

This Transcript has not been proof read or corrected. It is a working tool for the Tribunal for use in preparing its judgment. It will be placed on the Tribunal Website for readers to see how matters were conducted at the public hearing of these proceedings and is not to be relied on or cited in the context of any other proceedings. The Tribunal's judgment in this matter will be the final and definitive record.

IN THE COMPETITION

Case No. 1044/24/04

APPEAL TRIBUNAL

Victoria House,
Bloomsbury Place,
London WC1A 2EB

15th February, 2005

Before:
SIR CHRISTOPHER BELLAMY
(The President)
PROFESSOR JOHN PICKERING
RICHARD PROSSER OBE

Sitting as a Tribunal in England and Wales

BETWEEN:

M.E. BURGESS, J. J. BURGESS AND S. J. BURGESS
(trading as J.J. BURGESS & SONS)
and

Appellants

THE OFFICE OF FAIR TRADING
and

Respondents

W. AUSTIN & SONS
&
THE CONSUMERS' ASSOCIATION

Interveners

Mr. Peter Roth QC and Mrs. Jennifer Skilbeck (instructed by Howell & Co.) appeared for the Appellants

Mr. John Swift QC and Miss Kassie Smith (instructed by the Solicitor, Office of Fair Trading) appeared for the Respondent.

Mr. Cameron Maxwell Lewis (instructed by Brignalls Balderston & Warren) appeared for the first and second Interveners.

Mr. Andrew Macnab (instructed by the Legal Department, The Consumers' Association) appeared for the third Intervener.

Transcript of the Shorthand notes of
Beverley F. Nunnery & Co.
Official Shorthand Writers and Tape Transcribers
Quality House, Quality Court, Chancery Lane, London WC2A 1HP
Tel: 020 7831 5627 Fax: 020 7831 7737

PROCEEDINGS
DAY ONE

1 THE PRESIDENT: Yes, Mr. Roth.

2 MR. ROTH: Good morning, Sir, and good morning, members of the Tribunal. I appear with
3 Mrs. Skilbeck for the three Appellants, who are a mother, son and her daughter, trading as
4 partners under the name J.J. Burgess & Sons, so the name is an old one, and the firm has been
5 trading as funeral directors for over 160 years, and I will refer to them, if I may, as “Burgess”.

6 The Respondents, the OFT, are represented by my friends Mr. John Swift and Miss
7 Kassie Smith.

8 The First Interveners, are two companies, W. Austin & Sons (Stevenage) Ltd., and its
9 subsidiary, Harwood Park Crematorium Ltd., and they are represented by my learned friend
10 Mr. Cameron Maxwell Lewis. There is no issue that, for the terms of competition law, they
11 are of course one undertaking, and I will refer to them as “Austins” and refer to Harwood Park
12 Crematorium, where necessary to distinguish it, as “the Crematorium”; and Austins are also a
13 very long established family business, but Harwood Park Crematorium is much newer, it
14 opened in 1997.

15 The Second Interveners, formerly the Consumers’ Association, now called Which?,
16 are represented by my learned friend Mr. Jack Andrew Macnab, and I shall try and call them
17 “Which-Question mark”, but if I cannot get the right interrogatory tone in my voice I may refer
18 to them as the “CA”.

19 Sir, Burgess trade as funeral directors, as you know. They have three offices, at
20 Welwyn Garden City, Hatfield and Knebworth. I told you that the Crematorium opened in
21 1997. The Burgess Knebworth office opened in 1998, and is just one mile away from the
22 Crematorium. Austins are a considerably larger operation. They have branches in Stevenage,
23 Buntingford, Hitchin, two branches in Welwyn, and in June 2003, after the events with which
24 this case is concerned began, they opened a new branch in Welwyn Garden City, competing
25 directly with the Burgess branch.

26 THE PRESIDENT: Does that make three branches in Welwyn or is that the same branch?

27 MR. ROTH: Two in Welwyn and one in Welwyn Garden City. There is some evidence that they
28 are possibly in the course of opening a second branch in Stevenage, but I do not think anything
29 turns on it.

30 There is, helpfully, a map with a Decision, in annex 1, and if you take what I hope the
31 Tribunal has, a core bundle with the Decision at the first tab, and if you see the annex to the
32 Decision, there is a series of maps. I should say we do not have all the maps. There are
33 various pieces of information in the Decision which have been redacted from us, but we do
34 have map 1, and map 1 shows, rather helpfully, what I have just been referring to, and you can

1 see all the Austins branches, Buntingford at the top right, Hitchin at the top left, then one has
2 the Stevenage/Knebworth area, where there is Austins very close to them, there is the Co-op,
3 there is the Crematorium in bold, and there is Burgess in Knebworth, and then going down the
4 A1 you get to Austins, Welwyn, and you may want to know there they have got two branches,
5 Austins, so that is times two; then below that, Austins, Welwyn Garden City, and that is the
6 branch that opened in June 2003, a bit to the right Austins, Hertford, and then the two other
7 Burgess branches in Welwyn Garden City and in Hatfield.

8 While you have the maps open, if perhaps you could turn on to map 8, which is a
9 larger scale, so one sees everything I have just been talking about, but you also have, and these
10 are round dots, various other crematoria in a broader reach so that you have right in the middle
11 on the left the Luton Crematorium and down towards the bottom left, on the A41, the Garston
12 Crematorium, and you may care to note that is also referred to as the West Herts Crematorium.
13 Sometimes they use one name and sometimes the other which is a bit confusing. You will see
14 there are some others as well, Harndon Wood over on the right, and so on.

15 Sir, the history of this matter is somewhat involved because it has been going on for a
16 while, and Mrs. Skilbeck has prepared for the Tribunal a chronology and a cross-reference to
17 your bundles, setting out the various events, and perhaps I might hand that up, with copies for
18 the referendaires. [Documents handed to the Tribunal]

19 THE PRESIDENT: Is it available to the other parties?

20 MR. ROTH: Yes, they have all got it. So one starts with the date I have already given you, the
21 opening of the Crematorium. I am not going to run through it all, but just picking up a few key
22 days: you see the 16th January 2002, refusal of access to JJB by Austins – this is access to the
23 Crematorium of course – with effect from the 18th January for six months on the basis at the
24 end of six months we could reapply. Then assistance was received from local funeral directors
25 on one occasion, somebody called Gary Neil, more significantly from a firm called
26 Nethercotts, but of course they initially supplied the cars, did the funeral, and may clients had
27 to pay them for it.

28 So that runs down to, as you see, the complaint made fairly soon afterwards to the
29 OFT on the 21st January. On the 28th February, going down, the OFT's first Decision,
30 rejecting the complaint on the grounds that Austins are not dominant. On the 7th March – the
31 SAIF is I think the trade association of funeral directors – but more significantly, on the 7th
32 March JJB submitted an application to vary under what was then the procedure under s.47(1)
33 of the Competition Act.

1 On the 13th June, the six months now coming to an end, because initially it was a six
2 months withdrawal of supply, JJB asked to be readmitted, and Harwood Park said, “No, we’re
3 not going to have you any more”, and then some months later they complained to Nethercotts
4 because Nethercotts were now using some JJB vehicles to carry funerals. The OFT was
5 gathering information and you see there on the 13th November we supplied information and on
6 the 9th April 2003 the OFT took a further decision withdrawing their original Decision, their
7 reasoned Decision of withdrawal, and the reference is given for that.

8 THE PRESIDENT: So that was a year after the application to vary.

9 MR. ROTH: That was a little over a year – no, about a year after the application to vary – a year and
10 a month.

11 Then they sought further information, and you can see the chronology, going down,
12 the sort of information. There was a meeting on the 3rd June where our clients were told it
13 would take another one to two years until they could come to a decision – that should be JJB,
14 I am sorry, not to be confused with JJB in another case before the Tribunal.

15 THE PRESIDENT: I would call them Burgess if I were you, Mr. Roth!

16 MR. ROTH: I said I would call them Burgess except in the chronology. I will have to explain that
17 to my clients afterwards because they will be mystified by that.

18 Burgess would consider seeking interim measures, and indeed waited another couple
19 of months but then there was the first application for interim measures on the 18th August, and
20 then a month later the OFT refused to give interim measures, and on the 3rd February they said
21 that they hoped to produce a Decision in mid March. In early March they said, “No, it’s late
22 March/early April”, and then, very significantly for our clients, on the 22nd March of 2004 the
23 Crematorium stopped Nethercotts from assisting JJB, and would not take a Nethercotts
24 booking if there was JJB involvement. And on the back of that, because this was now total
25 exclusion for all customers of our clients, a second request for interim measures was made in
26 the light of that situation, made the next day. The last cremation was actually the 31st March
27 because HPC said if a booking has already been made a few days in advance – obviously they
28 are not far in advance being funerals – that would be honoured, but no new bookings. So that
29 is why there is that extra week. And the 21st July we will come to; that is the result of the
30 intervention of the Tribunal.

31 On the 5th April the OFT amend their time-scale for the Decision to say, “We can’t
32 give any estimate at all and indicated that confidential clearance would be required before they
33 issued a decision. Following that, they rejected the second application for interim measures.
34 In late April they repeat there is no date for the Decision that can be given, and in the light of

1 that and the amendment to the Act with effect from the 1st May a third application for interim
2 measures was made based specifically on the experience of our clients since the complete ban
3 that took effect on 31st March. The Consumers' Association then became involved and also
4 made a request for interim measures. We do not actually have in the bundle a copy of their
5 request. We do have a copy of the OFT's response which was on 27th May, when they rejected
6 our client's application for interim measures and they rejected the application by the
7 Consumers' Association, of course making it clear that they are concerned, as one would
8 expect, the Consumers not particularly about Burgess itself.

9 On 1st June we were told the Decision now will be in weeks rather than months. On
10 11th June the Consumers' Association made a complaint to the OFT. There was some further
11 attempt by JJB to try and meet with Austins and come to some settlement, and that came to
12 nought and on 24th June there was the Appeal to this Tribunal against the refusal of interim
13 measures – so that was an interim measures' Appeal. That, whether by coincidence or
14 otherwise had the effect that five days later the OFT said the Decision would be produced the
15 next day and on 30th June it was produced; and it was, as you know and no doubt have read, a
16 non-infringement Decision.

17 14th July was a CMC at the Tribunal which you, Sir, and your colleagues will recall. I,
18 of course, do not but Mrs Skilbeck does. An arrangement was made that there would be
19 limited interim access pending the hearing of this Appeal for Burgess to HPC on the basis of
20 postcodes, and the postcodes, as I understand it, covered essentially Stevenage area. They did
21 not cover the Welwyn, Welwyn Garden City area. That took effect on 21st July.

22 THE PRESIDENT: I think at some stage, Mr. Roth, and others represented here, we would be glad
23 to have some up to date information as to how that has been working since we made that order,
24 what has been happening on the ground.

25 MR. ROTH: Yes, certainly, we will attend to that. So we have effectively three periods as far as one
26 can break down what has happened on the ground. There is 18th January 2002 to 31st March
27 2004, no direct bookings by Burgess at the crematorium, access only for the first part of that
28 period if the actual funeral was carried out by Nethercotts.

29 THE PRESIDENT: Yes.

30 MR. ROTH: There is evidence that our clients had to pay Nethercotts £X for work they did. Then
31 there is the period 1st April 2004 to 21st ----

32 THE PRESIDENT: That was presumably, well you are going to help us to what extent that £X was
33 recovered from the clients, customers at some point, but do not stop now in your ----

1 MR. ROTH: I have mis-spoken, I am sorry. There was quite a lot of material redacted as between
2 the OFT and us, as between us and Austin, that figure I should not have mentioned.

3 THE PRESIDENT: Well, it is out now.

4 MR. ROTH: I am afraid so. I thought I was completely on top of what is public and what is not. 1st
5 April 2004 to 21st July 2004 complete ban, total exclusion. 21st July 2004 to today limited
6 access only by those postcodes of the customer. The third period, as you will appreciate, is of
7 course post-Decision.

8 THE PRESIDENT: Yes.

9 MR. ROTH: There is one preliminary matter. There is a very short supplemental witness statement
10 from Mrs Burgess, which I ask permission to file. It has been seen by our friends and the other
11 parties.

12 THE PRESIDENT: Is there any objection?

13 MR. SWIFT: No objection.

14 MR. MAXWELL LEWIS: There is no objection. We have only seen, of course, a redacted copy.

15 THE PRESIDENT: Yes.

16 MR. ROTH: In fact, there is a slight correction which Mrs Burgess has made this morning. I am not
17 quite sure who gets the original, but if I hand up three copies and an original. [Documents
18 handed to the Tribunal] This is the redacted version. If I can just explain, it really does two
19 things. First, it sets out how many branches are there in Welwyn Garden City and Hatfield,
20 how many funeral directors? Secondly, it sets out the position of the three branches up to the
21 period of 21st July, and therefore covering that period of the total ban, and those figures have
22 been redacted from the copy served on Austins. So the OFT have the unredacted copy, you of
23 course have the unredacted copy, but Austins do not have the figures in the table under para.6.

24 THE PRESIDENT: We may need to consider that a little, Mr. Roth, because I think at an earlier
25 stage in this case some figures have been given to you on a lawyers only basis, and I am not
26 sure whether we should not do the same thing in reverse as regards Austins.

27 MR. ROTH: Yes, I can take instructions on that. There are quite a lot of figures we have not got on
28 a lawyer only basis about Austins' business, including quite a lot of the Decision.

29 THE PRESIDENT: It is rather unsatisfactory, I know, at the moment.

30 MR. ROTH: We were going to make an application, the OFT has very sensibly now supplied us
31 with those figures on a lawyer only basis that we were particularly concerned about because
32 they played quite a large part in the reasoning, and we were really handicapped. We have now
33 got those, but there are various other things we have not got and we would welcome guidance
34 on that.

1 THE PRESIDENT: Yes, it is not an issue we have really grappled with yet in this case, but it may
2 be an issue we do need to grapple with. Just give me a moment.

3 (The Tribunal confer)

4 PROFESSOR PICKERING. Mr. Roth, in relation to the figures that you have provided, and without
5 quoting the individual numbers, I observe that you have converted four months into an
6 annualised figure by multiplying by three. I would have imagined, but please correct me if I
7 am wrong, that there is a fairly significant seasonal element in funerals and if that is so would
8 not a period through the spring and early summer of 2004 be rather less than for other times of
9 the year?

10 MR. ROTH: May I just take instructions from the experts? (After a pause) Sir, you are absolutely
11 right. Two points – to a very limited extent it is busy in the winter, which is I am sure what
12 you had in mind. But this in fact errs the other way because the four months used are March to
13 July, not the very busiest period, which is the winter period, so in fact there is a slight – I say
14 “errs the other way” there is a slight difference. What my clients have said to me is it is very
15 small, there is a slight increase in deaths in the winter.

16 PROFESSOR PICKERING: I understand that, thank you.

17 MR. ROTH: Thank you.

18 MR. SWIFT: May I just intervene on a small point? The OFT are happy for the Appellants to have
19 all the figures in the Decision on a lawyer-only basis, I do not want there to be any doubt about
20 that, we are not withholding any of the confidential information from Burgess’s lawyers.

21 MR. ROTH: I am very grateful for Mr. Swift’s intervention. It has, if I may say so, come a bit late.
22 We have been trying to get those figures and the OFT has been refusing, and it is nice to get
23 them such that we can consider them after our opening submissions, but it would be
24 appropriate if the OFT can make that disclosure to do it before the case starts, especially when
25 they have been asked to. But I make that as a comment.

26 THE PRESIDENT: Mr. Swift, is this a late change of front, or has this been the position all along?

27 MR. SWIFT: I can only speak as to the date on which I was given instructions in this matter, Sir. I
28 am only aware of one request for information that came in last week, and once I and Miss
29 Smith saw that we very readily agreed with our solicitors that that information should go over
30 and that was done on Friday afternoon. I am not aware of the previous history of this. But
31 while I am on my feet, we would appreciate some guidance from the Tribunal as to how the
32 latest information is going to be tested. Plainly, my learned friend may put it in but the
33 numbers are critical as Professor Pickering has rightly pointed out, how they have arrived at

1 the numbers, what inferences are to be drawn, and without being able to discuss the numbers I
2 doubt whether much progress can be made.

3 MR. ROTH: On the first point, Mrs Skilbeck tells me there was a whole CMC devoted to this issue
4 of disclosure and the Tribunal may recall that where we sought to get more and were refused
5 by the OFT, so I appreciate since Mr. Swift has been instructed that is the position, but there is
6 a history behind it.

7 On the second point, as far as the branches, paras. 1 and 2, subject to slight confusion
8 between Welwyn and Welwyn Garden City, it basically confirms what is in the Decision, so I
9 do not think there is any dispute. As far as Hatfield, how many funeral directors there are in
10 Hatfield, well, it is not a difficult thing to find out and, indeed, Austins will know. It is the
11 numbers that I think Mr. Swift was talking about. Some of them are not new numbers at all, it
12 is really the last column that is the new column. This is my client's evidence about the number
13 of cremations that Burgess has arranged. She is in the Tribunal, if you want her to say so on
14 oath, she will no doubt say the same from her records. I do not know what further testing is
15 involved. As far as inferences to be drawn, that is a matter for argument. So I really do not
16 follow what sort of testing of the evidence as evidence this required.

17 THE PRESIDENT: Let us take the various things in stages. First, as far as confidentiality is
18 concerned, I think it would now help the Tribunal to have a piece of paper from someone
19 which indicates who has got what and on what basis, I mean not just Burgess but the
20 interveners as well, so that we can see how far disclosure has already been made and we can
21 then consider whether there should be further disclosure, either in favour of Austins or in
22 favour of Burgess so that everybody feels comfortable that, so far as possible, we have a level
23 playing field while doing our best to respect what confidentiality there is. Some of these
24 figures, it has to be said, Mr. Roth, are now somewhat old – 2001 is four years ago and that
25 may be relevant in due course, but I do not think we can decide any issues of further disclosure
26 until we know who has what, and how important it is.

27 On the specific question of Mrs Burgess' witness statement, I would have thought at
28 this stage the whereabouts of various funeral directors offices is a matter of public knowledge
29 and the detailed figures I take it come from Burgess's records, so they can either be agreed as
30 figures, or the records can be inspected and verified, we need not hold up the proceedings
31 while that is done, but that can be done if necessary.

32 MR. MAXWELL LEWIS: Sir, can I just interrupt very briefly on that one point as to para.1 of Mrs.
33 Burgess's supplementary witness statement. I do not know whether anything is going to turn
34 on it but just in case it is seized to be relied on in terms of turnover per branch. My clients,

1 Austin, have one branch in Welwyn; it has two offices, and one is the chapel, one is the office.
2 So it has got the two locations but in fact it is ----

3 THE PRESIDENT: But it is one business, as it were.

4 MR. MAXWELL LEWIS: It is one office. It is one business location, it is just that one of them is
5 actually the chapel rather than the reception office where people go in and book.

6 THE PRESIDENT: Yes, that is a helpful clarification; thank you.

7 MR. ROTH: Could I just say we are not only grateful for the Tribunal's first point, but it would not
8 only help the Tribunal but it would greatly help me to know who has got what because I am
9 quite confused as to what each Intervener has got. I know what we have got on a redacted
10 basis and on a counsel only basis. So if the OFT could prepare that as regards their material on
11 the Decision, we will prepare that as regards our own material and they can be put together.

12 PROFESSOR PICKERING: Mr. Roth, in relation to our exchange on the numbers, you agreed that
13 the months on which you got – you offer four months data for 2004 – would be slightly lower
14 than an annualised or monthly average per year. The consequence of that of course is that
15 since you compare that annualised figure with an annual figure for 2003 while you admit that
16 you are understating the 2004 numbers, the consequence of that is that you are to the same
17 extent therefore overstating the proportion of drop.

18 MR. ROTH: Absolutely.

19 PROFESSOR PICKERING: I wonder therefore whether during the course of today or so the data
20 for the equivalent four months in 2003 might be available so that we could compare absolutely
21 like with like.

22 MRS. SKILBECK: May I just say something? We already have produced those figures in
23 Mrs. Burgess's first witness statement for almost the whole of that period on that comparable
24 basis for the purpose of the previous hearings, so it would just be a questioning of bringing that
25 up to date, Sir.

26 THE PRESIDENT: If you can draw our attention – tell us where we find that, Mrs. Skilbeck, in due
27 course.

28 MRS. SKILBECK: Would you like to know now or ----

29 THE PRESIDENT: Just signal when you have found the reference, yes. Yes, Mr. Roth – let us
30 press on.

31 MR. ROTH: There is a lot of paper in this case partly because of all these different applications to
32 the OFT, and it has covered a long period. So to help everyone, we hope, we have reduced our
33 essential case to a series of propositions which take into account some of the points made in
34 the OFT's skeleton, and take them on board. If I might hand those up; my friends have copies

1 of them. [Documents handed to the Tribunal] Can I just go through them. What I was
2 proposing to do was just to read them as they are the sort of road map of our submissions.

3 I shall deal with proposition 1. I shall then hand over to Mrs. Skilbeck, who has been
4 closely involved in this case since the outset, and she will develop the other propositions.

5 So firstly, standard of proof. We say the standard of proof that applies to all matters
6 arising under Chapter 2, Prohibition, is the ordinary civil standard, that is, the balance of
7 probabilities. However, the more serious the particular allegation the stronger and more
8 compelling must be the evidence to establish it on the balance of probabilities, hence stronger
9 and more compelling evidence is required to establish conduct amounting to an abuse than is
10 required to define the relevant market or determine that an undertaking holds a dominant
11 position.

12 Market definition ----

13 THE PRESIDENT: I do not think you need read the whole document to us, Mr. Roth. We can read
14 it to ourselves. Do you want to elaborate that first point, if that is what you are going to
15 elaborate?

16 MR. ROTH: I am going to elaborate the first point, which comes from the *Replica Kit* judgment of
17 the Tribunal.

18 THE PRESIDENT: What is the relevance?

19 MR. ROTH: On the standard of proof, which is in your bundle of authorities No.4 at tab 28.

20 Someone who does not like trees has copied the whole of this case, but in fact a very short part
21 of a long judgment dealing with a lot of other matters – p.56, para.195. There was an
22 argument before the Tribunal as to what the standard is, and this is the conclusion:

23 “In our view, the same balance of probabilities standard should apply to all issues
24 arising under the Chapter I Prohibition or, for that matter, the Chapter II Prohibition,
25 whether the issue is in some sense one of ‘primary’ fact or otherwise. Although the
26 appellants are, understandably enough, approaching the issue from the perspective of
27 this particular case, the Tribunal has to evolve a standard of proof that can be
28 reasonably and pragmatically applied across the whole range of issues likely to arise
29 under the Act.”

30 THE PRESIDENT: I do not think you have to read it all to us, Mr. Roth. Just tell us what you want
31 us to look at.

32 MR. ROTH: Then paras.199 to 200, and perhaps you could quickly scan your eye down those.

33 THE PRESIDENT (After a pause): Paragraph 200 has a very significant qualification at the
34 beginning of para.200, I am sure no one has missed. But just in case they have, it says:

1 “In these circumstances, you can find the balance of probabilities in a case involving
2 penalties ...”

3 MR. ROTH: Yes.

4 THE PRESIDENT: Which is not this case.

5 MR. ROTH: Which is not this case. Then perhaps just reading on, the dictum of Lord Nicholls, the
6 Tribunal adopts, the first half of 201.

7 THE PRESIDENT: Yes, more sure, yes.

8 MR. ROTH: From *Re H* – and that is what we rely on, and all we take from this long copy here, to
9 support our first proposition, and therefore market definition, and indeed dominance, because
10 dominance is not a recrimination, as it has been said, and indeed dominance may be the result
11 of success. You do not need the same degree of compelling evidence as conduct that amounts
12 to abuse ----

13 THE PRESIDENT: So there is a subtle difference, you submit, in three stages of the analysis, that is
14 to say, definition of dominance and abuse, and the further towards abuse you get the stronger
15 the evidence should be.

16 MR. ROTH: I would not put it, with respect, quite that subtly. We say that market definition and
17 dominance do not involve any unlawful activity or anything astonishing.

18 THE PRESIDENT: So it is just a straight balance of probabilities.

19 MR. ROTH: A straight balance of probabilities.

20 THE PRESIDENT: Or where they are ingredients of what is potentially a serious allegation.

21 MR. ROTH: Yes, but they are not in themselves – well, market definition, I say there is nothing
22 wrong about market definition. Market definition is a neutral exercise, it does not reflect on
23 anyone.

24 Dominance also does not reflect adversely on anyone as such, and the point that is
25 being made there, and that is the point in *Re H*, that when you are actually – someone is being
26 subject to an accusation of doing something where the conduct is unlawful, and there I am
27 thinking of a cartel agreement, but equally, as the Tribunal makes clear, abusive conduct, and
28 the evidence has to be more compelling to overcome the presumption of innocence. It is the
29 same standard of course; that is the fundamental point the Tribunal made. It is the balance of
30 probabilities standard. I think the example given in a case cited in an earlier paragraph I have
31 not read is Lord Hoffmann’s examine of the animal in Regent’s Park. Somebody said they had
32 seen someone walking with an animal on a lead in Regent’s Park, and you would need rather
33 more compelling evidence to convince you if they said it was a lioness than if they said it was
34 an Alsatian dog. It is a sort of common sense view of how one looks at evidence.

1 THE PRESIDENT: I think in his example the animal was not on a lead, it was just an animal, and
2 I have always found it a difficult example because Regent's Park proximity to the zoo means it
3 is about the only place in London you might have met such an animal!

4 MR. ROTH: I wonder if that point was put to Lord Hoffmann in the argument in the case, or
5 whether in deed that subsequently came into his analogy. But I think one sees what ----

6 THE PRESIDENT: But the underlying point is clear enough.

7 MR. ROTH: The underlying point is clear, and I think it all arose from the case of the ----

8 THE PRESIDENT: But it very much depends on the factual context you are in, because if you are in
9 the African bush then there would be a completely different likelihood ----

10 MR. ROTH: Absolutely. I think it all started with the case of someone claiming on a life insurance
11 contract and the insurers saying, "We're not liable to pay", a life policy on a husband, I think,
12 "because you actually murdered your husband". And this was a civil case so it was the balance
13 of probabilities, but that is a pretty serious allegation to make.

14 THE PRESIDENT: Pretty likely probably in some respects. It all depends on the factual context.

15 MR. ROTH: So that is our first proposition.

16 THE PRESIDENT: However, never mind. Let us press on.

17 PROFESSOR PICKERING: Could I just ask on this, I have a bit of a problem with your last
18 sentence, to see how it advances your case, because in this particular instance the OFT has
19 declared itself satisfied that there was not sufficient evidence to lead it to conclude that there
20 had been an abuse, and you seem to be saying in your argument here, "Fair enough".

21 MR. ROTH: No. We are only seeking, with respect, to set out the principle here. We then apply
22 that principle in our later proposition ----

23 PROFESSOR PICKERING: So you will be dealing with that argument later?

24 MR. ROTH: Absolutely. I am not ducking it, no. So when the OFT say in their skeleton argument
25 that there cannot be different standards of proof depending on whether or not there is a penalty
26 – perhaps I could ask you to look at that. It is in your core bundle at tab 10. It is para.9 on p.3.
27 "The Appellants appear to suggest a different standard of proof should apply
28 depending upon whether a penalty has been imposed or not. This is unfounded. The
29 OFT has power to impose a penalty in relation to any finding of infringement of the
30 Chapter 1 or Chapter 2 Prohibitions. When the OFT is considering whether there has
31 been infringement of the Chapter 1 or Chapter 2 Prohibitions it does not know and
32 cannot know whether a penalty will be imposed or not. It must first decide whether
33 the ... and then decide what action is appropriate in respect of that infringement."

1 I am ready to accept that there cannot be different standards of proof whether or not
2 there is a penalty but not for this reason. There is no power to impose a penalty if the turnover
3 of the undertaking – but a Chapter 2 Prohibition is less than 50 million in the year preceding
4 the infringement; that is s.40 of the Act and the Regulations under it.

5 Here we do not know the turnover of Austins - the OFT presumably does – but we
6 presume they must fall within that small business provision, and so the OFT would have
7 known early on in its investigation that this is not a penalty case.

8 THE PRESIDENT: In the first sentence in that para.9 there is a reference to a different standard of
9 proof. I appreciate this is a somewhat elusive area of the law, but the strict analysis is, I think,
10 that there is the same standard of proof, namely balance of probabilities, and that is quite a
11 flexible standard and how you satisfy that standard in any particular case depends on the
12 seriousness of the consequences and the person in question, and where there is a penalty are
13 the consequences more serious, or potentially more serious, than if not.

14 MR. ROTH: Yes, and I hope to make it clear by our first proposition we do not say there is a
15 different standard. What we are saying is ----

16 THE PRESIDENT: It is a somewhat semantic debate because in lay language you are sort of
17 mentally approaching the matter on a somewhat stricter basis than you otherwise would, and
18 you could arguably in ordinary words say you were applying a different standard. But, strictly
19 speaking, there are only two standards, the civil and the criminal, but within the civil there are
20 subtle differences.

21 MR. ROTH: Yes. Perhaps I was not putting it that way, but that is what I am seeking to say. We do
22 say that in fact not only is this wrong, saying the OFT could not know whether they might be
23 imposing a penalty or not because they would know straight away from the turnover, and we
24 say we assume on this, unless anyone corrects us, that Austins' turnover must be below 50
25 million from everything one knows about business. But there is some significance in this
26 exemption in the statute of s.40 because Parliament has exempted small companies, small
27 undertakings, from penalties, but there is no exemption from the prohibition.

28 THE PRESIDENT: But this argument would lead us to the proposition that it is easier to prove an
29 abuse against a small company than against a big company.

30 MR. ROTH: I am not saying that, first of all, there is a different standard, and secondly, the
31 proposition we have made is that one looks at the allegations about market definition,
32 dominance, abuse, and that is where the flexibility comes in. I am not suggesting that the
33 penalty point plays a role. I know you floated that suggestion, Sir, but we do not advance that.
34 There was also a director's disqualification, so there are potential serious consequences.

1 The other point I am now making is Parliament clearly is not saying that small
2 companies are exempt from the Chapter 2 Prohibition, it is saying, “No, they’re only exempt
3 from a financial penalty”, and they are therefore recognising that the prohibition can operate in
4 a local market, and in certain areas the market will indeed be very local, and that is of course
5 the case for funerals and cremations, and they are clearly intended to be covered, and that is all
6 I will say on proposition 1. I have perhaps made rather heavy weather of it because of the
7 semantic niceties.

8 If I may now hand over to Mrs. Skilbeck who will deal with propositions 2 and 4.

9 THE PRESIDENT: Good morning, Mrs. Skilbeck.

10 MRS. SKILBECK: Good morning.

11 THE PRESIDENT: We have read down through market definition, funeral directing service to
12 crematoria services.

13 MRS. SKILBECK: Perhaps I could just clear up a couple of points that my learned friend raised this
14 morning.

15 Firstly, the figure for the assistance given by Mr. Nethercott, the actual figure, which
16 is slightly different from the approximate figure Mr. Roth gave, is at tab 2, the Notice of
17 Appeal, at para.53, the redacted figure. What Burgess did was they paid Mr. Nethercott for the
18 services he supplied and for the disbursements that he would incur. The figure that you see at
19 para.53 is the figure paid to Mr. Nethercott with disbursements having been removed from that
20 figure; so that figure is the services provided by Mr. Nethercott excluding disbursements.

21 PROFESSOR PICKERING: Can I just clarify on that, presumably Burgess would have been able to
22 avoid certain costs that they would otherwise have incurred, had they been providing those
23 services rather than Nethercott?

24 MRS SKILBECK: Well, we discussed this some time at the CMC, but of course some of the costs
25 are common to all offices, for example the cars and the pall bearers, so that it may be that they
26 were sitting there idle during the period when Mr. Nethercott provided those for the Burgess’s
27 Later in the period in fact the Burgess’s cars and pall bearers were used. The extent to which
28 those costs were avoidable is a difficult issue. I agree in principle some might be, but I think
29 given that they were in particular pallbearers and cars that were in issue there is a limit to the
30 extent to which the costs were avoidable.

31 PROFESSOR PICKERING: Well presumably it costs a certain amount of money to run cars to the
32 crematorium, and I imagine that the pallbearers are not full-time employees.

33 MRS SKILBECK: Let me take instructions (After a pause) I am instructed that the pallbearers are
34 full-time, and there would have been some saving in petrol.

1 THE PRESIDENT: Yes, Mrs Skilbeck – let us get into the detail of the case.

2 MRS SKILBECK: If I may just mention that the figures that Professor Pickering referred to for the
3 three month period, they are found in the witness statement of Mrs Burgess which is vol.2
4 p.500.

5 THE PRESIDENT: Yes, so what do you want to tell us about them?

6 MRS SKILBECK: I am simply saying that the witness statement brings up to date ----

7 THE PRESIDENT: No, no fine, I want to get on with the case now, Mrs Skilbeck, if we may.

8 MRS SKILBECK: The market definition, Sir, if I could refer first to the OFT document, I suspect it
9 may be something you do not need.

10 THE PRESIDENT: We have a general idea of what the market definition is all about. We want to
11 know now how it works in this particular case.

12 MRS SKILBECK: Taking the hint from that, Sir, I would just simply leave it at this, that in
13 *Aberdeen Journals* the Tribunal did set out at paras. 86 – 104 their general views on the whole
14 issue of the relevant law in this case, and the proposition is there, and the extracts from other
15 authorities is what I am relying on and I will take the hint from you and not refer specifically to
16 the authorities perhaps, unless you invite me to do so.

17 THE PRESIDENT: Absolutely.

18 MRS SKILBECK: Moving swiftly on then to proposition 4, this is the market for funeral directing
19 services, and I would like to take you first, if I may, to the MMC Report on the merger of SCI
20 and Plantsbrook. That report, Sir, concerned a company that owned both crematoria and
21 funeral directing services and they purchased or merged with Plantsbrook which supplied only
22 funeral directing services. At the report para.219 which is in the authorities bundle 5, tab 29.
23 It is on p.11. It says:

24 “We have considered what area or areas were most significant for the purpose of
25 competition analysis, i.e. what were the appropriate geographical markets.”

26 THE PRESIDENT: We will read it quickly to ourselves. (After a pause)

27 MRS SKILBECK: If you could also look at 225 on the next page.

28 THE PRESIDENT: Yes. (After a pause) Okay, so the local areas in which most customers currently
29 look for services. I am not sure there is much dispute about that in this case, but we will see.

30 MRS SKILBECK: I do not think so, and this was adopted by the OFT in their Notice of
31 Withdrawal, that para.225, but I will not take you to it at present. Maybe it would be
32 appropriate to turn to the OFT Decision. Of course, the main issue here, since I sense the
33 Tribunal is already on top of this point, is that the OFT seemed to make relevant findings but
34 then concluded that they were only likely findings. The point that we want to make is that they

1 were certainly findings on the balance of probabilities, and if we were to look at the Decision
2 at para.54, it actually begins with the words, rather interestingly, “On balance the OFT
3 considers that Knebworth and Stevenage are likely to comprise of the”

4 THE PRESIDENT: Yes.

5 MRS SKILBECK: The OFT Decision in respect of the first area of Stevenage and Knebworth is
6 considered in more detail at para. 47 and 48-50. At 48 they set out the relevant evidence, the
7 vast majority of funerals are for deceased previously resident in the area, and in para. 49,
8 overall this indicates that demand for funeral directing services comes primarily from that area,
9 and then they test in 50 whether there is an argument against, and they do not seem to find one.
10 Looking at the practical evidence that can be found in maps 4 and 5 at the back of the
11 Decision. There are other maps that are relevant that we have not got relating to other funeral
12 directors, and you can see in respect obviously of Burgess’ offices, which is all I can talk to in
13 map 4, they are centred around Knebworth, and while we are looking at the map may I just
14 draw your attention to the other areas in which Burgess has offices, namely Hatfield and
15 Welwyn Garden City. That would seem to suggest or support the hypothesis that the OFT had
16 put forward.

17 The same applies to the area of Welwyn and Welwyn Garden City, that is set out in
18 the Decision at paras. 47, 51 – 53 where they make the same kinds of arguments as they did in
19 relation to the Knebworth and Stevenage area. It is slightly more complicated in respect of
20 Hatfield because since Austins does not have an office in Hatfield they did not think that they
21 needed to look at that area, that is set out in para.46.

22 THE PRESIDENT: Do we need to go into that?

23 MRS SKILBECK: We do, Sir, because the Hatfield office has been very much affected by the
24 refusal to supply, but whether you are asking me whether there is any doubt about whether
25 Hatfield is a separate geographic market for funeral directors?

26 THE PRESIDENT: Well what have we got to go on, because it is just not dealt with in the
27 Decision?

28 MRS SKILBECK: We have the maps to go on where the conclusions are the same. We have the
29 MMC report indications as to location instances, and we have the OFT’s acceptances of the
30 MMC’s report and we also have, which is rather a separate point, in 46 they say that the
31 Burgess Hatfield branch has made little use of Harwood. That is actually, in my submission,
32 not correct, Sir, because if I could take you briefly to annex 3 of the Decision and table 1, you
33 will see that under table 1 – “Funerals arranged by JJ Burgess in 2001” before the dispute, the

1 Hatfield office, it sets out the number of cremations at Harwood Park, and the total number of
2 cremations further along the row. You will see that the percentage is a significant one.

3 THE PRESIDENT: Just relating to it, there were not very many in 2002, as far as one can see?

4 MRS SKILBECK: It depends; there was a smaller percentage, that was at the point at which there
5 were difficulties in getting access to Harwood Park. The advantage of 2001 is because it was
6 before.

7 THE PRESIDENT: It is a clear period, yes.

8 MRS SKILBECK: May I just say at this point that one of the difficulties with the confidentiality that
9 Austins inevitably has a huge source of commercial information through running the
10 crematoria. They know exactly where all the work is coming from. Both they, and Burgess in
11 the relevant period – Burgess since the opening of the crematorium – have opened offices
12 which compete, and given that Austins have the superiority of commercial information it is
13 quite important for Burgess that they keep to themselves what information they have in a way
14 that might not be quite so strong a case in other situations.

15 THE PRESIDENT: Yes, I see.

16 MRS SKILBECK: Sir, that is the case on Hatfield, basically the relevant aspects of the geography is
17 the same as in the other markets. It is difficult to see on the basis of the Decision what
18 reasonable doubt there can be, if one is applying a test of balance of probabilities, that in fact
19 these are three separate definable markets for funeral directing services. In fact, it is quite
20 difficult to see what form of compelling evidence one could look for.

21 I now move on to proposition 6, which is the crematoria services. If I could take you
22 first to the Decision, para. 45. Again, it is a rather curious wording here, because it says that
23 on the balance of the evidence that is wider than Knebworth and Stevenage, and includes at
24 least the West Hertford Crematorium, and is likely to include all crematoria within a 30 km
25 radius.

26 Sir, I do not know if this is an appropriate point at which to make the observation that
27 if the OFT comes out and publishes a decision with statements of this kind in it, and it is relied
28 on as a statement of their position on the law by, for example, other funeral directors or
29 crematorium in the country, it would be quite difficult to see how any party could go to the
30 courts and make a good case to the contrary when they had this kind of Decision against them.
31 For that reason, as much as anything, I think one has to interpret a statement like 45 as
32 meaning that any normal person reading it would conclude that that was in fact a conclusion.
33 It is not a legal submission as such, it is more a matter of practical policy.

34 THE PRESIDENT: Well it is headed “Conclusion”.

1 MRS SKILBECK: Yes, but likely ----

2 THE PRESIDENT: It says that they have concluded.

3 MRS SKILBECK: Yes.

4 THE PRESIDENT: But the question is what have they concluded? They have concluded, you say,
5 that it is wider than Knebworth and Stevenage, it is at least as wide as West Herts. I do not
6 know if you would contest that?

7 MRS SKILBECK: I am about to, yes. I am just trying to understand ----

8 THE PRESIDENT: Yes, and then there is a 30 km radius.

9 MRS SKILBECK: Yes, I am just trying to actually understand what the OFT's position is.

10 THE PRESIDENT: Where does the 30 kms come from?

11 MRS SKILBECK: They, of course, say this is not a finding, it is only likelihood.

12 THE PRESIDENT: I see, yes.

13 MRS SKILBECK: They do not set out what crematoria fit in within the 30 kms radius, but hey do
14 set out at para.58 what they say are those crematoria. Now, they do not actually give any
15 distances, and there is a simple map behind the Appeal, which shows that on an "as the crow
16 flies" basis, St. Marylebone is not within that radius in any event.

17 THE PRESIDENT: Which map are we looking at now?

18 MRS SKILBECK: At the back of the Appeal, which is tab 2, there is a very brief map with the
19 various crematoria marked, and you will see that they are marked with a single cross, and you
20 will see that they are all towards the outer edge of the area, and St . Marylebone is beyond it.

21 Of course, driving times are critical in measuring distance and also the actual distance
22 on the roads, and the OFT has, subsequent to its Decision, submitted various calculations based
23 on the RAC route planner. If you adopt the same approach to the distances of these
24 crematoria, Sir, you will see that the actual distances are more than 30 kms, except in the case
25 of two of them, those are set out in our skeleton, which is at tab 9, at para. 75.

26 THE PRESIDENT: Yes, let us have a quick look.

27 MRS SKILBECK: You will see that even West Herts., which is the one that features most in the
28 Decision is 32.8 kms.

29 THE PRESIDENT: I do not quite follow the relevance of the driving distance between Harwood
30 Park and the other crematoria?

31 MRS SKILBECK: Because the Decision suggests that the relevant geographic market is a radius of
32 30 kms around Harwood Park.

33 THE PRESIDENT: But why should you start with Harwood Park? Why should you not start where
34 the funeral director is? Normally that is where the Chapel of Rest is and so forth? It does not

1 seem logical to start from Harwood Park, which his the destination not the starting point? That
2 is what they have done in the Decision but no doubt we will have an explanation for it.

3 MRS SKILBECK: Sir, our submission is that the relevant market is actually the market in which
4 Harwood Park is the nearest crematoria ----

5 THE PRESIDENT: Yes, to the funeral directors.

6 MRS SKILBECK: Or the deceased person, or whatever it might be.

7 THE PRESIDENT: Or the address of the deceased.

8 MRS. SKILBECK: ---- whatever it might be. I am first telling you or showing the Tribunal what
9 the Decision is that is made and the Decision itself is, even in its own terms, faulty.

10 THE PRESIDENT: Sorry, we just ought to look at the corrected version. These latest OFT figures,
11 we find them where?

12 MRS. SKILBECK: No, I am sorry, I misled you there. There is an amended para.4 of their skeleton
13 which deals with a different point, but in which they discuss the travelling distances from
14 different towns to various crematoria, and it is in that context that they use the RAC route
15 planner.

16 THE PRESIDENT: Where do I find that, Mrs. Skilbeck?

17 MRS. SKILBECK: The replacement is at tab G, p.612, our second volume.

18 MR. ROTH: It is the very last page.

19 THE PRESIDENT: Yes, I am there.

20 MRS. SKILBECK: Sir, if you are looking at that page I may perhaps make an observation here, that
21 while the route planner may be accurate looking at the distances, it is not accurate on guide
22 times if you are considering a funeral cortege. We have a certain amount of evidence. I do not
23 think this is necessarily the moment to take you to that evidence, but part of that evidence, for
24 example, is that to drive from the Knebworth office of Burgess to West Herts for a funeral
25 compared with Harwood Park adds about an hour-and-a-half to the journey. But we have a lot
26 of statistics in the application to vary at para.45, where there are some driving times, and
27 I think I will probably be taking you to these later.

28 THE PRESIDENT: Yes, we just need the references I think, and you have given us some of those.

29 MRS. SKILBECK: I might give you a few more as we go through, if I may.

30 THE PRESIDENT: Yes. Wait a minute, I am just looking at p.612. We have got customers in
31 Hertford, customers in Letchworth, customers in Welwyn Garden City, customers in Ware,
32 customers in Hatfield and customers in Hitchin, but what about customers in Stevenage and
33 Knebworth? We have not got Stevenage, have we - the sort of Stevenage/Knebworth area.

1 MRS. SKILBECK: No. I think there can be no doubt about which are their nearest ones. At this
2 point, Sir, all I was doing was trying to show that the RAC route planner had been considered
3 relevant as a source of measurement by the OFT in order to support the relevance of the figures
4 in my para.75.

5 THE PRESIDENT: Yes, but do you say that these new figures, among other things, undermine the
6 table in 50? I am just finding it.

7 MRS. SKILBECK: It is 58.

8 THE PRESIDENT: Yes, 58 of the Decision.

9 MRS. SKILBECK: That is what I am saying.

10 THE PRESIDENT: On any view, that does not stand any longer, you say.

11 MRS. SKILBECK: Precisely, Sir, that only Luton and Harndon Wood are within a 30 kilometre
12 driving distance of Harwood Park. While we are on that table there is of course another
13 difficulty with it, which is that if you are using it to calculate market shares, a large number of
14 the customers or clients of, for example, Luton, will come from an area well outside the 30
15 kilometres of Harwood Park, and you can ----

16 THE PRESIDENT: Yes, the nearer you are to the boundary the more customers you have got from
17 outside the circle.

18 MRS. SKILBECK: Exactly, and I think the OFT have accepted, as I understand it, that their
19 calculation of market share is inaccurate. That is para.60, where they say it is 15.6 per cent. It
20 will obviously be very, very much higher than that if you get your circles correct and if you
21 restrict the number of crematorium. In fact it may be possible on the conventional tests to
22 show dominance in that area, but it is not our submission that that is the relevant area.

23 I would like to move on now to another aspect in defining the market for the
24 crematorium, and that is the way in a consumer makes their choice of crematorium. There is
25 quite a bit of evidence on this scattered throughout the information, all of which I have to say
26 was – all the evidence I am relying on or was materially available to the OFT at the time it
27 took its decision. The OFT document itself, which you will find at tab E in the second bundle,
28 at p.455 ----

29 THE PRESIDENT: This is the consumer survey, is it?

30 MRS. SKILBECK: Yes, that is exactly what it is. Page 438 gives you the ----

31 THE PRESIDENT: It is an inquiry into the funerals industry, yes.

32 MRS. SKILBECK: Yes – OFT 346. In this section, on this page, they are deciding the kind of
33 advice that might be available to consumers and they say at 4.11:

1 “Given that many local authorities actually produce literature the Office believes
2 small changes are required...”
3 etc. Then in heavy type it says:
4 “We recommend that a template is employed”.
5 And this template is set out at p.494, and that describes a simple funeral, and in the final
6 column, “Provide a hearse to the nearest cemetery or crematorium”.
7 Similarly, there is another document at p.437. This is the advice that you will find on
8 OFT’s website, and if you look at the second set of bullets, the penultimate one again says,
9 “Provide a hearse to the nearest cemetery or crematorium”.
10 What is perhaps of more substantial interest are the views of the planning inspectors,
11 and these will be found in the first volume at tab 1C. Some planning reports were appended to
12 the application to vary, and if I could take you first to p.94. This is the inquiry actually into
13 Harwood Park, and if I could perhaps take you first, while we are here, to the previous page,
14 p.93, and to the final paragraph. It starts at p.87, the report. The bottom paragraph on p.93
15 says in the middle:
16 “You assured the Inquiry the facility would be open for use by funeral directors other
17 than your clients.”
18 And at the bottom:
19 “I give no weight to your arguments based on the convenience to clergy and doctors
20 in attending a crematorium near at hand or about legal documents. This is because
21 my concern is mainly with local mourners for whom nearness of a crematorium is a
22 matter of true need.”
23 And if I could take you also to Mrs. Burgess’s witness statement, which you will find again in
24 the second bundle at – and on p.91, I am sorry, before we leave that, the paragraph beginning
25 “Fourthly ...”, it says:
26 “... many mourners tend to be elderly. For them to have to travel these distances to
27 meet the appointment ... [etc.] causes extra distress. ... relieve the distress of local
28 mourners to have the opportunity to arrange a funeral at a crematorium close to their
29 homes.”
30 And in the paragraph after the one that begins “Fifthly”:
31 “... your clients have shown to my satisfaction a special need for a crematorium to
32 serve the Stevenage area, to provide mourners with facilities close enough to the town
33 to be reached conveniently, and this outweighs the visual damage.”
34 Mrs. Burgess’s witness statement is at volume 2, tab F, p.498. It begins at p.496.

1 THE PRESIDENT: I think one of the things we are interested in, Mrs. Skilbeck, is by whom the
2 choice is really made, is it the funeral director or the customer, and what evidence do we have
3 about that?

4 MRS. SKILBECK: Can I just show you ----

5 THE PRESIDENT: I do not want to take you out of your stride. You can come back to it at some
6 point when convenient.

7 MRS. SKILBECK: Yes, I understand. It is the witness statement at para.10:

8 "The journey from Knebworth to Garston takes a cortege around an hour to make.

9 Unsurprisingly, most people wish to spend as little time as possible driving ..."

10 Maybe I could ask you to read para.10?

11 THE PRESIDENT: Yes. (After a pause): I am looking at para.10, but also at para.9. If one is
12 looking at para.9, your Knebworth office is close to Harwood Park and West Herts is 21 miles
13 away. If, however, you are starting from Welwyn Garden City the branch in Welwyn Garden
14 City has Harwood Park at eight miles and West Herts at 14, and that might be more of a
15 choice, might it not?

16 MRS. SKILBECK: It might, Sir, and I am going to show you some figures which throw a great deal
17 of light on that observation.

18 THE PRESIDENT: Yes, thank you.

19 MRS. SKILBECK: I will take you straight to them, if you like, but I would prefer to ----

20 THE PRESIDENT: You come back to it when convenient.

21 MRS. SKILBECK: Thank you. I would like to take you back to the MMC report now, and this
22 partly answers the question you have just asked, and in particular at p.80. The MMC report is
23 in bundle 5 and it is the first tab. If you look at para.5.61, this is the observations of the
24 Mortlake Crematorium Board, and would you look at the third sentence beginning on the
25 fourth line, where it says:

26 "The Board told us that funeral directors used different crematoria for a variety of
27 reasons, including geographical convenience and previous use of a particular
28 crematorium by the bereaved family. Most funeral directors would use more than one
29 crematorium and the decision depended on the preferences of the client."

30 Then perhaps one of the most telling points is the information in the diaries that have
31 been kept by the Burgesses at various times for the purposes of this dispute, and if I can show
32 you first the ones attached to the application to vary, which should be in your core bundle at
33 tab 3. I am sorry, you will have to go to the first of the two bundles, and it is tab C at p.82. If

1 I may just take instructions for a moment. (After taking instructions): Sir, sorry, this is
2 redacted information. If you look at entry No.6 on p.82, here it says in the third line:

3 “They wished to have the service at Harwood Park as this was the wishes of the
4 deceased prior to death.”

5 And then at No.9, the second sentence:

6 “Our situation was explained to her and although she had discussed with her mother
7 prior to her death her wishes were for cremation at Harwood Park.”

8 And then at No.10, at the bottom:

9 “Mrs. X had taken out a Golden Charter pre-payment funeral plan with us some years
10 previously and her express wish was to be cremated at Harwood Park Crematorium.”

11 Over the page, at No.13 ----

12 THE PRESIDENT: I think matters that are redacted vis-à-vis Austins are a bit difficult for us to take
13 into account and base any findings on at this point, findings as to Austin I think.

14 MRS. SKILBECK: As my friend has pointed out, it is not adverse to Austins.

15 THE PRESIDENT: It is evidence tending to – maybe it is going to be agreed, I do not know, we will
16 see, but there is a general difficulty in relying on redacted information to prove a case, the
17 ultimate object of which is to find Austins guilty of an abuse of a dominant position.

18 MRS. SKILBECK: Maybe the answer is that we should consider over the adjournment what we
19 might put in and whether that objection extends also to something that is provided on a counsel
20 only basis.

21 THE PRESIDENT: It may do, which is why we do need to sort this confidentiality point out at some
22 stage.

23 MR. SWIFT: May I make an observation concerning this?

24 THE PRESIDENT: Yes, please do.

25 MR. SWIFT: I am not clear whether my learned friend Mrs. Skilbeck is proposing to leave the diary
26 there or whether she and Mr. Roth are proposing to come back to it, but I think it would be
27 insufficient for, for example, para.9 to be read into the transcript without having the last
28 sentence.

29 THE PRESIDENT: A similar point arises on para.10. I think this bit of evidence – perhaps you can
30 help us as well, Mr. Roth – this bit of evidence is a bit tricky, first of all, because not
31 everybody has got it and, secondly, because until you have actually seen the whole thing in its
32 full context it is a bit difficult to know quite what weight to put on it.

33 MR. ROTH: Yes, I fully see that. This was of course evidence that was attached to the application
34 to vary that went to the OFT, and indeed one assumes was taken into account in the Decision

1 withdrawing the original Decision, so as between us and the OFT there is no problem. It is
2 evidence that is relied on because of course it goes directly to your question about customer
3 preference and how customers make their mind up and it is fairly important, and we need to
4 find some way of dealing with the confidentiality that enables a fair hearing for everyone, but
5 equally protects the commercial interests of our clients who have already been gravely
6 damaged by the conduct that has brought them to this Tribunal, and if disclosure they have to
7 make in the course of hearing damages them even more that, of course, would be a most
8 unfortunate outcome. So it is a question of finding a sensible way through for the protection of
9 the interests of Austins. As I say, it does not arise as regards the OFT.

10 THE PRESIDENT: How difficult would it be just to blank out the names of this document?

11 MR. ROTH: We will certainly take instructions.

12 THE PRESIDENT: Think about it.

13 MR. ROTH: We take on board what you say and Mrs Burgess and Mr. Burgess have heard it as
14 well.

15 MRS SKILBECK: Sir, of course, if I could say first of all, I was picking out particular bits to show
16 directly the point you had raised as to how consumers choose the crematorium. The general
17 point, of course, is it goes absolutely to the competition between any funeral directors as some
18 of the substance of this which is why we need to think about it carefully.

19 PROFESSOR PICKERING: Mrs Skilbeck, you are presenting to us evidence of instances where the
20 customer wished to choose both the funeral director and the crematorium, and where faced
21 with a problem changed the funeral director in order to stay with their chosen crematorium.
22 That is the nature of the evidence to which you have just drawn ---

23 MRS SKILBECK: The ones I have referred to, yes, there have been some other counter examples.

24 PROFESSOR PICKERING: Exactly, and I just wonder whether there is a balance between the two
25 sorts of situation, the alternative, of course, being stay with the funeral director and accept their
26 recommendation for a different crematorium.

27 MRS SKILBECK: Precisely.

28 PROFESSOR PICKERING: Can you give us a flavour as to the balance between the two, please?

29 MRS SKILBECK: I will just take instructions. (After a pause) I am instructed that more have
30 chosen to stay with the crematorium than to stay with Burgess.

31 PROFESSOR PICKERING: Thank you.

32 MR. MAXWELL LEWIS: If I stand up at this point – it seems to me the more I hear of this, while I
33 am faced with blank pages, the more there is that I think I must be able to see, and probably
34 before the argument is advanced much further, because I do not know what else I should be

1 looking at. When this started a few moments ago I knew nothing of it and it seemed a fairly
2 general and not a specific matter. What we seem to be getting into is evidence which is
3 prejudicial and for that to be augmented by last minute instructions, themselves without any
4 figures on them, can give the potential to a bias in the balance of the evidence which I am not
5 in a position to redress or to even challenge. I think that is going to disadvantage Austins to
6 the point where they potentially can, as you have said, be found liable for something on the
7 basis where I am not in a position to challenge the evidence on which such a finding would be
8 based, or at least to comment upon it.

9 THE PRESIDENT: Yes, thank you. Perhaps you can help us – or perhaps your clients can help us,
10 Mr. Maxwell Lewis. What we are interested in just understanding, and I emphasise at this
11 stage we are just trying to understand the case, is to what extent in the experience of the parties
12 in front of us the choice of crematorium is something in which customers tend to express a
13 strong preference which the funeral director then carries out, or where the funeral director
14 gives advice and the customers accept the advice, or whether the customer tends to leave it
15 entirely to the funeral director, who goes to whatever crematorium suits him, and that maybe a
16 rather complicated question because it may depend on availability, and whether one
17 crematorium is full on a particular date, or how close you are and all sorts of things.

18 MR. MAXWELL LEWIS: A matter which had occurred to me, and which does not seem to have
19 been canvassed at all ----

20 THE PRESIDENT: We may not have in the record, as it were, and we must stick to the record, a
21 great deal to go on, I just do not know, that is why we are asking Mrs. Skilbeck what is in the
22 record. But insofar as your clients could help us, even in a general sense on that sort of point,
23 perhaps even between the parties there could be a measure of agreement that, for example, the
24 clients' wishes are very important but sometimes the funeral director gives - or whatever, that
25 would be one way of helping us just understand this case.

26 MR. MAXWELL LEWIS: Sir, my clients are here and listening to this, I hope that when we come
27 back after the adjournment we will be in a position to help you.

28 THE PRESIDENT: If you could just give us some help, basically. At the end of the day we have to
29 decide this case basically on the evidence, but we try in this Tribunal not to take too formalistic
30 and old fashioned a view as to how we receive information that should in principle be
31 information about which there should not be any real divergence of view. If there is a
32 divergence of view and we have not got the evidence then we cannot make a finding. To the
33 extent that you can collectively give views that are helpful to us then that is something that is
34 helpful.

1 MR. MAXWELL LEWIS: I will endeavour to see if we can help on this.

2 THE PRESIDENT: Thank you very much, yes. Mr. Roth, I think Mr. Maxwell Lewis has made a
3 fair point on behalf of Austins. It is quite difficult to carry all this through without them really
4 knowing what is going on.

5 MR. ROTH: Yes, I fully take the point on board and we will also look at it with our clients. The
6 flavour, of course, what has happened in general, namely that consumers often express a clear
7 preference for choice of crematorium. That is in the main body of the Notice of Application,
8 which is an open document at paras. 22 to 24 of then Notice.

9 THE PRESIDENT: Let us just look at that. What we were trying to do, I think, what we are trying
10 to do is to establish the paper trail to see what we have at this point, where it is and how far any
11 assertions are supported by any evidence that we have. So, Notice of Appeal?

12 MR. ROTH: It is in the application to vary, which is tab 3 in your core bundle at paras. 22. That is
13 the summary statement making the point.

14 THE PRESIDENT: We have the diary of events, we have the MMC ----

15 MR. ROTH: The diary is redacted, but the statement there that the clear preference, that was openly
16 on the record ----

17 THE PRESIDENT: Yes.

18 MR. ROTH: Then the MMC report emphasising that it should be, and then indeed a concern about
19 vertical integration of crematorium with funeral directors is that funeral directors should not
20 influence the customer's choice.

21 THE PRESIDENT: That is what you rely on, and that is what you still rely on in this Appeal.

22 MR. ROTH: Absolutely, then it is taken forward by Mrs Burgess in her witness statement where she
23 gives further details, and the numbers have been redacted, but what she says is ----

24 THE PRESIDENT: That is where?

25 MR. ROTH: That is in bundle 2 at tab F.

26 THE PRESIDENT: Yes.

27 MR. ROTH: There is para. 9 which you have already seen, but on a different point, I think.

28 THE PRESIDENT: That is her evidence that:

29 "...most customers who come into our two branch offices want a cremation at
30 Harwood Park, that is what they have that firmly in mind before the walk in the door."

31 That is her evidence.

32 MR. ROTH: That is her evidence before the Tribunal, and it has not been contested by anyone. That
33 evidence, of course, was available to Austins as well as the OFT to challenge, and saying "That
34 is not our experience, they do not do that with us", or whatever, their evidence, if they had it to

1 put in and they have not. Then she explains why, and gives some details as to why that should
2 be. Then she goes on to talk about actually what has happened with her particular clients, and
3 the figures in paras. 14 and 15 - there is only one figure in para.15 – as to the number of
4 clients and the number of cremations, showing the decline. Obviously those customers she is
5 talking about are customers who, when they came into Burgess would have been told “Well,
6 we can do West Hertfordshire”, and that goes down really to para. 17.

7 “A member of staff at Welwyn Garden City Branch reported a similar loss, during the
8 month of April we lost at least X potential clients who decided not to use us because we
9 could not provide cremations at Harwood Park.”

10 So there is clear open evidence that customers are coming in wanting Harwood Park and when
11 told they cannot have it they are going elsewhere, and the only thing that is not open evidence
12 is exactly how many.

13 THE PRESIDENT: How many is potentially relevant, I think. If it is a very small number, or a very
14 large number ----

15 MR. ROTH: It may be the numbers, one can also get then by the comparative tables, and I agreed
16 earlier at your invitation to look at what we can disclose from that, showing actually what are
17 the numbers year on year, because there is no suggestion that there is any difference in life
18 expectancy and death patterns one year on another. I was just trying to show you what is the
19 open evidence on this matter and what was there for Austins to respond to and challenge if
20 they had thought fit.

21 THE PRESIDENT: I think the procedural situation at the moment is that we are not going to be able
22 to take into account anything that has not been properly been made available at least to
23 Austins’ legal advisers as a first step, that is not in the open record. We need to be fairly
24 careful about taking in to account things we are told that pop up in the course of the
25 proceedings on the basis of “I will just take instructions on that” and “my instructions are”
26 whatever it is. As far as this Tribunal is concerned we really have to go on what is present in
27 the open record.

28 MR. ROTH: I fully accept that, equally I am sure you will accept when you ask us questions we do
29 our best ----

30 THE PRESIDENT: Everyone is trying to be helpful but we have to be as careful as we can.

31 MR. ROTH: I was trying to show you what actually is in, and indeed ----

32 THE PRESIDENT: No, thank you, well that is what we have.

1 MR. ROTH: This witness statement that I have just taken you to was not actually put in in the
2 Appeal stage, it was already put in in the interim measures' stage, so it has been there for quite
3 a long time.

4 THE PRESIDENT: I think you have taken us to what I wanted to know, which is where the material
5 that we can look at is.

6 MRS SKILBECK: The evidence I am now going to show you, Sir, is all open. One point I might
7 just add on the last matter is, of course, there are a large number of funerals sold on a pre-
8 payment basis where the deceased has already chosen the crematorium on the form, so that of
9 course is a simple case in which the client chooses.

10 On this one point I would like to take you to one further document, which is n the
11 public record. This is a planning appeal in the case of the area of South Crofty and you will
12 find this at tab C in the first bundle, p.121. The report begins at p.115. If you look at
13 para.3.11 in the middle there, it says:

14 "National figures indicate that in only 27 per cent. of funerals are the cremated
15 remains taken from the crematorium. In most cases they stay at the crematorium
16 which is therefore a place of remembrance which involves visits by family and
17 friends."

18 THE PRESIDENT: Yes.

19 MRS SKILBECK: I would like to move on now from the characteristics that are relevant in the
20 choice to look at some actual statistics supplied in the Decision, and that is annex 2A, which
21 has been updated by the OFT and the updated version is at Tab G of the second bundle, p.609.
22 The percentages have been supplied to us on a counsel only basis. What I do not know is
23 whether they have been supplied ----

24 MR. MAXWELL LEWIS: No, blank pages.

25 MRS SKILBECK: Sir, this was the subject of the case management conference, where this was the
26 limited disclosure that we obtained from the Tribunal in respect of annex 2A, and maybe it
27 would be appropriate if this was also disclosed to counsel for Austins.

28 THE PRESIDENT: I think it would.

29 MR. ROTH: Well, if I might intervene, Sir, I understood as a result of Mr. Swift's helpful
30 intervention we will all now be getting this complete table, so we are working on a partly
31 redacted version, Austins are working on a more completely redacted version, Mr. Swift has
32 the full version, it is a very unsatisfactory situation, but if we can be given the full version we
33 would be most grateful.

1 THE PRESIDENT: How do you want to proceed? I am very conscious of Mr. Maxwell Lewis's
2 position, with a great deal of argument going on mysteriously around him without really being
3 able to follow it. Is there any reason why he cannot look at this Annex 2A while the argument
4 is going on so he can at least follow the argument?

5 MR. ROTH: Yes, subject to the fact we cannot fully give it to him because we have not got it
6 ourselves, so perhaps we could have it as well?

7 THE PRESIDENT: I am looking at the one you have got. I thought p.609 was the one you had got.

8 MR. ROTH: We have it with some figures.

9 THE PRESIDENT: I thought that is what I was being taken to?

10 MR. ROTH: It is. But there are a lot of figures we have not got in it.

11 THE PRESIDENT: That I appreciate but for the time being, Mr. Maxwell Lewis has not even got
12 the figures that you have. It may be difficult because it has Burgess's figures in it.

13 MRS SKILBECK: Yes, it has.

14 THE PRESIDENT: It is difficult.

15 MRS SKILBECK: The figures that we have had supplied to us, are these percentages in bands. Sir,
16 if I can just explain what we have been supplied with, we have been supplied with the number
17 of cremations ----

18 MR. ROTH: If I can interrupt, our clients have said there is absolutely no objection to Mr. Maxwell
19 Lewis seeing it on the same basis we have – counsel only basis. There is no problem about that
20 at all.

21 THE PRESIDENT: Perhaps you can just pass it across to him then.

22 MR. ROTH (After a pause): There is no problem about that at all.

23 THE PRESIDENT: Perhaps you can just pass it across to him so he can see it. [Document handed]
24 We can supply a copy later.

25 MR. ROTH: Thank you.

26 THE PRESIDENT: That extends to your instructing solicitor, Mr. Maxwell Lewis.

27 MR. MAXWELL LEWIS: Thank you, Sir.

28 MR. SWIFT: May I just intervene on this point. I am not entirely ----

29 MRS. SKILBECK: This was not shown to your instructing solicitors. This is counsel only ----

30 THE PRESIDENT: I see, it is counsel only, I am sorry. What a pickle. We had better be careful for
31 the time being.

32 MRS. SKILBECK: The point to make from this table, and it is important, is that this is the table –
33 we were talking before about what the consumer – the consumer's choices as the consumer
34 might express them. Of course in economic terms it is much easier to look at what actually

1 happens in practice, and this is what this table shows. If you look down, and I am talking on
2 the basis of only having a certain number of figures myself, but in every case except one the
3 majority of funerals – of cremations go to the crematorium which is nearest even when some
4 crematoria are quite close.

5 The bands that we have been given, and I do not think there is any difficulty in me
6 saying what they are, range from 70 to 100 per cent. for the number of cremations at the nearest
7 crematorium. The OFT in their skeleton have actually said something rather different. It is tab
8 10 of the core bundle, annex p.30, and if I can bring your attention to para.8(a) and (b). Taking
9 (b) first, I think this is a mistake, that the reference here to Phillips's customers, and here I am
10 hampered to some extent by only having some of the figures – this is on p.611 ----

11 THE PRESIDENT: Wait a minute. Have we got another confidentiality problem here?

12 MR. MAXWELL LEWIS: I certainly have a blank page, Sir.

13 MRS. SKILBECK: You have a blank page?

14 MR. MAXWELL LEWIS: Page 611, yes.

15 MRS. SKILBECK: No, we have just given it to you. I have just given you pp.609 to 611.

16 THE PRESIDENT: No, it is para.30 of the OFT skeleton argument in the public domain.

17 MRS. SKILBECK: Sorry, I am at p.30, paras.8(a) and (b), and if we look at para.(b) ----

18 THE PRESIDENT: This is some information about another funeral director's customers.

19 MRS. SKILBECK: The figure that we have at our p.611 says between X and X per cent. I am sorry,
20 I should not have read that out. I simply invite the court to look and see whether the statement
21 8(b) is actually correct, or whether in fact Phillips do not, like anyone else, send the great
22 majority of their clients to the nearest funeral director – the nearest crematorium.

23 THE PRESIDENT: Hang on, you want to go to p.611.

24 MRS. SKILBECK: It says that Luton is the nearest and cheapest crematorium, and it is not clear to
25 me that that is not also the one in fact that most of those clients go to, but I cannot be sure from
26 the figures I have been given.

27 THE PRESIDENT: There would appear, at first sight, to be a conflict between the figure on p.611
28 and the figure in para.8(b) on p.30 of the annex to the OFT skeleton.

29 MRS. SKILBECK: Yes, thank you. And as for 8(a), that therefore remains the only case in which
30 clients do not choose to go to the nearest crematorium and, not surprisingly, that is the case of
31 one of Austin's branches, where they choose Harwood Park over the closest.

32 THE PRESIDENT: Yes.

33 MRS. SKILBECK: That mistake, if it is indeed a mistake, in 8(b), carries on to the rest of the
34 skeleton argument, because the OFT have done some kinds of calculations in which they

1 conclude, in para.9, that only a certain percentage of customers choose the nearest crematorium
2 - that is based on what appears to be a mistake in respect of p.611 - and the true figure is almost
3 certainly much higher. If I can refer you to the table on p.31, the first line is incorrect.

4 THE PRESIDENT: What about the rest of it?

5 MR. ROTH: If I can answer that: we have to rely on the OFT having ----

6 THE PRESIDENT: No, wait a minute.

7 MR. ROTH: Sorry, Sir.

8 THE PRESIDENT: I am just understanding the table. The table on p.31 tends to show that the
9 proportion of cremations at the nearest crematorium varies between 66 and 82 per cent. except
10 in two cases, Harpenden and Hitchin, one of which it is submitted is a mistake, and the other of
11 which it is submitted is explicable by the fact that that is an Austins branch.

12 MRS. SKILBECK: Yes, Sir. I have placed much more emphasis on the former point.

13 THE PRESIDENT: Yes, and, for whatever reason, if you took those two cases out and you rapidly
14 did a calculation you would get more than 66 per cent., I would have thought. I do not know
15 quite where you would get, somewhere in the mid seventies, I should think. Yes, very well.

16 MRS. SKILBECK: Thank you, Sir.

17 MR. MAXWELL LEWIS: Sir, I hate to do this again but just from my point of view I am still
18 somewhat in the dark because p.31 has got fully redacted figures in my copy of the skeleton.

19 THE PRESIDENT: I cannot see any reason at all why that should be the case.

20 MR. MAXWELL LEWIS: And the annexes are all totally blank in my copies of the documents as
21 well.

22 THE PRESIDENT: I cannot at the moment see any real reason why Mr. Maxwell Lewis at least
23 should not have everything. It is getting quite difficult. Mr. Roth and Mr. Swift, I am just
24 wondering whether we should not rise a bit early today and give you quite a bit of time over the
25 short adjournment to try and sort this out.

26 MR. ROTH: I hope the OFT, with Mr. Swift's helpful intervention, will take the hint. It is
27 extraordinary to me that the OFT skeleton and that table has not been disclosed to Austins.
28 I cannot for the life of me see why not.

29 THE PRESIDENT: If we gave a generous margin, and I know it will take up a bit of hearing time
30 but it probably is going to save quite a lot of toing and froing - if we rise now and resume at
31 half past two that gives us two hours, including time for lunch, which you must obviously take,
32 and perhaps progress can be made on some sensible basis between the parties on this
33 confidentiality issue because it is not satisfactory at the moment. How does that strike you,
34 Mr. Swift?

1 MR. SWIFT: I am very happy with that, Sir.

2 THE PRESIDENT: I am grateful.

3 MR. SWIFT: I have a general concern about the Tribunal's timetable, the way we are going.

4 THE PRESIDENT: Yes. I am beginning to get somewhat concerned.

5 MR. SWIFT: I said to my learned friend Mr. Roth this morning if he wanted to go on beyond three
6 I would not be objecting, but, with the best will in the world, I cannot see how we are going to
7 cover geographical market, dominance and abuse in half an hour to half past two.

8 THE PRESIDENT: I do not think we are, Mr. Swift, and I think we ought to – can I just invite the
9 parties to also consider in that period what are revised realistic time estimates for this case to be
10 properly argued, and see where we are as a result.

11 We will rise now and resume at half past two.

12 (Adjourned for a short time)

13 THE PRESIDENT: Yes, Mr. Roth.

14 MR. ROTH: We are very grateful for that time. We have, I hope and believe, reached a situation
15 which should solve the problems in that we, like the OFT on instructions will disclose
16 everything, all the redacted material to Austins on a solicitor and counsel basis, and I am sure
17 they will appreciate that some of what is said there about the detailed running of the business,
18 the accounts of the branches and so on is highly confidential.

19 THE PRESIDENT: Yes.

20 MR. ROTH: Particularly from a competitor, but we have handed over everything, and that includes
21 from the witness statement this morning. Indeed, there are few bits of information that on
22 reconsideration, having listened to the Tribunal our clients are happy to be disclosed on a
23 completely open basis.

24 THE PRESIDENT: Good.

25 MR. ROTH: Rather than take up time going through them tediously one by one, what I suggest is
26 we prepare a list overnight which we can supply you with in the morning, and we have
27 received from the OFT, of course, pursuant to the order. The only thing is, I suspect, no one
28 has had time to take in ----

29 THE PRESIDENT: I think that is the next point, because quite a lot has now been produced. I
30 would just like to explore with the parties how we do see the timing situation now, because (a)
31 there has been a lot of disclosure that has just happened, and (b) we have probably not been
32 running entirely to time this morning, so it rather seems to me a bit unlikely that we would
33 finish tomorrow evening in the ordinary course. I do not know whether anyone has any views
34 on that?

1 MRS SKILBECK: Sir, I am not sure how much longer I have because of course the Tribunal asks
2 questions, so it is difficult to estimate, but I would say about an hour to go if we are lucky.

3 THE PRESIDENT: How long did you anticipate, Mr. Swift?

4 MR. SWIFT: As long as it takes.

5 THE PRESIDENT: Quite, of course.

6 MR. SWIFT: The maximum I had under the timetable was three hours, I did not think I needed
7 three hours, but I would have thought an hour and a half. In that case, if my learned friend
8 says she can finish in about an hour, having covered dominance and abuse and the rest of the
9 geographic market then I wish her good luck, because there is quite a lot ----

10 THE PRESIDENT: Well, if the Appellants finish about 4 o'clock, say, we could at least start the
11 OFT this afternoon, we might go on a few minutes longer to make up a little bit of time, if that
12 is necessary, which would suggest that you would probably be through at least before lunch
13 time tomorrow.

14 MR. SWIFT: Certainly before lunch time, Sir.

15 THE PRESIDENT: Maybe even shorter, because when you boil the points down we have a lot in
16 writing.

17 MR. SWIFT: I am very happy to boil the points down because our submission is that the only
18 decision before this Tribunal is the OFT's Decision on abuse.

19 THE PRESIDENT: That is your submission.

20 MR. SWIFT: That is our submission. What the Appellants are seeking from this Tribunal is a full
21 finding of infringement in respect of product market, geographic market, dominance and
22 abuse.

23 THE PRESIDENT: That is a point that is going to need to be argued, I think. I think there are two
24 stages to this case, as I think I have said on a number of previous occasions at CMCs. The first
25 stage is whether there is anything at all wrong with the present Decision, and there may not be
26 anything at all wrong with the present Decision in which case the case finishes there. If there
27 is something wrong with the present Decision, by which I mean the Tribunal feels constrained
28 in some way to set aside the present Decision, there is then a real question, it seems to us, as to
29 what should then happen given the passage of events and so forth, and this is a situation in
30 which the Tribunal is in a position to take its own decision and, if it is, should it. Those are
31 points I think we need to explore with all parties and leave enough time to explore those points
32 in this course of this hearing, which may be an additional dimension that the existing timetable
33 has not fully yet taken I into account.

1 MR. SWIFT: I entirely accept that. The matter that is currently being argued before the Tribunal is
2 precisely one of those areas, namely the definition and scope of the relevant geographical
3 market.

4 THE PRESIDENT: Yes.

5 MR. SWIFT: On which you have our submissions fully set out in the appendix.

6 THE PRESIDENT: Yes, absolutely.

7 MR. ROTH: I think, on that basis, it means that Mr. Maxwell Lewis, who has had the greatest
8 impediment of redactions, will have overnight to read the material ----

9 THE PRESIDENT: I do not know how comfortable Mr. Maxwell Lewis feels about his situation,
10 whether you would like more time, Mr. Maxwell Lewis?

11 MR. MAXWELL LEWIS: Sir, I have just received these obviously and I have not had time to look
12 at them, let alone to try and digest them and to fit them into the arguments that have been made
13 by the Appellants to be in a position where I would be able to fully respond as much as I need
14 to. Of course that itself, as you have already indicated, is on two levels: one is to reply to the
15 appeal as it is currently formed. If we go beyond stages 1 and 2 and if this Tribunal were
16 persuaded of the need to actually make findings and decisions on the whole matter, including
17 abuse, then of course my client comes into the position of jeopardy which he might not
18 otherwise have been in, and if that be the case I think I might like perhaps to reserve my
19 position until that point to see if I need to do that, because of course then if this is going to be
20 effectively a trial rather than an appeal of course the question of fresh or other evidence and the
21 interpretation of this evidence, and perhaps evidence in response or rebuttal, needs to be
22 considered. So, if I may, I would like to reserve my position.

23 THE PRESIDENT: Entirely right. Just let me say this: if there was something wrong with the
24 present position the Tribunal has basically got three options, as we understand it, and there
25 may be argument as to whether we have actually got these options, but let me say at least
26 hypothetically what the options are. Option No.1 would be to quash the Decision and do
27 nothing beyond that. Option No.2 would be to quash the Decision and remit the matter to the
28 OFT, whatever "the matter" might be. And option No.3 would be to see whether this was a
29 case in which the Tribunal should take its own Decision under the relevant schedule to the Act
30 and, if so, what substantive and procedural considerations would enter into that option.

31 I think I did say at least once, and I think more than once in the course of these
32 proceedings, that certainly both options 2 and 3 are possible, i.e. we do not close off any option
33 at this stage, although that of course is subject to the hypothesis that the Decision is set aside,
34 and the Decision at the moment stands until it is set aside. So we do need to consider that sort

1 of last stage, and it does seem to me at the moment that, getting as far as we can in the two
2 days that we are allotted, it may still be sensible to think about the possibility of a third day at
3 some point, not necessarily consecutively but at some point, both to give you time to absorb
4 the material you have only just got and, secondly, for everyone to regroup and consider where
5 we are in relation to the hypotheses I have just outlined.

6 I am just exposing my thinking at the moment so that everybody can follow my train
7 of thought really.

8 MR. SWIFT: That is very helpful, thank you. I am thinking more about it as I speak; if there is
9 going to be a possible third stage to the proceedings then I am sure that I will be asking for
10 time to serve evidence in any event.

11 THE PRESIDENT: Yes. What I would suggest is this: let us proceed as far as we can today and
12 tomorrow, but let us not assume necessarily we shall be able to finish tomorrow; we may have
13 to find more time. We will have a further discussion probably at about lunchtime tomorrow to
14 see where we are. Does that sound reasonable?

15 MR. MAXWELL LEWIS: Yes, Sir. I think, from the point of view of my clients, if there was a
16 third day merely to finish off part 1 then obviously sequential would not be a problem, but if it
17 was to consider part 3 then it would be better after a delay in order for us to equip ourselves.

18 THE PRESIDENT: Yes. I would like you particularly to signal to me if you feel that you are
19 disadvantaged or uncomfortable about the amount of time you have had to react to what has
20 been happening so far.

21 MR. MAXWELL LEWIS: Perhaps I can address you tomorrow morning once I have seen where we
22 stand; thank you.

23 THE PRESIDENT: Mr. Macnab, you have been a bystander to a number of things that have been
24 happening since we have last had the pleasure of your attendance, and I am assuming you are
25 content that that should continue to be the case, not being involved in this particular battle.

26 MR. MACNAB: Certainly, sir.

27 THE PRESIDENT: Thank you very much. Yes, Mr. Roth and Mrs. Skilbeck, I think we just carry
28 on from where we were for the time being.

29 MR. ROTH: I thought my friend Mr. Swift wanted to say something?

30 MR. SWIFT: This is to put it into the record rather than asking you and the Tribunal to handle more
31 than two documents at the same time. There was a submission made by Mrs. Skilbeck in
32 relation to the use of Harwood Park by a funeral director in Harpenden.

33 THE PRESIDENT: Yes, said to be a mistake.

1 MR. SWIFT: A mistake. The mistake is in para.8(b) of appendix 1 to the skeleton at p.30: if
2 Harwood is replaced by West Herts, and I am instructed not only is that the correct fact but it
3 also makes the point on the aspects of choice and use of different crematoria.
4 THE PRESIDENT: I see. For Harwood read West Herts.
5 MR. SWIFT: And if West Herts is substituted for Harwood then that ----
6 THE PRESIDENT: Hang on; I have got it open in front of me. So your case is that although Luton
7 is nearest to Harpenden the vast majority of that undertaker's customers use West Herts.
8 MR. SWIFT: I would say that the position is accurately stated in annex 2(a) to the Decision, which
9 is also now in front of my learned friends.
10 THE PRESIDENT: But not yet, I am afraid, in front of the Tribunal, but no doubt it will be soon.
11 MR. SWIFT: Annex 2(a) is an annex to the Decision which I certainly hope is before the Tribunal in
12 whole form.
13 THE PRESIDENT: Sorry, yes, it is. Let us just see where we are.
14 MR. SWIFT: It is core bundle tab 1.
15 THE PRESIDENT: Yes, you are quite right.
16 MR. SWIFT: But I am not giving myself personal evidence as to the drive times between these
17 locations. That is simply correcting an inconsistency as between the text and the appendix to
18 the skeleton and the figures and percentages that are set out in an annex to the Decision.
19 THE PRESIDENT: I thought I have followed it and I have got lost.
20 MR. SWIFT: Sir, if you turn to p.30 of the Decision, which is the third page of annex 2(a).
21 THE PRESIDENT: Yes.
22 MR. SWIFT: You will see on the left-hand side "Harpenden".
23 THE PRESIDENT: Yes.
24 MR. SWIFT: Then there are three crematoria and each has a distance from Harpenden. Then the
25 percentages are in the right hand column.
26 THE PRESIDENT: Although Luton is nearer, they mostly use West Herts. Yes, I follow. Thank
27 you. Yes, Mrs Skilbeck.
28 MRS SKILBECK: We were discussing before annex 2A, which my learned friend has just referred
29 to, but I think I may have completed my observations on that. I would like then to move on to
30 the SNIP test, and I would like to take you first very briefly to show you the raw material on
31 which it is based, and if I could take you to volume 1, tab C, p.138. All I want to show you
32 here – these are tables produced by the Cremation Society of Gt. Britain, they are produced
33 annually. They show the number of cremations for every crematorium by year, 1 January to
34 31 December. They also show in one of the later columns the creation fee as at April 1st, 2000

1 or which ever year it happens to be. Unusually, I would guess, possibly quite exceptionally,
2 the OFT actually had access to comparable price data and quantity data for the various
3 crematoria it thought might be in its likely market over a period of time, which was available
4 for them to compare. I think it must be common ground that the SNIP test is invariably used if
5 the data is available. Now, some figures were provided in the application to vary but that was
6 some time ago, and they were updated for the purpose of the Appeal, but the figures in the
7 Appeal of course, were figures that were available to the OFT at the time they took their
8 Decision. Those figures will be found at tab 9 of the core bundle, para. 54. If it would assist
9 the Tribunal, or for that matter any of the parties, I have actually got tables which do no more
10 than reproduce the figures in those Cremation Society statistics in a manageable form – the
11 basic statistics – because here what I have put together is the percentage increase year on year,
12 so that, for example, the very first box shows between 1998 and 1999 the increase in price at
13 Harwood Park was 7.1 per cent. and the increase in the number of cremations was 0.7 per cent.
14 So this statistic is produced for a number of periods and in the final column there is the price
15 increase for 2003 to 2004 and no quantity data is available as yet. It is possible to see that with
16 I think one exception only that Harwood Park's prices have risen every year faster than all the
17 others – the one exception being West Herts. in the year 2002/3. Equally, in that period, the
18 number of cremations has gone up consistently, whereas in fact there has been an increase in
19 every year in the number of cremations, whereas for the other crematoria there has been a
20 decrease in at least one year.

21 The SNIP test suggests, as I understand it that if an undertaking can raise its prices
22 relative to others by a small but significant amount without reducing the number of items or
23 services it sells, then that is an explanation that it is, or evidence it is in a market of its own.
24 That, I would submit, is exactly what we have here, particularly when you look at the years
25 that have been relevant to the dispute before us, namely 2001/03, where the price rise has been
26 quite substantial, especially taken over those two years and the increase in the number of
27 cremations has also been quite substantial when compared with the changes in the other
28 crematoria.

29 THE PRESIDENT: Yes.

30 MRS SKILBECK: Equally, the price increase from 2003 to 2004 is higher than that at any other
31 crematoria, we do not of course know what effect (if any) that will have on the number of
32 cremations. So, Sir, my submission on that is that that is very strong and indeed compelling
33 evidence that the market contains only Harwood Park and indeed, compelling because the data
34 is surprisingly good compared with the kind of data one is usually forced to have regard to.

1 The OFT has made the point in its skeleton that in terms of relative price increases the
2 increases at Harwood Park are not too out of the way, they have come up with a figure of 9.6
3 per cent. I think it is over three years as a relative price increase. In looking at the relative
4 price increases, again I say with regard to the SNIP test you have to look at it in relation to any
5 loss of sales as well, so that if you can actually establish an increase in price and an increase in
6 turnover then those two must be looked at together, because if you regard, for example, 9 per
7 cent. over three years as being only a modest price increase then that must be associated with
8 no loss of market, I would suggest, whereas with a price increase that is not enormous, it is
9 associated with an increase in market share as well, then those two must be looked at together.

10 MR. SWIFT: Sir, I am reluctant to intervene at this stage, but I am not sure whether my learned
11 friend has finished on the SNIP test, but it might be helpful if my learned friend could explain
12 in para.57 of her skeleton, which is the market in respect of which it is alleged that Harwood
13 Park has increased its market share? I thought that the Appellants' contention was that the
14 geographical market was limited to that of Stevenage and Knebworth, which by definition it
15 would appear to be a monopolist.

16 MRS SKILBECK: No, our position on the relevant market is that Harwood Park is dominant within
17 the market with which it is the nearest crematorium, and that will extend to include Welwyn
18 Garden City, Welwyn and the edges of Hatfield as well, at the very least.

19 THE PRESIDENT: What do you say about what I understand the OFT's argument to be, and I may
20 be misrepresenting it and so I will be corrected in due course, which is that Harwood Park does
21 not price discriminate as between customers, depending on where they are coming from, and
22 that a substantial proportion of Harwood Park's customers come from a considerable distance
23 and that proportion is sufficient to keep some kind of competitive pressure on Harwood's
24 premises because if it did not at least those customers would go to some other crematorium.

25 MRS. SKILBECK: If I may take the first point first, it seems to me commercially quite
26 extraordinary for a crematorium to publish prices that gave different prices according to the
27 location where the individual resided. There is of course the exception, that some crematoria,
28 West Herts for example, do charge more rather than less to those who come from outside the
29 borough, but that is quite a different issue. That is not price discrimination in the sense that
30 you intend because the price is higher for those people.

31 THE PRESIDENT: Is that a municipal crematorium?

32 MRS. SKILBECK: It is municipal, yes.

33 THE PRESIDENT: So the good burgers get a discount for paying the rates all those years.

34 MRS. SKILBECK: Get a discount, yes.

1 The second point is, is there not a constraining influence on Harwood's prices because
2 a certain number come from outside the immediate area? Sir, with respect, that is exactly what
3 the SNIP test is there to establish, and if that were true then we would not see Harwood Park
4 increasing its prices so rapidly. It seems to me that the SNIP test is so central now, and that is
5 the precise point it is directed towards, that to argue that people from outside the area who
6 have a choice can constrain prices is to ignore the SNIP test altogether, which is of course
7 exactly what the OFT have done. In the application to vary it was set out very clearly, the
8 SNIP test and some figures and so on and, like nearly all the evidence in the application to
9 vary, it has not been referred to in the Decision at all. Since the OFT itself in all its documents
10 makes the SNIP test the central point in market definition, and since, as I said, the data is
11 available and was known to the OFT, it is quite surprising they did not look at it themselves,
12 but instead actually speculated that people from outside would have a softening influence on
13 prices without actually looking at the figures to see if that was the case.

14 THE PRESIDENT: Can I just put two points to you, Mrs. Skilbeck, which I put to you partly so that
15 Mr. Swift in particular can be thinking about it. They may both relate to the question of
16 whether the SNIP test is an appropriate starting point in this case at all given perhaps two
17 considerations: one is the point which question mark, if I have correctly identified this, the
18 two clients make in their submission that this particular purchase is made by the consumer at a
19 particularly difficult time, and it may not be that price is in the forefront of their mind as they
20 are making that particular decision – that is the first point, which I think is a point you make in
21 para.49 of your skeleton.

22 The second point I think really is implicit in para.58 of your skeleton, which is this,
23 that from the customer's point of view the charge for the crematorium is only one element in a
24 package of services that are being purchased from the funeral director, and that to the extent
25 that in a particular case one did not choose the nearest crematorium, it is at least imaginable
26 that the cost of the package from the consumer's point of view would tend to reflect the greater
27 cost of travelling a greater distance to another crematorium in terms of time and wages and
28 petrol and wear and tear and so forth. I do not know if there is any evidence on that last point,
29 but it may be indicate that the SNIP test is a somewhat complicated exercise to carry out in this
30 particular market.

31 MRS. SKILBECK: Sir, if we assume that consumers are not particularly price-sensitive, it
32 presupposes that they make no choice on some other basis, on some basis other than price, and
33 the question is whether they are elastic in respect of that, and I would say that annex 2(a) has

1 shown that they are not at all elastic, that they have a very strong preference expressed for the
2 nearest crematorium.

3 In addition, I agree that the SNIP test might not be the only evidence and, as a matter
4 of fact, it is the sixth point on market definition. It is not something I have relied on
5 exclusively by any means. So I think the question is one is looking in the round to see whether
6 there is some reason why people tend to choose the nearest crematorium, but in a sense the
7 figures speak for themselves. It is an issue in the expression of the consumer for the
8 businessman's preference, and not the options that he has before him. We have to look and see
9 whether the preference is expressed in a way that he cannot easily be dissuaded from it. If
10 I can put it this way; if it was easy to persuade a consumer to go to one crematorium rather
11 than another we would not be here today, and the Burgesses today would have no difficulty in
12 taking their clients to another crematorium, and we would have no need to be pursuing this
13 very difficult and expensive litigation that has been going on for months and it has been
14 extremely difficult.

15 THE PRESIDENT: Yes. So have we more or less done ----

16 MRS. SKILBECK: We have done market definition – no, I am so sorry. The only other useful point
17 to make I think is that the Burgesses would not have – this is similar to the point I have just
18 made to you, the Burgesses would not have needed to use Mr. Nethercott, or indeed another
19 funeral director if they had been able to substitute another crematorium.

20 Perhaps on that, Professor Pickering asked a question earlier about whether they could
21 not recover the money they paid from their clients and I rather misunderstood the question,
22 I am afraid, and gave you an answer to a slightly different question; and the answer is, yes, of
23 course the client in a sense would pay but, given the situation, the Burgesses could not expect
24 to make any profit, or any realistic profit, on a funeral conducted in that way.

25 THE PRESIDENT: So can we go on to dominance now?

26 MRS. SKILBECK: Yes, Sir. Sir, I do not need I think to remind you of the legal basis of
27 dominance, I would like here simply to point out in para.7 of the propositions, that it allows an
28 undertaking to ----

29 THE PRESIDENT: Yes. I think we have read that.

30 MRS. SKILBECK: Yes, and I would like to just stress the consumer angle in that. There is the issue
31 of market shares and the OFT accepts, certainly in its Decision at para.59, the AXO test, that
32 above 50 per cent. you need not ask any further, and that is a presumption of dominance that
33 can be rebutted. I have shown you annex 2(a) already and demonstrated, notwithstanding the
34 observations and corrections made by my learned friend, that the market share in the

1 crematoria market is defined as the use of the nearest crematorium, is over 50 per cent. on the
2 OFT's figures, I believe. This is look at page ----

3 THE PRESIDENT: This is p.96 of your skeleton – para.96 and/or para.97?

4 MRS. SKILBECK: Sorry, I was looking at the OFT's skeleton.

5 THE PRESIDENT: What market shares are you inviting us to say they have got?

6 MRS. SKILBECK: In every case in which Harwood Park is the nearest crematorium to a particular
7 office of a funeral director, over 60 per cent. In the case of Austins the figure is of course high.
8 The OFT in their table on p.31 of their skeleton – as we say, I have set it out in para.96, but
9 I cannot read out the figure. But it is equally set out by the OFT in their earlier skeleton at
10 p.31. As I drew to your attention earlier, Sir, in the decision the OFT were looking at an area of
11 30 kms which is much wider than the area that we are suggesting and in that case it is possible
12 that on a proper calculation of distances the crematorium is also dominant in that much larger
13 area. That is not directly relevant of course. The issue also arises as to dominance in the
14 market for funeral directing services and in the supply of funeral directing services in
15 Stevenage and Knebworth the figures are given in the Decision ----

16 THE PRESIDENT: Yes, well you already have a finding in your favour on that in the Decision.

17 MRS SKILBECK: Right, then in the other areas, of course, I am not sure now the figures we have
18 been given in the adjournment would enable us to draw any conclusions about Hatfield. So on
19 that basis of the simple market shares, we believe is a simple finding of dominance in both the
20 funeral directing services in Stevenage and Knebworth, and also in the supply of crematoria
21 services in the area which we have defined. It would be possible to add in the crematoria
22 services that another indication of dominance is elasticities which have already been covered in
23 the SNIP test. Those, Sir, are my submissions on dominance.

24 Moving on to the issue of abuse in which the OFT made a finding of no abuse, the
25 propositions are set out in paras. 10-12. I would like to draw particular attention to the point
26 at the end, para.10 that relative competition is one particular aspect of the responsibility of a
27 dominant firm not to impede growth, and that the responsibility is to be determined in light
28 of the characteristics of the market in question, which is para.11. Paragraph 12, the position in
29 respect of a vertically integrated undertaking is quite exceptional when they are dominant in
30 both the upstream and the downstream market, the responsibility not to abuse that position in
31 the downstream market must be that much greater.

32 THE PRESIDENT: And what is your authority for that?

33 MRS SKILBECK: It is a submission, Sir.

34 THE PRESIDENT: Yes.

1 MRS SKILBECK: Similarly, it is a submission that it is extraordinary that the OFT should be so
2 complacent about the potential exit of the only two other competitors in Knebworth and
3 Stevenage in a market that can be so described. Although I am going to develop these points a
4 bit more, of course where a firm is dominant with a very large market share, as Austins has
5 been found to have a market share of 79 per cent. in Stevenage and Knebworth – that is in the
6 Decision – that leaves only 21 per cent. for the other players who are, by their nature, bound to
7 be small. So if, and I would say it is not correct, but if you could argue that there was no harm
8 in losing a small competitor, that argument must be turned on its head when the dominant firm
9 has a very large market share, because by definition it will be exceptional market power, and
10 yet its competitors will be extremely small, and it is in a situation like that where the growth of
11 competition is something that any regulatory authority should have particular regard to, as
12 well, of course, as barriers to entry because I think it is on record with the OFT that the best
13 way of ensuring competition in any market is to do what you can to ensure that barriers to
14 entry are as low as is feasible commercially. We know, of course, in this case (it is in the
15 skeleton) that the barriers to entry in the crematoria business are enormous, and there are some
16 references in the MMC Report, and elsewhere, that there are barriers to entry also into the
17 funeral directing market.

18 The abuses in particular are impairing the free and undistorted competition in the
19 downstream market which is set out at 13(A). Before I move on to the abuses I might just
20 refer to a point that came up I think at the last CMC, and the issue of objective justification.
21 The OFT have made no finding either way on the matter of objective justification, and nor has
22 any been offered by them subsequently or by the Interveners. As a result, it has not been
23 appropriate for us to address the issue of objective justification but should it be relevant – we
24 would say it is not, but should it be relevant we would wish to have the opportunity to address
25 the Tribunal on that matter.

26 THE PRESIDENT: Yes.

27 MRS SKILBECK: I would, in the normal course of events, on the matter of impairing free and
28 undistorted competition in the downstream market take you to *United Brands* which I think is
29 an important authority in this case, and I would like to refer you to it. It is in vol.1 of the
30 authorities, tab 2. The paragraphs in issue are 182-194. I do not know if you would like me to
31 read it out?

32 THE PRESIDENT: No, we can skim read it and that will suffice probably. (After a pause): Yes.

33 MRS SKILBECK: Sir, I want to look at the effect on competition in two ways, namely, the effect on
34 Burgess and the effect on competition in the market, although I will not try and pretend that

1 they might not overlap, but I have in my mind that those are two kinds of effects that it might
2 be appropriate to look at. The OFT for a long time has maintained that it is only the effect on
3 competition that matters, and not the effect on competitors as well. I am not sure though if that
4 is still their position and in any event my submission is that either way you look at it the effects
5 are certainly great enough to bring them within Chapter II.

6 I would like to look first then effectively on the position that Burgess finds themselves
7 in and I would like to take you to annex 3 of the Decision. As I understand it, Sir, annex 3 is
8 now common as between all legal advisers, but not the parties themselves, so I shall not read
9 out any figures, but I would like to invite you first of all to look in table 1 at the bottom row –
10 the total – and consider the cremations carried out at Harwood Park as a percentage of the total
11 cremations that Burgess undertook in 2001 before there was any trouble. On any basis it was a
12 significant part of the Burgess business. I would then invite you to look at the same figure, but
13 on a branch by branch basis, and you will see at the top the percentage of cremations at
14 Harwood Park by the Knebworth office as a percentage of total cremations – this is looking at
15 the second and fourth columns. You will see the percentages, you can see that they vary from
16 branch to branch, but in every branch they are significant.

17 THE PRESIDENT: Yes.

18 MRS SKILBECK: I would now like to take you to tables 3 and 4 of annex 3, and I would like you to
19 consider the position of Burgess and Austins and the percentage increase in cremations that
20 each firm was able to achieve in the years 2001-2002. In looking at these figures I would ask
21 you to bear in mind that in 2002 Burgess did not have direct access to Harwood Park. I invite
22 you to consider whether, notwithstanding, they were a strong competitor to Austins.

23 THE PRESIDENT: In terms of the abuse, Mrs Skilbeck, how far should we distinguish between
24 what was going on in 2002 and I think up to 2003, March 2004 indeed, when Burgess was still
25 able to use Nethercotts, and the period since March 2004 when they have been excluded?

26 MRS SKILBECK: I was going to bring you on to that. The argument I am trying to develop, and
27 perhaps I should make it more directly, is that before the total exclusion and before indirect
28 access was available, at least at any time up to the total exclusion, Burgesses were a very
29 strong competitor to Austins, and they suffered hardship when they were only able to get
30 access through Nethercotts, but the real measure of loss can only be seen in the subsequent
31 period. But it would seem to me that one can posit a counterfactual, that if say during 2001,
32 and then maybe in 2002, though that would be more complicated, the Burgesses were
33 beginning to fall from the market then there might be some weight in the OFT's argument and
34 it really does not matter if J.J. Burgess does go out of business because there is still the Co-op

1 remaining. The point I am trying to make here is that Burgess is an important competitor in
2 that market, with every prospect of remaining so if it is allowed normal access.

3 In this connection, though I certainly do not want to make too much of this point, on
4 Austins' own figures they have lost part of their market share in the information. In the figures
5 they give for 2002 to 2003, it appears that Austins accounted for [X] per cent.

6 THE PRESIDENT: Careful. You what, you could not ----

7 MRS. SKILBECK: No, this is figures supplied in correspondence that has been shown to us
8 between Austins and the OFT.

9 THE PRESIDENT: It may or may not be appropriate to mention the figures in open court, I do not
10 know.

11 MRS. SKILBECK: Sir, there is not anyone here who does not know them, except perhaps the
12 Consumers' Association.

13 THE PRESIDENT: No, members of the public may be here; I just do not know.

14 MRS. SKILBECK: Sir, I am sorry, I will not – can I refer you instead to the correspondence. I am
15 so sorry, sir.

16 THE PRESIDENT: There is no need for any apologies, you just have to be very careful about
17 figures in public hearings.

18 MRS. SKILBECK: Can we take you to bundle 2, tab G, and look first at p.591. This is a letter dated
19 February 2002. The letter begins on p.590, and it is dated the 14th February 2002. If you look
20 on to the next page, I will read out the sentence without the figure. It is the second sentence at
21 the top.

22 “The number of funerals conducted at Harwood Park by companies other than Austins
23 have increased during this period to the extent that they provide X per cent. of our
24 cremation turnover.”

25 In other words, Austins provides 100 less X per cent. in that period, and I assume this is
26 approximately 2002, which is the date of the letter.

27 If I can take you then on to p.600, this is a letter written – it starts at p.599, and this is
28 a letter written a year later, in March 2003. There it says – I will read out the third sentence,
29 again without the figures:

30 “In 1997 Austins carried out X per cent. of the cremations at Harwood Park. Today
31 only Y per cent. of cremations are generated by Austins Funeral Service.”

32 I do not want to make anything of the 1997 figure at all because that is the year the
33 crematorium opened and it would not be a normal year at all and, as I say, I do not want to
34 make too much of this point in any event.

1 While we are on this page can I draw your attention to what is written under the
2 heading “Dominance of Harwood Park Crematorium”, the second sentence:

3 “I think it must be agreed that a crematorium could not viably survive if not exclusive
4 within its catchment area.”

5 That was a point that carried weight with the OFT in withdrawing the initial Decision.

6 I now want to look at the point that you raised, Sir, which is the loss since the total
7 refusal of supply. This was first introduced in the context of interim measures and is set out in
8 Mrs. Burgess’s witness statement. The witness statement is at p.496 of the second bundle. On
9 p.500, these are the figures that were in evidence then and which have since been brought up to
10 date in the witness statement that we served this morning, and what we did in this time was to
11 do exactly what Professor Pickering has discussed this morning; we looked at the period from
12 the total withdrawal of supply to the date virtually of the witness statement and compared it
13 with the same period for the previous year, and if you look at the top of p.500 and what is
14 para.13, we had a certain number in the relevant period in 2003 and another smaller number in
15 2004. In Welwyn Garden City, in para.14, we had – in the third line you will see the number
16 of cremations this year, for 2004 I should say, and two lines below we have the figure for the
17 previous year. Those figures show, on a comparable period by period basis, a loss to Burgess,
18 which I will not seek to describe in open court, but it is one that I think the Tribunal might
19 consider was within the brackets of an effect on competition.

20 I might at this point, but we intend overnight to re-do the figures, take you to the
21 witness statement that we produced this morning. I do not know if you have the witness
22 statement before you?

23 THE PRESIDENT: Yes.

24 MRS. SKILBECK: And taking Professor Pickering’s point in relation to comparing like with like,
25 we do not expect that the readjusted figures will show much difference. We have worked out
26 in the final column the percentage loss, a theoretical loss of course because of the way the
27 calculation has been done, to J.J. Burgess from each of the three offices.

28 I would like now, unless, Sir, you have any questions, to move on to the effect on
29 competition insofar as it is sensible to distinguish the two categories, and take you first to the
30 figures for cremations. I do not know – if I could take you to tab G, p.583. Sir, these figures
31 you ordered Austins to produce at the CMC and in fact at the CMC you indicated that they
32 should be put in descending order. That was not in the order itself and they have declined to
33 put them in descending order, but, given the disclosure that we have made on a

1 counsel/solicitor basis, we are hoping now that they will provide rather more detailed
2 information on this breakdown.

3 What can be said, however, is if you look at 2001, Burgesses were certainly the fourth
4 most important user of the crematorium. In February 2002, according to the crematorium
5 itself, and I will take you to that document in a minute, the Burgesses accounted for a figure --
6 rather than read it out I think I had better take you to the document -- I am sorry. That is at
7 volume 2, tab G, p.592.

8 THE PRESIDENT: Yes, you have just taken us to that figure, Mrs. Skilbeck.

9 MRS. SKILBECK: No, not at p.592, not in my tab G. I am sorry, Sir, this should be -- I have taken
10 you to this letter, and I am sorry but I did not take you to this figure, which I should have done
11 at the same time. On the final page of the letter, in the top paragraph, it explains how much of
12 the crematorium turnover Burgesses accounted for, and therefore looking at the table, and
13 looking at the years 2002 and 2003, it seems quite likely that they are, after Austins and one
14 other, the third largest user of the crematorium. That may not be the case but that is what those
15 figures tend to suggest.

16 I would like to take you back, if I may, to the MMC report again, at para.1.9. Sir, that
17 is in bundle 5, and it is the first tab. Paragraph 1.9 is on p.4 of the report itself. I would just
18 invite you, not because it is confidential but more efficient, to read through paras.1.9 to 1.12 to
19 pick up the point that, with a vertically integrated crematorium and funeral director, it was the
20 MMC's view, at least in the circumstances of a merger, that the integrated firm should not
21 have a market share of more than 25 per cent. in any area.

22 THE PRESIDENT: That is what they said in that case in relation to that particular merger.

23 MRS. SKILBECK: Exactly, Sir. I do not want to say you can necessarily take it across.

24 THE PRESIDENT: Yes.

25 MRS. SKILBECK: But I think it is indicative of what they felt in the specific circumstances of
26 vertical integration between crematoria and funeral directors. Sir, considering now what the
27 market position is in the three areas that have been identified. In Knebworth and Stevenage, as
28 we know, Austins have a high percentage which perhaps I should not repeat again, and it is one
29 of only three firms in that area, and the other one is, I believe, the Co-Op. So in Knebworth
30 and Stevenage it is just Austins, Co-Op and Burgess.

31 In Welwyn Garden City and Welwyn, there are only three competitors for Austins --
32 again Burgess, Warwick & Peters, and a third one, Coughlan Brothers, which is also owned by
33 the Co-Op.

1 In Hatfield there is only Burgess, the Co-Op and Oakleys, there is not Austins there
2 but it would be difficult to say that if Burgess were to lose its business or be seriously affected
3 it would have an effect on competition. I would say that self-evidently there is an effect on
4 competition if a single competitor is lost in these markets. If a competitor is lost, it would act
5 as a discouragement to new entrants, and a decision in favour of Harwood Park, if that is the
6 right way of putting it, could of course lead to further refusals by that company.

7 Similarly, as my learned friend has pointed out, if it is not lost but merely impeded
8 and the figures in the witness statement suggest a degree of impediment that might be suffered,
9 that would still have a significant effect on competition we would submit.

10 Sir, that finishes my submissions on the subject of market definition and abuse, and I
11 now turn to my learned friend, if I may ----

12 THE PRESIDENT: Presumably you maintain all the arguments that are in your skeleton argument,
13 one of which on abuse is under ground 8, paras. 92 onwards, the question of abuse in a
14 neighbouring market.

15 MRS SKILBECK: Sir, we do, and it is interesting how this has been dealt with by the OFT because
16 in their letter of withdrawal they identified it as something they would look at, whereas in their
17 Decision they have ignored it altogether. They have put an enormous amount of work, it must
18 be said, into looking at the market for funeral directors and they have then concluded that there
19 is no abuse in that market. Sir, we never alleged an abuse in that market. We alleged the
20 abuse was in the supply of crematoria, and they have not looked at that at all. Very much so,
21 Sir, we do maintain that, and we can make submissions on that if it would assist the Tribunal.

22 THE PRESIDENT: No, I think we have your argument.

23 MRS SKILBECK: (After a pause): Sir, my learned friend has just pointed out that I should draw to
24 your attention, though I think it is in the propositions, but the period when supply was
25 terminated altogether and assistance from Nethercotts was no longer available, that comes
26 under "classification" if that is the right way of putting it, of a complete refusal to supply,
27 whereas for the period before we would say that insofar as it is right to categorise these things
28 under headings at all that that was discrimination in the terms of supply, in the sense that
29 Burgess's clients could only use the crematorium through the intermediation of a third party.

30 Sir, unless you have any other matters?

31 MR. ROTH: Sir, that leaves only our 14th proposition which I can deal with in two minutes.

32 THE PRESIDENT: What are you inviting us to do, Mr. Roth, in this case?

33 MR. ROTH: We are inviting you: (1) quash the Decision; and then (2) to exercise, we say, in
34 para.14 your powers under Schedule 8 to make the order that the OFT could have made, that is

1 to find an infringement, and to direct that Austins shall supply services at the crematorium to
2 Burgess on a non-discriminatory basis. We say this is a classic case, given that you have been
3 given by Parliament that power to use in appropriate cases, where that should be used, where
4 all the material evidence necessary for the finding is before you. There is no need for any
5 further investigation. Indeed, al that evidence has been before the OFT, there is no substantial
6 new evidence for the Tribunal and we ask you to have regard, if it is the alternative of
7 remitting to the OFT to start its processes going, to the history of this matter, that the
8 application to vary it is then 13 months after that until the OFT produced its Decision to
9 withdraw, and once withdrawn, so the matter back in their court, it was a further 14 months to
10 produce the revised Decision. We say against that background this is a wholly appropriate
11 case not to go back to the OFT but for this Tribunal to use the powers that Parliament has
12 given it.

13 THE PRESIDENT: Yes.

14 MR. ROTH: Those are our submissions.

15 THE PRESIDENT: One point that has been raised I think by the Tribunal, but I am not sure that I
16 find it now raised by Burgess, is the question of procedure, which is in relation to the issue of
17 this Decision and the Tribunal's Judgment in *Pernod-Ricard* – is any point taken in that
18 respect?

19 MR. ROTH: I think a point was raised earlier at a CMC which, of course, I was not involved in.

20 THE PRESIDENT: The point in *Pernod-Ricard* is that you should give the disappointed party a
21 chance to comment before you issue the Decision.

22 MR. ROTH: Yes, we were very aggrieved about that, but I think Mrs Skilbeck dealt with that
23 earlier, and I would invite her to comment on that.

24 MRS SKILBECK: Sir, the *Pernod-Ricard* Judgment came out very shortly before the Decision and
25 a CMC and we made it clear that we did not wish at that point for any step to be taken that
26 would prolong the agony in this case, and we have set out in the Appeal, in the skeleton, the
27 nature of the failure to discuss any of the adverse findings. But as far as any procedure should
28 be concerned, it would not be constructive or helpful as the OFT have said for us now to enter
29 into discussions that they had failed to enter into at the time.

30 There is, of course, another point and that is that there is quite a lot of evidence in this
31 case, all of it was before the OFT. It is not a case where we have muddled along. We have
32 supplied everything they asked for in a very, very tidy fashion. The application to vary
33 contained an enormous amount of evidence, most of which is what I have relied on today.

1 THE PRESIDENT: Yes, thank you. Now, procedurally speaking, Mr. Swift, and this point has only
2 just occurred to me, we would normally now move to the OFT. I was just wondering whether,
3 since the clients whom Mr. McNab represents support the Appellant, whether it would not be
4 more sensible to have him first before you, so that you can reply to anything that he says as
5 well?

6 MR. SWIFT: An excellent idea, Sir.

7 THE PRESIDENT: I am sorry to catch you on the hop there, Mr. McNab. I should have been
8 clearer beforehand. Does that inconvenience you?

9 MR. MCNAB: Well, Sir, I had been hoping to polish up the final version, indeed, have the final
10 version with me before I was going to address the Tribunal. I do not propose to be particularly
11 long, but I would prefer to have actually written down what I was going to say before I said it.

12 THE PRESIDENT: Right, I think in that case we will allow Mr. Swift to carry on. I am sorry, it is
13 the Tribunal's fault for not making it clear beforehand.

14 MR. SWIFT: Sir, members of the Tribunal, some preliminary observations. The main burden of
15 my submissions will be to support the reasoning in the Decision and to use the skeleton
16 argument as my guide. Essentially these submissions are directed to support the principles the
17 OFT has adopted in respect of abuse of a dominant position, and the way those principles have
18 been applied in reaching a non-infringement Decision. It is trite law that those arguments turn
19 essentially on the interpretation of the case law of the ECJ and the CAT. My main submission
20 is that the OFT is right in favouring the principle of non-intervention, save in clear cases of the
21 elimination of competition or a substantial distortion of markets to the detriment of consumers.

22 I have four main propositions of which the first is going to be ----

23 THE PRESIDENT: When you say the principle of non-intervention, this case law applies in both
24 public law and private law, so it is not just a question of whether the OFT is going to intervene,
25 that is a decision they can take in a particular case, it is also a question of what civil rights the
26 parties may have in circumstances such as these.

27 MR. SWIFT: Certainly.

28 THE PRESIDENT: Non-intervention, one could postulate, is a different idea. It is a different idea,
29 unless you mean that competition law should not interfere, rather than that the competent
30 authority should not interfere.

31 MR. SWIFT: It comes down to the question of the reach of competition law.

32 THE PRESIDENT: So competition law should not interfere?

33 MR. SWIFT: But as a competition authority the emphasis of the Office of Fair Trading should be on
34 the promotion and retention of conditions of competition.

1 THE PRESIDENT: I just want to be clear that you are talking about the reach of competition law,
2 not just the cases in which the OFT wishes to intervene.

3 MR. SWIFT: Sir, the first proposition is that the OFT was right in deciding that Harwood Park
4 crematorium had not abused a dominant position in the refusal to supply its services to Burgess
5 with effect from January 2002.

6 The second proposition is that the OFT was right in limiting the scope of its Decision
7 of June 2004 to the issue of abuse. In a non-infringement Decision the OFT must retain the
8 discretion to reject a complaint if it is satisfied that on one of the constituent elements of the
9 infringement there is insufficient evidence. By contrast, in an infringement Decision the OFT
10 must be satisfied that it can establish all the constituent elements to the appropriate standard of
11 proof, and as my learned friend has been developing the arguments before this Tribunal this
12 morning and this afternoon, the Tribunal may consider that it would be in considerable
13 difficulties in step 3 – if I can call it step 3 – in finding the strong and compelling evidence that
14 on each of the elements of an infringement Austins and Harwood had abused their dominant
15 position in a relevant product or geographic market, and to make it absolutely clear, and this is
16 not a technical point, there is a distinction between a decision – the decision on abuse – and a
17 conclusion or a preliminary finding or preliminary thoughts, they are not decisions for this
18 purpose.

19 That takes me on to the third proposition, and I want to deal with it very, very briefly,
20 because I allowed myself one intervention of substance in Mrs Skilbeck's argument on the
21 relevant geographic market. In the skeleton the relevant geographic market is expressed in
22 two ways.

23 THE PRESIDENT: Which skeleton are we on – your skeleton?

24 MR. SWIFT: No, their skeleton, and I can refer you to it, but I think I am right in saying, and it goes
25 back to the Notice of Appeal, that the geographic market is that market which is located
26 adjacent to Stevenage and Knebworth, it is a very local market. Now, as an alternative it is the
27 market which represents the distance between that crematorium and a funeral service director
28 location where Harwood Park is the nearest crematorium. That therefore does not describe a
29 circle or any uniform figure and indeed, I do not know what that area is.

30 I would submit that on at least two points there is a complete lack of compelling
31 evidence in relation to the geographic market and thus dominance. It is clear from a passage to
32 which my learned friend referred, and it is around p.597 of tabG in bundle 2, it is in one of the
33 letters from Harwood Park to the OFT, in which Harwood Park says – no, I have to be
34 extremely careful about the figure, but the figure which is quoted there represents the turnover

1 which is accounted for by funeral directors other than Austins. The question therefore is
2 whether any, some or all of those funeral service directors have a choice in determining which
3 crematorium to use in carrying on their business.

4 In the same letter the proprietor of Harwood Park reminds the OFT that when Austins
5 were considering the investment in 1997 they had in mind a particular catchment area, but they
6 have found as a result of the success in running that business that that business is coming from
7 a wider area and we are now into the arguments familiar to competition lawyers and to
8 economists of the relationship between the crematorium and its marginal users and its intra-
9 marginal users, and the extent to which in order to maximise the profits on a particular facility
10 you should be setting your prices so as to appeal to as large a population as possible bearing in
11 mind the substantial investment in fixed costs. That is, I would have said “nursery slopes” in
12 terms of the qualitative analysis of how you arrive at a dominant position under the relevant
13 EC law. There is no evidence before the Tribunal of that kind. That, in a rather cumbersome
14 way ----

15 THE PRESIDENT: You are talking about markets for cremation services at the moment?

16 MR. SWIFT: For cremation services. The Tribunal can see on the map where Luton is, where West
17 Herts. is, the two big local authority crematoria, and the other crematoria towards the East of
18 that boundary. There is simply no evidence.

19 The second aspect, and this is not taking an intellectual clever point about how an
20 argument has been put in a submission, but by definition if a company is successful and it is
21 able to raise its price because of a perceived improvement in quality, as against competing
22 crematoria, and it increases its sales, and it increases its market share, then most observers
23 would say he must be competing in a market substantially wider than that which the Appellants
24 say it is in, because the gain of market share means by definition that somebody else must be
25 losing it and why other people are losing it is because the marginal users are no doubt
26 preferring – or their clients are preferring, which comes to the same thing – the services of
27 Harwood Park rather than those crematoria that were established well before Mr. Austin put
28 his investment in in 1997. Now, I am not proposing to say any more on that. The arguments
29 are set out in the appendix to the skeleton, appendix 1, but those are my submissions that go to,
30 as it were, the big absence in the qualitative analysis, and also in the scope of evidence which
31 would have to be taken by the OFT and by this Tribunal. Whether the OFT is to be criticised
32 for not doing it is one thing, but the fact remains there are no facts, insufficient facts, before
33 this Tribunal to enable it to get to that essential aspect of infringement.

1 And to add one footnote to those comments, the figures in annex A, on which my
2 learned friend has placed a great deal of reliance, represent only 75 per cent. of the total
3 cremations carried out at Harwood Park in the relevant years.

4 Your attention has been drawn ----

5 THE PRESIDENT: Sorry, Mr. Swift, I am just turning up annex A to remind myself.

6 MR. SWIFT: It is annex 2(a).

7 THE PRESIDENT: Annex 2(a) to the Decision?

8 MR. SWIFT: To the Decision. Let me give you, Sir, and the Tribunal an example.

9 THE PRESIDENT: Just a moment.

10 MR. SWIFT: It is at p.28 of the Decision and it runs on for three pages. Sir, you will see at the
11 bottom of p.1 we come to J.J. Burgess, and there it shows the use by the Knebworth branch of
12 crematoria at Harwood Park, West Hertfordshire and the others that are there. Then, turning
13 over the page, we see Welwyn Garden City. Then we get to the Co-op and a list of other
14 funeral directors down the left-hand side of the page, and then we turn over and see some more
15 funeral directors.

16 The first exhibit that was put to the Tribunal this morning was a supplementary
17 statement on behalf of Mrs. Burgess – as amended and reamended. It does appear that in
18 Welwyn Garden City, in addition to its own office, there is also Warwick & Peters and
19 Coughlan Brothers, who are owned by the Co-op. Now, what Warwick & Peters do, what the
20 Co-op do at Welwyn Garden City in terms of their use of crematoria do I do not know. I do not
21 know what the 25 per cent. of the business that was done at Harwood Park was done by funeral
22 directors who had a choice as between Harwood Park and others.

23 THE PRESIDENT: Sorry, where does this 25 per cent. figure come from, Mr. Swift?

24 MR. SWIFT: The 25 per cent. figure is to be found at para.11 of appendix 1 to our skeleton on p.31.

25 Sir, you will recall that this page – I will let the Tribunal find it.

26 THE PRESIDENT: I am just going to your skeleton at p.31, yes.

27 MR. SWIFT: We are now into the appendix – with the table at the top?

28 THE PRESIDENT: Yes.

29 MR. SWIFT: And this is the table from which my learned friend said, “Simple, it’s got a figure of”
30 whatever that figure is that I cannot disclosure in open court, “... well, that proves
31 dominance”. But if the Tribunal looks at para.11, what we say here is we are considering
32 whether there is sufficient evidence to reach a definitive conclusion on market domination.
33 The Tribunal should be aware that annex 2(a) of the Decision is not a complete data set of
34 cremations carried out for funeral directors within a 30 kilometre radius of Harwood, and for

1 this purpose it does not matter whether it is 20 kilometres or 30 kilometres. It contains
2 information from the Appellants, Austins, the Co-op and a sample of other funeral directors
3 operating in West Hertfordshire, but accounts for only 75 per cent. of all cremations carried out
4 at Harwood and the comparator, which is the footnote at 77, are the figures that are taken from
5 the Cremation Society of Great Britain's website, and that is broadly I think the source from
6 which Mrs. Skilbeck drew the conclusions on the change in relative prices.

7 THE PRESIDENT: I see. So you have got the total number of cremations from the websites, you
8 have got the figures in annex 2(a), and the latter is 75 per cent. of the former.

9 MR. SWIFT: And I am not proposing to say in open court, because, as you rightly reminded us,
10 these are figures and I do not know to what extent the totals at Harwood are ----

11 THE PRESIDENT: Yes.

12 MR. SWIFT: Anyway, I am not going to say what the figures are.

13 THE PRESIDENT: Anyway, it does not pick up everybody.

14 MR. SWIFT: It does not pick up everybody. As I say, I do not want to go into this too much, but
15 this is an illustration – if one takes that point, together with a point that is made by Mr. Austin
16 in his letter to the OFT, we never thought we would have business from Hatfield. That falls
17 outside the catchment area. But there is Burgess using Harwood Park for Hatfield. One of the
18 submissions made is that when people come into – well, one of the submissions made is that
19 business has been lost at Hatfield as a result of the refusal to supply at Harwood Park. We
20 simply do not know what the position of other funeral directors is in that area.

21 Anyway, I can make the submissions very briefly because it is not just sufficient, as
22 we know, to talk about the geographic market. The geographic market and product market are
23 simply the entry points into a determination of dominance. Dominance demands a qualitative
24 test, especially in a market where one would have thought that location is not just – location is
25 one necessary, but not a sufficient condition for the competitiveness of a private crematorium,
26 especially one that has been set up in competition with well established local authority
27 crematoria. And the second footnote, no doubt that is precisely the point that my learned
28 friend acting for the First and Second Interveners would want to develop in the event that this
29 Tribunal were minded to move to the full Decision.

30 Sir, the first proposition, the main one is on abuse. The second one is we are right as
31 a matter of the exercise of our discretion to limit the decision to abuse. In a non-infringement
32 decision you have not got to go through every constituent to satisfy on one. The third is some
33 basic points to illustrate why in respect of one of those constituent parts this Tribunal would
34 have to get far more evidence than it has. And the fourth touches on *Pernod-Ricard*, because

1 I read the transcript of the last CMC on the 14th July, which was 14 days after the Decision,
2 and I think shortly after this Tribunal's Decision in *Pernod-Ricard*.

3 I would say two things on that – three things. First, yes, technically it does not appear
4 that there was the kind of consultation or right given to the Appellant just before that Decision
5 was made. Secondly, the Office of Fair Trading submits that it has acted entirely in accordance
6 with a duty to act fairly, a duty to act in accordance with natural process, natural justice, and
7 that the Appellants have had every opportunity of making their submissions, and that little
8 would be gained by taking a point now such as to quash the Decision on a procedural ground.

9 Perhaps the most significant point is of course that the OFT takes extremely seriously
10 what the Tribunal has said in *Pernod-Ricard*, recognises that there is a large lacuna in the
11 current system for dealing with complaints, and is in the process of preparing draft guidelines
12 which will then have to go out to consultation, so it would in any event have been inappropriate
13 to try and bring in a *Pernod-Ricard* type protection before the OFT have satisfied itself that the
14 processes it is proposing to engage in have been fully consulted on and meet the requirements
15 of ----

16 THE PRESIDENT: These are draft guidelines on procedural – the procedure to be followed.

17 MR. SWIFT: Yes. Sir, abuse – the Decision. I do not need to address the Tribunal with any
18 authority on two issues. The first is that issues involving alleged abuse of a dominant position
19 involve complex assessment, fact, economics and law; and, secondly, that no decision is taken
20 without having regard to the factual situation, forming the ambit of the proceedings. There is a
21 lot of information in the bundles before the Tribunal. There is a chronology that was put before
22 the Tribunal this morning. Miss Smith has also prepared a chronology which we would be
23 happy to leave with the Tribunal this evening. I have not in the adjournment had a chance of
24 checking omissions and what have you, but there it is.

25 But chronology is one thing; there are some extremely important facts relevant to this
26 decision that should be before the Tribunal when they come to consider abuse. It is well
27 known that Austins have been trading as funeral directors in Stevenage since 1700, and J.J.
28 Burgess from Hatfield since the 1830s, and no point is taken on the 130-year difference. They
29 are both well established business which carry on extremely important sensitive functions in
30 their relative respective communities. Each of them would be regarded as a small to medium
31 sized enterprise, and they carry out an important economic function in their communities.
32 There is no doubt about that.

33 There is no record on the file of the extent, if at all, to which they were in the same
34 local funeral services market when there was no crematorium at Harwood Park. The

1 chronology – it says begins with in the establishment of the crematorium in 1997, and the
2 establishment by Burgess of its branch at Knebworth in 1998, but if we can just look back to
3 the early 1990s and consider what was the position on the ground in terms of the choice
4 available to funeral directors in West Hertfordshire. There was a gap. The local authorities
5 refused to invest in further crematoria despite the fact that Stevenage had been a new town
6 since 1946, and had grown. They even opposed Austins’ application for planning permission
7 to build a new crematorium. Sir, Austins had to go it alone and appeal to the Government, who
8 appointed an Inspector who reported in favour of the plan, and that report is before the Tribunal
9 and has been referred to by my learned friends this morning. There was also no financial
10 information before the Tribunal on the appraisal, the business case, the plan, the money, the
11 returns, but it is self-evident that when Austins went into that market they were going into it as
12 a new entrant seeking to take advantage, as Mr. Austin quite rightly said, of what he believed
13 was an attractive catchment area.

14 As I understand the law on crematoria and funeral services, there are no domestic
15 provisions that require the owner of any crematorium to offer open access to that facility. It
16 was plain ----

17 THE PRESIDENT: If there were there would not have been this case presumably.

18 MR. SWIFT: If there were there would not have been this case. Austins could, and I do not want to
19 stray too much from the facts but just deal with some hypotheses that the Tribunal may think
20 are relevant – Austins could in theory have designed the capacity of the crematorium so as to
21 meet the demand for its own funeral services at Stevenage. It would have been, at least in
22 theory, theoretically possible to construct a crematorium that would be vertically integrated to
23 the exclusion of other funeral directors or include some others who were prepared to operate on
24 a joint venture basis of some kind or another. In fact it went into an investment of sufficient
25 size that by now that famous X per cent. of its business is taken up by directors other than
26 Austin.

27 THE PRESIDENT: Burgess relies on the fact that they did give a commitment to the planning
28 inspector that it would be available to all comers.

29 MR. SWIFT: I am not quite sure whether there is evidence on reliance, but at least there is no
30 dispute that the decision by Burgess to set up an office in Knebworth had as its justification the
31 fact that there would be a nearby location. The point I am seeking to make here is that at the
32 time of investment planning the owner of an investment of that kind must decide with whom he
33 is going to contract, if anybody. Like any person investing in a new product or a new facility,
34 he has the freedom to contract. This is a basic principle. The Tribunal will remember this was

1 – it is part of our skeleton and it forms quite a large part of our skeleton, it is treated at length
2 by Advocate General Jacobs in the *Oscar Bronner* case that when we consider whether Austins
3 should now be subject to a remedy to impose effectively long-term non-discriminatory access
4 in an agreement that would have to be policed by a regulator, one has to remember that when
5 making this investment in the first instance Austins and Harwood Crematorium were producing
6 a very large gain for consumers in West Hertfordshire. I know that this Tribunal when
7 considering issues on the 14th July drew the attention to the interests of consumers, and the
8 evidence or the submissions this morning has been on the interests of the consumers who seek
9 the services of Burgess. But without Harwood Park many, many consumers would have been
10 far worse off in terms of the choice and the quality of the services that they now have.

11 The point I am making on the factual matrix is also related to the point I was making
12 before on the competitiveness of Harwood within a wider market, and that is it is not credible
13 that the success of a business of that kind has been achieved without taking market share from
14 the incumbents, and without being seen to provide a very effective choice for funeral directors.

15 So the success of Harwood I would submit has been arrived at, and is only explicable
16 in terms of the good relations which it must have established with funeral directors who are
17 able to exercise a choice. This is not a sort of a cold distinction between an upstream market
18 and a downstream market of the kind that appears in the economic journals. This is an acutely
19 sensitive service that has got to be carried out jointly as between the funeral service provider
20 and the provider of crematoria, so that, so far as the ultimate client is concerned, it appears as
21 simple and efficient a service as possible, and in those circumstances, it is inevitable that
22 personalities will be important.

23 So in terms of looking at the factual matrix, there is, in my submission, a balance to
24 be retained when the Tribunal comes to consider the question of abuse at the end of the day.
25 There is no evidence here of any kind of seeking by Harwood to reserve the funeral services
26 market for itself as against funeral directors more widely. It cannot be in the interests of the
27 owners of Harwood Park to be at such odds with their own communities in the areas in which
28 they carry on their business to lose the reputation, which has probably been the basis upon
29 which that increase in market share has been achieved. Sir, we are seeing in 2001 a dispute, a
30 dispute of a kind that was never anticipated when this investment was made, a dispute limited
31 to two traders, and the question before the Tribunal is whether in those circumstances the
32 weight of Chapter II, an abuse of dominance can be brought in as a means of achieving the
33 appropriate legal solution, and whether this is a Decision where, as the OFT found, there was

1 still not strong and compelling evidence in those factual circumstances the owners of Harwood
2 had abused the assumed dominant position which they held in that area.

3 THE PRESIDENT: Could I just ask one factual question, Mr. Swift, in relation to Mrs Burgess's
4 witness statement that was served today, the allegation is that since at least 22nd March 2004
5 there has been a substantial loss of business on the part of Burgess and they say, not only in
6 relation to Knebworth, but also in relation to Welwyn and Hatfield if that is right – if that is
7 right – do we know where that other business has gone, to whom it has accrued? Or is that a
8 gap in the factual matrix?

9 MR. SWIFT: I can certainly tell you, Sir, it is a gap in my factual matrix, because I was not aware of
10 this further evidence until it came in this morning. Maybe after we close today I will have
11 discussions with the OFT and see to what extent we can assess, but I am doubtful that I could
12 help. I am just trying to think if there could be anything in the public domain through
13 statements made in the local papers as to who the funeral directors were and the crematorium –
14 whether it could be done on a day by day basis, but apart from that kind of quite detailed
15 empirical evidence I do not know. It is the kind of evidence which I would have thought that a
16 competitor would be likely to have precisely because that is the information which goes into
17 the local papers so that mourners are aware of the date and location of the funeral or the
18 crematorium as the case may be.

19 THE PRESIDENT: Yes, sorry, I took you out of your stride, forgive me.

20 MR. SWIFT: No, I do not want to go through it at great length because the facts are there. Our main
21 submission and I am going to come on to this, is that this is not a question of fitting a dispute
22 into a nice legal bracket and saying “Ah, that looks similar to the kind of conduct that saw in
23 *Commercial Solvents* or whatever it may be, *Telemarketing*, therefore it must be an abuse.
24 What we are saying is, absent any intent on the part of Harwood Park to establish its
25 dominance in funeral services in any relevant area, looking at its general policy of open access,
26 competitiveness, is there not some conduct that that firm can engage in without bringing down
27 on itself a charge of an abuse of a dominant position, even if the effect of that conduct is going
28 to have some adverse effect on a person who is currently a customer. It is not even argued by
29 my learned friend that this is a case of an essential facility, there is no suggestion, as we said
30 before, that there are domestic rules. There are no provisions, so far as I am aware requiring
31 arbitration or compulsory mediation as between owners of crematoria and funeral services if a
32 dispute of this kind occurred, but is it the kind of dispute that should be met with a Decision on
33 infringement as to abuse, and the OFT has argued that there is no strong and compelling
34 evidence, and makes those submissions to you.

1 THE PRESIDENT: I am just trying to understand, are you submitting that effectively the
2 crematorium has carte blanche to deal with whomsoever it wishes, or are you making a more
3 limited submission about the particular circumstances of the particular ----

4 MR. SWIFT: I am making submissions that assuming dominance, because we are assuming
5 dominance for this purpose, and therefore the special responsibilities it attached to a dominant
6 firm according to the well established *Michelin* doctrine, then the tests are whether the conduct
7 risks the elimination of competition in a relevant market, or whether it risks substantial harm,
8 and that question is to be decided by reference to fact and degree, intention, effect, and relevant
9 facts. That is the application of the broad principle of what abuse means to the facts of any
10 particular situation. The OFT is contending that its policy is a correct policy in terms of the
11 case law, and that its application of that policy to the facts of this case was correct within the
12 margin of its appreciation. So there are rules that apply to the hypothetically dominant firm
13 and those are the rules, it is not carte blanche.

14 THE PRESIDENT: Translating that into the facts of this case we have a hypothetically dominant
15 firm in the supply of cremation services and we have the same firm vertically integrated and
16 hypothetically dominant in the supply of funeral services in the Knebworth and Stevenage area
17 and we know we have two other competitors in the Knebworth and Stevenage area, namely,
18 the Co-Op and Burgess, and the OFT's case is that no concern in relation to how that dominant
19 firm has behaved in either of those two markets arises from the fact that at least since March
20 2004 one of the remaining two competitors to that dominant firm, in the funeral services
21 market at least is no longer active in the market as a result, or hardly active in the market as a
22 result of a refusal to supply the services of the crematorium to that firm.

23 MR. SWIFT: We are saying that the Appellants must still provide strong and compelling evidence,
24 first that as a result of the refusal they have been eliminated from a market as a competitor. If
25 the markets are further defined as to include Hatfield, Welwyn Garden City and Welwyn, and
26 Stevenage and Wentworth, where is the evidence that there has been elimination? These
27 matters are extraordinarily difficult to ----

28 THE PRESIDENT: Well we have a market that at the moment in the Decision is defined in terms of
29 Stevenage and Knebworth for funeral services.

30 MR. SWIFT: There is no finding as such, and I go back to the point I made before, there is a
31 provisional conclusion but there is not a finding. I make the point, but the arguments are there
32 in the text. I will have to be careful that I am not making any concession but the Tribunal will
33 draw its own inferences.

1 THE PRESIDENT: I am not trying to get any concessions, just trying to understand the argument,
2 Mr. Swift.

3 MR. SWIFT: Plainly funeral services' markets are local markets, where you draw the boundary is a
4 question of fact and degree. The markets for one-stop supermarket shopping, if I can move
5 away from funeral services for one moment, are also defined by reference to local demand, as
6 we know from the Safeway merger case which is not cited in the bundle of authorities I am
7 delighted to say, that is one Competition Commission authority I need not put before this
8 Tribunal. So wherever it is drawn, yes, local funeral services' markets are local markets and as
9 illustrated goodwill attaches to established firms, that has been built up over many, many
10 years.

11 THE PRESIDENT: Yes.

12 MR. SWIFT: However, JJB Burgess considers that the Stevenage market was not so closed to
13 competition as not to seek to compete with Austins in that market. Again whether one arrives
14 at a true dominant position in terms of funeral services I simply do not know. Market share
15 plainly, if you look at the market share funeral services in a local market defined by reference
16 to Stevenage and Knebworth, would have to be high, but does that mean that Austins has the
17 power to exclude new entry I would doubt, but obviously there must a point at which there
18 must be a limit to the capacity to serve any particular market. But in terms of power to
19 exclude, I would have submitted, no, case not proved.

20 THE PRESIDENT: Can I also ask about this mantra of strong and compelling in the light of the
21 football shirts judgment we were taken to earlier. Is it still helpful to rely on those particular
22 words?

23 MR. SWIFT: Strong and compelling I have taken from *Napp*. I was not going to address you on
24 standard of proof until tomorrow, but, so far as we are concerned – we discussed this over the
25 adjournment and Miss Smith and my solicitors and clients say, and this is rather important, that
26 their policy in these cases is to apply the standard of proof set out in *Genzyme*, which itself goes
27 back to *Aberdeen Journals (No.1)*, and Miss Smith can get up and ----

28 THE PRESIDENT: Robust and soundly based I think that was.

29 MR. SWIFT: Robust and soundly based, and I am not sure whether anything that was said in
30 Replica Shirts which takes away the force of those extremely helpful statements in *Genzyme*.

31 THE PRESIDENT: Well, Replica Shirts discusses the standard of proof and the Tribunal reminds
32 itself that it is still the balance of probabilities and the question of whether the balance of
33 probabilities is met will depend on the particular circumstances and the seriousness of what has
34 been alleged. It is a fairly flexible standard. The idea of strong and compelling seemed to be

1 being used post *Napp* by defendants as a means of not escaping a finding of infringement and
2 by certain competition authorities – I do not necessarily include present company – as a means
3 of not doing anything about possible infringements because the standard was too high. We
4 have had a very good look at the standard in football shirts and that is probably where the
5 current case law is.

6 MR. SWIFT: And in January 2002, not having drafted the skeleton or the defence myself, one was
7 operating in accordance with the guidelines given at that time by the ----

8 THE PRESIDENT: *Napp* was there ----

9 MR. SWIFT: Whether had strong and compelling evidence been replaced by balance of
10 probabilities or standard of proof I would ----

11 THE PRESIDENT: It is just the balance of probabilities. The idea is that one could not use the
12 phrase “strong and compelling” to lose sight of the idea that you are talking about a balance of
13 probabilities test.

14 MR. SWIFT: I will of course take instructions overnight, but I would venture to submit that had the
15 Replica Shirts test been applied the OFT would retain the decision that it has taken in relation
16 to ----

17 THE PRESIDENT: I am not suggesting it should, but I am just raising the way that recent case law
18 has gone.

19 MR. SWIFT: I am quite happy to continue, and the Tribunal, but I am in your hands.

20 THE PRESIDENT: How are we getting on? I have the impression that, rather surprisingly, we have
21 caught up a bit of time.

22 MR. SWIFT: I am very surprised. It really is a question for the Tribunal, whether you would like
23 me to read you *Oscar Bronner* this evening or tomorrow morning.

24 THE PRESIDENT: No, neither alternative is particularly attractive!

25 MR. SWIFT: That was not said in *terrorum*.

26 THE PRESIDENT: I am rather inclined to leave it there. When you come to a natural ---

27 MR. SWIFT: This is a very natural break.

28 THE PRESIDENT: I think we have had a long and in some ways quite complex day, and probably it
29 would be useful for everybody to have a breather, including ourselves, and we have to think of
30 the staff in the building and so forth. So I think we will rise now and resume at half past ten
31 tomorrow.

32 (Adjourned until 10.30 a.m. on Wednesday, 16th February 2005)