Neutral Citation Number: [2005] EWHC 3015 (Ch)

Case No: HC05C00996

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 December 2005

Before :

MR JUSTICE ETHERTON

- -

Between :

ATTHERACES Ltd & Anr	**Claimants**
- and -	
THE BRITISH HORSE RACING BOARD & Anr	**Defendants**

- -
- -

Charles Hollander Q.C, Daniel Jowell (instructed by **Olswang Solicitors**) for the **Claimants**
Michael Brindle Q.C, Maya Lester (instructed by **Addeleshaw Goddard Solicitors**) for the **Defendants**

Hearing dates: 20, 21, 24, 25, 26, 27, 31 October 2005
2, 3, 7, 8, 9 November 2005

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE ETHERTON

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Mr Justice Etherton :

Introduction

1. The Claimants are in the business of supplying websites, television channels and other audio-visual media relating to British horse racing ("British racing"). For the purpose of this judgment, there is no need to distinguish between them, and I shall refer to them together as "ATR".

2. ATR has obtained rights in respect of certain British racecourses which entitle it to produce audio and visual coverage of horse races at those courses. ATR uses that coverage on, in particular (i) its website ("the ATR Website"), (ii) an ATR branded television channel available to cable and satellite television subscribers resident in the UK and Ireland ("the ATR Channel"), (iii) an ATR branded international audio-visual bookmaker service ("ATRi"), and (iv) a further international audio-visual bookmaker service run by Satellite Information Services Limited ("SIS") called the "SIS FACTS" service ("SIS FACTS").

3. The ATR Website and the ATR Channel show British horse races and allow viewers to place bets on those races through the internet or through the interactive services offered on satellite television. ATRi and SIS FACTS are sold to and shown in, among other places, overseas bookmaking offices where customers or viewers who watch those services can place bets on the races either on the pari-mutuel pool betting basis (that is to say, where all funds are pooled and, after deduction of expenses, paid out to successful bettors) (ATRi) or on a fixed odds basis (SIS FACTS).

4. The First Defendant, The British Horse Racing Board Limited, which is a company limited by guarantee, plays a central policy, promotional and administrative role in British racing. The Second Defendant is its wholly owned subsidiary which was established to be its commercial arm. For the purpose of this judgment, there is no need to distinguish between the First and the Second Defendants and I shall refer to them together as "BHB".

5. BHB maintains and operates a computerised database of information which contains a large quantity of data relating to British racing ("BHB's Database"). Part of BHB's Database consists of pre-race data, as distinct from on-course data (such as the non-runners in, and the result of, the race). Pre-race data includes the place and date on which the race meeting is to be held; the distance over which it is to be run; the criteria for eligibility to enter the race; the date by which entries must be received; the entry fee payable; the name of the race; a list of horses entered; their owners and trainers; the weight each horse has been allotted to carry; the list of declared runners (i.e. horses competing), their jockeys and the weight each will carry; each horse's saddlecloth number and the stall from which it will start.

6. The ATR Website, the ATR Channel, ATRi and SIS FACTS provide pre-race data to customers and viewers and prospective bettors which is ultimately obtained from BHB's Database.

7. ATR claims in these proceedings that BHB effectively has a monopoly in the supply of pre-race data to those in British racing that require such information, including, in

particular, bookmakers and producers of TV channels or internet sites showing British racing.

8. ATR claims that BHB has sought to impose terms for the supply of pre-race data required by ATR for its business, and made threats to procure the termination of the supply of such data, amounting to an abuse by BHB of a dominant position contrary to Article 82 of the EC Treaty ("Article 82") and s.18 of the Competition Act 1998 ("the 1998 Act").

9. At the heart of this case ATR is alleging excessive, unfair and discriminatory pricing by BHB.

10. ATR claims an injunction and declarations in relation to such alleged abuse.

11. Prior to the trial the parties resolved their dispute as to BHB's charges in respect of the ATR Website and the ATR Channel, and the parties agreed to stay that dispute.

12. The trial before me, therefore, concerned only BHB's charges in respect of ATRi and SIS FACTS.

13. By its Counterclaim, BHB claimed a declaration that it has copyright and database right in certain material in BHB's Database, and an injunction and an inquiry as to damages in relation to alleged infringement by ATR of those rights. Insofar as the counterclaim has not been stayed as relating to the ATR Website and the ATR Channel dispute, it has been discontinued.

Summary of analysis and conclusions

14. This is a long and detailed judgment. For the convenience of the reader, I shall summarise briefly at the outset my analysis and principal conclusions leading to my decision that BHB has abused its dominant market position in breach of Article 82 and s.18 of the 1998 Act.

    i) The product supplied by BHB is UK pre-race data. It is not, as contended by BHB, "the ability to create value from the whole show of British racing". It is not a bundle comprising both British pre-race data and British racing pictures.

    ii) The relevant product market is, as contended by ATR, the market for the supply of UK pre-race data to those in the horse racing industry that require such information for the services they provide their customers (in particular bookmakers and producers of TV channels or internet sites relating to horse racing). That conclusion is confirmed by the application of the economist's SSNIP test.

    iii) The geographical extent of that product market, for the purposes of these proceedings, is all countries outside the UK and Ireland; but it makes no difference to the outcome of the case if that is incorrect and the geographical extent of the market is the world.

    iv) BHB is dominant in that market.

v) BHB has abused its market dominance by threatening to terminate the supply of pre-race data to ATR, even though ATR is an existing customer of BHB and pre-race data is an essential facility controlled by BHB, without which ATR would be eliminated from the market. There is no objective justification for such conduct of BHB. It is irrelevant that BHB and ATR are not competitors. BHB seeks to justify its proposals as to price, which ATR refused to accept, as being reasonable charges on ATR's overseas customers- who would otherwise be "free riders" – collected through the agency of ATR, but that is not a correct description of them as a matter of substance or form: they would be charges on ATR in substance and form. Further the prices proposed prior to the commencement of the proceedings were unfairly excessive, and also discriminated unfairly against ATR. Further, BHB continued to insist, until after the commencement of the proceedings, that ATR enter into an intellectual property licence from BHB, even though the use by ATR of BHB's pre-race data would not infringe any intellectual property right of BHB.

vi) The prices specified from time to time by BHB to ATR prior to the commencement of the proceedings were excessive and unfair, and so an abuse of BHB's dominant position in the market, because they were significantly in excess of the economic value of BHB's pre-race data and not otherwise justified. The economic value of the data is to be measured, on the facts of the case, by the cost to BHB of producing its Database (about £5m) together with a reasonable return on that cost. BHB's proposed charges to ATR were so far in excess of any justifiable allocation to ATR of that amount as to be plainly excessive. I reject BHB's contention that its proposed prices are justified by the right or need to take into account the cost of the positive "externality" of British racing, that is to say the cost of providing those aspects of British racing which make it an attractive subject matter for broadcast and for betting. BHB's proposed prices were not justified by any application of the economic principle of Ramsey pricing.

vii) The prices specified from time to time by BHB to ATR prior to the commencement of the proceedings were an abuse of BHB's market dominance because they were substantially in excess of BHB's normal charge for broadcasters, and also because they differed from, and would have had more onerous consequences than, BHB's pricing mechanism for ATR's direct competitor Phumelela Gold Enterprises ("Phumelela"), in both cases for no justifiable reason and so unfairly discriminating against ATR.

viii) In the absence of any public interest defence under Article 86 of the EC Treaty ("Article 86") or para. 4 of Schedule 3 to the 1998 Act, the fact that a decision against BHB in the present case would have serious consequences for the proposals and plans of the Government and BHB to modernise British racing by "commercialising" BHB's assets and replacing the statutory Levy on bookmakers cannot affect the outcome of the proceedings. Nor can it make any difference to a proper application of Article 82 and s. 18 of the 1998 Act that BHB has been motivated, in its proposals to ATR, by the wider interests of British racing rather than private profit.

British racing

The principal authorities

15. Until 1993 the Jockey Club was solely responsible for the administration and regulation of British racing. In 1993 the Jockey Club transferred certain of its functions to BHB. In effect, the Jockey Club split its roles as regulator of British racing, on the one hand, and as administrator and "governing body" of British racing, on the other hand, with the BHB taking on the latter role of administrator and governing body.

16. The Jockey Club is now responsible for safeguarding the integrity of the sport through the licensing of participants and the performance of a disciplinary function. It remains responsible for registering and licensing horses, racecourses, owners, trainers and jockeys, and supervising the conduct of racing so as to ensure that members of the public have trust in the racing which they watch and on which they place bets. The Jockey Club also owns thirteen racecourses through the Racecourse Holdings Trust.

17. BHB's objects in its Memorandum of Association are of a wide ranging nature for the improvement and promotion of British racing. Pursuant to those objects, BHB's activities include strategic planning of, and formulating policy for, British racing, representing the interests of British racing in dealings with bookmakers, the collection and control of funds required for the administration of racing, the central marketing and promotion of British racing, controlling the fixture list, race planning and encouraging the breeding of blood stock.

18. BHB has four shareholders: the Racehorse Owners Association, the Racecourse Association Limited ("the RCA") (which represents the interests of 58 of the 59 racecourses in Great Britain), the Industry Committee (Horse Racing) Limited (which represents, among others, stable employees, jockeys, trainers, race-goers, equine vets, trade unions, sponsors and auctioneers), and the Jockey Club. Each of those shareholders has a representative on the board of directors. A nominee of the Thoroughbred Breeders Association also sits on BHB's board of directors.

19. British racing is conducted under the Orders and Rules of Racing ("the Orders of Racing") issued by BHB and the Jockey Club. They empower BHB to determine the date and time of any racing fixture, to control the number of fixtures a racecourse can hold and to determine the conditions of any race.

20. Information in BHB's Database is supplied by horse owners and trainers under the Orders of Racing, horse race organisers and others involved in British racing, to Weatherbys Group Limited ("Weatherbys"). Under an agreement between BHB and Weatherbys, Weatherbys agrees to gather, compile and distribute (to persons authorised by BHB) information in BHB's Database, for which BHB pays Weatherbys approximately £5 million per year.

21. Participants in British racing rely on BHB's Database as a reliable source of information. Further, without it, BHB would not be able to develop a fixture list and race programme which provide races with competition, balance and integrity.

22. The third organisation presiding over British racing is the Horserace Betting Levy Board ("the Levy Board"). The Levy Board was established under the Betting Gaming and Lotteries Act 1963 ("the 1963 Act") s.24 to assess, collect and pay out monetary contributions ("the Levy") levied on UK bookmakers and the Horserace Totalisator Board ("the Tote") for, among other things, "the improvement of horse racing". All UK pari-mutuel betting on British racing takes place through the Tote. With effect from 1 April 2002 the Levy has been charged at 10% of UK bookmakers' gross profits (that is to say, stake money less winnings paid out).

23. The Levy Board sets a levy scheme, that is to say an amount for the Levy, after consultation. A proposed amount is put forward by the Bookmakers' Committee (a committee, representative of the interests of bookmakers generally, which was established pursuant to s.23 of the 1963 Act for the purposes of the Levy).

24. The Levy Board membership comprises persons appointed by the Secretary of State, the Jockey Club, the Bookmakers' Committee and the Tote.

25. The amount of money collected under the Levy has increased substantially from £79.9 million in 2002/3 to £108.7 million in 2003/4.

BHB's Database and industry modernisation

26. On 2 March 2000 the Government announced its intention to abolish the Levy Board, stating that the arrangements under which British racing receives income from bookmaking should become a matter for agreement between the participants on a commercial basis.

27. According to BHB's "Future Funding Plan for British Racing" (October 2000) ("the Future Funding Plan") British racing was funded as follows in the year 2000. Race horse owners spent approximately £235 million on training fees, keep fees, transport, vets, race entry fees and other expenditure. They received back from their investment approximately £65 million, including some £15 million in prize money. The racecourses spent approximately £124 million on fixed annual expenditure, race day costs and prize money. The racecourses received approximately £138 million in income from gate admissions and memberships, box rentals, sponsorship and advertising, concessions and commissions, non race day activities and media rights in betting related activities, and a further £15 million from non betting related sources. The racecourses received approximately a further £6 million from the Levy Board. The Levy Board spent approximately £67 million and received approximately £65 million from the Levy. BHB at that time received approximately £10 million in revenue and spent the same in discharging its functions, principally on payments to Weatherbys and on administration.

28. BHB believed and asserted that it had intellectual property ("IP") rights in pre-race data under the Copyright and Rights in Databases Regulations 1997 SI 1997/30032 ("the Databases Regulations) which implement EC Council Directive 96/9 ("the Databases Directive") on the legal protection of databases. BHB took the view that, unless licensed by it, those using its pre-race data were infringing those IP rights.

29. BHB proposed in its Future Funding Plan that the structure for future funding of British racing should be based on combining the rights held by BHB and the RCA,

whose members owned rights in respect of a large number of racecourses, into a rights package for sale to bookmakers and media companies. Three sets of "rights" were considered: BHB's rights in respect of the fixture list, BHB's copyright and database rights, and the racecourses' picture rights.

30. The plan to sell picture and data rights as a package envisaged in the Future Funding Plan was subsequently abandoned. BHB concentrated instead on the sale of its pre-race data. BHB entered into an agreement with UK bookmakers under which the bookmakers agreed to pay BHB the same sum that they were obliged to pay under the Levy, the amount paid under the Levy being set off against the sums due under such agreement with BHB.

31. Against that background, the Government fixed 31 March 2006 as the provisional date for the abolition of the Levy Board and the Levy.

32. In June 2004 BHB published a further paper "The Modernisation of British Racing" in order to cater for the planned abolition of the Levy in 2006. The paper stated that "data income" for 2003 amounted to £110.3 million, of which £89.5 million was derived from the Levy, £7 million from the Tote and £13.1 million from overseas, primarily Irish bookmakers who pay BHB 10% of gross profits, similar to the payments made by UK bookmakers in respect of the Levy. The paper proposed that data income be distributed more widely in the industry than had previously been the case. The draft standard data licence annexed to the paper assumed BHB had database rights in the data.

33. In *British Horse Racing Board Limited v William Hill Organisation Limited* Case C-203/02 BHB alleged that the defendant ("William Hill") had infringed Article 7 of the Databases Directive by using information from BHB's Database without licence. The case was commenced in the High Court in March 2000. Laddie J held in favour of BHB on 9 February 2001. On appeal by William Hill, the Court of Appeal on 31 July 2001 stayed the proceedings and made a reference to the European Court of Justice ("the ECJ") for a preliminary ruling on the interpretation of Articles 7 and 10 (3) of the Database Directive. In its ruling on 9 November 2004 the ECJ drew a distinction between, on the one hand, investment in seeking out existing independent materials and collecting them in a database and verifying the accuracy of the database on its creation and during its operation (which is the subject of protection under the Databases Directive) and, on the other hand, investment in the creation of materials which make up the contents of the database and verification during such creation (which is not). BHB's investment lay in the latter. The ECJ ruled that, for the purpose of Article 7 of the Databases Directive, resources used to draw up a list of horses in a race and to carry out checks in that connection do not constitute investment in the obtaining and verification of the contents of the database in which the list appears.

34. In January 2005, as a result of the ECJ decision in the *William Hill* case, an independent review group under the chairmanship of Lord Donoghue was established to consider and make proposals for an enforceable and sustainable mechanism by which betting operators could contribute towards the funding of British racing. That review group reported in March 2005 that, in the light of the ECJ's judgment in the *William Hill* case, BHB was not in a position to proceed with the plan to fund racing by the sale of BHB's Database rights in place of the Levy, and so the Levy should

remain in place until at least 31 March 2009. The Government agreed. The Levy will remain fixed at the same rate until that date. Lord Donoughue's review group continues to explore alternative ways of funding British racing.

Contractual arrangements ATR/BHB up to 29 March 2004

35. By a media rights agreement ("the MRA") dated 11 May 2001 between ATR's parent company ("Holdings"), ATR, the RCA and 49 of the 59 licensed race courses in Great Britain, ATR acquired certain media rights from the 49 race courses so as to enable ATR to exploit broadcasting and other media rights. In broad summary, the rights granted allowed ATR access to each of the courses for the purposes of filming race meetings and to exploit such films worldwide on all media, excluding delivery to UK and Irish licensed bookmakers. The total minimum guaranteed consideration payable by ATR to RCA/the courses (divided among them under an agreed formula) was £307 million, plus up to £80 million on the marketing of ATR's services. It was a condition precedent to the MRA that on or before 30 June 2001 an agreement was entered into between ATR and BHB by which ATR was granted rights to data relating to meetings at the 49 courses.

36. Pursuant to that condition precedent, a "Binding Term Sheet" ("the BTS") was entered into on 25 June 2001 between BHB and ATR, by which BHB granted ATR the right to use BHB's data in conjunction with the rights to pictures acquired by ATR under the MRA. The BTS provided that the consideration payable to BHB was to be set against and deducted from the sums payable by ATR under the MRA, with a few minor exceptions. As regards ATR's media rights sub-licensees (that is to say, overseas bookmakers) outside the UK and Ireland ("non-Irish overseas bookmakers"), it was agreed under the BTS that ATR was to act as BHB's non-exclusive agent in granting the relevant data licences. BHB was to fix the licence fees payable, provided such fees for the use of data for betting purposes outside the UK and Ireland would not exceed 2.5% of the gross betting turnover generated by the licensee. The parties were to agree a mechanism to ensure on a case-by-case basis that the licence fee specified by BHB would not unreasonably deter ATR's proposed media rights sub-licensees from entering into agreements with ATR at the then current market rates. BHB was to pay ATR an agency commission of 15% of the total licence fees received by BHB under data licences granted to persons outside the EU, and a "nominal fixed" commission in respect of data licence fees from persons within the EU, but outside the UK and Ireland.

37. Under an agreement dated 17 April 2002 ATR granted certain rights to SIS, which produces a number of television channels, to facilitate the overseas exploitation of the coverage of racing from the 49 race courses in the SIS FACTS service.

38. In discussions in 2001/2002 between BHB and ATR, and between BHB and SIS, it became apparent that it was not realistic to expect non-Irish overseas bookmakers to make a payment to BHB based on gross betting turnover, and that a demand for such payment would act as a disincentive to such bookmakers taking the services offered, through SIS, by ATR.

39. Agreement was therefore reached between BHB and ATR that no consideration would be paid direct to BHB by non-Irish overseas bookmakers, but BHB's

consideration would be satisfied by an equal 50/50 split with ATR of the net revenue received by ATR from the exploitation of the SIS FACTS service overseas.

40. That net revenue was calculated in the following way. Of the income collected by SIS from overseas bookmakers, 35% was to be deducted and retained by SIS to pay for the other content on the SIS FACTS service, such as greyhound racing, as well as to pay GG Media Ltd ("GG Media") for the right to include pictures from the 10 courses that had granted rights to GG Media ("the GG Media Courses") and for Irish racing rights. Certain technical and delivery costs were then to be deducted before arriving at the net income in ATR's hands, which was to be divided 50/50 with BHB as I have said.

41. From the 50% payable to BHB, ATR took its "commission" of 15% of the money from bookmakers outside the EU, and the "nominal" "commission" of 10% of income from bookmakers operating within the EU, but outside of the UK and Ireland. ATR could then deduct all of BHB's share of revenue from the SIS FACTS service from the fees payable to the RCA under the MRA.

42. A diagrammatic representation of the arrangements I have described ("ATR1") is attached to this judgment as Annex 1.

43. One further point to be noted on the arrangements at that time is that PA News Limited ("PA") was the vehicle for supplying BHB's pre-race data to SIS, PA having been appointed by BHB, under an agreement dated 28 March 2002 ("the BHB/PA Agreement"), to collect on-course data at horse race meetings, to combine it with BHB's pre-race data and to distribute the result and package to persons who had a valid and existing licence from BHB for the use of the pre-race data. The consideration due to BHB from PA under the BHB/PA agreement was a sum equal to 10% of its income from such licensees, to be paid to BHB as and when the cumulative receipts of PA from such licensees exceeded the costs of providing its service. That time has not yet arrived. Not only was the authority of PA limited to distribution of the package to those with licences from BHB, but the BHB/PA agreement required PA to discontinue any supply of pre-race data after notification from BHB that the user in question did not have a licence from BHB.

44. The MRA was terminated with effect from 29 March 2004, at which time the BTS also automatically terminated.

45. During the period when the MRA and the BTS were current, BHB's entitlement to 50% of ATR's net revenue resulted in BHB receiving from ATR £4,675,306.00, exclusive of VAT. Almost all of that amount was set off by ATR against, and deducted from, the amounts due from ATR to the RCA under the MRA.

Contractual arrangements ATR/BHB after 29 March 2004

46. Following termination of the MRA and the BTS, ATR's business was restructured.

47. Between 29 March 2004 and 11 June 2004 ATR ceased to broadcast. During that time SIS continued to make BHB's pre-race data available to ATR's customers on its SIS FACTS service. BHB and SIS agreed that SIS should pay BHB for such data at the rate of £1,800.00 per fixture. That sum was paid up to 11 June 2004. The figure

£1,800.00 was agreed between SIS and BHB as being similar in financial terms to the 50% of net revenue previously charged by BHB to ATR.

48. During that interim period ATR entered into new agreements with 28 courses ("the New ATR Courses"), 18 of which were previously parties to the MRA ("the ATR Courses") and 10 of which (the GG Media Courses) were not, under which ATR obtained rights of access to those race courses and rights to the audio and visual broadcast of live races at those race courses on the ATR Channel and the ATR Website. The remaining race courses in Great Britain, or most of them, entered into similar agreements with Racing UK, ATR's competitor.

49. ATR re-launched its restructured service on 11 June 2004, and since then has, through SIS FACTS, continued to broadcast British racing from the New ATR Courses to overseas bookmakers providing fixed odds betting. A formal agreement relating to that service ("ATR2"), effective from 11 June 2004, was made between ATR and SIS on 3 December 2004. BHB complains that ATR did not inform BHB, or did not inform BHB in sufficient detail, of that agreement and those arrangements with SIS and their effect.

50. ATR is entitled to 50% of the net revenue from the SIS FACTS service.

51. Between 30 and 40% of ATR's 50% share of net revenue, after payment of anything due to BHB, is paid to the 18 ATR Courses.

52. A diagrammatic representation of ATR2 is attached to this judgment as Annex 2.

53. In additional to ATR2 (fixed odds betting), ATR launched in November 2004 ATRi as an audio-visual service for international pari-mutuel tote betting markets in countries, such as Holland, Spain and the USA, where fixed odds horse race betting is illegal. SIS produces ATRi for ATR pursuant to a contract dated 5 January 2005. In addition to broadcasting races from the ATR Courses, ATR has agreed with SIS (which controls the rights in respect of other racecourses) that ATRi will broadcast races from the GG Media Courses (in the UK) and AIR courses (in Ireland).

54. The net revenue from the ATRi service is, after payment of commission to SIS of 5% or 2.5% (depending on the overseas territories concerned), divided between ATR, in respect of its 18 ATR Courses, and SIS, in respect of the other courses. Out of ATR's share, ATR pays 10% to the Tote (other than in respect of Italy) and then what is due to BHB and the 18 ATR Courses.

55. ATRi uses BHB's pre-race data, which ATR acquires from PA pursuant to an agreement effective as from 18 October 2004 and a further agreement effective as from 1 January 2005 ("the PA/ATR Agreements").

56. Overseas bookmakers currently pay SIS 3% of their turnover for data and pictures on the ATRi service.

57. Diagrammatic representations of ATRi are attached to this judgment at Annex 3 and Annex 4 respectively.

58. Nothing has been paid by ATR to BHB for the supply and use of BHB's pre-race data in respect of the period since 11 June 2004. ATR's overseas bookmakers have, however, continued to receive and pay ATR for such data throughout that time.

Involvement of the OFT and the CAT

59. On 15 November 2001 Holdings, each of its three shareholders and the RCA jointly applied to the Office of Fair Trading ("the OFT") under the former s.14 of the 1998 Act for a decision that the formation of ATR to bid for and exploit the racecourses' media rights, the sale of such rights by the courses "pursuant to [the MRA] negotiated on their behalf by the RCA", and certain ancillary arrangements relating to the licensing and exploitation of the rights, did not infringe the prohibition in s.2(1) of the 1998 Act, that is to say "the Chapter I prohibition" (prohibition, unless exempt, of agreements between undertakings or concerted practices which may affect trade within the UK and have as their object or effect the prevention, restriction or distortion of competition in the UK).

60. In support of the application, it was asserted, in summary, that the arrangements were pro-competitive, beneficial for consumers, that British racing had to be properly funded by finding commercial sources of income in order to overcome its underfunding and compete effectively with other sports and leisure activities, and that BHB's plans to commercialise its assets by means of a charge on betting income in order to attain their full commercial value were key to the future of British racing.

61. The OFT informed the applicants of its objections to the notified arrangement on 10 July 2002. On 8 April 2003, after a period of informal consultation, the OFT issued a Rule 14 Notice (in accordance with Rule 14 of the Competition Act 1998 (Directors Rules) Order 2000 SI 2000 No. 293) concluding that one aspect of the arrangement infringed the Chapter I prohibition. It was issued to the RCA, ATR, Holding's three shareholders and to the 49 race courses.

62. In due course the OFT permitted BHB to intervene in the proceedings.

63. In the meantime, Holdings and ATR had a change of heart about the MRA. They decided to retreat from their stance in the s.14 notification that the MRA should be given a negative clearance by the OFT or alternatively an exemption. They instead chose to adopt the OFT's stance that the MRA was anti-competitive, unlawful and void.

64. In its decision under s.31 of the 1998 Act dated 5 April 2004 the OFT decided that one aspect of the notified arrangement, referred to in the OFT's decision as "the Non-LBO bookmaking rights" ("LBO" there meaning licensed off course betting office), infringed the Chapter I prohibition and did not qualify for individual exemption: those rights were picture rights to be sold collectively by the 49 racecourses which, in combination with betting rights and data, could permit interactive betting using television or the internet, specifically the ATR Website and the ATR Channel.

65. In a judgment dated 2 August 2005 in *The Racecourse Association v The Office of Fair Trading* and *The British Horseracing Board v the Office of Fair Trading* [2005] CAT 29 *("RCA and BHB v OFT")* the Competition Appeal Tribunal ("the CAT") allowed appeals by the RCA and BHB from the OFT's decision. It set aside the

OFT's decision that the sale of the Non-LBO rights in the MRA infringed the Chapter I prohibition.

Communications and negotiations between ATR and BHB leading to these proceedings

66. On 29 January 2004 there was a meeting between ATR and BHB in order to discuss ATR's plans for securing media rights to UK racecourses after the termination of the MRA and the BTS in March 2004. It appears from the notes of that meeting that, at the meeting, Mr Ian Hogg (of ATR) gave a summary of the deal that was being discussed between ATR and the racecourses and proposed that BHB consider a "payment holiday" period for ATR. It appears that Mr Nigel Smith of BHB said that he would not recommend the proposal to BHB's board of directors.

67. In an e-mail dated 16 February 2004 Mr Hogg said that "the BHB are going to write to all 49 courses and ATR with a proposal of their own, this will be along the following lines…Data for Overseas: 50%". This was confirmed by a letter from Mr Smith to Mr Hogg dated 19 February 2004, which stated: "ATR also collects data income from offshore bookmakers on behalf of BHB. This amounts to 50% of total income after agreed costs. We do not propose any change to this arrangement."

68. ATR did not agree that 50% was the appropriate figure. By letter dated 10 March 2004 it reminded BHB that the reason why ATR had agreed to pay 50% under ATR1 was that it "was held harmless from any charges by the Courses". It noted that ATR "agreed to the 50% charge for the SIS deal strictly on the basis that it was not setting a precedent for other overseas deals" and that ATR "has not agreed 50% revenue share with the BHB for any other overseas licence deals". It set out a number of detailed reasons why, so it claimed, 50% was not the correct figure for the future. By way of counter-proposal, ATR proposed a 3 year holiday on any payments, followed by payments of 10% of net revenue.

69. BHB wrote to ATR on 20 April 2004 insisting that it expected "ATR to pay BHB its share of revenues derived from such operations as before with the same split of income and at the same rate". It noted that:

> "If ATR is not prepared to do this, and to make these payments to BHB, or arrange for such payments to be made to BHB, we reserve the right to be exercised on 3 days written notice from us, to require you not to use our data in your services, and will take all necessary legal steps we consider appropriate to enforce our rights in this regard."

70. As mentioned earlier in this judgment, ATR did not broadcast from 29 March 2004 until 11 June 2004. In order to protect the overseas markets, ATR agreed to pay BHB 50% of net revenue received from SIS in respect of this interim period. It did so on the express basis that this was "without creating a precedent for any future contractual position".

71. At a meeting on 12 May 2004 the representatives of ATR and BHB discussed what licences ATR would need from BHB in connection with its proposed website and TV subscription channel.

72. On 9 June 2004 ATR's solicitors wrote to BHB:

> "...in respect of your failure to offer a data licence agreement on reasonable terms or at all to our clients to use race and runner data ("the Data") in relation to British horse racing. Please note, for the purposes of this letter, we do not raise any issue in relation to whether any rights in fact subsist within the Data. However pending final determination by the European Court of Justice in C-203/02 British Horse Racing Board Ltd and others v William Hill Organisation Ltd our client reserves its rights in this regard."

73. The letter stated that ATR was ready to enter into a data licence agreement with BHB for the use of BHB's Database provided that the terms on offer were fair, reasonable and non-discriminatory. It made clear that a licence fee of £3,600.00 would be acceptable.

74. BHB responded on 10 June 2004:

> "Your client has been informed that it will receive a data licence to be able to broadcast live racing to domestic customers via satellite and cable. The issue of this licence is not dependent on the payment of monies already owed by ATR. The licence is in draft form and will be issued to your clients shortly. In the meantime until that licence is concluded, we confirm that ATR may use BHB's data solely for the purpose of the broadcasting of racing for which it has picture rights to domestic customers in Great Britain via satellite or cable television and for static displays of information on its web-site."

A copy of a proposed IP data licence for the ATR Channel in the UK was in due course supplied to ATR by BHB's solicitors on 4 August 2004.

75. In the meantime ATR wrote to BHB on 29 July 2004 informing BHB that ATR would be conducting a "risky trial" exporting British racing into America that was "unlikely to be profitable". ATR sought a licence to use pre-race data without charge. BHB replied that it saw no "compelling reason to offer data at no cost", and said that "the data charge is set at 50% of all monies which ATR receive". ATR responded on 9 August 2004 seeking an explanation of the basis on which BHB was seeking to charge given that "data base rights do not exist as such in the US and that it is unlikely that the use of horse racing would constitute an infringement under American copyright law". Further, ATR proposed a "meeting as soon as possible to discuss international data licensing."

76. BHB responded on 11 August 2004 explaining that ATR would require a licence for the US broadcasts because, in summary, the "uplink" from the UK would amount to a database right infringement and BHB claimed copyright in the database that would be recognized under US law. BHB alleged that the UK market had "established that data is worth 4 times more than pictures" and that "50% can rightly be regarded as a minimum". It sought confirmation that ATR "will pay 50% of the revenue it receives" to BHB. The letter also said:

> "I note your offer to pay 50% of net revenues from SIS in relation to international distribution as an interim arrangement for the period post 29 March, subject to confirmation that the

> courses not aligned to ATR which had licensed distribution rights to SIS during the same period were also being charged 50% of net revenue for data. I can confirm that BHB has and will charge not less than 50% of net revenues for data from whatever source".

77. ATR continued to disagree with the proposed 50% charge. Both sides agreed that a meeting would be helpful.

78. Mr Matthew Imi (of ATR) reported to the other members of ATR's board of directors on 18 August 2004 that BHB was maintaining its position of a charge of 50% of net revenue and that ATR was proposing 10% of net revenue.

79. On 15 September 2004 a meeting took place attended by Mr Hogg, Mr Imi and Ms Walsh for ATR, and Mr Nigel Smith and Mr Paul Renney (of Addleshaw Goddard, BHB's solicitors) for BHB.

80. On 17 September 2004 BHB wrote referring to the "recent meeting" noting that "we have…set out our core reasoning why 50% is at least the right figure" and seeking to rebut the points advanced by ATR to the contrary.

81. There was a further meeting between ATR and BHB on about 26 October 2004. A day prior to the meeting, Ms Walsh sent an internal e-mail to Mr Imi and Mr Kevin Robertson. The e-mail said: "What we will need to do and I suggest that tomorrow's meeting with the BHB is as good a time as any is let them know of our plans for the Thoroughbred Channel and use of pre-race data". "The Thoroughbred Channel" was another name for ATRi. Mr Smith received prior to the meeting a publicity brochure in relation to the launch of ATRi.

82. Present at the meeting on 26 October 2004 were Mr Imi, Mr Robertson, Mr Penrose and Ms Walsh, for ATR, and Mr Smith and Mr Greg Nichols, for BHB.

83. As I have said, the ECJ gave judgment in the *William Hill* case on 9 November 2004.

84. On 15th November 2004 ATR wrote to BHB:

> "From our reading of that judgment it now appears that BHB has no right to impose terms upon ATR for its use of such information. Our previous discussions have been premised upon what has proven to be a mistaken understanding of the law applicable to the BHB's rights, the legal position having now been clarified by the ECJ… we invite you to set out in full what the BHB's position is concerning ATR's use of the information in the light of the ECJ judgment".

85. BHB responded by letter dated 17th November 2004. It contended that the ECJ had exceeded its jurisdiction and misunderstood the facts of the case. It claimed that BHB was entitled to copyright in some elements of pre-race data to which the ECJ judgment had no application.

86. ATR replied on 3rd December 2004. ATR acknowledged that it might be helpful to meet to discuss the copyright claim and continued:

> "Your letter does not provide any details of how copyright subsists in BHB's database and, if it does subsist, how ATR may have infringed that copyright, which allegation, if made, is denied. I believe it would be helpful if you set out the BHB's position in writing before any meeting between us. In the meantime, I will have to reserve ATR's position with regard to any such claim in copyright."

87. It appears that, other than an e-mail from BHB's solicitors of 6 December 2004, there was no contact between BHB and ATR for the following 10 weeks until February 2005.

88. On 10 February 2005 there was a meeting between the parties.

89. On the same day BHB wrote as follows to confirm the discussion at the meeting that morning:

> "Unless it is agreed that £900 per fixture is paid on behalf of end users outside the UK and Ireland, for pre-race data provided with pictures relating to racecourses covered by [ATR] BHB has taken the decision that it will instruct SIS that it may no longer broadcast pre race data to bookmakers which do not have a BHB data licence, which for all practical purposes is SIS' customer base. BHB is prepared, if SIS so wish it, to enter into an agreement with ATR in place of SIS. This would be a short term contract with a six month notice period, which will then allow more time to enter into negotiations for a longer term agreement. The agreement would extend to land based bookmakers only and would therefore not cover internet bookmakers who would continue to be required by BHB to enter into direct data licences.
>
> The agreement will be retroactive and cover all 2004 races for which payment has not already been made by SIS. I will send you a note of the liability under separate cover, for which BHB will also require payment by ATR under this proposal."

90. On the same day or the next day BHB sent an invoice to ATR for £782,550.00 in respect of data charges for the period 11 June to 31st December 2004 at the rate of £900 plus VAT for 704 fixtures. It is now common ground that some of those fixtures did not relate to the New ATR Courses, and that ATR could only have been liable, if at all, for £320,422.00, the balance of £462,128.00 being the liability of SIS.

91. ATR responded on 14th February 2005 rejecting the proposal made by BHB and expressing surprise:

> "...that you have written to me in the terms of your letter, most particularly in the context of my letter of 3rd December 2004 remaining unanswered. You have not been able to explain what protectable rights the BHB is entitled to enforce."

The letter continued:

> "Finally, I am sure that you do not need to be reminded that a contract is in place between ATR and SIS which would be adversely affected by any attempts by the BHB to persuade, induce or procure SIS not to broadcast pre-race data which

affects ATR's business in any way (or indeed succeeds in doing so). Nevertheless, if the BHB does take such steps, then ATR will take such action as is available to it (including legal proceedings) to protect its position."

92. On 22nd February 2004 BHB wrote refuting the various complaints made by ATR. The letter continued:

> "...I have no real concern over the contract in place between you and SIS, and how that might be affected by BHB's position. The position is very straightforward. SIS, under its existing contractual arrangements with BHB, is only permitted to make use of the data taken from BHB's database and deliver it to third parties, if those third parties have concluded a data licence with BHB. In the absence of the conclusion of such data licences, BHB has the contractual right, as you are aware, and which has been in place from well before your contract with SIS, to require SIS to cease supplying those unauthorised end users. Whilst BHB receives the relevant payments for use of its data within the services provided by SIS, it can be prepared to consider forgoing the need for there to be a data licence in place with the relevant end users. However in the absence of such payment, or other contractual arrangements protecting BHB's rights, BHB has no alternative but to enforce its rights, and require SIS not to supply data to third parties who do not have such a concluded data licence in place.
>
> BHB has similar agreements in place, most notably with PA. PA is not permitted to supply unauthorised users with BHB's data. If no licence(s) are in place with ATR, BHB is entitled to require its authorised suppliers not to supply data to ATR....
>
> In the light of this I invite you to revisit the proposal in my 10 February letter."

93. After a further exchange of correspondence, BHB wrote on 17 March 2005 claiming that the judgment of the ECJ in the *William Hill* case

> "confirmed that BHB does have a database right in the racing information database… and extends to overseas users which BHB has to date regarded as authorised on the basis that fees were being paid by intermediaries on their behalf."

The writer then gave notice that "unless ATR enters into a licence agreement with BHB within 14 days BHB will instruct its authorised suppliers to withdraw supply of BHB's data to ATR".

94. The period of 14 days was later extended to 21st April 2005 whilst correspondence between the parties' solicitors continued.

95. On 20th April 2005 BHB agreed not to cut off the supply of pre-race data until an application to the court by ATR had been determined provided that proceedings were commenced with due despatch.

96. The Claim Form in these proceedings was issued on 21st April 2005.

Developments in the proceedings prior to the trial

97. At the same time as proceedings were commenced on 21 April 2005 ATR issued an application for an interim injunction to restrain BHB from causing PA to terminate the supply of pre-race Data to ATR.

98. On 12 May 2005 BHB, for its part, issued an application for an order striking out or summarily dismissing that part of the claim which relies on s.18 of the 1998 Act and Article 82.

99. In the 1st witness statement of Mr Nichols dated 12 May 2005 in opposition to ATR's application for an interim injunction and in support of BHB's strike out/summary judgment application, it was stated that BHB's requirements, for payment for the use of BHB's pre-race data in ATRi and ATR2, were as follows:

> "BHB's requirement is either that ATR only supplies data to bookmakers who have a direct agreement with BHBE [the Second Claimant] or itself agrees with BHBE to collect from each bookmaker and pay to BHBE a fee amounting to 1.5% of turnover or 10% of gross profit derived from that bookmaker's British horse race betting business or, alternatively, to pay to BHBE a collective sum of £1,800.00 for each fixture in respect of which data is supplied. In addition, it would be required to pay 10% of the profit it receives from the bookmaker for that service."

100. ATR's application for an interim injunction and BHB's strike out/summary judgment application were heard together by the Vice Chancellor, Sir Andrew Morritt, over three days between 28 and 30 June 2005.

101. On the second day of the hearing BHB accepted that the invoice of 10 February 2005 was incorrect and that, as I have said, ATR could only have been liable, if at all, for £320,422.00, the balance of £462,128.00 being the liability of SIS.

102. On 28 June 2005 the Court of Appeal, which had made the reference to the ECJ for a preliminary decision, heard the appeal in the *William Hill* case, in the light of the ECJ's judgment of 9 November 2004. The Court of Appeal reserved its judgment.

103. In order to await, and in due course to consider, the decision of the Court of Appeal, the Vice Chancellor reserved his judgment.

104. The Court of Appeal handed down its judgment on 13 July 2005. It allowed the appeal on the ground that the effect of the ECJ's decision was that BHB's Database, insofar as it consists of official lists of riders and runners in races, is not within Article 7 of the Databases Directive or within the Databases Regulations.

105. The Vice Chancellor delivered his judgment on 15 July 2005. He dismissed BHB's strike out/summary judgment application.

106. As regards ATR's application for an interim injunction, the Vice Chancellor accepted undertakings from BHB, pending judgment or further order, to the same effect as the

interim injunction claimed by ATR, on ATR's undertaking to pay into Court or a joint account £900.00 per fixture.

107. The Vice Chancellor also ordered a speedy trial.

108. On 2 August 2005 BHB served its Defence and Counterclaim, which included an allegation of infringement by ATR of BHB's IP rights, notwithstanding the decision of the Court of Appeal in the *William Hill* case.

109. By letter dated 27 September 2005 BHB made an open offer to ATR of a charge of £900.00 per fixture between 11 June 2004 and the launch of ATRi in November 2004 for both the ATR Courses and the GG Media Courses, and a charge, for the period from the launch of ATRi until 31 March 2007, of 30% of ATR's net revenue from the ATRi service. The letter specified what costs are to be deductible from gross revenue for the purpose of calculating net revenue, but went on to say that BHB was willing to discuss with ATR other possible deductible costs.

110. In the trial before me, BHB has acknowledged that ATRi does not infringe any IP rights of BHB. As I have said, the Counterclaim has been stayed in part and discontinued as to the remainder.

111. As I have also said, issues between the parties as to the use of BHB's pre-race data in respect of the ATR Website and the ATR Channel were resolved prior to the trial before me; and I am therefore concerned only with ATR's case in relation to use of BHB's pre-race data in ATRi and SIS FACTS.

Witnesses

Witnesses of fact

112. Witness statements of fact were made, on behalf of ATR, by Matthew Imi, the Chief Executive Officer ("the CEO") and a director of ATR, Ian Penrose, formerly the CEO of Arena Leisure plc. ("Arena") (one of Holdings shareholders) and a Director of ATR, Kevin Robertson, the Chief Financial Officer of ATR, Ian Renton, the Racing Director of Arena, and Steven Baker, Howard Cartlidge and Stephen Hignett, all three of whom are partners in Olswang, ATR's solicitors.

113. Mr Imi, Mr Penrose, and Mr Robertson gave oral testimony at the trial.

114. BHB did not require Mr Baker, Mr Cartlidge, Mr Hignett or Mr Renton to attend the trial for cross-examination and was content for their witness statements to stand as their evidence in chief.

115. Witness statements of fact were made, on behalf of BHB, by Greg Nichols, the CEO and a director of BHB, Christopher Brand, the Finance Director of BHB, Peter Savill, the former Chairman of BHB, Dr Paul Raza Salim Khan, Weatherbys' Director of Racing, Phillip Smith, BHB's Senior Handicapper for steeplechasers and hurdlers, Peter Nigel Smith, BHB's former Commercial Director, and Ruth Quinn, BHB's Racing Director.

116. Mr Nichols, Mr Brand, Mr Peter Smith and Ms Quinn gave oral testimony at the trial .

117. Dr Khan and Mr Phillip Smith were not required by ATR to attend the trial for cross-examination, and ATR was content for their witness statements to stand as their evidence in chief. The witness statement of Mr Savill was served pursuant to a notice under the Civil Evidence Act 1995: he was not available for cross-examination as he was overseas at the time of the trial.

Expert evidence

118. Derek Ridyard prepared three reports and gave oral evidence for ATR. He is a partner and co-founder of the economic consultancy firm RBB Economics, and specialises in the economics of competition, trade, regulation and IP.

119. David Elliott and Dr Peter Davis prepared reports and gave oral evidence for BHB. Mr Elliott is a senior member of the Competition Practice within PricewaterhouseCoopers. Dr Davis is co-director of the Economics Industry Research Programme at the Suntory-Toyota International Centre for Economics and Related Disciplines and also Leverhulme Lecturer in the Department of Economics, at the London School of Economics. He is also a research affiliate at the Centre for Economic Policy Research and a director of Applied Economics Ltd, an economic consulting firm.

Article 82 of the EC Treaty

120. Article 82 is as follows:

> "Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.
>
> Such abuse may, in particular, consist in:
>
> (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
>
> (b) limiting production, markets or technical development to the prejudice of consumers;
>
> (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
>
> (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

The Competition Act 1998 s.18

121. Section 18 of the 1998 Act, which is closely modelled on the corresponding provisions of Article 82, is as follows:

"18 Abuse of dominant position

1) Subject to section 19, any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market is prohibited if it may affect trade within the United Kingdom.

(2) Conduct may, in particular, constitute such an abuse if it consists in-

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts.

(3) In this section-

"dominant position" means a dominant position within the United Kingdom; and

"the United Kingdom" means the United Kingdom or any part of it.

(4) The prohibition imposed by subsection (1) is referred to in this Act as "the Chapter II prohibition".

122. So far as possible, the 1998 Act is to be interpreted and applied consistently with the principles of Community Law: see the 1998 Act s.60(1) and(2).

123. The Court must, in addition, have regard to any relevant decision or statement of the European Commission ("the Commision"): 1998 Act s.60(3).

Burden of proof

124. Mr Michael Brindle QC, leading Ms Maya Lester, for BHB, laid considerable emphasis on ATR's burden of proof in the present case. Mr Brindle stressed the difference between an evidential burden which, in respect of certain arguments of BHB, rests upon BHB, and the overriding legal burden of proof on ATR at each stage of the analysis as to whether BHB is dominant in any market, and whether there has been abuse by BHB of any such dominance.

125. BHB's case is that ATR has not discharged its legal burden of proof in relation to any stage of analysis, and that it is irrelevant that, for example in identifying, as part of

the analysis, the relevant product market, BHB has not put forward any particular positive case of its own.

126. It is not in dispute that, since the legal burden of proof lies on ATR to establish abuse within Article 82 and s.18 of the 1998 Act, the burden also lies on ATR to establish each of the analytical steps which are prerequisites to a finding of abuse of dominant position. The standard of proof is the civil standard of balance of probabilities, but the seriousness of an infringement of s.18 of the 1998 Act or Article 82, involving as it may the imposition of financial penalties, requires that the proof or evidence must be commensurately cogent and convincing: *re H* [1996] AC 563, 586-587 (Lord Nicholls), *Aberdeen Journals Limited v OFT* [2002] CAT 11 citing *Napp Pharmaceuticals Ltd v Director General of Fair Trading* [2002] CAT 1 at para 109.

127. It is equally clear that an evidential burden may lie upon BHB, either initially or generally (depending upon the particular assertion and the manner and circumstances in which it is raised) in relation to any positive assertion by BHB in rebuttal of ATR's case: see generally the discussion in *RCA and BHB v OFT* at paras [130]-[134], and see also *Aéroports de Paris v Commission* Case T-128/98 [2000] ECR II-3929, 3991 at para 202 (burden on *Aéroports de Paris* to justify the reasons for and correctness of the differences in the rates of fees applied to different ground handlers operating at Orly and Roissy-CDG airports).

128. It is not fruitful to consider the precise nature and weight of such a burden on BHB in the abstract, divorced from the precise assertion and the stage of the analysis at which it is raised. I shall therefore consider that issue when it arises in the course of my analysis below.

Dominant position

129. A position of "dominance" has been defined by the ECJ as:

> "…a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of consumers":

Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission* [1978] ECR 207: Case 85/76 *Hoffman-La Roche v Commission* [1979] ECR 461 at para 38; Case T-228/97 *Irish Sugar v Commission* [1999] ECR II – 2969 at para 7.

130. That definition has been adopted by the OFT in its Guideline on the Chapter II prohibition at para 3.10.

131. The ECJ has also said in *Hoffman La Roche* at para 39.

> "such a position does not preclude some competition … but enables the undertaking which profits from it, if not to determine, at least to have an appreciable influence on the conditions under which competition will develop, and in any

> case to act largely in disregard of it so long as such conduct does not act to its detriment."

132. In assessing dominance, there are three inter-related stages of analysis. They are described as follows in Bellamy and Child's European Community Law of Competition (5th ed. P.M. Roth Q.C.) at para 9/009:

> "(i) *market definition*: defining the relevant product market and the relevant geographic market (which must comprise at least a substantial part of the common market) in which the market power of the allegedly dominant undertaking is to be assessed;
>
> (ii) *market share analysis*: establishing the market share of the undertaking in question on the relevant market so defined;
>
> (iii) *analysis of competitive constraints*: assessing the significance attributable to the market share of the undertaking in question and in particular whether it is likely to be eroded by actual or potential competitors."

133. The description of those three crucial aspects of the analysis as "stages" may be misleading. They are not self-contained sequential steps, leading to a conclusion. They are, as Bellamy and Child states, inter-related. As the present case so clearly shows, competitive constraints, for example, will be relevant in establishing the relevant product market and also market share. They are, rather, three facets of the analysis which must be addressed and considered before a conclusion can be reached on dominance.

The market

134. Identification of the relevant market involves identification of both the product market and the geographical extent of the market.

The product market

135. It is common ground between the parties that the standard approach to product market definition, which should apply in the present case, is the "hypothetical monopolist" or "SSNIP" (small but significant non-transitory increase in price) test.

136. That test is described in the following way in the OFT's Guideline on Market Definition (OFT 403) paras 2.5 to 2.10:

> "**2.5** The process of defining a market typically begins by establishing the closest substitutes to the product (or group of products) that is the focus of the investigation. These substitute products are the most immediate competitive constraints on the behaviour of the undertaking supplying the product in question. In order to establish which products are 'close enough' substitutes to be in the **relevant market**, a conceptual framework known as the hypothetical monopolist test (the test) is usually employed.

> **…**
>
> **2.7** In essence the test seeks to establish the smallest product group (and geographical area) such that a hypothetical monopolist controlling that product group (in that area) could profitably sustain 'supra competitive' prices, i.e. prices that are at least a small but significant amount above competitive levels. That product group (and area) is usually the relevant market.
>
> **2.8** If, for example, a hypothetical monopolist over a candidate product group could not profitably sustain supra competitive prices, then the candidate product group would be too narrow to be a relevant market. If, on the other hand, a hypothetical monopolist over a subset of a candidate product group could profitably sustain supra competitive prices, then the relevant market would usually be narrower than the candidate product group.
>
> **2.9** The steps in applying this approach are as follows. We start by considering a hypothetical monopolist of the **focal product** (i.e. the product under investigation) which operates in a **focal area** (i.e. an area under investigation in which the focal product is sold).
>
> **2.10** We then ask whether it would be profitable for the hypothetical monopolist to sustain the price of the focal product a small but significant amount (e.g. 5 to 10 per cent) above competitive levels. If the answer to this question is 'yes', the test is complete. The product and area under the hypothetical monopolist's control is (usually) the relevant market.
>
> **2.11** If the answer to this question is 'no', this is typically because a sufficiently large number of customers would switch some of their purchases to other substitute products (or areas). In this case, we assume further that the hypothetical monopolist controls both the focal product **and** its closest substitute. We then repeat the process, but this time in relation to the larger set of products (or areas) under the hypothetical monopolist's control.
>
> **2.12** As before, we ask whether it would be profitable to sustain prices 5 to 10 per cent above competitive levels. If so, the test is complete. The relevant market is (usually) the focal product and its closest substitute. If not, we assume that the hypothetical monopolist also controls the second closest substitute to the focal product and repeat the process once more. We continue expanding the product group in this way (i.e. by adding the next best substitute) until we have found a group of products (or areas) for which it is profitable for the hypothetical monopolist to sustain prices 5 to 10 per cent above competitive levels (by adding the next best substitute)."

The product

137. ATR's case is that the relevant product is UK pre-race data.

138. BHB's case is that the relevant product is the ability to create value from British racing. Mr Elliott says, for example, the following in his Expert Report:

> "9.10 …what is being purchased is the ability to create value from British racing…"
>
> "10.1 … the relevant product that ATR consumes in this case is the ability to create value from the whole show of British racing, separate and distinct from the mechanism by which that can be obtained, or more correctly, legitimately withheld. That mechanism is the pre-race data sourced from the BHB Database, whether by direct access to the BHB Database or delivery via PA in this case."
>
> "10.6…Thus, in providing a high value whole show, BHB (and to an extent the Jockey Club) have to perform a governance role that ensures integrity, meritocracy, competitive balance, and solidarity and fixture co-ordination between courses, whilst ensuring that the conflicting needs of the different consumers and users (TV, bookmakers, owners, racegoers etc) are met and balanced."
>
> "10.7… It is the whole show that generates value for users and it is access to this whole show that users are buying and selling to others. It is the aggregate activities of the BHB and Jockey Club that generate the (value of) the whole show."
>
> "12.2…The first step, the definition of the relevant product (what the OFT call the focal product), seeks to identify what customers actually consume. The Claimants see the relevant product as Pre Race Data. However what they are actually consuming is a relevant product defined more widely, since the data allows them the opportunity to create value from British racing (whole show). For convenience the relevant product is hereafter called British racing."
>
> "14.16…Thus the relevant product should more correctly be seen as the opportunity to create value from the British racing whole show."

139. That product, BHB claims, includes both British pre-race data and British racing pictures. The point is put succinctly in paragraph 74 of BHB's closing written submissions, as follows:

> "BHB's primary case is that it is a crucial first step in the analysis to realise that the product being consumed is not just any old data ("low-grade" data as ATR put it in opening…) but is British racing data, with all the costs, value, quality and attributes associated with that product. That product includes both British racing data and British racing pictures. It is that product as a whole that allows bookmakers (UK and overseas) to accept bets on British racing. Accordingly, it is that product which creates the positive externality for which payment must be made via BHB's data charge."

140. In advancing that case, BHB relies not only on the expert evidence of Mr Elliott but also on the evidence of Mr Penrose. In this connection, BHB refers to the evidence of Mr Penrose, in cross-examination, that, at the time of ATR1 "the British racing product", by which he clearly meant both pictures and data, had a certain value.

141. I have no difficulty in concluding that the relevant product in the present case is, as submitted by ATR, UK pre-race data.

142. The question is essentially one of fact and common sense rather than economic theory. As was put to Mr Ridyard in cross-examination, and he accepted, what is actually delivered to ATR as part of its contract with BHB is a practical question.

143. As appears from para 2.7 of the OFT's Market Guideline quoted above, the analysis begins with the "smallest product group", and so the narrowest possible definition.

144. The starting point is that the parties themselves have identified pre-race data as the subject matter of the contracts and negotiations between them from time to time, and also the subject matter of the invoice submitted by BHB to ATR dated 10 February 2005. Data, including, in particular, pre-race data, is also the subject matter of the BHB/PA Agreement and the PA/ATR Agreements.

145. BHB's contention and analysis on this point, including, in particular, its claim that the product includes both data and pictures, are artificial and counter-intuitive.

146. Pictures and data are not substitutes for one another. Furthermore, they can be, and have been, sold separately by different persons, namely BHB and the racecourses, and at different times.

147. Although pictures and pre-race data are complements, I do not accept, as contended by BHB, that the price of pre-race data is constrained by the purchase and price of pictures in such a manner and to such an extent as leads to the conclusion that the product is, in Mr Elliott's words, the opportunity to create value from the British racing whole show through "the mechanism" of BHB's pre-race data.

148. BHB claims that such constraint is perfectly clear because of the following matters which it asserts: the experts were agreed that data and pictures are complements to ATR, and ATR's customers require both; Mr Penrose confirmed Mr Smith's analysis of the manner in which the pictures and data deals were concluded in ATR1, namely that the RCA had no authority to sell data to ATR, and therefore the BTS was agreed afterwards; Mr Robertson illustrated how he built data charges into the ATR accruals, and that they were in the mind of ATR when it negotiated a deal for pictures in ATR2; Mr Imi stated expressly that ATR made a deal with the racecourses for pictures with his eyes open as to BHB's proposed data charge, and that ATR was influenced in the sum it would pay to BHB by amounts ATR had agreed to pay for pictures, and vice versa**;** Mr Elliott's evidence on price constraint was to the same effect.

149. I do not agree with that analysis by BHB or the conclusions BHB seeks to draw from it.

150. While I accept, if only as a matter of common sense, that the price of pictures may have some restraining effect on the price of data in a situation in which the purchaser is a purchaser of both, and for commercial reasons wishes to keep overall business costs as low as possible, none of the matters relied upon by BHB supports the conclusion that there is such a clear or close relationship between the price of pictures and the price of data that the former always or to any material extent controls the latter.

151. I do not consider Mr Penrose's evidence assists the analysis. His evidence was directed to the particular arrangement under ATR1 when, as he emphasised, BHB and the racecourses entered into an agreed arrangement for allocating between them the price to be paid by ATR for both pictures and data. The essence of his evidence, and the point he was seeking to make, was that under those particular arrangements (that is to say, the set-off of money paid by ATR to BHB against what was due to the RCA under the MRA) it was of no concern to ATR how the racecourses and BHB decided to divide between them the money paid by ATR.

152. I agree with the submission of ATR that BHB's identification of the relevant product as "the ability to generate value" from British racing or as "the mechanism" for access to British racing confuses the identity of the relevant product with two quite separate matters, namely, whether the relevant product is indispensable to the victim of the alleged abuse, and whether the seller of the product spends its money in a way that improves the product and generates benefits to the purchaser. I agree with ATR that the "ability to generate value from British racing" is not a product supplied by BHB, but, rather, it is a description of what ATR may (or may not) ultimately be capable of doing (providing a number of other matters go well for it) if it purchases BHB's pre-race data.

153. BHB relies on *Re Televising Premier Match League Football* [2000] EMLR 78 and *RCA and BHB v OFT*. In my judgment, neither of those cases assists BHB.

154. In *RCA and BHB v OFT* the CAT considered that the OFT's analysis of the relevant product and product market in that case was flawed because, among other reasons, the OFT failed to consider whether the non-LBO rights (pictures) were complementary with other products that ATR was acquiring simultaneously, in particular BHB's data rights.

155. ATR distinguished the *RCA and BHB v OFT* on the following principal grounds.

156. First, the CAT expressly relied on the facts in its case that:

> "any increase in the amount a licensee has to pay for the Non-LBO rights is likely to be matched by a decrease in the amount it is willing to pay for the data rights…ATR stipulated that the courses and/or RCA would ensure that the BHB data rights were made available to ATR "free of charge"".

157. By contrast, in the present case, there is no suggestion that the price paid for picture rights will be matched by a decrease in the amount paid for data rights or vice versa. The only decrease in cost will be to the extent that the data rights payments will be deductible before arriving at net revenue for the purpose of calculating the charges due to the racecourses. There is, however, no question of BHB offering to supply

ATR with data rights "free of charge". Nor will the racecourses permit data charges to be credited in full against the payments due to them. Moreover, it is quite clear that BHB does not find itself constrained by the price paid for the pictures by ATR. On the contrary, the only manner in which data and picture payments appear to be linked is by BHB's stipulation that it should always be paid "at least as much" for data as for pictures.

158. Secondly, the CAT criticised the OFT for failing to consider that ATR was "acquiring simultaneously" both data and broadcasting rights. The context was that the MRA permitted ATR to deduct the price it paid to BHB for data under the BTS from the monies due under the MRA. ATR was in practice "acquiring simultaneously" data and pictures. This is no longer the case. In the present case, the broadcasting rights were acquired in June 2004. The terms for the supply of BHB's data were being negotiated long after. Accordingly, the data charges are being sought against a background in which the charges for the pictures are already a commercial reality.

159. Thirdly, it should be noted that the CAT's finding was that the OFT "should have considered" the issue of complements in its decision. The CAT did not clearly stipulate that, in its view, data and pictures were, in fact, complements. The CAT emphasised that the OFT's own guidelines at the time contained the general proposition that "complements are included in the same market when competition to supply one product constrains the price for the other," but the OFT had nonetheless failed to consider that issue in its decision.

160. Those points of distinction asserted by ATR are, in my judgment, well taken. In short, consideration of the Chapter I infringement in that case involved materially different facts and matters to those with which I am concerned. I see nothing in the conclusion of the CAT which leads me to conclude in the present case that the focal product with which I am concerned is a bundle of data and pictures rather than pre-race data alone.

161. The *Premier League* case was a decision of the Restrictive Practices Court. In that case the Director-General of Fair Trading referred three agreements to the court, all of which were registered under section 1(2) of the Restrictive Trade Practices Act 1976. The agreements related to the establishment and rules of the Football Association Premier League Limited ("the Premier League") and to the granting by the Premier League of broadcasting rights to British Sky Broadcasting Ltd ("Sky") and the British Broadcasting Corporation ("the BBC"). Under agreements made in 1992 and 1996 the Premier League granted Sky and the BBC exclusive rights to broadcast Premier League football matches on television. The respondents to the reference were the Premier League (as representative of all member clubs past and present), Sky and the BBC. There were three main issues on the reference. The first was whether any of the restrictions under the provisions of the three agreements were restrictions in respect of one or more of the matters specified in section 11(2) of the 1976 Act. The second was whether any relevant restriction was contrary to the public interest. The third issue was what action the court should take in respect of any relevant restriction which was held to be contrary to the public interest.

162. Mr Brindle relied, in particular, on the following passages at p.160:

"The economist witnesses called on behalf of the respondents took a different view. Although each of them expressed himself in his own way we think it is fair to say that, on what may be called the cartel argument, they all took a line which accords with the following passage in the first report of Professor Yamey, who was called on behalf of the Premier League:

2.2 …In several important respects the collective licensing arrangements, viewed as a set of economic/commercial arrangements, are quite different from the ordinary business cartel.

2.3 In a widgets cartel, the cartel itself produces no output that is distinct from and additional to the outputs of the cartel members. Competition between widget manufacturers is desirable because it benefits the public as consumers by generating better and cheaper products. By contrast the FAPL [Football Association Premier League Ltd] produces a product, the PL [Premier League] competition, i.e. the PL championship, which no single PL club can produce, nor even any sub-set of PL clubs. It is a product that is jointly, i.e. collectively, produced by the PL clubs. Even the least successful of the least popular clubs contribute to the PL collective product. Each club has an interest in the PL competition no greater nor less than any other. The bottom clubs can and do spring surprises playing against the top ones. Each club plays an integral part in all aspects of the competition no greater nor less than any other. The bottom clubs can and do spring surprises playing against the top ones. Each club plays an integral part in all aspects of the competition, in determining the championship, those who qualify for European competition and those to be relegated.

2.4 Moreover the derived products stemming from the PL competition, the individual PL matches, are such that no single PL club can produce a unit of output: it takes two clubs to produce a match. It takes only one widget manufacturing firm to produce a widget.

2.5 The PL competition consists of a series of inter-connected matches extending over a season. In a given season the public's interest in a particular PL match depends in part on the outcomes of all the preceding PL matches and on the state of the PL league table.

2.6 More generally, the value of the television rights in any particular match is affected by the value of the PL product itself, i.e. the PL competition, and the public's interest and enthusiasm it succeeds in generating. Other things being equal, the less interest the PL competition is generating, the less

> valuable are the television rights in any one PL match. This consideration applies to the broadcasting of live matches and also of highlight programmes. "

163. In a further submission, which I found difficult to follow, BHB contended that there is an analogy in the present case with the analysis in the *Premier League* case that a broadcaster, like an ordinary viewer, that pays for the rights to broadcast a football match obtains not merely a bare licence to enter the grounds but also, in substance, the service of the match itself.

164. BHB contends that the similarities between the Premier League and British racing are clear. It submits that, analogous to Professor Yamey's argument which was accepted in that case - that the Premier League product as a whole was more valuable than its parts – is BHB's argument in the present case as to the value of the "whole show" of the British racing product, which is what allows bookmakers to make a profit.

165. I do not find the passages cited or the reasoning or decision in the *Premier League* case helpful to the resolution of the issues before me. Whilst it may be correct to say, by analogy with the Premier League, that British racing is greater than the sum of its constituent parts and elements, the composition of British racing, its organisation and the roles and responsibilities of its constituent elements, including those of BHB, are so distinct from the Premier League, and the legislation considered in that case is so different from that with which I am concerned, that the analysis of the precise relationship between BHB and ATR, including the product sold to ATR, for the purposes of Article 82 and s.18 of the 1998 Act, is not illuminated by that case.

166. At this point in the analysis, as at each succeeding stage, Mr Elliott emphasised that it is necessary to recognise the relevance of (in the language of an economist) the "externality" arising from the ability of bookmakers to take bets on British racing. For the reasons I have given, I do not accept that the focal product is defined or coloured by any such externality. In any event, for the reasons I give in more detail below, I do not accept that BHB is to be credited as providing the externality of "the whole show" of British racing.

<u>The relevant product market</u>

167. In order to establish the relevant product market, it is necessary to identify all products which are substitutable or sufficiently interchangeable with the product in question.

168. As the ECJ said in *Hoffman-La Roche* at para 28:

> "The concept of the relevant market in fact implies that there can be effective competition between the products which form part of it and this presupposes that there is a sufficient degree of interchangeability between all the products forming part of the same market in so far as a specific use of such products is concerned."

169. The overall effect of the case law was summarised in the judgment of the European Court of First Instance in TE504/93 *Tierce Ladbroke SA v Commission* [1997] ECR II-923 at 953, as follows:

> **"**According to settled case-law, for the purposes of applying Article [82] of the Treaty, the relevant product or service market includes products or services which are substitutable or sufficiently interchangeable with the product or service in question, not only in terms of their objective characteristics, by virtue of which they are particularly suitable for satisfying the constant needs of consumers, but also in terms of the conditions of competition and/or the structure of supply and demand on the market in question (Case 31/80 *L'Oreal* [1980] ECR 3775, paragraph 25; Case 322/81 *Michelin v Commission* [1983] ECR 3461, paragraph 37; Case C-62/86 *AKZO Chemie v Commission*[1991] ECR I-3359, paragraph 51; Case T-30/89 *Hilti v Commission* [1991] ECR II-1439, paragraph 64, and Case T-83/91 *Tetra Pak v Commission* [1994] ECR II-755, paragraph 63)."

170. To determine where to draw the line between the products to be included and those to be excluded from the relevant product market, the primary tool for judging interchangeability is "demand-led substitutability", that is to say the extent to which consumers are able to switch to substitute products, particularly in the event of small but significant changes in the relative price of the products concerned: see *Genzyme Limited v OFT* [2004] CAT 4 at paragraph [200] citing the Commission's Notice on Market Definition.

171. Factors to be taken into account in identifying the relevant product market have been helpfully identified by the CAT in the following paragraphs in *Aberdeen Journals* [2002] CAT 4 (and at [2003] CAT 11 at [120]):

> "96. The foregoing cases indicate that the relevant product market is to be defined by reference to the facts in any given case, taking into account the whole economic context, which may include notably (i) the objective characteristics of the products; (ii) the degree of substitutability or interchangeability between the products, having regard to their relative prices and intended use; (iii) the competitive conditions; (iv) the structure of the supply and demand; and (v) the attitudes of consumers and users.
>
> 97. However, this check list is neither fixed, nor exhaustive, nor is every element mentioned in the case law necessarily mandatory in every case. Each case will depend on its own facts, and it is necessary to examine the particular circumstances in order to answer what, at the end of the day, are relatively straightforward questions: do the products concerned sufficiently compete with each other to be sensibly regarded as being in the same market? Are there other products which should be regarded as competing in the same market?

> The key idea is that of a competitive constraint: do the other products alleged to form part of the same market act as a competitive constraint on the conduct of the allegedly dominant firm?"

172. ATR's case is that the relevant product market is for the supply of UK pre-race data to those in the horseracing industry that require such information for the services they provide to their customers (in particular, bookmakers and producers of TV channels or internet sites relating to horse racing): see amended Particulars of Claim paras 9 and 28.

173. BHB does not put forward any particular case of its own as to the product market, but maintains that ATR has failed to make out its case to the requisite standard of proof.

The SSNIP test and the competitive price

174. It is convenient, at this point, to return to the SSNIP test. The SSNIP test is an economist's method of determining the question of substitutability. In considering that issue, and applying the SSNIP test, what is under consideration is the extent to which the hypothetical monopolist controlling the relevant product can sustain small but significant amounts above the competitive price level. Accordingly, in order to apply the test it is necessary to establish the competitive price level.

175. The contrast between the positions adopted by the parties on this issue could not be more stark. ATR claims that the competitive price must be based on the cost of creating BHB's Database. It is not in dispute that such cost is currently in the region of £5 million. Notwithstanding that the costs of collating BHB's database are largely fixed, with very low marginal costs of providing access to each additional user, Mr Ridyard's evidence was that the competitive price is such price as would cover the cost of maintaining the database and sustaining it in the long term, including a small margin for a return on capital. I understood ATR to concede, accordingly, that in a competitive market, the cost of the BHB's Database, plus a small margin for a return on capital, would be the maximum price.

176. I understand the reason for the concession to be an acceptance that, where an undertaking has high fixed costs, but very low marginal or incremental costs (i.e. the undertaking must spend a considerable sum in order to produce its product but, having done so, the additional costs of each additional unit of production are very low), prices based on marginal cost would be very low and might lead to inefficiencies (or the reduction in incentives to investment and innovation) in the long term. In such cases, it may well be appropriate and efficient for the dominant undertaking to seek to recover its fixed costs as well as its marginal costs from its customers.

177. It is to be noted that even that concession by ATR was somewhat grudging since Mr Charles Hollander Q.C, leading Mr Daniel Jowell, for ATR, submitted that, strictly speaking, since BHB needs to produce its Database to fulfil its own statutory functions (that is to say, irrespective of any opportunities to sell it to third parties), in a competitive market in which one or more other bodies was in a position to sell similar data BHB would be willing to sell its data for considerably less than the cost of its production.

178. Moreover, the ambit of the concession became somewhat obscured in the course of Mr Hollander's final submissions. Mr Ridyard's oral evidence, as I have said, was that the competitive price was the cost of BHB's Database together with a reasonable return. In closing submissions, however, Mr Hollander drew attention to a part of Mr Ridyard's 1st Expert Report in which he treated the competitive price as the cost of the Database, without any additional return. In particular, Mr Hollander emphasised the following in paragraphs 74 and 75 of Mr Ridyard's 1st Expert Report:

> "A reasonable price to ATR for the use of the BHB database would raise only as much revenue as is required to fund ATR's appropriate share of the total revenue requirement that is needed to keep the database operating. I approach this problem below by sharing the estimated BHB revenue requirement proportionally to the turnover of various users on services that depend on BHB database. Consistently with this approach, the costs of upkeep of the database and the associated investments can be shared as follow….

Table 2

Turnover generated on British horse races and database cost split by user, year 2005 (£'000)

	Turnover	% of Total Turnover	Contribution to database
Database cost (Weatherbys)			5,248
Contribution from:			
UK bookmakers	6,533,333	89.81%	4,713.3
Irish bookmakers	593,393	8.16%	428.1
South African bookmakers	43,103	0.59%	57.5
Italian bookmakers	19,909	0.27%	31.1
ATR International	2,279	0.03%	1.6
SIS Facts	2,767	0.04%	2.0

> According to the estimates provided in Table 2, the price that ATR should pay for using BHB's database "utility" is approximately £1,600 per year, plus an appropriate share of the £119,700 due from bookmakers in Italy, South Africa, and other countries. (This can be compared to the £52,000 per annum paid by ATR to PA for the supply of the data). The great majority of the database revenue should come from the UK bookmakers whose betting turnover on British horse racing naturally greatly exceeds that from overseas bookmakers."

179. Mr Ridyard was not cross examined on those paragraphs of his 1st Report.

180. BHB contends that ATR has failed to identify a convincing competitive price. By contrast, BHB's case is that the competitive price must reflect the "externality" of all those aspects of British racing which make it an attractive subject matter for broadcast and for betting: including, in particular, "a high degree of integrity, meritocracy, competitive balance and solidarity, and a quality that is widely regarded as pre-

eminent in the world" (BHB's opening skeleton argument at para 15, and Mr Nichols' 1st witness statement at para 14 and his 3rd witness statement at paras 7.4 to 7.6). BHB claims that the cost of providing that externality must be reflected in the competitive price. In particular, BHB claims that the cost includes the amount of the Levy, which is set off against the contractual obligation of UK bookmakers under their contractual licences with BHB, the income from Irish bookmakers, and also the amounts raised by BHB from broadcasters and any other overseas bookmakers. All that revenue is applied, BHB says, for the benefit of British racing, with its associated value, quality and attributes. That amount in question is considerably in excess of £100 million.

181. Mr Elliott describes the economic significance of "externalities" in the following way in paras 5.1-5.2 of his Expert Report:

> "5.1 …Economic relationships have… effects that go beyond trading or other relationships and affect third parties or "bystanders". These effects are called externalities because one entity directly affects the welfare of another that is external to it. In such circumstances, externalities typically have an adverse effect on economic efficiency. This adverse effect can arise whether the influence of the externality is positive or negative. For example, if the externality is beneficial to another entity (a positive externality), too little will be produced and, similarly, if the externality has a harmful (negative) effect, then too much is produced. In that respect an externality does not differ from a normal good or service within a competitive market economy. The efficient price of such a good or service in the market will ensure that the optimal amount is produced and consumed.
>
> 5.2 The adverse effect on efficiency comes about when providers of the service do not internalise external costs or benefits when making production decisions…"

He goes on to say:

> "9.2 The benefit that is provided to bookmakers by high quality racing is significant… Absent the Levy, this would be a free positive externality for bookmakers and punters, obtained as a by-product of British Racing. Absent a market and correspondingly a price being placed on the value of British racing to bookmakers and other users, it is not possible for racing to supply or users to demand what they want. In economic terms, the Levy is an attempt to create such a market by administrative means.
>
> 9.3 Accordingly, the purpose of the Levy and of any subsequent commercial mechanism is broadly a payment by bookmakers for the ability to create value from British racing. The funds, so raised, are required to improve the quality and integrity of racing and the breed…

> 9.4 The aims of the BHB and the Horserace Betting Levy Board (HBLB) are very broadly similar.
>
> 9.5 The Levy, created as it was in the early 1960's, applied to LBO bookmakers and did not foresee subsequent technological developments in media and betting opportunities for creating value from British racing. Nevertheless, the principle underlying the Levy (a payment for the externality) applies equally to all the additional ways that users now create value from British racing.
>
> 9.6 The commercial mechanism which has been developed at the instigation of the Government to replace the Levy has a wider scope than the Levy. It is designed to ensure payment for the positive benefits (externalities) provided by racing to third parties generally, for example the media, and not just for the benefits provided by racing to LBO bookmakers. The commercial mechanism has a further advantage over the Levy. As it is a freely negotiated market price it will (providing that the externalities can be priced as a consequence of the ability to exclude those who seek to create value from British racing) give rise to a preferable outcome for all users compared to the administratively set price of the Levy.
>
> 9.7 The commercial mechanism is in effect the means by which the positive externalities conferred upon third parties are priced efficiently. It is irrelevant whether those third parties were or were not covered by the Levy or whether they are defined as a bookmaker or not. Those who benefit from British racing should pay for that ability to create value from British racing.
>
> 9.8 It is important to recognise that what is being provided to ATR and others is the ability to create value from British racing. Control of access to the BHB Database is the mechanism by which BHB is able to withhold the ability to create value. The essence of any efficient transaction on price is that the seller can refuse to sell and the buyer can refuse to buy. As explained earlier, BHB's coordinating role and its broad representative structure enables that transaction to take place efficiently."

182. BHB relies particularly, in this context, on the following passages in the written statements of "Experts' Agreed Issues":

> "6. As a matter of welfare economics it is generally desirable that an externality is priced. Externalities can be priced (i.e. internalised) by regulation/tax or by voluntary negotiation between the parties affected."

> "9. All things being equal, the greater is the size of the externality, the greater are the economic benefits for society of pricing or otherwise internalising the externality."
>
> "10. A financial contribution to the racing industry by bookmakers and other "users" of racing can provide a mechanism by which beneficiaries can influence the quantity and quality of racing."

183. BHB emphasises that British racing must be viewed as a single entity, which requires funding in order to maintain its quality and features and to withstand competition from other sports and leisure activities, and which requires supervision and funding by a central governing body representing the interests of participants and consumers in order to maintain its value. BHB maintains that it is precisely that body. BHB claims and emphasises that BHB seeks to balance the interests of all those who produce, participate in and consume British racing, and that it applies all its income and property, as required by its Memorandum of Association, solely towards the promotion of its objects, which include the improvement of the financial position of horse racing, funding its administration, and other purposes for the proper functioning, improvement and promotion of British racing. This provides the context for BHB's desire, in accordance with the Government's declared policy, to sell its assets at a commercial rate in order to fund British racing.

184. In pressing this point, BHB emphasises that a situation in which "free-riders" do not pay for positive externalities will result in underfunding and ineffective sports governance. It is, BHB contends, crucial that BHB should be able to withhold access to an asset in order to prevent "free-riding". BHB's commercial mechanism, a commercial charge on all who exploit the ability to generate value from British racing, is, BHB maintains, a more effective way of internalising racing's externalities than the Levy.

185. BHB emphasises that Dr Davis's report shows that BHB's expenditure increases the value of British racing and, in the language of an economist, "pushes out" the demand as a whole.

186. BHB draws attention to the apparent discrepancy between the position taken by ATR in the notification to the OFT in November 2001 (when ATR sought to support and justify as pro-competitive and in the interests of consumers BHB's plan to commercialise its assets by means of a charge reflecting the commercial value of its Database) and ATR's contrary position in these proceedings. BHB relies, in particular, on the following passages in the Notification document, which was signed by ATR:

> "British horse racing faces significant challenges from uncertainty over its future funding; and increased competition from other leisure pursuits… The Levy Board system has contributed to a lack of commercial funding, by preventing British horse racing from fully exploiting its product on a proper commercial basis. Only a relatively limited amount of revenue is presently raised from the exploitation of media rights…it is clear that the Government wishes to see British

racing operating, like other sports, on a fully commercial basis without state intervention…The future of British horse racing therefore depends on its public profile being raised. Racing must become an attractive, broad-based leisure activity, generating a dependable and long-term income stream, the principal source of which must inevitably be the betting industry…

The Notified Arrangement [ATR1]… will play a critical role in securing the financial future of British racing as it moves into a new commercial environment…as the industry moves away from current Levy funding arrangements. The increased revenue will enable the industry to invest in new facilities at racecourses and to raise prize money, which will help to retain existing owners as participants in British racing and to attract new owners to the sport, as well as increasing activity and employment in related areas such as training, and bloodstock sales… The Notified Arrangement will help racing to compete more effectively with other leisure interests for the 'leisure pound', and therefore provides the basis for considerable improvements to the British racing industry…

"The Notified Arrangement is the most efficient and effective means of delivering the benefits, both to consumers and to British horse racing… [and] does not result in the appreciable prevention, restriction, or distortion of competition in any relevant market

"The sale of the Rights pursuant to the Rights Agreement will enable the Courses to develop new facilities for participants, spectators and on-course bookmakers and ensure the continuation of racing at a local level: see the BHB Future Funding Plan …

Increased income will enable increased prize-money, which will make British racing more competitive internationally, helping it to develop further and thereby promote economic progress…. Increasing prize money would improve the international competitiveness and quality of British racing through increasing field sizes and horse population…British racing will also benefit from increased overseas interest in British racing, for example, from sharing in any revenues that Attheraces may earn from broadcasting British racing in other countries (or from licensing others to do this) and from international betting, for example through the Attheraces website: there is already considerable interest in British racing overseas, for example in America and the far East which is regarded as having integrity and reliability, thereby making it an attractive subject for gambling.

> Racehorse owners, trainers, breeders, jockeys, sponsors and other participants in the British racing industry will benefit from the greater sums of money that will flow into the sport and from the greater public profile that the sport will enjoy as a result of Attheraces' exploitation of the Rights and its marketing of British racing. These benefits will be shared by consumers through the resulting improved quality of British racing".

187. Further, BHB emphasises, in this context, Mr Penrose's agreement, in cross-examination, to the proposition put to him by Mr Brindle that until recently ATR's position was that "The arrangement whereby the racecourses and the BHB commercialised the rights to the pictures and the data was a jolly good thing". Moreover, Mr Penrose confirmed, in his cross-examination, that in commercial terms the data and pictures are just as valuable as they ever were to ATR.

188. BHB also relies upon the reasoning and conclusion in *Scandlines Svergie AB v Port of Helsingborg* Case COMP/A.36.568.D3, in which the Commission dismissed a complaint by a ferry company of excessive and discriminatory port charges by the port operator. The Commission said that, in calculating the production costs, it was necessary to take account not only of the costs actually incurred by the port in providing its services, but also additional costs and other factors which were not reflected in the audited profits and losses, such as high sunk costs, and the benefits to customers conferred by the particular location of the port. That case is, BHB submits, clear support for the proposition that the competitive price should reflect, not merely cost, but also the value to the consumer of the product or service in question.

189. My short observation on those submissions of BHB is that it is not appropriate, at the stage of fixing the competitive price for the purpose of the SSNIP test, to consider the externalities to which BHB refers. That is more appropriate at the stage of considering whether there has been excessive and unfair pricing. At that stage, BHB may seek to rely on the externalities as an objective justification for a price substantially in excess of cost. It is, in my judgment, analytically inapposite to fix the hypothetical competitive price by reference to the actual special features of the very entity alleged to be a monopolist abusing its dominant position in the market. Put a different way, the process of establishing the competitive price requires the hypothesis of a market in which there is, in fact, competition and BHB is not a monopolist or even in a dominant position.

190. Even if that is wrong, however, I do not consider that BHB's arguments on externalities assists it in the present case.

191. It must be accepted that, quite apart from the decision of the Commission in the *Scandlines* case (which was appealed to the Court of First Instance, but was withdrawn before the hearing of the appeal), in appropriate circumstances the competitive price can reflect an amount in addition to the cost of production. The classic example is the price which may fairly be charged by a pharmaceutical company for a particular product, and which is set at a level which takes into account expenditure on research and development and also the cost of failed products. This point is made in the draft OFT competition guideline issued for consultation in April 2004 (OFT 414a) at para 2.18 as follows:

> " … prices and profits may be high in markets where there is innovation. Successful innovation may allow a firm to earn profits significantly higher than those of its competitors. However, a high return in one period could provide a fair return on the investment in an earlier period required to bring about the innovation. These costs include investment in research and development and should take into account the risk at the time of the investment that the innovation might have failed."

192. Further, it must be accepted that, as in the *Scandlines* case, there may be circumstances in which the competitive price reflects a feature which makes the product especially attractive to the consumer. As Mr Hollander submitted, this is a principle of uncertain extent, but in economic terms is likely to be related to an economist's demand curve, in which the expenditure on the particular feature "pushes out" the demand for the product or the service in question.

193. Those principles do not, however, assist BHB on the facts of the present case.

194. The first and, to my mind, critical point to be made in this connection is that it appears contrary to common sense, and unsupported by authority, for the competitive price to be influenced by expenditure which is not strictly expenditure of the seller. I do not consider that the BHB can treat money raised by the Levy as expenditure by the BHB which can properly be reflected in the competitive price for its pre-race data. The Levy is raised by statute, and is both collected and distributed by a body other than BHB. BHB's shareholders are different from those responsible for the collection and distribution of the Levy. Bookmakers, for example, are represented on the Levy Board but not on the board of directors of BHB.

195. Nor do I accept that the contractual arrangements between BHB and UK bookmakers under which UK bookmakers are contractually obliged to pay to BHB 10% of their gross profit, against which is set off the Levy for the same amount, affects this analysis. The result of the set-off is that UK bookmakers do not, in fact, pay anything to BHB. The evidence of Mr Brand was that they are never invoiced by BHB. Nor will they ever pay BHB since, as Mr Hollander pointed out, the contractual licences between BHB and UK bookmakers are for 5 years from 2002 and so would expire before the Levy comes to an end in 2009.

196. Furthermore, whatever may be the position in other circumstances, BHB cannot properly be treated, for the purposes of the analysis I am conducting, as representing the whole of British racing. Important as may be its work and contribution towards the welfare and promotion of British racing, the fact remains that it is only one of a number of persons and bodies, including the Jockey Club, the racecourses and horse owners, responsible for the welfare and the success of the sport. BHB has its own particular constituency or constituencies, represented by the shareholders and those on its board, (which do not include bookmakers, as I have said). It does not, in fact, provide "the whole show".

197. This is highlighted by the fact that, by comparison with the Levy, the funding contribution of BHB is relatively small. The income raised by the Levy has grown from £59.4 million in 1996/2000 to £108.7 million in 2003/2004. BHB's revenue has increased from about £9.5 million in 1999 to about £44 million in 2004. About £12.4

million of that is derived from the Levy and is immediately paid out to the Jockey Club, leaving a balance of about £32 million.

198. Further, so far as concerns the evidence of Mr Penrose, which I have mentioned in paragraph 187 above, and also the statements in the October 2001 Notification to the OFT, on which BHB relies, it is to be noted that Mr Penrose, very shortly after making the admission quoted in that paragraph, retracted or qualified that admission and said "that is not actually what we said to either the OFT or the [CAT]". He went on to explain the limited contribution of ATR to the documentation sent to the OFT and in the proceedings before the CAT.

199. Moreover, BHB's approach appears to lead to the conclusion that there is potentially no limit to the amount of BHB's expenditure which could be required to be factored into the competitive price: it would be whatever amount BHB requires to spend on British racing and at least one consumer is prepared to pay. That is an entirely self-defeating analysis when the overriding object of the analysis is to establish a competitive price to test and control abuse of a market dominant position.

200. For that reason, it is clear that any additional element to be factored into the competitive price to reflect the type of "value to the consumer" featured in the *Scandlines* case must be strictly limited. The principle reflected in the analysis and result of that case cannot simply mean that the competitive price or the non-abusive price is whatever the consumer is prepared to pay.

201. Mr Elliott candidly accepted this difficulty. His evidence was that, in a case like the present, the "value to the consumer" point could only be established by evidence of comparables.

202. Mr Elliott provides evidence in paras 20.5 to 20.7 of his Report concerning horse racing in the USA, Australia, New Zealand, France and South Africa. On analysis, it provides no assistance. It relates merely to individual foreign racecourses in respect of pari-mutuel betting.

203. I do not discount entirely the possibility that there may be some moderate allowance, in the level of the competitive price, for the costs incurred by BHB which are indubitably for the benefit of non-Irish overseas bookmakers and those who provide broadcasting services to them. Such costs might be shown to "push out" the demand curve. No such costs have, however, been identified by BHB.

204. Dr Davis' evidence in his Report on the "pushing out" of the demand curve is flawed since it treats the Levy as part of the money expended by BHB. Further, he has not sought to analyse the impact of BHB's actual expenditure on the demand curve specifically in relation to non-Irish overseas bookmakers.

205. The evidence is, for example, that BHB's advertising expenditure has been spent almost entirely in the UK. The extent of its overseas advertising has been limited to approximately £50,000 out of £3 million, and such advertising has been targeted at benefiting the breeding industry in the UK. It is to be noted, in particular, that the evidence of Mr Nichols was that expenditure of the money sought to be charged by BHB in respect of the use of its pre-race data by non-Irish overseas bookmakers

would be unlikely to affect the demand for British racing by such bookmakers or their customers.

206. Furthermore, both in relation to positive externalities and "value to the consumer" it is necessary to take account of Article 86 and para 4 of Schedule 3 to the 1998 Act. They provide the means and mechanism by which account may be taken, in appropriate circumstances, of the fact that a monopoly is providing a service or services of general economic interest.

207. Article 86 provides, so far as relevant, as follows:

> "2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community."

208. Para 4 of Schedule 3 to the 1998 Act provides as follows:

> "Neither the Chapter I prohibition nor the Chapter II prohibition applies to an undertaking entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly in so far as the prohibition would obstruct the performance, in law or in fact, of the particular tasks assigned to that undertaking."

209. Explicitly or implicitly, the contrast made by BHB is between its own conduct as a governing body attempting to benefit British racing as a whole, from which ATR and its bookmaker customers make a commercial profit, and the conduct of ATR as a hard nosed commercial entity seeking to maximise its profits for its shareholders at the expense of BHB and British racing.

210. It was common ground before the Vice Chancellor that BHB is not such an undertaking as can claim the benefit of Article 86 and para 4 of Schedule 3 to the 1998 Act. Those provisions were not relied upon by BHB in the trial before me: compare the similar position, and consequent difficulty for, the Portuguese Republic in its unsuccessful appeal from the Commission in *Portuguese Republic v Commission* Case C-163/99 29.3.2001 in relation to its aircraft landing charge policy.

211. It does not seem to me to be appropriate, out of a sympathy for a particular public or governmental policy which cannot be justified under Article 86 or para 4 of Schedule 3 to the 1998 Act, to shoe-horn into the competitive price, for the purposes of Article 82 and s.18 of the 1998 Act and the SSNIP test, a reflection of significant costs which have nothing to do with the cost of producing the product in question but are the costs incurred by third parties of producing other benefits which consequently make the product in question of particular interest or value to the consumer. This cautionary approach seems particularly apt in the present context in which ATR has put in issue the extent to which BHB properly represents, and its expenditure has benefited,

British racing as a whole, including ATR and ATR's consumers who are non-Irish overseas bookmakers. As ATR has repeatedly emphasised, the reason, or at least one of the principal reasons, for the present dispute is to be found in the fact that BHB failed to reach agreement with the racecourses (as was done under ATR1) for a common strategy for selling data and pictures - itself an important reflection of the limitations in BHB's central governing role within British racing.

212. For all those reasons I consider that the competitive price is such as would recoup to BHB the cost of producing its Database (about £5 million) together with a reasonable return on that cost, and also, in principle, some additional small element to reflect any specific head of expenditure by BHB that could be identified as benefiting ATR's customers. As I have said no such separate head of expenditure has in fact been identified in the evidence before me.

213. ATR has not put forward any specific figure as the competitive price. The nearest approximation is the analysis carried out by Mr Ridyard at para 75 of his 1st Report, to which I have already referred.

The constraints of the downstream market

214. BHB and ATR operate in a vertically integrated market, that is to say one in which an upstream seller (BHB or the racecourses) supplies a product (data or pictures) to an intermediary (ATR), which itself supplies that product in its services to downstream consumers (UK or overseas bookmakers). It is necessary to consider whether the downstream market operates in such a way as to constrain the pricing by the upstream seller to such an extent and in such a way as to affect the definition of the market and the operation of the SSNIP test.

215. The point is made briefly, as follows, in the OFT's Guideline 403 (a) on market definition at para 5.12:

> "When considering the substitutes of a wholesale product, it may be necessary to consider substitution possibilities at the downstream level. For example, suppose a supplier produces a wholesale product A which is a necessary input for supply of a retail product B. Suppose also that a vertically integrated supplier that does not supply a substitute wholesale product supplies a product C which is a substitute for B at the retail level. The ability of customers to substitute to product C from product B at the retail level may constrain the ability to raise the price of the wholesale product A."

216. The parties' experts agreed that the issue in each case as to whether the downstream market acts as a constraint on the ability of an undertaking to raise the price in the upstream market is an empirical one.

217. BHB submits that, in order for ATR to discharge its burden of proof, ATR was obliged to examine each of the overseas countries in which its services are supplied for products which provide substitutes for British racing in order to see whether the price of British racing can be raised profitably and, if so, to consider "the distribution

level" (BHB's closing submissions at para 89). BHB maintains that ATR cannot discharge its burden of proof because it has not carried out that analysis.

218. The downstream market with which this issue is concerned is the market in which non-Irish overseas bookmakers carry on business. BHB relies on ATR's own statement, as follows, in the November 2001 Notification to the OFT of the MRA:

> "Horse racing is, at the very least, substitutable with a wide range of other sports... This indicates that many other sports rights should be considered within the same relevant market as that in which the sale and purchase of the Rights takes place. In terms of the 'hypothetical monopolist test', the price that the Courses may charge for the Rights is constrained to the competitive level, in the first instance, by the availability of rights to broadcast a wide range of other sports. Moreover, the ultimate objective of the purchasers of such rights is to produce programming that interests and entertains viewers…. From a demand side perspective, these types of rights are clearly substitutable….
>
> The Applicants also consider that the amount that the Courses may charge for the Rights is constrained by the ability of potential purchasers of the Rights to purchase rights to a wide variety of other types of video programming rights, including, for example, movies, game shows, and other light / general entertainment programming… The geographic scope of the market for the supply of rights to video programming is national, or at most the UK and Ireland. Programming rights are, in general, defined on a territory-by-territory basis by rights owners as a result of linguistic, regulatory and economic factors"

219. The Notification was concerned with the sale by the racecourses to ATR (upstream) of picture rights, for onward transmission to bookmakers (downstream). BHB's case is that the relevant market which was under investigation in the Notification to the OFT, and is the subject of the present proceedings, is the same; and that ATR, in those passages cited, neatly encapsulates the argument which BHB now makes that the downstream market in which ATR supplies to bookmakers is competitive, and there is a wide range of substitutes for bets on British racing (namely other sporting and gambling opportunities). In other words, when it suited ATR, ATR recognised in its Notification that the result of that downstream competition was that the racecourses (represented by the RCA) were constrained from making price rises in their sale of picture rights to ATR. BHB criticises ATR for resiling from that position merely to suit the current litigation interests of ATR and without carrying out an empirical exercise in relation to each of the foreign countries in which bookmakers receive pre-race data from ATR.

220. Further, BHB relies on the judgment of the CAT in *RCA and BHB v OFT* and its criticism of the OFT's failure to take account of the possibility of the "feedback effects" (as Mr Ridyard called them) of ATR's downstream market.

221. In that case, however, the factual situation under consideration was ATR competing in selling interactive betting with pictures with those selling without pictures, in circumstances in which people would look at the ATR pictures but could get precisely the same odds from bookmakers as from the ATR's Website. Accordingly, on the facts under consideration in that case, the downstream market was perfectly competitive: see [2005] CAT 29 at [135]–[138]. Further, the provision by the Courses of the Non-LBO rights in that case involved the provision of a novel service (see para [139]), and so there was no empirical evidence of a competitive price. In the present case, however, the rate of charge by BHB for its pre-race data over several years is well documented, as is the cost of the production of that data.

222. Quite apart from those considerations, as well as Mr Penrose's evidence (mentioned in paragraph 198 above) describing ATR's limited involvement in the preparation of the Notification to the OFT and the appeal proceedings in the CAT, I must decide the present case according to the evidence before me. Taking that evidence as a whole, I am satisfied that the downstream market does not constrain BHB's prices in the upstream market to such an extent as to preclude BHB raising its prices by small but significant amounts above the competitive price without bookmakers switching to other products. In so far as the burden of proof of that issue lies on ATR, as Mr Brindle contends, I am satisfied that ATR has discharged that burden.

223. I do not decide that issue on the (partly conflicting) evidence of the economists as to the contrast between (1) the absence of any incentive to pass on charges by BHB based on ATR's net profit or in the nature of fixed lump sum charges, on the one hand, and (2) the existence of such an incentive in the case of charges in other forms, on the other hand. I conclude as a matter of fact that ATR would wish to pass on, to such extent as is commercially prudent, increases in charges imposed in respect of BHB's pre-race data.

224. While it was common ground that in the downstream market British racing is a "filler" product, and so susceptible to substitution with other sports and gambling opportunities, the evidence is that the downstream market is far from "perfectly competitive". Evidence was given by Mr Imi specifically in relation to Italy, which indicated a significant degree of inelasticity in demand. I do not consider it was necessary in the present case for ATR to carry out an empirical exercise in relation to each of the foreign countries to which ATR supplies BHB's pre-race data.

225. Further, ATR's evidence (in particular that of Mr Penrose, esp. at paras 27 and 32-41 of his 2nd witness statement, and that of Mr Imi, esp. at paras 76-103 of his 3rd witness statement), which I accept, was that, under any of the proposals of BHB, ATR would be obliged for a variety of reasons to absorb all or a significant part of BHB's proposed charges.

226. Further, the empirical evidence shows that BHB has never in fact been restrained from increasing prices well above the competitive price.

227. The evidence shows that BHB's income from pre-race data was 0.62 million in 1999. By 2004 it had risen to £18 million. In the period 1992 to 2002 SIS paid £12,957,381.79 to the RCA for a package of data and pictures. Out of that sum, the RCA paid BHB £259,147.64 for the supply of its data. The proportion of that money attributable to payments from overseas bookmakers did not exceed £20,000. ATR

agreed to pay 50% of its net revenues to BHB in respect of the period 29 March 2004 to 10 June 2004. ATR agreed with SIS that SIS would meet that liability to BHB on behalf of ATR. SIS ultimately paid BHB £199,800 plus VAT in respect of that liability, on the basis agreed between BHB and SIS of £1,800 for 111 ATR fixtures. Further, BHB's consolidated accounts for the year end 31 December 2003 show that BHB's turnover from data licensing for the calendar year 2002 amounted to £4,822,000.00 in respect of the UK and Ireland, and £979,000.00 in respect of overseas territories other than Ireland. Those accounts further show that BHB's turnover from data licensing for the calendar year 2003 amounted to £11,127,000.00 in respect of the UK and the Ireland, and £4,505,000.00 in respect of overseas territories other than Ireland. BHB's consolidated accounts for the year ended 31 December 2004 show that the actual income received from ATR in 2003 was £3,268,395.00, and that the budgeted figure from ATR for 2004 was £3,173,000.04.

228. Taking the evidence as a whole, including the evidence of BHB's actual increases in price over the past few years, ATR's evidence that it would be obliged to absorb all or a significant part of BHB's proposed charges, and evidence of the degree of inelasticity of demand in those foreign countries supplied with BHB's pre-race data by ATR, I am satisfied that ATR has discharged its burden of proof in relation to the impact of the downstream market; that is to say, that the downstream market is not so competitive and price sensitive that it would restrain BHB from raising the price of the data upstream to ATR by 5-10% above the competitive price.

Conclusion on the SSNIP test

229. Although the SSNIP test concerns the practices of a hypothetical monopolist, neither party has suggested any reason why, in applying the test in the present case, it is necessary or desirable to ignore the actual practice of BHB, an actual monopolist. It is clear that a reasonable proportion of the cost of producing the data, together with a reasonable return, falls very far short of the prices which from time to time BHB has charged and has proposed to charge ATR for the supply of its pre-race data.

230. Further, as Mr Hollander pointed out in his closing submissions, it has never been the case of ATR that it would be unable to pay, and would not pay, the prices from time to time proposed or demanded by BHB since 2004, that is to say 50% of net revenue, £1,800.00 per fixture, £900 per fixture, with or without an additional 10% of ATR's profit, or 30% of net revenue, if BHB was or is entitled to charge such sums. ATR's case is simply that a charge at any of those levels would preclude its expansion plans and might require it to alter the services it provides for overseas bookmakers: see, for example, paragraph 32 of the 1st witness statement of Mr Robertson.

231. I conclude therefore that ATR has succeeded in proving to the requisite standard of proof that the relevant market is the market for the supply of UK pre-race data to those in the horse racing industry that require such information for the services they provide their customers (in particular, bookmakers and those that produce TV channels or internet sites relating to British racing).

Geographical extent of the market

232. Mr Ridyard stated, in paragraph 8 of his 1st Report:

> "The geographic scope of the relevant market is best considered to be world-wide, although the commercial behaviour of the BHB has effectively segmented the market in three regions: the UK, the Republic of Ireland, and overseas countries."

233. Strictly, the focal area is the narrowest area which satisfies the monopolist test: see para 4.2 of the OFT's Guideline on market definition. For the purposes of the present case, that area appears to me to be all countries outside the UK and Ireland. It was not suggested by BHB, however, that it would make any difference to the case if the geographical extent of the market is the world rather than the smaller area I have mentioned.

Dominance

234. Mr Elliott accepted that it is an empirical matter whether or not BHB is dominant in the market.

235. In view of my conclusions thus far, there can be no doubt that BHB is dominant in the market in question.

236. I have, for example, rejected BHB's contention that the downstream market is so highly competitive that it restrains any abuse in the upstream market.

237. I have also rejected the proposition that, because overseas bookmakers require pictures and data, the price of pictures restrains dominance and abuse.

238. The actual history of prices demanded or proposed by BHB, and which have been paid or which, if BHB is legally entitled to require them, ATR will be prepared to pay, are sufficient testimony to the reality of BHB's dominance of the market.

239. Against the background of all those facts and matters, it is no answer to contend, as BHB sought to do, that BHB can be relied upon "to balance the interests of all participants in the sport" or that BHB has every incentive to encourage new markets and new sources of revenue. BHB's dominance of the market is an historic fact.

Unreasonable refusal to supply data

240. At the outset of this part of the judgment, it is appropriate to cite the observation of the Commission (in the XXIVth Report on Competition Policy (1994) point 207) that:

> "A dominant company therefore has a special obligation not to do anything that would cause further deterioration to the already fragile structure of competition or to unfairly prevent the emergence or growth of new or existing competitors who might challenge this dominance and bring about the establishment of effective competition".

241. Rather, BHB had and has

> "a special responsibility not to allow its conduct to impair genuine undistorted competition": cp *Michelin* at para 57.

242. As was stated in *Napp Pharmaceutical Holdings* at para 219:

> "It is well established that such a special responsibility may deprive a dominant undertaking of the right to adopt a course of conduct that would be unobjectionable if adopted by a non-dominant undertaking (Case T-111/96 *ITT Promedia v Commission* [1998] ECR II-2937, paragraph 139), but the actual scope of that special responsibility must be considered in the light of the specific circumstances of each case: *Compagnie Maritime Belge* [2000] ECR I-1365 at paragraph 114. We for our part accept and follow the opinion of Mr Advocate General Fennelly in *Compagnie Maritime Belge*, cited above, that the special responsibility of a dominant undertaking is particularly onerous where it is a case of quasi-monopolist enjoying "dominance approaching monopoly", "superdominance" or "overwhelming dominance verging on monopoly" [2000] ECR I-1365 at paras 132 and 137"

BHB enjoyed and enjoys such standing in the supply of UK pre-race data.

243. ATR claims that BHB is in breach of Article 82 and s.18 of the 1998 Act in refusing to supply its pre-race data to ATR save on unreasonable terms.

244. The parties are not agreed on the relevant legal principles applicable to that claim.

245. BHB contends that, in order to succeed on this head of claim, ATR must show that it is an existing customer of BHB or alternatively that pre-race data is an essential facility controlled by BHB, and that BHB has refused to supply or has constructively refused to supply the data, and that has resulted in a total elimination of competition, and such conduct of BHB has no objective justification. BHB submits that, in addition to a total elimination of competition, ATR must show that it is in competition, or potential competition, with BHB in the downstream market.

246. BHB contends that ATR is not an existing customer of BHB; BHB's data is not an essential facility; BHB has not refused to supply anything; there is no evidence of total elimination of competition, or even a partial elimination of competition, arising from BHB's actions; BHB is not in competition, or potential competition, with ATR; and, even if BHB had refused to supply with ATR, it would have been objectively justified in doing so by ATR's refusal to agree reasonable terms.

247. I accept ATR's submission that refusing to supply an existing customer will amount to an abuse of a dominant position, even if the dominant undertaking is contractually entitled to do so, unless the act is "objectively justified". The position, in that respect, is summarised in *Bellamy & Child* at para 9-092 as follows:

> "Undertakings that are not dominant are generally free to choose for themselves the parties with whom they wish to enter into contractual relations. In the case of dominant undertakings, however, that freedom may be curtailed and a refusal to deal may constitute an abuse of dominance. An offer to supply only on terms that the supplier knows to be unacceptable will be a constructive refusal to supply. The precise boundaries of the circumstances in which a dominant undertaking's

> refusal to deal may constitute an abuse remain to be determined. However, it is clear that, in the absence of objective justification, a refusal to supply an existing customer will be an abuse, as will a refusal to grant access to essential facilities;"
>
> And see *United Brands* at paras 182-183; Case C-7/97 *Oscar Bronner GmbH and Co KG v Mediaprint Zeitungs und Zeitschriftenverlag GmbH & Co KG* [1998] ECR I-1365 at paras 35-43 (AG Jacobs)

248. Furthermore, I accept the submission of ATR that where a person who is dominant in the market is the owner or controller of a facility, which is an essential facility, it will be an abuse within Article 82 and s.18 of the 1998 Act if he refuses access to it and the refusal has no objective justification, whether or not the party seeking access is an existing or a new customer: *Oscar Bronner v* at paras 42-43.

249. In my judgment, unreasonable refusal, including constructive refusal, to supply may amount to an abuse of a dominant position within Article 82 and s.18 of the 1998 Act whether or not the supplier is in competition, or potential competition, with the purchaser.

250. Standing back from any detailed legal analysis, there is no reason why the absence of such direct competition should preclude unreasonable refusal to supply falling within the mischief of Article 82 and s.18 of the 1998 Act. Irrespective of such competition, the effect may be, for example, to deter others from entering into the market, or to encourage the purchaser to leave the market, or to curtail the purchaser's activities within the market, in each case whether in the upstream market or the downstream market.

251. There is no authority which has been cited to me which authoritatively determines that either in the case of the refusal to supply an existing customer or of the refusal to grant access to an essential facility to an existing or new customer, there is an additional requirement that the supplier is refusing to supply a competitor or potential competitor: cf para 47 of the Opinion of AG Jacobs in *Oscar Bronner* summarising the US essential facilities doctrine.

252. BHB relies on the decision of the ECJ in *Oscar Bronner*, especially at paras 38-42; but in those passages, as on the actual facts of *Oscar Bronner*, the court was considering a case in which the parties were in fact competitors. No authoritative general statement was made by the court which would preclude the doctrine applying on the facts of the present case. I agree with ATR that *Irish Continental Group v CCI Morlaix* Case IV/35.388 [1995] 5 CMLR 177 (port authority refusing a ferry operator access to the port facilities) indicates the contrary.

253. I do not accept BHB's submission that, for present purposes, ATR is not an existing customer of BHB. BHB's case is that ATR has refused to negotiate an agreement with BHB as to the terms on which ATR can receive BHB's pre-race data, and so ATR is at most a former customer (under ATR1).

254. I consider that, for present purposes, whether ATR is to be regarded as an existing customer or as a former customer is to be resolved as a matter of substance, rather than form, and having regard to the mischief at which Article 82 and s.18 of the 1998 Act are aimed. Even after the MRA and the BTS were terminated with effect from 29

March 2004, ATR has continued to receive data from BHB, through PA. ATR has continued at all times to pay PA for receipt of BHB's pre-race data, and PA is contractually liable to BHB in respect of payments made to it by ATR for the data. Furthermore, ATR has paid BHB direct for pre-race data in respect of the period from 29 March 2004 to 11 June 2004. The substance and commercial reality is that ATR has continued to be BHB's customer, both indirectly and directly, since 29 March 2004, but has been unable to agree what amount, if any, it should pay to BHB in respect of BHB's pre-race data in addition to the amounts paid by ATR to PA.

255. Even if that analysis of the relationship between BHB and ATR is incorrect, it is clear, in my judgment, that BHB's pre-race data is an essential facility for present purposes. BHB claims that the data is not an essential facility since ATR could obtain the data from public sources albeit not as conveniently as, and possibly of a lower quality than, the supply from BHB, through PA.

256. At para 47 of *Oscar Bronner* AG Jacobs summarised the US case law requirements for an essential facility (from which the concept of essential facility originates) as follows:

> "..a competitor is unable practically or reasonably to duplicate the essential facility. It is not sufficient that duplication would be difficult or expensive, but absolute impossibility is not required."

257. At para 65 of that case he said:

> "…intervention of that kind, whether understood as an application of the essential facilities doctrine or, more traditionally, as a response to a refusal to supply goods or services, can be justified in terms of competition policy only in cases in which the dominant undertaking has a genuine stranglehold on the related market. That might be the case for example where duplication of the facility is impossible or extremely difficult owing to physical, geographic or legal constraints or is highly undesirable for reasons of public policy."…(my emphasis)"

See also para 41 of the ECJ's judgment ("…no actual or potential substitute in existence…").

258. It is clear that BHB's pre-race data satisfies that test. The data is essential to ATR's business. There is no substitute for it. No one, other than BHB, is currently a supplier of that data in the market. It would be prohibitively expensive and difficult, and quite impractical, for any other person to collate and supply the same data. In addition to the oral evidence of Mr Imi, in cross-examination, the following evidence clearly supports those conclusions:

i) "The BHB Database is the only place from which the BHB pre-race data emanates for all of the 59 racecourses in Great Britain. If ATR cannot obtain this information, directly or indirectly from the BHB then there is nowhere else to obtain the information (at least in a reliable and up to date form)." (Mr Imi's 1st witness statement at para 36)

ii) "BHB is in practice the only supplier of key data required by ATR to provide the services it offers". (Mr Imi's 3rd witness statement at para 74:)

iii) "the commodity which enables bookmakers to generate income from British racing is data, specifically each day's daily feed of pre-race data…Without access to this information on a day to day basis, and without the accuracy of such data being guaranteed, bookmakers could not operate their bookmaking business in relation to British racing." (Mr Nichols' 3rd witness statement at para 12.1)

iv) "…data is the key which enables consumers to generate revenue from racing." (Mr Nichols' 3rd witness statement at para 19.4:)

v) The OFT said in its Rule 14 Notice:

> "Currently, British racecourses cannot independently exploit the basic, but commercially most important, information relating to their activities, namely race and runners data. This is the essential data concerning an individual race and the horses running in it that a bookmaker needs to take bets on a race. This is a key asset, as all bookmakers need this data. This data is currently only available from the BHB. While a bookmaker may buy live coverage rights direct from racecourses, it must go to the BHB for the corresponding data. Racecourses are therefore dependent on the BHB for the largest part of their income. There is an effective monopoly in the supply of this data, a position that the OFT considers is created and maintained by the operation of the Orders and Rules."

vi) BHB said in its response to the OFT that it was the only source of the data relating to horses taking part in horse races and that "there are no other sources of the data, which belongs to the BHB".

vii) BHB in its board meeting in January 1999 considered that it would not be appropriate to undertake a "quantum leap" in income from pre-race information as this might be considered to be an abuse by BHB of its "monopoly"

259. ATR would be eliminated from the market if it could not obtain access to the data. There would be no competition in the overseas countries in which ATR's services are provided.

260. In my judgment, the terms specified by BHB from time to time since 29 March 2004, at least until the commencement of the present proceedings, for permitting the continuation of the supply of pre-race data to ATR have been unreasonable and unfair.

261. BHB's explanation and justification for its suggested charges to ATR are that such charges are fair and proper charges on the ultimate customers, that is to say ATR's overseas bookmakers, which charges are conveniently to be collected by the agency of ATR, as in ATR1.

262. In retort, for example, to Mr Hollander's contention that the charges are an attempt by BHB to remedy a statutory deficiency in the Levy by, in effect, extending it to overseas bookmakers, BHB contends that it is simply making overseas bookmakers pay for having the benefit of the data for their commercial purposes, in exactly the same way as UK bookmakers and Irish bookmakers pay: see also BHB's outline closing submissions at paras 63 and 137; Mr Smith's oral evidence in cross-examination on 27.10.2005 at pp. 67 (ll 9-25), 80 (l. 22) to 81 (l. 7), 84 (ll. 16-17); and Mr Elliott's oral evidence in cross-examination on 2.11.2005 at pp. 74 (ll 2-4), 82 (ll. 23-25), 84 (ll. 16-20), 85 (ll. 15-16).

263. BHB graphically describes ATR's bookmaker customers (at para 129 of BHB's closing submissions) as "classic free riders" and asserts there that BHB is simply trying to agree a price at which overseas bookmakers pay for those benefits at equivalent rates to UK bookmakers.

264. BHB maintains, accordingly, that its starting point in negotiations with ATR for the future from June 2004 was, reasonably and understandably, the same arrangement as under ATR1 - "namely ATR acting as an agent in respect of overseas bookmakers, paying BHB 50% of its net revenue" (BHB's closing submissions para 19). BHB submits that the only commercial difference between the ATR1 and ATR2 arrangements that is conceivably relevant is that, instead of the amounts payable to BHB being taken from the lump sums otherwise payable by ATR to the RCA, ATR can now deduct amounts payable to BHB as costs in the calculation of net revenue due to the racecourses. That difference, BHB says, is not a material one.

265. The difficulty faced by BHB, however, which is an insuperable one, is that the proposed charges, whether under ATR1 or under the present arrangements, were not and are not either in form or in substance a charge on overseas bookmakers, collected through the agency of ATR.

266. Arguing the contrary, BHB relies heavily on the evidence of Mr Penrose, who was present when the ATR1 arrangements were agreed. BHB's written closing submissions refer to Mr Penrose's description (in cross-examination) of the arrangements in ATR1, under which ATR would act as BHB's agent in respect of overseas bookmakers, as "a much more sensible commercial way of dealing with matters". BHB asserts that under those arrangements ATR was to act as BHB's agent and BHB was to "give" ATR a "back-pocket" licence which overseas bookmakers were to sign, primarily in order to safeguard the integrity of BHB's pre-race data. BHB submits that "in economic terms, BHB and ATR agreed a convenient way for BHB (upstream) to supply data to bookmakers (downstream) would be to interpose ATR as an agent for everyone's mutual convenience" (BHB's closing submissions para 7).

267. Even if, however, the parties, as between themselves, chose to characterise the arrangements in ATR1 as being a charge on overseas bookmakers, collected by ATR as BHB's agent, for which ATR was notionally paid by BHB a commission of 15%, the reality, both legal and factual, was that there never was any such agency. There is no evidence before me that, under ATR1, ATR ever procured overseas bookmakers to enter into licences with BHB for use of BHB's pre-race data. Further, under ATR1, and under the arrangements since then, BHB's pre-race data has been supplied to overseas bookmakers by SIS (not ATR), and SIS (not ATR) has collected revenue

from overseas bookmakers. Further, as Mr Hollander pointed out in his closing submissions, the so-called commission of 15% notionally paid by BHB to ATR, and effected by way of a deduction from the amount for which ATR accounted to BHB, did not in fact reduce the total payments made by ATR for data and pictures. The 15% deduction from the amounts paid by ATR to BHB merely resulted in a larger payment to be made by ATR to the racecourses: in reality, it only affected the distribution between BHB and the racecourses.

268. Moreover, irrespective of how BHB and ATR may have sought to characterise commercially the arrangement between them under ATR1, the fact is that ATR is not willing to accept a similar arrangement with BHB under ATR2 or ATRi. BHB cannot, in those circumstances, unilaterally impose on ATR charges which BHB seeks legally and commercially to justify as charges on overseas bookmakers, to be collected through the agency of ATR, when the charges and the proposed arrangements do not in form or substance fit that description.

269. Furthermore, as I have stated earlier in this judgment, I am satisfied from the evidence as a whole that the charges sought to be imposed on ATR from time to time cannot and would not be passed in full by ATR on to the overseas bookmakers. I accept ATR's evidence that the charges could not in practice be passed on in full since British racing is a "filler" and therefore, at least to some extent, ATR's overseas markets are price sensitive. There is no clear evidence before me that the suggested charges could not be passed on in part, but that does not affect the analysis. The legal and commercial reality is that the proposed charges cast entirely on ATR the risk of the inability commercially to pass on those charges to ATR's customers, the overseas bookmakers. The charges were not and are not charges on gross turnover or revenue received by ATR (or SIS) from the overseas bookmakers.

270. Accordingly, the fundamental basis on which the additional charges (that is to say, additional to the charges payable by ATR to PA) are sought to be justified by BHB does not exist as a matter of law or commercial reality.

271. A further ground on which I find that the terms for the continued supply of pre-race data by BHB between 29 March 2004 and the commencement of the proceedings were unreasonable and unfair is that, contrary to the submission of Mr Brindle, BHB continued to insist, until the commencement of the proceedings, that ATR enter into an IP licence. Indeed, BHB asserted in its Counterclaim copyright and database right, and claimed an injunction to prevent infringement of those rights by ATR. An IP licence was unwarranted. Despite requests by ATR to do so, BHB never articulated its claim to copyright.

272. Further the price for the supply of pre-race data from time to time demanded or proposed by BHB between 29 March 2004 and the commencement of the proceedings was, for the reasons I give more fully below, excessive.

273. Further, at all times prior to BHB's open offer of 27 September 2005 the terms from time to time demanded or proposed by BHB discriminated unfairly between ATR, on the one hand, and Phumelela and other broadcasters, on the other hand, as I explain in more detail below.

274. There was debate before me as to the proper interpretation of the BHB/PA Agreement and the PA/ATR Agreements in the context of a submission by ATR that, in view of the charges already imposed on ATR under its agreement with PA, it is unfair and unreasonable for BHB to seek to extract further payment from ATR. ATR submitted that the PA/ATR Agreements only envisage a further charge if a further licence from BHB is required by law, for example in relation to IP rights. BHB submits that the BHB/PA and PA/ATR Agreements read separately or together contemplate that a further charge could and would be imposed on overseas bookmakers for the supply of BHB's pre-race data irrespective of BHB's IP rights. BHB also emphasises that ATR pays PA a composite delivery charge in respect of BHB's data and other products. Further, BHB points out that, in accordance with the terms of the BHB/PA Agreement, it has received no payment at all from PA in respect of money received by PA from ATR for the supply to overseas bookmakers of the ATRi service.

275. I do not consider that it is necessary or desirable to investigate those submissions in this judgment. It is not desirable to do so because PA is not a party to the proceedings and has played no part in them. It is not necessary to do so because the only justification for the charges on ATR proposed from time to time since 29 March 2004 by BHB, which I have rejected, is that those charges are charges on the overseas bookmakers which, for commercial convenience, are to be collected through the agency of ATR.

276. Mr Brindle submitted that BHB never refused to supply anything. He emphasised that BHB has continued to supply pre-race data to ATR's overseas customers, even in the face of a refusal by ATR (and SIS) to pass on any money for such data, or even to negotiate terms on which an agreement could be reached. He characterised BHB's conduct as an attempt to engage ATR in negotiation and, for that purpose, to elicit information from ATR. He submitted that the amounts specified from time to time by BHB since 29 March 2004 have been no more than proposals on which BHB has been willing to negotiate.

277. I reject that analysis of BHB's conduct. BHB's demand in its letter of 17 March 2005 that "unless ATR enters into a licence agreement with BHB within 14 days BHB will instruct its authorised suppliers to withdraw supply BHB's data to ATR" was, in the light of the previous correspondence, and, in particular, the letter and invoice from BHB to ATR dated 10 February 2005, plainly a threat to cause PA to withhold the supply of pre-race data to ATR unless BHB agreed to pay £900.00 per fixture plus VAT for the entire period since 11 June 2004. I reject Mr Brindle's submission that, on its proper interpretation, the letter from BHB dated 17 March 2005 contained no demand for the payment of those sums in respect of past fixtures and imposed no requirement for a licence containing terms for such payment for future fixtures. It was that letter which led to the commencement of the present proceedings.

278. It is not necessary to decide whether, on its proper interpretation, BHB's letter of 17 March 2005, in the light of the preceding correspondence, amounted to a demand for £900.00 per fixture not only in respect of ATR's Courses but also, as specified in the invoice of 10 February 2005, for non-ATR Courses. It is, accordingly, not necessary for me to comment on, or analyse, BHB's case and evidence that the invoice of 10 February 2005 was sent in the mistaken belief that ATR was responsible for all non-ATR Courses handled by SIS, such mistake being caused by the lack of information supplied to BHB by ATR about ATR's relationship with SIS and the allocation

between them of the amounts due to be paid to BHB, and also because, as BHB claims, BHB had been told by SIS to recover money from ATR.

279. As the Commission has said, the concept of refusal to supply covers not only outright refusal but also situations, which it calls constructive refusal, where the dominant firm makes supply subject to objectively unreasonable conditions: *Deutche Post AG and British Post Office* Comp/C-1/36.915 25 July 2001.

280. It is to be noted, in this context, that BHB fought the injunction application before the Vice Chancellor. It was only at that stage that BHB conceded that the invoice of 10 February 2005 was excessive. Even then, BHB continued to insist that ATR has no claim and that the competition parts of the proceedings should be struck out or judgment entered against ATR. BHB never offered to continue to supply pre-race data to ATR/SIS after the commencement of the proceedings irrespective of whether £900.00 per fixture was paid direct to BHB or into an account. The decision of the Vice Chancellor to grant an interim injunction against BHB and to dismiss BHB's strike out/summary dismissal application amounted to an acknowledgement that it was not unreasonable for ATR to have commenced proceedings in the light of the threat contained in BHB's letter of 17 March 2005.

281. BHB justifies its conduct, as I have said, on the ground that it has always been willing to enter into negotiations with ATR. It contends that it has from time to time put forward proposals, initially based on the ATR1 model, and that ATR has unreasonably never been willing to engage in any proper negotiations. Further, BHB claims that it was only late in the day that any useful information was provided by ATR to enable BHB to enter into meaningful discussions and to suggest a price or price mechanism tailored to ATR's circumstances, and for that reason it was only after the commencement of the proceedings that BHB was able to make its open offer of 27 September 2005. As I have previously mentioned, one of the complaints of BHB, and the reason it says it mistakenly included non-ATR Courses in the invoice of 10 February 2005, is that it was not informed of the agreements and arrangements between ATR and SIS in respect of the period after June 2004 and their effect. Indeed, Mr Brindle submitted that it is only by virtue of the evidence which has been given in the trial before me that BHB is now in a position to acknowledge that the suggestion of a 10% charge on ATR's profits (mentioned in para 18 of Mr Nichol's 2nd witness statement) is not appropriate.

282. I do not accept that explanation as an objective, or otherwise sufficient, justification for BHB's conduct for the purposes of Article 82 and s.18 of the 1998 Act.

283. There is nothing in any of the correspondence leading up to the commencement of the proceedings which contains a specific request by BHB for any particular information to be supplied by ATR. In April 2005 Addleshaw Goddard (for BHB) and Olswang (for ATR) agreed that the threat to cut off the supply of pre-race data to ATR would be deferred if ATR provided unspecified financial information to BHB so that BHB could re-assess the charges it had sought. Pursuant to that agreement, at a meeting in late April 2005, ATR supplied headline information to BHB.

284. It seems to me, looking at the course of events and the correspondence as a whole, that a stand was taken by both sides on broad points of principle, especially following the decision of the ECJ in the *William Hill* case. ATR sought to establish on what

basis BHB claimed to be entitled to charge ATR anything further, bearing in mind ATR's liabilities to PA, and, as ATR saw it, the absence of any IP right for which BHB could charge ATR. BHB took the position that, notwithstanding the ECJ's ruling, it still had IP rights and, even after the decision of the Court of Appeal, could charge ATR substantial sums. When some information was provided by ATR prior to the commencement of the proceedings, BHB did not say that the information was insufficient in any particular respects. The reality is that the parties were always divided by significant points of principle. ATR was correct on those points of principle.

Excessive pricing

285. I agree with BHB that it is entitled, in principle, to impose a charge for use of its pre-race data by, and for the benefit of, overseas bookmakers, whether or not BHB has IP rights in respect of the data, and, in particular, database rights under the Databases Directive and the Databases Regulations or copyright, and irrespective of the extent of any such rights. BHB has, in the data, a valuable commodity, for which it is entitled to charge. There is no authority to the contrary, including the *William Hill* case.

286. The critical question, in this part of the judgment, is whether the charge that has been imposed is an amount or otherwise such as to constitute an abuse of a dominant position in the market. Pricing policy which imposes a price which is excessive and so exploits customers or suppliers or which otherwise distorts competition in the market is abusive and so infringes Article 82 and s.18 of the 1998 Act.

287. For the reasons I have already given in this judgment, I have concluded that BHB's conduct, in its relations with ATR, has been abusive within Article 82 and s.18 of the 1998 Act, irrespective of allegations of excessive pricing.

288. In particular, I have decided that the terms specified from time to time by BHB since 29 March 2004 for the supply of its pre-race data to ATR have been an abuse because, contrary to the basis on which they have sought to be justified, they are neither in form nor in substance a charge on the overseas bookmakers but a charge on ATR. Accordingly, ATR's criticism of the proposed prices as excessive is, on analysis, a claim in the alternative that, even if the prices were in respect of charges on overseas bookmakers, they would be excessive.

289. This argument is, therefore, in effect an argument advanced by ATR on behalf of its overseas customers, who do not carry on business within the jurisdiction, and not all of whom are resident or carry on business within the European Community, are not parties to the proceedings, were not represented at the trial, and did not give evidence. No jurisdictional objection has, however, been raised by BHB on those or any other grounds.

290. From BHB's perspective, the issue of excessive pricing raises an argument, again in the alternative to BHB's other submissions, that, even if the positive externality of British racing is not to be reflected in the competitive price for the purposes of the SSNIP test, it should nevertheless be taken into account, and would be objective justification for, prices that would otherwise be excessive.

291. The parties are agreed that unfairness in pricing is to be assessed by reference to the relationship between price and the economic value of the goods or services in question (Case 26/75 *General Motors Continental NV v Commission* [1975] ECR 1367, 1379 Para 12), and that the test for unfair pricing, in the context of Article 82 and s.18 of the 1998 Act, is whether the price "is excessive because it has no reasonable relation to the economic value of the product supplied" and "is either unfair in itself or when compared to other competing products": *United Brands* at paras 250 and 252.

292. One way to determine that question is to make a comparison between the selling price of the product in question and its cost of production, which would disclose the amount of the profit margin: *United Brands* at paras 251-2.

293. That is not to say there are not other ways of determining whether the price is unfair: *United Brands* at para 253.

294. As para 252 of *United Brands* (cited above) indicates, the fact that a dominant firm charges a high price and enjoys a high profit margin does not necessarily mean that its conduct is abusive. It is always necessary to consider whether the price is also "unfair" either in itself or when compared to the price of competing products.

295. On the other hand, the charging by a person dominant in the market of a particularly high price, that is to say, one which gives rise to a particularly high profit margin, and which cannot be justified by comparison with other competing products or on some other objective criteria, is unfair and abusive conduct.

296. The ECJ has said, for example,

> "Although the price level of the product does not necessarily suffice to disclose the abuse of a dominant position within the meaning of Article 86, it may, however, if unjustified by any objective criteria, and if it is particularly high be a determining factor." (judgment of 18 December 1970, Case 40/70, *Sirena S.r.l. v Eda S.r.l. and Others* [1971] ECR 70) quoted in the Opinion of AG Mayras in *United Brands* at p.338.)

297. That approach has regularly been applied by the Commission, the OFT and the CAT. The OFT's Guideline on "Assessment of Individual Agreements and Conduct" (414, September 1999), pointing out also the anti-competitive effect of excessive prices, makes the point as follows:

> "2.1 The charging of excessive selling prices…by a dominant undertaking may be an infringement of the Chapter II prohibition.
>
> …
>
> 2.3 An important area where excessive prices might be viewed as an abuse is where a dominant undertaking is exploiting its ownership of an essential facility, an important network facility which is unlikely to face competition in the foreseeable future. In addition to having no relation to the economic value of the product supplied, such excessive prices might make it more difficult for

undertakings (that require the product as an input) to enter and compete in related markets.

…

2.6 An undertaking's prices in a particular market can be regarded as excessive if they allow the undertaking to sustain profits higher than it could expect to earn in a competitive market (in this guideline called supra-normal profits). …

…

2.14 As explained above, supra-normal profits are profits earned in a particular market which are sustained at a level in excess of the risk-adjusted cost of capital for investment in the business serving that market."

298. A similar approach was taken by the Director General of Fair Trading in his investigation in *Napp Pharmaceuticals* No. CA98/2/2001-30.3.2001), and by the CAT on appeal [2002] CAT 1, esp. at paras 390-392 and 400-403, where the CAT said:

> "390. In paragraph 203 of the Decision, the Director states that, as a matter of principle a price is excessive for the purposes of the Chapter II prohibition:
>
> > "if it is above that which would exist in a competitive market and where it is clear that high profits will not stimulate successful new entry within a reasonable period. Therefore, to show that prices are excessive, it must be demonstrated that (i) prices are higher than would be expected in a competitive market, and (ii) there is no effective competitive pressure to bring them down to competitive levels, nor is there likely to be"
>
> 391. While there may well be other ways of approaching the issue of unfair prices under section 18(2)(A) of the Act, the Director's starting point, as stated in paragraph 203 of the Decision, seems to us to be soundly based in the circumstances of the present case.
>
> 392. Measuring whether a price is above the level that would exist in a competitive market is rarely an easy task. The fact that the exercise may be difficult is not, however, a reason for not attempting it. In the present case, the methods used by the Director are various comparisons of (i) Napp's prices with Napp's costs, (ii) Napp's prices with the costs of its next most profitable competitor, (iii) Napp's prices with those of its competitors and (iv) Napp's prices with prices charged by Napp in other markets. Those methods seem to us to be among the approaches that may reasonably be used to establish excessive prices, although there are, no doubt, other methods.
>
> …

> 400. It is therefore established, on the facts of this case, that during the period of infringement Napp charged significantly higher prices in the community segment than in other markets or segments where it faced competition, and has significantly higher margins in the community segment than its most profitable competitor. In addition, Napp faced no competitive pressure on its prices in the community segment, had no patent protection, and enjoyed a market share of 96 percent throughout.
>
> 401. The fact that the Director has not chosen to rely on other comparators such as international price comparisons or returns on capital does not in our view lessen the force of the comparators upon which he does rely. Napp itself has not, in the notice of appeal, put forward any other comparators.
>
> 402. On those facts we are satisfied that Napp "has made use of the opportunities arising out of its dominant position in such a way as to reap trading benefits which it would not have reaped if there had been normal and sufficiently effective competition", so as to satisfy the test of abuse as laid down by he Court of Justice in *United Brands* at para 249 of its judgment.
>
> 403. To put the matter in terms of the principle set out at paragraph 203 of the Decision, in our view the above facts demonstrate (i) that, during the period of the infringement, Napp's prices in the community segment were significantly higher than would be expected in a competitive market; and (ii) that, during the period of the infringement, there was no significant competitive pressure to bring them down to competitive levels, nor was there likely to be over any reasonable time scale."

299. In my judgment, the prices specified by BHB from time to time between 29 March 2004 and the commencement of the proceedings were excessive and unfair and therefore an abuse within Article 82 and s.18 of the 1998 Act.

300. The economic value of BHB's pre-race data is not more, or not significantly more, than the competitive price.

301. BHB's principal justifications for the level of its proposed charges from time to time are the externality of British racing and, in economic terms, the fact that its expenditure "pushes out" the demand curve for viewing and placing bets on British racing and so for pre-race data. For the reasons I have given in paragraphs 193 to 212 above, however, I reject BHB's case on those matters.

302. In order, at least in part, to meet the problem (which I considered in paragraphs 204 and 205 above) of the lack of cogent evidence concerning the "pushing out" of the demand curve, reliance was placed by BHB's economic experts on the principle of Ramsey pricing. That principle is that the optimal pricing structure will seek to

recover costs from all who benefit, and the actual price charged to each user will depend upon the demand elasticity of each user. It has been expressed by the OFT as follows:

> "the Ramsey pricing principle … states that it is economically efficient to recover a relatively larger part of common or joint costs from those customers whose demand is relatively more inelastic (i.e. less sensitive to price).": OFT Economic Discussion paper 6 (July 2003) (OFT 657).

303. BHB's case is that the demand of overseas bookmakers for British racing is fairly inelastic, albeit such demand is likely to be less inelastic than that of UK and Irish bookmakers. I do not see, however, how that assists BHB. In the absence of benefit to the overseas bookmakers (on the demand curve test), and bearing in mind the greater inelasticity of demand of UK and Irish bookmakers, the logical conclusion is that UK and Irish bookmakers should be cross-subsidising ATR's customers and not vice versa.

304. BHB appears to place some reliance on the substantial accruals made in ATR's accounts for data charges since June 2004, but I cannot see any basis on which the fact of such accruals or their amount assist the analysis.

305. BHB's charges to ATR, and those proposed prior to the commencement of the proceedings, have been so far in excess of any justifiable allocation of the cost of production and a reasonable return (in effect, the competitive price) that they are, in my judgment, plainly excessive. If ATR had to pay £1,800.00 for each of the 583 ATR fixtures in the 2005 fixture list, ATR would have to pay £1,049,400.00: see Mr Robertson's 1st witness statement at para 9. Further, BHB's data income in 2004 (£18 million) covered its costs nearly 4 times over (i.e. a profit margin of 300% of the cost of maintaining the Database).

306. It is not necessary to deal with the proposed permutations of charges to be paid by ATR in para 18 of Mr Nichols' 2nd witness statement save to say they are equally excessive, including, in particular, the charge of 10% of ATR's profits which is now acknowledged by BHB, in the light of all the evidence given in these proceedings, to be inappropriate.

307. I deal below with BHB's open offer letter of 27 September 2005 in the context of discrimination.

308. The striking increase in the amounts received by BHB for the sale of its pre-race data over the past 6 years, and the striking disparity between the cost of producing the data and those amounts, support Mr Hollander's characterisation of the charging structure for the supply of BHB's pre-race data as an artificial device to cast on the back of the data all or a substantial part of the costs of British racing. However well intentioned in the interests of British racing, that has led, in the absence of any case made out under Article 86 and para 4 of Schedule 3 to the 1998 Act, to excessive and unfair pricing constituting an abuse of BHB's dominant position in the market within Article 82 and s.18 of the 1998 Act.

Discriminatory pricing

309. Article 82(c) and s.18(2)(c) of the 1998 Act expressly give as an example of abuse:

> "applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage"

310. The principle is summarised in the following way in Butterworths Competition Law Encyclopaedia (ed. Professor Brenda Sufrin) para [586]:

> "Discriminatory pricing can be described as the supply or purchase of units of goods or services at different prices which do not correspond with differentials in supply costs"

See also *United Brands*; *Hoffmann-La Roche*; 226/84 *British Leyland v Commission* [1986] ECR 3263.

311. Price discrimination is not always an abuse, as is pointed out in the following passage at para [587] of the Encyclopaedia:

> "Price discrimination is not necessarily undesirable. It may permit the more efficient utilisation of resources and may be essential to the economic viability of the enterprise. For example, lower fares on railways at certain times of day or to certain classes of customer can contribute to the fuller utilisation of scheduled services by encouraging their use during otherwise slack periods and this may be the only way of running the system at all in the absence of an unacceptable level of public subsidy. Discriminatory pricing may also facilitate structural changes in the economy. For example, the discounts available to supermarkets were a major factor in their growth at the expense of smaller retail outlets. However, the changes facilitated may themselves lead to undesirable effects such as an unacceptable degree of concentration in the retail markets. It is also arguable that price discrimination may enhance competition. If firms were unable to discriminate by offering lower prices to certain customers they might go out of business, reducing the number of suppliers in the market. This is particularly true of suppliers of commodities which cannot be stored, such as transportation services. In short, in some circumstances price discrimination will strengthen the dominant firm's position or lead to inefficiencies but in others it will increase competition. Each instance will depend on its own facts. In the EC geographical price discrimination causes particular problems and the Court and the Commission have condemned discriminatory pricing in discount schemes and its use as an exclusionary tactic. An undertaking may not apply artificial price differences such as to place its customers at a disadvantage and to distort competition.

312. ATR claims that BHB's proposed charges to ATR from time to time have been abusive, in contravention of Article 82 and s.18 of the 1998 Act, in that they unfairly discriminate against ATR in comparison with BHB's charges to other broadcasters and also Phumelela.

313. It follows from the conclusions I have already reached that BHB has indeed unfairly discriminated against ATR in comparison with other broadcasters.

314. BHB normally charges broadcasters (like others in the media industry) only a "nominal" sum for the supply of pre-race data. Mr Smith said, in para 17 of his witness statement of 19.9.2005:

> "BHB regarded broadcasters and information providers as being in an entirely separate category from bookmakers or distributors. Information providers … generate interest in British racing, as do broadcasters. Further, such users derive less value from British racing by having access to data, in contrast to, for example, bookmakers. Thus the fee charged to them is only a nominal sum, which is intended merely to give rise to the need for a written licence to be entered into containing the basic terms which BHB insists on being included."

Mr Smith confirmed that approach in his oral evidence at the trial.

315. In line with that approach, BHB has agreed to charge ATR a yearly fee of only £3,600.00 for the use of BHB's pre-race data on the ATR Website and on the ATR Channel.

316. In contrast, BHB's charges and proposed charges from time to time in and since 2004 in respect of ATRi and SIS FACTS have been markedly higher.

317. BHB's justification is, as I have already explained and analysed earlier in this judgment, that those charges are really charges on ATR's overseas bookmaker customers, to be collected through the agency of ATR.

318. For the reasons I have already given, the charges were not and are not in form or substance a charge on the overseas bookmakers, and insistence on them as a condition of continuation of the supply of pre-race data to ATR was an abuse of BHB's dominant position in the market contrary to Article 82 and s.18 of the 1998 Act.

319. I turn, then, to Phumelela, which is a South African distributor and supplies overseas bookmakers in respect of racecourses which have agreements with Racing UK (as opposed to ATR). It is the only other broadcaster supplying to non-Irish overseas bookmakers. It is a direct competitor of ATR.

320. By the middle of July 2004 BHB had agreed terms with Phumelela under which Phumelela pays 30% of its net revenues to BHB. BHB and Phumelela entered into a formal agreement on 24 December 2004. Net revenues, for that purpose, are calculated after the deduction of expenditure of particular items, which were the subject of detailed negotiation between Phumelela and BHB. That formal agreement was only disclosed in the course of the hearing before the Vice Chancellor.

321. It is notable and surprising that, notwithstanding that agreement with Phumelela, BHB, in its correspondence with ATR in August 2004, had assured ATR that its general policy would be to charge 50% of net revenue for data "from whatever source".

322. The proposals of BHB to ATR from time to time between 29 March 2004 and the commencement of the proceedings, namely 50% of net revenue, £1800.00 per fixture and £900.00 per fixture, were plainly discriminatory since they not only differed materially from the pricing mechanism for Phumelela, but they were capable of operating and, on the evidence before me, would have operated in a way that would have discriminated adversely against ATR. Accordingly, BHB's refusal to supply ATR in March 2005 save implicitly on the term of £900.00 per fixture, which was the trigger for the proceedings, was an abuse of BHB's dominance in the market of the kind specified in the Article 82(c) and s.18(2)(c) of the 1998 Act. The refusal to supply save on such a term was also anti-competitive since the evidence is that it would materially affect ATR's willingness to adopt the commercial risk of extending its service to new territories overseas.

323. The various permutations of charges to be paid by ATR in paragraph 18 of Mr Nichols' 2nd witness statement would appear equally discriminatory and abusive.

324. The subsequent open offer of BHB of 27 September 2005, long after commencement of the proceedings, of a charge based on a percentage of ATR's net revenue in respect of ATRi is also said by ATR to be discriminatory since, ATR contends, it penalises ATR if ATR has lower costs and so is more efficient than Phumelela. ATR would, in those circumstances, be paying more per fixture than Phumelela. Indeed, the evidence is that Phumelela has, in fact, been invoiced for very small sums compared to the amounts proposed from time to time by BHB to be paid by ATR.

325. In short, ATR's contention is that, in a case such as the present, a charge based on a percentage of the purchaser's (i.e. ATR's) net revenue or profit rather than gross receipts from overseas bookmakers would be discriminatory and anti-competitive and so an abuse since the mechanism would impose a higher charge per fixture on the more efficient purchaser.

326. I do not accept that, in principle, a charge on purchasers of a percentage of net revenue is always discriminatory, anti-competitive and an abuse within Article 82 and s.18 of the 1998 Act. As Mr Smith commented, in principle such a mechanism for determining the price would encourage greater efficiency, leading to better competition.

327. Furthermore, on the facts of the present case, it is plain that the proposal of 27 September 2005 is no more than an offer, the details of which, including the precise nature and amounts of any allowable deductions from gross turnover, remain to be discussed and negotiated.

328. Accordingly, both for that reason as well as because the offer was made after the commencement of the present proceedings, and notwithstanding a number of other criticisms by ATR of the illegality and discriminatory effect of the September 2005 open offer, I do not consider it is appropriate to comment further on the legality of the price mechanism proposed in that offer.

The Government's proposals

329. BHB has emphasised that, if ATR succeeds in its claims, "then the entire Government-driven scheme to commercialise BHB's assets was misconceived, as was the basis for the plan to replace the Levy, and the whole course of business between BHB, broadcasters, distributors, and bookmakers since 2000" (BHB's opening skeleton argument at para 9d).

330. That submission is plainly not one that can properly influence the adjudication of ATR's claims in these proceedings. As I have previously said, BHB has not sought to rely on any public interest defence under Article 86 or para 4 of Schedule 3 to the 1998 Act.

331. A useful comparison can be made with the observations of AG Darman in *British Leyland* at p.3286 as follows:

> "As regards the problems relating to the safety of consumers and therefore the reputation of the model, the solution can only be legislative. If there is a gap in the British system of type approval - the apparent lack of a right on the part of a manufacturer or any authority appointed to that effect to check that a conversion has been properly carried out after the issue of the certificate of conformity - the solution must be found in the adoption of appropriate laws or regulations, and not in a measure which by distorting the normal competition represented by prices of re-imported vehicles…amounts to depriving dealers and therefore private individuals of the possibility of purchasing vehicles at a lower price."

Decision

332. For the reasons I have given I hold that BHB has abused its dominant market position contrary to Article 82 and s.18 of the 1998 Act.

333. I shall hear further argument as to the form of any appropriate relief.