Neutral citation [2017] CAT 15

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1262/5/7/16 (T)

Victoria House
Bloomsbury Place
London WC1A 2EB

5 July 2017

Before:

THE HONOURABLE MR JUSTICE MARCUS SMITH
(Chairman)
PETER FREEMAN CBE QC (Hon)
BRIAN LANDERS

Sitting as a Tribunal in England and Wales

BETWEEN:

AGENTS' MUTUAL LIMITED

Claimant

- v -

GASCOIGNE HALMAN LIMITED (T/A GASCOIGNE HALMAN)

Defendant

Heard at Victoria House on 3, 6-10, 13-15 and 20 February 2017

JUDGMENT

APPEARANCES

Mr Alan Maclean QC and Mr Josh Holmes QC (instructed by Eversheds Sutherland (International) LLP) appeared for the Claimant.

Mr Paul Harris QC and Mr Philip Woolfe (instructed by Quinn Emanuel Urquhart & Sullivan UK LLP) appeared for the Defendant.

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ANNEXES

A. INTRODUCTION

1. Agents' Mutual Limited ("Agents' Mutual")[1] is a mutual association which is owned by its estate agent members (individually a "Member" and collectively the "Members"). It was incorporated in 2013 with the purpose of establishing a new online property portal called "OnTheMarket" (and is referred to as such or as the "Portal" in this Judgment), intended to compete with other online property portals already established. Property portals are websites on which estate agents list properties which they have available to them for sale or rent in order to attract prospective buyers or tenants. By far the largest two property portals in the UK are Rightmove, and then Zoopla and Primelocation, the latter two both owned by Zoopla Property Group ("ZPG").

2. Gascoigne Halman Limited ("Gascoigne Halman") is an estate agent, operating 18 offices in the South Manchester / Cheshire region, which agreed to subscribe to OnTheMarket. Gascoigne Halman signed a letter of intent with regard to its participation in June 2013 and entered into a written agreement with Agents' Mutual in January 2014.

3. In proceedings commenced by it in the Chancery Division,[2] Agents' Mutual contends that Gascoigne Halman breached the contract it made. For its part, Gascoigne Halman denies these allegations. In addition to denying that it is in breach of contract, Gascoigne Halman also asserts that various provisions in the agreement that it entered into with Agents' Mutual are void because they are in breach of section 2 of the Competition Act 1998 ("CA"), known as the "Chapter I prohibition", the text of which is reproduced in Annex 2. Because of the centrality of these provisions, it is said that the entire agreement is void for illegality. The specific provisions are considered in detail in paragraph 49 below, but in overview are:

    (1) The rule by which a Member may only list its properties on one other (competing) portal, and no more (the "One Other Portal Rule").

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[1] The terms and abbreviations used in this Judgment are set out in Annex 1, which identifies the paragraph in the Judgment where each term/abbreviation is first used.
[2] Claim No. HC-2016-000513.

(2) The rule that restricts membership to full-service office-based estate or letting agents, as opposed to those operating only an online business model (the "Bricks and Mortar Rule").

(3) The rule requiring members to promote only OnTheMarket and not any other portal (the "Exclusive Promotion Rule").

Gascoigne Halman further contended that the One Other Portal Rule formed part of a wider arrangement between Agents' Mutual and others collectively to boycott ZPG and/or Rightmove, contrary to the Chapter I prohibition (the "Collective Boycott Allegation").

4. In this way, by asserting a competition law defence, Gascoigne Halman contends that there is no breach of contract, because the entire contract is void. It was this reliance on a competition law defence that gave rise to the transfer of certain issues (the "Competition Issues") to this Tribunal by order of Sir Kenneth Parker of 5 July 2016 (the "Transfer Order").[3] The non-Competition Issues remain in the Chancery Division, subject to a stay.

5. The restrictions of competition alleged by Gascoigne Halman are considered in greater detail in Section F below. By way of introduction, however, the following points can be made:

(1) The restrictions of competition are alleged by Gascoigne Halman to be "object" restrictions or (in the case of the One Other Portal Rule) a restriction "by object" and "by effect".

(2) The restrictions alleged are both "horizontal" and "vertical" in nature. The EU Commission's *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements* (the "Horizontal Guidelines") state:[4]

[3] The Competition Issues in a second claim by Agents' Mutual (Claim No. HC-2016-001149), against Moginie James Limited ("Moginie James") were also transferred pursuant to the Transfer Order. On 6 January 2017, that claim before the Tribunal was withdrawn. Save where necessary to determine the dispute between Agents' Mutual and Gascoigne Halman, we consider it no further in this Judgment.
[4] 2011/C11/01, at paragraph 1.

> "Co-operation is of a 'horizontal nature' if an agreement is entered into between actual or potential competitors."

The EU Commission's *Guidelines on Vertical Restraints*[5] (the "Vertical Guidelines") do not define "vertical agreements and concerted practices",[6] but refer to the definition in the Vertical Agreements Block Exemption Regulation ("VABER"),[7] which provides that:

> "'vertical agreement' means an agreement or concerted practice entered into between two or more undertakings each of which operates, for the purposes of the agreement or the concerted practice, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services"

Thus, Gascoigne Halman contends that this was a case involving horizontal anti-competitive agreements between estate agents (albeit with the involvement of Agents' Mutual) and vertical anti-competitive agreements between Agents' Mutual and the estate agents that subscribed to, and entered into agreements with, Agents' Mutual.

(3) Furthermore, it was Gascoigne Halman's case that some of the provisions in the vertical agreements between Agents' Mutual and the estate agents that subscribed to, and entered into agreements with, Agents' Mutual were anti-competitive horizontally, because of the mutual nature of Agents' Mutual.

(4) Yet still further, Gascoigne Halman's attack on the agreements between Agents' Mutual and the estate agents that subscribed to, and entered into agreements with, Agents' Mutual was not confined to a single provision, but to multiple provisions within those agreements which (so it was said) were, either in isolation or collectively, anti-competitive.

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[5] 2010/C130/01.
[6] See paragraph (1).
[7] Commission Regulation (EU) No. 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, at Article 1(1)(a).

6. It will readily become apparent that these were no ordinary allegations of restriction of competition, focusing on a single provision, but a multi-faceted and wide-ranging attack on the manner in which Agents' Mutual entered the online property portal market.[8] It will be necessary to examine Agents' Mutual's approach to entering the market, as well as its dealings with estate agents in some detail.

7. This Judgment is confined to the (albeit very broadly framed) Competition Issues. It is structured as follows:

   (1) Section B describes, in broad-brush terms, the competitive scene on which Agents' Mutual was seeking to enter by way of its OnTheMarket portal.

   (2) Section C describes the factual and expert witnesses who gave evidence before us.

   (3) Section D considers the nature of the legal relationship between Agents' Mutual and the estate agents who subscribed to Agents' Mutual as Members. This Section sets out the terms within this relationship which Gascoigne Halman contended were anti-competitive. It also considers the extent to which it was possible for Agents' Mutual to vary the legal terms subsisting between it and its Members. This Section, in particular, seeks to resolve the issues between the parties as to the meaning and effect of the various provisions between Agents' Mutual and Gascoigne Halman, to the extent that this is necessary in order to determine whether the Chapter I prohibition has indeed been infringed. The meaning and effect of these provisions is potentially relevant to both the horizontal and vertical restrictions of competition alleged by Gascoigne Halman.

   (4) Section E describes, in detail, the manner in which Agents' Mutual and its OnTheMarket Portal came to be established and developed. It considers the manner in which Agents' Mutual planned to establish

[8] We discuss below what are the relevant markets for competition law purposes.

itself and, in particular, it considers certain meetings and communications that took place between estate agents and others as part of the process.

(5) Section F sets out Gascoigne Halman's allegations in relation to the Competition Issues as they came to be made in closing.

(6) Section G considers our general approach to the question of whether the Chapter I prohibition has been infringed, whether "by object" or "by effect". This Section sets out the relevant law in relation to "by object" infringement, "by effect" infringement and ancillary restraint/objective necessity.

(7) In Sections H, I and J, we apply the approach described in Section G to each of the three provisions said to constitute an infringement of the Chapter I prohibition by Gascoigne Halman. Thus:

(i) Section H considers the One Other Portal Rule.

(ii) Section I considers the Bricks and Mortar Rule.

(iii) Section J considers the Exclusive Promotion Rule.

(8) Section K considers the Collective Boycott Allegation which, as we noted in paragraph 3 above, arises not in relation to a specific provision but out of an alleged wider arrangement between Agents' Mutual and others collectively to boycott ZPG and/or Rightmove.

(9) Section L considers whether the One Other Portal Rule can be exempted under section 9 of the CA.

(10) Section M considers the extent to which – assuming the provisions that Gascoigne Halman contend to be in breach of the Chapter I prohibition are in fact illegal – these provisions can be "severed". Put another way, Section M considers Gascoigne Halman's contention that the entire agreement is void by reason of illegality.

B. INDUSTRY BACKGROUND

(1) Estate agents

8. Estate agents act for the vendors or lessors of property. For convenience, we shall in this Judgment generally refer to vendors (or buyers) of property, and shall only refer to lessors and the rental market where necessary.

9. Typically, at least in the case of sales, estate agents charge on a commission basis, taking a percentage of the sale price. One of an estate agent's principal duties – perhaps the principal duty of an estate agent – is to market the vendor's property effectively, with a view to achieving the highest price.

10. Naturally, the marketing of the properties that an estate agent is seeking to sell is critical. Estate agents will want to reach as many potential buyers as possible, with a view to attracting interest in the properties they have for sale. One of the ways, traditionally, in which this has been done, is through the use of "high street" sales offices, which display the properties for sale in shop windows, and where interested parties can come in and discuss their property interests, needs or desires. Some estate agents have but a single office; others are larger, and have multiple branches spread over a geographic region or regions.

11. We refer to estate agents having sales offices or branches as "bricks and mortar" estate agents. As we shall see, developments in technology have made other ways of providing an estate agent service possible.

12. Of course, a bricks and mortar estate agent does not exclusively advertise through its offices or branches. Even before the online portals emerged in the early 2000s, an estate agent would advertise in the local press; would send out property details to potentially interested persons; and might even (individually or in conjunction with others, including sometimes other estate agents) publish a "property" newspaper or magazine, in which properties were advertised.

(2) Online property portals, Rightmove and Zoopla

13. In the early 2000s, various online portals enabling the advertising of properties by estate agents on the internet were launched. Most, as a means of achieving market penetration, offered to list properties for nothing, but, even so, many did not endure. Two which did were Rightmove and Primelocation:

(1) Rightmove was set up in 2000 by the largest corporate estate agencies at that time: Countrywide plc (as it now is) ("Countrywide"), Connells Ltd ("Connells"), Halifax and Royal and Sun Alliance. Rightmove rapidly became the market leader, and floated on the stock exchange in 2006.

(2) Primelocation was launched in 2001:

(i) The initiative came from some 50 firms of estate agents. Mr Ian Springett, who came to be the Chief Executive of Agents' Mutual and who gave evidence before us, was involved in the development of the Primelocation portal. Primelocation was owned by Fastcrop plc, which enabled still more estate agents to participate as shareholders.

(ii) Fastcrop plc was purchased by the Daily Mail and General Trust ("DMGT") in early 2006. DMGT acquired other property portal businesses, in addition to Primelocation (e.g. Findaproperty, founded in 1997, acquired in 2004). This combined entity came to be known as The Digital Property Group ("TDPG").

(iii) Zoopla was launched in 2008, initially as a property valuation service. It subsequently became an online property portal. In 2010, Zoopla, for a time at least, entered into some form of strategic relationship with what are now the three largest corporate estate and lettings agency groups, Countrywide, Connells and LSL Property Holdings plc ("LSL"), which we shall collectively refer to as the "Corporates".

(iv) In 2012, Zoopla merged with TDPG, having obtained clearance for the merger by the Office of Fair Trading ("OFT"). The merged entity became known as ZPG.

(v) Since its formation, ZPG has acquired a number of other, smaller, portals. ZPG now effectively trades using two brand names, Primelocation and Zoopla. We shall refer to Zoopla – both pre- and post-merger – simply as "Zoopla". However, it is important to appreciate that the 2012 merger was a significant event – or at least, was perceived as such – by those setting up the OnTheMarket Portal.

14. Although there remain a number of smaller online property portals, until the entry of OnTheMarket, there were only two major online property portals, Rightmove and Zoopla.

15. Other than in Northern Ireland, the manner in which both Rightmove and Zoopla charge is on a "per branch" basis: the estate agent pays a fixed sum for listing and can, for this price, list every property that is being sold through that particular branch.

16. The listing services provided by Rightmove and Zoopla have evolved considerably over time. In the first place, advertising through such portals has become established in the mind of the "property-buying public" (which we include to mean those even peripherally interested in viewing properties). It is possible to search for properties according to various criteria – geographic location, property type, price – and it is obvious that the property-buying public finds these portals extremely useful. As a result, estate agents are – in order to provide an effective service – pretty much obliged to subscribe to one or more of these portals. Not to do so would be to disregard a very important way of marketing a property, and it is fair to say that property vendors would question signing up with an estate agent who did not subscribe to one or more portals. As a result of this rise in popularity, some forms of "traditional" advertising have suffered, in that estate agents are spending less on these traditional ways of promoting the properties that they sell.

17. Secondly, the range of services offered by Rightmove and Zoopla has developed. Both Rightmove and Zoopla, however, seek to provide "enhanced" services – involving additional payments by estate agents – ranging from premium listings to assistance with conveyancing and sale.

18. One enhancement to the service being provided by Rightmove and Zoopla that needs to be properly understood is the provision of "leads". At the outset, property portals simply listed properties, and left it to interested parties to get in touch with the relevant estate agent. Rightmove and Zoopla both seek to make it easier for the property-buying public to get in touch with estate agents by providing telephone numbers and email details on the portal. These lines of communication are monitored, so that when a member of the property-buying public gets in touch (whether that is by email or by telephone), both the portal and the estate agent know how that contact has been achieved. This can be a measure of how effective a portal is in generating "leads", although of course each portal differs in what it defines as a "lead" and how such "leads" are created.[9]

(3) The evolution of "online" estate agents and developments in the market

19. The development of the property portals – and in particular Rightmove and Zoopla – has enabled the evolution of a new or different form of estate agent, based less around a physical "high street" presence and more around an "online" presence. Such "online" estate agents do not have a high street presence as such, and seek to offer the services of an estate agent in what may be described as a non-traditional way. Marketing is less face-to-face and more online. But it would be inaccurate to characterise "online" estate agents as operating exclusively online. They have – or tend to have – employees to conduct viewings: these employees are simply not based out of high street offices.

[9] Thus, for instance, a portal may offer to put a user in touch with all estate agents in a given area with a single "click", generating multiple emails and multiple "leads". Other portals may be more restrictive in the email traffic (and so "leads") that they generate.

20. In terms of charging structure, such agents tend not to charge the commission of bricks and mortar estate agents, but a (lower) flat fee, payable whether the property is sold or not.

21. Of course, just as with bricks and mortar estate agents, there are variations on a theme. Some online estate agents are more online than others. The most extreme version of this – and it may be questioned whether the designation estate agent is appropriate at all – is simply an entity that aggregates the property details of private individuals, and places them on a property portal like Rightmove or Zoopla. Such "aggregators" only exist because (as matters stand) Rightmove and Zoopla do not permit "private" listings, where a home owner seeks to sell his or her own property. The aggregator enables such listings to be made, but (in their most extreme form) provides no other service: the home owner does his or her own selling.

(4) Agents' Mutual

22. Agents' Mutual was established in January 2013 with six founding members: Savills plc ("Savills"), Knight Frank LLP ("Knight Frank"), Strutt & Parker LLP ("Strutt & Parker"), Chesterton Humberts Ltd ("Chesterton Humberts"), Douglas & Gordon Ltd ("Douglas & Gordon") and Glentree Estates Ltd ("Glentree").

23. Agents' Mutual's approach to getting a critical mass of participating estate agents was to persuade what it regarded as "key" "independent" estate agents to sign a letter of intent. Independent estate agents are to be distinguished from the Corporates referred to in paragraph 13(2)(iii) above, which Agents' Mutual regarded as so tied in to the *status quo* as to be not worth approaching – at least initially.

24. The letters of intent, although not legally binding, would be used to encourage other estate agents to join Agents' Mutual – or at least themselves sign letters of intent. The letters of intent themselves tended to contain subjectivities or pre-conditions: there would not even be a moral obligation to sign up to Agents' Mutual unless these subjectivities or pre-conditions (which tended to relate to the total number of participating agents) were met.

25. As part of this process, Mr Springett, the Chief Executive of Agents' Mutual, and from August 2013 Helen Whiteley (who would become Commercial Director in February 2014) would have meetings, across the country, with various estate agents, with a view to informing them of OnTheMarket and what it had to offer. Agents' Mutual also had on its board various estate agents who – naturally enough – had a role in promulgating OnTheMarket. It will be necessary to consider some of the various meetings and communications that took place in some detail. For the present, however, it will be important to note:

(1) That there was a geographic aspect to these meetings. As is patent, the business of an estate agent is often very location dependent – particularly for a bricks and mortar estate agent. Estate agents in particular geographic areas tend both to keep a close eye on one another to ensure one does not steal a competitive march but also, to an extent, co-operate with one another (e.g. when putting out an estate agents' property "newspaper" of the sort referred to in paragraph 12 above).

(2) That there was a temporal aspect to these meetings, depending on exactly what stage of its development Agents' Mutual was at.

(3) There were or may have been meetings between estate agents:

(i) In which Agents' Mutual did not participate, and in which only estate agents participated.

(ii) In which Agents' Mutual did not participate, but which were between estate agents and someone else – like Rightmove or Zoopla. We know from the evidence that such meetings took place: we do not know very much about what was said at those meetings.

26. Gascoigne Halman was one of the estate agents approached by Agents' Mutual at a relatively early stage. By a letter of intent dated 21 June 2013 (the "Gascoigne Halman Letter of Intent"), Gascoigne Halman wrote to the

directors of Agents' Mutual "to confirm our non-binding intention to participate as a "GOLD" member firm in the portal proposed to be developed and operated by [Agents' Mutual]". The manner in which the Portal was to be developed was set out in an information memorandum dated 29 April 2013, to which the Gascoigne Halman Letter of Intent referred and which was appended thereto. By a letter dated 16 January 2014, Gascoigne Halman entered into a written agreement with Agents' Mutual, the terms of which are considered further in Section D below.

(5) The genesis of this dispute

27. Agents' Mutual was successful in signing up a respectable number of estate agents, sufficient to enable Agents' Mutual to proceed to the launch of the Portal. The consequence of the One Other Portal Rule was that, once the OnTheMarket Portal became operational, the Members of Agents' Mutual were obliged to stop listing with all other portals save one.

28. The evidence is that, when Member estate agents finally made their election (and there was a significant time-gap between an estate agent agreeing to become a Member of Agents' Mutual and this election), the substantial loser out of this was Zoopla. Most agents listing on OnTheMarket chose to de-list from everyone except Rightmove. In other words, Rightmove was – generally, but with certain notable exceptions – retained as the "one other portal" by Members of Agents' Mutual.

29. OnTheMarket was launched on 26 January 2015.

30. In November 2015, Gascoigne Halman was acquired by Connells. The relevant corporate structure is as follows:

    (1) Gascoigne Halman is wholly owned by Gascoigne Halman (Holdings) Limited.

    (2) Gascoigne Halman (Holdings) Limited is a subsidiary of Gascoigne Halman Group Limited.

    (3) Gascoigne Halman Group Limited is 75% owned by Connells.

(4) The ultimate parent entity of Connells is Skipton Building Society.

31. By an email dated 8 February 2016 to Agents' Mutual, Gascoigne Halman indicated that "as a subsidiary company to the Connells Group it was always inevitable that we would appear on Zoopla and this is likely to take effect later this week. As such it is my understanding that we will fall foul of the OTM one other portal ruling and be no longer eligible to appear on your site."

32. From no later than 11 February 2016, Gascoigne Halman listed its properties on both RightMove and Zoopla – as well as on OnTheMarket.

33. As a result, Agents' Mutual commenced these proceedings.[10]

C. THE WITNESSES

(1) Witnesses of fact

34. We heard evidence from a number of witnesses of fact. Five witnesses were called by Gascoigne Halman and three were called by Agents' Mutual. The Gascoigne Halman witnesses were as follows:

(1) *Ms Glynis Frew.* Ms Frew is the managing director of Hunters Property plc ("Hunters"). Hunters operates one of the largest national sales and lettings estate agency businesses in the United Kingdom. Ms Frew submitted a single witness statement, dated 1 November 2016. She gave her oral evidence on Day 2 (6 February 2017). Ms Frew was a somewhat defensive witness, determined to stick to her "script". As a result, she tended not to answer questions in a very focused way; she also tended to give, on an impressionistic basis, evidence of matters about which we are inclined to think she knew very little – for instance, what Rightmove and Zoopla may have "thought", when she actually had relatively little interaction with these organisations, and

[10] Pursuant to an application for injunctive relief by Agents' Mutual dated 17 February 2016 and the High Court Order of Mrs Justice Asplin of 23 February 2016, Gascoigne Halman undertook "not to…list any of its directly instructed and available UK residential sales and lettings properties on more than one property portal other than [OnTheMarket] until further order of the Court".

then only as a customer. She was an honest witness, but we place relatively little weight on her evidence.

(2) *Mr David Livesey*. Mr Livesey is the Group Chief Executive of Connells. Mr Livesey gave three witnesses statements, dated 1 November 2016, 15 November 2016 ("Livesey 2") and 20 January 2017 ("Livesey 3"). He gave his oral evidence on Days 2 and 3 (6 and 7 February 2017). Some of the content of Mr Livesey's statements was no more than commentary on documents in the case, to which he was not party. To this extent, we have discounted his statements as amounting to argument, not evidence. Apart from this, Mr Livesey was a most impressive witness. His answers to questions were short to the point of curtness, but they were precise and entirely responsive to the questions he was asked. He came across as a formidable businessman and entirely honest in his evidence.

(3) *Mr Jonathan Notley*. Mr Notley is the Chief Commercial Officer of Zoopla Property Group plc. Mr Notley gave four statements, dated 1 November 2016, 15 November 2016, 2 December 2016 and 31 January 2017. He gave his oral evidence on Day 3 (7 February 2017). He was an impressive and businesslike witness: like Mr Livesey, his answers were to the point and precise.

(4) *Mr Nicholas James.* Mr James is the Managing Director of Moginie James, the defendant in Claim No. HC-2016-001149. This was a claim, also brought by Agents' Mutual, raising similar issues to the present proceedings, and similarly transferred to this Tribunal (see footnote 3 above). The Moginie James claim was withdrawn, on terms that were not disclosed to us. Mr James' statement in those proceedings was, however, admitted into these proceedings (dated 31 October 2016, "James 1") and Mr James was called as a witness for Gascoigne Halman, and gave his oral evidence on Day 3 (7 February 2017). It was difficult to evaluate much of James 1 since – entirely unsurprisingly – much of his evidence was directed to points that were in issue in the Moginie James action, which were not in issue in this claim. It was

also clear when he came to give his oral evidence that Mr James' relationship with Agents' Mutual had not been a happy one.[11] Mr Maclean QC on behalf of Agents' Mutual quite rightly did not explore the reasons for this with Mr James (they were clearly collateral to these proceedings), and we are entirely agnostic as to whether they were well-founded or not. But the combination of this factor, and the fact that James 1 was (in considerable part) directed to other issues, means that we place relatively little weight on his evidence.

(5) *Mr Martin Forrest.* Mr Forrest is the Finance Director of Gascoigne Halman. Mr Forrest gave two statements, dated 1 November 2016 and 15 November 2016. He gave his oral evidence on Day 3 (7 February 2017). We found him to be a straightforward witness, doing his best to assist the Tribunal.

35. Agents' Mutual called the following witnesses:

(1) *Mr Peter Symons*. Mr Symons is the Senior Partner of Stags, a partnership offering property services in the South West of England. Stags is a member of Agents' Mutual, subscribing to OnTheMarket. Mr Symons gave one statement, dated 15 November 2016 ("Symons 1"). He gave his oral evidence on Day 4 (8 February 2017). He was an engaging witness, who seemed to enjoy giving his evidence. Although, inevitably, his views were given from the perspective of Stags, we found his evidence honestly given and straightforwardly and very clearly put.

(2) *Mr James Wyatt.* Mr Wyatt is a partner in Barton Wyatt Estate Agents, an estate agency operating in Virginia Water. Like Stags, Barton Wyatt is a member of Agents' Mutual, subscribing to OnTheMarket. Mr Wyatt gave one statement, dated 15 November 2016. He gave his oral evidence on Day 4 (8 February 2017). He was a careful witness, and gave his evidence straightforwardly and honestly. As with Mr Symons,

[11] Day 3/pp. 180 to 183.

inevitably his evidence was given from the perspective of his agency, Barton Wyatt.

(3) *Mr Ian Springett.* As noted above, Mr Springett is the Chief Executive of Agents' Mutual. He gave multiple statements in these proceedings, although some were given for interlocutory purposes and not for the purposes of the substantive trial: "Springett 1" (17 February 2016), "Springett 2" (27 June 2016), "Springett 3" (30 June 2016), "Springett 5"[12] (1 November 2016), "Springett 6" (15 November 2016) and "Springett 7" (9 January 2017). His oral evidence was given over several days, beginning on 8 February 2017 (Day 4) and ending on 13 February (Day 7). Early on in his cross-examination, Mr Springett frankly accepted that he had – at least potentially – a lot to gain or lose by this litigation, and to that extent was obviously *parti pris*. Over several days, he was the subject of a searching and probing cross-examination by Mr Harris QC on behalf of Gascoigne Halman. Mr Springett was an articulate witness, and he came across as highly intelligent. We consider that he was an honest witness: not only in terms of the evidence that he gave to us, but also in terms of his conduct during the course of the events considered in this Judgment. At various points in his cross-examination of Mr Springett, Mr Harris suggested that Mr Springett and Agents' Mutual were more concerned about <u>appearing</u> to comply with competition law than with <u>actual</u> compliance. Thus, for example, it was suggested that Mr Springett sought to ensure that no incriminating reference was made in email communications to the possibility of collective decision-making by estate agents[13] and that Agents' Mutual personnel did not actively take steps to dissuade such collective decision-making.[14] We should make clear at the outset that whilst we have no doubt as to the propriety of Mr Harris putting these points, we equally have no doubt (having seen Mr Springett in the witness box and heard his answers) as to the

[12] "Springett 4" was clearly so collateral, it never made it into the trial bundles.
[13] See, e.g., Day 5/pp. 127 to 129, 151 to 153 and 248.
[14] See, e.g., Day 5/pp. 146 to 154.

integrity of Mr Springett and the organisation he ran. In short, if there was a breach of competition law, it was not a deliberate one, but one where Mr Springett and Agents' Mutual inadvertently crossed the line drawn between competitive and anti-competitive conduct. Whether that in fact occurred is, of course, a major part of this Judgment, but it is important to be clear as to our starting point in terms of Mr Springett's and Agents' Mutual's conduct.

(2) Experts

36. We heard from two experts, Mr Parker (called by Gascoigne Halman) and Mr Bishop (called by Agents' Mutual). Their evidence was heard over the course of three days – 13 February (Day 7) to 15 February (Day 9). For the first day – during the afternoon of 13 February and the morning of 14 February – the experts gave their evidence concurrently or – more colloquially – as part of a "hot tub" process, whereby they gave their evidence together, in response to questions asked of them by the Tribunal. This was followed by cross-examination of Mr Parker by Mr Maclean for the afternoon of 14 February and part of the morning of 15 February. Mr Bishop was to have been called in the afternoon of 15 February 2017, but Gascoigne Halman elected not to cross-examine him.

37. Mr Parker and Mr Bishop each submitted two reports – a primary report and a reply report. Mr Parker's primary report ("Parker 1") was dated 2 December 2016 and his reply report was dated 9 January 2017.

38. Mr Bishop's reports were similarly dated: Mr Bishop submitted a primary report ("Bishop 1") dated 2 December 2016 and a reply report dated 9 January 2017.

39. Additionally, Mr Parker and Mr Bishop submitted a joint statement and provided the Tribunal with various data requested by the Tribunal.

40. We were enormously impressed by the diligence and helpfulness of both experts, and we found their evidence of considerable value. Both experts gave their evidence straightforwardly. That said, the views each expert expressed of

the markets they were asked to consider were irreconcilable and diametrically opposed. In terms of the quality of the evidence given by the experts, Mr Bishop gave his answers clearly and briefly. We only had the opportunity to see him give evidence during the "hot tub" process. Mr Parker gave much fuller answers during the "hot tub" process, which reflects the fact that he, as the expert called by Gascoigne Halman, tended to be asked questions first. In cross-examination, Mr Parker did appear to be overly wedded to a theory which he had first articulated – or first been involved in the articulation of – when advocating on behalf of Zoopla the merger between Zoopla and TDPG. The argument – made when seeking the OFT's clearance – was that in a market dominated by one portal (Rightmove), a merger between two less powerful portals (even though including the "number 2" in the market, Zoopla) was pro- and not anti-competitive in that the merged entity would act as a "constraint" on Rightmove. This was Gascoigne Halman's "theory of harm" in these proceedings, and we consider it later on in this Judgment. We merely note here that this theory of harm rested in large measure on Mr Parker's expert evidence.

D. THE NATURE OF THE LEGAL RELATIONSHIP BETWEEN AGENTS' MUTUAL AND THE ESTATE AGENTS WHO SUBSCRIBED TO AGENTS' MUTUAL

(1) The relevant documents

41. The legal relationship between Agents' Mutual, a private company limited by guarantee, and its Members – in terms of the contractual rights and obligations between them – is described in the following documents:

(1) The articles of association, which were adopted by written resolution dated 3 December 2013 (the "Articles").

(2) The membership rules, which were made pursuant to Article 25 of the Articles (the "Membership Rules").

These are "generic" documents, common to all Members, and all Members agree to abide by the Articles and the Membership Rules as from time-to-time applying.

(3) The listing agreement, referred to in Rule 11 of the Membership Rules, which sets out further terms on which an estate agent's properties are to be listed on OnTheMarket (the "Listing Agreement"). This is specific to each subscribing estate agent.

42. The starting point to understanding these documents, and so the legal relationship between an estate agent and Agents' Mutual, is the Listing Agreement. For present purposes, we shall consider the terms of the Listing Agreement entered into by Gascoigne Halman, namely its letter to Agents' Mutual dated 16 January 2014 (the "Gascoigne Halman Listing Agreement"). Although the letter does not expressly identify it as such, it would appear to be the Listing Agreement referred to in Rule 11 of the Membership Rules, and we so find.

43. The Gascoigne Halman Listing Agreement set out "the terms on which we agree, subject to the satisfaction of certain conditions of this letter, to become a member of [Agents' Mutual]". It provided (so far as material):

> "9. As a demonstration of our commitment to [Agents' Mutual] and its objects in accordance with the terms of this letter we hereby apply for membership of [Agents' Mutual] (in accordance with **paragraph 10**)…
>
> 10. Subject to **paragraph 11**, we hereby give notice of our application for membership of [Agents' Mutual] and confirm that we understand that any such membership shall be subject to the provisions of [Agents' Mutual's] Articles of Association and Membership Rules a copy of which we confirm has been made available to us. We hereby agree to comply with and be bound by all the provisions of [Agents' Mutual's] Articles of Association and Membership Rules.
>
> 11. Where we are a franchisee and form part of a wider franchise group (the "**Franchise Group**") we acknowledge that the Franchise Group shall only be entitled to one membership interest and accordingly, we agree that our membership shall be held jointly with all other members of the Franchise Group.
>
> …
>
> 13. In consideration of our entering into this letter and undertaking to list all of our UK residential properties on the Portal in accordance with the Exclusivity Requirement, [Agents' Mutual] shall:

13.1 enter our name into the register of members of [Agents' Mutual]…"

44. Pursuant to these paragraphs, Gascoigne Halman became a Member of Agents' Mutual as that term is defined in Article 2.1 of the Articles. Article 3.4 of the Articles provides:

> "Every person who wishes to become a Member shall deliver to [Agents' Mutual] an application for membership in such form as the Directors require, to be executed by such person applying for membership, agreeing to be bound by these Articles and agreeing to satisfy such criteria as may be specified by rules or bye-laws made in accordance with Article 25 and on being so admitted his name shall be entered in the register of members of [Agents' Mutual].

45. Clearly, the Gascoigne Halman Listing Agreement constituted Gascoigne Halman's application for membership of Agents' Mutual, and Gascoigne Halman became a Member in this way.

46. As noted above, the Membership Rules were made pursuant to Article 25 of the Articles. Article 25.2 provides:

> "[Agents' Mutual] shall have power to alter or repeal the rules or bye-laws referred to in Article 25.1 and to make additions thereto. The Directors shall adopt such means as they deem sufficient to bring to the notice of Members all such rules or bye-laws made pursuant to this Article 25 which, so long as they shall be in force, shall be binding on all Members."

47. The introduction to the Membership Rules provides as follows:

> "(A) In consideration of admission as a Member, each Member agrees with the other Members and [Agents' Mutual] to adhere to the Articles, these Membership Rules and any Agent Listing Conditions.
>
> (B) The Members shall together exercise their rights as Members to procure that [Agents' Mutual] adheres to the Articles and these Membership Rules where applicable.
>
> (C) These Membership Rules shall apply to any subsidiary of [Agents' Mutual] (as far as the same is applicable).
>
> (D) The definitions applicable to these Membership Rules are set out in **Schedule 1**."

48. The Listing Agreement, the Articles and the Membership Rules thus constitute a self-reinforcing set of rules binding Members of Agents' Mutual. But it is the Listing Agreement that is the gateway by way of which estate agents, like Gascoigne Halman, come to be bound by the Articles and Membership Rules.

We refer to the Listing Agreement, the Articles and the Membership Rules together as the "Arrangements".

(2) Specific provisions

49. The Articles, the Membership Rules and the Listing Agreement for each participating estate agent set out the terms of that estate agent's participation. A number of specific provisions are of importance for present purposes (see paragraph 3 above). They are:

(1) The One Other Portal Rule: This was a rule which we understand was contained in each Members' Listing Agreement. The provision in paragraph 6 of the Gascoigne Halman Listing Agreement provided:

> "We confirm our understanding that [Agents' Mutual] will, through its directors, seek to implement the requirement during the Listing Period that we list our UK residential sales and lettings properties on the Portal and our website together with a maximum of one other competing portal ("**Third Party Portal**") in accordance with the terms of this letter (the "**Exclusivity Requirement**"). We hereby undertake that we will comply and procure that each member of our Group (as defined in **Appendix 4**) complies with the Exclusivity Requirement at all times."

A number of points need to be noted:

(i) The obligation on Gascoigne Halman is very specific and on the face of it quite onerous – Gascoigne Halman undertakes that "we will comply and procure that each member of our Group (as defined in Appendix 4) complies with the Exclusivity Requirement at all times."

(ii) It will be necessary to consider precisely what the obligation to "procure" compliance actually means. We refer to this obligation as the "procure obligation". It is considered further below.

(iii) The obligation on Agents' Mutual is rather less specific and on the face of it less onerous – Agents' Mutual undertakes to "seek to implement the requirement during the Listing Period that we list our UK residential sales and lettings properties on the Portal

and our website together with a maximum of one other competing portal ("Third Party Portal") in accordance with the terms of this letter".

Although this term is referred to in the Listing Agreement as the "Exclusivity Requirement", we refer to it as the One Other Portal Rule, because that is a more accurate description of what is intended: in addition to listing on OnTheMarket, a Member of Agents'Mutual was entitled to list with one other portal – the "Third Party Portal" – and no more.

(2) The Bricks and Mortar Rule: By Rule 2 of the Membership Rules, a member "must be an Estate or Letting Agent". Schedule 1 to the Membership Rules defines an "Estate or Letting Agent" as "a bona fide office-based estate or letting agent offering a full range of agency services including valuations, attending viewings and liaison between the parties to an agreed sale or letting in pursuance of exchange of contracts". The intention of this rule appears to be to exclude from membership online estate agents.

(3) The Exclusive Promotion Rule: This was a rule which we understand was contained in each Members' Listing Agreement. The provision in paragraphs 7 and 8 of the Gascoigne Halman Listing Agreement provided:

> "7. We agree that from the Listing Date we will promote the Portal to our registered applicants, vendors and landlords and agree not to promote any other portal (including but not limited to the Third Party Portal save in accordance with and as permitted by this **paragraph 7**). In addition, we agree to promote consumer usage of the Portal in support of the overriding aim of creating a marketing leadership position for the Portal. Notwithstanding these requirements it is, however, acknowledged between us and [Agents' Mutual] that we are permitted to advise prospective vendor/landlord clients that we use the Third Party Portal and to reference the Third Party Portal in our marketing material.
>
> 8. In addition, we hereby acknowledge that from the Listing Date we will be required to co-operate generally in co-branding our business and each member of our Group (as defined in **Appendix 4**) with [Agents' Mutual]. In particular, we understand that we will be required to include [Agents' Mutual's] branding and that of its

> website, on all our consumer communications and marketing materials, sales particulars and digital communications (relating to UK residential sales and lettings properties) and in our office windows (using window stickers and/or display cards). We also agree to include a hyperlink to the Portal on our website. We hereby undertake to comply, and to procure that each member of our Group complies, with the co-branding requirements at all times."

(3) Points arising

50. In order properly to gauge the allegations of horizontal and vertical infringement that are made, it is necessary to reach a view on certain aspects of the operation of these rules. In particular, it will be necessary to consider:

    (1) The duration of these provisions.

    (2) The extent to which these provisions can be varied and – if so – by whom they can be varied.

    (3) Precisely what the One Other Portal Rule and the Exclusive Promotion Rule obliges Gascoigne Halman to do, that is to say, the nature of the procure obligation.

51. All of these factors are potentially relevant to the Competition Issues because they go to the operation of provisions that Gascoigne Halman contended were anti-competitive. Thus, in his submissions, Mr Harris stressed the duration of these provisions; the fact that they could not be changed; and the fact that the procure obligation was said to have effect beyond simply Gascoigne Halman. We consider later on in this Judgment in Sections H, I and J below the extent to which these factors are relevant to the Competition Issues. But it is necessary, before conducting any such evaluation, to appreciate how these provisions operated.

(4) Duration of the provision

52. Both the Articles (in Article 3.6) and the Membership Rules (in Rule 2.4) make provision for the termination of Membership. Thus, Article 3.6.3 provides that membership shall "terminate in such other circumstances as may be set out in any rules or bye-laws made in accordance with Article 25 or in accordance with any contractual arrangement with [Agents' Mutual]".

53. Rule 2.4 of the Membership Rules provides:

> "A membership shall cease:
>
> 2.4.1 automatically in the event that a Member confirms to [Agents' Mutual] that it no longer wishes to use the services of [Agents' Mutual] in accordance with the terms of any Agent Listing Conditions; or
>
> 2.4.2 at the determination of the Board if a Member has not used the services of [Agents' Mutual] during a Financial Year; or
>
> 2.4.3 following a material breach by the relevant Member of the terms of these Membership Rules, the Agent Listing Conditions or any Listing Agreement (which shall include but not be limited to the breach by the Member of any payment obligations, co-branding obligations, exclusivity requirement or requirement to list certain properties on the Portal contained therein); or
>
> 2.4.4 otherwise in accordance with **Articles 3.5** and **3.6** of the Articles."

54. The Membership Rules thus provide fairly broad means for a Member to cease membership. However, the following points should be noted:

(1) Membership continues unless terminated.

(2) We do not consider that a material breach by the Member <u>automatically</u> causes membership to end.

(3) Although Rule 2.4.1 provides for automatic termination of membership if a Member confirms that it no longer wishes to use the services of Agents' Mutual, that is subject to the terms of the Listing Agreement. In this case, the Gascoigne Halman Listing Agreement provided:

> "1. Subject to **paragraph 6**, with effect from the date set out in the Listing Notice (as defined below), we agree to list all and only our directly-instructed and available UK residential sales and lettings properties on the Portal for a period of 5 years (the "**Listing Period**") following the Listing Date as defined in **paragraph 4** below (the "**Listing**").
>
> …
>
> 4. The "**Listing Notice**" means the written notice served by [Agents' Mutual] on us by post or email at the applicable postal or email address or fax number set out below (or such other postal address, email address or fax number as may be notified by us to [Agents' Mutual] from time to time), notifying us of the date on which the Listing is to take effect (the "**Listing Date**") which shall be no less than 1 month from the date of the Listing Notice. Whilst the intention

> is that the Portal will be launched within 12 months of the date of the first drawdown of loan note funding, the Listing Notice may not be given later than 18 months from the date of the first drawdown of the loan note funding or, if earlier, 31 December 2015 and, in the event that the Listing Notice is not given by that date, the terms of this letter shall terminate automatically without liability on the part of either us or [Agents' Mutual] and be of no further force and effect, save in respect of the payment of the Pre-Launch Subscription noted at **paragraph 3** and the terms of **paragraph 5**."

The Gascoigne Halman Listing Agreement thus tied Gascoigne Halman into listing with the Portal for a period of five years from the Listing Date. We understand that similar – and sometimes effectively even longer – periods applied to other Members.

(5) The extent to which the provisions can be varied and by whom

55. The Listing Agreement is a bilateral contract between the Member and Agents' Mutual. Absent specific terms to the contrary, it can only be varied by mutual consent.

56. The Articles and the Membership Rules are multilateral instruments, binding all Members and Agents' Mutual itself. They can, however, be varied:

(1) The Articles may be altered by special resolution.

(2) The Membership Rules may be amended:

(i) Pursuant to Article 25 of the Articles;

(ii) Pursuant to Rule 7 of the Membership Rules. Rule 7 references Schedule 2 Part 2, which sets out in detail the manner in which the Membership Rules can be varied.

(6) The procure obligation

57. Both the One Other Portal Rule and the Exclusive Promotion Rule oblige Gascoigne Halman to "procure" that "each member of our Group" complies with those rules.

58. "Group" is defined in Appendix 4 of the Gascoigne Halman Listing Agreement. Appendix 4 provided for the following definition of "Group":

> "…in relation to a company, that company, its subsidiaries, any company of which it is a subsidiary and any other subsidiaries of any such holding company and each company in a group is a member of the group. Unless the context otherwise requires, the application of the definition of Group to any company at any time shall apply to the company as it is at that time…The words subsidiary and holding company mean a "subsidiary" and "holding company" as such terms are defined in section 1159 of the Companies Act 2006."

59. Section 1159 of the Companies Act 2006 provides so far as material that:

> "(1) A company is a "subsidiary" of another company, its "holding company", if that other company–
>
> (a) holds a majority of the voting rights in it, or
>
> (b) is a member of it and has the right to appoint or remove a majority of its board of directors, or
>
> (c) is a member of it and controls alone, pursuant to an agreement with other members, a majority of the voting rights in it,
>
> or if it is a subsidiary of a company that is itself a subsidiary of that other company.
>
> (2) A company is a "wholly-owned subsidiary" of another company if it has no members except that other and that other's wholly-owned subsidiaries or persons acting on behalf of that other or its wholly-owned subsidiaries."

60. Group is plainly widely defined. Taking the Member as a starting point, it applies to:

(1) That Member's subsidiaries;

(2) Any company of which that Member is a subsidiary (i.e. a holding company) and any holding company of the holding company;

(3) Any other subsidiary of such holding company.

61. It applies to the Member as it is from time-to-time.

62. According to this definition, when Gascoigne Halman was acquired by Connells, Connells became part of the "Gascoigne Halman Group".

63. Of course, only Gascoigne Halman entered into the Listing Agreement, and only it is bound by it. The term "procure" defines Gascoigne Halman's obligations and obliges Gascoigne Halman to see that the Group, as defined, performs according to what has been promised. If that does not occur, for

whatever reason, Gascoigne Halman is in breach of its agreement, and must suffer the consequences. There are many cases to this effect. "Procure" means "to see to it": it denotes a personal obligation to ensure a particular outcome.[15] In *Lloyds TSB General Insurance Holdings v. Lloyds Bank Group Insurance Co. Ltd* [2003] UKHL 48, [2004] 1 C.L.C. 116, Lord Hoffmann (who gave one of the majority opinions: Lord Hobhouse gave the other) stated – in relation to the term "ensure", which has a similar meaning to "procure" – at [21]:

> "It is therefore necessary to examine the nature of the cause of action asserted by the 22,000 claimants. It is a contravention of rule 3.4(4)(a); to "ensure that" company representatives comply with the Code of Conduct. A duty to "ensure that" something does or does not happen is the standard form of words used to impose a contingent liability which will arise if the specified act or omission occurs. Even if the act or omission is that of a third party, such as a company representative, the liability is not vicarious. The company is not liable for the representative's act or omission: that is simply the contingency giving rise to the company's own liability. Nor should one be misled by the word "ensure" into thinking that the effect is to impose upon the company a duty to do something. No doubt the company will be well advised to take whatever steps it can to prevent the contingency from happening, but the question of whether it took such steps or not is legally irrelevant to its liability. It is liable simply upon proof that the contingency has occurred."

E. FACTUAL BACKGROUND

(1) Genesis of the idea for a "new" portal

64. In late 2010, Mr Springett was invited to an informal meeting organised by Mr Trevor Abrahmsohn of Glentree. The meeting was attended by some 15-20 individuals from within the estate agent industry. The purpose of the meeting was to discuss mutual concerns arising from developments within the property portals market.[16]

65. There were a number of follow-up meetings during 2010 and 2011, culminating in a request that Mr Springett act as a consultant to gauge market views regarding portals.[17]

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[15] See, for example, *Re Royal Victoria Pavilion, Brighton, Whelan v. FTS (Great Britain) Ltd* [1961] Ch. 581.
[16] Springett 5 at paragraph 7.1.
[17] Springett 5 at paragraph 7.3.

66. Mr Springett presented his findings in 2011, and a steering group was established comprising individuals from Knight Frank, Savills, Chesterton Humberts and Strutt & Parker, as well as Mr Abrahmsohn and a Mr Michael Hodgson.[18] Although Mr Abrahmsohn and Mr Hodgson were both estate agents (with Glentree and Douglas & Gordon, respectively), they were also representatives of organisations known as "REAP" and "CLEA":

(1) CLEA was a company owned by some 50 or so firms of London based estate agents. CLEA had previously been involved with Mr Springett in the establishment of Primelocation and it had been involved in the publication of "The London Magazine", a magazine intended to market properties on behalf of estate agents associated with CLEA.[19]

(2) REAP was a similar organisation to CLEA, but operating in North-West London.[20]

67. Further meetings took place throughout 2011 and 2012. The 2012 merger between Zoopla and TDPG (see paragraph 13(2)(iv) above) "added impetus for the need to create a tangible response".[21]

(2) The establishment of Agents' Mutual and its business plan

68. Following its establishment in January 2013, the board of Agents' Mutual comprised: Trevor Abrahmsohn (Glentree), Robert Bartlett (Chesterton Humberts), Michael Fiddes (Strutt & Parker), Noel Flint (Knight Frank), Michael Hodgson (Douglas & Gordon) and Paul Jarman (Savills).

69. Mr Springett produced a business plan dated 11 March 2013 for review by the board. The executive summary of the business plan stated:

> "Agents Mutual Ltd has come into being as a result of an individual agent initiative followed by a two-year project to shape a response for agents to developments in the property portal website market. These developments have given rise to concern among agents about the pace of price increases, deteriorating

[18] Springett 5 at paragraph 7.4.
[19] Springett 5 at paragraphs 5.2 to 5.4.
[20] Springett 5 at paragraph 7.1.
[21] Springett 5 at paragraph 7.5.

quality of service and adverse conditions of listing being imposed on them by the major property portal groups.

During 2012, the OFT investigated the portals market as it was required to determine whether a proposed merger between DPG and Zoopla should be referred to the Competition Commission. It found that the only way to create a viable competitor to the dominant and super-profitable Rightmove was to allow the merger to proceed. It reasoned that the creation of such a competitor would provide agents with an alternative to RightMove, thereby providing a limit on the price increases it could impose. However, it noted that if agents felt obliged to list on both Rightmove and the newly formed Zoopla Group sites, then no increasing rivalry would be created. Early indications since the merger are that, far from providing a constraint on Rightmove, Zoopla Group is simply adding to the overall costs of listing agents by requiring them to list on all its sites (or none) and dramatically increasing prices. There appears to be every chance that what has been created in the portals market is more akin to a duopoly than a rivalry which will benefit agents and consumers.

The agent firms which have created Agents' Mutual Ltd believe that there is another way to create a true competitor both to Rightmove and to Zoopla Group. Whilst barriers to entry are substantial and potentially insurmountable to non-agent ventures, a new portal owned by agents and run with the aim of improving service and reducing costs to them, their customers and the property seeking public can win through in the medium term.

In order to form a solid platform for the development of a new portal, Agents' Mutual Ltd is seeking commitments from agent firms having, between them, at least 1000 offices. These firms will provide, by way of loans and membership fees, all of the working capital needed to establish and grow the business. Agents' Mutual is a Company Limited by Guarantee so that all its members will have a shared interest in it and no sale will be contemplated.

Around £3.2 million is required to fund pre-launch expenditure. The sum of £3M will be raised by issuing loan capital to the 'first 1000' firms on the basis of £3000 per office. The interest payable of 15% per annum will be covered, in the first year, by a £50 membership fee per office per month. As well as receiving an attractive loan interest coupon, the firms comprising the 'first 1000' offices will benefit from a 20% discount on the standard tariff of listing fees which are fixed for all firms committing for the full post launch 5-year period.

In order to achieve a viable market entry, members will be required to list on the new portal and on a maximum of one other portal only. The effect for many agents will be that their total expenditure on portals will be the same or less than now. This requirement will be implemented after launch. Agents will also be required to help promote the new portal in various ways."

70. The business plan treated sites owned by the "Zoopla Group" as a single portal for the purpose of the One Other Portal Rule. It recognised the apparent dominance of Rightmove, and noted that the merger in 2012 between Zoopla and TDPG (with clearance from the OFT) might not have achieved the effects hoped for by the OFT. Under the heading "The OFT may be proved wrong" (at page 8 of the business plan), the business plan stated:

"As indicated above, the OFT did not refer the DPG/Zoopla merger to the Competition Commission on the basis that it believed the combination would create a stronger competitive rival to Rightmove. It believed this would enable agents to switch between Rightmove and Zoopla Group and that this would provide a constraint on the ability of those portals to raise prices to agents. However, the OFT did note that if agents found that they had no commercial option other than to list with both Rightmove and Zoopla then 'the merger would not significantly enhance rivalry'. This rather understates the potential impact on agents of such a situation. In practice, it would mean continuing rapid price growth by Rightmove and the commencement of rapid price growth by Zoopla Group, limited only by the maximum budgets affordable by individual agents to be spent on portals. An effective duopoly would be created, with two powerful players able to dominate their agent customers. This would not only lead to higher listing fees but will also lead to further spending to achieve additional brand visibility with both portal groups (via "Featured Agent", premium listings and the like).

The reverse outcome – that agents are forced to rationalize their expenditure and, probably, to migrate away from Zoopla Group and list only with Rightmove – is ultimately at least as damaging for them since this would create Rightmove as a monopoly supplier with all the disadvantages that can bring.

Early indications are that Rightmove's pricing is not being constrained by the existence of Zoopla Group and that there is a reasonable chance that agents will find themselves paying out materially more in total for their portals, especially if they need to list with both."

71. The business plan contained the following justification of the One Other Portal Rule (at pages 14 to 15):

"Given the powerful established competition, the new portal would ideally require its members to list their properties exclusively, so that they were not listed on any other portal. This was part of the market entry strategy adopted by Rightmove and also, subsequently, by Primelocation. However, as indicated above, it will take time for the new portal to become fully effective and agents are now heavily reliant on the leads they receive from the portals. Accordingly, the requirement will be that members list on the new portal website and on one other portal website only. This requirement will be implemented after the new portal launches. Whilst not as impactful as full exclusivity of listings, it will create:

- Some disruption of the market as agents switch from other portals to the new portal;
- An opportunity for agents switching to promote the new portal to their vendors, landlords and applicants and to the wider public; and
- A consumer proposition that the new website is the only place to view every property from the agents listed with it."

72. The aim espoused by the business plan was to "sign up 1,000 agents in the year prior to launch, with 500 agents being signed up each year thereafter. The base scenario in the business plan envisaged £1.3 million being spent on marketing in the year prior to launch (i.e. 2014), with £3.3 million being spent

in the launch year itself (2015)".[22] (In the event, these targets were exceeded, and a new business plan was prepared in January 2014.)[23]

(3) Going public and seeking to recruit estate agents

73. In May 2013, after the board had approved the business plan, the creation of Agents' Mutual and the plans for its Portal (as yet unnamed) were announced.[24] The name – OnTheMarket.com – was announced in July 2014.[25]

74. Mr Springett began presenting the Agents' Mutual proposition to potentially interested estate agents between May 2013 and January 2014.[26] This was done by Mr Springett touring the country, making presentations. Supporting these presentations were written materials, either in the form of slides or print outs.[27]

75. In Springett 5, Mr Springett describes this process:

> "8.1 Following the creation of [Agents' Mutual] and the appointment of the Board, the next key step was gathering sufficient commitments from estate agents around the country. It was essential to sign up as many agents as possible to ensure that (i) there were sufficient numbers to make the project viable; (ii) the [Agents' Mutual] portal had a sufficient number of properties listed to attract and satisfy property seekers on launch day; and (iii) [Agents' Mutual] would have sufficient capital to allow it to build the portal, create the organization and invest significantly in marketing and advertising.
>
> 8.2 [Agents' Mutual's] objective was to recruit prospective agents at meetings and roadshow presentations as described below. Having attended a meeting or presentation, prospective agents would be invited initially to sign non-binding letters of intent which [Agents' Mutual] would seek to convert into formal contracts once a sufficient number of agents had shown commitment to the venture. Initially [Agents' Mutual] sought firms with a total of at least 1,000 offices to commit to [Agents' Mutual] in order for the venture to proceed – these initial agents would be the "Gold" members as I explain further below. Later, during 2014, [Agents' Mutual] offered different variations of "Gold" membership (which did not offer the same value in terms of listing fees and other benefits) as well as "Silver" membership (the terms of which were identical to Gold other than no loan note subscription was required and the fees tariff was a little higher) and,

[22] Springett 5 at paragraph 7.7.
[23] Springett 5 at paragraph 7.7.
[24] Springett 5 at paragraphs 7.7 and 7.8.
[25] Springett 5 at paragraph 7.8.
[26] Springett 5 at paragraph 8.4.
[27] Unsurprisingly, Mr. Springett varied these according to his audience. Thus, the disclosure revealed slides or a written presentation dated 6 June 2013 to unidentified estate agents; and a specific presentation to Gascoigne Halman dated 20 June 2013.

subsequently, “Bronze” membership (which did not require prelaunch funding or a commitment to sign up for a prescribed period of time, and for which fees would not be set until just prior to launch and would be higher than for committed members).

8.3 The way in which I initially sought commitments from estate agents was to present the [Agents’ Mutual] proposition to prominent independent firms operating in each region. Once their support had been obtained, it was often possible to expand membership of [Agents’ Mutual] among the smaller agents operating in the same region. In many cases, the principals of the prominent firms lent active support to this recruitment process by advocating the [Agents’ Mutual] proposition to others and by convening meetings of relevant potential agent members known to them at which [Agents’ Mutual] management could make presentations.

8.4 Between May 2013 and the end of January 2014 I organised or attended numerous regional roadshows in different parts of the UK, at which I would describe the principles behind the establishment of [Agents’ Mutual] and set out the requirements for listing and membership. By August 2013 I’d been joined at [Agents’ Mutual] by Helen Whiteley, who initially worked without a salary on the basis that if the project became viable she would become employed as a commercial director (this came into effect in February 2014). During this period Helen Whiteley made calls to agents who had attended meetings and presentations to gather their signed Letters of Intent as well as conducting meetings and presentations herself.

8.5 Typically, between 30 and 50 agents would attend each roadshow. I would deliver a standard form presentation…the contents of which, save for minor amendments, remained substantially the same each time I delivered it.

8.6 The presentation covered what [Agents’ Mutual] was “in a nutshell”. This would include that it was agent owned, without an objective of maximising financial returns to shareholders, with a focus on providing a high quality property search service to agents, the customers and the public, with all members having one vote. The presentation explained that agents would benefit from experienced management, maximum use of technology and a consumer-friendly portal with no non-agent or database marketing.

8.7 I would also set out a brief history of [Agents’ Mutual’s] establishment, the need for change in the market (i.e. “the opportunity”) and the strategy. As I described in these presentations, the strategy at that time was to sign up agents for five years to list with a maximum of one other competing portal of their choosing, to ensure that neither Rightmove nor Zoopla would have all of the agents/properties on the OTM portal (thus creating a unique set of listings for OTM and a reason for property seekers to use OTM). I made clear why the OOP rule was so essential to the strategy and emphasised that there would be a need to ensure that agents decided unilaterally and independently which other portal to list with (if any). I explained that the goal was that there would be no net increase in the cost of portals to agents and in some cases the total outlay on portals was expected to fall.

8.8 I would go on to explain that in order for the [Agents' Mutual] venture to proceed, it would need firms with a total of at least 1,000 offices to commit to listing – these firms were the "Gold Members". Gold Membership involved giving an early commitment (through a Letter of Intent) to a five year listing, subscribing to a loan note of £3,000 per branch and a prelaunch subscription of £600, in return for very low and fixed listing fees. In the presentation, I also described the two other forms of membership, "Silver" and "Bronze" (though these were not in fact offered to agents until a later date).

8.9 One of the final pages of the presentation…sets out the final message to be delivered to agents as follows "*What next? Consider our Information Memorandum with your colleagues - each firm must make its own independent decision*". At this point I would emphasise the need for firms to take both the decision to join [Agents' Mutual], and then the decision as to which other portal they would subscribe to, (if any), independently."

76. Pursuant to this process:

(1) In an email dated 6 June 2013, Mr John Ozwell of Hunters informed a number of other individuals, including Mr John Halman of Gascoigne Halman, who were part of an informal group of around 10 to 12 prominent estate agents known as the Independent Estate Agents Group ("IEAG"), of a meeting he had had with Mr Springett:

"I met with Ian Springett yesterday and we had a full blown discussion about the new portal. My overall impression is that if they can reach the critical mass (number of agents) that they require then this really does look like a possible winner. Many of you have already made contact and have seen the package and so I won't go into detail other than to say that there will be gold, silver and bronze membership.

…

Their plan is based upon most agents initially dropping Zoopla to go with them and then eventually dropping Rightmove as the new portal becomes the major portal. However, I reminded Ian that in the Midlands and the north Zoopla are nowhere as popular as in the south east and London. Their view on the savings we would make therefore vary considerably dependent upon whether you are with Zoopla or not, on the basis that Zoopla will be the first to go.

Companies with 50 offices or more receive a substantial discount on the subs per office per month and so I suggested that we might prefer to join as a group since we have well over 50 offices between us. However, Ian felt that this was probably not possible because everyone would then simply start to form groups to obtain the lower rate, which would then defeat their financial plan. I did however point out that IEAG was an established network and possibly the oldest current network of agents in the UK and that if we had to it would be quite easy for us to form a franchise agreement between us to obtain the lower rate. (Keith's idea – not mine!)

> I pointed out to Ian that if the whole network came over then it would be quite a coup for him to get us all in, in one go, and on that basis he said he would reconsider the group discount but I have to say my feeling is that it is probably unlikely that the founding of [sic] directors would agree – let's see…"

(2) In an email dated 7 June 2013 to various estate agents including Mr Flint and Mr Abrahmsohn, Mr Springett provided an update on progress in terms of which estate agents were proposing to join Agents' Mutual. This email contained a number of references to estate agent groups, either extant or in the process of being formed.

(3) In an email dated 14 June 2013 to Mr Ozwell, Mr Springett offered a group discount to IEAG members, which would be triggered if all the members fulfilled certain obligations, including signing their Letter of Intent by mid-July 2013 and actively promoting Agents' Mutual. Mr Ozwell forwarded the proposal to the IEAG members and asked for their views.

(4) Mr Springett approached Gascoigne Halman in June 2013:

(i) Mr Springett met Gascoigne Halman on 20 June 2013. Gascoigne Halman was an attractive estate agent because it was "a prominent regional independent firm which it would be necessary for [Agents' Mutual] to attract as a member, both in order to build a credible network in the North West of England, and to develop the UK-wide network. [Gascoigne Halman] is the leading estate agent in South Manchester, North East Cheshire and the High Peak, having 18 offices across these areas. [Gascoigne Halman] is also a member of a larger group known as the Relocation Agent Network ("RAN"), which is a referrals network of several hundred UK estate and letting agents."[28] In addition, Mr Halman was a member of the IEAG. Mr Halman signed the Gascoigne Halman Letter of Intent shortly after this meeting, and emailed Mr Springett to tell him

[28] Springett 1 at paragraph 25. Mr Springett had a specific presentation package for Gascoigne Halman, which is dated 20 June 2013.

so on 21 June 2013. That email suggested a couple of other estate agents with whom Mr Springett might make contact, and stated "I am also advising my fellow IEAG members of our decision".

(ii) Mr Springett's response, on the same day (21 June 2013) was as follows:

> "That is terrific news. Thank you very much for your support.
>
> I am pleased to be able to say we already have a letter of intent from Ryder & Dutton (Richard Powell dealing). Richard is attending our upcoming Yorkshire meeting as they have some offices there but I know the bulk of the operation is in Lancashire so they will be involved there too.
>
> I will now contact Farrell Heyworth (as part of the [IEAG] discussions) and the other names you mention. We will also develop the list I mentioned we had received from Andrew Snape. We also have other useful links in the region because of the founder members offices and there is a growing number of firms in and around Manchester who are registering at www.agentsmutual.co.uk. I will keep you advised as we go.
>
> May I take it that you are willing for us to make judicious use of the fact of your Letter of Intent when communicating with other firms outside the [IEAG] group?"

(iii) Mr Halman's response, again on 21 June 2013 stated:

> "I have no problem in you referring to our support. It's in all of our interest that there becomes a band wagon effect."

(iv) Prior to his correspondence with Mr Springett on that day, Mr Halman had sent an email to his fellow IEAG members informing them of Gascoigne Halman's decision to sign with Agents' Mutual, in which he also stated that:

> "The current duopoly will take over an ever increasing share of our profit and the proposition will mean that agents can only be on one of these two sites together with Agents' Mutual. In our area this is likely to result in the demise of Zoopla although in other areas such as central London the individual decision of companies is likely to be much closer.
>
> I think this is the most constructive proposition that has been put to agents to date to have a mutually owned website which is a defensive measure against the portals adopting and offering in the

future for "owner for sale". It also gives us a portal where we have some control over the costs.

There remain two significant dangers.

Firstly, they are unlikely to gain the support of the major corporates until the site becomes fully established although there are of course some fairly major companies who are founder members. Secondly Rightmove and/or Zoopla could elect to disallow agents to go on their site if they are on Agents' Mutual. This would be a risky move by them but is a real threat."

(5) An Agents' Mutual presentation was made to a group of estate agents in the North-East of England on 16 July 2013. As to this:

(i) It is, of course, impossible to say now who exactly attended the presentation, but from the subsequent email communications, it is possible to infer at least some of the attendees, who appear to have included:

(a) Steve Henning (Jan Forster Estates).

(b) Jonathan Parker (Brannen Partners).

(c) Mark Small (Signature).

(d) Clive Rook (Rook Matthews Sayer). Mr Rook, it should be noted, subsequently became a director of Agents' Mutual (from 10 March 2014 to 8 May 2015).

(e) Keith Pattinson and Justin Anim (Pattinson Estate Agents).

(f) Janet Hopkinson (Colin Lilley Estate Agents).

(ii) Mr Henning sent the following email to various estate agents in the area (copying in Mr Springett) on 17 July 2013:

"I personally found the meeting yesterday very informative.

There is only one way Rightmove can grow and meet the expectations of the City/Shareholders and that is to put prices up and sell us more products we probably do not need (e.g. micro sites) as they do not have a product to sell other than our data. Therefore they will continually find ways to repackage and sell it back to us

This by default will allow Zoopla to push their prices up

The information on estate agency software providers was also alarming

Over 10 years [a]go the agents in the north east got together to launch the Househunter as we were all paying approx. £2000 a page and the impact was rates came down and even today the rate is circa £400 a single page.

I would suggest if you are in agreement we hold a further meeting locally to discuss the Agents Mutual as I will be recommending to the Directors of Jan Forster Estates that we give the matter serious consideration

…I do not want to become a dinosaur

If you are interested please email me by return and forward this email onto others you know who attended the meeting (or did not) if you have their emails

Jordan (I AM sold) could you forward this email to Ben who was at the meeting"

(iii) Mr Henning continued to report positive feedback he was receiving from other estate agents (which communications he copied to Mr Springett). In an email dated 18 July 2013 (also copied to Mr Springett), he said:

"I have now received positive feedback from the following firms…[which were then set out]…

We may be in competition but it is good to see so many in agreement to review this opportunity further.

We also have a good geographical coverage from Durham across to the Tyne Valley up to Alnwick back down to Newcastle and the Coast north and south of the river.

So what are the next steps?

I have obtained a list of all the attendees at the meeting and those who did not attend and I will be contacting them via email.

I would ask you to forward this email on to your contacts and then we can arrange a meeting to take place either next week or the following week

…

We need an agenda but probably the starting point is

- Is this right for the North East?

- Are we collectively looking at Silver or Gold membership (or bronze membership at a later stage)

- Who do we want to drive this with the agents mutual in the North East?

- Which portal should we continue to support Rightmove or Zoopla or upto each individual agent?

Having spoken to Clive Rook earlier today if this is going to work for us we probably need a critical mass of agents taking Gold Membership

However, one thing is certain we have any opportunity to do something and if we don't it can only go one way based on Tuesdays presentation"

(iv) Mr Parker responded on 19 July 2013 in an email which was again copied to Mr Springett:

"I think following on from discussions within our company and to other agents, we are in broad agreement that something needs to be done to tackle Rightmove and Zoopla and their ever escalating costs!

The question for a lot of agents would be which portal to drop – Rightmove or Zoopla.

On the face of it, I think the obvious choice would be to drop Zoopla on the basis of Rightmove's market share/no of leads it generates in comparison. HOWEVER, in reality if every agent does that up and down the country, Zoopla would disappear as an effective force in the market and it would only go to strengthen Rightmove's hold. Ultimately Agents Mutual would probably just replace Zoopla. This therefore puts us in a unique position!

I would therefore propose for your consideration the following – **every agent in the North East drops Rightmove** (therefore meaning there is no competitive advantage which agents could 'use against each other' for marketing purposes.) The balance of power then suddenly changes. The effects of this would be thus:

- Rightmove sits up and takes notice – it puts US the agent back in control.

- It instantly changes the playing field and puts Agents Mutual in a strong starting position

- We will then be in a very strong bargaining position with Zoopla. IE if we get the Zoopla directors up in front of every agent in the North East and say we will drop Rightmove and use your services but for that we want a substantial discount in writing for X no of years.

- From a buyers/sellers point of view they would be forced to use another website as no / very few properties in the North East would be listed on Rightmove

- I daresay this rebellion would make national news and make other regions take a similar view

- Reduce your marketing costs.

However, this approach would have to be unanimous – it simply won't work if one agent says yes and one agent says no. I think we would also need to sign a legal document so there is no backtracking within a set period of time."

(v) This approach received support from other estate agents, who differed however in their views as between Rightmove and Zoopla. In an email dated 20 July 2013 sent to a number of estate agents and copied to Mr Springett, Mr Henning said:

"I attach Mark Small's original email to me yesterday about Rightmove and Marks response to Jonathan parkers email

We all know Keith Pattinson's view on Rightmove and I think following conversations with Clive Rook Clive may prefer the Zoopla option

This needs to be a key agenda point

Please feel free to add your views to this email thread

…As I said the other day we are all in competition but this is one area we all need to agree on"

(vi) Mr Springett responded to Mr Henning's email at paragraph 76(5)(v) above in an email dated 20 July 2013. This resulted in the following exchange between Mr Springett and Mr Henning:

(a) Mr Springett said:

"Many thanks for your hard work on this. Looks very exciting! However, I do need to speak to you regarding any attempt to reach a collective agreement on which portals to drop/remain on. There are competition law issues which you could be exposed to. The bottom line is that each individual firm must make it's [sic] own independent decision to [sic] other portal (if any) to choose. There must be no agreement between agents on these matters. I will call you on Monday to let you know the legal situation in more detail…"

(b) Mr Henning responded:

"I agree on that point and understand the legal position (I am married to a solicitor!)

It perhaps shows the way Jonathan feels about Rightmove but we cannot knock the energy on this one!..."

(c) Mr Springett responded:

"Ah – I didn't appreciate you had legal advice on tap! Please be mindful of it in relation to what gets circulated – we don't want anything out there which could be used against you all.

But it's great everyone's blood is up! Let me know as and when you need anything from me."

(d) Mr Henning responded:

"I was just joking not spoke to my wife about it she's to *[sic]* busy with her own work

But I agree 100 per cent with your observations and any advice you can give on these matters from a legal point of view will be appreciated

Speak Monday"

(vii) This exchange was between Mr Springett and Mr Henning only. However, Mr Henning then emailed the following to the estate agents, copying in Mr Springett:

"I have read Jonathan's well thought out email in more detail

However, as competitive firms we all have to make our own decision as to which portal we withdraw from (i.e. what is right for our/your business)

If we all agreed the same portal and entered into a written agreement to come off only Rightmove or Zoopla the other portal would have a legal comeback and we all know both parties financial clout!

I suspect we could therefore not enter into written legal agreements together

…On Monday I will seek detailed clarification from Ian Springett/Agents Mutual on this matter.[29]

[29] We were not referred to this "detailed clarification" during the course of the trial, and it does not appear to be in the chronological files. We attach no weight to this reference, one way or the other, given that we have not seen the underlying document.

> …However, what is clear is that while we must act independently we all have an equal opportunity to move this forward."

(6) In an email dated 13 August 2013, Mr Ozwell encouraged the IEAG members, if they had not already done so, to sign up to Agents' Mutual which was "gaining ground quickly". He identified in the email those IEAG member firms which, as far as he was aware, had already signed up to Agents' Mutual.

(7) In an email dated 21 August 2013, Mr Mark Leese of Leese & Nagle estate agents emailed Agents' Mutual:

> "As well as being an agent in Bristol I am also company secretary of our own agents owned paper and small internet search platform. We have about 16 member agents who set the paper up and lots of other agents in Bristol and surrounds who now advertise in it both online and in print. I know many of the members previously supported the Radarhome venture and are keen to find a solution that provides a solution like agents mutual. Several I know have also previously made contact independently. Not sure how many office in total are represented but at a guess between 50-100 with most of the leading firms in Bristol part of it.
>
> The reason for dropping you a line is that we have our AGM and annual drinks party coming up in a few weeks and feel it would be useful to perhaps be able to present a bit more info to the members and other agents to see if we can get critical mass of support to join up on launch and drop the other portals (except RM? To start with) as this has always been part of the process of setting up the paper and website."

77. The sort of support that Agents' Mutual was seeking was a letter of intent to sign up contractually once letters of intent had been accumulated from estate agents with at least 1,000 branches.[30]

(4) The Agents' Mutual venture proceeds

78. By around January 2014, completed contracts had been received from estate agents owning approximately 1,800 branches in the UK,[31] including Gascoigne Halman (see paragraphs 26 and 42 above).

79. At this point, the board of Agents' Mutual agreed that the venture should proceed.[32]

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[30] Springett 1 at paragraph 21.
[31] Springett 5 at paragraph 8.13.

80. The Members provided the first tranche of their loan note subscription monies in March 2014.[33]

81. By May 2014, the business was up and running, with a number of new employees, including a sales and IT team.[34] Amongst these new employees were Ms Whiteley and Ms Julie Emmerson.

82. In December 2014, Agents' Mutual sent out to participating estate agents a "Listing Notice" dated 18 December 2014 and a "Listing Notice Acknowledgement Form". The former notified participating estate agents that the "Listing Date" would be 26 January 2015. The latter, which was completed by the participating estate agent:

    (1) Identified the "one other portal" to which the estate agent would be uploading its properties.

    (2) Confirmed that that estate agent would abide by the One Other Portal Rule.

    (3) Indicated an intention (one way or the other) "on a voluntary and non-binding basis to send our newly-instructed properties to OnTheMarket.com at least 48 hours before they are sent to the Third Party Portal where it is commercially feasible to do so (e.g. sole instructions only/absence of specific client instructions)".

83. OnTheMarket launched on 26 January 2015.[35]

84. Between the point at which contracts had been signed (January 2014) and the launch of OnTheMarket (January 2015) there were further communications between participating estate agents, sometimes also involving Agents' Mutual and sometimes not. It must be borne in mind that during this period, whilst estate agents were signed up to the One Other Portal Rule, they had not selected (and would not until December 2014 select) their "one other portal".

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[32] Springett 1 at paragraph 23.
[33] Springett 5 at paragraph 8.13.
[34] Springett 1 at paragraph 23; Springett 5 at paragraph 8.14.
[35] Springett 1 at paragraph 23.

85. It is necessary to consider these communications in some detail, as Mr Harris relied upon a number of them in support of Gascoigne Halman's contentions. We have not, for obvious reasons, set out each and every communication contained in the trial bundles or referenced by the parties. However, we have (in light of the parties' submissions and the documents put to witnesses during the course of cross-examination) set out the documents that present what we find to be a true and fair picture of what was going on, given the materials before us.[36] Broadly speaking, we set out these communications chronologically; but where there is a series of related exchanges, we keep these together.

(i) March 2014: exchanges between Mr Springett and Mr Jones

86. In March 2014, there was the following exchange between Mr Nigel Jones of John Francis estate agents in Carmarthen and Mr Springett:

(1) On 27 March 2014, Mr Jones emailed Mr Springett:

> "We met Jon Notley from Zoopla yesterday in what was a very positive meeting. One thing that occurred to us is what are the founder and board member companies intending to do when choosing a portal partner with AMP? This would have an influence on other members as it would give a big indication to others on how Rightmove or Zoopla might be strengthened or weakened. We are favouring Zoopla as is Clive Rook in the NE. Whilst local coverage is the main driver to us a heads up on the national scene would help.
>
> Rightmove are now trying to 'pick us off' individually and are not prepared to speak to us as a group. This is feedback I have had from others as I have not met them yet! One claim they are making apparently is that large companies including 'founder members of AMP' are contracting with them as well as Zoopla into 2015. Obviously that is against AMP rules and I presume propaganda tactics from Rightmove on their well tied [sic] and tested 'divide and rule' tactics with agents.
>
> Any info on this latter point as well as your thoughts and comments would be good as well."

(2) Mr Springett responded on the following day:

> "Starting with Rightmove's 'divide and rule' – you are absolutely correct. I have now heard from a number of firms that Rightmove are attempting to spread misinformation about our launch. I will be sending out a mailout

[36] As we describe below, we are very conscious that the documents before us are incomplete.

shortly to all registered agents highlighting this and reaffirming the commitment to the 'one other portal' rule from launch.

Specifically on the point about the founder/board member firms, they have each confirmed to me that they are all in a position to meet their contractual obligations to Agents' Mutual which includes complying with the 'one other portal' rule from our launch date. This is the same for all 550+ member firms.

I am not able to give you any information about the intentions of the Board member firms as to their choice of 'other portal'. As you know, we must take care not to be seen to be leading a 'collective' boycott of an individual media owner. The matter is not discussed between them at Board meetings or elsewhere. I think I can, however, let you know the mood I am encountering in conversations with other agents up and down the country which is that whilst they would love to drop Rightmove, the likelihood is that they will not do so as it is perceived as the 'must have' portal. Situations such as your own where there is a good dialogue between a strong critical mass of firms remain the exception rather than the rule although we will be doing our best to create such critical mass everywhere.

I thought you might welcome a conversation with one of our Directors about this – not least to give further reassurance about the Board's commitment to the stated strategy – and I have asked Michael Hodgson of Douglas & Gordon to give you a call. It seems appropriate, in any event, for you and your colleagues to have a direct line to the Board given all you are doing to promote and support Agents' Mutual."

(3) Mr Jones emailed on 28 March 2014:

"Ian

Thank you for your email.

Having now met and listened to Rightmove (I barely had the chance to speak) I can personally now confirm that they are strongly promoting the myths that AMP board members & others are committing to two other portals into 2015 and went so far as to say that of the 70 'large agents' he had met only 1 had said that they could not commit to Zoopla & Rightmove because of the AMP rules. I suggested he had better add one other to his list then as we could not commit to something that we were legally contracted against doing!

We will have to see what our agents group view is when we report back to them on these discussions as Zoopla were in contrast very helpful and positive in their discussions with us. We are awaiting their final proposal before we report that to other members of our marketing group. There does still seem to be a strong body of support within our grouping to go with Zoopla but time will tell if that holds firm!

I will await Michael's call."

(4) The reference to "Michael" was a reference to Mr Michael Hodgson. Mr Hodgson and Mr Jones clearly did speak, for Mr Hodgson then emailed Mr Springett on 28 March 2014:

> "Ian - I spoke with Nigel and gave him the necessary assurances. I did cover off the potential "overlap" problem which is likely to lead to agents contracting to both post AM launch but withdrawing from one on launch. Many of his group are up for renewal in June/July so they have a decision to make.
>
> He talked about negotiating en bloc and making a group decision which one to support. I am not sure where that stands re competition law. Given that his group, apparently, has such a dominant position in their market, I put the view that they might be better served to see both sites lose stock, to enhance AM's profile and hasten the point at which it becomes the only/main portal. This needs to be balanced against client perception that RM (or Z) profile is much higher than AM at launch so clients will insist on being on one. This will be a temporary perception so it's their call.
>
> His group seem to be veering towards Z who will do a block deal (and I suspect be competitive on price) rather than RM who remain arrogant and will only deal one-on-one"

(ii) April 2014: exchanges between Mr Springett and the North East estate agents

87. On 4 April 2014, Mr Springett sent to members of the North East estate agents ground (including Mr Rook, Mr Henning and Mr Johnson) an email in the following terms:

> "As key members of Agents' Mutual in the North East, I thought you might find it helpful to receive the attached schedule. It shows all agents in the NE/DH/SR/DL/TS postcodes who have registered via our website and – in column B – whether they have yet signed up as a Gold or Silver member. There will, of course, be many firms who have yet to engage with us on any level and we will be working to contact all of them as soon as possible.
>
> I know that Steve Henning plans to invite existing members to meet shortly to consider how you might support further member recruitment and also the potential for portal negotiations. I am pleased to say that we have hired some excellent people to operate as our Field Sales Executives in the region and I will let you know more details as soon as their 'territories' have been agreed.
>
> Thank you very much for all your support so far."

88. The schedule provided contact details (telephone and email) for these estate agents.

(iii) April 2014: exchanges between IEAG members

89. On 10 April 2014, Mr Ozwell emailed the IEAG members regarding a potential meeting with Mr Notley of Zoopla. Mr Notley wished to make a proposal to the IEAG group, including in relation to discounts and promotion of Zoopla. In his response, Mr Halman stated that:

> "Agents' Mutual will require us to drop one portal and for us it's a no-brainer. Pity really as [Mr Notley] is a nice chap and I agree they are working hard but I don't want to get to a position where we are in their debt."

(iv) Communications between Mr Rook and Mr Jones

90. Beginning in March 2014, and continuing over some months, there were communications between Mr Rook – one of the North-East estate agents and, from 10 March 2014, a board member of Agents' Mutual – and Mr Jones:

(1) Mr Rook emailed Mr Jones on 24 March 2014. By this time, Mr Rook had been appointed to the Agents' Mutual board. He said:

> "I understand that you were away but perhaps you would kindly send me an email to advise when I could telephone you for a chat.
>
> Our group in the North East is very keen to establish group discussions with Zoopla and Rightmove, and I am sure your experience will be helpful to us."

(2) Mr Rook and Mr Jones obviously spoke on 26 March 2014, for later on that day, Mr Rook emailed:

> "Thanks for your help this morning, I have started the North East Agents Marketing Group as a base to follow your model and look forward to further discussions as this interesting opportunity develops."

(3) Subsequently, on being congratulated on his appointment to the Agents' Mutual board, Mr Rook said "…even unpaid…it will be well worth it if we can develop [Agents' Mutual] for our mutual protection".

(4) On 1 April 2014, Mr Jones described to Mr Rook discussions his "West Wales" agents had had with both Zoopla and Rightmove:

> "We met Zoopla last week who even came up with a special West Wales Agents package. Rightmove were not as accommodating. They said they

would come to talk to us and boy did they talk. And I listened and for over an hour I listened! They were really pushing the fact that some agents were committed into 2015 with both portals and [Agents' Mutual]. How they know that I have no idea but it serves their usual mantra of 'divide and rule'.

Interesting take on the other portal talk up from one of your board members I spoke to on Friday, Michael Hodgson who felt it was better for agents to split their take up between Zoopla and Rightmove as [Agents' Mutual] would then be the only portal with 100% take up of properties from agents.

There is going to be a lot of thinking to be done on this. I'd love to drop Rightmove but will too many others stick with them?"

(5) On 6 June 2014, Mr Rook provided Mr Jones with the following update:

"…I thought I would update you and ask some advice.

We had an excellent north east meeting on Tuesday (I'll send a photo) and have agreed to help the [Agents' Mutual] sales rep by organising a series of 6/8 local meetings. By members hitting the phones we are getting target members to meetings.

Zoopla are coming to see me next week with a view to making a presentation in September to NE owners of 150 – 180 offices. I would appreciate any advice you may have."

(v) The exchanges between Mr Springett and Ms Whiteley

91. In June 2014, there was the following exchange between Ms Whiteley and Mr Springett:

(1) On 2 June 2014, Ms Whiteley emailed Mr Springett:

"I just wanted to check the legal issues surrounding the NE meeting.

The meeting is officially a Marketing Forum for the agents mutual members in the North East. As part of that agenda, they will be negotiating with Zoopla and Rightmove for a collective rate to list with them.

That obviously could link to a collective decision for them to choose to list on 1 particular portal and hence a collective decision not to list on the other portal.

Does that create any legal issues and is there an issue with Julie [Emmerson] being present when those discussions happen?"

(2) Mr Springett responded on the same day:

"Yes – Julie needs to ask whoever is leading the meeting to put matters like further agent recruitment, communication etc which she should be involved

> at the top of the agenda and then move on to agent-only matters – joint [negotiation] with other portals and choice of other portal are completely off limits for us."

(3) Ms Whiteley responded:

> "But is it OK for them to make a group decision to come off a specific portal through a meeting like this?
>
> And can Julie be present when they discuss it – or should she leave at that point?"

(4) Mr Springett's response was as follows:

> "She must leave before either media negotiation or other portal is discussed. She should not be party in any sense to this – and should avoid receiving/sending any messages/documents about it. If questioned about this stance, she should refer people to Clive Rook and not attempt to explain it."

(5) Ms Whiteley then forwarded the email chain on to Ms Emmerson:

> "If you read through the notes below – you will see that the meeting agenda needs to be structured in a certain way and indeed you cant *[sic]* be present when it gets to the discussion on media negotiation or other portal choice!
>
> I am really sorry – this probably effects *[sic]* how the meeting is ordered.
>
> Lets *[sic]* have a chat when you get a moment."

(6) The chain was then forwarded by Ms Emmerson to Mr Rook. Mr Rook responded (to Ms Emmerson, Ms Whitely and Mr Springett) with:

> "The need to keep the 'media negotiation' item to the end of the meeting is clearly understood."

(vi) Further communications between Mr Rook and Ms Emmerson

92. Later in June, there were further communications between Mr Rook and Ms Emmerson:

(1) On 21 June 2014, Mr Rook asked Ms Emmerson "how the meeting went, did the e move advert help". It is unclear precisely which meeting Mr Rook was referring to, since clearly he was not present.

(2) Ms Emmerson responded:

> "Best meeting to date! About 25 turned up incl good show from AM members. Tv ad wouldn't play but am sending presentation to everyone so

> they should be able to access it. I left the room and they got into "the 2nd portal debate" feedback suggesting overwhelming desire to drop RM and Z.
>
> Speak to Andrew Craig for his feedback."

(3) Mr Rook responded with "Really encouraging news!!".

(vii) Communication between Mr Springett and Mr Burt-Gray

93. On 4 July 2014, Mr Kevin Burt-Gray of Pocock & Shaw emailed Mr Springett to request a list of the Cambridge agents who had signed up to Agents' Mutual "in order that we could have a few discreet discussions with some of them in order to gauge the general consensus on which portal they are likely to retain". Mr Springett responded on 7 July 2014 with a list of "[t]he following agents [who] have signed up to support us". The list included agents in the surrounding areas, in case Mr Burt-Gray wished to "consider a wider grouping".

(viii) Communications between North East agents and Zoopla

94. In July/August 2014, there was a series of communications regarding Zoopla and an offer made by Zoopla to the North East agents.

(1) In an email dated 29 July 2014, Mr Jones (of, it will be recalled, Carmarthen, and not the North East) emailed various people, not identified in the email before us, regarding "a very attractive offer from Zoopla for our agents group that Zoopla are happy for me to discuss except for the actual tariff which varies depending upon the part of the country you operate".

(2) Mr Rook – who evidently received this email – responded on 29 July 2014 (copying in Mr Springett):

> "Nigel,
>
> Thanks for update, I had a good chat with Jon Notley (Zoopla) yesterday as preparation for our NE group meeting on September 10th.
>
> He was optimistic about the reception received by your group and intends to make a similar offer.

He indicated that there may be at least three other sizeable geographic groupings which could also receive a 'group' offer."

(3) On 2 August 2014, Mr Jones emailed Mr Rook and other (unknown) addressees:

"Please find attached a summary critic of our offer from Zoopla.

As you haven't asked to see the terms I haven't sent it to you but you might be interested in the attached. Ian Springett and AMP board (as Clive well knows) don't want to be associated with agents choice on portal preference."

(4) Mr Rook replied on 4 August 2014:

"Thanks for this information. The current position is very interesting. I will discuss tactics with our group leaders this week. I currently have no idea what most people want to do but the guidance notes you sent are thought provoking.

Do you think RM will meet with you?, have you asked them? Jon Notley at Zoopla told me he may be talking to as many as 5 AM regional groupings, do you know of the other 2??

The next few months will be interesting. I'll keep you posted re NE developments."

(5) Mr Jones responded on 4 August 2014:

"No we failed to meet as a group with Rightmove as they refused to meet us stating that somehow they were unable to conduct business that way as it was unfair(?). They did go round and meet the larger firms in the area in the typical RM style of divide and conquer! I did notice a more negotiable stance from them though and feel I have had, for them, a good deal when renewing my firms *[sic]* contract.

No I don't know of others but possibly Hull London may do something? Does Ian Springett know anything from what he has heard on the grapevine. Presumably the newly appointed AM account managers may hear something.

I'm not sure if our group will accept the Zoopla offer, good as it is, because of a 3 month notice to exit being difficult for some who have already committed to RM beyond January and that 85 offices within our group need to remain signed up for everyone to meet the criteria. When it comes to the crunch will everyone stick together? Is it better to hold back until the end of the year when there is more pressure on everyone esp the portals?"

(6) On 2 August 2014, Mr Springett emailed Mr Rook:

"Ahead of your upcoming meeting with Zoopla, I have prepared a note with a few thoughts on the prospective group deal for your personal use. I don't

know what you will be offered so have left the table blank. I hope you find it helpful although you and others in the North East Group have probably considered all the points made and more. I hasten to say that I would never presume to tell any AM member what to do – still less a group as cohesive and advanced in its thinking as yours.

Should you decide to share any of the content of the note, may I ask that it is not attributed to AM/me."

(7) The note stated:

"**Zoopla strategy**

- Deal is partly defensive to preserve a presence in the region. They fear that if agents choose RM, there is little chance of that being reversed and staunch AM supporters will be unlikely to abandon it for Zoopla.
- Deal is partly aggressive as it creates a situation where Zoopla can lock out RM but also have better coverage in the region than AM. In other words, AM has AM members. Zoopla has AM members + other agents, especially the large corporates.
- Threat to AM in that if all its members go to Zoopla and then find leaving RM damages their business in the short term, this could put pressure on our 'one other portal' requirement, especially before we have had a chance to build traction with consumers.

This deal is therefore very important to ZPG and the North East agent group has a very strong hand to play in negotiating a good deal.

Deal Pricing

…

- Zoopla will be regarding a pricing deal as a 'loss leader'as it will look to upsell to the AM members – the majority of whom will be on the Zoopla deal…
  - The AM group could agree not to buy additional Zoopla products?
  - However, non-AM members will no doubt buy the additional products, putting pressure on AM members to do so.

…

Notice period

The proposal will no doubt contain a notice period to be given by individual firms. It may also have a threshold of office numbers below which the deal falls away, creating some pressure on group members to stay in.

- Zoopla is seeking to avoid a more vigorous negotiation environment where AM members can lay Z and RM off against each other and easily transfer between them.

- In circumstances where agents feel exiting RM is hitting business, the inability to leave Zoopla in the short term, might again put pressure on the AM 'one other portal' rule.

Promotion of Zoopla brands

Zoopla is well aware that promotion of the 'other portal' brand is not allowed under the AM contract. Member agents are required to promote AM/OTM but may only advise customers that they also use the 'other portal'.

- In combination with the strategy to have greater agent/property content than AM, any suggestion that AM members should promote Zoopla seeks to dilute AM impact and create a leading position for Zoopla in the region.

Summary

By offering a deal, Zoopla is attempting to secure its position in the region at the expense of RM and also establish a platform for becoming a strong leader there. The likely notice period and any suggestion of AM members promoting Zoopla would indicate their intent in this respect.

The group should consider all this in the light of the overriding objective of getting into a position where AM members have the option to wind down their use of any other major portal.

It is crucial that AM members choose their 'other portal' based on which one will be most effective for them rather than on the basis of a short term discount fees offer by one of the portals. They must make sure their businesses are protected as fully as possible given the AM will take time to build awareness and traffic."

(8) Mr Rook responded on the same day:

"Dear Ian,

We have a local leaders meeting next week to prepare for the Z presentation.

Thanks for the note which is very helpful. We will discuss the points on a strictly unattributed basis. Strong and varied views are held but this meeting will be the first at which members begin to nail their colours to the mast. I am keen to avoid any premature decisions being made or views becoming entrenched as I am still pushing the message that recruitment is still the priority so that membership is so strong that all options are available.

I believe that if the idea that a decision has been taken took hold too early it may hinder recruitment. Do you have any thoughts on this aspect?

I see SW agents are active in a group and Jon Notley (Zoopla) advised possibly 5 groups are in in [*sic*] discussion. It seems important that all groups communicate and coordinate tactics.

I realise that you cannot get involved except to put groups in contact.

Do you think RM will talk?..."

(9) Mr Springett responded on 6 August 2014:

"Dear Clive,

Thanks for this. A couple of points:

- In general, I think agents have most to gain if they are able to remain flexible in their choice of other portal so they can be played against each other. I appreciate the objective may be different in the North East where the group is pretty strong and can, perhaps, make a determination and gain benefit from doing so earlier and over a longer period.

- [T]o my knowledge, the only two groups currently in negotiation with the portals are yours and Nigel's. Your groups are working because 1) the AM membership is strong; 2) there is leadership at senior level by the largest independent firms who are also Gold members; and 3) a number of all-member meetings have previously occurred about joining AM. In the case of the SouthWest, only 1) applies and I think it unlikely that a group will form as the larger Gold members have limited interest in doing so and believe, in any event, that the SouthWest is too big a geographical area for a group to work. It is possible that an existing group in North London may seek a collective negotiation but I am not in that loop. Again, I think different dynamics operate as some of the founder members operate their [sic] but will probably not engage in a collective negotiation as their networks are much wider.

Per the earlier email, I think Zoopla sees advantage to themselves in creating group deals with a longish notice period and is trying to obtain AM member lists and/or get agents to organise meetings. We are not assisting this is any way and reiterate our stance that individual firms should choose the other portal which will work best for their business alongside AM."

(10) On 7 August 2014, Mr Robbie Hutchinson of YoungsRPS estate agents emailed (amongst others) Mr Rook on the subject of North East estate agents:

"As signed up members of Agents Mutual you will be aware of the North East Agents Marketing Group. For some reason I volunteered to be the facilitator for the Tyne Valley. I thought it may help if I made a suggestion to a few of the main protagonists to canvass views as to how we could work together for mutual benefit, before seeking support from the remainder of the agents.

We recently held a meeting at my offices to encourage new members of AM but to also begin a discussion as to how we can strengthen the Agents Mutual proposition and cut our marketing costs. Of course we are all in competition with each other but that does not mean we cannot join together where by doing so we can reduce our costs.

Whilst it would be nice to believe that on 1st January we all gave notice to both Rightmove and Zoopla and simply listed on Onthemarket, it would take a great leap of faith for us to do this for fear that other agents would use it against us. That is of course what Rightmove will rely on and unless we can work together we will only have ourselves to blame when they come with year on year increases.

All of us have bought into AM because we want to reduce our portal costs and it is really the next stage that I hope we can discuss.

On the assumption that Rightmove will be the preferred second portal of choice unless Zoopla can come up with an exceptional offer on 10th September we could I think agree between us how we can stage a gradual withdrawal from Rightmove by growing confidence between us in taking a group position in at least the Tyne Valley. I suspect like us you will all be getting a visit from Heather Black in the coming months wanting to sign us up for all sorts of add on's [sic] and on a 12 month contract.

My suggestion is that we all agree to the following:

1. Only agree to 1 month rolling contract on Rightmove.

2. Take only the basic package for each office with no add ons, premium listings etc.

3. Whilst we would not tell Rightmove we seek to delay the feed to Rightmove by 48 hours for new listings. We can say all properties will be on our own websites first and still be able to confirm to vendors that their property will appear on Rightmove.

If we all agreed and stuck to this it would give us confidence to take the next step of coming off Rightmove once the consumer is aware of Onthemarket as an alternative. In the meantime it should reduce our costs and make Rightmove a slightly weaker proposition. Of course Rightmove may realise they need to talk to us as opposed to their current position of not talking to agents in groups, ie the divide and conquer strategy, or they may stick to their belligerent approach and simply increase the basic package costs. If they take the latter line I suspect it will anger agents to the extent that the next stage becomes easier."

(11) Mr Foster of Foster Maddison estate agents responded on 8 August 2014:

"I'm all for a collective approach on this but I do think we should take sounding and consider what is evolving outside of our immediate area.

For instance, sentiment towards retaining Primelocation/Zoopla, rather than Rightmove, appears stronger in some other regions. Not much to be gained by regionalised portals and it may kill off the pair of them if buyers can't find what they want on their preferred portal.

I also subscribe to the view the [sic] Rightmove is already so focused on marketing to our customers (TV etc) that it wouldn't be a big step for them to offer direct listing, effectively entering the online agency market from a

> different angle. There customer brand is strong and I doubt they will move much on charging policy if they have alternative channels to exploit.
>
> Personally, I would ditch Rightmove. What the likes of Your Move and Bridgfords opt to do has no real impact in our operating area but I can appreciate that may be more sensitive to others.
>
> It is probably worth convening for an hour to discuss, outwith the formal umbrella of AM?"

(ix) Parallel discussions between Mr Springett and Mr Jones

95. In parallel with these communications, Mr Springett was also discussing matters with Mr Jones:

(1) On 30 July 2014, Mr Jones sent to Mr Springett a copy of Zoopla's offer to his group of estate agents. The proposal came from Mr Notley and was addressed to the "West Wales Group". Essentially, subject to a "minimum of 85 of the 96 West Wales group members being contracted by end September 2014", Zoopla was offering various concessions regarding rates. Zoopla did ask that "as we are entering into a long term agreement with the group that you will do what you can to promote the ZPG brands in your territory. No contractual commitment here but reasonable endeavours. If this could include helping us promote the approach elsewhere we would greatly appreciate that."

(2) In an email dated 2 August 2014, Mr Springett stated to Mr Jones:

> "Nigel
>
> Thanks for forwarding the Zoopla offer details. Please find attached a note with some comments/thoughts for your personal use. I hasten to say that I would not presume to tell any member what they should do and still less a group as sophisticated in its approach as yours. But I hope you will find it helpful.
>
> May I ask that if you are minded to share any of the content, that it is not attributed to AM/me.
>
> I think what you are achieving in West Wales is terrific – good luck with the meeting and thanks for your continued support."

The "note" was either identical or very similar to that sent to Mr Rook (see paragraph 94(7) above).

(x) Mr Jones' email regarding Zoopla's position

96. On 6 August 2014, Mr Jones emailed various estate agents in West Wales regarding "Agents Mutual & Zoopla":

> "This is a summary of the agents meeting held yesterday and is being sent to all agents that have signed up to Agents Mutual primarily to confirm what was agreed to those present **but also to inform those that did not attend and to receive the comments of support, query or otherwise, from those agents.**"

97. The email identified a number of queries/issues regarding Zoopla's offer and stated that "[t]he agents present were <u>all</u> prepared to sign up to the Zoopla deal" subject to agreement being reached with Zoopla on the issues identified. The email chain was subsequently forwarded to Mr Springett who suggested that the agents in West Wales could sign their contract with Agents' Mutual before entering into any deal with Zoopla.

(xi) North East estate agents discussing which portal to come off

98. On 11 August 2014, Mr Small of Signature estate agents emailed various North East estate agents (including Mr Rook) on the subject of "'On The Market' Making a decision on which portals to come off":

> "I was asked to approach all the coastal agents to arrange a second meeting to discuss and hopefully all agree to which portals we will all come off as a group. Some groups have been talking about coming off with both and some with one (so then a choice between rightmove/zoopla). In September there will be an 'on the market' meeting at which we all need to have a decision made for the coast. I have arranged a meeting point @129 coffee shop, Park View, Whitley Bay, Wed 20th August 3pm, Carol has kindly closed upstairs for us. Obviously it is incredibly important decision [sic] so if we could move things around to attend that would be great. I would advise that there is a high chance the group conversations could take some time so booking anything after could prevent you from hearing the outcome and being part of it. Please could you let me know as soon as possible if you can attend for numbers.
>
> Already had confirmation from Steve (Jan forsters [sic]), Nigel (Cooke & Co), Nigel (Sawyers) and Johnathan (Brannens)."

(xii) Exchanges in October 2014

99. In October 2014, there were the following exchanges. On 5 October 2014, Ms Whiteley emailed Mr Springett:

"Just to let you know that I had an interesting conversation with Clive on Friday. He was saying that lots of agents locally are thinking of pulling off both RM/Z – he understandably doesn't think that is a good idea.

He did say his view was they should stick with Zoopla. So I believe that is his vote."

100. Mr Springett responded on the same day:

"I think they are all trying to eat the cake before it is cooked.

Pattinson want off RM so maybe this is influencing Clive.

Much better for us if they leave Z. Much less likely to go back.

Should I have a go?"

101. Mr Springett did, indeed, "have a go". The communications are a little difficult to dis-entangle. In an email dated 6 October 2014, Ms Whiteley asked Mr Springett "Did you chat with clive re zoopla", to which Mr Springett responded:

"Yes. That is what prompted my correspondence with Caroline Pattinson.

I made the point to Clive that they should take the low risk option. Anything else is trying to get the benefits of [Agents' Mutual] instantly and forgetting it will take us time to get traction. He ran through the scenario in Whitley Bay where these [sic] is a strong campaign for both. I said that risks either portal breaching the dam in the short term and agents then flooding back in an uncoordinated way. Easier to hold the line on 'one other portal' (especially if RM).

I also said they should be careful about issuing a list of members to Zoopla. This is not needed to create a group deal. Just the numbers of offices is sufficient.

Clive, Andrew Craig, Steve Henning and Mike Rogerson are seeing Caroline P tomorrow. I will forward the correspondence to you.

In essence, they would be mad to come off RM and leave Pattinson on there. Better to come off Zoopla and render it useless and then market against Pattinson by saying they offer both RM and OTM.

I will send Clive a follow up email later tonight."

102. What seems to have happened is that Mr Springett spoke to Mr Rook, but there is no record of what was said. Mr Rook then emailed (at 10:31am on 6 October 2014):

"Hi Ian,

As you know, we have 200 plus offices in NE.

Jon Notley has had a number of post meeting discussions with Mike and has requested a list of NE members so that he can structure an offer. It would appear he needs this information to make progress.

We will obviously need to obtain individual firm's agreement to providing such information."

103. Mr Springett then had the following email exchanges with Ms Pattinson:

(1) Mr Springett to Ms Pattinson:

"Dear Caroline

I hope you are well.

Clive Rook mentioned to me that you are meeting with him and others tomorrow to discuss Agents' Mutual and the progress being made in the North East.

This is just to say that if, following that meeting, you are minded to explore membership options, I would be very happy to come to meet with you to discuss your requirements and try to meet them."

(2) Ms Pattinson to Mr Springett:

"Hi Ian,

I have been clear on our position, I am not prepared to commit to a 5 year agreement which could amount to £400,000 on a product which I have not seen and which relies on most of my competitors doing something which they currently lack the courage to do."

(3) Mr Springett to Ms Pattinson:

"Hi Caroline

Thanks for this. I appreciate your position, of course. I am simply thinking that if all of the main agents in the North East were aligned, it would be easier for them to make courageous decisions about individual and, indeed, potentially all other portals."

(4) Ms Pattinson to Mr Springett:

"Ian

Unfortunately we have been there with 'Property Penguin' before so if and when they act (and I refer to all of the agents not Andrew and Clive) we will evaluate our position."

(5) Mr Springett to Ms Pattinson:

"Hi Caroline

Noted. However, this is no 'Property Penguin'."

(6) Ms Pattinson to Mr Springett:

"Out of interest, why rather than creating a completely new portal was there not an attempt to purchase Zoopla whilst it was still a private company before it floated? Surely that would have been a simple solution?"

(7) Mr Springett to Ms Pattinson:

"Hi Caroline

Zoopla came to market with a valuation of over £940M (today £885M). This was on a rating which implied an expectation by the stock market that their income and profitability will catch up with Rightmove's over the next three years.

RM profit margin for 2013 was 74% on turnover of £140M. Z profit margin was 46% on turnover of £65M. Analysts expectations (until recently) were that RM income would reach £200M by 2017. NB A large part of this is expected to come from them extinguishing the historic discounts offered to multi-office firms now they are in a position to do so. As well as, of course, general fee increases (including the 'old rope' they sell as Additional Products).

So by 2017, the two portals could be taking £400M+ out of the industry – and possibly be a direct competitor to agents in the UK as they already are in Overseas Property.

We could never have raised the cash to acquire one of the portals – not least because the whole point is to operate the portal at cost for agents. However, agents (for now) have control over the 'crown jewels' – the listings and the listing fees – and the ability to add serious local marketing weight to the central advertising we will do. With support from the majority of independent agents, we will have all the firepower RM has – and they will be forced to amend their behavior.

RM started the year valued at £2.8Bn. Today it is at £2.1Bn. Our plan is to put them right back in their box as a supplier to agents rather than their master."

104. Mr Springett then responded to Mr Rook:

"Clive

Thanks for this. I thought I would summarise what we talked of earlier.

Your group is very strong so you have more options than most. The attention you are getting from Zoopla is testament to that. However, in all our discussions so far, we have focused on rebalancing the portals market over a period of years. Agents benefit in the early years as OTM will cause the duopolists to change their behaviour – especially in pricing but also in their ambitions to compete directly with agents. Trying to go to quickly would, in my opinion, risk being derailed.

Taking first the idea that agents come off both RM and Z. To make this work, a very high proportion need to do it and it has to stick. Arguably, this is the root most likely to crumble as both RM and Z will be trying to breach the dam and if either or both manage it then a disorderly flood could ensue.

A 'one other portal' situation is much easier to sustain whether this is RM or Z.

The easiest situation to sustain is where OTM agents choose to retain the portal they each consider the strongest for their business.

There is at least one major competitor in your region outside the OTM tent. If they remain so, one imagines they will choose their strongest portal to be with and possibly their number 2 also. If lots of OTM agents also choose their strongest portal this will reduce the number 2. OTM agents can then offer the number 1 and new number 2 (now OTM) to their clients and anyone outside OTM cannot match that combination.

Clearly the above dynamics change if all the key agents are signed for 5-year terms with us. But my advice would, on balance, still be that you should each choose the lowest risk option for your businesses and take the benefits we can deliver progressively.

You mentioned that Zoopla want a list of OTM member firms. I counsel caution. They have no need for this as a basis for a group deal. They could just offer a stepped deal based on numbers signing (e.g. 100 office[s]/150 offices/200 offices). A list just lets them target/pick off individual firms more easily.

Zoopla may claim they have signed group deals with OTM members elsewhere. To my knowledge, no such deals have happened so far but you are in touch with agents in other areas so can make your own enquiries.

I hope this is helpful."

(xiii) Communications with Mr Harrison

105. In early October 2014, Mr Graham Harrison of Webbers Property Services ("Webbers") (Devon, Somerset, Cornwall and London) had an exchange of emails with Mr Halman in which Mr Harrison stated:

> "We had a good AM meeting in our patch and Ian Springett did us proud in coming down from London and doing a great presentation. He really motivated some of the fence sitters and the main talk was of dropping both (won't happen) or dropping Rightmove."

106. The following communications then took place between Mr Springett and Mr Harrison:

(1) In an email to Mr Springett dated 13 October 2014, Mr Harrison said:

> "Good morning Ian,

Two quick questions

1. We have a dinner engagement with the MD of Rightmove tomorrow night down here in Barnstaple fixed up last Friday. Co-incidence after our Devon meeting where we talked of dropping Rightmove?? Could be that I spoke to a USA broker for an hour on Tuesday about the possibilities of Rightmove losing some areas. Any message you want me to give?

2. The North Devon group talked of dropping both portals immediately. If we did this could we still be on one of the others elsewhere. Like Rightmove in Somerset / Cornwall areas. I appreciate it would have to be one or the other of the two unilaterally in the other areas."

(2) Mr Springett responded on the same day:

"Graham

You move in mysterious ways, don't you!

1. Re: RM MD, from an AM/AM member agent viewpoint, we must avoid anything that would evidence collusion between agents or that AM is leading any kind of collective boycott. The main thing I'd want him to take away is (1) support for AM is solid and we are not going away and (2) agents will take a dim view of any attempts to undermine the project. Agents are taking against Zoopla on a number of grounds, not least the letter featured in this morning's Property Industry Eye. At present RM has the higher ground in terms of their behaviour towards us. They would be unwise to change that.

2. Re: coming off both in some locations: this would be great for AM as it would allow us to adopt an advertising strapline along the lines of 'the only place to find every property from the country's leading independent agents'. What would not be great if there were then a disorderly flow of agents back to the other two in those locations but I know you are on top of that. You would indeed be free to use a maximum of one other portal in all other locations.

3. For your private information at this stage, we are developing a concept we are calling 'Earlybird'. This would be where agents uploaded on their (sole instruction) properties to OTM (and perhaps their own websites) 48 hours or more before uploading to their 'other portal'. It is an idea which many members have suggested over the last year or so. Our board member firms are supporting this and we have legal clearance…"

(xiv) Communications between Mr Springett and Mr Flint

107. On 29 October 2014, Mr Noel Flint (Knight Frank and a founder member of Agents' Mutual) emailed Mr Springett, attaching for his attention an email he had received reporting on a meeting with Agents' Mutual which various estate agents had attended:

(1) The email sent for Mr Springett's attention stated:

> "The Maidstone based agents who have signed up to AM resolved to meet again 12pm Wednesday 19th November, you're welcome to attend. At the meeting I very much expect us to determine which portal to retain although in the interim period a steering group has been set up to organise a promotional campaign for our group with a starting budget of c £5,000 pcm to cover our patch, envisaged for at least six months. All agents attending recognised the power of unity and further recognised the retained portals power could be diminished by reducing the 'add ons' used.
>
> What occurs to me is that AM is a tool for estate agents to take back their destiny yet, so far, there have only been isolated groups of smaller independent agents dotted around the country getting together to discuss their futures. There has been a resounding lack of input and information from the larger, usually founder member agents, whose input into these discussions might prove to be influential. None the less we progress in our own little way. Estate agency at our level is pretty insular in that it is a local affair, mostly having a regional radius/catchment area, perhaps not experienced by the likes of yourselves, Savills and Strutt's. My fear is that if half the agents on our patch retain one portal and the other half retain the remaining portal we simply dilute the effectiveness of On The Market to no gain to anyone who has signed up to them. Surely the endgame is ultimately to take the retained agent to task with a view to coming off that portal too? In my view this needs a coordinated regional approach yet the big boys, and I include KF, Savills and Strutt's in that term, seem content to let us smaller fish flounder (pun intended). As estate agency at our level is usually regional it would actually make sense for all (say Kent-based) estate agents to retain one portal, and it wouldn't really matter if say Essex retained the other. Dilution by a split vote at a regional level can only be the end of OTM before it gets off the starting blocks.
>
> Our little group is 10 agents and only 22 offices yet we represent about 33% of the available property listings on our patch. Arun Estates have about 22% as do the other independents. Theinternet based agents and developers have about 11%, the same as the corporates of LSL/Countrywide. Can you imagine the damage to the rejected portal if we all came off at the same time, even at a regional level? It's possible that if we break ranks with the big boys above we will end up with a Prime Location situation all over again. The big boys loved PL yet ended up doing what us minions knew all along was the best course of action, and PL ultimately fell to acquisition.
>
> I guess what I'm saying is that input from the founder agents would be welcome, and some would say essential for the future of OTM. Maybe we should be discussing what promotion we should do ourselves other than what AM intend as it would seem to be to all our mutual benefit. There's no point in our group putting in full page ads in the local media promoting OTM only to find KF have done the same on the same week. We could pool our resources or at least coordinate a campaign.
>
> As an aside, I'm remarkably surprised at the lack of agents on-board in the Medway towns…Actually I think I know the reason why so few independents on-board in these areas is that the local rep just can't be everywhere all the time. It's in all of our interests to talk to anyone who is

> joined, or ought to consider joining. If you're aware of any similar groups like our own in and around your patch, I'd be pleased to at least have a chat with them."

(2) Mr Flint commented as follows:

> "I have left a message for Andrew to call me. I will explain that as founding board members we have made a conscious decision, backed by legal advice, not to give any recommendations on which portal to select. What is interesting is that local agents are getting together to make group decisions, is this an issue which we need to deal with? Something to raise with Eversheds. Ideally one of us "big firms" needs to go public on which Portal we are going to feed to sooner rather than later and that may then be the trigger for others to follow suit."

(3) Mr Springett responded saying "[a]s you know, I agree totally that the sooner you big firms declare your hands, the easier it will be for all other independents to follow".

(xv) Communications in November 2014

108. On 2 November 2014, Mr Underwood, a consultant at Webbers, emailed various estate agents as follows:

> "Here is an update on progress with the approach to OnTheMarket in the North Devon region, following a second meeting of our Marketing Group.
>
> The consensus is to keep Rightmove and give notice to Zoopla, and to that end Webbers has already given notice to terminate their contract at the end of November.
>
> The plan discussed is to defer loading properties to RM for say three days after they appear on everyone's own website and OTM. The aim is to have a basic RM subscription only with no premium listings etc, with a strategy to be in a position to resign from RM in 12 months. It has been agreed to carry out some marketing in the NDJ promoting OTM from December, with all of the agents logos to appear (and costs to be shared equally) and that no agent is to promote RM in our offices, or on any website or marketing, but to focus strongly and solely on OTM, to build profile."

This email was not copied to Mr Springett.

109. On 24 November 2014, Mr Rook emailed other Rook Matthews Sayer personnel on the subject "OTM RM Z HIGHLY CONFIDENTIAL":

> "Background
>
> 1. Nearly everyone in our patch is in OTM (not in – YM RR KP Bridgefords Coast and C Red hot)

2. Everyone in [*sic*] prepared to work together to make it No 1 portal, to advertise together in leaflets, e mails, newspapers directories and common newspaper ads with OTM branding. All members to heavily promote to make No 1 and marginalise none [*sic*] members. Interesting opportunity at Alnwick and Hexham.

3. Nearly all members in our area have committed verbally to Z. (SY AC JF NC RPS FM Mark Small Ben Bailey ROGERSON, (very confident re Rickards, Dobsons) not yet sure re Bowes Mitchell and Groves, George White staying with RM to see how things pan out

4. Central Durham Teeside staying with RM but most wish to stay Z but can't persuade each other at the moment (Sunderland and Shields may be coming off both).

5. Coast. Mark Small done a big job among big membership and appears to have all except N Cooke on board. If all others go Z I estimate NC likely to follow. If he does not he can be marginalised.

6. A real chance here to marginalise none [*sic*] members Steve Henning advised last week he had heard corporates in NE really worried about OTM.

7. If what I have been told by others occurs, and if we stay Z, OTM and Z will be by far the dominant portals in our area.

8. Stenghts [*sic*]: 1. OTM should be clearly dominant as all members work hard to promote it to sellers and buyers 2. We can successfully attack none [*sic*] members? (business market share opportunity). 3. Leaving RM will save us £80,000? after 1st June next year pa and slow / stop entry of Online Agents. 4. KP waiting to see site and wants a deal. Ian S will approach soon. Difficult to see how they can stay out? Corporates may join? 4. [*sic*] Will ask Z to support points of weakness with ads etc. 5. Should be easy to explain move away from RM (they have cluttered distracting ads with pop ups and intrusive questions which annoy / distract buyers. OTM property page is ONLY YOUR PROPERTY. (Honeymoon question?)

9. Weaknesses: isolated pockets of RM / OTM members and corporate strengths eg West Denton. NB Kingswood member and likely Z member are 3rd after RMS and YM. Sarah Mains staying on RM but Low fell [*sic*] agents working hard to change mind or marginalise

HEATON we need BM with Z.

10. RM contract and advice discussion.

11. Other considerations. 1. Their [*sic*] will be other developments some local and more national. 2. Zoopla injunction. 3. RM and Corporate attack. 4. Collective boycott illegal.

12. Decision and timing, our announcement will influence others.

10. [*sic*] Board minute record."

This email was not copied to Mr Springett.

(xvi) Communications in 2015

110. In January 2015, there was the following exchange between a London estate agent and Mr Trevor Abrahmsohn:

(1) By an email dated 7 January 2015, Mr Andrew Ellinas emailed Mr Abrahmsohn:

> "…With OnTheMarket launching on 26th – which portal are you dropping? We had decided to drop Rightmove but am now not so certain."

(2) Mr Abrahmsohn responded:

> "Dear Andrew
>
> Thanks for your email. We are dropping Rightmove since we believe that Zoopla will serve our purpose far more effectively in the London area.
>
> We are about to tie up the deal with Zoopla regarding a sizeable discount and if so, it could represent up to 45% less than we would have been charged had OTM not existed and certainly the first retrenchment in the last 14 years, I believe, is the first fruits of our new venture together. All this started by Reap 3 years ago which undoubtedly is the most transformational event of the Estate Agents' calendar in the UK in the last decade or more."

111. On February 2015, there was the following exchange between Mr Abrahmsohn and Mr Springett:

(1) On 3 February 2015, Mr Abrahmsohn emailed Mr Springett regarding Zoopla's terms and conditions, inviting his comments. Mr Springett responded a few minutes later:

> "Dear Trevor
>
> Of course. I won't be able to look/comment until this evening but will email you then.
>
> In the meantime, I thought you might be interested in the attached draft report (not for publication) which shows OTM property stock property stock v Primelocation property stock in our 'Prime Country' and 'Prime London' areas.
>
> Outside London most members have chosen to stay with right move which has put us in second position in all price categories…
>
> However, in London the RM/Z vote is split which sadly leaves us still in third place.

These numbers bear out the discussions we had during last year to the effect that the most efficient way to get swiftly to the number 2 position would be if members dropped Zoopla.

You and your Fabric colleagues represent a big swing vote!"

(2) Mr Abrahmsohn responded:

"Dear Ian

I hear what you say, but the problem is that participating Reap shareholders get a better response from Zoopla and in addition, they are offering a 25% discount which together make a very attractive package.

I would just say that the Zoopla, with a 1,000,000 properties on the site, will be a different entity to that of 500,000 which they presently have (so I believe). The contract will allow for a relatively easy exit and I can always monitor the progress as the year goes on and if I have to drive them elsewhere, I will try.

The matter is always under review but don't forget, there is a short-term, huge benefit to the management of Reap in not only initiating the online protection that ATM [*sic*] gives its members, but to reduce the costs of the alternative site as well.

Together, this is quite an irresistible combination which enhances the Board's appeal and effectiveness. This has some very attractive benefits in that it muffles the few voices of disquiet that we had about the magazine etc.

Don't worry, I am mindful of the benefits here that you describe."

(3) Mr Springett responded:

"Dear Trevor

Thanks for this – and what follows is geared to help (in my small way) any further negotiation of the commercial terms REAP is being offered by ZPG.

Of course, from a pure AM/OTM viewpoint I would prefer you all to ditch them – I hope you will forgive me for signalling that. I want to make sure we deliver the endgame for our members as as soon as possible and replacing Zoopla as No.2 has been a board strategy since last February and is becoming ever more achievable. I do recognise, though, that AM/OTM's existence has helped create useful and valuable negotiating opportunities and most importantly that these decisions are for members to take and not me.

Let me start by saying I think you could leverage a much better deal out of ZPG…

…

> Personally, I would be keeping both RM and Z on a short leash. RM is not as strong in London now as it remains elsewhere and I think it will become more malleable on price etc."

(5) Communications with the Competition and Markets Authority

112. On 27 March 2015, Agents' Mutual received a letter from the Competition and Markets Authority ("CMA") regarding a potential infringement by members or prospective members of Agents' Mutual of the Chapter I prohibition. The letter stated:

> "**The suspected agreement(s) or concerted practice(s)**
>
> Estate agents should act independently and should be free to choose which portals to list on. The CMA considers that the number and identity of portals they list on can be an important parameter of competition for estate agents.
>
> The CMA understands that one of the requirements of membership of Agents Mutual is that in order to list properties on its OnTheMarket.com portal, agents may list on a maximum of one other portal – known as the 'plus one' rule. If Agents Mutual's members were to meet and agree collectively either a) to list only on OnTheMarket.com to the exclusion of all other property portals or b) to list on the same portal in addition to OnTheMarket.com, the CMA would likely consider this to be an agreement or concerted practice that could constitute a breach of Competition Law.
>
> Although we do not have evidence that Agents Mutual has arranged or participated in any such meetings, or encouraged participation, we would be concerned if it were to be proven that Agents Mutual was encouraging its members to enter into potentially anti-competitive agreements.
>
> **Other concerns with the rules of Agents Mutual**
>
> We have received information that online only estate agents are prohibited from listing on OnTheMarket.com. Although, at present they have a choice of other portals on which to list their properties, the CMA may have concerns about their exclusion should OnTheMarket.com establish a position of market power – such that it is able to behave independently of the normal constraints imposed by competitors, suppliers and customers – in any market(s).
>
> In a similar way, the CMA's view on the impact of the 'plus one' rule itself on the main property portals may change if OnTheMarket.com establishes a position of market power in any market(s)."

113. Agents' Mutual responded to this letter on 9 April 2015:

> "Thank you for your letter dated 27 March 2015 headed "Advisory Letter". I am responding to that letter on behalf of Agents' Mutual Limited ("AM") in my position as its Chief Executive Officer.

> AM is grateful for the opportunity to respond to the issues raised in your letter. We had been made aware of a possible complaint to the CMA in relation to the creation of AM back in October 2014. As a result, we offered, via our legal advisers Eversheds, to meet the CMA to discuss that complaint and were informed that the CMA would contact us if appropriate. We heard nothing further.
>
> Nevertheless, your letter of 27 March 2015 now provides us with the opportunity to provide you with the background to and rationale for the creation of AM as well as to respond to some of the points made in your letter."

114. There then followed a detailed justification of Agents' Mutual's position, which it is unnecessary to recite. It appears that there was no further contact with the CMA until the following year (see paragraphs 124 to 127 below).

(6) Some estate agents' complaints

115. In an email dated 3 June 2015, Mr Ed Mead of Douglas & Gordon forwarded to Mr Springett an email he had received from a Mr George Franks, a London estate agent, setting out a series of "gripes" regarding OnTheMarket. These gripes included, "in no particular order", that:

(1) Participating estate agents had received no visits or contact from anyone at Agents' Mutual;

(2) The London agents felt let down by national agents all going with Rightmove;

(3) OnTheMarket had slowed Zoopla and made Rightmove stronger.

116. Mr Springett responded on 4 June 2015, suggesting that these gripes were overly negative. He went on:

> "In addition to the points above about our stellar performance relative to the original plan, the positive messages would include:
>
> - OTM is a superb portal which is <u>already</u> generating consumer engagement (pages viewed and time on site per visit) at the same levels as Zoopla
> - The marketing (which is heavily based on the TV advertising) is working. We <u>already</u> have over 4M visits per month from a standing start. It took Zoopla three years to reach 5M visits.
> - Leads to member agents are growing rapidly and are of much higher quality than Zoopla delivers.
> - We continue to grow our membership every day – despite aggressive tactics by much better funded competitors.

> …Some of the comments regarding strategy are a little illogical I think. Under "one other portal", the idea is that members retain the stronger of the duopoly portals to cover themselves while OTM builds up into the true alternative they need. No surprise that over 90% chose the dominant market leader. We have not made Rightmove stronger – they were already dominant. Those members who chose to retain Zoopla are finding it was probably the wrong choice, perhaps driven by a wish to take short term cost savings. Most bizarre is the idea that if RM starts to drive up prices even faster, firms would abandon OTM – just at the time it is most relevant."

(7) Gascoigne Halman states its intention to breach the One Other Portal Rule

117. As noted at paragraph 30 above, in November 2015, Gascoigne Halman was acquired by Connells. On 8 February 2016, in response to a confirmation from Ms Whiteley that loan note interest was payable by Agents' Mutual unless and until the Member was in breach of contract, Mr Halman responded:

> "Thank you for confirming that we will be entitled to the payment of our loan interest.
>
> As regards our future portal advertising I am sorry that I must advise that as a subsidiary company to the Connells Group it was always inevitable that we would appear on Zoopla and this is likely to take effect later this week. As such it is my understanding that we will fall foul of the OTM one other portal ruling and be no longer eligible to appear on your site.
>
> As you will recall, as an independent estate agency we were one of the first to support AM as we saw it as an opportunity to break the Rightmove/Zoopla dominance. I believe that OTM has a real battle moving forward as it really seems to be Zoopla and OTM which are battling for the register with Rightmove less affected. With the corporates in such an acquisitive mood this can only make your aims and intentions increasingly challenging.
>
> My understanding with regard to our loan notes is that we will fail to receive interest in future but they remain repayable at the expiration of the term.
>
> My sincere apologies for having to convey this news, and my best wishes to on the market for the future."

(8) The "four party meeting"

118. On 21 January 2016, a meeting took place between Mr Springett, Ms Alison Platt (Countrywide), Mr Ian Crabb (LSL) and Mr David Livesey (Connells).[37] These were representatives of the three estate agents described by Mr Springett as the Corporates.

[37] Springett 5 at paragraph 16.1.

119. The genesis of this meeting appears to have been an exchange of emails in October 2015 between Mr Paul Smith of Spicer Hart estate agents and Mr Springett, where Mr Smith reported that the Corporates appeared to be expressing greater interest in OnTheMarket.

120. Mr Springett responded:

> "I think anything which encourages Simon [Embley, of LSL] to think we are going to get to the tipping point and knock Z over would be helpful – might just be in conversation if you are in his company at any point. I would think he is hedging his bets – much like the stock market – he does not know if we are going to forge ahead at Z's expense or they will recover at ours although he said he was less sceptical than before our meeting. The best deal he will get from us is by coming now."

121. This resulted in Mr Livesey becoming involved in facilitating a meeting. In an email dated 12 November 2015, Mr Springett noted:

> "Confidentially, we have opened discussions with the big 3 corporate groups but, of course, there are lots of twists and complexities. However, the disposal of their ZPG shares would remove one of these. I hope the penny is finally dropping that the two monsters they have helped create and benefitted from financially are steadily eroding their core businesses and this will only accelerate unless the OTM alternative succeeds."

122. The meeting eventually took place on 21 January 2016. Mr Springett kept the only note of what was said:

> "Meeting notes of 21st Jan 16 - David Livesey, Connells; Alison Platt, Countrywide; Ian Crabb, LSL Holdings.
>
> - Meeting effectively 'convened'by DL. Relatively short notice.
> - IS opened: big potential opportunity to combine AM existing membership strength with their strength to create the market leading portal.
> - As a publicly quoted business, potential market cap could reach several £Bn - why not own it?
> - IC queried the route map – how to advance the business to and beyond the tipping point. Would this work from an economic viewpoint? IS covered the switch of their 90,000 listings from Zoopla and the likely surge in agent membership. Our model works on conservative ARPA and still generates big surpluses.
> - IS set out the route map to the ownership model needed.
>   - Disinvest elsewhere
>   - Enter contract with AM (inc OTM + 1) and invest in 0% loan notes with a multiple return at the end of the term contract.
>   - Include a 'conversion' clause in the event the Company moved to 'limited by shares'.

    - Proposition two members: close membership, IPO (at say £500M). Issue equal shares to current membership and authorise further issue for capital raising and to incentivise key agents. Each current member holding would have paper value of £100k after dilution of their stake to 60%. Some of the shares used to raise capital, others to meet conversion from Loan Notes, others to incentivise further key firms (ZPG partners). Further agents joining OTM are just customers.
    - All members remain OTM + 1 and this gets us past tipping point 1 towards tipping point 2 where we are seen as strong enough for agents to begin withdrawing from Rightmove.
    - Endgame – 15,000 branches at an avg monthly fee of say £1000 with no real need to list anywhere else. £118M income before any other revenue sources.
    - Under any scenario, the members need to be protected and receive the elements of the proposition they bought into = sustainably reasonable and fixed listing fees, no internet-only.
- AP queried the desire of the ZPG partners to join. IS said conversations had taken place, with one interested in joining simply to support the principles of what we are currently doing and another looking for a financial incentive. None seem locked to ZPG.
- DL pushed dropping one other portal and AP supported, saying the market should decide and the best portal would win – they would provide us with extra stock to put us in the game. IS said there is no magic – RM is now the only portal with near 100% stock and matching income so is winning. Would not have entered the market on any other basis than agents backing and directing their stock via OTM + 1 rule. Still plenty of mileage in that and consistent with the 'most interesting scenario'.
- IS asked what success resulted from them supporting OTM looked like for them. DL said it would be really strong portals competing, with them potentially benefitting from an investment in one or more.
- DL asked what we would do if the three of them don't join. IS said we would carry on growing organically with the support of the small and medium firms which still represent the majority of the market. OTM + 1 would remain as it is key to reaching the No. 2 position as the first milestone.
- AP queried the strategy – internet denier/consumer wants internet only. IS said pure internet plays are simply parasites only viable because the portals allow them to operate alongside the main customer base of high street firms. Why allow margin to be eroded in this way and allow this business model to flourish at agents' expense. As the market currently operates, the portals win either way.
- AP asked how we value the business. IS said (1) create a business projection based on the 3 joining OTM + 1 which would show strong forward profit and cash generation; then (2) approach an investment bank for a view on IPO value. IS said we all probably new suitable investment houses – it was agreed that it should be done by AM to avoid hares running. All felt Close Brothers would be a credible source for this. The forward income worked just based on UK resi listing fees but there would also be substantial further revenue potential from Overseas, Commercial, and commercial partnerships provided these did not detract from the core purpose."

Two points should be made in respect of this meeting note:

(1) This was Mr Springett's note; the other witnesses did not completely accept its accuracy. However, although Mr Harris sought to make much of a conspiracy against Zoopla out of this note, the note records no such conspiracy and we find that nothing of that sort took place. The note records Mr Springett's thinking and intentions, and we treat it in that light.

(2) We should explain that the reference to the two tipping points meant this:

(i) Tipping point 1 was where OnTheMarket had successfully challenged Zoopla for second place in the market.

(ii) Tipping point 2 was where OnTheMarket was rivalling Rightmove as "number 1".

These "tipping points" featured in a number of Agents' Mutual's plans. They were, and we treat them as, aspirations or hopes of a success to be achieved.

(9) The Northern Ireland Steering Committee

123. In March 2016, Ms Whiteley emailed Mr Springett regarding a Northern Ireland steering committee. Mr Springett's response was as follows:

> "I think we need to be very careful about our role in formalising any such committee. The risks are that AM is dragged into disputes about the role and composition (which could become acrimonious) and, potentially, is compromised on competition law issues. If the committee breaks asunder or just fades away, we want to be left with our business relationships/contracts with each individual firm intact.
>
> These member groups should be self-managing and…there is no representative from AM on the committee. This is how the North East Group operated, albeit all members were able (and mostly did) attend. The upset around Clive Rook's decision not to leave RM means that the group has ceased to function in the way it did but we still have a strong business there. The West Wales group is similar and still intact. There is another in North Devon. In each case, the key is a motivated individual or group of individuals prepared to lead/coordinate.
>
> Our capacity to support these groups is a key variable. The North East Group have/had Julie who was active as a liaison point to good effect. West Wales use me, really, but also interact with Patsy. And Devon operates without a BDC [Business Development Consultant] involved. If we had more local resource on

Member Support, I would think we could get more groups going and get more out of them.

I agree with you that the focus should be on how the agents can individually and collectively work to advance their portal in NI and to resolve any local issues in a manner which works for them and AM. For example, the operation of the OOP rule where we are slightly out on a limb and hopefully can contain it…"

(10) Further intervention by the CMA

124. On 21 April 2016, the CMA wrote an open letter to estate agents on the subject of choosing online property portals. This letter stated:

"The Competition and Markets Authority (CMA) is writing to estate agents to remind them that, when an estate agent makes a commercial decision about its choice of online property portals, the law requires that it makes that decision without colluding with estate agents that are its competitors.

The CMA is taking this step after becoming aware that estate agents in some local areas may have made a collective decision to join the OnTheMarketPortal and, at the same time, to remove their business from other portals that compete with OnTheMarket. [38]

The CMA has already been in contact with some agents and trade associations in this regard. However, given some evidence that such collusion may be happening between estate agents in more than one local area, we are issuing this open letter to all estate agents, advising them that this kind of conduct may break competition law and that agents engaging in it could therefore face significant fines. Separately, the CMA will be contacting individual estate agents it suspects may have been involved in this potentially anti-competitive collusion."

125. Mr Springett reinforced this message in an email dated 21 April 2016:

"The CMA has today published an open letter to agents about their obligations under competition law when choosing online property portals to advertise their properties.

As you would expect, the Board and management team of Agents' Mutual has always been scrupulous in building a procompetitive business to seek appropriate legal advice and to share that advice as appropriate with its current and prospective agents.

The guidance to agents given in the CMA's open letter accords entirely with the advice consistently given over time by OnTheMarket/Agents' Mutual to its current and prospective agents. We note that in the open letter from the CMA there is a specific statement that "The CMA has no reason to write to OnTheMarket in this connection at this time."

[38] It should be noted that the letter stated, in a footnote, that "[t]he CMA has no reason to write to OnTheMarket in this connection at this time."

> It has always been clear that in making a choice of 'other competing portal', if any, at the time of joining Agents' Mutual and listing their properties at OnTheMarket.com, agency firms must act independently. Firms must not enter any collective agreement with other agents either (a) to list only at OnTheMarket.com to the exclusion of all other property portals or (b) to list on the same "other" portal in addition to OnTheMarket.com. Such an agreement could constitute a breach of Competition Law."

126. The importance of independent decision making by estate agents was further discussed internally within Agents' Mutual.

127. Subsequently, the CMA wrote to Agents' Mutual's solicitors as follows:

> "I am writing to you as a matter of courtesy following the meeting between your client and the CMA on 11 May 201[6] to advise you that the CMA has received a complaint which relates amongst other things to the conduct of Agents Mutual. After careful consideration of the merits of opening a case in light of the CMA's Prioritisation Principles, the CMA has decided not to prioritise an investigation in relation to Agents Mutual's conduct as set out in that complaint at this time.
>
> By way of confirmation, the CMA's position is that it is not currently minded to open an investigation in respect of the rules of Agents Mutual under Chapter I of the Competition Act 1998 or Article 101 TFEU on the grounds that it is not a current administrative priority for the CMA. In selecting which matters to pursue, the CMA considers in the round impact, strategic significance, risks and resources, and may also take account of other relevant factors…"

F. GASCOIGNE HALMAN'S ALLEGATIONS

128. In its Defence, Gascoigne Halman contended that the relations between Agents' Mutual and its Members infringed the Chapter I prohibition in a variety of ways. As we have noted in paragraphs 5 and 6 above, the allegations were peculiarly wide-ranging and not at all specifically pleaded. We set out below the summary of Gascoigne Halman's case as stated in Gascoigne Halman's written closing submissions:

> "1. By these proceedings, [Agents' Mutual] seeks to enforce [Gascoigne Halman's] compliance with the 'OOP Rule'. [Gascoigne Halman's] case, in short, is that the rule is void because estate agents have coordinated anti-competitively, through the vehicle of [Agents' Mutual], and in particular through the OOP Rule, to limit their use of portals and thereby "*replace*" Zoopla, an existing and effective competitor to the clear market leader, Rightmove, with the agents' own favoured portal, OTM. However, OTM is run in the protectionist interests of traditional, high street agents to the exclusion of non-traditional agents who employ innovative and lower cost business models, and to the detriment of other consumer groups. Further, the entry of OTM under the "*protection*" of the OOP Rule has had the unsurprising effect of strengthening Rightmove and weakening its principal competitor, Zoopla, in circumstances where OTM is not an

adequate replacement for the loss of the competitive constraint on Rightmove previously exerted by Zoopla. Contrary to AM's case, the OOP Rule was not necessary for the implementation of OTM on to the market, let alone for the excessive period of 5 years (and longer in many cases) in which OTM aimed to build up "*healthy cash balances*", nor has such entry under the protection of the OOP Rule enhanced competition. In consequence, the OOP Rule is in substance a horizontal agreement or concerted practice between estate agents which infringes s.2 Competition Act 1998 ("**CA98**") by both object and effect and is void. In addition, (i) the OOP Rule forms an integral part of *wider* unlawful collusion between agents as to their choice of portal, which has been facilitated and encouraged by AM and (ii) other restrictions in the agreement between GHL and AM, namely, the Bricks and Mortar/Full Service Agent Restriction and the Restriction on Promoting Other Portals, have the object of restricting competition. None of the restrictions is severable, and thus the entire listing/membership agreement between GHL and AM is void.

2. GHL submits that, on the basis of the reasons and evidence further set out below, the Tribunal should make the specific findings set out below as to the anti-competitive object and effect of the arrangements at issue. Those objects and effects require to be understood in the specific context of the property portal market and the use of property portals by estate agents: property portals are two-sided platforms between househunters and vendors, on the one hand, and estate agents, on the other, which are characterised by strong indirect network effects. In consequence, (i) a portal such as OTM which does not have a strong presence with househunter/vendors will not be a serious competitive constraint in the market and (ii) the loss to a portal of property stock provided by estate agents, such as have been occasioned to Zoopla by the arrangements at issue, is liable seriously to undermine its effectiveness as a competitor.

OOP Rule as Object Infringement

3. *First*, the Tribunal should find that the OOP Rule infringes s.2 CA98 because, understood in its legal, economic and factual context, it is an agreement between undertakings, a decision by an association of undertakings and/or a concerted practice between undertakings which has the ***object*** of restricting competition in both (i) local markets around the UK for estate agency services and (ii) the UK-wide market for property portal services.

4. The OOP Rule represents not only a contractual term which is common to a large network of vertical agreements between AM and each of its thousands of Members (and some non-members) around the *whole* of the UK, but *also*, like in *BIDS* [2009] 4 CMLR 6, it represents a **horizontal** agreement decision [*sic*] by an association of undertakings and/or concerted practice between AM's Members *inter se* by which AM's Members have agreed (or collectively decided) to limit to two the total number of portals on which they will list and to agree that one of the two portals on which they will each list will be OTM.

5. Thus:

5.1 *Object of restricting competition in Estate Agency Markets*: by limiting themselves in respect of both the number and identity/choice of portals,

AM's Members have undertaken to each other and to AM both (i) to limit their total *output* on the market for estate agency services and (ii) to restrict themselves as regards a key parameter of competition between themselves in that market;

5.2 *Object of restricting competition in Property Portal Market*: by so limiting themselves in respect of both the number and identity/choice of portals, AM's Members have undertaken to each other and to AM (i) to limit their total *demand* on the market for property portals, (ii) to restrict the total number of portals to which they will supply an essential input for undertakings seeking to compete in the property portal market, namely property listings, and (iii) to restrict the identity of the portals to which they will supply that essential input, namely, only one other portal than OTM, in circumstances where, in practice, "*…for the majority of agents it is…*" – and always was – "*…inconceivable that they could come off Rightmove…*"…In other words, it was intended and foreseen that the agents would inevitably choose as their other portal the one that is the most powerful in their local area (nearly always Rightmove). That agreed upon restriction on choice both by its very nature and by deliberate design (a) will alter the structure of the market and tend substantially to weaken the second largest portal (nearly always Zoopla) (as well as all other, smaller, competing portals) nationally, and (b) to raise barriers to entry to and/or expansion by existing portals and/or any potential new entrant.

OOP Rule as Effects Infringement

6. Secondly, the Tribunal should find that the OOP Rule infringes s.2 CA98 because it is an agreement between undertakings, a decision by an association of undertakings, or a concerted practice between undertakings, which has the ***effect*** of restricting competition in the UK market for property portal services, for an excessive and unjustifiable period of time.

7. By denying to Zoopla listings amounting to 90% of AM's Members, which Members amount to over one third of the total number of agency branches, the entry of AM under the protection of the OOP Rule has, in fact, had the direct effect of structurally changing the market by weakening Zoopla as a competitive constraint on Rightmove (as was always foreseen and intended) and, therefore, diminishing the competitive constraint placed on Rightmove by Zoopla.

8. This effect is established by the whole suite of theoretical and empirical evidence adduced by Mr Parker including (i) as a matter of clear and orthodox economic principles applicable in this very type of market, entirely consistent with the economic analysis of the OFT and the BKA and (ii) by reference to multiple authoritative statements by a large number of knowledgeable analysts; (iii) by observation of the impact of the OOP Rule on Rightmove and Zoopla's relative share of visits and page views, the resulting decline in closeness of competition between Rightmove and Zoopla, and the commensurate strengthening of Rightmove's dominant position; and (iv) the more likely-than-not increase in the cost-per-lead by all categories of agents in consequence of AM's entry under the protection of the OOP Rule. This effect is observable both (i) by reference to the counterfactual where AM did not enter at all absent the OOP Rule; and (ii) by reference to the counterfactual where AM entered the market without the OOP Rule (a case not addressed at all by of AM [*sic*]).

Concerted Practice on Choice of Portal

9. *Thirdly*, the Tribunal should find that the OOP Rule infringes s.2 CA98 in that it forms an integral part of a wider, horizontal concerted practice between AM's members, facilitated, co-ordinated and encouraged by AM through its employees/representatives ***and*** its directors (including, but not limited to, Mr Clive Rook (of RMS), Mr Michael Hodgson (of Douglas & Gordon) and Mr Trevor Abrahmsohn (of Glentree)), by which those members (i) agreed between themselves that they would join OTM and (ii) agreed between themselves that they would delist from certain other portals, including (in some areas) Rightmove and (in most areas) Zoopla.

10. Further:

10.1 AM's strategy was to "*replace*" Zoopla to "*knock Z over*" and watch it "*wither*" out of the market specifically by denying it listings, and for that reason AM included the OOP Rule in its offering to agents: see for instance…"*…anything which encourages Simon [Embley, Chairman of LSL] to think we are going to get to the Tipping Point and knock Z over would be helpful…*";

10.2 because agents would not (acting unilaterally) voluntarily delist from one of the two leading portals (because of the "*competitive disadvantage*" to which that would give rise), it was necessary both for them and for AM to coordinate their competitive conduct to pursue the agreed strategy. It was necessary/desirable that agents would act *together* as groups or "*clusters*" both as regards joining OTM (and adopting the OOP Rule) and further as regards the choice of other portal;

10.3 it was further necessary/desirable *for AM* to pursue that strategy because it did not want to see the choice of portal in any given region "*diluted*" by a "*split vote*", because that outcome would likely mean that it would not become even the "*number 2 position*" portal in that local market. As Mr Springett explained, it is "*unquestionable*" that members dropping Zoopla was "*…the most efficient way to get there…If everybody moves from the number 2 portal, then you are going to accelerate a bit faster…*";

10.4 accordingly, Agents' Mutual was party to and provided:

10.4.1 a focal point for coordination on the choice of portal in the form of the OOP Rule;

10.4.2 processes or fora in which that coordination could emerge/develop/strengthen, in particular in the form of the Letter of Intent process, the holding of group meetings, the fostering of contacts among estate agent groups; and

10.4.3 where necessary, strategic direction in the form of communicating to actual and prospective members AM's messages regarding the alleged disadvantages of Zoopla and the aim and/or need to replace Zoopla;

11. Although it is not necessary for a finding that the OOP Rule formed an integral part of an unlawful concerted practice, whereby decision-making, instead of being unilateral was coordinated, it should be noted that AM

undertook these actions knowing and intending that agents would take group decisions.

Bricks and Mortar/Full Service Agent Restriction

12. *Fourthly*, the Tribunal should find that the Bricks and Mortar/Full Service Agent Restriction infringes s.2 CA98 by object in that by its very nature (as well as by intent) it was a horizontal restriction designed to deny non-traditional agents (who are viewed as both a current and potentially future source of competitive threat to AM's Members) the ability to access househunters/vendors through OTM, *in perpetuity and without any reference to OTM's entry and/or success in the market*. The Bricks and Mortar/Full Service Agent Restriction is not severable from the remainder of GHL's Membership/listing Agreement and the agreement (and others that contain the same restriction) are, therefore, void in their entirety.

13. Although this restriction of competition is limited to the use of OTM (which at present has few househunters/vendors that cannot be accessed through another property portal, i.e. unique users), that does not prevent it from being a restriction by object, in particular because it is clear that one of the principal purposes of establishing AM was precisely to engineer a situation where, well within the "*5 year strategy*" period, and then for ever more, non-Member agents would be at the very least hampered/restricted, or ideally even eliminated, as a source of competitive "*threat*" from the market. OTM was intended and set up to become at least the No. 2 portal around the UK (well within 5 years), and to reach a position in which there would be only "*…two credible participants…*"…per Mr Springett with "*no real need to list anywhere else…*" per Mr Springett at the 4 Party Meeting. Further, it should be noted that object restrictions are not subject to any strict *de minimis* exception based on market shares, provided that, having regard to the actual circumstances, the restriction is appreciable and there is, of course, no need to go to the extra trouble and expense of *proving* any anti-competitive effects when there is an object restriction which, by its very nature, is anti-competitive.

Restriction on Promoting Other Portals

14. *Fifthly*, the Restriction on Promoting Other Portals infringes s.2 CA98 by object in that by its very nature (as well as by intent) it is not limited just to positive promotional obligations on the part of AM members, but additionally has embedded within it the negative obligation of *denying* other undertakings on the portal market (including, remarkably, even the one other portal that is chosen by AM members) access to the promotional efforts of estate agents. As noted by Mr Springett "*…[the other portals]…will obviously lose some of the benefit of this free promotion from agents joining us…*" (emphasis added). No legitimate justification, let alone any *proportionate* justification, has ever been advanced for this naked restriction on competition that (i) sets out, in part, to damage other portals and (ii) that also lasts *in perpetuity and without any reference to OTM's entry on to the market*. This restriction is also non-severable and the GHL Membership/listing agreement is, therefore, void and unenforceable."

129. It is fair to say that the foregoing represented the latest way in which Gascoigne Halman's case was put. Although Gascoigne Halman's case, as pleaded, contained allegations of anti-competitive agreements that were both horizontal and vertical, the emphasis was initially on the vertical restrictions, whereas by the end of the case the horizontal restrictions had taken pole position. In its written closing submissions, Agents' Mutual observed that there was a "protean quality" to Gascoigne Halman's case. This is an observation with which we agree. That is not necessarily a criticism of Gascoigne Halman: this case is one that has come on quickly, with voluminous disclosure (the chronological bundles amounted to some 16 lever-arch files, with double-sided pages). In these circumstances, it is perhaps not surprising that there have been shifts in the emphasis and manner in which Gascoigne Halman's allegations have been put, albeit that this must have made Agents' Mutual's task in responding to those allegations more difficult. We raise the point simply to explain why, in summarising Gascoigne Halman's case, we do so by reference to the manner in which Gascoigne Halman's case was put in its closing submissions, rather than in its pleadings, although of course we have taken full account of both.[39]

G. INFRINGEMENT OF THE CHAPTER I PROHIBITION: OUR APPROACH

(1) Matters in issue

130. There was relatively little difference between the parties as regards the relevant markets and as to what constitute "agreements", "decisions by associations of undertaking" and/or "concerted practices" for the purposes of the Chapter I prohibition. Accordingly, we deal with these matters fairly briefly in Section G(2) below (which deals with the relevant markets) and Section G(3) below (which deals with agreements, decisions and concerted practices).

[39] It is also the case that some points raised in the Amended Defence were abandoned shortly before the commencement of the trial. In a letter dated 25 January 2017, Gascoigne Halman's solicitors identified two contentions it was no longer pursuing, namely that the One Other Portal Rule had anti-competitive effects in the market for the provision of estate agency services and that the Bricks and Mortar rule had any anti-competitive effects at all.

131. The real area of contention between Gascoigne Halman and Agents' Mutual lay in the question whether there had been an infringement (whether by object or effect) of the Chapter I prohibition. To summarise the position:

(1) Gascoigne Halman contended that, as between Agents' Mutual and its Members and/or the Members *inter se*, the One Other Portal Rule, the Bricks and Mortar Rule and the Exclusive Promotion Rule constituted "by object" infringements of the Chapter I prohibition (whether in isolation or collectively).

(2) Additionally, and going beyond individual provisions contained in the Arrangements between Agents' Mutual and its Members, Gascoigne Halman made what we have defined in paragraph 3 above as the Collective Boycott Allegation. In essence (and, it must be said, there was certainly a protean quality to this allegation), it was contended that the collective boycott comprised an agreement, decision and/or concerted practice not contained (or, at least, not expressly contained) in the Arrangements whereby Members of Agents' Mutual (with or without the knowledge of Agents' Mutual) collectively boycotted Zoopla in favour of Rightmove. Such a boycott would, if established on the facts, amount to a "by object" infringement of the Chapter I prohibition. We consider whether the Collective Boycott Allegation is made out on the facts in Section K below.

(3) It was only in relation to the One Other Portal Rule that Gascoigne Halman contended that the provision constituted a "by effect" infringement as well as a "by object" infringement. The anti-competitive effects alleged were confined to the online property portals market. [40]

132. In considering these alleged infringements of the Chapter I prohibition, our approach is as follows:

[40] See footnote 39.

(1) Section G(4) sets out the approach we take when considering "by object" infringements.

(2) Section G(5) sets out the approach we take when considering "by effect" infringements.

(3) Section G(6) considers the law relating to objective necessity. It was Agents' Mutual's case that if, contrary to its contentions, the One Other Portal Rule constituted either a "by object" or a "by effect" infringement of competition law, it was objectively necessary to the Arrangements.

(4) Section G(7) considers the implications of analysing and determining a multi-faceted and wide-ranging attack on a new market entrant in the context of a private action not preceded by very much regulatory analysis.

(5) Section G(8) considers the allegations made by Gascoigne Halman in their overall context. It is important, we consider, not to lose sight of this. The entry of the OnTheMarket Portal into the markets we have described was the entry of a new competitor to the incumbent portals. *Prima facie*, it might be said that that entry was pro-competitive. The significance of this question is considered in Section G(8).

(6) Section G(9) then summarises the approach that we go on to adopt in relation to each of the three allegedly anti-competitive provisions.

133. We also have regard to the consistency principle set out in section 60 CA, whereby questions concerning the Chapter I prohibition in relation to competition within the UK are to be dealt with in a manner consistent with the treatment of corresponding questions under EU law. In particular, the Tribunal must determine questions concerning the Chapter I prohibition consistently with the approach of the Court of Justice of the European Union ("CJEU") to Article 101 of the Treaty on the Functioning of the European Union ("TFEU"), and must have regard to any relevant decision or statement of the EU Commission.

(2) The relevant markets

134. It is first of all necessary to define the relevant markets in this case. This will inform our overall consideration of the matters in dispute and our specific approach to the restrictions of competition that are alleged to have arisen.

135. The parties presented as common ground that there were two distinct markets that were relevant markets for the purposes of this case. These were described in paragraph 30 of the Amended Defence as "(i) the market for the provision of services by estate agents and/or (ii) the online property portal market". The Amended Reply – in paragraph 27 - states:

> "Without prejudice to the expert evidence which may be required in relation to market definition, it is admitted that the market or markets of primary relevance to these proceedings are those on which the Claimant, Rightmove and ZPG compete to supply advertising services to estate agents in relation to property located in the UK, or a part of it, through the medium of an online property portal ('the **UK Portal Market**'). The geographic scope of such market or markets is no wider than the UK, and may also be confined to particular parts of the UK. It is admitted that there is also a market for the provision of services by estate agents."

(i) Property portals

136. In this formulation, the parties distinguish a property portals market in which portal providers sell to estate agents, and an estate agent services market in which estate agents sell their services to the public. It is the former, the property portals market, that is of primary relevance to this case, as it is in that market that the main anti-competitive effects are alleged by Gascoigne Halman to have occurred.

137. The two-sided nature of this market must be emphasised. This market not only consists in selling services to estate agents, but also in providing a property viewing service to the property seeking public.

138. Mr Bishop, in paragraph 53 of Bishop 1, described portals as involving a "two-sided platform with two principal customer groups – estate agents (acting on behalf of property vendors or lessors) and property seekers". This focus on the two customer groups is helpful. When referring to the "property portals market", as both parties do in this case, and which we accept as a relevant market definition, it is therefore necessary to keep in mind not only

that market players must consider both customer groups but that the way they do so may be very different. For example, the property portals charge estate agents to list their properties, but offer viewing services to the property seeking public generally free of charge.

139. We consider the relevant two customer groups to be: (i) estate agents (and not the vendors of property) on the one hand; and (ii) the property buying public on the other. Members of the property-buying public access portals directly, and separately from any approach to an estate agent, to inform themselves about properties on the market. Vendors may also access portals, but will normally approach estate agents to sell their properties for them, and it is the estate agents (and not the vendors) who transact with the property portals.

140. There is an interactive relationship between the two customer groups. The more customers there are on one side, the more attractive the platform is to the other side. Thus, the more properties a portal lists, the more attractive it will be to the property-buying public, and the more members of the property-buying public it attracts the more attractive it will be to estate agents. This feature, generally referred to as "network effects", means that a potential new market entrant must consider how best to create demand on one side of the market in order to create demand on the other, so that it may benefit from these network effects.[41]

141. A good example – used in *Sainsbury's Supermarkets Ltd v. MasterCard Incorporated and Others* [2016] CAT 11 ("*Sainsbury's*") – is the Metro newspaper:[42]

> "…A good example of a two-sided platform is the Metro newspaper, which is free of charge to readers (so as to maximise readership), thus making it attractive to the other group of users – advertisers – who will be prepared to pay more for advertising space the greater the size of the readership. There is a dynamic between the two groups of users (readers and advertisers), which causes one group (the advertisers) to pay more if the other group (the readers) is larger. That dynamic exists, even though there is no formal (legal) relationship between the readers and the advertisers."

[41] See, e.g., Bishop 1 at paragraph 59.

142. In terms of geographic scope, it is accepted by both parties, and we do not disagree, that the property portals market is national, i.e. no wider than the UK as a whole. Market conditions in Northern Ireland are materially different from those in other parts of the UK and the property portals market there would have to be considered separately, were it material to the present case (which it is not).

(ii) Estate agency services

143. The other relevant market is that for estate agency services, where estate agents compete with each other to offer services to potential vendors and lessors of property; again they do this in part by offering services free of charge to property seekers; and an increasingly important aspect of what they offer to potential vendors and lessors is the listing of their properties on property portals.

144. In terms of geography, the scope of estate agency market(s) is local or regional, so that there are in that sense numerous estate agency markets in the UK. Some estate agents offer a national service but, even here, the focus of their interface with customers tends to be local. We refer to these markets as "the market(s) for estate agency services" or "the estate agency market(s)".

145. The two relevant product/services markets are linked in that estate agents form a distinct customer group in the property portals market, and make use of the services provided by property portals in their own dealings with vendors and members of the property seeking public.

(3) Agreements, decisions and concerted practices

146. In Case C-49/92P, *Anic Partecipazioni* EU:C:1999:356, the CJEU said that "agreements", "decisions by associations of undertakings" and "concerted practices" were overlapping concepts. They are "intended to catch forms of collusion having the same nature and are only distinguishable from each other by their intensity and the forms in which they manifest themselves" (at [131]). At [108], the CJEU noted:

"The list in Article [101(1) TFEU] is intended to apply to all collusion between undertakings, whatever form it takes. There is continuity between the cases listed. The only essential thing is the distinction between independent conduct, which is allowed, and collusion, which is not, regardless of any distinction between types of collusion."

147. We do not consider that, in this case, there is any purpose in seeking to classify the Arrangements between Agents' Mutual, its Members and other estate agents as "agreements", "decisions" or "concerted practices". Agents' Mutual did not seek to contend that the Arrangements here being considered fell outside the Chapter I prohibition by reason of the fact that there were not "agreements", "decisions" or "concerted practices", and we consider that this approach was entirely right. Accordingly, we shall take the Arrangements to be any form of collusion between undertakings, whether by way of agreement, decision or concerted practice. That, of course, says nothing about whether those Arrangements infringed competition law.

(4) Restriction of competition by object: the law and our approach

148. The law regarding "by object" infringements is set out in *Sainsbury's* in the following way:

"[100] We begin with a consideration of the law:

(1) Ever since the decision in Case 56/65, *Société Technique Minière v Maschinenbau Ulm* [1966] ECR 235 at 249, it has been clear that the words "object or effect" in Article 101(1) TFEU are to be read disjunctively. Where an agreement has as its object the restriction of competition, it is unnecessary to prove that it will produce anticompetitive effects: only if it is not clear that the object of an agreement is to restrict competition is it necessary to consider whether it might have the effect of doing so.

(2) As Whish and Bailey note, what constitutes a restriction of competition by object remains a controversial topic, "a concept that, after more than 50 years of EU competition law, continues to be hotly debated". For a period, it appeared that the legal threshold for an object restriction was becoming lower – in that it was becoming easier to establish restriction of competition by object. That trend appears to have been halted, and perhaps reversed, by the Court of Justice's decision in *Cartes Bancaires* (emphasis added):

"[48] It must be recalled that, to come within the prohibition laid down in [Article 101(1) TFEU], an agreement, a decision by an association of undertakings or a concerted practice must have "as [its] object or effect" the prevention, restriction or distortion of competition in the internal market.

[49] In that regard, it is apparent from the Court's case law that certain types of coordination between undertakings reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects…

[50] That case law arises from the fact that certain types of coordination between undertakings can be regarded, by their very nature, as being harmful to the proper functioning of normal competition…

[51] Consequently, it is established that certain collusive behaviour, such as that leading to horizontal price-fixing by cartels, may be considered so likely to have negative effects, in particular on the price, quantity or quality of the goods and services, that it may be considered redundant, for the purposes of applying [Article 101(1) TFEU], to prove that they have actual effects on the market…Experience shows that such behaviour leads to falls in production and price increases, resulting in poor allocation of resources to the detriment, in particular, of consumers.

[52] Where the analysis of a type of coordination between undertakings does not reveal a sufficient degree of harm to competition, the effects of the coordination should, on the other hand, be considered and, for it to be caught by the prohibition, it is necessary to find that factors are present which show that competition has in fact been prevented, restricted or distorted to an appreciable extent…

[53] According to the case law of the Court, in order to determine whether an agreement between undertakings or a decision by an association of undertakings reveals a sufficient degree of harm to competition that it may be considered a restriction of competition "by object" within the meaning of [Article 101(1) TFEU], regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms a part. When determining that context, it is also necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question…

[54] In addition, although the parties' intention is not a necessary factor in determining whether an agreement between undertakings is restrictive, there is nothing prohibiting the competition authorities, the national courts or the Courts of the European Union from taking that factor into account…

[55] In the present case, it must be noted that, when the General Court defined in the judgment under appeal the relevant legal criteria to be taken into account in order to ascertain whether there was, in the present case, a restriction of competition by "object" within the meaning of [Article 101(1) TFEU], it reasoned as follows, in paragraphs 124 and 125 of that judgment:

> "[124] According to the case law, the types of agreement covered by [Article 101(1)(a) to (e) TFEU] do not constitute an exhaustive list of prohibited collusion and, accordingly, the concept of infringement by object should not be given a strict interpretation…

> [125] In order to assess the anti-competitive nature of an agreement or a decision by an association of undertakings, regard must be had *inter alia* to the content of its provisions, its objectives and the economic and legal context of which it forms a part. In that regard, it is sufficient that the agreement or the decision of an association of undertakings has the potential to have a negative impact on competition. In other words, the agreement or decision must simply be capable in the particular case, having regard to the specific legal and economic context, of preventing, restricting or distorting competition within the common market. It is not necessary for there to be actual prevention, restriction or distortion of competition or a direct link between [that agreement or decision] and consumer prices. In addition, although the parties' intention is not a necessary factor in determining whether an agreement is restrictive, there is nothing prohibiting the Commission or the Community judicature from taking it into account…"

[56] It must be held that, in so reasoning, the General Court in part failed to have regard to the case-law of the Court of Justice and, therefore, erred in law with regard to the definition of the relevant legal criteria in order to assess whether there was a restriction of competition by "object" within the meaning of [Article 101(1) TFEU].

[57] First, in paragraph 125 of the judgment under appeal, when the General Court defined the concept of the restriction of competition "by object" within the meaning of that provision, it did not refer to the settled case law of the Court of Justice mentioned in paragraphs 49 to 52 of the present judgment, thereby failing to have regard to the fact that the essential legal criterion for ascertaining whether coordination between undertakings involves such a restriction of competition "by object" is the finding that such coordination reveals in itself a sufficient degree of harm to competition.

[58] Secondly, in the light of that case law, the General Court erred in finding, in paragraph 124 of the judgment under appeal, and then in paragraph 146 of that judgment, that the concept of restriction of competition by "object" must not be interpreted "restrictively". The concept of restriction of competition "by object" can be applied only to certain types of coordination between undertakings which reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects, otherwise the Commission would be exempted from the obligation to prove the actual effects on the market of agreements which are in no way established to be, by their very nature, harmful to the proper functioning of normal competition. The fact that the types of agreements covered by [Article 101(1) TFEU] do not constitute an exhaustive list of prohibited collusion is, in that regard, irrelevant."

[101] It is clear that the essential criterion for discerning a restriction on competition "by object" is that the agreement by its very nature reveals a sufficient degree of harm to competition, so as to obviate any need for an effects-based examination. Although the basic test – "a sufficient degree of

harm to competition" – is not further defined, the following points can be made:

(1) Certain types of agreement can be said to be – by their very nature – likely to be anti-competitive. Their anti-competitive effect can be presumed. In this, it may be said that object restrictions bear a passing similarity to *per se* illegal agreements under the US Sherman Act 1890. In the case of a *per se* infringement, it is not open to the parties to the agreement to argue that it does not restrict competition: it belongs to a category of agreement that is by law regarded as restrictive of competition.

(2) Given that a finding of object restriction obviates the need for a consideration of the anti-competitive effects of an agreement, there is a symbiosis between restriction by object and restriction by effect. Restriction by object should not be used as a means of avoiding a difficult investigation of anti-competitive effects. In short, the harm to competition that might be expected in the case of an object restriction needs to be clear-cut and pronounced without an examination of the effects.

(3) Whilst the whole point of an object restriction is to avoid the need for an effects investigation, it is clear (not least from paragraph 53 of *Cartes Bancaires*) that the anti-competitive restriction needs to be seen and considered in context, and that the intentions of the parties can be a relevant factor."

149. We draw from this statement of the law the following propositions:[43]

(1) For an agreement to be held to restrict competition "by object" it must by its very nature reveal a sufficient degree of harm to competition, having regard to its specific legal and economic context. It is not enough for it to be merely capable of resulting in the prevention, restriction or distortion of competition.

(2) In determining whether an agreement reveals a sufficient degree of harm, we must look at the content of its provisions, its objectives and its economic and legal context. In determining that context, we must consider the nature of the services that are the subject of the agreement and the structure and functioning of the market or markets in question. The parties' intentions may be relevant, but we are not obliged to take these as determinative.

[43] See also the succinct statement of the relevant law by the EFTA Court under the corresponding provisions of the EEA Agreement in Case E-3/16 *Ski Taxi SA and ors v. The Norwegian Government* (Decision of 22 December 2016) at [64] to [66].

(3) This evaluation of harm is not the same as considering the economic effects of the agreement, which is a quite distinct exercise, only necessary if restriction "by object" is not established. Nevertheless the agreement must be capable of having some impact on the market or markets in question. Assessing this possible impact is a strictly limited exercise not involving a full examination of market effects, or any balancing of pro- or anti-competitive effects.

(4) The concept of restriction "by object" should be interpreted restrictively in the sense that it should only be applied to those categories of agreement whose harmful nature is easily identifiable in the light of experience and well-established economic analysis.

150. Accordingly, our approach will be to examine the agreement or provision in question to see whether by its very nature, having regard to the economic and legal context, it clearly and unambiguously reveals a sufficient degree of harm to competition to make any examination of its effects unnecessary.

(5) Restriction of competition "by effect": the law and our analytical approach

151. Whether a given provision constitutes a restriction of competition "by effect" requires extensive analysis of the agreement in its market context. This involves:

(1) Identifying the relevant agreement or provision said to constitute a restriction on competition. In this case, the only provision alleged by Gascoigne Halman to have an anti-competitive effect was the one other portal rule, and it is this rule (and this rule only) that we will consider.

(2) Having identified the relevant provision, identifying the market or markets in which the effect of that provision is to be gauged. In this case, the relevant markets are as we have defined them in paragraphs 134 to 145 above. As we have noted, these markets are linked. Market definition is important in this case for the following reasons:

(i) In its Notice on the Definition of the Relevant Market for the Purposes of Competition Law[44] the European Commission explained the purpose of market definition as follows:

> "Market definition is a tool to identify and define the boundaries of competition between firms. It serves to establish the framework within which competition policy is applied by the Commission. The main purpose of market definition is to identify in a systematic way the competitive constraints that the undertakings involve face. The objective of defining a market in both its product and geographic dimension is to identify those actual competitors of the undertakings involved that are capable of constraining those undertakings' behaviour and of preventing them from behaving independently of effective competitive pressure."

(ii) Often, it is only necessary to define a single market and to consider the (anti-) competitive effects of an alleged restriction in that market.

(iii) However, the present case involves two or more relevant markets (property portals and estate agents), at least one of which (the property portals market) is "two-sided". The effects of the alleged anti-competitive practice may differ on the different sides of this market. Moreover, there is an important link between the two relevant markets in that estate agents, who are the main players in the estate agency markets, form a distinct customer group in the property portals market. When evaluating anti-competitive effects, it may therefore be necessary, in view of their linkage, to consider both relevant markets.

(iv) In this case, as we have noted, Gascoigne Halman only makes allegations of anti-competitive effect in one of the two relevant markets, namely the property portals market. The allegation of anti-competitive effect in the estate agency market was withdrawn by Gascoigne Halman (see footnote 39 above).

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[44] OJ [1997] C372/5, at paragraph 2.

(3) To help the assessment, a theory of harm may be presented, and then tested against the evidence. In a public enforcement case, that is done by the competition authority; in a private action, it is the party alleging illegality which must make out its case and put forward the necessary evidence in support. Gascoigne Halman's theory of harm is described in paragraphs 197*ff*. below.

(4) The allegedly harmful effect must then be assessed and the effects that are alleged to occur tested against the evidence. In this case, we have the theory and evidence (i.e. the "empirical analysis") advanced by the expert economist Mr Parker, reports from industry analysts, evidence from other estate agents and what can be gleaned from some merger decisions by competition authorities. The assessment must also take account of evidence advanced in contradiction, including that by the expert economist Mr Bishop. We need also to consider the alleged effect in its actual market context, particularly the fact that the restriction is claimed by Agents' Mutual to be integral to successful entry of its new property portal on to a market characterised by a duopoly.

(5) In assessing the alleged restrictive effect of the various agreements and provisions, it is helpful to consider what the position would have been in their absence and then to compare the two situations. This counterfactual analysis also needs to recognise the actual context in which the allegedly anti-competitive provision operates, so that it is possible to make a realistic assessment of "the competition in question within the actual context in which it would occur in the absence" of the One Other Portal Rule.[45]

(6) Objective necessity: the law and our approach

152. In C-382/12P *MasterCard v. Commission* EU:C:2014:2201 ("*MasterCard*"), the CJEU stated:

[45] See *MasterCard* at [161] to [167].

"[89] It is apparent from the case-law of the Court of Justice that if a given operation or activity is not covered by the prohibition rule laid down in Article [101(1) TFEU], owing to its neutrality or positive effect in terms of competition, a restriction of the commercial autonomy of one or more of the participants in that operation or activity is not covered by that prohibition rule either if that restriction is objectively necessary to the implementation of that operation or that activity and proportionate to the objectives of one or the other…

[90] Where it is not possible to dissociate such a restriction from the main operation or activity without jeopardising its existence and aims, it is necessary to examine the compatibility of that restriction with [Article 101 TFEU] in conjunction with the compatibility of the main operation or activity to which it is ancillary, even though, taken in isolation, such a restriction may appear on the face of it to be covered by the prohibition rule in Article [101(1) TFEU].

[91] Where it is a matter of determining whether an anti-competitive restriction can escape the prohibition laid down in [Article 101(1) TFEU] because it is ancillary to a main operation that is not anti-competitive in nature, it is necessary to inquire whether that operation would be impossible to carry out in the absence of the restriction in question. Contrary to what the appellants claim, the fact that that operation is simply more difficult to implement or even less profitable without the restriction concerned cannot be deemed to give that restriction the 'objective necessity' required in order for it to be classified as ancillary. Such an interpretation would effectively extend that concept to restrictions which are not strictly indispensible to the implementation of the main operation. Such an outcome would undermine the effectiveness of the prohibition laid down in [Article 101(1) TFEU]."

153. This exception to the Chapter I prohibition is best considered in stages:

(1) First, there must be a given "operation" or "activity" that is not caught by the prohibition because of its neutrality or positive effect in terms of competition. In this case, that "operation" or "activity" is the OnTheMarket portal.

(2) Secondly, there must be inherent to this operation or activity, but ancillary to it, a restriction of commercial activity that would – but for its relation to that operation or activity – be caught by the Chapter I prohibition. In this case, these comprise the various restrictions identified by Gascoigne Halman.

(3) Thirdly, the relationship between the "operation" or "activity" not prohibited and the restriction that would otherwise be prohibited must be such that, without the restriction, the primary operation or activity could not be carried out. In a sense, this requirement is captured by the

words “inherent” and “ancillary” in the previous sub-paragraph, but the test is a stringent one. The mere fact that the removal of the restriction would render the primary operation or activity less profitable or more difficult or would have adverse consequences for its functioning is not enough. In the words of the CJEU, “it is necessary to inquire whether that operation would be impossible to carry out in the absence of the restriction in question”.

(4) Fourthly, the restriction must not only be necessary for the implementation of the main operation or activity: it must also be proportionate to the underlying objectives of that operation or activity.

154. The question arises as to how the objective necessity of the ancillary restriction is to be demonstrated. How is a court to satisfy itself that the primary operation or activity is indeed impossible to carry on instead of merely more difficult or less profitable? The question really is whether the ancillary restriction can be detached from the primary operation or activity without rendering that operation or activity impossible to carry on, and as with the consideration of restrictive effects, the response is helped by some consideration of the counterfactual situation.

155. In the present case, we have had various counterfactual situations presented to us, including market entry by OnTheMarket without the One Other Portal Rule being applied, and no market entry by OnTheMarket at all: we must decide which is the more realistic in the market context.

(7) Factual determinations in a private action commenced without anterior regulatory analysis

156. The Competition Issues arise out of Gascoigne Halman’s defence of these proceedings. This is not a case following on from a decision by a regulatory body such as the EU Commission or the CMA, where the facts are traversed well-before the matter reaches this Tribunal. We are conscious that the breadth and open-ended nature of the allegations advanced by Gascoigne Halman places the Tribunal in an extremely difficult position regarding the facts.

157. Gascoigne Halman makes allegations regarding the market relations between a large number of estate agents, who are not party to these proceedings, and whose documents have not therefore been disclosed. Equally, Gascoigne Halman, as part of its "effects" case, makes a number of allegations as to how Zoopla has been adversely affected by the entry of Agents' Mutual in circumstances where Zoopla has provided limited (voluntary[46]) disclosure of documents, and Rightmove has provided none.

158. We therefore approach the allegations made by Gascoigne Halman very conscious that the information before us – both in terms of witness evidence and disclosure – was limited. Specifically, the position was as follows:

(1) Agents' Mutual and Gascoigne Halman gave full and very detailed disclosure, as would be expected of parties to the proceedings. That disclosure appears to us to have been extremely full and carefully produced.

(2) Zoopla, as we have noted, provided limited information. As a non-party, Zoopla was under no obligation to assist at all, and we are very grateful to Mr Notley for his attendance as a witness, and to Zoopla for the limited additional material it did provide. But it has to be noted that this material was limited: for example, it did not include data relating to the listing fees Zoopla charged to estate agents.

(3) There was no disclosure from Rightmove or any other portal operator (apart from Agents' Mutual and Zoopla, as we have described). Rightmove was not a party, and has no interest in these proceedings.

(4) There was no disclosure from involved estate agents in general, as they are not parties to the proceedings. Naturally, the disclosure of Agents' Mutual gave an insight into inter-estate agent communications to the extent that Agents' Mutual was a party to or copied into or otherwise

[46] Zoopla has plainly assisted Gascoigne Halman in its defence of these proceedings, both in the provision of documents and in making witnesses available. But Zoopla has been under no obligation to do so, and the material it has provided has been provided voluntarily and (inferentially) because it benefits it and Gascoigne Halman.

received such communications. Equally, Mr Livesey was able to provide further (but limited) communications regarding estate agents.[47]

159. Yet we are very conscious that the very breadth of the allegations made by Gascoigne Halman means that these allegations – if made good – will have an effect going well beyond the Arrangements existing between Gascoigne Halman and Agents' Mutual. To take but two examples, the effect is likely to be felt:

(1) By other estate agents who are Members of Agents' Mutual.

(2) By Zoopla, the portal that has most suffered (or so Gascoigne Halman alleges) by the entry of OnTheMarket into the market and which – by a parity of reasoning – is most likely to gain if Gascoigne Halman's defence succeeds.[48]

160. In these circumstances, we have felt the absence of a review by a competition authority most keenly and the absence of material in terms of documents and market information even more so. For example, we received no robust data indicating what percentage of the property-buying public used a single portal and what percentage used more than one. Nevertheless, it is of course incumbent upon us to decide the Competition Issues on the evidence before us, and we have done so. We would only stress that, given the limits to that evidence and the likely third party effects of this Judgment, we have paid particular regard to the burden of proof. It is for Gascoigne Halman – as the party alleging illegality – to make good its case. It bears the burden, and unless that burden is properly discharged on the balance of probabilities, its claim will fail.

[47] In the manner described by him in paragraph 15 of Livesey 2 and in Livesey 3.
[48] It is no doubt for this reason that Zoopla has assisted Gascoigne Halman, not merely in the provision of documents, but also financially, to the tune of £250,000 (see Day 2/pp. 68-69).

(8) An overall pro-competitive purpose to the Portal?

(i) The importance of context

161. In focusing on the specific restrictions of competition alleged by Gascoigne Halman to arise in this case, it is important not to lose sight of the fact that Gascoigne Halman did not seek to deny that the entry of a new portal like OnTheMarket – even if promulgated by a mutual association of estate agents – could be pro-competitive provided the three provisions to which it objected and the associated allegation of a collective boycott were absent.

162. This might, perhaps, be a point so trite as to require no mention. It is, however, of importance in two respects:

(1) In relation to the characterisation of the communications that took place between estate agents *inter se* and estate agents and Agents' Mutual.

(2) In relation to the characterisation of the OnTheMarket Portal itself as pro-competitive and the significance of that characterisation.

163. We consider these two points in turn below.

(ii) Communications between estate agents inter se and between estate agents and Agents' Mutual

164. Mr Harris cross-examined Mr Springett on a great number of communications between estate agents *inter se* and between Agents' Mutual and one or more estate agents. It is important to stress that the mere fact that communications took place between estate agents *inter se* and between estate agents and Agents' Mutual says nothing about an infringement of competition law. As to this:

(1) With the possible exception of the Corporates, estate agents associate on a regional basis: see, for example, the REAP and CLEA organisations referenced in paragraph 66 above. What is more, there is inter-communication between the estate agents within those regions

and those in other regions. That much is plain from the communications generated by the appearance of Agents' Mutual, which we have described in Section E above.

(2) We do not accept (and do not understand any party to contend) that such inter-communications arose for the first time with the advent of Agents' Mutual. We consider that they took place prior to the advent of Agents' Mutual and continued, after the advent of Agents' Mutual, on the subject of the OnTheMarket Portal and (no doubt) on other matters of which we are unaware.

(3) It was out of communications such as these that the notion of Agents' Mutual was born. That idea then progressed: see Sections E(1) to E(3) above. Agents' Mutual is a co-operative of estate agents, done through the medium of a company limited by guarantee. But the company was established after the discussions and as a result of them. In short, the essence of, and certainly the genesis for, Agents' Mutual was co-operation between estate agents (i.e. the horizontal agreement) in forming a new portal in light of perceived problems with the offerings of both Rightmove and Zoopla.

165. Thus, whilst we will consider the communications that took place between estate agents *inter se* and between estate agents and Agents' Mutual for the purpose of determining whether Gascoigne Halman has made good its case, we read nothing into the bare fact that such communications took place. To the extent it was contended that the mere existence of such communications demonstrated anti-competitive conduct, we reject that contention.

(iii) Whether the purpose of OnTheMarket is pro-competitive

166. Leaving on one side the provisions and practices that Gascoigne Halman contends are anti-competitive, and particularly the One Other Portal Rule, we consider that the entry of a new property portal is in principle likely to have been pro- rather than anti-competitive, in two respects:

(1) First, in terms of providing an additional digital platform to benefit both the estate agents and the property-buying public by increasing choice in the portal market.

(2) Secondly, in terms of providing a lower-cost resource to participating estate agents and thus providing the potential to benefit consumers in the estate agency market.

167. We examine these two, likely, pro-competitive, effects, and their relevance to the Competition Issues, in turn below.

Additional competition on the property portals market

168. It would appear inherently plausible that, all else equal, the entry of a new portal would be pro-competitive in that estate agents would have an additional or alternative portal on which to advertise their properties; and the property-buying public would have an additional or alternative portal through which to view such properties.

169. Whilst we have not been given detailed evidence on the likely competitive effect of new entry on the property portals market, both economic experts expressed views on this point. Mr Bishop said that such new entry could be presumed to be beneficial to competition, or at least not harmful. Mr Parker, although expressing strong views on the harmful effect of the entry of OnTheMarket when accompanied by the One Other Portal Rule, accepted that new entry without this would be benign, describing it as "unambiguously pro-competitive".[49] He did, however, also point out that he could not be definitive on the point in the absence of any data. Nonetheless, we find this element of agreement between the experts reassuring. We accept that in general new entry to a market will have beneficial, rather than detrimental, effects on competition in that market and, whilst we do not need to come to a definite conclusion on this point, we also consider it likely that in this case new entry to the property portals market would have been pro-competitive in effect.

[49] See, eg, Bishop 1, at paragraphs 17 and 91 to 93; and Parker 1, at paragraphs 7.5.7 and 7.74.

Lower-cost resource in estate agency markets

170. Another question that arises in this context is whether collaboration between estate agents – such as occurred here – is itself to be viewed as pro- or anti-competitive. In order to answer this question, it is necessary – when considering the sort of horizontal agreement that existed between the Members of Agents' Mutual – to consider the essential object or purpose of the association as a whole.

171. Whilst we fully recognise that decisions in such cases are highly fact-specific, we were referred to the decision of the CJEU in Case C-250/92, *Gottrup-Klim Grovvareforeninger v. Dansk Landbrugs Grovvareselskab Amba* EU:C:1994:413 ("*Gottrup-Klim*"). This case concerned a co-operative association set up to purchase agricultural products in bulk, with the aim of achieving lower prices. The rules of the association provided that members of the association who became members of competing organisations could be expelled. The CJEU considered the lawfulness of such a provision under the EU equivalent of the Chapter I prohibition.

172. The CJEU appears to have proceeded on the assumption (without determining the question) that such a provision could be an infringement, but that if it was, it was likely to be justifiable on the grounds of objective necessity. The reasoning of the CJEU is not completely clear in this regard, but its conclusion is clear enough.

173. The CJEU stated:

> "[28] …the national court seeks to ascertain whether a provision in the statutes of a co-operative purchasing association, the effect of which is to forbid its members to participate in other forms of organized co-operation which are in direct competition with it, is caught by the prohibition in [Article 101(1) TFEU].
>
> …
>
> [30] A co-operative purchasing association is a voluntary association of persons established in order to pursue common commercial objectives.
>
> [31] The compatibility of the statutes of such an association with the Community rules on competition cannot be assessed in the abstract. It will depend on the

particular clauses in the statutes and the economic conditions prevailing on the markets concerned.

[32] In a market where product prices vary according to the volume of orders, the activities of co-operative purchasing associations may, depending on the size of their membership, constitute a significant counterweight to the contractual power of large producers and make way for more effective competition.

[33] Where some members of two competing co-operative purchasing associations belong to both at the same time, the result is to make each association less capable of pursuing its objectives for the benefit of the rest of its members, especially where the members concerned, as in the case in point, are themselves co-operative associations with a large number of individual members.

[34] It follows that such dual membership would jeopardise both the proper functioning of the co-operative and its contractual power in relation to producers. Prohibition of dual membership does not, therefore, necessarily constitute a restriction of competition within the meaning of Article [101(1) TFEU] and may even have beneficial effects on competition.

[35] Nevertheless, a provision in the statutes of a co-operative purchasing association, restricting the opportunity for members to join other types of competing co-operatives and thus discouraging them from obtaining supplies elsewhere, may have adverse effects on competition. So, in order to escape the prohibition laid down in [Article 101(1) TFEU], the restrictions imposed on members by the statutes of co-operative purchasing associations must be limited to what is necessary to ensure that the co-operative functions properly and maintains its contractual power in relation to producers."

Advocate General Tesauro's opinion is somewhat fuller in its reasoning, but to similar effect.

174. The present case is, of course, not identical to the situation examined in *Gottrup-Klim*. We consider the position to be as follows:

(1) Estate agents are in competition with each other in the various estate agents' markets. They compete for instructions from potential property vendors, ie the property selling public.

(2) In providing their services in this market, estate agents inevitably incur costs. One of those costs arises in respect of the advertising of the properties that they have been instructed to sell, and online portals are a part (indeed, a significant and increasing part) of these advertising costs.

(3) Although they are in competition, and in competing must act independently, that does not mean to say that estate agents do not have common commercial objectives, the achievement of which through co-operation is not a breach of the Chapter I prohibition.

(4) One instance of such permissible co-operation is where estate agents are faced with a common cost – that is a cost which, in competing with each other, they each must or generally will incur – and which, through co-operation, they seek to reduce. We consider that one such common cost is the cost incurred by estate agents in advertising properties through online portals.

(5) As the CJEU has emphasised, such co-operation and its compatibility with the Chapter I prohibition cannot be considered in the abstract. The individual circumstances are all-important. *Gottrup-Klim* concerned co-operation in the form of generating volume orders (the aggregation of multiple individual orders) so as to achieve price reductions.

(6) This case involves the creation of a rival portal to those already present on the market, in the hope of achieving the same (or better) service at lower cost. We would observe that this is *prima facie* pro-competitive as it reduces the common costs of competing estate agents. Whilst this is obviously beneficial to estate agents, it may also provide a potential benefit to consumers (in this case vendors of property who pay commission to estate agents) by offering some pressure to reduce prices.[50]

175. We do not consider any of this to have been contested by Gascoigne Halman. It is, however, important to set out the context that we find existed, for it is the prism through which the alleged anti-competitive restrictions have to be viewed.

[50] The extent to which a reduction in cost is passed on to consumers depends on the prevailing market conditions in which a given estate agent operates. We heard no evidence on this, hence our reference to "potential benefit to consumers". In an ordinarily competitive market, such benefits would generally be passed on.

(9) Summary of our approach in Sections H, I and J

176. Bearing in mind the generally pro-competitive effect of a new market entrant, it is evident that, as regards each provision alleged by Gascoigne Halman to be anti-competitive, the process of inquiry must be as follows:

(1) Is the provision (in the case of the One Other Portal rule, the Bricks and Mortar rule and the Exclusive Promotion Rule) anti-competitive "by object"?

(2) Is the provision (in the case of the One Other Portal Rule) anti-competitive "by effect"?

(3) If the provision appears to be anti-competitive is it, in all the circumstances, necessary to achieve an overall neutral or pro-competitive goal? This, third, question is the question of objective necessity.

The law regarding these questions has already been considered in Sections G(4) to G(6) above.

177. In terms of our approach:

(1) We consider (where both are alleged) "by object" infringements before "by effect" infringements.

(2) When considering these infringements, we consider the horizontal aspect of the agreements first, and then their vertical aspect. We explained what was meant by horizontal and vertical agreements, and how they might be inter-related at paragraphs 5(2) and 5(3) above. We recognise that in this case there is a high degree of inter-connectedness given that:

(i) It was Agents' Mutual that brought its Members together (the horizontal aspect); and

(ii) The Members and Agents' Mutual themselves were in contractual relations (the vertical aspect).

Our approach accords with the approach laid down in the Horizontal Guidelines. As is noted in *Bellamy & Child*,[51] "[t]he Horizontal Cooperation Guidelines indicate that the horizontal aspect of such arrangements should be considered first: if that produces a favourable assessment, it is then necessary to consider the vertical aspect in accordance with the principles governing vertical agreements…".

(3) Thereafter, we consider whether – if we were to find an infringement of the Chapter I prohibition – that infringement was justifiable as an ancillary restraint, i.e. whether it was objectively necessary. We only consider objective necessity in the context of the One Other Portal Rule and Exclusive Promotion Rule: Agents' Mutual only contended that these provisions were objectively necessary, and did not seek to argue that the Bricks and Mortar Rule was objectively necessary.

H. THE ONE OTHER PORTAL RULE

(1) Is the One Other Portal Rule a "by object" restriction?

178. We set out the relevant legal principles in Section G(4) above. As there set out, the essential criterion for discerning a restriction on competition "by object" is that the agreement must by its very nature reveal a sufficient degree of harm to competition, having regard to its economic and legal context, rather than merely being capable of doing so, so as to make any examination of its effects unnecessary; and that the notion of restriction "by object" should be interpreted restrictively.

(i) The nature and terms of the restriction and its true object

179. Self-evidently, the starting point must be the nature of the rule in question. In paragraph 52 of its closing submissions, Gascoigne Halman characterised the One Other Portal Rule in the following way:

> "By limiting themselves in respect of both the number and choice of portals, AM's Members have undertaken to each other both (i) to restrict their total output on the

[51] Rose & Bailey (eds.), *Bellamy & Child: European Union Law of Competition*, 7th ed. (2013) ("*Bellamy & Child*"), paragraph 6.065.

market for estate agency services and (ii) to restrict themselves as regards a significant parameter of competition in that market."

180. We do not agree with this characterisation of the rule. The following sub-paragraphs set out why we reject this characterisation, and what we hold the true purpose of the rule to be:

(1) It is not right to describe the advertisement of properties by estate agents as "their total output on the market". Estate agents do not produce, as their "output", copy for advertisers like Rightmove and Zoopla to publish. The "output" of an estate agent is the sale of the properties that estate agent has been instructed to sell by his or her client. Advertising is a means to achieving that end and no more than that.

(2) We appreciate that the phrase "parameter of competition" is one often used by competition regulators. Really all it means is that a certain factor is significant when assessing or measuring competition between market participants. We consider it misleading to say that estate agents compete "as regards the number of portals on which they list" (to quote from paragraph 53.1 of Gascoigne Halman's closing submissions): this puts things much too simplistically. We doubt very much whether an estate agent – seeing his or her rival signing up to N number of portals – would immediately consider that he or she would gain a competitive advantage by signing up to N + 1 portals.

(3) Estate agents do not compete as to the number of portals on which their properties are advertised. They do compete in terms of the provision of the most effective selling service of properties or (which is not the same thing) the provision of what prospective customers perceive as the most effective selling service. We accept that subscription to one or more portals forms a part of that service. We also accept that, given the increasing importance of portals, advertising properties on one of the main portals would be regarded by potential vendor customers of estate agents as important, and so would form part of the service provided by an estate agent even if that estate agent was him- or herself not

especially convinced of the efficacy of portals as an advertising medium. We further accept that most estate agents consider property portals to be extremely useful in advertising their properties. Finally, we accept that most vendors would regard an estate agent not signed up to at least one of the major portals (that is, one of Rightmove or Zoopla) as an estate agent not to instruct. Beyond this, we are not prepared to regard portals as a "significant parameter of competition" as stated by Gascoigne Halman.

(ii) Legal and economic context

181. When considering the nature of the One Other Portal Rule, it is important to bear three points in mind:

(1) First, neither Agents' Mutual nor OnTheMarket was alleged to hold any significant degree of market power in either of the two relevant markets we are considering. To the contrary, OnTheMarket was a new entrant to the property portals market, with all the market weakness that that generally implies.

(2) Indeed, secondly, in the case of markets with two-sided platforms, new entrants suffer from a much greater barrier to entry than in the case of products that only need to deal with a single group of customers as opposed to two inter-related groups of customers. It is difficult for a new entrant to establish itself in these circumstances. Because of the two aspects of demand linked by the platform, it is difficult to attract the listings of estate agents without having attractive "footfall" (that is, visits to the portal) from the property buying public; and it is difficult to attract such "footfall" without the listings (see paragraph 140 above).

(3) Thirdly, estate agents have an entirely free choice whether or not to join Agents' Mutual and participate in OnTheMarket. It is only if the estate agent chooses to join that that estate agent becomes subject to the One Other Portal Rule. Should an estate agent choose <u>not</u> to join then the *status quo* is unaffected. That estate agent will, obviously, not

be subscribing to OnTheMarket, but there is nothing to prevent an estate agent from purchasing advertising from Rightmove, Zoopla and/or any other portals.

(4) It follows that the One Other Portal Rule is a restriction freely accepted by an estate agent as part of the price of accessing OnTheMarket. The nature of the restriction – which binds the moment the estate agent becomes a Member both in terms of its horizontal and vertical effects – is to impose on all participating estate agents a measure of exclusivity in relation to portals in general. The rule is not one of absolute exclusivity – estate agents are not required to purchase their "portal" advertising only from OnTheMarket – but is a variant on the exclusivity theme. Participating estate agents must advertise their properties through OnTheMarket and can choose to do so through one other (but only one other) portal.

182. In short, we consider that the one other portal rule is to be characterised, in terms of its nature, as a semi-exclusive purchasing obligation: that is an obligation to purchase advertising from a given portal, not to the exclusion of all other portals, but to the exclusion of all other portals but one, and that its economic and legal context strongly suggest that its nature and purpose are not to harm competition.

(iii) Horizontal assessment

183. As we have noted, we will consider the horizontal aspects of this provision first. Whish & Bailey note that there are in fact very few decided cases considering whether horizontal co-operation arrangements constitute "by object" infringements.[52] We were referred to three decisions:

(1) *Gottrup-Klim.* We considered this decision of the CJEU in paragraphs 171 to 173 above. This case concerned a co-operative association set up to purchase agricultural products in bulk, with the aim of achieving lower prices. The CJEU clearly regarded this association as pro-

[52] Whish and Bailey, *Competition Law*, 8th ed. (2015) ("Whish & Bailey") at p.623.

competitive, but the question before it was whether one of the rules of this association – a rule preventing members from becoming members of competing associations – infringed competition law. The CJEU resolved this question primarily on the basis of the doctrine of ancillary restraint/objective necessity (which we consider further below), but appears to have concluded that provided the provision was limited to what was necessary, it would not be a "by object" restriction.[53]

(2) *Cooperatieve Stremsel- en Kleurselfrabriek v. Commission*. In Case 61/80, *Cooperatieve Stremsel- en Kleurselfrabriek v. Commission* EU:C:1981:75 ("*Stremsel*"), the CJEU considered the rules of an agricultural co-operative which required its members to purchase from it all their supplies of an essential ingredient. One of the rules stipulated the payment of a not inconsiderable sum in the event of resignation or expulsion. The sum was undoubtedly a fine of sorts, being calculated as a payment of 2.50 guilders per litre of the average annual quantity of rennet purchased from the co-operative over the previous five year's membership. The CJEU held:

> "[12] …it should be recalled that for the agreement at issue to be caught by the prohibition contained in [Article 101(1) TFEU] it must have 'as its object or effect the prevention, restriction or distortion of competition within the Common Market'. The Co-operative's rules, which require its members to purchase from the Co-operative all the rennet and colouring agents for cheese which they need, and which reinforce that obligation by stipulating the payment of a not inconsiderable sum in the event of resignation or expulsion, have clearly as their object to prevent members from obtaining supplies from other suppliers of rennet or colouring agents or from making them themselves should those alternatives offer advantages from the point of view of quality or price. Since, according to information which has not been challenged, the members now account for more than 90 per cent of Dutch cheese output, those provisions in addition contribute to maintaining the present situation, in which the Co-operative is virtually the only supplier of rennet on the Dutch market.
>
> [13] Those provisions are thus of such a nature as to prevent competition, at the level of the supply of rennet and colouring agents for cheese, between producers holding a large part of the Community market in cheese, and also tend to rule out the possibility of creating a competitive situation on the whole of the Dutch market in these

[53] See [33]-[35] of *Gottrup-Klim*, quoted above at paragraph 173.

> ancillary substances which are indispensable in the making of cheese. In the circumstances, there is no need to examine the question whether other factors help to maintain the Co-operative's dominant position on the relevant market and whether such factors are sufficient to consolidate that position, even in the absence of the aforesaid provisions." (emphasis added)

(3) *Competition Authority v. Beef Industry Development Society Limited*. In Case C-209/07, *Competition Authority v. Beef Industry Development Society Limited* EU:C:2008:643 ("*BIDS*"), beef processors in Ireland formed the Beef Industry Development Society ("BIDS") in the light of high over-capacity in the Irish beef processing industry. The processors wished to reduce the overcapacity through agreed arrangements, which essentially involved "stayers" (processors remaining in the market) paying "goers" (processors being incentivised to leave the market) to exit the market. The CJEU had no difficulty in concluding that this was a "by object" infringement:

> "[32] The matters brought to the Court's attention show that the BIDS arrangements are intended to improve the overall profitability of undertakings supplying more than 90 per cent of the beef and veal processing services on the Irish market by enabling them to approach, or even attain, their minimum efficient scale. In order to do so, those arrangements pursue two main objectives: first, to increase the degree of concentration in the sector concerned by reducing significantly the number of undertakings supplying processing services and, secondly, to eliminate almost 75 per cent of excess production capacity.
>
> [33] The BIDS arrangements are intended therefore, essentially, to enable several undertakings to implement a common policy which has as its object the encouragement of some of them to withdraw from the market and the reduction, as a consequence, of the overcapacity which affects their profitability by preventing them from achieving economies of scale.
>
> [34] That type of arrangement conflicts patently with the concept inherent in the [Treaty] provisions relating to competition, according to which each economic operator must determine independently the policy which it intends to adopt on the Common Market. [Article 101(1) TFEU] is intended to prohibit any form of coordination which deliberately substitutes practical cooperation between undertakings for the risks of competition." (emphasis added)

184. The question is whether the One Other Portal Rule, by its very nature, reveals a sufficient degree of harm to competition:

(1) Dealing first with the three decisions to which we were referred, these in our view illustrate the fact specific nature of the assessment to be made in each case, and are simply examples of the CJEU coming down on one or other side of the line that has to be drawn. With this cautionary note in mind, they are helpful to consider.

(2) Thus, *Stremsel* and *BIDS* are cases where the CJEU found a clear restrictive interference with competition in the relevant market. In *BIDS* the objective was, unambiguously, to cause competitors to leave the market (albeit to counter problems of over-supply), thus incentivising the departure of competitors from a market by reference to factors other than market forces.

(3) Equally, the CJEU found that the relevant provision in *Stremsel* was by its very nature harmful to competition without having to consider its effect on the co-operative's dominant position. The provision in question was, as we have described, in the nature of a penalty with at least the potential of altering behaviour from that which would pertain if only market forces were operating. However, we do note that this case is some forty years old and substantially pre-dates the CJEU's decision in *Cartes Bancaires*, and the accompanying debate about the significance of restrictions "by object" referred to at paragraphs 148 to 149 above.[54]

(4) In *Gottrup-Klim*, the CJEU appears to have decided that the restriction in question was not a restriction by object, but was in any case objectively necessary. We discussed this case in detail in connection with objective necessity, but here insofar as it deals also with infringement "by object" we see it simply as an example of a court deciding on the specific facts of the case that the provision in question did not infringe competition law.

(5) Turning now to the One Other Portal Rule itself, we do not consider that this can be said to reveal a clear and obvious harm to competition:

[54] As also does the *BIDS* case, by a lesser period.

(i) In the first place, this is a case where estate agents, through their membership of Agents' Mutual, might be said to be seeking a cheaper and more efficient solution to their portal advertising needs. We do not consider that the limited exclusivity provided by the One Other Portal Rule can be said clearly and unambiguously to have the object of restricting competition. To the contrary, having regard to the economic context in which the provision was intended to operate – that is, in a market having the characteristics we describe in paragraph 181(2) above – the nature of the provision suggests a pro-competitive object.

(ii) Secondly, the fact that the One Other Portal Rule is not exclusive but permits Members (if they wish) to use or continue to use one other portal appears to create competition between the two established portals. Whilst we must be careful not to confuse identifying the object of the restriction with assessing its economic effects, we are required to consider the economic context in which it operates and allowed to consider whether it is likely to have any impact on the market. The evidence described in Section E above shows that the One Other Portal Rule was likely to increase competition between Rightmove and Zoopla in that both Rightmove and Zoopla would pay greater attention to the demands of estate agents subscribing or thinking of subscribing to Agents' Mutual because they appreciated that membership of Agents' Mutual entailed one or other of them being dropped.

(iii) Thirdly, we have in mind the need to apply the concept of restriction "by object" restrictively and not to extend it to hitherto untainted categories of conduct, such as this. The One Other Portal Rule is a provision whose object can be seen as pro-competitive, providing as it does a means of new market

entry, and it does not obviously fit any previously established category of object restrictions.

(iv) Finally, whilst we do not regard the parties' intentions as determinative, we note from the evidence in Section E above that the overriding purpose of Agents' Mutual in launching its new Portal was to compete with the established property portals and provide cost reduction benefits to its Members. This is not, in our view, a clearly anti-competitive purpose.

185. For these reasons we conclude that the One Other Portal Rule, taken by itself, is not a "by object" restriction on competition by reason of the horizontal Arrangements between estate agents who are Members of Agents' Mutual.

(iv) Vertical assessment

186. Having considered the One Other Portal Rule in terms of a restriction accepted horizontally, ie, as between the Members of Agents' Mutual, we now consider the rule as a vertical restraint on the ability of each Member to list its properties on more than one property portal.

187. Here again, we do not consider that the vertical Arrangements between estate agents who are Members of Agents' Mutual and Agents' Mutual itself can be characterised as a "by object" restriction on competition. There are indeed very few instances in which vertical restraints have been found to be restrictive by object.

188. As Mr Bishop made clear in his evidence, which was not seriously disputed in this respect by Mr Parker, the One Other Portal Rule forms part of a vertical agreement not concluded between direct competitors, but between undertakings at different levels of trade.[55] Such agreements commonly contain restrictions on behaviour, but it cannot be presumed that such restrictions are anti-competitive, and vertical agreements are generally presumed to be pro-competitive. As the Vertical Guidelines state (at paragraph 6):

[55] See paragraph 5(2) above.

> "For most vertical restraints, competition concerns can only arise if there is insufficient competition at one or more levels of trade, that is, if there is some degree of market power at the level of the supplier or buyer, or at both levels. Vertical restraints are generally less harmful than horizontal retraints and may provide substantial scope for efficiencies."

In the present case Agents' Mutual does not have market power either in the property portals market, where it is a new entrant, or in the estate agents market, where its Members, though significant in terms of numbers of estate agency branches, account for only a small share of relevant purchase revenues.

189. Of course not all vertical restraints are so benign, but it is perhaps significant that the One Other Portal Rule, if seen as a semi-exclusive purchasing commitment not exceeding 5 years in duration,[56] would not appear to fall within the categories of "hard core" restriction excluded from the VABER[57] to which both parties made general reference in opening. Moreover, in Case C-214/99, *Neste Markkinointi Oy v. Yotuuli Ky* EU:C:2000:679, Advocate General Fennelly noted that the CJEU "has never formally held that [exclusive purchasing agreements] have as their "object" the restriction of competition".[58] In that case, the CJEU followed an effects- and not object-based analysis.[59]

190. In this case, we can see nothing that would suggest that the vertical Arrangements between Agents' Mutual and its Members had the object of restricting competition.

(v) Conclusion on restriction "by object"

191. We provisionally conclude that the One Other Portal Rule, whether viewed from the horizontal or the vertical perspective, does not (taken by itself) constitute a restriction "by object" of the Chapter I prohibition.

192. However, given that Gascoigne Halman specifically attacked the duration of the provision, its variability, and the fact that Gascoigne Halman was obliged

[56] We deal with the duration of the One Other Portal provision more specifically below.
[57] See Article 4.
[58] At [18].
[59] At [25].

to "procure" "Group" compliance, it is necessary to review this conclusion in light of these three specific factors.

The effect of the procure obligation

193. In paragraphs 57 to 63 above, we held that Gascoigne Halman was obliged to procure that each member of its Group comply with the One Other Portal Rule. In other words, the One Other Portal Rule had a wide legal effect. Our assessment of the competitive effects of the One Other Portal Rule takes this wide legal effect into account. It is our conclusion that, notwithstanding the wide effect of the rule, it was not a "by object" infringement. The purpose of the procure obligation was simply to ensure that an entire "Group", as it existed from time-to-time, was covered so as to avoid possible attempts to evade the effect of the One Other Portal Rule.

Duration and variability

194. Gascoigne Halman contended that both the duration of the One Other Portal Rule and the fact that it could not be varied were factors that needed to be taken into account when considering whether the One Other Portal Rule was a "by object" infringement of the Chapter I prohibition. In the case of Gascoigne Halman, the Gascoigne Halman Listing Agreement provided for a listing period of five years,[60] although Gascoigne Halman contended that in the case of other Members that period might be longer.

195. We have considered both the duration of the rule and the question of its variability. These factors do not change our conclusion that the rule is not a "by object" infringement. Our reasons for reaching this conclusion are as follows:

(1) Whilst there may be cases where the duration of a provision is a factor that affects whether or not that provision is or is not anti-competitive, this is not such a case. We accept that were the OnTheMarket Portal to achieve success on the scale of Rightmove – ie, dominance – then that might render the One Other Portal Rule anti-competitive, whether "by

[60] See paragraph 54(3) above.

object" or "by effect". We express no view, because the fact is that OnTheMarket is very far from achieving a status of dominance or anything like it.

(2) We appreciate, of course, that it is Mr Springett's and Agents' Mutual's aim to get to "tipping point 2", where OnTheMarket rivaled Rightmove as the "number 1" portal. But we are not obliged to take the parties' intentions as determinative of our assessment: these are mere aspirations, and with all due respect to Mr Springett, that is how we must regard such statements. We consider that the provisions that Gascoigne Halman contends to be anti-competitive must be assessed in light of the facts as they stand now. Should the situation change, and (for example) Agents' Mutual both achieves dominance in the market for its Portal and persists in maintaining the One Other Portal Rule, then the potential for that rule to offend the Chapter I (or indeed the Chapter II prohibition) would have to be considered. But that is not a matter for this Judgment. We consider that it would be entirely wrong to assess the anti-competitive object of the One Other Portal Rule by reference to the parties' aspirations against an uncertain future.

(3) What is more, as the communications in Section E demonstrate, Agents' Mutual was careful to take legal advice, and we would be surprised if Agents' Mutual were to persist with a provision that was anti-competitive (because, say, of the dominance of the Portal).

(4) Gascoigne Halman contended that there was no evidence that Agents' Mutual in general, or Mr Springett in particular, had given any serious consideration to or undertaken any analysis of the minimum period needed for OnTheMarket successfully to enter the property portals market. This contrasted with the extensive market analysis carried out by the new entrant in the case of *BAGS v AMRAC*[61] ("*BAGS*") (a case which Agents' Mutual had cited in support of its market entry argument) to find out the least restrictive justifiable entry level.

[61] [2009] EWCA Civ 750.

Instead, so Gascoigne Halman contended, Mr Springett, working on a small budget without support, had essentially relied on his own judgment in the matter.

(5) On the facts, it is no doubt correct that Mr Springett simply exercised his commercial judgment, without undertaking extensive analysis. We proceed on this basis. In our judgment, the suggestion that, before introducing the One Other Portal Rule, Agents' Mutual was obliged to carry out a detailed assessment in order to determine what the duration of the rule should be, is misconceived. Whilst the steps taken by the new entrant in the *BAGS* case were no doubt professional and impressive, that was a quite different industry with different characteristics. The case does not establish, in our view, that such steps must be taken by every new entrant to every market. Instead, what is needed is a serious and professional assessment that is appropriate to the context. In this case, we are satisfied, from Mr Springett's evidence, that he believed, on the basis of his experience and professional judgment, that a duration of five years was appropriate, and that the need for the One Other Portal rule to continue in its original form would be reviewed as OnTheMarket's business developed. That, we conclude, was all that was appropriate or necessary in the present case.

(6) As to the ability to vary the One Other Portal Rule, Gascoigne Halman contended that Agents' Mutual was actually unable to vary the rule without its (Gascoigne Halman's) consent. Whilst it is ironic to consider a case where the very party alleging a provision is anti-competitive is also refusing to alter it, we do not consider Gascoigne Halman's contention to be correct:

(i) As noted in paragraph 49(1) above, the One Other Portal Rule is contained in the Gascoigne Halman Listing Agreement and – we infer – in the Listing Agreements of all Members.

(ii) As we held in paragraph 55 above, the One Other Portal Rule is a bilateral obligation between each Member and Agents'

Mutual. There is nothing in either the Articles or the Membership Rules to prevent this provision from being varied by mutual consent. We do not, however, consider mutual consent to be necessary in this case for Agents' Mutual to abandon the One Other Portal Rule in certain circumstances.

(iii) As we noted in paragraph 49(1) above, the One Other Portal Rule is asymmetric in terms of the obligations assumed by Agents' Mutual and those imposed on Gascoigne Halman.

(iv) As regards Gascoigne Halman, there is an unequivocal obligation that "we will comply and procure that each member of our Group…complies with the [One Other Portal Rule] at all times". We see no reason why Agents' Mutual could not unilaterally waive this requirement and release Gascoigne Halman from this obligation, although we doubt whether Agents' Mutual could waive this requirement in the case of only a single Member, absent circumstances unique to that Member.

(v) However, assuming the Listing Agreements of all Members to be materially the same as the Gascoigne Halman Listing Agreement, such conduct, if carried out consistently amongst Members and for sufficient reason, would not be a breach of contract on the part of Agents' Mutual. All that Agents' Mutual undertakes to do is "seek to implement the [One Other Portal Rule] during the Listing Period". Even assuming this to be a contractual obligation (the Gascoigne Halman Listing Agreement simply refers to Gascoigne Halman's "understanding" of what Agents' Mutual will seek to do), we hold that there is nothing to prevent Agents' Mutual from abandoning the One Other Portal Rule were it in danger of infringing competition law, provided Agents' Mutual treated all its Members similarly. This ability to abandon the One Other Portal Rule arises because Agents' Mutual was only (if at all)

obliged to "seek to implement" the rule. It might very well seek to do so, and be unable to implement it due to the potential for a competition law infringement. In such a case, provided Agents' Mutual acted consistently as regards all of its Members, we consider that there is no absolute obligation on Agents' Mutual to implement the rule. We should say that we regard this question as one of construction: it is different to the question of the severability of this provision, which we consider in Section M below.

(2) Is the One Other Portal Rule a "by effect" restriction?

(i) Introduction

196. The approach to be used in determining whether a given provision constitutes a "by effect" restriction on competition was described in Section G(5) above. Essentially, the process involves:

(1) *Identifying the provision said to constitute a restriction on competition*. In the present case, that provision is the One Other Portal Rule.

(2) *Identifying the relevant market or markets in which the effect of the One Other Portal Rule is to be gauged.* In this case, our inquiry will focus on the effect of the One Other Portal Rule on the property portals market as it was Gascoigne Halman's contention that the rule had an anti-competitive effect in this market.

(3) *Articulating the theory of harm.* In the present case, Gascoigne Halman's theory of harm was that the entry onto the market of Agents' Mutual (with the One Other Portal Rule) caused a very material number of agents to cease listing properties on Zoopla (with comparatively fewer leaving Rightmove). This, according to Gascoigne Halman, was because Rightmove was perceived as being the "must have" portal, with Zoopla as the "also-ran". The consequence was that Rightmove's position in the market was strengthened, and Zoopla's ability to constrain Rightmove's apparent

dominance was undermined. Clearly, the mere fact that a new entrant onto a market has caused a competitor difficulties or harmed it is very much the point of competition. Gascoigne Halman did not, therefore, base its theory of harm on the fact that Zoopla had been harmed (although that was a necessary part of its argument). Rather, it was contended that this harm to Zoopla adversely affected consumers in the estate agents' market by adversely affecting Zoopla's ability to constrain Rightmove. Gascoigne Halman did not expressly claim that an adverse effect on Zoopla would also cause harm to viewers of properties on portals, but this would appear to follow from its argument.

(4) *Assessing the allegedly harmful effect by reference to what the position would have been in the absence of the allegedly infringing agreement or provision*. In this case, there was a dispute as to the appropriate counterfactual hypothesis. Mr Parker, Gascoigne Halman's expert, considered two counterfactuals, although his conclusions were unchanged whichever counterfactual was adopted. Mr Parker's alternative counterfactuals were:

(i) Agents' Mutual entered the market, but without using the One Other Portal Rule.

(ii) Agents' Mutual did not enter the market at all.

We agree with Mr Parker that there is unlikely to be any difference between these two counterfactual hypotheses. This is because of the centrality of the One Other Portal Rule to Agents' Mutual's market entry. This is considered further in Section H(2)(v*)* below. For the reasons we give there, we consider that it would not have been possible for Agents' Mutual to have entered the market without the One Other Portal Rule; and so, had it attempted to do so, the outcome would have been rather similar to that which would have pertained had Agents' Mutual never entered the market at all.

(5) We consider the nature of Gascoigne Halman's theory of harm in Section H(2)(ii) below. We then set out the evidence that Gascoigne Halman put forward in support of its theory of harm in Section H(2)(iii) below.

(ii) The nature of Gascoigne Halman's theory of harm

197. The notion that the entry of a new competitor onto a market should be anti-competitive is an inherently unusual suggestion and we have already found that in general such entry would be pro-competitive (see section G(8) above). In this case, nothing compelled estate agents to join Agents' Mutual. Of course, if an estate agent chose to become a Member, that involved the acceptance of certain conditions, like the One Other Portal Rule.

198. The fact that Agents' Mutual's entry onto the market harmed Zoopla is not the point. If, and to the extent that, Zoopla was (through Gascoigne Halman) contending that its business was adversely affected by the entry of Agents' Mutual, then this is a an example of competition working, rather than failing. What must be demonstrated – and the burden is on Gascoigne Halman – is that the entry of Agents' Mutual onto the estate agents market, by adversely affecting Zoopla, harmed consumers by restricting competition. Unless this can be established, all that Gascoigne Halman's theory of harm is, is a form of special pleading for Zoopla, which we discount.

199. It will readily be appreciated that the thrust of Gascoigne Halman's theory of harm rested on the agreement as between the Members of Agents' Mutual – that is to say, the case was based upon horizontal effects.

(iii) Evidence in relation to Gascoigne Halman's theory of harm

<u>The evidence relied upon by Gascoigne Halman</u>

200. Gascoigne Halman's theory of harm turned on two related propositions. First, that Zoopla had, prior to the entry of Agents' Mutual into the market, acted as a constraint on Rightmove. Secondly, that this constraint on Rightmove had

been undermined by the entry of Agents' Mutual. Gascoigne Halman relied upon the following matters in support of its theory of harm:

(1) The empirical analysis of Mr Parker, which Mr Parker claimed demonstrated that Agents' Mutual's entry onto the market had reduced Zoopla's ability to act as a pricing constraint on Rightmove.

(2) The views of independent estate agents who gave evidence before the Tribunal.

(3) The assessment of independent third party analysts in their view of market conditions.

(4) The conclusions of the OFT when considering the TDGP/Zoopla merger and the conclusions of the Bundeskartellamt ("BKA") in the Immowelt/Immonet merger.

201. We consider these four points in turn. All of them were included in Mr Parker's evidence. As it appears to us, in Parker 1, it was the empirical analysis of Mr Parker that took centre stage (i.e., the first of the points considered in paragraph 200(1) above), with the other points supporting it. By the end of the hearing, we were invited by Mr Harris, in his closing written submissions for Gascoigne Halman, to consider this evidence as a whole and to ask ourselves whether, on a balance of probabilities, the totality of the evidence established the theory of harm contended for.

202. This, no doubt, reflects the extent to which, during cross-examination, Mr Parker sought to downplay the significance of his empirical analysis. Footnote 22 of Agents' Mutual's written closing submissions noted:

> "During his oral evidence to the Tribunal, Mr Parker very visibly sought to downplay the significance of the empirical analysis, describing it as "by no means the only item of evidence that I think I bring to bear", and referring to it as coming "right at the end" of the other "evidence" which he relied on (consisting of his theory that RM's pricing power would be strengthened, the OFT ZPG merger decision…and various third party comments)…However, the empirical analysis is the only means by which Mr Parker purports to substantiate his allegation that agents have experienced higher prices by reasons of [Agents' Mutual's] entry. His theoretical predictions cannot do this. Nor can the OFT decision, which was similarly a prediction as to the future. Nor can third party statements prepared for

other reasons, which refer generally to the respective strength of RM and ZPG, but do not specifically address the question of *pricing* power. GH's effects case therefore stands or falls with Mr Parker's empirical analysis."

203. We consider that there is some force in this point. However, to be clear, whilst, for the sake of clarity of analysis, we consider the four points relied upon by Gascoigne Halman point-by-point, we look at the totality of the evidence when reaching our conclusion on effects.

The empirical analysis of Mr Parker

204. The evidence of Mr Parker was to the effect that the One Other Portal Rule weakened the competitive constraint on Rightmove that Zoopla had supplied, without any compensating strengthening by OnTheMarket. The weakening of the constraint on Rightmove that Zoopla provided could, so he said, be measured by reference to the "cost per lead" of the portals, which was a measure that featured heavily in Parker 1.

205. In order to evaluate Mr Parker's empirical analysis, it is necessary:

(1) To describe the data that was before the Tribunal.

(2) To explain the use that Mr Parker made of that data.

(3) To consider the weight that is to be attached to Mr Parker's analysis of that data.

206. Both experts, but Mr Parker in particular, had referred to and/or relied on various sources of economic data, some of which were publicly available and some of which could be derived from evidence disclosed between the parties. Prior to the hearing, the Tribunal asked the experts to provide certain data for Rightmove, Zoopla and OnTheMarket for the period since 2011. This data included:

(1) The revenue received by the portals from estate agents for property listings ("Portal Revenue").

(2) The number of estate agents or branches involved (distinguishing between agents and housebuilders or developers wishing to sell their own properties) ("Number of Branches").

(3) The number of "leads" each portal generated. The nature of a "lead" is described in paragraph 18 above ("Number of Leads").

207. The experts provided the requested data on a half-yearly and full-yearly basis for Rightmove and Zoopla, and a half-yearly and monthly basis for OnTheMarket. The data were largely derived from published accounts for Rightmove and Zoopla and from the management accounts for OnTheMarket. Some of the data provided to the Tribunal covered the same or similar ground as the experts' existing evidence; some had not previously been produced.

208. Thus data relating to Portal Revenue and Number of Leads had been used by Mr Parker in his empirical analysis in Parker 1. The data on Portal Revenue and Number of Branches were broadly similar to ARPA ("Average Revenue per Advertiser") figures given by Rightmove and Zoopla in their published accounts, with the addition of information from OnTheMarket's management accounts. These had been used both by Mr Parker and Mr Bishop.

209. It must be stressed that the data before us were extremely limited in terms of the number of data points available to us (and to the experts). In paragraph 80 of its written closing submissions, Agents' Mutual made the following point:

> "…the empirical analysis of 'cost per lead' is based on "only six [data] points [from which] it is very difficult to draw any conclusions (see the question of Mr Landers, Transcript, Day 8, p12, ll.9-10). It does not meet the conventional standards of statistical significance usually employed by economists and embodied in the European Commission's *Best Practice Guidelines*…"

Mr Parker nonetheless maintained that despite the lack of data points, his empirical analysis still showed that it was "more likely than not" that Rightmove's prices were higher than his model would have predicted. Agents' Mutual said this was far below the level of confidence normally required for economic evidence of this kind.

210. Although these points are made in relation to Mr Parker's "cost per lead" analysis, they actually hold good in relation to any analysis of the data. The crucial point, however, is this: it was Mr Parker and Gascoigne Halman that were seeking to make something of the data, not Mr Bishop and Agents' Mutual, who were contending that it would be unsafe to draw any conclusions from the data. We agree with this. We consider that Mr Parker's empirical analysis can be rejected simply on the ground that it was backed up by insufficient data to make it a robust or sound analysis.

211. However, there are other reasons, over-and-above this, as to why we consider the "cost per lead" metric to be unsound. The "cost per lead" is derived by dividing Portal Revenue by Number of Leads to obtain a unitised figure capable of being used for comparison and analytical purposes. Mr Parker contended that this measure demonstrated that Rightmove's "cost per lead" over the relevant period had increased. Mr Parker further claimed that Zoopla's own "cost per lead" had increased (although he expected this to reverse) and that OnTheMarket's cost per lead was higher than anyone's. By losing so many agents to OnTheMarket, Zoopla had become less of a close competitor to Rightmove, and less able to restrain its market power. In consequence, competition in the UK property portals market had been weakened.[62]

212. Even disregarding the limited data on which these findings are based, they are scarcely an unequivocal support for Gascoigne Halman's theory of harm. Mr Bishop took issue with "cost per lead" as a reliable measure. There are a number of reasons why we find the "cost per lead" measure to be an unsound one:

    (1) First, it is an artificial measure not used by the portals to charge for their services (where an annual per branch price is used) nor by agents to purchase them. Nor was there any evidence that agents themselves assessed the value of the services they received on a "cost per lead" basis. The fact is that "cost per lead" is a measure divorced from both

[62] See Parker 1 at 7.1.4 to 7.1.6.

the manner in which portals charged and the way in which agents would assess value.

(2) Secondly, leads are not homogenous. As we have described (see paragraph 18 above), precisely how a "lead" is generated depends upon the manner in which a portal functions: each portal is different. Moreover, the cost per lead could be affected not only by increases in listing fees, but also by the relative attractiveness of the agent's portfolio of properties, the level of marketing undertaken by the portal and the general level of economic activity affecting the number of people moving house. Leads also varied greatly in quality, which affected their value to an agent, and different agents had different levels of willingness to pay.

For these reasons, an increase in "cost per lead" cannot be equated with harm to competition, even if it were unequivocally demonstrated on the basis of reliable data (which, in this case, it is not: Mr Parker's figures were not unequivocal; and the data are insufficient). We reject it as a reliable measure of Zoopla's ability to constrain Rightmove.

213. Mr Bishop did not accept that Zoopla had at any time effectively constrained Rightmove's prices; nor did he accept Mr Parker's theory that the entry of OnTheMarket using the One Other Portal Rule harmed competition because it damaged Zoopla in its ability to constrain Rightmove. On the effect of OnTheMarket's entry to the property portals market, Mr Bishop suggested that it was contrary to standard presumptions for a new entrant like OnTheMarket to harm competition. Increased competition between Rightmove and Zoopla to avoid losing agents' listings to OnTheMarket was likely to benefit estate agents in terms of a reduction in Zoopla's listing fees.

214. Naturally, Mr Bishop's views could not – for exactly the same reasons as Mr Parker – be supported by reference to the empirical data. Mr Bishop accepted this, and did not seek to build a theory on insufficient data.

215. When pressed by the Tribunal, during the "hot tub" questioning of experts, Mr Bishop's view was that the best measure was ARPA which as described in

paragraph 208 above is the published measure used by the major property portals to show earnings from estate agents' property listings. Mr Parker appeared to be using revenue by *agent branch* rather than *advertiser* in calculating his ARPA figures[63] and it is this more precise measure that the information sought by the Tribunal also sought to show. On this basis, "cost per branch" is calculated by dividing Portal Revenue by Number of Branches, and in our view reflects what the portals actually charged and what branches actually paid better than does "cost per lead".

216. These "cost per branch" figures are susceptible to precisely the same criticisms, in terms of number of data points, as were levelled at those deployed by Mr Parker (see paragraphs 210 to 211 above). For what they are worth, the figures indicate that Rightmove's revenue per branch steadily increased over the whole of the period from June 2012 to June 2016. In this they confirm what is shown by the ARPA figures published by Rightmove and Zoopla. At a minimum, it can be said that the figures do not provide any evidence to support the contention that the entry of OnTheMarket led to a significant change in the trend underlying Rightmove's pricing. Zoopla provided, on the basis of these figures, no constraint on Rightmove's prices, whether before or after the entry of OnTheMarket.

217. In short, a different analysis of the same data used by Mr Parker results in a very different conclusion: namely, that the empirical evidence does not support Gascoigne Halman's theory of harm.

218. Gascoigne Halman also claimed that the weakening of Zoopla's position on the market and the strengthening of Rightmove's position, caused by the entry of OnTheMarket applying the One Other Portal Rule took the form of its becoming less attractive to viewers of properties listed on portals.[64] How property portals attracted "unique" or "overlapping" viewer audiences and how this might affect the competitive constraints imposed between them was discussed by Mr Parker and Mr Bishop both in their expert reports and in their 'hot-tub' concurrent oral evidence. Mr Parker referred to data on portal visits

[63] Parker 1 at paragraph 6.3.7.
[64] Paragraph 67.3 of Gascoigne Halman's written closing submissions.

and page views as evidence of Zoopla's success in rivalling Rightmove on the viewer side of the market prior to OnTheMarket's entry. He referred also to published data on 'above-the-line' marketing expenditure and evidence on portal innovations to suggest Zoopla was seeking to make itself more attractive to viewers and 'closing the gap' on Rightmove over the same period.[65] However, neither he nor Mr Bishop could point to any robust data on the extent to or manner in which the two major portals had succeeded in attracting viewer audiences and the effect this might have had on competition between portals. In the absence of such evidence it is very difficult to know whether Mr Parker's claims are sound or not. Consequently, we are obliged to conclude that Gascoigne Halman has failed to prove its case on this point.

219. We now turn to the other evidence advanced by Mr Parker in support of Gascoigne Halman's theory of harm.

Views of independent estate agents

220. In relation to the views of the independent estate agents called to give evidence before us, whilst we have no doubt that these views were honestly held, they only established that (in the eyes of estate agents) the prices of both Rightmove and Zoopla rose, including in the period before Agents' Mutual entered the market:

(1) Ms. Frew stated:[66]

Q (Mr Maclean)	And in your statement in paragraph 14 you say in the middle of the paragraph: "Many agents were concerned about being beholden to Rightmove and, to a lesser extent, Zoopla, including in respect of the annual price increases". That was a concern which Hunters, your organisation, shared, wasn't it?
A (Ms Frew)	Well, I think as I say in my statement, when you've only got two portals, then you know, it was interesting and positive, potentially positive to have a third portal and yes, there was no doubt about it, you know, there were obviously annual

[65] Day 8/pp.6-8, referring to Parker 1, Figures 5, 6 and 14. See also Figure 37.
[66] Day 2/pp.3 to 4.

price increases, you know, for the two major portals.

Q (Mr Maclean) And there had been annual price increases for several years, hadn't there?

A (Ms Frew) Yes, for most. I mean, I can't talk about – I can only talk about Hunters, of course, so I can't talk about any other agents and what agreements they had. So you know, from Hunters' point of view, then yes, every year you would go into a discussion on price.

(2) Mr Symons stated:[67]

> "8.4 By 2010, Rightmove and TDPG had emerged as strong players in the property portal market and I and the other partners at Stags were becoming increasingly concerned about the steadily increasing prices that Stags were paying for listing its properties on their portals. Despite the level of the fees, we felt we had no choice but to list with both Rightmove and TDPG as our clients expected us to list, and asked us if we were, on those portals.
>
> …
>
> 8.7 My frustration with the property portal market intensified over the following three years and was only exacerbated by the merger of Zoopla and TDPG (creating the Zoopla Property Group) in 2012, which caused even further consolidation into a duopoly."

(3) Mr Wyatt stated:[68]

> "It was an attractive reason, actually. It might not be mentioned in there but as I've previously said, when the OOP rule was announced, it was attractive to me as a small business guy because I was paying at least two other portals a great deal of money and it was increasing rapidly and it was increasing not just for me but for other small agencies. It was increasing rapidly enough that our spend on marketing was becoming too much, so we welcomed the idea that we could almost, if you like, be pushed to drop one of the expensive portals and save a not inconsiderable amount of money every year."

221. It is fair to say that the evidence of Mr Livesey was somewhat different: but, as the head of a large Corporate, he had the ability to negotiate lower or better prices. More to the point, he came from the part of the market that Agents' Mutual was not – at least initially – targeting. Agents' Mutual was seeking the smaller, independent, bricks and mortar estate agents, and their evidence was clear that there was an unequivocal upward trend in pricing.

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[67] Paragraphs 8.4 and 8.7 of Symons 1.
[68] Day 4/p.79.

222. What is more, the contemporaneous emails between estate agents (set out in Section E) clearly suggest that the arrival of a new portal on the market, with the One Other Portal Rule, was causing both Rightmove and Zoopla to make their offerings more attractive, particularly in terms of price. This is at least suggestive that Zoopla was not competing with Rightmove, but that it was Agents' Mutual that introduced fresh competition in what was a duopolistic market.

The assessment of independent third party analysts

223. We were not assisted by the views expressed by independent third party analysts. Mr Parker quoted from the published views of such analysts in Section 9.3 of Parker 1. Even if these analysts had clearly expressed the view that Zoopla was acting as a constraint on Rightmove, we would have been minded to attach relatively little weight to such views absent facts and figures and the crucible of cross-examination. As it was, these views really only amounted to:

(1) Statements that – prior to Agents' Mutual's arrival on the market – both Rightmove and Zoopla were established on the market.

(2) Statements that, as between Rightmove and Zoopla, the latter would be or was (depending on when the statement was made) more affected by the entry of Agents' Mutual.

There was no suggestion that Zoopla acted as an effective constraint on Rightmove and these views did not support Gascoigne Halman's theory of harm.

Merger decisions of the regulators

224. Mr Parker relied on the merger decisions of the OFT and the BKA.[69] In each of these decisions, the authority considered that a merger between the second and third largest property portals in a market to be pro-competitive because it would enable the second largest property portal to become bigger and so

[69] Referred to in Section 9.2 of Parker 1.

challenge more effectively the number one in the market. Thus, the OFT concluded – in paragraph 70 of decision ME/5233/11 *Anticipated Merger between The Digital Property Group Limited and Zoopla Limited* that:

> "The OFT considered that the merger is likely to have a pro-competitive impact by creating a portal that can rival Rightmove. At present, Rightmove is by far the biggest portal in terms of exposure to house-hunters. Estate agents have little choice but to list on Rightmove, allowing it to increase prices significantly in recent years. The merged portal will significantly reduce the difference in quality between the parties and Rightmove, which the OFT considers is likely to lead to a stronger constraint on Rightmove's pricing."

225. Mr Parker endorsed this reasoning, and sought to apply it by analogy to the present case: he contended that just as the merger of the second and third portals was pro-competitive, the emergence of a new portal with a one other portal rule was anti-competitive, because it would damage Zoopla and allow Rightmove to behave in an even more unconstrained manner.

226. We are unimpressed by this point. Inevitably, the OFT's decision is quite speculative, as it preceded the proposed merger. It also does not appear to have been borne out by what has subsequently happened.

(iv) Vertical aspects

227. As we noted, Gascoigne Halman's theory of harm was based upon the horizontal dealings between Members of Agents' Mutual. It is not clear whether Gascoigne Halman was contending that the vertical dealings between the Members of Agents' Mutual and Agents' Mutual itself were anti-competitive.

228. If such a case was being advanced, we find that it was not made out. Turning to these vertical aspects, we find as follows.

229. Many of the same considerations apply as with the horizontal assessment. Again, the theory of harm is that the One Other Portal Rule, applied by a new entrant to the property portals market, leads to a weakening of the ability of Zoopla to constrain Rightmove's behaviour, particularly as regards its prices to estate agents. We have not seen any evidence that Zoopla constrained Rightmove's prices prior to Agents' Mutual's appearance, or that the arrival of

the OnTheMarket materially weakened such constraints as did exist. Instead, the appearance of a third property portal appears to offer increased choice and more competition, in particular by requiring Zoopla and Rightmove to improve their respective offerings to estate agents in order to bid for their custom. We therefore find no restrictive effect from the One Other Portal Rule viewed as a vertical restraint.

230. Viewed both individually, and collectively, we find none of the points advanced by Mr Parker to be persuasive. We find that Gascoigne Halman's theory of harm is not made out.

(v) Potential pro-competitive effects

231. In these circumstances, it is unnecessary to consider the pro-competitive effects of the entry of OnTheMarket on the relevant markets as we have defined them.

232. However, given the evidence we have heard, we nevertheless note our findings in this regard, in case a balancing exercise between relative harms in different markets becomes significant.

233. We referred earlier to the likely pro-competitive effect of a new entrant to the property portals market absent the restrictions complained of, but not the effect of the actual entry of OnTheMarket with the One Other Portal Rule. Gascoigne Halman argued that the effect of this was to harm competition compared to the counterfactual situations of either entry absent the rule or no entry at all. We do not agree. In our judgment, the One Other Portal Rule was an essential part of OnTheMarket's entry strategy and central to its chances of success. Without the rule, there would have been no entry, and therefore no possible effect on competition in the property portals market.

234. We have already described the difficulties facing a new entrant to a market characterised by a two-sided platform with strong network effects. The new entrant must find a way of attracting both visits from the property-buying public and listings from estate agents. There are in theory several possibilities. On one side of the platform, one way might be to approach the property-

buying public (i.e. viewers) directly to seek to create a critical mass of viewers interested in buying properties. On the other side, another way (which was the way Gascoigne Halman suggested that Agents' Mutual should have tried) would be to offer free listings or other promotional attractions. A third way would be to seek to expand from a regional base. We do not see that Agents' Mutual should be held to any of these courses if, in its own judgment, they were unlikely to work in the circumstances prevailing at the time or if they were inferior to the approach Agents' Mutual determined upon in seeking to enter the market.

235. We were told that by the time Agents' Mutual came into existence, most estate agents were listing their properties on at least one property portal, and that it was no longer very easy for a new property portal to offer both to estate agents and to the property-buying public completely "new" listings, not already listed elsewhere. Instead it was necessary to identify some unique quality in the collection of listings provided, preferably in the form of a portfolio of listed properties that could not, as a portfolio, be found elsewhere, and with a range of properties sufficient to satisfy the needs of the property buying public, or at least enough to interest them.

236. The strategy adopted by Agents' Mutual was described in Mr Springett's cross-examination:

Q (Mr Harris)	But you accept that the market circumstances relating to the launch of Agents' Mutual are totally different from those that were extant when Primelocation launched, don't you?
A (Mr Springett)	Well, that's a third point in time, isn't it? So, Primelocation was launched in 2001. We are here talking in 2011, pre the merger, at a point where Zoopla was really not on anyone's radar, and then a post-merger situation where a reassessment was done of what was needed and still later a detailed financial model was put together.
Q (Mr Harris)	That is right, but I think you do accept, don't you, that the portals market at the time of launch of Agents' Mutual is totally different from the portals market when Primelocation launched?
A (Mr Springett)	It's considerably more difficult, yes.
Q (Mr Harris)	You say that, Mr Springett, but actually it is much more of a mixed picture, isn't it, as regards difficulty?

A (Mr Springett) I don't remotely agree with that.

Q (Mr Harris) Really?

A (Mr Springett) It was a market completely dominated by two large media groups.

Q (Mr Harris) You say that now, Mr Springett, but my understanding is that you were regarding it as a market that had moved to some extent in favour of portals to when Primelocation launched. Do you accept that?

A (Mr Springett) In favour of portals? That is a different matter. That is a different question altogether.

…

Q (Mr Harris) [Referring to an Agents' Mutual document]

"Although the competitor environment is now tougher, the situation is also eased by the fact that paying listing fees is now an established concept and agents recognize fully the value the portals provide."

A (Mr Springett) Yes.

Q (Mr Harris) That is right, is it not? So it is not unequivocally harder to launch when Agents' Mutual launched, compared to when Primelocation launched, is it, even in your own words?

A (Mr Springett) Well, that's certainly a saving grace, but I can tell you that the market environment when I launched Primelocation, or when we launched Primelocation, was rather easier than the one we entered into at the beginning of 2015.

Q (Mr Harris) But not unequivocally in one direction, as you would have had us accept just a moment ago, now that you have seen this document. That is right, isn't it?

A (Mr Springett) Well, to the extent that it is established that people had to pay for the two largest portals, that's true.

Q (Mr Harris) Well, it is not just that, is it? Because it is also because "agents recognise fully the value the portals provide"? So that had been a development in favour of portal launching, hadn't it, compared to Primelocation?

A (Mr Springett) That's true.

Q (Mr Harris) That is right.

…

Q (Mr Freeman) Mr Springett, when you say "more difficult", your answer is all about agents but what about persuading viewers to look at portals because that's the key to the other side of the market?

A (Mr Springett) Well, yes, and I think our challenge was that we were entering at a time where there were two entrenched portals. Consumer behaviour had been as it was in terms of the portal – of portal usage for a number of years, particularly in relation to Rightmove.

I'd also say, and it is a personal view, that Zoopla is

primarily an amalgam of a number of relatively long-established portals where again consumer usage of those was pretty well established.

So by the end of 2012 you had a situation where there were two portals, strong brands, big marketing budgets, with already entrenched consumer usage of those portals, and one of the challenges for us would be how to come into the market and move those eyeballs, if you like, and part of the logic, one of the primary parts of the logic of the One Other Portal rule was to say: we are not going to be able to afford the kind of marketing budgets which would achieve that, and I'm not even sure however much you spend you would necessarily be effective in achieving that.

But I've always believed that the properties, the listings themselves, are the thing that draws the consumer and therefore the strategy has been to, if you like, have some movement, some switching of the agents and the property listings between the three portals as now list in the market.

Q (Mr Freeman) From your point of view as a new start-up portal, does the increased willingness and preference of house-hunters, lease-hunters, to use online portals as a means of finding listed properties, does that make your task of entry easier or more difficult?

A (Mr Springett) I think the fact that there is a strong usage of portals, and it has undoubtedly grown – I have seen statistics, and I can believe them, that most searches for property now initiate online at the rate of about 90% of people, so that inevitably makes it easier in the sense that usage, in the generality, of the internet has increased amongst property sellers.

The thing that is more difficult is that there has been for a number of years established usage of a relatively small number of brands which had also recently become even more concentrated and so our entry to the market, one of the challenges for that was to say: well, how would it be possible to encourage – I got into trouble on Friday with "consumers", but property seekers to change their behaviour and begin to consider a new entrant to the market?

…

Q (Mr Harris) In the event, though, you went for just 1 degree less exclusivity, didn't you? You carved out from the exclusivity and exemption in favour of one of the portal, right?

A (Mr Springett) Well, that was really one of the main, I suppose negotiating points between me and the steering committee because I came from the point of view that I didn't think it would work at all without the agents being prepared to provide their listings and revenue on a fully exclusive basis.

There was an extended stand-off period actually during 2011 running into 2012 where I was saying: "we cannot move forwards or certainly you won't be moving forward with me involved unless we can get to a sensible outcome around that question." And in the end the compromise

position was One Other Portal.

Day 7/pp.27*ff*

Q (Mr Harris) … You have claimed as part of your case, you and the company, that there wasn't a competitive market at the time that OTM entered, right?

A (Mr Springett) I think that competition was extremely limited. There was no switching. In their published documents both of the major portals say that they suffer very little attrition and that they both have a very high proportion of the market listing with them. So that says to me there is very little competition in that market and I observe what's going on at grassroots level when talking with agents, so you can connect the market structure with what the customers are feeling as well.

Day 7/p.90

Q (Mr Harris) My suggestion to you is that under the OOP rule in fact you don't have any unique content on your website, do you?

A (Mr Springett) Well, I don't think we claim to have any unique content. The objective here was to reach a position where no one portal has complete coverage, so you can now find the entire market on either Rightmove and Zoopla, Rightmove and OnTheMarket, Zoopla and OnTheMarket. And therefore that changes the situation from what it was before entry and it disrupts the position where otherwise the consumers had got used to simply finding all the stock on either Rightmove or Zoopla.

Q (Mr Harris) In fact, even your own steering committee founder members take the view that under the One Other Portal rule there will be no unique content on OTM, don't they?

A (Mr Springett) Well, and I take that view because we've never said unique content. What we've said is, I think it is referred to here and there, is a unique collection of properties. Although I should make clear that is not what we say in our marketing material, that is effectively an internal term for discussion, but what it means is a differentiated property stock. And I've explained to you what the objective was: to move the market away from the situation where any new entrant would only ever have a subset of what one or other of the big portals had.

Day 7/pp.92-93

237. This evidence suggests strongly to us that the Agents' Mutual entry strategy, faced with two well-established, existing, portals, was predicated on the One Other Portal Rule as a way to break into the market, by forcing a reconsideration of existing listing practices and offering the property buying public a distinctive, if not unique, collection of properties to viewers.

238. Given the difficulties facing a new entrant, it would not have been unreasonable for Agents' Mutual to require complete exclusivity from its estate agent customers, ie, that they should not list properties on any other portal. In the event, Agents' Mutual opted for semi-exclusivity, in the form of the One Other Portal Rule, thus requiring those agents who joined it to withdraw their listings from other portals if they listed on more than one, and requiring the established property portals to consider how best to persuade their existing agent customers not to withdraw listings from them. This seems to us to have contributed directly to increased competition on the property portals market, and therefore strongly to suggest that the effect of the One Other Portal Rule could not have been harmful to competition: rather the reverse.

(vi) Conclusion

239. We have concluded that Gascoigne Halman has failed to make out its contention that the One Other Portal Rule amounted to a "by effect" restriction. We reach this conclusion on the basis of the evidence adduced by Gascoigne Halman.

240. Given this conclusion, it is not necessary to balance the pro- and anti-competitive effects of the One Other Portal Rule in the relevant markets, and we do not do so in this Judgment. However, we do find these pro-competitive effects to exist.

(3) Objective necessity

241. Given our conclusions on the validity of the One Other Portal Rule, it is not necessary for us to consider whether, if it were otherwise to be judged illegal, the rule could nonetheless be regarded as objectively necessary. However, given that Agents' Mutual pleaded to this effect, and for the sake of completeness, we go on to consider this issue.

242. We have already referred to the essentially pro-competitive purpose, and likely effect, of the entry of OnTheMarket to the property portals market. Given that this central purpose is beneficial in competition terms, we have to consider

whether the One Other Portal Rule is strictly ancillary to that purpose and if so, whether it is no more than is necessary to achieve it and is proportionate in its terms.

243. As we have observed (see paragraph 181(2) above), the barriers to entry for a new portal are formidable, given the existence of strong network effects on the property portals market. We have discussed in detail in relation to the possible restrictive effects of the One Other Portal Rule that, seen as a means of market entry, it would be likely to increase competition in the property portals market, rather than reduce it as Gascoigne Halman claim. In our view, the factors that are relevant to that consideration apply with equal force to the question of whether the rule could be regarded as objectively necessary, as claimed by Agents' Mutual.

244. No matter how great the new portal's functionality or how impressive its presentation or user experience – it will not attract visits from the property-buying public unless it has properties for them to see; and it will not attract estate agent's listings without significant visits to the portal by the property-buying public.

245. The question for Agents' Mutual was how to achieve the "virtuous circle" between listings on OnTheMarket and viewings of those listings. Other property portals may have adopted different strategies, in the light of the circumstances then prevailing, but we consider that the only viable way Agents' Mutual could succeed in establishing itself as a portal was to attract estate agents and to encourage them to put their properties onto the new (rival) platform in a manner that was not altogether duplicative of listings on other portals. We do not consider that Agents' Mutual could simply hope that estate agents would shift their properties away from their existing portals: without some form of obligation to that effect, estate agents would simply duplicate their listings.

246. We therefore conclude that some provision obliging estate agents to de-list from some portals was necessary. We understand that Mr Springett's preferred course would have been to adopt an outright exclusivity rule and that this was

abandoned only because the Members of Agents' Mutual persuaded Mr Springett that an exclusivity obligation would deter estate agents from joining – they would not wish to abandon an established portal in favour of an untried newcomer. In these circumstances, necessity forced upon Mr. Springett a less onerous form of exclusivity obligation – namely, the One Other Portal Rule.

247. We do not have to decide whether an outright exclusivity rule would have been objectively necessary, as it was not the strategy adopted by Agents' Mutual. Instead, it chose semi-exclusivity in the form of the One Other Portal Rule.

248. We conclude that in the circumstances of this case, and the circumstances of the market as we have found them, and given the beneficial central purpose of the new property portal, this apparently restrictive provision was objectively necessary to achieve the purpose of market entry.

I. THE BRICKS AND MORTAR RULE

249. The only point arising in relation to this provision is whether the Bricks and Mortar Rule is a "by object" restriction. Gascoigne Halman at one stage advanced a "by effect" case, but did not pursue it at the hearing; Agents' Mutual did not contend that the provision was objectively necessary.

250. The relevant legal principles are set out in Section G(5) above. Again we have considered the rule as a horizontal agreement and as a vertical restraint.

251. Gascoigne Halman contends that the Bricks and Mortar Rule is an overtly protectionist provision seeking to deny non-bricks and mortar estate agents access to OnTheMarket. That is right, to the extent that only bricks and mortar estate agents can become members of Agents' Mutual. That is what the rules say.

252. The real issue for us is whether the provision is a "by object" infringement. On this, Gascoigne Halman's closing submissions were remarkably silent. Gascoigne Halman's closing submissions simply assert that this is a restriction by object.

253. We do not consider that Gascoigne Halman has demonstrated that the Bricks and Mortar Rule is, by its very nature, sufficiently harmful to competition as to obviate any need for an effect-based examination of the provision. We have reached this conclusion having considered both the nature and purpose of the restriction as well as its economic and legal context.

(1) Viewed as a horizontal restraint, the Bricks and Mortar Rule defines the class of person who can become a Member of Agents' Mutual. Its effect is to restrict the persons who can become a member of a mutual association seeking to establish a new portal. Essentially, the rule excludes two classes of person:

(i) Persons selling property without using the services of an estate agent.

(ii) "Online" estate agents, as we have described them in Section B(3) above.

(2) We note that OnTheMarket was intended not only as a rival to the incumbent portals, but as a portal that would appeal to a very specific type of estate agent – a "traditional" estate agent. Thus, the designers of OnTheMarket intended that it should have very few frills or "add-ons"; and should not be over-cluttered with data (like how long the property had been on the market or whether its price had been reduced).[70] In cross-examination of Mr Springett, Mr Harris sought to make much of this approach – suggesting that, in some way, Agents' Mutual was acting contrary to the interests of the property-buying public.[71] We regard that point as misconceived: portals are means whereby estate agents seek to sell properties that they have been instructed to sell. The listing on portals are advertisements, not objective information and we consider that estate agents are entitled to craft a portal to their specifications omitting material that they consider

[70] Springett 6, paras 5.24-5.28.
[71] Day 6/pp. 151-159.

does not help them sell. That is exactly what happened here. As Mr Springett said:[72]

> "I made the point to you yesterday that our proposition is geared to full-service agents so it would not have been as attractive in the market to those sorts of customers if we had, for example, taken new homes developers as a customer who are in the end vendors directly listing on some portals. So it doesn't follow just by admitting those categories would necessarily have helped us to build the business. In fact, we believed that our approach has been very appealing to that category of potential customer."

(3) Viewed in this light, the purpose of the Bricks and Mortar Rule becomes clear. It is intended to enable like-minded undertakings to combine to provide a service ancillary to their business that they all need in order to do their business.

(4) In our view, the Bricks and Mortar Rule has the purpose of defining the nature and scope of the business created by Agents' Mutual, rather than clearly having the object of harming competition from or as between those undertakings not covered by its terms. It might possibly have such an effect, but this has not been alleged by Gascoigne Halman, whose allegation is confined to saying this is a restriction "by object", and we make no finding in this regard.

(5) We decline to regard such a provision – particularly when contained in the rules of an undertaking that clearly has little or no market power – as anti-competitive "by object". Viewing the rule as a vertical restraint (ie, as between each Member and Agents' Mutual) leads to the same conclusion.

J. THE EXCLUSIVE PROMOTION RULE

254. It is necessary for us to consider whether the Exclusive Promotion Rule is a "by object" restriction. Gascoigne Halman did not advance a "by effect" case. Agents' Mutual contended that the provision was objectively necessary. The relevant legal principles are again set out in Section G(5) above.

[72] Day 7/p.87.

255. Again, Gascoigne Halman's closing submissions do little more than assert that the Exclusive Promotion Rule is a "by object" infringement, although the duration of the rule (which lasts for the entire duration of the Listing Agreement) was stressed.

256. We do not consider that the Exclusive Promotion Rule is properly to be characterised as a "by object" infringement, taking into account its duration. Applying the legal analysis we have previously outlined, we fail to understand how a provision whereby a new-entrant to a market is favoured in terms of advertising by its own members is anti-competitive by object, whether viewed as a horizontal or vertical restriction.

257. We do not consider, however, that the Exclusive Promotion Rule – if anti-competitive – could be justified as objectively necessary. There was no sufficient evidence before us to suggest that, if this rule had been abandoned from the Arrangements, Agents' Mutual would have been unable to launch or promote the Portal in the manner that it did.

K. THE COLLECTIVE BOYCOTT ALLEGATION

258. The Collective Boycott Allegation was originally pleaded in paragraphs 38 to 40 of Gascoigne Halman's Amended Defence. It amounted to an allegation that estate agents and/or Members of Agents' Mutual and/or Agents' Mutual had substituted practical co-operation as to the portals they would use for the risks of competition. In these terms, this allegation appears to amount to no more than an assertion that Agents' Mutual and/or its Members co-ordinated to establish in the market a new portal, OnTheMarket. For the reasons we have given in Section G(8) above, we find that such a co-ordinated approach to be not harmful and probably beneficial to competition (assuming, for this purpose, no deployment of the One Other Portal Rule).

259. That, we found, was the context within which the One Other Portal Rule had to be assessed for the purposes of competition law. For the reasons we have given, we find that:

(1) The One Other Portal Rule did not breach the Chapter I prohibition "by object": see Section H(1) above.

(2) The One Other Portal Rule did not breach the Chapter I prohibition by "effect": see Section H(2) above.

(3) The One Other Portal Rule, even if it were shown to restrict competition, was objectively necessary: see Section H(3) above.

260. We find Gascoigne Halman's case, as originally pleaded as we have described, to be untenable and we reject it. For the reasons we have given, in some circumstances horizontal co-operation even between competitors can be perfectly acceptable in competition terms; and the use of exclusivity requirements – like the One Other Portal Rule – can, as we have found, be similarly acceptable, either because competition law is not infringed at all (as here) or because an anti-competitive restriction is objectively necessary (as we would have found, had our conclusions on "by object" and "by effect" infringements been different).

261. During the course of the hearing, it became clear that Gascoigne Halman's Collective Boycott Allegation really amounted to a contention that there was a wider arrangement between estate agents and/or Members of Agents' Mutual and/or Agents' Mutual that Zoopla would be boycotted and Rightmove preferred when the time came for estate agents who were Members of Agents' Mutual to choose the "one other portal" they would subscribe to in addition to OnTheMarket.

262. The difficulty with this contention is that it is not borne out by the facts. Some Members undoubtedly preferred Zoopla over Rightmove. Indeed, one of the estate agents most active in the promotion of the Agents' Mutual venture – Mr Clive Rook (a North Eastern estate agent, and board member of Agents' Mutual) – himself clearly favoured Zoopla: see, for instance, paragraphs 86(1), 94(2) and 109 above. It is also the case that London estate agents favoured Zoopla over Rightmove: see paragraph 110(2) above.

263. We consider the contention that there was a consistent England and Wales-wide "boycott" of Zoopla to be unsupported by the facts. Mr Harris appeared to accept this was the effect of the evidence. Instead, Gascoigne Halman contended for a much more geographically specific set of boycotts, such that there was a decision in some areas to delist from Rightmove and in others to delist from Zoopla. At our invitation, Gascoigne Halman produced a schedule of the documents and communications relied upon by it in support of this allegation (the "Collective Boycott Annex"). It is this allegation that is set out in paragraphs 9 to 11 of Gascoigne Halman's closing submissions: namely, that there was a concerted practice between Members and Agents' Mutual and/or between Members with regard to which would be the "other portal" or (which, given the pre-eminence of Rightmove and Zoopla, is to put the same point differently) which portal Members would not subscribe to or not be the "other portal".

264. In considering the allegation as it was finally put by Gascoigne Halman, it is necessary and important to make a number of preliminary points:

(1) *Limited information.* For the reasons given in Section G(7), this is a case where, given the limited disclosure and the absence of competition authority review, we consider that we must tread extremely carefully. We have seen only a partial picture and – as we have described – Gascoigne Halman's case on this particular point has shifted. Had it been the case that we felt that the picture we were seeing was in some way materially incomplete, then we would simply have decided this point on the burden of proof, and dismissed the Collective Boycott Allegation on this ground. As it is, whilst we have no doubt that we are not seeing the whole picture, we also consider that the communications between estate agents in Section E are in themselves sufficiently clear and sufficiently complete to enable us to decide the point substantively, without simply relying on the burden of

proof, although we accept that we must proceed with caution given the evidential gaps we have noted.[73]

(2) *Material relied upon by Gascoigne Halman.* We refer to the communications described in Section E in greater detail below. We should, however, make clear that Section E references (albeit in chronological order, and not in the regional arrangement used by Gascoigne Halman) the communications relied upon by Gascoigne Halman in the Collective Boycott Annex.[74] We did not find the regional arrangement of materials used by Gascoigne Halman in the Collective Boycott Annex especially helpful: the context in which such communications took place was thereby lost. However, we have taken all of the material relied upon by Gascoigne Halman into account.

(3) *An implied allegation of deliberate breach of competition law.* On one level, the Collective Boycott Allegation contained within it an implied allegation that competition law was deliberately being breached. This was how matters were put to Mr Springett by Mr Harris in cross-examination. It is important that we reiterate the point made in paragraph 35(3) above. Whilst Mr Harris had the right to put these points to Mr. Springett, we have no doubt, having seen Mr. Springett in the witness box and heard his answers, as to the integrity of Mr Springett and the organisation that he ran. We reject any suggestion that Mr Springett or Agents' Mutual was simply tending to appearances and that the warnings against collective decision-making

[73] Gascoigne Halman asserted in the Collective Boycott Annex that had there been standard or specific disclosure on the Collective Boycott Allegation (a matter on which Gascoigne Halman made an unsuccessful application before Roth J), the position for Agents' Mutual would only have been further incriminating. We consider this assertion to be entirely speculative, and not one that is borne out by the communications that we have seen. There are no obvious gaps. We also stress our finding that we do not consider Agents' Mutual or Mr Springett to have acted anything other than honestly. To the extent Gascoigne Halman was seeking to suggest there had been some kind of "cover up" of "incriminating" material, we absolutely reject any such suggestion.

[74] We should say that Section E does not set out the content of the Collective Boycott Annex word-for-word. Some of the documents cited by Gascoigne Halman were not considered material; and there were other documents, not cited by Gascoigne Halman, that we did consider material. Section E thus represents our description of what was occurring. However, we should record that we took the view that the documents referenced by Gascoigne Halman in the Collective Boycott Annex formed the high-water-mark of Gascoigne Halman's case, and we therefore used the communications set out in the Collective Boycott Annex as the "spine" around which Section E was constructed.

by Agents' Mutual were for form's sake only. We conclude that if – in the communications that he saw (and that was the majority of those identified in Section E) – Mr Springett considered that there was a risk of an infringement of competition law, he would have taken further action. In other words, if the Collective Boycott Allegation amounts to a breach of competition law, then that breach was not a deliberate one, but one where the line drawn between competitive and anti-competitive conduct was crossed inadvertently.

(4) *The importance of time-frame.* One of the reasons a chronological ordering of the relevant evidence is so important is because estate agents approached the question of which portals to subscribe to in two stages:

(i) First, when considering whether to become a Member of Agents' Mutual. At this stage in the decision-making process, an estate agent would be entirely unfettered in deciding which portals to subscribe to. However, that estate agent would, we consider, be aware that the existence of the One Other Portal Rule in Agents' Mutual's offering might mean that choice about portals would have to be made in the future. We say "might" because it is perfectly possible that an estate agent might only subscribe to a single portal (whether Rightmove or Zoopla). In such a case, the estate agent's decision would be whether to subscribe to an additional portal. It would only be where the estate agent was subscribing (or, perhaps, saw an advantage in subscribing) to both Rightmove and Zoopla that the One Other Portal Rule would bite.

(ii) Secondly, having signed up to become a Member of Agents' Mutual, and having therefore subscribed to the One Other Portal Rule, what to do in light of the obligations this entailed? It is at this stage – having subscribed to OnTheMarket – that the choice between Rightmove and Zoopla became starker. This was not just for Members; as we have noted, one of the

pro-competitive effects of the One Other Portal Rule is that it created competition between Rightmove and Zoopla as to the remaining portal choice open to Members of Agents' Mutual, and Rightmove and Zoopla both approached Members with a view to persuading them to sign up with them.

(5) We do not regard the period prior to an estate agent becoming a Member of Agents' Mutual as being nearly as relevant to the Collective Boycott Allegation as is the period after Membership. This includes the period after letters of intent were signed. During this period, whilst the level of commitment of an estate agent was higher (at least in moral, if not legal, terms), the serious debate regarding the One Other Portal Rule began when that rule was legally effective. During this (pre-Membership) period, estate agents would have been evaluating the relative merits of at least three portals – Rightmove, Zoopla and OnTheMarket. Whilst there may have been consideration by agents, either singly or collectively, of possible options, accompanied by suitable warnings of the need to make any decision individually, questions of any actual boycott did not seriously arise.

(6) Communications between estate agents implies nothing. The mere fact that there were communications between competing estate agents says nothing about the correctness of the Collective Boycott Allegation. As we have explained, when seeking to negotiate down the price of a common cost (and we have found, as a fact, that the horizontal participation of estate agents in Agents' Mutual had this purpose) discussions between estate agents are permissible and not a breach of competition law.

265. These preliminary points frame the question. The question is whether, during the course of the post-Membership period, the Collective Boycott Allegation is made out. As to this:

(1) Taken out of context, there are a number of communications, which demonstrate discussion of which portal to stay with and which portal to drop, that might be said to be anti-competitive:

(i) Paragraph 76(1): "…Their plan is based on most agents initially dropping Zoopla to go with them…".

(ii) Paragraph 76(4)(iv): "…In our area this is likely to result in the demise of Zoopla…".

(iii) Paragraph 76(5)(iv): "…I would therefore propose for your consideration the following – every agent in the North East drops Rightmove…".

(iv) Paragraph 76(5)(v): "…We all know Keith Pattinson's view on Rightmove and I think following conversations with Clive Rook Clive may prefer the Zoopla option…"

(v) Paragraph 76(7): "…see if we can get critical mass of support to join up on launch and drop the other portals (except RM? To start with)…".

(vi) Paragraph 86(1): "…We are favouring Zoopla as is Clive Rook in the NE".

(vii) Paragraph 86(3): "…We will have to see what our agents group view is when we report back to them…".

(viii) Paragraph 86(4): "His group seem to be veering towards Z who will do a block deal…".

(ix) Paragraph 89: "…Agents' Mutual will require us to drop one portal and for us it's a no-brainer. Pity really as [Mr Notley] is a nice chap…".

(x) Paragraph 90(4): "Michael Hodgson…felt it was better for agents to split their take up between Zoopla and Rightmove as

[Agents' Mutual] would then be the only portal with 100% take up of properties from agents…".

(xi) Paragraph 90(5): "Zoopla are coming to see me next week with a view to making a presentation in September to NE owners of 150 – 180 offices".

(xii) Paragraph 91(3): "But is it OK for them to make a group decision to come off a specific portal…".

(xiii) Paragraph 93: "…in order that we could have a few discreet discussions with some of them in order to gauge the general consensus on which portal they are likely to retain…".

(xiv) Paragraph 94(2): "I had a good chat with Jon Notley (Zoopla) yesterday as preparation for our NE group meeting…".

(xv) Paragraph 94(10): "On the assumption that Rightmove will be the preferred second portal of choice unless Zoopla can come up with an exceptional offer…".

(xvi) Paragraph 94(11): "…Personally, I would ditch Rightmove."

(xvii) Paragraph 96: "…the agents present were all prepared to sign up to the Zoopla deal…".

(xviii) Paragraph 98: "…and hopefully all agree to which portals we will all come off as a group…".

(xix) Paragraph 100: "Much better for us if they leave Z."

(xx) Paragraph 105: "…the main talk was of dropping both (won't happen) or dropping Rightmove".

(xxi) Paragraph 106(1): "The North Devon Group talked of dropping both portals immediately."

(xxii) Paragraph 107(1): "At the meeting I very much expect us to determine which portal to retain…".

(xxiii) Paragraph 108: "The consensus is to keep Rightmove and give notice to Zoopla."

(xxiv) Paragraph 109: "Nearly all members in our area have committed verbally to Z…Central Durham Teeside staying with RM but most wish to stay Z".

(xxv) Paragraph 110(1): "…which portal are you dropping? We had decided to drop Rightmove but am now not so certain."

(xxvi) Paragraph 110(2): "…We are dropping Rightmove since we believe that Zoopla will serve our purpose far more effectively in the London area".

(2) As regards these communications:

(i) In a two-horse race, between Rightmove and Zoopla for the one other portal slot, we consider that it is artificial to differentiate between a conversation about "dropping" one portal or "staying" with another. In the context of the One Other Portal Rule, a decision (for example) to stay with Rightmove inevitably means dropping Zoopla; and a decision to drop Rightmove very likely (not inevitably, because an estate agent might, conceivably, drop both) means subscribing to Zoopla.

(ii) What is striking is the lack of consensus in the run-up to the launch of OnTheMarket. It is quite clear from the communications in Section E, that the One Other Portal Rule had, very successfully, "disrupted" the market and that Members were genuinely torn as to which other portal to subscribe to.

(iii) The disruptive effect of the One Other Portal Rule on the market is evidenced by the discussions that both Rightmove and Zoopla had with Members of Agents' Mutual. Naturally,

we accept that the disclosure in relation to these discussions is limited, but it is clear that:

(a) Certainly as regards Zoopla, these discussions were often collective discussions, between Zoopla and multiple estate agents. The evidence is less clear as regards both the participation and the content of the discussions between Rightmove and estate agents, but such discussions certainly did take place (see, for example, paragraphs 86(3), 94(5), 106(1) and 108 above).[75]

(b) These discussions were focused on each of Rightmove and Zoopla to persuade estate agents that Rightmove or (as the case may be) Zoopla should be the other portal. Again, we have less evidence about the content of the Rightmove discussions, but of this (at least) we are confident.

(3) Again, taken out of context, there are a number of instances that reveal, both before and after the launch of OnTheMarket, an awareness by Agents' Mutual and its founder members of the need to avoid a breach of competition law and a concern that each agent should reach an individual decision on which portal to join or not to join:

(i) Paragraph 76(5)(vi): "…There are competition law issues that you could be exposed to…Each individual firm must make its own independent decision…There must be no agreement between agents on these matters" (July 2013).

[75] The available evidence, which is very limited, suggests that Rightmove did not meet agents collectively, but relied on a one-one-on approach: see the email at paragraph 94(10) above which refers to Rightmove's "current position of not talking to agents in groups". We proceed on the basis that Rightmove's discussions were one-on-one.

(ii) Paragraph 76(5)(vii): "…However, as competitive firms, we all have to make our own decision as to which portal we withdraw from (i.e. what is right for our/your business)" (July 2013).

(iii) Paragraph 86(2): "…I am not able to give you any information about the intentions of the Board member firms as to their choice of 'other portal'. As you know, we must take care not to be seen to be leading a 'collective' boycott of an individual media owner…" (March 2014).

(iv) Paragraph 91(2): "…joint [negotiation] with other portals and choice of other portal are completely off limits for us" (June 2014).

(v) Paragraph 94(3): "…Ian Springett and AMP Board (as Clive well knows) don't want to be associated with agents' choice on portal preference…" (August 2014).

(vi) Paragraph 94(9): "…We are not assisting this in any way and reiterate our stance that individual firms should choose the other portal which will work best for their business alongside AM" (August 2014).

(vii) Paragraph 104: "…The easiest situation to sustain is where OTM agents choose to retain the portal they each consider to be strongest for their business…you should each choose the lowest risk option for your businesses" (October 2014).

(viii) Paragraph 106(2): "…we must avoid anything that would evidence collusion between agents or that AM is leading any kind of collective boycott…" (October 2014).

(ix) Paragraph 107(2): "…I will explain that as founding board members we have made a conscious decision, backed by legal advice, not to give any recommendations on which portal to select…".

(4) These efforts to stay on the right side of the line in competition law terms were supported by Mr Springett's written and oral evidence. For example:

(i) Mr Springett confirmed in his written evidence that:

(a) The presentations delivered by Mr Springett contained a final message to agents that "each firm must make its own independent decision" (see paragraph 75 above). Mr Springett emphasised the need for firms to take both the decision to join Agents' Mutual, and then the decision as to which other portal they would subscribe to, (if any), independently.

(b) When queries were raised by estate agents about the position of Agents' Mutual board members and their choice of "other portal", Mr Springett explained that he was not able to give any information about the intentions of any particular board member. Whilst board member agencies ultimately made announcements as to which other portal they were moving to, they did so as and when each agency had made its own decision and at a time that was appropriate for each individual board member.

(c) It had always been clear to Mr Springett, and he had always been very clear to others that, for competition law reasons, there could be no discussions or agreements regarding each agent's choice of alternative portal.

(ii) Under cross-examination by Mr Harris, Mr Springett emphasised on several occasions that he had repeatedly warned agents, on telephone calls and/or face-to-face, that they should act independently and take their own independent legal advice if necessary. In light of that, he had not seen fit to repeat the

warning in writing to agents, as Mr Harris suggested he ought to have done in several instances.

266. It need hardly be said that the Collective Boycott Allegation, in all of its forms, was strenuously denied by Agents' Mutual. In his oral closing submissions, Mr Maclean addressed the most important extracts listed in the Collective Boycott Annex and variously submitted that the extracts were either quite innocent, or were taken out of context, or were capable of being interpreted differently from the adverse interpretation placed on them by Gascoigne Halman. We have taken due account of these points.

267. We find that there is nothing wrong in Rightmove and/or Zoopla approaching estate agents (whether collectively or otherwise), nor in estate agents collectively negotiating with Zoopla and/or Rightmove. This is precisely the sort of collective discussion that can result in a beneficial reduction in estate agents' common costs (as we have described in Section G(8) above).

268. Equally, we see a serious and sustained effort by those promoting Agents' Mutual, and by Mr Springett in particular, to underline the need for individual rather than collective decisions on which portal to choose and an awareness of the potential legal pitfalls. We have explained why we regard Mr Springett as an honest witness, and we take his efforts in this regard as genuine and credible.

269. Viewed in this context, there is nothing in the Collective Boycott Allegation, and we reject it on the facts. The mutual undertaking that was Agents' Mutual inevitably involved discussions between Members. But, because of the effect of the One Other Portal Rule, a Member of Agents' Mutual tended also to be driven into discussions (some of them undoubtedly collective) with one, or probably both, of Zoopla and Rightmove, during the course of which the terms on which access to these portals were discussed and improved (to the advantage of estate agents and, inferentially, their customers).

270. It is clear that the Zoopla terms (the evidence regarding Rightmove is scant) being offered to estate agents were being offered on a "volume" basis: in order to benefit, a certain number of estate agents had to sign up. Inevitably, this

meant a certain level of group discussion, and it is this sort of discussion that the communications in paragraph 265(1) evidence. Obviously, the terms offered by Rightmove and by Zoopla would be relevant to the decision an estate agent would ultimately make as to which other portal to join. As regards Zoopla, at least, those terms, were, to a considerable extent, negotiated collectively. But, when the decision as to which should be the other portal had to be made, that decision, so we find, was taken individually. In other words, each estate agent, having before him or her Rightmove's and Zoopla's offerings (obtained, certainly as regards Zoopla, through the collective efforts of estate agents) then made an individual choice. There is nothing in the evidence to suggest that that individual choice was subverted. Accordingly, the Collective Boycott Allegation fails.

L. POSSIBLE EXEMPTION UNDER SECTION 9 OF THE CA

271. In the event that we found the One Other Portal Rule to infringe the Chapter I prohibition, Agents' Mutual contended that the provision was exemptible under section 9 of the CA (the text of which is reproduced in Annex 2).

272. Given our conclusion that the One Other Portal Rule does not infringe the Chapter I prohibition, it is not strictly necessary for us to deal with this point, but we do so for completeness and because we can do so relatively briefly.

273. The question of section 9 exemption was broached somewhat half-heartedly by Agents' Mutual. Very little time was devoted to the point, either in evidence or in submissions, and the point was not addressed at all by Mr Bishop.

274. Four cumulative conditions have to be met in order for section 9 to be engaged:

(1) The agreement – or the allegedly anti-competitive provision – must contribute to improving the production or distribution of goods or to promoting technical or economic progress.

(2) Consumers must receive a fair share of the resulting benefits.

(3) The restrictions must be indispensable to the attainment of these objectives.

(4) The agreement must not afford the parties the possibility of eliminating competition in respect of a substantial part of the production in question.

275. The burden of proof is – as *per* section 9(2) – on Agents' Mutual to establish that section 9 is engaged, and we find that Agents' Mutual has not discharged that burden. The four cumulative conditions of section 9 were never specifically addressed by Agents' Mutual. The manner in which the One Other Portal Rule contributed to improving the production or distribution of goods or to promoting technical or economic progress was never clearly articulated. This is another area where the absence of a full market assessment by a competent competition authority was most keenly felt by us. Even if we were able to infer some form of progress or improvement out of the objective necessity of the One Other Portal Rule (and we make no finding in this regard), there was no evidence before us of consumers receiving a fair share of these (unarticulated) resulting benefits. We find that section 9 is not engaged in this case.

M. SEVERABILITY

276. Given the conclusions that we have reached, it is also strictly unnecessary to deal with the question of the severability of the One Other Portal Rule, the Bricks and Mortar Rule and the Exclusive Promotion Rule.

277. However, because we were addressed on these points, we briefly deal with the question of whether these three provisions are capable of being severed from the rules of which they form a part.

278. We refer to these three provisions collectively as the "impugned provisions", although of course we have found that none of these provisions actually does infringe the Chapter I prohibition. As noted in paragraph 48 above, we refer to the rules of which the impugned provisions are a part – that is, the Articles, the Membership Rules and the Listing Agreement – as the Arrangements.

279. *Chitty on Contracts*[76] states at paragraph 16-213:

> "Although a number of authorities on the application of the doctrine of severance cannot easily be reconciled, it is submitted that two underlying principles have throughout guided the courts. First, the courts will not make a new contract for the parties, whether by rewriting the existing contract, or by basically altering its nature; secondly, the courts will not sever the unenforceable parts of a contract unless it accords with public policy to do so."

280. The second point identified by *Chitty* can be dealt with relatively quickly. This is not a case where the impugned provisions "taint" the rest of the Arrangements between Agents' Mutual and its Members. As *Chitty* notes,[77] the court's power to sever the bad from the good will only be exercised if this accords with public policy. Here, as we have found, the overall purpose of the Arrangements was pro-competitive: we consider that this is a case where, if severance of the impugned provisions could be effected, it should be.

281. Turning, then, to the first point identified by *Chitty*:

(1) We consider that each of the impugned provisions is capable of being "blue pencilled", in the sense that these provisions can be deleted from the Arrangements without causing the Arrangements to fail on a technical or mechanical level. Equally, we are satisfied that to do so would not involve re-writing the Arrangements.[78]

(2) As regards the Bricks and Mortar Rule and the Exclusive Promotion Rule, we consider these provisions to be collateral to the main purpose of the Arrangements. We do not consider that the striking out of these provisions would "alter entirely the scope and intention of the" Arrangements, to quote from *Attwood v. Lamont* [1920] 3 KB 571 at 580. We have no hesitation in concluding that they can be severed and, had we concluded that they infringed the Chapter I prohibition, we would have applied a "blue pencil" and severed them.

(3) The same does not, however, go for the One Other Portal Rule. We consider this to have been quite fundamental to the scope and intention

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[76] Beale (ed.), *Chitty on Contracts*, 32nd ed. (2015) ("*Chitty*").
[77] See paragraph 16-219.
[78] See *Chitty* at paragraph 16-214.

of the Arrangements, both as regards Agents' Mutual and its Members. We consider that even though the deletion of the One Other Portal Rule is mechanically and technically possible, its deletion fundamentally alters the nature of the Arrangements on which Members and Agents' Mutual contracted. Accordingly, had we found that the One Other Portal Rule infringed the Chapter I prohibition, we would have held that the rule could not be severed and that the entirety of the Arrangements were therefore tainted by illegality.

(4) Agents' Mutual contended that there was a link between the anti-competitive nature of the One Other Portal Rule and its severability as a matter of contract law. As to this:

(i) We have found that the One Other Portal Rule does not infringe the Chapter I prohibition, whether "by object" or "by effect". We have also found the rule to be objectively necessary. For this reason, the question of severability is academic.

(ii) We accept that, as a matter of construction, Agents' Mutual could without breaching its contractual obligations not implement the One Other Portal Rule in circumstances where the rule potentially breached competition law provided Agents' Mutual acted consistently towards its Members (see paragraph 195(6) above).

(5) However, the criteria that apply to contractual severability are not the same as those which determine whether there has been an infringement of competition law. If we are wrong on the points described in paragraphs 281(4)(i) and (ii) above then, applying these distinct criteria, we find the One Other Portal Rule not to be severable.

N. DISPOSITION

282. For the reasons we have given, it is our unanimous conclusion that the Competition Issues are to be determined against Gascoigne Halman. More specifically, we find and hold that:

(1) As regards the One Other Portal Rule:

(i) The rule does not infringe the Chapter I prohibition by object: see Section H(1) above.

(ii) The rule does not infringe the Chapter I prohibition by effect: see Section H(2) above.

(iii) The rule is, in any event, objectively necessary to the Arrangements as a whole, which are pro-competitive: see Section H(3) above.

(iv) The rule does not form part of a wider concerted practice to "boycott" Zoopla and is not invalid on that account: see Section K above.

(v) The rule is not an exempt agreement within the meaning of section 9 of the Competition Act 1998: see Section L above.

(vi) If, contrary to our conclusions, the rule does infringe the Chapter I prohibition, then it is not severable from the Arrangements: see Section M above.

(2) The Bricks and Mortar Rule does not infringe the Chapter I prohibition by object: see Section I above. If, contrary to this conclusion, the rule does infringe the Chapter I prohibition, then it is severable from the Arrangements: see Section M above.

(3) The Exclusive Promotion Rule does not infringe the Chapter I prohibition by object: see Section J above. If, contrary to this conclusion, the rule does infringe the Chapter I prohibition, we do not consider it to be objectively necessary. The Exclusive Promotion Rule is severable from the Arrangements: see Section M above.

283. Because the Competition Issues have been determined within the broader context of proceedings in the Chancery Division of the High Court, we make no further order beyond the determinations set out above.

The Hon Mr Justice Marcus Smith
Chairman

Peter Freeman CBE, QC (Hon)

Brian Landers

Charles Dhanowa OBE, QC (Hon)
Registrar

Date: 5 July 2017

ANNEX 1

TERMS AND ABBREVIATIONS USED IN THE JUDGMENT

TERM IN JUDGMENT	PARAGRAPH IN JUDGMENT WHERE THE TERM IS FIRST USED AND DEFINED
Agents' Mutual	1
Arrangements	48
ARPA	208
Articles	41(1)
BAGS	195(4)
BIDS	183(3)
BKA	200(4)
Bishop 1	38
Bricks and mortar estate agents	11
Bricks and Mortar Rule	3(2)
CA	3
Chapter I prohibition	3
Chesterton Humberts	22
CJEU	133
CLEA	66
CMA	112
Collective Boycott Allegation	3
Collective Boycott Annex	263
Competition Issues	4
Connells	13(1)
Corporates	13(2)(iii)
Countrywide	13(1)
DMGT	13(2)(ii)
Douglas & Gordon	22
Exclusive Promotion Rule	3(3)
Gascoigne Halman	2
Gascoigne Halman Letter of Intent	26
Gascoigne Halman Listing Agreement	42

Symons 1	35(1)
TDPG	13(2)(ii)
TFEU	133
Transfer Order	4
VABER	5(2)
Vertical Guidelines	5(2)
Webbers	105
Zoopla	13(2)(v)
ZPG	1

ANNEX 2

EXTRACTS FROM THE COMPETITION ACT 1998

2 Agreements, etc, preventing, restricting or distorting competition

(1) Subject to section 3, agreements between undertakings, decisions by associations of undertakings or concerted practices which -

(a) may affect trade within the United Kingdom, and

(b) have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom,

are prohibited unless they are exempt in accordance with the provisions of this Part.

(2) Subsection (1) applies, in particular, to agreements, decisions or practices which –

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

(3) Subsection (1) applies only if the agreement, decision or practice is, or is intended to be, implemented in the United Kingdom.

(4) Any agreement or decision which is prohibited by subsection (1) is void.

(5) A provision of this Part which is expressed to apply to, or in relation to, an agreement is to be read as applying equally to, or in relation to, a decision by an association of undertakings or a concerted practice (but with any necessary modifications).

(6) Subsection (5) does not apply where the context otherwise requires.

(7) In this section “the United Kingdom” means, in relation to an agreement which operates or is intended to operate only in a part of the United Kingdom, that part.

(8) The prohibition imposed by subsection (1) is referred to in this Act as “the Chapter I prohibition”.

...

9 Exempt Agreements

(1) An agreement is exempt from the Chapter I prohibition if it –

(a) contributes to –

(i) improving production or distribution, or

(ii) promoting technical or economic progress,

while allowing consumers a fair share of the resulting benefit; and

(b) does not –

(i) impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives; or

(ii) afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.

(2) In any proceedings in which it is alleged that the Chapter I prohibition is being or has been infringed by an agreement, any undertaking or association of undertakings claiming the benefit of subsection (1) shall bear the burden of proving that the conditions of that subsection are satisfied.