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**IN THE COMPETITION**  
**APPEAL TRIBUNAL**

Case No. 1178/5/7/11

Victoria House,  
Bloomsbury Place,  
London WC1A 2EB

12 March 2012

Before:

LORD CARLILIE OF BERRIEW QC  
(Chairman)  
PETER FREEMAN CBE QC  
MARCUS SMITH QC

Sitting as a Tribunal in England and Wales

**BETWEEN:**

**2 TRAVEL GROUP PLC (IN LIQUIDATION)**

Appellants

– v –

**CARDIFF CITY TRANSPORT SERVICES LIMITED**

Respondent

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**HEARING (DAY 1)**

## **APPEARANCES**

MR. M BOWSHER QC and MS A BLACKWOOD (instructed by Addleshaw Goddard) appeared on behalf of the claimant.

MR. J FLYNN QC and MR C WEST (instructed by Burges Salmon) appeared on behalf of the respondent.

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Monday, 12 March 2012

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(10.00 am)

THE CHAIRMAN: Who's going to go first?

MR BOWSHER: Sir, I should perhaps go first, just to introduce the day, as it were. By way of appearances, I think you know most of those who are available who are appearing today. I appear with Ms Blackwood for the claimant; Mr Flynn and Mr West appear for the defendant, Cardiff Bus. We have a number of items for today to deal with. I thought it might be helpful if I set out what seemed to us to be the agenda for today because that has been somewhat moveable.

First, there is the defendant's application to strike out parts of our claim, which they wish to present today, which I was going to suggest should be dealt with first. We then have an application to admit a witness statement, which should have been delivered to you over the weekend or this morning, a witness statement of Mr Collingwood-Cooper.

THE CHAIRMAN: Yes, I have read it.

MR BOWSHER: If I can flag up now, if there's to be any discussion about substantive matters on that, given the nature of the subject matter, we would ask that any discussion about that be carried on in private, simply with lawyers present, because there are a number of

1 sensitivities in that regard. There are a couple of  
2 small disclosure matters, small in time, I hope, to deal  
3 with. It may be worth also then reviewing the timetable  
4 for the fortnight and how we get to the end of this  
5 hearing. Matters such as closing submissions, how we  
6 hope to deal with closing submissions and so on and so  
7 forth.

8 Then that will probably, I'm guessing, take us to  
9 lunch. My learned friend and I were then anticipating  
10 making a couple of very short opening statements with  
11 a view to having sufficient time to deal with Mr Jones,  
12 Mr Clayton Jones, if we possibly can, this afternoon,  
13 because he has an availability problem. It's either  
14 today or a week today, and it would be, obviously,  
15 a great deal more convenient to have him dealt with  
16 today.

17 THE CHAIRMAN: Yes. I'm bound to say I take the view that  
18 it is his availability problem, not our availability  
19 problem.

20 MR BOWSHER: Yes. Well, if we can squeeze him in today, so  
21 much the better. Having said that, I'm not sure there's  
22 a great -- it's probably better if we get rattling on  
23 with the strike out application and see how much  
24 progress we make.

25 THE CHAIRMAN: Do you want to rattle, Mr Flynn?

1 MR FLYNN: It might give it a rattle, sir, if that's  
2 a convenient order for you because obviously there are a  
3 few bitty applications and I have no strong view on  
4 where we start.

5 I should say good morning to the Tribunal. The  
6 strikeout application is covered in brief in our opening  
7 skeleton from paragraphs 157 onwards. That refers back  
8 to materials that were before the Tribunal at an earlier  
9 case management conference. I must confess that I think  
10 we're still catching up with the technology, so I'm  
11 afraid I haven't got the up-to-date references for where  
12 those are now to be found.

13 THE CHAIRMAN: I think the strikeout application was TB75.

14 That's our own internal numbering.

15 MR FLYNN: Sir, if you have access to --

16 THE CHAIRMAN: We'll have access to it in a moment.

17 MR FLYNN: -- the materials I refer to in paragraph 159 of  
18 our skeleton.

19 THE CHAIRMAN: Yes.

20 MR FLYNN: Sir, the application is made in the form of  
21 correspondence from my instructing solicitors,  
22 Burges Salmon, and then there is reference to the  
23 skeletons that were before you at that case management  
24 conference. What we have done, what we're seeking is an  
25 order that there are aspects of the claim that go beyond

1 the finding of infringement in the OFT decision, and  
2 therefore are not within the Tribunal's jurisdiction to  
3 determine in these proceedings.

4 What we have done is to identify, by type of  
5 allegation, the matters of which we complain. If I take  
6 them in the order that you see in the Burges Salmon  
7 letter of 7 December 2011, if the Tribunal has that in  
8 front of them?

9 THE CHAIRMAN: Yes.

10 MR FLYNN: It's at paragraph 1.2 of that letter. There are  
11 four types of claim, four types of allegation set out  
12 there. The first being that the Cardiff Bus vehicles,  
13 as is put there, operated just in front of and behind  
14 the 2 Travel infill services, which we have called  
15 "sandwiching". The second is an allegation of  
16 Cardiff Bus drivers intimidating 2 Travel bus drivers  
17 and other staff. The third is an allegation of  
18 dangerous driving on the part of Cardiff Bus drivers and  
19 the last, referred to in that letter, is an allegation  
20 that the white services were not operated in compliance  
21 with the registration for the services.

22 In our skeleton for this trial we also point out --  
23 and that's paragraph 161 of that skeleton -- that the  
24 claimant's opening skeleton makes some further  
25 allegations in this nature. The references again are

1 given at paragraph 161 of our skeleton. The allegation  
2 is one of starving 2 Travel of drivers and of poaching  
3 drivers from them. Those, we say for the same reason,  
4 fall outside of any finding of infringement by the OFT  
5 and should be struck out, for the reasons given in the  
6 Burges Salmon letter, and I'm not going to, as it were,  
7 read all that on the record. The Tribunal has it and  
8 has seen it.

9 There are matters in this list which the OFT has  
10 considered expressly. For example, the matters that are  
11 referred to in paragraph 1.8 of the Burges Salmon  
12 letter, quoting footnote 444 of the OFT decision, where  
13 it's recorded that the OFT says it has no convincing  
14 evidence on the issue of driving just in front of the  
15 services, it didn't consider the claims of intimidation.  
16 Those had been considered by the traffic commissioner  
17 with the conclusion that is quoted there, notably, in  
18 summary, that no action should be taken against  
19 Cardiff Bus because there was no evidence that they had  
20 a case to answer.

21 We also cite the reference to the relevant table of  
22 the OFT decision, observing that they have no sufficient  
23 evidence on timing of the white buses, the sandwiching  
24 point or the harassment point. So we say that those  
25 were raised by 2 Travel at the time, in front of the

1           OFT, as amounting to infringements of the Act and/or  
2           travel law, but relevantly, for matters of the OFT's  
3           jurisdiction, as infringements of competition law, as  
4           well as taking them up by the police, and that these  
5           matters simply do not form part of the OFT's finding.  
6           Indeed, they're not in any way, a necessary part of the  
7           OFT's finding. The OFT's finding, which -- although in  
8           opening the case, I should say immediately, of course,  
9           is one that Cardiff Bus fully has recognised, did not  
10          seek to appeal the finding, has apologised for the  
11          finding and bound itself not to repeat such activity and  
12          has lived by that commitment. So I should say that at  
13          an early stage.

14                 The OFT's finding is one of running a below cost  
15          service and it's not an inherent part of that finding  
16          that you have intimidation or dangerous driving or  
17          poaching of drivers or any of the other matters that are  
18          complained of in the -- [break due to technical  
19          problems].

20          (10.15 am)

21                                 (A short break)

22          (10.20 am)

23          MR FLYNN: I was saying, I think, at that point that the  
24          OFT's decision doesn't depend on any of those issues.  
25          The finding of predatory pricing, below cost pricing,

1           doesn't depend on any of those matters, so my friend --

2   THE CHAIRMAN:  A finding of predatory conduct rather than  
3           predatory pricing, isn't it?

4   MR FLYNN:  Predatory conduct, my Lord, below cost provision  
5           of the services.  My friend, I think, says that these  
6           are all part of the causation narrative.  We say it's  
7           not a necessary part of the infringement which is the  
8           foundation for their claim in this jurisdiction and it's  
9           not a necessary part of the OFT's reasoning.

10  MR SMITH:  Mr Flynn, you tie things back to pricing, but  
11           I must say, isn't it the case that the OFT's finding,  
12           in the sense of its decision, is that Cardiff Bus abused  
13           its dominant position simply by launching and operating  
14           its so called white services with exclusionary intent.  
15           They're quite vague about what the exclusionary intent  
16           was.  They don't say that the predatory aspect of  
17           Cardiff Bus' conduct was the pricing per se.  It's  
18           rather more wide-ranging than that, isn't it?

19  MR FLYNN:  The formulation you have just given is slightly  
20           wider than that, sir, but I think the intention, and  
21           I think the OFT says this, was to drive 2 Travel from  
22           the market.  That's the exclusionary aspect.  But even  
23           so, to do that, one doesn't need intimidation, one  
24           doesn't need aggressive or dangerous driving, and one  
25           doesn't need to be operating in breach of registrations.

1       Those are the sort of allegations that are made. They  
2       have, in fact, been reviewed by competent authorities  
3       and rejected, which brings me to my next point, which is  
4       if these are to be regarded as live issues in these  
5       proceedings, how actually, is the tribunal going to  
6       determine them? How on earth is the tribunal able to  
7       determine these issues of fact if they fall for  
8       consideration in these proceedings?

9             In our submission, if the claimants had really  
10       wanted to add these extra legs, as it were, to its  
11       claim, the appropriate thing to have done would not to  
12       have been to bring proceedings in this jurisdiction but  
13       to go to the Chancery Division and have a combined  
14       follow-on claim with additional aspects if that's what  
15       it wished to do.

16            In respect of the allegation that the buses were  
17       unregistered, sir, our submission there is it's  
18       impossible to see how that of itself would actually  
19       cause any recoverable loss, even if the matter had not  
20       been determined by the competent authority in the form  
21       of the Transport Commissioner. I think, if I was going  
22       much further than that, I would be essentially repeating  
23       the material that's already in front of the tribunal.  
24       What I would like to say at this stage is that the  
25       strikeout has been taken at a level of principle rather

1 than by identifying every single instance in the  
2 evidence to which we take objection. Obviously, we have  
3 given specific references in the materials before you,  
4 but we do not purport to have carried out the  
5 comprehensive exercise because the intention was  
6 rather -- and that's the application that I would make  
7 now -- for an indication from the tribunal that matters  
8 under those heads are not, as it were, live issues in  
9 these proceedings and don't fall for, as it were,  
10 resolution by the tribunal.

11 That's not to say, of course, that reference can't  
12 be made. There are plenty of references to those things  
13 in the documents. We're not trying to exclude reference  
14 to those matters. The point is, rather, that they  
15 don't, in our submission, fall for determination by the  
16 tribunal. And as we've said in the application and in  
17 correspondence leading up to this hearing, we, for our  
18 part, certainly would find it of assistance if the  
19 tribunal were able to consider the application and give  
20 an early indication on that because, clearly, it will  
21 save time, possibly some considerable time, in the  
22 handling of the evidence. We are already on, I think,  
23 quite a tight timetable.

24 THE CHAIRMAN: We're mindful to give an early indication.

25 MR FLYNN: Sir, I think, probably, if I were to take any of

1           those things further, I would be just telling you what  
2           you already know. So that's the application that I make  
3           at this stage.

4   MR FREEMAN: As a matter of law, can you have predatory  
5           conduct which is not price related?

6   MR FLYNN: Not that I'm really aware of. You can't really  
7           have physical predatory conduct. The OFT's finding is  
8           clearly based on the finding that in this particular  
9           case, anyway, the service didn't cover even its  
10          avoidable costs. So that's the basis of the OFT  
11          finding. I'm not immediately aware of any case in which  
12          it's -- while, say, the commission might look at  
13          a reputation for driving out competitors as a possible  
14          aggravating factor in certain cases, I'm not aware of  
15          any case that relies on such matters.

16   MR FREEMAN: So in this case it's the price behaviour plus  
17          the intention; is that right?

18   MR FLYNN: That's as I understand it.

19   MR SMITH: Just to follow on from that, suppose in this  
20          case, Cardiff Bus operated a white bus service but on  
21          four altogether different routes, not the same routes  
22          that 2 Travel operated, surely you'd accept that the  
23          factual matrix regarding predation would be altogether  
24          different in those circumstances?

25   MR FLYNN: If the scenario you're imagining is that they're

1 running low cost services on routes that are not  
2 competitive routes, as they seem to be called --

3 MR SMITH: All I'm suggesting is that if Cardiff Bus had  
4 selected not the same routes as 2 Travel operated but  
5 four different routes, then the predation case would be  
6 dramatically different.

7 MR FLYNN: It would certainly be extremely different. One  
8 would be looking for -- there'd be a very different  
9 search for an effect on competition, in the sense where  
10 routes which are not subject to competition are simply,  
11 extremely cheap.

12 MR SMITH: So a key aspect of the OFT's finding is that  
13 Cardiff Bus was operating the same routes?

14 MR FLYNN: Naturally, my Lord.

15 THE CHAIRMAN: Right. Mr Bowsher? Before you start  
16 addressing us, can I just ask you a question. Is it  
17 your submission that if a hostile act, I'll call it,  
18 occurred, allegedly, at a particular time on  
19 a particular day, that this tribunal should, as if it  
20 were a Criminal Court, as it were, seek to make findings  
21 as to those individual incidents or are we looking at  
22 a set of generics?

23 MR BOWSHER: It's the latter. It's the generic programme.  
24 That's a useful starting point. I was just trying to  
25 put together -- before I get into some of the technical

1 and legal responses to my learned friend's submission,  
2 let me put the headlines in a number of different ways.  
3 There are a number of reasons why it is relevant to look  
4 at these matters, the timing of the services, the  
5 intimidation, the driving practices and the registration  
6 practices.

7 The starting point is: this is statutory  
8 jurisdiction to compensate claimants for losses suffered  
9 as a result of the infringement. As a result of. It's  
10 a broad phrase and we've dealt with that in our written  
11 submissions already and we'll no doubt have to come back  
12 to that again. It would make a mockery of this  
13 statutory jurisdiction if, whenever there were some  
14 additional or exacerbating factor which was not  
15 necessarily part of the key finding made by the  
16 regulator, either because he didn't need to make the  
17 finding or he couldn't make the finding, that somehow  
18 that meant that this statutory jurisdiction of this  
19 tribunal was not available.

20 In fact, in this case, we say that the infringement  
21 is, as Mr Smith has already identified, broader than  
22 simply, purely pricing. It's about running the white  
23 services with exclusionary intent and it is necessary to  
24 understand the effect of these matters on top of the  
25 actual operation of those services, for a number of

1 reasons. Firstly, it is necessary to understand the  
2 facts as to how those services were operated. It would  
3 be absurd and unreal if, in trying to understand what  
4 was caused by the operation of the white services, the  
5 tribunal were simply to pretend that the real events  
6 somehow were not for its consideration. It's just not  
7 a real way of looking at causation, and I will come back  
8 to that point in a moment.

9 The tribunal, in order to make a real appreciation  
10 of what actually happened as a result of these services  
11 being run with exclusionary intent, needs to see how, in  
12 fact, that programme was implemented. You have  
13 a finding of infringement. Well, how was it  
14 implemented? How was that programme imposed upon us?  
15 And to simply say: well, because that, that and that is  
16 not specifically part of the -- it is what the infringer  
17 did, but it isn't part of the infringement but I'm going  
18 to ignore it somehow, because it is not part of the  
19 infringement, that would be simply to say: a whole chunk  
20 of the factual narrative disappears.

21 It is relevant because, as we say, and this will be  
22 no doubt -- it's clearly a point that's been engaged  
23 in the written openings. We say it is relevant for this  
24 tribunal to look at the intent of Cardiff Bus. The  
25 intent is already embedded within the description of the

1 infringement. We say that is also relevant when we come  
2 on to questions as to the appropriate test of  
3 causation. It is relevant that this was a programme  
4 intended to cause loss.

5 THE CHAIRMAN: The OFT have already found that.

6 MR BOWSHER: But it is necessary, in our submission, it is  
7 relevant to see what in fact they intended to achieve  
8 and how they did that. It is also important to see how  
9 this reflects in the way in which Cardiff Bus say things  
10 would have turned out. Because, of course, what they  
11 say is that the reason why 2 Travel went into  
12 liquidation was because of management difficulties and  
13 so on and so forth. They say that they were not able to  
14 manage the business, they were in difficulties, et  
15 cetera, et cetera. Well, that's a topic which we'll  
16 come back to on the evidence. But one of the things we  
17 say in our witness statements -- which the witnesses say  
18 in their witness statements, is: we were under pressure  
19 because of the way in which this programme was being  
20 implemented. Drivers were having to be driven around  
21 South Wales.

22 So an explanation -- how much of an explanation will  
23 be for the tribunal to determine -- an explanation for  
24 the reason why 2 Travel was struggling to keep up was  
25 because of the effect of the overall programme on its

1 management. So to say you were badly managed is not an  
2 explanation, when the management was being distracted,  
3 which rather understates the point, by these other  
4 matters. So it is relevant to look at these matters to  
5 see how, in fact, the explanations which Cardiff Bus  
6 comes up with actually stack up.

7 It is relevant, actually, when we come to  
8 quantification because when we want to look at  
9 questions: well, how many passengers would or would not  
10 have travelled on a particular bus at a particular time?  
11 How many did travel, and compare reality with  
12 hypotheticals, one of the questions is: well, was there  
13 sandwiching or not? How many people really were  
14 travelling on these buses? Regardless of the  
15 infringement and so forth, the actual quantification,  
16 the actual numbers of people who actually travelled,  
17 it is relevant to see how things actually did work out.

18 And, finally, the whole question of intent and how  
19 the programme was developed is highly relevant when we  
20 come to the question of exemplary damages because it  
21 will be, in our submission, necessary for this tribunal  
22 to consider whether it is appropriate to make an award  
23 of exemplary damages, and, if so, how much. And in  
24 doing that, it is certainly relevant to see how this  
25 infringement was implemented, the exacerbating factors

1       which will affect, in our submission, the tribunal's  
2       proper assessment of that question.

3               So for a number of reasons, it is relevant to look  
4       at, in general terms, these subject matters. It is not  
5       necessary to decide that on a particular Tuesday,  
6       a particular event did or didn't happen. There may be  
7       a particular incident that we'll spend a little bit of  
8       time on, but that is not something that this tribunal  
9       needs to engage with. What it does need to look at  
10      is: is this something that was happening intentionally  
11      or being tolerated? Was it part of the overall  
12      programme? Because if that is right, in our submission  
13      it would be wrong for the tribunal to ignore that  
14      material and would risk the tribunal running into error,  
15      error in its factual assessment and possibly finding  
16      itself unable to make a full appreciation of some of the  
17      legal questions that it has to deal with at the end of  
18      this matter.

19             Now, it may well be, of course, that the relevance  
20      of these matters will be a matter for submission at the  
21      end of this fortnight and that's right and proper. But  
22      that's, in my submission, the way in which the matter  
23      should be dealt with. The tribunal should hear the  
24      factual context, and that way it can judge properly the  
25      way in which we say that this programme, this

1 exclusionary programme, actually led to losses, and any  
2 other approach will lead to a necessarily unrealistic  
3 assessment.

4       There are various legal submissions that are made in  
5 writing by my learned friend in his skeleton and so  
6 forth, and maybe I should just deal with those fairly  
7 briefly. The first point is: what in fact is this  
8 application? The application seems to be made under  
9 rule 40 of the rules, it seems to be an application to  
10 exclude evidence, which is puzzling in our submission.  
11 If this is a strikeout, one would expect they were  
12 actually seeking to strike out a particular part of the  
13 claim. There isn't a part of the claim which, under  
14 rule 40, they have identified falls away. But there is  
15 this rather general application to eliminate different  
16 parts of the evidence. In our submission, it's not  
17 satisfactory that this be simply done as a sort of  
18 general way to say: some part of the evidence may or may  
19 not fall away, without identifying what it is that in  
20 fact needs to be dealt with at this stage.

21       In our submission, it is not right that you should  
22 simply be invited to ignore certain things which we say  
23 happened because it is said that they may or may not be  
24 collateral to the main infringement. Not a proper way  
25 of making that application. There is also reference

1           made to the previous case law on this matter,  
2           particularly of the Enron case, which I know you,  
3           Chairman, will be well familiar with --

4   THE CHAIRMAN:   Yes.

5   MR BOWSHER:   -- in its various iterations up and down.  The  
6           focus here is the first trip to the Court of Appeal.  If  
7           I can deal with that very briefly.  This is not like the  
8           Enron case.  To put it rather simply -- and I don't know  
9           whether it's helpful to get stuck into the authority,  
10          but if I can put it rather generally, the short point in  
11          Enron is that the claim there was being made about  
12          losses arising from a period before the pleaded period  
13          of infringement.  It's really a different sort of  
14          problem.  Sitting back, one can see how the claimant  
15          thought there might be a connection, but the finding of  
16          infringement was for one period, the claim was in  
17          respect of pricing on a contract in an earlier period.  
18          That is not what we're talking about here.  We are  
19          talking about a period of infringement during which an  
20          abusive programme was conducted.  The way in which that  
21          programme was conducted, we say, must be relevant for  
22          this tribunal, in order to understand what that  
23          programme actually caused.  Even if, at the end of the  
24          day, you decide that, actually, the events of  
25          intimidation, if they did happen, didn't add much or

1           whatever, you may decide they are not important. But  
2           to --

3   THE CHAIRMAN: I must say, for myself, I've been struggling  
4           with where Enron takes us on the facts of this case,  
5           given that the Court of Appeal appeared to reiterate  
6           a broad, general principle that we actually understood,  
7           even if we got some parts of our conclusion wrong.

8   MR BOWSHER: I think you have the general point and I don't  
9           need to say any more. I can probably skip over a fair  
10          bit of that then.

11           We say it would be wrong for this tribunal to  
12          restrict its power to look at matters of fact which may  
13          assist, or we say should assist it, in determining what,  
14          in fact, was caused by the infringement. In this case  
15          it is relevant to have regard to the fact that the way  
16          in which the OFT in fact was having to deal with the  
17          evidence -- and it is relevant that what has transpired  
18          from disclosure events in the last few months, that the  
19          record which the OFT had, the documentary record, was  
20          a partial record. And this, of course, was the subject  
21          matter of some discussion at the last CMC and I don't  
22          propose to go over that again. We've identified some of  
23          the key documents in our opening, I hope you had the  
24          coloured version so you could see that there are really  
25          some quite significant documents which the OFT did not

1 have.

2 If I can just take one. If I can perhaps just give  
3 you the reference. G1/560. This is a document in red  
4 in our skeleton. Minutes of recruitment and selection.  
5 This is just a sample, I only go to one document.  
6 "Minutes of recruitment and selection meeting on  
7 22 April 2004", so a few weeks into the period of  
8 infringement. You'll see, the second paragraph -- it's  
9 a Cardiff Bus document:

10 "CD [who appears to be Chris Dexter] also outlined  
11 the principle that we maintain the standards that had  
12 been set over recent months but to remember a business  
13 decision had been taken to deprive 2T of any staff we  
14 could and leave our internal mechanisms to deal with  
15 poor performance."

16 That, for instance, was a document the OFT did not  
17 have. Now, whether it would have made any difference to  
18 the overall finding of the OFT, maybe one can't tell.  
19 It might have affected their decision, their decision  
20 not to fine, but the short point is, without that  
21 material, they were that much more likely to decide: we  
22 don't need to decide this, it's not clear one way or the  
23 other what the programme was, we won't decide it.

24 But in fact, it seems -- and we will of course come  
25 on to develop this -- for whatever reason, Cardiff Bus

1           were not providing the full information they should have  
2           been providing to the OFT and so it was their own act,  
3           their own failures to respond appropriately to the  
4           section 26 investigations that was depriving the OFT of  
5           the information to make these findings.

6   MR SMITH: I'm a little troubled as to where this is going.  
7           Because we clearly only have jurisdiction to the extent  
8           the OFT has made a decision within the meaning of  
9           section 47A(9) of the Act. And to the extent that the  
10          OFT has made a decision, we are bound by it, and to the  
11          extent the OFT has not made a decision within the sense  
12          of section 47A(9), we have no jurisdiction at all. So  
13          isn't the crucial question for you to establish what  
14          exactly the OFT has decided, namely whether it is that  
15          the white bus service was operated with exclusionary  
16          intent and therefore, had there not been such an  
17          exclusionary intent, would not have operated at all?  
18          Or, on the other hand, as Mr Flynn seems to be  
19          suggesting, the white bus service was operated at too  
20          low a price, and had it been operated at a proper price,  
21          it would have been not predatory at all? Because that  
22          defines the ambit of the counterfactual that the  
23          tribunal has to assess in terms of causation and  
24          quantum. In other words, if it's the case that the  
25          entire service was predatory and would never have

1           operated for that reason, then one simply has the  
2           counterfactual on the basis that the white bus service  
3           would never have operated. On the other hand, if it's  
4           a much narrower decision, namely that the pricing was  
5           wrong, then the counterfactual is that the white bus  
6           services should have operated at a price of plus  
7           30 per cent or whatever.

8   MR BOWSHER: Sir, we're not asking you to make a finding  
9           about the competition law characterisation of these acts,  
10          but it seems to us there isn't a relevant counterfactual  
11          that the white services would have operated but at some  
12          correct pricing level. No one's been able to try and  
13          work out what that would have been. In our submission,  
14          what you have to look at is what really happened. The  
15          white services did operate, it was found they were  
16          operated with exclusionary intent, and the tribunal is  
17          faced with the reality of the way in which they were  
18          actually operated and the effects which they actually  
19          had.

20                 The comparator, in my submission, is what would have  
21          happened -- unless one can see some real possibility  
22          that they would have run the white services but in some  
23          different way, some price compliant way -- and there's  
24          some evidence of that -- and there simply isn't any  
25          evidence that that is what they would have done. What

1           they intended to do was to knock 2 Travel out of the  
2           market by using all the tools available to them, lawful  
3           or otherwise. There's no evidence that they had  
4           actually thought about: there's an intermediate  
5           position. So the counterfactual is: white bus services  
6           as they are, the exclusionary intention, or none at all.

7           And in order to demonstrate what really happened, it  
8           seems to us that it is right that this tribunal should  
9           see what really happened and we now have -- this  
10          tribunal available to it, significantly more evidence  
11          than the OFT had. To simply ignore that would be silly,  
12          to use a --

13        THE CHAIRMAN: Can I take you back to an earlier point, and  
14          this is about rule 40 of the Competition Appeal Tribunal  
15          rules. Do you accept that there is jurisdiction to make  
16          such an application as is made before us now under  
17          rule 40 or not?

18        MR BOWSHER: No, we said this should be an evidence  
19          application under 22, not a rule 40 application.  
20          They're not, in our submission, asking for a rejection  
21          of a whole or part of the claim. It seems to us that  
22          what they are really asking for is a rule 22, asking you  
23          to control the evidence in some general way.

24        THE CHAIRMAN: If it were a rule 22 application, would this  
25          be the appropriate time for making it?

1 MR BOWSHER: No, because we have had witness statements  
2 around for some considerable time. It should either  
3 have been made months ago before the service of witness  
4 statements or, at the very least, shortly thereafter.  
5 We were here in December.

6 THE CHAIRMAN: They made the application quite a long time  
7 ago, I'm just wondering about -- first of all, I'm  
8 asking myself whether this is, as you asserted,  
9 a rule 40 application or a rule 22 application. And if  
10 it's a rule 22 application, given what we're dealing  
11 with here, is this the right time to deal with it or is  
12 it better dealt with as the evidence unfolds?

13 MR BOWSHER: I would have thought -- you either deal with it  
14 way in advance of the witness statement or one sees  
15 whether or not, with a particular witness, whether it's  
16 necessary to deal with particular areas. The material  
17 is in the witness statements now. I would have thought  
18 it's better that it be left there. If my learned friend  
19 wants to make his submission that it is legally wrong,  
20 then he can make that submission. I have made my point  
21 clear that I'm not suggesting -- I'm not going to jump  
22 up with a schedule of incidents of sandwiching not put  
23 in cross-examination.

24 What we will say is that it is appropriate that he  
25 deals with the programme. It is better that the

1 tribunal hears such evidence as is to be given, decide  
2 what its relevance is, and whether it assists. But the  
3 reality is that this tribunal is in a position to make  
4 findings beyond the findings of infringement insofar as  
5 they go to causation. It's been made Albion Water is  
6 the one case that springs to mind.

7 THE CHAIRMAN: It always springs to mind in every case.

8 MR BOWSHER: And I wouldn't even know which Albion Water it  
9 was, but I know it's been said at least once or twice in  
10 that saga.

11 THE CHAIRMAN: Mr Bowsher, those are findings of fact, not  
12 findings of infringement.

13 MR BOWSHER: And I have not suggested that you will be  
14 making further findings of infringement, but we will be  
15 asking you to look at the intent of the defendant  
16 insofar as it goes to causation of loss for the  
17 compensatory heads and insofar as it goes to the  
18 intention of the defendant, insofar as we look at the  
19 exemplary damages claim. Unless I can assist further --

20 THE CHAIRMAN: We've got the point.

21 MR BOWSHER: I don't think I need to go any further.

22 THE CHAIRMAN: Mr Flynn, can you help us, or can you help me  
23 at least? Is this an application under rule 40 or is it  
24 an application under rule 22 which you are asking us to  
25 decide whether or not to give directions as to the

1 issues on which we require evidence?

2 MR FLYNN: Sir, in form we've made an application under  
3 rule 40, directed to parts of the claimant's claim.

4 THE CHAIRMAN: Yes, but if you look at rule 40 just for  
5 a moment, the essence of your application is to exclude  
6 certain evidence. That's the way it is set out in the  
7 letter of 7 December 2011, in effect. Now, is that an  
8 application to reject in whole or in part the claim for  
9 damages? Surely it's, at first blush at least, an  
10 application for us to give direction as to what evidence  
11 we hear?

12 MR FLYNN: We have directed it to parts of the claim that  
13 are being made and not specifically to paragraphs of the  
14 evidence, except in D, in relation to Mr Fowles'  
15 point on lack of registration.

16 THE CHAIRMAN: But which part of the claim for damages are  
17 you asking us to strike out?

18 MR FLYNN: The allegation that the loss was caused by the  
19 matters complained of under those categories, if I can  
20 call it that. The intimidation claim, the sandwiching  
21 claim, the dangerous driving and the poaching claim.  
22 Those matters, we say, do not form part of the OFT's  
23 consideration, which is the foundation of your  
24 jurisdiction.

25 THE CHAIRMAN: Okay.

1 MR FLYNN: And of course in relation to Enron, we're not in  
2 any way trying to teach the tribunal its business. As  
3 you said, sir, it's a general --

4 THE CHAIRMAN: Carry on.

5 MR FLYNN: A general principle which you have in mind. The  
6 Court of Appeal is the leading authority on the subject,  
7 so we say no more than that. In my submission, the fact  
8 that the matters fall outside the OFT's decision, even  
9 if they are incurred within the period that the OFT is  
10 considering, is not a relevant distinction from the  
11 Enron situation, which Mr Bowsher was making when  
12 matters fell outside. The fact is it fell outside the  
13 OFT's consideration.

14 I confess that I was left confused by what  
15 Mr Bowsher was saying as regards matters which the  
16 tribunal need or need not determine, because his  
17 starting point was that it would be unreal for the  
18 tribunal to proceed as if the facts were otherwise than  
19 they were. Of course, if that's a matter in dispute,  
20 then he's effectively asking the tribunal to rule on how  
21 the facts actually were. At one point he said that you  
22 didn't need to determine whether there'd been an  
23 incident of intimidation on a particular day. On  
24 another point, he said it was relevant to the causation  
25 issue and to the quantum, to find out whether the number

1 of passengers travelling on a bus had been reduced  
2 because of the sandwiching or the running of the service  
3 immediately in front of another one.

4 We say on that, of course, that the total number of  
5 passengers is known. There wouldn't have been any more  
6 passengers. The question was: how many would they have  
7 taken of the available passengers if we hadn't been  
8 running the white services?

9 Once again, going to the documentary record,  
10 Mr Bowsher is, in effect, saying to the tribunal that he  
11 would like the tribunal to proceed as if the OFT had  
12 made what I think Mr Freeman referred to in an earlier  
13 CMC, as a better decision from his perspective. Though  
14 if documents were not before the OFT that Mr Bowsher  
15 wishes to contend were relevant, that's a matter to be  
16 taken up somewhere else other than in these proceedings.

17 THE CHAIRMAN: Where, Mr Flynn, just out of interest?

18 MR FLYNN: Sir, I suspect if I wished to raise that, my  
19 first port of call would be to go to the OFT. It just  
20 can't be dealt with in these proceedings. There's  
21 simply nothing the tribunal can do, even if the  
22 claim, the allegation, was made out, which of course we  
23 strenuously deny. Tribunals are not in the habit of  
24 hearing things for the sake of it, that would be utterly  
25 otiose.

1           In relation to the counterfactual, I think there was  
2           some -- I'm not sure I put it as high as a complaint,  
3           but a suggestion that there is no evidence in the case  
4           of what might have happened if the white buses had been  
5           run on the basis that they covered their costs. That is  
6           true. Our case on the financial aspects of this case  
7           is on the basis that the counterfactual is that they  
8           wouldn't have been run. So sir, unless I can help you  
9           further, I think those are my immediate reply points,  
10          with possibly one exception, which is in relation to  
11          Mr Bowsher's reference to the exemplary damages head of  
12          his claim. That still, in my submission, has to relate  
13          to the infringement as found by the OFT; that doesn't  
14          give the tribunal a whole new line of enquiry. The  
15          tribunal has to decide, when it comes to that, if it is  
16          appropriate to make an exemplary award in relation to  
17          the infringement that the OFT has found and not for some  
18          wider or different infringement.

19   THE CHAIRMAN: Thank you, Mr Flynn. Now, it occurs to me  
20          that it might assist those instructing counsel, at the  
21          very least, if we were to, if we can, give an indication  
22          of our decision on this issue now, before we move on to  
23          other matters, because of the number of witnesses in  
24          this case. Do you agree with that?

25   MR FLYNN: Entirely, sir. We would be assisted by an



1           yesterday, and I believe signed copies have been handed  
2           up. It was sent under cover of a letter to the  
3           tribunal, again dated yesterday. We have made an  
4           application to admit this statement into evidence.

5   THE CHAIRMAN: Just to be clear, we have the letter dated  
6           11 March and the statement of Mr Collingwood-Cooper. We  
7           do not have any draft or full statement from the person  
8           concerned.

9   MR BOWSHER: That is correct. Given the sensitivities of  
10          the matter, in order to get into any detailed discussion  
11          regarding the contents of this, I would ask that this  
12          hearing proceed in private with only lawyers present,  
13          and we can decide how to deal with the matter. The  
14          individual concerned is extremely concerned and  
15          sensitive that anything may come out inadvertently.  
16          I don't want to even --

17   THE CHAIRMAN: Before we deal with the question of whether  
18          we go into chambers or not, what are you asking for?  
19          Are you asking for the witness to give evidence? First  
20          of all, where is the witness box in this court? Ah,  
21          right. Are you asking for the witness to give evidence  
22          anonymously or are you asking for the witness to be  
23          screened somehow from the view of other people in court,  
24          or what? What is the application?

25   MR BOWSHER: As I said, our application is that the witness

1 statement of Mr Collingwood-Cooper be admitted in  
2 evidence as evidence of its contents and --

3 THE CHAIRMAN: Ah, it's a hearsay application.

4 MR BOWSHER: It's a hearsay application under the general  
5 control that you have in this tribunal under rule 22.  
6 You're not bound by the normal rules of evidence, normal  
7 strict rules of evidence, and it is open to the tribunal  
8 to admit that evidence. It is, of course, also open to  
9 the tribunal, if it thinks it appropriate, to require  
10 a witness to give evidence. If that were to be required  
11 as a condition of hearing evidence on this subject  
12 matter, we would ask that the evidence be given by the  
13 witness anonymously and under appropriate special  
14 measures, and we can discuss what those special measures  
15 ought to be.

16 In short, as the tribunal will be well aware, the  
17 whole issue of the protection of whistle-blowers in  
18 competition law claims is a matter that needs to be  
19 given serious consideration. Those who do come forward  
20 to disclose information about improper behaviour in  
21 these matters, need protection. It is an important part  
22 of the discipline of any competition law programme, and  
23 we've sought, in the short time available since this  
24 information has come to us, to find a practical way of  
25 bringing it to the tribunal's attention. But that is

1 the nature of our application, and I can develop it, the  
2 basis of it, further, but I would ask that if we get  
3 into the subject matter of it, that we deal with it  
4 simply with lawyers in the room, because there are  
5 concerns as to whether or not the individual can be  
6 identified.

7 THE CHAIRMAN: Mr Flynn, is there any objection to the  
8 tribunal going into chambers?

9 MR FLYNN: Sir, yes, indeed. We don't consider that  
10 it would be appropriate for that to happen.  
11 Mr Collingwood-Cooper has signed a witness statement,  
12 which he is no doubt prepared to speak to, and so he  
13 should in public. The question of whether the person  
14 concerned is to be identified, is another one on which  
15 I would address you separately. Mr Bowsher hasn't gone  
16 into that. Essentially, under the Civil Procedure  
17 Rules, it is incumbent upon Mr Collingwood-Cooper to  
18 identify the person to whom he spoke. You may make  
19 exceptions, I dare say, in national security cases or  
20 something of the sort. But that would have to be on the  
21 basis of some pretty serious evidence if the tribunal  
22 were to consider it and not merely a general reference  
23 to the importance of protecting whistle-blowers in  
24 competition law, which this is not in any event. The  
25 competition infringement is a matter for the OFT. This

1 is matters -- I shan't go into it, but you'll see what  
2 is there. This is not relating to anything that goes to  
3 the OFT's procedures. It would be entirely unfair to  
4 Cardiff Bus and it would be impossible for Cardiff Bus  
5 to prepare any kind of response to this, without knowing  
6 who the individual is, in order to be able to prepare  
7 the necessary evidence in reply, in particular, as to  
8 the weight that you might wish to give to such  
9 statements as the witness may wish to make.

10 Also, of course, it is, to say the least, extremely  
11 late. Most of us were on the train on the way down when  
12 we received this, so it has been impossible even to  
13 mention it or discuss it with the client until this  
14 morning, and it's a highly unsatisfactory position. But  
15 our principal position will be that one way or another,  
16 the individual must be identified.

17 THE CHAIRMAN: Mr Bowsher, I'm looking at paragraph 9 of  
18 Mr Collingwood-Cooper's statement. I haven't had much  
19 time to read this because I actually saw it when  
20 I arrived here at 9.30 this morning. But I didn't read  
21 paragraph 9 as being a whistle-blower application,  
22 I read paragraph 9 as expressing fears of personal risk  
23 of some kind.

24 MR BOWSHER: Yes. The problem with explaining it in more  
25 detail is that that starts to identify the person

1           because the nature of the exposure starts to give  
2           personal information.

3   THE CHAIRMAN:   Why hasn't that been done in writing?  I'm  
4           very reluctant to turn a public court into a private  
5           court.  Much more information could have been given by  
6           Mr Collingwood-Cooper.

7   MR BOWSHER:   Well, this has, as you'll have gathered, only  
8           come to light over the weekend.  We can provide more  
9           information in writing if it goes only to lawyers.  But  
10          the problem is the information about the personal risk,  
11          as I understand it, will identify, specifically, the  
12          individual concerned.

13   THE CHAIRMAN:   There are a lot of witnesses in this case who  
14          have things to say about what one party or the other to  
15          this case was doing, and it strikes me that any one of  
16          them could have been concerned about being identified,  
17          for all kinds of reasons.  What's special about this  
18          witness?  Can you give us some kind of indication?  
19          Because we don't have it in writing.

20   MR BOWSHER:   Sir, not ...  Maybe what I need to do is renew  
21          this application, we make a written application  
22          overnight.  But the problem is that to set that material  
23          out will involve disclosing matters which the individual  
24          is concerned should not be known by management of  
25          Cardiff Bus because it will expose that individual to

1 specific risks.

2 THE CHAIRMAN: Under what provision do you ask us to go  
3 into, effectively, camera to determine this application?

4 I'm sorry, there very may well be --

5 MR BOWSHER: Rule 22 gives -- there's two aspects to this.  
6 Firstly, as a matter of general principle, as the guide  
7 notes -- I can't remember the paragraph number:

8 "The strict rules of evidence do not apply before  
9 the tribunal. The tribunal will be guided by overall  
10 considerations of fairness rather than technical rules  
11 of evidence."

12 So the considerations under the CPR do not  
13 necessarily apply. That is paragraph 12.1 of the guide.

14 Rule 22 provides the tribunal with as broad a power  
15 as it could possibly need, to control what evidence is  
16 adduced and the way in which it is to be placed before  
17 the tribunal.

18 THE CHAIRMAN: The question I asked you is: what is the  
19 power that permits the tribunal to go into camera for  
20 this purpose? I have read rule 22. It doesn't appear  
21 to deal with that at all.

22 MR BOWSHER: Under rule 44, you have general powers of case  
23 management to ensure that the matter is dealt with  
24 fairly. In our submission, that must include a power --  
25 just as it would if confidential commercial information

1           needed to be ventilated in court, you would have the  
2           general power to exclude individuals from the courtroom  
3           so that that information didn't get into the public  
4           domain. That must be an inherent power of case  
5           management.

6   THE CHAIRMAN: Well, is that consistent with the views  
7           expressed by the Court of Appeal in the Binyam Mohammed  
8           case? Off the top of my head. A case with which I'm,  
9           unhappily, familiar.

10  MR BOWSHER: There has to be a special reason for this to be  
11           done. The reality is, there is no hard and fast rule  
12           here. For the individual concerned, there may be  
13           special reasons why it's appropriate to strike -- well,  
14           the tribunal has to control its procedures to find an  
15           appropriate way of dealing with the matter. If, for  
16           example, there were going to be ventilated, sensitive  
17           price information, which should not get into the public  
18           domain, then the tribunal would, one would anticipate,  
19           exclude all but those directly involved in the case.

20  THE CHAIRMAN: We'll deal with issues like that by  
21           confidentiality --

22  MR BOWSHER: Well --

23  THE CHAIRMAN: -- rather than going into a private court.

24  MR BOWSHER: Well, the tribunal might have to go into  
25           private court so that the members of the public could

1 not hear cross-examination on points of difficulty, on  
2 points of commercial sensitivity. And that would, in  
3 our submission, just be consistent with the general  
4 principles. Yes, Binyam Mohammed deals with one  
5 problem, but as a general principle -- if one looks at  
6 Phipson -- it has been decided in a number of cases that  
7 it is not necessarily inconsistent with article 6  
8 rights, for evidence to be given either in private or  
9 anonymously, in the appropriate circumstance.

10 I don't want to overdramatise matters, but the  
11 reality is that in general terms, whistle-blowing in  
12 competition cases raises matters of serious risk for  
13 individuals concerned. That has been an ongoing problem  
14 for the EU and UK competition law programmes right back  
15 to the 60s, with some notorious cases where inadequate  
16 protections were put in place. Where those people do  
17 come forward, they need to be appropriately protected,  
18 and, of course, the whistle-blowers themselves also need  
19 to consider their position vis-a-vis the potential that  
20 they may be incriminating themselves. So there are  
21 a number of difficult issues, which are raised for the  
22 tribunal. This is a short point. My learned friend  
23 says he needs to know the identity of the individual to  
24 be able to deal with the matter. Well, the allegation  
25 is, in a sense, a short allegation which he can seek to

1 disprove, in my submission.

2 THE CHAIRMAN: But supposing the identity of the individual  
3 availed Cardiff Bus of knowledge that this was  
4 a disaffected individual who had -- I'm just proposing  
5 a possible set of circumstances -- an individual who had  
6 been sacked for a particular form of misconduct and  
7 might have a large bunch of sour grapes. How on earth  
8 could they attack the evidence on the basis of the  
9 information you provided?

10 MR BOWSHER: I fear that that is a weakness with all  
11 whistle-blowing type evidence. That may go to weight,  
12 I certainly accept that. But the reality is, if the  
13 whistle-blower has and can determine sufficient interest  
14 or concern that -- there's the interests of the party  
15 that wishes to test the evidence, but to be weighed  
16 against the personal, commercial and other interests of  
17 the person whose identity it is appropriate to protect.  
18 That is a difficult balancing exercise.

19 THE CHAIRMAN: Just bear with me. (Pause).

20 Well, we've read the application, we've listened to  
21 what's been said. Our view is, first of all, that in  
22 any event, we might need some considerable persuasion to  
23 admit this evidence in hearsay form. Secondly, we do  
24 not believe that we've been given anything like enough  
25 information, if there is more information to give,

1 in the written application, and if your clients wish to  
2 pursue this application, then we would expect a much  
3 fuller application, which gave us far more information.

4 MR BOWSHER: Sir, would the tribunal be amenable to our  
5 making that application in the first instance in writing  
6 or by written material overnight, but on the basis that  
7 it goes only to the lawyers representing Cardiff Bus  
8 rather than Cardiff Bus? It may be that that's a matter  
9 that then has to be broadened out later but in terms of  
10 making the application in the first instance, that we do  
11 it on a closed basis in that way.

12 THE CHAIRMAN: Mr Flynn's looking quite helpful. Do you  
13 feel helpful?

14 MR FLYNN: To that point, my Lord, yes. If that's going to  
15 come in overnight, then we can make submissions on it.  
16 Our submission will be -- and let me just point you to  
17 the relevant paragraphs. We haven't been able to chase  
18 up references to the case law and you probably, sir,  
19 know the case law much better than we do.

20 THE CHAIRMAN: No.

21 MR FLYNN: But if one looks at the CPR, and I know  
22 Mr Bowsher says you can just ignore it, but --

23 THE CHAIRMAN: Page what of the White Book?

24 MR FLYNN: Page 970 if you're in the 2011 edition, in  
25 Volume 1. Practice Direction 32. If one looks at

1 paragraph 18.2 in Practice Direction 18:

2 "A witness statement must indicate which of the  
3 statements in it are made from the witness's own  
4 knowledge and which are matters of information and  
5 belief and the source for any matters of information and  
6 belief."

7 On the authority of a Court of Appeal decision in  
8 a case called Consolidated Contractors v Masri which  
9 we have given copies to my learned friend and we'll hand  
10 them up to the tribunal. The reference, for your note,  
11 is -- I've just lost it.

12 THE CHAIRMAN: Consolidated what and what?

13 MR FLYNN: Consolidated Contractors, and various company  
14 names follow. The respondent is a Mr Masri. I think  
15 you now have it in front of you. (Handed). The unique  
16 citation is 2011 EWCA --

17 THE CHAIRMAN: Got it.

18 MR FLYNN: -- 21. Just briefly, sir, if one turns to  
19 paragraphs 31 and 32 of that case, it relates to an  
20 affidavit. The relevant paragraphs are contained in  
21 paragraph 12 of the judgment. I could have taken you to  
22 that in the first place. They quote from the paragraphs  
23 of the affidavit which relate to where a solicitor says  
24 that enquiry agents have basically been through rubbish  
25 bins, had a look at what was relevant, made copies of it

1 and put the originals back. And that's the basis of the  
2 information for the statement.

3 At paragraph 32 of the judgment, the short point  
4 is that they interpreted the words to indicate your  
5 source was not a different concept from identifying the  
6 source, and Lord Justice Aikens, who's giving the  
7 judgment of the Court of Appeal -- you'll see at the end  
8 of the report, the other two members of the Court of  
9 Appeal agreed with his judgment and reasons. He says:

10 "In my view, the aim of that paragraph of the  
11 Practice Direction is to ensure that a person against  
12 whom serious allegations are being made can identify the  
13 source of any information or belief that is not within  
14 the deponent's own knowledge, so that the facts deposed  
15 on the basis of information and belief can be  
16 investigated. That is only fair to the person against  
17 whom the evidence in the affidavit is directed.  
18 Therefore, I would interpret the phrase 'must indicate  
19 the source for any matters of information or belief' as  
20 meaning that save in exceptional cases, the deponent  
21 must identify the source of the relevant information or  
22 belief. If the source is a person, that person must,  
23 save in exceptional cases, be identified with sufficient  
24 certainty, to enable the person against whom the  
25 affidavit is directed to investigate the information or

1 belief in accordance with the rules of court or other  
2 relevant legal principles."

3 The Lord Justice goes on to say:

4 "I recognise there may be particular occasions where  
5 the source must not be specifically identified, eg where  
6 confidentiality is in issue, and there may be other  
7 circumstances which I will not attempt to define. In  
8 such cases, the wording of the practice direction is  
9 sufficiently flexible by using the word 'indicate' to  
10 ensure that justice can be done."

11 So there, sir, we think the general principle is  
12 pretty carefully stated and, as I said to you in my  
13 short remarks, you would have to have some extremely  
14 strong and unusual evidence to suggest that that  
15 wouldn't be departed from.

16 THE CHAIRMAN: Well, we'll leave that application then,  
17 until it's ready to be heard -- a suggestion was made  
18 overnight, and that is a matter for the parties when  
19 it's dealt with. It doesn't have to be dealt with,  
20 necessarily, tomorrow morning, but when it's ready.  
21 Right, what's next?

22 MR BOWSHER: Sir, there were two short disclosure  
23 applications which were made by correspondence. One by  
24 letter of 28 February 2012 and one ... I'm not sure  
25 I've caught up with the bundle references.

1 THE CHAIRMAN: Are these in annex 1, "List of unresolved  
2 issues", which accompanied a letter of 9 March? There  
3 are two disclosure matters set out there, in  
4 paragraphs 1 and 2 respectively.

5 MR BOWSHER: That should be them, although I don't think  
6 that letter caught up with me.

7 THE CHAIRMAN: "Bond Pearce invoices and timesheets" is  
8 number 1.

9 MR BOWSHER: That's the first one. It relates back to an  
10 earlier --

11 THE CHAIRMAN: And some files, the other.

12 MR BOWSHER: Indeed so. The application regarding  
13 Bond Pearce is set out at H5, page 506. I'm not sure if  
14 that was attached to that letter. The other matter is  
15 an application. Indeed it's relating to some specific  
16 files, or rather file descriptions. That was set out in  
17 a letter of 9 February, which ... I'll just find the  
18 reference.

19 THE CHAIRMAN: Shall we do them one at a time? We've got  
20 H5/506 available to us.

21 MR BOWSHER: Yes. The point is very short. It's set out in  
22 writing in paragraph 5, on 506. The short point is  
23 Mr Brown, on behalf of Cardiff Bus, says in his witness  
24 statement -- this is the last witness statement that  
25 he's produced -- that he had not been aware of the

1 nature of legal advice which had been provided. It  
2 might be useful to see the way in which that arises.  
3 This is the witness statement that he produced by way of  
4 correction.

5 THE CHAIRMAN: Well, in a nutshell, isn't it that it having  
6 been remembered that there was legal advice, the  
7 solicitor's file, so far as relevant, should be  
8 disclosed?

9 MR BOWSHER: Indeed, and what we say is it's relevant to see  
10 what the Bond Pearce invoices and timesheets provided  
11 because he says, "I don't remember ever having been  
12 involved" -- that's a broad paraphrase; we say it's  
13 relevant to see what Bond Pearce actually say about the  
14 communication of that advice and what he did or didn't  
15 know. I put that very shortly.

16 THE CHAIRMAN: So if he spent 10 hours in the solicitor's  
17 office, he could hardly forget it.

18 MR BOWSHER: If it says: discussing with Mr David Brown, the  
19 intimate details of this, that, and the other, that  
20 would be relevant. It's as short as that. And we say  
21 it can't be difficult for Messrs Burges Salmon simply  
22 to -- as I understand it, they've not actually asked for  
23 those to be produced by Bond Pearce. It would be easy  
24 enough to ask for them and for them to be reviewed and  
25 disclosed appropriately. That's all.

1 THE CHAIRMAN: Mr Flynn?

2 MR FLYNN: Sir, can I first take issue with the  
3 characterisation. Mr Brown was not, as his witness  
4 statement made clear, was not aware that Mr Kreppel had  
5 taken this advice. Having found it, in my submission,  
6 perfectly properly and commendably, the matter has been  
7 disclosed in full and indeed privilege waived over it,  
8 and all communications between Bond Pearce and  
9 Cardiff Bus have been put in front of you. There's  
10 nothing else to be found there. What Mr Bowsher is now  
11 asking for is the timesheets behind the provision of  
12 such advice as has been provided. So we submit this is  
13 a sort of infinite regress point. We could summon the  
14 solicitors to see if they recall anything. Advice was  
15 not given to Mr Brown, it was given to Mr Kreppel.  
16 That's what it showed. You're not going to find  
17 attendance notes of meetings with Mr Brown there.

18 THE CHAIRMAN: So you're saying that disclosure obligations  
19 have been fulfilled entirely?

20 MR FLYNN: We say that a proportionate disclosure has been  
21 given, the moment it was discovered that in fact,  
22 contrary to Mr Brown's earlier view, the company had  
23 received relevant legal advice.

24 THE CHAIRMAN: Right.

25 MR FLYNN: That's the position we take on this request for

1 the timesheets.

2 THE CHAIRMAN: Mr Bowsher? Proportionate disclosure given,  
3 they've disclosed every document that refers to any, as  
4 I understand it, conversations and communications.  
5 Isn't that proportionate and in fulfillment of the  
6 disclosure obligations?

7 MR BOWSHER: Well, sir, this is a matter which -- it's been,  
8 as it were, a late revelation, the discovery of changed  
9 recollection. It's appropriate to test the way in which  
10 that has happened.

11 MR FLYNN: Pardon me, it's not a changed recollection.

12 THE CHAIRMAN: It's a correction.

13 MR BOWSHER: It's a correction of a position. It is  
14 appropriate to test the basis of that, and that can  
15 easily be tested by reference to what the solicitors  
16 have recorded in terms of the giving of advice. It's  
17 simple. It isn't unduly burdensome and in those  
18 circumstances, it is not disproportionate.

19 THE CHAIRMAN: Right. So that's the first one.

20 MR BOWSHER: The second one is the file lists. It's to be  
21 found at H5/443. The short point here is that a long --  
22 as described in that letter on 9 February, we referred  
23 to a list of files which had been disclosed, a number of  
24 which appeared to contain relevant or potentially  
25 relevant documents and we asked for disclosure of

1 documents within those files in that letter. That has  
2 not been forthcoming and we seek confirmation or  
3 disclosure of any further documents arising out of the  
4 identified files in that letter of 9 February 2012. It  
5 may be that there is nothing further, but as  
6 I understand it, they've not been searched. We say that  
7 given the obvious relevance of some of these headings,  
8 if those files exist, they should have been and should  
9 now be searched, to see that there is nothing there  
10 further that ought to have been disclosed. They include  
11 some obviously relevant headings, as you can see in that  
12 letter, but also some headings which may or may not be  
13 relevant, such as "Private investigator". One wonders  
14 what that may or may not relate to. You see the written  
15 material, I don't propose to read it all out. We've set  
16 out in respect of each file why we say it ought to be  
17 looked at and it's as simple as that.

18 THE CHAIRMAN: Mr Flynn?

19 MR FLYNN: Sir, the position in relation to this is that  
20 Burges Salmon, as you know, pursuant to the tribunal's  
21 orders, conducted -- to say extensive would be putting  
22 it at its very lowest -- a disclosure exercise over the  
23 Christmas and New Year period that was exhaustive. What  
24 has been said to my learned friend's solicitors in  
25 correspondence is they have seen Mr Pheasant's witness

1 statement as to how the searches were carried out.  
2 Every conceivable relevant source and location has been  
3 searched. So in effect, these files will have been gone  
4 through. Documents were not necessarily searched by  
5 reference to looking into individual wallets, but there  
6 are no further documents to be produced.

7 What the claimant is actually really asking for is  
8 a re-categorisation so they know what is in these  
9 particular files, but the suggestion that there are any  
10 relevant files lying around that either haven't been  
11 searched or that we are refusing to search, is entirely  
12 misplaced. A complete -- according to the evidence of  
13 Mr Pheasant -- search has been carried out and the  
14 relevant materials have been disclosed to the other  
15 side. It would be, again, a wholly unnecessary,  
16 disproportionate exercise to provide a complete listing  
17 of the documents in these relevant files. When I say  
18 relevant, these identified files, which clearly have  
19 somewhat relevant names.

20 THE CHAIRMAN: These are all hard copy files?

21 MR FLYNN: That I would hesitate to say without turning  
22 round, but I believe so.

23 THE CHAIRMAN: My understanding is that this relates to hard  
24 copy files. Sorry, Mr Flynn, I didn't realise you'd  
25 turned your back.

1 MR FLYNN: To the best of our understanding, yes, they're  
2 hard copy files.

3 THE CHAIRMAN: Right. Thank you.

4 MR BOWSHER: Sir, this was a very long list of files. We've  
5 only focused on those which seemed to have obvious  
6 relevance, and it seems surprising if they've been  
7 through -- given that each of those headings are  
8 obviously likely to have direct relevance to this case,  
9 it seems strange that they can't tell us what in fact is  
10 to be found in those files. Because I've struggled to  
11 find in Mr Pheasant's evidence, but maybe I have  
12 misunderstood it, where in fact he identifies the  
13 process of going through those particular files. But  
14 I've not understood how his evidence relates to those  
15 files. Maybe it's there somewhere.

16 MR FLYNN: Perhaps I could just assist. Mr West helpfully  
17 points me to page 554 in the bundle in front of you.  
18 This is the correspondence or part of the no doubt  
19 extensive correspondence that I was referring to, sir.  
20 Paragraph 6.1 in that:

21 "We do not see what relevance the index has as set  
22 out in the second witness statement of Mr Pheasant. The  
23 approach to the hard copy search carried out in December  
24 was not to try and identify the specific file but look  
25 for documents."

1 THE CHAIRMAN: I've read it.

2 MR FLYNN: So that's why we're saying this is

3 a disproportionate and a misconceived request.

4 MR BOWSHER: I have nothing further, sir. (Pause).

5 THE CHAIRMAN: We'll adjourn for a few minutes to consider  
6 this.

7 (11.55 am)

8 (A short break)

9 (12.10 pm)

10 THE CHAIRMAN: Two applications for disclosure have been  
11 made. We reject both applications. However,  
12 in relation to the solicitor's time records  
13 for March 2004, we would be prepared to reconsider that  
14 matter as the evidence emerges, if it becomes clear that  
15 there is a requirement for such disclosure. In other  
16 words, the door is slightly ajar, but don't get too  
17 excited, Mr Bowsher.

18 MR BOWSHER: I'm supremely calm. Sir, I think the only  
19 other sort of administrative matter I was going to  
20 address before opening was just a question of timetable.  
21 I'm conscious -- I wasn't quite certain what the  
22 tribunal's been given. The last timetable I think you  
23 were sent was 29 February, when some things were still  
24 moving around. Of course, the tribunal then commented  
25 on that and suggested we bring up the timetable. I'm

1           afraid I don't have to hand an agreed timetable, but it  
2           maybe would help if I outline where I think we're  
3           running.

4           I was proposing to make a very short opening now.  
5           You have our written opening. I will just make a few  
6           observations. Mr Flynn was then going to make an  
7           opening submission. As I say, I think the tribunal  
8           knows we had hoped to be able to call Mr Clayton Jones  
9           this afternoon. He has a short witness statement in  
10          file C1 at page 641. I anticipate, therefore, that that  
11          means that we will be dealing with Mr Bev Fowles and  
12          Mr Huw Francis tomorrow. Mr Fowles will be available  
13          later on in the afternoon if need be. Then on  
14          Wednesday, that would be David Fowles, Chris Sutton,  
15          Roger Durbin and Charles Jones, although Roger Durbin,  
16          I don't think there are any questions for.

17 MR FLYNN: I indicated to my learned friend before, we have  
18          no questions for him.

19 MR BOWSHER: Then Thursday, that would be Daniel Conway,  
20          Stephen Harrison, Nigel Short. That would mean on  
21          Friday we have Graham Cartwright and if all that goes to  
22          plan, depending where we get to on the other witness  
23          discussed earlier this morning, that would leave us open  
24          to start with Mr David Brown on Friday. Then at the  
25          moment, the timetable between the parties, I think, has

1 the three experts, with a day each next week, so that's  
2 Monday, Wednesday and Thursday are the first three  
3 sitting days next week, which leaves us with one day at  
4 the end of the week, which leads me on to really where  
5 I was building up to, which is: how do we deal with  
6 closings?

7 In terms of the transcript position, I think it's  
8 been ironed out between us, as I understand it.

9 Obviously, to some extent we're in the tribunal's hands  
10 as to what would assist you more. You have fairly  
11 lengthy written submissions from us already, although  
12 I anticipate that some of the arguments on causation and  
13 so forth will need to be developed with considerably  
14 more detail, by reference to the facts as they come out  
15 in evidence.

16 My own personal preference is to deal with oral  
17 submissions, as it were, and then the matter is done  
18 with in the time, but I fear that the complexity of some  
19 of the matters means that we would probably need, if  
20 we were dealing with oral submissions in this fortnight,  
21 a day each to make sure we've dealt with all the  
22 questions that the tribunal has and so forth. Because  
23 I think that's one part of the case that we really can't  
24 unduly truncate, and at the moment, it seems to me we're  
25 one day out from being able to deal with that. The

1 alternative, which my learned friend had originally  
2 suggested, was that we have, as it were, a page limited  
3 written closing, with a day for sweeping up tribunal  
4 questions thereafter. He had actually suggested a time  
5 limit and a page limit, which, if that's the route we're  
6 going down, we're content with.

7 We would prefer to go the oral route, but as  
8 I acknowledge, it's a bit difficult to see how we fit  
9 that in within the time. We're in the tribunal's hands  
10 and it may be that we don't need to decide anything now,  
11 but I thought it right that we at least ventilate that  
12 now so we can be thinking how we try and pack the work  
13 into the time available.

14 THE CHAIRMAN: Yes. I think we can't decide this now.  
15 There's a degree of sucking it and see, because we may,  
16 hopefully, go more quickly than the timetable suggests.  
17 In an ideal world, we would like to have closing  
18 submissions in whatever form by the end of next Friday  
19 within the case window here in Cardiff. The question of  
20 written submissions is a matter for counsel. The  
21 proposal to have written submissions which were limited  
22 in length to a fraction of the skeleton arguments would  
23 be quite welcome and would shorten the oral submissions.  
24 That's just an indication of current preference.  
25 We have discussed this. It's an indication of our

1 current preference. But perhaps we can return to that  
2 at a slightly later stage.

3 Do you want to say anything, Mr Flynn, about this?

4 MR FLYNN: No, sir, not much. I would say, firstly on the  
5 transcript, you'll have seen correspondence and you  
6 expressed a view that the tribunal would be not  
7 intervening further. We have decided that the right  
8 course is that even if the claimants won't pay for it,  
9 we will make the transcript available to them on the  
10 same basis as we get it and you get it and we'll argue  
11 about the costs in due course, no doubt.

12 In relation to the running order, then, I think yes,  
13 we have that order, we follow it, we see where we get  
14 to. On our side, particularly if we are squeezed  
15 towards the end of next week, we would be going first on  
16 submissions. We would much rather, if we do get through  
17 the evidence on Thursday next week, we draw stumps at  
18 that point and we provide you with short written  
19 closings, because they're more likely to be helpful to  
20 you in two ways. Firstly, they'll be better considered  
21 and secondly, they'll be in writing. There may be bits  
22 that you'll want to use for your own purposes. So  
23 we would much prefer that approach if that's where we  
24 go, but that's all provisional, as you say; we suck it  
25 and see.

1 THE CHAIRMAN: Right, thank you. If we do have written  
2 closing submissions, Word format, please, not PDF. You  
3 can send it to each other in PDF, but send it to the  
4 tribunal in Word. Right.

5 Opening Submissions by MR BOWSHER

6 MR BOWSHER: As I have already indicated, you've already had  
7 from both parties, written openings, and I wasn't  
8 proposing to go over those in detail. They exist.  
9 I wanted just to respond briefly to a couple of the  
10 points, and this is not in any way a comprehensive  
11 opening, and if I'm taking it as read -- I'm not, as it  
12 were, seeking to limit the case that we are setting out  
13 because I hope that we've identified that sufficiently  
14 in writing.

15 We've already discussed this morning the way in  
16 which we see the case on causation. It is in that sense  
17 a fairly simple case, arising out of the finding of  
18 infringement that the white services were launched and  
19 operated with an exclusionary intent, with the intention  
20 of diverting prospective customers away from 2 Travel  
21 and forcing us out of the market. And as my learned  
22 friend has already confirmed, the counterfactual doesn't  
23 involve some hypothetical price compliant white service,  
24 we're dealing with the white service that happened and  
25 some other world in which 2 Travel was allowed to start

1       these in-fill routes against liveried services,  
2       presumably on the existing liveried routes. The white  
3       services were planned as a retaliatory entry and the OFT  
4       itself says that the conduct was a contributory factor  
5       in 2 Travel's exit from the market.

6             We adduce evidence, and you have seen substantial  
7       evidence which we say that we have proved sufficiently  
8       that, whatever the relevant test is in law, that there  
9       is sufficient causative connection between the  
10      Cardiff Bus predatory conduct and our losses while  
11      we were running the business and our exit from the  
12      market; that we are entitled to recover compensation in  
13      respect of all the losses incurred while running the  
14      business and as a result of our exit and then  
15      liquidation.

16            There are a number of ways of looking at the law.  
17      My learned friend, of course, takes a very particular  
18      view of the appropriate test of causation, but we have  
19      set out in our skeleton, we say, an appropriate and  
20      legitimate approach to the case law on causation, which  
21      takes account of a number of different approaches, but  
22      it is fundamentally a factual assessment as to whether  
23      or not the infringing act caused those losses.

24            The best, in our submission, that the defendant can  
25      do is to say, no, the claimant's actions or inactions or

1       whatever, displaced the infringing conduct as the cause  
2       of the loss. In other words, we say the right way of  
3       looking at it is to say there was an infringing act,  
4       there was loss caused by it, as the OFT has found, and  
5       unless the defendant can show that its actions were  
6       displaced as the cause of those losses, then we should  
7       succeed in our compensatory claim. We'll come back to  
8       that in closing. That concept of the displacement  
9       actually comes from the *Arkin v Borchard* case.

10       Now, as you'll have seen from our opening, we've put  
11       this in a number of different ways. We say one can look  
12       at this simply as a case of natural connection between  
13       two factual events, but we do put a number of different  
14       layers of the analysis. We do say on another test, that  
15       it is relevant to look at the intent of Cardiff Bus to  
16       the extent that we show that they intended -- and we say  
17       the OFT has already explained this -- but to the extent  
18       that they intended to cause us loss and to drive us out  
19       of the market, it was a natural consequence of that that  
20       we went into liquidation and that that intention itself  
21       is to be borne in mind when looking at causation. And  
22       contrary to what my learned friend says, there is  
23       nothing surprising about that. Perhaps the only  
24       authority I was going to just refer to in opening is the  
25       decision in *Smith v New Court*, which is in F1, page 349.

1 I won't open the case now, you've already seen  
2 references in our opening.

3 The judgment I was wanting to take you to is the  
4 judgment of Lord Steyn, which starts at page 361 of our  
5 bundle. These are all bundle-pages unless I say  
6 otherwise. I wanted just to note two propositions.  
7 Firstly, page 368, under the heading "The old cases".  
8 I don't propose to read it all out, but just to note the  
9 passage under the old cases, the Doyle v Olby heading.  
10 Doyle v Olby is a case we have already referred to in  
11 our opening, but you'll see that that starts with  
12 Lord Steyn observing:

13 "English law has always had a policy of imposing  
14 more extensive liability on intentional wrongdoers than  
15 on merely careless defendants."

16 And that's a proposition which we propose to develop  
17 in closing. We say that it is right when looking at  
18 questions of causation to have regard to the fact that  
19 in this case, it was intended that the loss be caused to  
20 us.

21 Further, later on in the judgment of Lord Steyn on  
22 page 371 under the heading "Causation"; one can see  
23 in the middle there's page 285 from the report, if I use  
24 that as the starting point:

25 "Our case law yields few ... But it is settled that

1 at any rate, in the law of obligation, causation is to  
2 be categorised as an issue of fact. What has further  
3 been established is that the but for test, although it  
4 often yields the right answer, does not always do so.  
5 That has led judges to apply the pragmatic test whether  
6 the condition in question was a substantial factor in  
7 producing the result. On other occasions judges assert  
8 that the guiding criterion is whether in common sense  
9 terms, there is a sufficient causal connection."

10 We say that in this case, in fact, on a proper but  
11 for analysis, we would win anyway, but that the tribunal  
12 in this case, on an alternative basis, can look simply  
13 at the question: is there a sufficient causation between  
14 the infringement and the events of the infringement and  
15 the losses which we suffer? And if there is, then our  
16 claim in compensation should succeed.

17 That's all I was going to say about the law now.

18 MR SMITH: This may be more for closing than for opening,  
19 but my understanding of the more generous approach that  
20 English law took in the case of fraud, was that the  
21 remoteness test was rather more generous than it was in  
22 cases of negligently affected harm, not that there was  
23 a different causation test.

24 MR BOWSHER: Yes, the first part of that is true, that there  
25 was a focus on remoteness, but it can't just be a focus

1 on remoteness because the second passage that I've taken  
2 you to is evidently a consideration of a causation test,  
3 not a remoteness test. It's about: is but for the  
4 correct causation test? I would suggest that, and we'll  
5 come back to this, if one's looking at the relevance of  
6 intention, it must be relevant both to remoteness, but  
7 also causation because that's how one makes sense of  
8 what Lord Steyn is really saying. Otherwise, why would  
9 he be dealing with exactly this point in the context of  
10 a discussion of causation tests about the but for tests  
11 and so forth and the sufficient connection?

12 MR SMITH: Well, Lord Steyn seemed to be listing simply  
13 three limiters on damage. I didn't read him as saying  
14 that there was one causative test in, say, negligence  
15 cases, and a different causative test in fraud cases.

16 MR BOWSHER: What he is saying, though, is that one is not  
17 necessarily confined to a but for test when testing  
18 causation, and one should look at the appropriate  
19 causation test and that a factor in looking at the  
20 appropriate causation test may be the nature of the  
21 claim. And intention, I would say, is relevant to that.  
22 There's a danger of taking this a little -- it's a sort  
23 of all or nothing. I wasn't proposing to get into the  
24 philosophy of the law of causation in too much detail  
25 here. We say that we succeed on a straightforward test

1           anyway because the straightforward test is, first, an  
2           event happens, it causes us damage, and unless some  
3           intervening act by ourselves displaces that chain of  
4           causation, then we should recover anyway. It is not the  
5           case, to use the analogy I think the defendants use,  
6           that they were, as it were, stabbing a dead body.

7           Whatever may have been the problems that 2 Travel  
8           had, and 2 Travel clearly did have its problems, it was  
9           entitled to compete and it was not left to compete  
10          in the way in which it was entitled. And unless the  
11          chain of causation is broken, we're entitled to recover  
12          our compensatory claim. That's our fundamental baseline  
13          point, but we do certainly say that there are in fact,  
14          standing back from it, other ways of looking at the test  
15          of causation, which would be appropriate, because of the  
16          particular nature of the tort in this case.

17   THE CHAIRMAN: I'm rather inclined to the view that we  
18          should hear the evidence before we have the rest of this  
19          discussion.

20   MR BOWSHER: I'm totally with you.

21   THE CHAIRMAN: That's not intended as a rebuke at all, it's  
22          just an observation.

23   MR BOWSHER: The discussion is philosophical at best and it  
24          only makes sense when grounded in sufficient facts.

25          I just thought it was appropriate to headline --

1 THE CHAIRMAN: You were asked, so you answered.

2 MR BOWSHER: We should emphasise -- and I'll come back to  
3 this -- that there are two specific points to be made  
4 about the Cardiff in-fill routes and the losses that  
5 flow from our inability to derive income from them.  
6 Firstly, they were profitable routes, and you'll hear  
7 evidence that they were chosen as profitable routes.  
8 You have seen that in the witness statements. We know  
9 they were profitable routes because the defendants said  
10 as much. Its defence to the OFT -- and we'll take you  
11 to it in due course -- was: these were profitable  
12 routes; we're not abusing our dominant position, there  
13 is money to be made on those routes, the prices we are  
14 charging are not predatory prices.

15 One gets that from the case that they positively put  
16 forward to the OFT at the time. So these were  
17 profitable routes. Running those routes in themselves,  
18 ought to have earned money for the claimant. But the  
19 fact that we were unable to run those routes without  
20 disruption from the white services affected both,  
21 of course, the running of the routes, but our Cardiff  
22 business more generally because, of course, we were  
23 running the in-fill routes so as to earn profits on top  
24 of costs which were already being borne on contracts  
25 which we had won in Cardiff, on school contracts. So

1       there is a knock on effect, and of course there are  
2       other routes as well which are affected in a number of  
3       different ways by the damage being done to our business  
4       plan by the disruption of our in-fill route.

5             The idea that we should have somehow bided our time  
6       on these in-fill routes does not make sense, and again  
7       the evidence will come on to develop this. The 2 Travel  
8       business won school contracts. Once we had won those  
9       school contracts, in order to push into Cardiff which  
10      was, as the evidence says, obviously a singular market  
11      in Wales -- it's obviously the largest market in Wales.  
12      If you're in the bus business in Wales, it is the market  
13      which you want to seek and break into. Once one has won  
14      those school contracts, one has the costs which you then  
15      want to try and exploit. You exploit that investment.  
16      You don't wait, having won those contracts, and see what  
17      happens until you're ready for the infill routes. Those  
18      are profitable routes, those are the routes you move  
19      into.

20            It might be that where you go after the most  
21      profitable routes does require a bit more reflection,  
22      but of course that is the reflection that 2 Travel was  
23      planning to have. It started with the profitable  
24      routes.

25            The business itself did have difficulties, but it

1 was a business which had been considered by  
2 Stephen Harrison of PwC, it had been considered by the  
3 board, it had been considered to have a validity as  
4 a means of developing the 2 Travel business. That  
5 Cardiff business was expected to be a business which  
6 would generate income and it is the failure of that  
7 business to generate income which ultimately led  
8 Mr Francis and Mr Short to conclude that they would not  
9 continue to support the business in the way they did.

10 A recurring theme from the defendant has been: well,  
11 there's no expert evidence from the claimant, proving,  
12 determining various matters. In our submission, the  
13 short point is, it is a matter for the tribunal, not for  
14 any expert witness, to decide what caused the losses and  
15 what caused 2 Travel to fail. You'll see Mr Francis and  
16 Mr Short and Mr Fowles, but Mr Francis and Mr Short were  
17 those who had the financial wherewithal to keep this  
18 business going. They expected there to be a period  
19 of -- a marginal period, if I can put it that way,  
20 a period out of which they would have to grow, and they  
21 were prepared to support it. But what their evidence  
22 says is there comes a point where they conclude that  
23 they're not going to succeed and their ability and their  
24 willingness to continue to secure funds, to put funds  
25 into the business, is the trigger that causes the

1 business to fail.

2 The defendant has put forward expert evidence, which  
3 says it was going to fail and so on and so forth. The  
4 factual evidence, and that's the decisive point, is that  
5 Mr Francis and Mr Short would have supported this  
6 business if they felt it had a prospect of success and  
7 of competing fairly. That's the case. And if, as  
8 a matter of fact, that is true, it is simply irrelevant  
9 what Mr Haberman says. If, as a matter of fact, it is  
10 true that Mr Francis and Mr Short would have continued  
11 to secure support for the business, it would have  
12 continued to do business and to earn money. It's as  
13 simple as that. No amount of expert evidence  
14 criticising the way in which the business was or wasn't  
15 managed, can undermine that factual proposition.

16 THE CHAIRMAN: I'm merely flagging this up as an issue that  
17 I understand to be put forward by the defendants,  
18 Mr Bowsher, but supposing we had a situation in which  
19 the tribunal was left in a serious state of doubt as to  
20 whether the business was complying with its statutory  
21 obligations. For example, there is evidence about lack  
22 of management accounts, which might indicate that the  
23 company, allegedly, was not complying with its statutory  
24 obligations to keep proper books of account under the  
25 Companies Act. Where would that leave us?

1 MR BOWSHER: If that were the allegation, that, in our own  
2 submission on the facts, goes nowhere. Because,  
3 firstly, there's evidence as to what has happened with  
4 the accounts. There's no positive case that that would  
5 have stopped the business from going forward. I mean,  
6 if there was a defect in accounting practice, then that  
7 would have to have been remedied. The chairman of the  
8 board was Sir Richard Needham. The people involved in  
9 this business are not trivial, inexperienced  
10 businessmen. We have Sir Richard Needham as chairman of  
11 the board; we have Nigel Short, who is a well-known,  
12 well regarded businessman in Wales; Huw Francis is  
13 experienced and Stephen Harrison had been involved on  
14 a number of occasions in this business. This was not  
15 a sort of casual business by amateurs. The short point  
16 is, if there was such a problem, if there was a matter  
17 that needed to be raised, no doubt it would be raised by  
18 the auditors and would have had to have been resolved.

19 The fact is that Bevan Buckland, the auditors, did  
20 sign off the accounts. There were questions raised  
21 about these matters, certainly, but that in itself does  
22 not mean that the business stops, it means that the  
23 business fixes itself. It wouldn't be the only business  
24 that has difficulties. Businesses do just have to  
25 survive and deal with these matters, whatever the nature

1 of their problem. It's not the case that BP is bound to  
2 fail because it has a problem with the deep water  
3 horizon, it deals with the problem. That may be  
4 a slightly flippant example but you know what I mean.

5 THE CHAIRMAN: I've got the point.

6 MR BOWSHER: The short point is they would have to show us,  
7 as a matter of fact, that the matter concerned was so  
8 serious that the claimant could not manage its way out  
9 of that problem. Manage and trade its way out of that  
10 problem.

11 The compensatory claim overall, then -- and you have  
12 the table at the back of our opening and you don't need  
13 to pull it out. You have seen the headings. It's  
14 essentially for a claim of loss of profit or loss of  
15 a capital asset. There's loss of profits and then the  
16 alternative claim, whether it's a loss of profits to  
17 date or loss of a capital asset at the time of  
18 liquidation, and those are put forward as alternatives.  
19 Then the claim is made for wasted staff and management  
20 time, although the evidence is not substantial -- to be  
21 fair, it's somewhat limited evidence we put forward of  
22 that. The key relevance of the wasted staff and  
23 management claim beyond the fact that we say that that  
24 time was wasted and it's very difficult to prove what  
25 the value of that time was, but it is very much relevant

1 as a factual matter that the management was disrupted,  
2 but I've already discussed that earlier this morning.  
3 We, 2 Travel, were in a position where we were having to  
4 deal with not just the price abuse but other matters,  
5 and as you'll have seen from the evidence, managers were  
6 having to drive round South Wales, taking drivers from  
7 different places. This is not a conducive environment  
8 for a business trying to grow in a challenging  
9 environment.

10 There is then the loss of the opportunity in  
11 Swansea, the Swansea depot which itself is -- there is  
12 a lot of evidence and I would have to concede the  
13 numbers are -- there's a broad range of numbers for  
14 that, and we'll come back to how the tribunal might deal  
15 with that. But there is land which is valuable and has  
16 become progressively more valuable, and that's clear on  
17 the evidence. It's land which, as a result of planning  
18 changes and the way in which Swansea has developed --  
19 and some of the tribunal may be aware of the location of  
20 this land. If one knows Swansea, it's land, one just  
21 knows inherently, has become more valuable. We will  
22 invite the tribunal to attribute a value to that.

23 But the Swansea depot again has an important  
24 relevance to this case because it goes back to the key  
25 fact that I identified at the beginning. Not only were

1 Mr Fowles -- both Mr Fowles!, but Mr Fowles, Mr Francis  
2 and Mr Short interested in making this business work as  
3 a bus business, the business itself had inherent value  
4 because it had that depot land. And part of the  
5 interest in the business was in retaining that value and  
6 part also, of course, of the strength of the business  
7 was that it had that value against which it could raise  
8 funds. It's an important corroboratory factor in  
9 understanding -- when we say Mr Francis and Mr Short  
10 were prepared to provide funds, this isn't an idle  
11 speculation, we know that they were and we know there  
12 was that land there, which made sure that that made  
13 sense.

14 That's what we say about the compensatory claim. To  
15 that, we add a claim for exemplary damages. In closing,  
16 we'll have to say quite a lot about some of the legal  
17 observations which are made by the defendant in its  
18 submissions on exemplary damages. Let me deal with  
19 that, with the points fairly swiftly. Firstly,  
20 Cardiff Bus say that there is an objection to our claim  
21 for exemplary damages because it's just a windfall.  
22 Well, the short answer to that is: that is not a reason  
23 not to order an award of exemplary damages. If it is  
24 right to award exemplary damages, it is of its nature  
25 that it is an award in addition to the compensatory

1 damages. That is clear from the Court of Appeal  
2 decision in *Borders v Metropolitan Police*. It was  
3 expressly stated there that the exemplary damages stand  
4 apart from and in addition to the compensatory award.

5 Far from setting their face against exemplary  
6 damages because they're a windfall, that is the inherent  
7 nature of such a claim. It's suggested that the  
8 exemplary damages claim must fail if the compensatory  
9 damages claim fails. Well, I don't want to take too  
10 long about this because I don't accept the premise,  
11 obviously, that the compensatory damage claim is going  
12 to fail. But I simply note that it is clear from *Lumba*  
13 *v Home Office* that the award of only nominal damages is  
14 not a bar to the award of exemplary damages. So even if  
15 the tribunal were to consider that all that it was able  
16 to award 2 Travel were nominal damages, it would still  
17 be right and proper to go on and make an award of  
18 exemplary damages.

19 There is then some argument to be made about the  
20 statutory immunity point. We have argued that out in  
21 our submissions and I don't propose to say much more  
22 about it, save to say this: in both *Albion Water* and  
23 *Devonish*, it was made clear that where the OFT has not  
24 imposed a fine, there is no practical danger of double  
25 counting and no reason why exemplary damages should not

1 be awarded. Those decisions are not themselves,  
2 therefore, bars to any recovery, nor is there any threat  
3 of double jeopardy or whatever; that is exactly the  
4 basis upon which such a claim is made. Indeed, to  
5 illustrate the point, in Devonish, Mr Justice Lewison  
6 specifically noted that he did not regard double  
7 jeopardy as being the relevant issue because he drew  
8 from the Borders case the fact -- the decision of the  
9 Court of Appeal in Borders, the fact that a person has  
10 been imprisoned did not bar the right to win exemplary  
11 damages for the same thing. So in a sense, double  
12 jeopardy is inherent in the process in that sense. It's  
13 not a bar to an award of exemplary damages as such.  
14 It's only where there's the fine and the compensation  
15 where Devonish gives rise to a special bar.

16 It is suggested that in order to fall within the  
17 calculation to make a profit limb of exemplary damages,  
18 it is necessary for us to show that there is some  
19 special assessments, that that thought process was  
20 undergone by the defendant. In our submission, one  
21 doesn't need to go through that. All one needs to show  
22 is that this was a programme of conduct put in place to  
23 make a profit in the long run, with cynical disregard  
24 for its consequences. Again, we'll develop that by  
25 reference to the case law in closing. But in our

1 submission, the OFT has already made sufficient findings  
2 by reason of the fact that this was a programme of  
3 abuse, which did infringe competition law, the Chapter II  
4 prohibition, and it was intended in the long run, to  
5 secure the business of Cardiff Bus. So that in itself  
6 is sufficient. They were intending to make profit out  
7 of their conduct in the long run.

8 There is some further law about the role of  
9 Cardiff Bus as a government servant. We say one can see  
10 from the evidence that Cardiff Bus is involved in the  
11 activities of Cardiff City Council in not just  
12 undertaking a commercial activity, but also in the  
13 functions of providing transport and the statutory  
14 functions of providing transport in Cardiff, and that  
15 will be sufficient to bring us within that limb, as well  
16 as the cynical earning of profit limb.

17 Finally, when it comes to the need for and the level  
18 of an exemplary award, there may be a number of reasons  
19 to be said why an exemplary award should be granted.  
20 The conduct of Cardiff Bus in itself may be sufficient  
21 grounds for that. We would note that when we come to  
22 it, we'll see in the Competition Commission report on  
23 the local bus market produced just before Christmas,  
24 that that itself offers an important reason why this  
25 tribunal should mark with appropriate punishment, for

1           that is what it is, the conduct of Cardiff Bus. Because  
2           it is to be noted that there has been no other sanction  
3           other than the infringement decision, no specific  
4           sanction has been imposed. Again, we'll take you to it  
5           in closing, but in the market investigation the CC notes  
6           that:

7                 "Head to head competition on routes provides  
8           benefits for consumers."

9                 And it's stated in a number of parts of that report.  
10           That in itself is an inherent public good identified by  
11           the CC. They note that head to head competition is  
12           relatively rare and they give some reasons for it. One  
13           of those reasons is that it's possible to target  
14           incomers. They also note that there have been a number  
15           of complaints regarding predation of this type. I think  
16           they give a number of 50 or so complaints. This is one  
17           of the few that's actually, of course, reached a final  
18           decision.

19                 It would be right, because this is a market in which  
20           a signal should be sent, that this tribunal sees this as  
21           an appropriate point at which to mark the  
22           inappropriateness of Cardiff Bus' conduct by making an  
23           appropriate exemplary damages award. It is not normal,  
24           in our submission, for a claimant to identify in its  
25           pleading or at the outset, what the amount of that

1           exemplary damages should be. It may be that that  
2           becomes clear in the course of the evidence. But it is  
3           right, as we have done, in our submission, for the  
4           tribunal to at least start by having regard to what the  
5           level of fine might have been, were the OFT to have  
6           properly fined. And given the number of occasions on  
7           which this tribunal has had to look at the OFT's fining  
8           process, it's probably in a better position than anyone  
9           else in the room to know what the OFT ought to have  
10          levied by way of fine. That's a rather cheeky remark  
11          and I apologise.

12   THE CHAIRMAN: They don't always get it right.

13   MR BOWSHER: They don't always get it right.

14   THE CHAIRMAN: By our findings anyway.

15   MR BOWSHER: But it is a relevant factor. What would and  
16          should the OFT have imposed by way of fine is a starting  
17          point. It is not the end point by any means, but it is  
18          a relevant starting point, and that is a matter which  
19          we'll have to consider in closing submissions.

20                That was all I wanted to say by way of opening  
21          because you've seen much too much from us in writing.

22          I just wanted to give you that thumbnail sketch.

23   THE CHAIRMAN: Very timely. We'll adjourn until 2 o'clock.

24   (1.00 pm)

25                               (The Short Adjournment)

1 (2.00 pm)

2 Opening Submissions by MR FLYNN

3 MR FLYNN: Sir, Mr Bowsher was short in opening and I shall  
4 be likewise. I have already made the point that since,  
5 I think, one of the purposes of us being in Cardiff is  
6 for these things to be ventilated in Cardiff, that  
7 of course, the starting point for this case is an  
8 infringement of the Competition Act, which Cardiff Bus  
9 has committed for a 10-month period in 2004 to 2005 and  
10 by unfairly competing on four routes with 2 Travel.  
11 That's an infringement, as I said this morning, that  
12 Cardiff Bus has fully accepted. There's no appeal  
13 against the decision. It has apologised in public for  
14 conduct which it recognises was the wrong reaction to  
15 the entry on to the route.

16 It has said that it would not respond in such  
17 a manner in relation to other such entry and it has not  
18 done so, as the evidence actually shows. It has not  
19 made any similar response to competitive entry.  
20 Cardiff Bus is fully prepared to accept and face up to  
21 the consequences of its action. The problem is that in  
22 these follow-on proceedings, they are significantly  
23 overstated and misconceived in a number of very  
24 important respects. They are essentially, in our  
25 submission and as we suppose the evidence will show, an

1 attempt to lay at Cardiff Bus' door the financial  
2 consequences of 2 Travel's own business mismanagement  
3 and incompetence. We say that these claims fail at the  
4 causation stage and they are considerably overstated in  
5 a number of heads.

6 There is also, of course, the claim for exemplary  
7 damages, which again, this level of generality we say is  
8 bad in law, and again pitched at a financial level which  
9 is orders of magnitude greater than any such award that  
10 has ever been made by courts, I should say in Wales or  
11 England. And of course, enormous costs have been run up  
12 in pursuing these claims by the claimant and its  
13 advisers and, inevitably, by Cardiff Bus in reaction.

14 So Cardiff Bus has had no choice but to defend these  
15 claims to the full. So here we are at the outset of the  
16 tribunal's second trial under section 47A. We shall in  
17 due course be submitting that the outcome should be the  
18 same as the first, namely the dismissal of the  
19 application on the basis that Cardiff Bus' actions  
20 caused no recoverable loss to 2 Travel. Why do we say  
21 this, as you have seen from our written openings? In  
22 short, and without being too technical about it,  
23 2 Travel was losing money hand over fist long before it  
24 came to Cardiff and the revenue that it would have  
25 earned in Cardiff, if there had been no infringement,

1 would have been, essentially, trivial. The basis on  
2 which that, if there had been no infringement, has been  
3 examined by all means -- indeed, as one of the  
4 options Mr Bowsher explained earlier, 2 Travel competing  
5 against the liveried services. So there's no sort of  
6 halfway house, we assume that -- simply there were no  
7 white services, what would have happened.

8 In our submission, the evidence shows that there  
9 would have been no profit on the four routes, let alone  
10 in the 2 Travel business overall. So even earning the  
11 additional revenues that might have accrued to them if  
12 there had been no white services, would not have stopped  
13 2 Travel going bankrupt when it did. That's why we say  
14 the infringement causes no recoverable loss. It wasn't  
15 a profitable business at the time, the school contracts  
16 were unprofitable. If you reallocate the costs, as  
17 you have to, so that the relevant proportion of drivers'  
18 costs are attributed to the in-fill services, those  
19 would have been unprofitable as well and would be  
20 unchanged by the counterfactual revenues.

21 As Mr Bowsher said, the company had some  
22 difficulties. In fact, serious difficulties, as no  
23 doubt we shall have to explore in the evidence, both  
24 financial and operational. On the financial side, there  
25 is a chronic and long-term problem of financial

1 recording, never mind financial performance. There's  
2 a chronic problem with financial recording. We say that  
3 it's absolutely clear from the evidence that that went  
4 back to the very early days. It's recorded or confirmed  
5 by materials from, as it were, third parties. So not  
6 us, not 2 Travel, it's confirmed by the Grant Thornton  
7 report in late 2004. It's Mr Good's starting position,  
8 2 Travel's expert, and the OFT makes the same point as  
9 well.

10 One consequence of that is, of course, the  
11 management themselves had very limited visibility of  
12 what the trading performance of the company actually  
13 was. We say when you go into those matters, the  
14 additional counterfactual revenues wouldn't have saved  
15 it from liquidation.

16 You'll have seen that our experts' assessment of  
17 those revenues is in the order of, just to use round  
18 figures, something between £7,000 and £12,000. On the  
19 basis of that sir, our expert, Dr Niels and on the basis  
20 of that, our expert Mr Haberman, makes the report,  
21 showing that in his expert view, 2 Travel would have  
22 gone bust when it did go bust.

23 We do make the point -- Mr Bowsher pulled us up on  
24 that -- that a contrary view is not offered by  
25 2 Travel's own financial expert, Mr Good. He says

1           that's a matter of fact and fact and law, and he's not  
2           going to express an opinion on it. Well, fine. He can  
3           do so. We do take the point that there's no expert  
4           evidence before the tribunal which contradicts our view  
5           of those matters. I think what Mr Bowsher said of  
6           that -- what Mr Bowsher says in opening in respect of  
7           that is that Mr Haberman's analysis is essentially  
8           irrelevant because Mr Francis and Mr Short would have  
9           been prepared to put money in, had it not been for the  
10          predation. They had the money and they would have been  
11          prepared to support it. Their willingness was entirely  
12          compromised, so he says. He says it all turns on the  
13          factual evidence. Whether that is a credible position  
14          is, of course, something that will have to be explored  
15          in cross-examination and will be and the tribunal will  
16          have to take an overall view based on factual and expert  
17          evidence. But the attempt to marginalise Mr Haberman's  
18          evidence from the start, on the basis that this all  
19          turns on facts, we say is completely misconceived.

20                 My friend Mr Bowsher said that he wished to make  
21                 a couple of points on the routes themselves. Firstly,  
22                 he said that they were profitable and quoted the  
23                 defendant as saying as much to the OFT.

24                 I'm not quite sure what the quotation was. Clearly,  
25                 the OFT's finding in relation to the white services

1 doesn't suggest that the white services could ever have  
2 been profitable because they didn't cover their costs.  
3 Whether a route is actually profitable depends on a very  
4 large number of things. It would include the fares you  
5 charge, the frequencies you run, the number of customers  
6 that get on your bus and, of course, your cost  
7 structure. So the fact that these routes had a large  
8 number of Cardiff Buses on them, which were no doubt  
9 doing all right, is not the same -- the liveried buses,  
10 I mean by that. One can't simply say these are  
11 profitable routes and therefore anyone who plies a bus  
12 up and down it will make a profit. That's a dramatic  
13 oversimplification.

14 I've already made the point about the financial  
15 recording, since that was also a point raised by the  
16 chairman. In terms of the value of the claim, we also  
17 have a table in our opening submissions, which is at  
18 paragraph 164. That was our then understanding of the  
19 value of the claim. That's at internal page 55 if the  
20 tribunal is turning it up. There is a table there.

21 At that time, that was our understanding of the  
22 total value of the claim, just over 17 million, of which  
23 10 million relates to the Swansea bus depot. As to the  
24 Swansea bus depot, our principal case is that, in fact,  
25 the company received full market value for that on its

1 disposal to Mr Francis and Mr Short. Our summary  
2 position in relation to that is at paragraph 246 of this  
3 skeleton. That's the summary of a discussion leading up  
4 to it. But the fact of the matter is that the company  
5 had to take a resolution through the independent  
6 directors to say that the price paid was the open market  
7 value of the asset at the date of the grant of the  
8 option.

9 If that is not the case, then if it's the claimant's  
10 case in these proceedings that that was not the case,  
11 that raises a number of serious issues which are set out  
12 there. Mr Bowsher said to you that the tribunal would  
13 be invited to attribute a value to the property, and  
14 obviously, what I say now is by way of an alternative,  
15 and if the tribunal comes to that -- because our primary  
16 case is that the company's already been paid for that so  
17 we don't see how that can possibly be regarded as  
18 a loss, and it's one of the more extraordinary features  
19 of the claim that no credit for the 2 million is given  
20 anywhere in the calculation leading up to the  
21 17 million, as we understand it.

22 But the tribunal will be aware that although there  
23 is a lot of evidence before it, there is no expert  
24 valuation evidence, although permission was given to  
25 2 Travel to adduce such evidence. So in our submission,

1 the tribunal is going to be put in an impossible  
2 position if it has to attribute a value to the property.

3 I think I have just put down a marker at the moment,  
4 on the list of possible issues for determination at the  
5 opening of the trial was, of course, in relation to  
6 documents held by Mr Francis. And what was said, as  
7 you'll have seen in the annex to the Addleshaw Goddard  
8 letter we were looking at earlier, is that we hoped to  
9 be able to resolve those issues. I put down a marker  
10 that we think we can. If we can't, that is as to  
11 documents held by Mr Francis -- if we can't, then we may  
12 have to come back, but so far, I think we're doing all  
13 right. It means we're getting somewhat late documents  
14 that we will need to look at and consider. But the main  
15 point is, at any rate, that the tribunal has no  
16 independent evidence of value.

17 The heads of claim in our table at 164, I think  
18 corresponded to the items that my friend Mr Bowsher ran  
19 through before lunch. But of course there has been an  
20 additional head of claim, which is relating to  
21 liquidation costs, where permission was given to both  
22 sides to amend and to the claimants to bring in new  
23 evidence. That we have pleaded to in what is a new  
24 annex J to our defence. I don't think I will take up  
25 the time of the tribunal now by reading that through,

1 but essentially we say that those claims which total  
2 another -- one's reminded of Mrs Thatcher. It's another  
3 quick couple of million or a quick run through. But we  
4 say again, those claims are misconceived and wrong for  
5 a number of reasons, which we set out in our annex J.  
6 I haven't got a page. It's internal page 62, but I'm  
7 not sure that follows an internal page 61. It might be  
8 what should be 162 through pagination in tab 1 of file  
9 B1. So that's where the tribunal will find it, should  
10 you wish to put a flag in that for when we come to it.  
11 Again, that's a matter which will have to be explored in  
12 evidence, I think when we come to Mr Conway.

13 While I'm on Mr Conway, there's perhaps just one  
14 other thing I ought to mention, which is the issue of  
15 whether there were, and if so, what has happened to  
16 them, management accounts of 2 Travel from, I think,  
17 basically the period from when Mr Waters left the  
18 company. Recent evidence has been given by Mr Conway as  
19 to the fate of a couple of computers and their hard  
20 drives in transit between the company, the Official  
21 Receiver and the liquidator.

22 That has led to a couple of exchanges of e-mails  
23 between the instructing solicitors and, I think, the  
24 deputy Official Receiver for the relevant region.  
25 I understand -- I think Mr Bowsher will tell me if this

1 is a problem -- what has been agreed is those e-mails  
2 will be added into the relevant part of the bundles and  
3 the matters will be explored in examination, subject to  
4 checking.

5 MR BOWSHER: I'm not sure that we had formally agreed.

6 I can't see that that would be a problem.

7 MR FLYNN: That, at all events, is our proposal for how to  
8 deal with it, rather than calling a witness from the  
9 Official Receiver. There's an exchange in which certain  
10 questions are put to him, certain propositions which  
11 need to be tested and he gives his response, confirming  
12 or supplementing his understanding of the factual  
13 position. That is something we may need to go over.

14 Sir, I think probably I don't need to say more,  
15 which wouldn't be repeating what is set out in the  
16 written openings then, about the principal claim.  
17 Perhaps it's not the principal claim, I shouldn't say  
18 that. The compensatory claim. Mr Bowsher also touched  
19 on the exemplary claim. I shan't go into the legal  
20 issues, but we do say that exemplary damages have to be  
21 supplementary to a compensatory award. Our reading of  
22 the Borders case, as our skeleton says, is that part of  
23 the Court of Appeal's reasoning was precisely that the  
24 compensatory award had to be inadequate, that they felt  
25 they could top it up, as it were, through the exemplary

1       award. We will have to have an argument about the  
2       respective effects of the Albion and Devonish cases on  
3       the issue of relevance in this particular case of the  
4       statutory exclusion from fining, which led the OFT not  
5       to impose a fine on Cardiff Bus on this occasion.

6             I should say that I think as possibly a refinement  
7       or development from the skeleton or the written opening,  
8       my friend Mr Bowsher referred this morning not only to  
9       a suggestion that you should work out what the OFT would  
10      have imposed by fine, but what it should have imposed,  
11      as if it was -- as you said, if it had done it properly.  
12      That may be a figure of speech, but if there's  
13      a suggestion that the OFT has in some way failed to  
14      carry out its legal role, its legal duties properly,  
15      that we would say is, of course, something that can't  
16      possibly arise in these proceedings. It's one thing for  
17      him to say that you should calculate the level of an  
18      exemplary award by reference to your assessment of what  
19      the OFT might have -- what fine it might have imposed  
20      applying guidelines relevant at a particular time, it's  
21      quite another to say what the OFT should have done. And  
22      in our submission, if that's being said, it simply  
23      doesn't arise in these proceedings at all.

24             In relation to conduct calculated to make a profit,  
25      we have made our position clear on the authorities.

1       There does have to be some assessment.  It's not  
2       a precise calculation, nobody's suggesting a spreadsheet  
3       model, but some thought has to be given -- if anyone is  
4       going to be sanctioned under this head, some thought  
5       clearly has to be given by that party.  It has to be  
6       demonstrated that they made some assessment of the  
7       upside and downside risks in the course of conduct and  
8       pressed on regardless.

9             I don't think I need say anything further on the  
10       relationship between Cardiff Bus and the County Council.  
11       That will be something we explore in evidence, if at  
12       all.  The last point that I would make is in relation to  
13       the double jeopardy and deterrence issues.  We lay  
14       significant weight on the fact that as a result of  
15       a combination of a recorded infringement, which, as I've  
16       said, the company has not in any way sought to contest  
17       or wriggle out of or back away from and a consequent  
18       examination of the matter by the Traffic Commission,  
19       which issued a formal reprimand, although stopping short  
20       of the sanction of withdrawing the company's licence, in  
21       our submission there has been both adequate punishment  
22       and adequate deterrence in this case and there is  
23       absolutely no basis, in our submission, for further  
24       deterrence of Cardiff Bus to be needed or the suggestion  
25       that the tribunal should mark some disapproval because

1 of the way that the Competition Commission has described  
2 this or other type of infringement in the bus industry.

3 Sir, I think that probably is enough of an outline  
4 of where we have to get to over the next couple of  
5 weeks, unless I can assist the tribunal further at this  
6 stage.

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

8 What next, Mr Bowsher?

9 MR BOWSHER: I think we can embark upon our first witness.

10 If we call Mr Clayton Jones.

11 MR CLAYTON JONES (affirmed)

12 Examination-in-chief by MR BOWSHER

13 MR BOWSHER: Mr Jones, can you take file C1? It's tab 10.

14 What is your full name?

15 A. Clayton Francis Jones.

16 Q. Your address?

17 A. [Address given].

18 Q. Thank you. If you have page 641, is that the front page  
19 of a statement that you prepared?

20 A. It is.

21 Q. And that runs on to page 648. Is that your signature on  
22 page 648?

23 A. It is.

24 Q. Dated 22 September 2011. So it's an eight page  
25 statement. Is the content of that statement true?

1 A. It is.

2 Q. Is there any further matter, correction, you want to  
3 make?

4 A. I think the only correction, really, was that the  
5 representation on the board of various councils by one  
6 political party, changed when the government Act changed  
7 20 years ago. It was more than one party on the board.

8 MR BOWSHER: If you wait there, there may be some questions  
9 for you.

10 Cross-examination by MR WEST

11 MR WEST: Good afternoon, Mr Jones. You were never an  
12 employee of 2 Travel at any point, were you?

13 A. Never.

14 Q. And you weren't otherwise involved in the management of  
15 2 Travel?

16 A. No.

17 Q. In fact at the time of the facts we're looking at in  
18 this case, you worked for the Shamrock Group, I believe?

19 A. I worked for Shamrock Coaches, I worked for RH & DT  
20 Edwards and I work for my own self.

21 Q. Shamrock, the one I mentioned a minute ago, that was  
22 another private bus company; is that right?

23 A. Correct.

24 Q. It was sold in 2006 to Veolia?

25 A. Correct.

1 Q. And your involvement with Shamrock ceased at that stage?

2 A. It did.

3 Q. And you now run a company, I believe, called Heart of  
4 Wales Bus and Coach Company?

5 A. Correct.

6 Q. The main involvement you had with 2 Travel at the time  
7 was that when you were still at Shamrock, 2 Travel  
8 approached Shamrock with a proposal to buy the company;  
9 is that right?

10 A. That's true.

11 Q. That acquisition didn't go ahead?

12 A. Correct.

13 Q. Apart from that, you didn't have any direct involvement  
14 with 2 Travel?

15 A. No.

16 Q. In October 2009, the Heart of Wales Bus Company started  
17 running commercial services in Cardiff; is that right?

18 A. That's correct.

19 Q. Using six buses?

20 A. That's correct.

21 Q. But with an intention to expand on to other routes in  
22 due course?

23 A. That was the hope, yes.

24 Q. And when you entered -- you, I mean Heart of Wales, on  
25 to the Cardiff market in 2009, Cardiff Bus didn't

1           respond to that entry in any way, did it?

2   A.   It did not.

3   Q.   The service provided by Heart of Wales was subsequently

4       reduced down to four buses, I believe?

5   A.   Correct.

6   Q.   And subsequently withdrawn?

7   A.   Correct.

8   Q.   You give the impression in your statement, I think it's

9       fair to say, that there are rich pickings to be had in

10      Cardiff because of the inefficiency of Cardiff Bus.

11      That is to say, on bus routes in Cardiff?

12  A.   Historically, yes.

13  Q.   But so far as the services provided by Heart of Wales in

14      Cardiff are concerned, they were not a success?

15  A.   No, but there was a reason for that.

16  Q.   Do you want to tell us what the reason is?

17  A.   The concessionary fare reimbursement scheme.

18  Q.   Would you like to expand on that?

19  A.   Well, the concessionary fare reimbursement scheme at the

20      time -- you received 73.69 per cent of the average adult

21      fare.

22  Q.   Why was that a problem?

23  A.   Because it wasn't giving you the full value that you

24      would be getting if they were paying.

25  THE CHAIRMAN:  So if I were to get on your bus with my bus

1 pass, then you would not get a fare, you would get

2 73.69 per cent of the normal adult fare?

3 A. That would be the case at the time, sir. Unfortunately,

4 the Welsh government decided to reduce it down to

5 70 per cent.

6 THE CHAIRMAN: Right.

7 MR WEST: But at the time in 2009, it was 73.89?

8 A. 73.69 per cent.

9 Q. That was also the case when 2 Travel was operating in  
10 Cardiff, I believe?

11 A. It was. I negotiated the figure so I know approximately  
12 what it was.

13 Q. After Veolia purchased Shamrock, Veolia also ran some  
14 commercial services in and out of Cardiff. You may not  
15 know, but that is right?

16 A. Not in Cardiff. There must be a distinction. We're  
17 talking about the hinterland, which is Cardiff Bus, and  
18 those that go to the north of Cardiff, which is  
19 a different company, goes to the east of Cardiff,  
20 a different company and to the west of Cardiff, a  
21 different company.

22 Q. Do you know where Veolia was operating?

23 A. I know Veolia were operating at Treforest Estate, I  
24 know they had some contract work with Cardiff City  
25 Council, but the main commercial operation was in the

1           valleys.

2   Q.   But they did open a depot outside Cardiff; is that

3           right?

4   A.   That is Treforest.  It's also in the Rhondda Cynon

5           Taff.

6   Q.   Those commercial services have largely been withdrawn

7           now?

8   A.   The commercial services that Veolia ran were not in

9           Cardiff.  They were in Rhondda Cynon Taff, the Vale of

10          Glamorgan, Merthyr, Brecon, but none in Cardiff.

11  THE CHAIRMAN:  Were they just local services or did they run

12          in and out of Cardiff?

13  A.   In and out of Cardiff.  You'd call them inter-urban

14          services.

15  THE CHAIRMAN:  So if I wanted to get to a bus from Merthyr

16          to Cardiff, I could get on a Veolia bus at that time?

17  A.   No, Stagecoach.  If you went from Aberdare to Cardiff,

18          you'd catch a Veolia one, sir.

19  THE CHAIRMAN:  Okay.  So some of those services ran in and

20          out of Cardiff?

21  A.   The inter-urban services were never an issue.  It's just

22          the local service was the issue.

23  MR WEST:  Again, Cardiff Bus didn't respond to Veolia's entry

24          to the extent that it did enter into this market?

25  A.   They had no reason to.

1 Q. Paragraph 36 of your statement, you talk about the  
2 global positioning system or GPS provided by the Council  
3 in the form of indirect subsidy. Because you say it's  
4 not available to other operators. Actually, it was  
5 available to any operator with regular services in  
6 Cardiff; isn't that right?

7 A. In Cardiff, yes.

8 Q. And indeed, didn't Shamrock Travel itself install these  
9 same GPS devices on its buses?

10 A. No, we did not.

11 Q. May it have done so after Veolia purchased the company?

12 A. I'm not sure of that. You make the point and it is  
13 relevant. Only Cardiff. To protect the centre at all  
14 costs.

15 THE CHAIRMAN: Just so I understand what these GPS systems  
16 do, are these the systems that enable a display to be  
17 put on the bus stop to show what bus is coming next?

18 A. Absolutely correct, sir.

19 THE CHAIRMAN: Thank you.

20 MR WEST: You may not be aware of this, but  
21 in February 2003. 2 Travel started operating the 88 and  
22 89 service. I believe the route of it at that time was  
23 from Barry to Llandough Hospital to Cardiff, for  
24 Cardiff Bus on a subcontracted basis.

25 A. Yes, it was a contracted service. It was never theirs

1 to give, it was the Council's to give. Vale of  
2 Glamorgan Council.

3 Q. And Cardiff Bus had the contract and it subcontracted it  
4 to 2 Travel?

5 A. It may well have, yes.

6 Q. And that contract expired in November of 2003. The  
7 reason you might know that is it was taken over at that  
8 stage by Shamrock?

9 A. I know we ran it. What period of time, I can't recall.

10 Q. As you may know, Cardiff Bus's case in these proceedings  
11 is that it wasn't the white buses which resulted in the  
12 demise of 2 Travel. We say that 2 Travel would have  
13 gone bust when it did because of its poor financial  
14 performance and its operational unreliability. I'm not  
15 asking you to agree with that, but you were not yourself  
16 familiar, were you, with the financial position of  
17 2 Travel?

18 A. No, but I was very familiar with the tactics.

19 Q. You've never made any study of 2 Travel's accounts, for  
20 example?

21 A. I did have their accounts, but it wasn't a study being  
22 done by an academic, it was just looking at how they  
23 were performing.

24 Q. 2 Travel was floated on the stock market in 2003; did  
25 you know that?

1 A. I recall early 2003.

2 Q. Early 2003. If you looked at its accounts, you'd  
3 probably know, therefore, that it lost nearly £1 million  
4 in 2003?

5 A. Yes, but can I say when I started in business, I lost  
6 a lot of money as well, but I managed to sell it at the  
7 end of the day because the tactics worked.

8 Q. But in 2003, 2 Travel hadn't just started, had it, it  
9 started in the year 2000?

10 A. Correct, but I'm just saying to you that just because  
11 people lose money one year, as long as they're prepared  
12 to continue to invest, like I did, back in the 80s and  
13 early 90s, ultimately it will become a business and  
14 somebody like Veolia will come along and say: I'll pay  
15 you for it. And that's exactly what I think would have  
16 happened in this particular instance.

17 Q. It lost nearly 1 million in 2003. And apart from those  
18 very general points you have just made, you're not  
19 yourself in a position to say whether, if the white  
20 buses hadn't run, it would have made a profit in 2004 or  
21 would have continued to make a loss?

22 A. No, I haven't got that ability, I'm afraid.

23 Q. 2 Travel in fact started outside Cardiff, didn't it, in  
24 Swansea, Neath, Carmarthen, not in Cardiff itself?

25 A. Indeed, yes.

1 Q. It only entered Cardiff later, I think originally in  
2 2002?

3 A. It would have been about 2002, yes.

4 Q. But following the infringement, that is the white  
5 services in Cardiff, it wasn't only 2 Travel's Cardiff  
6 operation which shut down, but ultimately the whole  
7 business?

8 A. Yes.

9 Q. Cardiff shut down first in December 2004, and then the  
10 whole business in May 2005?

11 A. That's correct, yes.

12 Q. In fact you went and collected the buses in Cardiff in  
13 2004 when the depot was closed?

14 A. For the receiver, I did.

15 Q. Again, you're not in a position to say whether the  
16 failure of the other depots: Swansea, Cwmbran, for  
17 example, Llanelli; that was a result of the white  
18 services or something else?

19 A. All I can tell you is what I've learned over 30 years  
20 in the industry. It's quite clear that the tactics  
21 being deployed by Cardiff Bus were going to run them off  
22 the road.

23 Q. Let's go back to 2 Travel's tactics. You say in your  
24 statement, paragraph 13, that the strategy of 2 Travel  
25 was very well thought out and presumably the reason you

1 say that is that the fixed costs of the buses were  
2 covered by the school contracts and then cut prices  
3 could be offered on the in-fill routes. Is that right?  
4 A. They were using their economies of scale to the full,  
5 yes.  
6 Q. But whether that's a good strategy or not depends on  
7 a number of factors, which I'm going to suggest to you.  
8 For example, you need to make sure that the school bus  
9 contracts actually do cover your fixed costs?  
10 A. Yes, I would agree there.  
11 Q. And the proportion of passengers that you're going to  
12 obtain by this strategy doesn't only depend, does it, on  
13 the fare which you're charging?  
14 A. In the market that they were in, it was a very key  
15 factor.  
16 Q. In fact, it's well-known in this industry, Mr Jones,  
17 that passengers tend to get on the first bus that  
18 arrives.  
19 A. If you live in Ely and you're on a limited income, take  
20 it from me, it's your pocket that you look at first, not  
21 which bus comes first.  
22 Q. Well, we're going to have a look at that in detail later  
23 in this case. But Cardiff Bus had far more buses on the  
24 relevant routes than 2 Travel had. Ely, for example,  
25 there were far more Cardiff Buses going from Ely to

1 Cardiff than there were 2 Travel buses?

2 A. Yes, there were.

3 Q. So if you're waiting for a 2 Travel bus, you have to

4 stand at the bus stop and probably have one or two

5 Cardiff Buses go past?

6 A. Yes, but let me repeat. You know, with the greatest of

7 respect, if you're on a limited income in the areas

8 we're talking about, then saving 30p each time you

9 travel is a lot of money to people like that and there

10 are a lot of people out there who unfortunately, not

11 like ourselves, can't afford public transport.

12 THE CHAIRMAN: Presumably this only applies to people who

13 are not in receipt of concessionary travel?

14 A. Of course.

15 THE CHAIRMAN: They get on the first bus?

16 A. Yes, they'd normally get on the first bus.

17 MR WEST: Or people who have Cardiff Bus season tickets?

18 A. They normally catch a Cardiff Bus, yes.

19 MR FREEMAN: Sorry, I'm confused. If you have concessionary

20 travel, the price is not relevant to you at all.

21 A. The relevance is this, sir --

22 MR FREEMAN: You get it free. Like my chairman colleague.

23 A. The relevance is this. It depends what your average

24 single fare is. If you have an average single fare

25 based on your whole operation, say for example, it's £2,

1 the average single fare, nothing to do with returns at  
2 all, then you will receive at the moment, because it's  
3 gone up 7 per cent, 1.40 for that £2 fare.

4 MR FREEMAN: You, the operator?

5 A. The operator. The person may get on the bus at  
6 Westgate Street and travel to the end of the road. You  
7 still get the same amount of money. That's the way it  
8 works. But you might go to Merthyr and you get the same  
9 amount of money. That's the way it works.

10 MR FREEMAN: Sorry, I thought we were talking about the  
11 effect on the individual passenger. From the operator,  
12 I understand the difference.

13 THE CHAIRMAN: If people are standing at a bus stop,  
14 you have a queue of people at the bus stop, the  
15 concessionary travel cardholders are going to get on the  
16 first bus, in reality, aren't they?

17 A. Absolutely certain, sir.

18 MR WEST: Actually, from the point of view of the operator,  
19 based on what you just said, having cheaper fares is  
20 actually a difficulty because it means the reimbursement  
21 rate for your concessionary passengers is lower.

22 A. To a certain extent you're right, but if you generate  
23 enough cash, then you haven't got to rely on  
24 concessionary travel, have you?

25 Q. It may depend what proportion of your business is

1           concessionary travel, whether it's in your interests to  
2           put your fares up or down.

3   A.   It's certainly grown since its inception in Wales, I can  
4           tell you that.

5   Q.   Although you say this was such a good strategy that  
6           2 Travel adopted it, nobody else has tried it since 2  
7           Travel went out of business?

8   A.   They're all rather frightened of the Council, to be  
9           honest with you.

10   Q.   Frightened of the Council?

11   A.   Yes.

12   Q.   But they're not frightened of Cardiff Bus because  
13           Cardiff Bus+ has publicly stated that it wouldn't  
14           respond by running white buses in future.

15   A.   Well, I can't speak for other operators. All I can tell  
16           you is the situation in Cardiff is dramatically, I use  
17           the word carefully, dramatically different to operating  
18           anywhere else because the Council, being the arm's  
19           length owner, don't act in an arm's length manner  
20           towards other operators. That is my view and that is my  
21           opinion over the last 20 years or 25 years since the  
22           competition started.

23   Q.   I'm going to ask you about that in a minute. But the  
24           fact that Cardiff Bus is not going to react in the same  
25           way again, doesn't put off other operators. For

1 example, it didn't put you off as Heart of Wales in  
2 2009?

3 A. The general situation regarding concessionary travel is  
4 now a key figure. Let me give you an example. At the  
5 moment, Welsh government cut grants -- that's grants for  
6 non-commercial routes -- by 27 per cent. On 1 January,  
7 retrospectively, they withdrew 3.69 per cent from that  
8 73.69, down to 70 per cent. They didn't even tell us.  
9 On top of all of that, the Government have now decided  
10 to withdraw BSOG, which is bus service operator's grant,  
11 to get the rebate off your fuel, giving us just  
12 10 weeks' notice. From 1 April it's been reduced by  
13 25 per cent. Given that scenario, you're going to see  
14 a lot less buses, a lot less competition and a lot less  
15 people being able to go to work by bus or even travel  
16 for convenience by bus because they're crippling public  
17 transport.

18 Q. This isn't a public inquiry into government policy. You  
19 say in your statement that there was very little  
20 monitoring of Cardiff Bus in Cardiff.

21 A. Correct.

22 Q. You may not know this, but in fact VOSA carried out  
23 a monitoring exercise in Cardiff at the time the white  
24 services were running; were you aware of that?

25 A. I was aware of that, yes.

1 Q. The results of the exercise, if I can ask you to look at  
2 a document, are in E7, page 597, I believe it is. It's  
3 a VOSA headed paper. This is the outcome of the  
4 monitoring exercise in 2003:

5 "Dear sir, 2 Travel Group plc have complained to the  
6 office of the Traffic Commissioner of experiencing  
7 anti-competitive behaviour from Cardiff Bus on routes  
8 they both operate. As a result of requests from the  
9 traffic area office, monitoring exercises have been  
10 carried out on services operated by both 2 Travel and  
11 Cardiff Bus. They were carried out over a 12 day period  
12 at various locations in Cardiff between 15 June and  
13 16 July. Monitoring reports consisting of 31 pages were  
14 completed and these are enclosed. They show all factual  
15 findings and results. 760 departures were observed. Of  
16 these, 627 related to Cardiff Bus and 133 to 2 Travel.  
17 Of the 627 Cardiff Bus, one failed to operate, one  
18 operated late. Total punctuality, 99.68 per cent.

19 Of the 133 observations on 2 Travel, 91 failed to  
20 operate, 68 per cent; 24 operated late, 18 per cent; 11  
21 operated early, 8 per cent; total punctuality,  
22 5.26 per cent. In addition to these 133, a further 34  
23 were seen to be operating off their registered route.

24 And if you go over the page to 598, just beside the  
25 second hole punch:

1           "Although no anti-competitive behaviour was  
2           witnessed by ourselves, the comparisons have been  
3           compiled to show the closeness of the no frills in  
4           2 Travel services."

5           So you can see that VOSA, when it carried out some  
6           monitoring, found that Cardiff Bus' punctuality was  
7           nearly 100 per cent.

8   A.   Yes, I can see that.

9   Q.   Whereas 2 Travel's punctuality was 5 per cent.

10  A.   There may be contributing factors to that. I give you  
11       an example. If the service is under 10 minutes, then  
12       there's more against them. It's only on services over  
13       10 minutes in frequency that they're very specific. So  
14       as long as you say within 10 minutes, they wouldn't have  
15       any reason to call it into dispute. With regard to  
16       this, to be quite candid with you, I would need the  
17       timetable to make a judgment as to what you're trying to  
18       lead me to. All I can say is that the fact that it was  
19       being carried out on part of the route would need to be  
20       examined as to the timetable because, you know, it's  
21       very difficult to do a proper analysis and speak to you  
22       having considered that. This is just generalisation, as  
23       far as I can see.

24  Q.   You talk about less than 10 minutes. What you're  
25       referring to there is the frequent registrations rule;

1 is that right?

2 A. That's right.

3 Q. So as long as you have six buses an hour, if it's every  
4 10 minutes, you don't have to run to a timetable with  
5 specific minutes?

6 A. Correct.

7 Q. But VOSA can still measure whether those six buses  
8 an hour are running or not?

9 A. Yes. All I need to do is to see the paperwork with it.  
10 There's no paperwork with it.

11 Q. We haven't got the paperwork, I'm sorry. I'm not sure  
12 where it is.

13 THE CHAIRMAN: Mr Jones, what does 99 per cent punctuality  
14 mean? That the buses ran within 10 minutes of their  
15 timetable time?

16 A. Yes. If it's a registration, which I'm sure it was, 10  
17 minutes or less, it just made sure that all those buses  
18 were running within that window, 10 minute window.

19 THE CHAIRMAN: So 5 per cent punctuality, does that mean  
20 that 95 per cent of the buses did not run within the 10  
21 minute window?

22 A. That's what it says, yes. But it's difficult to say  
23 without the actual sheets. This is just a general  
24 analysis. If I had the sheets, I could give you far  
25 better detail.

1 MR WEST: Just to be clear, the Cardiff Bus registrations  
2 would be frequent, so every 10 minutes as you say, but  
3 2 Travel wouldn't be frequent, would it, because they  
4 were not operating six services an hour on any of these  
5 routes?

6 A. Yes.

7 Q. So they had a timetable to run to?

8 A. Correct.

9 Q. And VOSA could measure punctuality against that  
10 timetable?

11 A. What I can say to you is you're trying to tell me it's  
12 exactly the same for them as it is for 2 Travel. That  
13 isn't the case because there is a lot you can do within  
14 the 10-minute window in terms of getting your act  
15 together, whereas if you've got problems outside the  
16 10-minute window and there's disruption, which there has  
17 been in Cardiff for many years, it does have an  
18 influence on the recordings.

19 Q. Even so, it's pretty bad, isn't it? 91 failed to  
20 operate. That's 68.24 per cent.

21 A. Well, all I can do is be honest with you. If I had the  
22 sheets that analyse them, I'd be able to comment, but  
23 it's unfair for me to comment to the tribunal without  
24 having those sheets because this is very much  
25 a generalisation. It says, for example, we were in

1 Canton Corporation. That's a pub. I don't know  
2 whether the Corporation is an official stop for 2  
3 Travel. Only the sheets will tell me that. If it  
4 wasn't, then if I was 2 Travel, I'd be saying to  
5 Miss Thomas, "We're at the wrong stop", but I don't know  
6 because I haven't got the sheets.

7 Q. Well, I'm sorry, I can't show you them because I don't  
8 know where they are myself. But the way VOSA operates  
9 is they do not announce in advance they're carrying out  
10 these monitoring exercises?

11 A. That's correct.

12 Q. They just turn up and, what, sit in the car and watch?

13 A. It depends. Sometimes they have sat on a park bench  
14 enjoying the sunshine. It depends.

15 Q. They do not advertise the fact that they're there?

16 A. No, but I think it's fair to say that if somebody's  
17 at the same place for the same time for quite  
18 a consistent period, that they are noticed.

19 Q. Did you know that 2 Travel had been subject to a Traffic  
20 Commissioner inquiry in August 2004 for not running  
21 scheduled services?

22 A. After seeing this, I wouldn't be a bit surprised.

23 Q. Well, the Traffic Commissioner found that 2 Travel had  
24 failed to operate 30 per cent of their registered  
25 services. That inquiry related to services outside

1 Cardiff, it should be said, in relation to a period  
2 before the white services had started. I can show you  
3 the decision if you'd like to see it. That's what it  
4 says. You say in your statement that the management of  
5 2 Travel was very competent.

6 A. I do.

7 Q. But it isn't competent management of a bus company, is  
8 it, to fail to operate 30 per cent of your registered  
9 services?

10 A. It depends what the circumstances are. The largest plcs  
11 have got into the same difficulty because of  
12 registrations, which have been affected by other  
13 factors. Example, Stagecoach. Example, First Bus.  
14 Example, Go Ahead. They've all been to a traffic court  
15 with a similar problem. Without knowing the exact  
16 details, it's actually difficult to comment.

17 Q. I showed you a minute ago in this report that VOSA say  
18 they didn't see any anti-competitive behaviour. You  
19 yourself weren't operating on these particular routes  
20 at the time, were you?

21 A. We were operating different routes.

22 Q. Were you aware that 2 Travel had taken video footage in  
23 Cardiff in an attempt to prove that there had been  
24 anti-competitive behaviour by the white services?

25 A. Not at the time but I'm aware that they did after --

1 Q. That footage was then shown to the Traffic  
2 Commissioner's clerk -- again, you may not know this --  
3 in November 2004. If you didn't know that, just say you  
4 didn't know it.

5 A. I didn't know it. I don't think it would take much  
6 effect on the traffic, but I think --

7 Q. The Traffic Commissioner's conclusion was that  
8 Cardiff Bus had no case to answer.

9 A. Doesn't surprise me.

10 Q. And the result of that was that the Traffic Commissioner  
11 didn't hold a public inquiry into these matters at the  
12 time.

13 A. Doesn't surprise me.

14 Q. So when you said you were surprised that the Traffic  
15 Commissioner didn't hold a public inquiry into  
16 Cardiff Bus, in fact there was a perfectly good reason  
17 for it?

18 A. The Traffic Commissioner I'm referring to is  
19 Mr Nick Jones, who did hold an inquiry.

20 Q. The Traffic Commissioner --

21 A. Prior to that, I had written to Mr Dixon, and Mr Dixon  
22 said to me in a letter that he would not interfere with  
23 due process in relation to the appeal to the competition  
24 authorities. He would review it afterwards. Mr Dixon  
25 retired after that, so as soon as the decision came out,

1 I wrote to Nick Jones and said: this is the letter from  
2 Mr Dixon. When are you going to hold a public inquiry?

3 Q. At which stage a public inquiry was held into  
4 Cardiff Bus?

5 A. It was.

6 Q. You say that Cardiff Bus was overstaffed and you suggest  
7 that the pay and pensions were over generous at  
8 Cardiff Bus; is that right?

9 A. Well, by industry standards they are.

10 Q. Could I ask you to look at another document. This is in  
11 bundle E12, page 3.

12 THE CHAIRMAN: E12?

13 MR WEST: E12, page 3. It's a memo from Mr Carl Waters, who  
14 was 2 Travel's finance director, and it's the second  
15 paragraph I'm interested in, where it says:

16 "It is clear now the company's cost base is much too  
17 high. A company of this size cannot justify or support  
18 the management director level overhead of nearly  
19 £300,000 per annum, whilst going public has put  
20 a further £100,000 of costs into the company."

21 The executive directors of 2 Travel at this time  
22 were Bev Fowles, David Fowles, Carl Waters, plus  
23 Huw Francis, who was the company secretary. Were you  
24 aware that they were earning nearly £300,000 per annum  
25 between them?

1 A. No, I was not aware of that.

2 Q. If that's evenly divided, it would suggest they were  
3 earning £75,000 gross per annum each. Would that strike  
4 you also as rather generous for a bus company of this  
5 size?

6 A. Um ... I'm just thinking of the time because we've got  
7 to go back a few years.

8 Q. 2003.

9 A. Yes. I would say it was slightly above the industry  
10 average at the time.

11 Q. You say at paragraph 42 of your statement that the  
12 directors of 2 Travel lost all their savings when it  
13 went bust.

14 A. That was my belief.

15 Q. Has your belief changed since then?

16 A. Well, I know that the one director's got up and started  
17 a business again.

18 Q. Is that Mr David Fowles?

19 A. It is. He appears to be doing very well.

20 Q. But two of the other directors were Huw Francis and  
21 Nigel Short Did you know that?

22 A. I know it now. I was aware that Mr Francis was  
23 involved. I wasn't aware of Mr Short's involvement at  
24 that time.

25 Q. Did you know that 2 Travel owned the freehold of its

1 depot in Swansea?

2 A. I was aware of that.

3 Q. Which is next to the Morfa Retail Park?

4 A. It's right next to the Liberty Stadium, yes.

5 Q. And was believed at the time to have development  
6 potential, as you can well imagine?

7 A. Yes, I understand.

8 Q. When 2 Travel was in financial difficulties in 2004, it  
9 was bankrolled by two of its directors, Mr Francis and  
10 Mr Short. Did you know that?

11 A. I know it now, but I didn't know it at the time.

12 Q. And prior to 2 Travel becoming insolvent, Mr Short and  
13 Mr Francis purchased the Swansea depot from the company;  
14 were you aware of that?

15 A. Not at the time, but I have been aware of it since, yes.

16 Q. And they purchased that, they got the land, rather, in  
17 exchange for the funding they had provided to the  
18 company?

19 A. Yes.

20 Q. And they were also both, independently, very wealthy  
21 men?

22 A. Yes.

23 Q. So it's not true to say that when 2 Travel became  
24 insolvent, its directors lost all of their savings, at  
25 least as far as those individuals were concerned?

1 A. I agree. I was referring to Bev, I was, and to his boy,  
2 because I know they were really on their downers.

3 Q. You also mention in your statement that, according to  
4 you, Cardiff Bus won the contract to provide school  
5 buses to Fitzalan School, despite not being the cheapest  
6 tender?

7 A. Correct.

8 Q. But in fact, in awarding contracts, the Local Authority  
9 doesn't have to take account only of price, does it?

10 A. Well, the trouble with the Cardiff Local Authority is  
11 this. Under section 89 of the Transport Act of 1985,  
12 they are supposed to provide competitors with all the  
13 details. Right? I've got more chance of breaking into  
14 Barclays Bank than getting the details from  
15 Cardiff Council, because they just won't give them to  
16 you.

17 Q. Which details are you referring to?

18 A. Well, they tell you exactly where you are as far as  
19 prices are concerned. Under this act, for local service  
20 operation, you are allowed to have all the details of  
21 how much expenditure, public expenditure, is being made,  
22 the highest and the lowest tender and the number of  
23 tenders that go in, which would give competitors an  
24 opportunity to take into account whether they should be  
25 active in that market. Cardiff Council or Cardiff Bus

1           have consistently refused to give us that information,  
2           even though I keep on pointing out it's against the law.

3   Q.   When you say Cardiff Bus was not the cheapest, how do  
4           you know that if you can't get the information?

5   A.   Because I was made aware of it by somebody at the  
6           school.

7   Q.   But as I've said, the Local Authority is not obliged to  
8           take into account only price when awarding the  
9           contracts?

10  A.   I would suggest that they look at the colour of the bus  
11           when they award contracts.

12  Q.   Well, actually, the truth is that other operators had  
13           struggled with this school bus route because of bad  
14           pupil behaviour, which Cardiff Bus had been successful  
15           in improving by the use of things like CCTV. Were you  
16           aware of that?

17  A.   Well, I'm sure that's the spin that's been put on it.  
18           As far as I'm concerned, a contract is a contract and  
19           a very valuable contract like that just happens to be  
20           right next to their depot and it just happens to go past  
21           the depot and come straight back, so the mileage is very  
22           limited. Like I say, it's a very lucrative contract.  
23           I think it's for four buses, if I remember rightly.  
24           I don't take the point that other operators can't run  
25           buses in Cardiff and do exactly the same job. I don't

1 take that at all.

2 Q. But if the position is in fact that Cardiff Bus had had  
3 much better results in terms of bad pupil behaviour,  
4 that would be a perfectly proper ground on which to  
5 award the contract to Cardiff Bus?

6 A. I'm sure the officers have put that spin on it, that's  
7 right.

8 THE CHAIRMAN: Can you answer the question? Just assume  
9 that the premise is right. If bad pupil behaviour was  
10 an issue and if Cardiff Bus had shown they could tackle  
11 it better than others, would that be a legitimate  
12 consideration?

13 A. It would be something that would have to be shared with  
14 the other operators and then we can take that into  
15 account. That has now been shared with other operators.  
16 That's the point. What I want is transparency from  
17 the Council. Never had it, I'm afraid.

18 MR WEST: You suggest in your statement that Cardiff Council  
19 is too close to Cardiff Bus and you have just talked  
20 about the colour of the buses there as well, and I think  
21 you also seem to suggest that the Traffic Commissioner  
22 was too close to Cardiff Bus.

23 A. I think the Traffic Commissioner's too close to the  
24 public sector. I think that can be demonstrated by the  
25 fact that in a recent case I was involved with, we

1 actually discovered under a Freedom of Information Act  
2 request, that he was giving advice to a council who were  
3 trying to take contracts off us and he's supposed to be  
4 an independent arbitrator. So much for independence.

5 Q. I wonder if we could just look at that case very  
6 briefly. It's E11, page 875. It actually starts on  
7 865. So this is a decision of the Traffic Commissioner.

8 A. Correct.

9 Q. Last year, I think it was.

10 A. It was.

11 Q. Into your company. Heart of Wales bus --

12 A. 1 April last year. Appealed successfully on 10 August  
13 last year.

14 Q. We'll look at that in a minute. But the Traffic  
15 Commissioner concluded that you had lost your repute and  
16 you successfully appealed that finding.

17 A. Yes.

18 Q. Can we just look at some of the grounds that were given  
19 at paragraphs 52 to 60, first. Perhaps 56 to 60 is  
20 enough for these reasons. Can I just ask you to read  
21 that. No doubt you've read it before. (Pause).

22 What's recorded here is what the Traffic  
23 Commissioner calls a history of you making personal  
24 attacks on public servants.

25 A. That was his observation, which was appealed

1           successfully. Let me just put you right on this  
2           particular issue. At the moment we have made  
3           a complaint to the senior Traffic Commissioner for the  
4           UK, that's Mrs Bell, on the basis of his actions.  
5           Because in the period between 1 April and 10 August, the  
6           independent Traffic Commissioner was giving free advice  
7           to Councils who were trying to take me off the road.  
8           Free advice.

9   THE CHAIRMAN: This is a bit of a satellite issue, isn't it,  
10           Mr West?

11   MR WEST: It is --

12   THE CHAIRMAN: I think we're into a bit of a satellite issue  
13           here, Mr West, if I may say so.

14   MR WEST: I agree, and I'll be very quick about it. I'm  
15           just going to put two more questions on this particular  
16           subject.

17           On paragraph 88 on page 82, the Traffic Commissioner  
18           says that you refer to the Rhondda Cynon Taff County  
19           Borough Council, which is known locally as  
20           a dysfunctional Local Authority:

21           "Later, he admitted ...(reading to the words)... his  
22           own personal views. I accept he might perceive the  
23           Local Authority is dysfunctional. However, the word  
24           'dysfunctional' more appropriately describes Clayton  
25           Jones himself."

1 THE CHAIRMAN: You're not too keen on public authorities,  
2 are you, Mr Jones?

3 A. I wouldn't say that, sir. I ask public authorities to  
4 act in a proper, transparent way. When they do not, I will  
5 speak out. When the Traffic Commissioner goes behind my  
6 back, giving free information to this very same council  
7 before an appeal, I do feel I've been taken for a ride  
8 by a certain Nick Jones. Yes, I do.

9 THE CHAIRMAN: I asked for that.

10 MR WEST: On appeal, if you go forward to page 889 -- this  
11 is where you were successful on appeal -- you see there  
12 under paragraph 2, a long list of cases in which you've  
13 been involved before the Traffic Commissioner. And then  
14 over the page again, 891, paragraphs 3 to 6. Hearing  
15 this appeal, you were represented by Mr Rhys Thomas of  
16 counsel:

17 "The first point related to the Traffic  
18 Commissioner's approach to the history of the licences  
19 involving Clayton Jones. Mr Thomas submitted that too  
20 much weight had been attached ...(reading to the  
21 words)... relevant to my present deliberations insofar  
22 as it goes to previous warnings, education and advice  
23 received ...(reading to the words)... approach taken by  
24 the transport tribunal in Heart of Wales Bus and Coach  
25 Limited. As a context and background for the Traffic

1 Commissioner's considerations, we find nothing  
2 objectionable in his finding ...(reading to the  
3 words)... consultant."

4 So you were unsuccessful on that point, in any case.

5 A. Well, I was successful in selling the business, so  
6 I think that gives me some credit. My problem with the  
7 Traffic Commissioner, as I'm telling you, is that he's  
8 not a straight man. He is not a straight man. That is  
9 the problem. He gives independent advice to people that  
10 are acting against your best interests. Now, no  
11 adjudicator should do that, and he did it and I've got  
12 the proof in an e-mail from the Freedom of Information  
13 Act, whether he likes it or not.

14 Q. But in your statement, Mr Jones, you make allegations of  
15 impropriety about the relationship between Cardiff Bus  
16 and the Council and the Traffic Commissioner. The fact  
17 is that you have a long history of making allegations of  
18 that type and, as can be seen here, a long history of  
19 findings of incompetence and poor management.

20 A. Shall I just repeat myself? If I've got transparency,  
21 I have no problems. The Traffic Commissioner and his  
22 officers have not been transparent. I have proof of  
23 that. They've been negligent. I have proof of that.  
24 They have negligence against Rhondda Cynon Taff. I have  
25 proof of that. They spent £60,000 of taxpayers' money,

1 to try and get a criminal conviction against me. And  
2 when it came to the court case, they didn't even bother  
3 to turn up. Now, I know these people and they know me,  
4 and I can tell you I've done everything transparently  
5 myself. That's why I'm here today.

6 THE CHAIRMAN: Can we go on to the next point?

7 MR WEST: The next question is my last question to you,  
8 Mr Jones. You are seeking to support in your evidence,  
9 2 Travel's case that it was white services which  
10 resulted in the demise of the company. But actually,  
11 that's a matter about which you know nothing whatsoever.

12 A. That is untrue.

13 MR WEST: That's my last question, thank you.

14 Re-examination by MR BOWSHER

15 MR BOWSHER: You say you sold your business. Was that sold  
16 as a going concern?

17 A. It was very much a going concern.

18 Q. Is that business still a going concern within another  
19 business?

20 A. No.

21 Q. Sir, I'm conscious that you might have wanted to break  
22 for the transcript writers.

23 THE CHAIRMAN: Yes.

24 (3.07 pm)

25 (A short break)

1 (3.17 pm)

2 MR BOWSHER: You were being asked some questions, Mr Jones,  
3 about preferences for particular buses and it was being  
4 suggested to you that people tend to prefer the first  
5 bus that comes along. Would it be your experience that  
6 if there is a timetable, people plan their journey  
7 around timetables for those buses?

8 A. It depends what routes. If it's a high frequency, no,  
9 but if it's a low frequency, yes.

10 Q. Is it your experience that it is possible to, over time,  
11 build a preference or a loyalty for particular buses or  
12 particular drivers?

13 A. Yes, definitely.

14 Q. And so that if that sort of loyalty is built up, would  
15 you expect customers to plan their journey around that  
16 loyalty, around that preference?

17 A. That's exactly what happened with my business, it was  
18 built around loyalty. We put the same drivers on the  
19 same routes. You know, people stopped outside their  
20 house, got to know them very well, and that sort of  
21 loyalty is something that's rewarded by people being  
22 more anxious to catch your buses than anybody else's.

23 Q. If you're able to build up that loyalty, are you able to  
24 break down the first come, first served effect of --

25 A. Most definitely. The problem was concessionary fares

1 but with the cash payments, definitely, and my  
2 experience of concessionary fares has been somewhat  
3 different. People will catch the first bus.

4 Q. Perhaps an unfair question, but do you have any sense  
5 how long it takes to build up that kind of preference,  
6 that kind of loyalty?

7 A. A very short time. Perhaps six months to a year.  
8 In the Cullen Valley we have routes that every  
9 driver's on every day of the week, six days a week, and  
10 the loyalty there built up in less than a year,  
11 probably, where we were in a very dominant position.

12 THE CHAIRMAN: So the key to it is having the same driver  
13 day after day after day?

14 A. Absolutely correct, sir.

15 MR BOWSHER: Thank you. The next question I was going to  
16 ask is about this -- I'm not sure whether you'll have  
17 familiarity with the rules on this, but it's this  
18 document E7, page 597, you were being asked about, the  
19 VOSA report. Maybe this comes to a -- this question  
20 doesn't get anywhere, but are you familiar with the  
21 different rules that would apply to ascertaining whether  
22 a service is punctual, depending on whether it is  
23 a frequent service or a timetabled service?

24 A. I am.

25 Q. Could you explain what those differences are?

1 A. Well, if it's in a ten minute window, it doesn't matter,  
2 really, what time the bus comes because there's  
3 recorders coming. Whereas, if it's booked in at, shall  
4 we say, 21 minutes past the hour at Westgate Street and  
5 it comes in at 22 minutes or 23 minutes past the hour,  
6 you're out the window of tolerance. The window of  
7 tolerance is 5 minutes late, 1 minute early. So, you  
8 know, the conditions we have in South Wales with  
9 traffic, it's quite easy to fall foul of the rules, and  
10 indeed many companies have, not only Cardiff, but  
11 elsewhere as well.

12 Q. So if you've registered six regular buses in an hour,  
13 how do you determine whether those buses are on time or  
14 not?

15 A. You send out a monitor, your own monitor to check.

16 Q. What's the reference point for them --

17 A. That's why I haven't got the sheets, that's why I keep  
18 trying to explain to you. Without the background  
19 sheets, it's difficult to know how Sian Thomas has  
20 done ... All you've got here is half a story. The real  
21 story is in the sheets. If I had the sheets, I would be  
22 able to tell you.

23 Q. If you're registered as a frequent service, is there any  
24 limit to how many buses you can operate in an hour?

25 A. No.

1 Q. You were being asked some questions about the way in  
2 which one would make a business such as this succeed in  
3 Cardiff and some questions about the financial position  
4 of 2 Travel. Your response, I think, was: well, you're  
5 familiar with the tactics that were being used. Could  
6 you explain what you mean? What are the tactics which  
7 you would use in order to make a service such as this  
8 work in Cardiff?

9 A. Well, it's the use of economies of scale, which means  
10 you have got to have buses on the road for most of the  
11 day. So, for example, a school which starts, say, at  
12 8.30, from 8.30 until 3.30, you would use that bus on  
13 local services. 3.30, take the children back home.  
14 After you have dropped them back, come back and finish  
15 the service. In the meantime, you'd have a reduced  
16 service. You'd have to continue to provide some sort of  
17 service, but a reduced service. But the overall  
18 economies of scale would result in you making substantial  
19 inroads to any competitor's cash pot.

20 Q. Right. And the observations you made about the loyalty  
21 of people on restricted income, you referred to Ely, but  
22 would you regard those comments as applying equally to  
23 the people at the end of each of the four routes that  
24 2 Travel were running?

25 A. Definitely.

1 Q. I have no further questions. Does the tribunal have any  
2 further questions?

3 Questions from the Tribunal

4 MR FREEMAN: Mr Jones, I don't want to go down an avenue  
5 we've decided not to go down, but the case where our  
6 attention was drawn related to the Traffic Commissioner  
7 who did hold a public meeting into Cardiff Bus. Do your  
8 strictures about Traffic Commissioners apply to his  
9 predecessors as well?

10 A. No, I got on very well -- I've even been to private  
11 parties with the other commissioners, to be honest with  
12 you. I don't think I'll be invited to this one.

13 THE CHAIRMAN: I have no questions, thank you very much.  
14 Mr Bowsher.

15 MR BOWSHER: Sorry, I'm just being asked something. May the  
16 witness be released?

17 THE CHAIRMAN: He may.

18 (The witness withdrew)

19 MR BOWSHER: Our next witness, I think, is Mr Bev Fowles.

20 MR BEV FOWLES (sworn)

21 Examination-in-chief by MR BOWSHER

22 MR BOWSHER: Mr Fowles, you'll need, I think to start with,  
23 the files labelled C1 and C2. If you have C1, tab 2,  
24 that's the first statement I wanted to take you to.  
25 What are your full names?

1 A. David Beverley Fowles.

2 Q. Your address?

3 A. [Address given].

4 Q. I think in this case, you're generally referred to as

5 Bev Fowles; is that how you're commonly known?

6 A. There's not many that want to be known as Beverley, as

7 it happens, so Bev, yes.

8 Q. This statement, there's a lot of pages in this section,

9 but your words, I think, run up to page 32. We've got

10 lots of page numbers. 109 is on the bottom right and

11 140 is on the bottom right. On page 140, is that your

12 signature, dated 23 September 2011?

13 A. It is.

14 Q. And are the contents of that statement true?

15 A. To the best of my knowledge, yes.

16 Q. Have you had a chance to re-read it before giving

17 evidence today?

18 A. Yes.

19 Q. Any corrections or anything you wanted to --

20 A. Nothing at all.

21 Q. Then in C2, at tab 11, page 1, that's the beginning of

22 a statement with your name on. That runs through to

23 page 22. We see what seems to be your signature again,

24 dated 26 January. Would that be right?

25 A. That's correct.

1 Q. Again, is there any correction you wanted to make to  
2 that?

3 A. None at all.

4 Q. So are the contents of that true as well?

5 A. Yes, as far as I'm aware.

6 Q. Could I just ask one question. It may help if I just  
7 ask this question about the second statement, page 17.  
8 It may just be because I was not understanding it  
9 correctly in reading this last night. This was about  
10 additional drivers required, in particular, I think,  
11 in the context of the 258 service. That's the service  
12 that you registered but never ran; is that correct?

13 A. That's correct.

14 Q. And that's a service that runs -- it's the only one of  
15 the five services that would have run north south, as it  
16 were, rather than east west?

17 A. Mm-hm.

18 Q. When you started the in-fill business, when had you  
19 intended that the 258 service might start up?

20 A. It was always envisaged it would start as the others  
21 did. However, time constraints against us with bringing  
22 in driving staff meant that we had to notify the Traffic  
23 Commissioner that we wouldn't start it until November.

24 Q. Was there any point where you thought you might be able  
25 to do that earlier than that?

1 A. We had hoped to do it earlier.

2 Q. Right. Could you just explain -- you describe these  
3 additional drivers and at the top of 66, page 18 --  
4 paragraph 66, you say:

5 "I would estimate that an additional three drivers  
6 at the most would have been sufficient to enable us to  
7 operate 100 per cent of the scheduled services,  
8 including the 258, possibly only an additional two."

9 And I wasn't quite sure how you were -- I wasn't  
10 going to read on the rest of that paragraph. How is it  
11 that you envisaged that these additional drivers would  
12 make the business work? How do you come up with the  
13 number of three drivers or possibly two? What's the  
14 calculation there?

15 A. There were two vehicles on there. There was obviously  
16 spare capacity. When you schedule drivers into  
17 a working rota, it usually throws up some spare  
18 capacity, otherwise you would be on the bare bones, as  
19 it were. So there's usually spare capacity in a rota.  
20 It all depends then, how much of the spare capacity can  
21 be utilised, hence 2/3. Three drivers would have been  
22 possibly an overkill if the rota had spare capacity on  
23 it, say 0.6, 0.7 per cent spare capacity, in which case  
24 you could have utilised that 0.6, 0.7, and you wouldn't  
25 therefore have needed three drivers, you would just have



1 Q. When it began, 2 Travel was primarily a coach company;  
2 is that right?

3 A. That's right.

4 Q. Doing coach tours and so on?

5 A. Yes.

6 Q. But it also began to win some school bus contracts?

7 A. It had some school bus contracts to start with when we  
8 purchased the original Capital Coaches in Cwmbran, it  
9 had some school contracts. In fact, the company was  
10 based on school contracts and also did private hire  
11 tours, et cetera.

12 Q. And although we refer to them as school buses, it's  
13 right, is it, that usually you used coaches to perform  
14 these services, or was it buses?

15 A. It was coaches at that particular time when we purchased  
16 the company, there were no buses there.

17 Q. And school contracts generally were performed by  
18 coaches; is that right?

19 A. In that area, yes.

20 Q. Except Cardiff was different, was it?

21 A. Cardiff was different.

22 Q. Because the Local Authority allowed you to use buses?

23 A. They allowed at the time, when we purchased Capital,  
24 I think there was probably -- the major operator of  
25 school contracts would have been Cardiff Bus anyway. So

1           you know, yes, they did permit buses.

2   Q.   Your first school bus contracts were won by 2 Travel,  
3           that is in Cardiff, in about September of 2002?

4   A.   That's correct.

5   Q.   Prior to that, your operations had been based outside  
6           Cardiff and other parts of South Wales?

7   A.   Yes.

8   Q.   Such as Swansea, Neath, Port Talbot, Carmarthen and so  
9           on?

10   A.   Yes.

11   Q.   But even in 2002 you were having some difficulties  
12           performing these contracts with the Local Authorities;  
13           is that right?

14   A.   I wouldn't say we were having some problems.  There  
15           weren't many problems in 2002.

16   Q.   Can I ask you to look at bundle E2, page 246.  This is  
17           in September of 2002 and this is a complaint from the  
18           City and County of Swansea that 2 Travel had been  
19           operating one particular school bus contract using  
20           a vehicle well over the 20-year age limit.  Is that  
21           right?

22   A.   That's correct, yes.

23   Q.   Then if you go forward to page 274, a month later  
24           in October 2002, City and County finds that again you've  
25           been using vehicles over 20 years old and issues the

1 company with a final warning.

2 A. That's correct.

3 Q. Then page 250. This is Carmarthenshire County Council,  
4 and they say on the second paragraph:

5 "I am concerned at the high number of incidents  
6 which have had to be brought to your attention during  
7 the first week of operations since the commencement of  
8 the new school year. You will recall there were various  
9 issues which were raised during June and July of this  
10 year which were attributed to the settling down period.  
11 Unfortunately, some of these continue to appear since  
12 4 September, particularly in regard to the late  
13 appearance of your vehicles to commence journeys."

14 So you were also having some difficulties in  
15 Carmarthen.

16 A. I think most people have difficulties in the first  
17 fortnight of a school term.

18 Q. Why is that?

19 A. Local Education Authorities tend not to know how many  
20 schoolchildren there are available, so there's  
21 a tendency that the contracts that they've -- or the  
22 numbers of seats that they've placed in being, often  
23 aren't sufficient.

24 Q. Then if you could look at page 272, this is a different  
25 Local Authority, it's Neath Port Talbot:

1           "As you're aware, a number of surveys conducted  
2           ...(reading to the words)... In accordance with the  
3           council's conditions of contract schedule A, please  
4           submit a credit note or deduct the following amounts."

5           The first point:

6           "Bus arrived at school at 8.50 instead of 8.40,  
7           18 minutes late. 2. Journey from Neath to ...(reading  
8           to the words)... failed to operate [under 3]. Did not  
9           depart Neath, Victoria Gardens until ...(reading to the  
10          words)... 20 minutes late. 4. Failed to display the  
11          route number."

12          So also some operational difficulties recorded there  
13          in Neath Port Talbot; yes?

14        A. Yes. You know, these are of a pretty minor nature, not  
15          displaying the route number.

16        THE CHAIRMAN: Are these all school contracts or are they --

17        A. No, some of them are local service registrations as  
18          well, sir.

19        THE CHAIRMAN: The times don't look like school contracts.

20        A. No, no.

21        MR WEST: Then forward at page 276.

22        A. And again we're talking about the early part of the  
23          term, I think.

24        Q. Neath Port Talbot again:

25          "I have received numerous reports regarding apparent

1           contravention of contracts at the above school during  
2           the month of September."

3           I won't try and pronounce the name of the school.

4   THE CHAIRMAN:   Oh go on!

5   MR WEST:   Then 283, later in October, again the same school:

6           "Various problems involving the operation of the  
7           above school contract since the start of term. A  
8           considerable amount of time has been wasted by my staff  
9           handling so many telephone complaints. Following more  
10          complaints from parents and the school because the  
11          afternoon journey was 90 minutes late ...(reading to the  
12          words)... change of operator. As a result, I am writing  
13          to you to terminate this contract."

14          So you actually lost that contract in October 2002?

15   A.   Mm-hm.

16   Q.   And the view was taken within the business at around  
17          this time in 2002 that it should seek to move away from  
18          tour work, certainly with coaches, more towards buses?

19   A.   Yes. It had been a very difficult time for tours in the  
20          early part of 2000. Foot and Mouth, which devastated  
21          incoming tourism to the country, and quite clearly,  
22          we were heavily committed at that time to tour work, but  
23          the decision to come out of the tour business was taken.

24   Q.   And 2 Travel then floated on the alternative investment  
25          market in January of 2003?

1 A. That's correct.

2 Q. And in preparation for the flotation, there were  
3 a number of documents produced, including a working  
4 capital report from Solomon Hare and a prospectus?

5 A. Yes.

6 Q. The Solomon Hare working capital report is at E3,  
7 page 6. If you go forwards to page 18, this is the  
8 trading projections which were being made by  
9 Solomon Hare for 2003/2004. You'll see there's a table  
10 there with some numbers in it. If you look in the  
11 column for year ended 31 August 2003, you'll see that  
12 they were projecting a profit before taxation of  
13 £295,000, a dividend of £100,000, leaving £195,000  
14 retained profits. At paragraph 4.3, it's explained that  
15 flotation costs of £250,000 are also reflected in the  
16 profit and loss account in 2002/03.

17 So these figures were after the flotation costs.  
18 But 2 Travel didn't make a profit of £295,000 in 2003,  
19 as it turned out?

20 A. No.

21 Q. In fact, it made a loss of £996,000?

22 A. I don't have those papers with me. I'll take it that  
23 you have.

24 Q. We'll look at those when we get there. The Cardiff  
25 in-fill routes didn't begin until April 2004, whereas

1           2 Travel's accounts year finished in August; year ending  
2           31 August?

3   A.   Yes.

4   Q.   So the results for the year 2003 reflected a period  
5           which was certainly more than six months before the  
6           white services commenced.

7   A.   That's right.

8   Q.   So well before the start of the infringement in this  
9           case, 2 Travel was already failing to live up to the  
10          predictions which had been made for the business'  
11          performance?

12  A.   According to Solomon Hare, yes.

13  Q.   Based, no doubt, on information provided by the  
14          management of the company?

15  A.   Correct.

16  Q.   If you go back to page 12 of this document, that's where  
17          it deals with cash flow projections.  It's  
18          paragraph 1.15:

19                "Projected peak overdraft requirement during the  
20                period following flotation is £252,000 in February 2004.  
21                This does not take full account of the additional  
22                factoring facility open to the company.  In February 04,  
23                2 Travel should be able to draw down a further £319,000  
24                based on a 75 per cent advance against trade debtors  
25                which would provide headroom of £67,000 before taking

1 account of current trading and additional costs from  
2 below."

3 A. Mm-hm.

4 Q. So they say that your factoring facility is sufficient  
5 to meet your cash flow requirements.

6 A. Yes. They would have had to ascertain that before we  
7 could have floated.

8 Q. But again, that did not turn out to be the case in fact?

9 A. No, there were extraordinary costs during the year of  
10 2003 and we didn't raise as much money on the Stock  
11 Exchange as we thought we would.

12 Q. The prospectus for the flotation is forward at page 166  
13 in this same bundle. Paragraph 10 explains the reasons  
14 for the placing on page 177.

15 THE CHAIRMAN: Just bear with us. You've prepared this so  
16 you know where you're going and we're catching up with  
17 you. Thank you, Mr West.

18 MR WEST: Reasons for the placing:

19 "The company has recently raised approximately  
20 £148,000 ...(reading to the words)... investors. These  
21 funds, together with the net proceeds of placing  
22 £556,000 and the loan stock, will be used primarily to  
23 fund existing and anticipated working capital  
24 requirements to assist in the purchase of --"

25 THE CHAIRMAN: Sorry, where are we?

1 MR WEST: This is paragraph 10, page 177:

2 " The freehold reversion in respect of the property  
3 referred to in the Swansea lease expanded vehicle fleet,  
4 as well as financing the two small acquisition  
5 opportunities."

6 So the reasons being given there for why you needed  
7 the money were working capital, purchase of the Swansea  
8 freehold, expanding the fleet and the two small  
9 acquisition opportunities. Just to clarify, the  
10 acquisition opportunities were the purchase of the CTC,  
11 the Coach Travel Centre, and a company called Hawkes,  
12 I believe it was?

13 A. Yes.

14 Q. Of those two, the CTC acquisition proceeded but the  
15 Hawkes one did not, I believe; is that right?

16 A. It did not.

17 Q. And paragraph 11 on the same page:

18 "The company is proposing to raise approximately  
19 £556,000 net of estimated expenses to £300,000."

20 You said you didn't raise as much as you had  
21 anticipated?

22 A. No.

23 Q. How much did the company raise in the event?

24 A. I recollect it was approximately £200,000 short.

25 Q. You also raised £600,000 from the loan stock?

1 A. Yes.

2 Q. That's referred to at page 198 of this bundle. Right at  
3 the bottom of that page, (i):

4 "On 9 January 2003, the company created £600,000  
5 nominal value of unsecured 8 per cent convertible loan  
6 stock, subject to a number of terms."

7 So this was a loan which was convertible at maturity  
8 into shares in the company; is that right?

9 A. At their choice.

10 Q. At their choice. And it was 8 per cent stock, which  
11 presumably means it paid 8 per cent interest per annum?

12 A. That's correct.

13 Q. 8 per cent of £600,000 is -- I think it's something like  
14 £48,000; does that sound right?

15 A. Mm.

16 Q. So by reason of the £600,000 loan stock, there's an  
17 additional £48,000 interest liability went into the  
18 company for a year?

19 A. Yes.

20 Q. Then page 171 of this document sets out how much of the  
21 company was floated, placing statistics, and the  
22 relevant one is the fourth line:

23 "Percentage for the enlarged share capital, the  
24 subject of placing, 31 per cent."

25 So it was about 31 per cent of the company was

1 floated?

2 A. Yes, that's right.

3 Q. And the balance of 69 per cent was, in broad terms,  
4 divided between yourself and Mr Francis?

5 A. Mr Francis and I retained 50 per cent between us.

6 Q. So who had the other 11?

7 A. I don't know.

8 Q. But 50 per cent was held, you said, between yourself and  
9 Mr Francis?

10 A. Exactly, we had 50 per cent of the shares.

11 Q. So you remained the largest shareholders?

12 A. That's right.

13 Q. Then at page 168, the directors of the company are set  
14 out. Sir Richard Needham was a non-executive chairman,  
15 and he was presumably paid a fee for acting as such, was  
16 he?

17 A. He was.

18 Q. Then you, your son David, Carl Waters, the finance  
19 director, Nigel Short, the non-executive director, and  
20 the NOMAD, nominated adviser, City Financial Associates.

21 A. That's right.

22 Q. They were presumably also paid a fee, were they?

23 A. They were.

24 Q. And the loan stock holder, which I think is a company  
25 called VCT, were entitled under the loan stock agreement

1 to nominate another non-executive director; is that  
2 right?

3 A. That's right.

4 Q. Which in the event was a company called Mentor?

5 A. Correct.

6 Q. Who were presumably also entitled to a fee?

7 A. They were.

8 Q. If you go back to the working capital report on page 26  
9 of this bundle, paragraph 4.60:

10 "Overhead costs include telephone expenses,  
11 equipment rental and advertising. Amongst other things,  
12 these expenses are forecast to include, primarily due to  
13 the inclusion of a chairman and two non-executive  
14 directors, and other public limited company expenses,  
15 which will be prorated to £50,000 this year."

16 Then if you look down at 4.64, they explain the  
17 proration by saying that the public limited company  
18 costs of non-executive directors are scheduled to be  
19 appointed halfway through. So presumably as an annual  
20 figure it would be £100,000, not 50, for these  
21 non-executive directors and other public company costs?

22 A. Assuming the costs for remaining in flotation were  
23 higher than £100,000 a year.

24 Q. And that included the non-executive directors, did it?

25 A. Yes.

1 Q. So as a result of the flotation, you had £100,000 of plc  
2 costs --

3 A. Can I just qualify that? In the first year they were  
4 well in advance of £100,000 because of the fee to the  
5 NOMAD and the CFA. After that, they might well have  
6 been around about 100K.

7 Q. Plus the £48,000 of loan stock interest?

8 A. Yes.

9 THE CHAIRMAN: So 100K for what in the first year,  
10 non-executive directors' fee?

11 A. No, 100K would have been the costs to membership of the  
12 Stock Exchange, the non-executive directors, fees to the  
13 NOMAD, et cetera. But in the first year, there was an  
14 introductory fee to AIM from the NOMAD which was far in  
15 excess of £100,000.

16 MR WEST: As far as the new shareholders were concerned, the  
17 holders of the 38 per cent which were floated, obviously  
18 there was no question of paying them interest, but they  
19 would nevertheless expect a return on their investment?

20 A. Most shareholders do.

21 Q. In the form of growth in 2 Travel as a company?

22 A. Yes.

23 THE CHAIRMAN: And dividends, presumably?

24 A. Dividends.

25 MR WEST: We saw a minute ago what the intention had been

1 for the proceeds of the flotation. In terms of what the  
2 proceeds were actually spent on, it's true that 2 Travel  
3 acquired the freehold of the Swansea depot in June 2003  
4 as the prospectus had suggested.

5 A. Yes.

6 Q. That was acquired partly with cash from the flotation  
7 and partly using a mortgage or bank loan?

8 A. Yes.

9 Q. And I think it's right that it was £300,000 of cash and  
10 a bank loan of £350,000, but correct me if that's not  
11 right.

12 A. I don't recollect the figures, but I'll take your word  
13 for it.

14 Q. And CTC, one of the two acquisitions, the one that  
15 actually proceeded, was purchased for £210,000; is that  
16 right?

17 A. Yes, that's right.

18 Q. Hawkes wasn't purchased, as you've said.

19 A. No.

20 Q. The prospectus also referred to expanding the fleet  
21 using the proceeds and, in fact, the fleet was expanded  
22 in 2003, wasn't it?

23 A. It was.

24 Q. But all of the new vehicles were purchased on HP, on  
25 hire purchase; is that right?

1 A. Most of them would have been purchased on HP, yes.

2 Q. So in fact, the proceeds of the flotation were not used  
3 in the main to acquire vehicles, as had been  
4 contemplated?

5 A. Well, you did have to put deposits down, so yes, the  
6 deposits were paid under cash.

7 Q. But the acquisition of the new vehicles on HP meant,  
8 of course, that 2 Travel would be liable for the ongoing  
9 financing costs?

10 A. Mm-hm.

11 Q. In a way that wouldn't have been the case if the  
12 vehicles had been purchased outright?

13 A. I think it was always the intention that some would have  
14 been purchased via HP.

15 Q. And in the event of 2 Travel defaulting on the HP  
16 agreements, the vehicles could be repossessed by the  
17 finance companies?

18 A. That's the case.

19 Q. Whilst we're in this working capital report, if you  
20 could look at paragraph 2.5 on page 16, it says there:  
21 "2 Travel has 31 vehicles dedicated to bus contract  
22 work and tendered local bus routes. That mostly  
23 includes undertaking daily school runs for Local  
24 Authorities and other customers, which equates to about  
25 42 per cent of turnover. Contracts are awarded to 2TC

1 for periods of three to five years ...(reading to the  
2 words)... and involves up to 16 vehicles a day. Bus  
3 services work mostly represents in-fill work, which has  
4 been developed by 2TC to work around its Local Authority  
5 contracts."

6 So you'll see the reference there to Gorseinon  
7 College.

8 A. Mm-hm.

9 Q. There's another reference to that at paragraph 7.11 on  
10 page 37 of the same document:

11 "The largest individual contract Gorseinon College,  
12 [this is 7.11], which was originally awarded for five  
13 years, is due for review in summer 2003. Turnover from  
14 this contract is expected to exceed £220,000, generating  
15 £73,000 profit based on 33 per cent estimated average  
16 margin. Management are confident of being re-awarded  
17 the work because of Bev's relationship with the college  
18 and also because there are few operators in Swansea  
19 large enough to undertake a contract of this size and  
20 nature. The company should also have a pricing  
21 advantage in that the area served adjoins other 2TC  
22 route scheduling."

23 In fact, however, the contract wasn't awarded to  
24 2 Travel again on renewal in summer 2003, was it?

25 A. No, it wasn't.

1 Q. And we can see that from this same bundle at page 628,  
2 from Diamond Holidays. This is to Huw Francis:

3 "I refer to our recent discussions regarding the  
4 concerns that have been expressed over your company's  
5 poor performance ...(reading to the words)... As  
6 a result, I am writing to confirm our decision. We are  
7 terminating all our current arrangements with your  
8 company. Please treat this letter as formal notice of  
9 termination ...(reading to the words)... sadly, there  
10 has been no improvement and this has jeopardised our  
11 relationship and contract with the college. Recent  
12 experience on the college routes during important  
13 student A Level exams was totally unacceptable and the  
14 college has complained extensively about the level of  
15 service provided."

16 THE CHAIRMAN: Were you subcontracting the Gorseinon  
17 contract?

18 A. We were, yes.

19 THE CHAIRMAN: So Diamond were the main contractors?

20 A. And using their vehicles.

21 MR WEST: But you lost the contract because of poor  
22 performance.

23 A. We lost the contract because they decided that it was  
24 coming up for renewal, they were getting rid of the  
25 vehicles and -- well, they went for it themselves and

1           won it themselves.

2   Q.   But your prediction, as given to Solomon Hare, that this  
3       contract would be renewed, turned out to be  
4       over-optimistic?

5   A.   You could look at it that way, yes.  I mean, this was  
6       another business that had made a decision to undertake  
7       the work themselves.

8   Q.   It wasn't just that, was it, because they weren't  
9       satisfied that your performance was satisfactory?

10  A.   That's what they said, yes.

11  THE CHAIRMAN:  Could you just pause for a moment?  What was  
12       the date of the document we have, which includes page 16  
13       and page 37, working capital report?  3 February 2003 is  
14       the date I can see on page 6 at the top.

15  MR WEST:  It's dated January 2003 at the top of the page on  
16       page 7.

17  THE CHAIRMAN:  Okay.  So it's the cusp of January  
18       and February.

19  MR WEST:  Then at page 9, 14 January.

20  THE CHAIRMAN:  Yes.  So when we look at page 628 in the  
21       second paragraph, "Diamond refer to the level of  
22       performance over the last 12 months as being far from  
23       satisfactory", had there been discussions about that  
24       being far from satisfactory over the last 12 months?

25  A.   There had been a meeting whereby we had commented about

1 the quality of the vehicles that we were expected to use  
2 on it, which were their vehicles. It hadn't gone any  
3 further than that. We were quite surprised to receive  
4 this letter.

5 THE CHAIRMAN: Right.

6 A. But by that time, they had obviously decided on  
7 a different strategy.

8 MR WEST: The loss of this contract would cost 2 Travel over  
9 £200,000 a year?

10 A. That's right.

11 Q. And again, this is well before the start of the  
12 infringement in Cardiff; this is July 2003?

13 A. That's right.

14 Q. In February 2003, Cardiff Bus offered 2 Travel the  
15 opportunity to run the number 88 and 89 services on  
16 a subcontracted basis. I can show you a document if it  
17 helps.

18 A. No, it's all right, I accept that.

19 Q. So that was in February 2003. 2 Travel decided to take  
20 up that offer.

21 A. Yes.

22 Q. And I was discussing this contract with Clayton Jones,  
23 as you may have heard. This is the route from Barry to  
24 Cardiff via Llandough Hospital.

25 A. Mm-hm.

1 Q. And in the event, 2 Travel's performance on that  
2 contract also fell well below the required standard, did  
3 it not?

4 A. Cardiff Bus notified us of some incidents, yes.

5 Q. Again, I wonder if we could look at a couple of those.  
6 One is at page 509 of the same bundle, E3. This is  
7 a letter to Mr Peter Heath, who is of Cardiff Bus,  
8 of course, the contract holder, who simply subcontracted  
9 to you. The Vale of Glamorgan Council says:

10 "It has come to my attention that numerous  
11 complaints have been received with regard to the  
12 non-operation of various journeys on the above service  
13 that your company is currently contracted to operate.  
14 I note you have subcontracted the services to  
15 2 Travel Group. However, it is with your company that  
16 we have the contract and I must therefore warn you that  
17 this authority will not accept poor standards in the  
18 operation of its supported bus services. The current  
19 level and standard is unacceptable."

20 So they were unhappy with your level of performance.

21 A. Yes, they were. Prior to that, they'd been unhappy with  
22 Cardiff Bus's performance, which was one of the reasons  
23 why it was subcontracted.

24 Q. Then 544, somewhat later, this time in June on the same  
25 route, page 544. This is an e-mail from Kerry Edwards,

1           again of the Vale of Glamorgan Council, to, it looks  
2           like Peter Heath again:

3           "Just had a complainant come in to see me in person  
4           ...(reading to the words)... [This is on service 88  
5           again] ...(reading to the words)... Wednesday failed to  
6           operate. In fact, I am led to believe there was only  
7           one vehicle being operated on the above evenings  
8           ...(reading to the words)... I would prefer to give him  
9           the facts as opposed to what 2 Travel may think I want  
10          to hear."

11          That suggests, doesn't it, Mr Fowles, that  
12          the Council had rather lost trust in 2 Travel by this  
13          stage?

14   A.   There was obviously a failure in that week and there was  
15          obviously a vociferous complainant.

16   Q.   But it wasn't just in that week, was it? If we look at  
17          page 616 of the same bundle:

18          "Please note the following journeys failed to  
19          operate in the month of June."

20          And we have a list there of another five or six  
21          services which failed to operate in June. So the  
22          problem hadn't been resolved, had it?

23   A.   No.

24   Q.   And then if you go forward to 707, practically the end  
25          of the bundle, this is now in July, this refers to

1 a meeting between David Fowles and the Vale of Glamorgan  
2 Council:

3 "Thank you for meeting myself and my transportation  
4 officers yesterday. We have carefully considered what  
5 you had to say in respect of your operation and  
6 performance. We have also carefully considered the  
7 content of your letter. As a consequence, I have  
8 decided to issue you with a formal final warning for  
9 services 88 and 89 rather than withdraw at this stage  
10 the contracts from you."

11 So you had a formal final warning in July.

12 A. Mm-hm.

13 Q. And this contract was due to expire in November; that's  
14 right, isn't it?

15 A. I think so, yes.

16 Q. It was a nine-month contract, starting in February. Can  
17 you have a look at E4.

18 THE CHAIRMAN: Choose your time, Mr West.

19 MR WEST: I'll just finish this route 88 and 89 point.

20 Page 666. This is a memo from Carl Waters, the  
21 finance director, to you, amongst others:

22 "Cardiff operations, 7 October. After several  
23 visits to Cardiff ...(reading to the words)... it is  
24 clear we are struggling enormously to run the depot.  
25 The quality of service we are providing is nowhere near

1 acceptable. We are getting a very bad name with all  
2 customers served. Vale of Glamorgan has advised that  
3 the last eight journeys on the 88/89 services have not  
4 run for the last week or so. In addition, the 1630 has  
5 not run on several occasions. They believe, probably  
6 correctly, the vehicle and driver have been used on  
7 schools. Also, the 539 service ...(reading to the  
8 words)... they have had enough and were looking to move  
9 contracts from us. If that is the case, then the loss  
10 of 88 and 89 would cost over £3,000 per week in revenue,  
11 subsidy, plus OAP, plus cash. This would, I believe,  
12 make the Cardiff depot unviable and probably not worth  
13 operating.

14 "If we cannot get drivers, then we have to make the  
15 decision as to what we want to be, a bus or a  
16 school/contract operator. Once this decision is made,  
17 we must run the services come what may or not be in the  
18 market at all. For a plc, we have a very poor  
19 reputation and will, I believe, find it difficult to  
20 re-establish one, which, as the director of the company,  
21 I find rather unpalatable and hard to hear. I think we  
22 now seriously need to look at all our operations  
23 ...(reading to the words)... I think we need to be  
24 realistic about where we go as a company, having been  
25 given a lifeline at the property."

1           So again, the problems on the 88/89 service were  
2           never resolved prior to the termination of the contract  
3           in November; is that correct?

4   A.   That's correct.  However, Vale of Glamorgan had awarded  
5           us several other contracts in the same time, same period  
6           as that.

7   Q.   The last question on this.  Can I ask you to look at  
8           paragraph 21 of your first statement.  Bundle C1,  
9           I believe.  C1, tab 2.  There you're talking about these  
10          very routes, 88 and 89.  Paragraph 21:

11                 "We operated these routes as a subcontractor to  
12           Cardiff Bus.  The feedback that came back from South  
13           Glamorgan Council was that they were happy with the  
14           services.  As such, Cardiff Bus would have known that  
15           we were providing a good quality service."

16          In light of the documents that we've just looked at,  
17          do you stand by that evidence?

18   A.   When we started the contract, yes.  We had  
19           a complimentary letter off Peter Heath, as it happens,  
20           after a couple of months.

21   Q.   The fact is that the Council were extremely unhappy with  
22          2 Travel's performance on those routes?

23   A.   They became unhappy.

24   MR WEST:  I wonder if that's an appropriate moment to break.

25   THE CHAIRMAN:  Yes, certainly, we'll start at 10 o'clock

1 tomorrow morning.

2 Be back just before 10 o'clock tomorrow morning,  
3 sir.

4 How are we doing time wise, so far?

5 MR WEST: I'll review matters overnight.

6 THE CHAIRMAN: It's very important, sir -- I'm very grateful  
7 to my colleague. It's very important not to talk to  
8 anyone about the evidence you have given in this  
9 tribunal overnight. So if anyone wants to discuss it  
10 with you, just tell them that the tribunal has said  
11 you're not permitted to. Please bear that very  
12 seriously in mind because, if you did, and it came back  
13 to us, it would undoubtedly undermine your case.

14 A. I have been prewarned.

15 THE CHAIRMAN: Thank you.

16 It looks as though we're keeping to timetable,  
17 roughly, doesn't it?

18 MR BOWSHER: Yes.

19 (4.07 pm)

20 (The hearing adjourned until 10.00 am the following day)

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