IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1044/24/04

Victoria House,
Bloomsbury Place,
London WC1A 2EB

16th 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) — Appellants
and

THE OFFICE OF FAIR TRADING — Respondents
and

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 Messrs. 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.

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PROCEEDINGS
DAY TWO

THE PRESIDENT: Yes, Mr. Roth, good morning.

MR. ROTH: Good morning, Sir. Two quick matters – first, I promised the Tribunal a list of those documents which we said could now be open to everyone and what has been redacted, and the disclosure note, can I hand up copies of that? [Documents handed to the Tribunal] We have given copies to our friends, and I hope we have one for your Referendaire.

THE PRESIDENT: Thank you.

MR. ROTH: The point about para.155 of course we did not have the annex 3 figures, and that was just Mr. Burgess's estimates, and now we have actually got the figures disclosed to us so there is no reason to rely on that. Secondly, and more significantly, in response to the request from the Tribunal, and I think a further question from Professor Pickering, Mrs. Burgess has prepared overnight a short supplemental witness statement dealing with those matters. You will see that the last page is solicitor and counsel only, so it is dealing with what was affecting, in quantitative terms and also how the thing has gone in practical terms on the ground, because the order made – I think a consent order – was restricted to three postcodes which were effectively I think in the Knebworth/Stevenage area. If you look at the table without my mentioning the figures, you will see that the fifth column is the period between 22nd March and 21st July last year when there was no access at all and that has now been compared with the like period the year before. The final column is what has happened since 21st July, that is under the terms of the order. You will see what Mrs. Burgess says in para.9.

THE PRESIDENT: Yes, thank you.

MR. ROTH: Thank you very much.

MR. MAXWELL LEWIS: Sir, just before my friend begins may I just give an indication that we intend to adduce a very short witness statement from Clare Austin relating to some matters that have been brought up yesterday. It is in manuscript being photocopied.

THE PRESIDENT: Thank you very much.

MR. MAXWELL LEWIS: And of course, anything in it is subject to comments that my learned friends may wish to make on it, but I hope to have that shortly before I begin my submissions.

THE PRESIDENT: Thank you very much. Good morning, Mr. Swift.

MR. SWIFT: Good morning, Sir, good morning, members of the Tribunal. Before I continue my submissions on abuse may I just make two observations on the transcript, if the Tribunal has the transcript before it at p.57, the transcript of yesterday's hearing.

THE PRESIDENT: Yes.

MR. SWIFT: At line 23, this is what I said, but I should have said "We are saying the Appellants must still provide strong compelling evidence. First, as a result of the refusal there is a risk of

eliminations", obviously not "they have been eliminated from the market". I put it in the past tense and it should have been related to risk.

Then there is an interesting typo – I do not know whether I said "Wentworth", I obviously meant to say "Knebworth", but it is a strange coincidence that every time I type "Knebworth" into my screen the spell check suggests I should mean "Wentworth", whether it has golf on the mind I am not sure. Anyway, onward to more serious matters.

It may be helpful to the members of the Tribunal to have before you the respondent's skeleton which is found in the core bundle at tab 10.

THE PRESIDENT: I have got that.

MR. SWIFT: And as I said to you yesterday, Sir, the bulk of the Respondent's skeleton is indeed directed to the issue of abuse, and, without taking the Tribunal through the structure, the way it is argued is, first, we put the two questions in para.11 that we say are the relevant ones. We then contrast the approach of the Appellants and the OFT. We advance some general propositions that we regard as important in cases of this kind, including freedom of contract, quoting extensively from the Advocate General's opinion in *Oscar Bonner*, general efficiency considerations, and the issue of significant effects on competition. We then go on to consider the relevant case and then apply what we submit are the relevant principles to the facts of the case. And that is the process that I am going to adopt here.

Sir, the two distinct issues that we are asking the Tribunal to determine are did the OFT adopt the correct legal approach in relation to refusal to supply? If so, was the conclusion reached by the OFT, having applied that legal approach to the facts of this case, one that it was entitled to take, and that is set out at para.11 of the skeleton. Of course the question of the correct legal approach, the question of refusal to supply is of general importance and not confined to the facts of this case.

Looking at the principles of EU competition law and the principles developed by this Tribunal, having regard to s.60 of the Competition Act, I would put the following questions to start with. Does a refusal by a dominant firm to supply goods or services to an existing customer give rise to an abuse unless there is an objective justification? To which, in my submission, the answer is No. Second question: if the customer is an existing competitor of the dominant firm does a refusal give rise to an abuse unless there is an objective justification? Again the answer is No. The OFT's case is that a refusal to supply will be an abuse where, in the absence of objective justification, (a) it risks eliminating all competition in a relevant market, or (b) it would lead to substantial harm to competition in a relevant market; and on (b), the question of whether there is substantial harm to competition is a matter of fact and

degree, and in resolving the matter of fact and degree one takes into account intention of the dominant firm, effect, both direct and indirect, of the conduct on the undertaking's competitors and customers, and the extent to which the conduct is plainly restrictive of competition, and, for the record, I am simply repeating what is set out at para.12 of the skeleton. That is the OFT's case and that is the OFT's policy.

Putting matters slightly differently, if the conduct eliminates competition there is no need to consider matters of fact and degree, but if there is no elimination of competition the conduct is not an infringement of Chapter II unless there is a comparable serious distortion of competition on a relevant product market, and that can only be tested by how the market operates and may be expected to operate taking into account its structure and the conduct of people on that market.

I am not going to take the Tribunal through a long list of authorities. This is not the beginning of a lengthy – I was going to say erudite, but I could claim any erudition on these matters, in relation to the doctrine of refusal to supply. There is a great deal been written on it, books have been written on it on both sides of the Atlantic, and Professor Pickering will have to just rest because I am not going to make lots of references to academic journals.

However, let me look at elimination of competition in the market from two distinct perspectives. One is what I would call a *Commercial Solvents* case. In *Commercial Solvents* the evidence was that the dominant firm in that case, an American corporation, had a policy of clearing out all activity that was previously carried on by independent firms in contract with that dominant firm and replacing them with a vertically integrated operation with sole access to the raw materials. There is a classic case of a dominant firm taking a policy decision to exclude all independent competition from a downstream market and occupy that activity to its sole benefit. The Tribunal will know that almost within a day or two after it was decided the *Commercial Solvents* case came under some criticism on the ground that the court was paying insufficient attention to the state of competition in the downstream market itself, that for ethambutol and tuberculosis drugs, but it has survived over the years and I am not proposing to go into any criticism of that kind. What I want to do, very shortly, but not just now, is to make submissions on what principles *Commercial Solvents* stands for today having regard to the way that case was analysed by the European Court of Justice in *Oscar Bronner*. That is the first example of elimination – a policy decision taken by a firm effectively to vertically integrate in the downstream market using its dominance to preclude any form of competitive activity to the vertically integrated concern.

THE PRESIDENT: That is *Genzyme* really, is it not?

MR. SWIFT: Yes, close to *Genzyme*.

The second instance of elimination of competition is a different kind. It is one of those exceptional cases in which, for example, the owner of an intellectual property right uses that monopoly to exclude any other undertaking from operating in markets where such IPRs need to be licensed for the activity to be lawful. Those are exceptional cases - the Tribunal is extremely familiar with them – of where the boundary line is to be drawn between the rights of an owner of intellectual property rights and the competition on the markets which are affected by any refusal to license. The matter is dealt with in the case law. In my submission, the most cogent analysis of this is to be found in the Advocate General's opinion in *Oscar Bronner*, where he points out the matters that have got to be determined before any such finding of abuse can be made. It is connected obviously with the essential services doctrine, but it is not limited to that. It is where the exercise of a right is actually blocking a competitive development of new services for the benefit of consumers, and that was *Magill*. That is an extreme case. So both cases of elimination of competition involve a definite policy decision to reserve certain markets to the sole exploitation by the owner of the relevant right.

By drawing the distinction between elimination of competition on the one hand and substantial harm on the other, (a) and (b), the OFT's policy is, in my submission, a sensible and pragmatic one. It focuses on the effect of conduct on the processes of competition within a market rather than looking simply at the effect on a particular competitor.

THE PRESIDENT: When you are discussing head (a), elimination of competition, what is the OFT's essential answer to the point, I think made by Mr. Macnab's clients, that that tends to suggest that it is all right to refuse to supply a competitor so long as there are some other competitors left, and if that is right how many competitors can you sort of lop off one by one before you have eliminated competition?

MR. SWIFT: Well it is a somewhat theoretical point because in every case ----

THE PRESIDENT: In other words, if we take Stevenage/Knebworth for example, there are two competitors to Austins – the Co-Op and Burgess – if, hypothetically, by refusing access to Harwood you substantially restrict the choice of customers of Burgess that leaves you with one competitor, do you argue that that is not eliminating competition? That is all right, because there is still one left? Or how do you put it?

MR. SWIFT: In the particular case of the Stevenage/Knebworth area then the OFT admits on an entirely hypothetical basis in its skeleton that if the Co-Op and Austins were to remain as the two existing competitors that would represent choice. The other argument is, of course, if the position of the ----

THE PRESIDENT: There is a sufficient choice?

MR. SWIFT: Yes, but let me go on to make the further point, by looking at the processes of competition rather than the position or status of an individual firm, and this is quite irrespective of funeral services, this is more general, the OFT is entitled to look at the circumstances in which that operates. If, for example, one particular firm were eliminated, for example, as a result of a dispute that had nothing whatsoever to do with competition, and the market wanted to have a third or even fourth supply in that market, then it is reasonable to infer that such a supply would be forthcoming. It does not follow that simply because one firm exits a market, whether as a result of an abuse or not does not matter, exit from the market does not by itself preclude new entry to substitute for that. That, in my submission, is how markets are expected to work. Looking at the OFT's position as a public enforcement authority, it is extremely important for the OFT to ensure that markets are working well. So my answer to the Which?, Consumers' Association, Mr. Macnab point is (a) it is somewhat theoretical, that is the Tribunal need not go down that route but, let us look at the facts of this case. Why on earth would Austins, having a vertically integrated facility, where more than X per cent. of its revenues come from customers other than Austins, why on earth would it take a business case that appeared to be so detrimental to the profitable operation of that facility? One has to deal with the reality of operations of this kind. It is precisely commercial considerations, and no doubt my learned friend will develop this, that are relevant here.

THE PRESIDENT: In this particular case, Austins is a vertically integrated operation that has a successful funeral directing business in the Stevenage and Knebworth area. Burgess is a competitor to that business and if it removes Burgess it can be expected to profit by funeral directing services in that area, and thus feed the crematorium.

MR. SWIFT: If one starts at day one and defining the market for this purpose is limited to the acquisition of funeral director services in Stevenage and Knebworth that must happen. It will go to the Co-Op or to Austins or to some other firm, but let us assume for this purpose that the only people who are capable of competing actually are those firms. What is there to stop any other firm entering that market and seeking to supply a service to the extent that consumers found that existing supply was inadequate? That depends entirely on questions such as the ease of access to that market. Now there has been reference before the Tribunal to barriers to entry to the funeral services market, and indeed I raised it yesterday, in terms of the long established firms, aspects of goodwill, the nature of the transaction itself, but that does not deal with the question of exit. If there is an exit voluntarily, or even as a result of an abuse so-defined – I say "abuse" – as a result of a refusal to supply on commercial grounds and a firm

exits, and we are not necessarily talking about the Burgess firm, we are talking generally, then it does not necessarily follow that the elimination of that firm substantially affects the nature of competition in that market.

THE PRESIDENT: But why should any firm come in when they have just seen what has happened to Burgess? If, as you say, the crematorium can refuse to supply so long as the Co-Op is left, what incentive is there for anyone else to come in?

MR. SWIFT: It does not necessarily follow in my submission that where one firm has exited as a result of a dispute, nothing to do with competition, that would necessarily have the effect of freezing the Stevenage/Knebworth market.

PROFESSOR PICKERING: Mr. Swift, could I just pursue this like a little bit? You seem almost to be arguing that exit lowers the barriers to entry, which I find a potentially surprising proposition in general terms. May I put it to you that the purchase of funeral director services, at least *ab initio* is something that occurs at short notice, is likely to be guided by an awareness of longstanding presence in a market place, entry barriers, one of the three classic examples of entry barriers currently addressed now by OFT and equivalent bodies is the question of reputational barriers and exit on a basis of the sort of circumstances that you are addressing may well give rise to reputational barriers. There is also the question about the trend in the size of the market, and so I wonder whether you are really inviting us to take the view that there are not significant entry barriers into a local market for funeral directing services. If I may, could I just invite you to park that one for a moment and let me raise one other thing which I hope you might address.

You are talking about competition and the way the market works. You have referred to "choice" once this morning but you have not actually, nor have your clients, discussed the way in which competition does work in this particular market. What is the nature of competition? What model of oligopoly or of the concept of rivalry have your clients used in their investigation and in producing their Decision in this case? If you could help me on that I would be most grateful.

MR. SWIFT: On the first point, I would answer that in terms of what is the position on the ground in West Hertfordshire? If, Professor Pickering, you and the members of the Tribunal were to look at annex 2A, to which reference has been made, and you run your eye down the left hand column, and you see the number of established firms in that area, each of whom is an existing customer of Harwood Park Crematorium, it is I would say entirely realistic to the extent that a third firm – let us say the third largest customer of Harwood Park – leaves that crematorium as a result of a dispute and therefore opens up that X per cent. of that market which is currently

occupied. It is reasonable to assume that existing customers, who get on extremely well with Harwood Park would, if there were an opportunity, enter and set up the kind of branch facility which is a very small branch facility (it has been admitted), in Knebworth. How can this Tribunal say that one is less probable than the other? There are opportunities for entry to fill that gap. That is the answer to your first point.

On the second point, I do not have either in front of me, or in my head the kind of economic modelling that the OFT did in respect of the operation of either the crematorium services markets, or the funeral services markets, and therefore I am at risk of being hauled back if I start speculating on this, but can I just take some instructions on that?

THE PRESIDENT: Can I just add there does not seem to be much trace in the Decision of any serious economic modelling.

MR. SWIFT: I was not going to develop one myself, certainly, because it is not in the Decision. I had better take instructions if I may.

THE PRESIDENT: Just before you take instructions on that point, Mr. Swift, emerging from this part of the conversation you might think over whether on the evidence it can reasonably be inferred that no one could operate a viable funeral directing business in the Stevenage and Knebworth area without access to Harwood Park Crematorium.

MR. SWIFT: I see the way the Tribunal is moving. You know the position we have taken in our skeleton and therefore I can make no concession on that point, but, if hypothetically the Tribunal were to come to a conclusion of that kind – in other words, applying the test of indispensability of a facility, to which I will come, because I can see there is a reluctance in the Tribunal to allow me to get to *Oscar Bronner* ----

THE PRESIDENT: You are very welcome to get to *Oscar Bronner* and persuade us that it has anything whatever to do with this case! [Laughter]

MR. SWIFT: If that is the position we start off with, Sir, then I would hope to be able to move you.

THE PRESIDENT: Yes, well we are open, Mr. Swift, to silken and persuasive arguments which I am sure we are about to listen to.

MR. SWIFT: I may have greater effect with Professor Pickering and Mr. Prosser, if I just get 2:1 that might be a step forward.

THE PRESIDENT: You might get the whole lot!

MR. SWIFT: Indispensability.

THE PRESIDENT: Yes.

MR. SWIFT: In other words, the test that is in *Magiill* and, as I shall be submitting to you, it is one of the tests that the European Court is now, in my view, requiring in order for commercial

samples to apply – if this is a commercial samples case. Let us assume for this purpose that the Tribunal finds that in order to be an effective participant in rivalry in a market confined to the supply of funeral services in the Stevenage/Knebworth area one requires access to Haywood Park. Then it would be difficult to argue in those circumstances that the *Commercial Solvents*' test did not apply because it would involve – assuming, and we are dealing here with a competitor, as you put it to me, someone who needed to operate in that market, and elimination, there would be indispensability.

THE PRESIDENT: Yes.

MR. SWIFT: That, of course, raises the question as to whether or not there would be more competition in that market, but that would seem difficult. But at the moment I am going on your hypothesis and not on what our case is. That would be a Stevenage/Knebworth issue, and a Stevenage/Knebworth problem. It could not be extended.

THE PRESIDENT: Well then you would have to look at Welwyn Garden City and Hatfield and see how ----

MR. SWIFT: One would have to look extremely carefully at Welwyn Garden City and if, for the moment, one leapfrogs over Welwyn Garden City, and there is very little evidence of how competition works in the Welwyn Garden City and Welwyn area, as I was suggesting yesterday two of the people operating there are not even on the list in annex 2A. But if one goes across to Hatfield and posses the same question then my answer would be "no", for two reasons. First, one could look at the situation before 1997, before the construction of Harwood Park, in which case West Hertfordshire was a facility that could be used, among others; and secondly, and this is not a tactical point but it is based on the law of abuse of a dominant position, Hatfield is not even within the market which is alleged to be dominated by Austins, because Hatfield is closer to West Herts. Than it is to Harwood Park. So even on the Appellants' narrow definition Harwood Park is not dominant in that market and Austins is not a competitor in that narrow market.

Can I just ----

THE PRESIDENT: I am sorry, I took you out of your stride.

MR. SWIFT: No, I was expecting – I did not know when it was going to come, but I was expecting that I was not going to get through eight pages of notes without some testing questions. So it goes back, as I say, to the question of fact and degree, looking at each case and looking at the product of geographical markets in question.

I am not quite sure how I should deal with Professor Pickering's second point. Could I park that, Professor Pickering?

PROFESSOR PICKERING: Yes, sure.

MR. SWIFT: Maybe that will give those behind me a chance to prepare some notes that I can use. Thank you.

In terms of the OFT's policy, I simply wanted to refer the Tribunal to an earlier decision in the *DuPont* case, which is to be found in the bundle of authorities No.5 at tab 30. In a sense I am just referring you to it. I was not proposing to spend any great deal of time on it. But if the Tribunal simply turns to that, at p.9, para.26, and it is really paras.26 to 33 on the following page which gives an example of how the OFT has articulated its policy and then applied it in the facts of that case, and it is really para.27. It is very close in its expression to para.11(b) of the skeleton, to which I have referred, and then there are the exceptional circumstances, and so on and so forth. So I suppose I am speaking here on behalf of the public enforcement authority; that is its policy, and that is the policy which it is proposing to include in the elaborated guidelines which the OFT will in due course be putting out under consultation. But at the moment those guidelines are out to consultation -- in draft. The point is simply, for the record, this is not a policy which is being developed for the purposes of dealing with the Burgess case, this is a policy which is in place – putting the interests of competition first ----

THE PRESIDENT: Putting the interests of competition first did you say?

MR. SWIFT: Yes. But I am simply referring to that to put it on the record that, to the extent that ----

THE PRESIDENT: And this is what you say the European Community law is?

MR. SWIFT: Yes. I am proposing now to go to *Oscar Bonner* and *Commercial Solvents* ----

THE PRESIDENT: We have not been to *Commercial Solvents*.

MR. SWIFT: There is a mighty hill to be climbed. Before we get there, my learned friend Mrs. Skilbeck referred yesterday to *United Brands* and quoted the well known passage, and indeed that passage is also cited in their skeleton. In my submission, when the Tribunal comes to consider the case law and how it has developed, it is important to consider just how different the facts were in those old important cases. *United Brands* was a classic case of a refusal to supply or cutting off a distributor because he favoured a competitor's product. It was a kind of exclusive distribution system that the dominant firm was intent on maintaining, thereby adversely affecting the ability of its competitors to compete with it on its dominated market. It has resonance with the old *Hoffmann-La Roche* case on exclusivity and fidelity rebates, where the dominant firm was doing something that tended to entrench its dominance on that particular market.

Commercial Solvents I have talked about in terms of elimination of competition; similarly, *Telemarketing* is another example where the dominant firm seeks to gain 100 per cent. of the added value in markets that can only be entered through access to the network.

If one turns to *Oscar Bronner*, and I am not intending to take the Tribunal through it first of all because *Oscar Bronner* has been cited to this Tribunal on many occasions, but it is to be found in the bundle of authorities No.1 at tab 12. Subject to any direction from the Tribunal, I am not proposing to start at the beginning and read through to the end, I am simply proposing to ask the Tribunal to go, in the first place, to paras.38 and 39 of that judgment, which is at pp.8 and 9 of the European Court report. *Oscar Bronner* has been referred to in one of the Tribunal's cases as an essential services case but, in my submission, it is wrong simply to classify it in that way; it could equally be regarded as a case considering the position of a dominant firm. *Commercial Solvents* and *CBEM* – that is the *Telemarketing* case – were both cases involving a dominant firm affecting the downstream market. But this is what they say:

> "Although in *Commercial Solvents v. Commission and CBEM* … the Court of Justice held the refusal by an undertaking holding a dominant position in a given market to supply an undertaking with which it was in competition in a neighbouring market with raw materials (*Commercial Solvents* … paragraph 25) and services [*Telemarketing* at p.26] respectively, which were indispensable to carrying on the rival's business, to constitute an abuse, it should be noted, first, that the Court did so to the extent that the conduct in question was likely to eliminate all competition on the part of that undertaking."

And then the court refers to "Secondly", which must be the second part of that proposition:

> "… in *Magill* … the Court held that refusal by the owner of an intellectual property right to grant a licence … cannot in itself constitute abuse … but the exercise of an exclusive right … may, in exceptional circumstances …"

And then they say:

> "In Magill, the Court found such exceptional circumstances in the fact that the refusal in question concerned a product … the supply of which was indispensable for carrying on the business in question …"

And this is why I have referred to the test of the elimination of competition on the part of the undertaking and, secondly, the indispensability of that facility; in other words, it is not sufficient for a complainant to say, "First of all, I have been eliminated from the market", it has got to establish that as a result of that act it cannot, alone or with others, get access to other

suppliers of goods or services or other facilities which would enable it to get back into the market, and that, without stretching the point too much, is the aspect of the dynamics of competition to which I was referring before.

So, in my respectful submission, and I am not going to say any more on *Oscar Bronner*, it is of some relevance to the matters in this case to the policies being adopted by the OFT and to the question that the Tribunal must itself address in this case.

THE PRESIDENT: If we look to para.61 of the Advocate General's opinion in *Oscar Bronner* ----

MR. SWIFT: Which is at tab 13.

THE PRESIDENT: Which is at tab 13:

> "It is on the other hand clear that refusal of access may in some cases entail elimination or substantial reduction of competition to the detriment of consumers in both the short and the long term. That will be so where access to a facility is a precondition for competition on a related market for goods or services for which there is a limited degree of interchangeability."

MR. SWIFT: That opinion was before the court when they made their judgment, and that was not the expression they used in para.37.

THE PRESIDENT: Your skeleton quotes extensively from *Oscar Bronner*. I am just wondering whether para.61 could not be said to be quite close to the arguments being advanced to us in this particular case.

MR. SWIFT: That may be so, but my submissions to you, Sir, and the members of the Tribunal, are that the court considered this, and it considered the Advocate General's opinion, and had it agreed with that formulation it would have put it in its judgment in the appropriate section when it was considering the full application of the *Commercial Solvents* doctrine in the conditions prevailing then. It did not, it was an opinion. We have relied on the Advocate General's opinion in *Oscar Bronner* I would have submitted much more for the general propositions relating to freedom of contract and other matters. Anyway, those are my submissions. To the extent that there is any conflict between the two then clearly the decision of the court is the relevant authority.

Sir, back to the formulation which I have to make, and that is the *Commercial Solvents* test involving elimination of a competitor ----

THE PRESIDENT: The elimination of competition?

MR. SWIFT: No, no, no. The *Commercial Solvents* case, as it is clarified in the *Oscar Bronner* judgment, is still talking about elimination of a competitor person, and then saying that there has to be elimination and the facility in question has to be indispensable. My submission is that

the *Commercial Solvents* principle applies most obviously in those cases where there is elimination of competition, as it was in *Commercial Solvents*.

The way I want to develop the argument is as follows: the test of elimination of the competitor, which is the way the Appellants put their case, an indispensability, are necessary aspects of the facts and matters to be looked at in considering whether there is substantial harm to competition, because plainly one starts off with the position of competition as it is on the ground – what is going to happen to the particular competitor in question. Those are matters that have been taken into account by the Office of Fair Trading. Whether or not the Tribunal is satisfied that the OFT arrived at the right decision, the OFT concluded that there was no risk of the elimination of that competitor because of access to other facilities, and that the indispensability test also did not apply. But the OFT is also saying as part of its policy that in looking at markets generally the process of competition can continue to work if, in certain circumstances, a individual competitor leaves that market. Then the question is what is the consequence of that exit for the purposes of looking at how competition may be expected to develop in the future?

THE PRESIDENT: What seems perhaps to be missing a bit from the analysis of the question of the risk of elimination of Burgess is any consideration of the consumer. Without worrying the Burgess family we are only indirectly concerned with the interests of Burgess itself and Burgess, we are concerned with the consumers of the Stevenage/Knebworth and Welwyn and Hatfield areas and it seems a somewhat surprising proposition, it does not matter that they have one less funeral director to go to in that area because another one will turn up at some point.

MR. SWIFT: It is a particularly difficult product market ----

THE PRESIDENT: In this very difficult product market, yes.

MR. SWIFT: It is a very difficult product market in which to be making submissions that do not appear to be subject to that kind of criticism. But if the law concentrates simply upon the position of an individual competitor where in this case the exclusion has nothing to do with competition ----

THE PRESIDENT: You keep saying that, Mr. Swift, but it has a direct effect on competition objectively speaking. Should we not be looking at the objective effect on competition? You are not advancing an objective justification of the case.

MR. SWIFT: I am not about to suggest objective justification, no, I am not.

THE PRESIDENT: So we have an objective effect of competition, we have one on a company that was in this market a new entrant; it came into the market and increased the choice for the

citizens of this particular area. The OFT is saying "Well, it does not matter, off they go. Leave it to the crematorium to decide who it is going to deal with".

MR. SWIFT: In my submission it goes back to the point that I believe Professor Pickering was putting, in terms of what kind of economic analysis should this Tribunal be looking for in markets of this kind. If, as a result, this Tribunal can confidently predict that, absent Burgess – and I do not particularly want to get into the Burgess matter, but absent a competitor of that kind – then the contribution made by that competitor could not be replicated at all, or to the same degree by any of the existing firms that are able to enter that market, that would be a very bold decision to take in my submission.

THE PRESIDENT: Well Advocate General Jacobs invites our attention to the short term as well as the long term.

MR. SWIFT: Well, the Tribunal will have to decide whether that is an appropriate view to take. That is an opinion of an Advocate General. It is not the decision of the court, there is no distinction between short term and long term. Yes – I am talking about Stevenage and Knebworth here – the consequence may be expected to be a short-term effect.

THE PRESIDENT: Detriment to consumers.

MR. SWIFT: The detriment to consumers has to be taken in the balance. I started yesterday with considering what the Tribunal may take into account and that is the very substantial benefit to consumers as a whole in the West Hertfordshire area and in particular Stevenage and Knebworth as a result of the investment in this crematorium. Then if the question is in all circumstances the owner of that crematorium must continue to supply services to all such people who are dependent on it then we are effectively in the position of being an essential facility in which the owner has no discretion whatsoever to determine with whom he trades, but is bound by a duty to assist that rival, whatever the state of the relationship between them and, as a result, have that duty enforced by the competition authority.

THE PRESIDENT: In the absence of an objective justification case that was more or less the position the planning authorities took, that this is a facility that happens to be open to all. On one argument it is a major distinction between this case and *Oscar Bronner* because the *Oscar Bronner* case was concerned with investment. You put your investment in, can you really be forced to share it with other people? In this case investment was made on the very assumption that it would be shared with other people, that is what it was for.

MR. SWIFT: It is, I would have submitted with great respect, a rather weak peg upon which to hang, the fact that a statement made by a planning inspector in 1997 in some way imposes a long term duty to supply all comers ----

THE PRESIDENT: No, it is not that that statement as such imposes a duty, it shows that the factual matrix of this case is not the factual matrix that was there in *Oscar Bronner*.

MR. SWIFT: I could not dispute that because I have been saying all along to you and to this Tribunal that the factual matrices in almost all the cases that we are considering are quite different from this one.

THE PRESIDENT: Yes.

MR. SWIFT: And this s a one-off, extremely sensitive case, in which, as the Tribunal will realise, the OFT has been in considerable difficulties in arriving at the decision. It is a decision which it has reached on balance. It is for the Tribunal to determine whether, in the application to the facts, the Tribunal considers the OFT has erred.

In a sense in answering – sorry, that is putting much too high a quality on what I have been saying – in seeking to respond to some of the questioning of the Tribunal ----

THE PRESIDENT: It is very helpful, Mr. Swift. It is no use having these hearings unless we put these questions. We are here to debate it.

MR. SWIFT: Absolutely. I talked about effect on the competitor, effect on the markets. Now, where are we, what is the current situation, and what is the Tribunal to do on this question of abuse?

The first question, on the facts of this case and on the hypotheses we have asked you to make, were the owners of Harwood Park under an enforceable duty to supply crematorium services to Burgess and acted in breach of that duty by refusing to supply such services in January 2002?

THE PRESIDENT: I think it is the period January 2002 to the date of the Decision in 2004.

MR. SWIFT: But the Decision has a continuing effect – if not, no abuse. If "yes", did the breach of duty extend to all requirements for services made by Burgess, or only in those cases where Burgess was in competition with Austin in the supply of funeral services? If the latter, that is competition between Burgess and Austin, was the breach further limited to those areas, namely, Stevenage and Knebworth, where Austins had hypothetically a dominant position in the supply of funeral services in that area.

On that last point, the Tribunal will recall, and it was not really developed yesterday by my learned friends, that one of the ways of putting this argument, this case is let us assume Austins is dominant in the market for funeral services in Stevenage and Knebworth, and let us assume it has gone into a neighbouring market, crematorium services discontinuing supply, with the effect of increasing its hypothetical dominance in that market. The answer is if that is right, and if the Tribunal moved to that conclusion that is limited to Stevenage and Knebworth.

When, as I believe, the Appellant said, I maybe misquoting and I will be corrected if I am wrong, that it does not really add anything to the case, actually what it says is this case is all about Knebworth, it is not about Welwyn, it is not about Hatfield, it is about Knebworth.

PROFESSOR PICKERING: Could I just ask, Mr. Swift, are you saying then, that each of the three Burgess offices should be viewed separately and joint costs, joint benefits from the fact that they are three offices, as I understand it, organised and operated as one in terms of shared facilities, should be discounted?

MR. SWIFT: I would say that they should be looked at as a single undertaking but operating in different geographical markets, and that the effect of this conduct should be looked at by reference to its effect in each of those three markets. If, for example, the Tribunal concluded that abuse was limited to the market in which hypothetically Austins dominated its old Stevenage market, that in my submission would not get near establishing the elimination of a competitor as an undertaking.

THE PRESIDENT: We do not mean the elimination of a competitor as an undertaking, we mean the elimination of the ability to supply competitive services in that area.

PROFESSOR PICKERING: And if one or two offices were to have to close as a consequence, would the impact of that be nil on the third office that would remain, in your submission?

MR. SWIFT: In my submission we are now dealing with an exceptionally difficult issue to determine and that is the counterfactual, which is what would an efficient business – let us assume that Burgess is an efficient business, I am just using that hypothetically – what opportunity would it have for the development of a funeral services' business were it denied access to Harwood Park from one or more of its funeral services' businesses? I do not know the answer to that question. I do not know the answer to that question. I do not have sufficient evidence to enable me to suggest what the appropriate counterfactual would be, and one problem is that I can only relate the counterfactual to a possible decision by this Tribunal in respect to one or more abuses in respect of one or more geographical markets. It is a matter that I would like to think about, maybe respond to in a later opportunity I have today, but it is in essence more a question for the parties to answer a question of that kind. Plainly, there must be a point at which a firm ceases to be capable of offering as a firm, if the revenues that it is able to demand are below the costs it must necessarily incur in order to establish a funeral services' business – that must be right. I have seen the transcripts and understand, Professor Pickering, your interest in these matters, but it is very difficult for me, on my feet, to help you. I may want to go back and think about that. But as a general proposition it must be right.

PROFESSOR PICKERING: But would you agree that OFT and other competition authorities necessarily must consider the counterfactual and indeed, that OFT will have accumulated significant experience through the cases that it handles in developing counterfactuals?

MR. SWIFT: Yes, I would, and I would submit that on the facts of this case the OFT's view was that the appropriate counterfactual was that Burgess's would be able to use the services of crematoria other than Harwood Park in order to carry on a funeral services' business, and that is part of the Decision.

PROFESSOR PICKERING: Without significant cost penalty, and revenue penalty?

MR. SWIFT: I will be advised on this, but I have to say that I do not find anything in the Decision that goes down that particular route, but I have to talk to my client anyway to answer your question on economic modelling.

THE PRESIDENT: I am just grappling with the following intellectual conundrum, which is not entirely unlike the conundrum that was posed in the *Tetra Pak2* case. Let us assume at this stage, entirely hypothetically, that issues of dominance, and the issue of the effect of the alleged conduct, are much clearer in respect of Stevenage and Knebworth, to use a neutral expression for the time being, but there is on the evidence, and I think it is in Mrs. Burgess's most recent statements in particular, a knock-on effect of the conduct on the Welwyn Garden City branch, because we can see from certain figures that it is said that there is a knock-on effect, how do you deal with the knock-on effect of the conduct that, on this hypothesis, might be an abuse in relation to one geographical area, and it has a knock-on effect in the neighbouring geographical area, where in that area the issue of dominance is less clear?

MR. SWIFT: In my submission the only way to approach that is not to consider the current business which is being lost to Burgess on the assumption of the supplementary witness statement, but to consider the points of principle as to the indispensability of Harwood Park in order to carry on a funeral service business at Welwyn Garden City. That is the only way in which I would submit that question could be answered.

THE PRESIDENT: Yes.

MR. SWIFT: Because to the extent that the knock-on point is relevant, then in theory and principle it could also apply to Hatfield.

THE PRESIDENT: Yes.

MR. SWIFT: I have stumbled a bit, I may not have climbed the hill, but I have ----

THE PRESIDENT: No, it has been very, very helpful, Mr. Swift.

MR. SWIFT: There are calmer waters, because I have asked Miss Kassie Smith, with your permission, to address the Tribunal on the question of standard of proof, which you raised with

me earlier when I started, and there was a small discussion between us, but overnight Miss Smith has prepared an extremely helpful submission – I say that before she has made it ----

THE PRESIDENT: Thank you very much.

MR. SWIFT: And then Miss Smith will go on from there to talk about the powers of the Tribunal ----

THE PRESIDENT: Yes.

MR. SWIFT: I am obliged.

MISS SMITH: Sir, members of the Tribunal, I will try to deal with these two discrete procedural issues relatively briefly, but they were raised yesterday so I think it is important that the OFT makes its position clear on those points.

First, on the standard of proof, as was indicated by Mr. Swift yesterday, the standard of proof applied by the OFT in the Decision was the civil standard of proof with the strong and compelling evidence test, as set out by this Tribunal in *Napp*, that is clear from the text of the Decision, the *Napp* test was the applicable test at the date the Decision was made. It is important to note however, that the decision that the OFT made was that the threshold had not been reached and this was therefore a non-infringement case.

As regards the test to be applied in an infringement decision, however, the OFT is of course aware that the *Napp* test has been refined since that date by the Tribunal in the Replica Kit case. We take from the Replica Kit case the following very short points; that the civil, not criminal, standard of proof is to be applied for both questions of primary fact and economic questions. An allegation of infringement is of course a serious matter involving penalties. It is necessary to distinguish on the one hand between the test to be applied, which is the civil standard, and the quality and nature of the evidence needed to satisfy it. Of course, in a case of an infringement finding a presumption of innocence applies, and as the Tribunal said in para.200 of its Decision in Replica Kit – I will not take you to it, I think you were taken to it yesterday by Mrs Skilbeck – the Tribunal must be satisfied the quality and weight of the evidence is sufficiently strong to overcome the presumption that the party in question has not engaged in unlawful conduct.

The Tribunal indicated the evidence must be "strong and cogent" (were the words used) and all will, of course, depend on the facts. At para.205 of its Judgment in Replica Kit the Tribunal repeated its concern that it had set out in *Claymore* that the test set out in *Napp* should not inhibit the application of the Act, should not prevent authorities finding infringements and, Sir, you repeated that point yesterday as a continuing concern. The OFT is very alive to that concern. There is no suggestion in the present case, we submit, that the OFT

would have reached a different decision had it applied the standard of proof clarified by the Tribunal in the *Replica Kit* case.

However, there have been two suggestions made by the Appellants in this case with regard to the standard of proof that I would like to address: first of all, the suggestion made in the first paragraph, No.1, of the Appellants' speaking note, that stronger and more compelling evidence is required to establish conduct amounting to abuse than is required to define the relevant market or to determine dominance. I would like to make three points on that. First of all, as the CAT confirmed in *Replica Kit* – as this Tribunal confirmed in that case, we say the same standard of proof, the civil standard, should apply to all of the issues arising under the Chapter II prohibition, whether there are issues of primary fact or not.

As regards the second point, as regards the approach that the Tribunal should take to the evidence for questions of market definition under Chapter II, we would, as we indicated yesterday, rely upon the test set out by this Tribunal in *Aberdeen Journals*, and repeated in *Genzyme* and in *Replica Kit* – it is *Aberdeen Journals (No. 2)* – I will not take you to it – para.125, where the Tribunal said that they would bear in mind that an issue such as the relevant product market may require a more or less complex assessment of numerous interlocking factors, including economic evidence, and that of course involves an element of appreciation and judgment. So the question there is on whether the OFT has proved its case, is whether the Tribunal is satisfied that the OFT's analysis of the relevant product market is robust and soundly based, and that is the test to be applied to an OFT finding on those matters.

Our third submission is that, in line with *Replica Kit*, of course stronger evidence may be required depending on the seriousness of an allegation. In that case it was a cartel agreement, an infringement. In our submission, however, that proposition does not mean that this Tribunal when considering questions for itself, if it decides to do so, on relevant market should apply perhaps a lower test, looking for less strong evidence. They should not apply a bare balance of probabilities test because one has to bear in mind that for a market definition in particular a complex assessment of various matters is required, including matters of economic analysis and judgment.

As regards the second argument made by the Appellants, we originally read paras.9, 11 and 12 of the Appellants' skeleton as saying that a different approach should be taken to the strength of the evidence required, depending on whether a penalty would be imposed or not. It appears from what Mr. Roth said yesterday, as recorded in the transcript at pp.1 and 2 and 32 and 33 and p.12 of day 1, that that argument is no longer run by the appellants.

However, in that regard we would just draw the Tribunal's attention to the fact that although under s.40 there is of course a threshold to the turnover of an undertaking to which a penalty can be applied, under s.40(3) that statutory bar can be removed in the case of a serious infringement, so one cannot assume from the start, even when dealing with a small undertaking, there will be no penalty applied.

Moving on now to the second ----

THE PRESIDENT: It is a genuine problem here. There is a genuine problem here, Miss Smith, because over large swathes of competition law – I am now talking in general without the particular circumstances of this case particularly in mind – what you actually want to achieve is to stop the conduct in question as quickly as you can or restore market conditions as quickly as you can. It may be an entirely secondary consideration as to whether or not you should impose a penalty, and there may be dozens of cases where you would not dream for a moment of imposing a penalty but you nonetheless wish to intervene as an authority, and that was really the principle upon which British competition law proceeded for many years. It is perhaps slightly illogical to say, "Well, we can't intervene to stop this conduct because we can't meet the standard of proof". If the standard of proof is geared to the imposition of a penalty then nobody would dream of imposing a penalty in the first place.

MISS SMITH: Of course before one decides – before the OFT or any other authority decides to intervene it must be satisfied that there is an infringement and the question is to what standard must the authority be convinced that there is an infringement, and we say in assessing that question there are real practical problems as well as a sense of unreality in deciding whether this is an infringement that might merit a penalty or not, because that is, in our submission, a question that cannot be answered at the beginning of an investigation or even possibly until the very end of an investigation, either for small companies or otherwise. So we say that trying to introduce two different tests that have to be applied during the course of an investigation is both unreal and impractical.

Moving on then to the second topic on which I would like to address you, and I think I can do this pretty briefly ----

THE PRESIDENT: And the criminal law faces the same conundrum in terms of the standards necessary to make the various orders that actually now have been made, like anti social orders and football banning orders and all that sort of thing, where you want to stop the conduct rather than produce the full force of the criminal law down on the particular offender, and it is true I think that recent case law suggests that it is too difficult to have more than one standard, you

should still stick to the criminal standard, but the way it is applied is more flexible. I think that is probably a reasonable summary of the case. You can look at hearsay evidence, for example.

MISS SMITH: That may be so. I would not want to make any submissions on that.

THE PRESIDENT: No, no. I am musing aloud, which is always a dangerous thing to do.

MISS SMITH: Sir, if I could move on to the second topic and deal with that very briefly. You indicated yesterday the various options open to this Tribunal. We would agree that there appear, in our submission, to be four options. The first of course is that the Tribunal uphold the OFT's Decision, and of course that would be the OFT's preferred option. The second is, as you indicated, to quash the Decision and do nothing further. The third is to quash the Decision and remit the matter to the OFT.

If the Tribunal disagrees with the approach that we took to abuse in this case, the OFT would submit, as I think has already been made clear, that the Tribunal should remit the matter to enable the OFT to reconsider the facts and whether or not those facts establish that there is an infringement on the basis of an approach set out by the Tribunal.

The fourth option, which is that requested by the Appellants, is that this Tribunal could make its own finding of an infringement under Chapter II. Of course we accept that this Tribunal has the power to do that under Paragraph 3, Schedule 8 of the Act, but, in our submission, if the Tribunal is not with us on our primary case it should not take the step in this case on these facts to make its own finding of an infringement. This Tribunal has already considered that issue to some extent in paras.107 to 109 of its judgment in *Freeserve*. The Tribunal indicated that it may decide there has been an infringement itself, and I am now quoting from the judgment:

> "… provided that the Tribunal has all the necessary material before it and the rights to be heard of all parties have been fully respected."

And I venture that that was in the Tribunal's mind yesterday as a result of some of the questions that were asked.

We say as a result of the first requirement that the Tribunal has all the necessary material before it, and in this case in order to find an infringement itself the Tribunal would of course have to make a decision on all the elements under the Chapter II prohibition, in our submission – market definition, dominance, abuse, and objective justification even though it has not featured in the Decision up to now. The Tribunal, if it were making a fresh Decision, would have to deal with that question as well.

We have already indicated that, in our submission, the Tribunal does not have the evidence necessary to determine each of those issues, and I would draw your attention to appendix 1 of the OFT skeleton on the geographical market.

As regards the second element, the rights to be heard of all the parties have been fully respected, as Mr. Maxwell Lewis said yesterday. If this case is to turn from an appeal to a first instance hearing in his opinion his clients will need the opportunity and time to put in full evidence on all the issues. So in effect I think, as indicated by the Tribunal, there will need to be a new hearing with evidence. We say such a hearing would not be necessary and should not take place unless and until the Tribunal has decided to reject the OFT's arguments on abuse and to quash the Decision. So in effect we would say the Tribunal should reach a decision on those issues first before deciding that the parties have to go through the lengthy and possibly costly task of a further hearing with evidence.

Moreover, we say that possibility merely underlines our submission that if it fails in defending its decision on abuse the OFT should – this case should not be dealt with by the Tribunal but should be remitted to the OFT, which, in our submission, is in a better position than the Tribunal to obtain further evidence not just from those parties presently before the Tribunal but from all other players in the market, such as other funeral directors and crematoria.

PROFESSOR PICKERING: Miss Smith, could I just ask, the OFT has had two goes at this already. You seem to be conceding, and indeed para.1 of appendix 1 of your skeleton concedes it quite clearly, that you do not have all the information that you consider you would have needed to take a decision on all the issues. Frankly, is it not a matter of concern that you are coming along three years after this matter started and saying, "Well, we still don't have the information?"

MISS SMITH: Sir, there has been delay in this case and we do not try to deny that. The approach that the OFT has taken in this case, and Mr. Swift I think indicated yesterday in his second proposition that this is a proper approach to take, is that it is open to the OFT to focus on one of the essential elements of a possible infringement under Chapter II, in this case the question of abuse, and to determine that as that was not made out it is not necessary for it to undertake a full investigation of the other elements that would be necessary to establish an infringement, and it is on that basis that, as you have seen from the Decision and as Mr. Swift again indicated yesterday, the question of relevant geographic market is not presented in the Decision as a considered final conclusion, it is an indication of the likely market in this case.

So, yes, we do accept that that is not a full and final considered conclusion, and that there may be further evidence, and that there is further evidence that is required were a conclusion on the relevant markets to be reached, a final conclusion on relevant markets to be reached.

PROFESSOR PICKERING: You will understand that I am not a lawyer, and so forgive me if I get the law wrong or interpret it inappropriately, but you are saying that the Tribunal must have all the information available to it if it was to take a decision. Presumably that is at the end of the process and it would be open to the Tribunal if it felt for whatever reason that perhaps it should move to take a decision in this case, that it would be open to the Tribunal to conduct itself in such a way that it obtained a filling in of the gaps in any evidence that you may be alleging would prevent us perhaps taking a firm decision as of today. So we could build up that evidence, could we not?

MISS SMITH: Sir, if I could answer that question by making two points. The first is that we would stress the fundamental difference between making an infringement decision and making a non-infringement decision, but obviously if an infringement decision is to be made a final decision must be reached on each of the elements of the infringement. It is absolutely the case that the Tribunal has power to take any steps that the Office could take and, as a matter of theory, that could include obtaining evidence. The question is then whether that is either sensible or practical for the Tribunal to carry out that process itself, and we say that it is not either sensible or practical for the Tribunal to carry out that process, and also if the Tribunal were minded to carry out that process there is a substantial risk that there will be a line drawn between the public authority given the role under the legislation to carry out investigations and to come to conclusions on infringements and, on the other hand, the Tribunal, which is essentially a tribunal of appeal, that that line would be blurred as a matter of principle. Of course there may be exceptional cases where the Tribunal chooses to take a different approach, but we say that this is not an exceptional case, if it were against us, where it should carry out its own investigation.

THE PRESIDENT: I think it is fairly evident, or must be fairly evident to you, that we have very grave concerns about the way this case has gone. This is essentially a matter that affects two firms, both of whom could be put in the category of small or medium size businesses. It is very important for both of them to have a resolution to this affair. It has taken a very long time to get this far. It has been very expensive for everybody. Whether the Burgess case is right or wrong, it is difficult to say that they have not got an argument, and the process by which that argument has been resolved does not show the system working in a particularly impressive

way, and now to be invited to send it back again for another cycle of delay is not a prospect as to which we are particularly enthusiastic, I have to say.

MR. SWIFT: This is a matter that, as the Tribunal will have expected, I have discussed with the Office of Fair Trading. You referred yesterday, Sir, and with considerable restraint, to the passage of time, but we are where we are and, in my submission, it is quite plain that the OFT as the public body is in the best position to carry through what further investigations need to be made in the event that this Tribunal would find that the OFT had erred. It is absolutely clear, and I can give this assurance to the Tribunal and in open court, that this case would be given the absolute highest priority to ensure that justice was done and seen to be done in an effective and firm manner.

THE PRESIDENT: Yes, thank you.

MR. SWIFT: Those are our submissions, sir.

THE PRESIDENT: Thank you, Miss Smith; we are very grateful. Yes, Mr. Maxwell Lewis.

MR. MAXWELL LEWIS: Sir, I did indicate that we would have a very short one-page additional statement to serve.

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

MR. MAXWELL LEWIS: I would like to do that. I would like to ask the Tribunal's indulgence for a very, very short adjournment for my own personal benefit, and perhaps we could serve that statement in the same time. It does contain one exhibit, a single page, which contains confidential information, so it is being distributed on the basis that the annexure is for counsel and solicitors only.

THE PRESIDENT: We will rise until ten past 12.

MR. MAXWELL LEWIS: Thank you very much.

(Short break)

THE PRESIDENT: This is very helpful, Mr. Maxwell Lewis. I do not want to put Miss Austin to undue trouble, but I think it would be helpful, if you were able, at some stage in relation to the figures that you have at CMA1 to divide the figures into burials on the one hand, and cremations on the other.

MR. MAXWELL LEWIS: They are all cremations.

THE PRESIDENT: Oh thank you very much. In that case the only bit of information that would be helpful to us would be know more or less exactly, if you can, what percentage of these cremations are at Harwood Park.

MR. MAXWELL LEWIS: They are all Harwood Park. That is the only cremation service that we have, Harwood Park.

THE PRESIDENT: They are all at Harwood Park?

MR. MAXWELL LEWIS: Yes.

THE PRESIDENT: Fine, thank you very much. I suppose the last question is this, this shows a certain trend, and it would be useful for us, we can take it, as it were, through you if that is convenient, to know whether in your client's opinion the total market served by these branches is in some sort of decline, i.e. there are just fewer cremations because of changes in population or whatever, or whether there is some other factor?

MR. MAXWELL LEWIS: I did actually ask that question and they say that currently there is a downward trend as far as they are aware in all the areas where they are. They cannot speak, of course, for an area outside of their operation.

THE PRESIDENT: The downward trend is because there are fewer deaths in the area or for other reasons, or not known?

MR. MAXWELL LEWIS: That is not known, I think. I do not want to speculate.

THE PRESIDENT: No.

MR. MAXWELL LEWIS: I do not think they have been able to inform me either, but they are seeing the results of some trend, they cannot explain the trend itself.

THE PRESIDENT: No, thank you.

MR. ROTH: Sir, just so I can understand, I am sure it is my mistake, the figures – are these all the cremations conducted by the Austins' branches, or is it only the cremations conducted by Austins' branches that were at Harwood Park, or are the two the same?

THE PRESIDENT: I had understood that those were the same thing, that they do not do cremations other than at Harwood Park.

MR. ROTH: But I thought on the OFT's table they did.

MR. MAXWELL LEWIS: Let me just make sure.

THE PRESIDENT: It is worth checking, I think, Mr. Maxwell Lewis.

MR. MAXWELL LEWIS: (After a pause): They are just Harwood Park figures.

THE PRESIDENT: Right, well in that case it would be useful for us to know what proportion of the total cremations, as it were, these figures represent.

MR. MAXWELL LEWIS: I will make sure that information comes to you.

THE PRESIDENT: Thank you very much.

MR. MAXWELL LEWIS: Sir, members of the Tribunal, thank you for that short adjournment, it was very helpful. Just one or two housekeeping matters and responses to matters produced and said yesterday. I think in referring to a table that was produced at the request of the Tribunal, which showed cremations carried out by the two parties here, plus the two other largest, which

was referred to yesterday by my learned friend, Mrs. Skilbeck, there was the proposition that they were effectively third or fourth largest of the users of Harwood Park ----

THE PRESIDENT: That Burgess was?

MR. MAXWELL LEWIS: Burgess was, in fact that is not the case. The list was compiled strictly in accordance with the request, i.e. the two parties plus two others, in fact, I am instructed there are over 30 different funeral directors who use Harwood Park from the surrounding areas and there were others, even on those tables, that came higher than Burgess in using them, so in fact they would not be the third or fourth largest users. If the parties want actual details of that we can certainly supply them. I do not want to make too much of a point on it, but just to correct what may have been a mis-impression of the size of Burgess's as a user of Harwood Park.

PROFESSOR PICKERING: We could be interested in the full list and relative orders of magnitude of usage of Harwood Park.

MR. MAXWELL LEWIS: I will make sure that those figures can come.

PROFESSOR PICKERING: Thank you very much.

MR. MAXWELL LEWIS: Just briefly to refer, since you have had the statement, again it refers to the question of the value of the retained business in relation to the amount of ashes that are taken away, there seems to be a declining trend on removal in the business as a whole. Through the figures of the Federation one can see that what was quoted as, I think, 27 per cent. taken away in the reference to the planning application made yesterday for the Appellants ----

THE PRESIDENT: It is now over half.

MR. MAXWELL LEWIS: Yes, that was a 1991 case, probably referring to figures from 1990 or earlier, so the trend is going down, and we have seen the trend of Harwood Park business itself, which have referred to.

THE PRESIDENT: Yes.

MR. MAXWELL LEWIS: Again, just before I get into what I hope will be a brief resume of the points in my skeleton, just one or two response points. We were referred yesterday to a consumer survey, tab E, p.494, I do not propose to go to it, as to what consumers may expect from their funeral director, and it was quite rightly stated that funeral directors were expected to provide a hearse to the nearest crematorium or cemetery as part of the service. I think that is obviously reasonable and relevant in terms of what the consumer may expect. It does not, in fact, I think go anywhere towards defining geographical market. You would not want to put in there that a funeral director would be expected to provide a hearse for a journey of 200 miles, or something – it just seems to be a reasonable expectation of what shall be provided in the service and I do not think it takes it any more than that.

In relation to the third witness statement of Margaret Burgess, in response really to the Tribunal's question of how has it been going in the interim?

THE PRESIDENT: Yes.

MR. MAXWELL LEWIS: Yes, it has been operating. The correspondence referred to there does say that there have been some issues recently with regard to what Austins say is postcode shopping in order to bring it within the bounds, that has been responded to and I do not need to take it any further than that, unless you wish me to. There are some issues but it is working, I think is the best way to describe it.

THE PRESIDENT: If I may say so, Mr. Maxwell Lewis, I think that is to the credit of both parties.

MR. MAXWELL LEWIS: If I may turn to my skeleton argument as a rough guide, as it were, to that which I wish to say.

THE PRESIDENT: In our core bundle it is tab 11.

MR. MAXWELL LEWIS: Let me preface what I am going to say by reference to some of the things that have been said, I think by both the Appellants and by the OFT, because I think it is going to touch very much on the decisions to be made here, and I think there was a reference already made before the brief adjournment to the amount of time that this has taken.

THE PRESIDENT: Absolutely.

MR. MAXWELL LEWIS: This is a matter which has been concerning my clients just as much as it has Burgess because there is not only, of course, the costs on both sides there is the interference to the normal flow of business. We know from the very beginning that by excluding that my clients were diminishing their own revenue, so there was a cost to them. It has been going on an awful long time, and there is of course the emotional drain of that and the need of any business at the end of the day to focus on its business and not a continued disagreement which arose out of particular circumstances which then gets taken out of the hands of the parties because it is now being dealt with in another arena, and that has gone on for a long time. I think it should be said, and I say this on instruction, that it has not been, and never was the policy of my clients to permanently exclude Burgess's from their crematorium. This was a banning which was originally for six months on the basis of "If you cannot behave in a reasonable way and you cannot answer our questions about what you say is your complaint about behaviour of our manager then you cannot use our facilities".

THE PRESIDENT: Yes.

MR. MAXWELL LEWIS: That was a matter which was accepted by the OFT as the cause of this and I will go into that later, but from our point of view we do not come to this Tribunal as an

Intervener to say "we want the right to ban a competitor in our geographic area for ever" – leaving aside the question of what is the geographic area, the *de facto* locality.

THE PRESIDENT: Can I just ask on that point how that fits with what eventually happened in March 2004? The original dispute started in 2002, yes, let us say 2002, there was then the rather grey period with Nethercotts, and then in March 2004, which is nearly three years down the line, there is then a sort of total ban ----

MR. MAXWELL LEWIS: Just over two years down the line.

THE PRESIDENT: Just over two years, yes, thank you for putting me right on that. One might have thought that by then things had moved on.

MR. MAXWELL LEWIS: One would have hoped that they had. I think the subterfuge of using Nethercott s made matters worse. It started to involve other parties and it was a question of the matter getting bigger rather than smaller. Let me answer that question, if I may, by saying there would have to be conditions fulfilled for Burgess to come back to the crematorium, and I do not want necessarily to restrict the exact terms of that, but they will be essentially threefold. One is the complaint about Mr. Peter Hope, the manager, would have to be withdrawn. Secondly, there would have to be an undertaking not to remove or interfere with Austins' promotional materials at the crematorium; and thirdly, there would have to be an undertaking not to withhold client information on statutory or Harwood Park forms which have to be filled out. Those have been three areas of conflict, and they have not been resolved to my client's satisfaction. I say this openly because it may be that during the course of the luncheon adjournment some progress can be made on that matter. I do not know, I postulate that as a possibility but I have not obviously spoken to any of the other counsel on that. But I want to put that really as a marker down in relation to everything I am going to say in respect of the argument.

THE PRESIDENT: That is helpful starting point, Mr. Maxwell Lewis. Obviously from the Tribunal's point of view we have various – we are currently seized with various arguments that affect points of principle that concern in many ways the longer run development of our domestic competition law, but are of no practical interest to your clients. But we are nonetheless, as a Tribunal, obviously always alert to the possible and practical solutions being found to particular problems, and if that is the beginning of a possible solution so much the better.

MR. MAXWELL LEWIS: My submissions are based on the same. What I propose to do is really refer to the skeleton but only refer to details and to authorities by turning to them should you

actually require me to, on the basis that we have already been through the authorities to some extent here.

THE PRESIDENT: Absolutely, yes. That is very helpful.

MR. MAXWELL LEWIS: I suppose the first point is really point 1 of the skeleton, which is that the central issue here – the question is must the Tribunal step in to upset or displace, quash, the decision that my clients have not infringed the Chapter II prohibition by their refusal to supply, and I think there is not much argument on that.

The context is that the Office of Fair Trading did not need to make any decisions other than those that it did make, and to that extent I do echo what my learned friend Mr. Swift has said. They dealt with it in the proper parameters in order to deal with the extent, issue and problem at the time, and that still remains the issue. So in dealing with it in the way in which they did they dealt with it in the most efficacious way. It was not necessary to come to all the other findings because, as has already been said, they found non-infringement so it was not necessary to go on and find the others, which may involve them in far more research and work, the construction of a detailed model and all of those issues, which once they find on the facts of the particular case is not an infringement, they have discharged their function, we say satisfactorily, and to a point where it need not be upset by this Tribunal by making the finding they did, and we support that finding based on the particular facts.

PROFESSOR PICKERING: Mr. Maxwell Lewis, in a number of places, and I cannot immediately pull them off from the back of my mind, OFT does indicate that there is a sequence, define the market, establish the market position and then establish whether or not there has been abuse. Are you saying that it is possible to determine whether there has been abuse of the dominant position without first knowing whether that position was dominant and what the market is in which that dominance is being determined.

MR. MAXWELL LEWIS: No, I am not saying that at all, and I do not think the OFT was saying that either. I think what they said was that they found what the likely markets were and then applied the test to that making an assumption of dominance. So if they had made the assumption which they did for the purposes only of their decision that there was dominance, and that, even on that assumption, there was not an abuse of a dominant position, then it would be effectively to act in vain to go into the further realms of, if you like, reinforcing what they had already come to a conclusion on.

PROFESSOR PICKERING: Thank you. That is helpful. Are you saying that they assumed dominance in both the crematorium market and also the funeral directing market?

MR. MAXWELL LEWIS: I think the Decision – it is para.74 of the Decision. I do not want to take the words out of their mouths.

THE PRESIDENT: That is an assumption about the upstream market, the crematoria services.

MR. MAXWELL LEWIS: Yes.

THE PRESIDENT: And it is not entirely clear what assumption they are making about the downstream market, but they have found a likelihood in 73 about Knebworth and Stevenage.

MR. SWIFT: I think it might be helpful to intervene. I would say that the quality of the finding, if I can call it that, is the same in respect of the relevant geographic market, the relevant product. The only difference is we are asking the Tribunal to make an assumption that there is dominance in the geographical – sorry, the geographical market is limited to that particular area, in which case plainly dominance is established.

THE PRESIDENT: If you have got para.74 there, Mr. Swift.

> "Nevertheless the OFT has … hypothetically assumed that Austins is dominant in the upstream market for crematoria services."

What is the geographical market in which this hypothetical assumption is being made?

MR. SWIFT: I will be corrected if I am wrong on this, but I am assuming for this purpose that the OFT has concluded that whether or not the geographic market is defined as Stevenage/Knebworth, or whether it is defined in this peculiar way, where the boundaries depend upon the location of the funeral director nearest to Harwood, that dominance is assumed to be in either of those markets.

THE PRESIDENT: Perhaps there is no assumption as to what the geographical market is.

MR. SWIFT: I have just taken some instructions on this.

MR. ROTH: I do not know if para.57 might be helpful in the Decision.

THE PRESIDENT: Yes, it might be – a 30 km radius. I do not think it can be the 30 km radius.

MR. SWIFT: No, it cannot be that.

THE PRESIDENT: I do not think anyone has really defended the 30 km radius particularly, but never mind.

MR. SWIFT: This is difficult. Subject to being corrected, may I just say that, on my reading of it, I assume that for this purpose the OFT is not prepared to contest the arguments the Appellants are putting forward about a narrower market.

THE PRESIDENT: I see.

MR. SWIFT: I had in mind that the OFT had, having vigorously denied ----

THE PRESIDENT: That is what we are to take to be ----

MR. SWIFT: Having vigorously denied that Austins was dominant in the upstream market, indeed relying on a table that showed it had 16.5 per cent. of the market, I hardly agree that the draftsman of this Decision, or the size of this Decision could – well, never mind about that, let us assume we are dominant. That would be to ask the Tribunal to assume the most extraordinary hypothesis. So I would say yes, very strongly, we concede for these purposes what the Appellants have argued. Yes, there is nodding behind me, so we have got it right.

THE PRESIDENT: Sorry, Mr. Maxwell Lewis.

MR. MAXWELL LEWIS: I hope that answers the Professor's question.

PROFESSOR PICKERING: I think it does, yes.

MR. MAXWELL LEWIS: Really just to wrap up that point, we say that that was the necessary information to come to that conclusion, and attacking that and the methodology does not actually take us any further in deciding whether they came to the right decision on the facts of the case.

As to burden and standard of proof, which is my next point, I think no one would disagree that quite a lot has been said on this, and we have moved on from perhaps the balder assertions in that to a more fluid and flexible approach within the civil standard, and unless you wish me to address you on that I am content to ----

THE PRESIDENT: No, I think we have probably had sufficient argument on that point.

MR. MAXWELL LEWIS: My next point is really – and again this has been argued quite substantially – the question, what is the product market, and I think the only point that I need to make on this, and I do not know to what extent it is still a matter of the appeal, is this distinction between consumer and the funeral director as the market, and the potential for two separate sub-markets. I think it is, in reality, common ground that you cannot separate them because the funeral director is the agent of the consumer, and what you have to do is perhaps differentiate for competition purposes between preference and choice because the competition law is concerned with choice, and the ability to choose and to choose effectively by choosing and getting the service that you want rather than by a particular preference, because a preference by its nature of course is the idea that you walk in the door with and it applies when you walk in the door of a travel agent thinking you might go on holiday. "I want to go on holiday next week. Ah, but Ibiza is not available next week, the flights are full so I'll go to Majorca." It is a question at the end of the day of what is available, and I think, bearing in mind that, yes, people seem to walk into – where there is a dispute as to this, you walk into the funeral directors with an idea of, a preference for, a church if there is a religious service to be included, or a cemetery if you are going to bury the deceased, or the crematorium. That is

probably subject, essentially I think, to availability of three things: that church, cemetery or crematorium, plus the availability of the funeral directors, pallbearers and cars, and other matters at the time, plus the availability of the crematorium at the time. So all of these of course involve people working together, and possibly the availability of the minister on that day, and maybe the minister is going to be doing a service at half past 11 at West Herts and cannot get back to Harwood for 12 o'clock. So it is a matter of organisation, and I think that has to be borne in mind when looking at the question of choice, and I think once you do that you do see that the preference which may have been in the mind of the consumer at the beginning actually is subject to the realities of the market place.

That leads me on to the geographic market. We say that the 30 km radius which was used – of course this was an indicative finding and I do not know to what extent it takes the matter further here because there was a finding based on an assumed dominance in a smaller market for the purpose of the Decision. We say that was a realistic assessment because it was based – there is no argument that research and information came in from 25 other funeral directors in compiling all this information, that effectively there is a bigger market that the crematorium competes in, and we know that everybody seems to use more than one crematorium, and we know of course that the Appellants themselves use other crematorium from all three branches throughout this entire process, and are able to do so, and were of course able to do so prior to the advent of Harwood Park on the scene,

I do not want to stick us in the past and say because there was another crematorium 15 km away then you have to judge it by that; we do move forward of course. But the reality is there is within striking distance a selection of other crematoria and the proof of that pudding is in the eating because all seem to use other crematoria, including the Appellants.

PROFESSOR PICKERING: But to a very small extent when you are talking about those ----

MR. MAXWELL LEWIS: From the Knebworth branch.

PROFESSOR PICKERING: Well, Knebworth, also Welwyn Garden City as well.

MR. MAXWELL LEWIS: Lesser Welwyn and Hatfield. It is of course going to be indisputable that the nearer the crematorium the more convenient it is likely to be.

THE PRESIDENT: Yes. There is going to be a sort of sliding scale I suppose.

MR. MAXWELL LEWIS: There is going to be a sliding scale but I think ----

PROFESSOR PICKERING: But furthermore, exceptions would prove the rule, would they not, in a sense? We do not have to have 100 per cent. usage.

MR. MAXWELL LEWIS: No.

PROFESSOR PICKERING: And the fact that there is some variability but not a lot does not undermine the sort of case that is being advanced on behalf of the Appellants, does it?

MR. MAXWELL LEWIS: It does not support it particularly. What we know is that they all use more than one. I do not think we have the information before us to say that consumer choice was not a factor in that as well. It may be that the relatives of course do not live exactly where the deceased person lived, and maybe it would be more convenient. It may be that somebody -- there is a previous family member who had a service at a particular crematorium before, and they may wish to follow that. There are so many variables in this that I think we cannot draw hard and fast rules or extractions from it. But given the fact that they all do use others, then I submit that the approximately 30 km radius, which is only 20 miles or so, is not an unrealistic one, and certainly not one that can be attacked as being necessarily wrong.

Price increases. I think we looked at the chart, looking at the price increases. I think at the end of the day we see that all of them have increased their prices and all of them, or certainly most of them, have been increasing their business over the years, and Harwood Park is not the most expensive. It is up there with the top prices, but some of them may be, particularly the ones which are local government owned, may be less expensive because they are for rather more basic services, perhaps with a shorter time. And I do not think the price increase that has been referred to here as a basis for a SNIP test determining the market really proves very much when you have got a field where all of them have been increasing their prices. As I said – it is 4(f) of my skeleton on p.8 – the reality is that we are more expensive than some of the others but, on the other hand, we offer pallbearers within the price and entry into the book of remembrance within that charge, and it is not, as suggested, unlawful behaviour on the part of a dominant undertaking. It is in fact transparent pricing, and we say that is all the more necessary in a business where the consumer at that time is making a purchase in a time of distress and needs to be protected from hidden costs and unfair price comparisons, and, as has already been said, we do not discriminate on the basis of the geography of a client.

THE PRESIDENT: You are right to draw our attention – I had not myself picked up the fact that you offer pallbearers as well.

MR. MAXWELL LEWIS: Yes. There is a table appended to my skeleton which actually shows some of the other competitors charge £40 or so for the provision of pallbearers.

THE PRESIDENT: Yes. I do not quite know where I find that now, Mr. Maxwell Lewis.

MR. MAXWELL LEWIS: I confess my own copy does not have the appendages to it.

THE PRESIDENT: No, but we have had a piece of paper with that sort of information on it. It is just a question of putting our hands on it.

MR. MAXWELL LEWIS: The Intervention. My apologies, it is the Intervention.

THE PRESIDENT: Yes, it is. I have it. Annexed to the Intervention we have got Luton and West Herts, but I am not sure I have got Harwood Park for some reason.

MR. MAXWELL LEWIS: No, I do not think it is Harwood Park. It is to show that those others have extras that you can purchase on top of the basic.

THE PRESIDENT: I see, yes.

MR. MAXWELL LEWIS: The book of remembrance extra cost, pallbearers extra cost, and I think there are in fact many other extras you can purchase.

PROFESSOR PICKERING: Mr. Maxwell Lewis, the very last sentence on p.8 of your skeleton, where you say:

"Further, it does not price discriminate against local funeral directors."

The President has just referred to that table for Luton and for West Herts, and they are presumably the crematoria that you would suggest price discriminate.

MR. MAXWELL LEWIS: No, I am not suggesting that. They are intended to show that there are extras you can purchase there.

PROFESSOR PICKERING: Your last sentence on p.8 says "It does not price discriminate against local funeral directors".

MR. MAXWELL LEWIS: "It" means Harwood Park.

PROFESSOR PICKERING: The implication is that other crematoria do price discriminate, and that material to which the President has referred shows that, because Luton "figures for residents and for non-residents" and then if the President would help me by turning the page West Herts. Refers about one-third of the way down the listing to a different fee for people who do not live in the areas of Bedfordshire, Hertfordshire, Buckinghamshire and Middlesex. Is that what is meant by not price discriminating, that Harwood Park charges the same wherever the customer comes from?

MR. MAXWELL LEWIS: Yes.

PROFESSOR PICKERING: It is not actually about funeral directors, is it, as you say in your skeleton, it is about the custom? Am I right that both Luton and West Herts. Crematoria are local authority owned?

MR. MAXWELL LEWIS: I believe they are, yes.

PROFESSOR PICKERING: I wonder whether that is the reason why they have different charges for local and less local customers?

MR. MAXWELL LEWIS: It may be, I actually have no knowledge of that as the President speculated yesterday, it may be that the taxpayers of those boroughs get a discount.

PROFESSOR PICKERING: Exactly. Do you happen to know whether other privately owned crematoria engage in price discrimination?

MR. MAXWELL LEWIS: That I have no instructions on, I can certainly see if I can answer that question before the end of my submissions.

PROFESSOR PICKERING: I would be interested to know because I think what I am developing is the hypothesis that it is not about whether some crematoria price discriminate on the basis of their market position, but whether local authority owned crematoria seek to give some price advantage to the local residents, and that that is the basis of the supposed price discrimination and it is not anything necessarily to do with market position?

MR. MAXWELL LEWIS: It may well not be, and I do not know, but of course it does raise the question of whether council owned crematoria are entitled to do that.

PROFESSOR PICKERING: Well they are doing it.

MR. MAXWELL LEWIS: They are doing it and of course they are doing it in a competitive market. They may be owned by the public through the local authority, they are competing with private enterprise in the same arena, so it does affect competition and may itself be unlawful discrimination.

PROFESSOR PICKERING: Well it is a matter for discussion as to whether there is a competitive environment in any meaningful sense of the term within which a local authority crematorium competes, and that is partly what this case is about, is it not? So let us not necessarily presume that, but what I am interested in is why some crematoria have different price structures and others do not, and any comments that you may wish to offer us later on on that, we would be grateful. Thank you.

MR. MAXWELL LEWIS: It looks as if I may well run over the 1 o'clock, and if I can get some more information over the lunch adjournment I shall. I am just about to move on to abuse.

THE PRESIDENT: Yes.

MR. MAXWELL LEWIS: Since that may take more than five minutes, would this be a convenient moment?

THE PRESIDENT: If that is a convenient moment for you, Mr. Maxwell Lewis.

MR. MAXWELL LEWIS: And maybe return earlier.

THE PRESIDENT: Why do we not rise now and restart at 2 o'clock.

(Adjourned for a short time)

THE PRESIDENT: Yes, Mr. Maxwell Lewis.

MR. MAXWELL LEWIS: Mr. Chairman, members of the Tribunal, two housekeeping matters, small ones, if I may, before we continue. First of all a correction and an apology for an answer to your question this morning regarding the exhibit to Clare Austin's witness statement, and the question of what this related to. I was absolutely wrong, it was the total funerals conducted by Austins, it is not cremations at Harwood Park.

THE PRESIDENT: Okay. So I think our previous request for a breakdown probably remains.

MR. MAXWELL LEWIS: Yes.

THE PRESIDENT: Sorry, when you say "total funerals conducted by Austins", that means, first of all, burials and cremations, does it, or just cremations?

MR. MAXWELL LEWIS: Yes, it is all funerals conducted by them.

THE PRESIDENT: So what would be helpful is to have the figures for cremations and the percentage of those cremations that were carried out at Harwood Park. Do you follow me?

MR. MAXWELL LEWIS: Yes. Those figures are not available as such. They would have to be created.

THE PRESIDENT: To take it in stages, it is probably not too difficult – I do not know, tell me if I am wrong – not too difficult to take burials out of the figures.

MR. MAXWELL LEWIS: I think that can be done. These are figures which are not here in my client's possession.

THE PRESIDENT: No, no. They can be sent in in a few days time or something. Secondly, if it is too time-consuming to work out how many precisely were carried out at Harwood Park, I would have thought an indicative percentage would do because we have the strong impression at the moment that the vast majority of Austins' cremations are done at Harwood Park.

MR. MAXWELL LEWIS: Yes, I think that is right. I think what the family is looking for is to see if there is any information to hand. What you are really interested in is total activity broken down by cremations versus funerals, and how many of those are at Harwood Park.

THE PRESIDENT: Yes. That is what we are looking for. It may not be here but it can be supplied within the next seven days or something of that kind.

MR. MAXWELL LEWIS: Yes.

MR. SWIFT: I am not quite sure whether I am going to help or hinder this exercise, but Harwood Park is the only crematorium owned by the Austin family. So is the answer not to be found in, dare I say it, annex 2(a), which shows the number of cremations carried out at Harwood Park from each of the funeral service offices of Austins, which shows, for example ----

THE PRESIDENT: Those show very high percentages and I think the ----

MR. SWIFT: It also shows the numbers, Sir.

THE PRESIDENT: And numbers, but those figures – the figures we have got in front of us from Miss Austin are for 2003 and 2004.

MR. SWIFT: Indeed.

THE PRESIDENT: If the picture is the same, i.e. the same kind of percentages in those years, that is sufficient for our purposes.

MR. SWIFT: I had not realised it was a time point.

MR. MAXWELL LEWIS: Can I just seek some clarification so that those behind me know exactly what to provide – the years for which those figures are required?

THE PRESIDENT: I think we have got 2001 and 2002 in annex 2(a). So it is 2003 and 2004, and you have given us a total figure, and what we really want to do is to see how that relates to annex 2(a) of the decision, for those subsequent years 2003 and 2004.

MR. MAXWELL LEWIS: So one can see the trend.

THE PRESIDENT: So one can see the trend.

MR. MAXWELL LEWIS: Thank you, I think those instructions are clear.

The second matter, information – I said I would try and get further information to support what we said, that there are over 30 different funeral directors. We have circulated on a confidential and restricted basis a list which I hope you have received.

THE PRESIDENT: We have, thank you, yes.

MR. MAXWELL LEWIS: I am afraid it is in random order. Although the percentage at the top of the page is the highest it does not go in decreasing order, and that is because of the way it has been prepared as an existing document and not for these proceedings.

THE PRESIDENT: No, quite. We understand.

MR. MAXWELL LEWIS: Perhaps that helps.

THE PRESIDENT: It does, thank you, yes.

MR. MAXWELL LEWIS: I should just add, for the sake of clarity, that one will see the name Jennings and Coughlan Brothers. They are in fact run by or are part of the Co-op; they have been taken over, so when we are looking at the Co-op figures we have to count theirs as well.

THE PRESIDENT: Yes, when we get to ----

MR. MAXWELL LEWIS: They are about 16th and 20th in the list.

THE PRESIDENT: Is the Coughlan Brothers effectively the Welwyn operation?

MR. MAXWELL LEWIS: Yes, Welwyn Garden City.

THE PRESIDENT: Welwyn Garden City, yes.

MR. MAXWELL LEWIS: And Jennings is Luton.

THE PRESIDENT: Yes.

MR. MAXWELL LEWIS: I hope that is of some assistance. If I may return to the skeleton as my rough guide, I was going to come on to abuse. Again, I do not want to repeat what has already been said, or rehash arguments that were there before. I think the two points I really want to make in relation to this is looking at what the Decision actually said rather than what it has been said that it said. I do not necessarily want to turn to it, but what para.75 of the Decision said was:

> "Refusal to supply by a dominant undertaking is not necessarily abusive. In considering such allegations of abuse the OFT considers the effect of the refusal to supply. In particular it considers the effect on competition rather than individual competitors."

That does not of course mean that it excludes individual competitors, and we say that that is the correct approach and there is authority for it to which I have referred in my skeleton. I think the point that needs to be made is really at (E) of my skeleton at the bottom of p.10, that the suggestion in para. 160 in the skeleton that refusal to supply *per se* is, without looking at the effect and the surrounding effects has to be an abuse of a dominant position is not supported, and that what *United Brands* said at para.182 – I think I do not need to turn to it unless you wish me to, but what it said was that you cannot stop supplying a long standing customer who abides by regular commercial practice and that, in our case, is the key phrase "who abides by regular commercial practice". In this case, the refusal to supply was a breakdown in regular commercial practice, and that was the finding of the OFT and those are the facts which I have alluded to earlier today.

PROFESSOR PICKERING: Can I just ask, how does that relate to the fact that no point is being taken in relation to objective justification?

MR. MAXWELL LEWIS: No point is being taken by?

PROFESSOR PICKERING: By OFT.

MR. MAXWELL LEWIS: I think it is perhaps two ways of looking at the same point. I cannot speak for the OFT, obviously, in their submissions, but I will come on to objective justification briefly in my skeleton, but in terms of how does that relate to it I think it is perhaps two different ways of looking at the same question.

It is all a question of circumstances and effect. I think objective justification is where you say what you have done you cannot do unless there is an objective justification to it. What the words in *United Brands* say are you cannot take this away from a regular customer who is

abiding by your normal commercial practice. So in fact, rather than two ways of looking at the same thing I think it is a stage by stage effect. So what *United Brands* is saying is that if you have a regular customer you cannot just stop supplying him provided he was abiding by the regular commercial practice between you. If he is not abiding by that regular practice between you, you do not have to go the next step to objective justification, because you are not fitting within the parameters, he has broken the contractual relationship, the underlying relationship of agreement as to the terms upon which people trade with each other. If he has not – as in *United Brands* where they were still in the relationship of supplier/grower/ripener and distributor of Chiquita bananas, it was its activities outside that relationship in promoting the rival product which angered United Brands, and caused them to take the steps they did effectively to frighten off anybody else, and the Tribunal were very clear in that case that you cannot do that. That was a huge international concern throwing its weight around for the purpose of bringing other suppliers and growers into line – wholly different circumstances.

But to get back to your question, if I can answer it this way, it is a two-stage process. If they are abiding by the commercial practice you go on to the next stage to see if there is any objective justification outside of those original circumstances which excused the behaviour. What we say is in this case you have not got to that stage, because they are not abiding by normal commercial practice.

THE PRESIDENT: That takes us on to the question which you were alluding to at the start of your submissions, which is for how long can you not supply because of a particular breakdown in commercial relations, i.e. is it indefinite? Is it time limited in some way, and at what point? I think you went on to say that as far as your clients were concerned it was not regarded as something that was indefinite?

MR. MAXWELL LEWIS: No, not at all. There is a broken relationship which ought to be mended. One of the problems has been that it has been taken out of the arena of the two of them and it is now in a larger, more formal, legal arena, and a regulatory arena first of all before we get into this Tribunal. It is not unknown, of course, for that to become adversarial as much as court proceedings and attitudes may harden. It needs something to be driven through to bring people back to the negotiating table. It may be that looking at the time expended, the energy and cost expended (as in these proceedings) is a good way of doing that.

THE PRESIDENT: It does seem to the Tribunal that the fact that this is now in a wider regulatory arena should necessarily prevent the parties from doing their best to mend the relationship, as you put it.

MR. MAXWELL LEWIS: I would not for one moment say that it would prevent them, or should hinder them, on the contrary it may be a matter of coming this far and taking stock of what has been gained and what has been lost, on both sides.

THE PRESIDENT: Yes, of course. Yes, so that is *United Brands*.

MR. MAXWELL LEWIS: That was *United Brands* and just in passing, para.7 of my skeleton, just to follow on from the point about normal commercial practice, the question of intent, and the factors surrounding a refusal are well set out in documentary form at pages 250-273 of the Appeal bundle. Again, I do not intend to take you through them unless you wish, but they are there for everyone to see.

I think that probably brings me on effectively then to the market place and the effect of the exclusion. Again, without wishing to rehash what has been said already we will try and use another term or series of words to rephrase what has already been well said – "serious adverse effect on competition" is perhaps a useful wrap-up phrase. You can go further into it but I think we have already established where that is. I think the reality of the market place is something that needs to be taken into account because of course one cannot judge any of these matters in a vacuum, and I think there are four points to bear in mind in this case – we have seen it before but just by way of bullet points. In the present case all of the Appellants' branches do use other crematoria. The number of funerals arranged at the Appellants' Knebworth branch increased in 2002 over 2001, which was the last pre-difficult year.

After exclusion, the total number of cremations undertaken by the Knebworth increased and that is in annex 3 tables 1 and 2. Even when access to Harwood was available through Nethercotts the Appellant organised the substantial majority of cremations at crematoria other than Harwood (para.87, Decision). I think that puts it in the context of the real market place in which to decide these factors.

That is all I wish to say on those particular points. We move on now to the remaining grounds of the claim ----

THE PRESIDENT: I am not sure you really need trouble us on this part of the argument.

MR. MAXWELL LEWIS: Then I am much obliged, that completes my submissions.

THE PRESIDENT: Yes, Mr. Macnab, good afternoon.

MR. MACNAB: Can I just say that Mr. Swift made a comment for the transcript, and can I just make the comment that I am not, and never have been called Mr. Jack Andrew Macnab, let that be reflected in the transcript.

I am going to be reasonably brief, I hope. The Consumers' Association which remains the legal person who instructs me, even though I understand some members of the Consumers' Association like to be known as "Which?".

THE PRESIDENT: Just on a serious point, we can continue to refer to them as the Consumers' Association?

MR. MACNAB: The Consumers' Association is, I believe, the correct company name. There are, in fact, two companies, one is called "Consumers' Association" and one is actually called "Which?". Those instructing me are the Consumers' Association.

THE PRESIDENT: Thank you.

MR. MACNAB: We have intervened in support of the applicant, in support of the interests of end consumers of the products in issue in this Appeal and more generally in support of the interests of end consumers, funeral purchasers, also called funeral arrangers, and the OFT itself noted in its inquiry into funerals that there is only one purchase of funerals, but many more consumers, mourners, etc. End consumers being two classes of person whom you may feel have been rather overlooked in all the matters that we have heard from the parties. Sir, we have said pretty much all we want to say in our statement of intervention and in our skeleton submissions and of course those skeleton submissions are skeleton in name only. I like to think that skeletons are perhaps rather bigger than in fact they are in reality, for reasons which may be apparent from looking at them.

Obviously, I urge the Tribunal to read those submissions and the documents to which we have referred in them, and I have been very heartened by the fact that a number of the criticisms that we made of the OFT's Decision have been echoed in a number of the Tribunal's questions.

The Tribunal will also have seen in the submissions the extent to which we support the Applicants' arguments, and the purpose of these submissions is simply to emphasise a couple of points. We have taken a position against the OFT. We have not done so lightly, and we do not take any pleasure in having done so. The fact remains that the Consumers' Association is disappointed with the OFT's approach to the Applicants' complaint.

The consequence, as the Consumers' Association sees it, of the OFT's Decision is that the end consumers of crematoria services in the relevant parts of Hertfordshire are deprived of or restricted in their choice of funeral director and crematorium; consumers who wish to use Harwood Park crematorium are restricted in their choice of funeral director. Consumers who wish to use JJ Burgess's services are restricted in their choice of crematorium.

As we have set out in the skeleton submissions at para.7 – I will refer to paragraphs, I am not going to take you to those.

THE PRESIDENT: Yes, we have them to hand, Mr. Macnab.

MR. MACNAB: We say in para.7 of our submission that result may be contrasted with the OFT's own stated views on the minimum service to be expected from a funeral director as set out in OFT 346, the report on this inquiry into the funeral industry, at para. 4.11 and annex F, namely, that most people who probably require a funeral director define the following services as a minimum: provide a hearse to the nearest cemetery or crematorium.

THE PRESIDENT: Yes.

MR. MACNAB: Consumers are being deprived of that choice in a situation in which my learned friend Mr. Swift described yesterday in the following terms (p.55, lines 18-21 of transcript): "This is an acutely sensitive service that has to be carried out jointly as between a funeral service provider and a provider of crematoria so that so far as the ultimate client is concerned it appears as simple and efficient a service as possible. In those circumstances it is inevitable that personalities will be important." The logical consequence, we say, of the Decision, if it is allowed to stand, is that Austins may exclude all funeral directors, other than itself - other than Austins – from the crematorium and thus reserve consumers to Austins to the further detriment of the end consumer.

The OFT says that is too apocalyptic a vision, it is all right if one or two competitors are left in the funeral director market. I note in passing that Mr. Swift's suggestion this morning that one should be looking at possible entry and supply side substitutes into the market for funeral director services and that this in some way ameliorated the Austins' conduct was not considered by the OFT or relied on by the OFT in reaching its Decision. Perhaps I could also note in passing, in answer to Professor Pickering's comment regarding barriers to entry into the funeral directors' market, a conclusion or comment of the OFT in OFT 346 at para.3.3, p.7 – I have to confess I could not actually locate the particular tab in the bundle where you will find it, but one of the factors relied upon by the OFT as a barrier to entry into that particular market – I will just read what it says in para..3.3:

> "Funeral Directors are not subject to any licensing or control nor are they required to have professional qualifications or be registered. Entry into the market is in consequence not difficult, but a steady decline in the death rate means the only scope for growth in the market is the provision of additional or higher value services. This may discourage significant new entry in a market where reputation is an important factor."

Of course drawing attention there to the reputational element as being a barrier to entry. You will note of course that both the Applicant and Austins have relied upon their own long histories in their marketing information.

Be that as it may, whether or not the Consumers' Association's view is overly apocalyptic the fact remains that even on its own case the OFT is content to allow an *ex hypothesi* dominant undertaking in an upstream market, namely crematoria services, which is n the business of supplying those crematoria services to the downstream market of funeral director services and also to end consumers to choose those whom should be allowed to compete with that dominant undertaking in that downstream market. We say that harms the competitive process, that is not a proper operation of competition law.

Our position is that the OFT's conclusion in relation to abuse is fundamentally flawed; and secondly, its methodology in relation to determining the geographical market is also flawed, whether or not the OFT has made any decision in respect of that geographical market. The overall result, we say, is that the OFT has failed those whom competition law and policy is supposed to benefit, namely the consumer, and, more generally, the Consumers' Association has a concern that the OFT has chosen to apply competition law and policy to the positive detriment of a particularly vulnerable class of consumers.

The two points on which I wish to address you are market definition and abuse, and I shall do so briefly. As regards market definition, we note the OFT's position, namely that it has not taken any final concluded decision on market definition. The Consumers' Association nonetheless invite the Tribunal to consider its submissions as set out in the skeleton submissions whether or not the OFT has made a final decision. Our position is that the approach to market definition is flawed and that it fails to take any proper account of the position of end consumers who, in this case, form a particularly vulnerable class.

The President asked yesterday (p.20 of the transcript):

> "I think one of the things we are interested in, Mrs. Skilbeck, is by whom the choice is really made. Is it the funeral director or the customer, and what evidence do we have of that fact?"

Mrs. Skilbeck directed the Tribunal to such evidence as there is yesterday. Our submission in relation to the need to consider the position of end consumers is set out in para.21 and the following paragraphs of our skeleton, and we say it is self-evident that the choice of crematorium is ultimately a matter for the end consumer rather than the funeral director. It may be the case that the funeral director gives the end consumer advice or information to assist in making a choice, or guides the consumer as to making that choice, and one hopes of course

that the funeral director does that job in good faith and having regard to the best interests of the consumer. Whatever happens, ultimately it must be the choice of the end consumer, and, that being so, and if it is correct to apply a SNIP test, and that is what the OFT has done, and whatever test one does apply, one has to consider what is the response of the end consumer to, once applying the SNIP test, a rise in prices, applying some other test, whatever other factor one chooses to throw into the mix.

Sir, the submissions are set out in the skeleton argument, but, Sir, the President's question highlighted one of the Consumers' Association's other criticisms of the OFT's Decision. The act evidence that the President asked for is very patchy because the OFT did not consider it necessary to decide the issue because the OFT's analysis was, it is said, the same whether it considered demand of funeral directors or demand of any consumers. That is a matter one finds in para.30 of the Decision. In our skeleton submissions we have pointed out the flaws in that approach. In particular, there is no assessment, having regard to the peculiar characteristics of these end consumers and the fact that they are unlikely to operate in the classically rational manner that would be expected of those who go to buy beans on a regular basis ----

THE PRESIDENT: Mr. Macnab, on the question of the end consumer, that is a point that I think I may have raised which is still puzzling to some extent. From the point of view of the end consumer, two things; as you point out, first of all even supposing for one moment he is thinking about price at all, he is going to get a composite bill of some sort in which he may not know or focus upon the actual cost of the crematorium as a part of the bill – that is one point. Secondly, even if a particular crematorium's price was lower than some other crematorium's price you would have to balance up the extra cost of getting to that crematorium as distinct from the other crematorium in order to work out whether there was a net saving or not presumably, even if you went into those issues; in other words, there must be some sort of transport cost protection for a higher priced crematorium in a particular area. If you have to pay £10 more to go to a particular crematorium and it is going to cost you £15 in petrol and time to go to one further away you are no worse off going to the more expensive one – add all those factors sort of billed into a SNIP test in this particular market.

MR. MACNAB: One of the reasons of course, Sir, why it was that we were the ones who questioned whether a SNIP test was actually appropriate, and one of the main factors we put in our skeleton argument, is that we are dealing here with a very particular market, a very peculiar market. It is not the classic market one is dealing with, which is why applying the SNIP test may be unreliable given that, as you say, variations in price may not have that much of an

effect at all. Certainly we accept that the price of the crematorium is one component of the overall services. It is an overall component that is a disbursement on behalf of the client, something that is going to be there and billed, and I think that I have to say your question really illustrates the problems one has when applying the SNIP test, and it is likely you can crank up your price a great deal and still have no switching.

THE PRESIDENT: Yes.

MR. MACNAB: I am afraid, Sir, that I have rather kept out of the figures ----

THE PRESIDENT: Yes.

MR. MACNAB: ---- and focused on the rather bigger picture, and it may be that those to my right here can offer you a more cogent response.

THE PRESIDENT: No, you are at the level of principle.

MR. MACNAB: The lofty plane, Sir, yes.

Sir, the criticism that we have in this particular matter is the OFT has confined its inquiries to funeral directors and has not carried out any inquiries of any consumers as to what their response would be to price increases in relation to crematoria services.

THE PRESIDENT: Possibly a slightly difficult survey to carry out!

MR. MACNAB: The end consumer of course in this case is the purchaser rather than anybody else!

THE PRESIDENT: Rather than the deceased, yes.

MR. MACNAB: I did not want to say that, Sir – well, I did but I did not feel I ought to.

Sir, you say that, but four years ago the OFT did in fact carry out a survey ----

THE PRESIDENT: Yes.

MR. MACNAB: ---- when it was conducting its survey which we see in OFT 346, so it is not beyond the bounds of possibility, it is something which has been done very recently.

Turning to the issue of abuse, we support the Applicants' submission on the question of abuse. The effect of the OFT's Decision is that the dominant undertaking, ex hypothesi dominant undertaking, can in effect choose its competitors and not merely its customers. The Consumers' Association is concerned that the OFT is prepared to condone such a state of affairs, and it was concerned that the OFT seemingly bent over backwards to reach an interpretation of the Luxembourg case law that is, first, not justified by the cases themselves but, secondly, limits the OFT's ability to prevent a course of conduct to the detriment of end consumers who are, after all, the persons whom competition law is intended to benefit.

The OFT says it in its response to our statement of intervention, that the case law does not support a finding that a refusal to supply by a dominant undertaking is a per se abuse. We say, and this is all set out in the skeleton, that *United Brands* shows just that. It may not be a

per se abuse but it is certainly a prima facie abuse. I have set out a passage from *United Brands* in para.47 of my skeleton at some length, and the proposition advanced in *United Brands* was accepted by Advocate General Jacobs in his opinion in *Oscar Bronner*, at para.43. *United Brands* shows that such conduct, a refusal to supply an existing customer by a dominant undertaking, is an abuse. It is only lawful if it is objectively justified and if it is proportionate.

The question of objective justification has not been considered by the OFT, neither has the question of proportionality. The OFT has drawn attention to and made much play of the fact that competition law is intended to protect the competitive process, not individual competitors. The first point is that the Consumers' Association supports the Applicants' arguments that that is not a correct statement in relation to the Chapter II prohibition, or Article 82. But, be that as it may, in our submission it is a distinction without a difference in the situation under consideration where a competitor is removed from a market by the simple means of refusing to supply it with a product it needs to compete in that market in the absence of objective justification and in the absence of proportionality.

Both the Applicant and the OFT have referred to the *Michelin* case and noted that a dominant undertaking has a special responsibility not to allow its conduct to impair genuine undistorted competition. That is fine, yes, a dominant undertaking is quite entitled to be dominant, there is nothing wrong with that; it may be that its product is so good that other undertakings are driven out of the market, and that is the competitive process in action. But the crucial point in that situation is that it is the consumer who picks the winner, and the effect of the OFT's Decision is that the dominant undertaking, Austins, is allowed to pick the winner, or at least influence the outcome of the fight by preventing other undertakings from competing with it and by preventing other undertakings from taking part in the fight. That is not protecting the competitive process.

I conclude by inviting the Tribunal to consider the following matters in relation to abuse. First, it is taken as read that competition is beneficial to consumers. Secondly, competition law ensures and promotes competition which, as we know, benefits consumers. The third point is ask yourself this, how has the consumer benefited from what Austins has done in relation to the Applicants, and how has the consumer benefited from what the OFT has decided? The answer is the consumer, the end consumer, has not benefited at all. The consumer has lost out significantly, or may lose out significantly. The end consumer who was not faced with a wide choice before Austins' actions faces the prospect of that choice being

even further restricted, and all that is occurring in a market which the OFT itself has identified as a dysfunctional market and in need of more competition rather than less.

Sir, those are my submissions. Unless you have any questions?

THE PRESIDENT: Thank you, Mr. Macnab. Can I say we have found both the written and the oral submissions of the Consumers' Association extremely informative and helpful.

Yes, Mr. Roth.

MR. ROTH: May it please the Tribunal. A couple of preliminary matters. My friend, Mr. Maxwell Lewis, began his opening earlier today by setting out the terms on which his clients say that Burgess would be readmitted to the use of the crematorium. No one will be more delighted than Mrs. Skilbeck and my clients if they are now readmitted to Harwood Park Crematorium and no one would have been more delighted if this matter could have been resolved without having to mount a prolonged and expensive case in a complex area of the law against a very well funded public authority. That is a daunting prospect for any small business. I simply say, for the record, and my clients are most anxious that I should say, that there have been repeated approaches to Austins to seek a resolution of this matter that are all reflected, or many of them are reflected, in the correspondence that is before the Tribunal – approaches by Mrs. Burgess personally, by the trade association, the SAIF, and by Burgesses' solicitors, and may I just give you some references. I am not going to read the documents. Right at the outset, bundle 1, tab D1, pp.165 to 166; then the correspondence towards the end of the six months initial ban, because you will remember it was only for six months initially, bundle 1, tab D2, pp.176 to 182; then the intervention of the SAIF, bundle 1, tab D2, pp.199 to 203; an approach before the interim measures application was taken out, bundle 1, tab D1, pp.183 to 186; and then before starting this appeal, a personal letter by Mrs. Burgess, bundle 1, tab D1, p.186A, and perhaps I draw your attention to that last document in particular and the terms of the letter, they speak for themselves, a letter to which sadly there was no reply.

THE PRESIDENT: Mr. Roth, there has been a reply now indirectly.

MR. ROTH: If it can be taken forward it certainly will be, and we ----

THE PRESIDENT: There is no reason to suppose that what Mr. Maxwell Lewis said was not said with genuine intent to see whether there was the possibility of a working solution.

MR. ROTH: It will certainly now of course be explored, and one of the points you made we thought had been dealt with, namely that the complaint about the merger should be withdrawn in one of the letters I referred to long ago. So there may be some ----

THE PRESIDENT: That may make things even easier.

MR. ROTH: There may be some scope for doing that and we will certainly act on it, unless my clients wish, and if they can achieve it they will be delighted.

THE PRESIDENT: It is certainly something the Tribunal would encourage.

MR. ROTH: Thank you very much, we shall of course act accordingly.

The second preliminary point. You asked, Sir, the question why were we stopped altogether from access in March 2004, and the answer I think came that then Austins became aware of the deception that we were using Nethercotts. With respect, they were well aware of that long before then in March 2002. It is reflected in their letter which is at pp.197 and 198 in bundle 1, tab D2. That was no news that they then discovered in March 2004.

I should say that letter is referred to in the Intervener's skeleton at para.15(a) with the date 1st March 2003. I think that must be a typographical error because it is the 1st March 2002. So that, with respect, cannot be the reason. We really do not know what the reason is.

So I turn to the competition issues. Mr, Swift began his address to you yesterday by emphasising that the OFT applies the principle of non-intervention, and I think that was clarified in response to your questioning to mean that is how the OFT understands the law on Article 82. If so, that is a question of law which I shall respond to. If it is anything more than that, although as a matter of law that might be an abuse, the OFT is saying it has the discretion not to intervene upon a complaint from a directly injured third party. That would be a very fundamental submission which raises far-reaching points. But there is no suggestion of that at all in the Decision, and I do not think, as I understood it, in answer to your question, that there seem to be advanced a sort of domesticated *Automec* principle, if I can put it in that shorthand way, in this case. They took a decision on their understanding of the law.

THE PRESIDENT: The words "non-intervention" carried the connotation of the public authority stepping in. When the public authority steps in or does not step in, the public authority at least knows that there is, in theory, an alternative route which is civil proceedings. However, from the Tribunal's point of view, and from the point of view of s.60 and the jurisprudence of the court, we are concerned with what the law is and not the question of intervention by the public authority.

MR. ROTH: Absolutely, and that is my point, and this Decision did not say "We are not going to take up this case because we think it is better to leave the parties to civil proceedings", there is not a hint of that in the Decision.

So one comes to the law. Can I respond briefly on the three heads? First, market definition/dominance, secondly, abuse and thirdly, what steps the Tribunal can, and we respectfully suggest should take.

So first market definition/dominance. The Decision makes it clear that it is quite correctly looking at two product markets, namely, funeral directing services and crematoria services – paragraph 25 of the Decision – is not disputed by anyone. First funeral directing services. Mr. Swift said very little indeed about the definition of the market for funeral directing services – presumably there is very little he could say. The Decision is clear, the OFT has concluded that the Burgess Knebworth branch is likely to compete in a geographical market comprising Stevenage and Knebworth and that the Welwyn Garden City branch is likely to compete in a market comprising Welwyn and Welwyn Garden City (para.47, Decision), and then reasons are given. Then there is the "Conclusion" in para.54, tab 1 of your core bundle.

THE PRESIDENT: I would particularly like to trace the train of thought and in particular in relation to Welwyn.

MR. ROTH: Yes. I am dealing with funeral directing services – they do it the other way round. I have started with funeral directing services, and it is para.47:

> "For the reasons set out in the following paragraphs, the OFT has concluded Burgess' Knebworth branch is likely to compete in a geographic market comprising….

THE PRESIDENT: Yes.

MR. ROTH: "…and the Welwyn Garden City is likely to be marked by Welwyn, Welwyn Garden City". Then comes discussion, available information and so on. Then comes para.54, "Conclusion on the relevant geographic market for funeral directing services".

> "On balance the OFT considers that Knebworth and Stevenage are likely to comprise a discrete geographic market for funeral directing services. The OFT also considers it is likely there is a discrete geographic market for funeral directors which includes Welwyn and Welwyn Garden City, and perhaps a limited area beyond this."

The OFT may now say to this Tribunal well that is only a provisional finding. Of course it is on balance, but that is the test – the balance of probabilities – the test made clear in *Napp* – it is not expressed as a provisional finding, and it is with respect to the OFT a little bit odd to stand before this Tribunal, addressing you on a Decision made on 29th June 2004 on a complaint submitted two and a half years before, which was initially dismissed by the OFT, but then withdrawn by a Decision – a reasoned Decision – over a year before this final Decision on the basis that Austins might be dominant in the likely market. Then to say "Well this final Decision is actually only setting out our preliminary findings and not any conclusion ----

THE PRESIDENT: It is headed "Conclusion".

MR. ROTH: It is headed "Conclusion" and we rely on that. One thing that has been referred to a lot but I do not think you have been taken to is the withdrawal Decision, which is bundle 1, tab C, p.149, in fact it begins at p.145. As you see, a Decision of 9th April 2003, and it is a very full Decision. I draw attention at p.149 to "Funeral directing services – the market".

> "The OFT has considered the arguments put forward by Harwood that Stevenage and Knebworth should be considered individually as they comprised "separate communities". The OFT nevertheless has reasonable grounds for suspecting Stevenage and Knebworth constitute a single geographic market in which Burgess and Austins both compete. The OFT believes that competition for funeral directing services takes place in local markets …"

And a footnote reference to the Monopolies Commission Report.

> "… and further that Stevenage and Knebworth together constitute a local market for funeral directing services. Estimates supplied …"

and so on. Then there is some discussion. So that is the basis on which they discuss market definition when withdrawing the Decision – that clearly is not a conclusion, that is their suspicion and their consideration. They withdraw the Decision to conduct further investigation, and then here we are, 14 months later in a Decision and they say "Well that is only a provisional finding." I will come back to that withdrawal Decision in due course.

So to dominance in the funeral directing services' markets. We have now, at last, the very full table in annex 3 of the Decision, that is Stevenage and Knebworth and you will remember the figures are confidential – the market share figures, 2001/2002. No one is challenging those figures. The Austins' market share in 2001, and table 3. In fact, it is set out unredacted in the body of the Decision at para.65. I do not know if that was a mistake, but it is there on the website for everybody to read. So one has the 2001 figure, but I still will not mention it just in case it is a mistake, but it is actually specified in para. 65.

If one asks whether that was a freak year or whether the high market share was maintained, you can look at the redacted figure we now see at table 4 of annex 3 for the following year. We now there are only two other competing funeral directors in that geographic market. We know the law on dominance, and the *Axo* presumption that even at 50 per cent. plus market share, there is a presumption of dominance that has to be rebutted, this is way above 50 per cent. There is no rebutting evidence. On the contrary, in the Decision para. 66 the OFT considers that very question and finds that the presumption is not rebutted (para.66, Decision). That approach is not challenged by anyone.

THE PRESIDENT: Paragraph 66 to which you drew our attention makes the finding that there are barriers to entry into the markets for the supply of funeral directing services in Stevenage and Knebworth.

MR. ROTH: Yes, which goes to the point raised by Professor Pickering. I was looking at the last sentence of 65:

> "It is necessary to consider whether there is any evidence to the contrary which might rebut this presumption."

Then para. 66 is, as it were, examining that, so it is not rebutted. In any event, whether the view set out in the Decision is a finding or only a preliminary finding, it is clearly correct, it is reasoned, it is supported by evidence on this the evidence is all one way. No one has suggested to this Tribunal in two days of argument that the OFT got it wrong. So even if the OFT has not made any conclusions because it is in some sort of Alice in Wonderland where words mean what it says they mean, as opposed to what they say, so a "conclusion" to the OFT does not mean a conclusion. It is clearly open to this Tribunal to reach that conclusion as a conclusion.

THE PRESIDENT: That is funeral directing services for Stevenage and Knebworth.

MR. ROTH: It is funeral directing services, yes, this is dominance. I am not saying, and I hope we have never said that we are dominant in the two other markets, Welwyn, Welwyn Garden City and Hatfield in funeral directing services.

THE PRESIDENT: That Austins is not dominant?

MR. ROTH: Sorry, that Austins is not dominant, yes, thank you.

THE PRESIDENT: Sorry, that Austins is dominant?

MR. ROTH: We have never suggested ----

THE PRESIDENT: That Austins is dominant.

MR. ROTH: -- that Austins is dominant in those two other distinct geographic markets. We do say that they are distinct, geographic markets, and that is implicit in everything.

Turning to crematoria services. Mr. Swift said, if I understood him correctly, that we have not previously put forward a claim that the relevant market is the area in which Harwood Park is the nearest crematorium and that we had previously argued that it was the Stevenage/Knebworth area (transcript p.49, 24-28). If that is what was being said it is wrong. We put forward the claim we advance in argument, namely, the area where it is the nearest crematorium, in our Notice of Appeal para.70 and in our skeleton argument para. 44. We put it in the alternative, saying either that or the Stevenage and Knebworth area, because the

Stevenage and Knebworth area was the approach the OFT took in its Decision of withdrawal (para.20). They thought that might be the likely market, so we said either one or the other.

Mr. Swift said there is no evidence at all for the market that we put forward. He pointed out that funeral directors within that area arranged funerals at crematoria outside it, and that Harwood Park similarly gets cremations from funeral directors for whom it is not the nearest crematorium – there is no dispute whatever about that. It is clear indeed from Burgess's own figures that even with the Knebworth branch just one mile away from Harwood Park, even there not every cremation from Burgess/Knebworth's branch is at Harwood Park. For the Welwyn Garden City Branch the precaution at Harwood Park is of course less. Of course, Harwood Park gained cremations from areas where before it was established the residents went to crematoria much further away – they had to, there was nowhere else to go.

As Mr. Justin Burgess explains in his witness statement, one reason consumers choose a particular crematorium – the point of consumers is referred to by my friend, Mr. Macnab – is sometimes that the spouse of the deceased was cremated there, or if it is the mother's cremation the father was cremated there and they like visiting the garden of remembrance. So that can be a link with Harwood Park, but of course Harwood Park only opened in 1997, so if the first death was before 1997 it would be over at West Herts. and there is that continuing link. But this misses the point, all these undisputed, non-contentious facts about defining the market, which is only a tool to assess market power. It does not mean that all the undertakings' business is conducted within that geographical area, and here we say the evidence is overwhelming now that we can read annex 2A to the Decision in full. It does not matter, with respect, that annex 2A shows only 75 per cent. of the cremations at Harwood Park and not all of them, because we can see what it does show, and that is that in all but two cases, for all these different funeral directors, and their various branches the substantial majority of consumers have their cremation at the nearest crematorium, and the two exceptions, one of them is Austins. There is no suggestion that the OFT took 75 per cent. of all cremations because the 25 per cent. would somehow distort the picture, this was a slanted sample, it is no doubt put forward as a representative picture and we suggest it can be regarded as representative, so there is no problem that it is not 100 per cent.

There is the point made by Mr. Swift that this is a very special kind of service that is supplied by crematorium, supplied at a sensitive and emotionally distressing time, and that is a very relevant point. One is not talking about the purchase of baked beans or bananas, and whether to go to the grocers in Stevenage or drive to the Tesco superstore in St. Albans

because one gets a better deal. One can see the point explained in the OFT report on funerals, which is bundle 2, tab E, p.450, para. 3.11.

> "Analysis of our consumer survey data by registration district found considerable price variation for ostensibly similar services. For emotional reasons people do not approach the purchase of a funeral in the way they might any other purchase of a comparable price. If they had, and had shopped around and compared prices and services, it appears they could have made considerable savings."

And as they say elsewhere in the report, regarding funerals in general, and not just cremations but the same must apply, it is a classic distress purchase, it is almost a paradigm distress purchase.(para1.2 of the report). So to some extent market definition and dominance here go together, because the question is: does Harwood Park enjoy a position of economic strength that enables it to behave to an appreciable extent independently of competitors, customers and, most importantly, end consumers – a classic definition. It is the case, first, that for the majority of consumers arranging a cremation, arranging a cremation at the nearest crematorium is a very important factor, not for all but the majority, and the figures in annex 2A bear that out. Secondly, it is not a price sensitive purchase, and it is well recognised it is not. Thirdly, we are talking about crematoria, there are very high barriers to entry in that market and the planning inspectors' report, not just for Harwood Park but the other planning inspectors' reports show that there are high barriers. At Harwood Park the Austins had to appeal to get planning permission and even then, the decision as you saw is based on special local need.

Then, we submit, towards consumers in that area the crematorium has market power, which s the dominance test, designed to determine that even though some of those consumers will choose to arrange cremations in other crematoria, and indeed people from far away will sometimes come to arrange cremations at Harwood Park because the deceased's spouse was cremated there or whatever, and the facts of this case bear that out. Harwood Park can refuse to provide the supply of services to one of the three funeral directors in the immediate locality, one of the three funeral directors in Welwyn and Welwyn Garden City and one of the three funeral directors in Hatfield, apart from its own branch in Welwyn, and it can raise its prices more than other crematoria and still keep increasing the numbers of cremations – the table in our skeleton argument at para.54, which Mrs. Skilbeck drew attention to.

So, for all those reasons, we say, yes, there is clear and strong evidence of dominance.

So I turn to abuse. I have four preliminary observations to ----

THE PRESIDENT: Dominance of?

MR. ROTH: This is dominance in – that Harwood Park Crematorium is dominant in the supply of crematoria services.

THE PRESIDENT: In what geographical area?

MR. ROTH: We say the area where it is the nearest crematorium, because that is the area where the evidence shows the majority of consumers will chose it – the high majority of consumers will chose the crematoria.

THE PRESIDENT: So that would not include Hatfield?

MR. ROTH: That would not include Hatfield.

THE PRESIDENT: And, as far as Welwyn is concerned?

MR. ROTH: I think it is accepted it includes Welwyn – not necessarily accepted, we have the distances. I will be taking you to the distances in just a moment perhaps rather than do it twice. But it is clear it includes Welwyn, it does not include Hatfield.

And so we come to abuse. I have four preliminary observations on the approach adopted by Mr. Swift, on behalf of the OFT. First, Mr. Swift asked, "Is this the kind of dispute which should be met with a decision as to abuse?" We say that depends on the effect on competition, not on the origin of the dispute. Competition law is there to protect consumers, and, specifically, Article 82 and therefore Chapter II prohibition is to protect consumers from the distortion of competition resulting from the conduct of the dominant undertaking. Sometimes intent may be relevant to determine whether in fact conduct is anti competitive or pro competitive, as, for example, with low pricing that is not below cost but above cost can it still be anti competitive, it is targeted at excluding a competitor, intent becomes relevant, and the Tribunal had to grapple with that in the *Napp* case. But that is not the normal case, it is not this case. If Austins is not dominant then, whatever the background to their conduct, it is not an abuse, end of story. If they are dominant then discriminating in terms of supply or a total refusal of supply which distorts competition in the market for funeral directing services is an abuse, and the fact that Austins are a small company or a family run business is completely irrelevant. As we state in our proposition 10, which is not challenged, nor could it be, abuse is an objective concept and we do not know, nor need we know, why the crematorium having initially refused access to Burgess for a period of six months, then when the six months expired made the exclusion indefinite, and we do not know, nor need we know, whether the decision of Austins to open a new branch in Welwyn Garden City in June 2003, competing directly with the Burgess branch there, was motivated by the prospect of picking up funerals that Burgess had previously carried out to Harwood Park Crematorium, maybe it was, maybe it was not; maybe there were several reasons for opening that branch. But would it make any difference if

in three months time Austins opened a branch in Hatfield to compete with us there, or if they did not? We do not know and it does not matter, and just as well because it is very hard to reach a conclusive determination on what are the motives of a company. The question is, what is the effect of the conduct on competition?

Mr. Swift said, and the reference is transcript p.57, lines 23 to 26, as corrected this morning:

"The Appellants must provide strong and compelling evidence that as a result of the refusal there is a risk that they would be eliminated from the market altogether."

Well, as a statement of law we say, with respect, that is not right, and of course that is the most extreme form of anti competitive effect. But the basic test in *Hoffmann-La Roche*, that we cite in our proposition 10, is clear: the special responsibility of the dominant undertaking is to refrain from conduct different from that of normal competition which has the effect of:

"… hindering the maintenance of the degree of competition still existing in the market or the growth of that competition."

I was not quite sure whether Mr. Swift really went as far as the astonishing statement by the OFT in the Decision that even if the Austins conduct would lead Burgess to exit the market that would not seriously affect competition in Stevenage since the Co-op would remain and they are bigger than Burgess (the Decision, para.89) and it would not matter, a point you were exploring, Sir. It is there in the Decision. It is the kind of argument one might expect to hear a dominant undertaking put to this Tribunal, somewhat tongue in cheek, when fighting an infringement Decision made against it by the OFT. It is a somewhat surprising argument to hear put forward on behalf of the OFT as the authority upholding competition.

The test laid down in *United Brands*, to which Mr. Swift referred this morning – in *United Brands* you may remember, the banana case, the Danish banana distributor that was refused supplies by United Brands was not immediately going out of business; on the contrary, still less was it an indispensable supply. The point was they were taking bananas from somebody else, from a competitor of United Brands, Standard Fruit Company, and the issue was could therefore it be an objective justification of United Brands' conduct, and the European Court of Justice held that it could not.

Then Mr. Swift referred to that case and said this morning, and I timed it at I think 11.12, in summarising United Brands' conduct, "This adversely affected the ability of the competitor of United Brands to compete with it on its dominated market." This conduct of United Brands adversely affected the ability of the competitor to United Brands to complete with it on its dominated market. We say that is exactly what happened as regards the ability of

Burgess to compete with Austins in the market for funeral directing services in Stevenage and Knebworth where Austins is dominant.

The third observation on what Mr. Swift said, when considering whether abuse is relevant he said, "One should ask whether Austins should be subject to a remedy imposing long-term non-discriminatory access subject to agreement that would have to be policed by the Regulator". Can that be right? With great respect, that is not relevant. Either there is an abusive refusal to supply or there is not. If there is there needs to be a remedy, and there are some cases where a remedy may be difficult to devise – excessive prices cases, margins in these cases, all kinds of problems in fashioning remedies as this Tribunal knows. But in this case in fact many of the usual difficulties do not arise since Harwood Park Crematorium I think has published charges and there is no problem, as you have heard, in carrying out the limited access over the past six months save for a complaint that arose out of the limitation of access and not on the handling of funerals or cremations. Here are two responsible local businesses well aware of the sensitivities of mourners and the bereaved, and that is what their business depends upon. One cannot have a different legal principle that applies to a small business that is in a dominant position from a large company in a dominant position.

The fourth observation Mr. Swift made was that Austins could have designed the capacity of the crematorium so as to meet only demand from their own funeral directing services business. That is transcript p.54, lines 18 to 24. With respect, that is wrong: see the report of the Planning Inspector. It is quite clear that he found, and he only found, there were very special circumstances on the basis that the proposed crematorium would be constructed to serve the Stevenage area, and he records the assurance by Mr. Austin to the Inquiry that the facility would be open to use by funeral directors other than their own clients. That is the basis on which they got their permission. The whole thrust of that report shows that it is quite inconceivable that planning permission would have been given if it had been proposed on the basis that it would only be for the clients of Austins and no other funeral directing services.

So one comes to the question, is there an abuse, and we rely on abuse of both the two dominant positions that I have referred to, that is to say, dominant position of Austins in funeral directing services in the Stevenage/Knebworth area, the one dominant; (2) dominance of Austins in crematoria services in the area nearest to Harwood, the area for which Harwood Park is the nearest crematorium, and we made that clear both in our application to vary long ago and in the skeleton.

Our proposition at 12(a), which I think when I said it you asked me was there any authority for it, and we say it springs from first principles, that is to say, the dominant position

in the downstream market, for a company dominant in the downstream market to use it for its upstream operation to terminate supply to one of its competitors in that downstream market in the absence of objective justification. That proposition should come as no surprise to the OFT because it is a proposition they floated themselves in their Decision to vary back all that long ago.

THE PRESIDENT: Sorry, just take me to where you put the proposition, Mr. Roth.

MR. ROTH: Do you have our propositions? I can hand up another one.

THE PRESIDENT: They are the ones that were handed up at the beginning?

MR. ROTH: Yes.

THE PRESIDENT: Yes, I have them.

MR. ROTH: Page 3, para.12(a). There of course we are talking about the dominant position of funeral directing services. We say that is in fact a reflection of something the OFT said they were considering in their decision to withdraw the Decision, which is in your bundle 1, tab C, p.150, at para.27.

> "Austins and Burgess appear to compete as funeral directors in the Stevenage/Knebworth area and customers in these areas may have a strong preference to use the crematorium. As Burgess is being denied access to the crematorium this would appear to reduce Burgess's ability to compete with Austins for customers."

And that is under the heading of "Abuse"; that is exactly the point we rely on. We say that is the clearest example of abuse, and although that is the basis on which the OFT in the Decision of withdrawal say they are going to reconsider that matter. It is totally ignored in the final Decision - weakening your direct competitor by stopping it from getting supplies from your upstream operation, and does it weaken Burgess as a competitor? The figures are in Mrs. Burgess's first witness statement, and now the updated figures of the effect on business, and those figures speak for themselves. And the effect on the business in financial terms is set out in Mrs. Burgess's witness statement, paras.29 to 39, and Mr. Justin Burgess's witness statement, para.10, both of them witness statements served in support of the interim measures application, so before the Decision was taken.

There was discussion this morning about does exit from the market by Burgess weaken competition. Mr. Swift said, well, speaking theoretically – it may be theoretical for the OFT, but it is very far from theoretical for my clients, and the position we have is this: the market is the Stevenage/Knebworth area, Austins have a very high and sustained dominant position, and I do not know if they quite come within that slightly nebulous category of super-dominance defined in the *CMB* and the *Napp* case, but they are certainly significantly

dominant. Austins have only two competitors, and we rely strongly, with great respect, on Professor Pickering's point this morning concerning their longstanding presence in the market and the reputational barriers to entry. Of course the links, the reputation, the links with Burgess, of their clients that Mr. Burgess speaks about in his witness statement at para.9, these go back over years. Arranging a crematorium is not something, at least I hope it is not something, one does every week or every month, this is something people do on rare occasions, and they very poignantly remember the last occasion on which they have done it. So does exit from the market significantly affect competition? Yes, it certainly does.

Mr. Swift spoke about the possibility of new entry. Quite aside from the barriers to new entry, there is no reliance in the Decision on likelihood of new entry, and indeed the *Bronner* dictum on which Mr. Swift relied, at para.38 of the *Bronner* judgment, talks about elimination of competition of that undertaking. There is no reference there to, "Well, not if somebody else might come in".

So we have three different geographical markets for funeral services, and the question then arises, what about the effect on competition or risk of exclusion outside the Stevenage and Knebworth area, which I have been talking about, where Austins are dominant? What about Welwyn and Welwyn Garden City, where they are not dominant. What about Hatfield, which is not, as has been pointed out, in the geographical market of the crematorium. Mr. Swift said there is little evidence about Welwyn and Welwyn Garden City. The evidence is this, that for the funeral directors there Harwood Park Crematorium is the nearest crematorium.

THE PRESIDENT: It is very marginal, is it not, Mr. Roth? According to the Decision, which I think is in terms of how the crow flies, if we can just turn up annex ----

MR. ROTH: We have got updated distances ----

THE PRESIDENT: Yes. If we can just take it in stages.

MR. ROTH: I am so sorry.

THE PRESIDENT: According to the Decision in annex 2(a), p.29, which I think is as the crow flies, and I will be corrected, it is 19.5 as against 20.4. Page 9 of the Decision and 37 of the core bundle.

MR. ROTH: It is 21.3 and 24 – it has been corrected.

THE PRESIDENT: In the Decision?

MR. ROTH: In the Decision, yes. At annex 2(a) there is a corrected table the OFT have served, which I think is at p.610. Annex 2(a) itself has been corrected by the OFT. It is p.610. It starts at 609 to 611. Yes, those turned out to be wrong, I think. In fact I have taken those out.

MR. SWIFT: It is one-tenth of a kilometre change.

MR. ROTH: I am sorry – it changes from 17.5 kilometres to 21.3 I think ----

THE PRESIDENT: Hang on.

MR. SWIFT: Welwyn.

MR. ROTH: Are we talking about Welwyn.

THE PRESIDENT: We are talking about Welwyn Garden City, Harwood Park – according to this corrected version is 19.5, and West Herts. is 20.3.

MR. ROTH: Then looking at Welwyn ----

THE PRESIDENT: We are not looking at Welwyn at the moment, we are looking at JJ Burgess in Welwyn Garden City.

MR. ROTH: That is 19.5 to 20, yes.

THE PRESIDENT: Burgess is in Welwyn Garden City. If we then go to the annex to the OFT's skeleton, which is tab 10 of the core bundle, at p.29, according to that information and query to what extent we can take this into account since it is post the Decision, but leave that on one side, that asserts that customers in Welwyn Garden City, that is where the Burgess branch is, are likely to choose between Harwood Park 19 to 20 kms distance, 16 minutes drive time, cost £360, and West Herts. 20 to 21 kms distance, 20 minutes drive time, cost £285.

MR. ROTH: Yes.

THE PRESIDENT: It is quite a considerable cost difference there.

MR. ROTH: That is partly the point, I think, Mrs Skilbeck made that these drive times are RAC drive times and not funeral cortege drive times.

THE PRESIDENT: Going on the evidence that we have, it looks a bit borderline.

MR. ROTH: It is near the border. In fact, I think p.29 has also been corrected, it does not affect this, but it affects the next point, which is p.612 of your bundle I think from the OFT is a corrected table from the one annexed to their skeleton.

THE PRESIDENT: 612, yes.

MR. ROTH: I do not think it affects the point, Sir, you have just made, but just to show one is looking – perhaps as it is open one can look at both of them? As you say, Welwyn Garden City is pretty much borderline, and Hatfield, West Herts. – West Herts. is nearer, there is not a vast difference.

THE PRESIDENT: West Herts. is nearer but on this calculation it is not much difference in drive time.

MR. ROTH: But there the point applies against me because the drive time will be longer because these are RAC drive times and not funeral cortege drive times. You have to double them.

THE PRESIDENT: You have to double it in both cases, so it does not make much difference, does it?

MR. ROTH: Not a huge difference, because of course it is not just kilometres it is also what the road is like, whether it is a main road, dual carriageway or a country lane.

THE PRESIDENT: That is right.

MR. ROTH: In a sense – I am jumping ahead of myself ----

THE PRESIDENT: Just help us, the point I want some help on if you can give it to us is, supposing for argument's sake you can say there is dominance in the supply of funeral services in Stevenage and Knebworth, and dominance in the supply of crematoria services in relation at least to the Stevenage and Knebworth area; and suppose further that there is no dominance in relation to funeral directors' services for Welwyn Garden City or Hatfield, and that it is uncertain whether there is dominance in crematoria services for Welwyn Garden City, and probably not for Hatfield, but it is at best uncertain. The evidence we have from Mrs. Burgess is that there has been nonetheless a knock-on effect for the Welwyn Garden City and Hatfield offices as a result of the conduct complained of. Assuming that the Chapter II prohibition reaches the conduct complained of as far as Stevenage and Knebworth are concerned, because of the dominance, could the Chapter II prohibition reach the effects of that conduct in relation to Welwyn Garden City and Hatfield, notwithstanding the absence of or inability to establish dominance in relation to those geographical areas? That is the question?

MR. ROTH: That, if I may say so, Sir, with respect, puts it very clearly, and the answer we say is "yes".

THE PRESIDENT: On what basis?

MR. ROTH: Two bases, two alternative ways. One is the *Tetra Pak* basis of effect in an adjoining market, closely associating market, and the other is something rather different, which I explain this way. The ingredient of abuse is not just refusal to supply, and perhaps we put it a bit too high in our skeleton. We accept in our propositions that it is refusal to supply that has a significantly distorting effect on competition, we make that very clear in our propositions. The boundaries of a geographical market – one has to put a boundary – it is slightly artificial this fixed boundary. If one says it is Stevenage and Knebworth area, one draws that on the map, does it mean that therefore a funeral directing service that is the other side of the road, or a quarter of a kilometre away, therefore that is no abuse, and if it is just a quarter of a kilometre inside it is abuse? Is that really the way that this geographical market works, a black and white "yes", "no"? We say "no, it is not". They way one judges it by looking "Does it have a substantial effect on competition in the affected market?" That is why, for example, suppose

there is a funeral director in Aberdeen who just once happens to have a client who, for family reasons wants to be created in Harwood Park. The funeral director contacts Harwood Park crematorium and they say "No, we do not deal with people so far away", so they refuse supply. Would that be an abuse – assuming dominance? No, it would not be, and the reason it would not be an abuse is not that it is outside the area of the dominance, the reason is it would have no effect on competition between suppliers of funeral directing services in Aberdeen, because it is a one-off insignificant effect. The service is being supplied at Harwood Park crematorium within the area of the dominance. The effect that you look at is in the market that is affected, and the market which can be affected which here is the downstream market, could be outside that area of dominance. But if there is a substantial effect there is still an abuse and that is why, even if it is the other side of the road from your fixed boundary, because you have to draw a boundary once you have a geographical area, if it has a significant effect on competition in that area then it is abusive; if it does not, then it is not.

THE PRESIDENT: Does the effect on competition have to be an effect on competition between the alleged abuser and the alleged victim, or just an effect on competition generally?

MR. ROTH: It is an effect on competition generally, because even in *Commercial Solvents* they were not yet in the market in which Zoja (the customer) was refused supply, they were going to get into that market, they were not there yet. It would be the market in which the victim was competing, because that is where the effect would be and it just so happens that here in Stevenage and Knebworth we have dominance in both markets, but usually you will not.

THE PRESIDENT: Forgive me just for a moment, Mr. Roth. I think we have a finding in the Decision that Welwyn and Welwyn Garden City are the same geographical area, and we have Austins in Welwyn in 2002 and a branch in Welwyn Garden City opening in 2003.

MR. ROTH: Yes, I think Austin has been in Welwyn for a while, but they opened in Welwyn Garden City.

THE PRESIDENT: As far as Hatfield is concerned ----

MR. ROTH: If I could interrupt you for a moment, if you do not mind, Sir – that is why I said one is not just looking at Welwyn Garden City, that is where the Austin's branch is but the area of the customers is Welwyn, Welwyn Garden City, which is the nearest crematorium so one has to include Welwyn, that is why I was saying Welwyn.

THE PRESIDENT: I see, so if you took ----

MR. ROTH: Some will be nearer Welwyn Garden City, some will be nearer Welwyn. We will indeed have the map showing where the customers come from, they are sort of spread around, the people live round that area.

THE PRESIDENT: So if you took some sort of point in the middle of the geographical area, Welwyn and Welwyn Garden City, it is reasonably clear that Harwood Park is the nearest crematorium?

MR. ROTH: It is the nearest crematorium. It is not vastly nearer, but it is the nearest.

THE PRESIDENT: It is considerably if you take Welwyn than it is if you take Welwyn Garden City.

MR. ROTH: Yes, and if one looks at one's maps that all fits together.

THE PRESIDENT: But in relation to Hatfield we do not know a great deal about Hatfield, there is no dominance on the part of Austins, you say, in relation either to crematoria or funeral directing services. As far as we know, Austins is not present in Hatfield ---

MR. ROTH: That is right, they are not.

THE PRESIDENT: So on what basis could the Chapter II prohibition ever reach Hatfield?

MR. ROTH: Because it is refusal to supply at Harwood Park Crematorium in the area where they are dominant, and it has a significant effect on competition in the Hatfield funeral directing services market. So you have dominance and abuse in the one market, you have substantial effect on competition in the other market, and they do not all have to be in the same market. Indeed, if I recall correctly in Professor Whish's book in the chapter he has a little table showing in the different cases, when you have dominance, when you have abuse, when you have effect in the one market or the other market, showing how they are different cases in different places.

THE PRESIDENT: And would that still "stack up" – to use a phrase which is sometimes used, of which we are not particularly fond – even given the information on p.31 of the OFT's skeleton which is tab 10 of the core bundle, which appears to assume that for Hatfield West Herts. is the nearest crematorium and 78 per cent. of the Hatfield cremations go to West Herts. You only have a very residual effect on competition regarding Harwood Park. I suppose you argue, it is still a reduction in choice from the consumers' point of view because the local funeral directors in that market, Burgess and others, do we know ----

MR. ROTH: We know who they are ----

THE PRESIDENT: Yes, there are two others, the Co-Op and ---

MR. ROTH: Mrs. Burgess's witness statement.

THE PRESIDENT: It is in Mrs. Burgess's statement.

MR. ROTH: Yes, the two others, the Co-Op, and Oakleys.

THE PRESIDENT: The Co-Op and Oakleys can offer their customers both Harwood Park and West Herts, and you can only offer Harwood Park, that is the argument.

MR. ROTH: Exactly, and we know the figure of the number of Burgess cremations from the Hatfield Office in Harwood Park and the effect it has had.

THE PRESIDENT: I see.

PROFESSOR PICKERING: Mr. Roth, I am sorry to raise this at what I guess is a late stage in the proceedings today, but I wonder whether this might be helpful, I think it would be to me, I do not know whether it would be to other people. If we were to produce a little matrix, if you could on a sheet of paper, where down the sides we put West Herts. and Harwood Park as two separate rows, and then on the top we had two columns, one Welwyn, Welwyn Garden City, and the other Hatfield, and I suppose we might even have a third column that would be Stevenage Knebworth. I wonder now those six cells could be filled in, not necessarily now, but with what I assume is a standard costing basis that both sets of funeral directors would use for the typical drive time to each of those crematoria, or indeed for a total round journey, because you have been making the point that geographic distance is not necessarily related to drive time and it just occurs to me that probably in terms of planning the availability of vehicles and so on that your clients, and probably Austins as well, may well have some sort of rule of thumb as to what allowance they make for such drive times, and that might be helpful in terms of indicating the actual differences in drive time terms.

MR. ROTH: Certainly – I cannot do it off the cuff, of course – we will show the drive time there and separately the drive time back because it is a different speed, and if we could send that into the Tribunal, copied to the other parties.

THE PRESIDENT: Yes, do not go to too much work, do not do anything extensive, Mr. Roth, because it is very late now for us to have new information.

MR. ROTH: My clients well know the time, and will produce it quickly, I think. We are just coming on to one or two quick points. Mr. Swift referred this morning to OFT policy on application of Article 82, I simply observe you are, of course, not governed by the OFT's policy and of course Mr. Swift did not suggest that you were. The point perhaps goes a little further, the OFT's application of the Competition Act and its policy is, on the contrary governed by this Tribunal. If you say the approach should be X, well the policy they adopt must reflect that.

THE PRESIDENT: It is a bit more than that, Mr. Roth, it is ultimately governed by the Court of Justice in Luxembourg. In the post-modernisation world we are not any longer on some domestic frolic of our own.

MR. ROTH: Yes, I was not suggesting that there is no further appeal or reference.

THE PRESIDENT: Well it is a serious point, if there is a disagreement in principle, if it became a major point of principle, it is the sort of thing that could not be resolved at national level it would have to go to Luxembourg.

MR. ROTH: Indeed, yes, and our national law, which of course must follow EC law. That takes me to my final points – it concludes what I say about abuse, which is what this Tribunal can do.

THE PRESIDENT: Yes.

MR. ROTH: The Tribunal is concerned, of course, about fairness to the Interveners, who are also directly affected by this matter, but I would, with great respect, draw attention to what was said at the case management conference on 19th October, last year directly bearing upon that point. You may have a copy there, I do not know. I have mentioned this to Mr. Maxwell Lewis. He was not there, I was not there, but the Interveners were represented there by their solicitor. If not I can hand up copies, if that is convenient.

THE PRESIDENT: We probably have got it in fact.

MR. ROTH: It is the 19th October, and it is p.14, addressing the solicitor to the Interveners, to Austins:

> "Mr. Watson, could I just say one thing to you, that obviously we are extremely anxious that Austins should have the fullest opportunity to put their point of view to us. Your statement of intervention quite understandably draws very heavily on the OFT's position but you are fully entitled to put in whatever evidence or matters you want to lay in front of us on those issues I have just mentioned, either on the geographical market, or dominance, or on the issue of abuse. They are all issues into which the Tribunal may wish to go in some detail, and there are perhaps three possible scenarios that you should, as it were, be aware of so that your clients can think about the situation. The first scenario is the Appellants lose on one or more of the issues, in which case the appeal is rejected and that is it. The second scenario is the Tribunal is very unhappy with one or more parts of the Decision and decides to send it back to the OFT. The third scenario is the Tribunal decides to decide itself one or more of the issues with a view to either deciding the case in part and sending another part back to the OFT or reaching some solution in terms of the order that it makes that will, in one way or another, resolve the case without having to send it back or whatever. I am just saying that so you are aware of all the possible outcomes in this case and can put whatever material or submissions before us that you would wish to put with a full understanding of all the possible outcomes that there may be."

So they were put clearly on notice that there is the possibility that this Tribunal would come to make a decision on abuse and, if I may respectfully put it that way, you were inviting them to put in ----

THE PRESIDENT: It goes on over the page.

MR. ROTH: Yes.

> "We are constrained. It seems the State constrains the Interveners, well, I mean, within the framework of the Intervener. I do not want to do something I might otherwise do with a possible misunderstanding. I am not anticipating we should get an avalanche of material from the Intervener, but it is legitimate to draw the Intervener's attention to his chance to make an effective intervention. Let us just see how we get on."

So they have had ample opportunity and were put on notice to serve evidence, and I would very strongly and respectfully urge against any postponed further hearing for new evidence on these matters.

You can, as you say there, Sir, of course make your own Decision, or, if necessary, to have a further investigation on part of the case, which is not what we submit but, if so, we do say you could still make findings on the rest. There can be, as that section of your remarks at the CMC indicate -- there can be a partial remission under Schedule A, paragraph 3 of the Act, so it is not quite remit the lot or nothing. You could find, say, if there is dominance in this market this would be abusive conduct, but will remit it to establish dominance, for example.

Miss Smith in her submissions to you said that if the Tribunal made a decision on infringement it would have to make findings on all the elements, market definition, dominance, abuse and objective justification, though she acknowledged that had not been raised until now. With respect, we do not agree that you need to investigate objective justification. The OFT has expressly not relied on it, and that is made clear in their Defence at para.36 and Mr. Swift repeated that this morning. The Interveners in their discussion of it in their statement of intervention, under the heading "Objective Justification", adopt the position in the OFT's Defence at para.36. That is the statement of intervention by Austins at para.13. Sir, we say that is just not an issue.

Finally, Sir, may I just say this: in the White Paper that preceded the introduction of the competition bill that led to the Competition Act the Government promised that the United Kingdom would have a world class competition regime. Mrs. Burgess and Mr. Justin Burgess might be forgiven for feeling that that appears in the case of their complaint to have been a rather hollow comment, and against the history of the conduct of this matter by the OFT our

clients really are most anxious now that they have had a very full hearing before this Tribunal that the Tribunal, if possible, and not the OFT should produce the Decision on this matter.

Thank you very much.

THE PRESIDENT: Thank you, Mr. Roth. I think that ----

MR. SWIFT: Sir, may I just – I see from the timetable of the hearing that I did have a slot on Intervener's if so advised. When Mr. Roth rose I assumed he was going to be dealing with my learned friend's open offer in relation to a possible settlement, but once he had got on his feet he seemed to be in his stride so I thought I had better let him go and not interrupt him.

THE PRESIDENT: I think he said that his clients were as anxious as anyone for normality to be restored, and that was a matter they were taking under advice, or words to that effect.

MR. SWIFT: That is true, Sir, but I am just saying that maybe I was too indulgent rather than getting on my feet and saying I wish to take preliminary views from my client as to whether they wish me to make any further submissions having heard essentially Mr. Macnab this afternoon, and would you be kind enough to give me five minutes to discuss that.

THE PRESIDENT: We will rise for five minutes in case anybody wants five minutes to think about their final position.

(Short break)

MR. SWIFT: Sir, I am grateful for that brief recess. I have discussed the matter with the Office of Fair Trading. We have formed the view that Mr. Macnab has not raised any new points. He has summarised very eloquently the contents of his skeleton argument. It is really left for the Office of Fair Trading, or me on their behalf, to make a few points.

First, it is clear that the Consumers' Association, through their counsel, have come to the conclusion that had it been their judgment as a competition authority in this case they would have concluded that the OFT ought to have arrived at conclusions different from those which the OFT has in fact arrived at. That is a matter of judgment in each case. The OFT's judgment was that, on the facts and having regard to the relevant law, there was not a case of an abuse that it could establish against Harwood Park. That is a question of judgment and the Appellants are exercising their right of appeal to this Tribunal to resolve that matter.

The OFT is concerned that the Consumers' Association has considered it necessary to go as far as to say that the OFT in this case appears to be condoning policies, taking actions that appear to be against the interests of consumers. It is very much the policy of the Office of Fair Trading to exercise its powers and its functions so as to promote the interests of consumers, and has borne that in mind in taking its decision in this case.

The third matter is that the OFT, as is quite apparent from all the information before the Tribunal, has found this a very difficult case. It has sought to establish what it believes to be the correct balance, in the undertakings in this matter, without acting to the detriment of consumers.

Those are general comments, they are comments of some importance, but I would not like to leave this Tribunal without putting them on the record. Thank you.

THE PRESIDENT: Thank you very much.

Very well, ladies and gentlemen, I think that does bring our hearing today to an end. Thank you all very much indeed. I think it would be useful if what Mr. Maxwell Lewis said in his submissions was pursued. If you would kindly keep the Tribunal informed of any developments there may be.

MR. MAXWELL LEWIS: We will do so, of course.

THE PRESIDENT: Thank you all very much indeed. We will simply reserve judgment.