IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1178/5/7/11

Victoria House
Bloomsbury Place,
London WC1A 2EB

10 May 2012

Before:

LORD CARLILE OF BERRIEW QC
(Chairman)

MARCUS SMITH QC
PETER FREEMAN QC

Sitting as a Tribunal in England and Wales

BETWEEN:

2 TRAVEL GROUP PLC (IN LIQUIDATION) Claimant

- v -

CARDIFF CITY TRANSPORT SERVICES LIMITED Defendant

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H E A R I N G
(Day 10)

APPEARANCES

Mr. Michael Bowsher QC, Ms Anneliese Blackwood (instructed by Addleshaw Goddard LLP) and Mr. Adam Aldred (of Addleshaw Goddard LLP) appeared for the Claimants 2 Travel Group PLC.

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

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THE CHAIRMAN: Good morning and welcome to England! Croeso I Loegr!

MR. BOWSHER: I think first on the agenda I have a few questions for Mr. Brown and the plan was that I might deal with those, I hope fairly swiftly, and then we move into closing submissions.

THE CHAIRMAN: Certainly. Mr. Flynn?

MR. FLYNN: Sir, then we recall Mr. Brown. I do not intend to make submissions about this now but given, as we say, the confused nature of the allegations that have been put in the closing submissions, and you will have seen some correspondence on that, I really must ask that the questions that are put to Mr. Brown are entirely precise so we know what is being said to him. I am not trying to teach my friend to suck eggs, but I am anticipating that he will put questions and then at the end will say: "I wish to maintain the submissions made in our closing submissions" which we will be saying are confused, so we really need to know what it is that is being put to Mr. Brown on this rather important topic.

THE CHAIRMAN: Well let us see how we get on, but thank you for your intervention.

MR. FLYNN: In that case we will recall Mr. Brown.

THE CHAIRMAN: Because we released Mr. Brown I think he will have to be re-sworn.

MR. FLYNN: I think that is right, sir.

THE CHAIRMAN: But only for that reason.

Mr. DAVID BROWN, Sworn

Further Cross-examined by Mr. BOWSHER

Q Good morning, Mr. Brown. Could you take up a new file called H6? I do not plan to go over old ground so far as we can avoid it, Mr. Brown, but just to set the scene, if you turn to p.16 in H6, this is a letter from Burges Salmon to those instructing me, written I think just towards the end, it was the late night letter, as it were, towards the end of our time in Cardiff, you may recall. If you look at para. 1.10, this refers to correspondence regarding a complaint which you had received from Darwin Gray, do you see that?

A Yes.

Q I infer from that then that on 14th May 2004 you were aware of the existence of a complaint having been made to the OFT by 2 Travel?

A I think the complaint had been made in the letter from Darwin Gray.

Q And you had that, there is no question on 14th May that was available to you?

A Yes, because that was what this correspondence was about, in response to that.

Q And you have, as I understand it treated that document, or the documents you had at that time as being privileged and therefore relating to legal advice, presumably about that complaint at that time, would that be right?

A I think that's right. In my first witness statement I did refer to the fact that we had had this correspondence with Darwin Gray and I had taken advice over that, and I think that is in my first witness statement that I did refer to the fact that I had taken advice, and I assume that the reason it was not disclosed is because of legal privilege, that is a matter that has been advised on.

Q If you then turn on to p.31 in the same file, this is an email from David Harrison of Bond Pearce to you, it is an email which is not one we had seen when we were in Cardiff, I do not think, and you can see it is dated 30th April?

A Yes.

Q If you want to just re-read it to remind yourself, if you look at the third paragraph:

> "In the meantime my advice would be to continue to ensure that your response to 2 Travel is presented in terms of improving services to customers rather than retaliating against a new arrival if there is uncertainty about the economics of pricing a service, the competition authorities may take into account evidence of intent."

So at that point, on 30th April, you are receiving, are you not, advice about the competition law characterisation of your response to 2 Travel, is that not right?

A Well if I can just explain on this, at the time I gave my first witness statement I referred to the correspondence regarding the Darwin Gray and indeed the Furzeland inquiry, what I consider to be traffic law issues. At the time of my third witness statement I was aware of a chain of correspondence from March 2004 between David Harrison and Alan Kreppel and I had seen that at the time I gave my third witness statement. I had not seen this document at that time, but it was clear that I probably had seen the letter from Mr. Harrison and probably the accompanying advice and that was the evidence I gave the Tribunal. In response to a very specific question, I think from Mr. Freeman, I was asked can I not remember anything more, particularly in the context of the Lothian case, and I explained at the time of my third witness statement I was racking my brains trying to understand who is this Mr. Harrison? Clearly I know the name, clearly there is some context here and I cannot understand it. All I have got in front of me is the letter relating to the Mid and West Kent case and the accompanying letter. At that time, and at the time of my third witness statement clearly I was already concerned that having given information that was proven to be incorrect in my

first witness statement I was particularly keen to get it right in my third witness statement, and I asked the question very particularly, very forcibly of solicitors, our own solicitors at the time: "Is there anything else?" because I am just seeing this. Having said that I've got no recollection this is not really helping me at all, but clearly the name "Harrison" has cropped up, I do have some understanding of who he is and I just cannot position it. They went back, they went through electronic and hard copy disclosure with Bond Pearce, there is nothing else at all that they are aware of. They then went back both to Mr. Woodhouse and to Mr. Harrison: "Can you remember anything relating to this at all?" and the answer came back: "No, absolutely not, other than the initial exchange there is nothing coming back at all." I was left completely nonplussed. Clearly I had probably seen this correspondence, had some understanding of who Mr. Harrison was, and that's where it went. Clearly, after the hearing of the trial in Cardiff I have had the benefit of seeing this email exchange relating to the Lothian case, and having re-read it, it is still not helping me, I have to say. Effectively what has happened is in the first exchange of correspondence in March there is a reference to the Lothian case and I would have seen that before the Tribunal sat on the hearing in Cardiff, because I'd seen those documents at the time of my third witness statement, so I was aware that there had been this reference to a Lothian case, and here, lo and behold we see it, and what happens is that Mr. Harrison writes to Alan Kreppel, paraphrasing: "Following up on the correspondence in March, I've now got some more information on the Lothian case, there are some brief details, more to follow." That is then responded to by Toni Kemp, who is the PA to the directors, saying that Alan is away on holiday, she refers it to myself. I introduce myself and say: "Just to let you know I have taken over as managing director, thanks for sending this through to me, please keep me in the loop." I get this response with the third paragraph, which is the one I have been asked to comment on, so I cannot comment on that but clearly I take it as it is. It is there, I can't remember having read it, I can't remember having seen this email. I then say: "Thanks for sending this information" I think on the same day.

On 4th May there is a follow up email, as I understand it, to say: "There are no real details yet, but as soon as there are any details I will let you have them". That completes that. There is then a follow up email which I believe is on 9th June or thereabouts: "Here is a summary of the details of the Lothian case. I respond: "Thank you very much, I'll let you know if we want any further information". I wish I could have remembered it. It's frustrating, at the time I was racking my brains. Clearly this fills in the gap, this is why the name "Harrison" was ringing a bell, because I'd seen this.

THE CHAIRMAN: This is presumably the email at p.35, the one of 9th June, you are referring to?

A Yes, indeed, Sir. I was racking my brains at the time; looking at it now it is one of those things it's kind of there somewhere in my mind but I really can't remember it, so I can't remember, you know, 9th June, that's it.

Q Do you know whether or not you ever had a meeting, a conference, a consultation with Mr. David Harrison about this?

A No, I can be absolutely clear I've never met Mr. Harrison, and to the best of my knowledge I never spoke to him on the telephone either. The sole knowledge I have of Mr. Harrison is the evidence I gave in my third witness statement, and this exchange of correspondence here. There is a letter of 10th May where I make a reference to, as you know we have been taking competition advice from Mr. Harrison, and then there is effectively a cold email, a marketing email a year later where he sends me some information on the block ticketing exemption which is a different issue, and says: "By the way, how did it go with 2 Travel?" That is the extent of my involvement with Mr. Harrison.

MR. BOWSHER: Thank you, Mr. Brown. I am not quite sure what my question was and I am not quite sure whether that answers the question. However, let me try and deal with my questions very briefly – it is helpful to have your explanation. Sticking at H6 31, it is plain, is it not, that Mr. Harrison on 30th April 2004 is telling you about the attitude of the OFT to your proposed response to 2 Travel, is that not right? That is the comment that has been given?

A Clearly what I know now is that Alan Kreppel – and at the time of my third witness statement – had been talking to Mr. Harrison and taking some advice and I only know what the Tribunal knows in terms of the information that was submitted on that. This email chain started by being sent to Alan Kreppel and then half way through transfers to myself. I can see what he is saying, and it is there in writing. I don't remember the email, so I can't comment on it other than it is what it is, it is what it says.

MR. FREEMAN: So, Mr. Bowsher, would you agree this is hardly comprehensive advice on abuse of a dominant position?

MR. BOWSHER: Absolutely.

MR. FREEMAN: It could be described as "quite cryptic".

MR. BOWSHER: Indeed, I am not suggesting that it is – no. Before I move on, let me try one more time, Mr. Brown. At that time, 30th April, at about the time, just a little bit before we are talking about the Darwin Gray correspondence, you are being told by a solicitor who is,

as you know, from the firm that you are getting advice from on a range of other matters, you are being told how to present the Cardiff Bus response to 2 Travel, with a view to what the OFT may or may not say about it, is that not right?

THE CHAIRMAN: That is what it says, we can read that. But what is the point we are getting to?

MR. BOWSHER: Sir, I just want to see whether Mr. Brown accepts it. It is, I would have thought fairly obvious, and ----

THE CHAIRMAN: Okay.

MR. BOWSHER: I mean I can move on.

THE CHAIRMAN: Go on.

MR. BOWSHER: (To the witness): Is that not what that email is saying?

A Just to go back on the context, because I am trying to understand your question. Clearly Cardiff Bus believed that what it was doing was legal, that was the advice that Alan Kreppel gave the Board, and he gave it twice to the Board in March. At the end of April I would have seen this and I accept I would have seen it and I am trying to understand that in the context, having been told by Alan Kreppel that what we were doing was entirely legal and I would have seen it in that context. Clearly there is some evidence that this is how you should present it. I do not want to put two and two together and make five of it. The first time I saw it was after the trial in Cardiff. It is eight years ago, it is for lawyers, perhaps, to say what it is saying.

Q Are you saying you did not get that email?

A No, I am saying I did get the email, yes. I don't remember it is what I'm saying.

Q And if you go on to p.38, and we have seen this letter before, you were clearly aware that you had been dealing – this is only a few days later in a letter from you – you had been dealing with David Harrison with regard to competition matters, that is clear again, is it not?

A Yes, indeed, this is the letter that I referred to and the one that caused me some concern, because I was struggling to understand why I was saying that, given that all I had in front of me at the time of the trial was the information from March and the Mid and West Kent correspondence, which seemed to surprise me. What I now know is I can understand that the reason I made that comment was because just a few days previously I had had this exchange of emails with Mr. Harrison and that is the context of that. At the time of the trial I didn't really understand, it wasn't making a lot of sense to me and that's why I say I was racking my brains to try and understand the context.

Q And during 2004 you must have had an ongoing discussion with Bond Pearce about these matters, because if you go to p.1 we get some of these items that we have seen before, but we can actually see that – do you have p.1?

A Yes.

Q Some of these ledger items refer to what we have already seen. 29th April we can see, and 30th April, we can see reference to engagement between Bond Pearce and yourself.

A Yes.

Q Again on 12th May, and 9th June – do you see that? So there is continuing engagement on the substance of, as it were, OFT ----

A Sorry, I have seen 12th May, the next reference was?

Q 9th June.

A Yes.

Q A little bit further on in 2004, do you see that DMH1, who I think we can infer is Mr. Harrison, is conducting research on the requisite undertakings' fines for "breaches of competition law (indemnity)". Do you see that?

A Yes.

Q There are then continuing telephone conversations, and at the very least at that point it would seem, would it not, that Bond Pearce are preparing advice for you on what the sanctions might be for a consequence of breach of competition law?

A If I can take the April, May, June, bit, I think there are two separate matters here that we are dealing with. The time logs, which I first saw, I think, at the trial when I was presented with them, have a number of entries. The entries between 29th April and 4th May entirely relate to the same email thread that we have just been seeing. Each stage of the email gets logged as part of the time sheet. It finishes off on 12th May saying, "I will keep you updated". So we have seen all that. That is what we have just been looking at. 9th June is also the summary that the Chairman referred us to. The situation in August, and I have seen very little on it and it means very little to me, as I said at the trial, my assumption then and my assumption is still the same now, this relates to the fact that when I was on holiday in early August there was the public inquiry with 2 Travel and the Traffic Commissioner, and at that public inquiry Mr. Francis informed the Traffic Commissioner that he was – I think it was this day, but I can't remember, it was certainly imminent – issuing High Court writs against the directors personally. That's what I came back to when I came back from holiday and was briefed on. Clearly that was an issue of concern. What we see here is on 23rd August, Toni Kemp, who is the director's PA, is contacting Bond Pearce – they all

relate to the same thing – saying, "Is this possible that High Court writs could be issued against the directors personally and what's the situation there?" We go into the Articles of Association, and the thing. I don't remember that advice being taken, and I don't remember what the advice was on it. I have to say, I am making the assumption that it relates to the High Court writs, and that is how it logically fits in. Why Toni Kemp, the PA, was talking to solicitors I don't know. It may have been that it had been mentioned to the Chairman, and he had asked her, or one of the other directors, when I was away, asked her to do it. I simply don't know, and because I don't know I don't recall the outcome, but presumably the outcome must have been a positive one because at that point it just – that's it, that's the August exchange.

Q We can see from that entry that for whatever reason and by whom it was being asked for, the advice that was being prepared included research into the sanctions, the fines, that the OFT might impose, can we not?

A I see that is what it says there in the time log. I have no information other than what is in the time log. As I said, there was certainly no follow-up, no further issue on this. In the context of the High Court writs that's how I see it. It gets passed around. It starts off with one person, and then it goes to someone else, and someone else again, all on the same day as being bounced around Bond Pearce. I have to say, the PA, I can't understand why she was being asked to ask the question, and it may be because she didn't understand the issue she was dealing with, and it might have been someone said, could she just check, "Can directors be held personally liable, can these writs be issued against the directors? Please can you just give them a quick ring and find out?" and it bounces around. That's all I can suggest.

Q So, Mr. Brown, you think "indemnity" in this time ledger note means the possibility of offering indemnity to individual directors?

A Yes, that's my understanding of it against the High Court writs, but, as I said, I am in danger of making assumptions because I can't remember the exchange.

Q What we can also see, if you go on to p.323, is that you were not just, as it were, a passive recipient of this advice and material. This was, in fact, an earlier occasion in March '04 when Alan Kreppel forwards to you advice, admittedly it is a short note, from David Harrison, and it includes in the first paragraph, and we have seen this press release already, so I am not going to waste time on looking at it, we can all work out which press release it is, saying:

"I do not think the press release creates any problems from a competition point of view. You have, I think wisely, not raised anything threatening retaliation."

That is what he says to Mr. Kreppel. It then goes on to deal with some issues about defamation. Mr. Kreppel says to you, Mr. Brown, "I suggest", and I presume that is "we go for it". I am not quite sure what he wants you to go for, but presumably it is, as it were, the press release itself, because that is the only way of making sense of the exchange. You are agreeing. It is not that you are a passive recipient, you actually sign up and agree to that course of action – is that not right?

A The release of the press release, yes.

Q So to that extent you must be taking on board the advice that you are getting at that point?

A This is 12th March, this goes back to the March correspondence. I didn't see it at the time of my third witness statement. It's three days after the first board meeting at which Alan Kreppel has assured the board that what we are doing is legal. I can't recall this email, but, given the first paragraph and the context, I've only three days previously been told that this is entirely legal and in accordance with competition law. It then goes on to the issue of defamation, and he may have been asking me in that context, "Are we happy with the tone of this?" and I sign up to it. Yes, that's what I'm doing.

Q And you continue throughout this period to be looking for reassurance on competition law issues. If you turn to p.325, you see this is a report from Mr. Harrison to you about the imminent arrival of the Edinburgh decision, and reiteration of the point which we have already seen in this email. This is the email which we have already seen where he is telling you, as it were, to present it in terms of improving services and not retaliating. That is in the third paragraph of the email to you. Your response is, you look forward to seeing the details when they become available. You are not just a passive recipient, you are actively looking for further advice on these topics, are you not?

A This is the same email chain that is referred to in the time logs that we looked at before. The only additional thing is the comment. I am in the habit of replying to emails, as a matter of courtesy, acknowledging them, and that is what I was doing. I think you go back to the bit of the bottom of that page where it says, "Thanks for the information, just to let you know I've taken designate, Alan leaving at the end of May". He then responds to that just saying, "I don't know when the Edinburgh decision is going to be available". Then I respond saying, "Thanks, I look forward to seeing the details when they're available". It's part of the same email chain. Then, of course, on 9th June we do get the decision which again we have looked at.

Q We are in May here. You clearly were thinking about the nature of your competitive response. Could I take you back in the file to p.142, it is an email from Mr. Kreppel to yourself. This actually is a follow on from an email which we saw before. It is that Union Office email, which we have seen before, but what we have not seen is the follow up from that from Alan Kreppel, do you see, at the top? So there is the Union Office one at the bottom, competitive vehicle roster, which is all about the TGWU's concerns.

A Yes.

Q We have seen that before, but the one above, we have not seen what Alan Kreppel said to you. If we just read it:

> "Gentleman,
>
> I've just spent some time this morning observing operations in Ely. Our competitive services are nothing short of a joke. We are successfully competing with ourselves and allowing 2 Travel a completely free rein. Our only saving grace is that many passengers will not travel with them. If this is typical and carries on then 2 Travel will gain a firm foothold, just as they have in Swansea, but we will have thrown around £500,000 per annum down the drain. The TGWU is partially correct, except I have not instructed anyone to do the sensible thing for reasons which are obvious. That is to ensure our white vehicles shadow 2 Travels rather than run to our notional timetables on services that are, for the most part, registered regular. The current nonsense needs to stop now, and we need to start competing with the competition rather than ourselves. I suggest we get on with it urgently before it is too late.
>
> Alan"

That is to yourself. I do not think we have a specific response to it. Then on the previous day you had been copied in on another email. It is on p.141:

> "Chris,
>
> Our policy seems to be to run to schedule time. You need to look at this as they are all over the shop and occasionally are getting a reasonable load. We need to consider running with them given the fact that most of our mileage is registered frequent. Please discuss with David and Peter."

You positively engage with this one because the response is, as we have seen before:

> "Is this one for the Competition Group? Should we have a meeting this week given that CD and myself are away next week?"

What we can see from this is that internally you know, and are being told, that the plan is to retaliate vigorously, to shadow 2 Travel's buses, and to spend money in doing so. That is right, is it not?

A If we go back to the evidence I gave at the hearing, and I think I am seeing this for the first time, I can't recollect it, it entirely fits with the evidence that I gave, that Alan Kreppel quite clearly at that time was looking to compete in a more aggressive way than I believe I'd signed up to, and we had a battle of wills at that time, when I had to exert my authority, not an easy situation because I was still managing director designate, and we went over this, that my instructions were to act legally and professionally at all times, and that included operating to pad, and you can see this difference, that Alan Kreppel had a different view from me, which I addressed at that time. It's really covered in my email of 25th May, "We are going to operate professionally", and it also goes on to say that we will do it with – I don't think I say within the law – but we are being fought on many fronts, which we explored, and what some of those were, like bringing the attention of the authorities to 2 Travel's activities. What I was keen to do was to make sure that what I had signed up to and what I believe the board had signed up to which was that we act properly, legally and professionally to pad, and that is what we did. That is what I had been advised, and you see this exchange just before Alan Kreppel leaves a week or so later.

Q The problem with that, Mr. Brown, is that what you are actually doing is referring us to your competition group, and we know that this topic, "Competition Group", is on your 24th May email, and we know that there simply are not any records of what is being said at those group meetings, are there?

A No, as I said, we didn't keep minutes of those meetings, and didn't keep minutes of those sorts of meetings in general, informal meetings of that nature. I don't know, looking at it now, whether there was a meeting of the Competition Group. It says, "I am free currently Friday am", whether we did meet or not, but my instructions throughout have been absolutely clear, and indeed I think they're set out on 25th May, that this is all about between Alan Kreppel, the Union and myself, and I set out my position very clearly, and I have not changed from that.

Q We will look at this together. What we can see is that you are being told, firstly, you must present your conduct as being an improvement of service not a retaliation, but you are actually internally planning to shadow 2 Travel and you are discussing competition at a group meeting which you never, in fact, provide any records or minutes for. That is the truth of it, is it not?

A The email from Alan Kreppel isn't what I signed up to. What I signed up to is as I have put in, as you see from my email of 25th May, the document you referred to before, as I said I had not seen, and I am seeing it now so I am reminded of it, but it still does not mean anything to me. You have got Alan Kreppel's version, which I appreciate is not one I was comfortable with and not one I had signed up to and is not what I believe the Board had signed up to, and you see me exerting my authority to say: "No, this is the way we do it. This is what I believe we are doing, this is the way we do it, and we are not going to get involved in these things."

Q So you are saying the 25th May email to the Union, copied to these others, is your repudiation of Mr. Kreppel's approach?

THE CHAIRMAN: So that is the fourth paragraph on p.143 is essentially what you are saying, is it?

MR. BOWSHER: Yes.

A Yes.

Q And there is no other note of any internal discussions repudiating or rejecting the position put forward by Mr. Kreppel, is that right?

A No, he left shortly after. I think he left at the end of May, it was his swansong, effectively.

Q Previously, when we were looking in Cardiff at the records we can see that there were a number of occasions when 2 Travel buses were being shadowed. From the material we have got here, I would suggest to you that the email of 25th May to the Union is just window dressing. It is an email sent out to the Union as pure window dressing, because the reality is that the competition group must have been discussing exactly what Mr. Kreppel had in mind, in other words, a retaliation and shadowing of 2 Travel's buses, because that is what happened, and that must be what you were planning to do internally?

A Well the Competition Group, or the people involved, I am not sure whether it was called the Competition Group at the time, but this was set up by Mr. Kreppel and he may well have briefed them of what his view of things were. When I took over the Competition Group, which was in April, at the time that the service started, I made my view very clear, and have consistently made my view clear. It is not just 25th May and I repeated, and we went through this at the trial, repeated several times during the course of the competition effectively the sentiments in that fourth paragraph. I wrote to the drivers following the Darwin Grey letter and I wrote to them again in November on the same thing. That was my consistent position. You talk about the "competition logs", is the way I think they are referred to and there is some evidence that on occasions we were running right in front of

them or right behind them, and the Traffic Commissioner, Mr. Furzeland's inquiry, looked at this issue of whether we were deliberately sandwiching or blocking the stops or whatever, and drew his own conclusions on that, which we have been through. We know that the buses were timetabled to run in front of theirs, so it is no surprise that in observations they were running in front of them. But my position right the way through was exactly as in that fourth paragraph. If that is not the position that is not from my instructions and it is not with my knowledge.

Q Before I move on let me just deal with this then. At this point, at the end of May you are about to take over as managing director of a public owned company, is that correct?

A Well on 1st April I took over as managing director designate, and I think the Chairman asked me the question does that mean effectively you became managing director and in many ways the answer to that is "yes", I was taking on responsibility for these issues, so I would say that by the end of May we completed the end of a hand over period and I formally became managing director.

Q It is plain from this material that at this point you knew that there was a competition law issue. It had been drawn to your attention on more than one occasion that there was a competition law issue, and one of those issues was whether or not you were retaliating against 2 Travel. That is right, is it not?

A I go back to the fact that the Board had been asked twice in March about competition law issues. I can't remember what was discussed, it was eight years ago, but clearly the Board had asked the question and had received the assurance that what we were doing was legal. So, yes, clearly, the evidence is there, the competition law was discussed, and the fact that our proposed response was legal was discussed. So yes, I do appreciate that there was a competition law issue. The issue for me is that it had been resolved. We had been advised that what we were doing was absolutely fine, and so I have no reason to question it subsequently.

Q You have an internal group which is going to have a meeting in May to deal with competition matters ----

A Yes.

Q -- while you were taking over. There is what you say is a different view being put forward by Mr. Kreppel?

A Yes.

Q And what I would suggest to you, Mr. Brown is, if in fact your position was that you were repudiating that view it is astonishing that there is no internal record of what happened at that Competition Group meeting setting out Mr. Brown's new broom.

THE CHAIRMAN: Well we are going on to comments now, Mr. Bowsher, and we do seem to be going around the same course again.

MR. BOWSHER: I am being asked to make sure that I have put the point.

THE CHAIRMAN: You have put it very clearly.

MR. BOWSHER: I hope I have put it clearly enough.

THE CHAIRMAN: Another time will not improve it.

MR. BOWSHER: Very well, I will move on. (To the witness): In fact, competition law continued to be a matter which you were discussing with Bond Pearce. At p.336 – you may not have met Mr. Harrison, but we can see that in April 2005, so a year later, you are still having an exchange with Mr. Harrison about competition law issues more generally. We were talking about the ticketing block exemption, and then there is a discussion here at 336, about what has happened to 2 Travel, and we can see here Mr. Harrison to you on 8th April, "Thanks for the update" – that presumably is the update on 2 Travel's activities:

> "It does seem unlikely the OFT will be taking action so long after a complaint, although not perhaps strictly impossible given their generally slow response time. You might also like to know that in the press release …"

and they are then talking about bus bunching and leap-frogging. So there is a continuing discussion between you and Mr. Harrison about competition law issues including 2 Travel and competition law and the issue of bus bunching, that is right, is it not?

A Yes. Just to explain, I think we established that the last email exchange with Mr. Harrison was the summary of the Lothian case he sent on 9th June, so this is nine, ten months later, and is the first correspondence, and out of the blue is raising the issue of the block ticketing exemption. The block ticketing exemption is a very big issue in the bus industry because, as I am sure you are very well aware, there is this conflict between the desire for services to be better integrated on the one hand, and on the other hand bus companies not to be talking to each other. It was a live issue for us because we were involved in ticketing schemes such as Plus Bus, and Network tickets, and so I was very much aware of this issue, and he writes to me with the details, and I say "Thank you very much, yes, we have already received the details", and he is effectively, I think, touting for business. But you are right, he says: "Presumably the 2 Travel affair has gone away", and I come back with a brief paragraph to say that "yes", they have gone away from Cardiff, we have been cleared by the Traffic

Commissioner – it is self-explanatory there. He comes back with some further information about bus bunching and leap-frogging – I can't recall what it was about at the time, but it is to do with this consultation exercise and I thank him for the information and that is the end of it.

So after 9th June there is a follow up email in April 2005 where he is touting for business and he just asks: "How did it go with 2 Travel?" effectively, and I respond. Then, as I said, given my letter of 10th May when I say I have been taking advice from Mr. Harrison and I couldn't understand the context, and of course the Lothian chain, which is the one that was missing, now gives that context and helps me understand how I knew of Mr. Harrison and the familiarity with which he addresses me.

Q Well, April 2005 it was still clearly fresh in your mind that Mr. Harrison and you had had discussions about 2 Travel and competition law; that must be pretty plain from that exchange, is that not right?

A Well it is clear that he was aware about 2 Travel.

Q Yes, you had not, in April 2005 forgotten, had you, that David Harrison was involved in providing information and advice to you about 2 Travel and competition law, had you?

A Well there is an exchange of emails which indicates that I did know who he was and that 2 Travel were involved, so I guess "yes" is the answer to your question.

Q And you got a s.26 notice from the OFT I think one and a half months later, 26th May 2005?

A Yes.

Q And albeit that in the course of the subsequent years you have at various points denied getting competition law advice and so on and so forth, what I would suggest to you is that since 2005 there can hardly have been a moment when 2 Travel and competition law was something that you were able to completely forget about. This has been an ongoing saga for you and Cardiff Bus since 2005, has it not?

A Yes.

Q I will put the question again, this has been an ongoing saga for you and Cardiff Bus since 2005, has it not?

A Yes. Sorry, can you put your question again, I didn't quite ----

Q Yes. The whole question of 2 Travel and Cardiff Bus' compliance with competition law regarding the 2 Travel entry has been an ongoing matter for you and Cardiff Bus since 2005, has it not?

A Since the s.26 notice, yes.

Q May 2005, yes. What I find surprising in that circumstance is that, given my experience of the way memory works, is that there is any moment at which one would actually have forgotten the original involvement ----

THE CHAIRMAN: We are moving into comment now, are we not. You can make submissions on this but I am not sure that the witness is going to be able to help you on the properties of memory.

MR. BOWSHER: Sir, I would accept that but various points have been made about propositions I should be making so I just want to make this very briefly, I have only a couple more questions on this point. We have already made our submissions about the necessity for some of these questions, but it is better I would suggest ----

THE CHAIRMAN: I am merely trying to encourage you to reflect on the fact that we have got the point Mr. Bowsher.

MR. BOWSHER: I am sure you have. I would suggest to you, Mr. Brown, that there really has never been a point where there has been a period where you are likely to have forgotten about Mr. Harrison and his involvement with you and the competition law ramifications of 2 Travel's entry?

A If I can just go back, at the time I gave my first witness statement I did not recall any competition advice and I made a similar comment in a lesser form in my oral reps. to the OFT in late 2007, and that was my belief when we started down this road back in August last year. Clearly I am now aware that we did take some competition advice, and it seems to me that it is in three phases. We have the thing which formed part of my witness statement which is the exchange with Mr. Kreppel, and that was reflected in my third witness statement. We then have this missing piece of documentation, which is the email chain on the Lothian case, which for me now, you know – light bulb – I can understand that that is where the reference to Mr. Harrison, and my understanding of Mr. Harrison came from, I couldn't recall it. Then we have this effectively touting for business email in April 2005 where, at that time, it is clear that I must have known who Mr. Harrison was, and that he had some connection with 2 Travel. Beyond that in terms of the s.26 notice, when the s. 26 notice came you could imagine the impact that it had on Cardiff Bus and all the issues, and in particular around disclosure and what is going on. I cannot remember at that time what we said about these things. I can't remember whether we were asked ----

THE CHAIRMAN: You see, I think what is being suggested is that by the time the s.26 notice was served, which was as early as 26th May 05, how could you have not racked your brain and remembered that not a year before you had been obtaining competition advice from Mr.

Harrison, and that you had made a response, which was the third paragraph of the email at p.143, namely "We are going to be absolutely legal", I think what is being put is how on earth could you have forgotten that when the s.26 notice arrived as early as May 05?

A All I knew, as I have said consistently, is that Mr. Kreppel had presented to the Board twice in March that, as far as he was concerned, what we were doing was entirely in accordance with competition law and with traffic law, and that is minuted there.

We then look at what did I know about it, I understand I was shown a copy of the Mid and West Kent case and the accompanying letter; I can't remember it, I can't remember it now – I don't know whether I remembered it at the time. It is not registering even now that I saw it, but I recognise that I probably did. We then have this Lothian case which is for the Tribunal to interpret what that is saying, for me it is just information. We have a course of action which we believe to be legal and you get this Lothian case and I am looking at it now: "What is it actually saying?" other than we have had this Lothian thing, and then this brief exchange here.

So in terms of taking advice I am not sure what advice even now. The advice that was taken was taken by Alan Kreppel, and I have no knowledge of that, other than what I have been shown now, subsequently. The only knowledge I had of that was what he told the Board, and I can't remember that, and the Mid and West Kent case.

Q Let me try and wrap this up quickly, Mr. Brown, these emails we have been seeing to and from you I think all came from your Cardiff Bus email account, that is right, is it not?

A Yes.

Q So they were available to you at the time of the various rounds of disclosure?

A Everything that we had was handed to our solicitors as soon as it became available, and some of this documentation, as we know, including the Lothian case, came up subsequent to the trial.

Q It is not true to say that you were just interested in the Lothian case and then it all went to bed, because if you go to p.334, p.6, you will see you to Peter Woodhouse, whom we know is Bond Pearce, although he is not the competition law Partner, as we know, but he is Bond Pearce – third paragraph – we can see from that that you are engaging with Bond Pearce and noting with Bond Pearce that you are still waiting to hear whether there is anything going to come from the OFT, are you not?

A Yes, just to explain again, Peter Woodhouse deals with employment and traffic law issues nothing to do with competition law, and he is the person I consulted with over the Darwin

Gray letter, and the issues were being raised at that time which, if you look at the letter of 10th May, I start the letter, it is the context of the reference David Harrison:

> "As you know we have been taking advice from David Harrison", which I now understand and we talked through, "but I believe this is a matter of traffic law and therefore within your remit."

And we deal with the Darwin Gray letter and say: "Peter Woodhouse is aware of 2 Travel". He then sends me an email on 29th: "Did you see an article in a magazine?" and I respond, "Yes, we did." The reference to "Nothing heard from the OFT" is the Darwin Gray letter, because they raised a whole series of traffic law related issues and they said: "and we've referred it to the OFT", and we were comfortable that what we were doing was legal but we made the point that nothing had been heard from the OFT. They said they had complained and we heard nothing, we heard nothing, we heard nothing. I think, and I may be going outside of my knowledge now, but my understanding is the first we understood was the s.26 notice that there was no correspondence with the OFT, so the fact that there has been no response from the OFT encourages us that there were not any issues.

Q The Tribunal will have the record, I am not going to say any more about that. Let me just put it to you, to be fair to you, I would suggest that the accurate way of looking at what has happened is that you were holding your breath – to put it loosely – to see what the OFT did on competition law matters – that is the first point. But, more importantly, there never was a point where you forgot about competition law and the competition law advice you had had, and that all the various suggestions that you have made to various bodies subsequently, including this Tribunal, were not only shown to be untrue, but at the time you made them you knew them to be untrue, because you simply had not at any point forgotten the involvement of Bond Pearce in giving you comments and advice on competition law?

A Can you just repeat the first point?

Q I am suggesting to you that you had never forgotten the involvement of Bond Pearce in providing competition law advice to you, Cardiff Bus, or you personally, David Brown, and that whenever you have said anything to the contrary to the OFT, to this Tribunal, not only was that statement untrue, but you knew it to be untrue?

A I think there was a point that you made at the beginning which I didn't catch, but in response to the main point I think what you are saying is that I lied and I am not a liar.

Q The reality is, is it not, that this was a programme of responding to 2 Travel, where you knew the following things: you have accepted previously you knew that you were not

supposed to predate, that the law prevented you from doing that. You knew that you were not supposed to run at a loss, for example, that is right, is it not?

A Yes.

Q You knew that if you did there were risks of competition law sanctions being applied to you, did you not?

A Well I knew that we would be in breach of competition law.

Q You knew also, because we have seen lots of evidence, I am not going to go back over it, the programme of responding to 2 Travel was costing money to Cardiff Bus?

A Yes, we went over that in the evidence.

Q And you knew also that there were substantial benefits to be gained for Cardiff Bus by eliminating 2 Travel from the Cardiff market, is that not right?

A Well, I think it is obvious that if you have a competitor that competitor is going to be taking market share and money from you, yes, it is self-evident.

Q I would suggest that not only were you weighing the likelihood of detection because we have seen that you were, in fact, waiting to see what the OFT did, but I would suggest also that the record shows that you were also taking advice or seeking advice about what the fines and sanctions might be if you had infringed competition law?

A We believed that what we were doing, I believed that what we were doing was legal, based on the assurances I had been given. I am not aware of any advice on sanctions or fines other than the reference we had in August to the threat against directors personally of High Court writs by Mr. Francis.

Q I would suggest that you had taken account of the risks of detection, the risks of enforcement, and the consequences of that against the benefits that you would get from driving 2 Travel out of the market, and you decided it was worth going ahead with the programme that you put in place?

A I believed what we were doing was legal based on the assurances we were given, and therefore that was not an issue. I believed that what we were doing was correct.

Q And you were furthering that programme by presenting it as an improvement of service just as you had done with Allisters, and all those ones in the past, rather than saying the truth which is this is a retaliation to drive 2 Travel out of the market, is that not right?

A Well, we had a position, as I said that Alan Kreppel had put to the Board, this is our competitive response, this is the way we are dealing with it, and this is what we followed through on.

Q But you were very careful, were you not, to try and tell the world that that was not your position, that in fact you were simply improving services, you were not in any way retaliating?

A Clearly we had a position that we followed through on and that has been my consistent view throughout and it is reflected in the press release at the time and the other documents.

Q The relationship between you and Cardiff City Council is largely a matter of record and we have already been told quite properly that the Tribunal can see very plainly from the records. We have already discussed previously the involvement you had with Aman Singh and so forth, and it is plain though, is it not, that when we look at these new documents, and if I take you just to an example, H6 38, this is a document we have looked at but I do not think I noted this point for you. This is the County Council not the City Council, but it is the same tenor, is it not, which is that you are seeking to engage public authorities to assist you, just as you did with the City Council, to try and eliminate 2 Travel from the Cardiff market?

A You are putting two and two together and making five there. Given the allegations that were being made we didn't feel it appropriate to contact the Traffic Commissioner directly. Given the issues which were well documented and we covered in the trial, the concerns that we had at that time about 2 Travel services, what we were saying is that Cardiff County Council as the Transport Authority should be doing that. I have not shied away from the fact that where 2 Travel were failing to meet their legal obligations we were pointing it out to the relevant authorities, and one of those would be Cardiff Council as the transport authority for Cardiff.

Q We know from the Memorandum and Articles that you are a company which is required, as you say in your original witness statement to conduct yourself consistent with the statutory duties and obligations of the controlling authority, the City Council. In doing so you are, in effect, in the conduct you carry out in the market ----

MR. FLYNN: Sir, I just wonder whether this really does arise from any new material that we needed to recall Mr. Brown for.

MR. BOWSHER: It is one question, I mean the point has been made in submission. The only reason why I make this point now is because quite properly the Tribunal observed that the relevant material does not need to be put to Mr. Brown; there is a great deal one could put. Complaint has been made about that. The simple answer, rather than get into a debate about whether I should have argued with the Tribunal or resisted the indications from the Tribunal and pursued this line of questioning before, I simply put one question to Mr. Brown ----

THE CHAIRMAN: Why do you not put the one question?

MR. BOWSHER: Yes, exactly. (To the witness): In your conduct vis-à-vis 2 Travel you are conducting yourself in discharge of effectively the duties and obligations of Cardiff City Council as your controlling authority?

A As I explained at the time, there are two relationships with Cardiff Council. There is the relationship with Cardiff Council as our shareholder, and there is our relationship with Cardiff County Council as an operator, and in this context all we are doing is what is open to any operator to do, which is to make a complaint to the transport authority, and that is what we are talking about here, and I appreciate it is quite difficult when you have got a situation where you have a shareholder and an operator, but that is the arms' length nature, we have discussions with them at one level, the shareholder, but we were perfectly entitled – and indeed did, and still do – talk to them as our local transport authority and every other bus operator does, and that is the context here, as the transport authority we are saying as an operator something is not right here, and pointing it out to them.

MR. BOWSHER: Thank you, Mr. Brown, I have no further questions.

THE CHAIRMAN: Yes, Mr. Smith has a question.

MR. SMITH: Mr. Brown, could you turn back to p.142 of H6? What we have here are two responses, one from Mr. Kreppel and one from yourself to effectively the same email which addresses the TGWU point, and in time I think it is Mr. Kreppel's email that is sent out first and yours is sent out some four or five hours later?

A Yes.

Q Would it be right to infer that you had seen Mr. Kreppel's email when you wrote yours?

A Clearly I can't recollect, but that would certainly be my understanding and looking at it I would see that I would have been jumping up and down at that email, and the fact that I sent it late in the day, considered it, what do I need to do here, and that was my response.

Q And your response is effectively you are in disagreement with the course that is being advocated by Mr. Kreppel in his email?

A Yes.

Q Why did you disagree with the course that was being advocated by Mr. Kreppel?

A Because it was not what had been explained to me. First of all, my understanding came from all the information that had been given to Board, this was not in accordance with any of my understanding of things, this sort of aggressive competition that he was advocating, and I did not want to have any part of it. I am sorry, I'm not quite sure if that answers your question.

Q No, that answers it. Essentially what I am seeking is an articulation of what the nature of your disagreement was with Mr. Kreppel and I think, if I understand you correctly, it was what he was proposing in his 12.05 email was not what was sold to the Board?

A Not what my understanding was of things either, no.

MR. FREEMAN: So you thought that what had been said to the board was that running White services in a legal way was permissible?

A Yes.

Q And you saw Mr. Kreppel's rather more aggressive email as a variation and departure from that course, is that right?

A Yes, I would not have condoned it then, and I wouldn't condone it now. I wouldn't condone it – even if it had not been the White services it had been the liveried services - that is not the way I deal with things, it is not the way I would want to take things forward, hence my response, and perhaps you are seeing a fairly hot headed person and I am trying to bring reason and reasonableness to it.

THE CHAIRMAN: Thank you. Mr. Flynn?

MR. FLYNN: I have no further questions for Mr. Brown.

THE CHAIRMAN: Thank you, Mr. Brown. Thank you for coming to London. You are released again.

(The witness withdrew)

THE CHAIRMAN: Yes, Mr. Flynn?

MR. FLYNN: Sir, I may need at some point to take instructions just to ----

THE CHAIRMAN: Do you want a short break now?

MR. FLYNN: I do not think I need that now, in that I would not logically be coming to anything to do with Mr. Brown's evidence.

THE CHAIRMAN: We thought it might be a good idea to give everyone a coffee break at some point, so you choose your time.

MR. FLYNN: In the trial, sir, you always said that if you said that we said, "Now", so I will not do that. I will make a start and we will see how we go for 15 to 20 minutes.

THE CHAIRMAN: We have a much nicer judges' room to retire to here, it has windows!

MR. FLYNN: You may want a longer coffee break. I am not sure what the facilities are for us out there, but we will manage.

Sir, I would really like to use this time, and I do not know how long I will have, but I would like to use the time principally to respond to what we have seen in 2 Travel's written

closing document. You have our fairly comprehensive written closings, and I know the Tribunal will have read it, and you do not want me to read it or paraphrase it to you.

THE CHAIRMAN: Please don't!

MR. FLYNN: I take that effectively as read. What I would like to do is to take this opportunity now to respond to what has subsequently been put in by my learned friend. Could I start, just to get it out of the way, with appendix 3 to their submissions. This is a tabular presentation of what is to be uncontested evidence.

THE CHAIRMAN: Questions from the parties, that one?

MR. FLYNN: Sir, no. It is appendix 3 to 2 Travel's written closings. You will see that that is effectively a tabular presentation of what is said to be uncontested evidence. There is quite a lot of it. Then it is attributed in relevance terms to various paragraphs of the appellant's opening submissions. In our submission, the Tribunal should disregard this document in its entirety. It proceeds on a misunderstanding of what the Tribunal asked for in its letter to the parties of 31st January as to how cross-examination was to proceed. This appendix apparently proceeds on the misconception that if it was not put, say, to Mr. Durbin, to take the first item, there was no reason to doubt that 2 Travel could have done what Rotala did, or that Bev Fowles is nobody's fool, just to take the first item, and those points of Mr. Durbin were to be taken as accepted. That simply is not right. What the Tribunal has asked for, and finally this morning got, was that if anyone was going to say, "What you are saying in your evidence is untruthful", that would have to be put, but on matters of opinion, that could be dealt with in submission and we did not have to go through each and every item in the witness statement saying, "That is not right, is it", or some such exercise. It is plainly wrong, again just to take those two items, to suggest that they are not contested. Our entire case, for example, is that 2 Travel could not have done what Rotala did because it would have gone bust when it did go bust. That is our entire case. Plainly that proposition is contested.

As for the proposition that Mr. Fowles is nobody's fool, that is just Mr. Durbin's colloquial way of putting, but it is plainly also our case that, with all respect to him, 2 Travel under the stewardship of Mr. Fowles was not a well run company. You have all the evidence of operational failures, the problems with tendered services, the losses of contracts, not only in Cardiff but everywhere they operated, the Transport Commissioner's findings, and so on and so forth. We did not have to put to Mr. Durbin that he was wrong to form a particular view of Mr. Fowles' competence to run a company, and so it goes on.

THE CHAIRMAN: It struck me that the most obvious example in all this schedule was in relation to Clayton Jones on p.4, number 26. That was fundamentally in dispute throughout the whole hearing.

MR. FLYNN: Precisely, sir. That is a good example, if I may say so, but there are other good examples. We have prepared a document which responds to this, and says, "No, it is contested", or, "Okay, it is a fact but it is irrelevant". I am not proposing, unless the Tribunal is anxious to have it, that we hand it up. The net result is, in our submission, that this particular appendix is going to be of no use to the Tribunal in reaching conclusions on the factual or expert issues that are before it and should be disregarded. I simply say that if Mr. Bowsher later is to say, "Look at appendix 3, this was not contested", then I can be leaping up and have a particular point of response. As I say, we have a document, a lot of work has been put into it, but unless the Tribunal is keen to have that then I would leave it there.

Then could I make a couple of preliminary points about the way that 2 Travel dealt with certain evidential issues in its closing. In places there seemed to be new theories being brought forward which formed absolutely no part of the evidence that was given at trial. An example of that is para.45 of their written closing document. This is just an example. This goes to the PwC report, 30 per cent market share estimate, and reworks some calculations of Dr. Niels in a way that was not put to Dr. Niels at trial. We say this approach is simply unacceptable. This is inadmissible new evidence, unsupported by an experts' report and not put to our expert for comment. That sort of approach again should form no part of the Tribunal's conclusions in this matter. The Tribunal's task is, if I may say, a difficult one possibly, but making sense of the evidence that was given at trial, and not subsequent attempts to re-jig it.

A slightly different point is going back on points that were established and agreed at trial. If one takes para.37 of the written closings, and also 91 and following, you will see some points that are made about growth, and suggestions that various figures are prepared on a conservative basis because there would have been additional growth. It was agreed between the experts before trial and confirmed during the trial that there was not any additional growth and all that was meant by growth when used in, for example, Mr. Good's report, was the time it takes to get from day 1 to your maximum expected passenger levels, which might be a six month period. It was getting from a start to the final expected position that was called "growth". There is no additional growth to be factored in, and there was plenty

of evidence about that. That sort of attempt to replay or introduce new theories into the case is, we say, just inappropriate and the Tribunal should disregard it.

In many ways the most important, perhaps the single most important aspect of the case is whether the infringement can be said to have caused 2 Travel's demise. That is really what we are on, and that is what I want to spend most of the time dealing with, and then to deal with exemplary damages at the end. There is no prospect, the Tribunal would not have the patience for us to deal with everything that comes up in these closings, and I will have to take things at a level of abstraction that I hope the Tribunal will not find unhelpful.

As I say, the key question that the Tribunal has to determine is whether the infringement caused 2 Travel's insolvency. One has to stand back and ask what was the state of play when it came into the Cardiff market. I shall develop some of these points. We have seen memos from its own finance director saying it was not generating cash or profits, and that the best thing to do would be to wind the company up some considerable time before it came into the Cardiff market. Some considerable time before it came into the Cardiff market it had huge debts, including an intractable debt to the Revenue for PAYE.

Quite independently of anything that happened in Cardiff, the company had adverse findings by the Traffic Commissioner to do with the maintenance of its vehicles, to do with the regularity of its services, for which it was fined the maximum that was open to the Commissioner, and at the end of the day, as we have seen, the Traffic Commissioner held that the company had not demonstrated that it had the regulatory capital available to it, so it lost its licence.

Shortly after the infringement began, within months, Grant Thornton were brought in by the new management team and Grant Thornton told the company that it was insolvent, that it could not pay its debts as they were due, and the implication is that it was probably balance sheet insolvent at that point as well.

The cash requirements that the company had in the period of the infringement and early 2005 were enormous, as we have seen from the size of guarantees, £1.625 million. The tax bill which was payable in August of that year, I think was £464,000. They needed £300,000 which was dealt with by way of payment for the overage rights, and the regulatory capital requirement of something just short of £350,000.

The suggestion that really any of these difficulties was due to the infringement and the suggestion that actually they could have been resolved and overcome if there had been no infringement is, frankly, an incredible one. If the Tribunal just stands back and asks itself that question,: would the company have been saved if there had been no infringement? The

answer, we say, is plain. On any basis the counterfactual revenues, the amount that it might have earned from the Cardiff infill services if there had been no infringement, could not materially have affected its financial position.

It is a striking feature of the case that on the other side there is no expert evidence to address that position. Indeed, it is part of 2 Travel's closing position that this is not a subject for expert evidence at all, which, in our respectful submission, is an extremely surprising submission. In our submission, it is entirely within the province of expert accountants to investigate the financial state of the company from such records as are available and form a view on it. That is what forensic accountants do, and it is what they do every day of the week, one fondly imagines, in the Commercial Court.

Mr. Good does not engage with that, as he said, and as he told the Tribunal. What he does do is to take a view on what the counterfactual revenues would have been, and he puts them in the order of £300,000, which obviously we dispute. You will see Dr. Niels' estimate of what the counterfactuals would be, and according to a range of scenarios, but on his preferred scenarios the counterfactual revenues are well under £20,000, and nothing like £300,000. Even assume that they had £300,000 during the course of 2004/2005 from Cardiff infill revenues, it simply would not have been enough to turn the company round. So the case that is put forward on the other side just does not add up in arithmetic terms, never mind the question of who is supposed to be giving the evidence on the subject. £300,000, on any view of the figures, just would not have been enough.

We say if it is right that the counterfactual revenues – in other words, if there had been no infringement, you could not have saved the company – most of the claim, which we have consistently maintained is a highly exaggerated claim, simply disappears. The going concern, which is a substantial amount, goes, the claim in respect of the Swansea depot goes, and the sums now claimed in respect of the liquidation also go away. So what you are left with are the claims for losses on the Cardiff routes, the counterfactual revenues that we have already mentioned, and the exemplary damages claim.

There is one other item and that is the claim for wasted staff management time. That Mr. Bowsher has not formally abandoned, but it is put in their closing submissions that the Tribunal may not be able to award a significant sum under this head of loss. The Tribunal will recall that this was not a matter on which Mr. Good felt able to express a view, although he did the number crunching.

I propose to say no more about that part of the claim.

That is our position on the great bulk of the claim. How does 2 Travel seek to get round that? Firstly, it says that this is a case where what is more relevant than any ex post rationalisation by a clever person, such as Mr. Haberman, what is more relevant is the recollection and views of those who were involved with 2 Travel at the time, and their views must trump anything put forward by Cardiff Bus. That is just a misconception because what this case is about is not who said what to whom at the time, it is about a counterfactual. It is about what did not happen, what might have happened, what would have happened but for the infringement. So to say that that is a matter on which the only people who can give a valid view are Mr. Fowles and Mr. Short and Mr. Francis, and so forth, is simply untenable. We say, as I have already said, there is an obvious role for expert evidence in that regard.

What they then seek to do, and these are issues which I shall be developing, is to undermine the independence of Mr. Haberman, improperly we say, and the correctness of his analysis. I will have to go into a little detail on that because so much is made of it in the closing submissions.

Then they rely on the evidence of Messrs. Francis and Short, and they also place a lot of reliance in the closing submissions on the Pricewaterhouse report. I shall have things to say on each of those, probably not in that order.

Let me just spend a few minutes on our position on the PwC report, because that need not take very long. We have set out our position on this in our closing submissions. In short, we say that it is untenable now, having heard the evidence of Mr. Harrison, for 2 Travel to present the PwC report as anything other than management projections. Those management projections are not, and it could not be clearer from Mr. Harrison's evidence, to be seen as underwritten, verified, supported by Pricewaterhouse. That is absolutely contrary to Mr. Harrison's evidence. I could give any number of references to what he said, but his constant refrain was, "Those are the management projections not our projections". They place some commentary on it, no doubt they did some number work, but fundamentally the source of those projections, as he said, was Mr. Fowles.

There is a suggestion, and I shall come back to that, that actually the *fons et origo* of these numbers was Mr. Waters. I do not think there is any basis in the papers for that. Clearly Mr. Waters was the finance director and would have been involved, but such things as the 30 per cent market share plainly would have come from the operations man, not the finance man, and that was explored in evidence.

The second very surprising thing when you stand back and look at it is that 2 Travel's own expert, Mr. Good, does not rely on the PwC report. That is not the basis of his opinion at all. He does his own work and comes to figures that are much lower than anything that the PwC report would suggest. He made that clear in evidence, and indeed at para.96 of the written closings 2 Travel make a virtue of that: one can entirely ignore the PwC report without that having any impact on Mr. Good's figures.

Perhaps I could ask the Tribunal just to look briefly at appendix 2 to 2 Travel's closing submissions. This is a report in the form of a letter from Mr. Good to Addleshaw Goddard, but he is addressing the Tribunal's questions in relation to the PwC report. There are just a couple of things I wanted to draw to the Tribunal's attention, though it is not the numbers. If one looks under the heading 2(a), which is the first question the Tribunal asked, "How is the figure of £473,000 arrived at for annual revenue in Cardiff for August 2004?" what he says is:

> "I have only had access to the February 2004 PwC Report and not to any other underlying papers from which that report would, I assume, have been based. I have made enquiries of Stephen Harrison regarding the preparation of the PwC Report but due to the period of time since it was originally prepared, no further information has been made available."

We have not seen that correspondence, but we see what it said. He has had no help from PwC. So he does his own work, he takes his own view on that, and he concludes at the end of (a) – in other words just above (b) on the next page – that there is an unexplained difference. If you look at the bottom of the page, the conclusion on (b), there is an unexplained difference. So 2 Travel's own expert has had no help from PwC and cannot make any sense of their report.

Nevertheless, there is this fundamental contradiction in 2 Travel's closing submissions. It seeks to rely both on Mr. Good and on PwC – images of circus acrobatics come into mind, but I will not pursue it. They cannot do both. They have to go one or other, and, in our submission, the PwC report is not something, despite the best efforts of the Tribunal, the parties and their respective experts, is not something that can be made sense of, and it is certainly no basis for deriving the counterfactual position which the Tribunal would have to do.

I do not know if that is a convenient moment, sir?

THE CHAIRMAN: It looks perfect timing to me. 11.45.

MR. FREEMAN: Can I just explain the difference in the appendix 2 letter. It is an internal unexplained difference within the PwC report, it is not a difference between Mr. Good's figures and the PwC figures.

MR. FLYNN: Yes, that is right, he is saying there is an inconsistency in the PwC report which I cannot explain. That is what he is saying.

THE CHAIRMAN: Thank you. 11.45.

(Short break)

THE CHAIRMAN: Yes, Mr. Flynn?

MR. FLYNN: Sir, perhaps I could move from, if I can put it this way, an accountancy report you cannot trust to one that we say you can, and that is Mr. Haberman. I have already made the point that really responds to what is said in para.10 of the claimant's closing submissions, that the issue of the company's position in the counterfactual is eminently one for expert evidence, and the idea that this is something that can only be dealt with through the relevant factual witnesses which inevitably means in other words 2 Travel's witnesses is simply misguided.

It is also said in that paragraph ----

THE CHAIRMAN: It is certainly not susceptible to determination by expert evidence, but it is susceptible to expert evidence, you would say.

MR. FLYNN: Exactly, it is a counterfactual issue, the Tribunal will have to resolve it to its own satisfaction and then factual evidence and expert evidence may be relevant then, but to say that the expert evidence has no part to play is, in my submission, untenable. Nobody can ever know what would have happened, that is not something – on this side anyway – we are ever going to know. What you are concerned with is the balance of probabilities issue as to what seems to you likely to have turned out in the counterfactual.

It is said that Mr. Haberman's evidence is "highly partisan". That is a loaded phrase in the context of an expert's evidence, and in our submission it was necessary for 2 Travel if it wished to say that Mr. Haberman had compromised his independence and effectively become an advocate for the party it was necessary for that to be put to him for him to respond. I know that in one or two examples, and we will be coming to them it was said to him: "You are just dressing that point up to make it look better from your point of view", not necessarily a point that he accepted, but that, in our submission, is not the same as putting to him that he is not acting in accordance with his duty as an expert to the Tribunal, which is what "highly partisan" might lead one to understand. There is also a general criticism that Mr. Haberman's evidence was based on incomplete information. Again, a

particular point is made which I will come on to which is as to the bank's willingness to lend at a particular point, but again there is a general lack of information in this case and our submission is that Mr. Haberman has done what is possible with what is available, and to say that he does not have the complete picture when, as a matter of fact nobody has, is an inappropriate criticism.

There is also a general criticism that Mr. Haberman had not sat through the trial and listened to the evidence, which we also consider entirely inappropriate. It is not usual for an expert to devote that time. As is plain from his evidence he had read some of the transcripts, no doubt he had had other things explained to him. The idea that he did not know what was going on for anything that was relevant to the evidence that he gave, we say that simply cannot stick. It is true that Mr. Good did attend most of the trial, practically all of it. While that is helpful in terms of cross-examination because he was indeed familiar with the evidence so we were able to move things on, that is not what experts are normally required to do and it was highly unusual. Possibly the fact that Mr. Good was on a flat fee, as we know from the security of costs application, the fact he was on a flat fee may mean that that was an appropriate use of his time, but it is certainly not fair to make the converse criticism of Mr. Haberman.

Then there are, in my respectful submission, some rather confused submissions saying that Mr. Haberman strayed into areas essentially of legal rules on which he is not an expert. I think what is being mixed up there are the relevant provisions of the Companies Act, or Insolvency Act as to what companies can and cannot do, and what the duties of the directors may or may not be, on which it seems, as one would have expected, Mr. Haberman did 'know his onions' as it were. What he said was he was not a particular expert on the AIM Rules. That was when he was being asked particular questions, I think by the Chairman, as to what the AIM disclosure rules were, and I think his reply was to the effect: "I am not quite sure what the AIM Rules are but, as I understand it, the Companies Act requirement is for a meeting to be held, and clearly that is going to have to be disclosed to the market so that people know the meeting is happening". So it is not right to present Mr. Haberman as someone who does not know what is relevant for an investigating accountant from the perspective of say, a company, or insolvency law.

A key issue in this connection is what it was possible for directors of an AIM listed company to do by way of loans, continuing loans, to the company, and the suggestion is made in the claimant's closing submissions that because Mr. Francis and Mr. Short have said that basically they would be prepared to lend the company whatever it needed to keep

going then it would not have become insolvent and therefore there is no question of individual directors' liability. That is not a fair representation of the position, or of what Mr. Haberman was saying. What he is saying is, first, that loans from anyone, including from Mr. Francis and Mr. Short would not turn the company into a profitable company, what it would be doing would be delaying the inevitable. That is a situation to which, as I understand it, s.214 of the Insolvency Act applies, and at that point the personal liability of all directors may be engaged. What Mr. Haberman said, with some precision (day 9, pp 64, 65) is that the directors, and particularly the non-execs would have looked at the position very carefully; are they prepared to see the company continue trading when it has no prospect of turning around. That is what he is saying in his expert opinion as what could be expected to happen in the case of a public company with responsible directors, and in particular the non-execs, he is not making any particular comment on Mr. Francis and Mr. Short, but he is giving the expert view of a forensic accountant on this issue.

Those, I think, are the general criticisms of Mr. Haberman, lack of independence, lack of factual knowledge, incomplete record and willingness to stray into areas of which he had no expertise, all of which we say is unfounded.

Then I think there are some more, and I am afraid it is a long list and I do have to go through it, there is a list of fairly specific criticisms of what he had to say. The first was in relation to the signing-off of the 2003 accounts by Bevan and Buckland. This arose in the course of an exchange with my friend, Mr. Bowsher, in which it was put to him the auditors signed off so the company must have been viable, must it not? That must have been their view.

As it happened, and as the Tribunal, I think Mr. Smith, pointed out when we resumed the following day, in fact the accountants themselves had been asking some searching questions as to whether the company could be regarded as a going concern, but that was not brought to Mr. Haberman's attention. But in the course of answering the question: "Well, it must have been okay because the accountants signed off on the accounts and therefore they expected a 12 month horizon, in which there would not be any problems", Mr. Haberman said it is possible that the reason why these statements were signed late by the auditors was that they did have some concerns, and that those were resolved in conversation with the directors – an advantage or a disadvantage which Mr. Haberman himself obviously had not enjoyed, and that the preparation at that time of the first PwC report may have been intended to allay those concerns. There was a report from plainly a reputable firm setting out a horizon for the company which looked reasonable, and that is what he said may have

happened. Indeed, for reasons which we have explained in our closing submissions that probably is what happened, but Mr. Haberman's opinion was not going any further than that, and he was not making unfounded speculations about what was going on, he was responding to a question. It was all right because the auditors signed off on it, and he said "Well they did, but it was late, and I wonder if they had some concerns and that is the context in which their late signature was given?"

In para.13, which is a long paragraph of the claimant's closing, there is a list of purported errors in Mr. Haberman's evidence, and I am afraid I do have to go through these because the conclusion that 2 Travel invites the Tribunal to draw from these errors is that, taken together, they entirely vitiate Mr. Haberman's evidence, and you should simply disregard it. I will try to deal with this fairly shortly but I do think it is necessary for our case, and in fairness to Mr. Haberman, to at least give you the headline response to the points that are being made.

The first of those in para.13(i) is the criticism which was explored with him in cross-examination that he had said in his report to the Tribunal that the company was relying on its overdraft at a time when it did not have an overdraft. What is not said there is what Mr. Haberman's actual evidence was, and that is at day 9, p.11, lines 1 to 9. I will summarise it but the Tribunal may at some point wish to look at it. Mr. Haberman's reaction was "Well, if they did not have an overdraft then the position must have been even worse", because the negative balance at the bank must relate to cheques that had not been presented. In other words, it is an exposure for the company but it does not have an overdraft so they are having to feed cash into the account to meet those cheques as they come along, and so then it is put to him again:

> "Well yes, but the bank knew they did not have an overdraft, did they not?"

He said:

> "Well no, because if that is right, they didn't have an overdraft, I thought they must have done because the accounts were showing a negative balance at the bank, but if it wasn't because of an overdraft, then the position is even worse".

That was Mr. Haberman's evidence on that, and in our submission that is a correct accountancy response to an error of fact — if it is an error of fact — which is entirely explicable as to whether or not they had an overdraft at the time. As far as the company's financial position is concerned, Mr. Haberman's evidence is correct and powerful.

Then the next one is the suggestion, Mr. Haberman had admitted under cross-examination (they make it sound like "Crown Court") but he admitted under cross-examination that there

was no evidence to suggest that 2 Travel's loans would have been called in early and would not be available in the long term. Again, the transcript, and I think this is, I have omitted the page reference, but it is round about then, he says:

> "Well, there's nothing that's clearly long term. There's nothing clearly long term, and it didn't have a short term payment date. It was callable at any time [It is p.13 and that runs on into p.14] they were callable at any time like bank lending".

So, he is not saying anything about when they might be called, but simply what the company's short-term exposure is. So, he does not — contrary to what seems to be being implied by the words he admitted under cross-examination — he does not for a minute accept in that exchange that he was wrong to treat that lending as short term. And we know, of course that £300,000 of that bank lending fell due in November of that year, 2004, much to the surprise of everyone who had not been informed of it. And, certainly, there is no error there in Mr. Haberman's evidence.

The next point is that he exaggerated the flotation costs by 10 per cent, made a calculation, and Mr. Haberman accepted, it is true, he fairly accepted that he put £474,000 in his report and it should have been £424,000. It is a minor point, but he accepted it. However, in fact, the chairman, in the chairman of 2 Travel's statement following the flotation said that they had raised £600,000 of loan stock but they raised £550,000 before costs, and Mr. Haberman's suggestion is that that should have meant after costs since it is a lower figure, and if you add 50, the difference between 600 and 550, if you add 50 to 424, you get to 474, which may have been where he got it from in the first place. But, anyway, if it is a mistake, it is not one that goes anywhere.

Two criticisms then follow in (iv) and (v) of para.13 in relation to characterisation of 2 Travel spending, where he said they spent £1 million on vehicles and that — I am sorry — that he criticised PwC for saying they spent £1 million on vehicles, and that the £½ million was for PAYE arrears, whereas in both cases there was a fuller description in the PwC report. Buses, and other fixed assets, and PAYE and other creditors.

Mr. Haberman did not accept that was in any way in error. He said simply one would assume in context, that those are the principal items of expenditure, and that is how the funds were intended to be used. He said, there is an outside reasonable interpretation that that is what it is trying to deal with. It is talking about how the funds are intended to be used. That is very much how they were intended to be used beforehand, and that is where it was suggested by my learned friend that Mr. Haberman had "glossed" the description to

make his criticisms better, and he said that is simply not right, he is interpreting what he sees before him.

The next point, at 6, relates to the amount of non-recurring costs for the year ended 31st August 2003 and, again, it is said that under cross-examination he accepted that he had got that figure wrong, the £600,000 was wrong as to how much were non-recurring.

Now, if one traces this through, Mr. Haberman's report (it is para.418 for the note) says that the £249,000 figure is identified as exceptional in the 2003 accounts. So that is not something that he accepts under cross-examination; that is something that is in his report.

The question was:

> "How did you deal with the bad debts in the previous year? Were they recurring or not?"

To which he answered (pp.16-17 of the transcript):

> "The question of whether a bad debt is recurring depends on how debts are handled in the future. That particular item would not recur, but there may be an expense in the future. It may not be of that size, but there may be some expense".

It is put to him that the 200 is in the past, so it is not going to recur, and Mr. Haberman says, (going over the page):

> "You could take that approach to any item. Once it's happened once, it can't happen again. But items of the same category could recur. They may not recur at the same level, so, yes at least 249 and possibly as much as 449 would be non-recurring and it may be somewhere in the middle".

The £200,000, the difference between the 249 and the 449, is that £200,000 of debtors in the 2002 accounts which, as we know, later turned out to be non-existent, either because the debts had been settled in cash but not recorded; or they were noted in respect of services that had not been provided, and that sort of thing, given 2 Travel's lack of accounting rigour, would plainly recur again. And we have made the point in our closing that that £200,000 figure which was corrected in the 2003 accounts more or less eradicates the profit on the 2002 accounts, which was the basis for the AIM listing, it was the basis on which the shares were sold to the market. So, in a sense, it is useful that it has been highlighted now because that is a pretty significant point for us.

The next one is really a very minor point on comparability of figures in the statutory accounts. Mr. Haberman accepted that there was — he should have used 996 rather than 950,000 and that is a completely insignificant error. What he was saying was there is some uncertainty about which numbers the PwC report is using, he was raising a query, and he

did not draw any conclusions from it. So, this is a small error which he fairly accepted and goes absolutely nowhere.

Then (viii) at 13. It is said that Mr. Haberman, again, admitted under cross-examination that he could not say that the first PwC report was optimistic. That is simply not right. One looks at para.430 in Mr. Haberman's report where he shows that the forecast of turnover at the time of flotation had not eventuated, and then says that the projections that were provided for PwC were in fact even greater than what had previously been forecast, with a further 30 per cent uplift for 2005. So, what he is saying, and what he repeated in cross-examination rather than mitigating, (and this is pp.18 and following in the transcript), he says the management's expectations had proved, management expectation as recorded at the time of flotation, had proved to be "way over-optimistic" in his phrase, and that their further expectations were beyond what had previously been expected. So, he says:

> "We have the forecast for the year one not achieved, the forecast of ·0 for year two, you would therefore think may not be achieved because we are behind on year one — then the forecast for year two is even better than the original forecast for year two. That is what seems to me surprising",

And then — unhelpfully perhaps — he made a hand gesture which does not come across very well on the transcript, and so the Tribunal may recall the shape of that, and we could graph it if necessary, but basically instead of going like <u>that</u> he went like <u>that</u>, I say, equally unhelpfully.

So, there was nothing admitted under cross-examination there, Mr. Haberman simply maintained his view and, in our submissions, it is a correct view to have maintained. (I am sorry that this is a tedious list, but I really feel that I absolutely need to do it).

THE CHAIRMAN: We are following it.

MR. FLYNN: At (ix) of para.13, "Loss-making contracts in Cardiff". Under cross-examination, it is said, he conceded that he had no evidence that the contracts were in fact loss-making.

Now, that is a hopeless point. Again, the transcript, it is p.20. It was put to him:

> "You assert in 438 of your report the existing school contracts were loss-making".
>
> "Yes [he says]. As I pointed, out the finance directors said the contracts were loss-making".

It was put to him that what he actually said was:

> "They are under-priced",

and the cross-examination of Mr. Fowles by Mr. West is put to Mr. Haberman and the quotation as given there is:

"The contract base is totally under-priced".

I think actually it says:

"severely under-priced",

but anyway there is an adverb indicating great strength in Mr. Waters' report. And it is put to Mr. Haberman that the evidence of Mr. Fowles was that:

"The Cardiff school contracts are, if anything, a net contributor, not a problem".

Now I think at that point we do need to look at Mr. Fowles' reply which is immediately above that, the quoted reply:

"Some of the schools contracts were not covering all their costs. The majority of the Cardiff contracts were much higher priced than those in Swansea and Llanelli, which is why they were targeted".

And what Mr. Haberman says with, if I may say so, some forensic accuracy there, is:

"That evidence doesn't tell us whether they're loss-making. He says some of the other contracts were not covering their costs. It says the majority, not all, of the Cardiff contracts were higher priced than those in Swansea and Llanelli, but it does not actually say whether or not there is sufficient to ensure they were covering their costs with a margin or not. It just doesn't tell us. There is no actual statement from the Finance Director saying they were loss-making. Yes, they were under-priced. Correct".

"Your assertion is they are loss making not based on any evidence".

"I would have to go back to all of his comments to double check, there's so many comments and memos from Mr. Waters making comments about the fact that the company is not covering its costs".

"And do you recall any evidence that supports the proposition the contracts were loss-making?"

"I don't think they [2 Travel] had the detail to be able to know for certain. I was taking that from his comments" and it is suggested that he has stretched the comment beyond what it actually says and made an assumption.

Now, a suggestion which he did not accept. Plainly, he is relying on Mr. Waters saying that the contracts are under-priced, "severely under-priced" as the memo says. "Plainly under-priced" can only mean that they are loss-making, and that is the context of the memo if the Tribunal wants to look at it again makes that really plain. That will be at E12 p.3 for your note. The suggestion that Mr. Haberman felt that he had made an unwarranted inference and withdrew it is just completely misplaced.

The next point is the degree by which 2 Travel's net assets had fallen to reach £183,000 by the end of October 2004. It is said Mr. Haberman admitted he put an exaggerated description of the change of the state of 2 Travel in his report, and there I have missed the page numbering but it may be —

THE CHAIRMAN: Page 34?

MR. FLYNN: That is right, line 22, so he says:

> "It is an exaggerated depiction, well, that's correct … I think the problem we have here is we have numbers put in so many different formats these numbers that are presented are relying on the management accounts of May and then extrapolated forward to August. There is doubt on all the numbers which, you are quite right, I picked the wrong figure of 825 to compare with the figures of 183".

So, he accepts that he had used the wrong figure and there is no suggestion — I do not think, my submission is it is not right or fair to suggest that Mr. Haberman had exaggerated the effect of the decline in any kind of deliberate way, if that is what is being suggested. It is hard to know whether it is worse to fall from 825 to 183, or from 240,000 to 183, which is a comparison that is being made, that the latter, the more gentle decline, might suggest that the company itself was in a state of gentle decline, rather than suffering some kind of shock in the period of the infringement.

(After a pause) I am sorry, I just need to check something. I have a note on that which is just too complicated for me to understand myself and explain to the Tribunal further.

I think I will confine myself to saying —

THE CHAIRMAN: Maybe after lunch!

MR. FLYNN: Or maybe I will spare you altogether. Our next point is in relation to paragraph (xi) of para.13 and the suggestion that I think is being made in that criticism is that by comparing a year's loss against a 4½ months figure, you would get an unattractive figure if you made such a comparison, and that is, again, part of whatever the opposite of gilding the lily is, trying to make it look worse than it is, I think, is the implication of the criticism.

Mr. Haberman conceded that that sort of comparison was almost bound to look unattractive, and he says (in the transcript, this is at p.28 of his cross-examination) he says:

> "Well, all I'm trying to do [this is probably going over to p.29] I am just trying to get a feel for what the results for the year for August 2004 would have looked like had the matters complained of not taken place. You are comparing a year's loss against 4½ months' profits".
>
> "Yes".

"What I'm saying is by August 2004 I am trying to get an estimate of what the profit position might have been in the company … in that year".

And then it is put to him that, given that the company might make some losses at the outset, that figure would not look particularly attractive. He said:

"Yes. What we're trying to do here is to see how the company is progressing at that time he says to see — this is how the company is progressing at this time — and in the year to August 2004 it would only have been operating the infill services for a limited period. So, I am trying to estimate what the results for the company would have been. As far as I can see, there would have been a continuing loss and a reasonably substantial loss".

And it says:

"Well, you've taken different profit figures which are just 4½ months' profit figures from Mr. Good's low and high cases, and that is just inaccurate basically".

And it is suggested to him that:

"On any view it is right, is it not, that if 2 Travel had been able to continue to trade and trade without predation that figure and calculation would have, even in the most general terms, involved a six figure sum"

And he says:

"I totally disagree".

In our submission, the comparison of a year's losses with a 4½ month profit was just simply trying to work out what the results might have been if the expected profits, the profits that Mr. Good expected, had actually been earned, and they had only been in operation for that period and that time, so the comparison was entirely proper. And Mr. Haberman agreed — agreed that figure would look unattractive, but not because he was making an unequal or in some way sharp comparison, but because he would believe there would have been a substantial loss. So, even assuming there was a break-even for the rest of the year, the position in the first 4½ months showed that there was going to be a substantial loss.

Then I think overall the claimants conclude (I think that is the end of the somewhat tedious matters you may be pleased to hear) the claimant's overall conclusion is that Mr. Haberman's statement contains a number of errors and misleading statements which lead or add force to 2 Travel's submission that the Tribunal should not rely on his evidence and should not take it into account in this case.

Now, plainly, that is a contention with which we disagree most vigorously, but Mr. Haberman himself said in evidence when it was put to him:

"Well, we've identified some errors and exaggerations",

"Well, you've identified two or three points, but there is a whole lot that you haven't commented on",

and in our submission Mr. Haberman's credibility, independence and accuracy simply has not been called into question by those submissions. As I say, I apologise for the level of detail, but that is what was, as it were, thrown on us.

Now, I think more towards another sort of general issue is that it is said we are making a lot of the memos from Mr. Waters, and that there is a danger that they will be taken out of context. A specific point is made, for example, that one of his memos says 2 Travel were short of vehicles. But the evidence of Mr. Jones, he of the Ghurkha tie who we called and, are happy to repeat, a witness of scrupulous honesty, Mr. Jones said his recollection was that 2 Travel was never short of vehicles, so, in other words, there is a clash. You heard live evidence from the honest Mr. Jones, and you have a memo from the absent Mr. Waters relating to running short of vehicles.

What Mr. Jones' evidence actually was, was that 2 Travel was not short of vehicles for the services that they were providing in Swansea; but he did accept (and this is day six p.60) he did accept that 2 Travel would have been short of vehicles if it was going to provide the full services that the PwC projections were based on. So, he says, for example:

"In relation to business planning we might have been short of vehicles, in operational terms, we weren't".

And so he accepted that, while they might have had the buses that he needed to run, what he had been taken on, they were short by reference to the business plan. So, that does not, in our submission, cast any doubt on the accuracy of what Mr. Waters says. And of course it is quite significant, we invite the Tribunal to draw an inference from the fact, that Mr. Waters was not called. As far as we know and as far as Mr. Fowles knows Mr. Waters is still around. He could have been called to give evidence in this case. His memoranda make significant criticisms of the operational efficiency, financial recording and so forth of 2 Travel. He could have been called, and no doubt he would have been if he could have given evidence, I suggest, that 2 Travel might ultimately have turned the corner. And we invite the Tribunal to draw that inference. And I will not, of course, repeat all the reliance that we place on Mr. Waters' memos, they speak eloquently for themselves, and you have seen them, and you will remember them.

Now, the next, having, as it were, got rid of Mr. Haberman, what 2 Travel then seek to do is to say, the conclusive evidence in this case, the thing that gets them home and would have

saved them, is the willingness of Mr. Francis and Mr. Short to keep pumping money into the company.

I have already, insofar as it has been suggested that Mr. Haberman was not right and did not, as it were, have the expertise to suggest that such a course of action would have raised issues under the law, I have already dealt with that point, and it should be remembered. Delaying the inevitable is exactly what the Insolvency Act provisions are designed to prevent.

Our submission, and we make it in particular at para.10 of our closing submissions in relation to the suggestion — there would have been an open cheque book from Mr. Francis and Mr. Short, and we say there that there are three fundamental difficulties, at least three fundamental difficulties, with that proposition. The first is, it would have been irrational for Mr. Francis and Mr. Short to keep tipping money into a company if it would not ever have been profitable. Both Mr. Francis and Mr. Short seem to have made quite a bit of money on the way and it offends against common sense to suggest that they would keep throwing good money after bad.

Secondly, of course, they did not. They did not. In the real world they put money in for as long as they could recover it through their security over the Swansea depot, and later buying out the overage rights. Once they got to that level they stopped putting money into 2 Travel. Now, that level I do not think again, we may never know exactly how much it is, but we note that it is at least possible for that amount (and I am looking at footnote 26 of our closing submissions) we have talked always in terms of £2.3 million which was the option price and the £300,000 the overage rights — it is possible that it went up as high as £2.7 million because it was said by those gentlemen that what they did when they exercised the option was to take over Barclays debt which stood at 2.4 million at the time and that the £300,000 for the overage was on top of that. That makes 2.7 million. Now, that cannot be precisely traced through in financial records. Just before trial we got the bank statements, and one can see £265,000 coming from Mr. Short, and he dealt with that, I think, both with Mr. Bowsher and with me, saying that he is not sure how the rest of it was transferred, but it definitely was — £300,000 was definitely transferred. So, the full amount they may have put in is 2.7 million, but it is all related and was secured on the Swansea depot, and once that was in their hands, their interest in the company disappeared pretty quickly, as we have seen. And we do not shrink from the continued assertion that Mr. Francis's primary interest was in the property. He is a property man. He saw an opportunity, no doubt, to invest into a business with his cousin, but his interest, everything that he seems to have done, in

relation to the company was on the property side, leaving the bus operations to be dealt with by others.

And then our third point, going back to para.10 of our written closing submissions, is the company law point that I have already made. If you have a private company well, that is fine, I think the example of Chelsea Football Club was given in cross-examination, in questions from the Tribunal I think. If you have a private company, well, you can put money in as you like. If it is a public company with external shareholders and independent directors, it is an entirely different thing, and that is what Mr. Haberman's evidence went to. It is also suggested that we have, in some way (I do not think misrepresented, that is not what I mean to say) that we in a sense failed to draw the right conclusion from accepting that Mr. Short was both a straightforward witness and an astute businessman. It is said, and this is para.7 of my friend's closing document, that we are saying that his assertion of willingness to continue to invest was because he had failed to understand the financial position or business model of 2 Travel. That is not what we were saying. What we said is he is, we say what is I think a fact, given his evidence, he was a non-executive director of 2 Travel. He was not involved in the day to day operations. He did not know what the day to day operations were. He had no experience of running that sort of company, and as he said, he had experience in logistics but he did not have any experience of running a transport, a public transport company or a bus company. And all his investment etcetera apart from the, in his terms, (notional 150,000 shareholding) was fully secured. As we have seen, he took security on the property, he took security on the book debts, and he said his lawyers advised him to take security if at any point it was available. And our submission is that a businessman like Mr. Short is most unlikely to continue to put money into a company which has no prospect of becoming profitable or repaying his loans. And, as we have already said, if he was relying on the flotation document, he may have been relying on a misconceived document because the financial state of the company as disclosed in the flotation document, was not as rosy as it later turned out to be.

Now, while we are on Mr. Francis and Mr. Short, perhaps we could also — talking about the Swansea depot itself as a head of claim — as I have already said if we are right that the infringement on any view would not have saved the company from insolvency, then the Swansea depot claim falls along with much else. As we say in para.14 of our closing submission, which I do draw to your attention in particular, it is also just not possible in any kind of factual world where the revenues from Cardiff are even what Mr. Good says they would be, that 2 Travel would not have had to give up ownership of the Swansea depot, and

we seek to demonstrate that in that paragraph by reference to the figures with which you are familiar.

So, as we say, even if £300,000 had been given by (I was going to say a good fairy, I should not say that) if £300,000 had arrived on the desk of whoever was the finance director in 2004, that would not have stopped 2 Travel having to go back to Mr. Francis and Mr. Short immediately afterwards in September and October when they did secure, when they did get £650,000 plus the tax bill. In the counter-factual world Mr. Francis and Mr. Short would have insisted on taking the option, just as they did in the real world. This is indisputable, it is what they did in the real world, and they would have exercised the option just as they did in the real world.

That is our basic submission on the Swansea depot. What is said in my friend's closing document is a misunderstanding, and I do not know what it is based on, of what we said. It is said (I am looking at para.7 of his closing) there is no evidence that Mr. Francis did not pay a fair and reasonable price for the Swansea depot, and it is notable that Cardiff Bus does not make the same allegation against Mr. Short. Now, that, I really, I simply do not know where this has come from. But it is a complete Aunt Sally. We say that a reasonable, a fair and reasonable price was paid for the Cardiff depot, and that therefore 2 Travel has suffered no loss. The price paid at the time, for reasons which were explored in the evidence, was an entirely fair one, not least by comparison with the estimates from Poolman Harlow and Mr. Sutton's own firm, and of course that is what the market was told after due consideration by the non-related parties. So, it is no part of our case, I can reassure my friend if that is reassuring for him, it is no part of our case that it was not a fair and reasonable price.

It is also said, later in closing submissions, and I am in the mid-seventies now, that 2 Travel would have been able to get a better price if they had not been forced by the predation into a "fire sale". Now, we say there is absolutely no evidential basis for any suggestion that the Swansea depot went for some knock-down fire sale price. The money had been provided, the EGM at which the Option Agreement was approved did not take place until right at the end of October 2004. The funding and the guarantees were already in place and there is no suggestion in the evidence that there was any pressure being put on anyone for that Option Agreement being signed at that time. In any case, it is contrary to Mr. Francis' evidence, so it is not open to my friend to suggest that there is a fire sale price when Mr. Francis, plainly, said that it was not. He said it was a fair price, and he said that indeed in re-examination in

response to a leading question, with respect, from my friend. One will see that at day three, p.158. Mr. Bowsher said to Mr. Francis:

> "Did the circumstances in the company therefore affect the independent director's assessment of the fair and reasonable valuation of the property?"

And Mr. Francis's answer was:

> "They still wanted a fair and reasonable price and took steps to ensure that they got it".

So, not only do we not say that it was not a fair and reasonable price, the claimant's own witnesses say it was a fair and reasonable price and, as I have said, that is the only view that it is really open to the Tribunal to reach, given that that is what the market was told as well. If my friend wishes to suggest that the market was told something inaccurate at that time, well, that, with respect, is more a problem for him than it is for us.

It is then said that a better reflection of the price that would have been achieved is the combined offers from Redrow and Lidl. Now, this is very much a subsidiary point as you will appreciate, in the way that I am putting the case. But the implications of that submission, if it is maintained, are indeed quite serious. The threshold problem with it is you have had no expert evidence on valuation. It was provided that there could be, but none was offered. We had some evidence from Mr. Francis, although he did not want to go into a lot of details, given that it was a sensitive time for him, we had some evidence from Mr. Sutton including a valuation prepared by one of his partners, and we have other documents in the files, such as the Poolman Harlow earlier estimates. The Redrow offer was made in the middle of September 2004. The offer was £800,000 net developable acre and we do not know how much of the site would have been developable. If it were the whole site of 4.7 acres, our calculation is that is a price of £3.76 million. If that is right and the Redrow offer was capable of acceptance at the time it was made, then the option price was undervalued by £1.4 million. Now, that means one of two things — either Mr. Francis and Mr. Short knew that the option price was an under-value because they did know about the Redrow price at the time — or, perhaps more realistically, that the Redrow offer was not capable of acceptance and would have needed investigation of what you would need to do before you found out how developable the acres were and what remediation works would need to be carried out at this tricky site, for all the reasons we know, and the same goes for the Liddle offer. Again, Redrow, when they made their offer, would have had no knowledge of the financial position of the seller, so no particular reason to think that they could pressure for a low price. It just undermines any suggestion that there was a fire sale.

So, our case on the Swansea depot is they got a fair price for it. You will remember I explored it with Mr. Sutton, the range of possibilities, you can sit on it and spend money to improve the position to get a bigger site, better access, you can spend money on remediation, you can get planning permission; or you can sell early and just get clear, and you are on a sort of spectrum there which he fairly accepted, and given the valuations that were around at the time, the money that was paid is, in our submissions, entirely fair and reasonable and there is no basis for a claim on that head either.

Now, sir, I am not going to finish by lunchtime, I think I should say that, partly because the further cross-examination of Mr. Brown took a little longer than I was expecting, but I will be able to finish not long after lunch, so I thought I should just give that indication.

THE CHAIRMAN: Well, stop when you want, shall we take three-quarters of an hour for lunch?

MR. FLYNN: Yes. Well, that is, of course, absolutely fine.

THE CHAIRMAN: And I think go on until one, because we are going to take three-quarters of an hour for lunch.

MR. FLYNN: Yes, what I shall, I think, be able to do is to get to the start on the exemplary damages aspect after lunch. I may be able to do that without absolutely guaranteeing it.

Now, those really are our submissions on the big parts of the claim. In respect of the counter-factual revenues, essentially our position is that we entirely rely and submit that the Tribunal should accept the preferred estimates of Dr. Niels on that point, which in our submission were not in any way undermined. That is essentially our position.

It is suggested in my friend's closing submissions that Dr. Niels, whilst a conscientious witness, did not have all the necessary expertise because he had not done a predatory pricing case before, we have not gone back to find out how many times he may or may not have advised on predatory pricing, I just leave that point alone. He clearly knows about the bus industry because he was involved in the Competition Commission inquiry, and I do not think there is any basis for questioning his expertise, and my friend does not suggest there is any basis for saying that he did anything other than attempt to fulfil his duty as an expert to the Tribunal.

One specific criticism that is made, and that is para.15 of their closing submissions, relates to the multiride tickets, and the criticism that was made is that he assumed that anyone who had the Cardiff bus multiride ticket would not ride with 2 Travel, although he did not know how long that ticket was valid for, and he assumed that the 2 Travel passenger levels would not increase after December 2004.

Now, we say those criticisms are not fair, first, because the season ticket, or the multiride ticket, issue arises in the exercise of attempting to re-allocate passengers who did travel on the White buses as between the liveried services and 2 Travel in the counter-factual, and Dr. Niels said that the fact that 2 Travel might subsequently be able to capture possibly some Cardiff Bus multiride ticket holders does not affect the calculation, because what you are asking is the people who did actually travel on the White Services, did they hold a multiride ticket or not? Not asking what happens in the future when indeed some of them may have gone over to 2 Travel, they might have been replaced by more multiride season ticket holders in Cardiff Bus; that is a separate exercise.

However, to say, "Well, he might have under-estimated 2 Travel's potential to improve its position in the counter-factual and therefore the steady state assumption is not valid is, we say, circular. That is really just seeking to prove by the assertion if they do better, well, yes, they would have done better. But that is because you do not know, the counter-factual assumption of Dr. Niels is that it is steady state, and we say there is absolutely no basis for suggesting that the future performance of 2 Travel would have been any better than it actually was. It was based on the kind of factors, frequencies and so forth that Dr. Niels investigates so thoroughly.

There is also a suggestion that conclusions of the Competition Commission are to be preferred to the evidence of Dr. Niels. We do not really understand that because as far as we are concerned they are both saying the same thing, principally the central plank of it is that people effectively take the first bus that turns up at the bus stop, as the Competition Commission summarised in the pithy paragraph which the chairman put to more than one witness, and that is entirely a basis on which Dr. Niels has proceeded before the Competition Commission report came out, and he was right to do so.

There is another issue that —this may be a little "bitty" but I will just try to make the points as they turn up. Another assumption that is being, or another issue that has come up in a few contexts including, for example, the cross-examination of Mr. Good is, what do you do with the — do you have to attribute any of the fixed costs to infill services, or do you assume they are covered by the schools contracts? We say, for reasons which we set out in para.97, I think, of our closing that there is absolutely no sufficient evidence for you to conclude that the schools contract did cover their fixed costs, but if in fact they were, then the rational thing for 2 Travel to have done would simply have been to stop providing the infill services, and then it could have been profitable in Cardiff, and could have considered its position — a point that Mr. Haberman makes. But, actually, 2 Travel's case has an

inherent contradiction, because while on the one hand saying you do not have to attribute any fixed costs to the infill services because they are all covered by the contract, they also say in several places that they had to carry on with the plans in Cardiff, because they had run up "massive fixed costs". Once the routes are prepared for, there are massive fixed costs and they have to be run so that the business can start making profits. Success in Cardiff was vital to the business plan so, which is not, we simply say there is a contradiction there.

I think I shall stop there, sir, if you do not mind.

THE CHAIRMAN: Okay. I do not mind.

MR. FLYNN: I have a couple more points to make before we get on to exemplaries, but —

THE CHAIRMAN: Shall we resume about, say, ten to?

MR. FLYNN: Ten to two. Thank you.

(Short adjournment)

THE CHAIRMAN: Yes, Mr. Flynn.

MR. FLYNN: Sir, I spent the adjournment crossing a few things out. Perhaps I could say just a couple of things before we come on to exemplary damages. We have addressed the legal test and what we have to say about mitigation, and so forth, in our opening and closing submissions. In short, we do say that the suggestion in the claimant's closing submissions that there is some legal requirement under the Competition Act for the Tribunal in a way to be generous and look to achieve full compensation and not to take "an unduly narrow test" for causation or quantification is, with respect, wrong. Causation will have to be established in this case as in any other damages case and we say on the same basis as any other damages case, which is the "but for" rule, which is not, in itself, an unduly narrow test. On the contrary, it is one which, in various contexts, has the concepts of remoteness, mitigation, and so forth, applied to it. So there is no need, as it were, for a special regime in this sort of case.

Quite a bit has been said on both sides about the fact that we say that the company would not have been profitable so there is no claim for lost profits. You will have seen the case about that. I do emphasise the fact that we have been saying this consistently and the claim has consistently been one for lost profits. The claim has consistently been put on the basis that but for the infringement or "but for" plus a measure of generosity the infringement, 2 Travel would have been profitable. We have pointed that out from the beginning and there has been no attempt to amend that away. This case is a claim for lost profits, and we say basically there would not have been any.

In relation to exemplary damages, as the Tribunal knows there are two heads under which this is claimed by references to Lord Devlin's test in this case, the first being the, as it were, agent of State or arm of Government sort of arguments. I am not going to repeat our arguments on that. We say it is hopeless from the beginning because the provision of transport is not a governmental function of the type that that rule is meant to embrace, and for that allegation to succeed 2 Travel would have had to show that Cardiff Bus was not run according to the requirements of the Transport Acts.

It is said in their closing submissions – and I am at around 110 of those – that where we say the necessary points were not put to Mr. Brown, it said the Tribunal had got it and indicated that it would not be assisted by further cross-examination on this point. With respect, that is not right. Where the Tribunal attempted to move the cross-examination along was on the point of whether or not Cardiff Bus was 100 per cent owned by Cardiff Council, which was not really a point in dispute. Mr. Brown was not cross-examined, as he would have had to be, on his extensive evidence about the relationship and the arm's length relationship between Cardiff Bus and Cardiff Council. There is nothing in the documents that suggests that they are not properly run and cross-examination on this was not advanced either.

The single question the Tribunal permitted this morning, in my submission, takes that no further.

If one briefly compares para.138 and 139 of their written closings, one again sees something of a tension. On the one hand there is the contention that Cardiff Bus was exercising functions of a governmental nature because it was an arm of Cardiff Council, and one of Cardiff Council's functions is provision of transport, Cardiff Bus was not merely undertaking a commercial activity. That is immediately followed by para.139, Cardiff Bus is supposed to be one of a number of bus companies which compete on a level playing field in order to be able to provide bus services to customers. If you were to take a swingeing award of exemplary damages which put Cardiff Bus out of business, well, someone would come along, some commercial company would create an opening in the market. Once again, two horses are being ridden here, and, in our submission, the case under the first limb must inevitably fail.

On the second limb – perhaps I could call it an "outrageous conduct" sort of limb – of exemplary damages, once again we have dealt with this quite extensively in our written submissions, and we maintain that there is no evidence of the necessary calculation that would need to be shown to get home on this argument, as well as all the other problems. There simply is not the evidence that Cardiff Bus made a calculation that it would be better

off risking the consequences of some illegality, rather than not doing so. That, again, was not put to Mr. Brown in cross-examination. I will be coming back to what was said this morning.

THE CHAIRMAN: We came quite close to it this morning, I think.

MR. FLYNN: It did come close to it this morning, and I will address that.

I think that probably brings us to the issue of the legal advice that Cardiff Bus had, and in particular the extent of the advice that Mr. Brown had in relation to competition law and indeed his recollection. We have made some submissions on that in our closing submissions, and I really wish in the first place to respond to the propositions that are put in my friend's closings, which he, I anticipate, will wish to maintain having been through the exercise this morning. The propositions there actually come, or some of them, quite early in their closing submissions. We say that these paragraphs, para.3 onwards, of their closing submissions really do muddle the picture quite considerably.

In para.3 it is said that the assertion – the assertion being that Cardiff Bus did not seek legal advice – was corrected by Mr. Brown's witness statement where he admitted that his predecessor had obtained some legal advice but said he had no knowledge of it.

More accurately, what Mr. Brown said in his witness statement was that he had known at the time back in 2004 that Mr. Kreppel had taken advice because he had seen the copy of the manual paper circulation and his initials had been crossed off. He fairly accepted that that must have meant it passed under his nose and he would have crossed his initials off. What he said was he had no memory of that having happened.

Then it is said in para.4 that the pressure of cross-examination finally caused Mr. Brown to admit that he took advice on competition law matters in November 2004, despite persistent earlier denials in witness statements and cross-examination. That, again, is simply not accurate. Mr. Brown's first witness statement, and para.97 for your reference, made it clear that he had taken advice from Bond Pearce in relation to the Furzeland inquiry and that he had told the board that he would have done so. What he said in his first witness statement was that he could not recollect any advice from Bond Pearce in relation to the Competition Act's application to the White Services.

Mr. Brown was dealing with Mr. Woodhouse, as we know their principal contact relationship partner at Bond Pearce at that time, and that is what the time ledgers show. The fact that Mr. Brown's draft response that he was asking Mr. Woodhouse to comment on refers to the complaint of breach of competition law, Mr. Brown says, well, yes, he was asking Mr. Woodhouse to comment on the competition law aspects. That is not a change in

Mr. Brown's position, because Bond Pearce did not provide any competition law advice. They basically said "Your response is fine". The reason why Mr. Brown, in the witness box in Cardiff, accepted that he had taken competition law advice from Mr. Harrison of Bond Pearce was because over the lunch adjournment or during that morning when he was being examined the Bond Pearce time ledgers attached to invoices had been found at Cardiff Bus's premises and, in my submission, properly disclosed just as fast as we could, which was immediately after the lunch adjournment. It is that which led Mr. Brown to say, "Well, yes, I must have taken competition law advice from Mr. Harrison".

As far as credibility goes, what is also said in para.4 of the closings is that Mr. Brown had said in response to the Tribunal was that he became aware of who Mr. Harrison was, and whether he had known who he was, because of the legal advice provided to Mr. Kreppel, and he denied remembering ever having met Mr. Harrison. It is said in para.4 that this seems incredible, given that we now know that he had several email exchanges with him. It is not clear what the allegation is. If the allegation is that he met, or must have met Mr. Harrison and a denial of that goes to credibility, well, Mr. Brown has once again this morning denied ever having met Mr. Harrison or indeed spoken to him on the phone. What there has been is some relatively desultory exchanges of emails, and nothing in the time ledgers suggests any kind of meeting. There is no attendance note or record of time being spent on any kind of meeting.

In relation to one particular point – this comes much later in their closing submissions, though it does, I think, go to the calculation point that you were asking me about, sir – it is said in para.121 of their closing submissions that Cardiff Bus did take advice as to the level of fine that could be imposed upon it for breach of competition law and therefore there is evidence that it would have been aware that it would benefit from an immunity from being fined due to its level of turnover. That is absolutely baseless. There is no suggestion, despite all their efforts, despite the vast correspondence that has been generated, despite the extensive disclosure, and we regret as much as anyone else that it came up in the way that it did, that that disclosure exercise which, in my submission, has been properly carried out and ethically carried out by my instructing solicitors, has not revealed any such advice as is recorded or asserted in that paragraph. That really goes to the calculation point. Mr. Brown again confirmed, as I understood it, this morning that no such advice had been given.

The basis for this assertion seems to be the extract from the time ledgers relating to their August advice somewhat mysteriously apparently initiated by Miss Kemp in relation to

directors' and undertakings' fines for breaches of competition law indemnity according to the ledger.

What Mr. Brown said in evidence before you in Cardiff (day 7, p.123) was that he could imagine, he did not know, he thought he was probably on holiday, but he could imagine that Miss Kemp was seeking that advice as a result of what had been said by Mr. Francis at the public inquiry at the time, in public, saying that High Court writs would be sought against the individual directors.

If one looks briefly, and I am not going to do a lot of this, at the time ledger, which I think is p.3 of H6, if the Tribunal has that, about half way down is the entry against the initials DMH1, which was mentioned, "Research on directors' and undertakings' fines for breaches of competition law indemnity", what exactly that means?

The next item against the initials MHD is to Tony (spelt "Tony", but we all believe "Toni", Miss Kemp), "Re potential High Court litigation re articles of association" and suggesting that other people would be the best people to deal with it.

Then the next entry, possibly one of those people, SML, "Various telephone conversations with Toni of Cardiff Bus, considering indemnity and advising discussing competition issues with David Harrison". Then what appears to happen is that you get Mr. Woodhouse (PMW) coming back from holiday and talking about "High Court writ dealt with in my absence". That seems to be what happens on that page.

In our submission, the reference to the articles of association there is telling and pertinent, because what it seems was being suggested by Mr. Francis was that the actions of Cardiff Bus would be *ultra vires* and would ground a claim against the directors as individuals.

That, again, was his evidence to this Tribunal. For your note, it is day 4, p.12-13. He said:

> "We felt, and it was discussed at length, that in the event that Mr. Brown and Mrs. Ogbonna were prepared to do this, then they would be exceeding their authority in acting *ultra vires*, and would be personally liable and we did not think they would take that risk."

That does not suggest that what is being addressed here is responsibility of directors under the Competition Act, but that appears to be the context in which that advice was being sought at that time.

Overall, what we say is that such competition law advice, if one can call it that, that Mr. Harrison gave was skeletal, not at all detailed. I think Mr. Freeman said of one of the emails this morning that it was "cryptic". Mr. Brown said this morning that, in effect, Mr. Harrison at one point was touting for business. He was sending some documents, some

OFT consultation on spec and there was a bit of a chat which was not taken up. I do not think I need go to the document. That was p.336 of that file that you have just put away. In our submission, such advice as has actually been given has been blown up out of all proportion. It is a very small issue in the context of this case. In our submission, it is telling that Mr. Harrison apparently has no recollection of it either. That is what has clearly been said in the correspondence. Mr. Harrison is not saying "that is unbelievable, not only did they not instruct me when the s.26 notice hit, but they are saying that I never advised at all, but they have forgotten that I ever advised them". He is not saying that, he is saying, "I cannot remember". In our submission, Mr. Brown remains, despite the way this disclosure has come out, a truthful and credible witness.

Just while we have that file, I would just like to make a quick point in relation to p.142. There was the exchange of emails starting at 141. For some reason these were not taken in chronological order. What seems to have happened, p.141, in the late afternoon Mr. Kreppel sends out an email saying, "Our policy seems to be run to schedule time, you need to look at this, they", which one assumes is "the competition", the heading of the email, "are all over the shop and occasionally getting a reasonable load, we need to consider running with them, please discuss with David and Peter". The following day, around midday, he sends an email saying he has been looking at operations in Ely: "Our competitors are nothing short of a joke". Then he says various things, but the particular point is in response to the email that has come in from the TGWU:

> "They are partially correct, except I have not instructed to do the sensible thing for reasons which are obvious, and that …"

– the sensible thing, one assumes –

> "… is to ensure our White vehicles shadow 2 Travel's rather than run to our notional timetables on services that are most part registered regular. The current nonsense needs to stop now, we need to start competing with the competition rather than ourselves."

Then later that day you see Mr. Brown, the in effect managing director at that point, responding formally to the Trade Union.

The significance of Mr. Kreppel's emails are that whatever he might have thought was the sensible thing to do, he had not instructed it at that point. It was not happening, even though he thought it would be a jolly good idea, and Mr. Brown's evidence has consistently been, "That would not have been my approach at any time, my instructions were, 'run legally, run to pad'."

I just make that point, firstly, because I think it was not drawn out this morning in questions, and it is appropriately a point for submission, but secondly, it goes really to the suggestion that it is up to the Tribunal to make any findings of fact about running in front. Here we have evidence saying at that point that it was not happening, however much the outgoing managing director might have liked it.

In our submission, all the issues that were held over from the strike-out have effectively gone nowhere, and the basis for redistributing passengers is that of Dr. Niels.

I think that also, if I may say, means that it cannot be right for 2 Travel now to make the point, I think for the first time, that the appropriate person whose knowledge is to be taken into account as attributed to Cardiff Bus is Mr. Kreppel. In our submission, the proper test in law is that it should be the entire board. You have had Mr. Brown's evidence as to what the board believed. In any event, from the date of his appointment of managing director designate, it was Mr. Brown who was in charge, despite having occasionally to have a "conflict of wills", as he put it this morning.

There have been various unpleasant things said about our approach to disclosure. I have already said that I do not think that is appropriate, but in the closing submissions from 2 Travel it is said that the scope of disclosure offered in the proceedings was unduly limited and "seemingly designed" to hamper 2 Travel's ability to pursue its claim. That can only mean that it is being alleged that Cardiff Bus has deliberately failed to comply with its disclosure obligations. I need hardly say we take exception to that formulation and consider that that is an allegation that should be withdrawn.

The other point that is being made generally is that Cardiff Bus was, as it were, economical with the *actualité* in responding to the OFT, both as far as the s.26 notice is concerned and trying to cover its tracks. Again, in our submission, those allegations simply are not made out. The relevance in this case of either of those allegations, whether as to disclosure obligations in these proceedings or to the OFT is, in our submission, nil. It cannot go, and I think that has now been accepted, to exemplary damages where any award of exemplary damages is for the infringement and not for the conduct of the proceedings relating to the exemplary damages.

In relation to withholding information from the OFT, even if that were the case, the jurisdiction of this Tribunal cannot go beyond what the OFT actually found on the information that was given to it. In fact, in our submission, what was given to it was pretty broad, and obviously it was sufficient to enable to find the infringement. When push comes to shove, it found the infringement. It had the competition policy document, it had the

Kitchener posters, it had the complete competitive service logs which had been disclosed in these proceedings, but almost not relied on for what they show, both good and bad. In our submission, those points simply go nowhere.

All of that comes after what may be logically the first point, which we have also made consistently, which was that this second limb of the exemplary damages claim faces a fundamental legal problem, which is encapsulated quite nicely in para.136 of my friend's closing submissions, when it is effectively said that an award of exemplary damages performs the same function as a fine. It is something that goes beyond compensation and punishes somebody that has breached competition law and should be an additional penalty. In our submission, that really exposes the legal problem in a case where the law, the statute, has already determined that there should be exemption from penalty. Parliament has precisely determined that in a case of so-called minor significance there should not be a penalty for infringements, and we are in effect, as we have said before, more closely to be aligned on the position where the fine has been imposed by the competition authority than a case where no fine has been imposed, but could have been.

We have also made the point, and the evidence at the trial confirmed it amply, that there is absolutely no need for deterrents in this case. That was confirmed by Mr. Clayton Jones, amongst others, who has been able to enter the Cardiff Bus market without hindrance as well as what Mr. Brown has said.

Unless I can assist the Tribunal further, we maintain the position that we put forward in our opening and closing submissions, and submit that this case has from the start been wildly exaggerated and in its latest form it is still completely over the top. Cardiff Bus was absolutely bound to fight it through to trial, and, in our submission, the claim should be dismissed and we have given the alternative formulation should our arguments on causation not be entirely accepted, sir.

THE CHAIRMAN: Thank you very much, Mr. Flynn. Mr. Bowsher.

MR. BOWSHER: Thank you, sir. We, of course, have already replied to my learned friend's written submissions in writing, and I do not propose, unless there is a point that the Tribunal wishes me to go back to, to cover that detail again. I will try and pick up some of the points that bear on this.

THE CHAIRMAN: You can assume we have read in detail both sides' closing submissions.

MR. BOWSHER: Maybe I can just pick up one of the last points that my learned friend made, and that concerns documents and disclosure. We do say that the conduct of Cardiff Bus regarding the preparation of documents in this case going back right back to 2004 is of a

piece, and we explored that in cross-examination. What is very clear, and we go into it in detail in our written submissions is that Cardiff Bus knew this was about presentation. We saw a flavour of it today in some of the emails. They knew this was a case where it was about presenting their conduct in a certain way, and they have been very careful not to produce documents that might incriminate them. For example, there are no White Service logs, even though one might expect from their own internal documents about how they were going to run the White Services that you might have seen such logs. We do say that it is striking that in the course of the preparation for this case and in the course of the trial, and so forth, we do find again and again further documents are produced often to try and meet a point that is made and it opens the revelation that there is yet more material.

We say that that is important because, as we have said in our written submission, the record was maintained to avoid providing any incriminating evidence (para.19 of our submissions), and as in cases such as *JJB Sports* the approach the Tribunal should take is that it is likely that the infringer is not going to let much evidence away of what it has done and what the effects are of what it has done. That is what intentional infringers do, they make sure that the information is not readily available. For example, when we are trying to look at what actually the buses did do, did the White buses actually sandwich the 2 Travel buses, we do not have the material to demonstrate in terms of their own internal logs. All we have is the Cardiff Bus material, but not the White Service.

This is, we say, a case in which there is a wealth of evidence supporting our case. It is coherent and mutually supportive and consistent. We do rely upon appendix 3. I think my learned friend may have misunderstood what we are saying here. What we are saying is you have to look at the weight of the evidence here. We have not said that this is a point not put, what we are saying is there is a weight of corroborative evidence. You look at all of the witnesses and all that they have said, and we have set out a great deal of it in appendix 3. That is supported by the evidence that you have heard. It all goes to show that the predation had a very specific and clear impact on 2 Travel. It is an impact which the OFT itself recognised. It said that there was abuse directed at 2 Travel and it said that the abuse did contribute to 2 Travel's exclusion from the market. It is idle to suppose that Cardiff Bus or anyone thought that if you were going to manage to exclude 2 Travel from the Cardiff market that somehow or other that disconnected from being able to push 2 Travel out of business altogether. The reality is where 2 Travel had positioned itself, it moved into the largest market in South Wales. It had played its cards to get into Cardiff and it was at risk if it could not make that work. The consequence of excluding 2 Travel from Cardiff, as

Cardiff Bus very well knew, was that it was likely to put 2 Travel out of business. That was not just what they knew, it was what they intended.

The OFT of course did not have all the material which you now have in order to consider what the impact of the predation actually was. They did not need, of course, to make a positive finding which would have bound this Tribunal. In a way, it would have been surprising if the OFT, unless they had compelling evidence, had not done what you would expect them to do, which is to make the findings they need to do for the decision that they have before them, and leave the issue for this Tribunal where it properly lies. They have made a very clear finding that Cardiff Bus conduct did contribute to 2 Travel's exclusion, and we say that it must follow from that that it leads to extinction.

The approach to causation in a case like this is, of course, a sensible common law approach. We are not arguing for anything else. We do say that arguing for a simplistic unduly rigorous 'but for' test ignores the true nature of a case like this. This is not like a sale case where one says "If the coffee beans had not arrived rotten they would have been sold", or "If the ship had arrived on time it would have been laden". Those are very simple causation cases, not even like a building case where, if the building had not been defective it would not have had to be repaired.

This is, in fact, more like a medical case. This is a multi-factorial case where you are looking at the survival or otherwise of a business. There is a comparison with the survival or otherwise of a patient. There are a number of things which enable a patient to survive or not survive. It is not just the care given to that patient by the surgeon. There are a whole range of factors affecting the patient's prospects of survival or otherwise.

One has to look, therefore, at the case law that deals with those sorts of issues and consider: is it found that the properly effective cause of the exclusion, and as a result the extinction of 2 Travel as a going concern was the predation? We say, yes, it plainly is. That is, we say, the evidence.

We say that, in fact, the *Arkin* case, and we have said quite a bit more about this in writing and I am not going to go over that again, there is much sense in that judgment. The only question is: is there a break in the chain of causation? *Arkin* is an odd case, and when we come on to look at the break in the chain of causation in the context of *Arkin*, I would urge the Tribunal to treat that part of the judgment with a little care in terms of the actual analysis, because when we look round about paras.550 to 560, this was a case where the Judge had already found that there was not an abuse or an infringement of competition law. He was somewhat reluctant to get into these hypothetical discussions about causation,

perhaps for that reason, so it was a slightly odd analysis as to what was or was not reasonable for Mr. Arkin to have done. The decision had already been made that in fact what the conferences were doing was not anti-competitive.

What we say one clearly gets from *Arkin* is that the simple question is: is there a break in the chain of causation? What we say is wrong about *Arkin*, and the only bit which, in our submission, this Tribunal needs to be wary of is the suggestion that there is some sort of obligation of reasonableness upon a claimant. If a business is caused damage – and we have gone into this in more detail in writing – by anti-competitive conduct then as long as that business has not acted in a strikingly irrational manner, what flows naturally from the abuse, the predation, is caused by that predation. It is not, as in *Arkin*, the situation where, in a sense, what was happening was Mr. Arkin was being judged, "Was there a better way of acting? Would it have made more sense to have withdrawn?" That, we say, goes too far because that imposes on a claimant such as 2 Travel some sort of special obligation of reasonableness. That must be wrong. The obligation, in fact, per *Michelin*, is on them, on Cardiff Bus, not to act anti-competitively. There is not a special obligation on us to be sure that every judgment we make is the best judgment. At every given stage the entrant has to make the best judgment it can, and we all make wrong judgments, and some judgments which will turn out to be strange, but it sees opportunities and it has to take them, and we have to make our assessment on the basis of the way in which that market was functioning. It would be wrong to place a burden on a claimant which in effect said that because something turned out not the way it was expected, that with hindsight we can say there was a better way of acting, and therefore because there was a better way of acting the claimant is the author of its own misfortune. That would be wrong in our submission. As long as the judgments we made were sensible judgments made at the time, with the benefit of the material available at the time, then they formed part of the long and complex chain of causation.

MR. SMITH: Just in terms of the articulation of your wider causation test, is your case articulated in para.91(iii) of your opening? Is that the test you contend we ought to apply?

MR. BOWSHER: That is a further broader way of putting it. If you look at the case law, and we go into it – that of course is a summary of what then follows on in our opening in some detail, which we have referred to. We do say that as part of the chain of causation that where part of the losses are caused by the disability then, yes, we suddenly sustain them. I am sorry, I am not making myself clear. That is not the only way we put it but yes, that is a limb of the way we put causation.

MR. SMITH: You see, Mr. Bowsher, I understand the "but for" test, and I understand you are saying that the causation test that should be applied is wider than "but for". What I do not quite understand is exactly how much wider it is.

MR. BOWSHER: I suppose the way I might put it differently, and the cases are not all consistent, one has to look at "but for" but without the benefit of hindsight, is a slightly short way of putting it. You have to treat the claimant in the position that the claimant was in at the time, but judge what actually was the position of the claimant at that particular time. It was faced with the opportunity to go into Cardiff, so it did. Was that a rational position to take, or not? Now it is in Cardiff it is a relatively weak company, if I can put it that way, it is suffering in that sense from a disability. That disability is then enhanced by the predation and, at that point, what is the effect of the predation upon it? The effect of the predation upon it is that it has now made that investment and the rational position is to continue to try to capitalise upon that investment. It is not to take some sort of standing back and say: "In fact, with the benefit of 10 years later, if you wanted to make the most amount of money out of this situation you would have done something entirely different." You have to take account of the situation that the claimant was in, including its condition, which is in effect, although Mr. Justice Colman did not agree with the eggshell skull analogy, in fact it is in effect an eggshell skull analogy. You look at the actual condition of the entrant, because as we have said in our submissions, a weak entrant is going to be more affected by predation than a strong entrant, a strong entrant will just brazen it out and will be able to survive whatever is thrown at it probably, and/or may decide to withdraw and take some rational position. A weak entrant is actually stuck. It has made the commitment and has to make the best of the decisions it has already made, and as long as they were rational at the time it is part of that sensible chain of business causation, and that is all we are contending for, that it has to be a sensible chain of business causation taken on the basis of the decisions taken at that time, not by reference to some later rationalisation to say actually looking back with hindsight you could have done something entirely different and it would have been better. It is a rather folksy way of putting it perhaps, but a lot of these causation cases do get a little bit imprecise around the edges, which is why, of course, they often end up saying: "What is the effective cause?" and often an awful lot is loaded in to that word "effective".

MR. FREEMAN: Can I just follow up on that, Mr. Bowsher? You may be going to deal with this, so if I am jumping ahead I apologise. You are talking about breaks in the chain of causation that are related to the claimant's own acts, whether they are reasonable or whether

they are unreasonable, or whether we should take that into account. What about third party acts? Have you found any of those? Are you going to deal with those?

MR. BOWSHER: Well I am not sure what third party acts – a third party act technically might give rise to a loss of chance claim, the *Enron* case might be an example there, because the third party – well let me take a more simple bid case, the third party break in causation is: "If this had happened we would have won this contract", well the question is: "would you or would you not?" If it is a third party then the loss of chance analysis set out by this Tribunal in *Enron* goes through that analysis and the role of the third party would actually go to setting that up as a loss of chance claim.

MR. FREEMAN: But in terms of what event caused 2 Travel to go out of business, we do have the Traffic Commissioners intervention. Do you categorise that as a third party act or something that is derived from the claimant's own situation?

MR. BOWSHER: We say that is derived from the claimant's situation caused by its worsening situation where you can see the figures, we were having a declining performance over time, the whole story about 2 Travel being under pressure and its performance declining in the course of 2004. So the Traffic Commissioner flows from what has happened to us as a result of the Cardiff Bus activities, of course the Traffic Commission itself is not decisive because if we had still been able to stay in business we then go on to the Transport Tribunal and we would have been in a position to put money back in. In that world it is not the end of the story.

MR. FREEMAN: And the Traffic Commissioner's August 2004 intervention which related to matters unconnected with Cardiff, does that have any bearing on the causation?

MR. BOWSHER: Well it is part of the condition of 2 Travel, and it goes back to my eggshell skull analogy which was developed in writing. 2 Travel is in the condition that it is in, it is weaker than Arriva would have been, it is more susceptible to being pushed out of the market.

THE CHAIRMAN: We are returning to your "patient" metaphor, are we not? But for the negligence of the surgeon in relation to mending the leg, if the patient would have died anyway?

MR. BOWSHER: I put it differently. A stronger patient is more likely to survive a dodgy anaesthetic.

THE CHAIRMAN: Yes.

MR. BOWSHER: A strong patient can probably tolerate a bit more negligence in the application of the anaesthetic than a weak patient, but the death of the weak patient is still compensated for as a death.

THE CHAIRMAN: But in this context it is really just a matter of evidence, is it not? But for the predation what was the condition of the company? We have heard Mr. Flynn's submissions that the company was doomed, and we know your submissions are that the company would have had a much fairer wind and would have survived.

MR. BOWSHER: The problem is we do not know what that wind would have been. The difficulty that we, the claimant, have in a case such as this is that predation has happened, and we were perhaps weak to start with and we were made weaker. When I say "weak" that makes us sound feeble ----

THE CHAIRMAN: Well we do know what the wind would have been do we not, if we are able to make an analysis of the expert evidence?

MR. BOWSHER: With respect no, because you do not know how we would have performed in Cardiff without the predation. They are able to say: "This is how it actually turned out and things got worse and worse and worse. Well, yes, of course they did, and various difficult decisions had to be taken as 2004 went on by a whole range of people. But the condition of 2 Travel – it was not Arriva or Stagecoach – it was having to make the best of an opportunity which it saw, but we will never know for certain how strong its continued entry had been if it had not been predated upon.

THE CHAIRMAN: We may accept your expert evidence in its entirety but we cannot simply make a presumption, can we, that it would have survived?

MR. BOWSHER: No.

THE CHAIRMAN: We have to act on the best assessment we can make of the expert evidence we have and the factual evidence which has come from the company itself – a normal evidential analysis.

MR. BOWSHER: Not just the company itself, and other individuals who said "These were profitable routes" etc.

THE CHAIRMAN: Of course, that is why I referred to the expert evidence.

MR. BOWSHER: Of course, when we started one knows from the figures we were getting reliability rates at a high end, we were getting more passengers than we had expected. We had backers, and I will come on to this presently, but we were in a position where we were able to exploit the opportunity. As I say, we were not Stagecoach, we were not in a position to behave as a national bus company, but we had that opportunity and we had backers who

were prepared to support us through a period of difficulty, and expected us not to be making profits for a period.

MR. FREEMAN: But you say we do not know for certain, but are you not inviting us, and what we have to do surely is to assess what the counterfactual situation would have been. To my mind that is not a particularly unusual exercise for the court to have to perform. If this were a merger case and we were reviewing the correctness of a merger decision we would be comparing what actually happened with what might have happened.

MR. BOWSHER: I am not saying it is unsustainable, what I am saying is – sorry.

MR. FREEMAN: As the Chairman says, we have to assess the evidence and then we have to make an assessment of what might have been.

MR. BOWSHER: I am not suggesting anything other.

MR. FREEMAN: I had the impression you were implying it was rather difficult.

MR. BOWSHER: What I am saying is that there is always the problem for a claimant in a case such as this, that is having to say "But for this predation we would have continued to perform well", because the actual evidence of what actually happened is only ever the disaster that befell us.

MR. FREEMAN: There is evidence on what might have been.

MR. BOWSHER: Exactly, and there is evidence of what might have been. All I am saying is you should not give undue weight – when balancing it up one should bear in mind that our evidence and the evidence from a number of our witnesses, not just 2 Travel witnesses but from other people experienced in the bus industry say that this was an entry which could and should have succeeded, and the reason why it has not succeeded in the past is because, as we have seen, Cardiff Bus have taken action in the past, and that is in our submission better evidence, it is better evidence from people who have dealt with these new entries, and that is better evidence as to what would have happened if it had not been for the predation, if they had let us carry on and compete fairly on those routes.

THE CHAIRMAN: Well we have had an interesting debate between "but for" and possibly "hindsight" and it may be conceptually interesting, but I think we should move on now.

MR. BOWSHER: Exactly, sir, you have it from us in writing.

THE CHAIRMAN: We have particularly in mind paras. 21 to 27 of your closing submissions which, if I may say so, are very clear in dealing with causation.

MR. BOWSHER: I have not memorised the paragraph numbers, but yes. The paragraph that Mr. Smith pointed me to, 91(iii) in our opening is intended to fit into that, you do not discount the fact that we were weaker than another company might have been, and that is just the

way we are. The reason I am making that point, of course, is that is a point where we would say Mr. Justice Colman in *Arkin* was wrong in really dismissing that point . We say you have to deal with the claimant in the condition the claimant actually is.

THE CHAIRMAN: We certainly do not penalise a young company for being a young company with the problems of such a company.

MR. BOWSHER: But where we certainly would pick up and adopt Mr. Justice Colman's observation – I think it is footnote 15 of our submissions – we pick up the reference where he says that the subject of directors' loans is not a reason, the fact that the company says we could have relied on loans is not a reason – one should take that on board and allow for the fact that directors can support businesses, and he expressly dismissed the argument – the very argument that has been made against us – that somehow or other the prospective insolvency of *Arkin* meant that it would not have survived anyway.

THE CHAIRMAN: That is not a categorical statement of principle, is it? There are directors' loans and directors' loans, and there are circumstances and circumstances.

MR. BOWSHER: Indeed, but that is why it is in the footnote.

THE CHAIRMAN: We have the point.

MR. BOWSHER: We do very much stand by the analysis that we have set out in writing as to what the propriety or otherwise was of the directors making loans. We say Mr. Haberman's analysis was wrong, it was wrong in law for reasons we have set out in writing and I am not going to go back over that. It was perfectly proper and appropriate, and this Tribunal should take account of the fact that the directors were there, and the shareholders were there and prepared and anxious to support the company; they had reasons to do so. One cannot simply discount them, we have been given a number of references, Mr. Short in evidence made plain that he was prepared to support the company and to continue to do so, even in fact without security, and he said that in evidence – again we have given the references in our submissions. The reason why, in the end, the plug was pulled was because Mr. Francis and Mr. Short saw no end to the predation in effect. The predation was going to continue, the OFT had not intervened; they would otherwise have been in a position to fund the company in the light of what the Transport Tribunal had said, and keep the company going. We say that must be crucial to the analysis.

It cannot be right, for example, that the only reasonable response to predation, which might have been suggested by *Arkin* is that we leave the market, because that really would undermine the sense of competition law at all because if one is to have any private enforcement of competition, for example, that depends on there being damages claims, and

it cannot be right that, somehow or other, the only reasonable response to abusive conduct is to abandon the field to the abusing party, which might be where the logic of *Arkin* does not make sense.

THE CHAIRMAN: *Albion Water* rings in my ears.

MR. BOWSHER: Exactly.

MR. SMITH: Mr. Bowsher, you said a lot about the expert evidence and a great deal about the witness evidence, what about the contemporary documents? What weight should we attach to those?

MR. BOWSHER: I do not think there is a universal answer to that because it depends who wrote them and for what circumstance. E21, which we have relied upon in our submission, is a continuing record that the management of 2 Travel was continually exercised during this period about what was going to happen about this predation. It was not a new event that happens at the end of the year, it is a repeating theme, and they are trying to deal with it. Now, I am not sure – what you can read into that is the perception of management is that that deprivation was affecting their ability to do business, and might affect their ability terminally. That is credible material and should be given weight. My learned friend would say it is self-serving internal material, but it is the material which was being written at the time about what was actually worrying the management, and should be given a value.

THE CHAIRMAN: Contemporaneous documentation includes a number of memoranda from Mr. Waters, and I think one of the concerns is what weight should we give to the contemporaneous memoranda of Mr. Waters who was, at the time, 2 Travel's finance director?

MR. BOWSHER: There is nothing that he says that actually undermines our case on causation. He is concerned about the strength of the company and the management of the company. His contemporary documentation goes to his finance director oriented concerns about how the company is going to carry on, but he says nothing which suggests there is any different analysis to be made about the impact of the predation and, indeed, one would be surprised if he did, that is an operational matter. So that does not, in my submission, take the matter anywhere particularly further.

In terms of Carl Waters himself, and what one should make out of that, it is difficult to test it now. He is clearly gathering together a dossier of things which concern him about the way in which 2 Travel is operating. It does not follow from what he is saying that 2 Travel was bound to fail. On the contrary he is in a position of trying to work out how that company might operate differently and how best it might operate, but he is not saying

anything which says: "This company is doomed to failure", he is suggesting there are alternatives. His written evidence is not always factually accurate because, for example, and we set this out in para.20 of our submissions. He does, for example, seem to suggest that that 2 Travel was short of vehicles, and that is simply not the case on the evidence. There is a shortage of vehicles for two different purposes. What Carl Waters seems to have been saying is that 2 Travel did not have at that time all the vehicles to meet the entire business plan. Of course, the entire business plan on the PwC analysis included 20 buses in total. Yes, 2 Travel did not have the buses for the PwC business plan, but it did have the buses to run the timetable that it was running at that time.

So there does seem to be some real ground for exercising caution when looking at Carl Waters, as it were, criticisms, and I think Carl Waters' criticisms also need to be assessed with a little caution, given the fact that it was clear from Mr. Harrison's evidence, whatever may have been said today Mr. Harrison was clear that Mr. Waters was himself the person who was producing the models that went into the PwC report. So insofar as criticisms are being made about the PwC report is just management output – we do not accept that – it was Mr. Waters who was producing that material, it was his analysis that went into the PwC report and presumably therefore his analysis that this was a model which could succeed. I find it a bit difficult to give a broad brush answer as to how you should deal with Carl Waters. Clearly, there are individual criticisms which he makes, which may or may not have a different amount of force.

MR. SMITH: Clearly you are right, Mr. Bowsher, one has to look at each piece of evidence in its own light. The reason I asked my question is this: the witness statements that have been adduced by all the witnesses effectively are written seven years after the event, whereas the contemporary documents are, of course, contemporary, and in the back of my mind I have a *dictum* of Lord Goff, where I think he said something like: "When you are listening to witnesses who are speaking of events long ago, a court should pay particular regard to the contemporary documents because they are likely to be a better guide to what went on."

MR. BOWSHER: It is to some extent sound commonsense, but one also has to have regard to the fact that evidence given seven years later can be usefully tested by contemporaneous documents, but of course contemporaneous documents can be self-serving and, as you know, we say much of what Cardiff Bus say certainly is self-serving. Certainly, it is appropriate to test what we say by reference to contemporaneous documents, but also if one is testing what the real state of 2 Travel was, the best professional independent assessments are those made at the time. There is PwC, Bevan Buckland, Grant Thornton – yes, there are

"warts n' all" analyses with their own individual strengths and whatever – but a number of professionals at different points in this sequence have looked at the state of 2 Travel and that, in our submission, is probably the best real test as to the condition of 2 Travel and what could or should have happened, which is why we place weight on the PwC report – not because it is necessarily right, and I will come on to the figures in it. The figures are not our case, and I come on to this point about the criticism of the way we have dealt with that calculation. We are not saying the figures in it are correct. What we are saying is a considerable time was taken by Mr. Harrison's team, it is not fair simply to say they were writing up what they were told. They conducted due diligence, they spent a great deal of time with the 2 Travel people considering whether or not this was viable. You look at that and the subsequent analyses, and the picture you get from the contemporary information, which is not self-serving, is of a company that can succeed, absent unfair competition. There are, with some of the witnesses, more complex issues which the Tribunal will have to judge. All I would say of Mr. Waters is he clearly was unhappy in his work by a certain point, and it may be that part of what one sees at some points are not always consistent with the message that must have been given by the person who was putting the input into the first PwC report.

What the Tribunal makes of that is difficult ----

MR. FREEMAN: Mr. Bowsher, is our problem that Mr. Waters can only speak to us through his documents because he is not here?

MR. BOWSHER: Exactly.

MR. FREEMAN: As Mr. Flynn pointed out.

MR. BOWSHER: Indeed. I am not going to start giving evidence about what may or may not have happened with Mr. Waters. We know he was not happy, as it were, because he interviewed with Cardiff Bus we discovered in the course of ----

THE CHAIRMAN: We cannot speculate upon what Mr. Waters might have said had he been here, but we do have contemporaneous documents, and I encountered the same Lord Goff *dictum* in another case that is going on at the moment in this Tribunal, the Tesco case. We have Mr. Waters' contemporaneous documents, and we do need you to help us as to how to deal with them because he was an accountant, he was fully qualified, and therefore subject to normal professional ethics. He had taken a job with 2 Travel. He presumably wished to remain in that job and see the company thrive because it would presumably have been to his benefit to be part of a growing newly AIM listed company. He had quite a lot of credibility invested in it; that is one side of the coin. The other side of the coin is he was obviously

pretty fed up with the way some aspects of the business were being conducted. Now, given that it is contemporary documentation what weight do we give to that compared with the expert evidence which is inevitably – like all expert evidence – and I use the term literally, a 'construct'?

MR. BOWSHER: I am not sure there is a quantitative answer to that question. It obviously has to be given weight. One has to look at it with care though because, as I say, Mr. Waters, while he may have formed different views about how things could have been done differently and/or better with the benefit of hindsight or whatever, and was putting out different hypotheses as to how the business would work. The reality is that 2 Travel and its backers wanted to run a bus company, and they had the reassurance of the Swansea depot. Those are the facts. Mr. Waters maybe unhappy about various aspects of it, some of his unhappiness can be seen to be factually inaccurate – he is making criticism about buses which are just not accurate, but I am not going to try and dismiss it all as not true. But what he is not, in our submission, saying, and there is nowhere there, in fact, that says that at the time they went into Cardiff Mr. Waters thought "this is bound to fail anyway"; he does not say that. He is involved in the PwC plan which goes forward, which is the basis for that project.

THE CHAIRMAN: We have interrupted you for long enough, move on.

MR. BOWSHER: All I would say is, in a sense the best evidence as to the ability of 2 Travel to go forward at the outset without predation is what was the perspective from all of those involved at the beginning before the predation happened, and that is really set out in the PwC report – yes, we are missing the underlying documents and so forth, but there we have professionals, the same point that you have just made to me, who go in and talk to Mr. Waters, they talk to all the management, they get the figures from Mr. Waters and they assess is this going to work or not, and they come up with a view. You have heard from Mr. Harrison. Now, obviously, many of the criticisms that my learned friend makes of the PwC report in many respects are strengths because what we are seeing in the PwC report is not just a professional analysis, it is not just a management consultant coming in and saying: "Have you thought of setting up a philately business in South Wales? There is a new opportunity here, you should really go for it." This is someone actually talking to management, getting the management's plans and testing the management's plans, and it is both of them together. Sorry, I have also been holding off Mr. Smith?

MR. SMITH: No, no, my last point on this. It is simply that years after the event memory can be frail, and this struck me reading one of the documents you helpfully put together last night, which said:

> "A shortage of drivers at the Cardiff depot was placing strain on resources at the Swansea depot. The drivers from Swansea were being transferred to Cardiff on a daily basis. Engineers and supervisors were replacing driving staff at Swansea."

I thought " Goodness, this is a very helpful document for 2 Travel" until I looked at the date, and the date is September 12th 2002. The problem is one has here a contemporary document that is rather gainsaying the subsequent evidence in the witness statements. It is E20 tab 12 if you are interested.

MR. BOWSHER: I do remember seeing this weeks ago. I think the problem with this is – I know this sounds a bit odd – it is from a different age of the company, it is almost a different geological era, and I am not sure what one can read into it. We do not have really very much evidence about how this fits into what. It is not the same Cardiff business, and I do not think we have had very much evidence really to compare it with.

MR. SMITH: No, it is 18 months before the relevant events.

MR. BOWSHER: You have other evidence from people like Charles Jones, from others who are also involved as to what was happening and how they were having to respond, and how they had put in place staff and they had enough staff. A lot of criticisms are made about 2 Travel which get knocked down and turned out to be insubstantial. For example, in the course of the hearing there were a number of criticisms made: "Well 2 Travel did not have its own proper training scheme", and so forth, perhaps not surprisingly – it was not Cardiff Bus. But, in fact, it was responding very sensibly to what was happening, it brought on the Ghurkhas. That was the right thing to do. So it is not that these things do not happen in a properly run business, the question is you respond to them and what the evidence shows, both the contemporaneous evidence and the oral evidence is that 2 Travel was continually responding. What the predation does is really put the position beyond 2 Travel to be able to respond, and you have heard and seen a lot of that evidence that 2 Travel – I do not think the word was ever used by any of the witnesses – became almost 'desperate' in their attempts to try and cover the situation, driving people from Swansea because they had got the Ghurkhas and trying to keep the service going. You see that in the figures if you look at the reliability figures which we had in Dr. Niels' calculation, we had them month by month and you can see them perhaps conveniently in our appendix 4 to our closing submission tab 4. I was not proposing to come to this quite yet. I am not going to get into the various

models which produced these documents, but we were achieving good performance figures. It is the second sheet after the cover sheet at tab 4, and it is in landscape, and starts: "Service scenarios: 2 Travel and Cardiff Bus frequencies per hour." It is the middle one: "Service scenario 1b) if 2 Travel ran reported services according to Mr. Good", it gives the reference to where one gets this and, I am sorry, there is a better place to find this material. But the simple point that I wanted to show is that of course those numbers actually screen the reality as to what has happened, namely 2 Travel went into Cardiff prepared to do a good job and was able to do actually a pretty reasonable job to start with, but was under pressure thereafter and we have seen from the documents only today the sort of pressure it was under. We know exactly why it was finding it difficult to sustain that sort of reliability rate. There are all sorts of factors we have gone on to about why you get a failure, which do not necessarily mean that the bus did not turn up at all. We know also that reliability rates between frequent services and 2 Travel services are not comparable. This is all teaching you old stuff. This was a business, whatever had happened in the past, that went in with a decent plan and was performing. We say there is no reason to suppose that it could not have continued to perform, as it did in the first couple of months, if it had not been for the predation. What we see is Cardiff Bus was organising and improving the organisation of its predation, that seems to be, in our submission, what one really gets out of this.

THE CHAIRMAN: When you choose a time we will have a break?

MR. BOWSHER: Perhaps that would be a sensible point to stop.

THE CHAIRMAN: After the break we will try and interrupt you less and we will sit through.

MR. BOWSHER: No, interruptions are always welcome, as you know, and I am nearly there. I had prepared 45 minutes submissions for this morning anticipating some dialogue – I would never call it 'interruption' just 'dialogue'.

THE CHAIRMAN: There is no pressure any way.

(Short break)

THE CHAIRMAN: Mr. Bowsher?

MR. BOWSHER: Just a couple of miscellaneous points, really, picking up the dialogue. I have not, in the time - maybe a month ago I would have been able to immediately lay my hands on the cross-reference material for that date in 2002, but perhaps fortunately, that part of my brain has atrophied already. But the short point is, as we know from the evidence, driver shortages in south Wales were a recurrent problem. They came and went. And I cannot remember quite how that fits into the overall narrative of driver shortage.

One final point maybe to make about the relevance of contemporaneous documentation and its weight — and it obviously is very useful material — but in looking at its context, one also has to think about the response to it, or the lack of it. You will have gathered, I think, and you have seen from the record, that the nature of these things is that Carl Waters often puts in comments which often do not get a response. That does not mean that there was not a written — just because there is no written response does not mean there was not a response. You have heard that response in many cases from the persons in question, yes, seven years later, but you have heard that response. And, yes, I accept that you have to weigh the operational man's view, given in evidence, with what Mr. Waters said. They clearly did not agree then all the time, and they clearly do not agree now, but in fact you can still get out of Mr. Waters the key points that we want to rely upon about the viability of this business at the outset.

I was not going to say a great deal about expert evidence, because we have said quite a bit already. Dr. Niels' exercise was a paper exercise, a calculation exercise, and I will come back to that in a moment when I look at the PwC report. We have indeed taken some of his calculations and looked again at some of the numbers. They are not for the purposes of developing our case, and we did not put them to Dr. Niels, but this is in the context of the calculations that were put to Mr. Harrison, and we have been looking at those again. This is not about our case on quantification. This is about looking at the evidence given by Mr. Harrison and what was and was not put to him; and I will take five minutes, if I may, just to show how that works.

The point that we are making about that is, well, Dr. Niels made the exercise, the paper exercise, as he did, which have whatever value they do have, and to some extent we seize upon them and taken them on board. But, insofar as his calculations have been used to undermine the credibility of the PwC report, we say they do not fly, and we have dealt with that in writing, but I will just illustrate how that works very briefly, and I will come back to the spreadsheets I was just looking at to show how that works.

What Dr. Niels does not do and cannot do, really, is alter the case about the behaviour of customers. He is an economist, he was very clear in cross-examination he was not an expert in the empirical behaviour of customers and how markets may or may not develop. He is an economist doing, effectively, a different kind of quantitative work. And I think at the CMC in this case, maybe just with the Chairman, I may have put it rather grandly in saying, you know, "He is no more an expert in bus behaviour than by virtue of having been in bus enquiries than a barrister is an expert in building defects having done many building

defects cases". He is able to deal, as it were, with the analysis, as it were, the abstract analysis from it, but that does not mean that he is giving evidence about the way in which customers actually behave. But, we have developed our comments on that in writing.

As regards Mr. Haberman, he has tied his colours to the mast of the proposition that 2 Travel would have failed when it did, regardless — regardless of facts and evidence to the contrary, and we stick by that. We say that it is for the Tribunal to decide what would have happened to 2 Travel. The bald way in which he put it simply cannot be right because in fact, if it had not been for the predation, it must be evident that things would have been different. We do say that it is relevant. Mr. Haberman no doubt has had many commitments, and we are not saying, we are not criticising Mr. Haberman as such for his involvement or otherwise at the hearing, but we say it is relevant that Mr. Good heard all the facts, and this is ultimately an analysis that the Tribunal has to make of the factual evidence as to what really happened in fact. And insofar as expert evidence is being put forward to assist you in understanding the facts, it is relevant as to whether that expert was there to hear and see those witnesses, and it is relevant. And it is relevant that Mr. Haberman has buttressed his position by reference to legal analysis about the relevance of insolvency, which we say is just incorrect, and we set that out in submissions about the relevance about when a company had to be wound up or not. We say his position on that is just wrong as a matter of law and is based on a misunderstanding about the different concepts of insolvency and obligations to wind up a company. We have set that out in detail.

My learned friend, Mr. Flynn, went through a number of our detailed criticisms of Mr. Haberman, one by one, and I am not, you will be glad to know, I am not going to go back over them again. Not each and every one of them. But we have given, in respect of each case, the references. My learned friend Mr. Flynn was keen to take you to other parts, sort of surrounding areas, but in each case if you look at the reference we have given there is a clear acceptance or admission, what we have said about Mr. Haberman's accepting or admitting the error or the failure, is borne out by the transcript. And we would invite you to look at each and every one of them. And this is an area where accuracy is called for and the chronicle of errors there is relevant.

We say that, whatever test of causation you are applying, a "but for" test, or a slightly broader test looking at the appropriate effective cause, whichever approach one takes on whichever of the authorities, the reality is that, in a "but for" world, 2 Travel would have been able to make a solid entry, as it did, as we have seen from the figures, with reliable

service and a good customer base, and it would have been able to develop that. And whatever my learned friend says about market growth, the reality is it may be that the market was not going to grow, but there is considerable evidence from the hearing that there would have been growth and could have been growth in other ways. We were planning to add to the number of buses and increase the rate of buses. There was the prospect of increasing the number of customers. There was the obvious prospect of increasing the number of routes, the 258 had not even been opened up.

If we had been able to compete without predation and sustain and build on our initial performance, we say it is more likely than not — and that, of course is the test — it is more likely than not that we would have been able to continue and survive as a business. We do not even have to go so far as "thrive", although clearly Mr. Francis and Mr. Short thought we could do. But the question is, would we survive? And the answer must be "Yes". We had well-funded investors, well-informed investors, Mr. Short well knew what he was letting himself in for, he had access to all the information, he said that in evidence, it is in the transcript, it is in the notes, and in those circumstances we submit that as a matter of causation, that is enough to show that the predation caused us, first, to have to leave Cardiff, and then to go into liquidation, because if it had not been for all those events, the sequence that in fact unfolded would not have unfolded.

The plan was a credible plan, the PwC reports, as I say, summarise what had been planned, they are a credible basis. They are not the basis of our quantum, and it is, we say, a strength of our case, not a weakness that we have actually, Mr. Good has gone and calculated the claim on the basis of the data, the hard data that exists, not on the basis of a plan in the past, no plan I cannot remember what the military aphorism is, something about "plans not surviving contact with the enemy", or something like that, no plan does.

What the PwC report does is establish that claim, and if you look at the calculation, again, at appendix 4, this may be, just to show how we have approached the attack on the PwC report in para.45, this is all to do with the various attacks made upon the PwC report set out, and we have dealt with them from para.43 on p.26 of our closing submissions, and they run on for a few pages, but it goes up to and including para.48.

And what the calculation at tab.4 does is simply take Dr. Niels' figures and show us, well, that in fact they are not so far apart, or his approach, if you correct them the figures from that logic are not so far apart from that which was adopted by PwC. So, if you have para.45 and the schedule, the first set of schedules on tab.4, taking 1-1's corridor, 1-1-7 what you can see is of course in the non-predation world where there are no white services, there

would have been — once the number of buses had been increased, up to three an hour, that is of course the basis on which the PwC report is based, because there are then 20 buses, there will be three 2 Travel buses playing six Cardiff Bus, and that therefore means that 2 Travel, just on a pure frequency —

THE CHAIRMAN: I am sorry, which line are we looking at, 117?

MR. BOWSHER: I am sorry, 117 under "Totals", under "Heol Trelai" so, I am looking at Dr. Niels' as it were first section, and in that first section there are going to be six Cardiff Bus buses and three 2 Travel buses. And of course in a predation-free world there is no white service bus to worry about. So, the 2 Travel frequency in an entirely equal world is three-ninths. And if you — you can follow this, this is what we are summarising in para.45, so, for each one of these you can deduce, if you have our para.45, just going back there with 20 buses we would have been able to run buses on each route with a 20-minute headway, resulting in three buses. Using extracts from the spreadsheet to reflect three buses per hour, we come up, we get these depictions on the first page. What that then leads one to is market shares on the third page. So that the Heol Trelai section is three-ninths and that of course is 33 per cent which is s.1 route 217. It is at the top left corner on the last page of appendix 4. It is the last, it is that one there. So, what you can see is this very quickly in fact once you start building up these figures. That is just to show one illustration where these figures come from. You very quickly build up to the total which is what we have given there, that the market share by relative frequency on the basis of the premise in the PwC report will be 26 per cent, not the 19 per cent in Dr. Niels' calculations. And if you take PwC's figures, and this is going back to our submissions, if you take the figures and adjust them for a 26 per cent market share, rather than 30 per cent, you get the revenue figures which we have given there, so you just take the 1920 revenue figure from the PwC report and you multiply it by 26 over 30, that is in the footnote at 23, and you get a weekly profit. And so you, that is how we get to the conclusion simply just re-working the numbers by making the obvious deduction that if you had actually done this analysis by reference to PwC's actual plan, that plan would have given you a turnover of £1.7 million per annum and a profit of £654,000 per annum on the basis of the 26 per cent market share.

THE CHAIRMAN: But we do not know what Dr. Niels would make of that.

MR. BOWSHER: We do not know what Dr. Niels would make — but, it is simply a calculation. I mean, it is simply just taking — all that has changed is simply plugging in the PwC plan, well the 2 Travel, the PwC depiction of the 2 Travel plan. That is all it is. To be blunt, there is no real thought about it, it is just arithmetic.

THE CHAIRMAN: Just arithmetic.

MR. BOWSHER: Well, it is. I mean, it is slightly convoluted through the documents, but it is just a question of saying what Dr. Niels was looking at was what actually happened, what is happening with a reduced number of buses. Our question is "Well, does the PwC report make sense? Yes it does. These are the figures that it generates". That was the ultimate 2 Travel plan and I am quite rightly corrected of course, the one area where we do rely upon the PwC report for our claim is in the loss of capital asset. That is where, in terms of where this was going to end up, that was the ultimate aim was to end up with 20 buses. We did not get there, but that was the aim. And those are — Dr. Niels' own figures get you to that point very simply.

And what then follows on in 46-47 is simply saying, "Well, the criticism based on that really is not fair". The criticism made of Mr. Harrison, and this all arises out of criticisms that were being put to Mr. Harrison in cross-examination, somewhat on the hoof out of the blue, but Mr. Harrison, again with the difficulty of time and so forth, was not able to, with the passage of time, was not able to remember all the aspects. But when you go back and look at this, it is pretty clear that there is a relationship and a close relationship between the figures in the PwC report and the plan it represents.

A similar analysis, a similar but different analysis, is set out in para.48 which actually shows that the proposition put to Mr. Harrison, the "71 passengers necessary to keep going", as it were, again does not actually stack up when you look at the figures that actually exist. They are in evidence and you follow through the analysis in paras.48-49 and the references which we have given, we say it is pretty clear that the attack on the PwC report just does not stand up.

One of the difficulties with using the PwC report, I should say, though, is that again, with the passage of time, it is plain that we do not have all of the underlying information, so that if you try to ----

THE CHAIRMAN: I am sorry, where are you looking?

MR. BOWSHER: In C1, p.36. This is where we get the number of buses, these are the numbers which we have just plugged into the calculation to generate payments 4, which is just increasing the number of buses in Dr. Niels' figures. But what one can see is that there are references to underlying assumptions and profiles which unfortunately we do not have, so that it is not possible to tell precisely how each PwC figure is generated, and this relates to the discrepancies which were identified by the Tribunal and which Mr. Good looks at in his letter of 27th April which is at tab.2.

What we can see from Mr. Good's analysis is that there were some figures which cannot be accounted for, but what that shows in fact is that the assessments in the PwC report had an element of conservatism built in. We do not entirely know why, but in each case the discrepancy is in fact to make the PwC report more conservative. We do not know what all of the underlying assumptions were which are referred to in this report, so we cannot, as it were, piece together, and that presumably is what is unaccounted for, as it were, by Mr. Good in his report. I mean, he has done the best he can, but it remains the case, in our submission that the PwC report continues to represent the best contemporaneous analysis of the viability of the business plan, nothing Dr. Niels has said actually undermines it because when you take Dr. Niels' calculation and methodology and simply plug in the planned figures, the 2 Travel planned figures, you come up with a result which is pretty workable and credible in the light of the actual outcomes.

I am conscious of the time. The impact of predation I think I have probably covered enough. The finance was available. I have discussed E21 and the sources of finance. You have heard from Mr. Short and Mr. Francis. Obviously, Mr. Francis had an interest and an expertise in property, and to some extent it is his interest and expertise in property that underlines his credibility as a continued investor in this company. He was interested in the depot, obviously, he was also interested and passionate about supporting Mr. Fowles in his business endeavours, and you get that strongly from the evidence of Mr. Francis and Mr. Short. They believed in that business. The dark mutterings today about possible issues about the value of the Swansea depot, they, in our submission, come to nothing. And they come to nothing for a very simple reason — that when you look at the resolution made at the time the Swansea depot was valued, it is explicitly stated that the value of the land at that point reflects the circumstances at that time. It is clear that, and we did deal with that in para.78 of our submissions, it is clear on the facts, in our submission, that Mr. Francis and Mr. Short would not have been in a position, would not have wanted and would not have been in a position to deal with the depot in the way they did if 2 Travel had not been put into the condition that it was at that time. It simply would not have got there. The company would have continued and they would not have been necessary, nor would they have been able to demand that the land be transferred to them, or that they could benefit from the land in that way. The reality was at that time the company had to deal with the land and the value which was put on it, uncertain though it was at the time, was acknowledged as being fair at that time, given the circumstances. If matters had been different, if it had not been for the predation, they would not have been forced into selling it then. They could have

sold it later and, as we know from the evidence, that would have been a sale at a higher price. So we say, yes, the evidence as to — this is one of those pieces of land of which the value is changing, as often is the case, that the prospects of developing the land change, it is often difficult to give a sort of universally accurate value, but you have the evidence. We say it is pretty clear, and we set it out in our submissions that the company could have secured significant additional capital from the sale of that land at a later stage.

Just picking up a couple of specific points, then, on counter-factual revenues, in terms of the revenues made by the company, you do have evidence that the costs of the schools contracts were being covered. The costs are set out by Mr. Bev Fowles at para.40 of his statement. You have had the evidence that those costs were being covered in general. It may very well have been that more might have been secured from them and they are under-priced in that sense, but under-priced does not mean that the costs were not being covered. And, as we have said in writing, once we had gone into Cardiff, we had to incur the costs involved in going into Cardiff. We covered those costs. The consequence of the predation is the profit we lost from the infills, and that is the lost profit which we claim. But, even if it is not profit, it is qualitatively the same thing, a lost opportunity to increase one's assets is still a loss of profit wherever the break-even line happens to be. It is still, it is still revenue which you are seeking to recover, the word one happens to apply to it does not matter. It is plain that what we are talking about is the lost additional revenue over cost that we would have secured. And there is no basis, as we have said in our submissions, there is no basis for allocating the costs of the schools contracts in some way to this; there is simply no legal basis for that, the correct basis to look at what actually happened and to value our lost profit claim in that way.

Finally, as time is marching on, I was just going to deal very briefly with exemplary damages.

THE CHAIRMAN: Perhaps before you do.

MR. BOWSHER: Yes, sir.

MR. FREEMAN: Are you going to deal with Mr. Flynn's point about £300,000 landing on the finance director's desk in August? Would that have been sufficient to have sustained the company? £300,000 is the lost profits on Mr. Good's —

MR. BOWSHER: Well, it would have, yes, because it is not just about the money. This comes back to the clear evidence you have as to why 2 Travel, why, as I have recently said, the plug was pulled. Mr. Francis and Mr. Short did not necessarily demand, and they anticipated that this would be a business that would have to develop, they were not looking

for profit then, and they were not looking for a particular financial result in summer 2004. What they were looking for was a business that could go forward, that they were prepared to commit to, to support Mr. Fowles and to support that business. And what caused them to pull out was not the lack or otherwise of £300,000, it was the inability to see any end to the predation. At that point in summer 2004, in fact £300,000 is, that is only the loss as valued by Mr. Good. What we see in fact is that that had a much wider, I mean, you have seen this from the evidence, the wider effect on the business was much greater than the loss on the infill routes because it was affecting not just the performance of the infill routes, it was affecting the performance of the company overall. It was disrupting management, and you know the point, the operation even in Swansea was being affected, so even taken as a number it is not the right number. But it is not the fact that whether or not £300,000 or £400,000 or £500,000 might have arrived on the desk of the finance director in summer 2004 that makes the difference, it is the decision not to carry on fighting in the face of predation that is effective.

MR. FREEMAN: I think I understand that point, but why is it not the right number — sorry.

MR. BOWSHER: Because the £300,000 is Mr. Good's valuation of loss on the infill routes. He has not tried, and I am not sure how you could, to value the losses, the ongoing losses suffered on the rest of the business, because the whole business was being affected. I mean, that is why we said things like wasted management time, which we simply do not have the material to value. I mean, I hope I have made that clear, we are not saying that there was not, we are not going to abandon the claim in the sense that we do not, there were losses, not just in terms of wasted management time, it was affecting performance, reliability, availability of drivers etcetera, etcetera. That, all of which was going to affect our revenues as a business, so £300,000 is not the right number but it is not also, in our submission, not the right point either.

On exemplary damages, the two heads, again we have dealt with the argument on the oppressive conduct of public authority head in submission, this is largely a question that we say about the status of the company and we say its conduct clearly was oppressive, we say when one looks at the evidence it is clear that — and if you look at the memorandum and articles — it is clear that the company was acting in a manner which, so that it should be treated as if it is a public authority. There is some law on this, which we have dealt with, the *AB v Southwest Water* case and we have dealt with that in some detail in our submissions. We say that this remains a valid and applicable head of claim for exemplary damages. I would add a couple more observations about *AB v Southwest Water* even if you

thought our argument, if you were not with us on those arguments, we would simply note the following points, and they may be points more for the future than for today:

AB itself of course has been over-ruled by *Kuddus* on other points. The significance of *AB* as a matter of law itself may be a matter that would have to be reviewed in due course, not least because it is a rather curious decision in the light of the fact that, a few years after the decision in *AB v Southwest Services* when it was decided that Southwest Services should not be treated as a public authority for those purposes, a few years later, after it had been privatised, the very same body was found to be an emanation of the state for EU law purposes in *Griffin v Southwest Water Services*. Now, I am not asking this Tribunal to deal with that, but just for the future to note that there is a real question in our submission as to what the correct approach should be on that head.

More immediate and, we apprehend, the way in which we have pressed the exemplary damages claim is the cynical disregard for rights. We say that it is now clear from the most recent disclosure that Cardiff Bus in general — and it does not matter whether Mr. Brown, Mr. Kreppel or both of them, or speaking to each other or whatever, Cardiff Bus was actively considering the benefits it would derive from anti-competitive conduct. It knew that at the very least there was a risk that its conduct was unlawful. In fact it plainly did know, because it knew that running at a loss was unlawful, so it clearly did know. But at the very least — and all that I would suggest is necessary, is that it knew that there was a risk that what it was doing was unlawful and that enforcement proceedings might flow, but that it thought the risk of any proceedings being brought against it was a risk worth taking in order to secure the benefits that it saw to it in following through with what was an unlawful course of conduct.

That, in our submission, is a classic example of acting with cynical disregard for rights. It is not a question of arithmetic calculation, again, that is not the way that the authorities look at it. "It is a decision, is it worth running the risk, I know or think I am reckless as to whether or not this is unlawful, but I think I will get away with it, it's worth a punt". That is cynical disregard for rights. That is what Cardiff Bus was doing, and that is exactly the sort of behaviour which can and should be marked by an award of exemplary damages. It is important, not just for Cardiff Bus's future conduct but for the wider industry, that this be appropriately marked. As I think we have said before, if one looks at the latest, the final Competition Commission report, what one sees from that is that there is a perceived lack of head to head competition. One of the reasons given for that is because there are competitive responses which may or may not be appropriate. The very fact that this is going on but

there are not more enforcement cases in itself argues in favour of there being an appropriate mark of punishment when these matters do come to light. And the reality is that whatever the OFT thought about the appropriate approach to finding on the material it had, the material you now have is considerably more serious. In terms of the fining decision, leaving aside the damages and compensation, if you were the OFT or you were this Tribunal sitting on an appeal from the OFT and considering the sorts of things which you have seen today and in previous days about the cynical approach of Cardiff Bus to their anti-competitive activity, that is exactly the sort of material which, in my submission, would cause one to think that there should be a fine and would exacerbate the size of that fine. And that, in our submission, is why this is an appropriate case for there to be an exemplary damages award.

I do not think there is anything else that I was going to cover, but I am obviously, if I can assist further?

THE CHAIRMAN: No. Thank you very much indeed, Mr. Bowsher.

Right. Anybody else want to raise anything else?

MR. FLYNN: Well, sir, I do not have a right of reply.

THE CHAIRMAN: No.

MR. FLYNN: Mr. Bowsher started by saying the OFT had made a finding, and you were not taken to a paragraph, the OFT did not make a finding. The OFT simply said in a section which it clearly said it did not need to find effects on the market, and its conclusion was that it considered it likely that Cardiff Bus's predatory conduct was a contributory factor and so forth —7.235 there was no finding. 7.235 is the conclusion, it is the section that starts at 7.229.

THE CHAIRMAN: We shall, unsurprisingly, take time to give our judgment in this matter, but we shall be as expeditious as we can manage. Can I say how grateful we are to everybody for their help with this case, including junior counsel and solicitors, both in London and, of course, yn Cymru.

MR. BOWSHER: Thank you, Sir.