IN THE COMPETITION APPEAL TRIBUNAL

Case No. : 1365/1/12/20

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP
(Remote Hearing)

Wednesday 9th December – 10th December 2020

Before:
Andrew Lenon QC
Michael Cutting
Pauline Weetman
(Sitting as a Tribunal in England and Wales)

BETWEEN:

(1) Roland (U.K.) Limited
(2) Roland Corporation

-v-

Competition and Markets Authority

A P P E A R AN C E S

Mr Daniel Piccinin (On behalf of Roland)
Marie Demetriou QC and Mr David Bailey (On behalf of CMA)

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Wednesday, 9 December 2020

(2.00 pm)

Housekeeping

THE CHAIRMAN: Good afternoon.

MR PICCININ: Good afternoon.

Sir, I am Daniel Piccinin and I appear for the appellant, Roland. My learned friends Ms Demetriou QC and Mr Bailey appear for the respondent, the Competition and Markets Authority.

If I could just start by running through the materials that we should all have, so hopefully we're all on the same page. I am going to be working from the electronic versions of the bundles, they run from section A to E and then there are the authorities at section F. I understand my learned friends are working from the hard copies, which come in two volumes for the hearing bundle, I believe. The first volume comprises sections A and B, runs from tabs 1 to 40. Then the second volume I think comprises sections C to E and runs to tab 72.

Could I just ask what the tribunal is using, just for referencing purposes?

THE CHAIRMAN: I'm going to be using the electronic bundle.

I'm not actually sure what my colleagues are going to be using.

MR CUTTING: Probably a combination of both.

MS WEETMAN: I'm mainly using the paper ones.

MR PICCININ: I'll try to give references that are comprehensible to both, the key point I think is the page numbers and tab numbers are exactly the same, so the A and the B probably don't mean anything much to the people with the paper, but I'll give them anyway.

In addition to those materials, yesterday the CMA filed a further witness statement from Ms Pope, which came with an exhibit and in addition there are some additional documents in the form of two email chains, I just want to check the tribunal has those.

THE CHAIRMAN: They may be in the bundle, but I haven't read them.

MS WEETMAN: Yes, thank you, I've received them today.

MR PICCININ: Okay, great.

The final point is I understand that the tribunal has asked for a copy of the statement of objections to be included in the bundle, I understand that has been done. All I want to say about that is it's obviously a confidential document and it's not been marked up with any confidential markings, so if we could avoid reading out from it in open court that would be great.

THE CHAIRMAN: Yes, on that point the tribunal did want to raise with the parties the question of the confidential status of some of the documents, there seems to have been quite a lot of blanket confidentiality markings. For example, the settlement agreement itself, it wasn't obvious to us why that was treated as wholly confidential from beginning to end, and there were quite a lot of other places where it wasn't clear to us why documents were marked as confidential.

MR PICCININ: Right.

Sir, I can take instructions on any particular points that you would like to raise, essentially the approach to confidentiality that we've taken is firstly anything that's marked as "confidential" in the confidential version of the decision has been treat as confidential wherever it's turned up in any of the parties' submissions or pleadings.

Secondly, all the leniency material is obviously confidential, because it's leniency

material.

I think that's about it, but perhaps -- I don't think for today's purposes we're likely to run into any difficulties in the hearing, but if there's something that the tribunal wants to put in the judgment, perhaps the easiest way to do it is that we could make representations on it.

THE CHAIRMAN: What about the settlement agreement itself?

MR PICCININ: Yes, sir, I think I'd need to take instructions on that and get back to you, if that's okay.

THE CHAIRMAN: Very well.

MR PICCININ: I'm grateful.

You will have seen I hope that we have an agreed hearing timetable, so I intend to, with the tribunal's permission, make my opening submissions this afternoon and then run until 11.25 tomorrow morning.

THE CHAIRMAN: Yes, sorry to interrupt, Mr Piccinin, as to that, I should have made clear earlier, I have to leave a little bit early, really, any time from 4 o'clock onwards it would suit me to end today's hearing. We can start at 10 o'clock tomorrow if that's convenient for everybody.

MR PICCININ: Okay. How about we see how we get on today and take a view on that then. I understand we also have Friday morning still in reserve, so if things take a bit longer, which they sometimes do online, then we can use that.

THE CHAIRMAN: Very good.

Opening submissions by MR PICCININ

MR PICCININ: I'd like to start then by just giving the tribunal a roadmap to my submissions, and it would be helpful at this point if you could have open the

agreed list of issues, which is at A2, tab 4, page 210.1.

The first part of my submissions, the first topic, really, is just going to be opening up the decision. I want to show you the infringement that the CMA has actually found, and I want to identify the key reasoning on penalty that we say is wrong.

The next topic will be the first issue on this list of issues, which is the correct approach to penalty appeals and the relevance of the CMA's margin of appreciation.

After that, I'll move on to ground 1 of my appeal and the three issues, 2.1 and 2.2. You will have seen from the pleadings and skeleton arguments that my submissions on that point really come into two parts.

Firstly, I have a topic on the seriousness of RPM generally, and then I also have submissions on what I'm going to call the market coverage point, the RPM in this case only covered a fraction of Roland's network.

Then we come on to the next topic, which is issues 2.3 and 2.4, which concerns the CMA's arguments in their defence that the fine that they have imposed also just happens to be the minimum penalty necessary for specific deterrence.

Then the next topic is going to be issue 3, which is my ground 2, which is the size of the leniency discount.

Then we have issue 4, which is what the tribunal should do with Roland's 20 per cent settlement discount.

Then, finally, I should also just say that there is an issue as to how the tribunal should approach interest in the unusual circumstances of this case, and that's addressed in our notice of appeal, but the CMA has said that it prefers to deal with that matter after judgment, so it is not included in the list of issues to be addressed at this hearing.

I should just add as well in terms of the time of those submission, is that my submissions are going to be weighted quite heavily towards the first few of those topics, up to ground 1.

Ground 2 is also very important, but it's quite a short point, so just bear that in mind as we go along, if it seems like it's taking a while.

Without further ado, if we could turn to the first decision, which is in the first bundle at tab 1. Before I actually open it up, I just want to identify for you the key points to look out for really in the parts of the decision I am going to be showing you. There are really four main points that I would like you to take away from these submissions.

The first point is that the RPM that was found in this case was very narrow. It only concerned one reseller, and even then only online.

The second point is that that one reseller was not a maverick reseller, or one who had any particular desire to do extensive heavy discounting.

The third point is about what this RPM was for, what it was about. This is not a case of RPM being used to facilitate a horizontal cartel at either the upstream or downstream level, neither between manufacturers nor between resellers. The purpose of the RPM in this case was to support reseller margins for Roland's products, for its drums, so as to incentivise more intensive sales efforts on their parts. In other words, it was to support interbrand competition.

The fourth and final point is that the actual finding of RPM in this case, in relation to this particular reseller, was in certain respects a nuanced one. In fact, for the reseller in question, the CMA only finds that the threat of sanctions for any breach of the resale price maintenance agreement was implicit. It was something that the reseller understood rather than any threats of sanctions that were expressly made to it. That's really going to be relevant when we

come on to ground 2 and we look at what the CMA is saying in its defence about leniency. I just want to flag that now.

As I've said, the decision is in tab 1 of the hearing bundle. I just want to pick it up at page 6 of the bundle to start with. That's using the numbers in the top left. You can see here I hope paragraph 1.2 of the decision, and it's really the first bullet point which sets out what the finding of infringement actually is. This is the first of the points that I was just making to you about. What's found here is an agreement that resale price maintenance involving reseller 1 -- I should just say, for the benefit of those who don't know, that we're going to be referring to the reseller as "reseller 1", because the identity has been kept confidential by the CMA. You can see here that the agreement related only to reseller 1 and only to online.

The second bullet I just note as well that you can see like in most CMA decisions, this is an object case. It's a finding that the agreement had the object of restricting competition, not a finding that the agreement had that effect.

If we could move on in the bundle to page 12, I just want to highlight a couple of points about the chronology of the investigation really. You can just see at paragraph 2.1 at the top of the page that the investigation was actually opened on 17 April 2018. You can see at paragraph 2.2 that initially the focus was only on the period from 21 January 2013, although then you can see at footnote 3 at the bottom that in 2019 the CMA expanded the scope to cover the period from 1 January 2010.

The next paragraph, 2.3, you can see there was a dawn raid, that's a section 27 notice, as well as a section 26 notice requesting documents on the very same day, as in on the day that the investigation opened. You can see over the page that at least in the first instance the CMA was interested in 12 resellers.

Paragraph 2.5, you can see the very next day, while the dawn raid was still ongoing, Roland indicated that it wanted to apply for leniency. It really got its skates on with helping the CMA, you can see over the page at paragraph 2.6, because the very next day the CMA actually started interviewing Roland's employees. I would also just highlight paragraph 2.8, you can see how quickly Roland progressed to give what are called proffers, which are explanations of the documents and the admissions that are being made, and you can see that these continued throughout the investigations.

If we could then move on to page 17 of the bundle. You can see just at paragraphs 2.19 down to 2.21 that there were settlement discussions, and that they began in March 2020, and that was before the statement of objections. Then, over the page, you can see at the bottom, paragraphs 2.26 to 2.27, that the settlement was actually agreed in May 2020. The decision, you can see from the front of the document, was on 29 June.

That's all I need to show you about the investigation for now. What I want to do is turn to the facts. These really get interesting for our purposes around page 23 of the bundle. We start with paragraph 3.18 at the top of the page. You can see the list of Roland's main competitors there. I stress this is just in the UK, and it's just for the relevant products, electronic drums. This is a market with quite a lot of competition, we would say, between brands, between the manufacturers. Consumers have a lot of choice.

At paragraph 3.20 you can see the CMA talks about the next level down, downstream, the resellers. You can see that the reselling business is massively unconcentrated. The numbers are marked as confidential, but I think I can say that the number in the third line, which is the number of resellers, has four digits in it. Most of those have just one location.

The top four, you can see, account for a minority of sales. That's how unconcentrated it is.

Over the page, page 24, I just note paragraph 3.24, you can see that Roland (UK) sells its products almost exclusively through that network, through those resellers. It operates what we call in the jargon a selected distribution system, where there are particular requirements that its identified distributors have to meet.

If I can just ask the tribunal just to read for itself the requirements that are set out here that Roland imposes. **(Pause)**

If the tribunal doesn't mind taking a little detour, I'd like just to turn up my notice of appeal very briefly, just to pick up a couple of further facts that fit into this part of the story. That's at bundle A2, tab 5, and I'm looking for page 215, paragraph 8. You can see it's explained here how many resellers Roland had, and you can see that there are quite a lot of them. You can also see over the page in the same paragraph what the size of reseller 1 was, it's at the top of the page. I'm going to need to refer to that quite a bit in the course of this hearing, but, because the number itself is confidential, what I'm just going to say is its share of Roland sales was under 10 per cent. That's what I'm going to say, but you're going to know what I mean from what's set out here.

While we're here, again just to save some time, you can also see at paragraph 9 how much of the commerce in this sector actually takes online versus instore. What you can see there is that most of it takes place instore. You can also see, at the end of that paragraph, specifically for reseller 1 what the position was. You can see that its sales were actually -- online sales were below average, and actually for some of the period the overwhelming majority of its sales were instore.

If we could just go back now to the decision for a bit more detail on this topic. If we can pick up at page 27, please. You can see there at paragraph 3.32 the CMA tells us that resellers compete on several aspects or sometimes parameters of competition, as it's sometimes called in the jargon. Price is only one of them. I would just say I think there's a missing comma here after "customer service", I think that's a separate point from "location", but that's a minor point.

Then if I could also just ask you to read paragraphs 3.33 to 3.34 to yourselves. I do not want to skip what might be thought to be the difficult bits for me, I absolutely accept all this. **(Pause)**

The only thing I want to say about that is although I absolutely accept all of this, I think it needs to be read together with the context of the numbers that I've just given you about the extent of online sales in this sector and specifically for this reseller. If we could go over the page, if the tribunal is ready, to section C, which concerns the Roland pricing policy. Page 28. You can see the generalised conclusion that's expressed here about the pricing policy. Again, perhaps if you could just read that. **(Pause)**

Again, what I say about that is that needs to be read together with the findings that followed and I'm going to show you, because sometimes my learned friends rely on bits of wording from the decision like this, that could be misread as suggesting that the CMA found RPM that went wider than reseller 1. As I'm going to show you, the position is actually very clear, and I don't think it's actually in dispute, that the finding is limited to reseller 1.

Before we move on to those key findings -- I'm sorry to keep asking you to read so much -- but if you could just read paragraphs 3.37 to 3.39 I would be very grateful, because those are going to be quite important for the leniency

submissions in due course. **(Pause)**

THE CHAIRMAN: Can I just be clear, Mr Piccinin, your case is that the Roland pricing policy, as such, is not relevant to what we have to decide?

MR PICCININ: I think that depends on exactly what's meant by "the Roland pricing policy", sir. Perhaps I could just be specific. The findings that Roland put out, prices that it asked all of its resellers to apply, is, you know, part of the context to the decision, that's fine. Insofar as what's said here at paragraph 3.35, is that, "The Roland pricing policy ensured that ..." or if it's meant to say "required that":

"... none of the resellers would sell below the minimum price."

You know, so that's like an agreement on resale price maintenance, then as I actually properly read within this decision there is no such finding. The finding is that there was an agreement for that for reseller 1, you will see this when I come and show you, but there's no finding, there's only a suspicion, that there was an agreement like that with the rest of them.

This will become clearer as we go along.

THE CHAIRMAN: So we should basically ignore 3.35?

MR PICCININ: No, I'm not asking you to ignore anything, I'm just asking you to read it together with what's said about it later.

THE CHAIRMAN: Okay.

MR PICCININ: Okay, if everyone's read up to 3.39, what I would just like to say about that is that there's no finding here, or anywhere, that the four staff members referred to here were in any way dishonest. What the CMA finds is that they were wrong. There are lots of reasons why an honest witness might be wrong about something. The events here took place some time ago, and the extent to which the witnesses were involved in any particular detail of it is

obviously something that's going to vary.

The point I want to highlight here for later is the last sentence of paragraph 3.39. The document that's referred to there is highly confidential, because it's a leniency submission. I don't actually think we need to go through it, but I'm going to give you the reference for it in case you want to look at it. It's at B2, 27, page 624. I just want to tell you a couple of things about that document in general terms.

The first thing about it is it runs to ten pages. What it is is quite a careful and thorough explanation of the extent to which Roland disagreed with the evidence of particular witnesses, and an explanation of why. It was not a total disavowal of what they had said, but it explained that the issues in this case were actually quite nuanced, and you will see the respects in which they're nuanced as we go through the decision. What it did do is it unpicked for the CMA some of the more strident positions that the witnesses had taken in the interviews, and it made very clear where Roland disagreed with that.

The substance of why Roland disagreed with that doesn't matter so much for our purposes when we get on to the leniency. What does matter is this is ten pages of unpicking and explaining these points to the CMA, and the other thing that matters is that the CMA then relied on it for its decision for this absolutely critical issue in the case. I'm going to come back to that in relation to ground 2.

If we could now move on to page 33, it's paragraph 3.45. We can see the structure of the CMA's analysis here. I'm not going to go through all of it, I just want to highlight some of the key points to allow you to see what the structure is. The first key point is under the heading "Commercial aims", which you can see at the bottom of the page. This is very important for my submissions on ground

1. You can see that the CMA identifies at paragraph 3.46 two aims of the RPM. The first aim is that it was designed to enable Roland's resellers to achieve attractive margins through the maintenance of high and stable pricing, thus increasing the attractiveness of the Roland brand and encouraging resellers to stock and sell, crucially, the relevant products. In doing so, it aimed to help Roland secure, maintain and/or improve its UK market position in the relevant products relative to its competitors, in particular by maintaining the brand value of the relevant products.

Paragraph 3.47 is also very important, you can see it's a quote from one of Roland's employees:

"Over time Roland has tried to influence its resellers to be profitable for two reasons. Number one, to purely try and stop the level of pressure and aggression from its retailers, which sometimes can be very challenging, and number two, we believe that we need a retail network that is profitable and sustainable so that our products can be demonstrated in store. If these disappear, it is more challenging for end users [in other words for consumers] to experience our products."

I'll come back to that in my submissions on ground 1. Just running you through the headings now, just flicking through the decision with me for a moment. If you flick on to page 37, you can see there's a heading that says "Content and communication". What we have here is lots of detail about how Roland communicated its prices to resellers. Then flicking on to page 41, we have the scope of the Roland pricing policy, again there's no issue about any of that.

Flicking on again to page 45, you have a heading called "Duration".

Then you can see below that there's a heading that says "Monitoring and enforcement". If I could just ask the tribunal to read the summary here, under the heading "Overview", down to paragraph 3.95 on the next page. **(Pause)**

What we have after that is 50-odd pages of examples of each of the general points you've just seen. I don't need to take you through all of that. I do need to show you one very important paragraph in it, though, which is paragraph 3.206. If you could just go over to page 74 of the bundle, it sets up the context for this. On page 74 you should see a heading which says "Illustrative examples of Roland (UK)'s monitoring and enforcement". What this is, is the introduction to a lengthy section which gives examples of this conduct for each year of the infringement. The paragraph I'm interested in is paragraph 3.206 on the next page. What that says is:

"Based on the evidence from the relevant periods set out below ..."

That's the lengthy stuff that's coming:

"... the CMA has reasonable grounds for suspecting that at least 24 resellers selling the relevant products were subject to the Roland pricing policy. However [this is the crucial bit] the CMA makes no findings in respect of any resellers of the relevant products other than reseller 1."

So despite the more enthusiastic phrasing that you see in various parts of the decision -- some of which find their way into my learned friend's skeletons -- the CMA is very clear that it only finds reasonable grounds for suspecting that those 24 resellers were subject to the pricing policy. No finding is being made about any of those resellers at all, except for reseller 1. You will see that there's more of that coming in the decision.

If we could just skip over that, not because it's difficult for me but because I want to focus on reseller 1, and I want to give you an example of what actually

happened with reseller 1, since that's what this decision is about. If we could go to page 96, you get to a heading that says "Section 4, legal assessment". I just draw attention to paragraphs 4.2 to 4.3 here, which make the same point as paragraph 3.206 that I was showing you before. Indeed, if anyone can make it out with the small text, the footnote takes you back to the same paragraph.

What follows after this is a detailed analysis of the law, and then specific findings of fact about the RPM agreement with reseller 1. What I want to do now is just show you some of the key bits of that analysis. If I could start on page 106 with paragraph 4.40. We can see here that the CMA finds that price lists were sent eight times per year, and you can see that reseller 1 generally complied.

But, see 4.42, on many occasions, we're told, Roland instructed reseller 1 to adjust its online prices, and again reseller 1 complied. You can see an example of that in the footnote.

4.46, over the page, is a start of a very important piece of analysis by the CMA about the threat of sanction. The threat of sanctions is just crucial for RPM, because just by way of context -- none of this is controversial -- there's nothing unlawful about a manufacturer telling its reseller about what price a manufacturer thinks it should be told for. There's nothing unlawful about monitoring their prices, there's nothing unlawful about picking up the phone and saying, "Hey, come on, what are you doing, you have to put your prices up", where it becomes unlawful, where it is elevated to an agreement within the meaning of article 101 of the treaty, that has the object of restricting competition, is when there is an element of coercion. So it goes beyond mere persuasion, and specifically one way to bring about that coercion is through the threat of sanctions, and that's what the CMA is finding here.

If you just read paragraph 4.46, see what the CMA says there. **(Pause)**

You can see that there was an email from 2011, and you can see what it said, but in the next paragraph, in the first sentence of the next paragraph, the CMA actually tells us that what that email said in terms didn't apply to reseller 1, because it wasn't the right type of reseller at the time. I don't want to get too technical about it, but the scope of what's being said there is important and clear.

Then paragraph 4.48 is the crucial piece of evidence, and if I could just ask you to read to yourself the quote there that appears right at the bottom of the page from the representative of reseller 1. What he says there is that there were never any explicit threats, any express threats, it was only implicit, if you go over the page, it was implied that there would be consequences. I don't take issue with that, but I just want to show what you it says. Then there's more explanation of this, but that is really what the support is for paragraph 4.52 over the page, page 109, which is a finding that there was a credible threat of sanctions. Again, I don't challenge that finding at all.

There's more detail on this again at page 112, and I just want to pick up the two bullet points at the top of that page, which is more correspondence from 2011. Again, if you wouldn't mind just reading that.

It's quite an interesting document. What it says, and the CMA confirms this at its view down in 4.63, is that reseller 1 actually wanted RPM, it was disappointed that there wasn't a bit more of it. That doesn't make it okay at all, but it tells us something about reseller 1, and this was one of my points from the start. It tells us that reseller 1 was not a maverick discounter, reseller 1 is actually someone who wants to stop other people from discounting.

What we have after this is lots of examples of particular pieces of RPM conduct over

the years. The CMA's done a great job of digging them all out and really piecing through what happened throughout the infringement period. It's an impressive set of analysis.

I just want to show you one example, and I'm not cherry picking, I'm very happy for Ms Demetriou to show you another example later, but just to give you a flavour of what it looks like. If we go on to a seasonal example, which we can find at 4.78 on page 119. If you could just read the text there to yourselves. **(Pause)**

I also just would like you to note what's said at paragraph 4.79, and in particular the role there that you can see Roland's witness evidence is playing in helping the CMA to understand what happened here. Again, that's going to be relevant to leniency. That's just one example.

That's all I want to show you of the details. I just want to show you the ultimate conclusions now as well. We can go forward to page 141. You can see there a number of bullet points under paragraph 4.144. If you could just note what they say.

Then I just need to say a few words about that last bullet point, because there's a finding there that reseller 1 reported other resellers for pricing too low. That's fine. The point I want to make about it is that there's no corresponding finding that Roland actually had any RPM agreement in place with any of those other resellers.

We can see again this over the page at paragraph 4.147, where the CMA defines the scope of the concurrence of wills. Just for anyone who doesn't know, that wording "concurrence of wills" is taken from the case law and what an agreement is in the terms of article 101. This is what the agreement is.

Then again you can see at paragraph 4.151:

"In the remainder of this decision, the agreement and/or concerted practice between Roland and reseller 1 that reseller 1 would not advertise or sell the relevant products online below the minimum price will be referred to simply as' the agreement'."

So that's the agreement, nothing else.

Now we come on to penalties. To save time, instead of going through the guidance and then going through the decision, I am just going to go through what the decision actually says about the guidance and the application to this case. If we can do that by just starting on page 172, and it's paragraph 5.20. We can see here that the CMA kicks things off under the heading "Step 1, the starting point", which is the focus of my ground 1, it says that the two key concepts are seriousness and general deterrence.

Then 5.22 to 5.23 explains those concepts in more detail. If you could just read those. What you will see is we're looking at the seriousness of this type of infringement. **(Pause)**

Then at 5.24, somewhat confusingly, there's a separate stage in step 1, so that the second stage in step 1 is described in paragraph 5.24, and that second stage, the CMA considers whether it's appropriate to go up or down from the starting point to take into account the specific circumstances of the case.

Then the CMA actually does that job, both of those jobs, at 5.26 and 5.27.

At 5.26, we're now applying to the facts of the case, we're told that RPM is serious but less serious than horizontal cartels, which tend to get the upper end of 21.30.

Paragraph 5.27 the CMA goes through a list of factors that relate to the second stage of step 1. You'll find these factors identified in the CMA's guidance.

Just running through them, we'll start with the first point.

The CMA says almost 40 per cent of the sales in this sector are online. Another way of saying that is that more than half of it is not.

Over the page, the next point, structure of the market, you can see the market shares there. Again I won't read them out, I will just say under 15 per cent. That's quite a small market share in competition law terms. That's the market share for Roland.

Then we have market coverage, which is very important for the second of my points in ground 1. Again, you can see the CMA puts it positively, saying it covers all of the relevant products sold by reseller 1. I just want to pull that apart for you briefly, by reference to the facts I showed you before. If we have less than a 15 per cent market share for Roland, then that means you have more than 85 per cent of the market is not even Roland at all. And so of the less than 15 per cent that is Roland, more than 90 per cent of that is not reseller 1. It's just not directly covered by the infringement.

Now of the remaining less than 10 per cent of less than 15 per cent that is reseller 1 selling Roland's products, most of that is not subject to the restriction at all, because it's offline. So the actual market coverage that's directly affected by the infringement, and I'm going to come on to indirect effects, which I accept. The actual market coverage of the infringement is well under 0.5 per cent. That's going to be relevant both to my submissions on the market coverage issue in ground 1, it's also going to be relevant when we come and look at what the CMA says about some of the horizontal collusion cases that I like to use as comparators in this case. We'll come back to that.

So then, yes, you also have the point about the actual and potential effect of the infringement on competitors and third parties. We can see that the CMA considered that the infringement would likely have had a wider effect on the

market, reducing downward pressure on retail price of Roland's drums more widely. I'm going to come back to that, because obviously that's an important finding, and I don't make any challenge to it. My point about it is that you have to take that in context with what the scope of the infringement was and what the market coverage of the infringement was. I'm going to deal with all of that under the heading of the market coverage point in my ground 1 in due course.

Then paragraph 5.28 is the other part of this analysis, general deterrence. You can see what they say here, which is fine as far as it goes. But as you'll see when we get to the authorities on deterrence, this really needs to be looked at hand in hand with seriousness. If you have conduct that is very serious, you can't turn up to the CMA and ask for a lower penalty just because it's uncommon or unique. Likewise, if you have conduct that is not very serious but is common, you can't impose a penalty that's out of all proportion to the seriousness.

Another way of putting the point is that the reason why we impose higher penalties on more serious conduct is so that we can generally deter people from engaging in serious conduct. There's no get-out-of-jail-free card just because you've thought of a unique way of doing it.

Then what the CMA does is it multiplies its starting point percentage by the turnover and then by the duration. Paragraph 5.32 explains that they only count the duration for the period from 1 January 2013, and that's because Roland got full immunity for the earlier period, because no infringement would have been found for that period without Roland's leniency application.

Then we have step 3, aggravating and mitigating factors, there's no appeal from this and the CMA doesn't propose to revisit it.

That takes us on to step 4, which you'll find on page 179. You can see out at

paragraph 5.47 the types of adjustments that can be made here. This is also relevant to my first ground of appeal in a couple of ways. Although there was no adjustment made in this case, quite a lot of the points that I make under ground 1 relating to step 1 could equally be dealt with under step 4, proportionality, particularly the point about market coverage.

Conversely, the CMA says that if we get a reduction at step 1 it would need to be undone at step 4 because of the need for specific deterrence. So that's how that's going to come up.

Then we have step 5, which we don't need to worry about. Step 6 is over at page 181. You can see the reasoning on leniency at paragraph 5.52, there isn't really anything there, but we're going to grapple with what the CMA says in its defence, obviously. To be clear, I don't criticise them for not having provided more reasons in this paragraph.

Then, on the settlement discount, you can see that at paragraph 5.54. Could I just ask you to highlight the first sentence, please. The point here is that the 20 per cent discount is not automatic. It's actually the maximum possible settlement discount. What's happened here is that the CMA has chosen to give Roland the maximum possible discount to reflect the fact that Roland admitted the infringement and cooperated in expediting the process of concluding the investigation. That's obviously going to be relevant to final of my topics and issues.

That's all I need from the decision. I now want to move to the next topic, which is the general approach to penalty appeals. We say this is really very simple. What we say the tribunal needs to do, if I can put it like that, is this.

Start with the CMA's decision.

Consider the substantive criticisms of the decision that we make.

Consider the CMA's substantive responses to those criticisms.

Then just decide for yourselves who is right or wrong, and what adjustments need to be made to the CMA's decision. It's really no more complicated than that. You don't need to defer to or place any greater weight on any of my submissions, or the CMA's submissions, or Ms Pope's evidence. You don't need to be quick or slow to interfere, whatever that means, you just need to decide for yourselves where the merits lie. I stress, though, just to be clear, it's not a de novo assessment, you don't have to retake the entire decision and reinvent the wheel where there's no challenge to it, but if there is a challenge, where there is a challenge, you just need to say what you think without fear or favour. That's the brief.

The CMA seems to think that it is more complicated than that. I can take this from their skeleton argument, which is in A2, tab 3, paragraphs 18 to 19. You can see in paragraph 18 that they accept this is not a judicial review, so they accept that we're not confined here to illegality or irrationality. But then in the last sentence of that paragraph they seem to suggest that we have to show an error of principle. I'm not actually sure what that means in this context, but it gets worse, or at least more worrying, when we get on to the next paragraph, paragraph 19. Because what they say there is that when you, the tribunal, decide whether there has been an error of principle, it will often be appropriate to afford the CMA a margin of discretion, and ask yourselves whether the CMA's approach was within the range of reasonable responses. In other words, they say that I have to show that the CMA's approach was outside the range of reasonable responses. That sounds an awful lot to me like public law irrationality. If they mean what they say, that is one way of saying Wednesbury irrationality, which is the test in judicial reviews.

You can see the support they give for that in paragraph 20 of the skeleton. It's a couple of quotes from Ping, from your judgment, Mr Chairman, and then the footnote, you can also see the reference to Argos. I'm just going to show you briefly that this is completely wrong. To be clear, I don't actually think, sir, that there's anything wrong at all with your decision in Ping, but what they've said about it here and what they've taken from it is completely wrong.

I want to start just with what I think is common ground, which is that all section 46 appeals, whether they're on infringement or penalty, have the same standard. What the tribunal is required to do is determine the appeal on the merits by reference to the grounds of appeal. Just to give you the reference for that, we don't need to turn it up, it's the Competition Act, schedule 8, paragraph 1. That's in the first tab of the first authorities bundle. The question is what does that mean? What is "on the merits"? How do you apply on the merits to evaluative judgments for which the CMA has the margin of appreciation? The very latest word on that is the Court of Appeal's decision in Phenytoin, I would like to turn that up. That's in authorities bundle F2, tab 29.

Just while everyone's getting that up, this was the CMA's appeal from this tribunal's decision which had set aside the CMA's finding of an excessive pricing infringement, which is an abusive of dominance under article 102. One of the CMA's arguments on this appeal was that the tribunal had not adequately deferred to the CMA in relation to the CMA's evaluative judgments and margin of appreciation. We can see that at paragraph 48, which is, using the numbers in the top left again, page 2216. If you could just read what's said in that paragraph, please. **(Pause)**

You can see that that sounds a bit familiar. There's more detail on that in paragraph 128, which is on page 2241. Again if you could just take a quick

look at the way Lord Justice Green summarises the issue there. **(Pause)**

The answer to that that Lord Justice Green gives is from paragraph 135 down to paragraph 140. Again, just to save my voice, if you wouldn't mind reading that. **(Pause)**

Perhaps you could just let me know when you've reached the end of it. **(Pause)**

THE CHAIRMAN: I think we've probably read that, Mr Piccinin.

MR PICCININ: Thank you, I'm grateful.

We say that that really is the beginning and the end of this point. Of course these judgments that the CMA has to make are evaluative, and of course the CMA has a margin of discretion, which it exercises. In most cases that's just the end of the matter, it doesn't go any further, but everyone on whom a penalty is imposed has the right to appeal to this tribunal. That's because this tribunal is the first opportunity that anyone has to have an assessment by an article 6 compliant tribunal. That's "tribunal" with a lower t.

If the party exercises that right, the tribunal can't then defer to the CMA's exercise of judgment, because the CMA is not an Article 6 compliant tribunal. That's why we say the tribunal has to consider the grounds of appeal for itself and reach its own view.

In the paragraphs that follow Lord Justice Green also explained, as I said before, that this is not a de novo exercise, you only consider the grounds of appeal and you only interfere where it's a material error. He has quite a lengthy and learned account of what "material" means, I don't think we need to look at. Before you put it away, I do want to draw attention to paragraph 146, which I can read out for you if you like, because it really shows where the CMA's gone wrong here. What he says is:

"Third, but importantly, it is consistent with a merits appeal for the tribunal, even

having heard the evidence, to conclude that the approach taken by the CMA and its resulting findings are reasonable in all the circumstances and to refrain from interfering on that basis. If the tribunal considers that the findings of the CMA are reasonable, it might be difficult to say that the findings that it arrives at which differ from those of the CMA are material. The tribunal in the present case [that's Phenytoin] indicated as much at various points in the judgment ...(Reading to the words)... before the CMA it arrived at a reasonable conclusion, but on the new evidence the CMA's conclusions were wrong. Such cases may be rare, but the possibility nevertheless arises."

That is really picking up on the language of the type that was found in the chairman's judgment in Ping, and numerous other judgments in this tribunal. What Lord Justice Green is saying about that is that an error is not material if the tribunal would not have done anything much different from what the CMA did anyway, so in this case if the tribunal thinks that what the CMA says about seriousness is just about right, that if the tribunal had been working from a blank page maybe it would have said 18 per cent or 20 per cent, then there may be no need to interfere, but that's because there isn't a material error to fix.

What you don't do is say, "Oh well, this is all very evaluative, but while I think the answer is 10 per cent, I can see that some reasonable people might think the answer is 20 per cent, so I won't interfere". You don't say, "Oh gosh, setting leniency discounts is one big exercise of discretion, I'd probably give them 50 per cent, but there's nothing wrong with someone giving them 20 per cent, so I'll leave it at that".

You do actually need to decide for yourselves whether the right answer is ... Roland is entitled to have these points decided by this tribunal.

Sir, as I said before, I've always read your judgment in Ping, actually, as being entirely consistent with that. I took you to mean, sir, that you had considered all of the criticisms of the CMA's approach to penalty that had been made, and without deferring to the CMA's evaluative judgment, you didn't accept the criticism, in other words, that you would have imposed roughly the same penalty as the CMA, but whether or not that is what you meant, sir, this is the law. That's just what it is.

While we're on the law, moving into ground 1, I will say one more thing about this point in a minute, but moving on to ground 1, there is just one other point I want to cover on the authorities, which is the right approach of the tribunal when faced with an appeal like this one, which is about the comparative seriousness of a type of infringement. You will have seen that we say that this is an inherently comparative exercise. When you are tasked with picking a number from 0 to 30 for this infringement, you need to make sure that it's roughly in line or broadly consistent with other similarly serious conduct. The corollary of that is that you need to leave enough room above and below the conduct that is either more or less serious. That's how the tribunal has actually approached this issue in the past.

The clearest illustration of that, which I'd like to take to you if I may, is the construction case, in particularly the judgment in Kier. That can be found at F2, tab 15.

Sir, actually, I should just ask at this point, just on timing, if we're going to finish at 4.00, should we have a break for the transcriber?

Perhaps that's a question to the transcribers then.

THE CHAIRMAN: I'm happy to have a five-minute break, probably that would be a good idea.

MR PICCININ: I don't need one, but it's just if others do. Now may be an appropriate moment, then.

THE CHAIRMAN: All right, let's have a five-minute break then.

(3.14 pm)

(A short break)

(3.20 pm)

MR PICCININ: Can I just check, are we are ready?

THE CHAIRMAN: Yes, we are.

MR PICCININ: Okay, great.

Sir, I don't want to turn it up, but just on the last topic that we were talking about, about the margin of appreciation, if I could just give another reference, this is really just for the benefit of my learned friends, in case they insist on coming back to this, but paragraph --

Sorry, I think we're okay now.

Paragraphs 74 to 77 of this judgment, Kier, also deal with this topic. It's a bit shorter than what Lord Justice Green said, but it's entirely consistent with it and entirely inconsistent with the submission the CMA make in their skeleton argument. But I'm moving on to seriousness now.

If we could start with paragraph 3 of this judgment of Kier, which explains what the conduct is we're talking about. Just picking it up from the third line:

"Simple cover pricing occurs where one of those invited to tender for a construction contract, company A, does not wish to win the contract but does not want to indicate its lack of interest to the client, for whose work it may be wished to invited to tender in the future. Company A then seeks a cover price from another company which is tendering for that contract, company B. Company B will be seeking to win the conduct and will have reached a view as to its

own cover price and indeed it may have already submitted its own tender to the client. The cover price which it provides to company A will be at a level sufficiently high to ensure that company A does not win. This price is submitted to the client by company A as though as a genuine tender, it should be noted that company B does not reveal its own tender price to company A, the cover price is an inflated price."

That's the conduct we're going to be talking about. If we can just go forward to paragraph 39, you will see a description of the OFT's analysis of seriousness. The details of it don't really matter, but if you could just cast your eye over that paragraph down to paragraph 41. All I am going to say about it is that you can see it was an evaluative judgment, you can see the CMA gave reasons, they weren't inherently unreasonable, and you can see that they landed slap bang in the middle of the zero to 10 per cent range that was applied at that time.

Then if we could go to paragraph 90, you can also see some more on this. You can see that the OFT relied on its own consistent practice in penalising similar conduct at similar levels in other cases. We can pick up what the tribunal said about this at paragraph 93. The first two sentences are really critical for my submissions:

"Whilst most infringements of a chapter 1 prohibition are likely to be regarded as serious, there are clearly degrees of seriousness which should be reflected in any penalty imposed. The non-statutory step 1 range, which was 0 to 10 then, 0 to 30 now, has to cover all agreements or concerted practices sanctioned by the chapter 1 prohibition. In determining the appropriate point on that scale account should be taken on a case-by-case basis of all the circumstances, including those various factors, and it is common ground that

hardcore bid rigging or price fixing belongs at the upper end of that range."

I just want to pause for a moment there and dwell on that first sentence, because a lot of what I say in this hearing is going to be saying that the RPM in this case and RPM generally is not so serious as to warrant a 19 per cent penalty, but I really don't want the tribunal to take from that that I'm saying that RPM is not serious. All infringements of the chapter 1 prohibition are serious. The question is how serious? Where on the scale from zero to 30 does it go?

Paragraph 94 is also important, it says that in its view the simple cover pricing that was just described to you, that was at issue in that case, was less serious than bid rigging, and that conclusion doesn't matter for us, but there are two points about it that do. One is that it's comparative in nature, the tribunal is trying to find where to fit this conduct in the scale.

The second point, just harping on about margin of appreciation and deference, you can see that there is no deference to the OFT here, there's no finding that the OFT was outside the bounds of what a reasonable person might think, the tribunal just disagreed.

Over the next few pages the tribunal gives its own detailed analysis of the seriousness of cover pricing and we don't need to go through it. We could just skip to the conclusion at paragraphs 114 to 115. If I could just ask you to cast your eye over it very briefly, the details don't matter. You can see it's an assessment in the round made by the tribunal. You can see that there's a comparison at the end of 114 with horizontal price fixing and market sharing. We can see the point about the need to leave enough headroom to distinguish between the seriousness of cover pricing on the one hand and those other forms of conduct on the other. You can also see that the tribunal ended up with a starting point of 3.5, compared with the OFT's 5 per cent.

That is exactly the type of analysis that I'm inviting the tribunal to undertake on this appeal.

That takes me now to my first ground of appeal, which is that 19 per cent is just far too high. As I've said before, there are two limbs to that appeal.

The first limb is that 19 per cent is just far too high for RPM generally. It overstates the seriousness of RPM.

The second point is that it doesn't adequately reflect the extremely narrow market coverage of the RPM that was found in this case. As I've said, in addition I'm going to need to address you on specific deterrence, so I will deal with that; but I want to start with that first point, which is about the seriousness of RPM.

In order to decide where to put RPM on the 0 to 30 scale, we need to have a bit of feel for what else we need to make room for, what else is sitting there on the scale. To do that I would be grateful if everyone could go to my notice of appeal, which is A2, tab 5. I'm interested in paragraph 50, which is on page 226 of the bundle. What I've done here is actually very similar to what the OFT has done previously in other cases, which is just give you a little survey of what else is out there that we need to worry about. What I have here is a list of the 13 chapter 1 infringement decisions that the CMA has taken since 2016, other than RPMs. I haven't cherry picked, I've just gone back over that period and shown you everything I could find.

Some of these were comprehensive, in terms of market coverage, market-wide price-fixing agreements or market-sharing agreements. You see, if you cast your eye down the list, that those ones tend to get penalties right at the top of the range, 28/30, that sort of level.

The other thing you see that really strikes you, we submit, is that quite some way below that, there's another group of horizontal object infringements, that get

penalties in the range of 16 to 23. Before I run through those, and I'm not going to turn them up, just tell you a little bit about them, I should just note that in its defence the CMA actually said nothing at all about any of these cases, just said that it was inappropriate in principle to look at them. I think they accept now that that was an unrealistic position for them to take, because of the approach to the issue of seriousness that the tribunal and actually the CMA itself has taken in its other cases, as I pointed out in my reply.

Now, in paragraph 37 of their skeleton, they have made various points about the facts of these cases that explain why they only attracted penalties in the range of 16 to 23, instead of 28 to 30. I'm happy to take those qualifications and I'm going to give them to you now as we run through them, and perhaps, if it's helpful, I don't want to be impertinent, if you just note them down next to what I've said about the decision what the CMA says about it.

The first one is a tongue twister, Nortriptyline I think. You can see there was a 20 per cent penalty, the third line down, so it's essentially the same level that we're talking about in this case, but for the horizontal exchange of future price intentions. I want to stress that this wasn't just some casual exchange of information between particular employees to help each other out, it wasn't a compliance breach. The CMA found, and you can see the quote that I have there:

"The CMA found that the purpose of exchanging that information was to maintain prices between competitors in the market."

That's very serious.

In its skeleton, the CMA points out, however, that the information exchange didn't remove all uncertainty in the market, and I think that's largely or partly because it did not involve all of the horizontal competitors. I think it's actually

three out of four of them. Those two factors, that second one is really a point about market coverage, that brought the penalty all the way down from 28 to 30 land, down to 20.

Then at point D, we have design, construction and fit-out services. 22 per cent for cover bidding. As you can see from what I say here, this isn't simple cover pricing like in the Kier case we looked at, this was cover bidding that was arranged by the party that wanted to win, not the party that wanted to lose, and he arranged for his competitors to submit uncompetitive bids. That's serious bid rigging, it's not mere convenience stuff like we had in Kier.

The CMA says, to be fair, that the cover bidding did not necessarily cause the cover bidder to cease competing, in other words it's an object finding not an effects finding, but the CMA did note, in a point against itself, I think, that in some cases the arrangement covered every single competitor who was bidding for the project, in other words the market coverage was 100 per cent. But, in a point going the other way, the CMA says there were only 14 contracts involved, so that's another market coverage point.

At E, we have Heathrow Airport parking, which was 18 per cent, so that's less than we're talking about in this case, for a horizontal price-fixing agreement. The CMA says that the competition was limited in this market, even without this restriction, because Heathrow owned most of the car parks in the area.

I don't know, because the CMA are being helpful, they've provided points for and against themselves, I don't know if that one is supposed to be a point in their favour or against them, but usually if you restrict competition in a market that is already restricted, you know like where you have a dominant undertaking for example, that's thought to be even worse. Another way of putting the point is that again the market coverage of the agreement was very high indeed, but

they say here that the effects on consumers, in their skeleton, may have been limited. So again, I have to accept that.

At F, we have 23 per cent for the full gamut of horizontal conduct in the solid fuel case. The CMA tells us that it covered the two main suppliers, and again I assume that's a point against themselves, but they also says that it didn't cover quite the whole market and only applied to some of the customers, so again that's a market coverage point.

Then at G, we have 16 per cent, substantially below our case, the horizontal market sharing in cleanroom laundry services, but the CMA tells us this one originated in -- originated, I say, in a long-standing and wider joint venture. For my part, I'm not sure how that is supposed to affect the starting point as opposed to stage 4 proportionality, but there you have it.

At J we have galvanised steel tanks, 18 per cent for information exchange, again horizontal, again on price, this time I believe covered the entire market. And yet the starting point is less than the RPM on our case.

The CMA says it occurred at just one meeting, not sure how that's said to affect seriousness as opposed to duration, but the CMA also says that it didn't remove all the uncertainty and says the evidence of harm to consumers was limited. Again, you expect that in an object case, don't you?

At point K we have horizontal price fixing and information sharing in the modelling case, which got 21 per cent.

On that one, the CMA says nothing at all.

Having looked at it, I think that's because there's not actually much to say. The price fixing was said to concern the total amount invoiced, this isn't price fixing on a part of the price, this is price fixing on the whole of the price, that's paragraph 5.34 of the decision.

All that I imagine the CMA could say about it is that competition in the market was not entirely eliminated. That got 21 per cent, marginally more than the RPM in this case.

That is the background sketch that I would like the tribunal to keep in mind throughout this hearing. What I need to persuade you of is that RPM does not belong in amongst those forms of conduct in terms of its seriousness.

I'm going to show you some materials on the seriousness of RPM, but before I do that, again I want to give you a little cheat sheet of the two headline points that I say distinguish RPM from the conduct that the CMA penalises in the 16 to 23 per cent range. I suggest this comparison applies to every single one of those cases I have just shown you. Even with the CMA's explanatory comments, all of them.

The first point is a point about what RPM does not do. I say this is what RPM does not do, with a footnote, unless it is part of a wider cartel. Unless it is part of a wider cartel, even if the RPM is applied across the entirety of the network, all of Roland's distributors, it does not restrict interbrand competition. Just to explain that, whatever is happening with competition between resellers to sell Roland's drums, there is no restriction of competition between the sale of Roland's drums and the sale of drums that make up more than 85 per cent of the market. If Roland pushes its prices up, it's going to lose market share to its other competitors, whereas in every single one of the 16 to 23 per cent horizontal cases, the whole point of the arrangement was to restrict competition between horizontal competitors. Some of those cases, as you have seen, actually covered the whole market, or very large parts of it, but even for the ones where the CMA says it covered only a part of the market, it always restricted competition between at least two suppliers, that's what

horizontal conduct is.

The second point is about what RPM does do. RPM does tend to intensify interbrand competition. That is its object. Now, other than in cartel cases -- again put those to one side, you'll see it come up, you'll see why I say that when look at the materials -- the whole point of RPM is to ensure that resellers earn enough profit, margin, on the sale of my products that they will have a good incentive to put proper effort into the service, the display and the demonstration of my products so that they can achieve a sale. So it's about providing the incentive for the resellers to promote my product. If the resellers who go to the trouble of that effort and expense get undercut by another reseller, who just flogs the product online at a discount without any sales effort, then that is going to undermine the incentive of the other resellers to invest in the demonstration and promotion of my products. That will mean that I cannot communicate effectively to my products why my products are better than those of my horizontal customers. Roland will be unable to communicate to its consumers why its drums are better or better value than Yamaha drums.

I don't think there's actually any dispute about any of that. I'll take it reasonably quickly in the materials. I just want to start with Leegin, the US Supreme Court's decision in Leegin, which is at F2, tab 14. Just while everyone's getting that open, I just want to say at the outset that I'm not relying on any of the analysis in this judgment of US law. The only reason I'm going to it is that the description of what RPM does and doesn't do that you find in this judgment is very nicely put, because it draws on amicus briefs that were submitted by numerous leading economists. This is effectively just my submission to you about the seriousness of RPM, but I'm putting it in the

much more learned and eloquent words of Justice Kennedy, just because he does a better job of it than I do. If we could go to page 799 of the bundle, page 9 of the judgment. You just see the first sentence under the big A, it says:

"Though each side of the debate can find sources to support its position, it suffices to say here that economics literature is replete with pro-competitive justifications for a manufacturer's use of resale price maintenance."

What follows on the rest of this page is a series of quotes from the amicus briefs and other learned sources, we don't need to worry about them, because Justice Kennedy summarises it later.

Over the page in the second main paragraph, we can see he says:

"The justifications for vertical price restraints are similar to those for other restraints."

Pausing there, that's going to be relevant to what I say about Ping later, if you could just bear that in mind. He continues:

"Minimum resale price maintenance can stimulate interbrand competition -- the competition among manufacturers selling different brands of the same type of product -- by reducing intrabrand competition -- the competition among retailers selling the same brand ... A single manufacturer's use of vertical price restraints tends to eliminate intrabrand price competition; this in turn encourages retailers to invest in tangible or intangible services or promotional efforts that aid the manufacturer's position as against rival manufacturers. Resale price maintenance also has the potential to give consumers more options so that they can choose among low-price, low-service brands [brands, not resellers] high-price, high-service brands; and brands that fall in between.

"Absent vertical price restraints, the retail services that enhance interbrand competition might be underprovided. This is because discounting retailers

can free ride on retailers who furnish services and then capture some of the increased demand those services generate."

Over the page:

"Consumers might learn, for example, about the benefits of a manufacturer's product from a retailer that invests in fine showrooms, offers product demonstrations, or hires and trains knowledgeable employees ... Or consumers might decide to buy the product because they see it in a retail establishment that has a reputation for selling high-quality merchandise ... if the consumer can then buy the product from a retailer that discounts because it has not spent capital providing services or developing a quality reputation, the high-service retailer will lose sales to the discounter, forcing it to cut back its services to a level lower than consumers would otherwise prefer. Minimum resale price maintenance alleviates the problem because it prevents the discounter from undercutting the service provider. With price competition decreased, the manufacturer's retailers compete among themselves over services."

I then want to move on to page 806 of the bundle. I just want to pick up the point in the middle of the page. The respondent's argument, which was about all the bad things that resale price maintenance does:

"... overlooks that, in general, the interests of manufacturers and consumers are aligned with respect to retailer profit margins. Not the interests of manufacturer and resellers, the interests of the manufacturer and the consumers. The difference between the price a manufacturer charges retailers and the price retailers charge consumers represents part of the manufacturer's cost of distribution which, like any other cost, the manufacturer usually desires to minimise."

Skipping over the brackets:

"A manufacturer has no incentive to overcompensate retailers with unjustified margins. The retailers, not the manufacturer, gain from higher retail prices. The manufacturer often loses. Interbrand competition reduces its competitiveness and market share because consumers will substitute a different brand of the same product. As a general matter, therefore, a single manufacturer will desire to set minimum resale prices only if the increase in demand resulting from enhanced service will more than offset the negative impact on demand of a higher retail price."

Now that last point is very important. Horizontal competitors, Adam Smith taught us this, have a common interest in increasing prices, because it benefits them all. That's why, when they collude, the object is almost always just to harm competition and consumers. But a reseller and a manufacturer have conflicting interests when it comes to the reseller's margins. A higher margin benefits the reseller, but prima facie it actually hurts the manufacturer, it hurts Roland, other than in unusual circumstances like a wider cartel, if a manufacturer wants to impose RPM, it must be because the manufacturer thinks, or the object is, to enhance interbrand competition. Otherwise it makes no sense.

I absolutely accept that RPM seeks to achieve that pro-competitive aim using a method that EU competition law and UK competition law regards as seriously anti-competitive. The benefits to interbrand competition are brought about by eliminating intrabrand price competition. You saw Justice Kennedy told us that.

Unless you can adduce convincing empirical proof in this jurisdiction that the benefits outweigh the costs, that's just going to be unlawful under article 101. You can't get out of the restriction of competition by pointing to the benefits, unless

you can prove them and quantify them. Of course it's virtually impossible to provide empirical proof capable of quantifying those costs and benefits. So the upshot is while RPM is effectively lawful in the US, subject to proof to the contrary, it's effectively unlawful in the EU and the UK, and we accept, I'm not trying to persuade you the situation should be any different from that.

While we're on this topic, I should also show you what the European Commission says about all of this in its explanation and its guidance as to why RPM is unlawful in the EU. We pick this up in the vertical restraints guidance, which is at F5, tab 67. It's all the way down at 7163.

MS WEETMAN: Can you say again the paragraph number, please?

MR PICCININ: Sorry, yes, I hadn't got that far, it's paragraph 224, at the bottom of page 7163.

What the Commission does for us here is it identifies, enumerates actually, seven ways in which RPM can harm competition.

My submission -- sorry, I've just had a warning that my headphones are about to stop functioning, so I might just take them out and hope it switches.

Could someone do me a favour of saying something?

THE CHAIRMAN: Can you hear me?

MR PICCININ: Yes, wonderful, thank you, I'm grateful.

As I was saying, the Commission enumerates for us the seven deadly sins of RPM. What I want to say about it is that almost none of them apply here on the CMA's own findings. I'm just going to run through them.

The first one is at -- you can see the second line, it says:

"Firstly, RPM may facilitate collusion between suppliers."

That's the point, as in collusion between manufacturers. We accept that is indeed something that RPM can be used to do. As the Commission explains, that's

most likely to arise if all the manufacturers impose RPM. The point there is that would increase price transparency, which could then be used to facilitate horizontal collusion between brands. There's no finding of that in our case.

The second point is, you see this towards the bottom of the left hand column, about four lines up, it can also facilitate collusion between the resellers. But again there's no finding of that here. Remember, it's a massively unconcentrated reseller market. There's no finding of RPM being applied to anyone other than reseller 1.

Third is on the right hand column, about seven lines down, right at the right hand edge of the line, RPM can soften competition between resellers and between manufacturers. That seems to be a softer version of the two previous points, because the only explanation that the Commission gives is that this particularly applies where RPM is applied by all or many manufacturers. Again, there's no such finding here.

Fourth, you can see a few lines down from that in the middle, the immediate effect of RPM is that all or certain distributors are prevented from lowering price, and that is true, we have to cop to that, that is what it does, although in this case the RPM is only concerning one reseller.

Fifth, just a few lines down from that, you can see that there's a concern about a scenario that economists like to call the commitment problem, I don't think we need to worry about that, there's no finding about that here.

Then sixth, just a few lines below that, this one is actually really important. I'll just tell you what it says. It says that if the supplier has market power, RPM can be used to foreclose smaller rivals, in other words it can foreclose other manufacturers. Now, how is that? What's said here is that RPM creates an incentive for resellers to promote that manufacturer's products. You note

that's exactly the same as the pro-competitive effect that the Supreme Court talked about in Leegin. What the Commission is saying here is that if the supplier has market power, then that effect could actually be so strong that it turns into a bad thing, wiping out rivals. But of course there's no finding of market power here; on the contrary, what we have is very small market share, under 15 per cent.

The seventh point is about six lines up from the bottom of that paragraph, lastly, it may reduce dynamism and innovation at the reseller level, preventing entry and expansion of discounters. Again, there's no evidence of that here, no finding, it's not even plausible for a situation where RPM is applied on one out of a thousand resellers.

Then at paragraph 225, the Commission explains its view of the pro-competitive effects, I don't think we need to go over this again. It's fair to say, and I accept, that it is more skeptical than Justice Kennedy was, but you can see, if you read it later, at all the same points are there. The Commission is skeptical that this adds up to enough to justify the anti-competitive effects other than in special circumstances. And that's fine, I don't need to persuade you that the Commission is wrong about that.

My point is that all of this feeds into the assessment of seriousness, and actually if you're interested in what the Commission thinks, we'll have a look at what the Commission thinks about seriousness when we come to see how the Commission analyses RPM. My submission on that is going to be that it reflects everything that I've just said today.

Sir, I'm conscious of the time, I can continue just a little bit more just to wrap up I think where this point takes us on the facts of this case, and then it may be that you need to dash.

Against that background, if we could just go back, if everyone's okay with that, to the decision, just to paragraph 3.46, tab 1 of the first bundle, page 34. I just want to look again at what the CMA actually found was the object of the RPM in this case. Was it to facilitate collusion with Yamaha? No. Was it to facilitate a cartel between reseller 1 and a thousand other resellers? No. Was it to deal with a commitment problem? No. Was it to create an incentive for resellers to promote Roland's products? Yes. That's the one.

That is just completely different from the horizontal collusion cases that we looked at before, the 16 to 23 club. Every single one of those cases was about collusion between suppliers to keep prices high, for no reason other than the parties to those agreements wanted to receive high prices at the expense of consumers. They were not trying to achieve anything pro-competitive at all. That is why we say that you just cannot justify putting RPM into the 16 to 23 club. It has to be substantially below that level.

Now, sir, at this point I go into the Commission's decisions, so I don't know if you want to break now and start at 10 o'clock tomorrow, or if you want me to go as far as I can with that before you need to go.

THE CHAIRMAN: If we start at 10 o'clock tomorrow, will that enable us to keep on track in terms of the timetable?

MR PICCININ: I think it will, I think I'm doing reasonably well. I've covered half of what I needed to cover, a bit more than that, in less than two hours. So I think that ought to do it.

THE CHAIRMAN: Do we need to start at 10? I'm in your hands.

MR PICCININ: If we do start at 10 it will maximise our chances of finishing tomorrow without needing to go on to the next day.

THE CHAIRMAN: Very good.

MR CUTTING: Can I just ask a question, Mr Chairman, and Mr Piccinin, I accept you may want to come back to this tomorrow. One of the points that struck me about that promotion, you have been clear that this form of RPM was designed to promote investment in the selling of the product, but this is a form of RPM within a selected distribution network, so everybody in that network has already demonstrated that they've met Roland's criteria for stocking and range promotion.

So I just wondered, that seems to me slightly to undermine the need for RPM to do that, given that this is a selected distribution network as opposed to some other form of distribution network. I'd just quite like to hear you talk about that tomorrow.

MR PICCININ: Yes. Yes, I'm very happy to, I can give you the answer in a nutshell now.

MR CUTTING: Yes, in a nutshell's fine.

MR PICCININ: I can give you the references tomorrow. There are two prongs to the answer in a nutshell. The first prong is that we don't need to worry about that too much, Mr Cutting, because the CMA has made the finding, the CMA has told us what the point of the RPM was, what it's trying to achieve. It doesn't much matter whether the CMA was right about that, that's the decision. That's the sort of cop out answer.

The other answer is that under the selected distribution agreement, the resellers were all required to do all of the things that are set out in the sections of the decision that I showed you. That's what they were supposed to do, but obviously if you have hundreds of, you know, more than a hundred resellers, policing that then is a difficult job. You see this both, actually, in Leegin and in the Commission's guidelines, it's in paragraph 225, an explanation of that's

really what RPM is for. It's to make sure that people actually have the incentive to do the thing that you're asking them to do, because sometimes when you ask someone to do something, they don't do it if they don't have an incentive to do it, and that's what it's really about. If you have a network where people are required to do all of these expensive difficult things, but it's unprofitable for them to do that, then it's not going to work. That's why you actually usually see RPM in selected distribution contexts. That's when it's actually particularly important.

I hope that's helpful, so you don't lose any sleep over it.

MR CUTTING: I suspect I won't, thank you.

MR PICCININ: I'm pleased to hear that.

As I say, I will give you the references in the morning.

THE CHAIRMAN: Very good.

Then let's resume at 10 o'clock tomorrow morning.

MR PICCININ: I'm very grateful.

THE CHAIRMAN: Thank you very much.

(3.56 pm)

(The hearing adjourned until 10 o'clock the following day)

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