Neutral citation [2022] CAT 34

**IN THE COMPETITION APPEAL TRIBUNAL**

Case No: 1351/5/7/20

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

15 July 2022

Before:

THE HONOURABLE MR JUSTICE ZACAROLI
Chair
PAUL LOMAS
DEREK RIDYARD

Sitting as a Tribunal in England and Wales

BETWEEN:

**(1) CHURCHILL GOWNS LIMITED**
**(2) STUDENT GOWNS LIMITED**

Claimants

- v -

**(1) EDE & RAVENSCROFT LIMITED**
**(2) RADCLIFFE & TAYLOR LIMITED**
**(3) WM. NORTHAM & COMPANY LIMITED**
**(4) IRISH LEGAL AND ACADEMIC LIMITED**

Defendants

Heard at Salisbury Square House on 24 January – 2 February 2022 and 13 – 14 April 2022

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**JUDGMENT (NON-CONFIDENTIAL VERSION)**

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APPEARANCES

Fergus Randolph QC and Derek Spitz (instructed by TupperS Law) appeared on behalf of the Claimants.

Conall Patton QC and Michael Armitage (instructed by Alius Law) appeared on behalf of the Defendants.

**Note:** Excisions in this Judgment (marked "[✂]") relate to commercially confidential information: Schedule 4, paragraph 1 to the Enterprise Act 2002.

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## A. INTRODUCTION

1. This is a claim brought by the Claimants (collectively, "Churchill") against the Defendants (collectively, "E&R") under section 47A of the Competition Act 1998 (the "1998 Act") for loss and damage caused by alleged breaches by E&R of section 18 of the 1998 Act ("the Chapter II Prohibition") and/or section 2 of the 1998 Act ("the Chapter I Prohibition"). The claim relates to the supply of academic dress typically comprising gowns, hoods and caps or mortarboards worn by students taking part in graduation ceremonies at higher and further education institutions in the UK (which we will refer to collectively, for shorthand, as "universities").

2. E&R carry on business activities that include the hiring of academic dress for students for use at university graduation ceremonies. As part of their business, E&R supply a range of graduation services to universities, including the provision of academic dress to staff and students, often pursuant to arrangements or agreements which were referred to at trial as official supplier agreements ("OSAs"). The various OSAs between E&R and universities took the form of *ad hoc* informal arrangements or formal written agreements. The terms typically found in the OSAs entered into by E&R, and by other suppliers, are described in more detail below at [20] and following.

3. Churchill are start-up UK companies (building on experience in Australia) who seek to enter and compete in the market in the UK for the supply of academic dress to students taking part in graduation ceremonies. They seek to do so, however, pursuant to an alternative business model. Rather than contracting with universities for the provision of their services (as do E&R and all other suppliers of academic dress for graduation ceremonies currently operating in the UK), they seek to sell or hire academic dress directly to students.

4. The essence of Churchill's claim is that E&R have, through their network of OSAs, achieved *de jure* or *de facto* exclusivity or near exclusivity for the supply of academic dress to students of universities with which they hold OSAs, and that, as a result, Churchill is foreclosed from competing on the merits for the supply of academic dress to students. By their claim form filed on 22 May 2020,

Churchill plead that the Defendants are in breach of both the Chapter I and Chapter II Prohibitions, in that:

(1) E&R have abused their dominant position in the market for the sale and hire of academic dress for use at graduation ceremonies in the UK through the conclusion of OSAs, contrary to section 18 of 1998 Act (the "Chapter II Claim");

(2) Further or alternatively, the OSAs have as their effect the appreciable prevention, restriction or distortion of competition within the UK, contrary to section 2 of the 1998 Act (the "Chapter I Claim"); and

(3) Absent these infringements, Churchill would have profitably established themselves over the claim period, and accordingly they have suffered loss and damage as a result of E&R's conduct.

5. E&R contend that the OSAs do not grant exclusivity (in the sense complained of by Churchill) in their favour, as there is nothing in the OSAs which either prevents students, or requires universities to prevent students, from procuring academic dress from other suppliers (including Churchill).

6. In relation to the Chapter II Claim, E&R deny that they are dominant in any relevant market, or that (if they are dominant) they have abused a dominant position. They also contend that even if actions by them foreclosed access to the market through Churchill's preferred route, the relevant restrictions are objectively justified.

7. E&R contend that the Chapter I Claim fails for essentially the same reasons, because the Claimants cannot establish that the OSAs have anti-competitive effects. Additionally, they contend that the facts which objectively justify the alleged restrictions of competition also mean that they satisfy the requirements for an individual exemption under s. 9 of the 1998 Act.

8. A further issue arose during the course of pleadings as to the veracity of marketing claims made by Churchill that their gowns were made wholly or

partly from recycled plastic (and specifically, plastic bottles). E&R subsequently amended their Defence to allege that Churchill made certain fraudulent and/or negligent representations regarding the composition of their gowns, and that as a result of this unlawful conduct, their claims are barred in whole or in part by the doctrine of illegality (or that damages should be assessed by reference to a counterfactual in which Churchill made accurate representations to customers).

## B. THE TRIAL ON LIABILITY

9. Pursuant to the Tribunal's ruling that quantification of damages should be split off and heard at a subsequent trial as necessary ([2020] CAT 22), the Tribunal heard evidence and submissions at the trial only on issues of liability (including infringement, causation of damages and joint and several liability).

10. The Tribunal heard evidence from the following witnesses of fact, who addressed the Tribunal on the business models, strategy and operations of Churchill and E&R:

    (1) Ruth Nicholls, a director of the Second Claimant, Student Gowns Limited ("SGL"), who joined the company as an employee in March 2018 and has been a director of SGL since April 2019;

    (2) Oliver Adkins, who has been a director of both Churchill Gowns Limited ("CGL") and SGL since their incorporation in 2016 and 2017, respectively;

    (3) Stefan Muff (who appeared remotely from Australia), the co-founder of Churchill Gowns Pty Ltd ("Churchill Gowns Australia"), and a director of both CGL and SGL since their incorporation;

    (4) Emma Middleton, the Operations Director of Ede & Ravenscroft Limited ("ERL");

    (5) Adrian Halls, a director of ERL and WM Northam & Company Limited ("Northams");

(6) Michael Middleton, the Chairman of ERL; and

(7) Andrew Telfer, the Group Financial Controller of ERL.

11. The Tribunal also received a witness statement from Johnson Zhuang, a barrister and solicitor of the High Court of New Zealand who is employed by the firm Wotton + Kearney in Auckland, New Zealand. His firm was instructed by E&R's solicitors, Alius Law, to order and arrange samples of a gown from Churchill Gowns Australia for testing at a laboratory in Hong Kong. Churchill did not require Mr Zhuang to be called for cross-examination at the trial.

12. The Tribunal was also assisted by hearing expert economic evidence from Dr Maria Maher (a competition economist and free-lance consultant) for Churchill, and Dr Gunnar Niels (a Partner at Oxera Consulting Ltd) for E&R. This evidence was heard, initially, concurrently as prior to the cross-examination of the experts by Counsel, they were subject to questioning from the Tribunal, led by Derek Ridyard. The experts were skilled in their areas of expertise and did their best to assist the Tribunal, however there were some areas (analysed further below) which could have been dealt with in greater depth. The Tribunal also received an expert report from Marco Chan (a Senior Technical Manager at Intertek Testing Services in Hong Kong) on behalf of E&R regarding the physical composition of the fabric used in Churchill's gowns. Churchill did not require Mr Chan to be called for cross-examination at the trial.

## C. FACTUAL BACKGROUND

### (1) The Parties

13. The Claimants are both companies incorporated in England and Wales. CGL was incorporated in July 2016 with the intention of adopting the same business model that its parent company – Churchill Gowns Australia – had initially operated in Australia, being the supply of academic dress directly to students. Churchill Gowns started trading in the UK market through SGL in 2017.

14. The evidence of Oliver Adkins is that Churchill operate three business models which run concurrently:

(1) direct hires to students via the Churchill website, whereby students select and pay for the academic dress specific to their university and degree, which is then posted to the consumer and returned following the ceremony to be cleaned and re-entered into stock (a business-to-consumer, or "B2C model");

(2) a purchase option, whereby the sales route is identical to the B2C hire above, but the consumer pays a higher price and does not return the academic dress following the ceremony; and

(3) a direct wholesale model, in which Churchill either sell a certain quantity of academic dress to universities for their own use, or contract with universities to rent to their students on an approved supplier basis. Churchill's involvement in the former is very limited, and they have not pursued the latter model in the UK. They do not currently seek to compete with E&R (and other official suppliers) by entering into OSAs with universities.

15. Churchill rely heavily on online advertising and social media to target graduands and they utilise a network of student "ambassadors" to promote Churchill on campus and online. Churchill claim that they can offer academic dress to students at prices materially lower than those charged on average by E&R (or other official suppliers). Churchill also promote their gowns as being made of recycled plastic, which they consider is attractive to potential consumers who may be concerned about sustainability and the environment.

16. ERL, Radcliffe and Taylor Limited ("R&T") and Northams are all companies incorporated in England and Wales, whilst Irish Legal and Academic Limited ("ILA") is incorporated in the Republic of Ireland. ERL is owned and controlled by the Middleton family, who also hold ownership interests in R&T. R&T is the ultimate parent company of Northams and ILA, but does not itself supply academic dress. ERL, Northams and ILA supply academic dress to universities (and are parties to various OSAs). E&R's case is that ERL's business is separate from those of Northams and ILA, and that they operate independently of each other and without influence over the others' business (and, in the case of ERL

and Northams, that they compete against each other). It is accepted by E&R that all Defendants form a single undertaking for competition law purposes. However, they dispute that the Defendants are jointly and severally liable.

17. As noted above, E&R adopt a business to business model, contracting directly with the universities for the supply of graduation services, including the supply of academic dress to students. E&R's business is, however, wider than academic dress; other strands of their business include tailoring, retail clothing, legal and clerical outfitting, ceremonial events, photography and property.

18. E&R are the largest supplier of graduation services to universities in the UK. The parties' experts were in agreement that E&R held a stable market share, across time, in the range of 75 – 80% for both the number of universities supplied with graduation services and students supplied with academic dress in the UK. It is relevant to note that the market for academic dress and graduation services was disrupted by the Covid-19 pandemic, with graduation ceremonies in both 2020 and 2021 being cancelled or postponed due to legal restrictions on large gatherings. However, for the 2018/19 academic year, E&R supplied academic dress for use at 80.5% of universities in the UK. There are a small number of competitors who also operate in this market, including J Wippell & Co, Marston Robing, Graduation Gowning Company ("GGC") and Graduation Attire, the last three of which have entered the market within the last six years.

**(2) Academic Dress**

19. The term "academic dress" is used in this judgment to refer to gowns, hoods and mortarboard or caps. The style of gowns and mortarboards may vary a little in design as between universities, but they are - on the whole – similar, if not identical, in terms of their shape and colour. However, the design and colour scheme used in respect of hoods is usually unique to each university (and sometimes to colleges and/or faculties within a university), and to the degree with which a student is graduating from that university or college.

**(3) OSAs**

20. OSAs are entered into by universities with providers of academic dress and/or broader graduation services by three main methods:

(1) A university may run a competitive tender process, by which universities publish a public tender and an Invitation to Tender ("ITT") is subsequently addressed to a number of potential providers. The bids submitted in a response to an ITT will detail the offering of that supplier as against a detailed specification set by the university;

(2) A university may approach potential suppliers for Requests for Proposals ("RFPs"); or

(3) A university may approach a supplier (or suppliers) on a more informal basis and engage in bi-lateral negotiations for the supply of services. In some cases, a supplier has maintained official supplier status for many years, without any evident consideration of alternative suppliers by the university.

21. The chosen supplier is typically appointed for a fixed term, usually between a period of between three and five years pursuant to the OSA. E&R may also, however, deal with universities on an "ad-hoc" or ceremony-by-ceremony basis where there is no contractual obligation to provide graduation services for a fixed number of years. Many such situations have resulted in E&R being the official supplier for many years.

22. Although the precise terms of OSAs vary as between different universities, they typically include the following obligations on the official supplier: to deliver academic dress to the venue; to run a robing service on the day of the ceremony; and to guarantee the provision of academic dress covering all degrees and course levels for every student wishing to attend the ceremony (and excess stock in case of emergencies). The price at which academic dress is to be hired to students is usually pre-negotiated with the university and an element to be evaluated in the OSA process. Graduands place orders directly with the official

supplier for the hire of their academic dress. The supplier may also provide design services in relation to the institution's academic dress.

23. Under the OSAs entered into by E&R, E&R make commission payments to universities, calculated (typically) as a percentage of E&R's revenues from the hire of academic dress to graduating students. The evidence before the Tribunal was that the exact rate varied between OSAs, but was typically in the region of [✂]%. E&R often also provide additional benefits to universities such as the provision of gratis academic dress for the university's academic staff and prize donations. In return, the university agrees to promote E&R as the "official" supplier of academic dress to graduands, and the university is precluded from promoting other suppliers of academic dress to their graduands. Other suppliers have similar arrangements where they hold OSAs.

24. Additional graduation services such as photography may also be offered by the holder of an OSA, but may also be offered by another supplier.

## D. CHAPTER II

### (1) Legal Framework

25. Section 18 of the 1998 Act provides, insofar as material, that:

> "(1) … any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market is prohibited if it may affect trade within the United Kingdom.
>
> …
>
> (3) In this section—
>
> "dominant position" means a dominant position within the United Kingdom; and
>
> "the United Kingdom" means the United Kingdom or any part of it.
>
> …"

26. It is common ground that the Chapter II Claim involves five elements:

(1) E&R must be an undertaking;

(2) which occupies a dominant position in the United Kingdom, or part of it;

(3) and engages in conduct which amounts to an abuse of that dominant position;

(4) which may affect trade in the United Kingdom; and

(5) which is not objectively justified.

27. It is also common ground that Churchill bears the burden of establishing both dominance and abuse. For reasons we explain below at [141] and following, while there is an issue as to where the burden lies in relation to objective justification, we do not find it necessary to resolve that issue on the facts of this case.

28. As to element (1) E&R accepts that each of the First, Third and Fourth Defendants constitute undertakings when they enter into OSAs and, since the Second Defendant is not alleged to have committed any infringing acts of its own, its status is relevant only to the question of joint and several liability. We address that issue below at [202]. As to element (4), E&R accept that this will stand or fall with the other elements.

29. Accordingly, the live issues concern elements (2), (3) and (5): dominance, abuse and objective justification. Before addressing these issues, we consider the question of market definition.

## (2) Market definition

### *(a) Introduction*

30. As Roth J explained in *Socrates Trading Limited v The Law Society of England and Wales* ("*Socrates*") [2017] CAT 10:

> "102. The concept and role of market definition in competition law is conveniently explained in the European Commission's Notice on the definition

of the relevant market (the "Market Definition Notice"). This states at paras 2-3:

> "2…The main purpose of market definition is to identify in a systematic way the competitive constraints that the undertakings involved face. The objective of defining a market in both its product and geographic dimension is to identify those actual competitors of the undertakings involved that are capable of constraining those undertakings' behaviour and of preventing them from behaving independently of effective competitive pressure. It is from this perspective that the market definition makes it possible *inter alia* to calculate market shares that would convey meaningful information regarding market power for the purposes of assessing dominance or for the purposes of applying Article [101 TFEU].
>
> 3. It follows from point 2 that the concept of 'relevant market' is different from other definitions of market often used in other contexts. For instance, companies often use the term 'market' to refer to the area where it sells its products or to refer broadly to the industry or sector where it belongs."

103. The Commission explains the role of demand substitution, supply substitution and potential competition, and states at para 13 of the Notice:

> "Basically, the exercise of market definition consists in identifying the effective alternative sources of supply for the customers of the undertakings involved, in terms both of products/services and of geographic location of suppliers."

104. …

105. This Tribunal reviewed the case-law on market definition in its first Aberdeen Journals judgment*, Aberdeen Journals Ltd v Director General of Fair Trading* [2002] CAT 4, and concluded, at [96]:

> "… the relevant product market is to be defined by reference to the facts in any given case, taking into account the whole economic context, which may include notably (i) the objective characteristics of the products; (ii) the degree of substitutability or interchangeability between the products, having regard to their relative prices and intended use; (iii) the competitive conditions; (iv) the structure of the supply and demand; and (v) the attitudes of consumers and users."

106. None of this is controversial, but we think it is important to emphasise that in competition law market definition is a means to an end and not an end in itself. Here, the end is determination whether at any period the Law Society had substantial market power amounting to dominance, and also to some extent determination of the competitive effect of the impugned practice.

107. It is necessary to consider both the product market and the geographic market."

31. The experts agreed that it is possible to analyse the present case as involving two separate ways of looking at the market, which correspond not so much to different products or activities, but to different routes through which graduands' demand for academic dress hire can be served. The first is a market for the

provision of graduation services to universities, including the provision of academic dress to the students at the relevant universities (which the parties have called the "B2B" market). The second is a market for the provision of academic dress directly to students (the "B2C" market).

32. There are certain matters of common ground between the parties. First, that there is no currently functioning material B2C market in the UK. Second, since the B2B market is the only market that currently functions, it is the B2B market that is the relevant market for the purpose of considering dominance. Third, none of E&R's conduct of which complaint is made has had any foreclosing effect in the B2B market (which is, as noted above, a market in which Churchill do not currently seek to compete).

33. The critical issue between the parties is whether Churchill's inability to supply academic dress directly to students (i.e. on a B2C market) is the result of behaviour by E&R that constitutes an abuse of a dominant position.

34. While there is an attractive simplicity in analysing the position as two different markets (B2B and B2C), this risks oversimplifying what is in reality a more nuanced picture. A more detailed understanding of how the market currently functions, and the economic incentives that underpin that way of operating, are essential in determining the issues to which this case gives rise.

35. Overall, for the reasons we develop below, we consider that the picture is at least as well analysed as a single market for the supply of graduation services to universities, one aspect or part of which is the hire of academic dress to students which Churchill would like to contest on a targeted basis. Both Dr Maher and Dr Niels accepted that was a possible alternative approach.

***(b) Scope of the product market***

36. Before developing that point, we deal with a separate debate between the parties as to whether the relevant *product* market at the B2B level is university specific (as E&R contend, supported by Dr Niels) or all-UK universities (as Churchill

contend, supported by Dr Maher). The parties are agreed that the *geographic* market is UK-wide.

37. Dr Niels' contention that the relevant market at the B2B level should be defined at the level of the individual university was based on the fact that (on the demand side) each university had its own distinctive requirements, and (on the supply side) the academic dress required for each university differed, especially with regard to hoods which were, effectively, unique to each institution. Once an OSA holder committed to supply academic dress to any particular university, it was rare for that stock to be re-deployable elsewhere, partly because of the different academic dress requirements and partly because graduation ceremonies were often tightly scheduled in the same calendar window around late June/early July.

38. Dr Maher, on the other hand, argued that there was sufficient ease of supply-side switching between the requirements of supply of academic dress to different universities to justify a single all-universities market. This was based partly on evidence that some academic dress elements were common to more than one university, and partly on the evidence that even for those elements that were university-specific it would take less than six months for an academic dress supplier to switch from supplying one to supplying another. This would simply be a matter of making an order for a new hood or gown specification, which was easy to do without any material investment commitment by the academic hire operator.

39. This is a debate which is primarily relevant to the question of dominance. Even if the approach is taken that B2B and B2C comprise two separate markets then, as we have noted above, dominance involves consideration only of the B2B market. In that context, we have no hesitation in concluding that the relevant product market includes all universities across the UK. The same is true if the market is analysed as one market for the supply of graduation services, including supply of academic dress to students. In the B2B market (or the single market as we have analysed it), any difficulties posed by the different requirements of universities or differences in academic dress specifications across universities can readily be addressed at the *ex ante* stage of bidding for

the relevant OSA by the various suppliers, who clearly compete with each other across the different universities.

***(c) The current [B2B] market in more detail***

40. We preface our consideration of the current market by noting that we have received no evidence from universities. It is accordingly necessary to draw inferences from such factual and expert evidence as has been presented in the case.

41. The first thing to note is that, although this case focuses on the supply of academic dress to students, in the vast majority of cases that academic dress is required for one specific purpose only, namely to be worn at the graduation ceremony at the end of the student's degree course. It is the university that decides what form that graduation ceremony will take, including what the students are required to wear.

42. It was Ms Middleton's evidence, based on the contents of the ITTs from universities she had seen, and negotiations she had had with universities, over many years, that universities wish to be provided with the range of services, which suppliers offered pursuant to OSAs, to ensure the smooth running and efficiency of the graduation ceremonies put on by them.

43. Dr Maher pointed to marketing materials provided by universities, containing colourful pictures of graduation ceremonies with students all wearing the same bespoke "uniform" of the relevant university, in support of her view that it is the universities who have the incentive to put on a "very good ceremony". The point she was making was that the interests of the universities in this respect are not aligned with those of the students: the university's interest is in using graduation ceremonies to market its product to potential future students, and this is funded (without adequate transparency) by graduands through the hire of academic dress, part of the price of which is passed on to universities via commissions and other benefits.

44. Dr Niels concluded, from analysing the ITTs, that universities' primary objective is to guarantee the smooth operation of the ceremonies. He disagreed with Dr Maher's opinion that the interests of students and universities are misaligned, contending that students also benefitted from a well organised graduation ceremony.

45. Dr Niels' argument in this respect does not, however, fully address Dr Maher's argument as to the potential for a misalignment of economic incentives where one party (the university) is able to define a hire price which incorporates a revenue stream from which it will derive benefit, but which another party (the graduand) is obliged to pay. This divergence between the beneficiary and the funder could raise legitimate public policy issues of the kind that might be addressed in the context of a market investigation which focused on the conduct of universities in choosing to offer OSAs. However, such considerations are beside the point in the present context, namely a private action for damages against the conduct of E&R in respect of either or both of the Chapter I or Chapter II Prohibitions. The key point is that the universities (whether for selfish or altruistic reasons) benefit from, and have an incentive to put on, a very good ceremony, including having all of the graduands for the relevant degrees dressed alike. The fact that the universities have designed (or had designed for them) hoods that are unique to that university or to the particular degree awarded by that university, reinforces this point.

46. A critical element in the OSAs, with this in mind, is that the supplier commits to the university to provide academic dress for every potential graduate on every course at the university's graduation ceremonies during the period of the OSA. This is of great importance to the universities, enabling them to ensure that any student who wishes to attend the ceremony may do so, and may attend in proper attire that satisfies the university's objective of a well-ordered, photogenic ceremony.

47. In principle, one way for the universities to achieve the same ends would be for them to be directly involved in the supply of academic dress to students. For example, they could enter into supply agreements with an OSA, for the supply *to the university* of a sufficient number of gowns, hoods and caps to enable all

students who wished to do so to attend a graduation ceremony. The university could then recoup the cost of doing so from students, either by charging them for taking part in the ceremonies, or from fee income from students more generally. Such an arrangement would clearly preclude, or have the potential to preclude, a supplier such as Churchill from hiring academic dress to students as much as the current system. Whether or not such a supplier could legitimately complain of the actions of the universities in that situation, we think it is impossible to see how they could level a complaint at a supplier who contracted to supply all of the academic dress needs of the university.

48. That, however, is not how universities have preferred to operate. They have chosen to outsource the provision of gowns (and other aspects of the ceremony) to suppliers of academic dress. Critically, they have outsourced the supply by imposing an obligation on the official supplier for the provision of academic dress to *all* students wishing to attend their ceremonies so that the suppliers, in effect, underwrite the academic dress side of the graduation. It is important to appreciate that this imposes a significant cost burden on the supplier. The supplier is required to have available not merely enough gowns, hoods and caps for all students taking the most popular degree courses, but also the bespoke academic dress – particularly hoods – for the more obscure degree courses taken by only a small number of students.

49. Such a commitment would not make economic sense from the supplier's perspective, given the costs involved, without a high degree of confidence that a sufficient number of students at a particular university would hire their academic dress from the official supplier. Unless that supplier could recoup enough from the hire of academic dress to students at a particular university, it would be unlikely to offer the same commitment the following year. Under whatever commercial terms might exist in a given OSA, the university has a direct interest in seeing that the supplier has a sufficiently low risk and profitable business opportunity to be able credibly and consistently to underwrite the academic dress part of graduation.

50. Accordingly, there is an inherent incentive on universities to appoint a supplier who is prepared to underwrite the provision of academic dress for all students

wishing to attend its graduation ceremonies, and to promote to its students the hire of academic dress from that supplier.

51. As we explain in more detail below, one of Churchill's principal complaints is that the payment of commission by E&R to universities, on revenue earned from academic dress supplied to students, incentivises universities to promote E&R to their students. Properly analysed in light of the considerations to which we have already referred, we think that the payment of commissions is a rational and expected outcome of competition between B2B suppliers. Such suppliers are competing with one another for official supplier status which carries with it, for the above reasons, the expectation that universities will take steps to promote the academic dress of that supplier to students. One way in which a supplier can compete for official supplier status is via the benefits it offers to universities. These include (as the market currently operates) such things as the provision of free academic dress for staff attending ceremonies, academic dress design and cleaning services, provision of academic prizes and the payment of a fee.

52. Payment of a lump sum fee, not linked to the number of hires of academic dress, is a possible alternative, but it carries more business risk for the supplier as the level of income from the hire of gowns to students is uncertain. The payment of a commission on each gown hire is therefore a more rational choice from the perspective of the supplier and the lower risk enables a supplier to offer more to a university when bidding for an OSA. The fact that this is a rational outcome of competition on the B2B market is reinforced by two things. First, as we note elsewhere, it is the model adopted – so far as the evidence shows in this case – by *all* suppliers of graduation services to universities and seems to occur in the vast majority of OSAs in the UK market. Second, while E&R have been supplying academic dress to universities for a very long time, they began paying commission to universities on academic dress hired to students only as a competitive response to another supplier who had started to do so to.

53. Moreover, as indicated above, under this outsourcing model, whatever form is taken by the commercial incentives that are offered to universities by suppliers, a university will wish, for its own independent reasons, to channel as many graduands as possible to its official supplier. It reduces the university's risk of

issues with academic dress suitability at the graduation ceremony. In addition, the more successful, financially, a graduation ceremony is for its supplier, the better the terms the university will be able to extract in future negotiations with that supplier and the greater confidence the university can have that the supplier will be able to meet its commitments.

**(3) Dominance**

54. Dominance is "a position of economic strength enjoyed by an undertaking which enables it to hinder the maintenance of effective competition on the relevant market by allowing it to behave to an appreciable extent independently of its competitors and customers and ultimately of consumers": *Socrates*, per Roth J at [119], citing the European Court of Justice ("ECJ") in Case 322/81 *Michelin v Commission* at paragraph 30. A dominant undertaking is therefore one that has a "position of strength which makes it an unavoidable trading partner": Case 85/76 *Hoffmann-La Roche v Commission* at paragraph 41, also cited by Roth J at [119] of *Socrates*.

55. While market share is not determinative, a share in excess of 50% is *prima facie* evidence of a dominant position. In this case, as already noted, E&R have a market share of between 70-80%. Moreover, they had enjoyed a market share of this magnitude for at least five years prior to the claim period. It accordingly falls to E&R to displace the *prima facie* inference that they are dominant.

56. E&R contend that, while accepting that the B2B market did not meet all the criteria for a perfect "bidding market", the competitive conditions were sufficiently close to the ideal benchmark of a "bidding market" to deliver effective competition and an effective competitive constraint on E&R despite their high overall market share. Dr Niels carried out an analysis of a sample of OSA bids, noting that the university's scoring system showed that competing bidders' overall scores were often close to those achieved by E&R, even where it was the incumbent. This demonstrated, he said, that even where E&R succeed in retaining OSAs, the fact that there is always a close "outside option" means that they could do so only on terms that are properly tested against a competitive benchmark.

57. Dr Maher rejected that contention. She referred to the Competition Commission research paper by Professor Paul Klemperer entitled "Bidding Markets" dated June 2005, which offered four criteria for a bidding market: (i) competition is winner take-all; (ii) competition is lumpy, in the sense that each contract is large relative to the supplier's total sales (i.e. the value of each individual contract is usually very significant relative to the overall market); (iii) competition begins afresh for each new contract and for each customer (i.e. there is no lock-in by which the incumbent is advantaged); and (iv) entry of new suppliers is easy. Dr Maher contended that these criteria were not met in this case, citing in particular the fact that only 25% of universities held formal ITT processes, the very low rate of switching by universities (particularly where the universities did not engage in an ITT process) and the fact that the academic dress market is not "lumpy", the value of each university's contract being small compared to the size of the overall market.

58. Dr Niels maintained that it was unnecessary for bidding to take place via a formal ITT process and that substance was more important than form. Even in the case of *ad hoc* arrangements, because competitors were in fact available, he contended that universities were able credibly to threaten the incumbent supplier with an option to switch, and that this was sufficient to deliver competitive outcomes analogous to those in a "bidding market", even when switching did not actually take place. However, since an ITT process is used in only a minority of cases, it would have been important for Dr Niels to make good this claim with robust evidence. At the hearing it became evident that E&R had submitted factual evidence on the profit and loss of each individual OSA, that might have enabled the experts to test whether conditions of competition differed as between the OSAs that came about through ITTs and other mechanisms. But neither expert chose to look closely at this information when preparing their expert reports, and the post-hearing submissions that were made on this evidence fell well short of deriving any clear conclusions therefrom.

59. While we agree that substance is more important than form in such assessments, and we accept that it is in principle possible to demonstrate that competitive outcomes can arise from informal negotiations as opposed to formal tendering processes, it is for the party seeking to demonstrate that proposition to adduce

sufficient evidence in the particular case, and we do not think that Dr Niels' evidence meets that burden. Dr Niels also claimed that evidence on E&R's price trends was sufficient to justify his claim that E&R were not dominant, but we explain below why we do not accept this conclusion.

60. We find that there has been a relatively low level of switching between suppliers. While Dr Niels did not accept Dr Maher's conclusion (that there was evidence of switching in relation to only 11 of 174 universities), his own conclusion that there was a "not insignificant" level of switching was based on the universities that went through a tender or RFP process. Taking into account all universities, that does not alter the conclusion that the level of switching has been relatively low. We also find that there are material incumbency advantages, arising from a variety of factors, including the fact that an existing supplier will typically already have incurred the costs of making university-specific investments in the particular dress that is required to meet the client's needs (whereas rival bidders will need to make such investments anew), the incumbent's superior knowledge of operational requirements, and the advantages that stem from any inherent conservatism, mutual trust and goodwill that may affect the university's attitude to switching supplier. Dr Niels acknowledged the existence of some such incumbency advantage.

61. We consider that the most natural inference to draw from these incumbency advantages and lack of switching, in circumstances where only a quarter of universities engage in ITT processes, is that E&R's incumbency provides a significant degree of protection from effective competition in many instances. In order effectively to rebut that inference, we think that it would be necessary – at least – to undertake a much fuller comparison than was undertaken by the experts in this case of competitive outcomes as between ITTs, RFPs and *ad hoc* arrangements. Absent such analysis (in order to test whether outcomes depend on the nature of the bidding process and/or length of time that an OSA had rested with a particular supplier), we think it is difficult to maintain Dr Niels' claim that competition is effective across all universities and modes of competition for OSAs. That is particularly so in those cases where no observable competitive process takes place.

62. E&R relied on *Independent Media Support Limited v Ofcom* [2008] CAT 13 ("*IMS*"), where the Tribunal held at [66] that in a case where the market is characterised by the award of a limited number of high-value contracts, "the fact that a particular company has had a number of recent 'wins' does not necessarily mean that one of its competitors will not be successful in the next contract to be tendered." We have no difficulty with that proposition but we do not think that *IMS* assists E&R. As E&R acknowledged in their written submissions, the graduation services market is characterised by the award of a *large* number of contracts. The value of each contract is relatively small in comparison with the total market, and as such we do not think that the market can be described as "lumpy", as per Professor Klemperer's criteria for a bidding market. In particular there is no indication that market shares would move materially following wins and losses on any single university contract. The IMS market dynamics were rather different from those in this market.

63. E&R also contend that the universities wield considerable buyer power, as evidenced by the following claimed facts: (i) the existence of other B2B suppliers who can and do successfully compete with E&R; (ii) E&R's prices are in line with those of their competitors; (iii) the lack of evidence that E&R charge supra-competitive prices; (iv) E&R's prices have declined in real terms over the claim period; (v) universities that use an ITT process undoubtedly exercise buyer power; and (vi) even in those cases where there is no ITT process, it was Dr Niels' "impressionistic" view that outcomes are comparable.

64. We have addressed the comparability of outcomes above. In the absence of a fuller analysis, and in light of the fact that only one-quarter of universities enter into a formal tender process, Dr Niels' impressionistic view is insufficient to rebut the inference that there is a strong incumbency advantage.

65. There are a number of difficulties with Dr Niels' reliance on the fall in real terms in E&R's prices. First, evidence of a fall in real terms yields no information on the competitive price level (because it depends on whether, and if so by what margin, the starting price was greater than the competitive benchmark). Second, price trends alone say nothing about competitive price unless accompanied by evidence on cost changes over the same time period. Third, the price charged to

students for academic dress hire is only one of the parameters that, taken together, determine the competitiveness of a bid. Without addressing these other matters, evidence of a reduction in prices alone cannot rebut the inference of E&R's dominance.

66. E&R argue that they cannot be dominant because there is active competition in the B2B market and their prices are comparable to those of their competitors. Even were that to be factually so (and we have not seen a full price comparison), it would not, without more, be sufficient to rebut the presumption of dominance. To do so would require a detailed investigation of pricing, the competitive dynamics and the cost structures and profit margins of each of the suppliers. Broadly equivalent pricing could exist at levels well above the competitive level, not least because E&R could be using their scale and market power to price at a highly profitable level (given their efficiencies and incumbent position, including the sunk cost in stock that was still economically productive) with it being economically rational for competitors to price at similar levels, and not to provoke a price war, given their (likely higher) cost structures and (likely lower) margins. Accordingly, we find that such evidence falls well short of rebutting the presumption of dominance.

67. While we accept that other suppliers have entered into OSAs with universities, and there are several apparently competent bidders in the market who are willing to contest OSAs with E&R, we consider that overall E&R have failed to rebut the reasonable presumption that E&R's high, and long-standing, market share in the B2B market, combined with low levels of switching and the strong indications that the majority of universities do not take steps to conduct tendering processes so as to nullify the incumbency advantages, confers dominance on E&R.

**(4) Abuse: The Law**

68. Both parties cited Advocate General Rantos' opinion, dated 9 December 2021, in Case C-377/20 *Servizio Elettrico Nationale SpA v Autorità Garanta della Concorrenza e del Mercato* ("*Servizio"*) as a useful summary of the law. From this can be derived the following principles.

(1) Conduct which amounts to an abuse is that which hinders the maintenance of the degree of competition on the market or the growth of that competition. Accordingly, if conduct is to be characterised as abusive, "…that presupposes that it was capable of restricting competition and, in particular, of producing the alleged exclusionary effects", and "…in order to establish whether such a practice is abusive, that practice must have an exclusionary effect on the market that is not purely hypothetical, and thus must exist, but the effect does not necessarily have to be concrete, and it is sufficient to demonstrate that there is an anticompetitive effect which may potentially exclude competitors that are at least as efficient as the dominant undertaking" (paragraph 41).

(2) An exclusionary effect does not, however, necessarily undermine competition, and "a distinction must therefore be drawn between a risk of foreclosure and a risk of anticompetitive foreclosure", the latter being characterised by methods other than those of "normal" competition (paragraphs 43-46).

(3) "Normal" competition is to be equated with "fair competition", "competition on the merits" and "competition on the basis of quality". But formulating rules which allow conduct that is harmful to competition, and therefore abusive, to be clearly distinguished is "neither easy nor intuitive" (paragraph 53).

(4) The CJEU has adopted an "effects-based" approach in seeking to identify normal competition (i.e. competition on the merits), that is, by analysis of the anticompetitive effects of the conduct, as opposed to an analysis based on its form (paragraph 55).

(5) While this is a highly fact-specific question, the following considerations are useful (paragraph 58-69):

(i) An undertaking with a dominant position has a special responsibility not to allow its conduct to impair genuine

undistorted competition, but that special responsibility cannot deprive an undertaking in a dominant position of its right to take into account its own legitimate commercial interests;

(ii) Pursuant to the effects-based approach, what matters is whether the conduct of a dominant undertaking tends to restrict competition or is capable of having that effect. If, however, conduct clearly departs from normal market practice, that may be considered a relevant factor in assessing whether there is abuse (in the same way as, for example, proof of intention);

(iii) Conduct that does not come within the concept of 'competition on the merits' is (without claiming to be exhaustive) generally characterised by the fact that it is not based on obvious economic or objective reason. Where, therefore, there is no justification for the conduct other than to harm competitors, that conduct will necessarily not come within the scope of competition on the merits;

(iv) 'Competition on the merits' refers, generally, to a competitive situation in which consumers benefit from lower prices, better quality and a wider choice of new or improved goods or services;

(v) It is necessary to assess the ability of competitors to imitate the conduct of the dominant undertaking: "exclusionary conduct of a dominant undertaking which can be replicated by equally efficient competitors does not represent, in principle, conduct that may lead to anticompetitive foreclosure and therefore comes within the scope of competition on the merits."

69. It is clear from the above that an essential requirement, in order to establish that conduct by a dominant entity is an abuse, is that it must at least be capable of producing an anticompetitive effect.

70. The parties are in disagreement as to the legal requirement for the degree of likelihood that the alleged conduct could actually exclude competitors. Churchill contend that, although an anti-competitive effect must usually be demonstrated, evidence of "actual" effects is not necessary (citing such cases as Case T-301/04 *Clearstream Banking AG v Commission* at paragraph 144). E&R, on the other hand, contend that where the conduct complained of is in the past (as here, where damages are claimed for alleged abuse of dominance during the claim period), then it is necessary to show that there have been actual anticompetitive effects, citing Case T-684/14 *Krka Tovarna Zdravil DD v Commission*, [2019] 4 CMLR 14, at paragraphs 359 to 362. On the facts of this case, we consider this debate to be irrelevant. There can be no doubt that Churchill have been precluded from gaining anything other than the smallest foothold in the market via the B2C model. Equally, there can be no doubt that a significant contributing factor (at least) is the fact that universities take steps to direct their students towards the supplier with whom they have an OSA. The critical question is whether that is *caused* by the conduct of E&R of which complaint is made by Churchill. On that question, it is clear that Churchill have the burden of proof on the balance of probabilities.

71. The parties were also in disagreement as to the use of counterfactuals in assessing anticompetitive effect. E&R contend that it is necessary, in order to demonstrate anticompetitive effect, to demonstrate an effect on competition by comparison to a world in which the alleged abusive conduct did not exist. It is common ground that this is a requirement under Chapter I, but Churchill contend that it is not a *necessary* element under Chapter II, where a more flexible approach can be adopted.

72. Churchill relied principally, in this respect, on a passage in the judgment of the General Court in Case T-612/17 *Google and Alphabet v Commission* ("*Google Shopping*") at paragraphs 377-378:

> "377. Furthermore, identifying a credible counterfactual scenario in order to analyse the effects on a market of what are assumed to be anticompetitive practices, that is to say, identifying the events that would have occurred in the absence of the practices that are being examined and identifying the situation that would have resulted, may, in a situation such as that of the present case, be an arbitrary or even impossible exercise if that counterfactual scenario does

> not really exist for a market that originally had similar characteristics to the market or markets in which those practices were implemented. In principle, in the case of existing competitive relationships, not just possible or potential competition, a credible counterfactual scenario must reflect an actual situation that is initially similar but whose development is not affected by all of the practices at issue. In comparing such a counterfactual scenario with the situation observed on the market to which those practices relate, the actual effects of those practices can normally be established, by isolating them from changes that are attributable to other reasons. In that respect, a counterfactual scenario, which compares two actual developments in such a situation, can be distinguished from an assessment of potential effects which, although it must be realistic, effectively describes a probable situation.
>
> 378. Therefore, in the context of the allocation of the burden of proof referred to in paragraphs 132 to 134 above, for the purpose of demonstrating an infringement of Article 102 TFEU, particularly as regards the effects of practices on competition, the Commission cannot be required, either spontaneously or in response to a counterfactual analysis put forward by the undertaking being challenged, systematically to establish a counterfactual scenario in the sense referred to above, contrary to Google's contention. That would, moreover, oblige it to demonstrate that the conduct at issue had actual effects, which, as will be noted in more detail in paragraphs 441 and 442 below in the examination of the first part of Google's fourth plea, is not required in the case of an abuse of a dominant position, where it is sufficient to establish that there are potential effects."

73. Churchill also relied on a passage in the judgment of Richards LJ in *National Grid Plc v Gas & Electricity Markets Authority* [2010] EWCA Civ 114 ("*National Grid*"), at [57], where he commented that:

> "What is appropriate by way of counterfactual, however, is a matter of judgment for the decision-maker. There is no rule of law that the counterfactual has to take a particular form… The purpose of the counterfactual is simply to cast light on the effect of the conduct in issue. It is for the decision-maker to determine whether a counterfactual is sufficiently realistic to be useful, and to decide how much weight to place on it. This is an area of appreciation, not of legal rules."

74. We do not think that these authorities go as far as Churchill contend. The comments of Richards LJ in the *National Grid* case go no further than saying that the decision-maker has considerable flexibility in the identification of an appropriate counterfactual and the reliance placed on it. The passages from *Google Shopping* cited above must be seen in light of the General Court's comment at paragraph 376, rejecting Google's argument that some only of the alleged anticompetitive practices should be excluded from the counterfactual:

> "Thus, since the situation considered anticompetitive in the present case is a combination of practices, the only counterfactual scenario that Google could properly have put forward would have been one in which no element of those

> practices was implemented, as otherwise the combined effects of those combined practices would be only partially understood."

75. In some cases, the complexities will be such that it is practically impossible to identify a realistic counterfactual; and it may not be particularly helpful to the analysis to insist on doing so. This is not such a case. Here, the *actual effect*, namely that Churchill is unable to participate to any meaningful degree in a B2C market, is clear. The question is whether that is the consequence, as claimed by Churchill, of the impugned conduct of E&R as the dominant party on the B2B market. As set out at [88] below, we conclude that it was not such a consequence. In testing that conclusion, we are reassured that an analysis of what the position would be in the absence of the impugned conduct on the part of E&R strongly implies that universities would behave in a similar manner and Churchill would suffer similar foreclosure effects.

76. In agreement with the parties, we consider any counterfactual considered must be one that is likely and realistic: see *Sainsbury's Supermarkets Ltd v MasterCard Inc* [2018] EWCA 1536 (Civ) at [185].

**(5) Alleged Elements of Abuse**

77. A claimant is obliged to identify with precision in its statement of case the specific conduct which is said to amount to an abuse of dominance. The importance of properly pleading a competition claim was emphasised by Roth J in *Sel-Imperial Ltd v British Standards Institution* [2010] EWHC 854 (Ch), at [18]:

> "It is only through the clear articulation of each party's position in its statement of case, with appropriate factual detail, that the other side can know what case it has to meet and what issues any experts have to address, and that the court can effectively exercise its case management powers."

78. In Churchill's statement of case, the only pleaded allegation of abuse is "[t]he entering into, by a dominant undertaking, of agreements which have the effect of conferring exclusivity or quasi-exclusivity on the dominant undertaking".

79. In their closing argument, Churchill identified three aspects of E&R's conduct which are said to amount to an abuse of dominance:

(1) The operation of "a network of exclusive exclusionary supply agreements";

(2) The payment of commission to universities; and

(3) The bundling of the three elements of academic dress: gowns, hoods and caps.

80. As to the first of these, Churchill were pressed in argument to identify precisely what was meant by "exclusive exclusionary" supply agreements and what terms in the OSAs were objectionable on this basis. There is a spectrum of possibilities, from (at one end) the appointment of an 'official supplier' who does no more than guarantee the supply of enough academic dress for all students wishing to attend the relevant ceremonies to (at the other end) an agreement whereby the university is contractually obliged to the supplier to procure that all of its students hire academic dress from that supplier. Mr Randolph accepted that the former would not constitute conduct on the part of a dominant supplier amounting to an abuse of that dominance. The latter would clearly be capable of doing so.

81. In response, Mr Randolph pointed to the following terms that were found in many of the OSAs entered into by E&R:

(1) A provision to the effect that E&R are appointed as the university's "exclusive provider" of "Services", which are defined to include the provision of academic dress for hire or purchase by students; and

(2) A provision to the effect that the university shall not endorse or recommend any other provider to supply academic dress to students.

82. As to the second aspect of E&R's behaviour complained of, the payment of commission, it is common ground that in most, but not all, of the OSAs entered into by E&R, there is a provision requiring E&R to pay commission to the university upon each item of academic dress hired or sold to a student of the

university. The evidence is that where universities invite tenders for OSAs, they stipulate, among other things, payment of commission.

83. As to the third aspect of E&R's behaviour, the bundling of gowns, hoods and caps, while it is accepted that E&R operate a general policy of only providing a student with a bundle comprising gown, hood and cap, E&R objected that this was not pleaded as conduct constituting abuse of dominance. We have already noted that the only pleaded instance of abuse of dominance is the entry into the OSAs. We agree with E&R that there is no specific pleading that the bundling of the three elements of academic dress is conduct amounting to an abuse of E&R's dominant position.

84. Churchill rely on a reference in paragraph 52 of their claim form to E&R supplying academic dress only as a bundle, one reason for which (it is to be inferred) is to prevent competition in respect of (for example) gowns and caps where E&R owns or purports to own intellectual property rights in the hood. This is pleaded, however, as "other activity" of E&R which is relied on as evidence of a "strategy to exclude or stifle competition". Churchill point to the fact that paragraph 52 is cross-referred to in paragraph 71(e) of their claim form. While paragraph 71(e) is contained within the section headed "abuse", it merely repeats the claim that the OSAs were part of an "overall strategy on the part of E&R to exclude or hobble competitors in the relevant market(s)". Churchill did not pursue the allegation of such an overall strategy at trial.

85. This is not a bare pleading point. E&R contend that necessary elements in such a claim are that the different products that are bundled together are "distinct", and that the anti-competitive effect of the bundling is demonstrated: see *Socrates* at [143] and [147]. These were not matters which either expert explored in their reports. The only treatment in Dr Maher's reports was the bare statement that the effect of bundling of academic dress was to prevent other suppliers from offering individual components. Dr Niels' only mention was to note the evidence of Ms Middleton that bundling of academic dress helped universities avoid the additional operational complexity of mismatched outfits. The brief discussion during the "hot tub" procedure did not take the matter materially further. Had the issue been pleaded as an independent element of

abusive conduct then, as E&R submitted, it would have to have been explored fully in the expert evidence presented by each side.

86. Accordingly, we conclude that Churchill is not entitled to advance a case that bundling of academic dress was itself an abuse of E&R's dominant position and that, in any event, such a claim cannot be made out on the limited evidence presented at trial.

**(6) Whether foreclosure of the B2C market is a consequence of the conduct of E&R which constitutes abuse of dominance**

87. It is Churchill's case that the fact that it has been unable to gain any material foothold in the market for supply of gowns to students via the B2C model is a consequence of E&R's behaviour alleged to constitute abuse of dominance: i.e. (leaving aside bundling of academic dress for the reasons set out above) (1) the terms of the OSAs appointing E&R as the university's exclusive supplier of academic dress and precluding the university from promoting other suppliers; and (2) the payment of commission to universities.

88. In our judgment, for the reasons we develop below, Churchill have failed to establish that any foreclosure which exists in the B2C market (or model) is a consequence of any abuse of dominance by E&R. We reach this conclusion primarily because we are not satisfied that it is E&R's conduct – as opposed to the unilateral conduct by universities responding rationally to incentives that are inherent in the B2B market – that results in Churchill (or anyone else) being unable to develop an effective B2C business. We find support for that conclusion by reference to what we consider to be the appropriate counterfactual.

89. So far as the specific terms of the OSAs relied on by Churchill are concerned, Mr Randolph submitted that these (specifically, the appointment as "exclusive provider" of services including the provision of academic dress to students) are to be interpreted as requiring the university to ensure that its students hired or purchased academic dress *only* from E&R.

90. We disagree. The appointment as "exclusive provider" is as between the university and E&R. It entitles E&R, alone, to be endorsed by the university as the supplier of academic dress to students and to preferential treatment (such as presence on site on the day) in that regard. It clearly cannot impose any binding legal obligations on the students to hire or purchase academic dress from E&R, and does not require universities to impose such obligations on its students. The natural meaning of official supplier of services to the university does not connote exclusive supplier to the graduands. This view is reinforced by the second term noted above which provides further protection to the supplier, which would not be necessary were the first to connote exclusivity. To put it another way, the latter provision is necessary precisely because universities are not obliged by the OSA to prevent students hiring or purchasing academic dress from other suppliers.

91. As to the second term of which Churchill complain, it simply does not follow that a provision which prevents a university from positively endorsing a rival supplier has the consequence of foreclosing the B2C model, under which suppliers advertise to, and contact, students over the internet. No authority was cited to us that demonstrated that either the appointment of an official supplier (a situation that is frequently observed in other markets) or an obligation not to endorse a rival supplier could constitute an abuse (or, indeed, was inherently anti-competitive for the purposes of Chapter I, as to which see below).

92. Mr Randolph pointed to statements made on the website of some universities that had entered into OSAs with E&R imposing constraints, including that students will "need to order your gown and hat" from E&R, and that students would not be able to graduate "without the correct gown". He accepted, however, in answer to questions from the Tribunal, that he was not contending that such wording was mandated by anything in the OSA with that (or any) university. Mr Patton pointed, on the contrary, to evidence demonstrating that E&R had, when the issue arose, made both private statements to universities, and public statements, confirming that their OSAs did *not* oblige students to hire or purchase academic dress from E&R. In an article in the *Telegraph* on 23 September 2017, for example, E&R were reported as having said "Students have the right to choose from where they hire or buy their academic dress". In

a letter from E&R's legal team to a university with which E&R had an OSA containing the relevant provisions relied on by Churchill, Arts University College Bournemouth, it was noted that the OSA was exclusive as between E&R and the college, but that "the Agreement does not bind Graduates and does not therefore seek to prohibit or prevent Graduates from hiring Academic Dress from their supplier of choice. Nor does the Agreement oblige the College to prohibit or prevent Graduates from hiring their Academic Dress from other providers."

93. The university website to which Mr Randolph referred us tends to support the view we have expressed above, as to the inherent incentives within the B2B market. It is an example of a university directing its students in terms that go significantly beyond its contractual obligations to E&R which it can only realistically be doing because it is in its own interests as regards the successful conduct of, and risks inherent in, graduation ceremonies. Those interests are supported by the underwriting of the process by the appointment of an official supplier with the resources fully to clothe in academic dress the entire graduating group.

94. That was further supported by other evidence. Ms Nicholls, for example, gave evidence of students being told by universities that they were not free to choose suppliers other than E&R (where the university had an OSA with E&R), or that they could not take part in graduation ceremonies unless they hired academic dress from the official supplier. That included universities with OSAs which did not include the clauses as to exclusivity of appointment of which Churchill complain. Churchill referred also to an email from one university to E&R saying that the university had updated its website to make it clear that E&R were the only official supplier and that "hopefully that will deter anyone hiring from Churchill". It was evident more generally from Ms Nicholls' and Mr Adkins' evidence that it was university conduct that consistently thwarted Churchill's attempts to market academic dress to students on campus. Churchill were unable to take us to any evidence that showed that such conduct by the universities was required by their contractual obligations to E&R or otherwise arose from action by E&R. We conclude that Churchill could not rebut the inference that such

conduct was a result of the university's own incentives, going beyond their obligations to E&R.

95. As to commission payments there are two important considerations. First, and most importantly, for the reasons we have set out above, we consider that universities are, even without commission payments, incentivised to direct students towards an official supplier prepared to underwrite the supply of academic dress to all students wishing to attend the relevant ceremonies, and to promote the success of that supplier. As we have also noted above, the making of some form of payment to universities is a rational and expected outcome of competition between B2B suppliers, and of the self-interest of universities, and commission payments (as opposed to a fixed level of remuneration not dependent on the volume of items hired) is the most rational option taking into account the financial burdens on, and risks taken by, official suppliers. While we do not think much emphasis can be placed on *how* the current market was initially formed, it is nevertheless of some relevance that commission payments (which are not said to be inherently unlawful or anti-competitive) were not the invention of E&R or any other dominant party.

96. There is some support for this in the fact that we were shown two examples of universities where commission payments are not paid on academic dress supplied to students, but where there is nevertheless no significant B2C market. The first is Edinburgh University which, since 2018, has not charged a commission per item hired to students (albeit that it does receive benefits not linked to the volume of academic dress hired to students, in the form of free academic dress for staff and distinguished guests, and cleaning and design services). Students are nevertheless told on its website that they "must" hire their academic dress from E&R. The second is Arts University Bournemouth, where there is no evidence of any material B2C market. (The impact of this last point is weakened to some extent by the fact that in June 2021, the University Secretary at Arts University Bournemouth wrote to E&R's solicitors saying that successive account managers at E&R had been clear to his colleagues that the contract between the two organisations was "exclusive", albeit that may merely indicate some confusion on the part of the Secretary as to what "exclusive" meant).

97. The second consideration is what would have been the case had E&R, as the dominant participant in the market, not paid commissions to universities. This raises the question as to the appropriate counterfactual to test whether the conduct of E&R in entering into OSAs, in particular involving commission payments, has an anti-competitive effect.

***(a) The appropriate counterfactual***

98. The parties have advanced diametrically opposite cases as to the appropriate counterfactual.

99. Churchill contend that in the absence of the impugned conduct on the part of E&R, universities would not have entered into OSAs at all (whether with E&R or any other supplier). Alternatively, they contend that if universities had entered into OSAs, these may have conferred "official supplier status" but would not have contained any terms as to the exclusivity of service provisions or payment of commissions. In that counterfactual world, Churchill contends that its preferred (B2C) model would have opened up, enabling it to acquire a share of the market for hiring academic dress to students.

100. E&R contend that if they had been prevented from entering into OSAs containing the terms of which complaint is made, and had been prevented from paying commissions to universities, then their share of the market would have been taken by other suppliers (including those that already share the remainder of the market). These other suppliers, with whom E&R would have effectively been prevented from competing on equal terms, would have entered into OSAs, and paid commissions, in the same way as is currently done throughout the B2B market. The consequence, they contend, would be that B2C sales would have been foreclosed to the same extent as in the current market.

101. We cannot see any foundation for Churchill's preferred counterfactual, in which there were either *no* OSAs entered into by any academic dress supplier or no OSAs with terms as to exclusivity or payment of commission. Further, Churchill have provided no sufficient reason why, even if E&R had been precluded from agreeing terms as to appointment as exclusive supplier or payment of

commission, other suppliers would not have continued to offer similar terms, and universities would have been incentivised to agree to them. Churchill do not allege that the conduct of other suppliers is unlawful (we address below the contention that the other suppliers' conduct, in aggregate, *would* be unlawful in the counterfactual world). They contend that E&R's conduct is unlawful only because it is dominant in the market, and it is not suggested that in a realistic counterfactual any one supplier would be dominant. In identifying the appropriate counterfactual for Chapter II purposes it is necessary only to remove E&R's impugned conduct. That would leave universities and other suppliers free to enter OSAs on the same basis.

102. Churchill support their version of the counterfactual by reference to certain allegedly analogous markets: the Irish market for academic dress; the market for school uniforms; and the market for supply of gowns in Oxford and Cambridge. None of these provides a realistic counterfactual in the context of a private action against alleged breaches of competition law by E&R (although they may have some relevance as possible analogues if the context was a broader market investigation into the way in which universities organised their graduation ceremonies).

103. The market for provision of gowns to students at Irish universities was the subject of intervention by the Competition and Consumer Protection Commission ("CCPC"). According to a press release issued by the CCPC on 19 December 2017, its concern was prompted by the fact that the lack of competition among the small number of suppliers of academic dress in the Irish market had led to one firm acquiring a dominant position. Its response was to secure commitments from universities: (1) to reduce the length of supply contracts to no more than two years; (2) to decouple the supply of photography services from the supply of gowns; and (3) to state in clear terms on their websites that students had the option to source gowns from other suppliers.

104. The fact that the solution to the perceived problem in Ireland was to secure commitments from universities demonstrates that the Irish market is clearly *not* an appropriate counterfactual for our purposes. Churchill have not explained why English universities would provide similar undertakings. This Tribunal has

no power to impose any requirements on universities. It also reinforces the conclusion that it is the incentives and behaviours of universities which are the cause of foreclosure in the B2C market. In any event, Churchill have not adduced any evidence to suggest that – even following intervention by the CCPC – there is a meaningful B2C market in Ireland.

105. The UK school uniform market has also been the subject of regulatory intervention, initially by way of an open letter from the CMA in 2015, identifying concerns that exclusive agreements between schools and school uniform suppliers had had tangible effects on the cost of school uniforms for parents and, subsequently, by way of statutory guidance given by the Secretary of State for Education. That guidance did not prohibit schools from entering into exclusive supply agreements, but required them to be the subject of open tender every five years. We do not see how that counterfactual, if applied by analogy here, would lead to any different B2C market. As with the Irish example, the solution involved restrictions (by way of guidance) upon the actions of *schools*. It suffers, therefore, from the same problem we have identified above, as this Tribunal has no power to direct how universities should behave and there is no reason to believe that universities would unilaterally change their behaviour.

106. The market for providing gowns to students at Oxford and Cambridge ("Oxbridge") is not a realistic analogy. The evidence of Mr Adkins for Churchill pointed to the following characteristics of Oxbridge "which make them stand apart": (1) they use 'college' gowns for formal dinners, events and exams across the student's time at university; (2) there are multiple gown suppliers with physical stores in the towns; (3) the graduation gowns are worn with additional accoutrements such as bands and bow ties; and (4) the institutions seem to be more accepting of slight variations in academic dress used by their graduands.

107. These characteristics were reinforced by Ms Nicholls' oral evidence. She said that students at Oxbridge typically purchase a gown to wear throughout their degree course from one of the physical stores in the town. When it comes to hiring their graduation attire they tend to return to the same store, which has strong brand recognition. Churchill had made no significant inroad into the Oxbridge market. The number of orders Churchill obtained from students at

Oxford for each of 2018, 2019 and 2020 was miniscule and no greater than orders from universities where OSAs were in place. They did not make a single hire in Cambridge in 2018, 2019 or 2020, and such gowns as they supplied at Cambridge colleges in 2021 – other than some provided on a B2B basis – were supplied on an in-person basis at the start of the students' career at freshers week, which was not Churchill's standard business model. Ms Nicholls accepted that Churchill's lack of success in the Oxbridge market had nothing to do with OSAs.

108. Dr Niels pointed to other distinguishing features at Oxbridge: these universities did not need the full suite of graduation services because of the collegiate structure, and the presence of ancient officer roles to manage events throughout the academic year; the graduation ceremonies at Oxford take place throughout the year (as opposed to being concentrated within specific times); academic staff attend functions throughout the year so that they are more likely to purchase their academic dress; and at Cambridge (but not Oxford) academic dress used for events other than graduation is college-specific.

109. In Dr Niels' view, the combination of these factors implies that the conditions at Oxbridge are such that supply can operate more closely to a typical retail environment.

110. Dr Maher disagreed with Dr Niels' analysis. She considered that the fact that there are multiple suppliers of academic dress at Oxbridge was what made them a highly relevant counterfactual. That, however, fails to engage with the *reason* there are multiple suppliers and, in particular, fails to address the evidence referred to above from Churchill's own witnesses. She also took issue with the suggestion that what students do when they acquire academic dress at the start of their career informs what they will do upon graduating. She did not provide any reasoned support for her objection, and we consider the evidence of Ms Nicholls and Mr Adkins on this point to be more compelling. Moreover, E&R pointed out in their written closing argument that, as stated by Ms Nicholls and as evidenced by its own website, students at Cambridge use the same gown at graduation as that acquired at the start of their university career.

111. In our view, the practices adopted at the Oxbridge colleges, as explained by Mr Adkins and Ms Nicholls, combined with the differences highlighted by Dr Niels, mean that they do not provide a realistic comparator for the vast majority of universities across the UK. The fact that Churchill has made no greater inroads in the existing market at Oxbridge than at other universities reinforces that conclusion.

112. Much of Dr Maher's evidence, in support of the view that there would have been no commission payments and no OSAs with the relevant impugned terms, was in reality not, in our judgment, expert opinion evidence as to what would realistically have occurred if E&R's conduct were changed, but an expression of how a fair and competitive market, in her opinion, *ought* to be organised. That might be relevant to a market investigation in which the conduct of all parties including the universities was under scrutiny, but does not assist in determining whether specific conduct of a participant in the market constitutes an abuse of dominance. Her support for the proposition that the Irish academic dress market or the school uniform market are appropriate counterfactuals reinforced this since, as we have noted above, those are examples of regulatory intervention in order to change the way the market operates by directing the institutions concerned (universities or schools) to behave differently.

113. Insofar as Dr Maher addressed the central question as to what would realistically have happened if E&R had been precluded from entering into OSAs containing the impugned terms, she did so by contending that the behaviour of universities and other suppliers would be modified *in light of knowledge of our ruling that E&R's conduct was unlawful*. That, however, was flawed for two reasons. First, there is no reason to think that non-dominant suppliers, or universities, would be prompted not to enter into agreements that are perfectly lawful merely because we had concluded that it was unlawful for a dominant supplier to enter into them. Second, it puts the cart before the horse to postulate a counterfactual in which we have delivered judgment: the question is what would have happened during the claim period (in the past) had E&R not entered into agreements with the impugned terms. Any judgment we might reach after the event cannot impact on what would have happened during the claim period.

114. Turning to E&R's preferred counterfactual, a lot depends in our view on what precisely has to be removed from the OSAs entered into by E&R, as the foundation for the counterfactual. The most extreme version of Churchill's case would appear to be that any term in an OSA entered into by a dominant party which incentivised universities to direct graduands towards that party would be outlawed in the counterfactual. In closing submissions, Mr Randolph cited "these exclusive agreements", with all that goes with them including the graduation services, ticketing services and commission, as the cause of foreclosing the B2C market, and thus as something which a dominant party could not enter into. On that extreme version of Churchill's case, E&R would effectively be precluded from providing any form of rent or additional benefits to universities (because, as we have noted above, these would provide an additional incentive on universities to promote that supplier so as to maximise the prospect of similar payments or benefits in future years).

115. In that event, when other suppliers were free to do what they currently do, then we find it difficult to see how E&R could have competed effectively on the B2B market at all, whilst subject to that constraint.

116. It is a standard feature of the tender documentation we were shown, emanating from universities, that particular weight is given to the remuneration (including but not limited to commissions) to be provided by the official supplier to the university. Based on the scoring mechanism within such tender documentation, if a supplier did not offer *any* such remuneration, it is highly unlikely they would score well enough to present a competitive bid, let alone a winning one. By way of example, in closing argument Mr Patton referred to one tender document for LSE which gave the following weighting to each bid: (1) cost (i.e. level of fees offered to the university) – 40%; (2) quality of goods/services – 40%; (3) innovation – 5%; (4) suitability as regards equality, diversity, inclusion and employment/training practices – 5%; and (5) acceptance of the universities standard terms and conditions – 10%. Another for Birmingham University weighted commission payments at 30% (as opposed to 20% for price of the dress itself and 50% for various aspects of quality). In either case, it is clear that a zero score on the remuneration paid to the university would render any bid highly uncompetitive.

117. We consider that this provides strong support for the conclusion that, if E&R had alone been precluded from entering into OSAs (at all, or on terms that precluded them providing any remuneration or other benefits that reinforced the universities' incentives to direct graduands towards them), universities would nevertheless have entered into OSAs with equivalent foreclosure consequences for the B2C market, with others.

118. If, however, all that is removed from the OSAs in the counterfactual are those features which Churchill allege (or are permitted to allege) constitute abuse, then the position is more nuanced, because it would likely have been open to a dominant party such as E&R to incorporate other provisions (such as another form of remuneration) which enabled it to compete effectively with other suppliers even if it could not, for example, pay volume-based commissions. The essential point, however, is that any such alternative provisions would not have removed the existing incentives on universities to favour an official supplier in the same way that the currently do so. Given our conclusions as to the incentives that already exist, any alternative payment mechanism, even if not in the form of commissions on gowns hired to students, would make economic sense only to the extent that the supplier could be confident of recouping it from the hire of gowns to students. That would be known to universities and suppliers alike, and would thus reinforce the incentive on universities to direct students towards the supplier prepared to make such payment, in order to be assured of a similar benefit in subsequent years. Fundamentally, the university benefits (in both financial and quality assurance terms) from funnelling graduands through an official academic dress supplier. Conversely, the university gains no such benefit (and indeed would lose out in both financial and quality assurance terms) from permitting or encouraging B2C sales. None of Churchill's submissions on the counterfactual addresses this key point about the university's incentives and conduct with respect to the way in which academic dress hire is arranged.

119. Churchill's overall objection to E&R's preferred counterfactual (and, logically, to the counterfactual we posit above) is that it is wholly unrealistic, for two reasons.

120. First, they contend that if the market is university-specific, then in every case where another supplier took over as the official supplier at a university it would by definition become dominant, rendering any OSA that contains the same terms that are complained of in E&R's OSAs unlawful. Given that we have rejected the notion that the market is university specific, this point falls away.

121. Second, they contend that even on the basis that the market is across all universities in the UK, and even if no other supplier became dominant, the entry by other suppliers into OSAs containing the same impugned terms would infringe Chapter I, by application of the conditions set out in Case C-234/89 *Delimitis v Henninger Bräu* [1991] ECR-I 935 ("*Delimitis*") at paragraphs 19 - 27.

122. *Delimitis* concerned the lawfulness of agreements by which breweries let public houses to publicans and which tied the publicans to purchasing supplies of beer from the brewery letting the premises. The court determined that a particular beer supply agreement would contravene Chapter I if two conditions were met:

> "The first is that, having regard to the economic and legal context of the agreement at issue, it is difficult for competitors who could enter the market or increase their market share to gain access to the national market for the distribution of beer in premises for the sale and consumption of drinks. The fact that, in that market, the agreement in issue is one of a number of similar agreements having a cumulative effect on competition constitutes only one factor amongst others in assessing whether access to that market is indeed difficult. The second condition is that the agreement in question must make a significant contribution to the sealing-off effect brought about by the totality of those agreements in their economic and legal context. The extent of the contribution made by the individual agreement depends on the position of the contracting parties in the relevant market and on the duration of the agreement."

123. The first difficulty with this argument is that it contradicts Churchill's pleaded case. In response to a specific request as to whether Churchill alleged that OSAs entered into by other suppliers contravened either section 2 or section 18 of the 1998 Act, Churchill responded: "No such allegation is made in these proceedings." Instead it was said that those agreements are relevant only to the question of whether the "cumulative effect" of the "Exclusivity Agreements" (defined as the OSAs to which E&R is a party) and other similar agreements is to deny or substantially limit access to the market to new and existing suppliers.

124. If an agreement between a non-dominant supplier does not currently infringe Chapter I then it is difficult to see how it would do so in a counterfactual world where the supplier has a larger, though still not dominant, share of the market.

125. The argument was not developed beyond the assertion that other non-dominant suppliers "would be precluded … from concluding a series or network of anti-competitive agreements or concerted practices conferring exclusivity, by which the parties involved collusively set the prices at which academic dress would be supplied to student customers lower down the supply chain". It is for Churchill to establish, for example, the ways in which (and the extent to which) the numerous agreements entered into by other suppliers would be similar. We have already concluded that the OSAs entered into by E&R did not confer exclusivity in the sense alleged by Churchill. We do not accept, therefore, the assertion that other suppliers would enter into agreements "conferring exclusivity". Nor have we seen anything that would justify Churchill's reference to "collusive" pricing conduct in the sentence cited above.

126. It is for Churchill to establish (i) that these agreements would be anti-competitive in effect, beyond the mere assertion that they would foreclose the B2C market; (ii) the "concerted practices" that they assert would exist; and (iii) the manner in which prices would be "collusively" set. We conclude that Churchill has not succeeded in establishing any of these matters. Accordingly, we reject Churchill's contention that E&R's counterfactual is flawed because it assumes the existence of agreements that would themselves be unlawful.

127. Moreover, just because we consider the counterfactual would involve the other suppliers reaching agreements with universities under which universities would be incentivised to direct students towards the official supplier in the same way as occurs now, that does not mean that the terms of the different agreements are necessarily "similar" for the purposes of the *Delimitis* conditions. The terms offered to universities by different suppliers would reflect the competition between those suppliers. It therefore cannot be assumed that their terms would be sufficiently similar to constitute a "network of anti-competitive agreements". Even amongst the OSAs before the Tribunal entered into by E&R, there were material differences as regards the terms specifically relied upon by Churchill.

128. For the above reasons, we reject Churchill's counterfactual and consider that the more realistic counterfactual is that proposed by E&R, or a variation of it, in which the B2C market would be no more active than it is in the real world. Whether the matter is approached without reference to that counterfactual, or by reference to it, we accordingly conclude that the foreclosure of the B2C market is *not* the consequence of any provisions of the OSAs or the payment of commissions pursuant to them.

***(b) Other considerations***

129. One of the considerations identified by Advocate General Rantos in *Servizio* is the extent to which the alleged anti-competitive effect is a result of normal competition or 'competition on the merits' and, therefore, whether the exclusionary conduct of the dominant undertaking can be replicated by equally efficient competitors.

130. E&R contend that the impugned terms are the result of normal competition in the B2B market, as demonstrated by the fact that they are indeed replicated by competitors, namely the other suppliers that operate on that market. We have already noted that, although Churchill contend (and we have found) that E&R are dominant on the B2B market, it is not contended that the terms of the OSAs or the commission payments made by E&R to any university had any foreclosing effect in the B2B market. This evidence that rival suppliers are able to compete sustainably with E&R *on the B2B market*, and that their ability to do so is not adversely affected by the exclusivity provisions that both they and E&R apply to their contracts (indeed the contrary may be true, since the prospect of a long term appointment as official supplier is likely positively to assist a rival bidder in challenging an incumbent provider), means that the concerns raised by Advocate General Rantos in the above case do not apply here.

131. Churchill's response to this is that the foreclosing effects occur in the B2C market, that the B2C market is a related market to the B2B market, and that conduct may be anti-competitive if its foreclosing effect is experienced on a related market. Mr Randolph referred us to *Genzyme Limited v Office of Fair*

*Trading* [2004] CAT 4 ("*Genzyme*"), and the cases cited by the Tribunal at [482] to [499]. Thus:

(1) In Case 311/84 *CBEM Télémarketing v CLT and IPB* [985] ECR 3261, CLT was held to have abused its dominant position as a television station in refusing to accept any advertisements involving telemarketing unless the telephone numbers shown were that of its own advertising agent. The Court of Justice referred to Cases 6 and 7/73 *Commercial Solvents v Commission* ([1974] ECR 233) in which the court held that "an undertaking which holds a dominant position on a market in raw materials and which, with the object of reserving those materials for its own production of derivatives, refuses to supply a customer who also produces those derivatives, with the possibility of eliminating all competition from that customer, is abusing its dominant position…" The Court of Justice applied the same principle to the case of "an undertaking holding a dominant position on the market in a service which is indispensable for the activities of another undertaking on another market."

(2) In *Commercial Solvents* itself, CS was dominant in the supply of raw materials for the production of a downstream product, ethambutol. Another entity, Zoja, was a producer of ethambutol who obtained its raw materials from CS. When CS itself decided to commence the downstream manufacture of ethambutol it ceased to supply the raw material to Zoja. The Court of Justice concluded that it had abused its dominant position.

(3) That principle was applied in Case No IV/30.178 *Napier Brown/British Sugar* OJ 1988 L284/41. In that case, British Sugar's refusal to supply Napier Brown with industrial sugar solely on the grounds that Napier Brown intended to repackage that sugar and sell it on the retail market in competition with British Sugar was held to be an abuse.

(4) The principle that it may well be an abuse for an undertaking which is dominant in one market to act without objective justification in a way

which tends to monopolise a "downstream, neighbouring or associated market" was said to be confirmed by the decision of the Court of Justice in Case C-18/88 *GB Inno* [1991] ECR I-5941, where a monopoly operator of a telecommunication system effectively reserved to itself the supply and maintenance of equipment for the network. The Tribunal in *Genzyme* said (at [489]):

> "…the abuses found in the case law essentially involve a company which is dominant in one market extending its monopoly into a separate or related market to the exclusion of competitors who would otherwise be able to compete in that separate market. If the elimination of competition in the related market is not the result of competition on the merits, then an abuse may be found."

(5) Other examples of similarly abusive behaviour include a dominant party in an upstream market supplying an essential input to its competitors in a downstream market at a price which does not enable its competitors on the downstream market to remain competitive (see *Genzyme* at [491]).

132. We do not find these authorities of much assistance in this case. They could be of assistance only if the present case is analysed as two separate markets. As we have already noted, it is at least as appropriate to analyse the position as the B2C model being a different (new and disruptive) channel for a delivery of part of the offering in the B2B market, in which case these authorities are not relevant. Moreover, even on the two-market analysis, in each of the cases cited the dominant party was active, or proposing to be active, on an existing related market, which is not our case: there is no active B2C market and, if there was, it would not be one on which E&R sought to compete. Finally, and critically, this line of argument does not address the fundamental finding that we have made that the cause of the foreclosure is not the actions of E&R but those of the universities. It does not, therefore, advance the Claimants' case.

133. If there were no dominant supplier in the B2B sector, foreclosure on the B2C market would remain, and to the same extent. While acknowledging that a dominant party is under a special responsibility which may include refraining from conduct in which non-dominant parties are free to engage, it is an

important factor in considering whether E&R's conduct in this case is anti-competitive that it does *not* foreclose entry of others in the B2B market. Moreover, as we have explained above, placing a handicap on E&R's ability to respond to universities' demands for OSAs would not address Churchill's foreclosure concerns as regards B2C sales.

134. As Advocate General Rantos recognised, the factors he discussed at paragraphs 58 - 69 of his opinion in *Servizio* are not necessarily determinative in any given case, since the question of anti-competitive effect is highly fact specific. We consider, however, that this factor is relevant here, at least to the extent of demonstrating why the approach adopted in *Genzyme* and the cases referred to in it (as summarised above) is not determinative here.

135. Churchill also rely on the fact that, in other cases, commission payments have been found to be anti-competitive. Mr Randolph referred us to Case T-155/06 *Tomra v Commission*, in which the General Court said at paragraph 208 – citing Case 85/76 *Hoffmann-La Roche v Commission*:

> "It should also be recalled that, according to case-law, an undertaking which is in a dominant position on a market and ties purchasers – even if it does so at their request – by an obligation or promise on their part to obtain all or most of their requirements exclusively from that undertaking abuses its dominant position within the meaning of Article 82 EC, whether the obligation in question is stipulated without further qualification or whether it is undertaken in consideration of the grant of a rebate. The same applies if the undertaking in question, without tying the purchasers by a formal obligation, applies, either under the terms of agreements concluded with these purchasers or unilaterally, a system of fidelity rebates, that is to say, discounts conditional on the customer's obtaining all or most of its requirements from the undertaking in a dominant position."

And in which the Court also said at paragraph 296 (citing *Hoffmann-La Roche* at paragraph 90):

> "In fact, obligations of this kind to obtain supplies exclusively from a particular undertaking, whether or not they are in consideration of rebates or of the granting of fidelity rebates intended to give the purchaser an incentive to obtain his supplies exclusively from the undertaking in a dominant position, are incompatible with the objective of undistorted competition within the common market, because they are not based on an economic transaction which justifies this burden or benefit but are designed to remove or restrict the purchaser's freedom to choose his sources of supply and to deny producers access to the market."

136. That was supported, he submitted, by *Achilles Information Ltd v Network Rail Infrastructure Ltd* [2019] CAT 20, where it was held that a requirement by Network Rail that undertakings seeking access to its railway network infrastructure use only a provider of supplier assurance services nominated by it, thereby excluding others from competing on the market, was an abuse of dominance.

137. Mr Patton submitted that these were cases where the counterparty was under an obligation to purchase exclusively from the supplier or where it was incentivised to do so by fidelity rebates that were conditional on exclusivity or near-exclusivity. As we found above, that is not this case where the universities are not *obliged* by any terms in the alleged offending contracts to direct all their students towards E&R, and are not incentivised by fidelity rebates conditional upon them doing so.

138. Insofar as there are any volume related commissions in the OSAs entered into by E&R, Mr Patton pointed out an example where the rate of commission *decreases* with greater volume. In his submission, they are not therefore (and in some cases are the opposite to) the type of commissions or fidelity rebates that have been found to be objectionable in other cases. Mr Patton referred us, for example, to C-9504 P *British Airways v Commission*, in which BA concluded agreements with travel agents which included, in relation to a basic commission system for sales by those agents of tickets for BA flights, three distinct systems of financial incentives. No complaint was made by the Commission, and no criticism by the Court was made, of the basic commission structure which, Mr Patton submitted, was the only aspect of the *British Airways* case that reflects the commission structure in this case. The three systems of financial incentives either rewarded the agent in a given year relative to the prior periods, or rewarded an agent that grew BA's share of worldwide sales relative to other airlines. Mr Patton pointed out that none of the elements of the commission schemes that were found to be abusive in *British Airways* is to be found in our case.

139. Here, again, great care is needed in translating the conclusions in other cases – where the facts were very different – to the circumstances of this case. We do

not find Churchill's reliance on the existing case law dealing with commissions to be helpful, given the very different factual circumstances in our case.

140. Equally, however, we do not think the fact that the case law has considered straightforward commission payments such as the basic commission in the *British Airways* case to be unproblematic is a complete answer here, again because the circumstances are very different. In particular, the Court in *British Airways* did not have to consider the situation that the payment of commission to universities who act – in effect – as gatekeeper for all those wishing to attend graduation ceremonies may act as an incentive to direct all, or virtually all, students towards the supplier paying that commission. That does not undermine the conclusion we have reached that, on the facts, it is not E&R's conduct that is the cause of the foreclosure in the B2C market, but we do not think that conclusion can be reached on the basis of the existing case law addressing exclusivity agreements or fidelity rebates.

**(7) Is the conduct objectively necessary?**

141. E&R argued that, had there been conduct that would otherwise have been abusive, it would not breach Chapter II because it met the test of objective necessity. Churchill contended that, the defence having been raised, E&R carried the burden of proof that the actions concerned were not necessary; E&R contended that Churchill carried the burden of proof.

142. We are content to adopt E&R's formulation that this question resolves to whether the impugned OSA provisions are inherent in the commercial relationship, with the result that the primary operation (on the Defendants' case, the delivery of graduation services to universities) could not be carried out in the absence of those provisions.

143. Given our conclusions on abuse, this issue does not arise for decision but, for completeness, we should record that we consider that, irrespective of which party carries the burden of proof, it is clear that the provisions complained of do not meet a test of objective justification. The relevant provisions are those that were pleaded: exclusivity/foreclosure and commissions.

144. E&R relied on the concept of relationship specific investments (which, on analysis, essentially related to hoods, since gowns and caps generally followed more widely used styles) and on free-rider issues to support their argument that the benefits of OSAs could not be realised without the benefit of these provisions. We heard some economic expert evidence from both sides on these issues.

145. Irrespective of which party bore the burden of proof, we were not persuaded that, in the light of the range of models available for E&R to supply services to universities (which universities clearly need) and the variety of terms governing the nature of those relationships that were deployed, any of (i) exclusivity, (ii) agreements to foreclose the B2C market or (iii) commissions were objectively necessary to achieve the benefits of OSAs. There are a variety of different models which could be adopted to balance the commercial risks associated with the provision of these services to universities.

## E. CHAPTER I

### (1) Legal Framework

146. Section 2 of the 1998 Act provides, insofar as material, that:

> "(1) Subject to section 3, agreements between undertakings, decisions by associations of undertakings or concerted practices which—
>
> (a) may affect trade within the United Kingdom, and
>
> (b) have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom,
>
> are prohibited unless they are exempt in accordance with the provisions of this Part.
>
> (2) Subsection (1) applies, in particular, to agreements, decisions or practices which—
>
> (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
>
> (b) limit or control production, markets, technical development or investment;
>
> (c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

(3) Subsection (1) applies only if the agreement, decision or practice is, or is intended to be, implemented in the United Kingdom.

(4) Any agreement or decision which is prohibited by subsection (1) is void.

…

(7) In this section "the United Kingdom" means, in relation to an agreement which operates or is intended to operate only in a part of the United Kingdom, that part.

…"

147. Section 9 of the 1998 Act provides that:

"(1) An agreement is exempt from the Chapter I prohibition if it—

(a) contributes to—

(i) improving production or distribution, or

(ii) promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit; and

(b) does not—

(i) impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives; or

(ii) afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.

(2) In any proceedings in which it is alleged that the Chapter I prohibition is being or has been infringed by an agreement, any undertaking or association of undertakings claiming the benefit of subsection (1) shall bear the burden of proving that the conditions of that subsection are satisfied."

**(2) Analysis**

148. We can deal relatively briefly with the alternative case under Chapter I, since the principal conclusions we have reached in relation to the Chapter II Prohibition determine the Chapter I Prohibition issue in a similar way.

149. The core of Churchill's Chapter I case is that the B2C market (or a part of the B2B market, depending on which view of the market is taken) is foreclosed to them by reason of the OSAs entered into between E&R and universities (being "agreements between undertakings" within section 2(1) of the 1998 Act).

150. We have rejected (in the context of the Chapter II case) the contention that the OSAs entered into by E&R imposed obligations on either universities or graduands to ensure that graduands hired academic dress exclusively from E&R. That conclusion answers Churchill's claim based on the OSAs having any *de jure* foreclosing effect.

151. As to the contention that the OSAs had *de facto* foreclosing effect, as set out above, we conclude that the foreclosure effect in the B2C market arises from the actions and choices of the universities, whether they are contracting with E&R or their competitors. Those actions are rational from the perspective of the universities, and occur without any particular connection being established between the nature or terms of the particular agreement and the relevant conduct of the university concerned. The foreclosure does not arise from contractual terms in the OSAs.

152. Churchill accept that reference to a counterfactual is an established method of assessing effect on competition under Chapter I. We have addressed the appropriate counterfactual at length in dealing with Chapter II. Our conclusions in that respect are the same in relation to the Chapter I Prohibition.

153. Accordingly, bolstered by our view as to the likely counterfactual, we conclude that, while there is no doubt that Churchill face considerable commercial hurdles in establishing their direct sale model, that is not the consequence of the OSAs entered into between E&R and universities so as to amount to an infringement under Chapter I.

154. Churchill's reliance on a network of agreements and *Delimitis* (see above, at 121) does not assist them. As E&R submitted, there is nothing in *Delimitis* which removes the need for Churchill to demonstrate that the anticompetitive effects flow from the agreement or concerted practice at issue, including by

reference to the counterfactual. Secondly, Churchill have not discharged the burden of proving a network of sufficiently similar contracts in the market that would promote the anticompetitive effect of any one contract into a broader, sufficiently significant, impact on competition.

155. In closing submissions, Churchill sought to widen their case as regards allegations of "collusive concerted practices", by reference to (i) allegations of "decisive intervention" by E&R after Churchill sent requests for information to universities, (ii) assistance provided by E&R to "certain universities" in developing their tender terms and conditions, and (iii) correspondence between E&R's lawyers and Arts University Bournemouth.

156. The evidence relied on consisted of: (i) E&R responding to universities (prompted by correspondence from Churchill) to clarify their position on intellectual property rights in the academic dress supplied by them; (ii) an occasion when a university, intending to invite tenders for the first time, asked E&R if they would be willing to answer any questions the university may have in putting together its specification; and (iii) an occasion when E&R wrote to Arts University Bournemouth to clarify that the university was *not* required to oblige its students to hire academic dress only from E&R.

157. In our judgment, these instances – even cumulatively, and irrespective as to whether a concerted practice had been properly pleaded (which E&R contest) – do not get anywhere near to establishing the sort of concerted practices that would amount to a Chapter I infringement.

158. Churchill also sought to widen their case by reference to allegations of price fixing and bundling of academic dress. Neither was pleaded or (therefore) addressed properly in the evidence. Accordingly, we reject these attempts to widen the scope of the Chapter I case.

**(3) Ancillary Restraint and Section 9**

159. In light of the above conclusions, it is unnecessary to consider issues of ancillary restraint or exemption under section 9 of the 1998 Act. However, in case this matter goes further, we state our conclusions on these issues briefly.

160. Had we determined that there had been a Chapter I infringement, we would not have decided in favour of an exemption under section 9 of the 1998 Act (which is set out at [147] above).

161. That section establishes four cumulative conditions. Whilst there is an argument that the OSA structure provides a level of improved production or promotes economic progress (the first condition), an exclusivity arrangement is clearly not "indispensable" (the third condition) since other models could be envisaged, operate in other countries and, seemingly, operate in the UK in some circumstances. Further, as regards the fourth condition, on the hypothesis in which this issue arises, competition would be eliminated whether by the foreclosure of the B2C market or by excluding a disruptive new channel in the B2B market. Finally, in relation to the second condition, while graduands do benefit from well-run graduation ceremonies, they have no say in the scale, nature or cost of those ceremonies. Again on this infringement hypothesis, we are not satisfied that E&R have discharged the burden of showing that they receive a "fair" share of those benefits.

162. The Defendants also raised the issue of ancillary restraint. The test to benefit from this doctrine is a high one. For reasons similar to those relating to the section 9 exemption and the objective necessity test for Chapter II considered in paragraphs [141] and following, we do not consider that any likely term between a university and E&R which had been held to have distorted competition would be so essential to the fundamental, and pro-competitive, nature of the wider relationship between them so as to benefit from the ancillary restraint doctrine.

163. On the expert and factual evidence that we heard, we are not persuaded that the economic and commercial issues were such that, were any of the elements of

the OSAs to have been infringements, "*the main operation would be impossible to carry out in the absence of the restriction"*[1] concerned so as to qualify for the doctrine. Rather, the consequences would have been in the nature of commercial issues for the parties to evaluate. They might have involved a higher degree of commercial risk, some more cost and some rebalancing of the commercial terms with the universities; but they would not have rendered the OSAs impossible.

## F. ILLEGALITY

164. E&R contend that the whole of Churchill's claim is barred by the doctrine of illegality, by reason of what are described, primarily, as fraudulent misrepresentations made by Churchill as to the extent to which their gowns contain recycled plastic. Alternatively, E&R contend that these are negligent misrepresentations which constitute "misleading action" under regulation 5 of the Consumer Protection from Unfair Trading Regulations 2008 (the "2008 Regulations"), and thus a criminal offence under regulation 9.

### (1) The Law

165. The defence of illegality is now a policy-based test: see *Patel v Mirza* [2016] UKSC 42 ("*Patel*"), as explained by Lord Toulson at [120]:

> "The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system (or, possibly, certain aspects of public morality, the boundaries of which have never been made entirely clear and which do not arise for consideration in this case). In assessing whether the public interest would be harmed in that way, it is necessary (a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, (b) to consider any other relevant public policy on which the denial of the claim may have an impact and (c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts. Within that framework, various factors may be relevant, but it would be a mistake to suggest that the court is free to decide a case in an undisciplined way. The public interest is best served by a principled and transparent assessment of the considerations identified, rather by than the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate."

[1] *Sainsbury's Supermarkets Limited v Mastercard Inc* [2018] EWCA 1536 (Civ) at [59]

166. E&R contend as follows, in relation to the three-fold framework identified in *Patel*.

167. First, the purpose of the law sanctioning those who make fraudulent misrepresentations, and of the statutory prohibitions on misleading actions, is to prevent unscrupulous traders from misleading customers. That purpose would be enhanced by denying the claim in these proceedings, because that would incentivise traders to be honest and accurate in their dealings.

168. Second, the policy of competition law will not be significantly undermined, since upholding the illegality defence would only affect a claimant that was guilty of fraudulent or criminal conduct. Moreover, it would not render it practically impossible or excessively difficult for those affected by infringements of competition law to exercise their rights; it would mean that, if they wish to do so, they must refrain from making misleading statements to customers.

169. Third, denying the claim is a proportionate response because: fraud and misleading customers are unquestionably serious; the illegality is central, because the deception strikes at the heart of fair competition; if fraud is established, Churchill's behaviour was intentional, and this would outweigh any culpability of E&R, who are not accused of dishonesty; there is no suggestion that Churchill face any other sanctions; and merely adjusting the quantum of the claim (i.e. by ensuring that damages are calculated on the basis that Churchill had not made misleading statements) is not an adequate response to the illegality.

170. We do not accept these submissions, for the following reasons (which largely reflect the clear and succinct oral submission made by Mr Spitz on behalf of Churchill).

171. First, on the assumption that Churchill had established a claim for infringement, they would have suffered a genuine wrong arising out of E&R's anti-competitive conduct, which was not founded in any way on their own alleged wrongful acts. Those acts are wholly incidental to their claim. There is no

evidence that any person was harmed by their misleading conduct, or that they profited from it and, since any damages would be framed on the assumption that they had acted lawfully, there is no prospect of their benefitting from their wrongful act if they had succeeded in their claim. If any person had been harmed by their wrongful acts, then remedies exist – in addition to any criminal sanction – if the authorities considered Churchill's behaviour justified action.

172. In short, the connection between the anti-competitive behaviour on which Churchill's claim is founded, and the alleged wrongdoing on their part, is too tenuous to think that barring the claim will materially enhance the purpose behind the prohibition on fraud and misleading statements. We accept that closeness of connection is not, following *Patel*, decisive, but it remains an important factor in the overall consideration.

173. Second, there is an important countervailing public policy in competition law. The importance of the private right of action for damages for loss suffered as a result of anticompetitive conduct was emphasised in, for example, Case C-882/19 *Sumal v Mercedes Benz Trucks* at paragraphs 36-37:

> "[entitlement to compensation is] … capable not only of providing a remedy for the direct damage alleged to have been suffered by the person in question, but also the indirect harm done to the structure and operation of the market, which was not able to reach full economic efficacy, in particular as regards benefits to the consumers concerned…actions for damages for infringement of those rules (private enforcement) are an integral part of the system for enforcement of those rules, which are intended to punish anticompetitive behaviour on the part of undertakings and to deter them from engaging in such conduct."

174. It is true that barring a claim for anticompetitive conduct by someone guilty of fraudulent misrepresentation and misleading actions would not in theory prevent others from complaining of the same conduct. In practice, however, Churchill are the only party seeking to establish a B2C model. If they had been correct that the B2C market had been foreclosed by E&R's anticompetitive conduct, then barring the claim on the grounds of their illegality would effectively leave the anti-competitive conduct unchallenged, with potentially adverse consequences for consumers, here the graduands.

175. Third, to deny the claim would be a disproportionate response, given: the tenuous connection between the wrong and the claim; there is no evidence that anyone was harmed by Churchill's actions; if they had been, they have their own cause of action against Churchill unaffected by the outcome in this claim; and punishment (if merited) is a matter for the criminal courts. Insofar as E&R rely on the relative turpitude between them and Churchill, that is the wrong approach: proportionality weighs the balance between Churchill's claim and Churchill's wrong.

176. For these reasons, we reject the defence based on illegality. It is strictly unnecessary to go on to consider the merits of the claim in fraudulent misrepresentation or breach of the 2008 Regulations. Since we heard evidence on these issues, and they were fully argued, we will nevertheless set out our findings and conclusions, albeit briefly and without dealing with every point raised.

**(2) Fraudulent misrepresentation**

177. E&R contend that, until 2021 (when the messaging changed), Churchill misrepresented that its gowns were made from 100% recycled plastic bottles (the "100% recycled plastic bottles representation"), alternatively that they were made from 100% recycled plastic, even if not all from bottles ("the 100% recycled plastic representation").

178. There is no doubt that the 100% recycled plastic representation was made. Churchill's website contained statements that their gowns were "manufactured entirely from recycled plastic" and that "our EcoThread Gowns are 100% recycled".

179. There can also be no doubt that, at least in relation to the second, and every subsequent batch of gowns supplied by Churchill, the representation was false. Churchill itself, having initially pleaded that the second and subsequent batches were made from 100% recycled plastic, now pleads that those gowns contained only 70% recycled plastic. The only issue, therefore, is whether Churchill knew (or was reckless as to whether) the 100% recycled plastic representation was

made and that it was false. E&R contend that Mr Muff (but no-one else) had the requisite knowledge to render this misrepresentation fraudulent.

180. As to the 100% recycled plastic bottles representation, there is also no doubt that it was made, at least in one of the instances on which E&R rely, namely a statement on Churchill's website that "We proudly donate 10% of profits to charity, manufacture our gowns from 100% recycled plastic bottles…".

181. E&R also rely on many other statements on Churchill's website which it is said amounted to the 100% recycled plastic bottles representation, where it is less clear cut. For example, the website stated that their "EcoThread Gowns" were 100% recycled "made from a post-consumer plastic waste that keeps 28 PET bottles from reaching landfill for every gown made." E&R also relies on a video posted on Churchill's website in which it was claimed that "each graduation gown that we make saves 28 plastic bottles from ending up in landfill", and a counter on Churchill's website, indicating a specific number of plastic bottles (133,620 as at 29 November 2020) that had been recycled "so far" in making their gowns. Finally, the labels in Churchill's gowns stated that they were "made from 28 Recycled Plastic Bottles".

182. E&R contend that the 100% plastic bottles representation was false, and that Mr Muff (but, again, no one else) had the requisite knowledge to render this misrepresentation fraudulent.

183. In addition, E&R contend that since 2021, Churchill has misrepresented that its gowns are made at least in part from recycled plastic bottles (the "implied plastic bottles representation"). This is based on statements on Churchill's website that: "Each graduation gown we make is made from 70% recycled polyester which is manufactured from recycled plastic waste. This is then blended with 30% viscose for a soft finish. Every graduation gown contains a minimum of 550g of recycled plastic waste, which equates to at least 28 500ml plastic bottles." E&R contend that this representation was false, and that each of Mr Muff, Mr Adkins and Ms Nicholls had the requisite knowledge to render it fraudulent.

184. Given that there is no doubt that the 100% recycled plastic representation was made, and that it was false in relation to the second and subsequent batches of gowns, we focus first on Mr Muff's knowledge in that respect.

185. The first batch of gowns for sale by Churchill in the UK was ordered in March 2017 and delivered in May 2017. It was based, according to Mr Muff, on a sample of gowns provided in November 2016 which were accompanied by a certificate and other documents purporting to show that the fabric from which they were made was 100% recycled.

186. In April 2017, after the first batch of gowns had been ordered, but prior to their delivery, Mr Muff decided to look for an alternative supplier. He approached alternative fabric suppliers for "black gabardine fabric made from RPET [recycled PET] or RPET/wool blend".

187. One of them (identifying herself as "Maggie" from Fuxin) responded to say that they had "polyester viscose wool blended fabric and polyester wool blended fabric". She asked what percentage of wool he wanted. Mr Muff replied: "maybe around 25-50% wool. In my business unfortunately the price is more important so too much wool is expensive". Maggie responded: "If you need the poly wool blened [sic] fabric? 70% poly 30% wool…" The price of that proved too high, so Mr Muff asked what else Maggie could offer. She replied on 21 April 2017 with 4 options, all of which involved some form of polyester/viscose blend (and in one case with wool in the blend as well). It is common ground that viscose is not recycled, as understood by Mr Muff at the time, so that none of these options were for 100% recycled plastic. Mr Muff replied to say that this looked interesting, and that "we do not need wool. Polyester/viscose is fine as well. for me it's important that the material drapes well and is not shiny".

188. Later, on 21 April 2017 Mr Muff messaged Maggie to ask: "what about 100% polyester? Do you have anything that might be suitable?" The response was that although they made polyester, the fabric would look shiny and "we don't suggest you use." Mr Muff accepted in cross-examination that he had not thereafter pressed Fuxin to supply gowns made from 100% polyester. He simply asked for and received samples of the blended fabrics. When Mr Muff ordered

fabric from Fuxin, in October 2017, the fabric that was supplied was not any of the options offered in Maggie's message of 21 April 2017, because – although it was a 70/30 polyester/viscose blend - the "GSM" (meaning the weight of the fabric) was slightly different to the 70/30 blend offered in the earlier message. The invoice included the line "TR 70/30", which it is common ground refers to a polyester/viscose blend of 70/30.

189. Mr Muff maintained, however, that when he came to order the fabric, he had forgotten the exchange of messages in April 2017, and therefore forgotten that Maggie had offered only blended fabrics, and had advised against 100% polyester because it was too shiny (the very thing Mr Muff had been concerned about). He also said that while he now understands the significance of TR70/30 on the invoice, he did not do so at the time. He maintains that he thought at the time that he was purchasing fabric for the purpose of manufacturing gowns that was made from 100% recycled plastic. He claimed that it was only in 2021 (when E&R raised the question as to the recycled plastic content of Churchill's gowns) that he realised that the gowns were not made from 100% recycled plastic.

190. There are two problems with this evidence. First, in relation to the first batch of gowns, he had been concerned to ensure that the claim by the supplier that the fabric was made from 100% recycled plastic was authenticated, and a certificate was procured to that effect. There are (as E&R pointed out) numerous problems with that certificate but, assuming in Mr Muff's favour that he did not spot them, the point is that he was clearly aware of the need for certification to justify claims as to the content of the fabric, and that certification was possible. Notwithstanding that he knew, in October 2017, that the fabric was sourced from a different supplier so was not covered by the certificate he had, he made no attempt to obtain any certificate as to its recycled plastic content. In fact, he did not seek any such certificate at any time over the next three years. It is not plausible that he had forgotten about certification: he was clear in cross-examination that he knew the importance of not making false claims about the composition of Churchill's gowns, and that it was not sufficient to rely solely on the supplier's word that it was recycled. Moreover, it was Ms Nicholls' evidence (which Mr Muff did not contradict) that when she joined Churchill in

2018, he had told her that they had certification relating to the recycled nature of the fabric.

191. Second, we find it implausible that, having been offered only blended fabrics in April 2017, and having specifically then asked whether Fuxin could supply 100% recycled fabric and been told they would not advise it because it was too shiny (something he was concerned about), Mr Muff assumed that the fabric he ordered from Fuxin just months later was 100% recycled. We are bolstered in this view by the fact that Mr Muff did not deal at all in his witness statement with the exchange of messages with Fuxin in April 2017 which made it clear that they were not supplying fabric from 100% recycled plastic. He accepted in cross-examination that the full exchange of messages would have been available to him when he prepared his witness statement. His failure to deal with them supports the conclusion that he did not have an adequate explanation for them.

192. It is true that, in a message to Fuxin in August 2017, Mr Muff told them that his manufacturer would like to speak to them, "about arranging the recycled fabric". The lack of any step, however, to ensure that what he ordered, and was supplied with, was 100% recycled plastic, and the failure to obtain any certification to that effect either then or over the next three years renders, in our view, the 100% recycled plastic representation one that Mr Muff caused to be made without caring whether it was true. That is sufficient to render it being made recklessly for the purposes of the tort of fraudulent misrepresentation.

193. In light of that conclusion, which would be sufficient to establish the requisite mental element in the tort of fraudulent misrepresentation, and since this point only arises if we are wrong to dismiss Churchill's claims and also wrong to dismiss E&R's illegality defence as a matter of law, we do not think it necessary or proportionate to address the alleged fraudulent misrepresentation in respect of the first batch of gowns, or the alternative 100% recycled plastic bottles misrepresentation (save to say that in relation to the one instance where the latter representation was clearly made, (see paragraph [180] above), then it necessarily follows from our conclusion on the 100% recycled plastic representation that it was false, and made recklessly by Mr Muff).

194. In fairness to Ms Nicholls and Mr Adkins, however, we do need to address shortly the separate implied recycled plastic bottles representation. In our view, E&R has failed to establish either that the representation was made or, if it was made, it was made fraudulently or recklessly by any of Ms Nicholls, Mr Adkins or Mr Muff.

195. In order to establish their claim in this respect, E&R would need to demonstrate (1) that the objective meaning to be ascribed to the relevant statement on Churchill's website was that their gowns were made from recycled plastic bottles; and (2) that one or other of Ms Nicholls, Mr Adkins or Mr Muff understood the statement to have that same objective meaning.

196. In our judgment, however, the statement that the gowns were made from 70% recycled plastic waste, which was equivalent to 28 plastic bottles is not reasonably to be understood as meaning that the gowns were in fact made from plastic bottles.

197. We also accept the evidence of Ms Nicholls, Mr Adkins and Mr Muff that that was how they understood the statement on the website. Ms Nicholls thought that the reference to bottles was merely an easily understood visual indicator to explain the amount of plastic waste that was used in making the gowns; i.e. to help customers visualise what 550g of plastic waste looks like. She also thought that was quite a common practice amongst companies advertising the recycled content of their garments.

198. Mr Adkins had a similar view that what customers are interested in is recycled plastic, whether that was a recycled plastic bottle or a container for washing-up liquid. The reference on the website to recycled bottles was a shorthand or metaphor to help give customers something that they could visualise. He thought bottles, rather than plastic meat packing trays, were the most identifiable thing that a customer could look at and recognise as plastic waste. Mr Muff's evidence was to the same effect: he thought that the emphasis in the messaging on the website was on plastic waste, and that the reference to plastic bottles was a convenient illustration.

199. We find the evidence of each of Ms Nicholls, Mr Adkins and Mr Muff on this point inherently plausible (particularly as it reflects our own view as to the reasonable meaning of the statement on the website).

200. We reject, therefore, the contention that any of Ms Nicholls, Mr Adkins or Mr Muff caused the implied plastic bottles representation to be made by Churchill either knowing that it was false, or being reckless as to whether it was true.

**(3) The 2008 Regulations**

201. Our findings in relation to the claim in fraudulent misrepresentation make it unnecessary to consider the claim based on the 2008 Regulations. Since the implied plastic bottles representation was not made, it is unnecessary to consider the claim under the 2008 Regulations in relation to it. In contrast, our conclusion of fraudulent misrepresentation in respect of the 100% recycled plastic representation (and, to a limited extent, the 100% recycled plastic bottles representation) means that there was necessarily a breach of the 2008 Regulations, but this would not add anything material to E&R's case (if we had otherwise found in their favour in relation to the arguments as to illegality).

## G. JOINT AND SEVERAL LIABILITY

202. The question of joint and several liability also arises only if our conclusion on infringement is wrong, and it then arises in respect only of the First Defendant, ERL and the Second Defendant, R&T.

203. It is common ground that the Defendants all form part of the same undertaking, in the sense in which that term is understood in competition law: "economic entities which consist of a unitary organisation of personal, tangible and intangible elements, which pursue a specific economic aim on a long-term basis and can contribute to the commission of an infringement of the kind referred to in [Article 101 TFEU]": see Case T-112/05 *Akzo Nobel NV & others v Commission*, at paragraph 57.

204. E&R submit, on the basis of *Sainsbury's Supermarkets Ltd v Mastercard Incorporated* [2016] CAT 11, that an entity forming part of an undertaking is

only jointly and severally liable with other entities forming part of that undertaking if one or other of two conditions is fulfilled:

(1) The entity participates directly in the infringement; or

(2) The entity exercises decisive influence over another entity in an undertaking that has participated in the infringement.

205. Neither condition is fulfilled, say E&R, in relation to either ERL or R&T.

206. Churchill contend that an entity forming part of an undertaking is jointly and severally liable for an infringement committed by other entities forming part of that undertaking, without more. They also contend, however, that ERL participated in the infringement committed by other Defendants and that R&T, as the parent company of the Third and Fourth Defendants, exercises decisive influence over them.

207. We agree – for the reasons that follow – with Churchill's contention that (if there had been infringement) ERL participated in it and R&T exercises decisive influence over the Third and Fourth Defendants.

**(1) ERL**

208. E&R contend that, although ERL itself entered into an OSA with various universities, on the assumption that Churchill has established an infringement at all, each OSA was an infringement. Accordingly, E&R did not participate directly in the infringement of any other Defendant, constituted by that Defendant's entry into an OSA.

209. We reject that contention. Infringement under Chapter II consists of abuse of dominance which forecloses the market. It can be committed only by an entity that is dominant in the relevant market. Neither the Third nor the Fourth Defendant is in itself dominant. It is E&R, the undertaking (as defined, i.e. the Defendants collectively), that is dominant and would have (on the assumption we need to make) engaged in a pattern of behaviour amounting to abuse of that dominance. On that analysis, there is no doubt that each of the First, Third and

Fourth Defendants, in entering into one or more OSA with a university, would have directly participated in the infringement constituted by the pattern of behaviour undertaken by E&R.

**(2) R&T**

210. R&T, as the holding company, is presumed to exercise decisive influence over its subsidiaries: Case C-97/08 P *Akzo Nobel* at paragraphs 60-61. It is up to E&R to rebut that presumption, by reference to "all the relevant factors relating to the economic, organisational and legal links which tie the subsidiary to the parent company": *Akzo Nobel* (above) at paragraph 74.

211. E&R contends that it has rebutted the presumption. They rely on the oral evidence, predominantly, of Mr Michael Middleton, who said that R&T has never had active influence over the Third and Fourth Defendants, that they ran independently, and that he (as director of ERL or R&T) had never been involved with them. They also rely on statements by Mr Middleton and Ms Emma Middleton that the respective directors of the Third and Fourth Defendants had "full authority to run all operational aspects of the business", and the absence of any documents showing R&T exercising *actual* influence over the Third and Fourth Defendants' conduct on the market.

212. Churchill countered this argument principally by reference to the annual report and consolidated financial statements for R&T, for the year ended 31 December 2017 for illustration purposes (the "R&T Accounts"). The R&T Accounts were prepared on a consolidated basis, including the Third and Fourth Defendants. They were signed by Mr Middleton as sole director of R&T.

213. The R&T Accounts contained a strategic report on the activities of "the group", describing those activities as property investment and development (which was R&T's business) and the sale and hire of garments (which was the business of the Third and Fourth Defendants).

214. In the directors' report, Mr Middleton, as director of R&T, was described as having, among other things, the following responsibilities: keeping adequate

accounting records for the group; safeguarding the assets of the group; taking reasonable steps for the prevention and detection of fraud and other irregularities; the establishment and oversight of the group's risk management framework. The report identified the risks to which the group was exposed from its use of financial instruments, and stated: "the exposure to the above risks are monitored by the Board of Directors [i.e. of R&T] as part of its daily management of the Group activities."

215. The R&T Accounts record that Mr Middleton, as director of R&T, had a reasonable expectation that "the group has adequate resources to continue in operational existence for the foreseeable future". Mr Middleton accepted that this reflected a judgment that he made as to the financial health of the group, albeit adding that "if the lawyers and the accountants are telling me that this is the position, I accept it."

216. While it was appropriate for Mr Middleton to rely on professional advisers, that does not resolve the question of decisive influence or prevent R&T, operating through him, having a sufficient degree of involvement in the activities of the Third and Fourth Defendants for joint and several liability purposes.

217. In Case T-38/07 *Shell Petroleum NV v Commission* , at paragraph 70, it was held that it is not necessary, to constitute decisive influence by a parent over its subsidiary, that the parent influences the subsidiary's actions in the area in which the infringement occurred:

> "…attribution to the parent company of the unlawful conduct of a subsidiary does not require proof that the parent company influences its subsidiary's policy in the specific area in which the infringement occurred (Case T-112/05 Akzo Nobel and Others v Commission, cited in paragraph 68 above, paragraphs 58 and 83). In particular, the fact that Shell Petroleum is merely a non- operational holding company, which rarely intervenes in the management of its subsidiaries, is not sufficient to rule out the possibility that it exercises decisive influence over the conduct of those subsidiaries by coordinating, inter alia, financial investments within the group. In the context of a group of companies, a holding company that coordinates, inter alia, financial investments within the group is in a position to regroup shareholdings in various companies and has the function of ensuring that they are run as one, including by means of such budgetary control (see, to that effect, judgment of 30 September 2009 in Case T-168/05 Arkema v Commission, not published in the ECR, paragraph 76)."

218. Accordingly, there is no need for Churchill to link the sufficient degree of involvement by R&T to the alleged abuse by the Third and Fourth Defendants. It merely needs to exist at a more general level: the question is whether the *Akzo Nobel* presumption can be rebutted in this case because there is a sufficient degree of distance in the "economic, organisational and legal links" between R&T and the Third and Fourth Defendants.

219. Conduct such as overseeing risk management and the keeping of appropriate accounting records, to ensure that the group had adequate financial resources and to consolidate accounts, is insufficient in itself to preclude a rebuttal, since these are normal parts of the group management and supervision function of a group holding company. If that were sufficient to prevent a rebuttal, the presumption would almost always apply.

220. In our judgment, however, the *Akzo Nobel* presumption has not been displaced in this case. We think that the Defendants place too much reliance on a distinction between the capacity to exercise control and the *de facto* exercise of control. The authorities cited to us involved large multinational groups. Here, in contrast, we are dealing with a relatively small family company with very different relationships.

221. Although the management of the Third and Fourth Defendants may have been given full authority over the specific operational decisions, there are important counterbalancing factors. R&T is a family owned holding company for family assets which was admitted by its sole director, Michael Middleton, to have overall control over its 100% owned subsidiaries, the Third and Fourth Defendants. There is a consistency of behaviour and approach, as regards the allegations in this case, between on the one hand, the First Defendant and, on the other hand, the Third and Fourth Defendants. The defined principal activities of the R&T group include the sale and hire of garments because of R&T's ownership of the Third and Fourth Defendants. Michael Middleton and his daughter were closely involved in the running of ERL, and Michael Middleton was its chair. ERL and the Third Defendant have some centralised combined support functions (e.g. IT and finance), and a director of the Third Defendant is the company secretary of R&T.

222. In short, we do not doubt that, whatever freedom is given to the management of the Third and Fourth Defendants on operational matters, their overall direction and strategy has to be compatible with the interests and approach of the wider family interests operating in the same market. On this basis, the strong *Akzo* presumption has not been rebutted.

223. Were we to have determined that E&R were liable for an infringement, we would have held R&T jointly liable with the Third and Fourth Defendants. We do not need, therefore, to consider the separate point of whether it is enough, to establish joint and several liability, simply that an entity is part of an undertaking, another entity in which is liable for infringement.

## H. CONCLUSION

224. The Claimants' claim is dismissed. This judgment is unanimous.

The Hon. Mr Justice Zacaroli
Chair

Paul Lomas

Derek Ridyard

Charles Dhanowa O.B.E., Q.C. (*Hon*)
Registrar

Date: 15 July 2022