

Decision of the Competition and Markets Authority

Residential estate agency services
Case 50235

31 May 2017

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Confidential information in the original version of this Decision has been redacted from the published version on the public register. Redacted confidential information in the text of the published version of the Decision is denoted by [§<].

The names of individuals mentioned in the description of the infringement in the original version of this Decision have been removed from the published version on the public register. Names have been replaced by a general descriptor of the individual's role.

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1. INTRODUCTION AND EXECUTIVE SUMMARY

1.1 By this Decision, the Competition and Markets Authority (the '**CMA**') has concluded that the persons listed at paragraph 1.2 below have infringed the prohibition imposed by section 2(1) of the Competition Act 1998 (the '**Act**') (the '**Chapter I prohibition**').

1.2 This Decision is addressed to:

- a. Abbott and Frost Estate Agents Limited ('**Abbott and Frost**');
- b. Annagram Estates Limited ('**Annagram**') (trading as 'CJ Hole');
- c. Gary Berryman Estate Agents Ltd and its ultimate parent company, Warne Investments Limited ('**Warne Investments**') (together, '**Gary Berryman**');
- d. Greenslade Taylor Hunt ('**GTH**');
- e. Saxons PS Limited ('**Saxons**'); and
- f. West Coast Property Services (UK) Limited ('**West Coast**')

which, in this Decision, are referred to singularly as a '**Party**' and collectively as the '**Parties**'.

1.3 The CMA has found that the Parties infringed the Chapter I prohibition by participating in an agreement and/or concerted practice to fix a minimum level of commission fees for the provision of traditional residential estate agency services (that is, property sales agency services provided by estate agents that operate with a 'high street' presence) in the area in which the Parties provided these services from branches located in Burnham-on-Sea ('**Burnham**')¹ from at least 4 February 2014 until at least 18 February 2015 in the case of Saxons and until at least 24 March 2015 in the case of the other Parties (the '**Infringement**').

1.4 In this Decision, the '**Relevant Period**' refers to the period of participation of the relevant Party or Parties (as appropriate) as indicated above.

1.5 The CMA has imposed financial penalties under section 36 of the Act.

¹ This area covers the area with postcodes TA8 and TA9, but also includes other geographic areas to the extent they are served by any of the Parties' Burnham-on-Sea branches. See further '*The relevant geographic market*' at paragraphs 4.12 to 4.18 below.

2. THE INVESTIGATION

A. Launch of the investigation

2.1 In September 2015, the CMA opened a formal investigation under section 25 of the Act, having determined on the basis of information received after compliance work following a previous CMA investigation in the estate and letting agency sector² that there were reasonable grounds for suspecting that the Parties had infringed the Chapter I prohibition by participating in suspected cartel activity.

2.2 On 10 December 2015, the CMA carried out searches under section 28 of the Act of the business premises of Abbott and Frost, Gary Berryman Estate Agents Ltd, GTH, Saxons, West Coast and [Other Burnham Estate Agent 1],³ and seized both hard copy and digital material relevant to its investigation.

B. Leniency

2.3 Between 28 February 2017 and 2 March 2017, the CMA entered into leniency agreements under the CMA's leniency policy with each of Annagram, West Coast and GTH, in relation to their respective involvement in the Infringement. Annagram was the first to apply under the policy and was granted immunity from financial penalties, conditional on its continuing to meet the requirements of the CMA's policy. West Coast and GTH were each granted conditional leniency.

C. Evidence-gathering

2.4 In addition to the evidence gathered under section 28 of the Act, each of Annagram, West Coast and GTH provided information and/or documents as part of each Party's obligation to cooperate under the CMA's leniency policy, including in response to information requests from the CMA.⁴

² *Restrictive arrangements preventing estate and lettings agents from advertising their fees in a local newspaper*. Decision of the Competition and Markets Authority (Case CE/9827/13, 8 May 2015) ('**Three Counties**'), available to view at https://assets.publishing.service.gov.uk/media/55841caee5274a1576000008/Property_sales_and_lettings_non-confidential_decision.pdf.

³ In light of its review of the relevant evidence and for reasons of administrative priority, the CMA subsequently decided to scope [Other Burnham Estate Agent 1] out of the investigation as [Other Burnham Estate Agent 1] was not operating during the Relevant Period for any Party.

⁴ Section 5 of OFT1495: *Applications for leniency and no-action in cartel cases* (July 2013, adopted by the CMA Board) (the '**Leniency Guidance**'). The CMA issued initial requests for information for certain corporate and financial information to GTH and West Coast on 10 August 2016 and issued a request to Annagram for certain financial information on 23 November 2016.

2.5 The CMA also issued compulsory document and/or information requests to some of the Parties under section 26 of the Act⁵ and, following the launch of its investigation, conducted voluntary interviews with 10 individuals who were employed by the Parties for all or part of the Relevant Period: [Employee 1] (Annagram); [Senior Employee 1] (West Coast); [Senior Employee 2] (West Coast); [Employee 1] (Saxons); [Senior Employee 1] (Saxons); [Senior Employee 1] (Abbott and Frost); [Senior Employee 2] (Abbott and Frost); [Senior Employee 1] (GTH); [Employee 1] (GTH); and [Senior Employee 2] (Gary Berryman). The CMA also invited [Senior Employee 1] (Gary Berryman) to attend a voluntary interview but he did not take up that invitation. For information about these individuals' positions during the Relevant Period, see the table at paragraph 3.76 below.

D. 'State of play' meetings

2.6 The CMA held 'state of play' meetings with each of the Parties separately during the period from 23 September 2016 to 11 October 2016.⁶

E. Settlement

2.7 On 2 March 2017, the CMA announced that it had settled the case with four of the parties, Abbott and Frost, GTH, Gary Berryman and West Coast (together, the '**Settling Parties**' and each a '**Settling Party**'),⁷ after each of the Settling Parties:

- a. admitted that it had infringed the Chapter I prohibition in the terms set out in a draft Statement of Objections dated 17 February 2017;⁸

⁵ The CMA issued a document and information request under section 26 of the Act to West Coast on 10 December 2015. The CMA also issued information requests under section 26 of the Act to Abbott and Frost and Gary Berryman on 10 August 2016, and to Saxons on 12 August 2016. The CMA sent follow up requests for certain information to Abbott and Frost on 26 October 2016 and to Gary Berryman on 15 November 2016 and 30 November 2016.

⁶ The 'state of play' meetings took place on the following dates: Abbot and Frost - 10 October 2016; Annagram – 23 September 2016; Gary Berryman - 11 October 2016; GTH - 27 September 2016; Saxons - 6 October 2016; and West Coast - 26 September 2016.

⁷ See the CMA's press release, dated 2 March 2017.

⁸ As part of the settlement process and consistent with the CMA's settlement policy as set out in the CMA's guidance, *Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases*, the Settling Parties had been presented with an earlier draft of the Statement of Objections, dated 16 December 2016, access to the documents referred to in the draft Statement of Objections, a list of the documents on the CMA's file and a draft penalty calculation. As part of the settlement process, the Settling Parties were provided with an opportunity to make limited representations on the draft Statement of Objections and draft penalty calculation, both in writing and orally at settlement meetings held with each of the Settling Parties during January and February 2017.

- b. agreed to accept a maximum penalty;⁹ and
- c. agreed to cooperate in expediting the process for concluding the CMA's investigation.

2.8 Saxons did not settle the case with the CMA.

F. Statement of Objections

2.9 On 7 March 2017, the CMA issued a Statement of Objections to the Parties.¹⁰ Gary Berryman and GTH made limited representations on the Statement of Objections. Abbott and Frost, Annagram, Saxons and West Coast made no representations on the Statement of Objections.

G. Draft Penalty Statement

2.10 On 28 April 2017, the CMA issued a Draft Penalty Statement to Saxons.¹¹ Saxons made no representations on the Draft Penalty Statement.

⁹ The maximum penalties agreed by the Settling Parties were as follows: Abbott and Frost - £30,099; Gary Berryman - £97,807; GTH - £186,054; and West Coast - £58,273. Under the terms of the settlement, any final penalty imposed by the CMA on the Settling Party cannot exceed the maximum amount specified for that Settling Party unless the CMA considers that the Settling Party has not complied with one or more of the requirements of settlement.

¹⁰ In accordance with section 31 of the Act and Rules 5 and 6 of The Competition Act 1998 (Competition and Market Authority's Rules) Order 2014, SI 2014/458 (the '**CA98 Rules**').

¹¹ In accordance with section 36 of the Act and rules 11 and 6 of the CA98 Rules.

3. **FACTUAL BACKGROUND**¹²

- 3.1 The CMA has found that the Infringement consisted of an anti-competitive agreement and/or concerted practice between each of the Parties to fix a minimum level of commission fees for the provision of traditional¹³ residential estate agency (that is, property sales agency) services in Burnham¹⁴ from at least 4 February 2014 until at least 18 February 2015 in the case of Saxons, and until at least 24 March 2015 in the case of the other Parties.¹⁵
- 3.2 For the avoidance of doubt, the CMA has found that the Infringement related only to the provision of traditional residential estate agency (that is, property sales agency) services. All of the Parties were active in the provision of residential estate agency services. Although most of the Parties¹⁶ also provide property letting services and some of the Parties¹⁷ also provide commercial property agency services (both property sales and property lettings agency services), the CMA has not seen evidence that the Infringement applied to the provision of any services other than residential property sales agency services.

A. Industry overview

Residential estate agency services

- 3.3 'Estate agency services' refer to agency services for and related to the sale of property.¹⁸
- 3.4 Estate agency services do not encompass other services which can be provided by property agents, such as 'lettings agency services', which relate to agency services for the letting of property.
- 3.5 In the remainder of this Decision, the CMA refers to 'property sales' and 'estate agency' services interchangeably to mean agency services for and related to the sale of property.

¹² Information in this section reflects the position as at 16 May 2017.

¹³ Traditional estate agency refers to those estate agents operating with a high street presence.

¹⁴ For ease, and as explained in paragraph 1.3 and footnote 1 above, the CMA uses the term 'Burnham' throughout this Decision to refer to the area in which the Parties provided traditional residential estate agency services from branches located in Burnham-on-Sea. This covers the area with postcodes TA8 and TA9, but also includes other geographic areas to the extent they are served by any of the Parties' Burnham-on-Sea branches.

¹⁵ The CMA has not prioritised investigating whether any infringement or infringements of competition law were committed outside of this period.

¹⁶ Abbott and Frost, Annagram, Gary Berryman, GTH and West Coast.

¹⁷ Abbott and Frost, Gary Berryman and GTH.

¹⁸ The term 'estate agent' only applies to the sale of interests in land (section 1 of the Estate Agents Act 1979).

- 3.6 Estate agents can act as sales agent in respect of both residential and commercial properties. The present investigation only relates to agency services for the sale of residential properties.
- 3.7 Estate agents that operate with a 'high street' presence are referred to in this Decision as 'traditional' estate agents. Alternatives to using traditional estate agents would include private selling (whether through direct sales or through private seller websites), online estate agents¹⁹ and auctions.²⁰ The present case concerns only the activities of agents which offer traditional estate agency services.
- 3.8 Traditional estate agents tend to fall into three main categories: estate agency chains (operating locally, regionally or nationally), affinity groups (groups of smaller, independent estate agents allowing them to market their properties more widely through the group and in some cases use the brand name of the group) and those operating independently.²¹
- 3.9 In terms of geographic scope, previous research shows that competition in the estate agency market takes place at a very local level.²² The present case concerns the activities of estate agents with a branch in Burnham-on-Sea, Somerset.

The provision of residential estate agency services

- 3.10 Estate agency is a two-sided market with the estate agent acting as an intermediary between the sellers of properties on the one hand and the buyers of properties on the other.²³ The estate agent's client is the seller of a property.
- 3.11 Residential estate agents tend to offer a range of services for sellers, including property valuations; price recommendations; promotional services; arranging and conducting viewings; screening of potential buyers; negotiation; a range of ancillary services; and liaison between the parties.²⁴
- 3.12 A seller of residential property will usually start by getting an idea of the value of their home. Estate agents tend to provide free valuations to prospective clients. Estate agents tend to seek to convert the valuation of the property into an appointment by the seller to act as sales agent in respect of the property. Estate agents will also compete on their fees/commission to

¹⁹ i.e. those agents with an internet presence only.

²⁰ *Home buying and selling*, A market study (OFT1186, February 2010), paragraphs 3.21 and 3.44 to 3.60.

²¹ *Home buying and selling*, A market study (OFT1186, February 2010), paragraph 3.29.

²² *Home buying and selling*, A market study (OFT1186, February 2010), paragraph 4.11.

²³ *Home buying and selling*, A market study (OFT1186, February 2010), paragraph 3.18.

²⁴ *Home buying and selling*, A market study (OFT1186, February 2010), paragraph 3.21.

gain new instructions from property sellers. They will also compete in terms of the quality of customer service they provide.

- 3.13 The CMA understands that the practice of 'touting' in the context of the provision of residential estate agency services refers to targeted marketing by an agent to an existing customer of another agent in an attempt to persuade that customer (through references to fees and/or quality of service) to instruct them in addition to or instead of the existing agent.

Fees for residential estate agency services

- 3.14 Estate agents tend to be remunerated for their services by a commission payable by the seller of a property. The commission is generally agreed when the agent is appointed and becomes payable on sale of the property.
- 3.15 The commission rate can be set as a percentage of the achieved sale price of the property (plus VAT), as a flat rate commission fee (plus VAT), or as a combination of a percentage commission rate and a minimum flat rate commission fee. In the latter (combination) case, the greater of the percentage fee or the minimum flat rate would be charged by the estate agent in relation to a property sale, such that, for example, if an estate agent has a commission rate of 1.5 per cent and a minimum fee of £2,000, the minimum fee would apply if 1.5 per cent of the achieved sale price was not greater than £2,000.
- 3.16 A percentage commission rate ordinarily differs depending on whether the estate agent is instructed alone or together with other agents in relation to a property. In England and Wales there are three main types of contracts between estate agents and property sellers, namely:
- a. 'Sole' or 'single' agency, where only one estate agent is instructed by a seller in relation to a particular property. This tends to be the most common arrangement and carries the lowest commission fee;
 - b. 'Joint sole' or 'joint' agency, where two or more estate agents are instructed as sole agents and split the commission if one of them is successful. The commission fees tend to be higher for joint sole/joint agency than for sole/single agency agreements; and
 - c. 'Multiple' agency, where two or more estate agents are instructed to sell the property at the same time. Commission is only paid to the

estate agent that finds a buyer. The commission fees for multiple agency tend to be similar to joint sole/joint agency.²⁵

Residential estate agency services – overview of relevant legal and regulatory provisions

- 3.17 Estate agents are not required by law to be licensed or to hold any particular qualifications. However, they are regulated principally by the Estate Agents Act 1979. They are also required to comply with consumer protection law including:
- a. The Consumer Protection from Unfair Trading Regulations 2008, which prohibit unfair commercial practices between traders and consumers;
 - b. The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013, which specify information traders must provide to consumers; and
 - c. Part 2 of the Consumer Rights Act 2015, which deals with the fairness of contractual terms and notices.

In addition, since 1 October 2008 it has been compulsory for estate agents to belong to a redress scheme.²⁶

- 3.18 Whilst not a legal or a regulatory requirement, some agents choose to join associations which promote best practice, such as the National Association of Estate Agents ('**NAEA**'). The NAEA issues guidance on recommended best practice.

²⁵ *Home buying and selling*, A market study (OFT1186, February 2010), paragraph 3.26.

²⁶ Section 23A of the Estate Agents Act 1979, as inserted by Schedule 3 to the Consumer, Estate Agents and Redress Act 2007 and brought into force by the Estate Agents (Redress Scheme) Order 2008.

Residential estate agency services in Burnham

3.19 During the Relevant Period, each of the Parties had a branch in Burnham-on-Sea and provided traditional residential estate agency services in Burnham. The CMA estimates that the market for the provision of traditional residential estate agency services in Burnham was worth in the region of £1.5 million during the Relevant Period²⁷ and that the Parties collectively had the overwhelming majority of the share of the market, potentially as high as 95 per cent.²⁸

B. The Parties

Abbott and Frost

3.20 Abbott and Frost is a single branch estate and lettings agent dealing with both residential and commercial property in Burnham.²⁹

3.21 Abbott and Frost is a private limited company registered in England and Wales with the company number 8251570. Abbott and Frost was incorporated on 12 October 2012 under the name of 'Abbott and Frost Estate Agents Limited'.³⁰ Abbott and Frost was an active company throughout the Relevant Period.

²⁷ The CMA reached this estimate by considering the market share figures provided by Saxons in its response of 23 September 2016 to the CMA's section 26 notice of 12 August, [URN1970], which put the Parties' collective market share at up to 95%, together with the information submitted by each Party to the CMA regarding its relevant turnover – see Email from Annagram to the CMA of 1 December 2016, [URN2079]; Annex 1B to Abbott and Frost's response of 6 September 2016 to the CMA's section 26 notice of 10 August 2016, [URN2078]; Annex 1B to Gary Berryman's response of 12 September 2016 to CMA's section 26 notice of 10 August 2016, [URN2072]; GTH's response of 24 August 2016 to CMA's Request for Information of 10 August 2016, [URN2083]; Saxons' response of 23 September 2016 to the CMA's section 26 notice of 12 August 2016, [URN1970]; and Annex 1B to West Coast's response of 24 August 2016 to CMA's Request for Information of 10 August 2016, [URN2047].

²⁸ Saxons' response of 23 September 2016 to the CMA's section 26 notice of 12 August 2016, [URN1970]. See also transcript of CMA interview with [Senior Employee 2] (West Coast), 5 February 2016, Disc 1 of 3, page 48, [URN1764], in which [Senior Employee 2] (West Coast) stated that there are six estate agents in Burnham, with potentially a maximum of four more 'outer-lying agents' which the CMA considered to be estate agents located outside Burnham that offer services in the area. The CMA did not consider [Senior Employee 2]'s (West Coast) evidence to be inconsistent with its conclusion that the Parties had the overwhelming majority of the market share in Burnham as estate agents operating outside the area are unlikely to have significant market shares in the area.

²⁹ It also offers related services, including market appraisals, and valuation of property for other purposes such as matrimonial matters and probate. Abbott and Frost's response of 6 September 2016 to the CMA's section 26 notice of 10 August 2016, [URN2078].

³⁰ Certificate of Incorporation, dated 12 October 2012, available on the Companies House website at <https://beta.companieshouse.gov.uk/company/08251570/filing-history>

- 3.22 Abbott and Frost's registered and trading address is 18 College Street, Burnham-on-Sea, TA8 1AE.³¹
- 3.23 Abbott and Frost is currently owned by [Shareholder 1] (fifty ordinary shares, 50% shares) and [Shareholder 2] (fifty ordinary shares, 50% shares). [Shareholder 1] and [Shareholder 2] were the only shareholders throughout the Relevant Period.³²
- 3.24 [Director 1] and [Director 2] are [X] the current directors of Abbott and Frost, and were so throughout the Relevant Period.³³ [Director 1] and [Director 2] shared responsibility for the business, including for residential property sales.³⁴
- 3.25 Abbott and Frost's annual turnover for the financial year ending 31 March 2016 was [less than £1million].³⁵
- 3.26 Abbott and Frost generated £[X] turnover from the provision of residential estate agency services in Burnham in the financial year ending 31 March 2014.³⁶

Annagram

- 3.27 Annagram is an estate and lettings agent dealing with residential property and land.
- 3.28 Annagram is a private limited company registered in England and Wales with the company number 05690800. Its registered address is 2 Saxon Court, Union Street, Cheddar, Somerset, BS27 3NA. It was incorporated on 30

³¹ Abbott and Frost Annual Return, dated 12 October 2015, available on the Companies House website at <https://beta.companieshouse.gov.uk/company/08251570/filing-history>

³² Abbott and Frost Annual Return, dated 12 October 2015, available on the Companies House website at <https://beta.companieshouse.gov.uk/company/08251570/filing-history>

³³ Abbott and Frost Annual Return, dated 12 October 2015, available on the Companies House website at <https://beta.companieshouse.gov.uk/company/08251570/filing-history>

³⁴ Abbott and Frost's response, dated 6 September 2016, to the CMA's section 26 notice of 10 August 2016, [URN2078].

³⁵ Annex 1A to Abbott and Frost's response, dated 6 September 2016, to the CMA's section 26 notice of 10 August 2016, [URN2078].

³⁶ Annex 1B to Abbott and Frost's response, dated 6 September 2016, to the CMA's section 26 notice of 10 August 2016, [URN2078].

January 2006 under the name Annagram Estates Limited.³⁷ Annagram was an active company throughout the Relevant Period.

- 3.29 Annagram trades under the 'CJ Hole' brand.³⁸ Annagram currently operates seven estate and letting agency branches (all under the CJ Hole brand), six of which are dedicated to sales and one of which is dedicated to lettings.³⁹ Previously, Annagram operated eight CJ Hole branches, with the eighth branch being the Burnham-on-Sea branch which was operated under the CJ Hole brand and which was implicated in the Infringement.
- 3.30 Annagram is currently owned by [Shareholder 1] and [Shareholder 2].⁴⁰ [Director 1] and [Director 2] are [redacted] currently the directors of Annagram.⁴¹
- 3.31 From July 2006 until 1 June 2015 (and therefore throughout the Relevant Period), Annagram had a third shareholder and director – [Shareholder 3].⁴²
- 3.32 [redacted]^{43 44 45 46}
- 3.33 Annagram generated £[redacted] turnover from the provision of residential estate agency services in Burnham in the financial year ending 31 January 2015.⁴⁷

Gary Berryman

- 3.34 Gary Berryman Estate Agents Ltd is an estate and lettings agent dealing with residential and commercial property in Burnham-on-Sea and the surrounding area. It has branches in Burnham-on-Sea and Wedmore.
- 3.35 Gary Berryman Estate Agents Ltd is a private limited company registered in England and Wales with the company number 04604240. Gary Berryman Estate Agents Ltd was incorporated on 29 November 2002 under the name

³⁷ Certificate of Incorporation, dated 30 January 2006, available on the Companies House website at <https://beta.companieshouse.gov.uk/company/05690800/filing-history>

³⁸ 'CJ Hole' is a franchise brand of [redacted].

³⁹ The branches are located at Axbridge, Bridgwater, Cheddar, Congresbury, Wedmore, Winscombe and Worle.

⁴⁰ Annagram Estates Limited Confirmation Statement dated 30 January 2017, available on the Companies House website at <https://beta.companieshouse.gov.uk/company/05690800/filing-history>

⁴¹ Annagram Estates Limited Officers on Companies House website at <https://beta.companieshouse.gov.uk/company/05690800/officers>

⁴² Annagram Estates Limited Annual Returns, dated 30 January 2007, 31 January 2008, 13 March 2009, 8 February 2010, 3 February 2011, 27 February 2012, 21 February 2013, 21 February 2014 and 2 February 2015, available on the Companies House website at <https://beta.companieshouse.gov.uk/company/05690800/filing-history>

⁴³ [redacted]

⁴⁴ [redacted]

⁴⁵ [redacted]

⁴⁶ [redacted]

⁴⁷ Email from [redacted] (Annagram) to the CMA, dated 1 December 2016, [URN2079]

of 'G B European Homes Limited'.⁴⁸ G B European Homes Limited registered a change of name on 1 February 2006 to 'G B Maintenance Services Ltd' and a further change of name on 28 January 2008 to 'Gary Berryman Estate Agents Ltd'.⁴⁹ Gary Berryman Estate Agents Ltd was an active company throughout the Relevant Period.⁵⁰

- 3.36 Gary Berryman Estate Agents Ltd's registered address is The Hub, Warne Road, Weston-super-Mare, North Somerset, BS23 3UU.⁵¹
- 3.37 Gary Berryman Estate Agents Ltd's trading address is 46 High Street, Burnham-on-Sea, TA8 1PD.⁵²
- 3.38 The current directors of Gary Berryman Estate Agents Ltd are [Director 1] and [Director 2]. Both were appointed on 19 April 2013 and were directors throughout the Relevant Period.⁵³
- 3.39 Gary Berryman Estate Agents Ltd is a non-trading company for the purposes of the preparation and submission of accounts to Companies House.⁵⁴
- 3.40 Gary Berryman Estate Agents Ltd is a wholly owned subsidiary of [Subsidiary 1 of Warne Investments], and was so throughout the Relevant Period.⁵⁵
- 3.41 [Subsidiary 1 of Warne Investments] is a private limited company registered in England and Wales with the company number [X], dealing in the [X].⁵⁶

⁴⁸ Certificate of Incorporation, dated 29 November 2002, available on the Companies House website at <https://beta.companieshouse.gov.uk/company/04604240/filing-history?page=3>

⁴⁹ Certificates of Incorporation on change of name, dated 1 February 2006 and 28 January 2008 respectively, available on the Companies House website at <https://beta.companieshouse.gov.uk/company/04604240/filing-history>

⁵⁰ <https://beta.companieshouse.gov.uk/company/04604240> and Gary Berryman's response of 12 September 2016 to CMA's section 26 notice of 10 August 2016, [URN2072].

⁵¹ Gary Berryman Estate Agents Ltd.'s Annual Return, dated 9 May 2016, available on the Companies House website at <https://beta.companieshouse.gov.uk/company/04604240/filing-history>

⁵² Gary Berryman's response of 12 September 2016 to CMA's section 26 notice of 10 August 2016, [URN2072].

⁵³ Gary Berryman Estate Agents Ltd.'s Annual Returns, dated 16 May 2016, 9 May 2015 and 13 May 2014, available on the Companies House website at <https://beta.companieshouse.gov.uk/company/04604240/filing-history>.

⁵⁴ Gary Berryman's response of 12 September 2016 to CMA's section 26 notice of 10 August 2016, [URN2072].

⁵⁵ Gary Berryman Estate Agents Ltd.'s Annual Returns, dated 16 May 2016, 9 May 2015 and 13 May 2014, available on the Companies House website at <https://beta.companieshouse.gov.uk/company/04604240/filing-history>

⁵⁶ [Subsidiary 1 of Warne Investments] Certificate of Incorporation, dated 29 July 2010, available on the Companies House website at <https://beta.companieshouse.gov.uk/company/07330707/filing-history?page=2>

- 3.42 [Subsidiary 1 of Warne Investments] was incorporated on 29 July 2010 under the name of [redacted].⁵⁷
- 3.43 [Subsidiary 1 of Warne Investments]' registered address is [redacted].⁵⁸
- 3.44 [Subsidiary 1 of Warne Investments] owns two companies in the real estate and estate agency sector. In addition to Gary Berryman Estate Agents Ltd, it owns [Subsidiary 2 of Warne Investments].⁵⁹
- 3.45 [Subsidiary 1 of Warne Investments]' current directors are [Director 1], [Director 2], [Director 3] and [Director 4]. During the Relevant Period the directors were [Director 1] and [Director 2].⁶⁰
- 3.46 [Subsidiary 1 of Warne Investments] is a wholly owned subsidiary of Warne Investments and was so throughout the Relevant Period.⁶¹
- 3.47 Warne Investments is the parent company of [Subsidiary 1 of Warne Investments]⁶² and two other companies: [Subsidiary 3 of Warne Investments]⁶³ and [Subsidiary 4 of Warne Investments].⁶⁴ It is a private limited company with the company number 08539382.⁶⁵
- 3.48 Warne Investments was incorporated under the name of Warne Investments Limited on 22 May 2013.⁶⁶

⁵⁷ [Subsidiary 1 of Warne Investments] Certificate of Incorporation, dated 29 July 2010, available on the Companies House website at <https://beta.companieshouse.gov.uk/company/07330707/filing-history?page=2>

⁵⁸ Confirmation Statement, dated 31 August 2016, available on the Companies House website at <https://beta.companieshouse.gov.uk/company/07330707/filing-history>

⁵⁹ [Subsidiary 2 of Warne Investments] Confirmation Statement, dated 15 November 2016, available on the Companies House website at <https://beta.companieshouse.gov.uk/company/07847629/filing-history>

⁶⁰ List of [Subsidiary 1 of Warne Investments]' current and former officers available on the Companies House website at <https://beta.companieshouse.gov.uk/company/07330707/officers>. Gary Berryman informed the CMA that [Former Senior Employee of Subsidiary 1 of Warne Investments] was a director of [Subsidiary 1 of Warne Investments] until 18 October 2013 and continued to act as managing director of [Subsidiary 1 of Warne Investments] until he left the company in December 2013 – see Gary Berryman's representations dated 16 January 2017, [URN2226].

⁶¹ Gary Berryman's response of 12 September 2016 to CMA's section 26 notice of 10 August 2016, [URN2072].

⁶² Email from Gary Berryman to the CMA dated 5 May 2016, [URN1729].

⁶³ [Subsidiary 3 of Warne Investments] Confirmation Statement, dated 5 September 2016, available on the Companies House website at <https://beta.companieshouse.gov.uk/company/07330973/filing-history>

⁶⁴ [Subsidiary 4 of Warne Investments] Confirmation Statement dated 26 March 2017, available on the Companies House website at <https://beta.companieshouse.gov.uk/company/03741697/filing-history>

⁶⁵ Warne Investments Confirmation Statement, dated 23 November 2016, available on the Companies House website at <https://beta.companieshouse.gov.uk/company/08539382/filing-history>

⁶⁶ Warne Investments Certificate of Incorporation, dated 22 May 2013, available on the Companies House website at <https://beta.companieshouse.gov.uk/company/08539382/filing-history>

- 3.49 Warne Investments' registered office is The Hub, Warne Road, Weston-super-Mare, North Somerset, BS23 3UU.⁶⁷
- 3.50 Warne Investments' current shareholders are [Shareholder 1] ([<]%), [Shareholder 2] ([<]%), [Shareholder 3] ([<]%), [Shareholder 4] ([<]%) and [Shareholder 5] ([<]%).⁶⁸
- 3.51 Warne Investments' current directors are [Director 1] and [Director 2].⁶⁹ Both of them were also directors throughout the Relevant Period.⁷⁰
- 3.52 Warne Investments' annual turnover for the financial year ending 31 March 2016 was [between £1 million and £5 million].⁷¹
- 3.53 Gary Berryman Estate Agents Ltd generated £[<] turnover from the provision of residential estate agency services in Burnham in the financial year ending 31 March 2014.⁷²

Greenslade Taylor Hunt

- 3.54 GTH is an estate and lettings agent that deals with agricultural, commercial and residential properties. It offers a range of other services, including auction services, development and planning services and other services related to properties and antiques.⁷³
- 3.55 GTH operates 17 branches across Somerset (including a branch in Burnham-on-Sea), Dorset and Devon.⁷⁴
- 3.56 GTH's trading address in Burnham is 75-77 High Street, Burnham-on-Sea, Somerset, TA8 1NW.⁷⁵
- 3.57 GTH is constituted as a partnership. Its current partners are: [Partner 1]; [Partner 2]; [Partner 3]; [Partner 4]; [Partner 5]; [Partner 6]; [Partner 7];

⁶⁷ Warne Investments Certificate of Incorporation, dated 22 May 2013, available on the Companies House website at <https://beta.companieshouse.gov.uk/company/08539382/filing-history>

⁶⁸ Warne Investments Confirmation Statement, dated 23 November 2016, available on the Companies House website at <https://beta.companieshouse.gov.uk/company/08539382/filing-history>

⁶⁹ Warne Investments Confirmation Statement, dated 23 November 2016, available on the Companies House website at <https://beta.companieshouse.gov.uk/company/08539382/filing-history>

⁷⁰ Warne Investments Officers, available on the Companies House website at <https://beta.companieshouse.gov.uk/company/08539382/officers>

⁷¹ Annex 3 to Gary Berryman response, dated 25 November 2016, to CMA's follow-up request for information dated 15 November 2016 to section 26 notice of 10 August 2016, [URN2069].

⁷² Annex A to Gary Berryman response of 12 September 2016 to the CMA's section 26 notice of 10 August 2016, [URN2072].

⁷³ GTH response of 24 August 2016 to CMA Request for Information of 10 August 2016, [URN2083].

⁷⁴ Annex B to GTH response of 24 August 2016 to CMA Request for Information of 10 August 2016, [URN2083].

⁷⁵ Annex B to GTH response to CMA Request for Information of 10 August 2016, [URN2083].

[Partner 8]; [Partner 9]; [Partner 10]; [Partner 11]; [Partner 12]; and [Partner 13].⁷⁶

3.58 GTH generated £[<] turnover from the provision of residential estate agency services in Burnham in the financial year ending 31 December 2014.⁷⁷

Saxons

3.59 Saxons was, during the Relevant Period, an estate agent that dealt with residential properties in Burnham and Cheddar.

3.60 Saxons is a private limited company registered in England and Wales with the company number 08287259. Saxons was incorporated on 9 November 2012 under the name of 'Saxons PS Ltd'.⁷⁸ Saxons was an active company throughout the Relevant Period.

3.61 Saxons' registered address is Tauntonian, Little Halt, Bristol, BS20 8JQ.⁷⁹ Saxons' trading address during the relevant period was 85 High Street, Burnham-on-Sea, TA8 1PE.

3.62 Saxons is currently owned by [Shareholder 1] and [Shareholder 2]. [Shareholder 1] and [Shareholder 2] were the sole shareholders of Saxons throughout the Relevant Period.⁸⁰

3.63 [Director 1 and Director 2] are [<] Saxons' current directors and have been the only directors since incorporation (including during the Relevant Period).⁸¹

3.64 Following the launch of the CMA's investigation, Saxons transferred its business assets to [Other Burnham Estate Agent 2],⁸² which continued to

⁷⁶ Annex C to GTH response to CMA Request for Information of 10 August 2016, [URN2083].

⁷⁷ Annex F to GTH response to CMA Request for Information of 10 August 2016, [URN2083].

⁷⁸ Certificate of Incorporation, dated 9 April 2012, available on the Companies House website at <https://beta.companieshouse.gov.uk/company/08287259/filing-history>

⁷⁹ Saxons Annual Return, dated 9 November 2015 (filed 25 January 2016), available on the Companies House website at <https://beta.companieshouse.gov.uk/company/08287259/filing-history>

⁸⁰ Saxons Annual Returns, dated 9 November 2015 (filed 25 January 2016) and 9 November 2014 (filed 24 November 2014), available on the Companies House website at <https://beta.companieshouse.gov.uk/company/08287259/filing-history>

⁸¹ Saxons Officers available on the Companies House website at <https://beta.companieshouse.gov.uk/company/08287259/officers>

⁸² [URN2089] - note of calls between the CMA and [An Accountant] of Saxons, on 28 November 2016. The current shareholders of [Other Burnham Estate Agent 2] are [Shareholder 1] and [Shareholder 2] [Other Burnham Estate Agent 2] Confirmation Statement, dated 9 August 2016 (filed on 10 August 2016), available on the Companies House website at <https://beta.companieshouse.gov.uk/company/08174451/filing-history>. [Director 1] and [Director 2] were also directors of [Other Burnham Estate Agent 2] until 11 February 2017 and 1 January 2017, respectively.

operate the former Saxons' branches in Cheddar and Burnham-on-Sea⁸³ and opened a new branch in Bristol.⁸⁴ The branch in Burnham-on-Sea has since been closed.⁸⁵

3.65 As at 16 May 2017, Saxons remained listed as an active company on the Companies House register.⁸⁶

3.66 Saxons generated £[redacted] from the provision of residential estate agency services in Burnham in the financial year ending 30 November 2014.⁸⁷

West Coast

3.67 West Coast is an estate and lettings agent dealing with residential properties.⁸⁸

3.68 West Coast has branches in Burnham-on-Sea, Patchway (Bristol), Portishead, Nailsea and Weston-Super-Mare.⁸⁹

3.69 West Coast is a private limited company registered in England and Wales with the company number 04145108. West Coast was incorporated on 22 January 2001 under the name of 'West Coast Property Services (UK) Limited'.⁹⁰ West Coast was an active company throughout the Relevant Period.

3.70 West Coast's registered address is 13-14 Alexandra Parade, Weston-Super-Mare, North Somerset, BS23 1QT.⁹¹ The Burnham trading address is 28 High Street, Burnham-on-Sea, TA8 1PA.⁹²

⁸³ As at January 2016, Saxons' Burnham branch operated under the name [Other Burnham Estate Agent 2] - transcript of CMA interview with [Senior Employee 1] (Saxons), 21 June 2016, Disc 1 of 3, page 13, [URN1771].

⁸⁴ [URN2089] - note of calls between the CMA and [An Accountant] of Saxons, on 28 November 2016.

⁸⁵ Email from [redacted] (Saxons) to the CMA, dated 23 November 2016, [URN2113].

⁸⁶ Companies House website available at <https://beta.companieshouse.gov.uk/company/08287259>

⁸⁷ Saxons response of 23 September 2016 to the CMA's section 26 notice of 12 August 2016, [URN1970].

⁸⁸ West Coast response of 24 August 2016 to CMA Request for Information of 10 August 2016, [URN2047].

⁸⁹ West Coast response of 24 August 2016 to CMA Request for Information of 10 August 2016, [URN2047].

⁹⁰ Certificate of Incorporation, dated 20 January 2001, available on the Companies House website at <https://beta.companieshouse.gov.uk/company/04145108/filing-history>

⁹¹ West Coast Annual Return, dated 28 April 2016, available on the Companies House website at <https://beta.companieshouse.gov.uk/company/04145108/filing-history>

⁹² <http://www.westcoast-properties.co.uk/contact-us>

- 3.71 West Coast is currently owned by [Shareholder 1] and [Shareholder 2]. [Shareholder 1] and [Shareholder 2] were the shareholders of West Coast throughout the Relevant Period.⁹³
- 3.72 [Director 1] is currently the sole director of West Coast and was so throughout the Relevant Period.⁹⁴
- 3.73 West Coast acquired an 80 per cent shareholding in [Subsidiary 1 of West Coast].⁹⁵ [Shareholder 1] owns the remaining 20 per cent shareholding. The directors of [Subsidiary 1 of West Coast] are [Director 1] and [Director 2].⁹⁶
- 3.74 West Coast's annual turnover for the financial year ending 31 March 2016 was [between £1 million and £5 million].⁹⁷
- 3.75 West Coast generated £[<] turnover from the provision of residential estate agency services in Burnham in the financial year ending 31 March 2014.⁹⁸

Individuals

- 3.76 The evidence demonstrates that the following individuals from each of the Parties were to differing extents involved in the Infringement:

Party	Key individual	Position (during Relevant Period)
Abbott and Frost	[Senior Employee 1]	[<]
	[Senior Employee 2]	[<]
Annagram	[Employee 1] ⁹⁹	[<]
	[Senior Employee 3]	[<]
	[Employee 2]	[<]

⁹³ West Coast Annual Returns/Confirmation Statements, dated 28 April 2017, 28 April 2016, 28 April 2015, and 28 April 2014, available on the Companies House website at <https://beta.companieshouse.gov.uk/company/04145108/filing-history>

⁹⁴ West Coast Annual Returns, dated 28 April 2016 (filed 25 May 2016), 28 April 2015 (filed 13 May 2015) and 28 April 2014 (filed 13 May 2014), available on the Companies House website at <https://beta.companieshouse.gov.uk/company/04145108/filing-history>

⁹⁵ West Coast response of 24 August 2016 to CMA Request for Information of 10 August 2016, [URN2047].

⁹⁶ West Coast response of 24 August 2016 to CMA Request for Information of 10 August 2016, [URN2047].

⁹⁷ West Coast response of 24 August 2016 to CMA Request for Information of 10 August 2016, [URN2047].

⁹⁸ West Coast response of 24 August 2016 to CMA Request for Information of 10 August 2016, [URN2047].

⁹⁹ [<]

Gary Berryman	[Senior Employee 1]	[X] ¹⁰⁰
	[Senior Employee 2]	[X] ¹⁰¹
	[Senior Employee 3]	[X] ¹⁰²
GTH	[Employee 1]	[X]
	[Senior Employee 1]	[X]
West Coast	[Senior Employee 2] ¹⁰³	[X]
	[Senior Employee 1] ¹⁰⁴	[X] ¹⁰⁵
	[Senior Employee 3]	[X]
Saxons	[Senior Employee 1]	[X]
	[Employee 1] ¹⁰⁶	[X]
	[Employee 2]	[X]
	[Employee 3]	[X]

C. The arrangement between the Parties

¹⁰⁰ See, for example, [Senior Employee 1]'s (Gary Berryman) email signature in email from [Senior Employee 1] (Gary Berryman) to [Senior Employee 1] (GTH) at 17:51 on 15 November 2013, [URN1092].

¹⁰¹ While [Senior Employee 2]'s (Gary Berryman) email signature from during the Relevant Period states his position as [X], the CMA presumes this to mean [X].

¹⁰² [Senior Employee 3] was also [X] during the Relevant Period.

¹⁰³ [Senior Employee 2] (West Coast) joined West Coast in June 2014 (i.e. during the Relevant Period) – transcript of CMA interview with [Senior Employee 2] (West Coast), 5 February 2016, Disc 1 of 3, page 3, [URN1764]. See also email at 13:22 on 16 August 2014 from [Senior Employee 1] (West Coast) to all of the other Parties, [URN0941], in which [Senior Employee 1] (West Coast) informed them that [Senior Employee 2] was the new [X] [of the Burnham office].

¹⁰⁴ [Senior Employee 1] left West Coast's Burnham office to support another West Coast office in July/August 2014 (i.e. during the Relevant Period) - transcript of CMA interview with [Senior Employee 1] (West Coast), 5 February 2016, Disc 1 of 2, page 22, [URN1767]. [Senior Employee 1] nevertheless stated that he remained 'aware [...] of what was going on', and there is evidence that [Senior Employee 1] continued to be involved in the implementation of the Parties' arrangement after this date.

¹⁰⁵ Transcript of CMA interview with [Senior Employee 1] (West Coast), 5 February 2016, Disc 1 of 2, page 18, [URN1767].

¹⁰⁶ [Employee 1] (Saxons) left Saxons in July 2014 (i.e. during the Relevant Period) – transcript of CMA interview with [Employee 1] (Saxons), 14 June 2016, Disc 2 of 2, page 18, [URN1770].

Sources of evidence

- 3.77 As described at paragraph 2.5 above, the CMA interviewed a number of witnesses during the investigation. During most of the interviews, the individuals were asked to comment on a selection of relevant documents. These documents had not been identified to the interviewees by the CMA prior to the interviews, although at least some of the interviewees had refreshed their memories in advance of the interview by reference to relevant material.
- 3.78 The CMA made recordings of these interviews which were transcribed and checked by the CMA against the recordings. The relevant transcripts form part of the CMA's file.
- 3.79 As described at paragraphs 2.2 to 2.5 above, the CMA also obtained documentary evidence (predominantly emails) through inspections and information and/or document requests, including from the leniency applicants pursuant to their duty of cooperation.

Assessment of Witness Evidence – Generally

- 3.80 The CMA has decided to place substantially more weight on the contemporaneous documents in this case than on the witness evidence for the following reasons:
- a. The CMA is of the view that a document prepared at the time is likely to have greater probative value than an account given later;¹⁰⁷
 - b. The interviewees all had, to a greater or lesser extent, an incentive to present their role in the conduct under investigation as minimal, which may have coloured their evidence whether consciously or otherwise. As explained in paragraphs 3.23, 3.24, 3.57, 3.62 and 3.63 above, some of the businesses are owned by the individuals concerned, who therefore have a direct financial interest in the outcome of the investigation, while others have an incentive to maintain the trust of their employers and customers, which might be undermined by a finding that they had been involved in serious anti-competitive conduct;
 - c. As well as working in the same industry, most of the individuals interviewed by the CMA also work and live in the same small town.

¹⁰⁷ See in this regard the judgement in *JJB Sports Plc and Allsports Limited v Office of Fair Trading* [2004] CAT 17, paragraph 287.

Some are current or former colleagues. Individuals are therefore likely to have personal relationships that might influence their accounts, even if only subconsciously;

- d. Some of the events occurred more than two years before the dates of the interview and recollections may have diminished, particularly as to the details of the dates, times and sequence of events.

3.81 Thus, where there was a conflict between the account provided by a witness and the contemporaneous documents, the documentary evidence generally prevailed. Nonetheless, the CMA has placed weight on the accounts of certain witnesses as evidenced in the transcripts to supplement the documentary evidence because:

- a. Much of the evidence provided by some individuals was consistent with the documentary evidence and the evidence provided by other witnesses;
- b. The individuals were all warned at the outset of the interviews that it would be a criminal offence knowingly or recklessly to provide false or misleading information;
- c. Those individuals who were interviewed pursuant to a leniency application made by their employer or firm had a strong incentive to provide a full and accurate account of events so as not to put the success of that leniency application at risk;
- d. Some of the witnesses were able to recall certain events in detail and were clearly careful not to overstate the extent of their recollection.¹⁰⁸

Summary

3.82 The CMA has found that each of the Parties participated in an arrangement to fix a minimum level of commission fees for the provision of traditional residential estate agency services (that is, property sales agency services provided by estate agents with a high street presence) in Burnham. The CMA has found that the arrangement started on at least 4 February 2014 and, for each of the Parties other than Saxons, their participation in the arrangement continued until at least 24 March 2015.¹⁰⁹ The CMA considers

¹⁰⁸ In this regard and given the significant volume of available documentary and witness evidence, the CMA decided that for present purposes it would not rely to any significant extent on the account of [Senior Employee 1] (Saxons) because, while it was in many respects consistent with the documentary and other witness evidence, [Senior Employee 1] (Saxons) also at points during the interview overstated the extent of his recollection.

¹⁰⁹ The CMA has found that Saxons participated in the arrangement until at least 18 February 2015.

that the Parties took steps to monitor and reinforce compliance with their arrangement, including through a rota of monthly 'policemen', and bilateral and multilateral correspondence and meetings.

- 3.83 The CMA's findings are based on email and witness evidence regarding:
- a. Contacts between the Parties in the period 1 October 2013 to 4 February 2014 in which they sought to set up a meeting to discuss an arrangement regarding minimum commission fees;
 - b. The content and outcome of the first meeting between the Parties on 4 February 2014 (the '**Formation Meeting**') and correspondence in the following weeks refining the terms of the arrangement;
 - c. The use of a 'policeman', email correspondence and meetings to implement and/or promote adherence to the arrangement;
 - d. The Parties' collective response to a potential new entrant;
 - e. The decline and eventual termination of the arrangement;
 - f. Attempts to restart the arrangement which corroborate the prior existence of the arrangement.

Contacts leading up to the Formation Meeting

Summary and Witness Evidence

- 3.84 Based primarily on the documentary evidence set out at paragraphs 3.86 to 3.111 below, the CMA has found that:
- a. [Senior Employee 1] (GTH) was in contact with [Senior Employee 1] (subsequently of Gary Berryman) to prompt him to promote concerted action between the Parties regarding fees;
 - b. [Senior Employee 1] (Gary Berryman) subsequently made contact with all the other Parties to arrange a meeting to discuss commission fees for the sale of residential property;
 - c. By the time that meeting (the Formation Meeting) took place, each of the Parties was aware that its purpose was to discuss a proposal for an arrangement to fix a minimum commission fee;
 - d. Prior to the Formation Meeting, [Senior Employee 1] (Gary Berryman) and [Senior Employee 1] (GTH) discussed a more

detailed plan for the level of minimum commission fee they would recommend in the meeting;

- e. While some Parties (Abbott and Frost and Annagram) may have had reservations and at times stated they would not attend the Formation Meeting, all Parties were eventually persuaded to attend by January 2014.

3.85 Witness accounts corroborate the documentary evidence in so far as some interviewees recalled contacts from Gary Berryman regarding fees and/or an arrangement to fix fees. In particular:

- a. [Employee 1] (Saxons) recalled Saxons being approached by [Senior Employee 1] (Gary Berryman) to set up a meeting to try and fix a fee but could not recall any detail of the approach (e.g. whether it was in person or by email);¹¹⁰
- b. [Employee 1] (Annagram) recalled various emails and talks about getting together after [Senior Employee 1] (Gary Berryman) returned to Burnham;¹¹¹
- c. [Senior Employee 1] (West Coast) stated that he was contacted in October/November 2013 by [Senior Employee 1] (Gary Berryman) to see if he would be interested in having a discussion about fees. He explained that [Senior Employee 1] (Gary Berryman) made the first approach because he had a lot of connections and that '*[Senior Employee 1]'s (Gary Berryman) role was to have verbal conversations with all agents to get an agreement and then follow up with a meeting*'.¹¹² [Senior Employee 1] (West Coast) also stated that he did not know in advance of the meeting what [Senior Employee 1] (Gary Berryman) was proposing (which the CMA inferred to mean that he did not know the precise details of the arrangement that [Senior Employee 1] (Gary Berryman) was going to propose);¹¹³
- d. [Senior Employee 1] (Abbott and Frost) recalled that he '*bumped in to [Senior Employee 2] (Gary Berryman) [...] in the high street*' and,

¹¹⁰ Transcript of CMA interview with [Employee 1] (Saxons), 14 June 2016, Disc 1 of 2, pages 10–11, [URN1769].

¹¹¹ Transcript of CMA interview with [Employee 1] (Annagram), 3 February 2016, Disc 1 of 1 pages 6-7, [URN0549].

¹¹² Transcript of CMA interview with [Senior Employee 1] (West Coast), 5 February 2016, Disc 1 of 2, page 45, [URN1767]. See also pages 5-6.

¹¹³ Transcript of CMA interview with [Senior Employee 1] (West Coast), 5 February 2016, Disc 2 of 2, page 4 [URN1768].

while he could not remember the precise conversation, its gist was that it *'would be nice to get back to the old days meaning I think sort of levels as I say we used to get one and three quarters per cent, two per cent sometimes on sole agency'*.¹¹⁴

Initial Contacts

3.86 The return to Burnham of [Senior Employee 1] (subsequently of Gary Berryman), following a period working in Weston-super-Mare, prompted email contacts between [Senior Employee 1] (subsequently of Gary Berryman) and [Senior Employee 1] (GTH) about the possibility of concerted action between the Parties with regard to fees, as follows:

- a. At 20:19 on 1 October 2013, [Senior Employee 1] (subsequently of Gary Berryman) emailed [Senior Employee 1] (GTH) to inform him that he would be returning to work in Burnham.¹¹⁵ In his reply at 08:54 on 2 October 2013, [Senior Employee 1] (GTH) invited [Senior Employee 1] (subsequently of Gary Berryman) to *'come and speak to us about fees'*.¹¹⁶ Once [Senior Employee 1] started his role at Gary Berryman on 1 November 2013,¹¹⁷ he contacted [Senior Employee 1] (GTH) to say that he and [Senior Employee 2] (Gary Berryman) would be *'very keen to discuss the situation with regards to "fees"'* with [Senior Employee 1] (GTH) and suggested meeting up to *'have a chat with the hope of getting all the other agents on board too!'*¹¹⁸
- b. In an email at 10:17 on 4 November 2013, [Senior Employee 1] (GTH) replied to [Senior Employee 1] (Gary Berryman) suggesting that [Senior Employee 1] (Gary Berryman) contact other agents while noting that there was a risk of GTH and Gary Berryman being exposed unless the other agents were also involved.¹¹⁹

¹¹⁴ Transcript of CMA interview with [Senior Employee 1] (Abbott and Frost), 22 June 2016, Disc 1 of 3, page 13 [URN1774].

¹¹⁵ [URN1089]

¹¹⁶ [URN1089]

¹¹⁷ The CMA understands from Gary Berryman that [Senior Employee 1] was employed at Gary Berryman from 1 November 2013 – see Gary Berryman's representations dated 16 January 2017, [URN2226].

¹¹⁸ Email at 14:43 on 1 November 2013, [URN1090].

¹¹⁹ [URN1090]. [Senior Employee 1] (GTH) at one point in his interview asserted that this initial correspondence between him and [Senior Employee 1] (Gary Berryman) cited in this paragraph concerned fees *'in a generic sense'* rather than a possible arrangement regarding fees. However, he was unable to explain why he was therefore concerned (in [URN1090]) that he and [Senior Employee 1] (Gary Berryman) might thereby *'expose'* themselves - transcript of CMA interview with [Senior Employee 1] (GTH), 5 July 2016, Disc 1 of 3, page 52, [URN1792]. He also later conceded that discussions regarding the potential content of an arrangement started

'[U]nless we get everyone on board we will only expose ourselves. Thinking about it, I'm not sure everyone will be up for it particularly now we have a better market. You might get the best response when you introduce yourself to the likes of Saxons, C J Hole [Annagram] and Westcoast and bring the subject up. You could be the catalyst of a possible agreement'.

- 3.87 [Senior Employee 1] (Gary Berryman) subsequently told [Senior Employee 1] (GTH) that he had reached out to all of the other Parties (West Coast, Annagram, Abbott and Frost and Saxons) with a view to setting up a meeting to discuss fees. Specifically, in an 'update' email at 17:51 on 15 November 2013, [Senior Employee 1] (Gary Berryman) reported to [Senior Employee 1] (GTH) about his progress, stating that he had spoken to Saxons, Abbott and Frost and West Coast and that all were 'up for having a chat about fees'.¹²⁰ [Senior Employee 1] (Gary Berryman) also stated that he was 'trying to get hold of [Senior Employee 3] at 'CJ's' [Annagram] about agreeing to get together. [Senior Employee 1] (GTH) indicated his approval of [Senior Employee 1]'s (Gary Berryman) progress in his reply at 09:42 on 16 November 2013.¹²¹
- 3.88 [Senior Employee 1] (Gary Berryman) was subsequently in contact by email with each of Annagram and Abbott and Frost, proposing a meeting among agents and making it clear that the purpose of the meeting would be to discuss a minimum fee arrangement.
- 3.89 In an email entitled 'Fees' at 16:08 on 16 November 2013, [Senior Employee 3] (Annagram) contacted [Senior Employee 1] (Gary Berryman) in terms which suggest he had missed a phone call from [Senior Employee 1] (Gary Berryman) and stated as follows:¹²²

*'I'm sorry I didn't receive a message to call you, so I apologise. [Employee 1] (Annagram) is your man to talk to. He runs Burnham for me and so **any agreement between agents** affects him directly. I'm sure he would be more than happy to meet up and discuss various options. The last valuation I did (a couple of weeks ago) I was shocked when told that both WC [West Coast] and AF [Abbott*

much earlier than he recollected - transcript of CMA interview with [Senior Employee 1] (GTH), 5 July 2016, Disc 2 of 3, page 8, [URN1793]. In the circumstances and in light of the clear and consistent documentary evidence, the CMA did not accept [Senior Employee 1]'s (GTH) assertion that his initial discussions with [Senior Employee 1] (Gary Berryman) concerned only generic market information.

¹²⁰ [URN1092]

¹²¹ [URN1092] - [Senior Employee 1] (GTH) stated 'Well done so far'.

¹²² [URN1093]

and Frost] *had quoted a fixed fee which equated to 0.75%. Our [X] offices rarely fall below 1.5% and even our [X] office aim to get close to 1.25%.*

I will support any mutual decision that gives us greater power to improve our fees.' (emphasis added)

- 3.90 In an email at 09:41 on 18 November 2013, [Senior Employee 1] (Gary Berryman) subsequently contacted [Employee 1] (Annagram) by forwarding his 'Fees' correspondence with [Senior Employee 3] (Annagram) and referring to having spoken to [Senior Employee 3] (Annagram) '*regarding **commission rates***' and getting '*some form of **agreement in place***' (emphasis added).¹²³ At 10:44 on the same day (18 November 2013), [Employee 1] (Annagram) replied to [Senior Employee 1] (Gary Berryman) stating that he was '*more than willing to meet with you and the other agents to discuss fee levels*'.¹²⁴
- 3.91 In an email at 12:37 on 18 November 2013, [Senior Employee 1] (Gary Berryman) contacted [Senior Employee 1] (Abbott and Frost) to ask whether Abbott and Frost would be happy to attend a meeting with the other agents in the town for the purpose of getting '*some form of **agreement to get these flippin** (sic) **fees up!!** (sic)*' (emphasis added).¹²⁵
- 3.92 In a follow up email two days later, [Senior Employee 1] (Gary Berryman) asked [Senior Employee 1] (Abbott and Frost) whether he had received [Senior Employee 1]'s (Gary Berryman) first email '*about trying to get all the agents (particularly Saxons) around a table to try and get some form of **agreement on fees***' (emphasis added), and stated that '*everybody else is saying yes*'.¹²⁶ In an email replying to [Senior Employee 1] (Gary Berryman) at 09:14 on 20 November 2013 [Senior Employee 1] (Abbott and Frost) stated:¹²⁷

'We're all for obtaining better fees but experience as you well know usually sees one agent or so slipping back to something lower just to get the instruction. We don't wish to appear negative but we've been here before so I see little point.'

¹²³ [URN0555]

¹²⁴ [URN0555]

¹²⁵ [URN1102]

¹²⁶ [URN0841] - email from [Senior Employee 1] (Gary Berryman) to [Senior Employee 1] (Abbott and Frost) at 08:51 on 20 November 2013.

¹²⁷ [URN0841]

3.93 At 09:29 on the same day (20 November 2013), [Senior Employee 1] (Gary Berryman) replied to [Senior Employee 1] (Abbott and Frost) stating that all other Parties were willing to meet, and encouraged Abbott and Frost to do so:¹²⁸

'I must say my initial reaction was the same, but surely for a little of our time it's worth a go!! (sic) Even if it lasts for a few months it will help all our incomes!! (sic) One things for sure it won't work without you, and everybody else is saying they are willing to meet up?? (sic) If you could let me know definitely one way or the other, as if it's a no, I will have to shelve it and let everybody know!!' (sic)

3.94 In his reply to [Senior Employee 1] (Gary Berryman) at 09:39 on the same day (20 November 2013), [Senior Employee 1] (Abbott and Frost) stated that he *'would be quite happy to meet up'*.¹²⁹

3.95 [Senior Employee 1] (Gary Berryman) also emailed [Senior Employee 1] (West Coast) around this time, not referring expressly to a minimum fee arrangement but referring to a previous conversation and updating him that the other agents had agreed to meet:¹³⁰

'Further to our recent conversation I just wanted to let you know that it appears I have got an agreement from all the agents in the town to meet up and have a chat about fees.....(sic)'

3.96 The CMA did not find any emails between [Senior Employee 1] (Gary Berryman) and [Senior Employee 1] (Saxons) from around this date but, based in particular on the emails set out at paragraphs 3.87 above and 3.97 below, has inferred that they must have been in contact by email or in person.

3.97 These initial approaches from [Senior Employee 1] (Gary Berryman) to all the other Parties culminated in an email entitled *'Proposed meeting 3rd December 2013'* which was sent by [Senior Employee 1] (Gary Berryman) to all the other Parties at 11:54 on 25 November 2013, stating:¹³¹

¹²⁸ [URN0844]

¹²⁹ [URN0844]. At 09:47 on the same day (20 November 2013), [Senior Employee 1] (Gary Berryman) replied to [Senior Employee 1] (Abbott and Frost) stating: *'Great! I will come back to you shortly!!'* (sic) - [URN0844].

¹³⁰ See email of 08:36 on 20 November 2013 from [Senior Employee 1] (Gary Berryman) to [Senior Employee 1] (West Coast) - [URN0482]. [Senior Employee 1]'s (Gary Berryman) statement that the other agents had all agreed may not have been accurate since Abbott and Frost emailed around an hour after [Senior Employee 1]'s (Gary Berryman) email to say that it would attend [URN0482]. In his reply at 09:19 on the same day, [Senior Employee 1] (West Coast) thanked [Senior Employee 1] (Saxons) for the update.

¹³¹ [URN0483]

'[F]urther to our recent emails or conversations relating to us all getting together to discuss fees etc, I am pleased to say that [Senior Employee 1 (GTH)] has kindly offered the use of this offices on Tuesday 3rd December at 1pm.'

Reservations from Abbott and Frost

- 3.98 As West Coast could not attend the meeting proposed for 3 December 2013, [Senior Employee 1] (Gary Berryman) sought to arrange a meeting for later in the month.¹³² However, as set out in further detail below, at this point Abbott and Frost changed its mind about attending.
- 3.99 At 10:34 on 13 December 2013, [Senior Employee 1] (Gary Berryman) emailed all of the other Parties (apart from Abbott and Frost) informing them that it was cancelling the upcoming meeting as Abbott and Frost had now said it did not wish to attend the meeting and *'there is no point going forward with discussions unless everyone is on board!!!'* (sic). [Senior Employee 1] (Gary Berryman) also stated that he had written to [Senior Employee 1] (Abbott and Frost) to try to persuade him to come to the meeting and listen to the proposals.¹³³
- 3.100 At 11:13 on 13 December 2013, [Senior Employee 1] (Saxons) replied to all of the other Parties apart from Abbott and Frost in terms that demonstrate he understood the purpose of the proposed meeting to be a discussion of fixing minimum fees, stating:¹³⁴

*'For too many years now the area has been driven by agents simply quoting low fees (including ourselves to be honest). **Is it not worth a push to higher fees** even if [Senior Employee 2] (Abbott and Frost) does not want to be part of it?'*

As you know, there is no need for this, [X] areas for example are getting on average 1.5% with 1.75% sole agency not uncommon.'
(emphasis added)

¹³² [URN1126] - email at 14:04 on 26 November 2013 from [Senior Employee 1] (Gary Berryman) to all other Parties, and reply at 13:59 on the same day (26 November) from [Employee 1] (Annagram) to [Senior Employee 1] (Gary Berryman). See also [URN0484] - email at 14:05 on 26 November 2013 from [Senior Employee 1] (West Coast) to all other Parties; [URN0566] - email at 09:02 on 27 November 2013 from [Senior Employee 1] (Gary Berryman) to all other Parties.

¹³³ [URN0487]

¹³⁴ [URN1162]

3.101 At 12:59 on 13 December 2013, [Senior Employee 1] (Gary Berryman) replied to [Senior Employee 1] (Saxons) and [Senior Employee 1] (GTH) raising the possibility of cooperation among a more limited group of agents and referring to the minimum (sole agency) commission fee of 1.5% he thought should be agreed:¹³⁵

'I had just emailed [Senior Employee 1] (GTH) to say I didn't mind him knowing that we were intending to charge between 1.5% and 1.75% next year when we can! I will speak to [Senior Employee 1] (GTH) and see if we 'sensible' ones can sort something out! At the end of the day if we can secure a minimum 1.5% on the majority of instructions and in doing so loose (sic) the odd one to them [Abbott and Frost], I still think we will be better off than we are now scrabbling around at 1% and 1.25%' (emphasis added)

3.102 By January 2014, [Senior Employee 1] (Gary Berryman) had, with '[S&C]'s¹³⁶ assistance, persuaded Abbott and Frost to change its mind about meeting. This is demonstrated, in particular, in an email at 17:22 on 8 January 2014, entitled 'Meeting!! (sic) – GOOD NEWS!! (sic)' to all of the other Parties except Abbott and Frost, in which [Senior Employee 1] (Gary Berryman) stated that he had persuaded Abbott and Frost to attend a meeting to discuss fees and that this meeting would be at 1pm on 4 February 2014 at GTH's offices.¹³⁷

Reservations from Annagram

3.103 At this point, however, Annagram changed its mind about attending¹³⁸ and at 17:41 on 8 January 2014, in response to the above email from [Senior Employee 1] (Gary Berryman), [Employee 1] (Annagram) informed [Senior Employee 1] (Gary Berryman) that Annagram had reflected and decided not to attend the upcoming meeting of 4 February 2014. In particular, [Employee

¹³⁵ [URN1164]

¹³⁶ The CMA has inferred that [Senior Employee 1]'s (Gary Berryman) reference to '[S&C]' in [URN0863] - email at 18:09 on 3 January 2014 from [Senior Employee 1] (Gary Berryman) to [Senior Employee 1] (Abbott and Frost) - could have been either to [Employee 1] (Annagram) or to [Senior Employee 2] (Gary Berryman). In his evidence, [Senior Employee 1] (Abbott and Frost) stated that he assumed [S&C] was [Employee 1] (Annagram) – transcript of CMA interview with [Senior Employee 1] (Abbott and Frost), 22 June 2016, Disc 1 of 3, page 42, [URN1774].

¹³⁷ [URN0400]. See also [URN0863] – email at 18:09 on 3 January 2014 from [Senior Employee 1] (Gary Berryman) to [Senior Employee 1] (Abbott and Frost); [URN0864] - email at 09:06 on 7 January 2014 from [Senior Employee 1] (Abbott and Frost) to [Senior Employee 1] (Gary Berryman); [URN0865] - email at 11:06 on 7 January 2014 from [Senior Employee 1] (Gary Berryman) to [Senior Employee 1] (Abbott and Frost); and [URN1186] - email at 08:20 on 9 January 2014 from [Senior Employee 1] (Saxons) to [Senior Employee 1] (Gary Berryman).

¹³⁸ Following an internal discussion at Annagram – see email exchange between [Senior Employee 3] and [Employee 1] on 8 January 2014 - [URN0581].

1] (Annagram) stated that, in his experience (while working in another town) of having '*attended many meetings for agents **to agree on increasing fees only for another a few weeks or sometimes even days later to retract** [...] a minimum fee amongst agents will not work, certainly in the long term*'.¹³⁹ (emphasis added)

3.104 In an email at 09:12 on 9 January 2014, [Senior Employee 1] (Gary Berryman) forwarded [Employee 1]'s (Annagram) email to [Senior Employee 1] (West Coast).¹⁴⁰ [Senior Employee 1] (West Coast) replied at 09:25 on 9 January 2014 in terms that make it clear he understood the purpose of the proposed meeting, stating:¹⁴¹

'What a shame, I understand where he from is coming from (sic) and inevitably someone always breaks rank but I still believe it is worth it, if only for a few months.

I was going to give [Employee 1] (Annagram) a call but I don't think there is much point.'

3.105 [Senior Employee 1] (Saxons) and [Senior Employee 1] (Gary Berryman) also corresponded about Annagram's decision not to attend the meeting. In particular, in an email at 08:41 on 9 January 2014, [Senior Employee 1] (Saxons) stated that Saxons was still willing to attend the meeting and thanked [Senior Employee 1] (Gary Berryman) for his '*efforts to try and earn us all more money!*'¹⁴²

3.106 [Senior Employee 1] (Gary Berryman) also corresponded with [Senior Employee 1] (Abbott and Frost) about Annagram's decision not to attend the meeting. In an email to [Senior Employee 1] (Gary Berryman) at 09:12 on 9 January 2014, [Senior Employee 1] (Abbott and Frost) stated:¹⁴³

*'I think without CJ H [Annagram] there is an even better reason for the remaining agents to have a meeting. **Before Christmas I don't mind saying that we thought what is the point because someone will break any agreement on fees sooner or later**, also one or two things*

¹³⁹ [URN0496]

¹⁴⁰ [URN1190]

¹⁴¹ [URN1191]. [Senior Employee 1 (West Coast)] also forwarded [Senior Employee 1]'s (Gary Berryman) email to [Senior Employee 3] (West Coast), stating '*we just (sic) dealing with weak agents, so it's never going to happen. Great shame, really is.*' – email at 09:27 on 9 January 2014 – [URN0496].

¹⁴² [URN1186]

¹⁴³ [URN1188]

came up at the time of the meeting which clashed with us. I think we could use this to everyone's advantage, not only regarding fees but advertising matters and other subjects aswell (sic)' (emphasis added).¹⁴⁴

3.107 On the same day (9 January 2014), [Senior Employee 1] (Gary Berryman) emailed [Senior Employee 1] (West Coast) at 09:33, encouraging him to get in touch with [Employee 1] (Annagram)¹⁴⁵ and again expressing his view that the Parties should charge a 1.5% fee:¹⁴⁶

*'If you have time, I would ring him, you never know, it may just work! Like you say even if it did last a few months, **better to list for a quarter at 1.5% and above** than the stupid fees we currently have to do.!! (sic) [...] For your information, Saxons and Abbott and Frost are still saying they want to meet without them, Greenslades [GTH] won't!!!' (sic) (emphasis added)*

3.108 At 16:39 on 15 January 2014, [Senior Employee 1] (West Coast) emailed [Senior Employee 1] (Gary Berryman) informing him that he had spoken to [Employee 1] (Annagram) and that, as a result, Annagram had now agreed to attend the meeting.¹⁴⁷ On the same day (15 January 2014) in his reply to [Senior Employee 1] (West Coast) at 17:03, [Senior Employee 1] (Gary Berryman) stated that this was '*great news*' and that it thought it '*daft not to at least try and formulate an agreement*'.¹⁴⁸ [Senior Employee 1] (Gary Berryman) subsequently got in touch with [Employee 1] (Annagram), who then confirmed Annagram would attend the meeting on 4 February 2014.¹⁴⁹ At 09:43 on 20 January 2014, [Senior Employee 1] (Gary Berryman) contacted all of the other Parties to confirm that all Parties were now '*willing to meet to discuss the ongoing fee situation*' and confirmed that the meeting had been set for 1pm on 4 February at GTH's offices. [Senior Employee 1]

¹⁴⁴ [Senior Employee 1]'s (Abbott and Frost) evidence in interview was that his intention in agreeing to meet with other agents was to '*know what was happening*' and also '*to try and discuss [...] taking things forward to form an association from the advertising*' - transcript of CMA interview with [Senior Employee 1] (Abbott and Frost), 22 June 2016, Disc 1 of 3, page 32, [URN1774].

¹⁴⁵ [URN0497]. [Senior Employee 1] (West Coast) confirmed that [Senior Employee 1] (Gary Berryman) encouraged him to contact [Employee 1] (Annagram) for this purpose - transcript of CMA interview with [Senior Employee 1] (West Coast), 5 February 2016, Disc 2 of 2, page 4, [URN1768].

¹⁴⁶ [URN0497]

¹⁴⁷ [URN0497]. [Senior Employee 1]'s (West Coast) evidence is that he told [Employee 1] (Annagram) that he had '*nothing to lose*' by coming to the meeting – transcript of CMA interview with [Senior Employee 1] (West Coast), 5 February 2016, Disc 2 of 2, page 4, [URN1768].

¹⁴⁸ [URN0497]

¹⁴⁹ [URN1197] - email at 13:06 on 16 January 2014. See also [URN0589] – email at 08:30 on 4 February 2014 from [Employee 1] (Annagram) to [Senior Employee 1] (Gary Berryman) in which [Employee 1] (Annagram) re-confirmed that he would attend the '*fees meeting later today*' but would only be able to attend for half an hour.

(Gary Berryman) sent a further confirmation to all other Parties and [Senior Employee 2] (Gary Berryman) on the day of the meeting.¹⁵⁰

Gary Berryman's proposals

3.109 In advance of the Formation Meeting, Gary Berryman and GTH corresponded in more detail about what they would propose to the other Parties during the meeting, including the minimum fee level to propose and other matters which had to be discussed. At 09:22 on 11 December 2013, [Senior Employee 1] (Gary Berryman) contacted [Senior Employee 1] (GTH) to check that both Parties were '*thinking along the same lines*' regarding the fees they would propose at the meeting planned for later that day and to make several proposals in relation to the issues for discussion at the meeting:¹⁵¹

'Personally I was thinking a minimum of a minimum (sic) commission of 1.5% plus VAT with a minimum fee of £2,000 for sole agency, with multiple agency being 2.75% plus VAT with £2,750 minimum fee. The other issues I see are the inclusion within fees of 'extras' i.e. EPC's as well as existing clients, multiple units etc. Any other thoughts let me know. Are you happy to lead it? See you later.' (emphasis added)

3.110 [Senior Employee 1] (GTH) replied on the same day (11 December 2013) in an email at 09:48 confirming that he would lead the meeting, stating:¹⁵²

'All well and good but if can just agree minimum 1.5% across the board, we would have done well.' (emphasis added)

3.111 While the meeting did not ultimately take place until 4 February 2014, there is no evidence that Gary Berryman's plans as to the minimum fee level that should be proposed during the meeting (described at paragraphs 3.101, 3.107 and 3.109 above) changed in the interim period. Indeed, an email discussion regarding various sales matters between [Senior Employee 1] (Gary Berryman) and [Senior Employee 3] ([redacted] of Gary Berryman [redacted])

¹⁵⁰ [URN1204] - email at 09:05 on 4 February 2014.

¹⁵¹ [URN1136]. See also [URN1137] – email at 10:12 on 11 December 2013 from [Senior Employee 1] (Gary Berryman) to [Senior Employee 1] (GTH) indicating approval of [Senior Employee 1]'s (GTH) email ('Great!!') (sic).

¹⁵² [URN1136]. [Senior Employee 1]'s (GTH) witness evidence that he was referring in this email to a target commission rate irrespective of the value of the property – transcript of CMA interview with [Senior Employee 1] (GTH) 5 July 2016, Disc 2 of 3, page 9, [URN1793].

dated 22 January 2014 confirms Gary Berryman's intentions for the proposed meeting between the agents to be as follows:¹⁵³

'Further to our meeting today¹⁵⁴ [...] the aim of the meeting with the other Estate Agents in the town next month will be to drive the fee level up to 1.5% plus VAT with a minimum fee of £2,000 plus VAT being set, but we will see how that progresses?!! (sic)'

Formation meeting - 4 February 2014

Summary

3.112 The CMA has found that, consistent with the evidence cited at paragraphs 3.86 to 3.111 above, all of the Parties met on 4 February 2014 at the offices of GTH (the '**Formation Meeting**') to discuss an arrangement with regard to the minimum fees that they would charge for residential estate agency services provided by their Burnham offices.

Meeting

3.113 The CMA did not obtain any agenda or minutes of the meeting recording its attendees.¹⁵⁵ However, the CMA has found that all the Parties were represented at the meeting on the basis that:

¹⁵³ [URN0160] - email at 12:16 on 22 January 2014. [Senior Employee 3] (Gary Berryman [X]) replied to [Senior Employee 1] (Gary Berryman) at 14:45 on 22 January 2014 thanking him for the information and stating both that he admired the '*bullish targets*' and '*Appreciate the other work with agents in B o S re fees*'. See also [URN1201] – email at 07:25 on 30 January 2014 from [Senior Employee 1] (Gary Berryman) to [Senior Employee 2] (Gary Berryman). See also [URN0497] cited at paragraph 3.107 above.

¹⁵⁴ The CMA infers that this is probably a reference to the Gary Berryman branch meeting on 22 January 2014 (see [URN1224]). The Minutes of that branch meeting (see [URN1224]) state that the attendees included [Senior Employee 2] (Gary Berryman), presumably [Senior Employee 3] (Gary Berryman [X]) and [Senior Employee 1] (Gary Berryman). The Minutes suggest that the upcoming meeting and agreement were among the matters discussed at the branch meeting – the first item '*Current Business: [Senior Employee 1] (Gary Berryman) has met with other local agents to discuss fee war to try to reach some mutual agreement. Further meeting arranged for February*' (emphasis added). The Minutes were circulated by email (see [URN1223]). Although the Minutes are dated 22 January 2014, the title of the attachment indicates that the branch meeting may have been held on 21 January 2014, such that [Senior Employee 1] (Gary Berryman) may be referring to a separate meeting between himself and [Senior Employee 3] (Gary Berryman [X]) of 22 January 2014.

¹⁵⁵ This is consistent with the witness evidence to the effect that the Parties' meetings were not formally documented in this way – see transcript of CMA interview with [Employee 1] (GTH), 5 July 2016, Disc 2 of 3, pages 38-39 [URN1800] and Transcript of CMA interview with [Senior Employee 1 (West Coast)], 5 February 2016, Disc 1 of 2, page 36, [URN1767].

- a. The pre-formation correspondence described at paragraph 3.107 above demonstrates that at least one of the Parties (GTH) was only prepared to meet if all Parties were present;
- b. A number of those interviewed recalled being present at a first meeting in GTH's offices to discuss a proposal to increase fee levels including [Senior Employee 2] (Gary Berryman), [Employee 1] (Annagram), [Employee 1] (Saxons), [Senior Employee 1] (West Coast) and [Senior Employee 1] (GTH) and all of these confirmed that all Parties were represented at this meeting;^{156,157}
- c. While neither [Senior Employee 1] (Abbott and Frost) nor [Senior Employee 2] (Abbott and Frost) recalled whether or not they were at this meeting, [Senior Employee 1] (Abbott and Frost) stated that he usually attended the meetings between the Parties either alone or with [Senior Employee 2] (Abbott and Frost).¹⁵⁸ In addition to the witness evidence above that all Parties were represented at this meeting, one witness specifically recalled that Abbott and Frost was represented;¹⁵⁹ and
- d. The correspondence from the day after the meeting cited at paragraphs 3.115 to 3.124 below corroborates that each Party was there.

¹⁵⁶ Transcript of CMA interview with [Senior Employee 2] (Gary Berryman), 10 August 2016, Disc 1 of 1, page 13, [URN1846]; transcript of CMA interview with [Employee 1] (Annagram), 3 February 2016, Disc 1 of 1, pages 7-8, URN0549; transcript of CMA interview with [Employee 1] (Saxons), 14 June 2016, Disc 1 of 2, pages 13-14, [URN1769]; transcript of CMA interview with [Senior Employee 1] (West Coast), 5 February 2016, Disc 1 of 2, pages 8–10, [URN1767]; and transcript of CMA interview with [Senior Employee 1] (GTH), 5 July 2016, Disc 2 of 3, pages 28 and 29, URN1793. [Senior Employee 1] (Saxons) also described being at the meeting but, as he accepted later in the interview, contemporaneous documentary evidence makes it clear he was absent. [Employee 1] (GTH) also described being at what he considered to be the first meeting of the Parties. However, his description of the content and date of that meeting are to some extent inconsistent with other evidence about the first meeting. Moreover, no other witnesses definitively placed [Employee 1] (GTH) at that meeting (other than [Senior Employee 1] (Saxons), who was not there himself) and [Employee 1] (GTH) did not receive the correspondence following up on the meeting the following day. In the circumstances, the CMA has not reached a finding as to whether [Employee 1] (GTH) was present at the Formation Meeting.

¹⁵⁷ [Employee 1] (Annagram) initially thought that Abbott and Frost may not have been represented but subsequently opined that [Senior Employee 1] (Abbott and Frost) was present. [Employee 1] (Annagram) also (incorrectly) recalled that [Senior Employee 2] from West Coast was present (rather than [Senior Employee 1]) which was not the case as [Senior Employee 2] had not by that date joined West Coast's Burnham office. However, the CMA does not consider that [Employee 1]'s (Annagram) error in this regard fundamentally undermines the reliability of his evidence.

¹⁵⁸ Transcript of CMA interview with [Senior Employee 1] (Abbott and Frost), 22 June 2016, Disc 1 of 3, page 34, [URN1774].

¹⁵⁹ Transcript of CMA interview with [Senior Employee 1] (West Coast), 5 February 2016, Disc 1 of 2, page 9, [URN1767]. While initially [Senior Employee 1] (West Coast) could not remember whether Abbott and Frost attended, he later recalled that there were '*quite a few big voices*' in the Formation Meeting, including '*one of the guys from Abbott & Frost*'.

The Outcome of the Meeting

3.114 The CMA has found that the outcome of the Formation Meeting was an arrangement regarding minimum commission fees for the sale of residential property in the Burnham area, described in an email entitled '*Fees!*' sent by [Senior Employee 1] (Gary Berryman) to all the other Parties the following day (the '**Formation Confirmation Email**'). As set out in further detail in paragraphs 3.115 to 3.142 below, the CMA's finding is based on:

- a. The substance of the Formation Confirmation Email and similar internal Gary Berryman emails sent by [Senior Employee 1];
- b. The replies of four of the Parties (Abbott and Frost, GTH, Saxons and West Coast) to the Formation Confirmation Email;
- c. Internal Annagram correspondence regarding the outcome of the Formation Meeting;
- d. Witness evidence regarding the Formation Confirmation Email; and
- e. Correspondence in the period following the meeting in which some of the terms in the Formation Confirmation Email were refined.

3.115 [Senior Employee 1] (Gary Berryman) sent the Formation Confirmation Email at 10:44 on 5 February 2014 to [Senior Employee 1] (GTH), [Senior Employee 1] (West Coast), [Senior Employee 1] (Abbott and Frost), [Employee 1] (Annagram), [Senior Employee 1] (Saxons) and [Senior Employee 2] (Gary Berryman) stating:¹⁶⁰

*'Further to our meeting yesterday, I am as promised emailing everyone to confirm the **agreement we reached with regards to minimum fees** that we will be charging, which I outline below:*

Sole Agency: from 1.5% plus VAT with a minimum fee of £1,500 for properties up to £100,000 and £2,000 for properties over £100,000

Multiple Agency: from 2% plus VAT

Joint Agency: from 2% plus VAT

¹⁶⁰ [URN0158]

We will also be looking to enforce a minimum fee on reposessions and corporate clients of £2,000 and if they don't like it, we will refuse the instruction!!!! (sic)

[...] As requested each company will take it in turns each month to play 'policeman/problem solver', which I would propose we each do in the following months:

February: Gary Berryman

March: Abbott & Frost

April: Saxons

May: CJ Hole [Annagram]

June: West Coast

July: Greenslades [GTH]

I would also like to propose Wednesday 7th May at 1pm at Greenslades [GTH] offices as a 'review' meeting.

I would like to thank everyone for attending the meeting and hope we can look to build on this to all our benefits in the future and would ask that if anyone is having problems with our agreement, please let's talk about it and try and resolve the problem, rather than going back to slashing fees! I think that with a bit of trust, a bit of co-operation and some goodwill we will all improve our businesses, enjoy our working day that bit more and start to actually make some money!! (sic)' (emphasis added)

3.116 [Senior Employee 1] (Gary Berryman) also sent a similar description of the outcome of the Formation Meeting via email to (separately) Gary Berryman staff and [Senior Employee 3] (Gary Berryman [S<]), which the CMA regards as being additional corroboration of what took place at the Formation Meeting.¹⁶¹

¹⁶¹ In an email to Gary Berryman staff at 08:25 on 5 February 2014 [URN0159], [Senior Employee 1] (Gary Berryman) stated: '[Senior Employee 2] (Gary Berryman) and I had a meeting with the other agents yesterday with all the other Burnham agents (sic) and I am pleased to say that an agreement has been reached with regards to minimum fees that will now be quoted and agreed with clients wishing to sell a property. They are as below:

Sole Agency: from 1.5% plus VAT with a minimum fee of £1,500 for properties up to £1000,000 and £2,000 for properties over £100,000.

Multiple Agency: from 2% plus VAT

Joint Agency: from 2% plus VAT

We will also be enforcing a minimum fee on reposessions and corporate clients of £2,000 and if they don't like it, we will refuse the instruction.

- 3.117 The Formation Confirmation Email does not refer expressly to the geographic scope of the arrangement. However, the CMA infers that [Senior Employee 1] (Gary Berryman) was referring to services offered by the Parties from their Burnham branches on the basis, in particular, that the Formation Meeting participants were all based in Burnham. This inference is also consistent with references in the pre-formation correspondence to raising fees to the level of other local areas set out at paragraphs 3.89 and 3.100 above.
- 3.118 The Formation Confirmation Email does not expressly refer to residential, as opposed to commercial, property sales. However, as this is the area of overlap between the activities of all the Parties,¹⁶² the CMA infers that [Senior Employee 1] (Gary Berryman) was referring to commission fees for sales of residential property. Its conclusion in this regard is reinforced by the fact that all the specific properties discussed in the subsequent correspondence cited in the '*Refining the Arrangement*', '*Policeman*', '[*A Developer*]' and '*Bilateral communications*' sections below are residential properties.
- 3.119 As set out in detail below, four of the Parties (Saxons, GTH, Abbott and Frost, West Coast) responded to [Senior Employee 1] (Gary Berryman) on 5 February 2014 in terms that make it clear that they agreed with [Senior Employee 1]'s (Gary Berryman) account of the outcome of the meeting. None of the Parties disputed either [Senior Employee 1]'s (Gary Berryman) use of the word '*agreement*' to describe the outcome of the meeting, or any of the terms of the Parties' arrangement as described in the Formation Confirmation Email. Rather, the replies from four of the Parties (Saxons,

If you have any queries about this please let [Senior Employee 2 (Gary Berryman)] or I know.'

In an email at 14:09 on 4 February 2014, [Senior Employee 1] (Gary Berryman) sent a similar report to [Senior Employee 3] (Gary Berryman [§<]) confirming the sole agency part of the Parties' arrangement – [URN1205]: '*we had a meeting with the other agents today and have managed to broker an agreement that sole agency fees will start from 1.5% plus VAT with a minimum fee for properties upto £100,000 set at £1,500 plus VAT with a minimum fee for properties over £100,000 being £2,000 plus VAT. We are obviously hopeful that this will last, but it at least has been agreed with all the agents so will hopefully now start to increase our revenue.*' There is evidence that [Senior Employee 3] (Gary Berryman [§<]) saw this email and asked [Employee 1] (Gary Berryman [§<]) to organise a meeting with [Senior Employee 1] (Gary Berryman) and [Senior Employee 2] (Gary Berryman) – see [URN1212] – an email at 13:14 on 6 February 2014 from [Employee 1] (Gary Berryman [§<]) to [Senior Employee 1] (Gary Berryman). See also [URN1216] - email at 15:25 on 6 February 2014 from [Senior Employee 1] (Gary Berryman) to [Employee 1] (Gary Berryman [§<]) and [URN1215] - email at 14:50 on 6 February 2014 from [Employee 1] (Gary Berryman [§<]) to [Senior Employee 1] (Gary Berryman) and [URN1214] - email at 14:48 on 6 February 2014 from [Employee 1] (Gary Berryman [§<]) to [Senior Employee 1] (Gary Berryman).

¹⁶² See paragraph 3.2 above.

GTH, Abbott and Frost and West Coast) were all positive and focused on the implementation of the arrangement and organising the next meeting.

- a. In an email of 11:10 on 5 February 2014, [Senior Employee 1] (Saxons) replied to [Senior Employee 1] (Gary Berryman), in an email also sent to all the other Parties and [Employee 2] (Saxons) and [Employee 1] (Saxons):¹⁶³

'My apologies for not attending but both [Employee 2] (Saxons) and [Employee 1] (Saxons) were very pleased with the outcome and are enthused with the thought of gaining (or losing) business based on their 'pitch' and not having to slash fees just to make a crumb.

Thank you again for your efforts, very much appreciated, let us all hope that by year end our balance sheets are showing a very healthy increase in income!'

- b. [Senior Employee 1] (GTH), in an email at 12:36 on 5 February 2014, replied to [Senior Employee 1] (Gary Berryman) and all the other Parties (now including a second Abbott and Frost representative, [Senior Employee 2]) stating:¹⁶⁴

*'I felt this was a **meeting of common minds and went remarkably well** I'm confident this will work everyone has stock and nobody is new to the town wanting to build stock from scratch. I have a good feeling that as entrepreneurs we can still cooperate to mutual advantage and grow our businesses equally but concentrating on our firms' unique brands and services and selling ourselves not cutting each other's throat financially. **We may even be able to build on this initial agreement at our next meeting** – can everyone get the date in their diaries? We need a 100% attendance, **it's really important we all give it the priority it deserves (making as much as profit as possible!)**' (emphasis added)¹⁶⁵*

- c. [Senior Employee 1] (Saxons) expressed to all of the Parties that he agreed with [Senior Employee 1]'s (GTH) email stating, in an email

¹⁶³ [URN0593]

¹⁶⁴ [URN1208]

¹⁶⁵ [Senior Employee 1]'s (GTH) witness evidence corroborates that, in sending this email to the Parties, he intended to encourage them to use the commission rates which had been agreed – transcript of CMA interview with [Senior Employee 1] (GTH), 5 July 2016, Disc 2 of 3, pages 33-34, [URN1793].

at 13:06 on 5 February 2014, '*Bravo [Senior Employee 1 (GTH)], well said.*'¹⁶⁶

- d. [Senior Employee 1] (Abbott and Frost) also replied to [Senior Employee 1]'s (Gary Berryman) email, at 16:55 on 5 February 2014, in an email to all the other Parties suggesting that implementation of the arrangement would result in a significant rise in fees stating:¹⁶⁷

'Thanks again [Senior Employee 1] (Gary Berryman) for organizing the meeting. If we can raise fees by an average of a third then there is sure to be a difference on our bottom line at the end of the day.'

- e. [Senior Employee 1] (West Coast) also replied to [Senior Employee 1] (Gary Berryman) (not copying the other Parties) at 15:12 on 5 February 2014 stating '*I'm glad we got there in the end and with a fantastic result, hopefully!*'¹⁶⁸

Annagram's Response

3.120 The CMA has not found any evidence to suggest that Annagram replied to the Formation Confirmation Email. However, as set out in the following paragraphs, [Employee 1] (Annagram) corresponded with [Senior Employee 3] (Annagram) (and later the other Annagram [Senior Employees]) about what took place at the meeting. During this correspondence, [Employee 1] (Annagram) confirmed the existence of the minimum fee arrangement and asked whether Annagram should adhere to it.

3.121 In an email to [Senior Employee 3] (Annagram) at 13:25 on 5 February 2014 entitled '*Fees meeting*', [Employee 1] (Annagram) copied [Senior Employee 1]'s (Gary Berryman) Formation Confirmation Email noting that '*Despite my initial thoughts on the fees meeting it went well*' before describing the Formation Confirmation Email as recording an arrangement reached by the Parties during the meeting: '*Below are the points **agreed in the meeting.***' (emphasis added).¹⁶⁹

¹⁶⁶ [URN0595] - [Senior Employee 1] (Saxons) also asked the other Parties to include Saxons' [Employee 2] in email correspondence.

¹⁶⁷ [URN0876]. [Senior Employee 1] (Gary Berryman) forwarded this email to [Senior Employee 2] (Gary Berryman) - email at 08:14 on 7 February 2014 - [URN1218].

¹⁶⁸ [URN1210] - [Senior Employee 1] (West Coast) also confirmed attendance of the upcoming 7 May 2014 meeting. [Senior Employee 1] (Gary Berryman) forwarded this email to [Senior Employee 2] (Gary Berryman) - email at 08:14 on 7 February 2014 - [URN1219].

¹⁶⁹ [URN0596]

3.122 [Senior Employee 3] (Annagram) responded in terms that demonstrate that he had not intended [Employee 1] (Annagram) to enter into an arrangement on behalf of Annagram at the meeting, stating, in an email at 15:56 on 5 February 2014: *'I thought you were going to report back before agreeing anything?'*¹⁷⁰

3.123 On the same day (5 February 2014), [Employee 1] (Annagram) replied at 16:09 stating:¹⁷¹

'I thought that was what I was doing?'

All agents in attendance during the meeting were encouraged by the positive attitude to raise fees to a more acceptable level.

If you would prefer me to revert back to lower fees please advice (sic).'

3.124 Also, on the same day, [Senior Employee 3] (Annagram) replied to [Employee 1] (Annagram) at 16:53, this time copying [Senior Employee 2] (Annagram) and [Senior Employee 1] (Annagram), as follows:¹⁷²

'With respect that's not what you were doing, you reported back a decision that you have already taken. I thought we had agreed that you were to attend the meeting and tell the group that as you were not the owner you would have to discuss the proposal with me. Don't get me wrong I'm all for higher fees, but I would have preferred to have been given the option to think about it first.'

3.125 While [Employee 1]'s (Annagram) witness evidence is that [Senior Employee 3] (Annagram) subsequently decided that Annagram would not participate in

¹⁷⁰ [URN0600]

¹⁷¹ [URN0600] - [Employee 1]'s (Annagram) suggestion in this email that he had not at the Formation Meeting entered into an arrangement on behalf of Annagram is consistent with his account in interview that he had explained at the Formation Meeting that he was not empowered to reach a decision on behalf of Annagram – see transcript of CMA interview with [Employee 1] (Annagram), 3 February 2016, Disc 1 of 1, page 7, [URN0549]. That [Employee 1] (Annagram) intended to attend the meeting in *'listening mode'* is also corroborated to some extent by the account of [Senior Employee 1] (West Coast), who stated that he encouraged [Employee 1] (Annagram) to attend the meeting because he had a relatively good relationship with [Employee 1] (Annagram) and that he told [Employee 1] (Annagram) that he had nothing to lose by coming to the meeting - transcript of CMA interview with [Senior Employee 1] (West Coast), 5 February 2016, Disc 2 of 2, page 4, [URN1768]. However, [Employee 1]'s (Annagram) account of the Formation Meeting in interview is inconsistent with his reports to [Senior Employee 3] (Annagram) at paragraphs 3.121 and 3.123, with [Senior Employee 3]'s (Annagram) response at paragraph 3.124 and with the Formation Confirmation Email.

¹⁷² [URN0600]

the arrangement,¹⁷³ the CMA has seen no evidence that, following this correspondence or any further discussions of the matter with [Employee 1] (Annagram), [Senior Employee 3] (Annagram) directed [Employee 1] (Annagram) to distance himself (and, with that, Annagram) from the arrangement¹⁷⁴ and no evidence that Annagram did in fact distance itself from the arrangement until March 2015. Instead, as set out in more detail below, and in particular in paragraphs 3.139, 3.156 to 3.159, 3.165, 3.174, 3.183 to 3.198 and 3.214 to 3.249, Annagram participated in correspondence and attended meetings about the arrangement up until March 2015. Indeed, [Employee 1]'s (Annagram) own evidence is that he (and on one occasion, his colleague [Employee 2] (Annagram)) attended further meetings at which compliance with the fee arrangement was discussed. In particular, [Employee 1] (Annagram) recalled discussing fees including minimum fees for repossession companies at a meeting at Abbott and Frost in either September or October 2014, and attending a meeting together with his colleague [Senior Employee 3] (Annagram) at which fees as well as collective advertising were discussed.¹⁷⁵

Witness Evidence

3.126 Other witnesses interviewed by the CMA took issue with [Senior Employee 1]'s (Gary Berryman) characterisation of the outcome of the meeting and, in particular, with his use of the word '*agreement*' in the Formation Confirmation Email. [Senior Employee 2] (Gary Berryman) considered the word was '*optimistic*' because some individuals had expressed reservations during the Formation Meeting such that he regarded the outcome of the meeting as a '*proposal*' rather than an agreement,¹⁷⁶ while [Employee 1] (Saxons) considered that an '*agreement*' denoted some degree of allegiance between the Parties that was lacking.¹⁷⁷

¹⁷³ Transcript of CMA interview with [Employee 1] (Annagram), 3 February 2016, Disc 1 of 1, page 7, [URN0549].

¹⁷⁴ The evidence the CMA has seen is an email chain between [Employee 1] and [Senior Employee 3] (both Annagram) ending with an email from [Employee 1] (Annagram) at 17:08 on 5 February 2014 suggesting to [Senior Employee 3] (Annagram) that they could discuss the matter further at an upcoming meeting - [URN0600].

¹⁷⁵ Transcript of CMA interview with [Employee 1] (Annagram), 3 February 2016, Disc 1 of 1, pages 11-13, [URN0549].

¹⁷⁶ Transcript of CMA interview with [Senior Employee 2] (Gary Berryman), 10 August 2016, Disc 1 of 1, pages 30-32, [URN1846].

¹⁷⁷ Transcript of CMA interview with [Employee 1] (Saxons), 14 June 2016, Disc 1 of 2, page 28, [URN1769]. [Senior Employee 1] also denied that an agreement had been reached at the Formation Meeting (see, for example, transcript of CMA interview with [Senior Employee 1] (Saxons), 21 June 2016, Disc 2 of 3, page 54 [URN1772]) but later in the interview agreed he was not present at that meeting (see, for example, transcript of CMA interview with [Senior Employee 1] (Saxons), 21 June 2016, Disc 2 of 3, page 58, [URN1772]).

3.127 [Senior Employee 1]'s (Abbott and Frost) evidence is that there was no agreement on fee levels, although fees were discussed at the meeting.¹⁷⁸ Rather, the thrust of [Senior Employee 1]'s (Abbott and Frost) evidence is that fees were discussed at meetings between the Parties largely in the context of downward pressure on fees from repossession managing agents and 'touting' but that there was no agreement. However, since he cannot recall the Formation Meeting in any detail, or receiving the Formation Confirmation Email, the CMA has decided not to place any weight on his comments in this regard.¹⁷⁹ Moreover, [Senior Employee 1]'s (Abbott and Frost) evidence regarding the absence of an agreement is inconsistent with the email cited at paragraph 3.150 below in which [Senior Employee 1] (Abbott and Frost) himself uses the word 'agreement' when communicating with the other Parties, as well as [Senior Employee 1]'s (Abbott and Frost) comments at interview about that email.¹⁸⁰

¹⁷⁸ [Senior Employee 2] (Abbott and Frost) also denied there being any agreement to fix fees - transcript of CMA interview with [Senior Employee 2] (Abbott and Frost), 22 June 2016, Disc 1 of 1, page 29, [URN1845], and explained that in his experience the other agents did not stick to the fees set out in the Formation Confirmation Email - transcript of CMA interview with [Senior Employee 2] (Abbott and Frost), 22 June 2016, Disc 1 of 1, page 45, [URN1845]. However, although [Senior Employee 2] (Abbott and Frost) confirmed he went to subsequent meetings, he cannot recall whether or not he attended the Formation Meeting - transcript of CMA interview with [Senior Employee 2] (Abbott and Frost), 22 June 2016, Disc 1 of 1, pages 36, 38-39 and 42, [URN1845], and was not a recipient of the Formation Confirmation Email. In these circumstances, and taking into account the clear contemporaneous documentary record, the CMA has decided not to place weight on his evidence in this regard. Evidence of non-adherence to the fee agreement is discussed further at paragraphs 3.202 to 3.206 below. [Senior Employee 2] (Abbott and Frost) also stated at interview that he did not open emails sent by the Parties to the email address [redacted] of [Senior Employee 2] (Abbott and Frost). In response to evidence that emails were forwarded from this account (see, for example [URN0893] - email at 15:34 on 5 June 2014 from [Senior Employee 2] (Abbott and Frost) to [Senior Employee 1] (Abbott and Frost) and a personal email account of [Senior Employee 2] (Abbott and Frost), [Senior Employee 2] (Abbott and Frost) stated that other members of Abbott and Frost staff may have accessed the account – see transcript of CMA interview with [Senior Employee 2] (Abbott and Frost), 22 June 2016, Disc 1 of 1, pages 55-58, [URN1845].

¹⁷⁹ Transcript of CMA interview with [Senior Employee 1] (Abbott and Frost), 22 June 2016, Disc 1 of 3, pages 54-57, [URN1774] and Disc 2 of 3, pages 10, 11 and 18 [URN1775]. [Senior Employee 1] (Abbott and Frost) also explained that he did not think there was an agreement because Abbott and Frost's fees in any event tended to be at the same level as those discussed, and Abbott and Frost maintained a level of flexibility with regard to fees - transcript of CMA interview with [Senior Employee 1] (Abbott and Frost), 22 June 2016, Disc 2 of 3, page 5, [URN1775] and Disc 3 of 3, page 3 [URN1776].

¹⁸⁰ When [Senior Employee 1] (Abbott and Frost) was asked to comment on what he meant in his email of 1 March 2014 to all other Parties [URN0880] in which he accepted the policeman role for March 2014 and commented '*I am pleased to understand that the agreement seems to be working*', he replied by noting that during the Parties' discussions Abbott and Frost would state that they charged 1.5% and that '*multiple agency rate tended to be two and a half per cent, or two and a quarter per cent*', before stating that by '*working*' he meant that other agents were not trying to undercut - transcript of CMA interview with [Senior Employee 1] (Abbott and Frost), 22 June 2016, Disc 1 of 3, pages 10-12, [URN1774]. See also [URN1637] – email from [Senior Employee 1] (Abbott and Frost) to [Employee 1] (Saxons) at 17:49 on 23 April 2014 - described further at paragraph 3.153 below, and [URN1641] – email from [Senior Employee 1] (Abbott and Frost) to [Employee 1] (Saxons) at 13:14 on 28 April 2014 - described further at paragraph 3.154 below. In both of these emails [Senior Employee 1] (Abbott and Frost) uses the word '*agreement*' while reporting instances of undercutting to Saxons, which was the designated policeman for April 2014.

3.128 None of the individuals interviewed disputed [Senior Employee 1]'s (Gary Berryman) record of the details of the arrangement and both [Senior Employee 1] (GTH)¹⁸¹ and [Senior Employee 1] (West Coast) confirmed that the email accurately represented the outcome of the discussions.¹⁸²

Refining the Arrangement

3.129 In the weeks following the Formation Meeting, the Parties corresponded further about the precise terms of the arrangement and, in particular, its application to properties that had already been valued.

3.130 For example, at 10:05 on 12 February 2014, [Employee 1] (Saxons) emailed the other Parties and [Employee 2] (Saxons) regarding apparent instances of one or more of the Parties quoting fees of 1% and 1.25%.¹⁸³ [Employee 1] (Saxons) referred to '*the meeting*' (which the CMA infers is a reference to the Formation Meeting of 4 February 2014 described above) and suggested that these fee quotes raised doubts about whether all Parties were '*on board*' with the discussions had at that meeting.

3.131 At 11:25 on the same day (12 February 2014), [Senior Employee 1] (Gary Berryman) replied to [Employee 1] (Saxons), cc'ing [Senior Employee 2] (Gary Berryman), asking that it provide Gary Berryman as the month's policeman with more information. [Senior Employee 1] (Gary Berryman) also suggested that the fee quotes raised by Saxons might relate to properties valued prior to the arrangement.¹⁸⁴

¹⁸¹ [Senior Employee 1]'s (GTH) initial evidence was that from his point of view, there was no arrangement, although the Parties did discuss fees at some of their meetings, and that the Parties felt there ought to be a target price for repossessions - transcript of CMA interview with [Senior Employee 1] (GTH), 5 July 2016, Disc 1 of 3, pages 10, 16 and 17, [URN1792]. However, [Senior Employee 1] (GTH) later confirmed that [Senior Employee 1]'s (Gary Berryman) email of 5 February 2014 recording the Parties arrangement [URN1206] was '*correct*', '*accurately reflects*' the discussions at the meeting of 4 February 2014 and '*means what it says*'. [Senior Employee 1] (GTH) also described the Parties as having reached a '*consensus*', been '*of a like-mind*' and formed a '*verbal agreement*' at the meeting - transcript of CMA interview with [Senior Employee 1] (GTH), 5 July 2016, Disc 2 of 3, pages 25, 26 and 33, [URN1793]. The CMA considered that these later comments from [Senior Employee 1] (GTH) were more consistent with the documentary evidence, and therefore more credible.

¹⁸² Transcript of CMA interview with [Senior Employee 1] (West Coast), 5 February 2016, Disc 1 of 2, pages 12-13, [URN1767]. [Senior Employee 1] (West Coast) also stated that he told West Coast's [Senior Employee 3], about the arrangement he had agreed with the other Parties – transcript of CMA interview with [Senior Employee 1] (West Coast), 5 February 2016, Disc 1 of 2, pages 18–19, [URN1767].

¹⁸³ [URN1621]

¹⁸⁴ [URN1621]. [Senior Employee 1] (Gary Berryman) stated: '*I must say I have had a similar situation recently [...] Abbott and Frost quote 1% plus VAT, but having asked them to prove it, they showed me their valuation letter that was dated two days before our agreement! I am just wondering if this may be a similar situation?*'

3.132 [Employee 1] (Saxons) replied to [Senior Employee 1] (Gary Berryman) (cc'ing [Employee 2] and [Senior Employee 1] (both of Saxons)) at 11:35 on the same day (12 February 2014), in terms that indicate that his understanding of the arrangement on this point - that the 1.5% minimum fee applied to any property on the market - differed from [Senior Employee 1]'s (Gary Berryman) understanding that the arrangement did not apply to properties on the market for which fee quotes had been given prior to the arrangement.¹⁸⁵

3.133 [Senior Employee 1] (Gary Berryman) and [Senior Employee 1] (West Coast) also corresponded regarding [Employee 1]'s (Saxons) email of 12 February 2014 and whether the Parties' arrangement applied to properties for which one or more Parties had already given quotes prior to the arrangement. [Senior Employee 1] (West Coast) stated in an email at 12:44 on 13 February 2014:¹⁸⁶

'[Employee 1] (Saxons) has raised a fair point that we didn't discuss at the meeting and that is properties that are currently on with other agents looking to. I don't believe I have broken our agreement, as this situation was not discussed.'

3.134 In his reply to [Senior Employee 1] (West Coast) at 13:08 on the same day (13 February 2014), [Senior Employee 1] (Gary Berryman) stated that his view was that Parties should be able to match fee quotes given prior to the arrangement (or in other words that the arrangement should not apply to property that was on the market prior to the formation of the Parties' arrangement). [Senior Employee 1] (Gary Berryman) went on to suggest that Gary Berryman as the month's 'policeman' could circulate [Senior Employee 1]'s (West Coast) email (described above) and state that Gary Berryman supported [Senior Employee 1]'s (West Coast) position on the issue.¹⁸⁷

3.135 Subsequently, at 10:56 on 14 February 2014, [Employee 1] (Saxons) emailed all the other Parties and [Employee 2] (Saxons) as follows:¹⁸⁸

'Guys

I have corresponded with a couple of you regarding our fees!! (sic)

¹⁸⁵ [URN1621]. [Employee 1] (Saxons) stated: *'My Vendor in Wells Close has been quoted 1% elsewhere!! (sic) Any valuations whereby the property is on the market our fee is 1.5% plus (as per our agreement) Also Huntspill Road I have been to and have been told by the vendor they have been quoted 1.25% elsewhere.'*

¹⁸⁶ [URN1230]

¹⁸⁷ [URN1232]

¹⁸⁸ [URN0877]

Moving forward I think we need to nip in the bud any teething issues so that we can all make more money.

My understanding is as follows:

Any valuation I did in the past regardless will be 1.5% plus

Any vendor wishing to come on board from elsewhere on a multi agency will be charged 2%

I have already come across 2 scenarios where the above has not been the case.

I believed that was the reason for the meeting.

Do please let us know you thoughts'

- 3.136 The version of this email obtained by the CMA from Gary Berryman Estate Agent Ltd's premises contains the following handwritten annotations, which are marked in bold:¹⁸⁹

*'Any valuation I did in the past regardless will be 1.5% plus **NO – Fee match** (sic)*

*Any vendor wishing to come on board from elsewhere on a multi agency will be charged 2% **YES** (sic)'*

- 3.137 Later the same day (14 February 2014), and following the correspondence between [Senior Employee 1] (Gary Berryman) and [Senior Employee 1] (West Coast) on 13 February 2014 described in paragraphs 3.133 to 3.134 above, [Senior Employee 1] (Gary Berryman) and [Senior Employee 1] (West Coast) further discussed their understanding of the arrangement in the context of [Senior Employee 1]'s role as that month's policeman. At 12:02, [Senior Employee 1] (Gary Berryman) emailed [Senior Employee 1] (West Coast) referring to their previous correspondence and stating:¹⁹⁰

'Can I just check that your understanding is/was as I described mine yesterday that if a fee was offered prior to the agreement then it is in

¹⁸⁹ [URN0156]

¹⁹⁰ [URN0157]

order to match it, otherwise the other agent has an unfair advantage?? (sic)'

- 3.138 At 12:12 on 14 February 2014, [Senior Employee 1] (West Coast) replied to explain why, in relation to the property being discussed, West Coast charged a 1.25% fee as opposed to 1.5%.¹⁹¹

'Yes [Senior Employee 1 (Gary Berryman)

Basically [Employee 1] (Saxons)] has the house on the market for .9%, vendor wants to swap and asked us to value (this is the first time we have had any conversation with this vendor, so it's a new enquiry to us).

However, they have also spoken to another agent who has previously been to the house prior to the meeting and offered 1% but has said, since the meeting that they would honour the 1%.

Obviously in this situation we are at a disadvantage and would never get the instruction if we stuck to 1.5% so we had to negotiate to 1.25%.'

- 3.139 The above correspondence culminated in an email from [Senior Employee 1] (Gary Berryman) to all the other Parties at 9:28 on 17 February 2014 to clarify the approach they should take in relation to properties valued prior to the arrangement. [Senior Employee 1] (Gary Berryman) confirmed that he had spoken to all of the Parties individually and that the 1.5% minimum fee would apply to properties valued prior to the arrangement unless an agent had visited the property prior to the arrangement and already committed itself in writing to a fee lower than 1.5% for the property:¹⁹²

'I have now had the opportunity...to speak with [Senior Employee 1], (GTH), [Employee 1] (CJ Hole) [Annagram], [Senior Employee 2] (Abbott & Frost), [Senior Employee 1] (West Coast) and [Senior Employee 1] (Saxons) [...] may I say how refreshing it was to hear how positive everybody was about how the agreement was working and that even though there had been a couple of genuine misunderstandings that have arisen, that everyone, was undertaking,

¹⁹¹ [URN0157]

¹⁹² [URN0878]

positive about resolving them and wanting to move forward to ensure that our agreement works!

For clarification purposes and subsequent to our conversations I would confirm the following agreement from all companies that from here forward:

*1.If we are invited to value a property that was valued **prior** to the agreement by another agent and they quoted less than the 1.5% and/or less than the minimum fees subsequently agreed, we will stay firm at 1.5% and not 'fee match' the lower figure quoted.*

2.If we are invited to value a property that is on the market with another agent, we will regardless of what commission was agreed with the other agent previously, we will (sic) quote 1.5% Plus VAT.

3.The only exception to point 2 is where we have previously visited the property prior to the agreement and committed ourselves in writing to a fee lower than 1.5% plus VAT.'

3.140 In the same email, [Senior Employee 1] (Gary Berryman) requested that the Parties follow Gary Berryman in circulating an email to their staff¹⁹³ and in keeping that email confidential:¹⁹⁴

'I would mention that we are circulating this email to all our staff and we are making sure they are aware that the contents are for their eyes only and would be grateful if you could all do the same.'

3.141 In addition to discussing the applicability of the Parties' arrangement to properties valued prior to February 2014, at least two of the Parties also discussed whether the arrangement applied to transactions with neighbours

¹⁹³ In an internal Gary Berryman email at 09:30 on 17 February 2014, [Senior Employee 1] (Gary Berryman) copied this email [URN0878] to Gary Berryman staff, adding a line in red at the top of the email that it was for their information and had been sent to all Parties - [URN1241].

¹⁹⁴ [URN0878] - email at 09:28 on 17 February 2014. In interview, [Senior Employee 2] (Gary Berryman) asserted that this email demonstrated that the Parties did not have a fee arrangement because at least four agents had within a short period offered a fee below 1.5% - transcript of CMA interview with [Senior Employee 2] (Gary Berryman), 10 August 2016, Disc 1 of 1, page 36, [URN1846]. However, the CMA does not accept this interpretation of this email. In particular, the CMA considers that the surrounding correspondence demonstrates the Parties considered the quoting of low fees resulted from 'cheating' on the arrangement rather than a failure to come to an arrangement. [Senior Employee 2] (Gary Berryman) also stated in relation to the correspondence of 14 February 2014: 'I can't recall anyone saying yeah well I'm not part of it' – transcript of CMA interview with [Senior Employee 2] (Gary Berryman), 10 August 2014, Disc 1 of 1, page 36, [URN1846].

and family. In an email at 10:57 on 28 February 2014, [Senior Employee 1] (West Coast) emailed [Senior Employee 1] (Gary Berryman) as follows:¹⁹⁵

'We've been to see a property in which we've obviously quoted 1.5% but another agent has said they will 'do a deal on the fee' as they are neighbours! Is this allowed and where do we stand with competing. The vendor has told us that their decision is based heavily on the fee as opposed to just being neighbours, in a case like this surely we can compete on fee?'

3.142 At 13:03 on the same day (28 February 2014), [Senior Employee 1] (Gary Berryman) replied to [Senior Employee 1] (West Coast) stating that the only exception to the minimum fee was for family members.¹⁹⁶ The CMA has seen no further evidence in relation to this possible exception.

The implementation of the arrangement, including 'policing' and meetings

Summary

3.143 The CMA has found that, from 5 February 2014, the Parties implemented and/or reinforced their arrangement by (i) allocating a 'policeman' to monitor adherence to the arrangement, (ii) using multilateral and bilateral email correspondence to deal with specific issues, and (iii) periodic face-to-face meetings. The CMA has found that all of the Parties continued to correspond until at least December 2014 with a view to maintaining adherence to their arrangement, and that some of the Parties continued to correspond and meet until at least March 2015 when one Party publicly distanced itself from the arrangement.

3.144 The CMA has found that on numerous occasions one of the Parties accused one or more of the others of having failed to adhere to the arrangement either through a complaint to the 'policeman', in multilateral or bilateral correspondence or at a meeting. Consistent with this, the evidence of a number of witnesses was that they did not always stick to the minimum fees outlined in the Formation Confirmation Email. On occasion, one of the Parties encouraged the others to adhere to the arrangement because of its positive impact on fees.

3.145 During this period the Parties also corresponded and discussed in person the setting up of an Association - The Burnham Association of Lettings and Estate Agents (the '**Association**') - including by creating a constitutional

¹⁹⁵ [URN0412]

¹⁹⁶ [URN0412]

document (the ‘**Constitution and Rules**’) and appointing officers, as well as arrangements for collective purchasing of newspaper advertising from the [Local Newspaper] . While the Constitution and Rules do not expressly refer to the Parties’ minimum fee arrangement, the CMA has found that on occasion the Parties, or some of them, used the term ‘Association’ to refer to that arrangement.¹⁹⁷

‘Policeman’

- 3.146 The CMA has found that the Parties put in place a ‘policeman’ system intended to promote adherence to the arrangement. Under the ‘policeman’ system, which is recorded in the Formation Confirmation Email,¹⁹⁸ each of the Parties took it in turns on a monthly basis to ‘police’ the arrangement by seeking to resolve any issues that had arisen and/or investigating any reports of non-adherence to the arrangement, including in relation to specific properties. The Formation Confirmation Email allocated each undertaking one month as policeman and covered the period February 2014 to July 2014. Each undertaking was allocated a second¹⁹⁹ month as policeman for the period September 2014 to February 2015.
- 3.147 In the period February 2014 to July 2014, the Parties emailed each other to confirm their role as policeman and/or deal with complaints as policeman and/or request intervention by the policeman. While a ‘policeman’ was appointed covering the period February 2014 to March 2015 (except for August 2014), the CMA has found little evidence of the ‘policeman’ taking an active role after October 2014. The CMA has found that on more than one occasion one Party encouraged another to take matters up with that month’s ‘policeman’.
- 3.148 In the Formation Confirmation Email, [Senior Employee 1] (Gary Berryman) stated:²⁰⁰

¹⁹⁷ The CMA has not, on prioritisation grounds, considered whether the Constitution and Rules (which was eventually signed by all Parties other than Saxons) or the Parties’ discussions in relation to advertising were compliant with Article 101 TFEU and/or the Chapter I prohibition.

¹⁹⁸ Transcript of CMA interview with [Senior Employee 1] (GTH), 5 July 2016, Disc 3 of 3, page 16, [URN1794]. Transcript of CMA interview with [Senior Employee 1], (West Coast), 5 February 2016, Disc 1 of 2, page 16, [URN1767].

¹⁹⁹ West Coast was also allocated a third month. This may have been accidental and related to the initial omission of Abbott and Frost from the second list as mentioned at paragraphs 3.161 to 3.162 below.

²⁰⁰ [URN0158] - email at 10:44 on 5 February 2014.

'As requested each company will take it in turns each month to play 'policeman/problem solver', which I would propose we each do in the following months:

February: Gary Berryman

March: Abbott & Frost

April: Saxons

May: CJ Hole [Annagram]

June: West Coast

July: Greenslades [GTH]'

- 3.149 Gary Berryman took its turn as 'policeman' during February 2014 (as evidenced by the emails in the *'Refining the Arrangement'* section at paragraphs 3.129 to 3.142 above. [Senior Employee 1] (Gary Berryman) then asked Abbott and Frost to take over. In an email at 08:58 on 1 March 2014 entitled *'March's 'Policeman'!!!!'* (sic), [Senior Employee 1] (Gary Berryman) stated to all the other Parties that Gary Berryman had now completed its month as policeman and would be passing the *'mantle'* for March 2014 to Abbott and Frost. [Senior Employee 1] (Gary Berryman) also commented that *'the fee agreement appears to be working well'* and encouraged the Parties to *'keep communicating and keep this agreement together'*.²⁰¹
- 3.150 At 15:45 on 1 March 2014, [Senior Employee 1] (Abbott and Frost) replied to that email confirming his role as policeman and the success of the arrangement, stating:²⁰²

'Thanks for passing over the reigns. Most (sic) our clients have not queried commission rates too much and I am pleased to understand the agreement seems to be working.'

²⁰¹ [URN0416]

²⁰² [URN0880]. When commenting on this email at interview, [Senior Employee 1] (Abbott and Frost) noted that during the Parties' discussions Abbott and Frost would state that they charged 1.5% and that *'multiple agency rate tended to be two and a half per cent, or two and a quarter per cent'*, before stating that by *'working'* he meant that other agents were not trying to *'undercut'* - transcript of CMA interview with [Senior Employee 1] (Abbott and Frost), 22 June 2016, Disc 2 of 3, pages 10-12, [URN1775].

- 3.151 At 15:20 on 24 March 2014, [Employee 1] (Saxons) emailed all the other Parties apart from Abbott and Frost²⁰³ stating that he had seen three instances of Parties quoting fees of 1% or less and stated *'average fees have gone in the right direction of late, so it would be a shame to let it slide now.'*²⁰⁴ [Senior Employee 1] (Gary Berryman) replied to [Employee 1] (Saxons) at 15:40 on the same day – 24 March 2014 – suggesting to [Employee 1] (Saxons) that he look into which agents were involved and when they valued the property in question and refer the issue to the current policeman – Abbott and Frost – if it had not yet been resolved. [Senior Employee 1] (Gary Berryman) also commented that its experience was that there had not been many issues with the arrangement (apart from in relation to properties valued prior to the arrangement).²⁰⁵
- 3.152 At 10:43 on 1 April 2014, [Senior Employee 1] (Abbott and Frost) emailed all the other Parties to inform them that it was passing the *'policeman's baton'* to Saxons for the month of April 2014.²⁰⁶ At 13:36 on 1 April 2014, [Employee 1] (Saxons) replied, noting that *'end of month average fees have been much more promising'*, before committing to investigate any *'issues regarding fees'* communicated to it by the other Parties.²⁰⁷
- 3.153 Saxons was called upon to and did investigate at least two alleged instances of non-adherence during its turn as policeman in April 2014, at the behest of [Senior Employee 1] (Abbott and Frost) on each occasion. At 17:49 on 23 April 2014, in an email entitled *'Commission'*, [Senior Employee 1] (Abbott and Frost) informed [Employee 1] (Saxons) of a suspected instance of one of the Parties – West Coast – winning an instruction by charging a fee of 1.4 per cent in circumstances where the pre-arrangement valuations exception

²⁰³ The CMA considered that Abbott and Frost were omitted because the email was sent in reply to an email which had been sent on December 2013 discussing Abbott and Frost's then refusal to attend the proposed meeting rather than, for example, because [Employee 1] (Saxons) felt Abbott and Frost were not part of the arrangement.

²⁰⁴ [URN0611]. The CMA inferred that [Employee 1]'s (Saxons) subsequent reference to the fact that these were all *'cold valuations'* where no *'special circumstances'* applied is a reference to the outcome of the Parties' discussions about the applicability of their arrangement to properties valued prior to February 2014 – see paragraph 3.139 above.

²⁰⁵ [URN1249]. [Senior Employee 1]'s (West Coast) reply to [Employee 1] (Saxons) and the other Parties apart from Abbott and Frost at 07:51 on 25 March 2014 was that West Coast was implementing the arrangement on the terms agreed during the Parties' meeting: *'[w]e have not quoted less than 1.5% on any new valuations since our meeting'* - [URN0612]. [Employee 1] (Annagram) sent a similar reply at 16:51 on the same day (25 March 2014) to all Parties apart from Abbott and Frost stating that Annagram had been strict on fees until that day when it had offered 1.25% in order to match a lower fee already offered by another agent - [URN1250].

²⁰⁶ [URN0416].

²⁰⁷ [URN1626]. An email sent to [Senior Employee 1] (West Coast) at 13:38 on 1 April 2014 is a further acknowledgement from [Employee 1] (Saxons) that it was policeman for April 2014 and that it would be proactive in doing so: *'[W]e have the policeman duties this month so my ear will be to the ground'* - [URN1627].

(described at paragraph 3.139 above) did not apply.²⁰⁸ At 17:54 on the same day (23 April 2014), [Employee 1] (Saxons) replied that he would look into the matter,²⁰⁹ and later, in an email at 14:13 on 24 April, reported back that [Senior Employee 1] (West Coast) had said that West Coast '*definitely quoted 1.5%*'. [Employee 1] (Saxons) went on to note that [Senior Employee 1] (West Coast) had suggested that Gary Berryman had been doing '*a fair few deals on the fees*' in order to win business.²¹⁰

3.154 At 13:14 on 28 April 2014, [Senior Employee 1] (Abbott and Frost) emailed [Employee 1] (Saxons) reporting a further instance of apparent undercutting of the minimum fee arrangement, this time by Annagram at a figure of 1.25 per cent. [Senior Employee 1] (Abbott and Frost) commented that the arrangement seemed to have '*broken down somewhat*' and asked Saxons about organising a meeting.²¹¹ [Employee 1] (Saxons) replied to [Senior Employee 1] (Abbott and Frost) explaining that he thought the meeting was scheduled for 7 May but would check.²¹²

3.155 On the same day (28 April 2014), [Employee 1] (Saxons) reported by email to all the other Parties apart from Abbott and Frost about its month as policeman. It referred to '*issues regarding the standard 1.5% and everything else we agreed*'.²¹³ Later the same day, [Senior Employee 1] (Gary Berryman) replied to [Employee 1] (Saxons) and all the other Parties apart from Abbott and Frost expressing his surprise and noting that any issues could be discussed at the next meeting (scheduled for 7 May 2014 at GTH's offices).²¹⁴

3.156 At 17:33 on 7 May 2014, following the Parties' meeting earlier that day, [Employee 1] (Saxons) emailed all of the other Parties apart from Abbott and Frost informing them that it was passing the policeman role to Annagram while also suggesting that the arrangement was working well and resulting in '*better figures*' for all of the Parties.²¹⁵

3.157 In an email at 08:13 on 16 May 2014, [Senior Employee 1] (West Coast) informed [Senior Employee 2] (Gary Berryman) and [Employee 1]

²⁰⁸ [URN1637]

²⁰⁹ [URN1637]

²¹⁰ [URN1639]

²¹¹ [URN1641]

²¹² [URN1641]. [Employee 1] (Saxons) subsequently sent a further email at 16:23 on 28 April 2014 to the other Parties apart from Abbott and Frost asking them to confirm the 7 May 2014 meeting - [URN0632].

²¹³ [URN0419] - email at 09:58 on 28 April 2014.

²¹⁴ [URN0419] - email at 10:28 on 28 April 2014.

²¹⁵ [URN1643]

(Annagram) (who was that month's policeman) that the owner of a property at which all three of them had initially quoted 1.5% had informed it that one of Annagram or Gary Berryman would reduce that fee if instructed while the other had said it would reduce its fee if the vendor used its independent financial advisor and preferred solicitors.²¹⁶

3.158 [Senior Employee 2] (Gary Berryman) replied to [Senior Employee 1] (West Coast) by email at 10:55 on the same day to say that this was not the case.²¹⁷ He went on to say that he had already spoken to [Employee 1] (Annagram) who had also '*stuck to his guns*' despite pressure from the vendor. In the same email, [Senior Employee 2] (Gary Berryman) informed [Senior Employee 1] (West Coast) of other alleged instances of Parties undercutting the fee arrangement:²¹⁸

'[W]e had a 1% the other day from [Abbott and Frost] and [Employee 1 (Annagram)] I believe had a fixed fee £210.00²¹⁹ (sic) on a £220,000 [...] we are anxious to keep this going and as we're both instructed in these cases we thought a quiet word best'

3.159 Later that month at 19:27 on 26 May 2014, and in advance of the meeting of 3 June 2014, [Employee 1] (Annagram) (as above, the policeman for May) emailed the remaining Parties to propose a meeting, stating:²²⁰

'[D]esperation from certain agents to gain valued instructions is forcing them to quote.....wait for it LOWER FEES.'

[...]

'At this stage i'm (sic) not going to name and shame but it is apparent that the initial idea of getting a better fee is slipping quite swiftly. Even after our previous meeting²²¹ I was against an agent quoting a lower fee than we agreed.'

3.160 In an email at 17:44 on 5 June 2014, the Parties discussed an instance, brought to their attention by [Senior Employee 1] (Abbott and Frost),²²² of one of them quoting a 1.25% fee. In the email at 08:41 on 6 June 2014, [Senior Employee 1] (West Coast) encouraged [Senior Employee 1] (Abbott

²¹⁶ [URN0420]

²¹⁷ [URN0420]

²¹⁸ [URN0420]

²¹⁹ Assumedly £2,100.

²²⁰ [URN0425]

²²¹ The CMA inferred that this is a reference to the meeting of 7 May 2014.

²²² [URN0425]. See also [URN0427] - email at 12:30 on 9 June 2014.

and Frost) to raise the matter of the 1.25% fee with the current policeman and stated:²²³

'[T]his needs to be nipped in the bud or else it'll be game over. Instructions are getting tighter but now's not the time to be getting fewer instructions at lower fees!'

*Can you please share with all the outcome. (sic)'*²²⁴

3.161 At 16:19 on 11 September 2014, [Senior Employee 1] (Gary Berryman) circulated to all Parties a further list of 'policemen' covering the period September 2014 to February 2015. In that email, [Senior Employee 1] (Gary Berryman) urged the other Parties to continue to use the policeman system in order to support the continued implementation of their arrangement, stating:²²⁵

*'[A]s promised I have put together below a list of who will be 'policeman' over the next few months as discussed, if you have any issues **please report to the policeman immediately and get the matter resolved rather than let it fester and risk the agreement falling apart!!!!'** (sic) (emphasis added)*

3.162 At 10:11 on 15 September 2014, [Senior Employee 1] (Gary Berryman) emailed all of the Parties to amend the list to include Abbott and Frost (which he had mistakenly omitted), thereby extending the period to be covered by a policeman to March 2015.²²⁶

3.163 At least two of the Parties adopted their role as 'policeman', at least to some extent, following the circulation of the second policeman list by Gary Berryman. Specifically, at 14:14 on 1 October 2014, [Senior Employee 1] (GTH) emailed all of the other Parties to report that it had no 'reports' in its time as policeman, and would now pass over to the next policeman.²²⁷

3.164 Likewise, at 14:46 on 7 October 2014, [Senior Employee 1] (Abbott and Frost) forwarded [Senior Employee 1] (Gary Berryman) the list of forthcoming policemen and asked whether Gary Berryman (which is listed as

²²³ [URN0425] See also [URN0896] - email at 22:35 on 5 June 2014 in which [Senior Employee 1] (Gary Berryman) directed [Senior Employee 1] (Abbott and Frost) to '*NAME AND SHAME!!!!'* (sic).

²²⁴ [Employee 1] (GTH) confirmed in his witness evidence that this is an example of a party policing fee levels – transcript of CMA interview with [Employee 1] (GTH), 5 July 2016 Disc 3 of 3, page 11, [URN1799].

²²⁵ [URN0118]

²²⁶ [URN0116]

²²⁷ [URN0956]. The CMA has not seen evidence of GTH taking its first turn as policeman (it had been allocated the month of July 2014).

the policeman for October) had ‘*an issue with someone*’ or ‘*any gossip?*’.²²⁸ At 15:36 on the same day (7 October 2014), [Senior Employee 1] (Gary Berryman) replied to [Senior Employee 1] (Abbott and Frost) stating:²²⁹

‘Aghh so it’s us as the ‘policeman’ then!!! (sic) It appears that Saxons are being naughty tinkers, but I am working on proof!!! (sic) [...] with it going quieter, we just need to make sure we keep these fees up eh!!! (sic)

3.165 The only reference to the ‘policeman’ system that the CMA has identified after October 2014 consists of an email sent at 17:02 on 2 February 2015 in which [Employee 1] (Annagram) told [Senior Employee 1] (Gary Berryman) that he would look for and forward the email relating to the ‘policeman’ followed by a description of an instance of Saxons undercutting.²³⁰

Witness evidence

3.166 The documentary evidence about the role of the ‘policeman’ is to some extent corroborated by witnesses. For example, [Senior Employee 1]²³¹ (GTH) confirmed that the role of the policeman was, at least in part, to ‘*see whether, in fact, people are actually adhering to those target commissions*’.²³² [Senior Employee 1] (West Coast) also confirmed that the role of the policeman was to ‘*police what we had agreed and if there were any discrepancies that the agents should refer to the policeman and that person would look into the matter.*’²³³ [Senior Employee 2] (Abbott and Frost) acknowledged that the purpose of the policeman system was to monitor what fees Parties were charging and that [Senior Employee 1] (Gary Berryman) suggested the system because ‘*he was hoping they’d hold it at the 1.5%*’.²³⁴

²²⁸ [URN0959]

²²⁹ [URN0959]

²³⁰ [URN0776]

²³¹ Transcript of CMA interview with [Senior Employee 1] (GTH), 5 July 2016, Disc 2 of 3, pages 26-27, [URN1793].

²³² [Employee 1]’s (GTH) evidence about the purpose of the ‘policeman’ is similar to that of [Senior Employee 1] (GTH) - transcript of CMA interview with [Employee 1] (GTH), 5 July 2016, Disc 1 of 3, pages 44–45, [URN 1795].

²³³ Transcript of CMA interview with [Senior Employee 1] (West Coast), 5 February 2016, Disc 1 of 2, page 16, [URN1767]. [Senior Employee 1]’s (West Coast) evidence is that he did not call upon the policeman to intervene, although he recalled an incident involving Annagram (but not any other agents).

²³⁴ Transcript of CMA interview with [Senior Employee 2] (Abbott and Frost), 22 June 2016, Disc 1 of 1, page 46 [URN1845].

- 3.167 [Employee 1]'s (Saxons) evidence is that he was not interested in the role of policeman.²³⁵ However, the CMA considers that his evidence in this regard is contradicted by the documentary evidence cited at paragraphs 3.151 to 3.156 above, which demonstrates him investigating and reporting on alleged instances of 'cheating'. It is further contradicted by [Senior Employee 1] (West Coast) who recalls that '*[Employee 1] from Saxons took it [policing] very seriously and was emailing quite a bit about this, that and the other.*'²³⁶
- 3.168 [Senior Employee 1]'s (Abbott and Frost) evidence was that the role of the policeman was merely to restrict '*touting*',²³⁷ which, as above, the CMA understands in this context to be targeted marketing to an existing customer of another agent. However, the CMA does not accept this version of events given in particular the evidence of the Parties reporting as policeman in circumstances where the vendor was not an existing customer (see, for example, paragraph 3.153 above) and the evidence of policemen reporting on adherence to the fee arrangement (see, for example, paragraphs 3.154 and 3.160 above). Moreover, and despite the clear contemporaneous documentary evidence that he took on the role of policeman,²³⁸ [Senior Employee 1] (Abbott and Frost) says that he does not recall in any detail Abbott and Frost's time as 'policeman' or any occasions on which he contacted the 'policeman', which further undermines his version of events.²³⁹ The CMA considers that this documentary evidence also undermines evidence from [Senior Employee 2] that Abbott and Frost was not part of any fee arrangement.²⁴⁰
- 3.169 [Employee 1]'s (Annagram) evidence is that the role of the 'policeman' was relatively limited because the Parties were not required to submit all of their

²³⁵ Transcript of CMA interview with [Employee 1] (Saxons), 14 June 2016, Disc 2 of 2, pages 10-11, [URN1770].

²³⁶ Transcript of CMA interview with [Senior Employee 1] (West Coast), 5 February 2016, Disc 1 of 2, page 17, [URN1767].

²³⁷ Transcript of CMA interview with [Senior Employee 1] (Abbott and Frost), 22 June 2016, Disc 1 of 3, pages 59-60, [URN1774]. For example, [Senior Employee 1] (Abbott and Frost) stated that if he had gained an instruction and another agent was trying to gain that instruction by slashing a fee, the idea of the policeman system was that the policeman would speak to the agent '*to see what they were doing*'. See also transcript of CMA interview [Senior Employee 1] (Abbott and Frost), 22 June 2016, Disc 2 of 3, page 3, [URN1775].

²³⁸ See paragraphs 3.150 to 3.152 above.

²³⁹ Transcript of CMA interview with [Senior Employee 1] (Abbott and Frost), 22 June 2016, Disc 1 of 3, pages 59-60, [URN1774] and Disc 2 of 3, pages 2-4, [URN1775]. [Senior Employee 2] (Abbott and Frost) could not recall Abbott and Frost performing the duties of the policeman - transcript of CMA interview with [Senior Employee 2] (Abbott and Frost), 22 June 2016, Disc 1 of 1, pages 47-48, [URN1845]. While it may be that Abbott and Frost received no complaints from the other Parties during its month as policeman, as above, there is clear contemporaneous evidence of [Senior Employee 1] (Abbott and Frost) acting as policeman.

²⁴⁰ Transcript of CMA interview with [Senior Employee 2] (Abbott and Frost), 22 June 2016, Disc 1 of 1, pages 29-31, [URN1845].

agency agreements so the Parties could ‘make sure that actually what you’re charging is what you’re supposed to be charging’.²⁴¹

3.170 [Senior Employee 1]’s (GTH) evidence is that the policeman idea did not really add anything.²⁴² However, the CMA does not accept this is correct in light, for example, of evidence that some agents encouraged others to contact the policeman (as described in paragraphs 3.151 and 3.160 above), implying that they considered this to be of value in reinforcing and maintaining the arrangement.

[A Developer]

3.171 On one occasion the Parties all corresponded while a deal was being negotiated with a particular customer with a view to ensuring adherence to the minimum fee arrangement with respect to that particular transaction.²⁴³

3.172 In an email chain of December 2014 entitled ‘Developer Trying it on?!!!! (sic) – [X]’, the Parties discussed an attempt by [A Developer] to obtain a 1% fee. At 17:52, on 8 December 2014, [Senior Employee 1] (Gary Berryman) emailed all the other Parties to report that it had, in line with the Parties’ arrangement, refused [A Developer]’s request for a 1% fee and had instead offered the agreed minimum fee of ‘1.5% subject to minimum fees of £1,500 below £100,000 and £2,000 for £100,000 and over.’ [Senior Employee 1] (Gary Berryman) went on to note that, ‘disappointingly’, [A Developer] had reported that another Burnham agent had agreed to a 1% fee, and invited the other Parties to confirm that they did not agree such a fee and that [A Developer] was ‘trying it on and playing us off against each other’.²⁴⁴

3.173 At 17:56 on 8 December 2014, [Senior Employee 2] (West Coast) replied to [Senior Employee 1] (Gary Berryman) stating that his branch had not had any contact with [A Developer].²⁴⁵

²⁴¹ Transcript of CMA interview with [Employee 1] (Annagram), 3 February 2016, Disc 1 of 1, page 16, [URN0549]

²⁴² Transcript of CMA interview with [Senior Employee 1] (GTH), 5 July 2016, Disc 3 of 3, page 16, [URN1794].

²⁴³ The email evidence also indicates that all the Parties on this occasion ultimately adhered to the arrangement but, based on the witness evidence of [Employee 1] (Saxons) - transcript of CMA interview with [Employee 1] (Saxons), 14 June 2016, Disc 1 of 2, page 40, [URN1769] and Disc 2 of 2, page 3, [URN1770] and [Senior Employee 1] (Saxons) – transcript of CMA interview with [Senior Employee 1] (Saxons), 21 June 2016, Disc 2 of 3, pages 21-23 [URN1773] - the CMA considered that at least Saxons and possibly other Parties may in emails have overstated the extent of their adherence to the arrangement in this particular regard.

²⁴⁴ [URN0142]

²⁴⁵ [URN1353]. See also [URN1366], an email at 09:19 on 9 December 2014 in which [Senior Employee 1] (Gary Berryman) replied thanking West Coast and commented that it hoped the incident was just [A Developer] ‘trying it on’.

3.174 At 08:35 on 9 December 2014, [Senior Employee 1] (Saxons) replied to all of the other Parties stating:²⁴⁶ *'I can 100% confirm that this is not Saxons [...] very disappointing to cheapen ourselves once again'*. At 08:34 on 9 December 2014, [Employee 1] (Annagram) confirmed that it was not Annagram which had agreed to the 1% fee.²⁴⁷ At 09:29 on 9 December 2014, [Senior Employee 1] (Abbott and Frost) emailed GTH, Saxons, Annagram, West Coast and an Abbott and Frost colleague (but not Gary Berryman) stating:²⁴⁸ *'Not guilty. We had a conversation with them but they quoted 1% so we declined the invitation to go and value.'*

3.175 In a subsequent email to [Senior Employee 1] (GTH) and [Employee 1] (GTH) at 15:48 on 11 December 2014, [Senior Employee 1] (Gary Berryman) confirmed that all of the other Parties had responded to his email of 8 December 2014 to say that they did not take on the [A Developer] instruction at 1%, while noting that he had not received the same confirmation from GTH:²⁴⁹

*'[I] hope I am right in assuming you didn't take the instruction on the basis of the fee were offering? [...] **it would be nice to be able to report back to everybody that our cooperation and trust in one another's actions is continuing to work** and that whoever they decide to instruct to sell the property will get a 'proper' fee [...] **hopefully we can look forward to another year of openness and cooperation amongst us all in 2015** and most importantly strive to keep those fees up...'* (emphasis added)

3.176 At 16:03 on 11 December 2014, [Employee 1] (GTH) replied to [Senior Employee 1] (Gary Berryman) stating that it had been invited to attend a part exchange appraisal of the property together with Saxons, and that, while no fees had yet been discussed, it would be quoting 1.5%.²⁵⁰ At 16:37 on the same day, [Senior Employee 1] (Gary Berryman) replied suggesting that GTH could individually 'police' Saxons in relation to the property.²⁵¹

²⁴⁶ [URN0982]

²⁴⁷ [URN1354]

²⁴⁸ [URN0752]

²⁴⁹ [URN1369]

²⁵⁰ [URN1371]

²⁵¹ [URN1371] - *'Maybe I could ask you to 'police' Saxons as you will have communication with the developer!!'* (sic). [Employee 1]'s (GTH) witness evidence is that, despite this request, GTH did not police Saxons in relation to the property - transcript of CMA interview with [Employee 1] (GTH), 5 July 2016, Disc 3 of 3, page 24, [URN1799].

3.177 Saxons explained to the other Parties that it had initially offered [A Developer] the lower fee referred to above but that it later retracted that offer and instead quoted the minimum fee. At 09:22, on 17 December 2014, [Senior Employee 1] (Saxons) emailed all of the other Parties as follows:²⁵²

'[W]ith regard to [A Developer] [...] [Employee 3] (Saxons) in our office had mistakenly said we would do 1%, his assumption, wrongly, was that we would take instructions from the likes of new homes and repossession companies at a lower fee. Reminded that we will not, [Employee 3] (Saxons) called them back and said that wse (sic) would not market the property at the fee he first quoted and that it would be subject to our minimum fee.

Needless to say they did not instruct us and said they would look to use an outside agent.'

Bilateral communications

3.178 The CMA has found that certain of the Parties also corresponded bilaterally about adherence to the arrangement, even when neither party to the correspondence was that month's policeman.

3.179 In particular, the CMA has found instances of West Coast communicating with each of Saxons and Annagram about adherence to the arrangement.

3.180 For example, at 16:52 on 31 March 2014, [Senior Employee 1] (West Coast) emailed [Employee 1] (Saxons) suggesting that Saxons quoted a 1.5% minimum commission fee but not a minimum fee of £1,500 in relation to a property for which both agents had provided quotes. [Employee 1]'s (Saxons) reply to [Senior Employee 1] (West Coast) at 17:34 on the same day acknowledged that this was correct and clearly referred to the existence of a minimum fixed fee of £1,500. [Employee 1] (Saxons) also suggested that it was adhering to (and planned to continue to adhere to) agreed fees.²⁵³

'Obviously I should have mentioned the minimum fee of £1500, we are adhering to the fees as im (sic) sure you would agree it is benefitting everybody right now.

²⁵² [URN0508]

²⁵³ [URN1625]. Despite this, [Employee 1]'s (Saxons) witness evidence is that he did not mention a minimum fee to this customer – transcript of CMA interview with [Employee 1] (Saxons), 14 June 2016, Disc 2 of 2, page 3, [URN1770].

No intentions to undercut anybody, id (sic) be shooting myself in the foot.'

- 3.181 In his subsequent reply to [Employee 1] (Saxons) at 13:19 on 1 April 2014, [Senior Employee 1] (West Coast) told [Employee 1] (Saxons) that he should quote a minimum fee while referring to the higher fees being obtained by the Parties and the importance of trust:²⁵⁴

'[I]t should go without saying that a min (sic) fee should be quoted when we know full well that it's going to apply [...] we are all enjoying higher fees, it makes a huge difference, so it's really important that the trust in each other remains.'

- 3.182 At 16:06, on 2 July 2014, [Senior Employee 1] (West Coast) corresponded with [Employee 1] (Annagram) regarding Annagram targeting a property the owners of which had signed a sole agency at 1.5% with West Coast. [Senior Employee 1] (West Coast) noted that its understanding was that Annagram had quoted a 1.25% fee, but it had not '*challenged this with you as I guess you've quoted this fee on the back of what you charged them previously*'.²⁵⁵ The CMA has inferred that in this particular instance West Coast considered the previous course of dealing between Annagram and the customer in question was before the arrangement and therefore justified Annagram quoting a fee that was below the agreed minimum fee.²⁵⁶

Meetings

- 3.183 The CMA has found that the Parties held at least eight meetings following the Formation Meeting. There is some evidence that there may have been a ninth meeting following the Formation Meeting (in October 2014) but the CMA did not consider it necessary to decide whether or not this took place. Although not all Parties attended every meeting, the CMA has found that the purpose of the meetings was, at least in part, to reinforce adherence to the arrangement (although the Parties also discussed other issues in at least some of their meetings including the potential for collective purchasing of advertising in the [Local Newspaper] and the terms of the Association

²⁵⁴ [URN1627]. [Employee 1]'s (Saxons) witness evidence is that he did cheat on the arrangement in relation to this (low value) property, as he thought he quoted a fixed fee equivalent to 1.3% - transcript of CMA interview with [Employee 1] (Saxons), 14 June 2016, Disc 2 of 2, pages 4-5, [URN1770].

²⁵⁵ [URN0434]

²⁵⁶ See also [Employee 1]'s (GTH) evidence, which is that [Senior Employee 1] (GTH) confronted [Employee 1] (Annagram) about an instance of Annagram charging a low fee towards the end of 2014 – transcript of CMA interview with [Employee 1] (GTH), 5 July 2016, Disc 1 of 3, pages 35-36, [URN1795]. While the CMA has seen no documentary evidence of such an exchange between [Senior Employee 1] (GTH) and [Employee 1] (Annagram), [Employee 1] (GTH) did not specify whether the exchange was by email, by phone or in person.

Constitution and Rules). In particular, the CMA has found, on the basis of the documentary evidence and witness evidence at paragraphs 3.185 to 3.199 below, that:

- a. fees and adherence to the fee arrangement were discussed at most, if not all, the meetings;²⁵⁷
- b. several meetings were called expressly as a result of instances of non-adherence to the arrangement;
- c. there was an expectation among Parties that the meetings would promote adherence to the fee arrangement.

3.184 The meetings were mostly held at the offices of GTH but sometimes at the offices of Abbott and Frost. Witness evidence is that no one prepared agendas for or minutes of the meetings (and the CMA has not obtained any minutes of any of the meetings), but that [Senior Employee 1] (Gary Berryman) took notes at some of the meetings.²⁵⁸

3.185 The CMA has found, based predominantly on the documentary evidence,²⁵⁹ that:

²⁵⁷ As set out further below, there is evidence that fees and the minimum fee arrangement were discussed at all the meetings. However, as the evidence that fees and the minimum fee arrangement were discussed on 26 June 2014 and 7 January 2015 is more limited, the CMA did not reach a definitive finding regarding whether fees and the minimum fee arrangement were discussed at these two meetings.

²⁵⁸ Transcript of CMA interview with [Employee 1] (GTH), 5 July 2016, Disc 1 of 3, pages 14-15, [URN1795].

²⁵⁹ The documentary evidence regarding the date and location of, and attendance at, meetings is to some extent corroborated by witness evidence. In particular, [Senior Employee 1] (West Coast) stated to the CMA that, on the basis of his diary entries from the Relevant Period, meetings following the Formation Meeting took place on 7 April 2014 (at GTH), 26 June 2014 (at GTH), 9 September 2014 (at GTH), 9 (or, from the diary entry provided, 8) January 2015 (at GTH) and 24 February 2015 (at Abbott and Frost) – transcript of CMA interview with [Senior Employee 1] (West Coast), 5 February 2016, Disc 1 of 2, page 37, [URN1767] and [URN0509] – extract of West Coast diary entries from the Relevant Period. Although [Senior Employee 1] (West Coast) stated that his diary entries show a meeting took place on 7 April 2014 at GTH, the relevant diary extract in fact shows that a meeting took place on 7 May 2014 at GTH. The CMA has therefore presumed that [Senior Employee 1] (West Coast) was mistaken in describing the Parties' second meeting as having taken place on 7 April 2014, and that this may be attributable to the presentation of the particular diary entry, which is headed April 2014. [Senior Employee 1]'s (West Coast) witness evidence does not support the conclusion that meetings took place on 3 June 2014, 7 January 2015 or 19 March 2015. However, in light of the documentary evidence referred to in this section, and [Senior Employee 2] (West Coast) evidence that he attended the meetings of 7 January 2015 and 19 March 2015 (see transcript of CMA interview with [Senior Employee 2] (West Coast), 5 February 2016, Disc 2 of 3, pages 21 to 23, [URN1765]), the CMA has concluded that [Senior Employee 1] (West Coast) evidence is unreliable in this respect and, in addition to the meetings [Senior Employee 1] (West Coast) confirmed, West Coast also attended meetings on 3 June 2014, 7 January 2015 and 19 March 2015.

In support of his witness evidence, [Employee 1] (GTH) also provided the CMA with a copy of diary entries from the Relevant Period of meetings between the Parties – see [URN1781]. While the documentary evidence

- a. meetings took place involving all the Parties on 7 May 2014 (at GTH),²⁶⁰ 3 June 2014 (at GTH),²⁶¹ 26 June 2014 (at Abbott and Frost),²⁶² and 9 September 2014 (at GTH);²⁶³

supports [Employee 1]'s (GTH) evidence (that there were 9 meetings following the Formation Meeting, and that these took place on 7 May 2014, 3 June 2014, 26 June 2014, 9 September 2014, 8 October 2014, 7 January 2015, 24 February 2015, 19 March 2015 (at Abbott and Frost) and 1 April 2015 (at Abbott and Frost), [Employee 1] (GTH) explained at interview that his diary may contain appointments that were subsequently cancelled but were not then removed from his diary – transcript of CMA interview with [Employee 1] (GTH), 5 July 2016, Disc 2 of 3, page 41, [URN1800]. The CMA therefore considers that [Employee 1]'s (GTH) diary entries are evidence that meetings were organised for these dates but does not intend to rely on them as evidence that those meetings took place.

[Employee 1] (Annagram) evidence is that Saxons was only present at one meeting and did not come to any further meetings - transcript of CMA interview with [Employee 1] (Annagram), 3 February 2016, Disc 1 of 1, page 9, [URN0549], but [Employee 1] (Annagram) evidence on this point is contradicted by clear contemporaneous documentary evidence as well as the evidence of other witnesses, including Saxons' employees.

²⁶⁰ See, for example, the affirmative responses to [Senior Employee 1]'s (Gary Berryman) proposal in the Formation Confirmation Email of 10:44 on 5 February 2014 that the Parties hold their next meeting on 7 May 2014 – [URN1219], an email at 15:13 on 5 February 2014 from [Senior Employee 1] (West Coast) to [Senior Employee 1] (Gary Berryman) and [URN1218], an email at 16:56 on 5 February 2014 from [Senior Employee 1] (Abbott and Frost) to all other Parties. See also [URN1270] - email at 20:44 on 2 May 2014 from [Employee 1] (Annagram) to [Senior Employee 1] (Gary Berryman) and [Senior Employee 2] (Gary Berryman).

²⁶¹ See, for example, [URN0890], an email at 17:20 on 30 May 2014 from [Employee 1] (Annagram) to all Parties confirming that a meeting had been scheduled for 1pm at GTH on 3 June 2014. See also [URN0656] - email at 08:27 on 2 June 2014 from [Senior Employee 2] (Gary Berryman) to [Employee 1] (Annagram); [URN0894] - email at 17:43 on 5 June 2014 from [Senior Employee 1] (Abbott and Frost) to all the other Parties; and [URN0425] - email chain containing an email at 17:44 on 5 June 2014 from [Senior Employee 1] (Abbott and Frost) to all other Parties in which [Senior Employee 1] (Abbott and Frost) stated: *'Good meeting on Tuesday'*.

²⁶² See [URN1304] - email at 10:50 on 23 June 2014 from [Senior Employee 1] (Gary Berryman) to [Senior Employee 1] (Abbott and Frost) and [URN0679] - email at 12:40 on 23 June 2014 from [Senior Employee 1] (Abbott and Frost) to all other Parties proposing a meeting for 26 June 2014 at Abbott and Frost's offices. See also [URN0924] – email at 13:11 on 23 June 2014 from [Senior Employee 1] (West Coast) to all other Parties; [URN0925] – email at 13:35 on 23 June 2014 from [Employee 1] (GTH) to [Senior Employee 1] (Abbott and Frost); [URN1307] – email at 15:50 on 23 June 2014 from [Senior Employee 1] (Gary Berryman) to [Senior Employee 1] (Abbott and Frost); [URN0681] – email at 09:34 on 24 June 2014 from [Senior Employee 2] (Gary Berryman) to all other Parties and [Senior Employee 1] (Gary Berryman); [URN0932] – email at 09:49 on 26 June 2014 from [Employee 1] (Annagram) to [Senior Employee 1] (Abbott and Frost); [URN0685] – email at 10:04 on 26 June 2014 from [Senior Employee 1] (Saxons) to all other Parties. While [Senior Employee 1] (West Coast) evidence is that this meeting took place at GTH, the documentary evidence described above corroborates [Employee 1] (GTH) diary entries from the Relevant Period ([URN1781]), which places the meeting at Abbott and Frost.

²⁶³ See, for example, [URN0118] - email at 16:19 on 11 September 2014 from [Senior Employee 1] (Gary Berryman) to all other Parties in which [Senior Employee 1] (Gary Berryman) stated that *'It was good to see everybody at the meeting this week'*. For the organisation of the meeting, see [URN0942] - email at 10:27 on 1 September 2014 from [Senior Employee 1] (Gary Berryman) to [Senior Employee 1] (Saxons) and [Senior Employee 1] (Abbott and Frost); [URN0943] - email at 10:35 on 1 September 2014 from [Senior Employee 1] (Saxons) to [Senior Employee 1] (Gary Berryman) and [Senior Employee 1] (Abbott and Frost); and [URN0944] - email at 11:16 on 1 September 2014 from [Senior Employee 1] (Abbott and Frost) to [Senior Employee 1] (Gary Berryman). See also [URN0509] - West Coast diary entries from the Relevant Period which include a listing for a *'Meeting with other agents'* on 9 September 2014, and [Senior Employee 2] (West Coast) and [Senior Employee 1] (West Coast) evidence that both of them attended a meeting around September 2014 at which [Senior Employee 1 (West Coast)] introduced [Senior Employee 2 (West Coast)] to the other Parties – transcript of CMA interview with [Senior Employee 1] (West Coast), 5 February 2016, Disc 1 of 2, page 24, [URN1767] and

- b. a meeting took place between all or some of the Parties on 7 January 2015,²⁶⁴ but the evidence regarding attendees is inconclusive;
- c. all of the Parties apart from Saxons met on 24 February 2015 (at Abbott and Frost) and on 19 March 2015;²⁶⁵
- d. Gary Berryman, GTH and Abbott and Frost met on 1 April 2015 (at Abbott and Frost);²⁶⁶ and
- e. some or all of the Parties may also have met on 8 October 2014²⁶⁷ but the evidence in this regard is inconclusive.

transcript of CMA interview with [Senior Employee 2] (West Coast), 5 February 2016, Disc 1 of 3, pages 17–18, [URN1764]. [Senior Employee 1]’s (GTH) witness evidence is that he personally may have stopped going to meetings in September 2014 – transcript of CMA interview with [Senior Employee 1] (GTH), 5 July 2016, Disc 3 of 3, page 15, [URN1794]. However, [Employee 1] (GTH) evidence is that he ‘*carried on going along*’ to meetings on behalf of GTH, even though [Senior Employee 1] (GTH) did at some point stop attending the meetings - transcript of CMA interview with [Employee 1] (GTH), 5 July 2016, Disc 1 of 3, page 14, [URN1795].

²⁶⁴ [URN1000] - email at 16:26 on 7 January 2015 from [Senior Employee 1] (Abbott and Frost) to all Parties in which [Senior Employee 1] (Abbott and Frost) stated: ‘*Following our meeting earlier this afternoon*’. Although [Senior Employee 1] (Abbott and Frost) stated ‘*Following our meeting*’ (emphasis added) to all Parties directly, as [Senior Employee 1] (Abbott and Frost) subsequently reported in the email on the outcome of the meeting, the CMA infers that not all recipients of this email necessarily attended the 7 January 2015 meeting. However, there is evidence that GTH and Saxons intended to attend the meeting, and that West Coast did attend the meeting - see [URN0991] – email at 17:05 on 16 December 2014 from [Employee 1] (GTH) to [Senior Employee 1] (Abbott and Frost); [URN0754] – email at 09:14 on 17 December 2014 from [Senior Employee 1] (Saxons) to all other Parties; and transcript of CMA interview with [Senior Employee 2] (West Coast), 5 February 2016, Disc 2 of 3, pages 21-23, [URN1765].

²⁶⁵ This is evidenced by the material described in ‘*The breakdown of the arrangement*’ see below at paragraphs 3.214 to 3.249. See also [URN0509] – extract of West Coast diary entries from the Relevant Period, which as above shows diary appointments for agents meetings on these dates. [Senior Employee 2]’s (West Coast) witness evidence corroborates that a meeting took place in March 2015 - transcript of CMA interview with [Senior Employee 2] (West Coast), 5 February 2016, Disc 2 of 3, page 19, [URN1765]. [Senior Employee 2] (West Coast) also stated that this meeting was held at Abbott and Frost, that fees were discussed, and that [Senior Employee 3] (Annagram) signalled that [S<] there would be a ‘*price war*’ - see transcript of CMA interview with [Senior Employee 2] (West Coast), 5 February 2016, Disc 2 of 3, page 44, [URN1765]. [Senior Employee 1] (West Coast) view was that the March 2015 meeting was scheduled with the [Local Newspaper] but did not take place – transcript of CMA interview with [Senior Employee 1] (West Coast), 5 February 2016, Disc 1 of 2, page 19, [URN1767]. Due to corroborating documentary evidence, the CMA has preferred [Senior Employee 2] (West Coast) evidence in relation to this meeting.

²⁶⁶ This is evidenced by the material in ‘*The breakdown of the arrangement*’ - see below at paragraphs 3.214 to 3.249.

²⁶⁷ See, for example, [URN1340] - email at 08:04 on 8 October 2014 from [Senior Employee 2] (West Coast) to all Parties, and [URN1337] – email chain from 11 September 2014 to 1 October 2014 involving all Parties regarding a meeting scheduled for 8 October 2014.

- 3.186 The meetings of 7 May 2014 and 3 June 2014 were set up specifically with a view to discussing the minimum fee arrangement, as shown by the email evidence set out at paragraphs 3.187 to 3.188 below.
- 3.187 In advance of the 7 May 2014 meeting, at 09:58 on 28 April 2014, [Employee 1] (Saxons) emailed all of the other Parties apart from Abbott and Frost stating '*[i]ts time for another meeting [...] there are issues regarding the standard 1.5% and everything else we agreed*'. By way of reply to [Employee 1] (Saxons) at 10:28 on the same day (28 April 2014), [Senior Employee 1] (Gary Berryman) suggested that any such issues could be discussed at the next meeting which had been scheduled during the Formation Meeting for 1pm on 7 May 2014 at GTH's offices.²⁶⁸ The minutes of an internal Gary Berryman meeting further corroborate that the fee arrangement was discussed at the meeting of 7 May 2014.²⁶⁹
- 3.188 The meeting of 3 June 2014 was also prompted by various instances of apparent '*cheating*'. In particular, in an email at 19:27 on 26 May 2014, [Employee 1] (Annagram), that month's policeman, emailed all of the other Parties referring to a couple of alleged incidents and invited all of the other Parties to let him know whether they would like a further meeting.²⁷⁰ In his reply at 16:43 on 27 May 2014, [Senior Employee 1] (GTH) stated that he was and encouraged a meeting, stating:²⁷¹

'For this to work everyone must drop their guard and be honest about a particular situation that may anyway have sympathy with the offended agent(s). However, unless that is 'aired' in a transparent way, these situations fester and breed contempt.'

- 3.189 While other meetings were set up to discuss a broader range of subjects (for example, the terms and/or officers of the Association, the collective marketing and the use by the Parties of [An Online Property Portal], the fee arrangement was among the subjects of discussion at almost all, if not all, of these meetings. In particular, there is evidence that the minimum fee

²⁶⁸ [URN0419] - in the same email, [Senior Employee 1 (Gary Berryman)] commented that he did not think there had been any major problems with the implementation of the arrangement in the past couple of months and that all the Parties were now experiencing benefits.

²⁶⁹ [URN1277] - minutes of a Gary Berryman branch meeting of 15 May 2014. '*Senior Employee 3*' (Gary Berryman [redacted]) is listed as an attendee, along with '*Senior Employee 2*' (Gary Berryman), while '*Senior Employee 1*' (Gary Berryman) was absent. Under '*Current Business*', the Minutes state: '*Meeting held with other Agents last week – not all Agents holding with the agreed 1.5% fee.*' See also [URN1276] – email at 11:12 on 28 May 2014 in which [Employee 1] (Gary Berryman [redacted]) sent the Minutes to [Senior Employee 2] (Gary Berryman).

²⁷⁰ [URN0645] - [Employee 1] (Annagram) also suggested that any meeting should also cover collective negotiation for better rates and exclusivity for newspaper advertising. See also [URN0650] - email at 09:09 on 28 May 2014 from Senior Employee (Gary Berryman) to [Employee 1] (Annagram).

²⁷¹ [URN1274]

arrangement was discussed at the meetings of 9 September 2014 as well as 24 February 2015, 19 March 2015 and 1 April 2015, as shown by the evidence referred to at paragraphs 3.191 to 3.193, 3.197 and 3.213 to 3.248 below. There is also evidence that at least one of the Parties intended to raise adherence to the fee arrangement at the meeting of 26 June 2014, and at the 'new year' meeting which ultimately took place on 7 January 2015.

- 3.190 As regards the meeting on 26 June 2014, the Parties discussed an instance of cheating in advance of the meeting, and in an email to all of the other Parties at 12:30 on 9 June 2014, [Senior Employee 1] (West Coast) stated '*This is disappointing. Do we need to get around the table again?*'.²⁷² Subsequently, at 11:04 on 20 June 2014, [Senior Employee 1] (Abbott and Frost) emailed all of the other Parties about a meeting he, [Senior Employee 1] (Gary Berryman) and [Senior Employee 1] (GTH) had had with [Employee of Local Newspaper], stated that the '*next stage*' would be for the Parties to draw up an Association to give them influence '*with matters such as the newspaper advertising, in particular to keep "outside" or internet based agents taking advantage*' and proposed a meeting for the following week.²⁷³ In the circumstances, the CMA considered that fees may have been discussed at this meeting but did not reach a definitive finding on this point.
- 3.191 As regards the meeting of 9 September 2014, in an email at 16:06 on 14 August 2014 entitled '*The Burnham Association & Catch up!! (sic)*', [Senior Employee 1] (Gary Berryman) contacted all of the other Parties stating that the purpose of a meeting proposed for 1pm on 9 September 2014 at GTH would be to discuss the Association and a forthcoming meeting with a representative from the [Local Newspaper] before going on to state that '*the meeting would also give us an opportunity to run through any queries or concerns that may have arisen since our last meeting!*'²⁷⁴

²⁷² [URN0427]

²⁷³ [URN1511]. See also [URN1299] – email chain between [Senior Employee 1] (Abbott and Frost) and [Senior Employee 1] (Gary Berryman) of 13 and 14 June 2014. This is evidence that [Senior Employee 1] (Gary Berryman) was motivated to suggest the meeting of 26 June 2014 by [the Estate Agent from outside Burnham] gaining an instruction in Burnham, and that [Senior Employee 1] (Gary Berryman) intended to raise the Parties' use of online advertising portals at the meeting. See also [URN0673] - email at 17:42 on 17 June 2014 from [Senior Employee 1] (West Coast) to all of the other Parties; and [URN0893] – email at 15:00 on 5 June 2014 from [Senior Employee 1] (Saxons) to all Parties. [Senior Employee 1]'s (West Coast) evidence is that the Parties had a discussion at one meeting about how they should react to '[An Estate Agent from outside Burnham]'s attempt to enter the Burnham market – transcript of CMA interview with [Senior Employee 1] (West Coast), 5 February 2016, Disc 1 of 2, page 26, [URN1767] – see further paragraphs 3.206 to 3.212 below. [Senior Employee 1]'s (West Coast) witness evidence on this point is corroborated by [Senior Employee 2] (Abbott and Frost) – see transcript of CMA interview with [Senior Employee 2] (Abbott and Frost), 22 June 2016, Disc 1 of 1, pages 51–55, [URN1845].

²⁷⁴ [URN0940]. The CMA inferred from the context that [Senior Employee 1] (Gary Berryman) was talking about issues with the minimum fee arrangement.

3.192 The Parties met as planned on 9 September 2014 and discussed the fee arrangement and policing as well as the Association. In an email to all the other Parties sent at 16:19 on 11 September 2014, [Senior Employee 1] (Gary Berryman) stated that he was ‘as promised’ and ‘as discussed’ circulating the second policeman list. [Senior Employee 1] (Gary Berryman) also stated:²⁷⁵

‘It was good to see everybody at the meeting this week and hear that we are all in agreement that our arrangement is in general working and we are all now seeing the benefits.’²⁷⁶

3.193 The same email demonstrates that, as envisaged by [Senior Employee 1] (Gary Berryman), the Parties also discussed the Association, the Property Supplement and the forthcoming meeting with the [Local Newspaper] .²⁷⁷

3.194 The purpose of the meeting eventually held on 7 January 2015 was to agree which Parties would be the officers of the Association but also to discuss an instance of undercutting of the minimum fee arrangement. At 14:08 on 16 December, [Senior Employee 1] (Abbott and Frost) emailed the other Parties to suggest a meeting to discuss the Association officers.²⁷⁸ In his reply to this email at 09:22 on 17 December 2014, [Senior Employee 1] (Saxons) stated that he would also raise adherence with the fee arrangement at the upcoming ‘new year’ meeting:²⁷⁹

²⁷⁵ [URN0118]

²⁷⁶ That fees and adherence to the fee arrangement were discussed at this meeting is also corroborated by the witness evidence of [Senior Employee 2] (West Coast) - transcript of CMA interview with [Senior Employee 2] (West Coast), 5 February 2016, Disc 1 of 3, pages 18–20, [URN1764]. See also [URN1530] – an internal West Coast email at 18:41 on 9 September 2014 from [Senior Employee 2] to [Senior Employee 3] and [Senior Employee 1], in which [Senior Employee 2] reported ‘*Interesting meeting at the “Burnham on Sea Estate Agents Association”? (sic) today, all agents reporting a difficult August hence Saxons and CJ Hole [Annagram] having to CUT fees to win instructions (as we have discussed, and no real surprise!)*’. See also transcript of CMA interview with [Senior Employee 2] (West Coast), 5 February 2016, Disc 1 of 3, pages 63-64, [URN1764].

²⁷⁷ [URN0118] - after referring to the Parties’ arrangement and policemen, [Senior Employee 1] (Gary Berryman) stated: ‘*Thanks in Advance (sic) to [Senior Employee 1] (GTH) and [Employee 1] (Annagram) for looking at the ‘Burnham Association’ agreement [the Constitution and Rules] and I hope that we can get this agreed and in place before the end of the year so we can start the New Year with the new property pull out in place and that way should another agent decide they fancy opening in our town we can at least stop them advertising in OUR pull out (sic) section of the paper!*’

²⁷⁸ [URN0508]

²⁷⁹ [URN0508]. Following the meeting, at 16:26 on 7 January 2015, [Senior Employee 1] (Abbott and Frost) emailed all of the other Parties stating: ‘*I am pleased to report that I will be taking on the role of Chairman for our above association, with [Senior Employee 1] (Gary Berryman) acting as Secretary (sic) and [Senior Employee 2] (Abbott and Frost) as Treasurer. I trust that you are all in agreement. I will be arranging a meeting with [Employee of Local Newspaper] to discuss advertising concerns (sic) and benefits to Association members with the paper. In*

'[I] will at the meeting give the name of the agent and property, with fee, that we have very recently lost (due to a lesser fee)...'

3.195 As set out further below in paragraphs 3.214 to 3.249, the primary purpose of the later meetings (24 February 2015, 19 March 2015 and 1 April 2015) was to discuss the fee arrangement, and in particular alleged instances of cheating, in addition to the exclusive property supplement and the Association. The CMA's enforcement action in the *Three Counties* case was also discussed at the meeting of 19 March 2015.

3.196 The Parties expected the meetings to promote adherence to the arrangement. For example, in an email at 17:44 on 5 June 2014, [Senior Employee 1] (Abbott and Frost) made clear his expectation that the meeting of 3 June 2014 should have promoted adherence to the arrangement, stating:²⁸⁰

'Good meeting on Tuesday, however I have just gained instructions on a property where the vendor was able to show me written evidence of a Burnham agent quoting a fee of 1.25%, sole agency. I was rather bemused that the other agents appointment was on Tuesday, the day of our meeting!'

Witness evidence – purpose of meetings

3.197 Several witnesses broadly corroborated the CMA's conclusions regarding the purpose of the meetings. [Senior Employee 2]'s (West Coast) evidence is that when he joined West Coast's Burnham branch on 30 June 2014, [Senior Employee 1] (West Coast) explained that the Parties had an agreement to try to lift fees to achieve a minimum of 1.5%, and that this had

the meantime, you should receive the Consituion (sic) and rules as agreed and it would be appreciated if you copy this, sign where indicated and return a copy to me, if not already done so.' - [URN1000]. [Senior Employee 2]'s (West Coast) evidence is that [Senior Employee 1] (Abbott and Frost), [Senior Employee 1] (Gary Berryman) and [Senior Employee 2] (Abbott and Frost) put themselves forward for the positions of Chairman, Secretary and Treasurer – transcript of CMA interview with [Senior Employee 2] (West Coast), 5 February 2016, Disc 2 of 3, pages 21-23, [URN1765].

²⁸⁰ See also [URN0425] - email at 17:44 on 5 June 2014 from [Senior Employee 1] (Abbott and Frost) to all other Parties and [URN0427] - email at 12:30 on 9 June 2014 from [Senior Employee 1] (West Coast) to all other Parties. [Senior Employee 1]'s (Abbott and Frost) evidence about this email was that at the meeting 'we've said, "It would be nice to keep up fees and people saying yes, '[...] I suppose a little bit amused that [...] obviously the next case is a lower fee anyway.' - transcript of CMA interview with [Senior Employee 1] (Abbott and Frost), 22 June 2016, Disc 2 of 3, page 30, [URN1775]

been discussed in meetings.²⁸¹ [Senior Employee 2]’s (West Coast) evidence is that meetings were called when Parties felt that others were not adhering to the arrangement,²⁸² and that the Parties would generally adhere to the arrangement in the period immediately following a meeting.²⁸³ He explained that fees were discussed in meetings, in the form of Parties making accusations of (and others denying) undercutting, as well as ‘*bravado*’ and ‘*ribbing*’ regarding fees. [Senior Employee 2] (West Coast) noted that these discussions and remarks created an understanding, and may have had the effect of encouraging adherence to the arrangement: ‘*[t]hat was enough for you to [...] feel, walking away, that they wanted to maintain that [...] minimum fee*’.²⁸⁴ [Senior Employee 2]’s (West Coast) evidence is that at the meetings he attended following the meeting on 9 September 2014, the Parties mainly discussed standards and the Association, and that the arrangement in relation to fees was ‘*the elephant in the room*’.²⁸⁵ However, [Senior Employee 2] (West Coast) later stated that fees, including [Senior Employee 3] (Annagram) signalling a ‘*price war*’, were discussed at the March 2015 meeting. In addition to stating that meetings were held throughout the arrangement, [Senior Employee 1] (West Coast) corroborated that issues about fees were discussed at meetings, and that at least some of the Parties ‘*had a [...] swing at each other*’ in meetings.²⁸⁶

3.198 [Employee 1] (Annagram) evidence is that the discussion of fees came up at the meetings and that ‘*he was quite often one that would hold my hands up and say yes actually I’ve done something on a fee, so you know perhaps I wasn’t the best person to go to the meeting*’.²⁸⁷ This is consistent with [Employee 1]’s (GTH) evidence that [Employee 1] (Annagram) was

²⁸¹ Transcript of CMA interview with [Senior Employee 2] (West Coast), 5 February 2016, Disc 1 of 3, page 3 and pages 6-7, [URN1764].

²⁸² Transcript of CMA interview with [Senior Employee 2] (West Coast), 5 February 2016, Disc 1 of 3, page 32, [URN1764].

²⁸³ Transcript of CMA interview with [Senior Employee 2] (West Coast), 5 February 2016, Disc 1 of 3, pages 32-33 [URN1764]: ‘*just by being around the table [...] the fee would, would lift as a kind of respect of [...] your peers. And then you don’t talk to each other for three months, and then it goes down. So then an email comes out from one of the agents to have another meeting*’. See also transcript of CMA interview with [Senior Employee 2] (West Coast), 5 February 2016, Disc 1 of 3, pages 33-34, [URN1764]. At other times, [Senior Employee 2]’s (West Coast) evidence is that the arrangement was ‘*unspoken*’ and that it was the act of meeting which created this effect on fees, as opposed to discussion of the fee arrangement – transcript of CMA interview with [Senior Employee 2] (West Coast), Disc 1 of 3, page 29, [URN1764].

²⁸⁴ Transcript of [Senior Employee 2] (West Coast), 5 February 2016, Disc 1 of 3, pages 39-40, [URN1764].

²⁸⁵ Transcript of CMA interview with [Senior Employee 2] (West Coast), 5 February 2016, Disc 1 of 3, pages 26–29, [URN1764].

²⁸⁶ Transcript of CMA interview with [Senior Employee 1] (West Coast), 5 February 2016, Disc 1 of 2, page 36, [URN1767].

²⁸⁷ Transcript of CMA interview with [Employee 1] (Annagram), 3 February 2016, Disc 1 of 1, page 11, [URN0549].

challenged about a low fee he had offered at one of the meetings.²⁸⁸

[Employee 1] (Annagram) also implied that he and his colleague [Employee 2] (Annagram) only attended meetings to listen (rather than take part in decisions) and that Annagram only attended three or four meetings.²⁸⁹ However, this latter part of [Employee 1]'s (Annagram) evidence is inconsistent with the documentary and other witness evidence.

3.199 [Senior Employee 1] (Abbott and Frost) also stated that the purpose of the meetings was to discuss advertising and he recalled two meetings specifically about newspaper advertising and one in which competition from online agents was discussed.²⁹⁰ However, his evidence was also that fees were discussed at more than one meeting.²⁹¹ Given the clear contemporaneous documentary record, the CMA has not placed weight on the fact that [Senior Employee 1] (Abbott and Frost) does not recall specific discussions about fees at meetings or on his view of the primary purpose of the meetings.

3.200 [Senior Employee 2]'s (Abbott and Frost) recollection was that the reason the Parties met was to discuss the Constitution and Rules of the Association.²⁹² However, in light of the clear contemporaneous record, the CMA has placed weight on [Senior Employee 2]'s (Abbott and Frost) evidence in this regard.

3.201 [Senior Employee 1]'s (GTH) evidence is that while advertising was a '*genuine concern*' for the Parties, the reason they met was '*the situation over fees*'.²⁹³

Cheating

3.202 The Parties in their correspondence cited at paragraphs 3.149 to 3.165 above accused each other of non-adherence to the minimum fee arrangement on numerous occasions. Witness evidence set out at

²⁸⁸ Transcript of CMA interview with [Employee 1] (GTH), 5 July 2016, Disc 2 of 3, pages 46–48, [URN1795]. See also transcript of CMA interview with [Senior Employee 1] (Saxons), 21 June 2016, Disc 2 of 3, page 5 [URN1772].

²⁸⁹ Transcript of CMA interview with [Employee 1] (Annagram), 3 February 2016, Disc 1 of 1, pages 12-14 [URN0549].

²⁹⁰ Transcript of CMA interview with [Senior Employee 1] (Abbott and Frost), 22 June 2016, Disc 1 of 3, pages 32–33, [URN1774].

²⁹¹ Transcript of CMA interview with [Senior Employee 1] (Abbott and Frost), 22 June 2016, Disc 2 of 3, pages 25-30, [URN1775].

²⁹² Transcript of CMA Interview with [Senior Employee 2] (Abbott and Frost), 22 June 2016, Disc 1 of 1, page 13, [URN1845]

²⁹³ Transcript of CMA Interview with [Senior Employee 1] (GTH), 5 July 2016, Disc 3 of 3, page 22, [URN1794].

paragraph 3.203 to 3.206 below supports the conclusion that some or all of the Parties on occasion 'cheated' in their arrangement.

3.203 For example, [Senior Employee 2]'s (Gary Berryman) evidence was that, based on what customers had told him about offers from competitors of below 1.5%, the arrangement only lasted a period of about five weeks.²⁹⁴ [Employee 1]'s (Saxons) evidence is that Saxons suggested to the other Parties that it was following the arrangement while in fact cheating on the arrangement.²⁹⁵ Likewise, [Senior Employee 1]'s (Saxons) account is that while Saxons attended meetings after the Formation Meeting at which it behaved to the other Parties as if it was following the arrangement, Saxons cheated by charging fees lower than the minimum fees outlined in the Formation Confirmation Email.²⁹⁶ [Senior Employee 1] (Saxons) also stated that other Parties '*definitely didn't play the game*', including Annagram and West Coast.²⁹⁷

3.204 [Employee 1]'s (GTH) evidence is that GTH did not implement the arrangement but also acted to the other Parties as if it was doing so.²⁹⁸ [Employee 1] (GTH) also stated that while he believed the other Parties were '*doing their own thing*' rather than following the arrangement, at the time they generally behaved otherwise.²⁹⁹

3.205 West Coast's witness evidence was also that the Parties at times cheated on the arrangement. However, [Senior Employee 2] (West Coast) suggested

²⁹⁴ Transcript of CMA interview with [Senior Employee 2] (Gary Berryman), 10 August 2016, Disc 1 of 1, pages 51-52, [URN1846].

²⁹⁵ Transcript of CMA interview with [Employee 1] (Saxons), 14 June 2016, Disc 1 of 2, pages 9, 15 and 39, [URN1769].

²⁹⁶ See, for example, transcript of CMA interview with [Senior Employee 1] (Saxons), 21 June 2016, Disc 1 of 3, pages 44-46 and pages 62-63), [URN1771].

²⁹⁷ Transcript of CMA interview with [Senior Employee 1] (Saxons), 22 June 2016, Disc 1 of 3, page 50, [URN1771]. [Senior Employee 1] (Saxons) made similar remarks at other points in his interview (see, for example, CMA interview with [Senior Employee 1] (Saxons), 22 June 2016, Disc 2 of 3, page 68, [URN1772]).

²⁹⁸ Transcript of CMA interview with [Employee 1] (GTH), 5 July 2016, Disc 1 of 3, pages 43-44, [URN1795]. [Employee 1] (GTH) stated that while GTH paid '*lip service*' to the arrangement, it nevertheless '*played the game*'. This evidence is to an extent corroborated by the evidence of [Senior Employee 1] (GTH), who stated that GTH did get '*caught up*' in, and '*go along with*', the arrangements – see transcript of CMA interview with [Senior Employee 1] (GTH), 5 July 2016, Disc 1 of 3, page 19-20, [URN1792] and Disc 2 of 3, page 40, [URN1793] respectively. [Senior Employee 1] (GTH) also confirmed that GTH sometimes charged fees lower than those contemplated by the arrangement – see transcript of CMA interview with [Senior Employee 1] (GTH), 5 July 2016, Disc 2 of 3, page 10, [URN1793].

²⁹⁹ [Employee 1] (GTH) described the Parties as '*showing off to each other*' and '*we're going along this path, we're all on this train*' - transcript of CMA interview with [Employee 1] (GTH), 5 July 2016, Disc 2 of 3, page 54, [URN1800]. [Senior Employee 1] (GTH) also stated that the Parties were '*doing their own thing behind the scenes*' - transcript of CMA interview with [Senior Employee 1] (GTH), 5 July 2016, Disc 2 of 3, pages 38-39, [URN1793].

that while West Coast, and to a greater extent the other Parties, cheated on the arrangement at times, for the most part, West Coast and the other Parties followed the arrangement.³⁰⁰ [Senior Employee 1] (West Coast) corroborates [Senior Employee 2]'s (West Coast) evidence that while West Coast cheated occasionally, it generally stuck to the Parties' arrangement.³⁰¹

3.206 Some witnesses suggested that at least some of the Parties were at times open with each other about having cheated on the arrangement. For example, [Employee 1] (Annagram) stated that he would '*often*' admit to the other Parties at meetings incidences where Annagram had cheated on the Parties' arrangement.³⁰² This is to an extent corroborated by documentary evidence and other witnesses.³⁰³ Likewise, [Senior Employee 1] (Saxons) stated that at the last meeting he personally attended he told those present that he had told his employees to '*go and get it on for whatever you can get*'.³⁰⁴

Targeting [An Estate Agent from outside Burnham]

- *Documentary evidence*

³⁰⁰ Transcript of CMA interview with [Senior Employee 2] (West Coast), 5 February 2016, Disc 1 of 3, pages 27-28 and pages 30-31, [URN1764] - [Senior Employee 2] (West Coast) stated: '*for the main [...] most people were [...] one and a half per cent.*' [Senior Employee 2] also said that from around September 2014 he discussed the fee arrangement with West Coast's [Senior Employee 3] via weekly and monthly reports and at a monthly managers' meeting, including whether West Coast should cheat on the arrangement – transcript of CMA interview with [Senior Employee 2] (West Coast), 5 February 2016, Disc 1 of 3, pages 13-17, [URN1764].

³⁰¹ Transcript of interview with [Senior Employee 1] (West Coast), Disc 1 of 2, page 12 and page 15, [URN1767]. [Senior Employee 1] (West Coast) stated that West Coast would sometimes undercut the arrangement if it needed to offer a lower fee to get the business: '*[i]f I had to negotiate on a fee then my priority was to get that business, as opposed to lose it because I had to stick to that level*'. However, [Senior Employee 1] (West Coast) stated that he thought the Parties' agreed minimum fee (of 1.5% for sole agency) was sensible for the market, that he was '*mindful of the agreement that we'd made to stick to the fees that we had agreed*' and '*aimed to try and achieve it*'. [Senior Employee 1] (West Coast) also stated that when he left West Coast's Burnham office in July/August 2014, [Senior Employee 2] (West Coast) was still quoting the fees the Parties had agreed – transcript of CMA interview with [Senior Employee 1] (West Coast), 5 February 2016, Disc 1 of 2, page 22, [URN1767].

³⁰² Transcript of CMA interview with [Employee 1] (Annagram), 3 February 2016, Disc 1 of 1, page 11, [URN0549].

³⁰³ See further paragraph 3.198 above. [Employee 1] (GTH) also recalled that that [Senior Employee 1] (GTH) also contacted Annagram directly about cheating outside of meetings - see transcript of CMA interview with [Employee 1] (GTH), 5 July 2016, Disc 1 of 3, pages 51-52, [URN1795].

³⁰⁴ Transcript of CMA interview with [Senior Employee 1] (Saxons), 22 June 2016, Disc 1 of 3, pages 46-47, [URN1771]. See also transcript of CMA interview with [Senior Employee 1] (Saxons), 21 June 2016, Disc 2 of 3, pages 5-6, [URN1772]. There is some documentary evidence that Saxons told the other Parties it had been charging lower fees at the meeting of 9 September 2014 (see [URN1530], an internal West Coast email chain including an email at 20:11 on 9 September 2014 from [Senior Employee 2] to [Senior Employee 3] and [Senior Employee 1].) However, there is also documentary evidence that even after 9 September 2014, Saxons confirmed to the other Parties that it was continuing to adhere to the terms of the arrangement – see paragraph 3.177 above.

3.207 The CMA has found that all of the Parties apart from Abbott and Frost discussed or were party to discussions about the attempted entry of [An Estate Agent from outside Burnham] with a view to co-ordinating an exclusionary response via fees. In particular, all of the Parties apart from Abbott and Frost discussed whether they should depart from the minimum fee arrangement to match or undercut [An Estate Agent from outside Burnham]. While the CMA has not found evidence that the Parties eventually agreed on a coordinated strategy towards [An Estate Agent from outside Burnham], their discussions in this regard provide further evidence of the minimum fee arrangement.³⁰⁵

3.208 At 08:33 on 11 April 2014, in the context of a discussion instigated by [Employee 1] (Saxons) about the fact that [An Estate Agent from outside Burnham] was advertising in the local paper, [Senior Employee 1] (West Coast) suggested to all the other Parties apart from Abbott and Frost that they could match [An Estate Agent from outside Burnham]'s (lower) fee *'in order to keep them out'*. [Senior Employee 1] (West Coast) opined that if [An Estate Agent from outside Burnham] received any instructions (in, the CMA infers, Burnham), it would give it the confidence to open a branch in Burnham.³⁰⁶

3.209 At 08:41 on the same day (11 April 2014), [Senior Employee 1] (Gary Berryman) replied to [Senior Employee 1] (West Coast) and all of the other Parties apart from Abbott and Frost disagreeing with [Senior Employee 1] (West Coast), stating:³⁰⁷

'My view personally, is keep firm! If we can't outwit an agent from [outside Burnham]] in our own town then we do have a problem! I agree we need to keep an eye, but having seen the results of our efforts now start to now be coming through in our commissions I am personally adamant that I won't let an out of town agent start to undo all that hard work and cooperation that we have put in.'

3.210 At 08:51 on the same day (11 April 2014), [Senior Employee 1] (West Coast) replied to [Senior Employee 1] (Gary Berryman) and all of the other Parties apart from Abbott and Frost on the subject of keeping [An Estate Agent from outside Burnham] 'out' of Burnham. In what the CMA infers to be a comment on the fees charged by [An Estate Agent from outside Burnham] compared

³⁰⁵ There is also evidence that all of the Parties were party to subsequent correspondence in June 2014 about competition from [An Estate Agent from outside Burnham] – see paragraph 3.190 above.

³⁰⁶ [URN0626]

³⁰⁷ [URN0626]

to those of the Parties, [Senior Employee 1] (West Coast) noted that potential sellers may regard the difference *'between 1.5% and 1%'* as significant. [Senior Employee 1] (West Coast) also suggested that the Parties could, given the level of fee they were maintaining, fee match [An Estate Agent from outside Burnham], stating:³⁰⁸

'For the few that they will be called out to I personally don't think we should give them any opportunity and with the level of instructions we are all enjoying at the higher fee, we could all afford to take the odd one or two at 1%, could we not?'

3.211 At 09:12 on the same day (11 April 2014), [Employee 1] (Saxons) replied to West Coast and all of the other Parties apart from Abbott and Frost stating that it agreed that matching [An Estate Agent from outside Burnham] at a 1% commission fee would *'keep them away'* without disrupting *'the agreement that we all seem to be benefitting from'*.³⁰⁹

Witness evidence

3.212 The witness evidence in relation to [An Estate Agent from outside Burnham] corroborates the documentary evidence above that the Parties discussed a proposal to undercut [An Estate Agent from outside Burnham] in order to keep it out of Burnham but that some of the Parties disagreed about whether to do so.

3.213 For example, [Senior Employee 1]'s (West Coast) evidence is that [An Estate Agent from outside Burnham] had started to tout in Burnham offering low (1%) fees with a view to opening an office there, and that as the Parties did not want this to happen they discussed at one meeting how they should react to [An Estate Agent from outside Burnham].³¹⁰ [Senior Employee 1]'s (GTH) witness evidence is that he is not sure whether the Parties agreed to undercut [the Estate Agent from outside Burnham].³¹¹ [Senior Employee 1]'s (West Coast) evidence is that the Parties had different views about whether to stick to the arrangement or deviate from it in order to match [An Estate

³⁰⁸ [URN0626] - [Senior Employee 1] (West Coast) also stated *'I have seen this happen before in [3x] and the agents were off (sic) the opinion that they could outwit an 'out of town agent' and continue quoting higher fees. They didn't and the agent subsequently opened and fees were hit even harder. It might be a storm in a tea cup but we can't afford to let them in at all, not even one instruction.'*

³⁰⁹ [URN1630]

³¹⁰ Transcript of CMA interview with [Senior Employee 1] (West Coast), 5 February 2016, Disc 1 of 2, page 26, [URN1767]. See further paragraph 3.190 above.

³¹¹ Transcript of CMA interview with [Senior Employee 1] (GTH), 5 July 2016, Disc 2 of 3, pages 45-48, [URN1793].

Agent from outside Burnham]’s fee, but that West Coast did fee match [An Estate Agent from outside Burnham].³¹² [Employee 1]’s (GTH) evidence is that GTH did not fee match [An Estate Agent from outside Burnham], as it considered that there was nothing it could do that would stop [An Estate Agent from outside Burnham] offering 1% fees.³¹³

The breakdown of the arrangement

3.214 As set out below, from December 2014 the arrangements started to break down.³¹⁴ The catalyst for this was first Saxons increasingly cheating on the arrangement, and failing to sign the Constitution and Rules with the result that it was not invited to the subsequent meetings, and then Annagram (in March 2015) distancing itself from the arrangements.

Saxons

3.215 In his email at 09:22 on 17 December 2014, [Senior Employee 1] (Saxons) not only claimed to have complied with the agreement in respect of [A Developer] but also asserted that Saxons would at an upcoming meeting provide details of a transaction which Saxons lost due to another agent’s lower fee.³¹⁵ However, while there is evidence that a meeting took place on 7 January 2015 between at least some of the Parties (see ‘Meetings’ above, and in particular paragraph 3.185), it is not clear whether or not Saxons attended this meeting.

3.216 In early February 2015, the other Parties were concerned by Saxons’ conduct. On 2 February 2015, [Employee 1] (Annagram) and [Senior Employee 1] (Gary Berryman) discussed Annagram and Gary Berryman obtaining a fee letter sent by Saxons to the vendors of a particular property – Heal Close – with a view to producing it at a subsequent meeting of the Parties. In an email sent at 17:02 on 2 February 2015, [Employee 1] (Annagram) stated: ³¹⁶

‘I was instructed on another property on Friday in Eton Road and [Employee 3] @ (sic) Saxons had offered them a 1% fee because it was ‘an easy one to sell.’

³¹² Transcript of CMA interview with [Senior Employee 1] (West Coast), 5 February 2016, Disc 1 of 2, pages 26-27, [URN1767].

³¹³ Transcript of CMA interview with [Employee 1] (GTH), 5 July 2016, Disc 3 of 3, pages 41-44, [URN1799].

³¹⁴ The email evidence cited at paragraphs 3.250 to 3.256 below about attempts to restart the agreement also demonstrates that the arrangements began to unravel from about December 2014.

³¹⁵ [URN0508]

³¹⁶ [URN1390]

3.217 In his reply at 9:08 the following day (3 February 2015), [Senior Employee 1] (Gary Berryman) replied stating:³¹⁷

'I really think we need to try and nip it in the bud with Saxons and maybe once everyone has returned their signed forms to [Senior Employee 1] (Abbott and Frost)] about the association we can call a meeting about that and discuss the fees as well. Did you get the letter about the fees on Heal Close??? (sic) As we need ammunition!'

3.218 At 09:54 on 3 February 2015, [Employee 1] (Annagram) replied explaining he had not obtained the relevant letter and [Senior Employee 1] (Gary Berryman) replied again (at 10:29 on 3 February 2015) urging [Employee 1] (Annagram) to obtain evidence that Saxons was 'cheating' on the fee arrangement, stating:³¹⁸

'It would be good to get it for us to be able to use at the next meeting and as you didn't get one at eton rd (sic) and will show and prove we are watching them!! (sic)'

3.219 In an email at 17:36 on 4 February 2015, [Senior Employee 1] (Abbott and Frost) emailed the other Parties apart from Saxons informing them that, because Saxons had not returned a signed copy of the Association Constitution and Rules despite being chased to do so, he assumed that it had decided not to join the Association. [Senior Employee 1] (Abbott and Frost) noted that the resulting '*area of concern is of course maintaining fee levels*' and asked whether anyone had come across Saxons quoting a reduction.³¹⁹

3.220 In an email at 17:52 on 4 February 2015, [Senior Employee 2] (West Coast) replied to [Senior Employee 1] (Abbott and Frost) noting that he suspected Saxons of offering not a reduced fee but rather a '*stepped fee (dependant on selling timescales)*', but that he was waiting for two vendors to come back to him to explain further and would update [Senior Employee 1] (Abbott and Frost) once he had '*quantifiable proof*' rather than just '*say-so*'. [Senior Employee 2] (West Coast) also stated:³²⁰

³¹⁷ [URN0774]

³¹⁸ [URN0774]

³¹⁹ [URN1017]. [Senior Employee 1]'s (Abbott and Frost) evidence is that the Association rules restricted touting and that Saxons' failure to join the Association would lead to them touting again which would have an impact on fees - transcript of CMA interview with [Senior Employee 1] (Abbott of Frost), 22 June 2016, Disc 2 of 3, page 39-40, [URN1775]. However, in light of the context, the CMA considered the reference to fees in this email to maintaining fee levels is more likely to be a reference to adherence to the minimum fee arrangement.

³²⁰ [URN1017]

'I hope we can maintain a good fee level in the town but if Saxons have not bought in to the association I feel that their fee's (sic) will of course always undercut ours.'

3.221 [Employee 1] (Annagram) also responded to [Senior Employee 1]'s (Abbott and Frost) query about whether the Parties had experienced Saxons quoting a reduction. At 09:29 on 5 February 2015, [Employee 1] (Annagram) emailed all the other Parties apart from Saxons stating that he and [Senior Employee 1] (Gary Berryman) had recently discussed fee levels and suspected instances of undercutting by Saxons. [Employee 1] (Annagram) went on to state that *'At present there seems to be a lot of over ambitious prices and a combination of lower fees by Saxons, assuming in a bid to buy larger market share'*.³²¹

3.222 At 09:52 on the same day (5 February 2015), [Senior Employee 2] (West Coast) also replied to all the other Parties apart from Saxons stating that he also thought Saxons was offering lower fees. [Senior Employee 2] (West Coast) went on to state that the Parties needed to form an Association to keep standards high:³²²

'more now than ever is a need form (sic) the association and keep standards amongst the five of us high. I'm sure we have all worked in an environment before where budget agents buy the market to their detriment'.

3.223 At 14:00 on the same day (5 February 2015), [Senior Employee 1] (Gary Berryman) confirmed that Gary Berryman had also experienced *'the same problem'* with Saxons and went on to suggest that all the other Parties give Saxons a deadline to confirm *'whether they wish to be in the association or not and either way that we call a meeting to move the association forward with or without them and discuss the best way of retaining the fees we have all benefitted from.'* [Senior Employee 1] (Gary Berryman) indicated that there was still uncertainty about whether Saxons wanted to be *'on board'* and asked whether any of the other Parties had spoken to Saxons directly.³²³

³²¹ [URN1021]. [Employee 1] (GTH) evidence is that by this he meant that things were slipping back *'to the old days when it was cheap, with cheap fees, touting...all that sort of thing.'* - transcript of CMA interview with [Employee 1] (GTH), 5 July 2016, Disc 2 of 3, page 52, [URN1800]

³²² [URN1021]

³²³ [URN1021] - [Senior Employee 1] (Gary Berryman) also stated that he thought if Saxons would not *'come back in-line (sic) of commit (sic) to joining the association'* then the other Parties should *'carry on without them,*

- 3.224 [Senior Employee 1] (Abbott and Frost) subsequently emailed [Senior Employee 1] (Saxons) copying all of the other Parties asking that [Senior Employee 1] (Saxons) reply to confirm whether or not Saxons wished to be in the Association.³²⁴
- 3.225 At 07:48 on 9 February 2015, [Senior Employee 1] (Saxons) replied to [Senior Employee 1] (Abbott and Frost) apologising for not '*getting to grips*' with the Constitution and Rules sooner due to being short on time and stated that he would read it and reply to [Senior Employee 1] (Abbott and Frost) '*very soon indeed*'.³²⁵
- 3.226 On 9 February 2015, [Senior Employee 1] (Abbott and Frost) informed [Senior Employee 1] (Gary Berryman) of [Senior Employee 1]'s (Saxons) reply.³²⁶ At 09:50 on 9 February 2015, [Senior Employee 1] (Gary Berryman) replied to [Senior Employee 1] (Abbott and Frost) stating that [Senior Employee 1]'s (Saxons) reply was more positive than he had expected and that he hoped they could get [Senior Employee 1] (Saxons) '*on board again*'.³²⁷
- 3.227 At 13:39 on 10 February 2015, [Senior Employee 1] (Abbott and Frost) also informed [Senior Employee 2] (West Coast) of [Senior Employee 1]'s (Saxons) reply, stating:³²⁸
- 'He [Senior Employee 1] (Saxons) says that he will read through the details of the Agreement [Constitution and Rules] and come back to let me know what they want to do. I think at the moment they are definitely undercutting fees'*
- 3.228 At 13:22 on 10 February 2015, [Senior Employee 2] (West Coast) responded linking Saxons' conduct with regard to the Association with its cheating on the Parties' arrangement, stating:³²⁹

push them outside the supplement and therefore have to pay full page rate and we could then use the Associations (sic) supplement as a tool to underline the benefits of on the market.com etc etc!!!' (sic).

³²⁴ [URN1022] - email at 16:22 on 5 February 2015.

³²⁵ [URN1024]

³²⁶ [URN1027]

³²⁷ [URN1027]

³²⁸ [URN1030]

³²⁹ [URN1030]

*'[I]t's probably just a delaying tactic whilst he [Senior Employee 1] (Saxons) continues to quote lower fees than the rest of us and gain some market share!'*³³⁰

3.229 The CMA has not seen any evidence that Saxons ever reverted to the Parties about the Constitution and Rules, or that Saxons ever signed the Constitution and Rules.³³¹ In an email at 13:07 on 17 February 2015, [Senior Employee 1] (Abbott and Frost) emailed [Senior Employee 1] (Saxons) stating that as [Senior Employee 1] (Abbott and Frost) had not heard from [Senior Employee 1] (Saxons) he assumed that [Senior Employee 1] (Saxons) did not wish to be included in the Association but asked him to confirm by return email.³³² Subsequently, on 18 February 2015, [Senior Employee 1] (Abbott and Frost) emailed the other Parties apart from Saxons stating that he had heard nothing further from Saxons and called a meeting (paragraph 3.232 below).

Annagram

3.230 The CMA has found that by the end of March 2015, Annagram had made it clear to the other Parties that it was no longer interested in cooperating to raise fee levels and by 1 April 2015 at the latest the arrangement had been discontinued.

3.231 In an email at 08:28 on 18 February 2015 to [Senior Employee 1] (Abbott and Frost), [Employee 1] (Annagram) asked that a meeting be called to discuss the Association in light of Saxons' continued silence.³³³ In an email at 09:52 on 18 February 2015 to all of the Parties apart from Saxons, [Senior Employee 1] (Abbott and Frost) did so stating: *'I have not heard further from [Senior Employee 1](Saxons) so I think it's fair to assume that Saxons are not part of the Association'*.³³⁴

³³⁰ In an email at 13:56 on 10 February 2015, [Senior Employee 1] (Abbott and Frost) replied to [Senior Employee 2] (West Coast) stating that he agreed – [URN1031].

³³¹ [Senior Employee 1]'s (Saxons) witness evidence is that he did not sign the Association Constitution and Rules due to the rules on touting, as he found that touting could be beneficial to Saxons' business – transcript of CMA interview with [Senior Employee 1] (Saxons), 21 June 2016, Disc 2 of 3, page 13, [URN1772].

³³² [URN1032]

³³³ [URN1033]

³³⁴ [URN0127]. [Senior Employee 1] (Abbott and Frost) had contacted Saxons (and the other Parties) the previous day (17 February 2015) stating that, as he had not heard from Saxons, he assumed that it did not wish to be in the Association but asked that it confirm this by way of reply to his email at 13:07 on 17 February 2015 - [URN1033]. The CMA has not seen any such reply.

3.232 All of the Parties other than Saxons attended a meeting on 24 February 2015.³³⁵ The CMA has found little documentary evidence directly evidencing what was discussed at that meeting, but in light of the correspondence cited at paragraphs 3.233 to 3.238 below, it has found that, notwithstanding Saxons' lack of engagement, the Parties represented at the meeting did not decide to put an end to the arrangement. This is corroborated (albeit to a limited extent) by an email at 17:25 on 24 February 2015, in which [Senior Employee 1] (Abbott and Frost) emailed the Parties (other than Saxons) to thank them for attending and noted that there was some '*valuable discussion around the table*'.³³⁶

3.233 In an email at 11:52 on 12 March 2015 to [Senior Employee 1] (Abbott and Frost), [Senior Employee 1] (Gary Berryman) and [Senior Employee 2] (West Coast), [Employee 1] (GTH) described several instances of Annagram undercutting the arrangement:³³⁷

'[I] went to a property in Gardenhurst Close yesterday which has been on with cj hole [Annagram] since last may (sic). The contract with them was at 1% !!! (sic) How many others have there been???? (sic) Also, a house in Rectory rd (sic) I saw last week has gone on with them, the vendors said that [Annagram] did them a 'special deal'! This along with the bungalow in Broadhurst Gardens last month at 1% also! This is painting a bit of a picture.

I think Saxons were right to point the finger at them.'

3.234 In an email at 12:11 on 12 March 2015, [Senior Employee 1] (Abbott and Frost) replied to [Employee 1] (GTH) about Annagram stating that it was '*pretty sure they are undercutting*' and that it would take this up with Annagram and suggest to [Employee 1] (Annagram) that his boss – [Senior Employee 3] (Annagram) – attend the meeting scheduled for 19 March 2015.³³⁸ [Senior Employee 1] (Abbott and Frost) subsequently did so,³³⁹ and in an email to [Senior Employee 1] (Abbott and Frost) at 10:34 on 17 March

³³⁵ [Senior Employee 1] (Abbott and Frost) emailed all of the other Parties apart from Saxons at 15:44 on 18 February 2015 to confirm that the meeting would be on 24 February at 1pm at Abbott and Frost's offices - [URN1040]. This followed emails from all of the other Parties apart from Saxons stating that they could attend – see Annagram – [URN1037] - email at 09:56 on 18 February 2015; GTH – [URN1039] - email at 11:58 on 18 February 2015; Gary Berryman – [URN1039] - email at 11:28 on 18 February 2015; and West Coast [URN0128] - email at 09:56 on 18 February 2015.

³³⁶ [URN1044] - this email demonstrates that options for joint advertising were discussed at this meeting.

³³⁷ [URN1054]

³³⁸ [URN0123]

³³⁹ [URN1058] - email at 16:38 on 12 March 2015 and [URN1059] - email at 11:59 on 14 March 2015.

2015, [Employee 1] (Annagram) confirmed that both he and [Senior Employee 3] (Annagram) would be at the meeting on 19 March 2015.³⁴⁰

3.235 Following the meeting of 19 March 2015, in an email at 12:02 on 20 March 2015, [Senior Employee 2] (West Coast) shared a link from [a Property News Website] to the Parties (apart from Saxons) to an article entitled '*Estate agents and local newspaper hit with £775,000 bill in cartel case*'. [Senior Employee 2] (West Coast) stated that this was something the Parties needed to '*keep an eye on*'. [Senior Employee 2] (West Coast) went on to indicate: '*[A]s we discussed, we are promoting an Association that will ensure standards are maintained throughout the town BUT (sic) if Saxons are not on-board (sic) we will have to be careful of any emails/literature that is floating around in their possession that would indicate fee-fixing?*'³⁴¹

3.236 The CMA has found that the meeting of 19 March 2015 is the last meeting Annagram attended, and that it subsequently emailed to confirm it was withdrawing from the Association. At 10:26 on 24 March 2015, [Employee 1] (Annagram) emailed [Senior Employee 1] (Abbott and Frost) and [Senior Employee 1] (Gary Berryman) stating that:³⁴²

'Further to the meeting last week and subsequent discussion between [Senior Employee 3] (Annagram) and myself we have taken the decision to reconsider our involvement within an association [...] [X] we will endeavour to reconsider our position.'

3.237 While Annagram made no specific reference to the fee arrangement, and instead spoke only of the Association, subsequent email correspondence indicates that other Parties considered Annagram's decision to be motivated

³⁴⁰ [URN1062]. [Senior Employee 2] (West Coast) evidence is that West Coast also attended this meeting. See [URN0509] – extract of West Coast diary entries from the Relevant Period and transcript of CMA interview with [Senior Employee 2] (West Coast), 5 February 2016, Disc 2 of 3, page 19, [URN1765]. [Senior Employee 2] (West Coast) also stated that this meeting was held at Abbott and Frost - transcript of CMA interview with [Senior Employee 2] (West Coast), 5 February 2016, Disc 2 of 3, page 44, [URN1765].

³⁴¹ [URN0807]. See also [URN0809] - an internal Annagram email chain in which [Employee 1], at 12:39 on 20 March 2015, forwarded [Senior Employee 2]'s (West Coast) email to [Senior Employee 3] and [Senior Employee 3], at 13:09 on the same day, confirmed to [Employee 1] that he had seen the article. In an internal West Coast email from [Senior Employee 2] to [Senior Employee 3] at 11:57 on the same day (20 March 2015), [Senior Employee 2] also described the Parties as having discussed the article on the Three Counties case at their meeting of 19 March 2015 '*I raised this exact case yesterday at the meeting, everybody agreed that we have no restrictions on fee written into our association or with the newspaper, the Association if (sic) formed on the basis of maintaining standards throughout the town. The only thing I would be concerned over that would leave Westcoast (sic) exposed is that if Saxons don't come back onboard (sic) if there are any emails/literature floating around that they could use against us?*' - [URN1549]

³⁴² [URN0465] [X]

by a desire to set its own prices. At 13:04 on 24 March 2015, [Senior Employee 1] (Abbott and Frost) informed [Senior Employee 2] (West Coast) and [Employee 1] (GTH) about Annagram's decision, that Annagram did not wish to be involved in the Association because it wished to *'go [its] own way regarding reduced fees following the ear bending last week. What are your thoughts?'*³⁴³

3.238 This is corroborated by [Senior Employee 2]'s (West Coast) evidence regarding this email of 24 March 2015. [Senior Employee 2]'s (West Coast) evidence was that, during the meeting of 19 March 2015, [Senior Employee 3] (Annagram) informed the other attendees that [redacted]³⁴⁴ and noted that he would not be able to *'walk away from business'* and so would take whatever fee he could. [Senior Employee 2] (West Coast) interpreted [Senior Employee 3]'s (Annagram) comments as a *'call to battle'* (regarding fees) and a sign that he would soon be *'buying the market'*.³⁴⁵

3.239 The CMA has found that following Annagram's withdrawal from the Association, the other Parties (without Saxons) considered the merits and risks of continuing some sort of coordination but ultimately decided not to continue.

3.240 At 13:46 on 24 March 2015, [Senior Employee 2] (West Coast) emailed [Senior Employee 1] (Abbott and Frost) commenting on the impact of Annagram's abstention from the Association on the other remaining Parties in light of the CMA's recently publicised *Three Counties*³⁴⁶ decision.³⁴⁷

'This slightly dilutes the Association doesn't it?

Listening to [Senior Employee 3]'s (Annagram) views on Saxons buying the market place I imagine this could be an avenue he might want to explore? Although this might be a bit to (sic) presumptuous of me!

³⁴³ [URN1065].

³⁴⁴ [redacted]

³⁴⁵ Transcript of interview with [Senior Employee 2] (West Coast), 5 February 2016, Disc 2 of 3, pages 44-45, [URN1765].

³⁴⁶ The *Three Counties* decision was not published until May 2015, but the CMA had issued a Statement of Objections in December 2014, which the CMA infers prompted this article in [Property News Website]. For the decision, see *Restrictive arrangements preventing estate and lettings agents from advertising their fees in a local newspaper: Decision of the Competition and Markets Authority* (Case CE/9827/13, 8 May 2015), available to view at

https://assets.publishing.service.gov.uk/media/55841caee5274a1576000008/Property_sales_and_lettings_non-confidential_decision.pdf

³⁴⁷ [URN0465]

We would still be interested in some form of association but with two other agents not on board and the recent ruling by the CMA over Estate Agents Association (sic) with newspapers (<https://www.gov.uk/government/news/companies-fined-over-775000-in-cma-investigation-into-advertising-of-agents-fees>) we would wish to tread carefully so there is no recourse from non-member agents.

What is (sic) the general thoughts from the other remaining agents?’

- 3.241 In an internal email at 14:14 on the same day (24 March 2015), [Senior Employee 2] (West Coast) informed [Senior Employee 3] (West Coast) of Annagram’s decision, before referring to statements made by [Senior Employee 3] (Annagram):³⁴⁸

‘I personally feel that listening to [Senior Employee 3]’s (Annagram) concerns over Saxons taking a chunk of the market at the beginning of the year by offering discounted fees, that he will probably wish to have that option [✕]. I think it is fair to say that with a diluted association I would be foolish to think that fee will not play a big part of securing instructions going forward. Be assured I will do everything I can to maintain a good fee whilst remaining competitive against other agents. I am waiting for the remaining other agents to confirm a meeting to discuss and resolve the above issue.’

- 3.242 In an email at 16:01 on 24 March 2015, [Employee 1] (GTH) contacted [Senior Employee 1] (Abbott and Frost) and [Senior Employee 2] (West Coast) noting that he was not surprised by Annagram’s decision as ‘*fee cutting has become very commonplace. Another one this week [...]* **Berryman** [Gary Berryman] **have also put one on [...]** **at a reduced rate this week too**’. He further stated: ‘**we have had a good-ish** (sic) **run but its** (sic) **now over**, I think [Senior Employee 2] (Abbott and Frost) is right regarding doing our thing when up against them. Perhaps we should discuss things over a coffee?’³⁴⁹ (emphasis added)

- 3.243 In an email at 14:09 on 25 March 2015, [Senior Employee 1] (Abbott and Frost) replied to [Employee 1] (GTH) about Annagram’s decision, stating: ‘*No surprise (sic) either although following [Senior Employee 3]’s (Annagram)*

³⁴⁸ [URN1553]

³⁴⁹ [URN1069] - as [Senior Employee 2]’s (West Coast) email address is spelt incorrectly [✕], it may be that West Coast did not receive this email from GTH.

attendance last week I thought they were up for it. [...] there will be a bit of commission bashing over the next few months which is a pity.³⁵⁰

3.244 At 14:46 on 25 March 2015, [Senior Employee 1] (Abbott and Frost) emailed [Senior Employee 2] (West Coast) regarding Annagram's departure and competition law:³⁵¹

'[...] it makes it a little more difficult but could be something we can still make work the newspaper etc. I think [Senior Employee 3] (Annagram) has decided to buy the instructions, which is a pity because things were going ok. I've had a look at the link [...],³⁵² interesting reading!' (emphasis added)

3.245 On the same and following day (25 and 26 March 2015), [Senior Employee 1] (Abbott and Frost) and [Senior Employee 1] (Gary Berryman) exchanged emails about Annagram's decision.³⁵³ At 13:36 on 26 March 2015, [Senior Employee 1] (Gary Berryman) noted to [Senior Employee 1] (Abbott and Frost) that he had already raised the possibility of a meeting with GTH and suggested a day for the meeting the following week.³⁵⁴

3.246 That meeting was subsequently organised. At 17:08 on 26 March 2015, in an email entitled '*BOS Estate Agents Meeting*', [Senior Employee 1] (Abbott and Frost) contacted [Senior Employee 1] (Gary Berryman), [Senior Employee 2] (West Coast) and [Employee 1] (GTH) to propose a meeting for the following Wednesday for them to discuss whether to '*continue or call it a day*' now that Annagram had decided not to be in the Association.³⁵⁵

3.247 An internal West Coast email exchange of the same day (26 March 2015) also evidences the breakdown of the arrangement. In an email to [Senior Employee 3] (West Coast) at 17:28, [Senior Employee 2] (West Coast) forwarded the above email from Abbott and Frost and equated the continuation of the Association with the continuation of the fee arrangement, stating that he was in favour of keeping the Association running due to an

³⁵⁰ [URN1070]

³⁵¹ [URN0465]

³⁵² The link [Senior Employee 1] (Abbott and Frost) refers to is to a CMA press release of 19 March 2015 regarding the settlement reached in the CMA's *Three Counties* case above: see <https://www.gov.uk/government/news/companies-fined-over-775000-in-cma-investigation-into-advertising-of-agents-fees>.

³⁵³ [URN1072] - email at 14:51 on 25 March 2015 and [URN1073] - email at 13:36 on 26 March 2015.

³⁵⁴ [URN1073]

³⁵⁵ [URN0466]. [Senior Employee 1]'s (Abbott and Frost) evidence is that this email refers to the Association rather than any form of fee arrangement.

experience of another agent quoting a low fee of 1% as opposed to the agreed minimum fee of 1.5% and earning £1,000 less on the property as a result:³⁵⁶

*[I] feel this will be the last attempt at keeping the association together but I have just been out to a valuation where 1% and £1500 have been quoted on a £170,000 listing! **That's a loss of £1000 on the fee against the more consistent 1.5%. They have all lost the bloody plot!!!** (sic)*

If we are going into battle I would rather lead the charge than lose anymore stock' (emphasis added).

3.248 There is conflicting evidence about whether the meeting planned for 1 April 2015 took place.³⁵⁷ While some witness evidence is that it did not, and that the arrangement was by this time at an end,³⁵⁸ [Employee 1] (GTH) confirmed that the meeting did go ahead at the offices of Abbott and Frost, and was attended by representatives from Abbott and Frost, GTH and Gary Berryman. There is no evidence of further correspondence between the Parties after this date until June 2015, and [Employee 1]'s (GTH) evidence is that the 1 April meeting was the '*death knell [...] of the whole thing*'.³⁵⁹

Witness Evidence

3.249 The CMA's conclusions about the breakdown of the arrangement are supported by certain witnesses. In particular, [Employee 1] (GTH) and [Senior Employee 2] (West Coast) both recalled that the arrangement started to break down at the end of 2014 and beginning of 2015. [Employee 1]'s

³⁵⁶ [URN0466]. Also see [URN0464] - email at 14:14 on 24 March 2015, where, in relaying Annagram's reconsideration of its involvement in the Association, [Senior Employee 2] (West Coast) in an internal West Coast email to [Senior Employee 3] (West Coast) attributed [Senior Employee 3] (Annagram) decision to a wish to be able to offer discounted fees [↔]. [Senior Employee 2] (West Coast) added: '*I think it is fair to say that with a diluted association I would be foolish to think that fee will not play a big part of securing instructions going forward.*' [Senior Employee 2]'s (West Coast) witness evidence is that he started quoting a lower fee from this email onwards – transcript of CMA interview with [Senior Employee 2] (West Coast), 5 February 2016, Disc 2 of 3, page 56, [URN 1765].

³⁵⁷ [URN0470] - email at 11:57 on 1 April 2015 from [Senior Employee 2] (West Coast) to [Senior Employee 1] (Abbott and Frost) suggested that there was uncertainty on the morning of 1 April 2015 about whether the meeting was to go ahead as planned that afternoon.

³⁵⁸ Transcripts of CMA interviews with [Senior Employee 1] (West Coast), 5 February 2016, Disc 1 of 2, pages 34 and 37, [URN1767], and [Senior Employee 2] (West Coast), 5 February 2016, Disc 1 of 3, pages 31 and 35, [URN1764] and Disc 2 of 3, pages 55-56, [URN1765].

³⁵⁹ Transcript of CMA interview with [Employee 1] (GTH), 5 July 2016, Disc 2 of 3, page 8, [URN1800]. [Employee 1] (GTH) subsequently confirmed that by '*whole thing*', he meant the fee arrangement and the Association – transcript of Interview with [Employee 1], 5 July 2016, Disc 2 of 3, page 10, [URN1800]

(GTH) recollection was that *'it pretty much fizzled out around the end of the year'*³⁶⁰ and that *'it all started to unravel really'* in the *'wintry February time'*.³⁶¹ Thus, [Senior Employee 2]'s (West Coast) recollection was that following the meeting of 19 March 2015 at which fees were discussed, the Parties went *'into battle'* as a result of *'Saxons buying the market in December, [Senior Employee 3] (Annagram) [S<] dropped fees'*³⁶² and by March 2015 the Parties' *'gentlemen's agreement about fees'* was *'pretty much [...] non-existent'*.³⁶³

Attempt to restart the arrangement

3.250 There is strong evidence to suggest that, following the breakdown of the arrangement, one of the Parties (Gary Berryman) proposed to the other Parties in June 2015 that they reinstate their fee arrangement. While there is no evidence that this attempt was successful, the correspondence cited at paragraphs 3.251 to 3.255 below corroborates the existence of the minimum fee arrangement.

3.251 At 14:51 on 6 June 2015, in an email entitled *'Frustration!!!!'* (sic), [Senior Employee 1] (Gary Berryman) contacted all of the other Parties as follows:³⁶⁴

'[W]e are now in June and about six months on since our 'gentlemen's agreement' fell apart. I am pretty sure that in those six months we have all seen our commission levels drop and consequently our incomes fall.

[...]

I therefore wanted to make the suggestion that we draw a line under what has happened so far this year and for us all to get around the table again and try and put an agreement back in place!! (sic)

³⁶⁰ Transcript of CMA interview with [Employee 1] (GTH), 5 July 2016, Disc 2 of 3, page 55, [URN1800].

³⁶¹ Transcript of CMA interview with [Employee 1] (GTH), 5 July 2016, Disc 3 of 3, page 30, [URN1799]. [Senior Employee 1] (West Coast) also refers to the arrangement tailing off around the end of 2014 and the beginning of 2015, albeit that [Senior Employee 1] (West Coast) had left Burnham-on-Sea by that point so that (as he acknowledges) his knowledge of events was less detailed than before – see transcript of CMA interview with [Senior Employee 1] (West Coast), 5 February 2016, Disc 1 of 2, page 22, [URN1767].

³⁶² Transcript of CMA interview with [Senior Employee 2] (West Coast), 5 February 2016, Disc 2 of 3, page 61, [URN1765].

³⁶³ Transcript of CMA interview with [Senior Employee 2] (West Coast), 5 February 2016, Disc 2 of 3, page 45, [URN1765]. See also transcript of CMA interview with [Senior Employee 2] (West Coast), 5 February 2016, Disc 1 of 3, page 31, [URN1764] - *'I'd say by about March 2015, pretty much all completely collapsed'*.

³⁶⁴ [URN0120]. [Senior Employee 1's (Gary Berryman)] contention in this email that the minimum arrangement had fallen apart six months prior to June 2015 is broadly consistent with the evidence of the events from December 2014 to the end of March 2015 described at paragraphs 3.214 to 3.249 above.

[...]

Finally, I just cannot see, why on earth, any one of us would think it is a good idea to give ourselves a 25% - 30% pay cut for doing exactly the same job that we were doing last year??? (sic) We all know from recent experience that with a bit of talking and co-operation between us, we all win!!! (sic)

Maybe I am being naïve thinking we can get this back in place, but I thought it was at least worth a try!

I would be grateful for your thoughts

Here's hoping!! (sic)'

- 3.252 In an internal West Coast email chain of 6 June 2015, [Senior Employee 2] informed [Senior Employee 3], [Senior Employee 1] and [Senior Employee 4] (West Coast) of Gary Berryman's suggestion to re-start the fee-fixing arrangement and the Association. In an email at 16:16 on 6 June 2015, [Senior Employee 2] (West Coast) referred explicitly to the CMA and competition law, stating that:³⁶⁵

'I have looked at the pipeline and we are around £10k worse off with the drop in fees BUT I feel that is better than the CMA fining Westcoast 10% of our companies (sic) incomes (sic) ([X]) should we fall foul of the competitions (sic) law! [...] I am not entirely sure that the agents in Burnham have strong enough relationships to carry off another "gentleman's agreement"'

- 3.253 In his reply to [Senior Employee 2] (West Coast) at 16:37 on the same day (6 June 2015), [Senior Employee 3] (West Coast) took a different view, and in terms which once again corroborate the evidence of the previous arrangement, stating:³⁶⁶

'I see no harm in having a mtg (sic) to see what is on the table.

I just see everyone wanting to play ball, however they were mad to stop it in the first place.

Let me now (sic) when you have had a mtg (sic) and let's see what the rest are saying and proposing.'

³⁶⁵ [URN0474]

³⁶⁶ [URN0474]

3.254 At 07:46 on 8 June 2015, [Senior Employee 1] (Saxons) replied to [Senior Employee 1] (Gary Berryman) agreeing with his sentiment and confirming Saxons' interest in re-starting the arrangement, stating:³⁶⁷

'I agree with your frustrations!

The problem we had last time around as we are all aware is the (sic) [Senior Employee 3] (Annagram) decided to undercut everyone whilst, we all, by and large held onto the fee levels.

[Senior Employee 3] (Annagram) simply wanted market share and took by with ludicrous fees, in desperation, we are all aware that he is once again doing it and offering as low as .75% and even less in some cases.

We will happily sit around a table again.'

3.255 At 13:48 on 8 June 2015, [Senior Employee 1] (Abbott and Frost) replied to [Senior Employee 1] (Gary Berryman). It commented that it shared Gary Berryman's frustration but suggested that GTH's response meant that they would have to accept that reinstating co-operation would not be possible:³⁶⁸

*'[I] share your thoughts but from [Employee 1]'s (GTH) tone of email it looks as though we will have to accept that any co-operation/Association is dead. I would guess that [Employee 1] (GTH) has been totally p***** off with [Annagram] and he admitted that he was under pressure to gain instructions. I wouldn't have thought that the market GTH generally prefer to go for would have been the same but then he is up against everyone else in our locality, rather than the likes of [X], etc, whom I sure operate at higher commission levels.'*

3.256 Despite at least some of the Parties expressing their support for recommencing the arrangement, the CMA has found no evidence that they in fact did so and all the witnesses that the CMA interviewed describe the attempt to restart the arrangement as being unsuccessful.³⁶⁹

³⁶⁷ [URN1429]

³⁶⁸ [URN1082]

³⁶⁹ For example, transcript of CMA interview with [Senior Employee 2] (West Coast), 5 February 2016, Disc 3 of 3, page 7, [URN1766].

4. THE RELEVANT MARKET

A. Introduction

- 4.1 When applying the Chapter I prohibition, the CMA is not obliged to define the relevant market, unless it is impossible, without such a definition, to determine whether the agreement and/or concerted practice under investigation has as its object or effect the appreciable prevention, restriction or distortion of competition.³⁷⁰
- 4.2 In the present case, the CMA has decided that it is not necessary to reach a definitive view on market definition in order to determine whether there is an agreement and/or concerted practice which had as its object or effect the appreciable prevention, restriction or distortion of competition.
- 4.3 Nonetheless, the CMA has formed a view of the relevant market in order to calculate the Parties' 'relevant turnover' in the market affected by the Infringement for the purposes of establishing the level of any financial penalties that the CMA may decide to impose.³⁷¹
- 4.4 For these purposes, it is not necessary to carry out a formal analysis; the relevant market may properly be assessed on a broad view of the particular trade affected by the infringement in question.³⁷²
- 4.5 The market definition reached in this case should therefore be viewed in context, and in light of its purpose as outlined above, and is not determinative for the purposes of any future cases.
- 4.6 The CMA is not bound by market definitions adopted in previous cases, although earlier definitions can, on occasion, be informative when considering the appropriate market definition. Equally, although previous cases can provide useful information, the relevant market must be identified according to the particular facts of the case in hand.

³⁷⁰ Judgment in *Volkswagen AG v Commission*, T-62/98, EU:T:2000:180, paragraph 230 and judgment in *SPO and Others v Commission*, T-29/92, EU:T:1995:34, paragraph 74. This principle has also more recently been applied by the CAT in *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, in which the CAT stated at [176] that '[i]n Chapter I cases...determination of the relevant market is neither intrinsic to, nor normally necessary for, a finding of infringement'.

³⁷¹ *Guidance as to the appropriate amount of a penalty* (OFT423, September 2012), adopted by the CMA Board (the '**Penalties Guidance**') paragraphs 2.1 and 2.3 to 2.11

³⁷² *Argos and Littlewoods v OFT and JJB Sports v OFT* [2006] ECWA Civ 1318, paragraphs 169 to 173 and 189 and the CAT judgment on penalty, *Argos and Littlewoods v OFT* [2005] CAT 13, at [178].

B. Framework for assessing the relevant market

- 4.7 In assessing the relevant market in this case, the CMA has considered what products and/or services are part of the product market ('the relevant product market') and the geographic scope of the relevant market ('the relevant geographic market').
- 4.8 For the reasons set out below, the CMA has found that the relevant market in this case (for present purposes) is the provision of traditional residential estate agency (that is, property sales agency) services in the area in which the Parties provided traditional residential estate agency services from branches located in Burnham-on-Sea.

The relevant product market

- 4.9 To define the relevant product market the CMA considers the competitive pressure faced by companies active in the market. It does so by establishing the closest substitutes to the product(s) or service(s) that is or are the focus of the investigation (the 'focal product(s)')³⁷³ and considering whether they exercise a competitive constraint on the ability to raise prices of those focal products.³⁷⁴
- 4.10 The CMA has found that the Infringement related to the provision of traditional residential estate agency services in Burnham. The focal service(s) for the market definition exercise is therefore traditional residential estate agency (that is, property sales agency) services. Starting with this focal service, the CMA has considered whether there are reasons to define the relevant market more broadly for the purpose of calculating any financial penalty. In particular, whether it would be appropriate to define the market more broadly to cover non-traditional residential estate agency services, traditional residential property lettings services or traditional commercial estate agency services.
- 4.11 For the purposes of calculating any financial penalty in this case, and given the scope of the Infringement (which concerns the provision of traditional residential estate agency services), the CMA has decided that it would not be appropriate to define the relevant product market more broadly. Therefore, the CMA has concluded that the relevant product market is the provision of traditional residential estate agency services.

³⁷³ See *Market Definition: understanding Competition Law* (OFT403, December 2004, adopted by the CMA Board), paragraph 3.2.

³⁷⁴ *Ibid*, paragraphs 2.9 to 2.10.

The relevant geographic market

- 4.12 The CMA has assessed the relevant geographic market for the provision of traditional residential estate agency services.
- 4.13 Given the CMA's findings,³⁷⁵ the focal geographic point is the area in which the Parties provide traditional residential estate agency services from branches located in Burnham-on-Sea.

Parties' branches located in Burnham-on-Sea

- 4.14 As set out in more detail below, the CMA has found that the relevant geographic market, in this case and for the present purpose of calculating any financial penalty, is the area in which the Parties provide traditional residential estate agency services from branches located in Burnham-on-Sea. In light of the above (see paragraphs 3.20 to 3.256 above), this includes:
- a. The geographic area with postcodes TA8 and TA9 as the Parties provided residential estate agency services in that area from their respective branches located in Burnham-on-Sea during the Relevant Period and therefore the CMA has found that the Infringement applied in that area; and
 - b. A geographic area wider than postcodes TA8 and TA9 to the extent that it is served by any of the Parties' Burnham-on-Sea branches.³⁷⁶ As set out in more detail above (see paragraphs 3.77 to 3.256 above), the CMA has not seen any evidence that the Parties had any 'exceptions' to the Infringement based on a geographic area and/or that the Parties distinguished the application of the Infringement by geographic area.³⁷⁷ Therefore, the CMA has decided that the Infringement applied to any sales into these wider areas the services for which were provided by the Parties' Burnham-on-Sea branches.
- 4.15 Therefore, for the purposes of calculating any financial penalty in this case, and taking into account the scope of the Infringement (which concerned the provision of traditional residential estate agency services by the Parties' branches located in Burnham-on-Sea), the CMA has found that the turnover of the Parties generated by their respective Burnham-on-Sea branches from

³⁷⁵ See sections 3 and 5 and, in particular paragraph 3.117 above.

³⁷⁶ [3<]

³⁷⁷ Such that, for example, the Infringement did not apply to the relevant Parties' sales from the Burnham-on-Sea branch of properties in an area wider than the area covered by postcodes TA8 and TA9.

traditional residential property sales services is the relevant turnover for the purposes of calculating any financial penalty.

Parties' branches located elsewhere

- 4.16 Given that four of the Parties have branches in the close vicinity of Burnham-on-Sea,³⁷⁸ the CMA has considered whether it would be appropriate for the purposes of calculating any financial penalty in this case to take into account any turnover of the Parties from traditional residential property sales services in Burnham which was generated by the branches of the Parties located elsewhere.
- 4.17 The CMA has decided that it would not be appropriate to take into account turnover from traditional residential property sales services in Burnham which was generated by the Parties' branches located elsewhere as the CMA considers that the primary focus of competition is likely to be between estate agents located in Burnham-on-Sea.
- 4.18 Given the above, for present purposes and taking a conservative approach, the CMA has found that only the turnover of the Parties from traditional residential property sales services generated by their respective Burnham-on-Sea branches is the relevant turnover for the purpose of calculating any financial penalty in this case.

C. Conclusions on the relevant market

- 4.19 For the reasons set out above, the CMA has found that the relevant market in this case is the provision of traditional residential estate agency services in the area served by the Parties' Burnham-on-Sea branches (broadly equating to the area with postcodes TA8 and TA9), but also including other geographic areas served by any of the Parties' Burnham-on-Sea branches.

³⁷⁸ GTH has a branch in Bridgwater (approximately 9 miles from Burnham-on-Sea) [3<] - GTH response of 24 August 2016 to CMA's request for information of 10 August 2016 [URN 2083]. West Coast has a branch in Weston-Super-Mare, which is ca.10 miles from Burnham-on-Sea, and other locations in North Somerset and North Bristol - West Coast response of 24 August 2016 to CMA Request for Information of 10 August 2016, [URN2047] and its website <http://www.westcoast-properties.co.uk/contact-us>. During the Relevant Period, Saxons had a branch in Cheddar - Saxons response of 23 September 2016 to the CMA's section 26 notice of 12 August 2016, [URN1970]. Annagram has branches in Axbridge, Bridgwater, Cheddar, Congresbury, Wedmore, Winscombe and Worle.

5. LEGAL ASSESSMENT

A. Introduction

- 5.1 The Chapter I prohibition prohibits agreements or concerted practices between undertakings which may affect trade within the UK and have as their object or effect the prevention, restriction or distortion of competition within the UK, unless an exclusion applies or the agreements or concerted practices in question are exempt. References to the UK are to the whole or part of the UK.³⁷⁹
- 5.2 Section 60 of the Act provides, broadly, that the Chapter I prohibition is to be interpreted consistently with Article 101 of the Treaty on the Functioning of the European Union ('TFEU').
- 5.3 For the reasons set out below, the CMA has found that each of the Parties infringed the Chapter I prohibition by participating in an agreement and/or concerted practice to fix a minimum level of commission fees for the provision of traditional residential estate agency (that is, property sales agency) services in Burnham from at least 4 February 2014 until at least 18 February 2015 in the case of Saxons, and until at least 24 March 2015 in the case of the other Parties.

B. Undertakings

Key legal principles

- 5.4 For the purposes of the Chapter I prohibition, the term 'undertaking' covers every entity engaged in economic activity, regardless of its legal status and the way in which it is financed.³⁸⁰ The term therefore includes, among others, companies, partnerships³⁸¹ and individuals operating as sole traders.³⁸²
- 5.5 An entity is engaged in '*economic activity*' where it conducts any activity '*... of an industrial or commercial nature by offering goods and services on the market*'.³⁸³
- 5.6 The term 'undertaking' also designates an economic unit, even if in law that unit consists of several natural or legal persons.³⁸⁴

³⁷⁹ Section 2(1) and (7) of the Act.

³⁸⁰ Case C-41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH*, EU:C:1991:161, paragraph 21.

³⁸¹ Commission decision *Breeders' rights: Roses*, OJ [1985] L369/9.

³⁸² Case 210/81 *Demo-Studio Schmidt v Commission* [1983] ECR 3045.

³⁸³ Case C-118/85 *Commission v Italian Republic*, EU:C:1987:283, paragraph 7.

³⁸⁴ Case C-97/08 P *Akzo Nobel NV v Commission* EU:C:2009:536, paragraph 55.

Findings and conclusions

- 5.7 The CMA has found that throughout the Relevant Period, each of Annagram, Abbott and Frost, Gary Berryman, GTH, Saxons and West Coast was engaged in economic activity, namely, the provision of traditional residential estate agency services in the UK or a part of it.
- 5.8 In light of the above, the CMA has concluded that each of the Parties constitutes an undertaking for the purposes of the Chapter I prohibition.

C. Agreements and/or concerted practices between undertakings

Key legal principles

Agreements

- 5.9 The Chapter I prohibition is intended to catch a wide range of agreements, including oral agreements and 'gentlemen's agreements'.³⁸⁵ An agreement may be expressed or implied, and there is no requirement for it to be formal or legally binding, to be made in writing, or for it to contain any enforcement mechanisms.³⁸⁶ An agreement may also consist of either an isolated act, or a series of acts, or a course of conduct.³⁸⁷
- 5.10 The key question in establishing an agreement is whether there has been 'a concurrence of wills between at least two parties, the form in which it is manifested being unimportant, so long as it constitutes the faithful expression of the parties' intention'.³⁸⁸
- 5.11 The General Court has held that: 'it is sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way'.³⁸⁹
- 5.12 Although it is sufficient to show the existence of a joint intention to act on the market in a specific way in accordance with the terms of the agreement, the

³⁸⁵ Case C-41/69 *ACF Chemiefarma NV v Commission*, EU:C:1970:71, in particular, paragraphs 106–114.

³⁸⁶ See, for example, the following Commission decisions: *Soda-ash - Solvay*, CFK OJ [1991] L 152/16, at paragraph 11; *Greek Ferries* OJ [1999] L109/24, at paragraph 141; and *Raw Tobacco Spain*, 20 October 2004, at paragraph 265. See also *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2004] CAT 24 at paragraph 658.

³⁸⁷ Case C-49/92 P *Commission v Anic Partecipazioni SpA*, EU:C:1999:356, paragraph 81.

³⁸⁸ Cases T-44/02 etc., *Dresdner Bank v Commission*, EU:T:2006:271, paragraph 55, citing Case T-41/96 *Bayer AG v Commission*, EU:T:2000:242, paragraph 69 (upheld on appeal in Joined cases C-2/01 P and C-3/01 P *Bundesverband der Arzneimittel-Importeure eV and Commission v Bayer AG*, EU:C:2004:2, paragraphs 96–97).

³⁸⁹ Case T-7/89 *SA Hercules Chemicals NV v Commission*, EU:T:1991:75, paragraph 256.

CMA is not required to establish a joint intention to pursue an anti-competitive aim.³⁹⁰

- 5.13 The fact that a party may have played only a limited part in setting up an agreement, or may not have been fully committed to its implementation, or did not put the initiatives into effect,³⁹¹ or may have participated only under pressure from other parties, or may have cheated on the agreement does not mean that it is not party to the agreement.³⁹² An undertaking which, despite colluding with its competitors, follows a more or less independent policy on the market may simply be trying to exploit the cartel for its own benefit.³⁹³ Such an undertaking may win a customer's business because it knows the price fixed at a meeting.³⁹⁴
- 5.14 Additionally, agreements of an anti-competitive nature can still be reached where an undertaking may have attended a meeting out of 'courtesy', but did not then publicly distance itself from what was discussed.³⁹⁵ As regards 'public distancing', the burden of proof lies on the undertaking concerned to put forward evidence demonstrating that it had indicated to the other participants that it was participating in the meetings in a 'spirit' that was different to theirs.³⁹⁶ The Court of Justice has held that, *'if an undertaking's participation in such a meeting is not to be regarded as tacit approval of an unlawful initiative or as subscribing to what is decided there, the undertaking must publicly distance itself from that initiative in such a way that the other participants will think that it is putting an end to its participation, or it must report the initiative to the administrative authorities.'*³⁹⁷ As regards the

³⁹⁰ Case T-168/01 *GlaxoSmithKline Services Unlimited v. Commission*, EU:T:2006:265, paragraph 77 (upheld on appeal in Joined cases C-501/06P etc. *GlaxoSmithKline Unlimited v Commission*, EU:C:2009:610).

³⁹¹ See e.g. Case T-141/89 *Trefileurope v Commission* [1995] ECR II-791; Case T-25/95 etc. *Cimenteries CBR v Commission* [200] ECR II-491.

³⁹² *Agreements and Concerted Practices* (OFT401, December 2004), adopted by the CMA Board, paragraph 2.8. See also e.g. Case T-25/95 *Cimenteries CBR and Others v Commission*, EU:T:2000:77, paragraphs 1389 and 2557 (this judgment was upheld on liability by the Court of Justice in Joined cases C-204/00 P etc. *Aalborg Portland A/S and Others v Commission*, EU:C:2004:6, although the fine was reduced); and Case C-49/92 P *Commission v Anic Partecipazioni SpA*, EU:C:1999:356, paragraphs 79–80. See also *BELASCO Case C-246/86, Re Roofing Felt Cartel* where the Court found that it was no defence for undertakings to claim that they intended to ignore the terms of the agreement and in fact cheated on it.

³⁹³ Case T-308/94 *Cascades v Commission*, EU:T:1998:90, paragraph 230.

³⁹⁴ Case T-62/02 *Union Pigments v Commission*, EU:T:2005:430, paragraph 41.

³⁹⁵ Case T-83/08 *Denka Chemicals v Commission*, paragraphs 62-63; Case T-377/06 *Comap v Commission* [2011] 4 CMLR 1576, paragraph 76. Upheld in case C-290/11 P *Comap v Commission*, not published but referenced in Case 68/12 *Protimonopolný*, paragraph 27. Remaining silent at a meeting where parties collude on pricing policy does not equate to firm and unambiguous disapproval and thus public distancing: Case T-303/02 *Westfalen Gassen Nederland v Commission* [2006] ECR II-4567, paragraph 76 et seq.

³⁹⁶ Case C-373/14 P *Toshiba Corporation v Commission* ECLI:EU:C:2015:427, paragraph 61 and the case law cited.

³⁹⁷ Case C-68/12 *Protimonopolný v Slovenská sporiteľňa a.s.*, ECLI:EU:C:2013:71, paragraph 27 and case law cited. See also Case T-377/06 *Comap v Commission* [2011] 4 CMLR 1576, paragraph 76 where the General

duration of participation in the infringement, the CMA is entitled to rely on the pieces of evidence that an undertaking actively participated in the agreement, lack of evidence that an undertaking publicly distanced itself from the agreement and the perception of the other participants in the cartel.³⁹⁸

Concerted practices

- 5.15 The concepts of ‘agreements’ and ‘concerted practices’ are intended to catch forms of collusion having the same nature which are distinguishable from each other only by their intensity and the forms in which they manifest themselves.³⁹⁹
- 5.16 The Court of Appeal has noted that ‘*concerted practices can take many different forms, and the courts have always been careful not to define or limit what may amount to a concerted practice for [the] purpose*’ of determining whether there is consensus between the undertakings said to be party to a concerted practice.⁴⁰⁰
- 5.17 The following key points arise from the case law on the concept of a concerted practice:
- a. The concept of a concerted practice must be understood in light of the principle that each economic operator must determine independently the policy it intends to adopt on the market, including the choice of the persons and undertakings to which it makes offers or sells.⁴⁰¹
 - b. A concerted practice is ‘*a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes*

Court held that for communication to constitute public distancing, it must be ‘*expressed firmly and unambiguously, so that other participants in the cartel fully understand the intention of the undertaking concerned*’ and Case C-510/06P *Archer Daniels Midland Co v Commission* ECLI:EU:C:2009:166, paragraph 120, where the Court of Justice found that leaving a meeting cannot in itself be regarded as public distancing.

³⁹⁸ Case C-634/13 P *Total Marketing Services v European Commission*, EU:C:2015:614, paragraph 31.

³⁹⁹ Case C-8/08 *T-Mobile Netherlands and Others v NMa*, EU:C:2009:343, paragraph 23; see also Case C-49/92P *Commission v Anic Partecipazioni*, EU:C:1999:356, paragraph 131 and *Apex Asphalt and Paving Co Limited v Office of Fair Trading* [2005] CAT 4, [206(ii)].

⁴⁰⁰ *Argos Limited and Others v Office of Fair Trading* [2006] EWCA Civ 1318, paragraph 22.

⁴⁰¹ Cases 40/73 etc. *Suiker Unie v Commission*, EU:C:1975:174, paragraph 173. The Court of Justice added that the concept of a concerted practice does not require the working out of an actual plan. See also *Apex Asphalt and Paving Co Limited v Office of Fair Trading* [2005] CAT 4, at [206(iv)]. See also Case C-49/92 P *Commission v Anic Partecipazioni SpA*, , EU:C:1999:356, paragraph 116; Case C-199/92 P *Hüls AG v Commission* EU:C:1999:358, paragraph 159 and Case C-286/13 P *Dole v Commission* EU:C:2015:184, paragraph 119.

practical cooperation between them for the risks of competition'.⁴⁰²

The Court of Justice has added that *'[b]y its very nature, then, a concerted practice does not have all the elements of a contract but may inter alia arise out of coordination which becomes apparent from the behaviour of the participants*'.⁴⁰³

- c. The coordination (which is prohibited by the requirement of independence) comprises any direct or indirect contact between undertakings which has the object or effect of influencing the conduct on the market of an actual or potential competitor⁴⁰⁴ thereby creating conditions of competition which do not correspond to the normal conditions of the market in question.⁴⁰⁵
- d. It follows that *'a concerted practice implies, besides undertakings' concerting together, conduct on the market pursuant to those collusive practices, and a relationship of cause and effect between the two*'.⁴⁰⁶ However, that does not necessarily mean that the conduct should produce the concrete effect of restricting, preventing or distorting competition.⁴⁰⁷

5.18 The Court of Justice has held that *'whilst the concepts of an agreement and of a concerted practice have partially different elements, they are not mutually incompatible'* – it is not therefore necessary, in order to find an infringement, to characterise conduct as exclusively an agreement or as a concerted practice.⁴⁰⁸

⁴⁰² Cases 48/69 etc. *ICI Ltd v Commission*, EU:C:1972:70, paragraph 64. See also Case C-8/08 *T-Mobile Netherlands and Others v NMa*, EU:C:2009:343, paragraph 26 and *JJB Sports plc v Office of Fair Trading* [2004] CAT 17, at paragraphs 151 to 153.

⁴⁰³ Cases 48/69 etc. *ICI Ltd v Commission*, EU:C:1972:70, paragraph 65. See also *JJB Sports plc v Office of Fair Trading* [2004] CAT 17, at paragraph 151.

⁴⁰⁴ Cases 40/73 etc. *Suiker Unie v Commission*, EU:C:1975:174, at paragraph 174. See also Case C-8/08 *T-Mobile Netherlands and Others v NMa*, EU:C:2009:343, at paragraph 33; and *Apex Asphalt and Paving Co Limited v Office of Fair Trading* [2005] CAT 4, at [206(v)]. The case law provides that a concerted practice also arises in the situation in which the object or effect of the direct or indirect contact is to disclose to a competitor the course of conduct which the disclosing party has decided to adopt or contemplates adopting on the market.

⁴⁰⁵ Case 172/80, *Gerhard Züchner v Bayerische Vereinsbank*, EU:C:1981:178, paragraph 14; Case C-49/92P *Commission v Anic Partecipazioni*, EU:C:1999:356, paragraph 117; Case C-8/08 *T-Mobile Netherlands and Others v NMa*, EU:C:2009:343, at paragraph 33 and Case C-286/13 P *Dole v Commission* EU:C:2015:184, paragraph 120.

⁴⁰⁶ Case C-49/92P *Commission v Anic Partecipazioni* EU:C:1999:356, paragraph 118. See also *Apex Asphalt and Paving Co Limited v Office of Fair Trading* [2005] CAT 4, at paragraph 206(ix).

⁴⁰⁷ Case C-49/92P *Commission v Anic Partecipazioni* EU:C:1999:356, paragraph 124. See also *Apex Asphalt and Paving Co Limited v Office of Fair Trading* [2005] CAT 4, at paragraph 206(xi). See also Case C-286/13 P *Dole v Commission* EU:C:2015:184, paragraphs 125 and 127.

⁴⁰⁸ Case C-49/92 P *Commission v Anic Partecipazioni*, EU:C:1999:356, paragraphs 131 and 132; Case T-1/89 *Rhône-Poulenc v Commission*, EU:T:1991:56, paragraph 127.

Findings

5.19 In view of the evidence of the arrangement between the Parties set out at paragraphs 3.77 to 3.256 above, the CMA has concluded that there was:

- a. a concurrence of wills (and thereby an agreement) between the Parties, and/or
- b. coordination of conduct between them in which they knowingly substituted practical cooperation between them for the risks of competition (that is, a concerted practice)

to fix a minimum level of commission fees for the provision of traditional residential estate agency (that is, property sales agency) services in Burnham. The CMA has concluded that Saxons participated in this coordination and/or concurrence of wills from at least 4 February 2014 until at least 18 February 2015; and that the other Parties participated in this coordination and/or concurrence of wills from at least 4 February 2014 until at least 24 March 2015.

5.20 In reaching this conclusion, the CMA has relied on the evidence set out at paragraphs 3.77 to 3.256 above and, in particular, the following:

- a. The evidence of contact between the Parties in the period from 1 October 2013 to 4 February 2014 in advance of the Formation Meeting (cited at paragraphs 3.86 to 3.111 above) which demonstrates that each of the Parties was aware that the purpose of the Formation Meeting was to discuss a proposal for an arrangement to fix a minimum level of commission fees, including:
 - i. the email correspondence between [Senior Employee 1] (subsequently of Gary Berryman) and [Senior Employee 1] (GTH) about [Senior Employee 1]'s (subsequently of Gary Berryman) return to Burnham potentially being a '*catalyst of a possible agreement*' between the Parties on commission fees (cited at paragraph 3.86 above), and about each of [Senior Employee 1]'s (Gary Berryman) and [Senior Employee 1]'s (GTH) proposals for minimum fee level(s) to be discussed at an all-Parties meeting (cited at paragraphs 3.109 to 3.111 above); see, for example, the email from [Senior Employee 1] (GTH) to [Senior Employee 1] (Gary Berryman) of 11 December 2013 at 09:48, stating '*if we can just agree a minimum 1.5% across the board, we would have done well*',⁴⁰⁹

⁴⁰⁹ [URN1136]

- ii. the email correspondence cited at paragraphs 3.86 to 3.108 above in the period from 1 October 2013 to 4 February 2014 between [Senior Employee 1] (Gary Berryman) and individuals at each of Annagram, Abbott and Frost, Saxons and West Coast about setting up an all-Parties meeting in December 2013. Although the meeting did not take place until 4 February 2014, the evidence demonstrates that each of the Parties was aware that the purpose of the meeting was to discuss a minimum fee arrangement;⁴¹⁰
 - iii. witness evidence (cited at paragraph 3.85 above) which at least corroborates to some extent that the purpose of the Formation Meeting was to discuss fees in so far as some interviewees recalled having contacts from Gary Berryman regarding fees and/or an arrangement to fix fees;
- b. The evidence of the outcome of the Formation Meeting (cited at paragraphs 3.112 to 3.142 above) which demonstrates that there was a concurrence of wills (or as [Senior Employee 1] (GTH) put it on 5 February 2014, ‘*a meeting of common minds*’)⁴¹¹ between the Parties whereby they expressed their joint intention to fix a minimum level of commission fees as set out in the Formation Confirmation Email and the email correspondence between the Parties in the succeeding weeks in relation to the ‘*agreement*’⁴¹² reached at the Formation Meeting, including:
- i. evidence (cited at paragraph 3.113 above) that all of the Parties attended the Formation Meeting, the purpose of which was to discuss a proposal for an arrangement to fix a minimum level of commission fees;
 - ii. the email sent by [Senior Employee 1] (Gary Berryman) at 10:44 on 5 February 2014 to all the other Parties after the Formation Meeting (referred to as the Formation Confirmation Email in this Decision), which refers to and summarises an ‘*agreement*’ that had been reached between the Parties as regards ‘*minimum fees*’ for the provision by the Parties of residential property services, namely, for sole agency contracts, a commission fee from 1.5 per cent;⁴¹³ for

⁴¹⁰ Although there is evidence (cited at paragraphs 3.98 to 3.108 above) that Annagram and Abbott and Frost may have had reservations and at the time stated that they would not attend the proposed meeting, the available evidence shows that all Parties were persuaded to attend by January 2014 and attended the meeting on 4 February 2014.

⁴¹¹ [URN1208]. See paragraph 3.119 above.

⁴¹² As referred to by Gary Berryman ([Senior Employee 1]) in the Formation Confirmation Email. [URN0158]

⁴¹³ [URN0158] Plus VAT, with a minimum fee of £1,500 for properties up to £100,000 and £2,000 for properties over £100,000.

multiple agency contracts, a commission fee from 2 per cent;⁴¹⁴ and for joint agency contracts, a commission fee from 2 per cent;⁴¹⁵

- iii. evidence (cited at paragraph 3.119 above) that none of the Parties at the time disputed [Senior Employee 1]'s (Gary Berryman) use of the term '*agreement*', nor any of the terms of the '*agreement*' as described in the Formation Confirmation Email. Rather, each of [Senior Employee 1] (Abbott and Frost), [Senior Employee 1] (GTH), [Senior Employee 1] (Saxons) and [Senior Employee 1] (West Coast) responded positively to the Formation Confirmation Email and focused on the implementation of the '*agreement*'.
- iv. As regards Annagram, the CMA has not seen any evidence that Annagram immediately responded to the Formation Confirmation Email and [Employee 1]'s (Annagram) witness evidence is that he was not empowered to reach a decision on behalf of Annagram and that his manager, [Senior Employee 3] (Annagram), subsequently decided that Annagram would not participate in the arrangement. Notwithstanding this, and for the reasons set out in more detail at paragraphs 3.120 to 3.125 above, the CMA has found that Annagram was a party to the arrangement reached at the Formation Meeting, in particular, given that Annagram was a recipient of the email correspondence (cited at paragraphs 3.127 to 3.140 above) in which the Parties refined the terms of the arrangement reached at the Formation Meeting. The CMA has not found any evidence to demonstrate that Annagram at that time publicly distanced itself from the arrangement so that the other Parties thought it was putting an end to its participation in the arrangement reached at the Formation Meeting or in its subsequent email correspondence that indicated to the other Parties it was participating in the meetings in a spirit that was different to theirs. Similarly, whilst some individuals might have expressed reservations about the arrangement during the Formation Meeting or considered that the term '*agreement*' denoted a degree of allegiance between the Parties which was lacking, (see paragraphs 3.126 to 3.128 above), the CMA has not seen any evidence that any of the Parties publicly distanced themselves from the arrangement at that time. Therefore, the CMA has found that the Formation Confirmation Email (and the subsequent email correspondence between the Parties to refine the terms of the '*agreement*' set out in

⁴¹⁴ Plus VAT.

⁴¹⁵ Plus VAT. The arrangement also included a minimum fee on reposessions and corporate clients of £2,000.

the Formation Confirmation Email) reflects the faithful expression of the Parties' intention to fix a minimum level of commission fees.

- c. The evidence of implementation of the arrangement by the Parties (set out at paragraphs 3.143 to 3.213 above), which demonstrates the existence and continuance of the arrangement and the joint intention of the Parties to act on the market in a specific way in accordance with the terms of the arrangement, including:
 - i. the evidence of the 'policing' system put in place by the Parties to promote adherence to the arrangement, whereby each of the Parties took it in turns on a monthly basis to monitor compliance with the arrangement, to seek to resolve any arising issues and/or to investigate any reports of non-compliance with the arrangement (see paragraphs 3.146 to 3.170 above);
 - ii. the evidence of correspondence between all of the Parties while a deal was being negotiated with a particular customer with a view to ensuring adherence to the minimum fee arrangement with respect to that particular transaction (cited at paragraphs 3.171 to 3.177 above);
 - iii. the evidence of bilateral communications between West Coast and each of Saxons and Annagram about adherence to the minimum fee arrangement (cited at paragraphs 3.178 to 3.182 above);
 - iv. the evidence (cited at paragraphs 3.183 to 3.201 above) that the Parties⁴¹⁶ held at least eight and possibly nine meetings following the Formation Meeting and that the purpose of the meetings was, at least in part, to reinforce adherence to the arrangement;
 - v. the evidence of 'cheating' on the arrangement by some or all of the Parties offering lower commission levels than those envisaged under the arrangement (cited at paragraphs 3.202 to 3.206 above) does not mean that they were not party to the arrangement for the purposes of the Chapter I prohibition.

5.21 In reaching its conclusion about the duration of the arrangement, the CMA has in particular relied on the following:

- a. the evidence leading up to the Formation Meeting, the evidence of the outcome of the Formation Meeting and the correspondence between the Parties in the succeeding weeks (cited at paragraphs

⁴¹⁶ As set out in more detail at paragraphs 3.183 to 3.201 above, not all of the Parties attended every meeting.

3.86 - 3.141 above), including the Formation Confirmation Email, which demonstrates that the Parties had entered into an arrangement as described above no later than 4 February 2014 i.e. at the Formation Meeting;

- b. the evidence of implementation of the arrangement by the Parties and the breakdown of the arrangement (cited at paragraphs 3.143 to 3.249 above) which shows that all the Parties corresponded with a view to maintaining adherence to the arrangement from 5 February 2014 until at least 9 February 2015;⁴¹⁷
- c. the evidence (cited at paragraphs 3.216 to 3.231 above) that the Parties treated Saxons' failure to sign the Constitution and Rules as evidence of its disengagement from the Association and consequently did not include Saxons in their invitation to the meeting on 24 February 2015, which was issued on 18 February 2015, or in their invitations to subsequent meetings;
- d. the evidence (cited at paragraphs 3.235 to 3.238 above) that in an email dated 24 March 2015,⁴¹⁸ Annagram had informed Gary Berryman and Abbott and Frost that, following the meeting held on 19 March 2015, it had decided to reconsider its involvement in the Association, and subsequent email correspondence on the same day between Abbott and Frost, GTH, Gary Berryman and West Coast which indicates that they considered Annagram's decision to be motivated by a desire to set its own prices;⁴¹⁹
- e. the evidence (cited at paragraphs 3.237 to 3.249 above) that, following Annagram's public distancing from the arrangement on 24 March 2015, the remaining Parties (with the exception of Saxons) considered the merits and risks of continuing some sort of coordination but ultimately decided not to continue by 1 April 2015.⁴²⁰

5.22 As regards the evidence at paragraph 5.21(d) above, the CMA reached the view that following the meeting on 19 March 2015 Annagram had by (at

⁴¹⁷ The date of the last email from Saxons - [URN1024] (see paragraph 3.225 above). The other Parties continued to correspond in the subsequent period (see paragraphs 3.227 to 3.248 above).

⁴¹⁸ [URN0465]

⁴¹⁹ [URN1065]

⁴²⁰ Although the other Parties (excluding Annagram and Saxons) ultimately decided not to continue with the arrangement by 1 April 2015, for the purposes of this Decision, the CMA has found that the arrangement ended on 24 March 2015 i.e. at the point at which there is clear evidence that one of the Parties (Annagram) had publicly distanced itself from the arrangement.

least) 24 March 2015 publicly distanced itself from the arrangement by having indicated to other Parties that it was putting an end to its participation in the arrangement in view of its desire to set its own prices. For the purposes of this Decision, the CMA has therefore found that all the Parties (other than Saxons) participated in the arrangement until at least 24 March 2015 at which point Annagram had publicly distanced itself from the arrangement.

- 5.23 As regards Saxons, while there is evidence that by 18 February 2015 the other Parties had concluded that Saxons was no longer participating in their arrangements, there is no evidence of Saxons having taken active steps to distance itself publicly from the arrangements.⁴²¹ In the circumstances it is at least arguable that Saxons' involvement in the infringement also continued until at least 24 March 2015. However, given that the difference between 18 February and 24 March 2015 is not material for these purposes (and in particular would not affect the adjustment for duration at Step 2 of the penalty calculation), the CMA has decided to take a conservative approach to the duration of Saxons' participation in the infringement and found that Saxons' participation ended on 18 February 2015.

Conclusion on agreement and/or concerted practice

- 5.24 In view of the foregoing and the evidence cited at paragraphs 3.77 to 3.256 above, the CMA has concluded that the arrangement between the Parties constituted an agreement and/or concerted practice for the purposes of the Chapter I prohibition.
- 5.25 The CMA has found that there was an agreement and/or concerted practice between all of the Parties to fix a minimum level of commission fees for the provision of traditional residential estate agency (that is, property sales agency) services in Burnham. The CMA has found that Saxons participated in the agreement and/or concerted practice from at least 4 February 2014 until at least 18 February 2015; and that the other Parties participated in the agreement and/or concerted practice from at least 4 February 2014 until at least 24 March 2015.
- 5.26 That agreement and/or concerted practice is referred to in the remainder of this Decision as the '**Agreement**'.

⁴²¹ The correspondence also suggests that at least one Party considered Saxons might still be 'on board' even after 18 February 2015 - see paragraph 3.235 above and the correspondence cited therein.

D. Object of preventing, restricting or distorting competition

Key legal principles

- 5.27 In this section and the remainder of this Decision, for ease of presentation, references to ‘agreement’ include ‘concerted practice’.⁴²²
- 5.28 Chapter I of the Act prohibits agreements between undertakings which have as their object or effect the prevention, restriction or distortion of competition.
- 5.29 The term ‘object’ in the Chapter I prohibition refers to the ‘aim’, ‘purpose’, or ‘objective’, of the coordination between undertakings in question.⁴²³
- 5.30 Where an agreement has as its object the prevention, restriction or distortion of competition, it is not necessary to prove that the agreement had, or would have, any actual anti-competitive effects in order to establish an infringement.⁴²⁴
- 5.31 The Court of Justice of the European Union has held that object infringements are those forms of coordination between undertakings that can be regarded, by their very nature, as being harmful to the proper functioning of normal competition.⁴²⁵ The Court of Justice has characterised as the ‘*essential legal criterion*’ for a finding of anti-competitive object that the coordination between undertakings ‘*reveals in itself a sufficient degree of harm to competition*’ such that there is no need to examine its effects.⁴²⁶
- 5.32 Horizontal price fixing has consistently been held to restrict competition by object and attract the highest fines.⁴²⁷ The Chapter I prohibition specifically prohibits agreements or concerted practices that directly or indirectly fix purchase or selling prices. Price fixing can manifest itself in a number of ways including: agreeing a sliding scale for commission to be charged to

⁴²² See also to similar effect section 2(5) of the Act which provides that a provision of Part 1 of the Act which is expressed to apply to, or in relation to, an agreement is to be read as applying equally to, or in relation to, a concerted practice (but with necessary modifications).

⁴²³ See, for example, respectively: Case 56/64 *Consten & Grundig v Commission*, EU:C:1966:41, p. 343 (‘...Since the agreement thus aims at isolating the French market... it is therefore such as to distort competition...’); Case 96/82 *IAZ and Others v Commission*, EU:C:1983:310, paragraph 25; C-209/07 *Competition Authority v Beef Industry Development Society*, EU:C:2008:643 (‘BIDS’), paragraphs 32-33.

⁴²⁴ See, for example, C-8/08 *T-Mobile Netherlands BV v NMa*, EU:C:2009:343 (‘T-Mobile Netherlands’), paragraphs 28-30 and the case law cited therein, and *Cityhook Limited v Office of Fair Trading* [2007] CAT 18, at paragraph 269.

⁴²⁵ C-67/13 P *Groupement des Cartes Bancaires v Commission*, EU:C:2014:2204 (‘Cartes Bancaires’), paragraph 50; affirmed in C-373/14 P *Toshiba v Commission* EU:C:2016:26 (‘Toshiba’), paragraph 26.

⁴²⁶ *Cartes Bancaires*, paragraphs 49 and 57. See also *Toshiba*, paragraph 26.

⁴²⁷ See e.g. C-246/86 *Belasco v Commission* where the Court of Justice found that, even though fixed prices might not have been observed in practice, the decisions fixing them had the object of restricting competition; Cases 48, 49 and 51-57/69 *ICI v Commission (Dyestuffs)* [1972] ECR 619, paragraphs 115 and 118.

buyers by the vendors,⁴²⁸ setting target prices,⁴²⁹ exchanging price information,⁴³⁰ pre-pricing communications⁴³¹ and pursuing a collaborative strategy of higher pricing.⁴³² As such, the Court of Justice has consistently found such coordination to reveal in itself a sufficient degree of harm to competition such that it restricts competition by its very nature (and therefore by object).⁴³³

5.33 In order to determine whether an agreement reveals a sufficient degree of harm so as to constitute a restriction of competition ‘by object’, regard must be had to:

- a. the content of its provisions;
- b. its objectives; and
- c. the economic and legal context of which it forms a part.⁴³⁴

5.34 In determining that context, it is also necessary to take into consideration all relevant aspects of the context, having regard in particular to the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question.⁴³⁵

5.35 The Court of Justice has held that, in cases involving restrictions of competition which fall within a category of agreements expressly prohibited by Article 101(1) of the TFEU, such as price fixing, the analysis of the legal

⁴²⁸ See *Fine Art Auction Houses* IP/02/1585 COMP/E-2/37.784, which concerned, for example, the introduction of a new sliding scale for the vendor’s commission, making the commission scale non-negotiable and monitoring adherence to the scale. See also paragraphs 162-163: [Article 81(1)] covers agreements not only on ‘prices’ in the narrow sense, but also on discounts, rebates, payment and credit terms. See also Joined Cases 209 to 215 and 218/78 *Van Landewyck v Commission* [1980] ECR 3125 and *Architectes Belges*, Commission Decision of 24 June 2004 [2005] OJ L004/10 Case 38549.

⁴²⁹ Case C-8/72, *Vereeniging van Cementhandelaren v Commission* [1972] ECR 977, paragraph 21: even fixing a price which merely constitutes a target or recommendation, affects competition because it enables all participants to predict with a reasonable degree of certainty what the pricing policy pursued by the competitors will be.

⁴³⁰ See Joined cases C-204/00 P etc. *Aalborg Portland A/S and Others v Commission*, EU:C:2004:6.

⁴³¹ Case C-286/13 P *Dole v Commission* ECLI:EU:C:2015:184, paragraph 134.

⁴³² Case T-202/98 *Tate & Lyle v Commission* [2001] ECR II-2035.

⁴³³ Case C-67/13 P *Groupement des cartes bancaires v Commission* ECLI:EU:C:2014:2204. In Case C-8/08 *T-Mobile Netherlands v Raad van bestuur van de Nederlandse Mededingingsautoriteit*, ECLI:EU:C:2009:343, paragraph 39, the Court of Justice found in order to find that a concerted practice has an anti-competitive object, there does not need to be a direct link between that practice and consumer prices, that is, the practice does not need to have a direct effect on the end prices paid by consumers to be restrictive of competition by object.

⁴³⁴ See *Cartes Bancaires*, paragraph 53 and *Toshiba*, paragraph 27.

⁴³⁵ *Cartes Bancaires*, paragraphs 53 and 78.

and economic context may be limited to what is strictly necessary in order to establish the existence of a restriction by object.⁴³⁶

- 5.36 As set out in paragraph 5.32 above, agreements that aim to fix prices are, by their very nature, restrictive of competition⁴³⁷ and are therefore restrictive of competition by object. Case law and decisional practice demonstrate that price fixing can arise in various ways.⁴³⁸
- 5.37 Although the parties' subjective intention is not a necessary factor in determining whether an agreement is restrictive of competition, there is nothing prohibiting that factor from being taken into account.⁴³⁹

Findings

- 5.38 The CMA has found that the Agreement had as its object the prevention, restriction or distortion of competition within the UK, by fixing a minimum level of commission fees (and thereby prices) for the provision of traditional residential estate agency (that is, property sales agency) services.
- 5.39 Such an agreement, by removing (or reducing) the benefits to consumers of price competition between direct competitors by its very nature restricted price competition between six competing traditional estate agents.
- 5.40 In reaching this finding, the CMA has assessed the content of the Agreement, its objectives and the legal and economic context of which it forms part.

Content of the Agreement

- 5.41 The content of the Agreement at its formation was as stated in the Formation Confirmation Email of 5 February 2014, namely that the Parties would charge minimum commission fees for the provision of traditional residential estate agency services as follows:
- a. for sole agency contracts, a minimum commission fee of 1.5 per cent;⁴⁴⁰

⁴³⁶ *Toshiba*, paragraphs 28 and 29.

⁴³⁷ See, for example, Case 123/83, *BNIC v Clair* EU:C:1985:33, at paragraph 22.

⁴³⁸ See case law cited in paragraph 5.32 above.

⁴³⁹ *Cartes Bancaires*, paragraph 54; affirmed in C-286/13 P *Dole v Commission*, EU:C:2015:184, paragraph 118.

⁴⁴⁰ [URN0158] Plus VAT, with a minimum fee of £1,500 for properties up to £100,000 and £2,000 for properties over £100,000. The Agreement included a minimum fee of £2,000 for repossessions and corporate clients.

- b. for multiple agency and joint agency contracts, a minimum commission fee of 2 per cent.⁴⁴¹

5.42 The content of the Agreement was refined on 17 February 2014 as follows:⁴⁴²

- a. If a Party was invited to value a property that was valued prior to the agreement by another agent and the Party quoted less than the 1.5% and/or less than the minimum fees subsequently agreed, the relevant Party would stay firm at 1.5% and not fee match the lower figure quoted;
- b. If a Party was invited to value a property that was on the market with another agent, the relevant Party would, regardless of what commission was agreed with the other agent previously, quote 1.5% plus VAT;
- c. The only exception to the previous point was where a Party had previously visited the property prior to the agreement and committed itself in writing to a fee lower than 1.5% plus VAT.

5.43 These findings regarding the content of the Agreement are consistent with the Parties' correspondence and contemporaneous documents in the period leading up to the Formation Meeting (see paragraphs 3.86 to 3.111 above). In particular, contacts between the Parties in the run up to the Formation Meeting and shortly thereafter demonstrate that the Agreement was put in place to set a 'floor' for the level of the commission fees. By way of example:

- a. At 12:59 on 13 December 2013, [Senior Employee 1] (Gary Berryman) sent an email to [Senior Employee 1] (Saxons) and [Senior Employee 1] (GTH) noting current commission fee levels while suggesting they were too low, and reiterating the minimum (sole agency) commission fee of 1.5 per cent it thought the Parties should agree:⁴⁴³

*[Gary Berryman is] [i]ntending to charge between 1.5% and 1.75% next year when we can! I will speak to [Senior Employee 1] (GTH) and see if we 'sensible' ones can sort something out! At the end of the day **if we can secure a minimum 1.5%** on the*

⁴⁴¹ Plus VAT.

⁴⁴² [URN0878]

⁴⁴³ [URN1164]

majority of instructions and in doing so loose the odd one to them,⁴⁴⁴ I still think we will be better off than we are now scrabbling around at 1% and 1.25%’ (emphasis added)

- b. By way of further example, in advance of the Formation Meeting, Gary Berryman and GTH corresponded in more detail about what they would propose to the other Parties during the meeting, including what minimum fee level to propose and other matters which had to be discussed. At 09:22 on 11 December 2013, [Senior Employee 1] (Gary Berryman) contacted [Senior Employee 1] (GTH), including to check that both Parties were ‘*thinking along the same lines*’ regarding the fees they would propose at the meeting planned for later that day.⁴⁴⁵

*‘[P]ersonally I was **thinking a minimum of a minimum** (sic) **commission of 1.5% plus VAT with a minimum fee of £2,000 for sole agency, with multiple agency being 2.75% plus VAT with £2,750 minimum fee.**’ (emphasis added)*

- c. At 09:48 on the same day, [Senior Employee 1] (GTH) replied stating:⁴⁴⁶

*‘All well and good but if can just **agree minimum 1.5% across the board**, we would have done well. (emphasis added)*

Objective of the Agreement to restrict competition

- 5.44 In view of its content, the CMA has found that the clear objective aim of the Agreement was to restrict price competition between six competing traditional estate agents for the provision of traditional residential estate agency services in Burnham (namely, Annagram, Abbott and Frost, Gary Berryman, GTH, Saxons and West Coast).
- 5.45 The Parties’ agreement to fix a minimum level of commission fees (prices) is further confirmed by their conduct on the market.

⁴⁴⁴ The CMA took the view that ‘them’ is a reference to Abbott and Frost, which at that time had not agreed to attend the meeting.

⁴⁴⁵ [URN1136]. See also [URN1137] – email at 10:12 on 11 December 2013, in which [Senior Employee 1] (Gary Berryman) indicated approval of [Senior Employee 1]’s (GTH) email (‘*Great!!*’) (sic).

⁴⁴⁶ [URN1136] [Senior Employee 1] (GTH) confirmed in his witness evidence that he was here referring to a target commission rate irrespective of the value of the property – transcript of CMA interview with [Senior Employee 1] (GTH), 5 July 2016, Disc 2 of 3, page 9, [URN1793].

5.46 For the reasons set out below, the objective aim of the Agreement, namely to restrict price competition, is further supported by the evidence of the Parties' subjective intentions.

5.47 In particular, the email correspondence between the Parties in the run up to the Formation Meeting and shortly thereafter demonstrates the Parties' subjective intention to increase commission fee levels (for the benefit of the Parties). For example:

- a. In an email entitled 'Fees' at 16:08 on 16 November 2013, [Senior Employee 3] (Annagram) contacted [Senior Employee 1] (Gary Berryman) (seemingly in response to a missed phone call) as follows:⁴⁴⁷

*'The last valuation I did (a couple of weeks ago) I was shocked when told that both WC [West Coast] and AF [Abbott and Frost] had quoted a fixed fee which equated to 0.75%. **Our [~~X~~] offices rarely fall below 1.5%** [...]*

*I will support any **mutual decision** that gives us **greater power to improve our fees**. (emphasis added)*

- b. In an email at 12:37 on 18 November 2013, [Senior Employee 1] (Gary Berryman) contacted [Senior Employee 1] (Abbott and Frost) to ask whether he would be happy to attend a meeting with the other agents in the town for the purpose of getting '*some form of **agreement to get these flippin fees up!!***' (sic) (emphasis added).⁴⁴⁸ In an email replying to [Senior Employee 1] (Gary Berryman) at 09:14 on 20 November 2013 [Senior Employee 1] (Abbott and Frost) stated:⁴⁴⁹

*'We're all for obtaining **better fees** but experience as you well know usually sees one agent or so slipping back to something lower just to get the instruction. We don't wish to appear negative but we've been here before so I see little point.'* (emphasis added)

- c. On the same day at 09:29, [Senior Employee 1] (Gary Berryman) replied to [Senior Employee 1] (Abbott and Frost) stating that the

⁴⁴⁷ [URN1093]

⁴⁴⁸ [URN1102]

⁴⁴⁹ [URN0841]

proposed arrangement would help the Parties' incomes and that all other Parties were willing to meet, and encouraging Abbott and Frost to do so:⁴⁵⁰

*'I must say my initial reaction was the same, but surely for a little of our time it's worth a go!! (sic) Even if it lasts for a few months **it will help all our incomes!! (sic) One things for sure it won't work without you, and everybody else is saying they are willing to meet up?? (sic) [...]**'*

- d. At 11:13 on 13 December 2013, [Senior Employee 1] (Saxons) replied to all of the other Parties (apart from Abbott and Frost) suggesting that it would be worth them trying to obtain higher fees even without the involvement of Abbott and Frost:⁴⁵¹

*'[F]or too many years now the area has been driven by agents simply quoting low fees (including ourselves to be honest). **Is it not worth a push to higher fees even if [Senior Employee 2] (Abbott and Frost) does not want to be part of it?** (emphasis added)*

- e. In an email at 09:33 on 9 January 2014 in which [Senior Employee 1] (Gary Berryman) wrote to [Senior Employee 1] (West Coast), encouraging West Coast to persuade Annagram to attend the forthcoming meeting between the Parties, [Senior Employee 1] (Gary Berryman) expressed its view that the Parties should avoid charging the 'stupid fees' they currently do:⁴⁵²

*'[I]f you have time, I would ring him, you never know, it may just work! Like you say even if it did last a few months, **better to list for a quarter at 1.5% and above than the stupid fees we currently have to do.!!'** (sic) (emphasis added)*

West Coast ([Senior Employee 1]) responded positively to this and contacted Annagram ([Employee 1]).⁴⁵³

- f. [Senior Employee 1]'s (GTH) response at 12:36 on 5 February 2014 to the Formation Confirmation Email about the Parties cooperating to increase profits reads as follows:⁴⁵⁴

⁴⁵⁰ [URN0844]

⁴⁵¹ [URN1162]

⁴⁵² [URN0497]

⁴⁵³ [URN0497]. See paragraph 3.108 above.

⁴⁵⁴ [URN0874]

*‘[...] I have a good feeling that as entrepreneurs we can still **cooperate to mutual advantage and grow our businesses equally** but concentrating on our firms’ unique brands and services and selling ourselves **not cutting each other’s throat financially**. We may even be able to build on this initial agreement at our next meeting – can everyone get the date in their diaries? We need a 100% attendance, it’s really important we all give it the priority it deserves (**making as much as profit as possible!**)’(emphasis added)*

The economic and legal context of which the Agreement forms part

5.48 Chapter 3 above provides an overview of the CMA’s findings regarding the contextual factual background relevant to the investigation.⁴⁵⁵ The CMA has concluded that the key points from the factual background that are particularly relevant to the legal and economic context for the purposes of determining the object of the Agreement are as follows:

- a. The Agreement was between six direct competitors for the provision of traditional residential estate agency services in Burnham: Annagram, Abbott and Frost, Gary Berryman, GTH, Saxons and West Coast.
- b. The Agreement covered almost the entire market for the provision of traditional residential estate agency services in Burnham as the Parties collectively held an overwhelming majority of the share of the relevant market, even allowing for the scope for others to enter the market (see paragraphs 3.207 to 3.213 above regarding the attempted entry into Burnham of [An Estate Agent from outside Burnham] .

Conclusion on the object of preventing, restricting or distorting competition

5.49 For the reasons set out above, the CMA has found that the Agreement had as its object the prevention, restriction or distortion of competition within a part of the UK (i.e. Burnham), by fixing a minimum level of commission fees for the provision of traditional residential estate agency (that is, property sales agency) services.

5.50 Such an Agreement, by removing or limiting the benefits to consumers of price competition between the Parties, including when considered in its economic and legal context, by its very nature restricted price competition. It reveals, in and of itself, a sufficient degree of harm to competition such that

⁴⁵⁵ Including with respect to the nature of the services and functioning of the market.

there is no need to examine its effects. Accordingly, it was restrictive of competition by object.⁴⁵⁶

E. Appreciable restriction of competition

5.51 For the reasons set out below, the CMA has found that the Agreement appreciably prevented, restricted or distorted competition for the provision of traditional residential estate agency services in Burnham.

Key legal principles

5.52 An agreement will fall within the Chapter I prohibition only if it has as its object (or effect) an appreciable prevention, restriction or distortion of competition.⁴⁵⁷

5.53 The Court of Justice has clarified that an agreement that may affect trade between Member States and that has an anti-competitive object constitutes, by its nature and independently of any concrete effect that it may have, an appreciable restriction on competition.⁴⁵⁸ In accordance with section 60(2) of the Act,⁴⁵⁹ this principle also applies with the necessary changes in respect of the Chapter I prohibition: accordingly, an agreement that may affect trade within the UK or a part of it and that has an anti-competitive object constitutes, by its nature and independently of any concrete effect that it may have, an appreciable restriction on competition.

Findings and conclusions

⁴⁵⁶ In making this finding, the CMA has also had regard to the European Commission's decision in *Agreements between manufacturers of glass containers*, OJ [1974] L160/1, in which agreements between manufacturers of glass containers to implement a set of rules that prohibited the undercutting of a competitor's prices in certain circumstances were found to be restrictive of competition by object. The Commission found that the clauses in question which contained the rules on undercutting had '*as their real and principal object the restriction of competition between the parties to the detriment of users of glass containers*' (at paragraph 34). It added that '*[s]uch provisions thus tend to prevent competitive behaviour, such as the practice of the most efficient and viable undertaking offering lower prices than those of its competitors...*' and concluded that the clauses in question had '*as their object the prevention of price competition between the parties*' (at paragraph 35).

⁴⁵⁷ It is settled case law that an agreement between undertakings falls outside the prohibition in Article 101(1) TFEU if it has only an insignificant effect on the market: see Case C-226/11 *Expedia Inc. v Autorité de la concurrence and Others*, EU:C:2012:795, paragraph 16 citing, among other cases, Case 5/69 *Völk v Vervaecke*, EU:C:1969:35, paragraph 7. See also *Agreements and Concerted Practices* (OFT401, December 2004), adopted by the CMA Board, paragraph 2.15.

⁴⁵⁸ Case C-226/11 *Expedia Inc. v Autorité de la concurrence and Others*, EU:C:2012:795, paragraph 37; and Commission Notice on agreements of minor importance [2014] OJ C291/01, paragraphs 2 and 13.

⁴⁵⁹ Section 60(2) of the Act provides that, when determining a question in relation to the application of Part 1 of the Act (which includes the Chapter I prohibition), the court (and the CMA) must act with a view to securing that there is no inconsistency with any relevant decision of the European Court in respect of any corresponding question arising in EU law. See also *Carewatch and Care Services Limited v Focus Caring Services Limited and Others* [2014] EWHC 2313 (Ch), paragraphs 148ff.

5.54 As set out above, the CMA has concluded that the Agreement had the object of preventing, restricting or distorting competition (see paragraphs 5.49 to 5.50 above). Given that the test on effect on trade within the UK or a part of it is satisfied (see paragraphs 5.56 to 5.59 below), the CMA has therefore concluded that the Agreement constitutes, by its very nature, an appreciable restriction of competition.

5.55 Furthermore, the CMA has found that the prevention, restriction or distortion of competition was appreciable because the Agreement covered almost the entire market for the provision of traditional residential estate agency services in Burnham as the Parties collectively held an overwhelming majority of the share of the relevant market.

F. Effect on trade within the UK or a part of it

Key legal principles

5.56 The Chapter I prohibition applies to agreements which may affect trade within the UK or a part of it.⁴⁶⁰

5.57 As regards the question whether such an effect must be appreciable for these purposes, the Competition Appeal Tribunal (**CAT**) has held that there is no need to import into the Act the rule of ‘appreciability’ under EU law, the essential purpose of which is to demarcate the fields of EU law and UK domestic law respectively.⁴⁶¹

Findings and conclusions

5.58 Based on the evidence set out in Chapter 3 above, the CMA has found that the Agreement may have affected trade within the UK or a part of it. The Agreement applied to the provision by the Parties of traditional residential estate agency services in Burnham.

5.59 If the appreciability requirement extends to the effect on trade within the UK or a part of it, the CMA has found that the Agreement may have appreciably affected trade within the UK or a part of it as the Agreement covered almost the entire market for the provision of traditional residential estate agency

⁴⁶⁰ The UK includes any part of the UK in which an agreement operates or is intended to operate: section 2(7) of the Act. It is not necessary to demonstrate that an agreement has had an actual impact on trade – it is sufficient to establish that the agreement is capable of having such an effect: joined cases T-202/98 etc. *Tate & Lyle plc and Others v Commission*, EU:T:2001:185, paragraph 78.

⁴⁶¹ *Aberdeen Journals v Director of Fair Trading* [2003] CAT 11 at paragraphs 459 to 461.

services in Burnham as the Parties collectively held an overwhelming majority of the share of the relevant market (see paragraph 3.19 above).

G. Exclusions and exemptions

Exclusion

5.60 The Chapter I prohibition does not apply in any of the cases in which it is excluded by or as a result of Schedules 1 to 3 to the Act.⁴⁶²

5.61 The CMA has found that none of the relevant exclusions applies to the Agreement.

Exemption

Block Exemption

5.62 Pursuant to section 10 of the Act, an agreement is exempt from the Chapter I prohibition if it does not affect trade between EU Member States but otherwise falls within a category of agreement which is exempt from Article 101(1) TFEU by virtue of a block exemption regulation.

5.63 It is for the parties wishing to rely on this provision to prove that the restrictive agreement in question benefits from a block exemption.⁴⁶³ The Parties have not made representations to the CMA in this regard.

5.64 The CMA has found that the Agreement does not benefit from a block exemption regulation.

5.65 In view of the foregoing, the CMA has concluded that the Agreement is not exempt from the application of the Chapter I prohibition pursuant to section 10 of the Act.

Individual exemption

5.66 Agreements which satisfy the criteria set out in section 9 of the Act are exempt from the Chapter I prohibition.

5.67 There are four cumulative criteria to be satisfied:

⁴⁶² Section 3 of the Act sets out the following exclusions: Schedule 1 covers mergers and concentrations; Schedule 2 covers competition scrutiny under other enactments; and Schedule 3 covers general exclusions.

⁴⁶³ Commission Notice *Guidelines on the Application of Article 81(3) of the Treaty* [2004] OJ C101/97 ('**Article 101(3) Guidelines**'), paragraph 35.

- a. the agreement contributes to improving production or distribution, or promoting technical or economic progress,
- b. while allowing consumers a fair share of the resulting benefit,
- c. it does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives,
- d. it does not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.

5.68 In considering whether an agreement satisfies the criteria set out in section 9 of the Act, the CMA will have regard to the Commission's Article 101(3) Guidelines.⁴⁶⁴

5.69 Agreements which have as their object the prevention, restriction or distortion of competition, are unlikely to benefit from individual exemption as such restrictions generally fail (at least) the first two conditions for exemption: they neither create objective economic benefits, nor do they benefit consumers. Moreover, such agreements generally also fail the third condition (indispensability).⁴⁶⁵ However, each case ultimately falls to be assessed on its merits.

5.70 It is for the party claiming the benefit of exemption to prove that the conditions for exemption are satisfied.⁴⁶⁶ No such evidence has been provided by the Parties.

5.71 In view of the foregoing, the CMA has found that the Agreement is not exempt from the application of the Chapter I prohibition pursuant to section 9 of the Act.

⁴⁶⁴ *Agreements and Concerted Practices* (OFT401, December 2004), adopted by the CMA Board, paragraph 5.5.

⁴⁶⁵ Article 101(3) Guidelines, paragraph 46.

⁴⁶⁶ Section 9(2) of the Act.

H. Attribution of liability

Identification of the appropriate legal entity

5.72 For each Party which the CMA has found has infringed the Chapter I prohibition, the CMA has first identified the legal entity directly involved in the Infringement. It has then determined whether liability for the Infringement should be shared with another legal entity, in which case each legal entity's liability will be joint and several.

Key principles

5.73 The liability of a subsidiary undertaking⁴⁶⁷ may be imputed to its parent company where, although having a separate legal personality, the subsidiary did not decide independently upon its conduct on the market (commercial strategy), but carried out, in all material respects, the instructions of its parent company.⁴⁶⁸

5.74 Where a parent company is able to exercise decisive influence over the conduct of the subsidiary, and does in fact exercise such decisive influence, the conduct of a subsidiary may be imputed to its parent company (with joint and several liability for the subsidiary and its parent). In such circumstances, the parent company and its subsidiary form a single economic unit and, therefore, the same undertaking, for the purpose of applying the Chapter I prohibition.⁴⁶⁹

5.75 Where a subsidiary is wholly owned by its parent company, the parent company is in a position to exercise decisive influence and the CMA is entitled to presume that the parent in fact exercised decisive influence over the commercial policy of the subsidiary; this presumption also applies if ownership of the subsidiary is just below 100 per cent.⁴⁷⁰ It is for the parent

⁴⁶⁷ Judgment in *Akzo Nobel NV and Others v Commission*, EU:C:2009:536, paragraph 55.

⁴⁶⁸ Judgment in *ICI v Commission*, EU:C:1972:70, paragraphs 132 and 133; Judgment in *Akzo Nobel NV and Others v Commission*, EU:C:2009:536, paragraph 58.

⁴⁶⁹ Judgment in *Alstom v European Commission*, EU:T:2014:999, paragraph 55; Judgment in *Akzo Nobel NV and Others v Commission*, EU:C:2009:536, paragraph 59.

⁴⁷⁰ Judgment in *Akzo Nobel NV and Others v Commission*, EU:C:2009:536, paragraphs 60 and 61; Judgment in - 174/05 *Elf Aquitaine v Commission*, EU:T:2009:368, paragraphs 153 to 157 (where the presumption was held to apply in relation to a shareholding of approximately 98%); Judgment T-217/06 *Arkema France and Others v Commission*, EU:T:2011:251 at paragraph 53; Judgment of 27 October 2010, *Alliance One International and Others v Commission*, T-24/05, EU:T:2010:453, paragraphs 126-130. The General Court has indicated, among other things, that neither the fact that the subsidiary operates independently in specific aspects of its policy on the marketing of the products concerned by the infringement, nor the lack of any direct involvement in, or knowledge of the facts alleged to constitute, the infringement by directors of the parent company, are sufficient, of themselves, to rebut the presumption. Judgment of 14 July 2011, *Total and Elf Aquitaine v Commission*, T-

company in question to rebut the presumption by adducing sufficient evidence to demonstrate that the subsidiary company acted independently on the market.⁴⁷¹ This also applies to situations where the parent company indirectly holds a 100 per cent ownership in a subsidiary, for example, via one or more intermediary companies.⁴⁷²

- 5.76 Where a parent company is in a position to exercise decisive influence over its subsidiary and does not take any action when it becomes aware of the involvement of that subsidiary in an infringement, it can be inferred that the parent company has tacitly approved its subsidiary's unlawful conduct and therefore the CMA is entitled to consider that the parent's conduct constitutes further evidence of exercise of decisive influence over the subsidiary.⁴⁷³

Application to the Parties

- 5.77 The legal entities that were directly involved in the Infringement during the Relevant Period were Abbott and Frost, Annagram, Gary Berryman Estate Agents Ltd, GTH, Saxons and West Coast.
- 5.78 The CMA has found each of Abbott and Frost, Annagram, Gary Berryman Estate Agents Ltd, GTH, Saxons and West Coast liable for the Infringement.
- 5.79 The CMA has found that Warne Investments is jointly and severally liable with Gary Berryman Estate Agents Ltd for the Infringement. Warne Investments holds a 100 per cent shareholding in [Subsidiary 1 of Warne Investments], which in turn owns a 100 per cent shareholding in Gary Berryman Estate Agents Ltd, and this was the position throughout the Relevant Period.⁴⁷⁴ It can therefore be presumed that Warne Investments exercised a decisive influence over Gary Berryman Estate Agents Ltd during the Relevant Period and therefore forms part of the same undertaking as Gary Berryman Estate Agents Ltd for the purposes of the Chapter I prohibition.

190/06, EU:T:2011:378, paragraph 64; Judgment of 14 July 2011, *Arkema France v Commission*, T-189/06, EU:T:2011:377, paragraph 65.

⁴⁷¹ Judgment of 27 November 2014, *Alstom v European Commission*, T-517/09, EU:T:2014:999, paragraph 55; Judgment in *Akzo Nobel NV and Others v Commission*, EU:C:2009:536, paragraph 61; Judgment in *Alliance One International and Others v Commission*, EU:T:2010:453, paragraph 130.

⁴⁷² Judgment in *General Química and Others v Commission*, C 90/09 P, EU:C:2011:21, paragraphs 86 to 87.

⁴⁷³ Case T-38/05 *Agroexpansion, SA v Commission*, paragraphs 146 and 157. See also Case T-41/05 *Alliance One International Inc v Commission*, paragraph 136.

⁴⁷⁴ See paragraphs 3.34 - 3.52 above.

5.80 This Decision is therefore addressed to Abbott and Frost, Annagram, Gary Berryman Estate Agents Ltd, Warne Investments, GTH, Saxons and West Coast.

6. THE CMA'S ACTION

A. The CMA's decision

6.1 In light of the above, the CMA has made a decision that Abbott and Frost, Annagram, Gary Berryman, GTH, Saxons and West Coast infringed the Chapter I prohibition by participating in an agreement(s) and/or concerted practice(s) to fix a minimum level of commission fees for the provision of traditional residential estate agency services (that is, property sales agency services provided by estate agents that operate with a 'high street' presence) in the area in which the Parties provided these services from branches located in Burnham-on-Sea, being an agreement(s) and/or concerted practice(s) that had as its object the prevention, restriction or distortion of competition within the UK or a part of it and which may have affected trade within the UK or a part of it. The CMA has made a decision that Saxons participated in the Infringement from at least 4 February 2014 until at least 18 February 2015. The CMA has made a decision that Abbott and Frost, Annagram, Gary Berryman, GTH and West Coast participated in the Infringement from at least 4 February 2014 until at least 24 March 2015.

B. Directions

6.2 Section 32(1) of the Act provides that if the CMA has made a decision that an agreement infringes the Chapter I prohibition, it may give such person or persons as it considers appropriate such directions as it considers appropriate to bring the infringement to an end. The CMA has decided not to impose any directions on the Parties in the circumstances of this case as the Infringement is no longer continuing.

C. Financial penalties

General

6.3 Section 36(1) of the Act provides that on making a decision that an agreement has infringed the Chapter I prohibition, the CMA may require an undertaking which is party to the agreement concerned to pay the CMA a penalty in respect of the infringement. In accordance with section 38(8) of the Act, the CMA must have regard to the guidance on penalties in force at the time when setting the amount of penalty.⁴⁷⁵

⁴⁷⁵ Guidance as to the appropriate amount of a penalty (OFT423, September 2012), adopted by the CMA Board (the 'Penalties Guidance')

- 6.4 The CMA has decided to impose a financial penalty on each of the Settling Parties and Saxons as follows:
- a. Abbott and Frost: £30,099;
 - b. Gary Berryman: £93,555;
 - c. GTH: £170,549;
 - d. Saxons: £20,257; and
 - e. West Coast: £55,624
- 6.5 Annagram was the first undertaking to apply to the CMA for leniency in respect of the Infringement under the CMA's leniency policy. Provided Annagram continues to co-operate and comply with the conditions of the CMA's leniency policy, as set out in the immunity agreement between Annagram and the CMA dated 2 March 2017, no financial penalty will be imposed on it. Consequently, the CMA has not calculated the level of any financial penalty that would be applied to Annagram if immunity had not been granted.

The CMA's margin of appreciation in determining the appropriate penalty

- 6.6 Provided the penalties it imposes in a particular case are (i) within the range of penalties permitted by section 36(8) of the Act and the Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 (the '**2000 Order**'),⁴⁷⁶ and (ii) the CMA has had regard to the Penalties Guidance in accordance with section 38(8) of the Act, the CMA has a margin of appreciation when determining the appropriate amount of a penalty under the Act.⁴⁷⁷ The CMA is not bound by its decisions in relation to the calculation of financial penalties in previous cases.⁴⁷⁸
- 6.7 Rather, the CMA makes its assessment on a case-by-case basis⁴⁷⁹ having regard to all relevant circumstances and the objectives of its policy on

⁴⁷⁶ SI 2000/309, as amended by the Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004, SI 2004/1259.

⁴⁷⁷ *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, at [168] and *Umbro Holdings and Manchester United and JJB Sports and Allsports v OFT* [2005] CAT 22, at [102].

⁴⁷⁸ See, for example, *Eden Brown and Others v OFT* [2011] CAT 8, at [78].

⁴⁷⁹ See, for example, *Kier Group and Others v OFT* [2011] CAT 3, at [116] where the CAT noted that '*other than in matters of legal principle there is limited precedent value in other decisions relating to penalties, where the maxim that each case stands on its own facts is particularly pertinent*'. See also *Eden Brown and Others v OFT* [2011] CAT 8, at [97] where the CAT observed that '*[d]ecisions by this Tribunal on penalty appeals are very closely related to the particular facts of the case*'.

financial penalties. In line with statutory requirements and the twin objectives of its policy on financial penalties, the CMA will have regard to the seriousness of the infringement and the desirability of deterring both the undertaking on which the penalty is imposed and other undertakings from engaging in behaviour that breaches the prohibition in Chapter I of the Act (as well as other prohibitions under the Act and the TFEU as the case may be).⁴⁸⁰

Small agreements

- 6.8 The CMA has decided that section 39 of the Act (which provides for limited immunity from penalties in relation to the Chapter I prohibition) does not apply in the present case on the basis that the Infringement amounted to a 'price fixing agreement' within the meaning of section 39(9) of the Act.⁴⁸¹

Intention/negligence

- 6.9 The CMA may impose a penalty on an undertaking which has infringed the Chapter I prohibition only if the CMA is satisfied that the infringement has been committed intentionally or negligently.⁴⁸² However, the CMA is not obliged to specify whether it considers the infringement to be intentional or merely negligent.⁴⁸³

- 6.10 The CAT has defined the terms 'intentionally' and 'negligently' as follows:⁴⁸⁴

'...an infringement is committed intentionally for the purposes of section 36(3) of the Act if the undertaking must have been aware, or could not have been unaware, that its conduct had the object or would have the effect of restricting competition. An infringement is committed negligently for the purposes of section 36(3) if the undertaking ought to have known that its conduct would result in a restriction or distortion of competition'.

⁴⁸⁰ Section 36(7A) of the Act and the Penalties Guidance, paragraph 1.4.

⁴⁸¹ A 'price fixing agreement' within the meaning of section 39(9) of the Act is 'an agreement which has as its object or effect, or one of its objects or effects, restricting the freedom of a party to the agreement to determine the price to be charged (otherwise than as between that party and another party to the agreement) for the product, service or other matter to which the agreement relates'. By virtue of section 39(1)(b) of the Act, such an agreement is excluded from the benefit of the limited immunity from penalties provided by section 39 of the Act.

⁴⁸² Section 36(3) of the Act.

⁴⁸³ *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* [2002] CAT 1, paragraphs [453] to [457]; see also *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, at [221].

⁴⁸⁴ *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, at [221].

6.11 This is consistent with the approach taken by the Court of Justice which has confirmed:⁴⁸⁵

'the question whether the infringements were committed intentionally or negligently...is satisfied where the undertaking concerned cannot be unaware of the anti-competitive nature of its conduct, whether or not it is aware that it is infringing the competition rules of the Treaty'.

6.12 The circumstances in which the CMA might find that an infringement has been committed intentionally include the situation in which the agreement or conduct in question had as its object the restriction of competition.⁴⁸⁶ As noted at paragraphs 5.49 to 5.50 above, the CMA has found that the Agreement had as its object the prevention, restriction or distortion of competition. Accordingly, the CMA has found that the Infringement was committed intentionally.

6.13 Ignorance or a mistake of law does not prevent a finding of intentional infringement, even where such ignorance or mistake is based on independent legal advice.⁴⁸⁷

6.14 For the reasons set out at paragraphs 5.38 to 5.50 above the CMA has found that the Infringement had as its object the prevention, restriction or distortion of competition and that the Parties must therefore have been aware (or could not have been unaware) and, at the very least, ought to have known that their conduct was capable of harming competition.

6.15 Further, there is evidence that [Senior Employee 1] (Gary Berryman) considered that the terms of the Agreement needed to be kept confidential and encouraged the other Parties to do the same. In an email dated 17 February 2014 (cited more fully at paragraph 3.140 above) [Senior Employee 1] (Gary Berryman) stated as follows in relation to the terms of the Agreement:⁴⁸⁸

*'I would mention that we are circulating this email to all our staff and we are making sure they are aware that **the contents are for their eyes only and would be grateful if you could all do the same**' (emphasis added).*

⁴⁸⁵ Case 280/08 P *Deutsche Telekom v Commission* [2010] ECR I-9555, paragraph 124.

⁴⁸⁶ See *Enforcement* (OFT407, December 2004), adopted by the CMA Board, paragraph 5.9.

⁴⁸⁷ See Case C-681/11 *Bundeswettbewerbshörde v Schenker & Co. AG*, EU:C:2013:404, paragraph 38. See also *Enforcement* (OFT407, December 2004), adopted by the CMA Board, paragraph 5.10.

⁴⁸⁸ [URN0878]

6.16 The CMA has therefore found that the Parties committed the Infringement intentionally or, at the very least, negligently.

Calculation of the penalty

6.17 As noted at paragraph 6.3 above, when setting the amount of the penalty, the CMA must have regard to the Penalties Guidance. The Penalties Guidance sets out a six-step approach for calculating the penalty.

Step 1 – starting point

6.18 The starting point for determining the level of financial penalty which will be imposed on an undertaking is calculated having regard to the relevant turnover of the undertaking and the seriousness of the infringement.⁴⁸⁹

6.19 The ‘relevant turnover’ is the turnover of the undertaking in the relevant market affected by the infringement in the undertaking’s last business year.⁴⁹⁰ The ‘last business year’ is generally the undertaking’s financial year preceding the date when the infringement ended.⁴⁹¹

6.20 In order to reflect adequately the seriousness of an infringement, the CMA will apply a starting point of up to 30 per cent of the undertaking’s relevant turnover.⁴⁹² The actual percentage which is applied to the relevant turnover depends, in particular, upon the nature of the infringement. The more serious and widespread the infringement, the higher the likely percentage rate.⁴⁹³ While making its assessment of the seriousness of the infringement, the CMA will consider a number of factors.⁴⁹⁴ The CMA will use a starting point towards the upper end of the range for the most serious infringements of competition law, including hard-core cartel activity.⁴⁹⁵ The CMA will also take into account the need to deter other undertakings from engaging in such

⁴⁸⁹ Penalties Guidance, paragraphs 2.3 to 2.11.

⁴⁹⁰ Penalties Guidance, paragraph 2.7. The CMA notes the observation of the Court of Appeal in *Argos Ltd and Littlewoods Ltd v Office of Fair Trading and JJB Sports plc v Office of Fair Trading* [2006] EWCA Civ 1318, at paragraph 169 that: ‘[n]either at the stage of the OFT investigation, nor on appeal to the Tribunal, is a formal analysis of the relevant product market necessary in order that regard can properly be had to step 1 of the Guidance in determining the appropriate penalty.’ The Court of Appeal considered that it was sufficient for the OFT to ‘be satisfied, on a reasonable and properly reasoned basis, of what is the relevant product market affected by the infringement’ (at paragraphs 170 to 173).

⁴⁹¹ Penalties Guidance, paragraph 2.7.

⁴⁹² Penalties Guidance, paragraph 2.5.

⁴⁹³ Penalties Guidance, paragraph 2.4.

⁴⁹⁴ In accordance with paragraph 2.6 of the Penalties Guidance, these factors include the nature of the product, the structure of the market, the market shares of the undertakings involved in the infringement, entry conditions and the effect on competitors and third parties. The CMA may also take into account other relevant factors.

⁴⁹⁵ Penalties Guidance, paragraph 2.5.

infringements in the future. The assessment is made on a case-by-case basis, taking account of all the circumstances of the case.⁴⁹⁶

Step 2 – adjustment for duration

- 6.21 The starting point under step 1 may be increased, or in particular circumstances decreased, to take into account the duration of an infringement. Where the total duration of an infringement is more than one year, the CMA will round up part years to the nearest quarter year, although the CMA may in exceptional circumstances decide to round up the part year to a full year.⁴⁹⁷

Step 3 – adjustment for aggravating and mitigating factors

- 6.22 The amount of the penalty, adjusted as appropriate at step 2, may be increased where there are aggravating factors, or reduced where there are mitigating factors. A non-exhaustive list of aggravating and mitigating factors is set out in the Penalties Guidance.⁴⁹⁸

Step 4 – adjustment for specific deterrence and proportionality

- 6.23 The penalty may be adjusted at this step to achieve the objective of specific deterrence (namely, ensuring that the penalty imposed on the infringing undertaking will deter it from engaging in anti-competitive practices in the future), or to ensure that a penalty is proportionate, having regard to appropriate indicators of the size and financial position of the undertaking as well as any other relevant circumstances of the case.⁴⁹⁹ At step 4, the CMA will assess whether, in its view, the overall penalty is appropriate in the round. Adjustment to the penalty at step 4 may result in either an increase or a decrease to the penalty.
- 6.24 Increases to the penalty figure at step 4 will generally be limited to situations in which an undertaking has a significant proportion of its turnover outside the relevant market, or where the CMA has evidence that the infringing undertaking has made or is likely to make an economic or financial benefit from the infringement that is above the level of the penalty reached at the

⁴⁹⁶ Penalties Guidance, paragraph 2.6.

⁴⁹⁷ Penalties Guidance, paragraph 2.12.

⁴⁹⁸ Penalties Guidance, paragraphs 2.13 – 2.15.

⁴⁹⁹ Penalties Guidance, paragraph 2.16. The CMA has considered a range of financial indicators in this regard, based on accounting information publicly available and/or provided by the Settling Parties and Saxons at the time of calculating the penalty. Those financial indicators included relevant turnover, total worldwide turnover for the last financial year, average total worldwide turnover over a three year period, average profit after tax over a three year period, net assets for the last financial year and dividends over a three year period.

end of step 3.⁵⁰⁰ In considering the appropriate level of uplift for specific deterrence, the CMA will ensure that the uplift does not result in a penalty that is disproportionate or excessive having regard to the infringing undertaking's size and financial position and the nature of the infringement.⁵⁰¹

- 6.25 Conversely, where necessary, the penalty may be decreased at step 4 to ensure that the level of penalty is not disproportionate or excessive. In carrying out this assessment of whether a penalty is proportionate, the CMA will have regard to the infringing undertaking's size and financial position, the nature of the infringement, the role of the undertaking in the infringement and the impact of the undertaking's infringing activity on competition.⁵⁰²

Step 5 – adjustment to prevent the maximum penalty from being exceeded and to avoid double jeopardy

- 6.26 The CMA may not impose a penalty for an infringement that exceeds 10 per cent of an undertaking's 'applicable turnover', that is the worldwide turnover of the undertaking in the business year preceding the date of the CMA's decision or, if figures are not available for that business year, the one immediately preceding it.⁵⁰³

- 6.27 In addition, the CMA must, when setting the amount of a penalty for a particular agreement or conduct, take into account any penalty or fine that has been imposed by the European Commission, or by a court or other body in another EU Member State in respect of the same agreement or conduct.⁵⁰⁴

Step 6 – application of reduction for leniency and settlement

- 6.28 The CMA will reduce the undertaking's penalty where the undertaking has a leniency agreement with the CMA in accordance with the CMA's published guidance on leniency, currently the Leniency Guidance, provided always that the undertaking meets the conditions of the leniency agreement.⁵⁰⁵

⁵⁰⁰ Penalties Guidance, paragraph 2.17.

⁵⁰¹ Penalties Guidance, paragraph 2.19.

⁵⁰² Penalties Guidance, paragraph 2.20.

⁵⁰³ Section 36(8) of the Act and the 2000 Order, as amended. See also Penalties Guidance, paragraph 2.21.

⁵⁰⁴ Penalties Guidance, paragraph 2.24. As there is no such applicable penalty or fine, no adjustment has been necessary in this case in that regard.

⁵⁰⁵ Penalties Guidance, paragraph 2.25. See also the Leniency Guidance.

6.29 Similarly, the CMA will reduce an undertaking's financial penalty at step 6 where the undertaking has agreed to settle the case with the CMA. This will involve, amongst other things, the undertaking admitting its participation in the infringement.⁵⁰⁶

Financial hardship

6.30 In exceptional circumstances, the CMA may reduce a penalty where the undertaking is unable to pay the penalty due to its financial position. Such financial hardship adjustments will be exceptional and there can be no expectation that a penalty will be adjusted on this basis.⁵⁰⁷

Penalty calculations

6.31 In determining the penalties for Saxons and the Settling Parties, the CMA has had regard to the six-step approach for calculating the penalty as set out in the Penalties Guidance and described above.

Step 1 – starting point

6.32 For the purpose of calculating the penalties for Saxons and the Settling Parties, the CMA used a starting point of 29 per cent of relevant turnover.

6.33 The CMA applied a 29 per cent starting point to the following relevant turnover figures for Saxons and each of the Settling Parties:

- a. Abbott and Frost - £[redacted], whose 'last business year' was the financial year ending 31 March 2014;⁵⁰⁸
- b. Gary Berryman - £[redacted], whose 'last business year' was the financial year ending 31 March 2014;⁵⁰⁹
- c. GTH - £[redacted], whose 'last business year' was the financial year ending 31 December 2014;⁵¹⁰

⁵⁰⁶ Penalties Guidance paragraph 2.26.

⁵⁰⁷ Penalties Guidance, paragraph 2.27.

⁵⁰⁸ Annex 1B to Abbott and Frost's response of 6 September 2016 to the CMA's section 26 notice dated 10 August 2016, [URN2078].

⁵⁰⁹ Annex 1B to Garry Berryman's response of 12 September 2016 to the CMA's section 26 notice dated 10 August 2016, [URN2072].

⁵¹⁰ Annex 1B to GTH's response of 24 August 2016 to the CMA's request for information dated 10 August 2016, [URN2083].

- d. Saxons - £[§<], whose 'last business year' was the financial year ending 30 November 2014;⁵¹¹ and
- e. West Coast - £[§<], whose 'last business year' was the financial year ending 31 December 2014.⁵¹²

6.34 In assessing the seriousness of the Infringement and arriving at a starting point of 29 per cent, the CMA had regard to the factors listed in paragraph 2.6 of the Penalties Guidance and, in particular, the following features of this case:

- a. the Infringement involved the most serious type of cartel behaviour, i.e. it was an agreement to fix (minimum) prices between horizontal competitors;
- b. the Infringement involved almost all competitors in the relevant market and covered almost the entire market;⁵¹³
- c. the use of mechanisms such as 'policing' to implement and promote adherence to the Agreement between the Parties;⁵¹⁴ and
- d. the need to achieve general deterrence within the estate agency sector. The need for further general deterrence is illustrated by the fact that, with the exception of Annagram,⁵¹⁵ the Parties contemplated re-starting their arrangement even though the CMA had taken well publicised enforcement action in the sector (i.e. the *Three Counties* case).⁵¹⁶

Step 2 – adjustment for duration

6.35 For the purpose of calculating the penalties for Saxons and the Settling Parties, the CMA applied a multiplier of 1.25 to the starting point for each party to reflect the duration of the Infringement, which the CMA found:

- a. in the case of Saxons, lasted from at least 4 February 2014 until at least 18 February 2015; and

⁵¹¹ Annex 1B to Saxons' response of 23 September 2016 to the CMA's section 26 notice dated 12 August 2016, [URN1970].

⁵¹² Annex 1B to West Coast's response of 24 August 2016 to the CMA's request for information dated 10 August 2016, [URN2047].

⁵¹³ See paragraph 3.19 and footnote 29 above.

⁵¹⁴ See, in particular, paragraphs 3.146 to 3.170 above.

⁵¹⁵ [§<]

⁵¹⁶ See paragraphs 3.195, 3.235, 3.240, 3.244 and paragraphs 3.250 to 3.256 above.

- b. in the case of the Settling Parties, lasted from at least 4 February 2014 until at least 24 March 2015.

Step 3 – adjustment for aggravating and mitigating factors

6.36 For the purpose of calculating the penalties for Saxons and the Settling Parties, the CMA made the following adjustments at step 3.

- *Aggravating factor: involvement of senior managers or directors*

6.37 The penalty for Saxons and the Settling Parties includes a 15 per cent increase at step 3 for director and/or senior manager involvement in the Infringement:

- a. In respect of Abbott and Frost, the direct participation in, and implementation of, the Infringement by [Senior Employee 1] (Abbott and Frost) and [Senior Employee 2] (Abbott and Frost), both of whom were [senior employees] of the company, as described in more detail at paragraphs 3.82 to 3.249 above;
- b. In respect of GTH, the role of a [Senior Employee 1 (GTH)], in forming, directly participating in and implementing the Infringement, as described in more detail at paragraphs 3.82 to 3.213 above;
- c. In respect of Gary Berryman:
 - i. the role of [Senior Employee 1] (Gary Berryman), in forming, directly participating in and implementing the Infringement, as described in more detail at paragraphs 3.82 to 3.249 above;
 - ii. the role of [Senior Employee 2] (Gary Berryman), in directly participating in and implementing the Infringement, as described in more detail at paragraphs 3.82 to 3.203 above; and
 - iii. the role of [Senior Employee 3] (Gary Berryman [X]), who was aware⁵¹⁷ of the Infringement, and at least supported it,⁵¹⁸ rather than taking steps either to prevent it or bring it to an end, as described in more detail at paragraphs 3.111, 3.116 and 3.187 above,⁵¹⁹

⁵¹⁷ See paragraphs 3.111, 3.116 and 3.187 above.

⁵¹⁸ See paragraph 3.111 and footnote 48 above.

⁵¹⁹ The CMA did not consider that Gary Berryman's representations, as set out in its letters to the CMA dated 15 February 2017 and 7 April 2017, concerning the role of [Senior Employee 3] (Gary Berryman) in relation to the Infringement, alter the CMA's conclusion that [Senior Employee 3] (Gary Berryman) was aware of the Infringement, and at least supported it, rather than taking steps either to prevent it or put it to an end.

- d. In respect of Saxons, the direct participation in, and implementation of, the Infringement by [Senior Employee 1] (Saxons), as described in more detail at paragraphs 3.82 to 3.229 above; and
- e. In respect of West Coast:
 - i. the direct participation in and implementation of the Infringement by [Senior Employee 2] (West Coast) and [Senior Employee 1] (West Coast), as described in more detail at paragraphs 3.82 to 3.249 above;
 - ii. the role of [Senior Employee 3] (West Coast), who was aware of the Infringement and did not take steps to bring it to an end, as described in more detail at paragraphs 3.104, 3.128, 3.192, 3.205, 3.235, 3.241 and 3.247 above.

- *Aggravating factor: leader and/or instigator*

6.38 The penalty for Gary Berryman includes a 10 per cent increase and that for GTH a 5 per cent increase at step 3 for their roles as joint instigators and, in the case of Gary Berryman, a leader, of the Infringement.

6.39 In respect of GTH, the CMA has found that the evidence set out above⁵²⁰ demonstrates that [Senior Employee 1] (GTH) jointly instigated the Infringement with [Senior Employee 1] (Gary Berryman) by making in October 2013 the initial contact with [Senior Employee 1] (subsequently of Gary Berryman) about the possibility of concerted action between the Parties with regard to fees, encouraging [Senior Employee 1] (Gary Berryman) in his efforts to make contact with the other Parties and discussing with [Senior Employee 1] (Gary Berryman) the proposals for the Formation Meeting.

6.40 In respect of Gary Berryman, the CMA considered that the evidence set out above⁵²¹ demonstrates that [Senior Employee 1] (Gary Berryman) jointly instigated the Infringement with [Senior Employee 1] (GTH) and subsequently played a leading role in driving forward the Infringement, in particular:⁵²²

⁵²⁰ Including, but not limited to, paragraphs 3.86, 3.87 and 3.109 above.

⁵²¹ Including, but not limited to, paragraphs 3.86, 3.87 and 3.109 above.

⁵²² The CMA did not consider that the fact that [Senior Employee 1] (Gary Berryman) was employed by Gary Berryman only from 1 November 2013 negates its finding that Gary Berryman jointly instigated the arrangement with GTH. Rather, the CMA's finding in this regard is based on [Senior Employee 1]'s (Gary Berryman) role from the time he took up his employment with Gary Berryman on 1 November 2013 to the formation of the Infringement in February 2014.

- a. after the initial contact with [Senior Employee 1] (GTH) and at a point when he had commenced employment with Gary Berryman, [Senior Employee 1] (Gary Berryman) made contact with all the other Parties to arrange a meeting to discuss commission fees for the sale of residential property;⁵²³
- b. [Senior Employee 1] (Gary Berryman) proposed to [Senior Employee 1] (GTH) in advance of the Formation Meeting the specific fees he thought they should seek to agree with the other Parties at the Formation Meeting;⁵²⁴ and
- c. [Senior Employee 1] (Gary Berryman) subsequently acted as a leader, driving forward the Agreement through active email contact with the Parties, including sending the Formation Confirmation Email which confirmed the content of the Agreement,⁵²⁵ encouraging others to monitor the Agreement,⁵²⁶ arranging meetings⁵²⁷ and sending an email to the Parties attempting to restart the Agreement in June 2015.⁵²⁸

- *Mitigating factor: cooperation*

6.41 The penalties for Abbott and Frost, Gary Berryman and Saxons include a 5 per cent reduction at step 3 to reflect the fact that each of them made at least one key witness available for voluntary interview with a view to enabling the CMA to conclude its investigation more effectively and/or speedily.

- *Mitigating factor: compliance*

6.42 The penalties for Gary Berryman, GTH, Saxons and West Coast include the following discounts for adequate steps taken post-launch of the CMA's investigation to ensure compliance with Articles 101 and 102 TFEU and the Chapter I and Chapter II prohibitions:

- a. 10 per cent for each of Gary Berryman, GTH and West Coast. The CMA considers that, in accordance with the '4-step compliance process' set out in the CMA's Competition Law Compliance Guidance,⁵²⁹ the identified compliance activities by each of Gary

⁵²³ See paragraphs 3.87 - 3.108 above.

⁵²⁴ See paragraph 3.109 above.

⁵²⁵ See paragraphs 3.114 - 3.115 above.

⁵²⁶ See paragraphs 3.115, 3.146, 3.148, 3.151, 3.161 and 3.162 above.

⁵²⁷ See paragraphs 3.187 and 3.191 - 3.192 above.

⁵²⁸ See paragraphs 3.250 - 3.251 above.

⁵²⁹ *Guidance on how your business can achieve compliance with competition law* (OFT1341, June 2011), adopted by the CMA Board ('**Competition Law Compliance Guidance**').

Berryman, GTH and West Coast demonstrate a clear and unambiguous commitment to competition law compliance, in that they have engaged in appropriate steps relating to risk identification, assessment, mitigation and review. The CMA has been provided with evidence of implementation of the compliance programmes by each of Gary Berryman, GTH and West Coast, including publication of a competition law compliance statement on external websites of each of Gary Berryman, GTH and West Coast; and

- b. 5 per cent for Saxons for the evidence of its competition law compliance programme submitted to the CMA. Having regard to the '4-step compliance process' under the CMA's Competition Law Compliance Guidance, the CMA considers that, whilst the identified compliance activities do not demonstrate appropriate steps to identify, assess and review risk, they do nevertheless demonstrate that Saxons has engaged in appropriate steps that mitigate the risk of non-compliance.

Step 4 – adjustment for specific deterrence and proportionality

6.43 Where appropriate, the penalties for Saxons and the Settling Parties include adjustments at step 4 of the penalty calculation, as follows:

- *Abbott and Frost*

6.44 The penalty for Abbott and Frost includes a [0-100] per cent decrease at step 4 to ensure that the level of the penalty is proportionate and appropriate in the circumstances, having regard to Abbott and Frost's size and financial position.

6.45 In assessing the penalty for Abbott and Frost in the round at step 4, the CMA took into account:

- a. Abbott and Frost's average annual turnover (over the three year period ending 31 March 2016);
- b. Abbott and Frost's average annual profit after tax (over the three year period ending 31 March 2016); and
- c. Abbott and Frost's adjusted net assets.⁵³⁰

⁵³⁰ Being net assets in the financial year ending 31 March 2016, together with dividends paid out in the financial years ending 31 March 2014, 31 March 2015 and 31 March 2016.

- *Gary Berryman*
- 6.46 The penalty for Gary Berryman [3<] [0-100 per cent] at step 4 [3<] , having regard to Gary Berryman's size and financial position.
- 6.47 In assessing the penalty for Gary Berryman in the round at step 4, the CMA took into account:⁵³¹
 - a. Gary Berryman's average annual turnover (over the three year period ending 31 March 2016);
 - b. Gary Berryman's average annual profit after tax (over the three year period ending 31 March 2016); and
 - c. Gary Berryman's adjusted net assets.⁵³²
- *GTH*
- 6.48 The penalty for GTH includes an increase of [100-200] per cent at step 4 to ensure that the penalty is sufficient for specific deterrence. The CMA has decided that such an increase is appropriate and proportionate having regard to GTH's size and financial position.
- 6.49 In assessing the penalty for GTH in the round at step 4, the CMA took into account:
 - a. GTH's average annual turnover (over the three year period ending 31 December 2015);
 - b. estimated average annual profit after tax of GTH (over the three year period ending 31 December 2015);⁵³³

⁵³¹ References in this paragraph to Gary Berryman's financial information are to Gary Berryman's consolidated financial position as set out in [Subsidiary 1 of Warne Investments] financial statements for the financial years ending 31 March 2014, 31 March 2015 and 31 March 2016. As part of this assessment, the CMA also took into account the financial support provided to Gary Berryman by the group of companies headed by [A company formerly owned by Warne Investments], which used to be under common control of Gary Berryman's shareholders.

⁵³² Being Gary Berryman's net assets in the financial year ending 31 March 2016, together with dividends paid out in the financial years ending 31 March 2014, 31 March 2015 and 31 March 2016.

⁵³³ The CMA estimated GTH's profit after tax for the three year period ending 31 December 2015 by reference to the information provided by GTH and contained in GTH's financial statements for the financial years ending 31 December 2013, 31 December 2014 and 31 December 2015.

c. estimated adjusted net assets of GTH;⁵³⁴ and

d. the proportion of its turnover generated outside the relevant market.

- *Saxons*

6.50 The penalty for Saxons includes a [0-100] per cent decrease at step 4 to ensure that the level of the penalty is proportionate and appropriate in the circumstances, having regard to Saxons' size and financial position.

6.51 In assessing the penalty for Saxons in the round at step 4, the CMA took into account:⁵³⁵

a. Saxons' average annual turnover (over the two year period ending 30 November 2014);

b. Saxons' (negative) average profit after tax (over the two year period ending 30 November 2014); and

c. Saxons' (negative) adjusted net assets.⁵³⁶

- *West Coast*

6.52 The penalty for West Coast includes an increase of [0-100] per cent at step 4 to ensure that the penalty is sufficient for specific deterrence. The CMA considers that such an increase is appropriate and proportionate having regard to West Coast's size and financial position.

6.53 In assessing the penalty for West Coast in the round at step 4, the CMA has taken into account:⁵³⁷

⁵³⁴ The CMA estimated GTH's adjusted net assets figures for the three year period ending 31 December 2015 by reference to the information provided by GTH and contained in GTH's financial statements for the financial years ending 31 December 2013, 31 December 2014 and 31 December 2015.

⁵³⁵ For the Settling Parties, the CMA took into account average annual turnover, average profit after tax and dividends paid over the most recent three financial years for which the Settling Parties prepared financial statements. For Saxons the CMA took into account average annual turnover, average profit after tax and dividends paid in the two financial years ending 30 November 2013 and 30 November 2014 (as contained in Saxons' financial statements for these financial years and in an email from Saxons' accountants, [An Accountant], to the CMA dated 30 November 2016, copied to [redacted] (Saxons) on the same date [URN2103]) as financial information was not available for the financial years ending 30 November 2015 and 30 November 2016.

⁵³⁶ Being net assets in the financial year ending 30 November 2014, together with dividends paid in the financial years ending 30 November 2013 and 30 November 2014.

⁵³⁷ References in this paragraph to West Coast's financial information are to that of West Coast and its subsidiary company, [Subsidiary 1 of West Coast].

- a. West Coast's average annual turnover (over the three year period ending 31 March 2016);
- b. West Coast's average annual profit after tax (over the three year period ending 31 March 2016);
- c. West Coast's adjusted net assets;⁵³⁸ and
- d. the proportion of its turnover generated outside the relevant market.

Step 5 – adjustment to prevent the maximum penalty from being exceeded and to avoid double jeopardy

6.54 The CMA has assessed the Settling Parties' and Saxons' penalties after step 4 against the statutory maximum penalty. This assessment has not necessitated any reduction to the penalty at step 5 of the penalty calculation for any of the Settling Parties or Saxons.⁵³⁹

Step 6 – application of reduction for leniency and settlement

- *Leniency*

6.55 In addition to Annagram, which has been granted immunity under the CMA's leniency policy as set out in its immunity agreement, and - provided it continues to co-operate and comply with the conditions of the CMA's leniency policy, as set out in its immunity agreement - will not be required to pay a financial penalty (see paragraph 2.3 above), two of the Settling Parties (West Coast and GTH) also applied for and were granted leniency under the CMA's leniency policy. The penalty for those Parties includes a leniency discount of 35 per cent in the case of West Coast and 15 per cent in the case of GTH, provided in each case that they continue to co-operate and comply with the conditions of the CMA's leniency policy as set out in the respective leniency agreements.

6.56 In determining the level of leniency discount for West Coast and GTH, the CMA had regard to a number of factors, in particular, the fact that they were not the first to come forward (and therefore fell to be treated as 'Type C

⁵³⁸ Being net assets in the financial year ending 31 March 2016, together with dividends paid out in the financial years ending 31 March 2014, 31 March 2015 and 31 March 2016.

⁵³⁹ In conducting the assessment for Saxons, as financial information was not available for the financial years ending 30 November 2015 and 30 November 2016, the CMA has assessed Saxons' proposed penalty after step 4 against the statutory maximum penalty as determined by reference to the financial information contained in Saxons' financial statements for the financial year ending 30 November 2014.

leniency applicants' under the CMA's leniency policy),⁵⁴⁰ the overall added value of the information, documents and evidence they were able to provide, and their overall level of cooperation.⁵⁴¹

6.57 West Coast applied for leniency in January 2016, after the start of the CMA's investigation and at a time when the CMA had already gathered considerable evidence. This meant that the documentary material voluntarily provided by West Coast was of limited additional value to the CMA's investigation. However, West Coast was able to provide significant added value to the CMA's investigation by making available for interview two of its senior managers, [Senior Employee 1] (West Coast) and [Senior Employee 2] (West Coast), whose evidence is relied on significantly in the Decision.

6.58 GTH applied for leniency in June 2016, after the start of the CMA's investigation and after both Annagram and West Coast had already applied for leniency. Given that the CMA already had considerable evidence, the very limited documentary material voluntarily provided by GTH was of limited value to the CMA's investigation. However, GTH was able to add value to the CMA's investigation by making a [Senior Employee 1] (GTH), and [Employee 1] (GTH), available for interview, whose evidence is relied on in this Decision, albeit that the credit that GTH obtained for [Senior Employee 1]'s (GTH) evidence would have been higher had GTH (acting through [Senior Employee 1] (GTH)) been more candid from the outset of GTH's leniency application about the extent of [Senior Employee 1]'s (GTH) participation in the Infringement.

- *Settlement*

6.59 The penalty for each of the Settling Parties includes a 20 per cent discount to reflect the fact that they admitted the Infringement and agreed to cooperate in expediting the process for concluding the investigation (provided that the Settling Parties comply with the continuing requirements of settlement).

- *Financial hardship*

6.60 The penalties for the Settling Parties do not include any adjustment for financial hardship, which the CMA did not consider would be warranted in the case of the Settling Parties.

⁵⁴⁰ Penalties Guidance paragraph 3.4. See also Leniency Guidance.

⁵⁴¹ Leniency Guidance, paragraph 6.8.

6.61 As regards Saxons, having considered at step 4 the proportionality of the financial penalty to be imposed on Saxons in light of its financial position, the CMA considered that there were no additional factors that would warrant making any further adjustment to Saxons' penalty after step 6 for financial hardship.

D. Payment of penalties

6.62 The table below sets out the final penalties the CMA requires Abbott and Frost, Gary Berryman, GTH, Saxons and West Coast to pay, together with an outline of the six step calculation by which they were arrived at.⁵⁴²

6.63 Payments should be made to the CMA by close of banking business on the next working day two calendar months from the expected date of receipt of the Decision or on such date or dates as agreed in writing with the CMA.

⁵⁴² Details on how to pay the penalty are set out in the letter accompanying this Decision.

Summary table of final penalties

Step	Description	Abbott and Frost	Gary Berryman	GTH	Saxons	West Coast	
	Relevant turnover	£[X]	£[X]	£[X]	£[X]	£[X]	
1	Starting point as a percentage of relevant turnover	x 29%	x 29%	x 29%	x 29%	x 29%	
2	Adjustment for duration	x 1.25	x 1.25	x 1.25	x 1.25	x 1.25	
3	Adjustment for aggravating or mitigating factors	Aggravating: director / senior manager involvement	+15%	+15%	+15%	+15%	+15%
		Aggravating: instigator / leader	0%	+10%	5%	0%	0%
		Mitigating: cooperation	-5%	-5%	0%	-5%	0%
		Mitigating: compliance	0%	-10%	-10%	-5%	-10%
4	Adjustment for specific deterrence or proportionality	[- 0-100]%	[0 - 100]%	[+ 100-200]%	[- 0-100]%	[+ 0-100]%	
5	Adjustment to take account of the statutory maximum penalty	No adjustment necessary	No adjustment necessary	No adjustment necessary	No adjustment necessary	No adjustment necessary	
6	Leniency discounts	0%	0%	-15%	0%	-35%	
	Settlement discount	-20%	-20%	-20%	0%	-20%	
	Final penalty	£30,099	£93,555	£170,549	£20,257	£55,624	

7. GLOSSARY

Term	Definition
the 2000 Order	The Competition Act 1998 (Determination of Turnover for Penalties) Order 2000, as amended by the Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004, SI 2004/1259.
Abbott and Frost	Abbott and Frost Estate Agents Limited
the Act	Competition Act 1998
Agreement	The agreement and/or concerted practice between all of the Parties to fix a minimum level of commission fees for the provision of traditional residential estate agency (that is, property sales agency) services in Burnham. The CMA has found that Saxons participated in the Agreement from at least 4 February 2014 until at least 18 February 2015; and that the other Parties participated in the Agreement from at least 4 February 2014 until at least 24 March 2015.
Annagram	Annagram Estates Limited (trading as CJ Hole)
Article 101(3) Guidelines	Commission Notice <i>Guidelines on the Application of Article 81(3) of the Treaty</i> [2004] OJ C101/97
Association	The Burnham Association of Lettings and Estate Agents
Burnham	The area in which the Parties provided traditional residential estate agency services (that is, property sales agency services provided by estate agents that operate with a 'high street' presence) from branches located in Burnham-on-Sea
CA98 Rules	The Competition Act 1998 (Competition and Market Authority's Rules) Order 2014, SI 2014/458
CAT	Competition Appeal Tribunal
[Other Burnham Estate Agent 1]	[Other Burnham Estate Agent 1]
Chapter I prohibition	The prohibition imposed by section 2(1) of the Act
CMA	The Competition and Markets Authority
Competition Law Compliance Guidance	<i>Guidance on how your business can achieve compliance with competition law</i> (OFT1341, June 2011), adopted by the CMA Board
Constitution and Rules	A constitutional document of the Association
Formation Confirmation Email	Email entitled ' <i>Fees!</i> ' and sent to the Parties by [Senior Employee 1] (Gary Berryman) at 10:44 on 5 February 2014
Formation Meeting	The meeting between the Parties held at GTH's Burnham office on 4 February 2014

Gary Berryman	Gary Berryman Estate Agents Ltd and its ultimate parent company, Warne Investments Limited
GTH	Greenslade Taylor Hunt
Infringement	The Parties' infringement of the Chapter I prohibition by participation in an agreement and/or concerted practice to fix a minimum level of commission fees for the provision of traditional residential estate agency services (that is, property sales agency services provided by estate agents that operate with a 'high street' presence) in the area in which the Parties provided these services from branches located in Burnham-on-Sea from at least 4 February 2014 until at least 18 February 2015 in the case of Saxons and until at least 24 March 2015 in the case of the other Parties
Leniency Guidance	<i>Applications for leniency and no-action in cartel cases</i> (OFT1495, July 2013), adopted by the CMA Board
NAEA	National Association of Estate Agents
Parties and each a Party	Abbott and Frost, Annagram, Gary Berryman, GTH, Saxons and West Coast
Penalties Guidance	<i>Guidance as to the appropriate amount of a penalty</i> (OFT423, September 2012), adopted by the CMA Board
Relevant Period	The period from at least 4 February 2014 until at least 18 February 2015 in the case of Saxons and until at least 24 March 2015 in the case of the other Parties
Saxons	Saxons PS Limited
Settling Parties and each a 'Settling Party'	Abbott and Frost, GTH, Gary Berryman and West Coast
TFEU	Treaty on the Functioning of the European Union
[Subsidiary 1 of Warne Investments]	[Subsidiary 1 of Warne Investments], parent company of Gary Berryman Estate Agents Ltd
Three Counties	Decision of the Competition and Markets Authority in the case CE/9827/13, dated 8 May 2015
Warne Investments	Warne Investments Limited, ultimate parent company of Gary Berryman Estate Agents Ltd
[Local Newspaper]	[Local Newspaper]
West Coast	West Coast Property Services (UK) Limited
[Other Burnham Estate Agent 2]	[Other Burnham Estate Agent 2]

SIGNED:

[✂]

Philip Marsden

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[✂]

Sarah Chambers

Panel Member and Panel Member Non-Executive Director, for and on behalf of the Competition and Markets Authority

[✂]

Christopher Prevett

Legal Director, Legal Service, for and on behalf of the Competition and Markets Authority

All of whom are the members of, and who together constitute, the Case Decision Group.

31 May 2017