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5 record.

6 **IN THE COMPETITION**

Case No. : 1285/10/12/18

7 APPEAL TRIBUNAL

8 Victoria House,

9 Bloomsbury Place,

10 London WC1A 2EB

11 24 October 2018

12 Before:

13 **Heriot Currie QC, Sir Iain McMillan CBE, Paul Lomas**

14
15 (Sitting as a Tribunal in England and Wales)

16 **BETWEEN:**

17 **Electro Rent Corporation v Competition and Markets Authority**

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19
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27
28 **HEARING – Day 1**

APPEARANCES

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Daniel Beard QC & Alistair Lindsay (of Monckton Chambers) appeared on behalf of the Appellant

Marie Demetriou QC & David Bailey (both of Brick Court Chambers) appeared on behalf of the Respondent

1 Wednesday, 24 October 2018

2 (10.00 am)

3 Housekeeping

4 MR. BEARD: Mr. Chairman, members of the Tribunal, as you
5 will be aware this is an appeal by Electro Rent against
6 the decision to impose a penalty on it by the CMA.
7 I appear today with Mr. Lindsay. For the CMA,
8 Ms. Demetriou and Mr. Bailey appear.

9 Just to check, I think, on housekeeping, by the look
10 of the files behind you we are all in the same place; we
11 have bundles A, B1, B2, C1, C2, D and then two
12 authorities bundles which mine are labelled E1 and E2.
13 You have had skeleton arguments and you have had further
14 materials provided.

15 The plan and timetable for today is for there to be
16 brief openings and then we will move straight into
17 witness evidence. So without further ado, unless the
18 Tribunal has particular matters it wants to raise, I was
19 going to begin with our opening.

20 THE CHAIRMAN: Thank you, Mr. Beard.

21 There are just three matters, very brief matters
22 that I would like to raise.

23 First of all, for the transcribers we will need to
24 have break at 11.30 and 3.30 each for about ten minutes,
25 so if whoever is on their feet at the time could choose

1 a suitable moment at around those times.

2 The second point relates to confidentiality, and we
3 understand that there is going to be no request for any
4 information that comes out in evidence to be treated as
5 confidential, but if that is not correct perhaps you
6 could let us know.

7 The third and final point is that I am sure counsel
8 will cover this but at some point we would like to be
9 addressed on the issue of the standard review. It
10 appears to us that there may have been some narrowing of
11 the differences between the parties on this, it may be
12 that there is no practical distinction, but we would
13 like to be advised by the parties as to what test we
14 should apply to the decision that is being appealed
15 against.

16 Unless anybody else has any preliminary issues, we
17 should just proceed.

18 MR. BEARD: Yes. Just in relation to the second, whenever
19 a witness, certainly from our part, is going to be
20 proffered to give evidence, I will provide the general
21 warning that if any of their answers might involve
22 matters they consider confidential, they should indicate
23 before giving their response. I think that is the only
24 practical way to deal with these matters.

25 We think in relation to documentary material it is

1 very unlikely that there is going to be anything confidential
2 that we are going to
3 touch on.

4 THE CHAIRMAN: Thank you.

5 Opening submissions by MR. BEARD

6 MR. BEARD: I am grateful to the Tribunal.

7 In opening I am going to try and deal with matters
8 in essentially four stages.

9 I want to make one or two points about the way in
10 which the merger control background has operated in this
11 case. Secondly, I am going to look at some of the
12 relevant legal issues. Third, I want to explain why the
13 CMA decision as set out in the decision is wrong.
14 Fourth, I want to explain why the new reasons which are
15 apparently being put forward, which are not in the
16 decision, are inappropriate but are also wrong.

17 Those are the four points I am going to deal with,
18 and in doing so I am seeking to outline how the decision
19 itself, without any subsequent attempts to embellish or
20 develop it, is wrong. But as I say, I will also
21 explain why the further efforts and the admirable
22 contributions of lawyers subsequently have not assisted
23 the CMA in its defence.

24 Let us just turn to the first point, some background
25 on the merger.

1 The Tribunal will be familiar with the structure of
2 UK merger control: no compulsory notification, a two
3 phase investigation process. It used to be that phase
4 one was undertaken by the OFT and then phase 2 by the
5 Competition Commission, but since the merger occurred
6 that is all done internally within the CMA.

7 Now, the present case concerns a merger of two
8 companies who rent out testing and monitoring equipment,
9 what is referred as TME. Electro Rent, which has a very
10 small UK presence and a very large US one, and
11 Microlease a large EU presence and a small US one. As
12 per the ordinary process, the CMA considered whether it
13 might be the case that a relevant merger situation arose
14 which might give rise to a substantial lessening of
15 competition, an SLC, that is the phase 1 assessment; and
16 as is also part of the ordinary process, interim orders
17 were put in place to ensure that the process of
18 investigation and any remedies were not prejudiced.
19 I will come back to those matters in a moment.

20 The initial concerns identified in the phase 1
21 process related to the overlap between Electro Rent and
22 Microlease in the UK, and given that there were those
23 concerns that arose at the phase 1 process the merging
24 parties actually offered to divest the UK Electro Rent
25 business during the course of phase 1.

1 That was with a view to obtaining what is referred to
2 as undertakings in lieu of a reference to phase 2. The
3 divestment of the UK business was something that would
4 have meant that this merger did not even need to go to
5 phase 2.

6 Now as it was, for reasons unrelated to the
7 particulars of the deal for the sale of the UK business,
8 which had been agreed during the course of phase 1, the
9 purchaser was at the last minute unable to complete. So
10 undertakings in lieu by way of divestment of the UK
11 business was not possible and the merger was therefore
12 referred to phase 2 for a fuller and longer enquiry.

13 Of course, the culmination of this fuller enquiry
14 was essentially an affirmation on the part of the CMA of
15 its initial concerns about an overlap in the UK that it
16 needed to be remedied.

17 As you know, the CMA prefers structural to
18 behavioural solutions for a whole range of reasons,
19 including the long-term effectiveness of the remedies
20 and the lack of need for monitoring. So in the proposed
21 remedies in this case three were put forward, and it is
22 just perhaps worth picking up the possible remedies
23 notice. This is in the B1, tab 9, at page 164 it
24 begins. I am sorry, it is tab 7 at 164.

25 This is a possible remedies notice which accompanied

1 the provisional findings of an SLC by the Commission.
2 5 February 2018. You will see if you turn on to 166
3 "Structural Remedy", "Divestiture of Operations". 13:

4 "We would expect to require the divestiture of the
5 whole of one or other party, Microlease or Electro Rent
6 Europe, unless we are satisfied that an alternative
7 remedy will be fully effective."

8 In other words, just block the merger and cause it
9 to stop:

10 "At this stage the CMA has identified the following
11 structural remedies as being likely to provide
12 a comprehensive solution to the SLC and resulting adverse effects
13 it has found: requiring the divestiture of Microlease
14 and its subsidiaries; requiring the divestiture of
15 Electro Rent Europe."

16 Then:

17 "In the case of the remedy outlined in 13(b), in the
18 absence of agreed undertakings we would expect to
19 address an enforcement order to Electro Rent
20 Corporation."

21 That is the American holding -- the American parent
22 company. Then 15:

23 "It is also possible that the divestiture of
24 a narrower part of the parties' business, focused on the
25 UK, may be capable of providing a comprehensive solution

1 to the SLC [the substantial lessening of competition]
2 and the resulting adverse effects; for example, through
3 the divestiture of Electro Rent Europe NV's UK
4 business."

5 Which is referred to as "Electro Rent UK".

6 So here possible remedies were, effectively,
7 complete block, divestiture of Europe, divestiture of
8 the UK, being the possibilities that would meet the
9 concerns that had been identified in the provisional
10 findings.

11 I mention this because it is important context for
12 all of this discussion, especially if the CMA in its new
13 case is trying to run some argument that there was
14 a nefarious plot to mislead the Monitoring Trustee,
15 because that would just be a bizarre suggestion. If in
16 any way the UK business was in any way undermined such
17 that divestiture would not be an effective remedy, that
18 would not be acceptable to the CMA; and the consequence,
19 of course, would not be that the CMA would say "Never
20 mind, just carry on", the consequence would be a more
21 intrusive remedy would be put in place, and those more
22 intrusive remedies were specifically being contemplated
23 and, as we will see later, were continuing to be
24 contemplated through into the remedies working paper.

25 As I say, ultimately, if you cannot find, as the

1 CMA, an equally effective remedy, the deal will be
2 blocked and the whole thing stopped and unwound even if
3 it has been completed. The reason that this
4 particularly matters is that for Electro Rent and its
5 management they had every interest in ensuring that
6 Electro Rent UK was a viable option that would attract
7 purchasers, because if not the next worst alternative
8 was a requirement to sell all of the EU assets, and at
9 worst block the whole deal.

10 Now as we know, in the final report, and just for
11 your notes that is in B1 at tab 5, in the end the remedy
12 that was put in place was the divestment of the UK
13 business. That divestment involved support arrangements
14 being put in place with other elements of
15 Electro Rent's business.

16 That is just a little bit of background on the
17 merger itself and some of the considerations that arose
18 which are relevant to context.

19 Next I am going to pick up some of the legal
20 background, if I may, on the interim order and
21 directions.

22 The interim order is in various places but I am
23 going to take it from the core bundle A at tab 13, if
24 I may. I will try to refer to documents in the core bundle
25 just because it is easier to transfer things around but

1 I will need to go to other bundles.

2 This is in fact the order that was made at the
3 transition to phase 2, 7 November 2017, after that UIL
4 process, undertakings in lieu process, failed.

5 "Notice of making an interim order", and you will
6 see over the page at 2 a series of recitals setting out
7 some of the procedural history. Then 1 to 3 are dealing
8 with commencement application and scope. Then if we
9 turn to 4, because this is a provision that is relevant
10 to this case, 4 under the heading "Management of the
11 Electro Rent Corporation and Microlease businesses until
12 determination of the proceedings":

13 "Except with prior consent of the CMA, Electro Rent
14 Corporation, Electro Rent Europe, including its UK
15 branch ..."

16 Electro Rent UK was not a separate company, it was
17 treated as a sort of -- it was a branch operation:

18 "... or Test Equipment Asset Management Limited
19 shall not, during the specified period, take any action
20 which might prejudice the reference of the merger under
21 section 22 of the Act ..."

22 That is just the provision that requires
23 consideration of relevant merger situations:

24 "... or impede the taking of any action under the
25 Act by the CMA which may be justified by the CMA's

1 decision on such a reference, including any action which
2 might lead to the integration of the Microlease business
3 with the Electro Rent Corporation business."

4 So there what the gravamen of this prohibition is
5 dealing with is not allowing you to scramble the eggs,
6 as it is sometimes put, of the two businesses. Keep
7 them separate whilst this investigation is going on.

8 Then (b):

9 "[Do not] transfer ownership or control of the
10 Electro Rent business or the Microlease business or any
11 of their subsidiaries."

12 That provision has a number of functions, but in
13 particular it means that you cannot be shifting
14 companies out of the control of those that are under
15 investigation, which potentially could circumvent the
16 way in which merger control operates here.

17 Then (c):

18 "Otherwise impair the ability of the Microlease
19 business or the Electro Rent Corporation business to
20 compete independently in any of the markets affected."

21 So again, it is about maintaining the independence
22 of the business and not impairing their ability to
23 compete; making sure that during the course of the
24 investigation they remain viable competing businesses.

25 So preventing integration, preventing the transfer

1 of ownership, and stopping the impairment of the ability
2 to compete independently, separately.

3 Then 5:

4 "Further, and without prejudice to the generality of
5 paragraph 4 and subject to paragraph 3 [and paragraph 3
6 is just about things that had happened before the
7 relevant reference], Electro Rent Corporation
8 Electro Rent Europe, including its UK branch, and Test
9 Equipment Asset Management Limited shall at all times
10 during the specified period procure that, except with
11 the prior written consent of the CMA, the Microlease
12 business is carried on separately from the Electro Rent
13 Corporation business, and Microlease's separate sales
14 and brand identities are maintained."

15 So again, it is that maintenance of separation and
16 ensuring that the businesses work properly. (b):

17 "The Microlease business and Electro Rent
18 Corporation business are maintained as going concerns
19 and sufficient resources are made available on the basis
20 of their respective pre-merger business plans."

21 So again, it is do not undermine these independent
22 businesses continuing to operate.

23 "Except in the ordinary course of business, no
24 substantive changes are to be made to the organisational
25 structure of or the management responsibilities within

1 the Microlease business or the Electro Rent business."

2 (d):

3 "The nature, description, range and quality of goods
4 and services supplied in the UK are to be maintained and
5 preserved."

6 Again, it is all about not undermining these
7 businesses that must remain separate. Then (e):

8 "Except in the ordinary course of business for the
9 separate operation of the two businesses [so ordinary
10 course of business for their separate operation] all of
11 the assets of the Microlease business and the Electro Rent
12 Corporation business are maintained and preserved,
13 including facilities and goodwill."

14 So you have got to preserve assets, including
15 facilities and goodwill unless what you are doing is
16 just in the ordinary course of business, but ordinary
17 course of business not bringing them together, keeping
18 them separate. (ii):

19 "None of the assets in the Microlease business or
20 Electro Rent business are to be disposed of, save in the
21 ordinary course of business, and "no interest in the
22 assets of either is to be created or disposed of", save in
23 the ordinary course of business.

24 Then in (f) we see no integration of information
25 technology; so you cannot get on and in the background

1 integrate your IT systems, because that is the sort of
2 egg scrambling specifically that wants to be avoided.

3 (g):

4 "Customer and supplier lists of the two businesses
5 should be operated and updated separately."

6 Again, a specific manifestation of the no scrambling
7 of eggs.

8 (h):

9 "All existing contracts of the Microlease business
10 and Electro Rent Corporation business continue to be
11 serviced by the business to which they were awarded."

12 So no swapping out or transferring contracts.

13 Then (i), no changes are made to key staff; so that
14 is all about undermining the ability of these businesses
15 to continue to operate separately.

16 No transfers between the businesses of key staff; so
17 that is a combination of ensuring viability and
18 separation.

19 "All reasonable steps are taken to encourage key
20 staff to remain"; and I think it is common ground that in
21 fact in this case, as is often the case, key staff
22 retention packages were put in place in the course of
23 the investigation.

24 Then (l) is to do with business secrets, know-how,
25 intangibles, not being transferred between the company.

1 So separation and viability. That is 4 and 5.

2 Just to be clear, we spelled it out in our letter to
3 the Tribunal in relation to these matters, for the
4 purposes of this appeal we have not challenged the CMA's
5 finding that there was a breach of this order. The
6 reason we have not done that in particular is because we
7 can see that it is open to the CMA to conclude that
8 issuing the service of notice on the break clause was
9 not in the ordinary course of business and would
10 therefore be in breach of 5(e), even though Mr. Brown
11 himself thought otherwise and, subject to one
12 qualification, so did the Monitoring Trustee.

13 We do say that issuing break clauses and shifting
14 offices, that is done in the ordinary course of
15 business. No issue about that. Nothing out of the
16 ordinary course in that. But we recognise, and
17 Mr. Brown has stated, that it is clear that one of the
18 considerations Mr. Brown had in mind was actually
19 ensuring that there was flexibility for potential
20 purchasers, making the business potentially more
21 attractive to them.

22 We can see that technically that may not be in the
23 ordinary course of business because that consideration
24 only arises because you are facing the prospect of
25 investigation and remedial consequences in the merger

1 investigation. So we can see that that may technically
2 not be in the course of business, because if you have as
3 one of the factors in mind making the business more
4 attractive to purchasers, we can see that is not the
5 ordinary course. But, of course, that is profoundly
6 ironic because the concern is one to ensure that the
7 business is more saleable, not less.

8 Of course, as we have seen, what the directions are
9 intended to protect are the remedies process here,
10 i.e. the saleability, the viability, the independence of
11 the different businesses. So you can well see why, in
12 this case, our focus is not on breach, it is on
13 reasonable excuse in all the circumstances.

14 THE CHAIRMAN: Mr. Beard, can I just see if I have
15 understood this. Are you saying that in principle the
16 disposing of the lease would be in the ordinary course
17 of business, but because of a special subjective
18 intention of Mr. Brown you are conceding that in this
19 case it was not in the ordinary course of business?

20 MR. BEARD: It is not simply a matter of subjective
21 intention. We recognise that if you are disposing of
22 a lease in the course of this merger investigation, in
23 circumstances where that is being done for maintaining
24 the viability, we can see that there can be a breach of
25 the order 5, which is why we are not bringing the

1 challenge in relation to it. But we say precisely
2 because that was the thinking, and as we will come on to
3 in the other factual context, we say that does give rise
4 to a reasonable excuse in these cases.

5 Then if we move on through the order, 6 is requiring
6 that the companies and all of their subsidiaries will
7 comply. 7:

8 "Electro Rent Corporation shall provide to the CMA
9 such information or statement of compliance as it may
10 from time to time require for the purposes of monitoring
11 compliance by Electro Rent Corporation."

12 Then if we go on to 8:

13 "At all times ..."

14 I am sorry, I am not just going to read through all
15 of these:

16 "At all times Electro Rent Europe and Test Equipment
17 Asset Management shall actively keep the CMA informed of
18 any material developments relating to the business,
19 which includes but is not limited to [but here are the
20 particulars] details of key staff who leave or join, any
21 interruption in the businesses [so procurement,
22 production, logistic, sales and employee relations
23 arrangements], all substantial customer volumes won or
24 lost or substantial changes to customer contracts,
25 substantial changes in the businesses' contractual

1 arrangements or relationships with key suppliers."

2 Then if we go to 9, the companies again. If any of them:

3 "has any reason to suspect that this
4 order might have been breached it shall immediately
5 notify the CMA and any Monitoring Trustee that they may
6 have been directed to appoint."

7 So if they have any reason to suspect this order may
8 have been breached.

9 Then 10:

10 "The CMA may give directions to a specified person
11 or holder of a specified office to take specified steps."

12 The reason I just refer to that is that it is the
13 relevant order power under which the Monitoring Trustee
14 is appointed.

15 Then 11. The companies:

16 "shall comply insofar as they are able
17 with such directions as the CMA may from time to time
18 give to take such steps as may be specified or
19 described in the directions for the purposes of carrying
20 out or securing compliance with this order."

21 So 10 is the directions making power for the
22 appointment of a Monitoring Trustee, and 11 is the
23 obligation to comply with it.

24 Then if we go on to the directions themselves, which
25 are in the next tab, we will see at (1) which is on

1 page 3:

2 "Electro Rent must appoint a Monitoring Trustee in
3 order to: support the CMA taking any remedial action
4 which may be required to maintain the Electro Rent
5 business and the Microlease business as viable
6 businesses; monitor compliance by Electro Rent and
7 Microlease with the interim order."

8 Then 2:

9 "The Monitoring Trustee must act on behalf of the
10 CMA and be under an obligation to the CMA to carry out
11 his or her functions to the best of his or her
12 abilities.

13 "The companies [in 3] must co-operate fully with the
14 Monitoring Trustee."

15 Then at 4:

16 "The Monitoring Trustee must possess appropriate
17 qualifications and experience to carry out his or her
18 functions."

19 There is no issue on that in this case.

20 6:

21 "Electro Rent shall remunerate and reimburse the
22 Monitoring Trustee."

23 So it is Electro Rent that pays, even though the
24 Monitoring Trustee is acting on behalf of the CMA, as we
25 see back in direction 2.

1 Then 8, that appointment of the Monitoring Trustee
2 has to be approved by the CMA.

3 Then if we go to 9 we can see the functions of the
4 Monitoring Trustee: (a) ascertaining the current levels
5 of compliance; (b) assessing the arrangements made by the
6 companies for compliance; (c) identifying and
7 supervising, if necessary, the arrangements made for
8 ensuring compliance; (d) monitoring compliance; and (e)
9 without prejudice to the right of the companies to
10 contact the CMA, responds to any questions which
11 Electro Rent and Microlease may have in relation to
12 compliance with the interim order in consultation with
13 the CMA.

14 So that is the function of the monitoring that is
15 potentially relevant here.

16 Then we go on through to the obligations of
17 Electro Rent and Microlease. At 12, co-operation.

18 13:

19 "If Electro Rent and Microlease is in any doubt as
20 to whether any action or communication would infringe
21 the interim order it is required to contact the
22 Monitoring Trustee for clarification."

23 Obviously the clarification there is whether or not
24 it would be complying by way of the action or
25 communication that is of concern there.

1 14, in contrast:

2 "If Electro Rent and Microlease has any
3 reason to suspect that the interim order may have been
4 breached, it must notify the Monitoring Trustee and the
5 CMA immediately."

6 So if you have got reason to suspect breach of the
7 interim order you are under an obligation to contact the
8 CMA, and that of course reflects the terms of the
9 interim order that we saw earlier. But if you have
10 doubts as to whether or not -- if you simply are in any
11 doubt as to whether or not any action or communication
12 would infringe the order, then you are required to
13 contact the Monitoring Trustee for that clarification.

14 MR. LOMAS: Is it part of your case, Mr. Beard, that the words
15 "for clarification" in paragraph 13 give rise to a power
16 to the Monitoring Trustee to give binding
17 interpretations of the way the order operates?

18 MR. BEARD: No.

19 MR. LOMAS: Okay. Thank you.

20 MR. BEARD: Then 15 you have the reporting functions of the
21 Monitoring Trustee, and in this case there is a
22 preliminary report and then subsequent reports.

23 Then 18, I will just go on to. 18:

24 "The Monitoring Trustee must immediately notify the
25 CMA in writing if he or she forms a reasonable suspicion

1 that their interim order has been breached or if he or
2 she considers that he or she is no longer in a position
3 effectively to carry out his or her functions."

4 Then the Monitoring Trustee must give reasons for
5 that view. So there is an obligation there on the
6 Monitoring Trustee.

7 That is the legal background on the relevant
8 provisions of the interim order and directions, I think.

9 Just for completeness, it is probably appropriate to
10 take you to section 94A of the Act. Authorities
11 bundle 1, tab 1, page 77. I hope my notes are better
12 than the last reference notes.

13 This is obviously the relevant statutory provision
14 with which we are focused on this appeal. 94A:

15 "Where the appropriate authority [obviously that
16 here is the CMA] considers that a person has, without
17 reasonable excuse, failed to comply with an interim
18 measure [and the interim measures are those set out for
19 these purposes in the interim order] it may impose
20 a penalty of such fixed amount as it considers
21 appropriate."

22 Now, I apologise if these submissions are just
23 statements of the blindingly obvious, but the question
24 of imposing a penalty only arises where you have found
25 a breach, and what is being said here, and what

1 Parliament has provided for, is that the CMA cannot impose
2 a penalty where there is a reasonable excuse.

3 In fact, Parliament gave the CMA a discretion that
4 even if there is no reasonable excuse a penalty is not
5 required, because it uses the language of "may impose
6 a penalty". But as I say, it went further, it made
7 clear there must not be a penalty where there is
8 reasonable excuse; and Parliament specifically uses
9 a very broad term here, it is not delimiting the very
10 scope or nature of excuses, by using the term
11 "reasonable".

12 We do not think the CMA guidance glosses that or
13 tries to constrain the interpretation of the term
14 "reasonable" and the scope of excuses that can be
15 considered. If it does, it is plainly wrong; but we do
16 not think it does do that. Because the phrase
17 "reasonable excuse" itself -- well, in the skeleton the
18 CMA discusses rather refined distinctions between
19 knowledge and belief, which I am not sure are
20 necessarily instructive in these circumstances.

21 To us the question is tolerably simple: was the
22 excuse given reasonable? As I am sure the Tribunal is
23 well aware, that term "reasonable" is a broad one;
24 a wide range of excuses may be reasonable. It is
25 difficult to identify some precise authority in relation

1 to this, but I suppose an analogy can be drawn with
2 tests of reasonableness that are used elsewhere.
3 Famously, of course, they are used in the context of
4 judicial review, it is the language of the classic
5 *Wednesbury* threshold; a decision can be
6 overturned only if it is unreasonable in the sense of
7 being irrational. But, of course, reasonable decisions
8 in those circumstances normally cover a very wide range
9 of decisions. It will include an awful lot of decisions
10 that a court might disagree with, but that does not mean
11 the decision in question is unreasonable, you need
12 something more than that.

13 In this context I think it might be easier just to
14 put the point the other way. Unless the excuse in
15 question is unreasonable, no fine should be imposed.

16 This is important when we come to consider the CMA's
17 contentions about how it must have a wide margin of
18 discretion in relation to these matters and the Tribunal
19 must respect its judgment. Of course, it is the *cri de*
20 *coeur* of every regulator faced with a challenge that it
21 must have a wide margin of discretion and that must be
22 respected by the tribunal or court. It is the mantra in
23 the face of any judicial review. But of course here
24 it is all the wrong way round, because if the test is
25 one of reasonableness of the excuse, in fact what you

1 have to do is give the person who is potentially subject
2 to the penalty proper leeway.

3 The CMA may think the person got its approach wrong,
4 it could have done something better. That may well be
5 your assessment of the breach. But when it comes to
6 a penalty, you must recognise that there may be a range
7 of excuses, all of which are reasonable, even though you
8 think people should have done better.

9 So actually the statutory test is a relatively broad
10 one, which is intended to afford protection to the
11 potentially affected party. The CMA's assessment of
12 reasonableness is not one where the CMA should be
13 afforded a wide margin of discretion. That is not
14 surprising given the severity of the penalty which can
15 be imposed, and was imposed here, because of course for
16 the purposes of human rights considerations and fair
17 procedure considerations this is very much a criminal
18 penalty.

19 The CMA says the question of reasonableness is
20 a multi-factorial assessment. That may well be true,
21 but it does not put the CMA in a special position in
22 assessing what is reasonable in all the circumstances.
23 This is not market definition or assessment of diversion
24 ratios or even a decision on whether or not the interim
25 order was breached. It is an assessment where the

1 Tribunal can and must test the CMA's reasoning acutely.

2 One other matter which is perhaps obvious: in
3 assessing whether there is a reasonable excuse, insofar
4 as any findings of fact are concerned in these
5 circumstances, the accused must have the benefit of the
6 doubt.

7 That then takes me to my third point. I want to
8 look at the decision itself. The decision is found in
9 the core bundle A3, A, tab 3. The Tribunal will no
10 doubt be familiar with it already. I just want to focus
11 on paragraph 52.

12 The reason I want to focus on paragraph 52 is
13 because in this case what had happened was, as we will
14 see when we get more into some of the factual matters,
15 there had been a concern expressed by the CMA that the
16 issuing of the break clause notice did amount to
17 a breach, and that there were further enquiries made and
18 the CMA issued a provisional -- a proposed finding of
19 penalty in relation to that breach, and in those
20 circumstances Electro Rent responded to those
21 provisional findings, and those representations the CMA
22 says it has considered.

23 At 52 we see:

24 "The CMA has considered the response letter, the
25 written representations and the oral representations.

1 The CMA does not accept that Electro Rent has reasonable
2 excuse for failing to comply with the interim order, for
3 the following reasons ..."

4 The first reason, (a):

5 "Addressees of an interim order have a statutory
6 duty to comply with it."

7 Well, that is absolutely true, and that goes
8 squarely to the question of breach. It goes squarely to
9 the question of breach. But, of course, when you are
10 considering the issue of reasonable excuse, breach is
11 a given. This is not a relevant consideration for the
12 purposes of reasonable excuse. The fact that there has
13 been a breach is just what takes you to the point where
14 you are considering reasonable excuse. So the fact that
15 you have a statutory duty to comply with the interim
16 order is not telling you anything.

17 (b):

18 "The interim order required Electro Rent and not the
19 Monitoring Trustee to seek prior consent of the CMA
20 before issuing the notice."

21 What it is saying there is there was a breach here
22 because you needed to get the consent of the CMA because
23 the breach was not -- or the action of serving the
24 notice was not consistent with the interim order. So
25 again it is about the breach.

1 (c):

2 "Whilst merging parties may discuss queries and
3 questions concerning the interim order with the
4 Monitoring Trustee, the CMA has never told Electro Rent
5 that its obligations under the interim order are
6 affected by such discussions and there is nothing in the
7 interim order to suggest they are."

8 That is about the obligations under the interim
9 order again. That goes to whether or not there is
10 a breach.

11 (d):

12 "The Monitoring Trustee is required to act in
13 accordance with the instructions of the CMA to monitor
14 compliance with the interim order and to report to the
15 CMA. The Monitoring Trustee has no delegated authority,
16 express or implied, to give consent to any action not in
17 compliance with the interim order on behalf of the CMA
18 and there is nothing in the interim order, the
19 directions or the Monitoring Trustee's mandate to
20 suggest that there is."

21 We have no issue with that. No issue at all. That
22 is absolutely true. The Monitoring Trustee cannot cure
23 a potential breach. We know that. But again, that is
24 about breach. You needed to get consent if you were to
25 avoid a breach, if there was a breach.

1 (e):

2 "Electro Rent raised the proposed issuing of the
3 notice with the Monitoring Trustee, which suggests it
4 had formed the view which it was a matter which might
5 have roused the concern of the CMA. Accordingly,
6 Electro Rent ought to have known that the onus on it was
7 to seek the consent of the CMA or to seek legal advice."

8 Electro Rent raised the issue, as Mr. Brown has
9 explained, out of an abundance of caution, consistently
10 with the terms of the directions, direction 13. He did
11 not really have any doubts, he did not think there was
12 any compliance problem here, but out of an abundance of
13 caution he contacted the Monitoring Trustee, as he was
14 required to do.

15 The fact that you comply with those requirements
16 under the directions does not tell you anything about
17 whether or not you should have contacted the CMA in the
18 circumstances.

19 (f):

20 "Electro Rent understood the requirement to seek
21 prior consent from the CMA. It had previously sought
22 consent direct from the CMA before engaging in
23 activities which were potentially in breach of the
24 interim order."

25 That is absolutely true. Because it thought that

1 those activities would otherwise be in breach of the
2 interim order:

3 "On those occasions Electro Rent had not notified
4 the Monitoring Trustee about its intended course of
5 action and then relied on the Monitoring Trustee to
6 notify the CMA. Electro Rent ought to have suspected
7 that by not seeking the CMA's consent before issuing the
8 notice it was failing to comply with the interim order."

9 Suggesting that because they had sought consent
10 direct from the CMA previously, that suggested that they
11 knew in this case they should have done so does not tell
12 you about whether or not, in these circumstances, what
13 was done in complying with direction 13 was somehow
14 inappropriate. Not at all. What is perhaps most
15 remarkable is when you go on through (f):

16 "Electro Rent ought to have suspected that by not
17 seeking the CMA's consent before issuing the notice it
18 was failing to comply with the interim order. Although
19 Electro Rent contacted the Monitoring Trustee prior to
20 issuing the notice, this does not amount to a reasonable
21 excuse for non-compliance with the interim order."

22 Electro Rent contacted the Monitoring Trustee prior
23 to issuing the notice, this does not amount to
24 reasonable excuse. Contacting the Monitoring Trustee
25 does not amount to reasonable excuse.

1 Of course, what is remarkable about this is it says
2 nothing about what the Monitoring Trustee said on
3 contact. It completely ignores that. That is of the
4 essence of the position that was put forward, and
5 continues to be put forward, as to why it is that
6 Electro Rent did have a reasonable excuse in these
7 circumstances.

8 That failing in this critical passage, the gravamen
9 of the decision, is enough to wholly undermine it. It
10 is not sustainable. This decision is not sustainable
11 because it has simply ignored in the relevant legal
12 assessment what was actually said by the Monitoring
13 Trustee to Electro Rent.

14 Now it is interesting that in the defence --
15 paragraph 82(f)(ii), I am just giving you this for your
16 notes, which is bundle A, tab 5, page 22 -- it says you
17 can read through the whole of the -- you should look at
18 these things in the round, look at the whole of the
19 analysis, look at the whole of the decision.

20 You can look at the whole of this reasoning section,
21 you will find no mention of what the Monitoring Trustee
22 actually said to Electro Rent. With respect to the CMA,
23 that is an abject failure of reasoning. It is plainly
24 failing to take into account a highly relevant
25 consideration. It is patently inadequate reasoning not

1 to have taken that matter into account. Indeed, there
2 is only one passing reference to the response of the
3 Monitoring Trustee, that is actually in the executive
4 summary, but ironically the executive summary does not
5 actually reflect the reasoning in the remainder of the
6 decision.

7 So (f) is fundamentally flawed.

8 (g):

9 "Arguments as to whether Electro Rent has complied
10 with the directions are not relevant because the CMA has
11 not alleged that Electro Rent has failed to comply with
12 the directions."

13 Not relevant. The directions are put in place in
14 relation to the Monitoring Trustee that require
15 Electro Rent, if it has any doubts, to contact the
16 Monitoring Trustee for clarification if it is concerned
17 that any action or communication could infringe. That
18 is not relevant, they say. That again is irrational.
19 It is abject failure of reasoning.

20 You cannot say that complying with directions that
21 you have specifically put in place is irrelevant to the
22 question of reasonable excuse. We accept that it does
23 not absolve a breach, but it is plainly relevant to the
24 question of reasonable excuse.

25 (h):

1 "Arguments as to whether Electro Rent had reasonable
2 commercial rationale for wanting to issue the notice are
3 not relevant to whether or not it had reasonable excuse
4 for failing to comply with the interim order."

5 Not relevant. Again, we say that is irrational and
6 failing to take into account a relevant consideration.
7 Because if there was good commercial reason to issue the
8 notice, to maintain the flexibility of the business, to
9 ensure that it operated separately but would be
10 attractive to purchasers, that is relevant to the
11 question of whether or not there was reasonable excuse,
12 in circumstances where we look at the whole of the
13 structure of the interim order and the directions, and
14 that is precisely what they are intended to protect.

15 Then we have the citation of guidance:

16 "Guidance states the CMA will consider whether
17 a significant and genuine and/or unforeseeable event or
18 an event beyond the company's control has caused
19 a failure to comply and the failure would not otherwise
20 have taken place. There is nothing to suggest any such
21 event occurred here which would have prevented
22 Electro Rent from being able to comply with its own
23 obligations under the interim order."

24 Insofar as it is saying that there is no genuinely
25 unforeseeable or unusual event, we are not in that

1 territory.

2 MR. LOMAS: Mr. Beard, can I just understand how far your
3 point on (h) goes.

4 MR. BEARD: Yes.

5 MR. LOMAS: It is hypothetical, and do not assume anything
6 else, but suppose the order said "Do not do X",
7 absolutely black and white, "Do not do X", and the
8 recipient of the order thought that X is nevertheless
9 a thoroughly good business idea; that would not,
10 presumably, amount to reasonable excuse if they went
11 ahead and did X without consent, would it?

12 MR. BEARD: The motivation for someone doing something must
13 be a relevant consideration in these circumstances where
14 you are considering relevant excuse. It clearly would
15 not absolve you from the breach, and it may well not be
16 sufficient in all the circumstances if you did have such
17 a clear provision to give you a finding of reasonable
18 excuse in the circumstances. But what is said here is
19 that those issues are irrelevant to the consideration,
20 and we say that is wrong.

21 So we say that the reasoning in this decision is
22 fundamentally flawed as it stands, and that really
23 should be the end of this case, we do not need to go
24 into lots of evidence. But as I will outline, if we do,
25 it does not help the CMA.

1 Before I do that, I want to pick up authorities
2 bundle 1, tab 3 now. I am just going to pick it up at
3 77. This was actually a case about admission of
4 evidence but it is the observations of the then
5 president of the Tribunal, Sir Christopher Bellamy at 77
6 and 78 that are instructive.

7 He is saying that where you are bringing an appeal
8 on the merits the appellant must have opportunity to
9 adduce new evidence. That is perfectly proper in the
10 circumstances, because that is the structure of the
11 appeal on the merits regime that he was dealing with.

12 In 77:

13 "We doubt, however, whether exactly the same liberal
14 approach to the submission of new evidence can be
15 applied to the director. In our view, the exercise of
16 discretion to allow new evidence for the director at the
17 appeal stage should take strongly into account the
18 principle the director should normally be prepared to
19 defend the decision on the basis of the material before
20 him when he took the decision. It is particularly
21 important that the director's decision should not be
22 something that can be elaborated on, embroidered or
23 adapted at will once the matter reaches the Tribunal.
24 It is a final administrative act with important legal
25 consequences which in principle fixes the director's

1 position.

2 In our view, further investigations after the
3 decision of primary facts in an attempt to strengthen by
4 better evidence a decision already taken should not be
5 countenanced. Were it otherwise, the important
6 procedural safeguards envisaged by rule 14 of the
7 directors' rules [that is the rule that later became the
8 statement of objections rule] would be much diminished
9 or even circumvented altogether. There would be a risk
10 that appellants could be faced with a moving target.
11 The Tribunal itself would be in difficulties if instead
12 of determining the appeal essentially by reference to
13 the merits of the decision, in the light of the material
14 relied upon by the director at the time, the Tribunal
15 was effectively adjudicating on a bolstered version of
16 the decision. The director himself concedes he cannot
17 make a new case before the Tribunal."

18 We say that is correct.

19 Now, we recognise that, of course, because the test
20 that you are applying here is whether or not the
21 decision was wrong, you do accept evidence, you do hear
22 evidence; and of course in giving your judgment you can
23 have regard to that evidence. But that does not mean
24 that the CMA can create a new decision where the
25 reasoning for its decision is fundamentally different

1 and fundamentally flawed, because if you do that you are
2 undermining the process of ensuring that there is proper
3 engagement through provisional notices of penalty,
4 opportunities to give full written and oral
5 representations, and you are not facing a moving target
6 in relation to a criminal penalty.

7 Indeed, the CMA itself, in its defence at
8 paragraph 70, emphasises that you are not determining
9 the issue afresh.

10 So we say the decision is wrong. Its reasoning
11 fundamentally does not stack up. We should be provided
12 with the same right as we had before if the CMA wishes
13 to pursue any case, that there would need to be a new
14 further decision that would enable us to put forward new
15 evidence and respond. It is not adequate for them to
16 engage in developing a moving target case.

17 THE CHAIRMAN: Can I just ask you, Mr. Beard, about that.

18 MR. BEARD: Yes.

19 THE CHAIRMAN: Is the issue between you and the CMA on this
20 particular point whether the CMA is, as you put it,
21 seeking to buttress its decision with new material or
22 whether what the CMA is relying on is material intended
23 to rebut factual evidence that you have adduced? Is
24 that the issue?

25 MR. BEARD: We say that of course the CMA can rely on

1 rebuttal evidence. We accept that. What it cannot do
2 is take that rebuttal evidence and try and turn it into
3 a new case. So there are plainly limits on how far that
4 can go, and we say, given the nature of the decision
5 that I have just traversed, it is well outside those
6 limits with what we understand to be the new parameters
7 of the case that it is putting forward. We are not
8 saying it cannot put forward rebuttal evidence, and we
9 recognise that this Tribunal hears evidence and must
10 take it into account. We recognise that, of course.
11 But we must not lose sight of the emphatic and clear
12 statement, accepted by the director at the time, that
13 they have to stand by their decision as they set it out,
14 because that is the basis on which you bring an appeal.

15 THE CHAIRMAN: Thank you.

16 MR. BEARD: Very briefly, I am going to just deal with what
17 we understand the new case to be, although it is
18 somewhat fluid and it is not entirely clear what is
19 being said.

20 It seems to be that even if it was the case that
21 Electro Rent followed the correct procedure and had the
22 Monitoring Trustee clarify that he did not consider that
23 there was any doubt that the conduct in question was
24 compliant, and that that could constitute in principle
25 reasonable excuse, that excuse is not open here to

1 Electro Rent. Why? It seems to be their case that they
2 say it is completely obvious that exercising the breach
3 clause and serving notice would constitute a breach.

4 The CMA, just in outline, and I will come back to
5 these points insofar as they are relevant in closing,
6 has three particular problems with that.

7 First, if that was true, it was plainly something
8 that the CMA was aware of at the time of the decision
9 and chose not to rely upon. It is wrong to allow the
10 CMA to rewrite its decision in that regard on the hoof.

11 Second, there were --

12 THE CHAIRMAN: Sorry to interrupt, Mr. Beard, before you go
13 on to the second.

14 MR. BEARD: Yes.

15 THE CHAIRMAN: If you go back to the CMA decision.

16 MR. BEARD: Of course.

17 THE CHAIRMAN: Paragraph 52(f).

18 MR. BEARD: (f), yes.

19 THE CHAIRMAN: Six lines from the beginning of (f), the CMA
20 in their decision say this:

21 "Electro Rent ought to have suspected that by not
22 seeking the CMA's consent before issuing the notice it
23 was failing to comply with the interim order."

24 Is that not at least some notice of the point that
25 you say, your first point, it was obvious the break notice

1 would constitute a breach?

2 MR. BEARD: No, we do not accept -- in these circumstances
3 we do not accept that that is adopting the point of
4 obviousness. If and insofar as it was being said that
5 the breach was so obvious that it was entirely
6 unreasonable not to have notified that, one would have
7 expected that to have been spelt out very clearly.
8 "Ought to have suspected that not seeking consent" is
9 dealing with a threshold of suspicion, and what is now
10 being said, so far as we understand it, is that the
11 position should have been obvious to Electro Rent, not
12 that it just should have suspected.

13 THE CHAIRMAN: Thank you.

14 MR. BEARD: Paragraph 39, Mr. Lindsay highlights to me.

15 "It should have been obvious" is the test, not
16 "should have suspected", which is what they are putting
17 forward now.

18 In essence, saying it ought to have suspected is
19 just saying: you ought to have had doubts in relation to
20 these matters, and sufficient doubts that you were
21 required to notify.

22 As I say, that is only the first point I am raising
23 here. The second is that there were very good reasons
24 why Electro Rent did not think it would be in breach,
25 and fundamentally because it would not prejudice

1 anything that was being considered by the CMA or indeed
2 the remedies being considered by the CMA. In fact, it
3 was considered it would assist any divestment process,
4 in particular for the Electro Rent UK branch.

5 The third point about the obviousness is, of course,
6 that the experienced Monitoring Trustee clearly thought
7 the same, he did not think it was obvious; and these
8 points will fully answer any CMA alternative case if it
9 is permitted to pursue it.

10 Of course, they then say: ah, but you did not give
11 accurate information to the Monitoring Trustee, so you
12 cannot rely on what he said; you got the notice period
13 wrong, you did not disclose that Mr. Colley was advising
14 you, you said it was reversible when it was not, you did
15 not mention that serving the break clause would disrupt
16 staff.

17 None of those points are good. I will briefly
18 take them in turn, because you will hear witness evidence on
19 them, so I will make further points in closing, but
20 I can cover off some of the key points now, and we say
21 these key points dispose of these new lines in any
22 event.

23 As for the wrong notice period, this point was
24 well-known to the CMA when it made its decision and was
25 not relied upon. This is not a case of new issues

1 coming out in the course of proceedings. The CMA should
2 not be permitted to rely on reasons that they could have
3 relied upon at the time and chose not to.

4 In any event, the CMA is missing the point here.
5 The Monitoring Trustee's reasoning in responding was
6 about the positive benefits of serving the break clause
7 notice. The length of that notice period does not
8 affect that fundamental issue. The fact that the notice
9 could have been issued later does not alter what was
10 being said, that issuing it was not a problem because it
11 did not undermine separation and it did not undermine
12 viability, and of course none of that is time-specific.

13 THE CHAIRMAN: You are beginning to encroach upon your
14 learned friend's time.

15 MR. BEARD: I am going to be two more minutes. I am sorry.
16 I started a couple of minutes late. I will try and wrap
17 up very briefly.

18 Second on Mr. Colley, the source of the error may
19 have been him in the end, but it does not change the
20 nature of the error that was made. The same point was
21 being made in relation to the notice period.

22 If the CMA is trying to impugn Mr. Colley as some
23 kind of eminence grise manipulating affairs in the
24 background, that would be wholly unjustified, unpleaded,
25 unevidenced and wrong. It would plainly be unfair to

1 proceed with that sort of new case.

2 But in any event, it only takes a moment's thought
3 to realise how bizarre such a suggestion might be. If
4 Mr. Colley was interested in any bidder buying the UK
5 business, it would not be in his interest to risk
6 jeopardising that potential remedy.

7 Thirdly, on reversibility, again it is something
8 about which the CMA had all the relevant materials at
9 the time of the decision but decided not to take them
10 into account. It is clear that all that what Mr. Brown
11 was talking about was commercial reversibility, either
12 non-compliance being accepted by the landlord or
13 renegotiation, indeed it is frankly hard to understand
14 what else reversibility could mean, and in any event
15 issues as to reversibility do not undermine the basic
16 position taken by the Monitoring Trustee, that he had no
17 concern about the service of the break clause. If it
18 was not problematic, this changed nothing. If it had
19 been problematic, then the ease with which it could be
20 unwound did not render it unproblematic, it just meant
21 that the solution was easier to find.

22 Fourth, on disruption of staff, it is just an error.
23 Mr. Brown has explained that he did not want to risk any
24 increased disruption to staff, so he was not going to
25 talk to them about the break clause service immediately.

1 What he did not tell the Monitoring Trustee was the
2 steps he was taking to ensure that there was not any
3 risk to staff being disrupted. It is simply mystifying
4 how not telling the Monitoring Trustee that you were
5 doing something to make sure there was not any risk,
6 even any risk of adverse effect, could mean that his
7 observations about the service of notice somehow had no
8 weight, could not be relied upon or were irrelevant to
9 issues of reasonable excuse.

10 The truth is that this CMA decision is profoundly
11 unsound.

12 Although there has been an attempt elegantly to
13 embellish and develop it by reference to the materials
14 before this Tribunal, there is not some other whole
15 story here. The CMA knew the story at the time, they
16 chose to ignore it and relied on other reasons. Those
17 reasons were unsound and the new story does not help
18 either.

19 I have focused so far only on ground 1. In relation
20 to ground 2 we have set out our position in relation to
21 the exorbitant nature of the penalty in any event.

22 I will deal with this further in closing but I would
23 invite the Tribunal to look in particular at
24 paragraphs 82, 85, 86 and 88 of our notice of appeal.

25 Unless I can assist the Tribunal further, those are

1 the opening submissions of Electro Rent.

2 THE CHAIRMAN: Thank you, Mr. Beard.

3 MS. DEMETRIOU: Mr. Chairman, I think you said 11.30 would
4 be an appropriate time for the break for the
5 transcribers, is that correct?

6 THE CHAIRMAN: Yes, if that suits you.

7 (11.05 am)

8 Opening submissions by MS. DEMETRIOU

9 MS. DEMETRIOU: That is fine with me.

10 Mr. Chairman, members of the Tribunal, you have
11 heard Mr. Beard confirm that Electro Rent does not
12 challenge in this appeal the CMA's finding that service
13 of the Break Notice was a breach of the interim order,
14 and so it follows of course that the CMA's decision in
15 that respect is binding.

16 Electro Rent's argument is that it nonetheless had
17 a reasonable excuse for that breach, namely that
18 Mr. Brown, on behalf of Electro Rent, sought advice from
19 the Monitoring Trustee who stated, on Mr. Brown's
20 account, that it would be fine to serve the
21 Break Notice.

22 The CMA's case is that this did not constitute
23 a reasonable excuse, and I want to summarise very
24 briefly first of all why the CMA says that.

25 First of all, leaving aside the other provisions of

1 the interim order which were also breached, it is
2 crystal clear on the face of paragraph 5(e) of the
3 interim order that the CMA's consent was required before
4 disposing of any interest in the lease.

5 The Tribunal has seen that provision already,
6 Mr. Beard took you to it, but it is at bundle A, tab 13,
7 and you will recall that paragraph 5(e), which is on
8 page 4, states that:

9 "Except in the ordinary course of business, all of
10 the assets of the Microlease business and the
11 Electro Rent Corporation business are maintained and
12 preserved, including facilities and goodwill, none of the
13 assets are disposed of and no interests in the assets
14 are disposed of."

15 We say that it is as plain as a pikestaff on the
16 face of that provision that disposing of the interest in
17 the lease, issuing the Break Notice and therefore
18 disposing of the interest in the lease, falls within the
19 scope of that provision and therefore required the CMA's
20 consent.

21 Now this is not a case, we say, on which views might
22 reasonably differ. One can envisage that there are
23 cases where action is taken which might be action which,
24 outside a merger context, might be taken in the ordinary
25 course of business, and there is then a debate as to

1 whether or not this does something to preempt some
2 remedy that the CMA might take. But this is not that
3 kind of case. This is a case where the breach of
4 paragraph 5(e) is plain. That paragraph itself is very,
5 very clear and its application to the facts of this case
6 is very clear.

7 If that were not enough -- and just pausing there --
8 the suggestion that Mr. Beard tried to convey in his
9 opening, that the interim order is all about, or I think
10 he said the gravamen of the interim order is all about
11 preventing someone from scrambling the eggs, we say that
12 is only half of the picture, because the remaining half
13 of the picture is exemplified by paragraph 5(e), and
14 there are other paragraphs that address it too, and that
15 is concerned with ensuring that any possible remedies
16 that the CMA might take are preserved, and that requires
17 the viability and competitiveness of each of the
18 undertakings or constituent elements to be preserved.

19 Now if the plainness and the obviousness of the
20 breach were not enough, the context in which this
21 Break Notice was served makes it all the more
22 unreasonable that Electro Rent did not seek the CMA's
23 consent. That is because two days, just two days before
24 service of the Break Notice the CMA had issued its
25 remedies working paper, and one of the three remedies

1 that was proceeded was the divestiture of Electro Rent's
2 UK business. That was the remedy, as Mr. Beard said,
3 and this is common ground, that Electro Rent wanted,
4 that it was pressing on the CMA to adopt.

5 The CMA had made it clear in the remedies working
6 paper, and in the notice of possible remedies earlier,
7 that divestiture of Electro Rent's UK business would
8 have to include the lease to its premises, and
9 Electro Rent could have been in no doubt whatsoever
10 about that fact.

11 Indeed, its own proposal, and I will take you to
12 this perhaps in closing, its own proposal to the CMA,
13 its own remedies proposal, expressly stated that
14 divestiture of the UK business would include the lease
15 to the Sunbury premises.

16 So the CMA says that it should, therefore, have been
17 obvious that terminating the lease would affect that
18 remedy, the divestiture package, and therefore the
19 remedy being contemplated by the CMA and being pressed
20 on the CMA by Electro Rent itself. In those
21 circumstances, Electro Rent should have sought written
22 consent from the CMA.

23 Now, if the Tribunal has open the CMA's decision at
24 tab 3 of bundle A, you will see at paragraph 50, which
25 is on page 15, reference to the *ICE Trayport*

1 decision judgment of this Tribunal.

2 There are two paragraphs which are very illuminating
3 in the context of this case. We have the whole
4 authority in the authorities bundle, but for present
5 purposes I need only refer you to these excerpts.
6 Paragraphs 220 and 223.

7 The CMA was there considering compliance with an
8 interim order, and after discussing the importance of
9 interim orders in the context of merger investigations,
10 said that:

11 "The interim order catches more than just actual
12 prejudice or impediments, which is why the onus is on
13 the addressee of the interim order to seek consent from
14 the CMA if their conduct creates the possibility of
15 prejudice or an impediment."

16 Then at 223:

17 "Where an IEO has been issued, it is incumbent on
18 parties to take a carefully considered view as to
19 whether their conduct might arouse the reasonable
20 concern of the CMA that the agreements that they reach
21 are significant enough that they might prejudice the
22 reference or impede justified action."

23 That is in the factual context of that case. I am
24 not seeking to draw a direct analogy, but what we do
25 gain from this discussion here in the Tribunal's

1 judgment, what we do gain from it is the finding by the
2 Tribunal that a party has to be very careful when
3 considering whether action that it is proposing to take
4 might breach the interim order, and if they think it
5 might breach the interim order they should be contacting
6 the CMA and seeking consent.

7 We say that in this case the threshold of
8 "reasonable suspicion" or "might breach" is amply
9 surpassed because of the clear wording of
10 paragraph 5(e). So we do not have to show that it was
11 obvious, but we say in this case it should have been
12 obvious, it should have been obvious to Electro Rent
13 that serving the Break Notice was a breach.

14 In those circumstances -- in those circumstances --
15 it should have been obvious to Electro Rent that it was
16 required to seek the CMA's consent, and in those
17 circumstances it is not a reasonable excuse to rely on
18 the views of the Monitoring Trustee without seeking
19 consent from the CMA.

20 In a sense this tallies with a question that
21 Mr. Lomas put to Mr. Beard in opening, and I think the
22 question, I think I am recollecting it properly,
23 Mr. Lomas put to Mr. Beard, that if the order is clear
24 on its face that some particular action is prohibited,
25 which we say is the case here, and then a person comes

1 along and says, "I thought it was a good idea anyway",
2 could there be a reasonable excuse in those
3 circumstances? What the CMA has found is we are in
4 those circumstances and no, the answer is no, there is
5 no reasonable excuse on the circumstances of this case.

6 It might be that in some other hypothetical case
7 what happens is that it is not crystal clear on the face
8 of the order whether the action is a breach or not, and
9 in those circumstances the subjective views of somebody
10 involved in one of the parties as to whether this is
11 a good idea or not may -- may -- amount to a reasonable
12 excuse, but that is not this case here.

13 On this point, we say that the decision makes it
14 clear, very clear, that this is the basis on which the
15 CMA found that there was no reasonable excuse. We are
16 very surprised to hear Mr. Beard say that this question
17 of obviousness is somehow a new case.

18 We had understood the allegation of a new case to be
19 confined to the circumstances in which the Monitoring
20 Trustee's view was given. But now what seems to be said
21 is, in addition to that, the idea that it should have
22 been obvious on the face of the order, that it was not
23 sufficient to rely on the Monitoring Trustee's view,
24 that that is a new case.

25 Well that is not a new case. That is the entire

1 basis for -- that is the thrust of the CMA's decision,
2 and it is the basis for its decision.

3 THE CHAIRMAN: Could I just ask you this. Apart from the
4 passage that I asked Mr. Beard about in the reasons in
5 paragraph 52, is there anywhere else in the CMA's
6 decision where we find the conclusion that it was
7 crystal clear that the CMA's consent was required in
8 light of paragraph 52?

9 MS. DEMETRIOU: Mr. Chairman, yes, we say that one gets that
10 from starting from paragraph 50 and the *ICE Trayport*
11 decision. What is the purpose of referring
12 to that *ICE Trayport* there? It is to
13 direct, it is to set out what is expected of the parties
14 when considering whether or not to seek consent from the
15 CMA.

16 So the reason that this citation is there under the
17 heading "Without reasonable excuse" is to make the point
18 that the threshold for when it is necessary to seek
19 consent from the CMA is set at the point where there may
20 be reason to believe that conduct might arouse the
21 reasonable suspicion of the CMA. First of all, that is
22 why that authority is referred to.

23 Then going to paragraph 52, the whole of
24 paragraph 52 -- so Mr. Beard tried to characterise these
25 reasons as being reasons which go to breach, rather than

1 reasonable excuse, but they plainly do not, because if
2 you look at paragraph 52 -- first of all, this is all
3 under the heading "Without reasonable excuse", and the
4 introduction to paragraph 52 is that:

5 "The CMA does not accept that Electro Rent has
6 reasonable excuse for failing to comply with the interim
7 order."

8 Then the reasons are set out. All of the reasons
9 are there to establish that there is a duty to comply
10 with an interim order, and that in the circumstances of
11 this case, if we look at (e):

12 "Electro Rent raised the proposed issuing of
13 a notice with the Monitoring Trustee, which suggests it
14 had formed the view that it was matter which might have
15 aroused the concern of the CMA. Accordingly,
16 Electro Rent ought to have known that the onus was on it
17 to seek the consent of the CMA or to seek legal advice."

18 That reference to "might have aroused the concerns
19 of the CMA" reflects the wording of the *ICE Trayport*
20 case which you see in paragraph 50. So
21 what is being said there is that Electro Rent should
22 have known that the onus was on it to go to the CMA. It
23 should have known in the circumstances of this case,
24 because we are talking about this case.

25 Of course, the question of whether or not there had

1 been -- this section, of course, is dealing with
2 reasonable excuse, so the question of how obvious the
3 breach was is not dealt with in this question, but the
4 conclusion is set out in this question, which is that it
5 should have been obvious to them that they had to
6 approach the CMA. That is the basis for the CMA's
7 decision.

8 Then we see at (f) the point that, sir, you put to
9 Mr. Beard, which is that Electro Rent ought to have
10 suspected that by not seeking the CMA's consent it was
11 failing to comply with the interim order.

12 Of course, that is all in the context of this
13 particular breach, and the circumstances of this
14 particular breach are set out earlier in the decision.
15 So you cannot read this paragraph in isolation, it is
16 against the backdrop of what actually happened.

17 You see that, contrary to what Mr. Beard said, the
18 CMA has not ignored the interaction with the Monitoring
19 Trustee. We see that, for example, if we read the
20 decision fairly as a whole, we see from the executive
21 summary at 5(k) on page 6:

22 "The CMA has had careful regard to the actions the
23 Monitoring Trustee in this case."

24 Then they went on to find that was a significant
25 factor in reducing the fine.

1 Then at paragraphs 19 to 26 on page 9 there is
2 a discussion of the interaction between the CMA,
3 Electro Rent and the Monitoring Trustee, and that was
4 all concerned with what the Monitoring Trustee's
5 explanation was for what happened.

6 Then you have at paragraph 55, and this is under
7 "Penalty", but it shows that this was all in the mind of
8 the CMA, and this goes back to the Chairman's point that
9 he just put to me:

10 "Electro Rent's failure to comply with the interim
11 order was significant and had a potentially adverse
12 effect on the merger investigation. The purpose of the
13 interim order is precautionary. Electro Rent was aware
14 when it issued the notice that the premises were part of
15 the possible divestment package ..." and so on.

16 The CMA had all of that firmly in mind when finding
17 that this was a case in which Electro Rent ought to have
18 contacted the CMA to seek written consent and not simply
19 relied on the Monitoring Trustee's views.

20 Of course, there are Electro Rent's submissions at
21 page 11, Mr. Bailey helpfully reminds me, which
22 summarise. So again, the submissions are set out on
23 page 11, and summarised at 31 of the written submissions
24 and 32 of the oral submissions, which again demonstrate
25 that the CMA had well in mind what Electro Rent was

1 saying about the reasonable excuse being based on the
2 Monitoring Trustee's indication.

3 In the CMA's submission, that really is or should be
4 the beginning and end of the matter. The breach was
5 obvious. It is clear and it seems to me on the basis of
6 what Mr. Beard said in opening that there is nothing, or
7 very little, between the parties as to the effect of the
8 interim order and the directions. So helpfully, in
9 response to Mr. Lomas' question, Mr. Beard confirmed
10 that paragraph 13 of the directions do not somehow
11 provide or comprise a power on the part of the
12 Monitoring Trustee definitively to confirm whether
13 something is a breach or not. I apprehend that there is
14 very little between the parties as to how all of this
15 works. But what the CMA says is that in the
16 circumstances of this case, given the clear wording of
17 5(e), given the clear application of the facts of the
18 case -- of 5(e) to the facts of the case, given the
19 surrounding circumstances of the remedies being proposed
20 and the parties' own proposal that the remedy comprises
21 the lease itself, then this is not a case in which it is
22 a reasonable excuse not to go to the CMA and simply to
23 rely on the Monitoring Trustee's views.

24 However, what Electro Rent is arguing is the
25 contrary. So Electro Rent is arguing that it was

1 entitled in principle to seek the views of the
2 Monitoring Trustee because of paragraph 13, and it is
3 relying on Mr. Brown's conversation with the Monitoring
4 Trustee in order to give rise to a reasonable excuse.
5 That is Electro Rent's case in this appeal.

6 If the Tribunal agrees that that might be relevant,
7 so if the Tribunal does not consider that the
8 obviousness of all of this meant that it simply was not
9 a reasonable excuse to rely on the Monitoring Trustee at
10 all, so if the Tribunal thinks that might be relevant,
11 then the Tribunal will obviously have to examine all the
12 circumstances of what went on, factually. What was the
13 discussion? What were the circumstances in which this
14 discussion took place?

15 The CMA's contention is that in all of the
16 circumstances that took place, it was not reasonable for
17 Electro Rent to rely on what the Monitoring Trustee said
18 to the exclusion of seeking consent from the CMA. In
19 particular -- and Mr. Beard has reflected these points
20 in his opening -- Mr. Brown provided the Monitoring
21 Trustee with incorrect information about the notice
22 period. Mr. Brown told Mr. Gopal -- and you will hear
23 evidence on this, I am not going to address it in any
24 detail now -- that the Break Notice was reversible; and
25 Mr. Brown failed to tell the Monitoring Trustee that

1 serving the Break Notice could destabilise key staff at
2 Electro Rent UK's business.

3 Electro Rent attempts to argue that this is somehow
4 a new case on the part of the CMA and that it is
5 impermissible for the CMA to make this point. But that
6 argument is fundamentally wrong.

7 Before I explain why, I want to take the Tribunal
8 very briefly to two authorities and I am then going to
9 make my submission but I would like to take the Tribunal
10 very briefly to two authorities.

11 The first is the *Allsports* judgment,
12 which is in bundle E1 at tab 5.

13 There are two sections or two parts or two
14 paragraphs. The first is paragraphs 60 to 63, which
15 starts on page 27. This passage comes after the
16 Tribunal has reviewed the authorities as they stood at
17 that time, including the *Napp* authority
18 that Mr. Beard took you to. What the Tribunal says
19 there is that:

20 "A balance has to be struck between various
21 competing considerations in question, avoiding undue
22 technicality whilst at the same time maintaining
23 procedural fairness. Where that balance is to be struck
24 will depend on the circumstances of the particular
25 case."

1 The Tribunal goes on to note that in the substantive
2 *Napp* judgment a very considerable body of
3 additional evidence was admitted on the appeal, and that
4 fell on the right side of the line as it transpired.

5 Then on the other side of the line was
6 *Aberdeen Journals* and *Argos*
7 in 61:

8 "In deciding where in an individual case the line is
9 to be drawn it is also important to bear in mind that an
10 appeal between the Tribunal, especially an appeal such
11 as the present, involving witness evidence, is by its
12 nature a dynamic process. In the course of the appeal
13 the appellant may, as here, produce further witness
14 statements. In responding to those statements, the OFT
15 may wish to adduce new elements. The Tribunal may, as
16 here, order the disclosure of further documents not
17 available at the administrative stage or may itself ask
18 for further documents, as in *Napp*.

19 Witnesses giving oral evidence may say things under
20 cross-examination which form part of the Tribunal's
21 record, but which by definition were not part of the
22 administrative procedure. By this natural process of
23 litigation new facts may emerge or existing facts may
24 assume a greater or lesser relevance than was first
25 supposed. It is in our view inevitable that matters

1 will often be gone into in more detail on appeal than
2 was possible at the administrative stage, particularly
3 since at that stage the OFT has no power to compel
4 witnesses or to cross-examine."

5 Now that has obviously changed, but we are not in
6 a Competition Act context anyway:

7 "As a matter of general approach we do not think we
8 should seek artificially to limit or inhibit a deeper
9 development of the case at the appeal stage, always
10 provided that the basic procedural framework and the
11 overriding principle of fairness are respected."

12 Then at 62:

13 "In our view, it is particularly important we should
14 not artificially limit the development of the evidence
15 at the appeal stage. Fairness requires that the OFT
16 should have a certain latitude to develop its case in
17 response to new evidence, provided always the rule 14
18 procedure has been properly followed. Were it not so,
19 the appeal process could become lopsided to the undue
20 advantage of appellants."

21 Then in the same judgment, I am not going to read
22 these out but you see the application of those
23 principles, just for the Tribunal's note, in the
24 circumstances of this case, at 80 to 89. It is worth
25 noting at 88 the Tribunal's reasoning there for

1 admitting or for finding that the OFT was permitted to
2 develop points differently to the decision:

3 "The issue of retailer pressure has now been raised
4 squarely by the content of [a particular witness
5 statement] and, in our view, reasonably raised in
6 response to the extensive evidence now served by
7 Allsports. It seems to us it would be inappropriate to
8 exclude that evidence or to prevent Mr. Ronnie from
9 giving it. Such a course would, in our view, distort
10 the witness evidence and prevent the Tribunal from
11 seeing the whole picture, contrary to the general
12 interest of justice. If that evidence is to be given,
13 it seems to us logical to permit the OFT to plead in
14 paragraph 21 of the defence the reliance which the OFT
15 seeks to place on it."

16 The other judgment, which is not in the bundle but
17 which we are just going to hand up, it is one paragraph
18 in the *JJB* case. (Handed)

19 It is paragraph 284. Really the same, very similar
20 points are made here, but at the end of that paragraph
21 the Tribunal says:

22 "Sometimes a new development will favour the OFT,
23 sometimes it will favour the appellants. In our view,
24 provided each party has a proper opportunity to answer
25 the allegations made and that the issues remain within

1 the broad framework of the original decision, we should
2 determine this appeal on the basis of all the material
3 now before us."

4 What we say is this, that the issue in the decision
5 is whether or not there was a reasonable excuse, the CMA
6 found there was no reasonable excuse in this case.
7 Electro Rent has now appealed against the decision, and
8 in Electro Rent's appeal what it does is Electro Rent
9 accepts that there was a breach of the order but says
10 that it had a reasonable excuse, and that reasonable
11 excuse was that Mr. Brown, on its behalf, raised the
12 matter with the Monitoring Trustee, who confirmed that
13 Electro Rent could serve the Break Notice. That is the
14 basis for Electro Rent's appeal.

15 Electro Rent has called Mr. Brown to give evidence
16 about his conversation with the Monitoring Trustee, and
17 also to give evidence as to why he did not think it was
18 obvious that he needed to approach the CMA directly.

19 The CMA is entitled, as all of these authorities
20 make clear, to test that evidence and to respond to that
21 evidence, and the CMA has done so. So it has adduced
22 witness statements both from Mr. Polito and from the
23 Monitoring Trustee, Mr. Gopal, himself. That evidence
24 demonstrates, the CMA says -- the CMA's case is that
25 that evidence demonstrates that in all the circumstances

1 it was not relevant, it was not reasonable, it was not
2 a reasonable excuse for Electro Rent to rely on
3 Mr. Brown's conversation with the Monitoring Trustee.

4 Now, that is not a new case. That case falls
5 squarely within the decision, and the decision was it
6 was not a reasonable excuse to rely on the Monitoring
7 Trustee and not to go to the CMA. So we are within the
8 bounds of that decision.

9 What the CMA is doing is responding to the case put
10 by Electro Rent that the conversation between Mr. Brown
11 and Mr. Gopal constituted a reasonable excuse. It would
12 be very odd -- and I will develop this after we have our
13 break for the stenographers, but it would be very odd,
14 not to say very unfair, if it were open to the appellant
15 to rely on what they say, and they have now given
16 a lot more detail about the content of the discussion
17 with Mr. Gopal, so it would be very odd if Electro Rent
18 were able to come to the Tribunal with evidence from
19 Mr. Brown about what the conversation was, all directed
20 to showing that Electro Rent had a reasonable excuse,
21 but somehow the CMA were not permitted to respond to
22 that evidence.

23 I do not think Mr. Beard, to be fair to him, is
24 saying that we should not be permitted to respond to the
25 evidence. Presumably, if they had been of that view

1 (11.45 am)

2 THE CHAIRMAN: Before you start again, Ms. Demetriou, I have
3 been asked to advise people present in the court that if
4 they are smelling gas, a gas valve has been changed
5 outside and the matter is being investigated and should
6 clear soon. I do not know if that provides people with
7 the reassurance that they seek, but that is the story
8 I have been told anyway.

9 MS. DEMETRIOU: Thank you.

10 I would just like to take the Tribunal briefly back
11 to the decision at tab 3 of the core bundle, to place
12 paragraph 52 in a little more context. This is page 16.
13 Because when, of course, the Tribunal is considering the
14 reasons given by the CMA in paragraph 52, those reasons
15 were set out and were given by the CMA in response, of
16 course, to the submissions made by Electro Rent, and
17 those submissions are summarised at paragraph 51. So it
18 would not be right to read those reasons without
19 referring to the submissions that were being made, and
20 what the Tribunal will see is that they are a response,
21 in effect, to the submissions that were being put to it.

22 You will see at (c):

23 "Electro Rent had no reason to believe it should
24 inform the CMA, because the Monitoring Trustee did not
25 indicate to Electro Rent that the proposed issuing might

1 be in breach of the interim order."

2 That is why, of course, the CMA is saying this is
3 not for the Monitoring Trustee, it is the CMA that has
4 the only power to grant derogations. So when Mr. Beard
5 said all of these reasons in 52 do not go to the
6 question of reasonable excuse, that is because they are
7 responding to the submissions made by Electro Rent.

8 Then if you go to the notice of appeal, which is in
9 the next tab, behind tab 4, you will see ground 1
10 summarised at paragraph 3, and the summary, so this is
11 on page 4, the reasonable excuse or the excuse advanced
12 by Electro Rent is that it contacted the Monitoring
13 Trustee for clarification, and you will see at
14 3.1(a)(iv):

15 "The Monitoring Trustee confirmed that he had no
16 interim order compliance concerns in relation to the
17 Break Notice."

18 You will see incidentally at 3.1(b):

19 "Further or alternatively, there were good reasons
20 for the Monitoring Trustee and Electro Rent to conclude
21 that the service of the Break Notice would not breach
22 the interim order, on the basis that the service of the
23 Break Notice did not adversely affect Electro Rent's UK
24 business's ability to compete."

25 In response to that the CMA says that is not

1 a reasonable excuse, because it should have been obvious
2 that this was a breach and that you had to go to the CMA
3 for written consent. To say that is somehow not open to
4 us, it is not open to the CMA to respond to that ground
5 in that way seems to us to be bizarre.

6 Going on in the notice of appeal, ground 1 is
7 developed at paragraphs 56 to 80. That starts on
8 page 21. You will see the heading at the top of
9 page 21:

10 "Electro Rent followed the proper procedure. The
11 Monitoring Trustee was properly briefed and had no
12 objection."

13 That is the basis on which the ground is advanced.
14 We see that very clearly from the conclusion which is on
15 page 30, at the top of page 30, and this is the
16 conclusion of ground 1 at paragraph 80:

17 "Accordingly, Electro Rent has a reasonable excuse
18 for any infringement because it provided open and honest
19 disclosure to the Monitoring Trustee prior to serving
20 the Break Notice and obtained approval to its
21 proceeding. The CMA erred in rejecting this argument in
22 the decision."

23 So there, plainly, Electro Rent thinks that the CMA
24 has in its decision considered the role of the
25 Monitoring Trustee and rejected it. But the key point

1 that I make here is that Electro Rent positively puts
2 its case on the basis that it provided open and honest
3 disclosure to the Monitoring Trustee.

4 Of course it has to do that, that is a necessary
5 part of Electro Rent's appeal. Because Electro Rent is
6 relying on the discussion with the Monitoring Trustee to
7 constitute the reasonable excuse, and it certainly would
8 not be a reasonable excuse to rely on what the
9 Monitoring Trustee said, in circumstances in which that
10 advice was based on information that was anything other
11 than honest and open.

12 Let us take an extreme case, which is not the case
13 that the CMA is putting in response to this appeal, but
14 let us say that Mr. Brown had told the Monitoring
15 Trustee a brazen lie. Then it would not lie in
16 Electro Rent's mouth to come to the Tribunal and say,
17 "This was a reasonable excuse, we rely on what the
18 Monitoring Trustee said", because of course the
19 circumstances in which that advice had been given would
20 not have been such as to permit such an argument to be
21 run. It would not be a reasonable excuse to rely on
22 something that the Monitoring Trustee said when he was
23 told something which was dishonest.

24 MR. LOMAS: But I think the point they put against you is:
25 in those circumstances, suppose the hypothetical brazen

1 lie had been told in the process preceding the decision,
2 and the CMA knew that it was a brazen lie and did not
3 rely upon it in the decision; would that affect your
4 point?

5 MS. DEMETRIOU: We say that is not something which arises.
6 I do not have to address that point.

7 MR. LOMAS: I was on your hypothetical.

8 MS. DEMETRIOU: It is on my hypothetical. We say that in
9 this case what has happened is that Mr. Brown has put in
10 a witness statement, he has sworn a witness statement on
11 behalf of Electro Rent, to make good this proposition
12 that disclosure was honest and open and that indeed
13 Electro Rent did rely on the Monitoring Trustee's views,
14 on the Monitoring Trustee's advice.

15 We see Mr. Brown's first statement behind tab 8. We
16 see, for example, at paragraph 20 Mr. Brown explain the
17 mistake that he made in relation to the notice period.
18 So that is evidence that Mr. Brown is voluntarily giving
19 to support the submission that is being made by
20 Electro Rent that they provided honest and open
21 disclosure. So he is explaining why he made that
22 mistake in support of Electro Rent's appeal.

23 Now that explanation, that he relied on advice by
24 Mr. Bill Colley, was not a matter that was drawn to the
25 CMA's attention in advance of the decision being made.

1 THE CHAIRMAN: Can I ask you, as I understand it now at
2 least, there are two legs to the CMA's position on the
3 Monitoring Trustee; 1 is a matter of principle, it does
4 not take Electro Rent anywhere, and 2, in any event they
5 cannot rely on it because the Monitoring Trustee was
6 innocently misled, or something to that effect.

7 Now, in relation to the second issue, did the CMA
8 have the means to investigate the discussions between
9 the Monitoring Trustee and Mr. Brown prior to making its
10 decision and did it have -- are you saying that it did
11 not have any cause to investigate these discussions
12 before it made its decision?

13 MS. DEMETRIOU: What we --

14 THE CHAIRMAN: There is two questions there.

15 MS. DEMETRIOU: What we say about that is that there was
16 some investigation that was carried out. So the CMA,
17 you will have seen in the documents, did ask the
18 Monitoring Trustee for an explanation of what had
19 happened. So to some extent that issue was
20 investigated. However, the basis on which the decision
21 was taken was that in the circumstances of this case --
22 and it is really your first point, Mr. Chairman. We do
23 not say -- just to clarify, we do not say that it could
24 never ever be an excuse in any case to rely on the
25 Monitoring Trustee's views. But the basis on which this

1 decision was taken was that in the circumstances of this
2 case it could not be an excuse, because of the nature of
3 the breach and of the circumstances in which the breach
4 occurred, namely the fact that the remedies directly
5 contemplated that the lease would be part of any
6 remedies package and the plain wording of paragraph 5(e).

7 So it is correct, in answer to your question, sir,
8 that the decision does not go into the circumstances in
9 which this advice was given, but what we say is that
10 that is a matter that is raised squarely -- just going
11 back, sorry, pausing there, you will see from
12 paragraph 51 of the summary of Electro Rent's
13 submissions, and also the submissions they actually
14 made, which I will take you to in a moment, that neither
15 did Electro Rent go into this in very much detail.
16 I will take you to that.

17 What has now happened on this appeal is that
18 Electro Rent, having accepted that there was a breach,
19 is now saying, is saying, has said -- I do not mean to
20 imply that they have somehow totally changed
21 direction -- that they are relying on the conversation
22 between Mr. Brown and Mr. Gopal. That is the basis for
23 their reasonable excuse.

24 In advancing their appeal, they give lots of detail
25 about what happened. One example is paragraph 20 that

1 I just showed you. That is an explanation. Why is
2 Mr. Brown giving this explanation? Plainly it is to
3 make good the proposition at paragraph 80, which is the
4 conclusion, which is that all of this was done in an
5 honest and open manner, because they have to say that.
6 Because if it was not, then of course it cannot be
7 a reasonable excuse.

8 Paragraph 20 is not the only one, I gave that by way of
9 example, but if you look at paragraphs 23 to 27, there
10 is a lot of detail there about why Mr. Brown thought
11 that it would be in Electro Rent's best interests to
12 serve the Break Notice. It is not said that he gave
13 that amount of detail in the brief phone call to the
14 Monitoring Trustee, although he may have conveyed the
15 gist of it. We will find out.

16 But then also if you look at paragraph 47 of the
17 statement, which is on page 12:

18 "I would not have been keen to liaise with
19 Electro Rent. I wanted to keep the service of the
20 Break Notice confidential as concerns the three
21 Electro Rent UK staff in case it destabilised them."

22 Mr. Gopal is of course entitled to respond to that,
23 and he does respond, and what he says in his evidence
24 is: Mr. Brown never said to me that this might
25 destabilise the staff. Of course, that is an important

1 issue because the CMA have made clear, and the interim
2 order makes very clear, that the question of the key
3 staff was critical, because by that stage there were
4 only three members of staff at the UK premises, and in
5 terms of this being a viable standalone business which
6 could be divested, those staff needed to be preserved.

7 That was not a point that was made before the
8 decision was taken.

9 So we say that Electro Rent has put in issue the
10 reasonableness of Mr. Brown's reliance on Mr. Gopal's
11 views, on his advice, and in response what the CMA has
12 done is adduce evidence from Mr. Gopal to answer some of
13 these points, as it is plainly entitled to do, it cannot
14 fight this appeal with its hands tied behind its back,
15 it has to be able to respond to these factual points put
16 by Electro Rent's witnesses; and it is now for the
17 Tribunal to decide what happened, on the basis of all
18 the evidence before it.

19 It is a bit difficult to see what it is that
20 Mr. Beard says that the CMA should not be entitled to
21 do. Because he accepts that we should be entitled to
22 respond on the evidence. So do we then stop there and
23 say: Tribunal, you have heard the evidence but you are
24 not entitled to reach the view that in all the
25 circumstances it was not reasonable for Mr. Brown to

1 rely on Mr. Gopal's advice? It is very odd, it is very
2 difficult to understand exactly what it is, where the
3 guillotine comes down, as it were.

4 I said I would take you briefly to what Electro Rent
5 said before the decision. You will find that behind
6 tab 4 at page 93. Sorry, bundle C1. This is page 93,
7 the response to provisional decision.

8 I am not going to read it out, but the Tribunal will
9 no doubt read it in your own time.

10 You will see that in these written submissions,
11 which are brief, Electro Rent does not delve into the
12 precise circumstances in which the advice was given.
13 Basically, it is relying on the fact that the advice was
14 given.

15 Then we see two pages on, starting at page -- sorry,
16 a few pages on, at 97, a summary of the call between the
17 CMA and Electro Rent to discuss the provisional
18 decision. So they made some oral points as well.

19 Again, what you will see there is a reliance,
20 a reliance on what the Monitoring Trustee said, but
21 there is no detail there being given by Mr. Brown on the
22 call as to the circumstances in which he made a mistake
23 about the Break Notice or the destabilising effect on
24 staff. All of that comes in the witness evidence.

25 THE CHAIRMAN: You mean in the witness evidence that

1 accompanied the notice of appeal?

2 MS. DEMETRIOU: Yes. In support of the proposition that is
3 advanced, which is: we are entitled to rely on the
4 Monitoring Trustee's views because we gave honest and
5 open disclosure and these are the circumstances in which
6 it happened.

7 MR. LOMAS: Is the distinction you are trying to make, if
8 I can do this without any double negatives, you are not
9 saying that the CMA is introducing a new case that there
10 was not a reasonable excuse because there were misleading
11 statements made, what you are saying is that
12 Electro Rent cannot establish that there was reasonable
13 excuse on the basis of statements which were misleading?

14 MS. DEMETRIOU: Yes.

15 MR. LOMAS: That is the distinction.

16 MS. DEMETRIOU: Exactly. We are saying that -- coming back,
17 I think the Chairman put it very helpfully in terms of two
18 ways of analysing this. We do not shrink at all from
19 the way in which the decision analyses it, which is that
20 it should have been clear that they should have gone to
21 the CMA, and in the circumstances of this case it was
22 not a reasonable excuse to rely on the Monitoring
23 Trustee.

24 Now, if the Tribunal thinks that it is nonetheless
25 relevant to look at the detail of the discussion of the

1 Monitoring Trustee, so if you do not think the analysis
2 stops there, and you agree to a limited extent with
3 Electro Rent that it is important to look at the
4 circumstances, which is what Electro Rent is arguing in
5 its appeal, they are saying, "Look, these are the
6 circumstances in which we approached the Monitoring
7 Trustee, this is what he said, that is a reasonable
8 excuse". If the Tribunal thinks that that might be
9 a reasonable excuse, then plainly you have to have
10 regard to all the circumstances, including the rebuttal
11 evidence adduced by the CMA, in order to reach a view --
12 the Tribunal must reach a view -- as to whether it is
13 a reasonable excuse or not, in all the circumstances
14 that you have heard. So that is how we put it.

15 I want to very briefly deal with one final matter,
16 because in a sense we need to get on with the evidence
17 and some of these points can be made perhaps in more
18 detail, if necessary, during closing submissions once
19 you have heard the evidence. But I want to deal with
20 one point that Mr. Beard made in opening, which was the
21 analogy that he tried to draw between the meaning of
22 "reasonable excuse" and "reasonableness" in a judicial
23 review context. We say that is a highly optimistic,
24 from his perspective, analogy and it is simply wrong.

25 As I understood his submission, he was saying that

1 in a judicial review context when somebody is looking at
2 whether a public body has acted outside their statutory
3 powers, then you can only quash a decision on grounds of
4 unreasonableness if it is so unreasonable that no
5 reasonable public body would have made it. So the
6 *Wednesbury* test. In other words, to be
7 unreasonable it has to be irrational, that is the public
8 law test.

9 He seems to be submitting that the test might be the
10 same or is the same in this context. Where would that
11 lead? That would lead to a decision where somebody can
12 breach an order and as long as there is nothing
13 irrational about what they did, that is a reasonable
14 excuse.

15 We say that is plainly not the meaning of
16 "reasonable excuse" in this context. We say that for
17 three reasons, which I will briefly summarise.

18 The first is that the statute does not say that. So
19 the statute does not talk in terms of irrationality or
20 draw any analogy with the judicial review standard.

21 The second reason is that there are a host of
22 statutory contexts in which the concept of "reasonable
23 excuse" is used, and so in lots of criminal offences, in
24 the taxation context, those words are used, and they are
25 not used in the sense that they are used -- that the

1 word "reasonable" is used in judicial review.

2 The third reason is that such an interpretation does
3 not accord with this particular statutory context. We
4 have made some of those points in our skeleton argument.
5 But the Tribunal will have well in mind the importance
6 of the interim order regime in the mergers context, and the
7 fact that Parliament has chosen to back up interim
8 orders with penalties. To say that at the same time it
9 would be permissible for companies to breach interim
10 orders subject to some irrationality threshold just does
11 not accord in the least with this statutory framework.
12 So we say that submission does not get off the ground.

13 Those really were the points that I wanted to
14 address you on in opening, unless the Tribunal has any
15 questions that you wish particularly to put to me at
16 this stage.

17 THE CHAIRMAN: Thank you very much.

18 MR. BEARD: It now falls to Electro Rent to call its
19 witnesses. You will be aware, Mr. Chairman and members
20 of the Tribunal, that in relation to Mr. Peterman there
21 is an indication that no cross-examination was sought,
22 and in those circumstances his unchallenged evidence is
23 simply part of the record and he is not attending for
24 the purposes of cross-examination. I think this was a
25 matter conveyed to you.

1 THE CHAIRMAN: Fine.

2 MR. BEARD: Therefore, in those circumstances the witness to
3 be called is Mr. Brown.

4 (12.10 pm)

5 MR. NIGEL PETER BROWN (sworn)

6 Examination in-chief by MR. BEARD

7 MR. BEARD: Mr. Brown, there should be nearby you a set of
8 bundles with labels on the spines.

9 A. Yes.

10 Q. Do you have a bundle labelled A?

11 A. Yes.

12 Q. Could you turn to tab 8 in the bundle, please. Could you
13 turn to the final page of that document, the very final
14 page. Is that your signature?

15 A. Yes.

16 Q. Is this your witness statement?

17 A. Yes.

18 Q. Is it true to the best of your knowledge and belief?

19 A. Yes.

20 Q. Do you have any corrections or amendments to make to it?

21 A. No.

22 Q. Could you turn on in this bundle to tab 12. If you turn
23 to the final page. Is that your signature?

24 A. Yes.

25 Q. Is this your second witness statement?

1 A. Yes.

2 Q. Do you have any comments or amendments or corrections to
3 make in relation to it?

4 A. No, I do not.

5 Q. Before I pass over to Ms. Demetriou, just a couple of
6 brief questions.

7 You have heard this morning reference -- were you in
8 court this morning?

9 A. Yes, I was.

10 Q. You will have heard this morning reference to the
11 undertakings in lieu process that occurred. Would you
12 be able to describe what happened in relation to that?

13 A. Yes. We -- in the phase 1 process we had a number of
14 people that were interested in completing the
15 acquisition of Electro Rent UK's business. Through
16 discussions they were -- candidates were narrowed down
17 to two main candidates and then eventually one. We
18 proceeded through to contractual negotiations with
19 a company called Interlligent, who were an Israeli-based
20 company with a UK branch office, trading in the same
21 market that Electro Rent UK does, and that historically
22 Microlease did too and does now. So they were an
23 existing competitor. They expressed a strong interest
24 in buying the business.

25 We took the negotiations right through to the final

1 contractual negotiations and at the 11th hour and 59th
2 minute the deal collapsed, due to the withdrawal of the
3 purchaser for personal reasons; and they were personal
4 reasons rather than commercial reasons, that is the
5 reasons that we were given. He withdrew with only
6 a matter of, you know, a couple of days through to the
7 conclusion of the phase 1 process. Therefore, we were
8 immediately forced to notify the CMA that he had
9 withdrawn and that we would then be automatically going
10 into the phase 2 process.

11 Q. You said that there were two candidates that you
12 narrowed down to, and you reached an agreement with one.
13 They had a UK branch office, you say. Did either of
14 those possible candidates give any indication whether
15 they wished, if they purchased the business, to retain
16 the Sunbury premises?

17 A. The first candidate that was discounted was a company
18 called [REDACTED]. They have offices based in [REDACTED] and
19 they clearly expressed that they would not want to
20 retain the Sunbury premises, that they would consolidate
21 into the existing footprint in [REDACTED].
22 Interlligent, I did not actually have a direct discussion
23 with them about whether they would retain the premises.
24 The only discussions I had with them were contractual
25 negotiations around the dilapidations provisions, and as

1 part of the agreement we agreed to pay the cost of the
2 dilapidations should they decide to exit the premises at
3 a later date. So part of the contractual negotiations
4 was actually the fee equivalent to those dilapidation
5 costs.

6 MR. BEARD: I am grateful. Thank you. I do not
7 have any other questions.

8 If you were in court earlier, you will have heard
9 that if there are any confidential matters you want to
10 refer to, please do indicate to Ms. Demetriou.

11 Cross-examination by MS. DEMETRIOU

12 (12.15 pm)

13 MS. DEMETRIOU: Good morning, Mr. Brown.

14 A. Good morning.

15 Q. You are currently global CEO of Electro Rent
16 Corporation, are you not?

17 A. I am.

18 Q. Before the merger I think you were employed as the CEO
19 of Microlease Plc?

20 A. That is correct. Immediately prior to the merger I was
21 employed at Microlease Limited, but prior to that
22 Microlease Plc. The company structure has changed just
23 prior to the completion of the transaction.

24 Q. From around 2006, I think you say in your statement.

25 A. Yes, 2006 was when the management buyout took place and

1 I became a permanent employee at that time.

2 THE CHAIRMAN: Could you keep your voice up, because the
3 ladies are taking the transcript.

4 A. Yes, sorry. Of course. I apologise.

5 MS. DEMETRIOU: You have your statement in front of you that
6 I am going to refer to.

7 A. Yes, I do.

8 Q. In paragraph 5 of your statement you say that you were
9 involved throughout the CMA's phase 1 and 2 merger
10 investigation and that you were leading the team from
11 the company in attending hearings and meetings and
12 acting as the principal point of contact with the CMA.

13 I think you say at paragraph 8 that you were the
14 person who -- you were familiar with the terms of the
15 initial enforcement order that applied during phase 1,
16 and the interim order was in essentially identical
17 terms.

18 The merger was completed in January 2017, was it
19 not?

20 A. Correct.

21 Q. But it was not notified to the CMA.

22 A. I think in the sense that you are suggesting, did we
23 make a formal notification to the CMA.

24 Q. Yes, that is the only sense I am suggesting.

25 A. Then the answer is no. But they were informed by us

1 that the merger was taking place several months before.
2 In November the deal was announced, and from November
3 through to December there was a dialogue with the CMA,
4 informing them that the merger was imminent.

5 Q. You were involved in that dialogue too?

6 A. Yes.

7 Q. So you have been involved in dealing with the CMA from
8 before the official investigation in the precursor to
9 the merger.

10 A. Yes.

11 Q. Then you were the point of contact during the
12 investigation itself. This would have involved meetings
13 with the CMA?

14 A. It did.

15 Q. You met the case team, I think, during phase 1
16 in February 2017.

17 A. Correct.

18 Q. Then you met the case team at the beginning of phase 2,
19 on 31 October 2017.

20 A. That is correct.

21 Q. You showed the CMA group around Microlease's facility in
22 Harrow, on 22 November 2017.

23 A. That is correct.

24 Q. You appointed Smith and Williamson as the Monitoring
25 Trustees, did you not?

- 1 A. We did.
- 2 Q. You personally signed their letter of engagement?
- 3 A. I did.
- 4 Q. You read the CMA's provisional findings on
5 5 February 2018.
- 6 A. I did.
- 7 Q. You presumably reviewed, did you, and approved
8 Electro Rent's response to the provisional findings.
- 9 A. Yes.
- 10 Q. Then you attended the response hearing with the CMA on
11 1 March 2018.
- 12 A. That is correct.
- 13 Q. Then you read, I think it is right to say, the CMA's
14 remedies working paper on 13 March 2018, and you had
15 seen the notice of possible remedies before that.
- 16 A. I had.
- 17 Q. The supplementary working paper on 5 April 2018?
- 18 A. Yes.
- 19 Q. You reviewed, did you, and you approved all of
20 Electro Rent's responses to these various papers?
- 21 A. Yes.
- 22 Q. So the investigation, I think it is fair to say, must
23 have taken up a considerable amount of your time.
- 24 A. Unfortunately, yes.
- 25 Q. It was your responsibility, was it not, every two weeks

1 to sign a statement that the company was in compliance
2 with the interim order?

3 A. Yes.

4 Q. Did you take that responsibility seriously?

5 A. Yes.

6 Q. You were familiar -- what did you do to satisfy yourself
7 every two weeks, before signing the form, that you were
8 satisfied that it was true?

9 A. Thought through the issues that had taken place during
10 the preceding period.

11 Q. By reference to the interim order itself?

12 A. Generally not. I am pretty familiar with it, on the
13 basis that I had been involved in the process from the
14 beginning, so it was more, you know, thought process
15 prior to signing the document. Each time the document
16 was due, then I would have been prompted by
17 Latham & Watkins that it was due for signature, so that
18 would force me to consider it prior to its production.

19 Q. Generally speaking, throughout the investigation you
20 liaised, did you not, with Latham & Watkins?

21 A. Yes.

22 Q. So they assisted, did they not, in producing these
23 various responses that you reviewed and approved to the
24 various CMA documents that you have just discussed?

25 A. Yes.

- 1 Q. Did you discuss -- sorry, you said that you were
2 familiar with the terms of the interim order. Let us
3 turn to the interim order itself, which is in the same
4 file behind tab 13. You are familiar with the
5 obligations in paragraphs 4 and 5; yes?
- 6 A. I will just read them and answer.
- 7 Q. These were the obligations that you were signing off on
8 every two weeks.
- 9 A. Yes, I am just checking the accuracy. I presume that is
10 okay.
- 11 Q. I think you can take it from us that this is a true
12 version of the interim order.
- 13 A. Yes, okay, fine.
- 14 Q. You agree that one of the purposes of these obligations
15 is to preserve the status quo before the merger, yes?
- 16 A. Yes.
- 17 Q. That involves preserving the ability of both parties to
18 complete independently.
- 19 A. Yes.
- 20 Q. That is because these measures are aimed at preserving
21 the CMA's remedial powers, not pre-empting those powers.
- 22 A. Yes, that is correct.
- 23 Q. So, for example, you would have understood that if the
24 CMA decides that divestiture is required, one of the
25 purposes of this order is to ensure that there is no

1 practical obstacle to that taking place.

2 A. Yes, I would.

3 Q. That is why -- because one of the key purposes of this
4 is to preserve the ability of each part of the business
5 as a viable business that can compete in its own right
6 and that is capable of being divested, that is why
7 consent is needed before key changes are made.

8 A. Yes.

9 Q. Including to staff.

10 A. To senior staff, yes. Key staff that had been
11 previously defined and identified, yes.

12 Q. You had identified the key staff as being the three
13 remaining staff members, had you, that were remaining in
14 Electro Rent?

15 A. No, a much longer list than that.

16 Q. In terms of the Electro Rent UK business a longer list?

17 A. No, at the time the three staff were the only
18 Electro Rent UK staff that remained.

19 Q. They were key staff.

20 A. All three of them were identified, yes.

21 Q. Turning to paragraph 5, and you see that 5(a) talks
22 about that without prior consent:

23 "Electro Rent Corporation and Electro Rent Europe,
24 including its UK branch, and Test Equipment Asset
25 Management Limited shall at all times during the

1 specified period procure, that except with the prior
2 written consent of the CMA ..."

3 "Then you see at (a):

4 "The Microlease business is carried on separately
5 from the Electro Rent Corporation business and the
6 Microlease business's separate sales or brand identity
7 is maintained."

8 Yes?

9 A. I do.

10 Q. Then you see that further reflected, so that idea about
11 them being kept separate is further reflected over the
12 page, for example in (f), so no integration of
13 information technology, and then at (g), yes, customer
14 and supply lists of the two businesses shall be operated
15 separately.

16 A. Yes.

17 Q. Then at (h), all existing contracts to be serviced by
18 the business to which they are awarded. Then (l), no
19 confidential information relating to either business
20 shall pass to the other.

21 Now the parties put in place arrangements, did they
22 not, to ensure that these requirements were met?

23 A. Yes.

24 Q. I think you say at paragraph 2 of your statement, and we
25 can go back to that Mr. Brown, so that is back at tab 8,

1 and paragraph 2 of your statement is on page 2, you say
2 that these arrangements included reporting lines which
3 were discussed with the CMA and which had remained in
4 place. Yes?

5 A. Yes.

6 Q. If we turn in this same bundle to tab 53, which is at
7 the back, and to page 83. You see the page numbers are
8 on the very bottom of the page.

9 A. Page 53, page 8, did you say?

10 Q. Yes, 83. if you go to the end of this document you will
11 see the date. It is one page back from the very end.
12 It might be easier to do it that way. At the very end
13 there is a diagram, and I will come to that in a second,
14 and you will see on page 85 there is a letter from
15 Latham & Watkins, or rather an update from
16 Latham & Watkins of 2 November 2017, and you can see the
17 title of the document on page 83.

18 If you look at paragraph 2.3, this refers to
19 a diagram of the current reporting lines within
20 Microlease and Electro Rent, attached at annex 2. Yes?

21 A. Yes.

22 Q. Then you see in this diagrammatic form, the very last
23 page of the file.

24 A. Yes.

25 Q. That shows that you -- your name there we see in the

1 middle, and that you were responsible for Electro Rent's
2 non-European businesses and also for Microlease.

3 A. Correct.

4 Q. The Electro Rent European businesses, including the UK,
5 were dealt with by Allen Sciarillo?

6 A. At that time, yes.

7 Q. At that time.

8 The purpose of this was to preserve -- it was one of
9 the ways, one of the arrangements that were put in place
10 to comply with the order, keeping the businesses
11 separate. The idea was that you would not be
12 responsible for the UK part of Electro Rent's business.

13 A. That is correct.

14 Q. You were, however, we see from that, permitted to be
15 involved with the non-European Electro Rent entities.

16 A. Correct.

17 Q. That was the result of a derogation, was it not, from
18 the interim enforcement order?

19 A. That is correct.

20 Q. You applied for a derogation to allow that to happen,
21 because otherwise it would have been a breach of the
22 interim enforcement order?

23 A. Yes, I believe so. Although the enforcement order was
24 obviously placed after the businesses had actually
25 merged, and by that time I had assumed the

1 responsibility of chief executive of the group. So
2 I did have some responsibilities before the initial
3 enforcement order was placed and those continued.

4 Q. But then in order to comply with the interim enforcement
5 order, the general idea was that you would be in charge
6 of Microlease, but you asked for a derogation to allow
7 you to manage or to be involved with the non-European
8 parts of the Electro Rent business.

9 A. Yes, that is correct. The detail of those businesses,
10 yes.

11 Q. So you understood, under the terms of the order, that
12 you should not be handling the UK business?

13 A. I should not be handling the detail of the UK business,
14 yes.

15 Q. If we could put this file aside just for a moment and
16 pick up -- do you have a file C1 somewhere there?

17 A. I do.

18 Q. If you could turn to tab 4 at page 85. Do you have
19 that? It is called "Memorandum for the CMA".

20 A. I have.

21 Q. Then if you just go on a couple of pages to 87, again
22 you see that it is a document produced by
23 Latham & Watkins and the date is 27 November 2017. This
24 is an application. We see this -- do you remember this
25 document?

- 1 A. I do.
- 2 Q. Do you remember reviewing it?
- 3 A. Vaguely, yes. I will have reviewed it, yes.
- 4 Q. You will have reviewed it.
- 5 A. Yes.
- 6 Q. Just to remind yourself, if you look at paragraph 1.1.
- 7 A. Yes.
- 8 Q. It is a memorandum submitted on behalf of the parties
9 that the CMA consents to the following derogations, and
10 they are listed. There are three derogations that you
11 are seeking.
- 12 A. Yes.
- 13 Q. The first one, I want to focus at the moment on the
14 first one, which is striking off and liquidating dormant
15 entities. They were subsidiaries, were they not?
- 16 A. They were, non-trading subsidiaries.
- 17 Q. Non-trading subsidiaries. We see that from
18 paragraphs 2.1 and 2.2. Your view is that this would
19 not have any impact at all on the merger investigation
20 or indeed on anything at all, because they were dormant.
- 21 A. Correct.
- 22 Q. But you took the view that it was still necessary to go
23 to the CMA and seek a derogation from the order.
- 24 A. I did.
- 25 Q. Was that because of paragraph 5(e)?

1 A. It was because I was advised to. Because, you know --

2 Q. Advised to by Latham & Watkins?

3 A. Yes.

4 Q. So was it you that decided that these subsidiaries
5 needed to be struck off because they were not doing
6 anything?

7 A. It was our chief financial officer that made the
8 request, and that came via Platinum Equity, our
9 principal shareholder. They requested, you know, that
10 these were struck off. So it was not my decision to
11 strike these companies off but I was aware of it going
12 through.

13 Q. Is this something that you had done before? Leaving
14 aside the merger, in the course of your role at
15 Microlease had you been involved before in disposing of
16 dormant subsidiaries?

17 A. Not to my recollection.

18 Q. In any case, it was thought that this would be a good
19 idea and you consulted Latham & Watkins and asked
20 whether or not you needed to seek a derogation.

21 A. Yes.

22 Q. Did you yourself take a view as to whether a derogation
23 was required?

24 A. Honestly, not really. You know, it was not -- because
25 in this particular case the decision was not really

1 mine, it was originated out of the finance team and
2 Platinum Equity to simplify the structure of the
3 business. These companies were non-trading businesses,
4 so they were not of significance or relevance.

5 Q. Was it you that had the discussion with
6 Latham & Watkins?

7 A. I would certainly have been party to those discussions,
8 yes. Not exclusively, necessarily. I do not remember
9 whether they were exclusive or not, but I would not have
10 been the decision-maker of whether these companies were
11 struck off.

12 Q. Generally speaking, this was typical, was it, that you
13 would consult with Latham & Watkins, who were generally
14 on board in relation to the investigation, to see
15 whether or not a derogation was required?

16 A. Frequently I would, yes. Not always. It depended on
17 the circumstances and the decision at the time.

18 Q. But you accepted that a derogation was necessary,
19 because that is what you were advised.

20 A. Yes. I felt that (b) and (c) were probably more obvious
21 in terms of derogation requests.

22 Q. Yes, but of course there is 5(e), which you are familiar
23 with, which says that assets cannot be disposed of, and
24 these would be assets, would they not?

25 A. These are dormant non-trading companies that had no

1 material relevance or value to the business, so I would
2 not actually class that as an asset, personally. But,
3 you know, that is a distinction that you might make but
4 I do not, that is all.

5 Q. Right, so in deciding whether something like this is an
6 asset, would you think "That is my decision to make" or
7 would you think "We had better check with the CMA"?

8 A. In this particular case I thought it was the CFO's
9 choice and Platinum Equity's choice to decide whether
10 they felt it was relevant or not. Then it was referred
11 to our lawyers for them to make a recommendation.

12 Q. They confirmed that you should seek a derogation from
13 the CMA.

14 A. They did.

15 MR. BEARD: Sorry, I do not want to intrude on the
16 cross-examination, and I have let it go, but obviously
17 there comes a point where asking questions about what
18 someone is advised by lawyers about is trespassing on
19 privileged material. I leave it to Ms. Demetriou's
20 discretion to ensure that she is not asking questions
21 about advice given that would breach privilege.

22 MS. DEMETRIOU: I do not think I have asked any questions
23 like that. We are asking factually who was involved.
24 I am perfectly entitled to ask factually who was
25 involved in making these decisions. That is not

1 intruding on privileged matters.

2 MR. BEARD: I completely accept you can ask factual
3 questions. When it comes to the statement that was just
4 made about being advised, which the transcript will
5 reflect, it is at that point that the concern arises.
6 I only place that marker. I did not stand up previously
7 in relation to the other matters, and I am sure
8 Ms. Demetriou will have it well in mind.

9 THE CHAIRMAN: Is your concern about not the fact of taking
10 legal advice but the content of what that legal advice
11 what might have been?

12 MR. BEARD: At the moment yes. Obviously the privilege can
13 extend to the fact of taking legal advice. Mr. Brown
14 has referred to particular matters in response to
15 Ms. Demetriou's questions. I do not know where
16 Ms. Demetriou is going in relation to her
17 cross-examination, I am simply saying that issues of
18 privilege arise actually both in relation to the fact of
19 taking legal advice but pre-eminently in relation to the
20 advice itself.

21 THE CHAIRMAN: I think if a question is asked that you are
22 concerned about, you should object.

23 MR. BEARD: Certainly. I just think it is useful that
24 Ms. Demetriou is aware of the fact now, that is all.

25 MS. DEMETRIOU: I am not sure how useful that general

1 statement was, but no doubt Mr. Beard will object if he
2 thinks I have overstepped the mark.

3 THE CHAIRMAN: It is helpful perhaps to understand from
4 Mr. Beard there may be an issue, but I think we have to
5 deal with the admissibility of particular questions. So
6 if a particular question is asked and you want to raise
7 an issue of admissibility, then you should do that.

8 MR. BEARD: Yes.

9 THE CHAIRMAN: I do not think the Tribunal can make any
10 ruling in advance of that as to what line may or may not
11 be permissible.

12 MR. BEARD: Of course. I am not suggesting otherwise.
13 It is simply to alert the issue.

14 THE CHAIRMAN: Thank you.

15 MS. DEMETRIOU: Mr. Brown, I want to go back to bundle A,
16 please, and look at the interim order itself, which we
17 looked at a moment ago. You may recall it is behind
18 tab 13. I want to focus in on paragraph 5(e), which is
19 on page 4. I want to leave aside for one moment the
20 "ordinary course of business" point; I will deal with
21 that later. I am not asking you about that for the
22 purposes of this question.

23 You do accept, do you not, that reading this, which
24 precludes, prohibits the disposal of assets and interest
25 in assets, and leaving aside the issue of ordinary

1 course of business, you accept, do you not, that this
2 would include terminating the lease over the Sunbury
3 premises?

4 A. Yes, with that exception.

5 Q. Now, when the parties sought derogations from the CMA,
6 there was not any guarantee, was there, that the CMA
7 would actually grant the derogation?

8 A. No.

9 Q. So we see, for example, on 2 November 2017 -- I can go
10 to the document if you want, but you may just
11 remember -- Electro Rent asked for certain non-UK
12 Microlease and non-UK Electro Rent companies to be
13 released from the interim enforcement order. Do you
14 remember that?

15 A. I do.

16 Q. The group refused that request. Do you remember that?

17 A. I do.

18 Q. Going back to the derogation request in relation to the
19 dormant companies that we just looked at, so I am going
20 to ask you to go back to bundle C1 at tab 4, page 85,
21 the second part of that request was for a derogation
22 concerning the development of a new global enterprise
23 resource programme.

24 A. Correct.

25 Q. The CMA granted that derogation, but on the basis that

1 there were safeguards put in place to prevent any
2 sharing of confidential information.

3 A. Correct.

4 Q. You complied with those conditions, did you not, by
5 putting in place various non-disclosure arrangements?

6 A. Yes.

7 Q. Going back to your first statement -- I am sorry there
8 is a lot of jumping around, Mr. Beard seems irritated by
9 it too -- behind tab 8 you have your first statement,
10 and if you go to paragraph 13(a) you refer here to -- do
11 you have that?

12 A. Yes, I do.

13 Q. You refer here to certain emails from the Monitoring
14 Trustee. These, I think you accept, all relate to that
15 programme, do they not?

16 A. They do.

17 Q. The circumstances were that the derogation, as we have
18 seen, had been granted by the CMA subject to conditions.

19 A. Yes.

20 Q. All you were doing here when you were communicating with
21 the Monitoring Trustee was seeking to include further
22 individuals, yes, into the programme?

23 A. Yes, who had varying responsibilities within the
24 business. So their exposure was different in each case
25 because of their access to particular pieces of

- 1 information.
- 2 Q. But you were asking that they sign the non-disclosure
3 agreements.
- 4 A. We were asking if they signed a non-disclosure
5 agreement, would they be able to participate in the
6 continuing development of the ERP programme.
- 7 Q. It was pretty clear, it must have been pretty clear to
8 you, that the CMA had already granted the derogation and
9 there were procedures in place relating to
10 non-disclosure that had been approved by the CMA; yes?
- 11 A. Yes.
- 12 Q. So the only question here was the relatively minor one
13 of introducing more people to those arrangements.
- 14 A. It is not minor. It depends on the function of the
15 individual concerned in the application, and each
16 application that is made is reviewed by the CMA
17 carefully, often requesting further information about
18 the organisation chart to validate their continuing
19 participation in the programme, in the ERP and
20 development programme. So, you know, the functions of
21 each person -- let me give you an example. If it was
22 the sales director that was being given access to
23 confidential information, that would be very different
24 to a member of the IT team that is looking at data
25 integration.

- 1 Q. When the Monitoring Trustee was saying to you it is
2 fine, you were assuming, were you, that he was talking
3 to the CMA?
- 4 A. Not necessary talking to the CMA. Again, it depends
5 largely on each application. I think each individual
6 application has its own nuances.
- 7 Q. Let us take an example of someone who you thought might
8 be a significant person that was going to be admitted to
9 the ring, as it were, and you took the view that the
10 existing arrangements might not cover this person
11 because this is a step-change in terms of who has access
12 to this information; you would have gone to the CMA
13 yourself, would you not, and have said --
- 14 A. No, I would have gone to the Monitoring Trustee
15 initially.
- 16 Q. Even though you thought there might be a breach of the
17 order?
- 18 A. If I was unclear or uncertain, I would have gone to the
19 Monitoring Trustee first; and bear in mind that was the
20 instruction that I was given by Simon Polito in the
21 discussion that took place at Microlease.
- 22 Q. We will come to that.
- 23 A. Okay, but that was pivotal to my continuing review, that
24 Simon Polito, as the chairman of the group, instructed
25 me to go to the Monitoring Trustee first. So that would

1 have been my natural reaction, and unless the Monitoring
2 Trustee raised a concern then I would not have felt it
3 necessary.

4 Q. But you knew that the Monitoring Trustee could not grant
5 derogations; yes?

6 A. Yes, but, you know -- yes, I do know that.

7 Q. You knew that then.

8 A. But if he felt in this application or an application for
9 an NDA that that required referral, I would have
10 expected him to be able to advise on that basis and then
11 I would have referred the matter to the CMA.

12 Q. Mr. Brown, what would you have done? Because you were
13 very familiar with the terms of the interim order and
14 you were signing off every two weeks on the compliance
15 statement, so if you had taken the view -- you, so
16 leaving aside the Monitoring Trustee -- if you had taken
17 the view that this is likely to be a breach of the
18 interim order, would you have thought it was sufficient
19 just to go to the Monitoring Trustee, or would you have
20 consulted Latham & Watkins --

21 A. Your words were if I thought it was "likely" that it was
22 a breach of the --

23 Q. Yes, that is the question I am asking.

24 A. If I thought it was likely that it was a breach, then
25 I would still have first gone to the Monitoring Trustee,

1 because that was the instruction I was given. Then had
2 the Monitoring Trustee indicated to me that that was
3 a potential breach, then of course I would have gone to
4 the CMA and I would have gone to Latham & Watkins.

5 Q. But let us say he had not indicated that to you. Would
6 you then have left it at that or would you have gone to
7 Latham & Watkins, as you did in relation to the other --
8 the derogations that we have just seen, or gone to the
9 CMA directly?

10 A. Almost certainly not. If the Monitoring Trustee had
11 indicated to me that he believed that there was no
12 issue, then I do not believe I would have raised it
13 further.

14 Q. Even though you took a different view?

15 A. If I took a wholly different view then, you know, maybe
16 I would have raised it, or questioned it with
17 Latham & Watkins. We are dealing with a hypothetical
18 question.

19 Q. Yes, we are. We are. That is the question I am putting
20 to you.

21 A. You know, I think if the Monitoring Trustee provided me
22 with advice, I do not believe I would have escalated it
23 further.

24 Q. You would have signed the compliance statements?

25 A. Yes, I would.

1 Q. If we go back to paragraph -- staying in your statement,
2 going back to paragraph, you refer to the Monitoring
3 Trustee throughout this statement, so in 13(a) and (b)
4 and you refer to the directions, and in the context of
5 the answer you have been putting to me you have talked
6 about the directions and paragraph 13 of the directions,
7 so let us have a look at that. The directions are
8 behind tab --

9 A. Actually, I did not refer to that. I referred to the
10 statement from Simon Polito, which is different to
11 clause 13. But they both cover a similar point.

12 Q. Yes, the same thing.

13 A. Yes.

14 Q. If we go behind tab 14 you see the directions, and
15 paragraph 1 of the directions, on page 3, requires
16 Electro Rent to appoint a Monitoring Trustee.
17 Electro Rent appointed Smith and Williamson as the
18 Monitoring Trustees on 14 November 2017, did they not?

19 A. Yes.

20 Q. Before formally appointing them, you had a conversation,
21 on the phone I think, with Mr. Gopal and
22 Latham & Watkins on 9 November.

23 A. Yes.

24 Q. Mr. Gopal told you in that conversation that the
25 Monitoring Trustee did not approve derogations, did he

1 not?

2 A. I do not remember what Mr. Gopal told me in detail in
3 that conversation, but I take your word for it that that
4 is true.

5 Q. You do not recall the conversation at all?

6 A. I recall the conversation taking place, because it was
7 about qualifying potential Monitoring Trustees. So yes,
8 I remember the conversation taking place but I do not
9 remember the point that you are raising.

10 Q. What Mr. Gopal says is that he told you in that
11 conversation that the Monitoring Trustee do not approve
12 derogations and that that would be for Electro Rent to
13 get from the CMA, but that they could run, Electro Rent
14 could run points by him for review. Does that sound
15 likely, or you do not remember anything to the contrary?

16 A. I do not remember the conversation in detail.

17 Q. Okay. You signed the retainer letter with the
18 Monitoring Trustee. We see that in bundle B1 at tab 7
19 at page 44. It starts at page 42. Your signature is at
20 the end of the letter on page 44.

21 A. Yes.

22 Q. Presumably you read the letter before signing it, did
23 you?

24 A. Yes.

25 Q. Then the same, you read the appendix too, did you?

1 A. I did.

2 Q. The appendix says, you will be aware then, at
3 paragraph 2.2(f) that:

4 "Electro Rent will ensure that all information,
5 whether provided by you or on your behalf by a third
6 party is true, complete and accurate to the best of your
7 knowledge and belief and not misleading, whether by
8 omission or otherwise, in all material respects, and
9 will notify us promptly if at any time you became aware
10 that any information as so provided does not meet these
11 requirements."

12 You are aware of that obligation?

13 A. I am.

14 Q. Going back to bundle A and again the last tab, so
15 tab 53, and it is page 43 that I am after. This is an
16 email from Latham & Watkins to the Monitoring Trustee
17 dated 22 November 2017, so that is shortly after you
18 appointed them, just over a week afterwards. Yes?

19 A. Yes.

20 Q. That says that:

21 "As their legal representative, Electro Rent and
22 Microlease would like me to sit in on their calls with
23 you going forwards so that we are fully in the loop on
24 what is happening and they do not need to separately
25 brief us."

1 Was it you that asked Latham & Watkins to sit in on
2 calls?

3 A. No, but, you know, I am fully aware of this so -- but in
4 practice this is not what has happened on a regular
5 basis. Post the appointment of either Nash or the
6 second Monitoring Trustee, discussions continued to take
7 place directly with the Monitoring Trustee on a regular
8 basis.

9 Q. I think it is fair to say, is it not, that when it came
10 to significant matters such as applying for derogations,
11 as we have seen, that Latham & Watkins were
12 fully involved?

13 A. They have certainly been involved in every derogation
14 request that we have made, yes.

15 Q. Yes, and also in relation, I think you said, to the
16 question about whether a derogation was needed. So you
17 did not address your mind to the defunct companies point
18 yourself, you asked for advice.

19 A. Well, the people that were requesting it asked for the
20 advice, which was our chief financial officer, not me.

21 Q. But you were involved.

22 A. I read all of the materials.

23 Q. If we go back to the directions, back in bundle A -- we
24 are still in bundle A, sorry -- tab 14, so back to
25 tab 14, and you will see that paragraph 9 of the

- 1 directions on page 4 is under a heading "Functions".
- 2 A. Yes.
- 3 Q. This sets out the functions of the Monitoring Trustees.
4 You are familiar with this?
- 5 A. I am.
- 6 Q. You see under (e), so 9 subparagraph (e):
7 "Without prejudice to the right of Electro Rent and
8 Microlease to contact the CMA, respond to any
9 questions which Electro Rent and Microlease may have in
10 relation to compliance with the interim order in
11 consultation with the CMA."
12 Yes?
- 13 A. Sorry, I am making sure I have the right reference.
14 Section 9(e):
15 "Without prejudice to the right of Electro Rent and
16 Microlease to contact the CMA, respond to any
17 questions which Electro Rent and Microlease may have in
18 relation to compliance with the interim order in
19 consultation with the CMA."
20 Yes.
- 21 Q. So you were aware, because it says it on its face, that
22 that was without prejudice to Electro Rent's right to
23 contact the CMA directly.
- 24 A. Yes.
- 25 Q. You knew, did you not, that it was important to have

1 that right, because ultimately it is the CMA that takes
2 the decision.

3 A. Yes.

4 Q. In fact, Electro Rent had approached the CMA directly on
5 several occasions.

6 A. Yes.

7 Q. We have already established that one of those occasions
8 was in relation to the derogation request that we were
9 just looking at in relation to the defunct companies.
10 That was not through the Monitoring Trustee, you went
11 directly through --

12 A. That is correct, yes.

13 Q. Paragraph 13 of the order:

14 "If Electro Rent and Microlease is in any doubt as
15 to whether any action or communication would infringe
16 the interim order it is required to contact the
17 Monitoring Trustee for clarification."

18 You understood, did you not, that the Monitoring
19 Trustee -- you understood from that that the Monitoring
20 Trustee could give an opinion as to whether or not
21 something would breach the order?

22 A. I am aware of that, yes.

23 Q. But you were also aware that what he could not do is
24 grant a derogation.

25 A. Yes.

1 Q. You were also aware that what he could not do was allow,
2 give permission to Electro Rent to do something that
3 required the CMA's consent.

4 A. Sorry, could you repeat that question?

5 Q. You were aware that what he did not have the power to do
6 was to give permission to Electro Rent to do something
7 which would otherwise require the CMA's consent.

8 A. Yes, I think that is fair to say.

9 Q. I want to deal now with what you say Mr. Polito said to
10 you. This is in your first witness statement, so again
11 we are back to tab 8. It is paragraph 9. You say:

12 "At the site visit at Microlease's facility on
13 22 November I specifically asked Simon Polito if
14 I should address questions regarding the interim order
15 to Mr. Gopal of Smith and Williamson, and he confirmed
16 that I should."

17 Now Mr. Polito did not say, did he, when you had
18 that conversation, that Electro Rent should contact the
19 Monitoring Trustee instead of the CMA?

20 A. No, the implication in what he was saying to me is that
21 my first port of call should be the Monitoring Trustee.
22 For all enquiries or queries, that should be where I go
23 first.

24 Q. But he did not say that you should only contact the
25 Monitoring Trustee or that you were not permitted to

- 1 contact the CMA.
- 2 A. No, he did not. Through his -- through the dialogue
3 that I had with him, he made it clear to me that
4 I should be going to the Monitoring Trustee initially.
- 5 Q. Did he say anything which indicated to you that you
6 could not go to the CMA?
- 7 A. No. But nevertheless he gave me instruction that my first
8 port of call should be the Monitoring Trustee, which is
9 exactly how I acted.
- 10 Q. Yes, so that did not -- your conversation with
11 Mr. Polito did not alter in your mind, did it, the
12 wording, what you understood to be the requirements of
13 the interim order?
- 14 A. It influenced my judgment to go to the Monitoring
15 Trustee, to check with the Monitoring Trustee if
16 I needed advice on any issue, and that he should be my
17 first port of call.
- 18 Q. First port of call. But you did not come away from that
19 conversation thinking: it is not the CMA that grants
20 derogations or that can decide what breaches the interim
21 order?
- 22 A. No, I did not. I did not, but I came away from that
23 conversation thinking that it was appropriate for me to
24 go to the Monitoring Trustee to get advice on anything
25 that I was uncertain about or needed confirmation on.

1 Q. Just five days after you spoke to Mr. Polito, that is
2 when Latham & Watkins put in the derogation request
3 relating to the defunct companies and at that stage, in
4 doing that, you did not go to the Monitoring Trustee
5 first.

6 A. I do not recall. I do not recall whether we went to the
7 Monitoring Trustee first or not.

8 Q. You say in your statement, I think, that you did not.
9 So that is at paragraph 14(b). Just so you refresh your
10 memory, you say that you requested a derogation
11 directly. This is under -- so paragraph 14 is dealing
12 with cases where you approached the CMA directly.

13 A. Yes.

14 Q. Now you explained to Mr. Beard when he asked you some
15 questions at the outset that Electro Rent first offered
16 to sell the UK business in June 2017 in phase 1.

17 A. Correct.

18 Q. That offer included the transfer of Electro Rent's lease
19 over the Sunbury premises.

20 A. It did.

21 Q. You have explained that you had a purchaser at that
22 stage and the purchaser fell through, but as far as you
23 were aware the purchaser was not planning to dispose of
24 lease.

25 A. I was not aware whether they were retaining or disposing

1 of the lease, other than they had requested
2 dilapidations compensation for when they did vacate the
3 premises. So that would imply that their intention was
4 not to remain in the premises for the long-term.

5 Q. You are hypothesising. But they did not say to you that
6 they were not interested in the premises or they were
7 concerned about the premises or they wanted to move it.

8 A. No, my view at the time was I felt they were likely to
9 occupy the premises for a period but then vacate them,
10 which is why they were negotiating for the dilapidations
11 to be paid by us at the time that they departed from the
12 premises.

13 Q. When they withdrew, so when this fell through, I think
14 you said to Mr. Beard that was for personal reasons, it
15 had nothing to do with the premises, so far as you were
16 aware.

17 A. It had nothing to do with any of the commercial terms.
18 To the best of my knowledge, they were personal reasons.

19 Q. The CMA published its provisional findings and notice of
20 possible remedies on 5 February 2018. We see the notice
21 of possible remedies in bundle B1. If you could take
22 that up, at tab 7. It is in the second half of that
23 tab, so it is pages 1 -- it starts at page 164.

24 A. Yes.

25 Q. We have already established that you were familiar with

1 this. If we turn to page 166 and paragraph 13, what the
2 CMA is saying there is that it would expect to:

3 "... require the divestiture of the whole of one or
4 other party, i.e. Microlease Limited or Electro Rent
5 Europe NV, unless we are satisfied that an alternative
6 remedy would be effective."

7 Then they list those two possibilities, yes?

8 A. Yes.

9 Q. Then at paragraph 15, over the page, they say:

10 "It is also possible that a divestiture of
11 a narrower part of the parties' businesses focussed on
12 the UK may be capable of providing a comprehensive
13 solution".

14 So that was canvassed at that stage as another
15 possibility.

16 A. Yes, and preferred by Electro Rent.

17 Q. Preferred by Electro Rent. Strongly preferred, I think
18 you say.

19 A. Yes, definitely.

20 Q. Because, what, that was a much less intrusive remedy so
21 far as you were concerned?

22 A. Less intrusive; more appropriate to the counterfactual
23 at the time. So the market prior to the merger would be
24 satisfied by that being the remedy.

25 Q. That is a legal point, Mr. Brown. But commercially it

1 would have been unfortunate, would it not, to lose the
2 substantial parts of the business?

3 A. There is no question that it would be commercially
4 substantially more damaging for either of the other two
5 remedies and that is why we were very strongly in favour
6 of Electro Rent UK being divested and why we would do
7 nothing to harm that divestiture.

8 Q. Yes. If you look at paragraph 18 you can see the CMA's
9 current view. So they say that:

10 "The current view is that for the option set out in
11 paragraph 15 [so that is the UK divestiture, the option
12 that you wanted] to have a chance of being effective it
13 would need to include, but may not be limited to the
14 following, freehold site or if leasehold rights to the
15 lease for all sites relevant to the business to be
16 divested ..."

17 Pausing there, the Sunbury site was the UK business'
18 only site, was it not?

19 A. I think my interpretation of this, of section A, is an
20 appropriate freehold or leasehold site. It is not
21 specifically -- Sunbury is not in my mind in reading
22 this. It is that the business would be divested with
23 a site that is appropriate and suitable for its
24 continued operation and use.

25 Q. Where do you see those words, Mr. Brown?

1 A. That is my interpretation of what is required in
2 "freehold site and leasehold rights to the lease", the
3 sites relevant to the business divested. So "relevant
4 to the business divested" to me means provided it has
5 a site that is capable of fulfilling the operations of
6 the business then that is relevant to the business to be
7 divested.

8 Q. The divestiture, going back to the wording of
9 paragraph 18, it is talking about a divestiture package
10 and what it would need to include. It does not say
11 "a suitable premises"; it says "the right to the lease
12 for the sites relevant to the business".

13 How can that be interpreted -- it cannot be
14 interpreted, can it, to mean --

15 A. I think it can be interpreted that way because it is
16 saying the rights to the lease at the time of the
17 divestiture. It does not specifically state the lease
18 at Sunbury; it is stating that they have to have
19 appropriate and suitable premises to fulfil the
20 functions that they fulfil, and that is exactly the
21 approach that we were taking.

22 Q. But the only premises that were available at that time
23 were the Sunbury premises. That is right?

24 A. No, no. I mean, at the time we served notice with the
25 expectation of relocating the business or giving

1 a potential purchaser the option to retain the premises
2 in some way through the renegotiation of a lease or, if
3 the landlord so accepted, the termination, you know,
4 cancelling the termination notice. But, you know, here
5 we had gone through the process of being confident that
6 there were other suitable premises in the locality that
7 would be more suited to this business on an ongoing
8 basis and would make it more attractive to a potential
9 purchaser.

10 Q. That is how you interpreted this, is it?

11 A. It certainly -- my interpretation of this, rightly or
12 wrongly, is the freehold site and rights to the lease
13 for all sites relevant to the business to be divested.
14 So it is creating access to a site that fulfills the
15 business requirements on an ongoing basis, and that
16 would have been fulfilled through moving the business to
17 an alternate site.

18 Q. Let us look at (b):

19 "... physical facilities related to the operation of
20 the business at these sites."

21 What site do you think they have in mind there?

22 A. Again, it is the site that the business is housed on at
23 the time that the divestiture takes place, wherever that
24 is.

25 Q. You think not necessarily the Sunbury site?

- 1 A. I do think not necessarily the Sunbury site.
- 2 Q. "Transfer of existing staff"; do you accept that means
3 existing staff or could that mean other appropriate
4 staff?
- 5 A. If somebody was recruited next week I would think it
6 would include them too. So whoever is employed at the
7 time that the sale takes place would be part of that
8 transfer.
- 9 Q. But not hypothetical staff that might be employed that
10 might be more suitable than the staff that you have
11 already. So you accept this is --
- 12 A. Hang on two seconds. That is slightly more complex
13 because if we felt there were more suitable staff to
14 replace the existing staff then we would go to the CMA
15 to ask them if we could replace them. If that were the
16 case then we would expect to transfer those people with
17 the business if it were sold.
- 18 Q. Yes.
- 19 A. Those people would be transferred under TUPE and so on.
- 20 Q. You accept that is the position in relation to staff?
- 21 A. I accept it could be more than the staff that exists
22 there today.
- 23 Q. If you then recruited further staff those would also be
24 existing staff?
- 25 A. Yes.

1 Q. But then if you go to (h):

2 "... rights to receive services and utilities
3 currently being provided at the divested site."

4 Again it is quite hard to read that as being some
5 hypothetical better site that you might view?

6 A. It is not. I think it is exactly the same. If we have
7 an alternate site and that was occupied by the business
8 at that time, and it was suitable, this clause is making
9 sure that it is appropriately serviced with utilities,
10 so that there are water, gas or electricity, or whatever
11 is required, to support the business in its operation,
12 wherever that is housed.

13 THE CHAIRMAN: Ms. Demetriou, I wonder if I could just
14 intervene. If it would be inconvenient for you to break
15 your cross-examination then please just carry on, but we
16 are now past 1 o'clock.

17 MS. DEMETRIOU: Could I ask one further question and then
18 I will stop, then I can leave it there.

19 THE CHAIRMAN: If you wish to finish a particular chapter
20 please just do so.

21 MS. DEMETRIOU: I am so sorry for going over the time.
22 There is just one question I want to ask in relation to
23 this and I think it is as well to do it now.

24 Could you turn to bundle C1, please, tab 4, page 71.
25 This is Electro Rent and Microlease's summary of remedy

1 proposal. If you go to the second page it is dated
2 7 March 2018. This is what you were putting to the CMA
3 in terms of the remedy proposal and it was after the
4 hearing, was it not?

5 A. Yes.

6 Q. Do you see there:

7 "The proposed remedy would consist of the following
8 elements ..."

9 Which were set out in paragraph 18 of the notice of
10 possible remedies. You are saying:

11 "The transfer of Electro Rent's lease over its
12 registered place of business in the UK."

13 So now whatever you might have thought about the
14 interpretation --

15 A. At the time of the transfer, yes. So, you know, the
16 same applies. If we were located to a different
17 premises then we would be transferring that premises
18 under the divestiture process.

19 Q. You did not think it was worth telling the CMA that what
20 you had in mind there was not the transfer of the
21 existing lease but the transfer of whatever lease might
22 be in place at the time?

23 A. Well, I went to the Monitoring Trustee and requested
24 advice and was given that advice. So the answer is I
25 then did not feel it was appropriate.

1 MS. DEMETRIOU: Sir, I will break there and thank you for
2 the indulgence.

3 MR. BEARD: Sir, it may well be worth just giving the
4 standard warning to the witness.

5 THE CHAIRMAN: Yes, please do not discuss the case or your
6 evidence with anybody during the lunch break. Thank
7 you.

8 (1.05 pm)

9 (The short adjournment)

10 (2.05 pm)

11 MS. DEMETRIOU: Mr. Brown, I think we established before
12 lunch that it is common ground that Electro Rent's
13 preferred remedy was divestiture of the UK business.

14 A. Yes.

15 Q. But it was clear, was it not, that the CMA needed some
16 convincing that that would be an effective remedy?

17 A. Yes, I think the CMA examined all of the options
18 thoroughly and after consideration felt that was
19 appropriate.

20 Q. But the CMA was concerned, were they not, when putting
21 forward the possible remedies, that the UK business
22 might not be a viable standalone business?

23 A. Yes, I think they considered every option.

24 Q. Were they concerned about that? Did you understand them
25 to be concerned about that?

1 A. I think they were concerned about every option.

2 Q. I am asking you about this, not every option.

3 A. That is one of them, so yes.

4 Q. Was the CMA also concerned that it might not be possible
5 to find an appropriate buyer for the UK business?

6 A. They did express that in the hearing.

7 Q. We see this, I think, in the remedies working paper so
8 let us go to that. If you turn to bundle C2 at tab 12,
9 this is the paper that was published on 13 March, 2018,
10 so two days before your telephone conversation with
11 Mr. Gopal.

12 If you turn to paragraph 66, which is at page 15,
13 that recites what the remedies notice required, which we
14 looked at before lunch.

15 A. Yes.

16 Q. Page 15, paragraph 66, have you got that:

17 "The remedies notice specified a number of assets
18 that we would expect to be available in any
19 divestiture package."

20 Again, you have the leasehold rights to the lease
21 and so on, we have looked at that.

22 Then at 67, in addition:

23 "This option may require additional behavioural
24 provisions to provide support during a transitional
25 period to ensure that the remedy is effective."

1 You are aware of that?

2 A. Yes.

3 Q. Then moving forward at 74, when considering -- this is
4 under the heading "Views of the parties". Yes?

5 "When considering potential purchasers, the parties
6 considered that this remedy would include everything to
7 which Electro Rent UK currently has access in order to
8 compete in the UK."

9 That is what you were saying, yes?

10 A. Yes.

11 Q. Then moving forward to paragraphs 82 to 83, this is the
12 CMA expressing a concern that Electro Rent is not
13 a standalone business. Do you see that in 82?

14 A. I do.

15 Q. "We have found that they are not a standalone business.
16 It is a part of Electro Rent Europe which supplies UK
17 customers. A narrow part of the Electro Rent business,
18 with only three employees. Heavily reliant on the wider
19 Electro Rent group."

20 Then at 83:

21 "Based on these reasons, we consider [that was
22 their position at that time] that Electro Rent UK does
23 not represent a viable standalone business that could
24 compete successfully on an ongoing basis, particularly
25 not from day one, as submitted by the parties. It

1 requires substantial external support."

2 That is the concern there in relation to this
3 remedy. So one concern was it is not a standalone
4 business in its own right, and so that may affect the
5 effectiveness of the remedy. Yes, you agree that is
6 what the CMA had in mind?

7 A. Yes.

8 Q. Then at 85 they say, having said that:

9 "However, we do not rule out that a divestiture of
10 part of the Electro Rent business, if an appropriate
11 package and suitable purchaser could be identified,
12 could create a viable competitor in the market. Being
13 a divestment of assets likely to be subject to purchaser
14 and competition risk, it would give rise to concerns on
15 which we would need to be satisfied."

16 Yes?

17 A. Yes.

18 Q. Then over the page at 86:

19 "We consider purchaser risk is a major concern."

20 Then at 88 it says that the remedy:

21 "Due to the relatively small size of the
22 Electro Rent UK business this remedy has significant
23 composition risks. We will require the merger parties
24 to specify the composition and operation of the package
25 in detail."

1 You were aware there, were you not, that the CMA is
2 concerned about this remedy and the composition of the
3 divestiture package would need to be carefully set out;
4 yes?

5 A. Yes.

6 Q. At 92:

7 "For the reasons set out above, we would consider
8 that the partial divestment of Electro Rent, namely
9 Electro Rent UK, including all the elements in
10 paragraph 86 above [which we have looked at], coupled
11 with a number of supporting provisions, could be
12 feasible to remedy the SLC that we provisionally
13 identified."

14 You knew how important it was to identify a suitable
15 purchaser and to satisfy the CMA about these things, did
16 you not? Because paragraph 165, which if you go forward
17 to page 40, paragraph 165 spells out that if the
18 divestment of Electro Rent UK to a suitable purchaser
19 fails, then the alternatives would be either divestment
20 of the Microlease companies or Electro Rent Europe,
21 which you did not want.

22 A. Correct.

23 Q. So your response to the CMA was to seek to persuade it
24 to adopt the third remedy, divestment of Electro Rent
25 Europe (sic).

1 A. Correct. UK, rather than Europe.

2 Q. I am so sorry, that was a slip of the tongue. UK.

3 I took you just before lunch, but let us go back to
4 it, to your response to the notice on possible remedies.
5 I think we can take this from bundle A, at tab 16.

6 We discussed already paragraph 3 before lunch.
7 I put to you before lunch -- so this is Electro Rent's
8 proposal dated 19 February 2018, and it is the response
9 to a notice of possible remedies. I put to you before
10 lunch that -- sorry, did we go to this document before
11 lunch? I may now be confusing myself. No, we did not.
12 I am so sorry, I have mistakenly said that we went to
13 this document before lunch. This is a different
14 document.

15 This is the response to the notice of possible
16 remedies. The document I took you to before lunch was
17 the 7 March remedy proposal. So in fact we have not
18 gone to this document before, Mr. Brown. I just need to
19 be clear.

20 But you remember this, do you not? Because it is
21 the response to the notice.

22 A. Yes.

23 Q. You see there, you set out at paragraph 3 what is
24 required to be included. Then at paragraph 7, over the
25 page:

1 "In the parties' view it is unnecessary for
2 Electro Rent UK to be sold to a purchaser with
3 significant existing TME rental operations elsewhere in
4 the world. The third remedial operation would include
5 everything to which Electro Rent UK currently has access
6 in order to compete in the UK. A purchaser does not
7 need a significant pre-existing TME rental business to
8 operate this business in a meaningful way in competition
9 with Microlease and other UK TME rental providers."

10 In relation to that comment, "everything that
11 Electro Rent UK currently has access to", do you accept
12 that that includes the Sunbury lease?

13 A. I accept that it would encompass premises suitable for
14 their ongoing use and purpose.

15 Q. But not necessarily the Sunbury lease?

16 A. No.

17 Q. Is your position that you -- am I summarising it
18 accurately when I say that you accepted -- you accept,
19 do you not, because the CMA made it very clear in the
20 notice on possible remedies and in the remedies working
21 paper, that the divestment package would need to be
22 carefully considered?

23 A. Yes.

24 Q. You accept that the divestment package had to include
25 the interest in the lease -- in a lease?

- 1 A. In a premises, yes.
- 2 Q. In a premises. In a lease.
- 3 A. Yes.
- 4 Q. You say not necessarily the Sunbury lease, it could be
5 another lease.
- 6 A. It could be, yes.
- 7 Q. So is it the case, then, that Electro Rent was planning
8 to enter into another lease after terminating the
9 Sunbury lease?
- 10 A. We would have either entered another lease or agreed
11 terms with a purchaser to amalgamate the business into
12 their facilities prior to divestiture.
- 13 Q. If you had entered into another lease you would have
14 required the CMA's permission to do that, yes, under the
15 order?
- 16 A. We would have gone back to the Monitoring Trustee under
17 the same principle as before.
- 18 Q. I am asking you now about what your understanding is of
19 the order.
- 20 A. Today or at that time?
- 21 Q. Today.
- 22 A. Right now, obviously given this appeal I would go back
23 to the CMA.
- 24 Q. Because you understand that the order requires --
- 25 A. No, because I would not want to go through this process

- 1 again.
- 2 Q. That is the only reason?
- 3 A. Because in my view I was acting in the best interests of
- 4 the business. I was doing nothing to harm or detract
- 5 from this remedy, because clearly that was the most
- 6 appropriate remedy for the business. So, you know,
- 7 there is no question that that would be my favoured
- 8 route and I would do everything in my power to make sure
- 9 that that was successful. So I would not be doing
- 10 anything to harm it in any way.
- 11 Q. But you accept that the CMA made clear, and that
- 12 Electro Rent confirmed, that the divestiture package
- 13 would include --
- 14 A. Premises.
- 15 Q. -- the right to a lease.
- 16 A. Yes, premises that were suitable for it to operate and
- 17 work.
- 18 Q. Yes.
- 19 A. Clearly my understanding at that time was that it would
- 20 either need premises to operate as a standalone unit or
- 21 it would need to be incorporated into the purchaser's
- 22 premises. So depending on who the buyer was, then that
- 23 would -- you know, the solution would vary.
- 24 Q. So in terms of -- because at that stage you did not know
- 25 who the buyer was.

- 1 A. No, of course not.
- 2 Q. So it could be -- I mean what you were saying to the CMA
3 here is that it could well be a buyer without existing
4 TME operations.
- 5 A. Yes, and I also told them previously that it could be
6 somebody with TME operations. So the flexibility of
7 choice was a big driver in my thought processes and
8 decision-making.
- 9 Q. Let us take the situation where you -- so let us take
10 the situation -- so the divestiture package, once the
11 package is put forward, so the divestiture package has
12 to be agreed before the remedy has been decided. So
13 that has to be straight, because you cannot have
14 a remedy where that is left at large. You accept that?
- 15 A. Yes.
- 16 Q. The divestiture package included, you say, a lease. We
17 say the Sunbury lease. Yes?
- 18 A. Yes.
- 19 Q. So what had to be divested, on any view, was a lease to
20 the purchaser.
- 21 A. Correct.
- 22 Q. At the time that all of this is decided you do not know
23 who the purchaser is.
- 24 A. Correct.
- 25 Q. So if it were the case -- so on any view there would

- 1 have to be a lease in place; yes?
- 2 A. If the acquiring company had their own premises, then
3 there may not be a lease in place, because that would
4 then be agreed as part of the divestiture package with
5 the CMA prior to closure.
- 6 Q. But the divestiture package has to be decided before the
7 purchasers are identified. So the purchasers are
8 identified once the --
- 9 A. It is part of the negotiations for the sale, so it will
10 be in the sale and purchase agreement. So the terms of
11 the divestiture will be agreed with the CMA, and it is
12 clearly documented that that is the case. The CMA will
13 be involved in agreeing the divestiture package, and
14 part of that would be appropriate and suitable premises,
15 whether they are owned by the current -- you know, the
16 proposed acquirer, or if they do not have suitable
17 premises then we would have secured premises to fulfil
18 our obligations.
- 19 Q. Mr. Brown, let us take the situation where a purchaser
20 has their own premises already, which you thought was
21 likely, likely to be.
- 22 A. Um-hmm.
- 23 Q. In that situation, it is likely that the purchaser would
24 not require additional premises. Yes? So the
25 divestiture package, what the purchaser would then be

1 likely to do would be not to use the Sunbury premises.

2 Yes?

3 A. Correct, yes.

4 Q. In those circumstances it is not correct, is it, to talk
5 about -- so you were saying, as I understand you, that
6 terminating the lease gave flexibility to cater for such
7 a purchaser.

8 A. For any circumstance of purchaser, yes.

9 Q. In those circumstances, the divestiture package would
10 not include a lease, would it?

11 A. No, it would not. But that would be pre-agreed with the
12 CMA as part of the divestiture package finalisation.

13 Q. But you understood, on any view, that the divestiture
14 package required a lease.

15 A. No, I do not. I do not agree with that. I think -- you
16 know, the fact that it is stated in here does not mean
17 that it will not be reviewed by the CMA prior to
18 closure. There are a whole variety of terms that are to
19 be agreed for the business to continue to operate,
20 depending on who the purchaser is.

21 Q. Mr. Brown, before lunch I put to you that the
22 divestiture package, it was crystal clear on the notice
23 of possible remedies, on the remedies working paper and
24 indeed on your own response, that the divestiture
25 package would include, I put to you, the lease to the

1 Sunbury premises. You said: no, no, it does not have to
2 be that lease, it could be another lease.

3 A. Mm-hmm, that is right.

4 Q. But that is inconsistent with your view that it might be
5 better to have --

6 A. No, wait, if I am being inconsistent --

7 THE CHAIRMAN: In these situations, it is not uncommon for
8 both the cross-examiner and the witness to interrupt
9 each other, but it makes it difficult for the shorthand
10 writers.

11 A. Yes. I shall try to prevent causing the same problem.

12 So the -- yes, I completely agree that we envisaged
13 providing leased premises to a potential purchaser
14 unless they had suitable premises to incorporate in
15 their own existing facility. In those circumstances, it
16 is unlikely that they would want to take the burden of
17 a lease that is superfluous to them. In that case, then
18 we would go back to the CMA to review the divestiture
19 package prior to divestment, and that would then be
20 built into the appropriate sale and purchase agreement.
21 It is, you know, I would have said not impractical,
22 uncommon or unrealistic to expect that to happen.

23 MS. DEMETRIOU: So when we go back to the notice of possible
24 remedies, which is at -- somebody is going to tell me --
25 B1/7. Thank you. Just so I make sure that I understand

- 1 your position, Mr. Brown. B1/7/167.
- 2 A. B1.
- 3 Q. Bundle B1, tab 7, page 167.
- 4 A. Yes.
- 5 Q. Where the CMA says that the divestiture package would
6 need to include the leasehold rights to the lease, your
7 position, can I just get this clear, is not, as we say
8 that that obviously means, the Sunbury lease, you do not
9 think it does, you think that it can include a lease to
10 some other appropriate premises. Yes?
- 11 A. I do.
- 12 Q. You also think it might not include a lease at all if
13 the purchaser already has their own building.
- 14 A. Correct. We would go back to the CMA and ask for these
15 conditions to be amended, if they had an appropriate
16 site to carry on the business.
- 17 Q. So it is fair to say you did not take that at face
18 value.
- 19 A. No, it is not fair to say that. I think it is fair to
20 say that I considered the options that would be
21 available from potential purchasers, and our aim is to
22 try to make sure that the business is as attractive as
23 possible to potential buyers.
- 24 Q. You thought that was for you to decide rather than the
25 CMA.

1 A. I think that it is for us to decide what is appropriate
2 for the business prior to divestiture, and I think it is
3 appropriate for the CMA to decide whether divestiture
4 has been fulfilled.

5 Q. You agree that it is for the CMA to decide what is
6 in the divestiture package.

7 A. Yes.

8 Q. Now if we go to -- this is the document that I started
9 to take you to a few moments ago just after lunch, so
10 bundle C2, tab 10. I have it as tab 10, maybe you have
11 it as tab 11. The document I want is the response to
12 the notice of possible remedies. Do you have that?

13 A. Tab 10.

14 Q. Tab 10, thank you. We just looked at paragraph 3, yes,
15 just after lunch.

16 Going on to paragraph 7, we looked at that, which is
17 that the third remedial option would include everything
18 to which Electro Rent currently has access, so I asked
19 you about that.

20 Then going on to paragraph 15, you see there in
21 addition the CMA -- in the CMA's view, and this is
22 Electro Rent saying this, Electro Rent UK has potential
23 for expansion which can be undertaken by a purchaser
24 without a significant pre-existing TME rental business.

25 The last sentence:

1 "The third remedial option would achieve precisely
2 that, replicating Electro Rent UK's TME rental business
3 as it currently stands."

4 But again, I think your evidence is going to be that
5 you thought that was completely consistent with not
6 having the lease to the Sunbury premises.

7 A. Yes.

8 Q. Thinking about what a standalone business that would be
9 fully operational from day one might require, the effect
10 of serving the Break Notice is that the UK business
11 would not have had premises as of April 2019, yes, would
12 not have had those premises?

13 A. It would not have had -- well, it may have had those
14 premises if we had renegotiated the lease, which was an
15 option.

16 Q. But discounting that. That lease would have been
17 terminated.

18 Assuming that a deal could be done with a new
19 purchaser by, say, Christmas of this year, because
20 a deal has not yet been done, has it, Mr. Brown?

21 A. No. Shortlisted candidates have not been selected by
22 the CMA yet.

23 Q. No. So assuming a deal can be done, but could be done
24 by Christmas of this year, the new purchaser would have
25 been left with a lease with only three months to run, is

- 1 that right, or three months or so?
- 2 A. Almost certainly not. We would have secured alternate
3 premises, in my view, by that time. Which I also stated
4 in communications to the CMA and to the Monitoring
5 Trustee.
- 6 Q. Depending on the purchaser? Because they might --
- 7 A. If we knew who the purchaser was, then we would procure
8 and secure alternate premises to meet the requirements
9 of the business.
- 10 Q. Your evidence is that you think that would have been
11 straightforward. But regardless of that, regardless of
12 how easy you think it might have been to have found
13 other premises, what you are doing here is disposing of
14 an asset, are you not, by terminating the lease?
- 15 A. Or a liability, depending on your term, yes.
- 16 Q. But you are disposing of an asset within the meaning of
17 the order.
- 18 A. Yes. We do dispose of assets every day within the terms
19 of the order. We hold an inventory of several thousand
20 instruments that are rented out to customers and sold on
21 a day-to-day basis in the normal course of our business,
22 many of which are substantially more expensive or of
23 higher value than the value of this lease.
- 24 Q. But I think it is clear that you accept, or at least
25 your lawyers accept that this was not in the ordinary

1 course of business.

2 Now, on --

3 A. The lawyers accepted that it was not in the ordinary
4 course of business, but at the time my feeling was that
5 this was an ordinary course of business decision.

6 Q. Let us have a look at how "ordinary course of business"
7 is defined. We are back to bundle A at tab 13.

8 "Ordinary course of business" is defined at page 8
9 of the interim order behind tab 13. It reads:

10 "Matters connected to the day-to-day supply of goods
11 and/or services by the Microlease business or
12 Electro Rent Corporation business."

13 A. Yes.

14 Q. It is not, is it, a fair description -- that is not
15 a fair description of disposing of the ten-year lease of
16 Electro Rent UK's only premises in the UK in the context
17 of a merger investigation.

18 A. Well I believe, I believe and believed it was, on the
19 basis that the premises was not suitable for -- it is
20 not fit for purpose for housing three people with
21 7,500 square feet of premises. It is not appropriately
22 configured for the business. The burden --

23 Q. We will come on to that, Mr. Brown.

24 A. Yes, but you asked me why this applies, so I am trying
25 to answer that.

1 So I believed it to be in the normal course of
2 business because that premises would be a burden on
3 a potential purchaser and operator of this business as
4 a standalone unit. The cost of the premises is
5 disproportionate to the size required, and that
6 overhead, which is a very significant overhead for
7 a business of that size, could render the business less
8 able to be competitive in the marketplace.

9 So do I think that it is in the best interests of
10 the business moving forward and is that day-to-day
11 supply of goods and services by Electro Rent UK? Yes,
12 I do. That is the description that I would apply to it.

13 Q. The question is not whether it is in the best interests
14 of the business, is it? You have an interim order here
15 that needs to be complied with that precludes you from
16 disposing of assets unless in the ordinary course of
17 business. It does not ask you whether something is in
18 the best interests of the business. That is a different
19 question.

20 A. Well, okay, but for me that is a fine distinction.

21 I believe in the ordinary course of business my duty as
22 an officer of the company is to try to enable the
23 business to perform in the most appropriate manner, and
24 carrying inappropriate and unnecessarily high overheads
25 is not conducive to that behaviour.

1 Q. Now, the hearing that took place before the CMA was on
2 1 March, was it not?

3 A. Yes.

4 Q. You told the CMA at that hearing that three companies
5 had expressed an interest in buying the UK business.

6 A. Three unsolicited people had made enquiries, yes.

7 Q. Yes, and we can see that if we go to bundle A to tab 53.
8 We can see a transcript, an excerpt from a transcript of
9 the hearing.

10 A. Did you say bundle A?

11 Q. Bundle A, the last tab, tab 53, and it is pages 45
12 to 46.

13 We have got to be a bit careful because the parties
14 have agreed not to refer to these potential purchasers
15 by name, so we will have to find some other way of
16 referring to them.

17 If you look at the bottom of page 50, so page 45 of
18 the transcript but page 50 of bundle, you say at the
19 end:

20 "The people that have approached us, one of the
21 companies is a private equity house."

22 Yes?

23 A. Yes.

24 Q. Then over the page you say:

25 "I think that ..."

1 Then it should be highlighted in red but three
2 letters, the name of a company:

3 "... would be interested, and they were interested
4 in phase 1."

5 Yes?

6 A. Yes.

7 Q. Then halfway down that page:

8 "The third company that has expressed an interest is
9 actually led by an ex-senior member of Microlease's
10 management team, who is chairman of a company that
11 provides test equipment services."

12 A. Yes.

13 Q. That is Mr Colley that you are talking about.

14 A. Correct.

15 Q. We know that your solicitors followed up by providing
16 his contact details, and we see that at page 65.

17 Followed up with the CMA. So they provided -- in
18 response to a question from the CMA, they provided
19 Mr. Colley's contact details.

20 A. Yes.

21 Q. For the Tribunal's benefit, you see in those contact
22 details the name of the company, but we have agreed not
23 to name the company in open court.

24 Now Mr. Colley had held a senior position at
25 Microlease, the same side of the business as you.

- 1 A. Correct.
- 2 Q. How long had you known each other?
- 3 A. Approximately 35 years I have known Mr. Colley.
- 4 Q. You were both senior managers in that part of the
5 business.
- 6 A. Yes.
- 7 Q. You had worked together very closely over a long period
8 of time.
- 9 A. Yes, but not, obviously, those 35 years. I knew him
10 when he was a main board director of Dixons and I worked
11 for Sinclair Research in Cambridge.
- 12 Q. You knew about his company, the company that he was
13 chairman of, because they are in the same industry.
- 14 A. I knew of them not because they were in the same
15 industry, but I knew of them, yes.
- 16 Q. Through Mr. Colley.
- 17 A. Yes.
- 18 Q. Because he was chairman, was he not --
- 19 A. Yes, he was chairman.
- 20 Q. -- and a director? Their premises were, or are perhaps,
21 in Dunstable. That is right, is it not?
- 22 A. I believe so, yes.
- 23 Q. Did you know that at the time? Is that Mr. Colley had
24 told you?
- 25 A. I probably did know, but I do not recollect. It has not

1 particularly registered.

2 Q. When you were explaining a few moments ago that you
3 thought that the likelihood was that a purchaser would
4 not want these premises because they had pre-existing
5 premises --

6 A. Facilities, yes.

7 Q. -- Mr. Colley's company would be an example of that.

8 A. All three of those companies are examples of that.

9 Q. All three are examples of that.

10 A. Yes.

11 Q. So in Mr. Colley's case, if his company had bought
12 Electro Rent UK's business it would have moved it to its
13 existing premises.

14 A. I would have expected it to, yes.

15 Q. Now, Mr. Colley had in fact told you in December, back
16 in December 2017, that his company was interested in
17 buying the business, had he not, and you had had various
18 discussions with him about that?

19 A. Yes.

20 Q. If we look at the email behind tab 50 of this file, we
21 see that reflected in that email. This is an email of
22 31 January 2018:

23 "Hi Nigel.

24 "Further to our meeting and discussions reference
25 the CMA investigations, could you please let me know if

1 there has been any developments which would allow us to
2 continue the dialogue about the organisation in Sunbury
3 on Thames."

4 A. Correct.

5 Q. When you referred at the CMA's hearing to Mr. Colley
6 being interested, potentially interested in buying
7 Electro Rent UK's business, you told him, did you not,
8 that you had done that, that it had come up in the
9 hearing?

10 A. I told him before we disclosed his details, yes.

11 Q. Yes, so he knew that this had come up in the hearing.

12 A. As I had also informed all of the other participants
13 too.

14 Q. Yes. You also say in your second statement that
15 Mr. Colley had been providing Electro Rent with advice
16 about the lease of the Sunbury premises.

17 A. About leases generally, yes.

18 Q. But including the Sunbury premises.

19 A. Yes.

20 Q. He did this on a consultancy basis.

21 A. Correct.

22 Q. If we go to your first statement, which is behind tab 8,
23 and you go to paragraph 20, here you say your evidence
24 is that when it came to the mistake about the notice
25 period, because you told the Monitoring Trustee that

1 12 months' notice was required, but in fact it was six
2 months' notice, and that is common ground --

3 A. That is correct.

4 Q. -- you made this mistake because you were:

5 "... informed by Bill Colley, a former employee who
6 by 14 March was acting as an external adviser to
7 Electro Rent on property matters, that notice needed to
8 be provided in accordance with a spreadsheet."

9 You exhibit that and you say:

10 "This spreadsheet and a telephone call with
11 Mr. Colley, during which he confirmed his opinion that
12 notice needed to be served in late March 2018, was the
13 source of my belief at the time that 12 months' notice
14 was required."

15 A. Correct.

16 Q. You do not mention in this statement, do you, that
17 Mr. Colley was interested in acquiring the UK business?
18 That is something that you deal with in the second
19 statement.

20 A. Correct.

21 Q. Do you remember -- so you refer to a telephone call. Do
22 you remember when that telephone call took place?

23 A. I think it was the day before, but I am, you know --

24 Q. On the 14th?

25 A. I think so.

- 1 Q. Which was the day that he sent you the spreadsheet by
2 email.
- 3 A. Yes.
- 4 Q. Is it likely that you spoke on the phone and then he
5 followed up by sending the email?
- 6 A. Yes.
- 7 Q. What did he say on the call?
- 8 A. That the notice on the Sunbury premises was due. You
9 know, if you are going to serve notice, then it needs to
10 be served now.
- 11 Q. Did you ask him during that call to refer you to the
12 relevant parts of the lease, or did you just take his
13 word for it?
- 14 A. I took his word for it.
- 15 Q. You had been discussing terminating the lease with
16 Mr. Colley for some time, had you not, before the
17 conversation on 14 March?
- 18 A. We had discussed terminating the lease going back right
19 through to the due diligence process when we first
20 looked at acquiring Electro Rent.
- 21 Q. When would that have been?
- 22 A. We completed -- or the notice of the purchase was
23 in November 2016. So the first discussion of
24 appropriate or suitable premises would have been some
25 considerable time before that, probably in March

1 or April that year, when Microlease was working with a
2 UK private equity house to bid to purchase Electro Rent.
3 The transaction actually happened the other way round
4 and Electro Rent acquired Microlease. But during that
5 early due diligence phase, then we carried out synergy
6 assessments for combining the businesses and that
7 obviously influenced our bidding process in buying the
8 company. So going back to, I would think, somewhere
9 between March and June of this year would have been when
10 we had first considered it.

11 Q. 2016?

12 A. Yes.

13 Q. The discussions carried on, did they not, through 2017?

14 A. Yes.

15 Q. It is correct, is it not, that the view that you took
16 was that this was not a suitable premises?

17 A. The view that I took at that time, of course, was before
18 the phase 2 investigation. So at the start of the
19 phase 2 investigation the whole process, as you are well
20 aware, starts again in terms of their assessment of the
21 competitive nature of the market.

22 So, you know, it may well have been the result that
23 the CMA found that there was no serious lessening in
24 competition, so it would be perfectly appropriate and
25 suitable for us to be looking at remedies that -- you

1 know, for our own business, in terms of how we deliver
2 synergies.

3 Q. Of course.

4 A. So that is what was happening at that time.

5 Q. I understand that. So you were of course, as any
6 sensible business person would be doing, looking at
7 pursuing things -- looking at both eventualities. So it
8 may be that this divestiture was not ordered, in which
9 case you would be left running the business and you
10 would need to be considering whether the lease was
11 suitable.

12 A. Correct.

13 Q. You formed the view, did you not, that it was not
14 suitable?

15 A. Yes.

16 Q. Mr. Colley, you were seeking advice from Mr. Colley, he
17 agreed with that.

18 A. Mr. Colley's advice was not a question of whether it was
19 suitable or not for -- you know, fit for purpose; it was
20 actually consulting on dilapidation costs and the likely
21 exit, you know, termination costs of surrendering the
22 lease.

23 Q. Yes, but you would have discussed with him, would you
24 not, the --

25 A. No.

- 1 Q. I have not asked the question.
- 2 A. You are going to ask me whether I would have discussed
3 with him the viability of the site, I imagine, and the
4 answers to that is no.
- 5 Q. No, I was going to ask whether you would have discussed
6 with him the rental liability on both scenarios, so if
7 you had kept the site or if you had terminated the
8 lease.
- 9 A. He would have looked at the rental costs, yes, because
10 he would have looked at the lease. So to be able to
11 surrender it, then to understand the cost of surrender
12 and the notice term, then that would have been relevant.
- 13 Q. Yes. Indeed on the spreadsheet, which we will come to
14 in a moment, he set out the potential liabilities, did
15 he not?
- 16 A. He did.
- 17 Q. He would have been aware that given a free hand by the
18 CMA, so let us say that the CMA had not found an SLC,
19 that you wanted to terminate the lease.
- 20 A. I am sure he would have suspected that. Whether he
21 would have known it or not is hypothetical.
- 22 Q. You were asking him to advise in relation to it, so what
23 did you think he was advising on?
- 24 A. Giving me options of what we should be doing in the
25 future, which is as you previously suggested.

1 Q. If you turn to tab 47 of this bundle, and his email of
2 1 March, when he says:

3 "I have also recently attended meetings with
4 Mr. Collingwood and have agreed to work with him on
5 the Sunbury lease, hopefully when you get the green
6 light ..."

7 What is he talking about?

8 A. To move forward in whatever way is appropriate.

9 Q. But he knew you were talking about -- you were thinking
10 about terminating it?

11 A. He is talking about three different premises here as
12 well. So the precise reference, I think --

13 Q. Can "green light" sensibly apply to any of the others?

14 A. Yes, because landlord's consent to relocate the
15 business in Paris or landlord's consent to relocate the
16 site in Mechelen to a smaller site, all of them are
17 reducing footprint from a large location to a smaller
18 location.

19 Q. Is it your evidence that you asked him to advise on
20 options in relation to the Sunbury lease but he had no
21 idea that you wanted to terminate the lease?

22 A. No, I am not suggesting that. I am sure that he
23 considered all options.

24 Q. No, but I am asking you what impression he would have
25 formed about what you wanted to do. Because you have

- 1 told the Tribunal that you had formed the view --
- 2 A. I think -- frankly, I think that is a question for
3 Mr. Colley not for me.
- 4 Q. No, it is not.
- 5 A. You are asking me, you know, what opinion he formed.
6 Well, I cannot answer what he formed.
- 7 Q. No, if you would listen to the question, Mr. Brown, then
8 you would understand I had not asked you that. What
9 I asked you was whether you formed the impression, so
10 I am asking you about your impression, whether you
11 formed the impression that Mr. Colley was aware that you
12 thought it would be a good idea to terminate the lease.
13 He would have formed that impression if somebody had
14 told him.
- 15 A. I think he would have formed the impression that that
16 was a viable option and something that we would
17 seriously consider, yes.
- 18 Q. You have told the Tribunal that you thought it was
19 positively a good idea to terminate the lease.
- 20 A. Yes, I do.
- 21 Q. Are you testifying that you had not conveyed those views
22 to Mr. Colley?
- 23 A. I doubt if I conveyed those views to Mr. Colley.
- 24 Q. If we turn to the email behind tab 48, here there is
25 another email from Mr. Colley, this time

1 dated November 9, 2017 and he says:

2 "Further to our chat earlier, please find attached
3 photographs taken of the Electro Rent facilities as
4 requested."

5 Pausing there, is that prior to the possible site
6 visit? It is prior in time --

7 A. Yes, it is, yes.

8 Q. -- but that would have been for the purposes of the site
9 visit, would it not? Although in the end the site visit
10 did not go to Sunbury.

11 A. I think it was actually partly due to quotation of
12 dilapidation costs. It was to assess the premises, the
13 use of the premises, and I believe that some of the
14 photographs also covered the -- that were taken covered
15 the roof leaks.

16 Q. I think we can agree, can we not, because where he talks
17 in the second sentence "in preparation for the possible
18 disposal of this building", I think we can agree that he
19 had in mind that you were --

20 A. Considering.

21 Q. -- considering disposing of the building.

22 A. Yes.

23 Q. I think we can agree that much.

24 A. Yes, definitely.

25 Q. Also that you were discussing that with him, plainly --

- 1 A. Yes. Prior to the SLC.
- 2 Q. -- and that he advised, or the results of his advice
3 were that this would result in a cost saving for
4 Electro Rent.
- 5 A. Yes.
- 6 Q. The spreadsheet that you refer to at paragraph 20 of
7 your witness statement, that was first created -- we
8 know that was first created by Mr. Colley in March 2017
9 and updated in November 2017. Would this email
10 of November have attached that spreadsheet, do you
11 recall?
- 12 A. I do not recall, and I do not believe it had an
13 attachment.
- 14 Q. There were some attachments.
- 15 A. Yes, I do not -- Electro Rent UK, the attachment is
16 a photograph or a PowerPoint presentation. So it is not
17 a spreadsheet, it is a PowerPoint.
- 18 Q. Do you recall if you saw the spreadsheet before
19 14 March 2018?
- 20 A. No. No.
- 21 Q. That was the first time that you saw the spreadsheet?
- 22 A. I believe so, yes.
- 23 Q. So you had not discussed the termination date with him
24 before 14 March 2018?
- 25 A. I think in the phone conversation the day before it was

1 mentioned.

2 Q. Is it the day before or the same day?

3 A. I think it was day before. I think that is what I said
4 before.

5 Q. On the 13th?

6 A. Yes.

7 Q. If we have a look at the spreadsheet, so that is in the
8 same file behind tab 39, and we see the covering email
9 attaching it on the first page, and then behind that we
10 see the spreadsheet itself. We can see, incidentally,
11 from the title of the email that the spreadsheet is
12 dated November 2017. Then if we look at the
13 spreadsheet, did you ask -- is this something that you
14 had asked Mr. Colley to prepare, the spreadsheet?

15 A. No.

16 Q. You say that you used it to work out -- you say in your
17 statement at paragraph 20 that you used it to work out
18 how much notice you had to give.

19 A. Well, I took the statement that says "give notice" and
20 the conversation that I had with Mr. Colley the day
21 before as an accurate record of the period or the time
22 we needed to give notice. Clearly that was a mistake,
23 and I have admitted that mistake so ...

24 Q. Yes, you have. On its face this says "give notice". It
25 says "give notice". That is equally consistent -- that

1 does not necessarily mean that the legal requirement is
2 to give notice at that point.

3 A. That was the implication of both this spreadsheet and
4 the conversation I had with him the day before.

5 Q. What did he say on the call? Did he say that the legal
6 requirement --

7 A. "You need to serve notice now", yes.

8 Q. Under the lease.

9 A. Yes.

10 Q. That is what he said, "under the lease"?

11 A. Yes.

12 Q. The spreadsheet also shows the rent payable and paid for
13 every quarter since the lease was signed in April 2016.

14 What is your understanding? Where it says "Days
15 48", what is your understanding, what does that mean?

16 A. I am sorry, perhaps ...

17 Q. If you look at the spreadsheet, it says on the left, if
18 you are looking at it -- if you turn it the right way
19 round.

20 A. Days 48. I see.

21 Q. What does that mean?

22 A. I have no idea.

23 Q. The spreadsheet also calculates the total cash out after
24 the lease has ended, yes, at 85,000 something,
25 approaching £86,000.

1 A. Yes.

2 Q. So this spreadsheet was helping you to decide whether it
3 was financially worthwhile to terminate the lease, yes?

4 A. Yes, to provide a comparison of rent with other premises
5 that we were examining. Yes.

6 Q. Something that Mr. Colley had been working on, to help
7 advise you whether it was financially worthwhile to
8 break the lease.

9 A. No, he supplied me with the costs of this lease. That
10 is the extent of his involvement here.

11 Q. Yes, he worked that out.

12 A. Yes.

13 Q. Now I think we have established that Mr. Colley -- that
14 you knew that Mr. Colley is not likely to have wanted
15 the premises if his company had purchased Electro Rent
16 UK's business. So let us assume that his business was
17 the successful purchaser and they did not want it, what
18 then? So if the Break Notice had not been exercised at
19 12 months, then the risk was, was it not, let us assume,
20 and I appreciate that you made a mistake about the
21 notice period, but let us say the Break Notice had not
22 been exercised at this point, then the position would
23 have been, would it not, that it is possible that the
24 new purchaser would not have been able to exercise the
25 Break Notice in time? Because the six-month period

1 would require notice to be provided in say October, and
2 it was likely that there would not be a new purchaser in
3 place.

4 A. No, I felt that it was probably likely there would be,
5 but ...

6 Q. There is a risk, clearly a risk.

7 A. There is a risk, yes. The risk is how long does it take
8 the CMA to make an assessment, rather than is there
9 a risk of interested parties or a timeframe for them to
10 review their requirements for premises.

11 Q. The practical consequence of that is that either
12 a purchaser would have been stuck with a lease they did
13 not need or, more likely, Electro Rent UK would have
14 been stuck with the lease that it did not need.

15 A. One of those two, yes.

16 Q. That is something that you wanted to avoid.

17 A. Naturally. I think I would want to avoid it for either
18 the purchaser or for Electro Rent.

19 Q. But the fact of the matter is, Mr. Brown, that you
20 should not really have been involved in any of these
21 decisions about the UK lease at all, should you, because
22 of the reporting lines that had been established?

23 A. Yes. I think I clearly reported this through to
24 John Hafferty, who served the notice, and there is no
25 question that it was easier for me to communicate with

1 Nash than John Hafferty, who is in a different time zone
2 in the US. So for convenience, yes, I dealt with Nash
3 in the telephone conversation to review the matter and
4 to inform him of the thought processes, the thought
5 process that we had gone through in evaluating whether
6 we should retain the Sunbury site.

7 Q. It is not just the Break Notice. You had been actively,
8 as you explained, considering terminating the lease and
9 what your options were for several months.

10 A. Certainly prior to the SLC decision, yes, no question.

11 Q. Yes, and afterwards. Because we have seen the
12 discussions with Mr. Colley where he referred about
13 ongoing discussions in relation to Sunbury.

14 A. The discussions with Bill on an ongoing basis were
15 around this notice period prior to the service of the
16 notice, and prior to the SLC decision, when he is
17 looking at should we be -- you know, should we be
18 disposing of the business if there is not a serious
19 lessening in the competition finding.

20 Q. Let us go to the notice to exercise the break option,
21 which is in bundle B1 behind tab 7.

22 As you say, that was signed by Mr. John Hafferty.

23 Do you have that, at page 213?

24 A. I do.

25 Q. You can see this is an unsigned version but you can see

1 John Hafferty's name at the end, and it says "Chief
2 Financial Officer, Electro Rent UK Limited". There is
3 not actually a company called Electro Rent UK Limited, is
4 there?

5 A. No.

6 Q. Were you the person who drafted this letter?

7 A. No.

8 Q. Who did draft it, do you know?

9 A. An employee of Electro Rent.

10 Q. Of Electro Rent UK?

11 A. US.

12 Q. Do you know who it was?

13 A. That is, you know, legally privileged information I think.

14 Q. Was it an external lawyer?

15 A. It was a lawyer.

16 Q. An external lawyer?

17 A. It was not an external lawyer.

18 Q. So it was an in-house lawyer in the States.

19 A. Yes.

20 Q. Now it is not -- I mean, anyway I will not press you any
21 more on that, although we would not accept that that is
22 privileged.

23 Did you see this letter before it was sent?

24 A. Yes, I believe so.

25 Q. So you would have seen, would you not, that the letter

- 1 correctly refers to a six-month notice period?
- 2 A. I did not examine the letter thoroughly, and I regret
3 not doing that.
- 4 Q. Turning to your second witness statement, so going back
5 to bundle A and this time tab 12, at paragraph 23
6 through to 30 you give some more detail about
7 Mr. Colley's role, and this is where you tell us for the
8 first time about his interest in Electro Rent's UK
9 business, but you do not here mention, do you, that
10 Mr. Colley had been advising the UK business about the
11 lease since 2016?
- 12 A. No.
- 13 Q. Did you not think that was an important matter to draw
14 to the Tribunal's attention?
- 15 A. I did not, but I do not -- I am relaxed about them being
16 aware of it.
- 17 Q. You say at paragraph 28 that you do not think that
18 Mr. Colley's interest in buying the business gave rise
19 to any conflict of interest. You can see that, you say:
20 "I considered that this did not give rise to
21 a conflict of interest that would disqualify
22 Mr. Colley."
- 23 Does that mean that you actively considered the
24 point at the time?
- 25 A. I considered Bill's involvement in every aspect of his

1 property work for us, and I did not believe there was
2 a conflict here.

3 Q. So when you knew that he was interested in buying the
4 business, did you expressly ask yourself the question:
5 does this change his impartiality?

6 A. As you quite rightly said, I have known Mr. Colley for
7 a very long time. He is a professional person whose
8 integrity, in my view, is unquestioned. So I do not --
9 I did not believe for one minute that there is
10 a potential ulterior motive in his thought process in
11 making this assessment.

12 Q. You went through that thought process at the time, did
13 you, or is that the evidence --

14 A. I think I went through it and it is implied in my
15 relationship with him. I have known him for a very long
16 time and been a fellow director of a business for years
17 and years and years. So yes, I trust him and I trust
18 his judgment, and I do not believe that he would -- I do
19 not think that he would in any way put himself in
20 a position of conflict.

21 Q. But you knew that he was interested. We have
22 established this. We have established that you knew
23 that he was interested in buying the UK business, that
24 he had spoken to you about that on several occasions.

25 A. Yes.

- 1 Q. That he had been keen to follow up. We see that from
2 his emails.
- 3 A. Yes.
- 4 Q. You knew that he had spoken to the CMA about it, did you
5 not, on 13 March?
- 6 A. I am not sure I knew that he had spoken to the CMA about
7 it at the time we were having the discussions, that is
8 a day before the call that I had, or the same day. I am
9 not sure that I would have been aware of his discussion
10 with the CMA at that time.
- 11 Q. Would he not have told you about it if you were speaking
12 on the same day?
- 13 A. Not necessarily. I have no idea whether that
14 conversation was bound by any form of confidentiality
15 between him and the CMA, so ...
- 16 Q. Okay, so you say at the moment you do not recall, so you
17 do not recall much about that conversation, but you
18 do --
- 19 A. The conversation that I had with Bill was focusing on
20 the termination of the lease, not on conversations that
21 he had had related to [REDACTED], or their bid process.
- 22 Q. Is your evidence that he definitely did not speak to you
23 about speaking to the CMA on 13 March, or that you do
24 not recall either way?
- 25 A. I definitely do not recall him speaking about the

- 1 discussion with the CMA on that call.
- 2 Q. But you accept that as a person experienced in dealing
3 with property matters, that he would have had his own
4 views as to whether his company would wish to keep the
5 Sunbury premises?
- 6 A. Yes.
- 7 Q. You would have known that in fact it was unlikely that
8 he wanted to keep the Sunbury premises.
- 9 A. I think that had been declared or discussed, yes. So
10 I would have known that it is unlikely that he would
11 have kept the Sunbury premises.
- 12 Q. You would have appreciated, would you not, that
13 Electro Rent's interest in relation to the lease might
14 not be identical to those of Mr. Colley's company? They
15 might not necessarily be aligned.
- 16 A. Sorry, could you repeat that?
- 17 Q. You would have appreciated, would you not, that
18 Mr. Colley's company's view about the lease, i.e. they
19 did not want it, might not necessarily be aligned with
20 what is best for Electro Rent UK.
- 21 A. If he were the purchaser and that was approved by the
22 CMA, then he would have had that discretion.
- 23 Q. I am asking you a slightly different question, which
24 is: at the time that you were speaking to him --
- 25 A. Yes.

1 Q. -- about the Break Notice, you were aware that his
2 company was interested in buying Electro Rent UK's
3 business, and we have established that you were aware
4 that he did not want to keep the Sunbury premises, and
5 you would have appreciated, would you not, that his
6 company's interests in the lease, i.e. they did not want
7 it, might not necessarily be the same, might not
8 necessarily be the best interests of Electro Rent UK?

9 A. Yes, I do not believe that that would have been my
10 thought process in the discussions. Bill -- you know,
11 I will reiterate. In my view, Bill's integrity is
12 extraordinarily high, so my focus was not on was there
13 some hidden agenda taking place for him on behalf of [REDACTED]
14 , he was acting as the professional adviser to
15 the company and providing genuine and good advice in
16 that support, and that is how I would have interpreted
17 what he was saying to me.

18 Q. Let us look at what you did and did not know about the
19 notice period. So you did not -- I think we have
20 established that you did not look at the lease itself.

21 A. Correct.

22 Q. You did not look at the heads of terms.

23 A. Correct.

24 Q. You did not read the draft notice to terminate either,
25 because that would have told you it was six months.

1 You relied on Mr. Colley's advice, and the first
2 time you say that he advised you about the notice period
3 was on 13 or 14 March.

4 A. Yes.

5 Q. You relied on his advice in circumstances where he had
6 an interest in the premises, or in not having the
7 premises. Is that factually correct?

8 A. Well, at that stage, whether he had an interest or not
9 I think is the subject of discussion or debate. But
10 I do not dispute your reasoning, so ...

11 Q. You did not refer to Mr. Colley's advice when you spoke
12 to Mr. Gopal on 15 March.

13 A. No, I did not.

14 Q. You did not run this past Latham & Watkins either.

15 A. I did not.

16 Q. I am going to ask you some questions now about the
17 telephone discussion with Mr. Gopal on 15 March.

18 A. Mm-hmm.

19 Q. We know that that was not a call that Latham & Watkins
20 attended. Correct?

21 A. Correct.

22 Q. We know that because you have just said that you never
23 asked Latham & Watkins what the notice period was of the
24 lease.

25 A. I did not.

1 Q. You did not ask them whether terminating the lease might
2 be a breach of the interim order.

3 A. I did not.

4 Q. If we go back to your first witness statement at tab 8
5 to paragraph 36, we see the context of the call. It
6 says that you emailed the Monitoring Trustee on 15 March
7 saying:

8 "If you have a few minutes I would like to talk to
9 you about the lease in Sunbury and get some advice.
10 Please let me know a convenient time for a chat."

11 A. Yes.

12 Q. It is correct, is it not, that neither in that email nor
13 on the call did you expressly say to him, "I want advice
14 on whether I would be breaching the interim order by
15 terminating the lease"?

16 A. I did not use those words, no.

17 Q. It is correct, is it not, that before the call you did
18 not send Mr. Gopal any of the documents that Mr. Colley
19 had sent you the day before?

20 A. No, I did not.

21 Q. We have already established that you did not tell
22 Mr. Gopal that you had been advised by Mr. Colley.

23 A. No, I did not.

24 Q. So the discussion about the lease would have come out of
25 the blue for Mr. Gopal, would it not, although not for

1 you?

2 A. Yes, it would.

3 Q. Now at paragraph 39 of your statement you say that you
4 do not recall the exact words that he used on the call
5 but they were to the effect of "Okay, you can proceed
6 with serving the notice". Now, it was obvious to you,
7 was it not, that -- and it is that, if I can understand,
8 it was that, you say:

9 "I was therefore in no doubt following the call that
10 Electro Rent could proceed to serve the Break Notice."

11 A. Correct.

12 Q. So it was the words, the confirmation given to you on
13 that call, that gave you the reassurance that you
14 needed.

15 A. Yes.

16 Q. It would have been obvious to you, would it not, I think
17 it is obvious on the face of it, that Mr. Gopal could
18 not have consulted the CMA before saying those words at
19 the end of the phone call?

20 A. Yes.

21 Q. If we turn to bundle C1, if you have got that, tab 4,
22 page 98. Just to put this in context, if you go to 97
23 you see this is a summary of the call between the CMA
24 and Electro Rent that you attended to discuss the
25 provisional decision to impose the penalty. If you go

1 over the page and look at paragraph 6, it says:

2 "Nigel Brown said that he referred the decision to
3 serve the notice to Nasoul Gopal before any action was
4 taken, and Nasoul Gopal approved the serving of the
5 notice. Nigel Brown said apparently this approval was
6 given without consulting the CMA, which I was unaware
7 of."

8 Mr. Brown, you must have been aware that he had not
9 consulted the CMA, because he gave you the approval at
10 the end of the call, and I think you have just accepted
11 that you were aware of that.

12 A. Yes. Similarly, he could have gone back to the CMA
13 following that call, and returned the call and given me
14 a different view.

15 Q. Moving on to the email -- I want to stay in the same
16 bundle and turn to tab 6 and turn to page 53. This is
17 an email from you to Mr. Gopal dated April 14, so this
18 is post-dating the events in question. You say in that
19 email:

20 "I apologise for this error, which was mine and mine
21 alone."

22 That relates to the error about the Break Notice,
23 yes? But you do not here mention Mr. Colley or his
24 spreadsheet or your reliance on his advice.

25 A. No, I do not, and I think, you know, I am the chief exec

1 of the business, and I accept the responsibility that
2 goes with that office and title. So, you know, it is my
3 mistake and if I have used Bill Colley to provide me
4 with information then, you know, I accept that I made
5 the mistake and there is a duty of care for me to have
6 looked more thoroughly at it.

7 Q. Then going back to your statement at paragraph 38, so
8 this is behind tab 8 of bundle A --

9 A. Yes.

10 Q. I am looking at 38(b) on page 10. You say that you
11 explained to Mr. Gopal why the lease was no longer fit
12 for purpose.

13 Do you accept -- you use the words "no longer"; do
14 you accept that the lease was at some point fit for
15 purpose?

16 A. No, not really. I think the mistake in securing the
17 premises in the first place was made by my predecessors,
18 but it was not an appropriate site.

19 Q. You did not ever tell the CMA that, did you, in all of
20 these discussions?

21 A. I think that is certainly implied in the meeting and
22 showing the photographs of the site, saying that they
23 did not need to visit it because it was not an
24 operational site. The functions that are carried out at
25 that site are not consistent or commensurate with the

1 business. It is as simple as that.

2 Q. We will come to the photographs but I am asking you at
3 the moment whether you expressly said to the CMA --

4 A. I did not expressly say, no.

5 Q. -- that these premises were not fit for purpose?

6 A. No.

7 Q. Electro Rent Europe opened the office at Sunbury on
8 Thames in June 2015. That is right, is it not?

9 A. I believe so, yes.

10 Q. Sunbury is still its only office in the UK?

11 A. It is.

12 Q. Electro Rent at the time was pleased with the premises
13 it had opened, was it not?

14 A. I believe so, yes.

15 Q. We see there is a press release. I am not sure if that
16 is in the bundle or not, actually, but we will hand it
17 up. (Handed)

18 I do not know if you have seen this or not. It is
19 on the current website. Have you seen this press
20 release before?

21 A. I think I have seen the press release before. I am not
22 certain that that is the Sunbury site.

23 Q. What site might it be?

24 A. When they first entered the UK market they occupied
25 a Regus office.

- 1 Q. Have you been to the Sunbury site?
- 2 A. Yes, I have, but I am not familiar with this -- with the
3 image of this photograph.
- 4 Q. It does seem to be the Sunbury site. If you look over
5 the page it gives the contact details as being Sunbury
6 on Thames. Now this --
- 7 MR. BEARD: I am sorry, I just am concerned. I think I am
8 instructed in relation to the photo that that is not the
9 Sunbury site.
- 10 MS. DEMETRIOU: All right. I can put the points to -- this
11 talks about a new UK office, which nobody has told us
12 about any other office apart from the Sunbury site, and
13 the contact details are the Sunbury site.
- 14 A. Well, they opened -- I do not believe this is the
15 Sunbury site, and I know for certain that they first
16 occupied short-term office accommodation that, you know
17 they were not the leaseholder. They worked in
18 a serviced office facility.
- 19 Q. Let me put the point to you in a different way. Let us
20 look at tab 53 of bundle A and turn to page 25.
- 21 A. Page 53 of ...
- 22 Q. Sorry, tab 53 of bundle A, page 25. This is a response
23 to a market questionnaire by Latham & Watkins of
24 1 November 2017. Were you involved in drafting that?
- 25 A. I am sorry, I am looking at the wrong page.

1 Q. Page 25, have you got that? Are you in the right
2 bundle? It is tab 53 of bundle A.

3 A. I am in the right one. Tab 53.

4 Q. It is page 25.

5 A. Page 25 I have got the response to market questionnaire.

6 Q. Yes, exactly.

7 A. Yes.

8 Q. Are you familiar with this document? Were you involved
9 in drafting it?

10 A. Yes.

11 Q. If you look at paragraph 20, so we have just included an
12 excerpt, you see there a question:

13 "Please explain the rationale behind Electro Rent's
14 decision to open UK premises."

15 You see there that the management felt that the
16 establishment of a local office with warehousing
17 capabilities would support such growth. Electro Rent
18 opened the UK office with the intention of offering
19 local sales and logistic support, allowing for local
20 inventory and rapid delivery as necessary, and so on.

21 A. Yes.

22 Q. That refers to the Sunbury site, does it not?

23 A. Yes.

24 Q. At (d) -- sorry, just over the page at page 27, at the
25 top of the page, under (1)

1 "What is meant by the statement that Electro Rent
2 UK's premises has the capability to supply customers?

3 "The UK office allows for local warehousing of
4 equipment which could be deployed to customers
5 in-country. Based on customer requirements equipment
6 could be sent in advance to the UK office and sourced
7 from there to customers.

8 "The office was designed for long-term growth with
9 both sales, UK outside sales, inside sales, and credit
10 control and laboratory and logistic support for UK
11 customers."

12 So somebody at the time obviously thought it was fit
13 for purpose.

14 A. Without question I would say that the people who secured
15 the lease felt that it was fit for purpose at the time.
16 I do not dispute that. I am not in any doubt that they
17 entered that lease in good faith, believing that the
18 premises were appropriate for their business. They
19 happened to be wrong, but only time proved that.

20 Q. If you turn behind the same tab to page 45, there is
21 a response to the CMA's RFI of 23 November. Again, is
22 that a document that you were involved in or not?

23 A. I am sure it was. Yes.

24 Q. Over the page, you see under 4(b):

25 "Open a premises in Sunbury, including assessments

1 of alternative sites being considered. The Sunbury
2 location was selected as it was the only site identified
3 during Electro Rent's six-month search that had
4 appropriately sized office and warehouse laboratory
5 space."

6 A. 4(b)?

7 Q. At 4.2. It is paragraph 4.2.

8 A. Sorry, 4.2(c)?

9 Q. 4.2, just above (c).

10 A. Okay. Yes. I am sure that was the case.

11 Q. You were aware of this fact, you were involved in the
12 document before speaking to Mr. Gopal?

13 A. I did not produce this document. This is nothing to do
14 with me. This is prior to my involvement with the
15 business. So their choice of premises was predicated on
16 this decision-making process at the time they made that
17 decision.

18 Q. If we go back to your statement --

19 A. Originally, you know, when they first embarked on
20 entering the UK market they entered in a serviced
21 office. They then took on the premises at Sunbury with
22 the expectation of that turning into a full serviced
23 facility with lab and logistics. That never happened.
24 So they never fulfilled that promise or expectation.
25 The property remained largely empty from the time they

- 1 signed the lease, right through until today.
- 2 Q. Partly that was because of the merger, was it not?
- 3 A. Certainly recently because of the merger, but even pre
4 the merger they had elected to service customers from
5 the UK through their Belgian facility rather than set up
6 local lab and logistics capabilities in Sunbury.
- 7 Q. Yes.
- 8 A. So whilst their original expectation for entering the UK
9 market was to achieve significant market share and to
10 compete aggressively against Microlease and win share,
11 they did not do that. So as you have almost certainly
12 seen in the documents, they embarked on a marketing
13 campaign, of which that press release is one of them,
14 that they called I think Project Bullseye, and that was
15 intended to try to capture share from Microlease
16 following Microlease's acquisition of Livingston. It
17 singularly failed.
- 18 Q. Can I ask you to go back to your statement behind tab 8,
19 and I want to look at what you say at paragraphs 24 to
20 27. These are the four reasons that you give as to
21 why --
- 22 A. Is this B1?
- 23 Q. It is A. Your statement behind tab 8. Your first
24 statement.
- 25 A. Yes.

1 Q. It is the four reasons that you give as to why, in your
2 view, you thought that it would be in Electro Rent's
3 commercial interest to terminate the lease. Yes?

4 A. Yes, sorry, which page reference are you on?

5 Q. Paragraphs 24 through to 27.

6 A. Thank you.

7 Q. You summarise four reasons.

8 A. Yes, thank you.

9 Q. The first is that the premises were too large. The
10 second -- of course the second -- sorry, the premises
11 were too large. That is not a factor that had changed
12 over time. The premises were the premises.

13 A. Except the functionality of the premises had changed.
14 So their original expectation when they took on a
15 7,500 square foot site was that it would be a fully
16 serviced facility with lab and logistics housed in one
17 location. That was never -- that never became
18 operational.

19 Q. You said that. The second reason is that the mix of
20 space in the premises did not correspond to Electro Rent
21 UK's needs. The third is that the premises were in the
22 wrong location. The fourth was the rental cost being
23 too high compared to their needs. That is what you say?

24 A. Yes.

25 Q. We have already established that Electro Rent's

1 submissions in response to the remedies notice and the
2 remedies working paper did not say anything at all about
3 any of these shortcomings. Yes?

4 A. Mm-hmm.

5 Q. You did not make any reference at all to them during the
6 hearing, did you?

7 A. No.

8 Q. Plainly they would have been relevant to the divestiture
9 package, would they not?

10 A. Yes, in the discussions then, you know, the only time
11 that we discussed the premises were in the site visit to
12 Microlease, and at that time then we demonstrated that
13 the facility was under-utilised and not being used for
14 its original designated purpose.

15 Q. Let us see what you say about that, because it requires
16 the CMA somewhat to read between the lines.

17 If you go to your second statement behind tab 12,
18 you deal with it at paragraphs 6 and 7. You say there
19 that you believe that the CMA understood that these
20 premises had more space than they needed and that could
21 easily be replaced, and there was no competitive
22 significance to them. You believed the CMA understood
23 that. Although you had not said so in terms, despite
24 saying so now.

25 A. No, I had not in terms. But at the site visit we had

1 joked about the fact that there were a very small number
2 of people in a very large facility.

3 Q. If we go to bundle D, because let us look at what you
4 did present to the CMA during the visit. That is in
5 bundle D behind tab 3, starting at page 16. Do you have
6 that? It is a series of slides.

7 A. Yes.

8 Q. If you go to slide 6, which is page 21, you have the
9 Electro Rent history. That states at June 2014:

10 "Electro Rent plans to open an office in the UK to
11 drive future expansion."

12 It sets out the new office lease being signed and
13 the permanent location in Sunbury.

14 There is nothing there on this slide, is there,
15 about any of those shortcomings of the premises?

16 A. This slide was produced and presented by the general
17 manager of the Belgian facility.

18 Q. If we go through all of these slides, they contain
19 photos, but there is nothing in these slides at all that
20 say that the office was too large or the mix of space
21 was not right or that it was not in the right location.
22 Nothing about rental costs.

23 A. That is pretty evident in the photographs, is it not?
24 Most of the facility is empty, and the number of
25 occupied desks and the amount of space they have is

1 totally disproportionate to the number of people that
2 are employed there. So I think the photographs speak
3 for themselves.

4 Q. You say that, Mr. Brown, but we are talking about a time
5 during the merger, where you had had staff leaving and
6 the whole thing had been put on ice.

7 A. The number of staff that were located at this site has
8 not varied significantly throughout that entire period.
9 The UK business employed seven people, I think, at its
10 peak. The majority of those were external sales staff
11 that were not based in those offices. So the only
12 office-based staff were the office manager, and he is
13 partly a sales executive as well, so his job is to be
14 out in the field for a proportion of his time,
15 a logistics person who is not operating logistics but
16 essentially has been an administrator, and a credit
17 control clerk. So --

18 Q. You do not address here in these slides the availability
19 of any more alternative premises available locally for
20 rent.

21 A. No, not in this -- in this presentation we were giving
22 the CMA the background of both Microlease's facility in
23 the UK and Electro Rent UK's facility and premises. We
24 were not going through alternative sites to suggest that
25 the business be relocated at that time.

1 Q. No, and nor did you expressly point out, whether in the
2 slides or the presentation, any of the shortcomings that
3 you have referred in your statement, did you?

4 A. Yes, I think we made it very clear that housing three
5 people in 7,400 square feet with a business that was not
6 functioning in logistics and lab was an unnecessary
7 overhead.

8 Q. So your evidence is that during that meeting with the
9 group, that you made clear that these were not fit for
10 purpose.

11 A. No, not made clear. It is certainly implied.

12 Q. I am asking you what was made clear.

13 A. I think it was implied. Let me put it that way.

14 Q. You did not say expressly that these premises are not
15 fit for purpose.

16 A. I did not. I did not use those words and I did not make
17 that statement. But I think the fact that the visit was
18 no longer required to go to Sunbury, which the initial
19 request from the CMA was to visit both sites, and that
20 was retracted subsequently because of the inactivity at
21 the Sunbury site.

22 Q. Now Mr. Brown, could you go back to your first witness
23 statement again, in bundle A behind tab 8.

24 Going back to the conversation with Mr. Gopal, you
25 addressed this -- you talk about this at -- you address

1 Mr. Gopal's summary of your conversation at
2 paragraph 43. Do you see that, you say:

3 "I have reviewed the Monitoring Trustee's email of
4 17 April which summarises his recollection of our
5 telephone discussion."

6 Yes?

7 A. Yes.

8 Q. Then you say:

9 "His first bullet points accurately record the
10 points as we discussed them, save for the following
11 respects ..."

12 Then you lay down three respects in which they do
13 not accord with your recollection.

14 A. Yes.

15 Q. Now we see Mr. Gopal's note, his summary is in the same
16 bundle at tab 3 --

17 THE CHAIRMAN: Can I just remind you that we are having
18 a break at 3.30. Hopefully your cross will be coming to
19 an end by about then.

20 MS. DEMETRIOU: Yes. I may have to go slightly over the
21 break. I do not have a whole lot more to do.

22 MR. BEARD: I should say I do not think there is going to be
23 pressure of time. The level of questions that I have
24 for the CMA witnesses I think are going to well fit
25 within my schedule, so I think if the Tribunal wants to

1 take a break now and Ms Demetriou carries on for a
2 little while afterwards, there is no issue with me.

3 MS. DEMETRIOU: I am very grateful.

4 THE CHAIRMAN: We will take a break now.

5 (3.25 pm)

6 (Short break)

7 (3.35 pm)

8 MS. DEMETRIOU: Mr. Brown, I have changed my mind about
9 taking you to the document I was going to take you to
10 before this break, because I want to try and shorten
11 things.

12 What I want to ask you about now is the point about
13 reversibility, because you appreciate that Mr. Gopal's
14 evidence is that you told him that the Break Notice
15 would be reversible. I want to ask you to go to
16 bundle B1. B1, tab 7. It is page 222, which is towards
17 the end of that divider.

18 Do you see there is an email from Mr. Gopal and the
19 date is 15 March, so that is the date of the call, and
20 it is to you, and he says:

21 "Nigel.

22 Many thanks again for the call earlier.

23 You mentioned the break period remains in force
24 until spring 2019 with one year notice and that the
25 decision can be reversed. Is there a time limit within

1 which the decision can be reversed? Can you please
2 send us the page of the lease which states these
3 conditions for our records."

4 So here it is clear, is it not, that Mr. Gopal is
5 saying that you said that the Break Notice can be
6 reversed, and he is asking whether there is a time limit
7 and asking you to provide the lease conditions.

8 It must have been plain to you on reading this email
9 that his understanding was at that stage that there was
10 a right for the tenant to reverse the Break Notice.
11 That is correct, is it not?

12 A. No. My statement to Mr. Gopal at the time was that the
13 lease could be renewed, and the power to reverse the
14 Break Notice only rests with the landlord. It would be
15 within our remit to apply to the landlord to reconsider
16 and accept the reversal of the Break Notice, but it is
17 his decision about whether a Break Notice is reversed.

18 Q. That is not what you replied to him, is it? Because we
19 see that from page 224, and this is your reply to his
20 email. So you are attaching the lease and the draft
21 notice to terminate, and then you say:

22 "If we do not comply with any of the termination
23 provisions, then the Break Notice is not effective. So
24 if we choose not to vacate the premises, we merely have
25 to not comply or serve a notice saying we will not

1 comply with the Break Notice for the lease to continue.
2 This is all standard stuff. It is always more onerous
3 to terminate than to continue the agreement."

4 You say. So what you are saying here is that it is
5 all at the option of the tenant, are you not?

6 A. No, I am not. The option is always with the landlord.
7 The truth of this statement is that landlords typically
8 want the existing tenant, providing they are paying
9 their bills on time and are a good tenant, to remain in
10 the premises, so --

11 Q. Mr. Brown, sorry, I just want to go back to the terms of
12 this email. You are saying that if the tenant chooses
13 not to comply with the Break Notice, for example by not
14 vacating, then the lease will continue. That is what
15 you are saying.

16 A. That is not my intention. That is not what --

17 Q. That is what you say. Do you accept that is what you
18 say?

19 A. No, because that is not my intention in the wording.

20 My intention is that we can renegotiate a new lease,
21 which is obviously what we have done, and we did very
22 quickly following the CMA's request or instruction, it
23 was matter of days for us to renew the lease; or, if we
24 defaulted on any of these points, the landlord would
25 have the right to waive the notice.

1 Q. You do not mention the landlord here, and I just want to
2 break this down.

3 You say "If we choose not to vacate the premises",
4 by that you mean the tenant, that can only mean the
5 tenant, yes?

6 A. Mm-hmm.

7 Q. "... we merely", so you are making it seem like it is
8 a simple thing "have to not comply, or serve a notice
9 stating that we will not comply, for the lease to
10 continue".

11 I think anyone reading that would think it is easy,
12 it is at the option of the tenant. But you are saying
13 that it does not mean what it seems to say on its face.

14 A. No, I do not. From my perspective, and I have dealt
15 with landlords in many premises over many years, then
16 the terms of any lease are onerous and in favour of the
17 landlord. You know, the landlord has the power to
18 accept or not your termination rights, and if you are
19 defaulting against those terms, then he has the right to
20 cancel your termination notice.

21 Q. When you say the terms are onerous and more in favour of
22 the landlord, here you are saying precisely the opposite
23 in the last sentence, are you not? Because you are
24 saying it is always more onerous to terminate than to
25 continue the agreement. So you are saying the opposite,

- 1 are you not?
- 2 A. No, I am not. I am saying for the tenant it is more
3 onerous to terminate. But the landlord has the right
4 to -- they are the ones that essentially have the power.
- 5 Q. You accept that on its face this does not mention the
6 need to renegotiate with the landlord at all?
- 7 A. No, although it does in previous communication and
8 correspondence.
- 9 Q. I am asking you about this.
- 10 A. No, but it does apply in other --
- 11 Q. This is your answer to Mr. Gopal's specific query, and
12 you accept that you do not mention here that the
13 landlord might not agree to reversing the break.
- 14 A. No, I do not mention that.
- 15 Q. You accept that you are not at all conveying here that
16 there is any uncertainty about the matter at all about
17 reversibility. What you are doing is, this is just
18 another way of saying that Electro Rent could, if it
19 wanted, unilaterally to reverse the Break Notice, is it
20 not?
- 21 A. No.
- 22 Q. Now, you say in your second witness statement -- what
23 you say in your second witness statement is that you
24 dispute that Mr. Gopal understood from you that the
25 Break Notice was reversible. That is right, that is the

1 effect of your statement, is it not?

2 A. I am sorry, could you repeat it?

3 Q. In your second statement you dispute -- let us go to
4 your second statement. That is behind tab 12 of
5 bundle A. You say at (d) on page 6, 19(d) which is on
6 page 6:

7 "I believe that Mr. Gopal understood me to be saying
8 that there was no certainty that the Break Notice could
9 be reversed, and any reversal may involve either the
10 granting of a new fresh lease or the continuation of the
11 existing lease."

12 Then you say at the end of that paragraph:

13 "Indeed, it would have been clear to anyone with any
14 commercial experience that once the Break Notice had
15 been served there was always some risk that the landlord
16 would sign a new lease with a new tenant, making it
17 impossible to reverse the Break Notice."

18 A. Correct.

19 Q. Now that is what you say in your second statement. If
20 we go to bundle C1 at tab 6 and page 47, there are
21 a series of text messages between you and Mr. Gopal sent
22 in April 2018. You have seen these, yes?

23 A. I have, yes.

24 Q. You have seen that the context is that the exchange is
25 on 13 April of this year, and Mr. Gopal is contacting

1 you because the CMA has asked for an explanation of what
2 happened. Yes?

3 You had spoken with Mr. Gopal, because this refers
4 to a call at the top, you see "Nigel, thanks for the
5 call", yes? He is asking you to send him an email
6 explaining why the notice period was only six months,
7 why you served it now when it was only six months. Do
8 you see this at the top of the page?

9 A. Yes.

10 Q. "Please set out the dates and please refer me again to
11 the reverse clause."

12 So that is his understanding there.

13 Mr. Gopal then writes on page 48, so over the page:

14 "Again, I recall you mentioned that this was
15 reversible and you said that this was possible. Please
16 refer me to the contract where possible."

17 Then your text in response, just below that, you
18 say:

19 "It is reversible if you simply pay late or do not
20 meet any of the other lease obligations."

21 That is totally consistent with what you said in
22 your email, which is: if the tenant does not meet the
23 obligations, the lease will continue.

24 A. Yes, I understand what you are saying, I just -- you
25 know, the context is not -- is just not right. You

1 know, the landlord is the only person that has that
2 power. No tenant does.

3 Q. That is not what you told Mr. Gopal.

4 A. The interpretation of the note is different between you
5 and me, that is all.

6 Q. You did not say "It might be possible to reverse it".
7 You said "It is reversible if the tenant does not comply
8 with the lease obligations."

9 A. By the landlord. The landlord can reverse it if we were
10 to default. They can.

11 Q. You say at paragraph 28 of your first witness statement,
12 so let us go back to that in bundle A, so this is again
13 behind tab 8, paragraph 28, you say that you were and
14 you are confident that, if needed, Electro Rent could
15 have moved premises without any adverse effect on the
16 business, and you rely on the witness statement of
17 Mr. Peterman. He is a director, we know from his
18 witness statement, of an estate agency. Have you had
19 dealings with him before?

20 A. Yes.

21 Q. He says, if we go to his statement, which is just in the
22 next tab, he says at paragraph 5 of that statement that
23 he was "instructed by Electro Rent to carry out a search
24 for premises meeting the following criteria", and he
25 sets out four criteria. Were you involved in

- 1 instructing him?
- 2 A. Yes.
- 3 Q. When was that?
- 4 A. I would have to check. I do not know.
- 5 Q. Let me just ask you this then, was that after the CMA's
- 6 penalty notice or before?
- 7 A. I cannot be certain, but it was soon after the CMA
- 8 questioned the process and we started to examine
- 9 alternatives.
- 10 Q. So it was certainly after your conversation with
- 11 Mr. Gopal.
- 12 A. It was.
- 13 Q. If you could now turn back, please, to tab 8 and to your
- 14 first statement. I just want to ask you about
- 15 paragraph 47 on page 12. You say that you did not
- 16 liaise with the Electro Rent UK's staff, you wanted to
- 17 keep the service of the Break Notice confidential in
- 18 case it destabilised them, encouraging them to seek
- 19 other positions. Yes? That is because there was a risk
- 20 that losing staff would affect the remedy, would it not?
- 21 So you knew the CMA were very concerned about key staff,
- 22 you did not want any risk of destabilising those staff.
- 23 A. Correct.
- 24 Q. Because you knew that might affect the viability of this
- 25 remedy, the sale of Electro Rent UK.

- 1 A. I would not want to do anything to destabilise the
2 staff, yes.
- 3 Q. You accept, I think, that you did not tell Mr. Gopal
4 about this risk on the call?
- 5 A. Well, I do not -- I did not discuss it with Mr. Gopal on
6 the call.
- 7 Q. No.
- 8 A. Neither -- you know, neither would I have done. My view
9 here was to protect them from the knowledge until later.
- 10 Q. Yes, but you accept that the reason you wanted to
11 protect them from the knowledge was to avoid
12 destabilising them, and that that was a matter which
13 fell within the scope of the order. It was connected
14 with the remedy?
- 15 A. I did not want to destabilise them because I did not
16 want to hurt the business in any way, yes.
- 17 Q. If you now turn, please, to your second statement, you
18 say a bit more about that at paragraph 36. You say
19 there that Mr. Gopal criticises you for not telling him
20 that serving the Break Notice would destabilise staff.
21 Then you draw rather a fine distinction, do you not,
22 because you say:
- 23 "In paragraph 47 of my first witness statement
24 I said that informing the staff about the service of the
25 Break Notice risked destabilising them, not that serving

- 1 it would destabilise them."
- 2 A. Correct.
- 3 Q. That is a distinction without a difference, is it not?
- 4 Because if the Break Notice is actually served and they
- 5 get to hear about it, then there is a risk of
- 6 destabilisation, is there not?
- 7 A. With the "if", yes.
- 8 Q. Yes, but there would always be a risk that they would
- 9 hear about it if the Break Notice is served.
- 10 A. There is a risk, but --
- 11 Q. In fact it happened, did it not, in this case?
- 12 A. It did. Quite where that contact came from I am not
- 13 sure, but clearly that was unfortunate. It either came
- 14 from the approach of the Monitoring Trustee or the
- 15 landlord back to one of the employees.
- 16 Q. Mr. Brown, I think in summary, we have established that
- 17 in relation to the notice period you did not put key
- 18 documents or you did not send key documents to
- 19 Mr. Gopal. I have taken you through that. You did not
- 20 tell him either about the risk of destabilising the
- 21 staff. We have seen your responses in relation to the
- 22 reversibility point.
- 23 A. The only comment I would make on that is that I did
- 24 provide the documents. Your first statement was that
- 25 I did not provide documents, but I did.

1 Q. No, not before the call.

2 A. No, I provided them to him after the call, yes.

3 Q. One of the documents was the Break Notice, you did
4 not read that, that has the six months. In relation to
5 reversibility, we have seen what you have said.

6 Now in terms of getting comfort from Mr. Gopal your
7 attitude was completely cavalier, was it not, Mr. Brown?
8 You were not putting the full facts before him, and you
9 dealt with this in a very short phone conversation
10 and you took his words as giving you the right to go
11 ahead without contacting the CMA.

12 A. I do not think I acted in a cavalier manner at all.
13 I followed the instructions that I had been given
14 initially by Simon Polito and then through the
15 instructions with the Monitoring Trustee's brief or
16 instructions to operate. I followed both of those, was
17 given clear instruction back, and I fully acknowledge
18 I made a mistake, which was that the notice period was
19 not six months. I apologised for that, and I apologise
20 for it now, but it is not the -- for me that was not the
21 decision-making criteria to serve the notice on the
22 lease.

23 MS. DEMETRIOU: Mr. Brown, I do not have any further
24 questions for you. If you wait there, the Tribunal may
25 have questions, and so may Mr. Beard.

1 THE CHAIRMAN: We have no questions, thank you.

2 (4.00 pm)

3 Re-examination by MR. BEARD

4 MR. BEARD: Just picking up there for clarity, what were the
5 criteria that you had in mind in terms of issuing the
6 service of notice on the lease?

7 A. I was interested in preserving the well-being of the
8 business, as I stated in my statement. There were
9 really four considerations that I had taken into
10 account, and all of those are geared to the continuing
11 appropriate performance of the business and its ability
12 to compete in the UK market which, you know, for me, is
13 what is in the best interests of the business.

14 Q. Ms. Demetriou took you to your second statement on
15 a couple of occasions, and in bundle D took you to
16 a slide in a slide pack. It is bundle D, tab 3.

17 A. Yes.

18 Q. She took you to slide 6, which is page 21. You said
19 that this slide was compiled by the Belgian manager. It
20 says under the entry April 2016 "New office leases
21 signed". Do you know what that refers to?

22 A. I believe that it relates to the Belgian facility, but
23 I cannot be certain.

24 Q. Okay, thank you.

25 You referred, in answering to a number of

1 Ms. Demetriou's questions, to the fact that this
2 presentation, which was made I think at the Microlease
3 premises site visit, you provided some photos. Could
4 you just turn through the slide pack. Are those photos
5 here?

6 A. Yes.

7 Q. Could you indicate to the Tribunal where they begin?

8 A. Slide 23 -- on page 23, slide 8 is numbered on page 23,
9 through 24, 25, 26 and 27.

10 Q. Did you present those photos at the site visit?

11 A. Yes.

12 Q. Without reliving it entirely, could you broadly
13 summarise what you said about those photos at the site
14 visit?

15 A. Can I go back a little bit further? Because when the
16 CMA first requested the site visit then they requested
17 to come to both sites, both Sunbury and Harrow.

18 Harrow is a much larger facility for Microlease's
19 business and it is the principal centre for managing
20 services across the whole of mainland Europe. So it is
21 a much bigger, fuller facility, containing all of the
22 services that are provided.

23 The site in Sunbury was -- you know, we informed the
24 CMA that it was not a full functioning site, that it had
25 a small number of staff and the warehouse lab logistics

1 were not functioning, and therefore it would not be an
2 appropriate use of their time to visit the site. So
3 that could be covered by photographs that would
4 demonstrate how the site was being used today.

5 That was the reason behind producing the photographs
6 in the first place, and then we talked to that,
7 demonstrating that the warehouse was not being used,
8 that the facility was only manned by a very small number
9 of people.

10 Q. I am grateful.

11 Early on in questions from Ms. Demetriou she
12 suggested to you that you were not involved in handling
13 the details of the UK business for Electro Rent. Why,
14 then, were you involved in issues concerning the
15 property lease?

16 A. Well, all the property -- you know, property and estate
17 is centrally managed and for that reason I got involved.
18 But I still referred the matter to John Hafferty, who
19 served the notice.

20 Q. I am grateful.

21 If we could just go to bundle B1, tab 7, at 167.
22 Bundle B, tab 7, page 167.

23 A. Yes.

24 Q. These are passages in the notice of possible remedies to
25 which Ms. Demetriou took you.

- 1 A. Yes.
- 2 Q. I just want to pick up paragraph 18(a). Did
3 Electro Rent have a freehold site in the UK?
- 4 A. No.
- 5 Q. It refers there to "all sites relevant". How many sites
6 or sets of premises did Electro Rent have in the UK?
- 7 A. One.
- 8 Q. Finally, if I may, could I go to bundle A, tab 3,
9 page 32. This is an email from Mr. Gopal to
10 a Mr. Hansen dated 17 April 2018. Have you seen this
11 email?
- 12 A. Yes.
- 13 THE CHAIRMAN: Did you say volume A?
- 14 MR. BEARD: Yes, I did. You can have it in two places. It
15 is A3 at page 32. I am sorry, sir.
- 16 THE CHAIRMAN: Yes, I have got that. Thank you.
- 17 MR. BEARD: Could you read the first two bullet points.
- 18 A. "Mr. Brown called ..."
- 19 Q. To yourself. Sorry Mr. Brown, that was my fault.
- 20 A. Yes. (Pause)
- 21 Yes.
- 22 Q. Is the second bullet point an accurate description of
23 your conversation or part of your conversation on
24 15 March?
- 25 A. Yes, it is. We would be able to negotiate a new lease

1 with the landlord, and of course that has been proved to
2 be the case because we have -- after the CMA's concern
3 and raising the concern, we went back to the landlord,
4 renegotiated the lease within a matter of days and put
5 it back in place.

6 The comment about the demand for sites in the area
7 being low is also true. You know, in Mr. Peterman's
8 report, for example, he identifies five sites that we
9 considered to be more suitable and appropriate. Earlier
10 this week I asked my assistant to check whether those
11 five sites were still available. Four of the five are
12 still available for rent several months later. So, you
13 know, it clearly demonstrates that the availability of
14 space in the area that is suitable for the business are
15 readily and commonly available.

16 MR. BEARD: I am grateful.

17 I do not have any further questions unless the
18 Tribunal does.

19 THE CHAIRMAN: Thank you.

20 Thank you, Mr. Brown.

21 A. Thank you.

22 (The witness withdrew)

23 MS. DEMETRIOU: As Mr. Beard indicated earlier, we do not
24 seek to cross-examine Mr. Peterman and so have not
25 required him to attend.

1 So I now turn to the CMA's evidence and the CMA now
2 calls Mr. Simon Polito.

3 (4.07 pm)

4 MR. SIMON POLITO (sworn)

5 Examination in-chief by MS. DEMETRIOU

6 MS. DEMETRIOU: Mr. Polito, you should have an array of
7 different files there and one of them should be
8 bundle A. If you could pick that up and turn to tab 11.

9 A. Yes.

10 Q. Do you see a witness statement? If you turn to the very
11 final page is that your signature at the bottom of that
12 page?

13 A. It is.

14 Q. Are you satisfied that this statement is true to the
15 best of your knowledge and belief?

16 A. I am.

17 Q. Do you have any corrections or clarifications that you
18 wish to make?

19 A. I do not.

20 MS. DEMETRIOU: If you wait there, Mr. Beard will have some
21 questions.

22 (4.10 pm)

23 Cross-examination by MR. BEARD

24 MR. BEARD: Mr. Polito, it may be worth just keeping that
25 file out, I am going to ask you one or two questions

1 about your statement. There are not too many.

2 You have set out your history and experience in
3 relation to these matters. If we could, could we just
4 pick it up at paragraph 19.

5 A. Yes.

6 Q. You say here:

7 "I understand that Electro Rent offered to give UIL
8 [so that is undertakings in lieu] to divest the entirety
9 of its business in the UK, including the transfer of
10 Electro Rent's lease over its registered place of
11 business in the UK, being the warehouse, offices and
12 laboratory located at Sunbury on Thames, staff, revenue
13 generating contracts, and so on. I refer to the CMA's
14 consultation on UILs."

15 You say at 20:

16 "I understand that although the CMA considered that
17 subject to consultation, the UILs would remedy the SLC,
18 the proposed purchaser of Electro Rent's UK business
19 withdrew late from the UIL process and therefore Electro
20 Rent was unable to propose an alternative purchaser
21 before the expiry of time allowed for concluding UILs."

22 That was before you became involved in this enquiry.

23 That is correct, is it not?

24 A. It was, yes.

25 Q. Just to be clear, when we are talking about undertakings

1 in lieu, we are talking about undertakings by the
2 merging parties which would be in lieu of a reference
3 creating a phase 2 enquiry. That is correct, is it not?

4 A. It is. I should just perhaps add to my first answer,
5 that although this was dealt with in phase 1, in phase 2
6 we approached the prospective purchaser to understand
7 why he had withdrawn at the very last moment. I can
8 confirm what we heard earlier from Mr. Brown that it was
9 very much for personal reasons. So we did have contact
10 with that purchaser in the phase 2 process. But this
11 happened prior to phase 2 beginning.

12 Q. Yes. In fact, as we have already heard this morning,
13 there were more than just that single potential
14 purchaser in the UIL process as well, were there not?
15 You are aware of that?

16 A. I am aware of that.

17 Q. You refer there to the UILs including divestment of the
18 lease of the Sunbury premises. Just to be clear, you
19 have not visited the Sunbury premises, have you?

20 A. No, I have not.

21 Q. Nor indeed did anyone from the CMA. That is correct, is
22 it not?

23 A. That is correct, and I think you heard earlier on the
24 reason for that. We had originally requested to see
25 both sites. As is our practice in these enquiries, we

1 like to see the premises of both parties. So in what we
2 call our first day letter we said we would wish to see
3 the premises of both parties, but there was a case team
4 meeting, attended by representatives of Microlease, when
5 they said they did not think it would be really worth
6 our while looking at those premises because we would not
7 learn anything useful from them because so little was
8 going on there. I believe that is why the photographs
9 were provided, because we took their word for that and
10 we were hoping to see from photographs that we would not
11 have learnt anything by visiting Sunbury.

12 Q. You saw the photographs, and I think the photographs
13 that you are referring to are the ones to which I just
14 took Mr. Brown in re-examination, but it may assist, if
15 you could take --

16 A. I did not actually have them in front of me when you
17 were talking to him, but I assume they are the same.

18 Q. Yes. We do not all carry these bundles with us at all
19 times, of course. I understand. They are in bundle D,
20 tab 3 at page 23.

21 A. Page 23, yes.

22 Q. People publish ironic coffee table books of dull
23 photographs.

24 I do not know whether or not page 23 would be
25 a prime entrant, but if one turns on are these the

1 photographs that you are referring to, Mr. Polito?

2 A. They are.

3 Q. Mr. Brown's description is accurate, that what we see is
4 actually very little, in the sense that we see limited
5 use of office space in a relatively generic building.

6 That is correct, is it not?

7 A. I think I cannot disagree with it.

8 Q. It is rather unremarkable office space, which is
9 materially identical to lots of other office space.

10 That is correct, is it not?

11 A. It is, and I think the point that they were trying to
12 make to us was that we would not learn very much by
13 going to Sunbury.

14 Q. Yes. In your statement you refer to it being warehouse
15 offices and laboratory. You are aware, are you not,
16 that the premises was not used as a warehouse? That is
17 correct?

18 A. It is.

19 Q. Yes. It was used as offices, and as we have already
20 heard from Mr. Brown, there were, back in 2015, seven
21 people at most working there, but during the course of
22 any of these enquiries the most that has ever worked
23 there is four.

24 I am sorry, you are nodding, Mr. Polito. I am very
25 sorry.

1 A. I was not sure there was a question there, but I agree.
2 There were four.

3 Q. It was a high end terminal rather than a full
4 confirmation. In the available space that office space
5 was hugely under-utilised; that is correct, is it not?

6 A. We could see from these photographs that it was not
7 being properly used, but I think Mr. Brown also referred
8 to the history of these premises, which I think is
9 relevant and I would like to re-emphasise that if I may,
10 because I think it was in 2014 that Microlease acquired
11 its major UK competitor in the UK, Livingston, and
12 Electro Rent, which had a fledgling small business in
13 the UK, in 2015 saw this as an opportunity to try and
14 enter into the market. Therefore, it thought that it
15 could present itself, as the two major competitors had
16 combined, as an alternative to them, and it saw an
17 opportunity to come into the UK market, to expand the
18 business, and it thought -- as Mr. Brown said, maybe
19 wrongly in the event -- it thought that it would be
20 better to have a local activity there and it would
21 establish its credibility on the ground if it had those
22 premises.

23 So they had anticipated building that business up
24 very substantially, and we had that in mind because that
25 had been explained to us.

- 1 Q. Yes.
- 2 A. I should also say -- sorry, I could go on to say that in
3 2016, as Mr. Brown also mentioned, Microlease looked at
4 the possibility of acquiring Electro Rent rather than
5 the other way round, and at that point the whole
6 progress and advancement of the Sunbury premises was put
7 on hold, because obviously if they were going to acquire
8 those business and premises and everything, they would
9 have duplicated everything. So any further expansion
10 was put on hold and the result is what you see in those
11 photographs.
- 12 Q. It may just be useful, picking that up, Mr. Polito, if
13 you go to tab 53 in bundle A.
- 14 A. Yes.
- 15 Q. This is a response to a market questionnaire,
16 1 November 2017, provided by Latham & Watkins.
17 Ms. Demetriou took Mr. Brown to a couple of passages in
18 it, which you will have heard.
- 19 If you turn over to page 26 in the external
20 numbering, you will see the passage at the top of the
21 page. Do you have the relevant page?
- 22 A. Yes, is it question 20 or the answer to question 20?
- 23 Q. She then took Mr. Brown to the rationale behind
24 Electro Rent's decision to open UK premises. Then if
25 you go over the page to 17, she took Mr. Brown to the

1 first paragraph. Would you just read the paragraph
2 under (a) and the first paragraph at the top of 17.

3 A. So 20(a).

4 Q. Yes.

5 A. Then (i) at the top of paragraph 17?

6 Q. Yes, please.

7 A. Right. (Pause)

8 Yes.

9 Q. That accurately describes the phenomenon that you are
10 talking about. But if you go on to (ii), the answer,
11 this is Electro Rent explaining the position:

12 "The operation of the UK office is more limited than
13 originally envisaged, as organic expansion plans were
14 put on hold. Electro Rent continues to supply UK
15 customers with equipment stored in Belgium, [so no
16 warehouse use]. No further documents other than those
17 already provided are available in this respect."

18 So although it was launched with optimism in 2015,
19 for whatever reason that project did not develop and the
20 premises were not used as warehousing.

21 If we could just go back to your statement at
22 paragraph --

23 A. I could, but could I just comment on what you have said?

24 Q. Of course.

25 A. You said "for whatever reason". The reason was that

1 Electro Rent and Microlease were considering a merger.
2 It therefore made no sense to continue to promote the
3 Electro Rent UK premises and develop its local business
4 there. I think there was a very clear reason why that
5 happened.

6 Q. So you are saying that essentially when a purchaser was
7 coming forward for Electro Rent, in those circumstances
8 those premises would not potentially be as useful.

9 A. Sorry, you have taken me a long way from where I was.
10 You will have to help me with the logic.

11 What I was looking at was where the two parties,
12 Electro Rent and Microlease, might merge, which they
13 were considering doing back in 2016, it was agreed that
14 Electro Rent UK would not promote its business and
15 therefore would not expand it in the way that had
16 originally been envisaged.

17 Q. The only point I was making was that Microlease was the
18 purchaser in those circumstances, was it not?

19 A. It would have been the purchaser, I agree.

20 Q. If we could just go back to your paragraph 19.

21 A. Paragraph?

22 Q. In your statement, so tab 11 in A.

23 A. Paragraph?

24 Q. Paragraph 19, I am sorry.

25 A. Yes.

- 1 Q. It is where we were before.
- 2 A. Yes.
- 3 Q. There you have your statement that the site is located
4 at Sunbury on Thames has warehouse, offices and
5 laboratory. We have agreed that in fact it is not used
6 as a warehouse; it is used as offices but they are
7 under-utilised; and you accept that it is not accurate
8 in your statement to say that there is a laboratory
9 located at Sunbury on Thames.
- 10 A. I think there was space that had been allocated for
11 a laboratory, but I do not know, we had never examined
12 in detail those premises and I do not think we could
13 tell from the photographs that you referred to earlier
14 on whether or not there was any laboratory equipment.
15 It is clear that they had not used a laboratory there,
16 but I think they had intended to have one there.
- 17 Q. Sorry, just to be clear, did you think there was
18 a laboratory at Sunbury on Thames?
- 19 A. I say I did not know whether there was. I knew
20 there had been an intention to establish one. I knew
21 there was nobody there who was capable of carrying out
22 laboratory work. That was made clear to us.
- 23 Q. You say at the end of paragraph 20 that you are aware
24 that the UIL purchaser was planning to keep the Sunbury
25 site. You did not know for how long, did you?

- 1 A. No, we did not.
- 2 Q. Paragraph 31, Mr. Polito. Just to be clear, did you
3 draft this witness statement?
- 4 A. It was -- much of it was drafted for me, but I reviewed
5 it very carefully by reference to all the documents, and
6 I made a number of amendments to it to ensure that it
7 was accurate.
- 8 Q. The sub-heading "UK site as a possible remedy" is not
9 actually accurate, is it? The text at 33 is actually
10 accurate, that the remedies, the possible remedies
11 include the sale of a business, not of a site, do they
12 not, Mr. Polito?
- 13 A. A notice of possible remedies included the option to
14 sell the UK business ...
- 15 Sorry, in what way is that not accurate?
- 16 Q. It is a mischievous heading, is it not, Mr Polito? You
17 might almost think that the draftsman was trying to
18 suggest that the possible remedy was the divestment of
19 a particular UK site, by that sub-heading. But you
20 actually have text in 33 that makes clear you are
21 talking about the business, do you not?
- 22 A. We were talking about the business, including, as it
23 says, the premises.
- 24 Q. Yes. Could we just turn then to B1, page 174, please,
25 in tab 7. B1/7/174. It is a document that starts at

1 164, Mr. Polito.

2 I am sorry, it is not. It starts at 173. It is
3 just an extract.

4 I apologise to the Tribunal. I have a reference in
5 my notes which is different from that which
6 Ms. Demetriou was using, and I will provide the
7 cross-reference subsequently.

8 This is just the remedies working paper, an extract
9 from it. I just wanted to ask you a question about
10 paragraph 66(a), with which you will be familiar. This
11 is under the heading of "Divestment of a narrower UK
12 focused part of the party's business". What has been
13 referred to as Electro Rent UK.

14 Here the remedies notice specified a number of
15 assets that we would expect to be available to
16 a purchaser in any divestiture package. (a) is:

17 "Freehold sites, or if leasehold, rights to the
18 lease for all sites relevant to the business to be
19 divested."

20 That is a boilerplate clause, is it not, Mr. Polito?

21 A. I think it is -- well, I cannot say whether or not it
22 was refined for the purpose of the remedies notice, but
23 it is, of course, simply repeating what was in the
24 remedies notice itself, and when we put out a remedies
25 notice we tend to use fairly generic language so we are

1 covering everything.

2 Q. Because you accept that there was no freehold site.

3 A. I do.

4 Q. In fact, Electro Rent, whether you are looking at it in
5 terms of the overall company or the branch, had only one
6 site and that was the site at Sunbury. That is correct,
7 is it not?

8 A. It did.

9 Q. Now if we could just turn then back to your statement,
10 so again bundle A, tab 11. You say at 37:

11 "During the hearing [so I think this is during the
12 remedies hearing] I was given the impression that
13 Electro Rent representatives and advisers were
14 well aware of the significance of having a presence in
15 the UK ..."

16 I do not think there is any issue in relation to
17 that. Then you say:

18 "... and that the UK site might be important to any
19 remedial action taken by the group."

20 But in fact, Mr. Polito, that could be a UK site for
21 a UK presence, could it not?

22 A. I would like to go back a little in that case, because
23 we had been proceeding on the assumption the whole time
24 that we were talking about Sunbury. I am not suggesting
25 it could not, in another world, have been another site.

1 But we were clearly looking at the Sunbury site as the
2 premises that would form part of the package.

3 Q. Yes.

4 A. It was put to us I think, and you may come to this in
5 a moment, that there was a standalone operation or
6 business that would be up and running on day one with
7 all the related infrastructure. So I think the
8 discussion we had, it was clearly based on the
9 understanding that we were talking about Sunbury, not
10 some other site that someone might find.

11 Q. So what you are saying there is that it was important
12 for a standalone Electro Rent business to have offices
13 in the UK.

14 A. What -- that is what we had been told when Electro Rent
15 originally entered the UK market. It had offices in the
16 UK. As far as we were concerned, it was essential to
17 preserve the assets of the business so that any
18 potential purchaser would be able to take over the
19 assets of that business. I could not say whether other
20 assets might have been better or worse or anything else,
21 but this was the set of assets that we were looking at.

22 Q. But so far as we are concerned with Sunbury, we have
23 accepted that it was office space, under-utilised office
24 space, and that if at the time the divestment occurred
25 Electro Rent held the lease in relation to that office

1 space, that would be part of the divestment package.

2 That is correct, is it not?

3 A. Yes.

4 Q. But if at the time Electro Rent did not hold that lease
5 and held other office space, that would be the premises
6 that would form part of the divestment package. That is
7 correct, is it not?

8 A. Well, I do not think it is, because we never considered
9 the possibility that there might be other office
10 premises. That was not in our contemplation at all.

11 Now, if someone had wanted and suggested to us that
12 there would be better premises elsewhere and that these
13 premises were too large or in the wrong place and there
14 may be very good other commercial reasons why some other
15 premises might be more suitable, we might have
16 considered that. But I am sure you will come on to in
17 due course the fact that we were not asked about that.
18 It would have been our decision had we been asked, and
19 it was very much our decision, the whole idea of the
20 hold fast arrangements is that you sort of freeze these
21 assets in place and it is up to the CMA to decide if
22 anything untoward or different is going to happen to
23 them. So we never contemplated the possibility that
24 there would be another site.

25 Q. Just in relation to that, I think, just to be clear,

1 there is no dispute you were not asked about it.

2 Can we go to C2, if we may, bundle C2, tab 12.

3 This is the remedies working paper in full, so

4 I have now actually found the cross-reference

5 inadvertently. So for the Tribunal it is the passage

6 I was just taking Mr. Polito to earlier on, but 88,

7 paragraph 88 on page 20.

8 I do not want to lose the context of it. This is,

9 you can see from page 15, that divestment of a narrower

10 UK focus part of -- I am grateful.

11 Paragraph 88:

12 "We consider that due to the relatively small size

13 of the Electro Rent UK business this remedy has

14 significant composition risks. This is discussed in

15 paragraphs 148 to 151 below. As noted in our guidance,

16 where a package of assets is proposed for divestiture we

17 require the merger parties to specify the composition

18 and operation of the package in detail."

19 Can you just explain what composition risk is? Is

20 it -- can I give you a definition and see if you can

21 mark my homework? A composition risk arises if the

22 scope of the divestiture package is too constrained or

23 not properly configured to attract a suitable purchaser

24 or may not allow the purchaser to operate as an

25 effective competitor.

1 I am happy to --

2 A. That seems a not unreasonable definition.

3 Q. What you are identifying here in 88 was if you had any
4 concerns about the package that was being put forward.
5 That is what you were talking about in 88.

6 A. Yes, and the package of assets here in question was
7 obviously Sunbury, or included Sunbury.

8 Q. I think there may be differences about the significance
9 of that fact, because it depends on the time of
10 divestment, depending on whether or not a break clause
11 had actually been exercised, not even served. But let
12 us leave that to one side.

13 Certainly at this time, at this moment, had
14 the divestment occurred it would have involved the
15 Sunbury lease. We can agree on that I think.

16 A. I think it is important to remember that when we are
17 looking at remedies, if we are going to accept remedies
18 we need to be certain at that time that there is
19 a certain fixed package that will be available for
20 a purchaser. It may be later on in the day, if we have
21 identified that and we are satisfied about the
22 package, that is fine. But we would not have been
23 satisfied with a situation if someone had come to and us
24 said "Well, actually, rather than Sunbury, we think that
25 we will probably manage to find somewhere else that will

1 do". That would not have been an acceptable package.
2 We need to be absolutely certain that there will be an
3 offer of a particular package.

4 I mention that because I think it is relevant in
5 terms of timing, and I think it was mentioned later on
6 that of course the CMA can take a view later on, once
7 the package has been identified and you have prospective
8 purchasers, that some people do not want it at all. But
9 that does not mean to say that up front, when we are
10 considering remedies, we do not have to satisfy
11 ourselves that there are assets there that a purchaser
12 who wants premises can take if he wants to.

13 Q. The key composition risks you were really thinking about
14 here were loss of customer contracts and loss of access
15 to stock in particular, were you not?

16 A. Yes, they were.

17 MR. BEARD: Thank you.

18 I do not have any further questions for the witness.

19 THE CHAIRMAN: Ms. Demetriou, do you have any
20 re-examination?

21 (4.36 pm)

22 Re-examination by MS. DEMETRIOU

23 MS. DEMETRIOU: I just have one question which relates to
24 the point that Mr. Beard was just putting to you about
25 paragraph 66 of the remedies working paper. He put to

1 you the point that is this not just a boiler plate
2 clause? He also said could not "lease" mean any lease?

3 I just want to ask you to turn to bundle C1, tab 4,
4 page 71.

5 A. Yes.

6 Q. There you see this is the parties' summary of remedy
7 proposal, and you have got the date on the next page,
8 7 March. Do you see there:

9 "The proposed remedy would consist of the following
10 elements ..."

11 Then at (a):

12 "The transfer of Electro Rent's lease over its
13 registered place of business in the UK."

14 What did you understand that to mean?

15 THE CHAIRMAN: Before you answer that, could you just give
16 us the reference again, please Ms. Demetriou?

17 MS. DEMETRIOU: Sorry, it is bundle C1, tab 4, page 71.

18 THE CHAIRMAN: Page 71.

19 MS. DEMETRIOU: The question is: what did you understand the
20 transfer of Electro Rent's lease over its registered
21 place of business in the UK to refer to?

22 A. The Sunbury premises.

23 MS. DEMETRIOU: I do not have any further questions.

24 THE CHAIRMAN: Thank you very much, Mr. Polito. You are
25 free to go.

1 A. Thank you.

2 (The witness withdrew)

3 (4.35 pm)

4 MS. DEMETRIOU: The CMA now calls Mr. Nasoul Gopal to give
5 evidence.

6 MR. NASOUL GOPAL (affirmed)

7 Examination in-chief by MS. DEMETRIOU

8 MS. DEMETRIOU: Mr. Gopal, is the file that you have in
9 front of you, does it say bundle A?

10 A. It does, thank you.

11 Q. Could you turn to divider 10.

12 A. Yes.

13 Q. Have you got that?

14 A. Yes.

15 Q. You see a witness statement there with your name on it.
16 Can you go to the final page of the witness statement.

17 A. Yes.

18 Q. Is that your signature?

19 A. It is.

20 Q. Are you satisfied that this statement is true to the
21 best of your knowledge and belief?

22 A. It is true, yes.

23 Q. Is there anything that you wish to correct or clarify?

24 A. No.

25 MS. DEMETRIOU: Mr. Beard will ask you some questions.

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Cross-examination by MR. BEARD

(4.40 pm)

MR. BEARD: We are not going to be too long this afternoon but please get yourself some water.

Just on your witness statement, in the introduction in paragraph 2 you say you have been involved in Monitoring Trustee work from around 2003, when you were part of the KPMG forensics department. That is correct, is it not?

A. That is correct, yes.

Q. You explain that you have been involved in a number of Monitoring Trustee roles since being at Smith and Williamson. That is correct, is it not?

A. That is correct, yes.

Q. You have worked on ten Competition Commission and CMA cases for Smith and Williamson, is that right?

A. Yes, that is correct.

Q. On six of them you were the named Monitoring Trustee, is that right?

A. Yes.

Q. The CMA is a major client for Smith and Williamson in relation to its Monitoring Trustee business, I assume.

A. The CMA is not a client of Smith and Williamson.

I mean, the parties usually are the client. I do not

1 know whether the Tribunal understands the relationship
2 between the CMA -- between the Competition Authority,
3 the parties and the Monitoring Trustee, it is
4 a tripartite relationship, so our engagement is between
5 us and the parties, but we report to the CMA. So the
6 CMA is the one who we have a duty of reporting, but our
7 engagement is with the parties.

8 Q. You are quite right to correct me. But it is a major
9 source of referral work for Smith and Williamson, is
10 that correct?

11 A. No, we do not get work referred from the CMA. I would
12 say it is a major source of work for our sort of
13 reporting, our Monitoring Trustee work, as an authority
14 which appoints Monitoring Trustee, but we also work on
15 behalf of the European Commission, on the other
16 Commission authorities, yes.

17 Q. I quite understand you have other cases where you are
18 operating as a Monitoring Trustee, but you do operate in
19 relation to a large number of cases in relation to CMA
20 and CC.

21 A. Yes. That is true, yes.

22 Q. I am going to just move on through your statement, if
23 I may, to paragraph 26. This is all under a heading of
24 "Discussion of a Break Notice with Mr. Brown on
25 15 March 2018".

1 We are probably going to juggle one or two files in
2 doing this, unfortunately. I will give you the
3 references as we go round them.

4 You start at paragraph 26 referring to an email from
5 Mr. Brown, which is in bundle B1, tab 7 at 219.

6 A. Which page, please?

7 Q. B1, tab 7, page 219.

8 A. Page 219. Yes.

9 Q. We can ignore the date heading at the top. It is an
10 email 15 March 2018:

11 "Nash, [which is how Mr. Brown I think referred to
12 you] if you have a few minutes I would like to talk to
13 you about the lease in Sunbury and get some advice.
14 Please let me know a convenient time for a quick chat."

15 Then you replied, if you go over the page you will
16 see at 220, page 220 the top of the page, 15 March:

17 "You can call me on my landline. I will pick it up
18 from the laptop at 10.15 am ..."

19 You were not actually in the country, I do not
20 think, at that time.

21 A. No.

22 Q. "... if that is convenient to you."

23 Mr. Brown then did call you via your laptop.

24 A. Yes. On my landline, yes.

25 Q. You had a conversation. That conversation is the

1 conversation you then describe or provide your
2 description of at paragraph 28.

3 A. Yes.

4 Q. You say that you spoke to Nigel about the Sunbury lease.

5 Now, just to be clear, he was not ringing for
6 consent to be given by you to derogate from any part of
7 the order, was he?

8 A. No. I mean he called me and just said, "I want to run
9 this by you, I just want to -- you know, we would like
10 to serve the notice within the next week, because it is
11 a 12 months' notice" and he did not mention anything
12 about, you know, this could be a potential breach or he
13 was asking for my formal consent, he was just informing
14 me.

15 Q. He wanted to run it past you, as you just put it.

16 A. Yes.

17 Q. In order to see whether there were any concerns about
18 compliance with the order, yes.

19 A. Yes, I am not sure whether he mentioned the word
20 "compliance with the order" but yes, he wanted to run it
21 by me just to check whether it was fine according to
22 what he was telling me.

23 Q. Right. Now at 28(b) you are referring to the fact that
24 he explained his thinking to you that the property at
25 Sunbury was unsuitable for anyone wanting to run the

1 business. That is what he explained to you on that
2 call; correct?

3 A. Yes.

4 Q. Now at paragraph (b) at the end he said:

5 "I had the impression from Mr. Brown, from what
6 Mr. Brown said on the call, that serving the Break
7 Notice was the only option."

8 But you do not recall whether he used those exact
9 words. He did not actually say the Break Notice was the
10 only option, did he?

11 A. I am not sure what words he used, but the impression
12 I got was, you know, this is something that has to be
13 done now, within the next day or today, I mean whatever
14 the day it was the call. I could sense there was some
15 sort of urgency, but I do not recall exactly what words
16 it was, but that was the sense I had, yes.

17 Q. You made some notes, I think, of this call. Those can
18 be found in the exhibit to your witness statement, which
19 is at bundle C1, tab 6. They are actually at 23,
20 page 23 of that exhibit.

21 A. Yes.

22 Q. Now, thankfully I am not going to ask you any questions
23 about page 23 because I am going to work on the basis
24 that there is an accurate transcription at page 25.

25 A. Yes.

1 Q. We have not had the forensic handwriting specialist in
2 to check but we are going to work on the basis that that
3 is accurate.

4 Now, in these notes, the manuscript notes you have
5 got, you do not make any note here that the break clause
6 was the only option, do you?

7 A. No, I think -- I mean, I had a piece of paper, I had
8 a notebook in front of me when I was on the call, and
9 that notebook was not to do with the Electro Rent job
10 because I was in China for another job, and I just noted
11 down some of the words which I was hearing on the call
12 here.

13 Q. You were noting down some of the key points, presumably.

14 A. Yes, yes.

15 Q. Yes. But if the break clause being served was the only
16 option, that would have been a key issue, would it not?

17 A. Key issue or key -- I mean, I did not write it on the
18 paper there. But it was something which the impression
19 I had on the call.

20 Q. But it would have been an important issue, and since you
21 were noting down key points you would have expected to
22 have noted it down if it had been either said or implied
23 to you, would you not?

24 A. I do not usually write everything on paper. I mean it
25 was a very quick call. I mean I only noted down things

1 which I was, you know, concerned about. It was, I mean,
2 the reversibility, which I put down here. You know,
3 likely the lease will not be required, and the break
4 clause, the (inaudible) during the break period. I mean
5 that was the key things I noted down.

6 Q. Yes, but if a break clause was the only way forward, or
7 serving notice under the break clause was the only way
8 forward, do you not think that is a sort of key point
9 you would have noted down?

10 A. I think, as I mentioned earlier, I would -- I do not
11 note everything, but it is the impression that I had on
12 the day, yes.

13 Q. I think we have the evidence of Mr. Brown that he did
14 not say it and made no words, so far as he is aware,
15 that gave that impression.

16 Now if we move on to 28(c), Mr. Brown said that the
17 break clause of the lease on the Sunbury premises had to
18 be exercised 12 months in advance of spring 2009.

19 A. 19.

20 Q. Spring 2019, I am sorry. Thank you.

21 We know that is now wrong:

22 "I had the impression from Mr. Brown that this was
23 something that needed to be done urgently ..."

24 You say "on that day", and you have already given
25 evidence that it is urgently within a few days or

1 a week. That is correct, is it not?

2 A. Yes, yes.

3 Q. So much of the discussion on the call was about
4 reversibility of any termination clause.

5 Can I just take this in stages. If we look at your
6 notes which have been transcribed, the fifth point is
7 "break laws", but although it is written down as "break
8 laws" -- I am so sorry, Mr. Gopal, it is in tab 6 in C1
9 at page 21. I had left mine open but I knew where the
10 next question was coming and you did not. The fifth one
11 down, it says "break laws".

12 A. Yes.

13 Q. But that is actually a reference to "break clause", is
14 it not?

15 A. That is correct, yes.

16 Q. You presumably have an awful lot of experiences of
17 dealings with leases and break clauses and the like in
18 your role as Monitoring Trustee, I imagine?

19 A. Not really, no. I have not dealt with many leases
20 before, so it was -- I think on this case it was the
21 first time we have come across a lease, and on other
22 cases for the CMA it depends whether a case goes into
23 remedy phase. During the interim order we do not
24 usually look at leases.

25 Q. But you know what a break clause is, do you not,

- 1 Mr. Gopal?
- 2 A. Yes.
- 3 Q. It is a clause which allows the early termination before
4 the expiry of the lease. That is correct, is it not?
- 5 A. Yes, it is. Yes.
- 6 Q. You know that the normal course in relation to a break
7 clause will be that some period of notice will be
8 required; yes?
- 9 A. Yes.
- 10 Q. Sometimes you can have limitations in a lease, such as
11 specific break dates.
- 12 A. Yes.
- 13 Q. Which mean you can only break the lease on those dates.
14 That is correct, is it not?
- 15 A. Yes.
- 16 Q. Then you have to give notice in advance of those break
17 dates in order to take advantage of them. Yes?
- 18 A. Yes.
- 19 Q. Mr. Brown, in your call, explained it was one of those
20 leases you were concerned with; it had break dates and
21 a break clause. That is correct, is it not?
- 22 A. I cannot recall exactly what terms Mr. Brown used, but
23 he did tell me, you know, the break date, or they needed
24 12 months to serve the Break Notice, and that was the
25 information I was given.

- 1 Q. Let us just look at your notes again, if we may.
- 2 A. Yes.
- 3 Q. You say "break laws" but we know that is "break clause",
4 and then you say:
5 "Can be stopped during break period, spring 2019."
6 That is actually a reference to the break date, is
7 it not?
- 8 A. Yes. So from 15 March until -- yes.
- 9 Q. Then "More than a year"; what you are saying is that you
10 need 12 months. That is what was Mr. Brown told you is
11 the notice period. That is correct, is it not?
- 12 A. Yes, yes.
- 13 Q. As we know, as I have already said, he got that period
14 wrong.
15 So you knew that this was a lease where you had to
16 give a period of notice in advance of a particular break
17 date, otherwise you would be stuck with this lease until
18 at least the next break date.
- 19 A. Yes.
- 20 Q. That next break date was 2022; you knew that, did you
21 not?
- 22 A. On the day, I cannot remember whether I knew that. But
23 I think probably Mr. Brown did explain that to me, yes.
- 24 Q. Yes. But in any event, even if he had not given you the
25 specific 2022 date, you knew the lease would carry on

- 1 and bind the company otherwise.
- 2 A. Yes.
- 3 Q. Let us just think about the notice period for a minute.
- 4 The notice period here means that a landlord who
- 5 receives a notice under a break clause, the landlord has
- 6 a period to look for new tenants --
- 7 A. Yes.
- 8 Q. -- from the date that the notice is served until the
- 9 break date. That is right, is it not?
- 10 A. Yes.
- 11 Q. On the other side of the equation, the tenant knows that
- 12 he or she can stay in the premises until that break
- 13 date. That is correct, is it not?
- 14 A. Yes.
- 15
- 16 Q. Sometimes there are commercial arrangements that can be
- 17 reached whereby landlords and tenants, or landlords do
- 18 a deal with tenants to get the property back earlier
- 19 than the break date.
- 20 A. Yes.
- 21 Q. That is correct, is it not? Equally, if tenants change
- 22 their mind, they can say to the landlord, "Hang on,
- 23 I want to stay until after the break date; can we do
- 24 a new deal?"
- 25 A. Yes.

1 Q. That is correct too, is it not? The whole essence of
2 the break clause is that once it has been triggered
3 there is not simply an option for the tenant to walk out
4 on the break date, which she can choose to stay or go;
5 she cannot insist on remaining beyond the break date
6 once she has triggered it, can she?

7 A. Sorry, can you repeat that question?

8 Q. If you exercise a break clause by serving notice --

9 A. Yes.

10 Q. -- you have a situation as a tenant where you do not
11 have a choice on the break date whether you stay or go?

12 A. No.

13 Q. You have to go?

14 A. You have to go, yes.

15 Q. That is correct, is it not?

16 A. Yes, it is. Yes.

17 Q. So it is not simply an option for the tenant to walk out
18 on the break date or stay; they have committed to
19 leaving. That is correct, is it not?

20 A. Yes, but I think in this case it was a bit different
21 from what I was told on the day. Mr. Brown had told me
22 that whoever comes in, whoever is the purchaser in six
23 months' time they may decide to stay on or they might
24 decide to take another site, yes.

25 Q. So I just want to understand what you are saying there.

1 You are saying that the purchaser that came in --

2 A. Yes.

3 Q. -- would be able to reverse the break clause?

4 A. That is what I asked Mr. Brown on the day, yes, that
5 whoever comes in can they reverse the Break Notice which
6 has been served. Yes.

7 Q. But it was only the purchaser, you thought, who could
8 exercise that reversal, did you?

9 A. Not only the purchaser, because on the day Mr. Brown
10 also mentioned that it is possible that they will not
11 have to sell Electro Rent UK, because it is possible
12 that they may have to sell Microlease and me, at the
13 time I did not know that Electro Rent has been the
14 preferred remedy proposal by the CMA. I was still
15 thinking about the three options.

16 Q. The three options.

17 THE CHAIRMAN: Mr. Gopal, could I just ask you this
18 question. It is perhaps my fault, Mr. Gopal, but I am
19 having a bit of difficulty in understanding what you
20 knew about break clauses before the conversation you had
21 with Mr. Brown on 15 March, that is category 1; category
22 2, what he told you about break clauses during that
23 call; category 3, what you now know about them.

24 I think I would find it very helpful if you could
25 indicate, first of all, what you knew about let us call

1 it reversibility, what you knew about the reversibility
2 of break clauses before you had that conversation. Then
3 tell us what --

4 A. In general, yes, not on this particular --

5 THE CHAIRMAN: No, what understanding did you have about the
6 effect of service of a break clause and who, if anyone,
7 could withdraw that notice without the consent of the
8 other party?

9 A. I think, I mean, as I mentioned earlier, I am not a --
10 first I am not a lawyer, I am not a property lawyer, and
11 I am not an expert in leases either. What was explained
12 to me on the day was very much he explained in a very
13 layman's term, I would say. I asked a question about,
14 is it easy to reverse if you have served a notice, and
15 Mr. Brown told me, yes, it should be quite easy to
16 reverse. My understanding was that you could either,
17 you know, stay or the purchaser also would be able to,
18 you know --

19 THE CHAIRMAN: The question that you asked Mr. Brown about
20 reversibility, did you have in mind any particular party
21 being able to reverse the notice or not?

22 A. No, I did not have anyone in mind.

23 THE CHAIRMAN: So you were not distinguishing in your own
24 mind between the ability of the tenant to do that or the
25 ability of the purchaser to do that?

1 A. The tenant would be the purchaser. I know the
2 distinction between the landlord and the tenant, and the
3 current tenant is Electro Rent, and the future tenant
4 would be the potential purchaser of the divestment
5 business.

6 THE CHAIRMAN: At whose instance were you interested in the
7 ability to reverse the effect of the Break Notice?

8 A. Sorry?

9 THE CHAIRMAN: When you asked the question about
10 reversibility to Mr. Brown, who were you envisaging
11 reversing the notice: was it Electro Rent; was it
12 a purchaser of the business from Electro Rent; or was
13 it the landlord; or was it one or more of these?

14 A. No, either the purchaser of the divestment business or
15 Electro Rent.

16 THE CHAIRMAN: Sorry, Mr Beard.

17 SIR IAIN MCMILLAN: Would it be all right if I ask
18 a question?

19 THE CHAIRMAN: Yes, of course.

20 SIR IAIN MCMILLAN: With regard to reversibility was it your
21 opinion that if the reversibility was going to be
22 exercised then notice would be given to the landlord
23 that they wanted to annul the break request and
24 that that would put them back to where they were?

25 A. It was, yes.

1 SIR IAIN MCMILLAN: Yes, thank you.

2 MR. BEARD: I am conscious of the time. I just wonder
3 whether now is a convenient moment.

4 THE CHAIRMAN: It is entirely a matter for you, Mr. Beard.
5 I interrupted your cross-examination.

6 MR. BEARD: Not at all. I am just conscious that we said we
7 were going to sit until 5.00 pm and it has been a long
8 day.

9 THE CHAIRMAN: If you are happy to stop ...

10 MR. BEARD: It is going slightly slower than I anticipated
11 but ...

12 THE CHAIRMAN: If you are happy to stop now we will rise.

13 MR. BEARD: Yes, and I think I can be done within the time
14 schedule. I know that things have been slightly
15 compressed for me but I think we will still be on track.

16 THE CHAIRMAN: Yes.

17 Mr. Gopal, please do not discuss the case or your
18 evidence with anybody before you come back tomorrow.

19 A. Okay.

20 THE CHAIRMAN: Thank you.

21 (5.02 pm)

22 (The hearing was adjourned until 10.00 am on Thursday,
23 25 October 2018)

24

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