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IN THE COMPETITION
APPEAL
TRIBUNAL

Case No: 1351/5/7/20

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Monday 24 January – Wednesday 2 February 2022

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

BETWEEN:

Churchill Gowns Limited and Student Gowns Limited

-v-

Ede & Ravenscroft Limited and Others

A P P E A R A N C E S

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

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

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1 Wednesday, 2 February 2022

2 (10.30 am)

3 DR GUNNAR NIELS (continued)

4 Cross-examination by MR RANDOLPH

5 MR RANDOLPH: Good morning, Dr Niels.

6 A. Good morning.

7 Q. Do you have your hard copy reports in front of you?

8 A. Yes.

9 Q. Good. Do you have anything else on the desk? Very
10 happy if you've got notes, or whatever.

11 A. I have got the joint -- joint statement and then the two
12 reports I have made.

13 Q. That is excellent. Thank you very much. But I will be
14 referring to the electronic page references for
15 the purpose of the transcript.

16 At paragraph 1.5 of your first witness statement you
17 say you have been assisted by a number of colleagues at
18 Oxera {E6/1/5}.

19 A. Yes.

20 Q. I presume you wrote the report yourself?

21 A. Yes.

22 Q. So if there are any mistakes, they are your own?

23 A. Yes.

24 Q. There is no similar mention in your second report. Does
25 that mean that you received no assistance for that, or

1 that the same assistance was provided but you just did
2 not mention it?

3 A. The latter.

4 Q. Thank you.

5 At section 1C of your first report -- so this starts
6 at {E6/1/8}. Do you have that? 1618, the materials you
7 have relied upon.

8 You say:

9 "The key materials I have relied on to prepare my
10 Expert Report and provided to me by AL ..."

11 "AL" is Alius Law, yes?

12 A. Yes.

13 Q. So the defendants' solicitors?

14 A. Yes.

15 Q. At paragraph 1.16.1, on the same page, you refer to
16 the pleadings you have looked at, including, three lines
17 down:

18 "Response to Claimants' RFI ... Response to
19 Defendants' RFI ..."

20 Those are dated 12 November 2021, both of them.

21 I can take you to those documents, but that is the wrong
22 date, would you accept that?

23 A. Yes, because the report was 10 November, so --

24 Q. Exactly.

25 A. -- that would be the wrong date.

1 Q. Okay, thank you.

2 You say that you have reviewed witness statements,
3 various witness statements, at 2, 1.16.2, and you list
4 them, and on the next page, so {E6/1/9}, having listed
5 the various witness statements, you say, about six lines
6 from the bottom of that subparagraph:

7 "There are other witness statements that I have
8 reviewed but these are not quoted in my Expert Report."

9 Which are those?

10 A. I cannot now remember which ones?

11 Q. Okay, but did you take them into account?

12 A. I do not think so. I think the witness statements
13 I took into account are the ones listed there.

14 Q. At 1.20 {E6/1/14} you fairly accept that you are not an
15 expert, an industry expert; and therefore you rely
16 extensively on the factual information provided in
17 the witness statements and the other documents, yes?

18 A. Yes.

19 Q. At paragraph, going back, 1.16.3, nearly where we were,
20 so this is where you are going through the key materials
21 that you have reviewed; so we have looked at
22 the pleadings and the witness statements. So 3 is
23 a clip of documents. It is a clip containing a sample
24 of 10 ITTs. That clip, just to make sure I have
25 understood this, that was provided to you by Alius Law?

1 A. Yes.

2 Q. So you did not make the choice as to which of the ten
3 were chosen?

4 A. Correct.

5 Q. You go on to say at 1.16.4, so over the page {E6/1/10},
6 that another document you were provided with was an
7 Excel document named "20211011". I assume that number
8 is a reverse date, so 11 -- does that work, 11/10/2021,
9 or 10/11/2021?

10 A. I do not know what this -- I did not focus on the file
11 name. I think this is the file name -- yes, this is
12 the file name; and it probably refers to -- it could
13 refer to a date, but I am not entirely sure.

14 Q. Fine. That is fine.

15 It is called, as you say "Oxera Contracts Tracker",
16 but as you say in the next line, at (i):

17 "[The] Tab labelled 'ITTs' contains a summary
18 compiled by AL ..."

19 So that is Alius Law:

20 "... of the key characteristics of a sample of 30
21 ITTs ..."

22 Then there is a tab labelled "OSAs" that contains
23 summary information. This is at (ii):

24 "I understand that AL simply collated the specific
25 provisions ..."

1 So in relation to both of those Roman numeral tabs,
2 they have been compiled -- the summary has been compiled
3 by Alius Law?

4 A. Correct.

5 Q. So the title is actually not correct, is it, it is
6 misleading. It is not Oxera contracts tracker, it is
7 Alius Law's contracts tracker?

8 A. Alius Law prepared this for me, so for Oxera. They gave
9 the name of the file. I did not come up with the file
10 name. I can only guess that they called it "Oxera
11 Contracts Tracker" because this is information they
12 wanted to compile for the expert. So for me in
13 the first instance, but then obviously it was also
14 shared with Dr Maher.

15 Q. Of course. I understand that. But just for
16 the avoidance of doubt, it is not Oxera's work product,
17 it is Alius Law's work product?

18 A. Correct.

19 Q. Thank you.

20 You say at footnote 23 on the same page, so
21 {E6/1/10}, so footnote 23:

22 "10 of the ITTs summarised in this document coincide
23 with those listed at point (c)."

24 Do you see that?

25 A. Yes.

1 Q. First of all, and just so that everybody is clear, 23,
2 the footnote, cross-refers, or is in the text at (i),
3 paragraph 4, so this is the tab labelled "ITTs"; and
4 that is where you put in the footnote. So you say it is
5 summarised to coincide with those listed in point (c).
6 Where is point (c)?

7 A. I think something went astray with the bullet naming.
8 So for some reason -- and this is not our house style,
9 and the bullet points ended up with numbers. So what
10 this refers to is not point (c) but point 3 on
11 the previous page that we just looked at. So point 3
12 has a -- that is basically a dataset of 10 contracts, 10
13 ITTs, the next point is 30 ITTs; and all I am saying is
14 that the ten were also included in the 30.

15 Q. Yes, I have got it.

16 You just said that this was not in your house style.
17 What do you mean by that? This report, is it not in
18 your house style, or ...?

19 A. No, just the formatting of the bullets. Normally we
20 have -- we do not have numbers. So I refer to Oxera's
21 house style for our original outputs.

22 Q. Sure. So how did (c) come into it? If you do not use
23 (c) and you use, as you say, point 3, how did that come
24 into the text.

25 A. Originally, the bullets were (a), (b) and (c), and then

1 they became 1, 2 and 3.

2 Q. So originally they were not in house style?

3 A. You are asking questions about -- at various points
4 about the formatting in Word. Something went astray
5 with the house style of the bullets. Oxera's house
6 style, if anyone is interested, is we actually have
7 bullets, as you point out.

8 Q. Sure.

9 A. But I think they first ended up as letters and then they
10 ended up as numbers.

11 Q. But this was all done at Oxera; it was not done
12 elsewhere?

13 A. This report was written at Oxera, yes.

14 Q. So it was an internal Word glitch?

15 A. Yes.

16 MR PATTON: Sir, I do not know if it is appropriate for
17 me to say, but I personally asked for the bullet points
18 to be changed to numbers, so that when we got to
19 the skeleton we did not have to say "seventh bullet
20 point" or --

21 MR RANDOLPH: Very good.

22 THE CHAIRMAN: So this is your fault.

23 MR PATTON: Well, ultimately I take full responsibility.

24 MR RANDOLPH: Well, I am delighted. There we are, you see,
25 Dr Niels, I have given you a hard time, or hardish time,

1 and it is not your fault at all, it is all down to
2 Mr Patton.

3 A. It is now clearer, yes.

4 Q. It is now clear, yes. That is very good. Excellent.

5 So insofar as concerns the ITTs, you have been
6 provided with ten of them, a sample that you did not
7 choose, and summaries of 20 other ITTs, because there
8 were 30 but 10 mirror the previous ITTs, that you did
9 not compile, and the complete documents you have not
10 seen because they are summaries rather than --

11 A. Correct. The original documents, I have not seen.

12 Q. Thank you.

13 The clip that we looked at, at 3, that, if I am
14 correct, covers the period 2016 to 2020; and I take that
15 from line 3 of paragraph 3 of 1.16 on page 1619
16 {E6/1/9}. So that is the clip of documents. That is
17 the sample of ten ITTs, yes?

18 A. Yes.

19 Q. So that is 2016 to 2020.

20 The Excel spreadsheet, which was in fact Alius Law's
21 work product, covers the period, I think, between 2013
22 and 2020; and you can get that from 1.16.4 (i), line
23 three and four on page {E6/1/10}; is that right?

24 A. Yes.

25 Q. So we have got those different periods.

1 At 1.16.5, which is the following page {E6/1/11}, or
2 1.16.5 starts on the same page {E6/1/10}:

3 "Three examples of Requests for Proposals
4 ('RFPs') [were] sent to E&R by ..."

5 Those universities, again, you did not choose those,
6 they were chosen for you?

7 A. Correct.

8 Q. Just looking at the first example, the University of
9 Kent, did you look at that document, or -- yes, did you
10 look at that document, the request for proposals sent to
11 E&R by the University of Kent, which you cross-refer to
12 in your footnote, footnote 25? Did you look at that?

13 A. Yes, I think here we were actually provided with -- but
14 I cannot now recall the detail. But I think we were
15 provided with the actual document, so I would have
16 looked at the actual document.

17 Q. We can see the actual document, because it is referred
18 to, usefully, in your report; and the electronic
19 reference is {F2/239/1}. Could we go to that, please.

20 So this would be the -- and of course, this is in
21 grey, so that means it is totally confidential.
22 Although it is referred to in a report.

23 While they are taking instructions, can you confirm,
24 Dr Niels, that this is the document you looked at?

25 A. Yes. I cannot now -- actually the act of looking at

1 this document, but this is one of the documents provided
2 that I list here.

3 Q. Good.

4 There is no cover letter -- sorry, did you manage to
5 ascertain the position?

6 MR PATTON: So I think the position is that we -- having
7 been ordered by the tribunal at the PTR to look again, I
8 think we do not say that the questions asked to
9 some universities are confidential, but we do say that
10 the answers provided are.

11 MR RANDOLPH: Sure. But I am just going to the request.

12 So, you can -- to the extent necessary, Dr Niels,
13 you can forget about the grey.

14 There is no cover letter with this, is there, so you
15 do not know to whom it was sent?

16 A. Correct.

17 Q. Now, could you go to clause 1.2 in the document.

18 {F2/236/2}.

19 A. Yes.

20 Q. "Summary of ... Requirement":

21 "[The University of Kent] invites you to submit
22 a Quote for the supply of academic gowns for hire to all
23 students, staff and Honorary Graduates, including
24 delivery and collection to specified locations. This
25 will be for the supply and dressing of all eligible

1 persons for all ceremonies held by the [University of
2 Kent] at Canterbury and Rochester in July and November
3 each year. A suitable commission to the UoK is to be
4 agreed. It is important for the University to achieve
5 value for money for the students.

6 "Photography is to be excluded from this contract.

7 "Further details of the requirement are described in
8 Part 2 of this [request for a quote]."

9 Now, did you go and look at the part 2 to the RFQ?

10 A. I cannot remember for this case where I looked into
11 more detail at the actual specifications. In particular
12 for ITTs, I cannot now recall if I also listed
13 the RFQ examples, but in my assessment in section 2 of
14 this -- of my first report, where I give an overview of
15 the kind of things that universities look for in their
16 ITTs, so to get that, that was provided in that summary
17 document that we just talked about. So there I did look
18 into detail at this kind of information, as was
19 summarised for me. I cannot now recall whether for this
20 RFQ I also looked at part 2.

21 Q. That is fine.

22 Could we go on in the document to part 2,
23 the requirements. If you could go to the next page.
24 Could you, sorry, go back to the page we were on and
25 the next page, and the previous page.

1 So we can see there it sets out the details of
2 the requirement that was sought, including -- the next
3 page, please -- including the scope of works. So that
4 is in section 2. {F2/236/7}.

5 Essentially, you cannot remember, Dr Niels, whether
6 you looked at section 2 or part 2?

7 A. Yes.

8 Q. That is fine.

9 So, in terms of tenders and RFPs, just going to
10 the RFPs first, because you have got a sample of three
11 that was chosen for you. In terms of the ITTs, you have
12 got 13 actual documents and 20 summaries, because ten of
13 them were mirrored, all of which were produced by
14 the defendants' solicitors; that's right, isn't it?

15 A. Yes.

16 Q. Thank you.

17 Can you turn to paragraph 3.80 of your report, where
18 we are at the moment. That can be found at {E6/1/62}.
19 You can see reference at 3.80 that you refer to
20 Ms Middleton's witness statement, yes?

21 A. Yes.

22 Q. And to her evidence that during the claim period,
23 the defendants participated in a total of 69 tender and
24 RFP processes, yes?

25 A. Yes.

1 Q. When did the claim period start?

2 A. You are testing my memory know. Is it -- whenever it
3 starts. Is it 2016?

4 Q. Yes.

5 So for that period you have seen 10 ITT documents
6 and two RFPs, because the University of Kent -- and just
7 so it is not a memory test, we can whizz back to
8 the University of Kent that we were looking at, and see
9 that that is the 2015 RFP. So just if you want to keep
10 a finger in the page we were on, which is 62, whizz back
11 to {E6/1/10}, you can see that the RFP for
12 the University of Kent is 2015, yes?

13 A. Yes.

14 Q. Right.

15 So for the claim period, 2016 through, you have seen
16 two RFPs and ten ITTs documents. So that, according to
17 Ms Middleton's evidence, on which you rely, that makes
18 a total of 12; and 12 divided by -- or 12 as
19 a percentage of 69 is approximately 15%; would you take
20 that from me?

21 A. I can take that calculation. If you add -- if you look
22 at also -- if you count all 30, the proportion is
23 higher.

24 Now, I should also clarify in this context that that
25 refers to the extent to which I saw the original

1 document in terms of the ITT or the RFQ as sent out by
2 the universities. I have of course had full sight of
3 the actual OSAs. So those are in the datasets that
4 the experts had access to. So that is the full set.
5 Then, in addition, I had also information for a number
6 of other ITTs or contracts in terms of the feedback they
7 received, et cetera. So the analyses are described in
8 my report.

9 But it is correct, the actual ITT documents, 30 or
10 ten in more detail, and then those examples from
11 the RFQ.

12 Q. That is kind, thank you.

13 Now table 3.5, back to page 62, and we have
14 clarified, if we needed clarification, that although
15 there is grey on there, it is not confidential, and I am
16 grateful.

17 You set out the figures for the share of
18 the recognised bodies that are now well known to
19 the tribunal. So 76%, this is the "Proportion of
20 recognised bodies served by E&R over the claim period".
21 So: June 2016, 76%; June 2017, 75%; June 2018, 76%;
22 June 2019, 75%. Then it drops off in 2020 and 2021
23 largely in part due, as you say, to the Coronavirus
24 pandemic. That is correct, is it not? Because you say
25 in the note under the table:

1 "Contracts are counted as at June each year. In
2 2020 and 2021, ad hoc contracts are not fully reflected
3 because many institutions rescheduled their summer
4 graduation ceremonies to the autumn and winter due to
5 COVID-19."

6 Yes?

7 A. Yes, certainly the numbers for 2020 and '21 are
8 significantly affected by the pandemic.

9 There is also an element of in -- over the period,
10 E&R having lost a number of contracts. But the big
11 jump, the big decrease in percentage that you see here
12 can be ascribed to the pandemic.

13 Q. Thank you.

14 While we are on this table, could I take you to an
15 authority, but I am not taking you to a legal
16 proposition. Do not worry, Dr Niels, I am not going to
17 ask you to jump into a different discipline. I just
18 want you to comment on something that is said there.

19 This is the *GE Alstom* merger decision. So that is
20 {AUTH1/62/61}. Could we go to the front of
21 the document, just so that -- I do not want to take
22 Dr Niels by surprise, {AUTH1/62/1}.

23 Do you know this document?

24 A. Yes, I am familiar with this.

25 Q. You are familiar.

1 Can we go back to 61, please, recital 233

2 {AUTH1/62/61}?

3 Just to play this in:

4 "Transaction results in market-leading and often
5 very large market shares."

6 So this is the commission speaking, it is
7 a commission document:

8 "In the present case ..."

9 This is recital 231:

10 "... the Commission will first examine the Parties'
11 market shares.

12 "According to paragraph 27 of the Horizontal Merger
13 Guidelines, the larger the market share, the more likely
14 a firm is to possess market power. And the larger
15 the addition of market share, the more likely it is that
16 a merger will lead to a significant increase in market
17 power."

18 Then 233:

19 "As will be seen in section 8.4 the Parties have
20 very large combined market shares world-wide and in
21 the EEA. The Transaction also leads to sizeable market
22 share additions in particular in the EEA. As the market
23 for 50 Hz HDGTs is typified by bidding with large
24 orders, historic market share data will be used. This
25 approach has been confirmed by the General Court, which

1 found that ..."

2 This is the quote from the General Court:

3 "... 'even on a bidding market, the fact of
4 a manufacturer maintaining, or even increasing, its
5 market share over a number of years in succession is an
6 indication of market strength'."

7 Could we go to the bottom of the page, because
8 I just want to give Dr Niels the footnote reference to
9 that.

10 At 204, I think. So it will be the next one
11 {AUTH1/62/62}.

12 So that is from the *General Electric v Commission*
13 case.

14 So could we go back to 233, please.

15 So would you accept that, Dr Niels, that where you
16 have a high market share that is stable or increasing,
17 but in this case we have just seen 76, 75, 76, 75, that
18 is what we have just seen. So that is pretty stable,
19 I would suggest.

20 In that case, even if there is a bidding market,
21 the market share, that stable market share indicates
22 market power of the company that is holding that stable
23 high market share?

24 A. So, as such, this proposition, I have nothing to
25 criticise that. As a matter of theory, this is a -- or

1 as a matter of sort of a policy criterion, this is
2 a sensible thing to say. I think they actually use
3 the term -- if we can go back over the page --

4 Q. Sure.

5 A. -- {AUTH1/62/62}, it is an indicator of market strength,
6 which maybe, I do not know -- I do not know. Either it
7 is a translation issue, or it means something subtly
8 different from "market power". But I would therefore
9 add the nuance myself to this statement that, yes,
10 the statement as such is valid, that is valid economic
11 reasoning, but it is not necessarily the full picture
12 for an analysis of dominance. You need to look at other
13 factors as well.

14 Q. But you would agree that it is something that
15 the tribunal should take into account as being relevant?
16 It may not be ultimately determinative, but it is
17 relevant, the stability of the high market share in
18 a bidding market context?

19 A. I think as a matter of principle it is relevant, yes.

20 Now, translating it into this case, one has
21 three years of -- it is clear in my table. One has
22 three years where the market share is stable, 76; then
23 it goes down, but that is pandemic. What would really
24 be interesting -- so I would not say this is a very long
25 term, stable issue necessarily forward-looking. It all

1 depends on, going forward, once the market returns to
2 normal, what is happening to these market shares.
3 Because what you also observe is that of the bids during
4 the period, actually E&R lost a number. Actually,
5 the percentage is not overly different from the 75% in
6 that sense. So one could say it is stable in that
7 sense. But that is not necessarily saying that going
8 forward there is an element that inherently keeps it
9 stable, because for every new competition -- new bid,
10 there is competition.

11 The other change I would say that you see over
12 the period, or just before the period, is this increased
13 entry or increased participation by the other providers.

14 So I would not necessarily -- if I were to forecast
15 market shares, I would not necessarily say that once
16 the market returns to normal it is always going to be
17 75%. But I accept that it has been fairly stable.

18 Q. Thank you.

19 Could you turn to annex 2 -- sorry, appendix 2 to
20 your first report, and that can be found at {E5/2/1}.
21 Then within that {E5/2/26}.

22 A. Sorry, I do not have the appendix in hard copy.

23 Q. No, you may not have the hard copy -- well, you do not
24 have the hard copy. It is not a question of you may
25 not; you do not.

1 A. I do not, no.

2 Q. Well, I am sorry about that.

3 A. But I see it now on the screen.

4 Q. Good, splendid. I will bear that in mind, because your
5 screen is slightly slower than everybody else's, which
6 is just a fact.

7 So this is a letter from the defendants' solicitors,
8 Alius Law, to you, dated 14 April (sic); and you had
9 apparently, you can see there, the first question:

10 "You have submitted some questions to follow up on
11 the Letter of Instruction we sent to you dated
12 23 September ..."

13 And you, under the title "Award processes", you
14 say -- sorry, not "you say", Alius Law say:

15 "You ..."

16 That is you, Dr Niels:

17 "... have asked for information on how OSAs and
18 extensions are secured, the win/lose statistics ...
19 interplay between gowns [and] photography ... and
20 summary information about OSAs in existence during
21 the claim period ..."

22 Then:

23 "Please see enclosed an Excel spreadsheet entitled
24 Contracts Summary with this information taking from
25 the disclosed contractual documents (save for pricing

1 information which the client has compiled ..."

2 So that would be Ede & Ravenscroft and the other
3 defendants, to the extent relevant. So:

4 "... (save for pricing information which the client
5 has compiled from various sources of information
6 including the current computer system and copies of bids
7 put in historically ..."

8 Then while we are on that page:

9 "Please also see enclosed an Excel spreadsheet
10 entitled Public Tender List which ER ..."

11 That is Ede & Ravenscroft:

12 "... has put together from disclosed documents and
13 its knowledge/recollection of different tender
14 processes."

15 Then finally, on the top of the next page {E5/2/27}:

16 "... please see enclosed a small clip of documents
17 recording or tending to show award decisions made by
18 institutions, the reasons for them and feedback."

19 Alius Law says:

20 "We are instructed the feedback on tenders varies
21 considerably as between different institutions and often
22 there is none. In the Public Tender List spreadsheet,
23 there are some references in original text to 'see
24 sheet' which are references to documents in this clip."

25 You recall getting this letter?

1 A. Yes.

2 Q. Now, insofar as the contract summary is concerned, we
3 saw that in the second paragraph I read out under "Award
4 processes", yes?:

5 "Please see enclosed an Excel spreadsheet entitled
6 Contracts Summary ..."

7 This is -- and I would like your confirmation,
8 please -- the document, I presume in any event, that you
9 refer to at paragraph 1.16.7 in the same witness
10 statement, which can be found at {E6/1/11}.

11 A. Yes.

12 Q. Thank you.

13 So this is {E6/1/11} at 7:

14 "An Excel file received named ..."

15 The date:

16 "... Contract Summary prepared for Dr Niels --
17 UPDATE 8 Nov 21."

18 You say in that paragraph, at the end of it:

19 "I rely on this dataset to analyse contracts'
20 lengths. In section 5, I rely on this dataset to
21 analyse E&R's price levels and trends."

22 So it is quite an important document, you would
23 agree?

24 A. Yes.

25 Q. Now, insofar as pricing was concerned, we have just seen

1 from the letter that I took you to, that you have
2 confirmed you received, that the pricing information was
3 put together -- just so you can refresh your memory
4 {E5/2/26}, penultimate paragraph from the bottom. So
5 this is the contract summary that you have confirmed
6 this is the relevant data you were looking at. It was
7 put together by the defendants' solicitors, not your
8 solicitors:

9 "... save for pricing information which the
10 client ..."

11 So Ede & Ravenscroft and the other defendants --
12 have put together.

13 So they put together the data that you say is
14 important in terms of your analysis in relation, amongst
15 other things, to E&R's pricing, they put together that
16 data?

17 A. Yes. They have the data. They put it together.

18 Q. Did you ask to see the underlying data which was used to
19 produce that summary data?

20 A. I am not sure if one can describe the contract data
21 as "summary data", because the contract database has --
22 is comprehensive, so has all the contracts, and as far
23 as I understand it, has all the prices, and the reason
24 why it had to be collated is, my understanding is it was
25 somewhere else in E&R's systems than the actual -- than

1 the other information around that contract, and E&R,
2 perhaps with some input, I do not know, from Alius Law,
3 put all that information together for me and then for --
4 was shared with the other expert as well.

5 So I would not call the pricing information
6 a "summary" as such, it is probably just the price
7 related to that contract somewhere on the system. So it
8 is in that sense not a summary, it is comprehensive
9 information of prices.

10 Q. Yes. You say it is "probably", but you did not check?
11 You did not say, "What are the various sources of this
12 information"?

13 A. I did not go into E&R's systems, no.

14 Q. Yes, thank you.

15 So you received the first iteration of this
16 important document on 14 October. It was then, as we
17 have seen, going back to 1.16.7, it was updated to
18 8 November, yes? That is page {E6/1/11}?

19 A. Yes.

20 Q. Well, first of all, why was it updated?

21 A. I cannot now recall why.

22 Q. Right. Can you recall -- I can probably guess
23 the answer to this question. If you cannot recall what
24 the update contained, you cannot recall whether you took
25 any update into account in coming to the decisions and

1 the determinations in your report?

2 A. I cannot now recall. If we got the update on
3 8 November, the report was 10 November, by then I had
4 done the analysis. So from that perspective, it is
5 unlikely. So I cannot recall the daily, but from my
6 recollection, it was not a massive update, it was just
7 updates of some particular details, or additional
8 information.

9 Q. Yes, thank you.

10 This is going to assist you and the tribunal,
11 I hope, just by giving -- at footnote 29 on that page
12 {E6/1/11} you say:

13 "Document ID to follow."

14 And you make the same point at footnotes 31 and 32,
15 for the tribunal, and for yourself, if you want to mark
16 it in. Footnote 29 is {E6/1/11}, if anybody wants to go
17 to that; and insofar as footnote 32 is concerned, it is
18 {E6/1/11} as well; and insofar as the footnote, I think,
19 31 is concerned, it is {F4/382}. So were you to want to
20 go back to this report, Dr Niels, you will be able to
21 cross-refer to the ID or the document that you were
22 referring to there. I hope that assists.

23 Going back to the solicitors' letter of 14 October
24 that we were looking at {E5/2/26}, so we have looked at
25 the contract summary and we have discussed that.

1 The next additional document you were given was an Excel
2 spreadsheet, so {E5/2/26}:

3 "... an Excel spreadsheet entitled Public Tender
4 List which ER has put together from disclosed documents
5 and its knowledge/recollection of different tender
6 processes."

7 Do you see that?

8 A. Yes.

9 Q. This is reference -- and I want to just cross-refer back
10 again, so put a finger in that page, and go to
11 {E6/1/11}. I assume that this is the item that you have
12 identified at paragraph 9:

13 "An Excel file received named 'Public Tender list
14 for Dr Niels UPDATE 8 Nov 21."

15 A. Yes.

16 Q. Yes, thank you.

17 You say:

18 "This dataset contains key information on a sample
19 of 65 tenders and RFPs covering the years 2016 to 2021."

20 Yes?

21 A. Yes.

22 Q. So this key information -- and you can move back to your
23 finger at {E5/2/26} was put together by
24 Ede & Ravenscroft:

25 "... from disclosed documents and its

1 knowledge/recollection of different tender processes."

2 Yes?

3 A. Yes.

4 Q. Did you see or ask to see the underlying data which E&R
5 had used to compile that spreadsheet or ask about their
6 knowledge and/or recollection?

7 A. No.

8 Q. Right, so you are taking their word for it?

9 A. I am taking -- yes. I mean, for all the information
10 I have been provided by the solicitors and the client,
11 I have worked on the assumption that that information is
12 correct.

13 Q. Thank you.

14 I am sure your answer is going to be the same. You
15 will have seen from the title that this was updated on
16 8 November, which is two days before your report was
17 filed. I assume your answer is the same: you cannot
18 remember what the update was; and therefore you cannot
19 tell the tribunal whether or not it was taken into
20 account in your final report?

21 A. Correct.

22 Q. Thank you.

23 The final additional document you were given under
24 cover of this letter of 14 October can be seen at
25 {E5/2/27}:

1 "... a small clip of documents recording or tending
2 to show award decisions made by institutions ..."

3 Doing the same analysis that we have done for
4 the previous two, can you put your finger in that and go
5 back to {E6/1/9}. Am I right in thinking that this is
6 the clip of documents that you refer to at 3:

7 "A clip of documents provided containing a sample of
8 10 Invitation to Tender documents ..."

9 Is that the clip you are referring --

10 A. I am not sure, because I think this last point referred
11 to also the clip with information on the feedback
12 that --

13 Q. Yes, it is.

14 A. -- E&R had received, and I think that is referred to
15 later on in my list, in my report.

16 Q. Okay. Well, I am sure we will not -- I am sure your
17 counsel can take you there, to the extent it is
18 necessary. But I just wanted to clarify where it had
19 been identified in your list of documents that you say
20 you looked at for the purpose of producing the report.

21 Now, as we have seen, going back to the letter, this
22 is a clip of documents that has been put together by
23 Alius Law, yes, the defendants' solicitors?

24 A. Yes.

25 Q. Which they say -- it is their words not mine -- those

1 documents "record or tend to show". Did you ask
2 Alius Law what "tend to show" means and how they reached
3 the decision that certain documents tended to show
4 something and certain other documents did not, and how
5 they made their choice of the clip of documents?

6 A. No.

7 Q. Thank you.

8 In your -- if I can call it this, Dr Niels -- hot
9 tub evidence, the evidence you gave whilst you were in
10 the hot tub, you referred to looking at a database of
11 all universities; and that is transcript {Day6/42:19-25}
12 and {Day6/43:1-3}, so it is at the bottom. So just
13 playing you in on this --

14 A. Sorry, it is not there yet.

15 Q. I will not read it until it is. Is it there now?

16 A. Yes, it is there, yes.

17 Q. Sorry, EPE operator, which page is that?

18 THE EPE OPERATOR: 41.

19 MR RANDOLPH: Sorry, 42 would be great. Thank you.

20 So I will play you in. From Mr Ridyard:

21 "The next question is whether, given those
22 conclusions that you both believe there is
23 university-specific markets ..."

24 We will come on to that in a moment:

25 "... is it therefore necessary when we do

1 the competition assessment and looking at the existence
2 of market power or not, that we look at each individual
3 university and consider the different levels of market
4 power that might exist?

5 "Dr Niels?"

6 You say:

7 "Yes, well, I would say thankfully not. If you look
8 at the various stages of the competition analysis, in
9 particular from the economic perspective, in some stages
10 you may want to look at each university, but actually
11 most of the stages you do not need to. So market
12 definition, that is all -- well, as I have done in my
13 report, you can answer a lot of these questions in
14 general, in a generalised way, about the way the market
15 works. You do not -- and you do then look at --
16 I have -- as I have done, to support the conclusion, you
17 look at the detail of some of those universities; and
18 indeed ..."

19 This is the point:

20 "... you look at a database of all universities, as
21 I have ..."

22 So my question is simply this: what is that
23 database?

24 A. So, I was referring to the database, the Excel sheets
25 that had listed all the contracts of Ede & Ravenscroft.

1 So "all universities" was not the right way of putting
2 it, of describing that, but it is -- what I have in mind
3 is that that is a comprehensive dataset of all
4 the contracts that E&R has. So that is a dataset that
5 I have looked at.

6 Q. That is fine, Dr Niels, I am not criticising you, it is
7 just I did not understand. I just thought "gosh, I have
8 missed the database", but I have not, it is just
9 a misnomer. So that is fine.

10 Could we go to paragraph 2.15, please, in your first
11 report {E6/1/33}. You say here -- this is in
12 the context of suppliers of graduation services and
13 academic dress. 2.14:

14 "As a result of the market structure ... the most
15 prevalent business model in the industry is one where
16 the supplier provides academic dress hire, as well as
17 all of the other services, on an 'approved supplier'
18 basis ..."

19 Then:

20 "Other companies in addition to E&R that operate
21 this business model are Northam and ILA (both part of
22 the same economic undertaking as E&R), J Wippell ...
23 Gray & Son ... Graduation Gowning ... (part of Tempest
24 Photography), Marston Robing ... Graduation Attire, and
25 Phelan Conan."

1 Insofar as Phelan Conan is concerned, you footnote
2 at 60, saying:

3 "I understand that Phelan Conan supplies Queen's
4 University Belfast ..."

5 Then you talk about paragraph 77 of Ms Middleton
6 witness statement listing Ryder & Amies as more
7 established players.

8 Insofar as Phelan Conan is concerned, do you know
9 who owns Phelan Conan?

10 A. No.

11 Q. Could you go to Dr Maher's first report {E4/1/43},
12 please. I am trying to look at the footnotes. It is
13 the next page, please, sorry {E4/1/43}, 174, and blow
14 that up again. Thank you so much.

15 Can you see, this is footnote 174:

16 "My research has indicated ..."

17 So, sorry, before I ask you the question, this is
18 Dr Maher's first report, and you have obviously had an
19 opportunity to respond to that in your reply report?

20 A. Yes.

21 Q. So this is her first report in November:

22 "My research has indicated that there may be some
23 structural links between the E&R Undertaking and
24 Phelan Conan (according to information available from
25 the Companies Registration Office Ireland the entity

1 with significant control over Phelan Conan appears to be
2 the 'MW & E Middleton Settlement')."

3 Did you read that footnote?

4 A. Yes, I did.

5 Q. You did not seek to comment on it in your responsive
6 report, so I assume that you do not contest that which
7 is set out in that footnote?

8 A. No, no, and I am not trying to think -- indeed, when
9 I read this, it says:

10 "... I understand that this may be the issue of
11 further communications between the ... legal teams."

12 I cannot now actually recall whether I followed up
13 with the legal team on our side as to the outcome of
14 that discussion.

15 Q. Well, I can tell you that there was a follow-up and
16 the confirmation from the defendants' solicitors was
17 that indeed Mr Middleton -- there was a family trust
18 which, as set out there --

19 MR PATTON: In fairness to the witness, Mr Randolph might
20 want to say when that exchange happened.

21 MR RANDOLPH: Oh, absolutely. I am not criticising. This
22 is post this report, but query whether -- I am not
23 making a timing point, I am just saying it was not
24 covered. Dr Niels correctly said: well, it is up to
25 the lawyers. That is all fine. So we have confirmation

1 of the position.

2 Can we go to 3.85 of your expert report, your first
3 report, {E6/1/63} and {E6/1/64}. So 3.85, {E6/1/63}.
4 This is after the famous table, table 3.5; and then
5 looking at table 3.6, "Outcomes of universities'
6 procurement processes ..." Then 3.85:

7 "In some instances, the dataset provides additional
8 information on the identity of other bidders. In many
9 instances, when E&R won the contract, E&R is unable ...
10 to name other bidders due to the confidential nature of
11 the process. However, the information that E&R could
12 verify indicates the following.

13 "1. There were at least five competitors (Marston,
14 Graduation Attire, Wippell, Graduate Gowning
15 Company/Tempest, Phelan Conan)."

16 My only point is this, given the fact that you do
17 not contest the fact that there is a control of
18 Phelan Conan by the Middleton family trust, you would
19 accept from me, would you not, that it is not correct to
20 call Phelan Conan a competitor, in that strict
21 independent sense, of Ede & Ravenscroft?

22 A. Yes, that is correct. If the structure link is such
23 that there is a sufficient degree of control or
24 influence, yes, then you would not call it an
25 independent competitor.

1 Q. Thank you.

2 Now, moving on to bidding markets, you would agree,
3 would you not -- well, in fact, I will ask you.

4 You agree, Dr Niels, that the market for graduation
5 services cannot be characterised as a theoretically pure
6 bidding market; and just before you answer that, I will
7 take you to 3.13 of your second report, so {E6/29/12},
8 just so you can see where I have got that from. So
9 3.13:

10 "In my first report, I explained that the bidding
11 market concept is a theoretical one, and I agree with Dr
12 Maher that the market for graduation services may not be
13 characterised as a theoretically pure bidding market."

14 Just stopping there, you do not resile from that,
15 you stand by that?

16 A. Yes, I stand by that.

17 Q. Thank you.

18 Just for the transcript, you confirm the same point
19 in your hot tub evidence, if I can call it that,
20 transcript {Day6/90:18-20}.

21 Now, you say in your joint expert statement, at
22 paragraph 3.11, so that is {E7/1/14}, and you have
23 a hard copy there, I think, yes?

24 A. Yes.

25 Q. You say there that outcomes -- well, actually, why do

1 I not let you read that, because it is quite a lengthy
2 extract. It is just easier if you read it to yourself.

3 (Pause)

4 A. Yes.

5 Q. Sorry, you have read that. That is great.

6 So you say there, as you can see:

7 "Outcomes can be equally competitive irrespective of
8 whether a buyer chooses to run a formal ... process
9 [including direct negotiations] ... (either with
10 multiple suppliers in parallel, successively, or
11 exclusively with one)."

12 Yes?

13 A. Yes.

14 Q. You can probably keep that open, because you have got
15 that in hard copy. Can you go to paragraph 3.17 of your
16 second witness statement, please, which can be found at
17 {E6/29/13}. Do you want to just read that to yourself.

18 (Pause)

19 Yes?

20 A. Yes.

21 Q. So this is the Klemperer debate, and we discussed
22 Klemperer with the tribunal; and so, for
23 the transcript -- this is 3.17:

24 "Third, Dr Maher has introduced a further test that
25 is not part of the Klemperer criteria, which is whether

1 or not universities run formal tenders. However,
2 Klemperer contemplates the existence of 'informal
3 bidding processes', such as parallel negotiations, and
4 does not express the view that these are more or less
5 close to the ideal of a bidding market than any other
6 type of process. Under this definition, both RFPs and
7 bilateral negotiations may be characterised as bidding
8 processes, to the extent that they give rise to parallel
9 negotiations."

10 Yes?

11 A. Yes.

12 Q. Now, my question is "parallel negotiations", by
13 definition, mean that you have to have more than two
14 people in the negotiation, yes, because if you have two
15 people, purely bilateral, A talks to B to try and reach
16 an agreement, there is nothing parallel; you have to
17 have A talking to B and then A talking to C; do you
18 agree with that?

19 A. Not necessarily. So, again, taking this to
20 the theoretical framework of bargaining, I mean,
21 basically, bargaining theory is very much about
22 bilateral bargaining between two parties. But what is
23 there in that -- what determines the outcome in that
24 economic setting of a bargaining game is the outside
25 options that each party has; and the outside options

1 typically, an important type of outside option is
2 indeed, you know, what other options -- which other --
3 in this case, which other suppliers can you turn to.

4 Now, in bargaining theory, that is often then not
5 made explicit as such. So how that translates into
6 a real world situation is, as long as, when you are
7 negotiating with someone, even if that -- let us say
8 with a buyer, even if that buyer is not explicitly
9 saying, you know, "I can ..." -- well, first of all
10 the buyer could explicitly say, "I am actually also
11 talking to so and so, so give me a competitive quote."
12 But even if the buyer does not say so explicitly, the --
13 in the framework, it is there, because the supplier may
14 often -- or, you know, may know or not.

15 But usually of course if it is a rational supplier,
16 they would be -- also and that is in the theory of
17 bargaining, they would be transparent about the fact,
18 because it is in their own interests to say, "Well, hang
19 on, I have got potentially another supplier; so if you
20 in the bilateral negotiations do not give me -- do not
21 budge, then I will go somewhere else."

22 So I know this is a bit theoretical, but it is
23 always there in that sense, even in a bilateral
24 negotiation, the fact that the buyer has other options.
25 So that is my point; and Mr Lomas, you referred to it as

1 well. I accept that in such a setting, where it is
2 purely bilateral but the other outside options are just
3 there in the background, they can still influence, but
4 they are there, it is more difficult -- it is a bit
5 further away from that ideal of a bidding market,
6 I accept that, than an RFQ or an ITT, which is more
7 explicitly, actually, a bid. But in my -- my opinion is
8 that the competitive dynamics that you can get is very
9 much still similar to what you get in the bidding
10 market.

11 Q. Sure, that is fine. But there has to be a reasonable
12 prospect of parallel negotiations in one form and
13 another, whether it is explicit or implicit; you cannot
14 just have a situation -- or rather, would you accept
15 that where you have a pure internal bilateral
16 negotiation, where A says to B, "I am only discussing
17 with you, I am never, ever going to discuss anything
18 with anybody ever again, it is just you," that would not
19 fall within the definition of "parallel"?

20 A. Correct. If a particular university was completely
21 locked in or beholden to E&R and E&R knows that, then
22 you have the situation that you just described.

23 Q. That is very kind(?), thank you.

24 You mentioned your discussion with Mr Lomas. Could
25 we go to transcript {Day6/100:3-5}, please. Actually,

1 if we go to the previous page, because otherwise
2 I cannot play you in {Day6/99:1}:

3 "I think it is also fair to say, is it not --it is
4 not a criticism at all -- but in doing your analysis,
5 you find it difficult to form a view of how many bidders
6 there were as a general rule; and sometimes you could
7 identify competing bidders, and you have named them in
8 your report. But you do not have any general feel for
9 how many bids went in for those ITT or RFP responses."

10 You said "correct"; and that is the position: you do
11 not have any general feel for how many bids went in for
12 those ITT or RFPs?

13 A. Correct, not a general feel. I think there were some --
14 there were a few instances where there was some
15 information on that, as I described in the paragraph
16 that we just looked at, but not a general feel.

17 Q. That is good, thank you.

18 Just moving to a different topic. You would agree,
19 would you not, Dr Niels, that the prices at which E&R
20 hire directly -- or sell, but we are talking about the
21 hire market really -- gowns to graduates are usually,
22 under the OSAs, pre-negotiated with the university?
23 The prices at which E&R sells to the graduands is
24 pre-negotiated with the university, so there is no
25 possibility, within the context of those OSAs, for

1 students to negotiate or renegotiate the prices with
2 E&R, a set?

3 A. Yes, that is my understanding.

4 Q. Thank you.

5 You would accept that the claimants' preferred
6 counterfactual represents a scenario in which the OSAs
7 across the board do not exist, or if they do exist, they
8 do not confer preferential access, and suppliers compete
9 to provide academic dress hire to students directly.

10 Before you answer that, I will take you to
11 paragraph 4.91 of your report, your first report
12 {E6/1/105}. So it is paragraph 4.91. So this is you in
13 your first report:

14 "Going back to the counterfactuals specifically put
15 forward by Churchill, as I set out in section 2A, I
16 consider Churchill's complaints relate to a significant
17 extent to the way the market operates at present, with
18 universities seeking a range of graduation services
19 alongside academic dress from suppliers, whereas
20 Churchill's preferred business model is to supply only
21 academic dress directly to students. The preferred
22 counterfactual proposed by Churchill is consistent with
23 this, and represents ..."

24 What I just said, which is:

25 "... a scenario in which OSAs either do not exist or

1 do not confer preferential access and suppliers compete
2 to provide academic dress hire to students directly."

3 You would accept that, because it is what you say?

4 A. Yes. No, I did my best to try to understand and reflect
5 the claimants' position as clearly as possible, and
6 I did note that on the opening day you also cited me, my
7 summary of the claimants' case.

8 Q. Dr Niels, you are a delight to have as an expert in
9 proceedings and you set out things, certainly where
10 I have referred to them, very clearly, and I am grateful
11 that you have set out the claimants' case so clearly,
12 and that is why I referred you to it. So I just wanted
13 to make sure that we had not moved away from that.

14 You would also agree, would you not, that on
15 the analysis of the relevant market as you see it -- and
16 we had a little debate about whether this is a product
17 or geographic description, and it is probably a bit of
18 both -- on your analysis of the relevant market being
19 ceremony hire on a university-by-university basis --
20 that is your analysis, is it not --

21 A. Yes.

22 Q. -- the relevant market being university-specific. So on
23 that analysis, which, for the avoidance of doubt, we do
24 not accept, but on that analysis, on your own case, an
25 OSA with that particular university, so in that

1 particular micro relevant market, would necessarily
2 restrict prices insofar as students were concerned,
3 which is what we have just clarified, and also, by
4 definition, given it would contain exclusive supply
5 obligations, it would restrict access to other suppliers
6 to that particular university, which comprises
7 a specific relevant market. So it would deny or
8 restrict access to that market, and it would impact on
9 prices in that market, by definition?

10 A. Yes, by definition, by design, this is actually how
11 bidding markets work. Competition is for the market, so
12 competition takes place before the OSA is awarded. So
13 along all those dimensions, there is competition. But
14 once it is awarded, there are, by design, certain
15 reductions in the OSA which make things -- which
16 restrict certain things for other market participants,
17 correct.

18 Q. Thank you.

19 Now, just moving on to abuse. If the relevant
20 market -- and I know you do not accept this, Dr Niels,
21 but just put yourselves in our shoes for a moment -- is
22 for direct supply, which we have also called "the B2C
23 market", yes -- so direct hire, direct B2C -- then you
24 would agree that there are significant barriers to
25 entry -- and again, before you go to that, I will take

1 you to the joint expert report at paragraph 3.21, which
2 is {E7/1/18}, 3.21, this is going to be one of those
3 where we have to flip over. You have got it in hard
4 copy, Dr Niels?

5 A. Yes.

6 Q. It is probably going to be easier to read it in hard
7 copy. I will read it slowly, and then you can turn your
8 page, and we will turn our page electronically.

9 So this is the statement on which you have both been
10 asked to comment is:

11 "There are significant barriers to entry in
12 the market for supply of academic dress to students (ie
13 the B2C/direct hire market)."

14 Yes.

15 You say:

16 "Neither agree nor disagree."

17 So this is the column on the right-hand side:

18 "The fact that direct hire suppliers find entry
19 difficult follows from the assumption that
20 the agreements between universities and official
21 suppliers are exclusive, and from the way the market for
22 graduation services ..."

23 "Is", I assume, rather than "if", yes?

24 A. Yes.

25 Q. "... [is] currently organised. This should not be

1 confused with barriers to entry in the market for
2 graduation services ... which I have shown to be
3 low ..."

4 So, could we go back to the beginning of that:

5 "The fact that direct hire suppliers find entry
6 difficult follows from the assumption ..."

7 So there are, you accept, that on that assumption
8 that the official agreements are exclusive -- and we
9 have seen the evidence that they are, and from the way
10 in which the graduation services market is currently
11 organised, that direct hire suppliers find entry
12 difficult; and therefore, I would assume, you would
13 agree that there are at least barriers to entry if --
14 you may not agree they are significant, but there are
15 barriers to entry.

16 A. Yes, B2C suppliers struggle to gain a foothold in
17 the market -- well, whichever the market is; and as
18 I have explained, that is not surprising given the way
19 the market is organised.

20 Maybe just also to clarify, because the question
21 started about market definition and whether I agree or
22 not.

23 As I have said before, and we have had
24 the discussion a couple of days ago, if one defines
25 the market, or considers only the market for B2C or

1 direct hire or dress only, just conceptually that cannot
2 be the only market, because there is no dominance,
3 because E&R is not active in that market. This goes
4 back just to the point that I made earlier about there
5 are different types of relevant market, it is not
6 either/or.

7 There is a market for the full graduation services,
8 the market where, according to the theory of harm, E&R
9 is active and has its source of market power. Whether
10 the -- whether this market, the market for B2C, is
11 a separate market, I think you can -- we had
12 the discussion with Mr Lomas as well, one can describe
13 it as a market. It is not a market that is currently
14 really functional; and that is the reason why
15 I said "neither agree nor disagree". But I think
16 the proposition is clear that this market struggles to
17 get established, and therefore entry barriers into it
18 are also high.

19 My final point in this column is that, but that is
20 not to be confused with what I consider to be
21 the relevant market, the market for graduation services,
22 where entry barriers are not high.

23 Q. Thank you.

24 Just to make that good in your second report, if we
25 could turn to paragraph 3.22 of your second report

1 {E6/29/15}, so:

2 "Dr Maher further refers to potential reasons why
3 entry for suppliers of graduation services may not
4 be 'easy'. However, that is provided in the context of
5 seeking to demonstrate that entry conditions are not as
6 easy as they would need to be in the highly idealised
7 bidding market that she is using as a benchmark."

8 51 you refer to there as a footnote, and you
9 cross-refer to her paragraph 215 in her first report,
10 and then you describe the evidence provided by Dr Maher
11 includes various things.

12 Then you say, four lines down:

13 "I note that point (d) -- the fact that universities
14 procure services as a bundle -- is in my view not
15 relevant to this assessment because it only creates
16 barriers to entry for suppliers that wish to provide
17 only academic dress."

18 That is right, is it not?

19 A. Yes.

20 Q. So that sort of confirms the barriers to entry point.

21 Thank you.

22 Could we go back to --

23 A. Apologies, I mean, not to be --

24 Q. No, no, go on.

25 A. Not to be too picky on this point, but here I am talking

1 about barriers to entry in the market for graduation
2 services, so the full service provision. Here I am
3 saying that B2C providers who want to provide only
4 dress, they face an entry barrier into the market
5 for graduation services. But my other -- my general
6 proposition is that those competitors who are willing
7 and able to offer the full service, so the competitors
8 to E&R, for them, the barriers to participate in these
9 contests are not high.

10 Q. Yes, that is absolutely fine.

11 Insofar as the -- I am just wondering whether I need
12 to go there. Can we look at 3.22 of the joint expert
13 statement, which is at {E7/1/19}. This just makes
14 the point, because 3.21 -- can we just go up to 3.21,
15 sorry {E7/1/18} -- this is:

16 "... significant barriers in the market for supply
17 of academic dress to students (ie the B2C/direct
18 hire~...) "

19 So that is what we were discussing.

20 Then over the page {E7/1/19}, 3.22, looking at:

21 "... significant barriers to entry in the market for
22 the supply of graduation services to universities."

23 Which is what you were just talking about. You made
24 the distinction. Then you do not agree that:

25 "There are significant barriers to entry in

1 the market for the supply of graduation services to
2 universities."

3 You do not agree by referring to paragraph 3.10 and
4 3.15 in your first report, and then in section 3B.2 of
5 your second report. I wonder if we could go to -- so
6 this is you disagreeing that there are significant
7 barriers to entry in the graduation services market
8 rather than the B2C market, and you say you do not agree
9 because of the reasons set out in 3.10, 3.15 and 3B.2 of
10 GN2. So if we could go to 3.10 of your first report
11 {E7/1/13} to {E7/1/14}.

12 A. Just to clarify, I think the references here to 3.10 and
13 3.15 are to points 3.10 and 3.15 in the joint statement,
14 and I think they are very similar points to what I do in
15 the GN1 --

16 Q. Yes, you are totally right. You are totally right, and
17 actually, my note refers to the 3.10 in the joint
18 statement, so shall we go there. I think it does,
19 anyway. Yes. {E7/1/13} to {E7/1/14}, please. 3.10:

20 "The E&R Undertaking is subject to significant
21 competitive constraints in the market for the supply of
22 graduation services as part of the universities'
23 procurement processes."

24 So, Dr Maher disagrees and you agree, stating this:

25 "My analysis of the level of competition at

1 the procurement stage indicates that there are several
2 credible suppliers of graduation services in addition to
3 E&R. These suppliers are able to submit competitive
4 bids, have participated in universities' procurement
5 processes and have won appointments, including when E&R
6 was the incumbent provider."

7 So I am right in saying, am I not, Dr Niels, that
8 that analysis and determination is predicated on
9 the competitor full service suppliers to E&R being able
10 to submit competitive bids?

11 A. Yes.

12 Q. At paragraph 3.15, please, which is {E7/1/16}:

13 "The E&R Undertaking's long term relationships with
14 the universities provide it with a significant
15 incumbency advantage."

16 So, Dr Maher agrees and you disagree, and you say:

17 "My analysis indicates that, while E&R enjoys
18 a degree of incumbency advantage, this does not impede
19 the competitive process, and E&R is subject to
20 sufficient competitive constraints ..."

21 You then refer to 3D.5, 3D.8 and 3B.2, the first two
22 of which are in your first report and the last one is in
23 your second report, and those are the sections you
24 referred to initially in 3.21, are they not?

25 A. Yes.

1 Q. Thank you.

2 Could we go to 3D.5, GN1, which is {E6/1/67},
3 please. So this is 3D.5, "Competition on the merits and
4 the role of incumbency ...":

5 "To complement the win-loss [scenario] above, I have
6 conducted a further detailed assessment of ITTs and
7 feedback documents provided as part of the tender
8 processes."

9 So this section deals with ITTs and feedback?

10 A. Yes.

11 Q. It does not deal with anything else?

12 A. Let me just check --

13 Q. No, sure, absolutely.

14 A. -- double-check that it is not anything else, but I
15 think --

16 Q. By "anything else", I mean any other method of
17 appointment.

18 A. Oh, in that sense. I think, for this particular
19 section, that is correct, yes.

20 Q. Thank you.

21 Going to 3D.8, which is at {E6/1/72} to {E6/1/77}.
22 So 3D.8, "The role of incumbency: competition is close
23 when E&R is the winner ...". This is the same point:

24 "[You] assess whether, in participating in
25 procurement processes or in winning appointments, E&R

1 benefits from an incumbency advantage ..."

2 Then at 3.106:

3 "The evidence presented in previous sections already
4 indicates that suppliers alternative to E&R are able to
5 submit competitive bids and win contracts ..."

6 So, again, this is predicated on procurement
7 essentially, on ITTs?

8 A. (Pause). Yes, so I was just flicking through --

9 Q. No, no, no, take your time. It is your report.

10 A. No, I have finished.

11 But yes, correct, I think also this subsection is
12 referring to the evidence from the ITTs.

13 Q. Thank you.

14 Can we then go to 3B.2, GN2, which is -- sorry,
15 by "GN2", I mean your second report -- responsive report
16 -- {E6/29/13}. So 3B.2, "Shares of supply, competition
17 between providers of graduation services, incumbency
18 versus merit-based competition, and entry barriers":

19 "I have reviewed Dr Maher's calculations of
20 the share of institutions and students served by E&R and
21 broadly agree with the approach. The precise share
22 figures will vary depending on the specific assumptions
23 underlying them, but ... Dr Maher's figures and my own
24 are ... similar ..."

25 Then we talk about competitive restraint, and

1 talking about market share and barriers to entry.

2 Then at 3.21:

3 "As I explained in my first report, the assessment
4 of entry barriers in bidding markets should focus on
5 factors that may make it difficult to compete in
6 the bidding process."

7 Then you deal with providers of services.

8 Then over the page {E6/29/15}:

9 "The fact that universities' schemes are often not
10 made public, and that the official supplier is charged
11 with designing variation/updates ... this may create
12 a potential barrier ..."

13 Then you talk about IP rights.

14 Then can we go down again, and we have been to 3.22,
15 which is the "potential reasons why entry ... may not be
16 'easy'". So, you cross-referred to 3B.2 in your second
17 report for the purpose of making good the point you made
18 in your joint statement that essentially there are not
19 significant barriers to entry.

20 Again, this section, insofar as it refers to
21 appointments, would refer to ITTs and procurement?

22 A. Yes.

23 MR RANDOLPH: Thank you. I have no further questions.

24 THE CHAIRMAN: Right, we will take a break there.

25 MR RANDOLPH: How long?

1 THE CHAIRMAN: Ten minutes.

2 MR RANDOLPH: I am grateful.

3 (11.54 am)

4 (A short break)

5 (12.07 pm)

6 Re-examination by MR PATTON

7 MR PATTON: Dr Niels, you were asked about the RFQ from
8 the University of Kent, do you recall that, it was put
9 to you that that was from 2015? Can I just ask you to
10 look at {F2/236/2}. So this is the RFQ, and could we go
11 to the next page, please {F2/236/3}. Can you see, in
12 the table in the middle of the page, the penultimate
13 entry, "Delivery commences"; do you see that?

14 A. Yes.

15 Q. What date do you see there?

16 A. July 2016.

17 MR PATTON: Thank you.

18 Sir, that was the only question I was going to ask.

19 There was one question that my learned friend asked,
20 which was -- I hesitated to stand up, and it had
21 a number of parts to it. Unfortunately, because we do
22 not have LiveNote, I cannot establish what the question
23 was and my learned friend does not recall. We have
24 discussed this; he does not recall what it was. So
25 I think we will just have to make submissions about

1 the significance of that, if any, in closings.

2 THE CHAIRMAN: (Speaker off-mic) (inaudible).

3 MR PATTON: It was a question -- it followed on from --

4 there was a question about the fact that the OSAs fixed
5 the price that the student pays and that the student
6 would not be expected to negotiate with the official
7 supplier. There was then a question that followed from
8 that which, first of all, referred to price and then
9 referred to the expectation that other suppliers would
10 not find it easy to supply because of exclusivity. Then
11 the question culminated in saying that the OSA creates
12 restrictions for other suppliers, I think, and
13 the witness said "yes" and gave some context.

14 But anyway, I cannot take -- if I had a transcript,
15 it may be I would have sought to break that down, but
16 I obviously cannot do that.

17 THE CHAIRMAN: Okay, thank you.

18 MR RANDOLPH: Thank you, sir. Well, I think that concludes
19 the evidence. Then there is the --

20 MR PATTON: So can Dr Niels be released?

21 THE CHAIRMAN: Yes, of course. Thank you very much --

22 MR RANDOLPH: Oh, I'm so sorry. Yes, of course. Can
23 Dr Niels be released? I do not want to keep you there
24 any longer than you need to be. Thank you very much.

25 (The witness withdrew)

1 I think the only thing on the agenda at the moment
2 is timing for closings.

3 Housekeeping

4 THE CHAIRMAN: Yes. Before we do that, we have discussed
5 particular areas we could find assistance on. What
6 I propose to do is give you a list of six points, but we
7 will send something out in writing to confirm, so do not
8 worry about taking a precise note right now; I will just
9 give you an indication.

10 So the first area is, we would be assisted by
11 precision -- and we mean precision -- as to what
12 constitutes the alleged abuse within the OSAs, and,
13 again, with similar provision, the evidence that each of
14 you say there is to support the foreclosing effect of
15 that abuse.

16 The second area is just to consider whether you say,
17 either of you, that under Chapter II it is necessary to
18 show actual foreclosure, or just a reasonable and
19 credible risk of foreclosure.

20 The third relates to the relevance of
21 the counterfactual -- and by "counterfactual" here we
22 mean what would have occurred if the elements in
23 the other Ede & Ravenscroft OSAs which are said to
24 foreclose competition were not there -- and
25 the relevance of the counterfactual in two scenarios:

1 first of all, its relevance to the question whether,
2 assuming dominance, there was an abuse of that dominance
3 under Chapter II; and secondly, the question whether
4 there was a distortion of competition under Chapter I.
5 At present, the defendants point out that the claimants'
6 skeleton, at paragraph 132, appears to accept that
7 consideration of the counterfactual is relevant in both
8 of those circumstances, but we want to know whether
9 indeed that is indeed an agreed position, and if not,
10 what your submissions on that point are.

11 The fourth point: so far as the claimants' case is
12 concerned, we understand their case to be that if there
13 is no dominance, then they claim under Chapter I, and in
14 that regard their claim is based upon there being
15 a network of agreements. We would like some help on
16 what both parties say is meant by "a network of
17 agreements" for the purposes of Chapter I. That is
18 obviously directly relevant to the claim under
19 Chapter I, but it also has relevance to the construction
20 of the counterfactual if, in the counterfactual, it is
21 said that other B2B suppliers would take over
22 the market. There is, lurking within that, the pleading
23 point which was raised. That will need to be addressed
24 in full by both parties.

25 The fifth area, and this is an overall point with an

1 example, but the overall point is -- and I am sure you
2 are well aware of that -- the parties will need to
3 grapple, when considering the application of existing
4 principles and existing authorities, with the particular
5 circumstances of this case, that B2C operators are able
6 to compete with Ede & Ravenscroft in the B2B market and
7 that what is alleged to be foreclosed is the ability of
8 the B2C operators to compete for a part only of
9 the services provided at the B2B level -- that is
10 the direct hire of academic dress to students. So in
11 particular, how does the existing case law on volume
12 rebates apply given those precise circumstances.

13 The final point is, we would appreciate clarity from
14 both of you on how it is said that the four criteria for
15 exemption are met.

16 As I say, we will put those in writing.

17 MR RANDOLPH: Excellent. Thank you very much indeed, sir.

18 I think, obviously, Mr Patton and I are obliged, because
19 otherwise we might be ships passing in the night.

20 THE CHAIRMAN: Yes, that is not to say, of course, that
21 there are other -- (overspeaking) -- to deal with and
22 will need to deal with.

23 MR RANDOLPH: We will --

24 THE CHAIRMAN: Yes, I am sure.

25 MR RANDOLPH: -- but we will pay particular attention to

1 that.

2 So, the only other matter that is presently on my
3 radar and Mr Patton's radar is the timing of
4 the closings. Sir, you said on Monday that -- and
5 I looked up the transcript just to see what you said:

6 "[The closings] should happen nearer to this hearing
7 than ... the next; and we were thinking something like
8 a week for yours and a week thereafter for Mr Patton's,
9 but to be discussed between [the two of] you."

10 You also said that you wanted everything in it
11 rather than just facts, and I think, with respect, that
12 is very sensible.

13 The oral closings are fixed for three days from
14 12 to 14 April. You obviously wanted it earlier than
15 that.

16 THE CHAIRMAN: Is it? I thought it was two days?

17 MR RANDOLPH: Oh, sorry, maybe floating for three for two.

18 THE CHAIRMAN: No, I think it has to be fixed --

19 MR RANDOLPH: Okay -- (overspeaking) --

20 THE CHAIRMAN: -- (inaudible).

21 MR RANDOLPH: -- right, fine, then my diary is wrong. So
22 two days some time in that period, 12/13 or 13/14, but
23 obviously the tribunal will not be assisted by having
24 the closings closer to that hearing than closer to this
25 hearing, but we would respectfully submit that in

1 the particular circumstances of my and my junior's
2 availability over the next couple of weeks, if we could
3 have the tribunal's indulgence to file our submissions
4 by Friday the 25th of this month, and then a week later
5 for the defendants, the first week of March, which would
6 then give over five weeks before the oral closings, we
7 would be most grateful.

8 I mean, to put flesh on the availability bones, I am
9 actually away abroad on work next week. We live in an
10 electronic world, but I have got my papers and
11 everything else, it would just make it massively complex
12 for me; and my learned junior, to be totally fair, has
13 got a long-standing personal commitment, which was
14 impacted severely by COVID, which would be hugely
15 complex to change, and would have to be changed were
16 that position to remain as suggested. So we would crave
17 the tribunal's indulgence, please, and ask for the 25th.

18 THE CHAIRMAN: You have discussed this between you, have
19 you?

20 MR RANDOLPH: I have mentioned it, but we agreed that it was
21 in your hands, sir.

22 THE CHAIRMAN: Right, Mr Patton, what do you say about that?
23 How long do you want after that?

24 MR PATTON: If you are content with that. I mean, obviously
25 we have been bearing in mind what you said at the PTR,

1 that you might expect things quite quickly after the
2 hearing, so poor Mr Armitage has been burning
3 the midnight oil during the trial. But that is
4 obviously a matter for you. I think we would be content
5 with the week after that, if you are content with that
6 date.

7 THE CHAIRMAN: Yes, we think that is fair in
8 the circumstances. So 25 February.

9 MR RANDOLPH: 25th and then 5 March. It is
10 the Friday/Friday.

11 THE CHAIRMAN: Can we just make sure we are all clear on
12 the dates for the hearing, though. I would like to make
13 sure we have that pinned down.

14 MR PATTON: Yes, it is the 13th and 14th, the Wednesday and
15 the Maundy Thursday.

16 MR RANDOLPH: 13th and 14th I am very grateful, and I will
17 tell my clerks to change that, because it would be
18 unfortunate if I turned up on the wrong day.

19 Thank you very much, sir. Counsel are very grateful
20 for your determination to press forward in the manner in
21 which this case has been conducted, so thank you.

22 THE CHAIRMAN: Thank you.

23 MR RANDOLPH: I think it is the 5th, is it not? Oh,
24 the 4th, I do apologise. Thank you so much.

25 So it is 25 and 4 March.

1 THE CHAIRMAN: Yes.

2 Well, thank you to all counsel, all solicitors and
3 everybody who has participated so far in this case, for
4 your helpful assistance, and we will meet again in
5 April.

6 (12.18 pm)

7 (The hearing concluded)

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