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IN THE COMPETITION
APPEAL
TRIBUNAL

Case No: 1351/5/7/20

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Monday 24 January – Wednesday 2 February 2022

Before:
The Honourable Mr Justice Zacaroli
Paul Lomas
Derek Ridyard
(Sitting as a Tribunal in England and Wales)

BETWEEN:

Churchill Gowns Limited and Student Gowns Limited

-v-

Ede & Ravenscroft Limited and Others

A P P E A R A N C E S

Fergus Randolph QC & Derek Spitz (On behalf of Churchill Gowns Limited and Student Gowns Limited)

Conall Patton QC & Michael Armitage (On behalf of Ede & Ravenscroft Limited and Others)

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Monday, 24 January 2022

(10.32 am)

Housekeeping

MR RANDOLPH: Good morning, sir, good morning, gentlemen.

THE CHAIRMAN: Good morning, Mr Randolph. Before you start, can I just remind everyone the proceedings are being live-streamed and there are many, I think, joining on a Teams platform.

These proceedings are in open court as much as if they were all being physically heard here. An official recording is being made and an authorised transcript will be produced, but it is strictly prohibited for anyone else to make any unauthorised recording, whether audio or visual, of the proceedings and I remind everyone that breach of that is punishable by contempt of court.

We will take a break for the transcribers both mid-morning and mid-afternoon at a suitable time.

MR RANDOLPH: Very good. Thank you, sir.

May it please you, I appear with Mr Spitz on behalf of the claimants; my learned friend Mr Patton QC appears with Mr Armitage on behalf of the defendants.

In line with the request from Opus, the default position when referring to documents will be that I will refer to the non-confidential versions, and then,

1 insofar as I wish to take the tribunal to confidential
2 materials, I will specifically say so.

3 So default: non-confidential.

4 Before I start, sir, I thought I ought to address,
5 out of respect and courtesy, the comments made by
6 the tribunal in its letter of 18 January insofar as
7 the F bundle is concerned. It is not perfect by any
8 means, and it has not been very user-friendly from
9 a counsel's perspective, and the problem -- I do not
10 want to weigh in too early too hard, but there have been
11 problems with disclosure, as the tribunal knows, and as
12 I understand it -- and I have taken specific
13 instructions -- the real problem insofar as
14 the inability to organise the documents, either
15 chronologically or insofar as emails are concerned in
16 family categories and/or chronologically, and also by
17 university, is that there was an absence of metadata.

18 Now, metadata, as I understand it, is data that
19 refers to sub data and so it is a label, essentially.
20 There have been issues with regard to metadata and a lot
21 of the documents -- obviously one can tell where
22 the document has been disclosed from, "AL",
23 the defendants, "FC" (?), from ourselves. It would
24 appear -- and I am not an expert, I have taken
25 instructions -- there is a lack of metadata.

1 We are where we are. I am not seeking to assign
2 blame, but that is, as I understand it, the reason.
3 There was not an unwillingness to -- obviously not an
4 unwillingness by the parties to abide by the directions
5 given at the pre-trial review on 13 December, and
6 I apologise if it is not as user-friendly as
7 the tribunal would like, it is not as user-friendly as
8 we would like, but we have tried our best. I think, as
9 I say, it is a technical issue with regard to metadata.

10 Insofar as chronology is concerned, one can actually
11 click on the column date and it will reorganise
12 the documents, not in a tab formulation, but in a date
13 formulation, insofar as there are dates.

14 The people behind me have given me those
15 instructions and so I thought it would be right for
16 me to address the tribunal as to its concerns and
17 the fact that you did not find it helpful and we are
18 sorry for that.

19 THE CHAIRMAN: I think the important point is that by
20 the end of this hearing we have a clear indication from
21 the parties of which documents they have referred to
22 orally or in writing that we are to look at, because we
23 are not going to trawl through thousands of pages of
24 F bundle.

25 MR RANDOLPH: No, of course not. We will do that, and

1 hopefully with the document references that I referred
2 to at the start it will make it easier because it will
3 be picked up on the transcript.

4 In terms of these openings, sir, the timetable has
5 been agreed, an hour and a quarter each for each side.
6 I will take the bulk of the hour and a quarter to deal
7 with the competition issues and my learned friend
8 Mr Spitz will deal with what has been
9 called "the eco-claims".

10 I am hoping that we can get through that in under
11 the time allotted, but let us see. It certainly will
12 not be over, because I think the aim would be to start
13 live evidence after the short adjournment.

14 I am very grateful.

15 Opening submissions by MR RANDOLPH

16 MR RANDOLPH: Despite the large amount of electronic
17 documents that we have just referred to that have been
18 generated in this case, at its heart this is a very
19 straightforward claim.

20 Ede & Ravenscroft, and the other defendants, but in
21 particular Ede & Ravenscroft, has been hiring out
22 academic dress for graduation ceremonies since,
23 according to its website, at least 1906, and
24 the reference to that is paragraph 24 of Dr Maher's
25 first report at {E1/1/7-8}. You do not need to turn

1 that up, but it is just there.

2 They badge themselves, Ede & Ravenscroft, on their
3 website as being the oldest firm of tailors in
4 the world.

5 The claimants' case is usefully summarised in
6 Dr Niels' expert report, and that summary can be found
7 between paragraphs 1.7 and 1.10 of Dr Niels' first
8 report, which can be found in a non-confidential version
9 at {E5/1/6-7}. I think it would be useful just to read
10 that out.

11 So, 1.7:

12 "The Claimants' case is that the Defendants have
13 hindered Churchill's entry into the market for the sale
14 and hire of academic dress, from July 2016 to date.
15 Specifically, they allege the following:

16 "E&R abused its dominant position in the market for
17 the sale and hire of academic dress for use at
18 graduation ceremonies through the use of de jure and
19 de facto 'exclusivity agreements', referring to
20 the Official Supply Agreements ('OSAs') with
21 institutions, for the supply of academic dress to their
22 students, contrary to section 18 of the Competition Act
23 1998 ...

24 "Further or alternatively, the 'exclusivity
25 agreements' have the effect of appreciably preventing,

1 restricting or distorting competition within the UK,
2 contrary to section 2 of the Act.

3 "The Claimants plead that the OSAs confer a right of
4 exclusive supply on E&R [Ede & Ravenscroft] and
5 typically require institutions to: (i) instruct, direct
6 or recommend to their students that they hire academic
7 dress from E&R; (ii) warn students against using
8 academic dress supplied by suppliers other than E&R;
9 and/or (iii) threaten students who do use other
10 suppliers with sanctions, such as not being able to
11 attend graduation.

12 "In addition, the Claimants allege that E&R:

13 "instigated attempts by institutions to add coats of
14 arms to their academic dress in an attempt to create
15 a protectable intellectual property in favour of E&R
16 and/or the institution;

17 "refused to hire academic dress as separate items,
18 instead only offering a full package of gown, hood and
19 hat - referred to as 'bundling' in the pleadings and
20 witness evidence - in an attempt to hinder Churchill in
21 any attempt to hire individual items;

22 "wrote to Churchill and others claiming copyright in
23 academic dress and encouraged institutions to assert
24 that E&R hold such copyright when, on Churchill's case,
25 it does not exist;

1 "caused its staff to check at ceremonies that
2 students are only wearing academic dress supplied by
3 E&R;

4 "held pre-tender discussions with institutions with
5 the objective and/or effect of designing a tender
6 process that will or will likely exclude competitors of
7 [Ede & Ravenscroft]."

8 Then the last paragraph of this extract from
9 Dr Niels' first report:

10 "Churchill alleges to have suffered loss as a result
11 of the alleged infringements. It pleads that, in
12 the absence of E&R's unlawful conduct, it would have
13 profitably established itself in the market over
14 the claim period."

15 So, as is obvious from that very useful summary from
16 the defendants' expert, a key component to the claim is
17 the content and the effect of what I am going to
18 call "the agreements" for the moment -- I am going to
19 make the case strongly that they should be rebadged
20 "exclusivity agreements", but right now I am just going
21 to call them the agreements. A key component to the
22 claim is the content and effect of the agreements signed
23 by Ede & Ravenscroft and the other defendants with
24 a large number of universities, and the market position
25 of Ede & Ravenscroft, as well as E&R's general behaviour

1 towards competitors and in particular the claimants.

2 So, going to the Chapter II case, the abuse of
3 dominance, obviously we have to show on the balance of
4 probabilities that Ede & Ravenscroft occupied during
5 the claim period a dominant position.

6 Before going to the agreements' contents -- and just
7 pausing there for a moment, I am glad to say that
8 the parties have reached agreement with regard to terms
9 that can be referred to in open court, which will make
10 everybody's life much easier -- it is worthwhile bearing
11 in mind Ede & Ravenscroft's share of universities served
12 by Ede & Ravenscroft.

13 The defendants' pleaded case admits that
14 the defendants supplied academic dress for use at no
15 fewer than 80.5% of universities and other recognised
16 bodies by number in the last academic year before COVID,
17 ie the 2018/2019 academic year. The reference for that
18 is paragraph 36.4 of the re-re-amended defence, which
19 can be found at {B/7/13}.

20 Is that going to come up? Perfect.

21 So, you can see there, sir, that at 36.4:

22 "As to sub-paragraph (d):

23 "(a) It is admitted that the Defendants supplied
24 academic dress for use at not fewer than 80.5% of
25 recognised bodies by number in the 2018/19 academic

1 year. Specifically, the Defendants supplied academic
2 dress for use at approximately 83% of recognised bodies
3 by number in the 2018/19 academic year (if
4 the Universities of Oxford and Cambridge [where these
5 agreements do not operate] and those Universities for
6 which the Defendants supplied academic dress for some
7 but not all of that academic year, are included)."

8 So a very high percentage.

9 Obviously, that figure relates to the 2018/2019
10 pre-COVID academic year, but it was not a flash in
11 the pan; it was not a one-off success, as one can see
12 from Dr Niels' non-confidential table at table 3.5 in
13 GM1, which can be found at {E5/1/62}.

14 THE EPE OPERATOR: You say that's non-confidential?

15 MR RANDOLPH: It is non-confidential.

16 THE EPE OPERATOR: I was told that that they are not
17 confidential (inaudible).

18 MR RANDOLPH: Okay. I just want {E5/1/62}, if that is
19 possible, which is the non-confidential, but I am very
20 happy to have the confidential version, which is at
21 the same tab and number, but it is just {E6}. Shall we
22 just stick with {E5} for the moment. Thank you very
23 much.

24 Is it possible to have it slightly enlarged? Thank
25 you very much.

1 So there you can see, sir, the figures are not
2 dissimilar. I note in passing that it is just odd or
3 strange, to say the least, that the pleaded figure of
4 80.5, and 83% that we have just seen in
5 the re-re-amended defence, is not redacted and yet
6 the figures that we can see there in Dr Niels' first
7 report at table 3.5 are. Anyway, the tribunal can make
8 up its mind about that.

9 Dr Niels confirms at paragraph 3.79, which I believe
10 is on the same page, so if we could scroll slightly up
11 the same page -- yes. So:

12 "Table 3.5 summarises E&R's contracts by type over
13 the claim period. This shows that E&R served a large
14 number of institutions. Such proportion was broadly
15 stable over the 2016-19 period, but fell in 2020 and
16 2021. However, as discussed in section 3D.3, the drop
17 is affected by many institutions postponing ceremonies
18 due to COVID-19."

19 The evidence from Dr Niels is clear. It was
20 a stable market share between 2016 and 2019, and that
21 market share shows that E&R served a large proportion of
22 the institutions.

23 Insofar as the tribunal is interested in what was
24 happening to the other participants in the market -- and
25 I am using that in a general sense, not in the relevant

1 product market sense -- which is important because, as
2 the tribunal will know, it would be rather difficult to
3 have a dominant operator in the market and another
4 dominant operator in the market unless they were jointly
5 dominant, but the disparity between market shares is
6 often instructive in determining dominance. We can see
7 the market shares of other suppliers of academic dress
8 in Dr Maher's report, which can be found at {E1/1/44},
9 and it is in footnote 178.

10 Perfect.

11 So, 178, the footnote, Dr Maher says this:

12 "Based on the number of institutions supplied
13 the market shares of Wippel, Marston Robing and
14 Graduation Gowning Company are circa 3-7% each,
15 with remaining suppliers having negligible market shares
16 each less than 2%; and based on the number of students
17 supplied, Wippel's market share is 8%, Marston Robing,
18 Graduation Gowning Company, Graduation Attire and Grays
19 are all circa 2-3% each, and all remaining suppliers
20 have negligible market shares of less than 1% ..."

21 So there is the evidence, which does not appear to
22 be contested, that the other competitors, the highest
23 market share, on a university basis, is circa 7%, and on
24 basis of number of students supplied, 8%, as against
25 the 80-odd% figure that we have seen pleaded and

1 the 83%, if one takes into account Oxbridge and other
2 ceremonies where Ede & Ravenscroft did not participate
3 fully, as we have seen.

4 So there is a marked discrepancy between
5 Ede & Ravenscroft, leading supplier, and the others.
6 Very marked.

7 That does not appear to be denied. Dr Niels,
8 the defendants' expert, admits, candidly and honestly,
9 that during the claim period, which started in, as we
10 have seen, July 2016, Ede & Ravenscroft has been
11 the leading supplier in the market, and that is at
12 paragraph 1.35 GN1 of his first report; we do not need
13 to turn that up.

14 So we have these very large market shares, large
15 discrepancy between the market shares of
16 Ede & Ravenscroft and the market shares of the other
17 competitors in the marketplace. The only way out of
18 a finding that Ede & Ravenscroft and the other
19 defendants are dominant is to posit a wider relevant
20 product market and a narrower geographic market and
21 assert countervailing buyer power, all of which they
22 have done.

23 The tribunal has read the parties' experts' reports
24 as well as our skeleton and can see where the battle
25 lines are drawn. They will be explored in the hot tub

1 and through cross-examination next week, but suffice it
2 to say that the claimants refute strongly that
3 the relevant market is for graduation services,
4 excluding photography, on a university-specific
5 marketplace and instead posit the relevant market as
6 being the one in which the claimants operate, the direct
7 hire to students market in the UK, the B2C market, and
8 a market that the tribunal will already have noted is
9 accepted as existing by the defendants' expert; one can
10 see that at paragraph 1.1 of the joint expert report.

11 I wonder if we could turn that up. That is
12 {E7/2/3}.

13 This document is entitled, electronically,
14 "Confidential". There are two versions. There is
15 a non-confidential version, which I have asked
16 the EPE operator to go to -- for which many thanks --
17 so, a confidential version and a non-confidential
18 version. We are looking at the non-confidential
19 version, so the tribunal does not need to be concerned
20 about the title at the top of this document, which
21 is "Confidential". It is not.

22 So we will just wait for that. Thank you very much.
23 {E7/2/3}.

24 THE EPE OPERATOR: That document is not loading.

25 MR RANDOLPH: Okay. It is fine. It is not absolutely

1 critical. I have it here. I will just read it out so
2 it is on the transcript. 1.1. Yes.

3 {E7/2/3} The question at paragraph 1.1 is -- or
4 the issue is:

5 "There is a relevant market for the supply of
6 academic dress hire to students."

7 Dr Maher agrees with that and says:

8 "Students are the ones who pay for the hire of their
9 academic dress. Further, it is the relevant market in
10 this case, ie it is the market on which
11 Churchill Gowns... has been foreclosed due to the E&R
12 Undertaking's ... anti-competitive conduct. It is
13 therefore the market in which the competition analysis
14 and effect should be conducted.

15 "By simply stating that a market is currently
16 organised differently is not an adequate response to
17 the allegation of foreclosure in the B2C market.
18 The current market organisation could be the outcome of
19 anti-competitive conduct."

20 Dr Niels agrees, with qualification, to
21 the statement that there is a relevant market for
22 the supply of academic dress hire to students, saying:

23 "Given that the actual conditions of supply for
24 a bundle of services, I consider that the relevant
25 product market should comprise academic dress hire and

1 other graduation-day services (excluding photography)."

2 Then he says:

3 "I consider it possible to also define a product
4 market for the supply of academic dress only ..."

5 Then he goes on to say -- this is why there is
6 a qualification:

7 "... however, this definition would not shed much
8 additional light on the competition analysis, as
9 the positions of each supplier in such a market are
10 a direct result of the outcomes in the market for
11 graduation services."

12 We do not agree with that and that will be explored
13 in the hot tub.

14 THE CHAIRMAN: Can I just ask this, Mr Randolph.

15 MR RANDOLPH: Yes, of course, sir.

16 THE CHAIRMAN: I think you accept there are two markets.

17 MR RANDOLPH: Yes.

18 THE CHAIRMAN: From your perspective the only relevant
19 market is the B2C market, as it has been called?

20 MR RANDOLPH: Yes, it is the academic dress.

21 THE CHAIRMAN: Yes, I think that is the hire to students
22 directly, which has been called "B2C".

23 MR RANDOLPH: Yes.

24 THE CHAIRMAN: You say that is the only relevant one from
25 your perspective. That is because Churchill does not

1 contend it has been excluded from the B2B market,
2 does it?

3 MR RANDOLPH: It is not part of its case.

4 THE CHAIRMAN: No.

5 MR RANDOLPH: The case is, essentially, it tried to get into
6 the B2B and it did not work, but that was not their
7 modus operandi. Their modus operandi was B2C -- that is
8 what happens in Australia, that is what happens in other
9 jurisdictions. They tried to get into this market,
10 which is a different concept, not doing what has been
11 done for years and years before, and it is the actions
12 of the dominant player in the B2B market, in acting on
13 the B2C market, that has caused them to not succeed, to
14 be impeded, in a substantial, foreclosed way due in
15 large part to the exclusivity agreements. We will come
16 on to that very shortly.

17 We have these very high market shares, massive
18 discrepancy with the competitors. We have Dr Niels
19 admitting leading supplier. We have common ground on
20 the basis that there does exist the B2C market, although
21 with qualification, and so we come to the issue of
22 exclusivity, because exclusivity and exclusionary
23 behaviour are tied together.

24 There is a marked reticence by the defendants to
25 admit that the word "exclusivity" is relevant as a label

1 when describing the agreements they enter into with
2 the relevant institutions. An example of that can be
3 seen at paragraph 16.2 of the re-re-amended defence, and
4 that can be found at {B/7/4}.

5 Thank you very much. If it could be enlarged.

6 16.2:

7 "The Defendants do not adopt herein the tendentious
8 term 'Exclusivity Agreements', as defined at 18(a).
9 That defined term (and the claim as a whole) is premised
10 on the misconception that the Defendants are party to
11 agreements with certain Universities that confer rights
12 of exclusive supply in respect of the provision of
13 academic dress to those Universities' students. In
14 fact, insofar as the Defendants are party to multi-year
15 arrangements with Universities in respect of
16 the provision of academic dress and related services,
17 those arrangements are in the nature of official
18 supplier arrangements ... These are (in many
19 cases) concluded following competitive tender
20 procedures."

21 So they find the label "exclusivity", insofar as it
22 is linked to agreements, their agreements, tendentious.
23 I do not and we do not see why that description should
24 be controversial. As Dr Niels makes clear in his second
25 expert report, both he and Dr Maher have treated

1 the agreements as exclusive or quasi-exclusive,
2 near-exclusive, for the purposes of competition
3 assessment. That can be seen at paragraph 4.1 of
4 Dr Niels' second report in the non-confidential version,
5 which is at {E5/16/20}.

6 Paragraph 4.1:

7 "Both Dr Maher and I treat the agreements as
8 exclusive or near-exclusive for the purposes of
9 the competition assessment. The difference is that
10 I assume them to be exclusive, whereas Dr Maher
11 considers that there is enough information to conclude
12 that they are exclusive. I have reviewed Dr Maher's
13 supporting evidence and I still conclude that, to
14 the extent that there is no de jure exclusivity,
15 de facto exclusivity remains an assumption in this
16 case."

17 So they have proceeded on the basis, assumed or
18 actual, that the agreements are exclusive or
19 near-exclusive.

20 One can see why they have proceeded on that basis
21 from an examination of terms that appear in
22 the agreements. As I have said, the parties have
23 discussed this and reached agreement, and so to that end
24 we have a table, which can be found at {G6/32}, I hope.
25 I also have hard copies which may assist, and I have

1 copies for my learned friends as well -- thank you very
2 much.

3 (Handed).

4 So, there are three tables, sir. The first table
5 was compiled following a review of some 52
6 Ede & Ravenscroft contracts over the claim period, of
7 which 32 are presently in force. So 52 over the claim
8 period, 32 still in force, which account for nearly 75%
9 of Ede & Ravenscroft's existing agreements.

10 Table 2, which is in the same general table but on
11 page {G6/32/4}, starts at page 4 at item 35. This table
12 is compiled following a review of some 32
13 Ede & Ravenscroft contracts over the claim periods, of
14 which four are currently in force.

15 Table 3, which my learned junior will tell me
16 appears at page {G6/32/7} -- very grateful -- was
17 compiled following a review of the third defendant's
18 agreements and other agreements presently in force.

19 Now, if the tribunal could turn to the first page,
20 so this is table 1 {G6/32/1}, so compiled following
21 a review of -- essentially accounting for nearly 75% of
22 Ede & Ravenscroft's existing agreements. Item 12 reads
23 as follows:

24 "During the term of this agreement and subject to
25 its terms, the Institution appoints the Supplier as

1 the Institution's 'Official Robemaker and Supplier of
2 Academic Dress' for the purposes of the Ceremonies and
3 as its exclusive provider of the Services (or any
4 equivalent or substantially similar services)."

5 Pursuant to that provision, that clause,
6 Ede & Ravenscroft is the exclusive, in the words of that
7 clause, provider of the services.

8 Table 2 --

9 MR LOMAS: "Services" means what in that?

10 MR RANDOLPH: Services means the services set out in
11 the schedule.

12 Now, I can take the tribunal -- that schedule has
13 not been agreed to be part of this table. I can take
14 the tribunal to an agreement, which is presently
15 redacted in part, which falls within this table, in
16 other words one that was reviewed for the purpose of
17 compiling this table, which will set out those services.
18 Would that assist?

19 MR LOMAS: Yes, I mean, what we are obviously trying to
20 understand is the way in which the term "services" deals
21 with the supply of academic dress to students, rather
22 than other services for graduation.

23 MR RANDOLPH: Indeed. We are still of the primary view that
24 it would have been better to have all the agreements
25 redacted.

1 I am going to take you to, sir, if I may,
2 a document -- ah, well, I may be able to avoid this,
3 because I have been helpfully told by my learned junior
4 and those behind me that categories 21 through 34, in
5 other words the end of table 1, have been compiled from
6 a review of the schedules to these types of agreements.
7 So we can run through those quickly: {G6/32/3}

8 "The Supplier shall provide Academic Dress hire
9 services and Photography services at and in respect of
10 Ceremonies during the term of this agreement.

11 "supply to the Institution if required colour
12 representations, design, sketches ...

13 "ensure that the Academic Dress manufactured
14 conforms ... with the Designs ...

15 "manufacture and loan to the Institution (free of
16 charge) for the term of this agreement, any new Senior
17 Officers Robes for the Officers of the Institution [and
18 also clean and maintain your existing Senior Officers
19 Robes free of Charge for the duration of
20 this agreement].

21 "provide free hire of Academic Dress for all
22 academic staff ...

23 "provide Academic Dress for hire by students for
24 each Ceremony or for purchase in accordance with
25 the Supplier's then-current standard terms of supply."

1 Which will be pricing:

2 "attend on each day of each Ceremony with
3 a reasonably sufficient number of trained personnel ..."

4 So that deals with on-the-day provision of services.

5 Then:

6 "Provide Photography services on each day of each
7 Ceremony to Students in accordance with the Supplier's
8 then-current standard terms of supply.

9 "take photographs ...

10 "Any mutually agreed modification to the scope of
11 the Services must be confirmed in writing ...

12 "The parties have agreed to the commission
13 arrangements set out in Schedule 1."

14 I will come to that in a moment:

15 "comply with all reasonable policies ... regarding
16 health [and] safety ...

17 "Provide the Annual Student Prize ...

18 "The Supplier shall carry such policies of insurance
19 as are reasonably sufficient ..."

20 Thank you very much for that.

21 Just so that you can not take my word for it, or
22 indeed those behind me or Mr Spitz, I would turn -- I am
23 not going to turn to it now because of time, but one of
24 the agreements that formed part of the review for
25 table 1 can be found at AL 20002604. I will just get

1 the bundle reference for you.

2 At the back of this agreement -- and I am being very
3 careful because I have been told I have to be careful,
4 I am not naming the institution and I will not name the
5 institution, but at the back there are two pages that
6 set out services. Does that assist?

7 MR LOMAS: I do not want to take up too much time on this
8 point but the chairman asked earlier the extent to which
9 your case rested on the impact on, loosely, the B2C
10 market.

11 The table you have gone through from 21 to 34,
12 I think only one of them, 26, references what I think
13 would be in the B2C market, which is providing academic
14 dress.

15 So is your case -- is the linkage that, back to
16 line 12, the services on line 12 means the exclusive
17 provision of academic dress as set out in clause 26?

18 MR RANDOLPH: Yes, absolutely.

19 MR LOMAS: Okay.

20 MR RANDOLPH: Absolutely. I will just make good the point
21 in terms of how that exclusivity is policed in a second.
22 Thank you very much indeed.

23 So, the non-confidential version of the document to
24 which I referred -- we do not need to bring it up -- is
25 {F1/163}. Very grateful.

1 So we have seen clause 12 there referred to, and if
2 we turn in table 2 to clause 46: {G6/32/4}

3 "During the period of this Agreement and under its
4 terms, the Institution agrees to appoint the Supplier as
5 its 'Official Robe Maker and Supplier of Academic Dress'
6 and 'Official Graduation Photographer' for the purposes
7 of the ceremonies and to allow the Supplier the sole
8 right to provide the Services and hire the Products to
9 Graduates."

10 That is the point that Mr Lomas was just making.

11 At table 3 at item 75 {G6/32/7}:

12 "The Institution's Ceremonial Gown Hire Services
13 will be provided by a single official robe maker,
14 managing the complete servicing of its academic dress
15 requirements."

16 Again, that makes the point with regard to
17 the provision of academic dress:

18 "... managing the complete servicing of its academic
19 dress requirements."

20 On the same table, same page, 79:

21 "For an exclusive [X] year agreement to supply our
22 complete graduation services to
23 [Institution] [the Supplier] are pleased to offer
24 the following options based on a minimum [X] students
25 ordering academic dress per graduation event."

1 We say that the experts were absolutely right to
2 treat, either actually or assumed, the agreements as
3 being exclusive. They clearly are, and it is right that
4 the parties' experts, as I say, have treated them as
5 such.

6 For that purpose, I am going to in the next
7 section -- and I am going through as quickly as I can --
8 talk about these agreements as being exclusivity deals
9 or agreements.

10 Dominance. Looked at that. The intricate issues of
11 relevant product market, relevant geographic market and
12 also bidding market, the countervailing buyer power,
13 obviously you have seen our skeleton on that. That will
14 be explored in the hot tub, not for now.

15 THE CHAIRMAN: Can I just ask this?

16 MR RANDOLPH: Yes, of course.

17 THE CHAIRMAN: Do you say that "exclusivity" in these
18 agreements goes so far as a contractual right in
19 the supplier, Ede & Ravenscroft, to preclude
20 the university from allowing any of its students to hire
21 any dress other than --

22 MR RANDOLPH: Sir, as ever, you are one step ahead of me.

23 I am just coming to that.

24 THE CHAIRMAN: Right, okay.

25 MR RANDOLPH: Foreclosure. Another area we have seen

1 the use of the word "tendentious" insofar as exclusivity
2 is concerned. We do not agree with that.

3 Another area of squeamishness portrayed by
4 the defendants relates to the effect -- this is
5 the point that you, sir, made -- of exclusivity deals.
6 They say in their pleaded case and in their witness
7 statements that they simply direct students to
8 the relevant defendant services. One can see at that
9 {B/7/5}. That is paragraph 16.3 of the re-re-amended
10 defence. So 16.3:

11 "By way of indicative summary only, pursuant to
12 the Defendants' arrangements with Universities,
13 the relevant University agrees to direct its students to
14 the relevant ..."

15 So, "direct its students":

16 "... to the relevant Defendant's services in
17 relation to academic dress supply (or otherwise
18 advertise or promote that Defendant's services)."

19 Then:

20 "Sometimes, but not in all cases, the Defendants'
21 arrangements with Universities also oblige the relevant
22 University not to actively endorse or promote any other
23 supplier of academic dress. The said arrangements do
24 not prohibit students from obtaining academic dress from
25 suppliers other than the Defendants (nor do universities

1 have any legal power to prevent students from doing so),
2 and therefore confer neither de jure nor de facto
3 exclusivity on the Defendants. Further, the Defendants
4 have not entered into any agreements with any
5 Universities' students so as to compel them only to hire
6 academic dress from the Defendants."

7 That is not something that we have alleged:

8 "For their part under the OSAs, suppliers of
9 academic dress will generally be required to ensure that
10 sufficient stock is made available ..."

11 So it talks about stock for the rest of that
12 paragraph.

13 We say that analysis, that description of simply
14 directing -- shepherding, maybe -- students towards
15 the E&R portal is misconceived. It is misconceived, as
16 can be seen from item 13 in the first table, which
17 represents, as we have seen, some 75% of existing
18 contractual arrangements between Ede & Ravenscroft and
19 the institution.

20 So paragraph 13: {G6/32/2}

21 "The Institution shall not, during the term of this
22 agreement, endorse or recommend any other provider to
23 supply and/or hire academic dress to Students or provide
24 any Student with the name or details of any other
25 provider."

1 So that is, we say, very instructive, because it is
2 not a direction, "Oh, if you would like to have your
3 academic dress supplied by our official robemaker please
4 go to its website". It is: the institution with whom
5 Ede & Ravenscroft has a long-term agreement is
6 prohibited during the course of that agreement to
7 endorse or recommend any other provider -- and -- cannot
8 provide a student with the name or details of any other
9 provider.

10 So one imagines a student about to graduate, rather
11 happy, rings up the administration in the university
12 concerned, or the college, and says, "Oh, where can
13 I hire my kit from, please", and they say, "Oh, well,
14 there is only one, there is only one place you can hire
15 it from, it is Ede & Ravenscroft", and if the student
16 has been studying law and may have done a competition
17 module and says, "What about the competitors?"; "We are
18 terribly sorry, cannot give you that, not allowed to".

19 So that is the foreclosure. We have this very large
20 market share, this leading supplier in the market that
21 has been providing gowns for hire since 1906 and it is
22 essentially telling the only people who can assist
23 the students -- the institution, the university -- "No,
24 you cannot, you must only supply -- or you must only
25 tell your students about us and you cannot tell them

1 about anyone else; no other provider", provider, aka
2 competitor.

3 MR LOMAS: Mr Randolph does your case hinge on this: that an
4 obligation not to promote a competitor is to be equated
5 with foreclosing the market?

6 MR RANDOLPH: Only insofar as the market power of the person
7 imposing that obligation is concerned.

8 Obviously if one were in a situation where there was
9 large-scale competition throughout the market with
10 occupiers or people, operators within that market
11 occupying relatively similar or not dissimilar market
12 share positions in that market, then there may not be so
13 much of a provision. But as you, sir, know, and as
14 the tribunal knows, once one is in a dominant position
15 one has a special responsibility.

16 It was put to me a long time ago by someone who is
17 far brighter than I am that being in a dominant position
18 is akin to being an elephant in a roomful of eggs: you
19 have to tread very, very carefully. Insofar as we have
20 a situation where Ede & Ravenscroft have, on their own
21 pleaded case, some 80% of the market and it is common
22 ground that the market share or similar market shares
23 have been around since 2016, ie the claim period, where
24 you are in that position and where you then prohibit
25 the gatekeeper for the student, in other words

1 the institution, from in any way, shape or form
2 informing those students of the competitive offering on
3 that marketplace, if you do that, then that is
4 foreclosure. That is our case.

5 MR LOMAS: Thank you.

6 MR RANDOLPH: So, I was about to say, the pleaded case
7 I took you to was, "We are just directing students".
8 Well, it does not look like directing to me; it looks
9 like closing off the market.

10 In addition to the active exclusionary behaviour
11 mandated by the exclusivity agreements, the tribunal
12 will have noted from the documents that commissions are
13 paid to Ede & Ravenscroft to individual services for
14 the provision of academic dress and the provision of
15 photographic services. As Dr Maher put in the joint
16 expert report at paragraph 3.2 -- so you can see at that
17 {E7/2/10} -- oh, this is the one that does not show.
18 Hopefully it will come up sometime, but I will read it
19 out:

20 "[Churchill's] foreclosure is a direct result of
21 barriers to entry arising from exclusivity of the [E&R
22 undertaking's] supply arrangements with universities
23 with their fidelity inducing commissions and other free
24 benefits that incentivise the universities and the [E&R
25 undertaking] to impose barriers to entry in the direct

1 hire market."

2 Now, the defendants do not deny the existence of
3 commission payments but seek to respond to
4 the inducement point by arguing that these substantial
5 financial incentives, paid by Ede & Ravenscroft to keep
6 its business, are not problematic from a competition law
7 perspective because they are not conditional on
8 customers only buying from Ede & Ravenscroft, qua
9 dominant undertaking. You can see that -- and I am not
10 going to take you to in the interests of time -- at
11 paragraph 77.5 of the defendants' skeleton, which can be
12 found at {A1/2/23}. Therein they rely on paragraph 89
13 in the Hoffmann-La Roche case, which is cited, and that
14 authority -- again, we do not need to go to it -- is
15 {AUTH1/21/77}.

16 Now, we say that reliance on Hoffmann-La Roche is
17 misplaced, with respect. A typical commission clause --
18 and this is something I mentioned earlier -- can be seen
19 at item 16 at table 2. We saw earlier there was
20 a reference to commission and in schedules. I do not
21 think that is -- sorry, can be seen at item 61 in
22 table 2. So 61 {G6/32/6}:

23 "In consideration of the rights granted to it under
24 this Agreement, the Supplier shall, during
25 the continuance of this agreement ..."

1 So the supplier being Ede & Ravenscroft:

2 "... pay to the Institution a commission in respect
3 of each ceremony of an amount equal to:

4 "[blank]% of the hire fee of all Products hired by
5 the Supplier pursuant to this Agreement excluding
6 refunds, late orders and extras on the day; and

7 "[blank]% of the Photograph Price of all Photographs
8 sold or otherwise supplied for money or money's worth to
9 the Customers."

10 So the commission is calculated on the basis of the
11 amount of business they do in the academic hire/sale
12 market and the photography services.

13 Now, why is that important? Because that informs
14 one as to the real meaning of "conditional", as one can
15 see in the Post Danmark case, and I wonder if we could
16 turn that up. So this is {AUTH1/39/5}. So Post
17 Danmark II, it is paragraph 24, authorities 39, 5.

18 Thank you very much. If we have it marginally
19 bigger. My eyes are too old! Brilliant.

20 So, this is the court describing the rebates in
21 question:

22 "... the rebates were 'conditional', in the sense
23 that Post Danmark and its customers concluded
24 agreements, at the beginning of the year, in which
25 estimated quantities of mailings for that year were set

1 out. At the end of the year, Post Danmark made an
2 adjustment where the quantities presented were not
3 the same as those that had been estimated initially."

4 So those are conditional rebates for the purpose of
5 that judgment.

6 That is exactly the position that we have seen in
7 item 61 on table 2, the commission is calculated on
8 the basis of the business carried out by the supplier.
9 So they are conditional, and so the point made by my
10 learned friends based on paragraph 89 of Hoffmann-La
11 Roche goes, with respect, nowhere.

12 Whilst we are on that authority and very briefly,
13 could we turn to paragraph 74, which is in the same tab
14 but at page 11 {AUTH1/39/11}. 74:

15 "It follows from the foregoing consideration that
16 Article 82 ..."

17 Obviously 102 now:

18 "... must be interpreted as meaning that, in order
19 to fall within the scope of that article, the
20 anti-competitive effect of a rebate scheme operated by
21 a dominant undertaking must be probable, there being no
22 need to show that it is of a serious or appreciable
23 nature."

24 So that is a low threshold. Our main argument on
25 abuse is clearly foreclosure. The loyalty-inducing

1 commissions are relied on as well, but insofar as they
2 are relied on, all we have to show is that
3 the anti-competitive effect has to be probable, rather
4 than of a serious or appreciable nature. We say it is,
5 but we do not have to go that far.

6 Carrying on, the counterfactual issue.

7 The defendants clearly saw the writing on the wall and
8 have sought to argue that even if their agreements are
9 exclusive, there is no anti-competitive effect because
10 the counterfactual is one in which the suppliers other
11 than Ede & Ravenscroft, so those suppliers we saw in
12 the footnote 129, they would operate similar agreements
13 and in that counterfactual world there would be no
14 discernible restriction of competition.

15 We, unsurprisingly, do not agree with that. Other
16 non-dominant suppliers, so the people we have seen with
17 7-8% and less, could not operate similar exclusivity
18 agreements with exclusionary bans on competition,
19 because that would be unlawful under Chapter I, given --
20 and this goes to the point that Mr Lomas made -- their
21 relevant network effect. We are not talking about one
22 or two; it is a network around the United Kingdom, from
23 the north-east of Scotland to the south-west of England
24 and indeed including Northern Ireland.

25 I will not go there now because of time, but for

1 the tribunal's reference, paragraph 10 of the amended
2 reply refers to the network of agreements and
3 paragraph 54.3.1 of the amended reply refers to
4 the issue of other suppliers. That can be found, for
5 the tribunal's note, at {B/8/6}, that is paragraph 10,
6 and {B/8/26} insofar as 54.3.1 is concerned.

7 In that counterfactual, as pleaded, universities
8 would make it clear -- so we have set out what we say
9 the counterfactual is. They would make it clear, unlike
10 at present, that the relevant consumers, the students,
11 the people who have to pay the price that is fixed, that
12 the relevant consumers were entitled to source their
13 academic dress requirements from either the official
14 supplier, if there was one, or from other suppliers
15 whose product satisfied the relevant
16 university-published scheme, so item 13 disappears; or
17 from other suppliers who have not(?) satisfied
18 the relevant university-published scheme. A level
19 playing field, in other words.

20 It would be possible to operate two types of supply,
21 B2B and B2C, but on the condition that
22 the anti-competitive exclusive, exclusionary
23 restrictions were stripped out.

24 I can deal very briefly now with the two remaining
25 points before I pass on to Mr Spitz.

1 Chapter I prohibition. The defendants complain at
2 paragraph 132 of their skeleton, which for
3 the tribunal's note is {A1/2/35} -- we do not need to go
4 there -- they complain that the claimants have just
5 engaged in mere rhetoric on this point. That is
6 incorrect, with respect, as a perusal of paragraph 141
7 of our skeleton, which can be found at {A1/1/38} shows.
8 We set out there in detail the matters on which we rely
9 in this regard.

10 First, a network of exclusive agreements or
11 arrangements.

12 Two, the price fixing within these agreements or
13 arrangements.

14 Three, the loyalty-inducing incentives to foreclose
15 competition.

16 Four, the actual or potential harm to students and
17 loss to the claimants.

18 It is telling, we say, that the defendants in their
19 responsive skeleton do not deal with those points, which
20 remain, in the claimants' eyes, clear and damning, which
21 is what we said in our skeleton.

22 THE CHAIRMAN: Just give me that paragraph reference again.

23 MR RANDOLPH: I am so sorry. 141 of us and 132 of them.

24 The final point for me: objective justification.

25 The defendants are therefore forced back, so in our case

1 they lose on dominance, they lose on abuse, they lose on
2 Chapter I; so in terms of the main part of Chapter I,
3 the restriction, distortion and prevention of
4 competition. So they fall back on objective
5 justification.

6 Their case under both Chapter I and Chapter II is
7 that the restrictions contained in the exclusivity
8 agreements were, and presumably remain, necessary and
9 proportionate, given the very substantial investments
10 that the defendants were and are required to make when
11 acting as official supplier and/or are outweighed by
12 efficiency considerations. The note, for the tribunal,
13 that is paragraph 16 of the defendants' skeleton at
14 {A1/2/5}.

15 That position, we say, can be dispatched as equally
16 swiftly as their other points. As the defendants admit
17 in their skeleton, in order to rely on the objective
18 necessity condition, they have to demonstrate that
19 the main operation, here the hiring or selling of
20 academic dress, is impossible to carry out in
21 the absence of the restriction in question. Impossible
22 to carry out in the absence of the restriction. That is
23 common ground and shows the very high hurdle
24 the defendants have to meet. That hurdle is clearly not
25 met by reference to real-world examples. The claimants

1 own B2C model does not use exclusive, exclusionary
2 tactics, neither do Oxford nor Cambridge. The position
3 in Ireland is also instructive.

4 For the tribunal's note, a useful summary of
5 the position in Ireland is set out in the joint expert
6 statement -- which we cannot actually see at
7 the moment -- which can be seen at paragraph 6.2, and
8 the reference is {E7/2/30-31}.

9 That finishes my submissions. If I can sit down and
10 then pass the baton on to Mr Spitz to deal with
11 eco-claims, unless you, sir, or the other members of
12 the tribunal have any questions for me?

13 THE CHAIRMAN: No, thank you very much.

14 MR RANDOLPH: Thank you so much.

15 Opening submissions by MR SPITZ

16 MR SPITZ: Thank you very much, sir, and members of
17 the tribunal. What I propose to do, pretty briefly and
18 I hope in no more than ten or so minutes, is to take
19 a quick walk through the case that is put on
20 the eco-claims to clarify what the lines are, as
21 precisely as is possible to do, on the basis of what is
22 in our learned friends' skeletons, so we know precisely
23 what the allegations are, because some fraud allegations
24 have been made, I would like to spell out what exactly
25 those are.

1 I would like to begin, though, with -- as I say, we
2 will make more detailed written and oral submissions on
3 the fraud case and also on the case based on consumer
4 protection from unfair trading regulations, because
5 the tribunal will recall that that is the fall-back
6 alternative that the defendants advance in the event
7 that their fraud claims do not succeed.

8 We will make written and oral submissions after
9 the evidence, and this sketch is not a substitute for
10 that.

11 The first point is a clarification. It is not
12 necessary to turn up their skeleton, but at
13 paragraph 193 they raise a concern about whether
14 the claimants contend that the question of
15 the correctness of any description of the products for
16 the purposes of assessing damages is a matter for
17 phase 1 of the trial.

18 The clarification is that the claimants agree that
19 it is a matter for phase 1, not a matter for phase 2.
20 We obviously do not seek to revisit the tribunal's
21 previous ruling, but the issue of misrepresentation,
22 insofar as it might relate to causation or illegality,
23 are matters for this hearing.

24 They accept that the damages are to be assessed on
25 the assumption that the products would have been

1 accurately described. What an accurate description is
2 in this case is a matter for this hearing and we will
3 hear evidence on that.

4 Then the question of how that description is applied
5 to the quantification of damages, that question is for
6 phase 2.

7 So I do not think there is any distance between us
8 as to the issues for this hearing.

9 Our point, of course, the tribunal will appreciate,
10 is a different one, and it is that the representations
11 are not the cause of the claimants' loss.

12 The defendants see the question of misrepresentation
13 as being relevant to causation and that will be a debate
14 that we will have in the closings if necessary, but we
15 obviously accept that whether or not the
16 misrepresentations were made, insofar as the defendants
17 seek to argue that this is relevant to causation is
18 a matter for this phase of the trial too.

19 So as we understand it, common ground on that point.
20 Worth just clarifying so we can get that out of the way.

21 The claimants' case on the eco-claims is that their
22 gowns were made in whole or in part at all material
23 times and continue to be so from recycled plastic, which
24 plastic could be sourced inter alia from recycled
25 bottles. The reference to that -- and, sir, I am going

1 to mention the references so that we have them on
2 the transcript but not so that we spend time turning
3 them up at this point -- is in our reply,
4 paragraph 11A(v), and the bundle reference is {B/8/7}.

5 The allegation that the gowns were made in some
6 cases wholly from recycled plastic is made solely with
7 respect to the first batch of gowns. The claimants'
8 case is that the second and subsequent batches contained
9 70% polyester made from recycled plastic and 30%
10 viscose. That appears in our reply at
11 paragraph 11A(vi), and in the Opus bundle it is {B/8/7}.

12 The defendants initially denied this, but in light
13 of their expert's report, they now have amended to turn
14 the denial into a non-admission, and that is in
15 the defendants' defence, paragraph 97D(ii), Opus bundle
16 {B/7/59}. We say that that does not assist them in
17 advancing the fraud case, obviously, because what they
18 have to prove is the falsity of the representations on
19 which they rely; a non-admission does not carry them far
20 enough.

21 The fraud case in its most recent formulation is set
22 out in the defendants' skeleton argument.
23 The contention is that the claimants made
24 representations that were "not merely false but were
25 made fraudulently or at least with criminal negligence".

1 That is in their skeleton at paragraph 162, and in Opus
2 it is {A1/2/43}.

3 They start off by running together their fraud case
4 and their case on breach of consumer protection from
5 the unfair trading regulations in the paragraph to which
6 I have just referred and then they disaggregate that
7 a little bit later in the skeleton argument. It is
8 important to be clear on exactly what the defendants'
9 fraud case is. It is set out in the skeleton argument
10 as follows.

11 The charge of fraud is made in three ways and it is
12 fairly narrowly drawn in each instance. In the first
13 two it is based on an omission. In the third it is
14 based on an implication that is said to be knowingly
15 false.

16 A fraud case is not being pressed in the skeleton in
17 relation to documents provided to a certain Alison in
18 November 2020. I will not dig into the detail of that
19 now. The tribunal will probably have seen that that is
20 a separate instance that was pleaded but that does not
21 find its way into the formulation of the fraud in
22 the skeleton argument. So that is the first point.

23 The next point is that neither Ms Nicholls nor
24 Mr Adkins are said to have acted fraudulently in
25 relation to either the so-called 100% recycled plastic

1 bottles representation or the so-called 100% recycled
2 plastic representation. It is less clear whether either
3 of them is said to have acted fraudulently in relation
4 to the so-called implied plastic bottles representation
5 and if that is the defendants' case, they should say so.

6 Notably, too, whether the charge is in the form of
7 deceit or fraudulent misrepresentation inducing
8 a contract, the fraud claim is incomplete because there
9 is no attempt to allege and prove that
10 the misrepresentations in fact induced anyone to do
11 anything and there is no attempt to show that any third
12 party suffered any loss as a result, both of which are
13 usually considered to be essential elements of a claim
14 for fraudulent misrepresentation or deceit.

15 Now, on, briefly, to the relevant facts, and these
16 are based on the defendants' expert Mr Chan's report,
17 which appears in the Opus bundle at {E/5/18}. I will
18 summarise those facts. They are as follows.

19 The defendants' expert's chemical testing uses
20 a chemical marker found in PET bottles. If the marker
21 is not found in a sample, that means the sample contains
22 less than 10% recycled polyester fibres made from PET
23 bottles.

24 The defendants' expert did not and is not able to
25 test for the presence of "'recycled plastic' generally".

1 So recycled PET bottles are a specific instance, but
2 the test is not able to test for recycled plastic
3 generally. He is also not able to test if fabric or
4 fibre is made from other sources of PET materials, for
5 example, food packaging or PET fabric, which is fabric
6 made from recycled virgin polyester.

7 We submit that what this means is that in relation
8 to the first batch of gowns, the polyester used in
9 the claimants' gowns could be made 100% from other
10 sources of recycled plastic material and that up to 10%
11 of the composition of the gowns could be from recycled
12 PET bottles.

13 MR LOMAS: Mr Spitz, do you now accept -- I think I saw it
14 denied at one stage -- that there is a specific chemical
15 marker for PET bottles in recycled plastic, or is that
16 still an issue?

17 MR SPITZ: No, we do accept that there is a marker.

18 MR LOMAS: Right, okay, thank you.

19 MR SPITZ: It has a threshold condition of 10%.

20 MR LOMAS: I understand that.

21 MR SPITZ: There is no available test for other recycled
22 plastic, so they cannot detect that.

23 MR LOMAS: Thank you.

24 MR SPITZ: So far as the second and further batches are
25 concerned, we say that 70% of those could also comprise

1 the same material.

2 The expert refers to 13 samples of fabrics received
3 in November and December 2020 and tested in
4 December 2020 and we say that is a small sample size.
5 There are one or two other fabrics that were tested at
6 other times, but we say it remains -- it does not change
7 the fact that the sample size was small.

8 For our part, the tribunal will have seen that we
9 obtained a report dated September 2021 by a consultancy
10 specialising in sustainability of supply chains, known
11 as Anthesis. That report is exhibited to Ms Nicholls'
12 second witness statement at exhibit RN3, and the Opus
13 reference is {F3/1404/2}.

14 That report explains that a marker known as "IPA",
15 to your question, sir, is found in clear PET plastic
16 bottles, but that marker -- and this is important, it is
17 a subtle but important distinction -- that marker would
18 not be found in unclear, coloured PET plastic bottles.

19 MR LOMAS: I think that may be the point I was trying to
20 make.

21 MR SPITZ: That may well be, indeed, indeed, and that we
22 persist with. There is that important distinction.

23 So, the defendants' fraud case must be understood
24 against that background.

25 Now, the first allegation of fraud, here it is worth

1 turning up our learned friend's skeleton at
2 paragraph 171, and that is {A1/2/44}. We say at
3 paragraph 171, in essence the case is based on an
4 omission.

5 Mr Muff is said to have known, and I am quoting,
6 "from the outset", that the second and subsequent
7 batches of the claimants' gowns were not made from 100%
8 recycled polyester, but to have done nothing to ensure
9 that the claimants' marketing claims reflected
10 the position as he knew it.

11 Quite understandably, the defendants do not contend
12 that Ms Nicholls or Mr Adkins acted fraudulently or made
13 fraudulent omissions in relation to what the defendants
14 call "the 100% recycled plastic bottles representation".

15 The fraud claim focuses on Mr Muff alone and it
16 appears to relate only to the contention that in
17 April 2017 Mr Muff knew that the second and further
18 batches of gowns would be made of a polyester/viscose
19 blend, in other words not recycled.

20 Mr Muff denies that he knew this in 2017 and his
21 evidence is at his first witness statement --

22 MR LOMAS: Sorry to interrupt again, I just want to make
23 sure I understood what you are saying. I think it is
24 implicit, is it not, that the 70% plastic content in the
25 blend could have been recycled; one does not know.

1 MR SPITZ: Indeed.

2 MR LOMAS: The viscose would not have been.

3 MR SPITZ: The viscose would not have been, quite so.

4 Mr Muff's evidence on this is at paragraphs 48 to 52
5 and that is in the bundle {D1/3/12-13}. He also deals
6 further with this understanding of recycled plastics in
7 his first witness statement SM1, paragraphs 28, 32, 37,
8 38, 39 and 42, and that is at {D1/3/7-10}. So that is
9 the first allegation of fraud.

10 The second is set out at paragraph 176 of
11 the skeleton argument and that is at {A1/2/45}. It is
12 worth turning that up for a moment, and this,
13 the tribunal will see, refers back to paragraph 171, so
14 the reasoning is the same.

15 It is likewise based on an omission, we say, and
16 here it is that Mr Muff is said to have had knowledge of
17 the falsity of what the defendants called "the 100%
18 recycled plastic representation" and to have been guilty
19 of fraud for the same reasons as those set out in
20 relation to the first allegation in paragraph 171.

21 The contention is that he allowed a statement on
22 the claimants' website stating that the gowns "were
23 manufactured entirely from recycled plastic and 100%
24 recycled", knowing this was false in respect of
25 the second and all subsequent batches of the gowns,

1 which were made of 70% recycled polyester, not 100%.

2 Again, Mr Muff deals with this in the same
3 paragraphs of SM1, paragraphs 48 to 52 {D1/3/12-13} and
4 at paragraph 56 {D1/3/14}.

5 The case in a nutshell is until 7 January 2021 he
6 believed that the gowns were being manufactured entirely
7 from RPET, in other words recycled polyester. He deals
8 with his understanding of recycled plastics again in
9 SM1, the same paragraphs as I mentioned earlier, 28, 32,
10 37, 38, 39 and 42 {D1/3/7-10}.

11 The last allegation of fraud is pleaded in
12 paragraphs 98I and 98J of the defence {B/7/63-64} and
13 there the defendants point to substantial revisions made
14 to the claimants' website, removing, as they put it in
15 paragraph 98.1, most of the references to the claimants'
16 gowns being made from recycled plastic bottles.

17 They then refer in paragraph 98J to a statement on
18 the website after January 2021 which says that each new
19 gown is made from 70% recycled polyester, which is
20 manufactured from recycled plastic waste and then
21 blended with 30% viscose.

22 Paragraph 177 of their skeleton argument, if we
23 could turn that up, please.

24 THE EPE OPERATOR: Could I have the reference again?

25 MR SPITZ: I am sorry, it is {A1/2/46}, paragraph 177, and

1 here the defendants focus on the last sentence of
2 the statement I mentioned above and in particular
3 the words that say every graduation gown "contains
4 a minimum of 550g of recycled plastic waste, which
5 equates to at least 28 500ml plastic bottles".

6 Paragraph 180 in the same document contains
7 the allegation of fraud and it is that the above
8 statement implies that the gowns are made of recycled
9 plastic bottles in whole or in part and that implication
10 is said to be false. The defendants say this "would
11 create a misleading impression for any reasonable
12 reader" and that:

13 "This, too, is fraudulent."

14 For our part, it is not at all obvious why
15 the claimants would wish to mislead a customer into
16 thinking that gowns were made of recycled plastic
17 bottles as opposed to other recycled plastic material,
18 but no doubt the defendants will intend to explore that
19 in evidence.

20 On this third allegation, the skeleton is silent as
21 to who in particular is said to have acted fraudulently.
22 We say the defendants should identify the persons
23 against whom the complaint is made.

24 I am coming to the end of this portion of
25 the opening. The witnesses have explained what

1 the statement means, or at least what they intended to
2 mean in making it. The references are Ms Nicholls at
3 RN1, paragraphs 90 to 91, and the Opus bundle reference
4 is {D1/1/21-22}.

5 In summary what she says is that it was a fair
6 illustration of the PET waste content of the claimants'
7 gowns adopted by the claimants and by others, because it
8 is far easier for consumers to relate to and visualise
9 than grams of PET. It was an illustrative shorthand and
10 a common industry practice, and the reference to an
11 equivalent was to ensure that it was not an indication
12 that the gowns were produced exclusively from plastic
13 bottles.

14 For his part, Mr Adkins, in his first witness
15 statement, OA1, paragraph 134, that is {D1/2/34}, sets
16 out his explanation and he makes the point that it was
17 thought to be a good visual metaphor to help customers
18 understand the amount of recycled plastic being used and
19 it was not to be interpreted literally but used as an
20 illustrative device designed to help consumers get
21 a sense of the environmental benefit of using recycled
22 plastic.

23 The last point to make is that Ms Nicholls in her
24 witness statement also goes on to explain the steps she
25 initiated to try and verify the supply chain after

1 the Intertek reports were drawn to her attention in
2 January 2021. That is in her first witness statement
3 RN1, paragraphs 93 to 96. That is Opus {D1/1/22}.

4 The steps included engaging the services of
5 Anthesis. The Anthesis report appears at {F3/1404/2}
6 and that report summarised its findings at {F3/1404/4}
7 as follows. This is the final point to make. They
8 concluded that there is no test available commercially
9 which provides conclusive evidence that there is no
10 recycled polyester in any given fabric, nor that any
11 fabric does not contain any polyester recycled from
12 bottles. They found sufficient evidence of the supply
13 of recycled materials by Churchill's current supplier,
14 and they found that Churchill acted in a matter that is
15 common in the industry in terms of due diligence,
16 focusing on agreed contractual terms and local
17 certification provided by suppliers.

18 So, that then summarises, I think, where
19 the parameters are drawn in relation to the eco-claims,
20 at least for the purposes of opening, so unless
21 the tribunal has any questions, that is all that
22 I propose to say at this stage.

23 My leader points out that this may be an appropriate
24 time to rise for the transcriber.

25 THE CHAIRMAN: Thank you very much, Mr Spitz. We will rise

1 now for five or six minutes.

2 (11.57 am)

3 (A short break)

4 (12.08 pm)

5 MR RANDOLPH: Sir, if I may, one very short point. I was
6 asked about B2C/B2B market differences. The important
7 point, which I may not have got across the net, is this.
8 We say the relevant market is the supply of academic
9 dress, either sale or hire. You can get to that market
10 in two ways, B2B, B2C, but the market is the same. It
11 is the routes to the market that are different. That is
12 all I wanted to say, unless you have any questions.

13 Opening submissions by MR PATTON

14 MR PATTON: May it please the tribunal. We say, as
15 you know, the claimants' case fails on many levels, but
16 we had the opportunity in our skeleton argument to
17 respond to the claimants' skeleton argument and we took
18 the opportunity, we hope, to make our document as
19 responsive to their case as possible. The tribunal will
20 have read the detailed submissions we have made and it
21 is not my intention in opening to repeat those.

22 The point I particularly wanted to focus on in
23 opening is what we say is the key overarching flaw in
24 the claimants' case, because although it masquerades as
25 a private law damages action, we say that the claim is

1 actually an attempt to alter the structure of the market
2 and we say it is impermissible for that reason alone.

3 As the tribunal knows, the way the market currently
4 works is that universities outsource the running of
5 graduation ceremonies to a single official supplier, who
6 is not only expected to supply sufficient academic dress
7 for everyone who wants to attend, but also to run
8 the ticketing, the event management on the day, robing
9 up the students and staff and so on.

10 Then the cost of the services provided under
11 the OSAs is to be recouped from the graduation hire --
12 from the academic dress hire fee. Now, that is an
13 important point which I am sure the tribunal has on
14 board.

15 Although one sees the claimants making eye-catching
16 claims about their hire fee being a few pounds cheaper
17 than the defendants' hire fee, those claims simply do
18 not stack up once you understand how the market works,
19 because it is comparing apples and oranges.

20 Our hire fee covers the costs of all the services
21 that are provided as part of the graduation services in
22 the OSA; theirs are simply for their students' dress
23 hire alone. Even the claimants' expert I think accepts
24 that for that reason the prices are not directly
25 comparable. So that is one important feature of

1 the market structure.

2 In addition, as Mr Randolph has said, the practice
3 has developed of official suppliers making commission
4 payments to the universities as a proportion of their
5 receipts from the academic dress hire.

6 Now, the claimants have referred to those commission
7 payments, when briefing the press, for example, and even
8 in their evidence, as "kick-backs", which is an
9 expression that is emotive and presumably intended to
10 invoke some sort of impropriety. But the evidence is
11 that these commission payments are used by
12 the university to cover their own costs of a ceremony,
13 for example in relation to venue hire, and I just wanted
14 to show the tribunal a few documents in relation to
15 that.

16 If we could look at {F3/848}. This is the start of
17 an email chain between university graduation officers,
18 and it is because there is, as you can see towards
19 the middle of the page, an email address "ceremonies@",
20 and that is a list server for graduation officers where
21 they can exchange emails on matters of interest to each
22 other. So it is a candid discussion between them, not
23 one that was intended to see the light of day.

24 The reason that we have this copy, as you can see
25 just from the top of the page --

1 MR LOMAS: Sorry, so ceremonies -- that email server
2 includes other universities?

3 MR PATTON: It includes a number of universities and they
4 exchange emails on topics of mutual interest.

5 Now, the reason we have this copy is, if you look
6 right at the top of the first page, the claimants have a
7 "mole", someone who is on the recipients' list for this
8 list server, but who covertly forwards some of the
9 messages to Mr Adkins at his Hotmail email address. You
10 can see that right at the top of the page. That was not
11 something, obviously, that the authors of the emails
12 would have necessarily anticipated.

13 Just in the middle of the page is an email of
14 27 March 2017 from a person at Essex University.
15 I should mention, Essex University is not actually one
16 of the universities for which we had the OSA at this
17 time, or I think today. There was a different official
18 supplier.

19 Now, if one looks at the third paragraph, so
20 the bottom paragraph on this page, he says:

21 "All the commission from gowns and photography goes
22 straight back into the Graduation budget, so there will
23 be a knock-on [effect] on Graduation itself from our
24 POV."

25 Our point of view:

1 "If Churchill insist on acting like a bull in
2 a china shop, then we will make sure our students are
3 aware of the impact the potential loss of income will
4 have on Graduation."

5 So, a candid email, clearly, but one which makes
6 the point that the commission payments go back into
7 the graduation budget.

8 One can see a similar point at {F3/845}. This is
9 another exchange from the same list server but now in
10 August 2019. It is the top email that I wanted to draw
11 to the tribunal's attention on the first page.

12 Here one can see it is dated 19 August 2019 and it
13 is from someone at the University of Chichester, who is
14 the events and external relations manager. In
15 the second paragraph she says:

16 "Our graduation ceremonies are not paid for by
17 tuition fees, they are self-funding so without
18 the commission we receive from robing and the free staff
19 academic dress we would have to charge more for guest
20 tickets, so on the long run students wouldn't be saving
21 any money."

22 So those are statements from the universities in
23 candid internal emails.

24 That has also been confirmed by the universities in
25 their public statements. If we could look at {F3/1676}.

1 So this is an article from The Times newspaper and it
2 was published I think in August 2019. You can see
3 the heading is, "Universities pocket £2m from graduation
4 gowns". But if you look down to the fifth paragraph:

5 "The Royal Veterinary College was paid £10,997.
6 'The income generated is used to offset some of the
7 costs of graduation,' it said. 'These savings are
8 passed on to the students through offering three free
9 tickets to each graduate and significantly subsidised
10 additional tickets.'"

11 In the next paragraph:

12 "Newcastle University, which received almost
13 £140,000 from Gray & Son Robe Makers and H Tempest, said
14 that the income 'goes straight back into funding
15 [graduation ceremonies]'."

16 So the same position in both public and private
17 statements.

18 Now, there is no evidence the other way from
19 the claimants. There is no evidence to suggest that
20 these commission payments are not used by
21 the universities to fund their own costs of
22 the graduation ceremony. Indeed, Dr Maher,
23 the claimants' expert, suggests that a key objective of
24 the universities is to subsidise the cost of putting on
25 their graduation ceremonies. She says that in the joint

1 statement at paragraph 2.4 {E7/1/7}.

2 Now, the claimants are therefore driven to suggest
3 that this market structure is somehow a device of
4 the defendants' creation. They will have to demonstrate
5 that to you by evidence rather than by mere assertion,
6 but we would suggest that it is an inherently unlikely
7 proposition for at least two reasons.

8 First, because our rivals have been successful under
9 this system in bidding for OSAs, including in
10 competitions where we are also bidding for the same OSA.

11 Secondly and perhaps more fundamentally, because
12 this theory that it is a device of our creation assumes
13 that over 100 universities in this country have ended up
14 contracting for services in a way that does not reflect
15 their needs or the needs of their students and without,
16 presumably, realising that fact.

17 It is much more likely that universities see
18 the appointment of an official supplier as an obviously
19 convenient arrangement from their point of view which
20 enables an important event in their students' lifetime
21 to be well run, and that they think choosing an official
22 supplier maximises their buyer power, enabling them to
23 extract value through the provision of high quality
24 services by the official supplier through the payment of
25 commission, as I have said, which helps them cover their

1 costs, and the sponsorship of prizes for outstanding
2 students, which enhances the experience of the day.

3 Now, be that as it may, that is our position, it is
4 clear that the claimants do not like how the market is
5 currently structured. One of the first things they did,
6 and they did this before, we think, they had rented out
7 a single gown in the UK, was to make a complaint to
8 the CMA. That complaint was made on 22 May 2017. It is
9 at {F3/389}, but we need not turn it up.

10 Now, the CMA has wide-ranging powers to investigate
11 the structure of the market, specifically to investigate
12 the structure of the market. Can I just show you what
13 those powers are. It is in {AUTH2/4/1}. This is
14 the Enterprise Act, section 131, and if we could just
15 look at subsection (1):

16 "[The CMA may ..."

17 Then reading on to the second line:

18 "... if the CMA] has reasonable grounds for
19 suspecting that any feature, or combination of features,
20 of a market in the United Kingdom for goods and services
21 prevents, restricts or distorts competition in
22 connection with the supply or acquisition of any goods
23 or services in the United Kingdom or a part of
24 the United Kingdom."

25 Then subsection (2):

1 " ... any reference to a feature of a market in
2 the United Kingdom for goods or services shall be
3 construed as a reference to --

4 "(a) the structure of the market concerned or any
5 aspect of that structure;

6 "(b) any conduct (whether or not in the market
7 concerned) of one or more than one person who supplies
8 or acquires goods or services in the market concerned;
9 or

10 "(c) any conduct relating to the market concerned of
11 customers of any person who supplies or acquires goods
12 or services."

13 Now, those powers, as you can see, do not depend on
14 establishing an infringement of the Chapter I or
15 Chapter II prohibition with which the tribunal is
16 concerned. So they do not depend on the existence of an
17 infringement. They do not even depend on the suspicion
18 of an infringement, because as you can see in
19 the opening subparagraph of 131, all it requires is
20 reasonable grounds for suspecting that a feature of
21 a market "prevents, restricts or distorts competition".
22 So it may be through no infringement on the part of
23 anyone, but some feature of the market is having that
24 effect.

25 Now, when it conducts a reference under these

1 powers, the CMA has to publish a report. Then if we
2 look at page 12 {AUTH2/4/12}, this is section 138,
3 the CMA then has a duty to remedy the adverse effects.

4 Under subsection (2) it shall:

5 "... in relation to each adverse effect ... take
6 such action ... as it considers reasonable and
7 practicable --

8 "(a) to remedy, mitigate or prevent the adverse
9 effect on competition concerned ..."

10 When you look at sections 159 and 161, those are
11 powers either to accept undertakings, one can see that
12 at page {AUTH2/4/15}, and that provides:

13 "The [CMA] may, in accordance with section 138,
14 accept, from such persons as it considers appropriate,
15 undertakings to take action specified or described in
16 the undertakings."

17 Also at page {AUTH2/4/17}, section 161, it may "make
18 an order under this section". It has very wide-ranging
19 powers in relation to the types of orders it can make.
20 Some examples are set out in schedule 8.

21 Just to give an illustration of how wide-ranging
22 these powers are, if we could look at {AUTH4/3}, this is
23 an order that was made by the Competition Commission,
24 which previously had the equivalent powers, in relation
25 to "Groceries (Supply Chain Practices) of Market". So

1 in other words, that is to do with the suppliers of
2 supermarkets, and it was thought that supermarkets were
3 behaving in a heavy-handed way towards their suppliers
4 and that competition was not working as well as it
5 should do.

6 Just to illustrate how far this can go, if one looks
7 at page {AUTH4/3/5} of this order, regulation 5 imposes
8 an obligation on a designated retailer. It says:

9 "A Designated Retailer ..."

10 So that is a supermarket:

11 "... must not enter into or perform any Supply
12 Agreement unless that Supply Agreement incorporates
13 the Code and does not contain any provisions that are
14 inconsistent with the Code."

15 So it creates a whole code of conduct for
16 supermarkets in relation to their suppliers which
17 the supermarkets have to incorporate into their
18 agreements.

19 Just to give you a flavour of that, if one could
20 look at page {AUTH4/3/13}. This is within the code, and
21 paragraph 2, "Principle of fair dealing":

22 "A Retailer must at all times deal with its
23 Suppliers..."

24 Sorry, it is page {AUTH4/13/12}, right at the bottom
25 of page 12:

1 "A Retailer must at all times deal with its
2 Suppliers fairly and lawfully. Fair and lawful dealing
3 will be understood as requiring the Retailer to conduct
4 its trading relationships with Suppliers in good faith,
5 without distinction between formal or informal
6 arrangements, without duress ... [and so on]."

7 So, it introduces an obligation on retailers to
8 behave in good faith towards their suppliers and there
9 is quite a lot of detail about that.

10 That is really just an illustration of the sorts of
11 powers to change the market that do exist under
12 a statutory regime, but it is not the statutory regime
13 that this tribunal is applying.

14 Now, when you have been reading the claimants'
15 witness statements, you will have seen that they make
16 many complaints about features of the market. If I can
17 just show you an example of that in Ms Nicholls' witness
18 statement, {D2/1/31}.

19 At paragraph 135 she says:

20 "Moving forward we feel that the decision given by
21 the Irish competition authority, the CCPC, sets out
22 a good blueprint for a fair and competitive graduation
23 industry where students feel they have a choice about
24 where they hire or purchase their gowns."

25 Then she says what the regulator has said. Then she

1 sets out essentially a wish list here, 136:

2 "Bundling or tying should not be used to prevent
3 students choosing where to get their gowns."

4 137:

5 "Universities should not be entering into exclusive
6 agreements with gown suppliers ..."

7 138:

8 " ... gown suppliers [should not be] blocked from
9 communicating with students or denied chances that other
10 businesses are given to market to them ..."

11 139:

12 "If universities are keen to ensure that students
13 look uniform on graduation days, and therefore have
14 certain requirements for what their academic dress
15 should look like, then they should publish these. This
16 would enable a competitive industry to flourish ..."

17 She suggests over the page: {D2/1/32}

18 "If a university requires a specific pantone colour
19 or weight of fabric, that's not a problem and they can
20 hold suppliers to those, provided that those details are
21 published. This should be done in a spirit of
22 encouraging competition ..."

23 If you look at her second statement at {D2/4/7}, at
24 the bottom, paragraph 29, talking about the services
25 that are provided under an OSA, she says:

1 "These additional services are not fundamental to
2 graduation ceremonies, and the graduation would still be
3 able to serve its purpose if there were fewer members of
4 staff on stage wearing gowns, if staff were asked to own
5 their own set of academic dress, or if staff were simply
6 asked to be smartly dressed (ie normal business wear -
7 suits, etc)."

8 So she is suggesting that one might go so far as to
9 dispense with academic dress for the staff altogether.
10 That would be a way of creating, she thinks, a more
11 competitive market.

12 Indeed, one wonders why she is not following
13 the logic of that, which would be to get rid of academic
14 dress for the students as well, since that would solve
15 the problem altogether, but of course that would be
16 a self-defeating one from the claimants' point of view.

17 THE CHAIRMAN: What do you say the relevance of these
18 paragraphs in her witness statement are?

19 MR PATTON: Well, I am going to make a submission later
20 about that, but they are really revealing of the way in
21 which the claimants' real problem is with the way in
22 which the market is structured.

23 THE CHAIRMAN: Yes, I see that is the claimants' case, but
24 in terms of these paragraphs in a witness statement?

25 MR PATTON: They are merely illustrative and I am going to

1 say these are actually just arguments and it is not
2 evidence, and I was going to make that point before
3 I finish, but no, I take your point on that.

4 Now, Dr Maher makes similar points in her expert
5 reports. She says that universities should not be
6 relying on students to fund graduation ceremonies at
7 all; she thinks that is wrong. She thinks universities
8 should appoint multiple official suppliers backed by
9 what she calls "certification schemes" instead of
10 the current approach. That is in her second report,
11 paragraph 123, at {E4/7/33}.

12 She even goes so far, if I can just take you to
13 {E4/1/28}, she suggests, if one looks at paragraph 119,
14 she discusses the convention that:

15 "... academic staff attending a ceremony wear
16 the Academic Dress applicable to their highest degree at
17 the time they were awarded it, from the university they
18 graduated from."

19 That is one of the features of academic life that is
20 obviously seen as very important in universities.

21 She says:

22 "It is suggested that this service became part of
23 services a university would seek to pure on behalf of
24 its staff because the cost of sourcing and hiring
25 the necessary Academic Dress was preventing staff from

1 attending the ceremonies."

2 If you look over the page, paragraph 121 {E4/1/29},
3 she says:

4 "I am not aware, however, of any reason why
5 alternative approaches could not be adopted."

6 If one looks at footnote 118, she says:

7 "I understand that the right to wear a particular
8 institution's Academic Dress is generally linked to
9 having achieved a qualification from that institution,
10 hence the rationale for this tradition. One alternative
11 is that universities could create a design of Academic
12 Dress to be worn by those staff attending graduation
13 ceremonies."

14 She goes on to say that:

15 "... academic staff can purchase their ... dress..."

16 So she is suggesting that one abandons
17 the conventions that universities apply and one designs
18 a new bespoke form of dress for staff to attend
19 ceremonies. Again, nothing to do with an infringement
20 under Chapter I or Chapter II but essentially
21 identifying features of the way the market is currently
22 structured, at the behest of universities, we say, and
23 seeking to meddle with those existing approaches.

24 Now, whether or not the CMA, with its wide powers,
25 could do any of the things that the claimants would

1 like, we submit that none of those are changes that can
2 be contemplated or taken into account by the tribunal in
3 a private law damages action, where the issue is whether
4 there has been an infringement of the Chapter I and
5 Chapter II prohibitions.

6 This is a damages claim brought against
7 the defendants alone. Universities are not parties to
8 the litigation. They cannot be enjoined or directed.
9 Even if you had the power to do it, they are not here.
10 They cannot be enjoined or directed to change the way in
11 which they go about organising their ceremonies.

12 Now, that is not just a forensic point to say that
13 there is this overarching flaw in the claimants' case,
14 because we say it feeds into the legal analysis in
15 a number of ways. The part of the analysis which it is
16 particularly relevant to is the question of whether
17 there has been an adverse effect on competition.

18 Just as to that requirement, the claimants need to
19 establish an adverse effect on competition as part of
20 their Chapter I case, and that is by definition,
21 because, as the tribunal knows, they do not say that
22 the agreements are anti-competitive by object; they only
23 say that they are anti-competitive by effect. So, by
24 definition, unless they prove an anti-competitive
25 effect, the Chapter I case must fail.

1 So that is Chapter I.

2 The same is true, in other words the need to
3 demonstrate anti-competitive effects, that is also true
4 in relation to the Chapter II case, the abuse of
5 dominance case.

6 Now, we understand the claimants to accept that
7 point, and the reference is in their skeleton at
8 paragraph 132, that is {A2/1/35}, and I say that because
9 they begin that paragraph by saying:

10 "In all circumstances where a counterfactual is
11 considered, whether as here, under the Chapter II
12 prohibition, for the purpose of assessing the effect on
13 competition ..."

14 So we understand that to be an acceptance that they
15 will have to demonstrate an effect on competition for
16 the Chapter II case as well.

17 In any event, we would suggest that that is clearly
18 borne out in the recent opinion of
19 Advocate General Rantos in the Servizio Elettrico case
20 and that is in {AUTH1/49}.

21 Can I say, you have been given a lot of authorities
22 in the authorities bundle, many of them for propositions
23 that are likely to be uncontentious, but I would
24 respectfully submit that if there was one authority that
25 you would wish to read, it is this opinion, which is

1 a very illuminating recent analysis. It is relied on by
2 both of us in our skeleton arguments, by both sides, so
3 it is not a contentious opinion in the sense that one
4 has to see whether the court is going to go along
5 with it; it is really a synthesis of many important
6 points.

7 The part on which I particularly rely for this
8 submission is at {AUTH1/49/9}, and it is paragraph 54.
9 The Advocate General is recognising that defining what
10 is an abuse is difficult. How do you distinguish
11 between aggressive but lawful competitiveness and
12 something that is anti-competitive? He says in 54:

13 "No doubt conscious of that difficulty,
14 the EU legislature included in Article 102... an
15 indicative list of abusive practices which does not
16 exhaust all the methods of abusing a dominant position
17 prohibited by EU law, thus allowing the application of
18 that provision to be adapted to different commercial
19 practices over time. Therefore, a practice described by
20 the referring court as 'atypical', such as at that at
21 issue in the main proceedings, which does not correspond
22 to a practice listed in Article 102 ... is also capable
23 of constituting an abusive practice. Since the analysis
24 is based on the anti-competitive effects and not
25 the form of the conduct, a competition authority has to

1 conduct careful verification of all the relevant facts,
2 without making the slightest presumption, since whether
3 the conduct is 'typical' or 'atypical' is not decisive."

4 Then he says:

5 "The concept of 'competition on the merits' is
6 therefore abstract, since it does not correspond to
7 a specific form of practices and cannot be defined in
8 such a way as to make it possible to determine in
9 advance whether or not particular conduct comes within
10 the scope of such competition. Indeed, the Court has
11 excluded the idea of an 'abuse in itself' (or an abuse
12 per se), which is to say the existence of a practice
13 that is inherently abusive, independently of any
14 anti-competitive effect it may have. The concept
15 of 'competition on the parties' thus expresses an
16 economic ideal the background to which is the current
17 trend in EU competition law to favour an analysis of
18 the anti-competitive effects of the conduct
19 ('effects-based approach') rather than an analysis based
20 on its form ('form-based approach')."

21 So we do say it is very clear that if the claimants
22 do not demonstrate anti-competitive effects, then both
23 of their claims will fail for that reason alone.

24 Now, it is trite and does not seem to be
25 controversial between us that to decide whether there is

1 an anti-competitive effect, you have to compare
2 competition in the actual world as it exists, and
3 competition in a notional counterfactual situation where
4 the challenged practice restriction does not exist.
5 Having drawn that comparison between the actual and
6 the counterfactual, one is looking to see an effect on
7 the parameters of competition, and that means things
8 like the price, the quantity and the quality of
9 the goods or services.

10 Now, we say, as you know, that the likely and
11 realistic counterfactual, if you assume for the sake of
12 argument that it is not permissible for the defendants
13 to enter into the OSAs, is that our rivals will step in
14 to fill the void. No case is advanced that that would
15 be unlawful.

16 Can I just make that good, given what Mr Randolph
17 said earlier. If I could ask you to look at {B/9/13}.
18 This is further information that was served by
19 the claimants on 12 November 2020 in response to our
20 request. You can see in the middle of the page that
21 a request is made under paragraph 83 of the claim form,
22 which referred in the underlying passage to:

23 "... similar exclusivity or preferred supply
24 agreements entered into with a limited number of
25 universities ... by ..."

1 Wippell, The Graduation Gowning Company, Graduate
2 Gowning, Graduation Attire and so on; so our rivals, if
3 I can call them that.

4 Then the question, 33:

5 "Do the Claimants allege that Wippel [etc]
6 contravened section 2 and/or section 18 of
7 the Competition Act 1998, by virtue of their alleged ...
8 '... agreements' or otherwise?"

9 The response is very clear:

10 "No such allegation is made in these proceedings.
11 It is not a necessary part of the Claimants' case in
12 these proceedings that the said other suppliers ... have
13 contravened section 2 and/or section 18 of
14 the Competition Act 1998. The agreements to which they
15 are/have been party are instead relevant to the question
16 of whether the cumulative effect of the Exclusivity
17 Agreements and other similar agreements is to deny or
18 substantially limit access to the market to new and
19 existing suppliers."

20 They disavow any allegation not only that there is
21 an abuse of dominance by these other suppliers but that
22 the agreements are anti-competitive by effect.

23 Now, this is not a point that we have kept up our
24 sleeve in any way. If you look at our defence at
25 {B/7/40} -- maybe it is sensible to start with {B/7/39},

1 but this is our defence and we are dealing with whether
2 there has been an abuse and dealing with whether there
3 are anti-competitive effects, and you can see at
4 the bottom of the page (a):

5 "the OSAs do not have appreciable negative effects
6 on the market, alternatively they are not reasonably
7 likely appreciably to harm the competitive structure of
8 the market ..."

9 If one can then go over the page to {B/7/40},
10 the amendment in (aa):

11 "Further and in any event, and without prejudice to
12 the Defendants' case ..."

13 Blah blah blah:

14 "... it is averred that the likely and realistic
15 counterfactual is that the Universities concerned would
16 have entered into equivalent OSAs with suppliers other
17 than the Defendants ..."

18 Then if you skip down a few more lines:

19 "In that regard, the Claimants make no allegation in
20 these proceedings, that the entry into OSAs by suppliers
21 other than the Defendants ... constituted a
22 contravention of either section 2 or section 18 of
23 the ... Act ... as specifically confirmed in
24 the Claimants' response ..."

25 To the request for further information.

1 These are the amendments we made at the same time as
2 we originally pleaded the fraud case, so I think in the
3 first half of last year, so they have been on
4 the pleadings for some time.

5 You see the response to this at {B/8/22}. This is
6 the reply. At the top of the page in red:

7 "Insofar as concerns paragraph 77.3(aa),
8 the asserted counterfactual described therein is denied.
9 Without prejudice to the Claimants' further legal
10 arguments on this issue, it is averred that
11 the Defendant's said assertion is flawed and wrong in
12 that it fails to seclude the presumed anti-competitive
13 nature of the impugned conduct through operation of
14 agreements similar in content and effect to
15 the Exclusivity Agreements. Further or in any event,
16 the link made by the Defendants between the fact that
17 the Claimants do not allege unlawful conduct in relation
18 to other suppliers who may operate similar exclusivity
19 agreements ... is flawed and wrong, not least because
20 the other suppliers are not in a dominant position on
21 the market."

22 Well, it is certainly accepting as a fact that they
23 do not make that allegation and they have not made that
24 allegation and indeed it has not been addressed by
25 the experts, no doubt for that reason. So that is

1 the position.

2 Mr Randolph suggested that the agreements to which
3 the other suppliers were parties, or would be parties,
4 would be anti-competitive agreements by effect, but that
5 is not his case and there is no evidence to that effect.

6 Now, if you assume that our rivals will simply step
7 in to fill the void left by our being prevented from
8 entering into the agreements, there is absolutely no
9 reason at all to suppose that the parameters of
10 competition would be any different. In fairness,
11 the claimants do not even suggest that they would be.
12 It is not their case that if this is the correct
13 counterfactual, they are able to succeed.

14 That is a simple short point. If we are right
15 about it, it is a complete answer to both of the claims.
16 We say we are right about it and indeed that it stands
17 unanswered by the claimants.

18 Of course, the defendants do not bear the burden of
19 identifying the correct counterfactual; that is the case
20 we have pleaded, but the burden is on the claimants to
21 identify the correct counterfactual. As you will have
22 seen in their skeleton {A2/1/36}, paragraph 133, they
23 suggest that the:

24 "... counterfactual is one in which the Defendants'
25 exclusivity arrangements would be removed; they would no

1 longer enter into OSAs; students would be informed that
2 they are entitled to hire their academic dress directly
3 from other suppliers; and the payment of commissions and
4 other loyalty inducing financial benefits and incentives
5 would cease."

6 So, that is the wish list in relation to
7 the counterfactual.

8 This is where we say that you come back to
9 the overarching flaw, that what they are really seeking
10 to do is to restructure the market, because when you are
11 considering the counterfactual, it is necessary to
12 isolate the alleged infringement on the part of
13 the defendant and ask: what would be likely to happen in
14 the absence of that infringement? The case law provides
15 no licence at all to start meddling with the conduct of
16 third parties, let alone restructuring the market.
17 There is simply no basis to do that as part of
18 the counterfactual exercise.

19 The principal way in which the claimants seek to
20 justify their position on the counterfactual is by
21 relying on a decision of the Irish competition
22 regulator. They say that shows that this is a likely
23 and realistic counterfactual. You have that in
24 the authorities bundle {AUTH4/4}, and you can see this
25 is an announcement, a press release of 19 December 2017.

1 So far as we are aware, that is the only document you do
2 have in relation to the Irish regulator's decision. It
3 is just the press release. There is no report that has
4 been produced that sits behind this.

5 You can see in the first paragraph:

6 "The ... (CCPC) has secured Commitments from
7 a number of Irish universities to change their
8 procurement practices in the supply of graduation gowns.
9 Following a complaint, the CCPC sought commitments to
10 ensure that tender processes would take place regularly
11 to encourage greater competition among suppliers and
12 potentially lower the cost for students."

13 Then, if we skip to the next paragraph:

14 "The CCPC engaged with the main third-level colleges
15 to make it easier for new suppliers to compete in this
16 market. Commitments were given by the National
17 University of Ireland, Trinity College Dublin,
18 Dublin City University and the University of Limerick to
19 put a number of measures in place in order to facilitate
20 more competition and ensure increased transparency in
21 the supply of gowns, including ..."

22 Then there are three bullet points, one:

23 "A reduction in the length of the supply contracts
24 to no more than two years with a one-year extension in
25 place for the on-campus supply and fitting of graduation

1 gowns."

2 Two:

3 "The decoupling of photography and gown supply
4 contracts."

5 Three:

6 "Each university must state clearly on its website
7 that students have the option of sourcing gowns from
8 other suppliers if they choose to do so."

9 So those are the three commitments that we know
10 about it.

11 Now, we say that the claimants' reliance on this
12 decision as the principal plank of their counterfactual
13 case is a point against them, it is not a point that
14 assists them. It underscores the fact that only
15 regulatory intervention could seek to change
16 the structure of the market and that the regulator
17 proceeded, in this case, by securing commitments from
18 universities and indeed not from the suppliers. Here,
19 in our case, the tribunal simply cannot assume that
20 there will be any regulatory intervention here, and
21 there is no question of any commitments being secured
22 from the universities.

23 MR LOMAS: I understand all that, Mr Patton, and that has
24 been clear, but does it not at least go as far as to
25 show there are other structures that are viable in

1 a gown or an academic dress market?

2 MR PATTON: Well, I will come on to the question of
3 viability in a moment, if I may. But viable if they --
4 if the universities agree to bring those about because
5 they are told by the regulator that they must do.

6 I mean, that is a --

7 MR LOMAS: Well, gave commitments to it.

8 MR PATTON: They gave commitments, one assumes under
9 the threat that if they did not, the regulator would
10 exercise --

11 MR LOMAS: They had not given them before.

12 MR PATTON: Yes, I am sure.

13 Now, we say it is striking, when you look at what
14 the commitments are, that they fall very far short of
15 the claimants' case on the counterfactual that I took
16 you to at paragraph 133. It has only one of their four
17 elements which is informing students of the right to
18 shop around, and there does not seem to have been any
19 commitment to identify who the other suppliers are, it
20 is simply to say that they have the option of sourcing
21 gowns from any other suppliers that might be out there.

22 Now, there is no prohibition in the Irish decision
23 on universities continuing to promote only the official
24 supplier. So there is no suggestion that exclusivity in
25 terms of promotion is impermissible, obviously subject

1 to the caveat that they have got to say, "You do not
2 have to do this", but there is no suggestion that they
3 have to promote anyone else. There is no suggestion
4 that there is any problem about commission being paid to
5 the universities, and I will expand on that in a moment.
6 There is no prohibition on bundling components of
7 academic dress together, so the gown, the hood and
8 the mortar board together. That is not prevented.

9 The commitment that there is in relation to
10 the frequency of re-tendering, that is a point that does
11 not assist the claimants, first of all because that is
12 not part of the counterfactual case that they advance,
13 as we saw in paragraph 133, and of course it would not
14 assist them anyway because they are not seeking to bid
15 for the tenders in the B2B market. That is the point
16 that Mr Randolph made clear in response to, I think,
17 the Chairman and Mr Lomas.

18 Now, that is the announcement that was given in
19 2017.

20 The tribunal should be aware, there is material
21 about what has happened following that announcement in
22 Ireland, and there is no live witness who is going to
23 give evidence about that, but the documents are before
24 the bundle, and I am just going to take you to a few of
25 them and I am going to suggest that one sees two things.

1 The first is that commission remains absolutely central
2 to the process in Ireland, and, second of all, that
3 the restriction on duration, if I can call it that, or
4 the requirement to tender only for a two year plus one
5 term, that that ends up being abandoned by some of
6 the universities.

7 So if I can just follow that through by reference to
8 one of the universities that gave the undertakings, that
9 is Dublin City University, as we see named in the third
10 paragraph here. If we can start at {F3/1875}.

11 Frustratingly, the dates are blacked out here, but I can
12 tell you that this is a tender from 2018, and if you
13 look at page {F3/1875/6} you can see that I am not
14 making that up. In paragraph 2.6.2, the tender deadline
15 is June 2018, so this is a tender in 2018, after
16 the Commission's decision in December 2017.

17 If we look at page {F3/1875/3}, you can see, in
18 the middle of the page -- well, paragraph 1.4, that
19 the term is for two years. Those are the words in bold
20 at the end of 1.4, and 1.5. They reserve the right to
21 extend the time for a period of up to 12 months of one
22 such extension. So, so far, the term is in accordance
23 with the commitment that was given.

24 Then if we could look at page {F3/1875/15}, at
25 the foot of the page you see the "Award Criteria":

1 "The Services Contract will be awarded in accordance
2 with the following criteria ..."

3 The first criterion is "Operational Delivery".

4 Then over the page {F3/1875/16} one sees the heading
5 "Cost", and there are three parts to that:

6 "i) Cost of academic dress ... for graduands -
7 pre-booked.

8 "ii) Cost of academic dress hire for graduands -
9 booked on the day."

10 Then:

11 "Value of annual concession fee to DCU."

12 So that is simply what they call the commission, and
13 one can see that is given a weighting of 60 out of
14 the points that are available for the tender submission.
15 So, commission clearly being sought and given weight in
16 the scoring of the bids.

17 Now, if one can next go to {F3/2838}, this is
18 a notice that is published publicly regarding the award
19 of the contract following the tender procedure, and this
20 is, I think -- yes, this is the one in respect of
21 the DCU contract. If you could look at page
22 {F3/2838/2}, at the foot of the page, one can
23 see "Information about tenders":

24 "Number of tenders received: 1."

25 So the tender has result in only one supplier

1 actually being prepared to put in a bid for this
2 contract, which does not suggest that the Commission's
3 intervention has increased commission; there is only
4 the one bidder.

5 If we could go next to {F3/2802}, this is the notice
6 that has been published in respect of tender by DCU, by
7 the same university, in 2021, and if we could look at
8 page 2 {F3/2802/2}, at the foot of the page, one can see
9 right at the bottom of the page that the duration of
10 the contract being tendered now is 36 months with one
11 12-month essential. So, one can infer from that that,
12 having received only one bid for the original tender,
13 the decision is then made, whether for that reason or
14 a combination of reasons, to increase the duration to
15 36 months, so it is not actually any longer in
16 compliance with the undertaking that was originally
17 given.

18 Then if we could look at {F3/3014}, this is
19 the specification for the 2021 DCU tender.

20 THE EPE OPERATOR: Sorry, can I have that page again,
21 please?

22 MR PATTON: {F3/3014}, please.

23 (Pause)

24 I am sorry, Mr Operator, I wonder if your system is
25 fully updated, because I have that in a pdf format,

1 {F3/3014}.

2 (Pause)

3 THE EPE OPERATOR: Sorry, I do not have that.

4 MR PATTON: Okay, I have downloaded it myself. But if I can
5 just tell the tribunal at the moment, and perhaps I can
6 come back to this at some later stage, if one looks at
7 pages 3 and 4 {F3/3014/3-4} it is just to confirm that
8 the concession fee remains one of the key criteria for
9 the award of this tender, so commission again remaining
10 part of the process in Ireland.

11 I do not need to take you through all of
12 the documents that we have from Irish universities, but
13 there was at least one other university where they have
14 increased the duration from two years to three years,
15 and there are tenders by the National University of
16 Ireland, which is another of the university that is gave
17 the commitments, where similarly weight is given to
18 the concession fee as part of the tender process. So no
19 suggestion at all that commission is impermissible. On
20 the contrary, it is still being given important weight.

21 MR RIDYARD: Is there any indication of whether

22 the commissions have changed, whether they have been
23 reduced, because you might expect that to happen if
24 there is less certainty on the part of the winner?

25 MR PATTON: The answer is I do not know, but I will take

1 a look at the documents that we have and see whether
2 I can come back to you on that, if I may.

3 Now, we say that even if there were any basis for
4 taking a foreign regulator's decision and parachuting it
5 in to the question of the counterfactual here, there
6 would be no basis at all for simply looking at
7 the regulator's press release without also considering
8 what has happened in practice, because what you are
9 concerned with is what is realistic and, in response to
10 Mr Lomas' question, what is viable. Well, this is an
11 indication of what has actually proved viable on
12 the part of the Irish universities. The limit on
13 duration has been short-lived, the continued emphasis on
14 commission is inconsistent with the claimants' case.

15 Quite apart from all of that, we say that there is
16 no evidence before you that the Irish regulator's
17 decision has had any beneficial effect on prices for
18 students, or otherwise on the parameters of competition.
19 So given that that is the key question that you are
20 looking at, there is no evidence before you to that
21 effect. So we would suggest that their key plank of
22 their counterfactual case is unsound. There are
23 a number of other points that they rely on in relation
24 to their counterfactual case and I will deal with those
25 in due course. We say, if you find that their case on

1 the counterfactual is not sustainable, it follows that
2 they will have failed to establish anti-competitive
3 effects and the consequence of that is that both of
4 the claims will fail.

5 I am conscious of the time. I have just a few small
6 points to mention at the end. I do not know whether it
7 would be convenient to sit for five minutes and then --

8 THE CHAIRMAN: Is that literally it of your opening?

9 MR PATTON: Yes.

10 THE CHAIRMAN: Are you going to deal with the eco-claims?

11 MR PATTON: I was not intending to open on them, because
12 I feel that I have set it out sufficiently in writing,
13 but if the tribunal has any questions for me, I am very
14 happy to deal with this.

15 THE CHAIRMAN: The only question is the suggestion that it
16 is not clear whether you are alleging that a particular
17 witness was or was not party to deceit and that is
18 critical to be cleared up in advance of the witnesses'
19 evidence.

20 MR PATTON: I accept that. We have not been asked before,
21 but I am very happy to be clear. We do contend that
22 both Ms Nicholls and Mr Adkins knew that the implied
23 representation was untrue.

24 THE CHAIRMAN: Right, thank you.

25 I think if we carry on for five minutes now.

1 MR PATTON: I am grateful.

2 Can I just make one or two points on the scope of
3 the case that the claimants are advancing. This relates
4 to their skeleton at {A2/1/30} and it is
5 paragraph 114(i). That makes an allegation that:

6 "Early attempts to operate a 'direct to consumer'
7 business model were sabotaged by the Defendants through
8 use of legal threats over copyright."

9 So that's (ii).

10 Then over the page {A2/1/31}, (vii), the suggestion
11 that the defendants are supporting a claim that has been
12 broad by St Andrews University for passing off. So that
13 is (vii).

14 Now, I perhaps should have made that point in our
15 skeleton, but just to make sure the tribunal is aware of
16 this. You can see that the first point is supported by
17 a reference to paragraph 11 of Ms Nicholls' first
18 witness statement -- that is footnote 90 -- and the last
19 point is at footnote 97, supported by paragraphs 22 to
20 29 of Ms Nicholls' witness statement. Now, those were
21 actually allegations which, when they appeared in
22 Ms Nicholls' statement, we took objection to them as
23 being new and unpleaded allegations. These were not
24 the ones that you, Mr Chairman, had to rule upon because
25 they were resolved by agreement, but unfortunately that

1 agreement was not reflected in the form of the witness
2 statements that were uploaded onto the Magnum system, so
3 can I just show you.

4 If one looks at {D2/1/3}, this was paragraph 11 and
5 indeed paragraph 12 of Ms Nicholls' statement, which was
6 relied on for the first proposition. That has now all
7 been struck through by agreement reflecting the fact
8 that that allegation was not permitted, or it was agreed
9 should not be advanced. Now, that may be different from
10 the version that the tribunal has looked at previously,
11 so it is right that you should be conscious of that.

12 A similar strike-through is in Mr Adkins' first
13 statement, paragraph 116 {D2/2/29}, and that should be
14 on the screen now, just in case you had not seen that.

15 Similarly, in relation to the St Andrews allegation,
16 if one looks at {D2/1/7} you see that the last sentence
17 of paragraph 29, that has also been struck through. So
18 I thought the tribunal ought to be aware of that.

19 One other point, just on the claimants' witness
20 statements generally. This is really a point that
21 the Chairman put to me. We would suggest that although
22 these statements say that they have been prepared in
23 accordance with the new practice direction and they set
24 out only matters from the witnesses' personal knowledge
25 and they do not seek to argue the case, there is

1 actually a great deal of argument in the witness
2 statements, and the passage to which I took you earlier
3 is a good example of that. I counted that
4 the word "should" appears in those paragraphs 11 times
5 in succession. Now, this will be a matter for comment
6 in closing, but I am not proposing to cross-examine, in
7 general, on matters of argument or opinion, and
8 I thought I should make it clear before I cross-examine
9 rather than it be said that I had left matters
10 unchallenged.

11 Then the only other thing I wanted to mention is
12 that the table of extracts from the OSAs that was handed
13 up, just to make clear, we have agreed that in the sense
14 that we have agreed that all of the clauses that are set
15 out here are taken from at least one OSA somewhere in
16 the bundles, but at times Mr Randolph suggested that,
17 for example in relation to form of contract 1 that
18 appears on page 1, these clauses appeared in all or
19 the majority of the contracts -- of a certain number of
20 contracts and I just want to make clear we do not accept
21 that.

22 So, for example, when he showed you the list of
23 services, that may be -- at page 3, that may be an
24 amalgamation from a number of different contracts rather
25 than simply being from one contract. We do not accept

1 that there is a single standard form of contract. So
2 that is a health warning. It is still a helpful
3 document, because it means that reference can be made to
4 these clauses in open court. If anything turns on
5 the particular terms of one contract or another, then
6 obviously submissions can be made about that in writing
7 with appropriate confidentiality restrictions in
8 closing.

9 THE CHAIRMAN: Do we take it that when it refers to, as you
10 call them, clauses, this is actually a quotation from
11 the document rather than a paraphrase?

12 MR PATTON: That is my understanding. I do not think there
13 is any paraphrasing. But when it says "form of contract
14 1", to the extent that that might imply that there is
15 a whole host of contracts which are all in these terms,
16 we do not accept that is correct, but obviously my
17 learned friend is free to make whatever submissions he
18 wants to make about that.

19 MR RANDOLPH: Sorry, to be clear, I was very, very careful
20 not to say that these were standard terms, because that
21 was made very clear to me. I did not. All I said was,
22 in terms of table 1, that comprises or was made up of
23 a review of 75% of the existing E&R agreements. That is
24 all I said.

25 MR PATTON: Unless I can assist the tribunal, those were my

1 submissions in opening.

2 MR LOMAS: Thank you, Mr Patton. Two short points,
3 the second one particularly probably not for now.
4 The first is, you were explaining how the commission
5 structure was used by universities to fund graduation
6 ceremonies and you took us to some correspondence, in
7 particular the list server, amongst ceremony organisers.
8 Do you accept, in your case, that, as that
9 correspondence appears to show, other models for funding
10 university graduation ceremonies are available, whether
11 it is charging more to guests or charging undergraduates
12 or whatever? The commission model is not the only one,
13 the only route by which university graduation ceremonies
14 can be funded?

15 MR PATTON: No, I accept that they could be funded in other
16 ways. It is not physically or legally impossible for
17 them to be funded in other ways, and indeed that is
18 a point on which we rely. If one is going to consider
19 the counterfactual, and insofar as it is open to
20 the claimants to say "suppose there is no commission at
21 all", they have to explain, well, why does that leave
22 the students better off, why does that not simply convert
23 the commission on a hire fee into a direct charge?

24 MR LOMAS: No, I understand that. There will be
25 a complicated economic argument as to where the cost of

1 that then falls and how it is brought.

2 The second point, which is not one that you alluded
3 to in opening but which I suspect it would be helpful to
4 have the help of both parties on at some stage, is that
5 cases that you both cite in your skeletons refer to
6 the well known series of cases dealing with
7 commissioning and rebates by dominant parties, and
8 Michelin and things like that. The gravamen of those
9 cases, it seems, is that the contracts between
10 the dominant party and non-dominant party, the customer
11 or the client, set up a series of commercial incentives
12 whereby it is deeply unattractive for the non-dominant
13 party to take their business elsewhere, but they are not
14 legally prevented from doing so.

15 I think what would be quite helpful at some stage in
16 this is to understand precisely how those cases
17 interrelate and the situation whereby the commission
18 structure sets up commercial incentives whereby it is
19 highly active(?) for the universities to push as much
20 business as possible to E&R without necessarily their
21 being formally permitted to doing so, or prohibited from
22 allowing a graduand to use anybody else's services. In
23 other words, is the abuse constituted by the commercial
24 incentives that are set by the commission arrangement
25 rather than anything else?

1 Now, I do not want you to answer that now, but
2 I think it would be quite helpful to have guidance on
3 your views from both sides on that at some stage.

4 MR PATTON: Understood. I am grateful.

5 THE CHAIRMAN: We will recommence at 2.05.

6 (1.10 pm)

7 (The short adjournment)

8 (2.04 pm)

9 MR RANDOLPH: Good afternoon, sir. May I call Ms Nicholls.

10 THE CHAIRMAN: Yes.

11 MS RUTH NICHOLLS (affirmed)

12 Examination-in-chief by MR RANDOLPH

13 MR RANDOLPH: You do not have any paper bundles, do you?

14 A. No.

15 Q. Could I ask the EPE operator to turn up -- I am going to
16 go to the non-confidential version and then
17 the confidential version of your first witness
18 statement. So the non-confidential version is at
19 {D1/1/1}.

20 Sir, if it is acceptable, I am not going to ask
21 Ms Nicholls to confirm that it is her statement with
22 regard to both confidential and non-confidential.

23 I take it that --

24 THE CHAIRMAN: Yes, I am grateful.

25 MR RANDOLPH: Thank you.

1 So go to the non-confidential, please. {D1/1/1}.

2 Can you see that?

3 A. I can, yes.

4 Q. What is that?

5 A. It is my first witness statement.

6 Q. Thank you.

7 Can you go, or the EPE operator will take you to,

8 {D1/1/35}. Is that your signature?

9 A. It is, yes.

10 Q. Is that your statement of truth?

11 A. It is, yes.

12 Q. Is it correct?

13 A. It is, yes.

14 Q. Thank you.

15 Just turning through, could you go to {F3/1405/1}.

16 What is that?

17 A. It is the exhibit to my first witness statement.

18 Q. Exhibit number?

19 A. RN1.

20 Q. Thank you. Could the operator turn up page {D1/4/1},

21 please. What is that?

22 A. It is my second witness statement.

23 Q. Thank you.

24 Can you turn to {D1/4/22}. Is that your signature?

25 A. Yes, it is.

1 Q. Good.

2 Is the statement of truth correct?

3 A. It is, yes.

4 Q. Thank you.

5 Is there anything, before I get to the exhibits on
6 it, is there anything in relation to either the first
7 witness statement that you have seen or the second
8 witness statement that you would like to alter or
9 comment on further at this stage?

10 A. No.

11 Q. Thank you.

12 Could we go to {F3/1825/1}, please.

13 THE EPE OPERATOR: Sorry, could I have that number again?

14 MR RANDOLPH: Sorry, {F3/1825/1}.

15 What is that?

16 A. It is the exhibit RN2, which was the exhibit to my
17 second witness statement.

18 Q. Thank you.

19 Can we go to {F3/1404/1}, please. What is that?

20 A. The exhibit RN3, which was another exhibit to my second
21 witness statement.

22 MR RANDOLPH: Thank you. If you stay there.

23 Cross-examination by MR PATTON

24 MR PATTON: Good afternoon, Ms Nicholls.

25 A. Good afternoon.

1 Q. If we could start just on the first page of your witness
2 statement {D2/1/1}. You tell us in paragraph 1 that you
3 are a director of Student Gowns Limited, one of
4 the claimant companies. It is correct that you are also
5 a substantial shareholder in that company; correct?

6 A. I am not, no. I do not have any current shares but
7 I have share options.

8 Q. You have share options. To what extent?

9 A. I think currently to about 4.5% of the business,
10 approximately.

11 Q. Now, if you turn over the page at page {D2/1/2}, you say
12 at paragraph 4 that you joined SGL as an employee in
13 March 2018; do you see that?

14 A. Yes. Yes, that has just come up.

15 Q. Now, can we look at page 27 {D2/1/27}, at paragraph 119
16 of your statement where you say:

17 "If this had been a truly competitive marketplace,
18 we would have been able to begin manufacturing and
19 supplying regalia to students earlier than 2018.

20 The initial market intelligence we had through our early
21 due diligence necessitated that we devote the time and
22 resources we had to researching and finding ways to
23 overcome the obstacles presented by E&R's monopoly in
24 the market, such as making a complaint to the CMA,
25 raising awareness of anti-competitive conduct in

1 the media and developing strategies to overcome
2 the legal challenges that we knew E&R would deploy to
3 bully us out of the market before we had a chance to
4 properly enter. Without these obstacles we would have
5 been in a position to focus on purchasing stock,
6 launching the brand and supplying students for
7 ceremonies in 2017, perhaps even the end of 2016."

8 Now, you were not involved in any of the Churchill
9 UK business in 2016 or 2017, were you?

10 A. No.

11 Q. You do not have any personal knowledge as to what
12 Churchill was able to do prior to March 2018, do you?

13 A. I was provided when I applied for the job with reading
14 materials, which included things like the complaint to
15 the CMA. So obviously I had seen quite a lot of
16 the work that had been done prior to my joining
17 the company.

18 Q. You do not give any personal knowledge of your own in
19 relation to what the business was doing prior to 2018;
20 do you agree?

21 A. Aside from looking at the documents, no.

22 Q. I am going to look at the position in March 2018 when
23 you joined. Could you be shown {F3/1102}. Could we
24 please look at page 2 {F3/1102/2}. Do you see here
25 there is an email dated 23 March 2018 sent from your

1 email account; do you see that?

2 A. I can see that, yes.

3 Q. The signatory is -- it says underneath "Kind Regards",
4 the signatory is given at Jordan Sinclair?

5 A. That is correct, yes.

6 Q. Did you write this email?

7 A. I did, yes.

8 Q. Jordan Sinclair was a false name that you used; is that
9 correct?

10 A. It was, yes.

11 Q. Presumably you had not intended to send the email from
12 your own email account?

13 A. No, we did not.

14 Q. I am sorry, what do you say?

15 A. No, we did not.

16 Q. "We did not". Who is "we"?

17 A. It was not the intention that it be sent from a personal
18 email address. I cannot remember whether we had --
19 I think we had kind of discussed sending this email but
20 sending it under an alias.

21 Q. Thank you, but when you say "we", can you identify
22 the human beings that you mean?

23 A. I do not remember specifically but I imagine it would
24 probably have been myself, Oliver, and potentially Alec
25 and Stefan as well.

1 Q. When we read the email we see that it is addressed to
2 the De Montfort University Graduation Department, and it
3 says:

4 "I am a freelance journalist putting together
5 a piece about the graduation market in the UK and I am
6 currently researching different university policies.
7 Does De Montfort University have a rule preventing
8 students from choosing alternative suppliers of
9 graduation services such as academic hoods, gowns and
10 memorabilia? Or are students free to choose where they
11 source these services from, provided they comply with
12 the university regulations?"

13 Just focusing on the first sentence, "I am
14 a freelance journalist", that was not true, was it?

15 A. No.

16 Q. You knew it was not true?

17 A. I did, yes.

18 Q. When it says that you were "putting together a piece
19 about the graduation market in the UK", that also was
20 not true, was it?

21 A. No.

22 Q. You knew it was not true?

23 A. No.

24 Q. So do you accept that the first sentence of your email
25 is a lie?

1 A. It is -- yes, it is not true. The reason why we phrased
2 it in those terms is because we thought that
3 the universities would not give an honest answer
4 directly to us if they knew it was us who were asking,
5 and indeed in the past they have given different answers
6 to us and, for example, students. So that is why we
7 potentially contacted them under an alias, you could
8 say.

9 Q. Do you accept that the first sentence is a lie?

10 A. Yes.

11 Q. You said that you did not think the university would
12 give an honest answer. Are you suggesting that
13 the university would have given a dishonest answer?

14 A. Well, in the past, universities have said to us, under
15 the guise of Churchill Gowns, that for example students
16 are free to choose; but then when students have
17 contacted them, they have said they are not free to
18 choose. So we had experience of universities telling us
19 one thing and students another anything.

20 Q. You did not have any of this experience as of
21 23 March 2018, did you?

22 A. Well, I had seen, for example, that in statements given
23 to the press that the defendants and universities had
24 said students are free to choose, but I had also seen,
25 for example in the dossier that we compiled for the CMA

1 that that was not borne out in communications from
2 universities to their students.

3 Q. Is it not true that you thought the university would be
4 more likely to respond to a request from someone who was
5 said to be a journalist than from someone who was in
6 business?

7 A. It was not so much whether I thought they would be more
8 likely to respond, but I thought the answer that they
9 gave might be different if they knew it was coming from
10 us.

11 Q. Do you say it was an ethical way to behave, to state
12 this lie in the email that you sent?

13 A. I think, in light of the opposition that we faced in
14 the market, on occasion we had to use tactics such as
15 this to gather evidence as to whether or not we would be
16 obstructed at a specific university. Part of the reason
17 for doing this was that we wanted to decide which
18 universities to target in our first year and then we
19 were trying to gather information as to which might be
20 more or less hostile to us in the market.

21 Q. So is it your position that anything that will assist
22 Churchill in its business justifies the means?

23 A. I would not say anything, but certainly I think tactics
24 such as this in the situation that we found ourselves in
25 were a reasonable response.

- 1 Q. Now, this must have been sent very shortly after you
2 start working with Churchill; is that correct?
- 3 A. Yes.
- 4 Q. You have already alluded to this, but this was something
5 that you discussed, you think, with Mr Muff; is that
6 correct?
- 7 A. I believe at this time both the Australian directors, so
8 Alec and Stefan, were in the UK, so we were all working
9 on the business together for around the first
10 three/four weeks of my employment. So they would have
11 probably been in the room at the point at which this was
12 discussed.
- 13 Q. Do you recall whose idea it was to lie about being
14 a journalist?
- 15 A. I do not know.
- 16 Q. But so far as you recall, Mr Muff was happy for you to
17 do so?
- 18 A. I do not remember specifically who was involved in those
19 conversations, so I would not want to guess,
20 necessarily.
- 21 Q. Did you keep a copy of this email?
- 22 A. I would assume it would be somewhere on my email server.
- 23 Q. The claimants have not disclosed a copy of this email.
24 Do you know why that might be?
- 25 A. I would suggest that it would not fall under one of

1 the categories of disclosure or one of the key searches
2 that we did.

3 Q. Do you say that you formed the view that it was not
4 disclosable? Is that the reason you think it was not
5 disclosed?

6 A. It is certainly not an email that I came across when
7 I was doing the disclosure exercise, so it was not one
8 that came up and we decided not to disclose it; it was
9 one that did not come up in our searches.

10 Q. Did you send this type of email to other universities?

11 A. I believe so, yes. I think we sent it to more than one.
12 I cannot remember how many.

13 Q. All of them would have made the same claim about you
14 being a freelance journalist; yes?

15 A. I believe what happened was we sent one or two under
16 a kind of mail merge, and then realised it had come from
17 my address so we stopped at that point.

18 Q. So the reason you stopped was because you realised you
19 had given the game away by sending it from your own
20 email address; correct?

21 A. Correct.

22 Q. Could you go in your witness statement to paragraph 104,
23 which is at {D2/1/24}. You say:

24 "After I joined in March 2018, we procured
25 the hoods, and some additional caps and gowns, to enable

1 us to launch at 18 universities in the UK. This meant
2 we had the regalia to supply a full graduation gown set
3 to the bachelors students at these 18 universities."

4 So the procurement of hoods, that took place after
5 you joined in March 2018; yes?

6 A. Yes, I think mostly -- I think some work had been
7 started before I joined in March 2018, particularly with
8 looking for fabrics, but in terms of placing orders for
9 the hoods, that occurred after I had joined.

10 Q. So at the time you joined in March 2018, the claimants
11 did not have any hoods for UK universities; correct?

12 A. That is correct.

13 Q. So, at the time you joined, the claimants were not in
14 a position to supply a full graduation gown set for
15 a single university; correct?

16 A. That is correct.

17 Q. Now, over the page, page 25 {D2/1/25}, at paragraph 108
18 you say:

19 "Unfortunately we did not hit the sales figures we
20 had hoped for in 2018. We consider that this was due to
21 the impact of the exclusivity agreements and
22 the consequential interventions of E&R and universities
23 in the market which I have outlined above. This meant
24 we did not make any profits in 2018 and instead had to
25 raise further investment for working capital and to

1 expand our range of stock for subsequent years."

2 Now, could you be shown {F3/1972}, please. Is it
3 right that these are images of a conversation on Slack;
4 is that correct?

5 A. Yes, that is correct.

6 Q. That is a method by which you communicated with
7 Mr Adkins, Mr Muff and Mr Ramsey; is that correct?

8 A. Yes, that is correct.

9 Q. We see at the top of the page a date of 26 April 2018
10 and then your comment at 5.54 pm. You say:

11 "I'll start by saying I think the only hood for
12 a graduation taking place BEFORE July 16th we can
13 realistically produce is Oxford. All others have
14 effectively dropped off the cutoff dates. I would
15 therefore definitely recommend that we start production
16 with 250 B8 gowns and get them shipped in 2 weeks time,
17 making the Oxford first ceremony date of July 14th."

18 Do you see that?

19 A. That is -- yes, that is right.

20 Q. So, the position that you saw on 26 April was that it
21 was already too late to order hoods for any graduation
22 taking place before 16 July; correct?

23 A. I think that was the position as I assessed it at that
24 stage. I think in actuality we did manage to produce
25 some hoods for earlier ceremonies, as it transpired.

- 1 Q. Well, I do not know what you are referring to, but
2 the position certainly at this date was that you thought
3 it was too late for any ceremony before 16 July?
- 4 A. Yes, that was my understanding at this point.
- 5 Q. Do you agree that a number of universities have their
6 summer graduation ceremonies in June?
- 7 A. I would say that very few have them in June. The peak
8 period is usually July. The first two/three weeks of
9 July is, I would say, the busiest time period for
10 graduation ceremonies.
- 11 Q. Oxford and Cambridge in June; do you agree?
- 12 A. Well, according to this, it looks like Oxford is on
13 14 July.
- 14 Q. What about Cambridge?
- 15 A. I think Cambridge is in June, but we were not targeting
16 Cambridge during this particular graduation season.
- 17 Q. Exeter and Durham, also in June?
- 18 A. I would have to check. Again, those ones were not ones
19 that we were targeting in this year.
- 20 Q. Do you recall when you actually placed the order for
21 hoods?
- 22 A. I do not recall off the top of my head, no, but based on
23 this, I would imagine that it would be end of
24 April/early May.
- 25 Q. If we look at {F3/9}, does that look like the first

1 order for the hoods, dated 9 May 2018?

2 A. Yes.

3 Q. Do you know when they were delivered, the hoods?

4 A. I do not know off the top of my head, no. I would
5 imagine late June, but I would have to check.

6 Q. Late June?

7 A. Yes.

8 Q. Could we look at {F4/260}, please. This is
9 marked "Confidential", but I am not intending to read
10 out anything that is confidential.

11 Now, this is, you can see, Churchill Gowns' business
12 plan dated 15 June 2019 and the logo "Foundation East"
13 appears at the top of the page. Did you make an
14 application for a loan to Foundation East? Is that
15 the context for this document?

16 A. We did, yes.

17 Q. Did you draft this application?

18 A. I believe I drafted some of it and Oliver drafted some
19 of it and we compiled it into one document.

20 Q. Did you review the whole document before it was
21 submitted?

22 A. I would say that is likely, yes.

23 Q. Now, if we look at page 2 of the document {F4/260/2},
24 you can see a heading "Brief Overview of Your Business":
25 "Describe what your business does and summarise any

1 trading history."

2 Do you see in the middle of the page it says:

3 "We launched to the UK market in May 2018 ..."

4 Now, is that accurate?

5 A. Yes, I would say so.

6 Q. Do you agree that Churchill had not launched at any time
7 before May 2018?

8 A. I believe it was possible to order, for example, a cap
9 and gown, but we recognised that, given that students
10 are required to order a cap, gown and hood together as
11 a bundle that it would be difficult for us to make
12 inroads into the UK university market until we could
13 offer the cap, gown and also hood, so a full set for
14 a given university. So that was what happened around
15 May 2018.

16 Q. That is what you regarded as launching to the UK market?

17 A. Yes, I would say so.

18 Q. Now, if we go to page 11 of this document {F4/260/11} --
19 actually, page 12 {F4/260/12}, do you see the question:

20 "Why do you believe that your sales forecasts are
21 realistic?"

22 It says:

23 "Our sales forecasts reflect an achievable increase
24 on the sales we achieved in our first year of trading."

25 That is a reference to 2018, the 2018 season, is it

1 not?

2 A. Yes.

3 Q. Then it says:

4 "In 2019 we are forecasting an average market
5 penetration of 3% at the universities. Our average
6 market penetration in Summer 2018 was 0.53%, however we
7 believe that our projected increase is justified
8 because:

9 "[1] Our seed investment raise took longer than
10 expected, which delayed production of the hoods and
11 meant we did not know which universities we were
12 targeting until late May 2018."

13 That is true, is it not?

14 A. Yes, it is true.

15 Q. So the thing that had delayed production of the hoods
16 was that the seed investment raised took longer than
17 expected; do you agree?

18 A. That was one of the reasons I have given, but if you
19 look at the third reason, I do talk about the concerns
20 that students have from ordering from us.

21 Q. Okay, but the first reason you give is that the "seed
22 investment raise took longer than expected"; so
23 presumably that was the primary reason?

24 A. I would not say I did it first because it was
25 the primary reason; it was just one of many reasons

- 1 I listed.
- 2 Q. Because the seed investment raise took longer than
3 expected, you did not have any money to buy hoods;
4 correct?
- 5 A. Well, we had the money to purchase the stock in time for
6 the summer graduation season, which is obviously when we
7 needed the stock, but we did not have time to order it
8 earlier in the year. In subsequent years we would
9 usually order our stock around sort of February/March,
10 so ideally we would have been in a position to order it
11 earlier; but from my recollection, the last of
12 the investment money came in sort of end of March/early
13 April.
- 14 Q. Until that investment money came in, you were not in
15 a position to order the hoods; correct?
- 16 A. I think we would have been in a position to order some
17 stock. Obviously the kind of investment money is paid
18 to us through the investors individually, so over and
19 around an investment that may take three/four months, we
20 would typically receive various cheques over the course
21 of that period, and certainly we would have had some
22 money at the point at which I started my employment,
23 because that was the money that was used to pay mine and
24 Oliver's wages.
- 25 Q. Anyway, you decided not to order it until you had

1 the seed investment monies actually paid to you;
2 correct?

3 A. I would say that was one of the factors. The other
4 factor was some difficulties we had around kind of
5 matching the hoods and deciding which universities we
6 would be able to target, and also doing the type of
7 market research that you alluded to before, to find out
8 which universities would be more or less hostile to our
9 presence.

10 Q. You did not know until late May 2018 which universities
11 you were going to be targeting in the 2018 season; that
12 is accurate, is it not?

13 A. Yes, we had a sort of long list, but it was at the end
14 of May 2018 that we had kind of crystallised it
15 into: these are the specific ones we'll target.

16 Q. You accept that that left you with very little time to
17 advertise to students graduating in July; do you agree?

18 A. Yes, I mean, I would say that most students, based on
19 our current experience, place their orders for their
20 graduation gowns a month ahead of time. So, even if we
21 began advertising in May, I think it is likely that
22 a lot of students would not have already placed their
23 orders.

24 Q. You see, you are very concerned to downplay all of these
25 points now as an explanation for your poor performance

1 in summer 2018, but in this loan agreement, this was
2 the explanation you gave for why you had achieved only
3 0.53% market penetration in summer 2018.

4 What is the difference between what you said here
5 and what you are saying today?

6 A. I would agree that these were some factors. I have
7 listed a number of factors, including the concerns that
8 students have. I did not intend to give any particular
9 weight to putting the seed investment point first as
10 opposed to any other factor. But yes, I would agree
11 that there were a number of factors, but I do not think
12 that they would have created an unassailable obstacle to
13 our achieving success in the first summer. Certainly
14 a large number of the universities we targeted that
15 first year graduated in September and October, so
16 the point about advertising would not apply to those.

17 Q. Right, so, I mean, for example, here you clearly make
18 the point you did not know which universities you were
19 targeting until late May and that "left us very little
20 time to advertise to students graduating in July";
21 whereas now what you are saying to the tribunal is, "It
22 does not really matter because we only needed a month to
23 advertise".

24 How do you explain that discrepancy?

25 A. Well, as I said, quite a lot of the universities we

1 chose to target in the first year, and what I was
2 alluding to on the Slack conversation, was that we
3 specifically targeted a lot of universities that either
4 graduated later in July or in September/October, I think
5 in one case November as well, and obviously what I was
6 pitching in terms of our potential for growth in 2019
7 was that we would be in a position to target students
8 graduating in July and target more of those universities
9 with a longer lead time.

10 Q. Well, the point you were making in this application was
11 that you had made mistakes in 2018 and those explain
12 the low market penetration in 2018. That is the point
13 you were making here, was it not?

14 A. I would not characterise them as mistakes. It was
15 simply a case of, you know, being able to match
16 the fabric and having the kind of investment marry up
17 with the time needed to match the fabrics and also
18 conduct research into which universities we should be
19 targeting in our first year. Obviously we wanted to
20 approach that quite carefully and kind of identify which
21 universities we should be targeting. So I would not
22 characterise it as a mistake.

23 Q. I suggest that when you look at paragraph 108 of your
24 witness statement at {D2/1/25}, you do not mention any
25 of the points we see here in the loan application, do

1 you? You do not mention that the seed investment raise
2 took longer; that that delayed production of the hoods;
3 you did not know which universities you were targeting;
4 you had very little time to advertise. You do not
5 mention any of that here in paragraph 108, do you?

6 A. No, but I did mention in the Foundation East application
7 the fact that our sales figures were affected by
8 students having concerns about shopping with us, so that
9 was -- what I have written in my witness statement here
10 was reflected in the application that we made to
11 Foundation East and the concerns we raised around
12 universities telling students not to order from us.

13 Q. That is not an answer. Why did you not in your evidence
14 to the tribunal mention the points that I have shown you
15 in the loan agreement? Why are they not in
16 paragraph 108?

17 A. I do not know.

18 Q. Well, it is a misleading explanation, is it not, or it
19 is at very best incomplete?

20 A. I would say that, from our perspective and also
21 the experience we have had in the subsequent years,
22 you know, we have seen that, even with a longer lead
23 time, having plenty of time to procure stock in
24 subsequent years, we have not seen -- in 2019 we did not
25 see a dramatic increase in uptake for our products, so

1 therefore that leads us to conclude that the main factor
2 of the several that we identified to Foundation East
3 that was preventing us, it was this one that remained
4 consistent both years, which was students being
5 concerned about ordering from us.

6 Q. So are you saying that the explanation you gave to
7 Foundation East you now say is not actually a correct
8 explanation for why you did not make market penetration
9 in 2018?

10 A. I would say that based on my subsequent experience that
11 I would now have a fuller understanding and that may be,
12 looking back retrospectively and given our experience in
13 2019, factors such as lead time or the time spent
14 marketing to students did not have a big impact and
15 actually it was more concerns that students had that
16 made more of a difference.

17 Q. You see, what I would suggest is it is convenient for
18 you in this litigation now to take that view, but
19 actually, the explanation you gave at the time was
20 the accurate explanation. Do you want to say anything
21 to that?

22 A. Simply that I would disagree with that.

23 Q. Now, if we look at page 24 of your witness statement at
24 paragraph 105, you say in the third line that you:
25 {D2/1/24}

1 "... purchased enough stock to secure up to
2 250 orders at most of the universities we were
3 targeting."

4 So that is the 18 universities that you are talking
5 about there?

6 A. Yes.

7 Q. So are you saying you had hoods for an average of
8 250 people at 18 universities?

9 A. I believe they ranged from just under 250, up to some
10 universities where, if for example, they had a different
11 hood for the BA and the BSc students, we would order
12 250 -- around 250 of each. So I would say the range
13 tended to be probably just below 250 up to 500 in
14 a couple of cases.

15 Q. In terms of the total number of hoods then, are we
16 talking about a figure of around 4,500; 500; something
17 of that order?

18 A. I --

19 Q. You do not know?

20 A. I assume you have done the maths, but yes, roughly 250
21 to 500 times 18.

22 Q. Okay.

23 Then if you read on at page {D2/1/25},
24 paragraph 109, you are now dealing with the position
25 today and you say you have the full regalia to supply

1 students at 61 universities, and you now stock hoods to
2 cover a broader range of courses, and on average you
3 have sufficient hoods to supply around 140 students per
4 university.

5 So if I multiply 140 by 61, I get roughly 8,500
6 hoods. Does that sound about right?

7 A. I would assume correct.

8 Q. So essentially, in the period since 2018 you have
9 doubled the number of hoods? Is that a fair
10 understanding?

11 A. Yes, our strategy after the first year changed to
12 essentially spread our stock over a wider range of
13 universities, particularly because we found that if we
14 went for a kind of eggs-in-one-basket approach of having
15 a large number of hoods at a small number of
16 universities, we were more kind of vulnerable to,
17 you know, the university adding a logo to a hood, or
18 told students not to order from us; it could wipe out
19 a larger part of our market. So we have kind of, since
20 2018, changed tactic to spread ourselves quite thinly,
21 I guess you could say.

22 Q. Just building on that, you accept that you had only
23 sufficient stock to dress a small portion of
24 the graduands at any given university?

25 A. Yes, I would say that is fair. We have not really been

1 in a position where we have sold out very often, so
2 essentially we have tried to allocate the amount of
3 stock to our expectation of the number of orders we
4 could get, and obviously, after our experience in 2018,
5 we thought -- I think we averaged sort of around
6 20 orders per university in 2018, so we obviously did
7 not continue with the tactic of ordering 250 to 500
8 hoods; we allocated our resources to order a smaller
9 number for a wider range of universities.

10 Q. Why have you not increased your stock?

11 A. Do you mean at each university?

12 Q. Why have you not increased the total number of hoods you
13 have, for example?

14 A. Well, we have increased the total number of hoods.

15 Q. Beyond the numbers we have just been discussing?

16 A. Because that is kind of reflective of the levels of
17 demand that we have been able to achieve.

18 Q. If you had higher demand, you would not have the stock
19 to meet that demand; is that correct?

20 A. Well, if we had high demand, then obviously the profits
21 from that high demand would be reinvested into
22 increasing the amount of stock and then we would be able
23 to meet the increasing levels of demand.

24 Q. But unless and until you make profits, you do not have
25 cash to purchase additional hoods; is that fair?

1 A. Yes, our expectation was that in 2018 we would achieve
2 our targets by getting, you know, close to -- close to
3 selling out of our stock and then that would be
4 reinvested and then we could target more universities
5 and increase our stock the next year and so on and so
6 forth; but obviously we did not achieve those profit
7 levels, so we had to take a different approach.

8 Q. If you look at paragraph 111 of your statement, you
9 discuss here a number of methods that can be used to
10 raise awareness of brand; do you see that?

11 A. Yes.

12 Q. Do you agree that those methods must be not misleading
13 to students, for example?

14 A. Yes, I would agree with that.

15 Q. Could we have a look at {F3/2426}. This is a Slack
16 exchange which Mr Ramsey is writing on 13 June 2018.
17 I think we can see your photograph in an icon in the top
18 right-hand corner, so do you think he would have
19 received this?

20 A. Yes. Yes, it is a channel that we were all part of.

21 Q. If you look in the middle of the page, he refers to:
22 "... changing the link description text on our
23 facebook ads to say 'Trusted by 20,000 students'. Trust
24 seems to be a huge issue, so I think we should address
25 this upfront, and put something similar on our home

1 page ..."

2 Then in the next sentence:

3 "I am also changing the ad text to 'Cheaper.
4 Ecofriendly. Home delivered. Don't get ripped off
5 hiring through the uni - find out why over 20,000
6 students choose us instead!'"

7 We see an image at the bottom of an ad:

8 "Churchill Gowns UK (GB).

9 "Cheaper. Ecofriendly. Home delivered. Don't get
10 ripped off hiring through the uni - find out why over
11 30,000 students choose us instead!"

12 Was this a message that you did roll out in your
13 advertising?

14 A. I cannot recall what the final -- I think this was
15 a conversation drafting an ad, so I cannot recall
16 the details of the final advert that went out.

17 Q. This is in June 2018, so just a couple of months after
18 you arrived. Who were the 20,000 students being
19 referred to in this ad?

20 A. I believe it was a reference to students who had ordered
21 both in the UK and Australia.

22 Q. How many students had ordered in the UK at this point,
23 approximately?

24 A. A couple of hundred.

25 Q. This is before you have even got the hoods. On

1 the evidence you gave earlier the hoods probably did not
2 arrive until late June 2018.

3 A. That is correct, but students could book to hire for
4 dates in July. So they could book even though we did
5 not have the hoods in the warehouse, as it were.

6 Q. So a couple of hundred students in the UK know about it.

7 Did you think it was fair to have an ad for
8 Churchill Gowns UK (GB) referring to a number of 20,000
9 or 30,000 students having "trusted us"?

10 A. I think so, given that at that point, and for example on
11 the website, a lot was shared with Australia, including,
12 you know, the quality of the gowns and so on and
13 the type of service we were offering. So, I think
14 the fact that, you know, that number of students had
15 chosen to shop with Churchill Gowns and were happy with
16 their experience, whether that be in Australia or in
17 the UK, was a fair comment to make.

18 Q. So in June 2018 do you see the Churchill Australia
19 business as being part of the same business with
20 Churchill UK?

21 A. I would not say we saw it as part of the same business,
22 but certainly there were a lot of aspects that were
23 shared between the two, for example the manufacturing of
24 the gowns.

25 Q. Do you accept that a reader of this ad would have no

1 idea that of the 20,000 students, only a couple of
2 hundred of them were actually based in the UK?

3 A. I would not want to speculate what someone looking at
4 this advert would assume.

5 Q. You would not want to speculate about that?

6 A. No.

7 Q. Okay.

8 Can I ask you about your witness statement at
9 {D2/1/4}. In paragraph 17 of your statement you say:

10 "A number of universities supplied by E&R began
11 adding their crests onto the hoods. Most of the time
12 these were subtly woven into the lining fabrics or onto
13 the neckband so that they were difficult to spot unless
14 viewed close up. In the past three years we believe
15 that around ten universities have had added these logos,
16 including large institutions such as Birmingham
17 University, Leeds University, Nottingham Trent
18 University and Coventry University."

19 Could I ask you to look at {F3/2991}. This is an
20 extract from a book called Shaw's Academical Dress. Is
21 this a book that you are familiar with?

22 A. It is, yes.

23 Q. If we could look at page 3 {F3/2991/3}, right at
24 the foot of the page, the last paragraph says:

25 "Each university tries to have some diagnostic

1 feature by which its hoods can be recognised. For
2 example, of the older ones, Wales (1893) adopted shot
3 silks; Birmingham (1900), watered silks; while Belfast
4 (1909) added a binding of pale blue watered silk to
5 the old Royal University of Ireland ... hoods. A new
6 concept was introduced by Aston (1963): the lining of
7 all its hoods, and the trim on the doctors' robes, has
8 the shield of the university arms woven in. Aston
9 remained the only example of this until 1992, when
10 several of the new universities took up the idea ..."

11 Now, was that something that you were aware of, that
12 one university had its crest woven into the hood as long
13 ago as 1963?

14 A. I was not sure precisely when the Aston shield was added
15 to the hood, but I have seen an Aston hood. It is quite
16 a different style of coat of arms, though; it is kind of
17 embroidered in colour, as it were; it is not the sort of
18 watermarked, subtle university arms that had been added
19 to the universities I listed in my witness statement.

20 Q. But you were aware that one university had added a crest
21 to its hood as long ago as 1963?

22 A. I was not aware that that was the specific date.

23 Q. But some time ago?

24 A. Some time ago, yes, I would say that is fair.

25 Q. Long before you were launching in the market?

1 A. Yes.

2 Q. Were you aware that several new universities had been
3 doing this since about 1992, or at least some time ago?

4 A. I am not sure specifically which universities are being
5 referred to there. Certainly I know the ones that
6 I listed in my witness statement added the crest quite
7 recently, and also that it was that different type of
8 crest, which is sort of subtly woven into the fabric so
9 it can only be seen close up; whereas Aston, for
10 example, it is a kind of embroidered feature in full
11 colour on the hood.

12 Q. So did you or did you not know that several of the new
13 universities had been doing this for some time?

14 A. Again, without -- if you give me a specific example of
15 a university, I could tell you.

16 Q. Whether you knew? But you do not know whether you know
17 that some of them had been doing it for some time?

18 A. I had seen that the Aston hood had the embroidered crest
19 on. I believe also Manchester Met and Greenwich had an
20 embroidered crest on. I do not know whether they would
21 come under the new universities, but those are
22 potentially ones that I was already aware of. But
23 I guess what I was drawing attention to in my witness
24 statement is the types of coat of arms that are kind of
25 subtly woven in and, as it were, watermarked on

1 the hood, rather than ones where the embroidered crest
2 is kind of a design feature.

3 Q. You referred just now to Manchester Met. What do you
4 say you knew about the Manchester Met hood?

5 A. I think that it had an embroidered crest on.

6 Q. For how long?

7 A. I do not know.

8 Q. Well, are you referring to Manchester Met as one of
9 the ones that you say have added it or one of the ones
10 that has had it for a long time?

11 A. I do not know how long they have had the crest on.

12 Q. Can I just ask you, if you look at your second
13 statement, {D2/1/28}. No, it is your first statement,
14 sorry. If you look in the last four lines of 123, you
15 say:

16 "Some of the largest universities in the UK
17 including Birmingham University, Leeds University,
18 Coventry University and Manchester Metropolitan
19 University now use these trademarks in their academic
20 dress, greatly diminishing the size of our potential
21 addressable market."

22 Just so you are aware, you begin this paragraph by
23 saying:

24 "... we would have been able to manufacture gowns
25 for a broader range of universities and have a broader

1 addressable market if E&R had not conspired with some
2 universities to add their trademarks to the hoods ..."

3 So the impression you are giving here is that
4 Manchester Met has recently added trademarks; do you
5 agree?

6 A. Yes.

7 Q. Do you stand by that or not?

8 A. Yes. I think there are two points I am making here.

9 One is obviously that the ones listed such as Birmingham
10 that I mentioned earlier in the statement have
11 the watermarked crest, and also that the crests
12 themselves, when coupled with the agreements, have led
13 us to believe that the universities would be unlikely to
14 license us the rights to use the logos because of their
15 exclusive agreements with the defendants. So even if
16 the logo pre-dated the agreements, the nature of
17 the agreements being exclusive means that those
18 universities would also be unlikely to then license us
19 the right to use the logos.

20 Q. Just sticking with Manchester Met, if we could look at
21 {F3/3003}. This is a snapshot from the Manchester
22 Metropolitan University website and it refers to
23 graduation ceremonies in 2012. Do you agree that what
24 we see in the photograph is a hood with a crest on it?

25 A. Yes.

- 1 Q. So do you accept that Manchester Metropolitan already
2 had a crest on its hood back in 2012?
- 3 A. It looks that way, yes.
- 4 Q. Was that something you checked before referring to it in
5 your witness statement?
- 6 A. I think when I said that the crest had been added
7 recently, I did not have a specific time frame in mind,
8 as in I did not necessarily consider that "recently"
9 would exclude before 2012.
- 10 Q. So "recently" would not exclude nine years ago. How far
11 back do you say it would go?
- 12 A. Well, I would say probably if the crest has been added
13 while the particular university has been in contract
14 with Ede & Ravenscroft, whether formally or informally,
15 that would form part of the -- the plan, I guess, to add
16 the trademarked arms.
- 17 Q. So potentially, 100 years is "recently"?
- 18 A. Well, if that is how long they had been in contact with
19 the defendants, then yes.
- 20 Q. That is your evidence.
- 21 Now, the point you were just making orally, we can
22 see it actually made in your first witness statement,
23 {D2/1/5}, paragraph 19. This is the point you make
24 about getting a licence of the universities' trademark
25 rights that you were just making orally, and it is true

1 that you have never asked a university for a licence,
2 have you?

3 A. No.

4 Q. Now, moving on in the same bit of your witness
5 statement, look at paragraph 20. You say:

6 "For example, I recall that our ambassador at
7 Canterbury Christ Church University told Ollie that she
8 was struggling to encourage students to order from us
9 because they had to hire their gown from E&R if they
10 wanted official photos on their graduation day."

11 Just to be clear, you are describing here what
12 Mr Adkins told you that he was told by the ambassador;
13 is that correct?

14 A. Yes. I remember Ollie having a conversation on
15 the phone with the ambassador at Canterbury Christ
16 Church and she said that one obstacle she was having is
17 that students wanted to order the official photographs
18 from Ede & Ravenscroft and that the kind of process for
19 ordering was set up in such a way that that meant they
20 would get their gown from them as well.

21 Q. You are giving evidence of what Mr Adkins told you about
22 a conversation he had in 2018; is that correct?

23 A. Yes.

24 Q. You do not have any other record of that call, do you?

25 A. I do not, no.

1 Q. Even assuming your recollection is accurate, you did not
2 seek to verify that what you think was being said was
3 true, did you?

4 A. Well, there would not really have been a way for us to
5 verify, because in order to kind of log into
6 the portals, you have to have a student reference
7 number, so we would not have been able to check that
8 that was the set-up at that university.

9 Q. But you did not ask the university, did you?

10 A. We did have some correspondence with Canterbury Christ
11 Church that year, because they had told -- they sent an
12 email out to all of their students saying that they
13 could not order from Churchill Gowns, and then when our
14 lawyers got in touch with them, they then retracted that
15 statement and told students that they were able to order
16 from us. So that was the extent of our conversation
17 with Canterbury Christ Church that year.

18 Q. Yes, so the point that you were making here at
19 paragraph 20, that people had to hire their gowns if
20 they wanted official photos, that is not a point that
21 you put to the university; is that correct?

22 A. I do not recall the detail of the letter that our
23 lawyers sent to the university.

24 Q. You do not have a recollection of checking that point
25 with the university?

1 A. Not personally, no.

2 Q. Now, the position is that E&R has not required students
3 at Canterbury Christ Church University to hire their
4 gown from E&R if they want official photos. Those are
5 my instructions. You do not have any basis to go beyond
6 that, apart from your recollection of what Mr Adkins
7 told you about what someone had said to him on
8 the phone; is that correct?

9 A. That is correct.

10 Q. Now, if you turn over the page at paragraph 30 -- two
11 pages {D2/1/8} -- sorry, page 8, at paragraph 30, this
12 is what you were just saying about students from
13 Canterbury Christ Church who had ordered, seeking
14 refunds, because they had been told by the university to
15 wear academic address supplied by E&R, yes?

16 A. Sorry, did you say paragraph 30?

17 Q. Yes.

18 A. Yes, I have that.

19 Q. That is what you were referring to just now?

20 A. Yes, that is correct.

21 Q. Then you say:

22 "After contact with our lawyers
23 [the university] responded stating that they would
24 retract this email and inform students that they could
25 purchase from us if they wanted."

1 If we just take a look at that. That is {F3/701} --
2 if you would not mind enlarging that, please. It says:

3 "We confirm that Canterbury Christ Church University
4 will permit graduands who have been supplied with their
5 academic dress by other providers (inter alia your
6 client) to attend the ceremony provided the academic
7 dress conforms to the aesthetic of the Canterbury Christ
8 Church University gown appropriate to the level of
9 qualification ..."

10 Then:

11 "We confirm that we intend to send out
12 a communication to all of our graduands to clarify this
13 position in advance of the ceremonies."

14 So far as you are aware, that was sent out?

15 A. As far as we know, yes, although we did not have sight
16 of it.

17 Q. But you have no reason to doubt it was sent out as they
18 had said they would?

19 A. Yes.

20 Q. Then you say: {D2/1/8}

21 "As a result CCCU ended up being our second
22 best-selling university in 2018, illustrating what a big
23 impact read these communications from universities to
24 students enforcing their exclusivity agreements have on
25 demand for our services."

1 Can we just have a look at {F3/2640}. I am not sure
2 why that is in native format because it is different on
3 my system.

4 Just while we are waiting for that, do you accept
5 that ever since this exchange of correspondence you had
6 with CCCU in 2018, CCCU has made clear on its website
7 that students are free to buy from other suppliers?

8 A. I believe that is the case, yes. I believe they say
9 something along the lines of: you can buy -- order from
10 our suppliers as long as it conforms to the dress code;
11 or --

12 Q. You are content with that form of notice, are you not?

13 A. I would say so, yes.

14 Q. So if we look at the spreadsheet and if you see row
15 16 -- in fact, could you open the other worksheet,
16 "Sales Comparison". Yes.

17 This is a spreadsheet that you had available when
18 you prepared your witness statement, is it not?

19 A. I believe so, yes.

20 Q. You actually mention it, I think, in a paragraph of your
21 witness statement.

22 A. Yes.

23 Q. This worksheet compares the orders in each year by
24 university; correct?

25 A. That is correct, yes.

- 1 Q. If we look at row 16, that is CCCU, so that is
2 the university we have been talking about; yes?
- 3 A. Yes.
- 4 Q. So do I understand from this you had 82 orders in 2018;
5 correct?
- 6 A. Yes.
- 7 Q. Then in 2019 you have 40 orders; do you see that?
- 8 A. That is right, yes.
- 9 Q. That is despite the fact that, as I think you have just
10 accepted, in 2019, CCCU had the same notice making clear
11 that students were free to order from other suppliers;
12 correct?
- 13 A. Well, that was the notice that was on their website.
14 Obviously we do not have sight of other communications
15 that universities send out. Obviously we are aware that
16 often students will be contacted about their graduation
17 and sent a link with an email, for example, directing
18 them to the defendants. So whilst that was
19 the statement on their website, we do not know
20 the extent to which students were encouraged to order
21 elsewhere as part of those communications.
- 22 Q. Well, you do know that the students were told on
23 the website that they were free to order from other
24 suppliers?
- 25 A. Yes, that was what was visible to us on the website.

- 1 Q. Despite that, the orders have halved between 2018 and
2 2019; is that not true?
- 3 A. Yes.
- 4 Q. Why did you not mention the 2019 figures in paragraph 31
5 when you were emphasising the success in 2018?
- 6 A. I think I was referring to the fact that when
7 the university explicitly contacted students indicating
8 that they would be able to order from other suppliers
9 and that they were retracting their statement about not
10 ordering from Churchill Gowns specifically, that had
11 a benefit to our business.
- 12 Q. I see. So that would have a benefit, but not
13 a statement on the website stating that students are
14 free to order from other suppliers if they wish,
15 provided it is compliant?
- 16 A. I mean, I would say that those types of statements are
17 also beneficial, but would obviously have to be
18 considered in concert with other communications coming
19 from the university to get a full picture of the extent
20 to which the university is encouraging students to shop
21 around.
- 22 Q. You are not aware of any statement made by
23 Canterbury Christ Church University that conflicted with
24 what they said on the website, are you?
- 25 A. No, we are not privy to the emails that they send to

1 their students, so we would not know the content of
2 those emails; but certainly when we have seen the emails
3 that universities have sent to students about booking
4 their graduation, it frequently just contains a link to
5 the official supplier, as it were.

6 Q. You agree that the university having sent the letter
7 that we saw to your solicitors in 2018 --

8 A. Yes.

9 Q. -- it is inherently unlikely that the university
10 retracted from that position in 2019; do you accept
11 that?

12 A. I mean, that would be to speculate. I would be
13 surprised if they would have made the same statements in
14 the strident terms of, "You are not allowed to graduate
15 wearing Churchill gowns", which is what they said in
16 2018; but they may have, as I said, simply directed
17 students to order from the defendants.

18 Q. Did you have a brand ambassador at CCCU in 2019?

19 A. I am sorry, I do not recall whether we did or not.

20 Q. Just on something you said earlier about not being able
21 to log in to the student website in 2018, presumably
22 your brand ambassador was able to do that and to
23 take screenshots of anything on the website that would
24 have supported what she said?

25 A. It would depend if she was a graduating student or not.

1 Usually only students who are graduating that year are
2 able to access the portal. So if she was graduating
3 that year, she probably would have been, if she was
4 a first or second year, for example, she would not have
5 been able to see that, no.

6 Q. If she was not graduating, she would not have access to
7 the portal?

8 A. I do not believe so, no. I think you need a student
9 log-in.

10 Q. It was the portal where she was saying there was this
11 suggestion that you had to book your gown hire with E&R
12 if you wanted photographs; is that right?

13 A. Yes, that was my understanding.

14 Q. Now, while we are on this document {F3/2640/1} can we
15 just look at the row above CCCU and that is Oxford
16 University; do you see that?

17 A. Yes.

18 Q. Do I understand that you made 17 sales at Oxford in 2018
19 and 10 in 2019?

20 A. That looks correct.

21 Q. Now, Oxford is what you regard as a competitive market;
22 correct?

23 A. Yes.

24 Q. There are not any OSAs?

25 A. Not as far as I am aware, no.

- 1 Q. So, on your case, Oxford would be an obvious market
2 where the B2C model could be deployed successfully;
3 correct?
- 4 A. I think there are some reasons why we did not make as
5 many sales in Oxford, mostly because Oxford and
6 Cambridge incidentally have a number of
7 bricks-and-mortar stores in town. Students at both
8 typically purchase a gown to wear throughout their
9 degree and then would return to hire their regalia for
10 graduation. So (a) they are sort of more likely to be
11 familiar with, for example, the shop where they
12 purchased their (inaudible) for their undergraduate
13 gown, and (b) when it comes to graduation, obviously
14 those are -- the bricks-and-mortar stores are the brands
15 that they would be familiar with, you know, having spent
16 three or so years walking past them.
- 17 Q. They might find it more convenient to be able to pick up
18 the gown in person, rather than waiting for it to come
19 through the post; correct?
- 20 A. I am sure some students might feel that, yes.
- 21 Q. So your position effectively is Oxford is not a good
22 comparison for other universities; is that fair?
- 23 A. Yes, I would say it can be distinguished on the basis
24 that they have all those bricks-and-mortar stores, much
25 like Cambridge.

1 Q. The fact that you have not had success in Oxford has
2 nothing to do with OSAs; you accept that?

3 A. Yes, I would accept that, yes.

4 Q. Now, if one looks at this list and tries to find
5 a reference to Cambridge, it is not there; is that
6 correct?

7 A. That is correct. I believe we started supplying
8 Cambridge in 2021.

9 Q. So you did not make a single B2C hire at Cambridge in
10 2018; correct?

11 A. No, we had not manufactured the regalia for Cambridge.

12 Q. Well, you never have.

13 A. We have in 2021.

14 Q. Right. So you did not make a single hire in 2018, 2019
15 or 2020 in Cambridge; correct?

16 A. No.

17 Q. Again, there are not any OSAs in Cambridge?

18 A. No.

19 Q. So the fact that you have not made a single hire at
20 Cambridge, that has nothing to do with OSAs; correct?

21 A. That is true, yes. The main reason we did not
22 manufacture at Cambridge initially was because we were
23 primarily targeting bachelor students at the beginning,
24 because they kind of form the largest market group, and
25 in Cambridge, bachelors students actually wear their

1 undergraduate gown to their graduation ceremony and
2 mortar boards are not part of Cambridge academic dress,
3 so essentially students only hire a hood for their
4 graduation ceremony. So obviously from a revenue
5 perspective we thought that it was a less lucrative
6 market for us initially because students would only be
7 hiring a hood; they would not be hiring a hood and gown
8 or a hood, cap and gown.

9 Q. It would not be economical just to hire out hoods; do
10 you agree?

11 A. It would, but it just was not a top priority for us,
12 which is why we have started doing it in 2021, but as we
13 were kind of initially targeting new universities, it
14 was not high on the list of priorities for us.

15 Q. The fact that you made no attempt to compete in
16 Cambridge in 2018, 2019 or 2020, that has nothing to do
17 with OSAs, does it?

18 A. No, that has nothing to do with OSAs.

19 Q. You have made reference to 2021. Are you talking about
20 B2B contracts in 2021?

21 A. For Cambridge?

22 Q. Yes.

23 A. We have done a mixture. So we supply gowns on
24 a wholesale basis to some colleges in Cambridge,
25 primarily for their undergraduate and postgraduate

1 students to purchase at the beginning of their studies.
2 Then we also stock, we now stock the bachelors hood for
3 Cambridge, the BA hood, and the MA hood for Cambridge as
4 well, which you can order via our website, either as an
5 individual item or in combination with a gown and a cap.

6 Q. But so far as the Cambridge gowns are concerned, that is
7 a B2B business; correct?

8 A. Well, students can also order the gowns used at
9 Cambridge directly from our website, and actually, at
10 the beginning of this academic year, so I suppose
11 October 2021, we did have a lot of students at Cambridge
12 purchase what are known as the B2 and M2 gowns, which
13 are the gowns worn by postgraduate students throughout
14 their studies to formal dinners and such. So quite
15 a few students did order those on a B2C basis from us
16 directly, and we also sold them on a wholesale basis.

17 Q. Did you go along in person to make those direct sales?

18 A. To St John's College and to Newnham College we went in
19 person and ran a sort of freshers' gown sale, if you
20 like. Then two other colleges, St Catharine's and
21 Sidney Sussex, we worked with the JCR, which is kind of
22 the Cambridge equivalent of student union, and supplied
23 the undergraduate gowns to them on a wholesale basis,
24 which I believe they then either sold or gave to their
25 new undergraduate students.

1 Q. So those direct sales that you made in person, I mean,
2 that is not your general business model, is it; that is
3 a special exception you have made for these Cambridge
4 colleges?

5 A. Yes, that is correct, that is not our standard business
6 model.

7 Q. It is not the online retailer model?

8 A. No.

9 MR PATTON: Mr Randolph would like to take the transcriber's
10 break.

11 THE CHAIRMAN: Is this a good moment?

12 MR PATTON: It is fine.

13 THE CHAIRMAN: We will break for five minutes now.

14 MR PATTON: Thank you.

15 (3.12 pm)

16 (A short break)

17 (3.24 pm)

18 MR PATTON: Could you be shown your second witness statement
19 at {D2/4/9}, please. At paragraph 38 you say you:

20 "... do not believe that the other benefits of
21 exclusive supply arrangements ... are precluded by
22 having a competitive academic dress market. Cambridge
23 University and Oxford University have multiple academic
24 dress suppliers, and based on [your] experience, they
25 have no problems with ceremonies running smoothly,

1 graduates wearing the correct regalia, or there being
2 sufficient academic dress for all students."

3 Do you know that Oxford and Cambridge Universities
4 are considerably wealthier than most other universities?

5 A. I guess that is my general impression, but I do not know
6 about specific comparisons, to be honest.

7 Q. Now, at paragraph 39 you describe getting your robes for
8 an MA graduation ceremony. This is not the biggest
9 point, but in the seventh line you say you:

10 "... collected [your] order in person on
11 the ceremony day from Emmanuel Church where there was
12 a 'robing room' area set up by Ede and Ravenscroft,
13 including staff on hand to help dress students if
14 needed."

15 Is it not the truth that this was just a place where
16 robes were being handed out to those who came to pick
17 them up?

18 A. Yes, I went there to pick up my robes. Was that
19 the question?

20 Q. So when you say "a 'robing room' area set up by Ede and
21 Ravenscroft", what are you actually referring to?

22 A. So, from my recollection, there was a kind of table set
23 up with the robes where you could collect them. There
24 were some Ede & Ravenscroft staff there who were kind of
25 handing them to students. I think there was

1 a photography studio as well set up. It was a while
2 ago, but that is my recollection.

3 Q. Okay; but the staff are not actually dressing
4 the students?

5 A. From what I recall there were a number of
6 Ede & Ravenscroft staff there who were kind of generally
7 lending assistance. So my impression was that, had
8 I asked for help putting my gown on, they would have
9 done so.

10 Q. I see, but unless someone asked for help, they were not
11 there dressing the students ready for the ceremony; do
12 you agree?

13 A. Having also worked at the university, I would say I did
14 not distinguish any difference in the service I received
15 when I collected my MA gown, as compared to when
16 the students at the university I worked at collected
17 their gowns.

18 Q. Now, if you look at your first witness statement
19 {D2/1/9}, at the top of the page, paragraph 35, you say
20 you have:

21 "... encountered difficulties when seeking to
22 advertise on campus via student unions ..."

23 You give some detail about that. Now, do you agree
24 that it is up to a university whether they allow
25 activities to take place on campus?

1 A. So, most student unions, as a kind of revenue-generating
2 exercise, I guess, advertise on their websites,
3 marketing packages that companies can buy. So,
4 typically, this would either be kind of like a web page
5 or a pdf that outlines, you know, "For X amount of money
6 you can put posters in the student union building" or
7 "For X pounds you can have students hand out flyers on
8 campus", that sort of thing. So those were the types of
9 services that we enquired about.

10 Q. Yes, but do you accept that it is a matter for
11 the university whether it wants to allow activities to
12 take place on campus?

13 A. I do not know whether -- I would imagine it varies
14 between universities in terms of whether the student
15 union controls that or the extent to which universities
16 control that, or I know some student unions outsource
17 the whole process entirely to marketing agencies.

18 Q. Would you agree that there is no general expectation
19 that commercial entities will be allowed on to
20 university campuses to promote their businesses?

21 A. Well, I would say that the fact that on the student
22 union website it advertises that those are marketing
23 opportunities available to companies would create an
24 expectation that companies can take advantage of those
25 opportunities.

1 Q. That is the basis on which you say there is an
2 expectation that you should be allowed onto campus?

3 A. Yes, the fact that they advertise those options, yes.

4 Q. That the student unions do so?

5 A. Yes.

6 Q. Understood.

7 Now, still on page 9, at the bottom of the page,
8 paragraph 39, you say:

9 "In July 2018 one of our customers 'Georgetta'
10 contacted us in a distressed state because she had taken
11 a set of our regalia to staff at Bedfordshire University
12 (I would assume it was the graduation department). It
13 was the day before her graduation and she was told
14 the gown set was 'wrong' and that she had to return it
15 for a refund and hire from E&R on the day at additional
16 expense. We verified with the customer which course she
17 had studied and that the correct Bedfordshire bachelors
18 hood had been sent out to her."

19 Now, you do not have any personal knowledge about
20 the basis on which the university took issue with what
21 she was wearing, do you?

22 A. Well, they told her that the regalia was wrong, so
23 I guess our first port of call was to question whether
24 perhaps she was a Masters student who had ordered
25 the wrong hood or had we sent something different; but

1 she confirmed that she was a bachelors student and she
2 confirmed that the hood she received looked like
3 the Bedfordshire bachelors hood. So on that basis and,
4 you know, as Ede & Ravenscroft alleged in their own
5 lawsuit to us, our Bedfordshire bachelors hoods look
6 identical to theirs, so the only basis that we could
7 think for the university saying that the regalia was
8 wrong was the fact that it had a Churchill Gowns label
9 in, not an Ede & Ravenscroft label in.

10 Q. But you are speculating, do you agree?

11 A. I am speculating on the basis that there is no other
12 possible explanation.

13 Q. You did not speak to the university directly about what
14 particularly was wrong with Georgetta's regalia; is that
15 correct?

16 A. I do not recall whether we -- I do not think we made
17 contact with them, no.

18 Q. Now, you say here, and you have just said the same
19 thing, that you thought they looked identical because
20 E&R had alleged as much in their letter. In fact, you
21 knew they looked identical because you had copied E&R's
22 Bedfordshire hoods, had you not?

23 A. Yes, that is one of the ones where we had a sample of an
24 Ede & Ravenscroft hood.

25 Q. You copied it?

1 A. We certainly used it to match the fabrics. I cannot
2 recall whether it was sent to our suppliers or whether
3 we sent instructions, but it would have been one of
4 the two. But we certainly used it to match the fabrics
5 used on the hood.

6 Q. That would have been -- it was completely routine for
7 you to copy E&R's hoods in order to ensure that they
8 match; correct?

9 A. Yes, that was one of the ways in which we ensured that
10 our hoods matched those of the official suppliers.

11 Q. Then if you could go to page 11 {D2/1/11}, paragraph 45,
12 here you are referring to a customer who contacted you
13 on 8 July 2018:

14 "... a customer ... contacted us to order a refund
15 on her order for a London Metropolitan University ...
16 gown set because the university had told her she had to
17 order from their official supplier."

18 Do you see that?

19 A. I do, yes.

20 Q. In the last sentence you quote from something that
21 London Metropolitan said to you, and you see:

22 "... making it apparent that their actions in
23 preventing students wearing our gowns were enforcing
24 the exclusivity agreement they had signed with E&R
25 16 years prior."

1 Could you just go in your statement to page
2 {D2/1/17}. At paragraph 72 you say:

3 "In 2018 we intended to supply to students at
4 London Metropolitan ..."

5 Then in the fourth line you say:

6 "... once we compared these hoods to those provided
7 to London Metropolitan students by E&R we could see that
8 the lining fabrics were noticeably different -- ours
9 were a lighter shade of grey and made from a shiny
10 satin fabric whereas theirs were more of a matte dark
11 grey finish."

12 The true position was that you knew in July 2018
13 that the hoods for London Metropolitan that you were
14 supplying were noticeably different; correct?

15 A. I do not recall the exact point at which we became aware
16 that they were different. Obviously initially we
17 thought that the ones that we were making were
18 the correct design and then at some point we must have
19 become aware that theirs had this kind of more matte,
20 dark grey lining. So I do not recall at what point
21 exactly we became aware of the fact that the stocks that
22 we had did not match the stock provided by
23 Ede & Ravenscroft.

24 Q. Okay.

25 Could you look at {F4/228}. So there is some

1 confidentiality highlighting on this document so I will
2 not read that out, but could you read to yourself
3 the top two messages.

4 A. Yes.

5 Q. Then can you see that the next date -- not
6 confidential -- is 2 July 2018?

7 A. Yes.

8 Q. So would you now accept that you knew before 8 July that
9 the London Met hoods were not satisfactory?

10 A. It looks that way, yes.

11 Q. So if you look again at paragraph 45 {D2/1/11}, where
12 you suggest that this was all about enforcing
13 the exclusivity agreement, in fact London Met were
14 justified in objecting to your dress because it was
15 noticeably different from the dress supplied by
16 the official supplier; do you agree?

17 A. No, because at that point London Met would not have seen
18 the regalia that we were offering. So the objections
19 that they raised in their email were not based on
20 the fact that our regalia did not match. They said
21 that -- my witness statement is not in front of me
22 anymore, but I believe what they said is, "We have
23 signed a deal with Ede & Ravenscroft in 2002 which means
24 that you have to order your gown from there". They did
25 not make any reference to the colour of the lining of

1 our hoods.

2 Q. But in fact they would have been right to object; do you
3 accept that?

4 A. Well, theoretically, yes, but in reality they did not
5 know anything about the nature of the design of our
6 hoods. So the basis on which they objected was not
7 the design issue that is highlighted here; it was
8 the fact that they have a deal with the defendants.

9 Q. But if they had looked on your website, would that have
10 made it clear?

11 A. I do not believe at that point we had pictures of
12 the stock that we had manufactured. Yes, if the hoods
13 were delivered around the end of June, which I think
14 they were, I do not think we would have photographed
15 them until later on, so we would have probably had
16 photographs that were mocked up, on Photoshop, for
17 example.

18 Q. Meaning pictures of the E&R garments?

19 A. No, so we would have pictures of, for example, a hood in
20 the same shape and design, and then we have a supplier
21 from a website called Freelancer, who can essentially
22 change the colours of the hood.

23 Q. In the third line of paragraph 45 you say:

24 "In order to clarify the position
25 London Metropolitan were taking with their students, and

1 because I suspected they would not be honest with me
2 directly, I contacted them on the 17th July 2018 under
3 the alias of a parent named Mia Suarez."

4 We can see that at {F3/604}.

5 If we look at page {F3/604/2} we see an email of
6 17 July 2018 from M Suarez saying:

7 "Hi there,

8 "I ordered my son a gown, hood and cap for his
9 graduation ceremony from Churchill Gowns. Can he
10 graduate wearing this as he's hearing mixed messages
11 from other students?"

12 This was again just an invention, was it not?

13 A. Yes, we had been contacted by some students at the Met
14 saying they had essentially been told they had to order
15 from the defendants, not from us, and again we thought
16 if we approached them as ourselves, then they would not
17 necessarily give us the response that they were giving
18 to students.

19 Q. What basis did you have to suspect that they would not
20 be honest?

21 A. Just based on our past experience of universities
22 essentially saying publicly or saying to us that
23 students are free to choose, and then saying to their
24 students that they had to order from the defendants.

25 Q. So, not anything specific to London Met; just a general

1 view that universities do not behave honestly; is that
2 right?

3 A. It is perhaps a generalisation to say that universities
4 do not behave honestly, but certainly our experience was
5 that in some cases we were getting a different message
6 than was being given to students, whether that is
7 because universities were being dishonest or students
8 were speaking to different departments.

9 Q. Here, anyway, it was because of your suspicion that they
10 would not be honest. That is the explanation you give
11 for writing as you did?

12 A. I would say that is fair, yes.

13 Q. You felt that that justified you in making things up;
14 correct?

15 A. Well, we wanted to verify the statements that had been
16 passed on to us by our customers, and so, yes, we
17 thought that the only way in order to do that was to
18 contact them under an alias.

19 Q. And to lie about the facts as well; correct?

20 A. I would say that is fair.

21 Q. Were you acting with the knowledge of Mr Muff in sending
22 this message as well?

23 A. I do not recall exactly, although I suspect we might
24 have discussed this either before or when I received
25 the response, but I could not say for certain.

1 Q. In paragraph 47 of your statement {D2/1/11} you say in
2 the second line:

3 "On 16th July ... I was phoned by a customer called
4 Rechelle Powell who had attended a Derby University ...
5 ceremony the week before. She was very angry because
6 she had hired one of our gowns and was told when she was
7 spotted carrying it into the ceremony venue that she
8 could not wear it and had to hire one from E&R on
9 the day."

10 Could we go over the page, please.

11 Sorry, I will just wait for you to catch up. Then
12 in the third line:

13 "She said she was pretty sure that the people
14 telling her this were representatives from E&R because
15 they were the people handing out and selling the gowns.
16 She said they proceeded to do a side-by-side comparison
17 of the regalia ... [and so on]."

18 You can see read to the end of that paragraph.

19 Again, you do not have any personal knowledge of
20 this beyond what she told you; correct?

21 A. That is correct.

22 Q. Now, page 15 of your witness statement {D2/1/15},
23 paragraph 63, you are now talking, just so you can
24 see -- actually, I think it might be better if there
25 were hard copies available, but if you look at

1 the previous page, page 14 {D2/1/14}, we see
2 the heading, "Quality of CGL's products". Then on
3 page 15 {D2/1/16}, paragraph 63, you were dealing with
4 the quality of your products; do you see that?

5 A. I can see that.

6 Q. In paragraph 63 you say:

7 "Our customer feedback reflects the fact that our
8 customers are, overall, extremely happy with the quality
9 and finish of the products we supply. We currently hold
10 a five star rating on Trustpilot from over 500 reviews
11 left by customers over the past three years ..."

12 Does Churchill ask every customer to leave a review
13 on Trustpilot?

14 A. So the way it works with Trustpilot is businesses can
15 pay for a different type of subscription on Trustpilot.
16 We have a free version, which means, I think, Trustpilot
17 sends out 100 invitations a month and their system is
18 plugged into our website, as it were, so they
19 automatically select a random hundred customers each
20 month and send them an invitation to leave a review. So
21 some of our reviews would have been invited in that way,
22 but customers are also just able to log on to
23 the platform and leave a review of their own volition as
24 well.

25 Q. But the reviews that show "verified" in the Trustpilot

- 1 site, they will be reviews that have been contacted
2 because you have given the customers' details to
3 Trustpilot; correct?
- 4 A. Yes, so those would be the random sample that the
5 Trustpilot platform pulled out of the back-end of our
6 website, as it were.
- 7 Q. Now, have you ever drafted a review to put on Trustpilot
8 of Churchill's products?
- 9 A. I recall at some photo shoots when we have had -- for
10 example, we did, like, a photo shoot with some students
11 who were friends of ours -- well, it was a friend's
12 younger sister and her classmates. We kind of did
13 a photo shoot with them and we asked them to leave us
14 a good review. We may have given them an indication of
15 the types of things that they were to say.
- 16 Q. Was that set out in an email?
- 17 A. I would not have thought so, but it is possible. I do
18 not remember.
- 19 Q. Is that the only example you can think of, of you
20 suggesting what someone might say in a Trustpilot
21 review?
- 22 A. It is the only example that comes to my mind.
- 23 Q. But there may be others; is that right?
- 24 A. It is possible if we have spoken to customers and they
25 had a good experience we have asked them to leave a good

1 review, but I do not remember specific examples, I am
2 afraid.

3 Q. Can you have a look at {F4/780}. Now, this is mostly
4 confidential, so I will not read it out, but you can see
5 it is another internal message from Mr Ramsey. Can you
6 just read to yourself the last line which is marked as
7 confidential.

8 A. "Surprising ..."

9 Q. Read to yourself, sorry. Apparently it is confidential.

10 A. Yes, I can see that.

11 Q. Do you recall receiving that message from Mr Ramsey?

12 A. No, I believe these messages were prior to my
13 employment. This was when he had a sort of monthly or
14 weekly Skype with Oliver about the business, which was
15 before I joined. So that would have been before
16 I joined Churchill Gowns, I think.

17 Q. So is this the first time you have seen that message?

18 A. It is possible that I saw it during the disclosure
19 process, but not prior to that, I do not think.

20 Q. Did Churchill ever pay anyone to put reviews on
21 Trustpilot?

22 A. No.

23 Q. Could we have a look at {F3/2809}. Now, this is
24 described as a "Brand Ambassador time sheet", and
25 the idea is this is a time sheet that your brand

1 ambassador would fill in, in order to be paid; is that
2 correct?

3 A. That is correct, yes.

4 Q. Did you produce this document?

5 A. I believe it was Oliver that produced it, but I could
6 not say for certain.

7 Q. But you have seen it before?

8 A. I have, yes.

9 Q. If we could look at the second page {F3/2809/2}, do you
10 see in the penultimate row it says:

11 "Week 1: Leave a 5 [star] trust pilot review."

12 Do you see that?

13 A. Yes.

14 Q. That was an instruction you gave to your brand
15 ambassadors; is that correct?

16 A. That is correct.

17 Q. They would have filled in the time it would have taken
18 them to create the review?

19 A. Yes, although, as you can see, there was kind of
20 a number of tasks that were very small tasks, so they
21 were kind of less paid by the hour, as it were.

22 Q. The answer is yes; they were to fill in the amount of
23 time in the time sheet that they had spent writing
24 a five-star Trustpilot review; correct?

25 A. I do not think they had to fill in the amount of time

- 1 they spent doing it; they just had to tick it off.
- 2 Q. I see. They were only allowed ten minutes to write
3 the Trustpilot review?
- 4 A. I would say that is fair.
- 5 Q. Then they would be paid at £11 per hour for doing so; is
6 that correct?
- 7 A. Yes, the main hourly payment was for doing flyering more
8 than other tasks, but yes.
- 9 Q. Did you think it was ethical to pay the ambassadors to
10 write a five-star review on Trustpilot?
- 11 A. Well, we did it on the basis that our ambassadors had
12 sort of seen our product and our service, and therefore
13 I guess we would have assumed that if they were unhappy
14 with it and did not think it merited that, then they
15 would not have done it.
- 16 Q. Even though they would be paid to do it?
- 17 A. Well, it was just there were a number of tasks we were
18 asking them to do and not all ambassadors were expected
19 to do every single one of them, so it was kind of up to
20 them, in a way, which one they wanted to tick off.
- 21 Q. But if they did not do it then presumably they would not
22 get paid for that task; correct?
- 23 A. Well, we would have paid them if they did kind of
24 the majority or ticked off the amount of time that they
25 had spent doing the various tasks. So we would not have

1 not paid them on the basis that they did not do
2 a five-minute task or a ten-minute task.

3 For example, some of our ambassadors said they did
4 not have a social media page and therefore they
5 could not do the tasks like follow us on Instagram, or
6 they did not have a LinkedIn so they could not message
7 to any people on LinkedIn; but we did not withhold their
8 payment because of that, this was just kind of suggested
9 tasks that they could do.

10 Q. To your recollection, did all of the ambassadors leave
11 a five-star Trustpilot review?

12 A. To be honest, I do not believe they all did, but I could
13 not say for certain.

14 Q. You have no recollection either way?

15 A. No.

16 Q. Now, paragraph 77 of your statement at page {D2/1/18}.

17 If you just see at paragraph 76 here you are dealing
18 with complaints that you have received about the quality
19 of the goods; do you see that? You see they broadly
20 fall into three categories?

21 A. Yes.

22 Q. The second one you say are complaints:

23 "... around five to ten complaints regarding a small
24 gap in the stitching ..."

25 Do you recall that?

1 A. Yes.

2 Q. Could you please look at {F3/780}. Do you see, just in
3 the middle of the page, an email of 15 July 2019 from
4 Sales, do you see that, forwarding an email from
5 a student?

6 A. Yes, from Declan Webster.

7 Q. Yes, exactly.

8 A. Yes.

9 Q. The email from Sales, is that likely to have been from
10 you?

11 A. It would be either myself or Ollie. We both have access
12 to that email account, so it would have been one of
13 the two of us. I do not recall which at this point.

14 Q. We see in the second line, Sales says:
15 "Looks a bit shit though ... Can they not stitch it
16 up?"

17 Do you recall having that reaction yourself to
18 the appearance of the hoods?

19 A. I agree that on close inspection it would look better if
20 it was sewn up, yes.

21 Q. But you agree it did not look good?

22 A. Yes, I mean, on close inspection, there is a small gap
23 in the seam. So I agree that it would be preferable if
24 they stitched it up. It is something that we enquired
25 about with our manufacturers but they basically said

1 that it would have to be hand-stitched to close that
2 small gap, and because so few customers had ever brought
3 it up, and obviously hand-stitching would increase
4 the cost, we decided that on balance it was not
5 necessary.

6 It is also on the part of the hood that kind of lies
7 flat against the back, as it were, so it would not be
8 visible when worn.

9 Q. Effectively, you decided you did not want to incur
10 the cost of the hand-stitching to make it look better;
11 correct?

12 A. Well, obviously if it increased the cost, that would be
13 a cost that we would pass on to customers, so I guess
14 you have to weigh up, you know, would customers want to
15 pay more to have that small hole stitched up, or --
16 I guess we decided on balance it is something that so
17 few customers had brought to our attention that it
18 was not worth increasing the cost for the customer,
19 based on that.

20 Q. Now, you emphasise in this part of your statement that
21 the number of complaints received is small relative
22 the overall number of orders. That is the thrust of
23 your evidence; yes?

24 A. Do you mean about this particular issue or in general?

25 Q. In general.

- 1 A. Yes, I would say so.
- 2 Q. Do you agree that even a small number of complaints can
3 have a ripple effect by word of mouth?
- 4 A. I suppose hypothetically, yes.
- 5 Q. Do you agree that if other students heard about
6 problems, even a small number of problems with
7 the dress, they might decide it was just not worth
8 taking the risk of ruining a special day by ordering
9 with you?
- 10 A. I suppose that is theoretically possible, but given
11 the fact that we have five stars on Trustpilot from over
12 550 reviews, I would expect that if students were
13 looking and shopping around for other people's opinions,
14 that they would be encouraged to order from us as
15 compared to the defendants, not discouraged.
- 16 Q. So that is if they look at the website, but if they
17 speak to other students who have been dissatisfied with
18 the quality, do you accept that that could itself have
19 a ripple effect?
- 20 A. I suppose in theory, although often students who are
21 hiring, which is the majority, they get their regalia
22 a couple of days before their ceremony, so them looking
23 at the regalia when it arrives would not necessarily
24 impact people's decision to order, if you know what
25 I mean, because usually people would have placed their

- 1 orders long before they --
- 2 Q. Unless they spoke to students in the year below who
3 would be put off for the next year?
- 4 A. I suppose that is theoretically possible, yes.
- 5 Q. Do you accept that when you have tendered for OSAs,
6 the universities have taken an adverse view of
7 the quality of your product?
- 8 A. I would say in the main, yes, quite a few have made
9 comments about the quality of our gowns not being to
10 the level that they expect, which seems to contrast with
11 the opinions of our customers.
- 12 Q. Now, could we go in your statement at page 9 {D2/1/9} to
13 paragraph 80. You are referring here to an email you
14 received on 4 November 2020 from a customer called
15 Alison, enquiring about the origins of recycled
16 materials; do you see that?
- 17 A. I do not have that one.
- 18 Q. {D2/1/19}. My mistake.
19 Do you see that?
- 20 A. Paragraph 80, did you say?
- 21 Q. Yes.
- 22 A. Yes.
- 23 Q. If we could go to {F3/1123}. If we could start at
24 page 4, please {F3/1123/4}. At the foot of the page, do
25 you see an email of 4 November at 2.13 pm, yes?

1 A. Yes.

2 Q. "Hi

3 "I have tried both contact numbers -- one hung up,
4 I have left a message on the other.

5 "2 issues-

6 "I have only received 1 gown and paperwork assuming
7 I am hiring.

8 "what happens next depends on your answer to
9 the following:

10 "Are these really made from fabric made from PET
11 recycled bottles?

12 "They very much feel like new polyester fabric, not
13 recycled PET material.

14 "Do you have any certificate or standard to confirm
15 the source?

16 "Please advise on the situation with the 2nd gown
17 and provide evidence of recycling standard used.

18 "It is important for me to responsibly source
19 clothing.

20 "If no assurance can be given, I wish to return
21 the garment sent and you can keep the missing one making
22 it straight to refund.

23 "Kind regards.

24 "Alison."

25 So that is the original enquiry that you get.

1 Then above that we see your response at 2.57. Do
2 you have that?

3 A. Yes.

4 Q. You say:

5 "Hi Alison,

6 "Thank you for your enquiry, and sorry about
7 the missing gown. We would of course be happy to send
8 this straight to you if you would like to proceed with
9 the order.

10 "I have spoken to our procurement manager and he is
11 going to send over the certification for the recycled
12 PET fabric, but he's based in Australia, so I will
13 receive them tomorrow if that's OK?"

14 The reference to the procurement manager, that is
15 Mr Muff?

16 A. That is correct.

17 Q. You say, "I have spoken it to our procurement manager",
18 but was that true?

19 A. I think at that point I potentially -- I do not think
20 I had spoken to him. Essentially I had intended to --
21 I drafted that message intending to contact Stefan and
22 then essentially realised that, because of the time
23 difference and also because him and Alec are now working
24 on another business, I would probably get a faster
25 response if I contacted our manufacturers directly. So

1 in actual fact, I think I sent this email to Alison and
2 then changed course and contacted our manufacturers.

3 Q. So it looks like there is about a 45-minute gap between
4 the two emails. Is that your recollection, that you
5 responded within about -- within the hour?

6 A. Yes.

7 Q. You say, "I have spoken to our procurement manager", but
8 I think your evidence is that you had not spoken to your
9 procurement manager. I am trying to understand why you
10 said you had spoken if you had not.

11 A. Essentially it was my intention to kind of immediately
12 make contact, but obviously with the time difference,
13 making contact at 2 o'clock in the afternoon would have
14 not yielded any response.

15 Q. When you say "he is going to send over the certification
16 for the recycled PET fabric", what was your basis for
17 saying that in this email?

18 A. Well, I knew that we had some certifications, so
19 I assumed that once I asked for it, he would send it, or
20 he would refer me on to the manufacturers. But as it
21 transpired, I decided just to go direct to
22 the manufacturers so that I could give the person
23 I thought was Alison, but was in fact the defendants'
24 solicitors, a response.

25 Q. So are you saying, when you said "he is going to send

1 over the certification", at this stage you did not know
2 whether he was or he was not?

3 A. I had not contacted him about it, no.

4 Q. You had not contacted him by email either?

5 A. I do not think so, no.

6 Q. Now, if we look at your witness statement at
7 paragraph 81 {D2/1/19}, you say in the fourth line, as
8 you have just said, I think, that you:

9 "... decided to contact our account manager, Cathy,
10 at our factory Ling Feng instead."

11 Then in paragraph 82 you say that she:

12 "... emailed [you] a selection of documents at
13 2:56 AM... on 5th November 2020 ..."

14 If we could look at {F3/1045}, this is the email of
15 5 November from Cathy that you are referring to;
16 correct?

17 A. Yes.

18 Q. She says:

19 "Now we can provide 2 certificates for recycled
20 fabric, one is for material, one is for fabric mill.

21 "1. Attached pls find a certificate for in green
22 for your reference, this is for material. They can
23 provide this certificate for each order of fabric."

24 Now, what that makes clear, does it not, is that
25 the certificate is specific to each order of fabric; do

- 1 you agree?
- 2 A. Yes, I guess that is what the intended meaning is, yes.
- 3 Q. You would have understood this at the time that you
- 4 received this email; correct?
- 5 A. Yes.
- 6 Q. Then, 2, she says:
- 7 "2020OEKO, this is the certificate for fabric mill,
- 8 but it is Chinese version.
- 9 "3. Fabric mill can provide the hangtag as
- 10 attachment for our gown to show it is recycled.
- 11 "Anything else we can do for you, pls don't hesitate
- 12 to let us know, thank you!"
- 13 Then, if we look over the page at {F3/1046}, this is
- 14 the first attachment; correct?
- 15 A. I believe so, yes.
- 16 Q. Did you read this when you received it from Cathy?
- 17 A. Yes. I definitely looked over it, yes.
- 18 Q. So before you sent it on to Alison, you read it?
- 19 A. Yes, (inaudible).
- 20 Q. I am sorry, I did not catch your ...?
- 21 A. Yes, I may not have read it in minute detail, but
- 22 I definitely looked over it before I sent it on and
- 23 appreciated that this was a certificate showing that
- 24 the fabric was made from recycled plastic.
- 25 Q. If you look at the top of the page, it says:

1 "Shanghai PET Recycling Textile Co Ltd."

2 So who did you think that was?

3 A. Based on what Cathy had said, I believed that that was
4 the -- I cannot remember, the "material", I think she
5 called it, so I assumed it was the supplier of
6 the fabric material.

7 Q. Right.

8 Then, it says:

9 "Certificate of Conformity.

10 "We hereby certify that Control Union Certifications
11 declares to have inspected our company and our products,
12 and have found our company and our products in
13 accordance with the GRS - Global Recycle Standard GRS
14 version 2.0 standards, and the Certificate and
15 Registration No as follow."

16 Then you see at the bottom a signature.

17 Did you understand that this was a certificate from
18 the fabric manufacturer itself?

19 A. That was my understanding based on what Cathy had said
20 in her email, yes.

21 Q. In other words, the factory was certifying that it
22 itself had been inspected; correct?

23 A. Yes. To be honest with you, I did not have a great deal
24 of knowledge about what a GRS certification process
25 would involve, but that was my overall understanding,

1 I would say.

2 Q. Did you ask anyone?

3 A. No, I did not.

4 Q. Then we see in the middle of the page:

5 "Scope of Certification.

6 "Manufacturer of PET Fibre Component in Spun Yarn,

7 Polyester Staple Fibres ... Full Drawn Yarn ... made of

8 100% Recycled Plastic Bottles."

9 Then it says:

10 "Following is the detail of shipment."

11 There is the name of a buyer.

12 Now, who did you think that buyer was?

13 A. I believe that was the fabric mill that Cathy then

14 referred to in her email.

15 Q. Right.

16 Then:

17 "Specification: 100% Recycle PET Filament ...

18 "Quantity: 2983 Kgs.

19 "Date of dispatch: 24 December, 2012."

20 Did you see that when you looked at the certificate?

21 A. I do not think that caught my attention, to be honest

22 with you.

23 Q. If you had noticed that, you would have realised, would

24 you not, that this certificate was completely

25 irrelevant?

1 A. I would have probably requested a more up-to-date
2 version if I had spotted that. But I did not
3 necessarily think it was completely irrelevant, because
4 I believed this was the supplier that we were using, but
5 I would have requested a more up-to-date version,
6 I think.

7 Q. Well, how could a certificate from December 2012 be
8 relevant to Churchill Gowns?

9 A. Well, on the basis that the supplier of the material had
10 the capability, I suppose, of providing certified
11 recycled polyester.

12 Q. Right. It had the capability, but whether it had
13 actually done so, this would not have assisted, do you
14 agree?

15 A. No, that is probably why I would have asked for a more
16 up to date version.

17 Q. But your evidence is you did not notice the date;
18 correct?

19 A. Yes, correct.

20 Q. Then if we look at the next attachment {F3/1047}, is
21 this what she called the "hangtag"?

22 A. Yes.

23 Q. It is just a picture, is it not?

24 A. Yes, with some writing, I guess.

25 Q. Picture and writing --

1 A. Yes.

2 Q. -- but it does not tell you anything about what
3 the gowns are made of; do you agree?

4 A. Well, it seems to say "PET" as to the composition, but
5 it does not give much more detail than that.

6 Q. I mean, this is just a picture, is it not, it does not
7 provide you with any reliable information about what
8 your gowns are made from?

9 A. Well, from what Cathy said in her email, I believed that
10 this was -- as it were, accompanied the material that we
11 used in our gowns, and therefore maybe provided
12 a clearer illustration of the process.

13 Q. What in Cathy's email? You can see it again at
14 {F3/1045}. What are you specifically referring to?

15 A. Where she said:
16 "Fabric mill can provide the hangtag as attachment
17 for our gown to show [how] it is recycled."

18 Q. Right, and what do you say you took away from that?

19 A. I took away that the hangtag that she had attached
20 illustrated how the fabric for our gown is recycled.

21 Q. I see, it is an illustration.

22 A. Yes.

23 Q. But in itself it is just an illustration; do you agree?

24 A. Well, it does say "PET" on it, so -- and the recycled
25 logo, so my assumption, based on the illustration, would

1 be that it is demonstrating recycled plastic PET being
2 used.

3 Q. You had illustrations like this on your website, did you
4 not?

5 A. I think so, yes.

6 Q. So being provided with an illustration does not tell you
7 whether your gowns are made from one material or
8 another; do you agree?

9 A. I guess my assumption would be that if this hangtag
10 accompanied the material then it would relate to that
11 material, which seems to be what Cathy is suggesting.

12 Q. Anyone can provide this kind of illustration, can they
13 not?

14 A. They can do, but if they -- I would suggest that if they
15 provided the illustration as a hangtag to the fabric,
16 then it would strongly indicate that that illustration
17 related to that specific fabric.

18 Q. I see.

19 Then if you look at {F3/1048}, this is another
20 hangtag; do you agree?

21 A. Yes.

22 Q. Did you look at this when you received it?

23 A. Yes.

24 Q. We can see a reference to "Scientific Certification
25 Systems", or "System", I think, in the middle of

1 the page. What did you think that was?

2 A. I believe, on the certificate that she provided, there
3 was a reference to both the global recycling standard
4 and SCS, and so I believed that this related to that
5 SCS, Scientific Certification System.

6 Q. I will just show you {F3/1046}. This is
7 the certificate. I think you might be mistaken about
8 a reference to SCS. Do you agree?

9 A. Yes, that is right, yes. I cannot see it on there.

10 Q. In fact it refers to something different called "Control
11 Union Certifications"?

12 A. Yes, and "Revertir", which --

13 Q. Do you know who Revertir is?

14 A. No.

15 Q. You never asked?

16 A. No.

17 Q. So when you see "SCS" on the other hangtag and "Control
18 Union Certifications", did it strike you that that was
19 a bit odd, that there were two agencies being mentioned?

20 A. No, to be completely honest with you.

21 Q. You did not notice that.

22 Then if you look at {F3/1049}, this is
23 the certificate from OEKO. What did you make of this?

24 A. To be honest, it was difficult to know what to make of
25 it because it was in Chinese. So, I think I was sent

1 this in relation to the fabric mill, but I did not
2 really know what it related to. I think I passed it on
3 to Alison, but said, "It is in relation to the fabric,
4 but it is in Chinese, so I do not know how instructive
5 you would find it".

6 Q. Then if you go to {F3/1123} again. At the foot of
7 page 1, we see your email to Alison:

8 "Thank you for your patience on this - please see
9 attached certifications from the factory we use for our
10 recycled PET textiles. Let me know if you have any
11 other questions, and if you would like us to send
12 the second gown ..."

13 Then above that, she responds:

14 "Hi Ruth

15 "Thanks for the reply.

16 "I am trying to understand.

17 "I have 2 questions -

18 "The certificate is 2012, is that still valid in
19 2020, are my gowns made from that batch of material?
20 How can you be sure? It seems a long time to keep
21 the fabric.

22 "The gown I have does not carry the labels you sent
23 - does this mean it was made from a different fabric?

24 "Why are the labels missing?"

25 Now, do you agree that by this point you appreciated

1 that the certificate was from 2012?

2 A. Yes.

3 Q. Did you contact anyone else to find out why that was?

4 A. I did not, no. To be honest, I did not know what batch
5 the gown she had would have been from, so ...

6 Q. Well, you knew they were not from 2012, did you not?

7 A. Yes.

8 Q. So you did not speak to Mr Muff, for example?

9 A. I do not recall. I do know that Oliver had a more
10 in-depth conversation with Alison over the phone, and
11 I believe that they discussed this point, but I was not
12 a party to that conversation, so I do not know
13 the details.

14 Q. Did you forward this email from Alison to Mr Muff?

15 A. I do not recall, to be honest with you.

16 Q. Have you checked?

17 A. I imagine I probably would have checked as part of
18 disclosure. I do not think I forwarded it on to him,
19 but I could not say for certain.

20 Q. If we look at the top of the page, we see your response:

21 "Hi Alison,

22 "The reason the labels don't come on the gown is
23 that those are the labels on the raw material that comes
24 from Shanghai PET. This raw material then goes to
25 the weavers, then to a third factory that dyes

1 the fabric and then finally to our manufacturers who
2 turn the fabric into gowns. So the material goes
3 through several factories and processes before it ends
4 up as the gown you received."

5 Now, when you said that these "are the labels that
6 are on the raw material that comes from Shanghai PET",
7 what was your basis for saying that?

8 A. Again, it was the third point that Cathy made in her
9 email where she said, "This is the hangtag".

10 Q. You felt that that meant you could say that these are
11 the labels... on the raw material that comes from
12 Shanghai PET"?

13 A. That is what I understood Cathy's email to mean, yes.

14 Q. You had not checked whether Shanghai PET was in fact
15 involved in the manufacturing process at all at this
16 stage; correct?

17 A. No, I had simply asked Cathy to send documentation for
18 our manufacturers and she had sent it -- that on to me,
19 so I did not think to question her on that.

20 Q. Then in the second paragraph, you say:

21 "With regards to the certification, that would be
22 the one our procurement officer has ..."

23 Just pausing there, that is Mr Muff, is it?

24 A. That would be a reference to him, yes.

25 Q. You say:

1 "With regards to the certification, that would be
2 the one our procurement officer has ..."

3 So you are referring here to the 2012 certificate,
4 yes?

5 A. Yes. In hindsight, that was incorrect. The one that
6 Stefan had was the 2016 certificate.

7 Q. What was your basis for saying this is the one that
8 Mr Muff has?

9 A. Because I knew that Stefan had some certification for
10 the fabric, and obviously I assumed that
11 the certification he had would be the same as
12 the certification our factory had, and that is what
13 the factory had sent me, so that was an assumption on my
14 part that -- that they would have the same certification
15 in their possession.

16 Q. What was your basis for knowing that Mr Muff had some
17 sort of certification?

18 A. I recall a conversation when I first joined
19 Churchill Gowns about the fabric and things, and that
20 kind of came up.

21 Q. He told you he had certification?

22 A. Yes, we discussed, sort of, the procurement of
23 the recycled material and I think certification was
24 mentioned, yes.

25 Q. So what do you recall about the mention of

1 certification?

2 A. I do not recall the details of any discussion, but it
3 was certainly the impression I got in early
4 conversations about procurement of the gowns that --
5 that it was certified.

6 Q. So when she asks why is it a 2012 certificate and you
7 say "that is the one our procurement officer has", that
8 is on the basis of your recollection of a conversation
9 in 2018, is it; is that correct?

10 A. Yes.

11 Q. You say:

12 "... because that is when we began working with
13 the company."

14 What was your basis for saying you began working
15 with the company in 2012?

16 A. To be honest, I had not quite realised that the move to
17 recycled materials in Australia also happened in 2016.
18 I thought that had been a USP of the Australian
19 business.

20 Q. So that is wrong as well, is it: "that is when we began
21 working with the company"?

22 A. In hindsight, yes, that is not correct.

23 Q. It is not so much in hindsight, it was always wrong?

24 A. Well, to my knowledge, that is what I thought was
25 correct, but in hindsight, that was not correct.

- 1 Q. Why did you make these statements which were wrong
2 without checking with anyone?
- 3 A. Well, I believed that in contacting our manufacturers
4 I was getting accurate information on the source of
5 the fabric direct from them, as it were, so to my mind
6 that was sufficiently accurate information, what I had
7 been sent by Cathy and the information that she had
8 given me, and I did not think to challenge her on that.
- 9 Q. So you have now focused on the fact that the certificate
10 is from 2020, and someone has asked you, "Is that still
11 valid in 2020, are my gowns made from that batch of
12 material?", "How can you be sure"? Is it your evidence
13 that you never asked anyone else in the company about
14 that?
- 15 A. Yes. I did not. I do not believe I did. I know Oliver
16 then had a follow-up conversation with Alison, so my
17 impression was -- I actually was not in the office that
18 day when he spoke to her, but my impression was that at
19 the end of that conversation the issue had been
20 resolved. I was not aware of the details of the phone
21 conversation that he had with her, but my overall
22 impression was that there had been a kind of
23 satisfactory conclusion, shall we say.
- 24 Q. So in other words, as long as Alison was not still
25 asking questions, you were no longer interested in

1 the subject; is that fair?

2 A. Well, I would say, yes, we felt that we had answered her
3 specific questions to her satisfaction, and nothing
4 about what I had been sent raised the alarm in my mind.

5 Q. Do you accept sitting here today that the answers you
6 gave were misleading?

7 A. Yes, I think I accepted in my witness statement that
8 the information Cathy gave to me turned out not to be
9 our most up-to-date information. It was actually based
10 on a search that she did of their computer system, and
11 she found those documents filed under our company name
12 and forwarded them on to me. So the information I gave
13 was -- was based on the representations that Cathy had
14 made to me, and I accept and Cathy accepts that in
15 hindsight they were not the most up-to-date information
16 that we could have passed on.

17 Q. What representations do you say Cathy made to you?

18 A. That the certificate that she sent to me related to
19 the material that we made our gowns out of, and also
20 that the hangtag related to that material as well.

21 Q. Well, look back at {F3/1045}. If you look at
22 paragraph 1, she says:

23 "... pls find a certificate in green for your
24 reference, this is for material. They can provide this
25 certificate for each order of fabric."

1 So she was not representing that this was
2 a certificate in respect of every fabric that you had
3 ordered any time after 2012, was she?

4 A. Well, given that I had asked her for the certificates
5 related to the fabric we used to make our gowns and she
6 has essentially said that this attached certificate is
7 for the material. Obviously what she is saying is that
8 there might be additional certificates for each order of
9 fabric, but we would not have known which specific order
10 Alison's gown would have come from, so I guess my
11 working assumption was that providing a certificate for
12 the material that our gowns had been made out of from
13 the manufacturer of the yarn would have been sufficient.

14 Q. So are you suggesting that you thought that your gowns
15 were manufactured from an order of material in 2012?

16 A. No. As I said, I did not initially spot the date on
17 the certificate.

18 Q. No, I know, but Alison pointed it out to you, did she
19 not, and she asked: how can you be sure that this
20 relates to the gowns that I bought in 2020?

21 A. I do not think I said that I could be sure that related
22 to the gowns she bought, because obviously I would not
23 know when the gown that she bought was manufactured. We
24 had several rounds of manufacturing gowns between
25 starting the business and her order, so it would have

1 been impossible for me to know which batch it was, for
2 example. But my understanding was that we had
3 certification for the factory that provided the material
4 and that therefore that was a general indication that
5 that factory could provide the recycled PET fabric.

6 Q. But you are not suggesting that meant that every piece
7 of fabric produced from that factory is recycled?

8 A. I -- I do not know, to be honest with you.

9 MR RANDOLPH: I am sorry to interrupt, but the witness has
10 been already taken to her response, which is to this
11 whole series of emails, to someone called Alison
12 {F3/1123}, and she has said, in relation to
13 certification:

14 "... [this] would be one our procurement officer has
15 because that is when we began working ..."

16 So really this is not a question -- and we have
17 found out who the procurement officer is, that is
18 Mr Muff, and so really I am not quite sure whether this
19 witness can answer the questions that are being asked of
20 her, but I just thought I would raise that.

21 MR PATTON: It is very unusual for counsel to say that he is
22 not sure that the witness is able to answer
23 the questions and think that is a good interruption.

24 MR RANDOLPH: Really? Extraordinary. It is not her
25 experience, not her knowledge.

1 THE CHAIRMAN: What was the last question, Mr Patton?

2 MR PATTON: Well, I have forgotten because of Mr Randolph's
3 interruption. I have lost my thread.

4 The point I was putting to you was that you did not
5 think that the existence of a certificate in respect of
6 a factory meant that every piece of fabric produced by
7 that factory was recycled. You did not think that, did
8 you?

9 A. I guess it is not something I had given a lot of thought
10 to. My assumption would be that fabrics -- factories
11 would be fairly specialised, and so in my mind it is
12 very much plausible that a factory would manufacturer,
13 for example, only recycled polyester.

14 Q. So you are suggesting you think that if you have got
15 a certificate for a factory, you can then proceed on
16 the basis that every piece of material generated by that
17 factory is 100% recycled? Is that what you are
18 suggesting?

19 A. No, but what I am suggesting is that when I asked Cathy
20 to send me a certificate in relation to our fabric and
21 she sent me that certificate, that that certificate
22 related to the specific type of fabric that we order
23 from that factory.

24 Q. But then it is pointed out to you that it is from 2012
25 and what I am not understanding is why you then go back

1 to Alison with the explanation that you do rather than
2 checking what is actually the basis for making
3 the claims for gowns sold in 2020.

4 A. But it would be impossible to know whether a gown
5 purchased by a customer in November 2020 was made from
6 any one certificated batch of fabric.

7 Q. Cathy has sold you she can provide the certificate,
8 the certificate can be provided for each order of
9 fabric, and you knew each of the orders of fabric that
10 had been made in respect -- you knew when you had
11 ordered gowns from the factory, did you not?

12 A. Yes, although ordering gowns would not necessarily
13 correlate to ordering fabric, because sometimes they
14 would order fabric in bulk and then make the gowns over
15 several months/years until the fabric ran out.

16 Q. You know it is not going to be fabric from 2012; do you
17 accept that at least?

18 A. I accept that, yes.

19 Q. You made no attempt to find out whether there were
20 certificates available for any of the fabric that would
21 have been used in 2018, 2019 or 2020; do you agree?

22 A. Yes. It was my understanding based on the email from
23 Cathy that this certificate related to the type of
24 fabric that we order and that we order from this
25 particular manufacturer. So, yes, I did not check that

1 it was -- I did not know the specific batch that
2 Alison's gown would have come from, so I did not check
3 whether -- it would have been impossible for me to check
4 whether there was a certificate attached to that
5 specific batch.

6 Q. It would have been impossible for you to check. How
7 would it have been impossible for you to ask her whether
8 she had a certificate in respect of any of the fabric
9 actually used for your gowns?

10 A. I could have asked if she had more recent certificates,
11 for sure, but I could not have asked, "Do you have
12 a certificate for this particular gown that this
13 customer had purchased".

14 Q. You did not ask whether she had any more recent
15 certificates?

16 A. I did not, no.

17 MR PATTON: Sir, I do not know whether that is a convenient
18 moment.

19 THE CHAIRMAN: Yes, it is. We will recommence at 10.30
20 tomorrow.

21 MR PATTON: No, I am afraid not.

22 THE CHAIRMAN: Sorry. Thank you, yes.

23 Ms Nicholls, you are in the middle of your evidence,
24 I am afraid, so there will be a gap now until sometime
25 after Mr Muff has finished his first chunk of evidence.

1 You must not talk about your evidence or the case until
2 anyone in the interim.

3 MR RANDOLPH: Sir, just one small practical matter. I was
4 wondering -- I have not had an opportunity to discuss
5 with Mr Patton, but for the ease of both side's
6 witnesses, maybe it would be a good idea to have a hard
7 copy, just a pure vanilla version of their witness
8 statement in the box. I do not know whether that would
9 help, because obviously if one is going from witness
10 statement to exhibit or disclosure --

11 MR PATTON: Yes, my solicitors actually suggested that in
12 correspondence some time ago, so it would be a much
13 better --

14 MR RANDOLPH: Great minds.

15 MR PATTON: It would be much better if that were done.

16 MR RANDOLPH: Would it be possible for that to be done, or
17 are you saying each party provides their own witness
18 statement?

19 MR PATTON: I think so. We are ready to provide hard copies
20 of our witness statements, I assume you can do the same.

21 MR RANDOLPH: I am sure we can. Thank you very much.

22 (4.25 pm)

23 (The Court adjourned until 9.00 am on Tuesday,

24 25 January 2022)

25

INDEX

1

2 Housekeeping.....1

3 Opening submissions by MR RANDOLPH4

4 Opening submissions by MR SPITZ.....38

5 Opening submissions by MR PATTON.....52

6 MS RUTH NICHOLLS (affirmed).....94

7 Examination-in-chief by MR RANDOLPH.....94

8 Cross-examination by MR PATTON96

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25