IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1008/2/1/02

Victoria House
Bloomsbury Place
London WC1A 2EB

2nd September 2005

Before:
SIR CHRISTOPHER BELLAMY
(The President)

MR. PETER CLAYTON
MR. PETER GRANT-HUTCHISON

Sitting as a Tribunal in Scotland

BETWEEN:

(1) CLAYMORE DAIRIES LIMITED
(2) ARLA FOODS UK PLC
(formerly Express Dairies plc)

Appellants

-v-

OFFICE OF FAIR TRADING

Respondent

supported by

(1) ROBERT WISEMAN DAIRIES PLC
(2) ROBERT WISEMAN AND SONS LIMITED

Interveners

Mr. Ben Tidswell (of Ashurst) appeared for the Appellants

Mr. George Peretz (instructed by the Treasury Solicitor) appeared for the Respondent.

Miss Bond (of Herbert Smith) appeared for the Interveners.

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PROCEEDINGS AFTER JUDGMENT HANDED DOWN

THE CHAIRMAN: For the reasons given in the judgment which the Tribunal is handing down today, we set aside the decision of the OFT appealed against, and we make no further order as regards remitting the matter.

That, as far as today is concerned, leaves two issues we would like to deal with, Mr. Tidswell. The first is the question of confidentiality. We have had submissions on confidentiality and at this stage we allowed some confidentiality and disallowed others, not wishing to take certain decisions without further hearing the parties. The existing non-confidential version includes various figures that are blanked out that are, essentially, internal cost information relating to Wiseman or other information relating to Wiseman which, in many circumstances, would be regarded as confidential information but in this particular case the information is some five years old. Because the issue has horizontal implications for other cases in front of the Tribunal, in particular how old confidential information has to be before it ceases to be confidential, we thought we would give the parties a further opportunity to make any observations they wanted to on that issue of confidentiality in case we want to re-visit that issue. That is the first point I would like to deal with, and I think it is primarily for Wiseman.

MR. PERETZ: Can I say on Wiseman's behalf that I gather from Miss Bond, who is a solicitor at Herbert Smith who has attended for the purpose of collecting judgment today, that the Tribunal's letter of yesterday has for some reason not got through to Herbert Smith. Miss Bond is not expecting to make submissions on the matters dealt with in the Tribunal's letter. Out of kindness to her I thought I would say that, rather than making her do it.

THE CHAIRMAN: Thank you very much. Yes, Miss Bond, you are not in a position to help us on any issue.

MISS BOND: My apologies, but the first I knew of that letter was five minutes ago, so I am not in a position to make any submissions on those points.

THE CHAIRMAN: Thank you very much. We will leave that point and if we need to pursue it, we will pursue it in correspondence.

MISS BOND: Thank you.

THE CHAIRMAN: We now come to the question of costs, and the first question is whether we should deal with costs today or whether we should give the OFT some further opportunity to put some submissions in. What is your position, Mr. Tidswell?

MR. TIDSWELL: My position, sir, is that I am happy to deal with it today if that is the Tribunal's wish. Obviously, Mr. Peretz, I imagine, will have something to say about whether he wants to or not and perhaps I should leave him to make that submission, but as far as the appellants are concerned we are ready to deal with it if the Tribunal wishes to.

THE CHAIRMAN: Very well. Mr. Peretz, it is somewhat inconvenient if we have yet another round of submissions that we have to deal with at a later stage, but what do you say about it?

MR. PERETZ: I am prepared to deal with it today, but it is against the background, as the Tribunal will appreciate, that senior officials within the OFT have only had the substance of the judgment communicated to them this morning, but we will do the best we can in the circumstances.

(The Tribunal confers).

THE CHAIRMAN: Mr. Peretz, we do not want to leave any feeling of grievance in the minds of the OFT. If you want a brief period to put in some submissions on expenses, our present view is that we would let you have it.

MR. PERETZ: We are happy to go ahead today. We have done as best we can, it is all sitting there waiting to be said and it is probably easier for me just to say it.

THE CHAIRMAN: If you are happy to go ahead, we will go ahead. Mr. Tidswell, your application for expenses.

MR. TIDSWELL: Thank you, sir. May it please the Tribunal, the appellants do seek their expenses in this case and they do so on the basis that we say not only was the decision wrong, but so also was the conduct by the OFT of the case. I do not make that suggestion lightly and will go on and deal with it.

The starting point, we say, is that there are a number of stages in this case where the OFT could properly have described the basis of its decision, if one takes as a point of fairness that the decision in itself in the four-page letter was defective, but was capable of being supplemented or remedied once challenged. Examples of those stages at which the OFT could have described their decision more fully are Mr. Lawrie's statements. I would also remind the Tribunal that there was a defence filed in March 2004 and, in fact, it came as a surprise to me to remind myself of that because I do not think it was ever referred to again at the hearing. It does have one important component in it that goes to the question of recovery and inspection, and that is that in that document the OFT pleaded the requirement of materiality in order for the decision to be set aside. I do not know if you would like me to take you to that document, if that would be helpful I am happy to do so.

THE CHAIRMAN: Just say that again.

MR. TIDSWELL: In their defence the OFT pleaded a requirement for the appellants to show materiality in relation to an error.

THE CHAIRMAN: They abandoned the materiality.

MR. TIDSWELL: Precisely, that is my point, sir. That was a document that had some significance beyond the fact that it could have been the stage at which the full basis of the decision was set out. There was a further round, the Tribunal will recall, of probing by the appellants for the basis of the decision in the form of the request for further information, and I do not think it is unfair to describe that document as being, in many respects, unhelpful. There were a number of occasions – indeed, they are set out in our written submissions and I do not need to spend more time on them – where there was an opportunity for the Tribunal to be better informed by the OFT about the reasons for its decision, points which would have been helpful to the Tribunal. It is interesting, perhaps, to speculate on what a different course this case might have had if Mr. Lawrie's witness statement had set out in full Technicolor the decision and the reasons for it, instead of being the document it was. I wonder if I could just refer the Tribunal to a paragraph of its own judgment so that the Tribunal has it in mind.

At paragraph 171, the last sentence, the Tribunal says:

"… a substantial part of these proceedings has been concerned with establishing what it was that the OFT did to ascertain the facts, what facts were identified, and what analysis was applied to those facts, in sufficient detail to enable the parties and the Tribunal to ascertain whether or not the OFT made a material error."

We say, with respect, that that is absolutely right and the approach taken by the OFT has had consequences for the timing of the case, to the extent that it has taken three years to get through this Tribunal, it has had consequences for the clarity of the issues and we say it is no surprise that the appellants found it difficult to find a target to aim at. They have been criticised for that – and I would like to come back to that – in terms of the pleading and also in terms of costs, for example the need to instruct Mr. Haven and carry out substantial work effectively to try and reconstruct what the OFT had done, instead of having that explained by the OFT themselves.

We say that taken together all those things demonstrate a closed and defensive approach by the OFT which is not appropriate for a public authority in this situation; that the failings of their decision have been magnified many times by the deficiencies of what can only be called a litigation strategy. An interesting test of that is to ask oneself whether it was a cards on the table approach in terms of *Huddlestone* and we say it was a long way from that and a long way from the expectation that any party, when asked by a court for an explanation of its position, will do so clearly at the first opportunity.

There is one point that I would like to remind the Tribunal about, it is in the decision at paragraph 5, but it is the case that Claymore is not wholly owned by Arla (formerly

Express). The Tribunal has recorded that at the start of the events in question it was 49 per cent owned by the Northern Milk Co-Op (which involves about 40 farmers in Scotland). That has been reduced down to 29 per cent and indeed I am told that the farmers' investment in that company has been written down to £1. It is not just Arla that has been frustrated by waiting several years for a decision from the OFT – and the Tribunal has recorded that there was at least a year where really nothing seemed to happen, between October 2000 and October 2001 – but also delayed in this proceeding through, we submit, a lack of openness, starting with the admissibility decision and going right through to the final hearing with the appearance of the 7th August memorandum. We say, therefore, that there is real prejudice, not just for Arla, which of course is a large company, but also for the minority shareholders in Claymore who have suffered through that.

The OFT has made the point in the Treasury Solicitor's letter of 30th August that the appellants failed in the recovery and inspection application. We would very much dispute that. We say that the application was entirely necessary because of the materiality point and we say it became unnecessary and was concluded because of the very late concession in the course of that hearing, and the appellants were fully justified in making that application. The Tribunal will have in mind that indeed the application was renewed on a number of occasions and on every occasion, including the last, it was left open for the appellants to try again if they needed to.

The second point made by the OFT in relation to expenses is a reference to voluminous grounds of appeal; I have already made reference to the difficulty of having no solid argument to aim at and it seems to the appellants very harsh to be criticised for having to effectively reconstruct the case themselves because of that. In any event, we say that we were proved right in relation to the matters that we pleaded and I would, if the Tribunal would permit me, like to take you to the revised notice of application briefly.

THE CHAIRMAN: I think we have it in our heads, Mr. Tidswell.

MR. TIDSWELL: There are two ways of doing this and I suspect the easiest way may be the second, but if I could just give you the reference in relation to the revised notice of application, first of all on page 40 of that document at paragraph 4.1 we listed six main headings for the grounds of appeal, and they were: predatory pricing; intent; targeted discriminatory pricing; exclusionary exclusive contracts; data gathering and analysis; fundamental errors of legal approach. Those are the six points and we say that there was nothing excessive about those six points, they were elaborated upon, as we would consider proper, in the revised notice of application, but they were the points which the Tribunal has addressed in its judgment and has,

in the vast majority of cases, found for the appellants. One can do it by reference to those paragraphs or, indeed, one can do it by reference to the paragraph in the judgment which lists out the appellants' grounds of appeal. It does not matter terribly how one does it, but I would like if I may just to very briefly give you some references to those points.

The grounds are set out in paragraph 166 of the Tribunal's judgment and the first one, in relation to the time period of the abuse and the assessment of pricing below AVC, paragraph 261 of the Tribunal's judgment deals with that and indicates that the Tribunal thought that the OFT could not have a particular period in mind when it should have.

Ground 2, the OFT erred in its approach to and assessment of AVC generally. That is dealt with in paragraph 258 of the judgment.

Ground 3, in relation to Average Total Costs, I am sure the Tribunal has well in mind the extensive discussion on that which is summarised in paragraph 256 where they again found for the appellants.

Ground 5, in relation to incremental customers and outlets, this is a point where it is correct that the appellants were not completely successful, in the sense that the Tribunal accepted the principle but was unable to find that there was a material error. Nonetheless, one can see from the way ground 5 is put that part of the problem we had was the failure to provide any adequate reasons, and we would say that we were fully entitled to take that point and, indeed, the Tribunal has effectively come to the same conclusion by saying in principle we were right, but it is impossible to tell whether in reality we were right because the OFT has not explained its position properly.

THE CHAIRMAN: It is the timeframe point on the incremental losses argument.

MR. TIDSWELL: There is that point as well, sir, I am conscious of that, but nonetheless there was also a period after March 2000 and the other point that the Tribunal made about that.

Ground 6, in relation to below cost pricing generally, that is dealt with extensively in paragraph 283 and, we say, entirely supports our arguments.

In relation to intent one can bundle up 7, 8 and 9 and we would say paragraph 282 is a good summary of the Tribunal's findings on that and again supports the appellants' claim that the OFT misdirected itself in relation to intent to eliminate as a test, the evidence generally in relation to Mr. Sweeney's statement in paragraph 278 and the lack of a requirement for documentary evidence.

Grounds 10 and 11 one can package up together as well, price discrimination. It is interesting that the OFT say that we did not succeed in relation to that, which we found quite a surprising assertion on the basis that we understood the Tribunal to be saying that in fact the

data-gathering exercise and the analysis exercise were sufficiently flawed that any conclusion as to pricing discrimination was unsound. That is paragraph 315.

Grounds 12 to 14 can be read together in relation to the all of Scotland contracts, and I am sure the Tribunal has well in mind the defects that it has found in relation to the OFT's decision there – that is paragraphs 297 and 313 and the appellants were fully successful on those grounds.

Ground 15, in relation to methodology and the approach, we would say that we have succeeded across a wide range of matters there in relation to internal management accounts – that is paragraph 211 – the allocation questions and cost drivers – that is 210 and 249, 249 is the point about resistance – cross-checking, use of statutory accounts and management accounts, and we say that 216, 229 and 256 all support that pleading. The omission of costs, things left out of the costs, 221 is the 5 per cent point and 256 is a summary of the costs analysis, and then the cost of capital point is 239. There are, therefore, a number of points where we say that the methodology and the approach in relation to data gathering and analysis were flawed and support that pleading.

Ground 16. There is no specific finding by the Tribunal that there was a failure to assess the overall impact, but there are places where the Tribunal has made a finding which is consistent with that allegation. If I could give you an example of 296, that is the point about below cost pricing not being in a separate box from the exclusionary contracts.

Ground 17, the Chapter I point I would accept is not a point that has found its way in any material respect into the Tribunal's judgment, and it is also a point that occupied very little time in front of the Tribunal and I would say is a *de minimis* point.

Ground 18, the separate strands of inquiry point, that is paragraph 296 again and we would submit that the Tribunal has accepted that these matters need to be looked at together and not separately.

The final point, ground 19, in relation to the standard of proof – which I suspect was a pleading that went more to the stage at which we were at than for the Tribunal to look at the possibility of an infringement – it is largely a legal question and not a question that would have contributed substantial costs.

There are two points that come out of that. The first is we would say that we have not just been substantially successful, we have been successful in the vast majority of points.

THE CHAIRMAN: Yes.

MR. TIDSWELL: Secondly, the criticism that has been directed at the Revised Notice of Application throughout this case and has been used as something of a blunt instrument to try

and bludgeon the appellants from time to time, we say is now, with hindsight and with the benefit of the Tribunal's decision, entirely misconceived and that the Revised Notice of Application, although a detailed document, had a coherent structure that is reflected in the Tribunal's judgment.

There are two other points made by the OFT. The point about the interveners' costs, where the OFT say we do not want to have anything to do with costs caused by the intervener, I would simply note the irony that the intervener was of course the party that put in Mr. Bezant's witness statement and the OFT seemed quite happy enough to rely on that at the time, it served the purpose.

THE CHAIRMAN: Just remind me, Mr. Tidswell, as to whether you are seeking any costs against the intervener.

MR. TIDSWELL: Sir, we do seek costs against the intervener and we do so recognising that it would amount to a misapplication of what seems to be the usual rule, although I hesitate to put it as a rule. In our submissions, at the last page, we simply say that like the *IBA* case where the intervener was unfortunate enough to have costs awarded against it, this is a similar case; it is a case where what has been done by the intervener goes well beyond what would normally be expected – Mr. Bezant is the most obvious example of that, calling expert evidence, and of course Mr. Haberman had to deal with that. We say, at the end of the day, what is important is that we recover our costs rather than from whom we recover them, but we would not want to be in the position where we did not recover them because it was said we had not applied against the intervener.

Sir, the final point made by the OFT is the Chapter I/Chapter II point and I really do not think that that is a material point that I need to address unless you would like me to.

In relation to the intervener's submission on costs, four short points. The first is a point that suggests that there is some consequence of the Tribunal not having made an order for remissions and cost consequence. We say that is entirely misconceived. The appellants have been successful in having the decision quashed, it is understandable that the Tribunal was not willing to speculate about current market position without any evidence of that, which of course the Tribunal did not have, and indeed the question of remission – I recall that the Tribunal did make an observation about this in the course of the hearing in Edinburgh – in circumstances where the decision being quashed has the effect of leaving the file open, unless the decision was to close the file, is an unusual one. Nonetheless, we say that we got what we wanted in the sense of a quashed decision plus a clear set of guidance on legal points set out in

the judgment which the appellants hope will be of assistance to the OFT in relation to this matter.

The second point made by the intervener was that the appellants were immoderate in their pleading; I have dealt with that point and I will not add to it.

The third point is that the intervener was neutral, and I have dealt with that point. I would just add it seems to be suggested that the intervener only became involved for two reasons. One was a concern regarding confidentiality and the other was the phase of the proceedings where the appellants were seeking a finding of an infringement. That gives rise to the question, firstly, as to why confidentiality required the intervener to be present at all, given that the OFT was quite capable and did in fact act as the guardian of that and, secondly, why, once the infringement concerns had been dealt with by the appellants recognising it was not a case where there was sufficient material to deal with that application, the intervener did not pull back but instead continued to play a very full role at the hearing.

The final point made by the intervener is that the matter is stale, and the appellants see some irony in that because the delay that has arisen, firstly, as I have already submitted, is in relation to the OFT in making its decision and the Tribunal's finding that it effectively did nothing for a year, and then three years in this Tribunal, fighting to try to get to the bottom of what had actually happened to present the case to the Tribunal. That, in our submission, is no reason for the appellants not to recover their costs, indeed, the contrary: the frustration suffered by the appellants, the expense and the conduct of the OFT all point the other way, in our submission.

We would summarise our position by saying that we have won and there is a presumption – not, I appreciate, a presumption in the strict sense – that we should have our costs. There is no justification for a partial award in our submission, there is no foundation in the submission that the RNA was too long, the stale proceedings point is an unfair point and, indeed, the main expense in these proceedings has come from the OFT. If one were to look at it the other way and say can the Tribunal be satisfied that it was appropriate, particularly appropriate in these circumstances, to award costs to the appellants, the answer we submit is yes, on the basis that the approach taken falls short of the *Huddlestone* cards on the table and, indeed, any reasonable basis in the civil standards for disclosure or a court asking for assistance from a party for clarification. Those are my submissions.

THE CHAIRMAN: Thank you. Miss Bond, unless you are in a position to deal with costs, which I rather gather you are not, we will not deal with the costs of the intervener this morning. If there is any point that the intervener wants to come back to in the submissions that Mr.

Tidswell has just made, the convenient course is probably for you to come back in writing as soon as you have had a chance to see the transcript.

MISS BOND: That would be great, thank you, sir.

MR.PERETZ: Sir, I just want to make the following submissions. Of course, the award of expenses is a discretionary matter for the Tribunal and the points we want to make are points which we suggest should lead, if the Tribunal is minded to make an award of expenses in favour of the appellants, to a percentage reduction in that award.

The first point that we want to make is that as we said in the letter of 30th August the applicants' approach to the appeal has been to attack, in voluminous detail, involving not just 18 grounds of appeal but a revised notice of application running to 93 pages, accompanied by an 87-page expert's report containing much further argument, but also to some extent repeating what was said in the RNA, together with several volumes of annexes. Despite a request by you, sir, to boil their case down to three or four main prongs of attack – the reference to that being the transcript for 24th September, page 4, line 18 – the applicants then produced a skeleton argument for the main hearing running to 75 pages.

Every part of all that material had to be considered and responded to by the OFT and its advisers, at great cost, both in terms of legal expenses and staff resources. As the Tribunal noted at paragraph 170, it needed to deal only with certain of the grounds of appeal advanced. Mr. Tidswell took you through the headline issues, going to the effect that the applicants succeeded on a large number of those headline issues. With respect, that approach conceals the fact that in relation to each of those broad headline issues the applicant took a very large number of individual points, spread across the revised notice of application and Mr. Haberman's report, sometimes repetitively, but all of those points had to be dealt with by the OFT and only a few of them needed to be dealt with in the end by the Tribunal. We say that as a point of general importance the Tribunal should not encourage what we would say is a "throw in the kitchen sink" approach by making the taxpayer pay for the kitchen sink.

The applicants' kitchen sink approach is also shown by their request for further and better particulars, which Mr. Tidswell has referred to. That request contained a large number of extravagantly relevant requests, made without – as the Tribunal have suggested it should be made – any explanation of why the request was relevant to the case they wished to make, and without particularising, in particular, the issues to which the data sets sought were supposed to go. Examples of that include requests relating to confidential parts of the CC report that gave rise to reasonable suspicion on the part of the OFT. The Tribunal said in its judgment of 24th September that that was all irrelevant to the issues in the case, and indeed flagged up its

preliminary thinking on that point at the 2nd September 2003 hearing. The request for further and better particulars sought, for example, a copy of the application for a warrant made by the OFT. They sought information obtained from Wiseman pursuant to its assurances and, previously – which the OFT had already explained by then – did not inform the thinking behind the contested decision and that, as the Tribunal itself states in the 24th September 2004 judgment, is irrelevant to the correctness or otherwise of the decision. Those are some examples demonstrating the kitchen sink approach adopted by the request for further and better particulars.

In relation to recovery and inspection, which accounted for a very large proportion of the expenses in this case, the following points arise. In relation to the OFT's position generally, the position is, and I quote:

> "We, the applicants, are not seeking in any material way to criticise the OFT with regard to the grounds for resisting disclosure. No criticism is intended. This is the first time that many of these principles have been taken and the OFT have set out its stance and have stuck to it. We are not suggesting that it was improper for the OFT to stand by the points of principle that it wishes to make."

Those were the comments of Mr. Green QC on 2nd September 2003, the reference is page 103, lines 12 to 21.

The applicants themselves very fairly recognise that the OFT's position on recovery and inspection should not be criticised, but the OFT simply could not agree to recovery and inspection of confidential third party documents without getting an order from the Tribunal, and was bound to make sure that the Tribunal was aware of the interests of third parties, including of course parties other than Wiseman, although of course primarily Wiseman, who had provided it in many cases with highly confidential information. The OFT also had the duty to draw to the Tribunal's attention the public interest in information being given to the OFT in confidence, not getting into or seen to be getting into the hands of competitors and, hence, chilling the willingness of undertakings to co-operate with OFT inquiries. The OFT stance in relation to recovery and inspection throughout these proceedings, we say, has been wholly reasonable and justified.

In relation to the application for recovery and inspection made at the hearing in September 2003, we note that the Tribunal agrees with our suggestion at that hearing that the applicants should ask a series of questions of the OFT so, putting it crudely, the OFT succeeded at that hearing, hence the order requesting further and better particulars.

At the May 2004 hearing the short position is, as we said, that the applicants lost on that application. As noted above, the Tribunal accepted that much of the material sought in the request for further and better particulars as well as in the application made at the 24th May hearing was not relevant to the issues before the Tribunal. Further, the Tribunal found that much of the application for disclosure then being made was made for the purpose of re-working the OFT's investigations, an objective which the CAT held to be "inappropriate" (paragraph 110 of the recovery and inspection judgment), or to go to a relevant matter such as the OFT's thinking in the period before it embarked on the analysis, which led to the contested decision.

It is of course true that the OFT's clarification that it did not seek to rely on the inability of the applicants to demonstrate that the errors of approach alleged made a difference – what Mr. Tidswell called the materiality point – did assist the Tribunal in rejecting certain parts of the application , notably the application for what came to be called the "price cost matrix", but I note that that point did not bite in relation to a large proportion of the disclosure application – for example, as I have said, the material obtained from Wiseman before and under the assurances and confidential material in the CC report. In any event, the point, which was only one part of the applicants' case for disclosure of the price cost matrix material at the hearing, can only be said to have arisen as a result of the OFT's defence, and the applicants had been asking for this information well before the point arose in the OFT's defence – they had originally made application for these documents in August 2003, some months before the materiality point arose.

In short, in relation to recovery and inspection, which effectively took up a year of this case – periods May to November 2003 and April to Sept 2004 – the OFT's position was entirely reasonable and the applicants' position, although we would accept to some extent justified too, also went to a very large extent over the top. That should be reflected in the expenses award.

In relation to the criticism made by the Tribunal for the late disclosure of certain OFT internal material by the OFT, we take that criticism on the chin and we repeat the apologies previously made in correspondence and through counsel at the January hearing. For present purposes, all we wish to say is that we simply note that there is no basis for saying that this late disclosure, in the circumstances, added significantly to the overall expenses of the proceedings.

Taking the applicants' kitchen sink approach in general and their over the top approach to recovery and inspection, we say that the fair result is that if there is an order for expenses, it should be reduced.

Finally, a couple of subsidiary points. First, if an order for expenses is to be made in favour of the applicants then the OFT should not be responsible for the expenses incurred by the applicants in addressing Wiseman's intervention. The second subsidiary point is, of course, that the expenses incurred by the applicants in the course of the Chapter I proceedings, which are presently stayed before this Tribunal, must of course be kept separate from the expenses relating to these Chapter II proceedings.

THE CHAIRMAN: Yes. Thank you, Mr. Peretz.

MR. TIDSWELL: Sir, I am anxious not to repeat myself and I am not going to ---

THE CHAIRMAN: We have your submissions very fully, Mr. Tidswell.

MR. TIDSWELL: I will not go into any of the details again, but I would wish to make one further observation in relation to the process the Tribunal is embarking upon and to draw a distinction between an assessment of whether costs are reasonable – which in my submission is not an exercise that the Tribunal need concern itself with as a matter for assessment, if that is where this goes if the costs cannot be agreed – and the usual rule, expressed as a warning in ordinary civil litigation, where the court will look at the grounds of particular issues on which a party gets its order.

THE CHAIRMAN: We are not on the question of assessment at the moment, we are on the question of deciding whether there should be an order and, if so, to what extent.

MR. TIDSWELL: Precisely, sir, and my submission would be that at that stage it is unnecessary to look at conduct within the individual issues to see whether particular aspects of it are appropriate or inappropriate, that is a matter for a costs judge, and it is unnecessary for the Tribunal to do more than look broadly, at a high level, at whether the appellants have been successful or not in relation to the substantial issues in the case.

MR.GRANT-HUTCHISON: Mr. Tidswell, I am a little bit confused by that submission because we are sitting as a Scottish Tribunal, so I do not think it would be open to you to go to a costs judge. It strikes me that if there were any disagreements between the parties it would probably be to the auditor of the Court of Session, and his mandate and his remit are very different to what I understand the remit of a costs judge to be.

MR. TIDSWELL: Sir, it would not be the first occasion that I have been caught out in front of this Tribunal in relation to my knowledge of Scottish procedure, and I do apologise for that. I would imagine that the next stage in any event, assuming that an order were made, would be for the appellants to try and reach some agreement with the OFT about quantum, but without knowing precisely what the auditor of the Court of Session would do, I am not entirely sure how good my submission that I just made was. Nonetheless, I would put the submission

a different way, which is that it is unnecessary for the Tribunal to deal with the minutiae of any particular issue and decide whether, in relation to those issues, points were well or badly put by the appellants. That is going beyond what this Tribunal needs to do in making an order for costs.

THE CHAIRMAN: You say the principle is to simply decide in general terms on what issues the appellants succeeded, and then it would be a question for assessment to decide whether, within those issues, costs were reasonably or unreasonably incurred.

MR. TIDSWELL: Subject to the point about the procedure in Scotland, sir, which may affect that submission, I would not exclude, by that submission, the ability of the Tribunal to take a view as to conduct, because I would accept – indeed I would submit – that one of the purposes of costs is to act as a deterrent for improper conduct, but there is a distinction between, for example, my submission that the conduct of this case by the OFT has been inconsistent with its *Huddlestone* obligations, and my learned friend's submission that in some respects we took points that we lost on and applications within the case. They are a world apart, I would submit.

THE CHAIRMAN: We are on the old rules for the purposes of this Tribunal which provide, in paragraph 26 that the costs in question are:

> "… costs and expenses recoverable in proceedings before the Court of Sessions …"

and as far as assessment is concerned we can either do it ourselves – though I am not sure we would be particularly keen on doing so in a case like this – or it is a matter for the detailed assessment by the auditor of the Court of Sessions.

Mr. Peretz, I saw you rising to your feet.

MR. PERETZ: I was simply going to note that I recollect in *Aberdeen Journals* costs you did make a reference to the auditor-general of the Court of Sessions, so it is not the first Scottish case before the Tribunal. I would also observe that it seems to us to be self-evident that prolixity – which is in essence what we are getting at – is a matter which the Tribunal can mark its disapproval of in terms of

a reduction in an order for expenses.

THE CHAIRMAN: Do you have anything to say about the basic submission that there is a distinction, at least in English procedure although we are not sure quite what the situation is in Scotland – Mr. Grant-Hutchison I am sure knows the situation in Scotland but the rest of the Tribunal has not had a chance to master that particular topic yet – between what he says is a broad assessment of how far an applicant has been successful in the overall case and a more detailed look as to whether there were unnecessary or prolix points taken within the scope of

that area upon which they were successful? Is that a distinction that is a valid distinction, in the sense that that point is a matter for assessment and not a matter for us at this stage?

MR. PERETZ: May I take instructions?

THE CHAIRMAN: Take your time.

MR. PERETZ: (After taking instructions): I would submit that there plainly is a distinction. To take an example, the question of whether it was reasonable for a number of partners to turn up at a hearing as opposed to just one is plainly a matter to be dealt with by the auditor of the Court of Session, and the question of whether a whole area of argument was or was not irrelevant and unhelpful, which is properly reflected in an order for costs made by the court that delivered the judgment. Our point is simply, as I have just said, that it seems to us self-evident that if the Tribunal feels in general terms there was a certain amount of prolixity and going over the top in the applicants' conduct of the case, that is something which is properly marked by an overall reduction. That then may make the life of the taxation court, if I correctly describe the auditor of the Court of Session, somewhat easier if in a sense that point has already been taken care of by the court that gave judgment in the case and is in the best position to work out to what extent there was prolixity.

THE CHAIRMAN: Very well, we will rise for a moment to consider the matter.

(The hearing adjourned).

THE CHAIRMAN: Mr. Tidswell, we were just discussing amongst ourselves the problem of the relationship between your application for costs against the OFT and your application against the intervener. We have not, at the moment, got the intervener's final submissions but it seemed to us provisionally, and no doubt you can help us on this, that we could perhaps adopt two approaches – assuming we were minded, as perhaps we provisionally are, to give your clients at least some proportion of their costs. One is to say that you are entitled to a proportion of your costs, excluding the costs referable to the intervention, which we are then going to deal with separately, and then we deal with the intervention in a separate box as it were, which would mean that at some later stage somebody would have to sort out what were the costs relating to the OFT and what were the costs relating to the intervention. The second approach is to say you have incurred costs, the cost are 100, say, out of that 100 we say some percentage is referable to the intervention and we deal with that separately – let us say, for argument's sake, it is 25 per cent or something, so that that leaves 75 and then you get some proportion of 75. That would involve us taking some view as to what proportion of the total was referable to the OFT and what proportion of the total was referable to the intervener. That

might be more helpful from the point of view of the auditor of the Court of Session, that we have given them some sort of indication as to how we see the carve-up.

I do not know whether I have made myself clear as to the state of our present discussion and whether you have any observations on whether there is a particular route that we ought to go down and, if it is the latter route, whether you have any submissions as to what proportion of the total costs are referable to the intervener and what proportion of the total are referable to the OFT.

MR. TIDSWELL: Sir, as I understand those two, the main distinction is the process by which the intervener's share is quantified.

THE CHAIRMAN: Is it now or is it later.

MR. TIDSWELL: I wonder whether there is an intermediate position ---

THE CHAIRMAN: There may well be.

MR. TIDSWELL: Which is that the Tribunal could take a written submission from the intervener on the position and allow the appellants to respond to that if so advised, and then to take a view, firstly, as to whether there was any payment to be charged to the intervener. One is then, I suppose, still left with the question of how best to deal with the point, and I perhaps should take some instructions on that. I wonder, at least, whether the Tribunal might be better in a position to make a decision about which of those to pursue having resolved all outstanding issues as to liability. I do not know whether that is a helpful suggestion, at least to have the intervener's position crystallised and oral submissions, if you like, on liability before the Tribunal then ---

THE CHAIRMAN: We are not going to take any view until we have some further submissions from the intervener.

MR. TIDSWELL: May I just briefly take instructions on those two?

THE CHAIRMAN: Yes, just take a moment to think about it. Miss Bond, did I see you rising to your feet tentatively?

MISS BOND: We would like the opportunity to make written submissions before a decision is made, even as to what proportion perhaps is attributable to Wiseman.

THE CHAIRMAN: Did you follow the point I was making to Mr. Tidswell?

MISS BOND: Yes.

THE CHAIRMAN: You may want to comment in a moment, Mr. Peretz.

MR. TIDSWELL: If I could just ask a question of clarification, in relation to option A is it anticipated that the Tribunal would not then make any finding as to the relevant proportions,

assuming that the intervener had some liability, and that perhaps the auditor of the Court of Session might have that task?

THE CHAIRMAN: Just thinking aloud for a moment, one could imagine saying that we are dealing in this decision with the OFT's liability for the costs incurred by the applicants in dealing with the OFT's defence, and separate issues arise as regards the applicants' recovery of any costs against the intervener. Then which costs are referable to the OFT and which costs are referable to the intervener is a matter which would have to be sorted out at a later stage by the auditor; we would just say we are dealing with the OFT's costs and we put a percentage of those costs on it, leaving it rather obscure as to what costs are OFT costs and what costs are intervener costs. We would then go on and deal with the intervener's costs that you have incurred as a result of the intervention – the cost driver if you coin a phrase being the defence – and then we would say as regards those, whatever the order is, that both sides support their own costs or that Wiseman pay a proportion, some or all or what. That obviously makes some difference to the overall result. Do you follow me?

MR. TIDSWELL: Yes, sir, I do.

THE CHAIRMAN: You may say that we need to decide first what is going to happen as regards the intervener's costs before we can usefully address the split.

MR. TIDSWELL: Indeed, that is the first point really, and the reason for that, if I can give an example, is that if the Tribunal were to take the position that had the 7th August memo been disclosed right at the very beginning, that would have disposed of the case entirely because of the section 60 problem; therefore, all costs lie with the OFT. One could make that argument and I suppose I am anxious not to find myself in the position where the appellants lose the ability to recover costs they should not have had to incur simply because of a split between the OFT and the intervener.

The second observation we would make is we would submit that it is probably better for the Tribunal to make a decision about the allocation between the intervener and the costs that are attributable to the intervener and the costs attributable to the OFT simply through its experience of the case, although we would suggest that that could be done at a very high level and indeed it could be dealt with in the round of submissions that my friend has anticipated.

THE CHAIRMAN: It has to be fairly broad brush. A further complication I suppose is you would say that in this case, at least to some extent, the distinction between the OFT and the intervener is somewhat artificial, because to some extent the OFT did adopt what the intervener did. The intervener came up with an expert report and the OFT did not, but the OFT did in fact rely on what the intervener had said.

MR. TIDSWELL: Absolutely, sir, and I would much prefer to be in a position where I was left with them arguing about their respective contributions, but I am not sure I can get myself to that position on the basis of the way the principle works.

THE CHAIRMAN: Yes, I see. Mr. Peretz, do you follow the point I am on, and if I have gone off the track can you redirect me back onto the track?

MR. PERETZ: Yes. In a sense we can see Mr. Tidswell's difficulty in terms of knowing that he is going to recover both from the OFT and from Wiseman and he is somewhat edgy about this issue. On the other hand, if the Tribunal were to order a recovery from both Wiseman and the OFT the question of proportion becomes somewhat irrelevant.

THE CHAIRMAN: I am not in any way prejudging the issue because we have not got any submissions yet, but assuming it was a situation that very often occurs in front of the Tribunal where we say the intervener supports his own costs but the OFT has a liability for costs, in a case like this what is the most efficient way of deciding what the appellant gets?

MR. PERETZ: We are attracted by your second approach, that is to take a broad brush rather than to leave it to auditor-general to sort out.

THE CHAIRMAN: Yes.

MR. PERETZ: This Tribunal has had the advantage – I hesitate to say the advantage but it is the only word I can think of for it – of sitting through all the arguments in this case ---

THE CHAIRMAN: The experience anyway.

MR. PERETZ: And therefore the Tribunal is by far better placed to judge to what extent the applicants have been put to expense by the intervener as opposed to by the OFT than the auditor-general is. It seems to us that there is obviously an element of very rough justice in setting a percentage but that, it seems to us, would be sensible, as it were it cuts the Gordian Knot. That is the approach we would prefer. As to what the percentage should be, there may be scope for a bigger argument between ourselves and the intervener potentially, more than the applicant, as to what the percentage should be. We have a slight difficulty today in that the intervener is effectively not represented.

I should also make the point that we did not adopt Mr. Bezant's report; we did refer to it but it was there as an appeal before the Tribunal, so I would reject the use of the word "adopt" here.

THE CHAIRMAN: I think, probably, the best course is for us not to try to decide this issue now because we have not quite got all the submissions that we need. What we will do is write to the parties briefly and invite them to make some further submissions by a fairly short deadline, in the case of Wiseman in reply to the points that Mr. Tidswell made and perhaps more

generally in relation to any possible split between what the liability of the intervener should be and what the liability of the OFT should be, at least provisionally. That is probably the way to proceed.

MR. TIDSWELL: Thank you, sir, and that would be the limit of the written submissions of course, you are not inviting any further submissions.

THE CHAIRMAN: I am not inviting any further submissions on any other point

MR. TIDSWELL: Nor are we encouraging that.

MR. PERETZ: May I make one further point? As we understand it what I am going to call the white version of the judgment, labelled "Non-confidential version", the status of this document is still slightly uncertain in that Wiseman has some outstanding requests for confidentiality which the Tribunal has not yet determined. We need to be clear about what exactly it is that we can do with this document. It seems to us that pending the resolution of those matters which are set out in Wiseman's letter of 30th August, it is probably right that this document should not appear on the Tribunal's website or otherwise be publicised. The document itself should remain within the terms of the confidentiality agreement, at least so far as the material set out in Wiseman's 30th August letter is concerned, but we would also want to be clear that the non-confidential version of the judgment can circulate fully within the OFT, as has always been the case with confidential information in this case and that both us and indeed all the other parties are free to refer to the general substance of the judgment, but not of course the outstanding confidential material, in such comments as they may need to make.

THE CHAIRMAN: The non-confidential version as far as we are concerned at the moment is what it says it is, it is not a confidential version. There are some bits in it to which confidentiality is still accorded, in response to Wiseman's request, but the point that I raised at the outset of the hearing was whether we are effectively being over-generous with Wiseman in that respect. There is nothing in the non-confidential version that we consider to be confidential, although we have not necessarily accepted all of Wiseman's points.

MR. PERETZ: In which case I apologise. I have not been through the document myself and I had not picked up that that was the approach the Tribunal had taken. It may be that there will be a further version of this judgment if the Tribunal in the end reject some of Wiseman's claims for confidentiality.

THE CHAIRMAN: We have effectively done a two-stage process. We have said that there are certain things that might be confidential, and in relation to those things confidentiality has been maintained in this judgment. We have said to ourselves that other claims are not confidential and in this version of the judgment the relevant things appear. What I am prepared to do as a

precaution, if this would assist the OFT and Wiseman, is not put this judgment on the website until people have had a chance to read it through and see whether there is any point that we have missed where there is some sensitive matter upon which somebody wants to make any further representation.

MR. PERETZ: I apologise, I simply misunderstood what the position is. If this document contains everything in respect of which Wiseman was claiming confidentiality in its letter and redacts that, then we certainly have no objection to this being publicised in the usual way. If Wiseman has any point that it wishes to make, doubtless it will make it, but there are certainly no submissions in that respect on our part.

I should also make a point in relation to what is a potential issue as between us and Wiseman regarding the percentage split of liability. We may of course need to respond to what Wiseman says and of course vice versa; provision needs to be made for that.

(The Tribunal confers).

THE CHAIRMAN: Miss Bond, in relation to what is called here the non-confidential version, we will not, as a Tribunal, publish that on our website until Tuesday at the earliest, and you can have until five o'clock on Monday if there are any further representations you want to make about confidentiality.

MISS BOND: Thank you, sir.

MR. TIDSWELL: Sir, I am sorry to rise again but just in that regard, firstly in relation to my clients who have that document, I am not sure if that is now appropriate or not.

THE CHAIRMAN: It is not inappropriate. As far as we are concerned this is, at the moment, the non-confidential version, but if there is going to be a general diffusion of the thing on the website, then I will give them a final chance to come back.

MR. TIDSWELL: For the sake of clarity, to avoid any confusion, one of my clients is obviously a listed company; in relation to any enquiry or obligation as to substance that we are satisfied does not involve confidential information, presumably it is free to do as it would ordinarily do.

THE CHAIRMAN: Yes.

MR. TIDSWELL: Thank you very much, I am grateful.

THE CHAIRMAN: Thank you very much.

(The hearing concluded at 12.00 noon).