IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1120/1/1/09

Victoria House,
Bloomsbury Place,
London WC1A 2EB

3 October 2011

Before:

LORD CARLILE OF BERRIEW QC
(Chairman)

ANN KELLY
DAVID SUMMERS OBE

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) QUARMBY CONSTRUCTION COMPANY LIMITED
(2) ST. JAMES SECURITIES HOLDINGS LIMITED

Appellants

- and -

OFFICE OF FAIR TRADING

Respondent

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HEARING

APPEARANCES

Dr. Mark Friston (instructed by Addleshaw Goddard LLP) and Mr. Adam Aldred (of Addleshaw Goddard LLP) appeared on behalf of the Appellants.

Miss Kelyn Bacon (instructed by the General Counsel, Office of Fair Trading) appeared on behalf of the Respondent.

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THE CHAIRMAN: Good morning.

DR. FRISTON: May it please the Tribunal, my name is Friston, I appear on behalf of the appellants.

THE CHAIRMAN: It is Dr. Friston, is it not?

DR. FRISTON: Or "Mr.", I leave that to the Tribunal. My learned friend Miss Kelyn Bacon appears on behalf of the respondents.

THE CHAIRMAN: Good morning, Miss Bacon.

DR. FRISTON: What I intend to do is to provide the Tribunal with an overview of what I say the law is, and then I propose to make three general points concerning the law, and then I propose to make three general points concerning the facts. I propose to proceed in that way unless the Tribunal has any questions which the Tribunal wishes to put at this stage.

THE CHAIRMAN: Yes, I have one question and the only qualification after I have asked my question is that we stick to time, because we have given, in my view, very generous timings for this hearing and so I am sure we can. Can we turn to Tribunal paper 52, please? It is the OFT letter concerning the Quarmby confidentiality claims of 3rd August, and in particular to the OFT submission on costs where there are boxes around paras 41, 42 and 43 re confidentiality – I am just concerned to deal with the confidentiality claims.

Quarmby have claimed confidentiality in relation to certain information covering success fees, the sum of costs, and the asserted multiplier of the amount sought by Willis in another case and, indeed, the last paragraph.

What basis is there for a confidentiality claim there? It seems to us that the underlying question is: how would Quarmby's business interests be adversely affected if there was not confidentiality over those matters?

DR. FRISTON: I will answer that in two ways. First, it is not only the business interests of Quarmby, it is also the business interests of those who advise Quarmby. In that regard issues such as success fees and things that can be derived such as hourly rates are issues concerning costs and, whilst I accept are available elsewhere in other contexts, they are commercially sensitive issues. Secondly, it could adversely affect Quarmby's own interests in the sense that one is able to tell at the end of the day the overall commercial effect of the litigation, but only in part, and therefore one may get an incomplete and misleading view, and that is because a general reader would not know the details of the agreement between Quarmby and their solicitors. In other words, a partial amount of information may give rise to a misleading view because the reader would not have knowledge of the entirety ----

THE CHAIRMAN: What is misleading about it? I have a suspicion that what we are protecting here is the confidentiality of the charges made by the lawyers, not anything to do with Quarmby's business interests. After all, in the statutory accounts that Quarmby will publish there will be a figure which will be referable to expenditure on professional costs. It will plainly be inflated for the period or periods in question by these costs, so it is going to be on the public record in one way or another anyway.

DR. FRISTON: Can I just take instructions on one point?

THE CHAIRMAN: Yes.

DR. FRISTON: (After a pause): If I may make it clear that the basis of the agreement between Quarmby and their lawyers is what is called 'a CFA Lite', which is an agreement whereby the amount that is actually paid to the lawyers is that which is recovered, and that therefore the burden on Quarmby itself is not as great as it would appear from these figures. In those circumstances we are content for confidentiality not to apply to those paragraphs.

THE CHAIRMAN: Thank you very much. You do not want to add anything, presumably, Miss Bacon?

MISS BACON: No, save that I was wondering how I was going to make some of my submissions if all of this was confidential because I would not actually be able to address ----

THE CHAIRMAN: That is why I thought we had better start with that.

MISS BACON: I am very grateful.

THE CHAIRMAN: Thank you. The five red lights have gone out now.

DR. FRISTON: If I may start, please, with just an overview as to what the law is. I say that, whilst the 'general rule' as set out in the CPR that costs will follow the event does not apply as a matter of law, as a matter of practice and general policy it does apply, unless there is very good reason for it not to apply. In other words, the starting point is that the loser pays. However, there is a gloss to that and that is that under the CPR and under most jurisdictions that follow the CPR, there is a practice of making issues-based costs awards, whereby where a successful party has lost on an issue then that party will be deprived of the costs of that issue. It is an important point that unless the case can be said to be 'exceptional', the generally successful party will simply lose the costs of the unsuccessful issue as opposed to paying them.

In addition to that, there is a further gloss in the sense that there are certain Tribunal specific factors that will apply. I say that those Tribunal specific factors do not change the law in the sense that they change the test to be applied, but what they do do is they introduce

certain additional factors that must be taken into account. The effect may be very similar to an asymmetric test applying. What do I mean by that? What I mean by that is that in a penalty case, such as this, there will be reasons for the Tribunal not to make an adverse order – that is not to order that a party pays costs where that party is an appellant who has failed to succeed; or, in my respectful submission, where the party is an appellant who has succeeded generally but has failed to succeed in respect of all issues.

Sir, put another way, what I say is that what the parties are entitled to is an ordinary costs award, applying the ordinary principles of costs, but tailored to this Tribunal.

Sir, having said that, I am now going to move on to make three points. The first point concerns costs following the event. Could I ask the Tribunal, please, to turn to my learned friend's skeleton argument, and in particular to para.17 thereof, where my learned friend says this:

> "The proper starting point is that there is no presumption as to the general rules which the Tribunal should apply in relation to the award of costs."

Then jumping to para.22 she says:

> "Furthermore, the role of the Tribunal, though judicial, is nonetheless part of an overall structure of competition enforcement put in place under the Competition Act…"

Then over the page at para.23 she says:

> "Since the introduction of the Competition Act 1998 the Tribunal has emphasised that there is no presumption in proceedings before the Tribunal that costs should necessarily be borne by the 'losing party'. In non-penalty appeals against decisions taken under [that Act] however, the Tribunal's starting point will often be that the successful appellant who can fairly be identified as a 'winner' is entitled to recover his costs. In relation to penalty appeals the approach has not developed in quite the same way."

I pause there to say that the impression given by that is that, I will call it the 'general rule' for convenience, does not really apply in appeals cases or, if it does apply, it applies less commonly. I say that that is absolutely wrong.

Could I ask the Tribunal to turn to p.28, tab 4, of the main blue bundle. This is Mr. Justice Rimer speaking in *The Racecourse Association*. This is a judge with particular experience in costs. He says at para.8, under "First":

> "First, the fact that a successful appellant has been put to expense in exercising his rights is a relevant factor, although it would not necessarily be decisive. We

> interpret this (taken with all else that we regard as implicit in the *GISC* decision) as reflecting a starting point for the exercise of discretion that a successful appellant ought, subject to all of the relevant considerations, be entitled to be compensated for the costs that he has incurred in vindicating his rights."

I pause there to say that that is an absolutely fundamental rule of any system involving civil costs where there is no reason to disapply that rule. There is no distinction there drawn between penalty cases and non-penalty cases.

Could I ask the Tribunal to turn to p.60. This is at tab 5. This is Sir Christopher Bellamy in the *Institute of Independent Insurance Brokers*, and he has the following to say at para.49:

> "As to what factors are relevant to the exercise of our discretion, an obvious factor is the financial prejudice, by way of costs, that the successful appellant has suffered as a result of having brought the case. We do not accept the submission, apparently advanced by the Director, that this Tribunal is in some way merely an extension of the system of administrative enforcement of the Chapter I and Chapter II prohibitions set up under the Act. The Tribunal is constituted as an independent and impartial Tribunal within the meaning of Article 6 of the European Convention on Human Rights and Fundamental Freedoms and proceedings before it are judicial, not administrative. In civil proceedings in each of the three legal systems of the United Kingdom of which this Tribunal forms a part, the financial prejudice suffered in costs, as a result of having asserted a lawful right is recognised by an award of costs, the general rule being that an unsuccessful party pays all of the successful party's costs. The same is true of the proceedings before the Court of Justice and the Court of First Instance in Luxembourg which exercises a similar jurisdiction to our own as far as the subject matter is concerned. Thus the fact that a successful appellant has been put to the expense of exercising his rights under the Act is a factor relevant to the exercise of our discretion, even though we accept that it is not necessarily a decisive factor."

THE CHAIRMAN: Who is the successful party in this case?

DR. FRISTON: In this case? Unquestionably I say it is the appellant. The question as to who is a successful party is a binary question. One simply asks who has won.

THE CHAIRMAN: You lost on liability.

DR. FRISTON: I will come on to that later on. The way in which these cases are dealt with, in my respectful submission, is that the first question is, 'who has won?' That is a simple matter of asking who brought the appeal? We did. Has the appeal been allowed? Yes, it has. That is the ----

THE CHAIRMAN: So losing on liability is not relevant?

DR. FRISTON: It is highly relevant, but it comes in at the second stage.

THE CHAIRMAN: I do not understand what you mean by the term “a binary question”. I think I need you to explain that.

DR. FRISTON: Yes, a binary question is asking, as a matter of fact, who has won, in the sense of, has the appeal been allowed? The answer to that question is yes.

THE CHAIRMAN: What is “binary” about it?

DR. FRISTON: It is 'yes' or 'no'.

THE CHAIRMAN: Oh, I see.

DR. FRISTON: So it is not a matter of degree. It is not a matter of considering the extent to which a party has won, or anything of that nature. As I say, I will come on to that a little later on. What I am doing at the moment is explaining the law, and then I will explain the application of the law a little later on. I will be explaining that it is a two-stage procedure in the sense that you ask yourself who has won, and then the issues concerning liability are dealt with at the second stage.

MISS BACON: If Dr. Friston is proposing to move on, and I saw him shuffling his papers, while we have got this open could he possibly just read paras. 50 or 51, or could the Tribunal ----

THE CHAIRMAN: We will read them to ourselves, there is no need to read them out. I will tell you when we have finished reading them.

MISS BACON: I am grateful.

THE CHAIRMAN: (After a pause): Yes, thank you.

DR. FRISTON: In my respectful submission that reinforces what I have just said in that it is a two-stage procedure: who has won, and then issues such as “has a party lost on certain points?” then come in at the second stage.

The next point I make is about the suggestion that is made in my learned friend’s skeleton argument at para. 29, if I can ask the Tribunal please to turn to that? This is said:

> “In particular it is important that there is not an undue burden on the OFT and the wider public purse by reason of the OFT taking decisions conscientiously and in good faith. It is integral to the proper functioning of the competition regime that the OFT makes infringement decisions and, thereafter, applies penalties. The

system of statutory appeals to the Tribunal may not function properly if the OFT is discouraged from taking and enforcing decisions made whilst fulfilling its public function without fear of exposure to undue financial prejudice if the decision is successfully challenged. Furthermore, any costs order against the OFT will necessarily result in a reduction of the resources available to investigate infringements of the competition regime, and its enforcement in the United Kingdom as costs orders would be funded from the public purse. This will of course be of detriment not only to the functions of the OFT but also, ultimately, to consumers."

Then my learned friend goes on in para. 30:

"Lord Bingham in *Bradford Metropolitan District Council v Booth* when dealing with another jurisdiction where there was a power to award costs where 'just and reasonable' emphasised that an important consideration in considering costs awards was:

'the need to encourage public authorities to make and stand by honest, reasonable ----'"

THE CHAIRMAN: You can assume that we have read these skeletons, so please draw our attention to the paragraphs but do not read them all out, you do not need to.

DR. FRISTON: Right. The point that is being made there is a two-pronged point. First, my learned friend is making the point that if the Tribunal can draw an analogy with *Booth* and the category of cases which it represents, and secondly that that is on the principal ground in the sense that there is a need to protect the public purse. I say that that is utterly wrong, and that certainly does not in any way allow the respondent to escape the consequences of the 'general rule'. In that regard if I can ask the Tribunal please to turn to p.499 of the bundle. I do not propose to take you through this in any detail, but I just draw your attention to the fact that even if one goes outside this type of Tribunal, the idea of protecting the public purse in the way that my learned friend suggests is not accepted. So the headnote there explains all that needs to be explained.

Then if I could ask the Tribunal, please, to turn to p.516. This is an extract from *Grimes v The Crown Prosecution Service*, and it is Lord Justice Sedley. If I could ask the Tribunal please to read para. 30, I will just read a selected part of it.

"The reason why the Judge did not approach the case in this way, as it seems to me, is that he recognised the CPS as having a special litigation position or status. As my Lord has made clear, it does not."

So Lord Justice Sedley is agreeing with Lord Justice Brooke. Lord Justice Brooke, until about 2006, had responsibility in the Court of Appeal for all costs issues, almost all of the costs cases were decided by him, so I say that that is something that should be given considerable weight.

THE CHAIRMAN: Was this a judicial review? Yes.

DR. FRISTON: Yes, it was. Then perhaps if I could ask the Tribunal to turn to p. 63. This is again Sir Christopher Bellamy in *The Institute of Independent Insurance Brokers*. The two paragraphs I would like the Tribunal to take into account are paragraphs 54 and 57, but I will confine myself to reading para. 57:

> "Again, however, we think that those factors cannot be decisive. In particular, we think considerations of public expenditure cannot be decisive in cases where considerations of fairness point in the opposite direction. We also bear in mind that the Act endows the Director, in the public interest, with wide ranging and draconian powers exercised on behalf of the State, which may substantially affect the civil rights and obligations of those concerned. The costs of administrative procedures under the Act are not recoverable by persons affected. However the Act provides that the exercise of the Director's powers may be challenged, on grounds of both fact and law, before a judicial tribunal."

In my respectful submission, in effect what is happening there is that the first point raised by my learned friend, that is the point that there is a need to protect the public purse, has been found not to be of merit.

Then at para. 58 you can see that Sir Christopher Bellamy goes on to deal with *Booth* and again he finds that he is not persuaded that *Booth* has any applicability.

THE CHAIRMAN: Does he really say that protecting the public purse is not of merit? Is it not more something like this: that protecting the public purse is one of the factors that the court is entitled to take into consideration in reaching a judicially reasonable decision about costs? It strikes me, looking at these authorities, that none of this is rocket science. At the end of the day the Tribunal is left to impose such order as to costs, or no order as to costs as it thinks is reasonable as long as the Tribunal weighs up the merits of the arguments on both sides and whether expenditure has been reasonable or not. We may have to return to your 'binary' question, as you put it, because at the moment – and I speak only for myself – Burnley beat Millwall 1-0 on Saturday afternoon, it is not necessarily a binary question before the match occurs because they may draw 1-1 for example. So there may be a binary answer if Millwall win or Burnley win, but it can be a draw.

DR. FRISTON: I will come back to that when I deal with the first of the three factual points that I intend to make, but I would like the Tribunal to turn to p.522 of the bundle, because, in my respectful submission, the point that the Tribunal has just made about is it a factor needs to be answered, and the answer is no, or, if it is a factor, it is a factor to which very little weight indeed should be given. This is an extract from *ex Parte Perinpanathan*. Clearly it is a review and this is the Master of the Rolls speaking. Perhaps the best thing is if I just ask the Tribunal to read the relevant parts to itself. You can see from the entirety of that page that this point is taken. *Booth* in particular is specifically addressed, but the Master of the Rolls finds that the point does not have merit. In my respectful submission, that is simply a reflection of the fact that there is no special status in the fact that one of the parties is a State. Instead the court or the tribunal should give equal weight to the need to protect the finances of all the parties, and therefore should give no particular weight to the fact that one of the parties is the State.

I have not got time to go through the entirety of this case, but I say that this case is authority for the proposition, when taken in its totality, that I have just stated.

Could I now please ask the Tribunal to turn to p.63 of the bundle. What I am doing now is moving on to deal with the issue of issues.

THE CHAIRMAN: Sorry, just before you move on, we are familiar with the case of *Perinpanathan* and we have done some preparation, my view was that para.77, right on the last page, probably summarised the principles that you are seeking to draw to our attention, but if you want to draw attention to anything in particular please say so.

DR. FRISTON: Paragraph 65 is probably worth looking at.

THE CHAIRMAN: I will note that down if you will just bear with me.

DR. FRISTON: Perhaps I should read that out:

"Lord Bingham said that his three principles applied to "questions of this kind", and it is therefore potentially open to argument as to how far they were intended to apply outside appeals against vehicle licensing decisions. However, it seems to me that the way he expressed himself suggests that he was intending to refer to any case where the police or regulatory authority was carrying through what was essentially an 'administrative decision', which I understand to mean the performance of one of its regulatory functions, and where the question of costs was governed by section 64. That view is supported by the High Court decisions in which the principles have subsequently been applied – see para.[28] above. This provides support for the proposition that Lord Bingham's principles …"

the principles in *Booth* –

"… should be applied in the present case."

In effect, what the Master of the Rolls is saying there is that if the case is an administrative case, which, in my respectful submission, means that if it is the sort of case where somebody, a business or an individual, applies for something and an administrative decision is then taken and then that decision is capable of challenge, then in those circumstances the *Booth* principles may apply. If, however, the case is more of a regulatory case – that is where a regulator finds that the conduct of somebody is in some way wanting – and then intervenes in a way that is not at the request of the person who is being regulated then the ordinary principles of justice will apply.

I say that that is authority for the proposition that I have made and that is that the consideration that my learned friend urges upon you is not one that can be taken into account.

THE CHAIRMAN: You referred to p.63. I have read paras.58 and 59. Apparently there is some mobile phone interference with the sound system so could everybody please make sure that your mobile phones are off, not merely on silent. It is no criticism. I probably would have left mine on silent if I had it in court, but I do not. We have remote transcription. Yes?

DR. FRISTON: I now move on to deal with the way in which the Tribunal should deal with the 'issues'. As I say, it is a two-stage approach, so the first question is 'who has won?' That is just simply a question of 'has the appeal been allowed?' I will address you further as to that in a moment.

The next question then is, 'what is to happen in respect of any issues that have been taken by the generally successful party, but then have been lost?' In my respectful submission, there are two things that can happen in those circumstances. The first is that the generally successful party can be deprived of the costs of those issues; and the second is that the generally successful party can be ordered to pay for those issues. In my respectful submission, the latter will apply only where the case can be said to be exceptional. It is because of that that the Tribunal needs to be careful to apply the first question, the binary question, in the way that I suggest. If the Tribunal addresses that question in any other way – for example, if the Tribunal says there were two issues, one of which concerned a penalty and the other of which concerned liability, it is 1 : 1, and therefore is a draw – then that will be to pre-suppose that the case is one that is exceptional, because the only way that you can get to a situation where no costs at all are awarded is if you find implicitly that the costs of one side have cancelled out the costs of the other. In my respectful submission, that would be wrong in principle.

There are two factors that are relevant to how the Tribunal deals with the question of 'issues'. The first relates to just the way in which the law, the law of costs, deals with issues generally. I am not going to repeat that which is set out in my skeleton argument, but you can see from the skeleton argument that one does have to find that the case is exceptional, or "suitably exceptional" is the phrase that is often used. I have given some examples of that in the skeleton argument, such as where there has been unreasonable conduct, or where there has been an element of impropriety, or something of that nature. I fully accept, of course, that other circumstances may well give rise to exceptionality, but, in my respectful submission, that is the sort of thing that would ordinarily give rise to a finding of exceptionality.

The second point is a Tribunal specific one, and that is that there is an additional factor that should be taken into account that applies to penalty appeals, and in particular that applies to penalty appeals where there is a concern that by not awarding costs, or by awarding costs against an appellant, that might have the effect of discouraging persons with a meritorious appeal from bringing appeals, which of course would have lots of adverse effects. It will have an adverse effect on the administration of justice, it will have an adverse effect on access to justice and it will have an adverse effect on the way in which penalties are set. If the OFT is not under a threat of having to pay costs then of course there may be a temptation not to look at penalties with quite the care that the issue may deserve.

In that regard I just say that it is just worth bearing in mind that what I am suggesting is not in any way a theoretical point. It is just worth bearing in mind that of the approximately 100 people who could have brought an appeal, only 25 did in this matter. In other words, I am instructed 76 persons did not bring appeals, so access to justice in my respectful submission is something that is highly relevant.

THE CHAIRMAN: That is a bizarre point, if I may say so, because there are all kinds of assumptions you are making. One might assume that some of them accepted they were guilty and that the penalty was reasonable.

DR. FRISTON: Oh yes, of course.

THE CHAIRMAN: And some may have made a perfectly every day commercial judgment that the cost of bringing an appeal made it not worth it because the appeal was so small. We know some of the companies concerned had gone out of business. I am really troubled as to where a crude analysis like that gets us, Dr. Friston.

DR. FRISTON: It is the second of the points that you referred to that is relevant, and that is that the costs of bringing an appeal are highly relevant, and the more difficult that the Tribunal

makes it to recover those costs and the more likely that the Tribunal makes it that a successful or unsuccessful appellant may be ordered to pay those costs the greater that issue will become in the consideration ----

THE CHAIRMAN: If you look at our judgment, concise and economical though we would claim it to be, pp.14 to 51 of the judgment are taken up with dealing with the issue on liability, and pp 51 to 82 are left with dealing with the issue on penalty, we are not dealing with a pure penalty case here, are we?

DR. FRISTON: That undoubtedly is correct, but I am addressing the Tribunal mainly in relation to penalties, I am answering the points that my learned friend has raised, and I am just pointing out that in this Tribunal firstly the ordinary principles of costs will apply, and that means that a case must be found to be 'exceptional' before a party is ordered to pay costs anyway.

THE CHAIRMAN: Does that not mean that you are exceptionally fortunate that the OFT have not made an application against your clients for costs in relation to liability?

DR. FRISTON: No, because in order to succeed on that point the OFT would have to show that the points that we took were in some way unreasonable, improper or something of that nature, and they would have to show that it was 'exceptional'.

THE CHAIRMAN: If there is an exceptionality test.

DR. FRISTON: Yes, so in my respectful submission that has not been done, and the Tribunal should not speculate as to what might have happened if it had been done. In my submission we are not 'fortunate' in that regard, because the OFT have done the right thing as there is no exceptionality here. In my respectful submission there is an exceptionality test, and then when one is talking about a penalty appeal there is an addition a Tribunal specific factor, which is that one takes into account the potential effect that making an adverse costs order against an appellant might have. In that regard if I could just ask the Tribunal to turn to p.161? This is an extract from *Actavis Ltd v Merck* and it is Mr. Justice Warren. If I could ask the Tribunal please to just read para. 26:

> "The task is to identify those cases where the loss on an issue carries the costs sanction ranging from deprivation of costs to an order against the losing party on that issue."

The test, as is clear from the citations I have already made, is that one no longer has to find improper unreasonable conduct, instead, as his Lordship puts it, one has to find a "suitably exceptional" case so far as concerns making adverse costs orders. This, of course, was in

the context of the transition from the RSC to the CPR, but in my submission that says in terms that one has to find a "suitably exceptional" case.

THE CHAIRMAN: You are going to ask me to read para. 27, are you not, Miss Bacon?

MISS BACON: Yes.

THE CHAIRMAN: I have read it.

DR. FRISTON: If I could ask the Tribunal then to turn to p.168, at the foot of that page at para.17:

> "It is thus a matter of ordinary commonsense that if it is appropriate to consider costs on an issue basis it may be appropriate, in a suitably exceptional case, to make an order which not only deprives a successful party of his costs of a particular issue but also an order which requires him to pay the otherwise unsuccessful party's costs on that issue, without it being necessary for the court to decide that the allegations have been made improperly or unreasonably."

So it is clear from those authorities that whilst it is not necessary to find there is improper or unreasonable behaviour, those sorts of things will certainly count. It is necessary to find that the case is exceptional, and in my respectful submission simply raising a point and then losing is in no way near meeting that test. It is probably worth just pausing there to look at p.31, this again being an extract from *Raceourse* and Mr. Justice Rimer said in para. 10:

> "Third, such an appellant would not necessarily be entitled to recover all his costs, and may in particular be deprived of those costs referable to issues on which he has failed, or which were not germane to the Tribunal's decision, or which involved unnecessary prolixity or duplication."

The point I make there is that he is referring there to a successful appellant being deprived of costs as opposed to having to pay them.

THE CHAIRMAN: Bear with me for a moment. (After a pause): Yes.

DR. FRISTON: I now move on to the factual points that I wish to make, and the first one is the question of who has won.

It is important in this regard to draw a distinction between a case where somebody has claimed something and then not wholly succeeded in claiming it - that is where an issues based award applies – and that sort of case, which is commonly referred to in authorities but which does not apply here, where both parties have claimed things, i.e. a counterclaim, and where it is difficult to tell who has won because both parties have had a degree of success. Where the question is one that does not involve a counterclaim then, as I say, the question is simply a binary question: 'has the appeal been allowed?' In those circumstances if the

answer to that question is “yes”, then as long as it is not a *de minimis* benefit then the answer to the question: 'who has won?' is that the appellant has won. The effect of that is that it then defines the correct track for the Tribunal then to go down insofar as the law then is, in that rather than saying: 'who has won? well, the respondent has won, and therefore they shall get their costs', or rather than saying that one party has 'won in part and one party has won in another part and therefore there should be cross orders to costs', the correct track is: 'who has won?’ The appellant has won. ‘Have there been any issues that have been taken which the appellant has lost?’ Answer: yes. ‘Would it be appropriate to make an issues based costs award?’ Answer: yes. ‘How is that award to be structured?' In my respectful submission the appellant in this case is to be deprived of the costs of the unsuccessful issues as opposed to being ordered to pay them. If the Tribunal were to depart from that train of thinking the Tribunal would be making an error.

The next issue then is how is the issue of the 'issues' to be dealt with? That falls into two parts. The first question the Tribunal has to deal with is: 'should an issues based award be made?' and I accept it should.

The next question is: 'is the case one which can be said to be exceptional?', and then the third question is dependent on the answer to the second question and that is: 'what is the effect of that finding?'

An exceptional case is not simply one which has been fought hard, and it is not simply one which has been fought and lost, even if the loss is a very, very bad one. As I have explained, unreasonable behaviour, improper behaviour and the like will have a bearing, but in my respectful submission something more than a mere loss is required.

There is nothing exceptional about this case, and the following points to that. First, this case was managed within the protocol, so it is not the case that longer was taken up with submissions than ought actually to have been the case.

Secondly, the Tribunal should take into account the conduct of the parties when considering whether anything brings the case into the category of ‘exceptional’. In that regard I say that it is notable that there were only two very small aspects of this case where the Tribunal said “That point ought never to have been raised”. One was the allegation that nobody had been misled, that was a very short point, and the second was the group turnover point which, I am instructed, was barely pursued before the Tribunal, or if it was pursued it only took a very short period of time. Everything else was simply a good, clean fight and in my submission that can in no way be regarded as being 'exceptional'.

The conduct of the parties, however, does not stop by looking at the receiving party's or the putative receiving party's, conduct. One has to look at the conduct of all the parties, and in that regard I say that it is relevant that, insofar as liability is concerned, there was criticism of the respondent and, in particular, there was criticism of the fact that the respondent had not carried out the task of obtaining statements as well as the Tribunal would have liked. In that regard I respectfully remind the Tribunal at para. 87, if the Tribunal wants to turn to that page, that the Tribunal found that the respondent had not put the Tribunal in a position where it was easily able to get a full picture. The relevance of that is that even though the appellant lost on those issues it was still reasonable, and particularly reasonable, in my respectful submission, to challenge those issues.

To put it another way, it is entirely reasonable to put the respondent to proof in relation to those issues. That is the first aspect of conduct.

The second aspect of conduct is that which relates to quantum. In my respectful submission, this is a much, much more serious issue. What in effect the Tribunal found, amongst other things, was, firstly, there had been a failure properly to treat everybody within this cohort of people of regulated persons the same; and secondly, that there had been a failure to stand back and to look at the proportionality of the penalty that was being imposed and to consider, 'is that fair?' In those circumstances, if an appellant is concerned, perhaps even up in arms, about the decision, then that is reasonable and in those circumstances the appellant ought to be afforded a certain degree of leeway. I say that that would include occasionally taking a point that perhaps ought not to have been taken. Certainly it means that the appellant is entitled to think, 'has the respondent properly addressed this matter as they ought to have done?' Answer: no. 'Can I therefore trust that the findings concerning liability are sound?' Answer: no. In those circumstances is it reasonable – I am talking about before the findings, obviously – to put the respondent to proof? Answer: yes.

So not only was this a simple clean fight without any obvious exceptional features, but there was a reason and that reason sprang out of the conduct of the OFT.

I do not invite the Tribunal to turn to its findings on conduct, but I just refer to the paragraph numbers so perhaps the Tribunal can remind itself of the relevant paragraphs. It is paras.87, 172, 193 and 201.

Sir, in my respectful submission, this case is not 'exceptional'. If, however, I am wrong in that submission, then the Tribunal is in the very difficult position of deciding what to do about it. The reason the Tribunal is in a difficult position is because there is no evidence

whatsoever before this Tribunal as to the amount of the costs claimed or incurred by the respondent. That is a highly relevant factor, because unlike in civil litigation where the court would have access immediately to listing questionnaires and allocation questionnaires and would know how much the parties had incurred, this Tribunal simply has no idea how much has been incurred, and the relevance of that is that a finding of no order for costs, as is urged upon the Tribunal by my learned friend, in effect is a finding that is based on us paying their costs on the issues on which we lost and them paying our costs on the issues on which we won, all set-off. But there is no evidence that that would give rise to a result that would be zero.

So, in my respectful submission, even if I am wrong on the point that there is nothing 'exceptional', then nothing turns on it because there is no evidence.

Furthermore, it is worth bearing in mind other factors concerning conduct and in particular the fact that we suggested ADR, and in particular early neutral evaluation, and also the fact that almost all issues were aggressively disputed by the OFT.

I do not know whether this is a Tribunal where offers are ordinarily made, but certainly, if it is, then there were no offers. Certainly there was no attempt to narrow the issues in any meaningful way. In my respectful submission that is something that should be taken into account when looking at the issue of 'exceptionality'.

THE CHAIRMAN: I am not sure about the no attempt to narrow the issues, Dr. Friston. If you look at the length of the hearing in this case, which I think was on 6th and 7th July, and you compare it with the length of comparable hearings in either the Queen's Bench Division or the Commercial Court even, you will find that the issues are narrowed so that the hearings are extraordinarily short in this Tribunal on the whole – not invariably but on the whole. I must say, looking at this case and refreshing my memory of it, I can imagine a case like this taking 15 days in some courts. That is because we manage cases pretty robustly here.

DR. FRISTON: Sorry, for the avoidance of doubt, I am not talking about the Tribunal. This Tribunal has case managed this case within the protocol. I am talking about concessions made by the respondent, and things of that nature.Offers, for example, to deal with the penalty at a certain level, or something of that nature. No attempts were made in that regard.

Just returning to what if I am wrong, one has to then look at the measure – and in any event one has to look at the measure – of the unsuccessful issues. I say that you have to look at it for the purpose of disallowing those costs. There is no perfect measure unfortunately. We have suggested a paragraph count in relation to submissions. That is reasonably close to the

work that was actually done. In my respectful submission, what the Tribunal is trying to do by taking an appropriate measure ----

THE CHAIRMAN: I read that with interest, but I have been knocking around a long time, Dr. Friston, and you know as well as I do that there are some lawyers who can make a powerful submission in one page and others will take 30 pages to make a response which has no power in it at all. Measuring paragraphs seems to me to be an extraordinarily crude way of looking at this matter, even if the paragraph count does not carry out the sub-analysis, which I think is the position here, of which are the successful paragraphs and which are the unsuccessful paragraphs

DR. FRISTON: I certainly do not pretend it is a perfect measure. The only perfect measure would be to carry out a detailed assessment and to look at the actual work that was done and then to apportion the amounts, which would be disproportionate for obvious reasons. Clearly we are not asking this Tribunal to do that. One has to take the measures that are most appropriate. The paragraph count in relation to submissions is reasonably close to the work and therefore is, whilst an imperfect measure, one of the better measures.

The similar exercise in relation to the judgment is further away from the work and therefore is not a particularly good measure. If I am wrong on that point then this particular judgment deals with liability in what I call 'longhand', in that it sets out all of the issues and all of the findings, but it deals with quantum in 'shorthand', in that it sets out all of the issues but then refers to findings in the other cases - *Kier*, and so on - in such a way as to not set it out in longhand. The Tribunal will be able to form its own view (or we can provide some figures), but if you add back those paragraphs that relate to the findings in those other cases then the two parts of the judgment become very much more equal.

In my respectful submission, almost all of the measures show a split between the two that is roughly equal, but that is not the correct measure for an issues-based order, and that is because that will include three categories of issue: one, those that are solely attributable to liability; two, those that are solely attributable to penalty; and then three, those that are attributable to both. On the facts of this case, for the reasons I have mentioned and in particular the conduct of the respondent, we would have had to have read into the whole of the matter in order to be able to deal with penalty. Not only would we have had to have read into the whole of this matter, but we would have had to have read into the other cases because that was a point that went very much to the findings of this Tribunal on liability. That is a particular point where, for example, the Tribunal ought to be careful not to just assume that time spent by the Tribunal is reflective of the work, because a huge amount of

work would have been involved in that regard in order to allow the Tribunal to deal with the matter reasonably shortly. That is a feature that very, very much skews this in the direction of penalty.

I have mentioned that the judgment should not be subject to a paragraph count as being an only measure. It may be a measure that the Tribunal wants to take into account, but certainly what is in the judgment is something that the Tribunal can take into account. I have already mentioned the conduct. That goes to exceptionality, but it also goes to the split.

It is also worth saying that whilst I accept that there are two 'issues' within the judgment that were ones that perhaps should not have been taken, they are very, very minor. They would certainly have taken a few minutes to have articulated but they were not the sort of points which would have required separate work in so far as preparation was concerned, or significant separate work. They were really just points which were arguments.

That brings me to my final point in relation to the way in which the Tribunal should deal with 'issues', and that is that the Tribunal should distinguish very much between that which is an 'argument' and that which is an 'issue'. An 'issue' is a major point. It is something that gives rise to a separate part in the judgment. An 'argument' is simply a part of a point, or something that goes to an issue.

The attempt by my learned friend to break all of the judgment down into tiny, tiny parts, salami slicing, if you like, is one that is unsupported by authority and, in my respectful submission, is wrong, not least because you never stop. You could carry on forever. In my respectful submission, certainly so far as quantum is concerned – it does not really matter in so far as liability is concerned – but in so far as penalty is concerned and the amount of the penalty, the “issues” (in inverted commas) to which my learned friend points were really just arguments.

I do have some further points to make but it is probably best if I deal with those in reply rather than now.

THE CHAIRMAN: Certainly. Thank you very much, Dr. Friston. Do you want a break, Miss Bacon, or do you want to go straight on.

MISS BACON: I think it is probably best if I carry straight on, we have a time estimate for this hearing ----

THE CHAIRMAN: Yes.

MISS BACON: -- I had better carry on, I have a number of points to deal with. Can I start by saying that although it is always a delight to appear in this court I must confess ----

THE CHAIRMAN: Sometimes it is less of a delight than others.

MISS BACON: Yes, exactly, and I am slightly dismayed that we are back here on the issue of costs when such a large amount of time and money has already been spent by everyone on this appeal.

The reason we are here, now that I am allowed to give the numbers, is that Quarmby is trying to claim almost £1.9 million of costs for bringing an appeal for a penalty of £881,749 – twice the amount of costs as it was trying to reduce its penalty in the appeal. The Tribunal, as I understand it, has before it the costs bills for all of the appellants insofar as costs have been claimed in the 25 appeals, so the Tribunal will see that the Quarmby costs claim is by a very large margin the largest costs claim for any of the 25 appeals against the construction decision, the only exception there is the case of *Durkan* where, as I understand it, no costs figures were supplied, and I will come to the *Durkan* judgment in due course.

It is perhaps not surprising that having incurred costs of that magnitude Quarmby should be attempting vigorously to get some of that back. The hard reality is that it lost on the vast majority of its case and, on that basis, the OFT's starting point is that Quarmby cannot be said to be the winner and the proper order is, as in the *Durkan* case, for there to be no order for costs. In fact, as I have said in my written submissions, the OFT's position is even stronger in this case than in *Durkan* so the position adopted by the Tribunal on costs in the *Durkan* case should, if anything, apply *a fortiori* here.

Dr. Friston has been curiously silent about the *Durkan* judgment – he has not taken you to it and I will. Implicitly he is inviting the Tribunal to ignore *Durkan* and go in an entirely different direction. He has advanced a number of arguments why he says that should be the case. Rather than deal with those sequentially I propose to set out the OFT's argument in three stages, and I think at least the first two of them are accepted by Dr. Friston to be the correct analysis.

The first stage is the question of whether there has been an overall winner, and if there has not then the correct order is no order for costs. The second stage is that if Quarmby can be regarded as a winner, the question is: how the costs order should reflect the multiplicity of issues on which Quarmby lost. That is the stage at which one can perhaps consider whether the exceptionality test should apply.

The third stage in my submission is to consider whether any other general considerations come to bear on the award of costs in this case. It is at that stage one can consider questions such as the conduct of the parties, the way in which the appeal was conducted, proportionality and so on.

My primary submission, the OFT's primary case, is that this is a very clear cut case of no overall winner, and if the Tribunal accepts that, then you can stop at the first stage and you do not need to get into any of the minutiae of the case law on exceptionality, or how an issues based approach to costs is supposed to work, it is simply a case that there is no winner, so costs should lie where they fall. Even if you get past the first stage and consider that you can identify a winner, and that the winner is Quarmby rather than the OFT, the OFT's position is that all the relevant features of the case point to the same result. So I get there however, whether you get there at the first stage or whether you have to go the second, or whether you have to go to the third and consider lots of other general considerations.

But if I can start with the first stage, I must say I did not understand Dr. Friston's submission that this was a binary question. In fact, I even wonder whether in any case one can say from the outset, before an appeal, whether the result will be a binary one. But perhaps the closest kind of case that might fall within that category is a kind of case where you have an appellant, or a claimant who is essentially seeking one thing and at the end of the day they get that one thing, even if they lose on some of the arguments along the way.

An example might be a judicial review of a decision where you are attacking a single decision, or a single element of a decision, and you advance various different grounds for review of that decision and some of your arguments succeed and therefore the decision is overturned and some of them fail.

In that case, conceivably, one might say that from the outset the results could be binary – either you get the decision set aside in its entirety, or the particular element you are challenging, or you do not, but this is not this case. Quarmby brought an appeal seeking a number of quite distinct things. It was making distinct attacks on different parts of the OFT's decision, and you can see that from its notice of appeal. If I can ask you to turn it up – I have no idea where in your bundles that is, but it was in my QAB 1, and that is the bundle I was working from.

THE CHAIRMAN: Just bear with us for a moment, Miss Bacon.

MISS BACON: If you like I can simply read it out, it is only three short paragraphs.

THE CHAIRMAN: Where did you want us to look?

MISS BACON: Just the last page of the notice of appeal where Quarmby sets out its conclusion and sets out what it is asking for.

THE CHAIRMAN: Yes, we have it.

MISS BACON: Leaving aside the order for costs, it was asking for three different things. First, an order setting aside the decision on the ground that the appellant should not have been

included in the SO and/or the decision at all, and the Tribunal will recall that was the preliminary issue, which took up a detailed amount of argument.

Secondly, an order setting aside the decision insofar as it decides that the appellants have infringed the Chapter I prohibition – that was the liability case; and thirdly, an order revoking the penalty imposed upon the appellants, or reducing the amount of that penalty. So what Quarmby was asking for was three very different things. It was not just a challenge to one single decision or even one part of the decision it was challenging different parts of the decision on entirely different bases. So it had three quite distinct limbs to its case, and in respect of the first two of those three limbs, the preliminary issue point and liability, Quarmby lost comprehensively.

Even getting beyond that simple truth that on two thirds of its case it lost, it is quite clear that however you try to slice up the cake the first two limbs of the case represented the vast majority of the hearing and the preparation time, even before you get on to the question of the extent to which Quarmby won or lost on the penalty limb. Quarmby has tried valiantly to wriggle out of that by carrying out an exegesis of its notice of appeal, but doing a word count of a single document, as I think the Tribunal has pointed out, simply does not reflect the reality of the situation. Quarmby's case on liability was not just set out in its notice of appeal, it was expanded in a total of 10 witness statements, four from Mr. Nelson, two from Mr. France, one from each of Mr. Jones, Mr. Harrison, Mr. Buckler and Mr. Hicks, and the Tribunal will recall that three of those witnesses were all cross-examined at the hearing – Mr. Nelson, Mr. Harrison and Mr. Buckler. There was a very large amount of documentary material that had to be gone through on both the liability issue and the preliminary issue and that is even leaving aside the legal arguments on the limitation points that were also taken by Quarmby on liability. So it is not surprising that, taken together, the preliminary issue and the liability arguments occupied the first one and a half days of the two day hearing; it unquestionably occupied the overwhelming majority of the OFT's preparation time.

Then, as I said, you need to add into the mix, even on the penalty appeal, although Quarmby succeeded on some points it lost on just as many and if not more quite discrete points, and I have set out the references to those in my written submissions, I will not take you to them. So the result quite clearly is that Quarmby is not the overall winner – if there is any overall winner in fact it is the OFT. In those circumstances the OFT submits that there should be no order for costs.

If I can take you to the one direct precedent about which, as I have said, my learned friend has been curiously silent, and that is the *Durkan* case, which is at tab 20 of your bundle. If

you have read that I can take it as having been read and I do not need to look at it. I thought it best to turn it up because we have not actually seen it.

THE CHAIRMAN: You had better take us to the main points.

MISS BACON: If I can ask you to turn up just a single page, p.208 of your bundle, tab 20. This makes good both my points that this is the correct approach in principle, and my point that if anything the present case is a stronger case than *Durkan*. If you start with para. 9:

> "We agree with the OFT that the fair outcome as regards costs in this appeal would be for us to make no order. We do not consider that, wherever the final result of an appeal is that penalty is reduced, or even substantially reduced, costs must necessarily be awarded against the other side. That is certainly a factor that can be taken into account. However, where, as in this case, there are a number of entirely discrete challenges to different parts of the decision, the Tribunal may also have regard to the respective successes and failures of the parties and time and resources devoted to each challenge."

Then in the following paragraphs the Tribunal goes on to consider the extent to which the OFT was or was not successful. *Durkan* had advanced an appeal against liability and penalty. It had been found guilty of three infringements, the first two, 135 and 240, were considered on the basis of a parent/subsidiary liability point, and on that ground we won. In relation to the evidence on the liability for infringement 220, the OFT lost and in relation to the fine the OFT won on two points and lost on another.

THE CHAIRMAN: Yes.

MISS BACON: So overall the judgment was fairly evenly split between success and loss for the appellants and the OFT one each of the liability and penalty issues. In this case it is far more balanced in favour of the OFT, we won on all of the liability points, including the preliminary issue which, as I have said, took up a considerable amount of discussion at the oral hearing and a considerable amount of paper work prior to it. Not only that, but there were a large number of penalty issues, there were not just three penalty issues as in *Durkan*. There were a very large number of penalty issues in this case and the OFT won on at least half of them. The points on which we lost were points which had been extensively canvassed in the previous hearings and could therefore be taken more shortly when it came to the Quarmby appeal hearing.

So, in our submission, *Durkan* is a direct precedent and my learned friend has not only not even mentioned it, but not taken the Tribunal to any reason why it should ignore that precedent and steer a completely different course.

The other cases supporting this principle I believe the Tribunal has already seen: Mr. Justice Rimer made exactly the same point in the *Racecourse Association* that if it was a draw the correct order might be no order for costs. I ask the Tribunal to read the relevant paragraphs of *GISC* .

The other authority which I think you ought to see is *BSkyB* which is at tab 9 of the authorities bundle. I am not going to ask you to read all of the judgment on costs in relation to Virgin but perhaps at some point you might like to look at it and the basic point is that Virgin had succeeded on one issue, lost on another, but took up a substantial part of the proceedings, so the Tribunal decided at para. 33 that in all of the circumstances justice is best served by making no order for costs.

My submission is that following *Durkan* as well as on the basis of the clear comments that are made as to the correct approach in proceeding judgments to the Tribunal, this Tribunal can and should stop at what I have called the 'first stage' of my analysis and make a ruling of no order for costs without needing to go any further at all.

If you are not with me on that point, and you decide that you can identify a winner and that the winner is Quarmby and not the OFT, then the Tribunal needs to decide how to take account of the fact that the vast majority of the preparation and hearing time were consumed by issues on which Quarmby did lose.

There are three possible approaches. The first is simply to deprive Quarmby of the costs of the issues on which it lost but award it the costs of the issues on which it won. The second would be to start from the point that Quarmby should get costs of some issues, and pay costs on others and then net off to get the overall result.

The third would be to look at the matter in the round and say that, on balance, there should be no order for costs taking account of the different issues.

Quarmby's position, not surprisingly, is the first of those. As to the second, it says that this is will be a terribly difficult exercise and the Tribunal does not have our schedule of costs so you cannot do the netting off exercise.

We say that the correct approach would be the third of those three alternatives. If I could start with the first: Quarmby says that the Tribunal should adopt the first approach – that is only deprive it of the costs of the issues on which it lost, but give it the costs of the rest, because there is a presumption that this approach should be adopted unless the case is exceptional. The exceptionality principle does not come from the Tribunal, it comes from cases decided under the CPR where the express starting point is different from that in the Tribunal. The express start is the entitlement of the winner to its costs. There is no

exceptionality rule in the Tribunal, and there never has been. As I think, Sir, as you said at the start, the correct approach is that the Tribunal takes all relevant factors into account and makes its order for costs on that basis.

Even if there were an exceptionality rule in the Tribunal, and even if the Tribunal were to decide to follow to some degree the CPR case law on this, the question then arises as to what is exceptional. Sir, you picked up on the fact that I asked you to read para.27 of *Actavis*. *Actavis* was a patent case where the claimant, Actavis, had succeeded and had shown that the patent was invalid. Merck had lost the action. The main issue on which Actavis had claimed invalidity was the issue of obviousness on which it lost. That was why the question of exceptionality arose. Mr. Justice Warren started out from the basis that he would make an adverse costs order against Actavis on the obviousness issue. The point at para.27, which I asked you to read, was that he considered that the case was exceptional in the sense that the method challenge and the obviousness challenge, the two different challenges to the validity of the patent, had little or no overlapping material, and that the obviousness challenge had formed a far more significant part of the case in terms of the trial and preparation. Sir, did you want to turn it up again.

THE CHAIRMAN: Yes, it is p.161.

MISS BACON: Tab 14, yes, and it is p.161. Half way down that page, para.27:

> "What has in fact happened is that the claimant has lost on the major issue in this case. On the other hand, this case is not at the extreme in a case such as *Rediffusion*, but against that it is not a case either where there has been any significant overlap of factual material between obviousness and medical treatment which are relevant to the issues which have to have been both won and lost by the claimant."

Then he continues:

> "In my judgment, it would not be fair to adopt an approach the result of which is to leave the costs of the obviousness attack ..."

That is the point on which *Actavis* had failed –

> "… falling where they have been incurred, but neither do I think it is fair that the defendant should, as Mr. Hinchcliffe submits it should, recover all of its costs on the obviousness issue."

Merck was saying that, "We will have all of our costs on obviousness", and he said, "I am going to give you some but not all". Then I think at para.30, I think there is a typographical error, he says:

"I consider that I should make an order which broadly allows the claimant to recover 75% of this issue."

I think he should be saying "defendant" there, and if you read on the context makes clear that he has wanted to award the defendant 75 per cent of the costs of the obviousness issue. Then he says:

"There is, I am afraid, little science in this and some might say no art either. It reflects my judgment of the nature of the case. It is exceptional in this sense, that the method challenge and the obviousness challenge had no or little overlapping material and, on any view, the latter formed the far more significant part of the case in terms of time of trial and preparation but it is not a suitably exceptional case to lead to the result of a 100% recovery."

What he did was he awarded Merck 75 per cent of the costs of the obviousness. He did not do a strict netting off in terms of money, but he then went on to net off overall in terms of percentages.

THE CHAIRMAN: That was not done on the basis of counting up the costs that were actually incurred on this issues, it was the "doing the best I can" approach.

MISS BACON: Yes, "doing the best I can". It was not a "let us look at the money spent by both sides", it was 75 per cent, and then he worked out in broad terms what percentage of the appeal was taken up on obviousness, which I think he found about 75 per cent. So Merck got 75 per cent of 75 per cent, or something like that.

There are two points to be drawn from that. The first is the point that you have just made to me, Sir, that it is not a mathematical exercise. The second is that exceptionality does not involve necessarily unreasonable conduct. It is simply advancing a case which is distinct from the part of the case on which you won.

Another example of exceptionality is the case of *Fulham Leisure*. I will just give you the tab number, it is tab 35. It is referred to in my learned friend's submissions. The exceptionality there was advancing a case for which a party had no affirmative evidence. That is precisely the case for the liability case that was advanced by Quarmby. You will recall that the bulk of the liability case was the claim that there was insufficient evidence for the three infringements. It is noted in the judgment that this single issue about the evidence of the three infringements took up the majority of the appellant's oral submissions, and it was the subject of the majority of the witness evidence and all of the cross-examination. On that aspect of its appeal Quarmby expressly said in its notice of appeal that it did not have a positive case to advance. If you have the notice of appeal in front of you still, you

might like to turn up para.2.10. The appellants do not advance a positive case as the relevant individuals, because of the effluxion of time, have insufficient recall. Then they go on to say that the OFT has not done the ----

THE CHAIRMAN: They were put to proof, were they not?

MISS BACON: Yes. It is a short point, and it is that if you are applying an exceptionality test you get there on the, in this case, three completely distinct arguments, and you also get there in relation to liability on the fact that for the most part the appellants were advancing a case for which they said expressly in their notice of appeal that they did not have any positive case to advance, they were simply putting us to proof.

Supposing you get this far and you decide that this is a suitably exceptional case, you can then look at options two and three. Exceptionality then defeats option one. You can look at issues won and issues lost and net it off, or you can simply look at the matter in the round and say no order for costs. We submit that the second of those options ought to apply in this case. Looking at the matter in the round, the relevant factors are those I have already drawn out in relation to my submissions on the first stage – in other words, that the successful parts of Quarmby's appeal were overwhelmingly outweighed by the unsuccessful parts, both in terms of preparation and hearing time.

As I have shown you, even if the CPR it is not a mathematical exercise. We say on that basis, even if you get into an issues based analysis, which we say you do not have to do anyway, the appropriate order is for there to be no order for costs.

The third stage of my submissions is, are there any other relevant considerations which weigh in one direction or another? You have seen that we have set out various points at section 3 of our costs submissions – public policy objectives, the appeal procedure sought by Quarmby and the proportionality of the costs claimed. We are not saying any of these factors is decisive, though I think Dr. Friston might have misunderstood our case. We are not saying, for example, that the public policy argument should be decisive. We say they are relevant factors to be taken in the round if you are considering on an issues based approach where costs should lie. You do not even get there if you agree with the first stage of my analysis that there is no clear winner. So you only need to look at these supporting factors to the extent that you think that Quarmby has won in some way and can be identified as the winner.

Since these points are canvassed in detail in the written submissions, I do not want to say a lot about them. I just want to pick up on a few points that have been made by Quarmby in writing and today. Starting with the public policy objectives, we are not saying that we

should be entitled to a degree of protection simply because we are a public body. We are not making the argument that was rejected in a number of the High Court cases that Dr. Friston took you to, rather we are saying that historically the Tribunal has been slow to award costs against a Regulator, such as Ofcom, where it is performing regulatory functions in good faith and where the Tribunal has found it on an issue that comes down to judgment. One of those cases, you will recall, Sir, because you and I were both involved in it, is the mobile number portability cases. That is a case, it is in the bundle, where you decided precisely on that basis that although *Vodafone* had won, this was an issue of judgment, and the relevant considerations were that the regulatory authority was under a statutory duty, that it acted honestly, reasonably and properly in the exercise of that public duty, and the court had struck the balance reached by the authority differently, and you considered in that case that taking into account those considerations the correct order was that there should be no order for costs. I am not saying that that should be decisive here, but I am saying that it is a factor that the Tribunal can bear in mind that, in these regulatory decisions, historically neither Ofcom nor the appellant has been the recipient of costs.

Sir, there are other cases which we have referred to in our written submissions, such as *The Number* case ----

THE CHAIRMAN: My recollection of that case, Miss Bacon, is that there was a very high degree of uncertainty as to how the regulatory regime applied and the playing field was pretty level between the two sides. I recall the Tribunal struggling to its conclusions, though it had to come to them.

MISS BACON: Different arguments were advanced by different mobile network operators, and a balance had to be struck and the Tribunal struck that balance differently. I am not saying that this case is on all fours with that. My point is simply that in all of these regulatory cases involving Ofcom the Tribunal has adopted this approach of neutrality when it comes to costs. That is something that the Tribunal can have in mind when it is considering the present case which also involves a Regulator.

THE CHAIRMAN: One of the idiosyncrasies of that case, as I recall it – correct me if my memory is wrong – is that 3G supported Ofcom against the other mobile phone ----

MISS BACON: Yes, as I have said, there were a number of MNOs in the case and they took different approaches. Hutchison 3G had urged Ofcom to adopt the approach that it did and the other MNOs disagreed and the Tribunal agreed with Vodafone supported by, among others, my clients.

THE CHAIRMAN: Yes.

MISS BACON: As I said, I am not saying that this case is squarely on all fours with that, but the point is that while my learned friend has taken you to various cases in the High Court where the court has rejected the submission that it should be neutral as to costs in a case involving a Regulator, in this Tribunal there is a precedent of making no orders for costs in cases involving a Regulator, and that is something that you can have in mind. I do not push it more vigorously.

THE CHAIRMAN: My feeling is that, if one looks at the trend of cases as the years have passed, there is a greater tendency now towards the ordinary rules, if I can put it that way, in relation to costs, rather than giving any special position to the regulators.

MISS BACON: Yes, and that is something that we have acknowledged in our submissions. Our point is that if this were a penalty appeal, this is an issue that the Tribunal should re-examine, whether it is appropriate to go down the route of tending to award costs if the OFT has been unsuccessful in defending a penalty, or rather whether the Tribunal can reflect, looking at its jurisprudence in cases involving Ofcom, and ask what the costs are to the public purse if the OFT has exercised judgment in the setting of a penalty and the Tribunal has decided that the judgment should be exercised in a different way. That is as far as we put the point.

Should that trend continue that you have observed in relation to penalty cases or should we actually take stock and perhaps set a different course more similar to the approach adopted in the regulatory appeals?

The second of the two points I wanted to pick up briefly was the appeal procedure. Quarmby seems to suggest that it is being victimised or singled out. In our submissions about the failure to agree the OFT's case management suggestions, I just want to clarify that, as the Tribunal will probably be aware, the same point has been taken by the OFT in all of the costs claims currently pending before the Tribunal in these appeals. The OFT's point is that it did make an attempt very early on to narrow the issues and ensure streamlined case management to the extent that the arguments did not have to be duplicated. All of the appellants vehemently opposed the OFT's proposals, and that included Quarmby. Ultimately, the commonality between cases was such that penalty was decided on essentially the same grounds across the board. We have seen that and Dr. Friston has acknowledged it, that large parts of the Tribunal's penalty judgment in this appeal could be decided by picking up on judgments in *Kier* and the other cases.

Of course, it is open to the appellants to come to the court and say, "We want our day in court, thank you", but my point is that in the same way that the Tribunal and courts will not

normally ask an unsuccessful party to bear two full sets of court costs where two successful parties have made almost identical or actually identical arguments. Our position is that it is a relevant factor in the exercise of your discretion that the costs incurred on the penalty appeals would inevitably have been reduced if there had been the test case approach that we suggested from the outset.

Sir, the last point that I wanted to pick up was the proportionality or access to justice point. This concerns the size of Quarmby's costs bill. Quarmby tries to have it both ways. On the one hand in its written submissions Quarmby makes repeated reference to the overall financial burden imposed on it and says that the Tribunal should bear in mind that overall burden of penalty and costs when it is considering the exercise of its discretion. So it is asking you to look at its large costs bill and be terribly sorry for it. It also tries to justify the size of its costs bill by reference to arguments about access to justice and the necessity in this case for it apparently to have a CFA which included a large success uplift fee. But, on the other hand, Quarmby protest that the full extent of its costs are entirely relevant and the Tribunal is completely unable for some reason to form a view on whether £1.9 million is disproportionate for a two day hearing.

Can I just cut through the confusion and clarify what the OFT's case is on this? We are not saying that an appellant should be deprived of costs that it otherwise ought to have – if you get to the stage of deciding that it ought to have them – simply because the costs bill is excessive, and Quarmby is right to say that if you decide that it ought to have some part of its costs then at the end of the day there will be a detailed assessment and we can raise points of dispute.

We are saying that if Quarmby comes to the Tribunal and says it ought to have some part of its costs because otherwise it will suffer an unfair financial burden, then you can take account, in considering that submission, the fact that the large costs burden that it is complaining of was entirely self-inflicted, or largely self-inflicted, and the result is from the profligate way in which it conducted its appeal.

If you come to that analysis, to say that you are somehow unable to form a judgment about proportionality in this case is completely absurd – the numbers speak for themselves. Quarmby's claim for a two day hearing is in excess of £1.8 million. Willis' claim for a one day hearing was less than £33,000 despite the fact that, like Quarmby, it also challenged both penalty and liability. Quarmby has never been able remotely to explain that extraordinary difference.

You might recall that in the *Racecourse Association* Mr. Justice Rimer considered precisely this point and if I can just take you to the findings on that, because he did make findings on proportionality, despite Quarmby's protestations that you cannot ever make any findings in that regard without having detailed assessment. Page 41 of the authorities bundle, para. 30, the latter half of the paragraph:

> "In the event, the BHB's costs have amounted to nearly 150% of the RCA appellants' costs, with the costs of both appellants totalling over £1.6 million. Total costs of that order incurred in challenging a single decision and ultimately resulting in a hearing lasting a mere three days are, we consider, manifestly disproportionate."

So, apart from not being able to look at proportionality without looking at the minutiae of how many hours were spent by which partner when, the Tribunal is able to express an overall broad brush consideration of proportionality, and can express concerns about it as Mr. Justice Rimer did.

In this case the bill of over £1.8 million is all the more disproportionate, given that there was a single appellant effectively, a two day hearing in circumstances where the Tribunal had already heard lengthy argument on many of the penalty points in previous appeals. I accept that Mr. Justice Rimer was deciding his case in 2006, but I do not think inflation has been that much since then.

Another way in which the size of Quarmby's costs bill can legitimately be taken into account by the Tribunal is the fact that it reflects the entirely disproportionate way in which we ----

THE CHAIRMAN: Just bear with us for a second – Ms. Kelly just wants to go and clear her throat. Just while we are having a break, I am reminded we asked the parties for but have not yet received a schedule of your costs in connection with this costs application.

MISS BACON: (No microphone): I was going to come to that. Can I deal with that at the end.

THE CHAIRMAN: Yes, alright.

MISS BACON: (No microphone): I am sorry, I was not aware that you had asked us for one of those but we can provide that.

THE CHAIRMAN: We will check that you were asked, but I think you were. Yes, certainly, Mr. Aldred is confirming they were asked.

MISS BACON: (No microphone): My instructing solicitors are not sure whether they were asked.

THE CHAIRMAN: Well if it can be provided that is fine. Yes, Ms. Kelly has come back, we can carry on.

MISS BACON: I am sorry, I have just seen a letter in which the Tribunal did ask for our costs, and I do apologise for not having brought one to the hearing, and we will provide it within a week.

THE CHAIRMAN: That is all right, do not worry.

MISS BACON: I was getting to my last point which was that Quarmby's costs bill can be taken into account in another way, and that is in the fact that it reflects the way in which it conducted its appeal. Quarmby chose to run what I would call a 'kitchen sink' appeal – the Tribunal put it somewhat more politely and said that there was a 'root and branch attack on penalty'. In my submission, the root and branch point can be said also for the other parts of Quarmby's appeal. Quarmby ran every conceivable point, the vast majority of which were rejected and, as Dr. Friston fairly accepts, several of them were not only rejected but were described in the judgment as being 'wholly without merit', in other words points that should never have been taken.

In our submission the Tribunal is entitled to send a strong signal to Quarmby and other prospective appellants that if they do bring an appeal that advances for the most part a succession of bad or completely hopeless points and if they do, as Quarmby itself puts it, fail to 'sort the wheat from the chaff', that will be a relevant factor to take into account in considering whether any costs at all should be recoverable. In our submission this is a factor that strongly points towards no recovery of costs by Quarmby. That was all I wanted to say about what you might term the miscellaneous points that we say can be looked at at the third stage if you are against us on the first stage and have to consider on an issues based approach where to exercise your discretion.

If I can sum-up in this way: our primary submission is a very simple one, that there was no overall winner in this appeal and costs should therefore lie where they fall. If you disagree and consider that Quarmby is to some extent to be regarded as a winner, the secondary submission is that if you set Quarmby's limited success on penalty against all of the other points on which Quarmby lost, the result should be no order for costs. If any support for that is needed then we rely on our miscellaneous submissions on appeal conduct, public policy and proportionality.

Can I just say a few brief words about the costs of this application? The OFT, as you will be well aware by now, considers that in the circumstances this application is not one that should have been made, and also that the hearing need not have taken place. Our position is

that although there should be no order for the costs of the main hearing, we are not saying the same for this costs application and we seek two things: first, our costs of this hearing in any event, and secondly, if the Tribunal is in favour of the OFT and considers that there should be no order for costs of the main appeal then the OFT will seek its overall costs of defending this application by Quarmby. If the Tribunal would be happy to receive our schedule of costs within a week it can be provided in that timescale.

Unless you would like me to address any further points, those are my submissions.

(The Tribunal confer)

THE CHAIRMAN: Thank you very much, Miss Bacon. Yes, Dr. Friston?

DR. FRISTON: I will take the points in roughly the same order that they were raised. The first point that was made was in relation to *Durkan* and there is a reason why I did not take the Tribunal to it when I made my submissions, and that is because there are reams and reams of authority that show that the issue of deciding the instance of costs is not a matter of matching cases to other cases. It is an issue of deciding each case on its own facts in accordance with established principles and, in that regard, the Tribunal can take and must take into account decided cases but only where they articulate decided principles.

THE CHAIRMAN: But is it not helpful to look at a case which occurs in precisely the same context and series of cases as an example, not necessarily as establishing a principle, but as an example of the application of that principle?

DR. FRISTON: I say no. I say that that is not helpful and I will go further than that and say that it is something which, if given any significant weight, would lead the Tribunal into error, and that is, as I say, because ----

THE CHAIRMAN: Sorry, what is the authority for the proposition that the Tribunal is prohibited from looking for some analogous assistance to a case in which the same point has been considered in the same series of cases where broadly the same issues arose?

DR. FRISTON: The answer to your question is a case called *Straker v Tudor Rose.* If the Tribunal wishes at the end of this hearing I will provide a couple of authorities that deal with that point. I am not going to go so far as to say ----

THE CHAIRMAN: But you knew they were going to cite the *Durkan* case, it is in the bundle.

DR. FRISTON: Yes. The point I make is that it is not appropriate to give weight – the Tribunal can take it into account in the sense that the Tribunal can note it and say: "That is what happened in another case", but what the Tribunal cannot do is say: "This case is comparable and, as a result, we are going to simply follow another case."

THE CHAIRMAN: Is this a principle that is set out in the Civil Procedure, in the White Book?

DR. FRISTON: I suspect we maybe at cross purposes. If all the Tribunal is saying is, is the Tribunal able to take into account another case and just say: "This is similar and I note that another judge has done a similar thing" then of course the Tribunal can do that because ----

THE CHAIRMAN: I am sorry, I think we may ----

DR. FRISTON: If, however, what the Tribunal wishes to do is to say "This case is on all fours" and because of that I am going to follow the case ----

THE CHAIRMAN: I do not think that is being contested. Is it any different, for example, to the Court of Appeal (Criminal Division) considering a sentence for wounding with intent with a knife in a shopping centre at night, and looking at another case where there was a sentence for wounding with intent with a knife in a shopping centre at night as an illustration, but not being bound by anything that occurred in that case as a principle. This is just normal, is it not?

DR. FRISTON: If it is simply as an illustration, then I will not push the point, but it should not be something which ----

THE CHAIRMAN: All right, I understand what you are saying and I do not think there is much dispute about it.

DR. FRISTON: I add to that by saying that very little help can be obtained by looking at comparable cases. In any event, *Durkan* is, in my respectful submission, not a case that should be followed for two reasons. Firstly, it does not appear from the judgment in *Durkan* that the Tribunal in that case was actually taken to the authorities that I have taken this Tribunal to. In particular, it does not appear that the Tribunal in *Durkan* had the benefit of the submissions that I have made today concerning 'exceptionality' and the way in which the Tribunal should address a problem where one side has won overall. There have been issues which have resulted in a generally successful party losing those issues. For that reason I say it should not be followed.

In any event, there is a factual reason why *Durkan* should not be followed, and that is that in *Durkan* the case itself, the hearing itself, lasted five days and the matter was brought out of the protocol, and that was a matter of *Durkan* requesting that it be brought out of the protocol. The overall factual matrix in *Durkan* was different to that extent. Put another way, that would have made it 'exceptional'. I say that this Tribunal can, of course, refer to *Durkan*, it can note what happened in that case, but it should not follow *Durkan*.

The next point that was made was that it was said that there was no overall winner. My learned friend drew an analogy with judicial review and she said that in some cases you have a position where you either win or you do not, and it was suggested that the same was

not the case here. My learned friend then went on to draw the Tribunal's attention to that which is set out in the appellant's notice and to say, look at these items that form the basis of the claim, they have succeeded in only some of them.

This is a case where one party either wins or it does not. The appeal has been allowed. That is just a fact. This is not a case where there has been a counterclaim. There could not be a counterclaim for obvious reasons. There is no doubt as to the extent of any win. It is not a matter of degree.

Finally, it is wrong in principle to point to that which is claimed to say that the putatively successful party has failed to recover that which it has claimed in totality, and therefore it cannot be said that there has been an overall win. That is for the reasons set out in my skeleton argument and I do not propose to repeat those reasons or to take you to the cases. I say it is wrong in principle to say that a putatively successful party should not be regarded as being a successful party because they have recovered less than that which has been sought. That is an issue that goes to 'issues'.

THE CHAIRMAN: I am having some difficulty with this, and you are going to help us, Dr. Friston. I am sure we would find it if we looked. Somewhere in the judgment that we gave I think we used the words "On the issue of liability this appeal is dismissed". That was, as Miss Bacon has reminded, and Mr. Aldred of course was here at that hearing, in relation to – I will not give percentages – a substantial proportion of the argument and evidence presented at the hearing. Why are we to ignore the fact that a substantial percentage of the hearing was taken on an issue in which we dismissed the appeal and your clients lost?

DR. FRISTON: You do not ignore it: that is the point. It is taken into account in the second stage.

THE CHAIRMAN: On that issue there was only one winner and it was not your client.

DR. FRISTON: It is similar to a situation where one has a claim and a counterclaim in the sense that it relates to similar subject matter; it is commonly the case that one has success on a claim and one also success on a counterclaim. The way in which that situation is dealt with is not by saying one party will recover the costs of the claim and the other party will recover the costs of the counterclaim. That used to be the situation some time ago, but that is no longer the case. The way in which that situation is dealt with is by the court – in that circumstance it would be a court – deciding who is the winner. In other words, unless there are obviously two totally separate issues in the sense of ----

THE CHAIRMAN: Subject to a discretion in all cases to allow only a proportion of the costs.

DR. FRISTON: Yes, of course, I am not suggesting otherwise.

THE CHAIRMAN: I understand.

DR. FRISTON: In those circumstances one has to decide who is the overall winner. With a counterclaim, the way you answer that question is, 'who pays money to whom?' Generally that is the way in which that question is answered. In the context of this matter, the question is, 'has the appeal overall been allowed?' I am not in any way suggesting that the fact that we lost that part of the appeal that related to liability should be ignored. It certainly should not be. All I am saying is that the first of the three ways of dealing with this matter that my learned friend pointed to is not the correct way. It is wrong in principle.

THE CHAIRMAN: I understand.

DR. FRISTON: I will make this point now as well as when I come to 'exceptionality'. It also ought to be borne in mind that there was a very great deal of overlap between the factual matrix that went to liability and the factual matrix that went to penalty. In that regard - I do not ask you to turn to it now for want of time – could I ask you to read para.6 of my instructing solicitor's witness statement dated 8th July 2011.

My learned friend then went on to deal with the way in which what I will call "apportionment" should be carried out – in other words, the way in which the Tribunal should decide how much related to liability and how much related to penalty. My learned friend made a number of assertions that I would like the Tribunal, please, to expressly exclude from its deliberations. The first is that the overwhelming majority of the Office of Fair Trading's time was spent in preparation for the liability issue. There is no evidence whatsoever on that point and there could have been.

In so far as my learned friend implies that the same is true in relation to our costs, I say the same: there is no evidence whatsoever as to the Office of Fair Trading's costs. I put forward also a number of reasons why there is such a degree of overlap between the two that one simply cannot say that.

My learned friend then went on to deal with the *Racecourse* case, and in particular to draw the Tribunal's attention to those paragraphs where ----

THE CHAIRMAN: Page 31?

DR. FRISTON: It is p.41, thank you. This was a passage, para.30, that related to proportionality. I will deal with that whilst I am on this page, but I will also just refer the court to the page beforehand where Mr. Justice Rimer expressly referred to the possibility of the Tribunal making no order for costs. I fully accept that circumstances may exist where the Tribunal could make no order for costs. If, for example, the Tribunal had found that there were

exceptional circumstances that took the case into that category where a generally successful appellant took points where it should be paying costs, and if the Tribunal had evidence before it whereby it could say that those costs will, when set off against those costs, give zero result, then of course the Tribunal can come to that conclusion. The mere fact that Mr. Justice Rimer has indicated that no order for costs is a possible outcome is in no way contrary to my submissions.

My learned friend then went on to deal with the case of *Actavis*, and you will find that at p.161. In particular, my learned friend drew your attention to para.30, and I will just read it out again:

> "I consider that I should make an order which broadly allows the [defendant] to recover 75% of its costs of this issue. There is, I am afraid, little science in this and some might say no art either. It reflects my judgment of the nature of this case. It is exceptional in this sense, that the method challenge and obviousness challenge had no or little overlapping material and, on any view, the latter formed the far more significant part of the case in terms of trial and preparation …"

What my learned friend invited the Tribunal to find is that, firstly, it is possible to find exceptionality in the mere fact that issues were separate. I say that that is not right. Secondly, my learned friend implied that this is authority for the proposition that you do not need to know the amounts of the parties for the purposes of making a percentage based costs order. To an extent, that is true, I am not going to suggest that it is a mathematical exercise that can only be carried out by working out one side's reasonable costs and working out the other side's reasonable costs and then carrying out an actual mathematical exercise. What I do say is that usually the court will have some idea. This case was a civil case and the judge deciding it, Mr. Justice Warren, would have had a very good idea as to the parties' costs. He would not have especially referred to them, because that is rarely done in civil litigation, but he would have known them because he would have had immediately before trial a listing questionnaire which would have set out both the costs that had been incurred at that point and the estimated costs to trial. So that second point that my learned friend made was simply a bad point.

In so far as the first point is concerned, however - that is that there is exceptionality in the mere fact that issues are discrete - I do not accept that. It, of course, can be the case in some circumstances where the issues could be so discrete that the court or the Tribunal may find that they really were two separate claims rather than two completely separate 'issues'.

But even if I am wrong about that, here they were not discrete. There may have been discrete parts of the appeal, but they went to the same subject matter and also equally importantly they turned to a very large part on the same factual matrix. And the Tribunal can be sure of that - in my respectful submission - because of the conduct of the respondent. The conduct of the respondent was such that we, for the purposes of dealing with the penalty, had to read into almost everything.

There would, of course, then have been further work specifically for the purposes of dealing with the liability aspect and that is that part of the apportionments that relates to liability, I am not pretending it is zero, but this case is distinguishable from *Actavis* on the basis it cannot be said that these two issues were entirely separate; they were not.

My learned friend then took the Tribunal to *Fulham*, tab 35.

THE CHAIRMAN: You say that the Tribunal had to read into almost everything for the liability that arose and the quantum, but I have just been checking that my recollection was right. There were four issues on the issue of liability. Limitation was the first issue. The second issue was that the alleged infringements pre-dated the introduction of the 1988 Act. The third issue was that there was insufficient evidence on infringements nos. 6, 214 and 233, on which we took a great deal of time. The fourth issue was that the client was not deceived on one of the infringements, infringement 233. What did any of those issues have to do with quantum?

DR. FRISTON: I respectfully ask the Tribunal to make sure it does not fall into the trap of considering as the appropriate measure that work that the Tribunal had to do.

THE CHAIRMAN: I am not, I am questioning something you just said to us, Dr. Friston, which I noted as: "It is the same subject matter", that is certainly true, broadly: "the same factual matrix", that is certainly true, broadly, and that we had to read into almost everything for liability that we would have had to read into for quantum. I have just listed the four issues that were taken on liability and I am a little bit at a loss to understand why you are saying we would have had to read into the detail of those issues in anything like the way we did to deal with the question of quantum, penalty, when actually the issues of the penalty turned on whether the correct year of relevant turnover had been used, whether the starting point percentage of 5 per cent was too high, whether the housing market had been segmented properly by the OFT in relation to the assessment of quantum, their failure to differentiate between culpability on the separate breaches, exclusion of turnover in relation to tenders, and some other issues specific to the financial state of the company concerned. Those were very, very separate sets of issues, were they not?

DR. FRISTON: They were separate in the sense that the arguments that were put would have been entirely separate and undoubtedly you would have been taken to different evidence in relation to the two of them. But they were not separate in the sense that they related to different subject matter, they related to a penalty, they related to the appeal. Secondly, the point that I was trying to make was that they were not totally separate in that they related to entirely separate issues such as ----

THE CHAIRMAN: Well they both related to cover pricing, that is certainly true.

DR. FRISTON: The link between the two is that they would have been based on broadly the same facts, broadly the same factual matrix, and that is why I say the Tribunal should not fall into the trap of looking at the work that it had to do for the purposes of dealing with these issues, because the vast majority of the work that a solicitor has to do – that is where the vast majority of the costs in any claims will lie – would have been in getting to the stage where the evidence that you will have seen would have been produced, and there is a significant link between the two.

I am certainly not suggesting that exactly the same work had to be done in relation to liability and ----

THE CHAIRMAN: I understand, thank you.

DR. FRISTON: My instructing solicitor has asked me to read out, rightly so, para. 6 of his witness statement dated 8th July, and in particular the second sentence – I will just read it out from the beginning:

> "Not surprisingly, the objective of the appeal was to reduce the level of the penalty and the general costs were heavily focused on that objective. Likewise, the liability arguments were directed towards the objective of reducing the penalty too. Even though the Appellants' liability arguments may not have succeeded in themselves, I certainly hope, they assisted the Tribunal in gaining a better understanding of the factual matrix of the Appellants' infringements and the Respondent's investigation generally which helped the Tribunal determine the appropriate level of penalty which was reduced from £800,000 to £200,000."

The point is that there is a nexus and the reason I make that point is to show that the case of *Actavis* can be distinguished.

It is also probably worth just saying, in passing, that the first of the two issues that the Tribunal has just mentioned were, of course, clarifying the law and to that extent it cannot be said that we were acting in any way unreasonably or, indeed, even exceptionally in

saying: “Well, that is something that needs to be addressed”. Indeed, one could almost say that that is something that would have had to have been done at some stage in any event.

The next point that my learned friend then made was in relation to *Fulham Leisure*, which you will find at tab 35. The point here is that it is said that this is a case where there was exceptionality arising out of a lack of affirmative evidence and Mr. Justice Mann then went on to make an order that not only deprived the generally successful party of their costs but also required them to pay costs.

I think it is just worth pointing out that the reason these two cases are in the bundle is because it is, of course, the duty of any advocate to make sure that all decisions are before the court where they are relevant. It is also relevant that there are not that many before the Tribunal - not many in the bundle - and this one in particular is not a particularly good comparator. I repeat what I said earlier on about comparators anyway. Here the absence of affirmative evidence really meant that there was no case and that is because, obviously, in civil litigation a party who asserts must prove, and without any affirmative evidence then that party is going to lose, on the whole. So there is no real concept in this sort of case of simply putting the party to proof whereas the entire basis – or a large part of the basis – of the appeal in relation to liability in this case was 'did the respondent have the relevant evidence to allow it to take the step of instigating proceedings?' etc.

In other words *Fulham* is in no way comparable to this case because in this case it was perfectly legitimate to put the respondent to proof. Indeed, that was the entire basis of the appeal.

THE CHAIRMAN: The *Fulham* case was one in which there was no winner.

DR. FRISTON: Yes, so there the thinking would have been: 'is this case exceptional? Yes, it is exceptional, can we set off ----'

THE CHAIRMAN: But it is an example of a case where the binary question was asked, and Mr. Justice Mann answered it by saying: “I cannot answer the binary question, there is no winner”.

DR. FRISTON: It is an example of a case where exceptionality would have been found. A lot of things go on behind the scenes, as it were, they are not expressed, but it is an example of a case where exceptionality would have been found. The netting off effect would have allowed the court to find that there was no net payment, and therefore there should be no ----

THE CHAIRMAN: Is this not a case in which Miss Bacon’s first question was answered: “No, there is no winner”, and then the judge went on *de bene esse* to deal with the other

questions? I have been reading para. 8 onwards, and particularly para. 10 on p.493. He considers with exceptionality plainly in a *de bene esse* argument as far as I can see.

DR. FRISTON: Yes, I would have to remind myself of the exact details of this case, but given the fact it is Mr. Justice Mann in the Chancery Division, it is likely that there was an element of both sides claiming something, and in those circumstances the court very often will come to the conclusion that nobody has won because there will be no net payment. So it is an important distinction between this Tribunal where one side who is claiming something, and especially commercial litigation and litigation in the Chancery Division where both sides will claim some sort of benefit.

The reason you were taken to *Fulham Leisure* - in my respectful submission - was primarily because it was an indication of a case in which exceptional circumstances may be made out, even implicitly, and I just explained why that is not a case which is of assistance in this case.

The next case that you were taken to was *Vodafone* which I think you will find at tab 47. I am grateful to my learned friend for clarifying that her position is not that the test to be applied is in some way rendered asymmetric by the putative need to protect the State and protect the State's resources. It is only a factor to be taken into account. My learned friend refers the Tribunal to this case where she says that was the case and, as a result, the costs were allowed to lie where they fell.

In my respectful submission this case is of no assistance at all and the reason for that is because this is an administrative case of that type that the Master of the Rolls referred to in that passage to which I took the Tribunal earlier on.

THE CHAIRMAN: I am inclined to agree with you about that, Dr. Friston. You do not need to trouble with this one.

DR. FRISTON: The next point that my learned friend then made went to the amounts that had been claimed in this case – it was one of a series of points – but in essence it was urged upon the Tribunal that the Tribunal can take amount into account and that it can do so in some very, very general way. Rather than simply saying what the law is not, it may be of more assistance if I say what I think the law is: that is, the Tribunal can take the amount that is claimed into account, and must take the amount that is claimed into account as being a background fact. In particular, if the Tribunal had evidence before it of the amounts that were being claimed by both parties the Tribunal could in those circumstances take those amounts in account for the purposes of deciding the appropriate percentage. What the Tribunal cannot do is to draw an adverse inference from the amount that is claimed by

either of the parties or both the parties, and to say that in those circumstances that is a factor that will be taken into account when deciding the incidence of costs. The reason for that is because there is a risk there of double jeopardy in the sense that if this Tribunal takes that factor into account and, let us say, a small award is made by reason of that fact and then, on the detailed assessment, the costs judge finds that the costs are significantly disproportionate and he reduces the costs by 75 per cent, then the receiving party in those circumstances will have been penalised twice.

Put another way, when looking at the amounts that are claimed, the actual amounts that are claimed are irrelevant for the purposes of considering the incidence of costs, because the costs judge will do his job in the sense that he will reduce the costs down to a level that is reasonable. At the very, very most, if the Tribunal is going to take the amounts claimed into account it is simply a background fact, and it cannot be taken into account in ----

THE CHAIRMAN: How far are we entitled to take this into account? This is a specialist Tribunal. Even as a part-time Chair of this Tribunal for a number of years, I have heard a number of cases in which the respondent has been the OFT or the Competition Commission or one of the Regulators, and we are familiar with the general levels of costs that are claimed by those public authorities and we are aware that the costs claimed by those public authorities, were they to be applying for costs, would be a fraction of the claim – they would be substantial sums, but still a fraction of the sum claimed by yourselves. Are we not entitled to take that into account in terms of proportionality?

DR. FRISTON: That brings me to my next point which is that proportionality is not an issue for this Tribunal. What the Tribunal can do, and what I suspect was being said in that case that my learned friend took you to, p.41, where it was Sir Christopher Bellamy who referred to proportionality, is to give an indication for the costs judge. What the Tribunal can do is to say that these costs appear to be disproportionate and we would like the costs judge to take that into account.

THE CHAIRMAN: He did not mince his words. He said, "They are, we consider, manifestly disproportionate". That is more than a nudge.

DR. FRISTON: Absolutely. It would be a brave costs judge indeed who found that they were not disproportionate in those circumstances. The point I make is that that is simply an indication for the next stage. It is not an issue that is relevant to the stage of considering the incidence of costs.

The Tribunal can take into account of course its own experience of costs that are claimed to the extent that that might be relevant. For the reasons I have already mentioned, I say that

that probably is not relevant on the facts of this case, but in any event the Tribunal ought to exercise considerable caution in this case and that is because there is a success fee. As I understand matters, this is one of the first cases in which a success fee has come before this Tribunal. A success fee can double the costs quite easily.

THE CHAIRMAN: We understand that.

DR. FRISTON: Whether that is something that this Tribunal thinks is a reasonable way of funding a case or not (I am sure the Tribunal will have views on that) it is the regime for funding that exists in this country at the moment. It is not permissible, or certainly not helpful, for the Tribunal to say, there is the amount that is claimed, that seems to be higher than the amount claimed in other cases.

My instructing solicitor also makes the point that there is no detail before this Tribunal as to the costs that have been claimed. In particular, for example, the Tribunal would not be able to form a view as to how much work was involved in the penalty aspects of the matter reading into other cases in order to be able to make submissions about unequal treatment.

THE CHAIRMAN: Of course, had you wanted to put the information before the Tribunal you could have done.

DR. FRISTON: It would have been extremely expensive to do that ----

THE CHAIRMAN: At this stage.

DR. FRISTON: -- to draw a bill in a case such as this.

MISS BACON: I am sorry, I have their schedule of costs, but I cannot refer to it because it is not before the Tribunal. They could have put it in, the document exists.

DR. FRISTON: To draft a detailed bill normally costs between ----

THE CHAIRMAN: We are not talking about a detailed bill.

MISS BACON: I have got it.

THE CHAIRMAN: I am not talking about the dates on which letters were written. It is a matter for you whether you put in your schedule of costs. The fact is that we do not have that in front of us.

DR. FRISTON: That is because that is a matter for the next stage. That is a matter for detailed assessment because this Tribunal does not need to form a view as to proportionality.

THE CHAIRMAN: You could have put it before us had you wanted to, that is the point. The material that is given to this Tribunal is a matter for the parties.

DR. FRISTON: We could have done, but there would have been no real point in doing so because the issue of proportionality does not arise at this stage.

THE CHAIRMAN: I understand you to be making that submission.

DR. FRISTON: So there would have been no point in us doing that.

THE CHAIRMAN: Do you want us to adjourn or do you want to finish your submissions?

DR. FRISTON: I will be only a few more minutes.

THE CHAIRMAN: It is up to you, we can adjourn now until two o'clock if you would like a little more time. I can tell you what we are likely to do if it is of any assistance to the parties. Our intention is to give our decision today, but to give our reasons later. We will take a little time anyway after you have finished your submissions to decide what our decision is going to be. Once we have reached that conclusion, it will take a couple of minutes to tell you what our decision is and then you will receive written reasons in due course without the need to attend. Miss Bacon is looking very enthusiastic about you finishing your submissions before the luncheon adjournment, but it is a matter for you. I will find against her on that if necessary, it is your call

DR. FRISTON: As we are going to be here this afternoon I will only be five or ten minutes later on.

THE CHAIRMAN: I am sorry, Miss Bacon, we are going to adjourn. Does that put you in great difficulty? If it does you do not have to be here.

MISS BACON: We will discuss it. I am grateful ----

THE CHAIRMAN: If you are not here, as long as there is a representative here we will not take offence.

MISS BACON: I will confer with those instructing me.

THE CHAIRMAN: We will adjourn now until just after two o'clock, and you can complete your submissions then.

(Adjourned for a short time)

THE CHAIRMAN: Yes?

DR. FRISTON: I will be five minutes, if that. The next point I make concerns the suggestion that there has been a self-inflicted element to the costs burden that the OFT says the Tribunal should take into account. One assumes that that is a reference to two parts of the costs that are claimed: number one, the costs generally - the base costs, as I will call them; and number two, the success fee. I have already addressed the Tribunal about the base costs, and that is that the Tribunal should work on the assumption that they will be reduced to a reasonable level. To the extent that the Tribunal may want to take into account any figures, then it should do its best to work on that basis, as it were. I suspect that the main part of the allegation relates to the success fee – that is that it is suggested that it was not necessary for Quarmby to enter into a CFA and that, as such, all of that part of the costs that relate to the

success fee is in some way self-inflicted. I say that is a bad point. It is a bad point because of the fact that the success fee is an integral part of that funding mechanism that applies when a litigant wishes to fund the matter on a basis that is more advantageous to the litigant than it is to his lawyer. It is entirely permissible, in my respectful submission and given the fact that that is what Parliament has said by passing legislation that allows for that mechanism for funding. It cannot then be said that that is an unreasonable way to act. In other words, in my respectful submission, in so far as the Tribunal is to take into account the amounts, the only amounts that can be taken into account will be the base costs and there is no element at all of any additional costs being self-inflicted.

The next point that was made related to the case of *Willis*, and for practical purposes this followed on from the self-inflicted point, in the sense that it was said that the costs which are claimed must be regarded as being so out of kilter with costs that are claimed in other cases that there must be an element of costs that have been self-inflicted. I have already addressed the Tribunal as to the relevance of that anyway. I say that that is really a matter for the costs judge, as opposed to for this Tribunal. But what I will say is that whilst it may just about be permissible for the Tribunal to take comfort from other cases and say, "Mr. Justice So and So has done this in this case and that gives me comfort in the decision that I am making", it cannot be permissible for a court or a Tribunal to say, "Look at this case and look at this other case, the difference in the amounts claimed is significant and has not been explained", especially where, as here, we know virtually nothing about *Willis*. We do not know the hourly rates that were claimed, we do not know whether it was a fixed fee, we do not know whether it was a discounted CFA, a CFA Lite, or even a CFA. We simply do not know anything at all about it. In my respectful submission, *Willis* is a case that ought not to be part of the Tribunal's deliberations, and I would invite the Tribunal to expressly exclude it as such.

The final point I make about the substance of my learned friend's submissions relates to access to justice, and that is that if it is the case that a party who has an appeal that would be expensive to litigate but is not sufficiently high value to merit litigation on the basis that it will be paid for by that party in any event in full, if it is the case that such a party, if he instructs solicitors on a conditional fee agreement basis, must find solicitors who are prepared to accept the type of risk that a departure from the ordinary costs regime would give rise to – in other words, if it has to be the case that he has to find a solicitor who is prepared to bear a risk that is larger than in ordinary litigation, then that method of funding will become unworkable. That will have a significant impact in so far as access to justice is

concerned: this case would never have been brought. In my respectful submission, that is an important point because this is not the type of Tribunal where the person who brings the appeal is here solely by choice; it is the type of Tribunal where a penalty may have been imposed that put everything in motion. In my respectful submission, in those circumstances, access to justice should be very, very high on the list, and all that my learned friend has urged upon you today would, if accepted, give rise to significant problems in so far as access to justice is concerned.

Finally, I deal with the costs of today. There is no need, in my respectful submission, to deal with anything to do with the quantum of costs because we simply say that the costs should be in the appeal. If we are successful then those costs will just simply be added to the bill to be assessed by a costs judge.

We say that it is wrong to regard this hearing as being something separate. Firstly, it is following on from the matters generally. Secondly, it concerns quite a large amount of money. The Tribunal has already taken account of the sums involved in the amount that is claimed. Of course, that is only a part of the total expenditure. That, of itself, would justify a hearing. Thirdly, it was the OFT who said in their submissions that the matters that were being raised were of some considerable importance and that this was an opportunity for the Tribunal to clarify those matters. In my respectful submission, that is entirely right, and that again, of itself, would be reason for an oral hearing, so the correct way of dealing with the costs of today would simply be ----

THE CHAIRMAN: Can I just correct something. In the letter from your instructing solicitors to the Tribunal dated 30th September, para.6, "On 23rd August 2011, the Référendaire informed us that the Chairman would like a hearing", I am not sure where that came from. The position was that I took the view that if one party was insisting on a hearing then it would be right to grant the parties a hearing. I do not think there is a really accurate basis for saying that I, as the Chairman, insisted on a hearing, and I thought I should correct that.

DR. FRISTON: Yes, we did not know that, we were not told what the Tribunal's initial thoughts were, so in those circumstances we were simply in line with that which was set out in the letter. My instructing solicitor simply makes the point that all we have done is set out our arguments and say that the Tribunal may, in fact, be assisted by an oral hearing. That was actually in the skeleton argument itself so that the Tribunal could see the argument being raised. In my respectful submission, even if the Tribunal had made the decision as set out in the letter, that would have been an entirely reasonable decision to make.

THE CHAIRMAN: Yes.

DR. FRISTON: For the avoidance of doubt, what we said in the letter is what we understood the position to be. So, in my respectful submission, the costs of today should be costs in the appeal.

One final point, it is quite difficult, of course, to deal with costs of today without knowing what the decision of the Tribunal is, so those are only my preliminary thoughts.

THE CHAIRMAN: I understand that. We are going to adjourn and, as I intimated earlier we will return in due course to give our overall decision and then reasons will be given later, but nobody need stay if they do not want to.

(Short break)

THE CHAIRMAN: As I have already said twice, we will give our written reasons later. We make two orders. In relation to the substantive case our determination is that there will be no order as to costs. Secondly, in relation to this costs application by the appellants, including today's hearing, our determination is that the appellants will pay the respondent's costs to be assessed if not agreed.

I do not think there is anything else. Thank you.