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IN THE COMPETITION APPEAL TRIBUNAL	Case Nos. 1035/1/1/04 1041/2/1/04

Victoria House,
Bloomsbury Place,
London WC1A 2EB

1st November 2005

Before:
THE HONOURABLE MR. JUSTICE RIMER
(Chairman)
PROFESSOR ANDREW BAIN
MRS. SHEILA HEWITT

Sitting as a Tribunal in England and Wales

BETWEEN:

THE RACECOURSE ASSOCIATION AND OTHERS — Appellants

and

OFFICE OF FAIR TRADING — Respondent

AND

THE BRITISH HORSERACING BOARD — Appellant

and

OFFICE OF FAIR TRADING — Respondent

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SUBMISSIONS ON COSTS

APPEARANCES

Mr. Christopher Vajda QC (instructed by Denton Wilde Sapte) and Mr. Sam Szlezinger of that firm appeared for the Appellants, The Racecourse Association and Others.

Mr. Rhodri Thompson QC and Mr. Julian Gregory (instructed by the Solicitor to the Office of Fair Trading) appeared for the Respondents.

Mr. David Vaughan QC (instructed by Addleshaw Goddard) appeared for the Appellant, The British Horseracing Board.

THE CHAIRMAN: Yes, Mr. Vajda?

MR. VAJDA: Sir, as you will have seen from the written submissions and from the RCA note there is a very large measure of agreement and a small amount of disagreement. The small area of disagreement relates to the 10 per cent reduction that the OFT put forward in the costs to be subject to detailed assessment, because there is agreement that the costs should be subject to a detailed assessment. That is based on the fact that the RCA failed on what one might call the "agreement" point.

Sir, before dealing with that point, could I make some very brief general observations, which will take no more, I hope, than five minutes or so, on the OFT's written submissions on costs. I do that to take issue with some of the points that are made there, because it may be that the Tribunal may have regard to some of what is said there in its judgment, and if it were to do so it is right that it should have the submissions of the RCA on those points. There are just three small points that I would like to raise.

The first is that in looking at the level of costs, the OFT seeks to compare the sums claimed in this case, and particularly I have in mind the sum claimed by the RCA, with the length of the oral hearing in this case, three days, and the costs in two previous hearings. I make the following points in relation to that, that so far as the RCA is concerned, over 85 per cent of its costs were incurred prior to the oral hearing. As the Tribunal will well appreciate the written proceedings in this forum assume a much greater importance in these type of proceedings than the High Court. So we say that it is wrong, effectively, to look at the figure and compare that with the length of the oral hearing.

There is also made in footnote1 of the OFT's submissions on costs a suggestion that costs are spiralling out of control. What the OFT does, which we say is not helpful, is they make a comparison of the costs in this case with, they say, earlier comparable cases, and the two that they refer to are, first, the *GISC* appeal, which was the first case that the Tribunal dealt with. The point that I would like to make, sir, is that the *GISC* appeal concerned an OFT decision which ran to eight pages. The decision in this case ran to 129 pages. So we say that is not a helpful comparison to draw.

So far as the reference to *Aberdeen Journals* is concerned, the costs that are being looked at there are the costs of the Intervener who came in in support of the OFT, who plainly had a much smaller role to play than an appellant in a decision running to 129 pages. So we would not accept the suggestion that those two cases are comparable. That is my first point of three.

My second point is that the OFT makes a number of criticisms of particular items in the costs schedule submitted by the RCA at paras.24 to 31. Given that the OFT has accepted that the costs, subject to the reduction point, are to be assessed on a standard basis, those costs will, as you, sir, will know, be subject to a proportionality test on a detailed assessment by analogy with the Rules under CPR 44.5. We submit that it would be inappropriate for this Tribunal to, in a sense, pre-empt anything that the costs judge would say on detailed assessment.

The next point I make is this: there is a suggestion that, looking at matters of costs so far as the OFT is concerned, the court should bear in mind that a costs order should, as it were, not hamper the role of the OFT in operating in the public interest – paras.8 to 9 of the written submissions. As I read those submissions – it does not say so expressly – the implication appears to be that the OFT should therefore be treated differently from other public sector and publicly funded defendants. We would respectfully submit that there is no reason why the OFT should have a more favourable costs regime than any other body funded by the taxpayer where a successful appeal is brought, and we would ask the Tribunal to bear in mind, for example, the position in a judicial review.

In particular, in the present case there are two factors which, in our submission, militate very strongly against giving the OFT any form of preferential treatment on costs. First, as the Tribunal will recall, this was a case where the OFT chose to take a decision, even though the conduct of which it was complaining had come to an end. This is not a case where there was, even on the OFT's view, a continuing infringement. Second, the court will also recall that there is a dispute in that the competition issue was essentially a private dispute between the 49 racecourses, the RCA and the BHB and the buyers. There was no suggestion, even on the OFT's case, that any final consumer suffered any harm. As the Tribunal observed in its judgment, a point that I made at the hearing, the 49 courses were left with no alternative but to challenge the decision because otherwise they would face the risk of piggyback action by the buyers either in this Tribunal under s.47(a) or in the High Court under s.58(a) of the Competition Act. Those are my general points.

I come now to deal very briefly with the 10 per cent reduction point. The basis of the reduction sought is that the RCA and the courses were unsuccessful on the agreement point. What we submit to the Tribunal is that it is necessary to have a sense of perspective here. The RCA appellants won on virtually every issue that the CAT adjudicated on, the relevant market, necessity, counter-factual, increase in price and the restriction on incentive, the two anti-competitive effects identified in the decision. In that context, the agreement point is, if I am allowed to lapse into Latin in this Tribunal, *de minimis*. I can perhaps expand on that briefly by reminding the Tribunal that it was not advanced, was not developed at all by the appellants at the oral hearing.

THE CHAIRMAN: It gave rise to a fairly full written argument.

MR. VAJDA: I am going to come to that.

THE CHAIRMAN: I think Mr. Thompson did devote part of his address to that.

MR. VAJDA: He did. In relation to the written argument, on my calculation it occupied five pages out of 121 pages of the Notice of Appeal which, by a process of arithmetic, comes out at under 5 per cent; it occupied three pages out of 78 pages of the RCA's reply, which is under 4 per cent, 3.8 per cent; and it occupied three lines out of the 31 page skeleton argument for the oral hearing. If one looks at how the Tribunal dealt with it, the Tribunal rejected the submission of the RCA and was able to deal with it in one and a half pages out of a 95 page judgment – so again very *de minimis*, under 2 per cent of the judgment is devoted to that issue. We say, therefore, that the proportion of effort, time and cost that the RCA appellants put into that point is well below the 10 per cent figure sought by the OFT and would amount to a significant reduction in the costs that were incurred by the RCA in relation to the issues on which they won. Of course, the Tribunal will bear in mind that on a detailed taxation the RCA appellants will probably receive between two-thirds and three-quarters of the costs.

Of course one accepts in the light of the CPR and indeed the position in this Tribunal, that effectively if a party comes and wins, but a substantial portion of time – it may not even be 50 per cent, 20, 30 per cent, you have three arguments and all three take an equal amount of time and you win on one and lose on two, or you win on two and lose on one, that would be a situation where the court would say, "We will have a look at the conduct of the parties and we may make a reduction to take that into account". What we say is that we are not in that territory at all and that, standing back and looking at the merits of the case, it would be appropriate for the RCA appellants to be awarded all their costs subject to a detailed assessment.

THE CHAIRMAN: Even you would concede that a percentage of your costs was devoted to this issue?

MR. VAJDA: Yes.

THE CHAIRMAN: Bearing in mind the very substantial size of your bill, a percentage, even if less than 10 per cent, is not insignificant. The modern fashion is, in an appropriate case, to make costs orders on an issue based approach. You are submitting that the percentage is so small in this case that we should ignore it all together?

MR. VAJDA: So far as the percentages are concerned that I have given, they are all under 5 per cent. I am, of course, aware of the modern approach which is that one looks at it issue by issue, but one also has, in my view, to take a realistic view of what has happened. In a case where one has three, four or five issues and one can see that one issue was not *de minimis* then the approach of a court to say, "We are going to disallow costs on that issue", is a fair one.

In my respectful submission, what would be wrong, as a matter of principle, would be for this Tribunal to take the view, "Because the RCA's costs are substantial, therefore we are going to make a reduction". It seems to me that that is a matter to be determined by the costs judge. What the Tribunal has to decide is whether, as a matter of principle, given that the RCA devoted no time at the oral hearing to this and in relation to the written pleadings under 5 per cent of the paper was devoted to this, this would be an appropriate case to make a reduction. Plainly, my personal knowledge of costs orders is much less than yours, sir, but I am not aware, in my own limited experience, of a court making such a reduction. If one is looking at percentages one would be looking at somewhere around 5 per cent. As I say, my experience is limited, but making costs orders dependent on issues, in my submission, entails saying, "Is this an issue which contributed more than a *de minimis* amount to the costs of the litigation?"

THE CHAIRMAN: Yes. So you say the answer to that is, "No, it did not", and ----

MR. VAJDA: I suppose the submission is probably in the alternative. The primary submission is that there should be no reduction at all. If the court is going to get into figures, 10 per cent is too high. The figures, as I said, at 4.13 per cent for the Notice of Appeal, 3.85 per cent in the reply, under 1 per cent for the skeleton argument, and 1.58 per cent in the Tribunal's judgment. If, for example, in the Tribunal's judgment it had occupied 10 or 15 per cent, that there had been a disparity between the amount of time that the Tribunal had to grapple with it and the amount in the RCA submissions, then one could see that that might be a reason for saying, "We are going to make a reduction in relation to that issue".

THE CHAIRMAN: Even 5 per cent of your costs is about £30,000, is it not?

MR. VAJDA: Yes, as a matter of arithmetic, that is right.

THE CHAIRMAN: There are those who have fought a High Court action for less!

MR. VAJDA: Possibly. If there is criticism of the RCA's costs, those matters in terms of whether something was duplicated, excessive or whatever, that will be looked at by the costs judge.

THE CHAIRMAN: I do not think there is any criticism that we are required to concern ourselves because, as you point out, it is not in dispute that, whatever order we make, there needs to be a reference to the costs judge. We are only concerned, I think, with the principle of whether you should have all of your costs or the percentage conceded by the OFT or, I suppose, whether we should form some different view.

MR. VAJDA: Yes. As I say, I think the submission is one in the alternative. The primary submission is no reduction at all because it is effectively *de minimis*; secondly, if there is a reduction, in my respectful submission, one would be looking at somewhere between 2 per cent and 5 per cent.

THE CHAIRMAN: Yes.

MR. VAJDA: Unless I can assist the Tribunal further those are my submissions.

PROFESSOR BAIN: I did just wonder whether it was reasonable to compare the pages devoted to this in the judgment with the whole length of the judgment when half of the judgment was descriptive. I thought that if you compare it with the analytical part of the judgment, that might give a fairer measure of its importance.

MR. VAJDA: I think that is a perfectly fair point, but also, of course, when one is looking at the costs of the parties and the length of the pleadings, one of the issues is setting out all the facts. Obviously in terms of the analysis it is more, but the setting out of the facts did not come out of the blue. It came from submissions of the parties. As a matter of arithmetic Professor Bain is absolutely right.

THE CHAIRMAN: Thank you very much, Mr. Vajda. Is it best to hear you next, Mr. Vaughan? Mr. Thompson, would you like to pick up all the arguments at the end or would you like to deal with Mr. Vajda's first?

MR. THOMPSON: I am happy to do either, but I think it is probably more efficient if I deal with both at the same time.

THE CHAIRMAN: Let us do that. Thank you. Yes, Mr. Vaughan?

MR. VAUGHAN: May it please the Members of the Panel; we have put in a speaking note.

THE CHAIRMAN: Thank you very much. Is that different from a skeleton argument?

MR. VAUGHAN: It is not really, but I know it has become rather fashionable to talk in terms of speaking notes. What we have tried to do is put together our answers to the OFT's position. It is different from a skeleton argument in so far as it does not repeat, or does not overmuch repeat, what we said originally in our application for costs.

Broadly speaking, it seems to us to be fairly common ground that we are entitled at least to some costs as a successful appellant, and the question is, what is the proportion that we are entitled to? We passed the test of when two appellants will recover in that situation. We refer, as we did in our original submissions, to the *Bolton* case in the House of Lords and the cases that have followed from that which deal with interveners, and we passed the test for, even if they are interveners, being entitled to their costs in these matters.

They effectively advance an offer of 50 per cent of our legal costs, whereas our legal costs are effectively the same as the RCA's legal costs, but very nearly 10 per cent of them are costs relating our economists. I will come on to that in a moment.

It is important also that they do not suggest that there is any fixed reduction for us to take into account any point that we lost. Unlike the RCA and the point that Mr. Vajda has just dealt with, they do not suggest there should be any reduction for that. Indeed, on that point, we did not support the RCA in its arguments on that point.

THE CHAIRMAN: That is why they do not suggest a deduction.

MR. VAUGHAN: That is right, but they do not suggest a reduction for anything else in that sense.

THE CHAIRMAN: There is no deduction on that point.

MR. VAUGHAN: Absolutely, sir. The important thing about this case is that it represented a complete victory for the appellants and a total disaster for the OFT. They did not win any single point in the argument, except for the one that Mr. Vajda has addressed you on. It was not a question of being a balanced matter of just losing or anything like that. I think it is the first decision which has been annulled on the substantive merits and, as you know, one in which the OFT have not sought permission to challenge in the Court of Appeal. We say we should be entitled to recover all our costs in this matter.

A large part of the reduction is based upon the "second fiddle" argument. We say we certainly did not play a second fiddle in this case. In order to be heard at all in the initial stages we had to go to a judicial review to get permission to make submissions to the OFT, and we won on that issue. There we pointed out, as we have continued to do, our separate interests and also our separate arguments. The High Court accepted that there were distinct interests of the BHB as opposed to the rather more commercial interests of the RCA in this particular matter.

We point out in para.4 of our speaking note what are the main issues which we say we advanced primarily ourselves. Certainly we initially raised them. Indeed, the OFT in its joint defence accepted that there were certain points that we raised that nobody else raised. That was a point that the OFT tried to exploit and the Tribunal rejected that argument. They pointed out in the joint defence that we dealt with products definition and market definition in the way that we did and raised various procedural matters in that case. We raised issues of practical means of acquiring necessary rights and we dealt extensively with the anti-competitive effect in that matter.

THE CHAIRMAN: Take point 3, for example, that was also at the very forefront of the RCA's case. You did not need to run that separately and additionally, did you?

MR. VAUGHAN: I certainly accept that they raised that in that way. Because of the Rules, in our Notice of Appeal we had to raise every single point that we wanted to argue in that way. Also we developed the economic arguments on that particular matter. It was not just a point of law, it was a factual and economic exercise that had to be undertaken on those matters.

In point 4 we developed the anti-competitive effect. We dealt with that as an economic exercise extensively in our Notice of Appeal and in our subsequent matters much more extensively than the RCA did. We made a lot about the failure of the business plan and put in a lot of evidence about that matter. We did a lot of work on the notification and the changes from the notification and RCA's changed position.

We have set out and annexed the exercise that we did at the time we were deciding whether we wanted to bring a separate appeal. That is at appendix 1. That is the exercise that was done in order to look at the economic cases and see to what extent there was a need for BHB to present a separate matter.

On product definition, as the OFT accept, there was nothing of that in the RCA.

In the market definition, six points on that, we set out where the RCA dealt with particular points.

On market power, none of that is covered in the RCA case. However, our points here are second order in terms of relevance and strength.

Failure to show an anti-competitive effect, we accept that they dealt with some of them but not all of them in that way.

That was, as it were, showing the internal exercise that was done by us in order to see whether we should separately appeal in this matter.

We obviously raised a lot of issues, as did the RCA, on matters which were not dealt with in the judgment. We say in para.7, the fact that we raised those was simply because we had to raise those according to the Rules. You cannot subsequently amend in order to plead matters you should have raised, and indeed the fact that they were not necessary for the Tribunal to deal with shows the strength or the weakness of the OFT case on the matters. Indeed, we needed to plead those matters because if the OFT had appealed this matter these matters might well have become relevant again in that case.

We set out at para.8(1) the judicial review matters. We point out that only us, only the BHB, because we were given permission to make our submissions in response to Rule 14, it is only us that had an oral hearing and developed these matters, and made it clear in writing and orally, what our objections to it were. That is an important matter because it shows that the OFT at that stage knew exactly what our objections were, but nevertheless went ahead and took the decision in that way.

We make the same point as Mr. Vajda does about the extensive nature of the decision in that matter.

Then there was the joint defence which was a long document and then our reply. The reply was particularly long because we had to deal with the ATR business plan in that document – that was the first time we had seen it – and also an analysis of the s.26 responses which is very important in the end result of the matter.

We make the point in (5) that you have got to raise all the points in your Notice of Appeal. In (6) we set out why our Notice of Appeal was more extensive than otherwise would be the case. We were well aware of the rules that we had to be concise and we explained why were longer than otherwise we might be.

We make the same point as Mr. Vajda does about the three day hearing. In addition to Mr. Vajda's point that it represents only a very small proportion of the total costs in this matter, three days, as we point out, is a long hearing before the Tribunal, particularly when there is no evidence, and we point to the recently published guide in this matter.

The CMCs were, in fact, the opportunity and the time when the matters were kept under control. It was made clear what the issues were, it was made clear what issues did not require further development both in the reply and at the oral hearing. Everyone complied with what the Tribunal requested and required the parties to do. So the three day hearing was a three day intensive hearing which, if it had been a civil case, would have been a very, very much longer hearing in this situation, and no doubt one with witnesses and so on.

We make the point in para.10 of our speaking note that Mr. Vajda does, that it is wrong to take into account the fact that the OFT pleads poverty, as it were, and that if it has a major order for costs against it it cannot perform its statutory duties. It is very unlikely that the OFT, one hopes, will ever fall into the trap it did in this case of lack of control and lack of appreciation of what the case would be in future.

The general rule is that the successful appellant recovers his costs in the ordinary way. In 10(1) we refer to *Aberdeen Journals*.

THE CHAIRMAN: Does one actually find that recorded anywhere in either the Rules or elucidation of the Rules in reported judgments at the CAT?

MR. VAUGHAN: No.

THE CHAIRMAN: You are just advancing it as a matter of unsupported assertion, are you?

MR. VAUGHAN: As unsupported assertion, yes, but basically, if you appeal and you are entitled to appeal and you win, then particularly applying the *Bolton* tests of the House of Lords, where they were, of course, dealing with an intervener, we satisfy all the requirements of that. It is unsupported, as it were, in the CAT but it is accepted as being the ordinary rule in the ordinary public law field in this case, we submit, if you fulfil the relevant criteria. Obviously the mere fact that you have come along and appeal does not necessarily ----

THE CHAIRMAN: Have we got *Bolton*?

MR. VAUGHAN: Yes, it is in our bundle that we have prepared for this hearing. It is at B1. It is probably most convenient if one looks at the *Smeaton* case, which applies *Bolton* and sets out what one gathers from it. That is B3. Paragraph 435 sets out the submissions of Mr. Anderson as to what he derives from what Lord Lloyd says in *Bolton:*

> "… (i) if there was likely to be a separate issue on which he was entitled to be heard, (ii) if he has an interest which requires separate representation, (iii) in proceedings at which instance and (iv) in a case raising 'difficult questions of principle' in which the importance of the outcome for the intervening party is 'of exceptional size and weight'."

We say we meet all those tests. There were separate issues and separate interests that BHB had which were distinct from the other matters, from the RCA. It required separate representation because we, as it were, the over-arching body responsible for British racing had different responsibilities from the RCA who were representing the racecourses. We appeared at first instance, i.e. before Rule 14 was taken, and there were difficult questions of principle and the outcome of, as it were, the second appellant was of exceptional size and weight. We say we satisfy all those matters.

THE CHAIRMAN: What about head three of Lord Lloyd's principles in para.433?

MR. VAUGHAN: Here we are at first instance, as it were, from this point of view: this is the first time we can get our costs. At the previous hearing we cannot recover our costs.

THE CHAIRMAN: This is regarded as the first instance?

MR. VAUGHAN: We would say this is effectively the first instance in this matter. It is the first time we have had a chance to attack the decision, as opposed to attack the Rule 14 notice in that way. At the Rule 14 stage we cannot recover our costs incurred at that stage. We did recover part of our costs in the judicial review proceedings, but that was different. This is the first time the issues have crystallised in a way that is important. Whether that would disqualify us if they appealed in this particular case is a separate point.

The idea that you should be cautious about awarding costs because of the inability of the OFT to perform its function, we have said it was *Aberdeen Journals* where it was referred to. In fact, it is *GISC*, that is a mistake in our speaking note at 10(1). It is paras.56-59 of *GISC*, not *Aberdeen Journals*. We make the point that we have already incurred considerable costs at the first stage which we cannot recover in this matter.

You cannot, in our submission, compare our costs with those of the OFT in its preparation of these matters. The OFT starts with the decision which it wishes to defend. We start with a decision which we need to attack in that situation. Inevitably, in a case such as this, it requires, or tends to require, specialist counsel. Parties are entitled to go to City law firms, and there are scales for City law firms in the costs rules in this matter; and they are entitled to go to economic experts, particularly in a case such as this, which is a very economic based case, as indeed the oral hearing made very clear. Economics in this case really dominated the judgment and the conduct of the hearing and the questions that we were asked to deal with at the oral hearing.

The last point is that the OFT knew perfectly well the risks it was running. It knew we were attacking before it took its decision and yet it took its decision and knew the basis upon which we were objecting, which, in fact, were exactly the same as you have found in this case.

We deal at para.11 with the use of economists. It seems to be suggested that you should only have economists as witnesses and not as part of the team. Of course, the OFT, themselves, used economists as part of the team in reaching the decision and no doubt in defending a decision in any particular case.

Price Waterhouse, who they say are very expensive, but probably no more expensive than the equivalent City law firms, provided very important work for the preparation of the Notice of Appeal and the subsequent pleadings. They formed an integral part of our team, and no doubt the OFT's economists formed an integral part of their team. They did not produce any separate economic justification or report to back up the position they got.

We set out why, in fact, we say the OFT are wrong about the weight that was given to the Price Waterhouse work that went into the preparation of the matter, but obviously you will form your own view on that. You are well aware of what the situation is and the arguments that we advance in this matter. It was very important to get the correct counter-factual in this situation.

A great deal of the work that was done by Price Waterhouse dealt with the question of the OFT were right that collective negotiation led to higher prices in this situation – or joint negotiation led to higher prices. Indeed, all the economic input on this part of the case came from us. The work that was done by RBB for RCA was of a very much smaller amount, and not really so much directed to this particular issue which were the fundamental points upon which the case was decided and indeed won.

The final point that they make is that there should be some general principle of reduction on the basis that the European Court of first instance knocks down regularly, they say, very substantially costs. We give an example, *Cambridge Health*, which we have annexed to this. *Cambridge Health* recovered virtually all of its costs in that case. The question raised in most of these case is justifying by means of fee notes and hourly rates, and things like that, the costs and the hours that have been worked in that way. £70,000 was asked by way of costs and *Cambridge Health* recovered £64,000. The reason they did not get the whole lot was because we had identified sufficiently the hours we worked and the particular rates in that matter, but *Cambridge Health* recovered virtually all its costs.

In our submission, BHB was right to appeal and to treat the matter with the same degree of seriousness as the RCA did. We did not cover the whole factual development of the negotiations and we were very careful to arrange by discussion between RCA and ourselves what areas we should major on and what areas they should major on in that particular situation. That is very apparent, in our submission, particularly at the oral hearing and the subsequent reply pleadings and the skeleton arguments.

So our basic contention is that we should be entitled to the full costs of both the lawyers and economists subject to assessment, which we entirely accept, of these matters. What we do say is that there should not be some preliminary cutting down proportionately of our costs at this stage and the whole matter should be left to be dealt with on assessment. It would be, in our submission, unfair to reduce our costs by some sort of proportion, whatever that might be, to take account of the fact that we were the party who appealed secondly. The reason we appealed, secondly, was in part due to the fact that we did not know the terms of the decision until later, but also we looked carefully to see whether, in fact, there was a need for us to appeal separately and it was accepted by the Tribunal at an early stage that there was a separate point and there were separate points to be made on our behalf in that way. So, in our submission, the appropriate order is that we should be entitled to our costs of this matter subject to assessment and with an interim payment, as we have suggested in our costs submissions, of half the claimed amounts.

Those are my submissions.

THE CHAIRMAN: Yes, thank you, Mr. Vaughan. Yes, Mr. Thompson?

MR. THOMPSON: I was intending to structure my submissions under five headings, and even though this is somewhat jurisdiction from the High Court, I was not proposing to go into enormous detail on the underlying factual issues, but I will obviously make certain points and I am sure that the Tribunal has well in mind the background to this case, so I do not propose to go into it at great length.

The five areas: first of all, the issues which I think are before the Tribunal today; secondly, the issue of the correct approach to adopt; thirdly, the role of the Tribunal in this particular case; fourthly, the position of the BHB which we see to be the primary issue here, not that of the RCA, although I will deal with the 10 per cent issue that Mr. Vajda addressed; and then, finally, simply to set out what our position is on the issues, although that appears in our written submissions.

First of all, the issues to be decided today, they seem to me to be fourfold: first of all, whether there should be a summary or a detailed assessment. I think there is agreement between the RCA and ourselves that a detailed assessment is needed in that case. In relation to the BHB, we have put forward two possibilities, either a summary assessment of £330,000 today or else a detailed assessment of BHB, and that is a matter on which the Tribunal will no doubt have a view as to the best way forward; secondly, what proportion of costs should be awarded – that is the 90 per cent issue in relation to RCA and the 50 per cent issue in relation to BHB; thirdly, whether any further guidance is appropriate of the kind that we have raised in our written submissions on the particular facts of this case for any detailed assessment; and fourthly, the question of any interim payment and, again, I think that is simply a matter between us and BHB. They are asking for half of their claimed costs, so some £470,000 odd, I think, whereas we are suggesting that £150,000 would be enough if the matter is going to go to detailed assessment. Those are the four issues that, as I understand it, needed to be decided.

Secondly, looking at the question of the correct approach, Mr. Vaughan took the Tribunal to the *Bolton* and *Smeaton* cases. In my submission, they are not really relevant today in that there is no dispute that there should be some award of costs, not only to the RCA but also to the BHB. In my submission, much more relevant is the general analysis is the general analysis in the *GISC* case, and in particular para.40 and paras.56 to 60. I think it is worth just turning that up for a moment because, in my submission, it gives very considerable support to the general points that the OFT put in its written submissions. That is tab 2 of the bundle that Mr. Vaughan has kindly produced. If one turns to p.10 of the judgment one finds what was Rule 26(2), which I think is now Rule 55 in the new Rules, setting out a general discretion in relation to costs. Then para.40:

> "As all the parties have pointed out, Rule 26(2) does not refer to the rule that applies, as a starting point, in civil litigation and judicial proceedings under CPR r.44.3(2)(a), namely that the unsuccessful party will be ordered to pay the costs of the successful party."

So the Tribunal expressly draws attention to the fact, contrary to the point that Mr. Vaughan was making some moments ago.

If you turn on to p.12, you will find an analysis in relation to the discretion under Rule 26(2), and then there is a broad statement of policy at para.48. The relevant part, in my submission, starts at paras.55 and following, where the Tribunal considers the question of the circumstances where the Director may be unsuccessful and refers to the principal argument advanced by the Director that:

> "… that it would bear unduly heavily on the public purse if the Director was regularly faced with large bills of costs from success appellants. The Director stresses that litigation before the Tribunal may be very complex, and the issues may be far from clear cut."

Then there is the question about resources. Then there is the analysis at para.56.

THE CHAIRMAN: Before you go on to that, I do not understand how we can exercise our discretion judicially under Rule 26, now Rule 55, unless the Rules identify the principles by reference to which the judicial discretion is to be exercised. Part 44 of the CPR does identify those principles and you can exercise your discretion judicially by reference to them. When you have a rule which simply says that the Tribunal has complete discretion I fail to see how it is possible to exercise that discretion judicially.

MR. THOMPSON: I think that is why I have taken you to this judgment because a tribunal has clearly had to grapple with this issue before and, as I understand it, this is where the ground rules were set out, and in particular ----

THE CHAIRMAN: So this is the first indication of what the principles are, is it?

MR. THOMPSON: I think it is fair to say that there was a document produced by the Tribunal last week called "Guide to Proceedings". I looked eagerly to see what the guidance might be and, in fact, on this question it is rather quiet and simply refers back to the earlier judgments. So, in my submission, this is the best guidance there is.

THE CHAIRMAN: Let us see what the guidance is.

MR. THOMPSON: I think it comes down to paras.59 and 60.

MR. VAUGHAN: Paragraph 56.

MR. THOMPSON: Paragraph 56 is the point that the Director puts forward, and we put a similar point in our written submissions, but at para.57 the Tribunal rejects any firm rule that the Director should, as it were, never be liable. At para.58 they say:

> "We think, therefore, it would not be proper, certainly at this early stage, to fetter our discretion under Rule 26(2) by adopting a general principle to the effect that, if the Director loses, he should be liable to pay costs to a private party only if he has been guilty of a manifest error or unreasonable behaviour … To introduce such a rule in the

context of this Tribunal could, in itself, be a disincentive to exercising the right to appeal, with possible detriment to the competitive process in the market.

"59. In our view, the Director's concerns over costs are better addressed by other means."

It refers to the case management powers. Then at para.60 they do go on to the question of costs and that is the primary relevant paragraph, I think:

"Furthermore the Tribunal will, as necessary, use its powers in relation to costs in support of its case management powers. WE have already referred to developments in the civil courts designed to ensure that the costs incurred are proportionate to the matters at stake, and in particular the willingness of the courts to make orders which reflect the parties' degree of success on particular issues. In addition, many factors may be relevant to orders for costs; or indeed whether to make any order at all. Such factors may include whether the appellant has succeeded to a significant extent on the basis of the new material introduced after the Director's decision but not advanced at the administrative stage; whether resources have been devoted to particular issues on which the appellant has not succeeded; or which were not germane to the solution of the case; whether there is unnecessary duplication or prolixity; whether event adduced is of peripheral relevance; or whether, in whatever respect, the conduct of the successful party has been unreasonable."

So those are the factors which ----

THE CHAIRMAN: Yes, but all those factors seem to presume that there is a silent basis, namely that the winner gets his costs, but they may have to be adjusted by reference to those considerations. I do not know where you get the starting point from under Rule 55.

MR. THOMPSON: I think the starting point – perhaps I have taken it too quickly – is rejecting the basic position of the Director in that case, which I think was that it was similar to under the Restricted Trade Practices Act that costs were only awarded for, effectively, unreasonable behaviour, and that was the starting point for the Director. The Tribunal said they thought that was unfair under the new regime, so there was, as it were, a limited principle that costs should be at least awardable to the successful appellant, but then the Tribunal went on at para.60 to indicate some factors which operate as discount factors, which were similar but, I think, going somewhat wider than the considerations under the CPR in the High Court. I think that is the way it developed.

THE CHAIRMAN: Is it implicit that the Tribunal has held in this case that the starting point is that the successful party is entitled to recover its costs, but it may then be subject to a number of considerations which will require that to be moderated in the circumstances of the case? Is that the right approach?

MR. THOMPSON: I think finding was the negative, that it is not only in cases of unreasonable behaviour that costs should be awarded. It is, as it were, a first step to a broader principle of costs liability, but the fact is that this is a developing jurisdiction where relatively few judgments have taken place and the scope of the positive obligation is to pay costs.

THE CHAIRMAN: Do you dispute that our starting point under the jurisprudence developed so far as that you are liable for both appellants' costs in principle, although, if so, we understand that you do dispute that you should be liable to pay all of their costs? Do you accept that, in principle, you are liable to pay their costs?

MR. THOMPSON: We certainly accept, and that is reflected in our submissions, that we are liable to pay the RCA costs. On the particular facts of this case – and it is an issue that was raised, I think Professor Bain and Mrs. Hewitt will recall, from the very first case management conference – that the Tribunal was very concerned about how this case should be handled and whether or not BHB was truly an appellant or an intervener in substance, but then agreed that there should be no stay and no effective order that this should be converted into some sort of intervention. So it does raise a difficult question, but we are not contesting that the BHB is entitled to an order for costs as an appellant given the way that this case has played out, but our submissions reflect in the end a substantial discount to reflect that they were very much the second appellant, but they appear to have, in the end, decided to take the primary role. I think Mr. Vaughan's submissions this morning have been to that effect, that they did not play the second fiddle and they did go into things at a great deal of length and we say that was rather inconsistent with the approach from the start ----

THE CHAIRMAN: It depends how much music the second fiddle is entitled to play. Were you restricting the score in any respect?

MR. THOMPSON: Yes, I think that is why we referred you, sir, to the first case management conference where, in my submission – and I was there and recall the tenor of the discussion – it was made very clear that the Tribunal was concerned about this and was only letting this go forward on the basis that it would be managed as tightly as possible. That is essentially why we now say that the BHB cannot come along and expect to get 50 per cent more than the RCA in terms of costs when it was made quite clear to it from the start that its presence was, as it were, a second string to the bow. Indeed, the President made it quite clear in questioning that he was not immediately clear what additional material actually was derived from the BHB, and that was the subject of some submissions.

THE CHAIRMAN: Has there been a lack of relevant management then? How is it that the BHB is in a position to present you with this really rather large bill, and Mr. Vaughan is able to tell us what massively valuable work the lawyers and economists have done on BHB's behalf if they were subject to some management restrictions on the extent to which they devote themselves to all that labour?

MR. THOMPSON: The most striking element in the bill is the vast discrepancy between the economic consultants engaged by BHB and the economic advisers or consultants, experts, engaged by the RCA. At no time was anybody aware that the BHB was proceeding on the basis that they would effectively treat the economists as a third wheel, as it were, in addition to a very experienced team of counsel and a very experienced and eminent team of solicitors, so that they have generated a whole third line of costs which was not thought to be necessary by the principal appellants.

THE CHAIRMAN: Is that something which we should be adjudicating upon or is that assuming that we are otherwise with Mr. Vaughan, or is that something which the costs judge should be adjudicating upon?

MR. THOMPSON: In our submission, it is very difficult for the costs judge without some guidance from this Tribunal as to what was or was not appropriate to judge the use of expert economists. I may be wrong, but ----

THE CHAIRMAN: He would have to assess, would he not, whether those costs were reasonably incurred, which is the sort of exercise that costs judges do all day long every day, is it not?

MR. THOMPSON: With respect, it does seem to us that the Tribunal, and perhaps in particular Professor Bain, is in a particularly good position to judge whether or not the economic issues raised in this case were furthered ten times as much by the contributions of BHB and Price Waterhouse than by the rather modest but incisive report produced by RBB, which formed the basis of essentially the battle between the RCA and the OFT supplemented by the acute questioning of Professor Bain. Our essential position is that the Price Waterhouse material added very little to that debate, and in one particular respect the BHB model simply produced a side show which appears to have generated quite a lot of work but which appears to have conferred absolutely no benefit in analysing the issues in the case. I do not believe it is a matter that was thought to be necessary even to refer to in the judgment. You will recall that we were somewhat dismissive of it in our submissions and I think that is one area where we have not been criticised.

THE CHAIRMAN: So you say we are in a better position that the costs judge would be to take a broad brush to the monies spent on economists?

MR. THOMPSON: Yes, and we thought that the simplest approach is that they should be allowed the same but no more than the RCA were allowed, given that they appear to have contributed, if anything, less than the RCA's much more economical economists, if I may put it that way.

We have made a number of detailed submissions in our skeleton argument on the policy issue but I suspect that they will not improve from being repeated orally, so unless there are points that you want to raise with me on paras.6 to 22 of our skeleton argument I think they have probably been aired in discussion. We essentially stand by that.

I hear what Mr. Vajda in particular said about the comparisons at footnote 1 and the issue of the oral hearing. As I think is quite clear, costs cases are very much on their own facts, but the mere fact that the costs were not even greater because we did not have a six month hearing with cross-examination of all witnesses is, in my submission, of no particular relevance to judging whether or not a total costs bill of £1.6 million is proportionate on an appeal of this kind where the Tribunal was clearly concerned to control costs from the start.

THE CHAIRMAN: It is an alarming figure.

MR. THOMPSON: Indeed, sir.

Looking briefly at the role of the Tribunal, you may recall that at part two of our submissions, we made three points in relation to the role of the Tribunal: first of all, the point that we have already discussed about the concern over possible duplication. You will recall that duplication is one of the issues raised expressly at para.60 of the *GISC* judgment. I think it may be worth just turning up one example of that. If one turns to tab 2 in the bundle, at p.1 one sees the President coming in and saying hello to Mr. Vajda, and then the very first point raised is at lines 12 to 32:

"From the Tribunal's point of view, however, a somewhat major issue arises in relation to item 2 of the agenda …"

Then he develops that in lines 21 and following:

"What we are concerned about from the case management point of view is the relationship between the RCA Appeal and the BHB Appeal, and whether in particular we should allow both Appeals to proceed together, or whether we should stay one … or whether we should seek to arrive at a situation in which the BHB Appeal is effectively treated as an intervention in the Racecourse Association Appeal, rather than a full blown appeal."

Then the point put to Mr. Vaughan is at p.3, lines 32 and following.

THE CHAIRMAN: Mr. Vajda is not keen at all that the second appeal should be stayed, and so it is not, which I think is Mr. Vaughan's point.

MR. THOMPSON: Mr. Vajda was pleased to have the support for whatever reason. Then at the bottom of p.3 ----

MR. VAJDA: One always enjoys having Mr. Vaughan in one's cases!

MR. THOMPSON: ---- the President puts to Mr. Vaughan:

"What we are driving at is this, there is always risk in cases like this that two appellants wishing to develop full blown appeals as it were double the time and effort and work and all the rest of it. In another scenario, two parties like yourselves and the Racecourse Association can be effectively heard in a way that does not double the work but is done in a sort of a hidden way."

Then there is a reference to the intervener role:

"… a crisper and more concentrated role than necessarily the role of a full appellant …"

Then it is said to be a technical point. Towards the end of that paragraph:

"No one is suggesting that you should not be heard, or you should not have a chance to make your points, but the question is in what sort of way? It is not a question that just affects this case, but for the reasons I have given it is a horizontal problem across the Tribunal."

That is the which is occupying the Tribunal at that stage.

Then there are two particular areas where, if I may say, the BHB were discouraged from developing their case any further. One finds that at p.6, lines 10 to 13, in relation to the sporting exemption, where the President says:

> "If we may say that part of the legal analysis ranges pretty widely over sport in general and a number of quite wide considerations, and we are certainly wondering at the moment whether an analysis of that breadth is really going to be necessary to decide this particular case."

Of course, you will recall that the Notice of Appeal really went to town on that issue in a way that, in my submission, was not particularly helpful or germane to anything that had decided. Then Mr. Vaughan comes back about the Premier League, et cetera.

Then the other question was what we might call the "whole show" point. I think the clearest example is at the next case management conference at tab 3. This was on 22nd October after the defence had been served and the Tribunal came into court and set out a number of points that needed to be dealt with, which one finds on p.1, and then Mr. Vaughan stood up at p.5. He seeks clarification after the short break about the relevant product market. Then over the page the President says:

> "… just to signal that we have had quite a lot in writing on the idea of British racing as an idea, so it is up to you but you may not want to take too much of your oral time further developing that because it is very fully argued."

In my submission, that is, in fact, a fairly clear indication that that is not, as it were, a central area of interest to the Tribunal. I think it is again a point that does not feature very much in the judgment and, in my submission, that is an area where the BHB Notice of Appeal raised issues which were not, in fact, germane to the case, and which certainly would not have succeeded in isolation and that is why they are not mentioned.

The third area that I mention in my submissions is the particularly important role of Professor Bain as expert economist in this case, and one finds this in two particular questions at the case management conferences. First of all, the one we are on at the moment at p.2, Professor Bain raises two points at lines 11 to 24, the first one about bidding in the market and bidding for the market; and the second one, the complementarity of the data rights. Then at the next case management conference in January 2005, the next tab, there is quite a long passage going from line 22 to p.15, line 3, and that is a point about the incoherence which the Tribunal perceived in the counter-factual advanced by the OFT. As I understand it, that point was, in fact, at least one of, if not the, decisive points on the issue of market definition which, in the end, was fatal to the decision as a whole because it undermined the whole basis for the analysis. One finds that at paras.142 to 144 of the judgment. As I understand it, that is a point which the Tribunal, and in particular Professor Bain, raised which does not appear in either Notice of Appeal. In my submission, that is relevant to the question of how far the Tribunal was actually assisted by expert economic evidence and in particular all the work that Mr. Vaughan says was done by Price Waterhouse, because in the end the decisive points appear to be those advanced by the Tribunal itself, rather than by BHB.

May I now turn to the position of BHB? We have said quite a lot at paras.30 to 46 in some relatively harsh criticisms of the way in which the BHB has conducted the litigation and the very large costs bill that seems to have been generated. Could I summarise those submissions by reference to the factors that we rely on from the *GISC* case, which the Tribunal can find conveniently set out at para.15 of the skeleton argument under five headings, and also at 16. At 15(2) there is the issue of not germane; under (3) there is unnecessary duplication or prolixity. I think it is those points, and also the issue of proportionality referred to at para.16 that we rely on, so perhaps I may make submissions under those four headings.

First of all, not germane: I have mentioned two points, the BHB model and the "whole show" about jockeys, et cetera. We say that they were not germane. Likewise, Professor Bain, who was here, will recall that at the first case management conference Mr. Vaughan came in breathing fire about ordering the OFT to summon witnesses that he could cross-examine and a certain amount of heat was generated in his Notice of Appeal on that subject. In my submission, that was not a useful exercise, it was not germane and there was no real prospect of the OFT being ordered to summon people for Mr. Vaughan to cross-examine.

Secondly, there was the issue of duplication and we have dealt with that at some length at para.44. WE do say that there was a good deal of duplication and excessive detail on matters that were raised much more concisely and efficiently by the RCA, and that that is a factor that should be taken into account.

Thirdly, prolixity, that is obviously as a matter of impression, but certainly my impression is that the Notices of Appeal and the reply – in particular the Notice of Appeal – is a strikingly prolix document and in particular in relation to sporting exceptions, procedure, and indeed market definition and product market. Although the point about BHB data is there, there is also a great deal of broadly incomprehensible prose about the wickedness of the OFT, which, in my submission, did not add to the sum of human wisdom on this case.

Then finally, the issue of proportionality: it obviously overlaps with the previous point, but we would say that the Price Waterhouse points that we make in some detail at para.42 are relevant to proportionality and that, in general, there is a kitchen sink flavour about everything that BHB has done, including its submissions this morning, which are precisely what the costs jurisdiction of the Tribunal should deal with.

There are a number of specific points that the BHB has made, but I do not think it is necessary to go into them here. The one point that I think Mr. Vaughan did make that should be dealt with is that he effectively had to take every point in the Notice of Appeal just in case it turned out to be relevant at some later date. I do not think it is appropriate to take a completely inflexible approach, and I do not submit that that is the correct approach, but, on the other hand, that cannot be taken as licence to take a selection of bad or barely relevant points at inordinate length and expect to have no sanction in costs, even at the Notice of Appeal case. So, in my submission, it does not get him far enough to deal with the criticisms of prolixity, et cetera, that I think the Notice of Appeal is exposed to.

Finally, what form of order should be made? I think, in relation to the RCA, we are very much on the same wavelength, subject to the 10 per cent point. In relation to that, we say that it was an important point which the RCA decided to take, and it was reflected not only in the analytical section of the judgment and of the Notice of Appeal and reply, as Mr. Vajda has pointed out, but also in the exhaustive analysis of the facts which had to be undertaken in order to deal with that issue, not only by the OFT, where I think we devoted some 30 odd pages to this question in our defence, but also by the RCA and by the Tribunal in its judgment. So, in my submission, the figures of 4 per cent, et cetera, are substantially too low and we think that our suggestion of 10 per cent strikes a reasonable balance between the fact that we do not dispute that we lost the case fair and square on the central issues of the case, but on the other hand it reflects the fact that this was an important threshold issue which generated quite a lot of factual as well as legal analysis.

THE CHAIRMAN: The factual analysis would have been necessary anyway, would it not, even if this point had not been taken?

MR. THOMPSON: You may recall that there was an issue about whether there was a concerted practice here at the least which required us gong into some detail about the later events after September of whichever year it was, 1999 or 2000.

THE CHAIRMAN: It required you to focus a particular eye on the facts, I suppose. The whole history of this case would have been investigated anyway, but I suppose you could say that they would not have been in part investigated with this particular point in mind and that all costs money.

MR. THOMPSON: I do not put this case tremendously high. We think that 10 per cent reflects a reasonable estimate of the proportion. Mr. Vajda, I think, was saying no more than 5 per cent. I think that is an area where I cannot take it any further, it is a matter for the Tribunal to judge.

In relation to the BHB, we have two lines to our submission that 50 per cent or £300,000 for the legal costs would be a reasonable approach: first of all, the points I have making to date about the criticisms to which the BHB case is exposed applying the *GISC* principles. The second, the rather more crude but, in my submission, quite persuasive point, that they were the second fiddle and if they get 50 per cent of the RCA costs that would have a rough logic and justice about that. That is the basis for the legal costs. In relation to the economics, again I have made some qualitative criticisms, but there is also the rough and ready point that they should have no more than the RCA, who appear to have done a perfectly good job for £30,000. That is our submission in relation to the BHB. They should have either 50 per cent on detailed assessment or £300,000 assessed today, and £30,000 for the economists either way.

In relation to the question of any additional guidance, that obviously depends on the form of any judgment, and the Tribunal will make up its own mind about whether it wishes to give any further guidance in relation to how any detailed assessment should be carried out in this case.

Finally, in relation to interim payment, I do not think we have any difference of view with Mr. Vajda on that; whereas we think that £150,000, which would be broadly half Mr. Vajda's interim payment, would be appropriate for the BHB.

Those are submissions.

THE CHAIRMAN: Thank you very much, Mr. Thompson. Mr. Vajda, do you want to reply:

MR. VAJDA: Sir, the only point I would make is that I would endorse the point that you, sir, made about the facts and the history. I was just, while Mr. Thompson was on his feet, looking back at our skeleton argument which we prepared for the oral hearing, where we went into the facts which were, in our view, critical and you may recall that in relation to the critical mass we had to go into the press releases of why ATR was so keen to sign on people with more than 70 per cent, so we very much endorse what the Tribunal said about the need to go into the facts in any case.

THE CHAIRMAN: Thank you very much, Mr. Vajda. Yes, Mr. Vaughan?

MR. VAUGHAN: I wonder if I can take you back to the joint defence of the OFT, which I mentioned in passing, but I think it is worthwhile looking at. It is RCA/8/tab1, and it is really para.A11 on p.10. It is what the OFT were saying at the beginning. They say that it is notable that two appellants appear and adopt very different stances on several of the central issues in this case. So they accept that these are central issues. It expressly states it is not pursuing the first substantive argument advanced by RCA that there is no collective sale. That is Mr. Vajda's 10 per cent point. Then they say a substantial proportion of the BHB Notice of Appeal is devoted to two arguments that are not advanced by the RCA. The first one is the important one, that the OFT has failed to identify the correct product in this case and that the relevant market is much wider than that identified by the OFT. The RCA seems straightforwardly to adopt the OFT's approach in the relevant product and challenge the OFT's market definition only on one narrow ground. Then they deal with the point about the sporting exception, as it tends to be called.

Then they make the point on collective sale and then the procedural points that we have taken. They make the point at A12 that they are going to try to exploit that position.

The importance of that is that they, at the beginning, accepted that we alone adopted the out and out attack upon product market and on relevant market. Indeed, that was right, we did, and that was one of the reasons we gave for wanting to come into the case as appellant. They sought to take advantage of that, but they accepted that we, alone, raised those matters at that stage. At A10(i) and (ii), they say our first point is rubbish, absurd to adopt that – A10(i). They say our product is absurd. Then the market definition is contrary to authority and principle, obviously incorrect.

Those points really are the heart of the decision of the Tribunal in this matter. At that stage they were accepting that we alone were making the running on the product market and the market definition. They said it was hopeless and contrary to authority and principle, but in fact that is the basis – the heart – of the decision of the Tribunal. So it is a bit strange to talk of us playing second fiddle when, in fact, we were the ones that advanced that part of the argument which was the main part of the winning argument.

If one looks at the Notice of Appeal itself we set out the considerable errors we say in that matter, and the point out in A11(ii)(a) the market part is paras.99 to 104 – that was the RCA accepting, subject to one narrow point. If one looks at our Notice of Appeal a very great deal of our Notice of Appeal deals with these errors of factual economic analysis. It runs from para.269 onwards: market definition, failure to identify the counter-factual, 294; and, as we said in our speaking notes, the counter-factual was the critical part of our case, and that was the case that was advanced by economists, advanced by our economists and not essentially advanced by the RCA economists in their report in this matter.

So one starts from a basis that they accepted at that stage that we were distinct, the accepted that we were raising separate points, we were first fiddle on these points – or perhaps leader of the orchestra would be more specific – on market definition and product market, and that was really the area in which the main part happened.

PROFESSOR BAIN: I wonder if Mr. Vaughan could take us to any point in the decision where we adopted the view that British racing was an appropriate market?

MR. VAUGHAN: Basically it was the complementarity of the data and the other part.

PROFESSOR BAIN: I thought that was an entirely separate point that was being made. British racing is the whole show point and I think that we did not actually discuss it in the decision.

MR. VAUGHAN: You did not discuss it in the decision but you accepted the complementarity point.

PROFESSOR BAIN: We accepted the complementarity point, indeed.

MR. VAUGHAN: It was much wider than that.

PROFESSOR BAIN: The point you were making that British racing was indeed very much wider than that and we did not accept it in the decision.

MR. VAUGHAN: You did not reject it.

PROFESSOR BAIN: Indeed, we did not think that it merited a comment.

MR. VAUGHAN: It would have been a point that, if this matter had gone further, would have been a relevant point at that stage.

THE CHAIRMAN: I am not sure it would be right to say that we did not think it merited a comment. I would prefer to say that we just did not comment on it.

MR. VAUGHAN: I prefer that way of putting it for obvious reasons. Basically we say that the product market and the market definition were critical questions to the whole result of the Tribunal matter and the OFT accepted that we were playing first fiddle or separate fiddle – they tried to put us down as a discordant or atonal figure in that analysis.

The point my friend made that they were not aware that we were using economists in this way just does not bear analysis. The original oral hearing that we had prior to the Rule 14 Notice, Price Waterhouse attended; and it was very clear from the Notice of Appeal itself that we were not relying upon a separate report, but we were relying upon the economic contributions that were contained in the Notice of Appeal.

I think my friend eventually accepted rather than stonily that he starts off from the basis that the successful appellant is entitled to his costs subject to any reductions. That seems to be the practice and indeed that is the whole basis upon him accepting that he is liable for RCA's costs subject to a reduction. The only question here is what reduction, if any, should be made against BHB for the points that my friend makes. We say that there should be no reduction at all; or, if there is a reduction, it should be done on assessment rather than applying some sort of arbitrary figure at that stage, however carefully it might be thought to be.

THE CHAIRMAN: That does not really meet the point, does it, because the costs judge is not going to be in a position to make a value judgment about whether you should or should not have devoted costs to certain issues which we did not rule upon, for example. He can only make judgments on whether the costs which have been incurred in relation to matters properly in issue were reasonably incurred or not. I think Mr. Thompson is probably right that if any relevant steer is to be given as to whether any costs need, in principle, to be disallowed it must come from us.

MR. VAUGHAN: I would adopt a different position in my submissions on that. It is much better to leave it to that stage. Also if there is to be a steer, as it were ----

THE CHAIRMAN: Are you saying that all these arguments should be rehearsed before the costs judge?

MR. VAUGHAN: Yes. In fact, if one looks at the whole matter ----

THE CHAIRMAN: That would not be usual, would it, Mr. Vaughan?

MR. VAUGHAN: If somebody wins on his issues, as it were, and the other side does not win on those issues – I can entirely accept that if somebody raises issues which he loses on, or the other side succeeds on, then it is an appropriate matter to be dealt with. If one raises points which the Rules require one to raise – i.e. all the points that might be eventually raised and relevant – it would be a bit difficult to say that those matters should not have been raised in that situation.

THE CHAIRMAN: It does not follow that they should not have been raised, it is a question of whether it is reasonable that the losing party should pay for the cost of raising them. There are two different questions.

MR. VAUGHAN: If you take a decision that, in our submission, is so fundamentally wrong, as you have found in this matter, that the OFT has not sought to challenge that in any way, you start from a basis that the costs should be paid subject to them being reasonable and proportionate in that situation. In our submission, it would be wrong to make some sort of reduction for the fact of being second fiddle when on some of the issues we were first fiddle and sometimes we were the only fiddle in that situation.

We submit that there is very little duplication indeed. In the Notice of Appeal obviously both parties have to set out their case separately. We were careful to ensure that we did not go through the whole factual analysis of the negotiations which RCA knew and we did not know the detail of the detailed negotiates, and the detailed negotiations formed quite a significant part of their case.

On legal costs our costs are virtually the same as the RCA costs in this matter. They are both about £600,000 for the legal costs. Nobody suggests that that should be reduced for the RCA to take anything into account other than the 10 per cent. In our submission, there is no basis at all for reducing our £600,000 legal costs other than on assessment.

The more dramatic attack is on the economist where the argument tends to be that it is wrong for these fees to require the OFT, or it is wrong to require the OFT to pay anything more than they have agreed, subject to assessment, should be paid to the RCA economists. It is only necessary to look at the Notices of Appeal, look at the whole conduct of the case, to see that we were essentially running an economic case and that RCA were running a factual situation in that situation. That is over-simplified but it is not far out from the truth. In our submission, the economists' costs should not be only granted to the extent to which RCA used the economists in a particular matter, particularly when no doubt the OFT used their economists constantly throughout the case in various matters. No doubt, if they had succeeded, we would be asked, if they used outside economists, to pay for economists in that way, but we do not know whether they did or not.

If there is to be a reduction on the lawyers or on the economists with some sort of steer, as it were, given, we would say that as regards the lawyers there should be no reduction at all, that all the costs were reasonable, subject to assessment of course. As regards the economists, if a steer is to be given, a steer of only 10 per cent of the incurred is much too draconian. It does not represent the amount of contribution of the economic arguments of BHB, as contained in its various pleadings and its answer to Professor Bain's questions and its various written submissions and its reply and should not be reduced by anything like that amount. It is obviously inappropriate to suggest a figure, but we would say only a small reduction by way of steer would be appropriate.

I think those are the main points. My friend said a lot of our arguments were not germane. In our submission, "germane" is not just the hearing here but the later part. If you had been in favour of the OFT in any of the factual or economic based matters then some of these other matters would have become relevant, or could have become relevant either here or in the Court of Appeal.

Duplication: in our submission, there is very little duplication after the Notice of Appeal in these matters and indeed we all worked very hard to avoid it. In the Notice of Appeal we worked hard to avoid duplication in this matter.

As regards proportionality, although I entirely accept that the sums claimed are high, it represented what, in fact, was an extremely complicated piece of litigation. It is of vast importance to the parties. If the whole matter had not ceased, if the ATR had not abandoned this whole scheme in the way that they did, it represented a very significant amount of money to racing generally, available to prize moneys, to owners and all the battlers in this matter. It is a matter of great importance to the principle, not only to racing but also to sport in general. These are complicated matters. The economics were complicated, the law was complicated and the facts were complicated, and in our submission the legal costs were wholly appropriate, subject to assessment on detail. The economists, we say that either the whole lot subject to assessment or a very substantial part would be appropriate. To say that the PWC related costs should be treated in the same way as the two reports on which the RCA rely does not take any proportionate account of the work that was done by the economists in that way. Proportionality works both ways. It does not, as it were, drag down, it is just a test to see whether it was reasonable in all the circumstances of this particular case to incur the costs. It is proportionality but it is not equality in that way. Even if it were equality it takes into account the objective differences that might be there.

Those are my submissions, sir.

THE CHAIRMAN: Thank you very much, Mr. Vaughan. We will retire to discuss the arguments. Whether we will give a Ruling on this today or not is something that we will discuss, but we will report back by one o'clock with what we are going to do.

(Short break)

THE CHAIRMAN: As the financial gulf between the BHB and the OFT is something in the order of £600,000, we take the view that the issue we have to decide is too important to both sides for us to give an immediate ruling on that matter which we, in any event, want to consider further.

The issues as between the RCA appellants and the OFT are rather narrower, but we propose to reserve our judgment on that as well and give one composite ruling, since our ruling on one may have an impact on the other.

Accordingly, we will give our decision in writing on both applications for costs and we will hope to do that as soon as we can.

May I thank you all for your respective arguments.