



Neutral citation [2012] CAT 19

**IN THE COMPETITION**  
**APPEAL TRIBUNAL**

Case Number: 1178/5/7/11

Victoria House  
Bloomsbury Place  
London WC1A 2EB

5 July 2012

Before:

LORD CARLILE OF BERRIEW C.B.E., Q.C.  
(Chairman)  
PETER FREEMAN C.B.E., Q.C. (Hon)  
MARCUS SMITH Q.C.

Sitting as a Tribunal in England and Wales

BETWEEN:

**2 TRAVEL GROUP PLC (IN LIQUIDATION)**

Claimant

- and -

**CARDIFF CITY TRANSPORT SERVICES LIMITED**

Defendant

Heard at the Cardiff Civil Justice Centre on 12, 13, 14, 15, 16, 19, 21, 22, 23 March  
2012 and at Victoria House on 10 May 2012

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**JUDGMENT**

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## **APPEARANCES**

Mr. Michael Bowsher Q.C. and Miss Anneliese Blackwood (instructed by Addleshaw Goddard LLP) appeared for the Claimant.

Mr. James Flynn Q.C. and Mr. Colin West (instructed by Burges Salmon LLP) appeared for the Defendant.

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## **I. INTRODUCTION**

### **(1) The parties and the OFT Decision**

1. This is a claim brought by 2 Travel Group plc (in liquidation) (“2 Travel”<sup>1</sup>) against Cardiff City Transport Services Limited, trading as Cardiff Bus (“Cardiff Bus”), for damages pursuant to section 47A of the Competition Act 1998 (the “1998 Act”). The claim is thus a “follow-on” action arising out of a decision of the Office of Fair Trading (“OFT”) in which it was found that Cardiff Bus committed an infringement of the Chapter II prohibition contained in section 18 of the 1998 Act (decision number CA98/01/2008, dated 18 November 2008, “the OFT Decision”).
2. In determining a claim to which section 47A of the 1998 Act applies, the Tribunal “is bound by any decision mentioned in subsection (6) which establishes that the prohibition in question has been infringed” (section 47A(9)). Section 47A(6)(a) provides that “[t]he decisions which may be relied upon for the purposes of proceedings under this section are...a decision of the OFT that...the Chapter II prohibition has been infringed”.
3. Plainly, the OFT Decision falls within section 47A(6)(a) of the 1998 Act, and the Tribunal is accordingly “bound by any decision...which establishes that the prohibition in question has been infringed”.

### **(2) The scope of the OFT Decision and the Tribunal’s jurisdiction**

4. Since, by virtue of section 47A, the basis for 2 Travel’s claim, and the extent of the Tribunal’s jurisdiction, is the OFT Decision, it is necessary to determine exactly what the OFT Decision decided. 2 Travel cannot put forward, and the Tribunal has no jurisdiction to determine, a claim based upon an infringement not established by the OFT Decision.
5. There was some disagreement between 2 Travel and Cardiff Bus as to the precise ambit of the OFT Decision. This gave rise to an application, on the part

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<sup>1</sup> Annex 1 to this Judgment lists the various terms defined in the Judgment, and identifies the paragraph in the Judgment in which the term is first used.

of Cardiff Bus, to strike out parts of 2 Travel’s Claim for Damages. The Tribunal heard this application, and rejected it, on the first day of the hearing (Transcript Day 1, page 30). Our reasons for this conclusion are given in Section II below, where we also set out our reasoned findings as to the ambit of the OFT Decision.

6. It is helpful, however, to state our conclusions as to the ambit of the OFT Decision at this stage. For the reasons we give in Section II, we find that the OFT decided that:

(1) The relevant market (for the purposes of assessing whether there had been an infringement of the Chapter II prohibition) was the provision of no-frills and normal bus services as part of the Cardiff Bus network, together with urban bus services, and also interurban bus services and urban rail services (to the extent that these served the same flows) into and out of Cardiff city centre.

(2) Cardiff Bus held a dominant position in this market.

(3) Cardiff Bus abused its dominant position (and so breached the Chapter II prohibition) by launching and operating its so-called “white services” with exclusionary intent. We shall refer to these services as the “Cardiff Bus White Service” or the “White Service”. The OFT found Cardiff Bus’s conduct to be “predatory” (paragraph 1.17 of the OFT Decision) and that it had “abused its dominant position by engaging in predation” (paragraph 8.2 of the OFT Decision).

(4) This abuse of a dominant position occurred between 19 April 2004 (when the Cardiff Bus White Service began) and 18 February 2005 (when the Cardiff Bus White Service ended).

(5) This abuse of a dominant position affected trade within the United Kingdom.

7. We consider that we are, by virtue of section 47A(9) of the 1998 Act, bound by the OFT Decision to this extent, and to this extent only.

**(3) 2 Travel's claim**

8. From 19 April 2004 until mid-December 2004, 2 Travel operated a no-frills bus service on certain routes within Cardiff (the “2 Travel In-Fill Service” or the “In-Fill Service”). The Cardiff Bus White Service was a response to this: it was not disputed before us – and it is clear from the OFT Decision – that the Cardiff Bus White Service was conceived and implemented in response to the 2 Travel In-Fill Service and was, as the OFT Decision found, an infringement of the Chapter II prohibition. We shall refer to Cardiff Bus’s unlawful response to the 2 Travel In-Fill Service as the “Infringement”.
9. 2 Travel contended that it had sustained loss and damage as a result of the Infringement under various different heads. The loss and damage claimed by 2 Travel is pleaded in Section 4 of 2 Travel’s “Claim for Damages”, as the pleading setting out 2 Travel’s claims was described. The claims were amended twice, first by letter dated 16 November 2011 (to take account of points arising out of the expert evidence) and then by a further letter dated 8 February 2012 (claiming certain additional losses said to be attributable to the liquidation of 2 Travel).
10. An overview of 2 Travel’s alleged loss and damage is helpfully provided in Appendix 1 to 2 Travel’s written opening submissions. In essence, 2 Travel contended that it had suffered loss and damage, by reason of the Infringement, under six broad heads, as follows:
  - (1) First, 2 Travel claimed a loss of profits, either to the date of 2 Travel’s liquidation (in the amount of £340,259) or alternatively to 30 September 2011 (which was the date to which Mr Good, 2 Travel’s expert, performed his calculations, in the amount of £3,828,121). We shall refer to this as “Claim 1: Loss of Profits”.
  - (2) Secondly, 2 Travel had been driven into liquidation on 20 May 2005. Absent the Infringement, 2 Travel would have grown into a successful bus company. Thus, 2 Travel, by its liquidator, claimed for the loss of a capital asset, namely the business of 2 Travel as a going concern (“Claim 2: Loss of a Capital Asset”). 2 Travel originally claimed also for the loss

of a commercial opportunity in the form of the growth of a successful bus company, but – by the time of its written opening submissions – had quite correctly accepted that this claim duplicated Claim 2: Loss of a Capital Asset and involved double-counting: this separate head of loss was not, therefore, pursued. 2 Travel contended that the value of 2 Travel as at the date of liquidation was at least £6,800,000.

- (3) Thirdly, 2 Travel lost the value of a commercial opportunity, namely the ability to benefit from the increase in value and development potential of some land (the “Swansea Depot”) that was purchased by it, and that it was obliged to divest as a result of the Infringement (“Claim 3: Loss of a Commercial Opportunity”). 2 Travel put this loss at £10,000,000.
- (4) Fourthly, 2 Travel expended wasted staff and management time during the period when the business was operating (i.e. prior to its liquidation) (“Claim 4: Wasted Staff and Management Time”). 2 Travel claimed £152,635 in respect of this head of loss.
- (5) Fifthly, 2 Travel incurred avoidable costs relating to its liquidation (“Claim 5: Costs of the Liquidation”). These costs, which were dealt with in the evidence of Mr Conway (as to which, see below) were substantial.
- (6) Sixthly, 2 Travel was in any event entitled to exemplary damages (“Claim 6: Exemplary Damages”).

The amount of damages claimed by 2 Travel was thus, on any view, substantial. In addition, 2 Travel claimed interest on these damages.

11. There were three general points to be noted in respect of the claims advanced by 2 Travel:

- (1) First, although Cardiff Bus, by virtue of section 47A of the OFT Decision, had to (and did) accept liability to 2 Travel in respect of the Infringement, the parties’ positions diverged widely as to the loss and damage flowing from the Infringement. 2 Travel contended that the Infringement had caused it significant damage, in the various respects we have identified,

and that this was a case where an award of exemplary damages was appropriate. Cardiff Bus disputed both of these contentions. It was Cardiff Bus's case that even if the Infringement had never occurred, 2 Travel would nevertheless have gone into liquidation when and as it did, and that Cardiff Bus's infringement could not be seen as a factor causing loss to 2 Travel at all. Even if the Infringement was a factor, Cardiff Bus disputed the quantum of 2 Travel's claim and contended that the claim, as articulated, was grossly excessive. Cardiff Bus also denied that this was a case where exemplary damages could, or should, be awarded.

- (2) Secondly, although there was some difference between the parties on questions of law – notably on causation and on the circumstances in which exemplary damages could be awarded – which we resolve in the course of this Judgment, the fundamental reason for the parties' divergence lay in their differing submissions as to what would have happened, had the Infringement not taken place. In this Judgment, we refer to this hypothetical case by the phrase used by the parties, the “counter-factual scenario”. Counter-factual scenarios fall to be considered whenever courts have to determine what would have happened had a particular wrong not occurred. Inevitably, the inquiry is fact-based, but in this case the factual history is both long and complex. Large portions of this Judgment are devoted to a chronological narrative of the business of 2 Travel. Similarly, it will be necessary to consider, in some detail, Cardiff Bus's conduct for the purposes of Claim 6: Exemplary Damages.
- (3) Thirdly, there is, unsurprisingly, considerable inter-relationship between the various heads of loss claimed by 2 Travel. As 2 Travel itself acknowledged, unless Claim 1: Loss of Profits was confined to the profits lost up to the date of 2 Travel's liquidation, there would be an overlap between this head of loss and Claim 2: Loss of a Capital Asset, which would have to be taken into account in order to avoid over-recovery. Equally, the extent of recovery under Claim 3: Loss of a Commercial Opportunity and Claim 5: Costs of the Liquidation, depends very much on our findings in respect of Claims 1 and 2.

12. Our approach to the facts is described, in general terms, in Section I(4) below.

**(4) Overview of our approach to the facts**

*(i) Introduction*

13. In order to assess 2 Travel's losses arising as a result of the Infringement, it is necessary to conduct a detailed review of the facts. In particular, it will be necessary to compare *(i)* what in fact happened as against *(ii)* the counter-factual scenario. Both parties were agreed that the appropriate counter-factual scenario was what would have happened had the Cardiff Bus White Service not operated at all, as opposed to it having operated on some different, legitimate, basis. Given the terms of the Decision – and for the reasons we give in Section II below – we agree that this is the correct approach.

14. Our analysis of the facts, therefore, is undertaken in three broad stages:

(1) *Stage 1*: an assessment of the period prior to the Infringement i.e. up to 19 April 2004.

(2) *Stage 2*: an assessment of the period subsequent to 19 April 2004, when the Infringement was taking place.

(3) *Stage 3*: an assessment of the counter-factual scenario i.e. what would have happened had the Cardiff Bus White Service not operated at all or (to put the identical point more shortly) had the Infringement not taken place.

*(ii) Stage 1: The period prior to the Infringement*

15. In Section V, we consider 2 Travel's business and the development of that business in the period up to 19 April 2004, which was when the 2 Travel In-Fill Service and the illegitimate Cardiff Bus White Service began. There is no need, for this period, to consider any counter-factual scenario: although Cardiff Bus was, in the period leading up to 19 April 2004, making plans for the commencement of its White Service, that service did not operate before 19 April 2004, and 2 Travel makes no allegation that it was affected by Cardiff

Bus's conduct prior to 19 April 2004. (We consider that any such allegation, if made, would have been wholly unsustainable.)

16. It is necessary to consider events up to 19 April 2004 because, without an understanding of 2 Travel's business as it stood at 19 April 2004, it is impossible to make any assessment as to how that business was affected by the Infringement.

(iii) *Stage 2: The period subsequent to 19 April 2004*

17. In Section VI, we consider 2 Travel's business and the development of that business in the period subsequent to 19 April 2004. It was during this period that the Infringement took place. Section VI does not consider Cardiff Bus's planning and execution of the Infringement. This (as we explain in paragraph 24 below) is properly the province of our consideration of Claim 6: Exemplary Damages (which is considered in detail in Section XV). Moreover, Section VI is confined simply to an analysis of the facts as they occurred. It makes no attempt to consider what would have happened, had the Infringement not occurred (i.e. it does not seek to consider the counter-factual scenario).

(iv) *Stage 3: The counter-factual scenario*

18. Thirdly, we consider the counter-factual scenario or – in plain English – what would have happened, had the Infringement not occurred. Section VII considers how 2 Travel has pleaded its case as to what would have happened had the Infringement never happened. As we describe in greater detail in Section VII, 2 Travel's pleading distinguishes between more or less immediate<sup>2</sup> effects of the Infringement and longer term effects.

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<sup>2</sup> We prefer the term "immediate" to "short-term", simply because "short-term" can mean that the effect was short-lived. This was not 2 Travel's case: 2 Travel contended that these effects followed quite quickly from the Infringement. Although "immediate" is, perhaps, an over-emphatic term, we consider it best captures the case that 2 Travel put forward.

19. 2 Travel contended that, had the Infringement not occurred, there would have been three, immediate, consequences in the counter-factual scenario:
  - (1) 2 Travel would not have suffered from the severe driver shortages that (so it claims) it did suffer from.
  - (2) Management time would not have been diverted from normal (i.e. revenue generating) duties, as the Infringement would not have disrupted 2 Travel's operations both in Cardiff and elsewhere.
  - (3) Passengers who in fact travelled on the Cardiff Bus White Service would have travelled on the 2 Travel In-Fill Service, resulting in increased revenues to 2 Travel. In other words, the Cardiff Bus White Service diverted passengers, and hence revenue, away from 2 Travel.
20. These immediate effects had, so 2 Travel contended, longer-term implications. As 2 Travel pleads in paragraph 3.35 of its Claim for Damages, “[a]s a result of the direct disruption at the Cardiff depot, as well as the indirect disruption at 2 Travel's other depots, 2 Travel incurred further losses and its requirement for working capital increased as a result. Whilst working capital was made available, income began to fall more sharply than 2 Travel was able to reduce its cost-base and service levels began to drop across all its depots”. In consequence, instead of establishing its In-Fill Service in the Cardiff market, with the prospect of then expanding its operations in Cardiff (and, perhaps, more generally), 2 Travel's business was seriously disrupted, with the result that the business went into a circle of decline and failure, culminating in its liquidation on 20 May 2005.
21. Section VII, as we have noted, considers how 2 Travel pleads its case on the counter-factual scenario. The next three sections consider the immediate effects that 2 Travel contends were the consequence of the Infringement, namely driver shortages (considered in Section VIII), diversion of management time (considered in Section IX) and loss of revenue as a result of passengers being diverted away from the 2 Travel In-Fill Service (considered in Section X).

22. Clearly, there is a considerable overlap between the diversion of passengers and 2 Travel's Claim 1: Loss of Profits. Accordingly, this claim is also considered in Section X.
23. Sections XI to XV then go on to consider the next four heads of 2 Travel's loss, as we have set them out in paragraph 10 above. Thus:
  - (1) Section XI considers Claim 2: Loss of a Capital Asset.
  - (2) Section XII considers Claim 3: Loss of a Commercial Opportunity.
  - (3) Section XIII considers Claim 4: Wasted Staff and Management Time.
  - (4) Section XIV considers Claim 5: Costs of the Liquidation.

All of these heads of loss are said by 2 Travel to flow causally from the Infringement as longer term effects.

**(5) Exemplary damages**

24. Our assessment of the facts in Sections V to XIV contains no consideration of how Cardiff Bus came to plan and execute the Infringement. That is because such matters are irrelevant to 2 Travel's first five claims (Claims 1 to Claim 5): the OFT Decision has found that the Infringement took place, and our role is solely to assess the loss and damage suffered by 2 Travel that flows from that Infringement. In short, we are not concerned with liability, but only with causation and quantification of loss.
25. However, 2 Travel's Claim 6: Exemplary Damages contends that, because of the nature of the Infringement, 2 Travel is entitled to exemplary damages. Claim 6, amongst other things, necessarily requires consideration of Cardiff Bus's conduct as regards the Infringement, as well as the legal grounds upon which exemplary damages can be claimed. Section XV below considers the question of exemplary damages.

**(6) Evidence**

26. During the course of a two-week hearing, the Tribunal heard evidence from a number of persons. In addition, the documentary evidence – in particular in the form of contemporaneous documents produced by both parties – was voluminous. We consider this evidence in Section III below.
27. There is, in addition to this witness and documentary evidence, the OFT Decision itself. As we have already noted, section 47A of the 1998 Act absolutely binds the Tribunal in respect of any decision establishing that a competition law infringement has taken place. But, in addition, section 58 of the 1998 Act binds the parties to these proceedings to findings of fact made in the OFT Decision, save to the extent that the Tribunal directs otherwise. The OFT Decision itself is, therefore, an important source of evidential findings which have, by virtue of section 58, special importance in these proceedings. We consider the implications of section 58 in Section III also.

**(7) Causation**

28. There was one legal issue which divided the parties. This was the appropriate test for causation in a case such as this. This issue is considered in Section IV below.

**II. THE INFRINGEMENT DECISION AND CARDIFF BUS'S STRIKE-OUT APPLICATION**

**(1) Section 47A of the 1998 Act**

29. Section 47A of the 1998 Act provides, in relevant part, as follows:

“(1) This section applies to –

- (a) any claim for damages, or
- (b) any other claim for a sum of money,

which a person who has suffered loss or damage as a result of the infringement of a relevant provision may make in civil proceedings brought in any part of the United Kingdom.

- (2) In this section ‘relevant prohibition’ means any of the following:

...

(b) the Chapter II prohibition;

...

(6) The decisions which may be relied on for the purposes of proceedings under this section are –

(a) a decision of the OFT that the Chapter I prohibition or the Chapter II prohibition has been infringed;

...

(9) In determining a claim to which this section applies the Tribunal is bound by any decision mentioned in subsection (6) which establishes that the prohibition in question has been infringed.”

30. In *English Welsh & Scottish Railway Limited v Enron Coal Services Limited* [2009] EWCA Civ 647 (hereafter “*Enron I*”), the Court of Appeal considered section 47A. After setting out the provisions of section 47A, Patten LJ stated as follows:

“30. The jurisdiction of the Tribunal is therefore limited to determining what are commonly referred to as follow-on claims for damages based on a finding of infringement of the Chapter II prohibition or Article 82 which has been made by the OFT or one of the sectoral regulators such as the ORR who enjoy concurrent powers of enforcement in respect of the Chapter II prohibitions: see CA 1998 s.54 and Schedule 10. The existence of such a finding is not only a pre-condition to the making of a claim under s.47A(1). It also operates to determine and define the limits of that claim and the Tribunal's jurisdiction in respect of it.

31. For there to be such a claim (and, with it, the jurisdiction of the Tribunal to adjudicate upon it) the regulator must have made a decision of the kind described in s.47A(6). The use of the word "decision" makes it clear that s.47A is differentiating between findings of fact as to the conduct of the defendant made as part of the overall decision and a determination by the regulator that particular conduct amounts to an infringement of the Chapter II prohibition. It is not open to a claimant ... to seek to recover damages through the medium of s.47A simply by identifying findings of fact which could arguably amount to such an infringement. No right of action exists unless the regulator has actually decided that such conduct constitutes an infringement of the relevant prohibition as defined. The corollary to this is that the Tribunal (whose jurisdiction depends upon the existence of such a decision) must satisfy itself that the regulator has made a relevant and definitive finding of infringement. The purpose of s.47A is to obviate the necessity for a trial of the question of infringement only where the regulator has in fact ruled on that very issue. We were not referred to any procedure for seeking clarification of any points of uncertainty from the decision-maker. The Tribunal ought therefore, in my judgment, to be astute to recognise and

reject cases where there is no clearly identifiable finding of infringement and where they are in effect being asked to make their own judgment on that issue.”

31. It is necessary, therefore, for the Tribunal to identify precisely what infringement or infringements the OFT has – in the OFT Decision – decided was/were committed by Cardiff Bus.

**(2) Cardiff Bus’s strike-out application**

32. Cardiff Bus contended that substantial portions of 2 Travel’s Claim for Damages and the associated evidence were irrelevant to the issues which the Tribunal had to decide and which fell outside the Tribunal’s jurisdiction. Accordingly, so Cardiff Bus contended, these parts of the Claim for Damages should be struck out under Rule 40 of the Competition Appeal Tribunal Rules 2003 (S.I. 2003 No. 1372).

33. Cardiff Bus’s strike-out application is well-summarised in its written opening submissions:

“160. ...the Claimant’s claim can only be founded on the OFT’s Decision and it is idle to attempt to pad it out by way of what the Claimant calls “causation narrative” as to matters on which the OFT made no findings. Accordingly, the claims that 2 Travel was caused loss by alleged intimidation of its drivers; by dangerous driving on the part of Cardiff Bus’s drivers; or by them ‘sandwiching’ 2 Travel’s buses; or why Cardiff Bus’s white services operating in breach of their registrations have no part to play in the present proceedings. The attention of the Tribunal and the energies of the parties in this case should not be directed to debating the accuracy or otherwise of 2 Travel’s factual assertions as to these matters or their claims about the consequential impact on 2 Travel. 2 Travel is attempting to have a third bite at the cherry, having failed to convince the OFT...”

34. It is right to say that the OFT did not make findings of fact on questions like intimidation, dangerous driving or “sandwiching”. But that is relevant only to the extent to which section 58 of the 1998 Act causes findings of fact in a decision to bind the parties. What matters, for present purposes, is the ambit of any decision as to infringement in the OFT Decision, for it is the Tribunal’s task to assess what damage flows from that infringement. If the scope of the

infringement, as found by the OFT, is sufficiently wide so as to make relevant to the Tribunal's assessment of damages questions such as intimidation, dangerous driving or "sandwiching", then these are matters that can be raised before us, and on which evidence can be heard. On the other hand, if the scope of the infringement, as found by the OFT, is such as to render irrelevant to the Tribunal's assessment of damages questions such as intimidation, dangerous driving or "sandwiching", then clearly such matters should not form part of the "follow-on" action.

35. The crucial question lies in ascertaining the ambit of the OFT Decision, and it is to that question we now turn.

**(3) The scope of the Infringement as found in the OFT Decision**

36. We consider that the OFT Decision established that:

- (1) The relevant market (for the purposes of assessing whether there had been an infringement of the Chapter II prohibition) was the provision of no-frills and normal bus services as part of the Cardiff Bus network, together with urban bus services, and also interurban bus services and urban rail services (to the extent that these served the same flows) into and out of Cardiff city centre (paragraph 4.130 of the Decision).
- (2) Cardiff Bus held a dominant position in this market (paragraph 6.101 of the Decision).
- (3) Cardiff Bus abused its dominant position (and so breached the Chapter II prohibition) by launching and operating its White Service with an exclusionary and predatory intent (paragraphs 1.14, 1.16 to 1.17, 7.224 to 7.227 and 8.2 of the Decision).
- (4) This abuse of a dominant position occurred between 19 April 2004 and 18 February 2005 (paragraph 1.17 of the Decision).
- (5) This abuse of a dominant position affected trade within the United Kingdom (paragraph 3.20 of the Decision).

37. For present purposes, it is the third element of the OFT Decision which is important. We consider that the OFT Decision did not find that particular aspects of the Cardiff Bus White Service were infringements of the Chapter II prohibition, but that the operation of the Cardiff Bus White Service *per se* was the infringement. The point is put very clearly in paragraph 1.16 of the OFT Decision:

“In all the circumstances, the OFT concludes that the evidence is sufficient to demonstrate that Cardiff Bus was reacting to 2 Travel’s entry by attempting to force the entrant to retreat from the market. Cardiff Bus’ white services were not, therefore, launched as a market test but were launched and operated simply for the purpose of driving out 2 Travel, rather than making profits for Cardiff Bus or fulfilling any other legitimate commercial strategy.”

38. In other words, for the purpose of assessing what damage flowed from the Infringement, the relevant counter-factual scenario is the one where the Cardiff Bus White Service did not operate at all, rather than the case where the service did operate, albeit in a different way (e.g. with higher fares or to a different timetable).

39. From this it follows that if (as to which we make no findings at present) there was intimidation by the Cardiff Bus White Service drivers, or “sandwiching” by the White Service buses, this would not have occurred on the counter-factual scenario, because the Cardiff Bus White Service would never have operated. Accordingly, 2 Travel is entitled to plead and rely upon in support of its damages claim any and all aspects of the operation of the Cardiff Bus White Service.

40. For these reasons we reject Cardiff Bus’s application to strike out part of the 2 Travel Claim for Damages.

### **III. EVIDENCE**

#### **(1) Sources of factual findings**

41. A “follow-on” action involves the Tribunal assessing the loss and damage flowing from a finding of infringement made in a decision that is not that of the Tribunal. Here, the finding as to infringement is to be found in the OFT

Decision, and the Tribunal is (by section 47A of the 1998 Act) absolutely bound by any “decision” contained in the OFT Decision. A decision, of course, does not necessarily have to be a finding of fact, but can determine a pure question of law or a mixed question of law and fact. Here, we have found the OFT Decision to contain the decisions set out in paragraph 36 above.

42. Section 47A is buttressed by section 58 of the 1998 Act. By section 58, the parties to this litigation are bound by findings of fact made in the OFT Decision, save to the extent that the Tribunal directs otherwise. The effect of this provision is considered further below, but plainly the Tribunal would be slow to “direct otherwise” in respect of a finding of fact in the OFT Decision that directly underpinned a “decision” contained in the OFT Decision.
43. The Tribunal also saw more traditional evidence, in the form of witnesses (both factual and expert) and documentary evidence.
44. In this Section, we consider these three sources of factual findings in greater detail:
  - (1) First, we consider the witness evidence heard by the Tribunal: Section III(2) below.
  - (2) Secondly, we consider the documentary evidence seen by the Tribunal: Section III(3) below.
  - (3) Thirdly, we consider the effect of section 58 of the 1998 Act: Section III(4) below.

**(2) Witness evidence**

45. The Tribunal received evidence, both factual and expert, from a number of persons.

*(i) 2 Travel's witnesses of fact*

46. We list 2 Travel's witnesses of fact in the order in which they were called. The following persons gave factual evidence on behalf of 2 Travel:

(1) Mr Clayton Jones, the director of Heart of Wales Bus & Coach Company Limited. As there were two "Mr Jones" giving factual evidence before us, we shall refer to this Mr Jones as "Mr Clayton Jones". Mr Clayton Jones provided one statement to the Tribunal, dated 22 September 2011, and gave evidence on 12 March 2012. Mr Clayton Jones was obviously expert in the bus industry, and showed an appreciation of how the industry worked and how to run a bus company. As such, his evidence was entitled to respect. However, in our judgement he exhibited a fixed predisposition against public regulators and companies, like Cardiff Bus. He had, in the past, been criticised for advancing colourful views in court proceedings, and we found his evidence before us similarly coloured. Whilst we have no doubt that he was doing his best to assist the Tribunal, for these reasons we treat his evidence with some caution. Ostensibly, Mr Clayton Jones was called by 2 Travel to lend weight to the contention that 2 Travel's business plan of operating in-fill services was a good one that, absent the Infringement, would have succeeded. Although Mr Clayton Jones did give evidence along these lines, he very fairly accepted that he knew little of 2 Travel's affairs and that he was unable to comment in detail on – for example – 2 Travel's financial position or operations. Given this, the extent to which he could assist the Tribunal on how 2 Travel would have fared, had the White Service never operated, was limited.

(2) Mr David Beverley ("Bev") Fowles, the former managing director of 2 Travel. Mr Fowles provided two statements to the Tribunal, dated 23 September 2011 and 26 January 2012, and gave evidence on 12 March

2012. Mr Fowles was an honest and straightforward witness. He answered questions frankly, even when the answer was against his interests, and we believed his evidence. Unsurprisingly, because he was giving his evidence some seven years after the events he was describing, his recollection on matters of detail was patchy. In his answers to us, he was careful to identify those cases where (for perfectly understandable reasons) his memory failed and he was unable – for that reason – to assist the Tribunal.

- (3) Mr David Huw Francis, the former company secretary of 2 Travel and a former director of and investor in 2 Travel. Mr Francis provided two statements to the Tribunal, dated 23 September 2011 and 30 January 2012, and gave evidence on 14 and 15 March 2012. Mr Francis was combative as a witness when defending what he perceived to be his own interests. At times, he went beyond the giving of evidence, tending to advocate, and to take positions on points on which he could actually give no evidence. This, combined with the fact that he had quite a poor recollection on points of fact where he had actually been involved (he was, for instance, utterly unable to provide us with a clear picture of how 2 Travel had been funded), rendered him a less helpful witness than he otherwise might have been. Whilst we have no doubt he was doing his best to assist the Tribunal, for these reasons we have treated his evidence with care in order to determine what weight should be attached to it.
- (4) Mr Nigel Vernon Short, a former non-executive director of 2 Travel and a former investor in 2 Travel. Mr Short provided one statement to the Tribunal, dated 23 September 2011, and gave evidence on 15 March 2012. Mr Short gave clear, precise, evidence to the Tribunal. He was swift to indicate what he did not know (and fairly acknowledged that, as a non-executive director of 2 Travel, he was not involved in the daily affairs of the company), but when he did have evidence to give this evidence was clearly and precisely given. We believed what he said.
- (5) Mr Stephen William Harrison, formerly a partner in the firm of PricewaterhouseCoopers (“PwC”) and now an ordinary member of the Tribunal. Mr Harrison’s role in this latter regard gave rise to an

application by Cardiff Bus in relation to Mr Harrison's evidence, which was dealt with in the Tribunal's ruling of 20 December 2011 ([2011] CAT 44). Mr Harrison provided two statements to the Tribunal, dated 26 October 2011 and 29 January 2012, and gave evidence on 15 and 16 March 2012. Mr Harrison sought to assist the Tribunal to the best of his ability, but he accepted that his ability to assist the Tribunal was qualified in three respects. First, he was particularly careful to emphasise that the events on which he gave evidence had occurred a long time ago, and that his recollection was imperfect. Secondly, his ability to refresh his memory by reference to documents was hampered by an absence of contemporary documents. Thus, although copies of the various reports and letters written by PwC were before the Tribunal, and clearly had been carefully considered by Mr Harrison (no doubt both at the time they were produced, and when he was preparing to give evidence), the working documents that underlay these reports and letters were neither before the Tribunal nor there to assist Mr Harrison when giving his evidence. Thirdly – and, again, Mr Harrison was careful to point this out – PwC's letters and reports (in particular, the crucial February 2004 PwC report considered in detail below) tended to be produced by subordinates in PwC under Mr Harrison's supervision. Thus, to take the February 2004 PwC report as an example, Mr Harrison told us that this was the product of about three weeks work of a Mr Farrand of PwC, combined with about three days work by Mr Harrison himself. Inevitably, this hampered Mr Harrison when asked to explain some of the detail in the reports. In short, Mr Harrison was an honest and straightforward witness, who did his very best to assist the Tribunal, but who himself recognised – largely because of qualifications which he himself identified to us – that his evidence could not descend to the level of detail that the case at times required.

- (6) Mr Christopher James Sutton, the director in charge of the Cardiff office of property consultants Jones Lang LaSalle. Mr Sutton provided one statement to the Tribunal, dated 23 September 2011, and gave evidence on 16 March 2012. Mr Sutton was a knowledgeable, objective and careful witness. We believed what he said.

- (7) Mr Graham Donald Cartwright, the former operations manager (initially as a consultant, then as an employee) of 2 Travel. Mr Cartwright provided one statement to the Tribunal, dated 23 September 2011, and gave evidence on 16 March 2012. He was an honest witness and we believed what he said.
- (8) Mr David Rhys Fowles, the former operations director of 2 Travel. Mr Fowles is the son of Mr David Beverley Fowles, and we shall refer to him as “Mr Fowles Jnr” in order to distinguish him from his father. Mr Fowles Jnr provided one statement to the Tribunal, dated 23 September 2011, and gave evidence on 16 and 19 March 2012. Mr Fowles Jnr was an unimpressive witness. He obviously had little recollection of contemporary facts; but, even so, was inclined to seek to gloss or mitigate failings within 2 Travel which were reflected in the contemporary documents. Indeed, he sought to re-write history by downplaying his own contemporaneous complaints to 2 Travel’s management regarding the set-up of operations in Cardiff in early 2004 (see for example paragraphs 197 to 200 below). We consider that his evidence needs to be treated with care.
- (9) Mr Charles Hugh Jones, formerly 2 Travel’s Operations Manager West. Mr Jones provided two statements to the Tribunal, dated 16 September 2011 and 27 January 2012, and gave evidence on 19 March 2012. He was an honest witness and we believed what he said.
- (10) Mr Daniel Simon Conway, a chartered accountant and director of BDO LLP. Mr Conway provided four statements to the Tribunal, dated 27 January 2012, 30 January 2012, 8 February 2012 and 27 February 2012, and gave evidence on 19 March 2012. Mr Conway gave evidence as to 2 Travel’s liquidation costs. He was, essentially, a peripheral witness, who did his best to assist the Tribunal.
- (11) Mr Jeffrey Roger Durbin, the operator of the South Gloucester Bus and Coach Company. Mr Durbin provided one statement to the Tribunal, dated 19 September 2011. Cardiff Bus indicated that Mr Durbin did not

have to attend for cross-examination, and we accept the evidence in his witness statement.

(ii) *Cardiff Bus's factual witness*

47. Mr David Ivar Brown gave factual evidence on behalf of Cardiff Bus. He was Cardiff Bus's only factual witness. Mr Brown is the managing director of Cardiff Bus, and he provided three statements to the Tribunal, dated 7 December 2011, 23 December 2011 and 25 January 2012. He gave evidence on 19 March 2012, 21 March 2012 and 10 May 2012.

48. In the witness box, Mr Brown presented as an impressive witness: knowledgeable about his company and its business; careful in identifying what he did not know, and what he could not remember; precise, when dealing with questions to which he had the answer. Ordinarily, Mr Brown's evidence would be entitled to great weight.

49. However, 2 Travel, quite properly, through their leading counsel, Mr Bowsher QC, made a number of most serious allegations in relation to Cardiff Bus's conduct as regards the Infringement. These allegations went to Claim 6: Exemplary Damages, and we consider these allegations in greater detail in Section XV below. Inevitably, these allegations had to be put to Mr Brown, as Cardiff Bus's only factual witness, and Mr Bowsher did not shrink from doing so. Mr Brown, politely but extremely firmly, denied the very serious allegations that were put to him.

50. Clearly, the substance of the allegations made by 2 Travel, and Mr Brown's credibility as a witness, are inter-linked. If there is no substance to these allegations, then our assessment of Mr Brown in paragraph 48 above stands. On the other hand, if we find that 2 Travel's allegations are right, then that involves disbelieving a great deal of what Mr Brown said, and finding that he – in a still impressive, if altogether discreditable manner – was seeking to mislead the Tribunal and misrepresent to it the true position.

51. Our conclusion as to Mr Brown's credibility as a witness is dealt with below under the substance of Claim 6: Exemplary Damages, in Section XV below.

(iii) *The experts*

52. 2 Travel adduced expert accountancy evidence from Mr Nicholas Good, an associate partner in KPMG LLP. Cardiff Bus adduced expert accountancy evidence from Mr Philip Haberman, a partner in Ernst & Young LLP, and from Dr Gunnar Niels, a professional economist and a director in Oxera Consulting Limited. These experts submitted individual reports:

- (1) Dated 14 October 2011 (from Mr Good), corrected and amended on 20 March 2012;
- (2) 11 November 2011 (from Mr Haberman); and
- (3) 11 November 2011 (from Dr Niels), corrected and amended on 29 February 2012.

53. The experts also submitted joint statements (Good/Haberman and Good/Niels) dated respectively 9 and 13 January 2012.

54. Mr Good gave evidence on 21 and 22 March 2012. Dr Niels gave evidence on 22 March 2012. Mr Haberman gave evidence on 22 and 23 March 2012. We consider that each of the experts did their best to assist the Tribunal and were punctilious in complying with their obligations, as experts, to the Tribunal. All the experts were assisting the Tribunal in determining what would have happened in the counter-factual scenario, which is a difficult issue that involves the weighing and consideration of multiple factors – including the opinion evidence of the experts. The fact that we have not necessarily accepted the opinion advanced by one or more of the experts in no way diminishes the fact that all the experts were, very professionally, doing their best to assist the Tribunal.

(iv) *The anonymous evidence*

55. Additionally, we should say that there was an application by 2 Travel to admit certain evidence anonymously. That application was dealt with in the Tribunal's decision of 16 March 2012 ([2012] CAT 7). The application to admit the evidence was rejected. We say nothing more about this, save to note for the

record that we have, of course, left entirely out of account all factual points made by 2 Travel in connection with this application.

**(3) The documentary evidence**

*(i) Introduction*

56. It is necessary to draw a distinction between documentary evidence produced by 2 Travel and documentary evidence produced by Cardiff Bus. This is because, whereas gaps in 2 Travel’s documentation – and there were gaps, in particular in relation to financial information – occurred through the innocent loss of material over time, in the case of Cardiff Bus, 2 Travel suggested (really, as part of its Claim 6: Exemplary Damages) that “Cardiff Bus’ contemporaneous documents appear to reflect a conscious decision not to record anything that might incriminate Cardiff Bus or provide any record of the effects of the predation on 2 Travel or others” (paragraph 19 of 2 Travel’s written closing submissions) and that Cardiff Bus’s disclosure in these proceedings (and before the OFT) had been similarly informed by the fact that Cardiff Bus “plainly knew from the outset of the predation that its conduct was at best questionable and it is submitted that it is now apparent that Cardiff Bus sought to strengthen its position by providing only limited disclosure” (paragraph 17 of 2 Travel’s written closing submissions).

57. It is evident, therefore, that 2 Travel’s disclosure raises different questions to that of Cardiff Bus’s disclosure, and we consider this documentary evidence separately.

*(ii) 2 Travel’s disclosure*

58. It was clear that many letters and memos written by or to 2 Travel, that had once existed, had gone missing. Additionally, a number of 2 Travel’s computer hard-drives had been mislaid or damaged (paragraph 20 of 2 Travel’s written closing submissions). We heard some evidence as to how these hard-drives might have gone missing, but it was inconclusive. We consider any suggestion that this material was deliberately destroyed by 2 Travel to be misconceived, but we reach no other conclusion as to how or when this material went missing.

Equally, we find nothing suspicious in the gaps in 2 Travel’s paper disclosure. It is a rare case where the documentary record is absolutely unimpeachable, and this was not such a case. To the contrary – as we have occasion to consider in greater detail – 2 Travel’s systems were not of the best, and that no doubt included its filing system. It must also be true that the liquidation cannot have assisted document retention.

59. We do not consider that there was any pattern to the gaps in 2 Travel’s documentary record. In other words, although incomplete, the documents produced by 2 Travel could be relied upon as representing a fair (albeit incomplete) picture of the company’s affairs.
60. Clearly, the relevance and importance of documents turns, in large measure, on the document itself. Nevertheless, as a general proposition, we regard the documentary evidence in this case as being of particular importance. All of the factual witnesses signed their statements in 2011/2012 and gave their evidence in 2012, a number of years after the events they were describing (which mainly took place in the period up to 2005). In such circumstances, it would be scarcely surprising if memories failed or recollections became distorted. In *Grace Shipping v Sharp*, [1987] 1 Lloyd’s Rep 207 at 215, Lord Goff observed:<sup>3</sup>

“In such a case [where witnesses were seeking to recall events and telephone conversations of five years earlier] memories may very well be unreliable; and it is of crucial importance for the judge to have regard to the contemporary documents and to the overall probabilities...”

61. We consider that Lord Goff’s observation is important when weighing the facts in this case, and that the evidence of the witnesses needs to be tested against the contemporary documents.

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<sup>3</sup> This case was not cited to us by either of the parties, although the substance of Lord Goff’s observation was raised with both parties during the course of oral closing submissions. During the course of this Judgment, we cite a number of other cases which were not cited by the parties to the Tribunal. These cases reflect points that were fully debated before the Tribunal, and do not give rise to new points or matters which, in fairness to the parties, they ought to be called upon to address. We did not, therefore, consider it necessary to invite further submissions from the parties on any of these cases.

(iii) *Cardiff Bus's disclosure*

62. Absent the very serious allegations made by 2 Travel in connection with Claim 6: Exemplary Damages, precisely the same considerations would apply to Cardiff Bus's disclosure. Given the allegations, however, we consider that it is necessary to bear in mind the approach suggested by *JJB Sports plc v Office of Fair Trading* [2004] CAT 17:

“206. As regards price fixing cases under the Chapter I prohibition, the Tribunal pointed out in *Claymore Dairies* that cartels are by their nature hidden and secret; little or nothing may be committed to writing. In our view even a single item of evidence, or wholly circumstantial evidence, depending on the particular context and the particular circumstances, may be sufficient to meet the required standard: see *Claymore Dairies* at [3] to [10]. See also, for example, the opinion of Judge Vesterdorf, acting as Advocate General, in *Rhône-Poulenc v Commission* [1991] ECR-II at p. 867; and *Cimenteries*, cited above, at paragraphs 1838 to 1839. As the Court of Justice said in Cases 204/00P etc. *Aalborg Portland v Commission*, judgment of 17 January 2004, not yet reported, at paragraphs 55 to 57:

“55. Since the prohibition on participating in anti-competitive agreements and the penalties which offenders may incur are well known, it is normal for the activities which those practices and those agreements entail to take place in a clandestine fashion, for meetings to be held in secret, most frequently in a non-member country, and for the associated documentation to be reduced to a minimum.

56. Even if the Commission discovers evidence explicitly showing unlawful conduct between traders, such as the minutes of a meeting, it will normally be only fragmentary and sparse, so that it is often necessary to reconstitute certain details by deduction.

57. In most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules.”

63. *JJB Sports* (and the cases cited in that decision) concerned infringements of the Chapter I prohibition. Nevertheless, Mr Bowsher invited us to have regard to this decision and to apply a similar approach in this case, which of course concerns an infringement of the Chapter II prohibition. We are, of course, conscious that *JJB Sports* is concerned with the evaluation of communications between distinct entities or undertakings, in order to ascertain the existence of cartellist behaviour, whereas the present case (at least so far as Claim 6: Exemplary Damages is concerned) requires an evaluation of Cardiff Bus's

internal documentation with a view to establishing precisely why the conduct constituting the Infringement was embarked upon by Cardiff Bus. Nevertheless, where (as here) an allegation of conscious wrongdoing is made, we consider that *JJB Sports* provides a helpful guide to the evaluation of the evidence. To this extent – and to this extent only – we have regard to the decision in *JJB Sports*.

**(4) Section 58 of the 1998 Act**

*(i) The provision*

64. Section 58 of the 1998 Act provides as follows:

“(1) Unless the court directs otherwise, an OFT’s finding which is relevant to an issue arising in Part 1 proceedings is binding on the parties if –

- (a) the time for bringing an appeal in respect of the finding has expired and the relevant party has not brought an appeal under section 46 or 47; or
- (b) the decision of the Tribunal on such an appeal has confirmed the finding.

(2) In this section –

“an OFT’s finding” means a finding of fact made by the OFT in the course of conducting an investigation;

“Part 1 proceedings” means proceedings brought otherwise than by the OFT –

- (a) in respect of an alleged infringement of the Chapter I prohibition or of the Chapter II prohibition; or
- (b) in respect of an alleged infringement of the prohibition in Article 81(1) or Article 82;

“relevant party” means –

- (a) in relation to the Chapter I prohibition or the prohibition in Article 81(1), a party to the agreement which is alleged to have infringed the prohibition; and

(b) in relation to the Chapter II prohibition or the prohibition in Article 82, the undertaking whose conduct is alleged to have infringed the prohibition.

(3) Rules of court may make provision in respect of assistance to be given by the OFT to the court in Part 1 proceedings.”

65. These are “Part 1 proceedings” within the meaning of section 58(1), in that they are proceedings brought by 2 Travel in respect of an alleged infringement of the Chapter II prohibition: *Enron Coal Services Limited v English Welsh & Scottish Railway Limited* [2011] EWCA Civ 2 (“*Enron 2*”) at paragraph 44. Equally, the Tribunal is a “court” for the purposes of section 58: *Enron 2*, paragraph 45. Accordingly, since the time for appealing the Decision has expired, and no appeal has been brought by Cardiff Bus, any “OFT’s finding” which is relevant to an issue arising in these proceedings is binding on the parties unless this Tribunal directs otherwise.

(ii) *Analysis of section 58*

66. A number of points are to be noted in connection with section 58:

(1) First, it is necessary for the Tribunal to be astute to identify when findings of fact that are binding under section 58 have in fact been made. In *Enron 2*, Lloyd LJ noted at paragraph 56:

“In relation to findings of fact said to be binding under section 58, it seems to me that ... the party seeking to rely on a finding must be able to demonstrate that the regulator has made a clearly identifiable finding of fact to a given effect, and it is not enough to be able to point to passages in the decision from which a finding of fact might arguably be inferred.”

Jacob LJ stated at paragraph 148:

“... It is not good enough for a party claiming damages in a follow-on claim to root around in the decision of the regulator to find stray phrases or sentences and say “look, here is a finding of fact, you cannot deny it.””

(2) Secondly, it must be noted that, unless disapplied by the Tribunal, “OFT findings” are findings of fact that are binding on both Cardiff Bus and 2 Travel. Yet, in the Decision, the OFT was considering not 2 Travel’s

losses as a result of Cardiff Bus's infringement of the Chapter II prohibition, but rather whether or not Cardiff Bus had in fact infringed the Chapter II prohibition. These are very different questions, and in this regard we have well in mind Jacob LJ's words in paragraph 150 of *Enron 2*:

"In this context it must be remembered that the party claiming damages is not a party to the proceedings before the regulator. Facts about causation and damages, which will normally include an investigation into whether and if so how the infringing conduct affected that particular party, are not necessarily a part of the regulator's inquiry. If one is not careful there could be an injustice: findings made by the regulator on incomplete evidence followed by an impossibility of attacking them later. Section 58 might provide a way to alleviate this, but it is not a particularly satisfactory solution: the defendant would have to rely upon the section 58 discretion being exercised in his favour to defend himself properly."

(iii) *Relationship between section 58 and the decision in Iberian UK Ltd v BPB Industries plc*

67. In its Schedule produced pursuant to the Tribunal's order of 21 April 2011, 2 Travel contended that – to the extent that findings of fact made by the OFT were not binding pursuant to section 58 (or, for that matter, section 47A) – then they were binding pursuant to the decision of Laddie J in *Iberian UK Ltd v BPB Industries plc* [1996] 2 CMLR 601.
68. By the time of 2 Travel's written closing submissions, it was clear that 2 Travel was no longer advancing such a contention (we refer to 2 Travel's Answer 1 to the Tribunal's Questions for the Parties dated 5 April 2012), and so we can deal with the decision relatively quickly.
69. In *Iberian UK Limited v BPB Industries plc* [1996] 2 CMLR 601, Laddie J held that a decision of the European Commission addressed to a particular undertaking to the effect that the undertaking had committed breaches of Article 82 of the EC Treaty (now Article 102 TFEU) was binding on the undertaking, and could be relied upon by third parties in national courts, so that the relevant undertaking could not deny that it had committed the infringements found by the Commission to have occurred.

70. Clearly, by a parity of reasoning, what Laddie J said in *Iberian* is equally applicable as regards OFT decisions. However, we do consider that the decision of Laddie J in *Iberian* has now been overtaken by legislation, in the case of Commission decisions by Article 16 of Regulation 1/2003, and in the case of decisions of the OFT by sections 47A and 58. We do not consider there to be a role for *Iberian* in this case given the existence of section 58.

(iv) *Findings of fact in the OFT Decision not accepted by the Tribunal*

71. In paragraphs 137ff of *Enron 2*, the Court of Appeal identified the need for the Tribunal to identify, with some precision, those findings not accepted by it under section 58.

72. In this case, subject to one exception, we do not consider that there are any such findings, and (subject to this exception) we proceed on this basis that the parties are each bound by those findings of fact made in the OFT Decision.

73. In paragraphs 7.231 to 7.240 of the OFT Decision, the OFT considered the effect of the Infringement on actual competition. The OFT stated:

“7.231 2 Travel’s no-frills services were only a part of its operation. For instance, in November 2004, its no-frills services represented approximately 25 per cent of 2 Travel’s services in Cardiff, with the other approximately 75 per cent of its activities being either tendered or school services.

7.232 Furthermore, as detailed in paragraphs 2.40 onwards, the evidence indicates that shortly after the introduction of its four commercial bus services in direct competition with routes served by Cardiff Bus, 2 Travel was investigated by the Traffic Commissioner over concerns about its financial standing as a result of poor service levels in Neath, Llanelli, Carmarthenshire and Gwent. These problems did not appear to be related to 2 Travel’s activities in Cardiff. Moreover, it appears from internal Cardiff Bus documents that Cardiff Bus was aware of the difficulties that 2 Travel had been encountering...

7.233 Given these developments, it may be the case that 2 Travel might eventually have exited the market even if Cardiff Bus had not engaged in predation against it.

7.234 However, given 2 Travel’s weak financial position and its apparent difficulties in providing effective bus services in certain areas, the OFT considers it likely that 2 Travel was at particular risk of being forced to cease its Cardiff operations or prevented from gaining market share so as to become an effective competitor and improve its financial position. This is particularly so given 2 Travel’s strategy to expand its no-frills services to a full-timetable, combined with its reliance on external sources of finance. Moreover, the fact

that 2 Travel was experiencing such difficulties does not, in the OFT's view, provide any justification for Cardiff Bus to predate against it.

7.235 On this basis, whilst there may be a question as to 2 Travel's long term viability, the OFT considers that it is likely that Cardiff Bus' predatory conduct was a contributory factor in 2 Travel's exit from the market, potentially accelerating its exit. Given how little actual competition Cardiff Bus faced at the time and the fragmented nature of the competition...this would have reduced actual competition."

74. The conclusions expressed by the OFT in these paragraphs are both tentative and equivocal, and we consider it doubtful whether what is said in these paragraphs could amount to a "finding of fact" for the purposes of section 58 of the 1998 Act. Nevertheless, so that there is no doubt, using our discretion under section 58, we direct that the parties are not bound by any finding of fact made by the OFT as regards the causative effect of the Infringement on 2 Travel. We make this direction because:

- (1) The whole purpose of the Tribunal's jurisdiction under section 47A of the 1998 Act is to assess the damages flowing from an anterior finding of infringement. The Tribunal's role is to assess and determine questions of causation and quantum on the basis that the finding of infringement has already been made. If it is the contention of one or other of the parties before the Tribunal that a question of causation or quantum has already been determined by the anterior decision such as to bind the parties to the proceedings by virtue of section 58, then that point needs to be raised at the earliest opportunity so that the Tribunal can determine whether the parties should indeed be bound and, if so, what the purpose of further evidence might be.
- (2) In this case, neither party made so bold a contention. Although 2 Travel did identify in its Schedule produced pursuant to the Tribunal's order of 21 April 2011 a number of findings by the OFT in the OFT Decision on which it relied, it did not go so far as to suggest that the OFT Decision had gone so far as to determine a question of causation or quantum. That is no doubt because of the tentative and equivocal nature of the relevant paragraphs in the OFT Decision.

(3) The Tribunal has now seen and heard a great deal of evidence going only to the question of causation and quantum, and it has heard directly from both parties. The Tribunal is now in a far better position than the OFT was in determining precisely what loss and damage the Infringement caused (which was not a question the OFT needed to consider in this case). We consider that it is the Tribunal's duty to determine questions of causation and quantum by reference to this evidence, and not by reference to paragraphs 7.231 to 7.240 of the OFT Decision.

**(5) Findings of fact that the OFT might have made had Cardiff Bus been more forthcoming**

75. At times in its opening submissions, 2 Travel suggested that had Cardiff Bus provided more material to the OFT, the OFT would have been able to make further or better findings in the OFT Decision. Thus, paragraph 38 of 2 Travel's written opening submissions states:

“The reason given by the OFT for not making any determination in relation to these matters was that it had insufficient evidence before it to reach a conclusion. It is noticeable that a large volume of the material disclosed by Cardiff Bus in the present case was not provided to the OFT by Cardiff Bus pursuant to the section 26 notice sent to it. In fact, if the OFT had all the material available to it which is now before this Tribunal, albeit following belated disclosure, it seems that more could have been said by the OFT in this regard.”

76. It is no part of this Tribunal's function to re-visit the OFT Decision, still less for the Tribunal to seek to second-guess the OFT in terms of what the OFT would have decided had more or different evidence been before it. The OFT Decision says what it says and decides what it decides. If the OFT has made decisions or findings in the OFT Decision, then these have legal consequences pursuant to sections 47A and 58 of the 1998 Act. If the OFT has not, then it is idle to hypothesise as to what decisions or findings the OFT might have made. This, fortunately, is one counter-factual inquiry that the Tribunal does not need to explore.

#### IV. CAUSATION

77. Generally, in English law, the basic test for causation – the test for “factual causation” – is the “but for test”. In paragraph 2-09 of Jones (ed), *Clerk & Lindsell on Torts*, 20<sup>th</sup> ed (2010), the test is described in the following way:

“The first step in establishing causation is to eliminate irrelevant causes, and this is the purpose of the “but for” test. The courts are concerned, not to identify all of the possible causes of a particular incident, but with the effective cause of the resulting damage in order to assign responsibility for that damage. The “but for” test asks: would the damage of which the claimant complains have occurred “but for” the negligence (or other wrongdoing) of the defendant? Or to put it more accurately, can the claimant adduce evidence to show that it is more likely than not, more than 50 per cent probable, that “but for” the defendant’s wrongdoing the relevant damage would not have occurred. In other words, if the damage would have occurred in any event the defendant’s conduct is not a “but for” cause.”

78. Cardiff Bus put the point in the following way in paragraph 165 of its written opening submissions:

“So far as concerns the legal test of causation, Cardiff Bus’s position is that the Tribunal should follow its own approach in the decision in *Enron v EWS* [2009] CAT 36. It should compare the position in the ‘real world’ (in which the infringement occurred) with what the position would have been in the counterfactual or ‘but-for’ world (in which there was no infringement). To the extent that the Claimant is worse off in the real world than it would have been in the ‘but-for’ world, such losses are to be treated as having been caused by the infringement and are in principle recoverable (subject to issues such as remoteness and mitigation). By the same token, to the extent that a particular claimed loss would equally have been suffered in the ‘but-for’ world, such loss is not to be treated as having been caused by the infringement, and the Claimant has no claim for damages in respect of it...”

79. As Cardiff Bus noted, in *Enron Coal Services Limited v English Welsh & Scottish Railway Limited* [2009] CAT 36 (at paragraph 85(a)) the Tribunal took a “but-for” approach, as did Colman J in *Arkin v Borchard Lines Ltd* [2003] EWHC 687 (Comm), [2004] 2 CLC 242 (at paragraphs 489ff).

80. 2 Travel took a different position. In paragraph 91 of its written opening submissions, 2 Travel stated:

“2 Travel puts its case on the relevant law as to causation as follows:

- i) It is 2 Travel’s case that the losses it claims were caused by the breaches of competition law by Cardiff Bus and that these losses can be shown to be so caused on a “but for” analysis.

- ii) The law does not, however, confine itself to a test of causation on a “but for” analysis. On a correct reading of the case law, a broader approach to causation should be taken in a case such as this and, again, on this broader approach the losses which are claimed by 2 Travel were caused by the infringement established in the decision.
- iii) The defendant remains liable for losses, even losses caused by the Claimant’s own action where the Claimant was subject to the disability caused only or only partly by the tort or where the tort contributed substantially to the loss. The OFT has found that Cardiff Bus’ predatory conduct was a contributing factor in 2 Travel’s exit from the market and that is a sufficient finding upon which to conclude that Cardiff Bus is to be liable for all losses consequent upon that exit.
- iv) All losses which flow from Cardiff Bus’ success in excluding 2 Travel from the market are recoverable by reason of (i) the nature of the tort committed by Cardiff Bus and (ii) Cardiff Bus intended that its predatory action should cause 2 Travel the damage, or damage of the type, that it has actually suffered.”

81. As a test for causation this is all rather vague. We have stated already the extent to which the parties are/are not bound by any findings of fact made by the OFT in the OFT Decision (see Sections II and III above). To this extent, and for the reasons we have given, we reject the contention made in paragraph 91(iii) of 2 Travel’s opening submissions.

82. Equally, we do not understand how – as appears to be suggested in paragraph 91(iv) of 2 Travel’s opening submissions – intention alone can be said to be causative. A may very well intend harm to B, but may take no effective steps to cause such harm to be done. In such a case, causation will not be made out. If we may have recourse to the basic concepts of criminal law, 2 Travel’s case confuses the *actus reus* with the *mens rea*.

83. In closing, Mr Bowsher was pressed on what 2 Travel’s case on causation was (Transcript Day 10, pages 55 to 56):

**“Q (Mr Smith)** Just in terms of the articulation of your wider causation test, is your case articulated in para 91(iii) of your opening? Is that the test you contend we ought to apply?

**A (Mr Bowsher)** That is a further broader way of putting it. If you look at the case law, and we go into it – that of course is a summary of what then follows on in our opening in some detail, which we have referred to. We do say that as part of the chain of causation that where part of the losses are caused by the

disability then, yes, we suddenly sustain them. I am sorry, I am not making myself clear. That is not the only way we put it but yes, that is a limb of the way we put causation.

**Q (Mr Smith)** You see, Mr Bowsher, I understand the “but for” test, and I understand you are saying that the causation test that should be applied is wider than “but for”. What I do not quite understand is exactly how much wider it is.

**A (Mr Bowsher)** I suppose the way I might put it differently, and the cases are not all consistent, one has to look at “but for” but without the benefit of hindsight, is a slightly short way of putting it. You have to treat the claimant in the position that the claimant was in at the time, but judge what actually was the position of the claimant at that particular time...”

84. We consider the significance of 2 Travel’s position – including its weak financial position – in the context of the specific heads of loss put forward by 2 Travel. For present purposes, it suffices to say that we consider that such factors can perfectly well be accommodated within a “but for” approach to causation, and that is the approach we adopt. We reject – to the extent that it was ultimately maintained at all – 2 Travel’s suggestion that some other test ought to pertain. No authority supporting this test was cited to us, and we consider it difficult to understand what the test propounded by Mr Bowsher actually means.

## **V. THE FACTS: THE PERIOD PRIOR TO THE INFRINGEMENT (TO 19 APRIL 2004)**

### **(1) The establishment and expansion of 2 Travel**

85. 2 Travel was incorporated under the name “2 Travel Coaches Limited” on 12 April 2000. The company was founded by Mr Fowles, Mr Fowles Jnr and Mr Francis. The sole director – until the company’s flotation in January 2003 – was Mr Fowles Jnr, but the shares in the company were held 50% - 50% by Mr Fowles and Mr Francis.
86. Initially, 2 Travel operated primarily as a coach company. In 2000, 2 Travel purchased a company called “Capital Coaches”. This acquisition brought with it depots in Swansea and Cwmbran. 2 Travel’s interest in the depot in Swansea – to which we return, and which we have already termed in paragraph 10 above the “Swansea Depot” – was at this time leasehold only.

87. 2 Travel began to develop its bus business, by seeking school bus contracts and then by operating scheduled buses on an “in-fill” and “supported” basis between those times when school children were being taken to and from school. An “in-fill” service is a scheduled service that operates subject to the anterior commitment contained in the school bus contract, and results in a “gap” in the schedule at the beginning and end of school. “Supported” services are socially necessary services which are subsidised by the local authority.
88. 2 Travel began to operate scheduled bus services in several towns and cities in South Wales, such as Swansea and Neath, but the company did not (at this time) operate in Cardiff.

**(2) 2 Travel’s financial results for the year ended 31 August 2001**

89. 2 Travel’s financial statements for the year ended 31 August 2001 showed a loss of £51,654 on a turnover of £2,334,451. In the previous year (the year ended 31 August 2000), 2 Travel had achieved a profit of £23,412 on a rather smaller turnover of £566,618.

**(3) 2 Travel’s commencement of business in Cardiff**

90. 2 Travel obtained its first school bus contract in Cardiff in late-2002, and it opened a depot in Cardiff at around the same time.

**(4) 2 Travel’s financial results for the year ended 31 August 2002**

91. 2 Travel’s financial statements for the year ended 31 August 2002 showed a pre-tax profit of £212,135 on turnover of £3,678,935. The report of the director (Mr Fowles Jnr) noted:

“The year has been another one of growth and has seen the company move into profit. Expansion into other areas of Wales is progressing and will continue into 2003 with additional contracts to be operated in Cardiff from September 2002. The cost of establishing these new contracts have been high during the current year, the full benefit will not be seen until future years. The outlook for the future continues to look encouraging.”

**(5) The appointment of Mr Waters**

92. In September 2002, Mr Carl Waters (who previously had been finance director at First Eastern Counties, a First Group subsidiary) joined 2 Travel as its finance director. Mr Fowles accepted that Mr Waters was an experienced accountant with a history in the bus industry, and that he would expect his judgment “to be reliable within industry terms” (Transcript Day 2, page 1). Mr Waters was not called as a witness by 2 Travel, but it was not suggested that he could not have been called (Transcript Day 2, page 2).
93. On 20 September 2002, shortly after his appointment, Mr Waters wrote an internal memo to Mr Francis, Mr Fowles and Mr Fowles Jnr. Mr Waters – three weeks into his job – noted that an audit by the company’s accountants had revealed a lower than anticipated profit, and made a number of points and suggestions:

“To ensure that a company is operating in line with its projections, the need for a formal reporting structure with regular timetables for reporting is essential, and these will need to be introduced immediately.

Whilst preparing the accounts, and during the audit, it has been apparent that the accounting records and standards have not been of the highest level, and whilst this should not be seen as a criticism of the existing staff, this is an area which will be addressed in the coming months, as new procedures and controls are introduced, and work tasks reallocated.

...

Whilst it is obvious that the company is making a profit, it is not certain from what operation within the business the money is being derived from. To ensure resources are best utilised it is essential that the accounting records are capable of measuring and monitoring all aspects of the company’s operations. To do this properly there will need to be a culture change within the organisation so that the requirement for correct recording of all transactions is carried out.

...

With such rapid growth, the Company’s finances have been ‘stretched’ over the last few years. To fund this rapid expansion, the Company has utilised all available sources of credit and in addition to very high Hire Purchase and Lease Finance borrowing, the business suppliers and other creditors (i.e. Inland revenue) have been used as sources of ‘cash’...

...

To further enhance the availability of cash, a concerted effort must be made to clear the high proportion of money due to the Company. To facilitate this and prevent any

future built up of debt, it is recommended that an experienced credit controller be employed. A policy of no pay, no bus, should also be enforced rigorously, even if this means upsetting some customers...

One area of finance which has not been utilised by the business is Bank Borrowings, which since the start of the Company have been nonexistent. Since the early days of the operation the Company has factored the vast majority of its [sic] credit sales, which, whilst helping cash flow, has proved a very expensive source of finance.

...

Since inception, Lease Finance and Hire Purchase have been used to fund nearly all vehicle acquisitions, often at high rates...

...

There can be no doubt that the Company has come a long way in a relatively short period. Now is the time for consolidation. Systems and procedures need to be introduced and this is not an overnight job if they are to be done properly. The Company has gone through the growing period of the early years and financially it has gone through the worst...

...

With this in mind and the work load required to catch up in terms of systems, management and staffing, now may not be the most opportune time to progress with the AIM flotation. The tidying up exercise required to meet the standards expected of a public company will take several months, during which period the Company's value should also be enhanced, providing an even more attractive proposition for potential investors if this indeed is the approach finally decided upon."

94. When this memo was put to Mr Fowles, he commented (Transcript Day 2, page 3):

"Obviously, Mr Waters was given a free hand as director. We were aware that we needed change at the time and felt that he was the person to introduce that change. He was given free rein to do that."

**(6) 2 Travel's flotation on the Alternative Investment Market**

95. On 20 January 2003, 2 Travel was floated on the Alternative Investment Market ("AIM").
96. Two important documents were published in connection with this flotation. First, a Working Capital Report (dated January 2003) by Solomon Hare (a firm of accountants); and, secondly, a Prospectus for the placing of 12,235,014 new

ordinary shares of 0.2p each in 2 Travel at 7 pence per share and for admission to AIM.

97. Paragraph 4.2 of the Working Capital Report set out 2 Travel's profit and loss accounts for the year ended 31 August 2002 (which we have described in paragraph 91 above), and made projections for the years ending 31 August 2003 and 31 August 2004:

	Actual for the year ended 31 August 2002	Projected for the year ending 31 August 2003	Projected for the year ending 31 August 2004
Turnover	£3,679,000	£5,895,000	£6,809,000
Profit before taxation	£265,000	£295,000	£439,000

98. The Prospectus gave (in paragraph 10) the reasons for the placing. These were:
- (1) To fund existing and anticipated working capital requirements.
  - (2) To assist in the purchase of the freehold reversion of the Swansea Depot.
  - (3) To expand the vehicle fleet of the company.
  - (4) To fund two small acquisition opportunities, being the acquisition of Hawkes Coaches and the Coach Travel Centre.
99. The flotation of 2 Travel was intended to raise about £556,000 net. Additionally, 2 Travel had raised about £148,000 from investors (see paragraph 10 of the Prospectus).
100. In fact, according to Mr Fowles, the flotation actually raised less than the £556,000 net amount expected: "I recollect it was approximately £200,000 short" (Transcript Day 1, page 138). It is a fair indication of the state of 2 Travel's financial records that it is not possible to be more specific than this as to how much capital was raised on the flotation.

101. A number of new directors joined the board, in addition to Mr Fowles Jnr. The composition of the board was now as follows:

Sir Richard Needham	Non-executive chairman
Mr Fowles	Chief-executive
Mr Waters	Finance director
Mr Fowles Jnr	Operations director
Mr Short	Non-executive director
Mentor UK Limited (“Mentor”)	Non-executive director

Mr Francis – who was one of the original shareholders in the company (see paragraph 85 above) – remained a shareholder, but did not join the board. He did, however, act as company secretary.

102. The result of the flotation was that the original 50% - 50% shareholdings of Mr Fowles and Mr Francis became diluted. About 30% of the shareholding in the company was sold in the flotation. Following this, Mr Fowles and Mr Francis came to hold about 32% of the remaining shares, and Mr Short came to hold around 5%. (Mr Short states that he acquired his shares (£150,000 worth) on or around 9 September 2003: see paragraph 5 of his first witness statement.)

103. Mentor was appointed as a director on behalf of an investor known as “VCT”, which had purchased a tranche of shares in the company on flotation, as well as taking out (in January 2003) £600,000 of loan stock, carrying interest at 8%. The maturity date of this loan was 31 January 2008, whereupon VCT had the option to convert this loan into ordinary shares in the company.

104. Each company listed on the AIM must have a “nominated adviser” or “nomad”. The role of a nomad is to ensure regulatory compliance by AIM-listed companies. 2 Travel’s nomad was City Financial Associates (“CFA”).

**(7) Use of the capital raised**

105. All in, the flotation of 2 Travel raised between £1,104,000 to £1,304,000 (£148,000 from private investors; £600,000 loan stock; £356,000 to £556,000 from the public offering) net. It is, unfortunately, impossible to be more specific because of the state of 2 Travel’s books.

106. This capital was used:

- (1) In part to acquire the freehold of the Swansea Depot (Transcript Day 1, page 143). However, the purchase of the freehold was not wholly financed by the capital raised on flotation: part of the cost of purchasing the Swansea Depot freehold was funded by a bank loan. The freehold of the Swansea Depot was financed by a cash payment of £300,000 and about £330,000 debt.
- (2) To acquire the Coach Travel Centre (“CTC”) for £210,000 (Transcript Day 1, page 143). CTC was a clearing house for coach tour operators.

107. Hawkes Coaches was not acquired (Transcript Day 1, page 143) and, although the vehicle fleet of the company was expanded, this was done by way of hire purchase, rather than using the funds raised on flotation (Transcript Day 1, pages 143 to 144).

108. Thus, of the £1,104,000 to £1,304,000 raised, only about £500,000 appears to have been used for the purposes described in the Prospectus. The rest – in excess of £500,000 – appears to have gone into 2 Travel’s general funds or working capital. Again, the fairly chaotic state of 2 Travel’s books makes it impossible to be more specific; but, on the evidence, this is what we find occurred.

109. As regards the flotation, the chairman’s statement (Sir Richard Needham) in 2 Travel’s financial statements for the year ended 31 August 2003 noted:

“The Company floated on the Alternative Investment Market (“Aim”) in January 2003. Depressed financial markets slowed the flotation process until well into our financial year 2002/2003, and this unfortunately pushed back many of the initiatives we had budgeted for earlier in the year. This had a detrimental impact on the year’s results.

As outlined in our Prospectus, the Board has concentrated its efforts on moving the coach business away from tour work to more predictable domestic business. We have frozen the expansion of the coach fleet, and developed and expanded the business towards a mid level regional bus operator. Given the volatility of coach operations in the year, due to international events such as SARS and the Iraq war, this position has been vindicated.

At the start of the financial year, the Company had its two depots at Swansea and Cwmbran. By August 2003, facilities and infrastructure had been established at both

Cardiff and Llanelli. This significantly expanded the potential range and size of our bus services and facilitated closer links with a number of Local Authorities to whom we could tender for bus services. These depots are now fully operational and have been inspected and approved by the Vehicle Inspectorate.

Since flotation, the Company has applied for, and was successful in its application to increase the number of vehicle operating disks it holds by 30 to a total of 110. The Company can now grow its activities by 37%.

Other achievements include the purchase of CTC in April 2003. CTC is a clearing house for coach tour operators and gives 2 Travel's coach unit first choice of available domestic work improving the general utilisation of the internal coach fleet. Additionally, in June 2003 the company acquired the freehold on its Head Office site in Swansea. As described in more detail below, the site is adjacent to a major retail development scheme which is currently well underway. The Board is examining how to capitalise on the site for the benefit of shareholders."

110. On premises, the chairman's statement noted:

"The significant Retail and Leisure development on local authority land adjacent to the Company's 5 acre premises at Swansea which is due to complete later this year will result in a market increase in the value of the Company's premises.

During the year the local authority officially recognised the existing use of the site, which is an important step towards enhancing the planning status of the premises.

The premises have already attracted attention from national companies looking for a base in Swansea. This has prompted the Board to investigate the possibility of relocating its operations in the Swansea area.

Whilst it is not expected that a significant cash return will be generated from the premises in the next financial year there clearly exists a potential opportunity for the Company to relocate and build a purpose-built depot and generate additional profit from a redevelopment of the site."

## **(8) 2 Travel's operations in Cardiff in 2003**

111. By 2003, 2 Travel's Cardiff operations included providing school buses for 12 schools, as well as operating two tendered services (the 98 and 99 routes). For a period of some 9 months, from February 2003, 2 Travel also operated two further services (the 88 and 89 routes) on a sub-contracted basis on behalf of Cardiff Bus.

**(9) Cash-flow problems in April 2003**

112. In a memo dated 9 April 2003 from Mr Water to Mr Fowles and Mr Francis, Mr Waters stated:

“It is becoming obvious that the Company is currently incapable of generating enough cash to cover its current commitments. I would recommend therefore that an immediate ban is put on all non critical expenditure.”

113. The memo analysed 2 Travel’s cashflow and commented:

“As you can see the sums do not add up. I think we have to stop looking at everything through rose tinted eyes and recognise that things are not going to get better in the short term...

...

I am certain the board will start asking very serious questions shortly and I think we need to discuss all our options without any bias and through practical, realistic eyes rather than the misty, idealistic views of the last few months and forecast.”

114. This document was put to Mr Fowles in cross-examination by Mr West, junior counsel for Cardiff Bus (Transcript Day 2, page 7):

**“Q (Mr West)** And it’s right, isn’t it, that the forecasts in the flotation documents had proved to be over-optimistic, as Mr Waters was saying?

**A (Mr Fowles)** They had, yes, but I think both Huw Francis and myself and probably the rest of the board, realised that there was a value underpinning the company, which was the value of the land.”

115. This was a reference to the Swansea Depot, which at this time was in the process of being purchased (Transcript Day 2, page 8).

**(10) The acquisition of CTC and its operation by 2 Travel**

116. CTC was acquired by 2 Travel in April 2003 (Transcript Day 2, pages 24 to 25 (evidence of Mr Fowles)).

117. On 28 August 2003, one of the employees at CTC emailed Mr Waters in the following terms:

“Dear Carl,

Can’t get hold of Bev as he is in a meeting. I know you said this is nothing to do with you but I have never had to put up with so much grief in the 4 years I have worked here [sic]. I have so many companies chasing payment they are pulling out of work for October and we can’t [sic] afford to lose [sic] these companies. I don’t blame these companies for chasing as they are Overdue by far.

I have never worked for Coach Travel like this, me and Christine have had the worst 4 weeks of working here ever.

Please can you pass this onto Bev and get these payments sorted.”

118. The inference that these payment difficulties were linked to 2 Travel’s cash flow difficulties (described in paragraphs 112 to 115 above and further below) is irresistible. Mr Fowles, however, did not accept this (Transcript Day 2, pages 25 to 26):

“**Q (Mr West)** So the position is that the result of the CTC passing into your ownership was that you stopped paying the creditors of CTC, just like you did with all of the other creditors of 2 Travel; is that right?

**A (Mr Fowles)** No, that’s not right at all. We were coming to terms with managing the Coach Travel Centre. The previous owner of Coach Travel Centre had operated it without very many systems. We were trying to implement our own systems into the place. Carl Waters was dealing with that. Quite clearly, papers had to come through Swansea to be verified and sent back before they could be paid. It just took a little bit of time.”

119. Yet in a confidential memo from CTC to Mr Fowles and Mr Fowles Jnr dated 2 September 2003, it is clear that systems were not the problem; rather, CTC was simply not paying its suppliers:

**“Effect of unpaid suppliers**

1. They have stated they will not undertake future work unless they have written guarantee of payment on terms previously agreed. They are all aware that payment has been made by tour operators. As I explained to you we have coaches booked with them for October and will not be able to cover the work if they refuse to operate. They emphasise that they do the work at a

competitive rate which is true. When these operators speak to other operators it wont [sic] take to [sic] long for word to spread that payment is not being made and then we shall be in the position whereby we wont [sic] be able to cover any jobs.

2. The tour operators will also get to know the situation and wont [sic] offer any work if they feel we have any problem with getting coaches.

...

Whilst I understand that decisions taken on behalf of CTC is [sic] not my responsibility I still feel a great affinity towards the company and see it as a great pity it appears that the company is being put in the position of having is [sic] reputation spoilt which I find surprising.”

120. Mr Fowles again suggested that this was simply due to the fact that “the transition or merging into the larger company, did prove difficult with the staff” (Transcript Day 2, page 28) and that the suppliers were paid “eventually” (Transcript Day 2, page 29).

121. Yet even by April 2004, CTC’s business was still being mis-managed. A handwritten note (the handwriting was not identified for us) on a memo from Mr Waters dated 25 April 2004 notes in relation to CTC:

“Urgent work needed to be done. Despite knowing of problems for many months, nothing has been done, both on the admin side and financial side, ie invoicing credit control, payments. We now have a very steep hill to climb to recover goodwill from coach operators and ensure our customers are shown a first class admin service, not bits of paper here and there. We must use technology...”

**(11) Increase in 2 Travel’s bus licences**

122. As was adverted to in the chairman’s statement set out in paragraph 109 above, 2 Travel’s application to increase its bus licences from 80 to 110 was granted on 23 July 2003. One of the conditions of bus licences being granted (pursuant to the financial standing requirements of the Public Passenger Vehicles Act 1981), was that 2 Travel must have ready access to €9,000 in respect of the first bus licence granted, and ready access to €5,000 for each subsequent bus licence granted. 2 Travel must, therefore, have been able to demonstrate to the Traffic Commissioner that it had ready access to €50,000.

**(12) 2 Travel's cash flow and predicament in July/August 2003**

123. In a memo, which can be approximately dated to the summer of 2003 (Mr Waters, the author, refers to "10 months down the line" from his previous memo of September 2002), Mr Waters wrote to Mr Fowles, Mr Francis and Mr Fowles Jnr in the following terms:

"After joining the Company last year I was asked to prepare a short paper on what my initial views of the Company were, 10 months down the line I feel a quick update is probably needed.

It is clear now that the Company's cost base is much too high. A company of this size cannot justify or support a management (director level) overhead of nearly £300k per annum, whilst going public has put a further £100k of costs into the company.

At the operating level the contract base is totally underpriced and the commitment to guaranteeing 45 hours pay per week is killing any chance of improvement in the short term. We fire fight not plan. Whilst operating from several sites has advantages I now feel that this is more of a hindrance than a help. The "dead" mileage costs are horrendous but to improve this will only lead to an even higher overhead as rental costs at the other (non Swansea) sites will have to increase, making them even more unprofitable.

The fleet itself is probably entirely wrong for the market the Company wants to be in. Too many mid life coaches not capable of doing Tour work but too expensive for schools. The huge financing costs to be covered every month, which in cashflow terms the company cannot sustain do not help the position either.

I do not believe that given the fleet mix, overhead costs, financing costs, diverse operating sites and current marketplace the Company can ever meet market expectations and the shareholders will try and force changes onto the Company in an attempt to maximise their return.

A solution to this situation has however arisen.

The potential development profits from the Swansea site (if Huw's estimates are correct) should raise enough funds to take the Company out of the public market, which given the current shareholder composition should get voted through.

I would then recommend liquidating the Company and closing all operations which should then provide enough cash to settle all outstanding debts, although given the potential development proceeds, there should also be some cash left over to enable the founder directors to acquire further small businesses if they wished to continue in the industry..."

124. In short, Mr Waters did not consider 2 Travel's business to be sustainable, and he suggested winding-up the company. This document was put to Mr Fowles (Transcript Day 2, page 11):

**“Q (Mr West)** Mr Waters' reaction to the possibility of development profits from the Swansea depot was that the land should be sold and the profits should be used to pay off the creditors and wind up the company.

**A (Mr Fowles)** That's what he says.

**Q (Mr West)** But, again, his advice wasn't taken about that at this stage?

**A (Mr Fowles)** His advice wasn't taken at all.”

125. In another (undated) memo to Mr Fowles, Mr Francis and Mr Fowles Jnr, Mr Waters returned to the question of the sustainability of 2 Travel's business:

“The profit of the past (if it existed) only arise [*sic*] through infill work and better vehicle utilisation. Our poor quality of service has destroyed the truth of this leaving our cost base exposed. We have dramatically increased our headcount and PVR [Peak Vehicle Requirement] but to no avail. On a weekly basis our factoring now does not even cover our net wages and this is not sustainable.

I do not want to seem the eternal pessimist but this condition cannot be allowed to go on. We have made no attempt to seriously cut costs and we will be found out very shortly.

The strive for turnover must end and some harsh decision [*sic*] over Company Structure and costs must be made immediately. The company was sold to the City on the basis that all standing costs were covered in the contracts and that other infill work was profit, this is blatantly now not true.

We must urgently look at how the business runs and decide where we want the Company to be in the future.”

126. In a memo dated 8 July 2003, Mr Waters informed Mr Fowles, Mr Francis and Mr Fowles Jnr that “in my estimation the Company will run out of cash by the end of July 03”. He asked that the position regarding the Swansea Depot be confirmed “as this I believe is the only possible saviour in the short term, whether it be used as security for an overdraft/loan or sold as a development opportunity”.

127. 2 Travel's cash flow difficulties are confirmed by the fact that, from about this time, the company stopped paying interest on the £600,000 loan from VCT (Transcript Day 2, pages 15 to 16 (evidence of Mr Fowles)).

**(13) 2 Travel's financial results for the year ended 31 August 2003**

128. 2 Travel's financial results for the year ended 31 August 2003 showed a loss £949,636 on turnover of £4,245,185.

129. Clearly, these results were significantly different from those projected in Solomon Hare's Working Capital Report (which projected turnover of £5,895,000 and profit before taxation of £295,000: paragraph 97 above).

130. The chairman's statement provided the following summary as regards these results:

“This has been a period of transition for the Company; a significant amount of work has been completed in developing this bus network and the Board remains optimistic for the future.

The year has seen significant costs being incurred to grow and support the infrastructure of the business whilst the bus services are further developed.

It is expected that further development will continue through the first half of the next financial year when the remaining 40 bus workings will come on stream.

The full effect of the first phase of the Company's development plan will not be felt until the next financial year when it is expected that significant improvements in the financial results will be achieved.”

131. Whatever the reason – and there is ample ground for considering that the chairman's statement was viewing matters through less than secure rose-tinted spectacles, it is clear that 2 Travel was suffering significant cash flow difficulties, so serious that 2 Travel's accountants (Bevan Buckland) were concerned as to whether the company could carry on as a going concern. In a letter dated 10 December 2003, written to Mr Waters in connection with the accounts for the year ended 31 August 2003, Bevan Buckland wrote:

“Following our meeting on Tuesday with yourself, Bev and for the last hour or so, Huw, you will be aware that there have been a number of issues that have arisen during our audit...

...

5. We have raised concerns about the accounting for cash income and cash expenses within the company. In particular there was a significant problem at your Cardiff branch for the first six months of the year and we understand that you have now done some work to estimate that approximately £39,000 of cash income was received but not accounted for in that period and that you have identified approximately £30,000 of receipts for this work i.e. there is approximately £9,000 unaccounted for. We believe this was probably spent on fuel and both yourself and Bev have confirmed that no cash wages would have been paid out of this money. As you are aware this is an extremely serious matter which you confirm is not continuing and appropriate controls have been instituted.
6. Similarly in the Cwmbran branch for December 2002 there were monies drawn for cash from the bank and spent, we are told, on fuel and again for which no invoices are available. You confirmed that this occurred because of the very serious cash flow problems that the company had at that point. Again you confirmed that no cash wages would have been paid out of that money.”

This paragraph in the letter bears the handwritten annotation “I cannot agree to this, am uncertain”. The letter continues:

- “15. There is a degree of uncertainty on the company’s ability to continue as a going concern. We understand that since the year end hire purchase and insurance direct debits have not been honoured by the bank which again highlights the lack of cash within the business. In addition we have raised the point that if the insurance direct debit has not been honoured is the company still covered by insurance. You said you would come back to us on this matter. There is no evidence that the company can meet its liabilities as they fall due and therefore we will need to see evidence that the company has sufficient cash funds in place to be able to trade for twelve months after the date of our signing the accounts before we can consider signing them. I am sure the board will also wish to see such evidence.”

132. The finally-published accounts contained the following note under “Going Concern”:

“At the balance sheet date the Group had current liabilities in excess of its current assets. After making enquiries the directors have a reasonable expectation that the Group as a whole has adequate resources to continue in operational existence for the foreseeable future. For this reason they continue to adopt the going concern basis in the consolidated financial statements.”

133. The finally-published accounts showed – amongst other things – “cash at bank and in hand” of £154,400. 2 Travel, of course, had other assets and other

liabilities: but it is worth noting that 2 Travel did not – only about a month after the Transport Commissioner approved its additional bus licences – in fact have ready access to the €50,000 it needed, absent an injection of cash by third parties (see paragraph 122 above).

134. Mr Fowles accepted that this was a serious situation for 2 Travel, and that the company only had net positive assets when the Swansea Depot was taken into account (Transcript Day 2, page 31):

**“Q (Mr West)** It’s a pretty serious position to be in, isn’t it, for a bus company, if your net current liabilities exceed your current assets by over £1 million? A bus company of this size?

**A (Mr Fowles)** Yes, it is. It was a known situation. I think we were somewhere in the region of between £450,000 and £600,000 worth of one off costs in that year. The valuation of the land wasn’t at its true value, it didn’t have its development potential, and...But I think Richard Needham, in his statement, alludes to that.

**Q (Mr West)** So the company still had net positive assets when one took account of the value of the land?

**A (Mr Fowles)** Yes.”

135. Quite what had happened to the £500,000 or more that 2 Travel had retained from the flotation (see paragraph 108 above) is not known.

**(14) Quality of service provided by 2 Travel**

136. Some insight into the quality of the service that 2 Travel was providing can be obtained from the documents. As has been described, 2 Travel operated a number of services for local authorities (including school services), both on a contracted and sub-contracted basis. It also operated some non-local authority services.

*(i) City and County of Swansea*

137. 2 Travel operated Route 714 for the City and County of Swansea. This was a school bus route to Bishopston Comprehensive School from Pennard. On 11 September 2002, Swansea Council wrote to Mr Fowles to complain about the age of the vehicles being used for the purposes of this contract, which was in

breach of the conditions stipulated (the bus used, at least on certain occasions, was “well over the 20-year age limit required by the Conditions of Contract”).

The letter went on to say:

“I am disappointed that, despite a wealth of correspondence during academic year 2001/2002, your Company’s use of buses over the 20-year age limit on Home to School Transport Contracts appears to be continuing. Please note that the use of these vehicles on any school contract for the City and County of Swansea is unacceptable and therefore request that you cease this practice immediately...

Please may I draw your attention to the Authority’s Scheme of Deductions for Failure to Perform Agreed Services or Comply with Conditions of Contract. As a result of the use of a vehicle over 20 years old, I am left with no option but to deduct 50% of the daily contract price for each of the days when the School has confirmed its use...”

138. On 1 October 2002, Swansea Council again wrote to 2 Travel on the subject of buses that were too old, and gave a final warning to the company:

“...should I find that your Company breaches any Condition of Contract during the next three months I will have no alternative but to cancel the contract forthwith.”

(ii) *Carmarthenshire County Council*

139. On 16 September 2002, Carmarthenshire County Council wrote to Mr Fowles in respect of “various complaints and observations” regarding Local Bus Service Contract 02/665/7483:

“I am concerned at the high number of incidents which have had to be brought to your attention during the first week of operations since the commencement of the new school year. You will recall that there were various issues which were raised during June and July of this year, and which were attributed to the “settling down period” of the contract. Unfortunately some of these have continued to appear since 4th September, particularly in regard to the late appearance of your vehicles to commence journeys.”

(iii) *Neath Port Talbot County Borough Council*

140. On 26 September 2002, Neath Port Talbot County Borough Council wrote to Mr Fowles notifying him of various deductions for non-compliance with conditions of contract in respect of services operated by 2 Travel. A further, similar, letter was written to Mr Fowles on 3 October 2002 and on 11 October 2002.

141. On 17 October 2002, Neath Port Talbot Borough Council wrote to Mr Fowles in the following terms:

“You will be aware of the various problems involving the operation of the above school contract route since the start of term. A considerable amount of time is being wasted by my staff handling so many telephone complaints about this route.

Following more complaints from parents and the school on Tuesday evening because the afternoon journey was at least 90 minutes late we have consulted our Education Directorate who pay for this transport. They have requested a change of operator. As a result I am writing to you to terminate this contract with effect from Saturday the 19<sup>th</sup> October.”

(iv) *The Vale of Glamorgan Council*

142. 2 Travel operated Cardiff Bus’s Route Nos 88 and 89 for The Vale of Glamorgan Council on a sub-contracted basis (Transcript Day 1, pages 94 to 95; 148 to 153). This gave rise to complaints. On 23 May 2003, the Council wrote to Cardiff Bus stating that:

“...numerous complaints have been received with regards to the non-operation of various journeys...I note that you have sub-contracted the services to 2 Travel Group PLC. However, it is with your company that we have the contract with [sic] and I must therefore warn you that this Authority will not accept poor standards in the operation of it’s [sic] Supported Bus Services and that the current level of service is unacceptable...”

143. In an email dated 5 June 2003, the Council recorded a number of complaints relating to Route No 88. In an email dated 1 July 2003, the Council identified to Cardiff Bus a number of Route No 88 services that had failed to operate, and levied penalties in the amount of £71.44 on Cardiff Bus.

144. On 9 June 2003, the Council wrote to Cardiff Bus, copied to Mr Fowles Jnr, stating that “we are still receiving numerous complaints about the non-operation of various journeys on these services, which is leaving passengers stranded”. Mr Fowles Jnr circulated this letter within 2 Travel (to Mr Fowles, Mr Francis and Mr Waters) under cover of the following memo:

“Please find attached copy of letter received from Vale of Glamorgan Council to Cardiff Bus regarding “their” operation of route number 88/89.

As you can see they have been given a final warning as to their future operation on this contract.

This typifies our problems in the Cardiff depot (and in some cases our company as a whole). However, the Cardiff depot in particular has:

1. No maintenance facility.
2. No spare parts/stock facility.
3. The oldest vehicle age profile of any depot in our company (pro rata).
4. No spare vehicle capacity.

When you consider that the depot turns over approximately £1.8 million than it seems ludicrous that so little attention is paid to its needs. It is **not** an outstation though it is treated like one.

Although a fitter is now sent up every day (except Tuesday because Warren attends College!) he has no parts with him of any description and is only able to undertake very minor running repairs.

We have been active in Cardiff for almost a year and it has to be said that the company has not done a great deal to improve the situation at the depot. We are all agreed that the major growth area in the company is in Cardiff but we are unable to achieve our goals.

We have already lost one school contract in the Cardiff area, not through poor operating procedures, but through mechanical failure and not having a spare vehicle to use in case of breakdown.

Until the above problems are addressed then we will continue to tread a fine line with local authorities and perhaps lose work accordingly.

I am sure that none of us would like that to happen.”

The minutes of an engineering management meeting on 13 June 2003 also bear out the internal problems that 2 Travel was experiencing in providing its services.

145. On 31 July 2003, the Council wrote to Mr Fowles Jnr concerning 2 Travel's operational performance and reliability on Route Nos 88 and 89, and issued a formal final warning to the company. 2 Travel was warned that the Council intended to monitor 2 Travel's performance carefully over the next six weeks.

146. It is evident that problems with this service continued. In an internal memo dated 7 October 2003, Mr Waters observed as follows to Mr Fowles, Mr Fowles Jnr and Mr Francis:

“After several visits to Cardiff, to drive, and having spoken to the Vale of Glamorgan Local Authority, it is clear that we are struggling enormously to run the depot.

The quality of service we are providing is nowhere near acceptable and we are getting a very bad name with all customers served.

Vale of Glamorgan have advised that the last eight journeys on the 88/89 service have not run for the last week or so and in addition the 16.30 has not run on several occasions with they believe (probably correctly) the vehicle and driver being used on schools! Also the 539 service did not run at all on 6/10 and 2/10!

The impression I had from the Vale (Emma Harvey) was that they have had enough and were looking to remove contracts from us.

If this is the case then the loss of 88/89 would cost us over £3K per week in revenue (subsidy + OAP + cash) this would I believe made [*sic*] the Cardiff depot unviable and probably not worth operating.

If we cannot get drivers then we have to make the decision as is [*sic*] what we want to be a bus or a school/contractor operator. Once this decision is made then we must run the services come what may, or not be in the market place at all.

For a plc we have a very poor reputation and will I believe find it difficult to re-establish one which as a director of the company I find rather unpalatable and hard to hear.

I think we now seriously need to look at all our operations as what is quickly happening in Cardiff is I believe also occurring elsewhere and needs to be addressed, I think we need to be realistic about where we go as a company having been given a life line of the property.”

(v) *Gorseinon College*

147. One of the contracts specifically referenced in Solomon Hare’s Working Capital Report was the contract with Gorseinon College. The Report stated:

“7.11 The largest individual contract, Gorseinen [*sic*] College, which was originally awarded for five years, is due for review in the summer of 2003. Turnover from this contract is expected to exceed £220k, generating £73k profit based on 33% estimated average margin.

7.12 Management are confident of being re-awarded the work because of Bev’s relationship with the college and also because there are few operators in Swansea large enough to undertake a contract of this size and nature. The Company should also have a pricing advantage in that the area served adjoins other 2TC route scheduling.”

148. This was, in fact, sub-contracted work (Transcript Day 2, page 146), the main contractor being a company trading under the name of “Diamond Holidays”. On 9 July 2003, Diamond Holidays wrote to Mr Francis in the following terms:

“I refer to our recent discussions regarding the concerns that have been expressed over your company’s poor performance on the Gorseinon College and ASDA contract routes and the imminent expiry of our existing contract for Gorseinon College. As a result, I am writing to confirm our decision that we are terminating all our current arrangements with your company. Please treat this letter as formal notice of termination.

As you [are] aware the level of performance over the last 12 months has been far from satisfactory and although we have had cause to discuss and write to your operations staff on several occasions, sadly there has been no improvement and this has jeopardised our relationship and contract with the College. Recent experiences on the college routes during important student A level exams were totally unacceptable and the college has complained extensively about the level of service provided. As an aside to that, we were extremely disappointed that, without our knowledge your company sought to compete against us on the new tender proposal, details of which was [sic] released last September.”

(vi) *Complaints from Cardiff Council*

149. On 21 July 2003, Cardiff Council wrote to Mr Fowles Jnr regarding a failure on the part of 2 Travel to operate (or the late operation of) a bus on route 98.
150. On 2 September 2003, Cardiff Council wrote to Mr Fowles Jnr regarding three complaints in respect of 2 Travel’s school bus services, namely two failures to operate and one late service. The letter stated:

“This is extremely disappointing for the first day of school. Your company failed to inform this department or any schools of any potential problems. In fact it was extremely difficult to contact your staff at your Wentloog depot to find out why buses failed to operate.

I would insist that you provide a written explanation for these failures and confirm what action you will be taking to ensure that this does not happen again.

No payment will be made for these journeys. Please accept this as a formal letter of warning.”

151. It is only fair to note that Mr Fowles Jnr’s explanation, when this letter was put to him, was that 2 Travel had been notified that the schools were closed for

training days (Transcript Day 5, page 104 (evidence of Mr Fowles Jnr)). That, of course, does not explain the late service.

152. On 22 December 2003, Cardiff Council wrote to Mr Fowles Jnr regarding the persistent late running of Countryride Service 646, another school bus service. The letter stated:

“I am most concerned that this service ran late on four out of five school days, resulting in the Ysgol Glantaf school children having to wait for longer than necessary during inclement weather for the bus. The late running is also affecting the time at which these children arrive home on an already long journey, which is clearly unsatisfactory.

Please accept this as a formal letter of warning. I intend to monitor this service closely to ensure the service operates to the scheduled timetable. Any further failures in the operation will result in non-payment and possible termination of the contract.”

153. On 22 March 2004, Cardiff Council complained about what it termed “major failures in the operation of the journeys” in respect of Countryride Bus Service No 632. The Council requested a written response to these complaints. On the same day, 2 Travel also received a complaint regarding the operation of Bus Service 99. We were not referred to any written response by 2 Travel to these letters. When they were put to Mr Fowles Jnr (Transcript Day 5, page 117), he said:

“If it’s in writing, then yes, those journeys may not have operated. Bearing in mind they were operating other journeys during the day satisfactorily, if one journey failed to operate, as any bus operator will tell you, things do happen, things go wrong. I don’t know the circumstances of what happened on that day. But one failure to operate wouldn’t seem to be a huge problem at the time.”

154. On 29 March 2004, Cardiff Council wrote to Mr Fowles Jnr expressing extreme concern about the operation of the Route 99 service. Another letter, relating to a further failure in respect of the same service, was written by the council on 29 April 2004.
155. Mr Fowles declined to accept that 2 Travel had been guilty of “repeated failures to comply with the contracts which you had signed” (Transcript Day 5, pages 117 to 118).

156. Cardiff Council's complaints continued (e.g. the council's letter of 8 June 2004). Further complaints about service resulted in the council terminating the contract for School Bus Service 655 on 29 June 2004.

(vii) *Conclusions*

157. Although these various complaints span some months, we have grouped them together for coherence's sake. In terms of timing, however, all of these complaints have one thing in common: they pre-date the Infringement. We consider that these contemporary documents provide an accurate barometer of the quality of service that 2 Travel was providing before the Infringement took effect. We find that that quality was poor.

**(15) 2 Travel's financial position in October 2003**

158. In a memo dated 28 October 2003, Mr Waters informed Mr Francis, Mr Fowles and Mr Fowles Jnr as follows:

"It is becoming increasingly difficult to meet our ongoing cash requirements and the position with Barclays is I believe at its limit.

To summarise, any business must make a profit and generate cash, we are doing neither.

Over £2 million of external funds have been invested in the company and the only tangible benefit I can see is we now own a potentially extremely valuable piece of land. The underlying business has not improved from where it was a year ago and in fact I believe has gone backwards. In several areas we have lost work due to poor performance caused by overstretch and a lack of resource.

Trading unprofitably is not in itself a major issue if the depreciation charge is high and ensures operating cash generation is satisfactory and the company can meet its liabilities. We are not. I attach a schedule of 'big ticket' cash requirements which funds need to be available in the short term.

The restructuring of some of the debt will help but the introduction of additional debt has eaten into the benefits of this. At the same time our single biggest creditor, The Inland Revenue, is seeing an ever increasing rise in the money owed to them; and I cannot see how much longer they will allow this to continue, particularly as I can see no way of us making payment to them of back debt or ongoing debt.

Other trade creditors continue to suffer, and now the fuel companies have been messed around their credit to us will be reduced, further worsening our already overstretched cash position."

159. The memo went on to conclude:

“Before proceeding too far into the new financial year we must recognize the problems we are in as I do not believe we can talk our way out of them.

As an executive board we urgently need to discuss possible strategies so that at least we have some answers available when we are questioned as to how this position has been allowed to occur.

The other issue will be the forthcoming audit when given all the above Bevan & Buckland may question our viability as a ‘Growing [*sic*] Concern’ which may lead to a qualified audit opinion and major issue with the stock exchange. I know a rabbit was pulled out of the hat last year but now we need another one, otherwise there may be a lot of egg on a lot of faces.”

160. As have been seen, there were indeed difficulties with Bevan & Buckland, but 2 Travel (narrowly) managed to avoid having its accounts qualified in a manner that would create a major issue on AIM (see paragraphs 131 to 132 above).

161. The schedule of debts appended to Mr Waters’ memo is also instructive:

“

<b>‘Big Ticket’ Cash Liabilities</b>	
	£’000
Eversheds	55
Solomon Hare	18
John Owen (CTC)	50
J Cleverly	100
Volvo VAT	45
Glan Harris	42
CFA	12
Downing Classic	16
Matrix	9
St Brides	2
Stock Exchange	7
Inland Revenue	500
Belmont Fee	<u>10</u>
	866

In addition to the above I am aware we are now behind in some of our Finance Agreements and some of our Trade creditors are well overdue for payment.

To get us back on an even keel we therefore need a cash injection now of over £1 million.”

162. Mr Fowles, who was asked about this list, was able to assist in describing further some of these “big ticket” liabilities (Transcript Day 2, pages 34 to 36). The liability to Eversheds was in respect of legal advice on the flotation; Solomon Hare were the accountants for the purposes of the flotation; John Owen was the vendor of CTC, who was still owed money; Mr Cleverly was the vendor of the freehold reversion of the Swansea depot, who was also still owed money; CFA is a reference to 2 Travel’s nomad (see paragraph 104 above); Downing Classic was a reference to the 8% loan stock; and Matrix was the non-executive director appointed by Downing Classic. The reference to the Inland Revenue is, of course, self-explanatory.

163. As Bevan & Buckland had noted (see paragraph 131 above), 2 Travel was even having to pay for its fuel out of cash receipts from passengers. Mr Fowles was asked about this (Transcript Day 2, pages 38 to 39):

**“Q (Mr West)**                    Going back to paying for fuel in cash, that’s pretty risky for a bus company, isn’t it, because if you don’t have sufficient on-board bus takings to pay for the fuel, you run the risk of running out of fuel whilst on the road, don’t you?

**A (Mr Fowles)**                    There’s always that possibility. It was reasonably well controlled at the depot level. They made sure in most cases that they had sufficient fuel.

**Q (Mr West)**                    But there were examples of 2 Travel buses running out of fuel whilst on service?

**A (Mr Fowles)**                    I think there was one or two in the Llanelli depot where we introduced new vehicles and the tankage wasn’t assessed properly.”

164. Interestingly, 2 Travel’s bank borrowing did not rise significantly. 2 Travel’s bank overdraft was £48,036 as at 1 September 2002, and this increased to only £87,914 by 31 August 2003. Additionally, 2 Travel had financed the acquisition of the Swansea Depot by borrowing around £330,000. But, otherwise, 2 Travel appears to have been funding itself by (i) not paying creditors and (ii) by relying on the “working capital” it had received as a result of the flotation (see paragraph 108 above).

**(16) PwC's letter dated 13 November 2003**

165. In a letter dated 13 November 2003, addressed to Sir Richard Needham and described as a “discussion document for further consideration by the board”, Mr Harrison – at that time a partner in PwC – set out a proposed strategy to grow the company through a series of acquisitions.
166. The letter had been preceded by a meeting between Mr Harrison and Sir Richard (Transcript Day 4, page 64 (evidence of Mr Harrison)).
167. In the event, this particular strategy of expansion through acquisition does not appear to have been pursued. Mr Fowles recognised that – in order to pursue this strategy – it would be necessary to go back to the market to raise further capital (Transcript Day 2, pages 42 to 43):

**“Q (Mr West)** So wasn't it completely unrealistic to suggest that 2 Travel, at this stage, was in a position to spend £25 million purchasing other companies?

**A (Mr Fowles)** We would have had to go back to the market. There had been other flotations since ours in the January. One fairly large London company had also floated. They had gone back to the market and acquired certain businesses. It was felt we could do the same.”

168. Mr Harrison's view was that it was completely unrealistic for the company to seek to raise this amount of new capital (Transcript Day 4, pages 91 to 94):

**“Q (Mr Flynn)** ...but those are quite big ideas, aren't they, for a company in 2 Travel's position at that point?

**A (Mr Harrison)** And that's, I think, what I'm saying in the letter as well, isn't it, really?

...

**Q (The Chairman)** Can I just ask you, Mr Harrison, you've got an AIM listed company, so there are a number of...ways of raising money for acquisitions, aren't there?

**A (Mr Harrison)** Yes.

**Q (The Chairman)** One is raising money by a share issue?

**A (Mr Harrison)** Yes.

**Q (The Chairman)** Would that have been remotely feasible with the numbers here, given the dilutive effect?

- A (Mr Harrison)** I wouldn't...If by issuing shares, you mean paper exchange for an acquisition, then I wouldn't have thought so. It's very difficult to do that if you're an AIM listed company. If someone is selling out their family business, they're not going to take shares in a –
- Q (The Chairman)** Some AIM listed companies are very large and can do it. So you'd have to borrow the money?
- A (Mr Harrison)** Or raise further funds from investors who had bought into the strategy. So you could have raised, perhaps, further funds from institutions who wished to -
- Q (The Chairman)** From institutions?
- A (Mr Harrison)** Who would have invested in AIM companies.
- Q (The Chairman)** Of course, institutions do invest in AIM companies, but am I right, generally in companies with much larger numbers than this?
- A (Mr Harrison)** Funds do have spreads of sized companies they invest in, and this would obviously be a high risk fund. One would perhaps have an element of funding who could invest in a company like this.
- Q (The Chairman)** Basically, you'd have to borrow the money or find investors who are prepared to risk their capital?
- A (Mr Harrison)** Yes.
- Q (The Chairman)** And how likely a candidate did you think 2 Travel was for, over a period, raising the sort of money that your report suggested could be raised for acquisitions?
- A (Mr Harrison)** Well, in my sort of recommendations under this, as I was saying in – the essence behind this letter, having listened to what was being described to me by Sir Richard Needham and Bev Fowles and Huw, was they really needed to articulate the strategy of how building blocks of this growth strategy were going to occur through acquisition. Because I, in a sense, couldn't see how, as is being implied all the way round, they could possibly achieve this level of growth.”

**(17) Valuation of the Swansea depot in December 2003**

169. In December 2003, a firm of chartered surveyors called Poolman Harlow were instructed by 2 Travel to value the Swansea depot. Poolman Harlow concluded that the value of the freehold – assuming vacant possession, but making no assumptions as to planning consents, etc – was £850,000.

**(18) 2 Travel’s interim accounts for the six months to February 2004**

170. 2 Travel’s interim accounts for the six months to 29 February 2004 (which were unaudited) showed a turnover of £2,209,000, on which a loss of £158,000 was sustained (Transcript Day 2, page 52).

171. Bevan Buckland prepared a report on these accounts, which commented as follows:

“It was noted that the majority of cash is spent on fuel, if the company were able to obtain credit with a fuel card provider approximately 80% of the onerous recording and collation of cash payments would disappear.

...

**General points**

...

e) We realise that it is a relatively short space of time between our issuing the management letter regarding the August 2003 audit and our review of the interim accounts and progress on controls. The majority of our recommendations have been actioned, there are some however that have not been actioned:

1. Goods received are not being matched to purchase invoices.
2. Debtors remain high and collection procedures must remain vigorous.
3. The Finance Director has not had any input in some major financial transactions, such as possible change of the factoring facility.

...

g) We are still very concerned at the cash flow position of the company...”

**(19) The February 2004 PwC Report**

*(i) Introduction*

172. In February 2004, PwC provided a report to 2 Travel entitled “Overview of business strategy and short term funding requirements”, recommending growth of the business by developing additional routes (“the February 2004 PwC Report”).

173. In short, the approach taken in this report was very different from that proposed in PwC's letter of 13 November 2003. Instead of growth through acquisition, the proposal was based upon a strategy of organic growth, increasing utilisation of 2 Travel's assets by registering new routes.

(ii) *Manner in which the February 2004 PwC Report was compiled*

174. Mr Harrison said this (Transcript Day 4, page 64):

“My involvement or my firm's involvement came first of all when I met Richard Needham, and that was in November, I think, towards the end of 2003. We then became involved and the report, that is – the first report, which was the February 2004 report, took a number of weeks. It's a long time ago and I'm going to preface a lot of what I'm going to say by saying this is from a memory point of view. It would have taken a number of weeks. The person involved in it was Nigel Ferrand, who was the senior manager who worked for me in the Cardiff office, and he undertook that work and ... I would have thought it would have typically involved about three weeks of constant time doing that, of that sort of order.”

175. Mr Ferrand's work would have involved visiting the company, spending time with its directors and employees, and with the company's auditors. Mr Harrison considered that he would have spent somewhere in the region of three days on the report (Transcript Day 5, page 20).

176. Mr Harrison explained the extent to which PwC would have gone into the figures contained in this report (Transcript Day 4, pages 80-81):

**“Q (Mr Smith)** These figures on page 38, do they simply represent 2 Travel's expectations or were they in any way subject to due diligence by PwC?

**A (Mr Harrison)** No, no, they were – we went through the exercise, as you would in any exercise of this nature. We went through it with the management and questioned them on it. Nigel Ferrand would have done that, and the judgment taken, based upon our view of Bev Fowles at the time – and it's throughout this, I have no reason to doubt his ability as understanding buses. He understood buses, he'd had a track record in the First Group, and therefore I believed his explanations behind these assumptions to be credible.

**Q (The Chairman)** So it is all predicated on Mr Fowles giving you information that was not over-optimistic but was credible?

**A (Mr Harrison)** I thought he was credible in his assessment of this. He had enough experience of this sector to be credible.”

177. The financial information in the February 2004 PwC Report derived from 2 Travel. This was made clear in the covering letter to the report, which stated:

“The Financial Projections (“Financial Projections”) on which this report is based were prepared by the management of the Company (“Management”) and are the sole responsibility of the Directors. We have reviewed the Financial Projections only to the extent that we considered necessary as part of our review. We have not undertaken any verification or audit work on the Financial Projections or any of the other information provided to us during this review.

...

We emphasise that the Financial Projections relate to future events and are based on assumptions which may not remain valid for the whole of the relevant period. Consequently they cannot be relied upon to the same extent as information derived from the audited accounts for completed accounting periods. For these reasons, we express no opinion as to how closely the actual results achieved will correspond to the Financial Projections.”

(iii) *Development of new routes*

178. The February 2004 PwC Report stated (at page 13) that the “short term strategy, now that four depots have been established, is to increase revenue by ensuring that all the buses used on school runs have infill routes between the school runs”. To this end, a number of new routes had been registered by 2 Travel, including five new “in-fill” services in Cardiff, each service requiring four buses for its operation (i.e. 20 buses in total, for these routes). The report observed that the proposed new routes would effectively utilise fully all available vehicles, and that the roll out of any further services would require additional capital expenditure.

(iv) *Revenue projected*

179. In terms of the revenue and profit that the new routes would generate, the report noted (at page 14) that the gross margin would be higher than for other proposed new routes, because these routes were all in-fill and so most of the fixed costs were covered by the contracted school routes. The report made the following projection regarding the proposed new Cardiff routes:

	Month 1	Month 2	Month 3	Month 4	Month 5	Month 6
<b>Weekly profile</b>						
<b>Cardiff for single bus</b>						
Revenue	£576	£576	£960	£1,281	£1,281	£1,920
Costs	(£1,035)	(£1,035)	(£1,035)	(£1,035)	(£1,035)	(£1,035)
Weekly profit/(loss)	(£459)	(£459)	(£75)	£246	£246	£885
Gross margin %						46%

180. The report set out a number of assumptions regarding the dynamics of the new routes (page 14):

**“General**

- The dynamics of the new routes varies depending on whether they are commercial, tendered or infill.
- Ticket income is assumed to increase over a six month period to its full potential. This is based on the profile of some Neath infill routes that commenced in late 2003.
- As costs (fuel, tyres, additional labour costs, etc) are relatively fixed once the routes are operating, the services will incur losses during initial start up period.
- Ticket revenues are based upon market research of the routes. This has identified current ticket prices and the number of passengers travelling on the routes.
- It is assumed that the new service will attract 30% of all passengers using the corridors by month 6. Brand loyalty is minimal in this industry.

**Cardiff**

- The Cardiff routes are all infill. The gross margin is therefore higher than phase 1 or Llanelli as most of the fixed costs covered by the contracted school routes.
- The routes are expected to incur losses until month 4.”

181. These bullet points make reference, or appear to make reference, to underlying data. Thus, the fourth bullet refers to “market research”. Mr Fowles was asked about this (Transcript Day 2, pages 43 to 44):

**“Q (Mr West)**                      What does that reference to market research – what document does that refer to?

**A (Mr Fowles)**                      It doesn’t refer to any document, it’s research that we did ourselves.

**Q (Mr West)**                      So one can’t find that written down anywhere?

**A (Mr Fowles)**                      It would have been submitted to PwC at the time.”

Mr Harrison also confirmed that PwC simply worked from information provided by 2 Travel (Transcript Day 4, page 126).

182. The fifth bullet refers to an assumption that the new service would attract 30% of all passengers. Again, this was information that was “provided by ourselves on the basis of what have been achieved in other areas, Neath in particular” (Transcript Day 2, page 44 (evidence of Mr Fowles)). Mr Harrison confirmed that he took the 30% figure from Mr Fowles (Transcript Day 4, pages 111 to 112).

183. The revenue projections for the Cardiff in-fill routes are not further expanded upon in the report, and it is unclear how they have been derived.

184. Mr Harrison simply relied upon what he was told (Transcript Day 4, page 114). In no sense did these figures bear the *imprimatur* of PwC. PwC simply transcribed them.

185. Essentially, three parameters must have been used to derive these projections, namely:

(1) Number of bus journeys per week.

(2) Number of passengers for each journey.

(3) Fares paid by each such passenger.

186. The report says nothing about any of these parameters. However:

- (1) We were provided with copies of the timetables of the five routes that 2 Travel intended to operate in Cardiff. These routes are considered more fully below, but for present purposes it is sufficient to note that these timetables disclose that 2 Travel intended 18 journeys into Cardiff and 18 journeys out of Cardiff on each route per day. (This is generous to 2 Travel, because it includes journeys that could only be undertaken on non-school days: on “in-fill” days, when the schools were open, the number of daily journeys would be less.) As we have seen, it was intended that each route would be served by four buses. Thus, each bus on each route would make 9 journeys a day (i.e.  $(18 \times 2)/4 = 9$ ), and 45 in a five day week (i.e.  $9 \times 5 = 45$ ).
- (2) Table 5 on page 22 of the OFT Decision identifies the fares charged by 2 Travel. Naturally, the level of these fares varied according to how far the passenger was travelling (a zonal system was used, comprising 4 zones), whether the passenger was an adult or a child, and whether the journey was one-way or return. 2 Travel’s ticket prices, as found by the OFT, were as follows:

Zone	Adult single	Adult return	Child single	Child return
1	50p	80p	30p	50p
2	80p	130p	50p	80p
3	100p	160p	70p	110p
4	120p	190p	80p	130p

Clearly, the passenger who would generate the most revenue for 2 Travel would be the Zone 4 adult single passenger, who would pay £1.20 for his ticket.

- (3) Assuming that 2 Travel based its projections on this price, it is clear that in order to generate revenue of £1,920 per week per bus, that bus would have to transport 1,600 passengers. Given the 45 journeys per week undertaken by each bus, this is just over 35 passengers per journey. Given

that the buses used by 2 Travel generally had a maximum (seated) capacity of 35 passengers, although some double-decker buses were also used (Transcript Day 5, page 54), this is obviously unrealistic.

- (4) Of course, as we have noted, not every passenger would travel for the maximum distance (i.e. not every passenger goes to and/or from Zone 4). Many passengers will get on in the middle of the bus's journey, and many will get off. But, of course, this will have a negative effect on revenue. A Zone 4 passenger pays £1.20; a Zone 2 passenger pays 80p.
- (5) In Table 1 of his report (at paragraph 5.2.3), Mr Good set out the average full fare revenue (thus, children and other lower charged passengers are ignored) that 2 Travel actually generated, on a monthly basis, between April 2004 and September 2004 – data for subsequent months not being available. Averaging these monthly averages itself gives an average of revenue per passenger of 81.35p. On this basis (which is still optimistic in favour of 2 Travel, because it ignores passengers other than full fare paying passengers), in order to generate revenue of £1,920 per week per bus, 2 Travel would need to transport 2,360 passengers, i.e. 52 passengers per bus journey.
- (6) Cardiff Bus did its own calculations, and derived an average passenger revenue of 71p, to take account of concessionary passengers, in respect of whom the revenue to 2 Travel would only be 73.69% of the full fare (Transcript Day 1, page 91 (evidence of Mr Clayton Jones)). On this basis, to generate revenue of £1,920 per week per bus, 2 Travel would need to transport 2,704 passengers, i.e. 60 passengers per bus journey.
- (7) Cardiff Bus also sought to explain the figure of £1,920 by calculating a revenue figure for all of 2 Travel's Cardiff buses per week (i.e. for all 20), calculating all the journeys that these buses would undertake in a school week (i.e. fewer than the number calculated above, because there would be no non-school days), and so assessing how many passengers each bus would have to carry to produce a weekly revenue of £1,920. Cardiff Bus's figure was just over 71 passengers per bus journey. (This was put in cross-

examination to Mr Harrison, who felt unable to comment: Transcript Day 4, page 132.)

187. As we have noted, the parameters used to generate a per bus per week revenue projection of £1,920 are not stated in the report, and no-one was able to assist us in evidence. But, whatever they were, our attempts to justify this figure on the basis of realistic assumptions have failed. We conclude that the figure was hopelessly over-optimistic.

(vi) *Sales growth*

188. Page 18 of the report contains a section dealing with sales growth, which notes:

- “● There is forecast to be little growth from the existing bus business. The growth is forecast to arise from the new routes described above.
- During 2005 the 20 infill buses in Cardiff are expected to account for 50% of the growth.”

189. Thus, turnover for the new routes in Cardiff were projected at £473,000 for the year to August 2004 and £1,588,000 for the year to August 2005. It is impossible to understand how these figures have been derived. It is, however, worth noting that they bear no relation to the weekly, per bus, revenue figures considered above. Such figures – if taken at face value – would produce an annual turnover of £1,996,800 (i.e. £1,920 per bus per week x 20 buses x 52 weeks = £1,996,800). The figures in the document appear now internally inconsistent. If they were justifiable at the time – and we doubt it – then that justification has been lost in the mists of time.

(vii) *Working capital requirement*

190. In order to implement this strategy, additional working capital of £600,000 was required.

**(20) Reaching accommodation with the Inland Revenue**

191. As was noted in the February 2004 PwC Report, 2 Travel owed £500,000 to the Inland Revenue.

192. In late-February 2004, 2 Travel reached an agreement with the Inland Revenue that this indebtedness should be paid off in instalments, with a first payment of £50,000 due by 20 March 2004, with subsequent instalments of £20,000/month. The agreement was subject to payment of all other tax on demand, and upon compliance with this payment schedule. The terms of this agreement were set out in a letter from the Inland Revenue dated 20 February 2004.

**(21) Obtaining additional working capital**

193. The additional working capital identified as necessary by PwC (see paragraph 190 above) of £600,000 was obtained by 2 Travel from the company's bankers, Barclays, in April 2004. Thus, 2 Travel's overdraft increased from £87,914 (see paragraph 164 above, which gives the figure as at 31 August 2003 – we do not know how this figure varied over time) by a further £600,000, plus borrowing of £330,000 in relation to the Swansea Depot.

194. This lending was backed by guarantees provided by Mr Francis and Mr Short in the amount of £675,000. These guarantees were provided on or about 2 April 2004, and were provided in exchange for security in the form of a second legal charge over the Swansea property, the first legal charge presumably securing the £330,000 borrowing taken out to acquire the property in the first place.

**VI. THE FACTS: EVENTS SUBSEQUENT TO 19 APRIL 2004**

**(1) Preparation for the provision of Cardiff services**

195. Operations in Cardiff were not well-planned or prepared for by 2 Travel. In an undated memo – which must, however, have been written in June 2003 – Mr Waters said as follows:

“With reference to your memo of 12th June 2003 I would comment as follows:

- 1) The decision to set up Cardiff was taken over a year ago and the full implications should have been considered then. Even at that time a schools base of 14 vehicles was planned and the maintenance needs of the operation should have been considered and casted into tenders.
- 2) The current site was found and although totally inadequate a lease was entered into at not inconsiderable cost. We now have to get out of this site as quickly as possible (and explain to the plc board why we are doing this) and find an alternative and hopefully cheaper alternative.

- 3) Until an alternative premises can be found there is no solution to the no parts, no maintenance facility problem.”

196. In late 2003 or early 2004, a second site was opened by 2 Travel, about half-a-mile from the depot, which had a maintenance facility (Transcript Day 5, page 102 (evidence of Mr Fowles Jnr)).

197. On 9 March 2004, Mr Fowles Jnr wrote the following internal 2 Travel memo:

“I wrote to you all in February highlighting items that needed to be addressed in order for our new Cardiff commercial registration to be successful. To date not one point has been addressed.

Our commercial registrations commence in approximately five weeks and we have **nothing** in place at the Cardiff depot.

- Ticket Machines/Depot reader need to be purchased (at least 15 machines are needed)
- Ticket rolls need to be purchased
- Vehicles need to be purchased (approximately 10 are needed – examples of what is available are attached)
- Said vehicles need to be painted
- Destination/Number blinds need to be purchased

The structure at the depot needs addressing:

- There is no electricity or mains water at the new site
- There is not enough office space at either the old or the new site
- An additional controller needs to be appointed. I have spoken to one gentleman and he is interested in the post
- The depot needs approximately 8 drivers. Gurkha’s [*sic*] were promised but this has not yet materialised.

I was instructed [*sic*] to register these commercial routes as soon as possible. This was done and I am now being held back because of reasons beyond my control. Unless the problem is addressed quickly I will not accept any blame for the failure of these services to operate correctly in the future.”

Similar problems were observed by Mr Fowles Jnr in May 2004 when attempting to register commercial registrations in the Newport/Cwmbran areas.

198. There was a further memo – dated 23 March 2004 – which detailed what steps had been taken in relation to the Cardiff depot, and what remained to be done:

“I am still awaiting clearance to purchase ticket machines, destination blinds and vehicles and am further awaiting permission to install mains water and electric at the new depot.

We are due to commence services on 19<sup>th</sup> April 2004. This allows us approximately 18 working days in which to achieve an awful lot.”

199. On 11 May 2004, after the commencement of the 2 Travel In-Fill Service – Mr Fowles Jnr wrote the following memo:

“I feel it my duty to inform you all in writing of the problems currently faced with our operation in Cardiff.

I hope that you will all agree that with the resource that has been provided for the depot what has been achieved to date has been remarkable.

However we have recently been given notice on one of the school contracts by Cardiff City Council and my fear is that we will start to lose one or two more if certain issues are not acted upon. You will be aware that, politically, we are not popular in the Cardiff area and the Local Authority is looking for the slightest mistake on our part to issue final warnings etc.

Our main problem at the depot is lack of resource – both drivers and engineering.

We were initially promised Gurkhas would be made available for the depot but this now looks increasingly unlikely despite housing being found for them at extremely competitive prices.

Lack of drivers is a major barrier to increasing revenue at the depot as we are losing mileage on a daily basis.

We do not have a coherent plan for going forward – we are still no nearer to getting a firm depot sorted out and until this is done we cannot move forward. I have been told to wait on getting water and electric into the depot due to high costs and cannot maintain vehicles effectively until this issue is resolved. This is leading to increased vehicle breakdowns (which was the reason for the termination of the above contract).

If we wish the depot to become a success then firm and decisive action needs to be taken, and quickly – our actions to date, however, lead me to believe that we are not all pulling in the same direction for those depots east of Swansea.”

Significantly, this memo does not mention the Infringement.

200. Mr Fowles Jnr was cross-examined about these documents, and sought to downplay their significance (“I had every assurance I needed about the time we

started operations”: Transcript Day 5, page 119; “I wouldn’t say it was to do with mains water or electricity”: Transcript Day 5, page 120; “I wouldn’t have thought it was wise to put trained Gurkhas on the streets of Cardiff, for some of the actions that were being undertaken by Cardiff Bus at the time”: Transcript Day 5, page 121).

201. In this case we prefer to rely upon the compelling contemporary documents, rather than *ex post facto* explanations of them.

**(2) Commencement of the 2 Travel In-Fill Service in Cardiff**

202. 2 Travel began its In-Fill Service in Cardiff on 19 April 2004 (Transcript Day 2, pages 54 to 55 (evidence of Mr Fowles)). These comprised four routes into and out of Cardiff City Centre. The four routes in question were:

- (1) Llanrumney to Cardiff City Centre (and back): “2 Travel Route No 250”.
- (2) St Mellons to Cardiff City Centre (and back): “2 Travel Route No 245”.
- (3) Pentrebanne to Cardiff City Centre (and back): “2 Travel Route No 262”.
- (4) Ely to Cardiff City Centre (and back): “2 Travel Route No 217”.

2 Travel registered a fifth service with the Traffic Commissioner (Pentwyn to Cardiff City Centre: “2 Travel Route No 258”). Mr Fowles stated (Transcript Day 1, page 127) that “[i]t was always envisaged it would start as the others did. However, time constraints against us with bringing in driving staff meant that we had to notify the Traffic Commissioner that we wouldn’t start it until November”. In the event, this service never operated.

203. The Cardiff Bus White Service commenced at the same time. In response to 2 Travel’s services, Cardiff Bus introduced the following additional services on the same four routes:

- (1) Llanrumney to Cardiff City Centre (and back): “White Service Route No 150”.

- (2) St Mellons to Cardiff City Centre (and back): “White Service Route No 144”.
- (3) Pentrebane to Cardiff City Centre (and back): “White Service Route No 162”.
- (4) Ely to Cardiff City Centre (and back): “White Service Route No 117”.

Cardiff Bus registered a fifth service with the Traffic Commissioner (Pentwyn to Cardiff City Centre: “White Service Route No 258”). Although this service operated initially, Cardiff Bus scaled back operations on this route when it became clear that 2 Travel were not running a service on this route (see paragraph 539 below). For this reason, Cardiff Bus’s passenger numbers and revenues on White Service Route No 258 were far lower than passenger numbers and the revenues on the other four routes operated by it.

204. At all material times, Cardiff Bus also offered liveried services on these routes (“Cardiff Bus Liveried Service” or “Liveried Service”). These services operated both before the 2 Travel In-Fill Service and Cardiff Bus White Service began, and after these services ceased:

- (1) Llanrumney to Cardiff City Centre (and back): “Liveried Service Route Nos 49 and 50”.
- (2) St Mellons to Cardiff City Centre (and back): “Liveried Service Route Nos 44 and 45”.
- (3) Pentrebane to Cardiff City Centre (and back): “Liveried Service Route Nos 61 and 62”.
- (4) Ely to Cardiff City Centre (and back): “Liveried Service Route No 17”.

Cardiff Bus also operated a service from Pentwyn to Cardiff City Centre (and back) – “Liveried Service Route Nos 57 and 58”.

205. All of the four routes operated to Cardiff City Centre, with different starting points/destinations. However, they did have common stops. Additionally, these four routes overlapped with other Liveried Services (i.e. in addition to those

described in paragraph 204 above), the closer they got to the City Centre. As is stated in paragraph 174 of Cardiff Bus's written opening submissions:

"...the four Cardiff routes partially overlap with other Cardiff Bus routes. Any particular bus route into Cardiff city centre overlaps with an increasing number of other bus routes into the city centre from other departure points, the closer to the city centre one is on the route..."

206. Where there was such an overlap, a potential passenger had more choice of bus service/vehicle.

**(3) 2 Travel's complaints regarding the Cardiff Bus White Service**

207. 2 Travel complained about the Cardiff Bus White Service on the day operations began – 19 April 2004 – in an undated letter to the OFT (but apparently sent on that day). A follow-up letter, dated 20 April 2004, was also sent by 2 Travel to the OFT. Neither letter appears to have been copied to Cardiff Bus.

208. The OFT wrote for further information on 27 April 2004, a request repeated in letters dated 15 June and 10 August 2004. Surprisingly, all of these letters went unanswered by 2 Travel.

209. In a letter dated 7 May 2004, 2 Travel's solicitors (Darwin Gray) wrote to Cardiff Bus. The letter focuses much more on the manner of driving of individual buses, rather than in making a suggestion that operating the White Service was itself an infringement of competition law, but the letter does say that 2 Travel regarded Cardiff Bus's conduct as a "serious matter" which, amongst other things, had been referred to the OFT. The letter was addressed to the "Managing Director", and it was Mr Brown who responded (in a letter dated 10 May 2004) refuting the allegations.

**(5) Correspondence from the Office of the Traffic Commissioner**

210. By a letter dated 8 June 2004, the Office of the Traffic Commissioner wrote to Cardiff Bus enclosing "copies of both reports and correspondence in respect of a complaint made by the operator 2 Travel PLC concerning alleged anti-competitive behaviour that they say they are experiencing on various routes,

which you and they appear to operate”. The allegations, again, appear to have focused more on the conduct of individual buses. The letter noted:

“The Traffic Commissioner has requested that you look into these allegations and advise us of your findings, as the Traffic Commissioner views anti-competitive issues seriously.”

211. Mr Brown, responding by a letter dated 17 June 2004, criticised 2 Travel strongly, and maintained Cardiff Bus’s innocence. He said:

“We are grateful for the opportunity to comment on the allegations. As a Company that is seeking to work to the highest standards in our industry, we have taken the complaints made very seriously, and conducted a thorough investigation. I am pleased to attach the detailed response received from our Commercial Manager (Appendix A), which you will see totally refutes any suggestion that we are acting anti-competitively. In the majority of cases the complaints appear to emanate from a misunderstanding of our registrations, and in most other cases arise from a mis-recording by their staff, particularly as evidenced by a comparison with factual records obtained from Cardiff County Council’s GPS Vehicle Location Monitoring System. Not surprisingly, given the number of observations made, there are one or two points where we have felt that action is required, and this has already been taken.”

**(6) The VOSA monitoring exercise in Cardiff**

212. In June 2004, as a result of the 2 Travel complaint, VOSA monitored the performance of 2 Travel and Cardiff Bus services. VOSA’s letter to the Traffic Commissioner (Mr Dixon) stated:

“2 Travel Group plc have complained to The Office of The Traffic Commissioner of experiencing anti-competitive behaviour from Cardiff Bus on routes that they both operate.

As a result of a request from Traffic Area Office (TAO), monitoring exercises have been carried out on services operated by both 2 Travel and Cardiff Bus.

These exercises were carried out over a 12 day period at various locations in Cardiff between 15.06.04 and 16.07.04. Monitoring reports consisting of 31 pages were completed and these are enclosed. [These reports were not, however, before the Tribunal.] They show all factual findings and results.

A total of **760** departures were observed.

Of these, **627** departures related to Cardiff Bus and **133** to 2 Travel.

Of the **627** observations on Cardiff Bus services –

**1** departure failed to operate.

**1** departure operated late.

**Total punctuality 99.68%**

Of the **133** observations on 2 Travel services –

**91** departures failed to operate (**68.42%**).

**24** departures operated late (**18.05%**).

**11** departures operated early (**8.27%**).

**Total punctuality 5.26%**

In addition to these 133 observations, a further **34** were seen to be operating off their registered route.”

213. VOSA sent “irregularity letters” to both 2 Travel and Cardiff Bus. Although both provided a formal response, neither operator actually queried the observations made.

214. VOSA’s letter continued:

“Also enclosed for your information are comparisons between departure times of 2 Travel and Cardiff Bus ‘no frills’ services on routes they both operate, i.e. Ely, Pentreban and St Mellons.

Although no anti-competitive behaviour was witnessed by ourselves, the comparisons have been compiled in order to show the closeness of the ‘no frills’ and 2 Travel services. All services departing within a minute of each other are highlighted in red on the reports.

Prior to the monitoring exercises commencing we requested registered timetables from the TAO, in particular timetables referring to the Cardiff Bus ‘no frills’ services 117, 144 and 162.

Timetables were forwarded to us, however no details were supplied specifically relating to the Cardiff Bus ‘no frills’ services 117, [144] and 162.

Due to this we again contacted TAO and were then supplied with a copy of a letter between Cardiff Bus and Mr Michael Douglas of TAO dated 16.04.04, (annex 4) from which we concluded that there was no reason to suspect that the ‘no frills’ services were not registered and were in fact part of existing registrations.”

215. The VOSA figures in our judgement should be treated with a degree of caution:

- (1) In the first place, all the Tribunal had before it were VOSA's conclusions, and not the working documents supporting those conclusions (a point made with some force by Mr Clayton Jones: Transcript Day 1, pages 103 to 105).
- (2) Secondly, whereas 2 Travel's services operated to a timetable, Cardiff Bus's services were registered as "frequent" services (i.e. operating 6 services an hour), and there was (for this reason) no need for a published timetable. Mr Fowles was vehement in his criticism of this: he considered that the Cardiff Bus White Service could not and should not have been registered as "frequent": (Transcript Day 2, pages 59 to 61; nevertheless, the registration appears to have been correct.) Thus, the criteria being applied to Cardiff Bus's services were different to those being applied to 2 Travel's services (Transcript Day 1, pages 104 to 108 and 123 (evidence of Mr Clayton Jones)). Essentially, services operating to a timetable would be judged as early if they left more than one minute early, and late if they left more than 5 minutes late (Transcript Day 1, page 123 (evidence of Mr Clayton Jones); page 151 (evidence of Mr Fowles)).
- (3) Asked by Mr West whether VOSA's figures amounted to a "pretty damning indictment...of the standard of service provided by 2 Travel on these routes, Mr Fowles' response was (Transcript Day 2, pages 56 to 57):

"If you observe the figures as they are, yes, it would appear so. However, monitoring at that time was not a very precise science. It had only just been started by the Traffic Commissioners. Our vehicles were being predated by the white services. The white services hadn't been registered in any way with the Traffic Commissioner. We felt them to be not legal. They would follow our buses, am and pm, they would follow them all day. It was felt by a lot of our drivers, to start with, that it would be sorted. It wasn't sorted. June and July is almost three months after it had started. The Traffic Commissioner didn't decide to send anybody out to look at it for that length of time, by which time I think both companies were not adhering to some of the routes that they were supposed to.

Drivers would drop short, they wouldn't complete the journey, in an attempt to get back on the next journey in front of the white bus, try and shake the white bus off. So I think it all depends where the monitors were standing, where their observations were made. I don't think they say where their observations were made. But, for instance, if they were made in Cardiff City

centre, then quite clearly, if a bus was meant to come down St Mary's Street and on to Wood Street, the driver may have decided to come down and do the turn, ready to go – to go back, missed the last stop, particularly if he didn't have any passengers on board. I think by other means of measurement, and some of Cardiff's own disclosures, I believe, indicate that we were operating up to 70 per cent of our services."

216. Cautious as we consider we should be about statistics that may not fairly be comparable, nevertheless we conclude that VOSA's observations of 2 Travel's performance, viewed on their own (rather than in comparison with those for Cardiff Bus), show quite poor service.

**(7) 2 Travel's board meeting of 25 June 2004**

217. A meeting of the 2 Travel board was scheduled for 25 June 2004. In advance of that meeting, papers were circulated. This information caused concern on the part of 2 Travel's nomad, Mr Tony Rawlinson. On 25 June 2004, Mr Rawlinson faxed Mr Fowles a message to the following effect:

"Reading through the pack I am extremely concerned about the losses and the dire state of the balance sheet where debt levels have risen to £5.46m including creditors, many of which I am sure will be terribly overdue. Given that these figures were at 30 April and that you made a cash loss of over £100k in April I can only assume the position is now much worse.

Could you please meet up urgently next week to discuss the position. I would like Graham Spooner to attend the meeting also.

I think the time has now come for some tough decisions."

Mr Graham Spooner was from Mentor, the corporate director representing the interests of VCT.

218. On 25 June 2004, Mr Rawlinson sent an email to Mr Waters, referring to the "clearly very disappointing results", and asking for certain information. One of the points made by Mr Rawlinson was as follows:

"I am very concerned about your cash position. You appear to have missed interest paid out of your cash flow figures and you have included the whole of your new overdraft facility in cash inflows the day you got the overdraft! You started the year with a £300k overdraft, you have spent further cash in the year of £540k and your stock and debtor position has worsened by £190k giving a total of £1.03 million of

deficit as at 30 April. This has been financed by (yet again) increasing your creditors by £280k and loans secured on the property of £670k. It looks to me therefore that you have already used up you [*sic*] new bank facility and are now racking up the creditors to finance the business. There is no information in the pack showing the amount of the facility currently used or he [*sic*] amount unutilised. If the overdraft was used the day you got it this has serious implications and I would like to know how the business has been financed since then. Please could you let me have these figures as soon as possible and let me have your comments on my analysis.”

219. This significance of this was pointed out with some cogency in Cardiff Bus’s written opening submissions:

“89. What the reference to the overdraft having been used on the day it was obtained appears to mean is that the increased funding provided by Barclays in exchange for the personal guarantees from Messrs Short and Francis, which had been intended to provide the working capital required for the development of the new routes as set out in the PWC report, had instead all been used up immediately in paying the outstanding creditors. Those loans could not therefore be used to provide the working capital which PWC had identified as being needed for the development of the new routes.

90. It is important to recognise that the infringement had no effect at all upon the company’s financial position as discussed in these messages. The Cardiff in-fill services only started on 19 April 2004, whilst the figures under discussion are as at 30 April. Further, as explained above, under the PWC report, the Cardiff routes were expected to be loss-making for the first four months of their operation in any event. Thus, even if the routes had performed as expected, there would have been no profits from them at this date.”

220. Mr Fowles accepted that the bank facility was drawn down to the extent of £550,000 immediately, and was fully drawn by August 2004 (Transcript Day 2, page 65).

221. In a note dated 2 July 2004, Mr Spooner gave his summary of the 2 Travel Board meeting which had taken place on 25 June 2004. He noted:

- (1) That Mr Waters had resigned.
- (2) That 2 Travel had received an offer from Redrow for the Swansea Depot at £500 an acre.
- (3) That 2 Travel’s trading continued to disappoint.
- (4) That there were continuing cash flow problems, with about £550,000 of the new bank facility of £675,000 being drawn down to date.

**(8) Further memo from Mr Waters**

222. On 22 July 2004, Mr Waters wrote a memo to Mr Francis, summarising the main issues which he (Mr Waters) considered were causing considerable problems in the maintenance of complete and accurate financial records. These were:

“Cheque Book payments not being properly recorded with stubs not being filled in.

Payments being made without full supporting documents.

Round sum payments being made with no allocations made.

Payments being made by third parties with no records being kept or advised to accounts.

Cash payments made with no advice to accounts department.

Invoices not being received or passed to accounts department.

Acceptance of “faxed” and “copy” invoices.

High staff turnover in accounts department, lack of training and systems familiarisation.

Staff shortages.

No formal accounts procedures.

Over reliance on “cash”.

Lack of Working Capital.

Over reliance on Factoring.

Depots lack of administrative staff.

Failures to properly record cash receipts.

Incorrect invoicing.

Failure to follow systems introduced.

Continual Fire fighting, no strategic planning.

Autocratic management style.

Senior management interference.

Fear of the truth.

Company culture.

Many of these can be addressed quite quickly and will prevent future problems occurring. However, it must be recognised that it will take time and resource to clear up the present position. Similar exercises have been carried out in the past and reliance has been made on information supplied to the accounts department, which has then subsequently proved to be incorrect. This has resulted in benefits taken having to be reversed and extra work all round. When clean positions have been reached then subsequent actions taken have negated all the hard work and effort expended. Hopefully this will not be the situation after this clean up exercise is completed.”

223. This document was put to Mr Fowles (Transcript Day 2, pages 67 to 68):

- “Q (Mr West) Many of these problems had been identified by Mr Waters at the time he arrived at the company, hadn’t they?
- A (Mr Fowles) Yes, certainly.
- Q (Mr West) Two years later, no progress appears to have been made?
- A (Mr Fowles) Most of them were under the remit of Mr Waters.
- Q (Mr West) Given these difficulties, it would be almost impossible for the company to keep reliable accounts?
- A (Mr Fowles) As he says in his next line, many of these can be addressed quite quickly. They were small systems failures. Chequebook payments not being properly recorded with stubs. I mean, it’s a memo. It’s his department.”

We do not accept Mr Fowles’ suggestion that it was Mr Waters who had failed to address these problems within 2 Travel. The documentary evidence suggests quite the contrary. But in the end, precisely why 2 Travel was a poorly run and administered company does not matter; what matters, is that (as a matter of fact) it was poorly run and administered. The potential for 2 Travel to meet even its basic statutory accounting obligations was diminished.

**(9) The June 2004 PwC Report**

224. In a further report – undated and apparently only existing in draft, but clearly written in the summer of 2004 (Transcript Day 2, page 66 (evidence of Mr Fowles)) – PwC provided summary draft financial projections for 2 Travel for the period to 31 August 2005. Looking at the figures in the documents, it appears to us that the document was written in June 2004, and we shall refer to the report as the “June 2004 PwC Report”.

225. According to Mr Harrison, this draft report was rather different from the February 2004 PwC Report (Transcript Day 4, page 65):

“...But if you look at the nature of the report, the report in 2004 [referring to the June 2004 PwC Report] is marked as a draft. I’m not sure if it was finalised in those forms. But it also, it doesn’t have the same degree of commentary and so on [as the February 2004 PwC Report]. This was to do with the preparation of a financial model in order to model financial projections for the business. So that was the purpose of that second report.”

226. The June 2004 PwC Report was prepared by a Ms Cheryl Williams, who did financial modelling (Transcript Day 4, page 65 (evidence of Mr Harrison)). Ms Williams would have spent a great deal of time at the company’s premises to do this, and Mr Harrison recollected (Transcript Day 4, page 66):

“The company, by the time we were talking about her involvement, was clearly under pressure, with backlogging creditors and creditor payments, so that’s the feedback that we had at the time, that they were under financial pressure.”

227. The June 2004 Report:

- (1) Projected a loss for the 3 months to August 2004 of £315,000;
- (2) Projected a loss for September 2004 of £7,000;
- (3) Projected a profit for October 2004 of £74,000, and a profit for the year ending August 2005 of (what appears to be – the document is very unclear) £647,000.

228. Mr Fowles, when this document was put to him, did not consider the projections over-optimistic (Transcript Day 2, page 69):

**“Q (Mr West)** So yet again, some projections for the future, which don’t appear to relate in any way to the company’s actual performance in the past?

**A (Mr Fowles)** I disagree. We had been awarded quite a lot of contracts from the September and the bus revenues were expected to flow in, as we’ve said, after the initial four month period.”

229. PwC projected a maximum overdraft requirement of £937,000 in April 2005:

“On the basis of the assumptions used, the peak overdraft requirement is projected to be £927k in April 2005.”

230. It is important to be clear about what this figure means. As we have described (see paragraph 221 above), 2 Travel’s overall borrowing was around £675,000, most of which had been drawn down immediately, and all of which had been utilised by August 2004 (see paragraph 233 below). The projected cash flows set out in the June 2004 were as follows:

Period	Funding requirement at beginning of period (i.e. the beginning of the month)	Funding requirement at end of period (i.e. the end of the month)
Jun 2004	£173,000	£277,000
Jul 2004	£277,000	£339,000
Aug 2004	£339,000	£579,000
Sep 2004	£579,000	£664,000
Oct 2004	£664,000	£690,000
Nov 2004	£690,000	£698,000
Dec 2004	£698,000	£743,000
Jan 2005	£743,000	£785,000
Feb 2005	£785,000	£794,000
Mar 2005	£794,000	£905,000
Apr 2005	£905,000	£937,000

231. It is clear from these figures that PwC was projecting additional funding requirements, over and above what 2 Travel had already borrowed. We infer – from the first period of June 2004 – that 2 Travel had actual funding requirements of around £173,000 at about this time, and it is clear that these funding requirements were then projected to increase for a period of time, albeit that these requirements were then projected to fall after a “peak” in April 2005. 2 Travel did not, immediately, need £937,000 in additional funding: it needed about a third of that amount.

## **(10) The August 2004 action plan**

232. In the light of these financial difficulties, an action plan was agreed with Mr Rawlinson. It was decided to make certain changes to 2 Travel's board of directors. These were set out in a paper dated August 2004. Mr Fowles moved from his role as managing director to operations director. Mr Francis – previously not a director, but company secretary – joined the board as director with responsibility for regulation. Mr Waters would leave as finance director in September 2004 and pending his replacement, PwC would assist with the financial reporting side of the business.

233. The paper also commented upon the financial position of 2 Travel:

“5. Cashflow continues to be critical and Messrs Francis and Short have agreed to underwrite additional bank facilities (of up to £500k) to meet the shortfall identified by PwC (June management accounts and projections due on 4 August for the 2TC Board to review on 6/8/04). 2TC is seeking to do deals with its creditors, including DC3.

### **Trading**

The latest figures available at present are the 9 months to 31 May 2004, as follows:

<b>£000s</b>	<b>Actual</b>	<b>Budget</b>
Turnover	3644	4711
Operating Loss	(198)	193
Net Loss	(338)	(109)
Cash Generation	(122)	77

2TC made an operating profit of £36k (£8k NPBT) in May.

The delayed (18) bus routes due to a shortage of drivers has been addressed by the recruitment of 21 former Gurkhas who have all now completed their driver training.

### **Cash/Balance Sheet**

The cash position remains tight partly due to poor debtors collection by the factors. Creditors may be overstated due to poor financial controls.

The £675k bank facility (guaranteed by Messrs Francis and Short) is fully drawn.

Net assets have been reduced to £641k (including the freehold at Swansea at £850k) by trading losses.

PAYE arrears are a cause for concern (now £794k) as the monthly payments schedule has not been adhered to by 2TC.

### **Swansea Property**

A joint venture with the local authority and Redrow for a housing development is the most likely way forward. Alternatively, Messrs Short and Francis will seek to buy the property (present value c. £1.5m as compared to potential value of c. £3m). King Sturge have been instructed to carry out independent valuation(s) based on existing use and housing consent being obtained.

### **Summary**

I have been working closely with the Nomad, the Chairman and executive directors to seek a solution to the current unacceptable position. I will update you following the board meeting on 6 August 2004 which will need to establish the extent of the current financial position and resolve the way(s) forward to address the working capital shortfall identified by PwC.”

## **(11) Mr Francis’ and Mr Short’s offer**

234. Further to this, in a letter dated 12 August 2004, Mr Francis and Mr Short wrote to 2 Travel in the following terms:

“Further to our discussions I am writing to confirm that Nigel Short and I are today making available to 2 Travel Group Plc “the Company” an unsecured loan (in the short term i.e. 28 days) in the sum of £937,000 in order to enable the Company to meet its anticipated working capital requirement as shown in the recent PWC working capital projection.

The loan is being made on the condition that:

- 1) The company provides Nigel and myself with a legal charge over its property and depot at Upper Bank Swansea and any land acquired from the local authority for a new access such legal charge to be on normal commercial terms.
- 2) The company provides Nigel and myself with an option to acquire the property and depot at Upper Bank (referred to above) in addition to any land acquired from the local authority for a new access. The option price will be current market value as of today’s date to be assessed by King Sturge [*sic*] (such value not to be less than £2m) plus 20% [of] any profit realised on a resale. This option will not be exercisable within 3 years 9 months of this letter unless an act of default occurs.
- 3) The company enters into the legal charge and option referred to in 1 and 2 above within 28 days of this letter.

On the basis that this is agreed, our facility is available for draw down by the Company as from today in line with the PWC projections.

We understand that City Financial Associates Limited will be referring to this letter in their forthcoming discussions with the AIM team.”

235. The board approved this proposal (Day 2, page 73 (evidence of Mr Fowles)), but the formalities relating to this funding were not completed immediately. As will be seen, Mr Francis and Mr Short executed two further guarantees, guaranteeing the liabilities of 2 Travel to the bank, enabling 2 Travel to borrow further:

(1) First, a guarantee in the amount of £300,000, done in September 2004 (see paragraph 250 below).

(2) Secondly, a guarantee in the amount of £650,000, done in October 2004 (see paragraph 259 below).

As will be seen, neither of these guarantees were gratuitously offered by Mr Francis and Mr Short.

## **(12) The Inland Revenue’s petition**

236. As noted in the August 2004 paper to which we refer at paragraphs 232 to 233 above, the Inland Revenue was seeking payment of back taxes in the amount of £464,000, the payment schedule that had been agreed with it not having been complied with. A winding up petition was served in August 2004 (Transcript Day 2, page 70 (evidence of Mr Fowles); Transcript Day 2, page 83 (evidence of Mr Fowles)), and 2 Travel paid £465,000 in settlement of the demand (Transcript Day 3, pages 113 to 114 (evidence of Mr Francis)).

237. Mr Fowles was absolutely confident that the Inland Revenue was paid by himself, Mr Short and Mr Francis (Transcript Day 2, page 71), and Mr Francis said it came from himself and Mr Short (Transcript Day 3, page 115).

238. Unfortunately, even on this significant financial question, 2 Travel’s financial records are not clear. Given that this was an AIM listed company, subject to London Stock Exchange rules, this is surprising. The best evidence, we find, is contained in a transcript of various exchanges between Mr Francis (representing 2 Travel) and the Transport Commissioner and a financial assessor assisting the

Commissioner (a Mr Callaghan). The exchanges occurred on 5 October 2004 during the Traffic Commissioner's assessment of 2 Travel's financial standing (referred to in paragraphs 272 to 273 below). At pages 11 to 12 of the transcript, we find the following exchange:

**“Mr Callaghan** Just going back to the PAYE NI, the letter from Fordham Warren (?) shows a payment of £465,000. Can I ask where that money came from?

**Mr Francis** Yes, it came from Mr Short and myself, sir.

**Mr Callaghan** Is it an unsecured loan to the company at the moment?

**Mr Francis** It is, which we've guaranteed on repayment date.

**Mr Callaghan** So you actually put the cash into the Company?

**Mr Francis** £150,000 was put in immediately, sir and £300,000 by way of a loan.

**Traffic Commissioner** So the £165,000 you say was put in, was that a gift or...?

**Mr Francis** No, Sir, no its a loan.

**Traffic Commissioner** Sorry, I thought you said £300,000 was a loan.

**Mr Francis** Yeah, it's all a loan, Sir.

**Traffic Commissioner** It was all a loan.

**Mr Francis** We have a charge against all of it.”

239. This is not, unfortunately, the clearest of exchanges. We consider that it is most likely that the Inland Revenue was paid from funds held by 2 Travel advanced to it by the bank, and guaranteed by Mr Francis and Mr Short. Whether these were the funds advanced as a result of the first guarantee (in April 2004: see paragraph 194 above) in the amount of £675,000 or one, other or both of the guarantees we have referenced in paragraph 235 above (and consider in greater detail below) is impossible to say, and does not matter. What we do find, however, is that the payment to the Inland Revenue was met out of these funds, and not out of further funds advanced by Mr Fowles, Mr Francis or Mr Short. The contemporary documentation does not support the existence of such additional lending.

**(13) The announcement to the AIM**

240. On 13 August 2004, 2 Travel made the following announcement to the AIM:

“Directors’ loan

The Board of 2 Travel Group plc (the ‘Company’) announces that Huw Francis and Nigel Short, both Directors of the Company, have provided the Company with an unsecured loan of up to £937,000 for working capital purposes.

The loan has been made on condition that security will be granted to Mr Francis and Mr Short over the Company’s freehold property and depot at Upper Bank, Swansea, and that they are given an option to acquire this site from the Company on agreed terms. A further announcement will be made at the time that formal agreement on the terms of security and the option have been reached.”

241. As we have already noted, the additional guarantees were actually executed later on, in September and October 2004. It may be that Mr Francis and Mr Short did make funds available in the short term to the company themselves, as their letter of 12 August 2004 suggests, but ultimately (as we have found) 2 Travel was at this time funded by way of significant bank lending, guaranteed by Mr Francis and Mr Short.

**(14) The Traffic Commissioner’s inquiry into 2 Travel**

242. On 16 August 2004, 2 Travel, as the holder of a Standard International Passenger Service Vehicle operator’s licence, was called to a public<sup>4</sup> inquiry before the Traffic Commissioner with regard to three aspects of its services. These aspects were:

- (1) Various matters arising under the Public Passenger Vehicles Act 1981. These matters all occurred in a two-year period from July 2002 to July 2004.
- (2) 2 Travel’s bus service reliability as monitored (by a Mr Anderson) in the periods 2 to 29 October 2003 and 4 February to 6 April 2004.
- (3) The financial standing of 2 Travel.

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<sup>4</sup> In dealing with 2 Travel’s financial issues, the Commissioner heard evidence *in camera*. However, we have seen the entire transcript of the proceedings.

The first two matters before the Traffic Commissioner clearly pre-dated the Infringement. The question of financial standing was an on-going requirement.

243. Proceedings before the Traffic Commissioner are relatively formal, with the company under inquiry entitled to adduce evidence, and to test the evidence against it by cross-examination.
244. At the hearing on 16 August 2004, the Traffic Commissioner reserved his decision in respect of 2 Travel's bus service reliability and financial standing. He dealt with the matters arising under the Public Passenger Vehicles Act 1981 in an *ex tempore* decision on 16 August 2004. As regards these issues, the Traffic Commissioner stated (at pages 102-103 of the transcript):

“Taking these two things together, the prohibitions and the non-display of the destinations, bearing in mind that the prohibitions are not at the serious end and trying to come to a conclusion that I believe is proportionate to what has gone wrong, my decision is to curtail the maximum number of vehicles for one month, at the month of September, from 110 to 100. I am aware that that is not likely to have much practical impact, but it does flag up the issues that they are not acceptable and that the Company have got to improve in both these regards to a very much higher standard and it is a marker for the future if you do not fail [*sic*] to put your house in order.”

245. The Traffic Commissioner's decision in relation to the issue of bus service reliability was made in writing in a decision dated 25 August 2004. He held:

“18. Of the 573 services monitored by Mr Anderson, 109 (19.0%) failed to run at all, and 61 (10.6%) ran outside the limits – almost 30% non-compliant against the 5% which is acceptable. While Neath's services improved between the autumn and the spring, the very poor performance recorded in Llanelli is consistent with the County Council's reports. I am staggered by the Newport/Cwmbran situation, where services hadn't even started to run nearly two months after the company gave notice they were to start – in other words, 100% non-compliance! Whatever the perceived greater need for drivers elsewhere, such behaviour is against the spirit and letter of the law, and cannot be tolerated. The overall non-compliance including Newport/Cwmbran would be well-over 50%.

#### Decision

19. I find that, under s26 of the Transport Act 1985, the company has without reasonable excuse failed to operate registered local services. I attach a condition to the licence that, for a period of 12 months from the date of this decision, the operator shall not use vehicles on any local services other than those registered at today's date. In regard to the Gwent Joint Passenger Transport Area (the unitary authorities of Blaenau Gwent, Torfaen,

Monmouthshire and Newport), the period is extended to two years because of the unacceptability of the company's conduct.

...

21. The Transport Act 2000, s155, entitles me to impose a financial penalty on an operator in addition to any action under s26 of the Transport Act 1985. Any penalty must be proportionate to the company's failures to operate local services. The company has told me (subsequent to the Public Inquiry) that about 52 vehicles are engaged on schooldays on local bus services. Under our guidelines, a 30% compliance failure normally attracts the maximum penalty of £550 per vehicle, which for the vehicles engaged in local services would be a total of £28,600. To achieve this, I impose a penalty of £260 per vehicle in respect of the 110 vehicles which the company is licensed to operate. The sum is payable by the company to the National Assembly for Wales."

246. This financial penalty was never paid by 2 Travel (Transcript Day 2, page 80 (evidence of Mr Fowles)).

247. The question of financial standing was adjourned to 5 October 2004, and is considered further in paragraphs 272 and 273 below.

#### **(15) The King Sturge valuation**

248. The valuation from King Sturge referred to in Mr Francis' and Mr Short's letter (see paragraph 234 above) was obtained on 22 September 2004, and sought to value the Swansea depot as at 31 August 2004. This gave an existing use value to the property of £650,000; a market value of £1 million; and a value of £500,000 to £750,000 per net acre if planning for residential or non-food retail was forthcoming, and if various other development-related conditions were met, giving a value (based on the acreage of 4.69, which might not be the net acreage, which could well be less) in the range of £2,345,000 to £3,517,500.

#### **(16) 2 Travel's detailed complaint to the OFT**

249. On 13 September 2004, the OFT (following on from the previous correspondence referred to in paragraphs 207 to 208 above) referred to the fact that it had not been provided with the further information in relation to 2 Travel's complaint which it had requested, and that the OFT therefore intended to close the case. In response to this letter, 2 Travel submitted a detailed complaint to the OFT on 3 November 2004.

**(17) Provision of guarantees limited to £300,000 by Mr Francis and Mr Short and the option agreement**

250. On 22 September 2004, Mr Francis and Mr Short executed a guarantee, guaranteeing the liabilities of 2 Travel to Barclays Bank plc, limited to £300,000.

251. Also on 22 September 2004, 2 Travel (of the one part) and Mr Francis and Mr Short (of the other part) executed an option agreement relating to the Swansea Depot<sup>5</sup> (the “Option”). Clearly the Option was prepared with legal advice. Its terms notably included the following:

- (1) The Option could only be exercised prior to 16 May 2008 with the prior consent of 2 Travel and only if certain planning conditions were satisfied.
- (2) The Option had to be exercised before 22 September 2009, otherwise it would expire.
- (3) The Option price (i.e. the price at which the Swansea Depot could be purchased) was £2,000,000 excluding VAT.
- (4) On the exercise of the Option, the transfer of the property would contain an overage provision, entitling 2 Travel to 20% of any increased value of the Swansea Depot if the property was sold on within 5 years of the transfer.

252. It is thus clear that the Option valued the Swansea Depot at well above the market value provided by King Sturge. This uplift can only have been due to the development potential of the land.

253. On 28 September 2004, Mr Rawlinson wrote to Mr Francis and Mr Short:

“Dear Huw and Bev

As you know we were astonished to learn yesterday afternoon that option and loan agreements had been entered into, albeit conditionally, prior to the company’s

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<sup>5</sup> The Option contained provisions relating to other land close to the Swansea Depot. Although, therefore, the term “Swansea Depot” is a little inapt, nothing turns on this, and we continue to use the term for ease of reference.

lawyers having consulted with us and Graham Spooner who represents the Independent Board.

I note that you (Huw) deny that they have been entered into although this contradicts the telephone conversation and e mail I have had from your lawyers.

Bev spoke to me at 14:30 last Friday and did not tell me that he had been to the lawyers to sign the paperwork or that he was on his way there. Getting David Fowles to countersign when David is, as far as I know, not involved in the transaction, appears to me to have been done in order to avoid asking Graham Spooner who was leading the transaction for the Independent Board, as you would have know [sic] that Graham would have refused to sign the documents at this stage.

It remains unclear why the documents needed to be entered into with such haste. Your solicitors state that it was done in order to alleviate the company's funding difficulties but you tell us that this was not the case and that your loan monies had been released to the company previously. Someone is not telling us the truth.

I was also astonished to learn that despite all of our requests to be kept informed, the company had received a demand from the Inland Revenue 2 weeks ago for payment of a substantial sum (which I understood from our conversation last night to be £400k) and that this sum has been paid out by means of Huw passing over funds to Bev for him to make the payment. I do not understand this process and I do not know when or if the payment has been made. The only mitigating factor as far as I can see is a comment made by Richard Needham last night to the effect that the IR had reached agreement with you earlier in the year and you have spent the last 2 weeks negotiating with them to get them to stand by their original agreement.

Without telling us you have also, apparently increased the amount of your and Nigel Short's loan to the company, you say to meet the shortfall in working capital arising from the increased payment to the IR. You say that you have checked the additional requirement by rerunning PWC's working capital model.

You, as directors of an AIM quoted company, had a clear duty to report these matters to your fellow board members and to keep us in our capacity as your nominated adviser, fully informed. You are in clear breach of your obligations to us as set out in our nomad appointment letter."

254. This letter is a little puzzling, as the broad thrust of the funding strategy for 2 Travel must have been clear to Mr Rawlinson by – at the latest – the date of the announcement to AIM on 13 August 2004. It would appear that Mr Rawlinson was concerned that the detail of the transactions, whereby this strategy was implemented, was not properly being scrutinised.

255. In an undated memo – but almost certainly written in late September or early October 2004 – Mr Spooner wrote:

"Further to my email of 15 September 2004 to Robert Wilson, the 2TG Board meeting on 24 September 2004 was cancelled (at short notice). Instead, Tony

Rawlinson and I met the new FD (Hugh Jenkins) and the MD designate, Martin Cook in Bristol.

### **Developments since August Report**

- 1 Carl Walters [*sic*] has left the company. His replacement has now started and the new MD is taking up his responsibilities from 1 October 2004. Bev Fowles has been advised to take leave on medical advice.
- 2 The Traffic Commissioner has fined 2TG £28,600 for failing to operate 19% of its bus services. A Financial Public Inquiry by the Traffic Commissioner is to be held on 5 October 2004.
- 3 Huw Francis and Nigel Short have taken over “de facto” control of 2TG, by injecting c. £1.1m into 2TG and installing the new (MD/FD) management team. Overdue creditors (including the Inland Revenue £400k) are being paid from these facilities.
- 4 It is envisaged that Bev Fowles may return (in due course) to 2TG as its Director of Operations, reporting to Martin Cook. His departure has been precipitated by his signature on the Property Option and Charge documents in favour of Messrs Francis and Short which had not been approved by the 2TG Board in their final form. 2TG’s Nomad and Independent Directors are currently considering their position as to possible breaches of Rules 10 and 12 of the AIM Rules by 2TG. An EGM will be required (and is a Condition Precedent of the Property Option) to ratify these agreements as required by S.320 of the 1985 Companies Act.”

### **(18) Discussions within 2 Travel in October 2004**

256. On 7 October 2004, Mr Spooner sent an email to Mr Wilson (VCT) and Ms Sinclair (Matrix). This email stated:

“Further to my email to Robert yesterday and following the subsequent meeting of Independent Directors (myself and Sir Richard Needham) and 2TG’s Nomad yesterday evening, there will be an announcement shortly which I will circulate when it is available as it provides a useful summary.

It is intended that a circular will be despatched to shareholders early next week with an EGM scheduled for 29 October 2004 at Newport (Holiday Inn) in Wales which you may wish to attend (I will be there).

2TG’s funding is being provided by Barclays (£2.2m, of which £1.625m is either being personally guaranteed by Messrs Short and Francis) plus loans/undertakings to 2TG totalling £300k from Messrs Francis Short and Bev Fowles, making total debt facilities (exclusive of vehicle and equipment finance and factoring) of £2.5m. The peak requirement in the PwC/Management Model is £2.367m in March 2005. This assumes that all debt is serviced (with £28k VCT interest paid in September 2004 and £12k quarterly thereafter). All arrears of fees (including Matrix, CFA and NxD’s) [we assume this is a reference to the non-executive directors of the company] will be paid prior to the EGM on 29 October 2004.

Messrs Short and Francis are being given the option (for 3 years from 5 October 2004) to buy the Swansea property for £2m plus a 20% enhancement in value for any planning consents obtained). The option cannot be exercised before May 2008 without 2TG's consent. King Sturge have valued the existing 4.7 acre site at £1m at present whilst Redrow have apparently made an indicative offer of £600k net per acre (with housing consents in place).

In the circumstances, I would commend this deal to you as the alternative is insolvency. 2TG is currently losing c. £100k per month and shareholders funds have been reduced to c. £200k (before any impairment review) and the new management team have effectively been provided with the resources to turnaround this business which may still require (in due course) a debt-equity swap or deeply discounted underwritten rights issue to address its highly geared balance sheet."

257. On 8 October 2004, 2 Travel made a trading statement to AIM:

"Trading statement

In our interim results for the 6 months ended 28 February 2004, we commented that the continued expansion of bus routes is having a positive effect even though the year had started slower than expected.

Whilst we were successful in achieving our objective of registering a number of new routes in key expansion areas, shortages of working capital, drivers and suitable vehicles meant that we were unable to operate the services at the intended levels. Our shortcomings were highlighted in a report of the Traffic Commissioner issued on 25 August and we committed to the Commissioner that we would operate all registered services in Gwent from 6 September onwards, which we have done, and improve performance in Llanelli and Neath also. These operational improvements have become possible given that we have located the vehicles we require at suitable prices, recruited additional drivers, and the further working capital facility announced on 13 August.

...

Against this background the Company's performance for the year to 31 August 2004, although not finally determined, was disappointing. In addition to not being able to expand the bus network as planned, we, in common with others in the transport sector, suffered from rising fuel, insurance and wages costs. Direct costs in the last 3 months of the year were almost half of costs in the first 9 months.

On 30 September we announced the appointment of Hugh Jenkins as our new Finance Director. Hugh's first task is to review and strengthen the financial reporting systems and controls. PricewaterhouseCoopers has been appointed as auditors and its audit will follow completion of Hugh's review.

...

Related party transactions

On 13 August 2004 the Company announced that Huw Francis and Nigel Short, both Directors of the Company, had provided the Company with an unsecured loan of up

to £937,000 for working capital purposes. In fact, the facility that was provided to the company by Huw Francis and Nigel Short was in the aggregate amount of £975,000 and comprised guarantees in respect of monies advanced to the Company by the Company's principal bankers. This facility was made on condition that security would be granted to Mr Francis and Mr Short over certain property and assets, including the Company's freehold site and depot at Upper Bank, Swansea and that they would be given an option to acquire the site from the Company.

A recent update of the earlier working capital review revealed that the facility referred to above would not be sufficient for the Company's requirements. As part of agreeing the security agreement and option agreement with Huw Francis and Nigel Short, they have agreed to facilitate the Company's revised requirements by giving an undertaking, direct loans, and also by agreeing to make available guarantees in respect of part of the Company's indebtedness to its principal bankers, such guarantees in aggregate amounting to £1.625 million inclusive of the previous guarantee commitments made by them. These agreements are classified under the AIM Rules as a Related Party Transaction and require the approval of shareholders under the Companies Act. Accordingly, a circular outlining these agreements will shortly be sent to shareholders together with notification of an Extraordinary General Meeting.

...

The Independent Directors, comprising Sir Richard Needham, Bev Fowles, David Fowles and Mentor UK Limited, after consulting City Financial Associates Limited, the Company's Nominated Adviser, believe that the terms of the Related Party Transaction are fair and reasonable insofar as the shareholders are concerned.

...

Board changes

2 Travel Group Plc also announces today that Martin Cook, aged 49, will be joining the Board of the Company as Managing Director with immediate effect. Mr Cook is a highly experienced commercial Managing Director and is currently the Managing Director of Betws Anthracite Limited, a position that he has held since 1993. Bev Fowles is stepping down as Chief Executive with immediate effect, but Bev will remain on the Board as Director of Bus Operations. They will form a strong executive team along with, Hugh Jenkins (the new Finance Director) and David Fowles."

258. What is interesting about this statement is that whilst it appears to be frank about 2 Travel's difficulties, it says nothing about the Infringement being the cause of these difficulties.

**(19) Further guarantee of £650,000**

259. On 8 October 2004, Mr Francis and Mr Short executed a guarantee, guaranteeing the liabilities of 2 Travel to Barclays Bank plc, limited to

£650,000. Quite why the additional funding to 2 Travel was guaranteed by two sets of guarantees, and not a single set in a single amount, is unknown.

**(20) The EGM**

260. On 29 October 2004, 2 Travel's EGM took place, at which the related party transactions were approved. Although he attended this and some other meetings, there is little sign of the independent chairman, Sir Richard Needham, being sighted as to much of this activity. If he was informed of the everyday progress of the company's financial position and progress, he exercised a light touch.

**(21) Proceedings before the Traffic Commissioner concerning 2 Travel's allegations against Cardiff Bus that Cardiff Bus had been operating its services in a dangerous manner**

261. On 22 November 2004, there was a meeting between 2 Travel and Mr Furzeland. Mr Furzeland was the Traffic Commissioner's clerk. The meeting was at the Traffic Commissioner's (Mr Dixon's) request, and the essential purpose was to consider 2 Travel's allegations that Cardiff Bus was acting in an illegal and uncompetitive manner. There is a note of the meeting, dated 13 January 2005, which also sets out Mr Furzeland's conclusions:

**"Conclusions**

40. Following the meeting and assessing the evidence I conclude the following:
41. That any accusation of cross-subsidies and unfair competition should be dealt with by the OFT.
42. I do not believe that senior members of Cardiff Bus have issued instructions inciting their drivers to act in an unsafe manner. I do not dismiss the possibility that supervisors in the depots may have aggravated the situation and helped to incite the drivers but there is no clear evidence of this.
43. That Cardiff Bus has operated in line with their high frequency registrations.
44. That the video evidence was only useful in showing incidents of poor driver behaviour as detailed above.

**Recommendations**

45. At the meeting both parties agreed to send letters to their drivers reminding them of their responsibilities as professional drivers. Cardiff Bus has

confirmed that this has taken place. I have not heard from 2 Travel on the matter.

46. That no action be taken against Cardiff Bus as there is no evidence that they have a case to answer. This may change should the OFT find against them.”

**(22) Appointment of Grant Thornton as investigating accountants over 2 Travel**

262. In mid-November 2004, £300,000 of 2 Travel’s bank lending fell due for repayment, which was not reflected in PwC’s model (Transcript Day 2, page 90 (evidence of Mr Fowles); Transcript Day 3, pages 114 and 118 (evidence of Mr Francis)).

263. Again, there is a great deal that is not known about this £300,000. It may be – but this is speculation – that the money advanced to purchase the Swansea Depot became due. In any event, the contemporary evidence is clear that 2 Travel was faced with an unexpected need to repay £300,000, which had the effect of invalidating or undermining the projections contained in the June 2004 PwC Report. An email sent to Ms Sinclair of Matrix on 16 November 2004 provides:

“It transpires that £300k of the Bank’s facilities to 2TG were due for repayment on 31 October 2004. This was not reflected in the PwC model...”

264. As a result, it was decided to appoint Grant Thornton as investigating accountants and to suspend trading in 2 Travel’s shares. The shares were suspended on 15 November 2004.

265. Grant Thornton set out their conclusions in a report contained in a letter (marked “draft”) dated 23 November 2004 (“the Grant Thornton Report”). The Grant Thornton Report’s factual accuracy had been confirmed by Mr Cook (2 Travel’s managing director) and Mr Jenkins (2 Travel’s finance director), as is noted in paragraph 1.3 of the Report. The Report noted:

- (1) That although Grant Thornton had received the full co-operation of 2 Travel's directors, "our work has been hampered by the breakdown in accounting records that has occurred since the departure of the previous Finance Director at the end of August 2004" (paragraph 1.12). The Report identified a number of specific deficiencies in paragraph 1.13.
- (2) That whilst there are inherent flaws in any cash flow forecast (paragraph 2.2), "[t]he cash flow forecast indicates that at the start [of] 16 November 2004 the Company is £39,000 over its existing overdraft facilities of £140,000" (paragraph 2.3) and "[t]his figure is forecast to climb to £371,000 over the current facility by 3 December 2004 before falling back to £275,000 over the facility in mid December. However, by Christmas the facility is exceeded by £318,000" (paragraph 2.4). It was also noted that no provision had been made to pay any interest on the 8% convertible loan stock of £600,000.
- (3) That a significant number of "bounced" cheques, £35,000 at the end of September 2004, and £30,326 during November 2004 (paragraphs 2.21 and 2.22), together with £30,734 of cheques issued, but not yet presented for payment.
- (4) That the Swansea Depot had been acquired in May 2003 for £650,000, and that (according to a valuation by King Sturge on 31 August 2004) this was its present value on an existing use basis. Its market value was assessed by King Sturge as being £1,000,000, and with residential or non-food planning permission £2,350,000 to £3,500,000 (paragraph 3.4).
- (5) As to 2 Travel's ability to trade, this was dependent upon 2 Travel's solvency (paragraph 4.1) and "[w]hilst the Company is technically solvent on a balance sheet basis, it is insolvent on a going concern basis as it cannot pay its liabilities as they fall due for payment". 2 Travel was "now under significant creditor pressure" (paragraph 4.3) and "[w]ithout an injection of funds of between £300,000 to £400,000 as identified on the short term cash flow, the Company will be unable to continue to trade in

the period up to 24 December 2004. The cash flow indicates that approximately £258,000 will be required this week...” (paragraph 4.4).

(6) That “[i]f there is no injection of funds as identified above within the next two days, then the directors must consider carefully whether they can allow the Company to continue to trade” (paragraph 5.1). However, Mr Short had confirmed to Grant Thornton that £300,000 could be made available within a matter of days “subject to acquisition of Company’s 20% overage rights on the sale of the freehold property following exercising of an option” (paragraphs 4.4 and 4.6).

266. At this stage, Mr Fowles apparently advised Mr Francis and Mr Short to put no more money into the company (Day 2, pages 92, 94 and 96 (evidence of Mr Fowles)).

**(23) Departure of the management**

267. Mr Jenkins and Mr Cook left 2 Travel in November or early December 2004 (Transcript Day 2, page 94 (evidence of Mr Fowles)). Mentor resigned as a director of 2 Travel on 24 November 2004. CFA resigned as nomad on 29 November 2004.

268. But the company still struggled on (Transcript Day 2, pages 94 to 95):

**“Q (Mr West)** But ordinarily, the company’s annual accounts would be prepared within six months of the year end; is that right?

**A (Mr Fowles)** That’d be February.

**Q (Mr West)** By February, and the company was still trading the following February, wasn’t it?

**A (Mr Fowles)** Um...It was still in existence and, yes, doing some trade.

**Q (Mr West)** No steps were ever put in place to prepare the statutory accounts?

**A (Mr Fowles)** That’s right. By that time we knew we weren’t going to be there very much longer.”

**(24) The Assignment**

269. On 22 December 2004, Mr Short agreed to advance £300,000 to 2 Travel in return for an assignment to him of any monies payable to 2 Travel under overage provisions of the Option (the “Assignment”). The Assignment recites that “[i]n order to facilitate the ongoing conduct of 2 Travel’s existing business Mr Short has agreed to advance to 2 Travel the sum of £300,000 (part of which has been previously forwarded by Mr Short to 2 Travel and the balance of which is being advanced on the date hereof).”

270. The Assignment was signed by Mr Fowles on behalf of 2 Travel, but there was no shareholders’ resolution to approve what was without doubt a related party transaction requiring a board resolution (Transcript Day 2, page 113 (evidence of Mr Fowles)). No-one, however, sought to suggest that the Assignment had been procured for an improper value, and Mr Francis positively asserted that the Assignment had been for a fair value: Day 3, page 50 (evidence of Mr Francis).

**(25) 2 Travel’s closure of its Cardiff operations**

271. 2 Travel ceased operations in Cardiff and Cwmbran on 17 December 2004 (Transcript Day 2, page 99 (evidence of Mr Fowles)).

**(26) Revocation of 2 Travel’s operating licence**

272. On 24 December 2004, the Traffic Commissioner revoked all of 2 Travel’s operating licences on the grounds that it had failed to establish that it had sufficient capital. This decision arose out of the hearing on 2 Travel’s financial standing, which the Traffic Commissioner had adjourned to a separate hearing which took place on 5 October 2004 (see paragraph 247 above).

273. Although the hearing took place in October 2004, the Traffic Commissioner took account of materials and information after this date, including information received from 2 Travel, as well as press reports noting the suspension of trading in 2 Travel’s shares. The Traffic Commissioner’s decision recorded (at paragraph 6) that on 7 December 2004 he was advised by solicitors retained by 2 Travel that the company was going to be wound up. However, on 20

December 2004, the Traffic Commissioner was advised that this course was not going to be followed, and that instead 2 Travel would reduce the number of licences it held from 110 to 50 (ie returning 60 licences) (paragraph 19) and that the company now intended to continue trading (paragraph 20).

274. The decision concluded:

- “25 ...Either an operator has sufficient funds to satisfy the requirement, or he hasn't. There is no discretion for me to exercise if I find there are insufficient funds. I have been more than patient in this case in awaiting evidence of what money is available. Based on documents provided over the months since the call-up letter, it appears that, not only is there too little money available for 110 vehicles, there is not enough for 50 or even 10.
26. The latest letter from Backhouses contains no evidence of finance, just more general statements to the effect that they have money available. While funds may be available or promised, they are of no value to financial standing until held by the company.
27. If I revoke the licence without disqualification of the company or directors, they will be free to apply for a new licence. Given that the company will be structured very differently from now on, it seems to me preferable that they should follow this course, and I will be able to consider all matters, including finance, afresh in the new circumstances. I believe this is the pragmatic, and indeed the right, solution in all the circumstances.
28. If as is likely this involves a pause in their operation, this will enable them to “take stock” and plan properly for what, if the application is granted, will need to be a very much better service than in the past.

#### Decision

29. I find the company no longer satisfies the requirement to be of appropriate financial standing, and revoke the licence with effect from 2359 hours on 22 January 2005...”

275. This decision was suspended pending 2 Travel's appeal. That appeal was heard on 24 February 2005 by the Traffic Tribunal. The revocation was set aside in a decision dated 10 March 2005, and the matter remitted to the same Traffic Commissioner (at the request of 2 Travel) to consider whether, by dint of 2 Travel's factoring facility, the financial standing requirements might have been met. The matter did not, however, proceed any further, no doubt because of 2 Travel's insolvency.

**(27) Final suspension of 2 Travel from AIM**

276. This occurred on 30 December 2004 (Transcript Day 3, pages 55-56 (evidence of Mr Francis)).

**(28) Offer to Mr Hoggan**

277. On 27 January 2005, Mr Fowles – writing on behalf of a company called Jamfell Ltd – wrote to a Mr Walter Hoggan to offer £440,000 for his land and business in Swansea. Mr Fowles was asked about this in cross-examination (Transcript Day 2, pages 111 to 113):

**“Q (Mr West)** ...You’re writing to Wally Hoggan, offering to purchase his freehold property in Swansea and his vehicles, plant and fixtures, the name Hoggans and all of the school contract work. That letter wasn’t written in the name of 2 Travel, was it?

**A (Mr Fowles)** No, it was written under Jamfell Limited.

**Q (Mr West)** And can you explain what the intention was of this approach?

**A (Mr Fowles)** The approach was to purchase the company and it was a very small company, six or seven vehicles, and it was to purchase that off Walter Hoggan, which eventually was successful.

**Q (Mr West)** And why was that not done in the name of 2 Travel?

**A (Mr Fowles)** 2 Travel at the time, you’re talking in January, were - we had our licence revoked, we had been subject to a serious leak from the Traffic Commissioner’s office, which had undermined the remainder of the company, and it was felt that possibly acquiring Hoggans would assist in what was left on the Swansea depot.

**Q (Mr West)** So was the intention to run this as a new company, effectively a different company?

**A (Mr Fowles)** It might well have been. We had approached the Traffic Commissioner for an MBO, as I said before lunch, and if there was a possibility of doing that, then we may well have done it.

**Q (Mr West)** The plot of land in question is immediately adjacent to 2 Travel’s Swansea depot?

**A (Mr Fowles)** That’s right.

**Q (Mr West)** And was it the intention at this time that that land would effectively be combined with the existing Swansea depot to form a larger, more valuable plot of land?

**A (Mr Fowles)** It was a very small part of the five, six acre site. Perhaps, I don’t know, as much as half an acre, if that.

**Q (Mr West)** But did Mr Hoggan – didn’t his land have some rights of way

over the Swansea depot?

**A (Mr Fowles)** He did have a verbal right of way over the site, given to him previously before we purchased Capital. But it was a verbal, nothing else.

**Q (Mr West)** But by purchasing this land and combining it with the larger plot, you would avoid any difficulties about rights of way?

**A (Mr Fowles)** Mm. It was Hoggan who approached us to – on the potential of selling out. So we took it for what it was.”

**(29) Cessation of the Cardiff Bus White Service**

278. The Cardiff Bus White Service continued until 18 February 2005, when it ceased.

**(30) Exercise of the option**

279. On 16 March 2005, Mr Short and Mr Francis exercised the Option to purchase the Swansea Depot. The conditions that the Option could only be exercised when the planning condition had been satisfied and only then after 16 May 2008 were both waived by 2 Travel.

280. The manner in which the Option was exercised involved not a direct payment by Mr Francis and Mr Short of the £2,000,000 option price to 2 Travel, but rather an indirect payment in the form of their assumption of primary responsibility of 2 Travel’s debts to the bank. That debt – which was rather in excess of £2,000,000 – was then taken off 2 Travel’s balance sheet.

281. Mr Fowles was asked about this (Transcript Day 2, pages 114 to 116):

**“Q (Mr West)** You’ll remember that under the terms of the option it couldn’t be exercised before May 2008, without the company’s written consent?

**A (Mr Fowles)** Mm-hm.

**Q (Mr West)** So this presumably also counts as the company’s written consent for those purposes, does it?

**A (Mr Fowles)** Yes, I would think so.

**Q (Mr West)** It also couldn’t be exercised before the grant of planning permission. And I see in the second paragraph there at the end:

“We confirm our discussions whereby you have agreed to

waive the requirement for planning condition.”  
So you waived that requirement as well, did you?

**A (Mr Fowles)**

Mm-hm.

**Q (Mr West)**

Again, there was no attempt to obtain the approval of the shareholders by any resolution for these further amendments to the terms of the option?

**A (Mr Fowles)**

There wasn't enough time for that, I'm afraid.

**Q (Mr West)**

And the way that the exercise of the option worked was that Mr Francis and Mr Short assumed the bank debt owed by 2 Travel to Barclays, which was thereby taken off 2 Travel's balance sheet. Is that how it worked?

**A (Mr Fowles)**

It was, yes.

**Q (Mr West)**

So, in effect, the bank lending, which had been provided by Barclays in exchange for or on security of the guarantees given by Mr Short and Mr Francis, was then assumed by them, rather than the making of any cash payment to 2 Travel, in order to exercise the option?

**A (Mr Fowles)**

Yes. The option came to something like 2.4 million, I think.

**Q (Mr West)**

So the amounts which had been provided by the bank under the guarantees from Mr Short and Mr Francis were effectively treated as part payments towards the exercise – the payment of the option price?

**A (Mr Fowles)**

Yes.

**Q (Mr West)**

So to the extent that Mr Short and Mr Francis had provided such guarantees, they were fully secured for those guarantees because they could be treated as part payment towards the £2 million option price?

**A (Mr Fowles)**

Yes.”

282. Mr Francis's evidence on the point was similar (Transcript Day 3, pages 57 to 61).

### **(31) 2 Travel's liquidation**

283. On 6 May 2005, 2 Travel's contracts for subsidised routes between Llanelli and Carmarthen and for schools services in Llanelli were cancelled by Carmarthenshire County Council.

284. A winding up petition was presented on 20 May 2005 by Haydock Finance, one of the companies providing hire purchase finance to 2 Travel (Transcript Day 3, page 116), and 2 Travel went into liquidation on 20 May 2005. The company's debts were over £2.091 million.

## VII. THE “COUNTER-FACTUAL” SCENARIO: WHAT WOULD HAVE HAPPENED BUT FOR THE INFRINGEMENT

285. As we have noted (see paragraph 18 above), the counter-factual scenario assumes that the Infringement did not take place.

286. Paragraphs 3.28 to 3.40 of 2 Travel’s Claim for Damages plead what 2 Travel contended was the effect of the Infringement. As we noted in paragraphs 18 to 20 above, 2 Travel’s pleading distinguishes between more-or-less immediate effects of the Infringement and longer term effects.

287. 2 Travel contended that, had the Infringement not occurred, there would have been three, immediate, consequences in the counter-factual scenario:

- (1) 2 Travel would not have suffered from the severe driver shortages that (so it claims) it did suffer from (see paragraphs 3.31 to 3.33 of 2 Travel’s Claim for Damages).
- (2) Management time would not have been diverted from normal (i.e. revenue generating) duties, as the Infringement would not have disrupted 2 Travel’s operations both in Cardiff and elsewhere (see paragraphs 3.34 of 2 Travel’s Claim for Damages).
- (3) Passengers that in fact travelled on the Cardiff Bus White Service would have travelled on the 2 Travel In-Fill Service, resulting in short-term increased revenues to 2 Travel (see paragraphs 3.28 to 3.30 of 2 Travel’s Claim for Damages).

288. These immediate effects were said to have damaged operations at the Cardiff depot, but also (so 2 Travel contended) affected 2 Travel’s other operations and had longer-term implications. As 2 Travel pleaded in paragraph 3.35 of its Claim for Damages, “[a]s a result of the direct disruption at the Cardiff depot, as well as the indirect disruption at 2 Travel’s other depots, 2 Travel incurred further losses and its requirement for working capital increased as a result. Whilst working capital was made available, income began to fall more sharply than 2 Travel was able to reduce its cost base and service levels began to drop

across all its depots”. In consequence, instead of establishing its In-Fill Service in the Cardiff market, with the prospect of then expanding its operations in Cardiff (and, perhaps, more generally), 2 Travel’s business was seriously disrupted, with the result that the business went into a circle of decline and failure, culminating in its liquidation on 20 May 2005 (see paragraphs 3.35 to 3.40 of 2 Travel’s Claim for Damages).

289. 2 Travel’s case on causation is also stated in a “Causation Narrative” set out in paragraph 15.7 of the Schedule produced by 2 Travel pursuant to the Tribunal’s order of 21 April 2011. This provides:

- “1. Cardiff Bus’ predation:
  - (a) diverted passengers, and hence the revenue from such passengers, away from 2 Travel (and to Cardiff Bus instead);
  - (b) (and intimidatory tactics) caused driver shortages which:
    - (i) prevented 2 Travel from operating the full number of planned services;
    - (ii) prevented 2 Travel from operating the 258 service from November 2004 (as agreed with the Traffic Commissioner);
    - (iii) had consequential effects for 2 Travel’s services in Swansea, Llanelli and Cwmbran due to drivers being diverted to Cardiff; and
  - (c) prevented 2 Travel’s infill services from growing in line with 2 Travel’s previous experiences in Neath and achieving optimal route realisation,

which, together, caused 2 Travel to suffer reduced revenues.

2. The reduced revenues caused:
  - (a) 2 Travel to suffer losses (both on the infill routes and by the 2 Travel business as a whole) rather than the anticipated profits; and
  - (b) a negative effect on 2 Travel’s cash flow and working capital requirement.
3. From the commencement of the predation to the insolvency of 2 Travel, 2 Travel’s management and staff were diverted from their normal revenue generating duties by having to deal with the predation, causing significant disruption to the 2 Travel business, thereby exacerbating the impact of Cardiff Bus’ predation on 2 Travel’s cash flow and working capital requirement.
4. The impact on 2 Travel’s cash flow and working capital requirement caused 2 Travel to:
  - (a) abandon its expansion plans;

- (b) grant security over and an option to purchase the Swansea Depot in return for an increase in its working capital requirements; and
  - (c) close the Cardiff depot (and the Cwmbran depot) and retreat to Swansea and Llanelli.
5. Unable to recover from the losses caused by Cardiff Bus and the consequential impact on 2 Travel's cash flow and working capital requirement, 2 Travel entered insolvency, thereby causing 2 Travel to:
- (a) suffer the loss of future profits;
  - (b) suffer the loss of a capital asset (the business of 2 Travel as a going concern);
  - (c) lose the commercial opportunity to grow the 2 Travel business; and
  - (d) lose the commercial opportunity to develop the Swansea Depot.”

290. Although there is some unhelpful difference in emphasis between the causation case pleaded in the Claim for Damages and the Causation Narrative, 2 Travel's case safely may be summarised as follows:

- (1) The Infringement had three, immediate effects:
  - (i) 2 Travel suffered from driver shortages, and these shortages affected operations. We consider this in Section VIII below.
  - (ii) Management and staff were diverted away from their normal duties, to the detriment of 2 Travel's operations. We consider this in Section IX below.
  - (iii) Passengers were diverted away from 2 Travel's In-Fill Service, resulting in a revenue loss. We consider this loss of revenue in Section X below. This question overlaps with 2 Travel's Claim 1: Loss of Profits, which we also consider in Section X.
- (2) These immediate effects resulted in 2 Travel going under as a business. This issue – which is effectively synonymous with 2 Travel's Claim 2: Loss of a Capital Asset – is considered in Section XI below. Furthermore, as a result of 2 Travel's liquidation, 2 Travel lost the commercial opportunity presented by the Swansea Depot. This loss – Claim 3: Loss of a Commercial Opportunity – we consider in Section XII below.

291. This leaves Claim 4: Wasted Staff and Management Time and Claim 5: Liquidation Costs, which we consider respectively in Section XIII and Section XIV below.

## **VIII. DRIVER SHORTAGES AND THE EFFECT OF DRIVER SHORTAGES**

### **(1) Approach**

292. There are many reasons why a driver may leave his employment, and the evidence before us was that recruiting and retaining drivers was a recurrent problem for bus companies in general, which some addressed through internal training programmes. Equally clearly, if a bus company suffers from a shortage of drivers, it may not be able to operate all of the services that it would like to operate.

293. The mere fact that 2 Travel suffered from driver shortages is not enough to enable 2 Travel to contend that its operations suffered as a result of the Infringement. Rather, it is incumbent upon 2 Travel to show:

- (1) First, that it suffered from a driver shortage in the period April to December 2004.
- (2) Secondly, that that driver shortage was caused by the Infringement.
- (3) Thirdly, that this driver shortage had an impact upon 2 Travel's operations.

294. We consider these questions in Section VIII(3) below. Before we do so, however, it is relevant to consider what driver shortages 2 Travel suffered from in the period up to April 2004. Clearly, if 2 Travel suffered from persistent driver shortages before it began its In-Fill Service, the inference that driver shortages occurring after the In-Fill Service commenced was due to the Infringement is diminished. This question is considered in Section VIII(2).

**(2) Driver shortages suffered by 2 Travel prior to 19 April 2004**

*(i) 2 Travel's contentions and witness evidence*

295. Mr Fowles described the position, as regards drivers, immediately before 2 Travel began its In-Fill Service in his first statement:

“92. The vast majority of our drivers, almost all of them, were employed on a full-time basis...

93. We historically had very little casual absenteeism. When a driver was absent he was either genuinely ill, which wasn't very often, or he wasn't coming back. We had experienced driver shortages in 2001 in the Swansea area, but the reason for this was that 2 Travel was growing and acquiring businesses and some of the drivers did not come over with the acquired business. If there was a driver shortage it would have been 2 or 3, nothing serious as such and nothing that managers couldn't cover.”

296. In his first statement, Mr Fowles went on to describe how, although there was a national shortage of drivers, 2 Travel used innovative measures for coping with this (see paragraph 94 of his first statement):

“Whilst there was a national shortage of bus drivers, we didn't suffer more than anyone else. We used innovative methods of coping with this national shortage. We hit upon the idea that armed forces personnel were finishing in their droves, and there were big transport sections in the RAF and the Army. Somebody just happened to mention that the transport section of the Army is largely operated by British Army Ghurkhas. So we embarked upon recruiting Ghurkas.”

297. In paragraph 96 of his first statement, Mr Fowles stated that, prior to April 2004, “we managed to cope with the driver shortage and it didn't effect [*sic*] our services detrimentally over the long-run. I'd go out and drive to cover any shortages, as would anyone who held a Passenger Carrying Vehicle licence (PCV), which most of the non-driving staff did. Obviously, such staff would do the minimum amount of driving, but you'd go out and do a school drive. You would always have one or two other people like a coach cleaner or bus cleaner who would have a PCV who would cover for drivers who didn't come into work, or who were absent or if the company was experiencing driver shortages.”

(ii) *The contemporary documents*

298. Cross-checking these statements with the contemporary documents, we consider that – before April 2004 – 2 Travel experienced driver shortages on more occasions than simply in 2001 in the Swansea area, and that these shortages were more serious than Mr Fowles described in evidence. We refer to the following:

(1) The minutes of a 2 Travel meeting held on 23 October 2001 record:

“Alun to shedule [*sic*] in advance for November & December so as to organise excess drivers who will be required, also to organise drivers times to collate Park & Ride with scheduled runs. Alun expressed concern to going ahead with 4 new contracts until we can be assured that we can get enough to [*sic*] drivers. It was suggested that we employ 17/18 yr old apprentices in the workshop who can be used on buses in peak periods.”

(2) The minutes of a 2 Travel meeting held on 12 September 2002 record:

“A shortage of drivers at the Cardiff Depot was placing a strain on resources at Swansea Depot. Drivers from Swansea were being transferred to Cardiff on a daily basis. Engineers and Supervisors were replacing driving staff at Swansea.”

(3) The minutes of a 2 Travel meeting held on 5 September 2003:

**“Engineering Staff used for Driving School/Contracts**

This is detrimental to our own discipline, as the scheduled maintenance is well in arrears and not completed to the standard required.”

It is clear that in October 2003, Mr Waters was driving buses to Cardiff (see paragraph 146 above and the evidence of Mr Fowles Jnr at Transcript Day 5, page 105).

(4) Although the Traffic Commissioner’s inquiry into 2 Travel first took place in August 2004 (as has been described, there were several hearings before the Commissioner), the evidence before the Commissioner regarding 2 Travel’s performance pre-dated 19 April 2004 (see paragraph 242 above).

As we have noted in paragraph 245 above, of 573 services, some 19.0% failed to run at all, and in Newport/Cwmbran no services ran. The Commissioner found that at least a factor in this was driver shortage.

299. Accordingly, we find that, in the years before 19 April 2004, 2 Travel suffered from significant and recurring driver shortages. These can have had nothing to do with the Infringement.

**(3) Driver shortages in the period April to December 2004**

*(i) 2 Travel's contentions regarding driver shortages*

300. Mr Fowles describes the driver position in Cardiff in April 2004 in paragraph 97 of his first statement:

“At the time the infill services commenced, we had 18 drivers in the Cardiff depot. At the start of the infill services operating, the four routes we were operating had three buses on each of them, so we had 12 drivers on the infill services. We had two drivers working all day on the 98 and 99 services, which meant we had four drivers spare, when they were not otherwise engaged on school contracts.”

301. According to 2 Travel's witnesses, thereafter, drivers left, and they left due to the Infringement. In paragraph 123 of his first statement, Mr Fowles states:

“As well as the 2 drivers who failed to turn up at the start of the infill services, a further driver left in the second week. The hard core stayed right the way through, but I would say there was 20% that probably left within 3 months. Some were replaced, but not all. Others would come in and not stay long, they just didn't like these White Buses, it was intimidation and they didn't like it, they couldn't handle it. I don't know many people that could.”

302. As we have noted, there are, of course, many reasons why a driver may leave his employment. As we have seen, the evidence before us showed that, historically, 2 Travel had suffered from driver shortages. Nevertheless, 2 Travel's witnesses gave a number of reasons as to why 2 Travel's loss of drivers, and its inability to recruit new drivers, was caused by the Infringement. These reasons were as follows:

- (1) Frustration at being “squeezed” by Cardiff Bus White Service operations.  
In a memo dated April 2004, Mr Fowles Jnr wrote to drivers, thanking

staff for “conduct[ing] themselves beyond reproach in the face of some unsavoury [*sic*] behaviour from the major bus operator in Cardiff, Cardiff Bus”. In paragraph 25 of his first witness statement, Mr Fowles Jnr commented upon the frustrations and difficulties his drivers suffered in being “sandwiched” by Cardiff Bus buses (i.e. where a 2 Travel bus would find itself preceded by and/or succeeded by a Cardiff Bus bus or buses; see also Transcript Day 2, pages 56 to 57 and pages 160 to 161 and 164 (evidence of Mr Fowles)).

- (2) Frustration at 2 Travel’s ineffectual handling of, and inability to stop, the Infringement (see, for example, paragraph 120 of Mr Fowles’ first statement; Transcript Day 2, pages 56 to 57 (evidence of Mr Fowles)). Although this might be said to be a sign of 2 Travel’s managerial failings (at the time 2 Travel certainly did not press its contentions as to predation very hard), we consider that – if factually well-founded – the essential cause would be the Infringement itself.
- (3) Frustration at time being wasted in being transported, at short notice, from one depot to another, in order to meet driver shortfalls in that depot (see paragraphs 133 to 135 of Mr Fowles’ first statement; and paragraphs 38 to 39 of Mr Fowles Jnr’s first statement).
- (4) Intimidation of drivers by Cardiff Bus (see paragraphs 122 and 125 of Mr Fowles’ first statement; paragraph 39 of Mr Fowles Jnr’s first statement; and paragraphs 27 to 29 of Mr Cartwright’s statement).
- (5) The mere fact that Cardiff Bus was operating additional buses in Cardiff in order to operate its White Service inevitably meant that, in the Cardiff area, there were more jobs available to drivers, and that it would be harder for 2 Travel to recruit (see paragraphs 35 to 36 of Mr Fowles Jnr’s first statement).

(ii) *Impact*

303. In Appendix 2.4 of his Report, Mr Good has calculated the percentage of scheduled journeys in fact completed by 2 Travel over time as part of the In-Fill Service (based upon four services operating). These figures were as follows:

<b>Period</b>	<b>Percentage of scheduled journeys completed</b>
From 19 Apr 2004	84%
May 2004	72%
Jun 2004	65%
Jul 2004	62%
Aug 2004	57%

As Mr Good pointed out in Note 3 to Appendix 2.4, there is no data going beyond August 2004.

304. As we have noted on a number of occasions, 2 Travel's retention of documents was patchy, at best, and Mr Good's figures need to be treated with caution for this reason. For example, cross-checking Mr Good's figures with those of VOSA (although, as is noted in paragraph 215 above, these figures also need to be treated with caution) obtained over a 12 day period between 15 June and 16 July 2004 shows a completion rate of 32% (i.e. of 133 observations, 91 failed to operate, a failure rate of 68%: see paragraph 212 above). It may well be, therefore, that Mr Good's figures flatter, although it may also be that VOSA was applying stringent criteria to services that in fact operated, but just not very well.

305. Cardiff Bus was assiduous in monitoring 2 Travel's performance throughout the Infringement, and kept written reports. Thus, a memo to Mr Brown from Mr Heath mis-dated 17 April 2004 notes that "[a]s you are aware, we have been monitoring the operations of 2 Travel since the start of their services on 19 April and the following summarises the current situation with this operator's services in Cardiff". The memo then lists a series of failings on the part of 2 Travel. A Cardiff Bus engineering team brief dated May 2004 records that "[t]he competition arrived but has yet to make any real impact. It is now well know [sic] that they are running no more than 75% of their services at best...". A similar brief for June 2004 refers to "the competition running no more than 70%

of their registered services” and the position for July was reported as being similar.

306. Mr Good’s figures – broadly confirmed by Cardiff Bus’s contemporary monitoring documents – show a progressive falling-off of performance, which may be indicative of services not operating due to driver shortage. We turn to the evidence on this point in the next section; but we must also observe that 2 Travel’s performance on services other than the In-Fill Service in the period prior to 19 April 2004 was also poor. In this regard, we refer to:

- (1) The various complaints in respect of 2 Travel’s service set out in paragraphs 136 to 157 above.
- (2) The findings of the Transport Commissioner (see paragraphs 245 above) in relation to pre-19 April 2004 services, which found that 19% of all services failed to operate at all.

307. Thus, we do not consider that the mere fact that 2 Travel’s In-Fill Service deteriorated over time compels the conclusion that the Infringement was affecting 2 Travel’s services, although it is of course consistent with that case.

*(iii) The evidence of the contemporary documents regarding driver shortages*

308. Cross-checking the recollections of 2 Travel’s witnesses with the contemporary documents, a different picture emerges in relation to the post-19 April 2004 position.

309. In the first place, it is clear from these documents that 2 Travel’s preparations, in the run-up to 19 April 2004, were poorly planned and inadequate. Mr Fowles Jnr’s memos – which we have quoted in paragraphs 195 to 200 above – are telling evidence of this. One of the points made by Mr Fowles Jnr (in his memo of 9 March 2004) is that “[t]he depot needs approximately 8 drivers. Ghurkha’s [*sic*] were promised but this has not yet materialised” (see paragraph 197 above). The Ghurkhas who had been recruited by 2 Travel were never deployed in Cardiff, albeit that Mr Fowles Jnr expected that they would be, and it is clear

that – as at 9 March 2004 – Mr Fowles Jnr was short of eight drivers in Cardiff. This shortfall cannot have been caused by the Infringement.

310. It is clear from Mr Fowles Jnr’s memo of 11 May 2004 (see paragraph 199 above) that the driver shortage persisted, and Mr Fowles Jnr continued to complain of the fact that the Ghurkhas had been diverted elsewhere. What is significant about this memo is that – some weeks after the 2 Travel In-Fill Service began – whilst many problems are listed, the effects of the Infringement are not mentioned.

311. 2 Travel’s board minutes for 21 May 2004 record (under “Staff”):

“5.1.1 The staffing position, particularly with regards to driving staff, had improved considerably in the month with no leavers.

5.1.2 Since the end of the reporting period the Company had successfully recruited and introduced 20 Gurkha Transport Regiment soldiers into the Swansea and Llanelli depots. The Company Secretary stated that the progress made by the Company in this recruitment was unique and that the Gurkhas work ethic was beyond reproach. They had settled to their tasks very quickly.”

In paragraph 130 of his first statement, Mr Fowles sought to minimise the significance of statements such as this, as being references only to absenteeism, rather than absences due to the Infringement. We do not accept this explanation. It is obvious that the minutes are referring to the driver position generally, and the reference to “leavers” is not consistent with the discussion being confined to absenteeism.

312. On 23 June 2004, there was a management meeting of 2 Travel staff. The minutes record that coach and bus duties would be separated in August and that at this point “coach duties would not be covered at the expense of bus duties. AP [Mr Phillips] stated that driver shortage would need to be addressed”. The minutes then went on to record:

“Driver availability for new services was discussed. Estimated that over 30 drivers are needed across all depots to achieve PVR. CEO told CAW [Mr Waters] that Cwmbran had sufficient drivers. This is not the case. Estimated that 16 drivers are needed at Swansea (just for Local Bus Services), seven at Cwmbran and five at Cardiff. CEO told CAW [Mr Waters] to tell meeting that Cwmbran services to commence Monday 5<sup>th</sup> July. DRF [Mr Fowles Jnr] concerned where resource would come from.”

The sense is that the company had sufficient drivers for the present, but that drivers were required for new services that were starting. This is confirmed by 2 Travel's letter to the Traffic Commissioner dated 21 June 2004 regarding the introduction of new services in Cwmbran and Swansea.

313. Confirmation can also be found in 2 Travel's board minutes for 25 June 2004, which record (under "Staff"):

“5.1.1 The Staffing position continues to improve with a significant reduction in staff leaving.

5.1.2 The Ghurka training has now finished and all 21 are now in full time employment in Llanelli and Swansea depots.”

Again, the suggestion is that present driver needs are being met.

314. Just before this board meeting, in a memo dated 24 June 2004, Mr Fowles Jnr made the following report:

“It has been some time since I last kept you updated on the situation in Cardiff.

#### **Competition**

Cardiff Bus are still operating illegally and unfairly along routes served by 2TG. Evidence suggests that approximately 6 pax per journey are being carried by these white “battle buses”. Drivers are still filling out forms and evidence continues to be collated but the feeling in the depot is that the company is doing nothing to remedy the situation. Perhaps a staff notice from senior company officials is needed to reassure them that we are dealing with the matter and also any progress that may have been made.

#### **VOR/Vehicle Maintenance**

The depot continues to suffer from inadequate maintenance facilities.

Due to problems with monthly rent payments we have now been given immediate notice to vacate Lamby Way (where we currently maintain vehicles) and so the situation may even worsen in the short term.

We currently have six or seven vehicles off the road for various defects – many of which are parts related and are large unit failures.

As stated we will have no maintenance facility at the depot from Monday 28<sup>th</sup> June 2004 and after discussions between AOP [Mr Price] and myself it appears that we will be forced to maintain low height vehicles at Cwmbran in the short term.

This is far from ideal as this facility is currently working to capacity with only one skilled engineer and one semi-skilled. Their workload is also due to increase

significantly in the next month due to increased local bus workings at the depot. Some thought needs to be given to this as soon as possible.

The VOR situation needs to be addressed ASAP as it is affecting operations at the depot considerably.

### **Resource**

The depot continues to lose mileage on a daily basis due to severe driver shortage. We are also in the process of losing another school contract due to lack of driver availability.

Carl has noted that some of the most profitable bus workings are to be found in Cardiff and the depot is regularly carrying 800-1000 passengers per day. To not concentrate resource on this depot seems to be ludicrous and needs addressing as soon as possible. Additional resource could make this depot a huge success.

### **New depot**

Some good news is that a suitable depot and maintenance facility has been found at Pontmanmoor Road (near Western Mail Printing Works and Docks).

I have already sent you all details of this site and I have now been told that the vendor will agree to let these premises with an initial bond of three months up front to be paid (approximately £8.8k).

I need to get back to Cooke and Arkwright as soon as possible if we wish to proceed with this new site.

### **Other**

Fuel supply continues to be a problem on a day-to-day basis. It is extremely difficult to ensure that all vehicles are fuelled daily when there is not a regular supply of cash available.

I firmly believe that other directors and senior managers should spend more time addressing our Eastern operations. I am concerned that without us all discussing the problems and addressing them one by one the depots will fail to deliver what has been promised and forecasted.

After what has been reported at Board Meetings about how successful the areas are I am sure that this is the last thing we would want and I would welcome comments.”

315. This is an important memo, for it highlights the problems that the Cardiff depot was suffering. Clearly, Mr Fowles Jnr was stressing that the depot was short of drivers, and this certainly appears to have impacted upon at least one school contract, and it seems a natural inference that the In-Fill Service was also being affected. But it is significant that Mr Fowles does not blame the Infringement for this shortage, but is rather reiterating his earlier complaints that the Cardiff depot was not being adequately resourced.

316. Mr Fowles Jnr's memo also highlights two other areas of difficulty which, in themselves, could cause buses not to operate:

- (1) Lack of maintenance facilities: obviously, a broken-down bus cannot operate, and unless the company has a redundant stock of buses to be deployed, operations are bound to be affected.
- (2) Lack of fuel: equally obviously, without fuel, buses cannot run; and, again, operations will be affected.

317. A memo by Mr Spooner, dated 2 July 2004 noted that "18 new bus routes are due to come on stream shortly" and that "[t]he 21 (former) Gurkhas recruited from Nepal (which has resulted in considerable media coverage) will facilitate the roll-out of the additional bus routes (see above)". A memo by Mr Waters dated 12 July 2004 also noted the need for 10 additional staff and 8 additional vehicles in order to run a further 8 services in Cardiff".

318. Both of these memos suggest that 2 Travel's demand for drivers was increasing in the period after April 2004, in particular in July. If drivers could not be recruited, then the existing pool of drivers would, self-evidently, have to be spread more thinly amongst ever increasing operations.

319. In a memo dated 30 July 2004, Mr Cartwright analysed the "variations in the personnel establishment figures" since March 2004, identifying (across the whole of the company) 10 resignations, one termination due to ill-health and five employees who were interviewed for jobs, but who failed to report. The total loss of drivers (i.e. drivers employed who left, as opposed to drivers who failed to take up offers of employment) was thus 11. The memo concluded:

"There are currently no planned interviews or new starters waiting to join the Company in Cardiff.

It is interesting to note that there appears to be a number of current employees who are researching the job market. Feedback indicates a frustration at the lack of progress by the authorities in curbing Cardiff Bus and the tactics adopted against 2 Travel."

This is the first mention of the effect of the Infringement.

320. 2 Travel's board minutes for 2 August 2004 record that "[o]perational issues in Cardiff were affecting the whole business", although driver shortages are not specifically mentioned.

321. Finally, a memo dated 28 September 2004 by Mr Fowles Jnr commented on the problems caused by a poorly trained driver:

"Following the loss of N857 clutch whilst away on tour over the weekend I decided to spend half an hour with the offending driver to firstly explain in monetary terms the loss incurred and also the operationally disruptive nature that his abuse of the vehicle caused.

The driver concerned is a nice enough guy who I am absolutely convinced did not burn this clutch out deliberately.

Gary and myself then took the driver on a short driving assessment and within a minute of driving it became apparent that whilst the drivers [*sic*] road awareness and vehicle positioning skills were adequate his use of the clutch pedal was appalling."

322. This, of course, highlights just how mechanical problems can de-rail operations.

(iv) *Analysis*

#### Decline in 2 Travel's operations

323. We accept that the number of In-Fill Service journeys in fact completed by 2 Travel over time fell, and (although we have some concerns about the figures) we accept as the best available the data adduced by Mr Good (see paragraph 303 above).

#### Pressures on drivers to leave/recruitment difficulties

324. We also accept that the Infringement would have generated additional pressures on 2 Travel's drivers (so creating an inducement to leave), and made recruitment more difficult. We summarised 2 Travel's contentions in this regard in paragraphs 300 to 302 above. In particular:

- (1) We accept that "sandwiching" and 2 Travel's inability to stop this would have caused frustration in 2 Travel's drivers, a fact that Mr Brown acknowledged (Transcript Day 7, page 90). Sandwiching is practically an inevitability where multiple buses are operating the same route. (The first

bus stops at the bus stop, and is delayed picking up the passengers; it is overtaken by the next bus, which is itself delayed at the next stop, for the same reason. Inevitably, “bunching” or sandwiching occurs.) Here, however, there was a deliberate decision on the part of Cardiff Bus to run its White Service just ahead of the 2 Travel In-Fill Service. In particular, Cardiff Bus’s Competition Policy of 24 March 2004 (which we consider in greater detail below: paragraph 522) expressly stated that the White Service buses “will be timed to operate just in front of the competitor’s vehicles. Where the competitor departs from scheduled time our times will vary to remain in front of the competitor’s vehicle”.

- (2) We also accept that the additional demand for drivers, to service the Cardiff Bus White Service, would have made retention of existing drivers and recruitment of new drivers more difficult for 2 Travel. Indeed, there is evidence in the documents that suggests that this was precisely Cardiff Bus’s aim. The minutes of Cardiff Bus’s recruitment and selection meeting held on 22 April 2004 record (at point 2) that “a business decision had been taken to deprive 2T of any staff we could, and leave our internal mechanisms to deal with poor performance”.

325. We do not accept that there was wide-spread intimidation. No doubt – in any area where rival services operate – tempers may boil over in an individual case, but we do not accept that Cardiff Bus instructed its drivers to intimidate, nor that any such intimidation took place in any widespread form. We reject 2 Travel’s evidence in this regard, in part because the contemporary documents from Cardiff Bus suggest that Cardiff Bus’s aim was to win over 2 Travel’s drivers through friendliness, not alienate them through hostility (see for example paragraph 9 of the Competition Policy document cited at paragraph 522 below), but mainly because the Traffic Commissioner reviewed this evidence at the time, and rejected it (see paragraph 261 above).

326. We accept that there may well have been frustration at drivers being shipped around Wales due to a shortfall. However, we consider that the evidence shows that driver shortfall was caused by factors other than the Infringement.

### Reason for the decline in services

327. We noted earlier that there are two broad reasons why a bus service may fail to operate:

- (1) There is no driver.
- (2) There is no bus (because, e.g. the bus has broken down or because the bus has no fuel).

328. We consider that the second reason certainly was a significant cause as to why 2 Travel's operations in Cardiff began to fail. It is clear that throughout 2004 – and particularly in the summer of 2004 – 2 Travel was suffering from major cash flow problems, which were getting worse, and not better. This affected 2 Travel's ability to purchase fuel for its buses (in the particular in the absence of any credit arrangements for fuel supply), but also it meant that the maintenance of the buses that 2 Travel did have in operation became increasingly difficult. Indeed, as is demonstrated by 2 Travel's memos, operations in Cardiff were never properly set up, and we find that they did not constitute a proper basis for the provision of an effective service. In short, we find that a major cause for the non-operation of certain In-Fill Service journeys was that fact that 2 Travel's infrastructure in Cardiff – in terms of bus repairs, maintenance and upkeep – was extremely poor.

329. That said, we do find too that a lack of drivers was also a problem. 2 Travel had historically suffered from a driver shortfall throughout its history, and this problem was only made worse by the fact that 2 Travel expanded its operations (in terms of the services it was trying to operate) without sufficiently expanding its driver base. Of course, the company was not wholly inactive – it recruited the Gurkhas – but (as Mr Fowles Jnr's memos demonstrate) a number of these were initially ear-marked for Cardiff, but then were diverted elsewhere. In short, we consider that 2 Travel was the author of its own misfortunes, in that it expanded too rapidly and too unthinkingly. It placed itself under too much pressure. It exercised inadequate financial discipline over its operations and accounting procedures.

330. We are sceptical that the driver position changed dramatically, in terms of shortage, after April 2004, when the Infringement began. Certainly, that is not borne out by the contemporary documents (see paragraphs 308 to 321 above), which, as we have noted, suggest that 2 Travel was coping in terms of driver numbers, and that to the extent that there were shortages, these arose out of 2 Travel's expanded services. Where there is some mention of driver shortages, most significantly there is very little mention of the deleterious effect of the Infringement.

331. In short, we do not accept that the impact of the Infringement on driver numbers was as suggested by 2 Travel's witnesses. Whilst we have no doubt that – years after the events they were seeking to describe – 2 Travel's witnesses were doing their best to recall events, we consider that they have, in their recollection, been over-emphatic, and have exaggerated the effect of the Infringement on 2 Travel's operations, in particular as regards driver shortages. Moreover, and quite understandably, there has been a reluctance to acknowledge the very real failings that existed within 2 Travel. 2 Travel was – and this is a point to which we will, unfortunately, have to revert – extremely badly managed.

332. Accordingly, we reject this part of 2 Travel's claim. On the balance of probabilities, we find that, although there was a falling off in terms of the number of In-Fill Service journeys operated by 2 Travel, the cause of that falling off was not the Infringement, but 2 Travel's basic operational failings combined with its too hasty expansion of services.

## **IX. MANAGEMENT TIME WOULD NOT HAVE BEEN DIVERTED**

333. It was 2 Travel's case that staff and management time was diverted from profitable activity by the Infringement. In closing, it was emphasised by Mr Flynn QC, on behalf of Cardiff Bus, that the evidence in this regard was insubstantial. Although 2 Travel did not accept this in terms, neither did 2 Travel mount a particularly strong defence of this part of its claim. In paragraph 104 of its written closing submissions, 2 Travel stated:

“It is clear from the witness statements and the oral evidence that the predation severely distracted 2 Travel's management and staff from carrying out their proper

functions and that a considerable amount of time was wasted dealing with matters that arose as a result of the predation. It is, however, difficult to specifically quantify the sum owed to 2 Travel for this loss and 2 Travel accepts that the Tribunal may not be able to award a significant sum under this head of loss as a consequence.”

334. Even this, we consider, overstates the position. The “evidence” in support of 2 Travel’s contention amounted to no more than assertion. Typical is the evidence of Mr Francis (Transcript Day 4, page 21):

“You have to understand at the time, we didn’t fully understand, I suppose, the level of the predation. Certainly, the management resources in the business, the executive management resources had become increasingly swamped by dealing with the issues. It became all consuming really, for the management by the end, even to the detriment of other aspects of the business.”

335. Apart from the assertions of 2 Travel’s witnesses – to which, for the reasons given in paragraph 331 above – we attach little weight – there is nothing in the contemporary documents to support the suggestion that the Infringement caused much wastage of staff or management time. A few complaints were made – to the Traffic Commissioner, to the OFT, to Cardiff Bus itself – but these were insubstantial. A detailed submission to the OFT was only made in November 2004 (see paragraph 249 above).

336. The reality is that 2 Travel’s management was, in large part, pre-occupied with managing an increasingly critical cash-flow and an increasing list of unpaid creditors. This is evidenced by the June 2004 PwC Report, the August 2004 action plan, the petition from the Inland Revenue, and the frequent calls for money from Mr Francis and Mr Short, which were (as we have described) secured by the Swansea Depot. We do not accept that the Infringement caused any abnormal diversion of management time or attention away from 2 Travel’s proper business. The fact is that operating a bus service according to the stringent parameters as to timing requires a hand-on approach and an attention to detail all the time, without particular reference to competition. In a City such as Cardiff, where there is much traffic and (as we will see) many rival services in the form of the Cardiff Bus Liveried Service, inevitably there will be “bunching” of buses and difficulties in keeping “to pad”. That is a normal incident of operating a bus service, and it is one (so we find) that 2 Travel had

significant difficulty in dealing with throughout its operational history, and not simply in Cardiff during the operation of the Cardiff Bus White Service.

337. The joint expert statement agreed between Mr Good and Mr Haberman stated:

“We agree that it is for the Tribunal to determine whether there is sufficient evidence that 2 Travel experienced any wasted staff and management time in dealing with any problems related to the running of the White Services. We agree that we have not seen contemporaneous documentary evidence of this. Mr Good notes that this issue is addressed in the statement of 2 Travel’s witnesses of fact.”

338. We have explained why we are sceptical of the after-the-event evidence of 2 Travel’s witnesses (whilst in no way impugning their desire to assist the Tribunal), and we agree with the experts: there is no contemporary evidence to support 2 Travel’s case. Accordingly, we reject the suggestion that the Infringement had any undue effect on staff or management, and we reject, therefore, that there was any effect on the company in this regard.

## **X. DIVERSION OF PASSENGERS, LOSS OF PASSENGER REVENUE AND 2 TRAVEL’S CLAIM 1: LOSS OF PROFITS**

### **(1) Introduction**

339. 2 Travel claimed for its lost profits, either to the date of 2 Travel’s liquidation on 20 May 2005 or alternatively to 30 September 2011. Which date is selected depends upon the approach the Tribunal takes with regard to 2 Travel’s second head of loss, the loss of the business of 2 Travel as a going concern. 2 Travel contended that its value as a business should be assessed as at the date of liquidation. If this is right, then 2 Travel’s claim for lost profits ought to be confined to the date of its liquidation. We consider the question of the inter-relationship between Claim 1: Loss of Profits and Claim 2: Loss of a Capital Asset first (Section X(2) below).

340. It was common ground between the parties that the relevant counter-factual scenario was to consider what 2 Travel’s position would have been, had the White Service never been operated. In other words, what the position would be if the 2 Travel In-Fill Service would be competing only against the Cardiff Bus Liveried Service. This involves an assessment of (*i*) the passengers that were

actually transported by Cardiff Bus and the revenue to Cardiff Bus that they generated and (ii) the number of these passengers that would have travelled on the In-Fill Service, had the White Service not operated, and the revenue to 2 Travel that these passengers would have generated.

341. We consider this revenue loss to 2 Travel in Section X(3) below, basing ourselves on the four services offered by Cardiff Bus operating in parallel with 2 Travel's four services up to the end of 2004. We should briefly explain why we have not used data relating to the fifth White Service and also why we have not used any of the 2005 passenger and revenue data:

(1) We have excluded consideration of the fifth route (White Service Route No 258) because that route was never operated by 2 Travel and this fact affected the extent to which Cardiff Bus itself devoted resource to this route. As is clear from paragraph 539 below, when it became apparent to Cardiff Bus that a fifth route was not being operated by 2 Travel, Cardiff Bus scaled back its operations on this route. This is reflected in the passenger and revenue figures for this route, which are a fraction of the figures for the other four routes. We therefore regard the data relating to White Service Route No 258 as unrepresentative and misleadingly low if relied upon.

(2) We only refer to Cardiff Bus's revenue and passenger figures to the end of 2004 for the same reason: 2 Travel did not operate in Cardiff in 2005, and a falling off in the Cardiff Bus White Service is to be anticipated, rendering the data unrepresentative.

342. Next – in Section X(4) – we consider whether 2 Travel would have (i) continued operations in Cardiff – and so continued generating revenue – from December 2004 until its actual insolvency and (ii) whether 2 Travel's services would have expanded beyond the four services operated by it until 19 December 2004. As we have noted, 2 Travel continued in business for some months after December 2004, and also had plans to operate a fifth service from November 2004. It is, therefore, necessary to consider whether and to what extent these factors would

have generated additional revenue for 2 Travel had the Infringement not occurred.

343. Next, having reached a view as to what revenue 2 Travel may have lost, we consider – in Section X(5) – the additional costs that 2 Travel would have incurred in order to generate this revenue, in order to reach a figure for 2 Travel’s lost profit.

344. We then consider – in Section X(6) – a legal submission made by Cardiff Bus that if the Infringement had, instead of causing 2 Travel to make lower profits than it otherwise would have done, caused 2 Travel to make greater losses than it otherwise would have done, such greater losses would, as a matter of law, be irrecoverable.

**(2) The scope of 2 Travel’s loss of profits claim**

345. Plainly, the Tribunal must be astute to avoid double-recovery on the part of 2 Travel, and 2 Travel accepted that it could not recover for the loss of a capital asset as at 20 May 2005 (the date of 2 Travel’s liquidation) and recover for loss of profits beyond this date. Conversely, if – even in the counter-factual scenario – 2 Travel would have gone into liquidation in around May 2005, it would be inappropriate to allow recovery for lost profits beyond this date.

346. Accordingly, it is our conclusion that we should – as part of Head 2: Loss of a Capital Asset – value 2 Travel as at the date of its liquidation but on the assumption that the Infringement had never taken place. This was the approach contended for by Cardiff Bus (see, for example, paragraphs 184 and 252 of Cardiff Bus’s written opening submissions). This approach is supported by authority. In *Crehan v Inntrepreneur Pub Company* [2004] EWCA Civ 637 at [176], the Court of Appeal cited with approval the following statement of the law by His Honour Judge Jack QC in *UYB Ltd v British Railways Board* (16 April 1999, unreported):

“The resolution is in my view to take a capital value of the hypothetical business at the time at which it became clear that it could not proceed, that is, when it was lost. That is the best reflection of what UYB...[has] been deprived of. That value should be based on the value which the business would have fetched in the open market at that date. That figure will reflect the fact that the new purchaser would be running the

business and taking the risks in the place of UYB. It would reflect the market view of the value. It will carry appropriate interest at the date of the valuation.”

347. We consider that the date on which it became clear that 2 Travel could not proceed was the date of its liquidation, namely 20 May 2005, and that is the date we use in order to assess – in the counter-factual scenario – the capital value of the company. That assessment is carried out in Section XI below.

348. In this section, we assess the loss of profit suffered by 2 Travel in the counter-factual scenario from 19 April 2004 (the date the Infringement commenced) to 20 May 2005 (the date of 2 Travel’s liquidation).

**(3) Lost revenue in the period to end 2004, on the basis of four operated services**

*(i) The counter-factual scenario*

349. It was common ground between the parties that the relevant counter-factual scenario was to consider what 2 Travel’s position would have been, had the White Services never operated. In other words, the 2 Travel In-Fill Service would be competing only against the Cardiff Bus Liveried Service.

350. It follows that those passengers that travelled on the White Service would not have been able to travel on the White Service. That is *ex hypothesi*. There are three possibilities:

- (1) Some or all of these passengers would not have travelled by bus at all. They would either have travelled by alternative (non-bus) means or they would not have travelled at all.
- (2) Some or all of these passengers would have travelled on the Cardiff Bus Liveried Service.
- (3) Some or all of these passengers would have travelled on the 2 Travel In-Fill Service.

351. We regard the first alternative as overwhelmingly unlikely, given the similarity between the 2 Travel In-Fill Service and the Cardiff Bus White Service. We discount it. We consider that the passengers who did travel on the Cardiff Bus White Service would – had that service never operated – have travelled on either a 2 Travel In-Fill Service or on a Cardiff Bus Liveried Service. The question is how many passengers would have travelled on which service, and what sort of revenue would thereby have been generated.

352. We consider that – so far as the four routes which were in fact operated by both 2 Travel and Cardiff Bus are concerned – the maximum number of additional passengers (i.e. in addition to those in fact carried by 2 Travel in the “real world”) that 2 Travel could possibly have attracted is defined by those passengers who in fact travelled on the Cardiff Bus White Service. Given that the Cardiff Bus Liveried Service operated in both the factual and the counter-factual scenarios, we do not consider that any further passengers would, in the counter-factual scenario, have transferred from the Cardiff Bus Liveried Service to a 2 Travel In-Fill Service.

353. Accordingly, the additional revenue that 2 Travel could have expected is to be calculated by reference to the number of additional passengers that 2 Travel would have received had the Cardiff Bus White Service not operated.

(ii) *Number of passengers in fact travelling on the Cardiff Bus White Service*

354. The starting point must be the number of passengers who in fact travelled on the Cardiff Bus White Service. This data was provided to us by Cardiff Bus. Passengers travelling on the buses were classified under the following heads (which were described by Cardiff Bus’s solicitors in a letter to the Tribunal dated 3 April 2012):

“The position in respect of the headings is as follows:

1. Adult – This relates to all adult classified tickets including single, day return or unlimited day travel tickets purchased on a bus.
2. All – This relates to any passengers boarding with a pre-purchased pass. The duration of the pass could be daily, weekly, monthly or annual as well as for the period of an educational term. This category does not include return tickets or 12 journey child tickets, which are covered by ‘Use’ (see below).

3. Child – This relates to all child classified tickets including single, day return or unlimited day travel tickets and also a 12 journey ticket purchased on a bus.
4. Cycle – This relates to any passenger boarding with a bike. This applies only to the Sunday Brecon service and is not applicable to the white service.
5. Family – This relates to a day ticket for a family purchased on a bus.
6. Swift – This relates to any passenger boarding with a smartcard containing a monthly ticket. This category is therefore analogous to ‘All’.
7. Use – This relates to any passenger boarding with a return ticket or a school child using a 12 journey ticket. In both cases, the driver would use the punch on the ticket to punch a hole in the ticket.
8. Welsh Conc – This relates to any passenger boarding with an all Wales concessionary pass entitling them to free travel.”

355. From this:

- (1) It is clear that Category 4 (Cycle) can be disregarded for present purposes.
- (2) It is evident that Categories 2 (All) and Category 6 (Swift) can be combined. The labels of these categories are not especially helpful or illuminating, and we propose to use the label “Season/Multi-Use Tickets”, but we exclude return tickets from this class.
- (3) In the data provided to us, there appear to have been no sales of Category 5 (Family) tickets. This class, also, falls to be disregarded. In any event, it seems to us that this category could, in any event, be combined with Category 1 (Adult). We also consider that Category 7 (Use) should be combined with Category 1 (Adult), because this relates to a passenger using a return ticket for the other leg of his journey, the first leg having been included in Category 1. We refer to this combined category as “Adult”, although we recognise that some of the Category 7 (Use) tickets will have been children’s tickets. There is, however, no means of differentiation, and it would appear to us that this classification has no revenue implications anyway: the price paid by a child will have been paid on the first journey undertaken, not the return journey, and this would be classified as Category 3 (Child).

- (4) The label “Welsh Conc” is not particularly helpful, and we propose to use the label “Concessionary”.

356. Accordingly, we use the following classifications, which are mutually exclusive:

- (1) Season/Multi-Use Tickets (which exclude return tickets).
- (2) Concessionary Tickets.
- (3) Adult Tickets.
- (4) Child Tickets.

357. Using these four classes of passenger, the numbers of passengers conveyed by White Service Route Nos 150, 144, 162 and 117 (which correspond to the 2 Travel Route Nos 250, 245, 262 and 217) was as follows:

<b>Period<sup>6</sup></b>	<b>Adult</b>	<b>Child</b>	<b>Season/Multi-Use</b>	<b>Concessionary</b>	<b>Total</b>
<b>Apr 2004</b>	2,833	274	1,243	3,878	8,228
<b>May 2004</b>	6,130	568	3,035	8,002	17,735
<b>Jun 2004</b>	6,370	824	3,064	7,507	17,765
<b>Jul 2004</b>	7,857	1,268	3,416	10,066	22,607
<b>Aug 2004</b>	5,804	1,541	2,552	7,750	17,647
<b>Sep 2004</b>	4,651	516	2,253	6,300	13,720
<b>Oct 2004</b>	6,699	727	3,967	8,818	20,211
<b>Nov 2004</b>	5,116	465	3,160	7,485	16,226
<b>Dec 2004</b>	5,774	689	2,768	7,357	16,588
<b>Total</b>	51,234	6,872	25,458	67,163	150,727

358. These figures relate only to the four services described in paragraph 357 above (in other words, they omit passengers travelling on White Service Route No 258). Equally, these figures only go to the end of December 2004, even though Cardiff Bus operated the White Service in January and February 2005. We have

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<sup>6</sup> The periods used by Cardiff Bus did not precisely correlate to months, but did so as nearly as possible. Thus, for instance, the figures for April 2004 were in fact for the period 1 April 2004 to 2 May 2004 and the figures for July 2004 were in fact for the period 27 June 2004 to 1 August 2004. We consider that nothing turns on this, and have (for simplicity’s sake) referenced the month.

explained why we have limited our consideration of the data in these two respects in paragraph 341 above.

359. Accordingly, for these reasons, we disregard the data relating to the fifth route and all of the data for 2005.

*(iii) Revenue to Cardiff Bus*

360. Unfortunately, the revenue to Cardiff Bus generated by these additional passengers cannot be broken down to the same extent as can the passenger data. Essentially, what we have are monthly revenue figures, broken down under the following heads:

- (1) “Fares”;
- (2) “Other on bus”;
- (3) “Multiride”;
- (4) “Concessions”; and
- (5) “Advertising”.

361. The figures – which we set out below – are summarised in Table 5 of Mr Good’s expert report (in paragraph 5.3.8) and set out in greater detail in Appendix 2.12 to Mr Good’s report. As Mr Good’s report makes clear, these data were supplied to 2 Travel by Cardiff Bus (see paragraph 5.3.7 of Mr Good’s report).

362. Mr Good provided the following explanation of these five heads of revenue (Transcript Day 8, pages 71 to 72):

- |                     |   |
|---------------------|---|
| <b>“A (Mr Good)</b> | ...All I had for white bus was the total number of passengers per month and the revenue for each of the five different types, whether it’s full fare, concession, et cetera. And so, in order to work out the passenger numbers, I had to work back from the revenue to passenger numbers by type of passenger. |
| <b>Q (Mr Smith)</b> | I see. So just to go through your various revenue heads. “Fares”. That is full adult fares, is it?  |
| <b>A (Mr Good)</b>  | That’s on-bus cash, so that would include children.   |

- Q (Mr Smith)** Right. And “Other on bus”; what is that?
- A (Mr Good)** I’m not sure. It was so small that I wasn’t too concerned that I didn’t know.
- Q (Mr Smith)** “Multi-ride” we understand. “Concessions” we understand. “Advertising”?
- A (Mr Good)** Yes. That’s advertising, as I understand it, advertising on the buses. I think we’ve seen – I know there were pictures of the 2 Travel buses that we saw with advertising on. As I understand it, that would be advertising in or outside the bus. But I haven’t included any revenue from that in my numbers at all.”

363. The advertising in question would be advertising on the White Service buses; and we consider that Mr Good was quite right to leave such revenue out of account. Although it is perfectly likely that passengers would transfer from the Cardiff Bus White Service to the 2 Travel In-Fill Service, that is not the case with advertising. We, too, leave it out of account.

364. That leaves four categories. As to these:

- (1) “Multiride” corresponds to the “Season/Multi-Use” category.
- (2) “Concessions” corresponds to “Concessions”.
- (3) “Fares” and “Other on bus” correspond to “Adult” and “Child”.

365. Using these three categories, it is possible to compute the revenue per month the four Cardiff Bus White Services generated. Taking the passenger numbers in the table at paragraph 357 above for the same month, and dividing the revenue by this number gives an average ticket price:

<b>Period</b>	<b>Adult and Child</b>	<b>Season/Multi-Use</b>	<b>Concessionary</b>	<b>Total</b>
<b>Apr 2004</b>				
Revenue (£)	£2,201.81	£924.62	£3,051.35	£6,177.78
Passengers	3,107	1,243	3,878	8,228
Average ticket price	71p	74p	79p	75p
<b>May 2004</b>				
Revenue (£)	£4,892.79	£1,982.04	£6,261.29	£13,136.12
Passengers	6,698	3,035	8,002	17,735
Average ticket price	73p	65p	78p	74p
<b>Jun 2004</b>				
Revenue (£)	£5,200.94	£2,028.85	£5,916.94	£13,146.73
Passengers	7,194	3,064	7,507	17,765
Average ticket price	72p	66p	79p	74p
<b>Jul 2004</b>				
Revenue (£)	£6,492.53	£2,127.65	£6,018.29	£14,638.47
Passengers	9,125	3,416	10,066	22,607
Average ticket price	71p	62p	60p	65p
<b>Aug 2004</b>				
Revenue (£)	£5,127.71	£1,508.60	£6,201.52	£12,837.83
Passengers	7,345	2,552	7,750	17,647
Average ticket price	70p	59p	80p	73p
<b>Sep 2004</b>				
Revenue (£)	£3,773.07	£1,667.78	£5,238.81	£10,679.66
Passengers	5,167	2,253	6,300	13,720
Average ticket price	73p	74p	83p	78p
<b>Oct 2004</b>				
Revenue (£)	£5,374.85	£2,551.68	£7,268.55	£15,195.08
Passengers	7,426	3,967	8,818	20,211
Ticket (p)	72p	64p	82p	75p
<b>Nov 2004</b>				
Revenue (£)	£4,082.24	£1,905.80	£6,245.12	£12,233.16
Passengers	5,581	3,160	7,485	16,226
Average ticket price	73p	60p	83p	75p
<b>Dec 2004</b>				
Revenue (£)	£4,694.41	£1,747.33	£6,138.29	£12,580.09
Passengers	6,463	2,768	7,357	16,558
Average ticket price	73p	63p	83p	76p
<b>Apr to Dec 2004</b>				
Total Revenue	£41,840.41	£16,444.35	£52,340.16	£110,624.92
Total Passengers	58,106	25,458	67,163	150,727
Average Ticket	72p	65p	78p	73p

366. Over the period April 2004 to December 2004, this gives an average ticket price of 73p/ticket, the average price for adult and children tickets being 72p, the average price for season/multi-use tickets being 65p and average concessionary price being 78p.

367. The consistency of the average ticket price over time supports the analysis that we have adopted. The relationship between the average ticket price between the three classes supports this analysis. Thus, the average price for multi-ride tickets reflects the fact that they would normally be cheaper than full fare tickets. Concessionary tickets are higher than adult and child tickets combined, but that is because of the impact of children, whose fares were significantly lower. Ideally, we would have wanted to separate adult from child fares, but that was not possible, given the data provided by Cardiff Bus.

(iv) *Maximum possible additional revenue to 2 Travel*

368. Even assuming (contrary to what we consider to be the true position, for the reasons considered further below) that all passengers on the Cardiff Bus White Service would have moved to 2 Travel, it is clear that 2 Travel would not have generated the same revenue as Cardiff Bus. This is because 2 Travel's ticket prices were higher than those of Cardiff Bus. The prices charged by Cardiff Bus and 2 Travel are set out at Table 5 on page 22 of the OFT Decision:

Zone	Adult single		Adult return		Child single		Child return	
	2 Travel In-Fill Service	Cardiff Bus White Service	2 Travel In-Fill Service	Cardiff Bus White Service	2 Travel In-Fill Service	Cardiff Bus White Service	2 Travel In-Fill Service	Cardiff Bus White Service
1	50p	60p	80p	110p	30p	40p	50p	70p
2	80p	60p	130p	110p	50p	40p	80p	70p
3	100p	80p	160p	150p	70p	50p	110p	90p
4	120p	100p	190p	170p	80p	60p	130p	110p

369. Averaging all these prices, 2 Travel's average price was 94p (1510p/16), and Cardiff Bus's average price was 86p (1370p/16). On average, therefore, 2 Travel's prices were 8p or 9.3% higher than Cardiff Bus's.

370. Assuming (and we recognise the assumption is unrealistic, and adjust it below) that all passengers transferred from the Cardiff Bus White Service to the 2 Travel In-Fill Service, we find that 2 Travel's additional revenue would have been £110,624.92 (the revenue generated by Cardiff Bus) plus an uplift of 9.3% to reflect the higher ticket prices charged by 2 Travel, making £120,913.04 (i.e.  $£110,624.92/100 \times 9.3\% = £10,288.12$ ).

(v) *Realistic revenue assessment*

371. The figure we have reached represents the maximum possible that 2 Travel could have hoped to have gained, based upon the assumption that all of the White Service passengers would have diverted to 2 Travel. It is not a realistic figure, for that reason, but only a starting point. We recognise that is not likely that each and every passenger who travelled on the Cardiff Bus White Service would (absent that service) have travelled on a 2 Travel In-Fill Service.

372. In a report dated 20 December 2011 entitled "Local bus services market investigation", to which we were referred by the parties, the Competition Commission considered the factors which affected a passenger's choice of alternative bus services. In paragraph 14.8 of the report, the Competition Commission noted:

"...There are two aspects of customer conduct. First, some customers commit to a particular operator by purchasing a single-operator multi-journey ticket. Second, customers place a high value on time saved and certainty, relative to other factors such as price or quality. This means that customers who are not already committed to an operator prefer to catch the first available bus when at the bus stop and to minimize waiting time (regardless of any differences in relative fares and service quality between operators)."

373. This statement commanded a large measure of agreement from those who gave evidence before us. Essentially, the Competition Commission identify four factors relevant to a passenger's choice of bus service: (i) price; (ii) quality of service; (iii) bus frequency; (iv) pre-commitment of passengers. We consider this to be a helpful list, and we adopt it. In terms of which service the passengers who did in fact travel on the Cardiff Bus White Service would have chosen, had

that service not operated, we consider the following factors in the following order:

- (1) The likely behaviour of purchasers of season/multi-use tickets.
- (2) The price of tickets.
- (3) The quality of service provided.
- (4) The frequency of services, bus timetabling and the reliability of those services.

#### Season/Multi-Use tickets

374. These are tickets that are purchased in advance of travel. Such tickets were usable on the White Service buses (see paragraph 4 of the Competition Policy document referred to at paragraph 522 below), but not on 2 Travel buses. Accordingly, the purchase of a season or multi-use ticket is strongly suggestive of an anterior decision to travel with Cardiff Bus and not 2 Travel. For this reason, it was common ground between the experts that passengers on a Cardiff Bus White Service who had purchased season tickets or multi-use tickets for Liveried (and so, White) Services would not have travelled on a 2 Travel In-Fill Service, but would have travelled on a Cardiff Bus Liveried Service had the White Service not operated.

375. We agree with the joint statement of Mr Good and Dr Niels: “The experts agree that 2 Travel would not have picked up any of the multi-journey or season ticket White Bus passengers”.

376. It follows that these passengers – and the revenue that they generated – have to be left out of account. These passengers would not, in the counter-factual scenario, have travelled on a 2 Travel In-Fill Service.

#### Price

377. As we have noted, the Cardiff Bus White Service undercut 2 Travel on fares (see paragraphs 368 to 369 above). However, 2 Travel’s fares were cheaper than those charged for travel on the Cardiff Bus Liveried Service. The prices charged

by Cardiff Bus and 2 Travel are set out at Table 5 on page 22 of the OFT Decision:

Zone	Adult single		Adult return		Child single		Child return	
	2 Travel In-Fill Service	Cardiff Bus Liveried Service	2 Travel In-Fill Service	Cardiff Bus Liveried Service	2 Travel In-Fill Service	Cardiff Bus Liveried Service	2 Travel In-Fill Service	Cardiff Bus Liveried Service
1	50p	65p	80p	115p	30p	40p	50p	70p
2	80p	95p	130p	175p	50p	60p	80p	110p
3	100p	125p	160p	225p	70p	75p	110p	140p
4	120p	155p	190p	260p	80p	90p	130p	170p

378. In its report, the Competition Commission did not consider price to be a first order factor in terms of determining choice of service, but it is obviously a relevant factor. Indeed, we consider that the importance of price would vary according to individual passenger circumstance.

379. Thus, we consider that the price of an “on-board” ticket would be irrelevant (for the reasons given in paragraph 374 above) to persons purchasing season or multi-use tickets. Such passengers would – before boarding – already have made their choice to travel on a Cardiff Bus service.

380. Equally, price would not be relevant to concessionary passengers, who paid nothing for their travel.

381. Price would be relevant to those passengers who paid for their tickets on the bus. Mr Clayton Jones considered that price could be important (Transcript Day 1, page 98: “If you live in Ely and you’re on a limited income, take it from me, it’s your pocket you look at first, not which bus comes first”), as did Mr Fowles (Transcript Day 2, page 144) and Dr Niels (Transcript Day 8, pages 159 to 161).

382. We find that price was a relevant factor in passengers’ minds and a significant differentiation between the 2 Travel In-Fill Service and the Cardiff Bus Liveried Service, operating in favour of 2 Travel. We were not provided with any evidence of how great the effect would be: but it is a factor that we take into

account (together with a number of other factors) in the manner described in paragraph 398 below.

### Quality of service

383. We heard some evidence that passengers would be attracted to the 2 Travel In-Fill Service by matters such as driver-friendliness and the willingness to give change and other such factors (see, for example, Transcript Day 1, pages 121 to 122 (evidence of Mr Clayton Jones); Transcript Day 2, pages 134 to 135 and 144 to 145 (evidence of Mr Fowles)).

384. We are sceptical as to the significance of quality of service as a factor favouring 2 Travel for three reasons.

(1) First, the fact is that all of the passengers here being considered chose to travel on a Cardiff Bus White Service, rather than a 2 Travel In-Fill Service. In short, these passengers disregarded the “quality” of service allegedly being provided by 2 Travel.

(2) Secondly, there were aspects of 2 Travel’s services that were undoubtedly of poor quality. We have already noted (from the evidence set out above) that 2 Travel was not a particularly reliable operator, and there was evidence of some 2 Travel buses having to halt operations in order to fill up with fuel (paid for in cash by the driver from the fares collected that day) whilst passengers were still on board. In short, even if there were aspects of 2 Travel’s service that would have attracted customers, this would have been off-set by other aspects of 2 Travel’s service that would have deterred customers.

(3) Thirdly, although it is true to say that the Cardiff Bus Liveried Service did not provide change, whereas 2 Travel did, 2 Travel did not have a monopoly on driver-friendliness, as Mr Brown pointed out (Transcript Day 7, page 10):

“Well, friendly drivers isn’t the exclusive province of any one bus company. I wouldn’t think that whether the drivers are friendly or not is a major factor. It’s certainly in the list that I talked about, after reliability and frequency. It’s a nice to have, rather than a major driver of demand.”

Moreover, there were other aspects of the Liveried Service which rendered it better quality than 2 Travel's service. Mr Brown noted (Transcript Day 7, pages 6 to 7) "in Cardiff, we have made a great play of having high quality vehicles, with things we would expect to attract, particularly perhaps the low floors, which are particularly attractive to parents with buggies and to older people".

385. For these reasons, we do not consider that quality of service would have been a factor driving passengers to choose 2 Travel over Cardiff Bus; but equally, given that these passengers all elected to travel on the White Service (a "no-frills" service), the additional qualities of the Liveried Service cannot have been particularly relevant. In short, we consider this factor to be neutral, and it is a factor that we leave out of account in our analysis below.

Frequency of service, timetable and reliability of service

386. A number of witnesses stressed the importance of the link between frequency of service and timetable. In the case of an infrequent service, passengers would pay considerable regard to the timetable, with a view to arriving at their bus stop in good time to catch the bus they were planning to catch. However, in the case of a frequent service, uncommitted passengers (i.e. those passengers who had not already purchased a ticket committing them to a particular carrier) would simply turn up and catch the next bus to arrive, irrespective of the service provider.
387. In short, the significance that a passenger attaches to a timetable depends upon frequency of service (see Transcript Day 1, page 121 (evidence of Mr Clayton Jones); Transcript Day 2, pages 47, 49 and 125 (evidence of Mr Fowles); Transcript Day 7, page 6 (evidence of Mr Brown)). We found the evidence of Mr Brown particularly helpful (Transcript Day 7, pages 15 to 18):

- “Q (Mr Smith)** ...clearly frequency of service must affect the extent to which a passenger pre-plans his journey?
- A (Mr Brown)** Yes.
- Q (Mr Smith)** In the sense that if your bus stop is served by buses coming along every couple of minutes, you don't have to pre-plan.
- A (Mr Brown)** Yes.
- Q (Mr Smith)** Whereas if you have a bus stop which perhaps has two buses

stopping an hour, you will plan ahead.

**A (Mr Brown)**

Yes.

**Q (Mr Smith)**

I get the sense from your answers that the factors that will determine choice of carrier are different, according to whether you are looking at a very frequently stopped bus stop or infrequently stopped bus stop?

**A (Mr Brown)**

Yes. I think that's basically right. We talk about frequent services at every 15 minutes and every 10 minutes. At 15 minutes they are on the cusp of becoming a frequent service. At 10 minutes, we describe it as a turn up and go service, and the reason for that is 10 minutes is believed to be an acceptable waiting time. If you miss your bus, it's somewhere between 0 and 10 minutes to go. If it's less frequent than that, then you do tend to plan your journey. There are many factors in how you might plan your journey and the most – the one I'm on, at best, an infrequent service, it's every half an hour, and I tend to look at when I'm trying to get to work and then you work back from that to find out the time of the bus that will get me to work for that time. That's probably the main – it's different for me, of course, but in general, people will look at the bus that will get them to where they want to go at the time.

**Q (The Chairman)**

So you do go to work by bus, do you?

**A (Mr Brown)**

I do both, but I frequently do, yes... So yes, I think generally it's about finding the convenience of the bus that will get you where you want to on time. Outside of that, if you're totally indifferent as to when you travel, then there may be other factors that come into it.

**Q (Mr Smith)**

And those other factors will be things like reliability and quality of service? You put reliability as the first key factor?

**A (Mr Brown)**

Yes. Reliability, followed by frequency.

**Q (Mr Smith)**

It just struck me, if you've got a frequently served bus stop, just how important is reliability? Will you surely not just get on to the next bus? Or will you say: I'm not going to get on this bus because I'm worried about reliability?

**A (Mr Brown)**

In those situations, I think the frequency trumps reliability because, effectively, it's overcome that problem, because even if the bus service is a little bit unreliable, you've still got a bus every 2 or 3 minutes on a frequent corridor."

388. We consider in paragraph 391 below the frequency of services on the four routes operated by 2 Travel, and it is clear that all four of the routes operated by 2 Travel overlapped to a greater or lesser extent with Cardiff Bus Liveried Services. The overlap, quite naturally, increased, the closer the service got to the City Centre, but even in the outskirts, the number of services operated by 2

Travel and Cardiff Bus together would have fallen within Mr Brown's definition of "frequent".

389. This is important, because (as we have noted) the 2 Travel In-Fill Service was not reliable. All too often, buses did not operate at all or did not operate according to the timetable published by 2 Travel. In the case of infrequent services, this would be a significant deterrent to a passenger planning his journey: a passenger will only pay regard to a published timetable, if that timetable is kept to. But in the case of frequent services, timetable and reliability matter far less – the passenger will simply get on the next bus.
390. Accordingly, when considering which service a passenger would have chosen in the counter-factual scenario, we place considerable weight on bus frequency, and rather less on reliability and timetable.
391. Dr Niels provided a helpful analysis of the frequencies of bus services on routes operated by the 2 Travel In-Fill Service. The table below sets out the frequency of 2 Travel's services on the various sections of the four routes operated by it (2 Travel Route Nos 250, 245, 262 and 217), as well as the frequency of the Liveried Services on these sections. Two points must be noted:
- (1) First, the figures in the table set out the published frequency of 2 Travel's services, and make no discount for services that did not operate.
  - (2) Secondly, the Liveried Services included are not just the four services that operated on precisely the same routes as the 2 Travel In-Fill Service (these are described at paragraph 204 above), but those Liveried Services that operated on the particular section of the route in question.

	<b>2 Travel Route No 250 Llanrumney – Cardiff City Centre</b>	<b>Liveried Services operating on this section of the route</b>
Section 1: Llanrumney Shops	2	8
Section 2: Ball Road/Burnham Avenue	2	4
Section 3: Carpenters Arms	2	15
Section 4: New Road	4	19
Section 5: Infirmary	4	33
	<b>2 Travel Route No 245 St Mellons – Cardiff City Centre</b>	<b>Liveried Services operating on this section of the route</b>
Section 1: St Mellons Police Station	2	8
Section 2: Crickhowell Road	2	4
Section 3: New Road	4	19
Section 4: Infirmary	4	33
	<b>2 Travel Route No 262 Pentrebane – Cardiff City Centre</b>	<b>Liveried Services operating on this route</b>
Section 1: Pentrebane	2	6
Section 2: Fairwater Green	2	8
Section 3: Waungron	2	2
Section 4: Ely Bridge	4	19
Section 5: Canton	4	21
	<b>2 Travel Route No 217 Ely – Cardiff City Centre</b>	<b>Liveried Services operating on this route</b>
Section 1: Heol Trelai	2	6
Section 2: Pendine	2	14
Section 3: Ely Bridge	4	19
Section 4: Canton	4	21

392. Cardiff Bus contended that, given this frequency of service, passengers indifferent to the bus company they used would take the first bus that arrived that was going to their stop and that – simply by virtue of force of numbers – this bus was more likely to be a Liveried Service than a 2 Travel In-Fill Service.
393. We consider that there is a great deal of force in this submission as regards passengers purchasing tickets other than season or multi-use tickets (who, as we have found, would in any event have used a Liveried Service). The problem is

that the data showing where passengers got on and where they got off simply does not exist, and so the question needs to be approached in an altogether more broadbrush way. Dr Niels's approach was to apportion the passengers travelling on each route purely according to frequency.

394. We see no alternative but to effect this sort of mechanistic allocation, but we consider it needs to be adjusted to reflect that fact that:

(1) There was evidence before us that the Cardiff Bus White Services were intended to run just ahead of the 2 Travel In-Fill Services (see paragraph 324(1) above). It therefore seems to us that if a passenger could not get on a White Service bus, because that service did not operate in the counter-factual scenario, there is a greater likelihood that he would have got on a 2 Travel bus than a Liveried Service bus, simply because the White Service ran ahead of the 2 Travel In-Fill Service. This, we consider, is a factor insufficiently taken into account by Dr Niels.

(2) The table of bus frequencies enumerates all Liveried Services operating on a particular route section. But only four Liveried Services completely paralleled the In-Fill Services. All other services would diverge – to a greater or less extent – from the 2 Travel routes. Given that the passengers we are considering all got on a White Service that ran the identical route as the equivalent 2 Travel In-Fill Service and these four Liveried Services, we consider that a number of these passengers would have wanted to travel on this particular route as opposed to a different route sharing some sections of the journey. Again, this is a factor that is insufficiently taken into account in a distribution based purely on frequency of service and is, we consider, a factor insufficiently taken into account by Dr Niels.

#### Our approach

395. In closing, 2 Travel re-worked some aspects of Dr Niels's calculations. Mr Flynn, on behalf of Cardiff Bus, objected to this (Transcript Day 10, page 23):

“This goes to the PwC report, 30 per cent market share estimate, and re-works some calculations of Dr Niels in a way that was not put to Dr Niels at trial. We say this approach is simply unacceptable. This is inadmissible new evidence, unsupported by

an expert's report and not put to our expert for comment. That sort of approach again should form no part of the Tribunal's conclusions in this matter. The Tribunal's task is, if I may say, a difficult one possibly, but making sense of the evidence that was given at trial, and not subsequent attempts to re-jig it."

396. We address this point briefly, in case Cardiff Bus were minded to suggest that the Tribunal is fettered in this way.

397. Of course, it is absolutely right that the Tribunal can only determine this case on the evidence before it, and cannot have regard to factual material that was not adduced before it. Neither Mr Good, nor Dr Niels nor Mr Haberman adduced such factual material. They provided expert opinion evidence. In particular, Mr Good and Dr Niels sought to assist the Tribunal in what sort of revenue would have accrued to 2 Travel had the Infringement not taken place. We have found their work extremely helpful, and have taken it fully into account, but we certainly do not consider that the opinion evidence in their reports must be used on a "take it or leave it" basis. It is for the Tribunal – based upon the factual evidence – to make an assessment of what would have happened in the counter-factual scenario, and this may very well involve re-working calculations done by the experts or adopting an approach which – although it draws on the work of both experts – adopts neither approach completely. That is what has occurred in this case. Our approach is neither that of Mr Good nor that of Dr Niels but – based upon the factual evidence we have heard – represents our concluded view as to what would have occurred in the counter-factual scenario.

398. Our approach is as follows:

- (1) As we have noted, we consider the appropriate starting point to be the number of passengers who, in fact, travelled on each of the four Cardiff Bus White Service routes.
- (2) From these passengers, it is necessary to exclude the passengers who had a season or multi-use ticket since, as we have found (see paragraph 376 above), these passengers would not have travelled on a 2 Travel bus in the counter-factual scenario.

- (3) The total number of passengers travelling on the four Cardiff Bus White Service routes between April 2004 and December 2004 – excluding season/multi-use ticket passengers – were as follows:
- (i) White Service Route No 150: 44,593 passengers in total, of whom 7,598 were season/multi-use ticket passengers, leaving 36,995.
  - (ii) White Service Route No 144: 34,317 passengers in total, of whom 8,098 were season/multi-use ticket passengers, leaving 26,219.
  - (iii) White Service Route No 162: 29,589 passengers in total, of whom 3,315 were season/multi-use ticket passengers, leaving 26,274.
  - (iv) White Service Route No 117: 42,228 passengers in total, of whom 6,447 were season/multi-use ticket passengers, leaving 35,781.
- (4) These passengers are then allocated evenly across each section of the relevant route. (As we have noted, the available data provides no material for any more sophisticated approach.) Thus, for example, White Service Route No 150 carried 36,995 passengers (excluding season/multi-use ticket passengers) and comprised five sections. In our model, we allocate 7,399 passengers to each section.
- (5) *Prima facie*, we consider that the passengers for each section of the journey should be allocated between 2 Travel and Cardiff Bus in accordance with the proportion of 2 Travel buses and Liveried Service buses serving that section. This is because – as we have found in paragraphs 386 to 394 above – frequency is a key determinant as to whether a non-season/multi-use ticket passenger will get on a particular bus. In the case of frequent services, a passenger will get on the next bus. Thus, taking Section 1 of White Service Route No 150, we find that that section was served by two 2 Travel In-Fill Services and eight Liveried Services. An allocation purely according to frequency would result in the 7,399 passengers being allocated 20% to 2 Travel and 80% to Cardiff Bus.

- (6) This, frequency-based allocation represents our starting point. However, for a number of reasons, we do not consider that purely frequency-based allocation is appropriate:
- (i) We concluded in paragraph 394(1) above that the Cardiff Bus White Services were intended to operate just in front of the 2 Travel In-Fill Services. Eliminate, for the purposes of the counterfactual scenario, the White Service, and there is a greater probability that the next bus will be a 2 Travel In-Fill Service.
  - (ii) We concluded in paragraphs 377 to 382 above that some passengers would be sensitive to price. This, we find, would incentivise these passengers to wait for a cheaper, 2 Travel In-Fill Service, rather than get on a more expensive Livered Service.
  - (iii) We noted, in paragraph 394(2) above, that only four liveried services completely paralleled the In-Fill Services. All other services would diverge – to a greater or less extent – from the 2 Travel routes. Given that the passengers we are considering all got on a White Service that ran the same route as the equivalent 2 Travel In-Fill Service, we consider that a number of these passengers would have wanted to travel on this particular route as opposed to a different route sharing some sections of the journey. This would have inclined some passengers against all Livered Services except the four that did run along the 2 Travel routes.
  - (iv) The frequency of 2 Travel buses noted in the table at paragraph 391 above is too generous to 2 Travel because it fails to take into account that fact that not all 2 Travel services operated. As we have noted in paragraph 306 above, the evidence is that the number of In-Fill Services that 2 Travel successfully operated over time diminished.
- (7) The first three of these factors all suggest that an allocation of passengers based purely on frequency of published services would under-state the

number of passengers that would get on a 2 Travel In-Fill Service. The fourth factor goes the other way, and results in an over-statement.

(8) In order to reflect these factors in our model, we have adjusted upwards the frequency of 2 Travel’s buses so as to reach a notional or adjusted frequency that we consider reflects not merely actual frequency of service, but the three other factors listed in paragraph 398(6). The adjustment we consider appropriate is to double the frequency of 2 Travel’s buses, so that in the case of section 1, where 2 Travel was scheduled to operate two services, 2 Travel is deemed to operate four. (We are not, of course, saying that 2 Travel was capable of operating such services: plainly it was not. This is a purely notional adjustment to figures which (left unadjusted) would not properly reflect the factors identified in paragraph 398(6).) As a result, instead of allocating the 7,399 passengers on that section 20% to 2 Travel and 80% to Cardiff Bus, the allocation becomes 33% to 2 Travel and 67% to Cardiff Bus.

(9) Having, in this way ascertained how many passengers 2 Travel would have gained in the counter-factual scenario, we then use our analysis of ticket prices (see paragraphs 360 to 370 above) to determine what revenue would thereby have accrued to 2 Travel.

399. Using this approach, we find that, in the counter-factual scenario, 2 Travel would have gained the following number of passengers:

2 TRAVEL ROUTE NO 250	Number of services per hour			Number of passengers on route: 36,995 Number of passengers per section: 7,399		
	2 Travel	2 Travel (uplifted)	Liveried	Pax per section	Allocation to 2 Travel	Allocation to Cardiff Bus
Section 1: Llanrumney Shops	2	4 (33%)	8 (67%)	7,399	2,442 (33%)	4,957 (67%)
Section 2: Ball Road/Burnham Avenue	2	4 (50%)	4 (50%)	7,399	3,700 (50%)	3,700 (50%)
Section 3: Carpenters Arms	2	4 (21%)	15 (79%)	7,399	1,554 (21%)	5,845 (79%)
Section 4: New Road	4	8 (30%)	19 (70%)	7,399	2,220 (30%)	5,179 (70%)
Section 5: Infirmary	4	8 (20%)	33 (80%)	7,399	1,480 (20%)	5,919 (80%)

<b>2 TRAVEL ROUTE NO 245</b>	<b>Number of services per hour</b>			<b>Number of passengers on route: 26,219 Number of passengers per section: 6,555</b>		
	<b>2 Travel</b>	<b>2 Travel (uplifted)</b>	<b>Liveried</b>	<b>Pax per section</b>	<b>Allocation to 2 Travel</b>	<b>Allocation to Cardiff Bus</b>
Section 1: St Mellons Police Station	2	4 (33%)	8 (67%)	6,555	2,163 (33%)	4,392 (67%)
Section 2: Crickhowell Road	2	4 (50%)	4 (50%)	6,555	3,278 (50%)	3,278 (50%)
Section 3: New Road	4	8 (30%)	19 (70%)	6,555	1,967 (30%)	4,589 (70%)
Section 4: Infirmary	4	8 (20%)	33 (80%)	6,555	1,311 (20%)	5,244 (80%)
<b>2 TRAVEL ROUTE NO 262</b>	<b>Number of services per hour</b>			<b>Number of passengers on route: 26,274 Number of passengers per section: 5,255</b>		
	<b>2 Travel</b>	<b>2 Travel (uplifted)</b>	<b>Liveried</b>	<b>Pax per section</b>	<b>Allocation to 2 Travel</b>	<b>Allocation to Cardiff Bus</b>
Section 1: Pentreban	2	4 (40%)	6 (60%)	5,255	2,102 (40%)	3,153 (60%)
Section 2: Fairwater Green	2	4 (33%)	8 (67%)	5,255	1,734 (33%)	3,521 (67%)
Section 3: Waungron	2	4 (67%)	2 (33%)	5,255	3,521 (67%)	1,734 (33%)
Section 4: Ely Bridge	4	8 (30%)	19 (70%)	5,255	1,577 (30%)	3,679 (70%)
Section 5: Canton	4	8 (28%)	21 (72%)	5,255	1,471 (28%)	3,784 (72%)
<b>2 TRAVEL ROUTE NO 217</b>	<b>Number of services per hour</b>			<b>Number of passengers on route: 35,781 Number of passengers per section: 8,945</b>		
	<b>2 Travel</b>	<b>2 Travel (uplifted)</b>	<b>Liveried</b>	<b>Pax per section</b>	<b>Allocation to 2 Travel</b>	<b>Allocation to Cardiff Bus</b>
Section 1: Heol Trelai	2	4 (40%)	6 (60%)	8,945	3,578 (40%)	5,367 (60%)
Section 2: Pendine	2	4 (22%)	14 (78%)	8,945	1,968 (22%)	6,977 (78%)
Section 3: Ely Bridge	4	8 (30%)	19 (70%)	8,945	2,684 (30%)	6,262 (70%)
Section 4: Canton	4	8 (28%)	21 (72%)	8,945	2,505 (28%)	6,440 (72%)
<b>TOTAL</b>					<b>41,255</b>	<b>84,020</b>

400. We thus find that, in the counter-factual scenario, 2 Travel would – on the four services here considered – have transported an additional 41,255 passengers.

401. The data does not enable us to determine the split of passengers, for the purpose of determining what this amounts to in terms of revenue. Our approach to calculating 2 Travel's lost revenue is as follows:

- (1) In transporting a total of 150,727 passengers (see paragraph 357 above), Cardiff Bus generated revenue of £110,624.92 between April and December 2004 (see paragraph 370 above).
- (2) Of these 150,727 passengers, 25,458 (or 17%) were Season/Multi-Use ticket holders who (*ex hypothesi*) would not have travelled with 2 Travel (see paragraph 376 above), leaving 125,269 (or 83%) non-Season/Multi-Use ticket holders.
- (3) Splitting the £110,624.92 revenue generated by all passengers 17%:83% gives a revenue split of £18,806.24:£91,818.68, and an average ticket price per (non-Season/Multi-Use ticket passenger) of 73p, which unsurprisingly dovetails with the average ticket price found in paragraph 365 above.
- (4) Of course, that average includes passengers using Season/Multi-Use tickets, which (as can be seen from paragraph 365) have a lower average price than the tickets sold to other classes of passenger. The average excluding Season/Multi-Use tickets is 75p/ticket, and this is the average ticket price we propose to use.
- (5) We have found that the Infringement caused 2 Travel to lose 41,255 passengers. Applying the average ticket price of 75p per passenger, this gives a loss of revenue of £30,941.25.
- (6) This figure then needs to be increased to reflect the higher 2 Travel prices. We have noted (paragraph 369 above) that 2 Travel's fares were 9.3% higher than those of Cardiff Bus. Increasing £30,941.25 by 9.3% gives £33,818.79.

(vi) *Conclusion*

402. We conclude that the Infringement cost 2 Travel 41,255 passengers in the period April to December 2004.

403. Translating these numbers into revenue, we find that these additional 41,255 passengers would have generated revenue to 2 Travel of £33,818.79.

**(4) Duration and expansion of services by 2 Travel**

(i) *Introduction*

404. It was 2 Travel's case that – but for the Infringement – it would have carried on with its In-Fill Services, instead of ceasing operations in Cardiff on 17 December 2004 (see paragraph 271 above), and would have expanded those services, at the very least to begin operating the fifth In-Fill Service, 2 Travel Route No 258.

405. Clearly, if this is right, this would have resulted in additional revenue to 2 Travel. We consider each of these matters in turn below.

(ii) *Would the service have continued beyond December 2004?*

406. So far, we have concluded that the effect of the Infringement was to deprive 2 Travel of revenue of £33,818.79. We have considered – and rejected – 2 Travel's contentions that the Infringement caused a shortage of drivers and caused a diversion of staff and management time. In short, 2 Travel's situation in the counter-factual scenario would not have been very different from what it actually was in the real world.

407. In the real world, the position was as follows. By mid-November 2004, £300,000 of bank lending unexpectedly became due (see paragraph 262 above), with the result that Grant Thornton were appointed as investigating accountants and 2 Travel shares were suspended (see paragraph 262 above). Grant Thornton found the company insolvent on a going-concern basis on 23 November 2004 (see paragraph 265 above). A number of directors resigned in late-November

and early-December 2004 (see paragraph 267 above), and 2 Travel was de-listed from AIM at the end of December 2004 (see paragraph 276 above).

408. In these circumstances, the injection of a further £33,818.79 into the company would have been a drop in the ocean, and would have made absolutely no difference to the decisions the company took. We find that, in the counter-factual scenario, that 2 Travel would have done exactly as it did, and ceased operations in Cardiff on 17 December 2004.

*(iii) Would a fifth service have been commenced?*

409. We consider that the only question can be whether 2 Travel would have operated the fifth In-Fill Service i.e. 2 Travel Route No 258. There could have been no question of 2 Travel operating any further services beyond this because of the Traffic Commissioner's decision that (because of failures in service pre-dating the Infringement) 2 Travel should not be permitted, for a period of twelve months from the decision (i.e. twelve months from 25 August 2004) to use vehicles on any local services other than those registered as at the date of the decision (see paragraph 244 above).

410. According to Mr Fowles, the plan had been for a fifth service to be commenced in November 2004 (see paragraph 202 above). Given the financial difficulties that we have described, and the costs of setting up a new service (additional drivers, buses, etc) we consider it inconceivable that 2 Travel would have begun a fifth service in the counter-factual scenario.

411. Moreover, even if 2 Travel had been legally permitted to do so, we consider it inconceivable that 2 Travel would have been in an economic position to begin any other services.

*(iv) Conclusion*

412. We conclude that, as a result of the Infringement, 2 Travel lost revenue in the amount of £33,818.79.

**(5) Costs**

413. Revenue does not, of course, equate to profit. Normally, it would be necessary to assess what costs 2 Travel would have incurred in order to generate such revenue.

414. In this case, however, such an assessment is unnecessary. The revenue that we have found 2 Travel has lost would have been generated by buses that 2 Travel operated in any event (i.e. they operated in the “real world” and they operated in the counter-factual scenario). The cost of running them was already incurred. It is simply that, in the counter-factual scenario, the buses that 2 Travel did in fact operate would have been fuller.

415. Accordingly, we find that there are no costs to be set against the revenue that 2 Travel has lost, and that the entire sum of £33,818.79 represents a loss of profit. On top of this sum, 2 Travel claims interest. We consider that 2 Travel is entitled to interest on the sum of £33,818.79 from 1 August 2004 (which is the mid-point of the period during which 2 Travel’s In-Fill Service operated). 2 Travel sought interest at a (high) rate of 8%. In paragraph 125 of its written opening submissions, 2 Travel sought to justify this rate by suggesting that “the interest should be set at a high rate to reflect the need not only to compensate 2 Travel but also to mark the nature of Cardiff Bus’ intentional breaches of competition law”. We consider this to be an inappropriate approach in what is a purely compensatory award of damages, and find that the appropriate rate of interest is the Bank of England base rate at the relevant time plus 2%. We leave it to the parties to calculate the precise amount of interest that is due on this basis.

**(6) Cardiff Bus’s contention that additional losses caused by Cardiff Bus are irrecoverable by 2 Travel**

416. It was Cardiff Bus’s contention that the 2 Travel In-Fill Services would always have been loss-making. Based upon this contention, Cardiff Bus additionally contended that if the effect of the Infringement would have been to cause 2 Travel’s losses on these services to increase, then such additional losses would,

as a matter of law, be irrecoverable. Cardiff Bus put the point like this in paragraph 18 of its written opening submissions:

“...Cardiff Bus says that the counterfactual additional revenues are not recoverable by 2 Travel in these proceedings. In the first place, 2 Travel’s claim in these proceedings is for lost profits...Since the Cardiff in-fill services would not have been profitable, there would never have been any such profits. More fundamentally, however, it does not amount to a valid claim for damages for a Claimant to say that, although the part of its business which was affected by the infringement would always have been loss-making even if there had been no infringement, by reason of the infringement it was even more loss-making than it would otherwise have been. Such a claim founders at the causation stage, because all of the losses would have been avoided if the Claimant had not operated an unprofitable line of business in the first place. Furthermore, by continuing to run a line of business which was never going to be profitable, the Claimant failed to mitigate its loss.”

417. We reject this contention as unarguable. A claim for lost profits does not cease to be valid just because the venture by which those profits were to have been generated was itself loss making. A claimant can claim for lost profits if his profits would have been £110 rather £100 or if his losses would have been £90 rather than £100. Either way, the claimant has lost £10.

418. It may be – but, if so, the submission was remarkably well-disguised – that Cardiff Bus was contending that 2 Travel acted so unreasonably in commencing the In-Fill Services that this – rather than the Infringement – should be regarded as the cause of 2 Travel’s losses. This contention, too, we consider to be bad. Even if – and we consider that the evidence was insufficient to make any findings on this point – it could confidently have been predicted that the In-Fill Services would have been loss-making at the start, that does not make the decision to enter the Cardiff market unreasonable.

## **XI. CLAIM 2: LOSS OF A CAPITAL ASSET (THE BUSINESS OF 2 TRAVEL AS A GOING CONCERN)**

### **(1) Introduction**

419. 2 Travel contended that its business would have expanded along the lines envisaged in the February 2004 PwC Report, and that the business would have grown – to mention a comparator used by Mr Good – in a manner similar to a

company such as Rotala plc. Cardiff Bus, by contrast, contended that 2 Travel would have failed, more or less as it did.

420. We approach this question in the following way:

- (1) First, we consider whether the February 2004 PwC Report constituted a viable business plan for the future of the company, and one which we could rely upon as a sensible projection of 2 Travel's business going forward.
- (2) Secondly, we consider the inherent characteristics of 2 Travel as a corporate entity. We do so under three heads: *(i)* management; *(ii)* quality of service; *(iii)* debt and cash flow. We also consider the extent to which these characteristics were affected by the Infringement.
- (3) Thirdly, we consider what, as a matter of fact, drove 2 Travel into insolvency.
- (4) Fourthly, we consider whether 2 Travel could have staved-off insolvency:
  - (i) By relying on the revenue it lost as a result of the Infringement; and/or
  - (ii) By relying upon Mr Francis and/or Mr Short advancing it more money.

**(2) The February 2004 PwC Report**

421. 2 Travel placed great reliance on the February 2004 PwC Report, which suggested that the In-Fill Service would be profitable. As we noted in paragraph 179 above, the February 2004 PwC Report projected – by Month 6 – revenue per bus per week of £1,920, with profits per bus per week of £885. Turnover for the new routes in Cardiff were projected at £473,000 for the year to August 2004 and £1,588,000 for year to August 2005.

422. These, clearly, are healthy figures. Taking the profit per bus per week of £885, if the company was (as the February 2004 PwC Report projected) operating 20 buses, then the annual profit (not the revenue) would be £920,000.

423. The projections in the February 2004 PwC Report were based not upon an independent analysis of 2 Travel's business by a respected management consultant, but came from 2 Travel itself (see paragraphs 177 and 184 above). The projections that we are particularly concerned with – the revenue and profits flowing from the In-Fill Services – were provided, we find, by Mr Fowles. Although Mr Bowsher, in closing, sought to suggest that Mr Waters provided this information, we reject that contention. The point was never directly put to Mr Fowles, but we consider that the evidence we have described at paragraphs 176, 181 and 1822 above is consistent only with Mr Fowles having provided this information. It may well be that Mr Waters provided PwC with other information: as the company's finance director, that would be unsurprising. But we consider that information and projections relating to bus operations and their profitability would have come from Mr Fowles.

424. The fact that these figures came from 2 Travel rather than PwC would not be a problem, but for two things:

- (1) First, 2 Travel's management was persistently and significantly over-optimistic in its projections as to how the business would perform in the future. Thus, by way of example:
  - (i) The Solomon Hare Working Capital Report projected profits for the year ending 31 August 2003 of £295,000 (paragraph 97 above); 2 Travel actually made a loss of nearly £1 million (paragraph 128 above).
  - (ii) Although the Prospectus on AIM flotation set out a plan to acquire the Swansea Depot, expand the company's fleet of vehicles and acquire Hawkes Coaches and CTC (see paragraph 98 above), 2 Travel's management achieved only parts of these objectives. A large part of the money raised on flotation, that should have been spent on building the business, appears to have gone into 2 Travel's general funds (see paragraphs 106 to 108 above).
  - (iii) The company's management simply disregarded Mr Waters' frequent warnings about the state of 2 Travel.

- (iv) The February 2004 PwC Report identified an additional working capital requirement of £600,000. That was intended to fund the expanded operations described in the report (see paragraph 190 above). Yet, when the money was raised, it was immediately spent dealing with 2 Travel's cash-flow problems (see paragraphs 218 to 220 above), and the company's Cardiff operations were neglected (see paragraphs 195 to 201). Within four months, PwC was identifying the need for further, substantial, cash injections.
- (2) Secondly, on their face, it is impossible to understand how the projections in the February 2004 PwC Report were derived. More particularly:
- (i) In questions given to the parties prior to their oral closing submissions on 10 May 2012, we asked the parties to consider how the per bus revenue figures could be reconciled with the annual revenue projections. Neither party was able to do: Mr Good, in particular, provided a very helpful analysis in his letter of 27 April 2012, but even he had to concede that there were “unexplained differences” between these figures.
  - (ii) We considered the revenue figure of £1,920 per bus per week in some detail in paragraphs 186 to 187 above. We found that it was impossible to understand how they had been derived, but in attempting to understand how such a figure had been reached, we found that improbably over-optimistic assumptions had to be made as to the number of passengers each bus would have to transport.
  - (iii) The state of 2 Travel's records was such that it was impossible to reach any view as to 2 Travel's costs, and in particular the weekly costs of £1,035 that were projected for each In-Fill Service bus. We can only say that – given what we know about the internal management of 2 Travel, and the way in which other figures in the February 2004 PwC Report were compiled – we would treat them with a healthy scepticism.

425. In short, we consider that the February 2004 PwC Report does not constitute any kind of sound prediction as to how In-Fill Services in Cardiff might perform – even if performed by a competently managed and run company. We now turn to the question of whether that is an appropriate description of 2 Travel.

**(3) Inherent characteristics of 2 Travel**

*(i) Poorly managed*

426. We find that 2 Travel was exceptionally poorly managed. We consider that an accurate picture of the company's affairs can be obtained from the contemporary memos written by Mr Waters, which we have described in paragraphs 93, 112, 121, 123, 125, 126, 146, 158, 195 and 222 above, and which speak for themselves.

427. This poor management was demonstrated in:

- (1) The flawed and over-optimistic business projections made by the company, which we have referred to in paragraph 424(1) above.
- (2) 2 Travel's failure to implement its strategic objectives. By way of example, having raised significant capital on flotation, 2 Travel then failed to use that capital for the purposes the money was raised (see paragraphs 424(1) above). Another good example is the failure to properly to prepare for the commencement of the 2 Travel In-Fill Services in Cardiff.
- (3) The way in which what appears to have been a soundly run business – CTC – was mismanaged by 2 Travel (see paragraphs 116 to 121 above).
- (4) The poor quality of 2 Travel's services, which we address next.

*(ii) Poor quality of service*

428. Given 2 Travel's poor management, it is not surprising that 2 Travel provided poor service. We have referred – in paragraphs 136 to 157 above – to the many complaints made in respect of 2 Travel's services. These complaints pre-dated the Infringement, and simply show that 2 Travel was a very poor provider of transport services. The decision of the Traffic Commissioner, which considered

2 Travel's bus service reliability in periods again pre-dating the Infringement (see paragraph 245 above) is also a good illustration of the extremely poor service provided by 2 Travel.

(iii) *Enormous financial difficulties*

429. 2 Travel's financial history shows a company in almost constant financial difficulty. We have described this history in some detail in Sections V and VI above, but in summary the position was as follows:

- (1) For the year ended 31 August 2000, 2 Travel made a profit of £23,412 on turnover of £566,618. For the year ended 31 August 2001, 2 Travel made a loss of £51,654 on turnover of £2,334,451 (see paragraph 89 above).
- (2) For the year ended 31 August 2002, 2 Travel made a profit of £212,135 on turnover of £3,678,935 (see paragraph 91 above), although it is right to note that Mr Waters subsequently expressed the view that this profit might have been overstated (Transcript, Day 2, pages 11 to 12 (evidence of Mr Fowles)).
- (3) In January 2003, 2 Travel was floated on the AIM. Although – remarkably – it is not possible to say exactly what this flotation raised, it was somewhere between £1,104,000 and £1,304,000. However, only about £500,000 of this capital was spent on the acquisitions 2 Travel had proposed, the rest went into 2 Travel's general funds or working capital (see paragraph 108).
- (4) Despite this, 2 Travel was reporting cash-flow difficulties in April 2003 (see paragraph 112 above), and in the summer of 2003 Mr Waters was openly questioning the viability of the company (see paragraph 126 above). 2 Travel's financial results for the year ending 31 August 2003 showed a loss of £949,636 on turnover of £4,245,185 (see paragraph 128 above). These accounts were not published until 26 February 2004, and it is clear from correspondence from 2 Travel's accountants (see paragraph 131) that they were concerned about the company's ability to continue trading as a going concern.

- (5) The company appears to have been financing itself using the money from the flotation. Certainly, its bank lending was very limited. 2 Travel had an overdraft of £48,036 as at 1 September 2002, which had increased to £87,914 by 31 August 2003. It had also borrowed £330,000 to purchase the Swansea Depot (see paragraph 164 above).
- (6) By October 2003, Mr Waters was reporting that “it is becoming increasingly difficult to meet our on-going cash requirements” (see paragraph 158 above), and 2 Travel’s “big ticket” cash liabilities were put at £866,000 (see paragraph 161 above).
- (7) Thus, the company’s position, before it commenced the In-Fill Services, can only be described as precarious. The February 2004 PwC Report suggested that additional working capital of £600,000 was required to implement the strategy contained in the report (see paragraph 190 above), and this was provided by the bank, secured by guarantees given by Mr Francis and Mr Short (see paragraphs 193 to 194 above). This money was not actually used to implement the strategy contained in the February 2004 PwC Report, but went to pay off creditors (see paragraphs 218 to 220 above). The facility was fully used by August 2004, when 2 Travel again experienced cashflow difficulties (see paragraph 233 above).
- (8) The June 2004 PwC Report identified the need for further injections of money, and projected a maximum overdraft requirement for the company of £937,000 (see paragraph 229 above). Again, this money was provided by the bank, this lending being secured by guarantees executed by Mr Francis and Mr Short in September and October 2004 (see paragraphs 233 to 235 above). At about this time, the company had to pay an enormous amount of money to the Inland Revenue, because it had been unable to keep to the agreed timetable for repaying its tax arrears.
- (9) When, unexpectedly, the bank demanded repayment of £300,000, Grant Thornton came in as investigating accountants and concluded that the company could not trade as a going concern (see paragraphs 265 above), although in fact the company carried on trading for several months,

receiving a further £300,000 from Mr Short. But, by this time, the writing was clearly on the wall: 2 Travel's shares were suspended from trading, and in December 2004 2 Travel was forced to close many of its operations (including those in Cardiff) and left AIM.

**(4) What drove the company into insolvency?**

430. We accept 2 Travel's point that Cardiff Bus must take 2 Travel as it found it. If – but for the Infringement – 2 Travel would have carried on in business, and it was the Infringement that caused a weak company to go under, then (on the but-for test) that is something for which Cardiff Bus is responsible.

431. We have found that 2 Travel was a badly run company, with enormous financial difficulties, even before it commenced the In-Fill Services, and providing poor transport services. This is why the company failed.

432. But for extremely large injections of cash – from the flotation and from the bank (guaranteed by Mr Francis and Mr Short) – the company would have gone under long before May 2005. It could only have survived beyond May 2005 had Mr Francis and Mr Short continued to support the company, which they did not do (a question we consider further below).

433. We have found that the Infringement would have resulted in additional revenue to the company of £33,818.79. This was a drop in the ocean, and could not have saved the company. We consider the Infringement to be causally irrelevant to 2 Travel's demise.

434. It is worth noting at the outset that the Cardiff market was not necessarily “rich pickings” for new entrants into this market. In October 2009, Mr Clayton Jones's company, the Heart of Wales Bus Company, began running commercial services in Cardiff, using six buses, and with an intention to expand. Mr Clayton Jones's operation was not the subject of the sort of unlawful response from Cardiff Bus that 2 Travel faced in 2004. Yet, the Heart of Wales Bus Company's services were reduced from six buses to four, and then withdrawn altogether (Day 1, pages 90 to 91). In his evidence to us, Mr Clayton Jones blamed the concessionary fare reimbursement scheme (whereby bus operators

carrying concessionary passengers received 73.69% of the average adult fare) operated in Cardiff. Be that as it may, precisely the same scheme pertained when 2 Travel was operating its In-Fill Services in 2004 (Day 1, page 91).

**(5) Could the company have been saved?**

*(i) The lost additional revenue*

435. For the reasons we have given, the lost revenue resulting from the Infringement was nothing like enough to enable 2 Travel to stave-off insolvency.

*(ii) Additional funding from Mr Francis and Mr Short*

436. 2 Travel contended that Mr Francis and Mr Short would have provided additional (unsecured) funding, so as to enable 2 Travel to avoid liquidation, had the Infringement not occurred. It was, on 2 Travel's case, the Infringement which deterred Mr Francis and Mr Short from putting more capital into the company.

437. We reject this contention for two reasons. In the first place, we do not accept the basic factual premiss on which this contention is predicated. In order for the contention to have any credibility, 2 Travel must show that the Infringement was seriously impairing 2 Travel's operations. For the reasons we have given, the Infringement did not have this effect. Its effect, as we have found, was *de minimis* (i.e. it deprived the company of revenue of £33,818.79), which could have had no effect on 2 Travel's business or future.

438. Mr Francis and Mr Short were experienced businessmen. We consider that they would have had a very clear understanding of 2 Travel's financial predicament, and would have appreciated that as a transport business, the company was going to fail. For example, we consider that the fact that – in the summer of 2004 – 2 Travel was suffering (again) from major cash-flow problems, in circumstances where it had only just received a substantial capital injection of £600,000 as a result of the recommendations in the February 2004 PwC Report, would have spoken volumes to them. We consider – as Mr Waters stated in his summer 2003 memo (paragraph 123 above) – that they would have appreciated that 2

Travel's only real asset was not its transport business, but the Swansea Depot's development potential.

439. In short, if it was the state of the company that deterred Mr Francis and Mr Short from further investment, then the company's state would have been just the same in the counter-factual scenario, and it follows that even if the Infringement had never occurred, Mr Francis and Mr Short would not have invested any more money in the company.

440. We reject 2 Travel's contention for a second reason, also. We find that Mr Francis and Mr Short would only have financed 2 Travel to the extent that security was available to ensure that their lending was repaid. We do not accept that either Mr Francis (notwithstanding his family connection with Mr Fowles) or Mr Short were in the business of gifting money to 2 Travel. They were willing to guarantee the company's borrowing, but only on terms, and those terms involved first a security interest in the Swansea Depot (see paragraph 194 above), subsequently the Option and after that the Assignment.

441. Mr Francis and Mr Short lent, or secured borrowing, of a total of £1,925,000, comprising:

- (1) A guarantee of 2 Travel's borrowing from the bank in the amount of £675,000.
- (2) A guarantee of 2 Travel's borrowing from the bank in the amount of £300,000.
- (3) A guarantee of 2 Travel's borrowing from the bank in the amount of £650,000.
- (4) An injection of funds from Mr Short of £300,000.

442. This, we consider, is probably what the land was worth, given its undeveloped state. Although King Sturge had valued the property in that state at £1 million, that ignored the development potential, and with planning permission clearly the value of the land was much higher. But that, of course, is just the point: there was development potential, which had yet to be achieved, and might not be

achieved. Given the development potential, we consider that the price identified in the Option was a fair price, (which, given the fact that 2 Travel, Mr Francis and Mr Short were related parties, is perhaps just as well for all concerned). It is entirely natural that Mr Francis and Mr Short should have stopped supporting the company when their exposure neared the £2 million mark. We find that the reason they stopped supporting the company was because any further lending or support would be unsecured, given the value of the Swansea Depot, and not because of the Infringement. Accordingly, we reject Claim 2: Loss of a Capital Asset.

## **XII. CLAIM 3: LOSS OF A COMMERCIAL OPPORTUNITY (THE SWANSEA DEPOT DEVELOPMENT)**

443. The essence of 2 Travel's Claim 3 is that the Infringement forced the company to mortgage and (through the Option and the Assignment) divest itself of its interest in the Swansea Depot. But for the Infringement – so 2 Travel contends – the company would have held, unencumbered save for the bank's first charge, property that was extremely valuable.
444. Given the findings that we have made in relation to the causal effect of the Infringement, this claim must inevitably fail. For the reasons we have given, we consider that 2 Travel's need to use the Swansea Depot to raise funds had nothing to do with the Infringement: in the counter-factual scenario, we find that 2 Travel would have had to act exactly as it did with regard to the Swansea Depot, or it would have gone into liquidation much sooner (probably in April 2004, when further "working capital" was raised with the assistance of Mr Francis and Mr Short).
445. For the reasons given in paragraph 442, we should also say that we are satisfied that 2 Travel divested itself of the Swansea Depot properly, and not at an undervalue. Mr Francis and Mr Short gave fair value – possibly paying more, and certainly no less, than a third party would have done. 2 Travel received a fair value for the property.

### **XIII. CLAIM 4: WASTED STAFF AND MANAGEMENT TIME**

446. For the reasons we have given in paragraphs 333 to 338 above, we find that the Infringement did not cause any abnormal waste of staff or management time, and that 2 Travel can recover nothing in respect of this head of loss.

### **XIV. CLAIM 5: LIQUIDATION COSTS**

447. Since we have concluded that 2 Travel would, in the counter-factual scenario, have ended up in liquidation at the same time as it in fact did, it follows that, even if the Infringement had never occurred, the liquidation costs would have been incurred exactly as they have been incurred. We find that 2 Travel can recover nothing in respect of this head of loss.

### **XV. CLAIM 6: EXEMPLARY DAMAGES**

#### **(1) Introduction**

448. While the purpose of an award of damages is to compensate a claimant's loss, the object of the exemplary damages is "to punish and deter": *Rookes v Barnard* [1964] 1 AC 1129 at 1221; *Kuddus v Chief Constable of Leicestershire Constabulary* [2002] 2 AC 122 at [51]. It is for this reason that they have been described as an "undesirable anomaly" (*Broome v Cassell & Co Ltd* [1972] 1 AC 1027 at 1086 to 1087 (*per* Lord Reid)). Exemplary damages are awarded in addition to compensatory damages for the purpose of "vindicating the strength of the law" (*Rookes v Barnard* at 1226 *per* Lord Devlin; *Kuddus* at [62] *per* Lord Nicholls) and "to teach a wrongdoer that tort does not pay" (*Rookes v Barnard* at 1227 *per* Lord Devlin and *Broome v Cassell* at 1130 *per* Lord Diplock), thus justifying the admission into civil law of "a principle which ought logically to belong to the criminal" (*Rookes v Barnard* at 1226 *per* Lord Devlin). The courts have emphasised that exemplary damages are a "remedy of last resort" (*Kuddus* at [63] *per* Lord Nicholls), which are not to be encouraged (*Watkins v Home Secretary* [2006] 2 AC 395 at 409 *per* Lord Bingham), and that the court's inherent discretion to award exemplary damages must be "cautiously exercised" (*Devenish Nutrition v Sanofi-Aventis SA* [2009] 1 Ch 390 at [56] *per* Lewison J).

449. It has been held that exemplary damages should only be awarded if compensatory damages are insufficient alone to punish the defendant. Thus, Lord Devlin in *Rookes v Barnard* stated that exemplary damages should be awarded (at 1228):

“...if, but only if, the sum [awarded as compensation] is inadequate to punish [the defendant] for his outrageous conduct.” (Emphasis added.)

450. It is with these general precepts in mind that we approach the question of exemplary damages.

451. In *Rookes v Barnard*, Lord Devlin identified (at 1226) the following three categories of case where an award of exemplary damages may be appropriate:

- (1) Oppressive, arbitrary or unconstitutional conduct by “servants of the government”.
- (2) Conduct calculated to make a profit which may well exceed the compensation payable to the claimant.
- (3) Cases authorised by statute.

452. 2 Travel contend that it is entitled to exemplary damages under the first two of these three heads.

**(2) Oppressive, arbitrary or unconstitutional conduct by servants of the government**

*(i) The relevant law*

453. In *Broome v Cassell*, the House of Lords expressed the view (*obiter*) that the term “servants of the government” was not to be strictly construed. Lord Hailsham LC, for example, considered that the category would extend to the police and “almost as certainly to local and other officials” (at 1077 to 1078). Lord Reid considered that the contrast being drawn was “between “the government” and private individuals. Local government is as much government as national government, and the police and many other persons are exercising governmental functions” (at 1088). Lord Diplock considered that the category

could not be confined “to torts committed by servants of central government alone. It would embrace all persons purporting to exercise powers of government, central or local, conferred upon them by statute or at common law by virtue of the official status or employment which they held” (at 1130).

454. *AB & Ors v South West Water Services Ltd* [1993] 1 QB 507 was a case where a number of a water authority’s customers brought claims in tort against the water authority’s successor in title alleging – amongst other things – nuisance, negligence and breach of statutory duty. The claimants sought exemplary damages under the first head of exemplary damages. In rejecting this claim, Stuart-Smith LJ stated (at 525):

“In the court below Mr Symons [counsel for the defendant] had conceded that the defendants’ servants might be within the first category. However, before us he sought and was granted leave to withdraw the concession. At the time of these events the defendants were a nationalised body set up under statute for a commercial purpose, namely the supply of water. They have since been privatised, but carry on essentially the same functions. Although it is conceivable that governmental functions could be delegated or entrusted to a nationalised industry with appropriate powers to carry out such functions, perhaps for example with powers of entry and search, I do not think it can possibly be argued that the defendant’s servants or agents were performing such a function in this case. A serious mishap had occurred in the course of the defendants’ commercial operations, their reaction to it was open to serious criticism if the allegations in the statement of claim are true, as they must be assumed to be for the purpose of this case. But their conduct was not an exercise of executive power derived from government, central or local and no amount of rhetoric describing it as arbitrary, oppressive, unconstitutional or high-handed makes it so. It would have been no different if the defendants had already been privatised and their servants were answerable to a board of directors and the shareholders rather than a board set up under statute.”

455. Bingham MR also regarded the case as well outside the first category (at 531 to 532):

“If the defendants’ conduct was as pleaded, as we must for present purposes assume, it was highly reprehensible, but the conduct complained of was quite unlike the abuses of power which Lord Devlin had in mind and I cannot regard the defendants, for any purposes relevant to these claims, as wielding executive or governmental power. They were a publicly owned utility acting as monopoly supplier of a necessary commodity, enjoying certain statutory powers and subject to certain obligations, but they were not acting as an instrument or agent of government.”

456. The Court of Appeal rejected the suggestion that the notion of a defendant exercising government power was the same as whether that body was an emanation of the state for the purposes of EU law (at 525 to 526 *per* Stuart-Smith LJ) or whether it was susceptible of judicial review (at 531 *per* Bingham MR).

457. We note that, in *Kuddus*, Lord Nicholls said this about Lord Devlin's first category at paragraph 66:

“In *Rookes v Barnard* [1964] AC 1129, 1226, Lord Devlin drew a distinction between oppressive acts by government officials and similar acts by companies or individuals. He considered that exemplary damages should not be available in the case of non-governmental oppression or bullying. Whatever may have been the position 40 years ago, I am respectfully inclined to doubt the soundness of this distinction today. National and international companies can exercise enormous power. So do some individuals. I am not sure it would be right to draw a hard-and-fast line which would always exclude such companies and persons from the reach of exemplary damages.”

458. We consider that it is not for this Tribunal to question the ambit of Lord Devlin's first category, and that if the soundness of the distinction he draws is to be questioned, that is a matter for the Supreme Court. For our purposes, we consider the law to have been correctly stated in *AB v South West Water Services Ltd*.

(ii) *Application in the present case*

459. Mr Brown described the management and operation of Cardiff Bus in his first witness statement, and that evidence was not challenged by 2 Travel. In particular, Mr Brown made clear:

- (1) That, prior to the coming into force of the Transport Act 1985, bus transport was subject to a high degree of government regulation (paragraph 9), but that “[t]he Transport Act introduced de-regulation in the marketplace, with Councils being required to divest themselves of their bus undertakings. As an alternative to outright sale, local authorities were permitted to transfer their bus undertakings into a separate private limited company, whose shares were owned by the local authority, but

with management that operated independently from the local authority and at arms length” (paragraph 10).

- (2) Cardiff Bus fell to this category, of being owned by the local authority, but operated at arm’s length (paragraphs 10 and 29).
- (3) Cardiff Bus has a board of directors, comprising three executive directors and seven non-executive directors. At the time of the Infringement, the executive directors were Mr Alan Kreppel (managing director); Mr Brown himself (finance and administration director and then, in succession to Mr Kreppel, managing director); and Mr David Worsell (engineering director). When Mr Brown succeeded Mr Kreppel, his position as finance and administration director was filled by Ms Cynthia Ogbonna (paragraph 13).
- (4) The non-executive directors are councillors appointed by the Council (paragraph 14). Essentially, the non-executive directors attend board meetings of Cardiff Bus, but between board meetings, have minimal dealings with the company (paragraph 18). Non-executive directors understand that they are not to concern themselves with the day-to-day management of the company, and they did not do so in the case of the Cardiff Bus White Services (paragraph 19). Although councillors, the non-executive directors understand that they cannot allow political alliance, personal constituency interest or any other non-Cardiff Bus considerations to play any part in their role as non-executive directors (paragraph 20).

460. We accept this evidence. Our conclusion, in the light of this evidence, is that it cannot be said that Cardiff Bus was, when operating the White Services, exercising governmental functions of any sort, and we hold that – for this reason – Cardiff Bus cannot fall within Lord Devlin’s first category.

**(3) Conduct calculated to make a profit which may well exceed the compensation payable**

(i) *The law*

461. In *Rookes v Barnard*, Lord Devlin defined his second category in the following way (at 1227):

“Where a defendant with a cynical disregard for a plaintiff’s rights has calculated that the money to be made out of his wrongdoing will probably exceed the damages at risk...” (Emphasis added.)

462. In the early cases the awards of exemplary damages in Lord Devlin’s second category arose mainly in the context of claims for libel. Thus in *Manson Associated Newspapers Ltd* [1965] 1 WLR 1038, (a case which, although not cited to us, was considered and relied upon by the House of Lords in *Broome v Cassell*, which was cited to us) Widgery J in his summing up stated that a situation falling within Lord Devlin’s second category would arise where the defendant published a defamatory statement (at 1043):

“...either knowing it to be untrue or quite reckless whether it is true or not, and with full knowledge that it is going to hurt somebody, but he published that statement after a cold and cynical calculation of profit and loss...”

463. This formulation is quite different from Lord Devlin’s wording, replacing as it does the concept of cynical disregard with the concept of recklessness. The House of Lords in *Broome v Cassell* (another libel claim) was at pains to explain that Lord Devlin’s formulation was not to be rigidly adhered to, like statute, for his categories were intended to be descriptive only: *Broome v Cassell* at 1068 and 1077 (*per* Lord Hailsham) and 1129 (*per* Lord Diplock).

464. Thus, regarding the element of “calculation” present in both Lord Devlin’s and Widgery J’s formulation, it was explained that Lord Devlin’s second category was not limited to the “kind of mathematical calculation to be found on the balance sheet”: *Broome v Cassell* at 1078 to 1079 (*per* Lord Hailsham), 1101 (*per* Lord Dilhorne) and 1130 (*per* Lord Diplock). Rather “the situation contemplated is

where someone faces up to the possibility of having to pay damages for doing something which may be held to have been wrong but where nevertheless he deliberately carries out his plan because he thinks it will work out satisfactorily for him”: *Broome v Cassell* at 1094 (*per* Lord Morris).

465. In other words, the cynical calculation required by Lord Devlin can be inferred from the deliberate conduct of the defendant in committing the tortious act.

466. Both Lord Morris and Lord Dilhorne held that exemplary damages could be awarded where someone “wilfully or knowingly or recklessly peddles untruths for profit” (at 1094 and 1101).

467. Similarly, Lord Diplock held that to bring a case within a second category the claimant must prove that (at 1130):

“...the defendant, at the time that he committed the tortious act, knew that it was unlawful or suspecting it be unlawful deliberately refrained from taking obvious steps which, if taken, would have turned suspicion into certainty. While, of course, it is not necessary to prove that the defendant made an arithmetical calculation of the pecuniary profit he would make from the tortious act..., it must be a reasonable inference from the evidence that he did direct his mind to the material advantages to be gained by committing the tort and came to the conclusion that they were worth the risk of having to compensate the plaintiff if he should bring an action.”

468. Lord Hailsham held that exemplary damages could be awarded for “outrageous behaviour” (at 1077) and that what was necessary to bring a case within Lord Devlin’s second category was commission of a tortious act with “guilty knowledge” and for a “motive” of making a profit, in other words (at 1079):

“...(i) knowledge that what is proposed to be done is against the law or a reckless disregard whether what is proposed to be done is illegal or legal, and (ii) a decision to carry on doing it because the prospects of material advantage outweigh the prospects of material loss.”

469. Lord Reid re-formulated Lord Devlin’s second category as follows (at 1088):

“An ill disposed person could not infrequently deliberately commit a tort in contumelious disregard of another’s rights in order to obtain an advantage which would outweigh any compensatory damages likely to be obtained by his victim.”

470. For Lord Reid, exemplary damages could not be awarded unless the publisher sued for libel either “knew that passages in the book were libellous and could not be justified or at least deliberately shut their eyes to the truth” (at 1089).
471. In *John v MGN* [1997] 1 QB 586, the Court of Appeal revisited the various reformulations of Lord Devlin’s second category in the context of libel claims. Bingham MR noted (at 618) that in cases where actual knowledge is not in issue, the formulation of the state of knowledge of the publisher as “reckless” can be misleading. Instead, he thought that the jury should be directed to be satisfied that the defendant “had no genuine belief in the truth of what he published”, i.e. he “must have suspected that the words were untrue and have deliberately refrained from taking obvious steps which, if taken, would have turned suspicion into certainty” (using Lord Diplock’s formulation in *Cassell v Broome*).
472. As to the second requirement of a profit motive, it was held that simply publishing a newspaper for profit was not enough. The defendant’s unlawful conduct must have been motivated by mercenary considerations (at 618 to 619) and an inference of a cynical calculation of mercenary advantage should not be lightly drawn (at 619).
473. More recently, in *Kuddus*, in the different context of a tort of misfeasance in public office, Lord Nicholls identified the circumstances in which an award of exemplary damages would be appropriate pursuant to Lord Devlin’s second category as follows (at [63]):
- “On occasion conscious wrongdoing by a defendant is so outrageous, his disregard of the plaintiff’s rights so contumelious, that something more [than compensatory damages] is needed to show that the law will not tolerate such behaviour...”
474. For Lord Nicholls, exemplary damages were a “remedy of last resort” awarded only when the conscious wrongdoing by the defendant was “outrageous” (at [68]):
- “...the essence of the conduct constituting the court’s discretionary jurisdiction to award exemplary damages is conduct which was an outrageous disregard of the plaintiff’s rights...” (emphasis added.)

475. In a Privy Council appeal from New Zealand, *A v Bottrill* [2003] 1 AC 44 at [23], Lord Nicholls had an opportunity to clarify what features make conduct “outrageous” when he explained that “cases satisfying this test of outrageousness [in *Rookes v Barnard*] will usually involve intentional wrongdoing with, additionally, an element of flagrancy or cynicism or oppression or the like: something additional rendering the wrongdoing or the manner or circumstances in which it was committed particularly appalling.” This decision was not cited to us. Given the citation of *Kuddus*, it should have been, as it elucidates Lord Nicholls’ thinking in that case.
476. Notably, the test set out by Lord Nicholls in *Kuddus* at [63] was also recently applied by the Supreme Court in *Lumba v Secretary of State for the Home Department* [2012] 1 AC 245 at [150] when it refused to award exemplary damages against the Secretary of State for unlawful imprisonment in a case falling within Lord Devlin’s first category.
477. Lord Nicholls’ speech with its focus on “conscious” and “outrageous” conduct appears to have been heavily influenced by the Law Commission report on Aggravated, Exemplary and Restitutionary Damages (1997) (Law Com No 247), to which Lord Nicholls made particular reference. In this report, it was proposed that exemplary damages should be awarded where, in committing a wrong (or in conduct subsequent to the wrong<sup>7</sup>), the defendant “deliberately and outrageously disregarded the plaintiff’s rights” (Part V, para 1.44(18)). In explaining what is meant by this test, the Law Commission merely stated as follows (Part V, para 1.47):
- “The minimum threshold is that the defendant has been subjectively reckless – to use criminal law terminology. The notion of ‘outrage’ imports the element of judicial discretion that we believe is inevitable, and essential, in this area. Factors that will no doubt be relevant in deciding whether conduct is not merely reckless but outrageous will include whether the wrong was intentionally committed, the extent and type of the potential harm to the plaintiff, and the motives of the defendant.” (Emphasis added.)

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<sup>7</sup> Note that this extension to the circumstances in which exemplary damages could be awarded was limited by the Supreme Court in *Lumba* where at [165] Lord Dyson pointed out that the role of exemplary damages is to punish the commission of the underlying tort and not the subsequent conduct of the litigation as any disapproval of the conduct of the litigation can be marked by an appropriate order for costs or by an increased award of (compensatory) aggravated damages (citing *Thompson v Comr of Police of the Metropolis* [1998] QB 498, 517D, per Lord Woolf MR).

(ii) *Exemplary damages in the context of the Infringement*

478. In the light of these statements of the law, two points need to be considered in greater detail:

- (1) First, the circumstances in which exemplary damages can be imposed where the wrong in question is an infringement of competition law, specifically an infringement of the Chapter II prohibition.
- (2) Secondly, what role exemplary damages can play where (as here) there exists a jurisdiction to impose a fine on the wrongdoer.

479. We consider these two points in turn below.

Exemplary damages where the Chapter II prohibition is infringed

480. *Devenish Nutrition Ltd v Sanofi-Aventis SA* [2007] EWHC 2394 is the only decided case dealing with the award of exemplary damages for breaches of competition law. This was not a case concerning the Chapter II prohibition, but an infringement of Article 101 TFEU. In that case, it was accepted that on the facts the case fell within Lord Devlin’s second category (although, ultimately, and for reasons which we will explore later, exemplary damages were not in fact awarded in this case). This was because of the European Commission’s findings that the defendants had participated in price-fixing cartels “with full knowledge of the illegality of their actions” (at [9] and [44]).

481. Because these findings so clearly brought the matter within Lord Devlin’s second category, it was not necessary for Lewison J to consider the second category in any great detail.

482. The reason that complaints of breaches of the Chapter II prohibition present a particular problem is that often a company will be unable to predict with certainty whether or not a proposed measure would amount to an infringement. This is because it can be extremely difficult to determine which unilateral acts by a dominant undertaking are pro-competitive and which are anti-competitive. As is noted in Whish & Bailey, *Competition Law*, 7<sup>th</sup> ed (2012) at page 192, “the application of [the Chapter II prohibition] involves a competition authority or a

court having to decide whether that behaviour deviates from ‘normal’ or ‘fair’ or ‘undistorted’ competition, or from ‘competition on the merits’, none of which expressions is free from difficulty”.

483. This being the case, it follows that many business decisions taken by a dominant undertaking will be taken in the knowledge that there is a risk that the company’s actions will be found to breach competition rules.
484. On the face of it, Lord Devlin’s second category is specifically aimed at the punishment and deterrence of such calculated risks. Yet we consider that – unless we are compelled to by higher authority – to impose on undertakings an exposure to exemplary damages in all cases where a company proceeds with conduct despite there being a known risk of an infringement of the Chapter II prohibition would be wrong. It would have the effect of deterring actions that might well have a pro-competitive effect.
485. Obviously – as *Devenish* shows – exemplary damages can in theory be awarded where there is an intentional breach of the law i.e. the defendant acts knowing that what he does constitutes an infringement of competition law and intending that infringement. It is equally clear – from the case-law we have cited – that the jurisdiction to award exemplary damages extends beyond this core case, and that cases which may be termed cases of “recklessness” can be sufficiently outrageous so as to fall within Lord Devlin’s second category (see, in particular, paragraphs 466, 468, 470 and 471 above).
486. In *R v G* [2004] 1 AC 1034 at [32], Lord Bingham defined recklessness in the context of the criminal law as the “knowing disregard of an appreciated and unacceptable risk of causing an injurious result or a deliberate closing of the mind to such risk” (emphasis added). The key word – for present purposes – is “unacceptable”. It is only when a risk is “unacceptable”, but is nevertheless consciously disregarded, that conduct becomes “reckless”. The conscious disregard of an acceptable risk is not recklessness.

487. What, then, is an “unacceptable” risk? We consider that an unacceptable risk is one capable of being characterised as:

- (1) Involving conduct that entails a cynical disregard for a claimant’s rights (to use Lord Devlin’s test in *Rookes v Barnard*); or
- (2) Behaving outrageously (Lord Hailsham in *Cassell v Broome*) or in outrageous disregard of the claimant’s rights (Lord Nicholls in *Kuddus*).

488. We consider that where there is only a small risk that the Chapter II prohibition will be infringed no question of exemplary damages should arise. In *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 at 390, Lord Nicholls considered the sometimes difficult question of a company carrying out a transaction for someone whilst nevertheless being aware of a risk that the transaction is unauthorised:

“...frequently the situation is neither clearly white nor clearly black... Instead there is a gradually darkening spectrum which can be described with labels such as clearly authorised, probably authorised, possibly authorised, wholly unclear, probably authorised and, finally, clearly unauthorised.”

489. We consider this appreciation that matters are rarely black-and-white to be a particularly helpful insight. Applying it analogously, in the context of infringements of the Chapter II prohibition, an undertaking may be aware that its proposed conduct is (i) clearly lawful, (ii) probably lawful, (iii) possibly lawful, (iv) wholly unclear, (v) probably unlawful or (vi) clearly unlawful.

490. We consider that it will only be in those cases where an undertaking is aware that its proposed conduct is either probably unlawful or clearly unlawful that a risk can be classed as “unacceptable”. Whether the risk is, in fact, “unacceptable” will in addition depend upon all the facts of the case, including (for example):

- (1) Any expected pro-competitive effects of the conduct.
- (2) The degree and seriousness of any anti-competitive effects.
- (3) The motive of the undertaking for acting.

- (4) The practicability of achieving the same commercial or pro-competitive aim by following a different course of action with less serious anti-competitive effects.

#### Punishment in parallel

491. In *Devenish*, Lewison J held (at [48]) that “the imposition of fines and an award of exemplary damages serve the same aim: namely to punish and deter anti-competitive behaviour”. He also held that “the principle of non bis in idem [trans: not twice for the same thing] precludes the award of exemplary damages in a case in which the defendants have already been fined (or had fines imposed and then reduced or commuted) by the commission”.

492. That was a case where some of the defendants, against whom exemplary damages were sought, had had their fines commuted to zero as a result of the application of a leniency notice. It was contended that these companies – at least – had not been sanctioned for the unlawful conduct at all, and that exemplary damages should, at least, be imposed here. Lewison J rejected this submission (at [51]):

“I do not accept this submission. The Commission decided in principle that fines should be imposed on the Aventis companies. It is true that by the application of the Leniency Notice, those fines were commuted to zero as a result of Aventis’ conduct as whistleblower; but the starting point of the application of the Leniency Notice was the finding of unlawful conduct coupled with the imposition, in principle, of a fine. The application of the Leniency Notice serves the important policy aim that it is of even more importance to encourage whistleblowers than to punish participants in a cartel. In my judgment the national court should not undermine that policy by an award of exemplary damages against a person who has had his fine commuted as a result of the application of the Leniency Notice.”

493. In the present case, the OFT found that Cardiff Bus had infringed the Chapter II prohibition. It was open to the OFT to fine Cardiff Bus in accordance with section 36(2) of the 1998 Act. However, as is noted in the OFT Decision:

“8.6 Sections 40(3) and (4) of the Act provide that a person is immune from the effect of section 36(2) if his conduct is conduct of minor significance. The OFT may withdraw that immunity if as a result of its investigation the OFT considers that the conduct is likely to infringe the Chapter II prohibition. Conduct of minor significance is defined, pursuant to section 40(1) of the Act and Regulation 4 of the Competition Act 1998 (Small Agreements and

Conduct of Minor Significance) Regulations 2000 (the Regulations), as conduct by an undertaking the applicable turnover of which for the business year ending in the calendar year preceding the one during which the infringement occurred does not exceed £50 million.

8.7 Applying the provisions of the Regulations and, through section 60 of the Act, applying the meaning of the term ‘undertaking’ under EC law, the OFT considers that the applicable turnover of Cardiff Bus does not exceed £50 million. Accordingly, Cardiff Bus benefits from immunity provided for in section 40(3) of the Act. The OFT can decide to withdraw the immunity from financial penalties in circumstances where it considers that it would be appropriate to do so. The OFT does not propose to do so in this case.”

494. The questions of policy arising in this case are thus very different from those arising in *Devenish*. In *Devenish*, the Commission had found facts sufficient to bring the case within Lord Devlin’s second category, but because the defendants in question were whistleblowers, and so benefited from leniency, the Commission commuted the punishment it would otherwise have imposed, and Lewison J (rightly in our view, given the importance of whistleblowing, both from the policy perspective of deterring cartels and from a practical perspective of uncovering cartels) declined to impose a penalty that would discourage whistleblowing.

495. Here, there was no question of whistleblowing. The OFT did not make any findings bringing Cardiff Bus within Lord Devlin’s second category and simply stated that it did not propose to withdraw the immunity in this case (paragraph 8.7 of the OFT Decision). It is not for us to speculate what the OFT would have done in light of the evidence we have heard, but we do note that the small undertaking immunity can only be disapplied where section 40(4) applies, and it is by no means clear whether – even if the OFT had found this to be a case within Lord Devlin’s second category – it could have withdrawn the immunity and applied a penalty to Cardiff Bus.

496. Were we to find facts sufficient to bring this case within Lord Devlin’s second category, then we can see no reason of policy why, in the present case, exemplary damages should not be imposed. Whilst we accept that in the general scheme of competition enforcement, punishment and deterrence are matters for the public authorities, this does not preclude an award of exemplary damages

under section 47A in an appropriate case. Clearly, the 1998 Act has a policy of conferring a limited immunity from penalties on small undertakings. However, this policy operates in a context where the OFT is not considering, as this Tribunal is, the specific harm caused by infringing conduct to a specific claimant. No-one would suggest that – where a small undertaking has caused loss or damage to such a claimant – an award of damages should not follow. The proposition only has to be stated, to be rejected. Equally, if such a small undertaking were to have behaved in so outrageous a manner as to trigger an award of exemplary damages, we fail to see why (as a matter of policy) such an undertaking should be immune. Section 47A of the 1998 Act applies to “any claim for damages” or “any other claim for a sum of money” which “a person who has suffered loss or damage as a result of the infringement of a relevant provision may make in civil proceedings brought in any part of the United Kingdom”: section 47A(1). Section 47A does not specify the rules by which the Tribunal is to determine what loss or damage has been sustained by a claimant, but it is obvious that, in a claim made in England and Wales, that claim is governed by the law of England and Wales. That law allows for the recovery of exemplary damages in the limited cases we have described. If a claimant advances a well-founded claim to exemplary damages, then we consider that such a claim cannot be rejected simply because (in an altogether different sphere) the defendant would have had an immunity from a penalty because it was a small undertaking. If the limits on the OFT’s ability to fine were intended by Parliament to have been read across to section 47A, then we consider that that section would have been very differently worded.

497. Cardiff Bus advanced other policy reasons as to why exemplary damages were inappropriate in this case. It is convenient to deal with these points here. Cardiff Bus contended that exemplary damages were inappropriate in this case because of:

- (1) The impact on public resources if exemplary damages were imposed (paragraphs 320-324 of Cardiff Bus’s written opening submissions); and

- (2) Double jeopardy as a result of Cardiff Bus's exposure to a possible sanction from the Traffic Commissioner (see paragraphs 33 and 292-295 of Cardiff Bus's written opening submissions).

As to the first of these points, we consider that it would be wrong in principle for a public body to have what would in effect amount to an immunity from Lord Devlin's second category of exemplary damages. Indeed, such an approach would be fundamentally inconsistent with the existence of Lord Devlin's first category. As to the second point, we accept the general point that no-one ought to be punished for the same thing twice; that was the point made by Lewison J in *Devenish*. Had the Traffic Commissioner found an intentional or reckless breach of the law on the part of Cardiff Bus, and punished Cardiff Bus accordingly, then that is a matter we would take into account. But the fact is the Traffic Commissioner did not do so.

498. Whether this is a case within Lord Devlin's second category is a question to which we now turn. We begin with a consideration of the facts.

(iii) *The facts*

Prior alleged anti-competitive behaviour on the part of Cardiff Bus

499. It was 2 Travel's contention that the anti-competitive behaviour that the OFT has found existed in Cardiff Bus's conduct towards 2 Travel in 2004 and 2005 also manifested itself in Cardiff Bus's conduct prior to 2 Travel's entry into the Cardiff market. In particular, 2 Travel alleged that another company, Cardiff Bluebird Limited, which operated in Cardiff between 1993 and 1996, was driven from the market by anti-competitive practices on the part of Cardiff Bus; and, in 1998, a firm trading under the name of Alister's Coaches was similarly driven from the market.

500. Both these episodes pre-date 2 Travel's entry into the Cardiff market, and so cannot possibly be relevant to 2 Travel's section 47A claim against Cardiff Bus, except to the extent that these episodes shed light on an "anti-competitive" intention or "similar fact" conduct on the part of Cardiff Bus relevant to 2 Travel's claim for exemplary damages.

501. We derive no assistance from these episodes and we leave them out of account for these reasons:

- (1) First, we heard very little specific factual evidence in respect of either episode.
- (2) Secondly, these are both episodes that would not have been regulated by the 1998 Act (which came into force on 1 March 2000), but by the rather different rules previously in force. We note that the Chapter II prohibition was one of the major innovations of the 1998 Act.
- (3) Thirdly, it has not been established that this conduct constituted an infringement of the old law or would have constituted an infringement under the 1998 Act, had that been applicable.

Cardiff Bus's preparations for competition from 2 Travel

502. Well before the 2 Travel In-Fill Service began on 19 April 2004, Cardiff Bus took steps to ensure that (if necessary) it would be in a position to commence its own, rival, operation at the same time. Thus, Cardiff Bus's board minutes for a meeting on 9 September 2003 (at which both Mr Kreppel and Mr Brown were present) record at Item 768(iv):

"Competition

...

The meeting noted that 2 Travel Ltd have recently obtained an increase in its operator licence provision at Wentloog to 45 vehicles. A numbers [*sic*] of actions were being taken to address the potential for a competitive attack in the run up to Christmas, including the retention of surplus vehicles."

503. In January 2004, Mr Brown was paying close attention to the accounts and financial position of 2 Travel (see his email to Ms Price of First Group, dated 14 January 2004).

504. In February 2004, when 2 Travel had registered its new Cardiff routes, Cardiff Bus considered them with some care (email dated 25 February 2004). This

email, written by Mr Heath, noted the advantage of registering routes as “frequent” services:

“This way we can really do what we like without registering specific competing services.”

The email shows something of the corporate mental state within Cardiff Bus regarding 2 Travel, referring to the buses that would operate additional services as “battle buses”.

505. At about this time, Cardiff Bus began internal advertising for drivers. We were shown two forms of staff notice, the first of which stated :

“If you wish to be considered for a driving role protecting your Company’s status, reputation and profitability, in a highly professional manner, on routes shortly to be facing competition please apply in writing to Dave Cole, Assistant Operations Manager by Friday 19<sup>th</sup> March 2004.”

One of these notices was in the form of the famous First World War Lord Kitchener poster “Your Country Needs YOU”; but instead of bearing the image of Lord Kitchener, the poster had a picture of Mr Brown (with super-added moustache) and the slogan “Your Company Needs YOU”.

506. On 31 March 2004, Mr Heath had noticed that 2 Travel were revising their services in Neath, and wrote “[f]or obvious reasons we are now interested to know what they are doing!”.

#### Legal advice obtained by Cardiff Bus

507. On 3 March 2004, Mr Kreppel wrote to Mr Peter Woodhouse of the firm of solicitors Bond Pearce. The letter stated:

“We are about to encounter a dose of heavy competition in Cardiff. I attach a draft of an article that will appear in our internal house magazine entitled “OMNIBUZZ”.

Would you or a colleague please cast your eye over this article to make sure that it could not be used by the incoming competitor for any legal action against us.”

508. The proposed article itself stated:

“The Swansea/Cwmbran based AIM (Alternative Investment Market) Company 2 Travel has now registered competitive local bus routes from Ely, Pentrebane, St Mellons, Llanrumney and Pontprennau to start operating Monday 19<sup>th</sup> April.

This follows 2 Travel’s expansion in to local services in Swansea, Llanelli, Neath and other areas. It is in line with this Company’s aggressive business plan.

The competition is likely to be low grade using a mixture of second hand double and old single decks vehicles. Details of the timetable are known to link the new local bus operation to school contracts awarded to 2 Travel by Cardiff Council.

Said Alan Kreppel, Managing Director “this operation to cream off revenue from Cardiff Bus was anticipated. As usual the competitor will only be operating during the working day and leaving Cardiff Bus to operate at times of low demand such as early mornings, late evenings and Sundays. The operation is entirely geared to provide cashflow to 2 Travel which is struggling to meet its business targets”. 2 Travel lost nearly £1m last year according to their latest published accounts. You can rest assured however that the Cardiff Bus response will be robust” said Alan Kreppel.

“We anticipate that in 12 months time Cardiff Bus will still be here but 2 Travel will have gone. There are no surprises in this business. We have all been here before. History shows that poor quality competition eventually disappears and dies.”

Details of the Cardiff Bus response and revised working arrangements will be discussed shortly with staff representatives. Full details will then be circulated to all members of staff.”

509. Mr David Harrison (also of Bond Pearce and not Mr Woodhouse) responded in an email dated 8 March 2004. This email stated:

“As promised, this is to summarise my advice on the Competition Act implications of your response to the arrival of 2 Travel. (As it is legally privileged it will not be read by a competition authority, such as the OFT).

Since you are likely to be dominant in your market the risk is one of a complaint based on alleged abuse of a dominant position (sometimes known as an infringement of Chapter II), which could trigger an OFT investigation, which, if it leads to a finding of infringement, could lead to directions to cease doing something, or even a fine (up to 10% of relevant turnover). If there is such a finding an affected party could also, independently, seek damages for loss suffered. (None of this is quick – investigations take months if not years to produce results. Any findings of infringement are also appealable).

However, as I mentioned, I have not been able to find any recent examples of the OFT issuing findings of infringement in similar cases. One possibility is that, where there have been complaints, they have not been able to establish sufficient evidence in what is a difficult area of competition law; another is that they may not have resources; another is that the parties have sorted out their differences between them, and an investigation has been abandoned.

There is, however, a 1993 case involving the dominant bus company Mid & West Kent (I'll send you the summary) suggesting that particular areas to watch out for are:

1. Running additional services where the long term profitability is doubtful;
2. Targetting the response to the new entrant in such a way as to appear retaliatory, or to exclude it from the market.

On the other hand, generally improving the level of services you supply, in response to increased competition, is a rational response to a new entrant, and it would be difficult for the OFT to base an abuse case on that.

I hope this is helpful. As and when matters progress do let me know if you need further help." (Emphasis supplied.)

510. This letter was followed up by a telephone call by Mr Harrison to Mr Kreppel, which was recorded in an attendance note kept by Mr Woodhouse. This recorded:

"DMH [Mr Harrison] called Alan Kreppel, and explained the completion [*sic*] law implications of the proposed course of action, as summarised in DMH's mail of 8 March to Alan Kreppel.

In discussion, AK mentioned that he thought there was one investigation of behaviour by a dominant bus company in Edinburgh currently underway (? First). He thought that in this case 2Travel were very unlikely to complain to the OFT, since their activities were by no means respectable.

AK said they were going to prepare a competitive response to the arrival of 2Travel, and DMH might well need to be on call as matters are unfolded.

AK said he would like to see the 1993 Kent case, and DMH said he would send him a copy of the case summary as it was very useful."

511. The case summary was sent to Cardiff Bus under cover of a letter the same day. This letter must have been seen by Mr Kreppel – as it was addressed to him – but also was probably seen by Mr Brown, Mr Kreppel's successor, as the letter has (in manuscript) his initials on it, and they are crossed out in a manner that suggests the letter was seen by him.

512. There are several things to note about this response from Bond Pearce:

- (1) First – as evidenced by the words underlined in the letter of 8 March 2004 set out in paragraph 509 above – Mr Harrison appears to have spoken with

Mr Kreppel between Mr Kreppel's letter of 3 March 2004 and Mr Woodhouse's email of 8 March 2004.<sup>8</sup>

- (2) Secondly, there is a fairly sophisticated understanding of how competition investigations work (or do not work). In particular, there is a very realistic appreciation of the length of OFT investigations (which proved entirely accurate), and an appreciation of legal advice privilege.
- (3) Thirdly, there is an absence of detailed advice. This is scarcely surprising, given the lack of detail in Mr Kreppel's 3 March 2004 letter. Nevertheless, Mr Harrison does draw a broad distinction between abusive, anti-competitive behaviour and non-abusive "improving the level of services you supply, in response to increased competition". This, of course, is significant, because Cardiff Bus did the former, whilst (when the OFT did investigate) purporting to do the latter. Mr Harrison also makes the point that Cardiff Bus is likely to be dominant in its market.

513. There was a further email from Mr Harrison regarding the press release on 12 March 2004, which stated that "I don't think the press release creates any problems from a competition law point of view. You have, I think wisely, not raised anything threatening retaliation." The email went on to consider the risk of an action in defamation based upon what was said in the article. Mr Kreppel – to whom this email was addressed – forwarded it to Mr Brown, with the comment "I suggest we go for it", to which Mr Brown responded "I agree!".

514. Again, it is worth noting that Mr Harrison was – *en passant* – making the point that retaliatory behaviour was something that might bring Cardiff Bus closer to a competition law infringement.

515. In fact, this press release was not used. An email from Mr Brown dated 13 April 2004 makes clear that:

"...[t]he original press release (12th March) was issued internally...but apparently not copied in to you and does not appear to have been issued externally.

---

<sup>8</sup> We are satisfied that, by the conclusion of the trial, we had seen all of the privileged communications between Cardiff Bus and its lawyers as regards the White Service. Privilege in these communications was waived by Cardiff Bus. It is worth noting that this material would not have been available to the OFT.

I have revised it to today's [sic] date (13th April) as discussed to take out the reference to school holidays in para 4 which was wrong – PLEASE USE THIS VERSION!

Please can you now put this into external format with appropriate headers and quotations. My view is that the quotations should be in my name, but I am checking with the Chairman and will get back to you if he wants it in his name instead.

Next stage is for a revised version to be sent to me for approval.”

#### Board meeting of Cardiff Bus on 9 March 2004

516. On 9 March 2004, there was a meeting of the Cardiff Bus board.

517. It is clear from the documents before us and Mr Brown's evidence that board meetings had a formal agenda, and that documents were circulated beforehand in a “pack”. These documents would typically comprise the minutes of the previous meeting and reports from (amongst others) the finance and administration director (Mr Brown) and the managing director (Mr Kreppel).

518. On this occasion, the managing director's report (Board Working Paper No. 405) noted at Item 4, under “Competition”:

“2 Travel the relatively new AIM listed company, which has already started to operate competitive services in Swansea and Llanelli, has now registered a network of thirteen vehicles on five of the company's key services, due to commence on Monday 19<sup>th</sup> April 2004.

This company is a low cost, low-grade operator and intends to use twenty to twenty-five year old double deck vehicles in competition with this Company's services on Ely, Pentreban, Pentwyn, Llanrumney and St Mellons. Services will only operate Monday to Friday and will operate in between school contract commitments. During the peaks, the vehicles will be operating on Cardiff school contracts. Cardiff Bus will need to make an immediate and positive commercial response details of which will be diarised at the meeting.

With this competition our financial position will have an effect on the Company's finances [sic – but it is easy to see what Mr Kreppel meant] and may affect our ability to make a substantial contribution to “socially” necessary services. It may therefore be necessary in the middle of the Summer to review some of the little used services.

...

The Board needs to be aware that if this competition is successful there is likely to be a second tranche of registrations, which has already happened in the South West Wales area.”

519. The meeting of 9 March 2004 was itself minuted, and the minutes record that (amongst others) both Mr Kreppel and Mr Brown were present. Item 789 (the items in the minutes are numbered sequentially) recorded the fact that Mr Brown had been appointed to succeed Mr Kreppel as managing director.
520. Mr Brown then gave his report (minuted at Item 790), followed by Mr Kreppel (minuted at Item 791). Item 791 records:

**“791 Managing Director’s Report**

(ii) Financial

...

- (c) The budget proposals for the financial year commencing 1<sup>st</sup> April 2004 were considered and reviewed in some detail. Councillor Sheppard raised a number of issues which were discussed in some depth.

It was noted that the recent advent of competition had effectively invalidated the budget as it stood. Options for addressing the situation were discussed, with the meeting agreeing that the budget should be implemented on a “without competition” basis, and then updated early in the New Year when the competitive situation had become clearer. This was compatible with the process adopted in previous years of updating the budget once approved with one or two revised forecasts to ensure that the company’s financial planning was up to date and sound.

Councillor Sheppard expressed his concerns over approving a budget without receipt of a formal Business Plan. The Chairman made reference to arrangements in previous years which had been deemed to be satisfactory, and expressed some concern that the divide between the role of the Executive and non Executive Director was in danger of becoming blurred. Following discussion the Board did however agree that a Business Plan to support the budget was an advisable requirement, and it was therefore agreed that the budget be approved subject to receipt of an acceptable Business Plan. Given that it was inadvisable to start the new financial year without an agreed budget, a special Board Meeting was arranged for Friday 26<sup>th</sup> March, 2004, and the Executive Directors were asked to prepare their Business Plan and circulate it in time for it to be reviewed at this meeting with a view to the existing budget being confirmed.

- (d) Predicted cash flow figures were reviewed, and Councillor Sheppard pointed out that the cash projections made no allowance for sale and lease back moving forward. The Financial Director [ie Mr Brown] pointed out that the cash flow forecast was a working document that would be updated in relation to the company’s ongoing trading performance and future plans. Leasing facilities had traditionally been reviewed on an annual basis, and whilst the forecast did not include any lease facilities, this did not preclude the use of lease facilities as part of the company’s ongoing cash management programme. It was agreed that this point would be considered further in relation to the company’s Business Plan.

...

(iv) Competition

The Board were advised of competitive registrations, and the company's reaction to this.

It was expected that this competition would significantly damage the company's profitability, and the extent of this financial effect was reviewed.

The company was preparing to make a commercial response, details of which were given to Board Members.

The Chairman led a wide ranging debate on the potential impact of these competitive registrations, and the company's commercial response, with the Managing Director confirming that the company's response would be in accordance with the Traffic Commissioner's guidelines and legal requirements, and in accordance with competition legislation.

...

(viii) Driver Shortages and Reliability

The current driver/staff establishment was complete, with reliability having been good in recent months. The position would need to be reviewed in the light of the company's competitive commercial response, and the effects of the holiday season."

Meeting of Cardiff Bus management on 16 March 2004

521. On 16 March 2004, various meetings took place between Cardiff Bus's senior management. There was a "Project Group Leaders Meeting" – which involved Mr Kreppel, Mr Brown and Mr Heath, amongst others – at 9am; a "Senior Management Meeting" at 10am; and a "Full Management Team Meeting" at 12pm. Unfortunately, although this meeting appears to have been minuted, the minutes have not survived. (We should note that the document in the trial bundles, which on the face of it looks like notes of the meeting, actually are of a meeting a year later.) An agenda has, however, survived and it records that Mr Kreppel addressed both the Senior Management Meeting and the Full Management Team Meeting on the subject of "Competition".

Cardiff Bus's "Competition Policy" dated 24 March 2004

522. At about this time, Cardiff Bus produced a "Strictly Private & Confidential" Competition Policy document.

"This document sets out the rules to be followed in the competitive environment, which will emerge, from mid April.

1. On the company's services registered as frequent the company will operate an experimental low grade service with additional mileage to match the mileage of the competitor. Buses will be in a white livery and will be timed to operate just in front of the competitor's vehicles. Where the competitor departs from scheduled time our times will vary to remain in front of the competitor's vehicle.
2. Where the competitor fails to appear or "disappears" for a meal break we will run the mileage until the two vehicles can be "re engaged".
3. Drivers will to all intents and purposes be in civilian clothing and Ticket machine rolls will be white. This is to differentiate the vehicle and the product completely from the mainstream high quality low floor Cardiff Bus operation.
4. Fares charged will be similar or the same as competitor's fares. At the start of the operation the adult single fares are likely to be as follows with appropriate day returns and child fares:-

Zone 1/2 – 60p

Zone 3 – 80p

Zone 4 – £1

The company's multiride, returns, local rider, network rider and all other company day or season tickets will be accepted on the separate "white bus" operation.

5. Where the competitor changes fares, such that they are below our experimental operations fares we will match their fare scale, but will not charge below the fare scale. The principle to be followed is that we will "not be knowingly undersold".
6. In terms of publicity we will keep all publicity to an absolute minimum, we do not want to have comments from managers causing "eye grabbing" headlines. We need to reduce the publicity opportunities for the opposition as much as possible.
7. The team operating the white vehicles will require instant communication between the team, with supervisors and with the Control Room. This may require a separate radio system. DBW/CD please progress.
8. Supervision of the operation needs to be down to one key inspector with a fully trained stand-in. Inspectors and drivers must follow the principle that

our services should operate within the legislative framework and safely at all times but effectively reducing the opposition's carryings to the absolute minimum.

9. The Supervisory staff should build a good rapport not only with their own staff, but with the opposition's drivers who may be persuaded to join and work for us as the incumbent operator rather than the new competitor.
10. In terms of our mainstream operations there must be no lost mileage on services which are subject to competition. Bus Station and control inspectors must pay particular attention to ensure that there are no operational gaps in any of these services. If need be vehicles will be switched from other areas to ensure that no holes appear for the opposition to fill.
- ...
11. The duty supervisor of the competitive operation will need to ensure that full details are taken of both our and other company's loadings. We will also need a programme of obtaining loadings from other sources and geographical points so that we can establish exactly the market penetration of the competition and the estimated number of passengers being carried per week. Peter Heath to pursue.
12. Every week OM/CM should chair a competition meeting involving drivers supervisory staff and marketing to review the competitive position, making any adjustments to our operation and strategy as required to minimise the competitors [*sic*] passenger carryings."

Before the OFT, Cardiff Bus asserted that "the Competition Policy document was not implemented" (paragraph 7.93 of the OFT Decision). Indeed, Mr Brown asserted before the OFT that "it was something that had been produced by my predecessor and was just ditched" (paragraph 7.93(d) of the OFT Decision). This was not accepted by the OFT. The OFT set out, in Table 23 of the OFT Decision, the very close similarity between the actions proposed in the Competition Policy document and Cardiff Bus's actual actions. In paragraph 7.94 of the OFT Decision, the OFT stated:

"Accordingly, whether or not the Competition Policy document was formally adopted by Cardiff Bus' Board of Directors, that document was plainly prepared at the senior executive level within the company and, in the OFT's view, is demonstrative of exclusionary intent. Further, the fact that Cardiff Bus' conduct on the market closely resembled that proposed in the document strongly suggests that the policy was substantially implemented and that the intent behind that conduct was itself exclusionary."

We agree with this assessment. It is quite clear from the evidence that this policy document described how Cardiff Bus in fact acted during the Infringement. The fares charged were as stated in paragraph 4 of the policy (see paragraph 368 above); publicity was kept to a minimum; drivers were dressed in civilian clothing; and the White Service buses were indeed white, and timed to run ahead of the 2 Travel service.

#### The Cardiff Bus board meeting on 26 March 2004

523. As agreed at the 9 March 2004 Cardiff Bus board meeting, a further meeting of the board took place on 26 March 2004. Again, this was minuted. (One can see from the Item numbers, that there was no board meeting between this meeting and the earlier, 9 March 2004, meeting.) Mr Kreppel and Mr Brown were both recorded as being present.

524. Item 795 records that the meeting agreed to “consider the plan on a section by section basis”, and for the most part the discussion at the meeting is recorded in some considerable detail.

525. As regards Section 2 of the Business Plan (“Business Plan Criteria”) the minutes record that:

“The meeting also considered their obligations under Competition Law, with the Managing Director confirming that he was satisfied that the company’s current activities were legally compliant in this regard.”

526. This is all that the minutes say about the so-called “competitive services” about to be operated by Cardiff Bus. The Business Plan itself, which was dated March 2004, says nothing about the “competitive services”.

#### Mr Brown succeeds Mr Kreppel as managing director of Cardiff Bus

527. On 1 April 2004, Mr Brown was appointed managing director designate in succession to Mr Kreppel. There was then a two month handover period, until Mr Kreppel left the company on 31 May 2004, whereupon Mr Brown became managing director proper.

528. Prior to this, Mr Brown had acted as Cardiff Bus's finance director, a role which was taken over by Ms Cynthia Ogbonna in September 2004.
529. Shortly after his appointment, on 13 April 2004, Mr Brown wrote to a Mr Godsell, AMICUS Regional Officer. Most of the letter is irrelevant for present purposes, but one paragraph is worth quoting:

“We are currently facing a potentially very damaging period of trading for the company, with the introduction of significant competition from April 19<sup>th</sup>. Our initial estimates are that this will cost us some £½M in lost profit in the current financial year, affecting our investment plans and forcing us to look at economy measures. In West Wales the company concerned, 2 Travel, has taken up to 40% of the market in some instances, and if anything like this were to be repeated in Cardiff it would certainly result in very significant job losses, and potentially put in jeopardy the current ownership arrangements. All our efforts are therefore currently targeted at minimising the impact of the competition, with the strategy designed to persuade the competition that there is no profitable future for them in Cardiff. We have the very fullest support of our TGWU and Unison partners in our strategy, who have indicated their willingness to be particularly flexible at this difficult time. Clearly I would hope to receive similar support from AMICUS, and look forward at our meeting to receiving similar reassurances.”

Steps taken in preparation for the commencement of “competitive services”

530. In early April 2004, Cardiff Bus told drivers who had applied for work on “Competitive Passenger Routes” that their applications had been successful (see, e.g. the letter to Mr Roberts dated 5 April 2004). Also, on 6 April 2004, Mr Kreppel wrote to inform a Mr Davidson that he would be working with the new managing director, Mr Brown, commencing 7 June 2004. The letter stated:

“As I indicated to you with a new Managing Director taking over, there will be changes in the structure of the organisation in the short term. As also indicated to you, you are likely to start as a Market Research & Planning Assistant working with Peter Heath. This will be confirmed by David Brown the new MD, who would like to see you within the next four weeks or so, prior to your starting to confirm full details.

As you are aware we face competition from 2 Travel from 19<sup>th</sup> April 2004, and it is highly likely we will want you to over-see the Company's programme to ensure this competition is met on a fully effective basis.”

531. In addition to recruitment, Cardiff Bus notified the Welsh Traffic Area Office of the new services it would be operating. In a letter dated 16 April 2004, Mr Heath stated:

“Please note that from Monday 19<sup>th</sup> April, we will start operating journeys on certain bus services in the Cardiff area on a low cost “no frills” basis, to test the commercial viability of this type of operation as a means on [sic] growing the public transport market. These services will operate at cheaper fares with a lower standard of vehicle and at lower frequencies compared to our normal operations.

These journeys will be operated as part of our existing registrations, but to permit the public to differentiate between a normal services and “no frills” journey we will be adding 100 to the service number of a “no frills” journey.”

#### Bond Pearce’s email of 13 April 2004

532. On 13 April 2004, Mr Harrison emailed Mr Kreppel:

“Though I’d check to see if all is well. As I understand it, the 2 Travel services begin next week?”

533. Ms Kemp, the PA to the directors, responded to say that Mr Kreppel was in Australia until 4 May 2004. It is therefore no surprise that Mr Harrison’s next email – dated 29 April 2004 (see paragraph 541 below) – should have been sent to Ms Kemp.

#### The “Competitive Services Guidelines”

534. On 15 April 2004, Mr Heath circulated by email to (amongst others, Mr Kreppel and Mr Brown) “guidelines for the operation of the competitive services being introduced in response to 2 Travel operations”. The email stressed that “[y]ou may wish to discuss aspects of these with your staff, but it is important to remember that this information is commercially sensitive and must not be divulged to persons outside Cardiff Bus”.

535. The “Competitive Services – Guidelines” identified the routes for the competitive services, and the fares that would initially apply. However, the guidelines went on to say:

“These fares will be altered once the market level of cheaper fares has been determined.

Normal Cardiff zonal fare stages will be used.

All competitive services will give change. Drivers must therefore carry a float, but will not be required to issue a change ticket.

On competitive services, only single and return tickets will be issued, but the full range of Cardiff Bus fares and tickets will be accepted on competitive services. 2 Travel tickets will not be accepted.

Lower price return tickets issued on competitive services are valid on normal Cardiff Bus services.”

536. Separate driver notes – “Competitive Services – Driver Notes” – and supervisor notes – “Competitive Services – Supervisor Notes” – were also issued.

#### Mr Brown’s concern with the press

537. On 16 April 2004, Mr Brown emailed regarding inquiries likely to come from a Mr Nifield of “The Echo”:

“The view here is that we cannot simply ignore the Echo – and it is better to keep in control of things. Inevitably Phil Nifield will be phoning me to ask for details of how many vehicles and the fares charged – I think I will have no choice other than to tell him, as he will be able to work out the details himself if we do not supply the information.

PLEASE NOT [*sic*] THAT ALL COMPETITION PRESS RELEASES ARE FOR THE ECHO ONLY AND SHOULD NOT BE CIRCULATED ANY FURTHER. If other media pick up on the story then we will deal with that on a case by case basis.”

#### Cardiff Bus’s monitoring of 2 Travel’s services and reactions to it

538. It is clear that Cardiff Bus intended to monitor 2 Travel’s services extremely closely. The Guidelines referred to at paragraph 535 above stated that “Each 2 Travel departure must be observed and time, passenger load on departure, vehicle registration number, and (if known) driver’s name recorded on the log sheet. Any departures not operating must be logged. Any observations of irregular operation, unfit vehicles (including vehicles not displaying an O licence) must be recorded”. This is what in fact occurred, as the log sheets in the documents before us demonstrated. It is also clear that Cardiff Bus intended to adjust its prices according to 2 Travel’s prices.

539. What is more, when it became clear that 2 Travel was not operating its fifth service – “2 Travel Route No 258” between Pentwyn and Cardiff City Centre – Cardiff Bus scaled back its own operations on this route. On 22 April 2004, Mr Heath emailed Mr Dexter and Mr Cole to say:

“If we only operate the 157/158 service between Coed-y-Gores and Panasonic factory between approx 0900 and 1500, we can provide the 6 journeys per hour over this section of route for most of the day. This achieves a saving of 2 buses and means two duties Z009 and Z013 are on reserve all day.

Suggest we decide tomorrow. Meanwhile, can you warn Greg/Allocations that there will be another set of alterations to duties from Monday – live work becoming reserve.”

540. Mr Dexter responded:

“Agreed as the best option, it will be boring for the 1 driver but saves 2 others and retains this registration should 2 travel start running. This will mean a duty board for this change.”

#### Bond Pearce’s email of 29 April 2004

541. On 29 April 2004, Mr Harrison emailed Ms Kemp:

“On Alan’s return could you please pass him the following message?

The OFT have on 29 April issued an interesting decision that First Edinburgh Ltd has not infringed the Competition Act in the Greater Edinburgh area, after a complaint by a rival bus company Lothian Buses.

Lothian complained that First Edinburgh was abusing a dominant position by predatory pricing and increasing services, and also cross-subsidising routes.

The OFT investigation seems to have found some conflicting evidence on pricing, but no intent to drive Lothian out of the market. The balance of evidence suggested that for First to reduce fares [*sic*] or increase services was a reasonable commercial strategy, from which passengers benefited, rather than an unlawful attempt to push Lothian out of the market.

It seems also that Lothian was in fact the larger operator in part of the area in question.

For the present only a summary of the decision is available. I will however attempt to obtain a full version.”

Mr Brown's email of 30 April 2004

542. It is evident that Mr Brown saw this email, for on 30 April 2004 he emailed Mr Harrison to say:

“Thanks for the info. Just to let you know that I have taken over as MD designate – Alan is leaving at the end of May.

This is a live issue so all information is very welcome. Please could you also copy in Peter Heath on all information...”

Bond Pearce's email of 30 April 2004

543. On 30 April 2004, Mr Harrison emailed Mr Brown in the following terms:

“Just to report that the OFT are not yet sure when the full Edinburgh decision will be available. On past form, I would expect it to take them a few days to remove business secrets etc. We will keep in touch.

The decision may well provide useful guidance on current thinking about predatory practices in the bus sector. (I sent Alan a rather old 1993 decision in March).

In the meantime, my advice would be to continue to ensure that your response to 2Travel is presented in terms of improving services to customers rather than retaliating against a new arrival. (If there is uncertainty about the economics of pricing a service the competition authorities may take into account evidence of intent).”

544. Again, it is clear that Mr Brown saw and read this email. On 4 May 2004, he emailed a response: “Many thanks. I look forward to seeing the details when they become available.”

Cardiff Bus board meeting of 4 May 2004

545. The next board meeting of Cardiff Bus was on 4 May 2004. A managing director's report was produced for this meeting. This was written by Mr Brown, as is evident from the opening words under Section 10, “New Management Structure”, which read: “Following my appointment as Managing Director (Designate) I met with...”.

546. The report stated:

“5. Competition

Competitive services commenced on the 19<sup>th</sup> April, 2004, and the company made a positive commercial response.

...

Whilst the company response has been professionally executed, the 2 Travel Service has been ragged and unreliable. The full service proposed has not been run due to driver shortage, and the services that remain have kept neither to timetable nor to route. The vehicles involved breach a number of legal requirements. Early indications are that patronage has been poor, with no clear demand emerging for a “no frills” service at this early stage, although the market will of course develop.

We are advised that 2 Travel may have complained both to the Traffic Commissioner and the Office of Fair Trading about Cardiff Bus’ commercial response which has been alleged to be uncompetitive. Whilst these matters are of course always open to interpretation, our view remains that our response is reasonable, appropriate and legal. At the present time we have not heard from either the Traffic Commissioner or the OFT, but are prepared to deal with any feedback in a positive and robust manner.

...

13. Drivers Shortage and Reliability

The company has enjoyed an extended period of full staffing, which together with effective management has meant minimal loss of mileage arising from staff shortages.

With the additional staff requirements resulting from competition, combined with the main summer holiday period, the situation will become more difficult in the months ahead. The company is currently actively recruiting to meet this requirement.”

547. The minutes of the meeting itself – which both Mr Kreppel and Mr Brown attended – recorded:

“(v) Competition

The meeting discussed the additional services launched by 2 Travel, and the extremely poor quality of service that had been introduced.

The company’s commercial response was reviewed, and the company had received no external feedback.”

548. On 10 May 2004, Mr Brown wrote to Mr Woodhouse regarding 2 Travel:

“As you may be aware we have been dealing with David Harrison in relation to competition advice, but the early issues being raised appear to relate more to traffic law, and area where you of course are the expert.

I enclose copies of correspondence between Solicitors acting for 2 Travel and ourselves, which are largely self-explanatory. Although this exchange has now taken place, I should be grateful for any additional comments you may have.

I also enclose correspondence with Cardiff County Council, again which is self-explanatory. At this stage we feel it to be inadvisable to contact the Traffic Commissioner ourselves direct, and are hopeful that Cardiff County Council will now wish to contact the Traffic Commissioner in its own right as representing the broader interests of Cardiff.

Clearly this is a developing matter, and one where we may wish to seek your advice at short notice.”

#### Debate regarding operation of the Cardiff Bus White Service

549. On 24 May 2004, Mr Kreppel emailed various persons in Cardiff Bus – including Mr Brown – regarding the operation of the Cardiff Bus White Service:

“...our policy seems to be to run to scheduled time. You need to look at this as they are all over the shop and occasionally are getting a reasonable load. We need to consider running with them, given the fact that most of our mileage is registered ‘frequent’ – please discuss with David [Brown] and Peter [Heath].”

550. Mr Brown responded:

“Is this one for the competition group? Should we have a meeting this week given that [Chris Dexter] and myself are away next week?”

551. On 25 May 2004, the issue cropped up again, this time from the drivers’ union representative, expressing concern that the rules according to which drivers were operating were constantly changing. An email to Mr Dexter copied to Mr Kreppel and Mr Brown stated:

“The T.G.W.U. is becoming increasingly concerned with the operation of the [competitive vehicle roster]. We are concerned that the drivers on this roster are being used as nothing more than scapegoats for the inability of the company to operate in competition with 2 Travel. The supervisor for this roster and the manager who is in charge of this roster are continually altering the rules so much so that the drivers are

no longer sure of where they are and which rules they are under. One minute they are working to the pad the next minute they are being told to fight the competition, Yesterday Alun Kreppel told me that he had instructed the supervisor to tell the drivers not to run to the pad and to start competing against 2 travel. We really need to let the drivers either compete against them or if we are not going to do this I suggest we remove our buses and save ourselves the revenue we are wasting...”

552. Mr Kreppel did not respond, but made his views known in an email to Mr Brown and Mr Dexter:

“[G]entlemen, I have just spent some time this morning observing operations in Ely. Our competitive services are nothing short of a joke. We are successfully competing with ourselves and allowing 2 Travel a completely free rein. Our only saving grace is that many passengers will not travel with them.

If this is typical and carries on then 2 Travel will gain a firm foothold just as they have in Swansea but we will have thrown around £500,000 p.a. down the drain.

[T]he TGWU is partially correct except I have not instructed anyone to do the sensible thing (for reason [*sic*] which are obvious). That is to ensure our white vehicles shadow 2 Travels’ rather than run to our notional timetables on services that are for the most part registered ‘regular’.

The current nonsense needs to stop now and we need to start competing with the competition rather than ourselves – I suggest we get on with it urgently before it is too late.”

553. It was Mr Brown who responded to the TGWU later on the same day:

“Thanks for your note. I fully understand your frustrations but feel that perhaps you are not seeing the full picture.

The competiton [*sic*] battle is being fought on many fronts, and not just the white bus competitive [*sic*] response. 2 Travels activities in a range of areas leave them wide open to challenge – for example by the Traffic Commissioner, VOSA, and potentially by a number of other statutory bodies. We believe that they are setting themselves up to be architects of their own fall, and part of our behind the scenes work is to ensure that the relevant authorities become aware of 2 Travel activities.

For example, whilst we would in any event not have been able to cover the Park and Ride, we were ready and waiting with our ‘spotters’ to observe 2 Travels activities. As expected a bus arrived without an O licence, and we were able not only to draw this to the attention of the Council official who was there, but also explain that the vehicle was illegal and could not be moved! The impact of that one incident was critical to our wider campaign, and is we now understand being followed up on.

However for our campaign to be successful we have to be 110% safe, and legal, and we do not wish to get involved in any activities that would compromise that position.

Having said that there is perhaps scope to alter timings on some routes and we will explore that option further.

For the sake of clarification Peter Heath is coordinating our competitive strategy, and chairs a group comprising of myself, DBW, CD and KSS that meets weekly to discuss developments and agree any strategic changes. I have asked Peter to meet with you to explain things in a little more detail, and to discuss whether there is any scope for fine tuning. Together with CD they can also discuss the issues of inconsistency to which you refer.”

554. Although this email exchange does show a difference between Mr Kreppel and Mr Brown – which Mr Brown stressed in his evidence to us (see, e.g. Transcript Day 7, pages 73 to 74) – it is important not to overstate this difference. Part of Cardiff Bus’s strategy against 2 Travel was to identify and highlight to the appropriate authorities technical legal shortcomings in 2 Travel’s services: this was one of the reasons why Cardiff Bus devoted considerable resource to monitoring 2 Travel’s operations (see, e.g. paragraph 538 above; Transcript Day 7, page 114). Of course, the price of such a strategy is that the accuser has to be “whiter than white” and that, we consider, is the thrust of what Mr Brown is saying in his email to the TGWU.
555. What Mr Brown was not saying was that Cardiff Bus was averse to running buses just ahead of 2 Travel’s buses: it is just that he – unlike Mr Kreppel – wanted to alter the pad timings first, whereas Mr Kreppel would have let the White Service operate on a more *ad hoc* basis. In this regard, we note that it was Cardiff Bus’s policy – as stated in the “Competition Policy” document described in paragraph 522 above – that “[w]hen the competitor departs from scheduled time our times will vary to remain in front of the competitor’s vehicle”.

#### Mr Harrison’s email of 9 June 2004

556. On 9 June 2004, Mr Harrison emailed Mr Brown:

“David

The OFT (finally) released the full 35 page version of their First Edinburgh/Lothian competition law bus decision earlier today.

Looking through the decision the facts of the Edinburgh case are a little different, in that both First Edinburgh and Lothian (who complained to the OFT) were sizeable firms, and each probably dominant in different geographic areas. There was in fact no prospect of First Edinburgh driving Lothian out of the Greater Edinburgh area, where the alleged predatory behaviour (price cutting and increasing services) took place.

The decision is nonetheless useful, because it shows the current reasoning that lies behind applying competition law to a ‘bus war’, involving fares reduction and increasing the number and frequency of services in response to a competitor (in this case over a period of over two years).

What the OFT did, briefly, was to consider all the allegations of fare reduction (by route, and by day or weekly tickets), increased frequency of routes and/or introducing new routes, and cross-subsidising of loss-making services from profitable parts of the business, as aspects of potential predatory behaviour by First Edinburgh.

The OFT said that predation infringes the Competition Act 1998 Chapter II prohibition (on abuse of a dominant position), and that it comprises ‘strategic behaviour whereby a dominant undertaking deliberately incurs losses in order to eliminate a competitor, or deter market entry by potential competitors, so as to be able to charge excessive prices in the future.’

...

I should add that this decision slightly tweaks the case law, which says, normally, that any prices below average variable costs will be predatory, and that only where prices are above average variable costs, but below average total costs, should evidence of the intention of the dominant firm be taken into account). (Variable costs are those which vary directly with the amount of output produced).

If you would like to discuss, or me to give further detail about this decision and its implications, please let me know.”

557. Again, this is a document which Mr Brown received, for he responded (“Many thanks for the information. I will get back to you if we need to follow up on this”) on 9 June 2004.

(iv) *Analysis*

#### Cardiff Bus’s intention

558. It is obviously the case that Cardiff Bus intended to operate the White Services. Cardiff Bus’s decision to implement its White Services was, in this very limited sense, a deliberate one. It required careful and detailed planning, the recruitment of staff, and the retention of buses, all over a considerable period of time. It involved significant expenditure.

559. That sort of intention – an intention to do something subsequently found to be anti-competitive – will be common in most, if not all, infringements of the Chapter II prohibition. Establishing an intention of this sort is no more than a necessary, and certainly not a sufficient, condition for the imposition of exemplary damages.
560. The key question is whether Cardiff Bus knew that this conduct was unlawful in the sense we have described at paragraphs 489 to 490 above i.e. did Cardiff Bus know that its “competitive services” either were probably unlawful or clearly unlawful?
561. This requires the existence – at the time of the infringement – of a subjective state of mind. Since Cardiff Bus is a legal and not a natural person, the first question that arises is whose knowledge, within Cardiff Bus, is to be attributed to the organisation? The next question is then as to the nature of that knowledge.

#### Whose knowledge is attributable?

562. In the case of a company, it is possible to attribute to that company the knowledge of one of its servants or agents. Although it is said that it is the knowledge of the person who is the company’s “directing mind and will” that is attributed, it is clear since the decision of the Privy Council in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 1 QB 716 that this is a dangerous over-simplification. Although both parties made submissions on the “directing mind” of Cardiff Bus, neither cited this fundamental authority, but it is appropriate to reference it. In *Meridian*, Lord Hoffmann made it clear that whether the knowledge of an agent/employee/servant of a company was to be attributed to that company for a particular purpose, depended upon the true interpretation of the substantive rule that was in play (at 506 to 507):

“The phrase “directing mind and will” comes of course from the celebrated speech of Viscount Haldane L.C. in *Lennard's Carrying Co. Ltd. v Asiatic Petroleum Co. Ltd.* [1915] A.C. 705, 713. But their Lordships think that there has been some misunderstanding of the true principle upon which that case was decided. It may be helpful to start by stating the nature of the problem in a case like this and then come back to *Lennard's* case later.

Any proposition about a company necessarily involves a reference to a set of rules. A company exists because there is a rule (usually in a statute) which says that a *persona ficta* shall be deemed to exist and to have certain of the powers, rights and duties of a

natural person. But there would be little sense in deeming such a *persona ficta* to exist unless there were also rules to tell one what acts were to count as acts of the company. It is therefore a necessary part of corporate personality that there should be rules by which acts are attributed to the company. These may be called “the rules of attribution.”

The company’s primary rules of attribution will generally be found in its constitution, typically the articles of association, and will say things such as “for the purpose of appointing members of the board, a majority vote of the shareholders shall be a decision of the company” or “the decisions of the board in managing the company’s business shall be the decisions of the company.” There are also primary rules of attribution which are not expressly stated in the articles but implied by company law, such as “the unanimous decision of all the shareholders in a solvent company about anything which the company under its memorandum of association has power to do shall be the decision of the company:” see *Multinational Gas and Petrochemical Co. v. Multinational Gas and Petrochemical Services Ltd.* [1983] Ch. 258.

These primary rules of attribution are obviously not enough to enable a company to go out into the world and do business. Not every act on behalf of the company could be expected to be the subject of a resolution of the board or a unanimous decision of the shareholders. The company therefore builds upon the primary rules of attribution by using general rules of attribution which are equally available to natural persons, namely, the principles of agency. It will appoint servants and agents whose acts, by a combination of the general principles of agency and the company’s primary rules of attribution, count as the acts of the company. And having done so, it will also make itself subject to the general rules by which liability for the acts of others can be attributed to natural persons, such as estoppel or ostensible authority in contract and vicarious liability in tort.

It is worth pausing at this stage to make what may seem an obvious point. Any statement about what a company has or has not done, or can or cannot do, is necessarily a reference to the rules of attribution (primary and general) as they apply to that company. Judges sometimes say that a company “as such” cannot do anything; it must act by servants or agents. This may seem an unexceptionable, even banal remark. And of course the meaning is usually perfectly clear. But a reference to a company “as such” might suggest that there is something out there called the company of which one can meaningfully say that it can or cannot do something. There is in fact no such thing as the company as such, no *ding an sich*, only the applicable rules. To say that a company cannot do something means only that there is no one whose doing of that act would, under the applicable rules of attribution, count as an act of the company.

The company’s primary rules of attribution together with the general principles of agency, vicarious liability and so forth are usually sufficient to enable one to determine its rights and obligations. In exceptional cases, however, they will not provide an answer. This will be the case when a rule of law, either expressly or by implication, excludes attribution on the basis of the general principles of agency or vicarious liability. For example, a rule may be stated in language primarily applicable to a natural person and require some act or state of mind on the part of that person “himself,” as opposed to his servants or agents. This is generally true of rules of the criminal law, which ordinarily impose liability only for the *actus reus* and *mens rea* of the defendant himself. How is such a rule to be applied to a company?

One possibility is that the court may come to the conclusion that the rule was not intended to apply to companies at all; for example, a law which created an offence for which the only penalty was community service. Another possibility is that the court might interpret the law as meaning that it could apply to a company only on the basis

of its primary rules of attribution, i.e. if the act giving rise to liability was specifically authorised by a resolution of the board or an unanimous agreement of the shareholders. But there will be many cases in which neither of these solutions is satisfactory; in which the court considers that the law was intended to apply to companies and that, although it excludes ordinary vicarious liability, insistence on the primary rules of attribution would in practice defeat that intention. In such a case, the court must fashion a special rule of attribution for the particular substantive rule. This is always a matter of interpretation: given that it was intended to apply to a company, how was it intended to apply? Whose act (or knowledge, or state of mind) was *for this purpose* intended to count as the act etc. of the company? One finds the answer to this question by applying the usual canons of interpretation, taking into account the language of the rule (if it is a statute) and its content and policy.

The fact that the rule of attribution is a matter of interpretation or construction of the relevant substantive rule is shown by the contrast between two decisions of the House of Lords, *Tesco Supermarkets Ltd. v. Nattrass* [1972] A.C. 153 and *In re Supply of Ready Mixed Concrete (No. 2)* [1995] 1 A.C. 456..."

563. Whether a person's knowledge can be attributed is thus acutely dependent on context. In this case, as we have found, the day-to-day management and control of Cardiff Bus lay in the hands of the executive directors. It was they who initiated the Cardiff Bus White Service, and they who determined how those services should operate. They were responsible for the legality of the White Service operation. We have no doubt that Mr Kreppel and Mr Brown constituted the controlling mind of Cardiff Bus.

564. 2 Travel did not seek to contend that the knowledge and acts of Mr Kreppel and Mr Brown could be cumulated when considering Cardiff Bus's state of mind. For the sake of clarity, we should stress that when considering questions of knowledge of wrongdoing, we do not consider it to be permissible to cumulate the knowledge or acts of two innocent persons so as to reach a conclusion that the legal entity, to whom their knowledge and acts can be attributed, has acted e.g. dishonestly or intentionally or recklessly: *Armstrong v Strain* [1952] 1 KB 232. Thus, for example, were Mr Kreppel, and not Mr Brown, to have been the only person involved in setting up the White Service, but Mr Brown, and not Mr Kreppel, to have had the requisite degree of knowledge of wrongdoing, then we consider that it would not be possible to order exemplary damages against Cardiff Bus.

## The extent of Mr Brown's involvement

565. In his first statement, Mr Brown states:

“49. Although I took on the role of Managing Director designate from 1 April 2004, I had no involvement in considering the potential impact of the Infill Services on the company and the subsequent decision to operate the White Services. This was a matter dealt with exclusively by my predecessor, Alan Kreppel. In his role as Managing Director, Mr Kreppel had exclusive responsibility for operational matters and the planning of Cardiff Bus' competitive response therefore fell to him. As I mentioned above, the management structure at that time was departmental in nature and so it was not unusual for the particular details on matters that Mr Kreppel was dealing with not to be shared with me.”

566. Mr Brown said the same in his oral testimony (Transcript Day 7, page 25):

**“Q (Mr Bowsher)** You were involved in the initiation of this commercial response, were you not?

**A (Mr Brown)** No, I took over when I took over as managing director designate at the beginning of April. So this planning, I wasn't aware of this planning in March, when it was going on, other than in terms of what I knew as a board member. It was the previous managing director's project.”

See also, Transcript Day 7, page 84 (evidence of Mr Brown).

567. Mr Kreppel was not called as a witness before us, although we do not understand it to have been impossible for him to give evidence before us. The only version of events that we heard came from Mr Brown himself.

568. We consider that Mr Brown consistently understated his involvement. As he acknowledged, he was present at a number of board meetings at which Cardiff Bus's “competitive response” was discussed or considered, in particular the board meetings of 9 September 2003 (paragraph 502 above), 9 March 2004 (paragraph 519 above), and 26 March 2004 (paragraph 523 above).

569. But that was not the full extent of Mr Brown's involvement. As we have noted, in January 2004, Mr Brown was paying attention to the accounts and financial position of 2 Travel (see paragraph 503 above), and it was Mr Brown, and not Mr Kreppel, that featured in the “Your Company Needs YOU” advertisements for drivers (see paragraph 505 above): it is difficult to imagine this occurring

without Mr Brown's knowledge and participation. Equally, there is evidence that Mr Brown had at least some involvement in the exchanges between Mr Kreppel and Bond Pearce in March 2004 (see paragraph 511 above), and in the press release that Mr Kreppel was discussing with Bond Pearce (see paragraph 513 above). Mr Brown was also one of the attendees at all three meetings that took place on 16 March 2004 (see paragraph 521 above). The minutes of this meeting have not survived, but it is clear from the agenda that "Competition" was discussed. There is thus a good deal of documentary evidence suggesting significant involvement on the part of Mr Brown prior to 1 April 2004.

570. We also consider that the seamless way in which Mr Brown stepped into Mr Kreppel's shoes is strongly suggestive of his full participation on the White Service project before 1 April 2004. Thus, on 13 April 2004, Mr Brown was writing to AMICUS (see paragraph 529 above) making points about the potential deleterious effects of 2 Travel's competition on Cardiff Bus. Whilst there may have been an element of exaggeration in this letter – so as to procure a more co-operative response from AMICUS (Transcript, Day 6, pages 153-155 (evidence of Mr Brown)) – the fact remains that this letter shows a sure grip of Cardiff Bus's affairs, including the White Service.

571. What is more, it is clear that between (at least) 13 April 2004 and 4 May 2004, Mr Kreppel was in Australia (see paragraph 533 above), at the very time the White Service was being planned to commence. Who, it may be asked, was holding the reins at that time? The answer must be Mr Brown: and it is impossible to imagine that Mr Kreppel could leave the company for a period of weeks, at an important time for the White Service, without having a fully-briefed stand-in. That stand-in was Mr Brown.

572. At the board meeting of 4 May 2004, it was Mr Brown and not Mr Kreppel (who had, however, returned, and was in attendance at the meeting) who wrote the report briefing the board on "Competition" (see paragraph 546 above). This was perfectly natural: Mr Brown was managing director designate, and Mr Kreppel had been away for some weeks. But we find – in the report – Mr Brown telling the board that although 2 Travel had complained to both the Traffic Commissioner and the OFT about the Cardiff Bus White Service, "what has

been alleged to be uncompetitive”, “our view remains that our response is reasonable, appropriate and legal”. This is Mr Brown’s assurance to the board: and we consider that it shows him to have been fully involved in the planning and preparations for the White Service.

573. We reject altogether the suggestion that Cardiff Bus was so compartmentalised that Mr Brown could have been insulated from these preparations. Cardiff Bus in fact had few executive directors. After all, it was recognised that 2 Travel’s competitive emergence in Cardiff, and Cardiff Bus’s planned response, would likely make a significant difference to Cardiff Bus’s financial position. Thus, for example, the board minutes for 9 March 2004 note that “the recent advent of competition had effectively invalidated the budget as it stood”. Mr Brown was the finance and administration director: it is inconceivable that he was not fully involved in a matter having these financial and budgetary implications.

574. Equally, although there is no documentary evidence one way or the other, we do not accept that documents such as the 24 March 2004 “Competition Policy” (paragraph 522 above) and the “Competitive Service Guidelines” were written with no input at all from Mr Brown.

575. For these reasons, we reject as untruthful Mr Brown’s evidence that he was not involved in the preparations for the Cardiff Bus White Service. We find that he was fully involved, together with Mr Kreppel (and others: notably Mr Heath), and that this involvement did not begin with his appointment as managing director or even managing director designate: he was in from the beginning.

Was there contemporaneous knowledge of unlawfulness?

576. In considering this question, we must be careful to avoid taking advantage of the benefit of hindsight. We now know – because the OFT Decision tells us so – that Cardiff Bus’s conduct was unlawful. But that says nothing about Cardiff Bus’s state of mind at the time it decided to begin its competitive services.

577. Equally, we cannot attach any weight to the fact that Cardiff Bus has now accepted the findings of the OFT, and accepted that it was acting with exclusionary intent. In doing so, Cardiff Bus is simply accepting the inevitable

implications of the findings in the OFT Decision. But that says nothing about Cardiff Bus's contemporaneous state of mind.

578. Until it accepted the implications of the OFT Decision (which occurred, at the earliest, when Cardiff Bus decided not to appeal that decision), Cardiff Bus contended that the reason it introduced the White Service was because it was testing the market to see if there was demand for a "no frills" service. Thus, in response to inquiries from Mr Nifield of The Echo, Mr Brown crafted the following press release:

"We note that 2 Travel believes that there is a market for what can perhaps best be described as a "no frills" operation – limited frequency, older vehicles, basic standards and lower fares. Experience in the past has indicated that such services are generally unsustainable in the longer term, even when cherry picking key routes and times of day. We do not believe that these are the future of public transport in a modern European Capital City.

On a commercial basis however we are bound to retest the market, to see whether a demand has emerged for this type of service. On an experimental basis we are therefore introducing a limited number of unbranded vehicles, on a "no frills" basis, to test demand, and will keep the situation under close review."

579. Until the OFT Decision was published, Cardiff Bus continued to assert that it was "market-testing the no-frills concept, having been alerted to the possibility that it might be a viable business model by 2 Travel's entry" (paragraph 7.35 of the OFT Decision).

580. Mr Brown said much the same before us. His evidence was that whilst Cardiff Bus now accepted that it had acted with exclusionary intent, at the time its intention was simply to compete with 2 Travel in the "no-frills" market (Transcript Day 7, pages 52 to 54):

**Q (The Chairman)** What were you trying to achieve at this time in relation to 2 Travel?

**A (Mr Brown)** Well, my understanding – and I appreciate the OFT finding is different from this – was based around the principle of differentiated competition, and I think in my original press release, I set out that as being what we were doing. Effectively, I think we talked about if Cardiff Bus were Sainsburys or Marks & Spencers and they had set up a Lidl, this was an Aldi. We talked about British Airways, who set up a low cost subsidiary, Go, and Stagecoach in Manchester, with Magic Bus. So that the idea of a differentiated market, I

think I said that – I may even have said that we'd experimented with it in the past -

**Q (The Chairman)** If you look at the very negative press release about 2 Travel, you were not saying in that press release: this is a legitimate differentiated market in which we believe our product is better. You were saying: this is a rubbish company which runs awful buses and is going to the wall.

**A (Mr Brown)** Certainly we said that. I thought in that press release, I thought we'd said the other part as well. Certainly, in one of the press releases it does talk about the concept of Sainsburys, Aldi and Lidl.

**Q (The Chairman)** But what did your board want to happen to 2 Travel?

**A (Mr Brown)** We were clearly trying to protect our market.

**Q (The Chairman)** What did your board want to happen to 2 Travel, or had that not been a question that was asked at board?

**A (Mr Brown)** As I said, I don't recollect the full discussion, but I think it's clear that certainly we were looking to protect the market in terms of them getting a foothold, and I think it is reasonable to say that we would not have been upset if they had left Cardiff.

**Q (The Chairman)** So you wanted to put them out of business? Is that too direct a way of putting it?

**A (Mr Brown)** No. Well, we're talking about Cardiff?

**Q (The Chairman)** Yes, of course we're talking about Cardiff.

**A (Mr Brown)** It was a competitive situation. We were seeking to stop them getting a foothold in Cardiff.

**Q (The Chairman)** You're being asked a lot of very legitimate questions by Mr Bowsher, but if the answer is "Yes, we were trying to get them out of business in Cardiff", it might be as well to get over that hurdle, perhaps slightly more quickly than we are.

**A (Mr Brown)** I'm not used to this sort of format. I think I prefaced all my comments by saying that we have accepted the finding of exclusionary intent and I think if one finds the – accepts that statement, then clearly, underlying things is the presumption that we would have been quite happy for 2 Travel -

**Q (The Chairman)** I'm feeling a "Yes" coming on.

**A (Mr Brown)** Yes."

581. Similarly, at Transcript Day 7, page 51:

**“Q (Mr Bowsher)** But at the time, is there any indication, other than that press release [i.e. the press release quoted at paragraph 578 above], that you were testing the market?

**A (Mr Brown)** It was my understanding of what we were doing. I subsequently now understand, being able to see the full picture, that the OFT took a different view and why they took that different view.”

582. Thus, it was Mr Brown’s position that Cardiff Bus simply wanted to offer an alternative service to its Liveried Services, a no-frills service, and that this decision was prompted by 2 Travel’s arrival in the Cardiff market. Clearly, if it was Cardiff Bus’s intention simply to operate a “differentiated” no-frills service, then it would appear to be unlikely that Cardiff Bus knew that its conduct was probably unlawful or clearly unlawful.

583. Having seen the evidence, we reject this description of Cardiff Bus’s intention (i.e. that the reason it introduced the White Service was because it was testing the market to see if there was demand for a “no frills” service) as untrue. At times Mr Brown’s evidence was more controlled and evasive than frank, and it was particularly so on this point. Although Cardiff Bus consistently told outsiders questioning the rationale for the White Service – both at the time, and thereafter – that Cardiff Bus’s decision to implement the White Services was taken because it considered it desirable, for Cardiff Bus, to provide these alternative services, this was not the truth. Cardiff Bus implemented the White Services for no reason other than to exclude 2 Travel from the Cardiff market. Cardiff Bus’s intent – and the conduct that resulted from it – was retaliatory for precisely that reason: until 2 Travel entered the market, there was nothing for Cardiff Bus to counter. When 2 Travel had entered the market, the objective was to make the company leave as quickly as possible, and the White Service was the weapon that Cardiff Bus fashioned to achieve that end. The evidence in this regard is overwhelming:

- (1) The White Service commenced at the same time as 2 Travel’s In-Fill Service, and on exactly the same routes. 2 Travel’s services were paralleled closely. Thus, when it became clear that 2 Travel’s fifth service was not being operated, Cardiff Bus scaled back its service on this route (see paragraph 539 above). Equally, once it had become clear that 2 Travel had ceased operations in Cardiff altogether, Cardiff Bus’s “competitive services” stopped (see paragraph 278 above).
- (2) The White Service was intended to operate just in front of 2 Travel’s services, so as to pick up passengers that 2 Travel would otherwise have collected. This is what paragraph 1 of the “Competition Policy” said in

terms (see paragraph 522 above) and what we find in fact happened (see paragraph 394(1) above). Essentially, Cardiff Bus's objective was not to maximise the number of passengers on its buses, but to ensure that 2 Travel's buses were as empty as possible. Of course, these two aims are linked, but what was driving Cardiff Bus's actions was the fullness or otherwise of 2 Travel's buses, as the exchanges on 24 May 2004 and 25 May 2004 make very clear (see paragraphs 549 to 553 above).

- (3) The prices on the White Services were designed to undercut – or at least match – 2 Travel's prices. As we have noted, the prices on the White Service were nearly 10% cheaper than those on 2 Travel's In-Fill Service (see paragraph 368 above). This was no coincidence: paragraphs 4 and 5 of the "Competition Policy" make it clear that Cardiff Bus had a close eye on the fares 2 Travel intended to charge, and would not be "knowingly undersold" (see paragraph 522 above). Also, the "Competitive Services – Guidelines" made clear that the White Service fares "will be altered once the market level of cheaper fares has been determined" (see paragraph 535 above).
- (4) The White Services were introduced without any consideration as to their cost or profitability. That would be extraordinary in the case of a company considering the viability of an experimental service. One would expect a careful analysis of cost and a careful articulation of objectives and success criteria in the case of a genuine experimental service. One would also expect the pros and cons of such a new service to be articulated in a business plan. Yet Cardiff Bus's rather detailed business plan – which was considered at the 26 March 2004 board meeting (see paragraph 523 above) – contains no reference, not even a mention, of the White Service. Of course, in the case of a service designed simply to drive someone else out of business, this silence is explicable (the service is not part of the company's business strategy), and the normal cost/benefit analysis does not pertain. The aim is to drive out the competitor as quickly as possible, and the nature of the service offered is informed by that objective.

- (5) The White Services were introduced with minimal publicity. There was no effort to promote the service (see, for example, the documents referenced at paragraphs 522 and 537 above, and also the “Competitive Services – Guidelines” document under the heading “Timetables/Publicity”: “No timetables will be produced for competitive services, nor will details of these services be added to roadside timetables, PTI Cymru database or Real Time information system”). Again, this would be difficult to understand in the case of a new service that Cardiff Bus genuinely wanted to succeed: one would expect the service to be publicised as a genuine, cheaper, alternative, to the Liveried Service. But in the case of a service that was only intended to operate as a means of excluding 2 Travel, the lack of publicity is understandable.

Although he denied this (particularly when re-called to give evidence on Day 10, but also in the passages we have cited above), we consider that Mr Brown always knew the true reason why Cardiff Bus introduced the White Service as and when it did; we also find that Mr Brown must have known that the tale Cardiff Bus told – that it simply wanted to offer an alternative service to its Liveried Services, a no-frills service, and that this decision was prompted by 2 Travel’s arrival in the Cardiff market – was false.

584. There is something inherently repugnant in a service being commenced by a dominant undertaking for the sole reason of excluding another. We do not go so far as to say that it was Cardiff Bus’s intention to drive 2 Travel out of business: that was, we consider, a matter of indifference to Cardiff Bus. But, it was Cardiff Bus’s intention to exclude 2 Travel from the Cardiff market. On 21 July 2004, Mr Cole, the assistant operations manager at Cardiff Bus, wrote this email:

“In my opinion travel are making a last ditch attempt to earn some cash, on tuesday they operated 7 buses at one stage into the west of the city.

At this time it is imperative we do not give them any opportunities to gain a foothold.

We will not regulate any bus during the day on its inbound journey on any competition route, if there are any problems of any kind on competative [*sic*] routes inform greg john who may be able to assist with his staff.

Your cooperation will assist in their demise.”

585. Mr Brown was asked about this email by Mr Bowsher (Transcript Day 6, page 158):

**“Q (Mr Bowsher)** So he’s completely wrong, is he, Mr Cole, when he says “Your co-operation will assist in their demise”? That’s not what Cardiff Bus intended?

**A (Mr Brown)** I would read it: their demise in Cardiff.”

586. It follows that Cardiff Bus’s description of its intention to test the market was no more than a deliberate smoke-screen, designed to make palatable to the outside world extremely unpalatable conduct. They were, not to put too fine a point on it, lies. From this conclusion follows the clear inference that Cardiff Bus knew that it was doing something illegal.

587. This subjective awareness is demonstrated by two other aspects of Cardiff Bus’s conduct, which are otherwise hard to understand. First, there is Cardiff Bus’s failure to take legal advice as regards its White Services. Cardiff Bus was not slow to avail itself of legal advice when it felt that such advice was needed. The Bond Pearce time sheets we have seen demonstrate very clearly that, for example, on employment and transport questions, Cardiff Bus regularly sought legal advice. Closer to the launch of the White Services, Mr Kreppel took legal advice regarding the article it was proposed to publish about 2 Travel.

588. But no-one – neither Mr Kreppel, nor Mr Brown – sought legal advice in relation to the legality of the White Service itself. In any case where there is doubt about the legality of a particular course of conduct, the solution is to articulate precisely what that conduct is, and to seek legal advice in relation to that conduct. Here, one would have expected Mr Kreppel and Mr Brown to have laid before Cardiff Bus’s solicitors exactly what was intended: showing the solicitors the “Competition Policy” and the “Competitive Services Guidelines” would have been a very good start. Certainly, one would expect them to have done so before informing the company’s board that their proposed course of

conduct complied with competition law (see paragraphs 520, 525 and 546 above).

589. We know – both because of Mr Brown’s evidence (see, for example, paragraph 96 of Mr Brown’s first statement;<sup>9</sup> Transcript Day 7, pages 30 and 33), and the exhaustive manner in which Mr Bowsher, quite properly, explored what legal advice Cardiff Bus did receive – that Cardiff Bus neither sought nor obtained legal advice specifically directed to the legality (or otherwise) of the White Service. The Bond Pearce time-sheets – which Cardiff Bus eventually disclosed – are clear on this point. The “advice” which Cardiff Bus received, was limited to the communications described in paragraphs 507 to 511 (which arose out of Mr Kreppel’s request that the draft article for Cardiff Bus’s in-house magazine be reviewed for defamation purposes), 532 to 533 (where Mr Harrison was simply asking if “all is well”), 541 to 544 (where Mr Brown was supplied with details, and a copy, of the Lothian decision). Granted, these communications related to competition law (and Mr Brown was cross-examined extensively about them on Day 10), but they in no way amounted to legal advice in relation to the legality of the White Service itself.

590. A failure to seek legal advice on a particular proposed course of action is suggestive of one of three states of mind:

- (1) A state of mind so confident of the propriety of the course being undertaken, so as to render legal advice unnecessary;
- (2) A state of mind that simply does not consider the legality of the course of conduct being undertaken, and so does not contemplate taking legal advice; or
- (3) A state of mind where the holder has some sense or appreciation that he is doing wrong, and deliberately avoids seeking confirmation of that fact.

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<sup>9</sup> In this paragraph, Mr Brown states: “I can confirm that Cardiff Bus did not seek or obtain any legal advice in respect of the launch and running of the White Services”. That paragraph was corrected by Mr Brown’s third statement, where Mr Brown makes clear that Cardiff Bus did, in fact, obtain “limited legal advice before the commencement of the White Services”. We have described that limited legal advice fully in this Judgment, but the fact remains that Mr Brown’s first statement remains correct as regards legal advice specifically directed to the legality of the Cardiff Bus White Service.

591. We consider that this case involves the last of these three states of mind. We consider that both Mr Kreppel and Mr Brown deliberately failed to put the matter of the Cardiff Bus White Service before Cardiff Bus’s lawyers, because they knew what the answer would be, and were minded to commence the White Service no matter what. We have reached this conclusion for the following reasons:

- (1) Even the limited advice that Cardiff Bus obtained (and, for the reasons we have given in paragraphs 565 to 575 above, we find that Mr Brown was as aware of this as Mr Kreppel) indicated:
  - (i) That Cardiff Bus was likely to be dominant in its market: see Mr Harrison’s email of 8 March 2004 (paragraph 509 above).
  - (ii) That “[t]argeting the response to the new entrant in such a way as to appear retaliatory, or to exclude it from the market” was a “particular area[] to watch out for”: see Mr Harrison’s email of 8 March 2004 (paragraph 509 above).

Given even these limited points, alarm bells should have been ringing in the mind of an innocent protagonist.

- (2) Both Mr Kreppel and Mr Brown gave unspecific and broad-brush assurances to the Cardiff Bus board that there was nothing wrong with the “competitive services” being proposed (see paragraphs 520, 525 and 546 above). Mr Brown, in his evidence, made much of this. Thus, in paragraph 51 of his first statement, he refers to the 9 March 2004 board meeting, and says that “[t]his concluded with Mr Kreppel confirming that the response he had outlined to Board Members would be in accordance with the Traffic Commissioner’s guidelines and legal requirements, and in accordance with competition legislation”. Mr Brown made the same point orally, at Transcript Day 6, pages 134 to 135 and again at Transcript Day 6, page 137:

“We were reassured by the managing director that this was in compliance with all relevant laws, including competition law. I can’t remember the detail of the discussion but I was satisfied that what we were doing was legal and

correct. I have no reason to doubt that. The board had discussed it and it's there in the minutes."

There is nothing in Mr Kreppel's managing director's report about the legality of the "competitive services", and the minutes simply record Mr Kreppel "confirming that the company's response would be in accordance with the Traffic Commissioner's guidelines and legal requirements, and in accordance with competition legislation" (see paragraph 520 above). Yet Mr Kreppel had no basis for saying this: he had no legal advice on the point, and what advice he had received (which arose incidentally, when he consulted about an article the company wanted to publish) suggested that the retaliatory response Cardiff Bus had in mind was an area to watch out for.

- (3) The mention of legality in the minutes for the 26 March 2004 board meeting are similarly vague, with the managing director "confirming that he was satisfied that the company's current activities were legally compliant in this regard" (see paragraph 525 above). Mr Kreppel – and the rest of the board – were plainly aware that a question of legal propriety was in issue. This was not a case of a company acting utterly unconscious of the legal question. Everyone knew there was an issue, and Mr Kreppel gave his assurance. Either – without having the benefit of legal advice – he was so confident of the answer no legal advice was needed. Or he said what the board needed to hear, quite conscious of the fact that he had no legal advice supporting his position. The latter was the case here.
- (4) The same is true of Mr Brown. Mr Brown was not the sort of man to accept, without question, statements made by his predecessor on important points, and it is clear (from his conduct in respect of employment and transport questions) that he was assiduous in taking advice. Yet he, too, assured the board (on his report given on 4 May 2004: paragraph 546 above) that "[w]e are advised that 2 Travel may have complained both to the Traffic Commissioner and the Office of Fair Trading about Cardiff Bus' commercial response which has been alleged

to be uncompetitive. Whilst these matters are of course always open to interpretation, our view remains that our response is reasonable, appropriate and legal”. Here, too, it is clear that there was an issue of whether Cardiff Bus was acting lawfully or not – indeed, there was an appreciation that the OFT was involved – and yet Mr Brown gave a bland assurance of legal propriety without having any foundation for giving that assurance.

592. Finally, there is the curiously stilted, undetailed and euphemistic manner in which the “competitive services” are discussed within Cardiff Bus. In general, Cardiff Bus’s minutes are quite full and provide a fairly detailed picture of discussions. That is not so as regards the “competitive services”. Equally, the rather detailed business plan – which was considered at the 24 March 2004 board meeting (see paragraph 523 above) – contains no reference, not even a mention, of the White Service. The inference that we draw is that Cardiff Bus was concerned to avoid an excessive paper trail as regards the White Services.

(v) *Conclusion*

593. We find that Cardiff Bus’s behaviour is only consistent with that of an organisation that had deliberately decided to disregard the law, and that this conduct was done in cynical disregard of 2 Travel’s rights. Inevitably, this involves rejecting much of the evidence given by Mr Brown as untrue (in particular as regards the extent of his involvement in the development and operation of the White Service, and in his appreciation of why Cardiff Bus decided to begin operating this service), and that is the conclusion we have reached.

594. There were no pro-competitive effects to Cardiff Bus’s conduct, serious anti-competitive effects, and there was an exclusionary intent. We find that Cardiff Bus acted in knowing disregard of an appreciated and unacceptable risk that the Chapter II prohibition was either probably or clearly being breached or it deliberately closed its mind to that risk. We find that this (at least) reckless state of mind was held by both Mr Kreppel and Mr Brown.

595. As we noted in paragraphs 448 to 450, an award of exemplary damages should be made cautiously, where compensation is inadequate to punish the defendant for his outrageous conduct. This is a case where Cardiff Bus's conduct has been outrageous and where, absent an award of exemplary damages, a compensatory award would be insufficient. We consider that this is a case clearly falling within Lord Devlin's second category where it is appropriate to award exemplary damages.

596. For the reasons we have given in paragraphs 491 to 496 above, we hold that there are no reasons of policy why exemplary damages may not be awarded in this case. Cardiff Bus urged us to measure any award of exemplary damages by reference to the sort of penalty that the OFT has jurisdiction to impose for breaches of the Chapter II prohibition. We decline to assess the level of exemplary damages in this way: the OFT has a statutory jurisdiction to punish and deter in this way, and although exemplary damages also have as their object punishment and deterrence (see paragraph 448 above), our jurisdiction derives from section 47A of the 1998 Act and the line of cases beginning with *Rookes v Barnard*. We are also very conscious that – contrary to fines imposed by the OFT – exemplary damages are paid to the claimant. We consider that:

- (1) Whilst exemplary damages do have to punish and deter, we consider that they also have to bear some relation to the compensatory damages being awarded, which in this case are low.
- (2) In assessing the amount of exemplary damages, it is important to have regard to the economic size of the defendant. In some cases, a defendant may be so economically powerful that exemplary damages will have to be of an order of magnitude sufficient to make that defendant take notice. Here, we do bear in mind that Cardiff Bus is a relatively small company.
- (3) As an entity with an association with a local authority, Cardiff Bus will no doubt take very full account of the Judgment, even if exemplary damages are (in numerical terms) quite low. In these circumstances, we consider that the punishment and deterrence effect of exemplary damages can be

obtained by an award of exemplary damages at a level that is relatively low.

597. Having regard to these factors, we award exemplary damages to 2 Travel in the amount of £60,000. We do not consider it appropriate to make any award of interest on this sum. An award of interest is intended to compensate a claimant from being kept out of his money, and is obviously appropriate in the case of compensatory damages, and not exemplary damages.
598. We are under no illusions but that this Judgment is likely to incentivise the bringing of claims for exemplary damages in competition cases. That is a matter for future Tribunals. We would only emphasise that the mere fact that an infringement of the competition rules has been found is insufficient to justify the pleading of such a claim. In any case where exemplary damages are sought, it will be necessary to plead, and to plead with specificity, facts and matters alleging that the competition law infringement in question was executed either intentionally in breach of the law or recklessly so as to be regarded as sufficiently outrageous as to fall within Lord Devlin's second category. Otherwise, we consider, the claim will fall to be struck out.

## **XVI. CONCLUSIONS**

599. For the reasons we have given in this Judgment:

- (1) We award damages to 2 Travel in respect of Claim 1: Loss of Profits in the amount of £33,818.79 (see paragraph 415 above).
- (2) We award interest on this sum at a rate of 2% above the Bank of England base rate from 1 August 2004 (see paragraph 415 above).
- (3) We reject 2 Travel's Claim 2: Loss of a Capital Asset (see paragraph 442 above), Claim 3: Loss of a Commercial Opportunity (see paragraph 444 above), Claim 4: Wasted Staff and Management Time (see paragraph 446 above) and Claim 5: Liquidation Costs (see paragraph 447 above).
- (4) We hold that this is a case where exemplary damages should be awarded under Lord Devlin's second category in *Rookes v Barnard* and make an

award in the amount of £60,000 (see paragraph 597 above). We make no award of interest in respect of this sum (see paragraph 597 above).

600. The effect of this Judgment will be set out in a formal order, once the parties have assisted us on the correct calculation of interest.

601. Finally, the Chairman and Mr Freeman wish to acknowledge the leading part played by our colleague Mr Smith in the drafting of this Judgment, which is unanimous.

Lord Carlile of Berriew  
C.B.E., Q.C.

Peter Freeman C.B.E.,  
Q.C. (Hon)

Marcus Smith Q.C.

Charles Dhanowa O.B.E.,  
Q.C. (Hon)  
Registrar

Date: 5 July 2012

## ANNEX 1: GLOSSARY OF DEFINED TERMS IN THE JUDGMENT

Defined Term	Description	Defined at para.
1998 Act	Competition Act 1998	1
2 Travel	2 Travel Group plc (in liquidation)	1
2 Travel Route No 217	Ely to Cardiff City Centre (and back)	202
2 Travel Route No 245	St Mellons to Cardiff City Centre (and back)	202
2 Travel Route No 250	Llanrumney to Cardiff City Centre (and back)	202
2 Travel Route No 258	Pentwyn to Cardiff City Centre	202
2 Travel Route No 262	Pentrebane to Cardiff City Centre (and back)	202
AIM	Alternative Investment Market	95
Assignment	On 22 December 2004, Mr Short agreed to advance £300,000 to 2 Travel in return for an assignment to him of any monies payable to 2 Travel under overage provisions of the Option	269
Cardiff Bus	Cardiff City Transport Services Limited, trading as Cardiff Bus	1
CFA	City Financial Associates (2 Travel's nomad)	104
Chapter II prohibition	The prohibition contained in section 18 of the 1998 Act	1
CTC	Coach Travel Centre	106
<i>Enron 1</i>	<i>English Welsh &amp; Scottish Railway Limited v Enron Coal Services Limited</i> [2009] EWCA Civ 647	30
<i>Enron 2</i>	<i>Enron Coal Services Limited v English Welsh &amp; Scottish Railway Limited</i> [2011] EWCA Civ 2	65
February 2004 PwC Report	PwC report to 2 Travel entitled "Overview of business strategy and short term funding requirements"	172
Grant Thornton Report	Grant Thornton Report dated 23 November 2004	265
In-Fill Service or 2 Travel In-Fill Service	'No-frills' bus service operated on certain routes in Cardiff by 2 Travel	8
Infringement	Cardiff Bus's unlawful response to the 2 Travel In-Fill Service	8
June 2004 PwC Report	PwC report containing financial projections for 2 Travel for the period to 31 August 2005	224
Liveried Service or Cardiff Bus Liveried Service	Liveried bus services operated by Cardiff Bus	204
Liveried Service Route No 17	Ely to Cardiff City Centre (and back)	204
Liveried Service Route Nos 44 and 45	St Mellons to Cardiff City Centre (and back)	204
Liveried Service Route Nos 49 and 50	Llanrumney to Cardiff City Centre (and back)	204

Liveried Service Route Nos 57 and 58	Pentwyn to Cardiff City Centre (and back)	204
Liveried Service Route Nos 61 and 62	Pentrebane to Cardiff City Centre (and back)	204
Mr Fowles	Mr David Beverley (“Bev”) Fowles, former Managing Director of 2 Travel	46
Mr Fowles Jnr	Mr David Rhys Fowles, former Operations Director of 2 Travel	46
Nominated adviser or nomad	Each company listed on the AIM must have a nominated adviser or nomad. The role of a nomad is to ensure regulatory compliance by AIM-listed companies	104
OFT	Office of Fair Trading	1
OFT Decision	Decision number CA98/01/2008, dated 18 November 2008	1
Option	Option agreement relating to the Swansea Depot	251
PCV licence	Passenger Carrying Vehicle licence	297
PwC	PricewaterhouseCoopers	46
Swansea Depot	Land purchased by 2 Travel that is the subject-matter of 2 Travel’s Claim 3: Loss of a Commercial Opportunity	10
TAO	Traffic Area Office	212
VOSA	Vehicle and Operator Services Agency	212
White Service or Cardiff Bus White Service	Bus service launched by Cardiff Bus in response to 2 Travel’s operation of the In-Fill Service	6
White Service Route No 117	Ely to Cardiff City Centre (and back)	203
White Service Route No 144	St Mellons to Cardiff City Centre (and back)	203
White Service Route No 150	Llanrumney to Cardiff City Centre (and back)	203
White Service Route No 162	Pentrebane to Cardiff City Centre (and back)	203
White Service Route No 258	Pentwyn to Cardiff City Centre	203