IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1078/7/9/07

Victoria House,
Bloomsbury Place,
London WC1A 2EB

30 January 2009

Before:

LORD CARLILE OF BERRIEW QC
(Chairman)

Sitting as a Tribunal in England and Wales

BETWEEN:

THE CONSUMERS' ASSOCIATION

Claimant

- v -

JJB SPORTS PLC

Respondent

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*Transcribed from tape by **Beverley F. Nunnery & Co.***
Official Shorthand Writers and Tape Transcribers
Quality House, Quality Court, Chancery Lane, London WC2A 1HP
Tel: 020 7831 5627 Fax: 020 7831 7737

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HEARING ON COSTS

APPEARANCES

Mr. Nicholas Bacon (instructed by Clyde & Co. LLP) appeared for the Claimant.

Mr. Paul Lasok QC and Mr. Ben Williams (instructed by DLA Piper UK LLP) appeared for the Defendant.

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THE CHAIRMAN: I thought before we get going there are one or two things we should mention if you do not mind. I am mindful that this hearing is taking place in open court, and that a transcript of the hearing in the usual way for this Tribunal will be produced and will be published on the Tribunal website. I am concerned that none of us should say anything in court today which we would not wish to be released into the public domain, given the confidentiality that there has been to date. I am thinking in particular of the figures that have been mentioned in correspondence and indeed in the skeleton arguments, both in relation to the amount of costs incurred, or claimed, and the amount that has been set aside under the settlement agreement, and the amount actually claimed so far to date.

Plainly, it would be easier for the Tribunal if we were able to refer openly to all of the figures, or at least to approximate values, but before we proceed along that course I will hear what the parties have to say on the matter and, if necessary, we can adopt algebraic formulae though the margin for error with algebraic formulae in court in my experience is extremely large and inadvertence leads to mistakes.

I understand that neither the total amount set aside for the settlement to date, nor the amount claimed by consumers to date referred to in para. 9 of the defendant's skeleton are in the public domain. Could I ask you, Mr. Lasok, first, does your client object to those figures being referred to in open court.

MR. LASOK: I am just trying to check, clause 2.1 of the settlement agreement, depending on which bundle the Tribunal has got is either the defendant's bundle tab 1 or it is the claimant's bundle 2 tab 7, but clause 2.1 which I think is probably the fourth page of the settlement agreement, at the bottom it says that:

> "The Parties are entitled to issue separate press releases recording the fact of a settlement being reached, the fact of payments to the current claimants and the amounts paid to the current claimants and the availability of further settlement moneys ... but not the total amount of the further settlement moneys."

So as I read it there is no confidentiality concerning the amount that has actually been paid.

THE CHAIRMAN: But there is confidentiality over the total fund?

MR. LASOK: There is over the total fund, yes. So far as the question of costs is concerned I am just seeking instructions from those behind me. (After a pause) I think the answer is that we are not sure.

THE CHAIRMAN: It is not in the public domain as yet, that is for sure.

MR. LASOK: It is not in the public domain. My learned friend, Mr. Williams, points out that if we go to clause 2.10 I think it is of the settlement agreement which is at p.6, that says that

nothing in the settlement agreement prevents the parties from disclosing the fact that the defendant has agreed to pay and will pay reasonable costs but of course if you look at 2.11 there is a further provision concerning the settlement monies or further settlement monies.

THE CHAIRMAN: It is a very carefully drawn settlement agreement but 2.11 is slightly ambiguous, is it not?

MR. LASOK: I think that relates to the amounts that were set aside and any additional amounts that would be set aside. It does not relate to the sums actually claimed. If you go to clause 1.1 for example, on the third page of the settlement agreement, you will see that 1.1 refers to the settlement monies, which is a particular sum and then 1.3 refers to the further settlement monies, which would be further sums of money, but those amounts are confidential but – and I am now going to utter it – the £21,000 or so that has actually been paid is not a confidential amount.

THE CHAIRMAN: Is that an up to date figure, because it may be somewhat historic now. It is in para. 9 of your skeleton but that is a little historic.

MR. LASOK: So far as we know the £21,000 is a ----

THE CHAIRMAN: It is a ball park figure.

MR. LASOK: Well it is what it was at that stage. It may well be that you could say "of the order of £21,000" or a similar phrase. Again, reverting to the question of costs the costs' figures, so far as I am aware, are not in the public domain, those behind me do not know whether they would regard our costs' figures as being confidential, but let us proceed on the basis that they are.

THE CHAIRMAN: I am simply drawing it to counsel's attention, because the Tribunal does not want to be the guilty party in breaching confidentiality, and I know that you will all, all three of you, stop me at once if I do anything that appears to be breaching confidentiality. I just thought it right to draw to your attention that there is this problem and you will deal with it in the way you think fit. Do you want to add something, Mr. Bacon on this.

MR. BACON: First of all, thank you for your observations. We broadly agree with the caution, Sir, that you exercised. There is one other clause, it does not add a great deal but for the purpose of fullness you will have seen clause 7, which is the subject clause, so that subject to clause 2, which we have already looked at, all the circumstances surrounding the settlement, and the terms are to be kept strictly confidential, which would on the face of it suggest that my learned friend is right when he describes his costs as being subject to confidentiality; we certainly do on our side.

THE CHAIRMAN: We have ventilated the issue and it really is up to counsel to decide what language you use and what you reveal.

MR. BACON: Indeed.

THE CHAIRMAN: I am sure that between you, you will have no difficulty over this, but as long as we have it in mind.

MR. BACON: Sir, can I turn then, unless you have any other observations to add ----

THE CHAIRMAN: I was just wondering who was going to start, actually.

MR. BACON: Well I was intending to, but I am happy of course, for my learned friend to start – I am in your hands.

THE CHAIRMAN: It struck me that this is a situation in which the claimant is entitled for costs to be assessed. The claimant has applied for the costs to be assessed, and the defendant has asked that the costs' assessment be transferred to the Supreme Court Costs' Office, so really in reality what we have here is Mr. Lasok's application for the costs to be referred to the Supreme Court Costs' Office for detailed assessment. I do not mind in the least, it struck me as possibly logical for Mr. Lasok to start, but if you have agreed otherwise between you I shall sit reasonably quietly.

MR. BACON: We have not agreed anything, but I am entirely in the Tribunal's hands, and we are more than happy.

THE CHAIRMAN: Do you want to think about it for a moment between you?

MR. LASOK: No, certainly, Sir, because as the Tribunal is aware there is this issue concerning whether it should be a summary or a detailed assessment of costs, and that gets into a rather convoluted debate which has a preliminary point associated with it, namely whether or not the claimant can actually advance the submission that there should be a summary assessment, bearing in mind that there is a contract between the parties which takes the form of the settlement agreement under which both parties have, in fact, agreed that the matter should be the subject of detailed assessment. It is common ground between the parties that the matter has to come before the Tribunal, that is pursuant to the order. Our submission is that that the detailed assessment ought to be transferred to the SCCO, and in accordance with the Tribunal's preference I will make that submission. If my learned friend in response wishes to raise this question of summary assessment, I think it is only fair to lay down a marker at this stage which is that before he gets to that point the Tribunal would have to be satisfied that it can actually hear him on it and I would want to make submissions on that should it be raised by the claimant.

So pausing there, and moving on to the question of detailed assessment, and whether it should be conducted by the Tribunal or by the SCCO. The starting point perhaps is to make an observation about the terms of the relevant rule in the Tribunal's Rules. I do not know whether you have the purple book?

THE CHAIRMAN: I have.

MR. LASOK: If you go to p.1266, the real page number is 313, but as the Tribunal knows it is really paragraph, the bit in bold in the top right hand corner of the page.

THE CHAIRMAN: I have p.312-3, Rule 55.

MR. LASOK: If you could go to Rule 55(3), the way it is phrased is that:

> "Any party against whom an order for costs is made shall, if the Tribunal so directs, pay to any other party a lump sum by way of costs, or all or such proportion of the costs as may be just. The Tribunal may assess the sum to be paid pursuant to any order under paragraph (1), (2) or (3) or may direct that it be assessed by the President, a chairman or the Registrar, or dealt with by the detailed assessment of a costs officer of the Supreme Court ----"

What has happened is that when one looks at the phraseology of that Rule, it suggests that in a case of detailed assessment, the assessment is to be carried out by, I will call it the "SCCO". In fact, when one looks at my learned friend's skeleton argument, and I think it is the last page of the substantive part of the skeleton argument before you get to the annex, para. 15(iii), the top of the page, the submission is this:

"… the reference in the Rules (r. 55(3)) to the words 'detailed assessment' is only used in the context of an assessment before the SCCO. The rules do not recognise the process of 'detailed assessment' in respect of assessments by the Tribunal"

That is one reading of rule 55(3). In other words that rule 55(3) does not actually give the Tribunal a choice in the matter; detailed assessment is something that is to be carried out by the SCCO. We do not disagree with that interpretation of the Tribunal's Rules. That, of course, leads inevitably to the conclusion that as, as we submit, this is a case for detailed assessment, then it should be carried out by the SCCO.

THE CHAIRMAN: When you are saying "should", you are saying "must" actually?

MR. LASOK: "Must", yes. If and to the extent that the view is taken that there is some discretion as to forum, the defendant would make the following submissions in support of the proposition that that discretion ought to be exercised in the form of a reference of the detailed assessment to the SCCO. The reasons are essentially these: first, the SCCO is skilled in detailed assessment; secondly, that this Tribunal was formed in order to perform

an important judicial function in relation to the application of competition law and the Judicial Review of regulators. That is why this Tribunal has been given the resources that it has got. It has not been given those resources for the purpose of devoting them to an exercise here, detailed assessment of costs for which a specialist body exists.

THE CHAIRMAN: So what you are saying is the Tribunal is in effect a creature of the High Court?

MR. LASOK: It is not a creature of the High Court technically, it is a creature of Statute.

THE CHAIRMAN: Yes, but it operates as, in effect, a Division of the High Court with a specified jurisdiction, and that if it had been intended that the Tribunal should carry out detailed assessments of costs we would have had our own costs' judge in effect, that is roughly it, is it not?

MR. LASOK: That is roughly it, and when one looks around the court and tribunal system in this country we see constantly courts and tribunals that have a particular expertise. So, for example, in the Chancery Division of the High Court, we see that there is an intellectual property speciality. We see various other specialities. In the Queen's Bench Division we see the Administrative Court. Outside the High Court we see specialist tribunals, and the one I am going to mention is the VAT and Duties Tribunal because that is a particularly good example since it is a Tribunal with a specialist fiscal jurisdiction, but it is also a Tribunal which, because of the origins of VAT in European Community law, is a jurisdiction that from time to time does have to grapple with state aid issues, distortion of competition issues in the fiscal context. So, we have, all around us, specialist courts and tribunals and, in our submission, their primary function is to decide those specialist questions of law. In relation to each and every one of them, although they have a jurisdiction, not merely to award costs, but also to assess them, it is ordinarily the case that any detailed assessment of costs will be conducted by the SCCO, which is, in turn, the specialist body to determine that kind of issue.

So, for example, in a case before the VAT and Duties Tribunal which, by definition, would be a case involving technical questions of fiscal legislation and might, as I have said, give rise to technical questions concerning state aids and distortion of competition, it would be simply ridiculous to submit to the VAT Tribunal that it should carry out a detailed assessment of costs. The Tribunal would simply refer the question of detailed assessment to the SCCO, and then get on with the performance of the specific technical function that was entrusted to it by legislation.

So, in our submission, to summarise, we have a situation in which on the face of it Rule 55(3) effectively directs that in a case of detailed assessment the matter must be conducted by the SCCO, but even if there were some discretion, a proper exercise of that discretion points in the direction of a reference to the SCCO because of the particular reason why this Tribunal was created, and because, of course, of the particular expertise of the SCCO.

THE CHAIRMAN: What about this: this is the first, and, so far as I am aware, the only case to have been brought so far under s.47B of the Competition Act as amended by the Enterprise Act 2002. This specialist Tribunal, as it happens, has a lot of experience of the assessments of costs in competition cases, and has assessed costs fairly routinely. It might be said that therefore this Tribunal actually has far more expertise in this class of case than the SCCO. I think that is a point that Mr. Bacon puts quite clearly in his skeleton. What do you say about that?

MR. LASOK: The first point about that is that one can well understand that a tribunal which actually dealt with the case may have a more direct feel for the appropriate assessment of costs arising from that case. This did not happen here because although proceedings were commenced in the Tribunal, right at the outset they went off to ADR and they never came back to this Tribunal until the consent order -- It is not technically a consent order - it is really an order enabling the complainant to withdraw the action that it had brought on the basis of the settlement agreement. So, what we actually have is a situation in which most of the costs, one assumes, would have been created in connection with something that was the subject of ADR, not the subject of a contested proceedings or contested hearing in front of this Tribunal. That turns the balance against, we submit, a detailed assessment being carried out by this Tribunal.

Another point that needs to be made is that it is accepted by the claimant that a detailed assessment would require something of the order of five days. That is just the five days of argument. That is not an estimate that we disagree with - although I think we put it as five to seven days after the normal preliminary exchanges between the parties, designed to identify the areas of dispute. That, in our submission, is something that ought to be factored into the exercise by the Tribunal of its discretion, always assuming that it has got one under Rule 55(3). Is it actually a proper use of the resources of the Tribunal in circumstances in which its primary function is to do something else, and in which there actually is a specialist body - the SCCO - which is actually in existence specifically for the purpose of doing exactly that job. Putting it colloquially, it is a case of horses for courses. One can well see the Tribunal assessing costs in a relatively simple case when it has got first-hand and direct experience of

the conduct of the litigation before it. But, it is altogether different when the Tribunal is being asked to devote a significant amount of its time and resources to an assessment involving a case in relation to which it has had no involvement.

Those are my submissions. What I propose to do is to respond to my learned friend's submissions that he makes, rather than seek to anticipate them at this stage. Unless there is anything further I can assist the Tribunal on, that is our case on the transfer of the detailed assessment to the SCCO.

THE CHAIRMAN: Thank you, Mr. Lasok. Mr. Bacon?

MR. BACON: May it please you, sir, the underlying submissions that were made by my learned friend really developed two lines of argument. If I may say so, they are both as astonishing as the other. The first is one of competency apparently. The second, which I deal with first, is one of jurisdiction.

On the jurisdiction point, my learned friend appears to contend that through a disingenuous application of para. 15 of my skeleton argument, taken together with supplementary submissions by my learned friend himself this morning, suggests that the Tribunal does not in fact have jurisdiction to conduct a detailed assessment. Can I put 'detailed assessment' in parenthesis because it is not a term that is understood by the Tribunal other than by reference to the CPR process of detailed assessment. There is a distinction, which I will come to. He is saying that the effect of Rule 55(3) is that a detailed assessment can only be carried out by a Costs' Officer of the Supreme Court. That is not what para. 15(iii) says in our skeleton argument. In my submission the Tribunal plainly does have the jurisdiction expressly to assess the costs that are payable in this case. You can call it detailed assessment. You can call it summary assessment. You can call it assessment. It is a process of assessment, whether it be an item-by-item assessment, or otherwise. The words 'may assess' inevitably must include a process of assessment, whether it be by way of detail or some other quicker form of summary assessment. Rule 55(3) plainly bestows up the Tribunal by the words, "The Tribunal may assess the sum to be paid --"

THE CHAIRMAN: Forgive me for interrupting you. It might be of some help to me if you could answer this: What does the word 'lump' add to Rule 55(3)? Is there a contrast to be drawn between the phrase 'lump sum', or is a 'lump' and 'sum' simply a tautologous phrase, or is 'lump' just an unnecessary word? Sorry. I interrupted my own sentence. Is there a contrast to be drawn between 'lump sum' and 'detailed assessment' because 'lump sum' seems to imply that it is a sort of ball park figure which is an instinctive judgment of what the right sort of sum is for costs as distinct from, or contrasted with, detailed assessment.

MR. BACON: In my submission it is contrasted, but it does not exclude the process of assessment because the paragraph which you are reading uses the words 'pay to any other party --' Sorry.

> "Any party against whom an order for costs is made shall ... pay to any other party a lump sum by way of costs or ----"

So, the Tribunal has a very wide discretion to either order a lump sum by way of costs or to order all or such proportion of the costs as may be just ----

THE CHAIRMAN: There is that contrast plainly, as you have agreed. At first blush, reading that paragraph it might be said that 'the lump sum, or all or such proportion as may be just' is directed at the sort of case where there may be a claim. Let us take an entirely hypothetical figure that has no connection with this case. Say there was a claim for £25,000 costs. I have been faced sitting as a deputy in the Administrative Court with a claim for £10,000 costs - a narrow dispute between, in that case, £10,000 and £7,000. Well, 'making an assessment of such proportion as may be just' is a very easy task because basically the proposition that is made is that they wrote a few too many letters, or something. But, where one has a dispute between (we will call it) A and B, and B is less than a 50 percent percentage of A, that is not the lump sum exercise, is it? That is something requiring detailed assessment.

MR. BACON: Or some form of assessment. In the context of the Administrative Court there could be a summary assessment, for example.

THE CHAIRMAN: Yes, I have done that.

MR. BACON: So it is a form of assessment. That is my point.

THE CHAIRMAN: But, in this sort of situation Mr. Lasok and Mr. Williams are saying, I think - and he will correct me if I have misunderstood them - that there is such an enormous difference between A and B that it does not lend itself to 'lump sum' or 'such proportion'. The only way of assessing it is going into the finer detail as set out in these files.

MR. BACON: In my submission the parties have agreed, clearly, to an assessment. The issue for the court is the nature of that assessment. What we are seeking to bestow upon the Tribunal is to ensure that the Tribunal leaves open - not only for this, but for other cases of course - the fact that it has a discretion to assess costs in a way which is proportionate to the case, which is not confined solely to some forensic lengthy, detailed assessment - that it has the jurisdiction by way of assessment to do some other form of assessment of the sort that we have advanced in our skeleton.

So, when you read Rule 55(3) you come away with the following: Yes, the Tribunal has the discretion to make an order for a lump sum by way of costs; Yes, the Tribunal has the

discretion to make an order for a proportionate part of the costs; Yes, the Tribunal has a discretion to assess the sum - in other words, a sum which is neither of the first two options. What the Rule goes on to say is to direct that the costs may be assessed in fact by the Tribunal or by detailed assessment by a costs' officer. In my submission the detailed assessment by a costs' officer, the words "detailed assessment" are used because they are defining the process of assessment that costs' officers undertake; it is not by any means narrowing the effect of the rule.

THE CHAIRMAN: As a relatively familiar legislator as well as litigator my mind takes my back again to those two words actually "lump" and "detailed", why are they there at all? If you are right, and there is simply a discretion to be exercised judicially in a broad judicial way, if the word "lump" was excised from the paragraph, and the word "detailed" were excised from the paragraph it will make absolutely no difference whatsoever, they are superfluous on your interpretation, are they not?

MR. BACON: No, they are not because the rule itself is delineating and explaining by way of the rule the different forms of assessment that can take place. One is by assessing a lump sum, one is by ordering a detailed assessment, and one is by assessing the costs other than by way of a lump sum, it is an extremely broad, deliberately bestowed discretion. If, Sir, you were right, I may say so, with respect, the rule would say: "The Tribunal may order a party to pay the other party a lump sum which shall be assessed by the Tribunal [full stop]" Any other assessment shall be remitted, it will be plainly straightforward and simple to confine the rule, if that were its intention, in that way, but the rule makers have deliberately expressed, for obvious reasons in my submission, a broad discretion by way of example in the rule as to what the Tribunal's jurisdiction is. The words "the Tribunal may assess the sum to be paid" is different to "may order a lump sum."

THE CHAIRMAN: Yes, but what is the purpose of the words in regulation 55(2), "subject to paragraph 3". Paragraph 2 seems to set out a very broad discretion, but there is a proviso, it is subject to para.3. What is the effect of that proviso?

MR. BACON: Because paragraph 2 is the stage dealing with the discretion that is to be exercised by the Tribunal in awarding costs. So, for example, a party gets all of its costs subject to assessment, subject to reasonableness, or 50 per cent of its costs subject to reasonableness. So it is a proportionate order, it is the first stage of the process, which means it has to be subject to (3) because (3) is the process by which the quantified element, unassessed, is to be assessed, so it allows the Tribunal to exercise a discretion, to take account of conduct, as sub-rule (2) says, but at the same time ensuring that the proportion, if it is going to be a

proportion, for example, is subject to assessment so that it is reasonable, because only reasonable costs, according to 55(1) are payable. So that is the answer to that.

In my submission you have a regime deliberately broadly expressed bestowing upon the Tribunal discretion to assess costs; it is as simple as that. It can do it in a number of different ways, by ordering lump sums, provided they are reasonable, or by quantifying the costs by a form of assessment. It would be rather odd if the Tribunal were not bestowed with that obligation given indeed the examples my learned friend referred to earlier on.

Other Tribunals of similar jurisdiction have the same assessment powers, and in no case that I am aware of, certainly, has it ever been said that actually they do not have the jurisdiction to assess costs by way of detail.

THE CHAIRMAN: Could I just refer back to you paragraph 15(iii) and let us forget the adjectives at the moment with which you describe Mr. Lasok's interpretation, let us just make an observation about it. Am I right in the observation that in para.15(iii) you accept that if it is the view of the Tribunal that there should be a detailed assessment of the costs then that has to be done by the SCCO?

MR. BACON: No, that is not what 15(iii) is saying. 15(iii) in the context of the question which 15 raises, which is: what is meant by the words "detailed assessment on the standard basis within the settlement agreement"? The words "detailed assessment" are not confining the jurisdiction of the Tribunal in any way; it is simply describing the process that takes place before a costs' officer if the matter is referred to a costs' officer.

THE CHAIRMAN: Well a skeleton argument is not a pleading so I am perfectly prepared for you to highlight what you mean even if that is not necessarily what is said.

MR. BACON: That is what is meant, so what I was saying in 15(iii) was that the words "detailed assessment on the standard basis" actually add nothing to my argument about the jurisdiction of the Tribunal, it is simply descriptive of the process that does take place in fact before a costs' officer, it is not excluding the ability of the Tribunal to conduct detailed assessment. It would be extraordinary if it were the effect of that because the rule itself would make that clear in my submission, it would not use the words "may assess" for example. The words "may assess" is a very broad, deliberately stressed word in the third line of costs sub-rule (iii).

My learned friend relied in terms of competency, I think, which is the other limb of the submissions, of citing examples in other Tribunals. My experience, if I may say so with respect, differs from my learned friend. I have actual experience and known experience of the VAT and Duties Tribunals assessing costs on a detailed basis. There are arguments

before the Tribunal fairly regularly as to whether the Tribunal should assess costs in a particular case. I accept that sometimes they are remitted off. I also submit that in other cases they remain with the Tribunal, sometimes very complex – I can think of one I know under carousel fraud cases. The Employment Tribunal is another, they assess and quantify costs themselves. They can also send it to the Costs' Office, there is a similar jurisdiction, but they do not decline detailed assessments for some jurisdictional point, and the Lands Tribunal similarly. My instructing solicitor has personal experience of detailed assessments taking place in the Financial Services and Markets' Tribunal, detailed assessments. If one thinks about the process of assessment in a wider context, as I have said in the skeleton, I think somewhere, arbitrations – big large commercial arbitrations – the parties have the ability under the Arbitration Act to have assessments by the court, but similarly arbitrators do undertake – and again one has personal experience of this – substantial detailed assessments in the confines of arbitration proceedings. I can think of one which I was in, a shipping arbitration, where the arbitrator embarked on arbitrations.

So it would be rather odd, indeed it would perhaps be concerning if the Tribunal were to accept a submission that notwithstanding what I have said actually this particular Tribunal does not have the jurisdiction to undertake some form of detailed assessment, you call it a term of art – some sort of assessment by way of detail, that would be a surprising conclusion for the Tribunal to arrive at and one which, in my submission, they should arrive at very carefully because you are immediately divorcing yourself from a process of assessment which has customarily occupied the minds of other Tribunals.

Jurisdictionally this Tribunal does have the jurisdiction to undertake an assessment which involves some form of analysis of the work done – however you want to describe it, detailed assessment or whatever.

Our submissions are, as you know, Sir, that there should be some form of assessment process convened in this Tribunal which, in a sense, is potentially a midway house between the convoluted, expensive, lengthy – and my learned friend's Junior will no doubt not disagree with the description I have given in terms of large cases – that takes place in the costs' office sometimes, and in some form of other assessment process which the Tribunal can itself convene within the confines of the rule to sensibly quantify the costs in a shorter, quicker way. I am not saying over the course of an hour – we have suggested, for example, a day, but it may be, say, two days – but something other than this lengthy process of assessment where we all disappear off to another court and have to rehearse the detail of the arguments in terms of the substance of the case before a Tribunal that has very little (if

one is lucky) or no experience of this sort of work, and then to justify the work that has been done against that ignorance. It will be far more sensible, in our submission, for the court under its wide powers of Rule 55(iii) to say that it does have the jurisdiction and it will convene a form of assessment, perhaps adopting a similar sort of process – they have already done some points of dispute as you have seen; we can do a short reply. You will be surprised and, of course, you will know from your own experience how judges are well able, in fact, when it comes down to it, to sort the wheat from the chaff and get through these sorts of processes with some relative ease. They are not that difficult

It is right to say, of course, that the Supreme Court Costs' Office is there to assess costs, but it does so, obviously because it is specialised, but its purpose, of course, is to draw cases out of the High Court because otherwise judges in the High Court would be spending their time assessing costs rather than dealing with cases.

When it comes to Tribunals, when you are comparing the work load of this Tribunal for example, to the work load of the Queen's Bench Division and the Chancery Division and Commercial Court, one can see the force of an argument in my submission that this Tribunal should, in fact, use its own resources to carry out the process of assessment, rather than burdening the SCCO with its work. It is a matter of policy which of course I will not say more on, but it seems to me it is a relevant factor for you to consider.

Indeed, being a novice in this Tribunal, as you will know – unlike my learned friend – I see from the Rules themselves that one is required to take into account saving expense and utilising the court's resources and so on in terms of what is seeming the overriding objective. But these are factors which, in my submission, are relevant to the court's discretion today as to what it does with this case.

Lastly on jurisdiction, I do say, with respect, and I may be completely wrong, but it seems to us on this side that it would be a significant move if the Tribunal were to conclude that it does not in fact have the jurisdiction to have some form of detailed assessment of the sort that we contend for.

Moving on then to the second limb of my learned friend's submissions, which is the competency. I have touched on some of those arguments as you will have heard and seen from my written submissions. Our position is quite different from my learned friend's. This Tribunal is, in my submission, much better placed to quantify the costs that have been incurred in this case. I did my best over the last few days to read in some detail the pleadings in the case and to some extent read into some of the law. That obviously provides some limited insight into the nature of the work that has to be involved in order to

prosecute or defend a case of this sort, but of course from the Tribunal's point of view this is its bread and butter, it knows from the outset what is involved, far more than a costs' judge would ever know and I say that with the greatest respect to the costs' judges and the SCCO ----

THE CHAIRMAN: Well we are all in virgin territory here, are we not? This is the first case (and the only case) brought under s.47B, in fact the Tribunal has not had to give Judgment in this case because it was withdrawn and taken to ADR, which is highly commendable, so we are in exactly the same position as the costs' judge.

MR. BACON: Well there is a very big difference – of course you are in the same position in the sense that they have not had a s.47 Competition Act assessment, but this Tribunal has enormous experience of the nature of these claims, and the nature of the issues involved, and the substance of the legislation and so on, which the costs' judge does not have.

THE CHAIRMAN: Well we have obviously anticipated the possibility of claims under this Act, and I as Chairman of this particular Tribunal read the foundation papers that were made available before the case was removed to ADR, and have a reasonable background knowledge of the case. How far that takes one into having greater expertise in this type of case than the Supreme Court Costs' Office I am not sure.

MR. BACON: It will, in time, be discovered because the process of assessment largely involves, of course, looking at what has been done and deciding whether what has been done was necessary and reasonable. Against the background and the knowledge of the legal issues in the case -- the legal complexities of the competition law generally and the processes involved you are in a much better position to judge the actions of the various matters than the costs judge.

THE CHAIRMAN: But this is a very atypical case for this Tribunal, Mr. Bacon, is it not, because it is the first time that this Tribunal has had a s.47B case. It is the first time, so far as I am aware, that any jurisdiction - and I may be wrong about this - has had a case in which the process of acquiring individual claimants was done by a website exercise. It is the first time in which a case of this kind has been subject to ADR and the whole background of correspondence, the kind of work required to be done, and so on, at this stage is unique. There might be an argument for saying that the Tribunal would actually be assisted greatly by an assessment being made in detail by a costs judge to guide us for the future with their specialist expertise, which may be greater than our own in this area.

MR. BACON: In my submission actually it is looking at the point the other way round. In my submission, given the expertise of this Tribunal, it would be almost perverse to say that

because it is such a unique, odd, strange, difficult case that therefore the Tribunal who specialises in this particular area, albeit not directly on the facts, should therefore send it off to a less experienced Tribunal. That, seems to me, in my submission, the wrong way of looking at it.

There is an alternative which is potentially available. I do not know what the position is of the Tribunal. There are occasions when a costs judge will sit with a tribunal as an assessor. Now, that may be a possibility in this case if, as we suggest, the court should retain jurisdiction over the case. But, that is something which I am afraid I cannot really add to. It is something which the Tribunal itself may have to make inquiries of the Costs' Office. There are specialists who sit as assessors in court proceedings.

In my submission, the points that you raise, sir, are actually points in favour of the Tribunal keeping the case because of its specialised jurisdiction in these matters.

Sir, you have my arguments in para. 14, which I am not going to rehearse orally because you have them in writing. Unless you wish me to do so it seems rather pointless. I take it you have got those.

THE CHAIRMAN: There are very helpful skeletons in this case, and you go into detail on the merits as between summary assessment or, let us call it, semi-detailed assessment and costs judge in para. 14.

MR. BACON: Yes. In my submission, the Tribunal should not be shy from advancing this argument by assessing the costs in a way which suits the case appropriately. So, one would not be confined to what used to be called a detailed assessment or a summary assessment. It just has to assess the costs. Of course, it can use the model of either to assist the Tribunal in the approach it will take. But, what we submit is that the Tribunal should take an approach which is a quicker, shorter, simpler process than would otherwise be the case in a detailed assessment in front of a Costs' Officer. The Tribunal has the jurisdiction to do that.

Provided the approach to assessment is a fair one, and giving the opportunity to both parties to make their points, it is well capable of being undertaken. The Commercial Court, for example, summarily assesses huge costs at the end of applications in the Commercial Court. They are becoming regularly concerned with quantifying hundreds of thousands of pounds worth of costs in summary assessments. Similarly with security for costs applications there is a form of process of assessment that the court is well able to apply and should not be sucked into some ethos of thinking that detailed assessment is actually the only real way of dealing with these things -- It is potentially a convenient way of dealing with things. I can see that. But, that may not be, in my submission, the most appropriate foundation for the

transfer of a case to the SCCO. The convenience of the parties is important. If the Tribunal has the resources to conduct some form of assessment - shorter, quicker, fairer - it should do so. It will be able and competent to arrive at an appropriate figure. That is possible undoubtedly.

THE CHAIRMAN: To what extent, if any, should the Tribunal take into account the possible disproportionality - it is certainly argued as a disproportionality - between Figure A and Figure B - A being the maximum amount of the settlement, the ceiling figure, and Figure B, being the amount of costs which is a multiplier of A, albeit taking into account the uplift which ----

MR. BACON: It should not have that issue in mind when deciding whether to transfer the case -- First of all, there are arguments both ways as to its relevancy at all in terms of the quantification of the costs. Secondly, it is not actually relevant to transfer that there may be an argument that one party wants to advance ----

THE CHAIRMAN: It is a process of assessment.

MR. BACON: It is a process of assessment.

THE CHAIRMAN: I understand the point.

MR. BACON: So, those really, sir, are my submissions on those points. You will see that we do submit, for the reasons I have given in writing, that the agreement in the settlement that there be a detailed assessment is not bestowing on us or the Tribunal some form of guillotine which prevents us from having an assessment in this Tribunal. My learned friend has not fully understood, in my submission ----

THE CHAIRMAN: Can we just have a look at the Agreement again?

MR. BACON: In our bundle it is behind Tab 7.

THE CHAIRMAN: It is para. 5.1 onwards, is it not?

MR. BACON: That is right.

THE CHAIRMAN: Just bear with me for a moment, if you do not mind. (After a pause): Mr. Lasok, I think, points to the second phrase of para. 5.1 and the way I think the Defendant would argue it has been carried through to para. 5.4? Is that right, Mr. Lasok? (After a pause): Yes. It seems to anticipate that if there is to be a detailed assessment it is going to be done by the SCCO.

MR. BACON: In our submission, first of all, para. 5.1 refers to detailed assessment on the standard basis without any reference at all to the SCCO. That does not answer the point one way or the other. Para. 5.2 adds nothing. Para. 5.3 does not inform the question either. In fact, para. 5.4 is a mechanism which suggests that an application will be made to the

Tribunal for a detailed assessment to be carried out. It is not conceding that a detailed assessment can only be carried out ----

THE CHAIRMAN: So, what you are saying is that an application can be made to the Tribunal for an SCCO assessment, but that leaves Rule 55(3) at large.

MR. BACON: Quite so. In my submission, that is consistent with the order that was finally drawn up with, indeed, the assistance of the Tribunal that (behind Tab 9) simply provides in para. 2 for an assessment. That must be an assessment ----

THE CHAIRMAN: I am not sure that para. 2 of the order adds anything whatsoever to this, does it?

MR. BACON: My point is that the order does not limit the assessment to the SCCO.

THE CHAIRMAN: Although it is not strictly a consent order - and there is, I recall, some correspondence about the nature of the order and whether it should be described as a consent order, I recall this particular point being referred to me administratively. The order merely reflects the agreement between the parties - hence 'upon agreement being reached between the parties' rather than 'ordered by consent'.

MR. BACON: Sir, yes. You have my point.

THE CHAIRMAN: I have your point.

MR. BACON: The order itself does not ----

THE CHAIRMAN: I have your point. I do not think anybody is going to dispute that the order does not add anything at all to this.

MR. BACON: Sir, those are my submissions. Can I just make one point I have been asked to make, which is that the fact that my learned friend seems to rely heavily on the fact that it settled early without the Tribunal's substantive intervention, it is a red herring. It does not add anything to the issue as to whether or not the Tribunal should accept jurisdiction to assess the costs. It is, after all, a case that did proceed in this Tribunal. It is a Tribunal case. What the court is going to be embarking on in terms of the assessment is the quantification of the preparation work in gathering the relevant material together to achieve the ultimate settlement. It does not inform the court one way or the other as to whether the court should remit either that the court has jurisdiction or, if it does, whether it should remit the matter off to the SCCO. It is just that you are looking at the costs for a certain period rather than for the entirety of a case. In fact, one might say that in a case that is one which was really concluded in a relatively short period, and was not really a very lengthy -- The Tribunal staff this morning who, I may say, have been very helpful to the novice advocate in this court ----

THE CHAIRMAN: Beware of Greeks bringing gifts!

MR. BACON: Well, you have days and days of hearings with a lot of parties. They might be the cases - the very, very big, huge cases - where the court may be more inclined to think, "Well, this may be one for the costs judge". This is not one of those cases.

THE CHAIRMAN: Actually, in most cases - and it may be just worth saying this to you - coming before this Tribunal in the round there is no order as to costs.

MR. BACON: Yes, I did notice that.

THE CHAIRMAN: Because of the nature of the Tribunal - the specialist nature as a regulatory Tribunal - it means that any application for costs here at all, in our ordinary competition jurisdiction, is keenly contested on the principle as to whether there should be an order. Members of the Tribunal - I mean, the members we, as chairmen, usually sit with - are very resistant to orders for costs being made.

MR. BACON: I understand that, sir. Of course, the rules themselves bestow the jurisdiction.

THE CHAIRMAN: I understand what you say.

MR. BACON: Those are my submissions, sir.

THE CHAIRMAN: Thank you. Mr. Lasok?

MR. LASOK: In my learned friend's submissions there were really two themes which emerged. The first was a suggestion that the kind of assessment that the Tribunal would be asked to carry out would not be limited to detailed assessment. My learned friend wandered from summary assessment to something that was neither summary nor ----

THE CHAIRMAN: A hybrid assessment.

MR. LASOK: A hybrid. The second theme was directed actually to the point that we are discussing at this stage today - which is the question as to whether or not an assessment - and, I might add, a detailed assessment - is to be carried out by the Tribunal or by the SCCO.

The first point - this question of the nature of the assessment - in our submission is completely irrelevant and wrong because the settlement agreement is expressed in the plainest of terms and the order made by the Tribunal was based upon, and intended to reflect, the Settlement agreement. Clause 5.1 of the Settlement agreement states in wholly unequivocal terms -- I do not know where the Tribunal has got it, but it was in the defendant's bundle ----

MR. BACON: It is in Tab 7 of the claimant's bundle.

MR. LASOK: Clause 5.1:

"The defendant will pay to the Association its reasonable costs to be either agreed or if not agreed to be subject to detailed assessment on the standard basis".

Now, there are two components there: firstly, detailed assessment; secondly, standard basis. The standard basis, of course, refers to the CPR. That is the agreement. The order made by the Tribunal proceeds on the basis of this agreement. Accordingly, there is simply no scope in our submission for any suggestion that the assessment to be carried out can be summary or hybrid. It actually has to be a detailed assessment on the standard basis.

One can extend that submission by pointing out that technically the application that was made by the claimant was for detailed assessment. There is extensive correspondence with the Tribunal in which they say that they are making an application for detailed assessment. This question of something other than detailed assessment arose in the course of correspondence when the claimants reacted to a letter from the Tribunal.

THE CHAIRMAN: Forgive me for interrupting you, Mr. Lasok. I just want to put this to you: Supposing that the Tribunal was against you on the jurisdiction point and were to hold that there is, in certain circumstances, a discretion to carry out (let us just use it as lay language at the moment) detailed assessment of a claim for costs. You would then be saying, "Right. Okay. But, this is not it. This is not that case because the level of detail is so high". Is that a fair summary of what you are saying?

MR. LASOK: That is correct, yes. But, at the moment what I am doing is addressing a point that my learned friend flirted with, which is this idea that what the Tribunal may have before it is something other than a detailed assessment. That is not so. It has to be a detailed assessment on the standard basis. That means that were the Tribunal to hold that it had jurisdiction and wished to exercise that jurisdiction so as to conduct the detailed assessment itself, it would have to carry out the exercise as 'a detailed assessment on the standard basis' namely, putting itself in the position of the SCCO. There is no alternative.

I now come to the gist of what really is the debate between the parties. My learned friend seems to have backed off the idea suggested in para. 15(iii) of his skeleton argument that on a fair reading of the rules, detailed assessment is not for the Tribunal - it is for the SCCO. Therefore, I will conduct this part of the argument by going to what my learned friend is saying. Now, what is he saying on the assumption that there is a discretion and that the Tribunal ought, as he puts it, to exercise the discretion to keep the case before it?

What he is saying is that there are features of this case that lend themselves to an assessment of costs on a detailed basis by the Tribunal rather than the SCCO. Now, there are two points really that have to be made about that. The first is, as I pointed out, that there

are plenty of specialist jurisdictions that do not engage in a detailed assessment of this nature, even though, *ex hypothesi*, they have an expertise in dealing with a technical case that the SCCO does not have. That raises inevitably the horrible question: Why is that so? My learned friend's argument would lead to the conclusion that the SCCO ought to be disbanded.

The reason why it is right and consistent with the public interest and the policy lying behind the creation of specialist Tribunals is that the primary function of a specialist Tribunal is to deal with specialist disputes which fall within its jurisdiction. Inevitably that means that in terms of an exercise of jurisdiction discretion the specialist Tribunal must consider whether it is best placed to deal with a detailed assessment of costs by comparison with the SCCO bearing in mind that its primary function is to deal with the specialist cases coming before it, and the SCCO's specialist function is to deal with detailed assessment. The logic -- the public policy lying behind the creation of the SCCO all points in the direction of an exercise of discretion in favour of the transfer of the matter to the SCCO unless the specialist tribunal, always assuming it has jurisdiction, feels comfortable that it is going to be able to deal easily with the assessment without that interfering with the exercise of its primary function.

That brings me now to the next aspect. What is the basis for asserting that the Tribunal actually is better placed than the SCCO to understand and evaluate the work required to be done in the present case? What was the present case? It was a follow-on action. There was no need for any court or tribunal seized with the present case to consider the question of liability.

THE CHAIRMAN: There is no competition issue in this case at all.

MR. LASOK: No competition issue. My learned friend, in his skeleton argument, in his annex, at the second bullet,

> "Though a finding of liability should in principle have been established without undue difficulty --"

- which I do not quite understand because liability had already been found. He then says,

> "-- issues of quantification and causation were complex ----"

That is what the case was actually all about - issues of quantification and causation. This is a damages action in which the issues were quantification and causation. There was an added element because it was an action brought by an association for the purpose of benefitting individual consumers who probably, individually, would not have brought claims, or would not have been in a position to bring them.

THE CHAIRMAN: Yes. I must say that when I first read the papers in this case with a view to trying it with two colleagues, it struck me that there were two major issues for the Tribunal to consider: one was jurisdiction, given how the individual claimants were coming into the frame (to use a neutral term); the other was the issue of the nature of damages that could be recovered. There was a claim for exemplary damages.

MR. LASOK: The difficulty with that, of course, was the fact that the primary claim for damages actually exhausted the scope of exemplary damages. Exemplary damages are things like when you make the callous decision to go ahead because you know that the profit that you will make will be greater than the damages ----

THE CHAIRMAN: Newspaper circulation. That sort of thing.

MR. LASOK: Yes. That sort of thing. But, in the present case the primary claim was for the difference between the price that the individual consumer actually paid and the price that he, or she, would have paid. That actually exhausted all the other possible grounds on which damages could be calculated. I have to say that when I looked at the pleadings I simply could not understand why it was that the claimant was advancing so complex a claim when, in reality, it was relatively simple.

THE CHAIRMAN: What I am really saying is that from our viewpoint, as the Tribunal, I was, shall I say, intrigued by the basis of the damages claim. That seemed to me which, given the pleadings we had at that stage, was going to have to be assessed. I am sorry. I interrupted you. But, I thought it might be useful just to characterise what the Tribunal felt it was looking at at that stage.

MR. LASOK: Quite so. If you look at the annex to the sixth bullet point, which is on the next page (the second bullet on that page), and if you go to the end of it, the last four lines or so, it is said,

> "-- it is also necessary to take account of the fact that this was not just a case about money. It was a case with far wider significance and importance than just the monetary consequence for consumers".

The point is then made that proportionality must take that into account. What you can see here is that the Consumers' Association regarded this case not as a damages action -- It was a sort of flagship case that was designed to establish principles of wider import. That is the only explanation that I can think of for why it was that the claim that was lodged at the Tribunal was not the kind of reasonable damages claim that you would expect from a claimant who wanted to get some money. That was why they had added in all these bits and pieces that were actually unnecessary for the purpose of achieving a damages claim but

would be extraordinarily useful in terms of precedent value. But, that raises a question about proportionality because, strictly speaking, when one is behaving proportionately, as one must do in the context of an assessment on the standard basis, it is important to bear in mind that you should only conduct the litigation proportionately in order to achieve the object of the litigation. Litigation should not be used for extraneous campaigning reasons. All I am saying at this stage is that at face value one of the reasons why the costs claimed by the Consumers' Association were chalked up is because it had decided to use the present case as a kind of campaigning vehicle. So, *prima facie*, we have a disproportionate approach to the conduct of this litigation.

However, that, I think, takes me slightly out of the path that I wanted to take because I wanted to focus on what are the aspects of this case that would render the Tribunal better placed than the SCCO to assess costs? I had got into this because I pointed out that as it was a follow-on action the primary issues were quantification and causation. These are not unique to competition litigation. There are other areas in which consumer claims can be brought in which the same kind of problems occur. That is one point.

The other point, of course, is that when you look at the process that was followed in this case, it was something that really cried out for ADR because of the fact that the claim was brought effectively on behalf of consumers who individually would have had very, very small claims. Each individual claim could have been no more than a few pounds. So, it was the kind of case which, in the ordinary and natural course, would inevitably go to some form of ADR. It did do that.

THE CHAIRMAN: Or a small claims court where no costs can be recovered.

MR. LASOK: Yes. The result is that it has all the features actually of litigation that will be well-understood by the SCCO. This is really common or garden -- You cannot really describe it as common or garden because, as the Tribunal points out, it is unique, but it is unique in terms of it being a body representing consumers, bringing an action on behalf of individual consumers. However, the underlying elements are elements that are not discrete and unusual, and limited in their scope and application to competition cases. In our submission, the major problem with the claimant's case is that realistically there is no feature of the real dispute between the parties in relation to which this Tribunal has a better feel or a better understanding than the SCCO.

So, in our submission, there is no basis for believing that this Tribunal has the edge over the SCCO. What you are then left with is, in our submission, a major problem - namely, that a detailed assessment on the standard basis is accepted by my learned friend to require five

days at least. That means that this Tribunal has to be diverted from the primary responsibility entrusted to it by Parliament for that length of time. I ask rhetorically, "Is that a right exercise of judicial discretion when there is a specialist body that exists and that is perfectly competent to undertake this task?"

THE CHAIRMAN: Thank you. (After a pause) I will give an extemporary judgment in relation to submissions that have been made, but not before 12 o'clock. Please do not take this as an indication, but were I to decide that this matter should be referred to the SCCO, *de bene esse* would counsel wish to make any submissions now about an interim payment, or later?

MR. LASOK: Well I can make our position plain now and that is that we have no objection to making an interim payment. I have already indicated to my learned friend the amount that we propose.

THE CHAIRMAN: Am I going to be told, or is there going to be an agreement as to an interim payment, or how do you want to deal with this.

MR. LASOK: Well I did not mention it because ----

THE CHAIRMAN: It is between counsel yes.

MR. LASOK: I was not too sure whether it was a confidential amount or not, it may be. It may be best if, in the interval, discussions will take place between the parties.

THE CHAIRMAN: Were I to refer the matter to the SCCO, then I would, of course, if necessary assess an interim payment but obviously the Tribunal would be delighted if such a figure could be agreed between counsel or at least a range agreed.

MR. LASOK: Yes.

THE CHAIRMAN: Thank you very much.

(Short break)

(For Ruling see separate transcript)

THE CHAIRMAN: That leaves the question of an interim sum.

MR. BACON: Sir, thank you for that very helpful judgment, given, as it was, in an extempore fashion. Can I ask you then to look at the issue of the payment on account? In principle, as I understand it, there is nothing between us save that a payment on account should be made. The issue is the amount. Of the payment. Dealing, as best I can with the sensitivity of the figures I would invite the Tribunal to consider p.51, which is the very last page in our claimant's detailed bill (which is one of the files that you have before you). It is the very last page, a summary page. There you will see the figure which remains confidential. My learned friend and I have agreed that the Tribunal could deal with this by way of percentages.

THE CHAIRMAN: I thought we might do it in that way.

MR. BACON: The issue between us, sir, is this: We submit that on an interim 'on account' basis, 50 percent of the amount claimed should be awarded. My learned friend's position, as I understand it, is that no more than 15 percent should be awarded. So, the difference between us is 50 percent or 15 percent. I really wish to make just one principle point on this. I know the Tribunal will have some experience of interim payments on account obviously in the context of this Tribunal, and elsewhere indeed. The usual approach to the quantification of interim payments is to look at the 50 percent figure. Clearly there are cases which go lower, and, indeed, higher. But, a 50 percent reduction to an inter-partes bill of costs, on any view, is a massive reduction on assessment, and, in our submission, is unlikely, indeed, to ever occur in this case. So, what we are seeking is the minimum figure that is likely to be allowed by the costs judge. 15 percent - the figure advanced by my learned friend - is an utterly inadequate figure for the payment on account of costs. We submit that 15 percent is nothing more than a token. It does not reflect at all even the fullness of the point in dispute. It represents well below the likely minimum figure for assessment of these costs. Our figure, if one looks at the numbers, excludes, as you will see from the calculations, if you do them, any claim for the conditional fee -- success fee elements which you have referred to. So, we are leaving those out of account. It represents a proportion of the base costs.

THE CHAIRMAN: Thank you. I am reminded by the referendaire: Does the figure on p.51 include both firms of solicitors or just the second solicitors? Page 51 seems to indicate that it refers only to the second solicitors.

MR. BACON: It is just the second firm of solicitors.

THE CHAIRMAN: So, what is going to happen about the first solicitors?

MR. BACON: The figure that we are seeking is the same. We would apply the same percentage to the Part 1 first solicitors' figure, sir.

THE CHAIRMAN: Where do I find the first solicitors' figure?

MR. BACON: Page 8 of Tab 1. That can be looked at alongside the previous p.7. It just sets out the summary. We would invite the Tribunal to make an order in the percentage we seek in respect of both elements of the costs claim.

THE CHAIRMAN: Thank you. Mr. Lasok?

MR. LASOK: With the Tribunal's leave, I will pass this over to Mr. Williams.

MR. WILLIAMS: I should say, sir, that the 15 percent which has been offered is in respect of both bills, or both firms of solicitors. Therefore, your arithmetic will see that it comes very close to a very convenient number.

THE CHAIRMAN: Yes. I have the figure in front of me now.

MR. WILLIAMS: Yes, indeed. So far as that is concerned, 15 percent, we are instructed - and I think it is right to say that neither my learned leader, nor myself have done the arithmetic ourselves - does represent roughly the sum which is conceded in the points of dispute, or the effect of the points of dispute, which clearly you have spent at least some time reading because of the very helpful summary which you gave in your judgment.

We recognise that 15 percent would ordinarily be a low level of concession, but if we can just very shortly identify a few special features of this case which we say justify that -- The first point is that the sum which is conceded still represents a sum significantly - by which I mean almost 30 percent - greater than the costs which the defendant expended in defending the proceedings. That sum is set out in our skeleton and you will have seen it.

THE CHAIRMAN: I have read it. It is just over double, is it not? No. The 15 percent is about that figure.

MR. WILLIAMS: The 15 percent is actually somewhat higher than that figure.

THE CHAIRMAN: Can you tell me where I can find that figure?

MR. WILLIAMS: It is Tab 5 of our bundle.

THE CHAIRMAN: Thank you very much.

MR. WILLIAMS: Page 2. It is the final figure in para. 4.

THE CHAIRMAN: Yes. That was the figure I recalled.

MR. WILLIAMS: So, the sum which we are offering is nearly 30 percent more than that figure. I should say that that figure, even once one eliminates success fees - so, if one takes out the very obvious distinction between the charges to the claimant and the charges to the defendant -- The figure which has been billed to the defendant by its legal advisors is rather less than one fifth of the sum which the claimant is seeking - as I say, excluding success fee. So, there is a huge disparity there. So that is the first reason why we say that a low starting point is called for.

The second reason, sir, which you have already indicated you are alive to is that of the sums claimed in this bill, about 40 percent of them relate to the success fees. We say that those success fees should be completely excluded at this stage, firstly because despite the claimant's promise it has failed to disclose the Conditional Fee Agreements, notwithstanding its promise also, and notwithstanding the clearest conceivable guidance from the Court of Appeal on that point. Secondly, given that this is a follow-on claim in which the recovery of some compensation was very likely, there are, in any event, very compelling reasons to suppose that success fees will be starkly reduced. So, that is an

immediate 40 percent reduction in the starting point, and, in our submission, it immediately falsifies my friend's contention that there should just be a conventional 50 percent as a starting point.

We then get to the costs of the first firm of solicitors. That is well in excess of 5 percent of the overall figure. We say that there are very compelling reasons for supposing that none of those costs will be recoverable at all. Again, I will not go over the ground in any detail, sir, because you have summarised it so recently in your judgment, but we say there are clearly arguable grounds for supposing that certain parts of the bill may not be recoverable as a matter of principle. You will be alive to the fact that, again, something around 5 percent of the bill relates to getting advice on defamation, and something in excess of 20 percent of the bill relates to charges for claims processing, which there is a real question as to whether or not that is lawyers' work at all. Certainly - and I think it is a point we make somewhere - in this sort of litigation, which is rather more common in the United States, that is not the sort of work that is done by attorneys.

So, it is for those reasons that we say that the proposition that this is an ordinary case with a 50 percent starting point is not a realistic proposition. If anything, if one takes out the 40 percent on the success fees, the 5 percent to the first firm of solicitors and the percentages on defamation, and so on - you are actually getting to a starting point which is more like 30 percent.

Then one has to take into account again the various matters which you summarised in your judgment. I will just run through them very shortly. I will - if I can use the vernacular - just point out the commanding heights, as it were, of our criticisms, rather than the great amount of detail that lies in the valleys. There are points about proportionality. You are aware of the difference between the costs and the compensation. There is the issue as to exemplary damages. I think I can say without fear of contradiction that it was a bold claim. We say it is misconceived, and all the costs with it in due course will be disallowed. In any event, one only has to look at the actual settlement agreement to see the amount of compensation which was alighted upon. In any event, that is a claim for exemplary damages which must be taken as having been abandoned. So, on any view, the defendant has good arguments of detailed assessment and that the costs associated with it are simply not recoverable.

There is the issue as to whether or not the way in which the litigation has been run is attributable - and not so much to these proceedings, but to the wider commercial, or charitable, call it what you will, interests of the Consumers' Association. That might very well be chargeable between them and their solicitors, but not on a standard basis chargeable

to us. I do not know if, in the course of your pre-reading, for example, you will have seen in one of the claimant's own bundles, a skeleton in excess of twenty-one pages settled by leading and junior counsel simply for a case management conference. That is just the sort of Rolls Royce approach where we say there is every reason for supposing that in due course a costs judge will look at that with a somewhat jaundiced eye.

Again, from your summary in your judgment, sir, you are aware there is a significant argument as to the hourly rates. I have simply taken, for illustrative purposes, the rates claimed in respect of the most senior solicitors involved - the partners. We are offering a figure which is 25 percent lower than the rate that is being claimed latterly. I am not saying those figures - I suspect they may not be confidential, but I will approach them on percentage terms, like the others.

You will have seen that we say in our draft points of dispute that something in the order of thirty-five weeks of working time is claimed for work done on documents in a case that settled without a hearing, and with not that many significant documents being produced. Of those significant documents, such as the Particulars of Claim, they were produced by counsel, and in due course, we regret to say, we will also be saying that they were significantly overblown.

There is the issue about the first settlement offer which was not accepted.

All in all, we respectfully say there is every reason to suppose that even from the much diminished starting point which I have suggested to the court, this is a case where there will be very significant reductions. We respectfully say that our points of dispute do not have an air of extravagance or intransigence about them. They are presented by an experienced costs drafts-person. They have been signed-off on by counsel - in that case, myself and not my learned leader. We respectfully say there is no reason why the Tribunal should, as it were, pre-judge the merits of those points of dispute by ordering a greater payment than the one which we have proffered - namely, the 15 percent. Of course, if, in due course, we have taken an overly rosy view, then, firstly, as we understand it, the claimant is not out of pocket; but, secondly, if the claimant is out of pocket, then it is entitled to be compensated by interest at what is now, compared to base rates, actually a very generous rate. So, even if we have misjudged matters completely, as we understand it, no harm is done.

THE CHAIRMAN: Thank you very much. Do you want to add anything, Mr. Bacon, in reply?

MR. BACON: Not a great deal - otherwise we may immerse ourselves in the detail of the argument which no doubt will go elsewhere. However, I do not accept large parts of it. To distil this into what appears to be a simple claim mis-characterises the case completely.

One only has to read, as you have done, the defendant's defence to see the nature of the issues. It is all very well and good to come down here, months later, saying, "This was a simple case. It ought to have been resolved very quickly". There was a thirty-page defence, pleading all sorts of interesting, convoluted legal issues on the causation elements.

THE CHAIRMAN: You have not been here enough to call those convoluted issues!

MR. BACON: You have my point.

THE CHAIRMAN: But, I have your point.

MR. BACON: It was a case involving a number of claimants of considerable public interest. The costs claimed will be, in our submission, supported on detailed assessment. The 15 percent concession is, frankly, unheard of in my experience and does not properly reflect the true merits of the case. Clearly, if a payment is made in excess of the sums which are ultimately awarded, that will have to be repaid.

THE CHAIRMAN: Thank you very much.

(For Ruling re. interim payment see separate transcript)

MR. LASOK: The only matter that remains is the question of costs for this hearing. Our submission is that the order should be that the claimant should pay the defendant's costs, those costs to be assessed in the context of the detailed assessment.

THE CHAIRMAN: You asked for the hearing, did you not?

MR. LASOK: We asked for the hearing because the way the matter went was that the claimant sought to have a summary assessment which we disputed. We wanted a transfer to the SCCO.

THE CHAIRMAN: The offer made by the Tribunal was that all issues, including the question of transfer, would be dealt with on paper.

MR. LASOK: Well, there was a dispute between the parties.

THE CHAIRMAN: Yes. But, the Tribunal indicated that it would be prepared, if the parties so agreed, to deal with this dispute on paper, and, as I understand it, the claimants agreed to that paper exercise - in other words, I would read the skeleton arguments and any other submissions that were made, and would determine the matter on paper.

MR. LASOK: Yes. But, this was a matter of considerable importance. In our submission it did merit a hearing.

MR. BACON: Sir, you are right. It is a hearing that we did not wish to participate in, other than through written submissions. So, although in part the defendant has succeeded in its arguments - it has of course failed on some arguments - it should not have its costs because the Tribunal would be awarding costs on a party that did not in fact wish to have the hearing

at all. It was convened at the request of the defendant. Indeed, on that basis I would seek our costs because other than the costs of the written argument we did not want the hearing. Clearly we have participated in it because the court convened the hearing at the request of the defendant.

THE CHAIRMAN: Thank you very much.

MR. LASOK: I would only point out - perhaps at the risk of repetition - that this was a situation in which the settlement agreement between the parties did specify that there should be a detailed assessment of costs. The question was, as we understood it to be, whether or not that should be carried out by the SCCO or should be carried out by the Tribunal. What then happened was that the scope of the debate between the parties was extended to include a form of assessment - either summary, or, as my learned friend put it this morning, hybrid - that, in our submission was inconsistent with what was agreed between the parties. Now, that was something that arose in the course of the correspondence, and it was something which, in our submission, required ventilation before the Tribunal so that the Tribunal could be shown exactly what the documents were actually saying, and was given a complete picture of the surrounding circumstances. This is a situation in which the claimant took a differing view. It wanted both a summary assessment and it wanted an assessment conducted by the Tribunal. It has lost on both scores.

(For Ruling re. costs see separate transcript)
