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25 June 2013

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Regulatory Policy Group
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WC2B 6TE

By email: airportregulation@caa.co.uk

Dear Sirs

IAPA Responses to CAP1027, CAP1029 and CAP1030

We act on behalf of the Independent Airport Parking Association.

We attach IAPA's Response to the CAA's Initial Proposals for the regulation of Heathrow, Gatwick and Stansted Airports.

The attached version is for publication. All appendices referred to in the Response, other than Appendix 6, have been redacted.

We will send you a further email of the Response which is not for publication which has no redactions.

Separately we will be forwarding to you today by courier hard copies of both versions of the Response.

Please let us know if you require any point mentioned in the Response to be clarified or if you require the submission of further evidence in relation to the Response.

Yours faithfully

stevensdrake

stevensdrake

Enc

DATED 25 June 2013

CIVIL AVIATION AUTHORITY

Economic Regulation at Heathrow

From April 2014: Initial Proposals (CAP1027)

and

Economic Regulation at Gatwick

From April 2014: Initial Proposals (CAP1029)

and

Economic Regulation at Stansted

From April 2014: Initial Proposals (CAP1030)

RESPONSE ON BEHALF OF
THE INDEPENDENT AIRPORT PARKING ASSOCIATION

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CONTENTS

APPENDICES

DEFINITIONS AND INTERPRETATIONS

1. The following words and phrases have the meanings hereafter ascribed to them.

Definition	Interpretation
"Airparks"	Means Airparks Services Limited
"APH"	Means Airport Parking and Hotels Limited
"Attheraces Case"	Means Attheraces Limited and Attheraces (UK) Limited -v- The British Horseracing Board Limited and BHB Enterprises plc [2007] EWCA Civ 38

"BAA"	Means BAA plc and where the context admits shall include its subsidiary companies and any one or more of them
"BIA"	Means Birmingham International Airport Limited
"Briefing Document"	Means the CAA Briefing Document CAP1031 relating to the Initial Proposals.
"CAA"	Means the Civil Aviation Authority
"Central"	Means Central Car Parks Limited
"Chapter II"	Means Chapter II of The Competition Act 1998
"CPL"	Means Car Parks Limited
"DOPU"	Means drop off and pick up
"EAL"	Means Edinburgh Airport Limited
"the Edinburgh Byelaws"	Means the Edinburgh Airport Byelaws 2005
"the Edinburgh Order"	Means the Edinburgh Airport Traffic Regulation Order 1978 (Amendment No.1 2006)
"Flying Scot"	Means Flying Scot (Edinburgh) Limited
"GAL"	Means Gatwick Airport Limited
"HAL"	Means Heathrow Airport Limited
"Heathrow Case"	Means Purple and Meteor – v – HAL [2011] EWHC 987 (Ch)
"IAPA"	Means the Independent Airport Parking Association
"Initial Proposals"	Means the proposals made in CAP1027, CAP1029 and CAP1030.
"Kiss and Fly"	Means a mode of transport to and/or from an airport where the airline passenger is dropped off and/or picked up by a family member, friend or colleague.
"LBAC"	Means Idris Ahmad who traded as LBA Carwatch, which business was incorporated as LBA Car Watch Limited on 14th July 2011
"LBIA"	Means Leeds Bradford International Airport Limited
"LCP"	Means Leeds Car Parks Limited
"Licences"	Means any licence under Chapter 1 of Part 1 of the 2012 Act.
"LLAOL"	Means London Luton Airport Operations Limited
"Meet and Greet"	Means the provision of an airport parking product (also known as "Valet Parking") where the customer's vehicle is collected from the customer by the OAPO at or near the airport

	terminal, is parked at the OAPOs car park and returned to the customer by the OAPO at or near the airport terminal
"Meteor"	Means Meteor Parking Limited
"MMC2"	Means the report of the Monopolies and Mergers Commission on the Economic Regulation of the South-East Airport Companies (HAL, GAL and STAL) presented to the CAA in June 1991.
"NEMA"	Means Nottingham East Midlands Airport
"NIA"	Means Newcastle International Airport
"OAPO"	Means an Off-Airport Parking Operator
"Other Activities"	Means bus and coach facilities and the other activities referred to in paragraph 7.1 of CAP1027.
"Other Charges"	Means the charges made by the airport operator for facilities and services at an airport used in connection with the Other Activities.
"Park and Ride"	Means the provision of an airport parking product where the customer is transported between the car park and the airport terminal in a coach or other vehicle operated by the OAPO.
"ParkMark"	Means an award made by the British Parking Association for car parks which attain stipulated safety and security standards
"Prestwick"	Means Glasgow Prestwick International Airport
"the Prestwick Operator"	Means PIK, Infratil and GPA or any one or more of them
"PRM"	Means a person with restricted movement
"Purple"	Means Purple Parking Limited
"PVM"	Means per vehicle movement
"SAP"	Means Secure Air Parks (Edinburgh) Limited
"Sentinel"	Means Gundigger Limited whose trading name is Sentinel
"SMP"	Means significant market power
"STAL"	Means Stansted Airport Limited
"Watsons"	Means Watsons Ayr Parks Limited
"the 2012 Act"	Means The Civil Aviation Act 2012
"2007 Representations"	Means representations made by IAPRA (now known as IAPA) to the Competition Commission in relation to its Market Inquiry into the supply of airport services by BAA within the UK and the Heathrow and Gatwick Quinquennial Review.

2. Reference to any UK Airport shall where the context admits include a reference to the operator of that Airport and reference to an Airport Operator shall where the context admits include a reference to the UK airport operated by the Airport Operator.

References to a forecourt or airport forecourt shall where the context admits include on-airport short stay car parks.

References to Case Studies are to case studies appended to this Response.

References to the UK include Northern Ireland.

IAPA

3. IAPA is a trade association representing the UK's independent off-airport parking industry.

4. IAPA (previously known as the Independent Airport Park and Ride Association, "IAPRA") was established in 2002 to promote security measures and high standards of customer service in the off-airport Park and Ride industry; to ensure that the role of the industry is fully understood and properly reflected in the operation, regulation and development plans for UK airports and their associated surface access strategies; and to assist its members with their dealings with airport operators.

5. Having regard to the increasing demand for Meet and Greet services, it was decided that the Association should additionally perform the functions it had provided for Park and Ride operators for Meet and Greet operators and the Association's name was changed to the Independent Airport Parking Association.

6. IAPA members comprise the majority of the UK's OAPOs providing Park and Ride services as well as the majority of the larger OAPAs providing Meet and Greet services.

7. Between them IAPA members provide 45,000 airport parking spaces to several million passengers travelling to and from UK airports each year.

THE ROLE OF ON AND OFF AIRPORT PARKING

8. Across the UK, around1 in 4 airline passengers (excluding transfer passengers) drive to the airport and park long-term on or off airport.

9. IAPA agrees in principle with the government's policy objective to encourage people to travel to airports by public transport as much as possible. However, for most airports, increasing public transport's modal share will continue to be an extremely challenging goal without a huge increase in government funding for public transport, which seems unlikely at present.

10. For public transport to be an option it needs to be available at the times that passengers are travelling between their homes or businesses and the airport. A significant volume of leisure flights are between midnight and 7am. Public transport is often not an option for passengers with flight times early in the morning (with even earlier check-in times) and for passengers taking flights late at night. Public transport may also not be the preferred option for PRMs, for passengers travelling with young children or for passengers with a large amount of luggage.

11. For a variety of reasons, the car is likely to remain the preferred method of travel for a significant proportion of passengers, and for many people public transport will remain an unviable option.

12. Travel by passengers in their own vehicle which is parked at the airport awaiting the passengers' return flight is, after public transport, the most sustainable transport mode. Park and Ride airport parking involves two journeys in the passengers' car. Meet and Greet airport parking additionally involves two short journeys between the airport and the OAPOs' car park. The Kiss and Fly mode involves four journeys as the family member, friend or colleague of the airline passenger will make journeys to and from the airport in both dropping off the passengers for the outbound flight and picking up the passenger after the inbound flight. Similarly, transport by taxi involves four journeys by the taxi driver; two when collecting the passenger for the outbound flight and two when driving the passenger to his home or place of business after the inbound flight.

13. A supply of airport parking adequate to meet demand is essential for the efficient operation of the UK's airports. As airline passenger numbers increase and UK airports expand the amount of airport parking will need to increase to meet increased demand for airport parking services.

14. Where airport parking supply does not meet demand the consequences are likely to include:

- A decline in airport passenger satisfaction levels.
- An increase in airport parking prices.

- The entry to the market of rogue operators who may not have adequate insurance and who may park vehicles at premises which do not have the ParkMark award.
- An increase in levels of on-street car parking in the vicinity of airports.

15. Notwithstanding than an increase in the public transport modal share for passengers travelling to airports may be achieved the anticipated increase in air passenger numbers at UK airports will result in an overall increase in the number of passengers travelling to airports by car.

16. An efficient and competitive airport parking market is an essential ingredient if the anticipated increase in airline passenger numbers and expansion of airports is to be achieved without compromising airline passengers' satisfaction levels or resulting in the deterioration of the amenity of those living and working in the vicinity of airports. This submission raises issues which need to be dealt with in order to ensure that an efficient and competitive airport parking industry is able to thrive.

ONE-SIZE-FITS-ALL REGULATION

17. The CAA briefing document states that "market conditions vary across the three airports: Heathrow is more insulated from competitive threats than Gatwick, which in turn faces less competitive pressure than Stansted." Given these differences the CAA has concluded that a one-size-fits-all approach to regulation does not suit the needs of each airport and the needs of their users.

18. Accordingly, the CAA's Initial Proposals for regulating aeronautical charges for each of the airports differs.

19. The Initial Proposals do, however, include "one-size-fits-all" regulation for charges for facilities and services at the airport for a range of activities including "bus and coach facilities".

20. The regulation which is proposed is that the licences for all three airports should contain price control conditions for Other Services which are an amended form of the public interest conditions recommended by the Monopolies and Mergers Commission in paragraph 13.129 of MMC2.

21. In order to consider the reasons why one-size-fits-all regulation is appropriate for Other Charges made for facilities and services used in connection with Other Activities it is instructive to consider the background to the public interest conditions recommended in MMC2. This will set the context for IAPA's submissions that:

- The activities which are appropriate for one-size-fits-all regulation should be extended.

- The Licences should contain conditions which regulate the terms on which facilities and services used in connection with the Other Activities are provided other than solely the charges for those facilities and services.

- Operators of all UK airports should be subject to one-size-fits-all regulation for Other Charges.

MMC2 – PUBLIC INTEREST CONDITIONS

22. At paragraph 13.125 of MMC2 the Commission states that "given BAA's position as a dominant supplier and the exclusion of non-airport charges from the regulatory formula, a lack of transparency in the cost information available to users of those services and facilities puts BAA in a strong position to charge what it chooses for such facilities, giving users little opportunity to complain about excess charges to the CAA or OFT, putting the regulatory authorities in a difficult position to validate complaints." The "non-airport charges" referred to are those defined as "Other Charges" in this Response.

23. As a result of this lack of transparency the Commission made the following public interest finding at paragraph 13.126 of MMC2:

> "…. In our view the failure to supply adequate details of the costs, or other principles, on which charges to users of such facilities are based might be expected to have the following effects adverse to the public interest: that BAA is in a position to impose charges for individual activities that are not systematically related to costs, and increases in charges unrelated to and in excess of increases in costs; we believe that BAA might be expected to take advantage of this position, particularly if it were subject to a more demanding formula on airport charges. We have therefore concluded that provision to users of inadequate information on the costs, or other bases of charges, of the services and facilities for airlines, tenants and licensees listed in paragraph 13.125 at HAL, GAL and STAL in the twelve months prior to the date of reference might be expected to operate against the public interest with the effects adverse to the public interest specified earlier in this paragraph."

24. The Commission recommended that the effects adverse to the public interest finding could be remedied by the imposition of the public interest conditions recommended at paragraph 13.129 of MMC2.

25. The Initial Proposals do not recommend a one-size-fits-all approach to the regulation of aeronautical charges as the three airports operate in different competitive markets for the provision of services to airlines.

26. The reason that one-size-fits-all regulation is appropriate for the Other Activities is that at each airport the airport operator has a local monopoly for the provision of facilities and services in connection with the Other Activities.

27. Park and Ride operators require facilities at the airport forecourt for dropping off and collecting passengers and their luggage. Meet and Greet operators require facilities on the airport forecourt for collecting and returning customers vehicles. The airport forecourts are owned and/or operated by the airport operators and there are no alternative locations, not controlled by the airport operator, at which these facilities can be provided.

28. In relation to the provision of services to airlines the airport operator can have SMP in the upstream market for the provision of services to airlines at an Airport. The airport operator does not, however, compete in the downstream market of providing airline services.

29. In relation to the airport parking market the airport operator not only has SMP, IAPA would say a monopoly, in the provision of airport forecourt facilities to OAPOs, the airport operator also competes in the downstream airport parking market. At most, if not all, airports the airport operator is dominant in the downstream airport parking market.

30. In situations where the airport operator has SMP in the upstream market and also competes in the downstream market there is an incentive for the airport operator to abuse its dominant position in the upstream market in order to leverage its position in the downstream market. This reinforces the arguments for conditions in the Licences for aspects of the provision of services and facilities in relation to the Other Activities which do not relate solely to the charges made for those facilities.

LICENCE CONDITIONS RELATING TO OTHER ACTIVITIES

31. For airport operators which meet the market power test provided for in Section 6 of the 2012 Act, Section 18 of the Act gives the CAA wide powers to include such conditions in a licence "as the CAA considers necessary or expedient having regard to the risk that the holder of the licence may engage in conduct that amounts to an abuse of substantial market power in a market for airport operation services (or for services that include airport operation services)", and such other conditions as the CAA considers necessary or expedient having regard to the CAA's duties to "further the interest of users of airport transport services regarding the range availability continuity, cost and quality of airport operation services."

32. Airport operation services include services provided at an airport for the purposes of the arrival or departure of passengers and their baggage (Section 68 of the 2012 Act). These services include those required by Park and Ride operators for dropping off and picking up passengers on the airport forecourt and by Meet and Greet operators for collecting and returning customers cars on the airport forecourt.

THE NECESSITY FOR CONDITIONS

33. Where a commercial organisation has SMP, the tendency would be for that organisation to use its market power to increase profits and achieve other commercial goals.

34. Where an organisation with SMP in one market competes in a downstream market, there is an further tendency for the organisation to use its market power to benefit its position in the downstream market, thereby restricting competition in the downstream market.

35. The use by airport operators of their SMP in the market for airport forecourt facilities is demonstrated by the Case Studies contained in Appendices 1-11. We would recommend that the CAA reads the whole of the judgment in the Heathrow Case as the conduct of HAL described therein is, in the experience of the OAPOs, common to most airport operators and underpins the rationale for the granting of Licences subject to the conditions which APH is proposing.

36. The complexity of competition law and the cost of litigation means that, in practice, the remedies for breach of SMP which, in theory, are available through the courts do not act as a restraint on the abuse by airport operators of the SMP when dealing with OAPOs.

37. These difficulties were referred to by Lord Justice Mummery in the following extracts from his judgment in the Attheraces Case:

"4. The proceedings presented the trial judge... and this court with a range of factual and legal problems of a kind which even specialist lawyers and economists regard as very difficult. This is the view of Professor Richard Whish in Competition Law (5th ed - 2003): "The law on abusive pricing practices is complex and controversial..." and "in practice it is immensely complex to determine what is the appropriate price for access to an essential facility.""

"5... The Trial Judge concluded there was excessive, unfair and discriminatory pricing, in addition to an unreasonable refusal to supply in relation to an essential facility. Essential facilities arguments have most commonly arisen in relation to access to unique physical structures or facilities such as... airports..."

"7. The nature of these difficult questions suggests that problems of gaining access to essential facilities and of legal curbs on excessive and discriminatory pricing might, when negotiations between the parties fail, be solved more satisfactorily by arbitration or by a specialist body equipped with appropriate expertise and flexible powers. The adversarial procedures of an ordinary private law action, the limited scope of expertise in the ordinary courts and the restricted scope of legal remedies available are not best suited to helping the parties out of a deadlocked negotiating position or to achieving a business-like result reflecting both their respective interests and the public interest..."

38. Purple and Meteor were faced with a difficult commercial decision as to whether to bring the Heathrow Case having regard to the likely costs thereof. The total costs of the action for Purple and Meteor (before recovery of costs) exceeded £700,000. Purple is the largest OAPO at Heathrow and Meteor were part of a large publicly quoted company. Smaller OAPOs would not have been able to justify or afford the cost of litigation to obtain the common law remedy to which they were entitled.

39. Heathrow, Gatwick and Stansted are the only UK airports currently affected by the public interest conditions imposed following the recommendation made by the Competition Commission in MMC2. Other UK airports, unconstrained by conditions, have used their SMP to negotiate charges for facilities to Park and Ride operators which are not "systematically related to costs."

40. The London Luton Airport (Licence Fee) Case Study shows that LLAOL proposed a number of alternative licence fees. The proposed turnover licence fees and initial PVM fee suggested were totally unrelated to costs.

41. Having issued proceedings to enforce a PVM licence fee which the OAPOs believed exceeded the economic value of the facilities provided a settlement was agreed for a PVM fee which was 58.82% of that for which LLAOL had issued proceedings. It was only possible to achieve this settlement because Airparks, one of the defendants to the proceedings, was prepared to incur the majority of the substantial costs, estimated at more than 500,000, of defending the claim.

42. The Leeds Bradford International Airport Case Study is expected to result in two of the OAPOs agreeing a licence fee for the use of DOPU facilities which they believe exceeds the economic value of those facilities. Solicitors for the OAPOs had estimated the costs of legal proceedings to challenge the licence fees proposed by the airport operator at more than £500,000. Solicitors for the airport operator had estimated the costs to each side of the proceedings at more than £1,000,000. Faced with a choice of expensive and, as recognised in the Attheraces Case, difficult litigation or agreeing a licence fee which the OAPOs believe exceeds the economic value of the facilities the OAPOs understandably intend to take the latter course of action. This is likely to result over the medium to long term in an adverse affect on competition in the market for airport parking services at Leeds Bradford Airport to the detriment of consumers.

43. The Case Studies in Appendices 1-5 are extracts from representations made by IAPA (then known as IAPRA) to the Competition Commission in relation to its Market Inquiry into the supply of airport services by BAA within the UK and the 2007 Heathrow and Gatwick Quinquennial Review.

44. The inclusion in this Response of Case Studies from the 2007 Representations, as well as the more recent Case Studies appearing in Appendices 6-11 demonstrate that the abuse by airport operators of their SMP in the market for airport forecourt facilities in their dealings with OAPOs is an historic, as well as a continuing, problem which will only be mitigated if the CAA imposes appropriate conditions when issuing Licences.

45. In the following sections we propose the case, having regard to the Case Studies, for Licence Conditions relating to:

- Price control for facilities used by Meet and Greet operators.

- The location at which facilities shall be provided on the forecourt for Park and Ride operators to drop off and pick up customers and for Meet and Greet operators to collect and return customers' vehicles.

PRICE CONTROL FOR FACILITIES USED BY MEET AND GREET OPERATORS

46. The Initial Proposals are that the Licences for Heathrow, Gatwick and Stansted should all include price controls for Other Activities.

47. The market for long-stay airport parking includes Park and Ride services and Meet and Greet services. Whether Park and Ride and Meet and Greet services are part of the same wider airport parking market or are to be considered as separate markets will probably depend upon the competition context in which market definition arises. Whether the customer of an OAPO purchases a Park and Ride or a Meet and Greet product the customer's car will be parked at the OAPO's car park during the parking period which is booked.

48. All of the effects adverse to the public interest which result from an airport operator's "failure to supply adequate details of the cost, or other principals, on which charges to users... are based" as referred to in paragraph 13.126 of MMC2 (see paragraph 23 of this Response), apply equally to charges made for Meet and Greet facilities as they apply to facilities for Park and Ride.

49. Having accepted that the Licences should contain price controls for charges to Park and Ride operators for facilities for coaches to drop off and pick up passengers it would, in IAPA's opinion, be illogical not to extend those price controls to facilities for Meet and Greet operators to collect and return customers' vehicles at airports.

50. Both the Stansted Airport (Location and Fee) Case Study and the Birmingham International Airport Case Study show that airport operators are charging, or are proposing, fees for use of facilities by Meet and Greet operators which are not "systematically related to costs," or any other proper basis for charging. STAL are proposing to limit the number of OAPOs who can collect customers' vehicles on the forecourt by awarding tenders which ILMG suspect will be awarded to the OAPO which bids the highest price. BIA were proposing to charge Airparks, and have charged other OAPOs, a fee for each Meet and Greet vehicle parked off-airport.

CONDITIONS RELATING TO RELOCATION OF FACILITIES FOR OAPOs

51. The Heathrow Case concerned the attempt by HAL to move the Meet and Greet operations of OAPOs to short-stay car parks at Terminals 1 and 3 whilst leaving HAL's own meet and greet operation on the airport forecourts.

52. The decision in the Heathrow Case included a damning finding that the intention of HAL's action was to have an anti-competitive effect. As a result of this, Mr Justice Mann concluded that "HAL has been guilty of conduct which contravenes Section 18" of the Competition Act 1998 which contains a prohibition against an organisation with a dominant position in a market from abusing that power.

53. Notwithstanding the guidance provided by the judgment in the Heathrow Case airport operators continue to attempt to provide OAPOs with locations for dropping off and picking up passengers and for collecting and returning customers' vehicles which are materially less convenient than the facilities enjoyed by passengers who use on-airport parking products.

54. We have provided relevant case studies for Luton and Stansted Airports although there are other examples which we could provide if this would be of assistance.

55. The judgment in the Heathrow Case was handed down on 15 April 2011.

56. The London Luton Airport (Location) Case Study concerns the proposal by LLAOL to move the facilities for OAPO Park and Ride operators to a location approximately 543 metres (by the pedestrian route proposed by LLAOL) from the departures entrance to the airport terminal building. This compared with the location approximately 20 metres from the departures entrance to the terminal building at which customers of the on-airport long-stay car parks dropped off and picked up.

57. In an email of 5 December 2011 the solicitor for the OAPOs asserted that "[t]he Purple Parking Case at Heathrow Airport... support my client's contention that if practicable drop off/pick up facilities for off-airport operators should be located in no less convenient a position than those serving the competing operations of the airport operator."

58. Point 7 of an email dated 19 December 2011 from LLAOL's in-house legal team to the solicitor for the OAPOs stated:

"We refute that LLAO's proposals have been designed to procure a business advantage for LLAO at the expense of Airparks, and we note that you have not been able to put forward any credible alternative location. The requirement for the roadworks and the criteria driving the redesign of the short stay car parks are very clearly set out in Tim's letter of 2 December 2012. We accept that Airparks may seek to argue that a business advantage may be a consequence of the design (although

we dispute that this is the case) but that is not the same thing at all. That simply takes us back to the "objective justification" argument for differing locations."

59. In fact there were numerous "credible alternative locations" for a DOPU facility for the OAPOs.

60. A settlement was ultimately reached which involved a licence agreement being entered into between LLAOL and Airparks which contained clauses providing that any temporary or permanent relocation of the DOPU facility "will be non-discriminatory and not materially further away from the airport terminal building and the pick-up and drop-off facility used from time to time by vehicles serving the on-airport car park". This settlement was only achieved after Airparks threatened to issue proceedings, (including making an application for an injunction) against LLAOL if they proceeded with the proposed relocation of the DOPU facility to the location which they had originally proposed.

61. The Stansted Airport (Location) Case Study is particularly concerning in view of STAL being part of the same group of companies as HAL when the initial actions referred to in the case study took place.

62. In November 2012, nineteen months after the decision in the Heathrow Case was handed down, STAL closed its forecourt to general traffic but has allowed its official Meet and Greet operation to collect customers vehicles on the forecourt.

63. In September 2012 STAL sent out a tender document to off-airport Meet and Greet operators inviting them to tender for concessions to be awarded to two OAPOs to collect customers' vehicles from the forecourt.

64. At the time of this Response one concession, which includes the allocation of six designated spaces on the forecourt, has been awarded. In January 2013 STAL sent out a further tender document inviting OAPOs to retender for the remaining concession which included use of four designated car parking spaces on the forecourt. A letter dated 22 January 2013 from the OAPOs solicitors to STAL referred STAL to the decision in the Heathrow Case and, relying thereon, stated "it is clear that SAL is acting in a discriminatory and unlawful manner in requiring the [OAPOs] to collect vehicles in the DOPU area whilst collecting its own vehicles on the forecourt."

65. A letter in response to the competition law points raised in the OAPOs solicitors' letter of 22 January 2013 were sent by STALs solicitors, Mills & Reeve, on 18 February 2013. The OAPOs solicitor responded to Mills & Reeve on 26 February 2013

pointing out that their letter of 18 February 2013 did not deal with the discrimination point, originally raised in the OAPOs solicitors letter of 22 January 2013 and repeated in a letter of 1 February 2013 to the Head of Legal. Neither STAL nor their solicitors have subsequently dealt with the discrimination point. Instead STAL have proceeded with the tender for the remaining concession to collect customers' vehicles on the forecourt which process the OAPOs believe to be discriminatory for the reasons set out in their solicitor's letters.

SUGGESTED CONDITIONS

66. If the CAA were minded to impose conditions in Licenses issued to airport operators to protect against the abuses of SMP highlighted in this Response we make the following suggestions as to how conditions could be framed.

67. Paragraph 7 of the condition relating to "charges for other services" in the proposed draft Licences states that the facilities to which the condition relates includes "facilities for bus and coach operators."

68. Paragraph 6.75 of MMC2 from which the proposed conditions derive specified that the six categories of bus and coach operators to which the conditions applied were "express, local, charter, hotel services, off-airport car parking and off-airport car rental."

69. An additional definition of "bus and coach operators" to include the six categories of traffic referred to above might assist in clarifying to which charges for bus and coach operators the condition is intended to relate.

70. If the CAA wish to extend this condition to Meet and Greet services this could be achieved by adding "and meet and greet operators" at the end of paragraph 7 of the condition.

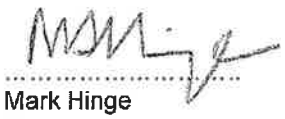
71. If the CAA were to consider imposing a condition relating to the location of DOPU facilities for OAPOs we would suggest that this could be framed along the lines of the provisions in the licence agreement which appears as Appendix 9.2, for example:

"any relocation of DOPU facilities for off-airport car park operators providing Park and Ride or Meet and Greet services at the airport will be non-discriminatory and not materially further away from the airport terminal building than the DUPO facility used from time-to-time by the operators of on-airport long stay car parking including on-airport Meet and Greet operators.

In this condition [no.] DOPU facilities are facilities for buses and coaches to drop off and pick up passengers and their luggage and for the collection and return of a customers car."

FURTHER INFORMATION

72 IAPA will be pleased to clarify any of the points made in this Response and, subject to confidentiality considerations, to provide further documents and information in relation to any of the Case Studies.



Mark Hinge
Chairman

ALL APPENDICES OTHER THAN APPENDIX 6
HAVE BEEN REDACTED

APPENDIX 6

HEATHROW AIRPORT CASE STUDY

1. Prior to 2010 Purple and Meteor had each for many years provided Meet & Greet services for passengers using Heathrow Airport Terminals 1 and 3 which involved customers' cars being collected and returned on the forecourts..

2. In 2010 HAL serviced notices on Purple and Meteor stipulating that at Terminal 1, with effect from 1st July 2010 and at Terminal 3 with effect from 1st August 2010, OAPOs providing Meet and Greet services would be required to collect and return customers' cars in the short-stay car parks at those terminals. While moving off airport Meet and Greet operators to the short-stay car parks, it intended that its own Meet and Greet service would continue to collect and return customers' vehicles on the airport forecourts.

3. Purple and Meteor issued Proceedings against HAL, claiming that HAL's conduct amounted to an abuse of its dominant market position in the provision of airport forecourt facilities at Heathrow. The Judgment in those Proceedings is attached as Appendix 6.1. References in this Appendix 6 to paragraphs are to paragraphs in the judgment in the Heathrow Case.

4. In the Heathrow Judgment Mr Justice Mann was of the view that there was a "material dissimilarity" in the requirement for OCPOs to collect and return customers' vehicles in the short-stay car parks while HAL's own Meet and Greet operations collected and returned customers' cars on the forecourt. In paragraph 139 Mr Justice Mann states that "the differences between operating from the forecourt and operating from the car parks are not merely geographical ones with no consequences. They affect the nature of the service, both in real terms and in terms of customer perception".

5. At paragraph 163 Mr Justice Mann states that the Director of HAL who was responsible for moving the OCPOs to the short-term car parks "appreciates that in [Terminal] 3 there is a commercial advantage to having valet activities conducted on the forecourt. He wishes to preserve that for HAL (HVP) if possible. It is consistent with the continued desire to present advantages to HAL's valet parking operation, which I find to be the thread running through the decision-making process".

6. At paragraph 166, Mr Justice Mann found "the proposals of HAL to move the off-airport Meet and Greet operators to the car park will have a real and anti-competitive effect so far as customers are concerned, and that was a very material part of the motivation of HAL in deciding to propose [to] implement them". Mr Justice Mann expanded on HAL's reasons for the proposed move at paragraph 216, stating:

"I find that the real motivation for the change in relation to Terminal 1 was a commercial one. That commercial one was to force the off-airport Meet and Greet operators off the forecourts and into the car park, in order to increase revenues from the car park and to decrease the effectiveness of those operators in their valet parking operations".

7. Mr Justice Mann made a similar finding at paragraph 238 in relation to the reasons for the changes at Terminal 3, stating that it had an "intended and anti-competitive effect".

8. In Paragraph 241, Mr Justice Mann concluded that "HAL has been guilty of conduct which contravenes Section 18." The prohibition imposed by Section 18 of the Competition Act 1998 comprises the Chapter II Prohibition of abusing a dominant position in a market.

APPENDIX 6.1

Neutral Citation Number: [2011] EWHC 987 (Ch)
Case No: HC10C02364

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL
15/04/2011

Before:

MR JUSTICE MANN

Between:

(1) Purple Parking Limited	
(2) Meteor Parking Limited	**Claimants**
- and -	
Heathrow Airport Limited	**Defendant**

Mr Alan Maclean QC and Mr Richard Blakeley (instructed by stevensdrake Solicitors) for the Claimants
Mr Mark Brealey QC and Ms Sara Ford (instructed by Herbert Smith LLP) for the Defendant

Hearing dates: 8th, 9th, 10th, 13th, 14th, 15th & 16th December 2010
12th, 13th, 14th, 18th, 19th, 20th January 2011

HTML VERSION OF JUDGMENT

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Mr Justice Mann :

Introduction

1. This is a claim in which the claimants allege abuse of dominant position by the defendant in preventing the claimants from accessing the forecourts at Heathrow Airport Terminals 1, 3 and 5 ("T1", "T3" and "T5" respectively) for the purpose of conducting part of their business of picking up and redelivering cars to customers who want to use one of their parking services. The proceedings were started on 19th June 2010 and this action, which is actually the trial of the question of abuse on an assumption as to dominant position, has come on as an expedited matter pursuant to an order of Mr Justice Roth dated 12th August 2010. Mr Alan Maclean QC led for the claimants ("Purple" and "Meteor"); Mr Mark Brealey QC led for the defendant ("HAL").

The respective businesses of the parties

2. HAL is a subsidiary of BAA (AH) Limited and BAA Airports Limited which in turn are members of the Ferrovial Group. HAL is the owner and operator of Heathrow Airport. That activity obviously has an enormous number of aspects. For present purposes the important aspects are car parking. It operates a number of car parks on the Heathrow Airport site ("on-airport" car parking), some of which are large open spaces and some of which are multi-storey (close to the terminals). The parking facilities offered by HAL vary in terms of pricing and services offered. The short stay car parks are priced so as to be appealing for short stays and to those who want to park close to the terminals, and the longer stay car parks (priced for longer stays) are those open ones farther away. The car parks are managed by a third party.

3. Purple owns car parks and provides car parking for those wishing to fly from Heathrow, but in their case the car parks are all off the airport site ("off-airport" parking). Meteor uses, but does not own, car parks which are technically within the airport boundary but is considered an "off airport" operator by HAL. Both are involved in the "meet and greet" or "valet parking" activities described below. In the terminology of this case HAL is called an "on-airport operator" and the other operators, such as Purple and Meteor, are called "off-airport operators".

4. If a passenger wishes to travel to Heathrow by car then he or she may park in one of the surrounding car parks. Very close to each terminal is a "short stay car park" owned by HAL. If the passenger parks in such a car park, then that passenger can walk to the adjacent terminal. If he or she parks in the farther flung long stay car parks parking is cheaper and there are shuttle mechanisms (buses or minibuses) to get the passenger to the terminal. (I ignore "business parking" for the purposes of this narrative.) However, an alternative to either of these is meet and greet or valet parking. Where this occurs the passenger drives to an agreed location by the terminal (in fact the terminal forecourts) and hands over the keys of the car to a representative of the car parking company – that is the drop-off or meet element. That representative then takes the car away and parks it while the passenger travels what is usually intended to be the short distance into the terminal. When the passenger arrives back from his or her journey, he makes an arrangement for picking up the car and the car is delivered to the same location more or less as the passenger emerges from the arrivals area (or so it is hoped), the keys are handed back and the passenger drives away – the pick-up or greet element. Where this takes place near to a terminal it has obvious benefits and convenience to the passenger because the passenger is not engaged in actually parking the car himself or herself and, depending on the actual location, never has to negotiate anything which can be described as a car park.

5. The claimants and the defendant all offer valet parking services to passengers flying from the three terminals relevant to this case. Until the dispute in this case arose, all three parties did their meeting and greeting from the forecourts of Terminals 1 and 3. In the case of Terminal 5, they all operated from forecourts at the time of its opening in 2008, but after a short while the position changed as will appear below. Having taken the car from the passenger, the parties then take the cars to their respective parking facilities – HAL has facilities on-airport and the two defendants take the cars away to off-airport car parks. This dispute concerns the use of the forecourt in that activity by Purple, Meteor and the other off-airport operators.

6. HAL's valet parking operation is carried out principally through a division (not a separate corporate entity) called Heathrow Valet Parking – "HVP". In terms of pricing it is significantly more expensive than

Purple and Meteor. HAL also operates a business called Heathrow Meet & Greet. This does (in effect) exactly the same as HVP, but on a much smaller commercial scale. It is priced along the same lines as Purple and Meteor, and is targeted principally at the private, as opposed to the business, user. Its business is not significant when compared with HVP. It will not be necessary to refer to it very much during the course of this judgment.

The geography

7. During the opening of this case I asked for, and was given, a view of the various terminals, forecourts and car parks. I was able to see the geographical layout and the qualities of each forecourt and car park, and walked all of the journeys that passengers would have to take between car parks and forecourts on the one hand, and terminals on the other (except for one between lower levels of the T5 car park and the terminal). The various areas were accessed as a passenger would access them, by car and on foot. This was an illuminating visit, without which I would not have been able to appreciate many of the important features of the car parks and forecourts. This judgment takes into account, and reflects, what I saw.

8. This case is all about the appropriateness or otherwise of places for carrying on the meeting and greeting activities described above around the three terminals. It is therefore necessary to have an understanding of the layout of the facilities. It is different for each of the three terminals.

Terminal 1 layout

9. Along the frontage of Terminal 1, at the departures level, there is a forecourt with four parallel lanes. Lane 1, closest to the terminal, is available for security vehicles and buses only. The remaining three lanes are available for passenger drop-offs, whether by individuals being delivered to the airport by friends, relations or others (so-called "kiss and fly" passengers), minicabs or taxis. Each of the outer three lanes has a centre part for driving down with bays on each side for the cars to pull off and drop passengers. All these lanes are outside the departures area of the terminal. The outer two lanes are at a slightly lower level than the inner two lanes.

10. Cars enter the departures forecourt by a ramp. They turn right off the ramp into the various lanes. More or less opposite the end of lane 4 (the outermost lane) they can turn left into an area which is used by HAL for its valet parking activities – both drop-off and pick-up. It is an area with parking for about 15-20 cars. On the first day of this trial I had a view of the relevant areas, and to my eyes it presents as a small parking area off to the side of the departure forecourt lanes. It can present itself as a discrete area if one knows what one is looking for in the context of this case, but to a departing passenger who is not steeped in the issues in this case it will look like a small parking area which is somehow ancillary to the forecourt.

11. Passengers walking across the lanes to the terminal will arrive at the departures area. The arrivals area is a couple of floors down. On that level, arriving passengers (passengers arriving by air) leave the terminal and are confronted by traffic lanes to which only buses and taxis have access; private cars do not have access.

12. Across those lanes outside the arrivals terminal exit is the short-term car park for T1. It has two or three layers and is effectively under the departures forecourt. It has a separate entry route underneath the ramp leading to the departures forecourt. I shall deal later with the qualities of this car park in terms of its space and impact on the customer.

Terminal 3 layout

13. T3 presents differently. The departures and arrivals areas of the terminal are entered and exited at the same level, which is also the same level as the forecourt. Putting the matter simply, the departures and arrivals terminals are on two adjacent sides of a rectangle, the centre of which is occupied by the forecourts. Most of the area is taken up with five lanes of the departures forecourt parallel to the departures terminal. The inner lane (lane 1) is for public transport only (and security vehicles). Lane 2 is a departure drop-off area, again for public transport, but it can be opened up (with the consent of the police) to private cars. Lanes 3 and 4 are for private car drop-offs (kiss and fly) and the outer fifth lane is currently designated for Heathrow staff buses. There are two additional lanes outside the arrivals area, but they are for public transport and taxis only. Private cars cannot drive down those lanes.

14. On what can be regarded as a third side of the rectangle, opposite the departure side, is the T3 short stay car park. Entry and access each take place through single ramps dedicated for each purpose. It can be accessed on foot at ground floor level, but there is also a bridge at second or third floor level connecting the arrivals area with the car park, the bridge crossing one of the access roads leading out of the forecourt area and passing through the "corner" of the rectangle. The bridge connects the arrivals area with one corner of the car park. At the other corner of the car park (along the side fronting the forecourt) is the entrance to a tunnel under the forecourt connecting that corner of the car park with the departure area. Thus if one does not want to walk across the forecourt and roads to get from the car park to the terminal, one leaves the car park to get to the terminal down some lifts at one corner of the car park to gain the tunnel, and on arrival at the terminal by plane one gains the car park by going up some more lifts to use the bridge at the other corner.

Terminal 5 layout

15. The departure hall for Terminal 5 is several storeys up a very long building. There is a departures forecourt running most of the length of the building at the departure level (part way up the face of the terminal building) with two lanes and spacious bays to the side of them. Access to those bays is by a vehicle ramp, with an exit by a ramp at the other end. Access is quick, efficient, modern and spacious.

16. The forecourt is essentially over the short stay car park for Terminal 5 which, similarly, runs the length of most of the building. It has several floors. The top floor of the car park (immediately below the level of the forecourt) is a "fast-track" area, so called because it is easily accessible via a separate ramp and access to it does not depend on going further down any spiral ramp (unlike the floors below). Since this floor is one floor below the departure forecourt, a passenger leaving this floor has a short vertical trip in the lift to departures.

17. The arrivals area is several floors below that, essentially at ground floor level. The arrivals exit door gives on to the bottom floor of the car park, which has a much higher ceiling than other floors, so it can accommodate higher-sided vehicles. On the far side of the car park is a departure lane, again running the length of the building.

18. The T5 car park has a very different feel to it from the T1 and T3 car parks. It feels very much airier and lighter and, while no car park can actually be said to be a pleasure to visit, one's degree of displeasure is rather less in this car park. One of the witnesses, Mr Merry, said it was designed with modern travel in mind, and it is quite understandable why he would think that.

The history of drop-off and pick-up arrangements leading up to this action

19. This action has been triggered by the attempts of HAL to change the arrangements made by the parties for their meet and greet operations. In order to deal with this it is again necessary to consider the arrangements on a terminal-by-terminal basis.

Terminal 1 – previous arrangements

20. Prior to the middle of last year, all parties conducting meet and greet operations at Terminal 1 carried them out on or adjacent to the departure forecourt. This included not merely the parties to this action, but also other smaller operators. All except HAL would arrange for jockeys to meet departing customers on the forecourt and take their cars away. The cars would be brought back to the forecourt where the newly arrived passenger would pick them up. HAL operated from a slightly different area. As I have observed, at one end of the forecourt there is a small area which HAL occupies with some parking spaces and an administrative building. HAL operated its meet and greet services from this area.

Terminal 3 – previous arrangements

21. Here all operators other than HAL conducted their meeting and greeting from lanes 3 and 4 (and presumably lane 2 when it was open for public use). HAL had its own separate area marked off on lane 4 and serviced by people in a small cabin adjacent to that marked-off area.

Terminal 5 – previous arrangements

22. When Terminal 5 opened, the off-airport meet and greet operators conducted their activities from the

departures forecourt. HAL did its meeting from there as well, from a dedicated area, and conducted its greeting (pick-up) activities from the lower area outside the arrivals exit. However, the initial stages of the operation of T5 threw up congestion (principally caused by buses), and while that was being resolved the off-airport meet and greet companies were asked, and agreed, as a temporary measure, to move their operations to the fast-track area, that is to say the area in the car park one floor down but with relatively easy access, where they were allocated some 53 spaces by HAL. There they stayed until the attempt to re-arrange matters by HAL in the middle of 2010. HAL's areas stayed where they were.

The events of 2010 which triggered this action

23. In 2010 HAL sought to change the arrangements, and in due course I will have to return to what is said by each side to be the motivation behind, or the reasons for, the changes, but for the moment it is sufficient to describe them.

24. First, changes to the arrangements at T5 were prescribed. In a letter dated 25th February, Mr Fraser Brown, Head of Travel Services at HAL, stated that the "concession" whereby the off-airport meet and greet operators were allowed to operate from the fast-track area was to have its terms changed with effect from 1st June 2010 so that a "proper procedure" could be put in place. The change was that a tariff would be introduced. Hitherto no charge had been made to meet and greet operators in the fast-track area and a HAL employee in a booth had been present to provide exit cards to the meet and greet operators and their customers. The letter specified that the car park's minimum charge of £2.50 (applicable to a 30 minute stay) would apply on the footing that most transactions were completed within 30 minutes. The reserved area in the fast-track area would no longer be marked out as available and the operators would be free to operate from anywhere in the car park. If that last matter was supposed to sound like a concession (which it probably was) it was somewhat disingenuous. It would not be easy to operate from an undesignated area because customers would not necessarily know where to go.

25. On 27th May a further change was proposed. The charge was to be reduced to £1.50. The operators could continue to use the fast track area after 1st June, but there was a "current expectation" that an alternative location would be found after the summer. That alternative location was anticipated to be level 2 (2 levels below the fast track level).

26. These arrangements were to affect only the off-airport meet and greet operators. HVP would continue to operate from its designated areas at the end of the forecourt (drop-offs) and on the bottom departure level (pick-up).

27. Next were proposals for T1. In a letter of 31st March Mr Brown stated that from 1st July 2010 all off-airport meet and greet activities would be moved from the forecourt to the T1 short stay car park and charged at the prevailing car park tariff – again, £2.50, assuming the transaction took place within 30 minutes. Any area of the car park could be used. On 28th June a variation was specified. A new 15 minute tariff of £1.50 was proposed, and it was suggested that the operators operate from a location on the lower ground floor of the car park, adjacent to the bays which were the last chance an exiting motorist had to pay for the car park before actually arriving at the exit. In due course HAL carried out certain works to the car park in order to facilitate use by the meet and greet operators. Some bays were taken out of operation to improve sight lines and certain ramp entrances and exits were widened a little by shaving some edges off ramp delimiters which might otherwise catch cars. These alterations would actually benefit all car park users. HAL remained operating from its own designated area.

28. Last were the proposals for T3. Mr Brown sent a letter to off-airport meet and greet operators on 27th April stating that use of the forecourt was not to be permitted and from 1st August all drop-off and pick-up activities would have to be conducted in the T3 short stay car park. Again a £2.50 tariff would be applied. Any area of the car park could be used. HAL remained operating from its own designated area in lane 4 of the forecourt.

29. Purple and Meteor did not accept what it regarded as unwarranted compulsory relocations and did not move their activities to the car parks at T1 and T3 as required by HAL. There was some rather more vigorous enforcement of the no-waiting rules on the forecourt by the enforcement officers, which led to some unpleasantness. In the end these proceedings were commenced based on competition law and an abuse of dominant position and injunctive relief was sought restraining HAL from implementing its proposals. An agreed regime was put in place pending the trial under which the removals were

suspended and the operators continued to operate from the forecourts (or fast-track area at T5) as before, save that customer pick-ups for T3 (but not drop-offs) were to take place in the car park from the top floor. Purple operate from the top floor (level 5); Meteor operate (at least in part) from level 1.

30. There matters rested until a point in Mr Brown's evidence when he said, apparently out of the blue (or so it seemed to the claimants and to me), that HAL had no foreseeable use for the fast track area at T5 and that HAL was "comfortable" with Purple and Meteor operating in the way they are currently operating in the fast track area. In fact this had been suggested in correspondence a little earlier, and a remark to that effect was made in opening by Mr Brealey, but no-one had picked it up. It obviously made one wonder why T5 had been left as part of the dispute in this case. In due course, during the hearing, HAL's attitude was confirmed in open correspondence with the result that Purple and Meteor no longer claimed relief in respect of T5, though the history in relation to T5 remained as an element of the case. The claim for injunctive relief, restraining abuse, remained in respect of T1 and T3.

31. To complete the picture, Terminal 2 is not in issue in this case because it is currently not operating. Terminal 4 is operating, and the meet and greet companies are using the forecourt and there has been no attempt to bring this to an end. This is said to be because of concerns about the T4 car park capacity. I do not need to consider that terminal either.

32. The position as HAL would want it to be would thus be one in which it operates from the forecourts (or, as it would say in relation to T1, adjacent to the forecourt) and the off-airport operators would have to operate from the car parks. HAL would therefore be the only forecourt operator. Purple and Meteor say that this is anti-competitive conduct which is unlawful because it is wrongfully discriminatory and is intended to damage competition (and it would have that effect).

Control of the forecourts

33. HAL claims to be entitled (and indeed, subject to the decision in this action is entitled) to rely on the control of forecourts by virtue of byelaws. It appears that the byelaws were amended in order to further HAL's aims to leave it as the sole forecourt valet parking operator. The position is as follows.

34. Use of the forecourts is controlled by byelaws and Traffic Management Orders ("TMOs"). The governing byelaw is The Heathrow Airport – London Byelaws, 1996 ("the Byelaws") which provides in the relevant part as follows:

1. Interpretation

1(1) In these byelaws:-

...

"the Airport" means the aerodrome known as Heathrow Airport - London;

"the Airport Company" means Heathrow Airport Limited, and where the context so requires references in these byelaws to the Airport Company shall include a reference to any person engaged (whether by employment or otherwise) by the Airport Company;

"Airport Official" means a person authorised in writing by the Airport Company to perform specified functions under these byelaws;

...

"Constable" includes any person having the powers and privileges of a constable;

...

"Sign" means any object or device (whether fixed or portable) for conveying warnings, information, requirements, restrictions or prohibitions of any description;

...

"Vehicle" means any mechanically propelled conveyance or manually operated apparatus on wheels and includes trailers items of plant that operate as wheeled Vehicles and as static apparatus but does not include an Aircraft."

...

3. Prohibited Acts

...

3(10) No person shall allow any Vehicle, Animal or thing to be on the Airport after its presence on the Airport has been forbidden by a Constable or an Airport Official and no Constable or Airport Official shall forbid the presence of any Vehicle, Animal or thing unless he has reasonable grounds to believe that its presence has been responsible for or is about to be responsible for a breach of a byelaw or a criminal offence.

3(11) Not to return for 24 hours

No person, shall allow any Vehicle, Animal or thing to be on the Airport after having been required by a Constable or an Airport Official to remove it and no person after having complied with this requirement shall allow that Vehicle, Animal or thing to re-enter the Airport for a period of twenty-four hours thereafter.

3(12) Persons required to leave

No person shall remain on the Airport, after having been requested by a Constable or an Airport Official to leave and no Constable or Airport Official shall request a person to leave unless he has reasonable grounds to believe that that person has committed or is about to commit a breach of a byelaw or a criminal offence.

3(13) Persons not to return for 24 hours

No person, having left the Airport, at the request of a Constable or Airport Official, shall re-enter the Airport, for a period of twenty-four hours thereafter except as a bona fide airline passenger.

...

3(24) Loiter etc

No person shall loiter, frequent or remain on the airport without reasonable cause.

3(28) Fail to comply with signs etc

No person whether on foot or whilst driving or propelling a Vehicle shall neglect, fail or refuse to comply with an indication or direction given by a Constable or Airport Official or Sign exhibited by or on behalf of the Airport Company.

35. There is also control via Traffic Management Orders ("TMOs"), which HAL is empowered to make. The Heathrow Airport (Waiting and Loading) No 1 Order 2010 was made on 10th May 2010 and came into force on the same day. Articles 5 and 6 imposed restrictions:

"PART II

RESTRICTIONS

...

Restrictions applicable to roads specified in Schedule C

5. No person shall cause or permit any vehicle to stop at any time in any length of

> carriageway or on any grass verge, concrete verge or hard standing within a verge, footway, vehicle access-way or pedestrian access-way immediately adjacent to the carriageway of the roads specified in Schedule C.
>
> PART III
>
> EXCEPTIONS AND EXEMPTIONS FROM RESTRICTIONS
>
> Persons boarding or alighting from vehicles
>
> 6. Nothing in Article 5 of this Order shall render it unlawful to cause or permit a vehicle to stop in any restricted road for so long as may be necessary for the purpose of enabling a person to actively board or alight from the vehicle or to load thereon or unload therefrom his/her personal luggage."

36. Schedule C lists, amongst other things, the forecourts, which do not, for these purposes, include the area used by HVP at T1. The relevant provisions describe the forecourts in a way which excludes this area.

37. It will be noted that that form of Article 6 seems to permit both pick-up and drop-off of passengers, and would not prohibit the activities of the meet and greet operators. However, those regulations were amended just over a month later by an Amendment No 1 order which amends Article 6 so that it reads:

> "Persons alighting from vehicles
>
> Nothing in Article 5 of this Order shall render it unlawful to cause or permit a vehicle to stop in any restricted road for as long as may be necessary for the purpose of enabling a person to actively alight from the vehicle or to unload therefrom his/her personal luggage. For the avoidance of doubt, picking up passengers and picking up or dropping off vehicles is not permitted."

38. This amendment was procured by members of Mr Brown's team, but he was, somewhat surprisingly, unable to give any evidence of how it came about. No documents were produced which preceded its creation, despite the fact that there must have been some. Mr Brown put this down to HAL's small e-mail boxes which led to deletion of emails, but it is nonetheless very surprising that there is no documentary trail for this amendment. Against the background of this case, I find that it was done in order to bolster and assist the implementation of the plans to remove the meet and greet operators, other than HAL, from the forecourts. Mr Brown more or less admitted as much, but I would so find anyway.

39. The TMO contains definitions which suggests that it was intended to provide for permits to be given by HAL or the police so as to give certain exemptions, but as I read the order it does not actually manage to provide for such exemptions in terms. Other regulations, to which I need not refer, do apparently allow for the issue of permits, and on 17th March 2010 HAL propounded some terms and conditions for permits and permit holders. These provided:

> "2.2 A permit may be issued where the issuer is satisfied that the activity cannot be reasonably carried out by parking the vehicle in a car park and that one of the following criteria has been met:
>
> ...(d) the permit(s) are essential to the efficient operation of the BAA licensed valet operation or Kerbside Check-in activity on the forecourt."

40. Condition 3 emphasises the need to demonstrate an inability to use the car park:

> "3.1 Subject to the issuer being satisfied that the applicant meets one or more of the eligibility criteria in section 2 above, the applicant will need to provide evidence that the activity cannot be facilitated from a car park..."

41. HVP was allowed a 20 minute maximum waiting period for each car. The regulations did not provide for, (or on their true construction, permit) any permits to be issued to off-airport meet and greet

operators.

42. These permit regulations were not amended. It will be noted that in order for HVP to be issued with a permit, the activities have to be ones which cannot reasonably be carried out from within the car parks. HVP has been given the benefit of permits in respect of its operations at T3 and T5 (they are not necessary for T1 because they are not operating from a restricted waiting area). Logically it would follow that it has been determined that it cannot reasonably carry on its activities from a car park, though it was not demonstrated that anyone had actually thought about this. The logic of this makes it difficult for HAL to say that the meet and greet operators can successfully carry on their activities from the car parks.

43. The parking regime did not permit HAL itself to impose penalties. The police could use criminal enforcement procedures, but HAL itself could only employ marshalls to enforce by persuasion or admonition.

Claimants' Witnesses

44. I heard evidence from the following witnesses for the claimants.

Mr Mark Hinge. He is the managing director of Purple and gave evidence of his company's meet and greet business, the markets, the history of the dispute and the effect of what he described as discrimination on his company's business. He gave clear and convincing evidence and was a reliable witness.

Ms Sarah Anglim. She is a director of Meteor and gave evidence of the same sort of things as Mr Hinge did, but in relation to Meteor's business. She was a good and careful witness who expressed herself moderately.

Mr Hugh Edwards. He is the Managing Director of Hedway Consulting, a travel management consultancy who recommends travel solutions. He has himself used Meteor's services and gave evidence of what would happen if Meteor was no longer able to use the forecourt. His witness statement said that Hedway would cease to use Meteor and would switch to HVP, and would recommend the latter to their clients. However, when it was suggested that the extra time which use of car parks did (and did not) require he said he would want to look at the timings in more detail before he himself switched. This, to some extent, undermined his earlier evidence. Nonetheless, he was a careful and honest witness.

Mr Brian Merry. He is the Director of Ancillary Products at Hogg Robinson (Travel) Limited. His company contracts for meet and greet services with Purple at Heathrow on behalf of a large number of customers and he gave evidence as to likely effect of their not being able to use the forecourt. He was a straightforward and impressive witness.

Mr Neville Gow. He is the operations director at Purple and gave evidence of the effect of his company's being confined to car parks for their meet and greet operations, why their use is distinguishable from that of taxis and mini-cabs, and the claimed need to enforce the parking restrictions. His evidence was convincing.

Mr Michael Butcher. He is the regional travel manager for Alácatel Lucent. Alcatel is a large provider of corporate telecommunications and a significant user of Heathrow. It uses Meteor's meet and greet services at Heathrow and currently averages 15 bookings per week. He gave evidence of the effect of a switch from the forecourt to the car park. Again, he was a good and clear witness.

Mr Scott Witchalls gave expert traffic management evidence for the claimants. He was a careful and impressive witness.

Mr James Rothman gave expert evidence on surveys, as a result of a late introduction of similar expert evidence by HAL. His evidence was considered and careful.

45. In addition to those witnesses Purple and Meteor put in two witness statements under the Civil Evidence Act. This was not opposed, but obviously the absence of cross-examination goes to weight. Mr Aubrey King is a director of Supplier Management for Carlson Wagonlit UK Ltd, a leading travel management company. He gave evidence of his view as to the relative desirability of the car parks and

forecourts for meet and greet operations and the likelihood of a change of supplier if Purple (who is its preferred supplier) were to be confined to the car parks. Mr David Molloy is employed by Virgin Atlantic Airways Ltd. His company flies out of T3 and Purple has been its preferred supplier, fulfilling 175 meet and greet bookings per week and 150 park and ride bookings per week. His witness statement comments on the usability of the T3 short stay car park for pickup and drop-off and he says that if the relocation were to happen and to be permanent then Virgin would have to consider switching to "the provider operating on the forecourt".

Defendant's witnesses

46. The following witnesses gave evidence for HAL.

Mr Fraser Brown. He is the Head of Travel Services for HAL and by and large has been responsible for bringing about and implementing the attempted move of the off-airport meet and greet operators to the car parks. He described the motivation for that and the alleged operational needs. He was not, I regret to say, always a reliable witness. He was at times defensive beyond the natural instincts of a cross-examined witness, evasive and his witness statement sought to put glosses on things which it is hard to accept he really believed to be accurate (for example, paragraph 39 of his third witness statement which plainly sought to attribute the removal of congestion from T5 in 2008 to the removal of the meet and greet operators and not the removal of buses, when it was the latter that was the major contributor). Above all, he was overly-reluctant to accept explicitly that which I find he believed, which is that meet and greet operators operating from the car parks would be operating from a disadvantageous location when compared with the forecourt. I think that some of his evidence was given with a view to the case he wanted to make about this and not with a view to giving accurate evidence.

Mr Nicholas Webb. He is the head of Yield Management for the BAA group and gave evidence related to the question of the relevant market, considering how customers choose products and how various products seemed to him to inter-relate in terms of customer price and competition between themselves. Like Mr Brown, he was guarded and cagey beyond what one expects of a careful witness.

Mr John Griffin is chairman of Addison Lee plc, a well-known minicab and chauffeuring company. He gave evidence of how his company uses the car park for pickups and as to its suitability. He was straightforward, and most of his evidence was uncontentious.

Mr Lee Parsons. Until shortly before the trial, Mr Parsons had been operations manager for Easyparking Heathrow Ltd. His company offered a park and ride and meet and greet service. He gave evidence of his views as to whether use of the car parks, as opposed to the forecourts, affected his company's meet and greet operations. He sought to say that car parks had the benefit of a certain drop-off and pick-up point and that customers found that beneficial. While I considered him to be an honest witness, his evidence struck me as somewhat superficial. He was also not a man of wide experience in the industry. His background had been elsewhere, and his company is only a small player (there was a suggestion that it was no longer trading but that was not formally proved in the proceedings). I did not find his evidence on the above points convincing.

Mr Neil Messenger is the coaching executive with the Confederation of Passenger Transport UK, whose job was to represent the coaching industry. He gave evidence of congestion on the airport forecourts (particularly at T1 and T3) and his suggestions for improving it – improved enforcement of the restrictions. He was careful and reliable, but his contribution added little to the debate.

Inspector James Bardwell is a Metropolitan police officer stationed at Heathrow and gave evidence of police concerns as to the use of the forecourt – congestion and unattended vehicles (a possible terrorist threat). His evidence was not significantly challenged.

Herman Maier was called by HAL to comment on the survey evidence introduced by the claimants. It turned out that he was not an expert on devising and conducting surveys, but had considerable experience in using and analysing their fruits. It was put to him that he had stepped outside his area of expertise, and to a limited extent that was true. However, his evidence still, in my judgment had value, and the points that he made had a high degree of plausibility. I certainly do not disregard his evidence.

Mr Martin Heffer is a traffic planning expert of 22 years post-graduate experience. He gave evidence as to the justification of regulating the use of forecourts and on the competitive effects of enforcement on meet and greet operators. As part of the latter he carried out timings of comparative journey times of those using the car parks and those using the forecourts. He was as careful and conscientious a

witness as Mr Witchalls.

The differences between use of the forecourt and car parks for drop off and pick up

47. A comparison of the meet and greet service when using the forecourts and when using the car parks is something that underlies the whole of this case, and various aspects of it are important at various stages of the reasoning. It is of the essence of the claimants' case that the latter is inferior to the former. It will therefore be helpful to deal with this aspect of the case at this stage so that my findings are available when necessary later on.

48. The geographical relationships between the car parks, terminals and forecourts have already been described. This results in different journeys and different journey times for passengers using each facility.

49. At T1 the driver arriving at the airport has a clear route to the forecourt (and to HVP's area). Instead of peeling off to enter the car park, the driver turns on to the forecourt (or area). The exit is also clear. He can see where he is supposed to go. The car park is different. It is not large, as multi-layer car parks go, but it has all the twists and turns to negotiate it that such car parks require. Some of the turns are tight. The claimants complained that the bay sizes were small, but it turned out that they were virtually the same size as the T5 bays, about which they did not complain, though some are partially hindered by pillars. Exiting by car from the designated area for meet and greet is not that much of a journey within the car park, but it does not present as the clean exit that exiting from the forecourt does.

50. So far as the foot journey between the terminal at T1 and the car park is concerned, the time differentials are not that great or, nominally, significant. Experts have walked the journeys and timed them. A dropping off passenger has a journey time which is 1 minute 18 seconds faster from the forecourt, which even Mr Hinge accepted was not significant ("fairly immaterial"). It is actually 49 seconds quicker for a passenger who arrives at the terminal by air and wishes to get to his car, because the arrivals level and the designated car park area are on essentially the same level.

51. The position at T3 is rather different. The foot journey is about 2 mins 17 secs for each journey if the forecourt is used. The experts agreed that the average extra journey time involved in walking from Level 5 (the top) of the car park to the departure hall was 6.5 minutes. That is an average, so some journey times would be longer. Mr Heffer timed the reverse journey, from arrivals to the car park, at a maximum of an extra 5 minutes; Mr Witchalls measured it at just over 7 minutes. I expect the difference can be explained by the length of time taken to wait for lifts. Many would be likely to experience the longer time differential. These are significant differences, and will in my view have a very material effect on the customer perception of the whole parking experience when compared with the use of the forecourt. Having walked the journey myself at the start of the trial, I can well envisage the tiresomeness of the longer trip, and the frustrations that would follow.

52. HAL sought to say that these differentials were insignificant in the context of overall journey times to Heathrow, and in pure comparative terms that may be correct. If a passenger has travelled more than 2 hours to get there (which many will have done), an extra 6 or 7 minutes in the airport seems, in purely numerical terms, an insignificant extra time. That, however, misses the point. I consider that in terms of what the passenger expects and perceives these will be differences which are beyond the mildly irritating. They will be treated as significant and impacting seriously on the perception of the quality of service.

53. That deals with the differences as a matter of objective timing. There is also the question of perception of the "trip" from the terminal to the car park and vice versa. For the customer who likes the convenience of the forecourt, treating it as like a car park outside the terminal, neither trip produces something that I or they would regard as equivalent. Nor is the car park experience itself comparable to the forecourt. HAL produced evidence of the Park Mark awards – an independent form of certification of the standard of car parks. I do not consider that they have much to do with the issues in this case. Its car parks pass muster as car parks, but that is not the point. They are still car parks. The T1 car park presents as a tight, somewhat gloomy, functional concrete car park. Views may differ as to where it is on the scale, and even Mr Hinge thought that the T3 short stay car park was somewhat better than T1, but the car parks are still what they are, and neither of them is a forecourt with its open air aspect and appearance of just being "over the road" from the terminal. The journeys from them do not improve this perception. The journey to and from the T1 car park involves a short trip through the car park, and then a lift, in the case of departures. I can quite see how someone who likes the convenience of the forecourt will not be convinced that this is the same thing as a trip from the forecourt. That is very much

more the case for T3. There the journey is not only longer; it involves 1, or in the case of arrivals 2, lifts (if the passenger has luggage). If lifts are not working, or are busy, there will be significant delays beyond the timings referred to above. The outward trip for departing passengers involves a longish underground walk with a walkway. The sort of passenger who appreciates the convenience of forecourt drop-off is not, in my view, going to think of this as the same sort of thing at all. Ms Anglim said this in her own words, and I agree with her.

54. The T3 car park also sometimes suffers from delays or congestion within itself, at pinchpoints, which will not commend itself to the user. This was originally denied on behalf of HAL in some unedifying correspondence which Mr Brown sought unsuccessfully to justify. At their worst these delays can amount to between 20 and 30 minutes on entry or exit, though often it will be rather less. Furthermore, from time to time (and often) at times of significant congestion signs at the entry to the airport complex inform those arriving by car that the T3 car park is closed. They re-direct intending users from the T3 car park to car park 1A, which is a car park a little farther away from T3. If a passenger arriving at the airport and expecting to drop off his car in the T3 car park sees these signs and accepts them at face value, he will be in a quandary as to what to do. In fact the position is usually that the T3 car park is still open, and can be accessed by the passenger. The signs are not intended to reflect the truth, but are intended to achieve certain traffic behaviour (viz. the redirection of traffic away from T3). The driver will not know that unless warned in advance. Giving that warning will not be straightforward, and this experience will again not enhance the experience of using the car park, when compared with the forecourt. There are occasional real closures, but they seem to be infrequent and of short duration. The forecourts are not subject to these disadvantages.

55. The directors of Purple and Meteor gave evidence of these sort of drawbacks, and I accept their evidence. It is reinforced by the evidence of some of the supporting witnesses. Mr Merry of Hogg Robinson has considerable experience of customer requirements. His company books meet and greet at Heathrow (and elsewhere) with Purple. His view was that it was not possible to conduct a quality meet and greet operation from the car parks, principally because of the extra time involved and the time manoeuvring into and out of the car parks, particularly at peak periods. Even though the journey time to the T1 car park from arrivals was apparently sometimes less than the journey to the forecourt, he maintained his stance. I consider that he was reflecting the perceived view of his customers about the whole experience. He referred to adverse comments and complaints from his customers who had experienced the new regime at T3. Mr Edwards gave evidence that he and his customers would view a service from the car park as substandard. Mr King (in his untested evidence) referred to the poorer quality of the T1 and T3 car parks and the fact that a service operated from there would be second rate when compared to a "premium" quality service on the forecourts. Mr Molloy of Virgin considered it was "self-apparent" that the top floor of the T3 car park was a far less convenient location, though the rest of his statement went on to rely heavily on the Purple/Meteor survey referred to elsewhere in this judgment and not on his own or his company's experience. Mr Butcher also emphasised the convenience of the forecourt over the car parks and was not impressed by arguments that the car park at T1 might be quicker for some journeys.

56. The evidence of the Purple/Meteor surveys, dealt with in a separate section in this judgment, shows a level of customer dissatisfaction with the operation from the T3 car park, as opposed to the forecourt, that reinforces the matters referred to above further. Though there are flaws in the survey, for the reasons given in that separate section I think it has some evidential weight. I regard it as significant, and it favours the case of the claimants.

57. Overall, HAL's own evidence points the same way. Its publicity emphasises the convenience of dropping the car off and picking it up at the forecourt. Elsewhere in this judgment I refer to a report by Caroline Thompson and Associates which extols the merits of valet parking, which are inconsistent with operating it from a car park. Mr Griffin of Addison Lee, while conducting a different sort of business, accepted the crucial importance of drop off at the forecourt. His drivers who went to pick up passengers had to park in the car park and go into the terminal to fetch the customer, but ideally even he would not have wanted to use the car park.

58. Mr Brown's witness statement sought to paint a picture in which he portrayed the car parks as being entirely acceptable places from which to conduct a meet and greet operation – "fair and reasonable location for the off-airport meet and greet operators to conduct their operations" was the phrase he used, and many paragraphs in one of his witness statements were given over to extolling the virtues of the car parks. However, in his cross-examination he admitted that the T1 car park would not be as good for business as the forecourt. He admitted (in a manner which suggested a strong reluctance to do so) that the former would give rise to an inferior service. He was not asked the same question in terms about T3, but the same must follow as a matter of logic.

59. In my view the proof of the pudding is in the eating, or (at the risk of extending the metaphor unacceptably) in the fact that HAL was not prepared to eat it. There was a suggestion, made in evidence, that HVP was considering moving its pick-up to the T3 car park. This remains in the realms of something it is said to be investigating. It was not, apparently, considered when the other relocations were proposed. Other than that, there is no suggestion that HVP is going to give up its position on the forecourts and move into the car parks itself, despite all the evidence of congestion, particularly at T3. One has to ask why that is, and the answer is, in my view, plain. The car parks do not present anything like as advantageous a trading position. The reason for that is all the reasons set out above, and they are not removed by demonstrating that, as a matter of pure timing, use of the T1 car park can be shown to be as quick or quicker for some passengers. Attempts by the witnesses, including Mr Webb, to suggest advantages of the car parks under some conditions (bad weather, lots of children) are unconvincing (not least, in the case of bad weather, because the top of the T3 car park is even more exposed than the forecourt).

60. The evidence of Mr Parsons does not give rise to any deflection from this conclusion. Mr Parsons sought to demonstrate the preferable nature of the car parks over the forecourts, but he was a man whose only experience was with a small operator, and who had little experience with them. Compared with the significant operators on the other side his evidence has little weight and I reject it. Nor does Mr Griffin's evidence that one can operate a "premium service" from the car parks deflect either. Mr Griffin is operating a different premium service, which can only be operated from the car parks in terms of pick-up (and his service uses the forecourts for drop-off), and in any event does not have any choice, or competition from the forecourt in terms of pick-up. His drivers conduct the customer to the right place in the car park, and deal with the luggage. I did not find his evidence on this point helpful or particularly relevant.

61. It does not contradict my overall conclusion to say, as HAL does say, that the fact that Purple and Meteor operate successfully from the fast track area at T5 means that they cannot claim that operation from a car park is inconsistent with a meet and greet service. The T5 car park is a different proposition as a car park (as various of the claimants' witnesses plausibly pointed out), and in any event it was not part of the claimants' primary case to say that no meet and greet service at all could ever be operated from the car parks. This primary case is about competition between a service operated from the forecourt and a service operated from the car park, and whether (and to what extent) they can be viewed as the same service. Furthermore, the claimants were going to take a point about the differences between the fast track and the lower levels at T5, until Mr Brown's "concession" on Day 7.

62. I therefore find that the car parks are a very much worse place from which to conduct a meet and greet operation than the forecourts. They are not nearly so appealing to the end customer.

The survey evidence

63. After the temporary arrangements at T3 were put in place pending the trial, Purple and Meteor undertook a survey of their T3 customers in an attempt to find out their views. The survey was not devised by an expert. In the survey customers were asked to give ratings on a scale of 1 to 10 of the convenience of having the car collected on the forecourt, the convenience of having it returned on level 5 (Purple) or level 1 (Meteor) of the car park, the convenience of having the car collected in the car park, the convenience of returns being relocated to the forecourt, whether the customer would continue to use valet parking if all operators operated from level 5 of the T3 car park, and whether they would continue to use Purple/Meteor if they were operating from the car park while others (unspecified) operated on the forecourt.

64. Purple had 662 responses out of 3279 requests; Meteor had 96 out of 540.

65. The data for Purple can be summarised as follows. I take Mr Hinge's formulation, apart from the formulation at (c) where I think that Mr Rothman's is slightly more reliable in its description of the category.

> (a) 71% of those who replied gave a rating of 10 for the convenience of having their cars collected on the forecourt, while only 5% gave a rating of 10 for collection on the top floor of the car park.
>
> (b) 62% favoured the forecourt for returns, compared with 8% who gave the top rating for the car park.

(c) 42% said they would not use Purple's meet and greet service again if they had to use the car parks while others were operating on the forecourt. 23% said they did not know what they would do.

(d) 57% of customers said that they would switch to a forecourt operator if Purple was confined to the car park; 29% said they did not know. Mr Hinge interpreted this as meaning that between 57% and 86% of his meet and greet business would be at risk.

66. Meteor's figures, on their smaller sample, were higher – over 80% favouring the car park under the first two heads, and 75% and 86% saying they would not use Meteor under the second two respectively.

67. The overall pattern of the results (which have been analysed in more detail by the experts, and particularly Mr Rothman) is that their customers express a strong preference for the forecourt service, and, prima facie at least, a large number would move to a forecourt provider if Purple and Meteor had to operate from the car parks.

68. This pattern, and other conclusions to be drawn from the survey, are relied on by Purple and Meteor as showing that the car parks are regarded as being inferior to the forecourts in the context of a meet and greet service. HAL challenges the survey as a whole, and invites a finding that its structure and presentation make it worthless for these (or indeed any relevant) purposes. HAL's challenge is based on the evidence of Mr Maier, who criticises the way the survey was presented. Purple and Meteor's riposte to that is to challenge Mr Maier's standing as an expert witness and to say his evidence is effectively worthless.

69. I have already indicated that I do not discount Mr Maier's evidence, though I accept that his expertise is not, for the purposes of this action, as great as Mr Rothman's. I think that Mr Rothman's has greater weight, but I do not think that the differences between them require me to decide to adopt the entire views of the one over the views of the other. The criticisms that Mr Maier makes of the survey have some validity as criticisms, and so far as they have validity then they affect the weight of the conclusions to be drawn. However, they do not require me to discount the survey results entirely, which is what Mr Maier's report seems to say should be the case.

70. Mr Maier's criticisms, and Mr Rothman's responses were as follows:

(a) The explanatory letter which accompanied the invitation to participate in the survey was capable of biasing in favour of Meteor by portraying Meteor as the underdog. Mr Rothman accepted that that was the case, but said that it was unlikely on the facts to have influenced any of the participants to change their preferences. Mr Rothman may be right in relation to some participants. I think that Mr Maier's criticism has some validity, and I therefore think that it cannot be dismissed as easily as Mr Rothman would say (though to be fair to him he does accept later on that the relevant references were capable of influencing the responses to a degree), but by the same token it does not require me to disregard the survey. For my purposes, in this action, it goes to weight.

(b) The covering letter stated that the survey could influence the location of meet and greet in the future, and Mr Maier said that this provided a motivation to respond in a way which would influence the decision. Mr Rothman dismissed this objection – the statement was a neutral description of the purpose, which was entirely acceptable. Again, I do not dismiss it myself. It is capable of providing a subtle influence over the answers, and goes to weight.

(c) Mr Maier pointed out that there was no weighting for the response rate (which was seriously below 50% for both surveys). Mr Rothman said that this factor was appropriate for some polls, depending on the objective but did not invalidate this one as one which sought to establish whether there would be a material effect on the business of Purple and Meteor. I accept Mr Rothman's evidence on this point.

(d) Mr Maier stated that the survey did not take account of other factors, such as price, that would be capable of influencing a decision on use of the car park as opposed to the forecourt. Mr Rothman agrees that that ought to be part of a survey if one is trying to arrive at an exact assessment of how much business Purple and Meteor would lose if moved to the car park, but since it was not the purpose of the survey to assess that matter then it was not a fundamental flaw in the survey. In any event, he says, the responders had an opportunity to mention price in a separate comments box, and a few of them did, so it is unlikely that many of them would have been influenced by the price factor. Again, I accept Mr Rothman's evidence, but I must still be careful about the weight to be attributed to the survey.

71. Having taken all this into account, I find that this survey evidence does, as submitted by Mr Maclean in slightly higher-flown language, demonstrate the view of a very significant part of Purple and Meteor's meet and greet customers that they are very antipathetic to the suggestion that car parks are a reasonable alternative to the forecourt at T3. It could have been fuller, and the questions could probably have been better drafted. If that had happened then one might have been able to draw more, and firmer, conclusions from it. However, the failure to do those things does not make it worthless, and it has some real weight. It leads, inter alia, to the conclusion just expressed, which in turn goes to my findings above as to the respective merits of those two venues as part of the meet and greet process.

The legal basis of the claim

72. The starting point and basis for the claim in this case is section 18 of the Competition Act 1998. It provides:

> "(1) Subject to section 19[1], 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".

73. This trial takes place on the footing (as specified in the order of Roth J providing for an expedited trial, and for the purposes of the trial only) that HAL is dominant in the "Facilities Market", namely the provision of access to Heathrow's facilities, including its roads and forecourts. So the case starts from that common ground.

74. Thereafter the parties diverge on practically all major issues. They agree that the claimant has to establish:

> (i) an abuse,
>
> (ii) which has an anti-competitive effect so far as the consumer is concerned, and
>
> (iii) that that conduct is not objectively justified. However, within those points there are major disputes as follows.
>
> (a) It is common ground that the claimants have to establish an abuse of that dominant position. However, there is a major dispute as to the way in which the claim can be made and what Purple and Meteor are entitled, or forced, to rely on as being an abuse in this case. Purple and Meteor rely on head (c) above (dissimilar conditions). HAL says that this case should be treated as an "essential facilities" case if it is a case under the section at all. The effect of this is said by HAL to impose a more stringent test of the effect on

competition. HAL says that if it is an essential facilities case then the abuse is actionable only if it is established that competition is or will be eliminated. It would not be sufficient to show that it was merely impaired. Purple and Meteor dispute this analysis, and press their claim under head (c), under which it can rely on impairment of competition short of elimination, though they advance a secondary case on "essential facilities" in the alternative, not accepting HAL's case as to the consequences of that categorisation in terms of the degree of destruction of competition that must be established under that head.

(b) Next there is a dispute as to the downstream market by reference to which the abuse is said to take place. The claimants' case is that HAL has abused its dominance in the upstream market by applying dissimilar conditions to equivalent transactions as between HVP on the one hand and the off-airport meet and greet operators on the other adversely affecting competition in a downstream market. There is a dispute as to what the downstream market is. There are three candidates – the Meet and Greet market (the provision of meet and greet services at Heathrow); the Premium Services market (on-airport short-term and business parking and meet and greet); and the Parking Market (parking services at Heathrow, including off-airport park and ride parking). Those markets are stated there in their ascending order of width, as will be obvious from their respective descriptions. Purple and Meteor rely on all of them so far as may be necessary, but they make primary, secondary and tertiary cases in relation to them in the order in which I have set them out. HAL says the relevant market is the third of those – the Parking Market.

(c) Having established that, there is then a dispute as to whether the requirements of paragraph (c), if applicable, are fulfilled.

(d) Then there is a dispute as to the effect, if any, on competition.

(e) If the claimants have won so far, then I have to resolve whether, notwithstanding the anti-competitive effect of HAL's steps, they are nonetheless objectively justified.

I shall deal with those areas in that order, but in order to do so I occasionally have to move sideways to deal with issues that emerge on the way.

Does this case have to be treated as an essential facilities case; and if so, with what consequence?

75. It is common ground that if the disputed activities are to infringe this section, it must be demonstrated that they have an effect on competition. However, there is a dispute as to law in relation to the level or extent of effect that has to be established. Mr Brealey says that the claimants have to go so far as to show that the activities of HAL would be likely to lead to an elimination of competition (or effective competition, if that is different) before the court is entitled to intervene. Mr Maclean says that it is sufficient to show that competition is hindered – he does not have to demonstrate elimination (though he says he can actually do that on the facts if it is necessary to do so). So the competition is between elimination, and an effect less than elimination which, for the purposes of this judgment I shall call "hampering" or "hindering".

76. Mr Brealey accepts that in other areas an effect less than elimination can lead to unlawfulness. He gives, as an example, a horizontal cartel. But what makes cases like this different, according to him, is that they fall into the category which he describes as "essential facilities" cases. HAL has an asset (a facility) which it owns and controls. The facts which are relied on by Purple and Meteor, so far as established, amount to a complaint that they have been refused access to those facilities, and the authorities show that a high test is required before that can be said to be wrongful. That high test is founded in policy reasons of not allowing proprietary rights (and the consequential freedom to decide who has access to those rights) to be easily overridden in favour of (inter alia) a competitor, and is achieved by requiring elimination of competition as a condition of actionability.

77. Mr Maclean says that that is a false characterisation of the wrong alleged. If a characterisation is required in this particular case it is to be found in a discrimination category, as referred to in section 18 (2)(c), not in some notion of "essential facilities", and there is in any event no such category which has such high requirements. The real question is whether there is an abuse of dominant position within section 18, and the instances given in subsection (2) are merely examples of what an abuse is. The

alleged "categories" are only catalogues of types of abuses, referable back to the overall principle to which one ultimately has to refer, not instances with rigid requirements. In any event, he says, the authority or authorities relied on by Mr Brealey do not establish any such high standard even if there are relevant "essential facilities" cases.

78. Mr Brealey's submissions seem to me to approach the matter in a way that is wrong in principle. The basic wrong is that set out in section 18 itself. It is plain from the wording of the section that what follows in subsection (2) is a list of examples of factual situations in which an abuse is capable of existing, not an exhaustive list of such situations or an exhaustive list of criteria applicable to those examplar situations. As the ECJ said in *Deutsche Telekom v European Commission* Case C-280/08P:

> "173 Furthermore, the list of abusive practices contained in Article 82 EC [an equivalent to section 18 for practical purposes] is not exhaustive, so that the practices there are merely examples of abuses of a dominant position. The list of abusive practices contained in that provision does not exhaust the methods of abusing a dominant position ..."

79. Mr Brealey's submissions require one to treat each of those examples, and the "essential facilities" type of abuse, as being individual pigeon-holes into which one must fit a case, and having thus fitted it to fulfil a list of criteria said to be applicable to that pigeon-hole. That is an erroneous approach. The statutory examples, and those developed by subsequent case law, are ways in which the basic wrong can be committed, but at all times an eye must be kept on the basic wrong itself. Unless the case law contains a principle which says that in factual situations of type X, condition Y must always be fulfilled even though it is not required in all other cases, then the analysis is not as rigid as Mr Brealey says it is.

80. In my view the case law does not require such an approach. Mr Brealey's high water mark is *Oscar Bronner GmbH v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH* Case C-7/97. The question in that case was whether a newspaper was abusing its dominant position in refusing to allow a competitor to use the home-delivery network that the former had set up. There are a number of statements in that case about the position where a dominant person controls something which is essential in order to operate in the market in question. Advocate General Jacobs' Opinion records that Bronner relied on "what is known as the 'essential facilities' doctrine" (para. 33). There then follow various references to cases in which elimination of competition was referred to. He refers to *Commercial Solvents* [1974] ECR 223 where a dominant supplier could not refuse to supply where it:

> "wished to eliminate the former customer from the market." (para. 35).

81. In paragraph 37 he referred to two cases where dominant undertakings reserved to themselves an ancillary activity:

> "with the possibility of eliminating competition from [another] undertaking"

and where on the facts one of the companies refused to supply:

> "thereby eliminating all competition on an ancillary market for the benefit of its associate."

82. In those citations the Advocate General was not setting out the requirements of liability in an essential facilities situation. He was merely indicating what the facts were. He is not making findings that elimination was necessary. However, elimination of competition would be the effect if logically the case is a true "essential facilities" case. If something is essential to competition on the market, then if only the dominant person has access to it then, a fortiori, there cannot be competition. Competition will inevitably be eliminated. If there can be competition then the facility is not essential.

83. The Advocate General then went on to describe the American anti-trust doctrine in which the submissions had their origins and he described the relevant effect on competition thus:

> "[A refusal to deal] will not be permissible where the refusal leads to reduced competition and higher prices, or reduces in any other way the quality of service or goods in relation to price to the consumer."

84. While he did not express the requirements of the US doctrine as being the same as the requirements

of an EC equivalent, his recitation of that particular aspect of the US doctrine does not suggest that he was suggesting a stricter requirement (elimination of competition) as being part of European competition law.

85. In paragraph 54 he identifies the first question that the national court had posed, namely whether a dominant supplier could commit an actionable abuse if it refuses access to its distribution system in the absence of other features which usually featured in abuse cases, such as cut-off of supplies, tying sales *or discrimination* (my emphasis). In paragraph 55 he disclaimed any intention to provide a comprehensive guide to the issue, though he went on to provide some general pointers. In none of them did he say that what was necessary for there to be an abuse was an elimination of competition, and paragraph 61 strongly suggests that he did not think it was. In that paragraph he said:

> "It is on the other hand clear that refusal of access may in some cases entail elimination *or substantial reduction* of competition to the detriment of consumers in both the short and long term." (my emphasis)

86. It is apparent from its context that he contemplates that either could be the basis of an abuse claim.

87. While I have dealt with this Opinion at some length (because it is the major part of the foundation of HAL's case on the point) I have not set out every passage which has a nuance one way or the other. I have set out the most salient features of it. So far as the Opinion contains nuances, they do not, in my view, support what Mr Brealey seeks to get out of it. The references to elimination are, on analysis, references to the facts of particular cases, and no more. This is not surprising. The question was not directly in issue.

88. However, Mr Brealey also relied on the judgment of the Court in that case. In paragraph 41 the Court observed:

> "41. Therefore, even if that case-law on the exercise of an intellectual property right were applicable to the exercise of any proprietary right whatever, it would still be necessary, for the *Magill* judgment to be effectively relied upon in order to plead the existence of an abuse within the meaning of Article 86 of the Treaty in a situation such as that which forms the subject-matter of the first question, not only that the refusal of the service comprised in home delivery be likely to eliminate all competition in the daily newspaper market on the part of the person requesting the service and that such refusal be incapable of being objectively justified, but also that the service in itself be indispensable to carrying on that person's business, inasmuch as there is no actual or potential substitute in existence for that home-delivery scheme."

89. The case law referred to, and the *Magill* case ([1995] ECR-I 743), were intellectual property or licensing cases. Mr Brealey points to the word "eliminate", and says that the court decided that that standard was relevant to essential facilities cases.

90. In my view Mr Brealey is vesting that word with too much significance. The distinction relied on in the present case was not an issue in that case, and I do not consider it likely that the court had it in mind and was rejecting a standard short of elimination. It was reflecting on the facts of the previously decided cases. A previous reference to elimination in paragraph 38 was such a reflection, and not a finding of an applicable standard.

91. Accordingly I do not consider that this case establishes what Mr Brealey seeks to get out of it. First, it does not require me to choose a single exclusive pigeon-hole for the abuse alleged in the case before me; second, if it does, it does not specify that it has to be the "essential facilities" pigeon-hole; and third, it does not clearly provide that one has to establish the elimination of all (effective) competition even in an essential facilities case, though as a matter of logic if the facilities are truly exclusive (in the sense of being the only ones available) then it would follow that no competition would be possible.

92. He gains a little more support from the decision of the CFI in *Microsoft v The Computing Technology Industry Association Inc* Case T-201/04. At paragraph 569 the Court embarked on the resolution of a dispute as to whether the test for abuse in case of a refusal to grant a licence in relation to intellectual property was that the conduct was "likely to eliminate all competition" or that there was a "high probability" that the conduct would have that result. In paragraph 561 the Court found that they meant the same thing, but in paragraph 563 it said:

> "Nor is it necessary to demonstrate that all competition on the market would be eliminated. What matters, for the purpose of establishing an infringement of Article 82 EC, is that the refusal at issue is liable to, or is likely to, eliminate all effective competition on the market. It must be made clear that the fact that the competitors of the dominant undertaking retain a marginal presence in certain niches on the market cannot suffice to substantiate the existence of such competition."

93. Taken on its face, that would appear to support Mr Brealey. However, I bear in mind that the present point was not in issue in that case, and at paragraph 561 the Court had said:

> "If the Commission were required to wait until all competitors were eliminated from the market, or until their elimination was sufficiently imminent, before being able to take action under Article 82 EC, that would clearly run counter to the objectives of that provision, which is to maintain undistorted competition in the common market and, in particular, to safeguard the competition that still exists on the relevant market."

94. The reference to the underlying policy is significant. Given that that is the policy (which I accept) then it would be potentially contravened if the effect on the competition was less than an elimination of effective competition, but still had some real and serious effect. Distortion is not synonymous with elimination.

95. Mr Brealey also pointed to the Commission's Guidance document 2009/C 45/02. At paragraph 75 the Commission refers to its starting point that a person has freedom to choose its trading partners and states that in refusal to supply cases it will consider a case to be an enforcement priority if (inter alia) the refusal to supply would be likely to lead to the elimination of effective competition (paragraph 81). However, as the document itself points out in paragraph 3, it is not a statement of the law, and paragraph 81 makes it clear that what is being referred to is an enforcement priority, not a definition of abuse. I do not think that this document assists the debate.

96. Other authority points against the law being as rigid as Mr Brealey says it is. In *Burgess v Office of Fair Trading* [2005] CAT 25 the Competition Appeal Tribunal heard a case involving a refusal of funeral directors who were also the owners of a local crematorium to allow access to that crematorium. At paragraph 311 of the judgment of the Tribunal it summarised the case law as follows:

> "(1) An abuse of a dominant position may occur if a dominant undertaking, without objective justification, refuses supplies to an established existing customer who abides by regular commercial practice, at least where the refusal of supply is disproportionate and operates to the detriment of consumers ...
>
> (2) Such an abuse may occur, in particular, if the potential refusal of the refusal to supply is to eliminate a competitor of the dominant undertaking in a neighbouring (e.g. downstream) market where the dominant undertaking is itself in competition with the undertaking potentially eliminated, at least if the goods or services in question are indispensable for the activities of the latter undertaking, and there is a potential adverse effect on consumers ...
>
> (3) It is not an abuse to refuse access to facilities that have been developed for the exclusive use of the undertaking that has developed them, at least in the absence of strong evidence that the facilities are indispensable to the service provided, and there is no realistic possibility of creating a potential alternative ...
>
> 312. The foregoing propositions suffice for the purposes of the decision in this case but are not intended to be an exhaustive statement of the issue of refusal to supply by a dominant firm under the Chapter II prohibition [i.e. section 18]. For example, if a competitor is substantially weakened but not eliminated, it is not necessarily the case that no abuse has occurred, in our view."

97. The Tribunal had *Bronner* before it in that case, and relied on it. The second sentence of paragraph 312 is of obvious significance. The Tribunal clearly did not think that principle, or *Bronner* (and other cases,) necessarily imposed a test of elimination. I respectfully agree.

98. The recent case of *Deutsche Telekom AG v European Commission* Case C-80/08 P demonstrates an

approach which is inconsistent with Mr Brealey's approach. It involved an allegation of anti-competitive behaviour by a national telecommunications company which offered prices to consumers and to its competitors which amounted to a margin squeeze – the difference between the wholesale price it offered to its competitors and its own retail price meant that it was difficult for the latter to compete. It was, on analysis, a potential "essential facilities" case – the General Court had found that the wholesale services were "indispensable to enabling a competitor to enter into competition with the [appellant]" (paragraph 237, cited by the Advocate General at paragraph 6 of his Opinion); and the Court noted the same thing in its judgment at paragraph 231. Yet it did not go down some special line of consideration appropriate to such a case. The thrust of the judgment of the Court was to consider the case as an instance of abuse with a number of aspects. It expressed itself generally in paragraph 175:

> "175. It is apparent from the case-law of the Court that, in order to determine whether the undertaking in a dominant position has abused such a position by its pricing practices, it is necessary to consider all the circumstances and to investigate whether the practice tends to remove or restrict the buyer's freedom to choose his sources of supply, to bar competitors from access to the market, to apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage, or to strengthen the dominant position by distorting competition ..."

99. This is quite contrary to the pigeon-holing approach of Mr Brealey. Furthermore, despite the fact that the case involved essential facilities, there is no real indication that this required a higher test for the exclusion of competition, though again that point was not in issue. There are, if anything, indications to the contrary – see for example the general citation in paragraph 174 of the oft cited passage from *Hoffman-La Roche v Commission* [1979] ECR 461 where it was said:

> "The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of *hindering* the maintenance of the degree of competition still existing in the market or the growth of that competition." (my emphasis)

100. See also the reference in paragraph 177 to conduct which made it " ... more difficult or impossible..." for competitors to enter the market; and the reference in paragraph 234 to prohibiting conduct which would (inter alia) "restrict" access to the market. Those are not absolute terms.

101. At the trial I was also addressed, in this context, on the Opinion of Advocate General Mazak in *Konkurrensverket v TeliaSonera AB* Case C-52/09, another telecommunications case involving a margin squeeze. However, since the trial concluded the CJEU has delivered its ruling, and it is sufficient to refer to that. Again, on the facts it looks as though it might have been an essential facilities case (the telephone company owned the only local loop which was capable of carrying the services in question) but it was not put as such. The Court referred to the concept of abuse of dominant position in general terms, and pointed out that the list of abusive practices in the European equivalent of section 18 were not exhaustive methods of abusing a dominant position (paragraph 26). Then at paragraphs 54 and 55 the Court went on to deal with a submission based on *Bronner*:

> "54. TeliaSonera maintains, in that regard, that in order specifically to protect the economic initiative of dominant undertakings, they should remain free to fix their terms of trade, unless those terms are so disadvantageous for those entering into contracts with them that those terms may be regarded, in the light of the relevant criteria set out in [*Bronner*] as entailing a refusal to supply.
>
> 55. Such an interpretation is based on a misunderstanding of that judgment. In particular, it cannot be inferred from paragraphs 48 and 49 of that judgment that the conditions to be met in order to establish that a refusal to supply is abusive must necessarily also apply when assessing the abusive nature of conduct which consists in supplying services or selling goods on conditions which are disadvantageous or on which there might be no purchaser.
>
> 56. Such conduct may, in itself, constitute an independent form of abuse distinct from that of refusal to supply."

102. That suggests that a court is entitled to look at conduct, and ask the overall question of whether there is an abuse by reference to various ways of committing that abuse, and is not forced to find one single appropriate label to the abuse (particularly at the behest of the defendant) and apply some test applicable only to that form. This is also apparent from paragraph 58:

> "Moreover, if *Bronner* were to be interpreted otherwise, in the way advocated by TeliaSonera, that would as submitted by the European Commission, amount to a requirement that before any conduct of a dominant undertaking in relation to its terms of trade could be regarded as abusive the conditions to be met to establish that there was a refusal to supply would in every case have to be satisfied, and that would unduly reduce the effectiveness of Article 102 TFEU."

103. That, again, is inconsistent with a single pigeon-hole approach, and consistent with the sort of inquiry that I think the general principles require.

104. Yet again, Mr Brealey's approach is inconsistent with the Commission decision in *British Midland Airways Ltd v Aer Lingus plc* (92/213/EEC). That case involved "inter-lining" – the practice under which one airline allows another airline to book a leg of a trip covered by the former's services. It also has other co-operative aspects. Aer Lingus had allowed BMI to interline with it on the former's Heathrow-Dublin route, but withdrew the facility when BMI started to compete more directly. The Commission found that this was abusive conduct. It did not actually attach one of the categories under the equivalent of section 18, or give it any other particular label. It considered the concept of abuse, and in particular the *Hoffman-La Roche* formulation, and concluded that there was abuse, and also in particular an absence of competition on the merits. So there was no pigeon-holing. It was in fact a case in which what was being sought was compulsory access to Aer Lingus's facilities. On the facts, competition was not wholly prevented by Aer Lingus's acts – in fact by the time of the decision BMI had managed to take some steps to remove some of the effects of the refusal to inter-line - but that did not prevent abuse being found.

105. I therefore find that the case against HAL does not have to fit into the category of essential facilities or fail. Even if the subject of the Facilities Market can be described as essential facilities, Purple and Meteor are entitled to put their case on abuse in another way; and even if they rely on the "essential facilities" type of abuse I doubt if elimination of competition, as opposed to a significant enough distortion, is required.

106. However, one factor that Mr Brealey does rely on emerges clearly from the cases. He submitted that the authorities acknowledge principles of freedom to contract with those one wishes to contract with, and they also acknowledge the rights of a property owner to do with his property as he pleases. These factors are said to justify the high hurdle of eliminating competition. I have already held he is wrong on that latter point, but he is right on the rest. Thus in *Bronner* the Advocate General said:

> "56. First, it is apparent that the right to choose one's trading partners and freely to dispose of one's property are generally recognized principles in the laws of the Member States, in some cases with constitutional status. Incursions on those rights require careful justification.
>
> "57. Secondly, the justification in terms of competition policy for interfering with a dominant undertakings freedom to contract often requires a careful balancing of conflicting considerations. In the long term it is generally pro-competitive and in the interests of consumers to allow a company to retain for its own use facilities which it has developed for the purpose of its business. For example, if access to a production, purchasing or distribution facility were allowed too easily there would be no incentive for a competitor to develop competing facilities. Thus while competition was increased in the short term it would be reduced in the long term. Moreover, the incentive for a dominant undertaking to invest in efficient facilities would be reduced if its competitors were, upon request, able to share the benefits. Thus the mere fact that by retaining a facility for its own use a dominant undertaking retains an advantage over a competitor cannot justify requiring access to it."

107. Having made some observations about the need to consider the impact on the consumer, the Advocate General said:

> "62. In assessing such conflicting interests [viz. the interests of the consumer and the

> interests of a property owner] particular care is required where the goods or services or facilities to which access is demanded represent the fruit of substantial investment. That may be true in particular in relation to refusal to license intellectual property rights. Where such exclusive rights are granted for a limited period, that in itself involves a balancing of the interest in free competition with that of providing an incentive for research and development and for creativity. It is therefore with good reason that the Court has held that the refusal to license does not of itself, in the absence of other factors, constitute an abuse."

He went on to consider the facts of another case and then went on:

> " 64. While generally exercise of intellectual property rights will restrict competition for a limited period only, a dominant undertaking's monopoly over a product, service or facility may in certain cases lead to permanent exclusion of competition on a related market. In such cases competition can be achieved only by requiring a dominant undertaking to supply the product or service or allow access to the facility. If it is so required the undertaking must however in my view be fully compensated by allowing it to allocate an appropriate proportion of its investment costs to the supply and to make an appropriate return on its investment having regard to the level of risk involved. I leave open to question whether it might in some cases be appropriate to allow the undertaking to retain its monopoly for a limited period.
>
> "65. It seems to me that 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 going to physical, geographical or legal constraints or is highly undesirable for reasons of public policy. It is not sufficient that the undertakings controlled over a facility should give it a competitive advantage.
>
> "66. I do not rule out the possibility that the cost of duplicating a facility might alone constitute an insuperable barrier to entry ... In that regard it seems to me that it will be necessary to consider all the circumstances, including the extent to which the dominant undertaking, having regard to the degree of amortisation of its investment and the cost of upkeep, must pass on investment or maintenance costs in the prices charged on the related market (bearing in mind that the competitor, who having duplicated the facility must compete on the related market, will have high initial amortisation costs but possibly low maintenance costs)."

108. It is therefore highly relevant that the dominant enterprise is seeking to make use of its own facilities. That is a factor that has to be born in mind, and I shall do so. Mr Brealey would say that, on the basis of *Bronner*, it means that the high standard of elimination (rather than hampering) applies. The point has not been tested as such – it did not arise in *Bronner* – but so far as it is a good point then, on the facts of this case, the relevant underpinnings do not in my view exist to the extent contemplated by the dicta in *Bronner*. I deal with this point below in a separate section.

Market definition questions

109. In competition law it is likely to be necessary to identify the markets involved. Pursuant to Roth J's order for a speedy trial, for the present trial it is to be presumed that the upstream market is the "Facilities Market", and that HAL is dominant in it. That Facilities Market is the provision of access to Heathrow's facilities, including its roads and forecourts. However, there is an issue as to the downstream market by reference to which it has to be assessed whether competition is hampered or eliminated. I have already identified the three candidates above – the Meet and Greet market (the provision of meet and greet services at Heathrow); the Premium Services market (on-airport short-term and business parking and meet and greet); and the Parking Market (parking services at Heathrow, including off-airport park and ride parking). Purple and Meteor rely on all of them so far as may be necessary, but they make primary, secondary and tertiary cases in relation to them in the order in which I have set them out. HAL says the relevant market is the third of those – the Parking Market.

110. The approach which I should adopt in deciding this question is common ground. It is set out in Mr Maclean's skeleton argument devoted to the point, and is taken from the OFT's Guidelines and the

European Commission's Notice on market definition. Since those documents, and the points appearing in them, are common ground I will not set out that material verbatim but will merely set out the technique relevant to this case:

(i) An economic market comprises those goods or services which provide a close competitive constraint on one another. A market is likely to have both a geographic and product dimension for these purposes, and an inquiry as to what the market is has to ascertain both. The objective in identifying the market is to identify the competitors of the undertaking involved which are capable of restraining that undertaking's behaviour and of preventing it from behaving independently of effective competitive pressure.

(ii) The relevant test in this case (which I was invited to apply) is one of substitutability – one tries to identify the products which would be treated as substitutes for each other, because they comprise the market. Those that are not substitutes are unlikely to be within the same market.

(iii) The object is therefore to identify those substitutes.

(iv) One needs to start somewhere, so the starting point is to identify a focus product by reference to which one then starts to apply the relevant test – what follows is known as the SSNIP test.

(v) Then one establishes the closest substitutes to that product - those which are the most immediate competitive constraints on the behaviour of the dominant undertaking. The "hypothetical monopolist" framework is the test usually employed.

(vi) The object is 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.

(vii) In order to do that one takes the hypothetical monopolist in the focal product in the focal area and asks whether it would be profitable for the hypothetical monopolist to sustain the price of the focal product at a small but significant amount (say 5 to 10%) above competitive levels. If "Yes", the test is complete, and the market is established. The market is the focal product under test.

(viii) If "No" (because the monopolist would lose sales to another product), the notional market is widened to include the focal product's closest substitute. The question is asked again on the assumption that the monopolist controls both products, and the process is repeated until the answer becomes Yes and the market is thereby defined.

(ix) In carrying out the exercise the following factors may (depending on the circumstances) assist:

(a) The characteristics of products by themselves, in terms of their similarity or dissimilarity, are not sufficient to bring them within, or exclude them from, a market, though obviously characteristics are relevant.

(b) Customer preferences are relevant and may lead to functionally interchangeable goods being in different markets.

(c) Significant price differentials may indicate customer values which in turn may be significant to market questions.

(d) Similar products may fall in different markets if they are sold to different types of customers.

(e) Evidence from the undertakings themselves as to their views as to close substitutes may be helpful.

(f) Survey evidence is potentially relevant.

(g) Those factors are not exclusively relevant. The relevant inquiry is an overall assessment bearing in mind all relevant factors.

111. Mr Brealey counselled caution in applying the hypothetical monopolist test in the absence of economist evidence. I am not sure how much such evidence would have assisted in the present case, but the fact is I do not have it, so I have to make do with what the parties presented to me.

112. Adopting the above methodology, the first step is to identify the first focus product. There was no dispute about this either – it is the meet and greet product at Heathrow.

113. So it becomes necessary to consider substitutability. The first candidate for substitutability is said to be parking in the short term car parks. The parties' respective evidential cases were as appears below.

114. The mainstay of Purple and Meteor's case was the characteristics of the meet and greet customer. It was said that bearing in mind the preferences of the customers, and the nature of the service, they would not switch to the short term car parks in the face of a 5-10% increase in price by a monopolist on the forecourt. The customers were after something else, and those car parks were not a substitute. What they were after was the convenience of the forecourt. They sought to make this good by various sections of the evidence.

115. They put in the forefront of their submissions a market research presentation prepared for HAL itself by Caroline Thompson & Associates in March 2009. It took the form of a Powerpoint presentation, and it described the presentation as being:

> "A one off opportunity to make sure everyone fully understands the wealth of historical (and recent) customer research in to car parking."

116. Its background research included 3 days of interviewing at Heathrow (it is not clear of whom) and other reviews. The main points identified by the research and relevant to the present question in this case are as follows:

(a) It claims to have been based on significant research. This is important because Mr Webb was rather dismissive of the presentation. I do not find his attitude justifiable.

(b) Page 4 refers to "Opportunities to increase BAA's share of the park and drive market". That is a small pointer, but only a small one, as to that researcher's view of the market.

(c) Page 6 refers to the fact that the recession had not yet produced changes in how passengers were getting to the airport and their parking behaviour.

(d) Page 7 says that neither business nor leisure passengers seemed willing to sacrifice greater levels of comfort and convenience for cost. £10-£20 potential savings on travel mode or car parking can be irrelevant, especially if the result would be more inconvenient or time-consuming journeys.

(e) Page 23 points out that "What the car park user really wants is to drive up to the terminal and park outside ... for free". This gives a "door to door service, no hassles and no cost." This again emphasises the convenience element of the forecourt.

(f) Page 24 contains a decision tree which flows into all modes of parking and presents them as branches of the same choice-making process.

(g) Page 26 identifies the key criteria in decision making as being cost and convenience. It identifies those who are convenience oriented for whom "Easiest = fastest and closest to terminal ... Convenience Oriented are more likely to be brand loyal, maybe through inertia: 48% use same car park out of habit." Page 27 records that business passengers tend to be more convenience-oriented whereas leisure passengers tend to be more cost conscious.

(h) Page 28 records that "Speed/distance to terminal is the most influential factor for the majority of car

park users." Page 34 remarks that Valet Parking "appeals strongly to convenience oriented".

117. What emerges from this is the emphasis that is placed on the perceived convenience of meet and greet services, and the willingness of customers to pay for the privilege. The clientele is presented as businessmen and the affluent.

118. Mr Maclean places this factor (convenience) at the heart of his submissions on the identity of the market. He says that this identifies a clientele which would not be deflected by a significant increase in price because convenience is much more important. Accordingly, for these people a car park would not be a substitute. They are not price sensitive, or at least not to the same degree as leisure passengers.

119. The benefits of the perceived convenience of meet and greet on the forecourt in terms of convenience was deposed to in the evidence of other witnesses. I have referred to some of it above when considering the comparative merits of the forecourts and car parks. Mr Webb himself acknowledged it. He said, inter alia, it is "a convenience product" for customers for whom convenience was their "top priority". Mr Merry told me that before meet and greet came along his company did hardly any car park bookings; now they do about 1200 per month. Indeed, it was an essential part of HAL's own case that customers traded price for convenience – they were prepared to pay more for meet and greet because it was (or they perceived it to be) more convenient than parking the car themselves. In re-examination Mr Hinge said that a lot of his corporate customers would want the convenience of forecourt parking because they liked the product, and would not move just because another product is cheaper. Ms Anglim said that for most of her meet and greet customers convenience was key, and price was only secondary – I took her to mean that price came in when they had identified the product they wanted and in order to select one supplier over another. Mr Brown acknowledged the convenience of meet and greet from the forecourt, particularly in relation to Terminal 3. Customers of Mr Merry who were forced to use the short term car park at T3 commented to him that the process had changed and asked why, saying it was not so good. Mr Edwards said that if Meteor was moved off the forecourts at T1 and T3 then he would have to review his use of them. All this, and other evidence, points to the pre-eminence of the customer perception of convenience so far as use of the forecourt is concerned.

120. It is, in my view, this key characteristic of convenience, or perceived convenience, that is one of the principal factors that makes the short stay car park a non-substitute for the purposes of the test that I am seeking to apply. I say "perceived" convenience because an objective case can be made for saying that if one looks at no more than the journey times from terminal to car park one can see that in some cases they are not materially different from the journey from terminal to forecourt, but I doubt that in those cases the customer will see it in that way. A product in which one drives as close as one apparently can to the terminal and then hands over the car to someone else to deal with (and the reverse process on pick-up) will be perceived as being not only a different product, but a product which is different to such a degree that the customer would not regard the short stay car park as being a substitute within the test which I am having to apply.

121. The other factor is, at least in the case of the T1 and T3 car parks, the fact that the car parks are themselves sufficiently unattractive as environments as to amount to the sort of thing that a person who really wants to deal on the forecourt would not want to penetrate if they could avoid it. I have made findings about this in the separate section of this judgment dealing with the car parks. T5 might objectively be a bit different, but it is still a car park and, in my view, that mere fact will keep it a non-substitute in the mind of the customer.

122. That explains why customers prefer meet and greet if they are convenience oriented (which meet and greet passengers are), and I consider that if faced with a 5-10% price increase by a monopolist, those passengers would stay with convenience and not move their custom to the short stay car park.

123. This is said by Mr Maclean to be supported by evidence of pricing. I had 3 tables showing pricing for various car park products for each of T1, T3 and T5, for each of three dates in November 2010 and for stays of each of 3, 8 and 15 days duration. They were published prices that could be seen on the internet (from where many customers would book). Deals could be done at different prices, particularly if the purchaser had buying clout, and actual prices would vary from day to day anyway. However, no-one suggested that the relationship of the pricing of the products as between themselves would vary, so I can take the general relationships between the pricing as being typical.

124. The material comparison for present purposes is the comparison between meet and greet products on the one hand and the terminal's short stay product on the other. For each of the three lengths of stay the pattern is the same. HVP's price is very significantly more expensive than the short stay car park.

Taking T1, the HVP/short stay comparison prices is £70.60/£45.70, £113/£87.50 and £150.60/£113.50 for the three stay periods respectively. These are very significant price differentials; yet HVP has a healthy business. The same pattern is not repeated across the other two terminals. For T3 the figures are £70.60/£47.20, £113/£110.80 and £150.60/£194.70, and for T5 they are £74.10/£53.10, £113/ £99.40 and £150.60/£186.90 respectively.

125. Mr Maclean pointed to the T1 prices and said that they showed that current meet and greet operators were able to sell their products at a considerably higher price than the short stay product, and he pointed to the T1 figures. However, the picture seems to me to be more complicated than that. It can be seen that on the longest stay the short term car park is much more expensive. That would, in a sense, support Mr Maclean, because at that price differential the short term car park would not be a substitute. However, for the 8 day stay the picture is confused. The pricing is about the same at T3, and the differential is not so marked at T5. This pattern of differentials was not the subject of consideration at the trial; Mr Maclean drew attention to them (or some of them) only in written submissions after the hearing. In the absence of some further evidence about this aspect, I am not prepared to give it much weight. It certainly does not assist Mr Brealey, and lends some support to Mr Maclean, but I do not give it any further weight than that.

126. All this evidence so far points to the self-use of car parks not being a substitute for meet and greet. Mr Brealey sought to counter this by various matters.

127. First, he relied on evidence that off-airport meet and greet operators compete with all the official on-airport parking products. In particular, he pointed (as did Mr Webb in his evidence) to the publicity material produced by some of them which extolled the virtues of their products over the car parks which involved a bus transfer, and the time saved over use of longer stay car parks. Other parts of the publicity compared meet and greet prices with the range of car parks. All this material, he said, demonstrated that all the car parks (not just the short stay) were substitutable. I agree with Mr Maclean when he says that this confuses how the claimants (and others) market their product with market definition. The former may be a factor in the latter, but it is only one factor. Here I think it is of little weight. For some people (a very limited number) it might be the case that a price comparison would lead them to choose car parks over meet and greet, but that does not outweigh the inherent benefits which the customer base perceives in meet and greet and which is the prime factor which places it in its own market. The fact that some might compare the two does not mean that at the end of the day the one is substitutable for the other. If one is looking at expressions by the parties or their representatives, the analysis of the Caroline Thompson study, which is geared to questions of market, is more compelling than the product brochures of the off-airport operators.

128. Next Mr Brealey relied on what he described as the price sensitive nature of meet and greet customers, pointing to various parts of the evidence which demonstrated that price had a relevance to customer choice, particularly in the leisure market. This sensitivity to price led Purple to price its product against HVP's. Even the Caroline Thompson study, he said, acknowledged that price was relevant and some customers would regard the on-airport offerings to be too expensive. This meant that customers would have a propensity to switch to more cost effective substitutes in what he called "appropriate circumstances". Convenience was not all.

129. The evidence relied on by Mr Brealey in this respect does not make a useful point. Of course, some customers will be influenced by price more than others, and for all customers one can project a price that they simply will not pay – presumably there would be no takers for a meet and greet service which charged £500 per day. But none of this detracts from the great emphasis that customers place on what they perceive to be the convenience of meet and greet services. The evidence is that they are prepared to pay for that. Above all, having an eye to price does not mean that they would switch products if faced with the SSNIP test price rise. I have found that they would not.

130. In addition, Mr Brealey pointed up some further price comparisons.

131. On the basis of all the evidence, including lesser points relied on by Mr Brealey, I therefore consider that the relevant downstream market is the meet and greet market at Heathrow.

Equivalent transactions and dissimilar conditions

132. With that in mind I now seek to ascertain whether the evidence establishes an abuse of the category relied on by Purple and Meteor.

133. Purple and Meteor's primary case involves an allegation of the application of dissimilar conditions to equivalent transactions, resulting in anti-competitive behaviour. It is therefore necessary to consider the equivalence (or otherwise) of the transactions, and the dissimilarity (or otherwise) of the conditions.

Equivalence of transactions

134. First I must identify the relevant transaction or transactions. There was a dispute as to this. Purple and Meteor's case is simple to state. They say that the transaction is access to Heathrow facilities for the purpose of conducting meet and greet activities. HAL does not accept this, and its submissions amount to a case that there is no identifiable common transaction. It seems, so far as I understood the submissions, to say that the transactions between itself and HVP (treating HVP as a separate entity for these purposes, which is obviously correct) were different for two or three reasons. The first is that HAL's use is use by HAL of its own facilities for an ancillary purpose to fulfil its own function as an airport operator – contrast the claimants, which do not operate an airport. Further, HAL operates on-airport car parks; Purple and Meteor do not; and they operate their jockey systems differently. Further, it prices its meet and greet service against, and fits it into a hierarchy with, its own car parking services for which Purple and Meteor have no equivalent.

135. I do not accept HAL's over-elaborated concept of the transaction in terms of its purpose. One has to take a realistic and common sense view of the transaction. It would be neither realistic nor in accordance with principle or common sense to adopt HAL's view. HAL's definition of the transaction in its own case would be accurately paraphrased as being: The grant of access to Heathrow's facilities to HAL's meet and greet operation as it (HAL) chooses to conduct it. Mutatis mutandis for Purple and Meteor. That is not a sensible or fair approach. Each of the participants is, of course, using that access for their own particular purposes, and their underlying businesses have different models, but the overall relevant transaction is, for these purposes, the same, and it is as defined by Purple and Meteor. Were it otherwise then it would be hard to see how this statutory example of abuse could ever be established. The alleged abuser could always find things which differ in the purposes of each of the counterparties to the compared transactions which would make the transactions different, and that cannot be a realistic approach to the legislation.

136. I also reject a submission made by HAL that the transactions were not equivalent at T1 because (as Mr Brealey submitted) HAL does not operate from the forecourt at T1 whereas the off-airport meet and greet operators do. I reject it because in substance they operate from the same area. It happens that the HAL area has not been designated as the forecourt in the subordinate legislation identified above, but that was HAL's choice. I have observed above how it presents, and in substance, for the purposes of applying the law that I have to apply in this case, it should in my view be treated as the same physical area of operation as the forecourt.

137. I therefore accept Purple and Meteor's analysis of the relevant transaction.

Dissimilar conditions

138. There can be little doubt that on one level there is a dissimilarity between the basis on which HAL and Purple/Meteor have the benefit of the forecourt (access for meet and greet purposes), or rather would have it if the compulsory relocations were fully implemented which is what has to be tested for these purposes. HAL operates from the forecourt at T3 and from an equivalent at T1; Purple and Meteor would operate from the car park for all activities. HAL has a permit, for no payment. Purple and Meteor would have to operate from the car park, for a charge which is currently at least £1.50 per vehicle.

139. In my view this is a material dissimilarity. There is a charge, which is not insignificant, and the position from which the two services are offered is different. The differences between operating from the forecourt and operating from the car parks are not merely geographical ones with no consequences. They affect the nature of the service, both in real terms and in terms of customer perception. This is dealt with elsewhere in this judgment.

140. HAL's submissions do not really deal with this point. It is said that if the claimants insist on equality of treatment then their case should fail in relation to T1 because HVP does not operate from the forecourt, so if Purple and Meteor were to operate from the car park, they would be in the same position because they would not be operating from the forecourt either. In my view this misses the point. The claimants are not entitled to insist on equality of treatment (or at least not at this stage of the argument). They are arguing that dissimilar conditions are imposed. In my view they are imposed, for the reasons given above. True it is that, so far as legislative definitions of property are concerned, at T1 HVP is not using

something that has been designated as the forecourt. However, it is in substance virtually the same as the forecourt, and as Mr Brown accepted (and I agree with him) a customer would think that it effectively was (and HVP's publicity suggests an equivalence). It is only not part of the forecourt in the sense that it has not been designated as such in the TMOs. So HAL has been permitted to use something that is the forecourt in the eyes of the consumer, and Purple and Meteor have not. There is therefore a dissimilarity of conditions here too.

Conclusion on the two limbs of section 18(2)(c)

141. I therefore find that those two limbs of section 18(2)(c) are satisfied.

Essential facilities

142. While resisting the notion that they had to run an essential facilities case, Purple and Meteor did in fact run a secondary claim to the effect that the T1 and T3 forecourts were essential facilities for the purposes of competition law and HAL's dominant position in relation to that facility imposed an obligation on HAL to ensure equal access to the facility. HAL did not afford that equal access and as a result distorted competition.

143. Since I have made a finding in favour of Purple and Meteor on the discrimination basis I do not need to make an alternative finding on this one. Purple and Meteor do not need it. It is an area of analysis which is not without its difficulties, so I will not lengthen this judgment with a detailed consideration of it. I will merely observe that I think that Purple and Meteor would have had some difficulties in getting home on it. In *Bronner* at paragraph 48 the Advocate General cited the Commission's decision in *Sealink* where it said:

> "An undertaking which occupies a dominant position in the provision of an essential facility and itself uses that facility (i.e. a facility or infrastructure, without access to which competitors cannot provide services to their customers), and which refuses other companies access to that facility without objective justification or grants access to competitors only on terms less favourable than those which it gives its own services, infringes Article 86 if the other conditions of that Article are met."

144. It would therefore be necessary for Purple and Meteor to establish that no meet and greet operation could be carried out in the two car parks under consideration if the forecourts were denied to them. For these purposes it seems to me to be necessary to assume use of the car parks with no competition from use of the forecourt. That would be a test of the essentiality (or otherwise) of the forecourts. I rather doubt that on that assumption Purple and Meteor would be able to fulfil the test of the Advocate General, particularly in relation to the T1 car park, which does not suffer from the more serious disadvantages of the T3 car park. The service would not be the same, and it might be less attractive, but I think that the service could probably be carried out (in an inferior way, as Mr Brown conceded) in the car park. There was some evidence that meet and greet activities were carried out from car parks at other airports. I doubt that the forecourt is analogous to the port in *Sea Containers v Stena Sealink* (Commission Decision 94/19/EC), or a telecoms network in the telecoms cases. However, I do not need finally to decide that, and I do not do so.

Competitive disadvantage

145. The next question is whether or not the acts of HAL in excluding Purple and Meteor from the forecourts place Purple and Meteor at a competitive disadvantage. It is common ground that the question is not whether the acts make their business more difficult, and make it harder for them to compete, but whether it has an anti-competitive effect felt by the consumer.

146. The case of Purple and Meteor is that they will suffer competitive harm because:

> (a) Competition in the downstream market is already weakened.
>
> (b) There will be a change in the structure of the meet and greet market to the detriment of fair competition if the compulsory relocations proceed.
>
> (c) The claimants will not be able to compete for customers who require a forecourt product, and HAL will monopolise the forecourt meet and greet market.

(d) The claimants will not be able to compete with HAL's short stay product in the premium parking market.

(e) The claimants are likely to lose substantial amounts of business as a result, and HAL will gain substantial amounts of business.

(f) One potential outcome is that their meet and greet business will not be viable at all.

(g) The result will be monopolisation of the meet and greet market by HAL to the detriment of the consumer.

147. HAL meets this case by saying:

(a) The car parks are suitable for conducting a meet and greet operation.

(b) The off-airport meet and greet operators compete with all HAL's products and can and do position themselves to compete so they will not be at a competitive disadvantage.

(c) The evidence that corporate customers will desert Purple and Meteor is unconvincing; it is unlikely to happen.

(d) The key merit of meet and greet, which is the avoidance of a bus transfer, will still be present if Purple and Meteor operate from the car park.

(e) Customers trade price for convenience, and the price differential between HVP and Purple and Meteor will continue to ensure that customers choose the former over the latter. Cost is always going to be a factor.

148. The central part of this inquiry is an assessment of what would happen if Purple and Meteor are required to operate from the car parks and HAL is left on the forecourts at T1 and T3. My conclusion is that this will have an anti-competitive effect for the following reasons.

149. While it might be true to say that, in absolute terms, the car parks are suitable for conducting some sort of meet and greet operation, that is not the point. That is not a particularly determinative fact in this case. The question is not whether they are suitable to some degree or other, but what will the commercial picture look like on the hypothesis that is currently being considered.

150. The picture that HAL sought to portray in this litigation was that not much would change. The differentials between meet and greet and bus transfer arrangements would remain the same; Purple and Meteor would still be cheaper than HAL; the car parks are good enough and no-one will mind much. That summarises much of what is said. To my eyes that seems to defy common sense, when one accepts (which I do) the particular merits of using the forecourt which underpin the current users' preferences, and which I have referred to above.

151. In fact it also turns out to be contrary to the subjective views of the HAL witnesses. Mr Brown accepted that it would not have a good effect on HAL's business were it to have to move into the car parks. He accepted that the T3 car park was inferior to the forecourt. If that is true for HAL, it is true for the claimants. At the end of his evidence Mr Webb accepted, somewhat reluctantly, that he, on behalf of HAL, would hope it would be able to pick up business as a result of the changes, and it amounted to a business opportunity for HAL, though he thought that the numbers of people who would switch to HAL would not be significant. In my view he is plainly right about the picking up of some business. The intended commercial effects can be seen as part of the rationale behind the first proposed change, that at T5. That change was proposed in February 2010, followed by the May letter – see above. HAL did not purport to justify it on grounds of congestion, security and other matters which were deployed to justify the proposals in other terminals. Mr Brown accepted that in his cross-examination – he claimed he was keeping his commercial options open. Prior to the February letter there was an internal HAL presentation by or for "Retail Travel Services" (Mr Brown's part of the operation) entitled "Terminal 5 Meet & Greet Operation" and dated 16th February 2010. Under the heading "Where we are now" it listed the following bullet points:

"Need valet solution for all terminals to improve congestion – particularly T3 and sustain good position at T5.

> Can't continue with existing parking solution at T5.
>
> - set a precedent for the other terminals we can't and don't want to deliver.
>
> - costs £67,500 per annum for little return.
>
> - give off-airport product a great place to park."

152. This demonstrates that what was ultimately proposed was all about commerce and what the meet and greet operators got out of use of the car park. Although the reference to congestion suggests that this factor was ostensibly in mind as well, Mr Brown accepted in cross-examination that this factor (and other factors later relied on in relation to the other terminals) were not relevant to the decisions in relation to T5. So far as congestion is still apparent at T5, it is on the forecourt (at peak times) and not in this car park. As well as introducing a charge, the fast track area was not ultimately to be available within the charge and markers were to be moved. The rest of the car park was to be available, but there was no designated area. This would make it harder for the meet and greet companies to operate because getting customer and representative together would be more difficult. I am satisfied that Mr Brown appreciated this. I am satisfied that this proposal was not merely intended to change a charging regime; it was intended to impose practical obstacles on the meet and greet operators with the intended effect of making competition more difficult.

153. At one point in his cross-examination Mr Brown said:

> "That move is about Heathrow commercially keeping its options open on use of that particular space ..."

That is a vague and woolly form of words in the circumstances, and I find that it was designed to cover up the principal motivation which was to disadvantage the meet and greet operators and to make competition more difficult. Of course, T5 is no longer an issue in this case, but in my view this desire to put obstacles in the way of competition from the meet and greet operators was something that was in the minds of Mr Brown and his team from the outset in relation to the whole of their consideration of the off-airport meet and greet operations and ultimately infected the decision-making process in relation to all 3 terminals. They probably started with T5 because T5 had the biggest single share of valet parking (about 50% of the airport's total). Mr Brown sought to justify the decision by reference to a "user pays" principle – the off-airport meet and greet operators were using airport facilities and ought to pay. This was not, I find, a prime motivation at the time the decisions were made.

154. T1 was next. Before sending letters to the operators Mr Brown briefed Ms Liz Neighbour, the manager of T1. They had a meeting on 12th March. There is a note of that meeting and according to that note she specifically told Mr Brown there had not been a congestion issue on the T1 forecourt for 18 months, and she asked if the proposed change (to move meet and greet operators off the forecourts) was "commercially driven". The recorded response (originally redacted from the disclosed copy of the note) is:

> "Following Counsel [sic] advice [Mr Brown] confirmed that this change was for legal reasons."

The note goes on:

> "Recognising that Terminal 1 has the only forecourt that does not impact the road network by congestion."

155. Mr Brown's evidence in chief had referred to a pack of slides presented at that meeting and had said that the decision to move the off-airport operators from the forecourt at T1 was taken "on the basis of congestion, security, safety and the environment". It is true that the slide pack recorded that "Need valet solution for all terminals to improve Congestion, Security, Safety and Environment issues", but when faced with the note of the meeting Mr Brown was forced to admit as follows:

> "Q. So there wasn't any congestion at Terminal 1 that was driving this decision after all, is that right?
>
> A – That's correct." (Day 7 page 155).

156. He sought to maintain that the other issues still had some force in relation to T1 but I do not accept that in his own mind they figured particularly highly. If they had he would not have given his recorded oblique answer – he would have referred to them and it would have been recorded. He told me that the note of the meeting and the slide should be read together, rather than inconsistently, and that the note was "merely amplifying" the slide pack. I do not accept that either. I think that this note recorded what he said, and that at the meeting he did not tell Ms Neighbour that the change was for safety, security or environmental reasons because those were not really his reasons. This is an example of the quality of Mr Brown's evidence which has caused me to make the observations about it that I have made above. In addition, the environmental reasons were so minimal that I do not accept that they can have played any real part in the prior reasoning – I return to this point below when I consider objective justification.

157. I therefore find that there were commercial reasons for this change. This conclusion is reinforced by other aspects of the history of this matter which I record in the section of this judgment on objective justification. However, it does not necessarily follow that those reasons were to suppress the competition. However, on the facts I think that reason did figure in HAL's intentions. The presentation slide pack contain various income and expenditure figures based on assumptions as to charging for the use of the car parks (apparently all of them) and as to the cost of employing more forecourt marshalls. Most of the income options, but not quite all of them, show a profit over the cost of extra marshalls. In fact the one ultimately adopted was the first proposal (all operations to be conducted from the car park, at a cost of £2.50 per visit), showed a good profit. Ms Neighbour is probably more likely to have focussed on that sort of commercial benefit, and not the competition angle. This may have been in Mr Brown's mind as well, but he did not admit as much in the witness box. While it may have been (and he did seek to rely on the "user pays" principle again in his cross-examination, though not very convincingly), I think that he also had in mind that competing from the car parks would be disadvantageous to the off-airport operators, and he did not want to admit that.

158. Last there was the projected move from the T3 forecourt. The presentations that preceded this aspect of the matter make it plain that HAL was looking at valet parking across all terminals, but taking them in order. The expression "master plan" is used in some of the documents. Mr Maclean frequently used this term in a pejorative sense, meaning some overall plan whose prime objective was to stifle competition. Mr Webb was prepared to acknowledge that there was an overall "master plan" to remove the off-airport meet and greet operators from the forecourts but would not go farther than that. I consider that those documents do demonstrate that there was one overarching plan, with a phased implementation. I have found that when it started it had, as a strong element, a desire to make commercial life more difficult for the off-airport meet and greet operators by confining them to the car parks. This intention carried on through to T3, though in the case of T3, as will appear below, there were additional matters which required addressing, and in particular congestion.

159. A presentation was made to a meeting with Mr Simpson, the then manager of T3. Like the other presentations it referred to congestion, security, safety and environmental issues. This time there was no challenge to the congestion point. The note of the meeting on 13th April does not refer to those matters, but this time I think that that means that Mr Simpson was accepting some or all of those matters as operating – the note is appropriately read with the presentation.

160. In relation to T3, and in contra-distinction to the other 2 terminals under consideration, HAL had commissioned a report from Mott MacDonald ("Mott"). Mott was instructed to conduct forecourt surveys and car park analysis. They presented a report on or about 15th February 2010, which presented a number of recommendations. They included changing the forecourt allocation so as to (inter alia) move staff buses to Lane 1, improve the periodic opening of Lane 2, have all valet pick up activity moved to the car park (including HVP's operation), and move HAL's drop-off activities to lane 5 (from where the staff buses had been moved). It made no express reference to off-airport drop-off in its recommendations.

161. The first two presentations (for T5 and T1) referred to "Ongoing Motts review" as one of the next steps, even though that review had nothing to do with those terminals. The presentation to the manager of T3 referred to "Ongoing Motts review to include the relocation of HAL's own valet product". The requirements of the letter of 27th April went farther than the Mott report in addressing both drop-off and pick-up, and HAL did not propose at that time to relocate its own operation. In December 2010 (shortly before the trial started) Mott gave a further report, based on a lot of the same data as the previous report. It made much the same recommendations as referred to above save that it explicitly recommended that all off-airport activities be confined to the car park (the difference from the previous report being that it made it explicit that off-airport drop-offs should also be there, a point not referred to in the earlier report).

162. By the end of the trial HAL had procured the opening of Lane 2 and has moved its own drop-off and pick-up operation to Lane 5 (though the reception hut will remain in its current place on Lane 4), in accordance with those recommendations. It has not moved its pick-up operation to the car park. Mr Brown gave some vague evidence which suggested it was under consideration but not in such a way as would encourage one to think that it was going to happen soon. I do not believe that he really wants it happen.

163. This reluctance is significant. In my view it reflects the fact that he appreciates that at T3, as elsewhere, there is a commercial advantage to having valet activities conducted on the forecourt. He wishes to preserve that for HAL (HVP) if possible. It is consistent with the continued and continuing desire to present advantages to HAL's valet parking operation, which I find to be a thread running through the decision-making process.

164. In the case of T3 I find that there were congestion factors which caused concern, and that they were operative at the time of the letter of 27th April and thereafter. However, I find that Mr Brown also had in mind that a change which left HVP on the forecourt and put all other operators in the car park was also perceived to give the former a competitive advantage, and it was, in part, intended to have that effect.

165. I turn to draw these strands together. As a result of the findings made above and elsewhere in this section of this judgment I find:

> (a) Looking at the matter objectively, the proposed changes (discrimination) will leave HAL as the only meet and greet supplier on the forecourts of T1 and T3.
>
> (b) Being on the forecourt confers very substantial advantages to an operator when compared with those who are operating from the car park. Customers prefer it, and such a service contains important elements which the consumer seeks to have when compared with a car park-based service.
>
> (c) The off-airport operators will not be able to compete on quality in the car parks – they will not have the same product to sell. It is not apparent that, in those circumstances, they will be able to compete on price either – it is not clear what the future pricing of the short-stay car parks will be, but in any event they will still be selling a fundamentally different product.
>
> (d) Accordingly, for the real meet and greet customer there will be no competition. HAL already charges a high price for its product, and although it has its lower-priced Heathrow Meet & Greet product it is unlikely to have an incentive to maintain this product. Since the motivation for these changes is partially commercial, it is fair to assume the resulting position will be commercially exploited.
>
> (e) The result will be an effective monopoly on the meet and greet service, and a serious risk to competition as far as the consumer is concerned. The customer will have only one product to buy; HVP can charge monopolist prices. Those prices will be higher than the off-airport suppliers' current prices; and the meet and greet customers will have to pay those prices if they want that distinct product.
>
> (f) This will therefore operate to the detriment of the consumer who will be very likely to have to pay significantly higher, and unconstrained, prices for the forecourt meet and greet service.

166. I therefore find that the proposals of HAL to move the off-airport meet and greet operators to the car park will have a real anti-competitive effect so far as customers are concerned, and that was a very material part of the motivation of HAL in deciding to propose implement them.

167. It follows that, subject to the matters raised in the next 2 sections (HAL's "own facilities" point and the objective justification point) the conditions of section 18 are fulfilled.

The "own facilities" point

168. In an earlier section of this judgment I have acknowledged that prima facie a trading entity is entitled to choose its own trading partners and that it is a strong thing to require that entity to share facilities which

it has created with a trade competitor. HAL relies on these points, and in particular on the latter. It is necessary to bear these points in mind in the overall assessment of contravention of the statute. It probably falls to be treated as part of any alleged objective justification, but for the purposes of this judgment it is convenient to deal with the point separately, while acknowledging that it has to be weighed with the other objective justifications at the end of the day.

169. The cases that I have cited acknowledge that a trading entity may well be entitled to trade to the exclusion of competitors if it is using its own facilities, for which it paid, and the cost of which is being recouped through trading activities. There may be very good reasons why a trade competitor is excluded from the facilities. However, it is not automatically a good defence to say that the defendant is merely using its own paid-for facilities. There are various cases in which a facility owner has been compelled to share with a competitor. Some examples will suffice.

170. In *Flughafen Frankfurt* (Commission Decision 98/190/EC) Frankfurt airport was required to open up its ramp handling services to third party service providers even though it owned the airport. Rights of ownership were trumped by the provisions of competition law – see paras. 89 to 92. Paragraph 95 of the decision has resonances with the present case:

> "FAG also submitted that since ramp handling is a complementary function to the landing and take-off of aircraft and subsequently influences the overall quality of the service provided by the airport, the airport operator has the obligation to control these activities. Again, this does not mean that the airport operator may retain these activities for itself, since the airport operator has the means to impose on competitors the rules that they will be bound to follow."

171. In *Sea Containers v Stena Sealink* (Commission Decision 94/19/EC) the Commission was prepared to intervene, by way of interim measures, where a port owner had not allowed sufficient access to a shipping line that competed with a line that the port owner itself had an interest in.

172. In *Bronner* the Advocate General and the Court acknowledged the rights of an owner of a facility to decide who should have access to it, but were prepared to contemplate requiring the owner to share the access if competition principles required it. On the facts they did not require it, but had the facts been different sharing might have been required.

173. It is unnecessary to give further examples, not least because HAL does not dispute that competition law might trump its rights as owner if the facts require it. It says they do not.

174. In my view much less weight falls to be given to the rights of HAL as owner of the forecourts (and Heathrow airport generally) because this is not a case where the creator of a facility, or the acquirer of property, is being required to share the real fruits of ownership with a competitor. By "the real fruits of ownership" I mean the essential fruits of the ownership of the particular property in question and the investment in it. In the dicta referring to the care that has to be taken before requiring access to be given to a competitor, the cases were ones in which what was being required to be shared was the result of investment in the central aspects of the property itself. In *Bronner* it was the distribution network. In *Frankfurt* it was an aspect of the handling of aircraft – part of the essential function of the airport. In *Sea Container* it was the actual port. In each case the property owner could say (although it is not apparent that in each case he did say) that he had paid good money to create the facility and should not be required to share it, at least until he had extracted a fair benefit. To hold otherwise (he would say) would discourage other people from innovation and developing their own products.

175. The present case is different. The forecourts at Heathrow were not developed so that HAL could run a meet and greet operation from them. The forecourts were provided so that they could help in servicing the central purpose of Heathrow which is the provision of an airport so that aeroplanes can take off and land with passengers (and cargo). They were ancillary to that central purpose (though no doubt important). HAL could not say that it is being forced to share an investment specifically made in the forecourts in the same way as a telecommunications company which is being required to grant network access to a competitor could say it is being asked to share what it actually created and invested in. HAL (or its predecessor) clearly did create the forecourts, and there is an element of investment in them, and it has managed to turn that to financial effect (it charges certain users) but it did not actually create them for that purpose. I discount for these purposes the specially erected cabins which exist at T3 and T5 – they were indeed erected specifically for the meet and greet operation, but they are not part of facilities which they are being asked to share, and in any event are only ancillary to the forecourt.

176. In my view that materially weakens the point that could otherwise be made about the care that has to be taken before interfering with property rights and investment. Purple and Meteor are undoubtedly seeking to have the benefit of HAL's property rights, but not in the central investment in the airport in a way that is relevant to the point currently under consideration. I acknowledge that in a technical economic sense, the forecourts are part of the overall investment in the airport, and that (as submitted by Mr Brealey) an airport must have facilities allowing people to drive to the airport, and that forecourts can be seen as facilities relating to the latter (though perhaps not absolutely necessary), but for present purposes they are ancillary to a more central purpose and are not in the same position as the property in the cases of the type I have referred to above.

177. Mr Brealey submitted that where an undertaking was relying on the use of its own facilities, that justified a high test when one had to consider the question of the extent to which competition had to be affected, and he said that that test was elimination of competition, and nothing less. He submitted that policy required that, because the property rights of the undertaking were being invaded and it would be unfair to require anything less. I do not necessarily accept that submission even in cases like the *Sealink* case, because its rigidity seems to me to be inconsistent with the general purpose of the legislation. The decision in *BMI v Aer Lingus* is inconsistent with it. It was a case in which the result was that Aer Lingus was forced to permit BMI to offer access to its flights, and it is quite apparent from the decision that some, but not a full, level of competition was possible without that access. A complete elimination of competition had not resulted, but the conduct was still abusive. However, even if Mr Brealey is right in relation to the category of case he refers to, the present case is not such a case for the reasons just given. This is not a case of an owner of dedicated property (or a dedicated property right) being forced to share property which he created for particular commercial exploitation. It is a case in which (if the facts otherwise justify it) a property owner is being forced to give access to his property where that access is to a part which is very much ancillary to the main purpose of the whole property. Even if the strict case applied in the first of those situations, I do not see why policy requires its application in the second.

178. I therefore conclude that this factor has much less weight than it would have if the claim to share related to the central airport facilities themselves. In fact I gave it little weight.

Objective justification

179. Both parties approached this case on the legal footing that conduct which was prima facie abusive could be justified if it was objectively justified. That seems to be in line with the law set out (in relation to Article 82) in Bellamy & Child on the European Community Law of Competition, 6th Ed at paras. 10.063-10.064. HAL (so far as may be necessary) relies on objective justification in this case in that it says that removing the off-airport meet and greet operators from the forecourts is justified by considerations of congestion, safety, security, and environmental considerations. Purple and Meteor dispute that at 2 levels. First, they say that it is not established on the facts. Those factors are said not to exist as justifications on any of those grounds in any of the relevant forecourts. The removals are not required by any of them. Second, they say that insofar as that is wrong, and some of them might have provided an objective justification, then HAL did not actually rely on any of them as a reason for taking its decision. Its decision was motivated by anti-competitive considerations and the invocation of the fourfold objective justification is a fig leaf for the purposes of this litigation. Accordingly they say that HAL is not entitled to rely on this justification.

180. I would add that this way of looking at objective justification (considering whether the conduct is prima facie abusive, and if so then considering whether it is objectively justified) is apparently required by the authorities, as opposed to treating the factor as one going to the overall inquiry as to abuse – see the Opinion of Advocate General Jacobs in *Syfait v GlaxoSmithKline* [2005] 5 CMLR 7. I have some sympathies with the stated preference of the Advocate General as to the merits of that course, but like him will use the structure apparently required by the authorities.

181. There was a bit of equivocation on the part of Purple and Meteor in their submissions as to what part subjective views play in this area. They are relevant in relation to Purple and Meteor's second approach to objective motivation. Originally Purple and Meteor were just relying on absence of any justification on the facts – the subjective approach of HAL did not come into it under this head, other than as part of the evidence as to whether such justifications did in fact exist. However, the second line emerged in the course of submissions as an allegedly appropriate analysis.

182. Should it matter, it seems to me that as a matter of principle Purple and Meteor are entitled to run their second approach to objective justification. It is unlikely to matter in many cases, but might matter in the

present case. In *United Brands v The Commission* [1978] ECR 207 the ECJ said:

> "Although it is true ... that the fact that an undertaking is in a dominant position cannot disentitle it from protecting its own commercial interests if they are attacked, and that such an undertaking must be conceded the right to take such reasonable steps as it deems appropriate to protect its said interests, such behaviour cannot be countenanced if its actual purpose is to strengthen this dominant position and abuse it." (para. 189)

183. It is therefore open to Purple and Meteor to seek to demonstrate that even if the conduct of HAL could be objectively justified, nevertheless its motivation was to suppress competition and thus this defence (if that is the right word for it) is not open to it. It is also, in my view, open to Purple and Meteor to test the assertion that there is an objective justification by seeing whether that justification was apparently the basis on which HAL acted. One would expect a serious commercial undertaking such as HAL to form a view as to what was objectively justified, where the justifications are those set out above, and were it to appear that those justifications were not really why HAL acted then that fact would be capable of shedding light on the strength of the justification now relied on.

184. HAL having set up its case, and advanced some evidence in support of it, it is accepted by the claimants that they then have the burden of knocking that down. Since the objective justification case is advanced, the claimants accept that burden.

185. There remains a dispute as to the standard of proof. It is common ground that the balance of probabilities is the appropriate standard, but HAL submits that the claim has to be supported by "strong and compelling evidence", to use the phrase used by Rimer J in *Chester City Council v Arriva plc* [2007] UKCLR 1582 at para. 10. In that case the judge noted that the allegations were serious and could attract significant penalties "in another arena". That was why he made his remark about the quality of the evidence. His remark is a manifestation of the line of which *Re H and R* [1996] AC 563 is probably the most significant case. He was doing no more than following that line. The essence of the point is that the more unlikely an event, the clearer the evidence will need to be to establish it. These are now well established principles. I do not find this particular line helpful in this case. At the end of the day the question is whether I am satisfied or not that the relevant matters have been proved.

The parties' cases as to motivation and justification

186. Purple and Meteor's case is that real motivation for what happened was the commercial one of a "master plan" to remove competitors from the forecourt. This is denied by HAL which relies on its real motivation coinciding with what it says the objective justifications are (prevention of congestion, safety, security and environmental considerations – the "four justifications", as I shall call them) and, for that purpose, to remove off-airport meet and greet operators from the forecourts (or at least at T1 and T3 – they had already been removed from T5). Purple and Meteor do not accept that what HAL puts forward as objective justification is, on the facts, capable of being such.

187. I have already made findings above as to the underlying commercial motivations, and those findings should be taken as repeated for the purposes of what follows on the topic of objective justification. I shall deal with the point terminal by terminal.

Objective justification - Terminal 5

188. In terms of specific relief claimed for the future, this terminal does not present a live point because HAL does not seek to move the meet and greet operators from where they currently are, and the operators do not seek to reinsert themselves into the forecourt. However, the acts relevant to this terminal have their place in the context of the other terminals because this was the first terminal to be tackled in 2010, and because what was said in relation to this terminal was, as I find, part of an overall plan to deal with off-airport meet and greet operators at all three terminals which were originally the subject of this action.

189. The Defence in this case does not clearly suggest that the motivation for the proposal to move from the fast track area was made on the basis of any of the four justifications. It is averred that the original move from the forecourt shortly after the opening of T5 was required on that basis, and there was some debate about the need for that, but I do not need to deal with that historic point. The letter of 25th February refers to the need to regularise the position which had hitherto been temporary. The letter of 27th May, which suggested a future move down to level 2, does not rely on the four justifications either.

Although in an earlier witness statement, not used at the trial, Mr Brown did rely on them in the context of T5, in the witness box he admitted that the four justifications had nothing to do with the proposals for T5 made in 2010. He said that they were to do with HAL "keeping its options open on use of that particular space". So this was an avowedly commercial move, as also appears from the matters referred to above. There is nothing inherently wrong with that of itself, but it does mean that a commercial purpose outside the scope of the four justifications was underpinning this whole process from the beginning of its implementation.

190. In fact the commercial underpinnings of HAL's exploitation of the forecourts were accepted by HAL. In his written final submissions Mr Brealey drew attention to earlier briefing and planning documents which set out generalised plans and ideas for the commercial exploitation of the forecourts. In May 2003 a Forecourts Strategy Group document acknowledged that:

> "The forecourts are a key area for the Airport providing an initial or final impression to the travellers of the airport and its processes whilst providing the opportunity through effective management and control to protect and grow income"

191. It goes on to outline various matters and referred both to commerce and to matters such as congestion, safety and security. It suggested that off-airport valet services be conducted from the car park. However, other than identifying unauthorised pick-ups (which would include, but not exclusively, off-airport meet and greet operators) on the forecourt as being a "main [offender]" in creating security and disruption problems, it contained no reference to the extent of the problems (if any) created by off-airport meet and greet operators. As a background document it suggests that commercial exploitation of the forecourts was an important factor, and does not go into the extent to which other factors might make it relevant to target use of the forecourt by meet and greet operators.

192. Other documents from this period refer to the desirability of commercial exploitation of the forecourts, while also referring to matters such as congestion and safety. I find that all those matters were in the minds of HAL representatives, but exploiting commercially was certainly a very material driver. In a document of June 2003 a Valerie Alderson remarked:

> "Forcing all Pick up traffic into the existing Car Parks at all locations would provide immediate relief to the congestion and implied safety consideration [sic] on forecourts but such a decisive measure cannot be implemented until the impact on the Car park operation is assessed. For this accurate information is required. It is recognised that the manner in which the forecourt operation is executed has a direct impact on revenue, be it in the form of lost revenue with cars failing to make use of the car Park facilities provided, with unlicensed operators conducting business detracting from the official concessions, and the cost of managing and policing. It has been recognised that there is the potential for additional income if private vehicles were to use the car park facilities provided."

193. Later in the same documents she refers to the off-airport operators "siphoning away" revenue from the operators who at that point had been appointed by HAL. The impact on the car park operations was not, as such, the subject of a detailed assessment before the 2010 changes. The document acknowledged that there was a requirement on BAA to make public transport more attractive to users which might well be by affording specific lanes closest to the terminal.

> "Such a move may well require current activities to be displaced and accommodated elsewhere. To make an assessment and formulate a plan that can be meaningfully and successfully implemented there must be a sound assessment of the existing level of use, and effectiveness."

194. Such an assessment was never carried out in relation to T5 and T1, and while there was an assessment by Motts in relation to T3 it was not quite of that kind.

195. What this history provides is a strong indication that it was recognised that there were various drivers for limiting the access of off-airport meet and greet operators to the forecourts, but objective justifications were articulated only in general terms. The commercial advantages of doing it were in the forefront of the minds of HAL. I find that they stayed there.

196. Thus when the master plan was first implemented at T5, it was the first step in a plan in which the cross-forecourt need to control the off-airport meet and greet operators was very much in the minds of HAL, and the four justifications were present in general terms but not developed. They could only be

expressed in general terms and, apart from T3, no steps had been taken to develop them (and particularly congestion) rationally or as a matter of research.

197. This is important background for a consideration of the claimed objective rationales in relation to T1 and T3. I bear in mind that the process started with proposals which had nothing to do with the four justifications.

Objective justification – Terminal 1

198. A close study of the letter of 31st March reveals that it does not expressly in terms claim that the reasons for the proposed change was any of the four justifications, though I think a reasonable reader would think that it was saying that. It refers to the purpose of the forecourt as being to "facilitate the congestion free, safe, secure and environmentally balanced way in which passengers can be 'dropped off' for their flights". The implication is that the use of the forecourt for meet and greet activities is contrary to those aims. The note of the meeting with Ms Neighbour indicates that she appreciated the commercial reasons that underlay the decision. She was not told that there were any other reasons. Mr Brown admitted that there was no congestion at T1 which drove the decision. He said that once the congestion factor went then safety, security and environmental questions also went "to an extent" – the concerns were still there though to a degree they were related to the presence, or absence, of congestion. Having considered Mr Brown's evidence I do not think that the other three factors actually played any significant part in the thinking of Mr Brown in relation to T1. They may have been present as general background factors, but they were no more than that. He had the commercial considerations very much in the forefront of his mind. They were the principal driver. If it had not been for those commercial considerations, I doubt if he would have implemented the decision he did in relation to T1.

199. So the justifications now relied on were not relied on at the time. However, the four justifications are still relied on as just that – an objective justification. Purple and Meteor challenge this. My finding that HAL did not actually rely on them in the case of T1 is not a promising start for any case that they existed, but it is not determinative. I am invited to find that, on the balance of probabilities, they do not exist as objective justifications. I remind myself that the inquiry is as to whether the justification is such as to justify conduct which is, absent that justification, anti-competitive. I also bear in mind that the burden of proof is agreed to be on the claimants on this issue.

200. Despite Mr Brown's expressed view that there was no congestion at T1, Mr Brealey continued to press congestion as an objective justification. He pointed to that part of Mr Brown's evidence in which he referred to congestion when lane 1 was closed for El Al flights; and evidence from Insp. Bardwell to the effect that there is sometimes congestion when the public go to the forecourt to pick up passengers when those passengers have arrived lower down, and when the upper level (or part of it) is closed for El Al flights. There was, however, nothing beyond this impressionistic evidence, and bearing in mind the overall absence of congestion it is a weak factor which is completely outweighed by the absence of a general problem.

201. The experts did not, overall, consider there was a congestion problem at T1. Although there was some "queuing", they considered that there were indications that this was triggered by driver behaviour, highway design and signage issues on the approach rather than lack of space on the forecourt itself. Mr Heffer's report does not say that there is a capacity problem in relation to T1 (contrast T3, where he says there is), and under the heading "capacity" he seems to suggest that the main problem with meet and greet operators using the forecourts is not that it causes, or contributes to, congestion on the forecourt, but that the delays (dwell time) in the handover procedures encourages kiss and fly users to overstay their time there, which behaviour is transferred to other terminals and adds to the "potential congestion" and security issues faced elsewhere.

202. Not much attention was paid to this last specific factor, and it seems to be a rather nebulous one, incapable of much proof, or at least it has not been proved on the evidence before me. I give it no weight. Mr Witchalls' clearly stated conclusion in his report was that bay occupancy levels show that for all bays there would be sufficient overall kerb length on the upper and lower forecourts to accommodate peak demands. It is therefore not necessary to remove the off-airport meet and greet operators from the forecourt. Their use is built into that conclusion. If there is the odd period when there is congestion, then removing the meet and greet operators to car parks permanently would be an over-reaction to that situation and would not be objectively justified. I accept all this evidence.

203. A different version of the congestion justification emerged during the trial. It was suggested that there

were sound operational reasons for an airport operator such as HAL to maintain spare capacity, or to have an eye on the prospect of future congestion arising out of increases in passenger numbers or unforeseen circumstances. Mr Heffer acknowledged that there was spare capacity at present, but said that if operations at T1 increased, then allowing longer than average dwell times to meet and greet operators would "impact negatively on the terminal's ability to handle its full capacity". Mr Brown, in his fourth witness statement (which was effectively the second one that he filed for trial purposes) also took a similar point. Mr Witchalls was cross-examined about the desirability, when designing an airport, to build spare capacity into a forecourt, and about good operational reasons for retaining it. All this emerged in Mr Brealey's final speech as an additional objective justification for excluding the meet and greet operators from the forecourts, which was said to apply to T1.

204. This is very unconvincing stuff, and it smacks of casting around for a justification which, before the action started, had never really occurred to anyone in the decision-making process, and so far as T1 is concerned it looks like a sort of last ditch attempt to retain something of the congestion point. It is telling that it did not figure in Mr Brown's first trial witness statement (his third chronologically), unless a casual reference to the need to bear in mind the London Olympics is intended to be a reference to it. It did not figure in his thinking, which demonstrates the poverty of the case built upon it. I accept that it is a point that an airport operator would want to consider, particularly when designing an airport, but as an objective justification for excluding meet and greet operators from an existing forecourt it does not work when its basis is merely a suggestion that spare capacity is a good thing. No link is suggested to meet and greet operations. The following are obvious questions - how much capacity would be freed? When is that capacity likely to be taken up? And crucially, would excluding the meet and greet operators be overkill in terms of freeing up capacity? None of these questions were addressed. I am quite satisfied that this is not a real reason or justification at all for excluding the meet and greet operators from any terminal.

205. There is one last aspect of congestion which has to be dealt with. It was said that there was an increase in traffic around the terminals (and therefore around T1) arising from occasions when a meet and greet company was re-delivering a car, failed to meet the driver on the forecourt, was moved on by a marshal and had to drive round the block and return to make a second rendezvous attempt. I accept that this may happen from time to time, but the number of occasions on which it is likely to happen, and its relative nature when compared with the other traffic around the terminals, are such that it is completely insignificant in area congestion terms. Most of the detailed evidence was focused on forecourt users, but in round terms the total off-airport meet and greet traffic is just over 2% of users of the forecourt. Only a proportion of that would be recirculating. The numbers involved provide no justification for the blanket ban which HAL wishes to impose. It would not, in my opinion, be a material factor in any overall assessment either.

206. In the circumstances I am satisfied that the claimants have clearly demonstrated that the removal of congestion is not an objective justification for the removal of the off-airport meet and greet operators from the forecourt of T1.

207. I turn next to security. It was common ground that security is a legitimate concern. No one doubts that, nor do they doubt the need for security at airports generally. Unattended cars present a security risk – they might contain a bomb. In this context it has to be borne in mind that T1 houses El Al flights, with the additional security risks that that presents.

208. The pleaded case of HAL on security is that security is a problem in a congested forecourt, because congestion makes it harder to spot the danger. Since congestion is not really a problem on the T1 forecourt this aspect of the matter is of lesser importance. During the trial the matter developed in a different way. Emphasis was placed on the risks posed by an unattended car, and Mr Heffer referred to the desensitising effect of cars remaining for the longer dwell times associated with off-airport meet and greet cars. The experts both agreed the presence of unknown vehicles for prolonged periods on the forecourt posed a potential security risk.

209. In the case of T1, and in the present context, this is not a major point. Security is always serious, but the question for me is the extent to which these security points amount to, or support a case of, objective justification for removing all off-airport meet and greet operators to the car park. In that context this is a small consideration. It is no part of this judgment to rule on how security should be dealt with, but there are other ways of dealing with this point short of banning the operators – better enforcement, a licensing system which imposes appropriate conditions, making sure that the operators use the two outer lanes (which by and large they try to do anyway). Weighing this point, it is not sufficient by itself to amount to an objective justification of the exclusion, and is not of great weight in an aggregated consideration of all the factors relied on. Excluding all off-airport meet and greet

operators on this basis would be over-extravagant, and to be fair to HAL it did not actually put this forward as a single standalone justification.

210. Next is safety. HAL's case is that increasing the number of vehicles leads to double parking and poor lines of sight which make the forecourts more dangerous for road users and pedestrians. Put that way this is another congestion-related point, and loses its force as the congestion point loses its force. Nonetheless it remains as some sort of point. However, as a point which is said objectively to justify the removal of the meet and greet operators it is weak and no more than a makeweight, if that.

211. Last of the pleaded issues are the environmental concerns. These have two aspects. First is said to be HAL's commitment to a strategy to reduce pollution from emissions from vehicles waiting with their engines running, and second is a desire to reduce pollution from vehicles which recirculate because their owners have not yet emerged from the terminal to pick them up. Bearing in mind the relatively small number of off-airport meet and great movements compared to all other vehicle movements (less than 3%), this is never going to be big factor. (Comparing the emissions from the rather larger engines on the other side of the terminal buildings, which are the raison d'être of the whole airport, might lead one to think that the point recedes to the vanishing point of irony, but I was not invited to find that.) It is something that HAL is entitled to take into account, but like the last point is only a small one, and does little more than lend weight to other grounds.

212. One further point emerged at the trial. Mr Brown sought to justify the stance taken by HAL on a "user pays" principle – the meet and greet operators were using Heathrow facilities. Mr Brealey did not advance it as if it were in the same category as the four justifications, but Mr Maclean was prepared to treat it as if it were, and once he had done so Mr Brealey took it up. I shall therefore deal with it.

213. HAL's case is that it is reasonable and proper for it to seek to charge the meet and greet operators for using Heathrow facilities. They were commercial operations, and were using the forecourts for commercial purposes. Other users such as taxis and coach operators had to pay. At the end of the day that was not a contentious principle – Mr Hinge himself said in the witness box that he did not object in principle to having to pay for access to the Heathrow facilities. I agree that that HAL's stance on that point is not unreasonable.

214. Mr Brealey's written submissions in reply were to the effect that the evidence demonstrated that requiring the claimants to operate from the short stay car parks was the only reasonably practicable method by which the operators could be required to pay for the use of the facilities. That was certainly the thrust of Mr Brown's evidence. However, I am not satisfied that that is right. Certain controls were accepted by both sides as being unworkable – for example, barriers on the forecourts. Other problems were not agreed as being insuperable. HAL suggested that self-declaration would not work, and that it would be impossible to ascertain who was operating pursuant to any given licence, if there were a licensing system. Purple and Meteor did not agree.

215. The problem with this part of the dispute is that it was not foreshadowed by the pleadings, with the result that the parties were not properly prepared to deal with it as a matter of considered evidence. It is known that HAL rejected a licensing scheme, but the reasons for that were not investigated, and I am not aware that any disclosure was given in respect of that. So the feasibility of that control could not be properly tested. So far as the defendant was concerned, most of the evidence was adduced ad hoc in the course of cross-examination. That is not a satisfactory way of dealing with a potentially significant point. There may be all sorts of ways of rendering a "user pays" scheme workable, especially with the benefits of modern technology, and the justification behind Mr Brown's apparent dismissal of all of them has not been properly tested. That is because of the way in which the point came up in the proceedings. I am not satisfied that making the users pay via using the car parks is the only way of achieving that end. I am not satisfied that HAL has really done any more than make an assertion of a possible justification, and I consider that more than that is needed to shift the burden on to the claimants. I think that this analysis gains strength from the fact that not only was this point not pleaded; it did not, as now articulated, form any real part of the background to the decision-making in relation to the events of 2010.

Terminal 1 – conclusion on objective justification

216. I have considered the above points individually and in aggregate. I find that the real motivation for the change in relation to Terminal 1 was a commercial one. That commercial one was to force the off-airport meet and greet operators off the forecourts and into the car park, in order to increase revenues from the car park and to decrease the effectiveness of those operators in their valet parking operations.

There was no real eye on the other factors referred to above.

217. That commercial justification is not a good objective justification for the purposes of the section. The other purported justifications are either non-existent or weak, and do not amount to good objectively justifiable reasons for creating the anti-competitive environment that HAL created (or wishes to create) there, taking them each individually and in aggregate.

Objective justification – Terminal 3

218. The position in relation to T3 is much more complicated, because HAL obtained some traffic consultancy advice and because actual congestion is more clearly an issue on this forecourt.

219. Mr Brown was at pains to point out the congestion issues on this forecourt. They exist on the forecourt itself, and at busy times, and under some conditions, are capable of having a significant if not serious knock on effect on the surrounding roads. This was not disputed by any relevant witness at the trial, and even Purple and Meteor's representatives acknowledged its existence. What was in issue was its degree, what contribution the meet and greet operators made to it, and what remedies were or might be appropriate to fix the problem. Under this last issue the real question was whether the reduction of congestion was a sufficient objective justification for the removal of the off-airport meet and greet operators to the car park.

220. The experts reached agreement on some useful points. First, they agreed that in the context of this case, congestion could be considered as over-crowding or other operational factors on the forecourt that led to queueing back from the forecourt. They also agreed that, having considered the statistics and other material before them:

> "at Terminal 3 queueing during peak periods is a regular occurrence (that is it occurs during peak periods, typically on Mondays, Fridays and Sundays). This queuing is related to available capacity, current layout/signage, and driver behaviour issues on the forecourt and on the approaches to the Terminal 3 multi-storey car park. Lack of effective management and enforcement is a further factor that contributes to queuing and it is agreed that enforcement is currently a matter for the police and Traffic Community Police Support Officers."

221. This was accepted by both parties, and I accept it too. What it shows is that congestion is not simply a matter of demand exceeding supply. The issue is more subtle than that. Other factors are involved, and some of the factors interact – thus driver behaviour (which would include not parking sensibly, and staying too long) interacts with enforcement. So the experts did not present a picture in which congestion came simply from there being too many users, and in which simply removing some of the users would fix the problem. Of course, if you remove enough users, you will fix the problem, but the fact that there are other factors in play means that there may be more complicated solutions than that, and none of them suggested that a simple move of the off-airport meet and greet operators to the car park would fix the problem.

222. Mr Witchalls sought to assess the relative activities of meet and greet usage and other forecourt usage, by carrying out a survey of traffic movements. Since he was conducting his survey activities at a time when the off-airport operators were using the car-park for pick up he had to carry out some adjustments to add them notionally back to the forecourt. In his report his adjusted figure was that, across 3 survey days, meet and greet operators, including HVP accounted for an average of 3.6% of the traffic flow of the forecourt. His figures came under attack, and it appeared that he must have missed some meet and greet transactions because the records of Purple and Meteor themselves showed more of their customers in the relevant survey period than Mr Witchalls had himself recorded. That seemed to be a fair criticism on the facts, though Mr Maclean demonstrated in his final speech that when one adjusted the figures one did not seem to come up with a percentage user which was, in overall terms, much more significant. Mr Witchalls' figure for the percentage of off-airport meet and greet usage (not including HVP) would rise from 2.3% to 3.1% on the assumption that all meet and greet operations were conducted from the forecourt. This is not an obviously significant leap.

223. The other major criticism of Mr Witchalls' evidence is, in my view, of potentially more significance. Mr Witchalls counted vehicle movements only. He did not factor in any element of what was Mr Brealey described as "value", that is to say use of the forecourt which brings in dwell time. The experts agreed that the average dwell time (time stationary at the kerb) of a meet and greet operation was very significantly greater than the average dwell time of a kiss and fly user – 5 minutes as against 2 minutes

45 seconds. That is getting on for twice as long. These were, of course, averages, and there was evidence of some much longer dwelling at the kerb by meet and greet operations, probably because of mis-timings on a pick-up operation between the arrival of a car at the kerb and the arrival of the driver. This sort of factor is capable of materially increasing the impact of the usage of the forecourt by meet and greet operators. It would not be fair simply to point to the numbers and treat that as an accurate reflection of forecourt usage. Mr Witchalls had not carried out a proper calculation to work out what percentage of use the meet and greet operators made of the forecourt, or indeed of their lanes (lanes 3 and 4), but on an impressionistic basis he put it at between 4 and 5%, though there were difficulties in identifying the correct whole of which the 4-5% was part. This was very much an impressionistic figure.

224. Mr Heffer seemed to have relied on "circuit and return" drivers (drivers who fail to meet their pickup and who go round again) as being a material contributor to congestion. In the overall context of the congestion this seems to me to be but a very small additional element.

225. Mr Witchalls also carried out a survey of bay usage across the forecourt. This part of his analysis was more "value-based". His analysis was quite complex, but from it he concluded that there were occasions of double-parking in some of the bays for some of the time, but across the forecourt as a whole there were always (or nearly always) available spaces. The second of those conclusions has to be treated with care, because it included parts of the forecourt which are not open to all users, so it pre-supposed a change on forecourt usage designation. Congestion arose from the over-utilisation of some bays and the under-utilisation of others. Sometimes this was alleviated by the opening of lane 2 to general traffic.

226. His overall conclusion was that off-airport meet and greet activities do not cause congestion or contribute to a significant extent to traffic management problems at T3, or at least not to such a significant extent as to mean that relocating them would provide a solution. The diversion of the number of vehicles involved would not address the problem, so relocating those activities to the car park would not be an appropriate response to the traffic management issues. However, re-allocating kerb space and managing traffic adequately would accommodate the traffic demands. Accordingly, the relief of congestion would not be an objective justification for the relocation of the off-airport meet and greet operators into the T3 car park.

227. Mr Witchalls was cross-examined on his figures but not, as such, on the specific conclusion which I have just cited. The effect of his cross-examination was that he acknowledged that he had to increase upwards his figures for off-airport meet and greet operators at T3, but not to a point at which he acknowledged that the usage had become significant enough to justify its removal as a response to congestion. While acknowledging that it would be rational for HAL to take account of such usage in considering forecourt planning, his theme remained that there were other things that could be done which would have a greater impact on congestion, to the extent that the forecourt could be made to have adequate capacity to accommodate the off-airport meet and greet operators.

228. I find that the overall effect of his cross-examination (which was detailed) is that while some of the elements of his modelling and reasoning required adjustment, none of the adjustments were such as to undermine his conclusion, which is that the off-airport meet and greet operators usage was not highly significant in congestion terms and other things could be done to manage the traffic (such as opening other lanes and better enforcement) which would create adequate capacity for all meet and greet operators. While his original analysis suffered from being numbers-based rather than "value-based", I do not consider that that undermines his conclusions at the end of the day.

229. Mr Heffer's evidence on the congestion point was largely geared to showing how much use meet and greet operators made of the forecourt when the dwell time was looked at. Using survey evidence he demonstrated that assessments apparently made by Mr Hinge and Ms Anglim were under-estimates, and that dwell times could sometimes be measured in very significant numbers of minutes for off-airport meet and greet operators. While he agreed with Mr Witchalls that it was an average of 5 minutes, his evidence demonstrated that perhaps between 30% and 40% exceeded that period. There was a tendency for meet and greet operators to cluster around the first bays in lanes 3 and 4, which led to a degradation of "operational performance and capacity". He agreed with Mott in its report that lanes 3 and 4 were over capacity and that a further 80 metres of car set down space was required. Any problems caused by congestion would get worse as airport usage increased with an economic recovery. His conclusion was that given the usage of the forecourt was over capacity and suffered congestion, he viewed it as sensible from a traffic management viewpoint that HAL had taken steps to restrict off-airport meet and greet operators so as to minimize the impact on capacity. He regarded plans on the part of HVP to move its pick-up operations into the car park as "wholly appropriate".

230. What Mr Heffer did not consider, however, was a bigger picture involving other alternatives, or additional steps, save insofar as he took Mott's report into account. Nor did he deal with the extent to which congestion would be reduced by the removal of the off-airport meet and greet operators into the car park.

231. Mott's survey identified a number of sources of problems on the forecourt, and identified lack of enforcement as a particular problem, and as being the single step which would have the greatest effect of improving efficiency on the forecourt. As appears above, it made a number of recommendations including moving staff buses to lane 1, increasing enforcement activity and increasing the number of occasions on which lane 2 is opened up. So far as meet and greet was concerned, it suggested moving all pickup activity to the car park, and moving HVP's area to lane 5. The first point about this is that while the report recommended moving meet and greet operators into the car park, this was as part of a much bigger exercise. The second point is that they were asked to assume that HAL's pick-up activities would be conducted from the car park (at one point in his cross-examination Mr Brown accepted a suggestion that Mott were asked to assume, or presuppose, that all off-airport meet and greet operations would be carried out from the car park, but looking at their briefing document that does not seem to have been the case). Third, as Mr Witchalls pointed out, Mott did not in either of its reports do any modelling to see the effects of leaving all valet parking on the forecourt while carrying out other changes, or just moving off-airport meet and greet operators into the car park and carrying out no other changes.

232. In the circumstances the conclusions that can be drawn from the Mott report, so far as concerns relief of congestion as a justification for relocating the off-airport meet and greet operators from the forecourt, are limited.

233. Taking into account all this evidence, I find that it has not been demonstrated that the relief of congestion is such as to justify the relocation of all off-airport meet and greet operations to the T3 car park. Taken by itself, it might produce some reduction in congestion at some times, but not to a predictably measurable extent and not to an extent necessary to justify it for the purposes presently under consideration. I prefer Mr Witchalls' evidence that if one were looking to remove the congestion there would other things that one would do which would have the desired effect while still leaving the meet and greet operators on the forecourt, and indeed some of them have now been done. Better enforcement and management would be the biggest single contributor to improving congestion, according to Mott, and I find that to be the case. Accordingly, if one is looking at single steps to relieve congestion, that step, rather than removing the valet operators, would be the step to take. I find that the claim that moving the valet operators is justified on this basis has been repudiated on the evidence. It is too simplistic a solution. And it is certainly not a justification for the step of moving the off-airport operators and leaving HAL on the forecourt.

234. I bear in mind that in my view the law requires a high degree of necessity if objective justification is relied on to justify what would otherwise be forbidden anti-competitive conduct. In the *Frankfurt* case the airport owners had relied on practical matters such as lack of space in seeking to justify its exclusion of third party handlers of aircraft, The Commission found that that was:

> "not such as to constitute an objective justification within the meaning of the Court's judgments, since there are solutions which would allow any lack of space to be overcome."

235. The factor or factors relied on must therefore be justified in that sense – not merely that it is a solution to the relevant problem, but that it is the solution to the problem. If there are other solutions then the conduct is not justified. In paragraph 88 the Commission determined that:

> "... FAG's decision not to authorise self-handling and not to admit independent handlers is not the result of an overriding need, but was a matter of choice of FAG, which did not take the measures which would have obviated the constraints imposed by the lack of space at the airport."

236. Mr Maclean relied on this paragraph, and in particular the strong phrase "overriding need". For my part I would have thought that seems to put the matter a little high, but the essence is that there is no justification if there is another solution. The evidence of the experts does not demonstrate that the removal of the off-airport meet and greet operators is the only solution, or is a necessary part of a composite solution (not that HAL implemented it as such at the time). The evidence of Mr Witchalls suggests, and I find, that it is neither. It is not, in my view, even a solution, because by itself it is not

enough.

237. In addition to congestion, HAL relied on the other elements of the four justifications in relation to T3. They have the same limited effect in relation to this terminal's forecourt as in relation to T1's. The same applies to points that were sought to be made in relation to the desirability of keeping some spare capacity. These points have varying merits, but again individually and collectively (even when taken with congestion) do not in my view add up to an objective justification for removing the off-airport operators and leaving HAL on the forecourt.

Terminal 3 – conclusion on objective justification

238. I therefore conclude that there is no objective justification for the changes at T3 either. Purple and Meteor have demonstrated that there are other steps which could be taken to alleviate congestion, and that removing the off-airport meet and greet operators is not a step which has a useful result to such an extent as to justify the otherwise prohibited anti-competitive effects. I also find that the motivation of HAL was not, in any event, simply to produce objectively justifiable effects. It intended an anti-competitive effect.

Miscellaneous points

239. As appears above, during the course of the trial there was a certain amount of discussion in the evidence about what else HAL could do or what they could have done in order to deal with congestion at T3, and what justifiable steps could be taken to ensure that the off-airport meet and greet paid an appropriate sum for use of the facilities (which Purple and Meteor accepted would be proper). Thus there was debate with the experts (principally Mr Witchalls) as to the sort of controls that would generally be proper, and what spare capacity should be kept in hand. There was limited discussion about the feasibility of a licensing scheme. This judgment is not intended to decide what controls, either individually or in aggregate, would be appropriate to achieve a proper degree of reduction of congestion in the sense of prescribing a scheme, or approving or outlawing individual controls as such. What this judgment is concerned with is ruling on steps HAL took to change the modus operandi of the off-airport meet and greet operators while leaving HAL untouched and in a better position on the forecourt. It is that particular scheme and state of affairs, against its proper factual background, that is ruled on in this judgment, and not anything else.

240. I would also add that my decision is not affected by the fact that the controls in question are contained in byelaws. In taking the steps that it took, HAL was relying on the situation that it had produced in byelaws with the force of the criminal law. Because of the position which HAL occupies at Heathrow it is in a position to control access through byelaws and not merely through the enforcement of proprietary rights. In my view that makes no difference. That is merely the control mechanism, and its position as the maker of bye-laws merely gives it another method of control, and not a special method of control which is exempt from the effects of competition law. It used these byelaws to its own commercial advantage when it amended them to allow for the issuing of permits to itself. This judgment is not concerned with the validity of those byelaws (there was no challenge as to that in these proceedings); it is concerned with HAL's decisions as to how and when to enforce them.

Conclusion

241. I therefore find that HAL has been guilty of conduct which contravenes section 18 and I will grant such relief as is appropriate after hearing argument (assuming there is a dispute as to that).

242. Mr Brealey submitted that one of the obstacles that the claimants faced in this case was an alleged difficulty in the sort of injunctive relief they sought (namely injunctive relief requiring their re-admission to the forecourts). He sought to paint a picture in which "the implementation of the Court's ruling can be the subject of some unspecified negotiation between the parties", and "it would be unfortunate for the Court to make an order in such vague, unspecified and unenforceable terms". The negotiations he envisages include deals (which he says will be difficult) as to how long the operators can dwell on the forecourts, how they are to be identified to the enforecement agencies, and what the terms of a licence might be.

243. This objection is misplaced. I do not propose to make any order which is faintly like that. I shall make an order which forbids the anti-competitive conduct, namely the exclusion from the forecourt. What happens thereafter is up to the parties, and particularly HAL. They may negotiate a solution; HAL may impose a solution which does not contravene competition law. There may be other outcomes. They will

not feature in my order.

Note 1 Which is not relevant to this case. [Back]
