality of leads decreased, that would</p> <p>5 strengthen my results. So in the absence of knowing</p> <p>6 which way we think this might go it seems to me there is</p> <p>7 no reason to suggest that my central estimate is not</p> <p>8 still a good central estimate.</p> <p>9 Q. If Mr Bishop is right about that, that the quality of</p> <p>10 leads generated by a particular portal varies over time,</p> <p>11 then it would follow, wouldn't it, that it is not</p> <p>12 possible to conclude with confidence that the value of</p> <p>13 Rightmove and Zoopla have remained constant over time</p> <p>14 which is the assumption that you make at 5.4.9 of your</p> <p>15 first report, right?</p> <p>16 Do you want to look at your 5.4.9, Mr Parker?</p> <p>17 A. So if there are changes in the quality of the leads</p> <p>18 generated by portals systematically over time, and if</p> <p>19 one had the data on those then one could take that into</p> <p>20 account and that could potentially change the analysis.</p> <p>21 I agree with that.</p> <p>22 Q. The design of a particular portal can affect the volume</p> <p>23 of leads produced, can't it?</p> <p>24 A. I mean, I guess it could. I'm not sure what sort of</p> <p>25 example you are talking about.</p> <p style="text-align: center;">Page 164</p> |
| <p>1 well -- if there are differences in absolute quality</p> <p>2 between portals and they don't change over time, then</p> <p>3 this won't affect the results. If there are differences</p> <p>4 over time, then that potentially makes a difference.</p> <p>5 Q. So if quality differences between portals are not</p> <p>6 constant over time, and that is not controlled for, then</p> <p>7 the counter-factual estimates are not identical. That</p> <p>8 follows, doesn't it?</p> <p>9 A. So if there are differences in quality of lead over time</p> <p>10 and in particular if it was the case that Rightmove</p> <p>11 leads had got considerably higher quality in H1/2016</p> <p>12 relative to previous years, then the increase in</p> <p>13 Rightmove's cost per lead that I estimate relative to</p> <p>14 the counter-factual may in fact reflect improvements in</p> <p>15 the quality of those leads which I am not expecting to</p> <p>16 see on the counter-factual.</p> <p>17 Q. Right. I think you are agreeing with me. I think.</p> <p>18 A. I think. To be clear, we don't have any data on that.</p> <p>19 Q. We do have some, don't we? I suggest to you that the</p> <p>20 quality of leads generated by a particular portal is</p> <p>21 likely to vary over time for the reasons Mr Bishop gives</p> <p>22 in his second report from paragraphs 99 to 101 at</p> <p>23 bundle E/51.</p> <p>24 A. Sorry, could you remind me of the page?</p> <p>25 Q. Bundle E/51, paragraphs 99 to 101.</p> <p style="text-align: center;">Page 163</p> | <p>1 Q. You have been sitting in court, haven't you? You have</p> <p>2 heard the evidence about the so-called one to many</p> <p>3 leads, haven't you?</p> <p>4 A. I have.</p> <p>5 Q. Could you be given the trial transcripts bundle, please.</p> <p>6 Presumably it is there somewhere. If not can we furnish</p> <p>7 you with a copy. (Handed)</p> <p>8 Would you turn to Day 3, please, Mr Parker, and</p> <p>9 would you turn to page 158. It is one of these four</p> <p>10 pages to a page document, okay?</p> <p>11 A. Okay.</p> <p>12 Q. If you could just be shown the pages of the transcript.</p> <p>13 Are you looking at page 158 of the transcript,</p> <p>14 Mr Parker?</p> <p>15 A. Yes.</p> <p>16 Q. And the first words are "All to"?</p> <p>17 A. Yes.</p> <p>18 Q. Between pages 158 and 159 Mr Notely explained that the</p> <p>19 Rightmove website, or portal I should say, removed</p> <p>20 a year ago the one to many click option?</p> <p>21 A. Yes.</p> <p>22 Q. And you see at 158, line 11:</p> <p>23 "Yes, a single click."</p> <p>24 I said:</p> <p>25 "By contrast in the Rightmove situation if you want</p> <p style="text-align: center;">Page 165</p> |

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| <p>1 to email multiple people you have to click your finger 2 or your mouse you could either select all or you can 3 select them individually ..."</p> <p>4 And then he said: 5 "It doesn't exist on the Rightmove site today. 6 I can't say whether it's important but they no longer 7 provide that tool which we believe is useful to 8 consumers and agents. 9 "Question: When did that happen? 10 "Answer: They moved over to a responsive platform a 11 year ago. I think it happened then." 12 And then the Chairman asked what was meant by 13 "responsive platform". 14 Now, assuming that is right, that change would have 15 an important impact both on the number and on the 16 average quality of Rightmove's leads, wouldn't it, 17 because the number would go down but the average 18 quality, by getting rid of these rather crappy, if I may 19 say so, one to all leads would go up? 20 A. I understood that because Rightmove didn't automatically 21 pre-select those it was rare for people to do those one 22 to all leads and I think the discussion was around 23 Zoopla, because it preselected, it used those to a very 24 great extent, so we don't actually know I think whether 25 anyone did fill in the "click, click, click, click" to</p> <p style="text-align: center;">Page 166</p> | <p>1 ARPA and divides it by number of leads. 2 A. That's correct. 3 Q. And we know that Rightmove's ARPA has been proceeding 4 apace as it was before, so the increase in costs per 5 lead that you rely on as supposedly showing Rightmove's 6 greater pricing powers since my client entered the 7 market is driven not by any change in the rate of 8 increase of Rightmove's ARPA but rather by the number of 9 its leads stalling in 2016, and here is one possible 10 reason, wholly unrelated to pricing power, why that 11 result you have identified may have come about. That is 12 right, isn't it, Mr Parker? 13 A. I accept that this may have had some effect. I don't 14 think we know anything about the effect either of the 15 number of people that were doing these one to many leads 16 on Rightmove previously or how many leads that has 17 affected or the relative quality of those leads when 18 they get there. So I think it is very difficult to 19 tell. 20 Q. But if we look at your figure 24 in your first report, 21 bundle F, page 78, this is your number of leads graph 22 and if you look at Rightmove, if you look at the 23 difference between 2012 to 2013 and then the upward 24 trajectory to 22.3 million and then up again to -- and 25 you see the figure third from the right. Do you see</p> <p style="text-align: center;">Page 168</p> |
| <p>1 get a one to all lead at that point. 2 Q. Never mind wrestling about the facts, Mr Parker. As 3 a matter of the theory of it, if they desisted from 4 having this and if somebody had used it but now it was 5 no longer available the consequence would be that the 6 number of leads would fall and the average quality would 7 go up, wouldn't it? It is obvious? 8 A. Well, I think there's a materiality issue. We haven't 9 got any facts here for Rightmove as to the extent to 10 which anyone used that and the discussion that 11 I remember was about Zoopla, this seemed to be 12 a material or some proportion, 15 per cent I think it 13 was, of its leads and that various analysts were saying 14 that that was reducing Zoopla's quality of leads 15 relative to Rightmove because they had quite a lot of 16 these one to many. I am not sure that we know. 17 Q. Mr Parker, this piece of evidence from Mr Notely is 18 inconvenient for the assumptions on which you proceed, 19 isn't it? 20 A. So I think this does suggest that there has been 21 a change in Rightmove's website. I am not sure that 22 from the bare statement here we can draw anything about 23 the quality of Rightmove's leads over time. We don't 24 have any data with which to do so. 25 Q. What we do know is that your average cost per lead takes</p> <p style="text-align: center;">Page 167</p> | <p>1 that in H1/2015? 2 A. Yes. 3 Q. And then what we see after that in the last two figures 4 is a very marked flattening, don't we, of the number of 5 leads? 6 A. Well, the first of those is H2/2015. 7 Q. We can see the flattening off, can't we, of the 8 trajectory of leads, right? 9 A. Well, I believe that you're saying there is a flattening 10 off between H1/2015 and H1/2016. 11 Q. Yes, since my client entered the market. 12 A. Yes, and we have H1/2015 and then it is reduced to 13 H2/2015 and then it's gone up again. And the discussion 14 here was that they moved over to a responsive platform 15 a year ago, by which I think I understand to mean 16 H1/2016, so we are now in H1/2017 and that is coinciding 17 with an increase in leads. So it is not clear to me 18 what this flattening off is that you are saying -- 19 Q. All I am suggesting to you, Mr Parker, is that your 20 suggestion that the cost per lead metric shows an 21 increase in Rightmove's pricing power simply can't be 22 extracted from this information at all. You can't 23 reliably come to that conclusion, can you? 24 A. If I had other data available, and I think we all agreed 25 there isn't any data available, then I think it would be</p> <p style="text-align: center;">Page 169</p> |

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| <p>1 something that would be important to include in the 2 analysis but we don't have that data, so I haven't done 3 that. 4 Q. But we are agreed from your figure 32, which was your 5 sliced up version of Mr Bishop's table, that Rightmove's 6 ARPA doesn't show any slowing down at all, does it? 7 A. Agreed. One factor that I think is very clear that we 8 can control for is the number of leads, which is 9 a relevant factor and on which we have data and that's 10 why I think cost per lead is better than ARPA. 11 Q. But the Tribunal has no way of knowing, no way of 12 knowing based on your methodology, whether the decline 13 in cost per lead which is brought about by a flattening 14 off of the number of leads rather than any change that's 15 happening to ARPA was caused by design changes to the 16 Rightmove portal or design changes to the Zoopla portal 17 or an increase in the quality of the product or an 18 increase in pricing power of the portal. There is no 19 way of telling which of those is the causative 20 influence, is there, Mr Parker? 21 A. There isn't in the absence of data, so what I have done 22 is look at the data that is available and I have tried 23 to use that in my analysis, but I would say, to put all 24 this in context, this is not the only piece of evidence 25 on which I rely. I look at the impact of the One Other</p> <p style="text-align: center;">Page 170</p> | <p>1 A. I am suggesting that in the context of theoretical 2 predictions and a lot of other empirical exercise 3 evidence pointing in the same direction, this is all of 4 a piece for that. I am further suggesting to you that 5 I have looked at the data that is available. 6 I understand that there are other potential factors out 7 there which, if one had data for, one would like to 8 control for, but by and large those factors could 9 strengthen my conclusions, if we found them, and not 10 weaken them. 11 Q. It might do or it might weaken them. So what you are 12 saying is your -- I just want to be clear what you are 13 saying about what reliable conclusion we can draw. 14 I have suggested to you that the Tribunal has no way of 15 drawing any reliable causative conclusion from your 16 analysis and I don't think you are disagreeing with that 17 but if you are, now's your chance. 18 A. So I think one should take this in the round with the 19 theory and empirical evidence that's also available, of 20 which this is one part. I think in the absence of data 21 or good theory that suggests that there are relevant 22 factors, relevant material factors that have been 23 omitted and that would push the results in a particular 24 direction, it seems to me that this analysis does have 25 some merit because it looks at the data that is</p> <p style="text-align: center;">Page 172</p> |
| <p>1 Portal rule on the differential agent propositions of 2 Rightmove and Zoopla. I predict from that or I see from 3 that that Zoopla's agent proposition has been weakened. 4 I predict from that that house-hunters will leave. That 5 is starting to be borne out from the evidence and 6 I predict that Rightmove will be strengthened. I also 7 look at the third party evidence and they -- 8 Q. Morgan Stanley and so on? You mean Morgan Stanley, 9 Exane Paribas? 10 A. Morgan Stanley, Exane Paribas, Enders, and so on, and 11 they come to the conclusion that Rightmove had been 12 strengthened. I see in the disclosure from 13 Agents' Mutual that there are internal presentations 14 that come to the same conclusion that Rightmove has been 15 strengthened. So whilst I accept that I haven't 16 controlled for factors for which there is no data to 17 control, I think we need to put this analysis in the 18 context of the wider picture both from theory and 19 empirics and I ... 20 Q. I think you are accepting that this empirical analysis 21 doesn't make out the causation that underpins your 22 theory. You are saying: "It is not the only thing I'm 23 relying on." But you are not suggesting to me that it 24 makes good the causative relationship that you are 25 suggesting exists, are you?</p> <p style="text-align: center;">Page 171</p> | <p>1 available but I would encourage the Tribunal to take it 2 in the round with both the theory and the empirical 3 evidence from other sources. 4 Q. So I suggest to you that if we go back to section 1.10 5 of your report, your first report, really what it comes 6 to, Mr Parker, taking it in reverse order, the extensive 7 third party commentary, for example the Morgan Stanley 8 report that we looked at with some of the factual 9 witnesses, doesn't support your conclusion. You put too 10 much weight on the OFT's report at paragraph 1.10.3. 11 Your empirical analysis doesn't permit any safe 12 conclusions at all as we have just been discussing. And 13 so far as your theory is concerned, it's an eccentric 14 theory which gives rise to an unusual result that is 15 actually contrary to the usual presumptions, and what 16 you are inviting the Tribunal to do is to put together 17 that basket of four different parts of the analysis, 18 none of which bears out your theory, put them all in 19 a basket and say that somehow they weigh greater in the 20 scales. That is really what your evidence comes to, 21 isn't it, Mr Parker? 22 A. Perhaps we should turn to the third party evidence 23 because we haven't actually dealt with that today. 24 Q. Mr Harris may take you to the third party evidence, 25 Mr Parker.</p> <p style="text-align: center;">Page 173</p> |

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| <p>1 A. So the Morgan Stanley evidence to which you refer, that 2 was largely about -- that's a kind of ex ante prediction 3 of where they think the situation might be. But we have 4 plenty of evidence to support the idea that Rightmove 5 will be strengthened, Zoopla will be weakened, and OTM 6 has had a limited impact. It seems to me, I am not 7 really sure -- you haven't particularly criticised or 8 led me to these. You are just saying -- 9 Q. I am sorry -- 10 A. -- you take me to 1.10.4 and you say, "I don't agree 11 with any of this" but you haven't actually looked at 12 this, so I am just saying I disagree that we should get 13 rid of 1.10.4 and the third party conclusions. I have 14 no understanding of why you make that statement. 15 Q. I am very sorry to be a disappointment to you, 16 Mr Parker. 17 A. The same comment applies to the OFT and to the 18 (inaudible) as well by the way. 19 Q. You know that the Morgan Stanley report is entirely 20 consistent with Mr Chesterman's own view as to what was 21 going to happen after the Zoopla/DPG merger, namely that 22 the one thing there wasn't going to be between the 23 merged Zoopla organisation and Rightmove was price 24 competition or pricing constraint, right? 25 A. So I understood from the discussion that Mr Chesterman</p> <p style="text-align: center;">Page 174</p> | <p>1 Q. Good. And you go on to say in your commentary to that 2 proposition, you say that for your conclusions to be 3 altered it would be necessary for the measurement of the 4 number of leads for Rightmove and Zoopla/Primelocation 5 to have varied systematically over time. 6 Do you see that? 7 A. Yes. 8 Q. And you say you are not aware of any. So that's -- hold 9 on one second. If you go back a page, sorry, to 10 proposition 28. My mistake. Proposition 28, you say: 11 "It is unclear whether the available data do not 12 permit a like-for-like comparison across portals ..." 13 And then in the right-hand column, do you see the 14 sentence beginning: 15 "My analysis based on ..."? 16 A. Yes. 17 Q. You say: 18 "My analysis based on a comparison of cost per lead 19 over time for Rightmove and Zoopla/Primelocation 20 relative to the counter-factual cost per lead for that 21 portal .." 22 That is not quite right, is it, Mr Parker? Your 23 estimate of harm to all agents compares the results of 24 your analysis when agents multi-list involving not just 25 Zoopla and Primelocation and Rightmove but also</p> <p style="text-align: center;">Page 176</p> |
| <p>1 was saying "We're hoping to increase ARPA," and it seems 2 to me the way in this market that you increase ARPA is 3 you increase the value of your proposition for agents. 4 We can see that what's happened in the market is a very 5 large increase in the population of house-hunters that 6 have been visiting Zoopla since then and that Zoopla has 7 been innovating to try and encourage more people on to 8 its website. 9 So I can entirely understand Mr Chesterman's 10 aspiration to increase ARPA but one can't increase ARPA 11 without also increasing value and I think there was some 12 discussion around -- the sense I got was that this was 13 due to some kind of cessation of competition but that 14 seems to me to be really an allegation of tacit 15 collusion and I understood that that was not really on 16 the table. 17 Q. Mr Parker, in bundle G, tab 29, which is proposition 28 18 in the joint statement, you say: 19 "It is unclear whether the available data do not 20 permit a like-for-like comparison across the portals of 21 ARPA reported by each portal." 22 Do you see that? 23 A. Sorry: 24 "It is unclear ..." 25 Yes, that's right, yes.</p> <p style="text-align: center;">Page 175</p> | <p>1 OnTheMarket, right? See your figure 34 -- 2 A. That's correct. 3 Q. -- of bundle F at page 95, right? 4 A. Yes. 5 Q. So then come to proposition 29. You say: 6 "It is unclear whether the available data do not 7 permit a like-for-like comparison across the portals of 8 the aggregate number of leads generated by each property 9 portal." 10 My suggestion to you, Mr Parker, is that it is 11 perfectly clear that the data do not permit such 12 a like-for-like comparison. Let's just look at what you 13 say. You say: 14 "For my conclusions to be altered it would be 15 necessary for the measurement of the number of leads for 16 Rightmove and Zoopla/Primelocation to have varied 17 systematically over time." 18 But that is not right either, is it, Mr Parker, 19 because a non-systematic variation in the quality of 20 leads data would also change your conclusions, wouldn't 21 it? 22 A. Here we are talking about the number of leads. So 23 I think in principle a non-systematic change in quality 24 of leads between 2016 and previously could affect the 25 results and in principle it could strengthen the results</p> <p style="text-align: center;">Page 177</p> |

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| <p>1 or weaken the results but we don't know the data so it 2 could go either way. 3 Q. The reason is that, for example, if in one period prior 4 to 2016 the average quality of one portal's leads 5 changed, say due to changes in the portal design or user 6 behaviour, then the cost per lead would change in that 7 period which would affect the counter-factual estimate 8 which is based on the average cost per lead over 9 a period but wouldn't affect the actual position. Is 10 that right? 11 A. So changes in cost per lead, say, in H1/2016 I would -- 12 if there is an increase in the average quality then that 13 might explain the increase in the factual cost per lead. 14 I agree with that. 15 Q. What you purport to do is, if we look at paragraph 7.5.6 16 of your first report at page 97, bundle F, tab 1, your 17 conclusion is that: 18 "On the basis of currently available cost per lead 19 data the entry of OTM of the OOP rule has been 20 detrimental for all agents from a cost per lead 21 ie effective price perspective. This is because all 22 agents have faced higher cost per lead than those 23 I estimate they would have incurred in the 24 counter-factual had OTM not entered with the OOP rule." 25 And that follows on from your table at 36 at the top</p> <p style="text-align: center;">Page 178</p> | <p>1 minutes is that actually there have been changes in the 2 quality of those portals so that answer is no answer. 3 But now we are on a different point, a slightly deeper 4 point which is that you don't just take the Zoopla and 5 the Rightmove average cost per lead. What you have got 6 to do is then to mix them in to the situation where some 7 agents who were on Rightmove only or Zoopla only or 8 Rightmove and Zoopla are now on OnTheMarket and you have 9 to draw some conclusion and you do draw a conclusion 10 that all groups of agents face higher costs. You are 11 saying that somebody who is OnTheMarket, an agent who is 12 now on OnTheMarket who was previously on Rightmove or 13 Zoopla or both is paying more. That is your conclusion, 14 right? 15 A. From a cost per lead perspective, yes, because OTM -- 16 Q. I get that. You get that using and using only cost per 17 lead, don't you? 18 A. Yes, that's correct. 19 Q. You draw conclusions on the basis of cost per lead by 20 mixing the cost per lead across all three portals and 21 your answer that, oh well, there's nothing to show that 22 there was any difference in quality of leads by 23 Rightmove or Zoopla or OnTheMarket as the case may be 24 over time. (a) it's wrong but (b) it doesn't help you 25 when you come to mix the average cost per lead across</p> <p style="text-align: center;">Page 180</p> |
| <p>1 of that page where we can see Rightmove only, Zoopla 2 only, Rightmove and Zoopla pre-entry and then the 3 various entries, Rightmove, Rightmove and OTM and so on? 4 A. Yes, figure 34 in particular which is a sensitivity. 5 Q. Yes, exactly, figure 34. 6 My suggestion to you, Mr Parker is this: that it is 7 just because taking the cost per lead from Rightmove and 8 Zoopla and then applying that into the position where we 9 have three portals rather than two, it's not possible to 10 draw any safe conclusion that an agent who listed on 11 Rightmove and/or on Zoopla before my client's launch 12 pays more as a result of listing with OnTheMarket now. 13 You haven't got any basis for any reliable conclusion to 14 that effect, have you, because the data doesn't permit 15 a like-for-like comparison across portals? 16 A. I think I'm struggling to fully understand your 17 question. Is the question that because there are 18 potentially differences in quality of leads across 19 portals that I can't make comparisons? 20 Q. You say, look, the fact I have assumed the quality stays 21 the same doesn't matter because unless there's some 22 systematic change in the quality of particular portals 23 leads it doesn't matter, right. That's your answer? 24 A. Yes. 25 Q. My first proposition we have been on for the last few</p> <p style="text-align: center;">Page 179</p> | <p>1 the three portals, does it? 2 A. I also break all the figures down by the individual 3 components. 4 Q. I know, I can see that. But it is a valueless exercise, 5 Mr Parker? 6 A. Well, I don't agree with that, but just to answer the 7 point. I break this down according to all the different 8 agent groups and I look at each of the individual agent 9 groups and if you look at Mr Bishop's adjustments to my 10 methodology, what you find is that all the numbers are 11 positive so I accept that how you weight them together 12 ultimately gives you the weighted number at the bottom 13 but whether you use my approach or Mr Bishop's approach 14 since all the numbers that you are weighting together 15 are positive, the outcome is positive. 16 Q. Mr Parker, I have two more topics. With the Tribunal's 17 indulgence -- the Tribunal may have other better things 18 to do with its time. But I am not quite finished but 19 I am not far from finishing. But I would be 20 minutes. 20 THE CHAIRMAN: I am a little reluctant to go beyond 4.30. 21 It may mean therefore that we will have to resume 22 tomorrow morning for your 20 minutes. 23 MR MACLEAN: So be it. I have two topics to do. I have 24 been trying to cut some stuff but there is a lot to 25 cover.</p> <p style="text-align: center;">Page 181</p> |

1 MR HARRIS: Sir, I also have some re-examination. Not much
 2 obviously but --
 3 THE CHAIRMAN: I don't think it is sensible to squeeze it
 4 in.
 5 MR MACLEAN: Would it, sir, and I don't know what --
 6 obviously Mr Parker may have other plans. At the moment
 7 we are not sitting tomorrow morning. I wonder would it
 8 be sensible, I simply raise this as a possibility,
 9 rather than everybody turning up some time in the
 10 morning to deal with Mr Parker and the exercise for me
 11 to finish and my learned friend to re-examine, Mr Bishop
 12 can't be here tomorrow morning, would it be convenient
 13 to sit a little earlier, perhaps at 12 o'clock or 12.30
 14 to finish Mr Parker and then we can move into Mr Bishop?
 15 I am obviously in the Tribunal's hands.
 16 THE CHAIRMAN: Yes. I am conscious of course that Mr Harris
 17 may have a lot to pack in as well. So my first question
 18 was actually when is Mr Bishop available? I know it is
 19 the afternoon.
 20 MR HARRIS: 2 o'clock, sir.
 21 THE CHAIRMAN: 2 o'clock is the earliest.
 22 MR HARRIS: There is another problem which is of course
 23 I was fully expecting and indeed I believed entitled to
 24 expect that Mr Parker would be out of purdah at the end
 25 of today in order to assist, as we all planned in my

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1 preparation for cross-examination of Mr Bishop, and
 2 because we have not kept to time that would be on the
 3 current proposal be denied to me and I
 4 respectfully submit that is totally unfair. I have to
 5 be able to have access to Mr Parker in exactly the same
 6 way as Mr Maclean is having and has had access to Mr
 7 Bishop right now. It can't be, if I can put it like
 8 this, denied to me until he has finished off his
 9 cross-examination and then we go straight into the
 10 cross-examination of Mr Bishop.
 11 THE CHAIRMAN: Fair enough. We will start at 10 or 10.30
 12 tomorrow then.
 13 MR MACLEAN: I see the force of Mr Harris's point and the
 14 answer to it is to deal with Mr Parker earlier rather
 15 than later contrary to my earlier --
 16 THE CHAIRMAN: That seems entirely fair enough. So the
 17 question is it 10.30?
 18 MR MACLEAN: I don't mind.
 19 MR HARRIS: I am afraid that gives rise to a real
 20 difficulty, sir, because we have some questions and
 21 issues that I had been fully expecting to deal with
 22 including Mr Parker overnight and that's now not going
 23 to be possible through no fault of mine or Mr Parker's
 24 and the lack of Mr Parker overnight can't be made up for
 25 by having him available by 11 or say 11.30.

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1 MR MACLEAN: I have had Mr Bishop available for an hour and
 2 a bit before I had to start my cross-examination of
 3 Mr Parker and Mr Harris will have more than the same if
 4 we are finished Mr Parker's evidence by 11/11.30
 5 tomorrow.
 6 THE CHAIRMAN: I think we are going to have to draw stumps
 7 now, so if it would assist you, Mr Harris, and if the
 8 gap between a 10.30 start and, let us say, an 11.30
 9 finish at worst for Mr Parker really causes you
 10 difficulties we can start earlier.
 11 MR HARRIS: Start earlier than 10.30?
 12 THE CHAIRMAN: If that would assist you.
 13 MR HARRIS: If I could ask for the Tribunal's indulgence
 14 that is at least minimising the difficulties I face.
 15 I obviously can't go into it but there were certain
 16 matters for decision this evening including with
 17 Mr Parker and now they can't be.
 18 THE CHAIRMAN: I understand, but I am afraid Mr Maclean has
 19 in my view been conducting as efficient
 20 a cross-examination as he can do and the witness has
 21 been answering quite properly as he should. The time is
 22 what it is and we'll assist you to an extent we can, so
 23 would 10 o'clock assist?
 24 MR HARRIS: Yes, please, sir, yes.
 25 THE CHAIRMAN: So then we'll start at 10 o'clock.

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1 So Mr Parker, you have heard this many times. You
 2 are in purdah as your counsel has indeed emphasised.
 3 Don't talk to anyone about the matter. I am sure you
 4 wouldn't. 10 o'clock tomorrow.
 5 (4.30 pm)
 6 (the court adjourned until the following day at 10.00 am)
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