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5 **IN THE COMPETITION**
6 **APPEAL TRIBUNAL**

Case No: 1577/12/13/23 (T)

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8
9 Salisbury Square House
10 8 Salisbury Square
11 London EC4Y 8AP

12 Friday 17th February 2023

13
14 Before:
15 The Honourable Mr Justice Marcus Smith
16
17 (Sitting as a Tribunal in England and Wales)

18
19
20 **BETWEEN:**

21
22 The Durham Company Limited **Appellant**

23
24 v

25
26 Durham County Council **Respondent**

27
28
29 **A P P E A R A N C E S**

30
31 Ligia Osepciu (On behalf of The Durham Company Limited)

32
33 Aidan Robertson KC (On behalf of Durham County Council)

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1 **Friday, 17 February 2023**

2 **(10.30 am)**

3 **(Proceedings delayed)**

4 **(10.38 am)**

5 MR JUSTICE MARCUS SMITH: Good morning, I am afraid there is no image in the
6 remote courtroom, "TV plus not available", it says on the screen. I am going to rise
7 for three minutes to see if we can sort that out. I do apologise.

8 MS OSEPCIU: Thank you.

9 **(10.38 am)**

10 **(A short break)**

11 **(10.40 am)**

12 MR JUSTICE MARCUS SMITH: Good morning.

13 MS OSEPCIU: Good morning.

14 MR JUSTICE MARCUS SMITH: Mr Robertson, I can see you. I do apologise for the
15 glitchy start but we can all hear and see each other well, can we?

16 MS OSEPCIU: Yes, thank you.

17 MR ROBERTSON: Yes.

18 MR JUSTICE MARCUS SMITH: I am very grateful. Before we go to anything more
19 formal, I will start with the usual warning. These proceedings are taking place
20 remotely but as if in the competition appeal tribunal physically. They are being live
21 streamed, they are to be treated as if physically in person in Salisbury Square
22 House. Although a transcript is being prepared, the proceedings should not be
23 recorded or photographed or transmitted by any other person and a breach of that
24 order would be of serious moment. I know that will not happen but I say it in every
25 case.

26 Thank you all for your very helpful written submissions and thank you also to the

1 defendants for their letter of yesterday in response to my draft directions order.
2 Before I hand over to Ms Osepciu, I thought I would just say a few words about why
3 I sent that order out and why this is a particularly interesting hearing.
4 It is, as you both rightly inferred, the first case concerning subsidies and the first
5 case under the Subsidy Control Act 2022 before the tribunal. As such, you have the
6 unhappy position, as do I, of dealing with a new jurisdiction, where we are somewhat
7 feeling our way.
8 Before the jurisdiction beds down, what we are doing is we are keeping a very close
9 eye on how we want the jurisdiction to evolve. Now, it may be that what we want is
10 not what happens because at the end of the day, a fair process for all of the parties
11 is paramount. But we do want this to be a fast, cheap and simple jurisdiction and
12 that is, I would hope, for obvious reasons. The one thing one doesn't want to have is
13 for the financial advantage of subsidies to be subsumed in challenges to their
14 making or not making in terms of legal cost and that is in essence what informed the
15 substance of my order yesterday.
16 I felt, rightly or wrongly -- and you must feel free to tell me that I was wrong -- I felt
17 that the draft you sent me, which was very helpful in crystallising my thoughts, was
18 a little bit too much down the heavy side of litigation than the light side which I think
19 ought to be the first touch for the conduct of this sort of hearing. So fast, cheap,
20 simple is the watch word but you must feel absolutely free to push back if you feel
21 that your case is not being able to be developed properly and I know you will do that.
22 Just a few points on disclosure, cost caps and additional issues -- and Mr Robertson,
23 you did address those in your very helpful letter. Disclosure, my thinking is that
24 disclosure ought to be minimal in these cases. Essentially, you ought to have
25 a decision and then you **(Audio distortion)** is always not a subsidy and, if it is
26 a subsidy, whether it can or cannot be justified under the Act.

1 It does seem to me that disclosure is going to have to be justified in pretty much
2 every case and although I inserted an order regarding candour, and I am quite sure
3 that will be the norm where there is a public body involved, I am presently of the
4 view, subject to any correction by the parties, that candour in this case requires
5 actually relatively little because of the constraints of the issues in the case. Again, I
6 am up for correction on that.

7 The question of cost caps, can I just flag up first of all that I am going to require
8 a good deal of persuasion that the regime which operates in judicial review cases is
9 simply translated over into the competition appeal tribunal. Of course, feel free to
10 argue it, but that is not my understanding of how the subsidy control regime works in
11 this jurisdiction. I am of course very willing to learn from what goes on in other
12 jurisdictions -- that goes without saying -- and I am very keen to ensure that we have
13 a proper costs jurisdiction going forward. But I don't think the notion that we are
14 obliged to follow what goes on in other courts is going to get much traction here.
15 Having said that, I absolutely accept that a costs control order, a costs cap, is in the
16 High Court at the very last end of what is normally ordered.

17 But for the reasons which actually Mr Robertson articulated in his written
18 submissions, costs budgeting carries with it its own costs which I am very reluctant
19 to import into a regime which, as I have said two times already but it bears repeating,
20 is intended to be fast, cheap and simple. So a costs cap struck me as a very
21 straightforward way of ensuring that all of the parties from the very get go appreciate
22 that this is intended to be a super-fast regime.

23 That brings me to the final point, which is the additional issues in the pleadings. Of
24 course I have been quite narrow in the issues I have defined for trial. That was in
25 part to control the ambit of the argument so that it could be done in two days plus
26 a day's reading and was intended to focus on those points which are likely to be

1 determinative. Of course I am open to hearing about how one can add further issues
2 in, but the decision, rather the drafting of a draft order, provisional order, was made
3 with an eye on keeping costs, scope of process and a May hearing very tightly
4 constrained.

5 So that was my thinking behind the order. But I sent it out -- you didn't get much
6 time but I sent it out as early as I could to enable you to think about what is going on.
7 With those introductory remarks over, I will hand over to you, Ms Osepciu, and you
8 can take the matter forward.

9 MS OSEPCIU: My Lord, I am very grateful for those indications and I am very
10 grateful also for the draft order you sent across yesterday.

11 By way of summary, I am going to address you primarily by reference to those draft
12 directions. We are largely content with its terms, subject to the May hearing date
13 provided for in paragraph 6. We do think that should be later and I will come on to
14 explain that. But perhaps if I could just work through our position on each of the
15 provisions, picking up any points.

16 MR JUSTICE MARCUS SMITH: That would be very very helpful, thank you.

17 MS OSEPCIU: With respect, first, to paragraph 1 and paragraph 2, forum and
18 intervention, I believe both parties are agreed those are the appropriate orders.
19 Paragraph 3, sir, you have indicated that you would like some further pleadings from
20 us to crystallise the question of the decision under appeal. We had sought to
21 address this in paragraphs 35 and 36 of our Notice of Appeal, but we appreciate --
22 which is in, if you wish to turn that up --

23 MR JUSTICE MARCUS SMITH: I have it. Let me just refresh my memory.

24 MS OSEPCIU: It would be in your bundle 1, which is the Notice --

25 MR JUSTICE MARCUS SMITH: I have it.

26 MS OSEPCIU: -- paragraphs 35 and 36.

1 MR JUSTICE MARCUS SMITH: Yes. I mean, let me be quite frank, Ms Osepciu,
2 why I said this. I think -- it is obviously going to be a matter for the Defence, but
3 reading your Notice of Appeal and the disclosure requests that were articulated in
4 your written submissions, I wonder whether there is not going to be an argument
5 about whether there is a decision in this case at all.

6 Now, that is absolutely not a matter for today, but if it were to be the contention that
7 the term "subsidy decision" contains actually two very significant operative elements:
8 the subsidy question, which is defined in section 23, and the decision question,
9 which is defined not at all, if that second element has serious traction, and one can
10 see arguments as to why it might have, then the kind of decision arising out of
11 conduct -- can I put it that way -- that might be said to be not a decision at all.

12 So that is why I wanted a pleading which made that absolutely clear because -- let
13 me articulate how I see this going. Let's suppose Mr Robertson says -- and I don't
14 want to anticipate your Defence at all, Mr Robertson, I have had this case
15 management conference in before your Defence for exactly the reasons to debate
16 this sort of thing. But let's suppose the Defendant says: look, how we structure our
17 arrangements in terms of the mandatory uncharged refuse collection as opposed to
18 the paid refuse collection, how we structure ourselves is simply a matter of the
19 organisation of the local authority. If anything it is a subsidy scheme, not a subsidy
20 decision, but it's not even that because we just structure ourselves this way and you
21 cannot get yourselves within the operation of the Act, then it does seem to me,
22 however I decide that point -- and I can see interesting arguments going both ways,
23 that is likely to be a matter for the Court of Appeal -- which is why I wanted to isolate
24 the issue out now and I am wanting to have as quick a hearing as possible with
25 a view to that then going on to the Court of Appeal, as I think it almost inevitably
26 would have to.

1 Mr Robertson, if you tell me, and you absolutely don't have to but if you tell me this is
2 not going to be a problem, there is not going to be any argument about the decision,
3 then we may have to rethink these things. But simply reading the pleadings and
4 thinking through how the Act works, it seemed to me this was likely to be something
5 which I was going to have to get my sleeves rolled up to consider. I see you nodding
6 but do feel free to say something.

7 MR ROBERTSON: Sir, keep your sleeves rolled up. This will be an issue.

8 MR JUSTICE MARCUS SMITH: Ms Osepciu, I am sure that is not a surprise but
9 cards on table, it seems to me that that is something which is -- I mean, this is a very
10 interesting first case to have and on one level I am very pleased to have
11 an interesting first case to have. On another level, this was very much not the first
12 case I was expecting. It was something where you would have in black and white in
13 three lines, "We are giving a subsidy to X and someone objects". So it is not that
14 case and that is why -- although I think I know exactly where you are going, what
15 I want to have is an articulation that Mr Robertson can kick the living daylight out of
16 in his response and we can then debate whenever we do debate it.

17 MS OSEPCIU: Thank you for that indication, and of course we have no objection to
18 providing that within the two-page limits. It is very helpful to have had this discussion
19 also to more fully understand what the tribunal was concerned about there. So we
20 have no difficulty with that paragraph.

21 MR JUSTICE MARCUS SMITH: Thank you.

22 MS OSEPCIU: Moving on then to paragraph 4 which concerns the Defence. We
23 are content with those terms. Mr Robertson had indicated that perhaps he would like
24 to cover other matters in his Defence and we certainly have no objection to that.
25 But, sir, you have just indicated that perhaps you it was not to keep this quite
26 focused on those points.

1 MR JUSTICE MARCUS SMITH: That is very helpful, Ms Opsepciu. Perhaps we
2 can deal with that now and, in a sense, there are a lot of moving parts that need to
3 be thrown into this. I am not for a moment saying, Mr Robertson, that the points you
4 have raised are not proper points to include in a pleading. The reason I didn't
5 include them was because this is an effort on my part to keep things as tight as
6 possible.

7 I am anticipating, unfortunately, that this three-day trial aspirationally in May, but we
8 will -- this three-day trial is likely to be something of a preliminary issue. I know it is
9 not crafted like that in the order, but it does seem to me that it is almost certainly
10 going to go further. The last round of battles did go to the Court of Appeal, this is
11 obviously something that both parties, entirely properly, are taking very seriously.

12 It just seems to me that the two points I have articulated, whether those go one way
13 or the other, unless something emerges with massive clarity from the argument, they
14 are going to go further and that is why I crafted them as narrowly. But I don't want to
15 leave something out which we can keep in play because it doesn't add very much to
16 the argumentation.

17 So Mr Robertson, that was my thinking for better or worse.

18 MR ROBERTSON: Yes, sir, understood.

19 Sir, the feed of your picture keeps freezing.

20 MR JUSTICE MARCUS SMITH: I am so sorry.

21 MR ROBERTSON: It is obviously a technical issue with Teams, but I can hear you
22 so I will just continue.

23 MR JUSTICE MARCUS SMITH: Do, but if you feel --

24 MR ROBERTSON: Two issues --

25 MR JUSTICE MARCUS SMITH: Do go on.

26 MR ROBERTSON: Yes. If I have missed something you have said, I will let you

1 know.

2 The two issues we have raised, I think we can park relief because that is
3 a consequential matter. However, section 12 of the Act, the principles which we are
4 alleged to have breached, I think that is a matter we would wish to address in front of
5 the tribunal and I think it would be a matter on which, should the matter go further to
6 the Court of Appeal, then the Court of Appeal would wish to express a view as well.

7 We have said in our covering letter that we anticipate addressing these issues pretty
8 shortly, so I don't think that is going to cause the tribunal to lose its time estimate.

9 As regards the time estimate, we think one day pre-reading and two days' hearing
10 will work and the reason why I and my learned junior, Mr Howell -- who cannot be
11 here today, he's in another hearing -- the reason why we are confident of that is that
12 we did the British Sugar case for the Department for International Trade last year in
13 front of Mr Justice Foxton in the administrative court, a very heavy judicial review
14 brought under the interim subsidy regime, applicable under the Trade and
15 Cooperation Agreement, and also involving a considerable amount of argument
16 about the interpretation and potential application of the Northern Irish protocol. It
17 was a heavy case and it had an interested party as well, Tate & Lyle, intervening in
18 support of the Department against British Sugar's application, and the argument in
19 that case was completed within two days.

20 So I think that is a pretty reliable guide, that although this is a new jurisdiction under
21 the Subsidy Control Act, that too was a new jurisdiction. It was the first time that the
22 Trade and Cooperation Agreement had been looked at, and the first time the
23 Northern Irish protocol so far as the EU state aid (**Audio distortion**). That was
24 tackled within the confines of a two-day hearing and I don't think any of the parties
25 felt pressed for time.

26 So that is why I think adding this extra issue is not going to prejudice the two-day

1 oral hearing time estimate we have and as you are aware, you have experienced
2 counsel in front of you, we are not the sort of people to run on unnecessarily -- at
3 least I am not.

4 MR JUSTICE MARCUS SMITH: Mr Robertson, I am taking that as read and we will
5 be, as in all our cases, immeasurably assisted by counsel.

6 I must say, having kicked out relief, for myself -- I will hear, Ms Osepiciu, what you
7 say -- but I am happy to include your issue 3, whether the Respondent has
8 contravened section 12. Ms Osepiciu, does that cause you any concern in terms of
9 unduly widening the ambit of the proceedings?

10 MS OSEPCIU: My Lord, it does. In light of Mr Robertson's indication about the
11 anticipated length of that part of the Defence, it doesn't at this stage, and of course
12 when the Defence does come through, although those are relatively short passages,
13 they throw up particularly large issues. We can perhaps pick that up at that stage
14 with the tribunal whether they can be heard within the allotted time span.

15 MR JUSTICE MARCUS SMITH: That is very helpful and, Ms Osepiciu and
16 Mr Robertson, let me make one thing clear: it is, in a sense, implicit in what I said
17 about feeling our way. I do think, notwithstanding, Mr Robertson, the comfort you
18 have given me arising out of the heavy JR in front of Mr Justice Foxton, we will keep
19 this matter under review, and both parties should feel -- I hope they will talk to each
20 other first -- but both parties should feel free, as I am sure they ordinarily would, to
21 raise these matters with the tribunal if there is a problem.

22 This is something we want to get right and I am sure that if, for whatever reason, one
23 or other party says, look, this just won't work, well, I would want to hear sooner rather
24 than later on that front and we will endeavour to sort that out, because I do know
25 counsel to come before this tribunal are very capable and if they say there is
26 a problem, then I want to listen.

1 So that is paragraph 4, I think.

2 MS OSEPCIU: Yes.

3 MR JUSTICE MARCUS SMITH: Ms Osepciu, do go on.

4 MS OSEPCIU: Yes.

5 Paragraph 5, we are also content with, subject to the provision for how
6 paragraph 5(b) then links to the timing of the hearing in 6.

7 MR JUSTICE MARCUS SMITH: Yes.

8 MS OSEPCIU: So, with respect, sir, we are very grateful for the suggestion about
9 an agreed statement of facts, and we can certainly see the sense that having that
10 agreed document will assist with disclosure of related issues, for example. So we
11 are proceeding on a common factual basis.

12 We are also content with the provision for short written submissions regarding any
13 additional evidence or disclosure that may be required, and also content with the
14 preliminary indication that that will be decided on the papers unless it appears at the
15 time that a CMC will be required. Sir, you will have seen that we initially suggested
16 that a CMC be pencilled in. Since the tribunal is not shutting out that possibility in its
17 entirety, we are content with the current form.

18 However, in the spirit of feeling our way through this, the documents that we have
19 identified -- you have indicated you have read those parts of our submissions -- the
20 documents and type of information we have identified as expecting to receive as part
21 of the Defence concerning, for example, the separate accounting and the costs of
22 the two rival businesses -- the two waste collection businesses -- we would, with
23 respect, be very concerned if we got a Defence that didn't contain certain types of
24 information.

25 So although we don't necessarily anticipate it now, it may be there is a lot of
26 pressure on the further disclosure and witness statements and that there are some

1 hard fought issues there. The concern is that a gap between 19 April when we are
2 putting in those submissions and a hearing date in May may just not be sufficient to
3 accommodate the arguments that could arise as a result.

4 MR JUSTICE MARCUS SMITH: I understand. That is very helpful, Ms Osepciu.
5 Let me set out my stall and it will, I think, be for Mr Robertson to push back on that in
6 the first instance and then you can come back on what he says.

7 I was very conscious that paragraph 5(a), an agreed statement of facts, is almost
8 always asking for trouble in a controverted case like this. What I am keen to avoid, if
9 it is at all possible, is for there to be an excessive perusal of detail when actually the
10 points at issue are likely to be rather more broad brush.

11 So let's take it that there is a degree of advantage arising purely to the, as it were,
12 private enterprise side of the Defendant's business such that because of the scale of
13 the municipal operations they have, they have economies which enable them to
14 price lower. I don't know what Mr Robertson is going to say because his Defence
15 has not yet been put in, but that is really why I want hearings like this to take place
16 when they do. I would be singularly unimpressed if there was a debate requiring us
17 to go through all the figures which are dealing with this question of whether there is
18 cross-subsidisation.

19 In other words, if we are talking about a point of general principle, I don't want the
20 tribunal, and therefore the parties, to be sucked through the sort of granular analysis
21 that requires you at the end of the hearing to work out what the facts actually are.

22 I would much rather there was a broader brush articulation of what is going on,
23 argument about whether that is or is not a subsidy decision consistent with the Act,
24 and then leave over the detail of how that can be corrected to the relief stage, rather
25 than to have everything in upfront, much heavier case.

26 That is why I have pushed back quite hard on disclosure and why I have in 5(a)

1 an agreed statement of facts because I am hoping that this case, and indeed most
2 subsidy cases, can operate on a debate about the significance of that which has
3 been decided, rather than an articulation of what would in an ordinary type of
4 competition case where the facts really do matter, when you are trying to work out
5 how a market is to be defined or some such thing, well, a wide-ranging factual
6 inquiry with experts is incredibly important.

7 Here, I would like to think not so much. But at the end of the day, what I said at the
8 beginning about fairness really does matter. If either of you have concerns that this
9 is not going to work, then I would like to hear from you now. Ms Osepciu, I take
10 absolutely on board what you say, that you might very well say it is going to work
11 now and we will try and make it work but you need to come back when it doesn't.

12 What I am really interested in is flushing out whether there are problems now which
13 we can see which need reworking. Mr Robertson, in a sense, the ball will be in your
14 court because you have all this information. The question is how cheese pairing are
15 you going to be on the drafting of the agreement statement of facts in terms of
16 setting out the basic parameters as to how the Defendant operated.

17 MR ROBERTSON: Sir, I think I have a pretty good understanding of where you are
18 coming from and I think it is largely from the same place that we are coming from,
19 which is you cannot get drawn into massive detailed granular examination of line by
20 line figures.

21 We had a bit of that before in the state aid case before His Honour Judge Keyser
22 KC. Just to give you an example of the sort of information we have already
23 provided: if you were able to turn to bundle 1, the Notice of Appeal, page 55 -- and
24 I have just plucked this out, it is a page I turned to, but there are several other
25 examples of this. This is a response to a Freedom of Information Act request, you
26 will see on page 55 what the Appellant asked for. Then you then get on the next

1 page, page 56, the council's response, and then on page 57, wheelie bin by wheelie
2 bin figures. I don't think this Tribunal is going to want to get into that sort of line by
3 line examination of detail because I just don't think it is necessary to answer the
4 questions posed by this Notice of Appeal.

5 But to a large extent, a lot of this information is already there to the extent that
6 Ms Osepciu wants to rely upon it.

7 MS OSEPCIU: My Lord, if I might make a couple of observations both in response
8 to Mr Robertson and your Lordship's indication about the broad brush approach.

9 Firstly, sir, we do agree that the way the subsidy issue is currently framed in the
10 Notice of Appeal is at the level of principle and that is based on the information we
11 currently have. To the extent that the subsidy issue is then defended on the basis of
12 more granular costs information, these things will naturally evolve. But the framing
13 of the issue currently is based on the extent of information available to us.

14 To respond in particular to Mr Robertson's point regarding the Freedom of
15 Information Act request from 2017, that was quite a while ago now, and this is one of
16 the matters which concerns us. We have had an indication that since then, some
17 form of separate accounting system, which we refer to in the pleadings has been put
18 in place and we have never had sight of that.

19 So at the moment, and this is a factor of having very usefully this CMC at an early
20 stage, we simply don't know at what level of granularity this is going to be defended.

21 And the broad brush nature, or the in principle nature of our Notice of Appeal on
22 subsidy, is driven to some extent by the information we have.

23 MR JUSTICE MARCUS SMITH: I am very grateful. Ms Osepciu, I have just been
24 handed a note saying there is a problem with live stream. So without any
25 discourtesy to your submissions, which are very helpful, I am going to suggest a very
26 short break just so I can see what is going on. It seems to be working fine with us

1 but when I am told something is not working, I had better make sure I understand
2 what the parameters of that are. I will rise for five minutes, I hope no more than that.

3 MR ROBERTSON: Sir, on the stream I am getting, your picture is almost constantly
4 frozen, so I can't actually gauge your reaction to my submissions.

5 MR JUSTICE MARCUS SMITH: That needs to be seen to. I will rise for five
6 minutes and we will sort it out. But thank you both very much. I will be back in five,
7 thank you.

8 **(11.13 am)**

9 **(A short break)**

10 **(11.17 am)**

11 MR JUSTICE MARCUS SMITH: Ms Osepiciu, Mr Robertson, we have reset the
12 stream, so I hope the signal is better. But do keep reporting any issues if they arise.

13 MR ROBERTSON: Sir, my junior on another case, Matthew O'Regan, is watching
14 on live stream and has emailed to say the picture was non-existent. I am sure he will
15 let me know if it is reset and working.

16 MR JUSTICE MARCUS SMITH: That would be very helpful. Keep the information
17 flowing.

18 Ms Osepiciu, we were talking about paragraph 5 and the concerns which
19 understandably you have that you cannot really work out what you are going to need
20 until, first of all, you have seen the Defence, that is understood, and worked out what
21 level of granularity you need to stoop to in order to make your case. But do go on,
22 I've got that right at least.

23 MS OSEPCIU: Sir, that is precisely our point, we will not know until we know. The
24 concern I was articulating was not with paragraph 5 itself but rather with the gap
25 between the date in paragraph 5 and the date in paragraph 6, or the proposed timing
26 in May in paragraph 6.

1 MR JUSTICE MARCUS SMITH: I understand.

2 One of the reasons I selected May was partly because it was a suitably prompt date,
3 but partly because I have a nasty feeling that June and July are going to be rather
4 difficult for me. So one of the things I am wondering is to what extent can we create
5 a gap -- because I do think your point about a gap is well made -- can we create
6 a gap by shortening the earlier date in the trial timetable.

7 22 March seems to me probably not a date we can sensibly advance further.

8 I certainly wouldn't want to do that without Mr Robertson saying he was happy with
9 that, and you are not -- no, that is understood.

10 19 April, shortening that again looks quite tricky, but I will raise it just to see what the
11 parties think about that.

12 MS OSEPCIU: Sir, I do agree that that does seem quite tricky, or if it could be
13 shortened, perhaps by a couple of days. But with respect, I don't think that
14 necessarily meets the concern about --

15 MR JUSTICE MARCUS SMITH: I understand.

16 So moving on then to the real question: when would you think would be
17 an appropriate date for the final hearing?

18 MS OSEPCIU: Sir, we would suggest the tail end of July, if that is available. It is the
19 week commencing the 24th. I will say that candidly in part because of my
20 understanding about Mr Bowsher's availability as well in the course of July and also
21 in the course of June, where I believe, sir, you and he are going to be in an
22 interchange related hearing that is yet to be listed -- an interchange-related hearing
23 that is yet to be listed, but that would be our proposal and it does allow for
24 a sufficient gap, we would say, to cater for the unexpected, effectively; and
25 potentially if, for example, the CMC you don't currently anticipate needing does end
26 up being necessary, that is really the sort of gap we should be allowing.

1 MR JUSTICE MARCUS SMITH: Yes.

2 Mr Robertson, do you have any observations -- three months seems to me pretty
3 generous from 19 April to 24 July, but I do see exactly where Ms Osepiciu is coming
4 from.

5 MR ROBERTSON: Sir, I am just trying to get my diary up online because I know the
6 Prochlorperazine appeals, in which I am acting for Lexon, are being heard in June
7 and on some days in July, picking up again, so ... **(Pause)**.

8 Yes, there is a gap in those between evidence and closing submissions which
9 means -- and the closing submissions start on 26 July, which is a Wednesday. So
10 the previous week, 17 July, would be available.

11 MR JUSTICE MARCUS SMITH: Yes, because that is a hearing I am doing, isn't it?

12 MR ROBERTSON: No, that is Lord Ericht.

13 MR JUSTICE MARCUS SMITH: Sorry, I am thinking about Flynn and Pfizer, which
14 is on or around the same time.

15 MR ROBERTSON: Yes.

16 In fact, the first half of July I think is fine because the hearing in Prochlorperazine
17 currently is -- evidence finishes on 27 June, in fact, and then we don't pick up again
18 with closing submissions until 26 July. So that actually leaves July reasonably free
19 to fit in this hearing.

20 MR JUSTICE MARCUS SMITH: Well, look, what I am sensing is that you are both
21 of the view that a May date is too dangerous and I think you are thinking July is
22 better. Have I got that fair?

23 What I will do is I will rise again, but not just yet, to check my own diary for July and
24 come back. But I will give you fair warning now: I have my own diary issues in June
25 and July and for obvious reasons, I am minded to retain this case. So it may well be
26 that you are going to get dates which are going to be, in the colloquial term,

1 inconvenient to counsel, and I am afraid that will have to be a price -- whoever is the
2 unlucky party who has diary issues, they will have to pay.

3 So I will come back -- not yet but in due course -- with a series of options and we will
4 try and work out the best one that fits for both parties in July because I would want to
5 accommodate both. But I think it is probably good that I can get this warning out
6 without knowing who it is going to disadvantage the most so that you know I am
7 trying to be as fair as possible, but it does, I think, have to be, in order to send the
8 right message to the market, done before the summer and May was a date, I think it
9 is fair to say, was aggressive, and I think Ms Osepciu has made some very fair
10 points about it being so aggressive that it might be counterproductive.

11 So I will do that. Is there then, before we go on to the question of costs, anything
12 more we need to say about paragraphs 5 or 6?

13 MS OSEPCIU: My Lord, not from us. Perhaps a suggestion of seven days -- the
14 second date in paragraph 6, seven days before the date of the relevant hearing for
15 skeletons, et cetera?

16 MR JUSTICE MARCUS SMITH: That makes sense, seven days. Yes, that I am
17 happy with, if Mr Robertson is also.

18 MR ROBERTSON: Yes.

19 MR JUSTICE MARCUS SMITH: Clearly what I have envisaged in terms of having
20 hearing bundles, authorities and written submissions, talking to each other means
21 the parties are going to have to prepare the hearing bundle and the authorities
22 bundle well before they do their written submissions in order to get the references in.
23 It is just I don't want to be bothered by the hearing bundles and the authorities
24 bundle until it is all ready in one go and it can all be lodged on one day. That was
25 the thinking behind paragraph 6, but I hope that was clear.

26 Good, in that case, I imagine there isn't a dispute about paragraph 8, but I suspect

1 you will both have something to say about paragraph 7.

2 Ms Osepciu, over to you on paragraph 7.

3 MS OSEPCIU: Sir, we respectfully agree with the proposed paragraph 7. We
4 respectfully also agree with the preliminary observations you made at the outset of
5 this hearing about importing the High Court's judicial review regime automatically to
6 the CAT. We do say this is a different jurisdiction and within the competition appeal
7 tribunal's own rules, cost capping orders are not limited to instances where there is
8 no private interest. I note in particular rule 58(2)(b), which is the fast-track cost
9 capping rule, wherefore different types of cases, competition cases. But those are
10 cases which do directly involve private interest by their very nature and there is
11 a cost cap on jurisdiction there.

12 We say that the ability to order these cost caps is something you can do under your
13 rule 19, broad case management jurisdiction, having in mind the nature of the
14 tribunal's jurisdiction and your Lordship's very helpful indication of the need to make
15 these cheap, fast and -- this is a cheap, fast and simple jurisdiction.

16 So we do say the tribunal is different, the power is not as strictly controlled as
17 perhaps it is in the High Court. We accept that that jurisprudence is relevant and to
18 be taken into account, but the fact of a private interest is not determinative.

19 We do say that the Durham company does have a private interest in the outcome of
20 those proceedings, they are also of significant public importance, and we are also
21 concerned about the costs which have been incurred by the Respondent in other
22 previous proceedings. So we would respectfully endorse that paragraph 7.

23 MR JUSTICE MARCUS SMITH: That endorsement extends to the amount of the
24 cap, the £50,000, you are not pushing back on that?

25 MS OSEPCIU: We are not, no, my Lord.

26 MR JUSTICE MARCUS SMITH: That is very helpful.

1 Just to inform your thinking, and by way of supplement to what I said at the
2 beginning, one of the things I had in mind when drafting this order was the order the
3 tribunal made back in 2018 in *Electro Rent Corporation v the CMA*. There is no
4 reason either of you should have the faintest idea what that was all about, but that
5 was a case where the value at risk was about £100,000 and the tribunal capped the
6 costs in that case at £40,000 because it was quite clear from the get go that if the
7 parties were given, as it were, free rein to how to fight the case in the way they
8 wanted to, there would be an immediate risk of the value at risk being swamped by
9 costs. I do not know what the value is here and I am not expecting either of you to
10 tell me, but my sense is that subsidy control cases are likely to be at the smaller
11 rather than at the larger end -- there will be big cases of course -- but we do need to
12 get a mindset which is focused on not allowing the very important public funds to be
13 spent on -- you will excuse the barb -- lawyers rather than subsidy. But Ms Osepciu,
14 thank you for your submissions.

15 Mr Robertson, you obviously do want to push back on this, and please do.

16 MR ROBERTSON: Sir, I most certainly do wish to push back on this.

17 The first thing to say is that we would appreciate the opportunity to address proper
18 written submissions to the tribunal on this highly important, and I would say
19 controversial, point of principle. This has been raised less than 24 hours -- it is no
20 criticism of the tribunal but as a matter of fact, it has been raised less than 24 hours
21 before this morning's CMC. Sir, you have helpfully indicated that you will bear in
22 mind the *Electro Rent* case. That is not a case I have researched or know the detail
23 of what cost capping was done in that case, so I would need the ability to address
24 submissions on that case.

25 I am aware of the cost capping approach in fast-track proceedings applications.

26 I was involved in one of those last year before a tribunal chaired by Bridget Lucas

1 KC, that was the Belle Lingerie v Wacoal case --

2 MR JUSTICE MARCUS SMITH: Yes, I am very familiar with that one.

3 MR ROBERTSON: Yes. The case wasn't -- the fast-track application was rejected
4 and instead there was some detailed cost budgeting which was dealt with at
5 a separate costs management CMC by my junior in that case, Matthew O'Regan,
6 who incidentally has just emailed me to say the live stream is working properly now.

7 MR JUSTICE MARCUS SMITH: Very good.

8 Mr Robertson, your point about notice is entirely well made and I certainly don't want
9 either party -- in this case it would be your clients -- to feel that an order had
10 effectively been imposed on them without being heard.

11 So can we proceed in this way: that this is something I am minded to do but I don't
12 propose to make an order today, provided both sides understand it is something that
13 is on the cards, unless I am persuaded to the contrary, and we proceed that each
14 side, perhaps in sequence, can put in some written submissions on the point for me
15 to decide the matter if I can on the papers, and if I can't, or if the parties both agree
16 I shouldn't, in a short hearing.

17 Is that the best way to square this particular circle?

18 MR ROBERTSON: Sir, I am just taking instructions from my instructing solicitor,
19 Mr Heap, but I anticipate that that will be viewed as a sensible way to go forward,
20 and it means we can do some more research in particular into the approach to cost
21 capping in judicial review cases under the Criminal Justice and Courts Act 2015 and
22 the extent to which that reads across to limit the tribunal's approach.

23 Mr Heap has just confirmed to me that we would be happy to go down the route of
24 written submissions, and then it is up to the tribunal in the usual course in this
25 tribunal to decide whether it is something on which you wish to invite further oral
26 representations, or whether you feel confident that you can dispose of the matter on

1 the papers.

2 MR JUSTICE MARCUS SMITH: Well, we will do exactly that. Ms Osepciu, I saw
3 you were nodding when Mr Robertson was speaking. It does seem to me that I don't
4 really have a choice in this regard because this is, as I said at the outset, a new
5 jurisdiction. You haven't had very much notice. No one is to blame for that, it is one
6 of those things that strikes one and, frankly, it has hit me when I saw the parties'
7 contested order on costs control generally. I thought yes, you are absolutely right,
8 we need to think about this, and my solution provisionally was this, but it is and can
9 only be a provisional articulation.

10 Just so I get it on the record, I did consider costs capping in the High Court in the
11 Genius Sports litigation. The reason I mention that is because I am, at least in the
12 relatively small case, something of a sceptic about the benefits of costs budgeting
13 because one gets a twofold set of problems. First of all, there is the cost intrinsic in
14 framing the budget, and of course you could say let's create a budget that is
15 generous and so safe that then defeats the object of the budget in the first place,
16 because although it is cheaper to compile if you do it on the safe side, it becomes
17 increasingly less pointful.

18 If you do it properly, and actually have capped budgets for each stage of the
19 process, then you have a very perverse counterincentive in that you are crystal ball
20 gazing in a manner as it controls recovery at each stage (Audio distortion), and it is
21 extraordinarily difficult to meet. That was the problem I had in Genius Sports, not
22 that it was a small case, but it was actually next to impossible to work out whether
23 the budget on a staged basis would work at all, so I cut to the costs cap. What
24 struck me in that case was how the costs cap was at the very end of the High Court
25 process of investigation in terms of costs control, and it seems to me, particularly in
26 the small cases, it ought to be the first port of call in the question of costs control.

1 That is something which I am sure both of you will have something to say and
2 I welcome your saying it. But I throw that in as a further matter which was informing
3 my provisional thinking in this order.

4 MR ROBERTSON: Sir, can I just raise one perspective which is going to apply in
5 subsidy control cases but doesn't arise in a case like Genius Sports, which you may
6 remember I had a slight walk-on part in the case --

7 MR JUSTICE MARCUS SMITH: You did.

8 MR ROBERTSON: -- but these cases are almost inevitably going to involve private
9 interests on one side, as the Appellant here, and then public authorities on the other,
10 in my case, Durham County Council.

11 The consequence of costs capping is that if we are successful, we can only recover
12 a proportion of our costs -- we are not obviously limited only to spending those
13 costs -- and then additional costs, which may have been reasonably and
14 proportionately incurred but they are above the cap, then fall on the public purse.

15 MR JUSTICE MARCUS SMITH: Yes.

16 MR ROBERTSON: That is what makes this, I think particularly -- that is why I say it
17 is an important and, indeed, controversial point of principle: who bears the risk of
18 costs? Is it commercial enterprise who, as Ms Osepiciu has repeated what
19 Mr Bowsher said before His Honour Judge Keyser, they are motivated by private
20 interests in this case. Mr Bowsher said in response to questioning from
21 His Honour Judge Keyser KC that their aim was to get the council to increase their
22 prices to local businesses.

23 So we are fighting the case because we don't want to impose additional costs on to
24 local businesses, and then to be met, well, even if we are successful in resisting that,
25 lo and behold, we end up having to get the local rate payers to fund the costs of
26 having defended it. So it is quite an important point of principle --

1 MR JUSTICE MARCUS SMITH: I completely see that. On the other hand, and this
2 is I think perhaps something which weighs quite heavily on me, the downside risk of
3 losing to the local authority is contained and of course I appreciate that public bodies
4 will take a responsible view to whether they defend or change their conduct. One
5 would expect no less.

6 Nevertheless, I wouldn't want local authorities to be deterred from defending this sort
7 of claim in the appropriate case by the concern that they are going to be hit with
8 a bill, if the claimant is successful, of £250,000. That is quite a reasonable sum to
9 expect if you have a party that is gearing up to do a proportionate Rolls-Royce job in
10 this sort of case.

11 So that is one of the considerations, namely to protect the position of the public
12 purse so you have every incentive to take riskier decisions in defending so that you
13 know that actually the costs valued risk is contained from the outset.

14 Now, what I am reading from your sense is you think you have a pretty good chance
15 of winning this and you don't want to have your costs capped at £50,000. That may
16 very well be, and I couldn't possibly comment, but the obverse does need to be
17 borne in mind as well and that is, I think, one of my concerns which I am sure you
18 will bear in mind when you are thinking about this as well.

19 It is not just this case, but it is a number of cases like this that could affect local
20 authorities. I mean, I wouldn't be averse, although it would be quite difficult to justify,
21 to thinking about an asymmetric set of caps, that would be possible. So I think
22 I want both parties to consider not merely the operation in principle of the regime but
23 what, if I were to go down this route, the appropriate caps ought to be in each case.

24 So I hope you would include that in your written submissions.

25 MR ROBERTSON: Sir, that is a really useful and helpful insight into where the
26 tribunal is coming from and we will certainly address submissions accordingly.

1 MS OSEPCIU: Sir, we are also grateful for that.

2 MR JUSTICE MARCUS SMITH: Thank you both.

3 MS OSEPCIU: I was going to say, not to pre-empt the submissions that we will
4 make in due course, but we would point out that we are a small family-owned
5 business rather than the big corporate with the £250,000 budget. But these are all
6 matters we will --

7 MR JUSTICE MARCUS SMITH: That is entirely right and, in a sense, reflected by
8 the fact that you were happy with this order, but of course the same thing applies on
9 the claimant's side.

10 One of the things which is often said against competition litigation is that it is a form
11 of litigation that only applies to those with the balance sheets in tens of millions of
12 pounds. Regrettably, that is something which has more than an element of truth to
13 it, that these are cases that you can only afford to fight if you are really a big player in
14 monetary terms. That is something which is bad in general and it is not something
15 I am very keen to translate over into this new regime. I am sure you will both bear
16 that in mind that it is not just this case, but a wider context I am having to consider.
17 I know I will be assisted by both your submissions as regards both general principle
18 and specific application in this case, and it may be that the two diverge. It may be
19 you take a stance on what the general regime would be but say that this is a special
20 case. I wouldn't want that to be regarded as off the menu in terms of your
21 responses.

22 MS OSEPCIU: I am very grateful for that indication, sir.

23 I think, sir, you mentioned sequential submissions, if I might let Mr Robertson make
24 some jurisdictional points that I apprehend he perhaps still wishes to make, that it is
25 perhaps for the council to go first on this and for us to respond.

26 MR JUSTICE MARCUS SMITH: That is my thinking, Mr Robertson, if you are happy

1 with that?

2 MR ROBERTSON: Yes, that is my thinking as well and I am, again, trying to work
3 out, not having Mr Howell here, who I suspect is going to bear the brunt of the
4 drafting and I know is also working on the council's Defence, two weeks from today
5 to put in those submissions?

6 MR JUSTICE MARCUS SMITH: I am happy with that. Then Ms Osepciu, a further
7 two weeks for you?

8 MS OSEPCIU: We would be grateful, my Lord, yes.

9 MR JUSTICE MARCUS SMITH: Very good, 14 plus 14.

10 I mean I suspect what that may mean is that we would have to have an adjustment
11 to whatever costs cap imposed, if it is imposed, to reflect the fact that it is not being
12 imposed now and I think both parties should recognise that I would be receptive to
13 submissions on that point, because it would be grossly unfair for me to seek to inhibit
14 how you go about things with the shadow of an order hanging over you. So I will
15 certainly be bearing in mind -- where it goes, I don't know, but I will certainly be
16 bearing in mind that, although I have raised this order, I will not be making it for at
17 least five weeks.

18 With that in mind, unless there is anything else, I will rise for a few minutes just to
19 see if we can get a date fixed in the diary but can I just check that we have otherwise
20 covered everything that we need to?

21 MS OSEPCIU: I will check with those behind me, as it were.

22 MR JUSTICE MARCUS SMITH: Do please.

23 MR ROBERTSON: I don't think there is anything more from our side, sir.

24 MR JUSTICE MARCUS SMITH: We will just wait for Ms Osepciu's team to come
25 back to her.

26 MR ROBERTSON: Nothing further from us, sir.

1 MR JUSTICE MARCUS SMITH: If there is, then we will raise it when we come back
2 but I will rise for another five minutes to see if we can get a date for the hearing in
3 the diary, because I think it would be helpful if you could leave with that available.
4 I know those who are listening in at the tribunal will be getting the diary out and we
5 will see what we can offer in July.

6 So I will come back in five minutes. I will rise until then, thank you very much.

7 **(11.49 am)**

8 **(A short break)**

9 **(11.58 am)**

10 MR JUSTICE MARCUS SMITH: I am back.

11 There are two weeks in July that I can make: neither are great. The week
12 commencing 3 July or the week commencing 24 July.

13 I am fairly firmly of the view that, even though that is going to put Mr Robertson in
14 difficulty, we should go for 24 July, rather than 3 July. The reason I say that is
15 because the more I think about it, the more I think that Ms Osepiciu's points about
16 paragraph 5 have -- I mean I hope they don't have force to them but I think it would
17 be foolish to ignore them and it does seem to me that the moment you get a dispute,
18 even with parties who are doing their very best to ensure that they assist the tribunal,
19 you are talking about delays of a few weeks.

20 So I think Ms Osepiciu, you will be happy with that; Mr Robertson you will be less
21 happy. Do you want to make a push for the beginning of July?MR ROBERTSON:

22 Yes, I would push for that because I am in a hearing due to recommence on 26 July.

23 The point I would make is that this is a case in which I am not -- it is not a case in
24 which I am newly instructed. Mr Bowsher and I did this below, both before
25 His Honour Judge Keyser KC and then subsequently in the Court of Appeal, and so
26 we are both steeped in the case.

1 MR JUSTICE MARCUS SMITH: Yes.

2 MR ROBERTSON: My junior, Mr Howell, was not instructed in those state aid
3 proceedings -- I did those on my own -- and therefore you would be denying my
4 client the ability to be represented by the only counsel that has been involved
5 throughout the state aid and thus far in the subsidy control proceedings.

6 I should say I have also been advising on subsidy control prior to this claim being
7 brought because Mr Bowsher concluded the state aid proceeding by saying,
8 essentially, like Arnie the Terminator, we will be back under the new subsidy control
9 laws. So this is not a case where I have just relinquished it; I have been acting
10 throughout. That is a period now of a number of years.

11 MR JUSTICE MARCUS SMITH: That is an entirely fair point and it does tie into the
12 question of costs which I am of course, as you both know, quite exercised about.

13 If I went for 3 July, Ms Osepciu, would that put Mr Bowsher in difficulties?

14 MS OSEPCIU: I haven't double-checked, my Lord. The week of the 24th is the only
15 week that has been confirmed he can do -- I don't want to misspeak. I seem to
16 remember that the 3rd and 4th may have been a possibility but that possibility may
17 have vanished. So I do think it would put Mr Bowsher in difficulty and I am not able
18 to offer those dates.

19 MR ROBERTSON: Sorry to interrupt. Since we are all here, a couple of minutes'
20 phone call to Ms Bowsher's clerk should --

21 MR JUSTICE MARCUS SMITH: Yes, Ms Osepciu, do feel free. I won't rise but do
22 mute the feed and let's at least work out whether there is a problem.

23 MS OSEPCIU: Yes. **(Pause)**

24 My Lord, I am very grateful for that.

25 MR JUSTICE MARCUS SMITH: Not at all.

26 MS OSEPCIU: So I have double-checked with Mr Bowsher's clerks and

1 I understand that the 3rd and 4th are far from ideal but possible. To finish by the end
2 of the 4th in court would be the constraint, which would therefore mean that the
3 reading day has to take place some time in advance of that.

4 MR JUSTICE MARCUS SMITH: Earlier, I see.

5 Well, in that case, Mr Robertson, I think notwithstanding what I said about counsel's
6 convenience, this is one of those cases where it would be irresponsible not to take
7 into account, given both counsel's history, both leading counsel's history in this,
8 I appreciate that it is going to put Mr Bowsher under some pressure but I am very
9 grateful to him for making the 3rd and 4th July possible. Those are the dates I will
10 fix.

11 I am a little bit troubled -- it shows how excellent your point was, Ms Osepciu -- that
12 I am a little troubled about losing three weeks in order to contain problems arising
13 out of agreed statements of fact and things like that, but I am satisfied that the
14 parties know that I am concerned and will therefore ensure that, if there are
15 problems -- and there may be, I know agreed statements of fact are difficult -- that if
16 there are problems, you will raise them in as constructive a way as possible with the
17 tribunal sooner rather than later, so that we can avoid the sort of derailment that we
18 really don't want to have occurring.

19 So I will order those dates. We will have a think about when the documentation
20 needs to be delivered, since the reading day will be some time in advance of that,
21 but what we will do is we will tweak the directions order, send it out to you in draft to
22 make sure that you are happy and we haven't missed anything and we will make
23 an order along those lines.

24 I was going to -- not today -- but, in a reserved way, put out a judgment on how we
25 approach these cases or are minded to approach these cases generally. I am not
26 going to do that in short order but I think it will be part of the very helpful submissions

1 I am going to receive on costs that I will do a sort of expectation management
2 judgment for cases which will come in the future. So you are going to have
3 (Inaudible) an eye on not just on what is right and appropriate in this case but what
4 works for future cases, which may not be like this. I mean the trouble with subsidy
5 control is there are small, there are medium-sized and I am sure there will be very
6 large cases coming up, and we need a basic regime that covers all; but in a way
7 I am very pleased that this is a case that involves smaller players who are concerned
8 about costs in a responsible way, because that is where the regime really does need
9 to work.

10 So, unless there is anything more, can I express my thanks to both of you for the
11 very helpful way in which you have put forward the directions for this and I will
12 circulate an order in due course.

13 MR ROBERTSON: Thank you very much, sir.

14 MS OSEPCIU: Thank you, sir.

15 MR JUSTICE MARCUS SMITH: Thank you very much, thank you.

16 **(12.08 pm)**

17 **(The hearing concluded)**

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Key to punctuation used in transcript

--	Double dashes are used at the end of a line to indicate that the person's speech was cut off by someone else speaking
...	Ellipsis is used at the end of a line to indicate that the person tailed off their speech and did not finish the sentence.
- xx xx xx -	A pair of single dashes is used to separate strong interruptions from the rest of the sentence e.g. An honest politician - if such a creature exists - would never agree to such a plan. These are unlike commas, which only separate off a weak interruption.
-	Single dashes are used when the strong interruption comes at the end of the sentence, e.g. There was no other way - or was there?