IN THE COMPETITION APPEAL TRIBUNAL
AND
IN THE HIGH COURT OF JUSTICE CHANCERY DIVISION

Case No. 1262/5/7/16

Claim No. HC-2016-000513
Claim No. HC-2016-001149

Victoria House,
Bloomsbury Place,
London WC1A 2EB

14 September 2016

Before:

THE HON. MR. JUSTICE PETER ROTH
(President)

(Sitting as a Tribunal in England and Wales
and judge of the High Court)

BETWEEN:

AGENTS' MUTUAL LIMITED Claimant

- and -

GASCOIGNE HALMAN LIMITED T/A GASCOIGNE HALMAN Defendant

AND BETWEEN:

AGENTS' MUTUAL LIMITED Claimant

- and -

MOGINIE JAMES LIMITED Defendant

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APPLICATIONS

A P P E A R A N C E S

Mr. Alan Maclean QC and Mr. Josh Holmes (instructed by Eversheds LLP) appeared on behalf of the Claimant.

Mr. Paul Harris QC (instructed by Quinn Emanuel Urquhart & Sullivan, UK LLP) appeared on behalf of the Defendant Gascoigne Halman.

Mr. James Hall (instructed by Gordon Dadds LLP) appeared on behalf of the Defendant Moginie James.

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THE PRESIDENT: Just before we start, Mr. Harris, can I just ask, on the Moginie James application for fortification for cross undertaking, I see from your skeleton argument, Mr. Hall, that the figures have been agreed.

MR. HALL: Yes.

THE PRESIDENT: What I was not quite clear about, looking at the claimant's skeleton, is have the dates been agreed as well.

MR. HALL: One of the dates is yesterday, so that cannot stand, clearly. I understand, although it may be for my learned friend Mr. Maclean to deal with this, that they would like until the end of September for the first date.

THE PRESIDENT: Because you say in the skeleton "It is now agreed" in para. 4.

MR. HALL: Yes, that is my mistake and I am sorry for that. I had not thought about the date. May I just say, Sir, we are content with the end of September, which I think is what the claimant is seeking.

THE PRESIDENT: That is right. Otherwise, the issue is whether it should be 21st December, or 30th December for the second one, as I understand it – is that right?

MR. HALL: No, I do not think it is, respectfully. I think we are now agreed----

THE PRESIDENT: I am just looking at para. 27 of Mr. Maclean and Mr. Holmes' skeleton.

MR. MACLEAN: (No microphone) It is all agreed. There is some correspondence which I will show you if necessary. The only problem is because, and I am not criticising, because they did not accept our, what we call 'revised dates' until Monday, the first date was yesterday, and I am told that the court funds office is not terribly fleet of foot, or indeed very 21st century in how it receives money, so it is just a question of the mechanics of the money being paid but I do not think there is anything between the parties as to those dates, and so the dates are now the end of September and the revised date in December which was 30th December.

THE PRESIDENT: So it is 30th September.

MR. MACLEAN: And 30th December.

THE PRESIDENT: And 30th December, and it is two tranches of £50,000 on each date, is that right.

MR. MACLEAN: That is right.

THE PRESIDENT: So I can make that order by consent.

MR. MACLEAN: Yes.

THE PRESIDENT: Thank you very much. I think it would be sensible then to deal with the second Moginie James application for security for costs. As I understand it, it is accepted that security should be given but the issue is the amount and the timing, is that right.

MR. HARRIS: Yes, sir.

THE PRESIDENT: You are seeking £460,000 and the claimant has offered £250,000 in two stages, is that right.

MR. HALL: That is the primary position, sir, and I do have an alternative case, as spelt out in the skeleton argument, for £370,000.

THE PRESIDENT: I have seen your updated costs budget corrected. You put in a Precedent H, a full costs budget and I think this is revising it a bit, which is, I think, in bundle A, in the costs budget section. It does seem to me that it is not appropriate, as you anticipated in the skeleton, to include the costs of the High Court trial, security for those costs. The matter can be, to that extent, adjourned and you can seek those costs later because that part of the case is stayed apart from your summary judgment application. So that takes out £126,000 from the total of £643,662 on your 8th August revision. Is that right?

MR. HALL: I have been using the costs budget in a different part of the bundle, Sir. Could you just tell me which page you are at?

THE PRESIDENT: I think it is the same document. There is a section of bundle A, which is headed cost budget, which is section C, and at p.325 - I think that is just another version of the same document.

MR. HALL: Yes, I think that is right.

THE PRESIDENT: That has been corrected, because there was a typographical mistake in the addition, and it is now £643,662.

MR. HALL: That is correct, Sir, yes.

THE PRESIDENT: And we take of £126,000, and then it is £517,662.

MR. HALL: Indeed.

THE PRESIDENT: I have to say, and you may want to persuade me otherwise, you have a summary judgment application in the High Court, which I think is now listed, is it not?

MR. HALL: 19th December.

THE PRESIDENT: Those costs are not, I think, included here.

MR. HALL: So one adds £25,000.

THE PRESIDENT: It would be very unusual to get security for costs for a summary judgment application. In the usual way they are listed together, and if you get summary judgment you get summary judgment and you get your costs.

MR. HALL: It is not our application, Sir, it is the claimant's application.

THE PRESIDENT: If they get summary judgment your costs go away, but one would wait to see how that application gets determined. To say, as it were, we cannot seek summary judgment without giving security for costs, that is designed to avoid any extensive investment thereafter. It is something I have encountered before.

MR. HALL: May I take several points on that, Sir? Firstly, that point has been taken by the claimant, in fact. They, in their calculations of the sum which they say should be used for the purpose of determining what security for costs should be ordered, have, I think, come up with a figure of £450,000, which is the basis to be used for any percentage order that you make. That £450,000, as I understand it, includes provision for £25,000 that those instructing me estimate the summary judgment application will cost my client.

So it is not a point taken by the claimant.

Secondly, that is not an insignificant sum. This is obviously a significant case. I daresay that the claimant's costs of that application will be somewhat higher, but £25,000 is something that my clients should not be put to the expense of where there is an impecunious claimant bringing such an application. The application has been brought - it is not late, I do not suggest that it is late - later in the day than some such applications are brought. We have already been through costs and a case management conference in the Chancery Division before Master Matthews in May, we have had the hearing before Sir Kenneth Parker in early July, and this application will not be heard until December. Obviously, the balance of the Chancery Division proceedings are stayed pending the outcome of the proceedings here in the Competition Appeal Tribunal, but it is still some way down the line. We have also had disclosure, so it is not a summary judgment application that appears, as it were, in the ordinary sequence, perhaps pre-disclosure, perhaps at the same time as the case management conference and, in those circumstances, I would invite you, Sir, to include the £25,000 as part of the figure on which to base any percentage based security for costs order.

THE PRESIDENT: So you say the correct total is £542,000 I think that is right, and then you say on that basis the revised amount that you seek, and that is on p.15, is it?

MR. HALL: Yes, I have done it in two ways. There is an analysis based on the costs estimate itself, as updated, and there is analysis based on the actual costs incurred, plus future costs which are, in fact, £5,000 more because the estimate is, itself, now a month old. Whichever way one looks at it, it comes to somewhere in the region of £532,000 to £537,00, 70 per cent of which is a little over £370,000.

THE PRESIDENT: Yes.

MR. HALL: And it seems to me, Sir, that the real difference between the claimant and my client on this application in terms of the starting figure for a reasonable costs estimate to use for the basis of the order is the experts' fees. So, the claimant argues that my client will not necessarily have to incur the entirety of the experts' fees, which is both in the experts' phase of the costs budget and also in part as to £50,000 in the trial phase, so you can see at p.325, £71,300 at the expert phase, and then the £50,000 at the other phase. What they say is that we should be allowed only £40,000 of those fees, presumably all from the expert phase, because that is how much it should cost for my client to obtain its initial reports, having seen the expert evidence to be relied upon by the claimants and the other defendant. "Therefore, that is all that we can be confident will be incurred", they say, and so you, Sir, should deduct another £81,000 from the circa £532,000. That is where we get from my £532,000 to their £450,000 roughly. I do not know if you wish to hear from me on that point now, it might be convenient.

THE PRESIDENT: Yes. I can tell you my provisional view on that which is I think you might reasonably, in any event want your expert at trial to help you cross-examine the claimant's expert, even if she/she is not called. But, allowing for the fact that your expert may not be giving full evidence, I did think a total of £100,000 was rather over the top, and that £60,000 for the two, however it is split, 40:20, whatever, seemed to me more reasonable. So I was inclined to take off £40,000 and bring it down effectively, therefore, to half a million, but on that, it seemed to me reasonable, then to order security in the sum of £350,000, and that seemed to me giving you fair protection on these figures. Now, if you want to persuade me I should go up to £370,000 it is a broad-brush approach, but that is the view I have taken. I do not think it is right to knock out your expert at trial altogether, even if he/she is not going to be called.

MR. HALL: I am very grateful for that indication. All I would seek to do is reserve my position in case Mr. Maclean raises an issue that I have not dealt with yet. But I, for my part, would be content with an order at £350,000.

THE PRESIDENT: As regards payment stages, it seemed to me probably the sensible way to deal with it is to say that it is paid in three stages----

MR. HALL: Yes.

THE PRESIDENT: --and what I had in mind, therefore, was £120,000, £110,000 and £120,000. You have no security at the moment so end of September, end of October and end of December.

MR. HALL: Again, Sir, I would be most content with that, subject to anything my learned friend, Mr. Maclean, has to say.

THE PRESIDENT: The claimants want their money, you are getting your money, your income monthly, I think everybody knows that because they are members of your company, or subscribers. So, quite what your financial position, the detail of it I am not discounting the amount that you will receive because of anything the claimants might say about lack of funds, all I am doing is spreading it over three stages over three months.

MR. HALL: Indeed.

THE PRESIDENT: Thank you very much. Mr. Maclean, what do you want to say about that?

MR. MACLEAN: I want those behind me to reflect on what you have said, Sir, and if your Lordship finds it convenient make my submissions once they have had that opportunity----

THE PRESIDENT: Yes.

MR. MACLEAN: --because you have done two things, Sir, you have indicated a number, and you have also indicated a period of time for payments. It may be that one of those is less controversial than the other.

THE PRESIDENT: Do you want me to rise for 10 minutes. It seems sensible to get this resolved, because, obviously, I have read all that you have put in and there is not a lot once one takes out the £126,000, the Chancery trial costs, as it were, not the competition costs, there was not such a lot between you.

MR. MACLEAN: I understand that. I do have some questions of principle, which perhaps the light shines brighter in my learned friend, Mr. Harris's application, but there are, nonetheless, some issues of principle as to how the court should approach security for costs in a case like this where, amongst other things, my client is in a position where, as you have seen from the confidential skeleton, you know the monthly figure in terms of income. You also see the monthly outgoings figure, which is in the next paragraph of the skeleton, and the balance that is left over in the ordinary way if we were not tied up in this litigation, is spent on marketing in order to grow the business. For every pound that we spend putting into court by way of security for costs is £1 less to spend on marketing. That means that we are in a situation where the payment of security for costs does cost my client more than the opportunity of having that money in the bank, so we are in the territory of the balance of prejudice having to be weighed.

THE PRESIDENT: I see that. It matters rather more in dealing with the much higher sum.

MR. MACLEAN: It does.

THE PRESIDENT: And it does not seem to me that it arose here, if, at the same time, your client has quite well-funded backers in the founding members and there is no evidence to suggest that they would not support it in these matters, the evidence is a bit thin----

MR. MACLEAN: I am not suggesting, and it is a quite separate principle from the stifling principle. There is a line of cases, as you will know, Sir, which say that if the respondent to an application for security for costs says that the giving of security for costs would stifle the claim, would knock them out of the litigation driving seat, then it is incumbent on him to have scraped all the necessary barrels, and come along to court and explained what those barrels are. I do not make that submission. We do not make a stifling argument; the argument is a different one, which is that the giving of security for costs in many cases the court is able to say that to the extent that there is prejudice to the defendant if he turns out to be successful at trial against an impecunious claimant who cannot pay his costs, that is obviously the whole underlying rationale of security for costs. In many cases the only prejudice to the claimant in giving the security for costs will be the fact that he has to take the money out of his bank and put it into court and loses the interest for the cost of using that money.

There are some cases, and this is one, and the Court of Appeal case that we refer to in our skeleton is another, where the giving of security for costs costs the claimant more than simply the opportunity cost of the money.

THE PRESIDENT: If you are working towards the question of a cross-undertaking from the defendant getting the security, as in the *Stokors* case, I think that is something that arises much more in Gascoigne Halman than where we are, on any view, getting to £1 million. I do not think it arises really on £370,000. Moginie James, themselves, I think are a much smaller operation that the Connells Group.

MR. MACLEAN: My Lord, I suspect I know what I am going to be asked to do, but may I just take five minutes to reflect on what you have said, Sir.

THE PRESIDENT: Of course, I will rise. I will come back just before 11.

(Short break)

MR. MACLEAN: Sir, I am very grateful for the opportunity to take those instructions. Having done so, we are content to proceed on the basis of the figures and time periods that your Lordship indicated. Just to make sure we are all singing from the same hymn sheet, I think what your Lordship had in mind was security of a total of £350,000----

THE PRESIDENT: Yes.

MR. MACLEAN: --payable as to £120,000, £110,000, £120,000 at the end of September, October and December.

THE PRESIDENT: That is right.

MR. MACLEAN: We are content with that. I have spoken to my learned friend for Moginie James and we are content with that. At least two other matters, first, the question of costs of the application, and we are agreed that the correct order as to that is that the costs should be reserved. Then, my learned friend, Mr. Hall, makes the observation, which I respectfully agree with, that that, having disposed of the security for costs application, if it pleases your Lordship we should now proceed to deal with my application for costs, management and budgeting and so on. Once we have dealt with that then Moginie James can head for an early lunch.

THE PRESIDENT: Yes.

MR. HALL: May I just mention also the costs of the fortification application, which are a very modest proportion of our costs. It seems to me that they should be dealt with on the same basis as the security for costs.

THE PRESIDENT: Yes, because it would be quite hard to disentangle them anyway.

MR. HALL: Indeed, and, as you, Sir, observed earlier, our security for costs application is not, in fact, in total complete, we have the balance in relation to the Chancery----

THE PRESIDENT: The balance and----

MR. HALL: Which is, perhaps, another reason why costs reserved makes more sense.

THE PRESIDENT: Balance adjourned – just 'adjourned', I think.

MR. HALL: I had suggested it to be listed on a date to be fixed 14 days after the conclusion of the Competition Appeal Tribunal hearing, but I am not wedded to that.

THE PRESIDENT: I do not think so. I think we will just say "Adjourned" and you just apply in the Chancery Division after. All sorts of things can happen by that stage. Yes, we can turn to costs management. Mr. Maclean, again I have read what you say and the points made. I am not attracted by the idea of a monthly budget, I think that needs quite a lot of work on a continuing basis when people are fully engaged in preparing for trial and working to other deadlines, but I do think, subject to what the defendants may say, that this is a case for costs management by costs budgeting as in the High Court----

MR. MACLEAN: Yes.

THE PRESIDENT: --in accordance with Rule 3 of the CPR, applied by analogy, we have power to do that, and there should be, therefore, costs budgets which, in the case of Moginie James – they did a full costs budget I think at the end of June in Precedent H, so it is really a case

of just updating that, and there will then be a direction. Gascoigne Halman will also have to do a costs budget, and will follow the procedure in the CPR. They can obviously do it quickly because they have produced summary figures which must have been calculated, and then have either a costs case management conference after you have done the report, where you indicate what is agreed and what is not agreed, it is in the Rule 3 Practice Direction – Budget Discussion Report is the name I am looking for – shortly afterwards, and then we have a hearing of half a day unless it is agreed that it can be dealt with by submissions in writing, and that is that. I do not see any great value, and I can see a lot of disadvantage for everyone if, every month, they have to provide the budget, or produce a new one.

MR. MACLEAN: Our real concern was that the Tribunal needed to reach for some appropriate costs management tools, and the suggestion you, Sir, put forward, if I may say so, is a very sensible one and we certainly do not resist what your Lordship said, indeed, we welcome it.

We have been puzzled and concerned by the position of Gascoigne Halman in correspondence and in the evidence and, I think, in my learned friend's skeleton, just for an example, in bundle D at p.695 – is always where one finds the most important documents in any case – Quinn Emanuel say that the claimant's application for active costs management will be resisted for reasons that will be set out in full in response to the application.

We have been concerned by that.

THE PRESIDENT: Anyway, we do not have to revisit all that. You have heard what I am minded to do and, in particular, it seems to me appropriate because this is a part, an adjunct to a High Court action and so adopting the High Court procedure seems to me entirely appropriate. That is not to say it would not be appropriate in any event, but when one has a procedure that has been quite carefully crafted as a result of a lot of work that is put in then it seems to me sensible to follow it.

MR. MACLEAN: I respectfully agree.

THE PRESIDENT: That would apply, of course, to everyone. Mr. Hall, do you resist that?

MR. HALL: I do not, in fact, it was suggested in the Chancery Division originally that there should be costs budgeting.

THE PRESIDENT: Yes. Thank you. Mr. Harris?

MR. HARRIS: What we had opposed was the application notice which is detailed monthly, and your Lordship is with us on that, and we are grateful.

The only observations I have as to your Lordship's suggestion, it is obviously more sensible than, with respect, the application put forward by the claimant. The reservations I have are these, and it is only fair to raise them. We are in the middle of an expedited timetable to

trial with a phenomenal amount of work. This adds to that work in circumstances where the Claimant knows full well what our cost are anticipated to be, (a); and (b) knows full well broadly when they are going to be incurred. They will all be incurred by the time of the trial. So they have a very broad handle on the level of expenditure and when it will be incurred.

THE PRESIDENT: But I cannot make a costs management order on the basis of the schedule you have put in and the Tribunal would then make an order approving, or not approving, or revising and approving a revised budget.

MR. HARRIS: Sir, I understand that point, but what I was going to say is there is therefore some merit in having the revised budget that we put forward for security for costs turned into a Precedent H Form, and no particular difficulties on that front. Where we have greater reservations is the notion of having potentially a half a day hearing which will definitely engage further costs and in the middle of the expedited hearing, which we respectfully contend would not be and are not necessary because, of course, we are faced with the strictures of all the other litigants in this claim, which is if, at the end of the day, we are in the fortunate position of getting a costs order in our favour and we put forward a costs bill and it is not reasonably incurred, we are not going to get that.

In other words, the Claimant knows what our overall figures will be and we can split them up further into Precedent H form. It will know when they are going to be incurred, so there is no difficulty, in any event it is obvious, and it knows – and we know – that we are not going to ever recover more than that which is reasonable. So I would invite your Lordship not to go so far as to order that there be a hearing if it cannot be agreed in writing, because of the unnecessary distraction and the additional costs which we see as not being proportionate on the facts of this case, when everything is going to happen in the next few months in any event.

We also have this reservation, which is that I ask rhetorically: when is this hearing going to take place? One imagines it will not take place for at least a month if not longer.

THE PRESIDENT: Why?

MR. HARRIS: Because there has to be, on the Tribunal's proposed approach, the preparation of the budgets, then the liaison about them.

THE PRESIDENT: Pausing there, the claimants have done theirs, the defendants have done theirs, they just have to update it. You produced a schedule which must have been compiled, so you can produce Precedent H by Friday, the discussion report can be a week later, and the hearing can be in the week of the 26th, so we can do it very quickly.

MR. HARRIS: Potentially quickly subject to availability and listing problems which, of course, in the real world always apply. Even if, Sir, the point that it took place in several weeks, two to three rather than four to five, my point is still the following, which is that by that stage a very large proportion of our budgeted costs will have been incurred and, therefore, the utility of this exercise begins to decrease. All the costs that will have already been incurred, the less there is the point in having the extra----

THE PRESIDENT: What is the date for witness statements?

MR. HARRIS: 23rd September – disclosure, I beg your pardon.

THE PRESIDENT: No, witness statements.

MR. HARRIS: Well, disclosure is----

THE PRESIDENT: Disclosure would not be covered by an order because it has been incurred. But witness statements must be quite a while away. 21st October, so they are a way off, and then looking at your summary, PTR, which is a very large sum, trial, which is a huge sum, and then we are still quite a way from trial.

MR. HARRIS: My point, Sir, is it is a question of proportionality. The higher the proportion of those sums that will have been spent then the less utility there is in engaging in those exercises that the Tribunal is mooting and proposing with me, and that is against the background of the fact that people know the amounts and they can be spelt out in a bit more detail in a Precedent H, and they know when they will be spent and they know that nobody – not just my client, of course, but nobody – will be able to recover more than their recoverable reasonable amount. So, my compromise – if I could put it like this in my submission – is that there is no difficulty in turning the costs budget, updated – I think you know, Sir, that there was a typographical error to the tune of £100,000.

THE PRESIDENT: Yes.

MR. HARRIS: In that grand total, which no doubt we will come to later in the hearing, updated into the form of a Precedent H that can be done in relatively short order but on the facts of this case there is no need to engage in those additional steps both because they distract, secondly, because they engage further costs not budgeted for, of course, this additional cost; and thirdly, and perhaps most pertinently, they are not necessary in the scheme of this particular litigation.

You will have also picked up from our skeleton that whilst at the last hearing Mr. Maclean was mooting, not to say advancing, a cost capping application that, of course, is not the position now, and there was an expression of disapproval by the Tribunal on that occasion. It might be different were this to be a cost capping case but it is not. What we say is a

sensible compromise that achieves some of the objectives that the Tribunal has put forward is to have the Precedent H if needs be in short order, but the additional steps, for the reasons I have given, we do oppose. May I just take further instructions?

THE PRESIDENT: Yes, sure.

MR. HARRIS: (After a pause) I am grateful to those instructing me as well. The other point on timetabling is not so much just the logistics. You, Sir, raise the point with me about when we can do a Precedent H, when we can liaise, and when a hearing in theory can take place. But, with respect, my team is not in a good position to have a hearing on this additional issue, non-budgeted an additional issue, certainly during September because they are completely engaged with the other expedited steps in the litigation which----

THE PRESIDENT: It is only a two hour hearing. We do not even need a hearing, it can be done on paper. Say you have until Monday to put in the Precedent H and the discussion reports, you have seen the others already, effectively, which is just your comments, what is agreed, what is not agreed by 22nd, one can deal with it on the papers.

MR. HARRIS: But, Sir, with respect, the point I am making is that that coincides with the disclosure deadline and also the preparation of witness statements, and they are fully engaging the team that instructs me and, to the extent necessary, counsel.

As you well know, Sir, the expedited litigation can be extremely intensive and this is no exception. This is a very intensive period and so what I am saying is, with respect, it would not be fair. In the first instance the onus is on us to do this additional work, and it does coincide with some crunch points.

THE PRESIDENT: Disclosure has been put back, has it, because I think it was to be 13th was it not?

MR. HARRIS: It is certainly 23rd September, and that is in the order of Sir Kenneth Parker, which I think you will find in bundle B at tab 7.

THE PRESIDENT: That is my order.

MR. HARRIS: The Tribunal's order from the last occasion. It is an intensive and difficult exercise. That is partly reflected in the numbers that you have seen in the budget for it. This is fully engaging us. What I would say, with respect, is in the real world it is likely to be a little bit later than the Tribunal might currently be envisaging for good and fair reason. Again, that diminishes the need for some of the additional steps that the Tribunal is proposing.

THE PRESIDENT: Why can it not be in the week of the 26th. Disclosure is over by Friday of the week before. You can say you, therefore, want a few days to do your agreed/disagreed

statement and it could be - I will have to check my availability - on something like 30th September, if you want a hearing.

MR. HARRIS: Sir, it certainly could in theory, but that does not address the points that I have made about the utility of the exercise.

THE PRESIDENT: I understand that, but that is a separate point.

MR. HARRIS: Yes, it is a separate point, I accept that. The other issue, Sir, is this: we already know that the claimant does not agree with our proposed budget. It will not make any difference that it is set out in a Precedent H form so they----

THE PRESIDENT: It might do. It might well do, because they might say - we do not know what you are going to say because we have not seen it - this is an unreasonable expenditure of partner's time. Disclosure will not feature because----

MR. HARRIS: That will have been done.

THE PRESIDENT: On the further issues they might say that the division of time is completely unreasonable. They might say that you failed to use a trainee. We just do not know.

MR. HARRIS: Sir, what we do know, however, is that they are adamant that the grand total that we have put forward is far too high.

THE PRESIDENT: Yes, but we do not know which particular point and why.

MR. HARRIS: I accept that, but it goes again to the question of proportionality and utility, Sir, that in the few months that are available before the beginning of the trial, and against the background of the other points that I have made about utility, it further, in my respectful submission, reduces the utility, given that we know with 100 per cent certainty that they will not agree to that part of the Precedent H that reveals future anticipated costs post disclosure. There is no chance. Since we already know that, and given that there is no application for something like costs capping, again, in my respectful submission, it reduces the utility. Those are the points, Sir.

THE PRESIDENT: Yes.

MR. MACLEAN: My learned friend really does protest too much. In the bundle of witness statements, the second volume of C, C2, tab 19, there is a witness statement of Mr. Bronfentrinker, which your Lordship may have seen, in which Mr. Bronfentrinker rather modestly describes Quinn Emanuel as "a leading City litigation law firm that is recognised as specialist in the competition law litigation" (para.18). I do not doubt that is right, and if it is right, the idea that Mr. Bronfentrinker's firm can not juggle all the balls that are required in this litigation, including the addition of a two hour hearing, is, frankly, absurd.

So far as the suggestion that it is pointless having the hearing that you suggest, Sir, because quite a lot of the costs will have been incurred.

You may also have seen from Mr. Bronfentrinker's exhibit at tab 20, p.1426, there is a very helpful breakdown of when they say they are going to incur these vast sums. You can usefully draw a line under disclosure, under the figure £341,000, and you will see that, as we suggest in our skeleton, these sums really divide into three sections: up to and including disclosure, then there is another roughly one-third of the total which runs then, witness statements, experts' reports, PTR, and then there is another fairly big chunk dealing with the £914,000. You see there, Sir, when they say they are going to incur these costs.

The final fairly short point is that Mr. Harris's submissions----

THE PRESIDENT: That cannot be quite be right because witness statements, it says 21st October to 11th November, and they have got to be served by 21st October. So presumably that starts being incurred on 24th September.

MR. MACLEAN: Yes, that is right.

MR. HARRIS: Sir, as we pointed out, that has already started to be incurred.

THE PRESIDENT: I would expect so.

MR. MACLEAN: If this piece of litigation was entirely in the Chancery Division it would be subject to the regime that applies for costs management in the Chancery Division. The fact that it has been transferred, or part of it has been transferred, to the CAT should not affect that. The fact that it is an expedited hearing does not affect that. Indeed, if anything, when parties are in an expedited hearing, all the more reason for the court to exercise its costs management tools.

Mr. Harris says we are not going to agree his budget, maybe we will and maybe we will not. Again, that is not a reason for the court not having active costs management. To the contrary, the whole point of these costs management conferences, which I have attended in the Chancery Division, is that the court is able to see how the parties are going to spend their clients' money, see what the dispute is between the parties, and then make judicial decisions about what is going to be allowed by way of budget which then sets the framework for the rest of the litigation, and, importantly, exercises a restraint on the extravagance of the legal advisers. In this case one can see that that squeeze is entirely appropriate, and if the squeeze is likely to be put eventually on Quinn Emanuel, so much the better.

Sir, Mr. Harris's submissions do not provide any reason for departing from the process you outlined.

THE PRESIDENT: Yes, thank you.

[**SEE SEPARATE TRANSCRIPT FOR JUDGMENT ([2016] CAT 15)**]

THE PRESIDENT: Mr. Hall, is there anything remaining as regards your involvement in costs management, other than anything on the costs of this application? I think that deals with the Moginie James aspect?

MR. HALL: I think it does. May I just clarify one matter, which I am sure is not controversial, but you have ordered, Sir, the £350,000 security in the way that we have discussed. That application, of course, is on foot in both the Chancery Division and the Tribunal. It would seem simplest to me, respectfully, if the order was made in the Tribunal for that. I cannot really see how both forums can make the same order because there would be two orders for security for costs then, unless it is dealt with in the preamble in the order in some way.

THE PRESIDENT: I will give that some thought. I am sitting in both capacities, but I can see there might be an issue about making an order simultaneously in two forums, and how it is drawn up.

MR. HALL: I really do not mind where it is.

THE PRESIDENT: If that is so, then I would need to make an order in the Chancery Division, adjourning your application save and so far as dealt with by the order of the Competition Appeal Tribunal.

MR. HALL: I am grateful.

THE PRESIDENT: We will find a way of doing that.

MR. HALL: The other point to make, again, I am sure it is not controversial is that the fortification application, of course, only relates to the Chancery Division proceedings.

THE PRESIDENT: That is the Chancery Division because it is the undertaking there, yes.

MR. HALL: So that will be dealt with in that order.

THE PRESIDENT: I think that is probably right that we have two orders.

MR. HALL: I will liaise with my friends in the usual way about the Chancery Division order for submission for your Lordship's approval.

THE PRESIDENT: Yes. It may be that we will just draw up both orders here, it will probably make it quicker.

MR. HALL: I am very grateful. In which case, I am grateful to my learned friend's also for having dealt with the other points that concern my client now, might I and my instructing solicitor be released.

THE PRESIDENT: There is only the question of I have not said anything about the costs of that application, what do you want to say about that?

MR. MACLEAN: The costs of the costs management application should simply be reserved.

THE PRESIDENT: Yes.

MR. MACLEAN: The other alternative would be to have the costs in the case, it perhaps does not make a huge amount of difference.

THE PRESIDENT: I would have thought it is costs in the case. I cannot see any great benefit in reserving it.

MR. HALL: Sir, we agree, costs in the case.

THE PRESIDENT: Costs in the case.

MR. MACLEAN: Yes, indeed.

THE PRESIDENT: I think it is more sensible. In that case you and your solicitors are released.

MR. HALL: I am very grateful.

THE PRESIDENT: Thank you very much, Mr. Hall.

(Mr. Hall and his instructing solicitors withdrew)

MR. HARRIS: Would your Lordship rise for a moment?

MR. MACLEAN: If your Lordship can rise for five minutes, we might be able to make some phone calls and see if either of those two dates were convenient.

THE PRESIDENT: That would be useful. My preference is for the 30th, I do not mind whether it is morning or afternoon.

MR. MACLEAN: Can we take five minutes.

THE PRESIDENT: Yes, if you can do that, and you can liaise with the Référendaire on hearing dates.

(Short break)

THE PRESIDENT: Yes, Mr. Harris.

MR. HARRIS: Sir, I regret to inform the Tribunal that there is a significant fly in the ointment. Can I invite your attention to bundle B for today's hearing at tab 6. I am happy to apologise for the fact that I did not draw this to your attention before, but equally everybody else is at least as responsible. This is the order of Sir Kenneth Parker made on 5th July, and can we pick it up at para.20 on p.19. You will see that this issue of costs management under CPR 3 has already been dealt with. That is in the part of the order which, if you turn to the previous page, p.17, was by consent. I apologise that this slipped my mind when you first made the suggestion in argument a few minutes ago before the very short adjournment.

THE PRESIDENT: Costs management conference ordered by - that is the other one, is it?

MR. HARRIS: Sir, at least in our case - this does not affect the Moginie James action - this issue has been contemplated by the parties, and they have agreed, and it has been ordered by consent, that there be no costs management under CPR 3.13.

Sir, with respect, what has happened just before this short five minute adjournment that we have just had has proceeded on a misapprehension. Just so that you know, our position is that if it is go ahead on that basis, and I regret that I did not draw this to your attention, that would have to be by an application by my learned friend's team to discharge the consent order, which of course we do oppose.

THE PRESIDENT: Was this all by consent, or----

MR. HARRIS: No, there were some issues at the front of the order where it was ordered.

THE PRESIDENT: Yes, I see, "And by consent it is ordered that", at the bottom of the page.

MR. HARRIS: Yes, that is right. There are two difficulties. First of all, there has been a misapprehension, for which, as I say, I accept part responsibility. Then there are the formalities to be dealt with. Sir, you will be aware, of course, of the case law about discharging or overturning consent orders. As it happens, that very issue arose in the hearing before Sir Kenneth Parker, because there was a part of the hearing where we sought to discharge a part of a previous consent order. In the end, that part of the application was effectively compromised, and I will not bore you with the details. It was all to do with interim relief. On that occasion, Sir Kenneth Parker said, and in any event it is trite law, that there are various rather significant hurdles to be overcome when discharging a consent order, especially when it is opposed by the other party to the consent. We do oppose it.

The second thing, Sir, is that this was, certainly from our side - and I cannot speak about the other side's mindset when they agreed to this - the reasoning that was live was the very reasoning that I have advanced before you, Sir, that did not find favour. In other words, there were good reasons why at a stage some months ago it was even thought not to be sensible to have the full rigour of the case management regime. As you have heard me say, they are only magnified now that we are several months down the track.

I should also add, and this is being prompted by me having upturned this order, that another concern that we had was that the case was already fairly advanced when this hearing was heard in July. We all had taken a position that if costs management should be imposed then it should be done from the beginning. It is largely irrelevant, Sir, in the sense that the order was made, and it is by consent, but just so that you know, there were good reasons, at least on our side, why it was made. There must have been good reasons on the other side because it was an agreed order.

The position, Sir, is that, with respect, we say that the judgment that was given has not, of course, been drawn up into order was given on a misapprehension and the way forward is if the claimant now wishes to pursue the costs management under CPR 3.13, it needs to apply to discharge the consent order. For the reasons I have given, we do oppose that.

THE PRESIDENT: Can you just help me: the other claim, the 2015, that is presumably the Moginie James claim, is it?

MR. HARRIS: Yes, that is right. Their claim came into existence a month or two before ours, and there had even been at least one hearing before Master Matthews during the course of which there were certain things said about costs management. My recollection of para.21 is that he had made some order about costs management, which was no doubt in para.7 of his order dated 25th May. Yet all parties agreed----

MR. MACLEAN: We have got that at tab 17.

MR. HARRIS: I am grateful. All parties consented to the form of the order in para.21 - all those parties. Of course, I played no role in that.

THE PRESIDENT: Yes.

MR. HARRIS: Just so that I can complete the picture, when we applied to discharge a different consent order made some months earlier about interim relief that was firmly resisted by the claimants, the boot being on the other foot, including on the very basis of the case law that says this is by consent and-----

THE PRESIDENT: I understand. Mr. Maclean, it is obviously a shame this did not come up earlier, but anyone could have spotted it and obviously it was overlooked.

MR. MACLEAN: My Lord, there is no difficulty, in my respectful submission. If you take Master Matthews' order, first of all, in the Chancery Division in the Moginie James, which is at tab 17 of bundle B, at that hearing which my learned friend Mr. Hall attended, you will see at p.288 of the bundle that the costs management conference that was on the stocks, as it were:

> "… be adjourned to a date to be fixed with a time estimate of one and a half hours, to be not earlier than 14 days after the application issued of Gascoigne Halman … seeking, inter alia, to transfer the said proceedings to the Competition Appeal Tribunal, has been finally disposed of."

Then at para.8:

> "The parties do file and exchange costs budgets by no later than 7 days prior to the adjourned Costs Management Conference."

There has been no similar hearing, no case management hearing at all, in the Gascoigne Halman case.

If one then looks at the order that was made by Sir Kenneth Parker, after a hearing where there were quite a lot of things on the court's plate, which is at tab 6, paras.21 and 21, just dealing with 21 first before I come to 20:

> "The Costs Management conference ordered by Master Matthew … [was] to take place before the Allocated Judge …"

because this order is made in contemplation of the transfer of the competition part of the case to the Tribunal, and there being an allocated judge who would be also designated to sit as the Chairman of the Tribunal, who would be able to deal with the Chancery Division matters as they arose.

Then, para.20, which is the supposed fly in the ointment----

THE PRESIDENT: The first paragraph you refer to is paragraph----

MR. MACLEAN: Paragraph 21 or this order.

THE PRESIDENT: Yes, that is the one dealing with the other one.

MR. MACLEAN: The reference to para.7 of Master Matthews' order is the one we have just looked at at tab 17.

Then para.20 of Sir Kenneth Parker's order, which is my learned friend Mr. Harris' fly in the ointment:

> "The requirements for costs management under CPR 3.13 be dispensed with in [the Gascoigne Halman claim].

So what the learned judge there was doing by consent was dispensing with costs management under CPR 3.13 in the Chancery Division. That made sense because the competition issues had been transferred to the CAT, to this Tribunal, and it was contemplated, and indeed it is directed in this order, that the first thing that would happen would be that the competition issues would be determined.

So here we are in the Tribunal with my application today for the costs budgeting, to which the court has responded by making an order not under 3.13. What you have done today, Sir, is to give directions under Rule 53(2)(n) for the costs management of proceedings in this Tribunal. You have done that by analogy, Sir, to CPR 3, but you have not trampled on the toes, or cut across, para.20 of Sir Kenneth Parker's order. The Tribunal has simply given directions under 53(2)(n) for the costs management of the proceedings in this Tribunal. There is no reason why you should not have done that, Sir, very good reason why you should, and there is nothing in para.20 that causes any difficulty.

Of course, even if there were any difficulty, even if there was a fly in Mr. Harris's ointment, and it was necessary to jump through various hoops in order to unpick Sir Kenneth Parker's order that could clearly be done, not least because in the light of the revised budget of 1st August by Gascoigne Halman there is clearly a significant change in the circumstances which gave rise to my client's application, which came before the Tribunal and you have dealt with it in the way that you have, Sir.

The primary submission is that there is no need for any unwinding of para.20, no need to dust down the authorities about change of circumstance, because the long and the short of it is that the dispensing by Sir Kenneth Parker with 3.13 in the Chancery Division made sense because the case was, in effect, going off to the CAT for a period of months and might never in substance re-emerge back into the Chancery Division, but it might. That order made sense, but it does not trespass on this Tribunal's powers under Rule 53, and that is what you have done this morning, Sir.

THE PRESIDENT: Is there in the correspondence bundle an exchange of correspondence which led to that agreement on that provision?

MR. MACLEAN: I do not believe there is. I have looked at the skeleton arguments for the hearing before Sir Kenneth Parker which are in the bundle, and my recollection was that they did not touch on this point at all. Having had a quick look at them while Mr. Harris was on his feet my recollection appears to be correct.

THE PRESIDENT: They are in the bundle, are they?

MR. MACLEAN: They are. If you look at bundle B, tab 13, first of all, you will see Mr. Harris' and Mr. Woolfe's skeleton argument for the hearing before Sir Kenneth Parker, which was 4th and 5th July. I do not remember there being anything about what became para.20 in the order. Mr. Harris will no doubt correct me if I am wrong, but just glancing through the headings in the skeleton nothing leapt out at me.

At tab 12 of the same bundle is the skeleton argument from myself and Mr. Holmes, which also does not deal with that point. I do not recall, despite the fact that we have, I think, 795 pages of correspondence, which I have actually read, I do not recall there being anything in the correspondence dealing with what became para. 25. Mr. Holmes has just----

THE PRESIDENT: The hearing before Sir Kenneth Parker, were you in attendance at that hearing?

MR. MACLEAN: Yes, I was, and so was Mr. Harris.

THE PRESIDENT: We have the transcript.

MR. MACLEAN: We have. Mr. Holmes just draws my attention, my Lord, in our skeleton argument for Sir Kenneth Parker's hearing, will your Lordship just turn to p.159 of bundle B, tab 12, which is para. 4 setting out those other matters which the claimant understands may also be raised at the hearing. "Second, . . . Moginie James has applied for security for costs . . . The Defendant has also applied for security for costs", and our position was that the application should be adjourned and the issue of costs, including the application, should be dealt with by the CAT at the CMC which should be listed as soon as possible following transfer.

That accords with my recollection, but our position----

THE PRESIDENT: Yes, but Mr. Harris was saying that he made the same arguments about utility and so on at the July hearing as he has made today, and I am just looking at the transcript.

MR. HARRIS: Sir, no, I did not say that.

THE PRESIDENT: I am sorry.

MR. HARRIS: I said our position was that there was no utility.

THE PRESIDENT: What was said about it at the hearing?

MR. HARRIS: That I do not know absent studying the transcript. My recollection accords with Mr. MacLean that it did not feature, certainly not in any large part in the hearing; it is possible it did not feature at all, but the explanation for that, if there is no mention of it in the transcript is precisely that it was by consent and the draft order had been created. Those bits that were not disputed were not argued about.

THE PRESIDENT: It can be by consent that there should be no costs case management in the Chancery Division because the bulk of the case was going to the CAT.

MR. HARRIS: Can I just address you on that – and that is not the basis, Sir.

THE PRESIDENT: But if, on the other hand, there was no costs case management because it was an expedited timetable, and it would be burdensome and a distraction that is rather different.

MR. HARRIS: We respectfully agree, Sir.

THE PRESIDENT: That is why it is of some relevance to understand what----

MR. HARRIS: Can I assist you with two points that you may not be aware of. First, some considerable effort was made in the run-up to the hearing before Sir Kenneth Parker, to obtain a hearing before somebody who was suitably qualified and experienced and the position, as we very clearly understood it, and we respectfully contend is set out without any real doubt in para. 20 is that he dispensed with the costs management of the type that

we were talking about earlier this morning in the claims (plural), the claims (plural) in the entirety of the claim with the relevant number and we had gone to some trouble to point out to him, including, of course, because of the transfer orders that we sought, that the claims before him in the action with that number encompassed a whole series of competition claims and a whole series of non-competition claims, some of which would stay behind in the Chancery Division. We say that it is not seriously arguable that he was not ordering that this dispensation with the costs management under CPR 3.13 applied to the entirety of the claim.

THE PRESIDENT: He could not make an order binding the Tribunal, obviously. That is clear.

MR. HARRIS: The relevant point goes back to what you, Sir, was saying to me a moment ago, what is the nature of this agreement recorded in 20. The nature of the agreement, we respectfully contend, as reflected in the use of the plural, is that the parties were consenting to dispensation with the CPR 3.13 Costs Management, throughout the entirety of the claim, that is the relevant bit. Now, I accept that were there to be any other material in the transcript or in correspondence, that would bear upon it. We are not in a position to find that today and I certainly cannot recall any, but our clear position is that including for the reasons that you had adverted to, Sir, this was – certainly on our part, a clear understanding and, what is more, an agreement, that there would not be cost management of that type across the entirety of the claim. That is wherein lies the difficulty, because that has been not drawn to your attention and/or overlooked by all parties, but it makes a critical difference to what happened this morning.

THE PRESIDENT: That might have been your understanding or wish, but it does not mean that it was the claimant's understanding or wish, so either it was communicated in correspondence or it is in the transcript.

MR. MACLEAN: It is in the transcript, Sir.

THE PRESIDENT: Fine, where is it.

MR. MACLEAN: I am very grateful to Mr. Holmes. The transcript is at tab 10 of bundle B, and if your Lordship turns to p.56 first of all. I say something beginning: "Yes, absolutely", and then refer to Rule 72, and the guts of it is over the page. Would you like to read the paragraph over the page at p.57 beginning: "Then one comes to . . ." Mr. Holmes and I submitted a supplemental note which alas is not in the bundle for you today:

> ". . . in that relevant part of the Tribunal Rules dealing with case management, the Competition Appeal Tribunal has got a very broad canvass to paint on in terms of case management and the particular costs management of the proceedings. It can

make all sorts of clever orders in order to bear down on the overall proportionality of the costs of any case. Those are matters that your Lordship can deal with today. Certainly, no party is keener than my clients for the Competition Appeal Tribunal, sooner rather than later, to consider the exercise of those powers, not least, vis-à-vis the proper conduct of the competition issues as between Moginie James, on the one hand, and Gascoigne Halman on the other."

THE PRESIDENT: "It must be those are matters your Lordship . . ."

MR. HARRIS: Cannot.

THE PRESIDENT: "cannot" it must be.

MR. MACLEAN: That is a transcription error, "cannot deal with". So the whole point was that Sir Kenneth Parker was, by consent of the parties, sending the substance of the case to this Tribunal and it was perfectly clear that when the case got to this Tribunal we, at least – perhaps also Moginie James, but we at least – would be asking this Tribunal to exercise its cost management powers which the Tribunal has just done, and there was nothing in Sir Kenneth Parker's order which cut across that. Sir Kenneth Parker would, I respectfully suggest, be startled to be told that para. 20 of his order had disabled this Tribunal from making a costs management direction which the Tribunal considered to be otherwise appropriate for the management of these proceedings whilst they are in this Tribunal. But that is the effect of Mr. Harris' submission.

If you look on to see what the judge says, as I recall, he took the point that (a) these were matters for the Tribunal to deal with when the case got here, and (b) that it had a lot of available powers. For example, at p.63:

> ""If you get a speedy transfer then representations can be made to the CAT . . . should come on as soon as possible. Again there is no objection in principle from Mr. Maclean to any security for costs application relating to both competition and the other matters, on the obvious footing that no one is to be precluded before the CAT from saying it is not an appropriate moment to be dealing with the other matters or the CAT itself in deciding that that is the case."

So, he was very keen to make sure that he specifically did not trespass on the CAT's powers, and he did not do so. At p. 88, I am grateful to Mr. Holmes, he makes precisely that point.

> SIR KENNETH PARKER: There is no difficulty about my trespassing on the position of the allocated judge on that, is there?

MR. HARRIS: I do not believe so, because this is an order as regards to the parties. The judge, should he or she see fit, can raise the issue of jurisdiction.

SIR KENNETH PARKER: And can do anything in respect of this application.

MR. HARRIS: Yes, that is a matter for the judge."

So everybody was proceeding on the basis that what Sir Kenneth was doing was sending the substance of the case to this Tribunal and when it got here it was open to all parties to make such submissions and applications as they sought fit and the Tribunal would have all its powers open to it, and Mr. Harris' submission is that para. 20 of Sir Kenneth's order inhibits, indeed, prohibits this Tribunal from making a direction under 53(2)(m); with respect that cannot be right.

THE PRESIDENT: Yes, thank you.

MR. HARRIS: Sir, may I respond. The first point is that this is an unsatisfactory way in which to attempt to deal with the true interpretation of para. 20 that has only just been raised. Although I accept my share of the responsibility, with great respect it was incumbent upon my learned friend to have drawn this to the attention of the court when he made his costs management application and it is now unsatisfactory that I should be expected to deal with flicking through parts of the transcript, even for a hearing that I attended months ago. I have not had a chance to go back to it, I have not had a chance to read it through. I have not had a chance to look at any relevant correspondence, and I simply do not accept the slant or basis of the submissions that Mr. Maclean has just put about what is said in some of these passages in the transcript.

In any event, just like you put to me, Sir, a moment ago: "you may have thought that and that does not bear upon the true meaning and construction of the order", no matter what Mr. Maclean said, that is the exact same response to him. "You may have thought that, you may have submitted that, but unless and until there is a judgment from the court, or indication from the court saying the basis of this order is the following, it is just as irrelevant, with respect, as what I was saying. The sensible course is in the light of the fact that my learned friend's application did not draw this to your attention, and there is an issue here that needs to be resolved about the true meaning and effect of that order, then we should revisit this when the parties have had an opportunity to look into it properly, otherwise there is an unfairness to my client.

The second point, Sir, is this: on any view, even on Mr. Maclean's interpretation of the order, which we do not accept, the order that your Lordship has made trespasses upon

territory in the High Court which, on any view of para. 20 is something that was agreed by consent not to be the subject of costs management.

THE PRESIDENT: Why does it do that?

MR. HARRIS: In two senses. The first is that the Precedent H Form, under 3.1(3) that we have been ordered to put in in the High Court relates, in part, to High Court costs and proceedings----

THE PRESIDENT: Sorry, no, just to be clear, the order I made which you seek to reopen was that it should be put, not in the High Court, in the Tribunal in the form following Precedent H relating up to the trial in the Tribunal.

MR. HARRIS: Yes, and that includes----

THE PRESIDENT: That does not include the future trial in the----

MR. HARRIS: Exactly, but it does include, everyone acknowledges, the costs of disclosure in the High Court because that was----

THE PRESIDENT: Disclosure is not subject now to costs management because it is past.

MR. HARRIS: No, but it will not be the subject of argument going forward at the proposed hearing, but nevertheless, the basis of the order, that your Lordship indicated in the judgment earlier this morning, it has not yet but it is going to be made does include some measure of costs management as regards aspects of the High Court claim as I have just identified, namely, at least, the disclosure plus any historic costs.

THE PRESIDENT: I am sorry, you misunderstood me. I cannot now manage the costs of disclosure under the regime, by analogy with CPR 3, because that regime is prospective. Disclosure has been completed, so there will be no costs management of disclosure.

MR. HARRIS: Sir, I accept that.

THE PRESIDENT: Costs management will be prospective only, limited to the steps that will now be taken in the Tribunal.

MR. HARRIS: Sir, I do understand, and I am making a slightly different point – apologies I am not making myself clear. It is a much more minor, minor point than the first point, much more minor, Sir, let us not get it out of hand.

The point is simply this, that part of what your Lordship gave judgment about this morning was ordering a Precedent H and including, because that is the cost budget that is referred to, as I wrote it down, in CPR 3.13 and the other steps follow. Part of that Precedent H does relate to the High Court in two respects, and I say again this is much more minor, but it is a jurisdictional question.

THE PRESIDENT: You offered it, of course.

MR. HARRIS: I accept that, but of course, Sir, this was all against the background of this misapprehension that is most unfortunate. The minor point that I am making is simply jurisdictional, that some measure of costs management has been ordered in the High Court as regards the costs to date of the High Court proceedings and the costs of disclosure of the High Court proceedings, and that is not permitted, as a minimum, by the consent order. But, again, I do not want to overstate that. It is, nevertheless, a proper point for me to take now that this has come to everybody's attention.

What we say is it is regrettable, and I accept some measure of responsibility for it, but nevertheless it is now not the correct course for simply the order to be drawn up on the basis of this Tribunal's judgment given that we need to get to the bottom of the true meaning of para.20 and there are rival interpretations. It seems very clear, as a minimum, that different people had different views about what it was all about, and that is classic interpretation of agreement territory, and there is all manner of case law on that.

We need to look at the relevant factual matrix documents, we need to comb through the transcript, we need to look at all other relevant material. We plainly cannot do that today, that is most unfortunate, but I am only prepared to accept a part of that responsibility.

THE PRESIDENT: Thank you.

It has been drawn to my attention and overlooked by all parties, that in the order of Sir Kenneth Parker, which is the same order whereby he transferred the competition issues in the Gascoigne Halman case, to the Tribunal, para. 20 states, and this was by consent:

> "The requirements for costs management under CPR 3.13 be dispensed with (in that action)."

It is obviously unfortunate this was not mentioned in argument, but I make no criticism of either party for failing to have spotted that.

What is the effect of that order? It seems to me one thing is absolutely clear it was not an order made in the Tribunal, it cannot bind the Tribunal. One does not have to get into difficulties of interpretation to reach that conclusion, that is clear as a matter of jurisdiction.

Further, the judge in the High Court could not preclude the Tribunal from giving directions in accordance with Rule 53(2) of the Tribunal Rules, including in particular sub-para. (m) Directions:

> ". . . for the cost management of proceedings, including for the provision of such schedules of incurred and estimated costs as the Tribunal thinks fit."

The question that has exercised me is, therefore, a more nuanced one. It is whether in agreeing to that order there was an agreement expressed between the parties that they did

not wish for case management in the Tribunal, although the order would not bind the Tribunal if there had been such agreement, and it seems to me that would clearly be very relevant. That is in the Tribunal's exercise of its own discretion under Rule 52 (2). Nothing has been pointed to in the correspondence to that effect, nor on a review briefly, in the short time available, of the skeleton arguments. Indeed, counsel for the Claimant has pointed to an express submission addressed to Sir Kenneth Parker, making clear that this Tribunal has:

> ". . . a broad canvas to paint on in terms of case management and the particular costs management of the proceedings, it can make all sorts of orders in order to bear down on the overall proportionality of the costs of any case, but those are matters that your Lordship . . ."

and it must be:

> "*cannot* deal with today. Certainly, no party is keener than my clients for the Competition Appeal Tribunal sooner, rather than later to consider the exercise of those powers . . ."

On considering that passage, it seems to me relatively clear that it was not being advanced in argument or submissions before Sir Kenneth Parker on the basis of an understanding between the parties that there should be no costs management by the Tribunal as well as the jurisdiction that rested in Sir Kenneth Parker, that is to say costs management of the case in the High Court.

I accept that counsel and solicitors for Gascoigne Halman had only a very brief time to review the documents as this point has been spotted very much at the 11th hour. It seems to me, therefore, the appropriate course is that my order as pronounced earlier will stand, but I will give permission to Gascoigne Halman to apply for the Tribunal to review the order by 4 pm on Friday if, on further consideration, they find documents between the parties for submission to Sir Kenneth Parker indicating that there was agreement or understanding that there should be no costs management also in this Tribunal.

I make clear that what is required is agreement between the parties or a clear submission to that effect. It is not a question of what might have been within the subjective intention of either side.

To that extent I will qualify the order made.

MR. HARRIS: I am grateful, Sir.

THE PRESIDENT: So you have until 4 pm on Friday.

MR. HARRIS: Sir, may I simply ask for 4 pm Monday, I have a hearing tomorrow and the next day, and 4 pm Friday would cause me some difficulty.

THE PRESIDENT: You have a Junior and you have solicitors.

MR. HARRIS: My Junior is away, Sir.

THE PRESIDENT: I see. Yes, 4 pm Monday.

MR. HARRIS: I am grateful.

THE PRESIDENT: I should say on the other point that was taken, namely, as regards the preparation of the costs schedule trespassing on the High Court, it seems to me that the clear terms of 52(m) talk specifically about schedules of incurred costs and I do not think the preparation of the costs schedule that includes costs already incurred involves any jurisdictional problem, but it will not engage any costs management powers of the Tribunal and this really is a very minor point as Mr. Harris very properly accepted.

MR. MACLEAN: I mentioned, and I thought I saw a bit in the transcript, reference to a supplemental note. We have dug out the supplemental note, Mr. Harris, of course, has seen it before but you, Sir, should have this, just in case the other side----

THE PRESIDENT: I think we will now move on.

MR. MACLEAN: The relevant paragraph is 17, Sir. Where you see in the third line: "It depends in part on case management decisions which the CAT will need to take following transfer" and, in particular, (c) – I am not going to read it out – but you see reference there to 53(2)(f).

THE PRESIDENT: I think it is sensible to perhaps put this, just as we are keeping these bundles, at 168A to 168F.

MR. HARRIS: Sir, I am in the Tribunal's hands. What remains is the balance of my security for costs application, that was part heard before Sir Kenneth Parker, and as you well know from the skeletons, Sir, there are two issues there, one is the amount of further security, and the other is the timing of that further security. Subject to you indicating otherwise, I was proposing to address you briefly, bearing in mind that you have obviously digested fully the skeletons on the question of timing in some of the points now taken in the skeleton of my learned friend and, in particular, some suggestions that further evidence can be put before this Tribunal that I do not accept, and then on the question of the size, but I am obviously in the Tribunal's hands.

THE PRESIDENT: I think timing is probably a less significant issue. It is the amount that is obviously extremely important.

MR. HARRIS: Can I do it this way then, if you prefer to deal with it in that order, can I simply lay down a marker that my submissions are that we have very significant issues with those figures that are said to be confidential in the confidential version of the skeleton argument.

THE PRESIDENT: Can I make clear, I am not going to moderate the amount of security that your client will receive, and it is all about amount because it is accepted that you are entitled not just to the security you have but to further security on a ground of impecuniosity. It is a question of what, I think, are your reasonable costs and therefore what is the right amount.

MR. HARRIS: Sir, I accept that.

THE PRESIDENT: The fact that their ability to pay may be better than suggested by those paragraphs need not concern you.

MR. HARRIS: I only raise it just because we are concerned that there is an attempt to adduce additional evidence in those paragraphs, and we do not accept that attempt. To the extent that it bears on the overall amount I have made my point. Of course, the attempt is made by my learned friend's team to have those figures bear upon timing, and we will come to that in due course, but we do not accept that either.

THE PRESIDENT: But I think you accept that it can be paid in tranches.

MR. HARRIS: Two tranches, yes.

THE PRESIDENT: So that is already there as regards tranches. It might have an effect on the date. It may be that, as with Moginie James, it can be paid in three tranches, but I think the big question is how much you should get.

MR. HARRIS: Sir, I accept that. I am happy to take it in that order. I am largely in the Tribunal's hands. I certainly do not – and I would not be allowed in any event – to make lengthy submissions on overall amount, but there are some headline points that I would like to just raise, notwithstanding that you have read the skeleton argument, if I may.

THE PRESIDENT: Yes.

MR. HARRIS: The first is, of course, you do know, Sir, that the schedule that I think appears at tab 14 of bundle A, that is the one that needs to be updated. This has been dealt with in correspondence.

THE PRESIDENT: There is an error and it should be £2,800,000, not £2,700,000.

MR. HARRIS: Exactly, and that is because the fourth figure down in the third column, instead of 28,800----

THE PRESIDENT: 128,000, yes.

MR. HARRIS: I did not want you to be under any misapprehension, Sir.

THE PRESIDENT: I have that point, yes.

MR. HARRIS: And we are grateful to my learned friend's team for pointing out that error. Sir, with that in mind, the headline points that I wish to make are fairly few, subject to any questions from the Tribunal.

The suggestion is made that as regards our bill of costs, we should only be effectively allowed 55 per cent of that amount. That is what my learned friend's team put forward. He says that it should be a million, and that is only 55 per cent of his slightly understated costs schedule for comparison purposes.

THE PRESIDENT: I can tell you, I do not see any great magic in 55 per cent, and that it necessarily is limited to 55 per cent.

MR. HARRIS: It obviously makes a difference what the headline figure is, I accept that.

THE PRESIDENT: I am more concerned to say about the headline figure and how it is made up.

MR. HARRIS: I accept that, but it is just worth putting it in context and perspective, Sir. There is a dispute between the parties as regards amount and we say there would be no warrant, and it would be unheard of, save in the most exceptional of cases - and there do not appear to be any relevant exceptional circumstances here - for only allowing what would end up being 55 per cent.

What has happened is that they have come making an offer of only 55 per cent, and that is of their costs schedule, whereas the relevant figure to look at is our costs schedule. We say that, with respect, on any view, we ought to be getting more than that.

Just for indicative purposes, Sir, so that you have them at your fingertips, on the more traditional and orthodox figure of about 70 per cent - and I say that, again, no magic, and I do not pretend otherwise - I note that that was the figure that the Tribunal was minded to grant to my learned friends for Moginie James this morning. On an individual basis only, 70 per cent of even the £1.8 million that my learned friend's team has put forward as its reasonable costs is £1.26 million - in other words, significantly more than they have offered - and we are here fighting about getting more than they have offered. That 1.8 is a little understated, it should be closer to 1.9. They have accepted that at least £50,000 more should be added to it because it was excluded from the £1.8 million budget, and there are some further costs that are not included in the £50,000. So call it £1.9 million just for indicative purposes, Sir, and 70 per cent of that is £1.33 million.

THE PRESIDENT: Sorry, what is the £50,000?

MR. HARRIS: I can show you in correspondence.

THE PRESIDENT: Can you tell me?

MR. HARRIS: What has happened is in the budget, if you were to turn up their budget, the one that came out at £1.8 million, it quite fairly says on its face that they have excluded from that document the costs of the security for costs and fortification applications. In a letter that came in, I think, yesterday, they have acknowledged that if those costs are added back

in for comparison purposes, which is part of today's exercise, then part of those costs are £52,000, but that is not the entirety of those costs.

MR. MACLEAN: That is not quite right. If you have the schedule at p.326, Sir, if you look at Contingent 1:

> "Security for costs and fortification costs excluded from budget on the basis that costs will be subject to summary assessment …"

Then zero is put in to the succeeding columns. What contingent 1 comes to is £52,615. That is all that is excluded from Precedent H, because the other costs relating to security for costs and fortification and costs management are all covered, as is explained in Eversheds' letter of yesterday, in contingent 2 which becomes a total of £71,000.

So my learned friend, with respect, is not right to say call it £1.9, just chucking in an extra £40,000 for luck. The total figure is £1.809, plus £52,616.

THE PRESIDENT: So £1.86.

MR. MACLEAN: Yes, and I would not call that £1.9 million.

THE PRESIDENT: Is that right, Mr. Harris, you accept that is £1.86?

MR. HARRIS: I have only recently seen this. If that is Mr. Maclean's submission to the court, of course I accept that. The point is, it does not really matter. This is for indicative purposes. What it means is that 70 per cent of the £1.86, subject to somebody pulling out a calculator, is £1.3 million. Even 70 per cent of £1.8 million, before you add in the £52,000, is £1.26 million, and that is very significantly more than has been offered, so I have to be here today, in my respectful submission.

THE PRESIDENT: More than offered, less than you receive.

MR. HARRIS: Yes, that is right. That was the first point that I wish to make. I am very conscious of course that you wish me to deal with some of the figures, but there we go, that is that.

The second point at a headline level is that we are not comparing like with like. If and in so far as you are persuaded, or have had regard and think there is any force in a comparison between the Agents Mutual proposed costs of its further conduct of this litigation and ours, then there are very significant difficulties with that. There may be in all cases, but there certainly are in this case.

The first point I have already made, it does not include the 52. So that has to be added in if we are going to do any form of comparison.

The second and more important point is that unlike us this claimant is facing, for relevant budgetary purposes, two claims and, therefore, is able to produce two cost budgets and allocate and attribute costs across two claims, whereas we have only got one.

You will know, and I can tell you where this is, that the Agents Mutual proposed costs for the Moginie James action come to £458,072. I have got a reference in a different bundle, but if somebody knows----

THE PRESIDENT: I have got the costs schedule.

MR. HARRIS: Yes, if you wanted to turn it up. The point is that I do not say, of course, that you can simply add for comparison purposes effectively another £458,000 on to their £1.85, but just for indicative purposes, if you did do that then the figures are a lot closer. They become £2.3 million versus £2.8 million. All of a sudden, this supposed vast disparity begins to fitter away.

What I do say, and you will pick this up from our skeleton and from the evidence of Mr. Bronfentrinker in his third witnesses, is that of course there are some additional costs that have to go into lone and single cost budgets that are generated by the fact that these cases are being managed and then heard together. We cannot split them out because we have got only one budget, whereas Agents Mutual, of course, have been able to split them up. I do not need to dwell on the detail, they are fairly obvious.

THE PRESIDENT: I understand.

MR. HARRIS: So, for comparison purposes, that is my second point.

The third point for comparison purposes is that, in my respectful submission, ours are inevitably higher than theirs in any event, and perfectly reasonably so. You will have seen in our skeleton argument, Sir, that we take the point, and I am happy to show you documents if you want to see them, that, unlike us, this claimant will inevitably have borne some pre-litigation legal costs on relevant matters for the competition issues prior to the litigation starting, or even being contemplated. That is absolutely inevitable because they simply must have had competition law advice when setting up Agents Mutual and launching it.

Indeed, if you were to pick up our skeleton and look at footnote 2, I have given you the cross-references to the bundle. I am happy to take you to any documents.

THE PRESIDENT: Would this go - I am just looking at your summary schedule - to general advice? It obviously does not go to statements of case, it does not go to disclosure, it does not go to CMCs or witness statements.

MR. HARRIS: It does go to statements of case, certainly, to some degree. I am not suggesting it does not. This is how it works, Sir: when my learned friend came to issue his claim form and his particulars of claim that was against the background - I am not saying him specifically, but certainly his team, and definitely Eversheds, because, as we have seen in the records, they were advising right from the first inception of this claim vehicle - they will have had the benefit of what seems to have been, on the basis of even pre-disclosure materials, considerable competition law advice and thinking, whereas we had not because we were hit with a claim form more or less out of the blue and then an injunction application.

Then, of course, all of our thinking as regards the true competition law structure and framework for this case is generated properly within, and reasonably within, the litigation budget, whereas it seems that at least a considerable part of a six figure sum, pre-disclosure, and I cannot go any further than that, was spent on regulatory and legal advice about setting up the claim and then getting it to start operating. So that was, I think, £126,000 right in year one. I can show you these documents if you would like me to.

THE PRESIDENT: No, you do not have to do that.

MR. HARRIS: Then £25,000 a year, including year one, which is pre-launch. Of course, there will have been other issues besides competition law, I accept that, but a large chunk of that from the firm that represents them in the competition litigation must inevitably have been competition law advice. They can draw upon all of that throughout this litigation, whereas we cannot. So for comparison purposes, it is not comparing apples with apples.

You will also have seen, because it is in footnote 2 of our skeleton, that it is not limited just to advice given to the claimant vehicle itself. It is said in the slides of 6th June - the reference is in our footnote - that the founding members also had significant regulatory and legal input, and all of that is available to the claimant, and none of it is properly a litigation cost.

THE PRESIDENT: Yes, I understand that.

MR. HARRIS: The next point is that again, because of the nature of the claim, we are bound to have, in my respectful submission, higher costs than the claimant because largely the competition case is about what the claimant is, how it came into existence, how it operates, what documents it created, how it used them, what they mean. Of course, that is largely new to us. I accept the defendant was a member, but it did not have sight of all of these documents, whereas in sharp contrast the claimant obviously knows about all of these documents and has a good working understanding that, does not have to read them for the

first time, does not have to see how they fit in context, does not have to begin to understand what they mean. It knows all of that. Let me give you just----

THE PRESIDENT: I am sorry to interrupt you, that would mean disclosure is much more onerous on the claimant because the documents have to be found and produced by the claimant. You will not have to produce many documents because it is not about your conduct.

MR. HARRIS: That is a fair point, Sir, in one direction, but the point I was making points in the other direction, which is that when we get documents we have to digest them, put them to witnesses, put them to experts, and seek to comprehend them afresh. That includes the professional fees that we will no doubt be talking about later. That raises larger, properly recoverable, litigation fees, both for counsel, solicitors and experts, and there is bound to be less of that from the claimant because of their familiarity with the documents.

I can give you a concrete example. It is just an example, Sir.

THE PRESIDENT: Counsel would not be familiar with the documents presumably. It is not suggested that these counsel were advising the claimants, is it?

MR. HARRIS: No, Sir, I am not making quite that point. I am just saying that for us to deal, our team across the board, with materials with which we are not familiar, whereas they are intimately familiar, that generates most cost.

THE PRESIDENT: Yes, the only thing I am saying, you make the point their solicitors will be familiar because they have been involved from creation of the claimant back in, I think, 2013, whereas it is all new to your solicitors. I understand that. I am just saying that for counsel it is new to both sides.

MR. HARRIS: I amend that accordingly, Sir. There are some examples. Let me give you----

THE PRESIDENT: I understand the point. It seems to me a fair point with that qualification.

MR. HARRIS: Moving on then to the next headline issue, of course, in the usual way what is done in opposition to this part of my application is that the other side comes on and says, "Well, look at this particular heading, look at that particular heading, we think they are too high, look at our costs, our costs are a lot lower". The inference is sought to be drawn that, therefore, the other side's costs must be far too high. With respect, we do not see it that way at all.

There are significant headings in my learned friend's budget, even when one adds in the 52, that are, in our respectful submission, obviously too low. So this is not a one way street. We say, for example, that the trial costs that they put forward of £483,000 are not realistic. They are unrealistically low. I can explain why in some detail if you like. What I would

not want the Tribunal to do, with respect, is proceed on the basis that somehow there is a legitimacy in some of the headline figures put forward in my learned friend's budget and sort of have either expressly or in the back of the Tribunal's mind, well, it is by reference to them that we should see reasonableness or otherwise of the Quinn Emanuel budget, when we do not accept the reasonableness of those fees. Take trial costs as an example----

THE PRESIDENT: You say "reasonableness", you do not say they are unreasonable, you are saying they are too low?

MR. HARRIS: Yes, that is right.

THE PRESIDENT: You say their trial costs - I am looking at the trial costs----

MR. HARRIS: Sorry, I was trying to locate it. I was using, I am afraid, different copies of this. Looking at p.326 in bundle A, that is the figure of £483,320, and, as you will see, the very significant bulk of that is counsel's fees. That is £395,000, so that is £400,000.

THE PRESIDENT: Counsel's fees are?

MR. HARRIS: It is disbursements, I beg your pardon.

THE PRESIDENT: Disbursements, but if taken together £395,000.

MR. HARRIS: Yes, experts are accounted for separately.

THE PRESIDENT: Yes, as they are in yours - so £395,000, but one could add, it seems to me----

MR. MACLEAN: My Lord, it is all broken down.

THE PRESIDENT: There is about £24,500 in the other case, so it is £370,000 for counsel. You have got £642,000.

MR. HARRIS: Yes, and my point is that for a trial of this speciality, complexity and length, for instance just the pleadings - there is a 40 odd page defence, 40 odd page reply, 40 odd rejoinder, and there are multiple issues. All I am saying, Sir, is in the scheme of things, not just the length, but the complexity and difficulty, which is why specialist counsel and solicitors on all sides have been instructed, you are invited to compare our figure for trial with £483,000, but the £483,000 is too low. This is a case, of course, in which there are also experts, multiple witnesses, 12 days of court time, not all of them literally in court, but nevertheless----

THE PRESIDENT: We have got nine hearing days. Part of the difficulty is that you have not produced a proper broken down schedule and I do not know why. Everybody else has, not just the claimant. Moginie James, in support of their application for security, produced a full schedule, broken down by fee earners and rates. Although you are seeking a large sum of money, you have not. So this sort of comparison becomes very difficult because one just does not know how the schedule has been prepared in any detail.

MR. HARRIS: Sir, I accept that point.
THE PRESIDENT: Why was it not produced?
MR. HARRIS: May I just take a moment. (After a pause) Sir, the explanation is that we did not feel it necessary for today in the absence of an order. My learned friend's team for the claimant was seeking a cost budget and indeed they sought to persuade the Tribunal that that should be done before today and the Tribunal said, no, effectively - and I paraphrase - let us deal with it today. It has now been ordered and we will do it.
THE PRESIDENT: I am not thinking about cost budgeting, I am thinking you are asking for an order for security on the basis of your estimate of costs - that is the foundation of the application - and I do not know the rates.
MR. HARRIS: We do know the rates, Sir.
THE PRESIDENT: Do we?
MR. HARRIS: Yes, that is dealt with expressly in the correspondence. That was queried by my learned friend's team and we wrote back. The answer is that it is between £590 and £520 per hour. That is less, of course, than the rates that this Tribunal and you, Sir, considered reasonable in----
THE PRESIDENT: That is for whom?
MR. HARRIS: Those are for the partners of Quinn Emanuel.
THE PRESIDENT: What about everyone else?
MR. HARRIS: £395 for the associate. That is less than the figures that you, Sir, considered reasonable in litigation.
THE PRESIDENT: They are doing all the work? All the disclosure and all the hard work is all being done by partner and senior associate - is that right?
MR. HARRIS: No, Sir, in the usual way, but the experienced litigation team divides it up as appropriate and delegates as appropriate so that it is deliberately not done at the highest possible rate.
THE PRESIDENT: Where do I find the rates being charged? Where are they set out?
MR. HARRIS: We will find you the letter in which it is set out. This was queried by my learned friend's team.
THE PRESIDENT: Yes, I saw it was.
MR. HARRIS: We wrote back and said, "Here are the answers".
THE PRESIDENT: Is that the letter presumably in bundle D?
MR. HARRIS: It is bundle D at 743.

THE PRESIDENT: I have seen that letter. That just says what you have told me. It does not say anything about anybody else. Either it is being said that all the work is done by those rates, or it is not said, and you have just clarified that is not the position. You have not provided clarification, as asked, of everybody else's rates.

MR. HARRIS: Sir, I accept that. You do not have that today.

THE PRESIDENT: Why not?

MR. HARRIS: The explanation is that there was no order for that . Indeed, when my learned friend sought to have the order made for a full cost budget prior to today, that was not adopted by the Tribunal. What we did do is explain the hourly rate, we explained----

THE PRESIDENT: Not the hourly rate of everyone involved. If it is said that disclosure is carried out only by a partner and a senior associate that would be wholly unreasonable. If it is said, no, that is not the position, it is largely carried out by junior associates and a trainee or paralegal, then we have not got any of the relevant rates for disclosure.

MR. HARRIS: Sir, I accept that. I accept that you do not have - with great respect, we need to move on from this point, in my respectful submission, because we do not have the full Precedent H, and therefore you do not have the full breakdown.

THE PRESIDENT: I do not need the full Precedent H, but it is usual for security for costs, certainly in the High Court, and it should be no different in this Tribunal, to have more of a breakdown when one is seeking costs of this order, so one can see----

MR. HARRIS: Yes and no, because, of course, the context to this dispute is that we are only seeking £1.5 million out of what was at the time it was asked for £2.7 million, and is now £2.8 million. The context of the dispute and the lead-up to the dispute is that we are miles apart from the other side, because under no circumstances are they prepared to offer more than £1 million. So the requisite headline figures are really what is required, we respectfully contend, for the purposes of the balance of this part-heard application, bearing in mind that my learned friend's team will not go above £1 million.

At the previous stage, Sir, there was a full Precedent H. So at the beginning of this application there was a Precedent H all split out, and that was relevant to the hearing before Sir Kenneth Parker, but events have moved on beyond then. What is really required, in our respectful submission, given where the dispute lies - namely, should it be £1 million, which is 30 something per cent of our budget, or should it be £1.5 million, which is 55 per cent of our budget? In that context, Sir, it is, in our respectful submission, not necessary to have the full detail of the full costs budget or Precedent H, because that is the nature of the

dispute, £1.5 or £1 against the background of an overall of £2.7 or £2.8 which is being put together. I accept that there was a typographical mistake, and that is regrettable.

THE PRESIDENT: I do not think you need worry about that.

MR. HARRIS: Be that as it may, it is been in evidence as being put forward by an experienced specialist solicitor as being his personal assessment - those are his words, I think it is para.17 of Mr. Bronfentrinker's third statements - of the costs that are likely to be incurred, in our submission, reasonably for this litigation. In my respectful submission, they are entirely the sorts of costs you would expect for a party who finds itself in our position, given the points that I have made about the things that we have to do, certainly in comparison terms, for litigation of this kind. They are entirely in line with the sorts of costs that I see all the time. That is not to say that your Lordship cannot say, "I do not agree that is reasonable, that is not reasonable", but what I do submit to you is that there is no sensible basis upon which the Tribunal could say that they are not a proper estimate of the anticipated costs.

THE PRESIDENT: The point of the PTR is to have costs - a PTR is essentially concerned with trial timetable, what is a sensible way of preparing bundles, whether expert evidence should be consecutive or concurrent, the order of witnesses. Why should that incur costs of £123,000? It is an extraordinary figure. It may be in line with what you have seen, it is not in line with what I see in the High Court, I can tell you that, for a PTR.

MR. HARRIS: Sir, in my experience, there is, especially in expedited litigation, often a panoply of applications and other points that arise in the context of a PTR. Of course, I do not have a crystal ball. There will be all of the things that your Lordship has just mentioned, but there may, one does not know, but it was certainly a point that was raised at the last hearing, whether or not - actually, that may be a point in the High Court proceedings so I will not pursue that. One does not know. One certainly anticipates that in this case, and given the compressed timetable, there may well be ongoing disputes about disclosure. I appreciate that the PTR is not until December and disclosure is supposed to be completed in September, but there are already disputes brewing about that. These have to be fitted in somewhere. There may be further disputes about whether or not the case can properly be understood, there may well be disputes about experts by that stage because the reports have to be in----

THE PRESIDENT: It is still an absolutely astounding figure. You say that one should not compare, but I do look at what no doubt equally experienced solicitors in Eversheds, also an

experienced litigation firm, consider are likely to be costs of the PTR, taking your point that we look at the two cases together.

MR. HARRIS: Sir, that is right, but of course we say that across the board the Eversheds' figures are unrealistically low based upon our experience and our expertise. In our respectful submission, it is always the case - it is in the interests of the person who is being asked to provide security for costs to err upon a conservative side. I do not criticise them for that, that is the natural tendency. What we are doing, we are being intensely realistic. The fact is that these sorts of figures do get incurred as actual billable costs that have to be paid by the lay client.

THE PRESIDENT: That does not make them reasonable and proportionate, that is the point.

MR. HARRIS: I accept that, but just taking that PTR figure as a for instance, there are counsel's fees which are a significant chunk thereof, and this is a hearing where, even today, unlike my side, my learned friend's team has saw fit to send a very senior junior and a silk. The PTR is likely to be a silk and at least a junior on my team, and these are the sorts of costs that in specialised expedited litigation get incurred.

THE PRESIDENT: You say the claimants have proceeded that way. They have estimated counsel and solicitor fees for a PTR in this case and in the other case in a total amount of £40,000 altogether.

MR. HARRIS: Yes, for an entire day, two counsel and specialist solicitors in two actions, that is, in our respectful submission, very noticeably and unrealistically low.

THE PRESIDENT: Maybe they are just under-charging.

MR. HARRIS: Sir, what, with respect, we say is we do not take a particular point about hourly rate or not recording costs or anything, but what we do say is that there a natural tendency, when resisting security for costs to come in on the low side, and we say across the board their schedule is unrealistically low.

THE PRESIDENT: They may be, of course, confined to that as they are also for costs management, which might wish them to have a realistic schedule, because they may not recover any more even if they spend in excess.

MR. HARRIS: Maybe, but in so far as they are confined to that because of the constraints of the budget that they face, in so far as that is your point, Sir, then, of course, that is not a fair point to take against us. The fact that they have made budgetary constraints that they cannot afford does not mean that it is unreasonable for us to spend, using the correct specialist team, amounts that are higher than theirs. That would be a completely unfair way, They have chosen to sue us, Sir, it is not the other way round.

I accept your point, Sir, and I am conscious of the time, of course, that there could have been more detail, but in the context of this dispute, is it £1.5 million or is it £1 million? That really recedes, we say, into the distance, because on any view, we respectfully contend, we ought to be getting, even if you were to take a dim view of some of the particular headings and reduce the bill accordingly, significantly more than the £1 million that has been offered, and that is why we are here today because that is the bottom line for my learned friend's team. That is 30 odd per cent of our budget. Even if you do not like the size of some of the figures, Sir, in my respectful submission, we would get nowhere near bringing it down such that the relevant percentage would take us to £1 million. That is only 55 per cent of their budget. On any view, they must be contending before this Tribunal that every single penny of their budget is reasonable.

THE PRESIDENT: I have got to work out what is reasonable. It is not just more than £1 million. I have got to work out on the material before me what I think is a reasonable figure, not simply to say it is more than £1 million.

MR. HARRIS: I am conscious of the time, but I have other criticisms. Take disclosure, for example, my learned friend's disclosure figure, we say that it is unrealistically low.

THE PRESIDENT: Although they have more disclosure than you, as you accepted.

MR. HARRIS: Yes, but the figure that they propose in their budget for dealing with disclosure is, we say, unrealistically low.

THE PRESIDENT: The trouble is, it is hard to understand your figure. They have shown us, and what is interesting in disclosure, that it is mostly done by a junior associate and a trainee. We have no idea how your figure is split.

In any event, I will say five past two. You have more points to make and of course Mr. Maclean will respond.

MR. HARRIS: Thank you, Sir.

(Adjourned for a short time)

THE PRESIDENT: Yes, Mr. Harris.

MR. HARRIS: Sir, I had a couple of specific points to finish off on about specific headings in my learned friend's budget, and then I had a couple of points to make stepping back on the question of overall levels. Then, at the appropriate juncture when you wish to hear them I would obviously still have submissions about timing, but I accept that you may want to hear Mr. Maclean first, that is a matter for the court.

On specific costs I had drawn the Tribunal's attention to the heading of £483,000 in the claimant's schedule for costs of the trial. You, Sir, rightly identified that when one turns

over in tab 16, that within that overall heading there is £395,000 disbursements of which £360,000 is counsel, and I was making the point, which I stand by, that that is an unrealistically low figure for counsel's fees. I put that in two ways to finish off this specific point.

The figure that is put for counsel's fees for our budget for the relevant heading is significantly higher and is, of course, a considered estimate from the clerks' room with which you are, Sir, very familiar, and that is based upon experience and expertise in these actions, and that comes out at £642,520, that is p.324. I can submit with complete confidence that the figure put forward of £360,000 for trial fees for the other side is therefore unreasonably low. Even if you were to take the view, which, of course, I do not accept, that the figure in our schedule is unreasonably high, there is no serious basis, in my respectful contention that it could be as low as £360,000.

It does not end there, Sir, because if you have regard to my learned friend's team's schedule, that £360,000 is said to include absolutely everything to do with the trial, and the entirety of trial preparation because looking at p.329 there is a nil figure for counsel, for anybody else, for anything on trial preparation. We say, with great respect, that betrays an unrealistically low figure for whatever reason that may have been put in it is, in our contention demonstrably and unrealistically low. You have heard the reasons why I have said that in terms of the scale and the complexity and length and what have you.

THE PRESIDENT: Yes, I am just looking, there is the further – if one takes them together and, as you rightly say, it is not a direct comparison. There is a further £80,000 on the schedule for the Moginie James trial.

MR. HARRIS: Yes. Even if one were to say apportion that as to half each, or a relevant half of it over to our schedule, that would still be £400,000, which, whilst it makes the comparison closer, Sir, it is still unrealistically low.

There are other examples of this, Sir, and obviously now is not the cost management hearing where we are cross-referring to the costs budget reports and comparing this, that and the other. But, nevertheless, I will give you one or two others. There is the "disclosure" heading which, if you pick up the claimant's schedule----

THE PRESIDENT: I note that Moginie James, they are also using leading counsel I think. Is that right?

MR. HARRIS: I do not know what they will be doing for trial, Sir.

THE PRESIDENT: They have a detailed costs budget, so we should be able to see that. (After a pause) Yes, Mr. Grant for trial. He is £248,000.

MR. HARRIS: Yes, you can see that at tab 15 which, of course, is not in a split----

THE PRESIDENT: No, but it is just an updating of the 27th June breakdown, so one can relate that to it, some of the figures are the same, some have been revised upwards. Indeed, the trial figure has gone up as a result.

MR. HARRIS: This one, of course, is of slightly less assistance, indeed, greatly less assistance because they are by their own wish and now order of the Tribunal taking – and I mean this with no disrespect – very much a back seat or secondary seat in the competition law issues trial to which this budget largely relates. They do not have the specialist solicitors or specialist counsel. That is not to take anything away from them, I am just saying for comparison purposes that is obviously highly material. Indeed, their pleadings adopted the same approach, their evidence will adopt the same approach and it is all manifested in the experts' direction, they may not have a live expert.

THE PRESIDENT: I was expecting it to be lower.

MR. HARRIS: In any event, that is one of the two specific points that I just wanted to draw to your attention and why I put it that way, and we say with considerable force, we are able to identify they are unrealistically low on trial including on the counsel's fees thereof.

Then another one, Sir, is the "Disclosure" heading. If you pick up tab 16 in bundle A, where we were in the Agents' Mutual Precedent H, and trace that down to the third or fourth heading, one has disclosure, and going across that is a total of £141,986.

THE PRESIDENT: (After a pause) Disclosure £142,000.

MR. HARRIS: £142,000, and if you look over the page, you can see some degree of split out under the disclosure column on p.328. But, in the overall heading, if you pick it up, Sir, on p.326, you see next to the reference "Disclosure" it says:

> ""Assume potentially 10,000 documents to sift through, leaving 5,000 for disclosure and possibly 1,000 from the defendant. That appears to be the basis upon which the £142,000-odd has been put forward."

There are two comments to make about that. First, there is no basis for making that assumption, and this is therefore not an up to date, or particularly accurate figure. The disclosure has been largely completed or, at any rate, for the purposes of an up to date costs estimate to this court, it could be much more accurate than simply assuming a 10,000 document figure.

THE PRESIDENT: It has been largely completed.

MR. HARRIS: Yes, because the deadline is 23rd.

THE PRESIDENT: Yes, but it would have been well advanced by 25th August, would it not?

MR. HARRIS: The other point – these two points go hand in hand – is that the assumption upon which this has been put forward so far as we can make out is a mistaken assumption because the basis of the 10,000 documents was drawn out in the hearing before you, Sir, on 26th July, and if you turn in bundle B to tab 11, there is the transcript of that hearing at the end of July. Sir, you may recall that we were having the argument about what the scope of disclosure should be in response to my collective boycott allegations, and it was standard disclosure for everything except for those, and then it was limited disclosure on those and that is this part of the hearing. What you say, Sir, at----

THE PRESIDENT: Sorry, what page?

MR. HARRIS: Page 147, I beg your pardon. At line 25 you made reference to a date. Mr. Maclean responds: "It is a two year date". Then Mr. Maclean says:

> "Inclusive, yes, Sir. If, which we do anticipate to be the case, those searches throw up 10,000 documents or fewer, we will manually review all 10,000 documents and provide disclosure of such of them as fall within disclosure.
>
> If, which we do not anticipate to be the case, there are more than 10,000 documents . . ." etc.

That is relevant, because if you turn back to the costs schedule, the disclosure figure is expressly on the assumption of potentially 10,000 documents to sift through leaving 5,000 for disclosure, and possibly 1,000 from the defendant. So, so far as we can make out that contemplates only the collective boycott disclosure, not the remainder which is, of course, standard disclosure on all the other issues in the case, which are significantly greater in number; the multitude of other issues obviously far outweighs the collective boycott allegation.

The two points I make go hand in hand. It does not seem to be accurate or updated and, in any event, on the face of it appears on a mistaken assumption. Overall, in any event, even if I did not have either of those two points, we say, based upon our experience and expertise of the team on this side of the court, that it is unrealistically low. There is, in our contention, no realistic basis upon which disclosure in a case taking more than two weeks of CAT time, of specialist issues of this complexity, will engage a total disclosure cost of only £141,000. There is, with respect, no chance. No chance that that would happen, and no chance that that is reasonable. That is, obviously, in our submission unreasonably low. For instance, it does not, at least on the face of the document, refer to any e-disclosure platform, or input or expertise, and yet it is not realistic to assume that a case going to trial in this Tribunal of this type could, or would or should not involve e-disclosure input and, in any

event, even if – which we regard, with respect, as very unlikely – even if that were the case on the part of the claimant, it simply does not follow that it would be unreasonable for us to have an

e-disclosure provider. Quite the opposite, it is absolutely orthodox and par for the course. When one has regard to our schedule at tab 14, p.324, we make, with respect, a modest provision for e-disclosure. That £60,000 for the e-disclosure provider, both involvement in the actual exercise in providing the platform and then all further queries and searches and what have you, which is, of course, absolutely run of the mill for these cases and, indeed, we submit, necessary----

THE PRESIDENT: Do you have an idea now of how many documents you are going to disclose? It is fairly close?

MR. HARRIS: I cannot provide that, I am afraid, today, no. But, what I do know is that the e-disclosure figure is extremely reasonable, indeed, we managed to get a very, very good deal on that, and it is significantly lower than in other parallel cases, and that is leaving aside the point I made earlier on that in terms of our analysis and the ability of our team to get on top of what, for us, are new and fresh documents on each occasion, will be higher than that for the other side, at least for their solicitors. We say that £141,000 is grossly too low, and is not a relevant or fair comparator to our figure for disclosure of £341,000 which has been put together, as I say, by a very experienced team who do this all the time including in expedited litigation.

Just before I move on from disclosure, because you asked me, Sir, earlier on----

THE PRESIDENT: Just one moment on that. (After a pause) They have calculated their disclosure on the basis of 365 hours – I think that is right – of solicitors' time. I note that your previous solicitors, thought, having no doubt taken full instructions because this was in June and so they would have had an idea of the documents involved in your client's 307 hours – that was their attested estimate. I have no idea from your schedule how many hours.

MR. HARRIS: I can give an update to the court. Unsurprisingly, the court does not seriously expect this to be done by the Partners, they are only involved proportionately to the extent necessary and, indeed, we have paralegals. So the way the two teams compare is as follows – and you can discern this from the costs information that you do have and/or with the correspondence – on the Eversheds' side for the claimant there is one Partner, one Senior Associate, and one Associate as the core team. On the Gascoigne Halman defendant's side

there are two Partners and one mid-level Associate as the core team, and so overall they are almost directly comparable.

THE PRESIDENT: Yes, I am just looking at total number of hours on this case.

MR. HARRIS: There are a number of difficulties with the earlier costs schedules prepared by the former solicitors. First, they were not sufficiently experienced in these matters and that is one reason they are not here, that is no disrespect----

THE PRESIDENT: Well, they know about disclosure. They are a very experienced litigation----

MR. HARRIS: With respect, Sir, I do not want to make particular submissions about them, but it is no accident they are not here today. Secondly, and even more germane, even if they were experienced they would have had to go on the basis of the pleadings as they then stood, and the pleadings have moved forward significantly since then both in the reply, which did not exist back then, and then the amended reply, which did not exist back then, and then the rejoinder, and the issues have become clearer. On top of that, of course, there both could not and should not have been any allowance in that former number for the added disclosure costs that arise from the joinder for case management purposes of the Moginie James action with the Gascoigne Halman action.

So, there is a limited referential value of that former number, whatever it was.

THE PRESIDENT: I was just thinking of the hours they would spend going through your client's documents, which is something experienced commercial litigators such as those solicitors are as well – they may be in Manchester so their rates are lower, but they know about litigation and they know about relevance, and I just note that maybe as things were fine it goes up, but it is not to suggest that actually it should be 800 hours or something, it would be a remarkable change.

MR. HARRIS: Sir, be that as it may----

THE PRESIDENT: We do not know what it is.

MR. HARRIS: No, that is true. Just on that point, of course, and before I come back to the other specific point and the more general point. Sir, you will, of course, remember that it was on 7th September that you, Sir, as President, gave the direction – I can show you if you would like – that there should not be any more detailed cost budget put forward for the purposes of this hearing and so, with respect, we say, Sir, it is a little unfair for there to be undue weight put upon the fact that there is not a further updated costs budget in advance of this hearing when: "The President is not minded to direct the parties to provide any further updated costs budget in advance of the hearing." I take your point that there is not an updated one, but

you were specifically invited to direct to do that before today and you specifically did not, and we therefore come here today on the basis of----

THE PRESIDENT: That was for the purposes of costs management.

MR. HARRIS: Maybe, Sir, but if the Tribunal had felt that there was a particular relevance or need for the applications that are live before the Tribunal today to have a Precedent H before today then it could have been done, even though the Tribunal directed its mind to the question of further and updated costs budgets.

There is that point, but there is also the point that I made before, which is that we are arguing between 1.5 and 1 where we arguably do not need the full detail and rigour of a Precedent H. I will not develop that, because I developed that before.

THE PRESIDENT: Yes.

MR. HARRIS: But going back to the specific point of disclosure, I cannot over emphasise, it would be unfair for me to start to make detailed points about a former solicitor and what they were precisely experienced, and how they did what they did. The fact is, they are not here today and the fact is we have a specialised and an experienced team, and a senior Partner there, who has given sworn evidence as to his personal assessment of what it will cost in this litigation bearing in mind the pleadings as they stood by the time that he put together the budget, the nature of expedited litigation and the joinder for case management purposes of Moginie James. For all of those reasons I invite you to disregard the previous costs budget.

What you have so far, Sir, is two sets of specific submissions from me about particular items which we say are demonstrably and heavily unrealistically low on the other side's case, but it does not end there. I am not going to go through every heading for obvious reasons, but I will just give you one more because it is so discrete and obvious.

If you pick the Agents' Mutual Cost Schedule at tab 16, you drew to my attention earlier, Sir, the costs in our budget of a PTR, but if you turn to p.329 and you had compared – and one understands why – proposed costs in their schedule for the PTR which were £40,390, and I was saying "unrealistically low". One way to show that, Sir, is at p.329. So the first sets of columns on that page are the headings, and then the next set of columns under the heading "PTR" – do you have that, Sir, 329?

THE PRESIDENT: Yes.

MR. HARRIS: If you go down to counsel's fees, for reasons that are not clear they have not indicated seniority or hourly rate, but be that as it may it is demonstrably and unrealistically

low to think that for a day's PTR in this case you would have counsel's fees of a grand total of £12,500 with Leading counsel's fees lower than Junior counsel; it is simply not realistic. As I said before, Sir, the difficulty here is, for obvious reasons there is a temptation and a tendency on the part of the claimant seeking security for costs to put in numbers that are, if you like, undercooked. Here are numerous examples of that, and this is a particularly discrete example, that is totally unrealistically low.

For all of those reasons if, and insofar as you derive real assistance out of the comparison exercise, and for the reasons put in our skeleton we say that that is of limited benefit, that is not a true comparator on the discrete headings, let alone for the overall reasons that I gave about 'apples and apples' at an earlier stage.

I do not propose to take more specific points on that heading, but I just want to step back for a moment and invite you to reflect on looking at it on an overall basis, bearing in mind that, as I repeat again, the question before you today is: is it £1.5 million that we should get out of the total of £2.8, or is it only £1million?

The teams at the solicitor level are broadly the same, as I have already suggested; no relevant point can be made there. The teams at counsel level are broadly the same, so again no really relevant point can be made there. It turns out that the paralegals – you can see this from the costs schedule £185 at the Eversheds' level, but they are £50 an hour less at the Quinn Emanuel level. So, in fact, on that level they are noticeably less and, in the usual way, you would expect them to be as involved as is appropriate under supervision in the disclosure, and although I accept that you do not have the breakdown of the number of hours my clear instructions, just as you would expect, are that they would be involved to do that.

Against that background of similar sized teams, of similar seniorities and experience and expertise, at least for these purposes, sufficiently similar for there to be no sensible point to be taken, and bearing in mind that, in our submission, the claimant's budget is demonstrably too low, you have to ask yourself this question, taking a step back: looking at the overall figure of £2.8 million what could I, at this stage, even on a broad brush basis, realistically say: "I think that is unreasonably high" – what could you knock off for these purposes? We say there is no basis identified before you for knocking off any more than, say, 20 per cent – I will come on to the 25 per cent in a minute – because that is a considerable sum, well over £500,000 and if you were, on a broad brush basis, say 'Even though I do not have figures, I take a view they are 20 per cent overstated, or unreasonably high, or unrecoverably high' then that takes you to £2.24 million. Then, applying a sort of standard, although I accept

not 'term of art' standard 75 per cent for security purposes, that takes you to £1.68 million and that, of course, is higher than the amount that we even seek by quite a long way, we only seek £1.5 million.

Even if one were, on this broad brush basis, to start at the £2.8 and say 'I think it is more than 20 per cent overstated, 25 per cent', and that takes some doing bearing in mind that it is attested to by the Partner on his personal assessment, given his background and expertise, but even if you were to do that, which, of course, I do not accept, that goes from£2.8, deduct 25 per cent and that gets you to £2.1 and then 75 per cent on a fairly standard basis takes you down to £1.575 million, and again that is more than we even seek. So, even if you were to knock off 20 or 25 per cent and then apply the around about standard amount for security, we are still in excess of the amount that even we seek, let alone a million that is the bottom line for my learned friends, so you would have to smash an enormous amount off the bill and even then apply an unorthodox and, in our submission, an unsubstantiated security percentage to get down to anywhere near the £1 million that is put forward.

So, taking into account, Sir, the points that you have made about the absence of the detailed schedule, but nevertheless also taking into account the context of what this battle is really about, how it came about, and the fact that the Tribunal did not direct the updated costs schedule in advance, we say that there is no realistic basis upon which we would not be recovering at the end of the trial, if the costs order is made in our favour, more than £1.5 million of the £2.8 million that we put forward. There would be extraordinary slashing on both fronts to get below that. In any event, in practice, the battle today is: do we get more than £1 million because that is the bottom line for my learned friend, and there is no sensible basis upon which, in our submission, we could not or should not be getting more than that.

That is my submission, Sir, orally, on the question of the overall amount.

THE PRESIDENT: Do you want to say anything about the (inaudible) cross-undertaking?

MR. HARRIS: Yes, I was going to deal with that on the timing.

THE PRESIDENT: The *Stokors v Markets*.

MR. HARRIS: Well----

THE PRESIDENT: That is really about the fact, never mind when it is paid, but it will deprive the claimant of working capital that it would use to promote business, if it turns out at the end of the day that you do not recover any costs, you all have suffered loss as a result.

MR. HARRIS: Absolutely, Sir. I vehemently oppose that for a number of reasons. It is based upon the allegation in my learned friend's skeleton argument at para. 23(c) which we need

to turn up. I am looking at the confidential version – I will take you to both relevant lines. 23(c) in the final two lines.

> "It is submitted in a way which has regard to the 'adverse impact on the claimant's business of the provision of security for costs'."

The other way it is put is at para. 18(b) where they cite *Stokors* on one of the occasions. At the top of 18(b): "The damaging effect of reducing the funds available for the marketing of its online property portal", and over the page "of resulting harm to the claimant's business." Sir, there is absolutely no evidence whatsoever before this Tribunal upon which you could even begin to make a finding of adverse impact on the claimant's business, or reducing the funds available for the marketing of its online----

THE PRESIDENT: I am not making finding, really what I am asking is whether it may or may not have funding, and I am in no position to assess that, whether your clients are prepared to offer a cross-undertaking?

MR. HARRIS: Certainly not, because the only basis upon which it could begin to be mounted, any such submission in favour of an undertaking is if there is any evidence of actual adverse impact. As the Tribunal has rightly identified you are in no position to do that.

It does not end there, because----

THE PRESIDENT: I cannot exclude it either. One knows this is not a multi-national company with huge reserves.

MR. HARRIS: Sir, with respect, the only proper course is for you to exclude the possibility altogether on the evidence before you for this reason, Sir, that they have had every opportunity for literally months to advance any and all evidence that they wish to advance about impact upon their business, impact upon their cash flow and all future anticipated expenses; every opportunity. We have repeatedly pressed for that.

THE PRESIDENT: What they have said is, this is their monthly income, 'these are our operating costs'.

MR. HARRIS: Exactly, Sir. Let me take each of those two points in turn. The first one is not substantiated by the materials and, by the way, is not confidential. The second one is completely and utterly unsupported and wholly improper for it to have been put forward in this manner when we have been pressing for these materials in evidential form for literally months. Let me take those in turn.

If you take 23(b), the cross-reference there is to the 2016 accounts, which you will find at vol.2 of bundle C. It is in an exhibit to Miss Farrell's first witness statement, and the relevant page is 1324 behind tab 14. She says it is p.4 of the accounts under the heading

"Turnover", and that is to be found on p.1324. What this reference is said to support is that monthly amounts are received at the end of each month and that they amount to that figure. For the moment I will not read it out because it is said to be confidential, in fact, it is not, but nevertheless----

THE PRESIDENT: Well, if you show me a non-confidential version.

MR. HARRIS: Yes, I will. I will do that in just a moment.

THE PRESIDENT: What it said is that its turnover is the monthly amount from estate agents for membership. Are you quarrelling with that?

MR. HARRIS: What it says is that the turnover is recognised on a monthly basis, net of Value Added Tax. That is recognised for accounting purposes. It does not say that it is received on a monthly basis, and we have no basis for going behind what it says on the face of the document.

THE PRESIDENT: Well, are you paying it?

MR. HARRIS: But, Sir, this goes in stages. We have said all along, if you want to make points about either impecuniosity, even as regards timing, or on stifling, or anything like that, fine, show us the information.

THE PRESIDENT: Yes, just on the point on whether the membership is paid monthly, you know that, you are a member.

MR. HARRIS: We know that for us, Sir.

THE PRESIDENT: What is it paid for you?

MR. HARRIS: We have been paying monthly.

THE PRESIDENT: You are paying monthly?

MR. HARRIS: Yes, but the point, Sir, is we do not know about anybody else, and we have not had disclosure about anything else?

THE PRESIDENT: You think they might be on different terms?

MR. HARRIS: It may well be that they are on different terms, what we certainly do know, and is pleaded, Sir, is that there has been a great deal of differentiation in terms between different members. There are four or five membership schemes pleaded, some of which came as absolute bolts out of the blue for us in the reply. We know as well – this is pleaded, Sir – that there have been holiday periods, or non-payment of subscriptions for various new members under various schemes. There is an article came out in 'Estate Agent Today', Sir, this was this morning before the hearing, the other action that is being taken against the claimants by the action group represented by Tollers and, according to that: "It is no wonder that so many Agents' Mutual members have simply stopped paying their subscriptions".

The point is we simply do not know what they are actually receiving or when they are actually receiving it, monthly or otherwise.

THE PRESIDENT: They may not get anything but people have stopped paying, but the people who pay if they do not pay they do not get anything.

MR. HARRIS: We do not even know that, Sir.

THE PRESIDENT: You have just read out something telling me that.

MR. HARRIS: Yes, but we do not know whether they are still getting services or not. The basic point, Sir----

THE PRESIDENT: I am sorry, I am talking about whether the claimants are getting any income, if people are not paying then to that extent they are not getting income.

MR. HARRIS: I accept that.

THE PRESIDENT: For the people who are paying the question is whether they are, like you, paying monthly or six months in advance.

MR. HARRIS: Exactly, and all of that evidence is in the hands of the claimant, and they have refused, point blank, to give us any of it.

MR. MACLEAN: Sir, we have----

MR. HARRIS: With respect, I have not quite finished.

THE PRESIDENT: Mr. Maclean, you will get your chance in a minute.

MR. MACLEAN: Thank you very much.

MR. HARRIS: That is the first point, Sir, that note does not support what is said.

THE PRESIDENT: It says for accounting purposes it is recognised monthly.

MR. HARRIS: Exactly, it is recognised on a monthly basis but we know, and you will see this in a minute, Sir, that all kinds of other things have been going on with at least one monthly amount – I am about to take you to this in terms. So, we do not even know that it is monthly, and that is the less important point.

THE PRESIDENT: Except for yourself.

MR. HARRIS: Except for ourselves, yes, and that is the less important point. It goes on to say that the payments amount to approximately – then there is the supposedly confidential figure each month. There is absolutely no foundation whatsoever for saying that it is each and every month in the same amount, let alone in that amount and the reference to that, Sir, is in the same bundle as you are looking at but turning to an earlier tab, tab 13, you go to Farrell (1), para. 8.2, and this requires a bit of attention. What she says is that this is the sum total, para.8 of the financial analysis that they have been prepared to put before this

Tribunal at any point, the sum total. It begins with a recitation of cash in the bank and that was simply updated in Farrell 2 for the purposes of this hearing.

8.2, they also show an amount of £3,800,000-odd falling due to creditors within one year. In other words, that is money owed by Agents Mutual, the claimant, to other people, not an amount owed to external creditors. So the point in the first sentence is drawing a distinction, one only speculates as to why, but anyway the distinction is drawn as between internal and external creditors; we do not regard that as relevant, but that is what she does on instructions from Mr. Springett. Miss Farrell goes on: "I understand from Mr. Springett it includes £2.759 million in respect of accruals and deferred income." The deferred income is important for these purposes, Sir.

> "The bulk of this relates to two items: (i) deferred income of more than £1.5 million relating to February 2017 listing fees payable in by the members of Agents' Mutual."

So, first, there is a figure in non-confidential form which, incidentally, was referred to in open court by both me and Sir Kenneth Parker in the hearing on 4th July and it was never said to be confidential, but be that as it may.

What it says is two things of very great importance for the purposes of today. It is a figure that relates only to one month. It does not say "each month", so when my learned friends say in their skeleton argument that their payments amount to the supposedly confidential figure each month, and 8.2 is cited, there is simply no basis for that submission.

MR. MACLEAN: I am sorry, Sir. You told me, Sir, to sit down earlier, no doubt rightly, but Mr. Harris has not shown you para. 5 of Miss Farrell's second statement at tab 17. He alluded to it a moment ago on the basis that she was simply updating the cash in bank figure in her second statement. That was one of the functions of para. 5, but would you, Sir, just please read the sentence at the end of the second line of para. 5 beginning: "The position in relation to . . ."

THE PRESIDENT: Yes. ". . . monthly income remains the same. Listing fees are credited at the end of each month."

MR. HARRIS: But that simply does not address the issue, because this is a specific figure relating to a specific month, there is no evidence that that is the same figure for each month.

THE PRESIDENT: But it says: "The recurring monthly income remains the same".

MR. HARRIS: The same as what? We do not have evidence of their monthly income figures save only for this figure for----

THE PRESIDENT: Yes, but that is the figure. I am sorry, Mr. Harris, I do not understand this. "The financial position remains" and she refers to 8.2, and she says it remains the same, obviously the same as the one in 8.2.

MR. HARRIS: No, Sir, with respect----

THE PRESIDENT: What do you say it is the same as?

MR. HARRIS: We do not know, that is the whole point. The whole point is, Sir, we have asked repeatedly for cash flow statements.

THE PRESIDENT: Well, Mr. Harris, I do not understand it. A figure is given in 8.2 in a further witness statement she says that Mr. Springett, of the claimant, "has confirmed to me the recurring monthly income remains the same".

MR. HARRIS: Sir, there is no reference in 8.2 to "recurring monthly income, so in a later witness statement to say----

THE PRESIDENT: There is reference to one monthly income, for one month. We cannot take it any further. I understand – sort of – your point.

MR. HARRIS: Sir, what we can take further is that it is definitely within the possession, custody and control of the claimant to tell both us and this Tribunal everything that there is possibly to know about their cash flow and their historic and future anticipated monthly income fees, and they have steadfastly refused point blank to do it, even though----

THE PRESIDENT: Yes, I have your point.

MR. HARRIS: That is the point there, and that is only one side of the equation, so that is 23(b) of the skeleton. 23(c) for the first time ever, out of the blue, without any reference to any evidence of any kind purports to set out a figure of "regular operating expenses" and names some of them. That is to be rejected, in my respectful submission, by this Tribunal. There is absolutely no foundation for that figure. They could and should, if they wanted to rely upon it, have adduced the evidence to support it. We have asked for it repeatedly and they have deliberately chosen not to do it and it is completely improper. It would be an error of approach and principle to pay any regard to that figure in those circumstances, grossly unfair. We have had no disclosure to support that figure and it cannot be tested.

THE PRESIDENT: Anyway, you make that point and you say you are not prepared to offer a cross-undertaking so if they do suffer loss, too bad. That is the position.

MR. HARRIS: Exactly. Leaving aside that they have not asked for one and they have not mentioned it ever in correspondence, it arrives in a passing reference in their skeleton argument a day or so before the hearing.

But the same points are relevant to the question of timing. The only reason that these are really put forward, aside from this floated suggestion of an undertaking, is supposedly in support of and opposition to the timing that we seek.

Sir, I put it as high as this, there is absolutely no proper basis of principle for this Tribunal to proceed on the basis that there is any timing difficulty for this claimant in circumstances when it has point blank refused to reveal to either us or to you what its true cash flow position is.

THE PRESIDENT: You want the money so you are secured, you have not incurred all your costs up front, obviously, it does not hugely matter, as long as you get the amount you say you should get, if you get it in stages in, say, three stages, September, November, December. You have explained that some of the costs are being incurred, you set out the various periods.

MR. HARRIS: It matters in this sense, that we could turn this up in exhibit 6 to Mr. Bronfentrinker, if you would like to do so, where we put some dates next to the proposed expenditure schedule, but they are fairly obvious in any event.

THE PRESIDENT: That is what I am looking at.

MR. HARRIS: Sir, what you will see, of course, is that by the time at the end of September, we will have spent over £1 million and we say, obviously, quite reasonably so, and in any event that will have been spent, and we say the proper approach in principle, the whole point of security is to provide us with some security in advance of actually spending the money, though having spent it we will not be out of pocket if we get the costs order.

THE PRESIDENT: You are going to be spending another £1.8, so £2.8, and you are getting secured for each stage, as it were.

MR. HARRIS: Yes, but no warrant, given that we will be spending a great deal more than that for which we are getting secured to further string the lack of security out by spreading it over too long a period. Sir, I will accept this, it might be different if this claimant had come to this court and said: "Look at my 'anticipated expenditure schedule'" – that is quoting from Miss Farrell's second witness statement, which has not been disclosed. If she had disclosed that, or if Mr. Springett had disclosed it, that might be different. Then you could look at what I say my schedule of expenditure will be, and why I say I want it, and then you could compare that with what they say they can and cannot afford on a cash flow basis, and then you might come to the answer and/or reach a compromise, but you simply do not do that, and they end up deliberately not giving you that.

THE PRESIDENT: Yes, but you are accepting it should be paid in stages.

MR. HARRIS: Yes, as an indulgence we have said that even though----

THE PRESIDENT: Yes, so that is agreed that it should be paid in stages.

MR. HARRIS: In two stages.

THE PRESIDENT: Yes, and you want it for the various stages of expenditure you are going to incur. It is not that you get the total amount for the amount you have spent to date, and everything else is then just at your risk, because you would not be getting £1 million for security just for statements of case, CMC and disclosure, so it is proportionately allocated over time. I cannot see that it prejudices you at all if it comes so that for each point you are secured a significant sum for what you are spending. You are not going to get the full amount; you are not asking for the full amount.

MR. HARRIS: Exactly, and that is wherein lies the rub, Sir. Because we are not asking for the full amount but we have been, we say, extremely reasonable and, indeed, indulgent, including on the tranches and we split down from our figure of £2.8, which is what we say we will, in fact, incur, to only seek by way of security £1.5, that you should not grant the further indulgence of spreading it out on an unduly lenient basis in circumstances where they could have given you and us all the information to allow that to be done. This would be a double indulgence against the background of no evidence where they could and should have done it.

The other thing, Sir, that you need to draw out of para. 8.2 which is highly germane to this question, it is not just the figure, if I go back to Miss Farrell's para. 8.2 at tab 13 of bundle C vol.2. The highly germane point is that where does this, what they call, 'deferred income' come from? It has come from their own members in advance, that is what it means, 'deferred income', which is why it is still due to these other people because they have become creditors. It is a period of time, February 2017, that obviously has not happened yet, and what they have done for accounting purposes, for reasons best known to themselves, is that they have received or they have accounted for that amount in advance, and therefore, the people from whom they have received it in advance, become their creditors, i.e. Agents Mutual owes them that money, and that is how they have to account to it, that is what 'deferred income' means. What this reveals, Sir, is that in circumstances when it has suited them for reasons that are not disclosed, they have been able to advance the receipt of listing income to a considerable sum, and account for it in their accounts as at 31 January 2016, then it showed as a creditor amount, because unless and until they provide those services they owe that money.

But, what is never explained is two things. First, why that particular amount was advanced from whom, and why, which members----

THE PRESIDENT: I do not understand. If, for February, if your monthly fees are £1.5 million paid in advance, if you receive them in January, because it is in advance, or the end of January for February----

MR. HARRIS: No, for the next year, these are different years, Sir.

THE PRESIDENT: Oh, I see, it is a different year.

MR. HARRIS: It is a long way in advance.

THE PRESIDENT: I am sorry, I had missed that.

MR. HARRIS: So the two problems that you, Sir, have, and we say it would be frankly unfair and erroneous in principle----

THE PRESIDENT: 2017, I am just trying to understand that.

MR. HARRIS: This is an accounting device.

THE PRESIDENT: Yes, but it is an odd figure in that case. Just let me see that, just one moment.

MR. MACLEAN: It should be 2016.

THE PRESIDENT: Falling due within one year.

MR. MACLEAN: It should be 2016, Sir, not 2017.

THE PRESIDENT: It must be 2016, it is falling due within a year of January 2016, it cannot be----

MR. HARRIS: Well, the situation is now even more unsatisfactory.

THE PRESIDENT: It must be a mistake; it does not make sense otherwise.

MR. HARRIS: Sir, that kind of sums-up my point in one way.

THE PRESIDENT: Yes, it is just a slip, is it not.

MR. HARRIS: Be that as it may, the points remain good, Sir, even if that is a slip, and that is the first we have ever heard of it, even though this very paragraph was ventilated in open court before Sir Kenneth Parker, and he expressed some concerns and doubts about what it all meant, as did I, and it has never been corrected. But, even if that is right it still does not address the two fundamental difficulties, namely that they have not explained to you how and why, even in this instance, they have been able to advance the receipt for accounting purposes of certain amounts of monthly income. If they have done it once, why can they not do it again? That would dispel any difficulties about any timing or cash flow issues. Closely related, we have not been provided with a shred of evidence as to who these other members of Agents Mutual were, who made this advance accounting payment and,

therefore, become creditors, and why they cannot provide any moneys in advance insofar as they needed to pay security or security on a certain date.

You, Sir, made the point earlier on, that there are well resourced backers, and we respectfully agree. What is signally absent from this case is any degree of candour by the claimant about its finances and, notwithstanding that, they seek to persuade this Tribunal that they should be granted further indulgence on the timing of payments, and we say that that is wrong in principle, and properly should have adduced any and all evidence, and then it could have been tested.

If you choose, Sir, deliberately not to adduce anything that can assist on this topic then you cannot get the indulgence that you then hope to obtain, that would be grossly unfair to us given the ongoing expenditures. The way that I put it is that they are, with respect, lucky that we are prepared to be indulgent as regards a two tranche payment, and that does not extend so far as to three months, or to three separate tranches.

If you wanted the reference, Sir Kenneth Parker raises this point about this seems to be money that is coming in, and that is at transcript p.44, tab10, bundle B. That was when this very paragraph was debated before him.

THE PRESIDENT: (After a pause) This was in connection with the fact that you should have security because they might not have the means to pay your costs.

MR. HARRIS: It was unclear, because what happened on the morning of that hearing, having intimated that they were resisting on all bases the security for costs application, they then capitulated I think at about 11 o'clock that morning or, perhaps, 9 o'clock, and said "£500,000" and we said that provided that is only interim and we can come back for the rest, that is fine for today because there were other fish to fry.

THE PRESIDENT: Yes.

MR. HARRIS: But it was in that context that we were looking at this, and why Sir Kenneth Parker was making any points.

Just so I can finish off this point so that you, Sir, have the relevant additional points, not just completely unexplained advanced payments here, but there are other indulgences which are in the evidence which would have been granted by the backers, which remain unexplained, and certainly no evidence as to why they could not do the same again. If you look down the page to para. 8.5, in her first witness statement Miss Farrell continues: "Loans from AM's Board member firms. As a result of the security for costs application, Mr. Springett has, on AM's behalf, negotiated with the relevant lenders and they all agreed on 23rd June 2016 that £2.1 million----"

THE PRESIDENT: Yes.

MR. HARRIS: "--and that is after the conclusion of the trial". So £2.1 of the £2.475, that had been deferred, apparently for cash flow purposes. No explanation has been given as to how or why they cannot agree to any other indulgences as regards a payment back of loans or, frankly, any other financial indulgences. They have been prepared to do it to some extent at some point in time, no explanation of any of that, and then complete silence. It is simply unfair in those circumstances for there to be any reliance upon any point about how we cannot pay on cash flow terms. You have the point from the skeleton that Miss Farrell even identifies, in Farrell (2), in the final paragraph that on instructions from Mr. Springett, that she understands, there is something called an "anticipated schedule of operating expenses". That, potentially, would dispel all of these issues, and yet they have deliberately chosen not to disclose it.

The final point is what you do have, Sir, is evidence before you, again in Farrell (2), but this time at para. 5, that as at the end of August, so only some two weeks away or thereabouts, they had cash in the bank of £2.8 million. What we are asking for is only £1million of those £2.8 million, and even that is split into two tranches with only £500,000 at the end of September, and the remainder at the beginning of December. The only fair basis, on the evidence, that you can proceed, Sir, is that there are simply no cash flow difficulties at all and, in those circumstances, it would be wrong in principle for you to split it up any further and/or to string out the dates for payment.

THE PRESIDENT: You say the end of September.

MR. HARRIS: I think we said 1st December, I will check my skeleton.

THE PRESIDENT: Effectively the end of November.

MR. HARRIS: We propose £500,000 on 30th and the second £500,000 on 1st December, bearing in mind all the extra expenditure in December.

Just to end, putting the same point in a different way, the claimant cannot have it both ways. It cannot simultaneously refuse to divulge the relevant information and then complain that in information that it has refused to disclose it would show cash flow difficulties. You simply cannot have your cake and eat it. They have made their bed by deciding not to disclose it, now they have to lie in it.

THE PRESIDENT: (After a pause) Yes.

MR. HARRIS: Thank you, Sir, those are my submissions.

THE PRESIDENT: Yes. Mr. Maclean.

MR. MACLEAN: Sir, can I start with the point that Mr. Harris was on last, just to square it off. If you have Miss Farrell's first statement, tab 13 of bundle C2, what she is doing in this statement, and in her second statement at tab 17, see para. 5, which you have looked at, but also para. 20, which I think you have not been taken to, at p.1347. This is explaining, as my learned friend's clients must know, that payments from members are made to Agents' Mutual monthly. They are paid at the end of the month – monthly.

The income is essentially static, assuming the membership remains the same as my learned friend's clients must know. That is not surprising, because the fees are not a function of the number of transactions, they are simply a monthly membership fee. So if there are 100 members, and they remain members throughout the year, then, other things being equal, the monthly income will remain static.

When one puts it together with the second bit in the statement at para. 5, tab 17, my clients have recurring monthly income, which comes from its membership in the figure that we have set out, the figure that Miss Farrell refers to, the £1.5, which is----

THE PRESIDENT: Can you help me? Is it confidential or not, because it does look as though that statement there is not confidential?

MR. MACLEAN: That statement is not confidential, I think that is right.

THE PRESIDENT: That is the recurrent figure that----

MR. MACLEAN: That is the recurrent figure.

THE PRESIDENT: --that she is actually referring to when she says the "same"?

MR. MACLEAN: Yes, she means the same, recurring monthly income. There is no mystery about para. 8.2 once one appreciates that the reference to 2017 should be 2016. The point is, as is clear from 8.1, that the financial statements were drawn up as at 31st January 2016, you see that, Sir. The point is simply that by 31st January, the monthly fees for the following month had come in because they are payable at the end of the month in advance, and so at the accounting period of 31st January, there is some money sitting there which has not yet been, as it were, earned.

THE PRESIDENT: They paid monthly in advance.

MR. MACLEAN: Monthly in advance. And so the deferred income was more than £1.5 million related to the February 2016 listing fees which are payable in advance by the members of Agents' Mutual.

It is all very simple, £1.5 million comes in regularly every month. What then happens to that money? In the ordinary way, like any other business, it has to pay its expenses, and my learned friend complains about the fact that we have told you, Sir, in our skeleton argument

what that figure is, it does not matter what the figure is for present purposes, what matters is that what is left after those expenses have been incurred, staff, premises, and so on, is, in the ordinary way spent on marketing, that is where the marketing money comes from.

Miss Farrell makes that point at 8.6 of the statement: "Agents' Mutual expects to continue generating recurring contracted income from OnTheMarket and to increase its income . . ." i.e. grow its business, ". . . so long as its marketing budgets do not have to be diverted to providing security for Gascoigne Halman's costs."

So, were it not for this litigation my clients would be receiving £1.5 million per month. They would be paid their expenses; we have told you in the statement what those are. What is left goes on marketing, and everybody agrees that marketing is critical to the success of a business such as my client. Not only do we say that, if you take bundle A, Sir, please, just for a moment, which is where all the schedules are that we have been looking at, and turn to tab 5, which is the rejoinder from my learned friend and his Junior, and go down to para. 5 p.103. "As to para. 8", that is looking at the amended reply and we find para. 8 of the amended reply at that tab before, p.72:

> "As to para. 8 it is not admitted that the claimant's members have also conducted marketing efforts on its behalf and again the claimant failed to provide relevant particulars."

That is a bit of a refrain in this document.

> "It is denied, if it be so alleged, that such marketing efforts as are proven constitute whether taken alone or in combination with the claimant's own resources sustain an effective marketing sufficient to achieve successful or efficient market entry."

So it is agreed on all sides that critical to the development of a business such as this is sufficient marketing, and we are being taken to task by Gascoigne Halman for not having put sufficient of our shoulder to the wheel when marketing, that is one, they say, of the failings.

That is not a matter for today's purposes, but the reason why this is important, it is not simply a matter that goes to timing, we will no doubt come at the relative margin it does go to timing. It goes to the proper approach, which the court needs to take in an application for security for costs.

A key problem, perhaps the key problem with Gascoigne Halman's submission in support of its own application for security for costs is that it ignores the need to weigh the prejudice to both parties when requiring payments into court for my client's value of security for costs.

As I mentioned earlier when we were dealing with Moginie James, as is obvious, an order to pay security for costs deprives the paying party, my client, of the use of its funds during the litigation, although no costs may ultimately be payable, depending on the outcome of the case, and the White Book commentary – I will just read this sentence – at 25.12.7 to the Civil Procedure Rules says this:

> "In deciding the amount of security to award the court may take into account the balance of prejudice, as it is sometimes called, a comparison between the harm the applicant would suffer if too little security is given and the harm the claimant would suffer if the amount secured is too high."

The White Book cites the *Stokors* case. If I can just ask you, Sir, to turn that up, just briefly.

THE PRESIDENT: It is attached to your skeleton?

MR. MACLEAN: Yes, I hope you have it attached to the skeleton, Sir. In that case, the Court of Appeal upheld the amount of security ordered by the Judge at first instance, which had been arrived at on the familiar broad brush approach as to how much of the bill seemed likely to survive detailed assessment, and in that case 62 per cent was the original amount awarded by Mr. Justice David Steel. Can I ask you to take it up at para. 27? This is the judgment of Lord Justice Tomlinson, and there are two short concurring judgments from Lord Justice Lewison and Lord Justice Munby, both of whom make the point that the Court of Appeal like to support first instance judges in making robust but fair case management decision. Paragraph 27 records that Mr. Justice David Steel had ordered security for costs in the sum of £320,000, which was 60 per cent of the amount that was then being sought as being the appropriate amount to be given up until the completion of disclosure.

Then, if you go over the page, Sir, to p.29, what was being contended for by counsel for the defendant was that 80 per cent of the additional cost, because it turned out disclosure had been more expensive than had been thought, and then (para.30) counsel sought to justify that on the basis that at the end of the day there was going to be indemnity costs, and the Court of Appeal and, indeed, the Judge, had not thought much of that. But at para. 30, to quote from the Judge's judgment at first instance (Mr. Justice Popplewell):

> "I turn, therefore, to the next question which is how much of the £725,000 should be awarded by way of further security. It requires a discount because that figure represents the costs as between solicitor and client and it is bound to be reduced on an assessment. Mr. Downes submitted that because this was a case in which there

was a real prospect of indemnity costs, it should only be discounted by 80 per cent. He submitted the claim was speculative and weak."

THE PRESIDENT: Yes, the standard basis.

MR. MACLEAN: He did not think much of that. Then at para. 32 of the Court of Appeal judgment:

> "But in relation to the quantum of the order which he should make, the judge had to have regard to the well-known circumstance that a party's bill of costs prepared as between solicitor and client is most unlikely to be recoverable in full on a detailed assessment. So the judge was faced with the usual debate as to whether or not the bill put forward by the defendant in relation to the disclosure exercise could be said to be reasonable and proportionate."

Then he dealt with a particular criticism that was advanced and he awarded in the end £450,000. Paragraph 33:

> "So that was the order which the judge made. As it happens, £450,000 is 62.07 per cent of the £725,000. Whether the judge realised that the figure . . . " etc.
>
> It seems to me that what the judge conducted was a familiar broad-brush approach as to how much of the bill seemed likely to survive detailed assessment."

Then the court goes on at para. 34 to say:

> "The appeal is brought on the basis that the judge erred in the manner in which he approached the exercise because, it is said, he discounted the headline figure sought without taking into account that, on an exercise of this sort, the balance of prejudice, as it is sometimes called is ordinarily in favour of the defendant rather than the claimant. This point arises because, as is well-known, in the usual run of cases the prejudice which will accrue to a defendant in the event that he is under-secured is likely to outweigh the prejudice which will accrue to a claimant in the event that he is required to put up an amount of security for costs which proves to be an over-estimate of the amount recoverable by the defendant."

Then the court explains the obvious reason for that.

Then there is reference to the cross-undertaking point. Mr. Downes, like Mr. Harris, was not prepared to countenance that and I will say something about that later.

Then at para. 37:

> "It so happens that counsel for the claimants, Mr Jonathan Nash, had not suggested to the judge that this was a case in which such an undertaking ought to be given. Furthermore, Mr. Downes suggests that the judge had in fact fallen into

error in concluding that the claimants were parties who might be in a position to say that the cost to them of paying money into court by way of security would be greater than the mere loss of interest on it because of the superior returns which they could achieve. So it is said that the judge was wrong to come to the conclusion that the balance of prejudice was not in this case, as it ordinarily would be, one which tipped in favour of the defendant."

Then the Court of Appeal bases its conclusion on the point, it upholds the learned judge at paras 38, 39 and 40.

In my submission, my clients are in the position, on the facts of this case, referred to at para. 37 by the Court of Appeal because the cost to my client of putting up security would be greater than the mere loss of interest, because the resources which are going to be diverted, to some extent, to whatever extent they are the end diverted, to the payment of security for costs, are taken pound for pound from the marketing budget, which everybody accepts, including my learned friend's pleading, is absolutely critical to the ability of a start-up enterprise such as my client, to achieve, to use my learned friend's words: "successful or efficient market entry".

This is a point which goes not just to timing, but it goes to the approach which the court takes and the caution with which the court should, in our submission approach an application for security for costs, because this is a case where the balance is not tipped in favour of the defendant.

My learned friend's submissions lose sight of that, and if you take my learned friend's skeleton, and turn to the questions which he suggests are 'the relevant two questions' – para.7 of his skeleton:

"The pertinent questions for the Tribunal are twofold. Does the cost budget for the competition issues dated 1st August represent the best estimate by Gascoigne Halman's representative of the cost which will actually be incurred?"

And:

"Are Gascoigne Halman's recoverable costs likely to fall below the total security of £1.5 million that is sought?"

That leaves out of account the consideration discussed by the Court of Appeal and focuses exclusively on the question – no doubt an important question – of whether Gascoigne Halman's estimates are reasonable. We see the error in my learned friend's approach compounded, repeated in the context of timing, if you look at para. 11.8, please, of his skeleton.

THE PRESIDENT: Sorry, you say it leaves out of account the question whether the costs are reasonable, but is that not implicit in 2, the recoverable costs?

MR. MACLEAN: Yes, but he leaves out of account the prejudice and the relevance of the prejudice to my client of putting the money up by way of security. In the ordinary case that may not matter, if it is simply the cost of the money popping in the bank, but as I have just submitted we are not in that territory. There is the balance of prejudice to be considered, and my learned friend's error is only to look on one side of the scale. I am not suggesting, if you, Sir, have understood me as submitting that the question of the reasonableness of Gascoigne Halman's costs is not relevant, of course, it is. It is an important question, but it is not the only question.

If you look at para. 11.8 of my learned friend's skeleton, you see the same point replicated in the context of time. He says: "Finally, even if there had been proper disclosure of all relevant materials joined to the claimant's cash flow . . ." I do not accept that characterisation, of course, but what matters is the next bit:

> "It is submitted as a matter of principle that the timing of security should not be driven by the claimant's convenience, but rather by the costs risk to which Gascoigne Halman is exposed."

That is just not right. This is not right, that the only question which matters is the risk to which Gascoigne Halman is exposed. Of course, that is part of it, but there is this other consideration on the other side. Sir, that is my first overall submission, which is that the balance of prejudice has to be looked at and is engaged in this case because my clients are being asked and, indeed, have offered, to put a further half million pounds of security for costs for Gascoigne Halman, offered money to Moginie James as well and that has been dealt with, in the context of a business which has got £2.8 million in cash in the bank, and in circumstances where, ordinarily, were it not for the litigation, every available pound would be spent on marketing.

Mr. Harris is going to say to that: "Mr. Maclean's clients chose to bring this litigation they are suing us". That is true, we are suing them, but as you know, Sir, we are suing them because Gascoigne Halman and, indeed, Moginie James, originally for slightly different reasons, suggested they wanted to walk away from their contractual responsibilities in circumstances in which there was essentially no alternative but to bring these proceedings. But, having done so, the fact is that my clients are in the position of putting up security for costs as a price of being able to bring the litigation in circumstances where the very giving of that security is so damaging to the marketing effort which is at the heart of the successful

entry into the business which, of course, is what my client's commercial rivals, in which Gascoigne Halman has a stake with one of them in particular, are no doubt so anxious to avoid.

THE PRESIDENT: I understand the point. If this was a major point going to the amount of security one would have expected it to feature rather more prominently in the evidence put in for your client. It is one thing to say they pay monthly so one should have regard to that in the timing because of cash flow, and if you are making a major point about impact on marketing we know there is that paragraph.

MR. MACLEAN: 8.6, Sir.

> "We expect to continue generating recurring contracted income from OnTheMarket, and to increase its income so long as its marketing budgets do not have to be diverted to providing security."

THE PRESIDENT: I understand that statement you hang it on, but all I am saying is that in the ordinary way one might have expected rather more in terms of how marketing expenditure is----

MR. MACLEAN: It is a very simple business. It receives, essentially, static monthly income, it has, essentially, fixed monthly costs, and what is left goes on marketing to grow the business. There is not much more to it really than that. That is my first overall submission. The second submission is as to the conditioning of the court's approach to the security for costs application. You touched on this a little with Mr. Harris, Sir.

The security for costs application is brought on the basis of, in the end, a one page schedule which has no supporting detail at all, in the context of a previous schedule for a much lesser sum which was properly broken down by the previous solicitors who Mr. Harris just about resisted the temptation to dump on in the middle of his submissions, as having got some aspect of it all wrong and paid the price.

I just want to show your Lordship just a few of the letters in which my clients have been seeking and pressing for the detail of how the £2.7, now £2.8 million is arrived at. I just want to show your Lordship a few of those.

We are going to need bundle D, and would you take p.146 first of all? This is the only letter I think I need show you from Hill Dickinson, who I had always regarded as competent litigators. This is a letter from 27th May, and it essentially threatens a security for costs application and it raises a number of points, including, you see, from p.147 in the middle, it refers to "supposedly significant and expensive litigation from a group of 100 estate agents apparently advised by Tollers LLP" and, so far as I am aware, no litigation has been

commenced by Tollers LLP. It threated security for costs, and at the bottom of p.148, it sought security for costs in the total sum from the start of the proceedings up to and including trial of £1,050,000. Do you see, Sir, at the bottom of p.148:

> "Unless your client provides confirmation by 4 pm on Wednesday, 1st June it will provide security for costs in two tranches by paying the sums into court as set out below, our client will bring an application for security . . ." etc.

They want £350,000 to cover the costs of litigation from the date of this letter until exchange of experts' reports, and then £700,000 to cover trial. Sir, you note the reference there to "from the date of this letter", which makes it look as if, on the face of it, it is prospective only.

If you just glance ahead to p.153, that was an error and it is explained, it should not be: "date of this letter", it should be "date of your pre-action letter", so your Lordship sees Hill Dickinson correct that.

What they were asking for was £1,050,000 by way of security – that was 70 per cent of the two subtotals derived from what they describe as a conservatively drawn budget making certain non-binding assumptions, set out on a Form H, which they enclosed.

Matters then moved on and I will skip ahead to p. 523. This is a letter from Eversheds, who, as you know, Sir, instruct me, to Quinn Emanuel and to Gordon Dadds, and by this stage there was correspondence circulating among the parties about case management and the transfer of the guts of the case to the CAT, and this was shortly ahead of the hearing that took place before Sir Kenneth Parker. It refers to security for costs at p. 525 and agreed to a hearing taking place.

Then at p.527----

THE PRESIDENT: At 525 they say: "We note, however, Quinn Emanuel seek a hearing after 12th September 2016 yet do not propose to serve an updated costs' budget until 8th August."

MR. MACLEAN: That is right.

THE PRESIDENT: "This would leave us only a week to review it.

MR. MACLEAN: That is right, and Quinn Emanuel pick that up in the letter at 527, and the relevant reference is at 529, where they agree to file an updated costs budget. They say: "Whilst there is no need for Gascoigne Halman's updated costs budget to be filed before the CMC" – "no need" –

> "we note you have never before made such a request. In the interests of expedience, and to ensure your client has sufficient time to consider the updated

costs budget prior to filing its evidence in respect of the security for costs application, we will agree to file this by 1st August."

THE PRESIDENT: There has been one in between, has there not?

MR. MACLEAN: There was one in June.

THE PRESIDENT: Because you took me to----

MR. MACLEAN: Yes.

THE PRESIDENT: There was one on 17th June, that is what they are referring to, is it not?

MR. MACLEAN: They are referring to the last one, the August one.

THE PRESIDENT: They are saying "an updated costs budget, we will agree to file this by" but that is updated on the one of 17th June.

MR. MACLEAN: Yes, you are right, Sir. They agree to update it by 1st August and they do, and there is a letter of 1st August where they send it, that is the one page document that we have in the bundle at various places, but at tab 14 of bundle A, p.324, a single sheet of paper.

If you go to p. 608, please. This is 1st August.

"As set out in previous correspondence, we do not consider our client is obligated to file and serve an updated costs budget as the proceedings before the Tribunal are not subject to any form of costs budgeting."

That is true, of course, as a matter of English, and it is true as a matter of fact. But the other party is applying for security for costs. "This is reflected in the fact that no order was made at the CMC requiring----"

THE PRESIDENT: Yes, I have read it. You were going to show me correspondence after this, I thought.

MR. MACLEAN: Yes. Page 625 Quinn Emanuel replying to the letter we have just looked at.

"We refer to your letter dated----"

THE PRESIDENT: 625 is Eversheds.

MR. MACLEAN: 625 is replying to 1st August. "We note your comment you do not consider your clients obligated to file . . ." and so on.

"We acknowledge your client has not yet been ordered to file a costs budget, we do not understand how our client could be expected to respond to your client's (inaudible) to the costs application nor how our client could make the appropriate application to the CAT without a detailed and updated estimate."

That is why we had asked for the updated budget. Then there is a series of questions asked at 626, which you can read, Sir----

THE PRESIDENT: Yes.

MR. MACLEAN: --if you would forgive me, essentially complaining about the lack of detail that was given in the budget. Then if you go to p.645, another letter from Eversheds. If you would please look at the paragraph beginning "In our letter of 3rd August", and the next paragraph: "Your position is". Then, at the bottom of the page, four lines from the bottom:

> "Notwithstanding the difference you have referred to between your and Hill Dickinson's hourly rates, it is not at all clear to us why the Quinn Emanuel budget is now so much higher than the previous two budgets, given the position that your budget effectively excludes work in the High Court proceedings . . ." and so on.

and asks some questions about experts as well. Those details, those questions that were posed by Eversheds in those two letters were never provided.

If you go to p.695, for example, Quinn Emanuel on 15th August:

> "In order to ensure the Tribunal is fully informed, can you confirm that on 1st August Gascoigne Halman voluntarily provided an updated schedule of its estimated costs. It considers premature the claimant's suggestion they be directed to provide any further detailed budgets and active cost management will be----"

THE PRESIDENT: Yes, you have made the point.

MR. MACLEAN: Just a couple more, one in particular is important. 673, there is a letter from, Eversheds of 12th August making the offer of the further half million pounds of security. This is the position which remains my client's position today, save that since this letter we have suggested that we would be prepared to make the second payment, not on 30th January 2017, but on 30th December 2016, to bring it forward which would allow, in principle, the opportunity for Gascoigne Halman if it thought it wise, and was so advised and thought it wise to seek further security before the trial.

The penultimate letter I want to show you is at p.693, which is Quinn Emanuel responding to the one I have just shown you.

My learned friend, Mr. Harris, on a number of occasions referred to the fact that he had to be here to get more than his million pounds that he had been offered. In fact, what Quinn Emanuel say on 15th August (p.694) is this:

> "Whilst the amount sought in the application represents approximately 65 per cent of Gascoigne Halman's estimated budget costs for the competition claim and disclosure in the High Court proceedings, which is reasonable."

Pausing there, your Lordship will recall slightly higher than the percentage awarded in the Court of Appeal *Stokors* case.

"Gascoigne Halman is willing to accept the further £1 million"----

THE PRESIDENT: The application that was seeking what, £1.7?

MR. MACLEAN: Yes, that is right. Then they say:

> "So you take a further million, 30th September and 1st December. Please note this is the minimum our client is willing to accept in order to avoid proceeding with the hearing of its application on 14th September. Should this proposal not be accepted we are instructed to proceed with Gascoigne Halman's adjourned application for security for costs. We reserve the right to bring this offer to the attention of the Tribunal."

An opportunity which Mr. Harris eschewed.

Then at p.741, this is the penultimate letter I want to show you, it is my clients to Quinn Emanuel offering to advance the second payment, and making the point in the middle paragraph, beginning, "As previously noted" - we say it all goes to 'disproportionate and overblown':

> "… more recently your client's latest costs budget fails to provide any appropriate and necessary information, including such matters as hourly rates …"

We did get some indication of some of those -

> "… or, more importantly, the time to be spent on the various stages of the litigation. You failed to provide clarification of your costs estimates, as requested or at all."

The answer is, in solicitor-speak, "Get stuffed", p.742, 24th August, they say £1 million, an appropriate proportion of the costs:

> "… reasonably proportionate to be incurred in relation to determination of the competition issues. Your repeated criticisms in respect of costs are not accepted. We are not obligated to file and serve an updated costs budget because the proceedings are not subject to formal costs budgeting. The costs budget information provided to you on 1st August is entirely sufficient for the purposes of Gascoigne Halman's application."

As the course of this afternoon has demonstrated, it simply is not.

THE PRESIDENT: You have made the point and you have shown me that you have been urging it in correspondence.

MR. MACLEAN: So what we respectfully submit is that the court, when faced with a startlingly budget, with some rather obvious big numbers in it, which are hard to comprehend, some of them, the PTR being one of them, the fees for the trial being another, but also others that

Mr. Harris did not touch on - for example, the witness statements. Sir, you have a good grip of the issues in this case.

THE PRESIDENT: Just pausing there, you have referred to fees for trial. What was being said effectively was that you and Mr. Holmes were being seriously undersold. That was what it came to. The clerk to Mr. Harris, when negotiating for him and his junior, did a much better job than when negotiating for Mr. Holmes. I do not know which Chambers you are in.

MR. MACLEAN: Blackstone.

THE PRESIDENT: Your clerk was a pushover and gave you a seriously low fee.

MR. MACLEAN: Yes. We do not accept that. We do not accept that the budget set out and broken down by Eversheds and put together by their costs draftsman is unrealistically low, or obviously low, or hopelessly low. I do not accept that there should be any sackings in the Blackstone Chambers clerks' room, nor targeted sackings and targeted promotions in the Monckton clerks' room either.

What is overblown is the suggested fees, costs, of the trial preparation and the conducting of the trial on the part of my learned friend. The whole of this schedule, to say it is obviously overblown, it is, on the face of it, *prima facie*, overblown, and if these numbers were really going to be advanced in support of an application for security for costs, it was incumbent on the party seeking security for costs in these large sums properly to justify the numbers. There has been no attempt to justify them. Take witness statements. As I say, Sir, you have got a fairly good grasp of this case and what it is all about, having now had two hearings, and you will remember that the guts of the case is about the legality of certain terms in the contract - in particular, the one other portal rule. It is true that there is a factual issue in the Gascoigne Halman case about what was supposedly said at certain meetings, and so on, you will remember that. Quite how Quinn Emanuel are going to spend more than £250,000 putting together, I think, six or seven factual witness statements in a case which is really all about the legality of the contractual terms, which is a matter of essentially legal analysis and expert economic input, is rather hard to fathom.

The same might be said of disclosure. Mr. Harris focuses on the e-disclosure provider, who he tells us is absolutely critical to the success of this enterprise, but £235,000 for Quinn Emanuel and Hill Dickinson on disclosure.

These numbers are very large and, as Lord Justice Sedley might say, call for an explanation. But there has not been any explanation. There has not been any back-up to them. In those circumstances, in my submission, Sir, you should, for the purposes of security for costs,

essentially subject the Gascoigne Halman schedule to deep scepticism, and proceed on the prudently cautious basis of the much more realistic budget, and certainly the budget to be relied upon for security for costs, at least pending the further hearing which is potentially going to take place on costs budgeting, which is the Precedent H document at tab 16 filed by my clients.

THE PRESIDENT: It was suggested that your solicitors might be doing this on a concessionary basis and not a fully commercial basis, and why they would be doing that is because the client has not got money to pay their normal fees, although the rates that are set out in that schedule did not strike me as particularly concessionary rates. That is not said in the evidence but it was said in argument.

MR. MACLEAN: I do not recognise that description of the way in which the litigation is being funded. I know that big City firms, such as no doubt Eversheds and others, do do cases sometimes for deserving causes *pro bono*, but I do not think Agents Mutual fall into that category and they do not say that they do.

THE PRESIDENT: It is done as a commercial client.

MR. MACLEAN: It has been done as a commercial client and all the lawyers are being paid in the normal way. The Precedent H - Mr. Harris made the point several times that he has got a schedule attested to by a partner at Quinn Emanuel, which is true, and here is one signed by Miss Farrell, who sits behind me, a partner at Eversheds, "The budget is a fair and accurate statement of incurred and estimated costs which it would be reasonable and proportionate for my client to incur".

Sir, we respectfully suggest and submit that the starting point for the court's assessment of security for costs is our schedule of £1.8 million. There is a debate about whether the £52,000 in respect of security for costs is properly included or excluded from that schedule, but it does not follow that it should or it should not be included, it does not in the end make a great deal of difference in the scheme of things. So the question is what is the appropriate broad brush----

THE PRESIDENT: Would one not include all applications normally?

MR. MACLEAN: Probably one would, Sir, probably that is right. So the question then is what is the appropriate percentage, applying the approach of the 'broad brush', which then leads one to the amount of security? In relation to that, would you just take my learned friend's skeleton argument for today at para.10.3, p.4 . This is in relation to my learned friend's second question that he poses at para.7. Sir, you will recall his first question is: did the costs budget for the competition issues represent the best estimate by Gascoigne Halman's

representatives of the costs that are likely to be incurred? My answer is, well, maybe it does and maybe it does not. It may be their best estimate, but if it is it is a grossly disproportionate best estimate.

His second question is more pertinent: are Gascoigne Halman's recoverable costs likely to fall below the total security of the £1.5 million that is sought? Over the page at para.10, 10.3:

> "As a sense check it may be pointed out that the claimant's estimate of its own costs in the Gascoigne Halman action exceeds £1.8 million."

That is true.

> "This estimate by the claimant has been prepared in Precedent H form signed to certify that it is a fair and accurate statement of the costs which it would be reasonable and proportionate for the claimant to incur. These costs are understated on their face …"

I miss out the words in parenthesis -

> "… but on the assumption for these purposes they are reasonable and taking the £1.8 million as accurate and complete, the claimant's proposal of a total of £1 million of security amounts to only 55 per cent of the claimant's cost estimate. So the claimant accepts the correct proportion to pay of a proper costs estimate is 55 per cent, yet Gascoigne Halman is seeking 55 per cent of its reasonable costs estimate and the claimant refuses to accept this proposal."

So, Sir, what one gets from that paragraph is that the issue between the parties is whether the correct amount of security for costs is 55 per cent of X or 55 per cent of X plus Y. The parties are agreed----

THE PRESIDENT: I am not sure I quite get that.

MR. MACLEAN: The parties are essentially *ad idem* that 55 per cent - in the *Stokors* case it was 60 or 62.07 per cent----

THE PRESIDENT: There is no magic percentage.

MR. MACLEAN: I am not suggesting this is something that is set down in statute or in the decided case. There is no particular magic, and you paint with a broad brush, Sir, inevitably. In my respectful submission, Mr. Harris, with his reference to a standard 75 per cent for security, there is no standard 75 per cent for security. That is much too high. He did not seek to back up his standard 75 per cent by reference to anything. To the extent that we can see what the parties think the right percentage is and we see what the Court of

Appeal thinks the right percentage is, it all looks very much as though one is in the 55 to 60 per cent territory than the 75 per cent territory.

THE PRESIDENT: If one is looking at your costs estimate, which you suggested, the point was made that disclosure was arrived at on the assumption of 10,000 documents, which seems to relate just to the collecting boycott.

MR. MACLEAN: Yes, that was a bad point. I do not know how my learned friend managed to construe the budget in that way, but I can assure him that he is in error in doing so. The passage that he showed you in the evidence was simply saying that the exercise of the disclosure for the particular allegation of collusion might throw up more than 10,000 documents, which was thought to be unlikely, and if it did that would be a problem, but it was much more likely that it would throw a lot fewer than 10,000, which, as I understand it, it has - surprise, surprise.

THE PRESIDENT: It says the assumption of your schedule is that there are potentially 10,000 documents to shift through.

MR. MACLEAN: In total.

THE PRESIDENT: In total, yes.

MR. MACLEAN: Mr. Harris was suggesting----

THE PRESIDENT: That, in fact, is not what your client is assuming for all the documents, but only part of them.

MR. MACLEAN: No, the assumption of 10,000 documents applies to the whole shooting match. Mr. Harris was, I think, trying to suggest, I think by reference to the transcript of the last occasion, where I said when we were having a debate about the ambit of disclosure for the collusion allegation, I said that if we do anticipate it to be the case that those searches throw up 10,000 documents or few, we will manually review them all; and if, which we did not think would be the case, there were more than 10,000, then we would have to get into some further search term exercise. That reference to 10,000 is completely divorced from and separate from the reference in here, the working assumption on disclosure, which refers to the whole shooting match.

So to the extent that Mr. Harris is suggesting that the disclosure number must be too low because the Precedent H is only talking about a part, and perhaps he would say a small part of the case, he is, with respect, in error.

THE PRESIDENT: That was at a hearing back in July, and presumably by a month later, given that the date for disclosure is 23rd September, rather more work had been done on disclosure by 25th August. That is what one assume.

MR. MACLEAN: I can tell you, Sir - and I am sorry for my impertinence in getting the answer to the question I knew you were about to ask - the assumption of potentially 10,000 documents to sift through leading to 5,000 for disclosure, and leave aside the defendant, that assumption has been borne out. In fact, it has turned out to be an abundant assumption.

THE PRESIDENT: I assume that is an assumption valid as at the date of this document, which is a month later than the hearing.

MR. MACLEAN: Yes, and it has not been invalidated by subsequent events.

Sir, there is one other point I want to make about the schedules which on the Moginie James schedule, which you have, not surprisingly, referred to once or twice in the course of the hearing. When I say Moginie James, I mean my client's Moginie James schedule.

THE PRESIDENT: Your other Precedent H schedule.

MR. MACLEAN: You have put this somewhere in bundle A, Sir, but I am afraid I never got round to doing that.

THE PRESIDENT: Yes, I have got that.

MR. MACLEAN: This the £458,000 one. I have three short points about this. The first point is that quite a large percentage of that figure has got nothing to do with Gascoigne Halman at all, so pre-action costs and the issue and the statements of case, £123,000, they are essentially nothing to do with the Gascoigne Halman case. You will remember, Sir, that the guts of the Moginie James were set out - first of all, we started a breach of contract case against them. The answer came back essentially upon misrepresentation grounds with, I think, literally two paragraphs on competition and one on supposed restraint of trade, and it was dealt with very lightly. So it would be quite wrong to in any way add in those costs to the Gascoigne Halman schedule in order to get to what my learned friend would want to say are our, as it were, real costs of the Gascoigne Halman case in order to make a proper comparison, he would say, with his schedule.

Then if you look at some of the rest of this, what we have done in this schedule is to assess the incremental cost of the Moginie James action being there and being heard at the same time as the Gascoigne Halman case. That is why, for example, for the PTR the figure is zero, because Moginie James being at the PTR, with respect to my good friend Mr. Grant, will not add anything probably to the costs.

If you look at the trial figure, the £57,000 figure, that is obviously, I accept, not a figure for the trial of the whole of the Moginie James action. That is an estimate of the extra costs that will be incurred in Moginie James being there.

Similarly, the expert report, the £57,000, is an estimate. It is mostly, as you see, disbursements, mostly expert disbursements and perhaps a little bit on counsel. That is an estimate of the costs that might be incurred if it turns out that Moginie James do have their own expert to come along and say something about the economics of it that has not been covered by Gascoigne Halman's expert.

So it is not correct - it is not right - to take this schedule, the Moginie James Precedent H, and say, "They are going to spend £458,000 on Moginie James, therefore Agents Mutual's real costs of the litigation, to get a comparison with the £2.8 million, is £1.8 plus £450,000".

THE PRESIDENT: I think Mr. Harris accepted that, which is quite understandable.

MR. MACLEAN: He did not quite push it that far, but he, I think, did not give, if I may say so, full weight in his submissions to the fact that this schedule is actually prepared essentially on the incremental basis that I have just described.

THE PRESIDENT: But Gascoigne Halman will have to be there and take part in assessing the witness evidence from Moginie James on this trial because it is all to do with competition issues, and you attribute that, rightly, to Moginie James. Gascoigne Halman, as far as they are concerned, it is relevant to their case.

MR. MACLEAN: I accept that. What I do not accept, however, is the suggestion - it is not surprising, perhaps even obvious - that Gascoigne Halman's costs should exceed my client's costs. Mr. Harris tries to make that good in his skeleton. In fact, if we went back---

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THE PRESIDENT: You would say on disclosure it is the other way.

MR. MACLEAN: Exactly, I would. I absolutely would.

THE PRESIDENT: He did say about statements of case that they were starting from scratch, and your solicitors have been involved extensively beforehand.

MR. MACLEAN: Sir, if you take bundle C, I am looking for Mr. Campbell's statement.

THE PRESIDENT: He made two statements.

MR. MACLEAN: Not the first one. It is in bundle C2.

THE PRESIDENT: The second one is C2, tab 5.

MR. MACLEAN: That is right. Could you turn that up. This is Mr. Campbell, the partner at Hill Dickinson, who is no longer with us in this litigation. In para.38 he makes reference to the £1,050,000, and I showed you that a little earlier, and he says that the Form H has now been superseded, and it was incomplete for the reasons that he is going to go on to describe. The reasons why it is incomplete are essentially given in para.42. He says that a lot of time was spent liaising with the defendant's counsel, who have particular expertise in competition

law actions, and with expert advisers, and estimating in detail the time that will need to be spent in relation to the proceedings and in the event the matter proceeded to trial. There was also an internal costs draftsman, and that identified that they were under-estimates.

Now, a couple of points about this, Sir. The first is that at that stage Hill Dickinson must have been proceeding on the basis which my learned friend was proceeding on before you, Sir, on the last occasion, that there would be lots of disclosure about, for example, the issue which they identified on the pleadings, the issue of dominance. You will remember the discussion you and I had, Sir, about Rightmove and whether Rightmove was dominant, to which the answer is, well, it is, but it does not matter, and you eventually directed that there must be no disclosure of that issue because it is not actually relevant to the issues before the Tribunal.

At the stage that Mr. Campbell is discussing, they must have been proceeding on the basis that the disclosure exercise would be a rather bigger one than it turned out to be.

Then at para.44 he then says that the defendant's estimated costs on a realistic basis are circa £2.5 million, and that has been prepared following careful consideration by his firm, counsel and expert advisers. You will see, if you go over the page to 44.3.6, just making good the point I have just made he says that it will be necessary for witnesses to address allegations of the broader collective boycott, and he refers to disclosure being documents which may be provided by the claimant covering a time period of several years. So he was proceeding on the basis that I have just outlined.

We see from the next paragraph but one, 44.5, that he was proceeding on the basis of a three week trial.

Then at 46----

THE PRESIDENT: That is because this costs estimate covers the High Court trial as well.

MR. MACLEAN: Yes, that is right. The point we make in our skeleton is that when it gets cut back to a two week trial, we do not see a proportionate reduction in the Gascoigne Halman schedule.

THE PRESIDENT: That costs estimate is 17th June.

MR. MACLEAN: That is at p.1359, I think.

THE PRESIDENT: Yes, what is just curious is that the statement of case cost has not changed to any appreciable extent on counsel, it is just the solicitors.

MR. MACLEAN: The witness statement number there is perhaps one of the most startling comparisons, because one would have thought that sitting down Mr. Jones and Mr. Smith and getting them to set out their statements and perhaps showing them the relevant

documents in order to do so, assuming four to eight witnesses for the defendants, and it is actually a little more than the current working assumption, gives a number which is very, very substantially less than what is now suggested in the August document.

The final point on Mr. Campbell is that at para.46 he says:

> "I consider it is appropriate to assume that the claimant's costs will be approximately equal to the defendants' costs. This is not a case in which a burden of work will fall far more on one party than another."

Then he gives various reasons for that. That is irreconcilable with the submission which Mr. Harris now advances in skeleton argument. It is not for me to speculate as to why Mr. Campbell is no longer with us, but, in my submission, his assumption is a correct assumption. This is not a case in which a burden of work will fall far more on one party than another, but to the extent that it will fall more on one party than the other, in my submission, not least for reasons for disclosure, it will fall more on my client than on Gascoigne Halman.

Can I just deal with the points which Mr. Harris makes in his skeleton argument about this? He says at para.10.5, p.4:

> "In any event, it is to be expected that Gascoigne Halman's costs of the competition issues in its action will reasonably exceed those of the claimant for several reasons."

He gives four reasons over the next few paragraphs. In my submission, all four of his reasons are bad reasons. First of all, he says, in effect, that his client is the claimant in the sense that they are the ones making the running on the competition issue, and claimant's costs often reasonably exceed the defendant's. That is true, but that is often because of the burden of proving the extent of loss. In this case no damages are claimed, there is no question of causation or quantum. There is no reason to think that the competition issues will not involve essentially an even division of labour between the parties.

His second point is that the focus of the competition case is essentially on the claimant's business model, and we will be terribly familiar with all of that and Gascoigne Halman will have to get up to speed. That is not a very convincing argument either, in my respectful submission. The case is about the estate agents' market as well as the portal market, and Gascoigne Halman knows all about the estate agents' market. It is part of the Connells Group, which is in strategic partnership, a shareholder, in Zoopla, which, of course, is a major player in the portal business. The idea that there is anything in my learned friend's

second point to justify a significant excess in costs on Gascoigne Halman is, in my respectful submission, fanciful.

His third point is the point about the fact that legal advice may have been given and was given to my client before it started, and that somehow a lot of the legal thinking will have been done and that is all in the bank. You will know, Sir, as all of us do who are involved in litigation, that litigation is a completely separate kettle of fish from that type of advisory work. Litigation and the costs of litigation are driven by the points that are pleaded and the facts that are alleged, and the disclosure that has to be given, and so on. The fact that there may or may not have been advisory work done in the past is of negligible impact on the course of any litigation such as this. In my respectful submission, that counts for very little.

His fourth point is the Moginie James point which I have really already dealt with, because the costs which are allocated in our schedule to Moginie James are incremental.

The final point on Moginie James is that, of course, if one looks at their costs, their costs are modest. It is true that they are not going to be making the running so far as the expert evidence is concerned - that is true, they are playing second fiddle, or perhaps they will not have a fiddle at all on the expert issues. Apart from that, they are every bit as involved in this litigation as anyone else. When you look at their costs and compare their costs with the costs which are suggested for Gascoigne Halman, the disparity is quite startling. I do not know whether you have had an opportunity to glance at costs schedules which were submitted by both defendants yesterday.

THE PRESIDENT: Yesterday?

MR. MACLEAN: Yesterday, for today's purposes.

THE PRESIDENT: Of this hearing?

MR. MACLEAN: I am not suggesting that you need to turn them up now, but if I tell you that one of them was, I think, essentially eight times higher than the other, you will not have to pause very long to work out which was the higher and which was the lower.

So, Sir, what it comes to is that we have here a £2.8 million one page schedule which is not sufficiently supported for the Tribunal to have any confidence in it being a proper basis for security for costs. You do have a proper broken down substantiated costs budget from my clients in circumstances where Mr. Campbell, the previous partner representing Gascoigne Halman, considered it appropriate to assume that the claimant's costs would be approximately equal to the defendants' costs.

You should, in my respectful submission, proceed on that basis, Sir. That means that the starting point for security for costs is our Gascoigne Halman schedule. The question then is

what broad brush percentage should the Tribunal apply taking into account the fact that in this case we are in *Stokors'* territory. We are in the territory of my clients being able to engage the balance of prejudice analysis. That should make the court be prudently cautious in how it uses its broad brush, and, in my submission, the offer which my clients made now some weeks ago of a total security for costs of £1 million to Gascoigne Halman was an appropriate offer which Gascoigne Halman was unwise to reject, and, in my submission, that is the figure, payable in two tranches or three tranches, which is perhaps something that can be discussed as necessary. In my submission, that was a perfectly reasonable offer to make and that is the order which I would invite the court to make.

Unless I can assist you any further, Sir, those are my submissions.

THE PRESIDENT: Thank you.

MR. HARRIS: Sir, I have a few short points in reply. Taking them in the order in which they arose, my learned friend began by saying that there are various things that my side 'must know'. That is wrong. The things that he said we must know, we do not know. He could have allowed us to know them by adducing the evidence. He has deliberately chosen not to do so.

Taking them in order, therefore, his submissions are completely unfounded on his first point about prejudice. First, he said that he would have to 'divert' monies from marketing spend pound for pound into security. We do not know that. There is no evidence to support that. He could have adduced full evidence to support it. If so, we would have tested that in advance of the hearing.

THE PRESIDENT: What would the full evidence be?

MR. HARRIS: It would be the anticipated schedule of 'operating expenses', and the full disclosure as to monthly incomes.

THE PRESIDENT: Why does it matter whether the expenses are £200,000 or £600,000?

MR. HARRIS: We do not have any profit and loss account, we do not have any management accounts, we do not have any cash forecasting.

THE PRESIDENT: What is the difference?

MR. HARRIS: Sir, we do not know what their monthly expenditures are or were forecast to be on marketing. It is a blank. It is an absolute blank, and it is grossly unfair and improper for it to be suggested in counsel's submissions against the background of that complete and deliberate absence of evidence that this Tribunal should proceed on the basis - there are various ways he put it - pound for pound, what is left goes on marketing, etc, etc. The only thing to which he points is Miss Farrell's first witness statement at 8.5, and that does not say

what he wished to make as his submission. What it says is, "We expect to continue generating recurring contracted income".

THE PRESIDENT: Where is that?

MR. HARRIS: It is bundle C2, tab 13, para.8.6, expects to continue generating recurring contracted income from OTM. Just pausing there, we do not have any material to back up even that part of the statement. We do not have cash flow forecasts, management accounts, we do not have a single profit and loss account, Sir, either historic or monthly present. We just do not have one. We have asked for them and they said no. Then it goes on, "to increase its income", and then it does not say what Mr. Maclean submitted. It says, "hypothetically". What comes next is a hypothetical, "so long as its marketing budgets do not have to be diverted". It does not say what they are or what they would be or how they would be diverted or why. If it had purported to say those things, then we would have said, "Okay, let's have disclosure, please", and if they had refused to provide that we would have been here asking you, Sir, for an order for specific disclosure to back up the supposed point. I cannot emphasise this enough, they have done this deliberately, they are trying to have their cake and eat it, and it is not acceptable.

We also do not know about the diversion. What is said is it would be diverted, and then, conveniently the submission is, but not the evidence, it would definitely be diverted from the marketing budget. How very convenient, because he wants to make a prejudice argument. How do we know, Sir, without any disclosure at all whether, in fact, if there even needs to be a diversion, and I will come back to that, it could not be diverted from something else. There are lots of other heads of expenditure, some of which are mentioned in my learned friend's skeleton for the first time. There is no evidence at all that expenditure could not be diverted from, say, the claimant's own legal team, or from, say, rent. Why can they not negotiate a short rent holiday? Why can they not reduce other items of expenditure that are not marketing? There are all kinds of other… There is no evidence at all. It is simply unsafe. It would be unsafe in any event for you to take the submission that it will pound for pound be diverted from marketing expenditure, and it is not just unsafe but grossly unfair for you to take that submission as a proper submission when they have deliberately chosen not to substantiate it.

So that is the end of the entire point about prejudice. It does not work because they have deliberately chosen not to substantiate, leaving aside that it has all arisen at very much the last minute.

That is the first and one of the major points. The rest are more discrete in the usual way of a reply, and I will rattle through them, if I may, with an eye on the clock. There is no answer to specific discrete point that I gave about the inadequate and obviously unrealistic low PTR disclosure costs on my learned friend's schedule where his estimated fees were £5,000, Mr. Holmes was £7,000 - his are less than Mr. Holmes, and in any event the grand total is £12,000 for a day in court from counsel of such seniority, hopelessly and obviously too low. There was a submission which was incomprehensible to me. The suggestion seemed to be made that I accepted that the appropriate percentage was 55 per cent. Obviously I do not. We are told, although it is not possible to discern this on the face of the budget, that, in fact, there has been a proper estimate for the number of documents that it is assumed will be reviewed by my learned friend's solicitors for disclosure purposes. Be that as it may, it is still the case that in our experience and expertise, and in particular that of my instructing solicitor, who has sworn to the personal assessment he gave in his budget, that either £134,000 or £143,000 for the other side's disclosure is hopelessly inadequate for a more than two week trial of complex competition issues against the panoply of pleaded competition law points. Never have I experienced anything remotely resembling such a low figure, and that is even leaving out of account the fact that there is not provision made for any form of e-disclosure on the part of the claimants.

THE PRESIDENT: Who says that? Is that you saying that?

MR. HARRIS: Yes, I have diverted. Let us not forget, Sir, and I am reminded helpfully by those instructing me, that the disclosure also is for disclosure in the High Court, and yet it is said that that is the figure. It is, with respect, far too undercooked.

Then a point was made about what proportion of Moginie James can properly be put in to the apples versus apples comparison. As you rightly pointed out, Sir, I have never said it was all of it. The point that cannot be overcome by Mr. Maclean is that we only have one schedule, so if and in so far as, which there are, costs properly attributable to our involvement with that other part of the case, they can only go in our schedule whereas, and Mr. Maclean has admitted this and accepted this quite properly, all of his additional costs of the Moginie James case are stripped out and put in a separate document. So obviously we are not comparing apples with apples.

The next point that was made is that it is not fair to say that we will not have higher costs in comparison. The truth is that this Tribunal, based on its experience, and the point put forward by my instructing solicitor in my submission is that when you are acting as claimant you do, in the event, end up having to make the running, as we do in this

competition set of allegations, and we are likely to have higher costs just in the scheme of things.

We also have a point that has been overlooked which was that on the question of disclosure our overall budget number is high because we have properly and reasonably included actual and potential third party disclosure costs. That does not apply to my learned friend's team. Some of those costs have already been spent. That is an ongoing issue.

The next point is that reference was made----

THE PRESIDENT: When you say third party disclosure, you mean what, that you may be getting some documents from----

MR. HARRIS: We have already had to spend some part of our budget on seeking third party disclosure. That is, so far, in the form of correspondence, but it may have to morph into an actual application. Some of it relates, Sir, to - the bit that I am aware of, which may not be all of it, is as regards the collective boycott allegation and the founder members.

THE PRESIDENT: Yes, but so may, surely, the claimant?

MR. HARRIS: I do not believe that that falls into any part of the remit of the claimant's conduct of its litigation.

THE PRESIDENT: They have got to defend the allegation that they were in discussions with other parties and they may have well approached other parties----

MR. HARRIS: That is right, but the point I am making is that we have made provision in our number for the actual going forward and seeking, whereas they will not have that expenditure. Of course, the third party disclosure, the normal rule is if you get it you then pay for that, that is a litigation cost. That is something that is again not apples with apples, but these are all perfectly proper and reasonable, but it has not been taken into account.

I did not understand the point about dominance on the pleadings, so I will pass over that one.

Points were made about the reliability of Mr. Campbell's statements at an earlier stage when I was instructed by Hill Dickinson, but of course it was very much a pick and choose. On the one hand, it was said, "Mr. Campbell, look at what he has to say, broadly claimant's and defendants' costs are the same". That was at an earlier stage before the pleadings had crystallised. It is said, "We will rely upon him for that, when he says they must be broadly the same", but then, when he puts forward in that witness statement a proposed schedule of costs of £2.5 million, that is ignored. That is not reliable. Were that to be reliable, fair enough, for today's purposes we could use that figure, but we would still end up, in my respectful submission, as highly likely to obtain more than £1.5 million in security overall,

even based upon a costs schedule of £2.5, rather than £2.8. So he cannot again try to have his cake and eat it.

Then he made a separate submission that there were some pre-litigation costs about competition law issues, amongst other things, that are in his submission 'a completely separate kettle of fish' and/or negligible. On the best information before this Tribunal there is not basis for saying that they are negligible. We have given you all the references. On the contrary, they seem to be significant.

Secondly, it is only to be expected that they would be significant. It is self-evident that one needed extensive competition law advice to set up this particular claimant vehicle. It is simply not understood how it can be suggested that that competition law advice and that head start, which is not properly recoverable, does not give them an advantage or make it a not apples for apples comparison.

THE PRESIDENT: You sort of said you were withdrawing, you were not bound by the membership agreement. Did you write a letter before that claim was issued setting out your position----

MR. HARRIS: I believe there were some very short letters immediately prior to the issue of the claim by the claimant, as I recollect it, in a matter of days because when the claimant found out about the triple listing by the defendant, it took place over approximately a week, no more, "You are in breach, if you do not back off we will immediately seek an injunction", and then Hill Dickinson, the Manchester based firm, were retained by the Manchester based, my lay clients, and they did two things: they, in very outline terms in a letter, I believe, of one and a half pages long, said, "We think there are competition law points here and we also resist your injunction". The first letter was half a page and it said, "We have only just been instructed". I think it said, "It is a Friday night and we will take instructions". So not a great deal of pre-action. It does not detract from my point, in any event, which is entirely pre-action. They had obviously spent a lot of money on advice that does not fall into their litigation budget, but we did not.

Just whilst we are on Mr. Campbell, there were issues about the way in which costs budgets were put together. Again, it is obviously invidious of me to go into any particular detail. Life has moved on. That firm is no longer retained.

One of the points that those instructing me now have identified, and quite properly so, is that there was in the disclosure budget back then for that schedule a higher figure for counsel than there was for solicitors, which, on any view, is extraordinary.

The most pertinent point, and I am finishing with these two last submissions, is that when Mr. Maclean finishes with a flourish and says, "Ah, but the £2.8 million is not supported", that is just not right, Sir. The £2.8 million is expressly supported by the sworn evidence of the senior partner in my instructing solicitors' firm. It is correct that it does not have the back-up detail, it came earlier, but it is simply not right to say that it is not supported. It is expressly supported.

You have the point that, whilst further detail was sought and pursued repeatedly by the claimant in advance of this hearing, the Tribunal did not order it. That is one of the reasons it is not here.

Sir, unless I can assist further those are our reply submissions.

THE PRESIDENT: Yes, thank you very much.

[**SEE SEPARATE TRANSCRIPT FOR JUDGMENT ([2016] EWHC 2315 (Ch))**]

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THE PRESIDENT: There is one question, which is whether this order is being made in the Tribunal or in the High Court. The application was in the High Court, and I think it is probably a High Court order, is it not? I know it relates to costs here, and I am neutral about this, so I just want to get it right. I do not think it can be in both, as it were. The recital can refer to the other, but----

MR. MACLEAN: Sir, it strikes me as a Tribunal order rather than a High Court order in principle. You mentioned earlier the idea of wearing one hat and adjourning something to yourself, then sitting as the President of this Tribunal, and it may be that is the way to go.

THE PRESIDENT: Yes, just looking back on the order, the application was in the High Court. Was it adjourned by Sir Kenneth Parker to the Tribunal, or is that not clear?

MR. MACLEAN: It is tab 6 of bundle B.

THE PRESIDENT: It is a formalistic question. It is not going to make much difference to anyone.

MR. MACLEAN: At para.4, "save as aforesaid, the Gascoigne Halman and the Moginie James be adjourned to an allocated judge" - that is the High Court judge.

THE PRESIDENT: "At that hearing in respect of both" - that is why it did seem to me that I should be doing as a Chancery judge.

MR. MACLEAN: I think you are right, Sir.

THE PRESIDENT: I think so.

MR. HARRIS: It was my understanding, and this includes the basis of para.4 of Sir Kenneth Parker's order, that it was effectively split so that there would be from the Tribunal for the competition issues in the CAT, and in so far as security issues continued in today's hearing in any way shape or form, then that would be by the same judge as the allocated judge or a dual hat judge sitting in the Chancery Division, so my respectful submission is that there needs to be two orders just to close off the formalities. They can be the same or cross-refer to one another.

THE PRESIDENT: I think I should make the order as a Chancery judge pursuant to para.4. I can make an order in the Tribunal referring to the order in the Chancery Division, and saying that, in the light of that, there be no further order.

MR. HARRIS: Sir, I think that is the way forward.

THE PRESIDENT: No one would get anywhere if they came back and asked in the Tribunal, ignoring the other order.

MR. HARRIS: Subject to any contrary indications from you, Sir, there is the question of the costs of the application. I certainly would like to make a costs application. I do not know if Mr. Maclean has anything else?

MR. MACLEAN: I do have something that arises before we get to costs. Sir, Mr. Springett is abroad this week. Can I ask you give us liberty to apply on the question of the dates, Sir? I have in mind in particular the sum you have ordered to be paid by the end of this month. There are some other sums to be paid at the end of this month by way of fortification to both defendants, as well as the security for costs to Moginie James that you ordered this morning.

THE PRESIDENT: Yes, the fortification is?

MR. MACLEAN: £250,000 to Gascoigne Halman.

THE PRESIDENT: By the 13th, is it, or has that changed?

MR. MACLEAN: That was changed, that is by the end of----

THE PRESIDENT: That is now the 30th.

MR. MACLEAN: Yes, so there is quite a lot of cash coming out of the door, Sir, and I am not able to take instructions from Mr. Springett as I am on my feet, but what I would respectfully invite the court to do is to give me liberty to apply to you as to the dates and the amounts that you have ordered, so that if there is some important difficulty in cash flow terms, in particular with the first one obviously which is most immediate, and I think also

likely to be the largest single monthly slug of money, if I have understood their schedule correctly. I am not submitting that there is a problem, but I can see that there----

THE PRESIDENT: It would be only on the dates, not on the total amount?

MR. MACLEAN: No, no, of course. I simply do not know whether the payments that now, as a result of today's hearing, have been ordered to be paid by 30th September will or will not cause some short term logistical problem. If it does, I would respectfully ask for liberty to apply to you on paper, Sir, to explain what those difficulties are?

THE PRESIDENT: Yes, I will give you that. I think, if there was a significant difficulty in that regard, it should have been flagged in the evidence. I will give you that liberty.

MR. MACLEAN: I am grateful. Sir, that only leaves the costs. I know Mr. Harris is keen to make a costs application. In my respectful submission, the----

MR. HARRIS: Sir, I have a point on----

THE PRESIDENT: I think it is for Mr. Harris to go first, it is his application.

MR. HARRIS: Thank you, Sir. Just on that last point, obviously I cannot prevent the Tribunal giving liberty to apply. I just make this point, which is, as you have rightly said, Sir, had there been any particular difficulty with the end of September, it should have already been attested to in evidence.

THE PRESIDENT: I agree with that.

MR. HARRIS: I just note that they had agreed to provide by the end of September the amount payable to Moginie James on that date and £250,000, and this is only £30,000 more than that. So were there to be liberty to apply, where they seek to take it up----

THE PRESIDENT: You have put down your marker.

MR. HARRIS: I am very grateful. I reserve the right to seek specific disclosure of any points made about cash flow, were they to try to take it.

THE PRESIDENT: They would have to justify it.

MR. HARRIS: I am grateful. That then leaves the costs of today, Sir. We say that we have had to come here in order to seek security beyond the amount that the claimant was willing to put forward. They were not prepared to go anywhere beyond a grand total of £1 million. We have achieved £1.33 million. On that basis we have substantially won the application and costs should follow the event, and I would invite you to make that order in the usual way and summarily to assess it. I do have a costs schedule. I am happy to hand that up unless you would like to deal with the issue of principle first.

THE PRESIDENT: Let us deal with the principle first.

MR. MACLEAN: Sir, in my submission, that is not right. The application that was made was an application for security for costs in the sum of £1.778 million, I think it was.

THE PRESIDENT: It came down to £1.5 million.

MR. MACLEAN: Yes, I understand, that is what the application said on its face. But when the parties were squaring up for the hearing Quinn Emanuel's position was, as I showed you earlier, articulated in their letter of 15th August at p.694 of bundle D, which was. "We will take another £1 million, but that is a minimum we are willing to accept", they said, "and if that is not accepted we are instructed to proceed". So they came looking for their extra £1 million, and they have not got it. They have lost, and, Sir, we have successfully resisted their application. So, in my respectful submission, the correct order for costs is that my client have the costs of and occasioned by the security for costs application in any event.

MR. HARRIS: Sir, I have never heard such an extraordinary submission. The fact of the matter is, although they were only prepared to offer an additional £500,000, taking it up to a maximum total of £1 million, we said we were not prepared to accept that, and we have come here and we have substantially exceeded the amount. So, self-evidently, on the substance we have won, and the costs should follow the event.

THE PRESIDENT: Thank you. This is a situation where both sides have suggested to the Tribunal that they have won, and that, therefore, they should have their costs. The reality is that the claimant was prepared to offer £500,000. The defendant, Gascoigne Halman, stated expressly that it would take nothing less than £1 million. The claimant has had to pay more than £500,000, but Gascoigne Halman has got significantly less than £1 million. Each side, therefore, had to come here to achieve a result which was not offered by the other. It seems to me, in those circumstances, the correct order is that there be no order for costs.

We will draw up the order. I think that is all there is to deal with.

MR. MACLEAN: I think so, Sir.

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