IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1150/4/8/10

Victoria House,
Bloomsbury Place,
London WC1A 2EB

10th February 2010

Before:

LORD CARLILE OF BERRIEW Q.C.
(Chairman)
MARCUS SMITH
PROFESSOR ANDREW BAIN

Sitting as a Tribunal in England and Wales

BETWEEN:

CTS EVENTIM AG

Applicant

– v –

COMPETITION COMMISSION

Respondent

– and –

LIVE NATION ENTERTAINMENT, INC

Intervener

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CASE MANAGEMENT CONFERENCE

APPEARANCES

Mr. Alistair Lindsay (instructed by Allen & Overy LLP) appeared for the Applicant.

Mr. Daniel Beard (instructed by Treasury Solicitor) appeared for the Respondent.

Mr. Mark Hoskins Q.C. (instructed by Freshfields Bruckhaus Deringer LLP) appeared for the Intervener.

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THE CHAIRMAN: Good afternoon. You should have had given to you a preliminary draft order for discussion which I hope will be of some assistance, and it reflects discussions that we had earlier in the day. Number 3, "[Costs]" is in square brackets to indicate that we have reached no conclusions of any kind whatsoever, provisional or otherwise on that subject, but we thought we would simply put the word there so it had its right place.

I do not know how you want to deal with this, and we are happy to be in the hands of the parties, though it struck us, Mr. Hoskins, that you might want to start in case there is anything you want to add to what has already been said on behalf of Live Nation.

MR. HOSKINS: Absolutely nothing, we reserved our position until we saw the way the wind was blowing; it is blowing quite bitterly today I am afraid.

THE CHAIRMAN: It is cold, yes.

MR. HOSKINS: With great regret we have to live with the way the wind is blowing, so we are content with the quashing, etc, and we have explained why we think the quashing should relate to the whole decision. The only difference I note between the draft the CC provided earlier and this draft is that the CC's previous undertaking had two limbs, and that is omitted from this, but that is probably a matter for the Tribunal to raise with the CC and if I have any comment I will come back on that, but subject to that we are happy.

THE CHAIRMAN: The reason for taking out "A" of the Commission's draft is probably obvious anyway – I hope so. We felt it was simply unnecessary for us to deal with that aspect of the matter, Mr. Beard.

MR. BEARD: Yes, it was put there out of an abundance of caution and we can quite see that it is not necessary and that the new Panel will proceed on the basis that those were the provisional findings and the matter will roll forward accordingly, so we quite understand that. From the Commission's point of view they are perfectly content with the reworking of the order save, of course, for the square brackets around the costs issue.

THE CHAIRMAN: We will come back to that. Mr. Lindsay, do you want to add some hail or thunder to the wind?

MR. LINDSAY: No, we are happy with the draft order as well, Sir.

THE CHAIRMAN: Thank you very much indeed.

MR. HOSKINS: Sorry, Sir, can I just raise a typographical error that has just been pointed out to me.

THE CHAIRMAN: If so I have not noticed it because we have just had it typed up.

MR. HOSKINS: It is in the title, my client is "Live Nation Entertainment, Inc".

THE CHAIRMAN: Right. It might be Entertainments in the plural because I think they offer tickets for all kinds of entertainments. (Laughter)

MR. HOSKINS: (After a pause) I am sorry for the confusion, the title should be "Live Nation Entertainment, Inc" because that is the new merged company. However, in the body of the order at para. 1 when it refers to the reports it is actually "Live Nation, Inc" because that was the company that was merged with Ticketmaster, so we need to take "Entertainment" out of para. 1 of the order.

THE CHAIRMAN: So let us get this right. We have the name of the applicant correct in the draft. We have the name of the Competition Commission correct. Live Nation Entertainment (in the singular) Inc.

MR. HOSKINS: That is right.

THE CHAIRMAN: And then in para. 1 of the order it should be "Live Nation, Inc"?

MR. HOSKINS: That is right.

THE CHAIRMAN: Any other corrections?

MR. HOSKINS: Apparently not.

THE CHAIRMAN: You are at your most persuasive, Mr. Hoskins! (Laughter)

MR. HOSKINS: I knew it was going to be a good day when I got up, Sir.

THE CHAIRMAN: Obviously the wind is blowing behind you. Thank you. I am reminded about something I was going to raise anyway. We will be producing a short judgment providing brief reasons for the order we are making. We would like in that to refer to the skeletons, and we would like to put the skeletons on the website. Is there any objection to that course being taken? It has been done in other cases, particularly, for example, from the cases I have chaired, the *Albion Water* case. We are accountable to the public and we feel that it is an accountable way to deal with matters.

MR. LINDSAY: Sir, speaking for Eventim, we are happy for the skeletons to be made public and also for the short judgment.

MR. BEARD: The Commission are happy for the skeletons to be made public.

THE CHAIRMAN: It does not affect you, does it, directly?

MR. HOSKINS: We had some very short written submissions, we are happy.

THE CHAIRMAN: You are content with that; they were very short, yes. In which case, leaving costs at the moment, we will, subject to the argument on costs make an order in the amended form. We would like to say as a Tribunal that the three month limit which is given in the undertaking is, we hope, a maximum period not a fixed period, and we simply

express the hope that the Competition Commission will act as expeditiously as is humanly possible, bearing in mind the facts of this case.

MR. BEARD: Of course, the point is well understood. The Commission has put forward the three months as a "no longer than" time period. It does wish to act as expeditiously as possible. It is obviously conscious however that there are various potential ways that things could go and, in particular, the need to ensure that there was time t o deal with remedies, even under an accelerated process, was what we were concerned to accommodate. I should stress that the figure was not plucked at random, an assessment of the period between provisional findings and final reports in a number of cases was reviewed to see what sort of time was taken. Three months is towards the outside of the periods taken, but three months is a period that has been taken in ordinary reports when there has been no challenge between provisional and final decision.

THE CHAIRMAN: Thank you, Mr. Beard. Shall we now turn to the question of costs?

MR. LINDSAY: After a great deal of consensus we now come to the more contentious issue of business. Just on housekeeping, can I check that you have two skeleton arguments from us?

THE CHAIRMAN: We have.

MR. LINDSAY: A skeleton argument from Mr. Beard and also a bundle of authorities.

THE CHAIRMAN: Yes, we have a joint bundle of authorities.

Eventim seeks its costs from the Competition Commission. Can I first show you the merger action group decision, which is at tab 4 of the bundle of authorities? This is recent case, obviously, under s.120 in which the Tribunal gave reasons for its determination on costs. It is probably sensible to pick it up at the start of the discussion of costs which is on p.4, para. 13: "Tribunal's Jurisdiction to Award Expenses and Costs." The Tribunal quotes Rule 55 and then when one gets to para. 16 it talks about the fact that the costs rule covers all proceedings which come before the Tribunal including the following categories, and obviously the relevant category for us is category (4) which is on p.5: "Applications under sections 120 …" so mergers cases "or 179" so market investigation cases, "… which are in the nature of judicial review". Then picking the text up again at para.17: there are fundamental differences between these jurisdictions and the discretion of the Tribunal is necessarily wide.

Paragraph 18 over the page, talks about appeals against decisions by Ofcom so probably is not particularly relevant. Then we come to para. 19, which explains that "starting points are just that" – there can be no presumption that the end point is the same as the starting point. Then in the second half of para. 19: "The Tribunal's decision in relation to costs/expenses

can be affected by any one or more of an almost infinite variety of factors … success or failure … parties' conduct … nature purpose and subject-matter of the proceedings, and any offers of settlement", and many and varied other matters.

Then at para. 20, p.7 turns to our relevant category, category 4. The Judicial Review Rules on costs are not imported – that is clear from *IBA* and the Tribunal has a discretion. Then the most important paragraph in our submission is para.21 which says the "… starting point in section 120 applications that a successful party would normally obtain a costs award in its favour", and then the Tribunal cites obviously a series of precedents. "However, in those cases and others of the same kind the Tribunal has reiterated the need to retain flexibility in order to reach a just result on the specific facts …"

Then para. 22 says the Tribunal will also take account of analogous proceedings.

Returning to para.21 the effect of the draft order is that we have won our application, we applied for the decision to be quashed, and by the agreement of the Competition Commission it is being quashed, and therefore we would say the starting point is that we should get our costs subject to any particular circumstances point to an opposite conclusion – that is the long list of factors that have been identified.

That leads us to the question: are there any particular circumstances in this case that point towards a different conclusion and reading the documents that have been filed there seem to be five issues that potentially might lead to an opposite conclusion, and I wanted to work through those if I may.

First, does it make any difference that the Competition Commission has withdrawn its decision rather than losing in the Tribunal? The answer to that, we say, is that the precedents say that it does not make any difference. There are two cases, *Sports Direct* that the Chairman will be only too familiar with, and *Association of Convenience Stores*. *Sports Direct* was under s.120, and *Convenience Stores* was under s.179 which have been grouped together, so that is a merger investigation. In both those cases the respondent chose not to defend its decision – so exactly the same as we have here. There are no reasoned judgments of the Tribunal but we have put into the authorities' bundle the relevant orders. I can show you them very quickly. *Sports Direct* is at tab 6. One sees from the third recital: "Upon … the Commission having withdrawn the Decision on the same date …" Over the page, Costs: "The Commission pay the Applicant its reasonable costs".

Then the *Convenience Stores*' case is at tab 2, and it has the same structure, which is the fourth recital: "Upon considering the correspondence … indicating that the Respondent wished to withdraw its decision."

Over the page the order is quashed and referred back – para.2, and then para. 3 there is an order that the respondent pay costs. So the fact the decision has been withdrawn has not, in previous cases, been taken as an indicator that the respondent should not pay the costs. That is the first potential difference.

The second issue that has been brought up on the skeletons is whether a costs order would affect the Competition Commission's incentives adversely. We say it would not. We say that if costs are awarded then the Competition Commission will, first, have a greater incentive to give parties a fair hearing because they know that if they do not they will have to pay costs. Secondly, they will have a greater incentive to settle cases that they are likely to lose, because the earlier they settle them the more that they are able to cap or mitigate their costs exposure.

We say from a perspective of the Competition Commission's incentives it would be emphatically a good thing to award costs in this case.

THE CHAIRMAN: If they go on they run the risk of paying another couple of hundred thousand pounds in costs.

MR. LINDSAY: Precisely, whereas if they are not liable in costs they need only think about their own costs and if they can keep those under control they may choose to drag on proceedings that in practice they would have been better off bringing to a speedy conclusion for all the benefits that arise here, in terms of getting on with the revised determination.

When considering the incentives it is also important to appreciate that the Competition Commission in this case had a duty to report on the merger. This is not one of those cases where the OFT has a discretion to investigate and the Tribunal might be concerned that if it was faced with a large costs bill it might in its discretion choose not to investigate in future, because they have their budget and if they think that a big part of that budget is going to be potentially taken up by a costs award, therefore we will shy away from potentially difficult cases that would be in the public interest. There is no issue of that sort here. As soon as the OFT refers a merger to the Competition Commission it has a duty to report and it reports according to fairly circumscribed criteria: is there a merger situation? Is there an SLC? Do we need to impose remedies. So no question here of distorting the incentives on discretion.

Finally, if I may, on the incentives issue, there is no impact here, we would say on the Competition Commission's ability to finance its activities in the public interest. One can remember cases in the past where costs potentially were running into millions of pounds, and there was a concern on the part of the Tribunal that if particularly the OFT was ordered to pay those costs then potentially it might stifle their ability to act in the public interest.

Last night the Competition Commission requested from us an indicative schedule of our costs, which we have prepared. It is not intended to be the final word, in other words, it is not our costs as detailed for taxation in the event that we are awarded costs, but it is just to give the Tribunal a ball park figure and to respond to ----

THE CHAIRMAN: We are talking about the costs of these proceedings.

MR. LINDSAY: Precisely. Can I hand up the schedule just so that you can see it, Sir?

THE CHAIRMAN: Please. (Same handed) Thank you.

MR. LINDSAY: That is simply to provide a little bit of context. The total on the clock is significant but we would say reasonable in the context of this sort of high stakes litigation, and given the issues that were in play. That was all I wanted to say about incentives, unless you had any questions about the schedule I have just handed up.

THE CHAIRMAN: No, not at the moment anyway.

MR. LINDSAY: That was the second issue. The third of the five issues is Eventim's conduct before the Tribunal, and the gist of this point is that the Competition Commission complains and says: "Eventim has breached the judicial review protocol by failing to send a pre-action letter." I would ask you, if I may, to turn to the protocol, which is tab 9 of the bundle of authorities. This is "Pre-Action Protocol for Judicial Review". In para. 3.1 towards the end, there is warning to parties which says that if you do not follow the protocol then the court must have regard to such conduct when determining costs. "However, parties should also note that a claim for judicial review 'must be filed promptly and in any event not later than 3 months …" in other words, complying with the protocol will not be a good reason for failing to comply with the time limits.

Over on the second page we come to what we say is the most important provision which is in bold under numbered para. 6:

> "This protocol <u>will not be appropriate</u> where the defendant does not have the legal power to change the decision being challenged, for example decisions issued by tribunals such as the Asylum and Immigration Tribunal ."

So this protocol does not arise if the respondent does not have power to change the decision. The Competition Commission skeleton argument explains at length why they did not have power to arrange for an extended three month investigation without an order of the Tribunal. They say they had no power to extend time. They required (which they do not) the quashing order in order to get rid of the statutory time limit of 19th January. In other words, we have to get the case before the Tribunal in order to have the extension of time, in order to have time for a review. So because we had to come to the Tribunal in order to get

the relief the protocol, we say, does not apply on its face, and that is before one even considers the separate question where I think there is potentially a difference between ourselves and the Competition Commission which is: was the CC *functus officio*? It had issued a final report, it discharged its duties. We say that it was then *functus officio*, it had no power to withdraw its decision; that is quite different from the position *Sports Direct* and that, we say, is a second reason why, looking at this para. 6, there was no point in complying with this protocol if it were applicable, because there was nothing we could do. There is no scope to withdraw their decision, it is not an interim decision in the style of *Sports Direct* where they could say: "We will withdraw it." So we say protocol, on its face, does not apply in this situation, even if we were in a judicial review case, which I will come on to.

Just to finish off by showing you the relevant sections of the protocol. Paragraph 7, at the start:

> "All claimants will need to satisfy themselves whether they should follow the protocol, depending upon the circumstances of his or her case."

Finally, para. 13 "The letter of response": "Defendants should normally respond within 14 days using the standard format." So that is the protocol. We say it does not apply and the discussion, or the points I have just made in relation to *functus officio* and in relation to the time limit issue show in our respect why there was no point whatsoever in us writing to the Competition Commission. The Competition Commission could not do anything about the issues that we could have complained about, they had no power. There is no point in us expending time and effort and cost in writing letters that ultimately are purely of academic interest because they lack the relevant powers. That is our first point in relation to conduct, which is the protocol on its face does not apply, and the principle of it tends to show why writing a letter would have been irrelevant.

The second point we have is that the protocol is irrelevant, this is not a judicial review application. This is an application that has been brought to the Tribunal. The application is governed by the Enterprise Act, the Tribunal's Rules, and the Guide to Proceedings, and if one looks at all three of those documents there is no indication in any of them that a pre-action letter is appropriate or required. The Guide to Proceedings talks about what you should do before you bring proceedings in a s.120 case. We looked at that and we complied with it. We would say that if the Tribunal would like parties to comply with the judicial review protocol then they should amend the Guide to Proceedings and request parties to do

so, and when doing so they should also, we would say, explain to parties how to deal with the fact that there are inconsistencies between the two approaches.

So the first point is that the protocol is not applicable on its face; the second is that it is irrelevant because we have a separate set of legislation that governs our case.

The next point we have is that the Guide to Proceedings says that you should inform the respondent if you are considering making an application and Eventim's solicitors informed the Competition Commission that they were considering making an application – they did that by telephone on 13th January.

The Competition Commission did not ask what the grounds were. If they were very keen to understand the nature of the application and if they had the power to withdraw the decision one might have expected them to say: That's very interesting, can you give me an overview of the grounds?" They did not do that. In those circumstances it appears to us to be an *ex post facto* rationalisation for the purposes of costs rather than a genuine issue that arose at the time.

The final point in relation to conduct and pre-action letters, our third issue, is that there was simply no time in this case to go through the process of a pre-action letter. As you know, the deadline under the relevant rules are 28 days. The decision was taken on 22nd January so time ran through Christmas and New Year. There is no provision that says time does not run on bank holidays or over that holiday period. It took us a while to get instructions and we then began the drafting and worked on it through mid-January, so the case only started to properly take shape in mid-January, that is not that far before the deadline for filing. It is not realistic, we would say, to think that the Competition Commission, had we written to them at that stage, would agree to the quashing of a final decision without a formal hearing, which would be the very first time in the Competition Commission history this had happened. It is not realistic we would say to think that they would agree to that for the very first time without having seen a notice of application and without having had a reasonable period in which to consider the detailed grounds. This is *ex post facto* rationalisation. Even if we had sent a pre-action letter to them, we could not have downed tools and started working on a notice of application because time was still running. There is no provision that says "time is suspended whilst the respondent is considering your pre-action letter." We had a deadline of 19th January, which was incredibly tight to meet. We would have had to have carried on full steam ahead, costs would have continued to have been incurred during that period. So the effective claimed costs saving that might have arisen had we written a pre-action letter simply does not arise because being practical, if we had written

one it would have been near to the deadline. We would have had to have given a very short response time and even if the Competition Commission had come back on 18th or 19th January and said: "We agree with you", all of the costs would have been incurred and we still would have had to file the notice of application in order to get the matter before the Tribunal in order that time could be extended. Those are my submissions on the third of the five issues which is Eventim's conduct before the Tribunal.

The fourth issue that comes up on the papers is Eventim's conduct before the Competition Commission. The Competition Commission seeks to take you right back in time into Eventim's conduct prior to publication of the provisional findings on 8th October 2009. We say that it is completely inappropriate to get into the detail of what happened before the Competition Commission on a costs application.

Even if that is wrong, the point the Competition Commission makes is utterly irrelevant, because our issue on fair hearing is about our treatment following publication of the provisional findings. So our issue was: the provisional findings said this, the Competition Commission changed them very significantly without telling us, all of our complaint on fair hearing is about conduct after 8th October, so it cannot be an answer to our complaints about the treatment of Eventim to say: "Oh well, there were issues that arose prior to 8th October." The Competition Commission owe a duty to us, Eventim, to give us a fair hearing and one cannot complain about matters that Eventim may or may not have done prior to that period.

The third point is that the points the Competition Commission is making about Eventim's conduct are utterly and completely wrong. They say that we have effectively obstructed the process in relation to the provision to Live Nation of access to our submissions and, as a result, Live Nation was not able to comment on the issues that we were raising until they had seen the provisional findings. That simply is not right on the fact s.

The Competition Commission opened discussions with Eventim about confidentiality and Eventim expressed concerns about confidentiality; it was quite right to, it is the number two ticketing company in the world, and we are talking about disclosure of its information to the number one ticketing information in the world, that is a commercially sensitive issue. There are also issues about competition law compliance, about sharing business secrets with one's competitor.

Eventim expressed concerns about that, and the Competition Commission understood those concerns and wrote on 13th July an email explaining how it proposed to deal with confidentiality issues during the procedure. That letter is in moderate, balanced and

understanding terms. That came on 13th July. Nothing further at all was heard from the Competition Commission on confidentiality issues until late November. The provisional findings, which are the issue that the Competition Commission are saying were distorted by our actions on confidentiality, they were published on 8th October. So we had an email on 13th July saying: "We understand your issues on confidentiality, and this is how we propose to resolve them". Provisional findings on 8th October, and then the Competition Commission only became concerned about confidentiality in late November. So their concerns from late November do not match up with their complaint that we distorted the outcome of the provisional findings on 8th October.

When we were pressed by the Competition Commission in late November about confidentiality because the Competition Commission said: "How can we give Live Nation a fair hearing if you are making submissions to us that Live Nation cannot see?" Eventim took that concern on board and it proposed a confidentiality ring. So it borrowed the procedure from the Tribunal. That proposal was ultimately accepted by the Competition Commission. It took some time to set up but the period of time in question was three or four days. In other words, the process of protecting Eventim's concerns about confidentiality whilst giving Live Nation a fair hearing, which we accept they are entitled to and need to have, took three or four days, in a process which had 32 week time limit.

There simply can be no complaint that Eventim's actions in relation to confidentiality in any way distorted the way in which the procedure worked. We say that these points the Competition Commission is making are simply bad.

I have dealt with those issues reasonably briefly, there is more detail in the supplementary skeleton that you have seen.

THE CHAIRMAN: Which we have read.

MR. LINDSAY: Exactly, I will not dwell any further on the history unless it is helpful to you.

That is issue four ----

THE CHAIRMAN: Yes, we have another issue to go.

MR. LINDSAY: Yes, exactly, and then we have wrapped up. The fifth issue is the Competition Commission says that Eventim has benefited from the work it has done. It has prepared its notice of application and there is now going to be a three month process, and Eventim will be able effectively to recycle some of the work it has done on the notice of application and save costs in the three month period. We say that is a rather skewed way of looking at things because in fact Eventim is being put to significant additional costs by reason of being

forced to come to the Tribunal in order to vindicate its rights, and then having a three month period of further inquiry with the costs associated with that.

Obviously we cannot recover the costs of that three month investigation, and this application is limited clearly to the costs of the application to the Tribunal. But given that we will have significant additional costs overall of dealing with the Competition Commission twice, first, up to 22nd December, and secondly on the three month period, we think it is a little bit rich for the Competition Commission to say that "Some of the costs you have incurred before the Tribunal might be capable of recycling, or some of the work to get the case before the Tribunal might be capable of recycling". We are net out of pocket significantly.

The second point about recycling is that the scope for recycling is, in fact, overstated, so ground one of our application was about fair procedure, and nothing from that can be recycled. Grounds 1 to 4 attack the substance of the Competition Commission's decision, and therefore in a broad sense go to the merits of the decision and they are the grounds that are the potential feeder for our recycling points. But those grounds were drafted so as to fit within the parameters of judicial review. So the Tribunal will have seen there is a lot of discussion about relevant considerations and irrelevant considerations, because that is the language and nature of judicial review arguments. When we get back before the Competition Commission that will be a merits case; it is simply an analysis of how competition issues work, which is completely different from working through a decision and trying to identify what relevant considerations may have been omitted and so on. It is, would accept, of some use, but not of very much.

Recycling, of course, is an issue that comes up quite frequently in judicial review cases, so it could com up in most public law contexts if you remit a decision back, and also potentially would have been relevant in the earlier appeal Tribunal decisions under s.120 and s.179, but this recycling point does not seem to have loomed large until the skeleton that we received from the Competition Commission here.

Pulling the strands together. We now know the decision is effectively being quashed on fair hearing grounds, and we say it is quite wrong for the Competition Commission to say: "We failed to give Eventim a fair hearing but Eventim has to pay the costs of putting that problem right." There can, we say, be absolutely no justification or excuse in this case for the Competition Commission failing to give us a fair hearing and, as a result, there is no reason to depart from the normal rule in s.120 cases, the costs follow the event and therefore

we would seek our costs. That is a summary presentation of our argument, you have seen it expressed in more detail.

THE CHAIRMAN: Yes, thank you. But presumably, in the normal way the 944.1 hours claimed will be subject to detailed assessment if so required and it may be that the person making the assessment will come to the conclusion that only a proportion of those hours are attributable to the fair hearing point. That remains an issue, does it not?

MR. LINDSAY: Sir, we have won on fair hearing point, but we have also made a number of other points. The Competition Commission has been careful not to accept that those points are right, but equally there is no decision that we are wrong, and we stand by them entirely as we said in the original skeleton. We say it would be quite wrong to limit the costs award to the fair hearing point, because we drafted the fair hearing point, we thought it was quite a good point when we drafted it. We could not be sure that we were going to prevail on that point; we could not stop drafting at that point and say: "We will only take that point because it might win, and if it wins we might not get our costs of the other argument." We had to carry on drafting and put forward all of the grounds for challenge. Had the case gone to a full hearing of course it is perfectly plausible, and one cannot tell, and one cannot determine obviously in this arena, it is perfectly possible that we would have worked on many, perhaps all of the grounds in 2 to 4.

You are contemplating potentially that because the Competition Commission has conceded on fair hearing and not on the others that any costs award would be limited to fair hearing, and we would say that is quite wrong. It is wrong to suggest that we should have stopped drafting once we had finished the fair hearing point.

The other point is that grounds 2 to 4 actually feed off the fair hearing point. If we had been given a fair hearing and we had had adequate sight of what the Competition Commission was planning to do we would have been able to put a number of points in response that would have made it more likely that the Competition Commission's decision would not have been flawed under grounds 2 to 4. In other words, the fact that we did not get a fair hearing , we say, contributed to the errors that we have identified in grounds 2 to 4; that is the reason for having a fair hearing so that you can get the right result on the merits.

THE CHAIRMAN: Thank you. Yes, Mr. Beard?

MR. BEARD: I too will have five points with a couple to wrap up – I am sorry to lack novelty!

The first thing to cover is the nature of the discretion in relation to costs before this Tribunal. You have already been taken to the *Merger Action Group*, and in summary the outturn of that case is that the rule before this Tribunal is not simply "costs follow the

event", but there is a starting point. My learned friend, Mr. Lindsay, very deftly skated over and ignored para. 18 of *Merger Action Group* and said: "This is to do with costs in relation to Ofcom appeals. Of course, that is not the proper approach to this case.

As the Tribunal makes clear in its preceding analysis at para. 16, it is recognising that the discretion is broad because of the range of cases with which it is dealing and that breadth of discretion applies to all of them.

Then in relation to para.18 it notes that in one case where Ofcom was dealing with matters – *The Number* – and it had dealt with matters reasonably and in good faith, it was decided that there a no costs order should be made, but in another case dependent on the particular circumstances Ofcom did face the costs in relation to T-Mobile. We accept that one has to look at the particular circumstances of the case, and we accept that the starting point is going to be t hose that are successful in litigation, maybe work on the assumption that they will recover some or all of their costs, but as the Tribunal emphasises a starting point is just that, and these examples illustrate the extent to which fact sensitive analysis means that this Tribunal does not apply that starting point as any more than that.

Two cases are then referred to by Eventim in this context, *SDI* and *ACS*. I was quite surprised to hear that there had been no reasoned decision in *SDI* because there was, of course, a reasoned decision in relation to the prematurity point, so the matter was resolved to a certain extent. One component of the arguments being run by the Commission and supported by the OFT in that case was heard and was determined by this Tribunal. But more than that both *SDI* and *ACS* were cases where there was an awful lot of too-ing and fro-ing going on in the background before the matter came to a final hearing.

If one turns back to *SDI* what was going on was that certain working papers were redacted. They were sent out, they were received by SDI who, with promptness, expressed specifically their indignation about the redactions. Indeed, at para. 36 of the judgment the Tribunal specifically notes the rapid reaction saying "We are unhappy. We are unhappy, Commission, with what you are doing; you need to justify what you are doing, otherwise we are going to proceed to court. As, Chairman, you will no doubt recall, that led to an iterative process whereby there were a series of allegations put by SDI as to the extent to which redactions should be lifted, and there were discussions with the CC and SDI and others about the extent to which that could happen. There were, in fact, two or three versions of the working papers that were then generated. In other words, the basis of the legal challenge was spelt out even though that was a very accelerated process, because it was in the midst of the inquiry at a most sensitive time in that inquiry, in the run up to

provisional findings, so legal objections were expressed, some concessions were made. In the end, the concessions that were made by the Commission in that case were considered by the Tribunal at least to be the sorts of matters that warranted challenge on a judicial review process basis, in other words they were not premature. So the matter did come to a head but there was a detailed exposition of the legal issues between the parties.

I understand the same was true of *ACS*. There had been a lot of too-ing and fro-ing between the ACS and the OFT as to whether or not the OFT was dealing with matters on the appropriate basis before the matter was then conceded by the OFT.

I should just pick up one point. Obviously the opening gambit from Mr. Lindsay was: "We have succeeded". In one sense that is true, in the sense that the report is being quashed, but in the sense that their grounds have been specifically upheld on any point, that is not correct.

The Tribunal must take into account the reasons that have been given by the Commission. The Commission has accepted the arguability of the fair procedure point. It has looked at these matters, and taken into account pragmatic factors as any good public body should. Bearing in mind the time that would be taken to fight about these matters the expense that would be incurred on both sides, the Commission has not gone through the detailed analysis and prepared itself a detailed defence on any of the issues including in relation to the fair procedure point. So it should not be taken, as Mr. Lindsay says, that there is a simple blanket concession on any of the points. There is an acceptance that on the basis of the reasons set out in the Commission's skeleton, and as accepted by the Tribunal, that there is arguability in relation to fair procedure point the most efficient and sensible way of dealing with these matters is to have the report quashed and remitted. So it is discretion, costs follow the event is not the basic rule; it may be a starting point. In circumstances that have been referred to in relation to *SDI* and *ACS* there were very, very different backgrounds to that which occurred here, even where tight timetables were in play.

Then one can take this a stage further because this is a judicial review challenge, and although my learned friend has created the aunt Sally that we are saying the judicial review pre-action protocol applies, we do not say that; it is not what is in our skeleton argument. We use that as an illustration.

We say that this is a judicial review process and, as was illustrated in *Merger Action Group* it is sensible for this Tribunal to have reference to the case law and jurisprudence in relation to that field. In that regard, if I may, I will pass up an authority to the Tribunal, *Kuzeva*. It is a Court of Appeal authority. My learned friend only received his copy of this shortly

before the hearing, but I will refer to various passages briefly in this case. It concerns a judicial review saga, a sad saga involving housing issues in the context of some potential immigration questions, and the background to the saga is set out at paras. 2, 3 and 4. It was a sad saga that resulted in a number of hearings occurring, albeit some brief hearings as is described thereafter in para.7 onwards. In the outturn of the process, Mr. Justice Collins decided that there should be no order as to costs in relation to any part of the proceedings, even though the outturn of those judicial review proceedings was that the claimants eventually got what they wanted in terms of accommodation.

The background, however, is of secondary importance. What is of greater importance is if one turns to para. 18, which is top right hand corner, p.4 of 6, there we have the Court of Appeal approving lower court authority in relation to the procedure in relation to costs in judicial review. The first part of the quote referring to *Blatcher v Heaysman* is not really of any relevance, it is to do with whether or not ----

THE CHAIRMAN: Legal aid.

MR. BEARD: -- legal aid is a red herring in relation to costs' issues. It is the next category of quote that is important, starting from: "The authorities fall into two groups. Cases that are settled before permission is granted. The fact that the case has not reached the permission stage is not a bar to a costs order." But in *R v The Royal Borough of Kensington & Chelsea ex p Ghrebregiosis* there was an order for costs made against the respondents in such circumstances and he said it should only be made in a very clear case, and that that was such a case.

"The letter before action …", and I note that one had been sent there, and this was long before any protocol applied:

> "… set out the facts and law with admirable clarity. If the respondents had given proper attention to the merits of the case when they received the letter they would have taken the necessary steps to make the proceedings unnecessary. But the judge said his judgment should not be taken as a green light for applicants to seek orders for costs against the local authority that has made a concession at an early stage.
>
> In *R v London Borough of Hackney ex p Rowe*, Sedley J [as he then was] refused the applicant a costs order. He said the case did not meet the test enunciated by Brooke J in the *Ghrebregiosis*; it was not a plain and obvious case. The attempt to recover costs had simply incurred further public expense on both sides. He pointed out that the practice on costs should do nothing to discourage sensible

> settlement and pointless expeditions to the Court that incurred further costs. With that I entirely agree."

We say that although there is not a permission stage in relation to s.120 and s.179 cases, that line of authority approved by the Court of Appeal applies here. In other words, if a public body at the first opportunity says: "We see there may be a point here, let us take steps to deal with that point without everyone wrapping up costs" then there should be no costs order save in exceptional cases.

The court then goes on to deal with a situation where: "Cases are discontinued after permission is granted." So here we have the situation in judicial review case law where the public body has actually opposed the initial application. It has not conceded at the first possible opportunity, it has taken the matter at least on to the papers, possibly to an oral hearing under Part 54. Even there the courts are circumspect about the situations in which costs should follow the event, and that is in the jurisdiction where, unlike here where you have this broader discretion that has been described in *Merger Action Group*, costs follow event is the basic approach.

If I just read a quote from *Boxhall* referring to *R v Liverpool City Council ex p Newman*, Simon Browne (as he then was) said:

> "… there was a general rule that if judicial review proceedings are discontinued the respondents would recover their costs provided that such discontinuance can be shown to be the result of the applicant's recognition of the likely failure of challenge."

So that just mirrors the basic rule. He went on to say:

> "The position is, however, entirely different where, as here, the discontinuance follows some step which has rendered the challenge no longer necessary, which in other words renders the proceedings academic. That may have been brought about for a number of reasons. If for instance, it has been brought abut because the respondent recognising the high likelihood of challenge against him succeeding has pre-empted his failure in the proceedings by doing that which the challenge is designed to achieve – even if perhaps no more than agreeing to take a fresh decision – it may well be just that he should not merely fail to recover his own costs but indeed …"

- I think it should be "pay the applicant's". So it is recognising that if you have resisted up to permission you may well end up having to pay costs.

> "On the other hand it may be that he challenge has become academic merely through the respondent sensibly deciding to short-circuit the proceedings, to avoid their expense or inconvenience or uncertainty, without any way accepting the likelihood of their succeeding against him. He should not be deterred from such a course by the thought that he would then be liable for the applicant's costs. Rather in those circumstances, it would seem to me appropriate that the costs should lie where they fall and there should accordingly be no order. That might equally be the case if some action wholly independent of the parties had rendered the outcome of the challenge academic. It would seldom be the case that on discontinuance this Court would think it necessary or appropriate to investigate in depth the substantive merits of what had by then become an academic challenge. That ordinarily would be a gross misuse of this Court's time and further burden its already over-full list."

So here we have a situation where you fought the first stage but even then, notwithstanding the basic rule one has to have sensitivity to the way in which public bodies deal with these matters. So where public bodies act quickly and scrupulously in order to deal with these sorts of issues in order to rectify any arguable deficiencies in the way in which they have dealt with matters, then that is a matter that should be taken into account. Indeed, the fact that a public body is carrying out its duties, its regulatory functions is a factor that has been recognised by this Tribunal in other costs judgments, and is recognised by courts more widely as a relevant and material issue.

In that context, just in passing, I would refer the court to the notes in the CPR, to CPR 44.3.8.1 entitled "Costs against a regulatory body". It is noted that those observations are made in a different context from these, but it simply recognises that public bodies may be different. So there is a broad discretion and where you are dealing with a public body that has acted quickly the authority from the Court of Appeal in relation to jurisdiction, which does have 'costs follow the event' suggests there should not be any costs against the public body.

The next point I would turn on to deal with is the issue of incentives and 'onerous-ness'. Paragraph 7 of Eventim's skeleton contains the quite remarkable suggestion that the costs order sought is not onerous. That may have been a sentence that was written, perhaps without due regard to the schedule that we have now seen. I feel I must move in the wrong circles if a third of a million pounds is not onerous. It may be that it does not cause the Competition Commission to buckle at the knees and give up on merger control, but it is a

big chunk of money by anybody's standards bar those perhaps purchasing football clubs, although given Portsmouth's history recently maybe not.

THE CHAIRMAN: You have made the point very effectively!

MR. BEARD: Nonetheless, this schedule, as I understand it, is not the be all and end all of costs, indeed, it is notable that that wonderful font of income, the photocopier, as far as we can see, and we wonder whether there may indeed be further disbursements to be detailed in relation to these costs.

THE CHAIRMAN: Maybe the number of hours signifies that the copies were being made with a quill pen.

MR. BEARD: It would be invidious for me to comment, Sir. So, onerous – undoubtedly. It is remarkable that this schedule has not been produced previously, given that in line with the Guide to Proceedings, para.17.8 one would expect specifics on cost in order for this Tribunal properly to be able to assess the sorts of sums that might be granted pursuant to any order. Indeed, it was noted last night, as has already been adverted to by Mr. Lindsay that, notwithstanding the lengthy additional submissions submitted yesterday, there was a wonderful omission, in a sense, of no numbers being attached.

The impact on a public body of this sort of costs bill in circumstances where it is acting with expedition and with efficiency in order to deal with criticisms is onerous, and to counter that, the wonderful spectre is raised of how this will concentrate our minds and incentivise us to do better in future.

The courts previously have never recognised that, indeed as is clear from the authority to which I have just taken the Tribunal, the courts are concerned that public bodies should not be facing these sorts of large costs bills that would deter concessions.

It is suggested that it will incentivise a concession because otherwise the costs will continue to mount. That is no the way that litigation on any side is approached, it is an assessment of risk and reward or risk and punishment in the circumstances of a public body who really only faces a downside on costs.

What large costs bill, or the prospect of large cost bills will do, will tend to make public bodies think that it is worth the fight if we have a reasonable chance of winning, or winning on part of the case, in order to say that "We win on some costs; they win on other costs, and the outturn should be that no one gets their costs." For instance that is precisely the order that was made in the context of the *Sky* litigation by this Tribunal in circumstances where the Commission had won on certain points and lost on others, vis-à-vis Virgin. In other words, the risk reward analysis will change, because it may be, for example, that if

Eventim were to win on ground 3, but lose on ground 4 you would be in a position where you say "We have a pretty good shout at wiping out costs on that basis." So plainly, the analysis of incentives is simply 'other worldly' that Eventim is putting forward.

Recycling – it is obviously a wonderful thing, and it is clearly an important factor to be borne in mind in the context of understanding whether or not in this case the costs of the preparation of the application should be borne by the Commission.

It is, of course, a secondary consideration, but nonetheless, it is well worth bearing in mind that although it is suggested that the ability to recycle is overstated, it is not quite right that the ground 1 issues will not be recycled, because of course ground 1 dealt with fair procedure, and the impact on certain parts of the analysis in the final report, in particular interpretation of Eventim's documents, the importance of the merger, the nature of price and volume estimates, all of those were matters that were dealt with in ground 1, which we anticipate are the sorts of matters on which Eventim will intend to put in submissions echoing those parts of its case set out in the notice of application. My learned friend rightly recognises that grounds 2 to 4 are grounds which do cover issues which will undoubtedly be the subject of submissions thereafter. So in large part there will be a recycling effect; that is a material consideration, and although one understands from Eventim's perspective the desire to say: "We brought this case, we have now got the matters sent back, in those circumstances we should get our costs." The right counterfactual in relation to the recycling issue is of what work will be recycled. In other words, what costs savings will be made in relation to the three month period going forward because of course there is no possibility of recovering costs in relation to that three month period. Those costs will be borne in any event and effectively it will be subsidising that process if the costs were to be paid by the Commission.

Moving now on to pre-action conduct in relation to these proceedings. As I have already adverted to, the skeleton from the Commission does not say that the judicial review pre-action protocol applies. What is being said is that it was incumbent on Eventim to give the Commission a clear indication of the nature of its challenge before it occurred, so that the costs of the application could be avoided.

There are some wonderful legal sophistry now woven to suggest that the Commission is powerless, it could do nothing because it is somehow *functus*. The "nothing" that the Commission can do is the sort of nothing that has meant there has not been any need for a substantive hearing today, that the matter has been disposed of without detailed argument. It is plain that the Commission is the respondent in this matter. If it had been sensibly set

out what the basis of challenge was, as SDI had done previously under a very tight timescale, what could then be done by the Commission is a discussion of how this matter could be dealt with and disposed of by consent. Yes, the Tribunal would have to be involved because of the statutory timetable, but the idea that an extensive 60 page notice of application would have to have been drafted in order to deal with all of these matters is simply not correct. There was a way around this. The way around it involved Eventim telling us what it was that they were concerned about in order to give us an opportunity to deal with it before these vast costs were incurred. That proposition is relatively obvious, we do not need a judicial review pre-action protocol to tell us that. What we did in the skeleton was illustrate that that is the way forward by reference to the judicial review pre-action protocol because these are judicial review proceedings before this Tribunal.

Just to provide the Tribunal with a little comfort on this issue, if I may I will pass up section C of the White Book, the start of it, which is entitled: "Pre-action Protocols" and it is this section of the White Book which includes the pre-action protocol for judicial review, but all the other pre-action protocols that exist.

What is interesting here is that there is not just a pre-action protocol for each specific type of claim, there is actually a practice direction about pre-action conduct generally.

THE CHAIRMAN: I think it was called the "Cards on the table" system or approach.

MR. BEARD: Yes, there are those grand exhortations that Lord Woolf put out in 1999 when the CPR was changed, indeed, they are adverted to, if the Tribunal turns on to the start of section C dealing with pre-action conduct and protocols, and it sets out Lord Woolf's recommendations and the early stages of disputes, and the main themes from the Civil Justice Reforms, one of which – as you say, Sir – is the 'cards on the table approach'.

If one turns on a page to bottom right hand corner, C1A-008, there you have a section on pre-action conduct in non-protocol cases. It says:

> "Where protocols do not currently apply it is still good practice for the claimant or their solicitor to send a detailed letter of claim to the prospective defendant and to wait a reasonable period for the defendant to respond before issuing proceedings."

In parentheses, of course, the period for response will have to be truncated where you are dealing with short timetables, that is accepted.

> "The Practice Direction now clearly states how the court will expect parties, in accordance with the overriding objective (CPR r.1.1(2)) to act."

Then it goes on in the next paragraph:

"Failing to send a letter of claim at all is unreasonable conduct, which will invariably attract a sanction."

Then it cites the *Phoenix Finance* case – different circumstances, but nonetheless illustrating a severe sanction being imposed.

The next paragraph similarly, severe sanctions imposed for failing to warn as to what it is you were doing so as to avoid the costs of litigation unnecessarily being incurred.

Then if I could invite the Tribunal to turn on further, starting on p.2314 is the Practice Direction – Pre-Action Conduct. So this is a general Practice Direction for all proceedings, save those that have the specific protocols.

If one turns on again through that to p.2318: heading: "Section III – The Principles Governing The Conduct of Parties in Cases Not Subject To a Pre-Action Protocol", and I just invite the Tribunal to read 6.1 and 7.1, simply illustrating that there is no magic about the judicial review pre-action protocol, it is a fundamental tenet of litigation practice now, that forewarning in as much detail as possible, as far in advance as possible, is a vital component of the proper procedure to be followed by any claimant in order to obviate the incurring of unnecessary costs.

THE CHAIRMAN: It is really what good lawyers have always done to achieve a settlement of a case without going to court.

MR. BEARD: Yes, and with bells on where you are dealing with a public body would be the Commission's submission.

So there we have the disposal broadly of the "aunt Sally" that we are trying to hook this all on to the judicial review pre-action protocol. But it is noted in para. 14(a) of their skeleton there is an emphatic statement that there is nothing in the Enterprise Act or the Rules of this Tribunal or the Guidance that this Tribunal has promulgated to suggest that this sort of approach is appropriate. Well, litigators know how litigation works, this is a general principle, and the Commission leaves it to the Tribunal to consider the weight that that submission of ignorance should be given in the light of a general discretion as to costs and the plain manner in which it is proper to conduct litigation in all of these areas. The idea that somehow a modification of this Tribunal's Guidance is needed is simply unsustainable.

Then we move on to 14(b) and (c) in their skeleton. (c) deals with the *functus* point I have already touched upon that, clearly we are the right respondent, we could have done something, it is not a matter of nothing. Plainly we could have circumvented the need for such an extensive application to have been made, and certainly vastly limited the sorts of costs that were being incurred.

It is worth just touching on 15(b) which us just a plainly bad point in relation to the operation of the judicial review pre-action protocol. It is suggested that because we had c completed our statutory function and carried out our duty the protocol principles would not apply to us because we are a bit like the Asylum and Immigration Tribunal. It would be invidious to start pointing out other distinctions, but it is worth bearing in mind that where the Asylum and Immigration Tribunal faces a challenge for judicial review, and that will not be the common route of challenge to the AIT in any event, it will be a statutory appeal in most circumstances. But where you do have scope for judicial review of course the AIT does not appear as the respondent. What you will see in all the reports is that the Secretary of State for the Home Department turns up. So there is no point in writing to the court saying: "Will you settle this case?" because the role fulfilled by the Tribunal in those circumstances is: "We take our decision; that is the end of it. You challenge us by the appeal route, if you go by JR, deal with the Secretary of State, do not talk to us", and this protocol simply recognises that.

THE CHAIRMAN: I have heard quite a number of those judicial reviews, generally speaking, just going from memory there is a great deal of correspondence before even the single judge dealing with the matter on paper has to decide whether permission should be granted or not.

MR. BEARD: Quite so, and it is not just the AIT it happens in relation to other Tribunals. I am always cautious, given the restructuring of the Tribunal system that has been undertaken in the past year to make too general a submission, but it occurs in relation to Mental Health Tribunals, Pension Appeal Tribunals, all of these bodies do have the capacity to be represented, and sometimes, maybe, but vanishingly rarely. In normal circumstances under a judicial review you will have the relevant Secretary of State dealing with matters. Indeed, in circumstances where I have been involved in judicial reviews where the Government has actually reviewed what is colloquially referred to in War Games terms as a Tribunal's "blue on blue" action, but in those circumstances because it was such a strange situation where you would not have the Secretary of State both bringing the judicial review and defending the judicial review, in those cases you might have representation of the Tribunal, but more commonly one would expect an *amicus* to be appointed by the court in those sorts of circumstances, so you are dealing with a whole different world effectively. The point is it is a plain vanilla bad point even if the judicial review pre-action protocol did apply here, it does not in any event. That is 14(a), (b) and (c).

14 (d) says that it was very difficult to do anything before the relevant deadline. It is difficult to be anything other than just slightly sceptical about these submissions. 28 days is

plenty of time to send a letter or an email. If it is suggested somehow that the Commission had published its report in order to make life difficult over Christmas I hope that submission is no longer pursued and I did not hear it fall from the lips of my learned friend.

As to the snow ----

THE CHAIRMAN: Well we have not heard about the snow.

MR. BEARD: No, sadly.

THE CHAIRMAN: I have a joke ready for the snow which I will not ----

MR. BEARD: I am sorry, Sir, I do not want to go there!

THE CHAIRMAN: Something to do with electronics, anyway.

MR. BEARD: Yes, I had a similar one. I will move on! So the idea that there was no scope to write to the Commission an informative pre-action letter until shortly before 19th January, if at all, is simply a submission that this Tribunal should reject.

There was a call on 13th January, it was a brief call. I have an attendance note of the call. The suggestion that the Commission brought this all on itself because it did not ask what the grounds were that they were pursuing is again quite a remarkable attempt to justify the absence of any proper pre-action dealing, and that is the focus of the Commission's submission in relation to costs. You have a discretion; it is a public body, even in relation to judicial review where the public body is acting efficiently, effectively, responsibly in trying to cut a piece of litigation off as quickly as possible, then in those circumstances there should be no order as to costs.

We have, however, noted the preceding conduct of events. There is no misunderstanding on the part of the Commission. It understands that the challenges in relation to Eventim's position after the provisional findings, but the point made by the Commission was that the conduct of Eventim in relation to dealing with confidentiality prior to those provisional findings contributed to the difficulties which led to the problems in part that resulted in the application being brought. This Tribunal has already seen how Eventim jealously guards its confidentiality to the extent it was not even willing to provide Live Nation with a copy of a redacted version of the notice of application and stood on ceremony about the matter until final intervention was granted, and an order made by the Tribunal. Throughout the proceedings the Commission has had difficulties in relation to these matters. By insisting that material should be kept confidential, it did mean for the Commission that until the provisional findings Live Nation and Ticketmaster were not in a position properly to comment on relevant evidence provided by Eventim which was crucial to those provisional findings, and it meant that when Live Nation and Ticketmaster then provided that sort of

information and caused a change of mind on the part of the Commission the matter was happening late in the process.

THE CHAIRMAN: Mr. Lindsay is not unreasonable is he, Mr. Beard, in making the point – well let us take an analogy, Asda and Sainsbury's. One could understand Asda wishing to guard jealously their confidentiality against Sainsbury's and vice-versa ----

MR. BEARD: Absolutely.

THE CHAIRMAN: -- given that they are among very few competitors in a major market.

MR. BEARD: Of course.

THE CHAIRMAN: It is a good analogy here.

MR. BEARD: It is a perfectly good analogy and one recognised by the Commission. If I might, I will just pass up a couple of emails. (Same handed)

THE CHAIRMAN: Thank you for anticipating. Where do we start – at the back?

MR. BEARD: 24th June, the first email, p.1. That is the invitation to Eventim to comment on what is going on in relation to the Ticketmaster merger. There is an email of 23rd, it precedes the email of 24th because they are printed out in reverse order being an email string. The email of 23rd is simply, it is a Mr. Appel, his details are being provided to the Commission as the person to contact. I am sorry, I do not think that has any particular significance.

The next email string ends on p.4, and starts on p.8. This is an exchange dealing with matters concerning confidentiality, and if one reads the bottom email on p.5.

THE CHAIRMAN: I see, so I am looking at page?

MR. BEARD: I am being slightly cautious about referring to this material, I should say Live Nation does not have this clip of correspondence because I do not know whether there is any objection.

THE CHAIRMAN: I am only going to refer to page numbers, but I think I start with something that starts at the bottom of outer corner p.6 going on to p.7.

MR. BEARD: Yes, that is right.

THE CHAIRMAN: Followed by the one above it on outer corner p.6.

MR. BEARD: Yes.

THE CHAIRMAN: Can I just read that?

MR. BEARD: Yes, if you could read backwards through the email string.

THE CHAIRMAN: We will now read backwards from that.

MR. BEARD: Thank you.

THE CHAIRMAN: (After a pause): Right, I have read back from page 4.

MR. BEARD: Yes, and I would ask the Tribunal to note the comments made in lines 4 and 5 of that final email on p.4. Then the next document is on p.9 of the outside numbering. This is the note or the email from which a quote is taken in para. 16(c) of the Eventim skeleton argument. Unfortunately, it is not quite an accurate quote – it is accurate in the sense that all the words there quoted appear in this note, but it might be said that the way it is quoted suggests something slightly different from the content of what was actually said by Mr. Fowlis in his email. So I would ask the Tribunal to read the entirety of that email. As you will see from it what is recognised here is that Eventim is in a difficult position. It is recognising the confidentiality concerns, the Asda/Sainsbury's point as you, Mr. Chairman, put it.

THE CHAIRMAN: This is all material that the recipient would have been very familiar with. The principles that are set out ----

MR. BEARD: Yes, I think the particular recipient, yes, but also it is for onward transmission to the lay client.

MR. LINDSAY: Just to help on that issue Mr. Pritchard was instructed before the documents at p.9 but was not instructed during the correspondence at page 4 reflects a German lay client's perspective on the Sainsbury/Asda position, and then one gets obviously a discussion between the CC and somebody who is eminently familiar with the CC's process, yes.

THE CHAIRMAN: I sort of twigged that one, thank you.

MR. BEARD: There is no point taken there. It is in relation to the interpretation of this letter, obviously, to Mr. Pritchard, an informed recipient, but also being drafted in such a way as to communicate the Commission's position onwards.

THE CHAIRMAN: The point I was trying to make was there is no rocket science in the email of 9th July.

MR. BEARD: There is no rocket science. There is a recognition of the particular sensitivity, however. This is important because, point 1, if one could read "normally when a party provides an initial submission the Commission will publish a non-confidential version of its submission on its website. So that is the normal position. But here the Commission was accepting that it would do something different and out of the ordinary.

The same is true of 3, it is also normal Commission practice to publish a summary of the hearings, but again given the particular sensitivities the Commission was diverging from normal practice. It is slightly unfortunate therefore that in a quote from this note that is included in para. 16(c), the quote is:

"We appreciate that CTS is in a difficult position. I confirm that the CC does not normally publish detailed questionnaire responses containing data from parties on its website and we can see no reason why we would wish to do so in this case."

Then it is suggested that there is nothing unusual about the confidentiality issues. In one sense there is nothing unusual about the confidentiality issues in this case, in the sense that the Commission often deals with high sensitive merger cases, and difficult confidentiality issues arise. What is different here is that the insistence of Eventim on the levels of sensitivity on material that was being submitted meant that the Commission diverged from normal practice in relation to what it made available and that is set out in bullets 1 and 3. So it is not right, if it is being suggested by Eventim, that the ordinary course was being adopted here. It was not. There was inordinate sensitivity as to what you, Mr. Chairman, referred to as the Asda/Sainsbury's point. The point that is made, however, is that because of that there were difficulties further down the line in relation to a time constrained process because that evidence transpired to be crucial to the provisional findings and response to it crucial to the final report.

PROFESSOR BAIN: I am not quite clear whether you are suggesting that Eventim will be unreasonably sensitive. Your para. 58, the tone of that is that they were really being a bit difficult.

MR. BEARD: Yes.

PROFESSOR BAIN: The response to the Chairman's example of Asda and Sainsbury's you said yes, it was rather like that, it is perfectly reasonable.

MR. BEARD: Yes.

PROFESOR BAIN: I am not quite clear what your position is now, whether, "yes", there were difficulties, they were in the nature of the inquiry or "yes" there were difficulties and Eventim could have been a bit easier about it. Which is your position?

MR. BEARD: Certainly the latter, there were difficulties, Eventim could have been easier about it, perhaps the Commission should have been harder, we accept that. With the benefit of hindsight, and given what has happened here, perhaps we should have been harder about what we said had to be put out.

But what we say here is these matters should not be entirely ignored in terms of the general approach that this Tribunal takes to costs issues, but we recognise that this is very much of secondary importance in the consideration of the exercise of discretion and we emphasise the points already made public body discretion acting as quickly as possible to preclude the need for any costs in the face of pre-action conduct in the proceedings, not in the preceding

process, that was not justifiable and led to higher costs being incurred in circumstances where that was not necessary.

THE CHAIRMAN: Because at the end of the day we are left with a situation when all these narrow points are put aside in which the Competition Commission accepts that it is at least arguable that they followed an unfair process, and so they have made a concession that the report should be quashed so that a guaranteed fair process can be followed.

MR. BEARD: Yes.

THE CHAIRMAN: So to that extent Eventim have won?

MR. BEARD: Yes, as accepted at the outset that must be right but only to that extent, and it is not a full concession on any of the grounds. What is being accepted is that it is arguable that in the circumstances nothing is achieved by us fighting battles, which might leave us in a better costs position if we were to win on a number of grounds, potentially lose on some. That would be the worst of all worlds so far as the process is concerned, because with the best intention in the world this Tribunal with a hearing on 17th/18th March would not have a judgment out for another fortnight potentially, in those circumstances we would lose six weeks of a process which at maximum is going to take 12 and may, as indicated at the outset, take substantially less. In those circumstances the Commission took the pragmatic view that that arguability meant it was better off withdrawing rather than fighting its way through thinking it might win on some, it might win on all. In the end, if it won on some it would probably do better on costs overall than is being suggested should be the outturn now, but that would not be in the public interest overall.

THE CHAIRMAN: You started with, if I may say so, Mr. Beard, a characteristically persuasive flourish about the costs estimate that was submitted to us and the fact that it suggests that between 22nd December last and today the equivalent of 21x45 hour man weeks were spent on this. But should we really pay any attention at all to the quantum of that estimate? That is for others to assess, is it not?

MR. BEARD: No, not necessarily. The way in which the Tribunal can go about assessing costs is that it can do it on a summary basis in the same way as a court would do. Indeed, the guidance under the CPR is that where you are dealing with a hearing of less than a day that is the appropriate way of dealing with costs and you should not send them off for detailed assessment at all. That, we would say, is a sensible way of dealing with these matters; incurring further costs of a detailed assessment thereafter is unhelpful. It is particularly unhelpful in the circumstances of litigation like this, which is not the meat and drink of a costs judge or a costs draftsman. Trying to get a handle on what is or is not reasonable is

really going to engender a great deal of effort and argument as a second degree here, and therefore it is appropriate for this Tribunal to make orders on costs taking into account quantum as well. Indeed, that is what was done in relation to Tesco, Tesco was in the end successful overall and it came out with a heroic requirement as to its costs, and I think that it was in the order of less than 20 per cent that was in the end awarded in that case – I cannot remember whether the figures are public and therefore I am being circumspect and not referring to them.

So yes, we would say obviate the need for any collateral satellite discussion. Yes, you can take into account the sorts of costs that are being asked. Those are the sorts of costs that could have been obviated or, indeed, minimised, if a sensible attitude to pre-action dealing had been dealt with but, in any event, you have the Commission's submissions on why, when a public body is acting sensibly, pragmatically, efficiently and expeditiously, that in these circumstances where it effectively backs off defending a notice of application at the first available opportunity you should follow the approach of the Court of Appeal in relation to judicial review proceedings and there should be no order as to costs.

Unless I can assist the Tribunal further.

THE CHAIRMAN: Thank you very much, Mr. Beard. Mr. Lindsay?

MR. LINDSAY: Sir, I have seven fairly brief points in response – obviously it would be symmetrical if I had five, but unfortunately I have a couple more.

The first of them relates to the precedents. My learned friend made an attempt to distinguish *Association of Convenience Stores* and *SDI*. He said *SDI* there was a judgment because the judgment was on prematurity and he said in both cases there was some too-ing and fro-ing which is not the case here.

We would say that both of those points of purported distinction are utterly irrelevant. We rely on those cases as saying there were cases where the respondent withdrew their decision and there was no full conclusion from the Tribunal on the merits. The fact that there was a prematurity judgment in the case of *SDI* is neither here nor there, there was no final determination of the merits of their application. So in both of those cases you have a withdrawal without a decision on the merits and you get 100 per cent of costs going in favour of the applicant. That is the starting point for our application. My learned friend attempts to distinguish those cases, his distinctions simply do not add up. Secondly, he says that it is not entirely clear that Eventim have succeeded in their application. We asked for the decision to be quashed. The Competition Commission wrote to us and said "We are willing for our decision to be quashed". We said: "You are giving us what we want, so

thank you very much, that is substantively what we are after". The Competition Commission wrote and said: "We only think your case is arguable."

In some respects that is a very surprising observation because most cases that come before the Tribunal are arguable and one might think that the Competition Commission had a slightly different assessment of the merits but, be that as it may, they said the position was arguable, and we thought maybe our case is quite a lot stronger than that, should we come to the Tribunal and say: "It is not just arguability, actually we have a very good case"? The answer is that you would not have indulged us. You would have said that if the Competition Commission is willing to have the decision quashed, we are not going to have some satellite litigation about the extent of your argument on the merits; that would simply be a waste of time and money.

So my learned friend relies on the formulation of arguability, that is a form of words that his clients have put into the correspondence, and which our clients have no interest whatsoever in challenging. In some respects I have no concern whatsoever about why my learned friend is willing to agree to the decision being quashed, my client is simply interested in it being quashed and remitted. So my learned friend seeks to make capital out of something which is a self-serving formulation for the Competition Commission that we have no interest or ability in challenging. We are quite happy with that formulation insofar as it goes to quashing. We say that my learned friend should not be able to make capital out of it on the question of costs. That is my second point.

The third point is the pre-action protocol. You have seen the pre-action protocol on judicial review. You have seen the White Book. What you have not seen is the document: "Competition Appeal Tribunal Guide to Proceedings" that one might have thought would be the start – and indeed, we would say the end point – of a discussion of what is the proper way of going about litigation in the Tribunal. I do not unfortunately have copies to hand up.

THE CHAIRMAN: Is it in the handbook? We usually have them up here.

MR. LINDSAY: The relevant paragraph is 6.57, Sir, on p.24. This is "Time for filing an application for a review under section 120 (mergers)" 6.57 – these are normally highly urgent:

> "As a result it is quite likely that the parties will be expected to assemble and present their respective cases within demanding timescales."

The timescale was extremely demanding in our case, partly because of the snow and partly for all the other reasons that have been talked about. "It is therefore important that the Registry is contacted ..." which we did. It is also imperative that the applicant takes steps at

an early stage to make all interested parties aware of the applicant's intention ..." which we did by telephone, we were not asked about the grounds. "Where possible, the applicant should serve the application ..." which we did. There is no suggestion that "we want you to write a pre-action letter", and indeed had the Tribunal said: "You have 28 days and you have to do a pre-action letter giving a reasonable time for response", people would say: "well, hang on, 28 days is not enough to do that, one needs to extend to 56 days or three months", obviously in the context of judicial review where often you have an inkling of what the decision is before it is actually made, and where one has a long stop of three months. It is much more sensible and practical to have a protocol – as indeed we have – around the pre-action letter. 28 days is extremely demanding in order to pull together this type of application, and the suggestion that we would write a letter and the Competition Commission would say immediately: "We agree to the decision being quashed, please just do a skeleton notice of application", this is the very, very first time that we have agreed to have a final decision quashed by consent; it simply does not make any sense, it is a construct for the purposes of this costs argument rather than a reflection of how the world would have actually looked had we taken the step that my learned friend says we should have done.

That takes us on to the fourth point, which relates to the *Kuzeva* case that my learned friend showed you, and he took you through that quite carefully. In relation to each of three scenarios that he was talking about, they are all cases in which the respondent had power to withdraw or alter their decision. So on p.4 of the transcript, about four-fifths of the way down where we are talking about the first category, about cases that are settled before permission is granted.

> "If the respondents had given proper attention to the merits of the case when they received the letter they would have taken the necessary steps to make the proceedings unnecessary."

Then at the bottom of p.4:

> " ... do nothing to discourage sensible settlement and pointless expeditions to the Court ..."

Then over the page, p.5, there is reference to the respondents sensibly deciding to short-circuit the proceedings. My learned friend skated over the issue of time limits and *functus officio* but in this case we had to prepare a notice of application in order for the Tribunal to be able to quash the decision; it was an absolutely essential criterion, and drawing analogies with cases where there was no obligation to make the application simply

does not work. The Commission had made a final decision; it had no power to withdraw it, and had it withdrawn it then there was no way we could have fitted in the three month period because the statutory time limit expired on 19th January 2010. We had to get the case before the Tribunal. There is only one way in which the case can come before the Tribunal which is the preparation of a notice of application. That is the work that we did. When the Competition Commission received the notice of application they said "We are willing to consent to the decision being quashed" and therefore they put a cap on the incurring of further costs.

That takes me on to the fifth point, which is the onerous costs issue, and my learned friend has criticised the numbers. It is worth just dwelling on the numbers though, this is an extremely important case. This is an $800 million. Eventim is looking at entering the UK market, which is a very, very significant market in the global context of ticketing. There are very large sums of money involved. It is a billion pounds a year market. Eventim, we would say, is perfectly entitled to instruct the lawyers that it used on the Competition Commission investigation and to ask those lawyers to do really the very best job in order to try to overturn a decision which creates huge difficulties for their business and, indeed, one could hardly criticise Eventim's choice of lawyers because once the application was made the Competition Commission promptly said: "We are happy to agree to the decision being quashed" – if anything it rather vindicates their decision to instruct those lawyers and to have those lawyers do the work.

THE CHAIRMAN: If we were to allow the application for costs are you suggesting that we should do so summarily?

MR. LINDSAY: No, I am not. The reason for providing the schedule was in order to give the Tribunal an understanding of the ball park. Our application would be that the costs are taxed. The Tribunal has identified questions about the number of hours. We understand those questions. Those questions we would say are properly determined by a taxing master, or the relevant officer of the court, so our application is for the costs to be taxed. They may be taxed down, they may not, that is obviously a debate for a different day. We would say it is not appropriate on the basis of a one page schedule for the Tribunal to say: "We think the relevant figure is as follows". Obviously in the discussion with my learned friend, Sir, you made the point that taxation is a way of bringing down any excessive costs claims that may be said to exist here. That is the fifth point.

The sixth point of seven is the emails that my learned friend showed you, and I only want to take you back to one of them to give you a little bit more context as to what was going on,

which is the email on p.9 that my learned friend suggested I may have quoted from in a misleading way.

There was the initial correspondence with Mr. Rainer, who made a number of perfectly sensible commercial points from the prospective of a German business person, and then because of the way the issues were going he instructed Allen & Overy, and Mr. Pritchard in particular, at which point the dialogue became a dialogue obviously between experts as is evident from the correspondence.

The overarching comment about this email is effectively the Competition Commission identified the concerns that had been expressed by Eventim and it made a proposal as to how the case should operate, and Eventim operated the case in accordance with that agreement, and nothing further was heard about confidentiality until late November. It is very difficult to criticise Eventim for saying: "We are concerned about confidentiality", for bringing in some experts, agreeing a protocol and then operating that protocol.

The Competition Commission may say now: "We made a bad deal" but that can scarcely be something that is laid at Eventim's door. That is my overarching point on the email. The Competition Commission made a proposal and we stuck to it and they cannot turn around and criticise us for it. One needs to understand a little bit more of the context to understand what is going on.

My learned friend says "You did not quote para.1". Paragraph 1 says that the Competition Commission was willing to make an exception in this case regarding the publication of our submissions. The very short answer to that is that we did not quote para.1 because Eventim did not make any submissions before the provisional findings. There were no documents that fell within para.1. Eventim did respond to questionnaires from the Competition Commission but paragraph 1 is not about questionnaires; there is simply nothing for para.1 to bite on, which is why we did not quote it in the skeleton.

The second paragraph is relevant because we did provide responses to questionnaires, and the Competition Commission said it did not normally publish those questionnaire responses and they were not intending to do so in this case. So normal practice was applied and it was applied to us in the same way as it is elsewhere.

On hearings the Competition Commission says "We would be content to publish a very limited summary". My learned friend says that at is different from the normal process and in a sense it is, but it is not the case that Eventim was given remarkably different treatment because C Tickets and AEG were granted exactly the same treatment in the Competition Commission process in this very case. We were one of three parties who were treated in

that way. Then the document concludes that they hope it is helpful. It reads as a sensible proposal to legitimate concerns that then went away until late November only to be resurrected for the purposes of this costs investigation. We would say Eventim acted wholly reasonably in agreeing to and complying with that protocol.

My seventh and final point is my learned friend says: "If we went to a Tribunal hearing it may be that you would win on some points and not others. You might win on fair hearing, and you might lose on all of grounds 2 to 4, or you might win on some and not others." That reminds me of the *Unichem* case. In *Unichem*, as you remember, the applicant ran a fair hearing point and a large number of other points, and effectively they succeeded on the fair hearing point and not on the others. The Tribunal said: "You have taken up some of our time in relation to points that you failed on and so the upshot is that we are going to give you an award of 50 per cent of costs." We would say that we cannot, under any circumstances, be in a worse position than *Unichem*; we have not lost any of our points. We would say that the absolute minimum position for us would be the 50 per cent but in fact it is quite straight forward to distinguish our position from *Unichem* which is we have not lost any of our points, so we are actually in the bracket of *Sports Direct* and *Associated Convenience Stores*, which is where I started my submissions, which is you withdraw the decision and in s.120, s.179 cases the applicant gets their costs.

They are my submissions in reply unless you have any further questions.

THE CHAIRMAN: Thank you very much. I presume you do not feel you want to contribute to this interesting discussion.

MR. HOSKINS: I, like my client, am merely caught in the crossfire, I do not think there is anything I can add. Thank you.

THE CHAIRMAN: We will retire and return in due course.

MR. HOSKINS: Sir, this is not supposed to be discourteous, simply given this does not affect us, if there is to be a natural break would you give us permission perhaps not to be here for the ----

THE CHAIRMAN: Absolutely. If you want to stay for the entertainment please do so, Mr. Hoskins, otherwise please feel free to go.

MR. HOSKINS: That is very kind, thank you.

THE CHAIRMAN: Thank you for coming.

(Short break)

THE CHAIRMAN: We are grateful to counsel for the interesting and energetic arguments on the issue of costs. The decision of the Tribunal is as follows. The applicant will be awarded 75

per cent of its costs to be agreed or assessed by a costs judge of the senior courts. We shall give our reasons later, briefly. Is there anything else?

Thank you all very much.

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