

Case No: 1262/5/7/16 (T)
IN THE COMPETITION APPEAL TRIBUNAL

Competition Appeal Tribunal
Victoria House
Bloomsbury Place
London
WC1A 2EB

Before:

MR JUSTICE MARCUS SMITH
MR PETER FREEMAN CBE, QC (Hon) and MR BRIAN LANDERS

Between:

AGENTS' MUTUAL LIMITED
Claimant

and

GASCOIGNE HALMAN LIMITED (T/A GASCOIGNE HALMAN)
Defendant

MR ALAN MACLEAN QC and MR JOSH HOLMES appeared on behalf of
the Claimant

MR PAUL HARRIS QC and MR PHILIP WOOLFE appeared on behalf of
the Defendant

<p>1 Tuesday, 7 February 2017 2 (10.30 am) 3 Application re confidentiality 4 MR MACLEAN: I was about to come to the four party meeting. 5 THE CHAIRMAN: You were, but we were about to have 6 a preliminary argument about the yellowed pages, aren't 7 we? 8 MR MACLEAN: Yes, so far as that is concerned, can I just 9 remind you, if you take bundle D, please, tab 7, 10 page 118. Sorry, it can't be. It must be C, tab 7. My 11 mistake. C, tab 7, page 118. 12 THE CHAIRMAN: Yes. 13 MR MACLEAN: Paragraph 9.13. This is Mr Springett's sixth 14 witness statement and he makes the point there, which 15 I articulated yesterday. So that has been the position 16 on the evidence but the discussions were, so far as 17 Mr Springett were concerned, private and confidential 18 and they concerned possible ways forward for 19 Agents' Mutual's business and the three corporates, as 20 you will have seen from reading the note. And in those 21 circumstances, in our submission, it would be 22 appropriate to treat the questions and answers about the 23 four party meeting as confidential. 24 THE CHAIRMAN: Was the confidentiality ever articulated 25 between the parties? We have seen various emails</p> <p style="text-align: center;">Page 2</p>	<p>1 to Mr Livesey and to your witness, Mr Maclean, and 2 secondly, it does seem to shed some light on the 3 importance of the OOP rule and I can see it might well 4 be a document that we would want to refer to in any 5 judgment. 6 MR MACLEAN: Yes. 7 THE CHAIRMAN: So those are the factors that we really have 8 to weigh up, in terms of whether we lift the yellowing 9 now or at a later date. 10 MR MACLEAN: So far as the last point, sir, that you have 11 made, I entirely see, if I may say so, that is right, it 12 may well be that it would be a document which would be 13 referred to or at least cited from in any judgment. But 14 the particular parts of the note which deal with the 15 possible prospective structure of my client's business 16 may or may not have to be referred to in any judgment. 17 That is the bit I am particularly concerned about. And 18 so the question of whether it has to be referred to in a 19 judgment is a bridge that can be crossed on another day. 20 And so my submission is actually quite a narrow one in 21 terms of the point of particular concern. It is the 22 commercial confidence of the -- it amounts to what, in 23 effect, is blue sky thinking on Mr Springett's part as 24 to the possible future course of the business and it is 25 not at the centre of this case, it is not at the centre</p> <p style="text-align: center;">Page 4</p>
<p>1 preceding this meeting and it certainly wasn't said 2 expressly. I take it this is -- 3 MR MACLEAN: There is a reference which may be slightly 4 inaccurate, to Chatham House rules in one of the emails, 5 a clear indication, in our submission, that this was not 6 intended to be a meeting, the transcript or minutes of 7 which were to be splashed across Property Ad or 8 otherwise made public. So, yes, our submission is that 9 the meeting was private and it was understood by all 10 participants to be private and when one looks at the 11 fruits of the meeting in the note, one can see that the 12 parties did indeed discuss more or less hypothetical, 13 more or less likely to happen but they did do some blue 14 sky thinking as to the possible future course of my 15 client's business, and that's, obviously, commercially 16 sensitive. 17 THE CHAIRMAN: Yes. In a sense, we are debating less the 18 question of confidentiality and more the question of 19 whether this is so confidential that it needs the 20 protection of the confidentiality ring. 21 MR MACLEAN: Yes, that's right. 22 THE CHAIRMAN: And that needs to be weighed against the 23 importance of these matters being debated in open court 24 and I am very conscious of two things. First of all, 25 that these are documents that are going to be put both</p> <p style="text-align: center;">Page 3</p>	<p>1 of the rationale for the OOP rule. I take your point, 2 sir, about possible judgment but if that's the point, 3 then that's a point, in my submission, to be dealt with 4 when it arises, when the judgment is prepared in draft. 5 THE CHAIRMAN: Let me ask you a further point. Suppose 6 Mr Livesey had, after this meeting, made a file note and 7 it was disclosed but Mr Harris hadn't marked it as 8 confidential or his team hadn't marked it as 9 confidential. Would you be making exactly the same 10 argument, that this was something that -- 11 MR MACLEAN: Absolutely, and that's why I took you to 12 Mr Springett's witness statement. That's my client's 13 evidence, the meeting was private and confidential and 14 it doesn't matter who produced the note. As it happens, 15 only one of the participants produced a note and as it 16 happens, the note is agreed as, at least by Mr Livesey, 17 accurate reflection of the meeting. But if they all 18 produced rival notes, they would all be in the same 19 boat, yes. 20 THE CHAIRMAN: Thank you. Mr Harris. 21 MR HARRIS: Sir, this is a wrongly headed confidentiality 22 claim which should be rejected in limine. This meeting 23 at the time, the critical consideration, number one, is 24 what was said to the participants at the meeting at the 25 time, about it supposedly being confidential. Now,</p> <p style="text-align: center;">Page 5</p>

<p>1 either the Tribunal or Mr Maclean or I can ask 2 Mr Livesey but my clear instructions are it was never 3 said at the time to be confidential. Therefore, 4 Mr Livesey didn't understand it to be confidential. 5 There were no confidentiality arrangements and since he 6 participated in the meeting, he also knows that it 7 wasn't said to be confidential to either Miss Platt or 8 Mr Crabb. 9 Relevant to that is a bundle, a document in 10 bundle 14, where you will also find the four party 11 meeting note itself. Just so that you can locate it, 12 the four party meeting note is on page 7734. You might 13 want to just put a mark or finger in there for a moment 14 and also turn -- 15 THE CHAIRMAN: Hang on, finger's not in yet. 16 MR HARRIS: Sorry. 7734 and 35 is the meeting note itself. 17 THE CHAIRMAN: Yes. 18 MR HARRIS: You will have seen from the witness statements 19 that the proposal was after the meeting to create 20 confidentiality agreements and nondisclosure agreements 21 of further discussions, so the chronology is important. 22 You will find the one that relates to Connells in this 23 bundle at 7780. 24 THE CHAIRMAN: Yes. 25 MR HARRIS: You don't need to look at any of the details.</p> <p style="text-align: center;">Page 6</p>	<p>1 meeting and not a single person else. That is the 2 claim. Obviously wrong. Even if it were right, that 3 confidentiality has already been lost because 4 Mr Livesey, quite properly, has already told people 5 about the meeting. It doesn't end there because this 6 meeting featured, if you could now pick up the pleadings 7 bundle, please, at bundle A and turn in it to tab 8 number 3, you will see at internal page 53 of the 9 bundle -- this is part of paragraph 40 of the amended 10 defence on behalf of DHL, you will see that this meeting 11 has been described, including the substance thereof, 12 from the very beginning of the pleadings of this action. 13 So it is a completely open document, has always been 14 open, never been suggested that this was confidential. 15 No steps have been taken to make it confidential. It 16 talks about the meeting, who was there. Then in K, it 17 talks about Mr Springett seeking to persuade 18 Countrywide, LSL and Connells to agree collectively to 19 join the (inaudible) and to agree collectively to 20 boycott Zoopla Primelocation. It talks openly about Mr 21 Springett's explaining that he wanted to produce a 22 membership proposal -- well you can see the rest. All 23 of these things are completely open. Never been 24 suggested to be confidential. 25 The next point, sir, is that you are quite right.</p> <p style="text-align: center;">Page 8</p>
<p>1 It is fairly pro forma. What is important is this was 2 produced afterwards and if you look at the email on 3 7779, the previous page, you will see: 4 "Dear David [so that is to Mr Livesey from 5 Mr Springett], good to see you ... we agreed the next 6 step would be to get a nondisclosure agreement in place 7 to cover any proposals we make and subsequent 8 discussions. I attach a draft NDA for your 9 consideration." 10 Not only was there was no suggestion at the meeting 11 itself and that one by itself, is decisive, that it was 12 confidential but the clear and express proposal was that 13 subsequent discussions would be covered under 14 a confidentiality agreement, not these discussions. So 15 that's the next point. 16 The third point is that the cat is already out of 17 the bag. Because the meeting was not said to be 18 confidential to any of the participants, including 19 Mr Livesey, my clear instructions from Mr Livesey is 20 that he has already told people about the contents of 21 the meeting. So, for instance, unsurprisingly, given 22 that it wasn't confidential, he has told at least 23 Mr Twigg and Mr Plumtree, as you would expect. 24 Now, the claim from my learned friend's side is that 25 this is confidential to the four participants of the</p> <p style="text-align: center;">Page 7</p>	<p>1 This is a central document, this note. I will be 2 cross-examining extensively on the note. Mr Maclean is 3 about to do the same. It is undoubtedly the case, 4 whatever conclusion you come to, you will be referring 5 to this document in your judgment. It is likely to crop 6 up in numerous places in my cross-examination and I want 7 to be able to refer to it openly, given that it is 8 already open. 9 The next point, sir, is that what we apprehend is 10 that the supposed sensitivity about this document, it 11 has nothing to do with business secrets or 12 confidentiality of this type. It is because 13 Agents' Mutual is embarrassed by what Mr Springett put 14 forward there because it is not consistent with the 15 message that he was putting forward to his members. And 16 these are matters that will be explored throughout the 17 remainder of this week. That is not a reason for 18 confidence at all, on any view. The fact that you have 19 made awkward and embarrassing proposals and not 20 consistent with how you have been presenting your 21 organisation to your own members, it has nothing to do 22 with confidence. 23 That is really what is going on here. 24 The final point, as I said yesterday, if you needed 25 to see it there, is the redaction of the supposed</p> <p style="text-align: center;">Page 9</p>

<p>1 irrelevance. On any view, that has to be removed, since 2 Mr Livesey was present at the meeting and even he is 3 being excluded from seeing what that says. So for those 4 reasons, sir, I suggest that you should rule that this 5 document is not confidential. 6 MR MACLEAN: With respect, the NDA point is a point against 7 Mr Harris because it would be a bit odd if this 8 discussion, with its fairly high level discussion and 9 various options, was not confidential and the parties 10 only got into a confidence huddle when they, following 11 that meeting and as a direct consequence of that meeting 12 as the next step, then put in place a formal 13 confidentiality agreement to get down to the brass tacks 14 on. 15 So the fact that on 27 January which was six days 16 after the meeting, my client is proposing 17 confidentiality nondisclosure agreements with each of 18 the other players, as the next step, is an indication, 19 contrary to Mr Harris's submission, that the four way 20 meeting was and was understood by all of the 21 participants, to be a private and confidential one. 22 The second point is not a sound point. I don't, of 23 course, contend that the meeting was private and 24 confidential to the four individuals. I don't for 25 a moment suggest that Mr Livesey couldn't discuss it</p> <p style="text-align: center;">Page 10</p>	<p>1 MR MACLEAN: No, that was shorthand for it being a 2 confidential meeting. 3 MR FREEMAN: But it is not shorthand, is it? 4 MR MACLEAN: That is why I said it was a misnomer. 5 MR FREEMAN: There is only one rule anyway, as far as 6 I know. 7 MR MACLEAN: (Inaudible) As I say, I am not suggesting it 8 was under Chatham House rules, I am not suggesting 9 Chatham House rules -- 10 MR FREEMAN: That is a very different suggestion. That is 11 non-attributability, not confidentiality. 12 MR HARRIS: May I respond on that. We are trying to find 13 the reference. The express suggestion has been made by 14 the other side it was Chatham House rules, which as Mr 15 Freeman has pointed out, is not the same as confidence 16 at all. We will try to find you that reference. 17 I think it is in the witness statement, that concern. 18 We are just checking and another point -- 19 MR FREEMAN: I suspect it is a red herring actually. 20 MR HARRIS: With respect, they have to identify exactly what 21 the supposed nature of the confidence was. They have in 22 the past suggested that it was the four people in the 23 room. That's now changed. They have in the past 24 suggested it was Chatham House rules. That's now 25 changed. If you are going to maintain a claim for</p> <p style="text-align: center;">Page 12</p>
<p>1 with Mr Twigg and I am not surprised that he has 2 discussed it with Mr Twigg and Mr Plumtree. But that, 3 of course, doesn't let any cat out of any bag because 4 the relevant bags are Connells, Countrywide LSL and 5 Agents' Mutual. 6 So far as the pleading is concerned, that is another 7 bad point because if one looks at the amended defence at 8 subparagraph (c) at page 53, the passage that Mr Harris 9 referred to, there is nothing in there which refers to 10 the proposed possible change of structure of the 11 business which is the material which I am particularly 12 concerned about. 13 My learned friend says my clients are embarrassed. 14 It is not a question of embarrassment. It is a question 15 of the commercial confidence of proposed ways in which 16 the business might develop: that is sensitive, 17 commercially confidential information and that part, at 18 least, of the four way meeting note should, in our 19 respectful submission, be treated as confidential. 20 THE CHAIRMAN: Even though the proposal went nowhere? 21 MR MACLEAN: Even though the proposal went nowhere. It 22 doesn't mean it's not confidential. 23 MR FREEMAN: Can I ask you, you mentioned Chatham House 24 rules, you are not claiming this should be subject to 25 Chatham House rules instead of being confidential?</p> <p style="text-align: center;">Page 11</p>	<p>1 confidentiality, you have to know exactly what it is and 2 yet they don't even know. 3 THE CHAIRMAN: Right, we will retire to consider our ruling. 4 MR HARRIS: We will find you the reference to the Chatham 5 House rules. 6 THE CHAIRMAN: Thank you, I suspect Mr Freeman is right that 7 it is more red herring than anything else. But 8 thank you. 9 (10.47 am) 10 (A short break) 11 (10.50 am) 12 Ruling 13 THE CHAIRMAN: The Tribunal has the power to maintain 14 confidentiality over material adduced before it, even in 15 its judgments. Needless to say, that is a power that 16 needs to be exercised sparingly. It is a power that has 17 given rise to confidentiality rings and the practice 18 before the Tribunal is that we have something of a taper 19 effect. Initially, many papers are put into the ring. 20 Often, on examination, confidentiality is lifted, still 21 more so if the document is referenced in the judgment. 22 In this case, we are faced with an application to 23 have confidentiality lifted over four pages that have 24 been introduced into the confidentiality ring, pages 25 from the H bundles, 7734 through to 7737.</p> <p style="text-align: center;">Page 13</p>

<p>1 These are materials which are going to be used in 2 the cross-examination of two witnesses, Mr Livesey and 3 Mr Springett. They are notes of a meeting in which 4 Mr Springett and Mr Livesey both participated with two 5 others. The material is said to be confidential as 6 between the four organisations who participated in this 7 meeting and Mr Maclean, for the claimants, references 8 the witness statement of Mr Springett in which that 9 confidentiality is asserted.</p> <p>10 There are after the event agreements or draft 11 agreements which have sought to protect confidentiality 12 in any subsequent negotiations and I am inclined to 13 agree with Mr Maclean that these subsequent NDAs cut 14 both ways, in the sense that they do indicate that the 15 subject matter of the conversation was regarded as 16 sensitive.</p> <p>17 That said, it is not so much a question of whether 18 these documents are confidential but whether they are 19 sufficiently confidential to deserve the protection of 20 the confidentiality ring, in a context where they are 21 also important for purposes of cross-examination and 22 perhaps, in due course, our judgment.</p> <p>23 In these circumstances, given that large parts of 24 the substance of the four party meeting, as this meeting 25 has been called, are pleaded, given the fact that these</p> <p style="text-align: center;">Page 14</p>	<p>1 would not include the One Other Portal rule.</p> <p>2 Q. We looked at his presentation yesterday. There was 3 nothing in that about dropping the OOP rule and you and 4 your colleagues, by which I mean Connells, raised in 5 that meeting, your opposition to the rule and 6 essentially said that your position was you weren't 7 interested in OnTheMarket with the OOP rule?</p> <p>8 A. And his position -- when I gave him that push back on 9 the One Other Portal Rule, his position was that they 10 would only consider dropping the One Other Portal rule 11 if all three corporates were to join.</p> <p>12 Q. How many offices did the three corporates have listed on 13 Rightmove and on Zoopla in January 2016, roughly?</p> <p>14 A. I would guess probably about 1,700, 1,800, that kind of 15 order; around 500 from Connells, around 500 from LSL and 16 about 900 from Countrywide.</p> <p>17 Q. So more than 1,000, perhaps not as many as 2?</p> <p>18 A. Yes.</p> <p>19 Q. Now, let's look at the meeting note at H14/7734. And we 20 agreed yesterday, just before we stopped for the day, 21 that the one thing that we can agree about this meeting 22 is that nothing was agreed at the meeting; correct?</p> <p>23 A. We agreed that the next step would be for Mr Springett 24 to furnish us with a draft confidentiality agreement in 25 preparation for a formal proposal.</p> <p style="text-align: center;">Page 16</p>
<p>1 materials are going to be put to two witnesses, given 2 the fact that it is quite likely that we are going to 3 want to aver to this meeting, it seems to us that the 4 confidence ought to be lifted, particularly when this 5 was a meeting which was, as it were, crossing the line 6 between the protagonists. So in these circumstances, we 7 order that the four documents, 7734 to 7737, be removed 8 from the confidentiality ring.</p> <p>9 MR HARRIS: Sir, there is also the question of whether we 10 can now be provided with the missing words.</p> <p>11 THE CHAIRMAN: On grounds that they are only irrelevant, 12 I don't see why not.</p> <p>13 MR HARRIS: Thank you.</p> <p>14 MR MACLEAN: I don't know what they are. We'll get them.</p> <p>15 THE CHAIRMAN: I am grateful, Mr Maclean, thank you.</p> <p>16 MR DAVID LIVESEY (continued) 17 Cross-examination by MR MACLEAN (continued)</p> <p>18 MR MACLEAN: Mr Livesey, let's turn to the meeting. Just to 19 recap Leighton Buzzard, before we get to the four way 20 meeting. The dropping of the OOP rule didn't form any 21 part of Mr Springett's pitch to Connells at 22 the September Leighton Buzzard meeting, did it?</p> <p>23 A. Well he didn't make a formal pitch to us at that meeting 24 but I made it very clear to him that I was only 25 interested in a pitch, a presentation from him that</p> <p style="text-align: center;">Page 15</p>	<p>1 Q. So nothing concrete was agreed?</p> <p>2 A. Well, that was agreed. I've seen some internal 3 correspondence from Mr Springett, where he says that any 4 action points on his part are purely optional, whatever 5 that means, but no, that was the specific agreement, 6 that he would bring a proposal to us at the next 7 meeting. It would include other members of the 8 Agents' Mutual board, so we would have some exposure to 9 them and vice versa.</p> <p>10 Q. Yes. Now, I am going to come to the note of the meeting 11 in a moment but I just want to take another file at the 12 same time. Bundle H16/9086. You won't have seen this 13 document at the time but I am sure with diligent 14 homework, you have seen it in preparation for these 15 proceedings. Do you see 9086? It is minutes of a board 16 meeting of my client on 11 January last year. Do you 17 see that, ten days before the four way meeting; right?</p> <p>18 A. Yes.</p> <p>19 Q. As you know, that was on the 21st. If you go over the 20 page, there is an update and if you look at part of 21 item 7, 9088: 22 "It was confirmed that the OTM plus one [that is the 23 One Other Portal rule] strategy was essential to achieve 24 the company's aims and should not be compromised." 25 Do you see that?</p> <p style="text-align: center;">Page 17</p>

<p>1 A. Mmm.</p> <p>2 Q. And when Mr Springett came to the four way meeting,</p> <p>3 consistent with that board decision, and he of course,</p> <p>4 is not a member of the board, he did not at the meeting,</p> <p>5 when it began, resile in any way from the OOP rule, did</p> <p>6 he? And you were very impatient. We'll look at your</p> <p>7 witness statement. You were very impatient, you say.</p> <p>8 Take bundle D.</p> <p>9 A. I was a little tetchy in the meeting.</p> <p>10 Q. Yes?</p> <p>11 A. The reason for that was at the meeting in Leighton</p> <p>12 Buzzard, it could not have been any clearer that the</p> <p>13 only basis I wanted to hear a proposal from Mr Springett</p> <p>14 for Connells was without the One Other Portal rule. So</p> <p>15 when we did come to the four way meeting and he started</p> <p>16 putting a proposition together that incorporated the One</p> <p>17 Other Portal rule, therefore I was tetchy and the</p> <p>18 reasons were obvious, that I was not expecting that. We</p> <p>19 then got into the conversation about: well let's have</p> <p>20 two alternative proposals, one which included the OOP</p> <p>21 and one which didn't.</p> <p>22 Q. Let's come to that in a minute. So the start of the</p> <p>23 meeting is at Leighton Buzzard, you had made it clear to</p> <p>24 Mr Springett that Connells wasn't interested in OTM with</p> <p>25 OOP?</p> <p style="text-align: center;">Page 18</p>	<p>1 A. Yes.</p> <p>2 Q. "DL pushed dropping One Other Portal and AP [that's</p> <p>3 Miss Platt] supported, saying the market should decide</p> <p>4 and the best portal would win. They would provide us</p> <p>5 with extra stock to put us in the game. IS said there</p> <p>6 is no magic. RM [Rightmove] is now the only portal to</p> <p>7 deal with 100 per cent stock and matching income, so is</p> <p>8 winning. Would not have entered the market on any other</p> <p>9 basis than agents backing and directing their stock via</p> <p>10 OTM plus one rule. Still plenty of mileage in that and</p> <p>11 consistent with the most interesting scenario."</p> <p>12 A. It also says later in the document that the rationale</p> <p>13 for going to the members to drop the One Other Portal</p> <p>14 rule would be concerns over competition law.</p> <p>15 Q. That had always been clear, that if and when my client</p> <p>16 obtained some degree of market power, then the OOP rule</p> <p>17 may have to be rethought and if all three of the</p> <p>18 corporates were, in the wake of this meeting, all to</p> <p>19 have joined OnTheMarket, that would have given a not</p> <p>20 insignificant, as John Major might say, boost to the</p> <p>21 number of listings on OnTheMarket, wouldn't it?</p> <p>22 A. That was one year into what would have been five year</p> <p>23 contracts with that clause.</p> <p>24 Q. So when Miss Platt questioned the OOP rule, Mr Springett</p> <p>25 explained that it was essential to the strategy of</p> <p style="text-align: center;">Page 20</p>
<p>1 A. Correct.</p> <p>2 Q. He then turns up at the meeting and is adhering to OOP</p> <p>3 and that leads you to be, as you put it in paragraph 53</p> <p>4 of your first statement:</p> <p>5 "... very impatient with this suggestion, given the</p> <p>6 discussions in our previous meeting on 28 September,</p> <p>7 about Connells' absolute unwillingness to sign up to the</p> <p>8 OOP rule."</p> <p>9 A. Yes, at which point, in Leighton Buzzard, he had said</p> <p>10 the only basis upon which they could drop the One Other</p> <p>11 Portal rule was if all three corporates were to join.</p> <p>12 All three corporates were in the room, so my expectation</p> <p>13 was that his proposal would be without the One Other</p> <p>14 Portal rule.</p> <p>15 Q. And Mr Springett, as the note makes clear, made it clear</p> <p>16 that Agents' Mutual's position was that the OOP rule was</p> <p>17 vital to its entry into the market; right?</p> <p>18 A. No, he said that he would consider dropping it.</p> <p>19 Q. Well, what he said, as the note reflects, was that there</p> <p>20 was no way that Agents' Mutual would have entered the</p> <p>21 market without OOP and Agents' Mutual's position was</p> <p>22 that the OOP rule was key to its success. If you look</p> <p>23 at page 7734, do you see the seventh bullet point:</p> <p>24 "DL [that is you] pushed dropping One Other Portal."</p> <p>25 Do you see that?</p> <p style="text-align: center;">Page 19</p>	<p>1 Agents' Mutual, given the two key players, Rightmove and</p> <p>2 Zoopla, didn't he?</p> <p>3 A. I think he was trying to justify why it was there in the</p> <p>4 first place.</p> <p>5 Q. And he noted that even if the three corporates all</p> <p>6 joined Agents' Mutual, OnTheMarket would still be a long</p> <p>7 way from the point at which it would have gained that</p> <p>8 market power that the CMA had indicated in its letter</p> <p>9 of March 2015, might cause the CMA to start being</p> <p>10 interested in the competition legalities of OOP, in</p> <p>11 a way that it was completely uninterested in when</p> <p>12 Agents' Mutual had no market power; right?</p> <p>13 A. We didn't have that discussion in the meeting.</p> <p>14 Q. And it was Miss Platt who asked Mr Springett how,</p> <p>15 hypothetically, the dropping of the OOP rule might be</p> <p>16 presented to the members of Agents' Mutual, didn't she?</p> <p>17 A. She did.</p> <p>18 Q. And that led to a discussion, a bit of blue sky thinking</p> <p>19 about how the financial upside to any investment</p> <p>20 contemplated from the three corporates would be impacted</p> <p>21 and whether the effect of the value of the holding which</p> <p>22 all three corporates had in Zoopla, could in some way be</p> <p>23 accommodated or catered for or taken account of, if the</p> <p>24 corporates joined OnTheMarket; right?</p> <p>25 A. There was no blue sky thinking at all. Mr Springett</p> <p style="text-align: center;">Page 21</p>

6 (Pages 18 to 21)

<p>1 actually had a slide which demonstrated what he thought</p> <p>2 the financial impact of this could be. So there was no</p> <p>3 blue sky thinking there.</p> <p>4 Q. When you talk about the slide, you mean the one at 7736,</p> <p>5 do you?</p> <p>6 A. Yes.</p> <p>7 Q. Which shows the market capitalisation of Rightmove was</p> <p>8 4 billion; Zoopla, 1 billion, of which there was some</p> <p>9 speculation that two per cent goes to the three</p> <p>10 corporates, though Mr Springett may or may not have</p> <p>11 known the precise numbers and, obviously, if all three</p> <p>12 corporates joined Agents' Mutual, then they would all be</p> <p>13 joining what was, at that stage, a mutual organisation,</p> <p>14 by definition?</p> <p>15 A. So my point was that this wasn't blue sky thinking.</p> <p>16 He'd come with a proposition in mind.</p> <p>17 Q. Well, it is not a specific financial proposal, is it?</p> <p>18 A. Not specific and, in fact, the follow on was that he</p> <p>19 would come back with a specific proposal. In his words,</p> <p>20 he would come with a -- a with or without the One Other</p> <p>21 Portal rule and I told him that I was not interested in</p> <p>22 the one that included the One Other Portal rule, so to</p> <p>23 discover the one specific proposal.</p> <p>24 Q. By the time of the four way meeting, it was clear to all</p> <p>25 of you at this meeting, wasn't it, that by a clear</p> <p style="text-align: center;">Page 22</p>	<p>1 us potentially dropping Rightmove. It was about</p> <p>2 dropping Zoopla and finding an equity based way of</p> <p>3 compensating us for the damage that that would do to the</p> <p>4 value in our Zoopla shareholdings.</p> <p>5 Q. We had that discussion yesterday about what he was doing</p> <p>6 was recognising the fact that the three corporates all</p> <p>7 had an equity stake in it. What he was suggesting was</p> <p>8 that if the corporates joined OnTheMarket, they might</p> <p>9 prudently choose to divest themselves of their</p> <p>10 shareholdings in Zoopla and cash in their chips?</p> <p>11 A. And he would give equity to compensate us for that.</p> <p>12 Q. No, no. That's the --</p> <p>13 A. That's exactly what he said in Leighton Buzzard.</p> <p>14 Q. That is the point in my learned friend's skeleton</p> <p>15 argument at paragraph 44, where it said that -- what is</p> <p>16 suggested by my learned friend in his skeleton argument</p> <p>17 was that there was a suggestion at the meeting that</p> <p>18 there would be compensation paid when they all chose to</p> <p>19 drop Zoopla. That's not right, is it?</p> <p>20 A. Is that not a boycott?</p> <p>21 Q. No.</p> <p>22 A. When they all chose to drop Zoopla?</p> <p>23 Q. No, when they all chose to disinvest their equity in</p> <p>24 Zoopla?</p> <p>25 A. In the meeting at Leighton Buzzard he said very clearly</p> <p style="text-align: center;">Page 24</p>
<p>1 majority but short of unanimity, those estate agents who</p> <p>2 had joined OnTheMarket had chosen Rightmove</p> <p>3 preponderantly, over Zoopla, to be their one other</p> <p>4 portal?</p> <p>5 A. That's correct.</p> <p>6 Q. You all knew at this stage that the numbers were</p> <p>7 somewhere between 80/20 and 90/10?</p> <p>8 A. It was in the public domain.</p> <p>9 Q. Everybody knew that. It was no surprise to anybody.</p> <p>10 You all knew this industry as well as each other; right?</p> <p>11 A. Yes.</p> <p>12 Q. The one thing that doesn't appear in the four way</p> <p>13 meeting note is any reference to any boycott by anybody</p> <p>14 of anybody; is that right?</p> <p>15 A. That's not right. If you read the note, that is very</p> <p>16 clearly what he was trying to do. He was trying to</p> <p>17 convince all three of us to come off Zoopla at the same</p> <p>18 time. It even says that in his file note.</p> <p>19 Q. He was trying to convince all of you to join</p> <p>20 OnTheMarket, wasn't he?</p> <p>21 A. No. Well, that as well but specifically, and in his</p> <p>22 file note, he says that he wants us to drop ZPG. He</p> <p>23 said that in the meeting in Leighton Buzzard. He says</p> <p>24 it again in the file note, he said it in the meeting.</p> <p>25 He didn't talk to us at any point in the meeting about</p> <p style="text-align: center;">Page 23</p>	<p>1 that he would come up with an equity based proposition</p> <p>2 that would compensate us for any potential damage to the</p> <p>3 value in our shareholdings in Zoopla.</p> <p>4 Q. Exactly.</p> <p>5 A. In the statements that have crisscrossed he said that</p> <p>6 I must have misunderstood that but it is really</p> <p>7 interesting that Alison Platt, from her one-to-one</p> <p>8 meeting with him, seemed to have that same</p> <p>9 understanding.</p> <p>10 Q. As the note of the meeting makes clear, Mr Springett, if</p> <p>11 you look at page 7735, third bullet point:</p> <p>12 "AP asked again about OTM plus 1. She felt it</p> <p>13 constrained choice. IS explained that this had been an</p> <p>14 essential strategy to enter a market dominated by two</p> <p>15 big players. We were not forcing anyone to do anything</p> <p>16 but there was now a credible new option for agents and</p> <p>17 consumers. It would be sustainable until we gained</p> <p>18 market power under the CMA definition. Even with the</p> <p>19 three [that's Connells, Countrywide and LSL], we would</p> <p>20 be a long way from that. One eighth of Rightmove</p> <p>21 revenue, for example. However, we would accelerate</p> <p>22 quickly and might need to drop it later."</p> <p>23 So there was no discussion about coercing or forcing</p> <p>24 or boycotting anybody. It was just a discussion about</p> <p>25 terms on which these three corporates, with their large</p> <p style="text-align: center;">Page 25</p>

<p>1 number of listings, might choose to join OnTheMarket and 2 recognising that they had an equity stake in Zoopla, 3 there was some sort of high level discussion, a very 4 sketchy discussion about whether some mechanism might be 5 arrived at which would, as it were, compensate the 6 corporates for the loss of their equity interest in 7 Zoopla?</p> <p>8 A. No, that's not right. He was encouraging us and 9 incentivising us collectively, to all leave Zoopla at 10 the same time. The incentive would take the form of 11 equity to compensate us for the damage to the value in 12 the shareholdings. So not forcing or coercing but 13 definitely incentivising a boycott.</p> <p>14 Q. The question of leaving, divesting yourself of the 15 equity and which other portal you might choose as 16 a member of OnTheMarket, are two different questions?</p> <p>17 A. And he talks in the file note about us dropping Zoopla, 18 separate to the issue of selling the shares.</p> <p>19 Q. Whatever might have been discussed at the meeting in the 20 end, if you look at the bullet point at 7735, it was all 21 a bit of a dialogue of the deaf, wasn't it, Mr Livesey, 22 because if you look at that second last bullet: 23 "DL said no. Rather they are closely embedded with 24 Rightmove and Zoopla and have no intention of leaving 25 either. AP agreed."</p> <p style="text-align: center;">Page 26</p>	<p>1 well.</p> <p>2 Q. We have just seen what the board's position was, 3 reinforcing the OOP rule ten days before the meeting; 4 right?</p> <p>5 A. I am giving you the question that I asked and the answer 6 that I got from him, that they were fully aware of the 7 conversation and he said they would be very happy to 8 meet us at the next stage.</p> <p>9 Q. There was also discussion about the position of internet 10 only agents and Mr Springett mounted a defence of what 11 we now call the Bricks and Mortar rule, didn't he?</p> <p>12 A. Yes.</p> <p>13 Q. And his position about that, you might think it is 14 commercially sensible or not sensible but it is 15 a perfectly logical position, isn't it?</p> <p>16 A. I disagree with his position. I don't think that 17 a portal should choose which type of estate agent to 18 allow to use it as a customer and which shouldn't.</p> <p>19 Q. Now, you must have reported back internally -- in fact, 20 Mr Harris told us you reported back internally -- as to 21 what was said at this meeting, didn't you?</p> <p>22 A. I did.</p> <p>23 Q. To Mr Twigg and Mr Plumtree?</p> <p>24 A. The fellow execs, so Shipperley, Plumtree and Twigg.</p> <p>25 Q. And you did that by email, presumably?</p> <p style="text-align: center;">Page 28</p>
<p>1 So here we are, right at the end of the meeting, 2 because the only thing that happens now is that you say: 3 would it be worth meeting some of the board member 4 firms? And Mr Springett concurred and then he suggests 5 that you wanted to go straight to, as it were, the 6 board, to sidestep members. If that is right or not, 7 I don't, frankly, care, but if you look at the 8 penultimate bullet point, by the end of this discussion, 9 you were all back where you started, weren't you? You 10 had made it clear and Miss Platt had agreed, that you 11 were closely embedded with Rightmove and with Zoopla and 12 you had no intention of leaving either, which was 13 a recognition of the fact that if you had been 14 interested in joining OnTheMarket, you would have had to 15 have decided which of those two other portals to drop?</p> <p>16 A. No, I think you're reading something into that that's 17 not there. What we were saying was: we will not have 18 a new supplier that forces us to do anything negative to 19 our existing suppliers, but if he was prepared to bring 20 forward a proposal that didn't include the One Other 21 Portal rule, we were all ears. The question that I 22 asked in the meeting was: are your board aware of these 23 discussions? And his answer was: yes, they are. 24 I said: well in which case, at the next stage, it would 25 be quite helpful for us to meet some of the board as</p> <p style="text-align: center;">Page 27</p>	<p>1 A. No.</p> <p>2 Q. Or a note of the meeting? Did you make a note of the 3 meeting?</p> <p>4 A. I made no file note of the meeting.</p> <p>5 Q. You didn't circulate a note of the meeting?</p> <p>6 A. I didn't.</p> <p>7 Q. There is no written evidence anywhere in Connells, 8 evidencing this discussion?</p> <p>9 A. No. There was an informal, early doors discussion. 10 Didn't know at that stage if it would go anywhere. If 11 the NDA had been signed and we got into substantive 12 negotiations, then obviously things would start to be 13 documented.</p> <p>14 Q. So if it had come down from the level of blue sky 15 thinking, you might have put pen to paper, but it 16 didn't, so you didn't?</p> <p>17 A. You describe it as blue sky thinking. I think there is 18 a very clear outline proposition in the mind of 19 Mr Springett which was centred around retaining the One 20 Other Portal rule and we sent him away to reconsider it 21 without the One Other Portal rule.</p> <p>22 Q. If there was a very clear proposition, you would have 23 discussed that and put a note round internally in 24 Connells about it, wouldn't you, expressing your views 25 about it?</p> <p style="text-align: center;">Page 29</p>

8 (Pages 26 to 29)

<p>1 A. He didn't give us a proposal in that meeting.</p> <p>2 Q. No, so there was no proposal in the meeting?</p> <p>3 A. So there was nothing for me to circulate.</p> <p>4 Q. So it was, in the end, much ado about nothing because</p> <p>5 the end point was you and Miss Platt wanted shot of OOP,</p> <p>6 otherwise you weren't interested and Mr Springett's</p> <p>7 position at the meeting was consistent with the board's</p> <p>8 resolution ten days before, that OOP was essential to</p> <p>9 the strategy?</p> <p>10 A. No, it wasn't an unhelpful meeting at all, in the sense</p> <p>11 that it took us from the point at which he came in with</p> <p>12 an outline proposal as to how he could bring the three</p> <p>13 corporates on board with the One Other Portal rule. He</p> <p>14 left the meeting with a number of things agreed. One</p> <p>15 was that he would come forward with a proposal which did</p> <p>16 not include the One Other Portal rule and</p> <p>17 a nondisclosure agreement and at the next stage we would</p> <p>18 meet his board.</p> <p>19 Q. But as you have accepted, what was discussed at Leighton</p> <p>20 Buzzard was that Mr Springett was, even in his own mind,</p> <p>21 never mind the board's position, prepared to even</p> <p>22 contemplate getting rid of the OOP rule unless all three</p> <p>23 corporates agreed to join OnTheMarket?</p> <p>24 A. Yes.</p> <p>25 Q. And what's clear from the penultimate bullet point is</p> <p style="text-align: center;">Page 30</p>	<p>1 prepared to join OnTheMarket and the reason for that was</p> <p>2 that OnTheMarket, obviously, would have welcomed the</p> <p>3 support of these corporates, because if all of them were</p> <p>4 to join OnTheMarket, it would have brought about 90,000</p> <p>5 additional property listings, wouldn't it?</p> <p>6 A. He'd had an individual meeting with each of the three</p> <p>7 corporates. It sounds like he'd got fairly similar</p> <p>8 messages to and from each of them and on the basis of</p> <p>9 that, he had asked for a meeting with all three</p> <p>10 together.</p> <p>11 Q. And the one message that or one of the messages that</p> <p>12 comes across loud and clear from this meeting was that</p> <p>13 there was no way that OnTheMarket would ever have got</p> <p>14 into the market other than on the basis of the OOP rule,</p> <p>15 given that exclusivity wasn't an option; right?</p> <p>16 A. No, that may be what he says but I think that's</p> <p>17 fundamentally flawed.</p> <p>18 Q. Let's look at your second witness statement, Mr Livesey,</p> <p>19 in bundle D, tab 7, paragraph 15. We had a bit of</p> <p>20 discussion about this paragraph about something called</p> <p>21 the pre-trial review. I don't think you were there but</p> <p>22 you know that this paragraph proved to be controversial,</p> <p>23 don't you?</p> <p>24 A. I do.</p> <p>25 Q. What you say in this statement, you produce a bunch of</p> <p style="text-align: center;">Page 32</p>
<p>1 that at least you and Miss Platt's organisations were</p> <p>2 making it perfectly clear that you were never going to</p> <p>3 do that if it impacted on any way with your current</p> <p>4 arrangements, your closely embedded arrangements with</p> <p>5 Rightmove and Zoopla?</p> <p>6 A. All three of the estate agents there said the same</p> <p>7 thing. He only mentions myself and Alison Platt but</p> <p>8 Ian Crabb was of the same mind, that he wasn't</p> <p>9 interested with the One Other Portal rule included. He</p> <p>10 also, in the meeting though, refers to the other ZPG</p> <p>11 partners, as he refers to them, that he was trying to</p> <p>12 get across out of Zoopla and to OnTheMarket. So when</p> <p>13 you talk about the collective boycott issue, it wasn't</p> <p>14 just the three estate agency firms in the room, he was</p> <p>15 talking to other firms as well. He says that he had</p> <p>16 been talking to a number of other large Zoopla clients,</p> <p>17 with a view to getting them to drop Zoopla.</p> <p>18 Q. He's trying to get them to join OnTheMarket?</p> <p>19 A. He's getting them to drop Zoopla.</p> <p>20 Q. You are equating joining OnTheMarket with dropping</p> <p>21 Zoopla?</p> <p>22 A. They are his words.</p> <p>23 Q. I don't accept that, Mr Livesey. What Mr Springett was</p> <p>24 doing was exploring whether there were circumstances in</p> <p>25 which one, two or three of these corporates would be</p> <p style="text-align: center;">Page 31</p>	<p>1 emails, including some emails involving Mr Rook of Rook</p> <p>2 Matthews Sayer which was an independent agency, a bit</p> <p>3 like Gascoigne Halman which, like Gascoigne Halman, was</p> <p>4 acquired by Connells in March 2016. So about five or</p> <p>5 six months after Gascoigne Halman; right?</p> <p>6 A. Correct.</p> <p>7 Q. And you say here:</p> <p>8 "In light of the evidence and emails referred to by</p> <p>9 Mr Springett in his fifth witness statement, I looked to</p> <p>10 see whether there were any of Mr Rook's emails that</p> <p>11 could shed more light on what was being discussed at</p> <p>12 this time and who was involved in those discussions.</p> <p>13 I set out what I found below."</p> <p>14 That's not an accurate description of what you did</p> <p>15 or what happened, is it?</p> <p>16 A. It is.</p> <p>17 Q. If we look at your third witness statement, filed on</p> <p>18 20 January, if you look at paragraph 2, page 154. Now,</p> <p>19 what you say here is, over the top of page 154, you</p> <p>20 refer to:</p> <p>21 "... addressing the comprehensiveness of the search</p> <p>22 I undertook of a limited number of documents that are in</p> <p>23 the possession, custody, control of Rook Matthews</p> <p>24 Sayer".</p> <p>25 And you are very concerned in this witness statement</p> <p style="text-align: center;">Page 33</p>

<p>1 to deny any suggestion that you were involved in any 2 cherry-picking operation; right? 3 A. Correct. 4 Q. But the position is that the cherries had been picked 5 and you were presented with the bowl to sort through; 6 right? You didn't carry out the search at Rook Matthews 7 Sayer. You were presented with the fruits of that 8 search and then exhibited some emails. Is that what 9 happened? 10 A. There was a formal search undertaken, not by me, of all 11 the documents in Rook Matthews Sayer for another matter 12 which is the subject of legal privilege. 13 Q. Do you know who conducted that search? 14 A. I don't. It would have been in conjunction with our 15 lawyers or with Rook Matthews Sayers's lawyers, so I was 16 presented with the fruits of that search, if you like, 17 to review the documents, to see if there was anything 18 relevant to the new information that Mr Springett was 19 providing. 20 Q. Yes, so you were given a bowl of cherries and then you 21 picked some of the cherries from the bowl of cherries? 22 A. No, I wouldn't characterise it that way at all. I was 23 given a large volume of documents which I reviewed with 24 colleagues, to see if there were any documents in that 25 bundle which had been searched for for other purposes,</p> <p style="text-align: center;">Page 34</p>	<p>1 back to tab 7 at page 109. So at page 109 you are 2 referring there to some emails involving Julie Emmerson, 3 who is one of the agents working for my client in the 4 North East; yes? 5 A. Yes. 6 Q. So you say in paragraph 11 of your third statement: 7 "I was also interested to know whether there were 8 any further emails from Miss Emmerson, stating that she 9 would not be involved in any collective boycott 10 discussions. However, as I explained in my second 11 witness statement, no such emails were found, only 12 a limited number of RMS documents". 13 So we don't get any more than you've got in your 14 second witness statement, so far as Miss Emmerson is 15 concerned. That is where it rests; right? 16 A. Yes. 17 Q. If you go in the same statement, the third statement, 18 look at paragraph 6: 19 "When I reviewed the documents [and these are 20 Mr Springett's documents], IS1 [that is the exhibit to 21 Mr Springett's witness statement, right, and then we've 22 got the H bundle references], I observed many of the 23 emails of the North East group were sent to, amongst 24 others, Mr Clive Rook of RMS. In addition, I noticed 25 one particular email that Mr Springett exhibited, namely</p> <p style="text-align: center;">Page 36</p>
<p>1 to see if there was anything relevant to the new 2 information that Mr Springett had raised. That's all. 3 There was no cherry-picking. No positive selection of 4 just stuff that might help our case and not hinder us. 5 That was the process. 6 THE CHAIRMAN: Sorry, Mr Livesey, I want to get away from 7 the cherry analogy if we can, but it is the case that 8 you looked through a limited pool of documents that had 9 been produced to you; in other words, someone had made 10 a selection. I am not going to ask you on what criteria 11 they had been made but someone, you think a lawyer, for 12 a purpose that has nothing to do with this litigation, 13 produced a selection of documents which you then looked 14 through? 15 A. Yes, they would have been produced in conjunction with 16 the lawyers, probably by a third party data company, as 17 a formal search of Rook Matthews Sayers' documents and 18 data in respect of this other thing. So I didn't see 19 every piece of documentation in this business but 20 there's hundreds of pages in there. 21 THE CHAIRMAN: Thank you. 22 MR MACLEAN: Look at paragraph 11, please, Mr Livesey, of 23 this third statement. You refer back to paragraph 19 of 24 your second statement, so just let me show you the 25 context of that. So if you keep a finger at 156 and go</p> <p style="text-align: center;">Page 35</p>	<p>1 an email from Mr Rook to Miss Emmerson, Ms Whiteley and 2 Mr Springett, in which Mr Rook states the need to keep 3 the media negotiation item to the end of the meeting is 4 clearly understood. To me, this email suggested that 5 the evidence of Mr Springett regarding Agents' Mutual 6 not being involved in any collective discussions 7 regarding agent portal selection, may not be accurate." 8 Is your evidence that Mr Springett's evidence about 9 not being involved in discussions about agent portal 10 selection in the North East, is it your evidence that 11 Mr Springett's evidence is not true, is that what you 12 are saying? 13 A. I have very strong suspicions that that's not the case. 14 Q. So you are suggesting that Mr Springett is lying, when 15 he says that Agents' Mutual wasn't involved in any 16 collective discussion regarding agent portal selection 17 in the North East of England? 18 A. I have very strong suspicions that employees of 19 Agents' Mutual were closely involved in those kind of 20 discussions. 21 Q. But all you have been able to dig up to support that are 22 the emails which you disclosed in your second witness 23 statement; is that right? 24 A. They were the emails that were there. 25 Q. And the resources available to Connells across all of</p> <p style="text-align: center;">Page 37</p>

<p>1 these other acquired companies, Rook Matthews Sayer, 2 Gascoigne Halman, that's the sum total of it, is what 3 you exhibit to your second statement; right? 4 A. I can only use the information that's within our -- 5 Q. And that is the basis for your evidence that 6 Mr Springett is not telling the truth here? 7 A. All the emails and the documentation throughout the 8 whole case kind of points in that direction, yes. 9 Q. Now, in paragraph 8 of this statement you say: 10 "I can also confirm that RMS and GHG are sister 11 companies and RMS's documents cannot be accessed by GHG. 12 And, therefore, RMS's documents could not be and were 13 not captured and searched by GHG for the purposes of GHG 14 complying with its disclosure obligations in this case." 15 I agree, Mr Livesey, that RMS and GHG are sister 16 companies and I agree that RMS's documents couldn't, on 17 the face of it, be accessed by GHG. But the 18 100 per cent shareholder in GHG, or at least the 19 controlling majority shareholder in GHG is Connells; 20 right? 21 A. Correct. 22 Q. And Connells controls RMS as well? 23 A. Correct. 24 Q. And you are a director of both Connells and GHG? 25 A. I am.</p> <p style="text-align: center;">Page 38</p>	<p>1 purpose of GHG complying with its disclosure obligations 2 in this case." 3 I have just suggested to you there is a perfectly 4 simple mechanism by which RMS's documents could have 5 been put into a proper disclosure exercise, subject to 6 the proper disclosure rules, which you, as a director of 7 all three companies, and Connells as the owner of both 8 companies, could, if it had wanted to, very easily have 9 put into motion. And that is right, isn't it? 10 A. They are two sister companies, they are independent 11 legal entities with their own boards and the board of 12 Rook Matthews Sayer would have been quite reasonable in 13 saying "no way", if the request came in from Gascoigne 14 Halman to access its records. 15 Q. Not if its 100 per cent shareholder passed a shareholder 16 resolution, Mr Livesey. That would have bound the 17 board? 18 A. OnTheMarket is suing Gascoigne Halman, not Connells 19 Group. 20 Q. There is a nice point. Let's go back to where we 21 started. This is a battle between my client and 22 Connells and the entity in which they still have a very 23 significant shareholding, namely Zoopla. And Gascoigne 24 Halman is merely the patsy, it is merely the proxy for 25 this battle and the suggestion that this is all to do</p> <p style="text-align: center;">Page 40</p>
<p>1 Q. And Rook Matthews Sayer? 2 A. I am. 3 Q. So why couldn't Connells, by way of shareholders 4 resolution, have instructed RMS to produce its documents 5 and then given them to GHG, so that this tribunal would 6 have had a fuller picture? 7 A. I didn't know that -- well, until Mr Springett's 8 statement, where he raised the issue of the collusion 9 that looked to have been taking place in the North East, 10 I didn't refer to the documents that had been produced 11 for RMS for this other purpose. I was aware that that 12 search had gone on for the other purpose but it was that 13 that triggered me to go and look at those documents. 14 I didn't order GHG to be able to have access to its 15 sister company's records. 16 Q. Do you accept that the "therefore" in the middle of that 17 second line, is a non sequitur? 18 A. Where are we looking? 19 Q. At the sentence I just read: 20 "I can also confirm that RMS and GHG are sister 21 companies and RMS documents cannot be accessed by GHG 22 ..." 23 Okay, fine. Pausing there: 24 "... and that, therefore, RMS's documents could not 25 be and were not captured and searched by GHG for the</p> <p style="text-align: center;">Page 39</p>	<p>1 with little Gascoigne Halman which has 18 branches in 2 the North West of England, you know it is complete 3 nonsense, is it not, Mr Livesey? 4 A. Absolutely not. There was no need for this litigation. 5 OnTheMarket have decided to take an injunction against 6 Gascoigne Halman and went straight to an injunction. 7 They leapfrogged all of the dispute resolution clauses 8 in the contract. They started this. They also 9 threatened us with the procurement rule which then would 10 have sucked in the whole of the 600 branches of the 11 Connells Group but this is a fight that we couldn't run 12 away from. 13 Q. It wouldn't have done, actually, Mr Livesey, because 14 that is not what the rule means, but I am not going to 15 debate the law with you. 16 A. That was the threat that was made at the time. 17 Q. Do you accept -- 18 A. Sorry, the threat is still being made. 19 Q. Do you accept or not that the word "therefore" in the 20 second line of paragraph 8, is a non sequitur? 21 A. I really don't understand what you mean. The documents, 22 the data from Rook Matthews Sayer was not available to 23 Gascoigne Halman. 24 Q. But it was available to Connells? 25 A. It was available to me as a director of Connells.</p> <p style="text-align: center;">Page 41</p>

<p>1 Q. And there is no earthly reason why, if Connells had 2 wanted to pass a shareholders resolution, instructing 3 RMS to cough up its documents, there is no earthly 4 reason why it couldn't have done so, is there? 5 A. We did. The documents are here. 6 Q. No, you didn't, you had a selective disclosure exercise 7 by somebody, I don't know who, under some criteria, 8 I don't know what, from which you then made a selection, 9 on the basis of which you are suggesting that 10 Mr Springett is a liar, aren't you? 11 A. I have not called him a liar. He's raised some issues 12 in the North East. I was aware of some documents that 13 had been put together through a trawl through of the new 14 subsidiary, Rook Matthews Sayer. I looked at that 15 bundle. There were some documents there that were 16 relevant. 17 Q. You are calling him a liar. I took you to the last 18 sentence of paragraph 6, where you say the email 19 suggested to you, suggested to you that his evidence may 20 not be accurate. Then I asked you whether it was your 21 position that his evidence was not accurate and you said 22 you had a strong suspicion that it was? 23 A. Yes, there is a difference between saying that something 24 may not be accurate and calling someone a liar. 25 Q. That is what I was exploring with you. Is it simply</p> <p style="text-align: center;">Page 42</p>	<p>1 cherries, the same wodge of stuff that we were 2 discussing earlier? 3 A. Correct. 4 Q. Did you do that exercise, searching through this wodge 5 of stuff, did you do that alone or with the assistance 6 of others? 7 A. I did it with the assistance of others. 8 Q. Lawyers? 9 A. Lawyers, external and internal. 10 Q. There is something else, Mr Livesey. In paragraph 27 of 11 this second statement, page 112, you say: 12 "Mr Springett claims that Agents' Mutual had to 13 divert funds from marketing, in order to pay for fees 14 associated with these proceedings. I note the alleged 15 diversion is not quantified or supported by documents. 16 I note that this claim of diversion cannot be tested by 17 GHJ or by the court because Agents' Mutual has refused 18 point blank to provide disclosure of its relevant 19 finances, at all stages of the dispute in this 20 litigation." 21 It sounds like a submission you might have heard at 22 the interlocutory application: 23 "It seems most surprising to me that Agents' Mutual 24 would reduce marketing spend, given that Mr Springett 25 recognised such spend is so important. Even if there</p> <p style="text-align: center;">Page 44</p>
<p>1 that you think his evidence may not be accurate or you 2 think it is not accurate? 3 A. I think it's probably not accurate. 4 Q. On the basis of the Julie Emmerson email? 5 A. On the basis of all of the information that you see 6 here, including those emails. 7 Q. If you look in your second witness statement, please. 8 Go back to your second witness statement, tab 7, I think 9 it is, paragraph 19. I touched on this earlier. This 10 is a long paragraph about Mr Henning and Mr Small and 11 Mr Rook and Miss Emmerson. But at the end of it, there 12 is a sentence beginning about six lines from the bottom 13 of the paragraph: 14 "On this occasion"; do you see that? 15 A. Yes. 16 Q. "... Miss Emmerson of Agents' Mutual continues to be 17 involved in the discussions between the agents in the 18 North East regarding the portal they should all drop. 19 I have searched for but not found, any email or other 20 communication from Miss Emmerson in which she responds." 21 Did you search for and if so, where did you search? 22 A. The same place that I looked for these other emails. 23 The bundle of documents that had been produced for the 24 other purpose. 25 Q. So you looked through the same, I won't use a bowl of</p> <p style="text-align: center;">Page 43</p>	<p>1 was such a reduction, there is no basis upon which I or 2 the court can determine whether other costs could have 3 been or indeed, have been produced." 4 Let us go back to where we started. The costs of 5 this litigation are very considerable, aren't they? 6 A. I would guess probably £6 million, by the time we're all 7 done. 8 Q. Do you know what a cross undertaking fortification is? 9 A. No. 10 Q. Do you know what security for costs is? 11 A. My understanding of that is that if one party sues 12 another, they are asked to make a payment into the court 13 for costs for the other side that they are suing, if 14 they choose to walk away mid-litigation, which would be 15 unfair to dump those costs on the other side. 16 Q. Not quite but I don't get to debate the rules with you. 17 My clients don't have the benefit of a sugar daddy with 18 £250,000 to hand down, do they? 19 A. Sugar daddy, £250,000 in the context of a £4 million 20 bill. This isn't -- I think your point is that Zoopla 21 are behind all this. It is a small fraction of our 22 legal costs that they might pick up. 23 Q. You see in paragraph 20 -- it is all just a bit narky, 24 Mr Livesey. 28: "Even if Mr Springett's unsubstantiated 25 claim is accurate". Are you seriously suggesting that</p> <p style="text-align: center;">Page 45</p>

<p>1 it comes as a surprise to you that because of this 2 litigation, my clients have had to reduce their proposed 3 marketing spend in 2016? 4 A. I think it's absolutely bonkers that they would spend 5 this kind of money on this piece of litigation, to stop 6 18 branches in Cheshire from listing on their 7 competitor, when they could have been spending that on 8 business development. It is just nonsense. 9 Q. Come on, Mr Livesey, you know that if my clients don't 10 defend the OOP rule in this litigation, then the OOP 11 rule will unravel like the proverbial ball of wool? 12 A. But they have already approached me with a view to 13 unravelling it themselves voluntarily. Getting the 14 three corporates on board, dropping the One Other Portal 15 rule and, actually, they'll have a better business 16 without it. 17 Q. Mr Springett says and the reference is in his fifth 18 witness statement, bundle D, tab-4, page 71 -- it must 19 be bundle C, tab 4. Sorry, my mistake. Paragraph 17.7. 20 I think you are entitled to look at the yellow ... he 21 needs the confidential version. Could Mr Holmes -- it's 22 just for that one sentence, sir. 23 THE CHAIRMAN: Yes, I think it is important that the witness 24 sees it. (Handed) 25 MR MACLEAN: Have you got page 71, Mr Livesey? Do you see</p> <p style="text-align: center;">Page 46</p>	<p>1 I wonder if I could ask you about this contribution that 2 Zoopla made to your costs, the 250,000. 3 A. Yes. 4 THE CHAIRMAN: Is that subject to any terms? Is there 5 any -- 6 A. No, there's a very brief, early exchange of emails and 7 they offered to pay up to £250,000 to cover our costs. 8 This was at the very genesis of the litigation, when 9 OnTheMarket had opened the litigation -- sorry, taken 10 out the injunction against Connells. It's not been 11 contracted. There is no documentation. 12 THE CHAIRMAN: Against Connells? 13 A. Sorry, against Gascoigne Halman. 14 THE CHAIRMAN: Has that payment been made? 15 A. No. 16 THE CHAIRMAN: Is it subject to any pre-conditions for 17 payment or is it unconditional -- 18 A. No -- 19 THE CHAIRMAN: -- its obligation to pay or the offer to pay 20 is unconditional? 21 A. Yes. 22 MR MACLEAN: Sorry, sir, I can't hear you. 23 THE CHAIRMAN: Sorry, I was asking about the conditionality 24 of the payment and Mr Livesey said there were no 25 conditions to the payment.</p> <p style="text-align: center;">Page 48</p>
<p>1 the last sentence of paragraph -- 2 A. Sorry, bear with me. 3 Q. I am sorry. Do you see the first word at the top of the 4 page should be "home"? 5 A. Correct. 6 Q. And the last steps of that paragraph begins "in any 7 event"; is that right? 8 A. Yes. 9 Q. And does that sentence end with the word "2016"? 10 A. Sorry, what is this document? 11 Q. It is Mr Springett's statement. 12 A. His original statement? 13 Q. This is his first statement for trial, yes, his fifth 14 statement. Have you got a sentence at the end of the 15 paragraph beginning with the words "In any event", and 16 ending with the words "in 2016"? 17 A. Yes. 18 Q. Could you just read that sentence to yourself. (Pause). 19 That is wholly unsurprising, isn't it, that that should 20 be the circumstances that my client finds itself in? 21 A. Because it's open litigation incurred a load of costs, 22 it has had to reduce its marketing spend. No surprise 23 at all. 24 MR MACLEAN: Thank you very much, Mr Livesey. 25 THE CHAIRMAN: Mr Livesey, before Mr Harris re-examines,</p> <p style="text-align: center;">Page 47</p>	<p>1 A. It is just an exchange of emails. There is no 2 documentation. And come the end of the trial, we'd be 3 going back to them and asking them for that contribution 4 to our total costs of circa 4 million. 5 THE CHAIRMAN: Thank you. 6 MR MACLEAN: Can I just ask one question arising? 7 THE CHAIRMAN: I raised it now, for that reason. 8 MR MACLEAN: Between whom are the relevant emails, 9 Mr Livesey? 10 A. Myself and Alex Chesterman. 11 THE CHAIRMAN: Thank you, Mr Livesey, Mr Harris may have 12 some questions in re-examination. 13 Re-examination by MR HARRIS. 14 MR HARRIS: I have a few things to go through. I'm in the 15 Tribunal's hands as to if and when you'd like 16 a shorthand break. I am just going to start. 17 Mr Livesey, on a point of clarification yesterday 18 you were giving some evidence about the Rightmove stats 19 and the Zoopla stats of leads per month, per branch and 20 I just want to make sure what your answer was because at 21 one point you said the Rightmove stats were 328 per 22 month, per branch and the Zoopla stats were 180 per 23 month, per branch but a few moments later you said the 24 Zoopla stats were 280 per month, per branch. Which is 25 right?</p> <p style="text-align: center;">Page 49</p>

<p>1 A. 180. I think I also made the comment that the general 2 gist of the volumes is that Zoopla's are more than half 3 of Rightmove's, but 180 is the figure. 4 Q. Thank you. Towards the beginning of your 5 cross-examination you were giving some evidence about 6 what you expected to be a flexible or conciliatory 7 approach that would be adopted by Mr Springett and 8 Agents' Mutual, after Connells had taken over Gascoigne 9 Halman; yes, do you remember that? 10 A. I do. 11 Q. Can I draw your attention, please, to bundle number H13. 12 Can I just check with Mr Maclean whether this is 13 confidential. (Pause) 14 Sir, I am going to move on because that one is, 15 I think -- that is a document that is blanked out from 16 you, Mr Livesey. Do you have a copy or can you be 17 provided with a copy of yesterday's transcript, please, 18 Mr Livesey. I can give you the page reference but 19 no one from my team has a hard copy. It is in 20 yesterday's transcript at page 190, line 3. Do you see 21 you were giving your evidence in response to questioning 22 and what you describe is: 23 "... wasn't an assurance or a promise made to me but 24 it was very loudly broadcast at the launch of 25 OnTheMarket that that is what would happen."</p> <p style="text-align: center;">Page 50</p>	<p>1 become the credible alternative to the number 1." 2 It goes on to talk about: 3 "Members overwhelmingly indicating that nationally, 4 Zoopla is weaker." 5 And then do you see the next line: 6 "Accordingly, our objective for the year ahead -- " 7 Which year is that, Mr Livesey? 8 A. That would be 2015. 9 Q. So that is for the year -- and what does it say? 10 A. Where are you looking exactly, sir? 11 Q. So beneath "Accordingly, our objective for the year 12 ahead is"? 13 A. Forgive me. (Pause) Can you take me to the line, sir? 14 Q. Yes, so second hole punch. Do you see "Objective for 15 the year ahead"? 16 A. Yes. 17 Q. And we just read out a few lines and do you see the line 18 beginning "The portal choices made by members indicate"? 19 A. Yes. 20 Q. And it says "Accordingly, our objective for the year 21 ahead is"? 22 A. Yes. 23 Q. And what does it then say? 24 A. "To replace Zoopla as the number 2 portal by January 25 2016." He uses the word "replace" and he sets a</p> <p style="text-align: center;">Page 52</p>
<p>1 You were talking about taking over from Zoopla and 2 killing off Zoopla. Do you recall that? 3 A. I do. 4 Q. Can I draw your attention to bundle 9, please, page 51 5 and 52. 6 THE CHAIRMAN: No, the bundle starts at 4708, Mr Harris. 7 MR HARRIS: Within bundle 9, do you not have a 5152 towards 8 the back of bundle 9? 9 THE CHAIRMAN: Sorry, 5152? 10 MR HARRIS: Sorry, if I didn't say that. Do you see, 11 Mr Livesey, that that is an email from Agents' Mutual 12 "Update for members", so sent to all its members on 13 17 February 2015? 14 A. Yes. 15 Q. Is that or is that not at or about the time of launch? 16 A. Yes, it was around the time of launch and it was 17 probably about a month after. 18 Q. Can I take you over to the third page of that email to 19 all members, a few weeks after launch. Do you see by 20 the first hole punch, the heading "Objective for the 21 year ahead"? 22 A. I do. 23 Q. "Members will be aware that from the outset, our 24 strategic objections have been to become the number 2 25 portal as rapidly as possible and then to be billed to</p> <p style="text-align: center;">Page 51</p>	<p>1 timescale on it. 2 Q. And then if you can go down a couple more lines, do you 3 see the line beginning "If OnTheMarket.com grows"; do 4 you have that line? 5 A. Yes, "and 90 per cent of this comes at the expense of 6 Zoopla." 7 Q. Are these amongst the sorts of materials that you had in 8 mind when you gave your evidence at page 190 at 9 yesterday's transcript, line 3, about what was being 10 broadcast at or about the launch of OnTheMarket? 11 MR MACLEAN: I am not sure that's quite how one does 12 re-examination, sir. 13 THE CHAIRMAN: I have the point, Mr Maclean. 14 A. This is the exactly the kind of documentation. There 15 was a lot of it at the time. Press releases, these kind 16 of documents. 17 MR HARRIS: Can I also draw your attention, please, to 18 bundle 11, a document you were taken to by my learned 19 friend, the Leighton Buzzard slides. Page 6237. If you 20 could just cast your eye at 6237 and also have a look at 21 page 6249. Do these documents cast any light on what 22 you were saying in answer to my learned friend's 23 questions about replacing Zoopla or anything on that 24 line? 25 A. They do. These are exactly the points. These are the</p> <p style="text-align: center;">Page 53</p>

<p>1 slides from the Leighton Buzzard meeting, I think, and</p> <p>2 they're exactly what I was referring to. In fact, if</p> <p>3 you look at the sort of three slides before there --</p> <p>4 Q. Sorry, which pages?</p> <p>5 A. 6244. "The agent doesn't matter. This is all about</p> <p>6 knocking Zoopla."</p> <p>7 Q. I am sorry, you say all about knocking Zoopla. Why do</p> <p>8 you say that on 6244?</p> <p>9 A. So he has the slide there. He has a Zoopla screenshot.</p> <p>10 Q. Can you just show the Tribunal where Zoopla is. Why is</p> <p>11 it knocking Zoopla?</p> <p>12 A. The very top dark band, you can see this is a Zoopla</p> <p>13 screenshot. It is from the Zoopla website, from its</p> <p>14 competitor and he is giving a list of reasons, bad</p> <p>15 things about Zoopla. This led on to me saying to him,</p> <p>16 "When you're playing golf, just play your own game of</p> <p>17 golf and forget about your competitor." And the heading</p> <p>18 in the middle is "The agent doesn't matter", so this is</p> <p>19 knocking copy of his competition.</p> <p>20 Q. Sorry, just pausing there --</p> <p>21 A. And the page after. It was page after page. That was</p> <p>22 the point in the meeting at which I said "Look, can you</p> <p>23 just focus on telling me what you can do for Connells</p> <p>24 rather than what that can do for Zoopla."</p> <p>25 Q. I see, so the next page, 6245, is that the same point,</p> <p style="text-align: center;">Page 54</p>	<p>1 price reduced. They try and make a virtue of not giving</p> <p>2 that information to the consumer, so he's saying as an</p> <p>3 estate agent: why would you give that information? So</p> <p>4 he's using -- there are a number of different things</p> <p>5 there which he is trying to damage the Zoopla</p> <p>6 proposition by.</p> <p>7 Q. And what do you think that he was saying by reference to</p> <p>8 slide 6249?</p> <p>9 A. I think 6249 illustrates the point that was made</p> <p>10 yesterday which is that this isn't about overtaking the</p> <p>11 number 2 player and then becoming a contender for</p> <p>12 number 1. This is about replacing the number 2 player</p> <p>13 and knocking them out of the ballpark completely. So</p> <p>14 replacing the second strong player in the market with</p> <p>15 themselves.</p> <p>16 Q. Why do you say that by reference to the slide?</p> <p>17 A. Because the graph kind of paints the picture of where</p> <p>18 Zoopla would disappear to if his world domination was</p> <p>19 successful.</p> <p>20 Q. By reference to the slide or otherwise, within what</p> <p>21 period?</p> <p>22 A. I don't think the period is stated on there. Is it?</p> <p>23 Five year strategy, in the small circle.</p> <p>24 Q. Thank you. So the small circle on 6249, is that right,</p> <p>25 is that what you are pointing out?</p> <p style="text-align: center;">Page 56</p>
<p>1 is it a Zoopla specific --</p> <p>2 A. That is exactly the same. It is a Zoopla screenshot</p> <p>3 and, again, making other reasons why you shouldn't --</p> <p>4 why we should come off Zoopla and then he moves on to</p> <p>5 page 6246, where he is making the same -- this is</p> <p>6 uSwitch, which is a business that's owned by Zoopla.</p> <p>7 Q. So going back then to 6244, a Zoopla specific slide and</p> <p>8 what are the reasons that in your evidence, Mr Springett</p> <p>9 was giving to you to leave Zoopla?</p> <p>10 A. Well, this is knocking copy. He was trying to generally</p> <p>11 trash Zoopla.</p> <p>12 Q. So, for example?</p> <p>13 A. In his presentation to us.</p> <p>14 Q. What are the reasons?</p> <p>15 A. He has given you half a dozen reasons on there.</p> <p>16 Q. Is that the numbered items?</p> <p>17 A. Yes, if I take as an example. Number 4, "show the</p> <p>18 trends in potential buyer interest in your property."</p> <p>19 So in Zoopla, they make a virtue of -- on the property</p> <p>20 details, when you're doing a search, they'll tell you</p> <p>21 when that property came on the market, when its price</p> <p>22 reductions were. So it's giving you information which</p> <p>23 as a buyer, is really informative on that type of</p> <p>24 property. It has been on the market six months. It has</p> <p>25 only just come on to the market, it has just had its</p> <p style="text-align: center;">Page 55</p>	<p>1 A. I think so, yes.</p> <p>2 Q. Please keep this to one side. It is possible we might</p> <p>3 go back to that but moving on in the transcript of</p> <p>4 yesterday. If you could please be taken in yesterday's</p> <p>5 transcript to page 138. And just so that you can locate</p> <p>6 it by -- you were being asked some questions at line 13</p> <p>7 about a page number 4974. Can you please be given that.</p> <p>8 That is bundle 9/4974. It is an email you were being</p> <p>9 asked some questions about. If you just cast your eye</p> <p>10 down the transcript, you will see that you were giving</p> <p>11 evidence -- this is lines 21 through 23 -- about:</p> <p>12 "Answer: Replacing Zoopla being board strategy.</p> <p>13 Replacing, not overtaking. It is about killing Zoopla."</p> <p>14 And then Mr Maclean takes you on about:</p> <p>15 "Question: What does that mean, replacing not</p> <p>16 overtaking?"</p> <p>17 And then do you see that at line 9, you start to</p> <p>18 give an answer:</p> <p>19 "I have met Mr Springett on a couple of occasions.</p> <p>20 That has been the very clear message all the way. This</p> <p>21 is not about competing fairly, trying to overtake the</p> <p>22 number 2 and then trying to become the number 1. It has</p> <p>23 been about killing the opposition -- "</p> <p>24 Then you were cut off in giving your evidence by</p> <p>25 reference to document 4974. Can you just go back to</p> <p style="text-align: center;">Page 57</p>

<p>1 4974. Do you remember, in particular, you were taken 2 to -- after the sort of thank yous in the first 3 paragraph, you were taken in particular to the next 4 paragraph, the one beginning "Of course".</p> <p>5 A. Yes, I have that.</p> <p>6 Q. Does that paragraph shed any light about what you were 7 talking about when you were cut off, namely about 8 "killing the opposition in the ..."?</p> <p>9 A. It is exactly the point, sir. This isn't about Zoopla 10 competing fairly, becoming the number 2, aspiring to 11 become the number 1. It is about them replacing, about 12 killing the number 2 and replacing it with their 13 business. They also say it has been their board 14 strategy since February.</p> <p>15 Q. On that very front, you were asked some questions -- 16 going back to the Leighton Buzzard slides, you referred 17 to it being board strategy. If you could look at 18 page 6247 once again in the Leighton Buzzard slides, 19 volume 11, 6247.</p> <p>20 A. Got that.</p> <p>21 Q. Were you present when Mr Maclean was giving his opening 22 submission about some of these slides being so-called 23 stylised scenarios, his term?</p> <p>24 A. I was.</p> <p>25 Q. Can you shed any light as to whether you regard this</p> <p style="text-align: center;">Page 58</p>	<p>1 point subsequently. My answer to that was: well yes, of 2 course, that was a good idea. In this particular email, 3 as a follow up for the meeting, I said to him: I am 4 quite relaxed about meeting one-to-one or with two of 5 the others or with all three of them at the same time, 6 but the suggestion of the four way meeting was his.</p> <p>7 Q. Sorry, was whose?</p> <p>8 A. Was Mr Springett's. I was very happy to -- in fact 9 I did chivvy along the others at one point, when they 10 were proving a bit unresponsive. You will see some 11 correspondence from Alison Platt saying that, you know, 12 she didn't see much value in a meeting unless there was 13 some new news in there and so I did help to get the 14 meeting put in place. If you look at the file note of 15 the meeting from Mr Springett, I can't remember the word 16 he used but the words in speech marks, when he suggests 17 that I created the meeting, but he has put in speech 18 marks deliberately because it's very clear that it 19 wasn't my suggestion, I had merely helped him to 20 facilitate the meeting.</p> <p>21 Q. Thank you. Whilst we are still on setting up this 22 meeting, if you were to look at the transcript, this 23 time at page 160, line 10 -- picking it over the top of 24 the page, page 160 of yesterday's transcript at the very 25 top of the page, line 1, do you recall that Mr Maclean</p> <p style="text-align: center;">Page 60</p>
<p>1 slide to be a strategy or a stylised scenario?</p> <p>2 A. I think it's a very clear business plan. This is not 3 stylised in any way.</p> <p>4 Q. I think I might be finished with this document. If you 5 just give me one moment. Thank you, yes, we can put 6 away bundle 11. You were then asked some questions 7 about the setting up of the four party meeting. Do you 8 recall those questions?</p> <p>9 A. I do.</p> <p>10 Q. You were taken to bundle 12, an email at page 6489. Do 11 you see at the top of that page, 6489, that is an email 12 from you:</p> <p>13 "Monica has the diary. Depending on who you would 14 like at the meeting from each of the three, I can be 15 alone or with David."</p> <p>16 What is your evidence about who was asking for there 17 to be more than one person at the next meeting?</p> <p>18 A. This goes back to the meeting in Leighton Buzzard, when 19 I put up a very clear block to any proposition for us to 20 join OnTheMarket that would include the One Other Portal 21 rule. Mr Springett said: well the only way we could 22 consider dropping it was if all three corporates came on 23 together. He explained that he had met with us and was 24 meeting with the others individually and would it be 25 a good idea if all three of us met with him at some</p> <p style="text-align: center;">Page 59</p>	<p>1 put to you a conversation that you had had with Ed Mead?</p> <p>2 Do you remember that?</p> <p>3 A. I do.</p> <p>4 Q. And then Mr Maclean said at line 7:</p> <p>5 "And you had had a discussion about the fact that 6 you were keen to have a meeting involving LSL, 7 Countrywide and Connells and Mr Springett?"</p> <p>8 And your answer was:</p> <p>9 "No."</p> <p>10 My note read "not the conversation at all". The 11 transcript reads:</p> <p>12 "No, no conversation at all." 13 Was there a conversation between you and Mr Mead?</p> <p>14 A. Yes, there was.</p> <p>15 Q. What was that conversation?</p> <p>16 A. We met on a the shoot and bearing in mind this is 17 probably about six weeks after the September meeting in 18 Leighton Buzzard and he said to me: how are you getting 19 on with Ian and OnTheMarket? And my answer was: I've 20 not heard anything for six weeks. He said: I'll give 21 them a chase. That was the conversation.</p> <p>22 Q. So was that you being keen to have a meeting involving 23 LSL, Countrywide and Mr Springett?</p> <p>24 A. No, not at all. That's the bit that wasn't discussed at 25 all with Ed Mead.</p> <p style="text-align: center;">Page 61</p>

<p>1 Q. And now yesterday and just a few moments ago, you 2 referred to an internal document that you thought 3 existed in the hands of OTM, about Mr Springett saying 4 he could conceivably or words to the effect of "the only 5 way in which he could drop the OTM rule was if all three 6 joined together -- all big three joined together." Do 7 you remember that yesterday? If you look in the 8 transcript, you will see it at 161, lines 21 to 24. Do 9 you see that? You said in answer: 10 "He then said the only way we could consider 11 dropping the One Other Portal rule is if all three 12 corporates joined. He says that elsewhere in some 13 internal communications as well." 14 Can I draw your attention, please, to bundle 11 at 15 page 6215; do you see that? That is an email from 16 Mr Springett internally, to Mr Milsom on 28 September. 17 A. Yes, got that. 18 Q. That's the one at 6215, is it? 19 A. It is, yes. 20 Q. Are you able to shed any light as to whether or not this 21 is a relevant internal document? 22 A. It is very relevant. 23 MR MACLEAN: What kind of question is that? This has 24 nothing to do with -- I appreciate Mr Livesey referred 25 to internal communications. All right, we can all look</p> <p style="text-align: center;">Page 62</p>	<p>1 A. The second alternative wasn't put forward as a proposal 2 in the meeting, other than the concept upon which he 3 would come back to us with a proposal, which was an 4 initiative to get the three corporate estate agents to 5 join OnTheMarket but without the One Other Portal rule 6 being involved. It would involve giving us equity to 7 compensate us for the potential damage to our Zoopla 8 shares and there would be a discussion about listings, 9 fees and durations and so on. 10 Q. And why would there be any need to compensate you for 11 your Zoopla shareholdings? 12 A. Because at that point he was still trying to convince us 13 to come away from Zoopla. 14 Q. When you say "convince us", who are you referring to? 15 A. Convince Connells, Countrywide and LSL together, to all 16 come off Zoopla, along with the other agents he refers 17 to in his file note that he was in discussions with, to 18 encourage them to come off Zoopla as well, using equity 19 from the IPO. 20 Q. Nearly there, Mr Livesey, I am grateful. A few minutes 21 later you talked about: at the next stage, you would 22 meet -- "they would meet with us at the next stage". We 23 had got to the end of the note and I was just -- can you 24 just tell the Tribunal who you were talking about as the 25 "they" in the "they would meet with us at the next</p> <p style="text-align: center;">Page 64</p>
<p>1 at the internal communications. This is a document from 2 Mr Harris to put to Mr Springett. It is nothing to do 3 with this witness's evidence and his part of the story 4 at all. 5 MR HARRIS: With respect, this is picking up in 6 re-examination, line 24 on page 161 of yesterday's 7 transcript. 8 THE CHAIRMAN: Yes, he refers to internal communications 9 which, by definition, he won't have seen at the time. 10 I am very happy for you to fill in what communications 11 they are. As we all know, these are after the event 12 comments which Mr Livesey is making. Take them in that 13 light. 14 MR HARRIS: Thank you. This morning you were being asked 15 about the four party meeting and there was an exchange 16 about Mr Maclean saying you were impatient and you used 17 the phrase "I was a little tetchy". You then went on to 18 refer to Leighton Buzzard and then you said that 19 Mr Springett offered two alternative ways forward at the 20 four party meeting. Do you recall that? 21 A. I do. 22 Q. And you started to describe the first one but you were 23 cut off and interrupted by Mr Maclean before you got to 24 the second alternative. What was the second alternative 25 put forward in the meeting?</p> <p style="text-align: center;">Page 63</p>	<p>1 stage"? 2 A. I think that is referring to the board of 3 Agents' Mutual. 4 Q. The board of Agents' Mutual? 5 A. Yes, and in the conversation. I'm not a competition 6 lawyer but in the discussion about the One Other Portal 7 rule, the phrase that I use is if it waddles like 8 a duck, swims like a duck and quacks like a duck, it 9 probably is a duck. And I couldn't have made it any 10 clearer to him in the meeting in September in Leighton 11 Buzzard and in the four way meeting, that the One Other 12 Portal rule is anti-competitive and it just wouldn't 13 wash with us, there was no point talking about it. 14 Q. Nearly there, Mr Livesey. Do you recall being 15 questioned by Mr Maclean and he was criticising you for 16 not having given a fuller picture by reference to the 17 Rook Matthews Sayer wodge of documents? Do you know 18 whether Gascoigne Halman have ever asked for more 19 disclosure about the goings on with the North East 20 groups of agents from Agents' Mutual? 21 A. I'm not aware of any request. 22 Q. The last point then is, at the end, just then at the 23 same point, it was put to you without being in 24 a question, that you maintain now, a significant 25 shareholding in Zoopla. Do you recall that?</p> <p style="text-align: center;">Page 65</p>

1 **A. I do.**
 2 Q. What is the shareholding that Connells holds in Zoopla?
 3 **A. It's just under 3 per cent.**
 4 Q. Thank you. May I just have one moment? No further
 5 questions. Very grateful.
 6 THE CHAIRMAN: Mr Freeman and Mr Landers both have
 7 questions, Mr Livesey.
 8 Questions from the Tribunal
 9 MR FREEMAN: Mr Livesey, you said on a number of occasions
 10 in your evidence that I think you were in favour of fair
 11 competition. Could you just describe to me what you
 12 think fair competition is? You did say you weren't
 13 a competition lawyer.
 14 **A. In this context, sir?**
 15 MR FREEMAN: A businessman's comment on what fair
 16 competition is in this context.
 17 **A. Fair competition would be coming to the market with**
 18 **a portal proposition, winning clients because of the**
 19 **nature of that new proposition, the differentiation**
 20 **factor and building a business in competition, rather**
 21 **than saying to potential customers: if you join us, you**
 22 **can't use your other suppliers.**
 23 MR FREEMAN: And does that concept of fair competition apply
 24 equally at whatever stage you are in your market
 25 performance, whether you are a market leader, whether

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1 you are halfway up the ladder or whether you are just
 2 a new joiner. Is that a broad concept you have or just
 3 applying to Agents' Mutual?
 4 **A. No, that would be my general concept and I'm all for**
 5 **fair competition. Our business is always getting**
 6 **competition. There's very low thresholds to entry to**
 7 **the estate agency market. You can be a window cleaner**
 8 **on Friday and a estate agent on Monday.**
 9 MR FREEMAN: Don't demean your profession quite so much,
 10 Mr Livesey.
 11 **A. So people come into our profession and, actually, that's**
 12 **very healthy and I think it's the same in the portal**
 13 **market, it is the same in most markets, that I think you**
 14 **can come in and compete on fair grounds, without having**
 15 **to tie hands.**
 16 MR FREEMAN: One other question. Do I take it from what you
 17 have said that you regard the traditional Bricks and
 18 Mortar office based estate agency model as robust and
 19 able to survive the perils of the internet age, if I can
 20 put it like that?
 21 **A. It is a very good question. It is very relevant.**
 22 **I would describe Connells as an online agency with**
 23 **branches. We have been involved in all of the internet**
 24 **stuff, Rightmove, Zoopla. We have got search engine**
 25 **optimisation, specialists within our business. We use**

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1 **the internet very strongly, it is integral to our**
 2 **business, but we also have branches. If you compare us**
 3 **with Purple Bricks which is the main contender in this**
 4 **so-called internet estate agency space, they don't have**
 5 **branches but they do have 300 people based locally, who**
 6 **are there to deliver very similar service to what we're**
 7 **trying to deliver. They have a different fee structure**
 8 **which is the most marked difference of their business**
 9 **model, where they will charge you a fee of 795 upfront**
 10 **for example, rather than maybe 1.5 per cent upon**
 11 **a successful sale. So there's differentiation that they**
 12 **have come into the marketplace with and created and**
 13 **competed. And, actually, I see that as fair**
 14 **competition, it keeps us on our toes as a business and**
 15 **I wouldn't try as OnTheMarket have done, have tried to**
 16 **lock them out by some device.**
 17 MR FREEMAN: I think we should revisit this in ten years and
 18 see who is right, thank you.
 19 MR LANDERS: Yesterday you were asked about the fees per
 20 branch paid by Connells and by Gascoigne Halman and you
 21 said that the buyer -- the fees charged by Zoopla and
 22 Rightmove and you said that Connells would be
 23 significantly lower. Am I right in thinking that the
 24 costs incurred by a portal would be the same for two
 25 branches of the same size, irrespective of who owned

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1 them? So the implication is that the margins achieved
 2 on the smaller estate agent by Zoopla and Rightmove will
 3 be, to use your words, significantly higher than they
 4 would achieve on your own branches. If that is true,
 5 when you said you would consider joining Agents' Mutual
 6 if they didn't have the OOP rule, would you have
 7 anticipated a similar sort of price discount, a volume
 8 discount with them? Would that have been part of your
 9 plans?
 10 **A. Yes, sir, so this is the discount for scale --**
 11 MR LANDERS: Yes.
 12 **A. -- and we would expect that from any supplier. You**
 13 **know, if you have got a business with six and a half**
 14 **thousand staff and 600 branches, you would be expecting**
 15 **to get better deals from your suppliers. Whether it is**
 16 **the BMWs that you buy or the photocopiers or what you**
 17 **pay to the portals, you would be expected to strike**
 18 **a better deal for volume than a single branch competitor**
 19 **might. But that doesn't mean to say that a single**
 20 **branch competitor will have poorer profit margins than**
 21 **us. They run their business completely differently. If**
 22 **you look at Connells' profit margins and compare them**
 23 **with LSL, for example, they're a similar size to us.**
 24 **Ours are completely different to their margins because**
 25 **of the different shape of the business.**

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<p>1 MR LANDERS: But Zoopla and Rightmove would expect to have 2 higher margins if they were dealing with a smaller 3 estate agent, than they would have dealing with you? 4 A. On a per branch basis, we will be paying them millions. 5 MR LANDERS: And if you joined Agents' Mutual, would your 6 going in position have been: we want better prices than 7 the small agents that set you up because of the volume? 8 A. Indeed, that's what OnTheMarket offer. They do offer 9 volume discounts already and they would have offered 10 a bigger volume discount for the bigger scale that we 11 would have brought with us. 12 MR LANDERS: Thank you. 13 THE CHAIRMAN: Mr Maclean, any questions arising out of 14 those questions? 15 MR MACLEAN: No, sir. 16 THE CHAIRMAN: Mr Harris? 17 MR HARRIS: No, sir. 18 THE CHAIRMAN: Thank you very much, Mr Livesey. You are 19 released. We'll rise for five minutes. 20 (The witness withdrew) 21 (12.10 pm) 22 (A short break) 23 (12.15 pm) 24 MR HARRIS: Sir, may I please call my next witness, 25 Mr Notley.</p> <p style="text-align: center;">Page 70</p>	<p>1 do you recognise that is the front page of a second 2 witness statement you have given in the proceedings? 3 A. Yes. 4 Q. Is that a copy of your signature on the last page of 5 that tab? 6 A. Yes. 7 Q. Are the contents of this witness statement also true and 8 accurate to the best of your knowledge and information? 9 A. Yes. 10 Q. Then in the same bundle can you turn to tab 10. Do you 11 recognise that as the front page of a third witness 12 statement? 13 A. Yes. 14 Q. I think you get the drill, now Mr Notley. 15 A. Yes. 16 Q. Actually, is yours signed on the final page? 17 A. No, this was electronic I believe. 18 Q. Did you sign that one electronically? 19 A. I believe so. 20 THE CHAIRMAN: There is something that looks like 21 a signature on mine. I wouldn't warrant it is 22 a signature but it looks like one. 23 MR HARRIS: Did you recall signing a copy of your finished 24 witness statement? 25 A. I believe so, yes.</p> <p style="text-align: center;">Page 72</p>
<p>1 THE CHAIRMAN: Yes, Mr Harris. 2 MR JONATHAN LEWIS NOTLEY (affirmed) 3 Examination-in-chief by MR HARRIS 4 MR HARRIS: Please can the witness be given bundle number D. 5 And turn to tab 4. Mr Notley, do you recognise that is 6 the front page of the witness statement you have given 7 in these proceedings. 8 A. Yes. 9 Q. On the final page within that tab is that a copy of your 10 signature? 11 A. Yes. 12 Q. Are the contents, subject to one correction you wish to 13 make in I think paragraph 7, are the contents of that 14 statement true and accurate to the best of your 15 knowledge and belief? 16 A. Yes. 17 Q. What is the correction you would like to make in 18 paragraph 7? 19 A. So, in paragraph 7 there is a typo. I have said along 20 with around 4,000 new homes developments, it is actually 21 3,000. 22 Q. So you would like to change the 4 into a 3 and make it 23 3,000 not 4,000? 24 A. Yes. 25 Q. In the same bundle can you now turn to tab number 8 and</p> <p style="text-align: center;">Page 71</p>	<p>1 Q. Does it represent the true and accurate contents of 2 further evidence you wish to give in these proceedings? 3 A. Yes. 4 Q. Finally, there is a fourth witness statement of yours in 5 a separate bundle, bundle X. You ought to find that at 6 tab number 30? 7 A. Yes. 8 Q. Do you see that? Is that a front page of a fourth 9 witness statement? 10 A. Yes. 11 Q. Have you also signed a copy of that witness statement on 12 the final page at page 230 of that bundle? 13 A. Yes. 14 Q. Is that also a true and accurate reflection of the 15 further evidence you wish to give in these proceedings? 16 A. Yes. 17 MR HARRIS: Thank you. Mr Notley, there may be some 18 questions for you. 19 Cross-examination by MR MACLEAN 20 MR MACLEAN: Good morning, Mr Notley. 21 A. Morning. 22 Q. You are the chief commercial officer of Zoopla. To whom 23 do you report? 24 A. I report to Mark Goddard who is the managing director of 25 property services, and until recently I reported</p> <p style="text-align: center;">Page 73</p>

<p>1 directly to Mr Chesterman.</p> <p>2 Q. Mr Chesterman is the founder of Zoopla; is that right?</p> <p>3 A. Co-founder and chief executive, yes.</p> <p>4 Q. In 2015 Mr Chesterman sold some shares and committed to</p> <p>5 a new share scheme which was intended to bind him into</p> <p>6 the business for a further period of time; is that</p> <p>7 right?</p> <p>8 A. That's right.</p> <p>9 Q. He sold a quarter of his stake in the business and,</p> <p>10 according to the press anyway, cashed those shares in</p> <p>11 for £11 million; is that right?</p> <p>12 A. I don't know the details.</p> <p>13 Q. But he kept 75 per cent of his shares?</p> <p>14 A. I don't know.</p> <p>15 Q. And he kept that shareholding under an arrangement which</p> <p>16 will see him gain a further 7.5 million shares in Zoopla</p> <p>17 if he can boost shareholder returns over the next three</p> <p>18 or four years; is that right?</p> <p>19 A. I know there is an arrangement in place. I don't know</p> <p>20 the details of it.</p> <p>21 Q. So as one might say, Mr Chesterman although he sold</p> <p>22 25 per cent of his shareholding, has plenty of skin left</p> <p>23 in the game, doesn't he?</p> <p>24 A. Yes.</p> <p>25 Q. Can you think of a single individual who has more to</p> <p style="text-align: center;">Page 74</p>	<p>1 Q. Any names?</p> <p>2 A. None that spring to mind.</p> <p>3 Q. None that come to mind?</p> <p>4 A. He's very experienced.</p> <p>5 Q. He knows what he's doing, doesn't he?</p> <p>6 A. My view on his approach both for Primelocation and for</p> <p>7 Agents' Mutual I don't personally agree with. I don't</p> <p>8 think it starts in the right place and therefore I would</p> <p>9 say he clearly knows what he's doing in the sense of</p> <p>10 running a business but in terms of running a successful</p> <p>11 property portal I would have to disagree.</p> <p>12 Q. What about Primelocation, pretty successful, wasn't it?</p> <p>13 A. Well it depends what context you -- what lens you look</p> <p>14 through.</p> <p>15 Q. You think Primelocation was unsuccessful from</p> <p>16 Mr Springett's point of view, do you?</p> <p>17 A. I think it was successful from Mr Springett's point of</p> <p>18 view, yes.</p> <p>19 Q. Take your second witness statement, bundle D, tab 8,</p> <p>20 page 117, Mr Notley. Look at paragraph 6.1. What you</p> <p>21 are doing here is commenting on Mr Springett's evidence,</p> <p>22 you are making what you call "overarching" points, do</p> <p>23 you see that?</p> <p>24 "I make the following overarching points..."</p> <p>25 A. Yes.</p> <p style="text-align: center;">Page 76</p>
<p>1 gain from the successful outcome of these proceedings</p> <p>2 from Gascoigne Halman's perspective than</p> <p>3 Alex Chesterman?</p> <p>4 A. I can't think of anyone.</p> <p>5 Q. Neither can I. Why is Mr Chesterman not giving evidence</p> <p>6 in this case? He's putting up £250,000 for it. Why is</p> <p>7 he not coming along to give evidence?</p> <p>8 A. So the case isn't between Zoopla and Agents' Mutual. It</p> <p>9 is between Gascoigne Halman. You have probably seen</p> <p>10 that we have made a number of acquisitions recently and</p> <p>11 we are very, very busy. I have given up a lot of time</p> <p>12 to this process and trying to run the business. I don't</p> <p>13 think it would make a lot of sense for Mr Chesterman</p> <p>14 being here and being involved in the proceedings.</p> <p>15 Q. Do you agree that there are very few people in the</p> <p>16 country with as long and as successful association with</p> <p>17 the property portal business than Ian Springett?</p> <p>18 A. There are a few people. There aren't many but there are</p> <p>19 a few, yes.</p> <p>20 Q. Who are they?</p> <p>21 A. So some of the guys at Rightmove. You have got some of</p> <p>22 the people who have been involved in some of the early</p> <p>23 portals like FindaProperty. That had been around. Some</p> <p>24 of whom do development work for Agents' Mutual over time</p> <p>25 I believe.</p> <p style="text-align: center;">Page 75</p>	<p>1 Q. And the first overarching point, read that sentence to</p> <p>2 yourself beginning "first" and then I want to pick it up</p> <p>3 at the next sentence beginning "either".</p> <p>4 A. Okay.</p> <p>5 Q. "Either Mr Springett considers that consumers are not</p> <p>6 important or he fails to understand why consumers are</p> <p>7 important for the overall success of a portal."</p> <p>8 A. Yes.</p> <p>9 Q. Are you really suggesting to this tribunal that</p> <p>10 Mr Springett is as dumb as that sentence suggests?</p> <p>11 A. I have not said that Mr Springett is dumb. I have said</p> <p>12 that he hasn't considered consumers.</p> <p>13 Q. No, you don't. You say:</p> <p>14 "Either Mr Springett considers that consumers are</p> <p>15 not important..."</p> <p>16 A. Correct, yes.</p> <p>17 Q. Do you really think that Mr Springett considers</p> <p>18 consumers are not important? Is that really your true</p> <p>19 belief?</p> <p>20 A. I think the point I am making there is if Mr Springett</p> <p>21 considered that consumers were important, he wouldn't</p> <p>22 have taken the approach that he's taken.</p> <p>23 Q. So your evidence to the Tribunal is that either</p> <p>24 Mr Springett considers that consumers are not important</p> <p>25 or he does consider they are important but fails to</p> <p style="text-align: center;">Page 77</p>

<p>1 understand why they're important?</p> <p>2 A. Sorry, say that again.</p> <p>3 Q. I am just breaking your sentence up into two. It is</p> <p>4 either he doesn't consider consumers are important at</p> <p>5 all or he does but he's completely failed to understand</p> <p>6 why?</p> <p>7 A. Could be one of those, yes.</p> <p>8 Q. In your case it is one or the other.</p> <p>9 A. Well, so the point I am making here is that the ultimate</p> <p>10 beneficiary of a property portal is either the vendor on</p> <p>11 one side or it is the purchaser on the other side.</p> <p>12 Q. And you think Mr Springett doesn't understand that?</p> <p>13 A. I think he understands that perfectly well.</p> <p>14 Q. Right, good.</p> <p>15 A. The approach that he's taken to the property portal</p> <p>16 market doesn't seem to consider that fully.</p> <p>17 Q. Is this statement in your own words, Mr Notley?</p> <p>18 A. Yes.</p> <p>19 Q. Let's go to paragraph 6.6. We are still on your</p> <p>20 overarching points about Mr Springett. We haven't got</p> <p>21 to your story:</p> <p>22 "Fourthly, Mr Springett has a section in his fifth</p> <p>23 witness statement that is headed 'Attempts by other</p> <p>24 portals to enter the market'. In this section he goes</p> <p>25 through a few selected purported attempts to enter the</p> <p style="text-align: center;">Page 78</p>	<p>1 drafted not in your words but in some lawyer's words</p> <p>2 wasn't it?</p> <p>3 A. They are my words.</p> <p>4 Q. And these attempts to enter the property portal market</p> <p>5 weren't purported. They were real attempts which</p> <p>6 failed, didn't they?</p> <p>7 A. No, I think I made the point a moment ago that referring</p> <p>8 to Tesco as an entry into the portal market as</p> <p>9 a property portal is an incorrect statement.</p> <p>10 Q. Well, Mr --</p> <p>11 A. They were judged to be an estate agent and that put</p> <p>12 Tesco off, as I understand it, because they didn't want</p> <p>13 to be subject to the sort of legal ramifications of</p> <p>14 being an estate agent.</p> <p>15 Q. Are you suggesting that successfully entering the</p> <p>16 property portal market is not very difficult?</p> <p>17 A. Entering the market isn't difficult at all.</p> <p>18 Q. Successfully entering the market?</p> <p>19 A. Successfully entering the market is a difficult thing to</p> <p>20 do.</p> <p>21 Q. It is very difficult, isn't it?</p> <p>22 A. Very difficult, yes. Certainly if you don't have</p> <p>23 something that is compelling to a house buyer or</p> <p>24 a vendor or an agent you are going to struggle entering</p> <p>25 this market.</p> <p style="text-align: center;">Page 80</p>
<p>1 property portal market and draws the conclusion that</p> <p>2 entry is very difficult."</p> <p>3 What was purported about the attempts to enter the</p> <p>4 property portal market that you refer to in this</p> <p>5 paragraph, Mr Notley?</p> <p>6 A. I believe what I was referring to, certainly one of the</p> <p>7 examples was Tesco's entry into the market. I believe</p> <p>8 the OFT determined that Tesco wasn't a portal, it was in</p> <p>9 fact an agent which is one of the reasons why Tesco</p> <p>10 decided to exit the market. The other one was Google</p> <p>11 entering the market. Google experimented listing</p> <p>12 property portals on its Google Map service but it didn't</p> <p>13 actually launch a portal as such. So, therefore, they</p> <p>14 are the two examples that I said were purported</p> <p>15 attempts. They weren't actual attempts.</p> <p>16 Q. They weren't actual attempts to enter the property</p> <p>17 portal market?</p> <p>18 A. Correct as a property portal.</p> <p>19 Q. Really?</p> <p>20 A. Yes.</p> <p>21 Q. You suggest that Mr Springett goes through a few</p> <p>22 selected purported attempts to enter the property portal</p> <p>23 market and draws the conclusion that entry is very</p> <p>24 difficult. Now, first of all, Mr Notley, purported is</p> <p>25 lawyer's words and this paragraph, I suggest to you, was</p> <p style="text-align: center;">Page 79</p>	<p>1 Q. And this litany of failures which Mr Springett refers to</p> <p>2 is testament to that, aren't they?</p> <p>3 A. I don't think they are relevant examples is the point</p> <p>4 I made.</p> <p>5 Q. So they don't tell us anything, these failed purported,</p> <p>6 to use your word, attempts they don't tell us anything</p> <p>7 about how easy or difficult it is to enter the property</p> <p>8 portal market. Is that your evidence, Mr Notley?</p> <p>9 A. I think there are two separate things. There are the</p> <p>10 specific examples that have been given of businesses</p> <p>11 attempting to enter the property market versus whether</p> <p>12 it is difficult or very difficult to successfully enter</p> <p>13 the property portal market. The point I am making here</p> <p>14 is that the examples Mr Springett has given are not</p> <p>15 relevant examples but I do agree that it is difficult,</p> <p>16 even very difficult to enter the portal market</p> <p>17 successfully.</p> <p>18 Q. You joined an outfit called FindaProperty as sales</p> <p>19 director in 2005?</p> <p>20 A. Correct.</p> <p>21 Q. What did you do before that?</p> <p>22 A. I worked for Express Newspapers for four years.</p> <p>23 Q. In sales?</p> <p>24 A. Yes, advertising sales, yes.</p> <p>25 Q. So basically you are a salesman?</p> <p style="text-align: center;">Page 81</p>

<p>1 A. That's my background, yes.</p> <p>2 Q. And you left DPG as it had become in 2011?</p> <p>3 A. Correct, yes.</p> <p>4 Q. Why?</p> <p>5 A. To join Zoopla.</p> <p>6 Q. Why?</p> <p>7 A. Because it was clear to me that Zoopla had a winning</p> <p>8 proposition. The more I met the people in the team</p> <p>9 I wanted to join it and I moved across.</p> <p>10 Q. You got promoted, a bigger job, more money?</p> <p>11 A. It was actually smaller team, much smaller revenues,</p> <p>12 smaller customer base but a winning proposition.</p> <p>13 Q. And that was obviously pre-merger?</p> <p>14 A. That was pre-merger, correct, yes.</p> <p>15 Q. So you stepped away from DPG, went to Zoopla?</p> <p>16 A. Yes.</p> <p>17 Q. And then about 12 months later you found those two</p> <p>18 organisations merging one with the other?</p> <p>19 A. It was about 18 months after I was exited from Digital</p> <p>20 Property, yes.</p> <p>21 Q. You were at FindaProperty?</p> <p>22 A. Yes.</p> <p>23 Q. Mr Springett was the chief executive at Primelocation?</p> <p>24 A. Yes.</p> <p>25 Q. Primelocation was sold to the Daily Mail and General</p> <p style="text-align: center;">Page 82</p>	<p>1 "Mr Springett also asserts at paragraph 6.8 of his</p> <p>2 fifth witness statement that the 'duopolistic' structure</p> <p>3 of the property portal market in the UK that existed</p> <p>4 prior to Agents' Mutual is itself a barrier to entry.</p> <p>5 Mr Springett appears to be familiar with the OFT</p> <p>6 assessment ... That being so, Mr Springett ought to be</p> <p>7 aware that in clearing the margin OFT determined that</p> <p>8 the market would function more effectively with two</p> <p>9 credible competitors where there was a truly effective</p> <p>10 and genuine competitive constraint on Rightmove in the</p> <p>11 form of the merged Zoopla/DPG entity."</p> <p>12 A. Yes.</p> <p>13 Q. You don't give any particular reference to any</p> <p>14 particular passage of the OFT report, do you, Mr Notley?</p> <p>15 A. That's right.</p> <p>16 Q. And that is because that sentence is a considerable</p> <p>17 gloss on what the OFT actually said, isn't it?</p> <p>18 A. It's my interpretation of the OFT ruling, yes.</p> <p>19 Q. So it is a gloss on what the OFT said?</p> <p>20 A. No, no, I believe that the deal was approved, for the</p> <p>21 reasons that I put in my witness statement.</p> <p>22 Q. Let me show you what the OFT actually said. Take</p> <p>23 bundle F1 and turn to page 309 and you should be looking</p> <p>24 at the first page of the OFT determination. If you then</p> <p>25 go to page 330. It starts at 309. I am showing you the</p> <p style="text-align: center;">Page 84</p>
<p>1 Trust in 2006?</p> <p>2 A. Yes.</p> <p>3 Q. And Mr Springett stayed on as chief executive after that</p> <p>4 acquisition?</p> <p>5 A. That's right, yes.</p> <p>6 Q. And then he departed?</p> <p>7 A. Mmm.</p> <p>8 Q. So what if any relationship contact did you have during</p> <p>9 that period when Mr Springett was still in post for two</p> <p>10 years after the buyout of Primelocation?</p> <p>11 A. Very limited, probably no contact other than the odd</p> <p>12 sort of brush in a management meeting up until 2008 and</p> <p>13 then at that point there was a proposal made to Daily</p> <p>14 Mail that with a new merged Digital Property Group</p> <p>15 business that Ian Springett would be chairman,</p> <p>16 David Garrett who was the chief executive of</p> <p>17 FindaProperty would be the chief executive of Digital</p> <p>18 Property Group, and I was invited in as commercial</p> <p>19 director.</p> <p>20 Q. So while Mr Springett was still the chief executive for</p> <p>21 the two year period you were still under the</p> <p>22 FindaProperty umbrella, were you?</p> <p>23 A. Yes.</p> <p>24 Q. We are still I think in your second witness statement.</p> <p>25 Look at paragraph 14.</p> <p style="text-align: center;">Page 83</p>	<p>1 first page of the document. And if you go to 330.</p> <p>2 A. Yes.</p> <p>3 Q. Paragraph 70. The first sentence. Under the heading</p> <p>4 "Assessment":</p> <p>5 "The OFT considered that the merger is likely to</p> <p>6 have a pro-competitive impact by creating a portal that</p> <p>7 can rival Rightmove."</p> <p>8 Do you see that?</p> <p>9 A. Yes. Sorry, which number?</p> <p>10 Q. I have just read the first sentence of paragraph 70.</p> <p>11 A. Of 70, yes.</p> <p>12 Q. Can you see that? That is not the same as the OFT</p> <p>13 determining that the market would function more</p> <p>14 effectively with two credible competitors, is it?</p> <p>15 A. Sorry, say that again, I was reading the paragraph.</p> <p>16 Q. Just listen to the question, Mr Notley, we'll go a bit</p> <p>17 quicker; all right?</p> <p>18 A. Yes.</p> <p>19 Q. I have read the first sentence of paragraph 70 and I</p> <p>20 think you have at least twice; right?</p> <p>21 A. Well I was reading the whole paragraph.</p> <p>22 Q. And I was suggesting to you that that is not the same as</p> <p>23 the suggestion that the OFT determined that the market</p> <p>24 would function more effectively with two credible</p> <p>25 competitors is it?</p> <p style="text-align: center;">Page 85</p>

<p>1 A. I guess what I was saying in my witness statement was on 2 balance, the OFT agreed that it was good for competition 3 that the merging go ahead, otherwise they wouldn't have 4 allowed it to go ahead. 5 Q. You see, if you just quoted what the OFT, said there 6 wouldn't be any debate about it but this witness 7 statement is constantly spinning the facts, isn't it? 8 Glossing them and spinning them to mount an argument 9 rather than simply presenting the facts? 10 A. Well, as far as I'm aware, this is a public document and 11 the assessment is available in full. 12 Q. Can I ask you to look at paragraph 56 at page 327 while 13 we are here. Are you involved in this merger -- you 14 were in the Zoopla side of this, you are working for 15 Zoopla at this time; right? 16 A. Yes. 17 Q. Were you involved in this process? 18 A. In which process? The OFT process? 19 Q. The merger process, yes, the clearance process? 20 A. Not directly in the OFT process, no. 21 Q. Let us look at paragraph 56: 22 "By merging to create a larger portal, the parties 23 submitted [that's Zoopla and DPG] that there would be 24 increased competition, as estate agents would have 25 a viable alternative they could switch to on leaving</p> <p style="text-align: center;">Page 86</p>	<p>1 has increased as well. 2 Q. So in other words, what you are saying is it is quite 3 difficult to draw conclusions about price just by 4 looking at overall revenue recovered by a portal because 5 there are lots of things going on. Is that right? 6 A. Yes. 7 Q. In fact, Zoopla -- let's pocket the merger. The merger 8 has now happened; okay? In fact, Zoopla's publicly 9 stated strategy after the merger was for ZPG's ARPA to 10 close the gap with Rightmove, by rising to meet it, 11 rather than Rightmove's ARPA falling to meet Zoopla's. 12 You know that, don't you? 13 A. We only have a strategy that is relevant to the Zoopla 14 ARPA. I am not sure -- which document are you referring 15 to? 16 Q. I am not referring to a document. I am asking you 17 whether you are familiar with the fact that Zoopla's 18 publicly stated strategy after the merger was for ZPG's 19 ARPA to close the gap with Rightmove, by rising to meet 20 it, rather than Rightmove's ARPA following to meet 21 Zoopla's? 22 A. Well, we have never had a strategy that involves any 23 competitor's ARPA or business generally but certainly it 24 is our business objective to grow ARPA through a number 25 of means. So from increasing the value that we deliver</p> <p style="text-align: center;">Page 88</p>
<p>1 Rightmove. Third parties generally indicated they 2 believed that the merger would increase competition to 3 Rightmove and that, overall, the price of property 4 portals would fall." 5 Do you see that? 6 A. Yes. 7 Q. "A number of estate agents specifically said they would 8 switch away from Rightmove following the merger, 9 suggesting Rightmove would face customer attrition 10 unless they had improved its competitive offering. Some 11 third parties, however, stated that they believe they 12 would have to advertise with both Rightmove and the 13 merged portal post merger which would therefore indicate 14 that they may be compliments rather than substitutes. 15 If this did occur, the merger would not significantly 16 enhance rivalry, as there would be a lack of switching 17 between the portals." 18 Do you see that? 19 A. Yes. 20 Q. Now, after this merger, the overall price of property 21 portals did not fall, did it, it rose? 22 A. Correct. Although I don't believe that that's a -- you 23 can't look at it completely at face value because the 24 audience to property portals has grown significantly in 25 that time and the range of services provided by portals</p> <p style="text-align: center;">Page 87</p>	<p>1 to agents, by increasing the number of services. So, 2 for example, we acquired a software business a few 3 months ago. So we have added in considerable new 4 services over that period of time but it has never been 5 our business objective or strategy in any way to affect 6 any other business's performance. 7 Q. Why did Mr Chesterman make precisely the statement that 8 I have just read to you in 2013? 9 A. I don't know. In what document have you seen that? 10 Q. Don't worry, Mr Notley, we'll look at plenty of 11 documents; all right? 12 MR HARRIS: Sir, with respect, he just now put to him the 13 proposition and that it comes from a specific document. 14 MR MACLEAN: No, I didn't. No, I didn't. 15 MR HARRIS: "Why did Mr Chesterman make exactly that phrase" 16 was the -- 17 THE CHAIRMAN: Mr Notley hasn't answered. Do go on, 18 Mr Maclean. 19 MR MACLEAN: I am very grateful. 20 Were you at the event in 2013 which Morgan 21 Stanley -- I will put you out of your misery, Mr Notley. 22 If you take bundle H5 and turn to page 2354. 23 A. Okay. 24 Q. Were you present at something called the DMGT investor 25 day?</p> <p style="text-align: center;">Page 89</p>

<p>1 A. I believe so, yes.</p> <p>2 Q. And Mr Chesterman spoke at that investor day, didn't he?</p> <p>3 A. Yes, I'm trying to see the date of that investor day on</p> <p>4 here.</p> <p>5 Q. It was in 2013.</p> <p>6 A. So I was involved in a number of investor day</p> <p>7 presentations on the lead up to the IPO. I can't say</p> <p>8 for sure whether I was at this one.</p> <p>9 Q. If you look in this document, this is -- are you</p> <p>10 familiar with this document, Mr Notley?</p> <p>11 A. I remember the title. I've seen it over time, yes.</p> <p>12 Q. If you look at page 2367, do you see that the Morgan</p> <p>13 Stanley document has what they call a key debate and the</p> <p>14 question, the first question, there were two questions</p> <p>15 debated here, the first is:</p> <p>16 "Will Zoopla dent Rightmove's profitability?"</p> <p>17 Do you see that?</p> <p>18 A. Yes.</p> <p>19 Q. And at the bottom of the page 2367, last line:</p> <p>20 "The result, ie the result of the merger, has been</p> <p>21 to create a duopoly with the combined market share</p> <p>22 across Rightmove and Zoopla of greater than 95 per cent</p> <p>23 online property advertising in the UK in 2012."</p> <p>24 That is correct, isn't it?</p> <p>25 A. That's the opinion of the analyst at Morgan Stanley,</p> <p style="text-align: center;">Page 90</p>	<p>1 a misinterpretation of what was said on that day because</p> <p>2 it's never been our strategy to specifically close the</p> <p>3 ARPA on Rightmove or affect any other business in any</p> <p>4 way.</p> <p>5 Q. Was the investor day recorded and broadcast, Mr Notley?</p> <p>6 A. It may have been.</p> <p>7 Q. Does a recording of it exist?</p> <p>8 A. Potentially, I don't know.</p> <p>9 Q. I want to be absolutely clear about this. Are you</p> <p>10 suggesting that Morgan Stanley have got the wrong end of</p> <p>11 the stick when they say that "Mr Chesterman indicated at</p> <p>12 the investor day that he expected ZPG's ARPA to close</p> <p>13 the gap with Rightmove by rising, rather than</p> <p>14 Rightmove's falling to meet Zoopla's"?</p> <p>15 A. I would need to understand the context. That</p> <p>16 information may have come from a question. So, for</p> <p>17 example, if the question was: do you expect your ARPA to</p> <p>18 increase or Rightmove's to fall, I imagine</p> <p>19 Mr Chesterman's only potential comment on that would be</p> <p>20 that we are planning on growing our business.</p> <p>21 Q. Well you see, if Mr Chesterman had come to give</p> <p>22 evidence, I could have asked him and we wouldn't have to</p> <p>23 have your imaginings of what he had said.</p> <p>24 Look at page 2385, Mr Notley. The Morgan Stanley</p> <p>25 model was that third last bullet point:</p> <p style="text-align: center;">Page 92</p>
<p>1 yes.</p> <p>2 Q. It is obviously correct. That is obviously was what</p> <p>3 was --</p> <p>4 A. I wouldn't say that, necessarily, the analyst at Morgan</p> <p>5 Stanley would be correct. It depends on his</p> <p>6 interpretation of what information he was given on the</p> <p>7 day.</p> <p>8 Q. Look at page 2373, Mr Notley, under the heading</p> <p>9 "Pricing"; do you see at the top of the page?:</p> <p>10 "ZPG's broad intention to raise prices seemed to be</p> <p>11 confirmed by the CEO ..."</p> <p>12 The CEO is Mr Chesterman; right?</p> <p>13 A. Correct.</p> <p>14 Q. "... who indicated at the DMGT investor day that they</p> <p>15 expected ZPG ARPA to close the gap with Rightmove by</p> <p>16 rising to meet it rather than Rightmove ARPA falling to</p> <p>17 meet Zoopla's."</p> <p>18 That is what Mr Chesterman said at the investor day,</p> <p>19 isn't it?</p> <p>20 A. I'm really sorry, I don't remember that being said and</p> <p>21 what we are looking at here is an analyst document and</p> <p>22 we are relying on interpretation of a third party on</p> <p>23 a strategy which is based around increasing prices</p> <p>24 because of the value increasing of the proposition that</p> <p>25 we provide. So this, I would say, is</p> <p style="text-align: center;">Page 91</p>	<p>1 "Rightmove and Zoopla are able to drive effective</p> <p>2 price increases on portals of circa 13 per cent per</p> <p>3 annum in 2012 to 2020, absorbing declining print spend</p> <p>4 as well as attracting the bulk of incremental marketing</p> <p>5 spend."</p> <p>6 Have they got the wrong end of the stick there too</p> <p>7 or is that correct?</p> <p>8 A. Well, I don't think there's any secret that we are</p> <p>9 looking to drive up the ARPA of our -- for agents and</p> <p>10 developers who advertise with us. That is a very clear</p> <p>11 strategy on our part but it is through what means are we</p> <p>12 planning on doing that? And our plans are very much to</p> <p>13 add in additional services. So if you read this bullet</p> <p>14 point in isolation, you could get multiple</p> <p>15 interpretations from it. We are -- I mean, if you</p> <p>16 compare our business to Rightmove, as we are doing here,</p> <p>17 Rightmove's strategy is very much to continue to provide</p> <p>18 exactly the same service to estate agents and developers</p> <p>19 but to increase prices over time. If you look at the</p> <p>20 reality of our strategy over the last two or three</p> <p>21 years, it has been to acquire and to add meaningful</p> <p>22 services, so you can't compare the two things.</p> <p>23 Q. Look at page 2358. Paragraph 9, left-hand column:</p> <p>24 "The merger of Zoopla and FindaProperty competition</p> <p>25 should not undermine returns. The merger of Zoopla,</p> <p style="text-align: center;">Page 93</p>

<p>1 FindaProperty and Primelocation in 2012 to form Zoopla 2 Property Group has created a duopoly in the online 3 portal market in the UK and reduced the risk of 4 regulatory intervention for Rightmove. Commentary from 5 DMGT suggests that ZPG achieves a circa 50 per cent 6 EBITDA margin. This high profitability and its stated 7 desire to raise prices, gives us confidence that there 8 will not be aggressive competition on price and industry 9 profitability will be supportive. Our market model 10 conservatively assumes a normalisation in Rightmove's 11 share of digital marketing spend to 60 per cent by 12 2020."</p> <p>13 So if Morgan Stanley have not got the wrong end of 14 the stick, what they are suggesting is that Rightmove 15 and Zoopla are going to do very nicely, thank you very 16 much, between 2012 and 2020, as duopolists in the portal 17 market; right?</p> <p>18 A. That is the view of a third party and you know, it is 19 talking about a duopoly that exists that I certainly 20 haven't experienced over the years.</p> <p>21 Q. If Morgan Stanley have not got the wrong end of the 22 stick, if they have got the right end of the stick, then 23 do you accept that this report, assuming it has the 24 right end of the stick, is not consistent with the 25 suggestion that ZPG was constraining Rightmove on price,</p> <p style="text-align: center;">Page 94</p>	<p>1 paragraph 21 and 22. You don't mention the Morgan 2 Stanley document in this witness statement do you, the 3 one we just looked at?</p> <p>4 A. No, there's a lot of documents out there, there are 5 a lot of documents in circulation.</p> <p>6 Q. Yes, but that might be thought to be one of the more 7 important ones. What you do mention is one from 8 Barclays Capital. Let us look at 21: 9 "First, Mr Springett's comments in relation to 10 Zoopla's ARPA are derived from a report prepared by 11 Barclays Capital and not by Zoopla, that reflect the 12 comments and views of Barclays Capital, based on its [in 13 italics] understanding of what was stated at Zoopla's 14 capital markets day." 15 Do you see that?</p> <p>16 A. Yes.</p> <p>17 Q. And then you quote from a document at H17/9555. Let's 18 just pick that up. This is actually Mr Springett who 19 had actually referred to this document. You are merely 20 giving us your helpful commentary on his evidence; 21 right? If you turn to 9555. This is a much later 22 document than the Morgan Stanley report that we have 23 just looked at because this document is dated, do you 24 see, 15 September -- it gives you the price anyway, on 25 15 September 2016, so it must have been introduced after</p> <p style="text-align: center;">Page 96</p>
<p>1 at this stage, after the merger?</p> <p>2 A. I disagree. So subsequent to -- or rather after the 3 merger, I had lots of feedback that Rightmove would 4 change their behaviour in terms of pricing. In fact, 5 I remember meeting with Paul Smith, the chief executive 6 of SpicerHaart, who I met for the first time after quite 7 a long break because he wasn't advertising on Zoopla 8 prior, and the first thing he said to me in our meeting 9 was: well I have to start off by thanking you, for the 10 first time I have got a discount from Rightmove. 11 Equally, following the merger, some new homes developers 12 were able to list on just one portal. So Persimmon 13 Homes, for example, just list on Zoopla. They don't 14 list on Rightmove. So I think the merger has actually 15 delivered some material or had developed some material 16 benefits until the launch of OnTheMarket, when Zoopla 17 was effectively pulled back.</p> <p>18 Q. And that spoilt it all?</p> <p>19 A. It is not that it spoilt it all, we still have a very 20 successful business but in terms of our ability to 21 compete and offer competition to Rightmove, that has 22 been materially diminished.</p> <p>23 Q. I don't accept any of that, Mr Notley, but let's move on 24 to your second witness statement. Still on the same 25 copy. Second witness statement, bundle D, tab 8,</p> <p style="text-align: center;">Page 95</p>	<p>1 that. Do you see that?</p> <p>2 A. I am trying to see whose document it is.</p> <p>3 Q. 9555, just under the heading. Do you see "Price, 4 15 September 2016"?</p> <p>5 A. Yes.</p> <p>6 Q. So I think we can assume this document was produced 7 around about then. The bit you quote from is over the 8 page at 9556: 9 "At the IPO ..." 10 When was the IPO, Mr Notley?</p> <p>11 A. June 2014.</p> <p>12 Q. "... the Zoopla pitch was that it would close the ARPA 13 gap versus Rightmove to reflect their relative share in 14 leads. Of course this hasn't panned out, as OnTheMarket 15 has disrupted Zoopla but in time, Zoopla still sees an 16 opportunity here. We do have the underlying portal 17 business getting back to ARPA growth of 6 per cent in 18 18, 19. We have Rightmove doing high single digit ARPA 19 growth of a significantly higher base." 20 And so on. You then go on -- go back to your 21 statement: 22 "It is not clear how Mr Springett draws from the 23 above passage, the conclusion that Zoopla can increase 24 ARPA to the level achieved by Rightmove. As is clear 25 from the Barclays Capital report, the analyst's comments</p> <p style="text-align: center;">Page 97</p>

<p>1 that the gap between Rightmove and Zoopla is not likely 2 to close."</p> <p>3 But the point is that this Barclays document has got 4 exactly the same account of the Zoopla pitch as Morgan 5 Stanley had, hasn't it?</p> <p>6 A. I don't know whether they have got this information from 7 the Morgan Stanley report. I don't know -- so I sit on 8 the exec team of Zoopla Property Group and I'm involved 9 in all of our senior management meetings and never once 10 has it been our strategy to close the ARPA gap on 11 Rightmove.</p> <p>12 Q. Yes it has, Mr Notley, as you well know, as Mr 13 Chesterman announced at the investor day?</p> <p>14 A. I don't understand the context of that -- I don't know 15 whether that was a misunderstanding or whether it was an 16 answer to a specific question.</p> <p>17 Q. So Barclays Capital and Morgan Stanley have published 18 these documents based on a misconception of what the CEO 19 said was the fundamental strategy of the whole business. 20 Is that remotely plausible, Mr Notley?</p> <p>21 A. So what I'm saying is these are third parties, not 22 commissioned by Zoopla Property Group, who are giving 23 their view on a presentation and no doubt a Q and A 24 session, and this is their interpretation of how they 25 see our business progressing over time. It is not</p> <p style="text-align: center;">Page 98</p>	<p>1 some other people that we have seen in these emails: 2 "As you are all aware, I have had the pleasure of 3 negotiating the London consortium 2013 contract with the 4 newly formed Zoopla Property Group, ZPG." 5 What is the London consortium, Mr Notley?</p> <p>6 A. It is a group of agents, mainly represented by the 7 businesses in the recipients --</p> <p>8 Q. "As a starting point, ZPG took an aggressive stance to 9 negotiations and demanded large increases." 10 Do you see that?</p> <p>11 THE CHAIRMAN: Mr Notley, you are seeing something which has 12 a blank after that; is that right?</p> <p>13 MR MACLEAN: I don't see how this can be confidential to 14 Zoopla because it's Zoopla's own data.</p> <p>15 THE CHAIRMAN: Let's resolve this then. First of all, whose 16 confidentiality is this? Is it your client's?</p> <p>17 MR MACLEAN: It can't be my client's.</p> <p>18 MR HARRIS: It says this is an Eversheds confidential 19 documents on the right-hand side.</p> <p>20 MR MACLEAN: The increase proposed is clearly not 21 confidential to Zoopla because it is proposed by Zoopla. 22 So Mr Notley ought to see the blanked out passage in 23 this paragraph.</p> <p>24 THE CHAIRMAN: I am entirely in agreement. It is your 25 client's yellow, so if the yellow is removed --</p> <p style="text-align: center;">Page 100</p>
<p>1 a Zoopla document and, therefore, it cannot state our 2 strategy. It can give a view on what they believe is 3 our strategy.</p> <p>4 Q. The strategy was to have the merger and then jack up the 5 ARPA and enjoy the comfortable duopoly. That was the 6 strategy, it is not very difficult?</p> <p>7 A. So it was a -- was that a question?</p> <p>8 Q. Yes, that is not very difficult. That was the strategy?</p> <p>9 A. No, it wasn't the strategy. I think it is very clear 10 from our behaviour as a business that we've always been 11 about making sure that -- in fact, our mission statement 12 is that we want to be the most useful resource to our 13 consumers and the most effective partner to 14 professionals.</p> <p>15 Q. I see.</p> <p>16 A. And our business is all about increasing value and we 17 believe that we can grow the commercial value of our 18 business by doing so.</p> <p>19 Q. I see. Take bundle H1, Mr Notley and turn to page 394. 20 Let's just have a look at an example. I am not sure -- 21 it can't be confidential to you, Mr Notley, but do you 22 see we are looking at an email of 13 December 2012, so 23 this is after the merger; right?</p> <p>24 A. Yes.</p> <p>25 Q. And it is from Mr Jack to Mr Flint and Mr Jarman and</p> <p style="text-align: center;">Page 99</p>	<p>1 MR MACLEAN: The yellow should be removed. 2 THE CHAIRMAN: -- then I am sure we can proceed on that 3 basis. 4 MR MACLEAN: I am sorry, Mr Notley. It is not your fault. 5 So have a look at this sentence which begins "As 6 a starting point." Do you see that? 7 The second sentence: 8 "ZPG took an aggressive stance to the negotiations 9 by demanding a 100 per cent rate increase on 2012 rates 10 and suggesting that the new rate would be payable from 11 January 2013. After much toing and froing, the offer 12 they have now proposed has been reduced to an increase 13 of 30 per cent year on year, effective from 1 April." 14 A. Yes.</p> <p>15 Q. And that was the final offer: 16 "The basis for such a large increase year on year is 17 that the consortium now benefit from listing on Zoopla 18 [that was true because previously, it had been on the 19 other entities, Primelocation or FindaProperty] and the 20 number of leads received by most members has increased 21 by up to 40 per cent in some cases." 22 So the justification for the initially contended for 23 100 per cent rate increase, was that the number of leads 24 had shot up after the merger; is that right?</p> <p>25 A. So 100 per cent rate increase is not the case. That is</p> <p style="text-align: center;">Page 101</p>

<p>1 not what we were asking for. That is a misunderstanding 2 and it is one that I established to be the case with 3 Paul Jarman of Savills. 4 Q. So you were involved in this, were you? 5 A. Yes, yes, I was personally involved in this negotiation 6 and this 100 per cent rate increase was a complete 7 misunderstanding and more to the point, it is important 8 to know that in 2008, when this group of agents were 9 advertising on Primelocation and Mr Springett was 10 running Primelocation, if you compare the rate that 11 these agents were paying at that point versus the rate 12 they were paying at the end of this, they were paying 13 a discounted rate from their Primelocation rate, four 14 years in the future, after portal traffic had more than 15 doubled. So they were actually being delivered a much 16 more cost effective proposal and there was a material 17 misunderstanding from this proposal, that we asked for 18 100 per cent. That is just incorrect. 19 Q. I will take your word for it but the 30 per cent is 20 correct, isn't it? 21 A. I have to look back at the numbers. 22 Q. And you see at the end of the email, the recommendation 23 was they came back with a counteroffer of 25. I don't 24 know where you ended up but the battle lines seem to 25 have been drawn between 30 per cent on the one hand and</p> <p style="text-align: center;">Page 102</p>	<p>1 Q. What these customers thought anyway, was that 2 Primelocation and Zoopla had a different demographic, 3 with Zoopla having a modest percentage of AB visitors 4 whereas Primelocation was at the other end of the scale? 5 A. That was the perception, yes. 6 Q. And we see that one of the factors that these agents are 7 discussing in the middle paragraph, beginning "To assist 8 you", is the concept of monthly unique visitors; do you 9 see that? Do you see in the middle of the page, it's in 10 parenthesis. 11 A. "To assist you in assessing the offer"? 12 Q. Third line "Monthly unique visitors." I think you and 13 I can agree, Mr Notley, that the concept of the unique 14 audience for a portal is of major importance to its 15 attractiveness to an estate agent; right? 16 A. Depending on who those unique users are, yes. 17 Q. Clearly, if you are in Mr Abrahmsohn's neck of the woods 18 and you don't have very many AB visitors, that's not 19 going to buy those properties? 20 A. Yes, exactly. 21 Q. But all things being equal, I think you would agree. 22 Now -- 23 THE CHAIRMAN: Mr Maclean, when you have a convenient 24 moment. 25 MR MACLEAN: I am sorry, sir. I was quite carried away by</p> <p style="text-align: center;">Page 104</p>
<p>1 25 on the other; right? 2 A. The principle of the negotiation was that we'd 3 increased, on average, leads of about 50 per cent, 4 I believe. I don't know if it is referred to but every 5 one here had benefited from a period of time where they 6 had been listed on not just Primelocation and 7 FindaProperty but also Zoopla, albeit that FindaProperty 8 was absorbed into Zoopla and all of these members, 9 I believe the smallest amount of increase they had seen 10 was 50 per cent more leads and we settled on the 11 25 per cent increase. So even after the increase they 12 had had, the following year's value was a materially 13 better rate on a cost per lead basis, than it had been 14 the year before. So it is misleading to talk about 15 a 30 per cent increase in isolation, when you don't 16 consider that as a result of the merger, all of these 17 agents saw a material increase in the leads that we 18 delivered. 19 Q. One of the tensions in the merger was that the 20 demographic profile of Primelocation on the one hand and 21 Zoopla on the other, was rather different, wasn't it? 22 A. Funnily enough, there is a perception that the 23 demographic is different but, actually, the Zoopla 24 demographic is actually higher than the Primelocation 25 demographic.</p> <p style="text-align: center;">Page 103</p>	<p>1 the excitement of the merger and my gut was not sending 2 me any signal at all. Would that be a convenient 3 moment? 4 THE CHAIRMAN: That would be convenient, Mr Maclean. 5 MR HARRIS: Sir, ought we have to have a word about the 6 timings because we have Mr Notley and Mr James and 7 Mr Forrest all to be finished today. 8 MR MACLEAN: I will be very short with Mr James, if that 9 helps and I won't be terribly long with Mr Forrest but 10 I will be a little time with Mr Notley but not nearly as 11 long with Mr -- 12 THE CHAIRMAN: So we may be running behind but not very 13 much. 14 MR MACLEAN: Not very much. 15 THE CHAIRMAN: We'll see where we are after 4 o'clock today 16 and we can, if necessary, sit a little earlier tomorrow. 17 Mr Notley, you probably know this already but don't 18 discuss your evidence with anyone over the short 19 adjournment or hopefully it will just be the only time 20 then. 2 o'clock. 21 (1.05 pm) 22 (Luncheon Adjournment) 23 (2.00 pm) 24 MR MACLEAN: Mr Notley, could you turn, please, to 25 bundle H1/519.</p> <p style="text-align: center;">Page 105</p>

<p>1 A. I am looking at a confidential version.</p> <p>2 Q. It's okay.</p> <p>3 A. So it is fine for me to look at the confidential --</p> <p>4 Q. It is, because it is your numbers again.</p> <p>5 A. Yes.</p> <p>6 Q. So this is an email from Mr Ozwell; do you see that?</p> <p>7 A. Yes.</p> <p>8 Q. And it is discussing a meeting he had had with you; do</p> <p>9 you see?:</p> <p>10 "I my meeting with Jon Notley, who was the guy</p> <p>11 basically in charge of creating full national coverage</p> <p>12 for Zoopla. Asked him to summarise his proposal and</p> <p>13 this is attached."</p> <p>14 So this was for IEAG members, see paragraph 6, for</p> <p>15 example, "In the strictest confidence"; do you see that?</p> <p>16 A. Yes.</p> <p>17 Q. So you, on behalf of Zoopla, were making a proposal</p> <p>18 collectively to IEAG members for listing fees for the</p> <p>19 following year?</p> <p>20 A. Yes.</p> <p>21 Q. And the pitch you were making, see paragraph 2, was:</p> <p>22 "We need to support someone else to break down the</p> <p>23 monopoly that RM has, to stop them increasing fees over</p> <p>24 on year, get them to start reducing fees year on year."</p> <p>25 Do you see that?</p> <p style="text-align: center;">Page 106</p>	<p>1 own email is at 669, 15 March 2013, on the facing page.</p> <p>2 And you wanted to extend the term by a couple of years;</p> <p>3 do you see that, paragraph 1?</p> <p>4 A. Yes.</p> <p>5 Q. And including the ability for any member to cancel?</p> <p>6 A. Yes.</p> <p>7 Q. And then just below the yellow box:</p> <p>8 "Given that the property seeking audience has</p> <p>9 largely moved online and over 50 per cent of our</p> <p>10 audience does not visit Rightmove, strategically, what</p> <p>11 we are proposing should be very easy to agree to."</p> <p>12 So one of your big selling points was the amount of</p> <p>13 unique audience which Zoopla had, people who only used</p> <p>14 Zoopla's portal and didn't use Rightmove's?</p> <p>15 A. Yes.</p> <p>16 Q. And the higher that percentage of unique audience, the</p> <p>17 higher it is, obviously, the more attractive your portal</p> <p>18 will be, other things being equal, to the estate agents</p> <p>19 that you are selling it to?</p> <p>20 A. All other things being equal, yes.</p> <p>21 Q. And you had collective negotiations with a number of</p> <p>22 estate agents in a whole series of different parts of</p> <p>23 the country, didn't you? In south Wales, in the North</p> <p>24 East, in London and I think some other places too?</p> <p>25 A. Yes.</p> <p style="text-align: center;">Page 108</p>
<p>1 A. Okay.</p> <p>2 Q. And then we see the negotiation and you were saying:</p> <p>3 "The cost to Zoopla providing all of this runs at</p> <p>4 ..."</p> <p>5 That number in paragraph 4, that was your figure.</p> <p>6 And they were coming back, see the paragraph:</p> <p>7 "From my own point, expenditure of another [you see</p> <p>8 the number there] per month ... like a hole in the</p> <p>9 head."</p> <p>10 And at the bottom:</p> <p>11 "I genuinely believe both sides are stuck between</p> <p>12 a rock and a hard place."</p> <p>13 You say you:</p> <p>14 "... couldn't go down on the figures we want because</p> <p>15 of the impact on the existing membership rate. On our</p> <p>16 side if we don't support ... the only major competitor</p> <p>17 are RM, then RM continues their stranglehold on us."</p> <p>18 So you were making a pitch then, collectively, to</p> <p>19 IEAG. If you take the next bundle on the same point,</p> <p>20 H2/668. This is an email from a Mr Jenkinson to</p> <p>21 Mr Ozwell; do you see?</p> <p>22 A. Yes.</p> <p>23 Q. "Subject: re Zoopla and IEAG."</p> <p>24 If you look down the page, what you were</p> <p>25 suggesting -- he was referring to your email and your</p> <p style="text-align: center;">Page 107</p>	<p>1 Q. So if you take bundle H5. Now in South Wales -- not</p> <p>2 clear to me from the bundle whether it's south Wales or</p> <p>3 west Wales or southwest Wales but perhaps it doesn't</p> <p>4 matter. 2560, please. This is Mr Jones, Nigel Jones of</p> <p>5 John Francis in Carmarthen?</p> <p>6 A. Yes.</p> <p>7 Q. You know him, don't you?</p> <p>8 A. Yes.</p> <p>9 Q. If you go to 2560. This is March 2014. So by this</p> <p>10 time, you knew that a number of estate agents had signed</p> <p>11 up to OnTheMarket but OnTheMarket hadn't yet launched</p> <p>12 and it wasn't to launch until the beginning of 2015;</p> <p>13 yes?</p> <p>14 A. Correct.</p> <p>15 Q. So we are about ten months away from what became</p> <p>16 OnTheMarket's launch. And we are about -- well we are</p> <p>17 two years now, after the merger. So 2560:</p> <p>18 "We met Jon Notley from Zoopla yesterday in what was</p> <p>19 a very positive meeting. One thing that occurred to us</p> <p>20 is what are the founder and board member companies</p> <p>21 intending to do when choosing a portal partner with AMP?</p> <p>22 This would have an influence on other members, as it</p> <p>23 would give a big indication to others on how Rightmove</p> <p>24 and Zoopla might be strengthened or weakened. We are</p> <p>25 favouring Zoopla, as is Clive Rook in the North East."</p> <p style="text-align: center;">Page 109</p>

<p>1 In fact, you were successful, weren't you, in 2 collectively dealing with the agents in Wales, all of 3 whom decided that -- those who were OnTheMarket 4 members -- all of whom decided to list Zoopla and not 5 Rightmove as their one other portal, didn't they? 6 A. Correct. 7 Q. And if you go to 2563, Mr Jones reporting to 8 Mr Springett: 9 "We will have to see what our agents group view is 10 when we report back to them on these discussions, as 11 Zoopla were, in contrast, very helpful and positive in 12 their discussions with us. We are awaiting their final 13 proposal before we report that to other members of our 14 marketing group. There does still seem to be a strong 15 body of support within our grouping to go with Zoopla 16 but time will tell if that holds firm." 17 Now, Mr Springett never put a spanner in the works, 18 did he, of the deal that you did with these agents in 19 Wales, to list Zoopla as the other portal, did he? 20 A. I don't know what Mr Springett did in relation to this. 21 Q. You are not aware of him doing anything, are you? 22 A. I'm not aware of him doing anything, no. 23 Q. Or anyone else at Agents' Mutual doing anything? 24 A. Correct. 25 Q. But if there was some dastardly plot to do down Zoopla</p> <p style="text-align: center;">Page 110</p>	<p>1 organisation called REAP; is that right? 2 A. Correct. 3 Q. Just remind me, Mr Notley, what REAP is? 4 A. REAP is a collection of agents in the north of London. 5 There is a bit of cross over between the REAP membership 6 and CLEA membership, so Central London agents and they 7 are -- I believe they came about and created a magazine 8 called Fabric. 9 Q. And a London magazine as well? 10 A. That's CLEA. 11 Q. So there are these two groups and each of them set up 12 a magazine -- 13 A. Yes. 14 Q. -- which is circulated in London? 15 A. Yes. 16 Q. For their own purposes? 17 A. Yes. 18 Q. And here you are dealing with REAP and on this occasion, 19 Mr Abrahamsohn is emailing you and he's copying in 20 Mr Chesterman? 21 A. Yes. 22 Q. We don't see Mr Chesterman appearing very often in these 23 emails. Why should he be copied in to this one? Is 24 this because REAP was a particularly important group 25 of --</p> <p style="text-align: center;">Page 112</p>
<p>1 at the heart of my client's raison d'etre, you would 2 have expected them to be exercised about this, wouldn't 3 you? 4 A. I can't comment on what they were doing in relation to 5 the west Wales group and the interesting thing about the 6 west Wales group is they were very different to other 7 groups, in that they, I believe, know -- if not know, 8 but very few corporate offices down in the southwest. 9 So they were quite different, in the sense that they 10 were insulated from any of their competitors listing 11 with Rightmove -- 12 Q. The North East -- 13 A. -- after the fact. 14 Q. The North East group which we will see some examples of 15 in a minute, the North East group was a bit more 16 fractured, wasn't it, and in fact, I think didn't, in 17 the end, all list with Zoopla or with Rightmove, some 18 split one and some to the other, is that right? 19 A. The vast majority in the North East went with Rightmove. 20 Q. But not all? 21 A. I don't believe so, no. I think there were a small 22 handful of letting agents who stuck with Zoopla. The 23 vast majority went with Rightmove. 24 Q. Can you take H6/3265. One of the other groups of estate 25 agents that you collectively negotiated with was an</p> <p style="text-align: center;">Page 111</p>	<p>1 A. I believe Trevor and Alex are near neighbours. 2 Q. In north London? 3 A. Yes, and I know there's -- you know, their paths have 4 crossed outside Zoopla, I believe. 5 Q. Just keep that one open if you would and if you take 6 bundle H8/4481. This, I think, is your proposal in 7 2014, November 2014, to Mr Abrahamsohn on behalf of REAP? 8 A. Yes. 9 Q. "Following to our discussion late last week, we reviewed 10 our proposal as follows. Should a minimum of X per cent 11 sign up, we will extend the discount offered to Y. 12 Should the minimum of Z sign up, we will increase the 13 discount to [something else]. I hope you will agree we 14 have moved a long way from our initial starting point of 15 freezing rates." 16 So what we see here is your proposal and then at 17 4575, if you look at the "Dear John" email at the bottom 18 of 4575 on to 6, you see what Mr Abrahamsohn was 19 suggesting by way of response to your offer; do you see 20 that?: 21 "We are looking for a discount of ..." 22 Do you see, 4576? 23 A. Yes. 24 Q. And then your response is to offer a further level of 25 discount, subject to continued advertising; right?</p> <p style="text-align: center;">Page 113</p>

<p>1 A. Correct. 2 Q. So what we see by this time, by 2014, shortly before 3 OnTheMarket launches into the portal market, is that 4 with the agents which were signing up to OnTheMarket, in 5 other words, a fairly marginal part of Zoopla's 6 business, Zoopla was reacting to OnTheMarket's impending 7 arrival and offering better deals to these marginal 8 customers than it would have been if OnTheMarket's 9 impending arrival wasn't coming. Is that right? 10 A. In this case, yes. 11 Q. And -- 12 A. Although it has to be said that we have had these sort 13 of group negotiations in the past and for us, if we're 14 able to negotiate with a group, it has made life a lot 15 easier and, therefore, we are sometimes prepared to give 16 better terms. I'm not sure but I think the linear 17 example that you gave, I can't remember exactly what the 18 date on that was but I believe that was well in advance 19 of OnTheMarket. 20 Q. That was when you were putting the prices up. That was 21 before -- that was in 2012, I think, that one, wasn't 22 it? That was while my client's entry was still some way 23 off? 24 A. Yes, so we have got a number of group deals that we have 25 given around the UK over the years but yes, the timing</p> <p style="text-align: center;">Page 114</p>	<p>1 south Wales. What were the other three sizeable 2 geographic groupings, Mr Notley? 3 A. I don't know. I don't recall. Maybe -- I don't recall 4 that. 5 Q. Do you recall? 6 A. I am guessing that maybe REAP was one of them. 7 Q. Yes. 8 A. I can't remember. 9 Q. There was one in Devon, wasn't there? 10 A. Yes, north Devon, did we get -- I don't think we got to 11 a point of offering a proposal to north Devon. I'm not 12 entirely sure. 13 Q. There was some contact with a group in north Devon by 14 Zoopla, wasn't there? 15 A. Yes. It is difficult because when a group of local 16 agents, local competitors get together and ask to 17 negotiate on a group basis, especially when there's 18 a substantial chance that you may lose all of the 19 listings in that area, you are more likely to -- 20 Q. Do you know what Rightmove did? Did they deal with 21 these people in the same group basis or not? 22 A. No, because I think -- and this is the interesting thing 23 around this piece, is that the positioning by 24 Mr Springett that this was a duopoly, I think is a false 25 one, because I think the point you are going to make is</p> <p style="text-align: center;">Page 116</p>
<p>1 of this is just before -- is at the point at which we 2 have the threat of losing agents as a result of 3 Agents' Mutual's entry, yes. 4 Q. So for the people who are signing up to OnTheMarket but 5 not more generally for Zoopla's business, you are going 6 round, reacting to OnTheMarket's impending arrival by 7 offering better deals? 8 A. We had a number of negotiations at the time, yes. 9 Q. If you still have H6 which I hope you still have that, 10 if you go to 3287. This is an email from Mr Rook of 11 Rook Matthews Sayer, from whom the wodge is eventually 12 extracted later in the story. Mr Rook to Mr Jones. So 13 this is the North East agent -- he's one of the group 14 you are negotiating with in the North East, Mr Rook, 15 emailing another agent in south Wales that you've also 16 been negotiating with. We have just seen his email, 17 Mr Jones; right?: 18 "Thanks for the update. I had a good chat with Jon 19 Notley yesterday, as preparation for the NE group 20 meeting on September 10th. He was optimistic about the 21 reception received by your group and intends to make 22 a similar offer. He indicated that there may be at 23 least three other sizeable geographic groupings which 24 could also receive a group offer." 25 So this is the North East of England talking to</p> <p style="text-align: center;">Page 115</p>	<p>1 that Rightmove didn't negotiate. 2 Q. I am just asking you a question. 3 A. So my understanding is that they weren't as forthcoming 4 at this time, yes. 5 Q. Take bundle H7, Mr Notley, and turn to page 3182. This 6 is September 2014. Do you know who Mr John Newell is? 7 A. What company is he from? 8 Q. Kingston Newell. Does that ring a bell? 9 A. No. 10 Q. Look at the email at the bottom of 3812: 11 "Hope all is well. Just an interesting conversation 12 had today with Zoopla, as I have given my one month 13 required notice which expires on 5 October and all of 14 a sudden, a call out of the blue from one of the 15 management team today, virtually begging for me to stay. 16 They have slashed monthly rate by 50 per cent, thrown in 17 loads of extras. He explained the next two months heavy 18 marketing and TV ... and want to be the second portal 19 for Agents' Mutual. I had to keep a straight face 20 without laughing. He explained west Wales [this is the 21 Zoopla representative] are dropping Rightmove and 22 sticking with Zoopla as a group of agents and want all 23 of Wales to do the same as they have offered west 24 Wales." 25 So what seems to be happening here is that Zoopla is</p> <p style="text-align: center;">Page 117</p>

<p>1 suggesting to Mr Newell that like those in west Wales, 2 agents in his area should get together and stick with 3 Zoopla; right?</p> <p>4 A. That's the view of John Newell. I'm not aware of this 5 conversation, so I can't comment on it.</p> <p>6 Q. Now, the first paragraph of that email, beginning "Hope 7 all is well", down to "without laughing", would you 8 agree with me that's indicative of competition at work, 9 Mr Notley?</p> <p>10 A. No, I think that's the One Other Portal rule at work. 11 I think that's the carving a value out of Zoopla as part 12 of a purported duopoly which isn't a duopoly at all, it 13 is a monopoly. And Zoopla naturally defending their 14 position in any way that we could at the time. That's 15 exactly what this is saying to me and, actually, most of 16 these examples tell me exactly that. And you will see 17 from some of the commentary in some of these emails, 18 comments about the fact that Zoopla are being a lot more 19 friendly and a lot more helpful. That is because we had 20 to be.</p> <p>21 Q. That is because you are competing?</p> <p>22 A. No, it is because we had a competitor coming into the 23 market, whose sole purpose was to carve value out of our 24 business and we did what we could to resolve that.</p> <p>25 Q. You are competing with my clients, who I think haven't</p> <p style="text-align: center;">Page 118</p>	<p>1 compete at a local level. There were some areas 2 where -- there were some markets where no agents were 3 signing up to Agents' Mutual and some markets where 4 almost all agents were signing up to Agents' Mutual.</p> <p>5 Q. But where estate agents were showing an interest, 6 signing a letter of intent for OnTheMarket, Zoopla was 7 reacting to their particular position by going round to 8 them, either individually or more usually, in your case, 9 on a group basis, and competing with OnTheMarket by 10 offering better deals than you otherwise would have 11 done?</p> <p>12 A. But in the case that you've -- the two cases that you 13 have given or certainly these last few cases, not the 14 INEA one, these agents have signed up to Agents' Mutual, 15 so we were actually competing with Rightmove They had 16 already signed with OnTheMarket so there is no question 17 that they were going to drop some --</p> <p>18 Q. Agents' Mutual, people signed, as you well know, people 19 signed a letter of intent months and months before OTM 20 launched and it would never have launched unless it got 21 to the critical mass of agents to make the project 22 viable. So all the way through 2013 and 2014, there was 23 a struggle going on, wasn't there?</p> <p>24 A. Not between us and Rightmove.</p> <p>25 Q. Between you and OnTheMarket, as --</p> <p style="text-align: center;">Page 120</p>
<p>1 yet but are about to, enter this portal market, aren't 2 you?</p> <p>3 A. We are competing with OnTheMarket and we're competing 4 with Rightmove and all this does is set Zoopla back in 5 their competitive position with Rightmove, thereby 6 strengthening Rightmove.</p> <p>7 Q. You equate, don't you, any weakening of Zoopla's 8 position with an equal and opposite strengthening of 9 Rightmove. That is fundamental to your position, isn't 10 it?</p> <p>11 A. I'm not attaching proportions to it but I would say that 12 a weakening of Zoopla and a widening of the competitive 13 gap between Zoopla and Rightmove, serves really no other 14 party other than Rightmove.</p> <p>15 Q. It doesn't please Mr Chesterman, no doubt but that is 16 a different matter?</p> <p>17 A. Talking about Mr Chesterman, I think this is a -- for 18 me, I think there is no clear example with the emails 19 that you have sent me and the group negotiations we are 20 talking about, that we don't exist in a duopoly.</p> <p>21 Q. Have a look at bundle H8/4467, Mr Notley, please. You 22 see the people who were joining OnTheMarket were 23 a relatively small proportion of the total agents 24 listing on Zoopla, weren't they?</p> <p>25 A. They -- yes, but a local level because of course, agents</p> <p style="text-align: center;">Page 119</p>	<p>1 A. Sorry, not between us and OnTheMarket. It was a direct 2 competition in those cases, between us and Rightmove and 3 as you have seen, in the vast majority of cases we lost 4 because we are a long way behind Rightmove.</p> <p>5 Q. Let's have a look at 4467. H8/4467. Have a look at the 6 email at -- it starts at 4468 at the bottom: 7 "Dear Mark". Do you see that? Go over the page: 8 "It was great to see you." 9 This is from Mike Norris, who is an account manager 10 at ZPG, so he works for you, does he? Do you see that?</p> <p>11 A. He's in my team, yes.</p> <p>12 Q. Do you see the paragraph in 4469: 13 "Our standard membership rate, if you were joining 14 us as a new customer today, would be ... " 15 And I am not going to read that number out in case 16 you don't want me to but you see that number: 17 "... plus VAT per month for your two offices. Due 18 to our ongoing relationship and your continuing support 19 for ZPG, I can offer you a significantly discounted rate 20 of a bit less plus VAT per month, effective from 21 21 December 2014." 22 Then you see the email from Mark Hayward which 23 starts at the bottom of 4467: 24 "Please be in no doubt I do not agree your 25 14 per cent increase in rates as from 21 December 2014.</p> <p style="text-align: center;">Page 121</p>

<p>1 At our meeting I challenged the validity of this, as our 2 contract anniversary is the 16th of the month and you 3 couldn't justify any reason in the hike". 4 And then third paragraph: 5 Thank you for comparing your rates with 6 Agents' Mutual. I have looked at OnTheMarket and do you 7 know, these guys have probably got it right. They are 8 agents working for agents. They are not a portal grown 9 out of just making money for the founders and now having 10 to answer to shareholders. Nor are they offering 11 competitive services which do not act in the best 12 interests of agents who have supported you over the last 13 few years. The impression I have is that Zoopla is now 14 running scared and you have been sent out to increase 15 revenues, as you are fearful of agents walking and your 16 losing a significant proportion of the income. If this 17 is the case, this strategy is seriously misguided. 18 "The agent's offering is attractive and I have the 19 distinct feeling it is most likely that in a year's 20 time, they'd be offering me a 14 per cent reduction of 21 fee ..." 22 And so on. 23 He makes a counteroffer. And do you see then, at 24 4467, what happens? Wendy, Wendy Stevens -- she is one 25 of your regional sales managers, isn't she?</p> <p style="text-align: center;">Page 122</p>	<p>1 emailed her "Guess what, I have rattled the cage and 2 they do not want to lose our business." 3 Do you see that? Those top two emails don't matter, 4 Mr Notley, what matters is -- 5 A. I don't understand why Agents' Mutual is commenting on 6 confidential rates. 7 Q. Because Mr Hayward has emailed Agents' Mutual. That's 8 why. In the middle of 4467. Nothing wrong with that. 9 You shake your head. What matters about this is that 10 this is a classic example, is it not, of ZPG responding 11 to the competitive pressure resulting from 12 Agents' Mutual's entry into the market, isn't it? 13 A. Well, this is one example of one conversation that 14 happened. But I mean it is a matter for public record 15 that we lost 3,000 branches as a result of 16 Agents' Mutual, so it is unsurprising to me that in 17 some, if not cases, we have done what we can to save the 18 business. Importantly though, if they have signed up to 19 Agents' Mutual in the vast majority of cases, there is 20 nothing we can do to save their business. 21 Q. But do you accept that that is at least an example of 22 ZPG responding to competitive pressure resulting from 23 Agents' Mutual's impending entry to the market? 24 A. I think it's a reaction of having a gun put to your 25 head.</p> <p style="text-align: center;">Page 124</p>
<p>1 A. Yes, yes. 2 Q. So there has been a phone call with Mr Hayward: 3 "Hi Mark, further to our telephone conversation, 4 I can confirm your membership fee for branch X and 5 branch Y will remain at a particular level as a valued 6 customer. Please ignore all previous email 7 correspondence about a rate alignment on your account, 8 [ie increase] as this has not been processed. I am 9 sorry for the stress this has caused you. Hopefully we 10 can continue working with you into 2015 and help you win 11 in your marketplace. As a goodwill gesture for the 12 inconvenience I've applied ten free premium listings per 13 branch to you." 14 And Mr Hayward says at the top of the page: 15 "In a nutshell, my agent is not going to help Zoopla 16 by giving notice until the last day possible. My agent 17 received an email putting his rates up. He said 'No, 18 play the AM card'. They said 'Okay, sorry, forget it 19 and have ten premium listings free, LOL!'" 20 Now that is a classic example -- 21 A. Sorry, I don't understand -- who is this top email from? 22 "Hi all, below is a summary of ..." 23 Q. The top one is from Donna Beaufoy to Mark? 24 A. And who is Donna Beaufoy? 25 Q. To the sales team at Agents' Mutual and Mark Hayward has</p> <p style="text-align: center;">Page 123</p>	<p>1 Q. You see, take your witness statement, Mr Notley, the 2 second witness statement, bundle D, tab 8, page 133, 3 paragraph 38. You spend some time in this paragraph 4 setting out all the awards that Zoopla have won and I am 5 sure you are right, including sixth position in the 6 Guardian's top UK, 100 UK tech companies, best property 7 portal for western Europe and best website and so on. 8 But then you say this: 9 "I cannot accept as truth the suggestion that 10 Agents' Mutual has delivered any benefits to consumers 11 whether directly or by somehow spurring on new and 12 additional competition by existing portals". 13 That sentence is belied, is it not, by the examples 14 I have just been showing you? Take the last one. 15 A. Well it depends who you consider to be the consumer. So 16 in the case of my witness statement, I am talking about 17 the vendor and if the vendor has been using an agent who 18 has been listing on Rightmove and Zoopla, as appears to 19 be the case in many of these examples, and that agent 20 then pulls away from Zoopla or Rightmove, and lists on 21 Agents' Mutual, then they are seeing a substantial 22 reduction in the service they receive. 23 Q. So consumer is synonym for vendor in that sentence, is 24 it? 25 A. In my world a consumer is the end consumer.</p> <p style="text-align: center;">Page 125</p>

<p>1 Q. I thought you said consumer is a synonym for vendor but 2 now you're saying it's not? 3 A. Vendor being a vendor is a house-hunter. 4 Q. I know what a vendor is but they are not the only 5 end-users, are they, the vendors, what about the 6 prospective purchaser or the prospective tenant or the 7 prospective landlord? 8 A. That is not what I am referring to in point 38. I'm 9 talking about the end consumer. 10 Q. You told us a moment ago, I think you told us that what 11 you intended by consumers was vendor; is that right? 12 A. Vendors, householders. 13 THE CHAIRMAN: A vendor and a house-hunter may be the same 14 thing sequentially but they are not the same thing at 15 the same time. 16 A. No they're not. When I am referring to consumers in my 17 witness statement, sir, I am referring to a member of 18 the public, as opposed to a property professional, is 19 probably the -- 20 MR MACLEAN: What about Mr Hayward's end-users? 21 THE CHAIRMAN: Mr Maclean, I don't want to interrupt but 22 let's just get Mr Notley's evidence on exactly on what 23 he means by consumers. 24 A. Yes. 25 THE CHAIRMAN: You are talking about not necessarily</p> <p style="text-align: center;">Page 126</p>	<p>1 listings that an agent would have would be, say, 60. So 2 the cost to Mr Hayward of a listing for a month is £4. 3 The average property is on the market for between three 4 and six months, so that's between 18 and £36 benefit on 5 a overall estate agency fee of 1.5 per cent of -- we 6 will assume it is the national average premium. That is 7 £3,000. So I think there would be a material 8 disadvantage to the end consumer, by the agent moving to 9 Agents' Mutual, if the agent is using Rightmove and 10 Zoopla prior to moving to Agents' Mutual. 11 Q. Zoopla wanted to charge Mr Hayward £560 and ended up 12 agreeing to charge only £240 per month? 13 A. Yes, it's £560 for two offices, two Chew Magna at £280 14 and Wrington. And it is a matter of public record that 15 our ARPA, our average ARPA is £367, so it looks to me 16 like -- 17 Q. It was a 14 per cent increase that has been planned? 18 A. Yes, the missing information here is what we have done 19 in terms of increasing value. 20 Q. Not much by the looks of it, Mr Notley? 21 A. Well, we don't have that information in front of us, do 22 we? I don't know whether Debbie Fortune were just 23 listing on Zoopla prior to the merger or just on DPG. 24 Q. If there was any increased value, Mr Hayward hasn't 25 spotted it, has he?</p> <p style="text-align: center;">Page 128</p>
<p>1 vendors, you are talking about the man or woman in the 2 street who is looking to buy or sell property or simply 3 see what property there is in the market? 4 A. That's right, who may or may not also be a vendor or 5 a landlord but it is the end consumer and you know, 6 different types of consumers use our service and use 7 through their agent, our services. 8 THE CHAIRMAN: So perhaps could one put it this way: the 9 members of the public to whom estate agents provide 10 their services? 11 A. Yes, yes. 12 MR FREEMAN: So not an intermediary? 13 A. Yes, not an intermediary, no. 14 THE CHAIRMAN: Thank you, I don't know whether it matters. 15 MR MACLEAN: I am very grateful, sir. 16 So what you are talking about here is vendors or 17 property seekers but you see, take the example of 18 Mr Hayward, who, when he kicked up a fuss and mentions 19 Agents' Mutual, the jacking up of his price got 20 cancelled, it got frozen at what it was and he got ten 21 free premium listings. Wouldn't that in due course 22 trickle down to the benefit of Mr Hayward's ultimate 23 customers, vendors or property seekers? 24 A. It is probably worth just talking that through. So 25 currently paying £240 per branch. The total number of</p> <p style="text-align: center;">Page 127</p>	<p>1 A. Correct, yes, I agree with that. Or he's negotiating. 2 Q. Now, when agents did join OnTheMarket, Zoopla sent 3 letters to their clients, didn't they? 4 A. Yes, well we employ lots of different marketing 5 techniques, yes. 6 Q. And that is one of the strategies which presumably you, 7 in your senior position, approved as part of Zoopla's 8 strategy to counter OnTheMarket? 9 A. It was a marketing decision but I was aware of it, yes. 10 Q. You approved it, didn't you? 11 A. I was involved in the decision-making process, yes. 12 Q. Did you disapprove of it? 13 A. No, no, not necessarily. 14 Q. Take bundle H7, please, and come to 4020. This caused 15 a bit of a stir in the trade press, didn't it, this 16 tactic? 17 A. I remember it got some coverage, yes. 18 Q. It did, didn't it: 19 "Zoopla letter direct to Agent's clients is 20 confirmed as genuine. A letter sent by Zoopla to house 21 seller appears to be going viral among the estate agency 22 industry. Other agents have forwarded it to Eye after 23 being sent it themselves." 24 And it refers to a heavily creased letter. If you 25 go over to page to 4022, that I think, is a heavily</p> <p style="text-align: center;">Page 129</p>

<p>1 creased letter but if the Tribunal would like to see it 2 once it has been ironed, you have it at H9/4741, where 3 we can see it a bit more clearly. Addressed to the home 4 owner: 5 "We are very sorry to see your property is no longer 6 being marketed in any of our websites, mobile apps or 7 partner sites. Marketing your property as widely as 8 possible is advised until you get maximum exposure and 9 the best price in any transaction ... " 10 And so on: 11 "We recommend that you discuss this matter with your 12 agent as soon as possible and consider using an agent 13 who will market your property as widely as possible, 14 including on the websites above." 15 And then very helpfully you add: 16 "You can find a list of such agents in your area ... 17 www.Zoopla.co.uk/find-agents. Love and kisses, Zoopla." 18 So that's another example, isn't it, of what might 19 be described as rather aggressive reaction at the 20 margins of Zoopla's business to the agents who are 21 joined OnTheMarket, by trying to set their clients, 22 their ultimate clients, against them by having them 23 running into the estate agent saying: what the devil are 24 you doing, signing up with this new outfit, we want you 25 back on Zoopla PDQ. That is the message you wanted to</p> <p style="text-align: center;">Page 130</p>	<p>1 that letters like this were a standard part of your 2 marketing and it wasn't a specific response at the time 3 of OnTheMarket arriving? 4 A. This was something we started doing in 2014. This 5 letter is dated 2 September 2014. I can't say it 6 wasn't -- I can't say you can entirely separate it but 7 we have -- vendor targeted marketing is something we do 8 often. Even our TV advertising often has a vendor angle 9 to it because we are looking to educate consumers, as in 10 the vendor in that case, that choosing an agent that 11 lists with Zoopla would be of benefit to them. And in 12 most cases, for any agent who left ZPG to join 13 OnTheMarket, in many cases the agent would have felt 14 obliged to have written to their customers to inform 15 them they were leaving Zoopla, especially if the 16 customer had signed up on the understanding that they 17 were going to be listed on Zoopla. Potentially the 18 agent could fall short of the consumer protection 19 regulations in that case, especially given they're 20 leaving because they have taken, effectively, 21 a shareholding in a competitive website. So I saw 22 a number of letters sent by agents themselves to 23 vendors. But for us this is -- it is quite punchy but 24 it is marketing and it is completely valid marketing and 25 in some cases, vendors switch agent because they</p> <p style="text-align: center;">Page 132</p>
<p>1 get across, wasn't it? 2 A. It is marketing, yes. 3 Q. It is not just marketing, it is targeted competitive 4 reaction to the new player in the game? 5 A. No, it's marketing. 6 Q. It is just marketing, is it? 7 A. Yes, and it wasn't targeted, necessarily, at -- 8 Q. It was untargeted marketing? 9 A. It wasn't targeted -- let me finish, please. It wasn't 10 targeted, necessarily, at anyone who wasn't with Zoopla 11 and who was OnTheMarket. It was targeted at any vendor 12 who had their property OnTheMarket and perhaps wasn't 13 aware their property wasn't listed on our websites. 14 Q. It wasn't targeted to people whose agents were on 15 Rightmove, was it, because the letter wouldn't have made 16 sense, if it had been sent to them? 17 A. If it was on Rightmove and it wasn't on Zoopla, yes, 18 they may have received a letter. 19 Q. Really? 20 A. It was only relevant -- it is only relevant if the 21 property isn't advertised on Zoopla, Primelocation, 22 Times, Telegraph, Evening Standard. We believe that is 23 quite an important message to get to a vendor. 24 Q. If you go back to bundle H2, please. 25 MR LANDERS: I am sorry, can I just clarify, are you saying</p> <p style="text-align: center;">Page 131</p>	<p>1 couldn't believe that they weren't advertised on Zoopla 2 because that's the website they use. In some cases it 3 was ignored. In some cases it was passed on to estate 4 agents which is why we see it here. 5 MR MACLEAN: Mr Notley, this isn't untargeted marketing. 6 The very first line of the letter doesn't say -- 7 A. I wasn't saying untargeted to the consumer. I was 8 saying it wasn't necessarily targeted to just 9 OnTheMarket members. It was targeted to any consumer, 10 quite clearly targeted because it had an address on it 11 to consumers whose properties weren't listed on Zoopla. 12 Q. Not quite, Mr Notley, that's my point. The very first 13 line of the letter says, not "We are very sorry to see 14 that your property is not being marketed on any of our 15 websites." It says "We are very sorry to see your 16 property is no longer being marketed on any of our 17 websites." 18 A. Yes. 19 Q. So it had been marketed on one of your websites? 20 A. Correct, and taken off but not necessarily -- 21 Q. And taken off and the reason why it would be taken off 22 in this period in 2014 and following, is because agents 23 were making their choices as to who their other portal 24 was. We have seen some of these agents in the examples 25 I have been showing you, giving their 30 day notice to</p> <p style="text-align: center;">Page 133</p>

1 ZPG, dropping Zoopla. That means their properties
 2 disappear off the website and this triggers this rather
 3 aggressive letter then being sent to the homeowner,
 4 designed to set that homeowner, that vendor, to go along
 5 to the estate agent, saying, "What the devil are you
 6 doing, get back on Zoopla?"
 7 **A. So it doesn't necessarily mean that the property is**
 8 **featured on Agents' Mutual, is my point.**
 9 Q. Not necessarily but that's obviously the --
 10 **A. It is a retention --**
 11 Q. -- reason why these letters --
 12 **A. It is a retention piece of marketing.**
 13 Q. And the reason why you started doing this in 2014, not
 14 2011 or 2012 or 2016 or 2015, is because you knew that
 15 OTM was coming down the track?
 16 **A. No, I don't accept that. That's not true.**
 17 Q. It is just a big coincidence, is it?
 18 **A. So the primary reason that we started doing this was**
 19 **because that a provider emerged in the market who was**
 20 **able to provide full address details, so the fact that**
 21 **that provider emerged and we became aware of them at**
 22 **that point, that's what drove the decision.**
 23 Q. I see, so you sent the letters out because you could; is
 24 that your evidence?
 25 **A. Yes.**

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1 Q. A bit like climbing Everest because it's there. I don't
 2 accept that, Mr Notley. This was targeted at the
 3 vendors who had --
 4 THE CHAIRMAN: Mr Notley, so where did you get the address
 5 from?
 6 **A. So in many cases agents don't provide full addresses to**
 7 **us. So for some agents, if we were going to send this**
 8 **kind of marketing, we had to source the full address of**
 9 **the property from an external provider. It meant**
 10 **a provider that offers its services to estate agents for**
 11 **essentially the same reasons. So we were tapping into**
 12 **that supply.**
 13 THE CHAIRMAN: So when a property is listed on Zoopla, it
 14 will just say 31 Acacia Avenue and that's it?
 15 **A. Yes, in many cases the agent sends the full address but**
 16 **we don't publish it is and the reason we don't publish**
 17 **it is because agents don't want other estate agents**
 18 **touting their business, effectively. But in many cases**
 19 **the agent doesn't provide the full address and,**
 20 **obviously, you can only do this kind of marketing if you**
 21 **have the full address.**
 22 THE CHAIRMAN: How do geographic searches work, if you don't
 23 have the full address?
 24 **A. Because we have full postcode. So generally we go off**
 25 **full postcode. We go off full address as well but it is**

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1 **behind the scenes. The full address isn't published on**
 2 **the consumer facing website.**
 3 THE CHAIRMAN: Yes, but it is available to you?
 4 **A. It is available behind the scenes, yes.**
 5 THE CHAIRMAN: Yes. I am just trying to understand what the
 6 provider was adding to information you already had.
 7 **A. So in many cases we weren't being provided with the full**
 8 **address but we were being provided with the full**
 9 **postcode, so we may have had Acacia Avenue but we didn't**
 10 **have 32 Acacia Avenue and clearly, you can't send the**
 11 **letter to Acacia Avenue, you need to send it to --**
 12 THE CHAIRMAN: I understand. So you had somebody who was
 13 able to convert Acacia Avenue with the postcode into 31
 14 Acacia Avenue?
 15 **A. Correct.**
 16 THE CHAIRMAN: Can you give us an idea of when this
 17 marketing started? As an example of September 2014?
 18 **A. It may have been around that time. This may have been**
 19 **one of the first letters that went out.**
 20 THE CHAIRMAN: Thank you.
 21 MR MACLEAN: Let me take you to bundle H2/906. Do you
 22 remember meeting Mr Jarman at Savills in May 2013, along
 23 with Mr Chesterman?
 24 **A. I'm sure the email will remind me.**
 25 Q. Savills, as the Tribunal may know, are a pretty well

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1 established, fairly high end estate agent and one of the
 2 founder members of Agents' Mutual. Is that right, Mr
 3 Notley?
 4 **A. Yes.**
 5 Q. I am going to show you the email in a minute. Is that
 6 right?
 7 **A. Yes.**
 8 Q. So you had had a meeting with Mr Chesterman and
 9 Mr Jarman in May 2013. "He", and I assume that's
 10 Mr Chesterman who presumably did most of the talking; is
 11 that right, from your side?
 12 **A. Yes, that's a fair assumption, yes.**
 13 Q. "He implied". That is what I gathered from Mr Livesey
 14 yesterday.
 15 **A. Yes.**
 16 Q. "He implied that the AM portal was of little concern as
 17 he didn't think we would get enough traction for it to
 18 get off the ground."
 19 Does Mr Chesterman normally go round and see clients
 20 to talk about things that he's not concerned about?
 21 **A. Mr Chesterman doesn't see a huge number of clients.**
 22 **Especially not nowadays but back then, he would fairly**
 23 **regularly attend client meetings with me.**
 24 Q. What Mr Chesterman suggested was that he would like to
 25 try and tie this steering group into a five year deal

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<p>1 with ZPG at a fixed rate; yes?</p> <p>2 A. That's what it says, yes.</p> <p>3 Q. So even as early as May 2013, we can see that the</p> <p>4 prospect of OnTheMarket has given greater leverage to</p> <p>5 these agents vis à vis ZPG, hasn't it?</p> <p>6 A. I don't accept that. The reason I don't accept it is</p> <p>7 because there is a well established grouping of agents</p> <p>8 here, just looking at the emails, who formed part of the</p> <p>9 consortium, who we -- like I say, they were paying £360</p> <p>10 per month, per branch, when Mr Springett left</p> <p>11 Primelocation and they were paying significantly less</p> <p>12 than that around the time of this conversation. So to</p> <p>13 suggest that this group of agents had no negotiating</p> <p>14 position and then had a negotiating position because of</p> <p>15 Agents' Mutual, I don't think is right.</p> <p>16 Q. I suggest to you it is plain and obvious why you and</p> <p>17 Mr Chesterman went to see Mr Jarman?</p> <p>18 A. Yes, it was an interesting conversation to have.</p> <p>19 Q. Will you take bundle H4, please, and go to 1929. This</p> <p>20 is an email from Paul Masters. Do you know who he is?</p> <p>21 He is the Kinleigh Folkard; yes?</p> <p>22 A. Yes.</p> <p>23 Q. To various people on 4 November 2013:</p> <p>24 "I have a feeling that Zoopla wanted to do a deal</p> <p>25 with us all to list with them when AM goes live, as this</p> <p style="text-align: center;">Page 138</p>	<p>1 do Y" on the other, even if the consequence of doing X</p> <p>2 might inevitably be also Y?</p> <p>3 A. Well, all I can say is that at no point have we made any</p> <p>4 proposal to any agent in any year that has required them</p> <p>5 doing or not doing something else on another portal.</p> <p>6 Q. If that's right, you are in exactly the same position as</p> <p>7 Mr Springett, aren't you, Mr Notley?</p> <p>8 A. I don't agree with that.</p> <p>9 Q. Now, let me turn to something else. Will you take</p> <p>10 bundle X, please. This bundle is liable to give you</p> <p>11 a broken wrist. I want you to turn to tab -- the</p> <p>12 Tribunal might have bundle X. We will split it into</p> <p>13 two. It is probably getting overfull. It does get</p> <p>14 added to every hour, on the hour. Will you take bundle</p> <p>15 X at 3D. Would you also take at the same time, take</p> <p>16 bundle H18 and turn to the first page of the bundle?</p> <p>17 A. They look like the same document.</p> <p>18 Q. They do indeed look like the same document. Would you</p> <p>19 turn in H18 to internal page 20?</p> <p>20 A. "Long-term strategic vision".</p> <p>21 Q. That's right. If you then go back a page, internal 19,</p> <p>22 it is a page headed "Macro backdrop." Do you see that?</p> <p>23 A. Yes.</p> <p>24 Q. This document that has been in the bundles doesn't</p> <p>25 appear to be complete or at least there is another</p> <p style="text-align: center;">Page 140</p>
<p>1 was suggested by Jon Notley when I saw him a few weeks</p> <p>2 ago. I told him that we will make our own decision,</p> <p>3 based on what's best for our business and I assumed</p> <p>4 others would as well."</p> <p>5 So you were suggesting to a group of agents that</p> <p>6 they should all identify Zoopla as their one other</p> <p>7 portal and thereby drop Rightmove; is that right?</p> <p>8 A. That's what this email says.</p> <p>9 Q. That's what you suggested to Mr Masters, isn't it? He's</p> <p>10 not making it up?</p> <p>11 A. No, I don't think so. It is a well established group of</p> <p>12 agents that we had already negotiated with as a group,</p> <p>13 at their request.</p> <p>14 Q. And so you were suggesting that they collectively could</p> <p>15 identify Zoopla as the One Other Portal and drop, as</p> <p>16 a group, Rightmove?</p> <p>17 A. No, we were suggesting that they do a deal with us.</p> <p>18 Unfortunately, because of the One Other Portal rule,</p> <p>19 that meant that they had to drop someone else. We</p> <p>20 weren't suggesting they had to drop anyone else. The</p> <p>21 One Other Portal rule insisted they had to drop someone</p> <p>22 else. They were forced to.</p> <p>23 Q. So what you are saying is, and you may very well be</p> <p>24 right, Mr Notley, that there is a distinction to be</p> <p>25 drawn between saying "do X" on the one hand and "don't</p> <p style="text-align: center;">Page 139</p>	<p>1 version, because if you go back to the X version and you</p> <p>2 turn to page 125W or internal page 19 in old money,</p> <p>3 there is a heading "Macro backdrop"; do you see?</p> <p>4 A. Yes.</p> <p>5 Q. And then if you go over the page, 125X and 125Y, those</p> <p>6 two pages for some reason aren't in the version at H18.</p> <p>7 Do you see?</p> <p>8 A. Yes.</p> <p>9 Q. I want to ask you about 125Y in a minute, but do you</p> <p>10 have any idea why there are two versions of this</p> <p>11 document?</p> <p>12 A. No.</p> <p>13 Q. We can put H18 away because it doesn't have the most</p> <p>14 interesting page. The most interesting page is 125Y.</p> <p>15 So these are Zoopla's full year results for 2014, dated</p> <p>16 25 November 2014, and what we have here is some of these</p> <p>17 pie charts that we saw with Mr Livesey yesterday. So</p> <p>18 ZPG and Rightmove account for 61 per cent of property</p> <p>19 traffic in the UK. The source for that is Hitwise. The</p> <p>20 next 1,000 property websites, collectively, are</p> <p>21 39 per cent and 28 per cent of Zoopla's property portal</p> <p>22 users don't visit Rightmove and 35 per cent of</p> <p>23 Rightmove's don't visit Zoopla; right?</p> <p>24 A. Yes.</p> <p>25 Q. And so as we saw yesterday with Mr Livesey, it is not</p> <p style="text-align: center;">Page 141</p>

<p>1 quite one third, one third, one third, but it is not so 2 very far away; right? 3 A. Yes. 4 Q. And the point that this document is making, this page is 5 making, is that Zoopla has an excellent position in a 6 market with high barriers to success; right? 7 A. Where does it say that? 8 Q. In great big type at the top of the page, Mr Notley. 9 A. Yes. 10 Q. And that's right, isn't it? Zoopla, just before 11 OnTheMarket came along, was sitting in an excellent 12 position in a market with high barriers to success, 13 enjoying the duopoly with Rightmove? 14 A. I don't recognise the duopoly. So it is absolutely the 15 case and you would expect it from a Zoopla document, for 16 us to be very clear about the fact that we are very 17 proud of what we've achieved over the years through 18 a lot of hard work and a lot of disruption, in terms of 19 the information and the transparency that we brought to 20 the market but to portray the Rightmove and Zoopla 21 position as a duopoly, is incorrect in my view. 22 Q. What -- 23 MR LANDERS: Could you just explain what you mean by 24 duopoly? You obviously mean more than just two large 25 companies dominating the market?</p> <p style="text-align: center;">Page 142</p>	<p>1 made is that in terms of audience, in terms of consumers 2 using the websites, there is some clearly defined 3 behaviours. 4 MR FREEMAN: Another way of interpreting it could be that 5 the market is concentrated to account for 90 per cent of 6 value and the two of you, even though you say you 7 compete with each other, are well entrenched. That 8 could be a reasonable reading of that strap line. 9 A. It is certainly the case that in terms of -- there is no 10 doubting when it comes to usage, consumers have very 11 clear, entrenched behaviours in using Zoopla and 12 Rightmove. That doesn't follow though, that we 13 necessarily have a duopoly as such. The evidence is -- 14 MR FREEMAN: You are dug in in different trenches, you would 15 say? 16 A. I would say Rightmove is effectively a de facto monopoly 17 and we have been working hard to catch up and the entry 18 of Agents' Mutual has effectively carved value out of 19 Zoopla. 20 MR FREEMAN: I understand you are saying that but I was just 21 looking at this picture which is before Rightmove has 22 appeared, I think -- Agents' Mutual, sorry. 23 A. Yes, although if you were to add Agents' Mutual into 24 this chart because of roughly 5 per cent of the audience 25 of Rightmove and about 10 per cent of the audience of</p> <p style="text-align: center;">Page 144</p>
<p>1 A. Well I think it's -- the inference for me, of a duopoly, 2 is that you have two players effectively dominating 3 a sector and the competition inference is that there is, 4 therefore, no competition between those two players. 5 Whereas if you look at the Gascoigne Halman evidence, 6 you can see us working incredibly hard to win the 7 Gascoigne Halman business. So the inference of duopoly 8 has always been, for me, of two businesses that are 9 effectively milking estate agents for cash. Whereas you 10 can see from the evidence that you have seen today 11 Zoopla simply -- it is not the position that I have been 12 in. And you can see that my name is littered across 13 these meetings. I have done a lot of miles over the 14 last few years and I simply don't recognise the picture 15 that's being painted. 16 MR FREEMAN: Could I ask, what do you understand by a well 17 entrenched and concentrated market? Does that mean you 18 are well entrenched, Rightmove is well entrenched? 19 A. It is talking about the market there, I believe, in 20 a well entrenched and concentrated market. You have 21 to -- from a -- 22 MR FREEMAN: The market can't be entrenched, it doesn't make 23 sense. 24 A. It is an internal document. I'm not entirely sure who 25 the audience is for this but I think the point being</p> <p style="text-align: center;">Page 143</p>	<p>1 Zoopla, it wouldn't really make much of a difference to 2 this. 3 MR FREEMAN: No. 4 MR MACLEAN: Mr Notley, can I just take you back to your 5 second witness statement at paragraph 6.6. I am sorry 6 to go back to -- bundle D, tab 8, page 120. Do you 7 remember a discussion about the second sentence of 8 paragraph 6.6, where you say: 9 "In this section he [that is Mr Springett] goes 10 through a few selected purported attempts to enter the 11 property portal market." 12 A. Yes. 13 Q. Do you remember the discussion about purported? 14 A. Yes. 15 Q. And I think you told us the examples Mr Springett was 16 talking about which you are responding to here, weren't 17 actually entering the property portal market at all and 18 hence your reference to purported was perfectly 19 appropriate. Was that the thrust of your evidence? 20 A. Yes, I believe so, yes. 21 Q. And I think you gave examples of Tesco and Google, 22 didn't you? 23 A. They were Mr Springett's examples, yes. 24 Q. But what you were telling me was that those were 25 purported attempts to enter the property portal market</p> <p style="text-align: center;">Page 145</p>

<p>1 and your reference to purported attempts was correct 2 because they weren't actually attempting to enter the 3 property portal market? 4 A. They weren't portals as such. 5 Q. They were doing something else? 6 A. Correct. 7 Q. So can you help me then. If you go back to bundle X, 8 the page we were on at 125Y, this Zoopla document. Just 9 help me with the bottom left-hand corner. You see the 10 two square boxes, the two blobs, "Significant 11 resources"; do you see that? 12 A. Yes. 13 Q. "... are required to obtain and retain a critical mass 14 in this fragmented market. Google REA Group and Tesco 15 tried to enter the market unsuccessfully." 16 What market is page 125Y referring to, Mr Notley? 17 A. Well, it's making -- it's insinuating that they are 18 entering the portal market. 19 Q. It is not insinuating, it is making it perfectly clear, 20 isn't it? 21 A. Yes, I don't know who put this document together. 22 Q. They have got it wrong, have they? 23 A. They have in those two cases, not in the REA Group case. 24 Q. Perhaps they got Morgan Stanley or Barclays Capital to 25 help them. How does this square with your answer to me</p> <p style="text-align: center;">Page 146</p>	<p>1 Q. So you say and Mr Springett was the chief executive in 2 2006 to 2008. 3 A. Yes. 4 Q. But there's a debate between us which we will be 5 submitting to the Tribunal in due course, is not one the 6 Tribunal needs to resolve, in order to resolve the case 7 and so I am going to move on. 8 Now, do you accept that by 2013, what Mr Chesterman 9 would call the portal space was rather different to the 10 situation he had been in a few years previously? 11 A. Materially different, yes. 12 Q. Really quite different? 13 A. Yes. 14 Q. And for your note, for the Tribunal's note, 15 Mr Chesterman's email which I don't now need to go to is 16 bundle H2/915, 3 March 2013. 17 I just want a couple of more points, three or four 18 points, Mr Notley. Paragraph 16 of your second 19 statement, page 125, bundle D, tab 8, you say: 20 "Pricing -- " 21 Third line: 22 "Pricing in our industry is, however, not 23 principally driven by costs. Rather, agents that are 24 looking to maximise their marketing spend are assessing 25 how to spend their marketing budget based on what will</p> <p style="text-align: center;">Page 148</p>
<p>1 earlier, Mr Notley, about purported attempts? Do you 2 want to reconsider your defence of purported attempts? 3 A. No, not at all. Tesco clearly was not a portal entering 4 the market. Whoever -- someone at Zoopla has fallen 5 into the same trap here. 6 Q. Let me help you -- I am grateful to Mr Holmes. Could 7 you go back to page 125G. We can see who put this 8 document together? 9 A. It wouldn't have been put together by Alex or Stephen. 10 Q. Mr Chesterman doesn't make a presentation unless he's 11 satisfied that the presentation is something that he's 12 happy to put his name to, does he? Mr Chesterman and 13 Mr Morana? 14 A. It doesn't change my position on Google and Tesco 15 entering the market though. They weren't entering as 16 property portals. 17 Q. All right, Mr Notley. There we are. Now, I haven't got 18 time, Mr Notley, to have a little skirmish with you 19 about why Primelocation dropped its exclusivity but 20 there is a difference in the evidence between you and 21 Mr Springett about that. It doesn't matter. I don't 22 care. Because it doesn't matter. I don't accept your 23 position on that but I am going to move on. 24 A. My information came from conversations with senior 25 management at The Daily Mail Group.</p> <p style="text-align: center;">Page 147</p>	<p>1 generate the most number of leads from that portal 2 marketing spend." 3 Pausing there. What they are actually interested 4 in, I suggest, is generating the biggest number of 5 new ... 6 (3.10 pm) 7 (A short break) 8 (3.15 pm) 9 MR MACLEAN: Mr Notley, I think I was reading to you, 10 paragraph 16 of your second statement, wasn't I? Third 11 line: 12 "Pricing in the industry is not driven principally 13 by cost." 14 And then you refer to spending the budget based on 15 what would generate the most number of leads from that 16 portal marketing spend: 17 "Agents are concerned about the value that they 18 derive from their portal listings rather than how the 19 listing fees compare to the costs faced by a portal." 20 Do you accept that the high profit margins of the 21 portals, Rightmove and Zoopla, which of course, in large 22 part, not exclusively, is thanks to the estate agents' 23 data that they display, is a powerful reason why the 24 mutual model of OnTheMarket would be attractive, 25 especially to independent agents like Gascoigne Halman</p> <p style="text-align: center;">Page 149</p>

<p>1 that couldn't command the discounts that the Connells 2 and the Countrywides of this world could enjoy? 3 A. So there are a couple of questions there. I can 4 understand why the mutual structure would be attractive 5 to an estate agent, yes. 6 Q. Now, do you accept that the value of a portal to agents 7 resides not simply in a number of leads delivered to 8 agents but, more importantly, the quality of the leads 9 delivered to agents? 10 A. Yes. 11 Q. And do you agree with me that different types of lead 12 offer -- 13 A. I think there's a balance between the two. 14 Q. Well, obviously, if you only have high one quality lead 15 per year, you would starve? 16 A. Correct. 17 Q. Do you agree that different types of lead offer 18 different levels of value to agents and some leads are 19 less likely than others to result in instructions, sales 20 or lettings? 21 A. Every lead is different, yes. 22 Q. Well, but there are different types of lead which, 23 typically, some are more likely to lead to instructions 24 than others. An appraisal lead being the classic 25 example of one that's most likely to lead to an</p> <p style="text-align: center;">Page 150</p>	<p>1 Q. Yes, all right. Are you familiar with the Morgan 2 Stanley report from October 2013 which supported the 3 view also expressed by BNP Paribas that agents perceived 4 Rightmove's leads to be superior to those of Zoopla? 5 A. I think I've seen it, yes. 6 Q. If we take bundle H5/2384. 7 A. I've got that. 8 Q. This is a document I have just referred to. 9 A. This is the one we looked at earlier? 10 Q. No. 11 A. Well underpinned -- no, was that a different one? No, 12 this is the same one, I think. 13 Q. It is the same one, you are quite right. It is the same 14 one. A different passage in it. At page 2362, the 15 right-hand column, top of the page: 16 "The findings from our Alphawise survey appear to 17 challenge Zoopla's assertion at the DMGT capital markets 18 day [and there is the date we were looking for earlier, 19 March 2013] that it is responsible for 50 per cent of 20 all sales being generated from online portals. Our 21 survey date ...(Reading to the words)... Rightmove that 22 this is responsible for five to six times the number of 23 leads versus its nearest competitor." 24 And then it is suggested Rightmove was a must have 25 portal and then:</p> <p style="text-align: center;">Page 152</p>
<p>1 instruction, compared to a prospective tenant ringing 2 up? 3 A. Yes, but it depends on the motive, the readiness, 4 whether it is relevant to that agent's part of the 5 market. There are lots of things that can affect the 6 value of a lead. 7 Q. Do you agree that in general terms, leads relating to 8 valuations of property are of the most value to agents? 9 A. Yes. 10 Q. And do you agree that that's on the basis that any 11 agent's primary source of revenue, not only, is from 12 fees for marketing properties and instructions to an 13 agent to market a property usually follow from that 14 agent conducting a valuation of the property in 15 question? 16 A. Yes, I mean, that would mainly be the case for an online 17 agent who charges a fee based on the marketing of the 18 property but for a traditional high street agent, they 19 don't get a fee if they're working on a success basis, 20 unless someone buys that property. 21 Q. So accordingly, individual owner or vendor emails or 22 telephone calls or other contacts are generally 23 considered by agents to be the highest quality of lead? 24 A. Yes, agreed. Well highest value lead, not necessarily 25 the highest quality.</p> <p style="text-align: center;">Page 151</p>	<p>1 "As a further sense check, we asked agents about the 2 quality of sales being generated from portals. A larger 3 portion, 30 per cent of respondents, detected no 4 discernible difference between Rightmove and Zoopla but 5 Rightmove led Zoopla by a factor of four times, with 56 6 ...(Reading to the words)... higher quality compared to 7 14 per cent for Zoopla." 8 Now, that is consistent, isn't it, with the BNP 9 Paribas -- I don't know, were you in court when I looked 10 at the BNP Paribas report yesterday, I think? 11 A. Maybe. 12 Q. If you take bundle -- 13 A. Could I just ask a question. It says here "October 4, 14 2013, Rightmove Plc." Is that because this was funded 15 and paid for by Rightmove? Or are they acting on behalf 16 of Rightmove? 17 Q. I am sorry, where are you now? I have closed my volume. 18 A. I am on H5/2362. 19 Q. No, it is not a Rightmove document, it is a Morgan 20 Stanley -- 21 A. They are initiating on Rightmove, are they? 22 Q. They're just talking about Rightmove, that's all. 23 THE CHAIRMAN: I think if you look at page 2354, you see the 24 title. It is a report into Rightmove. 25 MR MACLEAN: That's right. Mr Notley, I want to take you to</p> <p style="text-align: center;">Page 153</p>

<p>1 bundle X again, tab 3. 2 A. Are we leaving this one? 3 Q. Yes, we are leaving that one. The next one is more of 4 the same. 5 A. Can I just make a point on this before we leave it? 6 Q. Of course. 7 A. The respondents here, there are 147 respondents and 8 there are 18 to 20,000 estate agents in the UK. 9 Seventy per cent of the respondents were directors. In 10 many cases, directors aren't the people who are fielding 11 leads on a day-to-day basis. So what we have found when 12 we have done research on these kind of things is these 13 things tend to be self perpetuating. Where you read the 14 Zoopla leads are lower quality and then your perception 15 of Zoopla leads, when we have dug into the data 16 ourselves and we have done it many times, actually the 17 differences aren't that great at all. 18 Q. I understand you take issue with these figures but what 19 you are saying is that this information is too 20 impressionistic? 21 A. It is not a scientific study, 147 agents, many of whom 22 aren't dealing with leads on a day-to-day basis. 23 Q. And it would be much, much better, much more robust 24 information, is this what you are saying, if it was 25 statistically significant data, based on a scientific</p> <p style="text-align: center;">Page 154</p>	<p>1 A. Yes. 2 Q. Once you have done that, turn on to 89, please. Just 3 read the paragraph beginning "We note from industry 4 contacts" to yourself. (Pause). All right? Down to 5 "Client enquiries". 6 A. Yes. 7 Q. And then to save time, I am going to skip over one at 8 the bottom of the page. Go over the page to "A second 9 factor". 10 A. Sorry, where's this? 11 Q. Over the page, page 90, "A second factor", do you see: 12 "Outlined in the graphic below is the importance of 13 the one to all emails. If an individual conducts 14 a property search in a given geography, both websites, 15 [this is Rightmove and Zoopla] at the bottom of the 16 page, may offer the opportunity to send a one to all 17 email. This email allows the individual to request 18 contact from all the agents in a given area." 19 That is right, is it not, so far so good? 20 A. Yes. 21 Q. "Our testing suggested two key differences between the 22 sites which potentially could inflate Zoopla's lead 23 count. Firstly, Zoopla typically preselected a number 24 of agents. In the case of Exeter, 16. Rightmove never 25 preselected enquiries for the user."</p> <p style="text-align: center;">Page 156</p>
<p>1 survey? 2 A. I am merely making an observation about that piece of 3 analysis. 4 Q. But you are making the point, are you, that it is not of 5 any statistical significance? 6 A. No, it is 147, so it is significant, in the sense that 7 they have spoken to 147 people, but that is 147 of 8 nearly 20,000. 9 Q. But if it was a -- 10 A. If it was a thousand, using data, as opposed to 11 a section, you may get a different result. 12 Q. If it was a randomised sample carried out by 13 statisticians that gave a statistically significant 14 result, then you would sit up and pay much more 15 attention to it, wouldn't you? 16 A. Depending on the source, yes. 17 Q. Yes, let's look at bundle X, tab 3. BNP Paribas. In 18 order to try and save time, Mr Notley, can I just ask 19 you, please, to turn to page 81 and could you just read 20 to yourself, please, the paragraph beginning "We note 21 from industry contacts". Do you see that? 22 A. Yes. 23 Q. And to the bottom of the page and just tell me when you 24 have got to the bottom of the page, okay? (Pause) All 25 right?</p> <p style="text-align: center;">Page 155</p>	<p>1 Pausing there, that is a key difference between the 2 two approaches, isn't it? 3 A. So it's -- they are different approaches, correct. 4 Q. So Zoopla preselects agents and Rightmove doesn't do so? 5 A. At that time, yes, Rightmove has removed it completely 6 now, yes. 7 Q. "Secondly, Zoopla typically offered the one to all 8 offering more regularly than Rightmove. We see from the 9 Bromley example below, an individual could instantly 10 generate 34 leads for Zoopla, while Rightmove do not 11 offer a one to all email for such a wide search 12 criteria." 13 A. Okay. 14 Q. So that was also the position, wasn't it? 15 A. Well, you probably saw in my fourth witness statement, 16 I went into this in a little bit more detail and 17 actually spoke about the proportion of our leads that 18 are email and it is a relatively small proportion of the 19 total, so this strikes me as a relatively marginal 20 point. 21 Q. These two key differences have always existed, haven't 22 they, between the Rightmove portal and the Zoopla 23 portal? 24 A. But like I say, the proportion of leads that are sent 25 through the email auto is relatively small.</p> <p style="text-align: center;">Page 157</p>

<p>1 Q. But you do accept these two key differences have always 2 been there, at least since the merger in 2012? 3 A. I wouldn't describe them as key differences. They are 4 differences. 5 Q. They are differences. 6 A. Yes, and you will notice on Rightmove there is a button 7 there that says "Select all". I can't quite see it but 8 I know it existed at the time and equally on the Zoopla, 9 example, there is a button which says "Deselect all". 10 Q. So your answer to this, if we go to your fourth witness 11 statement which is paragraph 14, which Mr Harris 12 referred to in X, tab 30 which is also more conveniently 13 I think in bundle D, tab 12 if you have a tab 12. Do 14 you have it at the very back at 159 and following? 15 A. Yes. 16 Q. It is much more convenient obviously to take it from 17 there. If you would turn, please, in D, Mr Notley, to 18 page 164, paragraph 14 this is where you deal with this 19 point. This is where you deal with this point, isn't 20 it? 21 "In his seventh witness statement Mr Springett seeks 22 to make a point about the fact that Zoopla shows 23 property search results with agents pre-selected ..." 24 So you accept that that's what Zoopla does. 25 Mr Springett --</p> <p style="text-align: center;">Page 158</p>	<p>1 Rightmove website? 2 A. I can't say whether it's important but they no longer 3 provide that tool which we believe is useful to 4 consumers and agents. 5 Q. When did that happen? 6 A. They moved over to a responsive platform a year ago and 7 I think it happened then. 8 THE CHAIRMAN: What do you mean by "responsive platform"? 9 A. So a website that works across mobile desktop app, a 10 single website and I believe at that point they dropped 11 one of the email all tool at the same -- or one tool as 12 they called it. 13 THE CHAIRMAN: Are you going to another topic, Mr Maclean, 14 if so I had one question. 15 MR MACLEAN: I am sorry, sir. 16 THE CHAIRMAN: Are you moving on to another topic? 17 MR MACLEAN: I am going to my last question on a slightly 18 different topic. 19 THE CHAIRMAN: Then I will interrupt you. 20 You said a moment ago that email wasn't the most 21 important lead? 22 A. Email? 23 THE CHAIRMAN: Email, yes. 24 A. Did I? 25 THE CHAIRMAN: Yes, you were -- the transcript. You were</p> <p style="text-align: center;">Page 160</p>
<p>1 A. Yes, our view on that is if someone is working the email 2 all tool they want to email multiple agents and 3 therefore preselecting it is quite useful for the 4 consumer but we make it very easy for them to deselect 5 it. Our view isn't if a consumer is the using the email 6 all tool they want to email no agents which is why we 7 preselect it to be useful. 8 Q. What you are saying is that if the person using the 9 Zoopla portal doesn't want to email everybody, they can 10 so organise things to make sure they don't by 11 deselecting? 12 A. Yes, a single click. 13 Q. By contrast in the Rightmove situation if you want to 14 email multiple people you have to click your finger on 15 your mouse? 16 A. You could either select all or you can select them 17 individually. 18 Q. But the inert suffer, if I can put it like that, the 19 default position on the Zoopla website is preselecting 20 everybody and on the Rightmove, and I think OnTheMarket 21 website, is not preselecting everybody? 22 A. Except it doesn't exist on the Rightmove site today. 23 Q. Anymore? 24 A. Correct. 25 Q. Because there has been an important change on the</p> <p style="text-align: center;">Page 159</p>	<p>1 being asked about these email selections and you said 2 that email is a relatively small source of leads. 3 A. Sorry, the proportion of leads that are sent through 4 this tool is relatively small. 5 THE CHAIRMAN: I see. 6 A. I gave the numbers in my witness statement. I believe 7 it was the end of -- yes, paragraph 18 in my fourth 8 witness statement. 9 MR MACLEAN: The very last page. 10 A. It is marked as confidential but you can see it is 11 a relatively small proportion. So even if the resulting 12 emails that went from this tool on Rightmove at the time 13 or OnTheMarket were half the number of Zoopla, it would 14 be a very marginal difference in the overall quality of 15 the lead. Genuinely, it is very interesting when you 16 get into this area because if you were to ask an agent, 17 all things being equal, would you take an email all lead 18 or would you take a telephone call, they would say, I'll 19 take the telephone call. Whereas if you say the 20 telephone call is from a plumber selling his wares but 21 the email all lead is a vendor who has a £4 million 22 property ready to put on the market, they would take the 23 email all tool. So it is very subjective. 24 MR FREEMAN: I am relieved to hear it. 25 THE CHAIRMAN: In terms of being able to attribute the lead</p> <p style="text-align: center;">Page 161</p>

1 back to a particular portal, so if I am an estate agent
 2 and I get an email it will be obvious it comes from
 3 either Zoopla or Primelocation -- Rightmove, I beg its
 4 pardon.
 5 **A. So all of our leads are sent from Zoopla Property Group.**
 6 THE CHAIRMAN: So I will know as an estate agent that the
 7 lead as an email comes from a particular portal.
 8 **A. Yes, and telephone call as well because there's**
 9 **a whispering service that -- so we lay our telephone**
 10 **numbers on top of the agent's telephone number so when**
 11 **the call comes through the first thing the agent gets is**
 12 **"this is a call from Zoopla being put through" and then**
 13 **the consumer is put through. So whether it is**
 14 **a telephone number or an email they will know the source**
 15 **of the lead if they're paying attention and are**
 16 **interested.**
 17 THE CHAIRMAN: Yes, I see, thank you.
 18 MR MACLEAN: Finally, Mr Notley, do you accept that prior to
 19 OnTheMarket's entry into the property portal market
 20 in January 2015 neither Rightmove nor Zoopla routinely
 21 allowed property seekers or landlords or vendors to
 22 click directly from the full details page of their
 23 portals straight through to the estate agent's own
 24 website?
 25 **A. I believe I answered this in my witness statement,**

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1 **Mr Maclean. Zoopla has been doing that almost since our**
 2 **launch and Rightmove has been doing the same.**
 3 Q. I don't think that is right, is it? Zoopla at times on
 4 its full details page provides a click through but not
 5 directly to the home page of the estate agent?
 6 **A. Not to the home page but that's quite a confusing**
 7 **experience for a consumer to be on a property detail**
 8 **page on a portal and then to get sent to a home page**
 9 **where they've got -- if they are interested and they**
 10 **think by clicking this link they are going to get to**
 11 **more details about that property they are sent right**
 12 **back to the beginning of the search. We don't believe**
 13 **that's a sensible thing to do.**
 14 Q. But rightly or wrongly, as we can see from, for example,
 15 if you take bundle H14/7576 --
 16 **A. Have we finished with X?**
 17 Q. Yes, thank you. H14/7576 is a version of the
 18 information memorandum of my client, okay?
 19 **A. Yes.**
 20 Q. You can see the first page, if you just want to get your
 21 bearings at 7570, right, that is the information
 22 memorandum. If you turn to 7576 and turn it round you
 23 see the heading "Portal"?
 24 **A. Yes.**
 25 Q. The second paragraph:

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1 "The design is elegant and uncluttered. No
 2 distraction like third party advertising. Unlike Zoopla
 3 and Primelocation the page doesn't offer a statistically
 4 based opinion of the value of the property.
 5 OnTheMarket.com believes this information should be for
 6 the agent handling the property to communicate with
 7 applicants so it can be properly explained."
 8 Then at the bottom of the page.
 9 "Unlike our competitors OnTheMarket.com provides
 10 a visible and direct link to the agent's own website.
 11 Member agents also have the choice of their own office
 12 phone numbers or a trackable TO number [that is the
 13 whispering service which you just referred to I think]
 14 which facilitates the reporting of telephone leads, call
 15 introduction and call record."
 16 So rightly or wrongly my client saw as one of its
 17 key selling points for its portal that ability to have
 18 the visible and direct link to the agent's own website
 19 which wasn't offered by either Rightmove or Zoopla, was
 20 it?
 21 **A. That's right. We didn't send people to an agent's home**
 22 **page from the property details page, that's right.**
 23 Q. But now you do?
 24 **A. On the agent's profile page, yes.**
 25 MR MACLEAN: Thank you very much, Mr Notley.

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1 MR LANDERS: Just on that last point, Mr Maclean, when you
 2 say "a key selling point", to whom, the consumers or the
 3 agents?
 4 MR MACLEAN: To the agents joining OnTheMarket. The
 5 information memorandum was targeted at the agents to
 6 encourage them to join OnTheMarket as opposed to down
 7 the chain consumers.
 8 Re-examination by MR HARRIS
 9 MR HARRIS: Mr Notley, I have a few questions for you in
 10 re-examination. You were asked, Mr Notley, about
 11 closing the gap and driving ARPA and you said, amongst
 12 other things, you need to understand the context and one
 13 part of that context was I have written down you saying
 14 that Zoopla has been adding new services. Do you recall
 15 that?
 16 **A. Yes.**
 17 Q. Can you give any examples of new services that you have
 18 added?
 19 **A. Crikey. So I guess I'll group them as follows. So**
 20 **there is the products and services that we offer on our**
 21 **websites to agents and developers. Then there's the**
 22 **additional business services marketing services that we**
 23 **offer to professionals, so we power a thousand agent**
 24 **websites today. We can provide in print solutions, you**
 25 **know, and we offer digital marketing services to agents**

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<p>1 and developers.</p> <p>2 Interestingly, one of the products or services that</p> <p>3 we've started offering since the acquisition of Property</p> <p>4 Software Group is a product called Move It and Move It</p> <p>5 is a platform that sits on top of the agent's software</p> <p>6 that they use on a day-to-day basis and increasingly</p> <p>7 agents are looking to sell more peripheral services,</p> <p>8 mortgages, conveyancing services et cetera and there is</p> <p>9 a lot of pressure on fees in the market at the moment</p> <p>10 and that's driving down fees. Most agents are</p> <p>11 experiencing -- everyday agents are experiencing that.</p> <p>12 And what Move It does it effectively helps the agent</p> <p>13 become better at selling ancillary services. So the</p> <p>14 interesting thing when you look at our ARPA growth now</p> <p>15 and you ignore the Move It product which launched a year</p> <p>16 ago and is starting to gain some more attraction now.</p> <p>17 You are forgetting that the more our ARPA grows with the</p> <p>18 Move It platform the agent is actually generating more</p> <p>19 revenue. So if you were to put all of our ARPA together</p> <p>20 for all those products you would end up with a quite</p> <p>21 distorted picture.</p> <p>22 Q. Have I understood this right, you sell these further and</p> <p>23 additional services to the estate agents, do you?</p> <p>24 A. Yes.</p> <p>25 Q. And that --</p> <p style="text-align: center;">Page 166</p>	<p>1 see the final line "On our side"? Do you see that line?</p> <p>2 A. Sorry, on 519?</p> <p>3 Q. At the bottom of that page does it say "On our side if</p> <p>4 we do not ..."?</p> <p>5 A. Yes.</p> <p>6 Q. "... if we do not support the only major competitor and</p> <p>7 Rightmove continues their stranglehold on us ..."</p> <p>8 Who do you understand Mr Ozwell to be referring to</p> <p>9 in that sentence as the only major competitor?</p> <p>10 A. Zoopla.</p> <p>11 Q. Thank you. While we are still in this bundle ever so</p> <p>12 slightly out of order but it is easier to do it while we</p> <p>13 are in the bundle, can you please turn to page 250. Do</p> <p>14 you recall as you turn up that page that you were</p> <p>15 answering both the Tribunal and Mr Maclean about the</p> <p>16 context and the meaning of duopoly?</p> <p>17 A. Yes.</p> <p>18 Q. And you were saying, amongst other things, that you</p> <p>19 didn't accept that there wasn't any competition between</p> <p>20 the two players?</p> <p>21 A. Yes.</p> <p>22 Q. Then you went on to say, and I tried to note this down,</p> <p>23 I think it was the transcript, page 133, line 9 and my</p> <p>24 note reads something like, "We worked very hard to get</p> <p>25 Gascoigne Halman's business." Do you remember saying</p> <p style="text-align: center;">Page 168</p>
<p>1 A. Or rather we give them a tool that helps them sell the</p> <p>2 services on to their end customer.</p> <p>3 Q. Yes, sorry that was the Move It one?</p> <p>4 A. That was the Move It one.</p> <p>5 Q. But you also talked about a service that relates to,</p> <p>6 say, conveyancing?</p> <p>7 A. That was one of the services they would sell on to their</p> <p>8 own customers. The products that we would sell direct</p> <p>9 would include software to help run their business,</p> <p>10 websites to power their website, a product called</p> <p>11 Average which is a partnership with Google and Facebook</p> <p>12 where we help them target their local market, that way</p> <p>13 helping them tilt some of their direct spend with Google</p> <p>14 towards ZPG.</p> <p>15 So a lot of these products and services are tilt and</p> <p>16 spend elsewhere into their relationship with ZPG. So</p> <p>17 the commercial relationship is growing as we are</p> <p>18 providing more services and becoming more valuable.</p> <p>19 Q. Do they all contribute to your ARPA, these other</p> <p>20 services?</p> <p>21 A. Yes.</p> <p>22 Q. Can I take you to a couple of documents in bundle 1 that</p> <p>23 Mr Maclean took you to. We only need to look at them</p> <p>24 briefly. The first one is at page 519. Do you</p> <p>25 recognise this as an email about the IEAG group. Do you</p> <p style="text-align: center;">Page 167</p>	<p>1 that?</p> <p>2 A. Yes.</p> <p>3 Q. What is this document starting on page 250?</p> <p>4 A. It looks like a presentation, sales presentation given</p> <p>5 to Gascoigne Halman 2011.</p> <p>6 Q. Is that pre- or post-launch of OTM?</p> <p>7 A. Oh well, well before.</p> <p>8 Q. I am sorry, what did you say?</p> <p>9 A. Well before.</p> <p>10 Q. Well before?</p> <p>11 A. Years before.</p> <p>12 Q. Years before indeed. You may not have put this together</p> <p>13 yourself but can you offer any comment about what's</p> <p>14 going on on page 269 of this document?</p> <p>15 A. Yes, we're offering an introductory trial and proposal</p> <p>16 beyond that trial period by the looks.</p> <p>17 Q. Thank you. Slightly earlier than when you gave evidence</p> <p>18 about working hard for Gascoigne Halman's business</p> <p>19 Mr Maclean asked you various questions and you said: "Oh</p> <p>20 well, that's a response or reaction to competitive</p> <p>21 pressure." Do you remember those exchanges?</p> <p>22 A. Yes.</p> <p>23 Q. And then one of your answers -- I am afraid I have</p> <p>24 not -- I think it is page 117, lines 8 to 9 was: "Well,</p> <p>25 that's not right," you said to Mr Maclean. "In our case</p> <p style="text-align: center;">Page 169</p>

1 it was like having a gun to our head." What did you
 2 mean by that?
 3 **A. So the existence of the One Other Portal rule means that**
 4 **anyone who signs that contract has to select either**
 5 **Rightmove or Zoopla as their One Other Portal or drop**
 6 **both. If a group of agents comes to you and says that**
 7 **they are going to leave you en masse and then that's**
 8 **going to leave you with less inventory in your area it's**
 9 **like having a gun put to your head in a commercial**
 10 **sense.**
 11 Q. Thank you. We are almost there now. I think you have
 12 your fourth statement possibly at the back of your
 13 bundle D. I still have it in X, tab 30. You were asked
 14 some questions about one to all and clicking through to
 15 websites just a few moments ago. Do you remember those?
 16 **A. Yes.**
 17 Q. And you said, "It's dealt with in my fourth witness
 18 statement." Perhaps you could just look at that and?
 19 **A. This is point 18, paragraph 18?**
 20 Q. I am looking at paragraph 8. My page number is 226 but
 21 you may not have that number. Paragraph 8 of the --
 22 MR MACLEAN: 162.
 23 **A. Yes, got it.**
 24 MR HARRIS: Can you just read to yourself quickly 8 and 9.
 25 (Pause)

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1 **A. Yes.**
 2 MR MACLEAN: Does this arise out of cross-examination?
 3 I don't remember going to either of these paragraphs.
 4 THE CHAIRMAN: No, you didn't.
 5 MR HARRIS: Yes, of course it arises out of the
 6 cross-examination. A strange question.
 7 THE CHAIRMAN: Proceed for the moment, Mr Harris.
 8 **A. Yes, I have read it.**
 9 MR HARRIS: So when you were being asked questions in
 10 cross-examination about click throughs to websites and
 11 you said, "I think I deal with it in my witness
 12 statement", are those the paragraphs that you had in
 13 mind?
 14 **A. Yes. Did I go on and say from an agent's point of view**
 15 **actually it wasn't useful? Primelocation had the same**
 16 **feature on its website. I can't remember exactly when**
 17 **it was but we did some extensive research with agents at**
 18 **the time around the value they placed on that traffic,**
 19 **and the agreement with the majority of agents that we**
 20 **spoke to was that they would prefer the traffic**
 21 **contained within the portal so they could actually see**
 22 **the value that we delivered, so we got rid of the links**
 23 **at that point. So I don't see it as a key selling**
 24 **point.**
 25 MR HARRIS: Thank you, I have no further questions.

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1 Questions by the Tribunal
 2 MR FREEMAN: Mr Notley, you described Zoopla's strategy
 3 going forward and your vision for the future. Do you
 4 see that as including the continued existence of the
 5 high street bricks and mortar estate agent's business?
 6 **A. Absolutely.**
 7 MR FREEMAN: And your relationship with that business, how
 8 do you see that?
 9 **A. Sorry, in the commercial sense?**
 10 MR FREEMAN: Well, in the service between you you offer the
 11 consumer, you discuss the consumer, do you see
 12 yourselves as partners with the estate agents?
 13 **A. Yes, absolutely.**
 14 MR FREEMAN: Or in some possible future scenario replacing
 15 them and making their existence unnecessary?
 16 **A. So this is a subject that often comes up and it often**
 17 **plays --**
 18 MR FREEMAN: I am sorry if I'm following the track but it is
 19 something we talk about.
 20 **A. But it has played a big part of the narrative around**
 21 **a lot of the conversations that I believe Agents' Mutual**
 22 **have had with agents that in future that somehow Zoopla**
 23 **or Rightmove, I can't comment for what Rightmove are**
 24 **doing, but it would make absolutely no sense for our**
 25 **business whatsoever to compete directly with our estate**

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1 **agent partners. Our job as we see it is to support**
 2 **agents.**
 3 **The interesting thing about agencies is it is**
 4 **changing. David Livesey spoke earlier about the**
 5 **changing face of estate agency, and if you look at the**
 6 **likes of Purple Bricks and you look at the services they**
 7 **provide there is no doubting that they are estate**
 8 **agents. Where we don't get into making judgment calls**
 9 **is determining as long as a business is providing agent**
 10 **services, whether they are an estate agent or not.**
 11 **So whether they are bricks and mortar, whether they**
 12 **are a hybrid agent, as most of the online agents are**
 13 **described, we will continue to support them as their**
 14 **partners and build their websites, provide their**
 15 **software, provide advertising services and I am sure**
 16 **there will be some more ideas that we will come up with**
 17 **over the next few years, but we see our job as**
 18 **supporting our agent partners and in no way competing.**
 19 MR FREEMAN: So you don't think it is like the travel agency
 20 where the travel agent, the bricks and mortar travel
 21 agent has succumbed to the online offering?
 22 **A. The interesting thing in the travel agency market is --**
 23 **I use a business called Destinology for my holidays and**
 24 **they are an amazing travel agent. They just don't**
 25 **happen to have a high street office. You go to some**

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<p>1 towns with certain demographics there are still high</p> <p>2 street travel agents. What's happening in the market is</p> <p>3 that service offerings are becoming more diverse because</p> <p>4 it's directly meeting consumers' needs as opposed to</p> <p>5 forcing one business model on the market.</p> <p>6 MR FREEMAN: So that suggests that online estate agency will</p> <p>7 grow.</p> <p>8 A. Yes, although to Mr Livesey's point earlier, online</p> <p>9 agencies are a bit of red herring because Purple Bricks</p> <p>10 have feet on the street. I personally think that pure</p> <p>11 online estate agency won't grow materially because when</p> <p>12 you are selling your most important asset you want</p> <p>13 someone to look after that process for you. You want</p> <p>14 someone to come to your home and understand your home</p> <p>15 and sell your home. So I believe that that aspect will</p> <p>16 always dominant an estate agency. Pure online click for</p> <p>17 bricks as it called I believe has got limited appeal.</p> <p>18 MR FREEMAN: I see, thank you.</p> <p>19 THE CHAIRMAN: Any questions arising out of those?</p> <p>20 MR MACLEAN: No, sir.</p> <p>21 THE CHAIRMAN: Thank you very much, Mr Notley, you are</p> <p>22 released.</p> <p>23 (The witness withdrew)</p> <p>24 MR HARRIS: Just whilst Mr Notley is making his way away.</p> <p>25 Of course we have two more witnesses and they both have</p> <p style="text-align: center;">Page 174</p>	<p>1 not available tomorrow.</p> <p>2 MR HARRIS: I am afraid not. Three opportunities have been</p> <p>3 given to have earlier starts.</p> <p>4 THE CHAIRMAN: I am not going to go into the blame -- we'll</p> <p>5 sit as long as necessary then in that case, Mr Maclean.</p> <p>6 MR MACLEAN: Thank you.</p> <p>7 MR HARRIS: Without further ado can I ask Mr James to come</p> <p>8 to the stand.</p> <p>9 MR NICHOLAS JAMES (affirmed)</p> <p>10 Examination-in-chief by MR HARRIS</p> <p>11 MR HARRIS: Please can the witness be handed bundle D and</p> <p>12 open it at tab 2A. It is not on the index I am afraid,</p> <p>13 members of the Tribunal, but it is in the bundle or at</p> <p>14 least it is not on my index. Do you recognise that as</p> <p>15 the first page of a witness statement you put together</p> <p>16 for use in these proceedings when Mognie James was</p> <p>17 formally a party to these joint proceedings?</p> <p>18 A. Yes.</p> <p>19 Q. Is that a copy of your signature on the final page?</p> <p>20 A. Yes.</p> <p>21 Q. Is the evidence contained in this witness statement true</p> <p>22 and accurate to the best of your knowledge?</p> <p>23 A. Yes, it is.</p> <p>24 Q. Do you have any corrections or ..?</p> <p>25 A. No.</p> <p style="text-align: center;">Page 176</p>
<p>1 to be dealt with today. They are available today and we</p> <p>2 have not been told there are any problems for today.</p> <p>3 That is Mr James and Mr Forrest. I am going to call</p> <p>4 Mr James in just a moment.</p> <p>5 Before we finish for today I would like to make</p> <p>6 a short submission about this document which is now</p> <p>7 unredacted. I am in your hands. I am happy to call</p> <p>8 Mr James and Mr Forrest but this needs to be dealt with</p> <p>9 as I would like to invite the Tribunal to do something</p> <p>10 overnight. Before finish for the day we also need a few</p> <p>11 minutes on that document.</p> <p>12 MR MACLEAN: It is all very mysterious because my learned</p> <p>13 friend hasn't told me what the submission is so I am</p> <p>14 completely in the dark, but I suggest we get on with</p> <p>15 Mr James. Mr Woolfe and Mr Holmes might, for example,</p> <p>16 discuss whatever this point is because I have no idea.</p> <p>17 THE CHAIRMAN: In terms of timing are you going to be able</p> <p>18 to finish both witnesses tonight?</p> <p>19 MR MACLEAN: I am in the Tribunal's hands as to how long you</p> <p>20 are able to sit but in principle, yes.</p> <p>21 THE CHAIRMAN: I have a meeting at 4.30. It is not</p> <p>22 essential that I be there.</p> <p>23 MR MACLEAN: I am not going to finish both witnesses before</p> <p>24 that.</p> <p>25 THE CHAIRMAN: No, but I didn't think you were but they are</p> <p style="text-align: center;">Page 175</p>	<p>1 MR HARRIS: You may have some questions, thank you.</p> <p>2 Cross-examination by MR MACLEAN</p> <p>3 MR MACLEAN: Mr James, good afternoon.</p> <p>4 A. Good afternoon.</p> <p>5 Q. Can I just ask you to take bundle H2/967, please. That</p> <p>6 is a bit of it. Go to page 933 for the front page.</p> <p>7 This is a presentation that was given in June 2013 which</p> <p>8 I think you say you attended?</p> <p>9 A. Yes, I believe so, yes.</p> <p>10 Q. And you attended another presentation I think</p> <p>11 in November 2013 in Bridgend?</p> <p>12 A. That's correct, yes.</p> <p>13 Q. And the two presentations were materially identical?</p> <p>14 A. Yes, just let me have a ...</p> <p>15 Q. I am just going to take you to this one as illustrative</p> <p>16 of the two unless you tell me for some reason why that</p> <p>17 is not a safe course?</p> <p>18 A. There were two presentations, one at the RAM meeting</p> <p>19 where I first met Mr Springett and then later on at</p> <p>20 Bridgend.</p> <p>21 Q. So this is June 2013. Can I just ask you about some of</p> <p>22 the features of the Bricks and Mortar estate agency</p> <p>23 business in the summer of 2013, okay, before we come to</p> <p>24 the detail of what's in the presentation. Was the</p> <p>25 background for Bricks and Mortar estate agents in 2013</p> <p style="text-align: center;">Page 177</p>

<p>1 that there had been a pattern over a period of years of 2 ever increasing prices being charged by the portals? 3 A. I think, yes, there certainly had been an increase in 4 prices, not hugely but I think as a commercial entity 5 they were both increasing prices annually. 6 Q. And both for listing fees and for various add-ons, is 7 that right? 8 A. Yes. 9 Q. Increasingly there was pressure on estate agents to be 10 on Rightmove and Zoopla? 11 A. I wouldn't say there was pressure on us. It is all 12 a competitive thing. I think that one of the 13 attractions when OnTheMarket came forward is agents tend 14 to look at getting an edge. 15 Q. But there is a bit of a herd instinct, isn't there? 16 I think Mr Forrest talks about this in his witness 17 evidence. There is a bit of a herd instinct, isn't 18 there, amongst estate agents so that if the other agents 19 at the other end of the street join a second portal, 20 then the chap at the other end of the street says, "Well 21 I'd better do that too?" 22 A. Yes, I think there's an element of that, yes. That's 23 why in my view I think probably OnTheMarket could have 24 launched without the One Other Portal rule. 25 Q. One of the other features was that the portals were</p> <p style="text-align: center;">Page 178</p>	<p>1 A. I think we negotiated quite well with them. Our rate 2 increases weren't that large. So -- yes, of course 3 I think if anything, I think Mr Livesey referred to this 4 earlier, that of course with his spending power he would 5 be expecting to get a slightly better rate and I can't 6 really argue with that. 7 Q. So it is not surprising if you were in Mr Springett's 8 shoes in 2013 that the first port of call to build the 9 OnTheMarket business would be to go to leading 10 independent estate agents like you? 11 A. Very possibly, yes. But I think, you know, I think we 12 can -- we just -- we were happy to look at the options 13 of the OnTheMarket at the time, so -- 14 Q. Because OnTheMarket against the background of a number 15 of these problems or one might even say threats that 16 were faced by the independent estate agents the 17 principle of an agent owned portal on a not for profit 18 basis was one which you and many others found very 19 attractive, wasn't it? 20 A. Yes, I think initially it was, but I think I feel very 21 misled by that. I personally think it could have been 22 launched without the One Other Portal rule. I think the 23 fact that agents do follow each other, the fact that if 24 OnTheMarket were there others -- we would have joined it 25 et cetera et cetera.</p> <p style="text-align: center;">Page 180</p>
<p>1 creating more and more paid for services which they were 2 then offering to the estate agents, weren't they? 3 A. Yes, I think just adding different products. I think it 4 was just normal for the time. 5 Q. By the summer of 2013 there was also I think at least 6 for some of the portals the inclusion of direct private 7 listings alongside agent listings, wasn't there? 8 A. I'm not sure on that. 9 Q. Increasingly there were internet-based or non-Bricks and 10 Mortar based agencies who were also entering the estate 11 agency sector? 12 A. I think just at that time they were just starting to 13 raise their heads, yes, but again, you know, I am 14 a small agent in Wales. We weren't subject to the big 15 meetings in London et cetera et cetera and down in Wales 16 we just don't seem to be getting much input into the 17 market from not on the high street agents. 18 Q. Because you were an independent and perhaps because of 19 your geographic location you weren't in a position like 20 Mr Livesey and the big corporates like Connells and 21 Countrywide or LSL to drive a harder bargain with the 22 portals to get a decent discount, were you? 23 A. Well, I think we were viewed locally as being a leading 24 agent. 25 Q. I am not suggesting otherwise.</p> <p style="text-align: center;">Page 179</p>	<p>1 Q. Yes. You found -- I am sorry, go on. 2 A. Well, also I think there has been lots said about the 3 presentations made and with the different memberships 4 and we were very much led to believe that being a gold 5 member -- because this trial seems to have been so much 6 about the big boy against the other big boy. 7 I represent a tiny agent who really collectively across 8 the country helped launch OnTheMarket as a business 9 because we gave them loan money upfront. 10 Q. Yes, but -- I am sorry. 11 A. In doing that it subsequently has become apparent that 12 agents are being signed up at a fraction of the cost 13 that we did even although we gave them money upfront. 14 So it appears to me that although it is an attractive 15 proposition then that the presentations that were made 16 and the contracts we have are practically worthless 17 because they are doing what they like. 18 Q. We'll come to this in a minute, Mr James, but your 19 complaint last year and what led to the litigation, your 20 complaint was that you said that there had been 21 misrepresentation to you about the commercial terms. 22 Your complaint wasn't about the One Other Portal rule or 23 any competition law concerns, was it? 24 A. It was a concern. It was a concern definitely, but, 25 yes, very, very -- we feel very angry, very angry that</p> <p style="text-align: center;">Page 181</p>

46 (Pages 178 to 181)

<p>1 we feel misrepresented.</p> <p>2 Q. Yes. And that litigation was settled following summary</p> <p>3 judgment application. Can I show you bundle X, please,</p> <p>4 at page 190 which is tab 28A. Mr James, have you seen</p> <p>5 this document before?</p> <p>6 A. Yes.</p> <p>7 Q. Can you just cast your eye over (i) at the bottom of the</p> <p>8 page. Just read that to yourself, would you. (Pause)</p> <p>9 A. Yes, but that doesn't tell the story at all.</p> <p>10 Q. Well –</p> <p>11 A. Can I – I have got something to add to that if</p> <p>12 possible.</p> <p>13 Q. What we are not here to do, Mr James, because it is not</p> <p>14 the function of this Tribunal and because your</p> <p>15 misrepresentation claim has been dealt with in that</p> <p>16 consent order is that this Tribunal is not concerned</p> <p>17 with the complaints which you made about what you saw</p> <p>18 and felt, no doubt on a heartfelt basis, felt to be the</p> <p>19 misrepresentations that you say were made to you. That</p> <p>20 is not what we are here for.</p> <p>21 A. What I wanted to add if possible is that, you know, this</p> <p>22 doesn't actually represent the whole story and it goes</p> <p>23 into – what I have got to say does explain a little bit</p> <p>24 about the company we're dealing with here, and simply</p> <p>25 that we were going to win that summary judgment but we</p> <p style="text-align: center;">Page 182</p>	<p>1 corrected if I am wrong, in the November presentation.</p> <p>2 "What next? Consider information memorandum with</p> <p>3 your colleagues. Each firm must make its own</p> <p>4 independent decision."</p> <p>5 And that is exactly what Moginie James did, isn't</p> <p>6 it?</p> <p>7 A. Yes, we discussed options with other agents but, yes,</p> <p>8 that's what we ultimately did.</p> <p>9 Q. And you understood that when a letter of intent was sent</p> <p>10 that the whole project might not get off the ground if</p> <p>11 there wasn't the necessary critical mass?</p> <p>12 A. No, I didn't really think that at the time.</p> <p>13 Q. You didn't really think that at the time?</p> <p>14 A. No.</p> <p>15 Q. Have you had any contact with Zoopla in recent months,</p> <p>16 Mr James?</p> <p>17 A. No.</p> <p>18 Q. And as we stand here today Moginie James is listing its</p> <p>19 properties on what, OnTheMarket and Rightmove?</p> <p>20 A. Yes.</p> <p>21 MR MACLEAN: Thank you very much, Mr James.</p> <p>22 MR HARRIS: Sir, I don't have any re-examination.</p> <p>23 THE CHAIRMAN: Thank you very much. You are released.</p> <p>24 (The witness withdrew)</p> <p>25 MR HARRIS: Sir, that leaves my final witness who has been</p> <p style="text-align: center;">Page 184</p>
<p>1 just had run out of money and effectively we were forced</p> <p>2 into a situation when we had to settle. Because it was</p> <p>3 adjourned I just couldn't go that extra mile and we just</p> <p>4 ran out of money, and I think it reflects on the type of</p> <p>5 company that have been bullying me all year and, you</p> <p>6 know, I feel very, very frustrated that this was the end</p> <p>7 result.</p> <p>8 Q. Mr James, let's have a look at this. One of the things</p> <p>9 you were attracted by at the outset was the 15 per cent</p> <p>10 coupon on the loan notes, right?</p> <p>11 A. Sorry?</p> <p>12 Q. 15 per cent that was payable on the loan notes. That</p> <p>13 was an attractive proposition to you?</p> <p>14 A. The attractive proposition to me was the fact that we</p> <p>15 were absolutely told that being a gold member and</p> <p>16 putting the loan upfront meant that we would always have</p> <p>17 the cheapest rate payable back.</p> <p>18 Q. Mr James, I am really not going to start debating with</p> <p>19 you the terms of the disclaimer and the information</p> <p>20 memorandum because it is simply not the business of the</p> <p>21 Tribunal, okay.</p> <p>22 Let me show you one piece of paper from the</p> <p>23 presentation. Would you turn to page 972. This is one</p> <p>24 of the last slides of the presentation which was made</p> <p>25 in June and there is a similar slide, I think, I will be</p> <p style="text-align: center;">Page 183</p>	<p>1 very patient today, Mr Martin Forrest. If he can please</p> <p>2 come to the stand.</p> <p>3 MR MARTIN FORREST (affirmed)</p> <p>4 Examination-in-chief by MR HARRIS</p> <p>5 MR HARRIS: Please can the witness be handled bundle D, the</p> <p>6 witness statements and open at tab 6, please.</p> <p>7 Mr Forrest, do you recognise that is the front page of</p> <p>8 a witness statement you have given in these proceedings?</p> <p>9 A. I do.</p> <p>10 Q. Is there a copy of your signature on the final page?</p> <p>11 A. That's right.</p> <p>12 Q. Are the contents of this true and accurate evidence that</p> <p>13 you wish to give to this Tribunal?</p> <p>14 A. Yes.</p> <p>15 Q. Are there any corrections or inaccuracies in this</p> <p>16 statement?</p> <p>17 A. No.</p> <p>18 Q. Can you also please turn over in this bundle to tab 9.</p> <p>19 Do you recognise that as the front page of a second</p> <p>20 witness statement in these proceedings?</p> <p>21 A. Yes.</p> <p>22 Q. And a copy of your signature on the final page?</p> <p>23 A. Yes.</p> <p>24 Q. Is this true and accurate evidence you wish to give to</p> <p>25 the Tribunal?</p> <p style="text-align: center;">Page 185</p>

<p>1 A. Yes. 2 Q. Any corrections or inaccuracies? 3 A. No. 4 MR HARRIS: You may have some questions. 5 Cross-examination by MR MACLEAN 6 MR MACLEAN: Good afternoon, Mr Forrest. 7 A. Good afternoon. 8 Q. You are an accountant by background? 9 A. Yes. 10 Q. And you have never set up a portal business, have you? 11 A. No. 12 Q. You have never set up any business? 13 A. No. 14 Q. You've never worked in what Mr Chesterman, if he were 15 here, would no doubt call the portal space, have you? 16 A. No. 17 Q. Gascoigne Halman had 18 branches when it was -- still 18 has 18 branches, I think; is that right? 19 A. Yes. 20 Q. You attended the management meetings, you tell us in 21 your statement at paragraph 9, until August 2015? 22 A. That's right. 23 Q. And have you seen these bundles? 24 A. Yes, I have. 25 Q. A number of examples in the bundles?</p> <p style="text-align: center;">Page 186</p>	<p>1 January 2015, these year on year price increases had 2 been going on for many years, hadn't they? 3 A. They had. 4 Q. If we go to your witness statement at paragraph 20 -- 5 let me just show you a document. In bundle H1. Can you 6 just be shown H1 at 355. Mr Halman was -- he was the 7 boss; right? 8 A. He was the managing director. 9 Q. He was the boss, you were one of the management team? 10 A. Yes, that's right. I suppose overall, yes. 11 Q. There wasn't a CEO, there was an MD instead? 12 A. Yes. 13 Q. And you explained in your witness statement you worked 14 closely together and you had an open door policy and so 15 on? 16 A. We did. 17 Q. And Mr Halman's view, as we see from page 355, look at 18 the sentence beginning "The merger of Zoopla." Do you 19 see in the middle of the page? 20 A. I do. 21 Q. "I think it is likely that we will end up having to be 22 on Zoopla in due course but I see no reason for being 23 the catalyst for all of our offers going on to the 24 site." 25 And at the end of the email he makes the point:</p> <p style="text-align: center;">Page 188</p>
<p>1 A. Yes. 2 Q. Now, the evidence suggests, I think, that Rightmove 3 always generated good quality leads for Gascoigne 4 Halman? 5 A. Well, they generated a lot of leads and a lot of them 6 are good quality but not always. 7 Q. And those were focused and accurate leads as well, 8 weren't they? 9 A. More than any other leads we had, yes. 10 Q. And, in particular, more so than Zoopla's leads which 11 were, every time a free trial was offered, without 12 exception, fairly hopeless, weren't they? 13 A. Yes, they weren't well respected. 14 Q. And at the same time, as you say in your paragraph 24, 15 if we just turn that up, please, Mr Forrest, in your 16 first witness statement, which is at tab 6, 17 paragraph 24, you say: 18 "Overall, Gascoigne Halman has generally been 19 satisfied with the services offered by Rightmove, save 20 for the year on year price increases and the practice of 21 Rightmove consistently forcing more and more additional 22 services and product on us which you would not 23 necessarily have chosen but at considerable cost." 24 A. That's correct. 25 Q. So by the time OnTheMarket entered which was in</p> <p style="text-align: center;">Page 187</p>	<p>1 "We may have to face up to it as a defensive measure 2 at some stage in the future." 3 That's the 19 June 2012. So what Mr Halman was 4 saying was that what I would call the herd behaviour 5 instincts of estate agents might force Gascoigne Halman 6 on to Zoopla in time but he didn't want to be the first, 7 as it were, wildebeest to cross the Mara river; right? 8 A. Yes. 9 Q. And you refer to the same characteristic of estate 10 agents, of what I call the herd instinct, at 11 paragraph 41 of your statement? 12 A. Yes. 13 Q. In 2012, Gascoigne Halman had another go on Zoopla and 14 the leads were found to be very poor? 15 A. Again. 16 Q. The same bundle, bundle 1 at page 342, please, just 17 a few pages further back. Mr Jolleys, what was his 18 role? He was a manager -- basically a manager of one of 19 the offices? 20 A. He is -- he's currently the manager of our Wilmslow 21 office but in 2012 he was probably the manager of our 22 Didsbury office. 23 Q. He makes the point to Mr Halman: 24 "Considering Didsbury [that was then his office 25 then] isn't in profit yet, I would consider it foolish</p> <p style="text-align: center;">Page 189</p>

<p>1 to remain on Zoopla at the moment. Also, I take on 2 board your valid views we could be fuelling another RM." 3 That was obviously a reference to Rightmove; yes? 4 A. Yes. 5 Q. And if you go two pages further on, here is one of your 6 management meetings. This one is held on 14 June 2012. 7 Can you just glance, Mr Forrest, at the top of 345, 8 under the heading "Property portals", and I want you to 9 tell me what the reasons are that are un-minutable? 10 A. I should imagine it was a little while ago, clearly, 11 that the leads were very poor. 12 Q. So could I infer that somebody perhaps expressed in the 13 vernacular what they thought of Zoopla's leads; is that 14 it? 15 A. That could well be the case. 16 Q. Mr Halman, at page 384, was rather presciently, if I may 17 say so, keen to ensure, as he put it, that "we will 18 resist" -- you see the third paragraph of 384, beginning 19 "As a consequence", second line: 20 "We will resist as long as we can. Better to have 21 only one ogre than two." 22 So Mr Halman was a deep sceptic about Zoopla, wasn't 23 he? 24 A. Yes. 25 Q. And by contrast, he was rather enthusiastic from the off</p> <p style="text-align: center;">Page 190</p>	<p>1 Q. Do you remember seeing that, that is the information 2 memorandum? 3 A. Yes. 4 Q. That's the information memorandum. And the meeting with 5 Mr Halman was a very positive one and the very next day, 6 after that meeting, Mr Halman sent the letter of intent 7 to Agents' Mutual, didn't he? 8 A. Yes. 9 Q. Between the end of the meeting and sending a letter of 10 intent, Mr Halman discussed that with you, did he? 11 A. He did. 12 Q. And you concurred with his decision to send a letter of 13 intent? 14 A. Yes, I did. 15 Q. And Mr Halman saw, as you say in paragraph 35 of your 16 statement: 17 "GHL also viewed -- " and this was certainly 18 Mr Halman's view, if you look at paragraph 35 of your 19 first statement: 20 "... the Agent's Mutual proposition as a way for GHL 21 to be proactive and take a step towards defending itself 22 against Rightmove and the ever increasing costs that we 23 were facing for listing on that portal." 24 Pausing there. So far as GHL was concerned, Zoopla 25 wasn't imposing any restraint at all, so far as you</p> <p style="text-align: center;">Page 192</p>
<p>1 about OnTheMarket? 2 A. Yes, there were different times, that was 2012 and 3 I think OnTheMarket was 2014. 4 Q. The presentation actually, we will come to in a second, 5 the presentation, when Mr Springett came to see 6 Mr Halman, was on 20 June 2013. It was a year later; 7 yes? 8 A. Yes. 9 Q. So Mr Springett came to see Mr Halman on 20 June 2013. 10 I don't think he met you, did he? 11 A. No. 12 Q. I don't think you have ever met Mr Springett? 13 A. No. 14 Q. And he visited the office in Wilmslow which is where 15 Mr Halman had his office and the purpose of the meeting 16 was to introduce Gascoigne Halman to the Agents' Mutual 17 proposition? 18 A. Yes. 19 Q. You weren't at the presentation but I know that you 20 discussed it with Mr Halman afterwards, didn't you? 21 A. We did. 22 Q. And you know, don't you -- let me show you H2/735. This 23 is the presentation that Mr Springett made. No, it is 24 not. 25 A. Yes, I remember seeing that.</p> <p style="text-align: center;">Page 191</p>	<p>1 could detect from your perspective, on Rightmove, was 2 it? 3 A. Not in our geographical area, no. 4 Q. And your experience was that Rightmove's prices 5 historically, as you put it in paragraph 32, had, 6 historically, gone up and up? 7 A. That's right. 8 Q. And against that background, Mr Halman took the view, as 9 he expressed in an email of 30 December that 10 Agents' Mutual was a must have for all agents, didn't 11 he? 12 A. I'm not sure that he described it as that to me, but he 13 was certainly very positive. 14 Q. I am sorry, I didn't catch the last word? 15 A. He was certainly very positive. 16 Q. Yes, indeed he was. And he was very positive from first 17 to last, wasn't he? Even when following the takeover by 18 Connells, he had to part company with OnTheMarket, he 19 did so more in sorrow than in anger, didn't he? 20 A. I think at that time we were probably getting a bit 21 disillusioned with OnTheMarket because of lack of 22 results. 23 Q. Really? Take bundle H14, Mr Forrest, and turn to 24 page 7919. I have to suggest to you that that last 25 answer isn't entirely or even mainly correct. Here is</p> <p style="text-align: center;">Page 193</p>

<p>1 Mr Halman's email to Ms Whiteley of Agents' Mutual; do 2 you see?</p> <p>3 A. Yes.</p> <p>4 Q. Have you ever seen this email before?</p> <p>5 A. I have.</p> <p>6 Q. You have. So you will be familiar with the fact that he 7 says in the middle of the paragraph:</p> <p>8 "As you will recall, as an independent estate 9 agency, we were one of the first to support AM, as we 10 saw it as an opportunity to break the Rightmove/Zoopla 11 dominance. I believe that OTM has a real battle moving 12 forward, as it really seems to be Zoopla and OTM which 13 are battling for the register, with Rightmove less 14 affected. With the corporates in such an acquisitive 15 mood, this can only make your aims and intentions 16 increasingly challenging."</p> <p>17 Then he talks about the loan notes and he says "best 18 wishes to OnTheMarket for the future."</p> <p>19 There is not a whisper or a hint of a suggestion of 20 any dissatisfaction by Mr Halman with the OnTheMarket 21 proposition, is there?</p> <p>22 A. No, but then why would he want to raise any 23 dissatisfaction at that stage, just as you're leaving?</p> <p>24 Q. Well, why not?</p> <p>25 A. Well, why?</p> <p style="text-align: center;">Page 194</p>	<p>1 A. It showed promise to start with, yes, but actually, it 2 performed very similarly to Zoopla for our purpose.</p> <p>3 Q. You, personally, didn't ever, at any of these monthly 4 meetings, raise any query or disillusionment or question 5 about OnTheMarket, did you?</p> <p>6 A. No.</p> <p>7 Q. And there is no evidence in any of these bundles that 8 anyone else did either, until after Connells bought 9 Gascoigne Halman and then the corporate party line 10 changed, didn't it?</p> <p>11 A. It did.</p> <p>12 Q. And since October 2015, you have had to toe the 13 Connell's party line, haven't you?</p> <p>14 A. That is not exactly their management style, no. We 15 still operate quite autonomously. There are very few 16 things that we are told that we have to do. The ones 17 that we are told we have to do are relating to health 18 and safety procedures rather than how we run our 19 business.</p> <p>20 Q. Toeing the line in this litigation, that is the other 21 one that is absolutely crucial; right?</p> <p>22 A. That was one of the items, yes.</p> <p>23 MR MACLEAN: Thank you very much, Mr Forrest. 24 Re-examination by MR HARRIS</p> <p>25 MR HARRIS: I am afraid, Mr Forrest, I can't lay my finger</p> <p style="text-align: center;">Page 196</p>
<p>1 Q. The truth is, he doesn't ever raise any suggestion that 2 there was any disillusionment at all, did he?</p> <p>3 A. He didn't raise it, but I was aware of it.</p> <p>4 Q. You were at these management meetings until August 2015. 5 There isn't a hint of a suggestion in one of them of any 6 dissatisfaction with OnTheMarket, is there?</p> <p>7 A. I think we discussed OnTheMarket very little because 8 they featured very little within the marketing that we 9 had for our properties.</p> <p>10 Q. If it had been a problem, if it had been a pain in the 11 neck or causing some problem for the business, it would 12 have been discussed at these monthly meetings, wouldn't 13 it?</p> <p>14 A. Yes. I wouldn't say it was a pain in the neck. I think 15 it was OnTheMarket was a replacement for Zoopla for us 16 and we felt that we had to be on two portals because our 17 competitors featured on two portals and that was 18 a preferred one rather than the other. It wasn't 19 providing many leads, it wasn't really that worthwhile 20 talking about.</p> <p>21 Q. It wasn't a replacement for Zoopla for you, Mr Forrest 22 because Zoopla for you had always been rubbish. 23 Whereas OnTheMarket promised to actually have an impact, 24 a positive impact from Mr Halman's perspective, didn't 25 it?</p> <p style="text-align: center;">Page 195</p>	<p>1 on the document that I am looking for but am I right in 2 saying that in answer to Mr Maclean's question, you said 3 that you didn't think that leads from Zoopla, and 4 I paraphrase, were very good?</p> <p>5 A. That's right.</p> <p>6 Q. Was that the case across all of your branches?</p> <p>7 A. No, there was one office, our sale office, who valued 8 the leads from Zoopla. We could only assume that it was 9 the demographic. There is more central Manchester type 10 of people who would search for properties. Whereas the 11 rest of our geographical spread was north Cheshire and 12 a different suburbia.</p> <p>13 MR HARRIS: Thank you. I am afraid we can't locate it right 14 now, sir, but we were under the impression that there 15 was a document in the Gascoigne Halman internal meeting 16 notes, board minutes, making adverse comments about OTM 17 and Mr Maclean said there wasn't one. But I don't think 18 I need to put it to the witness. If we find it 19 overnight, we'll draw it to the Tribunal's attention 20 tomorrow. If it's not there and we don't find it, well 21 so be it and it stays with how Mr Maclean put it.</p> <p>22 THE CHAIRMAN: Yes.</p> <p>23 MR HARRIS: If you are content with that, then I have no 24 more questions for Mr Forrest.</p> <p>25 Questions by the Tribunal</p> <p style="text-align: center;">Page 197</p>

<p>1 MR FREEMAN: Mr Forrest, when Mr Maclean asked you whether 2 the arrival of Connells meant that you were toeing the 3 line in this litigation, and you agreed, I think, what 4 do you understand by that, what do you mean by that? 5 A. Well, we were asked to list our properties on Zoopla. 6 We obviously raised the point that we were with -- 7 MR FREEMAN: That was before the litigation started, 8 presumably? 9 A. Oh yes. 10 MR FREEMAN: So once the litigation started, you were asked 11 to toe the line in the litigation? 12 A. Well, not so much in the litigation but just on the 13 listing of the properties. Not in the litigation at 14 all, no. 15 MR FREEMAN: You were asked to take the step which has 16 provoked this litigation? 17 A. Yes. 18 MR FREEMAN: Thank you. 19 THE CHAIRMAN: Any questions? 20 MR MACLEAN: No questions. 21 MR HARRIS: No questions. 22 THE CHAIRMAN: Thank you very much, Mr Forrest, you are 23 released. 24 (The witness withdrew) 25</p> <p style="text-align: center;">Page 198</p>	<p>1 a mistaken redaction for irrelevance. It is not just 2 similar in theme to that which wasn't redacted but it 3 also goes to show how much thought had gone into whether 4 a great deal or less of a deal, it doesn't matter. It 5 is the degree of thought that had gone into this second 6 proposal that was being put and how developed that 7 proposal was. Which, as you know, is a bone and has 8 been a bone of contention between the witnesses. And 9 this detail that has now been unredacted goes squarely 10 to the degree of detail which has always been in dispute 11 between the parties, so it has clearly been relevant. 12 I raise that specifically because as you know, we 13 have always had, as you know from the PTR, amongst other 14 things, leaving aside the reams of correspondence about 15 this, very great concerns about what's been redacted in 16 this case. 17 And can I give you a specific example of a document 18 that now I would invite you to direct the other side to 19 revisit. That's a board minute reporting upon the four 20 party meeting. 21 I have it in a separate bundle but my common bundle 22 reference is in H15/8190. This is a board minute from 23 Agents' Mutual dated Monday, 8 February 2016, so it is 24 a matter of a couple of weeks after the four party 25 meeting. There are various matters redacted on page 1</p> <p style="text-align: center;">Page 200</p>
<p>1 Housekeeping 2 THE CHAIRMAN: Mr Harris, you had a point on the new 7737A. 3 MR HARRIS: With your permission, we need to run through 4 arrangements for tomorrow and also the point that I have 5 about this document. I am in your hands as to -- 6 THE CHAIRMAN: Do you want to start with the document? 7 MR HARRIS: Yes, so as you know, we asked yesterday for the 8 supposedly relevant words to be unredacted and they have 9 now been provided. Can you see them, two lines up from 10 the bottom, after where it says "done by AM to avoid 11 hares running. And then it was redacted. All felt 12 Close Brothers would be a credible source for this." 13 And those were the words that were redacted and then 14 it went on "forward income worked." 15 The point is simply this, sir, that we are concerned 16 that those words should have been said to have been 17 redacted for irrelevance, right up until a couple of 18 hours ago because they are not irrelevant. They are 19 every bit as relevant as the previous sentences. It is 20 talking about approaching an investment bank. That 21 wasn't redacted for irrelevance. "All new suitable 22 investment houses." That wasn't redacted for 23 irrelevance. And then when they go on to give 24 an example of either an investment bank or an investment 25 house. And what concerns us, sir, is that this is</p> <p style="text-align: center;">Page 199</p>	<p>1 for irrelevance and page 2. The whole of page 3. Half 2 of page 4. Indeed, we don't know what any of those 3 matters are although they are under the heading 4 "Business update." One might have thought that the four 5 party meeting was a relevant business update. But in 6 any event, something becomes unredacted in the bundle, 7 8193. It is about four pages in. And then it is 8 headed -- this is, of course, not confidential now. It 9 is reporting on the four party meeting, so I am at 10 liberty to read this out, now that those notes have been 11 declared non-confidential. So you can see for yourself 12 it is a report on the meeting -- well -- 13 THE CHAIRMAN: Sorry, which page are you on now? 14 MR HARRIS: I think it is on page 8193. It is about the 15 fourth page of these meeting notes. 16 THE CHAIRMAN: Yes, I have it. 17 MR HARRIS: And you can see that the heading is about major 18 corporates and the meeting. And then you can see that 19 there is various aspects of the substance, about the 20 meeting. If you just cast your eye over it. Some parts 21 of the meeting are discussed. Various bullet points. 22 Then it goes down "IS expressed his view ..." 23 Over the page, "IS reported that". And then "This 24 would involve retaining OTM plus one. This would 25 accelerate the growth of OTM." And suddenly, in the</p> <p style="text-align: center;">Page 201</p>

<p>1 middle of the discussion, the contents of which are 2 plainly relevant and not at all confidential, a huge 3 chunk is redacted on alleged grounds of irrelevance and 4 then it picks it up again "As LSL had seemed 5 interested ..." And then further reference to what 6 happened in this meeting. The entire contents of which 7 we have now seen in the meeting note and in the witness 8 statements and then another large chunk is redacted for 9 alleged irrelevance and then over the page at privilege. 10 And then we don't see item 8, et cetera. 11 What concerns us very greatly, now that we have seen 12 this mistaken redaction for irrelevance having been 13 lifted, is that the same mistake or similar mistakes may 14 well have been made in at least this document and, in 15 particular, the two chunks of alleged irrelevance on 16 page 8194. What I would invite you to do, sir, with 17 great respect, is to direct the solicitors for 18 Agents' Mutual to review very carefully now, in light of 19 the ruling that you made earlier today on this removal 20 of the irrelevance redaction, at least those passages on 21 that page, to make sure that only truly irrelevant 22 material remains redacted from us and that if there are 23 any other reports of the meeting in other documents -- 24 that's the only one that I have been able to find since 25 this was handed to me at the short adjournment -- at the</p> <p style="text-align: center;">Page 202</p>	<p>1 I have already had instructions to suggest that my team 2 which may or may not include me or Mr Holmes but senior 3 people on our side, will overnight review this note, in 4 particular dealing with the business update and the 5 kernel of Mr Harris's suspicion or concern is the bit in 6 the middle of 8194. We will look at that and we will 7 apply the appropriate standard of relevance and we will 8 report back in the morning. 9 THE CHAIRMAN: Thank you, Mr Maclean. I wasn't, to be 10 clear, going to make an order, I was inviting a helpful 11 response which I have now received. 12 MR MACLEAN: I hope that is helpful. 13 THE CHAIRMAN: Mr Harris, I hope that deals with that point? 14 MR HARRIS: Yes, thank you, I am happy with that. 15 There is one other matter that arises which is the 16 Tribunal has been served today, as have my learned 17 friends, with an additional witness statement from my 18 instructing solicitor which contains some additional 19 evidence that came to us very late in the day, at the 20 very end of last week and was reviewed over the weekend 21 and was disclosed over the weekend. It takes the form 22 of some audio tapes and some transcripts of those tapes 23 from collected meetings of agents that took place in 24 Northern Ireland and -- 25 MR MACLEAN: I am sorry to interrupt my friend. We received</p> <p style="text-align: center;">Page 204</p>
<p>1 end of the short adjournment today -- if there are any 2 other such reports, that they also be reviewed for 3 redactions. 4 THE CHAIRMAN: Mr Harris, to be quite clear, I don't think 5 the Tribunal made a ruling on the unredaction of the 6 irrelevance line. It was simply a matter which you 7 asked for and I could see no reason to resist that and 8 the matter has been disclosed. 9 It is quite clear from the identification of 10 irrelevance and privileged parts that there has been an 11 application of mind to this. And I am not particularly 12 inclined to require wholesale revisiting of that which 13 has already been marked up. 14 And I can see why you suggest that notes and minutes 15 going to this particular meeting are important. If 16 Mr Maclean or his learned, nearly leading junior were 17 minded to double check this. 18 MR MACLEAN: Sir, can I help? 19 THE CHAIRMAN: Of course you can. 20 MR MACLEAN: Mr Harris's side have never raised this 21 particular issue until now. There have been endless 22 other points raised but not this one. As you rightly 23 say, sir, an application of mind has been applied to 24 this document as to relevance and privilege. In order 25 to set Mr Harris's mind at rest, I have instructions --</p> <p style="text-align: center;">Page 203</p>	<p>1 the transcripts today, not over the weekend. Not 2 Thursday, not Friday but today and we received a witness 3 statement of Mr Bronfentrinker over the luncheon 4 adjournment and I haven't read it. 5 THE CHAIRMAN: Mr Maclean, let me try and take a little bit 6 of the heat out of this. I know the existence of 7 Mr Bronfentrinker's statement but it has been kept away 8 from the Tribunal. We have not read it. And what I am 9 going to suggest is that you at least, have some time to 10 look at it. 11 MR MACLEAN: I haven't read it. 12 THE CHAIRMAN: Precisely. Before we look at it ourselves. 13 MR MACLEAN: It raises a number of questions because as 14 I understand it, there are three transcripts of three 15 different meetings, all of which took place in the 16 spring time of last year which, as I understand it, it 17 is suggested came into the possession of Quinn Emanuel 18 at the end of last week, in circumstances which I am 19 told are unsatisfactorily explained in 20 Mr Bronfentrinker's witness statement. I am also told 21 that what was originally delivered were very poor 22 quality, I think Mr Bronfentrinker accepts, very poor 23 quality tapes of meetings which it seems have been 24 surreptitiously recorded by way of some sort of 25 microphone in somebody's handbag. The transcripts,</p> <p style="text-align: center;">Page 205</p>

<p>1 I understand, are quite long. There may be an issue 2 about the correct transcription of those transcripts but 3 the circumstances in which this evidence has come to 4 light are very odd and Mr Harris's case very shortly 5 before the case opened, is unsatisfactory. I obviously 6 need an opportunity to read Mr Bronfentrinker's 7 statement. My respectful suggestion is that the 8 Tribunal should maintain the self denying ordinance 9 meanwhile, until we can revisit this matter in the 10 morning but it may be we aren't able to reach an agreed 11 resolution then. 12 THE CHAIRMAN: Mr Harris, these transcripts, how are you 13 proposing to put them into evidence? 14 MR HARRIS: Sir, may I make one correction. I did not say 15 that the transcripts had been disclosed over the 16 weekend. I said that the audio tape had been disclosed 17 over the weekend. The transcripts, and it says it on 18 today's transcript, the transcripts were disclosed today 19 because we had to make the transcripts. That is a point 20 of correction. 21 We have done that as fast as has been humanly 22 possible, since we received those documents. So there 23 can be absolutely no criticism whatsoever. Evidence 24 comes into our possession when it comes into our 25 possession and that's the end of that matter.</p> <p style="text-align: center;">Page 206</p>	<p>1 formally closed his case but if he wants to adduce more 2 evidence, then he has to adduce that evidence through 3 some witness who is able to speak to that evidence and 4 I don't know who that witness is. It is not going to be 5 Mr Bronfentrinker. 6 MR HARRIS: I am very grateful to Mr Maclean. Another 7 reason why I raise it now is precisely because I haven't 8 closed my case. The tapes speak for themselves. They 9 are formally adduced by Mr Bronfentrinker. If you would 10 like to call him or have him called so he can explain 11 the circumstances in which they were arrived at, but 12 that's all set out in his witness statement. But I am 13 not to be denied, in my respectful submission, the 14 introduction of what we say is relevant and germane 15 evidence that only just came into our possession and 16 which we have very promptly disclosed. 17 MR MACLEAN: There is a difference between the continuing 18 obligation of disclosure on the one hand and obtaining 19 permission from a court or tribunal to adduce a witness 20 statement which exhibits further evidence out of time, 21 which is what Mr Harris needs. That's base camp for the 22 submission because directions were given and have been 23 complied with for serving witness statements, setting 24 out the evidence-in-chief and that was all done months 25 ago.</p> <p style="text-align: center;">Page 208</p>
<p>1 Now, I accept the reason I raise it today is because 2 it now needs to be dealt with. We have disclosed it, 3 pursuant to our obligations of disclosure and because we 4 wish to make use of it, it being relevant evidence, we 5 have also put it into the form of exhibits to a formal 6 witness statement. The reason I raise it tonight is 7 because if it is going to be opposed on whatever 8 grounds, that needs to take place first thing tomorrow 9 morning, because I do propose, otherwise, to use this 10 evidence in the cross-examination of witnesses during 11 the remaining part of this week. And so that's why and 12 it makes absolutely no sense for the Tribunal to not 13 have regard to this material overnight because the 14 Tribunal will need to have had regard to it in order to 15 make a decision, if its introduction by way of evidence 16 in the form of exhibits is opposed in the morning. And 17 that's why I say, with respect, responsibly, bring this 18 matter to the attention of the Tribunal at this 19 juncture. 20 I am not suggesting there is any application now but 21 I am suggesting that everybody needs to take stock of 22 that overnight and if there is going to be opposition to 23 it, it needs to be dealt with tomorrow morning. 24 MR MACLEAN: One problem is that Mr Harris's last witness 25 has just left the witness box. I appreciate he hasn't</p> <p style="text-align: center;">Page 207</p>	<p>1 Mr Harris needs to make a proper application, 2 explaining and persuading the Tribunal that he's 3 entitled to the indulgence of the Tribunal to allow him 4 to put in evidence late. The mere fact that they got 5 some documents in a brown paper bag or however it was 6 last Thursday and they have to disclose it, they say, 7 through their continuing obligation of disclosure, 8 doesn't get Mr Harris home, in terms of adducing this as 9 what he calls evidence. It is not evidence until the 10 Tribunal gives him permission to put it into evidence. 11 THE CHAIRMAN: So you don't know how these tape recordings 12 came into Mr Harris's team's possession? 13 MR MACLEAN: Mr Bronfentrinker may explain it but I haven't 14 read his statements. 15 MR HARRIS: Yes, I do because it is in Mr Bronfentrinker's 16 witness statement. It sounds to me, sir, as though we 17 have now reached the relevant point for today. Which is 18 that it sounds as though Mr Maclean is going to oppose 19 the introduction of the evidence. In which case I will 20 need to make an application in the morning, in which 21 case the tribunal, with great respect, and I am sorry to 22 add to your burden, given that we already have 10,000 23 pieces of paper, will have to read Mr Bronfentrinker's 24 witness statement and have regard to the transcripts 25 overnight. And I would, if I may respectfully say and</p> <p style="text-align: center;">Page 209</p>

<p>1 this is a development as unexpected for me as for 2 anybody else, and there is going to be a large amount to 3 get through with the three witnesses and I would beg the 4 Tribunal's indulgence to start, say, at 10 o'clock 5 tomorrow, so that we can dispose of this question of the 6 introduction or otherwise of this evidence at the 7 outset.</p> <p>8 It needs to be dealt with before I start with the 9 witnesses and before I close that part of my case. May 10 I --</p> <p>11 THE CHAIRMAN: So you are planning to put it to Mr Wyatt and 12 Mr Symons, are you?</p> <p>13 MR HARRIS: Probably not those two gentlemen but I will 14 certainly have dealt with both of those and be dealing 15 with Mr Springett tomorrow and it will certainly arise 16 for Mr Springett, yes.</p> <p>17 THE CHAIRMAN: Mr Springett is, on the timetable, appearing 18 not merely on the 8th but on the 9th and the 10th.</p> <p>19 MR HARRIS: That's right, yes.</p> <p>20 MR MACLEAN: As I understand it, it is not suggested that 21 Mr Springett attended any of these meetings.</p> <p>22 THE CHAIRMAN: I don't want to get into arguing the merits. 23 Clearly an application will have to be dealt with. I am 24 a little reluctant to push you, Mr Maclean, into 25 resisting the application at 10 o'clock tomorrow, seeing</p> <p style="text-align: center;">Page 210</p>	<p>1 MR HARRIS: Yes, there is a great deal to get through but 2 I am happy to start at 10.30. Unlike Mr Maclean, of 3 course, I have vastly more documents to put to the 4 witness because all of the documents come from 5 Agents' Mutual, virtually all of them come from 6 Agents' Mutual, so I am very happy to start but there is 7 a lot to get through.</p> <p>8 THE CHAIRMAN: I am quite conscious that we had a diary 9 issue today. I don't want to go into the details of why 10 it arose in the way that it did but given what you have 11 said, there must at least be a risk that Mr Springett 12 may slip into Monday. Is that going to cause problems 13 with regard to the experts?</p> <p>14 MR MACLEAN: Sir, it depends how long the Tribunal had in 15 mind for the hot tubbing experience on Monday. In 16 principle, we, for our side, don't think the point you 17 raise would cause a problem.</p> <p>18 THE CHAIRMAN: No.</p> <p>19 MR HARRIS: Yes, I am afraid there is a risk. Plainly it 20 rather depends on how long it takes for answers to come 21 out but at this stage, I do think that that is a risk. 22 It doesn't present a problem for us if it slips into 23 Monday, with either continuing cross-examination or 24 dealing with the experts.</p> <p>25 THE CHAIRMAN: What I suggest is that we establish the</p> <p style="text-align: center;">Page 212</p>
<p>1 the word 4.50 today.</p> <p>2 MR MACLEAN: Yes, quite.</p> <p>3 THE CHAIRMAN: And from what, Mr Harris, you have said, I am 4 not sure why we can't deal with it first thing on 5 Thursday.</p> <p>6 MR HARRIS: Sir, I take that point. That is a fair point. 7 We can do that.</p> <p>8 THE CHAIRMAN: In that case, we will pursue our case of self 9 obligation for tonight. We will give Mr Maclean 10 a chance to catch up and we will read tomorrow night, 11 the Bronfentrinker statement and Mr Maclean, you can 12 perhaps indicate tomorrow morning whether you continue 13 your position, because I appreciate you haven't had 14 a chance to take a final view and we'll see where we go.</p> <p>15 MR MACLEAN: Yes.</p> <p>16 MR HARRIS: Thank you very much, sir. That is a sensible 17 course, if I may say.</p> <p>18 My understanding is that it is going to be Mr Symons 19 first and then Mr Wyatt and then when those two 20 gentlemen are finished, Mr Springett and that is how 21 I am proposing to proceed tomorrow.</p> <p>22 THE CHAIRMAN: Good. I am grateful. Anything else before 23 we rise?</p> <p>24 MR MACLEAN: I don't believe so, sir.</p> <p>25 THE CHAIRMAN: Will 10.30 tomorrow suit?</p> <p style="text-align: center;">Page 211</p>	<p>1 experts' availability into the 15th and 16th, just in 2 case and hopefully we won't need those days, but it 3 seems sensible that we at least ensure we have an 4 overrun. I would be discouraging of any overrun beyond 5 half a day or so, I have to say.</p> <p>6 MR MACLEAN: I would say, sir, that there was some debate 7 about the timetable and Mr Harris contended for more 8 time to cross-examine than we did. Initially, we were 9 suggesting two and a half days each and Mr Harris's side 10 said: well we need more time, for the reason he has just 11 articulated and we saw the force of that. Mr Harris is 12 going to have three days. I have had two. As you will 13 have gathered, I cut my cloth this afternoon. I am not 14 suggesting I didn't put points that had to be put but 15 I kept within my time. I lost, and I am not 16 complaining, an hour and a half yesterday, whenever it 17 was, and we made up a little bit of it, so we, on our 18 side, have kept to our side of the two days/three days 19 bargain and Mr Harris says he has a lot to do. Maybe he 20 has but the Tribunal, I am sure, will be astute to make 21 sure he gets on with it and doesn't overlabour the 22 cross-examination.</p> <p>23 THE CHAIRMAN: I think that is an entirely fair point, 24 Mr Harris, I am sure you have that well in mind.</p> <p>25 MR HARRIS: Yes.</p> <p style="text-align: center;">Page 213</p>

<p>1 THE CHAIRMAN: We will leave it at that. We will leave it 2 that markers have been put down and I am sure they have 3 been noted. 4 One further point to make, about the hot tub 5 experience. There will have to be some rearrangement of 6 the courtroom, in order to accommodate that. There will 7 have to be space for the experts probably to sit in the 8 front row and so I fear there will be a degree of 9 vacation. 10 MR MACLEAN: Some of us have other places to be anyway on 11 Monday, so there will be a spare seat here. 12 THE CHAIRMAN: But we'll have to factor that in as a matter. 13 In that case, thank you all very much. Until 10.30 14 tomorrow. 15 (4.55 pm) 16 (The court adjourned until the following day at 10.30 am) 17 Application re confidentiality2 18 Ruling13 19 MR DAVID LIVESEY (continued)15 20 Cross-examination by MR MACLEAN15 21 (continued) 22 Re-examination by MR HARRIS49 23 Questions from the Tribunal66 24 MR JONATHAN LEWIS NOTLEY (affirmed)71 25 Examination-in-chief by MR HARRIS71</p> <p style="text-align: center;">Page 214</p>	
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